CRIMINAL JUSTICE
COMMISSION

REPORT BY THE HONOURABLE WJ CARTER QC ON HIS INQUIRY INTO THE SELECTION OF THE JURY FOR THE TRIAL OF SIR JOHANNES BJELKE-PETERSEN

AUGUST 1993

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Dear Sirs

In accordance with Section 2.18 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you its Report on an inquiry conducted by the Honourable W J Carter QC into the selection of the jury for the trial of Sir Johannes Bjelke-Petersen and related matters.

Yours faithfully

R.S. O'REGAN Q.C.
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9 August 1993

Mr R O'Regan QC
Chairman
Criminal Justice Commission
557 Coronation Drive
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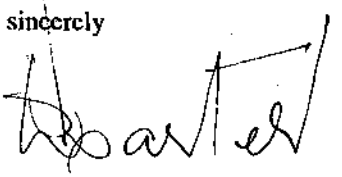
Dear Mr O'Regan

I refer to resolutions of the Commission dated 2 October 1992 and 9 October 1992, resolving to conduct an investigation into the selection of the jury for the trial of Sir Johannes Bjelke-Petersen and related matters, and further resolving to engage me to conduct such an investigation.

I wish to advise you that I have today forwarded to the Acting Director of the Official Misconduct Division of the Commission a report on my investigation in relation to this matter, in order that he may report to you in the discharge of his responsibility under section 2.24(1) of the *Criminal Justice Act 1989*.

Yours sincerely



The Honourable W J Carter QC

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CHAPTER 1

INTRODUCTION

1.1 The Establishment of the Inquiry and its Terms

On 2 October 1992 the Criminal Justice Commission resolved to conduct an investigation into matters of concern which had arisen in connection with the trial of Sir Johannes Bjelke-Petersen, and for that purpose resolved to appoint an "independent qualified person" to conduct the investigation. This and ancillary resolutions take their place in the context of other events which led to the establishment of this inquiry and investigation. The resolutions of the Commission dated 2 October 1992 and 9 October 1992 are contained in Appendix 1.

Having been appointed to conduct the inquiry it was thereupon decided by myself, in consultation with Counsel Assisting me, Mr R V Hanson QC, and legal officers attached to the Commission, that the terms of the inquiry should address the following issues:

(i) The whole of the circumstances leading to, surrounding and related to the selection of the jury in the matter of the *Queen v Johannes Bjelke-Petersen*, with particular reference to:

(a) Whether any prospective jurors on the jury panel (Panel Z), from which it was initially determined by the Sheriff that the jury for the trial of Sir Johannes Bjelke-Petersen would be selected, or any members of their households were approached by any person connected with the defence of Sir Johannes Bjelke-Petersen prior to the commencement of that trial; and if so:

(i) by whom;
(ii) with whose knowledge;
(iii) in relation to what subject matter; and
(iv) for what purpose and/or with what intent.

(b) Whether senior defence counsel for Sir Johannes Bjelke-Petersen provided the trial judge with false or misleading information in connection with the defence application for the substitution of Panel Z; and if so:

(i) who had knowledge of the falsity of the information or that it was misleading;
(ii) who had knowledge that the false or misleading information would be provided; and

(iii) for what purpose and/or with what intent.

(c) Whether the procedures used to create prospective jurors' lists and jury panels for criminal trials were manipulated to include the name of any person who was subsequently empanelled on the Bjelke–Petersen trial; and if so:

(i) by whom;
(ii) with whose knowledge;
(iii) for what purpose and/or with what intent.

(d) Whether any person employed in the Sheriff's Office or in the Centre for Information Technology and Communications (CITEC) improperly disclosed confidential information concerning any juror who was subsequently empanelled on the Bjelke–Petersen trial; and if so:

(i) by whom;
(ii) to whose knowledge did it come;
(iii) what use was made of it; and
(iv) for what purpose and/or with what intent.

(ii) Whether senior defence counsel for Sir Johannes Bjelke–Petersen provided the trial judge with false information concerning a juror empanelled on the Bjelke–Petersen trial in response to an application by the Crown for the discharge of the jury before the jury returned a verdict; and if so:

(i) who had knowledge of the falsity of the information;
(ii) who had knowledge that the false information would be provided; and
(iii) for what purpose and/or with what intent.

(iii) Whether the available evidence shows a prima facie case to support a charge of official misconduct and/or warrants the Chairman of the Criminal Justice Commission authorising a report pursuant to section 2.24(2) of the Act; and if so:

(i) against whom; and
(ii) what charge and/or offence.

By reference to such matters it was considered that all of the relevant concerns raised initially by the Special Prosecutor Mr D P Drummond QC (now Mr Justice Drummond, Federal Court of Australia) could be properly addressed, and at the same time, the persons affected by the investigation could be properly informed as to the scope of the Commission's inquiry.

Furthermore, it was decided that the investigation, to the extent that it should involve the taking of evidence on oath, should be conducted in public. In the result, the investigation of the relevant subject matter, with persons sworn as witnesses in the hearing, was conducted wholly in public. This process commenced on 18 November 1992 when persons who had been summonsed to produce documents were examined on oath in relation to the material produced. The public hearing was then adjourned to a date to be fixed.

The public hearing was resumed on 4 May 1993, and concluded on 2 June 1993 except for the evidence of Mrs Nioa which was heard on 12 July 1993.

The public hearing occupied 19 sitting days. Sworn evidence was heard from 60 witnesses.

1.2 The Dramatis Personae

Set out below in alphabetical order are those who can be readily identified as the more relevant persons in the inquiry. It is convenient to collect their names here in this form and to indicate the particular relevance or role which each had or assumed within the matrix of factual material which was investigated by the Commission. It will also avoid the need for detailed explanation in the course of the text of the Report. The male persons will thereafter be referred to only by their surnames:

Robert David Butler

- Former police officer; now a solicitor of the Supreme Court of Queensland; the principal of Trial Consultancy Pty Ltd; a staunch admirer and close associate of Sir Johannes Bjelke-Petersen, who was engaged by the accused to provide services, either personally or through Trial Consultancy Pty Ltd, for the purposes of the defence of the accused in respect of criminal charges brought

against the latter by the Special Prosecutor. He was the longest serving member of "the defence team" and the most active. The whole of his working life in the relevant period was devoted to the defence of the accused.

Yvonne Anne Chapman

- A member of the National Party of Australia and formerly a Member of the Legislative Assembly; a Minister of the Crown in the Bjelke–Petersen Government; she was involved in the Friends of Joh organisation which was active in Brisbane.

Kenneth Warren Crooke

- State Director of the National Party of Australia in Queensland.

Hedley Friend

- A member of the jury in the trial of Sir Johannes Bjelke–Petersen; employed as a trades assistant; formerly a union delegate at Evans Deakin Industries, and a member of the Federated Ironworkers' Association of Australia and the Amalgamated Metal Workers' Union.

Edmund Francis Green

- Sheriff, Marshal and Deputy Registrar, Supreme Court of Queensland.

Robert Francis Greenwood

- One of Her Majesty's Counsel; Senior Counsel for Sir Johannes Bjelke–Petersen at his trial.

Adrian Paul Gundelach

- Barrister of the Supreme Court of Queensland; briefed at the trial as Junior Counsel to Greenwood QC.

Neil William Hansen

- Deputy Registrar of the Supreme Court and Deputy Sheriff with immediate responsibility for jury matters in the District Court of Queensland at Brisbane, the Court in which the trial of Sir Johannes Bjelke–Petersen was held.

Maxwell James Mead

- Solicitor of the Supreme Court of Queensland; sole member of Maxwell Mead and Young; engaged to act as Solicitor for Sir Johannes Bjelke–Petersen in about May 1991; a friend of Butler.

Lorraine Morrison

- A committed and ardent admirer of Sir Johannes Bjelke–Petersen, who was the energetic leader and organiser of the Friends of Joh organisation at the Gold Coast.

Kathleen Nioa (née Cairns)

- A member of the personal staff of Senator Florence Bjelke–Petersen; the first cousin of Luke Edmund Shaw.

Barrie Cornelius O'Brien

- A former police officer; security consultant engaged in private investigation; the principal of Lloyds Pacific Pty Ltd; engaged to undertake investigative work in respect of the panels of jurors assembled for the trial of Sir Johannes Bjelke–Petersen; regarded as one of "the defence team".

Mark John Patrick Pitt

- A member of the Young National Party of Australia; employed by the National Party as field officer for the Young Nationals; a friend of Luke Shaw.

Luke Edmund Shaw

- Foreman of the jury at the trial of Sir Johannes Bjelke–Petersen; a student at Griffith University; a committed admirer of Sir Joh; a member of the Young Nationals, and for a time, Secretary of the Brisbane Central Branch of the Young National Party of Australia; the first cousin of Kathleen Nioa, a member of the staff of Senator Bjelke–Petersen.

Victor Sirl

- An active member of the Young National Party of Australia; a friend of Shaw and Pitt; and a person who dealt with O'Brien during the trial.

Phillip Clarence Walliss

- A former member of the Victoria Police; conducts the business of an intelligence consultant; the principal of Estwell Pty Ltd; engaged by Butler to do investigative work in respect of the jury panel from which the jury at the trial was to be selected; the person, whom it is alleged, polled at least part of the panel of jurors to be used for the trial, and because of this allegation, application was made to discharge the panel.

1.3 The Relevant Chronology

This chronology is designed to present in a brief form some of the events which are of importance in any analysis of the factual material which is relevant to the question of jury selection at the trial. It is not intended to be, nor should it be, read as an exact chronological review of all of the material. Some witnesses gave conflicting evidence concerning relevant events and the date or dates on which these occurred. Therefore, the

inclusion of a particular event below by reference to a particular date should not be understood to be a finding of fact. Rather, the relationship of date and event is more important and the list is designed only to indicate the more important events and their approximate place in the chronology within which such events occurred:

1989/1990	The formation and development of the Friends of Joh organisation in Brisbane and Gold Coast.
29 October 1990	Sir Johannes Bjelke-Petersen is charged with one count of official corruption and two counts of perjury. The return date of the Summons is 2 November 1990.
2 November 1990	Matter mentioned before S Deer SM. Committal proceedings set for 11 February 1991.
November 1990	Lyons retained as the solicitors for Sir Johannes Bjelke-Petersen.
29 January 1991	Annual General Meeting of Brisbane Central Young Nationals at Ardrossan Restaurant when Shaw nominated as contact person for Friends of Joh movement.
5 February 1991	Pre-committal conference with Mitchell SM. Accused waives right to committal proceedings. Consents to matter proceeding ex officio. To be mentioned on 8 February 1991.

8 February 1991	Mention in Magistrates Court. Accused waives right to committal. Matter adjourned.
11 February 1991	The date originally set for committal proceedings in respect of the charges against Sir Johannes Bjelke-Petersen at Magistrates Court, Brisbane.
15 February 1991	An ex officio indictment presented in the District Court at Brisbane charging Sir Johannes Bjelke-Petersen with certain offences.
20 February 1991	The trial of Sir Johannes Bjelke-Petersen is set down for trial before Judge Helman, Chief Judge, District Courts, commencing 23 September 1991. The Crown advised the Court that it was likely it would proceed only on one count of perjury.
17 May 1991	Maxwell Mead and Young engaged through the agency of Butler to act as the solicitor for Sir Johannes Bjelke-Petersen.
20 June 1991	At a mention of the matter before Judge Helman, Mr Burns, on behalf of Lyons Solicitors, was given leave to withdraw as the solicitors on the record. Mr Mead appeared on behalf of the accused.
June 1991	Initial discussions between Butler and Walliss concerning the latter's engagement to investigate the jury panel for the trial. Further discussions in July 1991.

15 July 1991	Greenwood QC phoned by Butler and Mead. Accepts the brief to lead at the trial.
17 July 1991	Conference at Hilton Hotel, Brisbane – Greenwood QC; the accused; Mead; Butler and Gundelach (who was present from time to time). Jury selection issue discussed. Walliss' name referred to in these discussions.
23 July 1991	In Greenwood's diary for this date, O'Brien's name is noted. A telephone conversation with Greenwood QC concerning O'Brien's engagement may have occurred on a different date.
30 July 1991	At 3.15pm a call was made from Butler's mobile phone to Walliss. The call lasted 6 minutes and 14 seconds.
July/August 1991	Casual meetings between Greenwood QC, O'Brien, Butler and probably others, in which O'Brien's engagement for jury investigations was discussed.
12 July 1991	The Deputy Registrar signed the precept for the establishment of Panel Z – the panel of jurors to be used in the Bjelke–Petersen trial.
18 July 1991/2 August 1991	Various telephone conversations between Mead and Butler in Brisbane, and Greenwood QC in Sydney.

2 August 1991	Greenwood QC en route from Townsville to Sydney. Met by Butler in Brisbane and they visit and confer with the client at "Bethany", Kingaroy.
8 August 1991	Major fund-raising function organised by Mrs Lorraine Morrison and conducted by Friends of Joh organisation at Royal Pines Resort, Gold Coast.
14 August 1991	Exhibition Wednesday, public holiday. Greenwood QC in Brisbane. Confers with Mead and Butler re jury and other matters. Gundelach not present.
28 August 1991	In District Court, argument concerning joinder of counts.
30 August 1991	Mead's office receives the file of documents originally brought into existence by Lyons, the accused's former solicitors.
11 September 1991	Panel Z jury list (the list generated for the trial of the accused) purchased by Mead's office from the Sheriff's Office. This was the first date on which the list became available for the trial fixed for 23 September 1991.
16 September 1991	Early in the week commencing Monday, 16 September 1991, Walliss says he received a copy of the list (Panel Z) from Mead's office.

Wednesday, 18 September 1991 Greenwood QC in Brisbane to prepare for trial appointed to commence Monday, 23 September 1991.

At 7.14pm a phone call was made from Mead's office telephone, probably by Butler, to the home of Mrs Lorraine Morrison. The telephone conversation lasted 13 minutes and 14 seconds.

Thursday, 19 September 1991 Greenwood QC in Court in Brisbane – application before the trial Judge on matters concerning joinder of charges. Crown advised it would pursue only one count of perjury if the corruption issue could be adequately canvassed at the trial.

Friday, 20 September 1991 Greenwood QC engaged on trial preparation. At 9.31am a phone call was made from Mead's office telephone number probably by Butler to the home of Mrs Lorraine Morrison. The telephone conversation lasted 7 minutes and 22 seconds.

Sheriff's Office select jury panels P, L and Z to be summonsed for Criminal Courts, District Court, for Monday, 23 September 1991 and appropriate recorded telephone message made to that effect.

Saturday, 21 September 1991 About 5.00pm meeting at the Gateway Hotel – Greenwood QC, Gundelach and O'Brien. After O'Brien left (about 5.15pm) discussion in Greenwood QC's room with Gundelach and Butler.

Later the same evening, Greenwood QC speaks to Macgroarty of Counsel by

	telephone. They agree to meet next morning.
Sunday, 22 September 1991	
11.00am	Greenwood QC and Macgroarty meet in Macgroarty's Chambers for approximately one hour.
Late afternoon	Greenwood QC at Gundelach's home for dinner. O'Brien visits for a short time.
Monday, 23 September 1991	Day fixed for commencement of the trial.
7.30am	O'Brien visits National Party Headquarters to check jury panel (Panel Z).
9.00am	Butler confers with Gundelach at the District Court concerning Panel Z.
9.15am	Application made in Chambers to Judge Helman to discharge Panel Z. Application granted. Trial adjourned to 10.00am on Wednesday, 25 September 1991.
11.00am	Mead's office obtains Panels P and K, the substitute panels.
1.59pm	O'Brien telephones Crooke at National Party Headquarters.
2.10pm	O'Brien telephones Caboolture Hair Stylists, the business owned by Mrs Chapman's daughter.
3.50pm	Court reconvenes to consider application by the Special Prosecutor for trial to commence earlier. Trial Judge orders trial to commence 2.30pm on Tuesday, 24 September 1991. Court adjourned 4.25pm.

Tuesday, 24 September 1991		On this morning (or previous evening) O'Brien again contacts National Party Headquarters concerning jury lists.
	11.25am	Judge Helman reconvenes the Court in his Chambers and requests Greenwood QC to disclose his reasons for seeking the discharge of Panel Z.
	1.30pm	O'Brien gives jury information to Butler according to O'Brien's letter dated 30 September.
	2.30pm	Trial commences, jury selected.
27 September 1991		Letter from the trial Judge to Sheriff.
Tuesday, 15 October 1991		At 1.00pm jury retired to consider its verdict.
Friday, 18 October 1991		At approximately 10.00pm Cowdery QC applied for the discharge of the jury pursuant to section 626 of the *Criminal Code* because of Shaw's alleged affiliation with the National Party and the Friends of Joh movement.
Saturday, 19 October 1991		The application pursued. Evidence given by D Russell QC, Vice President of the National Party, and by Woodward. The trial Judge refused the application.
	1.06pm	Final request by the jury for redirections.
	9.20pm	Shaw announces that the jury could not agree on its verdict.

9.27pm	Court adjourned.
Wednesday, 23 October 1991	The Sheriff interviewed Mead/Butler.
24 October 1991	Sheriff interviewed Walliss.
	O'Brien interviewed also at about this time.
28 October 1991	Complaint by Drummond QC (Special Prosecutor) to Chairman, Criminal Justice Commission.
29 October 1991	The Sheriff's first report to the Attorney-General concerning interviews.
29 January 1992	The Sheriff's second report concerning investigations of Panel Z and the alleged polling by Walliss.
30 March 1992	The Sheriff's third report detailing his completed investigations concerning the alleged polling of Panel Z.
1 April 1992	Letter from the trial Judge to the Attorney-General.
2 October 1992	Resolution of Criminal Justice Commission to investigate.

1.4 The Fact Finding Process – The Evidence and the Standard of Proof

The proof of material facts is an essential part of the litigious process and the fact finding tribunal, whether it be judge or jury, is necessarily required to make findings of fact, that is, to decide whether on the available evidence relevant facts can be said to have been established. It is incumbent upon the decision-maker, by this process, to say whether he/she has achieved that degree of persuasion or satisfaction of the mind which enables the fact finder to say that a particular event occurred, or that a particular fact has been established.

For the jury in the criminal trial its essential task is to say whether it is satisfied, beyond reasonable doubt, that the accused did the act or acts which constitute the offence with which the accused has been charged.

For the Judge (or jury) in the civil trial he/she will usually have to determine whether a particular fact, of critical importance to the case in hand, has been established on the balance of probabilities, that is, to say whether it is more probable than not that the particular fact in question has been established.

It is immediately obvious that the attainment of absolute truth or certainty is beyond the domain of the fact finding process which is at the heart of the judicial process. Conviction of the offender is possible, with its penal consequences, if the jury, the fact finding body, is satisfied beyond reasonable doubt that he/she is guilty. Damages or compensation or some other civil remedy will be made available if the judge (or the jury) is satisfied that a particular result or factual scenario is the more probable.

An inquiry or investigation of the kind here undertaken faces the same challenges but, as will be seen, others who have already undertaken the difficult task of fact finding in this context have identified the degree of satisfaction of mind which one should attain before concluding that a particular fact or facts occurred.

One of the primary issues of fact which arises here is whether the trial judge was misled by others. As will also be seen, the determination of that issue will itself involve the determination of other facts and the question again arises as to the degree of mental satisfaction one should attain before a fact can be found to be established.

In other words, the question, put in more technical language, becomes what is the standard of proof that is applicable to an inquiry of the kind here being undertaken.

This raises for consideration the question of the degree of persuasion of the mind which one must have before considering an adverse finding in respect of any person in the course of an inquiry such as this. In the traditional litigation, be it civil or criminal, lawyers speak about the onus and standard of proof when addressing like questions. These legal concepts have no real place in an inquiry such as this and are used here by way of analogy only. The matter was referred to in the first *Report of The Parliamentary Judges Commission of Inquiry*, to which further reference will be made below, in these terms:

> *"1.6.1 By s.5(1)(a) of the Act the Commission is required to report to the Speaker of the Legislative Assembly its findings of fact in relation to each of the two judges the subject of the inquiry. On those facts, as so found, it is to base its conclusions. The question immediately arises as to the onus and standard of proof which the Commission must apply.*
>
> *1.6.2 In civil or criminal litigation the outcome of proceedings is always dependent upon whether one participant or another proves certain facts, or discharges the onus of proof as it is termed. Throughout the proceedings one participant or one side may carry the onus of proof completely, or it may shift between participants or sides as the case progresses. But always, unless the facts are not in dispute, one party or another is required to establish facts which will determine the findings of fact made by the tribunal before which the case is heard, and, based on those findings, the result.*
>
> *1.6.3 In criminal proceedings every fact necessary to be established in order that there may be a conviction must be proved to such a degree that the tribunal can be satisfied beyond reasonable doubt of the guilt of the accused. In most civil proceedings proof of any fact is required only to the extent that*

the tribunal can reach its decision on a balance of probabilities. In other words there is a criminal standard of proof and a civil standard. There is a refinement on this simple dichotomy and this will be discussed later [para 1.6.9].

1.6.4 *In an inquiry such as the present one there is no requirement on any participant to prove anything; no-one "carries the onus of proof" as it is termed. Matter said to be relevant to the behaviour of one or other of the judges within the meaning of that expression when used in s.4 of the Act is able to be brought before the Commission, or indeed the Commission may inform itself about that topic in such manner as it thinks proper (Commissions of Inquiry Act, s.17). There is no "outcome" of the inquiry dependent upon who establishes what; the Commission is required to do no more than form an opinion based upon the material in its possession and then advise the Speaker of that opinion and the facts upon which it is based."*

It is well recognised that the discipline of Royal Commissions and Commissions or Boards of Inquiry is essentially different from that of the Courts. On the other hand, there is also a well recognised adaptation by Commissioners of those principles to which judges and jurors traditionally resort when engaged upon the critical process of fact finding. It is, therefore, necessary to restate the position and to support it by reference to the Reports of others.

All of the witnesses who gave evidence to the inquiry were sworn or affirmed to tell the truth and the testimony of each was tested by the examination of Counsel Assisting or of Counsel given leave to appear. That process of course is well-recognised as integral to the process of valid fact finding.

Dr Hallett in his text *Royal Commissions and Boards of Inquiry* (1982) at page 165 states the generally accepted view that:

"It is obvious that an inquiry has to make various judgments in the course of its proceedings as to the degree

> *of satisfaction which it should feel before concluding a certain fact has been established."*

Mr K J Jenkinson QC (as he then was) in his Report consequential upon the *Board of Inquiry into Allegations of Brutality and Ill Treatment at HM Prison Pentridge* (1972) wrote at page 9:

> *"Having considered the conflicting interests of the Executive Government and prison officers accused of criminal acts, the Board has refrained from reporting that an identified prison officer has committed an act which appeared to constitute a criminal offence unless the Board was satisfied of the commission of the act to the extent which would be required in a civil proceeding at law."*

Mr Beach QC (as he then was) dealt with the question of the appropriate standard of proof in the same way in his Report of the *Board of Inquiry into Allegations against Members of the Victoria Police Force* (1975) when he wrote at page 18:

> *"Accordingly, and in fairness to the various Police Officers concerned, I have refrained from making a finding against a particular Police Officer unless I have been satisfied that he has been guilty of the act complained of to the extent which would be required in the given circumstances in a civil proceeding at law."*

Strong authority that the approach adopted by Commissioners Jenkinson and Beach was the correct one is provided by the first report of the *Parliamentary Judges Commission of Inquiry* (1989) which examined the conduct and behaviour of the former Mr Justice Angelo Vasta. The Commission of Inquiry was constituted by the Rt Hon. Sir Harry Talbot Gibbs, formerly Chief Justice of the High Court of Australia, Hon. Sir George Hermann Lush, formerly a Judge of the Supreme Court of Victoria and Hon. Michael Manifold Helsham, formerly a Judge of the Supreme Court of New South Wales.

Their Report addresses the question here being considered in these terms:

> *"1.6.5 However it was apparent from the legislation that facts had to be established, by whatsoever means,*

and that inherent in this was a requirement of applying some yardstick of proof.

1.6.6 In order to do both, the Commission adopted a procedure that enabled it to apply a proper judicial method for their establishment, the weight to be afforded to them and the proper degree of proof to be applied. All material brought or to be brought before the Commission has been and will be scrutinised in public, all witnesses were and will be questioned in public by counsel assisting and legal representatives of the judge concerned, or will be available for such questioning, objections to relevance have been and will be entertained, and a general framework adopted within which judges familiar with that very task would be able to apply the appropriate standard of proof of the facts."

The references in paragraph 1.6.6 as to what would occur prospectively were obviously references to the further inquiry which that Commission had to address and which concerned the conduct and behaviour of another Judge.

The report then continues:

"1.6.7 In considering the standard of proof appropriate to the evaluation of the evidence before it, the Commission was mindful of the gravity of the issues involved, and the dearth of precedent for specifically constituted inquiries of this nature. The Parliamentary Commission of Inquiry established in 1986 by the Federal Parliament to report on allegations concerning the conduct of the late Mr Justice Murphy was an inquiry with a similar function and legislative framework. However, no guidance could be derived from this precedent as the Inquiry was unable to complete its task because of the intervening grave illness of the Judge.

1.6.8 After due deliberation, the Commissioners decided that the criminal standard of proof would not be an

appropriate yardstick. In Australia, it is well settled that, subject to statute, the standard of proof beyond reasonable doubt is applicable only in criminal proceedings Helton v Allen (1940) 63 CLR 691; affirmed in Rejfek v McElroy (1965) 112 CLR 517 at 520. The Commission of Inquiry is not a criminal proceeding. The Commissioners are not required to determine the criminality of any of the behaviour in question.

1.6.9 *The Commissioners considered that the civil standard of proof on the balance of probabilities was the proper standard to apply. When this standard is used as the measure of proof, it is sufficient if a fact is proved to the reasonable satisfaction of the tribunal evaluating the evidence. However, since the High Court decision in Briginshaw v Briginshaw (1938) 60 CLR 336, it has been recognised that the degree of persuasion necessary to establish facts on the balance of probabilities may vary according to the seriousness of the issues involved. In that case, Dixon J expressed this proposition in the following words (p 362):*

> *'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references.'*

Subsequent High Court decisions have approved His Honour's statement. In Rejfek v McElroy (supra at page 521) the Court stated unequivocally that 'the degree of satisfaction for which the civil standard of proof calls may vary according to the

> *gravity of the fact to be proved'. The Commissioners were of the opinion that, in conformity with the High Court's approach to the degree of proof, due regard to the seriousness of the issues must be had in applying the civil standard to the evidence adduced.*
>
> *1.6.10 The Commission appreciates that the legal principles referred to were enunciated in relation to litigation and curial proceedings. However in the light of what is said in section 1 of this report and in particular in para 1.6.6, the Commission is quite satisfied that the civil standard of proof applied in the way declared by the High Court to be correct is both necessary and proper."*

If further authority for this conclusion is required, it is provided by the Report of Mr Justice McGregor who presided over the Royal Commission of Inquiry established by the Australian Government into *Matters in relation to Electoral Redistribution in Queensland 1977*. The Report was delivered in August 1978. McGregor J was required to consider possible illegalities or impropriety by a Minister of the Crown and certain senior public servants. He said at page 27:

> *"I have to consider these possible irregularities not assisted by a standard of proof since, in the nature of things, no one party or person carries an onus. But I consider that the degree of satisfaction which must be brought to my mind, before I accept as proven, irregularities which are under consideration must be proportionate to the gravity of the conclusion."*

To the authorities in this country which make the same point, McGregor J added a reference to the remarks of Denning LJ in *Hornal v Neuberger Products Ltd* (1957) 1 QB 247 at 258:

> *"The more serious the allegation the higher the degree of probability that is required."*

It is unnecessary for me to go beyond what was said by the High Court in *Helton v Allen, Briginshaw v Briginshaw* and *Rejfek v McElroy* cited in the extract quoted above from the report of the *Parliamentary Judges*

Commission of Inquiry. I add that the thrust of the dicta in the High Court is consistent with the remarks of McGregor J, and that what was said by the High Court in *Briginshaw* was also expressly relied upon by Commissioners Jenkinson and Beach.

For the sake of completeness only, I should add the following dicta of Dixon J (as he then was) in *Smith Bros v Madden* (1945) QWN at page 42:

> *"In an action of deceit the burden of proof does not differ in its measure of persuasion from that in other civil causes; but the gravity of an issue determines the application of the measure and to find that fraudulent misrepresentations have been made is a responsibility which a judge should discharge only when he feels persuaded on the balance of probabilities that representations have been made which are false."*

Although stated there in a different context, the principle was the same and it has been and should be applied when Commissions of Inquiry are charged with the responsibility of making findings of fact which are grave and serious.

In short, I am satisfied *"that a civil standard of proof applied in the way declared by the High Court to be correct, is both necessary and proper"*. (Para 1.6.10 referred to above.)

There is one other substantial body of principle relating to the proof of facts to which I need refer and to which resort is frequently made in curial or adversarial proceedings. It is necessary to refer to it here also because in determining whether any fact has been proved to the required degree, there is often no direct evidence which proves that fact. Indeed, that is hardly surprising in a case such as this because misbehaviour or impropriety, if it occurred, can generally be expected to have occurred in circumstances where direct evidence of relevant facts will rarely be available.

The first question for inquiry is whether the trial Judge was deliberately misled. That is a question of fact. As with many other like questions, that fact can be established but not always by direct evidence, that is, by evidence which proves the fact directly. It can, however, be proved to the required degree of satisfaction circumstantially, that is, from the proof of other facts and circumstances from which the fact in issue can be inferred.

It is necessary, therefore, that in explaining the processes adopted in the course of finding facts in this inquiry there be reference made to some basic matters of principle concerning the use of circumstantial evidence.

In *Wills on Circumstantial Evidence* 6th Edition at page 16, it is said:

> *"Circumstantial evidence is of a nature identically the same with direct evidence; the distinction is, that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the factum probandum (ie the fact which has to be proved); circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts incidental to and usually connected with some other fact as its accident, and from which such other fact is therefore inferred."* (The words in parenthesis are mine.)

The distinction can be illustrated simply.

The fact that X did something can be proved, eg, by X's admission that he did the act or by the evidence of an eye witness who saw X do the act. In that case, the fact is proved directly.

That same fact can, however, also be proved by the proof of other facts and circumstances from which the fact to be proved can be established as a matter of inference from those proved facts and circumstances. In that case, the fact is proved circumstantially. Precisely the same process is available when it is sought to prove whether one person knew or was aware of what X had done or what the state of mind of X was at any particular time.

Whether the required standard of proof of any fact be proof beyond reasonable doubt or proof on the balance of probabilities, the fact to be proved can be proved either by direct or circumstantial evidence. Further, in those cases where the standard of proof is the civil standard applied in the way declared by the High Court in *Briginshaw* (supra), the fact or facts to be proved can be legitimately proved circumstantially as validly and as effectively as the same fact can be proved directly. In *Luxton v Vines* 85 CLR 352 at page 358 the High Court expounded the relevant principle:

> *"The test to be applied in determining in cases like this whether circumstantial evidence suffices to support a*

> *finding...was restated recently by this Court in Bradshaw v McEwans Pty Ltd (unreported)...of course as far as logical consistency goes, many hypotheses may be put which the evidence does not exclude positively. But this is a civil not a criminal case. We are concerned with probabilities not possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence whilst in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort while direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture. But if the circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought, then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise."*

In *Holloway v McFeeters* 94 CLR 470 a case which was concerned with the sufficiency of the evidence to support a finding of civil negligence, the same principle was restated by the High Court at page 480 per Williams Webb and Taylor JJ in these terms:

> *"It is clear that it is a mistake to think that, because an event is unseen its cause cannot be reasonably inferred. ...Inferences from actual facts that are proved are just as much part of the evidence as those facts themselves. In a civil cause you need only circumstances raising a more probable inference in favour of what is alleged (the Court then restated the above dictum from Bradshaw v McEwans Pty Ltd). All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."*

But again in a civil case where the standard of proof is to be applied in the way declared by the High Court in *Briginshaw* to be necessary and proper, it cannot be doubted that that standard can be satisfied as fully and as effectually by circumstantial evidence as it can be by direct evidence. Also proof of a fact to the standard required by the criminal law is not infrequently established by circumstantial evidence. It has often been said that proof by circumstantial evidence should never be considered to be a method of proof which is inferior to proof by direct evidence. A fact may be proved as effectively by circumstantial evidence as it can be by direct evidence. As *Wills* implied in the above statement, direct and circumstantial evidence provide different means of proving the same fact.

It is, therefore, by reference to these well-known principles of the law of evidence that one has to commence to address the critical issues of fact which are exposed by the evidence produced in this inquiry. It may be necessary from time to time to refer to them again.

1.5 False Testimony and False Denials

I am in no doubt that several relevant witnesses persistently gave false evidence in the course of this inquiry. In the text of this Report I will have occasion to identify evidence which I regard as untruthful. For present purposes, and by way of example only, I refer to the evidence of Butler that he had had no involvement at all in relation to matters concerning jury selection and investigation, which was expressed in his evidence with some emphasis:

> *"No wouldn't touch it with a barge pole."*

And in the following evidence which he gave on 18 November 1992 - the first day of the public hearing when the primary concern was to identify any relevant documents in his possession.

> *"And did you yourself have any role in engaging Mr O'Brien or Mr Walliss?---I recommended Mr Walliss.*
>
> *Well, did you engage him or was he engaged by Mr Mead?---He was engaged by Mr Mead.*

And did you have any communication with him after he had been engaged?---I can't say definitely that I did or I didn't. I never saw any report from him.

Do you have any recollection of any oral report from him to you?---No.

And what about Mr O'Brien?---Once more, I can't say whether I did or I didn't speak to him, but I can't recall any communication from him to me.

What, oral or in writing?---Oral or in writing. I did see a report which I believe was by Mr O'Brien but I saw that at the jury table, and it was in the possession of Mr Gundelach.

And had it ever been in your possession?---No.

All right. And what was your role at the time or the period with which we are concerned?---I was employed as an investigator and that was to investigate witnesses or potential witnesses to discover evidence for the trial. I was not employed in any way to investigate a jury and had no involvement in such."

I am satisfied that Butler's obvious concern during the evidence to dissociate himself from the involvement of Walliss and O'Brien, indeed his deliberate attempt to isolate himself from any matter relevant to jury selection, was constituted by a series of false statements and false denials.

Once again, the law of evidence has had to address the contentious question as to how the fact finding tribunal should treat false statements made and/or false denials given in the course of evidence as well as such statements and denials made out of court. The general principle is expressed by Clarke JA in the New South Wales Court of Appeal in these terms:

"In general a false denial that a fact occurred does not provide positive evidence that it did occur. For example, as Lowe J pointed out in Edmunds v Edmunds [1935] VLR 177 at 186: '...by no torturing of the statement 'I did not do

> *the act' can you extract the evidence 'I did do the act'."* (*R v Heyde* (1990) 20 NSWLR 235 at 241–242.)

Clark JA continued at page 242:

> *"But, as has been pointed out, statements made by an accused, whether in or out of court, which are capable of being regarded as deliberate lies may in strictly limited circumstances provide evidence which the jury may find corroborates or strengthens the prosecution case."*

The New South Wales Court of Appeal in *Heyde* regarded the law as having been correctly stated in *R v Lucas, (Ruth)* (1981) 1 QB 720 where at page 724 Lord Lane CJ said this:

> *"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."*

Clarke JA continued at page 242:

> *"An accused person may give inconsistent answers or tell a lie for a variety of reasons none of which would permit of the lie being used as corroboration. For instance, he may become confused; he may tell a lie out of panic or fear, to improve his case, to escape what he regards as an unjust accusation or to hide misconduct which is not the subject of the charge under consideration. For this reason in a great many cases it will be impossible to infer a consciousness of guilt from the nature of the lie or the circumstances in which it occurred.*

> *Where the prosecution seeks to rely upon a false statement by the accused as providing corroboration of the evidence of a prosecution witness the first question which arises is whether the statement is capable of providing corroboration. This is a question of law to be decided by the trial judge: Eade v The King (1924) 34 CLR 154 (as explained by Sholl J in Popovic v Derks [1961] VR 413 at 420).*
>
> *If the judge decides that the statement is capable of providing corroboration then the question whether it does corroborate the evidence of a complainant or accomplice is properly left to the jury.*
>
> *In determining whether a false statement is capable of providing corroboration it will first be necessary to decide whether it could be held to be a deliberate lie – in determining this the trial judge will pay regard to evidence independent of the witness to be corroborated: Lord Lane's first and fourth points."*

These judicial dicta were stated in the context of criminal cases where the question arose as to whether false statements and/or denials by an accused, whether made in or out of court, could provide corroboration of another witness, on the ground that such falsities exposed a consciousness of guilt. Nevertheless, they are applicable as well to the process like the one here undertaken. However, the need for caution is expressed by Gleeson CJ in Heyde in this passage from the judgment at page 236–237:

> *"This provides a rather extreme example of a danger against which Courts of Criminal Appeal have repeatedly warned. In R v Sutton (1986) 5 NSWLR 697 at 701, Street CJ said that reliance by the Crown on lies as collateral conduct providing evidence of guilt is 'fraught with the risk of miscarriage'. In R v Buck (1982) 8 A Crim R 208, Burt CJ said that a jury requires very careful direction upon the circumstances in which a lie told by an accused person in or out of court can amount to corroboration. It is well settled that, provided certain conditions are fulfilled, such lies can amount to corroboration. In the present case, however, the issue was dealt with in a perfunctory manner, and it is impossible to escape the conclusion that if the*

necessary attention had been given to the relevant principles some of the so-called "lies" would never have been left to the jury at all, and others, if left, would have been the subject of instructions considerably more detailed than those that were given.

The particular example referred to above was not, in my view, capable of being fairly regarded as a "lie". It was simply a case of an incautious overstatement which the accused was later forced to qualify. The fact that it was even considered as a possible source of corroboration suggests a disregard of the warnings earlier mentioned, and the need to reinforce them.

If, by evidence or admission, it is proved that an accused person has told a lie, that is to say, made a deliberately false statement, in court or out of court, then, provided various conditions are fulfilled, the jury may regard the lie as demonstrating a consciousness of guilt and may treat the lie as corroboration. The conditions in question are discussed in various cases referred to in the judgment of Clarke JA, including R v Lucas, (Ruth) [1981] 1 QB 720. However, commonsense and ordinary human experience indicate that a judgment as to whether a lie reveals a consciousness of guilt, although one which people not infrequently make, may, depending upon all the circumstances, be very difficult. People tell lies for many reasons other than a consciousness of guilt. For example, a person may tell lies to escape a false accusation, just as a person may be put to flight by the threat of unjust arrest. In R v Lonergran [1963] Tas SR 158, Burbury CJ said (at 160):

> *'...As most false statements or denials may also be explicable upon some hypothesis other than the accused's implication in the crime, the judge would do well to point to other explanations and the danger of giving too much weight to a lie. ...The jury must clearly understand that it is only within strict limits that false statements and denials may be relied upon as independent proof of the affirmative of the issue.'*

> *The problem is compounded when the Crown seeks to rely upon features of the evidence of an accused person who has been a "bad witness". Not all unsatisfactory witnesses are dishonest, and some dishonest people make good witnesses. For a jury to be invited to conclude that the unsatisfactory performance, in the witness box, of an accused person is a demonstration of a consciousness of guilt might, depending upon the circumstances, involve a very risky undertaking indeed. Such an undertaking would ordinarily need to be accompanied by a degree of caution which has repeatedly been indicated by the authorities as necessary, and which was absent in the present case."*

As pointed out above, I am satisfied that in numerous instances witnesses told lies. Indeed the prevalence of lies told under oath in this inquiry was of such a magnitude that any person with any judicial experience could not but be impressed by the widespread and persistent practice in this case. But one has to be cautious and not hasten to conclusions of fact which may not be soundly based because of an inappropriate reliance upon the fact that witnesses persisted with lies.

The matter will be dealt with in the individual cases where the problem arises and the relevant principles applied.

CHAPTER 2

THE TRIAL OF SIR JOHANNES BJELKE–PETERSEN

2.1 Legal Representation

Three ex officio indictments were presented against the accused in the District Court of Queensland on 15 February 1991 charging him with certain offences, including one that he had committed perjury in the course of the evidence which he had given at the Commission of Inquiry presided over by G E Fitzgerald QC (now Mr Justice Fitzgerald, President of the Court of Appeal). The Crown proceeded on this indictment only. At the time of the presentation of the indictment and for some time previously the accused was represented by Lyons, a well–known and highly–regarded firm of solicitors in Brisbane. The partner of the firm who had the immediate responsibility for the client was Martin Jasper Burns, an experienced and competent practitioner in the criminal law. He is presently a member of the Queensland Bar. The firm of Lyons was retained by the client in late November 1990. Burns at all material times was the partner of the firm with responsibility for the file.

The accused, Sir Johannes Bjelke–Petersen, had been introduced to Lyons and in particular to Burns, by Butler. As will be seen, Butler played a prominent role in representing the accused during the whole period leading to the trial which ultimately commenced on Tuesday, 24 September 1991. Because of the evidence which Butler gave to the inquiry, and in order to be able to better assess its worth and credibility, it is necessary to first dwell on some aspects of his legal background and his relationship with the accused.

Butler was for some years a police officer, and in the years immediately prior to his resignation from the Police Service, he had worked as a police prosecutor in the Magistrates Court. He was at the same time studying for a law degree which he ultimately obtained. He did not seek admission to the profession in Queensland, but in New South Wales where on or about 5 April 1991 he was admitted as a practitioner for that State. Later, in about November 1991, he sought and obtained conditional admission as a solicitor of the Supreme Court of Queensland. This of course was after the trial of Sir Johannes Bjelke–Petersen had been completed. It was unnecessary to explore the unorthodox route which Butler took to obtain admission in Queensland. It suffices to note that it was probably taken so as to avoid certain of the admission requirements laid down by the rules

relating to the admission of solicitors in this State. In short, at the time when he introduced the client to the firm of Lyons, and to Burns in November 1990, he was not admitted to practice as a solicitor and appears to have earned income as an investigator only.

Again, it is unnecessary to determine the circumstances whereby he became friendly with the accused and began to act on his behalf. Clearly a close association existed between the two men prior to November 1990 when Burns was introduced to the accused by Butler. The basis for this association need not be explored in detail. It suffices to say that on the basis of information given by Butler to one Ian David, a writer who prepared the script for the television program "Joh's Jury", which was shown on ABC television, both men had become friends, but also they had a mutual dislike and distrust of a former high–profile police officer, Superintendent John Huey, who had worked for the Fitzgerald Commission of Inquiry. It appears that Huey had been engaged in the investigation of matters concerning the accused during the currency of that inquiry, and on the basis of that investigation, and the accused's evidence to the inquiry, the relevant charge of perjury was laid.

The basis for Butler's intensely obsessional distrust and dislike of Huey is a little obscure and again irrelevant. It suffices to say that in seeking to resist giving evidence to this inquiry, Butler sought to raise matters concerning Huey and also certain complaints which he allegedly made to the Criminal Justice Commission about Huey. All of these matters are complex and it would be unnecessarily prolix to attempt to document them here. It is sufficient to say that in this inquiry Butler persisted in seeking to raise matters which concerned Huey and which revealed his obvious distrust and dislike of him.

The matter is dealt with here, if only so briefly, because it is relevant to the relationship which developed between Butler and the accused. That was a close relationship no doubt based on mutual friendship, despite a great disparity in age, but cemented by their mutual dislike and distrust of Huey.

I am in no doubt that Butler became intensely aggressive in the pursuit of the matters which he regarded as relevant to the proper defence of his friend the accused. One further reference to Butler's attitude to Huey can be left for the moment.

Butler whilst at Lyons acquired a shelf company, the name of which was changed to Trial Consultancy Pty Ltd, of which he and his father became directors. The nature of the "professional" relationship between the accused and Trial Consultancy Pty Ltd is referred to by Butler in a letter dated 10 April 1992 which he wrote to the accused.

> *"In the last week of November 1990 it was agreed that Trial Consultancy Pty Ltd would investigate and assist in the preparation and conduct of your defence against the three charges proferred by the Special Prosecutor's Office. Those charges being two of corruption and one of perjury.*
>
> *Trial Consultancy Pty Ltd was retained at a set figure of $2,000 per week. From 30th November 1990 until the 8th March 1991 Trial Consultancy Pty Ltd was paid by Lyons Solicitors the sum of $30,000 (2 x 15 weeks)."*

The letter goes on to recite matters relating to the client's financial position, vis a vis Lyons, which, according to Butler's letter, had refused to pay further fees to Trial Consultancy Pty Ltd unless and until the client had put the firm of solicitors in funds. Butler's letter continues:

> *"As a result of this position I had conversation with you and it was agreed that Trial Consultancy Pty Ltd would continue to work on the agreed basis of $2,000 per week and that you would continue to attempt to resolve your financial difficulties."*

Other records obtained from the Friends of Joh organisations disclose that between May 1991 and August 1991, the Gold Coast section controlled by Mrs Lorraine Morrison paid Trial Consultancy Pty Ltd on behalf of the accused $17,000, and the Brisbane section controlled by Mr Geoffrey Woodward paid to Trial Consultancy Pty Ltd on behalf of the accused, $5,000. Trial Consultancy Pty Ltd was later paid by Maxwell Mead and Young, a firm of solicitors to be referred to shortly, a further sum of $33,000 by 3 payments, as follows:

4 October 1991	$3,000
8 October 1991	$10,000
30 December 1991	$20,000

In summary, on the basis of these payments disclosed in Butler's letter to Sir Joh dated 16 April 1992, Trial Consultancy Pty Ltd received between 30 November 1990 and 30 December 1991 the sum total of $85,000.

Again, these matters are referred to only for the purpose of exposing as fully as possible the nature of the relationship between Butler and the accused, the nature of the engagement of Butler by the accused, and the nature of the involvement of Butler firstly with Lyons and later with the legal firm Maxwell Mead and Young, of which Maxwell Mead was the sole member.

Butler's relationship with the accused, however, was not merely a "professional" relationship, they were obviously close friends. Butler was an undisguised admirer of his client and friend, and of course, the relationship was confirmed by their mutual feelings towards Huey.

It is necessary to return to the evidence of Burns. When Butler and Trial Consultancy Pty Ltd were first engaged by Lyons, Burns assigned Butler to work under his direction and to carry out such investigative work as Burns directed. I have not the slightest doubt that Burns marked out clearly for Butler what was expected of him and insisted that Butler comply. Butler of course then had a legal qualification, but was not admitted to practice. Burns was plainly intent upon ensuring that Butler do only that which Lyons required of him, namely such investigative work as Burns directed. Burns described Butler's designed role in these terms:

> *"Well his role was meant to be to follow my directions and for instance, interview prospective prosecution witnesses, witnesses for the defence, and carry out other – all other inquiries that we considered necessary."*

Burns was soon to learn that Butler was not to be so compliant. The position can best be illustrated by reference to Burns' evidence:

> *"Well, would you like to tell us how it all worked out?---It's hard to summarise briefly. Mr Butler unfortunately would always want to go off on tangents, and I found it quite difficult to control what he was doing in the sense of – he would have a – a different test of relevance to me, and I would find him conducting inquiries that I hadn't necessarily directed. I'm not suggesting that it was improper to do so – – –*

No?---- – – but perhaps wasteful in terms of time.

All right. Well, did you find it necessary to do something about – about this?---Well, almost constantly you needed to keep a tight rein or else the impression I gained or I obtained was that he would be running the show, and from time to time I would, of course, talk to him about what he was doing, and I tried a number of things to endeavour to ascertain on a daily basis precisely what he was doing. In the end, I arranged a conference with the junior counsel retained in the matter and asked Mr Butler to attend it so that – – –

All right. Just – yes, go on?---Simply so that it could be explained to Mr Butler where we were going in the sense of our preparation so that we were all pulling in the one direction.

Well, why was this conference necessary? Wasn't he following your directions?---Not particularly. I found that, as I say, he had some view of the matter. In particularly – in particular, he, at least for a great part of the time, thought that Mr Huey was a relevant witness. In fact, it quickly became known that Huey wasn't going to be a witness at all for the prosecution. He seemed to direct a lot of time and energy to Mr Huey. I didn't agree with that, although I did initially, in the sense that before I had seen the prosecution brief I was told Mr Huey had been responsible for the investigation and that he needed to be looked at closely.

Did you tell Mr Butler you didn't agree with his ideas about preparation in the investigation?---Yes, yes.

And did he accept that?---At face value, yes.

And did you find out later that he did not?---Well, it was an odd arrangement in the sense that I'd discuss with him on a number of occasions that I required him to do certain things. Either they wouldn't be done or alternatively he'd be devoting more time and energy to, for instance, the Huey angle, and I'd tell him not to do that, but it didn't

seem to have a great effect coming from me in the end; hence the conference with counsel.

All right.

MR CARTER: Did counsel confirm your point of view?---Yes.

MR HANSON: Did you – were you giving advice – did you give advice to the client on the relevance of this Huey issue?---Yes.

And did he accept that advice?---Well, he did – he did fairly quickly. He was hesitant about it. He had been, as I understand it – or he had the view, I should say, that Huey was very relevant.

Sir Joh had that view?---Yes, he did.

Yes, go on?---After some short explanation of that, he agreed that he wasn't.

Now, you mentioned a moment ago that – – –

MR CARTER: Did that seem to deter Butler?---No, Mr Commissioner. It wasn't a case of Mr Butler ignoring everything I said.

No, I understand?---It was more a case of – he obviously had some sort of suspicion about Mr Huey and kept working in that direction as if he would uncover something, but it was in my view quite wasteful to do so.

Yes.

MR HANSON: You mentioned a moment ago that if you did not – I think you said something like if you did not watch him closely he would be running the show, I think was your expression?---Yes. He – – –

Just tell me about that?---Well, in a sense, he was involved in all facets of preparation but for conferences

with counsel. I simply didn't invite him to those except for the one I've mentioned, but in all other facets of the preparation he was involved in it, and I would find that he was – he would be preparing areas that we hadn't arrived at in terms of our general preparation strategy, and generally he, as I've said, needed a tight rein.
All right. Well, what happened at the conference then with counsel? This was not Mr Gundelach, was it?---No, no, this was Mr Martin.

Mr Terry Martin?---Yes.

And who was present?---I was present; Mr Martin and Mr Butler, and I think Mr Kent, a partner of mine, although I'm not sure about that.

All right. Well, what was said at this conference?---It was explained to Mr Butler that Huey – Huey's evidence, at least on the face of it – rather, I should withdraw it. It was explained to Mr Butler that Huey just wasn't a witness for the prosecution, and the suggestion that a voir dire be conducted in relation to Huey, which is what Mr Butler was suggesting, was explained in no uncertain terms that that not only shouldn't be done but couldn't be done, that there was no basis for what Mr Butler was saying, and he was told again in no uncertain times that it was wasteful of time and money to keep going down that track.

Well, did you find that he had been communicating with the client or giving advice to the client?---That was – yes, that was particularly irksome. I had forgotten to add that at that conference the attempt was made once and for all to clarify Butler's role for him in the sense that it was – it was an endeavour to try and control him, and one of the things that was made plain to him was that any legal advice going to the client should either come from me or from counsel, that Butler wasn't to be giving any legal advice to the client, or indeed, receiving instructions.

Had he been giving advice to the client?---As far as I'm aware, yes.

And did that correspond or conflict with the advice that you had been giving the client?---I think in answer to that question it both corresponded and conflicted, but it became particularly distracting when it conflicted.

And this is a topic that was dealt with at the conference with Mr Martin?---Yes, it was.
All right. And what was he told in that regard?---He was told that any communications as such, apart from formal matters as I recall it, should be made by me as the partner in charge of the matter or by counsel in my presence, and that he was to, in effect, stay away from the client in terms of giving any advice or receiving instructions.

And did you later find out whether or not he followed those instructions that were given at that conference?---He didn't.

He did not?---No.

How did you find that out?---Well, shortly after that conference – I can't recall whether it was the same day or the following day, may have even been the day after that – but the client phoned me and asked me what I thought about a view expressed to him by Butler.

All right. Well, eventually, the client went somewhere else, did he?---Yes, I think in May of 1991 that the retainer was terminated and as I recall it, on a date in June I think, leave was formally given to withdraw, and the client went to Maxwell Mead and Young."

I accept the evidence of Burns as fairly describing not only his stormy relationship with Butler, but also Butler's obsession that Huey was a key figure for the purposes of the defence. Butler's idea that in some way Huey could be discredited on a voir dire was clearly fatuous. Huey was not even an intended Crown witness.

It was not long before the retainer of Lyons as solicitors for Sir Joh came under pressure. The failure of the client to put the solicitors in funds was no doubt aggravated by the troublesome relationship which had developed

between Burns and Butler on account of the latter's refusal to comply with Burns' instructions.

On or about 17 May 1991 the retainer was terminated, whereupon Butler assumed a new role. Freed of the constraints imposed upon him by Burns, Butler then set about arranging for new legal representation for the accused. Before retaining Lyons, the accused's solicitors had been Flower & Hart, a prominent city legal firm with a long-standing reputation for excellence in commercial matters. I am satisfied that it was Butler who persuaded the client to retain Lyons, and in particular Burns, an experienced and competent criminal lawyer. It was Butler who facilitated that engagement, and then through his company Trial Consultancy Pty Ltd, attached himself and his company to the defence of the accused at Lyons. Not only was this a satisfying engagement for Butler given his admiration for the accused and the possibility, in his mind, that it may afford the opportunity to destroy Huey's credibility, the engagement was also financially attractive.

Once the retainer was terminated by Lyons it was Butler who then orchestrated the engagement of Maxwell Mead & Young, a firm of which Maxwell Mead was the sole practitioner. Again, it seems clear that Butler and Mead were friends and Butler apparently was able to negotiate with Mead on behalf of the accused a financial arrangement concerning fees whereby Mead would become the solicitor on the record for a fixed fee. Of course, Butler and Trial Consultancy Pty Ltd retained throughout this whole period his personal engagement by the accused and Butler was henceforth to attach himself to Mead's firm, where he was given an office.

Mead agreed to act on or about 17 May 1991.

Meanwhile the trial of the accused had on 19 February 1991 been set down by Judge Helman, the Chief Judge of District Courts, to commence on Monday, 23 September 1991. On 20 June 1991 the matter was listed before His Honour for mention when Burns, on behalf of Lyons, formally was given leave to withdraw. Mead on that date appeared as the solicitor for the accused.

The engagement of Mead by Butler on behalf of the accused was notable because of one particularly striking feature. Mead, a sole practitioner, was wholly inexperienced as a criminal lawyer. He had been admitted to practice in 1975. In May 1991 when he was retained, the defence of this accused was only the third occasion during his legal career of his

involvement in the defence of a client in a trial by jury of a criminal charge. His retainer was, as I have said, arranged by Butler. His new-found client was the former Premier of the State who was well-known throughout this country for his Premiership of the State of Queensland. He was aged and had given years of service as a Member of the Legislative Assembly, as a Minister of the Crown and finally as Premier. He was now facing trial on indictment for corruption and perjury. The facts of the case related to his dealings with an investor during his Premiership. The charges of corruption were not pursued, but the related charge of perjury which was based on allegedly false testimony given by the accused to the Commission of Inquiry concerned his dealings with the overseas investor. It was without question a trial which had and was likely to generate enormous public interest.

For the inexperienced Mead it must have represented the most difficult and challenging retainer in his professional career – the trial of the aged high-profile Sir Johannes Bjelke-Petersen by jury in respect of charges of corruption and perjury allegedly related to dealings during his Premiership, made so much more difficult by the fact of Mead's enormous inexperience in this branch of legal practice. He was, as he said, a sole practitioner. When asked why he accepted the retainer he replied, inter alia, that he regarded it "as a good earner".

The place occupied by Butler in the establishment of the relationship of solicitor and client between Mead and the accused is of critical importance. Butler's persistence in seeking to isolate himself from the jury selection process at the trial will have to be assessed in the light of all that had happened in the arrangement of legal representation for the accused and of course other matters yet to be dealt with. However, I am more than comfortably satisfied that Butler's place in this retainer was paramount. He knew Mead and was friendly with him; he no doubt knew him as a very inexperienced criminal lawyer; he had himself terminated his arrangement with Lyons when Lyons' retainer was terminated; in short, he went with the client to the new solicitor Mead and henceforth occupied the facilities made available for him in Mead's small city office.

Plainly, Butler was not now likely to be confronted or constrained by the firm directions and control sought to be exercised by the dominant hand of the experienced and competent Burns. Butler was henceforth free of that kind of constraint. I have not the slightest doubt that from the time Butler moved himself and his company, with the client, into Mead's office, Butler either was given or assumed a free hand and was able to devote the whole

of his time and energy to the defence of his friend the accused. The opportunity to again raise the question of Huey presented itself. Clearly Butler had not been deterred by the advice of Burns or by Martin of Counsel that Huey was an irrelevancy in the trial. When Greenwood QC and Gundelach were ultimately briefed, it is clear that Butler again sought their adoption of his somewhat paranoid idea that Huey was crucial to the defence case. However, the point met the same fate. He was again rebuffed and the idea was quickly discarded by Counsel; as Gundelach said, it became "an irritating distraction".

My point has been to give clearer emphasis to the fact that Butler was intimately and closely involved in the defence of the accused. So long as Mead was the solicitor on the record, Butler had the greater scope to immerse himself in the many matters relevant to the defence of the accused, including the matter of jury selection.

Butler's position in the office of Maxwell Mead & Young is clearly exposed by the evidence of Mead:

> *"MR CARTER: The number, telephone number, 2295488 is your office number?---That's one of my office numbers, yes, sir.*
>
> *Is there more than one?---Yes.*
>
> *2295778?---That's correct, yes.*
>
> *Are they - do they both go through the switch?---Yes, they do.*
>
> *Was Butler or Trial Consultancy allotted a particular telephone number when it came to be retained by you and to occupy your office?---No, they weren't - no, it wasn't.*
>
> *You said that Trial Consultancy Pty Limited did not pay rent?---No, sir.*
>
> *Did it pay phone rental and phone charges?---No, sir. No, sir. It paid - - -*

Was there any payment – what? Go on?---It paid certain lease fees on equipment that I had to purchase to be able to handle the bulk of the paperwork in this matter.

So, who actually purchased the equipment, or who took the lease?---Well, Trial Consultancy took the lease.

Well, I mean, Trial Consultancy was obliged to pay the lease payments?---That's so.

Not you?---No.

So, that was simply between Trial Consultancy and the owner of the equipment?---That's so, yes.

So that, Trial Consultancy did not pay rent, did not pay any of the phone charges, did not make any payment in relation to secretarial services that it used, provided its own equipment in respect of which it made the lease payments?---That's so.

And what equipment?---Well, the equipment was – – –

Fax machine?---No, equipment was – yes, I'm sorry, fax machine, photocopiers, computer equipment, electronic equipment used in typing, etcetera.

That was acquired by Trial Consultancy?---That's so.

Did you have your own fax machine before then?---I did have, yes, but I – – –

Whose fax machine is 2219213?---Well, it's the same fax machine, it is mine. I've since taken over the lease of those pieces of equipment.

So that when the second fax machine was introduced, it was on the same line?---Yes. The – the second – there's only ever been one fax machine at one time.

Well, when Trial Consultancy acquired its fax machine, what happened to yours?---I sold mine.

So that you would receive documents faxed to your firm from the same fax machine which was owned by Trial Consultancy?---Which was – yes, which was leased by Trial Consultancy.

Which was leased by Trial Consultancy?---Yes."

Butler was clearly the dominant personality in Mead's office so far as the defence of the client required any professional input. Again, it will be noted that whilst he had been admitted to practice in New South Wales he had not yet applied for admission in Queensland. Other evidence as to Butler's "hands on" involvement in the defence appears also in the following evidence of Mead:

"Did he attend at your office?---Yes, I set an office aside for him. It was adjacent to mine. In my building there are – like, sort of, rooms which can be offices. It is not an open floor plan type of thing. And I set aside that office for his use. He used the telephone, fax machines, photocopy machines, etcetera.

Was his company charged rent?---No.

And his company was paid for its services by your firm, was it?---It was – the agreement that we reached was that I would retain his company for that work, but the fees would be paid from the fees I received from the client. In other words, if I wasn't paid, he wasn't paid, or the company wasn't paid.

Did you receive money from Sir Joh?---I received money from a number of people on behalf of Sir Joh.

Yes?---And I think I did receive money from Sir Joh personally as well. I couldn't be sure.

I take it that was dealt with in the normal way – receipted into your trust account?---That's so.

And disbursed from the trust account?---That's so.

And what, among the disbursements were payments to Trial Consultancy Pty Ltd?---That's so.

We have some evidence here that some money was paid direct to that company by people who were raising money?---Yes.

Do you know about that evidence?---Yes, Mr Butler advised me that he was on a – on a fee previously with respect to the file, and I wasn't sure where that fee was being paid, but I understand it was paid from people who were assisting Sir Joh in his defence, and some moneys were paid to him prior to my taking over the file as I understand it. And as I further understand it he received some moneys from that organisation after he'd started working with my firm. That money, as I understand it, was for moneys that were owed for previous work done.

All right. You were quite content with this arrangement, were you?---Yes, I was.

And was the client aware of it?---Yes, he was – well, to the best of my knowledge he was.

Well, after the file arrived, August, did you say, August 1991?---About 13 August, I think it was.

Did you both work in preparing the defence?--- Not - - -

MR CARTER: Sorry, you said he went to work at your office- - -?---Yes.

- - -in May?---Yes, sir, about 17 or 18 May.

But he was not your employee?---No, sir. He was working from my office.

And the file arrived on 13 August?---That's so.

What did he do at your office between May and 13 August?---Well, there was a number of- - -

Did he create his own files?---Yes, there was a number of witnesses and that type of thing that he had to follow through on.

What do you mean by that?---Well, Mr Butler had been engaged in this file for a period of time, and he knew the file intimately. He advised me that there was – there had been no committal in respect of the matter, and because of that, there had to be witnesses – statements taken from various witnesses, which may or may not be called at the trial, and this is what he proceeded to do.

Did you do any work in connection with the retainer before you received the file?---No, I didn't.

When do you say you were retained by the client?---The client agreed to the terms on or about 17 May.

Yes. He had agreed to the terms which had been sought by Butler?---No. I'd sought the terms by letter.

I thought you said that he was seeking the bids on behalf of Sir Joh?---Well, perhaps it was badly put, sir. He asked me whether I was indicated – asked me whether I was interested in acting, and I said yes, I was, and accordingly I wrote to Sir Joh with a proposal.

When?---Some time prior to 17 May, but probably between the 1st and the 17th; I don't have the exact date.

And who informed you, or how did you know that your bid had been accepted?---I believe it was Mr Butler.

And was that before or after Butler commenced to occupy an office in your offices?---No, he let me – he advised me beforehand.

And then did he come to occupy an office in your offices?---That's correct.

And what did he do between then and August when you got the file?---As I say, he proceeded to chase up and take

statements from witnesses. He acquired a copy of the Fitzgerald Report; he went through that, researched the file generally.

Researched the file?---Yes.

What file?---No, well – I'm sorry; researched the matter generally. I mean- - -

Did he have his own files?---They were starting to be created, as I recall.

Did he bring his own files with him?---I can't recall, sir, whether he did or not. I – there was some paperwork I think that he had, but I can't recall precisely what they were.

Was he using the secretarial services in your office?--- Yes, he was.

And the phone?---Yes.

And did he have access to secretarial services generally?--- --As it worked out, the one – one girl did primarily most of the work.

Who was that?---That was Tracey Lea.

And did you do any work in relation to the retainer before you received the file?---No, sir. I – I – as a sole practitioner, I just carried on my – my business.

Waiting for the file?---Well, yes; there wasn't a great deal I could do with it, I didn't think.

Well, whether that is so or not, you obviously – no doubt there was a lien on the file held by other solicitors which had to be satisfied before you could get it?---That was the case, yes.

And in the meantime, Mr Butler, through his company, Trial Consultancy, provided the services to the client, to Sir Joh Bjelke-Petersen?---That's so.

Which you would have provided as his solicitor had you had the file?---Had I the – had I the file and the manpower. I didn't have the manpower.

In fairness to Mead, it should not be thought that he abrogated totally his responsibility to the client and left the matter wholly in the hands of Butler. It may be too simplistic to say that Mead merely provided the letterhead. Mead is by nature a somewhat reserved man, quietly-spoken with a pleasant temperament and disposition, who was totally unused to the discipline and practice of the criminal court. Whilst I am satisfied that he was content to leave the preparation work to Butler, he was at all times prepared to assume final responsibility, if necessary, for what had to be done. At the same time his inexperience with this type of case and the demands of his relatively small practice, which required his giving attention to his other clients, meant that from day to day it was Butler, not Mead, who was and was seen to be active in matters relating to the defence. After all, this case was the only matter to engage Butler's attention. Mead had other clients. Butler, the ex-police officer and prosecutor, might well be seen to be the more experienced of the two in preparing for trial and more likely to assist Counsel. Mead's inexperience when compared with the nature and quality of Butler's background and his involvement in the case from its beginning readily explains Mead's lesser involvement in practical terms. As Counsel Assisting me submitted, the fact that Mead spent the whole of the weekend immediately before the anticipated commencement of the trial on Monday, 23 September 1991, at the Gold Coast on a social engagement "speaks volumes". On the other hand, the evidence clearly discloses Butler's close involvement during that weekend in matters relevant to the jury and indeed to the question of jury selection.

Finally, I turn to the engagement of Counsel. Greenwood QC was on 15 July 1991 phoned by Butler. Mead also spoke to Greenwood QC on this occasion and as a result Greenwood QC was briefed and he travelled to Brisbane on 17 July 1991 for a conference at the Hilton Hotel, which continued into 18 July 1991. It will be referred to later.

I am satisfied that Butler had some input into the decision to brief Greenwood QC.

I accept what Butler told David, the writer for the ABC program, concerning the decision to brief Greenwood QC as substantially accurate. At the same time Mead had had dealings with Greenwood QC's brother, John Greenwood QC, in relation to some commercial litigation and the decision to engage Robert Greenwood QC, a very experienced and competent criminal lawyer, was probably influenced by those dealings. In any event, Greenwood QC was briefed, with Gundelach briefed as Junior Counsel. Gundelach was also known to Butler and I am satisfied that it was Butler's decision to brief Gundelach.

There is no reasonable doubt in my mind that at least from the time when Lyons was retained as solicitors in late November 1990 up to and including 17 July 1991 when Greenwood QC and Gundelach were briefed, Butler was wholly engaged on matters relating to the defence of the accused, and was personally involved in practically all of the matters of fact which required preparation and professional attention. As will be seen, he remained involved beyond the conclusion of the trial on Saturday, 19 October 1991.

It follows that I am satisfied, and comfortably so, that in all relevant matters concerning the jury selection for the trial of the accused, Butler was intimately involved. It also follows that his evidence of his non-involvement in this important issue is unacceptable and I reject it. I will develop this finding further in the course of my dealing with other aspects of it.

2.2 Jury Panel Z

The District Court calendar had scheduled a criminal sittings to commence on 2 September 1991 to last for four weeks. This was the period within which the trial of Sir Johannes Bjelke-Petersen was appointed to commence. It could be expected that an appropriate number of judges would sit to deal with criminal matters during the appointed sittings and that a number of jurors sufficient to service the requirements of those criminal courts would be summonsed.

Because the trial of the accused was likely to be a lengthy one and had been fixed for Monday, 23 September and accordingly was likely to extend beyond the expected closing date of the sittings, it was decided by the Sheriff, Edmund Frances Green, and his deputy, Neil William Hansen, that a special jury panel should be established for this trial and also for another

trial of a police officer named Yorke, who had been charged with corruption, and whose trial was appointed to commence on Monday, 16 September 1991. Yorke was also to be prosecuted by the Special Prosecutor.

The panel for use in the trial of Yorke, which was expected to commence on 16 September 1991 and in the trial of Sir Joh, which was expected to commence on 23 September 1991, came to be known as Panel Z. It was a special panel designed to service these two particular trials. The use of a specially compiled panel had additional advantages, firstly, that the prospective jurors could be informed that jury service in respect of these two matters may extend longer than the usual period and, secondly, its size could be specially determined since it could be expected that, given the "political" aspects of Sir Joh's trial, more than the usual number might seek to be excused.

Accordingly, on 12 July 1991 Green as Deputy Registrar signed the precept to the Sheriff directing him to have sufficient jurors called for a sittings commencing 16 September 1991. This was the anticipated date of the commencement of Yorke's trial. The trial of Sir Johannes Bjelke-Petersen was to commence one week later.

It is necessary to first outline the administrative process necessarily undertaken for the compilation of the required jury panels. Once the precept is signed a member of the Sheriff's staff initiates the random selection of persons from the Electoral Roll in the State Government computer centre known as CITEC. At the same time as the random selection is undertaken CITEC generates a notice to each prospective juror and these notices are posted to the persons whose names are randomly generated.

In deciding how many names will be generated by this process the Sheriff uses a factor of 6. That is, the number of names generated and to whom notices are sent is 6 times the number of persons required to constitute the panel. In this case 1200 names were generated. It was thought that 200 would constitute the panel.

The notices forwarded to the prospective jurors from CITEC are in the form of a questionnaire. These are returned to the Sheriff's Office where they are examined and sorted. Many will declare their availability. Many will not, for a variety of reasons. The present rule is that females may reject jury service without assigning a reason. This sorting process reduces

very significantly the number of persons to whom original notices had been sent.

Once the number of available persons is determined, a further random computer selection occurs within the Sheriff's Office whereby the number of available persons is further reduced and once this reduced number has been selected the Sheriff's Office issues to each such person a jury summons requiring the attendance of each such person for a particular sittings which has been fixed for a particular date.

The Sheriff has the power to excuse a person, who may have been summonsed for good reason, and this finally results in a panel of jurors being compiled which is identified in an appropriate way for a particular sittings or trial.

The panel compiled and assigned to the trials of Yorke and Sir Johannes Bjelke–Petersen came to be known as Panel Z and was constituted by the names of 168 persons. It was first summonsed for Monday 16 September 1991 – the date of Yorke's trial. In accordance with the provisions of the *Jury Act* the panel codenamed Z first became available to the public on 11 September 1991. Since Sir Joh's trial was not to commence until 23 September, Panel Z had become available 12 days earlier.

The evidence establishes that on 11 September 1991 a copy of Panel Z was purchased from the Sheriff's Office by an unidentified person in Mead's office.

Because of the importance which this further point will assume later it is necessary to point out that once compiled the Sheriff gives to the Police Service the copy of each jury panel. This is done so that any criminal history in respect of any person on the panel can be identified. The criminal history, if any, of any person on the panel is then given to the Sheriff so that the Sheriff can determine whether in accordance with the *Jury Act* any such person is disqualified by law from jury service on account of any particular in the criminal history. At the same time as the Sheriff gives the panel to the Police Service the panel is also given to the Department of Transport which determines the traffic offending history of any such person. The resultant information from the Department of Transport is not returned to the Sheriff since it is irrelevant for his purposes, but the information is returned to the Office of the Director of Prosecutions. The latter also receives the details of the criminal histories supplied to the Sheriff by the Police Service.

Finally, it should be noted that for the sittings of the District Court appointed to commence on 2 September 1991, of the several panels compiled, 3 of them were identified as Panels P, K and L respectively. Panel Z, the special panel compiled for the trials of Yorke and Sir Johannes Bjelke-Petersen was summonsed for the first day of Yorke's trial, namely 16 September 1991.

Luke Edmund Shaw, the juror whose presence as foreman of the jury at the trial of the accused was the source of the controversy, was a juror on Panel P, and identified as P50.

As will shortly appear Panel Z was not used for the trial of Sir Joh and Panels P and K were substituted.

2.3 Proceedings Before the Trial Judge 23-24 September 1991

In order to fully expose the issues raised for inquiry by the resolutions of the Criminal Justice Commission it is necessary to detail the course which proceedings before the trial judge took on Monday, 23 September 1991 and Tuesday, 24 September.

Early on the morning of Monday, 23 September 1991 a member of the defence team, who cannot specifically be identified, but probably senior or junior Counsel, spoke to the Clerk to His Honour Judge Helman and sought a hearing in Judge Helman's Chambers at 9.15am.

Nicholas Cowdery QC of the Sydney Bar led for the Special Prosecutor with Robert Martin Needham of the Queensland Bar as his junior. Early on that day Needham was telephoned by Greenwood QC who invited Needham to meet with defence counsel in the Judge's Chambers before the trial began. Needham received this telephone call in his Chambers where he and Cowdery QC were working. Needham asked Greenwood QC "what it was about", and the latter replied that, "he would tell us over at Court". Accordingly, at 9.15am Cowdery QC and Needham went to the trial Judge's Chambers.

Prosecution Counsel entered the Judge's Chambers still ignorant of the terms of the application which Greenwood QC proposed to make. I am satisfied that the proceedings in Chambers were private, but that a transcript was made of what transpired. I am also satisfied that apart from Counsel for both sides, Mead was also present to instruct defence Counsel.

Apart from the Judge's Clerk and the court reporters the only other relevant person present during the proceedings was Hansen, the Deputy Sheriff. I am satisfied that Hansen was not present from the outset, but came to the Judge's Chambers during the course of the hearing and only then at the request of the Judge. Before Judge Helman commenced to hear the application, which turned out to be one to discharge Panel Z, neither His Honour nor defence Counsel had any inkling of what was proposed. There was no occasion for Hansen to be present until the details of the application emerged and the submissions in support of it developed.

So that all of the relevant matters can be properly identified it is best if I set out fully from the transcript what was said in the Judge's Chambers:

> *"HIS HONOUR: Is there some problem?*
>
> *MR GREENWOOD: Thanks for seeing us. I have this to say, and I preface it by saying that I have not said anything on the subject matter of this requested meeting or meeting with you in chambers to the Crown. A matter has been brought to the attention of my instructing solicitor and his view is of such a nature that he has instructed me to move the Court for the transfer of the jury Panel Z from this trial to be replaced by another of the panels or a combination thereof insofar as that might be able to be done without inconveniencing the mechanism of the Court.*
>
> *Having considered myself the matter brought to my attention and discussed it with Mr Gundelach, my junior, and as well as that taken independent professional advice from another senior member of the Bar, I am of the view that this is the appropriate course for the Court to follow and for me to request.*
>
> *The nature of the difficulty is of a type that in our collective judgment, including the judgment of the senior counsel I independently consulted with, my duty to the Court does not oblige me to disclose the precise nature of the difficulty. On the other hand, it is also our common view that my duty to my client tends positively for me not to reveal those details. So, what we have sought is to place this matter before you at a point of time before this jury panel would normally formally assemble and at a*

point of time where the other panels would be able to be kept in the precincts of the Court after they do their other duties.

I might add that the matter of concern did not come to Mr Mead's attention till last evening, so hence we are bringing the matter forward and bringing this request forward at the first available opportunity albeit which also coincides with the last available opportunity. That is the way the cards have fallen, Your Honour.

HIS HONOUR: Well, do you want to say anything?

MR COWDERY: Well, we know nothing more about the matter than Your Honour has just heard. What it amounts to in effect is a request by an accused person for the Court to alter its normal administrative arrangements at his request without the reason for that being disclosed. Frankly, we think that that is a rather unusual situation. Of course, we accept the assurances of senior counsel for the accused that at least in his view and in the view of others whom he has consulted there is some basis for making that request; there is no argument about that, but in the absence of the disclosure of the reason, we would submit that the Court should follow its normal administrative procedures as it would for any trial of any accused person.

HIS HONOUR: There wouldn't normally be a difficulty in moving panels from one case to another, and I am not aware of any that might exist in this case, but I would have to check with the Sheriff, that is the only thing, but as you say, I am in the dark as much as you are, but I suppose I can accept Mr Greenwood's assurance. It seems if a change can be made nobody could really object, could they, if we just substitute one panel for another? I mean, it is meant to be a random–––––

MR COWDERY: Yes, the identity of the panel is of no concern to us at all. Might I raise this: is the difficulty such that the problem could be overcome by excusing certain members of the panel rather than the whole panel?

MR GREENWOOD: The answer to the question is no.

HIS HONOUR: When you say "our normal administrative practice", Mr Cowdery, I don't know that we have got a normal administrative practice in a situation like this, but it often happens that a panel is moved from one case to another just-----

MR GREENWOOD: Willy-nilly

HIS HONOUR: Yes, for practical administrative reasons – well, I believe that to be the case. That is really in the province of the Sheriff but I would have to check with the Sheriff that this wouldn't cause any difficulties. If it does, it might cause some delay, that is the only thing. My inclination is to accede to the request; I can't see that it should cause any real difficulty with the possible exception of delay. Bearing in mind that it is meant to be a random selection of people in any event, this just introduces another element of randomness.

MR COWDERY: Our only concern is that as a matter of principle it seems unusual at least that an accused person – and this accused is no different from any other – when it comes to the Court's processes that an accused person may interfere – and I mean that in a neutral sense – interfere in the administrative process of the Court without disclosing a reason for it.

HIS HONOUR: Well, yes, but would it not be proper for me to accept Mr Greenwood's assurance? Would you be prepared to discuss the matter privately with Mr Cowdery and reveal to him the difficulties?

MR GREENWOOD: Well, yes, Your Honour. I say before perhaps that course is entertained that I have thought this matter through very carefully insofar as it touches my duty to the Court and my duty to my client. What I have placed before you has, as you probably observed, been drafted by me in writing before I put it before you, and I would say that I would prefer to not go any further unless there is some good and compelling reason for me to do so.

As far as the switching of panels is concerned, what has happened in my experience is that sometimes for instance a particular matter in a sittings concludes a couple of days before it is expected to and the panel originally intended for the next following trial has been put off and another panel is brought in earlier and so forth. What usually does follow as a consequence from that sort of situation is that the Crown and the representatives of the accused are usually granted the indulgence of a day or two to do some inquiries on the names on the panel – although it is a random system, it is my experience that proper inquiries are made by both sides which are not to be criticised any shape or form and, as you say, the consequence may be that we might lose a day or two, but that is of no great consequence in a matter which is going to go for a considerable period of time, and I can assure Your Honour that I would not be asking for a step like this to be taken unless I thought it thoroughly through and believed it to be necessary in the interests of the proper progress of justice.

I suppose what I am saying is that if I am pushed – and I know that you wouldn't push me for other than good reason – then I will be prepared to discuss the matter in more detail with Mr Cowdery, but I don't embrace that situation. If you think it is fair that I do so-----

HIS HONOUR: Well, the position is that you have come to the conclusion that this is what ought to be done and you have also consulted some other senior counsel; is that correct?

MR GREENWOOD: Well, not senior in the sense of Queens Counsel but a very senior junior; much more senior and experienced than myself, and his advice to me was that the course that I had proposed was the only course I could properly follow.

HIS HONOUR: Well, I would have to make some inquiries from the Sheriff what the ramifications of this were. Are you wanting to resist this in the light of that?

MR COWDERY: Could I make two further submissions? One is that it is very much a matter for the Court as to how it orders its administration and, as I indicated, we do accept the assurance of Mr Greenwood in the way that he has expressed it. We simply raise two matters. One is that the question of the principle involved should be considered, with respect – but I am sure it would be; and the other is that there may be some practical ramifications, as Mr Greenwood suggests, which would flow from the substitution of another panel or a mixture of the panels which would require, as Mr Greenwood has pointed out, some little time to pursue. We would only require a short time.

MR NEEDHAM: Twenty minutes to have a look through the list, see if we know anyone.

HIS HONOUR: Well, I agree there is a matter of principle involved; it is unusual, though I am inclined to think that I should accept Mr Greenwood's assurance, which I assume isn't lightly given, but I suppose the next step is for me to inquire about the possible practical difficulties involved in this. I think this panel was brought in specially for this case and for another long case which is underway at present apart from this one.

MR GREENWOOD: I see by the paper however that there are two other panels coming in this morning.

HIS HONOUR: Well, I hadn't checked that myself.

MR GREENWOOD: Well, I had a bit more interest in it.

HIS HONOUR: Well, could you just excuse me for a moment? I will just have a word with the Sheriff."

I pause at this point to point out that there then followed a somewhat complex discussion involving the trial Judge, Hansen, the Deputy Sheriff, Counsel for the defence, and to a very minor extent Cowdery QC. This discussion focussed on what altered administrative arrangement might be possible if Panel Z were not to be used in the Bjelke–Petersen trial. Before proceeding it is important to point out the following facts.

It is the practice of the Sheriff's Office to determine on the afternoon of any day what jury panels will be required to service the requirements of the particular court for the next day. Once the Sheriff or Deputy Sheriff determine what panels will be required for the courts on the morning of the next day, that information is placed in the law list for publication on the next morning in the Courier Mail, a metropolitan daily newspaper circulating in the city. The information is also placed on a recorded telephone message which discloses the information and is heard once the caller phones a certain number. The jurors for a sittings are made aware of this telephone number which is publicly listed in the telephone directory. Since the Bjelke–Petersen trial along with several others had been appointed to commence on Monday, 23 September 1991, Hansen had on the afternoon of Friday, 20 September 1991, determined what panels would be required for Monday and had arranged for this information to be included in the law list for the publication in the newspaper on Monday morning and for inclusion in the recorded phone message.

The relevant extract from the published law list reads as follows:

> *"DISTRICT COURT JURY NOTICE: Jurors on Panels P L and Z are required. Jurors on Panels K and W are not required. Jurors on Panel Q not empanelled on the current trials are not required."*

This notice makes more intelligible the statement of Greenwood QC made to the trial Judge and recorded in the transcript:

> *"I see by the paper however that there are two other panels coming in this morning."*

Those other two panels were Panels P and L. Shaw was on Panel P. One other statement of Greenwood QC is also noteworthy in this context. It occurred during the discussion referred to, but not reproduced above:

> Mr Greenwood: *"What I am saying is you have got the role that panel "X" or some other panel was going to be playing today. If you simply swap them over until our new panel come back on Wednesday morning then Panel Z can do whatever they were going to do today."*

Clearly, Greenwood QC knew when he went to the trial Judge's Chambers to seek the replacement of Panel Z, that there were two other panels in the

precincts of the court which could serve as a replacement for Panel Z which could then be assigned to "do whatever they were going to do today". He was clearly referring to the work which had been already assigned to Panels P and L.

It should also be pointed out that Greenwood QC had sought an order that the trial not commence until Wednesday, 25 September 1991, in the event that there was to be a change of jury panels so that "proper inquiries are made by both sides". This, it should be said, was a matter of no interest to Counsel for the prosecution because, although they had had access to Panel Z and the other panels as well, a deliberate decision had been made by the Special Prosecutor, Cowdery QC and Needham that no preliminary inquiries of any kind would be made in respect of jurors on the panel. The prosecution was prepared to commence there and then in the event that Panel Z was not used in the Bjelke-Petersen trial and the other Panels P and L substituted.

In the result the trial Judge agreed to the removal of Panel Z from the trial and that it be adjourned to commence at 10.00am on Wednesday, 25 September 1991. One further section of the transcript should be included here. It is the part which concluded the proceedings on that morning:

> *"MR GREENWOOD: It would certainly be of assistance to us if we walked away from here this morning knowing which jurors were going to turn up on Wednesday morning.*
>
> *MR HANSEN: You won't know precisely. I am sure we are going to have to put another panel in.*
>
> *HIS HONOUR: They will just be put on notice.*
>
> *MR NEEDHAM: The only way you would know the names is if you did the excusals in open Court this morning.*
>
> *MR HANSEN: We could on one panel; you couldn't on the other one.*
>
> *HIS HONOUR: Would that be wise to do that now, though? I am inclined to leave that to the normal course of things.*

MR GREENWOOD: What are we going to leave with today? I mean, are we going to leave with a list of two panels out of which our twelve are going to be chosen, and that will be over a hundred people.

MR HANSEN: 105, I work it out. There is 60 on one of the panels this morning and there is 45 on one I haven't brought in.

HIS HONOUR: So we should be able to get twelve.

MR GREENWOOD: Yes, no problem.

HIS HONOUR: By the way, what I intended to do in following what you said the other day was to have two reserves, so that will mean ten challenges.

MR GREENWOOD: Ten challenges.

HIS HONOUR: Yes, and ten stand–bys, because that is what the Act provides. Look, I think we better let you get moving so that we can get the other trials underway.

MR HANSEN: Find out who's got who, yes.

HIS HONOUR: What do you propose doing about the Bjelke–Petersen case? Will we just mention it and say that you–----

MR GREENWOOD: I will just ask you to stand the matter over till Wednesday morning.

MR COWDERY: Should there be some mention in Court of the fact that the matter has been the subject of submissions in chambers or something of that sort?

MR GREENWOOD: I placed certain matters before Your Honour in chambers which have been transcribed in the presence of counsel for the Crown. Your Honour has given an intimation–----

HIS HONOUR: Is that all right?

MR GREENWOOD: --- and would you now adjourn this matter till Wednesday morning.

HIS HONOUR: Is that all right from your point of view?

MR COWDERY: Well, no, but we accept it.

HIS HONOUR: I am anxious to see that this trial doesn't miscarry, and I would be anxious to avoid its miscarrying on the first day.

MR COWDERY: I understand those feelings fully.

HIS HONOUR: I don't think this is likely to set an undesirable precedent; however, if this became more common, we may have to ask for a more detailed explanation, but at the moment I think I am justified in acting on senior counsel's assurance."

Mr Hansen's reference to 105 jurors requires amplification. Panel P had 60 jurors. Panel K – the "one I haven't brought in" – was constituted by 45 jurors.

It is clear enough that in Hansen's mind he intended to use Panels P and K (not L, the other panel in attendance on that day) for the Bjelke-Petersen trial. It was clearly a matter of indifference to the trial Judge. Needham gave evidence that at the conclusion of the hearing he was unaware of what panels would be used. As pointed out earlier, it was also a matter of indifference to the prosecution. From Greenwood QC's point of view it was clear enough to him that "one of the panels this morning" would be used and one other that had not been brought in. I regard it as unlikely that Greenwood QC, at the time the hearing concluded, had any clear idea of what precise panels would be used for the trial. His major concern was that having successfully had Panel Z rejected, the trial not commence until Wednesday, 25 September 1991 so as to enable "proper inquiries" to be made.

I am satisfied that the proceedings in the trial Judge's Chambers concluded not earlier than 10.00am. It had obviously thrown the court's arrangements for that day into confusion. Certain aspects of this will be referred to later. Jury panels required for courts on that morning had to be reassigned. In particular, Panel Z was assigned to trials other than the one for which it

had been specifically established. I accept Hansen's evidence that after the proceedings concluded he arranged for copies of Panels P and K to be made available to the solicitors for the defence. I am satisfied that this occurred later on that morning. The evidence does not permit one to make a precise finding as to the time at which that occurred. It is, however, an important point, as will be seen, and the relevant evidence will be explored below.

When the parties left the trial Judge's Chambers on that morning it was expected that they would re-assemble for the commencement of the trial at 10.00am on Wednesday, 25 September 1991. That, however, was not to be.

At 3.50pm on the same afternoon of Monday, 23 September 1991, the parties again appeared before the trial Judge. This appearance was prompted by concern on the part of Cowdery QC and those instructing him that the Crown may be prejudiced by the adjournment to Wednesday since a vital Crown witness, a certain Mr Sng, a resident of Singapore, was available only for the week commencing Monday, 23 September 1991. A fixed arrangement concerning his availability for 23 September 1991 had long since been in place and he, Mr Sng, had important commitments with business, and public officials including the President in Indonesia in the following week. A section of the transcript is reproduced here:

> *"MR COWDERY: Your Honour, thank you for relisting the matter this afternoon at our request. The reason for that is as follows: in the application in chambers this morning before Your Honour when the somewhat unusual course was taken which has resulted in the trial being adjourned until Wednesday, I did indicate in the course of submissions that there might be some consequences in the adjournment of the trial for the availability of witnesses.*
>
> *We do have, amongst the 23 or so, I think it is, witnesses, two witnesses from overseas. In respect of one of those there is probably not a difficulty, or at least not a difficulty that we foresee at this time. In respect of the other witness, however, there is a substantial difficulty which I will come to in a moment, and it is for that reason that we wish to apprise Your Honour of the difficulty, and to ask Your Honour if consideration might be given to the trial*

commencing tomorrow rather than Wednesday in an attempt to overcome that difficulty.

The difficulty is this, that one of the witnesses, Robert Sng, is a resident of Singapore. He is a man who is involved in business in a number of countries apart from his own, and he is a man consequently upon whom the livelihood and convenience of others in their business arrangements depend. This trial was listed in March of this year for hearing to commence today, 23 September, and in reliance upon that arrangements were made for Mr Sng to come to Australia and to arrange his business schedule in such a way that he could conveniently be here to give evidence. He did that in good faith, representations having been made to him by those instructing us about the dates and times for which he would be required. He has travelled to Australia voluntarily and is available to give evidence, but the difficulty is this, that he is not available beyond the end of this week until the beginning of November. What I am saying is that he is available this week, then not for the month of October, but is available then from the beginning of November on.

He has important commitments in two other countries commencing from Monday. First there are commitments in Indonesia which involve not only other businessmen but public officials of that country, including the President, in a function which is to take place on Tuesday. That is a commitment that Mr Sng has made and it is a commitment that was notified to us some little time ago. There was a longer–standing commitment of which we had longer notice which commences late next week in the Philippines, another place in which Mr Sng has substantial business interests, and those matters will require him to be in that country for the balance of the month of October.

Your Honour, our situation is this, that if the trial were to commence tomorrow there is a good prospect of Mr Sng being able to complete his evidence in an order of witnesses that would enable a reasonable and logical presentation of the case to the jury. He would be called, in effect, as soon as reasonably practicable after some

preliminary matters have been dealt with. If, however, the trial were to commence on any later day, Wednesday on, we can see that, with other matters that will need to be dealt with and with matters perhaps unforeseen which might arise, there is a real risk that that evidence will not be completed by the end of this week.

Now, as I said, Your Honour, representations have been made over the course of the last months by those instructing me made in good faith and on the basis that the trial would commence today. Mr Sng has ordered his affairs accordingly in good faith and has voluntarily attended Australia for the purpose of giving evidence and we, for our part, would wish to see those arrangements honoured and would wish to have him complete his evidence before the end of the week so that he can then attend to other commitments that he has made in turn to other persons.

If that can't be done, the Crown is placed in a position of some very real difficulty. If the trial were to commence on Wednesday and Mr Sng were not to return until after his business commitments had concluded, it would probably be too late. I do not foresee the Crown case taking four weeks, that is the Crown case apart from Mr Sng. So the position is, Your Honour, that we really are in a position of some difficulty by reason of the order that was made this morning, and we have taken advice that we can during the course of the day and have taken the first opportunity this afternoon to bring these matters to Your Honour's attention so that they can be dealt with. So the primary application, Your Honour, is that the trial commence tomorrow morning rather than Wednesday.

HIS HONOUR: Is there some other application?

MR COWDERY: Well, if that application is not successful, then the Crown feels compelled to make application for an adjournment of the trial until, at the earliest, the beginning of November so that the evidence available to it can be presented to the jury.

HIS HONOUR: Yes, thank you, Mr Cowdery.

HIS HONOUR: Mr Greenwood?

MR GREENWOOD: Well, Your Honour, of course the convenience of witnesses and so forth is one thing that has to be taken into account. No judicial proceeding proceeds without inconveniencing somebody. That's the general consideration. It may be that the way the cards fall the Crown might have to ask Mr Sng to come back for a couple of days later on before the beginning of November. Such things are not impossible. We all have experience of "important commitments" that can, given enough notice, be turned around.

I must say that I am failed to be impressed with the drama of the situation, but more practically, our adjournment until Wednesday morning was sought and given in good faith and for good reasons. This matter wasn't raised then. I don't take any particular point about that, but fundamentally I wonder why with a Wednesday morning start – an hour to empanel the jury, an hour or two to open, an hour or so for argument about a few pieces of evidence – why Mr Sng couldn't be in the witness–box by Thursday morning.

HIS HONOUR: At that rate Wednesday afternoon, I suppose.

MR GREENWOOD: By Thursday morning. If the Crown might perceive any difficulty about presenting his evidence out of order, I wouldn't be particularly dog in the manger about making any point about that. If they are being straight forward about their difficulty – it might be they want to show him a document which hasn't been formally proved or something of that nature. Well, the Court wouldn't find me to be unnecessarily obstructive, but the time between now and Wednesday morning is not time thrown away. It's time which is being spent by others acting on my instructing solicitor's request to carry out some quite legitimate matters which are necessary to the

preparation of the defence case which have got to be concluded before the jury is empanelled.

Just listening to this for the first time, I'm afraid I'm not persuaded that matters can't be accommodated as we have previously intimated. I must apologise I'm not robed. I only found out about five minutes ago you wanted to have us here.

HIS HONOUR: The Special Prosecutor informed us.

MR GREENWOOD: I just formally apologise for that. I came straight to court.

HIS HONOUR: I understand exactly, Mr Greenwood. There is one feature I think perhaps that hasn't been mentioned and that is, of course, Mr Sng's ability to leave after he gives evidence subject to my giving him permission to do so. You are assuming that would be forth coming, I suppose.

MR GREENWOOD: In ordinary course, Your Honour, yes.

HIS HONOUR: Normally witnesses are required to be here until the end of the trial unless excused, and of course normally that's done.

MR COWDERY: It was in reliance on the normal practice that we were proceeding, Your Honour.

HIS HONOUR: I see, naturally, merit on both sides of this argument. Could I suggest to some extent a judgment of Solomon in this, that we start the trial at 2.30 tomorrow afternoon. That will give you each a half day.

MR COWDERY: That would certainly help our position, Your Honour.

HIS HONOUR: Mr Greenwood, that might require burning the midnight oil, but that's one of the normal incidents of practise at the Bar. Would that accommodate

your problem, do you think? That means we could get the jury empanelled and we could have of the arguments on matters of law and perhaps start with the opening.

MR COWDERY: Yes.

HIS HONOUR: Then you would be ready.

MR COWDERY: It would certainly help, Your Honour.

MR GREENWOOD: Your Honour, there are a couple of things I have to say. First of all the seeking of an adjournment order sought by me which was designed to bring this matter on as quickly as possible consistent with the interests of my client, the protection of my client. If I had thought that we would have been ready by 2.30 tomorrow afternoon, I would have said so. I can't consent to an order that we begin at 2.30 tomorrow as opposed to the order that's already made. Indeed I oppose it, and although I appreciate that the convenience of witnesses is something which the Court should take into account in ordering its affairs, I would submit, with respect, that the one factor which stands in a different category to that is that the defence be given an opportunity to properly prepare themselves for trial, and that the interests of an accused person be protected.

We have sought a resolution of the somewhat unusual and difficult problem that's come to us. We would like to agree, if we could, consistent with our duty to our client, to the comprise suggested by Your Honour, but we can't. Although this might cause some inconvenience to Mr Sng, he certainly wouldn't be the first witness to appear in the court who has had a bit of inconvenience.

The paramount consideration that I have got to look to is the interests of my client who is charged with a very serious criminal offence. I have said that the defence can fairly be ready by 10 o'clock on Wednesday, and I can't say that we can be ready by 2.30 on Tuesday. That is not based on a nine to five schedule.

MR GREENWOOD: I don't think I can add anything to that.

MR COWDERY: Your Honour, the situation, as Your Honour is well aware, was brought about by the wholly unusual, indeed perhaps extraordinary application that was made this morning. My learned friend refers to the order granting an adjournment until Wednesday for the reasons given. The simple fact of the matter is that there have been no reasons explained either to Your Honour or to us as to why this indulgence was sought from the Court. So we are very much in the dark and very much in the hands of defence counsel at present. In those circumstances where the indulgence has been sought and where it has been given, although not based of any expressed grounds, we would submit that it would be quite appropriate for the defence to make a little extra effort to accommodate to a more limited indulgence than that that has been given.

HIS HONOUR: Well, you understand I was put in the position of having to accept the assurance made to me about the matter, which I think you were also prepared to accept as being-----

MR COWDERY: As being genuinely made, Your Honour, yes, but nevertheless there is something that has arisen. We don't know what it is but it has caused the trial at this stage to be adjourned for two days. We would submit that it would not be unreasonable for some extra effort to be made in whatever is being done and for the matter to be brought forward to the time suggested by Your Honour. It is not, might I say this, Your Honour, simply a matter of the convenience of witnesses. This is a resident of another country who is involved in substantial activities in his own right, who has made arrangements around a commitment that has been given based upon the listing of this matter as far back as March of this year. So it's not simply – it can't be thrown off lightly as being merely pandering to the convenience of a witness, in our submission."

It is only necessary to recite one further passage from the lengthy transcript because of its reference to the proceedings in Chambers earlier that day:

> *"MR GREENWOOD: If I can just put something else into the ring here. Two considerations. First of all, the consideration of fact that I put to you in relation to the matter discussed in chambers this morning was consideration of fact directly within the knowledge of my instructing solicitor and I put it on that basis. That was my precise wording. Of course in a technical sense what Mr Cowdery is putting before you now in relation to Mr Sng and his availability is on instructions which comes from his instructing solicitor, but the reality is that what he is presenting is a scenario in which a witness has said, "Look, it is impossible for me to make myself available other than this time and that time." There might be perfectly acceptable reasons for that. Perhaps Mr Cowdery might like to explain to me in a little bit more detail out of court for five minutes just what he has done to get to the bottom of this."*

It appears that this did not occur before the trial Judge decided to bring forward the commencement time of the trial to 2.30pm on Tuesday, 24 September 1991. These proceedings are recorded as having concluded at 4.25pm. Thereupon, it was necessary for Hansen to further re-arrange the jury arrangements for the next day.

The law list for the publication on the next morning had to be amended to provide for the attendance of Panels P and K on Tuesday, 24 September 1991, when it was expected that the Bjelke-Petersen trial would commence. The law list for that day required the attendance of jurors on Panels P and K at 1.15pm.

It is apparent from the concluding passage in the transcript of the proceedings in Chambers on Monday morning that the trial Judge was concerned at what had happened, and which he described as "an undesirable precedent" but concluded that he thought he was "justified in acting on senior Counsel's assurance".

The fact that this matter continued to trouble His Honour is made more apparent by what occurred on the morning of Tuesday, 24 September 1991, the new date of trial. The trial Judge himself summonsed Counsel to his Chambers and both Sheriff and Deputy Sheriff were present. The trial Judge's state of mind is readily apparent from what follows. The

proceedings are recorded as having commenced at 11.25am. The trial was of course to commence at 2.30pm later on that day.

> *"HIS HONOUR: Since our discussion yesterday I have given some further consideration to the subject that we discussed in chambers yesterday. I have come to the conclusion I might have too readily agreed to the change in the panels without being told the details of why that was necessary. Mr Cowdery did raise the question of principle yesterday. I think upper most in my mind was the notion that there would be no injustice in substituting one panel for another, and I still think that's correct. However, on reflection it's probably undesirable to accede to changing panels without some greater indication of the reasoning.*
>
> *I think this is a difficult matter, and re–reading the transcript I draw the inference that there may be some ethical difficulties in your being more explicit. I don't know whether that's correct or not, but that's the inference I draw. However, let me put it this way: I would be prepared to re–open the matter if necessary. Perhaps I should ask Mr Cowdery what his attitude is. We are ready to proceed this afternoon. I don't see that you can say there is any injustice involved in having one panel rather than another, but on reflection I see the force of one of the points you made yesterday; that it maybe undesirable to accede to a request when the court isn't given explicitly the reasons. I might add I think it's a very difficult matter.*
>
> *MR COWDERY: Could I simply say this: upon reflection it occurred to me that the application that was made was really akin to a challenge to the array and the principles upon which such a challenge should be made in open court and on specified grounds are well established. It was not something that occurred to me on the spot yesterday, but on reflection it seems to us that it is really in that category. For that reason it certainly would be desirable at this stage of proceedings to at least know the reasons for the application.*
>
> *HIS HONOUR: Let me say I don't doubt the propriety of Mr Greenwood's submission or application, but the*

difficulty is that it may set an unfortunate precedent, I think, which, as you say, avoids the normal procedure that might be involved. While I believe – although it's a matter for the Sheriff – panels are changed around, but mainly for administrative reasons; is that right? Because a case that a panel was going to be assigned to may not begin when expected or things like that.

MR HANSEN: Normally numbers. If there is a reason to change a panel out of a court it would be because of lack of numbers or we need to combine panels and things.

HIS HONOUR: I would be prepared to re-open the matter if it's necessary to do so, if it's desirable to do so. Did you want to say anything, Mr Greenwood?

MR GREENWOOD: We don't ask you to re-open the matter. There are two other possibilities, however. The first is that the Crown would seek to re-open the matter and there is no point in re-opening a matter unless an order is sought. If they wish to make an application for you to reverse your previous ruling and for the original panel to be used on the trial, then that's one thing. The second is that a you, of your own motion, could vacate your original administrative direction and ask the Sheriff to reinstate the original panel. If either of those things are foreshadowed, then I would resist the making of those orders. In resisting the making of those orders, as a matter of forensic judgment, it may be that I would wish to place material before you which went further than that which I placed before you the other day which was merely my word.

HIS HONOUR: Which, I should add, everybody accepted, including Mr Cowdery, as I understood him.

MR GREENWOOD: If there is a motion by the Crown to change the administrative arrangements or if Your Honour moves to do so, then I suppose my attitude is I'll meet that when I come to it. I have already indicated, after being specifically asked by Your Honour in chambers, as to whether I would be prepared to have discussions with the

Sheriff to disclose to him things which might be useful for the future. I have indicated we will certainly do that if we possibly can and I can't see any reason why we can't. That's where I am.

HIS HONOUR: I must say, one of the Mr Green's concerns is that he should know what the reason for this is.

MR COWDERY: The matter having been raised again today, and in light of Your Honour's expressed views this morning, we would submit that it is inappropriate and undesirable that an order of the kind should be made in the absence of any explanation, in the absence of any reasons being given for it. We appreciate that Your Honour acted yesterday on the assurance of senior counsel for the defence, and the Crown certainly accepts that the matters put forward by him are put forward conscientiously and honourably, nevertheless, upon reflection we take the view that the application really is akin to a challenge to the array procedure, a procedure which is well established, a procedure that requires the proof of reasons for the administrative arrangements of the court to be displaced, and we would submit that similarly in these circumstances reasons should be advanced. If those reasons are not forthcoming then Your Honour should reverse the order of yesterday and revert to the arrangements that were in place at that time.

HIS HONOUR: There is a practical problem about that, of course. Although I should mention to you that the original panel, Z, is now depleted from – what was it?

MR HANSEN: 116 available.

HIS HONOUR: Down to 53, but the people excused – there were people excused, I think.

MR HANSEN: Just excused from further attendance in the sittings because they were only really called in for those two trials. This one and the previous one.

HIS HONOUR: 54 would still be sufficient, wouldn't it? We need a basic number of 34, don't we? The ones excused were the ones who weren't anxious to serve any longer; is that right?

MR HANSEN: That's right.

HIS HONOUR: We can take it that the ones who are left are prepared to -----

MR HANSEN: To serve full time, yes.

HIS HONOUR: It may be that the ones who were excused yesterday possibly would have been excused in any event.

MR GREENWOOD: When will Z be available?

HIS HONOUR: It wouldn't be available until tomorrow, you see.

MR COWDERY: Well the matter of principle, we would submit, is an important matter. Your Honour has adverted to the possibility of a precedent being set by such action and that would be, we would submit, wholly undesirable in the public interest, and that if the matter can be regularised then we would submit it should be, even if there is some cost involved.

HIS HONOUR: What about your position?

MR COWDERY: We will have to accommodate to that as best we can.

HIS HONOUR: You mean you'd be prepared to start tomorrow?

MR COWDERY: If that were necessary.

HIS HONOUR: So you are asking me really to go back to panel Z?

MR COWDERY: Yes, in light of the further matters that Your Honour has mentioned this morning.

HIS HONOUR: Well, yesterday was a matter that came out of the blue.

MR COWDERY: Yes.

HIS HONOUR: I was under the impression at the time that we were talking about, perhaps, a change of panels to begin at 10 o'clock tomorrow morning. I didn't realise there would be a delay. I don't think there's any suggestion from anybody that one panel rather than another would be more or less impartial.

MR COWDERY: We're certainly not suggesting that, Your Honour, but any interference at the request of a party in arrangements that have been made for the conduct of a criminal trial should be, at the very least, accompanied by cogent reasons and that simply has not occurred.

HIS HONOUR: Mr Greenwood?

MR GREENWOOD: Well, it is plain that the Crown is making an application for you to vacate the administrative - or the changes to the administrative arrangements that you've made, and to order the attendance of panel Z here at 10 o'clock in the morning to select a jury in the Bjelke-Petersen matter. That being now on foot, I'd like to just quickly seek some instructions from my instructing solicitor who is not present who is not present, but it won't take very long and I will come back-
----

HIS HONOUR: You understand I regret having to raise this again, but I didn't, in the circumstances, have time to consider it as fully as I have since and I am concerned that this trial be conducted absolutely regularly, of course - as every trial should be, and I hope is - and I just think that possibly there was a too ready acceptance, perhaps, of what seemed to me to be a proper thing to do at the time but on reflection may set an unfortunate precedent.

MR COWDERY: Shall we wait?

HIS HONOUR: Do you object to Mr Cowdery and Mr Needham staying here while you leave?

MR GREENWOOD: No.

MR GUNDELACH: Would that be an appropriate time to certify for two copies of the transcript, Your Honour?

HIS HONOUR: Yes, I certify for the transcript.

NOTE-TAKING CEASED AT 11.39 A.M. AT THE DIRECTION OF HIS HONOUR

NOTE-TAKING RESUMED AT 11.57 A.M. AT THE DIRECTION OF HIS HONOUR

MR GREENWOOD: Your Honour, I've received some instructions. I'd ask Your Honour to consider the further argument in this matter as being a matter heard in chambers with the consequences that matters which I do place before you are held in confidence which is usually associated with chamber applications. Our only concern in asking that the matter be so heard is that – or, I have to say, it could materially affect the interests of my client. If you are prepared to hear it in chambers and make the appropriate indications, then I am in a position now where I have instructions to disclose to Your Honour the gist of what we were on about.

HIS HONOUR: I will see what Mr Cowdery says about that.

MR COWDERY: Well, I think in the circumstances that we have reached in this particular matter, there would be no objection to that.

MR GREENWOOD: I take it then that what I am about to say is a matter which, at least until those matters in dispute as between the Crown and Bjelke-Petersen have been finally disposed of, including any appellate

processes – that what I have to say will not be a matter of public knowledge or to go outside the chamber hearing.

HIS HONOUR: Mr Cowdery?

MR COWDERY: Subject only to this, that I would wish to disclose it to those instructing me but no further, certainly no public disclosure.

MR GREENWOOD: That disclosure, of course, would be with the rider of what my client might have said.

MR COWDERY: Yes.

MR GREENWOOD: As a part of preparation for this trial, my instructing solicitor and I decided that inquiries should be made in relation to the proposed members of the jury panel, that those inquiries should include the normal checks that are to examine the electoral rolls to see, for example, who else makes up the household from which the juror comes. In particular, in practice it's been found that in relation to female jurors who are simply described as housewives in occupation, it is sometimes edifying to know that Jane Smith lives in the same house as John Smith. Her occupation is housewife, Mr Smith's occupation is police officer or accountant, District Court Judge or lawyer or whatever. Also we determined that other general inquiries be made as to the reputation of individuals on the jury panel insofar as it was known to be able to be properly ascertained.

One of the matters that I mentioned was that it would be of interest, although not of determinative interest, if any information could legitimately be brought to my attention in relation to the political affiliations of anybody who might be on the jury panel. I remember that one of the things that I suggested was that people who were known to our client or to others associated with him in the various electorates in Brisbane through political machinery of the National Party or the Liberal Party, or whatever, could legitimately be asked if they knew as to whether a particular person was active locally politically and known

to have particular political leanings or memberships. These matters are some that now come to mind as to the matters that I discussed with my instructing solicitor, and I was informed that-----
HIS HONOUR: Just before you go on, perhaps I should make it clear that of course the Sheriff, and possibly I, have certain duties in relation to the administration of justice. I couldn't bind myself or the Sheriff to any concealing of anything that might be relevant to any of those duties. That's understood, I take it?

MR GREENWOOD: Yes, Your Honour. My instructing solicitor then, I understand, set all this in train. It came to his attention on Sunday that contrary to the types of guidelines that he had laid down, people engaged by him – or a person engaged by him had gone further than he or I considered to be proper in making investigations or inquiries in relation to individual members of panel Z. Those inquiries included contacting by telephone the households of members of this panel and asking certain questions in relation to conducting some form of survey about something or other which didn't directly bear on the case. It wasn't as if they did a ring around and said, 'I believe that you are on the Bjelke-Petersen jury panel; do you think that the man is guilty or not guilty?', but a form of opinion survey was conducted in relation to the households of the members of that panel.

Both my instructing solicitor and I were of the view that although there is probably nothing illegal about that if it didn't go to actually attempting to influence a juror in a decision he might make, and although it was arguably not improper, it nevertheless was a situation which we were not comfortable with.

This initiative, if I can call it that, has absolutely got nothing to do with the client. In fact the client was unaware, as I understand it, as to what we were doing in this regard and certainly in many regards simply taking the usual attitude of a client that he is leaving it up to his legal advisors. That was a most important consideration, and I took the view that my duty to my client was of

importance on one hand, my duty to the Court was of importance on the other.

As far as my duty to the Court was concerned, I had no reason to expect that what had happened would in any way denigrate or jeopardise the proper use of that panel in respect of other matters which were before the courts before other judges. However, because it could not be denied as a matter of truth that these contacts had a been made by a person acting under the agency of my instructing solicitor and technically therefore on behalf of my client, it then, as I saw it, presented a practical difficulty which could unfairly reflect upon Mr Bjelke-Petersen if, for example, during the trial the jury members all realise that coincidentally they each have been approached to ask their opinions about Curtis Island, Fraser Island or whatever this political question was, and brought it to the attention of the authorities and if in those circumstances I was asked whether I knew anything about this, then I would have to say yes. This would be a matter in open court. There would be consequently publicity about the matter which could, in my opinion, adversely effect against my client.

If it was an adverse effect which was fair then that's one thing. If it's an adverse effect which would be, as it would in this case, unfair, then that is another thing. Having possession of that knowledge and sharing the view of my instructing solicitor and that was that he was uncomfortable to say the least with what had been done, I decided that after consultation with another barrister, that the proper course of action was to do what I did.

They are the facts. I don't know any more about the results of these inquiries than I have told you because my solicitor deliberately has said that he is not interested in looking at the reports which arise out of any of these inquiries. He doesn't know what's in them himself. That's as much, gentlemen and Your Honour, that I know about the matter. They are the factors that I took into account.

HIS HONOUR: Would you like a bit of time, Mr Cowdery?

MR COWDERY: I think it probably would be of assistance, just to consider what we have now been informed are the reasons for the application. Might we take it that the matters that I have been referred to are relevant only to the individuals in panel Z?

MR GREENWOOD: Yes. That was one of my first questions. Otherwise we would have had to go the other way and scrap the whole thing.

MR COWDERY: I would appreciate the opportunity of just a short time to seek instructions on whether or not to pursue the application that we have now made and on any other matters that might need to be raised with Your Honour at this stage.

HIS HONOUR: I should perhaps say I do regret having to re-open this matter, but I felt a duty to do so.

MR COWDERY: For our part we would submit that that it is an important matter relating to the administration of justice and in the circumstances it is quite appropriate for it to be properly agitated.

HIS HONOUR: As I say, I do regret having to re-open it, but I felt it wasn't too late to do so and it may be that that has clarified the position sufficiently. I don't know. What would you like to do?

MR GREENWOOD: I would like to point out that I indicated before His Honour the other day that I will take on board the suggestion that I might be of assistance to the Sheriff's office in relation to what has arisen in this matter. I undertook to take note of that, and at an appropriate time to take the matter up with the Sheriff.

NOTE-TAKING CEASED AT 12.15 P.M. AT THE DIRECTION OF HIS HONOUR

NOTE-TAKING RESUMED AT 12.23 P.M. AT THE DIRECTION OF HIS HONOUR

HIS HONOUR: What is the next step?

MR COWDERY: We have considered the matters that have been put. In the circumstances, we regard the situation as one which is arguably, in the strict sense, a case of tampering with jury panels. Might I say that in the light of events at the end of last year and early this year in relation to another matter here in Queensland, we find it remarkable, and indeed outrageous, that people should be embarking on conduct of this kind in relation to a forthcoming trial. That having been said, we appreciate that the reasons that motivated Mr Greenwood to make the application yesterday are quite proper and sufficient for the application that was made. In the circumstances, it is clear that that panel should not be the panel for the trial and we would not pursue the application made this morning for the order made yesterday to be reversed.

HIS HONOUR: Perhaps there is just one further person who is involved in this who I should ask. Is there anything you would like to mention, Mr Green, as the Sheriff?

MR GREEN: No, Your Honour. I think it has been sufficiently canvassed. The CJC, to my knowledge, didn't consider polling of jurors an offence, but in the circumstances of what was said this morning, it may be better if we don't use panel Z now. I leave it at that.

HIS HONOUR: Are you satisfied that that's the proper thing to do?

MR COWDERY: I am satisfied that would be the correct course, that is not to use panel Z.

HIS HONOUR: Is there any further inquiry you want to make, perhaps not now but later, of Mr Greenwood or his instructing solicitor?

MR GREEN: Unless Mr Greenwood or his instructing solicitor can add something to what Mr Greenwood has already said which will take the matter further, from what Mr Greenwood has said here this morning I don't think it warrants any further action from my office in the light of the previous finding by the Criminal Justice Commission.

MR COWDERY: Could I add one further matter? I am instructed that the panel list for this trial was made available last Friday week. I am also instructed that the normal course is that the list would be made available for a Monday trial on the Friday before. Here there seems to have been one further week's notice. I don't know the reasons for that, but perhaps it's a matter that should be– ----

MR GREEN: The Jury Act states that the panel is to be published not less than five days before the precept is returnable. Five days before the Monday is the Wednesday.

Now this particular panel was used in the trial of The Queen v. Yorke which commenced a week ago. So the jury list then is available the Wednesday of the earlier week. One reason in a lot of instances where the panel isn't available until the Friday before the Monday is because administratively we don't know what panel we're using. Particularly the District Court have multiple trials and it is not until the Friday afternoon, as a rule, that we know what jury panels we have left and which ones are to be used for the Monday. That's the main reason that the panel isn't available until the Friday. But in instances where a particular jury panel is brought in for a particular trial, as in this instance, the jury list would have been available five days before the return of the precept which, as I say, was originally used in The Queen v. Yorke which commenced, as I understand, over a week ago. So it would have been available the Wednesday before that.

MR COWDERY: I have nothing to add. I was simply instructed to raise that further matter.

HIS HONOUR: I think I'm right in saying, am I not, Mr Green, that if some irregularity comes to your notice, the practice has been for you to refer the matter either to the Attorney–General or to the Criminal Justice Commission; is that right?

MR GREEN: Yes

HIS HONOUR: After–––––

MR GREEN: After consultation with the presiding Judge.

HIS HONOUR: So that's what happened in the cases that – I think they were last year, was it, or early this year?

MR GREEN: November last year.

HIS HONOUR: In other words, you are satisfied now that the arrangements that have been made are proper?

MR COWDERY: Yes.

HIS HONOUR: And the matter should proceed as arranged? If not say so, please.

MR COWDERY: Yes, we accept that. There's just one matter – might I just wait until Mr Needham has finished on the telephone?

HIS HONOUR: Yes.

MR COWDERY: There was a message when we broke just a few minutes ago. This may be some follow–up message. Could we just wait perhaps?

HIS HONOUR: Yes.

MR COWDERY: There might be something I just need to foreshadow.

NOTE–TAKING CEASED AT 12.30 P.M. AT THE DIRECTION OF HIS HONOUR

NOTE–TAKING RESUMED AT 12.32 P.M. AT THE DIRECTION OF HIS HONOUR

MR COWDERY: There is a matter, Your Honour, that may require an urgent application to be made to you. Might we foreshadow that if such an application is to be made, it might be made at 1.30? I know that's highly irregular, but it is a matter potentially of some considerable importance that may require an application in Court.

HIS HONOUR: Will it take long?

MR COWDERY: I hope not. I am sorry that at the moment I can't give any particulars of it because it may not come to pass at all, but if that happens might we approach Your Honour with a view to having an urgent application listed at 1.30?

HIS HONOUR: We will be on standby. Is that everything? There is nothing you want to say?

MR GREENWOOD: No

HIS HONOUR: We will start at 2.30 and we will hope we get the requisite number of jurors."

2.4 The Selection of the Jury

Before the selection of the jury commenced the trial Judge heard several applications for exemption. It has to be remembered that Panels P and K had been first summonsed for 4 weeks criminal sittings commencing 2 September 1991. By 24 September the panel members were in the last week of that period and if empanelled on the Bjelke–Petersen jury their jury service was likely to be extended significantly beyond the 4 week period allotted to the panels. It was not surprising therefore that many applied for excusal from further jury service.

From the trial Judge's notebook it appears that 14 members of Panel P were granted excusal as were a further 10 from Panel K. In the result, the 105 jurors available on Monday in respect of Panels P and K were reduced by a further 24 to 81 for the selection process to commence. This was of course more than sufficient after allowing for the maximum number of challenges by the defence and of standbys by the Crown.

Gundelach announced the challenges for the defence. Greenwood QC took no part at all in the selection process and, according to Needham, removed his chair back from the bar table and appeared to deliberately distance himself from the selection.

As the jurors' names were called in turn Gundelach challenged each one of them before there was no challenge announced by him nor a standby announced by the prosecution. Accordingly, the first of the 12 jurors was empanelled. That juror was Luke Edmund Shaw. I accept Needham's evidence that the number of jurors challenged by the defence before Shaw was empanelled was approximately 20 to 25. The process was completed and the trial then commenced. Clearly Shaw was regarded by the defence as a most desirable juror.

It is only necessary to add at this stage that Hedley Friend, a member of Panel P (P20) was empanelled as juror number 4.

2.5 The Application to Discharge The Jury

At 1.00pm on Tuesday, 15 October 1991, the jury retired to consider its verdict. At approximately 10.00pm on Friday, 18 October 1991 the Crown made application to the trial Judge pursuant to section 626 of the *Criminal Code* that the jury be discharged without giving a verdict "on the basis that circumstances have arisen of such a nature as to render it, in the Crown's submission, necessary or highly expedient for the ends of justice to do so". At the same time Cowdery QC applied to have the Registry of the court opened to permit the issue of a subpoena for immediate service. In respect of the first matter Cowdery QC continued:

> *"Your Honour, in view of information that has only late today come to the notice of the Crown, the first application is made on the basis of evidence available concerning the nature and strength of the views of a member of the jury towards the accused. There has been consideration given*

to the question of whether or not an application should have been made under s 628 for the discharge of that juror only, the remaining eleven to continue, but in all the circumstances it has been considered that the only appropriate application to be made, given the stage of the trial that has been reached, would be for the whole jury to be discharged.

Your Honour, the evidence that the Crown seeks to rely upon is to be found in two places. One is in an affidavit sworn today, which I shall tender to Your Honour in a moment. The other evidence is to be found in certain records, the production of which is sought by the intended subpoena. The custodian of the records has agreed to supply that information voluntarily if the Crown and the defence joined in a request for it to be supplied. We have spoken to my learned friends and that joint application will not be made. In those circumstances the Crown feels constrained to ask for the necessary machinery to be put in order for a subpoena to issue for the production of that material. We are given to understand by the custodian that it can be provided immediately upon receipt of a subpoena."

The juror to whom Cowdery QC was referring in his submission was Luke Edmund Shaw (P50) the first juror empanelled who was appointed by the jury at the commencement of the trial as the foreman.

In support of his application, Cowdery QC tendered an affidavit sworn by one Stephen Reddy on that day. In the affidavit Reddy deposed that he knew Shaw personally because of their mutual interest in the affairs of the National Party, and in particular, the Young National Party, since both were members of the Brisbane Central Branch of the Young National Party at the same time. Reddy described Shaw as an active National Party member who engaged more actively in election campaigning and like party activities than the average party member. He also deposed that he had been informed by Shaw, at a meeting, of the work which he, Shaw, was doing at Griffith University on behalf of the National Party and at the same meeting, Shaw spoke of his association with the Friends of Joh organisation. Shaw presented to Reddy as "an admirer and supporter of Sir Joh Bjelke–Petersen".

The subpoena which Cowdery QC wished to have issued on the night of Friday, 18 October 1991, was one directed to the National Party organisation requiring the production of documents evidencing Shaw's connection with the Party.

These documents when produced confirmed Shaw's membership of the Young National Party and the details of the offices which he held at various times. It is unnecessary to refer to these in any detail here. Particular attention, however, needs to be directed to one document produced, that being the minutes of the Annual General Meeting of the Brisbane Central Branch of the Young National Party held at Ardrossan Restaurant on 29 January 1991. At that time, Shaw was the secretary of the branch, although the minutes show that he did not attend that meeting. However, the following excerpt from the minutes was obviously regarded as of major significance:

> *"Anybody interested in supporting the Friends of Joh movement contact Luke Shaw on 352 6334. There is a rally being planned for 11/2/91 at the Courthouse in Roma Street."*

The phone number 352 6334 is Luke Shaw's phone number at his home. On 29 January 1991, the date of the meeting, it was believed that the committal proceedings in respect of the charges brought against the accused would commence in the Brisbane Magistrates Court on 11 February 1991. It was then apparent, from media reports of the proceedings concerning the accused, that the court was always attended by persons who were committed supporters of the accused, particularly those who described themselves as belonging to an organisation named the Friends of Joh. In fact, committal proceedings did not take place on that date because, on the advice of Burns and others, his then legal advisers, it was decided to forego committal proceedings and agree to the presentation of an ex officio indictment in the District Court. This occurred on 15 February 1991. The entry in the minutes of the meeting held on 29 January 1991 and the reference to Shaw and the planned rally at the court on 11 February 1991, need to be read in that context.

I will deal with this entry and its importance in a later part of this Report.

It was this matter which was heavily relied on by Cowdery QC in pursuing his application for the discharge of the jury. It was submitted that not merely was Shaw an affiliate of the Young National Party, he had, on the

evidence of Reddy, and according to the minutes of the meeting, a close association with the Friends of Joh organisation, which was known to comprise committed supporters and admirers of the accused. Reddy had sworn that Shaw was such a person. Again I pause to observe that this organisation and Shaw's involvement or otherwise with it will also be dealt with later in some detail.

Cowdery QC therefore had not only the evidence of Reddy, but also the documentary material on which to base his application. It was pursued on the morning of Saturday, 19 October 1991 at 10.00am. The subpoena was responded to by David Graham Russell, the senior Vice-President of the National Party of Australia who was sworn as a witness. He confirmed Shaw's history of membership, which was evidenced by the documents.

Russell also gave evidence that when Sir Johannes Bjelke-Petersen had lost the leadership of the Parliamentary National Party and the Premiership there was division in the Party and many were disaffected on this account and left the Party. Russell's belief was that many of those who joined the Friends of Joh organisation were those persons who left the National Party on this account.

Geoffrey Woodward, one of the founders of the Friends of Joh Brisbane-based organisation, gave evidence, having been called by the defence in opposition to the application by the Crown. The thrust of his evidence was that Shaw was not a member of the Friends of Joh, that a person by that name had never been a member and that he, Woodward, did not know Shaw nor did he recognise Shaw as a supporter of Sir Joh. Woodward had attended each day of the trial except one since its beginning.

The thrust of Cowdery QC's submission was that Shaw's membership of the Young National Party, but more importantly, his alleged involvement with the Friends of Joh organisation was such as to render "the person (Shaw) unable to reach an impartial verdict".

In the course of the submission the following exchange took place between the trial Judge and Counsel for the Crown:

> *"HIS HONOUR: There is something in the material you tendered last night indicating that Mr Drummond has been told that there is a supporter of another political party on the jury.*

MR COWDERY: Yes, Your Honour. Could I deal with that-----

HIS HONOUR: Well, should that then be investigated?

MR COWDERY: Your Honour, could I deal with those two matters? First, as to the timing: this information was volunteered to the Special Prosecutor late yesterday. It was not information that was in any way sought or discovered by reason of any activity of the Special Prosecutor or of anyone concerned with the Crown. It was volunteered. It having been volunteered, it was investigated. The result was the affidavit that was tendered last night.

In the course of discussions between the Special Prosecutor and Mr Russell, who has just given evidence, mention was made by Mr Russell – and it's contained in the exhibits that Your Honour has – of the fact that Mr Russell had been told that the wife of a prominent trade unionist and also another ALP supporter are on the jury. No further information was given. Those facts have not been known to the Crown. An invitation has been extended to Mr Russell for any further information in regard to that to be supplied, and nothing has been supplied. The identities of those persons are not known, have not even been suggested by way of description or anything of that sort, and the Crown has not been in a position, because of that absence of information, to do any inquiries or to take the matter any further than the assertion made by Mr Russell in the course of the telephone conversation. But as Your Honour sees from the letter, that invitation was extended as soon as the assertion was made.

Your Honour, the Crown's position is that if any-----

HIS HONOUR: I suppose the fact might be that those people might have political views which are -----

MR COWDERY: That's so, Your Honour, but they may have countervailing -----

HIS HONOUR: Contrary to those of the person in respect of whom this application is made.

MR COWDERY: Well, if those descriptions are accurate, then that would quite probably be the case. That by itself, depending on the information that was available, would probably not ground an application of this kind. It is the additional involvement of the Friends of Joh Association and of the clear connection between the foreman and that association, at least from the foreman's point of view, if not from the association's, which adds the additional factor that is of concern to the Crown.

HIS HONOUR: Yes, I understand. There is nothing in the material, however, to suggest any declared bias in relation to this case, is there?
MR COWDERY: Well, the function of the Friends of Joh Association appears to us, from the evidence, to be to give personal support to the accused in his trials - and I use that not in the legal sense - and that would be a clear indication of bias in favour of the accused on a personal level, and there are statements attributed to members of the Friends of Joh in the clippings that I tendered last night, Your Honour, which show quite clearly that the attitude taken by the association is that the present trial is - to quote one of their expressions - "a political manhunt". Those are our submissions, Your Honour."

It appears that when Drummond QC (as he then was), the Special Prosecutor, had on the previous evening spoken to Russell concerning Shaw and the Crown having access to the National Party's documents relating to Shaw, Russell had informed Drummond of his (Russell's) belief, that there was also on the jury "the wife of a prominent trade unionist" and "another ALP supporter". This was the matter to which Cowdery QC was referring in his submissions. The matter was taken up by Greenwood QC in reply. Part of his submission was as follows:

"Your Honour, the information that is available to us in relation to another member of the jury is that that person is described as a very active official at shop steward level of two affiliated unions of the Australian Labor Party; one the Federated Iron Workers' Association of Queensland for

> *an indefinite period up until 1989, now a member of the Australian Metal Workers' Union. That information has been known to the defence since - I can't exactly remember when I got that information, but it was somewhere well into the trial that that information was passed on to me. That information has not been further investigated by us because it did not come as a surprise that out of 12 people a union official, even though active in a fairly well known left-wing union, would end up on the jury. It, of course, was a factor, the information that I had, which influenced the way in which I addressed the jury. It is a matter of commonsense."*

As will be seen, this part of Greenwood's submission led to the formulation of one of the questions raised as a matter for inquiry by the Criminal Justice Commission. As will also be seen later, there is a large body of relevant evidence concerning it and it will also be dealt with below. It is sufficient to say here that the "very active official at shop steward level" referred to by Greenwood QC was Hedley Friend. Russell's reference to "the wife of a prominent trade unionist" is probably mere gossip with no substance in fact.

At the conclusion of the submissions the trial judge took time to consider the application and later gave his considered reasons for dismissing the application.

2.6 The Conclusion of the Trial and of the Proceedings

Immediately after the trial Judge had ruled against the application to discharge the jury, the jury, which was still considering its verdict, sought what turned out to be a final redirection. This occurred at 1.06pm on Saturday, 19 October 1991.

Once redirected, the jury again retired and at about 9.20pm on the same day the foreman Shaw finally announced that the jury was unable to agree upon its verdict. Whereupon the trial Judge discharged the jury, adjourned the matter to a later sittings and granted bail. The final comments of the trial Judge will be referred to shortly.

The fate of the trial immediately caused immense media and public interest, much of which centred upon Shaw and the Friends of Joh

organisation. Drummond QC, however, was left with the difficult decision as to whether he should continue the prosecution of the accused or abandon it by the entry of a nolle prosequi.

Shortly after the conclusion of the trial, Drummond QC announced that he would not proceed with the prosecution and the accused was discharged.

On 27 September 1991, His Honour took the matter a step further with a letter to the Sheriff of the same date. It reads:

> *"I refer to the disclosures made last Tuesday in my chambers in your presence and in the presence of counsel for the Crown by Mr Greenwood QC for the accused about possibly improper approaches to members of a jury panel.*
>
> *I think you should consider speaking to Mr Greenwood's instructing solicitor and making such other inquiries as you see fit, at an appropriate time, to determine finally whether, in your opinion, the matter warrants further action, such as referring it to the Honourable the Attorney-General or the Criminal Justice Commission.*
>
> *I should be grateful if you would inform me what you decide in the matter."*

It is apparent from the content of the letter that the trial Judge was concerned that the Sheriff consider inquiring further from Mead and if necessary referring the matter to the Attorney-General or the Commission.

By 18/19 October 1991 the matter had obviously taken on a totally different complexion. This was apparent from the application by Cowdery QC for the discharge of the jury.

After His Honour had on 19 October 1991 discharged the jury without giving a verdict, having been first advised by the foreman Shaw that the jury was unable to agree upon a unanimous verdict, His Honour dealt with other formalities and before the Court adjourned at 9.27pm he said this:

> *"HIS HONOUR: There was one other thing that I thought I should mention in open Court which hasn't been mentioned up to date in open Court, and I think it now appropriate to do so. Before the trial began, certain matters concerning the jury panel originally intended for this trial were very properly brought to my attention at a meeting at which all counsel were present. After full discussions with counsel, I decided that the proper course to adopt in order to prevent any possible miscarriage of the trial was to use other panels not affected by the matters brought to my attention. For a large part of the*

discussions a Deputy Sheriff and the Sheriff himself were present.

The trial, accordingly, began with the other panels I have mentioned. That course was accepted by both sides as the proper one. The matters brought to my attention will be investigated by the Sheriff who will then decide whether they warrant reference to the Honourable the Attorney–General or the Criminal Justice Commission.

I should emphasise that until the Sheriff's inquiries are completed, it will not be clear whether there has been any cause for substantial concern but, in my view, the prudent course consistent with the proper administration of justice was the one adopted. Do either of you gentlemen want to say anything about that?

MR GUNDELACH: No, thank you, Your Honour.

MR COWDERY: No, Your Honour."

As will be seen in the next section the Sheriff undertook his investigations, one of the results of which was to raise serious doubts as to whether the members of jury Panel Z had been canvassed as alleged to His Honour by Counsel. Since this was the very basis for the application to His Honour for the discharge of panel Z the cause for further concern became manifest. Accordingly, on 1 April 1992 the trial Judge wrote this further letter to the Attorney–General:

"As you know, by a letter dated September 27, 1991 I requested Mr E F Green, the Sheriff, to make inquiries to determine whether in his opinion disclosures made to me by Mr Greenwood QC in the presence of counsel for the Crown about possibly improper approaches to members of a jury panel originally intended for the above case warranted further action, such as reference to you or to the Criminal Justice Commission.

Mr Green has sent me a copy of his last report, dated March 30, 1992, a copy of which I understand you have.

My part in this matter is now at an end, and so, in my opinion, is that of the Sheriff.

In my view it is now for you to consider what further action, if any, it is appropriate to take. I should add that, from Mr Green's investigations, it appears that few, if any, jurors on the panel in question had been approached in the way I was told they had been, so further inquiries seem warranted."

It was considered improper and unnecessary that the learned trial Judge be invited to give evidence to the Commission. Fortunately His Honour had ensured that all relevant dialogue touching the relevant questions was reported and transcribed by the Court Reporting staff. Senior Counsel assisting me waited upon His Honour with a request for any relevant documentary material in his possession. This was given by His Honour to Counsel.

I wish to record my appreciation for the co-operation and assistance in this way given by the Chief Judge to Counsel.

3.3 The Investigations Carried Out By The Sheriff of Queensland

3.3.1 (a) The Polling of Panel Z

In his first report to the Attorney-General dated 29 October 1991, Green's initial investigations focussed on his interviews with Mead (and Butler), Walliss and O'Brien. These will be dealt with below.

By this time of course the complaint of Drummond QC was receiving the consideration of the Criminal Justice Commission which later had access to Green's first report. This fact led to Green's undertaking further investigations which focussed on the question whether there was in fact any evidence that the members of Panel Z had been polled or canvassed as alleged.

Green reported as follows on 29 January 1992:

"In addition to the above interview, 50 of the 150 Jurors from Panel Z were contacted by telephone.

Each person was asked whether he/she or any member of their household had been contacted in the week prior to the trial commencing and their opinions canvassed on any topic whatsoever.

With the exception of four persons, all responses were negative.

The first person to confirm a telephone contact concluded that it was in relation to aluminium cladding or some similar product and terminated the conversation before the caller had time to go into any detail.

The second person was asked what radio station he listened to.

Neither of these contacts were of any assistance, in my view.

The third person – juror No. 95 advised an enquiry was received. The juror refused to give any further details and indicated the matter had already been referred to the Criminal Justice Commission for their attention.

I do not recall receiving advice from the Commission to confirm this.

The fourth juror (No. 121) confirmed a call was received. The juror was questioned as to whether he used marijuana and did he agree with the present laws regarding the substance.

The caller identified himself as conducting a Morgan Gallup Poll.

The names of the jurors contacted were selected at random and only the Telecom white pages were used to obtain telephone numbers, this being the same method employed by the investigator.

It should be remembered that Walliss advised he did not ask to speak to each juror, but surveyed whoever answered the telephone. In some instances, it may well be that a juror is not aware that his/her family was contacted and having regard to the type of questions said to have been asked, those family members would most probably not link the poll with the jury duty."

That investigation whilst of limited extent only – "50 of the 150 jurors from Panel Z" – was nonetheless useful. Only one possible juror – juror number 95 – could be identified as possibly having been polled by Walliss. As will be seen, Walliss had informed Green (Green's first report dated 29 October 1991) that he, Walliss, had polled "approximately one third of the list" (Panel Z). The result of Green's initial investigation required that the matter be investigated more closely and extensively by him. The result of these further investigations were included in Green's third report dated 30 March 1992, to the Attorney–General. That report is as follows:

"This additional report has been prepared in an attempt to identify any member of the entire Jury Panel Z who may have been contacted by inquiry agents engaged by the Solicitors for the defendant, Johannes Bjelke–Petersen.

An earlier report dated 29 January, 1992 dealt with a number of the jury members of Panel Z who were contacted by the Sheriff's Office.

The results of the most recent survey have been combined with those in the earlier report in order to present a comprehensive overview.

One hundred and fifty jurors combined to form Panel Z.

A thorough search of the Telecom white pages revealed that thirty–nine (39) jurors did not have a telephone listing that was able to be identified with their address

on the jury list. Thus these persons were unable to be contacted.

Of the remainder, ninety–five (95) persons indicated they had received no telephone contact whatsoever.

One person whose name and address did appear in the white pages was unable to be contacted as the telephone was disconnected. (Juror No. 24).

Two persons were found to have left their previous addresses. (Jurors No. 48 and 144).

Two persons had left the addresses given, but each jurors' parent advised that no one had contacted the household. (Jurors No. 91 and 74).

One person was unable to be contacted as he had left for North Queensland with his employment. He was expected to return in approximately 1 month. (Juror No. 9).

The following jurors advised they received some type of contact.

No. 5. Received a Market Research call, but does not recall what it was about or whether it was at the relevant time.

No. 42. Received a Market Research call but was unable to recall any details, or when it was received.

No. 76. Received a telephone call, but did not let the caller proceed with questions – assumed it was for aluminium cladding or a similar product and terminated the conversation.

No. 95. Confirmed a telephone call was received and had already reported it to the Criminal Justice Commission. The caller was a female

but the juror was unable to recall which organisation, if any, was involved.

No. 110. Could not recall any telephone calls, but can remember being visited by a female person around the relevant time and being questioned about house security – (Door and window locks etc.)

No. 121. This juror confirmed a telephone call, the source was identified as the Morgan Gallup Poll. The juror was asked whether he/she smoked marijuana, and whether he/she agreed with the laws relating to marijuana.

No. 128. This juror did not personally receive any contact, but believes a son may have had a "funny phone call". Details of the call are not known. The son is living somewhere on the North Coast. No telephone number is known and the juror was unsure as to the son's current address.

No. 136. This juror was polled as to which radio station he/she listened to.

No. 154. This juror was polled by a female person. It related to which political party the juror would vote for and also if the juror knew the names of the various leaders of the Queensland political parties. The person could not recall which organisation the pollster belonged to.

Juror number 30 was unable to be contacted despite numerous attempts at various hours. No calls were answered indicating the juror is most probably temporarily absent from his/her residence.

A breakdown of the survey is as follows:

Unable to be contacted by Sheriff	–	*44*
Contacted, but indicated no approaches had been made	–	*95*
Unable to be contacted personally, but family members indicated no approaches had been made	–	*2*
Contacted and advised that some type of approach had been received"	–	*9*
		150

Green forwarded this report to the Attorney–General under cover of his letter dated 30 March 1992, two days before the trial Judge's letter dated 1 April 1992 to the Attorney–General which advised that further investigations "seemed warranted".

Before proceeding it should be observed that the results of the Sheriff's investigation disclosed in the report dated 30 March 1992 can best be assessed in the light of certain criteria identified by Walliss as having been involved in his alleged investigations of Panel Z. These can be extracted from the various interviews which he has given and his evidence.

1. Walliss conducted the phone polling himself.

2. No female person was employed or assisted in his polling.

3. No personal visits were made by him – all inquiries were conducted by telephone to phone numbers identified from the White Pages directory.

4. His polling occurred in the days immediately prior to the trial (according to the evidence he was given the list 4/5 days prior to 23 September 1991).

5. He did not announce who he was nor did he identify himself as belonging to any particular organisation.

6. He did not ask questions which were overtly political but which related to topics of general interest, eg the apparent dispute between Wally Lewis and Wayne Bennett who are local football identities, the logging of Fraser Island and the proper management of the wet tropics.

By reference to such criteria the further analysis of the results of Green's inquiries means that none of the jurors addressed by Green were persons who could have been telephoned by Walliss. The latter's statement to Green earlier that he had canvassed approximately one-third of the panel in the manner identified by him is very clearly inconsistent with the results of Green's inquiries.

Two further matters should be mentioned here.

Firstly it is significant that Green's inquiries were conducted within a very short time of the conclusion of the trial when this issue was one in the public arena, and, secondly, Walliss' statements and evidence were to the effect that he, Walliss, may have spoken to a member/s of the juror's household and not to the juror personally.

As will be seen the Commission itself undertook a very detailed investigation of these questions of fact for the purpose of this inquiry and the results thereof will be detailed below. This was done to overcome any shortcomings which one might associate with the Sheriff's investigation.

3.3.2 (b) The Interviews With Mead (Butler) Walliss and O'Brien

The immediate concern of the Sheriff was to identify any impropriety or possible illegality by any of the persons who may have been involved in the alleged polling of Panel Z which was at the source of the application to discharge this panel on 23 September 1991. Therefore, as appears from Green's first report dated 29 October 1991, he was first concerned to interview Mead, Walliss and O'Brien. It is probable that Green was then unaware of the nature and extent of Butler's involvement although he did become aware of this

on the occasion when he, Green, went to Mead's city office to interview him. Butler was present.

Green reported on his interview with Mead as follows:

> *"On Wednesday, 23 October, 1991, I interviewed Mr Mead, the instructing solicitor.*
>
> *Mr Mead informed me that after the jury list was obtained from the District Court Sheriff's Office, he had it forwarded to Mr Phillip Wallis. This was done through the medium of a Mr R Butler, who operated a company called Trial Consultancy Pty Ltd. Apparently this company undertakes investigative work for Mr Mead's firm."*

And, in addition:

> *"A matter which is not connected with this chain of events but has arisen by innuendo since the trial has finished is that of the political affiliation of the foreman of the jury which was eventually selected, and whether the solicitors for the accused had prior knowledge of this. Mr Mead has assured me that confirmation of the juror's political following was given to the defence only a short time prior to the application being brought by the Special Prosecutor to discharge the jury panel."*

The matter is dealt with a little more fully in Green's second report as follows:

> *"The Criminal Justice Commission noted that Mr R Butler who forwarded the jury list to Phillip C Walliss for investigative action, had not been interviewed with respect to any instructions he may have given Walliss or to an O'Brien – both of whom were engaged as investigators.*
>
> *I contacted Mr Butler of the firm, Trial Consultancy Pty Ltd in this regard. It should be noted Butler had*

already been interviewed on the occasion of my meeting with Mr Mead, Solicitor for the Defendant.

Butler confirmed he was given the Panel Z jury list by Mead. He instructed Walliss that all enquiries were to be conducted properly – more so because of the political nature of the trial and the high media interest.

Wallis was informed that problems had arisen in the past with jurors being contacted (a reference to Reg – v– Herscu) and that these investigations were to be carried out "within the confines of the law".

This phrase was not elaborated on, as Butler was of the view that Walliss would be aware of his limitations – taking into account Walliss' 30 years experience in the Victorian Police Force."

In addition to the above, the evidence at the inquiry disclosed the existence of a handwritten memorandum made by Green as a result of a telephone conversation with Mead in October 1991. It reads:

"Mead further advised that the defence was not aware of the political affiliation of the jury foreman until advised by D Russell QC just prior to the application by the Special Prosecutor."

The "D Russell QC" referred to is Mr David Russell, the senior Vice–President of the National Party who gave evidence on the application to discharge the jury on 19 October 1991. It was he who responded on behalf of the Party to the subpoena referred to earlier. A more detailed memorandum made by Green as a file note is as follows:

"Memorandum re Reg v Bjelke–Petersen: On Wednesday, 23 October 1991 I interviewed Mr Maxwell Mead, the instructing solicitor in the above trial with respect to inquiries which we made into persons whose names appeared as jurors on panel Z. Mr Mead informed me that after the jury list was obtained from the district court sheriff's office, he gave

a copy of it to a Mr Phil Walliss, phone 8242442. Mr Walliss was contacted through a Mr Bob Butler, the director of trial consultants. Walliss, an ex-Federal police officer from New South Wales. Mead asked Walliss if he was capable of handling the checking process of the jurors due to the large number and indicated that it was to be subject to the rules and regulations governing such inquiries. Walliss stated he was aware of the rules but because of the large number a Barry Cornelius O'Brien was to be also engaged, he being an ex-Queensland police officer, phone (home) 356 2918; (work) 356 0936. Mead informed me that no specific instructions were given as to the conduct of the investigation or to any specific questions to be asked. He does not know whether the agents had a set list of questions to ask. Mead spoke to O'Brien on the Sunday before the trial was to commence and requested results. This conversation was the subject of a telephone hook-up with Mr Greenwood of counsel, Mead and Mr O'Brien. O'Brien advised that Walliss had conducted the survey by contacting households of the jurors by phone. On a couple of occasions he (Walliss) or his staff had spoken to the actual juror. It depended on who answered the phone at the time, otherwise members of the juror's household were spoken to or was spoken to. The survey consisted of questions relating to the recent decision to stop logging on Fraser Island. No questions were asked concerning the trial. On being told this information, the defence decided to approach the court and Panel Z was subsequently discharged."

Green also interviewed Walliss. A file note dated 24 October 1991 records Green's discussion with Walliss. It reads as follows:

"24 October 1991. Interviewed Mr Phillip Walliss of 1 Topaz Street, Alexandra Hills. He was hired as a consultant to Trial Consultancy Pty Ltd, which is owned by Mr B. Butler. Walliss was given a copy of the panel Z jury list. His instructions were to present to solicitors acting for the defendant with a reduced

list by eliminating those who showed a biased way of thinking to enable further inquiries to be made of the remainder. He obtained telephone numbers from the Telecom phone book and spoke to whoever answered the telephone. He did not ask for any particular person. No other person assisted him in this survey. His procedure was to select a current topic – for example, logging on Fraser Island; whether Wally Lewis should or should not stay with the Broncos; or the Wet Tropics Agency (protection of parks, tropics, etcetera). They were not all the topics, but those he could recall. His procedure was to describe the argument for both sides, take the views of the persons interviewed, and assess their degree of bias having regard to their responses. He also inquired as to the attitudes of other members of the household. Based on the responses received, he would categorise as follows: (a) inability to be impartial or would be biased; (b) impartial; (e) don't know. Walliss had no way of knowing whether the person from any particular household was the person whose name appeared on the list of jurors or otherwise. In conducting this survey he did not present himself as representing any market research organisation. He stated he merely indicated he was conducting a telephone poll. If asked to identify himself, he would not hesitate to do so. He did not keep a list of the responses or names of those he contacted. It was disposed of when informed by the defendants solicitors that the panel was to be discharged. Walliss was of the view that he had contacted approximately one third of the jury list. He stated he was informed by Butler (Trial Consultancy Pty Ltd) that guidelines came out of the inquiry surrounding the trial of Herscu, but could not obtain a copy of the Criminal Justice Commission's Report from GoPrint or any other sources. Walliss informed me he has 30 years' experience as a Victorian Police Officer. The last five of those he spent as the Chief Intelligence Analyst at the Australian Bureau of Criminal Intelligence, Canberra. During his employment he served as a police officer in the "jury room". His duties were to compile lists from the electoral roll for

Crown law. On occasions it was necessary to visit the residence of a juror to confirm particulars on the jury list. Part of his duties was to attempt to make an assessment of jurors' biases. He stated this was the accepted practice in Victoria, and that he considered his inquiries in this instance to be quite proper, mainly based on his Victorian Police Force experience and analytical experience in the Australian Bureau of Criminal Intelligence."

Green gave more detailed evidence of his interview with Walliss. When Green asked Walliss "What instructions did Mead give you?" Green noted Walliss' reply which indicated that his instructions came from Butler. Green underlined this fact. Walliss' reply was:

"Butler's instructions were to present them with a reduced list of jurors - that is, to eliminate those who showed bias - a bias - a biased way of thinking to enable further inquiries to be made of the remainder."

Finally, Green interviewed O'Brien. He summarised the result of this interview in his first report in these terms:

"Mr Barry Cornelius O'Brien is an ex member of the Queensland Police Force and is a director of a company named Lloyds Pacific Pty Ltd which operates as security consultants. A copy of Panel Z jury list was supplied to him by Mr Walliss on the Thursday before the day the trial was to commence.

His instructions were to carry out inquiries with respect to the jurors whose names appeared on the panel. These inquiries were to ascertain whether any jurors held a possible bias or otherwise. O'Brien stated that his method of operation was to proceed to the area of the juror's residence and to observe the general area and the residence. He made discreet inquiries from persons who were well known to him eg local professional people or members of sporting clubs and whose integrity he was confident of, as to whether they knew or knew of the juror or the juror's family.

No direct approach was made to any juror or any member of jurors family or household.

The information obtained was to be combined with that received from Walliss to give a better assessment of potential jurors' bias.

No reports as to the results of these inquiries were produced. Rough notes made at the time were subsequently destroyed when he received instructions to cease further inquiries. He stated that he did not receive specific instructions as to the manner in which inquiries were to be made and it was left to his own judgment, based on 28 years experience in the Police Force, as to his method. Because of the nature of the trial he indicated he exercised greater discretion than he would in normal circumstances.

Mr Mead spoke to O'Brien on the Sunday – the eve of the trial date. He learnt that Walliss had contacted some of the jurors' residences."

Green's handwritten contemporaneous notes of his conversation with O'Brien (exhibit 29) contains the follows:

"From Butler to check on jury. To carry out inquiries with respect to jury members – re possible bias – drove to area of residence and observed general area and residence – discreetly – enquired of contacts, eg people who were well known to O'Brien as to whether they knew a member of jury or family, no approach was made to any juror member of jurors family or household. Combined this information received with that obtained by Walliss to gain a better assessment of potential jurors bias. No juror contacted personally."

It will be necessary to examine O'Brien's statements in later interviews and in evidence in light of Green's report and notes.

3.4 Some Conflicting Legal Advice

The original legal advice furnished to the Commission was to the effect that whilst the Commission had the statutory power to inquire into the question concerning possible interference with the procedure for creating jury panels (the fourth matter raised by the Special Prosecutor) it had no power to deal with the first three questions.

The Solicitor–General for the State of Queensland, Keane QC, advised the Attorney–General that it was within the statutory power of the Commission to deal with all four matters raised by the Special Prosecutor. The Commission thereupon sought further advice from Hanson QC whose advice was to the same effect as that given to the Attorney–General by the Solicitor–General.

Whereupon the Commission resolved to inquire into the relevant matters.

The reference to this body of legal advice is to be found in the preamble to the Commission's resolution dated 2 October 1992.

CHAPTER 4

THE ALLEGED POLLING OF PANEL Z

As has been pointed out, this was the very thing which was relied upon in the application to the trial Judge to discharge Panel Z from service in the Bjelke-Petersen trial. It was the one and only reason for substituting Panels P and K in place of it. It was the alleged conduct of Walliss which was relied upon to support the substitution. The Sheriff's inquiries were sufficient to cast serious doubt upon the truth of the claim.

The question remains: Did Walliss poll or canvass the members of Panel Z or the members of jurors' households in circumstances requiring the dismissal of Panel Z, or indeed, at all?

The question needs to be addressed and the issues which it raises can only be properly understood by dealing with it in the context of other matters. I am only concerned for the present to determine whether in fact Walliss polled Panel Z and if so to what extent.

4.1 The Herscu Case

A criminal sittings of the District Court was scheduled to begin on 29 October 1990. Two trials of "some political sensitivity" were scheduled for the sittings - the trial of a businessman, one George Herscu, and that of a former Cabinet Minister, Brian Austin. Both trials were to commence on Monday, 12 November 1990. On Friday, 9 November 1990, the Sheriff allocated Panel F to the Herscu trial and Panel G to the Austin trial.

It was established by subsequent investigations that on the weekend of 10/11 November 1990 almost one half of Panel F (the Herscu jury panel) or members of their households were contacted by a person who purported to be conducting a survey on political allegiances and voting intentions. Most of these people were approached by a female telephone caller who falsely stated that she was acting on behalf of the Morgan group.

For reasons which are immaterial, neither trial commenced on Monday, 12 November 1990. The Herscu trial was adjourned to commence on Tuesday, 13 November 1990 and administrative arrangements within the Sheriff's Office required that Panel E be amalgamated with Panel F to

accommodate the perceived need to excuse a large number of jurors because of the anticipated length of trial.

Investigations disclosed that almost one–third of Panel E were also contacted by a female person who inquired concerning the juror's political allegiances and/or voting intentions. Almost one half of those contacted said that this contact was made on Monday, 12 November. In this case most said that the female caller identified herself as a university student in political science.

The Herscu jury was empanelled on the morning of Tuesday, 13 November 1990. Shortly afterwards one juror complained to the bailiff that a number of jurors had complained that they had been questioned on political allegiances and/or voting intentions in the course of the previous three days. The trial Judge was informed and the jury was discharged.

On 14 November 1990, the Special Prosecutor, Drummond QC, who was also conducting the prosecutions of Herscu and Austin, notified the Commission of the above matters and on 12 December 1990, the Commission resolved to conduct an inquiry, including a public hearing, into the allegations that jurors had been approached.

This inquiry proceeded forthwith in December 1990/January 1991 and in March 1991 the Commission reported and at the same time issued through the Research and Co–ordination Division of the Commission an Issues Paper entitled "The Jury System in Criminal Trials in Queensland".

In the report of its findings the Commission found that the allegations were substantially true in respect of the Herscu jury panel(s) but that the approach to jurors did not constitute contempt of court or improper behaviour by the solicitors for the accused, Herscu, or his other legal representatives. On the other hand, the Report included the following:

> *"Whilst no offence was committed in these circumstances, it is worth observing that there is a fine line between the conduct revealed by this inquiry and conduct which would amount to contempt. The law at present leaves doubt about the type of conduct which is permissible. This doubt was evidenced by the diversity of opinions expressed before the inquiry, both in evidence and in submissions, about the permissible length to which the parties in criminal trials may go to make inquiries of jurors or prospective jurors.*

Uncertainty in this area, which is of great community interest, can only bring the law into disrepute."

The Commission recommended the establishment by the Attorney-General of a Committee of the legal profession and the community to consider the need for reform on the law relating to the distribution of jury lists and the inquiries which can be made in respect of prospective jurors.

This Committee was established and did report. There was some distinct lack of unanimity among the members of the Committee and no action was taken in respect of its conclusions.

The issues which had arisen in the Herscu case and the Commission's investigations of the facts and its conclusions received wide publicity. The questions asked of the jury panel which became the subject of complaint by the jurors in that case, were as follows:

1. If there was an election going to be held tomorrow, how would you vote?

2. How did you vote last time there was an election?

3. Do you belong to any political party and, if so, which one?

Whilst the finding was that there had been no impropriety, illegality or contempt of court in what had occurred, any person with even a passing interest only in criminal law and practice would have known that, if personal contact were known to have been made with jurors for the purpose of learning personal matters, including political attitudes, concerning them and which might assist in assessing their response as jurors in a particular case, it was likely to lead to the discharge of that jury. That precisely was what occurred in the Bjelke-Petersen case once the alleged fact of contact was disclosed and the trial Judge informed.

As mentioned above, there was considerable publicity given to the Herscu matter and to the concerns which led to the discharge of the jury in that case. This publicity occurred in the period December 1990 to March 1991. The committal proceedings in respect of Sir Johannes Bjelke-Petersen had been fixed for 11 February 1991 and the ex officio indictment presented on 15 February 1991. The proceedings in respect of Sir Joh also gave rise to considerable publicity.

It is inconceivable that any person concerned in the defence of the accused in this case could not have recognised the problems associated with any pre-trial polling of the jury panel to be used for his trial, at least, to the extent that such polling was based on personal contact with the potential jurors or their households and related to political matters. Yet, that is precisely what is alleged to have happened. As will be seen, Greenwood QC, on the basis of what he had been told by O'Brien, could not distinguish the position from the Herscu case. Paradoxically, Butler asserted in his interview with Green that he had raised the Herscu case with Walliss. So too did Walliss. Whether the polling of jurors in fact happened, and the parts played by Butler, Mead, O'Brien and Walliss in the allegations that it did, require the closest scrutiny.

4.2 The Engagement of Walliss

Walliss described himself in a sworn written statement (exhibit number 2151) as the director of Estwell Pty Ltd "an intelligence management company". He is the holder of a private inquiry agents licence. He was a Victoria police officer for over 30 years. He came to Queensland in 1987. He claims that his expertise lay in the intelligence processing area and he had worked for the Australian Bureau of Criminal Intelligence (ABCI). He also stated that for a time he worked in the "jury room" – apparently a section of the Victoria Police concerned in gathering intelligence in respect of prospective jurors.

There is no doubt in my mind that his first contact with the trial of the accused was through the agency of Butler, whom he had known since 1982. Butler was then in the Queensland Police Service. Walliss was a police officer in Victoria. When Walliss came to Queensland to live in 1987 he again met Butler "through association with police officers".

Their first relevant contact is described by Walliss in his sworn statement as follows:

> *"Some time in late June or early July 1991 I again met Robert Butler at a social function. He asked me if I was interested in helping him profile a jury list for the Joh trial some 2 months ahead. I replied to him that I did not have sufficient local knowledge or the resources to build indepth profiles but I could introduce some techniques which I had brought with me from Victoria over a great period of time*

> *which may assist in reducing the size of the list to allow more work to be done. He told me that he would let me know as to whether this was acceptable or not."* (The underlining is mine.)

Walliss continued:

> *"Some time towards the end of July Robert Butler again contacted me this time I think by telephone and said that he was still interested in having me do some work. He understood my previous explanation of lacking resources and time and told me that a person whom I may know Barry O'Brien was being employed to co-ordinate the activity and he had the necessary experience to do some indepth profiles and asked whether that was acceptable to me. I told him that I did find that acceptable and he advised me that he would contact me further when the jury list was available and send it to me."*

In a later paragraph he stated:

> *"I had discussed my fees with Mr Robert Butler around about June or July period and informed him that my fees were $600.00 a day but that was the total extent to the discussion about costs. What I did discuss with him was that if the techniques were found to be acceptable then I would look at developing this as a service to himself and anybody else that wanted to use the service. So my primary objective was to attempt to build this into a business. I was not terribly familiar with the facts that surrounded the Joh trial and really not terribly interested in the trial itself. But I did see the opportunity to develop a future business technique."*

I will return to his statement shortly.

In the previous chapter I have referred to Green's interview with Walliss in October 1991 in which Walliss told Green in words to this effect that "Butler's instructions were to present them with a reduced list of jurors...to enable further inquiries to be made...". I will also deal with this statement below. However, it is important in the light of the above to extract some

parts of Walliss' evidence concerning his "engagement" which, I am satisfied, was the subject of discussion with Butler. He gave this evidence:

> *"There is the first time which I think is around about June of '91 when I meet Butler after some time, and he says 'Are you interested in doing some work for us?' Well, he doesn't really clarify that. There is an intervening period of perhaps two or three weeks, perhaps a month after that, I'm not sure, when I have need to go to Mead's office. I was then working for the Greyhound board and Mead was employed by them to do some work for them, so I had a need to go there, and there met Butler, and Butler said 'Are you still interested in doing some work for us?' And I can't recall verbatim the conversation but it was along the lines of 'I am responsible for the conduct of the defence of the Joh trial, and what I briefly discussed with you when we met say a month ago was a method for vetting juror lists. Are you still interested in that?' And my response was along the lines of 'I will put to you a proposal for doing that. I would want sufficient time to be able to do it properly'."* (Again, the underlining is mine.)

He was questioned concerning Green's note that he, Green, was told by Walliss that Butler's instructions were to present them with a reduced list "that is, eliminate those who showed a biased way of thinking to enable further inquiries to be made of the remainder".

> *"Now, is that what you told Mr Green?---I am unable to recall, but I accept that what he has written down would be the conversation that took place.*
>
> *And you are telling him what Butler's instructions to you were, were not you?---Yes*
>
> *And in the course of doing that you tell the sheriff that Butler's instructions to you were to present them – them, I suppose, being the defence team or the people whom Butler was representing – with a reduced list of jurors, that is to eliminate those who showed a biased way of thinking to enable further inquiries to be made of the remainder?---Mm.*

Now, is that a fair summary of the instructions which Butler gave to you?---No, it's not a fair summary.

What is unfair about it?---Butler says to me, 'What can you do?' and I say, 'I can present you with a list, a reduced list', but I believe the sheriff may have used the word, reduced, where I used the word, manageable list."

And again:

"Well, did Butler instruct you to present them with a reduced list of jurors?---Yes.

And those were, in effect, Butler's words?---Yes.

They gave you a jury – Butler obviously gave you a jury list then. Is that right?---Yes – sometime later.

Yes?---Yes.

And obviously, when he gave it to you some time later, that was so that you could carry out his instructions obviously?---Yes.

And the instructions were for you to present them with a reduced list of jurors?---Yes.

On which there were the names of the jurors?---Correct.

All their addresses and personal details?---Yes.

And you must have – well, you clearly knew what he wanted. He – he wanted a reduced list of jurors?---Yes.

Now, for him to say that to you, 'Present me with a reduced list of jurors,' it must have been common ground between you as to what was involved in the reduction of the list?---Yes.

Otherwise it makes no sense?---Yes.

It is meaningless?---Yes.

So, it was common ground between you– – –?– – –Yes.

– – –as to what was involved in the reduction of the list?– – –Yes.

And that common ground was to remove those who were unbiased – remove those who were biased, I am sorry?– – –That was the role that I would play.

No, no, no. You see, if he says to you, 'Present me with a reduced list' as you sensibly concede, that is meaningless unless there is some understanding between you as to what you are talking about. You have got to reduce the list. You have got to use some criteria to reduce it. I mean, you just do not say, 'Give me a reduced list.' What you can do is get a pair of scissors and cut off two–thirds of it and say, 'Here's a reduced list.' That is senseless. So that if he says to you, 'Present me with a reduced list' one can only – you can only carry out your instructions by reference to criteria which you both understand?– – –Yes.

And that criteria must necessarily include the proposal that you will reduce the list by excluding those who you regard as being biased?– – –Yes.

And he understood that?– – –Yes.

He must have understood it?– – –Yes.

And how else do you find out whether a person is biased or not unless you speak to them?– – –Yes.

So, again, it is common ground that you must necessarily have understood both of you, that in presenting them with a reduced list, you must necessarily speak to the jurors– – –?– – –Yes.

– – – for the purposes of finding out whether they are biased or not?– – –Yes.

And that you, then, would send who you regarded as the unbiased ones to O'Brien?– – –Correct.

So that, from the time you obtained your instructions, it must have been the position, from what you have said, that Butler knew that you were going to telephone jurors?---Yes.

And you, in fact, referred to what you called a telephone survey. You would do a telephone survey?---Yes.

Is that right?---Yes.

A telephone survey of those people who were on the jury list which you were going to receive in due course?---Yes.

And which you received in due course four or five days beforehand?---Yes.

At Mead's office?---Yes.

And you were given the jury list, obviously, so that you could make the telephone – know who to make the telephone calls to?---Correct."

Pausing there. Walliss professed that his developed expertise, based on his previous police experience, was such that by speaking to any person and asking certain questions he could determine whether that person "showed a biased way of thinking" or was one who was by nature more balanced and objective in his/her way of thinking and who was more likely to assess the competing considerations in relation to any issue in a balanced way.

I am not so concerned with Walliss' claimed expertise, but rather with what occurred between himself and Butler at the time of his "engagement".

Whether it was Butler or Walliss who conceived the idea of reducing the jury list by seeking to eliminate those who "showed a biased way of thinking", it obviously stands to reason that such a process was incapable of being undertaken without speaking to the persons concerned, in this case, the jury panel members. Walliss' evidence acknowledges that, and in the lengthy passage cited above it was, according to him, understood by both himself and Butler that if this process of list reduction was to proceed it could not be done unless individual jury panel members were approached and questioned in some way. After all, one cannot sensibly make a valid

assessment of a person's thought process without first speaking to the person in order to test what the mind of the person is. The logic of that is confirmed by the fact that Walliss says he was given a list of Panel Z with the name, addresses and occupations stated on it. A "telephone survey" was said to be necessary and it was, according to Walliss, understood by both himself and Butler that the list would provide the base material for the telephone survey which was designed to identify those who "showed a biased way of thinking".

I am comfortably satisfied that from their first contact when their discussion centred on "jury vetting" that Walliss and Butler discussed a suggested process which necessarily involved, to the knowledge of each, contact with individual jurors. Walliss in his statement and in parts of his evidence refers to his "techniques" in assessing whether a person is biased or not, but denied informing Butler of the details of how he proposed to make the critical assessments of individuals, other than apparently, the primary need to approach jurors and speak to them. Walliss asserted that because he was intent on marketing his technique as a business proposition he wished to keep that secret from Butler. Paradoxically, however, he stated that he revealed it to O'Brien, to whom I shall later refer. O'Brien, also a private inquiry agent, and also engaged by Butler for the purpose of vetting the Bjelke-Petersen jury panel was, in a business sense, Walliss' competitor. Yet Walliss said that he told O'Brien of his "technique", but not Butler. Yet it was Butler whom he proposed to charge the fee of $600.00 per day.

It is incomprehensible to me that Butler and/or Mead should engage Walliss on this task at that fee without knowing what Walliss intended to do. It needs to be understood that the objection to jury contact had been well-publicised by that time. I cannot accept that Butler did not know of any of the processes or their details which Walliss claimed he intended to undertake. Walliss' statement, if acceptable, makes it clear that Butler had to know, indeed, needed to know. Walliss has stated twice that Butler had said that he, Butler, at the end of the discussion had said that "he would let me (Walliss) know as to whether this was acceptable or not" (paragraph five) and "if the techniques were found to be acceptable" (paragraph 10) Walliss intended to develop the service as a business venture.

I am satisfied that Butler and Walliss prior to 17 July 1991 had detailed discussions, firstly, concerning the prospects of Walliss' engagement for the purpose of "vetting" the Bjelke-Petersen jury, secondly, as to the means Walliss intended to employ, and, thirdly, that this could only be done by a

personal approach to jurors. The question of Walliss' fee for this service was a part of those detailed discussions.

It follows that I reject both Walliss' evidence that he had not explained the so called "technique" to Butler and also Butler's evidence that for all practical purposes he, having introduced Walliss to Mead, was henceforth an innocent bystander. I am in no doubt that Butler understood from the beginning that whatever Walliss originally intended to do, this necessarily involved Walliss making personal contact with jurors. Butler well knew that this had been condemned in the Herscu case. Indeed, he told Green that he had informed Walliss about the problems in the Herscu case.

I have introduced the date, 17 July 1991, into the text because that is the first date on which Greenwood QC was informed concerning Walliss. I am satisfied that Greenwood QC learned of Walliss from Butler and Greenwood QC noted Walliss' name in his diary for 17 July 1991, the first day of the two-day conference at the Hilton Hotel, at which the question of jury vetting was first discussed with Counsel. By that date, Butler and Walliss had had detailed discussions on the subject of preparing for jury selection. Those discussions must necessarily have had only a prospective quality about them. By that time it was known only that the trial would begin on 23 September 1991.

Nothing was then known concerning Panels Z, P or K or indeed about Luke Shaw. They, at that time, were unknown and irrelevant to the initial discussions between Butler and Walliss.

In finding that these discussions were conducted at a personal level between Butler and Walliss, I am also satisfied that Mead's involvement in these matters was at the most peripheral from the outset and remained so. Apart from his inexperience, he was concerned basically with his other clients and was content to leave the Bjelke-Petersen matter to Butler. He well knew of Butler's long-time involvement with the case and the client and that it was Butler who had brought the client to Mead. At the same time it must be said that Mead knew Walliss because Mead was the solicitor for the Greyhound Racing Control Board and Walliss had coincidentally been engaged by that body to do investigative work for it. That had brought Walliss into contact with Mead. I am satisfied, however, that in respect of the Bjelke-Petersen matter Walliss was concerned to deal only with Butler and that any discussion concerning it between Walliss and Mead was marginal only. Mead did not, in my view, formally instruct

Walliss in any relevant respect. Rather, that was done by Butler to the knowledge of Mead and with his implied approval.

Therefore, I am satisfied that Walliss' prospective engagement in the Bjelke–Petersen matter was arranged by Butler and that as a result of discussions between them, Butler well knew that any work which Walliss might do in the future necessarily involved personal contact with the jurors, who would be named on the panel selected for the trial of Sir Johannes Bjelke–Petersen, for the purpose of determining whether they could be assessed as jurors who might be favourably disposed to the accused. Butler's denial of this and his positive statements of his non–involvement with such matters is false.

Butler's close involvement with Walliss is also evidenced by the fact that Butler and Walliss, in the relevant period, had significant contact with each other by telephone. This is confirmed by the evidence of the Telecom charging records which the Commission obtained. These records only record charging details for calls made by STD or on mobile phones and not for local calls. The chronology of these known and identifiable calls has also to be seen within the relevant time context. As has been said, it is clear from Greenwood QC's diary entry for 17 July, which reads "Jury selection/Phil Walliss" that Walliss and Butler had discussed jury selection before that date. By 17 July 1991 there is no evidence that Greenwood QC knew or had ever heard of Walliss. His source of knowledge was primarily Butler. Subsequent to that date there are these recorded details of telephone contact between Walliss/Butler as recorded by Telecom:

28.7.91	8.41am	Estwell Pty Ltd to Butler's mobile	2 mins 12 secs
28.7.91	3.49pm	Butler's mobile to Walliss	37 secs
*6.8.91	12.05pm	Walliss to ISYS Text Retrieval Software (STD)	6 mins 22 secs
6.8.91	2.05pm	Walliss to Butler's mobile	12 secs
22.8.91	9.37am	Walliss to Butler's mobile	21 secs
22.8.91	4.35pm	Walliss to Butler's mobile	12 secs
9.9.91	5.32pm	Walliss to Butler's mobile	16 secs

This known telephone contact occurred before 11 September 1991, the first day on which Panel Z became available. It is not unlikely that the two men spoke to each other on other occasions by means of unidentifiable local calls. There is no evidence that in the period 17 July to 9 September 1991 Walliss and Butler had any other matter of common interest other than the Bjelke-Petersen trial. It is of course possible that the contact may have been social contact only. On the other hand, the call on 6 August 1991 marked with an asterisk makes it probable that at least some of the calls were related to Bjelke-Petersen. Walliss stated and gave evidence that, in his earlier discussions with Butler, he advised that he knew of certain information data bases which he could access if given enough time. It is likely that Walliss' call to ISYS Text Retrieval Software at 12.05pm on 6 August was a call made for this purpose. It is significant that on the same day at 2.05pm he made contact with Butler on his mobile phone.

Neither Walliss nor Butler were asked in evidence concerning these calls because at the relevant time all of the detailed information was not available. It is included here only for the sake of completeness. My findings concerning the Butler/Walliss contact and the nature of it are based, however, on the other evidence to which reference has been made above and on the inferences which can properly be drawn from it.

4.3 Counsel's Advice and Jury Selection

Greenwood QC gave evidence generally in accordance with a statement prepared by his solicitor and given by him to the Commission, dated 13 November 1992.

I accept his evidence that at the Hilton Hotel conference on 17/18 July 1991 a procedure for jury vetting was discussed. He stated that the discussion of matters pertaining to jury selection had arisen for early consideration,

> *"For the obvious reason that the client was an extraordinarily prominent person who was to stand trial arising out of the prominent proceedings known as the 'Fitzgerald Commission of Inquiry' followed along by the Special Prosecutor. The matters were very controversial indeed and it would be pretty obvious to any experienced criminal lawyer that the question of the jury selection would be of significant importance right from day one."*

Greenwood's statement continued:

"As to the Jury on one or more of the dates, probably on my estimate 14 August 1991, but certainly on a date or dates prior to 28 August 1991 I gave the following advice to Mr Mead and/or to Mr Butler:-

1. *That the relevant Jury panel be obtained as soon as possible prior to the trial, obviously from the Registry.*

2. *That a reputable private investigators be engaged to carry out the usual enquiries and by usual I indicated electoral role searches and such other lawful enquiries as would give an indication of the likely attitudes of the individual Jurors.*

3. *Moving from the general to the particular I do recall suggesting that in this trial it would be highly desirable to gain information as to the possible political sympathies of the panel members. I positively recall on Wednesday, 14 August (exhibition Wednesday in Brisbane) I suggested that a person be identified in each metropolitan state electorate who knew the local political scene. This person or persons should be supplied with a copy of the panel members especially those within that particular electorate for comment.*

4. *I stressed that nothing improper be done and that if they had any queries in that regard they were to refer the matter to me.*

It will no doubt be appreciated that I was dealing with first of all with Max Mead, a Solicitor of the Supreme Court of Queensland for some twenty years or so, as I would guess, and certainly, as I would expect, a Solicitor of considerable experience. Mr Butler, a former Police Prosecutor and obviously a former police officer, a man who had been around the criminal Courts and familiar with the criminal jurisdiction for a considerable period of time and obviously an experienced person. I was comforted by the knowledge that Wallis was a former Victorian Police Officer and as later events will disclose the contact with Barry O'Brien,

> *again a very very experienced Police Officer of senior rank in Queensland before his resignation from the Queensland Police Force. It was not a situation where I was dealing with inexperienced Solicitors who very rarely practiced in the criminal jurisdiction. I cannot now recount precisely the discussions and the instructions that I gave to these various people including discussions with my Junior Counsel but the thrust of it all was that work was to be done on the Jury as is usually done in Queensland, to my knowledge in criminal trials, but that nothing improper and/or unlawful was to be remotely contemplated."*

The confidence which Greenwood QC asserted in respect of Mead was obviously misplaced. Indeed, Greenwood QC was being instructed by "(an) inexperienced (solicitor) who very rarely practised in the criminal jurisdiction". Greenwood QC may not have known it but the fact clearly was that any advice from him was likely to be executed, if at all, not by Mead but by Butler. He made it clear in his evidence that he was somewhat uncomfortable with Butler's involvement and the extent of it, and he sought to insist that he regarded Mead as the one formally instructing him. It is clear from the evidence to be addressed later that Greenwood QC's advice was never implemented or at best, that if like procedures were implemented, that was so, not because of his advice, but that it was perceived, probably by Butler and O'Brien, as the sensible procedure to adopt in any event.

I am satisfied that the above represents the sum total of the relevant advice given by Greenwood QC in respect of the Bjelke-Petersen matter. I am satisfied that he was also instrumental in the engagement of O'Brien, a matter which will be dealt with in the next section.

4.4 The Engagement of O'Brien

It is not entirely clear as to how it was that O'Brien became involved in matters relevant to the selection of the jury at the Bjelke-Petersen trial. What is clear is that he, more so than Walliss, was active in the days immediately prior to the trial in collecting intelligence concerning potential jurors. Just what he did and in respect of what jury panels will be analysed more closely in Chapters 7, 8 and 9 . It will there be necessary to refer in detail to his evidence which in so many respects is unacceptable.

It suffices to say here that O'Brien proved to be a most unsatisfactory witness of very doubtful credibility.

There is no evidence that O'Brien's involvement was formally arranged; as in the case of Walliss, there is no documentary evidence of his appointment, of his instructions, nor of the terms and conditions of his appointment. In fact, the involvement of O'Brien seems to have been initiated by Greenwood QC.

O'Brien for many years was a very experienced, well-known and somewhat high-profile member of the Criminal Investigation Branch. He resigned from the Police Service in 1987. Since that time he has carried on business as a private investigator through a company known as Lloyds Pacific Pty Ltd. He was known personally by Greenwood QC and they were friends of long-standing.

According to the statement provided to the Commission by Greenwood QC he, Greenwood QC, had a chance meeting with O'Brien "in July or August" 1991. At this meeting they discussed the prospect of O'Brien being engaged by instructing solicitors "in respect of jury investigations if called upon". Greenwood QC states he "certainly passed this information on to either Butler or Mead" as he, Greenwood QC, saw O'Brien to be a valuable source of possible jury information, and an experienced investigator. O'Brien was without doubt also well-known to Butler and it was clear to Walliss, at some time after his engagement had been discussed, that O'Brien would be involved with him. Again, I am in no doubt that Butler's was the hand which established this process. Walliss understood the position to be that after he had "reduced" the list to a "manageable" size by means of his techniques, which would exclude those who "showed a biased way of thinking", it was to be O'Brien who was to establish the profiles in respect of the remainder, thereby permitting defence Counsel to select the most appropriate jury.

But again, there is no available documentation which evidences any aspect of Walliss' and/or O'Brien's involvement – their instructions, their terms and conditions of employment and so on. All that transpired between Butler (and/or Mead), Walliss and O'Brien was dealt with orally. Closer to the trial both Walliss and O'Brien asserted that there was some documentation prepared and which passed between them, but it was destroyed by shredding. An attempt to elicit more precisely the circumstances in which O'Brien was engaged and the terms of his engagement produced this evidence from O'Brien:

"All right. Now, you were first formally brought into this matter when and by whom?---Well, towards the end of the week preceding the trial.

But there had been some informal approach before that?---There had.

And who was that from?---Well, the first time the trial was mentioned was in the presence of Bob Butler and Bob Greenwood several weeks before the trial.

Weeks before. And was that on a social occasion rather than an official - - -?---It was just a chance meeting in the street.

And what was proposed on that occasion?---Well, there was a fairly vague proposal in that Bob Greenwood said to me that - or he asked me if I'd be available to do some inquiries for the defence as he was conducting the Bjelke-Petersen defence.

Inquiries into?---Oh, he didn't go any further than that.

Did not mention it was a jury - - -?---I don't think so. I don't think a jury was mentioned at that stage, but it could have been.

All right. And what is the next you heard of it?---The next would have been a couple of weeks before the trial date - proposed trial date start, and that was when I met Adrian Gundelach and Bob Greenwood, and perhaps Bob Butler and Max Mead. I'm just not certain if they were there or about to arrive.

And was this an informal occasion again?---Yes.

What was said this time?---This time the jury was certainly mentioned, and Bob Greenwood mentioned that Bob Butler would be in touch with me to ask me to carry out some inquiries in relation to the jury.

Was Mr Walliss mentioned on this occasion?---No. No.

All right. What is the next you heard of it?---The next would have been when I received a phone call from Phil Walliss.

From Phil Walliss?---Yes.

Yes?---And he told me he was conducting inquiries in relation to the jury for the trial, and he said that he understood that I also was conducting inquiries, and I told him that was not correct, and he discussed – he seemed surprised by that, but in any case, he told me that he was conducting inquiries and he told me the nature of them. And – – –

MR CARTER: What did he tell you?---He told me he'd been conducting a survey in that he had a list of a jury panel and that he had been conducting a survey by telephoning the – the residence of some of the jurors and by asking them questions – sets of questions and obtaining answers from which he would make a deduction as to their views, and he would make a conclusion from that as to whether or not they may be biased against the defendant – the accused, or alternatively. Something along those lines.

MR HANSON: And, this was being conducted how? By phone?---By phone, yes.

To the households of the jurors?---Yes.

Did you know Mr Walliss before?---I had met him, yes.

All right, and this is before you had been engaged?--- Formally, yes. Yes, well before I was engaged, yes."

The lack of any formality in O'Brien's engagement is striking. According to O'Brien it was arranged on "an informal occasion" with Greenwood QC and Gundelach, although it was not within the responsibility of either Counsel to do this. His next recollection then is a phone call from Walliss whom O'Brien had met before this.

Butler's evidence on this point, as in respect of all of the relevant issues, is consistent only with his persistent and untruthful attempts to distance

himself from any aspect of the trial preparation which related to jury selection.

During his evidence Butler was questioned on statements said to have been made to David, the ABC scriptwriter, by Butler:

> *"Well you can have another look at it at lunch time, but for the time being, you can tell me what you want to comment on. Page 2 about Greenwood's fee, you said something about those?---Well, that's not - that's not the correct figure. Likewise mine isn't the correct figure. Where it talks about private investigators, one of them being former head of the CIB and the ABCI, and it says - you wouldn't mention names but obviously meant Barry O'Brien.*
>
> *But it says Butler hired two private investigators to check on the jury. Is that correct? Looks as if you did it, that is the way they have got it here?---No.*
>
> *Do you comment on that?---In relation to the - in relation to the hiring, Max Mead was the solicitor, and any person that was actually employed to do a task for the firm was done by Max.*
>
> *He might have paid the bill, but who engaged them?--- Well, Max engaged them.*
>
> *Who contacted them and asked them to do the work?---I honestly can't - can't say which one - which one phoned, whether I phoned or Max phoned.*
>
> *You see, the way it reads here, to do justice to yourself, Mr Butler, you really must deal with this:*
>
> > *Butler hired two private investigators to check on the jury.*
>
> *They have got it down here as if you were the one who engaged them?---Well, they've - they've got a number of things that aren't correct.*

All right. Well, what about this sentence, you are the one who hired the two private investigators to check on the jury? Do you - - -?---No. What actually happened is at an early conference with Mr Greenwood, Mr Gundelach, Mr Mead, myself - and it was at the Hilton, and it was chosen at the Hilton because we put Mr Greenwood in there for the day, and we had a conference room there, and the - because he did not have chambers in Brisbane, and the Hilton was in the proximity to Max's office. They are both on to the mall. We had preliminary discussions. At that stage we didn't have a brief because the brief was retained by Lyons because Lyons hadn't been paid, and Lyons had exercised their lien, so a lot of what the evidence was and the result of investigations, etcetera, had to be given orally because we didn't actually have a file, we didn't have the brief."

That piece of prevarication is fairly typical of Butler's non-responsive answers. The evidence continued:

"Did not you have a file? Did not Trial Consultancy have a file?---Trial Consultancy didn't have a duplicate of the brief.

All right. Well, it is almost 1 o'clock. Do you - have you got time to tell me whether you agree or disagree - well, you were going to tell me how it came about that private investigators were engaged?---Well, at that discussion - and I think it was raised by Mr Greenwood - has anything been put in place to do the usual checks in relation to a jury, and we said no, but we would deal with that. Subsequently - and I can't say whether the same day or whatever - Max and I were discussing - well, it couldn't have been - well, it could have been the same day, but I don't know. There were a number of discussions, but eventually Max and I discussed it, and Max said, will you - asked me would I do the jury investigations, which was probably fairly logical question, because I was employed as an investigator. I said, 'No, wouldn't touch it with a barge pole,' or words to that effect - I'm not saying I'm giving verbatim what transpired. It's - any investigations into juries are contentious, particularly in

the current environment, and the Herscu problems had already reached quite public prominence, and I said, 'We'll get a private investigator to do it,' and I said, 'I think it's important that I be independent because I could be giving evidence in the trial,' and initially that was a course that was thought, and I recommended that Phil Walliss – I'm, not quite sure how it came about, whether Max said who would you recommend, or I volunteered, but it was in discussion between Max and I, and I recommended Phil Walliss, and Max had had contact with Phil Walliss through other matters, and I said that he's got an excellent reputation. He also was the head of the Australian Bureau of Criminal Intelligence. I believed him to be an honest person and above reproach, and I thought he would do a good job."

It is probable that O'Brien's name was introduced by Greenwood QC and that henceforth Butler was the person who dealt not only with Walliss but also with O'Brien. As will be seen later, O'Brien marked for Butler's attention the letter dated 30 September 1991 in which O'Brien confirmed his handing to Butler at 1.30pm on Tuesday 24 September the information gathered by O'Brien in respect of Panels P and K. The same letter covered O'Brien's Memorandum of Fees for his services. The relevance of this correspondence will be more apparent at a later stage. The clear inference from O'Brien's letter is that it was Butler with whom he dealt. It was as the letter states, from Butler whom he received instructions.

It is sufficient for present purposes to confirm my finding that Butler was the person who was immediately concerned with both Walliss and O'Brien and with their engagement to provide services to the defence team for the purpose of facilitating the selection of a favourable jury at the Bjelke–Petersen trial.

The relationship and the nature of the dealings between Butler, O'Brien and Walliss requires the closest scrutiny and this will be provided later in this report.

For the present, I should merely indicate my finding that it was Butler who dealt with both Walliss and O'Brien and who was the point of contact for each of them. In respect of O'Brien I am in no doubt that his engagement was suggested by Greenwood QC, but that henceforth O'Brien dealt with Butler. In respect of both Walliss and O'Brien I am satisfied that Mead's

involvement was again marginal only and whilst he regarded himself as ultimately responsible for the engagement of them and for payment of their fees, if any, he was content to leave the detailed work to Butler. I am satisfied that this is what in fact happened.

4.5 The Commission's Investigations and The Sheriff's Inquiries

It is now necessary to address what is perhaps the most fundamental issue of fact which faced the inquiry, namely whether in fact Panel Z was polled by Walliss before 23 September 1991. It was on this account that the application to discharge Panel Z was made. It was the allegation that Panel Z had been polled which led Greenwood QC to assert to the trial Judge:

(a) that panel Z be transferred "from this trial to be replaced by another of the panels or a combination thereof";

(b) that "the precise nature of the difficulty" is such that "my duty to the court does not oblige me to disclose" it;

(c) that "my duty to my client tends positively for me not to reveal the details";

(d) that "the difficulty (is) such that the problem could (not) be overcome by excusing certain members of the panel rather than the whole panel";

(e) that he "believed it to be necessary in the interests of the proper progress of justice" that Panel Z be replaced; and

(f) that his submission that Panel Z be replaced without disclosing to the court his reason for so doing "was the only course I could properly follow".

Without question Greenwood QC perceived "the problem" to be of such gravity and magnitude that not only should the court grant his application that this extraordinary step be taken, but also that he should be relieved of his obligation to the court to disclose his reasons for making it.

It was Walliss' alleged polling of Panel Z which was at the heart of "the problem".

I pause to observe that at no stage before making this extraordinary application did Greenwood QC confer with Walliss. His first knowledge of what Walliss is alleged to have done came from O'Brien on the afternoon of Saturday, 21 September 1991; he, Greenwood QC, shortly thereafter discussed "the problem" with others, including Butler, who had known from his first discussions with Walliss that it was Walliss' intention to personally contact jurors, but who had failed to disclose this fact to Greenwood QC; he, Greenwood QC, had on Sunday 22 September 1991 discussed "the problem" with Macgroarty of Counsel and on the evening of Sunday, 23 September 1991, had received instructions from Mead, who had spent the weekend at the Gold Coast, to apply for the discharge of Panel Z.

The facts as disclosed by the evidence do not support Greenwood's opening statements to the trial Judge that "a matter has been brought to the attention of my instructing solicitor and his view is of such a nature that he has instructed me to move the court for the transfer of the jury Panel Z from this trial to be replaced by another of the panels or a combination thereof", and "that the matter of concern did not come to Mr Mead's attention till last evening, so hence we are bringing the matter forward and bringing this request forward at the first available opportunity". The statement that Mead did not know of the "concern" until Sunday evening is, I am satisfied, literally true. However, it was not the fact that the matter had been brought to Mead's attention that prompted the application. On the evidence the first step in that process was the gratuitous disclosure to Greenwood QC himself by O'Brien at their meeting at the Gateway Hotel on the late afternoon of Saturday, 21 September 1991. It was that disclosure which dictated the course of later events.

The significance or otherwise of these matters will be analysed below.

It is first necessary to examine what it is that Walliss is alleged to have done which led to the extraordinary application by Greenwood QC at 9.15am on the morning of Monday, 23 September 1991.

Walliss' own sworn statement, which is dated 12 November 1992, and his evidence is a convenient starting point:

> *"Having received the jury list the first thing I did was to take hold of the telephone book and attempt to identify those people that were on the telephone. I did discover that quite a number of the list either had silent numbers or*

did not have phone numbers I am not sure of which in those instances. So that in in itself had a tendency to reduce the list. In addition to that there were a number of names on the list shaded and there were also some names that had an asterix or something similar beside them and my instructions were not to worry about those that were shaded or those that were otherwise marked. So taking the list I then took it in alphabetical order and searched the phone book to see how many I could find phone numbers for. The object of this exercise was to conduct a poll of these individuals a process that I had learned whilst serving in the jury room as a young constable in Victoria. The jury room is a group that used to exist within the Victorian police who are responsible for compiling jury lists to be available for a trial. These lists of course were worked on long before the trial was known or what the matter was in relation to."

And again:

"One of the things that I was aware of was that this had previously been done in relation to a trial in Queensland and I believe that was the Herscu matter. Whilst I was not then and I am not now familiar with the details of that trial or the circumstances of the people involved what I did understand was that potential jurors were asked to offer an opinion on which way that they would vote or what degree of support that they would give to the players in the trial. I was totally aware of this. I had experience of that and took the appropriate steps to ensure that nothing could be indicated in the poll that I was conducting that would in anyway relate to the future trial and completely avoided any sort of political argument or referring to any particular matter."

And later:

"My method of conducting the poll was to phone the person or phone the residence that is the phone number not knowing to whom I was going to speak. Having done that and made contact through the telephone number I used a number of circumstances that were popular in the media at

that time. For example, I believe that one I used on a number of a occasions was that there was being publicised a disagreement between Wally Lewis a player with the local rugby team and the coach Wayne Bennett. This was planting backwards and forwards in the media quite a bit. In conducting the poll I would put to the person on the other end of the telephone that it had been recent media discussion about a conflict between Wally Lewis and Wayne Bennett and from the information that was available what was the callers opinion as to who was in the right. So the question would be which of the two individuals in this instance was correct based on the information available to the person I was talking to.

My experience indicated that where there is an emotional issue people would fall to one side or the other. My question would then be in respect of the Lewis Bennett situation. My question would then be based on the information that is available does Bennett have any case at all and frequently the answer would be I am not interested – not exactly in these words – but the answer would indicate that the person was pro Wally Lewis and was not interested in the other side of the argument and therefore Wally was right. Now based on my previous experience my assessment of that situation was that that person could not operate in an unbiased way, nothing more nothing less and while not definitive of the person being the juror it was the starting point to reduce the list."

He later stated that "I do recall using the Lewis/Bennett incident. I do recall using the Wet Tropics Management Agency in North Queensland which was the subject of TV and newspaper discussion at the time. I do recall using the Fraser Island argument...". He further stated that having gone through the process periodically "I would send by facsimile that list with the markings I had made to Barry O'Brien". Walliss estimated that he had contacted "in the vicinity of 25 to 30 people". It will be recalled that he had much earlier, that is, in October 1991, very shortly after the trial, informed the Sheriff that he had approached approximately one–third of the list. By the relevant time there were 150 persons on Panel Z.

Two other significant statements appear in Walliss' statement to which later reference will need to be made:

> *"Each of the facsimiles I sent to Barry O'Brien with this information I believe was sent on my facsimile in my office in my home. I am not exactly sure when but I do believe it was on the late Saturday evening or on the following Sunday which is about the 22nd of September. I think that I was talking to Barry O'Brien on the telephone and Barry found the information that I had sent to him helpful and asked how I had arrived with my conclusions and I described the technique that I was using to him. He became alarmed at this and felt that it was a repeat of what he referred to I think as the Herscu trial"*

And secondly:

> *"I recall part of the conversation with Barry saying my understanding of the Herscu trial was that jurors were polled as to which side they would take. I certainly did not do anything like that and was very conscious not to in any way adopt any sort of a stance that could lead to that conclusion. I believe it was on the Sunday of the 22nd that I was contacted by Robert Butler who informed me that the method I used had been mentioned to the barristers conducting the trial and they became alarmed that it was a repeat of the Herscu matter."*

The unsatisfactory and inconsistent character of Walliss' evidence is apparent from what follows:

> *"All right. Well, you did not tell Mr Butler the technique?---No, I did not.*
>
> *Did you tell him it would consist of a telephone survey?---Yes.*
>
> *Did you tell him where the survey would be directed: who you would be phoning?---No, I didn't. At the time - now, I can't tell you when I told him I would be using the telephone. Again, in that period I am unable to recall when, but he expressed concern when I said that I would conduct telephone surveys, and I think he asked me if I knew about the Herscu - or Herscu matter. Now I had no specific detail on that, but I had an overview of what I*

understood Herscu to be, and I understood that was someone phoning jurors and discussing the ins and outs of the trial and the individuals with them. So that was my understanding of the Herscu matter. And – – –

Yes. And did he – where did you get that understanding from? From Butler?– – –No, it was before – it may have even been from the ABCI or my previous employment somewhere, but it was not from that set of people at the time. It was from some other source entirely. And it may have been – reinforced by an article by Bob Bottom, an author that I am sure you are aware of. So, I think it may have – a number of sources told me about Herscu. May I continue?

Mr Butler expressed some concern and referred to Herscu, did he?– – –He – yes, Butler said words to the effect, 'You're aware – this is not going to be Herscu. You're aware of the Herscu situation.' And my reply was just as I've given, 'Yes. I have an overview and I – it will be not anything like that.'

Did he know you were going to ring the jurors or their households?– – –No, no. He may have been – may have wished to pursue that. I was not about to let him pursue that. I was avoiding him interrogating me as to how I was going to do this."

Contrast this evidence with that set out on pages 114 to 117 of this Report.

His modus operandi was described by him as follows:

"MR HANSON: Well, how many of these households do you say you contacted?– – –Well, I can only – again, now, I can only guess, and my guess is based on the fact that I carry round in my pockets, most times, a little bundle of cards like that so once I got the jury list and I would put four or five names and telephone numbers on lists like – on a card like that, and as I went about my daily business I would make the phone calls. I would have on the card whatever the theme for the day was, and I would have picked that up out of the days newspaper. Like it was

logging on Fraser Island, or Wally Lewis, I'd have that on the card. So, I recall filling out about five or six of those cards, so I make that around about 25 or so people."

The full details of the Sheriff's investigation concerning the polling of Panel Z is set out in Chapter 3.3 of this Report.

Before dealing with the Commission's own investigation into this issue, it is first necessary to make some observations about Green's inquiries

Green's second report to the Attorney-General disclosed that prior to 29 January 1992, the date of the report, that is within three months of the conclusion of the trial, he, Green, made personal contact with about 50 of the 150 persons on Panel Z. Each person was asked "whether he/she or any member of their household had been contacted in the week prior to the trial commencing and their opinions canvassed on any topic whatsoever".

Of the four persons who responded positively it can now be established that none of those could have been included in Walliss' alleged poll.

Green's third report is dated 30 March 1992. He had pursued the matter further between 29 January 1992 and 30 March 1992 and his further inquiries taken with the first revealed that nine persons had been approached in one way or another. Of those nine persons it is apparent that none of them received any inquiries of the kind alleged by Walliss to have been an essential feature of his technique.

It might be thought that all of the persons "polled" by Walliss could have forgotten the approach by the time Green made contact with them. This is an improbable explanation. Whether it was one-third of the panel or 25 or 30 of them who were approached, it is improbable that all of them would have forgotten this approach, particularly having regard to its special quality. It was not an approach merely to ascertain one's radio or television preference or indeed one's interest in a commercial product. It was quite different. It was specifically designed to encourage the recipient of the call to engage in dialogue about some contentious public issues. Walliss would necessarily have had to put competing viewpoints if the poll was to have any validity. After all, this was said to involve some special expertise and was presumably the work of an expert who was charging $600 per day for his services. His approach was not in the nature of a casual inquiry or designed to advance a commercial interest; it was "an interview". As Walliss said "the object of conducting the interview was to

establish whether the person was able to operate without bias". This required the introduction of allegedly controversial matters. Yet, Green's inquiries failed within a short period of the conclusion of the trial to disclose even one person who could reasonably be identified as having been approached in the terms asserted by Walliss or having engaged in a telephone interview in relation to contentious public issues.

It is also the fact that Walliss did not claim any fees for the work allegedly done by him. On his version, either to the Sheriff or to the Commission, the process must have occupied a not insignificant period of his working life. Yet, he did not claim any remuneration. He explained this on the basis that he had become disenchanted and angry when he learned that what he had done was said to have been the source of the upheaval for which he was immediately responsible. Perhaps one can accept that as a legitimate response. On the other hand, one might equally assert that the supposedly angry response of others to what he had done in good faith would make him firmer in his resolve to be paid for his troubles rather than himself bear the cost of the telephone calls which he said he had made. After all, he had detailed conversations from the beginning with Butler who had engaged him.

Walliss also gave evidence that he received the jury list only four or five days before the trial was due to start. This, he said, displeased him. In any event, the matter had by then become a matter of urgency. Therefore, within the four or five days, on his own statements and evidence, he must have spoken on the telephone to between 25 and 50 people for the purposes of interviews designed to elicit the existence of biased minds or otherwise. Common sense dictates that that is no mean feat. There was considerable time to be consumed if it was to be done in an expert way. Besides, Walliss asserted that he had faxed the results to O'Brien from time to time.

The conclusion seems unavoidable that if Walliss had subjected a significant number of persons to this particular process, for the purpose of his professional assessment, the results of which were faxed from time to time from Walliss' office to O'Brien's home, he, Walliss, would require of Mead/Butler that he receive due recompense. Furthermore, and more importantly, it is improbable that not one of 25 to 50 people subjected to this process in the four or five days prior to their commencing jury service would recall it when specifically asked by Green to address the question within a relatively short period of the event.

Immediately it was resolved by the Commission to inquire into the matters raised by Drummond QC considerable resources were committed to it by the Commission. The very first question for inquiry focussed upon the issue whether in fact any juror on Panel Z or any member of the households of those jurors had been approached. It will be understood that Green was concerned to direct his inquiries only to the jurors themselves on Panel Z. It was therefore decided to re-investigate the whole matter by personal interviews with each juror and each member of the juror's household, and for the sake of completeness, to extend these personal inquiries and interviews beyond Panel Z to the jurors on Panels P and K (the substitute panels) and to each member of their respective households.

A questionnaire consisting of 26 questions was designed to ensure uniformity of questioning by the various investigators. The questionnaire is contained in Appendix 2. The process commenced in November 1992 and was concluded in April 1993. Three experienced police officers were assigned to the task: Detective Sergeant John Gordon, Detective Sergeant Geoffrey Sheldon and Detective Sergeant David James. Because of the large number of persons to be interviewed the Commission engaged two former police officers of considerable experience: Mr Brian Pitman and Mr Reg Ashmore.

The results of all interviews have been tabulated and are part of the material in evidence (exhibit numbers 18, 19 and 20).

The results can be summarised.

In respect of Panel Z an attempt was made to interview 168 persons whose names appeared on the original panel. This included those who, for any reason, had their names taken from the panel for the purposes of the trial. Only jurors Z71, Z89, Z154 and Z166 could not be located. Of the remaining 164 interviewed, 15 reported some kind of approach.

Of these 15 persons, 11 can be excluded because the nature of any approach to them is wholly inconsistent with an approach by Walliss (Z7, Z20, Z23, Z42, Z65, Z87, Z95, Z98, Z110, Z121, Z133).

According to Walliss:

(a) his calls were made in the period four to five days before trial;

(b) the calls were made by him; a female person was not engaged;

(c) he recalls only three topics of conversation: Bennett/Lewis, logging Fraser Island and Wet Tropics Management;

(d) persons were definitely and specifically not asked about politics or politicians.

(e) Walliss did not identify himself, but if asked, gave his name.

The above 11 are excluded because:

- Z7 recalls being polled "probably by a radio station". Asked for radio preferences and his opinion about Sir Joh Bjelke-Petersen.

- Z20, female caller; asked her opinion of politicians including Sir Joh and political preferences.

- Z23, asked for her political preferences and whether she would vote for current Government or not.

- Z42, polled three to four months before jury service; female caller; recalls a reference to Lewis/Bennett.

- Z65, female caller; asked for his preferred code of football; reference made to Wally Lewis.

- Z87, female caller; asked for her preferred brand of toothpaste and also questions about politics and religion.

- Z95, female caller; reference to Fraser Island, Commonwealth Bank logo; who she voted for and asked about advertising jingles.

- Z98 phone not listed in her name. Had received a call about the environment.

- Z110, female caller; selling house security products.

- Z121, female caller; Morgan Gallup pollster; asked about listing of Fraser Island, legislation of marijuana and whether Wally Lewis should lead the Broncos football team.

- Z133, questioned about Prime Minister, political preference, preferred motor vehicle; may have been asked for his preferred football code.

In respect of the remaining four:

- Z5 had a phone call; believed it was some kind of survey and immediately terminated the call;

- Z13 cannot remember whether caller was male or female; vaguely recalls a reference to "logging".

- Z66, juror's 16 year old son vaguely recalled survey by male; cannot remember when; vaguely recalls a reference to Wally Lewis.

- Z76, recalls receiving a call – a survey of some kind; hung up.

- Z112, mother of juror; recalls questions about logging on Fraser Island; believes by a female. However, phone is in the name of the mother not the juror.

Evidence was given by six of the persons who could be considered relevant: Z5, Z13, son of Z66, Z76, mother of Z112, and Z136.

- Z5 gave evidence that the call which he received was "an opinion poll, asking me things about my family". He was not asked about logging on Fraser Island or about Bennett/Lewis.

- Z13 said that he received a call shortly before he went to the court and was asked some questions about "tree logging" and that the caller said "we'd rather you didn't discuss this with anybody". Z13 replied that he would tell the Sheriff. However, there is no evidence from Green that he did this. Z13 gave evidence that he "felt that they might be trying to manipulate me in some way".

- The son of Z66 gave evidence that "around my birthday", which was 23 September 1991, he answered the phone at home and was asked what he thought of Wally Lewis but he "hung up pretty quickly".

- Z76 gave evidence of receiving a phone call in which the caller said he was conducting a public opinion poll, but he immediately terminated the call.

- The mother of Z112 gave evidence that in her case the caller was a female who said words to the effect "I am conducting a survey on the logging of Fraser Island. Would you mind answering some questions?", to which the mother of Z112 replied "No, I don't want to conduct a survey. All I will say is that I'm against it".

- Z136 gave evidence that he received a call in which he was asked if he "thought the Labor Party was doing a good job with unemployment" and "that sort of thing". He was asked questions about logging Fraser Island and the Wet Tropics. He also recalls a reference to Wayne Bennett but then decided to "give him the brush-off".

Therefore, it appears that of the 330 persons interviewed in relation to Panel Z (163 jurors and 167 family members), only three are possibly persons who received a relevant call on a relevant subject at the appropriate time from a male caller. These are Z13, the son of Z66 and Z136. The position in respect of Z13 is ambiguous. To the Commission interviewers he said that he vaguely remembered questions about logging. In evidence he was much more definite to the extent that he believed some person was trying to manipulate him in some way and that he reported the matter to the Sheriff. This is not Green's recollection. Z136 introduces also questions of a purely political nature, a matter which Walliss specifically denies.

In respect of Panel P, of the 65 jurors and 76 family members interviewed, three persons, two jurors and one family member, reported receiving a phone call. The juror (P20) reported receiving a call asking his views of "Lewis joining Seagulls". P65 was phoned on two occasions. On each occasion he was asked questions about Wally Lewis. The mother of P70 believes she received a relevant phone call also.

In respect of Panel K, of the 71 jurors and 99 family members interviewed, one family member was questioned about voting preferences.

It has to be remembered that Walliss never alleged that his work included Panels P and K.

Evidence was given to the inquiry by one Colin Douglas Caust, the Queensland Manager of Roy Morgan Research Centre, whose business is market research. He gave evidence that in August/September 1991, his firm was conducting a large variety of surveys in respect of the following:

> *"Car tyres, car dealers, anti-smoking program evaluation, youth anti-smoking and drugs, awareness of health warnings, road safety, environmental issues, newspaper readership, cigarette launch, financial decisions, four-wheel car buyers, drink-driving and household insurance and we also conduct a weekly omnibus survey which carries a very large range of topics and that also includes the political questions which - - -*
>
> *What is an omnibus survey?---An omnibus survey is a survey with - that carries a whole range of different topics. It is not dedicated to one particular topic.*
>
> *I see, but we are still talking about telephone calls?--- That particular survey is done door-to-door, the omnibus survey.*
>
> *Oh right. I am only interested in telephone calls?--- Right.*
>
> *Have you given me then the whole gamut of topics?--- Yes.*
>
> *For September and August 1991?---Yes."*

He also gave evidence that at the same time there were 12 or 15 firms doing the same kind of business. From common experience one knows that it is not unusual to receive an unsolicited phone call from a stranger asking questions on a variety of matters. However, the question as to what Walliss may have done, if he did anything at all, can best be assessed in the light of the Sheriff's inquiries and those conducted by the Commission. Both the questioning of the jury Panel Z by the Sheriff and by experienced police officers on behalf of the Commission was specific and these inquiries were made of a specific group of people at a time when the subject matter of the inquiries had received considerable publicity. The lack of relevant response therefore cannot be excused on the basis of mere forgetfulness.

After giving the matter long and close consideration I have come to the following conclusions.

I am not prepared to find on the balance of probabilities that Walliss surveyed or polled 25 to 50 people on Panel Z in the manner and with respect to the subject matter of which he gave evidence.

If Walliss did approach any of the persons on Panel Z I am satisfied that it is more probable than not that such polling was token only and involved only a very few people – less than five.

I also make the following findings:

(a) Butler knew of and was at all material times aware of the fact that Walliss either did no polling or at best engaged in token polling only;

(b) O'Brien knew of and was at all material times aware of the fact that Walliss either did no polling or at best engaged in token polling only;

(c) It was O'Brien to whom Butler assigned the task of making such useful jury inquiries as were in fact made for the purposes of the trial. The inquiries made by O'Brien in respect of Panel Z will be dealt with later.

(d) At all material times Butler well knew, as did O'Brien, that Walliss not only had no useful information concerning any juror on Panel Z, but also that he, Walliss, had not seriously attempted to obtain such information by phoning jurors, or alternatively, that at best, Walliss had undertaken token polling only.

In making the above findings I have taken into account the fact that it was Butler who had first discussed jury vetting with Walliss; it was Butler to whom Walliss looked for instructions; it was Butler who had arranged for Walliss to receive a jury list; it was with Butler that Walliss had discussed fees; it was Butler who had the longest and most intimate involvement in the preparation of matters for trial; it was Butler only whom Walliss could have identified as the person to whom he was immediately answerable.

In my view it is inconceivable that Butler, having allegedly set Walliss to work on a task which, on the evidence, and which common sense suggests

must have involved Butler's knowing that Walliss would need to contact jurors personally if the suggested process was to be effective, did not maintain at all material times a full awareness of what Walliss was doing.

Equally in respect of O'Brien; he was supposed to have been the recipient of Walliss' faxed information which was said to have been progressively forwarded by him to O'Brien; this was also Butler's expectation; this was the arrangement proposed by Butler whereby O'Brien would co-ordinate his own inquiries with those made by Walliss; Walliss alleged that he forwarded material to O'Brien by facsimile transmission; O'Brien says that he received it; O'Brien, as will be seen, told Greenwood QC that Walliss had exhaustively polled Panel Z; O'Brien had documents in his possession on the afternoon of Saturday, 21 September 1991 which he led Greenwood QC to believe evidenced work done by Walliss. However, if Walliss had in fact polled no member of Panel Z or a few at best, as the independent evidence establishes, then O'Brien could not have received from Walliss detailed documentation supporting the claim that Walliss had exhaustively polled Panel Z.

The evidence satisfies me that Butler and O'Brien were more actively concerned than any other persons with the jury vetting of Panel Z to the extent that it occurred. As will be shown later, the information available in respect of Panel Z by the morning of 23 September 1991 was paltry.

These matters will be dealt with more fully in later sections of this Report.

I am also satisfied of these facts in accordance with the proper standard of proof.

(a) At no time before the application to the trial Judge at 9.15am did Greenwood QC confer with Walliss to ascertain the nature and extent of the polling which Walliss was alleged by O'Brien to have done.

(b) O'Brien did not either on Saturday, 21 September 1991, or at any other material time, disclose to Greenwood QC or to any member of the defence team any documents from which the nature and extent of Walliss' alleged polling could be determined.

I am not satisfied that at any time prior to 9.15am on Monday, 23 September 1991 O'Brien received from Walliss any documents whether by

facsimile transmission or otherwise which evidenced the nature and extent of the work allegedly performed by Walliss in respect of Panel Z.

I am satisfied that in the form in which the application was made to the trial Judge to dismiss Panel Z from service in the Bjelke–Petersen trial, His Honour was misled into believing that whatever "the problem" was, it could only be properly dealt with by dismissing the whole of Panel Z from service in the Bjelke–Petersen trial.

Whether the trial Judge was deliberately and consciously misled by Counsel is a matter which requires further analysis.

My purpose in this chapter has been to focus only on the issues of fact concerning Walliss' alleged polling of Panel Z. My conclusion is that Panel Z was not polled by him; that 25 to 50 persons were not polled by him as he alleged and that if any contact was made with individual jurors or members of their family by Walliss prior to the afternoon of Saturday, 21 September 1991, that contact was with fewer than five persons, the identity of whom was known by him, Butler, and O'Brien either of whom was in a position to disclose to Greenwood QC, if asked, the names of those persons, the nature of the contact and the result of it.

CHAPTER 5

THE RELEVANT EVENTS PRE-TRIAL

5.1 The Application to Discharge Panel Z

By the time this application was made I repeat my finding that Walliss had not polled Panel Z, or at best, had canvassed only a very few members of the panel; that that fact was known to Butler who was for all practical purposes in control of the preparation for trial, including matters relevant to jury selection; the position was also known to O'Brien. O'Brien stated, falsely in my view, that Walliss had forwarded to him the results of his polling by facsimile transmission. It is apparent from what has gone before that Walliss was not and could not have been in possession of any material which could have been transmitted to O'Brien, whether by facsimile or otherwise. In this context, it is also significant that in his statement, (exhibit number 15), prepared in consultation with his solicitor, Mr Patrick Nolan of Gilshenan and Luton, a well known and highly regarded firm of solicitors specialising in all areas of criminal practice, Greenwood QC stated that in his conference with O'Brien on the afternoon of Saturday, 21 September 1991, "it was quite apparent...that quite an exhaustive poll had been done by this person Walliss". Greenwood QC could only have obtained that impression from O'Brien. The conference lasted only a short time. Present were Greenwood QC, Gundelach and O'Brien, and it was held in a secluded area of a bar facility at the Gateway Hotel. If Greenwood QC's statement is accepted as credible, then the conclusion is inevitable that O'Brien deliberately misled Greenwood QC to the belief that Walliss had conducted "quite an exhaustive poll" of Panel Z. That was a demonstrably false statement. At the same time O'Brien made it also apparent to Greenwood QC that "little had been done" by O'Brien. The purpose of the conference was for Greenwood QC to know what the state of the information in the possession of the defence was concerning the jurors on Panel Z. I will later examine what in fact O'Brien had done in respect of Panel Z. For the present, it is necessary to focus on what O'Brien told Greenwood QC on the Saturday afternoon. In whatever form it was put by O'Brien, it is clear from his statement that Greenwood QC was in no doubt in his mind that Walliss had conducted a "quite exhaustive poll". If Greenwood QC's statement is true it is again beyond question that he was misled – by O'Brien, who clearly purported to satisfy Greenwood QC's thirst for information concerning jurors on Panel Z. If Walliss had done nothing or practically nothing of relevance he had nothing concerning Panel Z to give to O'Brien or to Butler, yet O'Brien succeeded in creating

in Greenwood QC's mind the impression that Walliss' efforts had been "exhaustive". In short, there was no information of substance to be committed to writing which could have been the subject of facsimile transmission from Walliss to O'Brien. At the same time, given Butler's intense interest and involvement in all aspects of the preparation for trial, it is inconceivable that he at any material time was not at least as well-informed as O'Brien. It was shortly to emerge that Butler in conversation with Greenwood QC said nothing to dispel the wholly erroneous notion which O'Brien had successfully planted in Greenwood QC's mind. It is preferable that I deal with that in much greater detail later.

My purpose here is only to set the background, or some of it, against which Greenwood QC pursued his application at 9.15am on the Monday morning, 23 September 1991, on the basis of the major default allegedly committed by Walliss in conducting an apparently exhaustive poll of Panel Z. I need to return to Greenwood QC's submissions.

However, before I do that it is necessary to clarify the position in relation to Gundelach.

Gundelach was not present when O'Brien disclosed to Greenwood QC what Walliss had allegedly done. He was at the bar buying drinks for the three of them. Upon his return Greenwood QC said that he asked O'Brien to repeat to Gundelach what he had said to Greenwood QC. The meeting is said to have broken up shortly afterwards by which time Butler had arrived. O'Brien left and Greenwood QC, Gundelach and Butler went to Greenwood QC's room in the hotel where Greenwood QC engaged, according to Gundelach, in an angry ranting like soliloquy, which Butler and Gundelach virtually heard in silence.

By the time the application was made on Monday morning, Gundelach well knew that Greenwood QC was concerned. The latter seems not to have discussed the issue at length with Gundelach, his junior, although he also was experienced in the practice of the criminal law. Gundelach knew that the application was to be made but he had also assumed that Greenwood QC proposed to first inform Cowdery QC and Needham of the reasons for the application, and then later the trial Judge. Gundelach was plainly surprised that his leader had not informed Crown Counsel beforehand and that he had deliberately and consciously refrained from telling the trial Judge of the factual basis for the application. Gundelach also made it clear that he could perceive no objection to informing the prosecution and certainly the trial Judge.

It is therefore necessary to return to Greenwood QC's submissions. He had on the previous night received formal instructions from Mead to pursue the application. He had also informed himself by reading the law list in the Courier Mail on the morning of Monday, 21 September, when he learned that the Deputy Sheriff, Hansen, had also arranged the attendance of Panels P and L. It was Greenwood QC's apparent purpose to have Panel Z dismissed and to have "the other panels kept in the precincts of the court after they do their other duties" so that they could be "swapped" over and thereby exchange the roles designed for each on that day. The only proviso asserted by Greenwood QC was that the trial be adjourned to Wednesday so that inquiries could be made in respect of the substituted jurors.

It is obvious that Greenwood QC had informed himself from the law list and had considered the options.

It has been noted above that Greenwood QC's submissions opened with the statement that the matter of concern had been "brought to the attention of my instructing solicitor" who had given him certain instructions. In fact, Mead was the last to know. It was Greenwood QC who was first informed of "the problem" by O'Brien. By the time Greenwood QC informed Mead, he, Greenwood QC, had in apparent anger, discussed the matter with Gundelach and Butler, but more importantly, on the next morning with Macgroarty whose counsel he had sought and, according to Greenwood QC, the course he was about to pursue was, as he told the trial Judge, "the only course I could properly follow". Mead's instructions were a mere formality. Given Mead's marginal involvement in the case and his inexperience, it is wholly unlikely that Mead was prone to instruct Greenwood QC in any aggressive way. Mead's sole task could only have been to seek the instructions of the client, at the same time conveying to him the apparently strong view of Greenwood QC. There is no evidence of Greenwood QC having conferred with the accused on the Sunday evening. One might reasonably expect that Butler would have kept the client well-informed.

It is surprising that senior Counsel did not with clearer and more accurate particularity inform the trial Judge of the circumstances whereby he himself and Mead had become aware of the existence of the supposed "problem".

I am satisfied that Greenwood QC conferred with Macgroarty on Sunday morning and as a result of that was confirmed in his view that he should apply for the discharge of Panel Z subject, of course, to the client's

instructions. Furthermore, it should be noted that Greenwood QC revealed expressly in the course of his submissions to the trial Judge that "what I have placed before you has, as you probably observed, been drafted by me in writing before I put it before you and I would say that I would prefer to not go any further unless there is some good and compelling reason for me to do so".

One might fairly comment that it should not be necessary for any senior Counsel of experience, for the purpose of a submission such as was made by him, to have to draft its terms in writing first and then read it to the court. On the other hand, it may be the approach of a particularly meticulous and careful Counsel. At the same time, it is not hard to recognise that there was a "good and compelling reason", indeed more than one reason, for Counsel to be more fulsome in properly informing the court of the relevant facts.

It is necessary for me to examine in close detail the submissions of senior Counsel because one of the primary questions in the inquiry is whether senior Counsel provided the trial Judge with false and misleading information in connection with the defence application to discharge Panel Z. To the extent that Greenwood QC did on the morning of Tuesday, 24 September 1991, inform the trial Judge that the application had been rendered necessary because of Walliss' improper polling of Panel Z he provided to the trial Judge information which was false and misleading. The real question is whether he did this deliberately and consciously or whether he himself having first been provided with false and misleading information was doing no more than passing on the same to the trial Judge.

In order to assist the resolution of this issue there are four matters related to and arising out of the submissions that need to be analysed. At the same time I am conscious of the fact that this might be seen to be an unfair and unduly pedantic approach. I am satisfied that it is not because it is based on Counsel's own statements to the trial Judge. I have already referred to his careful approach in writing down his submissions, but more importantly, senior Counsel said to His Honour:

> *"I can assure Your Honour that I would not be asking for a step like this to be taken unless I thought it thoroughly through and believed it to be necessary in the interests of the proper progress of justice."*

One can therefore safely proceed on the basis that the statements Counsel made were not ill-considered and "off the cuff". Rather, they were "thoroughly thought through" and committed to writing.

The first matter of apparent concern is that Counsel made this somewhat extraordinary application before properly informing himself of the facts. It is clear that he pursued this unusual course which he "believed to be necessary in the interests of the proper progress of justice" on the basis only of what he had been told by O'Brien on the Saturday afternoon. There is no evidence that he sought to better inform himself between then and when he ultimately spoke to Mead on Sunday afternoon. In particular, he neither sought to confer with Walliss himself nor to examine any of the documents which O'Brien appeared to have in his possession at the conference. Nothing was volunteered by O'Brien other than his statement that Walliss had obtained information by conducting an apparently exhaustive poll. That seems to have been the basis for Greenwood QC's expressed concern and apparent anger and he failed to confer with Walliss.

It cannot be said that Walliss was unavailable because reference to the Telecom charging records discloses that at 4.23pm on Saturday, 21 September 1991, Walliss by using his mobile phone spoke to Butler on his mobile phone for 3 minutes and 31 seconds. The content of that conversation is not known. The fact is, however, that it took place at a time when Butler was either at the Gateway Hotel or en route there. Greenwood QC estimated that his discussions with O'Brien commenced at about 5.00pm. Had he chosen to do so it is likely that Butler could easily have arranged for Greenwood QC to speak to Walliss.

Greenwood QC's explanation for not seeking to confer with Walliss is the logical one that Mead instructed him that he, Mead, had spoken to Walliss late on Sunday and confirmed that Walliss had made personal contact with members of the jury Panel Z.

In this context it is relevant to notice the exchange between Greenwood QC and Cowdery QC in the course of the submissions:

> *"MR COWDERY: Yes, the identity of the panel is of no concern to us at all. Might I raise this: is the difficulty such that the problem could be overcome by excusing certain members of the panel rather than the whole panel?*
>
> *MR GREENWOOD: The answer to the question is no."*

In the light of subsequent events Cowdery's question was a very pertinent one and Greenwood's unequivocal reply might have been different were he properly informed.

However, there is a totally unacceptable degree of hindsight in that view and it would be unfair to be critical of Greenwood QC on that account.

Having given the matter due weight, I have concluded that whilst a conference with Walliss may have elucidated the position, there is a strong prospect that it may not have, and Greenwood QC was in no position to make his own investigations. In the circumstances, he cannot be criticised for relying on O'Brien whom he obviously trusted and/or Mead. There was, in my view, no sound basis for his distrusting Mead.

The second matter which has to be examined is Greenwood QC's considered decision to withhold from the trial Judge the facts as he understood them to be.

It will be recalled that the trial Judge in the Herscu case had been informed of the jury's complaint and he had immediately discharged the jury. One does not know what the response of the trial Judge in this case may have been. It is very unlikely that it would have been any different. Once the trial Judge accepted the statement that polling had occurred, and in the circumstances His Honour likewise would have no reason not to accept that fact, it is probable that Panel Z would have been dismissed in any event. Indeed, if it was the mind of O'Brien and Butler to mislead Greenwood QC to the extent that he would be put in the position of making a false statement to the court, their expectations must also have been, and could only have been, that Panel Z was likely to be dismissed. It was therefore unlikely that any order other than dismissal of Panel Z would have been made in any event.

The facts of the Herscu case were different. There the complaint had emanated from the jury room. Here the concern lay only with those at the one end of the Bar table. However, it is unlikely that the result would have been any different had Greenwood QC disclosed the reason for the application.

On the next day when Greenwood QC was persuaded by the trial Judge to disclose the basis for the application, Cowdery QC conceded readily that the proper order had in the circumstances been made. Nothing was said by the trial Judge which would indicate that his order would have been

different had he been informed on Monday, 23 September of the factual basis for the application.

Therefore, there was no apparent reason for withholding the information and every reason for disclosing it to ensure the dismissal of Panel Z.

However, it may be that Greenwood QC was being ultra–cautious and was not prepared to concede in his own mind that the trial Judge would dismiss the jury once he had informed him of what O'Brien had told him. Greenwood QC's major concern, according to his evidence, was to ensure that disclosure did not prejudice his client.

According to his evidence, Greenwood QC reasoned that if Panel Z were retained, it was a possibility that jurors, who may have been polled, might discuss that fact among themselves in the jury room, wrongly attribute that to the actions of the accused and therefore adopt an attitude of antagonism towards the accused. In short, Greenwood QC was afraid of publicity that polling had occurred of which the jury might become aware. This, however, totally overlooks the fact that the application was one made in the privacy of the Judge's Chambers and there was no reasonable likelihood of the details of the application reaching the jury.

Accordingly, one could be forgiven for thinking that frank disclosure was more likely to achieve the object of the application than non–disclosure. Perhaps the latter was intended to give to the matter a sense of mystery and a perceived gravity which it did not deserve, but which it was thought was more likely to ensure success. Gundelach clearly had no concern about disclosure and rightly so. Perhaps it was only a matter of approach about which individual minds could differ and therefore no adverse inference should be drawn against Greenwood QC for his failure to disclose the facts as he understood them to be. The decision to withhold the facts given to Greenwood QC was apparently supported by Macgroarty or at least arrived at after consultation with him. That only makes the situation more curious. Two experienced criminal Counsel, Greenwood QC and Macgroarty, after an apparently detailed consultation concluded that the Judge ought not to be told but should be put in the position of having to accept Counsel's assurance on the basis that the peculiarities of the situation were such that Counsel's duty to the court was overridden by his duty to his client.

I find that quite remarkable. Certainly it succeeded in creating an atmosphere of mystery, even one of grave intrigue. Perhaps that was

intended as the preferred forensic tactic, but in my view, it was wholly unsupportable in terms of principle. Moreover, it was unnecessary. Full disclosure would not only have satisfied Counsel's duty to the court it would undoubtedly have achieved the desired result. One with any experience in such matters could not seriously contemplate a trial Judge in a criminal case insisting on using a jury the members of which he had been told had received personal approaches of the kind allegedly undertaken by Walliss. O'Brien's disclosure to Greenwood QC had immediately raised his anger to the point that he could see that there was no real alternative to dismissing Panel Z. It is unlikely that the response of the trial Judge would have been different. As pointed out, Cowdery QC quickly recognised that the proper order had been made once he learned of the alleged facts. He did not demur for a moment. Again, it can be said with confidence that his response would have been the same had he and Needham been told beforehand. They, however, were likewise kept in a state of ignorance despite Needham's earlier request for the basis for the proposed pre-trial application. I am in no doubt that had Cowdery QC and Needham been told by Greenwood QC, before the application, what it was which was alleged to have been done by Walliss, the Crown would have readily agreed to the discharge of Panel Z.

Therefore, in my view, there was absolutely no valid reason for Greenwood QC's withholding the relevant information when disclosure to the Crown and the trial Judge would have readily achieved the desired result. One can only wonder how thoroughly the matter had in fact been thought out.

The question is whether an adverse inference should be drawn against Greenwood QC by reason of his non-disclosure on the basis that he may have been a willing tool of O'Brien and Butler in the use of information which was known to be false and misleading.

I am comfortably satisfied that no such inference should be drawn against Greenwood QC. His approach can readily be explained as a matter within his professional judgment however idiosyncratic it may appear. I am in no doubt that his dominant concern was for his client and in some way, which is not readily explicable, it was thought that non-disclosure was the best course in case the application failed and disclosure was made and the disclosed information somehow became public. If, on the other hand, the concern was that in the jury room individual jurors might accidentally discover the fact that they had been polled, in the course of casual conversation, then it was irrelevant whether disclosure was made to the Judge or not.

Therefore, the failure by Greenwood QC to disclose to the trial Judge what he had been told does not support any adverse inference against him.

Thirdly, Greenwood QC's insistence that his duty to the court did not require him to disclose what he had been told might, superficially, be seen to provide cover for some more sinister motive. I am satisfied, however, that this was not so. As has been pointed out above, it was entirely consistent with his duty to the court for Greenwood QC to disclose what he had been told. There were other matters as well which, if properly considered, would have required Counsel to make a disclosure in accordance with his duty.

Panel Z, it will be recalled, was established to commence jury duty on 16 September 1991 with the trial of police officer Yorke on corruption charges. The jury for that trial had by 23 September 1991 already been selected and on the latter date was still empanelled. Therefore, any concern which Greenwood QC had in respect of Panel Z's use in the Bjelke–Petersen trial applied equally to its use in Yorke's trial and moreover, to its use for any other trial committed to it in the event that other panels were substituted for Panel Z in the Bjelke–Petersen trial. Greenwood QC's submission to the trial Judge expressly countenanced its use for trials in the event that it was discharged from the Bjelke–Petersen trial.

Therefore, if Panel Z had been polled by some form of improper personal contact, its use in any trial was objectionable. The concern which Greenwood QC harboured in respect of his client Bjelke–Petersen might equally have extended to any other accused to be tried by members of Panel Z. Furthermore, Yorke's trial was still in progress. To the knowledge of Greenwood QC it was at least likely that the jurors in Yorke's trial had also been polled. If, as Greenwood QC surmised, the worst were to happen and those jurors were to become aware of the fact of polling, Yorke was likely to be prejudiced. He was after all, a relatively high–profile police officer being tried for corruption. Greenwood QC's duty to the court of disclosure might therefore have properly led to the discharge of Yorke's jury.

In fact, there was no risk of prejudice to Yorke or to any other accused because of my finding that it is probable that none of them were polled. But Greenwood QC was not to know that.

Greenwood QC readily conceded that he had not thought of the possibility of prejudice to other accused on account of Walliss' alleged polling. I accept that, and I am satisfied that had he considered the matter to that extent he would have acted in accordance with his duty to the court to have Panel Z discharged not only from service in the Bjelke-Petersen trial but in the trial of Yorke and in any trial for which the Sheriff might contemplate the use of Panel Z.

If Panel Z had been polled by personal contact by Walliss or any other person the panel was thoroughly unsuitable for use in any criminal trial and one could not seriously contemplate any trial Judge in a criminal trial insisting upon its being used.

I am satisfied that Greenwood QC believed erroneously that it was consistent with his duty to the court to withhold the relevant information from the trial Judge. However, no adverse inference should be drawn against him on that account.

Finally, in explaining to the trial Judge his view that his duty to his client "tends positively" against his disclosure of the material Greenwood QC had made a distorted assessment of where his relative duties lay. That, however, is not a sufficient basis to support an adverse inference against him that he had improperly misled the trial Judge.

I am in no doubt that Greenwood QC was at all times conscious of the heavy professional burden involved in his defending Sir Johannes Bjelke-Petersen. Needham considered the case for the Crown to be a strong one, but Greenwood's difficult professional task was compounded by the fact that he was instructed by the totally inexperienced Mead, a matter severely aggravated by the complicity and irritating intrusiveness of the obsessional Butler. On the other hand, Gundelach had a significant contribution to make, but apparently chose to remain in the shadow of his more experienced leader.

I will return to the question of Greenwood QC's involvement or otherwise in relevant matters prior to 23 September 1991 at the conclusion of this chapter.

5.2 The Decision to use Panels P and K

The Deputy Sheriff, Hansen, had arranged the attendance of Panels P and L for Monday, 23 September 1991, in addition to Panel Z. Once the trial Judge had agreed to discharge Panel Z from service in the Bjelke-Petersen trial and adjourn the matter to Wednesday, 25 September, there was resultant chaos for the administrative arrangements which Hansen had in place for that day. His expectation was that Panels P and L would service the other requirements of the District Court criminal courts for that day.

Once it was decided not to use Panel Z for the Bjelke-Petersen trial the position was aggravated by the fact that Panel Z was an extra large panel specifically established for particular trials which were expected to last for long periods. Greenwood QC had submitted that it was merely a matter for the jury panels present on that day to exchange "roles". But it was not as simple as that. If Panel Z was to be retained at the same numerical strength it was wasteful in terms of resources to use it for the every day business of the criminal courts. Besides, if P and L or any other combination of panels was to be used for the Bjelke-Petersen trial, the fact was that those panels were in their last week of jury service and the use of one or other of them for the Bjelke-Petersen trial would extend their service for some additional weeks. The fact is that the decision not to use Panel Z for the Bjelke-Petersen trial threw the court's administrative arrangements into confusion.

Greenwood QC had sought two things in his applications. Firstly, the discharge of Panel Z and the possible substitution of P and L, the other two panels which had been brought in on that Monday; and secondly, that the trial be adjourned to Wednesday, 25 September, to enable the defence to make inquiries concerning the substitute jurors.

Having decided to abandon Panel Z, the trial Judge chose to confer with Hansen before confirming what was to happen in respect of substitute panels. I am satisfied that this was Hansen's first involvement in the matter on Monday, 23 September. He gave evidence of being in attendance from the beginning. This was not so. I am satisfied that he has confused his attendance when hearing Greenwood QC's submissions on the Monday with his attendance on the Tuesday when Greenwood QC detailed his reasons for the application at the request of the trial Judge. Green was also present on the Tuesday from the beginning. There was no reason for Hansen to be present on Monday from the beginning because no one else,

not even defence Counsel, and certainly not the trial Judge, was aware of Greenwood's intention until he commenced his submissions.

As the transcript discloses, Hansen was summonsed by the trial Judge in the course of the submissions. I am satisfied that nothing turns on Hansen's faulty recollection.

I am also satisfied that Hansen and the trial Judge discussed the most appropriate way of providing substitute panels before a final decision was made. Much of the discussion which also included defence Counsel appears from the transcript. A mere reading of it makes little sense unless one knows the administrative details which were then known only to Hansen. The size of Panel Z was capable of being reduced for use in other courts. That was done. Panel P had 60 names on it on 23 September 1991, Panel L consisted of 56 names; Panel K consisted of 45 names and Panel Q consisted of 44 names.

Hansen, I am satisfied, was committed to providing for the Bjelke-Petersen trial, the largest number of jurors which could in practical terms be made available. He ultimately chose to reduce Panel Z for use in other trials and to use Panels P and K for the Bjelke-Petersen trial. He gave evidence that he "pretty well decided on numbers, that the biggest two panels that I could combine would make up 105" (Panel P consisting of 60 and Panel K consisting of 45). In fact, the largest combination would have been Panel P (60) and Panel L (56) totalling 116, and they were the panels then present at the court on Monday. Hansen did not make it clear why Panel K was substituted for Panel L. In any event it is clear that Panel P had the largest number of available jurors, apart from Panel Z, namely 60. I am satisfied that he decided to commit Panel P to the Bjelke-Petersen trial purely for that reason. It is probable that the administrative arrangements of the court were best met by using Panel K (45) rather than Panel L (56). Hansen was, as I have said, the one person with the relevant information. I am satisfied that the trial Judge adopted the suggested arrangement advanced by Hansen rather than made the choice himself.

In short, Hansen knowing best the requirements of the court for the remainder of that week suggested Panel P and Panel K in combination for the Bjelke-Petersen trial, then expected to begin on Wednesday. This suggestion met with the approval of the trial Judge who adopted it. Therefore, by the time the parties dispersed from the Judge's Chambers, Hansen in particular and probably the trial Judge knew that Panels P and K would be used. I am satisfied that neither Gundelach nor Needham knew

which panels were to be used and gave evidence accordingly. I am satisfied that Greenwood QC also was probably unaware of the exact identity of the substitute panels. I should say that the identity of the panels was a matter of indifference to the Crown. Mead was present at the hearing of this application at which substitute panels were discussed. His notes on file are clearly consistent with his being there. I am satisfied that Butler was not present, nor was O'Brien.

Therefore, I am satisfied, and I so find, that at the conclusion of the application:

(a) it had been decided to dismiss Panel Z from the Bjelke-Petersen trial;

(b) the trial had been adjourned to 10.00am on Wednesday, 25 September;

(c) Hansen had decided with the trial Judge's concurrence to use Panels P and K;

(d) Counsel for the Crown and the defence did not specifically know the identity of the particular substitute panels.

In particular, I am satisfied that Panel P was included by Hansen because it was numerically the largest of the other available panels. Shaw, it will be recalled, was a member of this panel.

5.3 The Application by the Crown - The Afternoon of 23 September 1991

Reference has been made in Chapter 2.3 to the application by the Crown at 3.50pm on 23 September 1991 to commence the trial earlier than 10.00am on Wednesday, 25 September. The trial Judge then decided it should commence at 2.30pm on Tuesday, 24 September 1991. This selection was plainly designed to accommodate the Crown's concern about the availability of Mr Sng and to give the defence a reasonable time to make inquiries concerning jurors on Panels P and K, the substitute panels selected earlier on that day.

Before referring to what was said in the afternoon application, there are some other relevant matters of fact to examine.

It is not clear as to the precise time at which the defence team obtained Panels P and K from the Sheriff's Office. By that I do not intend to imply that nothing was known nor could have been known by them prior to the morning of Monday, 23 September, of the composition of the other panels. If attention is confined to Panel P, of which Shaw was a member, that panel had been available for not less than five days prior to 2 September 1991, which was the first day on which it was able to be used and at any time subsequent to its first becoming available. It was available from a variety of sources.

Firstly, it had been posted up in a public place in the court building and was available for perusal by any interested observer.

Secondly, it was available through the office of the Director of Prosecutions whose prosecutors would need to have access to it from time to time, during the sittings, for the various trials in which it might be used. It should not be thought that this was not an available source of information for the defence team in the Bjelke–Petersen trial. As this Report will later discuss, it is beyond question that O'Brien had access prior to 1.30pm on 24 September 1991 to the criminal history and traffic offence history of the jurors on Panels P and K. The only source for this information which was reasonably available to him was some unidentified person in the office of the Director of Prosecutions. The reason why this is so will also be dealt with later.

If the source was able to supply him with this sensitive material, O'Brien obviously had access to a broader range of jury information including the composition of each panel, including Panel P, which was then in use in the District Court from 2 September 1991.

Thirdly, another available source of information was the Office of the Public Defender or any of the other defence lawyers who had been engaged in trials in the District Court since 2 September 1991. In particular, the Public Defender's Office could reasonably be expected to have relevant details concerning any of the other panels, including Panel P then in use, which the defence team in the Bjelke–Petersen trial might wish to secure.

Fourthly, the decision to call in Panels P and L for Monday, 23 September, was known on Friday, 20 September 1991, and that fact would have been known to any inquirer to the telephone number for the recorded information which number was available in the public telephone directory.

However, the evidence as to when Mead's office received Panels P and K from the Sheriff's Office is imprecise.

Hansen gave evidence that at the conclusion of the hearing before the trial Judge he instructed his staff to print out from the computer the Panel P and K lists so that they could be made available to the solicitors and the Special Prosecutor in substitution for Panel Z. The Sheriff's receipt book records Mead's office purchasing the Panel Z list on 11 September 1991. Hansen said that in these circumstances, that is, where the panels were changed and one party had already paid for one list the substitute panel was provided free of charge. He gave that explanation for the fact that there is no evidence in the receipt book that Mead's office paid on receipt for Panels P and K on the morning of 23 September 1991 after 10.00am.

It was a matter of some significance to the inquiry to ascertain whether Mead's office paid for Panels P and K to evidence the receipt of those panels on that day rather than on an earlier date because if there was no evidence of payment it could be inferred that the solicitors did not receive those panels on that day. The further inference may then have become available that they were not received on that day because they were in possession of those panels prior to 23 September 1991.

The correctness of Hansen's explanation that Panels P and K would have been supplied free of charge in the circumstances was somewhat shaken by the disclosure, apparent on the face of the receipt book, that another solicitor, Mr Russo, who was inconvenienced by these changed arrangements was dealt with differently.

The trial of Mr Russo's client on Monday, 23 September 1991 was listed to involve Panel P. His was the first receipt issued on that morning when he purchased a copy of Panel P. After the decision to discard Panel Z in the Bjelke-Petersen trial and allocate Panel P to it for the Wednesday another panel was assigned to the trial of Mr Russo's client. The receipt book establishes that he, Mr Russo, on the same morning thereupon obtained the substitute panel for his case and was charged the usual fee.

Either Mead's office did not receive Panels P and K from the Sheriff's Office on that morning or there was an innocent administrative error in charging Mr Russo twice, both for Panel P and the substituted panel.

I am satisfied on the basis of other material to be referred to later, which was unearthed by the diligent efforts of Counsel Assisting me, that it is

probable that Mead or one of his staff did obtain Panels P and K from the Sheriff's Office on the morning of 23 September. In the result, Mr Russo was disadvantaged by having to pay twice, whereas Mead's office was only required to pay once.

Mead gave evidence that his first recollection was that he had obtained Panels P and K after the hearing from the Sheriff's Office and that he had handed the documents to O'Brien at the court. He also said that his secretary's recollection is that the documents were obtained by a junior staff member who had been dispatched from the office for that specific purpose.

It is necessary to consider O'Brien's evidence concerning his receipt of the substitute Panels P and K on Monday after the conclusion of the hearing before Judge Helman. He gave this evidence:

> *"All right. Well, at some time that morning, you learned Judge Helman had agreed to change panels. Is that the case?---Yes.*
>
> *You do not remember where, or who told you?---No.*
>
> *In what circumstances?---No.*
>
> *Well, I take it you were then told to get on with the job again with the replacement panels?---Yes, when they became available. Yes.*
>
> *And who gave you these instructions?---Max Mead.*
>
> *Max Mead?---Yes.*
>
> *And somebody must have physically given you the replacement jury list?---Yes, he did that.*
>
> *And you remember this?---Yes, I remember that.*
>
> *Where did that happen?---At - outside Adrian Gundelach's chambers in the Inns of Court.*
>
> *And about what time of day is this?---Well, I would think about - you know, lunch-time.*

And you were asked – – –?–––Mid–day, 1 o'clock or – somewhere – approximately.

You were asked to do it all again?–––Yes."

I am satisfied that Mead or some person from his office obtained the Panels P and K from the Sheriff's Office at approximately mid–morning and then gave the same to O'Brien later on that day. The evidence suggests that this happened at about "mid–day, 1 o'clock". I am not to be taken as saying that this was the first time that O'Brien had seen these panels. Whether that was so or not requires further detailed analysis. It is O'Brien's evidence that it was quite late on the morning of Monday, 23 September 1991 when he first received Panels P and K. It follows from that evidence that the information relevant to jury selection which O'Brien says he was able to marshall in respect of Panels P and K must have been collected between "mid–day, 1 o'clock" on Monday at the earliest and 1.30pm on Tuesday, at which time O'Brien asserted he gave the same to Butler.

As will be seen, the material given by O'Brien to Butler in respect of Panels P and K was quite voluminous and included even the criminal and traffic offence histories of the jurors. It will be contrasted with the paucity of information which was available by 9.00am on Monday, 23 September, in respect of Panel Z even though that panel had been in the possession of the defence since 11 September 1991.

It was against that background that the Crown sought an order late in the afternoon of Monday, 23 September 1991 for the trial to be brought forward to a time earlier than 10.00am Wednesday. The hearing commenced at 3.50pm. Some difficulty had been experienced in locating both defence Counsel earlier. The hearing concluded at 4.25pm when the trial Judge ordered that the trial commence at 2.30pm on Tuesday, 24 September 1991.

Cowdery QC had sought the hearing because of his concern that a Wednesday starting date might inconvenience a vital Crown witness to the extent that the witness may become unavailable if the hearing was prolonged unduly.

Greenwood QC responded that the defence needed the additional time "to carry out some quite legitimate matters which are necessary to the preparation of the defence case which have got to be concluded before the

jury is empanelled". He opposed the order sought by the Crown on the basis that "I can't say that we can be ready by 2.30 on Tuesday". There is no evidence to suggest that the preparation had not progressed to the stage where that was not possible, nor that he had instructions that that was so. That is not surprising because I am more than satisfied that Mead knew little of what was happening. By late on Monday afternoon the matters relevant to jury selection were firmly in the hands of Butler and O'Brien. Clearly, Greenwood QC's opposition to the Crown application was based on the mere proposition – "the more time the better" – and nothing else.

Cowdery QC not surprisingly contrasted the defence attitude on this application with that of the Crown earlier that day. This drew from the trial Judge this revealing response:

> *"Well, you understand I was put in the position of having to accept the assurance made to me about the matter..."*

He was referring to the form in which Greenwood QC had applied for the discharge of Panel Z; and again:

> *"His Honour: The only thing is the adjournment was sought and granted on the basis of your assurance Mr Greenwood this morning..."*

Finally, I should add one other statement by Greenwood QC in the course of this hearing:

> *"...the consideration of fact that I put to you in relation to the matter discussed in chambers this morning was consideration of fact directly within the knowledge of my instructing solicitor and I put it on that basis."*

Greenwood QC's persistent attribution to Mead of all of the relevant knowledge is curious but, so it seems to me, irrelevant for my purposes.

5.4 The Parties Assemble Once More – The Morning of 24 September 1991

The trial Judge was troubled that he may have "too readily agreed to the change in the panels" merely on an unsubstantiated assurance of Counsel.

He sought to know the reasons for the earlier application – reasons which might just as well have been given to His Honour at the time.

The transcript of what occurred is to be found in Chapter 2.

Having disclosed that he had given advice that "it would be of interest, although not of determinative interest, if any information could legitimately be brought to my attention in relation to the political affiliations of anybody who might be on the jury panel", Greenwood QC went on to disclose that "it came to his (instructing solicitor's) attention on Sunday that contrary to the types of guidelines he had laid down people engaged by him had gone further than he or I considered to be proper...".

That was hardly a true presentation of the position. The matter had come to Mead's attention on Sunday, but only because Greenwood QC had passed on the information which he himself had received from O'Brien on Saturday. Furthermore, it is fatuous to suggest that Mead had laid down guidelines. Greenwood QC himself had given advice in July which could not be construed as the formulation of guidelines. Indeed, there is no evidence that "guidelines" were laid down at all. Such instructions as were said to have been given to Walliss hardly fell into that category. Rather, the whole process was said to have originated in a casual discussion between Butler and Walliss which focussed on "reducing the list to manageable size". The presentation to the trial Judge had about it a much more formal quality – that Mead had "laid down" guidelines for Walliss, which the latter had breached, which breaches had been brought to Mead's attention "on Sunday" – hence the application. This was clearly designed to exculpate Mead and to isolate Walliss as the defaulter. Again, one can only wonder at Greenwood QC's insistence that the matter had come to light only on Sunday. It might be thought that Greenwood QC was intent on isolating himself from his dealings with O'Brien on the Saturday. My concern about O'Brien's involvement will emerge, if it has not already done so. However, it would be unfair to Greenwood QC to draw excessively upon what he said in the course of this submission. I am prepared to assume that his misstatements were purely accidental and unintended.

Having exposed his reasoning for the benefit of the trial Judge, Cowdery QC responded:

> *"...Might we take it that the matters that I have been referred to are relevant only to the individuals on Panel Z".*

To which Greenwood QC replied:

> *"Yes. That was one of my first questions. Otherwise we would have had to go the other way and scrap the whole thing."*

It appears, therefore, that Greenwood QC stated that his own queries had extended beyond Z. He was not asked, unfortunately, of whom he asked "one of my first questions" or when – presumably it was Mead. But why on Sunday would Greenwood QC have occasion to ask Mead or anybody else whether other panels had been polled or surveyed as well? Was it within his contemplation that pre-trial investigations concerning jury matters might have extended to the other available panels? Or was he only being unduly cautious? Regrettably, this matter was not pursued in evidence with him. He had stated to the trial Judge his reason for asking questions about the other panel – "otherwise we would have had to go the other way and scrap the whole thing", that is, asking for substitute panels for Panel Z would have been inappropriate and the trial would have had to be adjourned for some time. This response to Cowdery's question clearly indicates that Greenwood QC as one of his "first questions" had turned his mind to the other panels. It is difficult to understand why on Sunday he would need to have done this. His statement does not refer to the matter and it was not pursued with him in evidence.

In the circumstances therefore, I should adopt the view which is most favourable to him. I conclude that his pursuit of this matter, probably with Mead, was a measure of his generally cautious approach which, as has been said, is apparent in other matters.

5.5 The Selection of the Jury

Some features of the jury selection are referred to in Chapter 2.4.

Gundelach gave evidence that only shortly before 2.30pm on Tuesday – "within an hour or two" – he was instructed to "pick" the jury. His evidence continued:

> *"Well, what did you do about preparing yourself for that task?---Well, I then started making inquiries as to what was going on and what was being done. I knew Butler had gone away with Mead the day before to make inquiries. I*

think I rang Maxwell Mead and Young's office to look for them. I tried to contact Butler; he had a mobile phone. I couldn't. I think I spoke to a secretary in Maxwell Mead's office called Bernie, and I was told they were on their way to court, you know, they would be coming to court.

Well, when Mr Greenwood said, 'You can pick the jury', did you ask him for the material he had, he was going to use?---No, because the day before he said, 'You look after it'.

That did not mean picking the jury, you tell us?---No, that's right, but he said, 'You look after it'.

Look after the inquiries?---Yes. He was very – I said that he had his mind on other things. What had happened on the Saturday night had really thrown him. He was in a bit of a flap, and he was preparing a big case, probably the most important case he'd ever done, and I think perhaps the jury was the last thing on his mind at that stage.

All right, well, when you found the job was yours, you looked to the solicitors for the material rather than Mr Greenwood?---Yes.

And when did it reach your hands?---Somewhere between 2 and quarter past, as I recall.

And what did it consist of?---There was a folder, as I recall, with the clean sheets of P and K. I'm pretty sure they were all clean.

As it comes from the sheriff?---Yes.

Yes?---And then a – the typewritten piece here with the asterisk, 'yes', 'maybe yes', and that sort of thing. Comments."

As will appear later, the typewritten lists of Panels P and K, which were given to Gundelach, were prepared by O'Brien and contain copious assessments of individual jurors on those lists. The assessments ranged

from "Yes****", which indicated the most favourable assessment, to "No**", which indicated the least favourable. A variety of assessments lay between these two extremes.

As was pointed out in Chapter 2.4, Greenwood QC played no role, not even a consultative one, in the selection of the jury and appeared to take no interest in it. Shaw was selected as the first juror after Gundelach had challenged 20 to 25 jurors whose names were called before Shaw. Greenwood QC was asked:

> *"Were you surprised when he let Mr Shaw on to the jury?---Yes.*
>
> *Why?---Thought he was a bit young.*
>
> *Did you think it was a mistake at the time?---Not necessarily because I hadn't the information that he had but I – actually when – when he went on, my – I remember, as I say in my statement, reacting – well, he looks a bit young to me but then I thought perhaps he may very well be the person in whom – there was a suggestion that there was a young person on the jury but that they were believed to be acceptable because they came from a conservative family. And it did turn out to be him.*
>
> *MR CARTER: Well, you knew that before the jury was selected?---Yes. There was talk about that – there was talk about that, to my recollection, either immediately afterwards or immediately before. Now, I remember the reaction by me – he looks a bit young to me. But then, later on – certainly later on and it might've been before – my memory is not 100 per cent on this – that it turned out to be the chap in respect of whom we had had those instructions.*
>
> *I thought you said, when you thought he was young and then he got on, that then you thought, well he is probably the fellow who we have been told about who comes from a conservative family?---Yes.*
>
> *Well, is that what happened because that clearly suggests that you knew of this person before the jury was*

selected?---Yes. I can't remember, Commissioner, I'm sorry. The - - -

Well, the question really is, at the time that he did get on - - -?---Yes.

- - - your immediate reaction was, well, he seems a bit young to me?---Yes. But we did have - - -

Sorry. But then you went on to say:

And then I thought, oh well, he's probably the one who we know about or who we know comes from a conservative family.

?---Yes.

Now, I mean, just be fair to yourself, is that your recollection now - - -?---Yes.

- - - as to - your recollection now as to what happened?---Yes. I said that in my statement.

So that it follows from that necessarily, does not it, that you must have been told beforehand of the young fellow on the jury who comes from a conservative family?---Sure. That's - there's no doubt about that.

You were told before the jury was selected?---I - before the jury was selected?

Yes?---I rather think so, Commissioner, yes.

Well now, told by who?---I don't know.

When, where, in what circumstances, who was present, etcetera?---I'm not sure, Commissioner. I'm sorry. If - I rather think that we - that I knew from some source, and there was general discussion in the room near the - near the court, from some source, that there was a young person on the jury, was a student, but that something was known of the family and the - and the conservative background

phrase comes in. Now, my recollection is that it – it probably was then but, certainly, afterwards I had that information. And then that firmed up into – into National Party membership of the family or a member of the family.

I need to come back to it, Mr Greenwood, because it may be important and I would ask you to give me – to exhaust your recollection on the point. That is why I asked you before. Did you know before the jury selection process started that there was a young man on the jury, a student, who you were told came from a conservative family background. Now, would you think about that. Take your time about it?---I think, yes.

The best of your recollection is that you knew that beforehand?---I think, yes, Commissioner.

Well, to the best of your recollection?---Yes, to the best of my recollection. However, there is a strong competing chance that it was immediately after or soon after.

Well, that gets back to this fact which of course only you can tell us about because it is a fact peculiar to yourself, that when the first juror was selected - - -?---Yes.

You were sitting there?---Yes.

Watching the process?---Yes.

Saw him go on?---Yes.

Thought to yourself, he looks a bit young to me?---Yes. And then your mind working, you say to yourself, well, perhaps he is the young fellow we were told about. Now, that is a fact - - -?---Yes.

- - - which is peculiarly within your knowledge because it is a matter which relates to your own thought processes?---Mm.

And only you can really tell us what happened, what your thought processes were?---Yes, I know. But, you see, the

reason it's difficult is that I knew that Gundelach had had information on members of – of the panel. Obviously, there were these pieces of paper with markings and they were to–ing and fro–ing and talking about this one and that one. Now, immediately after the jury was empanelled, or very, very soon after, I get the information either immediately before or immediately after and it's all within the space of say 24 hours or so – I get the information of young student who comes from conservative background and, of course, that raps up into Luke Shaw within a relatively short space of time. Now – – –

Like what?– – –Well, like – like over that 24 hour period. Now, I also know now that, apparently, the jury list from which Gundelach picked the jury has got stars against Shaw. The information firmed up on Shaw during the course of the trial that his family were National Party – active National Party supporters or members. I forget which. But it firmed up that yes, you know, this young fellow was believed to be okay in that sense. Now, what I've now got to do, as a matter of memory, is to go back to – when I was sitting at the bar table and the question that you asked me to address. Now, I think that – I'm certain about my reaction about he looks a bit young to me – certain about that. But then whether – whether the thought that occurred to me was, well, Adrian must – he must be someone that Adrian's got information on, that he's been given, and that, sort of, comforted me and I went on to look at the next person – or whether, at that stage, I had the more – the slightly more specific information that he was believed to come from a conservative family and don't hold his age against him – that sort of information – may have been one or the other – I find it, as a feat of memory, just too hard at this point of time.

This might be easier. Before the jury selection started, and given that you had asked Mr Gundelach to do the task of selecting the jury, what was the general state of your knowledge about any particular person on the jury panel – about the jury panel or any particular person on it?– – –I can answer the first limb. In the short space of time available, information had come to light which indicated

that there were some people who identified themselves as being desirable. In other words, there was an intelligence basis for – for ticks, and I believe an intelligence basis for crosses. That was the nature of – and so, although as much time as should've been spent, hadn't been spent, at least something was able to be put together.

And the second part of my question?---The second part of your questions specifically, no, no, unless – unless it was – it was the student with the conservative background piece of information, there was nothing other that I can recall."

The reason for my pursuing this line of questioning will be more apparent when certain correspondence between Drummond QC and Mead is dealt with in the context of examining O'Brien's involvement.

I am satisfied that before the jury was empanelled Greenwood QC knew of Shaw and that he was a desirable juror for this trial. It will appear later that I am satisfied that, at the latest on the morning of Tuesday, 24 September 1991, O'Brien knew not only of Shaw's close political affiliation with the National Party, but also that he was a strong personal supporter of the accused. I am satisfied that Butler also knew this. My major doubt focuses on how much of this information was imparted to Gundelach and Greenwood QC. In other circumstances one could safely infer on the balance of probabilities that if persons in the positions of Butler and O'Brien knew such relevant details, persons such as Mead and Counsel would also be told. My lack of confidence in drawing the otherwise obvious inference in this case is based on my earlier finding that Greenwood QC was plainly misled with information from O'Brien which created the totally false impression in Greenwood QC that Walliss had extensively polled Panel Z. Again, in any other case, one could expect that relevant information such as was known to Butler and O'Brien concerning Shaw would be passed to Counsel, particularly Counsel charged with the immediate task of selecting the jury. On the other hand, if Butler and O'Brien had good reason to mislead Greenwood QC and Gundelach as to what Walliss was alleged to have done in respect of the polling of Panel Z, then they might well have had similar and equally good reason for failing to disclose to them their detailed knowledge of Shaw. In that event it was a real possibility that their real agenda might emerge, namely the relationship between the discharge of Panel Z and the empanelment of Shaw. It was sufficient for O'Brien and Butler's purpose to identify Shaw

as a favourable juror by the marking "yes****". Gundelach would well understand the meaning of such a marking. No doubt the indication in general terms that a young person on the jury had come from a "conservative background" was sufficient for Greenwood QC's ears.

I am satisfied that the detailed information which O'Brien had concerning Shaw was known to Butler, but I am not satisfied that it was given to Greenwood QC and Gundelach before Gundelach commenced to "pick" the jury. He relied essentially on O'Brien's marking. Butler on the other hand, had been given by O'Brien the results of his investigations. This is confirmed by O'Brien's letter dated 30 September 1991.

There is one final aspect of the matter which is relevant here.

Evidence was given that on the occasion of the jury selection, Shaw, obviously a young man and described as a student on the jury list, was casually dressed to the point that he might, objectively speaking, be viewed by the defence as an unlikely supporter of the aged and conservative Sir Johannes Bjelke-Petersen, and therefore, one who was likely to be challenged by the defence rather than stood by by the Crown. The further evidence on the point is that once selected as a juror he henceforth appeared with a shorter hair style and dressed with a conservative suit and tie.

Shaw gave evidence that, as a matter of course, he attended for jury service casually dressed because if not required he would then proceed to the university. After he had been selected on 24 September 1991 he regarded it as more appropriate to attend court dressed in a suit.

In my view, to draw any unfavourable inferences from the evidence concerning Shaw's attire would constitute mere "conjecture or surmise", and I am not prepared to accept the suggestion, for the purposes of this Report, that Shaw's comparative style and mode of dress on different occasions is relevant and helpful for my purposes.

CHAPTER 6

LUKE EDMUND SHAW

The first mention of Shaw's name came in the course of the application by the Crown to discharge the jury on the night of Friday, 18 October 1991. As has been pointed out, the relevant information was provided by Stephen Reddy who swore an affidavit on that day in which he disclosed the information which identified Shaw as an active member of the Young National Party, as an avid supporter of the accused, and as a person who was apparently sympathetic towards the so-called Friends of Joh movement.

As will be seen, those persons from the Young National Party in whom the inquiry became interested were all committed followers and admirers of the elderly accused. Many of them attended at the court to view the proceedings and of course recognised Shaw as the foreman of the jury. Later I will deal in much greater detail with Shaw's jury service and what was known about that subject in Young National Party circles.

Alison Louise Swan (née Mooney) was a fellow Young National and a member of the same branch as Shaw. She attended the last four days of the trial during which time the jury was deliberating. On one such day, she believes 16 October, she and a friend, another Young National, Cecilia Phyllis Frances Bird, attended at the court and for the first time observed Shaw as a member of the jury. At about 7.00am on the next morning Ms Swan received a phone call from one Gottruth, a fellow Young National, who asked her did she know that Shaw was a member of the jury. She replied in the affirmative and also said that she "didn't think it was, you know to be – for the public knowledge". She said that she did not discuss it further with Gottruth. Later that morning Ms Swan received a phone call from Jennifer Margaret Davis, a friend with whom she worked and who was keeping company with Stephen Reddy. Ms Davis gave evidence that Ms Swan had mentioned to her her earlier conversation with Gottruth and the fact that Ms Swan and Ms Bird had been at the court on the previous afternoon and that she had seen Luke Shaw on the jury. According to Ms Davis, Ms Swan continued that she ought "not to tell anybody that he (Shaw) was a part of the Young Nationals and a Friends of Joh person". Ms Davis said that the latter part of Ms Swan's response was prompted by her own question "who is Luke Shaw?" because, according to Ms Davis, she did not know Shaw. Ms Swan denied saying that Shaw was "a Friends of Joh person" and asserted that Shaw's association or otherwise with the Friends of Joh was not known to her. I find it unnecessary to resolve this conflict in the evidence because my later finding that Shaw knew of and was a supporter, if not a member of the Friends of Joh movement, is based on other evidence.

Ms Davis herself was not a Young National and had little or no interest in politics, and appeared to have little, if any, interest in Shaw's membership of the jury. When she next met her friend Stephen Reddy (she is now engaged to him) she passed on the information which she had obtained from Ms Swan. Reddy was or had been a Young National and he knew Shaw whom he believed to be a "gung-ho Joh supporter". Reddy was obviously uncomfortable with the fact that Shaw was a member of the jury and he thereupon gave the information to a friend of his who referred him to the office of the Special Prosecutor. Thereupon, the information was passed to Drummond QC. Hence the application to the court on the evening of Friday, 18 October 1991 after Reddy had sworn the affidavit which recited the relevant material.

I am satisfied that Reddy was generally a truthful witness whose recollection of the chronology of events may have been a little astray. However, I am quite satisfied that when he learned from Ms Davis of Shaw's presence on the jury for the trial of Sir Johannes Bjelke-Petersen he was troubled because of his knowledge of Shaw, in particular his membership of the Young Nationals, his "gung-ho" support for the accused, and Shaw's apparent connection with the Friends of Joh movement. It was his concern based on this knowledge which led to his disclosure to persons whom he knew were involved with the Special Prosecutor.

Possessed of this knowledge, Drummond QC thereupon sought the production of any documents in the possession of the National Party which might evidence the nature and extent of Shaw's involvement and political affiliations. As has been pointed out, this led to the use of subpoena and the evidence of Mr Russell on Saturday, 19 October 1991.

6.1 Shaw and the Young National Party

Russell gave evidence to the trial Judge that Shaw had joined the National Party in January 1988, but did not renew his membership in 1989, but applied to rejoin at the end of 1989. This application was processed in January 1990. He was accepted for membership and further renewed it in January 1991. Originally, Shaw had become a member of the Wavell/Clayfield Young Nationals and upon rejoining had become a member of the Brisbane Central Young Nationals and of the Alderley branch of the senior Party.

At the time of the trial he was a member of the Brisbane Central Young Nationals and had been its secretary up to 23 April 1991 when, according to the documents produced by Russell, new office bearers were elected.

The minutes of that meeting record Shaw's involvement in that the minutes record that "Luke Shaw gave report on his recent election to the Griffith University student union". At that same meeting Stephen Reddy was elected a delegate to the Brisbane Divisional Council and to the Ashgrove Electorate Council.

6.2 Shaw and the Friends of Joh

Reference was made earlier to the minutes of the Annual General Meeting of the Brisbane central branch held on 29 January 1991 at Ardrossan restaurant, in which it is recorded:

> *"Anybody interested in supporting the friends of Joh movement contact Luke Shaw on 352 6334. There is a rally being planned for 11/2/91 at the Courthouse in Roma Street."*

Significantly, Shaw tabled an apology in respect of that meeting. Andrew Roy Hassall presided at the meeting. He was the Chairman of the Brisbane Central Young Nationals from approximately October 1990 to March 1992. Hassall gave the following evidence when asked to explain the entry in the minutes of the meeting.

> *"What happened that resulted in that minute being recorded? Can you remember?---I cannot recall exactly. What I probably did was when I was typing up the minutes, I was looking at the previous minutes – or a previous set of minutes of the Brisbane Central Young Nationals, and decided to include something like that for an information – on an information purpose – for the members. I cannot recall the rally. I cannot recall who told me about it.*
>
> *Why was Mr Luke Shaw nominated as the contact for this Friends of Joh Movement?---Because I was not interested in being a contact.*
>
> *Did he hold some position with the Young National branch?---At that stage, I believe not.*
>
> *Was some other person the secretary?---I was in effect the acting secretary of the Brisbane Central Young*

Nationals at that stage, Luke having informed me that he was no longer interested in being secretary.

Right. Well, was there any prior arrangement with Mr Shaw that he would be nominated as the contact for that movement?---No. There wasn't.

And did you confirm it with him after the meeting; that he had been nominated as the contact?---No.

And why - why Mr Shaw, rather than some of these other names we see here? There seem to be about a dozen other people there under apologies, and half a dozen under those who were present. Any reason why Mr Shaw, rather than none of the others?---No. Not particularly any reason.

Did you know anything of the Friends of Joh movement yourself?---No. To this day I do not know if it is an organised or incorporated sort of organisation. I couldn't tell you, to this day, of any particular member of the Friends of Joh. Yes.

What was the source of the information we see here that there was a rally at the courthouse in Roma Street to take place on 11 February next?---I do not remember.

Was that Mr Shaw, perhaps, the source of that information?---I do not remember.

Well, did you know whether Mr Shaw had any connection with that movement at all?---I do not remember if Mr Shaw had any connection with the Friends of Joh.

Has he ever, either before or after that, said anything to you to indicate he had any connection with that movement?---No.

And have you ever discussed with him this nomination of him as the contact?---No.

Well, if somebody took up the suggestion that we see in the minutes to contact Mr Luke Shaw if you are interested in

the Friends of Joh movement, how did you know they would get a positive response if they rang Mr Shaw?---I wouldn't.

What is the use of naming him as the - as the contact man if you do not know that he is going to be able to help the person who rings?---As a chairman of an organisation, I can't do everything, and it was merely a case of delegation or political buck-passing.

But if somebody saw this and thought, 'Yes, I'm interested in Friends of Joh,' and rings Mr Luke Shaw, from what you tell me, they would get a completely blank response?---That is possible.

It seems, from what you tell me, you are directing people interested to a blank wall, if I could put it that way. Is that a fair comment?---Well, if somebody rang up Luke wanting to know about the Friends of Joh, he probably would've sent them back to me. That is correct, he may - there might have been a blank wall."

One has only to read this evidence to recognise its absurdity. Hassall was plainly intent on avoiding the obvious truth which is inherent in the minute. As stated earlier, Shaw was unable to attend the meeting and tendered his apology. The minute needs to be read in that context.

It is demonstrably true that on 11 February 1991 the attendance of Sir Joh at the Magistrates Court for the committal proceedings was anticipated. This was clearly the expectation on 29 January 1991.

It is also demonstrably true from the minute itself that at the meeting on 29 January 1991, those assembled were given the information that "there was a rally being planned" for the Courthouse on 11 February 1991.

It is beyond question that supporters of the accused, many of whom were members or associates of the Friends of Joh movement attended the court whenever he appeared so as to show their support for him. His presence at the court at any time was likely to obtain wide media coverage in which the Friends of Joh were given some prominence.

The obvious purpose of the minute was to promote support for the accused by attendance at the planned "rally". Otherwise the minute is pointless.

Furthermore, the very terms of the minute speak for themselves – "Anybody interested in supporting the friends of Joh movement contact Luke Shaw on 352 6334".

The matters of inference which fairly emerge from the minute are also clearly obvious:

(a) Some person had informed either Hassall or the person at the meeting who made the announcement, that:

  (i) support was sought for the Friends of Joh movement;

  (ii) any interested person should contact Shaw, who was absent from the meeting, on 352 6334 (Shaw's home);

  (iii) the rally was planned and its details;

(b) the person who generated the announcement was him/herself a Friends of Joh supporter.

Hassall obviously knew of and had spoken to or had dealt with the person who gave him the information with the request that it be passed to those at the meeting and those who were unable to attend were given it via the distributed minutes. At the meeting there were 9 attenders; 18 had tendered apologies.

Again, either Hassall, of his own motion, or at the request of the person who generated the advice, identified Shaw (and his telephone number) as the contact person for the Friends of Joh movement. Hassall or that same person knew of the planned rally.

Hassall's explanation that it was mere "buck passing" on Hassall's part when nominating Shaw as the contact is really quite fatuous, if not totally ridiculous. One might well ask: Why Shaw? Why should Hassall's listeners be told to contact Shaw unless Hassall or any other person knew that Shaw could answer relevant queries and the inquirers would not meet "the blank wall" suggested by Counsel.

If Hassall himself originated the notice then why not invite his listeners and the readers of the minutes to contact himself personally? If it was not Hassall himself who was the relevant contact, then why not nominate a person who, to his knowledge, could be expected to give a meaningful reply to any query? And if the contact person was one of those present at the meeting why not nominate that person there and then?

Obviously, Hassall was asked by a person who was not able to personally attend to make the relevant announcement. The minutes record that the announcement was in fact made. Of all of the persons who were unable to attend, Shaw was the obvious person who generated the announcement. He was the contact point and his phone number was provided. The very terms of the announcement itself suggest clearly that if any person were minded to ring Shaw at home and to express interest "in supporting the Friends of Joh movement" or to obtain further details about the rally, that person could properly expect that Shaw would be able to satisfy any relevant inquiry.

I am satisfied that Shaw was the source of the announcement and that Shaw himself was well able to satisfy the inquiry of any "interested" person who wished to support the Friends of Joh movement. Furthermore, he was briefed with relevant information about the rally planned for 11 February 1991. In making this finding I find support for it in the acceptable evidence of Reddy, as to what Shaw had said to him about supporting the Friends of Joh movement.

Therefore, I am satisfied that Shaw, if not formally a financial "card carrying member" of the Friends of Joh knew of the group, knew sufficient about it to direct interested persons to the appropriate quarter, had had contacts with its organisers prior to 29 January 1991, knew of their plans to "rally" at the Courthouse on 11 February 1991, was strongly sympathetic with the ideals and objectives of the movement and maintained at least an informal contact with those who one would readily identify with the Friends of Joh movement. The latter included both Woodward and Mrs Morrison. From whom else would Shaw learn of the planned rally? If from neither Woodward nor Mrs Morrison then clearly from one or other of their associates. And again, Shaw's views on relevant matters must have been sufficiently well-known by persons involved in the Friends of Joh movement to make him a useful and reliable point of contact.

His devotion to the accused and the objectives of the movement were clearly established by the evidence. To Reddy, he was "gung-ho"; to

Hassall, he engaged in the "hero worship" of the accused, and demonstrated "sympathy for someone who had been victimised"; others readily identified him as a strong supporter of the accused.

He was a totally inappropriate person for service on this jury. Given his affiliations and his known and expressed admiration for the accused, his capacity for impartial decision-making had been very seriously compromised.

Explanation was attempted by Hassall and Sean Cousins, then the Young Nationals State President, as to the entry in the minutes of the 29 January 1991 meeting, but these explanations were entirely unconvincing. Likewise, Shaw's refusal to accept the obvious inferences which are contained within the terms of the minute was another unsatisfactory aspect of his evidence. I am persuaded in accordance with the appropriate standard of proof that it is more probable than not that Shaw was the source of the contents of the relevant section of the minutes. Shaw's commitment to the accused was beyond question and was well-known. The available inferences which emerge from the document itself are entirely consistent with the evidence of Reddy which I accept.

6.3 Shaw The Juror – Who Knew About It

Despite some concerted effort on the part of relevant persons to deny it, I am satisfied that Shaw's being called for jury service and the fact that his jury service was likely to coincide with the period during which Sir Johannes Bjelke-Petersen would be tried, was a relatively well-known fact.

Sean Petrie Allen Cousins, the State President of the Young Nationals was questioned about his knowledge of Shaw. He gave this evidence:

> *"Now, do you know a young man called Luke Shaw?---Yes, I do.*
>
> *How long have you known him?---I met – first met Luke maybe – I couldn't tell you the exact time or date; however, I did know Luke for some months, maybe even for – maybe even up to two years at the time of the trial in question at these proceedings, but I couldn't tell you exactly when I met him.*

And how did you know him?---I knew him through the Young National Party. I had never seen Luke at a branch meeting or any official meeting or conference of the party that I recall. However, I had met him and seen him and spoke with him at a number of social gatherings related to the party. That was prior to this trial that we are talking about.

Prior to Sir Joh's trial commencing?---Yes, that's right.

And prior to the trial commencing, were you aware that Luke Shaw was coming up for jury service?---Yes, I was.

How did you learn that?---There was an occasion some time prior to the trial of the former Premier of Queensland. I believe it had been a mock parliament that is normally held in about August. That would have been in about August of 1991 and at a social gathering after that particular mock parliament Luke told me that – his words were something to the effect of, "I've been – received a jury notice to be on the panel for the next sittings of the District Court," and he also made reference to the fact that Sir Joh's trial was coming up in the next sittings.

The same sittings?---That's right.

Did you yourself go to the trial of Sir Joh?---No, I didn't attend the trial.

Did you hear at some stage that Luke Shaw was, in fact, on the jury at that trial?---Yes, I did.

When did you first hear that and who from?---I'm afraid I can't answer either of your questions with any particularity other than to say that during the course of the trial I became aware that he was – that he had, in fact, been empanelled as a juror. At that time I would have had conversations, a number of conversations per day relating to party matters and it would have been, I believe, during the course of one of those conversations that I was told. I can remember the first specific occasion that I can

Who?---Alison Mooney, Celie Bird, Victor Sirl, possibly Mark Pitt and maybe Rodney van Weegan – maybe five or six people.

All right. Did they all hear Luke say that he was coming up for jury service or was doing jury duty?---I think they could have heard it, yes. He didn't just say it to me. It was just in the general course of the conversation.

And what was Luke's response to your remark: "Wouldn't it be funny if you got on Joh's jury"?---He just laughed.

All right?---I laughed.

Had you ever heard Luke Shaw speak about Sir Joh before?---No.

Right. Now, did you attend at Sir Joh's trial yourself?---Yes, I did.

At what stage of the trial, do you know?---In the first week of the trial, I would say the second or the third day.

How long were you there?---I was there for about 10 minutes.

And did you notice that Luke was on the jury?---Yes, I did.

Right. Is that the first you knew that he was on the jury?---Yes.

Did you tell anybody what you saw?---Yes, I did.

Who?---I told my flatmate, Alison Mooney. I think I told her that night or the following night. I think I also mentioned it to Celie Bird who was a guest at our house, very frequently, during that period of time, and later on in the trial I mentioned it to Victor Sirl and Sean Cousins.

And how did you know him?---I knew him through the Young National Party. I had never seen Luke at a branch meeting or any official meeting or conference of the party that I recall. However, I had met him and seen him and spoke with him at a number of social gatherings related to the party. That was prior to this trial that we are talking about.

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The same sittings?---That's right.

Did you yourself go to the trial of Sir Joh?---No, I didn't attend the trial.

Did you hear at some stage that Luke Shaw was, in fact, on the jury at that trial?---Yes, I did.

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specifically recall being advised of this, but I believe there were a number of occasions."

Cousins also gave evidence of being informed by other Young Nationals – either Mark Pitt or Ms Libby Stoneman – that Shaw had been in contact with others during the trial. However, this is more relevant to the issues relating to Hedley Friend and can be left for later.

Victor Byron Sirl, who was closely associated with Shaw and Pitt gave this evidence:

"Well, was it a surprise to you to see Luke Shaw on the jury?---No.

When did you first learn that he was on the jury?---It was somewhere during the trial. Precisely, I couldn't – again, at this point in time, I don't know my date. It – it'd become pretty widely-known.
Had it? Among whom?---Well, among people like – – –

What circle of persons?---Okay, among the Young Nationals, certainly the Brisbane Central's branch. They all knew about it. And they had been telling people and talking about it, and I've always been of the impression that I thought it was because Rob Martin had simply gone down to the trial and seen him there, and so forth, but I think Rob Martin may have been the first person to tell me, but I'm not sure. I'm not certain, but it certainly got around.

Well, how soon after the trial started did you hear about it?---I wouldn't have thought it was very long. I just – to name a date and a time – I mean, I have a great deal of trouble remembering how long the trial went for or anything like that.

All right. Did you know even before the trial that he was coming up for jury service?---No, absolutely not, no, because – it was quite a surprise. It was a great surprise that he was on the jury, and I think Alison and everyone else was surprised, as far as I know.

Did you have much social contact with him before the trial?---As in like a week before or two weeks before or just in general?

In the month or two before the trial?---I don't believe so, but I would've bumped into him at university. I don't think I had a lot, in the week or two before that. I may have – I can't recall whether I approached him to run for the SRC elections or not. I've been trying to remember that, and I just can't remember whether I actually – did actually physically approach him or not. I didn't see a lot of him, I don't think, though, immediately before the trial, no, but again at different people's places and functions over a period of time I certainly would've seen him a few times. I mean, he was a casual acquaintance, I guess you'd say, and he was a branch member of Brisbane Central's.

Well, you were not aware that he was coming up for jury service- - -?---No."

Robert David Martin gave this evidence:

"Now, do you remember that he was called up for jury service in 1991?---Yes.

And did you yourself have some prior knowledge that he was coming up for jury service?---Yes, I did.

How did you get that knowledge?---Approximately one week before the trial we had a Brisbane Central Senior Party meeting. Luke was present. After the meeting some of us went out to dinner and he mentioned that he had been called up for jury duty.

Yes. Was there any mention of Sir Joh's trial?---I said something like, 'Wouldn't it be funny if you ended up on the Joh jury.'

All right. And how long before Sir Joh's trial started was this?---Approximately one week before the trial.

Was anyone else present?---Yes.

Who?---Alison Mooney, Celie Bird, Victor Sirl, possibly Mark Pitt and maybe Rodney van Weegan – maybe five or six people.

All right. Did they all hear Luke say that he was coming up for jury service or was doing jury duty?---I think they could have heard it, yes. He didn't just say it to me. It was just in the general course of the conversation.

And what was Luke's response to your remark: "Wouldn't it be funny if you got on Joh's jury"?---He just laughed.

All right?---I laughed.

Had you ever heard Luke Shaw speak about Sir Joh before?---No.

Right. Now, did you attend at Sir Joh's trial yourself?---Yes, I did.

At what stage of the trial, do you know?---In the first week of the trial, I would say the second or the third day.

How long were you there?---I was there for about 10 minutes.

And did you notice that Luke was on the jury?---Yes, I did.

Right. Is that the first you knew that he was on the jury?---Yes.

Did you tell anybody what you saw?---Yes, I did.

Who?---I told my flatmate, Alison Mooney. I think I told her that night or the following night. I think I also mentioned it to Celie Bird who was a guest at our house, very frequently, during that period of time, and later on in the trial I mentioned it to Victor Sirl and Sean Cousins.

"As to the Jury on one or more of the dates, probably on my estimate 14 August 1991, but certainly on a date or dates prior to 28 August 1991 I gave the following advice to Mr Mead and/or to Mr Butler:–

1. *That the relevant Jury panel be obtained as soon as possible prior to the trial, obviously from the Registry.*

2. *That a reputable private investigators be engaged to carry out the usual enquiries and by usual I indicated electoral role searches and such other lawful enquiries as would give an indication of the likely attitudes of the individual Jurors.*

3. *Moving from the general to the particular I do recall suggesting that in this trial it would by highly desirable to gain information as to the possible political sympathies of the panel members. I positively recall on Wednesday, 14 August (exhibition Wednesday in Brisbane) I suggested that a person be identified in each metropolitan state electorate who knew the local political scene. This person or persons should be supplied with a copy of the panel members especially those within that particular electorate for comment.*

4. *I stressed that nothing improper be done and that if they had any queries in that regard they were to refer the matter to me."*

One could only expect therefore that once the jury panel became available some considerable attention was likely to attend the jury selection investigation. It is significant that on the very first day on which the jury panel became available, 11 September 1991, Mead's office arranged to acquire its copy of Panel Z. After all, in the light of Counsel's advice, that is what one would expect. Having the jury list was the essential first step. By 11 September, the other panels including Panel P had been on jury service for some days since 2 September 1991, the first day of the appointed sittings.

What occurred subsequent to 11 September, perhaps more correctly what failed to occur subsequent to 11 September 1991, can only be described as unexpected and as extremely curious, a matter which can only raise serious

questions about the intentions of those who, one can assume, had the obligation of executing Counsel's advice.

Greenwood QC was of course in the position before trial of having to advise. I am in no doubt that he did this as fully and as effectually as he could. His experience had clearly identified for him the critical importance of detailed but legitimate jury inquiries in the chronological context of the Herscu and other high-profile cases which had been disposed of only a short time before. Whatever detailed preparation was required of him Greenwood QC had properly delegated to others the urgent need to assemble appropriate information concerning the 168 persons on Panel Z.

The collection of detailed accurate and reliable information concerning the proposed Panel Z was of crucial and fundamental importance and the fact that Greenwood QC recognised that is evidenced by the nature and the extent of the advice he tendered to those instructing him. It must also have been obvious to others.

The inexperienced Mead did little or nothing in pursuing Greenwood QC's advice and that is not surprising. Apart from his absolute lack of familiarity with the process and his inexperience with jury trials he had by now attached to his office the energetic and committed Butler who had brought the client to Mead's practice in the first place. Besides, Butler was supposedly experienced in investigative matters and well-equipped to respond appropriately. Besides, he had nothing else to do other than commit the whole of his time, talents and energy to the defence of the one client who had engaged him - not just any client, but the former Premier of the State whom Butler admired and liked, and for whom, like Shaw, he, Butler, had a great respect. If there could be any possible doubt about the profundity of Butler's interest in the defence of the accused, one need only refer back to the experience of Burns at Lyons to resolve such doubts.

Butler, I am in no doubt, was well able to appreciate the significance of Greenwood QC's advice and to have it executed. His own experience in the criminal law emphasised in his mind the significance of having a jury comprised of appropriate people and to ensure the exclusion of those who may be antipathetic to the accused.

Butler's assertion that he decided that the issue was too sensitive and that "he would not touch it with a barge pole" is nonsense. I reject it without hesitation.

The facts on the other hand speak for themselves. It was Butler who as early as June/July had engaged Walliss in discussion on the subject of jury vetting. As has been pointed out earlier, it was Butler who maintained liaison with Walliss. It was from Butler that he received a copy of Panel Z. If one can accept Walliss, it was to Butler to whom he obviously looked for instructions. It was Butler who gave instructions to O'Brien and who received the result of O'Brien's investigations in respect of Panels P and K.

It is inconceivable that Butler should at any material time remain ignorant of the position concerning the jury and the assembly of the relevant information. After all, from 11 September 1991, the date of the receipt of Panel Z, the trial was only days away – 12 days in fact and the jury list had on it 168 persons. It required no mean effort if Greenwood QC's advice was to be implemented. On the contrary, it required a disciplined and energetic professional response, particularly by Butler, the one person whose working time was consumed by no other brief, no other distraction. He was working only for Sir Johannes Bjelke–Petersen.

To assert that, having obtained the jury list, Butler thereupon henceforth dissociated himself from the process is simply fatuous. It is also totally inconsistent with the mind and the personality of Butler. Burns had experienced the unacceptable level of intrusion by Butler into the defence of the accused and had, with the assistance of Counsel, tried to dissuade Butler from the notion that a voir dire involving Huey could achieve any useful purpose. Clearly, Butler was out of his depth in purely legal matters or was so obsessed with Huey and the defence of the accused that he remained intent on intruding somewhat aggressively into the matters controlled by Burns and as a result suggested forensic tactics which were simply fanciful. One cannot sensibly and reasonably concede that the same person Butler, the ex–police officer and now private investigator, would not approach the investigation of the jury with like aggression and commitment. Butler would have his listeners believe that the matter was such that he had no interest in it and that he made the deliberate decision to totally dissociate himself from it.

I cannot accept that. Indeed, I reject it as false and untruthful.

What is of enormous consequence is the fact that by Monday, 23 September 1991, the anticipated date of the trial at about 9.00am, the information assembled in respect of Panel Z was at best sketchy and superficial, and practically useless.

The other fact of like consequence is that it is now known that by the same time Walliss had done nothing for all practical purposes, that Counsel had been misled to a contrary belief for the purpose of seeking the discharge of Panel Z, but that within 24 hours of the substitute panels "becoming available" a voluminous body of information supposedly emerged which permitted a close and detailed assessment to be made of most of the potential jurors on the substitute panels.

That result therefore requires the closest scrutiny of the events which occurred on Saturday 21, and Sunday 22 September 1991.

I have already indicated my finding that I am satisfied that Greenwood QC was misled and at all material times remained ignorant during that weekend of the true facts. So too was Gundelach.

If others were intent on manipulation I am satisfied that neither Greenwood QC nor Gundelach were. Likewise with Mead. On this weekend he was happily engaged on some planned social activity at the Gold Coast. The inquiry needs to focus more closely on Butler and O'Brien.

Firstly, I turn again to the engagement of O'Brien. As has been said Greenwood QC was instrumental initially in involving him. Greenwood QC and O'Brien were well-known to each other. So too were O'Brien and Butler; both were former police officers. In respect of his formal engagement in the Bjelke-Petersen trial it is obvious from the available documents that O'Brien looked to Butler for instructions. O'Brien and Mead up until this time were virtually strangers. O'Brien needed to liaise with instructing solicitors and the obvious point of contact was the ubiquitous Butler. It was Butler who had supposedly instructed Walliss to forward the results of his survey not to Butler but to O'Brien who had been engaged to do the personal profiles of jurors and to co-ordinate the marshalling of jury information. I am satisfied that Butler and O'Brien liaised closely during the days immediately prior to 23 September. Butler, the proprietor of Trial Consultancy Pty Ltd, and O'Brien, the proprietor of Lloyds Pacific Pty Ltd, both former police officers and now both engaged in private investigative work, whose only common interest was now the defence of Sir Johannes Bjelke-Petersen, had good reason to maintain a close working relationship, and in fact did. On 30 September when O'Brien rendered what would appear to be an inordinate claim for professional fees the covering letter was marked for the attention of Butler and it refers to prior instructions and to the fact that he, O'Brien, on 24 September at 1.30pm, had given to Butler part of the material (in respect

of Panels P and K) which O'Brien had collected. Significantly although O'Brien's time for which he charged Mead's firm included time spent on jury vetting before 10.00am Monday when Panel Z was discharged, O'Brien at no time ever gave to Butler any documents or other records to evidence what, if any, work he had done in respect of the Panel Z and the information which had supposedly been collected as a result of that work.

Before turning in greater detail to what had transpired between Greenwood QC, Gundelach and O'Brien at the Gateway Hotel in the late afternoon of Saturday, 21 September 1991, it is necessary to first examine O'Brien's evidence concerning what he alleged he had done in respect of Panel Z prior to that time.

7.2 O'Brien's Involvement with Panel Z

In the light of Greenwood QC's involvement with O'Brien in July/August and Butler's close involvement in the management and preparation of the whole case, it is relevant to refer to O'Brien's somewhat incredible evidence as to his first involvement. Later I will disclose more fully my total dissatisfaction with O'Brien's performance as a witness. He was, I am satisfied, intent on evasion and prevarication, and a significant body of his evidence was patently false:

> *"All right. Now, you were first formally brought into this matter when and by whom?---Well, towards the end of the week preceding the trial.*
>
> *But there had been some informal approach before that?---There had.*
>
> *And who was that from?---Well, the first time the trial was mentioned was in the presence of Bob Butler and Bob Greenwood several weeks before the trial.*
>
> *Weeks before. And was that on a social occasion rather than an official - - -?---It was just a chance meeting in the street.*
>
> *And what was proposed on that occasion?---Well, there was a fairly vague proposal in that Bob Greenwood said to me that - or he asked me if I'd be available to do some*

inquiries for the defence as he was conducting the Bjelke-Petersen defence.

Inquiries into?---Oh, he didn't go any further than that.

Did not mention it was a jury - - -?---I don't think so. I don't think a jury was mentioned at that stage, but it could have been.

All right. And what is the next you heard of it?---The next would have been a couple of weeks before the trial date - proposed trial date start, and that was when I met Adrian Gundelach and Bob Greenwood, and perhaps Bob Butler and Max Mead. I'm just not certain if they were there or about to arrive.

And was this an informal occasion again?---Yes.

What was said this time?---This time the jury was certainly mentioned, and Bob Greenwood mentioned that Bob Butler would be in touch with me to ask me to carry out some inquiries in relation to the jury.

Was Mr Walliss mentioned on this occasion?---No. No.

All right. What is the next you heard of it?---The next would have been when I received a phone call from Phil Walliss.

From Phil Walliss?---Yes.

Yes?---And he told me he was conducting inquiries in relation to the jury for the trial, and he said that he understood that I also was conducting inquiries, and I told him that was not correct, and he discussed - he seemed surprised by that, but in any case, he told me that he was conducting inquiries and he told me the nature of them. And - - -

MR CARTER: What did he tell you?---He told me he'd been conducting a survey in that he had a list of a jury panel and that he had been conducting a survey by

telephoning the – the residence of some of the jurors and by asking them questions – sets of questions and obtaining answers from which he would make a deduction as to their views, and he would make a conclusion from that as to whether or not they may be biased against the defendant – the accused, or alternatively. Something along those lines.

MR HANSON: And, this was being conducted how? By phone?---By phone, yes.

To the households of the jurors?---Yes.

Did you know Mr Walliss before?---I had met him, yes.

All right, and this is before you had been engaged?---Formally, yes. Yes, well before I was engaged, yes.

And, when is this?---I would think probably no more than about a week before the trial date start – before the Monday the trial was to start. It may have been the previous Monday or a couple of days before that but around about that time.

And, were you surprised to hear that he had been ringing the jurors' households?---Well, I was, but I discussed that with him and he told me the methods that he was using. He emphasised that he had been doing it in a very discreet fashion; that he ensured that there was no direct mention of politics and that he covered subjects such as environmental issues, Fraser Island, the woodchip industry and that sort of thing and he also, in addition to those subjects, had just asked questions on topical matters, and he hoped to gauge from that whether the person to whom he was speaking was what he considered to be a rational person or could think with some rationality on topical issues or controversial issues.

Had you ever heard of a direct approach to a juror's household in Queensland before?---No, I had not. Well, I had read something of the Herscu trial but – – –

You knew what trouble that had caused?---Beg your pardon?

You knew what trouble that had caused, did not you?---I knew there had been some controversy over that, yes.

All right. This is about a week before the trial?---I did not know specifically what had been done in relation to Herscu. As I understood it, there had been actual questions in relation to political affiliations. I do not know how direct, but that is as I understood it.

Why was he ringing you?---Ringing me?

Yes?---To liaise with me because he thought that I was carrying out inquiries on the same subject.

All right. Well, what is the next you heard about the matter?---Well, I told Phil Walliss that - - -

MR CARTER: Well, just before you go on, what sort of liaison? You see, I mean, he told you what he was doing?---Yes.

And, he could only have done what he told you he was doing if he had a jury list?---Correct.

And, he told you that he was to liaise with you?---Yes.

Well, liaise in what form in relation to him? Were you both covering the same ground or what? Doing something different, or were you both covering the same ground or what?---No, he had the impression that I was carrying out inquiries and he was going to provide me with the result of his survey so that I could co-ordinate the results of his inquiries with the results of whatever I had ascertained but he did not think that I was carrying out a survey.

Well, you were conducting inquiries into the jury panel presumably; that is his belief?---Yes.

And, he told you he was doing the same thing?---Yes.

In respect of the same jury panel?---Yes.

Well, did you tell him what you were doing?---Yes, nothing.

Did you tell him what you were going to do?---No. I had not – well, what I said to him was that I had not done anything; that I had had these brief conversations sometime before but that I had not heard anymore and, consequently, I had not done anything and that I would not, in the circumstances, do anything until I had received something formal. I think at this stage he told me that Max Mead was the solicitor involved in the defence but that Bob Greenwood was doing - - -

Well, you knew that?--- - - - the leg work or the inquiries.

But, you knew all those facts anyway, did not you?---Yes.

Well, you told him that you were doing nothing?---Yes.

Well, did you ask him why he was ringing you?---Yes, because he had the impression that I was doing – and I guess, he may have said that he got that from Bob Butler or Max Mead or whatever, and I do not recall now whether I specifically asked him but I assume he got that from them.

Yes, Mr Hanson?

MR HANSON: What is the next you heard about it then, Mr O'Brien?---I got a phone call from Bob Butler.

To say what?---To ask me to carry out inquiries in relation to the jury.

Can you say when this was?---I would have thought about the Thursday or Friday before the trial. I would have thought about the Thursday.

How long after Mr Walliss had rung you?---Some days.

Days?---In fact, long enough for me to believe – when I heard nothing, I thought that I was not going to be contacted.

All right. Well, did Mr Butler specify what he wanted you to do?---No, he did not, as I recall, but he did say that Mr Walliss had been conducting some inquiries but he felt that I might have more local knowledge as I had been a resident of the area for a lot longer than – that Walliss had come from Canberra and Melbourne.

MR CARTER: But, you already knew from Mr Walliss what he was doing?---Beg your pardon?

You already knew from Mr Walliss what he was doing because he had told you – – – ?---Yes

– – – by the time Butler rang you?---That is correct, yes.

Well, did you discuss that with Butler?---No, I do not think so.

Not at all?---I do not think so.

For instance, did you tell him that Mr Walliss had told you that he was ringing jurors' homes?---I do not know but I do not think so.

Yes, Mr Hanson?

MR HANSON: Did not it occur to you to mention that to Mr Butler? Like, 'Hey, do you know that Walliss is ringing jurors' homes?---Well, I did not. Well, I do not know whether I did or I did not but – – –

Well, do you think Butler knew already?---Well, that I did not know.

Did you assume he knew?---I do not know.

Well, did he tell you that he knew?---No, he did not tell me that he knew, no. He did not discuss – well, I do not think he did anyway. I do not think he mentioned it. I think the only one who mentioned the survey to me was Phil Walliss, the fellow doing it.

All right. But you were not told was expected of you?---No, not specifically.

Well, did you get a jury list?---I think I already had one. I think that Wallis faxed me a jury list, possibly some time that week.

Well, did you start work? You did not?---No.

I mean, after you received the telephone call from Butler, you must have started work?---Yes. I did then, yes.

MR CARTER: But did Walliss fax you a jury list before you had spoken to Butler?---I think so.

Why?---Well, he assumed that I'd be carrying out inquiries and I had no jury list, and I'm pretty sure that he faxed me a list. I think he faxed – I think I'd received a list from him prior to speaking to Butler. If I received a list from Butler's office, that may be the case, but my recollection is that, in anticipation that I – you see, Walliss said that he would get in touch with Mead or Butler or whoever he was dealing with, and tell them that I wasn't carrying out inquiries – to clarify the matter. Now, at that stage, he probably anticipated that I would be – would receive formal instructions in the near future and would need a list. So, on that belief, I would imagine, he's faxed me a list.

But you would expect you would get that from Mr Mead or the solicitors?---Well, yes, of course I would, but I hadn't been – they had had no contact with me.

And when Butler first rang you and engaged you, you did not mention to him what Wallis had mentioned to you?---I don't think so.

Did you tell him you had a jury list?---I could have. I would have, yes.

You said that you had never heard of this happening in Queensland before that. Did you tell that to Butler?---No.

Not at all?---No.

Did not mention it to him?---No.

You had never heard of it happening before?---No.

You knew of the Herscu matter?---Yes.

You had had a discussion with Walliss about it?---With Herscu – about Herscu?

About what Walliss was doing?---Yes, yes.

You had not been engaged by Butler?---No.

Then Butler rings to engage you and tells you to liaise with Walliss?---Yes.

But you did not tell Butler what Walliss was doing?---No.

Even though it was unusual, and you had never heard of it happening before?---No. There was no point made of it, to my recollection.

No point made of it by you?---No.

Why not?---Well, why?

Because it was unusual and – – –?---You see, you are likening it to the Herscu matter.

Sorry. Because it was unusual and it had not – you had not known of it happening before. One would think that would be the very reason why you would speak to Mr Mead and Mr Butler about it?---Well, I didn't know that Butler didn't know about it.

Did you assume that he did, therefore?---No. I'm not following that. I just didn't know. To my recollection, it wasn't discussed, you know. It was a fairly brief phone call and he asked me if I would then start to conduct inquiries – – –

Well, did you under – – –?--- – – – and he said that Mead had – something to the effect that he had made some inquiries and he knew I'd been in touch with him or vice versa, and he mentioned the fact of local knowledge, and asked me if I'd conduct some inquiries, and I really discussed, I think, the difficulty that I saw in conducting those inquiries at such short notice.

And you would have discussed, or he would have told you, no doubt, that Mr Walliss was going to send his information to you so that you could co-ordinate it or liaise with him about it?---Yes. Well, he may well have done that, but Walliss had already done that and I suppose Butler would have said it as well.

Well, no. No, no, no, no. No, all he had sent you so far was an empty jury list which you thought was irrelevant?---Yes.

But in your discussion with Butler, you learn that Walliss is going to send material to you as a result of his inquiries?---Yes. Well, yes. He may have said that or I may have got back in touch with Walliss and – – –

And you knew from your discussions with Walliss that that would involve contact with jurors?---What, with myself?

Yes. No. You knew, at the time you had this discussion with Walliss – with Butler that Walliss had been in contact with jurors?---Yes.

And Butler told you that Walliss was going to send his material to you so that you could co-ordinate it?---That's correct, yes.

And you knew from your previous knowledge and your discussions with Walliss that that involved contact with jurors?---That's correct, yes.

So you knew the information that you were going to get from Walliss was information which Walliss had obtained as a result of his direct contact with jurors?---Yes, or their residences at least.

And you were going – or their residence?---Yes.

And you were going to co-ordinate that information for the purpose of Butler, Mead and counsel?---Yes, that's correct.

But you did not mention anything to Butler about the fact that he had been discussing – – –?---I don't believe so.

– – – these matters with the jurors?---No.

Mr Hanson.

THE WITNESS: You see, I'd – if I can just make – I had discussed at length with Walliss the methods he'd been using and, as a result of that, I was fairly convinced that what he'd been doing was lawful, certainly was lawful, but even more so, I was convinced that it was discreet. And the potential that I first of all saw for problems after I'd – when I first was told by Walliss of the methods he was using, I later felt, weren't as serious.

MR HANSON: But did it occur to you that just to protect your own position, you should clear it with Butler that he was aware what Walliss had been up to, just to make sure you did not get yourself involved in something that was perhaps irregular, just for your own protection?---Well, I don't believe so but of course I did raise it the next day.

The next day?---Yes.

This is the Saturday?---Yes.

With Greenwood?---Yes."

That evidence really speaks for itself. It is really designed to diminish the nature and extent of O'Brien's involvement in jury matters to the point that he was not formally engaged, that he became involved somewhat casually and that it was Walliss who really initiated contact with him and then only a week before the trial was to commence although the jury list had been available for some days. Indeed, it was Walliss who first gave him a copy of the jury list, and by Friday, 20 September 1991 he, O'Brien, had done nothing; all that happened according to him was discussion with Walliss about what Walliss had done and that Walliss' material would be sent to O'Brien.

But as has been established, Walliss had done nothing or practically nothing; Walliss had no information to pass to O'Brien; O'Brien must have therefore known well that Walliss had nothing to contribute to the information which O'Brien was to co-ordinate. And why would O'Brien look to Walliss for his receipt of a jury list? The alleged lack of contact between O'Brien and Butler in this evidence is wholly inconsistent with every reasonable inference which is available based on the nature of Butler's involvement in the case, the plan to involve O'Brien some weeks before, Greenwood QC's plan to have O'Brien engaged and the likelihood of close liaison between O'Brien and Butler.

I am satisfied that O'Brien was to be the main activist in the profiling of jurors for the Bjelke-Petersen trial. Greenwood QC had identified him as the most valuable resource some weeks beforehand. His enormous experience in investigative work and his capacity to handle the kind of inquiry work which Greenwood QC required to be done can only support the conclusion that he was actively involved in the whole process so much earlier than he would have me believe. What he in fact did remains to be

seen, but I am satisfied that on account of his close liaison with Greenwood QC and Butler and the other matters referred to, it was O'Brien rather than Walliss who was the leader in the process and the close ally of Butler.

The other alternative is that Butler simply failed to pursue the question of jury enquiries in any real shape or form, that he ignored Greenwood QC's advice, that he simply took little or no interest in the process, that in spite of his importance in the preparation of the case he deliberately distanced himself from matters relevant to jury selection; in short, that he was incompetent and dismissive of senior Counsel's entreaties in July 1991 that jury selection was a vital issue or else he chose deliberately to do nothing and to ignore in this case doing what was obvious to any person with even passing experience with jury trials. Given Butler's connection with the client and the whole case neither of these latter alternatives is credible.

The obvious inference is one of Butler's close involvement in the jury issue and his close involvement with O'Brien. Walliss' involvement or lack of it can be demonstrated factually. The suggestion which appears from O'Brien's evidence that it was Walliss who was the proponent in respect of jury matters is fatuous. So too is the assertion by O'Brien that it was probably Walliss who first gave him the jury list (Panel Z).

One then needs to analyse O'Brien's evidence as to what he supposedly did when he first became active, according to him, on the Friday before the trial. In making this analysis it needs to be borne in mind that Walliss claimed to have sent to O'Brien, and O'Brien swore that he received from Walliss, the results of Walliss' survey which according to Walliss covered 25 to 30 jurors on Panels Z, or about one–third of the panel (according to Green's evidence). Walliss' survey was either non–existent or was virtually so. Besides it needs to be borne in mind that O'Brien successfully created the belief in Greenwood QC's mind on Saturday afternoon, 21 September 1991, that Walliss' survey had been "quite exhaustive".

What then is O'Brien's evidence as to what he claims to have done once he was "formally" engaged:

> *"MR HANSON: But by the Saturday afternoon, you – what you had been on the job for two days, and you had not added any of your own comments?---To what?*

To Mr Walliss's material?---Oh, no, I don't say that. I hadn't given a report to Butler or anyone. I had just said that I hadn't had sufficient time at that stage, and that I was still making inquiries. That is why I only stayed there a few minutes because I had things to do.

But, if asked, how many of the jurors could you have commented upon that Saturday afternoon?---How many could I have commented on?

Yes, yes?---Oh, that would be hard to estimate.

MR CARTER: Or an idea?---I don't think I could give a really accurate estimate, but not too may.

Ten?---I don't know, maybe 10, if you like, but I don't know.

More than 10?---I don't know.

Twenty?---I don't know.

Well, such information as you had, you say, had only come from Walliss?---Not only.

Well, at that stage when you were speaking to Mr Greenwood and Gundelach on Saturday afternoon did you have any information yourself in respect of any jurors apart from information you had received from Mr Walliss?---I'm not sure whether – most of the information, to my recollection, came to me on the Sunday, or the Sunday evening, or very early in the Monday morning. Now, I just don't think – without being specific in relation to numbers, I don't think I had that much information by the Saturday afternoon.

Yes, Mr Hanson?

MR HANSON: Well, what had you done by the Saturday afternoon?---By the Saturday afternoon.

What had you done?---Yes. Well, I had the panel which was Panel Z I believe, and I had looked at the panellists, and I had decided to draw a list of as many people as possible who may have some knowledge of those panellists in a whole broad – over a whole broad field, whether it be through living close by, or through employment, or through a whole range of activities.

With any results by the Saturday afternoon? Had you drawn up a list?---Oh, yes, I did.

Had you been in touch with any of these people and had they responded with any information?---I don't recall specifically.

Would you just look at Mr Mead's bundle of documents for me, please, exhibit 2145. Have you brought any papers with you, Mr O'Brien?---No.

I just want to show you a bill that you sent to Maxwell Mead. Just go back one page, there is a covering letter there. That is yours, is not it?---Yes.

30 September 1991?---Yes.

To Maxwell Mead, for attention Mr R. Butler. Read that if you want to, but I am interested in the bill that comes with it?---Yes.

You say there – perhaps you better look at the letter for your own sake. You say there you have got instructions from Mr Butler on the 20th – that is the Friday?---Mm, Mm.

Would that be correct?---Well, yes.

We will come back to the rest of the letter later. Look at the bill. You have charged them for on the 20th, which was the Friday, 9 hours of investigations?---Yes.

62 kilometres?---Yes.

Mileage. Plus use of the telephone and fax. On the Saturday, the 21st, you have charged for 14 hours investigation/conference and 138 kilometres of mileage. Well, just looking at the Friday for a start, what had you done on Friday that added up to 9 hours and 62 kilometres running around?---Well, prepared a list of potential contacts and driven to some of the areas.

For what purpose?---Because it is easier to jog one's memory in relation to residents of areas if you go to the area rather than rely solely on memory.

And what was the purpose of driving to the areas where the jurors lived?---To see if I recall anyone whom I could add to my overall list who may have resided nearby the jurors residence.

Well, did Friday's efforts produce any information about any jurors that would be of use to the barristers?---I doubt it. I think it was very much at preparation stage.

Saturday: you have got 14 hours there. Were any of those prior to the meeting with Gundelach and Greenwood?---Yes.

And what did that involve?---The same thing.

Sunday, 14 hours and more mileage?---Yes.

What was happening on Sunday?---Much of the same thing.

All right. Well, then, the trial was due to start on the Monday morning?---Yes.

What were you able to report to Greenwood and Gundelach on Sunday night when you went to Gundelach's house?---Well, I went there to report progress, and by this stage I had some information, from which I may have been able to make an assessment of a particular juror. However - - -

A particular juror?---Or a number of jurors, yes.

Yes?---Certainly not Shaw.

Oh, no, you were not working with panel P, were you?---No, I know. I know.

Well, were you?---There was no particular – no, I'm afraid not.

Working with Z, were you?---I'm afraid so, yes.

Yes?---On the Sunday night, well – – –

Yes. What were you in a position to report?---I was in a position to report some information, but I was going to say that I had – I expected a lot more information to come in later that Sunday night, and that I wouldn't be in a position to give a final report until the next morning.

And this information was to come from where?---Well, it was to come from the network that I had attempted to build up.

Yes. These were people who were going to feed you comments; is that right?---Yes.

You did, in fact, set up this network, did you?---Yes.

About how many people did you contact who were going to feed you comments?---Oh, quite a few, I would suggest.

MR CARTER: How many?---I don't know how many. I made a lot of phone calls.

Ten?---Yes, could be about 10, who were also – – –

Twenty?--- – – – had been going to make their own inquiries.

Twenty?---Probably about 10.

About 10?---Ten or twenty, yes.

Well, now, perhaps you might tell me who the 10 were?---Yes. Well, specifically I can't recall - - -

Not one?--- - - - who they were. One was Mrs Chapman, as you know. I can't specifically recall others. You see, some people, whom I – perhaps it had been suggested to me that I contact, weren't known to me.

No, no, bear in mind, see – see, you have charged for that nine hours on the Friday, and have travelled 62 kilometres, and counsel asked you what had happened, and you had said that you drew up a list and then did some travelling?---Yes.

Now we know it is a list of 10?---Oh, no.

Just a - - - ?---The list would have been 100 or more.

100 or more of what?---Names.

These people who were going to be sources of information?---Potential sources of information.

Well, then, what was the 10, the list of 10 that you mentioned?---Oh, that's probably the number that I finally contacted.

Oh, Mr O'Brien, please. You mentioned a moment ago, and the transcript will speak for itself, that you drew up a list of people who were going to be sources of information for you?---That's correct, yes.

And when questioned about that list you said there was a list of 10?---I've misunderstood, yes. The list was far more extensive than that.

Well, apart from Mrs Chapman, who was on the list, this extensive list now?---Who was on – to recompile the list.

Who was on the list of names that you had compiled who were going to be sources of information for you about the jurors. You had 160 jurors and now you tell me you have a list of 100 people, or up to 100 people, who are to be the sources of information in respect of that 160?---Yes, probably more than 100.

Now, you have told me Mrs Chapman was probably one of them. Who were the other 99?---Well, there – there were virtually everybody that I knew.

Well, then, you would be able to tell me who they were. If I gave you the time you could sit down and write out them all, I suspect?---Oh, yes, yes, I could recompile the list.

Yes, Mr Hanson.

MR HANSON: Mr O'Brien, is this really the truth you are telling us? Is it?---Yes. Yes.

Were not you asked these very same questions by the investigators here a few weeks ago, 8 April?---Yes, something – or something similar, anyway.

You told them that you did not actually ask anybody then to make inquiries for you; is not that the case?---No. I said that I couldn't specifically recall whom I had asked.

Well, we can have the tape played back, and we have got a transcript of it, so - - -

Let me read this to you, Mr O'Brien. We will play the tape if needs be. You said this:

> *I know one of the things I did was drive around to the areas and try and cover most of them. I didn't get through all of them to the areas where the jurors lived. Not for the purpose of having a look at their house and making a deduction how they might vote on the jury because of that, because I have never really had much faith in that sort of assumption, but by going to the actual area it would jog one's memory about so*

and so living there far more than going through phone books or going through refedexes would. And in that way that is why I was able to get probably a list of, I don't know, probably a hundred a couple of hundred people who I thought potentially, you know, just potentially, might have been able to be approached. But as I said, you know, looking at really, it is a pretty hard question to ask someone, and more probably different if it is a person who might be just up on a car stealing charge who is unknown, but with a high profile defendant there just the mere question could end up on the front page of the Courier Mail the next day. And how else would you, how else could you do it unless you did find someone like that. The key to it ended up finally really just the National Party. No one else could help, could really help you that much or would be willing to.

Question, by Inspector Huddlestone:

Just on that point was there any one person that you approached and asked to make inquiries for you.

And you said, 'No.' 'In any residential area?' And you said, 'No.' Now, do you remember that exchange between yourself and Inspector Huddlestone?---Yes, I do, yes. Yes.

Well, did you ask any of these people then to supply you with information?---Well, I can't specifically recall the identify of any particular person or what information they gave, but obviously I got some information.

But did you ask anybody. Whether you can recall their identify or not, did you ask any one person to feed you information?---I would have.

You would have. But why did you tell Inspector Huddlestone that you did not, not one?---Well, perhaps that should be qualified by saying none that I could specifically recall.

Why, why do you want to qualify it. You did not qualify it here on 8 August, did you – on 8 April?---No, but it is not – that doesn't convey the correct meaning that was intended.

Well, let me read to you again the question Inspector Huddlestone asked you:

> *Just on that point was there any one person that you approached and asked to make inquiries for you.*

It is a fairly straightforward question, is not it?---Yes.

You are recorded as saying:

> *To make inquiries for me>*

And he said, 'Mm.' And you said, 'No.' He said:

> *In any residential area?*

And you said, 'No.' Now, that was fairly plain. He carried on. He said:

> *You know, over those a couple of hundred names you say that you formulated.*

And you are recorded as saying:

> *No, I don't, I don't think there is anyone that I actually asked finally.*

You said it three times?---Yes. Well, the difficulty I found once I had compiled the list was that for a start I felt that I had to be very careful that the privacy of any potential juror wasn't invaded to any unacceptable level, apart from the fact the inquiries had to be kept legal.

I can understand that?---But having compiled a list of virtually everyone, myself and my family could recall, in areas or residential or other areas where they may have known some information that might have assisted me, it

was really a question of asking them about a matter that could be intruding on their privacy to ask the question.

Yes?---And this is why it was so difficult at the start.

Yes, of course?---To get information. And as the time came around probably to the end of inquiries on the first panel, but certainly by the time the second panel had started, although I went through the same process of adding to that list for the second panel, I could see that the basis for the inquiries should become something connected with the National Party or people who were recommended by the National Party. And I couldn't really see another way to get any information that may be relevant so quickly and information that could be kept, could be discreetly obtained so quickly. So when that list was compiled, I don't - - -

List of?---The first list – the list of contacts – the list of potential contacts.

Yes?---I don't know that – specifically to whom I might have spoken.

MR CARTER: Or if you spoke to any of them?---Well, I would have spoken to some, but just how far I went with the inquiry, I don't really know. I just saw problems with it.

MR HANSON: Can you name any one of those persons for us? One? One out of a hundred?---No.

Well, try to think of who they could possibly be. Present or past members of the police force with whom you were acquainted who perhaps lived in the area of some of the jurors. Anybody in that category?---I don't believe so.

Anybody known to your children?---Not that I recall.

Professional people? Members of sporting clubs? Does not bring any name to mind?---Not at the moment.

Mr O'Brien, the sheriff, Mr Green, interviewed you, did he not?---Yes.

And did not you tell him that you made discreet inquiries from persons who were well-known to you, local professional people or members of sporting clubs whose integrity you were confident of, as to whether they knew the juror or the juror's family? There was no direct approach to the juror's family, but you did make checks in that way; that is what you told Mr Green, so he says?---Yes. That was the intention, but I can't recall who those people were now.

Mr Green says you did it, not that you intended to do it. You did it. Do you agree?---Well - but I - I may have, but I can't recall who those people are now.

According to Mr Green, you made discreet inquiries from persons who were well-known to you. Professional people, members of sporting clubs. Did you or did you not do it?---Yes, I would have.

Made the inquiries, asked the questions?---I suppose so, yes.

And you cannot tell me the name of one of them?---No."

Pausing there, the intrinsic lack of merit in O'Brien's evidence is clearly apparent. His answers to Inspector Huddlestone and to Green are inconsistent with each other and both are inconsistent with his sworn evidence. His memorandum of fees to Butler also speaks for itself. For Friday, 20 September 1991, and Saturday, 21 September 1991, he had charged as follows:

20 September 1991			$
Investigations	–	9 hrs @ $45.00 hr	405.00
Mileage	–	62 kms @ 45c km	27.90
Telephone/fax	–		9.60

21 September 1991			**$**
Investigations/ Conference	–	14 hrs	630.00
Mileage	–	138 kms	62.10
Telephone/fax	–		5.00

He was in conference with Greenwood QC/Gundelach late in the afternoon of Saturday 21 September 1991. In that context the fees charged above (and paid by Mead) provided the basis for the questioning by Counsel assisting me. What was done in the 23 hours charged for? What information was collected? Why was it necessary to travel 200 kilometres? And for what purpose? What information became available in the course of the journey? Of course no particulars are available in respect of the telephone/fax charges. O'Brien's responses to the obvious questions were pitiful and inadequate. I reject his evidence as untrue. O'Brien was intent on the suggestion that he had set up or was intent on setting up a network of informants from whom he could obtain information in various parts of the city. There was perhaps 10, maybe more, perhaps even 100, and the kilometres were travelled in the hope that travelling to a particular part of the city might jog O'Brien's memory of a particular person whom he could include in his list of possible informants. For the experienced investigator O'Brien to expect that any person of average intelligence would accept this as a suitable modus operandi is to insult their intelligence. And finally, when asked to name any of the these persons he was unable to, except Mrs Yvonne Chapman, the former National Party politician and Minister of the Crown, whom I will deal with separately.

Furthermore, the inconsistencies in the evidence compared with what he told Green and Inspector Huddlestone of this Commission are too obvious to require further treatment.

Counsel then directed his questions to O'Brien on the basis of other documents and information available to the Commission.

When this Commission began to inquire it first sought the available documents which might be held by any relevant person. In November 1992 Gundelach was still in possession of the copy of Panel Z which had been given to him by Butler. As I will later point out, I am satisfied that this jury list was in Gundelach's possession at about 9.00am at the District Court on 23 September 1991 just before the application was made to discharge Panel Z.

At a meeting between Gundelach and Butler at that time Butler gave him some sketchy information about relatively few jurors and Gundelach put some ticks against the names. Only one potentially antagonistic juror was identified.

This list was not needed after 10.00am on that morning because the trial Judge had resolved to excuse Panel Z. Gundelach, however, kept the list in his possession and in November 1992 handed it to Gilshenan and Luton Solicitors who forwarded the same to this Commission.

Counsel assisting me then used the Panel Z document for the purpose of questioning O'Brien. O'Brien's memorandum of fees also contained charges for Sunday, 22 September 1991 as follows:

22 September 1991			$
Investigations	–	14 hrs	630.00
Mileage	–	210 kms	94.50
Telephone/fax	–		15.40

Therefore, by Sunday evening O'Brien's investigative work on Panel Z had presumably totalled 37 hours work which entailed travel for 410 kilometres in addition to telephone/fax charges.

Counsel directed O'Brien's attention to Gundelach's copy of Panel Z (exhibit number 89):

> *"Now, up until the Monday morning, you were working on Z; is that the case?---That's correct.*
>
> *Now, do you recognise the document that is there, spiked to the cover, the manila folder?---Well, I recognise it as a copy of the list that I'd have seen, yes.* (This was the list used in discussions between Gundelach/Butler on the morning of Monday, 23 September 1991.)
>
> *Now, do you see – just have a look at it. Do you see there are some ticks, a couple of stars or asterisks perhaps?---Yes.*

Number 22, somebody has printed in – I think Mr Gundelach tells us he has done it. Col Chant's wife; see that?---Yes.

Z22. Did you give that information? Col Chant's wife. Do you remember this?---No, I don't.

All right. Well, just keep looking through. You will just see ticks, three or four ticks on each page. When you get over to about Z82 there is a comment there on Ys jury, on Charlie York's jury; see that there?---Yes.

Go on to the same comment at 114. You get to Z124 and there is a 'No' with an exclamation mark against it. Do you see that there?---Z124?

124?---Yes.

Carry on. A couple of ticks each page until you come to the end of it, 162?---Yes.

Are you with me?---Yes.

Now, this is the information Mr Gundelach had on Monday morning in case he had to pick the jury?---Yes.

Was there any more available than this?---Was there – yes, well, there was another list typed in a similar way to – – –

What, there was a Z retyped, was there?---Yes.

By yourself?---Yes.

I see; and what information was on the Z one that you retyped?---Similar information to what's on the K and P panels.

All right. I just want to draw your attention to this particular Sheriff's version. There is only one there that is not wanted – 124 – is not there? Only one 'No'?---Right. Yes. Yes.

And 20, perhaps two dozen, ticks?---Yes.

Well, where is all the information that Mr Walliss had been feeding to you and that you had been gathering?---Where is it?

Where is it? Well, it is not on here, is it?---No. No, it's not.

You had more information that this at your disposal, did not you?---A lot more, yes.

A lot more?---Yes.

Many no's?---Yes. Yes, quite a few.

Are these your ticks on this document?---No, I don't believe so.

A lot more no's than what we see on here?---Yes.

It sounds like Mr Gundelach was not very well informed at 9 am on the Monday. Would that be the case? There was a lot more available, if somebody had only told him about it?---Yes, yes.

Many more there who were - who were no's, should not be allowed on the jury?---Oh, and - and yes's, and - and other comments.

And that was all in the form of a retyped Z list?---Yes.

Retyped by yourself?---Yes.

And what did you do with that one?---It was never used.

MR CARTER: No, that does not answer the question?---Oh, destroyed it.

What did you do with it?---Destroyed it.

MR HANSON: When?---On Monday.

At what stage of Monday?---Oh, probably Monday afternoon or something like that, after it was decided that the – the panel wasn't required.

Of course, you had to keep it in case the judge refused Greenwood's application?---Exactly, yes.

And was not Gundelach given the information, anyway, before 10 am in case the judge said, 'No, let's get on with the trial.' He had to be ready to go on with it, did not he?---Well, I don't know, but I – the information – – –

MR CARTER: That is his evidence; that is his evidence, Mr O'Brien. Mr Gundelach himself – – –?---Yes.

– – – was briefed – – –?---Yes.

– – – on jury information before 9.15 on the Monday morning?---Not by me.

Well, you were not present?---No.

His evidence tells me who was present?---Yes.

Are you saying that you had a large body of information by that time on Monday morning and did not give it to anyone?---No, I'm not saying that at all.

Well, you did not give to anyone?---No, I don't think so, but because – because by the time I'd got to the court, there was – the court was in progress in relation to the submission for the panel to be replaced, and when I next got information, it was that that panel was in fact replaced, that it had been discarded, and so my inquiries were never produced.

Yes, Mr Hanson?

THE WITNESS: You see, I think the – it started that morning, well before 10 o'clock.

MR HANSON: Before Judge Helman, yes?---Yes. And had – had it started at 10, I'd have gotten there at about 10 o'clock with the result of my inquiries, because I'd worked right up until the last minute.

MR CARTER: Greenwood had arranged to meet you at the – at the Gateway Motel before they went to the court?---On the Monday?

Yes, according to his statement?---I don't recall that.

So that you could give them the information?---I don't recall those arrangements.

Yes, Mr Hanson?

MR HANSON: So you never ever passed over your retyped Z list?---No, not to my knowledge – or if I did it would have been given back to me.

Did you pass anything over to Butler, or Gundelach, or anybody, which could be the source of this Z list we see here with a few ticks on it? Did you give anything over?---Well, I don't think so. But this list here has virtually got no inquiries on it.

The one we are looking at?---Yes.

It would not be much help to Mr Gundelach, would it?---None.

Well – – –?---Oh, well, I guess – – –

– – – a couple of dozen ticks on it?--- – – – if – I guess if you assume that a tick is okay.

There is only one no on there, is not there?---Yes.

It is pretty important to keep off the no's, if you think they should not be there?---That's correct.

And he has only been told that there is one fellow should be kept off; is not that the case?---Yes.

You had a lot more information, though?---Certainly.

Well, did you let - - -

MR CARTER: Mr - sorry, well, Mr O'Brien, you have told me that by Saturday afternoon, between 4 and 5 o'clock, you didn't have virtually any information at all; is that correct?---That's correct.

You went to Gundelach's home on the Sunday afternoon and you did not have any more information then?---No, I didn't say that.

What did you say?---I said that when I arrived there I was told - with the information I had to that point - I was told that it might not be needed.

So you went there?---Yes.

How long were you there for?---Probably only about 10 minutes.

And why had you gone there?---I had gone there to report on the progress of inquiries into Z Panel.

And what information did you have by the Sunday afternoon?---I had more than by the Saturday, but I still expected much more that Sunday night, and the next morning I expected more information still.

Yes, Mr Hanson?

MR HANSON: Where was it all going to come from overnight? It was all going to come flooding in overnight, it sounds the way you tell it, Mr O'Brien?---Well - - -

All these 100 - 200 people were going to ring in, were they?---Well, some were; some did.

I thought you did not even contact any of them. You did contact them, did you?---Well, I had contacted some people obviously.

And asked them for information. How many is it now? 10? How many did you ask for information?---I don't know.

And they were all expected to ring in on Sunday night, were they?---Well, they were expected to ring in before the jury was chosen so either Sunday night or Monday morning was the deadline because the information was worthless after that.

MR CARTER: Well, you must have given these people your phone number?---Yes.

Well, can you think now who they were?---Well, whoever I had given them to were in the process of contacting other people who may have been able to assist, and I was waiting for a return of that information.

Look, you have said that lots of times. What I am trying to find out is to identify one such person to whom you gave your phone number, one of this large body of people who was ringing in on Sunday night and Monday morning with this critical body of information. You cannot even tell me one such person?---No."

A word of explanation is necessary. O'Brien asserted that in respect of Panel Z he had collected a somewhat voluminous body of information based on his own work which was "co–ordinated" with the information supplied by Walliss. He asserted that this information was "similar information to what's on the K and P panels".

As will be seen, O'Brien himself retyped Panels P and K, on which copies he included in typewritten form his various assessments. He added in handwriting the traffic offence and criminal histories of many jurors. Accordingly, he had by Sunday evening/Monday morning a somewhat voluminous body of information concerning Panel Z including information supplied by Walliss. Walliss, of course, in fact had nothing to contribute which immediately makes O'Brien's evidence in this regard highly suspect. However, there is more reason than that alone to reject O'Brien's evidence that by Sunday evening/Monday morning there was available for Counsel's use the same degree of information which was to be available in respect of Panels P and K on the next day.

O'Brien was at Gundelach's home on Sunday afternoon. He gave to Counsel no information concerning Panel Z. He knew that if the suggested application, of which I am sure he was made aware at least by Butler, was to fail then he had to provide all of the information concerning Z. I am satisfied that if O'Brien was in the precincts of the court on the morning of Monday, 23 September 1991, it was later than 9.15am by which time Butler had given to Gundelach the paltry information contained in exhibit number 89.

Again, at the risk of being unduly repetitive, this was not a relatively unimportant trial, it was the trial of Sir Johannes Bjelke–Petersen for which O'Brien had been specifically engaged to co–ordinate the jury vetting process. Not only was no apparent effort made by O'Brien to have the valuable material concerning the Panel Z jurors in the hands of Butler/Gundelach in time for the anticipated commencement at 10.00am, it was never ever produced to Butler, nor to Mead, nor to any other person, if only for the reason of supporting the significant claim for fees incurred on 20, 21 and 22 September 1991. Not only was it not produced even for this limited purpose, it was destroyed according to O'Brien as a result of his unilateral decision that it had become superfluous after 10.00am on the Monday. One cannot but entertain the gravest doubt that it ever existed.

One has only to examine, firstly, O'Brien's evidence of his having obtained material from Walliss, secondly, his bizarre evidence as to his suggestion of setting up the network of people who supplied this information – only one of whom he can now identify, and thirdly, his inability to produce any trace of any information (the list was said to have been retyped on word processor), in order to evidence the gravest of doubts that the material ever existed. Nor is there any satisfactory evidence that he ever attended the court on Monday morning with the information in case it was needed. This will emerge from the lengthy excerpts of O'Brien's evidence set out below.

In accordance with the relevant standard of proof, I am satisfied that it is more probable than not that by Monday morning, 23 September, O'Brien had no or little relevant information concerning the Panel Z jurors. Certainly he had nothing useful from Walliss.

For the sake of completeness, I should set out further excerpts of O'Brien's evidence on the point which I am satisfied cannot be accepted as truthful:

> *"MR HANSON: Mr O'Brien, yesterday we were talking about – you may remember – the inquiries you made about Panel Z?---Yes.*

Up until the Monday morning?---Yes.

And I think you told us that you had, in fact, compiled a re-typed Panel Z with a lot more information on it than what we see to be on Mr Gundelach's Panel Z?---Yes.

I think I was asking you about the source of that information. Do you recall?---Yes.

All right. Now the one that you had re-typed, I think you told me yesterday, it too much the same form as what we see here in P and K, which you re-typed?---I think so, yes.

Which means that many of the jurors had a comment against them, by way of Yes, or No, or Maybe, something like that. Would that be the case?---I think so, yes.

And some crosses and asterisks?---Yes, something similar to the second list, yes.

All right. Now that document, you say, you held on to and it apparently did not find its way into Mr Gundelach's hands?---I don't think so.

And did it leave your hands?---I'm not certain of that, but I don't think so.

So the comments upon Panel Z: what was the course of what was commented - what was endorsed against each of the names. What was the source?---The source was whoever had rung me back with result of inquiries.

Now, just remember I am talking about Z?---Yes.

And I take it also Walliss's information had been incorporated into the document?---Yes, I'm certain it was. I think that there was a - I thought of doing two documents, but I think finally I incorporated the two together.

Well, it would have been silly to not use Walliss's information, I suppose?---Oh, yes, it would have been,

but there was the question mark on it from the conversation I had the night before.

Yes, well, what would be wrong with using it anyway? If the judge said, 'Well, I'm not going to discharge Panel Z; we'll go on'?---Yes.

You would want to use Walliss's information, would not you?---I'd say so, yes.

Well, was that then incorporated on to Panel Z?---I believe so.

Plus information that you yourself had gathered?---Yes.

By what means?---By telephone mainly.

And this was by means of people phoning you with information?---Yes.

So you did, in fact, ask some of these people to comment on the jurors; is that the case?---Yes.

Yes. And – – –?---Or someone had asked them to comment and they had got back to me.

And they phoned this information through to you when?---Over the weekend.

Well, we know – – –?---Monday morning.

Monday morning?---Over the weekend. You know, at various times."

And again:

"MR HANSON: Well, with what response then from those 10 or so people?---Yes. Well, the response – I think a few faxes came back, but the response largely came on the telephone, as was organised, along the basis that the panel – the number – the jury were always identified by the panel number, which may be, say, for instance, Z50. And if there was any indication that Z50 may be okay, that person would phone me back with some message like, 'Z50

should be okay. Z16, no.', or whatever, or, of course, in most cases, no comment; there might be just one or two mentioned.

And did all 10 respond?---Oh, I don't think so.

And what did you do with this information?---But, you see, the – those 10 or so – or whatever the number was – contacted other people, and I guess had their own network, and some of those people contacted me back – people that I'd – you know – had not contacted personally.

Well, what did you do with all – – –?---And it was done on the basis that – the inquiry was done on the basis expressed – or certainly strongly implied – that the inquiries would be completely confidential in relation to their source. And I maintained that, and in fact ensured that by destroying any – any notes that I did have of those replies after the jury was selected.

What did you do with this intelligence that was fed back to you – and I am still talking about up until the Monday, you understand?---Till Z – to Z, yes.

Up until the 23rd, I am talking about?---Yes.

What did you do with what you had gathered?---I'd have put – marked it on the list.

And that is the list that you held onto on the Monday?---Well, there was a final list compiled. But in – in the meantime there would have been a progressive list, or progressive lists.

MR CARTER: Do not tell us what there would have been; tell us what there was, in fact. Yes, Mr Hanson?

THE WITNESS: Well, I kept notes somewhere, and – and I don't recall now whether it was on a list or just on other paper.

MR HANSON: Did you give this document to the solicitors, Mead or Butler?---Which one?

The list that contained the results of your searches and inquiries up until Monday morning?---I don't recall.

The list to be used if the judge knocked back Greenwood's application?---Yes. Well - - -

Did you give it to the solicitors?---Well, I don't recall giving it to them, but I - I - you know - guess I would have.

I think you told me yesterday that you - you were, or were going to be, at the court just before 10 with the fruits of your labour?---That's correct.

Well, were you, or were you not?---Well, I don't recall at - at what time I got there on that Monday morning.

Well, did you ring Mead or Butler and say, 'I'm coming' - you know - 'I have got it all. I will be there at quarter to 10" - or, 'I have got some information for you about the jury. Look out for me. Where will I find you?' Anything like that?---Probably, yes, but I don't recall now, exactly.

Well, this is what you had been commissioned to do, was not it?---I know. Yes.

And it was vital to get there with the information, surely, before 10 o'clock?---Yes. That's correct.

In case Judge Helman said, 'No. We will go on with it'?---Yes.

Well, do not you recall making some arrangements to make sure that the barristers got the fruits of your labour?---Of course. There would - there would have had to have been some arrangements.

Yes?---I just can't recall what they were - - -

Cannot recall?--- - - - or who I spoke to, at this time.

MR CARTER: Well, the arrangement must have to be there sometime before 10 o'clock?---It would have - yes, certainly.

Well, what was the arrangement?---The starting time.

What time were you to be there to give the information to the solicitors so counsel could be briefed?---I'd- - -

No good being there after 10?---That's correct. No.

Well, what time would - - -?---I - I don't recall now the exact time.

Sorry?---I don't recall the exact time.

Oh, well, Mr O'Brien, you are an experienced witness. You are very experienced in these matters. You have, all your life, had to, sort of, recall things in the course of your duties as a police officer. Surely you can tell me what arrangements were made with the solicitors for the purpose of passing to them all of this vital information about the jury, which was going to be selected at 10 o'clock?---Yes.

You must remember that?---I don't. The - the last I remember - and that - I say I - there would probably have been some phone calls. But the last I remember discussing the jury and panel Z with the defence team was the previous evening.

But you did not have any information the previous evening, or only very limited information. Now, this information has flooded in from this network of sources on the Sunday night and the Monday morning; it has all got to be compiled, put into appropriate form, given to the solicitors, certainly well before 10 o'clock, so that it could be used in the course of selecting the panel. You must have made - you must remember the kind of arrangements, if any, you made with respect to this subject matter?---Well, I don't.

Yes, Mr Hanson?

MR HANSON: Did you find out anything at the National Party that morning between 7.30 am and whatever?---No, I don't believe so.

Monday - Monday, we are talking about?---Yes.

Monday?---Yes. I don't believe so.

You do not believe you found out anything?---No.

Anyway, you managed to gather some intelligence from your network, did you, which you were prepared to deliver, but never did. Is that the case?---That's correct.

Mr O'Brien, look, I just want to remind you of what you said in an interview with Inspector Huddlestone here on 8 April, a few weeks ago. I just want to read this to you. He asked you:

> *Did you also conduct some other inquiries yourself outside?*

This is after speaking about Walliss' inquiries?---Yes.

He went - then went on to your inquiries. No - perhaps I will just take it back this little bit further:

> *In addition to asking the people at National Party headquarters to indicate on the list whether the people may have had a bias or otherwise, did you also conduct some other inquiries yourself outside?*

And you are recorded as saying:

> *Well, not really. I certainly spent a lot of time drawing up a list of people who live near the potential jurors, or who might have been expected by way of occupation, or whatever, to have known them, and they would all be people that I'd have known, you know, from my knowledge of people in the whole of Brisbane, which would be extensive. But I don't - I can't really recall specifically anyone - well, anyone giving me any information, because in most cases - I'd say 90 - a high 90 per cent - I decided not to approach. I was hoping to find someone that I could - I felt that I could speak to who wouldn't be annoyed at the request, or wouldn't have felt embarrassed at the request, for information on someone that might have been a neighbour, or a fellow worker, or whatever. So, really, most of it - most of the time was spent just*

finding out who might be approached – who could discreetly be approached. But, really, although I thought at the start that I might have ended up with a fair sort of list of people who could be approached, I discarded virtually all of it.

And Huddlestone asked you:

Do you recall approaching any people outside?

And you say:

Any individual?

And he – he says:

Any of your connections?

And you are recorded as saying:

No. I've no individual record – recollection of any individual person. I can't recall anything of – significant that came from that.

Now, did you say that to Inspector Huddlestone here a few weeks ago?---Yes.

Well, how does that square with what you are telling us today?---Well, as I said, I spoke, as I recall, to Mrs Chapman, and on my recollection someone must have suggested her to me, but I can't recall who that person was. There were a – a lot of phone calls made – a lot of phone calls made by me, and a lot of phone calls made back to me, and I have no recollection of who those people were at the present time.

We are still talking about panel Z, are not we, up until Monday morning?---I think so, yes.

Well, you claim to have gathered a fair body of information about panel Z by the Monday morning?---Yes.

By 10.00 am or whatever?---Yes.

All right. And you cannot tell me anything about the document that found its way into Mr Gundelach's hands that you were looking at yesterday? You had better see it again, exhibit 89. I am sorry, yes, the copy is not in court. There is a copy being made at the moment. I will show you mine. Remember you were looking at Z yesterday?---Mm.

Said by Mr Gundelach to be what was put in his hands about 9?---Did he say who gave it to him?

About 9.00 am on the Monday. Well, I do not remember.

MR CARTER: Well, that is probably a matter of no interest to you. Yes, go on, Mr Hanson.

THE WITNESS: Well, with respect, sir, I have not had the advantage of hearing all earlier evidence or reading the depositions, and obviously some of that earlier evidence could help to jog my memory. I am thinking of an instance from a couple of years ago, and that is the only reason I ask that question.

MR CARTER: Well, if I told you it was Mr Butler, would that help?---So Mr Gundelach says it was Mr Butler?

That is right?---You see, what's – if I may comment, what's remarkable to me about this list is that it only has ticks on it.

No, do not comment, do not comment. Just respond to questions. Yes, Mr Hanson.

THE WITNESS: Okay. What is the question again, please?

MR HANSON: Well, you see what is on Z there, a couple of dozen ticks and one no?---Yes.

That is all Mr Gundelach had to work off. Now, we looked at this yesterday. So what do you want to say about panel Z as it appears there?---Well, I can't recall a list being compiled only of positives, as this list apparently is.

Well, what is your suggestion? Who is the source of two dozen ticks and one no that was fed to Gundelach? Who is the source of that paltry information, and how is it that the wealth of information that you had gathered did not reach him? That is what we are interested in?---Mm.

If indeed you had gathered the wealth of information that you say you had? Can you help us with those two queries, Mr O'Brien?---Well, it just looks to me as though, if this is a list that has come from me, it is a progressive list. It's not complete. You know, from the information gathered on the survey of Walliss's alone, there would have been several doubtfuls or negatives.

I am sure there would have been, more than one?---Yes.

Yes?---And this list is a – seems to be a positive list.

MR CARTER: Do you identify it as such? Did you have one list of positives and one list of negatives?---I don't think so.

Well, you said it might be a progressive list. What did you mean by that?---Well, it might have – might have been. I'm not saying that it is, but it just might have been a list that – – –

Anything is possible. Why do you say it might have been? Did you have a progressive list? Did you give Butler a progressive list, or did you give him information progressively? Is that what you are saying?---No, but I recorded information that I'd got somewhere on some document. Whether on one of these – whether this was on one of these sheets or not, I don't know, but I just can't recall compiling a list of positives.

MR HANSON: All right. You cannot help me. You do not claim to be the source of that particular list?---No, I don't say I'm not the source of it, because if Butler has given this to Gundelach, I don't recall giving it to Butler, but I don't say that I didn't.

All right. Well, let us part – – –?---But it's not the – it's not the final list.

Of course not. You have told me that you retyped list Z?---Yes.

With much more information, something like the Ps and Ks that you retyped the next day; is that the case?---I believe so, yes.

You had a similar list for Z?---Yes.

And when did you retype that?---I think that was that morning I completed it.

After you had been to the National Party?---Yes.

After you got home from the National Party?---Well, whether it was all typed then or not or whether the list had been typed up and any extra comments from that morning were placed on it, I don't know when exactly it would have been typed, but my recollection is that there was a list similar to the combined panels P and K typed up, and the - and that the information from Walliss had, you know, a number of negatives.

It would be astonishing if it did not, would not it?---Yes. I would have said more negatives than positives.

Do you work from your home?---Yes.

Your office is at your home at Stafford, is that the case?---That's correct.

Well, did you go back to your office from the National Party headquarters that Monday morning?---I think I did. My recollection is that I did.

What for?---To finish typing the list, to get any extra information that might have come in.

And then got back into town before 10.00 am?---Yes.

Did you go up to the court house?---I don't recall.

Were you told not to go to the court house?---I don't recall whether I went to the court house or to chambers.

How long were you at the National Party, then, that Monday morning?---Just roughly a half an hour or something like that.

Do you remember sitting down there with one of the staff, one of the female staff, and reading her the names and addresses while she checked them against the computerised list of members?---That's correct, yes.

How long did all that take?---Well, I don't know. Just roughly I'd say a half an hour, maybe an hour.

And you have got no information from that search?---I don't think so.

So then you went home to Stafford?---I think so.

Intending to get back into town in time to give your information to the barristers before 10?---Yes.

Can you tell me what happened from there on? Did somebody tell you not to come or did you go and find it was all over, or what happened?---No. The next I recall is that there'd been a - someone told me that the application for discarding of the first panel had been successful, or had been agreed to, and that another panel would be arranged.

MR CARTER: Mr O'Brien, you had to take this information and give it to the people concerned?---Yes.

Well, where did you go?---I can't recall now whether it was court or chambers.

What is the best of your recollection?---I can't recall with any certainty.

Who were you intending to give it to?---Bob Butler.

And what arrangements had been made with Butler about Butler receiving it?---I don't recall.

You must have made some arrangements. Do you concede that?---Yes, yes.

And you had to get the information to him, obviously?---Yes.

In sufficient time for counsel to be briefed with it?---That's correct.

And your understanding was that the trial would commence at 10 o'clock?---Yes.

So, you had to allow sufficient time to get the material to Butler so that counsel could be briefed in detail with this considerable body of information?---Yes.

Stands to reason that any arrangements you made with Butler for this purpose must have involved your meeting him at least an hour, one would think, before 10 o'clock?---Yes. Well, sometime before 10 anyway.

Well, I am suggesting not 5 to 10 but I am suggesting probably at least an hour before 10?---Well, as early as possible before 10.

Well, what was the arrangement? You see, this is – you have been charged with a responsibility of co–ordinating all of this information. You are the main person who is involved. We know you were going to charge a not insubstantial fee for your services. You were the person in possession of the critical information. You were the person whose responsibility it was to put it all together. You were the person who was to give it to Butler so that Butler could brief counsel. Now, Mr O'Brien, tell me what arrangements, if any, you made with Butler for the purpose of briefing him in respect of the information, the significant body of information, which you say you collected in respect of panel Z?---Well, I don't recall but the previous evening I spoke to Adrian Gundelach, as I've said, in relation to the panels.

You spoke to Adrian Gundelach?---Yes.

Where?---At his home.

You sure about that?---Positive.

You spoke to Adrian Gundelach at his home?---Yes.

About what?---About the – the panel, the inquiries into the jury.

What did you tell him?---Panel Z.

What did you tell him?---Well, I don't recall exactly what I told him. I'd have told him the progress in relation to panel Z – – –

Well, did you have – – –?---But it was at this stage that he said that it may not be required now.

Is that your recollection of it?---Yes.

Did you speak to Mr Greenwood?---Yes.

What did Mr Greenwood say?---Well, when Mr Gundelach had said that it may not be required now, I may have asked why or I certainly would've indicated what was to be done if that was the case. And I looked at Bob Greenwood who just said without a – he just offered the explanation that he was concerned about the survey that Walliss had done. And I think Gundelach said that there was a – that they were considering an application to apply for the panel to be discharged or re-replaced.

Any more? Anything else?---Well, he said – Adrian said that – I said, 'Well, what about the –' you know, I said, 'I've got a lot of inquiries that are in train that will be taking place overnight. Some information I won't get possibly until, you know, tomorrow morning, till just before the trial.' And, also, I mentioned that I had made arrangements to attend the National Party headquarters the next morning early. And he said, 'Well, you know, tell them to stop. Tell them not to bother.'

Tell who not to bother?---The people whom I'd been asking for information.

And was he telling you not to bother, too?---Well, he – he seemed – – –

Is that what you are saying, that Gundelach told you on Sunday afternoon not to bother?---Sunday night.

Sunday night?---Yes.

Well, why did you go to the National Party at half past 7 on Monday morning?---Because, and I said to him - I said - I said, 'Is it certain that the panel will be replaced?' And he indicated that it wasn't certain but certainly there would be a definite attempt by the defence to do it. I said that it would be difficult to stop the inquiries at that stage. And it would certainly be, potentially, or have the potential to cause a lot of speculation if I started at that stage of a Sunday night to telephone people to say not to proceed with inquiries in relation to the panel which they had been asked to institute.

Well, go back to my - - -?---And including - yes?

Go on?---Including the visit to the National Party. And he said - he said, 'Yes.' He seemed to agree with that. And he said, 'Well, just let it run.'

Was that all? Anything else?---In relation to that? I think that's all, yes.

Well, go back to my question, then?---Yes.

What about your arrangements with Butler?---Well, you see, I can't recall the arrangements with Butler, although I would say there must have been some. Butler was either on his way, or they expected Butler at the house at about that time.

No, no. About the next morning, the arrangements with Butler for the next morning. You see, you have got to give to him all of this information in case it is needed?---Yes. I don't recall contacting Butler after that, but I may well have.

Well, you see, now, there is introduced into the scenario, according to you, this large element of doubt. You do not whether you have to or whether you do not. So, you have got to cover both contingencies?---That's correct.

So, you have got to go and give the information in case it is required?---That's right.

You have got to compile it, put it together?---Yes.

And take it in?---Yes.

Well, again I ask you, what were the arrangements with Butler about that?---I can't recall specific arrangements with Butler about that.

Well, do you recall seeing him?---No, I don't.

Did you have all of this body of information with you when you left your home?---I had – I had some – yes, I had some material because I intended to discuss.

Well, you must have had it all?---Well, probably. Certainly my notes of it.

Not probably because when you leave home to go and pass over this information, you say, you do not know what is going on?---When was that?

On the Monday morning?---Oh, on the Monday morning.

Yes?---No, that's – that's true.

So, you have got to take all of this information that has been collected and compiled?---Sure.

In whatever form it is?---Yes.

And you have got to take it and give it to Butler?---That's correct.

And you cannot remember what the arrangements were?---No.

But you must have seen Butler on that morning and given him the information?---Unless I had left it at Adrian Gundelach's on the Sunday night.

Not unless. You must have seen him. I mean that was – that just stands to reason?---Well, I – I may have but I can't recall seeing him.

Well, you must have had the material with you when you left your home, according to your version?---Yes.

And when you left home, you were going somewhere that you now cannot remember for the express purpose of giving it to Butler?---Well, I'd – I would have said that it's either the chambers or the court, just which – which I don't remember.

Well, wherever it was, wherever it was – – –?---Yes.

– – – for the purpose of giving it to Butler – – – ?---Yes.

– – – so that Butler could brief counsel – – –?---Yes.

– – – in sufficient time to allow the jury to be selected at some time after 10 o'clock?---Yes.

Well, you must have had the material with you – – –?---However there was an application – – –

I understand all that. Do not – – –?--- – – – at 9 o'clock.

– – – – do not cloud the issue. I am – – –?---I'm not clouding the issue.

I am looking at what your state of mind was and what you did and what you must have done on the Monday morning. You did not know what the position was, precisely; nor did you know what Judge Helman was going to do?---No, that's correct.

So therefore, having regard to your retainer and what you had been retained to do, as I said earlier, as the person immediately responsible for the collection of this information, you had to compile that material and give it to Butler?---Yes.

And you do not recall – and you must have had the material with you when you left your home?---Yes.

You do not recall where you saw Butler; whether it was at counsel's chambers or at the court?---No.

Did you – and you had the information with you?---Yes.

So you must have seen Butler at some time – some arranged time – in sufficient time to give it to him so that he could brief counsel?---Well – – –

Did you?---I – I don't recall any contact with Butler that morning, but I'm not saying that I didn't have any with him.

Well, you must have, surely – recall, if you did not see him you must now recall your concern or your disappointment or your emotion at having collected all of this material and gone to Butler and not been able to find him?---The next I recall – the next information I recall receiving is that the – Judge Helman had decided that the panel would be replaced.

Mr O'Brien, I am perfectly aware of the fact that that is what you want to tell me. What I am trying to probe is what was happening in accordance with what one might think would be the normal course of events in this situation. You have arranged to meet Butler. You have got to see him, because you are the person with the information that he wants to give to counsel?---Yes.

You cannot remember – are you saying now you do not even remember seeing him?---No, as – – –

Do you not remember – – – ?--- – – – as I recall – – –

– – – looking for him so that you could give the information to him?---Well, I certainly would have been doing that.

No, no, no. That is not – – –?---But I – I can't recall. No, I can't recall what – – –

- - - pardon me, please. Please - please, Mr O'Brien?---Yes.

Do you recall that morning looking for Butler, urgently, so you could give him the information?---No, I don't recall that.

Not even - do not even recall looking for him?---No, I don't.

You, the person who was seized of this valuable information which was needed for use in court and you do not even recall even looking for him?---No, I don't.

And you say you - - -?---But that doesn't mean that I wasn't looking for him.

And you tell me that your next recollection is that - is being told that the - it was not needed. A new jury was going to be selected. Is that your story?---That's correct, yes.

Yes, Mr Hanson?

MR HANSON: Mr O'Brien, it must have been a matter of some urgency that morning, by the time you left the National Party?---Yes. It was - - -

You had to drive back to Stafford?---Everything was a matter of urgency that morning.

You had to drive from - from what, Petrie Terrace, or where are they, Wickham Terrace?---Somewhere St Paul's Terrace, or somewhere like that.

St Paul's Terrace. From there to Stafford?---Yes.

Out to your home and back into the city between, what, 8 and - 8 or so - and 9.30 or something?---Something like that, yes.

Do not you recall any sense of urgency that morning; hurrying back to town with this information?---Yes, I - well, I don't recall that now, but - - -

Well, if you do not recall that, I take it you do not recall the result of it; the let-down at being told it was not needed, or the relief at handing it over in time? You do not recall either of those two emotions?---No.

Well, do you remember where, and in what circumstances, you got the news that the judge had agreed to change the panels?---No.

Or who gave you that news?---I don't know.

Where you were?---Again, either at the court or at chambers."

Other aspects of O'Brien's evidence which are critical to an assessment of his role in the matter and his credibility will be dealt with later.

7.3 The Saturday Afternoon Meeting - Gateway Hotel

It has been necessary to deal with this aspect of O'Brien's evidence so extensively so as to better place in its correct context the meeting between O'Brien, Greenwood QC and Gundelach on the Saturday afternoon, 21 September 1991. The evidence is variable as to the exact time it commenced and its duration. It is reasonable to find that it occurred late in the afternoon – between 4.30pm and 5.30pm and that its duration did not exceed 10 to 15 minutes.

I am satisfied that the meeting was arranged by Butler. Mead, as has been said, had left Brisbane on Friday for the Gold Coast for a social engagement of some personal significance. His next anticipated involvement in the trial was for Monday morning when, as he thought, the trial was to commence at 10.00am. His role was to instruct Counsel although in practical terms that was to be a somewhat formal participation. Both senior and junior Counsel were well-prepared, and of course Butler's presence throughout the trial was assumed. There was little left for Mead to do other than to present himself as the solicitor instructing Counsel. As for the client, it was probably a matter of little significance to him as to whom he would deal with; perhaps Mead, but more probably it was to Butler that he looked for advice and information and with whom he himself would deal.

The Saturday meeting was as Greenwood QC said to better inform himself and Gundelach as to the state of the jury panel. The very fact of the

meeting being called illustrates the importance, at least to the mind of Counsel, of the state of the jury panel. Were there any potentially favourable jurors? Who were they? Were there jurors who would need to be excluded? Who were they? What was known about particular jurors? and so on, were the kind of questions likely to arise.

It is probable that Greenwood QC advised the meeting and that it was arranged by Butler. O'Brien arrived first and left at or about the time when Butler arrived. Butler, it will be recalled, was speaking to Walliss by mobile phone at 4.23pm.

Therefore, the time and the apparent purpose for holding the meeting is clear enough. The real purpose of the meeting is less clear. That can best be ascertained by examining what happened.

O'Brien met with Greenwood QC and Gundelach. Almost immediately it seems that Gundelach went to the bar of the lounge in the hotel to buy the three of them a drink. Greenwood QC had been accommodated there since his arrival in Brisbane on Tuesday, 17 September and for the duration of the trial. All of the relevant conversation between Greenwood QC and O'Brien occurred in the short period which it took for Gundelach to order and pay for drinks. The bar was quiet. By the time Gundelach had brought the drinks to the table the relevant conversation between O'Brien and Greenwood QC was complete. Greenwood QC described it thus:

> *"MR HANSON: And the Saturday conference was designed to look at what they turned up; is that the case?---Exactly.*
>
> *Mr O'Brien was there to deliver the goods?---He was there to have the conference.*
>
> *All right. Well, now, he had some papers with him, you have told us?---Yes.*
>
> *Did you yourself look at what O'Brien had with him?--- No, Mr Hanson, I don't think so, except in a general sense that he had papers there. One appeared to be a list – jury list, which would be what you would expect, and other pieces of paper. I remember one piece of paper that I assumed, rightly or wrongly, was a summary of the Walliss investigations, but – – –*

Well, were you told that their inquiries were now complete by that Saturday evening?---No, they were far from complete.

Were you told how far they had gone, or what yet had to be done?---I have a recollection that Mr O'Brien was taking – was taking the general ground that he had only been brought into the matter a couple of days before and I got the early impression that, really, the whole – my whole program, or my proposed program, that I had put forward back in July and August, seemed to have fallen on deaf ears. But then, very quickly, after I got that impression that nothing much had been done, this matter of the Walliss alleged telephone polling matter came up.

MR CARTER: Other evidence, which you may not have been aware of but which I am aware of, is that the jury's panel had been obtained from the sheriff's office, by the solicitors, when it first became available, which I think, from memory, was about 11 September?---Yes, I saw that date on the statement this morning, I think.

That is evidenced by a receipt issued out of the sheriff's office to Maxwell Mead and Young for Panel Z. Do you understand me?---Yes.

That is what I am referring to?---Yes.

Now, we are dealing now – you are dealing now with events which took place on Saturday the 20th?---Yes, 10 days later.

Yes. Now, did you know – did you have any idea that in fact the firm had had the jury list for that period?---No.

Yes, Mr Hanson.

MR HANSON: All right. Were you told anything of what had been achieved so far? Anything at all?---Not that I can recall, Mr Hanson. My total recall of that conversation on the Saturday night is as recorded in my statement. That's the best I can do, and if I was told anything else, it was so subsumed - - -

MR CARTER: That is with O'Brien, you mean? That is with O'Brien?---With O'Brien.

Yes?---And if I was told anything else there by anybody, it was so subsumed by this bolt out of the blue about the telephone polling that I'm afraid everything else became subsidiary.

MR HANSON: Was Butler meant to be at that conference?---Yes.

But he was late?---He was late.

He came late?---Yes.

But did arrive eventually?---Yes.

MR CARTER: But Mead was not?---No. He was down the coast.

MR HANSON: Well, you have described to us how it developed, I think. While Mr Gundelach was away doing something, O'Brien explained to you what had happened. Perhaps you had better tell us in your own words again what – just how it came to your ears; what had happened?---Yes. Well, without referring to my statement, I'm now relying on my present recollection, O'Brien said that Walliss had been active; had done a fair bit; that he had conducted a ring around of the households of the jurors and had engaged whoever answered the phone in conversation aimed at ascertaining the general political and/or attitudinal atmosphere of the household; that – I can't remember his words, but I was given to understand that this had been done in a substantial number of cases; that the sort of questions he'd asked – and I think this was in response to a question by me, 'What had he asked these people?' and I think, in that context, O'Brien said, 'Well, they were very innocuous questions like: What do you think of mining on Fraser Island; what do you think of this issue; what do you think of another issue, and so forth,' and he said it was just not direct political polling but just to get – to get some idea of what the domestic attitude was at that – in that particular household. And I said – I think I would've – I think I said, you know, 'Well,

he must've spoken to some of the actual jurors?' and he said, well, he didn't specifically set out to do that but, obviously, the probability would there be very high. That's the gist of it.

And did he explain when he'd learnt that that is what Mr Walliss had been up to?---No. No, but he had – he had this – he had this piece of paper which was – which was, to my recollection, vertically lined and with various notations on it and he was referring that – to that in such a way as being consistent with that being a Walliss piece of paper and I got the impression, although you really couldn't say that there was any evidence of it, that he had reasonably recently seen Walliss who had told him about all this and had given him this piece of paper.

And did Mr O'Brien seem to be surprised or concerned by the news that he was conveying to you?---No, O'Brien, to my recollection was matter–of–fact about it, and didn't express any concern, but – I mean, that is how he presented. Whether he had his own opinions or not, I just don't know."

Greenwood QC's statement should be repeated:

"The thrust of the discussion with Barry O'Brien was to the effect that to my absolute surprise he had only been brought into the matter of the Jury investigation a day or so before he was meeting with me and also contrary to what I had advised back on the August show holiday. Nothing to his knowledge had been done by way of approaching an appointed person in the various electoral districts. In essence my memory is that Barry O'Brien had had little opportunity to do much productive work and that the information that he was talking about was largely Wallis' information. My purpose in having this conference really was twofold. Firstly I wanted to find out what information had been collected so far and secondly what else, if anything, should further be done. It was quite apparent to me that little had been done by Barry O'Brien but that quite an exhaustive poll had been done by this person Wallis."

Clearly O'Brien very quickly and very early in the discussion presented to Greenwood QC in a "matter-of-fact" way "this bolt out of the blue about the telephone polling". The matter requires closer analysis.

According to Greenwood QC, "O'Brien was taking...the general ground that he had been brought into the matter a couple of days before and I got the impression that really the whole...my whole program, or my proposed program that I had put forward back in July and August seemed to have fallen on deaf ears. But then very quickly after I got that impression that nothing much had been done, this matter of the Walliss alleged telephone polling matter came up".

Had "nothing much been done by O'Brien?" According to his evidence to this inquiry and according to his memorandum of fees given later to Butler he had on Friday/Saturday worked for 23 hours on the jury Panel Z and had travelled 200 kilometres in pursuit of his objective. He had also used the telephone and facsimile machine to assist him. He, O'Brien, was the supposed co-ordinator. Why did not O'Brien explain to Greenwood QC what he had done so far about the process he had set in place, about the large network of people who were engaged on information gathering, that that was to continue during Sunday, and that by Monday morning he anticipated that a wealth of relevant material would be available to brief Counsel before the commencing time for the trial? After all it was O'Brien's evidence that that was the fact, namely that by 10.00am on Monday, 23 September 1991 he had as much information and of the same kind as he later provided in respect of Panels P and K.

Greenwood QC was told nothing of what O'Brien, the main player in this part of the case, had done. Indeed, according to O'Brien's evidence, if it is true, he had created a "network" of persons of the same general kind which Greenwood QC himself had advised. Already 23 hours work had been done by O'Brien; he had travelled extensively; presumably his many agents were busily collecting material which was to be expected in time for the commencement of trial on Monday. Instead, Greenwood QC was left with the "impression" that nothing had been done. It was a simple matter for O'Brien to tell Greenwood QC what he told this inquiry and rather than give Greenwood QC cause for concern, to tell him that things were well in hand and that Counsel could anticipate a detailed assessment of Panel Z jurors in time to select a jury on Monday morning. Why then did O'Brien create in Greenwood QC's mind the very opposite but "false" impression that he had done nothing?

Furthermore, why did O'Brien create the demonstrated false impression in Greenwood QC's mind that Walliss had been polling jurors and had done

"quite an exhaustive poll" when in truth he had done nothing or virtually nothing?

As Greenwood QC said in evidence, after he had been given the impression that O'Brien had done nothing,

> *"Very quickly...this matter of the Walliss alleged telephone polling matter came up."*

As pointed out earlier, all of this was said and was complete by the time Gundelach bought the drinks. He had heard nothing of it. In fact, when he brought the drinks to the table Greenwood QC asked O'Brien to repeat to Gundelach what he had just told Greenwood QC.

Greenwood QC's statement continued:

> *"This information disturbed me when I first received it, although, I quite deliberately did nothing overt to indicate my disturbance to Mr O'Brien at that time. When Adrian Gundelach returned to our table I asked Barry to convey that information to Adrian, in other words to repeat what he said to me, and he did so. I am now left with the impression that at that time Mr O'Brien believed that Wallis had put in a good deal of work and that at least a significant number of households had been polled. I am also clear that O'Brien conveyed this information without comment and in a matter of fact way. There was no discussion between any of us at that time as to the propriety of what had been done. I do however recall that, unseen by and unobserved by O'Brien, I 'rolled my eyes' at Gundelach as O'Brien was speaking."*

Thereupon the meeting broke up. Butler arrived. O'Brien was dismissed and "arrangements were made for him to come to Gundelach's home the next afternoon (Sunday) for a more detailed update". Greenwood QC, Gundelach and Butler then adjourned to Greenwood QC's motel room and the discussion continued. Before dealing with that, it is necessary to briefly recapitulate.

In the meeting with O'Brien Greenwood QC had been told two main facts; firstly, that he, O'Brien, had done nothing which, if what he told the inquiry is true, was false; secondly, he had falsely misrepresented to Greenwood QC what Walliss had done. If it is true that Walliss had in fact done nothing or virtually nothing but that he, O'Brien, had received the

Walliss information by facsimile, which ex hypothesi must have been false, then O'Brien had successfully manipulated Greenwood QC to the belief that Walliss had completed "quite an extensive poll" of Panel Z. And this had been done at the outset of the meeting. As Greenwood QC said in evidence, O'Brien had "very quickly" emphasised the nature and the quality of Walliss' alleged efforts. As will be seen shortly, he had succeeded in this brief period in persuading Greenwood QC that the case was now indistinguishable from the Herscu case.

Again, the obvious question returns – why? Greenwood QC's statement and evidence left me with the definite impression that immediately they, that is he and O'Brien, commenced to converse on the topic of the jury, O'Brien raised the falsity concerning Walliss and of his having personally polled jurors. O'Brien, it should be understood, was not a novice in the practice of the criminal law. He had been engaged in many high-profile criminal investigations; he had frequently given evidence in cases over several years; he had worked for two Royal Commissions – the Stewart and Williams Commissions – concerning the drug trade. He was well-familiar with the forensic tactics used in criminal cases and I am in no doubt that if he knew that Walliss had personally polled the jurors to be empanelled in the Bjelke-Petersen trial by telephoning them, that that ought to have been a major cause for alarm. Again, I am in no doubt that he believed that the transfer of this most critical information to defence Counsel would predictably be the cause of grave concern. O'Brien's experience was definitely such that any person with any experience in the practice of the criminal law would know that it was likely that this may well lead to that jury panel being discharged from jury service.

O'Brien himself gave this evidence:

> *"MR CARTER: What did he* (Walliss) *tell you?---He told me he'd been conducting a survey in that he had a list of a jury panel and that he had been conducting a survey by telephoning the – the residence of some of the jurors and by asking them questions – sets of questions and obtaining answers from which he would make a deduction as to their views, and he would make a conclusion from that as to whether or not they may be biased against the defendant – the accused, or alternatively. Something along those lines.*
>
> *MR HANSON: And, this was being conducted how? By phone?---By phone, yes.*

Did you know Mr Walliss before?---I had met him yes.

All right, and this is before you had been engaged?--- Formally, yes. Yes, well before I was engaged, yes.

And, when is this?---I would think probably no more than about a week before the trial date start - before the Monday the trial was to start. It may have been the previous Monday or a couple of days before that but around about that time.

And, were you surprised to hear that he had been ringing the jurors' households?---Well, I was, but I discussed that with him and he told me the methods that he was using. He emphasised that he had been doing it in a very discreet fashion; that he ensured that there was no direct mention of politics and that he covered subjects such as environmental issues, Fraser Island, the woodchip industry and that sort of thing and he also, in addition to those subjects, had just asked questions on topical matters, and he hoped to gauge from that whether the person to whom he was speaking was what he considered to be a rational person or could think with some rationality on topical issues or controversial issues.

Had you ever heard of a direct approach to a juror's household in Queensland before?---No, I had not. Well, I had read something of the Herscu trial but - - -

You knew what trouble that had caused?---Beg your pardon?

You knew what trouble that had caused, did not you?---I knew there had been some controversy over that, yes.

All right. This is about a week before the trial?---I did not know specifically what had been done in relation to Herscu. As I understood it, there had been actual questions in relation to political affiliations. I do not know how direct, but that is as I understood it."

Note also this part of Greenwood QC's evidence. O'Brien, when describing to Greenwood QC what Walliss had supposedly done, said "that he (Walliss) had conducted a ring around of the households of the jurors and

had engaged whoever answered the phone in conversation aimed at ascertaining the general political and/or attitudinal atmosphere of the household". In his statement Greenwood QC said this:

> *"Mr O'Brien informed me that apparently Walliss had asked questions designed to ascertain the general attitudes including political attitudes of the members of the households."*

And again when Greenwood QC was describing what O'Brien had said to him about Walliss, this occurred:

> *"Anyway, that is what Mr Walliss claims to have done, but you were not given that impression that that is what he did, and that is what he - - -?---My impression was that he rang up to try and find out who might be adverse to Bjelke-Petersen and at the same time who might be favourable to him.*
>
> *And passed that impression of his back to O'Brien?--- Yes.*
>
> *And you got that impression, of course, from O'Brien?--- Yes.*
>
> *All right.*
>
> *MR CARTER: So that you could not really have drawn any distinction between the Herscu case and what Walliss had done?---No."*

Greenwood QC's evidence left me in no doubt that whatever O'Brien had said, he had left Greenwood QC with the clear view that Walliss' personal polling of jurors and jurors' households, however "subtle" it may have been, was designed to elicit inter alia, "political attitudes". If it was different to the Herscu case, it was a difference of minor degree only. O'Brien was familiar with the Herscu case to the extent that he knew it had created "controversy". He had, however, succeeded in creating in Greenwood QC's mind the belief that for all practical purposes the case was indistinguishable from the Herscu case. Jurors had been polled personally with questions designed to elicit, inter alia, "political attitudes".

This point needs to be developed a step further by reference to the evidence of others.

It is not clear who it was who formally arranged the Saturday afternoon meeting. Perhaps it was Butler. However, it is clear from the evidence of Gundelach that the initiative for it came from O'Brien. On the morning of Saturday, 21 September 1991, O'Brien rang Gundelach and informed Gundelach that "he (O'Brien) had information to give to us". It is clear from what happened in the course of the very short meeting that O'Brien was later to say that he himself had done nothing. His only identifiable purpose therefore when he phoned Gundelach was to tell Greenwood QC and Gundelach what he wanted to tell them about Walliss. This is Gundelach's evidence:

> *"MR CARTER: How did you know that Greenwood had arranged for O'Brien to be there?---I spoke to Greenwood some time that day and he told me. In fact, I think I rang him to tell him that I'd received a phone call from O'Brien earlier that morning and he had information to give us, and I knew that Bob Greenwood had given instructions to Max Mead and Butler to discuss the jury on Saturday night and, after I had a conversation with Greenwood, I was able to tell- - -."*

And again:

> *"Oh, please, yes, but do not reconstruct?---No. I recall getting a conversation - I recall getting a phone call from O'Brien on the Saturday morning saying that he had information in relation to the jury, and I was going out that Saturday. I don't know whether he wanted to see me or what, but I recall then having a conversation later by phone with Greenwood and he told me that it had been organised for all of us to meet that Saturday night and to come into the Gateway at 5 o'clock."*

It is clear from what is said earlier that all that had happened in the very brief meeting with O'Brien was that O'Brien had told Greenwood QC two things:

(a) that he, O'Brien, had nothing to report; and

(b) that Walliss had phone polled jurors by reference to "political" issues.

In respect of the latter point, it is necessary to refer also to another aspect of Gundelach's evidence. When asked what O'Brien had said to Gundelach at Greenwood QC's invitation, Gundelach said:

> *"Well, as far as I can recollect he told me that this fellow, and he mentioned the name then, Walliss, had made inquiries on behalf of Mead and Butler in relation to the jury and that he'd carried out a survey with a number of the jurors, made phone calls personally to jurors homes. If he didn't speak to the juror, he spoke to a member of the household, and he was conducting some sort of survey – that is what he told the householder or the person who answered the phone, in an attempt, he said, to find out whether the people were biased or not, or I thought he said to find out what sort of political affiliations, if any, they had."*

It is useful also to refer to what Macgroarty told the inquiry of his discussions with Greenwood QC on Sunday morning. Macgroarty's professional commitments prevented his giving evidence. However, he assisted by giving a recorded detailed interview to Counsel assisting me. In the course of it he said this:

> *"MR MACGROARTY: I came into Chambers on the Sunday morning. He was staying at the Gateway. I rang him at the Gateway and said, "I've arrived in Chambers", and he came up. I couldn't put a time on it with any accuracy. About 10.00 o'clock I think on Sunday morning. And when he came up, he came up to my Chambers, on his own, and uh told me what the problem was.*
>
> *MR HANSON: Mmm. Oh well, how did he describe it?*
>
> *MR MACGROARTY: He described it this way, that he'd been away on holidays, from memory I think he said overseas. He had the brief in hand before he went overseas.*
>
> *MR HANSON: Mmm.*
>
> *MR MACGROARTY: Uh before he went overseas he'd been asked, because I recollect that he'd been asked by the solicitor uh what about the jury. He, Bob, was aware of the public uh outcry, if that's the correct phrase, that had*

come to light after the Herscu trial verdict. So he, Bob, was aware that uh there'd been some direct approaches to jurors on the panel there, and that had been judicially frowned upon and publicised after the verdict of Herscu. And for that reason before he went on his overseas trip he left specific instructions with the solicitor that proper inquiries should, you know, could be made and they were entitled to make proper inquiries, but under no circumstances was there to be any direct contact with members on the jury panel. And that when he got back, and I, look I'm not a hundred percent sure of this time frame, but when he got back was only a few days before the Monday scheduled starting date.

MR HANSON: Mmm.

MR MACGROARTY: That he'd come from, he got back to Sydney where he lived.

MR HANSON: Mmm.

MR MACGROARTY: That, I can't say he got back on the Wednesday, but he'd come up here I thought, think, on, either late Thursday or the Friday morning. He'd started conferences here with his junior and some people, I think the client might've been involved on the Friday, but I'm not sure if the client was involved on the Friday.

MR HANSON: Mmm.

MR MACGROARTY: It might've been mainly just conferences with the junior and with the solicitor, and that had continued through into the Saturday, and on the Saturday afternoon he'd learnt that there'd been a direct phone contact uh by investigators appointed by the solicitors, direct phone contact with uh members of the panel. And uh when he learnt that on Saturday afternoon he was immediately upset, angry, annoyed, and told them so, and uh, and uh started applying his mind to what his position was, and then uh I can't give you the time that that came to his knowledge on Saturday afternoon, but it was Saturday afternoon as I recollect him telling me when he finished his conference with them, gave it some thought

and then rang me at home, which I think was round about 7 or 8.00 o'clock on Saturday night."

And a little later in the interview Macgroarty returned to the same matter:

"MR MACGROARTY: And the out', the view he outlined to me was this. Well I should continue first and say this, he told me that uh what he had been told the previous day, the Saturday, was that some, and look I say some investigator, he did name them, but I don't remember. I truly don't. I've read since, but I don't remember which one of, of the two he said. Do you understand? But he told me on the Sunday, in addition to what I've just said, he told me that what he'd learnt on the Saturday afternoon was that one of the two investigators had telephoned either all or several of the jurors on the, on panel whatever number, I can't remember that, you know how they letter, not number, but how they letter them, Panel A, and I think the District Court frequently runs through, you know, down as far as panel G or F certainly.

MR HANSON: Mmm.

MR MACGROARTY: In any event he did say that it was panel, whatever letter.

MR HANSON: Mmm.

MR MACGROARTY: And that he'd found out the previous afternoon that one of these investigators had contacted some, if not all, of the members of panel, letter such and such.

MR HANSON: Mmm.

MR MACGROARTY: By phone, pretending to carry out a consumer survey, which in turn enables, you know, the questions went on about the consuming of whatever goods, a dummy consumer survey.

MR HANSON: Mmm.

MR MACGROARTY: Which ultimately led on to the person, the investigator, asking the panel member, you know, what his political persuasions were.

MR HANSON: Mmm. What directly you mean? or, or just asking questions that would reveal...

MR MACGROARTY: Oh well it could've been...

MR HANSON: Unknowingly...

MR MACGROARTY: It could've been, and I can't be accurate on that. It could've been asking questions that might give, you know, some insight into what their political persuasions were.

MR HANSON: Yeah.

MR MACGROARTY: And uh, and he told me he was absolutely, you know, livid about this because it was directly contrary to the instructions he'd given that there be any contact, direct or indirect, with any panel members. And he then expressed his view to me that most certainly that panel couldn't be used, because that, you know, if any one member, or more, members of the panel had woken up to the scam nature of the telephone consumer survey."

He then went on to other things.

This interview with Macgroarty was held on 14 April 1993.

There is little doubt, therefore, that Gundelach understood from what O'Brien had said to him in the presence of Greenwood QC on Saturday that the polling was "political" in nature. Macgroarty's recollection of what Greenwood QC told him on Sunday, 22 September 1991, was that the poll was designed to ascertain "political persuasions", although Macgroarty's recollection perhaps faulty, was that this was done in the context of a "scam (sic) nature of the telephone consumer survey".

The evidence of Greenwood QC and Gundelach, and Macgroarty's interview, the contents of which I accept as the best of his recollection, persuades me that whatever words O'Brien had used, he successfully created the belief in both Greenwood QC and Gundelach that Walliss had polled "either all or several of the jurors", or "some, if not all, of the

members of the jury panel" personally to ascertain the "political affiliations" or "the political persuasions" of the jurors.

It was clearly this "information in relation to the jury" which O'Brien told Gundelach on Saturday morning he wanted to give to Greenwood QC and Gundelach.

Not surprisingly, the immediate response of both Greenwood QC and Gundelach was immediate and precisely the same. This was a repeat of the Herscu case; Panel Z could not be used.

The established fact is that "the information" was false.

One other aspect of O'Brien's evidence on the point is also worthy of note. He gave evidence that he had spoken to Walliss and had learned what Walliss was doing on "the previous Monday or a couple of days before that", that is, on or about the Monday before the trial was to commence. Walliss had told him he, Walliss, had been "very discreet" and "ensured that there was no direct mention of politics" and that his purpose was only to gauge whether the person to whom he spoke was "a rational person". He had later spoken to Butler about jury matters generally, but did not discuss with Butler what Walliss had told him – "there was no point made of it".

One can then well ask: If O'Brien knew at least a week before the trial what Walliss was supposedly doing and had chosen not to tell Butler about it, why did he need to telephone Gundelach on Saturday morning so as to make arrangements to tell Greenwood QC and Gundelach about "the information" he had concerning the jury? It was no doubt on that account that the Saturday afternoon conference was initiated. And besides, the availability of Panel P on the Monday was known from the previous afternoon.

Therefore, the conclusion seems to be clear enough that O'Brien at the beginning of the planned conference told Greenwood QC "very quickly" that:

(a) Walliss had telephoned jurors and their households to ascertain political attitudes and to find out "who might be adverse to Bjelke-Petersen and at the same time who might be favourable to him".

(b) that this poll was a "quite exhaustive" one; and

(c) that he, O'Brien, himself had done virtually nothing.

The falsity in all of this has already been demonstrated. In respect of (c), if what he told the inquiry on oath is true why was not Greenwood QC similarly advised?

O'Brien's knowledge of the Herscu case and of the criminal courts was, in my view, such that in view of what he told Greenwood QC concerning Walliss it was sufficient to lead Greenwood QC to the conclusion that Panel Z could not be used. I am satisfied that he knew that Greenwood QC's response to that information was predictable. It was presented in a form with material which made the case virtually identical with Herscu's case and the material used was false.

Did O'Brien act innocently? Was he moved only by the higher motive of ensuring the integrity of the criminal justice process? Or did he have an ulterior motive in so informing Greenwood QC?

In addressing these questions I have anxiously considered these facts:

(a) that Walliss had in fact done little or nothing and that O'Brien must have known that because of his position as co–ordinator of the jury vetting process;

(b) that Walliss had not in fact passed any such information to O'Brien as to lead him to the belief which he successfully created in Greenwood QC;

(c) that O'Brien himself either had done nothing, as he informed Greenwood QC, or he had worked long hours on Friday, 20 and Saturday, 21 September 1991 in respect of Panel Z;

(d) that either O'Brien falsely informed Greenwood QC that he had done nothing or he has sworn falsely that he had done not less than 23 hours of work on Panel Z;

(e) that O'Brien was sufficiently au fait with criminal law and practice to know that disclosure of the fact that jurors had been polled for political attitudes was likely to lead to discharge of the panel;

(f) that O'Brien had falsely informed Greenwood QC concerning what Walliss was supposed to have done;

(g) that O'Brien had falsely created the impression that Walliss had done that which had been condemned in the Herscu case.

These are the options which present themselves – either O'Brien was intent on submitting to Butler and/or Mead at a later date a false claim for fees or he had knowingly given false information to Greenwood QC for the purpose of seeking the discharge of Panel Z and the substitution of another or for some other unknown reason he had misled Greenwood QC. I am satisfied the last alternative has no substance.

The first option requires some analysis. If O'Brien was intent at a later date of submitting a false claim for fees, it is unlikely that he would seek to lay the foundation for such a claim by telling Greenwood QC that he had done nothing, whereas he claims to have worked 23 hours and to have travelled 200 kilometres on Friday/Saturday. On the other hand, if he had spent the time working not on Panel Z, but on Panel P, then he had good reason not to disclose to Greenwood QC precisely the work he had been doing. But if the hours and the mileage had been expended on Panel Z there was no point in saying that he had done nothing unless he was more intent on ensuring the discharge of Panel Z. His main purpose seems to have been to inform Greenwood QC that Walliss had repeated the process which had led to the discharge of the Herscu jury. This last matter could have no relevance to any projected false claim for fees.

It needs also to be remembered that the fact that Panel P qualified as a substitute panel, if necessary, was known from Friday afternoon. Any inquirer to the Sheriff's Office on Friday afternoon would know that Panels Z, P and L were summonsed to the court for Monday.

Furthermore, if O'Brien's only purpose was to himself lay the basis for a false claim for fees at a later time it would seem unnecessary for him to falsely inform Greenwood QC concerning the alleged Walliss telephone poll. That was a matter totally irrelevant to any claim for him for work done by him.

In my view, the matter can only be sensibly resolved by a finding that it is more probable than not that O'Brien falsely informed Greenwood QC as he did because of the intention that Panel Z be discharged from service in the Bjelke-Petersen trial on the Monday morning. Disclosure of the Walliss information, whether true or false, to Greenwood QC could predictably lead to the application to discharge Panel Z.

The only sensible reason for seeking the discharge of Panel Z was therefore to ensure the use of substitute panels. By Friday afternoon Panel P had qualified as a substitute. Shaw was a juror on Panel P.

There are several other issues that need to be addressed in this context, including O'Brien's knowledge of Shaw before Monday, 23 September 1991. Other issues of fact are relevant to my finding that O'Brien falsely misled Greenwood QC in relation to matters affecting Panel Z so as to ensure that it was dismissed from service at the trial for which it had been specifically assembled.

7.4 Butler and O'Brien's Disclosures to Greenwood QC

Butler's close involvement in the management of the case generally, and in particular his personal dealings with O'Brien in relation to jury vetting, in my view, lead to the conclusion that Butler was well–informed at all material times in relation to the relevant facts. There is no sound reason for believing that O'Brien had reason to act unilaterally in the way in which I have found that he did. It was Butler, rather than O'Brien, who had the closest personal association with the client and the greater interest in ensuring his acquittal. On the other hand there is a good reason to regard O'Brien as a ready ally of Butler's. Otherwise why would O'Brien want to engage in subterfuge in order to mislead Greenwood QC?

At the same time there is no identifiable reason for claiming that O'Brien himself may have been misled by Walliss. It can be shown that Walliss himself had done little or nothing in fact. It can also be shown that he made no claim for fees. He was a relatively newcomer to the scene. He does not appear to have had any close association with the case. There was no reason for him to have said that he had conducted an exhaustive poll if he had not done so. I am satisfied that he did not tell O'Brien anything which could suggest he had engaged in the same practices condemned in the Herscu case. Walliss at least knew of the Herscu case. He said that he and Butler had discussed it at the beginning. Butler also knew that any work which Walliss might do involved contact with jurors. Perhaps it was that fact which was taken advantage of by O'Brien and Butler. But there is no logical reason to conclude that O'Brien himself was misled by Walliss. Walliss had no apparent reason for falsely informing O'Brien. If there were, then one can only ask why it is that O'Brien misled either Greenwood QC or the inquiry in describing what work he himself is alleged to have done in respect of Panel Z.

It is necessary to examine more closely Butler's dealings with Greenwood QC and Gundelach on this Saturday afternoon and evening.

By the time Butler arrived Greenwood QC was, to use his own expression, "ropeable".

The evidence of Gundelach best describes what happened immediately after O'Brien left:

> *"All right. Well, what happened when O'Brien left? There is just the two of you there. I take it you started to discuss what you had just heard?---Yes. Well, he'd said to me – he said to me immediately, 'Come up to my room.' That's Greenwood.*
>
> *Yes. And you went?---Yes.*
>
> *All right. Well, was there a discussion about this news from O'Brien?---Well, Bob was walking around with his hand on his bald head like this a lot, pacing up and down in the room, saying, you know, 'God, what have' you know 'What have they done? What have they done?' That sort of thing. And saying a few things about them.*
>
> *And what about your own feelings?---Well, I wasn't doing that, but I was very disturbed and concerned at what I'd heard.*
>
> *Did you say so?---Yes, I did.*
>
> *Well, what did you tell him?---I – who, Greenwood?*
>
> *Yes?---I just said – I thought in my own opinion it was quite improper that any – that there'd been this sort of contact with the jurors, potential jurors, or member of the jurors' household.*
>
> *And did you say what consequence there would be – or should be?---Immediately, I don't know. It was a developing conversation.*
>
> *Did O'Brien arrive at some stage?---Butler?*
>
> *Butler I should say?---Yes. My recollection is there was a phone call; it was obviously from Butler downstairs, and he came up.*
>
> *And did Greenwood voice his concern to you?---Yes. He said, you know, 'What's this Wallis done?' and they – you*

know, he started getting quite cross and expressing a few things in pretty straight language to Butler.

No, before Butler got there. Before Butler got there?---Yes.

Just the two of you?---Yes.

Did he express concern to you?---Yes, he did.

And did he suggest what would have to happen?---I don't know if it was at that stage that he came out with what had to happen, but I know he was very worried about it and there was discussing in it, saying how improper it was; there was a discussion about Herscu's case, and that sort of thing.

MR CARTER: With you?---With me.

MR HANSON: You, I take it, knew what had happened in Herscu's case?---I knew, as much as to understand what he was talking about. I knew that there'd been approaches – very direct approaches to jurors, asking them, I think, about their political affiliation.

With what result at the trial?---I can't recall the detail now, at that stage. But I knew there was a hue and cry, and the media was reporting about what had happened in Herscu's case. I'd read those sort of things, but I wasn't directly involved in the result or the running of – or anything else that happened in Herscu's case.

All right. Well, Butler arrived, did he?---Yes.

And he was informed what had happened?---Yes.

And did he express any surprise or concern?---He was pretty subdued and quiet at the start because – – –

MR CARTER: What did Greenwood say to him? What happened when Butler arrived?---Did Greenwood say to him?

What was the first exchange when Butler arrived, that you can recollect?---My recollection is that he started telling Butler how he'd explained in detail what he wanted done, and I can remember him doing what I'm doing now – slapping his hand into the – or his fist into the palm. He'd not only told them once; he'd told them on a number of times what was to be done, and then went on to explain what O'Brien had just told him what Wallis had done. Butler didn't say anything for a long time; he was just listening. Greenwood was upset and it was obvious. He was pacing up and down, talking to him, pointing his finger at him – that sort of thing. That was my recollection. I mean, it just wasn't a calm conversation once Butler arrived. And I know at times, he said – you know, Bob was saying, 'Where's Mead? Where's Mead?' And there were attempts on that evening whilst I was there to get Mead. On the phone.

By?---By Greenwood. And then Butler tried. They were both trying on the phones.

MR HANSON: Did Butler seem to know where Mead might be found?---Well, he had numbers for Mead. I mean, we weren't told, but he may have had other numbers for Mead. We found out subsequently Mead was at the coast with his girlfriend, who is now his wife.

But did Mr Greenwood tell Butler just what you had heard from O'Brien?---Yes.

There had been a telephone approach to the homes of the jurors?---To the names? Did he mention any names?

That there had been a telephone approach to the homes of the jurors?---Yes, he told him that. He told him exactly what we'd been told by O'Brien. I can remember asking again before Butler got there, or whether I just picked it up, who Walliss was, and whether it was Greenwood or Butler who told me, I don't know, that he was a BCI fellow, ex police officer from Victoria, and I remember some conversation about him being a person out of the jury room and I'd never heard the expression before, and I said, 'What's a jury room?' And someone explained to me that that was a special squad in the Victorian police force

that used to run checks on people that were coming up in juries in forthcoming criminal trials.

What was Butler's response to this news?---Initially he was sort of cowering, saying nothing. Bob was just admonishing him and telling him what had happened and raising his voice at him, using pretty straight language, as I said, telling him exactly what his instructions were when he'd spoken to him and Mead on earlier occasions, and how he'd explicitly spelt it out on Exhibition Wednesday, that sort of thing.

Did Butler show any surprise at what had been done by this fellow Walliss?---Not surprise. It struck me that Butler didn't think that there was anything altogether wrong with what had happened.

Yes. Well, did he appear, perhaps, to know it was no news to him?---I can't say that. It just appeared to me that he didn't - he wasn't concerned about it as though there was nothing wrong with what had happened.

Well, did he try to justify it? Just to argue with Greenwood?---Oh, he wouldn't have been game to do that on that night.

Did you also know that night that not only had Walliss done this telephone survey, but what Greenwood had suggested be done had not been done at all?---No.

Do you understand what I am saying?---Well, I since know, after a - I know what instructions Bob has said he gave them.

You did not hear them given?---No.

But you know the instructions he says he gave?---Yes.

Well, the evidence seems to suggest that those instructions had not been carried out, because those inquiries had not been instigated?---Well, I wasn't aware of that.

You were not aware of that on that Saturday night?---No, not that I recall, but I was aware that

Greenwood knew that O'Brien hadn't been called in when he wanted him called in and had only been on the matter a few days.

He had been in for a few days?---Mm.

MR CARTER: But did Greenwood take up with Butler their earlier conversations about what Greenwood had instructed to be done. I mean, did you - - -?---That sort of thing, yes.

Did - very well - we will leave the histrionics out of it?---Yes.

Did Greenwood say, 'Well, did you do - did you get those people in those particular areas, in those electorates that I was -' anything like that? Did he - - -?---I don't recall that. He just said, 'I told you what to do,' and spelt out what he told them.

And did Butler acknowledge that he had not done any of those things?---No, not in my presence.

Well, was it clear from what was being said that what Greenwood had instructed to do had not been done?---No, it wasn't to me, except that they'd done something improper that he told them - I think one of his instructions - 'Don't step over any lines, just carry out proper instruction. Do things properly. Carry out proper investigations.'

Yes, Mr Hanson?

MR HANSON: The evidence we have so far suggests that Greenwood might have had two causes for complaint: one was the telephone poll, being perhaps improper?---Yes.

And the other was failure to do what he said should be done. Well, was he complaining about the failure to do what he said should be done, or were you not even aware that it had not been done?---I knew he was annoyed about what had been done. I heard him spell out to Butler what he expected to be done, and I couldn't pick up - I

didn't pick up from the conversation that all those things had not been done, if you follow that.

MR CARTER: Well, what did – what did he spell out what should have been done? What did he say?---There was some talk that he wanted – he spelt out that he'd told them that they could check on a person's affiliation by checking on people in the area, where they lived, and the other thing I remember is that he didn't want anything improper done.

Well, what did Butler say about finding people in the area, and so forth? What of Butler's response to all of that?---I don't recall him answering that.

But did he say anything to indicate that it had been done?---No, I can't recall that, commissioner.

And he did not say anything to say that it had not?---No.

O'Brien had not apparently in your presence said anything about doing that or anything like that?---No.

Yes, Mr Hanson?

MR HANSON: And how long did this go on for in Butler's presence?---Oh, I'm guessing, quarter of an hour, 20 minutes.

And during that time there was an attempt to contact Mead, was there?---Many attempts.

Unsuccessful?---Yes.

All right. Well, how did the meeting break up?---I think Bob Greenwood said, sort of, 'I've had enough. I'll sleep on it. I'm going to bed.'

Was there any decision as to what you were going to do about it?---No. I was – I was letting him sleep on it.

But did you advise what you thought should be done about it?---I – I was very concerned about it and I thought it

was a matter - I don't know whether I did that night. I don't know whether I did.

Did you at a later stage advise, in your view you could not use this panel?---Yes.

That was your opinion?---That was my opinion.

And you told him so?---Yes.

Did he agree with that?---He did.

Or is it - - -?---Well, it wasn't a matter of agreeing with me. It was his opinion as well.

That they could not be used?---Not that they couldn't be used, that - that the Crown and the judge had to be told about it. That was my concern.

Yes, all right. Well, that was the end of that meeting, was it?---Yes."

One needs to pause here and to go back to the initial discussions between Walliss and Butler in about July. It will be recalled that Butler and Walliss had had substantial discussions about Walliss' involvement and the contribution which he was able to make to the process. As Walliss' evidence makes clear, Butler well understood that whatever it was that Walliss had originally intended to do, that had necessarily to involve him in speaking personally to jurors. It is only necessary to repeat here my earlier finding that if Walliss was to become involved, the use of his "techniques" would require him to personally approach jurors and that Butler well knew that that was the case.

It is plain from Gundelach's description of what occurred in Greenwood QC's room that Butler was for all practical purposes silent. Perhaps he did not want to incur Greenwood QC's obvious wrath any further. It was, however, clearly within his power to better inform Greenwood QC more fully of his own discussions with Walliss at the time of the engagement. Indeed, it was his duty to do so. Greenwood QC had only heard O'Brien's "matter-of-fact" version of what Walliss was supposed to have done. Obviously Walliss was not there to speak for himself and Butler well knew of the somewhat detailed discussions which he himself had had with Walliss much earlier. After all, it was Butler who had introduced the name of Walliss into his discussions with Greenwood QC on 17 July when

Greenwood QC had noted in his diary "jury selection/Phil Walliss". It was obviously necessary for Butler to explain to Greenwood QC and to Gundelach his discussions with Walliss which had led to Butler's engaging Walliss in the first place. Butler's explanation to both Counsel of his understanding was obviously called for. He might well have explained his own position that, as had been explained to him by Walliss, he believed that the position was arguably acceptable if he was anxious to retain Panel Z. Butler, however, remained silent and said nothing at all which might relieve Greenwood QC's concern or at least make for a more rational discussion.

Furthermore, he had not responded to Greenwood QC's concern that his, Greenwood QC's, advice to Butler "on Exhibition Wednesday" had not been followed. Perhaps he, Butler, was ignorant of what O'Brien swore to have done in recent days. Of course if O'Brien had done nothing of substance then there was nothing that Butler could say. On the other hand I am satisfied that Butler at all material times knew with reasonable precision what the state of O'Brien's inquiries were at any particular time. In short, Butler remained strangely quiet concerning both Walliss and O'Brien.

There is, of course, the other available option, namely that nothing at all had been done in respect of the preparation for jury selection and that Butler was totally ignorant of the matter and that he himself had with gross incompetence failed to address the issue and the several matters which had been discussed with Counsel and about which Counsel had advised in July/August.

Given Butler's involvement in the case that option can, I am satisfied, be easily rejected. The successful defence of the client, Butler's sole professional responsibility, was all that had to engage his attention. One can reject as wholly improbable the notion that Butler simply did nothing and knew nothing of the preparatory work concerning jury selection.

As is pointed out at the beginning of this Report, Butler's statement that he "would not touch the jury question with a barge pole" cannot be accepted.

The state of mind of O'Brien and Butler on the afternoon of Saturday, 21 September 1991, can be left for final evaluation to a later chapter.

CHAPTER 8

PANEL Z - WHAT WAS KNOWN ABOUT IT

It is now necessary to demonstrate as far as possible what information was known about the Panel Z jurors by the morning of 23 September 1991. I am satisfied, in accordance with the relevant standard of proof, of these facts:

(a) Walliss either had not polled any members of Panel Z or at best had spoken only to a few of them;

(b) such inquiries as Walliss pursued, if any, resulted in no useful information;

(c) Walliss had not collected any relevant information which needed to be "co-ordinated" by O'Brien;

(d) By 9.15am on Monday, 23 September 1991, O'Brien had not conveyed to Butler any information concerning any juror on Panel Z;

(e) By 9.15am on Monday, 23 September 1991, O'Brien had little or no information in his possession concerning any juror on Panel Z.

8.1 At Gundelach's Home - Sunday Afternoon 22 September 1991

Gundelach had invited Greenwood QC to his home for dinner on Sunday evening.

Greenwood QC in his prepared statement asserts that on Saturday afternoon prior to O'Brien's departure from the Gateway Motel arrangements were made for O'Brien "to come to Gundelach's home the next afternoon for a more detailed update". According to Greenwood QC he had not conveyed to O'Brien his concern at what O'Brien had told him about Walliss, but had left O'Brien "with the instruction...to continue with his own investigations".

Greenwood QC's immediate concern after Gundelach and Butler had left later on Saturday evening was to discuss the matter with Macgroarty of Counsel who was his friend and an experienced criminal lawyer. Macgroarty was unavailable on Saturday night and he and Greenwood QC met at Macgroarty's Chambers in the city on Sunday morning. According to Greenwood QC's evidence and an interview which Macgroarty gave to Commission staff, it was agreed between them that the application to discharge Panel Z was the only available option. I am satisfied that by the time they parted company at or shortly prior to lunch time on Sunday,

Greenwood QC had resolved to apply for the discharge of Panel Z. The only remaining formality was the client's instructions and Greenwood QC not surprisingly looked to Mead for these instructions. As has been said already, Mead was not readily available. He was socialising at the Gold Coast.

Later that afternoon Greenwood QC went to Gundelach's home for dinner. According to Gundelach, Greenwood QC left his home at about 8.30pm.

At about 5.30pm to 6.30pm O'Brien arrived at Gundelach's home. Gundelach's evidence continued:

> *"And what was the purpose of his visit?---I can't rightly recall. He was a –he was left on the understanding that – you know – carry on, the night before. And I think he was that – then going to come in and – or get in contact with Bob and tell him what he'd been doing on the Sunday.*
>
> *Well, when he got there, Sunday afternoon, did he produce anything; any news, information, results, or documents?---No, not really.*
>
> *Well, was he asked?---He was talking to Bob Greenwood for a little while before I joined the conversation because he came in. Bob was sitting in a downstairs area and that's where O'Brien walked up the path too and I just came down from upstairs and I wasn't there for long.*
>
> *Well did you – – –?---He just sort of dismissed him again, after having a brief conversation with him.*
>
> *Well, did you, yourself, learn the result of his efforts?---I can't say I did.*
>
> *Well, did you learn whether or not he had been on the job, as requested, turning up people in the areas in which jurors lived, making – – –?---Oh, he said he'd been driving round areas and checking out where jurors had lived and that sort of thing, looking at their – trying to gauge what sort of a socio–economic sort of level they were on; that sort of thing.*

What, by looking at their houses?---Oh, the cars they drive. I don't know if he'd been talking to neighbours. You know, I just didn't know what he was doing.

But he had not been doing what Greenwood had wanted done, had he, by the sound of it; getting in touch with people who lived in the areas in which jurors lived and then speaking to them?---Well, that was never said to me in my presence. It was never said that he'd done that.

But you came to know, at some stage, that that is what Greenwood wanted done. Is not that the case?---Oh, yes, but I didn't know whether they wanted – that he was to do that or Butler or Mead was to do that.

So, O'Brien reported he had been driving around looking at their houses and cars?---That's my very vague recollection of it.

Produced no documents?---No.

Offer any documents to you or Greenwood?---No. He may have had a folder with him but I certainly didn't see any documents.

All right.

MR CARTER: A jury list?---No, I didn't see a jury list.

Did you ask to see a jury list?---No, I didn't.

Well, this was Sunday night before the trial on Monday morning and you have not yet seen the jury list?---No, that's right.

Did you ask him: well, look, let us have a look at it; what have you done; what does it look like it; how is the jury looking; what is the position; what have you done?---I didn't ask those things and, in hindsight – – –

I am not suggesting those specific things. I am simply approaching the matter on the basis of what one might expect counsel to say to a solicitor on the eve of an important trial?---Well, with everything happening, I was

letting Greenwood conduct everything. I wasn't going to stick my bib in. I had nothing to do with the instructions that were initially given. I didn't know who this Walliss fellow was. I wasn't quite sure what O'Brien was to be doing and I just kept out of it. If Greenwood was going to ask for a jury list, he could have.

Yes, but it does not - - -?---At that stage I didn't know I was going to have anything to do with picking a jury.

But it does not quite work like that, does it, I mean, in reality? I mean it is a cooperative effort and here you have - I mean, before I go on to that, was O'Brien, for all practical purposes, an invited guest at this time, or did you expect him to be there?---I can't say. I don't know whether Greenwood had made the arrangement. I certainly hadn't.

Well, I can understand you inviting Mr Greenwood to your home?---Yes.

I just - Mr O'Brien arrives at the home - at your home - when Mr Greenwood is there and you have spoken to him the previous evening which might suggest that O'Brien is there at the time when Greenwood is there for a specific purpose, in other words that he has been invited there. Can you help me on that point?---By Greenwood. I don't know. I don't know. It was just - - -

Well, it is probably unlikely Mr Greenwood would invite him to your home without you knowing?---Oh, I - I can see nothing wrong with that if he - - -

No?--- - - - if Greenwood said, 'Look, I won't be at the hotel. I'll be at Gundelach's.'

All right. And Mr O'Brien obviously knew where your home was, obviously?---Yes.

So, well then, when he does arrive - and he is obviously there to do with the trial. I mean he must be there for a purpose?---Yes.

And the only purpose is in connection with the trial and, specifically because it is O'Brien, to do with the question of the jury selection. I mean, that seems to be the reality of the matter?---I think it – I don't mean to say it had taken a back seat but, at that stage, Greenwood had been to see Macgroarty and he'd told me that.

Had he told you that?---Yes.

Yes?---And he told me that Macgroarty was of the same view that he couldn't see us proceeding with that particular panel in view of what had happened.

Well, what was the purpose of having O'Brien there?---I don't know. I – I – I didn't arrange O'Brien to come.

Well – – –?---I just don't know.

Well, what took place, in your presence, whilst O'Brien was there?---I virtually got there – – –

About the jury, I mean?---I virtually got there at the tail end of the conversation and it was a case of, 'Oh, well, Barry, keep working on it' – that sort of thing – and he was again dismissed.

Well, the situation was obviously calmer than it had been the previous evening; more relaxed?---Mm.

Did anyone say, 'Well, look, Barry, tell us, what in fact has Phil Walliss done? Just tell us exactly what happened.'?---No, they didn't, not – – –

'Tell us what you've done.' In other words, in a relaxed situation at your home, an informal gathering?---Well – I'm sorry, Commissioner, you – keep going.

I was – why – – –?---He didn't even sit down or anything like that. They were talking at the door downstairs.

Well, why had he come? Was it apparent to you why he was there?---Oh, I don't know. I think Greenwood just said, 'I told O'Brien to keep in touch' – that sort of thing –

see - you know - see what he's doing. I really don't know. I can't recollect that.

He obviously must have known Mr Greenwood was at your home?---Yes.

You do not know precisely the circumstances in which he came to be there?---No.

Did it seem - was there anything strange or unusual about the fact that he had come, and presumably nothing had happened? From what you have said to me, he just - I have the impression - correct me if it is the wrong one - that Mr Greenwood was at your place for dinner. You are having - he has been there in the afternoon. No doubt, you were chatting about various things; perhaps talking about the trial; what would happen the next day etcetera, etcetera; the sort of things that I imagine would happen. Then, all of a sudden, O'Brien arrives?---Yes, but I wasn't there - - -

And he is there only for a short time and then he leaves?---Yes.

How long was he there?---Minutes.

Well - - -?---And he'd - he'd been there, talking to Greenwood, before I came down from upstairs.

Well, did - I mean - you know - it is - as between a leader and his junior, it is not really a game of hide-and-seek. I mean, was there any - did Greenwood say to you why he was there? What was the purpose of him being there? Why had he come and why had he left? Did he deliver something? Had he brought some information etcetera? Any of that?---No. My recollection is that Greenwood was pretty disappointed with whatever had happened; or whatever further investigations Barry O'Brien had carried out were pretty worthless sort of things. That - that was the impression of - I was left with, and I don't recollect the conversation.

Well, then, is the position this: that late on this Saturday afternoon whenever it – what time was it when O'Brien came?---This was Sunday afternoon, Commissioner.

Sunday afternoon, I am sorry. What time?---5.30 – 6.

So, by 5.30 – 6 on the Sunday, so far as you were concerned – and you are the junior in the case – – –?---Yes.

You do not – you have never seen a jury list?---No.

And you have not got any information about the jury list other than the information given to you by Greenwood or by O'Brien on the Saturday afternoon. That is all you know about it?---Mm.

And you do not know what O'Brien has done?---No.

And you have got no information at all about what the position is in respect of any jurors on Panel Z, the panel to be selected the next day?---I – I didn't think there was any real need to do that, Commissioner.

Oh?---I mean, you can speak to a solicitor in ten minutes, on a morning, just to get the information that he has – – –

Yes?--- – – – with respect to a jury list and there was going to be plenty of time the next morning if Greenwood was to get any information that they had.

Well, that may be one way of approaching it. Another way might be, because you had such a high profile client, and the jury selection was such a major issue that it had been discussed with the senior back in July, two or three months previously?---I hadn't discussed it.

Well, you were there when such discussions had taken place?---No, I wasn't really. I was aware that someone was doing something about the jury.

Yes, and of course one would not need to be a Rhodes scholar to understand that one would want to be – one

would want to ensure as best as possible that one would have an acceptable jury for that particular trial of that particular person?---Well, I can only say that that can be done in a morning.

Ten minutes?---Quarter of an hour if – if they've got the material there in front of you, you can run through a jury list, they'll tell you who is favourable and who is not favourable.

Yes?---And who is more favourable than the favourable ones.

Yes. Yes, all right Mr Hanson.

MR HANSON: Mr Gundelach, so Mr O'Brien was dismissed in a few minutes as far as you know?---Yes.

Again, as far as you know, without being asked to say what he had or to produce what he had?---As far as I know.

Well, by then had any decision been made as to what was to happen next day?---Well, I'm – once Bob Greenwood had been to see Kelly Macgroarty – – –

That had happened on the Sunday morning?---Sunday morning.

Yes?---I didn't know that was to happen but it happened. He said he had spent an hour or two with Macgroarty, telling him about it, and Macgroarty had agreed with him that he would have to make an application to discharge to the jury – that could not be used, but still at that stage we had not got in touch with Mead; the client knew nothing about it; and he had to get instructions from Sir Joh before anything was finally done.

And one further uncertainty, the judge might refuse the application?---Certainly.

All the more reason to know, surely, what O'Brien had with him?---Well, I'd get that on Monday morning or Greenwood would get that on Monday morning.

Was not it your view that you could not use that jury panel?---It was, but I wasn't to make that decision. I knew that it was improper in my own view, and I knew that the Crown had to be informed of it, and the judge. That was my feeling."

Certainly Gundelach was to learn of nothing useful from O'Brien on Sunday afternoon. Referring again to O'Brien's memorandum of fees he was to charge Mead/Butler for 14 hours of investigation work and for the cost of 210 kilometres on that day apart from telephone calls and facsimile use. That amount of working time and the effort involved suggests that O'Brien had had a busy day before arriving at Gundelach's home at 5.30pm – 6.00pm. Yet Gundelach was to learn nothing of the progress so far. On his evidence there is no reason to suspect that either he or Greenwood QC had discussed with O'Brien the possibility of dismissing Panel Z. The two Counsel obviously had. On the other hand, Greenwood QC had encouraged O'Brien to continue. It is probable that O'Brien and Butler had discussed the events of the previous afternoon and evening. In any event, it is clear from Gundelach's evidence that the O'Brien visit to his home on Sunday afternoon was a pointless exercise.

The evidence of Greenwood QC and O'Brien does little to elucidate the position.

Firstly, the evidence of Greenwood QC:

"You had a meeting you tell us at Mr Gundelach's home on the Sunday night, was it, I think?---Yes, late Sunday afternoon, early Sunday evening.

At which O'Brien was present?---He came, yes.

And why was he there again?---Prior arrangement. I left him on the Saturday evening to cut it down to its bare bones, to get about his business, get what hadn't – obviously hadn't been done – as much of it done as possible albeit it being over the week-end. And to come back to Gundelach's home on the Sunday evening to bring – he, particularly Gundelach and myself, up to date on what had been achieved in the meantime.

Yes. And what news did he bring then?---Well, in the interim, I had decided subject to receiving specific instructions from Mead and I believe I hadn't received

them at that stage, I believed that I would be making this application to have Panel Z discharged and it was clear that O'Brien was still working on various inquiries and there was a general discussion, the details of which I don't remember, about how far he had got and how far he hadn't and after about 20 minutes he left again.

Did he bring with him the result of any of Walliss's work?---I don't remember.

Was any more mention made of Walliss's efforts?---I don't remember, I don't think so.

Well, did he reveal to you whether the instructions you had given had been complied with in whole or in part by way of inquiries within the areas in which the potential jurors lived?---He indicated that he had managed to do some more work which was – which had carried him further than he was the previous evening, but that he was still on the trot as it were and it just doesn't seem to be fruitful to take it much further.

I would expect that you would want to know that every person on the jury panel who maybe hostile to your client should be identified if possible. That would be vital, would it not?---Perfect world, yes.

Yes. You do not know how far through that task he had got by the Sunday night?---No, I can't remember how far through but he still had work to do and it was better for him not to be sitting around talking to us. It would be better at that stage for him to be continuing working. You see the – in the end result, what happens – as you would know – what happens in these circumstances, is that pretty well at the eleventh hour the counsel who is responsible for picking the jury, sits down with the solicitor and any investigator that is being used, and all the counsel selecting the jury really is interested in, is ticks and crosses. And the judgment – in my experience, this is the way I've always done it – the judgment is substantially that of the solicitor in consultation with his sources of information which are principally the investigators

MR CARTER: That may be well so in an ordinary case. But in this case, you had put procedures in place as long ago as July- - -?---Yes.

- - - for the purpose of ensuring an appropriate jury in this particular case?---Yes.

So that the point about the eleventh hour does not seem to have a lot of validity in the context of this case and given your own involvement in it back in July with Mead and Butler?---Except, Commissioner, that one of the important criteria that I put in place back in July was the political criteria. And so that stood very prominently behind what eventually would be ticks and crosses.

All the more reason perhaps why counsel's question is relevant. Would you not therefore want to ensure and did you not always want to ensure that those who would maybe seen to be hostile to your client were readily identified - - -?---Yes.

- - - and excluded?---Yes.

Yes?---And the criteria for that, of course, was well known to O'Brien, to Mead and to everybody else, anyone with any common - - -

All of that assumes a continuing interest by yourself in the process which you had really initiated back in July - - -?---That it was progressing - - -

- - - rather than address the question at the eleventh hour?---Yes, well my interest was that it was progressing and that as much time - it was obvious that my programme had not been put in place in the way that it should have been.

And one would think that your major interest, given your close involvement in it from that time back, in the days before the trial was to commence, to be able to ensure that there was no person on the jury panel who was thought to be hostile?---That was the aim of the exercise. And they knew that.

They, being?---O'Brien and Mead and Butler and old Uncle Tom Cobbley and all."

O'Brien's evidence on this point needs to be read in the context of his other evidence as to what he had managed to achieve, if anything, by Saturday afternoon:

"MR CARTER: Why had you gone there and at whose invitation? Who had arranged it? What were the circumstances?---To – to advise – well, it was to – to my recollection to advise on the progress of the investigations re the jury.

Well, who told you to go there or asked you to go there?---Well, I would think it would've been Butler.

Well – and what, do you recall what he had said to you: when had you been asked to go there, do you recall?---No, I don't, but, you know, I guess it would have been that day.

And you were going there for – to advise on the progress?---Yes.

What progress?---The progress of the inquiries in relation to the jury.

And who did you expect to be speaking to?---Bob Butler.

You normally would not meet Bob Butler at the Gateway Hotel?---No, but Bob Greenwood was staying there and, for that reason, I should imagine, that the meeting was there.

Well, did he tell you that counsel would be there?---Yes, I think so, yes.

So, you went there in the belief that the meeting had been arranged by Butler?---Oh, well, I don't know who had arranged it, but Butler – I think Butler contacted me; I don't recall – – –

And you - - -?--- - - - who contacted me exactly, but obviously, someone did to tell me that there would be a meeting there.

And you were going there to meet Butler, and you believed counsel?---Yes, and probably Max Mead, too.

Yes, to pass on the information which you had about the jury?---Right.

Yes.

MR HANSON: What did you have by this stage?---Not a great deal, as I recall.

Let us go back to the list that Mr Walliss faxed to you some days before; was there anything on it when he first faxed it to you?---No. No, I think he would have faxed me the sheriff's copy.

Unmarked?---Probably. I'm not sure about that.

Well, did he add any information then in the days between then and the Saturday?---I think so.

In what form?---He faxed it again, and I'm not sure, I think he might have typed his own list up with some notation as to his assessment of a particular jury.

And how did he express his assessment?---In some term like, 'yes' or 'no' or something like that.

Not just a tick or a cross?---I don't think so.

There was a comment?---I don't know, but there was something there that indicated to me whether he felt that that juror should be - have a bias for or against the accused.

All right. Well, did you add to his information, at all, before that Saturday meeting with Greenwood and Gundelach?---Not on paper I wouldn't think.

Not on paper?---No. I had inquiries in train.

Yes, but had not anything come back?---Oh, I don't recall.

By the Saturday?---But obviously not a great deal, I wouldn't think.

MR CARTER: Could I just ask you to pause there, Mr Hanson, before you go on to that point. Had you only – the information that you got from Walliss in the interim, you had received through the fax?---Yes.

Now, was it only one fax or had you received more than one fax?---I don't know. I think there were probably more than that.

Well, come on. You can do a bit better than that. Think about it. The information the exchange between you and Walliss in those days immediately prior to the trial?--- Yes.

Did Walliss fax you on one occasion, or did he – in other words, did he fax you progressively with information - - - ?---I - - -

- - - as his inquiries developed?---I think – well, I think he faxed me initially the sheriff's list, without comment, as I recall. Later he would have faxed me a list which would have been the bulk of his – the result of the bulk of his inquiries. Now, I've an idea that there were other faxes with some material added, but not a great deal.

Yes, Mr Hanson.

MR HANSON: Well, you did not have much to report to the barristers?---No.

Well, were not you getting concerned? Did you express your concern to anybody?---Yes, well, as I said: I said that I had only started the day before and - - -

The trial was meant to start on the Monday morning?---Yes, that is right.

And who did you express your concern to?---Well, not so much a concern, I guess, but I did mention in the conversation I had with Bob Greenwood I had only started the day before, and he did seem, I think, a little surprised at that, but we didn't discuss it. And we, at that stage, I mentioned the survey to him.

Well, how many jurors were you able to comment upon by that Saturday afternoon?---I don't think I attempted to comment on any and because - - -

None?---No, well, I didn't attempt to because I don't know that there was much information there that could be relied upon at that stage.

How long had you been on the job by Saturday afternoon?---About 20 – or two days.

Two days. And you could not report one comment on the Saturday afternoon?---No.

Of your own?---But there was - there was a - arrangements - - -

Not one of your own?---Arrangements were made - I beg your pardon?

Yes?---Arrangements were made for a further meeting, the next night.

MR CARTER: With?---With Butler, Mead and Gundelach, and I didn't know, but Greenwood, as it turned out, was also at that meeting.

Where at?---Gundelach's house.

MR HANSON: But by the Saturday afternoon, you - what you had been on the job for two days, and you had not added any of your own comments?---To what?

To Mr Walliss's material?---Oh, no, I don't say that. I hadn't given a report to Butler or anyone. I had just said that I hadn't had sufficient time at that stage, and that I

was still making inquiries. That is why I only stayed there a few minutes because I had things to do.

But, if asked, how many of the jurors could you have commented upon that Saturday afternoon?---How many could I have commented on?

Yes, yes?---Oh, that would be hard to estimate.

MR CARTER: Or an idea?---I don't think I could give a really accurate estimate, but not too may.

Ten?---I don't know, maybe 10, if you like, but I don't know.

More than 10?---I don't know.

Twenty?---I don't know.

Well, such information as you had, you say, had only come from Walliss?---Not only.

Well, at that stage when you were speaking to Mr Greenwood and Gundelach on Saturday afternoon did you have any information yourself in respect of any jurors apart from information you had received from Mr Walliss?---I'm not sure whether – most of the information, to my recollection, came to me on the Sunday, or the Sunday evening, or very early in the Monday morning. Now, I just don't think – without being specific in relation to numbers, I don't think I had that much information by the Saturday afternoon.

Yes, Mr Hanson?

MR HANSON: Well, what had you done by the Saturday afternoon?---By the Saturday afternoon.

What had you done?---Yes. Well, I had the panel which was Panel Z I believe, and I had looked at the panellists, and I had decided to draw a list of as many people as possible who may have some knowledge of those panellists in a whole broad – over a whole broad field, whether it be

through living close by, or through employment, or through a whole range of activities.

With any results by the Saturday afternoon? Had you drawn up a list?---Oh, yes, I did.

Had you been in touch with any of these people and had they responded with any information?---I don't recall specifically.

Would you just look at Mr Mead's bundle of documents for me, please, exhibit 2145. Have you brought any papers with you, Mr O'Brien?---No.

I just want to show you a bill that you sent to Maxwell Mead. Just go back one page, there is a covering letter there. That is yours, is not it?---Yes.

30 September 1991?---Yes.

To Maxwell Mead, for attention Mr R. Butler. Read that if you want to, but I am interested in the bill that comes with it?---Yes.

You say there – perhaps you better look at the letter for your own sake. You say there you have got instructions from Mr Butler on the 20th – that is the Friday?---Mm, Mm.

Would that be correct?---Well, yes.

We will come back to the rest of the letter later. Look at the bill. You have charged them for on the 20th, which was the Friday, 9 hours of investigations?---Yes.

62 kilometres?---Yes.

Mileage. Plus use of the telephone and fax. On the Saturday, the 21st, you have charged for 14 hours investigation/conference and 138 kilometres of mileage. Well, just looking at the Friday for a start, what had you done on Friday that added up to 9 hours and 62 kilometres running around?---Well, prepared a list of potential contacts and driven to some of the areas.

For what purpose?---Because it is easier to jog one's memory in relation to residents of areas if you go to the area rather than rely solely on memory.

And what was the purpose of driving to the areas where the jurors lived?---To see if I recall anyone whom I could add to my overall list who may have resided nearby the jurors residence.

Well, did Friday's efforts produce any information about any jurors that would be of use to the barristers?---I doubt it. I think it was very much at preparation stage.

Saturday: you have got 14 hours there. Were any of those prior to the meeting with Gundelach and Greenwood?---Yes.

And what did that involve?---The same thing.

Sunday, 14 hours and more mileage?---Yes.

What was happening on Sunday?---Much of the same thing.

All right. Well, then, the trial was due to start on the Monday morning?---Yes.

What were you able to report to Greenwood and Gundelach on Sunday night when you went to Gundelach's house?---Well, I went there to report progress, and by this stage I had some information, from which I may have been able to make an assessment of a particular juror. However - - -

A particular juror?---Or a number of jurors, yes.

Yes?---Certainly not Shaw.

Oh, no, you were not working with panel P, were you?---No, I know. I know.

Well, were you?---There was no particular - no, I'm afraid not.

Working with Z, were you?---I'm afraid so, yes.

Yes?---On the Sunday night, well - - -

Yes. What were you in a position to report?---I was in a position to report some information, but I was going to say that I had - I expected a lot more information to come in later that Sunday night, and that I wouldn't be in a position to give a final report until the next morning.

And this information was to come from where?---Well, it was to come from the network that I had attempted to build up.

Yes. These were people who were going to feed you comments; is that right?---Yes.

You did, in fact, set up this network, did you?---Yes.

About how many people did you contact who were going to feed you comments?---Oh, quite a few, I would suggest."

In the course of being questioned about what was required of him on the morning of Monday, 23 September, a further reference is made to his visit to Gundelach's home on the previous evening:

"MR CARTER: Mr O'Brien, you had to take this information and give it to the people concerned?---Yes.

Well, where did you go?---I can't recall now whether it was court or chambers.

What is the best of your recollection?---I can't recall with any certainty.

Who were you intending to give it to?---Bob Butler.

And what arrangements had been made with Butler about Butler receiving it?---I don't recall.

You must have made some arrangements. Do you concede that?---Yes, yes.

And you had to get the information to him, obviously?---Yes.

In sufficient time for counsel to be briefed with it?---That's correct.

And your understanding was that the trial would commence at 10 o'clock?---Yes.

So, you had to allow sufficient time to get the material to Butler so that counsel could be briefed in detail with this considerable body of information?---Yes.

Stands to reason that any arrangements you made with Butler for this purpose must have involved your meeting him at least an hour, one would think, before 10 o'clock?---Yes. Well, sometime before 10 anyway.

Well, I am suggesting not 5 to 10 but I am suggesting probably at least an hour before 10?---Well, as early as possible before 10.

Well, what was the arrangement? You see, this is - you have been charged with a responsibility of co-ordinating all of this information. You are the main person who is involved. We know you were going to charge a not insubstantial fee for your services. You were the person in possession of the critical information. You were the person whose responsibility it was to put it all together. You were the person who was to give it to Butler so that Butler could brief counsel. Now, Mr O'Brien, tell me what arrangements, if any, you made with Butler for the purpose of briefing him in respect of the information, the significant body of information, which you say you collected in respect of panel Z?--Well, I don't recall but the previous evening I spoke to Adrian Gundelach, as I've said, in relation to the panels.

You spoke to Adrian Gundelach?---Yes.

Where?---At his home.

You sure about that?---Positive.

You spoke to Adrian Gundelach at his home?---Yes.

About what?---About the – the panel, the inquiries into the jury.

What did you tell him?---Panel Z.

What did you tell him?---Well, I don't recall exactly what I told him. I'd have told him the progress in relation to panel Z – – –

Well, did you have – – –?---But it was at this stage that he said that it may not be required now.

Is that your recollection of it?---Yes.

Did you speak to Mr Greenwood?---Yes.

What did Mr Greenwood say?---Well, when Mr Gundelach had said that it may not be required now, I may have asked why or I certainly would've indicated what was to be done if that was the case. And I looked at Bob Greenwood who just said without a – he just offered the explanation that he was concerned about the survey that Walliss had done. And I think Gundelach said that there was a – that they were considering an application to apply for the panel to be discharged or re–replaced.

Any more? Anything else?---Well, he said – Adrian said that – I said, 'Well, what about the –' you know, I said, 'I've got a lot of inquiries that are in train that will be taking place overnight. Some information I won't get possibly until, you know, tomorrow morning, till just before the trial.' And, also, I mentioned that I had made arrangements to attend the National Party headquarters the next morning early. And he said, 'Well, you know, tell them to stop. Tell them not to bother.'

Tell who not to bother?---The people whom I'd been asking for information.

And was he telling you not to bother, too?---Well, he – he seemed – – –

Is that what you are saying, that Gundelach told you on Sunday afternoon not to bother?---Sunday night.

Sunday night?---Yes.

Well, why did you go to the National Party at half past 7 on Monday morning?---Because, and I said to him - I said - I said, 'Is it certain that the panel will be replaced?' And he indicated that it wasn't certain but certainly there would be a definite attempt by the defence to do it. I said that it would be difficult to stop the inquiries at that stage. And it would certainly be, potentially, or have the potential to cause a lot of speculation if I started at that stage of a Sunday night to telephone people to say not to proceed with inquiries in relation to the panel which they had been asked to institute.

Well, go back to my - - -?---And including - yes?

Go on?---Including the visit to the National Party. And he said - he said, 'Yes.' He seemed to agree with that. And he said, 'Well, just let it run.'

Was that all? Anything else?---In relation to that? I think that's all, yes.

Well, go back to my question, then?---Yes.

What about your arrangements with Butler?---Well, you see, I can't recall the arrangements with Butler, although I would say there must have been some. Butler was either on his way, or they expected Butler at the house at about that time.

No, no. About the next morning, the arrangements with Butler for the next morning. You see, you have got to give to him all of this information in case it is needed?---Yes. I don't recall contacting Butler after that, but I may well have.

Well, you see, now, there is introduced into the scenario, according to you, this large element of doubt. You do not know whether you have to or whether you do not. So, you have got to cover both contingencies?---That's correct.

So, you have got to go and give the information in case it is required?---That's right.

You have got to compile it, put it together?---Yes.

And take it in?---Yes.

Well, again I ask you, what were the arrangements with Butler about that?---I can't recall specific arrangements with Butler about that.

Well, do you recall seeing him?---No, I don't.

Did you have all of this body of information with you when you left your home?---I had – I had some – yes, I had some material because I intended to discuss.

Well, you must have had it all?---Well, probably. Certainly my notes of it.

Not probably because when you leave home to go and pass over this information, you say, you do not know what is going on?---When was that?

On the Monday morning?---Oh, on the Monday morning.

Yes?---No, that's – that's true.

So, you have got to take all of this information that has been collected and compiled?---Sure.

In whatever form it is?---Yes.

And you have got to take it and give it to Butler?---That's correct.

And you cannot remember what the arrangements were?---No.

But you must have seen Butler on that morning and given him the information?---Unless I had left it at Adrian Gundelach's on the Sunday night.

Not unless. You must have seen him. I mean that was – that just stands to reason?---Well, I – I may have but I can't recall seeing him.

Well, you must have had the material with you when you left your home, according to your version?---Yes.

And when you left home, you were going somewhere that you now cannot remember for the express purpose of giving it to Butler?---Well, I'd – I would have said that it's either the chambers or the court, just which – which I don't remember.

Well, wherever it was, wherever it was – – –?---Yes.

– – – for the purpose of giving it to Butler – – – ?---Yes.

– – – so that Butler could brief counsel – – –?---Yes.

– – – in sufficient time to allow the jury to be selected at some time after 10 o'clock?---Yes.

Well, you must have had the material with you – – –?---However there was an application – – –

I understand all that. Do not – – –?--- – – – at 9 o'clock.

– – – – do not cloud the issue. I am – – –?---I'm not clouding the issue.

I am looking at what your state of mind was and what you did and what you must have done on the Monday morning. You did not know what the position was, precisely; nor did you know what Judge Helman was going to do?---No, that's correct.

So therefore, having regard to your retainer and what you had been retained to do, as I said earlier, as the person immediately responsible for the collection of this information, you had to compile that material and give it to Butler?---Yes.

And you do not recall – and you must have had the material with you when you left your home?---Yes.

You do not recall where you saw Butler; whether it was at counsel's chambers or at the court?---No.

Did you – and you had the information with you?---Yes.

So you must have seen Butler at some time – some arranged time – in sufficient time to give it to him so that he could brief counsel?---Well – – –

Did you?---I – I don't recall any contact with Butler that morning, but I'm not saying that I didn't have any with him.

Well, you must have, surely – recall, if you did not see him you must now recall your concern or your disappointment or your emotion at having collected all of this material and gone to Butler and not been able to find him?---The next I recall – the next information I recall receiving is that the – Judge Helman had decided that the panel would be replaced.

Mr O'Brien, I am perfectly aware of the fact that that is what you want to tell me. What I am trying to probe is what was happening in accordance with what one might think would be the normal course of events in this situation. You have arranged to meet Butler. You have got to see him, because you are the person with the information that he wants to give to counsel?---Yes.

You cannot remember – are you saying now you do not even remember seeing him?---No, as – – –

Do you not remember – – – ?---– – – – as I recall – – –

– – – looking for him so that you could give the information to him?---Well, I certainly would have been doing that.

No, no, no. That is not – – –?---But I – I can't recall. No, I can't recall what – – –

– – – pardon me, please. Please – please, Mr O'Brien? – – – Yes.

Do you recall that morning looking for Butler, urgently, so you could give him the information? – – – No, I don't recall that.

Not even – do not even recall looking for him? – – – No, I don't.

You, the person who was seized of this valuable information which was needed for use in court and you do not even recall even looking for him? – – – No, I don't.

And you say you – – –? – – – But that doesn't mean that I wasn't looking for him.

And you tell me that your next recollection is that – is being told that the – it was not needed. A new jury was going to be selected. Is that your story? – – – That's correct, yes.

Yes, Mr Hanson?

MR HANSON: Mr O'Brien, it must have been a matter of some urgency that morning, by the time you left the National Party? – – – Yes. It was – – –

You had to drive back to Stafford? – – – Everything was a matter of urgency that morning.

You had to drive from – from what, Petrie Terrace, or where are they, Wickham Terrace? – – – Somewhere St Paul's Terrace, or somewhere like that.

St Paul's Terrace. From there to Stafford? – – – Yes.

Out to your home and back into the city between, what, 8 and – 8 or so – and 9.30 or something? – – – Something like that, yes.

Do not you recall any sense of urgency that morning; hurrying back to town with this information? – – – Yes, I – well, I don't recall that now, but – – –

Well, if you do not recall that, I take it you do not recall the result of it; the let-down at being told it was not needed, or the relief at handing it over in time? You do not recall either of those two emotions?---No.

Well, do you remember where, and in what circumstances, you got the news that the judge had agreed to change the panels?---No.

Or who gave you that news?---I don't know.

Where you were?---Again, either at the court or at chambers."

In summary then, the most that can be said is that O'Brien claimed that by Sunday night he had spent 37 hours in investigative work which involved 410 kilometres of travel. Yet all he seems to have achieved was the establishment of a "network" of people who were to report in on Sunday evening and/or Monday morning with the information which O'Brien claimed he would collate and have available for Butler by 10.00am Monday. Neither Gundelach nor Butler, it seems, saw any of that material on Monday. Indeed, it is doubtful whether O'Brien even went to the court on Monday morning.

8.2 The Evidence of Mrs Chapman and Dr Lynch

Yvonne Anne Chapman, a former Minister of the Crown in the Bjelke-Petersen Government, and the chairperson of the Brisbane connection of the Friends of Joh, gave evidence of being approached by O'Brien for information concerning members of the jury panel.

She gave evidence that O'Brien phoned her and that as a result of this he went to her home on Saturday, 21 September 1991 at about lunch time when she was in the process of bringing in her washing. She was confident about the day and the time because of her domestic habit which include the fact that she did the domestic washing on Saturday, and she recalls that O'Brien's arrival coincided with her bringing in her family washing.

Mrs Chapman was an obvious contact for any person seeking information on a jury in these circumstances. It was to be expected that she may know of persons on the list in her electorate whose names were related to the suburbs contained within it. Besides, she could be expected to have a

range of persons who had assisted her with work in her electorate and at election time and who lived in the area and who may be able to provide information about persons on the list who came from the area of her electorate.

Mrs Chapman was shown a list of names by O'Brien which he had brought with him, but she "was unable to help him". I am satisfied that he did not leave any lists with Mrs Chapman for distribution throughout the supposed network of people whom she might enlist in aid of O'Brien's search for information. In short, I accept that Mrs Chapman could not herself provide any useful information, that O'Brien did not ask her to enlist the aid of others and that he did not leave with her copies of the list for distribution to others. There were in fact persons on the list who lived in her electorate, but she was unable to assist him.

It will be recalled that of the persons whom O'Brien swore that he had recruited into his network of informants, he at first identified only Mrs Chapman. She was an obvious contact, a well–known supporter of the accused and a high–profile political figure in her area. It is not surprising that he contacted her, nor is it surprising that he was able to identify her as one such useful contact. What is surprising was O'Brien's inability or refusal to identify any of the other several persons whom he said he had enlisted for support except Dr Lynch to whom I shall refer in a moment. What is more relevant is that Mrs Chapman herself could not provide any useful information to O'Brien, nor did she seek to enlist the help of others, nor was she asked to by O'Brien.

Her evidence is therefore totally inconsistent with that of O'Brien, but I have no hesitation in accepting as true that part of it to the effect that O'Brien visited her on Saturday with a list, that she was unable to help him, and that she did not enlist others to help him. When these facts are considered in the context of O'Brien's sworn evidence of establishing a widely based network of people which was facilitated by his initial contact with people such as Mrs Chapman, the unacceptable nature of O'Brien's evidence is made clearer.

Mrs Chapman suggested to O'Brien that she could assist him by putting him in contact with Kenneth Warren Crooke, the State Director of the National Party. I am satisfied that Mrs Chapman succeeded in making telephone contact with Crooke at his home at the Sunshine Coast on the morning of Sunday, 22 September 1991 when he was advised by her that the defence team were attempting to contact him. The thrust of her conversation with Crooke was to the effect that O'Brien wished to check

names against the National Party records of membership and she left with him O'Brien's telephone number.

Therefore, I am satisfied that having spoken to Mrs Chapman on Saturday he left her home empty-handed except for the expectation that Crooke may be in contact with him.

In the result, the high-profile politician, Mrs Chapman, and a person readily identifiable as a friend of the accused, was unable to assist O'Brien, nor did she offer the assistance of others, nor was she ever asked to enlist the aid of others. That evidence is also of considerable importance in assessing the worth of O'Brien's credibility.

It was necessary to recall O'Brien at a late stage of the public hearing to put to him material which had emerged after he had first given evidence. In the course of his later evidence he identified a certain Dr Lynch as another of the persons whom he had enlisted for the purpose of obtaining information. He was identified as Dermot Morgan Lynch, a medical practitioner and a co-opted member of the Management Committee of the National Party.

He was called to give evidence. Dr Lynch said that he was first visited by O'Brien late on a Friday afternoon. O'Brien was a stranger and introduced himself as one of the defence team working for the accused and he thereupon sought from Dr Lynch any information concerning those persons who were named on a list which O'Brien had with him. O'Brien left the list with Dr Lynch for his perusal on the weekend with the request that he ring O'Brien if he had any useful information.

The list which O'Brien left with Dr Lynch had about 20 names on it. He now recalls that one of the addresses listed for one such person was "Suelin Street, Boondall", a location which was well-known to Dr Lynch, whose medical practice covers that area, but he did not know the relevant person. In fact, one of the jurors on Panel Z (Z13) was listed as a resident at 35 Suelin Street, Boondall. To the best of his recollection he could not identify any person on the list. He informed O'Brien accordingly. He was not asked to enlist the support of others, nor did he do so, nor did he distribute the list given to him to any other persons, nor was he asked to.

Therefore, as late as Sunday, 22 September 1991, O'Brien had failed to obtain any useful information from the only two persons he was able to identify as being part of his network of informants. He was to insist in his evidence that by Sunday night/Monday morning he had been successful in obtaining from his range of contacts a considerable body of material in

respect of Panel Z which he intended to give to Butler on Monday morning. This information came not from the National Party persons, Mrs Chapman and Dr Lynch, but from a range of unidentified and now unidentifiable people, not even one of whom O'Brien was able to identify. And besides all the relevant information was, according to O'Brien, destroyed on the Monday.

8.3 O'Brien's visit to National Party Headquarters

Having received Mrs Chapman's phone call on Sunday at about 9.30am to 10.00am Crooke then took legal advice as to the propriety of his making available to O'Brien information which might be in possession of the National Party concerning any jurors named on the panel. He was advised that the course proposed was unobjectionable and he thereupon arranged with a member of his staff to be at the office at 7.30am on Monday, 23 September to assist O'Brien. Crooke informed either Mrs Chapman or O'Brien himself concerning this arrangement.

Susan Fawcett gave evidence that she was at the time the Membership Supervisor employed by the National Party and at 7.30am on that morning she met O'Brien and he and she checked the names on the list against Party records but no coincidence of names was revealed.

I will deal later with the further Crooke/O'Brien contact later during Monday and on Tuesday morning, 24 September 1991.

From the above one fact clearly emerges and that is that by 9.00 – 9.15am Monday, 23 September 1991, O'Brien was unable to obtain any information concerning any person on the jury panel from any one of the persons or sources which he identified or who were known to the inquiry. Mrs Chapman, Dr Lynch and the computerised National Party membership list revealed nothing. Yet O'Brien swore that the material which he had collected and which he intended to pass to Butler on Monday morning was as complete and as comprehensive as that which he had concerning Panels P and K only 24 hours or so later. One can only wonder where the information came from. O'Brien's unsatisfactory evidence and the known facts have led me to the conclusion that it is more probable than not that little, if anything, had been done to marshall material which was to be used for the purpose of profiling the members on Panel Z. Walliss, I am satisfied, had done virtually nothing; whatever O'Brien and Butler had done did not include any substantial investigation into Panel Z. In short, the investigative effort during the days immediately prior to Monday, 23 September 1991 produced very little information concerning Panel Z. This

is confirmed by exhibit 89, the list on to which Gundelach transposed such little information as he had received from Butler.

8.4 The Briefing of Gundelach by Butler - The Morning of Monday, 23 September 1991

By Sunday night Greenwood QC had instructions from Mead to apply for the discharge of Panel Z. Early on the morning of Monday the arrangements were made to make the application to the trial Judge in Chambers. The application was fixed for 9.15am.

Arrangements had also been made with court officials previously to have available to the defence team a room in the District Court building for the use of Counsel and as a temporary office to which all could retire during adjournments.

It is necessary to detail the events which occurred on the Monday morning. This is a necessary and important introduction to a relevant contest between the evidence of Butler and Gundelach concerning the briefing to Gundelach by Butler of information in case it was necessary to use Panel Z. In short, Gundelach gave evidence that Butler briefed him with some sketchy material concerning Panel Z before 9.15am on that morning in the room set aside for their use. This is denied by Butler who alleged that he was not at the court that morning but remained at the Gateway Hotel with the accused and Lady Bjelke-Petersen. Gundelach's evidence is important for another reason as well, and that is that it illustrates Butler's involvement in the process of jury vetting - a matter which he swore he would never touch "with a barge pole".

This was the evidence of Gundelach:

> *"Sorry, the Monday. Mr Butler's recollection does not accord with yours. I just want to ask you whether - just how firm you are in your recollection that you went across on the Monday morning and sat down with panel Z?---Well, I'm as firm as I can be because I can recall Mr Greenwood wanted us there early in the morning at the Gateway. He'd arranged for the client to be there. I think it was about 8.15 or 8.30, we were to meet there and we were all going to move up to the court together.*
>
> *Including Sir Joh?---Yes.*

And did that happen?---That happened, yes.

Now, that would have to be early, of course, because you were due into Judge Helman's chambers just after 9?---Yes. I would say we would have left the Gateway very close to 8.30.

And who would have been in that party?---I recall specifically Butler and Mead, Greenwood, myself, Sir Joh and Lady Flo, and there were an assortment of hangers on. I think they may have been relations to Sir Joh.

There is a newspaper photograph here on the Tuesday, which probably records the procession up to the court. You might like to look at this for me. You will see Sir Joh there in the middle of the photograph, of course?---Yes.

And his wife?---Yes.

You see Mr Butler there in the background?---Yes, I see Mr Butler there.

Now you say you and Mr Greenwood would have been in this procession, would you?---Yes, I'm pretty sure. We were walking ahead – not all that far – but my recollection is photographers weren't particularly interested in us, but they formed a semi-circle in front of Sir Joh and Lady Flo, and kept on the back foot photographing him as they went along, and we were sort of ahead of that group going into the court.

All right. Well, it would – – –?---But I have a distinct recollection of Greenwood insisting that we all go across together.

All right. Well, perhaps would it be the case that after you had been in Judge Helman's chambers, you went back to the Gateway and picked up Sir Joh and then all came again – came together to the court sometime after 10 for the matter to be mentioned in open court?---No, well – – –

Is that possible?---No, I don't think that's possible at all, because, as I say, it is my clear recollection we were to go

over there, and we weren't intending to come back and pick up Sir Joh or anything like that.

All right. So your recollection is you went over before 9 o'clock, and it was then, before you went to Judge Helman's chambers, that you were given this information about Z?---Yes, because, once we got to the court, we all went up into the room that had been organised for us.

Well, just consider this possibility: Mr Butler's recollection, he tells us, is that he remained back at the Gateway with Sir Joh and Lady Flo, and having tea and scones while the rest of you went up to Judge Helman's chambers?---No, that is not my recollection."

The relevant press photograph was available and used in the hearing and it clearly shows Butler in the photograph. I accept Gundelach's evidence that at least he and Greenwood QC were ahead of the photographers but that the whole group including the accused and his wife had at Greenwood QC's insistence gone to the court together as one group. A host of press photographers and media personnel could be expected to await the arrival of the accused and his legal team.

I am satisfied on the basis of Gundelach's evidence, which I accept, that O'Brien was not in the precincts of the court on the morning of Monday, 23 September.

It was Butler who briefed Gundelach with the paltry information which was then available in respect of Panel Z.

As has been said already, exhibit number 89 came to the inquiry from Gundelach through solicitors Gilshenan & Luton. The exhibit consists of a manilla folder into which is pinned a copy of Panel Z. The jury list was in Gundelach's possession that morning and he attached it to the inside of the folder. His writing appears on and inside the front cover. His evidence continued:

"Yes?---I clipped that in.

MR CARTER: On the Monday morning?---Yes, it's Panel Z.

Yes, but you were not in that room on the Monday morning; you were in the judge's chambers?---Oh, we

had the use of the room. I can recall going up there from the Gateway. That's my recollection, I went up to the room.

Before you went to the judge's chambers?---Yes, because down at the Gateway on the Monday morning, Sir Joh was there, Lady Flo, Butler, Mead, myself, and some of the relatives down there. And - - -

Would you go on, Mr Hanson; I will come back to it.

MR HANSON: You see, the record shows you were in the judge's chambers on Monday morning, at about 9.15 or so?---Yes.

Do you remember that?---Yes.

So what, are you saying before that you were dealing with these documents, or was it after that?---Before that is my recollection.

Before that. It would have to be before?---Yes.

Because you were no longer interested in Z after you had come out of Judge Helman's chambers?---That's so.

Yes. And this is at the court?---Yes.

MR CARTER: So are you saying that you were given Panel Z at some time on the Monday before a quarter past 9?---Yes.

In the room?---Yes, that's my recollection.

By?---Butler and Mead.

When you say Butler and Mead, what do you mean by that?---Well, Butler and Mead walked across from the Gateway to the fourth floor of the old District Court building, where we had organised for a room to be used by the defence representatives, and it was in that room – we got up there before quarter past 9, well before quarter past 9, and it was either Butler or Mead who handed me then Panel Z - - -

Yes, go on – – –?––– – – – and it was I who put, commissioner, the Panel Z into this folder – – –

When you received it?––– – – – but I can't say when I put the jury on it."

The final reference to "the jury" in that excerpt of evidence is a reference to the word "jury" which Gundelach wrote on the front cover of the folder. The evidence continued:

"MR HANSON: And was this a folder you had brought with you?–––I can't say that. I mean, there was a lot of rubbish, if I can call that folder rubbish; there was a lot of other stuff in the room that had been left there by other people who'd been using the room. There were two telephones that were still operating in the room. There were chairs stacked up in one corner, empty springback folders, and some old manilla folders, and bits of paper, and rotting biros and pencils, and that sort of thing.

All right. So you put a spike through it, and through Panel Z?–––Yes.

Well, was it in the form in which we presently see it, when it was handed to you?–––No. I believe I was handed two copies like this.

Of Panel Z?–––Yes. And I put one in here, pinned it in, and then started having conversations with Butler, running through the jury panel, 'Let me know who's favourable, and give me any other comment as we go through the numbers about them.'

And this was with Butler?–––Yes.

Not with Mead?–––Mead was there, but he didn't offer any contribution whatsoever.

And what was Butler drawing on to supply you with these comments, do you know?–––Well, my recollection is I was sitting at a desk, a very small desk, facing George Street. Greenwood QC was sitting about 3 feet across from me, behind me, and on a much bigger desk facing towards the river, and whilst I was at my desk, Butler either pulled up

a chair behind me or stood at my side, and he had material that he was giving me information from.

And did you see it?---It wasn't a springback folder, as I remember; it was just a flap–over plastic – – –

Did you see it, yourself, see – – –?---I saw him holding it in his hand.

But did not see the contents?---No.

All right. Well, let us run through them?---All right.

Number 2, there is a tick there – – –?---Yes.

– – – and another mark?---I beg your pardon?

Number 2?---Yes.

Who put the tick on?---Well, I'm reconstructing again; I think I did. I can't tell the difference between my ticks and anybody else's ticks, but I'm pretty sure I put the ticks on.

And there is also another mark beside number 2. Did you put that there?---Yes, I think I did.

What is it meant to be, or indicate? Is it a star, or an asterisk, or – – –?---It looks like a sort of asterisk.

Is it a sign of approval?---No, I think that is something I put there, and – I'm reconstructing, but I think I've marked three like that, and the only thing I can think of is that they came from an area where I live. Ascog Terrace, Toowong, number Z8 is from Auchenflower, where I live; and Dobie, Z30, is from Indooroopilly. I mean, they're areas that I'm very familiar with, and I don't know if I was just doodling, that because they were from the area where I live and where my sister lives, and where I've lived all my life, I may have made that mark there – – –

All right?--- – – – just in case I recognised their faces or saw them – – –

It does not represent any information given to you by Butler?---Not that I recall, no.

28 – sorry, Z8 has got a tick on it?---Yes.

What do you say about that, same?---Yes.

Were there any ticks or any information on the jury list when you were given it?---No, nothing, as far as I can recall, nothing. I'll just go through it quickly.

Well, let us – the first page, you have got about six ticks, you think they are all yours, do you?---Yes.

Second page, 21 has got a tick?---Yes.

22 has got a comment against it?---Yes.

Whose printing is that?---That's mine.

Where did that information come from? The juror was somebody or other's wife?---Yes, well, I feel that was information given to me by Butler.

He would know that, would not he?---Yes, because Col Chant was the police rank and file representative, as I understand, on the Police Union, and had been so for many many years.

And Butler had an interest in union affairs, did not he, at that stage?---Well, I certainly know he had afterwards – or might have been at that time.

Anyway, that came from him, you think?---Yes.

And you wrote it on?---Yes.

Another couple of ticks there on the second page, probably yours, are they?---They're mine.

Next page, half a dozen ticks?---Yes.

And 47 is ruled out by hand. Do you know anything about that?---No, I don't. They might have given me a tick,

and I see it's in a dark shade, and my experience tells me that those in dark shades are people that have already been excused by the – either another judge or an under–sheriff or something like that. They just have been put on the list, but they won't necessarily be there on the day.

Next page you have got four ticks?---Yes.

And some handwriting against 58?---Yes.

And a star, is it?---Well, an asterisk of some sort.

And what does the word say?---Look, I've been shown that, Mr Hanson, on a number of occasions, and I can't even read my own writing.

All right?---But it is my writing. Looks like Feeney, or picnic, or something; I don't know.

Greenie; it is not a greenie, is it?---No.

All right. Next page, you have got a couple of ticks, and 82 was on Ys jury, that was Charlie York's jury, was it?---Yes.

Had they finished their trial?---I've been trying to think of that, too, and I don't know whether they had or not. Now, whether I was told that they were on Ys jury and they wouldn't be there, or they were on Ys jury and I know York was acquitted, and that's why I put it there, I don't know.

All right, but it is your printing?---Yes.

Next page, 106: Frank's brother. Is that your writing?---Yes.

What does that mean or what is the source of that information?---Well, I looked at this list yesterday and I think I might have been being just a bit flippant with Butler, you know, when he told me this was Col Chant's wife back on page 2. I said, 'Oh, Brian O'Callaghan? This must be Frank's brother,' and – – –

Who is Frank O'Callaghan?---Frank O'Callaghan is a well-known sports writer, Rugby Union writer.

All right. Next page, you have got three ticks, 114, 121, 122?---Yes.

Another note on Ys jury. That is your note, is it?---Yes.

124 has got a no and an exclamation mark?---Yes.

Is it your printing?---Yes.

What did he tell you about that juror?---That that person is definitely not to get on.

He did not tell you why?---No.

You were not interested to know?---No.

Next page, you have got two ticks. Yours, I take it?---Yes.

Next page, another two ticks. Is that the case?---Yes.

And that is the end of – that is all the information, then, you had about Panel Z?---That's all the information I was given, yes.

And that is all you were going to go in with if the judge happened to refuse to discharge Panel Z from this trial: is that the case?---Well, yes, I had something to go on.

Well, you see, it amounts to a series of ticks but there is only one veto, is not there? Only one gets no, is that the case, that is 124?---Well, I just assumed they were telling me or he was telling me that the ones with ticks were favourable people to put on.

Yes, of course. But in a case such as this, do not you think it would have been very important, if it could have been achieved, to identify those who might be hostile to your client because of their political views and his? That would be vital in a trial of a fellow like this, would not it, if you could do it?---Well, if they could do it.

Well, they do not seem to have come up with anything except number 124, a definite no?---Well, I had to move on Monday morning and get something to go on.

Yes, and this is all they came up with: is that the case?---That's right, but both Mead and Maxwell were going to – not – both Mead and Butler were going to be there in court, so they could've told Greenwood if there was any further information or anything like that.

Was O'Brien there that morning when you were running through this jury list?---No.

You did not see fit to comment on this – on the paucity of this information yourself?---No. I – – –

Do you agree it is pretty poor in that regard, in that regard, identifying, if possible, some of those who will be hostile to your client?---Put it this way. I knew that, if they had that sort of information, they were in a position to tell Greenwood in court if they had to. I was marking the favourable ones that had been given the all–clear; there's nothing wrong with them to get on, and one of all of them was a definite no, no, no, no. No, exclamation mark. A fellow called Saxby.

Yes. And it is the only one who is indicated no, is not it?---A definite no, that is right.

Out of 162, they only told you there was one definite no– no. You did not comment on that to Butler?---I didn't feel it was necessary.

All right. Now, you can – you were prepared – you had to go in then and pick from this list if it became necessary?---Yes."

Butler denied his involvement in the process described by Gundelach. He swore that he was at the time at the Gateway with the client and his wife having morning tea.

I do not accept Butler's evidence. Gundelach was plainly truthful and intent on recalling the occasion with some attention to detail. Butler's denial of any involvement is simply his attempt to maintain consistency

with his general denial of involvement in any matter relevant to jury selection.

I am satisfied that at some time prior to 9.15am when Gundelach and Greenwood QC went to the Judge's Chambers Butler had exhausted the information available to him from any relevant source and the commencement of the trial had been set to commence at 10.00am. It is in that factual context on the Monday morning that the application was made. As stated earlier, I am satisfied that O'Brien was not even present.

Gundelach gave this evidence:

> *"Well, did Mr O'Brien ever join in any discussion with you personally about the prospective jurors?---Well, the only time I recall seeing Mr O'Brien was on the Saturday night, then on the Sunday night, very briefly at my house, then I didn't see him at the court afterwards.*
>
> *All right. One other thing I should - - -*
>
> *MR CARTER: Just a moment. Just a moment. Even on the Monday morning?---No, I didn't see him on the Monday morning, Commissioner.*
>
> *Either at the Gateway or at the court?---No.*
>
> *MR HANSON: Do you recall when you - - -*
>
> *MR CARTER: Just hold on. Sorry.*
>
> *On the Tuesday afternoon?---I don't recall seeing him on the Tuesday afternoon.*
>
> *So the - is it your recollection that the documentation - that is the jury documents - which you needed either on the Monday morning or the Tuesday afternoon - came from Butler?---Came from Butler, yes."*

There is no reason to doubt that on the Monday morning Butler had disclosed all of the information available to him. If O'Brien was then in possession of the considerable body of material on Panel Z which he claimed had been advised to him from his sources, it is inconceivable that Butler would not have had access to it. Clearly, he did not and O'Brien, the so–called co–ordinator of the jury vetting process for Panel Z, was not

even there. Were he there, again it is inconceivable that he would not be involved in briefing Gundelach before 9.15am in case it was necessary to use Panel Z. That was a remote chance, but it was one which Butler recognised – otherwise it was pointless for him to brief Gundelach. And once he perceived the need to do that he would obviously need to have any information in the hands of O'Brien to whom and to which information he would have had ready access. It had been Butler who had engaged O'Brien with appropriate instructions.

I repeat my definite satisfaction that virtually no attention had been given to Panel Z in the days immediately prior to the trial. The other most significant event was that on Saturday O'Brien had successfully misled Greenwood QC into believing that Walliss had exhaustively polled Panel Z and it was that event which had dictated the course of later events on the Saturday, Sunday and Monday morning.

Finally, one can ask: If Walliss had conducted his "exhaustive" poll over the days prior to Saturday, 21 September 1991, why was Butler in possession of such minimal information when he briefed Gundelach prior to 9.15am on Monday?

Not only does that raise again serious questions about the alleged Walliss polling, what is even more difficult to understand is the following statement in O'Brien's letter to Butler dated 30 September 1991, when forwarding his memorandum of fees to Mead's office:

> *"We refer to the above (pre-trial investigations – Sir Johannes Bjelke-Petersen) and advise that as a result of instructions from Mr Robert Butler of your office on 20/9/91 urgent pre-trial investigations were commenced and co-ordinated with Mr Phill (sic) Walliss of Estwell Consultants.*
>
> *The results of those investigations were conveyed to you on 23/9/91."*

The latter statement is false if the oral evidence of both Butler and O'Brien is true. If it is not false, then both have failed to supply to the inquiry the documentary evidence of "the results of those investigations".

O'Brien swore that the material was destroyed. His letter to Butler on 30 September states that "the results" were conveyed to Butler on Monday, 23 September 1991.

It is obvious that one or the other or both have lied.

Furthermore, the letter falsely refers to the investigations which were "co-ordinated with Mr Phill (sic) Walliss". If Walliss had done nothing and had collected no useful information, what did O'Brien have to "co-ordinate", particularly if he himself had no useful information on Panel Z to contribute on the Monday morning.

CHAPTER 9

PANELS P AND K – THE SUBSTITUTES

9.1 A Picture of Contrasts

The paucity of the information available in respect of Panel Z by 10.00am Monday, 23 September 1991 can be contrasted with the large body of information supposedly gathered between "about lunch time" on Monday, 23 September 1991, and 1.30pm on Tuesday, 24 September 1991 when, according to O'Brien's letter to Butler dated 30 September, "the results of the (further) inquiries were conveyed to you at 1.30pm 24/9/91".

The form in which the results were compiled by O'Brien and presumably given to Butler is apparent from the lists prepared by O'Brien in respect of Panels P and K which are included in Appendix 3. These results were in respect of Panels P and K which were substituted for Panel Z. There is one major difference in the form in which the "results" in respect of Panel Z and Panels P and K was made available.

As is apparent from exhibit number 89, Butler gave to Gundelach a Panel Z list in the form compiled by the Sheriff's Office. The O'Brien compilation in respect of Panels P and K was his own. Firstly he produced his own typewritten lists in respect of P and K respectively; in compiling these lists he omitted those names of persons who had been excused from those two panels; he also excluded addresses and occupations.

It follows from the form of the documents themselves that O'Brien must have compiled each list in his own form after he had received the lists from the Sheriff's Office because there is excluded from the O'Brien lists of P and K the names of those previously excused. There is included, however, the names of the persons excused by the trial Judge after 2.30pm on Tuesday, 24 September 1991. The traffic offence and criminal history information is handwritten and so, having regard to the form of the documents, must have been added when the documents were already in typed form.

A comparison of the two sets of documents, ie Panel Z and Panels P and K, and the broad circumstances should be given at the outset.

Panel Z

This list was in the possession of the defence from 11 September 1991 to and including the morning of 23 September 1991.

There were 168 names on it in its original form on 11 September 1991.

The list on which Gundelach worked with Butler on the morning of 23 September 1991 prior to 9.15am was a Panel Z list generated by the Sheriff's Office computer on 16 September 1991. Inquiries reveal that the Panel Z list, although first available from 11 September 1991, would show on its face that it was generated on 16 September because that was the first day on which it was to be used. Eighteen names have been excluded from the original. It therefore had on it 150 potential jurors.

On this list there are 31 ticks (two of which are in respect of persons whose names had already been excluded from the 16 September Panel Z list). There was one "No".

There was no information available in respect of the other 120 persons whose names are on the 16 September list.

Information is therefore available in respect of only one-fifth of the total panel.

O'Brien swore that in respect of Panel Z he had compiled similar information to that compiled in respect of Panels P and K. Is that the information which he gave to Butler, as his letter states, or did he destroy it, as he swore on oath? In any event, compare "the results" of the investigation with those revealed in respect of Panels P and K.

Panels P and K

There are 105 names on the combined Panels P and K as prepared by O'Brien (that is, after excluding earlier excusals).

The assessments made in respect of these persons are:

Yes ****	4	(including Shaw)
Yes *	2	
Yes	3	
Maybe Yes	12	
No	30	
No x	10	
No xx	1	
No Assessment	43	
	105	

Information is given in respect of 62 of the 105 jurors – approximately two–thirds and it is to be noted there is detailed classification in respect of the 62.

In summary therefore, although Panel Z was in the possession of the defence from 11 September 1991 (approximately two weeks prior to anticipated trial date) Butler passed to Gundelach prior to 9.15am on 23 September his assessment in respect of only 20 or one–fifth of the number available on the panel from 16 September (this assessment included two who were on Yorke's jury which had already been empanelled also on 16 September).

The source of the information to Butler is not disclosed by him. It may conceivably have been obtained from Yorke who was a former police officer on corruption charges.

By contrast, although it is said that the defence team had access to Panels P and K only from about lunch time on 23 September 1991, by 1.30pm on 24 September 1991 (say approximately 24 hours) a graduated assessment from No^{xx} through other classifications to Yes**** was available in respect of about two–thirds of the total panel.

In short, it took from Wednesday, 11 September to Monday, 23 September to have available information in respect of only one–fifth of the Panel Z; it took only 24 hours approximately to have a graduated classification made in respect of two–thirds of the combined Panel P and K. Significantly, Panel Z was the one panel especially assembled for the Bjelke–Petersen trial; Panels P and K were the panels substituted at some time after 10.00am on Monday, 23 September.

This dichotomy is remarkable. It is a piece of understatement to say that it begs explanation.

These alternatives present themselves:

1. Butler had arranged virtually nothing in respect of the investigation of Panel Z from the time he received it on 11 September 1991.

   But had not Butler first engaged Walliss prior to 17/18 July? Had not jury vetting been a most significant matter in discussions with Greenwood QC in July/August? Had not Walliss undertaken "quite an exhaustive poll" of the jurors on Panel Z prior to Saturday, 21 September 1991? Had not O'Brien set up a substantial network of persons who were reporting in with information to O'Brien on Panel Z throughout the weekend? Had not O'Brien been engaged on 20, 21 and 22 September in 37 hours of investigative work during which time he had travelled 410 kilometres?

   If these questions are to be answered in the affirmative, and the evidence of Butler, O'Brien and/or Walliss would assert that they should be, then the first alternative should be rejected. But if so, why was so little information available to Gundelach on the morning of Monday, 23 September, before the application was made to discharge Panel Z? Why had so much effort produced such a paltry response when, according to O'Brien, the same network of informants was able to produce the considerable body of information in respect of Panels P and K only 24 hours later?

2. Butler/O'Brien/Walliss had been busily complying with Greenwood QC's directives, albeit belatedly, during the period 11 September 1991 to 23 September 1991 and had collected a large body of material, according to O'Brien, of the same kind and as substantial as that in respect of Panels P and K, and furthermore, from the same network of sources.

   If that is so and if Butler, O'Brien and Walliss are to be accepted as witnesses of truth, then why was this material not briefed to Gundelach on the morning of 23 September 1991? Where is it? If it was "conveyed to you" (Butler) by O'Brien "on 23/9/91" what happened to it? Why was it not given to Gundelach in the same form as he received Panels P and K on the following day?

   And in considering these alternatives why should O'Brien on the afternoon of Saturday, 21 September falsely mislead Greenwood QC if in fact Walliss had done nothing, objectionable or otherwise,

or practically nothing? And why liken Walliss' alleged polling to Herscu?

Finally, there is a third but unlikely alternative, namely that O'Brien simply made up the comments on Panels P and K. This is unlikely, given the fact that he knew that his work was to be the basis for jury selection by Counsel in this trial. And if he simply made up the assessments why go to the trouble of adding the criminal and traffic offence history?

It is these issues which require one to sharply focus on the remarkable contrast demonstrated above. These are the kind of questions which arise:

- Did O'Brien use the same network of sources in respect of the Panel Z for the information conveyed to Butler in respect of Panels P and K?

- If not, did he establish a new/different/more extensive network in respect of Panels P and K?

- Was the time charged for by O'Brien prior to 23 September expended in respect of investigations which related to jurors other than those on Panel Z?

These and like issues have now to be addressed in the context of the relevant facts.

9.2 The Availability of the Other Panels Prior to 23 September 1991

One can say with confidence that prior to 23 September 1991 the panels – other than Panel Z – were readily available to any person who was interested enough to possess them. They had been in service since 2 September and the criminal law legal community had been using them during that time – other Counsel, solicitors, prosecutors, the office of the Public Defender were obvious sources if it was not intended to acquire them from the Sheriff's Office. Indeed, for the defence team in the Bjelke-Petersen trial it would have been odd for one or the other to seek to acquire one of these panels from the Sheriff's Office. Panel Z had already been purchased; and Panel Z had been especially assembled for the Bjelke-Petersen trial.

It is now plain beyond question that O'Brien had access to a source in the office of the Director of Prosecutions from whom he obtained both the traffic offence history and the criminal history of the jurors on Panels P and K. This matter will be dealt with later in more detail. It is clear that he did obtain this information and the conclusive evidence is that this combined body of offence history was available from no other source at the time. The panels, other than Panel Z, were being used by different prosecutors since 2 September in a number of trials during the sittings. If O'Brien's sources were sufficient for him to obtain sensitive information such as the criminal and traffic offence histories, he likewise had ready access to the other panels, if for any purpose he needed them, and of course prior to 23 September 1991 Panel Z was of no interest to the Director of Prosecutions since it was specially compiled for the trial which was to be conducted only by the Special Prosecutor.

I am satisfied that the other panels, including Panel P, were available and that Butler and/or O'Brien had the capacity to access them if so minded.

9.3 O'Brien's Evidence as to his Receipt of Panels P and K

> *"All right. Well, at some time that morning, you learned Helman J had agreed to change panels. Is that the case?---Yes.*
>
> *You do not remember where, or who told you?---No.*
>
> *In what circumstances?---No.*
>
> *Well, I take it you were then told to get on with the job again with the replacement panels?---Yes, when they became available. Yes.*
>
> *And who gave you these instructions?---Max Mead.*
>
> *Max Mead?---Yes.*
>
> *And somebody must have physically given you the replacement jury list?---Yes, he did that.*
>
> *And you remember this?---Yes, I remember that.*

Where did that happen?---At – outside Adrian Gundelach's chambers in the Inns of Court.

And about what time of day is this?---Well, I would think about – you know, lunch-time.

And you were asked – – –?---Mid-day, 1 o'clock or – somewhere – approximately.

You were asked to do it all again?---Yes.

At that stage, I think you would have been told that you had until 10 am on Wednesday morning?---That's correct.

All right. So what did you do about it?---Well, I decided to do the same thing that I'd done before, and that was a list I'd already had prepared, and perhaps out of that list – – –

Walliss was out of it now, of course, was not he?---Yes, although I sent him a copy of it.

Did he send anything back?---Not to – not to do a survey.

No. Did he send anything back?---I think he did, but it was fairly vague sort of material. I don't think there was anything of significance that he sent back.

Well, may we take it that you are the source of all of the information on P and K?---That's correct, yes.

All right. Well, how did you get hold of it?---Well, there was already something of a network set up as a result of panel Z, and I contacted those people who had contacted me with information on panel Z and I arranged that there would be copies of the new panels, P and K, faxed to them or delivered to them.

Yvonne Chapman among them?---I would have thought so, but I'm not certain. I recall that I didn't – wasn't able

to get in touch with all of those who had been helpful the first time around – – –

No. Well, this is – – –?––– – – – simply because of the time factor.

This is Monday afternoon, is not it?–––Yes. Yes.

Yes.

MR CARTER: Were they at work or at home?–––Well, I don't know where they – each one was, but obviously they – – –

Well, where were the fax machines that you sent them to?–––Where were the fax machines? Well, the fax machines – those that were faxed would have been to a place of employment – work place.

Are you sure about that?–––I would think so – unless someone had given me a home fax number.

Well, did they? Did you – – –?–––I don't recall.

You must have had all of these fax numbers, then, from this large group of people you were telling us about yesterday?–––Oh, not all of these were fax numbers. There may have been a couple faxed, but mainly they were spoken to by telephone and – – –

No, you said you faxed them. You had to get the documents to them if they were going to be any use – – –?–––Yes.

– – – because this is a completely new list, you tell us?–––That's correct.

Well, how did you get the new lists to this new body of people, or this same body of people – this large body of people you told us about yesterday?–––By delivering the list or by faxing it.

Well, you must remember then where you delivered them to?---Yes. I remember one was an address somewhere at Aspley.

Well, you can do a bit better than that, surely?---Well, it was in the older – I don't know the address now, and there were others on the south-side, but I'm not sure of the addresses.

Would you be able to take one of the investigators helping me to the addresses?---I don't think so.

Not at all?---No, I don't think so.

In other words, if I put you – or asked you to go into a car with Detective Sergeant James or one of the other officers, you would not be able to take them to any of those addresses. That is what you are telling me, is not it?---Well, just off the top of my head now I can't think of any precisely.

Not only can you not think of any precisely; you cannot think of any at all. The best you can do is perhaps an address in Aspley and a couple in South Brisbane?---Yes.

Yes, Mr Hanson?

MR HANSON: Are you still in business as a private investigator, Mr O'Brien?---Yes.

What if Mr Bill Milligan or Mr Potts asks you tomorrow to do the same job for them: 'Give us some information on this jury list for this trial we've got next week'?---Yes.

Yes?---I didn't keep records of the list.

No. What if you were given the same job tomorrow by a solicitor?---Yes.

'Give us some information on this list of jurors'?---Yes.

Would you be able to think perhaps of any of these 100 people who formed your network for Sir Joh's trial?---Yes, I'd say so.

10 of them?---Yes.

You can name them, can you, if we press you? You can name them? You would be able to do the job for Mr Potts or Mr Milligan, would you - use this network for gathering information?---Well, there was probably - the fact that that trial had the political overtones made it both difficult in some ways and easy in others, and had it not been through the National Party and their connections, I couldn't have got the information, particularly the information for the second lot of panels. So - and, as I say, the - any information provided was on the basis of confidentiality, and the notes were destroyed. If I'd had instructions from someone else, hypothetically that would be a whole new job, a whole new situation.

MR CARTER: Well, are you telling me now that you got all of the information about the second panel from the National Party?---Or from people who had been given as contacts by the National Party, and who in turn had contacted others.

But you told me a moment ago - less than 5 minutes ago - that you contacted the same network and faxed or delivered copies of the new panels to the same people. You re-agitated the process that you say that you had had in place for panel Z. Is that true or not?---That's probably true, yes.

Oh, please - is that true or not?---That's true. That's basically true.

Well, then, what part did the National Party play?---When I say the National Party, I mean people who were either connected with or who had been referred to by the National - to me - by the National Party.

So the range of network had been extended – had been supplemented with further information or contacts from the National Party?---Yes. I – – –

Who were the additional contacts given to you by the National Party?---Well, I'd obtained a list – – –

Who were the additional contacts over and above those on your original list given to you by the National Party for the purposes of the second panel?---By name, I don't know. But they are recorded on a list that was given to me by the National Party – a typed list of – – –

Well, where is that list?---I haven't got – I haven't got that list.

Where is it?---The list that I was given – – –

Yes?--- – – – was destroyed.

Why did you destroy it?---Because of the confidentiality of the inquiry.

And when did you destroy it?---After the jury was empanelled.

So that the additional names on the list were given to you by the National Party on a list?---Yes.

And did you contact those people?---Those that I could, I did, yes.

Did you fax a copy of the list to them?---Those that had – yes. I would have said so, yes.

So what information did the National Party give you: their name?---Yes.

Address?---Yes, and telephone number.

And telephone number?---Telephone number.

Fax number?---Well, I don't know if they'd given me the fax number, but on contacting that person – – –

Well, how did you contact that person?---By telephone.

And how did you deliver the list to those people – not your original network, but these new people who were supplementing it?---By delivery.

And by this time we are into Monday afternoon?---Yes.

And did you deliver any of these lists to any of these new people?---Yes.

And can you tell me now any address or any suburb that you delivered these lists to?---No.

Yes, Mr Hanson.

MR HANSON: But they did come back with information to you, did they?---Yes.

This network of National Party people?---Yes.

And what about the other network you had set up for panel Z? Did you not use them for P and K?---No. I did. But I think with limited results.

At the National Party, did you ask Mr Crooke if he could put you in touch with some of the people in the National Party who would be in a position to provide information about the people on the jury list?---Yes.

In their particular locality?---That is correct.

And did he give you the names of a Mr Bill Benson, who was the Metropolitan East Zone Vice President, and Mr Roger Harcourt, the Metropolitan South Zone Vice President. Do you remember that?---He gave me a list with names and addresses on them of area manager, or whatever.

All right?---The list contained names of officials for areas of Brisbane.

Yes?---And outside of Brisbane.

Yes?---The ones outside of Brisbane, I didn't contact as I felt they were irrelevant, but certainly - and they could have been the names or some of the names.

Yes?---But in addition to that there names - he had written some names on the list, and when I contacted people here they indicated that they would contact others to ascertain any information as well.

Did Mr Crooke telephone any of these people in your presence?---I don't think so.

Did you get in touch with some of these people, did you: those that you could get in touch with?---Those that I could, I did, yes.

All right. Do you remember getting any information from Mr Bill Benson or Mr Roger Harcourt?---I don't remember, no.

You see, Mr Crooke's evidence is that neither of those persons was able to give you any information. Do you want to comment on that?---Well, I don't recall it.

His evidence is he put you in touch with Bill Benson and Roger Harcourt for the purpose for which you requested that you be put in touch with people who would know people in their areas; he gave you these two people at least, and his evidence is they reported back to him they could not help you. You cannot comment on that?---I thought I had their names for both panels, but some - I - I know I don't recall whether they were able to specifically give me information or not.

Well, somebody did, anyway, sombody - - - ?---Well, somebody whom they or others had contacted rung me back - a number of people rung me back.

Well, how did you gather this information: how did it come into your hands?---By telephone in the main.

In the main?---Yes.

And what is the rest?---I think I might have got a fax or two back.

So all of this must have happened before half past 2 on the Tuesday afternoon, is that the case?---Yes.

Because - - - ?---And information kept coming in after Tuesday as well, but even information in relation to the first panel was coming in, and it came in in dribs and drabs virtually for the rest of the week - not a flood of it, but just a - some information."

O'Brien's evidence therefore is that between "midday, 1 o'clock" on Monday, 23 September 1991 and 1.30pm, Tuesday, 24 September he set about jury vetting Panels P and K using the same network of sources, but in addition using the resources of the National Party. By 1.30pm on Tuesday not only was the information available, it had been closely assessed and relative evaluations made and all of the information had been prepared in the form shown in Appendix 3.

9.4 The Further Involvement of The National Party

It will be recalled that O'Brien had been at the National Party Headquarters on Monday morning, 23 September at 7.30am, but that the check of the jury list against the computerised membership list had been negative. Crooke then gave this evidence:

"Yes. What was the result, did they tell you?---That there was no match from the list.

All right. Did you then meet Mr O'Brien later that day?---Yes.

About what time?---I'm unsure; I think it was around lunch time that day.

And what did he have to say?---He then asked me ---

Where did you meet him?---In my office. He came to my office. He asked me if I would be prepared to contact any officials of the party who may happen to know any of the persons on the jury list. He said that if that was possible, he would seek to ask officials of the party whether they knew of persons on the list, knew of them by their own personal knowledge or reputation in that particular district.

All right. And what did you do about that request?---Well, I thought about it, and I thought the request didn't, in my view, counter any of the previous legal advice that I had received, that such inquiries as to the background of jurors on a list would be legitimate and legal, and then I gave to Mr O'Brien the names of two senior vice-presidents, or zone vice-presidents of the party in the Brisbane South and Brisbane East districts, metropolitan districts.

And you contacted those two persons yourself, I take it?---I contacted those to let them know that I had taken legal advice on the matter and that they may be contacted in turn by Mr O'Brien who might run the list of names by them. I told them that if that happened, it was in order to co-operate because I'd checked the position legally.

Did both those persons subsequently report back to you on the result of the inquiries?---Certainly, I recall that Mr Benson did. My recollection was also that Mr Harcourt did, but that may have been during or subsequent to the trial. Certainly, Mr Benson did, as I recall, on or about the same day of the inquiries.

And did either of them report that they had been able to give Mr O'Brien any information?---No, they were unable to assist him with any knowledge of the persons on the list.

Well, on the same day, did you have a further contact with Mr O'Brien?---That's after this contact?

Yes?---Not that I recall. I had a further contact with Mr O'Brien – I can't recall whether it was that evening, late that afternoon, or that evening or whether it was, indeed, the following morning.

MR CARTER: That is the Monday evening or the Tuesday morning?---Yes. My recollection is it was the Tuesday morning, but I can't be certain that it wasn't the Monday evening, and by evening – I'm at the office often till 7 in the evening.

MR HANSON: And what did he have to say this time?---He said words to the effect that there'd been a problem with the jury list that he was operating from and that it was likely or there would be a second jury panel, and he asked whether he could conduct the same checks when he was in receipt of the jury panel as he did with the first. Again, I gave consideration to that matter and took into account the legal advice which would have been the same in this position and said that we could assist in that respect.

All right. Well then, did another list come to the National Party then for checking?---Yes, it did.

By what means?---By facsimile.

Had you received any previous advice other than from Mr O'Brien that it was coming?---My secretary informed me that a call had been received from another secretary in the offices of Sir Joh's legal team to advise that they would be faxing the list through and to stand by the fax.

Do you know the names of these people?---I'm trying to recall, sir. Tracey is the name of the girl that I did deal with there when I was giving my statement to Mr Butler for the purposes of the trial itself. My recollection is that it was Tracey who had made that contact.

Have you prepared a statement about these present matters of investigation in consultation with a solicitor for the National Party?---Yes, I have. I volunteered that

statement to go forward to the CJC, I think, in October last year.

Is that a copy of that statement of yours?---Yes, it is.

See at the foot of page 3, you are making reference to this particular telephone call about the second list; is that the case?---Yes, I see that.

You described it as a telephone call from the office of Mr Bob Butler?---Mm.

Why do you describe it as from Mr Butler's office rather than Mr Mead's office?---Well, it was just my recollection, sir, because I had to go into that office area at the time when I was preparing my statement to give to Mr Butler prior to the trial, I wasn't sure whether that was Mr Butler's office, or Mr Mead's office, so I described it in my statement as Mr Butler's office.

And the telephone call came from a secretary - - - ?---Yes, sir.

- - - rather than from Mr Butler or Mr Mead?---It wasn't Mr Butler, no.

MR CARTER: Where had you gone on that occasion, that earlier occasion, Mr Crooke?---I had gone to premises in the Rowes Arcade in Adelaide Street.

The Brisbane Arcade?---Brisbane Arcade, is it? Yes.

Right. And about how long prior to this had that taken place?---Sir, I don't recall exactly, but I would think certainly some weeks before, perhaps three weeks before.

And who had taken the statement from you?---Mr Butler, assisted by Tracey at that time.

Yes, thank you. Yes, Mr Hanson.

MR HANSON: Did you have any dealings with Mr Mead at any time?---No dealings with him, no. I may recall seeing him walk by the office, but I can't recall being introduced to Mr Mead at that time.

All right. Well, did this faxed copy of the second jury list arrive - - - ?---Yes, sir.

- - - at your office? And what was done with it?---It was handed again to Susan Fawcett to run the check against our membership list.

Did she give you the result then of that check?---Yes, she did.

And what was the result?---There was a name on the list which she had marked; the name of the list was Luke Shaw, which matched as a member she informed me.

She told you?---Yes.

And she marked the list?---She marked the list against Shaw's name, yes.

All right. Well, did you discuss anything about Mr Shaw with her?---Yes, in the presence of my secretary, I asked – I guess both at the same time, 'Does anyone know Luke Shaw.' Susan indicated she didn't. I didn't know Luke Shaw or anything about him. My secretary indicated to me that he was a member of the Young Nationals and she knew him or knew of him, and I said words to the effect, 'Well, what sort of person is he?' Ray said – my secretary said, 'Well, I don't know him too much about him; he's a conservative background family, or he comes from a conservative family background.' I didn't make any further inquiries of them.

All right. Well, what did you do with this information?---I rang Barry O'Brien's number, and I told him that our records show there was a match against Mr Shaw's name.

Yes, what did you tell him exactly, do you remember?---And I said to him that no one here knew terribly much about Mr Shaw. I didn't know Mr Shaw, but my inquiries in the office indicated that he was a person from a conservative family.

Did you tell him he was a member of the Young Nationals?---Yes, I did.

All right. What - this is on the Tuesday, is not it?---Yes.

About what time of day is this telephone call to Mr O'Brien?---My recollection was it was mid to late morning.

Before lunch?---I think it was before lunch, yes.

Before lunch. And was that the only request for information you got from Mr O'Brien that day?---Yes.

There are some matters in that evidence which require attention.

I am satisfied that at 7.30am on Monday morning O'Brien had taken Panel Z to be checked for National Party membership. Later on that day the first personal encounter took place as Crooke described. It was "around lunch time". The personal contact was probably preceded by a phone call from O'Brien to Crooke at 1.59pm. The fact of this call is recorded in the National Party telephone register. By that time Panel Z had become irrelevant. O'Brien's visit was to inquire whether he, Crooke, was prepared to assist O'Brien by enlisting the aid of party officials. As a result, Crooke spoke to two zone Vice-Presidents, Messrs Benson and Harcourt. It is demonstrable that O'Brien's inquiries of Crooke must necessarily have been in respect of the substitute panels. This raises the further question: Why had not O'Brien enlisted the aid of Crooke in respect of Panel Z earlier? In any event I am satisfied that Crooke contacted at least Mr Benson, but Benson, and any other person who may have been contacted, were unable to provide information about any of the panellists.

Mr Benson gave evidence accordingly. Mr Harcourt gave evidence that he was not contacted by O'Brien or Crooke and played no part at all in the process. He was on holidays at the time and unavailable.

I accept the evidence of Crooke that at about lunch time or early afternoon on Monday he received O'Brien's visit. This visit must have been in respect of Panels P and K, but the inquiry was not related to the contents of Panels P and K but designed to identify National Party officials who O'Brien could deal with. I accept Crooke's evidence that he spoke only to Benson and probably some other person (probably not Harcourt), but whoever the two officials were neither was able to help since neither knew any information concerning the persons on the list.

Later the same day or early on Tuesday, 24 September, O'Brien again spoke to Crooke by telephone and told him of the "problem" with the first list, that there was a "second list" to be checked and could the earlier membership checks be repeated. Crooke agreed and a second list was received by facsimile. It was checked and the only "match" was Luke Edmund Shaw. Crooke then passed on to O'Brien the information which Crooke had received from his secretary, namely that Shaw came from "a conservative family".

I am satisfied that Crooke told O'Brien of Shaw's membership of the National Party. O'Brien denied this. His denial cannot be accepted. The very reason for having the first list checked was to identify those jurors who held membership of the National Party. So too with the second. It turned out that Shaw was the only person identified. Not surprisingly, Crooke informed O'Brien accordingly, that is that Shaw was a recorded member of the National Party.

O'Brien said that he was also given a list of party officials by Crooke. Crooke's memory is incomplete in this respect. I regard it as unlikely that he would leave this list with O'Brien. He had already chosen to speak to some of the officials himself. Again, one can only query O'Brien's access to this information on late Monday/Tuesday morning in respect of Panels P and K and ask why no effort had been made previously to enlist the aid of party officials in respect of Panel Z. I am satisfied that O'Brien had done nothing in respect of Panel Z, as Greenwood QC had advised, other than speak to Mrs Chapman and Dr Lynch both of whom were unhelpful.

In respect of the list of officials referred to by O'Brien as having been received from Crooke, it might be thought that confirmation of O'Brien's evidence lies in his contact with Dr Lynch. Dr Lynch was a co-opted member of the Management Committee and his name appeared on one such official list. However, O'Brien's evidence is to the same effect as Crooke's, namely that their personal contact occurred either on Monday

afternoon or Tuesday morning. But O'Brien had, according to Dr Lynch, been in contact with him first on the previous Friday and O'Brien had made the same approach later, probably on Monday at some time after the discharge of Panel Z. The contact between O'Brien and Dr Lynch on Friday is confirmed by the earlier reference to Suelin Street, Boondall. The name of Dr Lynch must therefore have come from some other source.

In this context it must also be borne in mind that when O'Brien received his "instructions" in respect of Panels P and K (I am assuming for the moment that that first occurred on Monday at about midday - 1.00pm) it was then thought that the trial was adjourned to Wednesday at 10.00am. On the Monday afternoon at about 4.25pm the trial Judge had brought it forward to 2.30pm Tuesday. The time frame for O'Brien's investigation was therefore, late on Monday afternoon, further contained. Time was very quickly running out. However this unexpected time constraint does not seem to have unduly restricted the investigation when one compares the results of it with the alleged investigations into Panel Z.

I am satisfied then that before the trial commenced on Tuesday, 24 September 1991 at 2.30pm O'Brien knew that Shaw was a member of the National Party. If he did not know it already, he was so informed by Crooke. If Butler did not know that fact already, I am satisfied that he was informed by O'Brien. It is no doubt true that by the commencement of the trial O'Brien's assessment of Shaw as "Yes****" was at least in part based on O'Brien's knowledge of Shaw's political affiliation with the National Party. So too with Butler. It is a ready inference that O'Brien would pass that fact to Butler if Butler did not know the fact already. Indeed, O'Brien's letter of 30 September asserts that the results of his investigations were conveyed to Butler at 1.30pm Tuesday. Commonsense suggests that it is probable that if O'Brien knew of Shaw's membership of the National Party that information would be shared with Butler. O'Brien's letter only confirms that whatever information O'Brien had, he conveyed it to Butler, again as one would expect.

The real concern is whether O'Brien and Butler knew of that fact and of Shaw's other associations and his professed admiration of the accused before Monday/Tuesday, 23/24 September 1991.

I pause to mention here, and I will deal with it more fully later, that the fact that O'Brien/Butler had this knowledge concerning Shaw prior to Monday, 23 September 1991 is still consistent with their enlistment of Crooke's assistance in respect of Panels P and K on Monday afternoon or

Tuesday morning. Once it was known that Panels P and K would be used (from after 10.00am Monday) it was obviously thought necessary to subject the whole of these panels to the appropriate check. Persons other than Shaw might well be exposed also as National Party members in the course of such a check.

In the light of my finding that both O'Brien and Butler knew of Shaw's National Party connection prior to the commencement of the trial it is necessary to examine certain correspondence which passed between the Special Prosecutor and Mead's office shortly after the trial.

On 19 October 1991, when the trial ended with the lack of unanimity in the jury room the Special Prosecutor was then charged with the onerous duty of deciding whether to continue the prosecution of the accused or to abandon it. There were many competing considerations, one of which was the controversial circumstances which had led to the unsuccessful application by Cowdery QC to discharge the jury. This concern was repeated by Drummond QC in a letter to the accused's solicitors dated 22 October 1991:

> *"Two of the numerous matters I am giving consideration to in deciding whether or not to put your client up on trial a second time on the perjury charge are these: firstly, whether the trial that ended in a deadlock should be regarded as an airing, sufficient to meet the public interest, of the allegations against your client in view of the evidence that suggests the jury foreman may have been unacceptably biased in favour of your client. Secondly, I think it is also relevant to take some account of the extent of the financial burden that has been imposed on your client to date in defending the charges, although that cannot be a consideration of major significance.*
>
> *As to the first matter, I believe it is relevant for me to take into account, in making my decision whether there is to be a further trial or not, the extent of the knowledge possessed by both your client and his legal representatives of the juror, Luke Shaw's political activities before he was empanelled, insofar as those activities relate to the question of his capacity to act impartially as a juror."*

The letter then requested a response to the following:

"Could you please provide the following information. Prior to the juror Luke Shaw being empanelled on the jury, was your client or you or your counsel or anyone working with you or otherwise assisting you or your counsel:

(a) aware that Shaw held or had held any of the offices of Electorate Council delegate or Secretary or Zone Conference delegate in his branch of the National Party, the Brisbane Central Young Nationals, which are listed in the material tendered to the Court and obtained under subpoena from the National Party or that he held or had held any office in the National Party or a branch of the National Party?

(b) aware of anything connecting him with the Friends of Joh movement, either as regards the matter referred to in the minutes of the Brisbane Central Branch meeting of 29th January, 1991 contained in the subpoenaed material, or as regards any other matter?"

The response is contained in Mead's letter dated 24 October 1991 in the following:

"In answer to your specific question contained in paragraph marked (a) and (b) of your letter under reply I advise that neither myself, Counsel or anyone working with me or otherwise assisting me or my Counsel, were aware of the facts as set out in paragraphs (a) and (b) of your letter hereinbefore mentioned, prior to or at the time that the juror Luke Shaw was empanelled on the jury.

Subsequent enquiries have now led me to believe that the juror Luke Shaw is not connected at all with the 'friends of Joh' movement."

The material subpoenaed from the National Party at the trial established that Shaw was a National Party and Young National Party member and that he had held various offices including the position of branch secretary of the Brisbane Central Young National Party branch in January/February

1991 when he was nominated as the contact person for the Friends of Joh movement.

Question (a) was really directed to the issue whether Shaw held, or had held, "any office" in the Party rather than to his merely holding membership. The response may have been literally accurate because at the time of Shaw's "being empanelled on the jury" he did not hold the secretaryship of the branch. On the other hand, it seems that he may have held at least the position of electorate Council delegate. Furthermore, he "had held" the position of Secretary of the branch, but there is no evidence that Crooke passed to O'Brien any details of offices held by Shaw in the Party. These facts, therefore, may not have been known to the accused, Mead, Counsel "or anyone working with you or otherwise assisting you or your Counsel" before Shaw was empanelled. Both Butler and O'Brien fell within the latter categories.

On the other hand, O'Brien knew, and I am satisfied that Butler knew, of Shaw's membership of the National Party at the latest on the Monday evening/Tuesday morning prior to the empanelling of the jury. Both denied this knowledge of Shaw, but persisted with the theme that to their limited knowledge he was "from a conservative family background" only.

There had obviously been a wider discussion in the defence team about Shaw prior to the trial. It will be recalled that Greenwood QC revealed in his evidence that when Shaw, the first juror, was empanelled, he, Greenwood QC, was surprised, because he appeared so young but comforted himself with the thought that he was probably the one from "the conservative family background".

I repeat my finding, however, that O'Brien and Butler well knew of Shaw's affiliation with the National Party prior to his being empanelled. I am not satisfied that this detail was known by Greenwood QC, Gundelach or Mead.

9.5 Other Relevant Matters Concerning Panels P and K

Before finally considering at a later stage in this report the question of the relationship, if any, between the discharge of Panel Z and Shaw's political associations and his membership of Panel P, it is necessary to emphasise some other matters of fact relating to Panels P and K and Shaw's membership of Panel P.

In respect of Panel K there is no evidentiary basis for any finding other than the one that at no time prior to the conclusion of the hearing on the morning of Monday, 23 September could anyone have anticipated the later use of Panel K as a substitute for the discharged Panel Z. Panel K had not even been summonsed for that Monday. It was included by Hansen, with the implicit approval of the trial Judge, because its inclusion would satisfy the demand for numbers and its use would be consistent with the other requirements of the criminal courts.

I am satisfied that it was not known and could not have been known or anticipated by any person prior to about 10.00am on the morning of Monday, 23 September 1991 that Panel K was to be part of the combined panel from which the jury for the accused would be selected.

The position in respect of Panel P (Shaw's jury) was different.

Panel P had been summonsed for jury service on Monday. This fact had been decided and was known on the afternoon of the previous Friday. The fact could not have been known before Friday afternoon unless there had been some collusion with Hansen and there is not sufficient evidence to support such a finding. But once Hansen had decided on Friday to bring in Panel P for jury service on Monday the persons interested in knowing that (including the members of Panel P itself) could inform themselves of the fact from the time on that day when the recorded message was put on the telephone. It was also included in the law list on Friday for publication on Monday, but that would not appear in the Courier Mail until Monday morning. However, on Saturday, 21 September 1991, one could easily ascertain that Panel P was called for the Monday by phoning the recorded information.

It was important that the jury panels summonsed for Monday have due notice of the fact that they were required for Monday. The members of all jury panels are informed and urged as a matter of course to keep themselves informed as to when they are next required to attend. Shaw himself, like his co-panellists, had to know that they were required on Monday, 23 September 1991 to attend for jury service and that knowledge was available to them from Friday afternoon, 20 September 1991. Likewise, any other person sufficiently familiar with the workings of the system had the capacity to know that Panel P was to be brought in on Monday. Both Butler and O'Brien were persons sufficiently acquainted with the system to learn that fact if needs be. Mead, on the other hand, had left all such matters to Butler. Greenwood QC himself only knew on

Monday morning after reading the published law list in the Courier Mail that two other panels (Panel P and L) had been summonsed together with Panel Z. There is no evidence that Gundelach ever turned his mind to the question.

Furthermore, there is this important additional fact. Monday, 23 September 1991 had been fixed as the trial date from as long ago as 19 February 1991. As I have said much earlier, Shaw himself had been aware of the proposed date for committal proceedings (11 February 1991) when he was nominated by Hassall as the contact point for the Friends of Joh. He had already told Cousins of the fact that he was to do jury service and that the trial of Sir Johannes Bjelke–Petersen was to coincide with the period of his jury service. It is more probable than not that Shaw knew that the trial of the accused was fixed to commence on Monday, 23 September. It is beyond question that he had the means of knowing from the afternoon of Friday, 20 September that his panel, Panel P, was to be at the court for jury service on Monday, 23 September 1991, the date for the Bjelke–Petersen trial.

I will need to consider later whether these facts are relevant to O'Brien's false disclosure to Greenwood QC on Saturday afternoon, 21 September 1991, that Walliss had improperly undertaken "quite an exhaustive poll" of Panel Z.

One other important fact had to be noted and later weighed in the balance when deciding the critical questions.

Among the documents produced to the inquiry by Mead from his file were the copies of Panels P and K which he said came into his possession on 23 September 1991 after the trial Judge had discharged Panel Z. It will be recalled that O'Brien swore that he was given copies of Panels P and K for the first time at "about midday, 1pm" on Monday, 23 September 1991. The copies produced by Mead were obviously the copies which he himself used when the jury was being selected. They include the excusals granted on that day, the challenges and standbys and the order in which the 12 jurors were selected, all in Mead's handwriting.

The relevant important fact identified by Counsel assisting me is that those lists in Mead's possession were themselves generated from the Sheriff's Office computer on 23 September 1991 because that fact can be established by computer–generated information contained in the top right–hand corner of the lists. I am satisfied that the Panels P and K which Mead used were

produced by the Sheriff's Office on 23 September 1991 and not before. As pointed out earlier, from that fact it may be inferred that it was only after the discharge of Panel Z that "the defence team" acquired Panels P and K and only after the proceedings before the trial Judge on that morning had been completed. However, my earlier finding that the jury panels other than Panel Z, but including Panel P, were available within the criminal law community since 2 September 1991 needs also to be added to this equation. I am satisfied that Mead himself saw for the first time and possessed for the first time, Panels P and K on 23 September 1991 only after the proceedings before the trial Judge on that morning were completed. The same finding cannot be made in respect of O'Brien and Butler.

9.6 The Traffic Offence and Criminal History Information on Panels P and K

As will be seen from the documents, and as has been pointed out above, on the Panels P and K compiled by O'Brien and on which the many assessments were made as to the suitability of individual jurors, there is also included, plainly, as an addition, in handwriting the traffic offence and criminal history details of 33 persons on Panels P and K.

The evidence of Green to the inquiry establishes that once the jury panels for any sittings of the court are finally generated a copy of the final list is given to the Police Department for the purpose of determining whether any of those on the panel are disqualified from jury service, as a matter of law, by reason of any criminal history. This sensitive and confidential material is then returned to the Sheriff for his purposes. He retains it as a matter of confidence and it is not disclosed to any person.

The evidence also establishes that as a matter of practice the same information on criminal histories as is given to the Sheriff is at the same time given to the Director of Prosecutions.

The evidence is that the jury lists are also forwarded to the Department of Transport which records the traffic offence history of all offenders. It is not entirely clear why this is done or what the source of the arrangement is because the information is not returned to the Sheriff. It is obviously irrelevant for his purposes. However, the information in respect of any recorded traffic offence history is returned to the Director of Prosecutions.

In the result therefore, the Director becomes the only recipient of both the criminal histories and the traffic offence histories. The Sheriff receives the criminal histories only and these are kept in strict confidence although the system appears to be somewhat loose in that the relevant documents are simply kept for some time in a drawer. I am satisfied that the Sheriff does not receive, nor does he have any interest in receiving the recorded traffic offence history from the Department of Transport.

It was both the criminal histories and the traffic offence histories which were handwritten on to the O'Brien compiled typed lists of Panels P and K by O'Brien. Again, it is obvious from a perusal of the documents that the handwritten material is written on to the documents after they had been typed.

This information could have come from the only available source which held both the details of criminal history and traffic offence history in respect of the particular group of persons who constituted the jury lists. That source was the office of the Director of Prosecutions.

It was at first thought that the information may have been made available unofficially and improperly by unauthorised access to the police computer; however, an investigation revealed that this had not happened.

The Director of Prosecutions disclosed to the inquiry, through his deputy, that the relevant information was held confidentially for the purposes of the Crown, and whilst several officers of the Director had access to it the disclosure of the information to unauthorised persons was regarded as improper and a serious breach of office confidentiality.

It is clear that there was an improper and unauthorised disclosure to a person(s) concerned in the defence of Sir Johannes Bjelke-Petersen by some person in the office of the Director who had access to the information. Inquiries failed to reveal the identity of the person who made the unauthorised disclosure.

The Commission was therefore particularly anxious to identify the person whose handwriting had detailed this confidential information on the documents and which had obviously come from an unauthorised source. Hopefully, that inquiry might also disclose when it was that the disclosure was made and included in the documents which admittedly had been produced by O'Brien.

When interviewed by Commission staff on 8 April 1993 before the public hearing, O'Brien had denied that the handwriting was his.

Counsel assisting me in the course of the public hearing requested that the following persons provide, whilst giving evidence, a relevant sample of handwriting; Mead, O'Brien, Butler and Hansen. The samples were submitted for the forensic examination of Gregory Keith Marheine, a handwriting expert who concluded that it was probable that the handwriting of the criminal histories and traffic histories was that of O'Brien. O'Brien was recalled to give evidence. This question was raised again with him in evidence:

> *"All right. We pass on to something else. This handwriting in question, Mr O'Brien, you would by now have read the evidence given by Mr Marheine?---I have, yes.*
>
> *What do you say about it?---What do I say about the handwriting?*
>
> *What do you say about Mr Marheine's opinion. He thinks it is your handwriting?---Yes.*
>
> *On the criminal histories endorsed on your typewritten document?---That's correct.*
>
> *In your handwriting, he thinks. What do you say?---I think it may be.*
>
> *It may be?---Although I can't recall recording it.*
>
> *You do not want to cross-examine Mr Marheine, do you?---Not at this stage, no.*
>
> *You are content to let his opinion go forward here to Mr Carter without being scrutinised by cross-examination, without being tested?---Well, I've done some of my own experimentation with the – with the document, and it is similar to my handwriting. I just do not recall, probably because it's not the type of notations that I would make in relation to a criminal history or a traffic history, but I*

don't recall copying that from any other document, but I must have.

You – – –?– – –Because Popple and Sittons are clearly my additions to that list.

Well, you do – – –?– – –Which I said the other day here – I started to say.

You accept, do you, that it is your handwriting?– – –Yes, I would, yes.

Not only Popple and Sitton but also the other printing, the traffic history, UIL?– – –Well, I don't recall making those notations.

But do you accept that it is yours?– – –Yes, I would accept that it's mine.

The endorsements like: obstruct police, stealing, false pretences, assault?– – –Yes.

Indecent manner?– – –That's correct.

You accept you have written all of this, do you?– – –I would – yes, I think I must have, yes.

Well, you do not want to challenge Mr Marheine's opinion?– – –No.

Do not just accept his opinion, Mr O'Brien. You know it is your writing, do not you?– – –Well, I – I know that – I recall adding Popple and Sittons to the list.

I see. When did you first recall that?– – –And – beg your pardon?

When did you first recall that?– – –When I examined the – well, when I was in the witness box here the other day, the names jogged something in my memory, but I've had a chance since, as you know, to examine that documentation at length.

And the same thing did not jog your memory when you were questioned about these documents by the investigators, Inspector Huddleston?---No, it didn't.

Just – – –

MR CARTER: 8 April.

MR HANSON: Just last month, 8 April?---Yes, yes.

They showed you the document and ask you if it was your handwriting, did not they?---I don't recall the exact question.

Well, you have got a copy of your interview with Mr Huddleston and James, have not you?---No, I don't.

You have not?---No.

You remember being asked about it?---Yes.

And you remember, do not you, that you said it was not yours?---I remember saying it wasn't mine and saying that it was a prosecutor's sheet or a prosecutor's list.

Well, I will just read to you if you have not got a copy of this. We will make it available to you. You were asked this straight out:

> *Is that your handwriting on them, is it?*

You said:

> *No, no.*

I am on page 46?---Yes.

> *Is that your handwriting on them, is it?---No, no.*
>
> *Do you recognise whose handwriting it is?---No. Well, that wasn't my list.*

What in relation to these traffic offences and so on?---No, I don't know whose that – who put that on, but I would say the rest of the list is the list I prepared for Adrian Gundelach.

The handwriting then –

Huddleston came back then –

The handwriting.

You said –

That looks like – that's the sort of notations that a prosecutor would make, one by traffic, two by traffic, one by false pretence, yes.

Question:

So it is your document originally?

You said:

Yes.

But not your handwriting?---No.

Question – and he said, 'And you say –' and then you interrupted you said:

Did I put the history on there?

Yes?---Oh, no, I didn't. I never obtained the history of any – any member of a panel at any stage.

?---Yes.

So there was not much doubt about your denial on that occasion, was there?---That's correct".

Sittons had been omitted from the list, so I came with two pages for P, and two pages for K. And whilst I was checking the traffic histories on this other list I noticed that Popple and Sittons were missing.

MR HANSON: Yes, because Sittons has a traffic conviction, does he not?---Yes, and that's - - -

And when you went to endorse that on there was no Sittons there?---Yes.

MR CARTER: So are you going to tell me then that you wrote the traffic histories onto the other panel from this list that appeared from the Director of Prosecutions office?---I don't recall doing that, but in the comparison I must have jotted down, in the same type of notation that appeared on the other one, because that, that is not the type of notation that I would make in relation to criminal histories. It is the notation, the type of notation I have seen before on prosecutors lists which come from the prosecutors office to crown prosecutors, and I have guessed that I have, in comparing the lists, just typed that down on that copy that I had, just - - -

MR HANSON: Written it there?---Written it in - - -

Yes?--- - - - on that copy that I had, and written in also at the same time the two panellists who were missing from my copies, Popple and Sittons.

Yes, well, when you got down to P71 on the prosecutors list there was a traffic conviction against P71, and when you look back at your own there is no P71 there?---That's right, no, and there is no P70 either.

P70 Popple, and P71 Sittons - - - ?---Yes.

- - - T by 1?---Yes.

That is how it happened, is not it?---I'd say so, yes.

Yes. Mr O'Brien, you have known all of this, have not you, since 24 September 1991, have not you?

MR CARTER: If it is correct, you must have?---Well – – –

And not a recent invention?---No. It's – it's certainly not a recent invention.

Well, then, you must have known it – – – ?---But – – –

– – – as long ago as 24 September 1991?---But it – it wasn't a matter of significance. It's not a detail that I've remembered.

Yes, Mr Hanson. You continue.

MR HANSON: But you have told us here in great detail now how it all happened. You were all there together and a – – – ?---I don't recall – – –

– – – a list was expected?---I don't recall making the list – – –

Oh, no – – – ?---But – but I suggest that's how – – –

– – – just listen to the question?---I suggest that's how – I didn't recall making the notations, but I suggest that's how it – but I recall that I omitted Popple and Sittons.

But what brought that to your attention was, on looking through the prosecutor's endorsed list, there was a traffic conviction against Sitton and when you went to transpose that onto your list there was no Sitton there?---That's correct.

So you then wrote in Popple P70 and Sittons P71 and put the traffic conviction against Sittons' name?---That's correct.

That's how it happened?---Yes.

Now, Mr O'Brien, just listen to this summary of what you have told me and tell me if it is unfair. You were all there on the Tuesday, you think, and a prosecutor's list was expected to arrive but had not yet arrived, and there was some talk of sending you to go and get it?---I think someone said something like, 'Can Barry go and chase it up' – – –

Yes?--- – – – or some words like that.

And then eventually it arrived, and it was either put in your possession or you had access to it – – – ?---Yes.

– – – and you transposed the information onto your typewritten list. Now, is that a fair summary of it all?---I would that – that must be what happened. I don't recall putting the traffic or criminal history down, but I would say that must have been what happened.

And in the process you noticed you did not have P70 and P71 there – – – ?---That's what I recall.

– – – when you put them on?---I recall that I didn't have P70 and 71, and obviously they have been printed out on a third page from my word processor. I'd used up the number of lines for that second page.

Now, Mr O'Brien, that account that I have just summarised for you, it is a fair summary, is not it, of – – – ?---Yes.

– – – what you tell us?---Yes.

Now, that is a detailed account of what happened there that Tuesday with respect to the criminal history, is not it?---Well – – –

Even to the extent that there was some suggestion that you should go and pick up the document, and then it was not necessary?---I recall something like that, yes.

What in relation to these traffic offences and so on?---No, I don't know whose that – who put that on, but I would say the rest of the list is the list I prepared for Adrian Gundelach.

The handwriting then –

Huddleston came back then –

The handwriting.

You said –

That looks like – that's the sort of notations that a prosecutor would make, one by traffic, two by traffic, one by false pretence, yes.

Question:

So it is your document originally?

You said:

Yes.

But not your handwriting?---No.

Question – and he said, 'And you say –' and then you interrupted you said:

Did I put the history on there?

Yes?---Oh, no, I didn't. I never obtained the history of any – any member of a panel at any stage.

?---Yes.

So there was not much doubt about your denial on that occasion, was there?---That's correct".

I am in no doubt that it was O'Brien who wrote the detailed criminal history and traffic offence history for each of the relevant 33 persons on Panels P and K. I pause to observe that there is no suggestion that similar information was available in respect of Panel Z. One very decisive reason for this is that the only two trials for which Panel Z was compiled – Yorke, a former police officer and Sir Johannes Bjelke-Petersen – were the concern of the Special Prosecutor and not of the Director of Prosecutions. As I said much earlier, I am satisfied that the office of the Special Prosecutor did not have any information at all concerning any of the persons on Panels P and K. This was the result of a deliberate decision to avoid the pursuit of information. And of course the Director of Prosecutions had no interest in Panel Z. O'Brien's source was clearly in the office of the Director of Prosecutions.

O'Brien later conceded that the information had come from the office of the Director of Prosecutions.

O'Brien's patently untruthful and unhelpful evidence as to the availability of this information is apparent from what follows:

> *"Well now that you have been found out by the handwriting expert you are prepared to admit it, now is that not the case?---No, that is not the case.*
>
> *Well what has brought about your acknowledgment, Mr O'Brien?---Well, the lists that I typed up were typed at home on a word processor. There is a two page list for panel P and a two page list for panel K. They were typed up on the morning of Tuesday. I brought those lists into the court, either to chambers or the court, and I distributed copies to, I think, probably one for Mr Gundelach, one for Mr Greenwood, one for Mr Mead and one for Mr Butler, and probably one for myself. There was a copy from, I believe, the Director of Prosecutions office - - -*
>
> *A copy of what?---A sheriff's copy - - -*
>
> *The sheriff's copy of what?---Of the jury list of panels P and K.*
>
> *Yes?---Which had the traffic and criminal histories of the panellists, those that had it.*

And this was a Director of Prosecutions list?---Well, that is the impression that I have, that it was.

What gave you that impression?---Well, whilst I was waiting, having arrived with the lists – – –

MR CARTER: I mean, who had it, where was this document, who had it, in whose hand, possession was it?---I believe that it was in Mr Butler's.

Go on, tell me more?---Whilst I was waiting for – well, prior to that, whilst I was waiting for, or to brief someone on those lists that I had brought in – – –

•

Yes?--- – – – there was some conversation.

With who?---Well, not with me, but with the defence team, and I'm not certain exactly who said what in it, but Mr Butler or Mr Mead or Mr Gundelach, or the three of them were saying, or someone said something to the effect that the list hadn't arrived, the list hadn't arrived from the Director of Prosecutions office, and there was some talk about chasing the list up. And at one stage it was suggested that I might go and chase it up, but evidently, but that never occurred, and evidently it arrived. Now whilst I was waiting to do the briefing I had a look at that list as I recall, and – – –

You had a look at which list?---The list that had arrived.

From the Director of Prosecutions office?---I believe that was the source, yes.

Go on?---And I was interested, the list wasn't of any great concern to me as my inquiries hadn't gone in that direction, but I was interested to see how the list married up with my assessments, and in doing that I noticed that I had made a mistake with the, my word processor, listing of the two panels. In the panel P, evidently had the final two panellists, who were Popple and Sittons, when I had printed them out, no doubt in a hurry to get into town, they had gone to three pages on my processor, and Popple and

Sittons had been omitted from the list, so I came with two pages for P, and two pages for K. And whilst I was checking the traffic histories on this other list I noticed that Popple and Sittons were missing.

MR HANSON: Yes, because Sittons has a traffic conviction, does he not?---Yes, and that's - - -

And when you went to endorse that on there was no Sittons there?---Yes.

MR CARTER: So are you going to tell me then that you wrote the traffic histories onto the other panel from this list that appeared from the Director of Prosecutions office?---I don't recall doing that, but in the comparison I must have jotted down, in the same type of notation that appeared on the other one, because that, that is not the type of notation that I would make in relation to criminal histories. It is the notation, the type of notation I have seen before on prosecutors lists which come from the prosecutors office to crown prosecutors, and I have guessed that I have, in comparing the lists, just typed that down on that copy that I had, just - - -

MR HANSON: Written it there?---Written it in - - -

Yes?--- - - - on that copy that I had, and written in also at the same time the two panellists who were missing from my copies, Popple and Sittons.

Yes, well, when you got down to P71 on the prosecutors list there was a traffic conviction against P71, and when you look back at your own there is no P71 there?---That's right, no, and there is no P70 either.

P70 Popple, and P71 Sittons - - - ?---Yes.

- - - T by 1?---Yes.

That is how it happened, is not it?---I'd say so, yes.

Yes. Well, Mr O'Brien, you will realise, of course, that we are interested to know when that information was available to you because when it was available to you might help us to know how long you had been working on P and K?---Yes.

Do you understand that?---I do.

All right. Well, what is the answer to that question? When was this prosecutor's list available to you?---At about lunch-time on Tuesday, the 24th of September.

And into whose hands was it put when it arrived from wherever it came from?---I don't recall.

Do you remember some messenger bringing the document?---No, I don't recall it arriving.

But you knew it was coming?---Well, I didn't know it was coming.

MR CARTER: Yes, you said there was - - - ?---I gathered from the - - -

- - - a discussion about it - - - ?---There was a discussion about it but - - -

- - - and you were concerned it had not arrived?--- - - - there was a discussion that it had not arrived. The discussion was that it had not arrived.

Well, now, tell Mr Hanson before you go on where did the discussion take place and who were the persons who involved in the discussion. First of all, where was the discussion?---The discussion was - I'm not certain whether it was at the court, but I think it was at the chambers, either the court or the chambers.

Whose chambers?---And I think - Mr Gundelach's chambers.

And who was present?---Mr Butler, Mr Mead and Mr Greenwood. However, Mr Butler – Mr Greenwood – was in chambers most of the time. Mr Butler, Mr Mead – I was outside of chambers – Mr Butler, Mr Mead, Mr Gundelach, and I – – –

Who was present at the discussion in which the imminent arrival of this prosecutors list was being discussed? Who was present?---I wasn't part of the discussion.

Beg your pardon?---I wasn't part of the discussion.

Just answer the question, would you, please?---Who was discussing this question?---I don't recall precisely.

Well, give me the best of your recollection?---I can remember, amongst other conversation, the question being asked, 'Where was the list?' 'Had the list arrived?'

Yes. Well, who asked that question?---I'm not certain. I'd not like to – I'm not certain.

Well, what did that mean to you?---Well, whatever was said, that wasn't the exact words – – –

What did it mean to you, whatever was said?---That the list was being provided.

What list?---The – – –

What were you waiting for? What was the discussion, 'Has the list arrived?' What is – you cannot remember who mentioned it, but what did you understand it to be a reference to?---I understood it to be a reference to the jury list – – –

What jury list?--- – – – which had – – –

You had a jury list?---I know that.

You had jury lists running out of your ears. I mean – – – ?---Yes.

– – – not only had you the sheriff's jury list you had re–typed the other jury list. There was all this information on jury lists?– – –Yes.

Well, what did you understand – – – ?– – –Well, I understood that someone – – –

– – – this reference to the list to be?– – – – – – that someone had decided that they wanted the details that is provided to a prosecutor in relation to traffic and minor criminal histories of the panel.

Well, did someone mention that detail?– – –No. But whatever term they used gave me the impression that that was the list that they were waiting for.

Well, now, who was it?– – –I cannot be certain.

Well, now, who are the possibilities;
Greenwood?– – –Butler.

Greenwood?– – –I don't think it was Greenwood.

Gundelach?– – –A possibility.

Mead?– – –Yes.

Butler?– – –That's correct.

Anyone else?– – –I don't think so.

So there are the four possibilities. Sorry, there are – – – ?– – –Three.

Three?– – –Yes.

Gundelach, Mead and Butler?– – –That's correct.

Do you deliberately exclude Greenwood?– – –No, but I don't think – I can't recall – I can't recall Mr Greenwood – I can't recall really seeing him surface from chambers at that time. I just can't recall him – I had an

idea that he was in chambers and the others were moving about the hallway and the reception area and – – –

Well, are you sure Gundelach was involved?–––He was one of the persons there, yes.

Yes, when this discussion took place?–––I believe so, yes.

Yes. Now, who, to the best of your recollection, raised the question?–––I'm not sure.

To the best of your recollection who raised this question in whatever form it was raised which led you to believe that they were waiting for the Director of Prosecutions list?–––I'm not certain.

Best of your recollection I asked for. I am not asking you to be certain. I am asking you for the best of your recollection?–––Well, to the best of my recollection it was Mr Gundelach – – –

All right?––– – – – whom I heard mention it.

All right. Well, now, what was the response?–––I don't know, but the – – –

Well, to the best of your recollection, what – – – ?–––Well, it was – – –

– – – was the response?––– – – – that they had not arrived.

Now, who mentioned that?–––I'm not certain.

Yes. And what was said then?–––I don't know, but after some time someone, I don't know whether Butler or – Mr Butler or Mr Gundelach or, for that matter Mr Mead, said, 'Perhaps Barry could go and chase it up,' or some words to that effect.

You think Gundelach or – or Butler?–––Or Mead, yes.

You seem to – – – ?– – –This is in – whilst they were – – –

You seem to put Mead as probably the less likely of the person who said, 'Well, perhaps Barry could go and get it'?– – –I think so, but I'm not – I'm not certain. I can't be certain.

All right. Well, what was your response to that: did you say something? I mean, here is someone saying, 'Well, perhaps Barry can go and get it', it being a Director of Prosecutions list?– – –No, I didn't respond to that.

Well, not at all?– – –No.

Well, what was said next, if you did not respond?– – –Yes.

What was the next thing said about it?– – –The next thing, well, I didn't – I didn't see it arrive or I – but I was handed the list.

In the same – how long after?– – –Oh, maybe 20 minutes, a quarter of an hour, 10 minutes.

The same place as you were when the discussion took place?– – –I think so.

So, this is in Gundelach's chambers you think?– – –Well, in the – not in the chambers, not in the room, but in the hallway and reception area outside the room.

And the same people were there when it arrived?– – –I believe so, yes.

Who was the person who brought it?– – –I don't know. I didn't see it arrive.

Well, how did you come to be aware of the fact that it was there?– – –I was handed it.

By?– – –I think Mr Butler.

Oh, you think Mr Butler?---Mm.

Now, when the question was asked, perhaps you could go and get it?---Yes.

Where did you understand you would have to go?---To the Director of Prosecutions office.

Well, now, you are speaking about the Director of Prosecutions, are you, as distinct from the Special Prosecutors?---I think so, yes.

You see, because Mr Needham has told this inquiry that the Special Prosecutors Office did not have any of this information?---Yes.

You understand?---Yes.

Yes. Well, this was to come from the Director of Prosecutions office?---I believe so, yes.

Why would the Director of Prosecutions office be delivering to Mr Gundelach's chambers the criminal histories on a jury list to be used in a matter in which the Director of Prosecutions had no interest?---I don't know.

Oh, surely you must?---I – what?

I put it to you again – – –?---That I would know why that was done?

Yes. I mean – – –?---I don't know.

– – – why? I mean – – –?---On request, obviously on request.

All right, well, let us just take it a little bit more slowly. The scenario you have created by your evidence is that someone from the Director of Prosecutions office, not the Special Prosecutor, but someone from the Director of Prosecutions office, by arrangement with somebody who you cannot now identify, was going to bring to the defence

team, the Sir Joh Bjelke–Petersen defence team, the criminal histories relating to jurors on a list in respect of a trial in which the Director of Prosecutions had not the slightest interest?–––Yes.

Does that seem strange to you?–––Well, are you saying that there would not have been such a list?

Does that seem strange to you?–––It's not unknown that the prosecutor provide the defence with the list of traffic and criminal convictions of a panel.

Sometimes it happens because very – – –?–––I've seen that happen. And I thought that was what was happening in this case.

Because reputable prosecutors give it. You knew that the prosecutor in this team, in this case, was the Special Prosecutor and not the Director of Prosecutions?–––Yes, but that wouldn't lead me to believe that there was not a provision – – –

Surely, Mr O'Brien, you would know – – –?–––An ability to have the list provided.

Beg your pardon?–––That would not have led me to believe that someone didn't have the ability to have the list provided, through – – –

Even though they were not entitled to it they could still get it, is that what you are saying?–––Well, I don't – that must have been the assumption.

Well – – –?–––Now, I didn't know that they weren't entitled to it, as I say.

Well, tell me now, from your understanding of the matter, of the people who were there, who had made the arrangement?–––I can't say that.

Well, if we can identify the person who asked the question, that might take us a little bit down that road, at least to

explore it. You thought that the question was asked either by Gundelach or by Butler. You think maybe Mead but unlikely to be Mead. So, can we confine it then to Gundelach and Butler?---I don't think you can, because it's not a matter that I was taking a lot of notice of.

Well – – –?---I was not there close – I was close enough to hear them speak. I remember the conversation; there was a lot of other conversation at the time. I can't be certain who said it.

So, the only extension then to either Gundelach or Butler or Mead could be Greenwood?---Yes.

So either Greenwood, Gundelach, Mead or Butler, and no one else – – –?---I can't recall.

– – – inquired about whether the list from the Director of Prosecutions office with all the criminal histories on it had arrived, that right?---Something like that, yes.

Now, at some time that you cannot remember after that, you think you must have written them on this list. That is what you say now?---Well – – –

Is that right?---My recollection of it is not vague, except that I remember suddenly finding that I'd omitted two names from my list.

You told me all that, and that is how you – how the other point comes about?---Yes.

So that shortly after this conversation that we are now hearing about for the first time – – –?---Yes.

– – – took place, someone who you do not know – some unidentified person – came along with this list, and at some time after that – you cannot remember how it came about – you were handed the list, and in circumstances about which you are uncertain, you sat down – or you think it must have been you who wrote the list; wrote the material onto the list. Is that right?---Yes."

I am satisfied that Gundelach was not responsible for obtaining this information, nor was Greenwood QC. I am satisfied that it was either Butler or O'Brien.

The O'Brien version was then put to Butler. The following is the result:

> *"We have had some relevant evidence since you were here last that I must take up with you. Mr O'Brien now tells us that he is the man who wrote – well, he accepts that he is the man who wrote the criminal histories of the jurors – – –?– – –Yes.*
>
> *– – – on to the list that he types up. Now that we have that piece of information does that jog your memory, in any way at all, about that information?– – –No.*
>
> *He also thinks that it was perhaps in Mr Gundelach's chambers, although he is not certain of any of this, that the information came to him in the form of a document, a jury list with the information endorsed on it. Does that help you?– – –No.*
>
> *He thinks, without being sure, that Mr Greenwood might have been there, Mr Gundelach might have been there, you might have been there, Mr Mead might have been there. Does not jog your memory?– – –No.*
>
> *He goes on to tell us that, in fact, this information was expected to arrive at the place where you were all assembled and it was expected to come, he thinks, from the Director of Prosecutions office and you were all sitting there waiting for it. It did not arrive as expected. Somebody suggested that Mr O'Brien should go and get it but, in fact, it arrived. Does any of that jog your memory?– – –No.*
>
> *All right. I suppose it is no good asking you who brought it?– – –No.*
>
> *He cannot tell us who brought it. He says it was put in his hands and he transposed, then, the information on to the*

document that we are all familiar with. Does not ring a bell with you?---No.

Now that you have heard that from Mr O'Brien's evidence, do you recall at all that the defence team was in possession of this information?---No, I don't really. I'm not saying that the defence team wasn't; I just don't – don't recall it.

You have been given copies of these documents, I think, have not you?---Yes, yes.

And do we need to get them out to talk about this?---No.

You recall some of the information there would be very useful in selecting this particular jury for Sir Joh: do you remember that?---Yes.

I think there is a fellow there who has got three convictions for drink driving?---Yes.

He would be an undesirable juror for Sir Joh, would not you think?---I would think so.

An irresponsible sort of fellow, do not you think?---Well, it's having a guess.

Do you remember that there is some on there with a conviction for false pretences and another one or two for stealing?---I recall the false pretences. I don't recall the stealing, but – – –

Well, the same one has a conviction also for stealing or, perhaps, two, and not likely to be a Joh supporter, you would not think, would you?---Probably not, no.

And there are a few others there that you would steer clear of if you had that information: do you remember that?---Well, I recall seeing the list and the material written.

Well, I was just interested whether it had occurred to you, before the trial began, to seek out this sort of information

because it would be useful?---Not – not to myself. I wasn't – I tried to stay removed from anything to do with the jury for the purposes which I've already stated.

But if you could get hold of this sort of information it would be useful, would not it?---If – I presume, yes, it would be.

You were not concerned about that at all?---No.

Would you have contacts who could perhaps get you this information if you wanted it? You can forget about the police network, the police computer, plugging into the computer. I am not going to suggest that you had some mate do that for you but, leaving that aside – – –?---That would be the only way I would know.

What about after the information has been gathered up in the police office and transmitted to the Sheriff and transmitted to the Crown Law Office, put in use by prosecutors and their clerks. It is circulating among a fair circle of people. There is the Sheriff's office and his staff. Any contacts in any of those places – – –?--- I don't have – – –

– – – where you might get hold of this if you were so minded?---I don't have any contacts in the Sheriff's office. I obviously know some prosecutors but I – I didn't approach any prosecutors. I made no approaches whatsoever.

What about prosecutors' clerks? Did you know any of them well enough in September 1991 to ask them to slip you one of the Crown Law Office endorsed jury lists?---Well, it's something I wouldn't do, so I wouldn't – wouldn't of asked anyone to do it.

All right. You cannot help me at all with this information. It came to hand and, according to Mr Gundelach and his documents, was not used. You cannot help us?---No.

MR CARTER: Do you remember any discussion about it – – –?– – –No, I don't.

– – – with Gundelach?– – –No.

With Mead?– – –No.

With O'Brien?– – –No.

You do not even recall any discussion about at any stage attempting to capture the relevant information which was available from that source?– – –No, I don't. See, as I – as – – –

You know, this sort of information and these sort of documents do not materialise out of nowhere?– – –I appreciate that.

Here you were heavily involved in a major trial. The selection of the jury was a matter of considerable importance. You are a person who has had involvement in the Police Service as a police prosecutor; you were familiar with the processes of the criminal courts. You are obviously aware of the importance of having information about the jury. One such known source of information is the criminal histories of the jurors?– – –That's correct.

And as you have pointed out to Mr Hanson, that is information which you would regard as relevant. Did you, during the relevant period, turn your mind at all to that kind of information?– – –No. I – I specifically did not wish to be involved in any way with the investigation of the jury. In fact, I was offered the job by Max if I wanted to do it, and – – –

Look, you have told me that several times, but you understand that I am not bound to accept that. I have got to test it – – –?– – –Yes.

– – – by reference to the real world. All right?– – –Yes.

Which I suspect you know and which I know?– – –Yes.

And you say you deliberately refrained from turning your mind to it?---Yes.

And from that it would follow you deliberately refrained from discussing it with anyone?---As I – as I recall with the – – –

Is that what you are saying?---I don't recall discussing it.

Well, what do you mean by that?---Can I just – can I just explain?

No, no, just – no, no, no. No, no, let me – I have got the agenda at the moment?---Okay.

You seem to think that you do not remember addressing it with others?---I – I don't recall discussing traffic and criminal histories on jury lists at all.

So far as Mr Mead was concerned, we know that Mr Mead was, one might say, hopelessly inexperienced in this exercise. He has told us as much himself?---Yes.

You would concede that?---I wouldn't have said hopelessly, but yes.

Well, in the whole of his professional career since 1975 this was his third criminal trial?---Right.

All right?---That's jury trial, is it?

Third jury trial?---Right.

All right? So, can we agree that he was quite inexperienced in these matters; right?---Yes.

You were plainly heavily concerned in the defence of Sir Joh Bjelke-Petersen?---Yes.

You had brought the client to Mead's office?---Yes.

To Mead's practice?---Yes.

A relatively inexperienced criminal lawyer?---Yes.

And you at no stage raised with Mead the prospect of obtaining that kind of information?---No.

In fact, you would say you deliberately refrained from turning your mind to it?---Yes.

Well, then, did you discuss it with Mr Greenwood, who might be at the other end of the pole from Mr Mead, a very experienced criminal lawyer?---No.

Did you discuss it with him?---No.

Did he raise it - - -?---What was - - -

Pardon me, please. Did you raise it with him?---No.

Did he raise it with you?---No.

Did he say, "Can you get hold of the criminal history"?---No.

So that as between yourself and Greenwood, there was no discussion?---No.

You knew Mr Gundelach well?---Yes.

Mr Gundelach was an experienced criminal lawyer?---Yes.

You had known him for some time?---Yes.

You knew him as an experienced Crown Prosecutor?---Yes.

Who had been on Mr Sturgess' staff when he was the Director of Prosecutions and before that?---Yes.

You knew him as an experienced prosecutor?---Yes.

And when he left the Director's office and went to the private bar, you knew him to be actively involved in his practice in the criminal law?---Yes.

Did you raise with Mr Gundelach the question of getting this important information?---No.

Did Mr Gundelach raise it with you?---No.

So you had no discussion with Mr Mead about it, the inexperienced – or relatively inexperienced Mr Mead?---Yes.

You have no discussion with the quite experienced Mr Greenwood and/or Mr Gundelach?---That's as I recall.

You had engaged Mr Walliss and later Mr O'Brien to become involved in jury selection matters?---I take the question on 'engage,' but, as I have said, yes, I was involved in that.

And you discussed with Mr O'Brien what your expectations of his work would be?---No.

So that what you say is that you did not even discuss any matters involving jury selection with Mr O'Brien?---Well, I would regard Mr O'Brien as more experienced than I in that regard.

That does not really answer my question, which I repeat: you did not even discuss with Mr O'Brien any matters at all about jury selection issues?---Not to my recollection.

What is the best of your recollection?---The best of my recollection is no.

Did you specifically raise with Mr O'Brien the obtaining of that valuable information?---Criminal histories and traffic histories?

Yes?---No.

Did Mr O'Brien raise it with you?---No.

So, therefore, there was no discussion between you and Greenwood about it?---That's correct.

Nor between you and Gundelach?---That's correct.

Nor between you and Mead?---That's correct.

Nor between you and O'Brien?---That's correct.

And this valuable information simply came out of nowhere?---I didn't say that.

Well, came out of nowhere, so far as you are concerned?---Yes."

The evidence speaks for itself. Obviously the unauthorised disclosure of important and sensitive material relating to jury selection did not occur fortuitously. It was obviously arranged. Given O'Brien's involvement and the fact that his handwriting appears on the documents and given my finding of Butler's close involvement in the preparation for trial, I am satisfied that it is more probable than not that it was either Butler or O'Brien to the knowledge of the other who arranged the improper disclosure of this information from the office of the Director of Prosecutions. Their denials are untrue. Regrettably, the identity of the person who handed over the information could not be established.

Finally, the evidence of O'Brien on the point which is set out above might be contrasted with this other evidence of O'Brien on the same point, but which was given before the evidence of Marheine, the handwriting expert.

"MR HANSON: I think you have got there, Mr O'Brien, a bundle of documents that have the pages numbered?---I have, yes.

Turn to page 84 for me, please. This is a bundle of documents Mr Mead produced to us - - -?---Yes.

- - - last November. You will see at pages 84, 85, 86 and 87 the typewritten versions or the versions of P and K as typed by yourself. Do you see that there?---Yes.

I think you will also see that written in there by hand are notes about the criminal histories of some of the jurors. Do you see that there?---That's correct.

Traffic history and criminal history?---Yes.

And is that your writing or printing?---No, it is not.

And you will see at the foot of the second page of P, P70 and P71 have been added in, Popple and Sitton?---Yes.

That is not your printing, you say?---No.

Can you give me any idea how Maxwell Mead's office would be in possession of the criminal history and traffic history of the jurors on panels P and K?---No, I cannot.

Were you instrumental in them obtaining that information?---No.

Either directly or indirectly?---No.

MR CARTER: If you look at the form of the document, Mr O'Brien, it is obvious from looking at it that the handwritten details of the various criminal histories must have been put on the document after it was typed with the assessments made in respect of a large number of jurors?---That's correct.

The document was typed by you?---It was.

And those assessments were made by you?---That's correct.

You compiled the document, apart from the handwriting, for delivery to Butler?---That's correct.

And you can see that on that same document which contains the information you put there - - -?---Yes.

– – – somebody has handwritten additional information, that is, the criminal histories in respect of a large number of those people – – –?– – –Yes.

– – – and it has been put on the document. It has been put on the same document that was compiled by you but after you had finished your typing?– – –That's correct, yes.

Yes, well now, address the question again. Can you explain how that information appears on your document?– – –No, I can't.

And it is in the possession of Mr Mead's office in that form?– – –No, I cannot.

Yes, Mr Hanson.

MR HANSON: How long would it take to get this information off the police computer?– – –Which information?

The information we see here, the traffic history and criminal histories of these jurors. How long would it take?– – –I've got no idea.

Hm?– – –I've got no idea.

Surely you could give me some idea of that. How long since you left the police force?– – –Two years.

And what do you need to get a person's criminal history and traffic history?– – –Well, you need firstly access to the computer – – –

Yes. And what information – – –?– – – – – – you need – you need a password.

Yes?– – –Then you would require a full name, and a date of birth.

Anyway, somebody has got it by the look of this, unless it is an invention.

MR CARTER: And to get to the criminal history, if you did a licence check in respect of those names and addresses - - -?---Yes.

- - - that would turn you up the date of birth?---Yes. Yes.

And then with the date of births, you could go back in again, and get the actual criminal histories apart from the traffic histories?---That's correct.

And that is a fairly time consuming and complex process, is not it?---Very much so.

Well, now, do you agree with me that that information appears on the jury list which was to be used at half past 2 on the Tuesday?---That's correct.

Yes. If that process started late morning on the Monday - - -?---Yes.

- - - it would be impossible to collect the information to permit the assessments to be made plus the criminal histories?---That's correct, I would think so.

Yes, Mr Hanson.

MR HANSON: Unless this criminal history was picked up all in one go from some other source - - -?---Yes.

- - - rather than off the - - -

MR CARTER: Before the Monday, or, sorry - - -?---Why before then.

- - - you answer - address Mr Hanson's question.

MR HANSON: All in one go off some other source other than the police computer - - -?---Yes.

- - - name by name?---Yes.

And are you aware that the sheriff asks the police department to supply him with the criminal histories to see who is disqualified under the Jury Act?---I wasn't aware, but it is an obvious thing for him to do.

You had nothing to do with procuring this information in whatever form?---No, I did not.

Neither from the sheriff's office nor from the police department?---Certainly not.

Nor from the Department of the Director of Prosecutions?---No."

I reject that evidence as untruthful.

CHAPTER 10

THE FRIENDS OF JOH

It would be to misrepresent the true situation to assert that the Friends of Joh movement was a formalised and structured unincorporated association legally supported with a constitution and rules, and the other quasi-legal infrastructure which one associates with a major club or association.

Rather, the Friends of Joh was an informally established group of people whose common interest lay in their admiration for the man and in providing him with emotional support and with fund-raising to assist in defraying the legal costs which the accused had and was likely to incur in the course of his prosecution for criminal offences.

He had given evidence to the Fitzgerald Commission of Inquiry which had formally concluded with its Report in July 1989. The office of the Special Prosecutor had been established by that time and proceedings against the accused had commenced on 29 October 1990. He first appeared at the Magistrates Court on 2 November 1990 and was on that day remanded for committal proceedings on 11 February 1991. However, because of the defence decision to forsake committal proceedings the ex officio indictment was presented in the District Court on 15 February 1991. This was by arrangement at a pre-committal conference with Mitchell SM on 8 February 1991. The accused was publicly supported by the Friends of Joh from the beginning of the proceedings.

Linda Delores Woodward, the wife of Geoffrey Tex Woodward, gave evidence that the Friends of Joh movement had its origins in a family barbecue at her home to which friends were invited, many of whom had a like attitude as she and her husband towards Sir Johannes Bjelke-Petersen. Both he and Lady Bjelke-Petersen attended. A cake was ordered and decorated, and it was decided to put on the cake the words "Friends of Joh" because "there will be some friends of Joh there". As she said in evidence "...that was the start of the Friends of Joh".

This function occurred "in about 1989".

Geoffrey Tex Woodward became identified as the leader of the group. He and his wife were ardent admirers of the accused and their obvious support of him preceded his being deposed as the leader of the National Party in the Legislative Assembly.

Lorraine Morrison lived at the Gold Coast and she and many of her friends were likewise committed followers of the accused and were likewise intent upon supporting him during the relevant period. As will be seen, Mrs Morrison and her group were even more active and committed in pursuing their obvious objectives. Several functions were organised and considerable funds raised and contributed towards defraying the costs incurred by the accused. The Gold Coast section of the Friends of Joh paid $17,000 to Trial Consultancy Pty Ltd – in effect to Butler – towards payment of his services in the course of the defence of the accused.

The Friends of Joh movement is therefore best described as an informal group of people united in their uncompromising devotion to the man, who were prepared to publicly support him and to support him personally, both with funds raised on his behalf, and with emotional support. There was no formal link between the Brisbane based group led by Woodward and the Gold Coast group led by Mrs Morrison. Mrs Chapman was associated with the Brisbane group and became its chairperson. Although the two groups had a common interest there was no official link between them. Indeed, there may have been an element of division which seems to have emerged after the large fund–raising function at the Royal Pines, Gold Coast, on 8 August 1991. The cause of this divisiveness was probably based on jealousy and on personal differences. It is irrelevant here.

Mrs Morrison said that her group commenced its activities in 1989. The first recorded minutes of any meeting of the Gold Coast Friends of Joh are in respect of a meeting held on 4 November 1990 attended by 16 persons (including Woodward) and at which the office bearers and committee was selected. But apart from this there was no other formal structure. Membership for instance was, I am satisfied, again informal. It appears that some persons paid a token sum for so–called membership and were given a badge. But the main purpose was to have a group of helpers who could be relied upon to assist with fund–raising, and in particular, to assist in the organisation associated with the larger fund–raising occasions.

Mrs Morrison herself presented as a devoted, uncompromisingly committed follower and admirer of Sir Johannes Bjelke–Petersen. She was obsessed with the notion that he had been unfairly and unjustly victimised and that the prosecution by the Special Prosecutor was an integral part of that process. I should say that Needham had considered the Crown case against the accused to be a strong one. I am satisfied, however, that Mrs Morrison's commitment was so profound that no amount of logic and good reason could ever persuade her from the notion, with which she was plainly obsessed, that the accused had been victimised and unjustly persecuted. It follows of course that she was always and without question

convinced of his innocence of the offence with which he was charged. She attended on each day of his trial.

I am satisfied that her deeply held belief in the innocence of the accused and her attitude towards those who prosecuted him seriously affected her objectivity and her capacity to give honest and truthful evidence. I will have to deal with several aspects of it later.

Some introductory matters of fact can be quickly disposed of.

Mrs Morrison enjoyed a close and continuous relationship with the accused and Lady Bjelke–Petersen. She was obviously in contact with them regularly and frequently. She was well–informed in relation to the dates of the accused's court appearances. She was unfailingly in attendance. She dealt with the media and was identified by the media as the leader at any rally of supporters on those occasions when the accused attended at court, whether the Magistrates Court or the District Court. In the minutes of the meeting held on 4 November 1990 she is recorded as thanking "those who went to Brisbane on Friday, 2 November 1990 to give Sir Joh moral support". 2 November 1990 was, as has been said, the return date of the summons which required his attendance at the Magistrates Court. This was his first court appearance on the criminal charges.

10.1 The Friends of Joh Contact Book

The Commission's summons resulted in the production of a substantial exercise book arranged alphabetically which became known as the "contact book". It contains hundreds of names, addresses and telephone numbers and I am in no doubt that it was compiled largely by Mrs Morrison and was used by her as a convenient reference point for her to make contact with those named, and in particular, it contained the names of those whom she either knew to be, or believed to be, interested in supporting the accused. I hasten to add that the book contains the names of several prominent persons who would be totally ignorant of the fact that their names were included. It was assumed from the outset that the mere fact that a person's name was included in the book did not necessarily mean that that person was a supporter of Sir Johannes Bjelke–Petersen and one who was sympathetic to the objectives of the Friends of Joh movement. A significant number certainly were.

Of major interest to the inquiry from the outset, however, was the fact that the name of Shaw was included in the book and also the fact that prior to

its production to the inquiry the page with Shaw's name on it had been deliberately torn from it.

I accept that the tearing out of the page was done by Mrs Morrison's husband and occurred because of his concern that the fact of the name in the book would necessarily evidence a connection between Shaw and the Friends of Joh. It will be recalled that Mead's letter to the Special Prosecutor of 24 October 1991 denied knowledge of any connection between Shaw and the movement. All of the relevant persons associated with the Friends of Joh in evidence denied any knowledge of Shaw or of association or contact with him at any time prior to 23 September 1991. The evidence that the relevant page was torn from the book is, I am satisfied, equivocal and I am not prepared to draw any adverse inference on account of that fact. The entry in question reads:

> "Luke Shaw
> 28 Abuklea St
> Wilston 4051 07 352 6334."

All of these details concern Shaw, his postal address and home telephone are accurate. The entry appears in the book under the letter "L".

It is necessary to examine the oral evidence and the internal evidence of the book itself in order to properly address the relevant questions.

Given the close association of the Friends of Joh movement with the accused and his defence, especially with Butler, it was essential to determine if possible when it was that Mrs Morrison made the entry of Shaw's personal details in her contact book. If she knew these details before the trial then there was a real likelihood of that fact being known by at least Butler before the trial. That is not to say that Butler did not have other means or sources of information concerning Shaw. However, the nature and extent of Shaw's association with Mrs Morrison and the Friends of Joh, if any, before the trial was a most relevant inquiry. Butler was a close associate of Mrs Morrison before the trial.

Mrs Morrison persistently denied any knowledge of Shaw before and during the trial and insisted that the entry was only made after the trial. Some aspects of the entry and the book itself may have permitted an inference to the contrary and so it was necessary to explore this issue with

her in considerable detail. The most unsatisfactory aspects of her evidence concerning this can be identified.

10.2 The Evidence of Mrs Morrison

Her first explanation of how she obtained the details of the entry in relation to Shaw in the contact book emerged in this evidence:

> *"All right. Now, Mr Luke Shaw: was he a member of your association?---Never, ever. Never a member of the Friends of Joh.*
>
> *Have you ever met him?---I have never met him.*
>
> *Have you ever spoken to him by phone?---I spoke to him once about June last year, and then after that thing on television - that movie - the next day. That's all.*
>
> *What, the reconstruction of the trial?---Mm. I asked him, wasn't that terrible.*
>
> *All right. When did you first speak to him by phone?---Around about the middle of last year.*
>
> *That is June or so?---Round June.*
>
> *1992?---Yes.*
>
> *Which is about eight months after the trial had finished?---That's right.*
>
> *And in what circumstances did you come to speak to him?---Well, in the first place, I felt very sorry for him, that he was being hounded so much by the media, and when we saw him being chased by a media fellow, I thought, 'This poor young fellow, 20 years of age, copping this is dreadful. I'll ring him.' But I didn't ring him. I rang and I spoke to his father, and I said my sympathies for what he's going through.*
>
> *You told him who you were, of course?---Yes.*

Yes. Did you leave a message for him to ring you back?---No. No.

And did you try again to get in touch with him personally?---Not personally, no, but I just felt sorry for the family, so I – and a couple of months after I made a phone call and spoke to his brother.

Missed him again?---I don't know whether he was living at home so much just then, or something.

Well, did you ever catch up with him on the phone?---Yes, that June.

I am sorry. I have misunderstood you. When did you first ring the Shaw household?---About five or six weeks after the court case.

I see; but it was not until the next June that you caught up with Luke Shaw?---That's right.

On the phone?---On the - - -

And how did you get in touch with him? How did you know where to ring?---Quite easy. The media said where he lived and I was quite disgusted with that actually.

Yes?---Gave his suburb, so I wrote that down, and went across the Runaway Bay Post Office, looked up the telephone book.

You did not have a Brisbane phone book?---Not the – yes, Brisbane phone book.

You did not have one in your home?---No, I didn't have one.

Did it occur to you to ring the National Party and ask for his phone number?---No. It didn't enter my head.

Would you be well enough known to the people at the National Party that they would give you his phone number if you rang and asked for it?---I think they would.

All right. Now, I just want you to have a look at your contact book again for me, please, and his name is in there, as you know, is not it?---Yes.

MR CARTER: Just before you go on to that: when you went to the telephone book at the Post Office, Mrs Morrison, and looked up his phone number, you said you had no difficulty. Why was it so easy?---I don't quite understand what - - -

You said that you did not know his phone number?---No.

So you went to the Runaway Bay Post Office and got a Brisbane phone book - - -?---Yes.

- - - and found his telephone number, and you said - I understood you to say that was quite an easy task because the - - -?---Yes, because the media said he lived where he lives, the suburb he lives in.

Yes; and what did you do?---Well, I just - I think I wrote the suburb down so I wouldn't forget, and sometime after, I went over and got the number from the Brisbane book.

Well, you have confused me a little. Did you make two visits to the post office?---No.

Just one?---One.

So you had learned from the media the suburb in which he lived?---Yes.

And you went to the post office?---Yes.

Looked at the Brisbane phone book?---Mm.

Just tell me what you did?---Well, I just looked down Shaw that were living – I don't even like to mention the suburb today, if I can.

Do not worry. I live in it myself. Wilston?---Wilston, yes.

Yes. It is a good address?---See how frightened I am of the media.

Do not be worried about the media. They will not hurt you?---Yes, and – – –

And so you looked in the phone book and you looked at the suburb?---Yes.

Just tell me what you did?---Yes; that's what I did, and so I think I wrote it on a piece of paper. I'm still not too sure.

You found it?---Yes, I found it, and wrote the – – –

What did you find?---Well, the telephone number.

Well, there would be lots of telephone numbers under Shaw, but how did you know which one?---Well, it must – it might have been the only Shaw in Wilston. I just don't know, but anyhow whatever it was, I picked the right one.

Now, just tell me what you did? You looked at the telephone book, looked at the Shaws, and looked for Shaws at Wilston?---Yes.

And this was in 1991?---Yes.

And you found the right telephone number?---Yes.

No problems?---No.

And you rang that number?---Yes.

First one you found was the one you rang?---Yes.

Yes, Mr Hanson. I will leave it to you.

MR HANSON: Mrs Morrison, did you have the street, or just the suburb?---No, I didn't have the street; just the suburb.

But surely there must have been more than Shaw in Wilston?---I don't know. Haven't got a – get a Brisbane book and we'll have a look at it.

Well, we might do that, too.

What she there swore seems clear enough. She had heard from media reports that Shaw lived in the Brisbane suburb of Wilston; she went to the Runaway Bay Post Office, and having consulted the Brisbane phone book, found the name Shaw at Wilston and noted the address and telephone number.

Then the following exchange occurred in the course of Mrs Morrison giving evidence of consulting the telephone book:

"MR CARTER: Well, if you do, Mrs – you will find that there are three Shaws in Wilston?---It might have been the initial.

What, L. Shaw?---Mm.

Well, there happens to be an L. Shaw?---Mm.

But that is not the person concerned?---Mm.

So how did you find his number?---Well, maybe the press – – –

If you go to L. Shaw?---Maybe the press put the whole address in. I am not sure. But I know that I just got that out of the book and with that one number.

So if we assume the press did not publish his residential address, but only the suburb, you will find that if you go to

a 1991 telephone book you will find that there are three Shaws?---Mm.

And in fact there is an L. Shaw?---Mm.

But the L. Shaw is not the Luke Shaw that we are concerned about?---No. Well, maybe - - -

And, indeed, to find the number for the address at which he lives, it is in his parents name - - - ?---Yes.

- - - which does not have an L in it?---No.

So, tell me again how you first off got the right telephone number?---Well, maybe it was in the press, the full address.

Well, if it was not, and we assume it was not, and if – how then did you find it?---Well, what I've just said. Maybe - - -

You say it was the first – you had no trouble, you found it straight off?---Mm.

You rang the number which you identified from the phone book as being the phone of Luke Shaw?---Mm."

Reference to the telephone book will disclose that there are in fact three subscribers in Wilston with the name Shaw. There is in fact one "L B Shaw" in Wilston, but that is not Luke Shaw. The phone at Luke Shaw's home is in the names of his parents "P H and M E Shaw". So that unless Mrs Morrison had his full address – at first she said she had only the suburb – reference to the telephone directory would not assist her in finding the correct number. Inquiries made of the other subscribers with the name Shaw, who were available, did not disclose any attempts by others to contact Luke Shaw at their numbers.

Counsel then continued:

"MR HANSON: Mrs Morrison, would you look at your contact book for me, please. You have it in front of you?---Mm.

You know, of course, do not you, that his – he is in there?---Yes.

Would you just turn up the page for me, please?---I've got it here.

What letter is it there under? It is in among the Ls, is it?---Yes, that's right.

Why is he there among the Ls rather than the Shaws – the Ss for Shaws?"---I just do that sometimes. I just happen to put it there.

It is not just that you are on first name terms with him – –?---No. I hadn't – – –

– – – when you wrote – wrote this in?---No. Never met him.

All right. Now, we – – –?---I still haven't met him.

We see the address there, and you have got the number – – –?---Mm.

– – – and the street, and the suburb, and the postcode number?---Right.

4051. Now, surely you did not get the postcode number out of the telephone book?---No, because I have a postcode at home; postcode book.

I see. And why – well, why is his full address, including his postcode, in your contact book?---Well, I – I just do that. I automatically – I've got the postcode book on the table all the time and I always enter it into addresses.

Have you ever sent him anything by post?---No.

.....

Now just tell me then how the full address, including the postcode, comes to be in your contact book. You went over to the post office – – –?– – –Mm.

– – – and came back with not only the phone number but the address, but not including the postcode?– – –Well, this is a contact book – – –

Yes?– – – – – – for anything to do with Joh.

Yes?– – –And I just put it in this book. I wouldn't put it in my private teledex – in fact, at the time our private teledex was full up. I couldn't have put another name in there if I tried.

Well, no, I am just trying to understand how the whole composite entry comes to be put together. You have got the name, Luke Shaw, you have got the street – the house number and the street, and then the suburb, and then the postcode, and then the telephone number?– – –Yes.

Now, you tell me you started out by knowing his name and the suburb, and then you went across the road and got the Brisbane phone book, and that gave you the telephone number, and I suppose, if you looked, it would have also given you the address?– – –Mm.

And you brought that back, did you, on a piece of paper?– – –Yes.

But it would not have given you the postcode?– – –No.

So you put that information into your book and then added in the postcode from your list of postcodes?– – –Yes."

Shortly after this part of her evidence the hearing adjourned at the end of the day and Counsel returned to the question at the beginning of evidence on the next morning:

"All right. I think we spoke about this yesterday. You have got his full address including his postcode and his

telephone number?---Yes, could I just say something here?

Yes, yes?---I've discovered how I got the full address. We were doubtful about the street.

Yes?---And on the way home, I just concentrated on it and I was thinking – – –

On the way home from here yesterday?---Abuklea, yes, Abuklea Street.

Yes?---When I went home, I said to my husband, I said, we were watching that, I said, when the, you know, the television cameras were chasing after Luke after the trial, and I said, I seem to think that I might have seen the street sign, I'm not sure. He said, of course you said, I remember seeing it. He even described it. It had a slight lean on it, and I – then I can remember – I couldn't – it's an unusual name, but I knew it started with AB and it had, like, a K in it somewhere, and I went over to the Post Office at Runaway Bay, went down to a Shaw that had an address like that, and I found it.

I was just wondering if you could tell me why you did not bother just ringing directory assistance; see, all you wanted was his phone number at that stage, was not it?---Mm.

Why did not you just ring directory assistance?---Well, I was going over – – –

Give them the name Shaw?---I was going over to the Post Office that particular day to post mail, and I did it while I was there.

Just have a look at this book for me, please. I think it is a 1991 Brisbane phone book. This would be the one that you had a look at, would it?---I guess so.

Just turn up the pages dealing with the Shaw's?---Yes.

Now, there is an entry for Shaw at Abuklea Street, 28 Abuklea Street, Wilson; is that the case?---Yes. I can't see it just here. Have you got it marked?

The initials?---Yes. Yes, I can see it now.

And what are the initials?---PH and ME.

And that is the phone number of course that you have got in your contact book?---I'll check up. Yes.

So, that is obviously Luke Shaw's parents' entry?---Yes.

But if you look for an L. Shaw at Wilston, you will find one, I think, will not you?---I don't - there's L. Shaw's, yes.

There is one - - -?---I don't know - in Wilston, yes.

There is one at Wilston, is not there?---Mm.

You were telling us yesterday you only had the suburb?---Yes.

But you think now overnight that you also had the street?---Yes.

THE CHAIRMAN: No, only the first two letters of the street?---Well, a bit more than that.

Sorry?---I can remember there was AB and there was a K in it somewhere, you know, it was an unusual number.

And unusual number?---Name. Unusual name.

MR HANSON: So, what did you do with the phone book; you went through the phone book looking for Shaw's at Wilston and looking for a street of which you had part of the name?---Yes.

And then arrived at the entry there that must be for his parents?---Yes.

That is the only one for Shaw's at Abuklea Street at Wilston; is that how you arrived at it?---Yes."

She went on to explain that she obtained the postcode for the entry in the contact book by reference to a book of postcodes which she kept at her home.

The trend of her explanation so far for the detailed entry in the contact book is therefore clear enough. Her first explanation of having name and suburb was obviously unacceptable. Her second was, but it involved the somewhat tortuous process of going to the Runaway Bay Post Office to consult a Brisbane phone directory, of finding the name Shaw living at Wilston at a street beginning with the Letters AB and containing K, noting the telephone number, and on her return home, placing the details in the contact book and adding the postcode from another source.

All of this occurred according to Mrs Morrison after the trial was completed. Her purpose in obtaining the information was to telephone Shaw for the purpose of offering him her support in view of the publicity which had attended him and his alleged part in the jury's indecisive verdict. This occurred about "five or six weeks after the court case".

Mrs Morrison gave evidence that she phoned the Shaw household from time to time after this.

Later in her evidence she was to abandon this detailed explanation for finding Shaw's personal details in favour of another, asserting that her means of knowledge concerning Shaw, his address and telephone number, had come from another and totally different source. The first explanation was given by her on 6/7 May 1993.

On 12 May 1993 Shaw was called to give evidence. In the course of his evidence he was questioned by Mr Ponting, solicitor for Mrs Morrison, and shown a Christmas card which Shaw acknowledged he had received from Mrs Morrison at Christmas time 1991. Shaw said he did not know Mrs Morrison personally at that time. It seems that he had recently handed the card to his solicitors who had given it to Mr Ponting. It was on that account that Mrs Morrison's solicitor, Mr Ponting, was in the position of showing Shaw in the witness box the Christmas card which Mrs Morrison had allegedly sent to Shaw for Christmas 1991.

Then followed immediately this further exchange between Shaw and Mr Ponting:

> *"Do you know a lady, Susan Alexander?---I've never met her but I do know of her, yes.*
>
> *Do you know Mark Pitt?---Yes.*
>
> *How well do you know Mark Pitt? Would you classify him as a friend?---I would classify him as a friend, definitely.*
>
> *Has he been to your home?---He has been to my home.*
>
> *Would he know your home address, do you think?---He certainly would.*
>
> *Thinking again about Susan Alexander, I would ask you to look at this document please. This document was also received this morning, Mr Chairman in the same circumstances as the card?---Thank you.*
>
> *Would you tell us what that document is?---It's a letter of support from Susan and the branch down the coast.*
>
> *And what is the date of the letter?---That is 12 November 1991.*
>
> *And did you receive that letter in the mail?---I would assume so, yes.*
>
> *Well, did you receive the letter?---Yes.*
>
> *Do you know where it came from? Was it hand delivered to you?---No. Well, it was in the mail, if you put it like that, yes."*

The letter referred to was one which purports to have been written to Shaw by one Susan Alexander, then an active member of the National Party at the Gold Coast.

The content of the Christmas card referred to and allegedly sent by Mrs Morrison to Shaw reads:

"Dear Luke,

We would love to meet you anytime. I spoke to your mother a couple of weeks ago. Susie Alexander gave me your number and address and promised not to pass it on, only to Sir Joh, as he would like to speak with you. No doubt about it you put "Friends of Joh" on the map, all over Aus! We were fortunate you were chosen jury foreman and not the unionist. Our prayers were answered. Joh should never have been charged. It is dreadful. But he looks good and happy and starting to make money at last. We raised just on $30,000 and it did help him."

The content of the letter dated 12 November 1991 reads:

"Dear Luke,

Just a quick note to show our support during this harrowing time!!

We just can't believe the unmitigated rubbish that is being beaten up by the Labour Party and most of all, the press!

We feel that you have been a victim of unfair allegations and we hope that in the future you take some legal steps to defend yourself.

Perhaps when you have finished your exams, you could attend one of our meetings as we would like to express our support personally.

Cheers for now, and all the best with your pending exams."

It seems clear enough, therefore, that following upon the Commission's inquiry of Mrs Morrison as to when and the circumstances in which she first became aware of Shaw's address and telephone number there allegedly came into the possession of Mrs Morrison's solicitor from Shaw's solicitor the Christmas card and letter dated 12 November 1991.

The major public hearing of the Commission had begun on 4 May 1993. In a later attempt to explore more fully the facts and circumstances concerning the Christmas card the following evidence emerged:

"MR CARTER: Pardon me. Just pardon me for a – have you been in touch with Shaw since this hearing started?---Since this hearing started, no.

MR PONTING: Well, did you mean Luke Shaw, Mr Chairman?

MR CARTER: Yes.

MR PONTING: Yes?---Mm.

Just as long as there is no misunderstanding as to which Shaw?---No, I haven't no.

MR CARTER: Or any member of his family?---Not since this inquiry started.

MR PONTING: Well, have you had contact with Mick Shaw since this inquiry started?---Right, yes, maybe a day after or something. Mick Shaw rang me and - - -

MR CARTER: Who is that? Luke Shaw's brother?---That's one of his brothers.

Tell me more?---He just rang to ask was I all right and how – you know was I going okay, and he was thinking about me, and wished me well. It was very short.

Yes, Mr Ponting?

MR PONTING: And you had a conversation more recently than that when the existence of the card was drawn to your attention. Is that right?---The existence of a card?

Of the Christmas card?---What – would you say that again?

Well, you had another conversation in which the existence of this Christmas card was brought to your attention?

MR CARTER: Another conversation with who?---With her?

Sorry?

MR PONTING: Well, who told you? Who reminded you of the Christmas card? Well, perhaps I might walk you through it?---I just can't think at the moment.

All right. Well, you remember last Saturday, around about quarter to 6 in the evening?---Mm.

You telephoned me at my home?---Mm.

And you told me something about a Christmas card?---Yes, that's right.

All right. Now, have you got your mind focused on to that?---Yes, that.

All right. Now, what was it that led you to do that? How did you come to think about this Christmas card?---Yes, well, I started to think - yes, I can remember sending a card for Christmas.

Well, did you speak to anybody to confirm the existence of the card or did you speak to one of the Shaw household to confirm that there was a card?---No, I don't think - I didn't ring the - their house. No.

All right. Well, was 7 December 1991 the - - -

MR CARTER: Just - just - I am not at all satisfied with this. I will adjourn for a short time. You may wish to sort it out with the witness perhaps, Mr Ponting.

MR CARTER: Yes, Mr Ponting?

MR PONTING: Thank you, Mr Chairman.

Mrs Morrison, we will talk again about last Saturday. Did you have a phone contact last Saturday with the Shaw household?---Yes, I did. I recollect I did now.

All right. And who initiated that contact?---Well, I start to think about whether I did send a Christmas card and ---

MR CARTER: No, no, no, no. Just listen to Mr Ponting's question. Ask it again, would you, Mr Ponting?

MR PONTING: Yes. Who made the phone call?---I did.

All right. Now, why did you make the phone call?---Because I wanted to clear it up whether I did send a card for sure.

What, you had started to think that perhaps you had sent a Christmas card?---Yes.

And you were not sure?---Mm.

And who did you speak to?---I spoke to Laurie Shaw, the brother.

And who is he?---Brother.

He is Luke Shaw's brother?---That's right.

And did you ask him about it?---Yes.

And what did he tell you?---Yes. He said I did.

And did he get the card and read it out to you?---No, he didn't.

He did not, but he told you you had sent a card?---Yes.

All right. And you then contacted me?---That's right.

Now you have mentioned two contacts with the Shaw household since the commencement of this inquiry. I take it by that we mean this present sittings we are talking about. That is since 4 May we are talking about. We are not talking about the commencement last October. It was your question, Mr Chairman.

MR CARTER: Sorry?

MR PONTING: You asked a question as to whether she had had contact with the Shaw household since the commencement of the inquiry.

MR CARTER: Yes.

MR PONTING: I take it you are talking about the present sittings of the inquiry – the May – this month?

MR CARTER: Oh, yes. Yes.

MR PONTING: So since these hearings started on 4 May, you have had – that is two contacts you have – – –?– – –That's – – –

– – – told us with the Shaw household?– – –That'd be right.

One of them, Mick Shaw rang you?– – –Yes. That's right.

And that was the day you first gave evidence here; is that right?– – –Yes. The – yes, I think it was the first day, yes.

And the topic of conversation was simply he was offering you some moral support and comfort?– – –That's right.

And the second conversation was last Saturday – – –?– – –Yes.

– – – when you telephoned and spoke to Laurie Shaw?– – –That's correct.

And confirmed the existence of the card?– – –That's right."

This evidence was given on 17 May 1993. In it Mrs Morrison appears to assert that she thought she may have sent Shaw a Christmas card at Christmas time 1991. She rang the Shaw household and confirmed this. On its face, this phone call to the Shaw household on the previous Saturday in order to confirm that she had sent Shaw a Christmas card in 1991 would seem to have no relevance at all to the manner in which she came to know Shaw's address and telephone number. In any event, a Christmas card was ultimately produced in which she wrote that she had received details of Shaw's telephone number and address from one Susan Alexander.

There are some unusual features about this evidence. It involves the first proposition that in May 1993 during the hearing, Mrs Morrison recalled that at Christmas 1991 she had sent Shaw a Christmas card and she had phoned to confirm this. Secondly, it is said that Shaw's brother (not Shaw) was not only able to confirm the fact but in fact was able to produce it. It was given to Shaw's solicitor who gave it to Mrs Morrison's solicitor. This then is said to have occurred against the background of Shaw having received a letter from one Susan Alexander dated 12 November 1991. In the card it is asserted that Mrs Morrison obtained his "number and address" from Susan Alexander who is said to have received his "home address" from Mark Pitt.

Accordingly, the scenario said to be supported by this evidence is that Ms Susan Alexander who, according to Shaw, did not know him, had obtained his, Shaw's, "home address" from Pitt. In turn, Mrs Morrison's card asserts that she obtained Shaw's "number and address" from Susan Alexander and that is how at some time subsequent to Susan Alexander's letter dated 12 November 1991 and before Christmas 1991, Mrs Morrison obtained Shaw's address and telephone number, which she then wrote into her contact book.

Unfortunately, at the time of the inquiry Ms Alexander was a resident of Papua New Guinea and was not called to give evidence.

The above chain of events is somewhat curious. The inquiry began with the purpose of ascertaining how Shaw's address and telephone number found its way into Mrs Morrison's contact book. The above chain of events was more recently advanced as the source of the information.

One feature of it is somewhat striking. Apparently Pitt was able to provide Ms Alexander with Shaw's "home address" so that she could write him a letter. Ms Alexander was then, according to Mrs Morrison's Christmas

card, able to give to Mrs Morrison Shaw's "number and address". Furthermore, it seems that Shaw's brother was able to confirm in May 1993 that Mrs Morrison had at Christmas 1991 sent to Luke Shaw a Christmas card and that Luke Shaw had retained it and therefore was able to produce it to Mrs Morrison's solicitor. There is no evidence that Pitt had ever given to Ms Alexander Shaw's "number".

The Commission sought to establish whether the Christmas card was in circulation at Christmas 1991 and was able to obtain information from the manufacturer of it to the effect that the card was manufactured first in July 1990 and was distributed to newsagents in Australia at both Christmas 1991 and 1992. There are no other means available of determining the authenticity of the document.

It is impossible to reconcile the versions of the relevant episode sworn to by Mrs Morrison. At the beginning, and by a somewhat tortuous process, I was informed that Mrs Morrison obtained the relevant details of address, phone number and postcode from, in combination, the media, the phone book at the Runaway Bay Post Office, and the postcode book kept at her home.

Later, after the production of the Christmas card and letter, she gave evidence of having received the address and telephone number from Susan Alexander who, according to Mark Pitt, had obtained Shaw's address from him at National Party Headquarters.

I find it extremely difficult to sensibly reconcile the two versions. The first was detailed, and although in some respects inherently unlikely, was strongly persisted with. The second was based on a totally different and unrelated set of facts and circumstances, namely the supposedly contemporaneous receipt by her from Susan Alexander of the relevant information which she repeated in the Christmas card.

I am not comfortable in my mind with the attempts which I have made to resolve these conflicts in Mrs Morrison's evidence in order to arrive at a suitable finding. My only acceptable conclusion is that she is a totally unreliable witness whose evidence is really worthless. One would normally find assistance in the evidence of the card, but there are some concerns about an unequivocal acceptance of it as decisive. And besides, if it is valid why did she construct the rather complex story about the circumstances which led her to the Runaway Bay Post Office to find the number, particularly after it was pointed out to her that she could not have

found the number if she had had only the name of the suburb, as she had said at the outset.

I find it quite impossible to reach a proper finding on the point in the light of her evidence, which was obviously unsatisfactory and which consisted largely of confabulation.

10.3 The Internal Evidence of The Contact Book

An examination of the contact book discloses that on the same page as that which records Shaw's name and personal details there are written below Shaw's name, and obviously after Shaw's details were written, the names of other persons and as well their addresses and telephone numbers. Of these persons, Doreen Longhorn and Henry Lach were in attendance at the Royal Pines function on 8 August 1991 and a third Councillor W M Laver, had indicated that he would attend but at the last minute had to cancel. An invitation had, however, been sent to him before 8 August 1991.

The solicitor for Mrs Morrison was at pains to emphasise that the form in which material was recorded in the book was variable and ad hoc and that one could not safely conclude from the order in which the names appeared that they had been entered in the book at or about the time they came to be regarded as supporters of the Friends of Joh movement. There is, however, one striking feature about the entry relating to Doreen Longhorn. She was, I am satisfied, a long-term supporter of Mrs Morrison's organisation. Her name also appears in the "D" section as "Doreen Longhorn (See L)". This cross-reference was plainly entered at the same time as the original entry under "L" which also contains address, postcode and telephone number. In the "D" section and on the same page other names are written below "Doreen Longhorn (See L)" and these persons can also be shown to be persons who had attended at the 8 August 1991 function.

From the internal evidence in the contact book one might infer therefore that the name of Shaw was inserted before 8 August 1991. However, given the informal nature of the book and its form it may be unsafe to infer that that was so.

I therefore again find myself unable to safely conclude when it was that the name of Shaw was inserted, that is whether it was inserted before or after the trial began on 24 September 1991. I would prefer to rely on the other

material which illustrates Shaw's connection with the Friends of Joh organisation before 23 September 1991.

10.4 The Friends of Joh and Butler

I am more than comfortably satisfied that there was a close personal link between Mrs Morrison and Butler well before the commencement of the trial.

The contact book reveals the degree of personal contact which existed between Mrs Morrison and Butler.

Butler had left Lyons and gone to Mead's office in May/June 1991. His address at Mead's office is recorded in the beginning of the book, as is the name Trial Consultancy Pty Ltd. In addition, under the letter "B" there is recorded again Butler's office address, his home telephone number, his fax number, the number at which he could be contacted through his girlfriend Tracey Lea at her place of employment, the phone number of the address at which Butler and Ms Lea lived, and finally at the beginning of the book, the bank account number of Trial Consultancy Pty Ltd and the name and address of the branch of the bank at which the account was kept.

Butler's name also appears in the contact book among those who were presented with a free video presentation by the guest speaker at the function at the Royal Pines on 8 August 1991.

There was one additional reason for Butler's name and personal details to figure prominently in Mrs Morrison's contact book. They both were ardent admirers and supporters of Sir Joh. More importantly, however, it was to Mrs Morrison that Butler looked for payment, in part, of the fees payable to him by the client. A reference to the relevant documents discloses that most of the money raised by the Friends of Joh was paid to Butler or his company, Trial Consultancy Pty Ltd, both by the Gold Coast branch and the Brisbane branch.

In all, a total of $22,000 was paid to Butler, $17,000 of which was paid to Butler by Mrs Morrison.

Even further evidence of the closeness of the contact between Butler and Mrs Morrison is provided by the details of telephone contact between them.

On Friday, 20 September 1991, at 9.31am Butler spoke to Mrs Morrison on the telephone at her home on the Gold Coast for 7 minutes and 22 seconds; on Wednesday, 18 September at 7.14pm he spoke to Mrs Morrison for 13 minutes and 14 seconds. Neither could recall the purpose or content of the calls.

I am persuaded that before the trial Butler and Mrs Morrison were well-known to each other and their dealings with each other were based on their mutual interest in the trial of the accused. They were both concerned to ensure, if possible, his acquittal.

I am in no doubt that if Shaw was known to the Friends of Joh organisation at the Gold Coast before the trial, and in particular to Mrs Morrison, and that he was on jury service, that fact would have been shared by Butler and Mrs Morrison.

I wish to emphasise, however, that whilst the close association between Butler and the Friends of Joh before the trial can easily be demonstrated, the evidence of the contact book alone does not permit one to positively find that before the trial Shaw and Mrs Morrison were known to each other or that Shaw and the Gold Coast organisation were in contact. On the evidence of the contact book one cannot find that they were; on the other hand, one cannot find that they were not.

However, as indicated above, I am satisfied from the evidence of Reddy and that of the minutes of the Young National Party meeting of 29 January 1991, that Shaw had prior to the trial been identified by those involved, as an avid supporter of the accused as a person, and as one who was a suitable point of reference for the Friends of Joh organisation. One cannot identify precisely the point of contact between Shaw and the Friends of Joh.

I regard it as more probable than not that in the days prior to the trial, when Shaw was known at least to O'Brien and Butler as an active member of the Young National Party, that he was also known to be an avid supporter of the accused. These facts were well-known in Young National Party circles. The close involvement of persons associated with the Young Nationals in and concerning the trial of the accused will shortly appear. Persons connected with the Young National Party who were close to Shaw were a ready means and source of information.

CHAPTER 11

SHAW AND THE YOUNG NATIONALS

Well before the trial Shaw had been an active member of the Young National Party. He had joined the Wavell/Clayfield branch in January 1988, but did not renew his membership in 1989, but applied to rejoin at the end of 1989. His application was processed in January 1990 and he renewed his membership in January 1991. This brief review of his membership of the Party is in accordance with the evidence given by David Russell QC, the Senior Vice-President of the National Party to the trial Judge on the application by the Crown to discharge the jury on 18/19 October 1991.

Shaw was an active and committed member. Some of his colleagues were apt to down-play his commitment. His admiration for the accused was widely acknowledged. He was a student at Griffith University and was active in student politics on the campus. He, like Sirl, another vigorous and active Young National at Griffith University, was interested in gaining membership of the Students' Representative Council (SRC). The evidence and the documentary material, which evidences the activities of the Young Nationals, particularly the Brisbane central branch, present a clear picture of a relatively small but committed group of young people who were actively intent on promoting this section of conservative politics. Whilst committed to the Party and its causes, there was still scope for factional in-Party groupings, the dynamics of which were probably no less intense than that which occurs with more mature political minds. Perhaps in their relatively immature and youthful enthusiasm it meant, in some cases, that the political game was played with even greater intensity.

One thing was obvious in their evidence, and that was their common intent of protecting Shaw. Some were more frankly truthful than others. Some, I am certain, were blatantly untruthful. In spite of their apparent youth, some attempted to present a measure of political sophistication which was, in truth, shallow and transparent. All for the most part presented an undisguised animosity and lack of respect for the integrity of the inquiry. It was perceived as just another unit in the machinery of Government intent on the further victimisation of Sir Johannes Bjelke-Petersen. Perhaps the high water mark was the evidence of one Justin Choveaux, who proclaimed gratuitously in the course of his evidence:

> *"I personally think Sir Joh is a great man, and what everyone here is doing is victimising him and I believe Luke thinks the same way and any conservative Queenslander with any brains would think*

> *the same way...I mean, this thing* [the inquiry] *is basically just a witch hunt."*

In spite of his youth, Choveaux was the endorsed National Party candidate for the electorate of Brisbane at the last Federal election but described himself as "a suicide candidate to get the Senate vote up".

His demeanour was immature, arrogant, egocentric, rude and offensive. His partiality and apparent inability to act reasonably and objectively is demonstrated by this additional gratuitous contribution to the evidence:

> *"...If you would give me a chance, and that is that I think Luke spoke about Sir Joh as we all did and that was with reverence. Sir Joh was a great man; he made Queensland. Luke believes that, I believe that, we all did, and still do."*

His totally immature, rude and offensive disrespect for myself, those assisting me and the inquiry generally was regrettably obvious. Equally regrettable is the fact that the oath was for him a useless formality and any attempt by him to tell the truth was overridden by his obsessional view of the inquiry as a "witch hunt". Evasion, prevarication and untruthfulness were apparently justifiable in such circumstances. Choveaux's performance as a witness was clearly the worst. Others only marginally less so. On the other hand, some other Young Nationals who gave evidence were apparently intent on the truth and on giving the best of their recollection.

So far as Shaw himself is concerned, there is no basis for finding that before the trial he was actively engaged in promoting himself as a favourable juror for the accused or for a finding that he was actively assisting the deceitful process which led to the discharge of Panel Z. His passive involvement is a different question. Furthermore, as will appear, I am satisfied, having regard to the relevant standard of proof, that he was actively engaged during the trial in disclosing from the jury room information, at least to Sirl and Pitt, concerning Hedley Friend and other matters which would normally be retained within the confidentiality of the room. That is a measure of his attitude to the accused and to the jury service which he was sworn to discharge.

I am satisfied, particularly by the evidence of Cousins and Martin, that it was known in Young National Party circles that Shaw was, at the relevant time, performing jury service. He had discussed this with Cousins and speculated about the likelihood of his panel (Panel P) being concerned in the trial of Sir Johannes Bjelke–Petersen. In particular, I do not accept the denials of Sirl and Pitt, who

were close associates of Shaw, concerning their lack of knowledge of Shaw and his jury service. Some witnesses, like Sirl, insisted that they only became aware of the fact that Shaw was the foreman of the accused's jury at some time after the trial began. Others said they learned of this only after the jury had commenced its deliberations. I am satisfied, in particular, that Sirl and Pitt at least knew from the outset that Shaw had been empanelled on the accused's trial and that he had been selected as foreman. I will deal at some length with Shaw's breaches of jury confidentiality shortly and also with the involvement therein of at least Sirl and O'Brien.

11.1 Shaw's Record of Jury Service

The occasions on which Panel P was called to do jury service were ascertained by inquiry. Between Monday, 2 September 1991 and Friday, 20 September 1991, Panel P was called on five occasions. One such occasion was on Thursday, 19 September 1991. On this day Shaw applied to the Judge for and was granted excusal for that day. The result was that there was no chance on that day of his being empanelled. He gave evidence that the trial Judge excused him because he was concerned about an uncompleted assignment associated with his university course.

There is no reason at all to question the genuineness of this application for excusal or to suggest that it was designed to ensure his availability in case Panel P was to be used for the accused's trial on Monday, 23 September. On Thursday, 19 September 1991 there was no possible basis for even suggesting that Panel P may be used. On the contrary, it was clear on that date that the suggestion would not merit even speculative consideration. Panel Z was the jury to be used for the trial of the accused and there is no reason for believing that Shaw could have foreseen on that date the turn of events which occurred between Saturday, 21 September and Monday, 23 September 1991.

I am perfectly satisfied that Shaw's application for excusal was genuine and not provoked by extraneous considerations.

I need only repeat my earlier view that Shaw's casual mode of dress on Tuesday, 24 September when first empanelled, compared with his later personal style after empanelment, does not assist me in forming any relevant conclusion.

I am therefore satisfied that Shaw himself played no active role in encouraging his selection for the accused's jury. I am satisfied that it was generally known in Young National Party circles that he was doing jury service. On the other hand, I am satisfied that Shaw himself had no reason to believe that Panel P might be called for the trial of the accused. Indeed, until about 10.00am on Monday, 23 September 1991, neither Shaw, Counsel, nor Mead, had any reason to contemplate the possibility of Panel P being used. I have specifically excluded O'Brien and Butler from this latter finding.

11.2 Crooke Reprimands Pitt and Sirl

Crooke's secretary, Ms McCaull, had known Shaw and his brothers for some years. She also knew Kathleen Nioa (née Cairns) who worked on the personal staff of Senator Bjelke-Petersen, the wife of the accused. Ms McCaull knew that Mrs Nioa and Shaw were first cousins. Their mothers were sisters. When she, Ms McCaull, had on 23/24 September 1991 informed Crooke that Shaw's name was on the relevant jury list and that she knew him to be a member of "a conservative family" she said that she overlooked informing Crooke at the same time that Shaw was the first cousin of Kathleen Nioa, an employee of the accused's wife.

Ms McCaull was obviously well-known to many other active Young Nationals. She herself was a member. She also was aware of the fact that Shaw had been empanelled on the jury at the accused's trial.

During the trial she and Sirl were both attending a course on communications presented by a firm of public relations consultants. During the course of one of the lectures Sirl informed Ms McCaull "that he had knowledge" that one of the members of the jury was "a member of the ALP or a trade unionist". Ms McCaull allegedly told Sirl "to see Mr Crooke the Director, that he was not to be playing detective". Sirl's response was that "he was trying to find out information concerning this person called Friend to see whether he was a member of the ALP or the trade union movement and that he had asked Mark Pitt to help him...". Pitt was then a field officer employed by the National Party. As will be pointed out later, Sirl's father was an ALP supporter and had for some years been an active trade unionist. O'Brien's part in this will also be dealt with below.

After this exchange between Sirl and Ms McCaull the latter on the next day told Crooke of what Sirl had told her and of his plans to further his and Pitt's investigation of the matter.

I am satisfied that Sirl and Pitt had, by the time of Sirl's disclosure to Ms McCaull, already discussed the matter which Sirl had raised with Ms McCaull, and that the source of the information which Sirl had was Shaw. Shaw, Sirl and Pitt were closely associated and extremely active and committed National Party supporters and admirers of the accused. I will indicate more fully later my reasons for this finding. Once Crooke was appraised by Ms McCaull of what Sirl and Pitt intended, he was angry and he summonsed Pitt to his office.

All of these events occurred during the trial. It is not clear exactly when. I am satisfied, however, that the information had circulated throughout National Party circles well before the application to discharge the jury that a member of the jury was a member of the ALP or a trade unionist. The first recipient of this information outside the jury room was probably Sirl.

The information later reached Crooke in the form that the particular juryman was "a man with strong trade union and Labor Party connections and...that this man was a red hot Joh hater and under no circumstances would allow an innocent verdict to pass". Pitt was of course an employee of the Party and in the course of reprimanding Pitt, Crooke described he and Sirl as acting "like a couple of young boys from an Enid Blyton novel" and to cease their "detective work" forthwith "because the trial was in progress".

It seems that Pitt heard the reprimand almost in silence and said nothing to deny the allegations raised against himself and Sirl by Crooke. Crooke gave evidence that from what Pitt had said "their concerns were heartfelt...they genuinely believe...there was something wrong with a juror and that they had taken it upon themselves to look into the matter". An undertaking was given to desist. How effective that undertaking was remains to be seen. It may be that the inquiries were complete before Ms McCaull and Crooke learned of it. It will also be recalled that Cousins, a solicitor, had been contacted by Ms Stoneman and/or Pitt for legal advice as to how to deal with the fact that Friend, the "active trade unionist", was on the jury.

11.3 O'Brien and Sirl "Talk in Riddles"

Mrs Swan (née Mooney) had given evidence to the inquiry on the first occasion on 6 May 1993, shortly after the hearing commenced. She was recalled on 20 May 1993. In the meantime she had disclosed to Commission investigators certain very relevant material which became the subject matter of her evidence on the second occasion. Before dealing with it, I should say that she and Ms Cecilia Phyllis Frances Bird in volunteering this additional information displayed a most responsible attitude. It was for each a distressing experience and one cannot but be concerned that their courageous and honourable disclosure will by now have produced criticism and possible rejection of them by some of their less mature and more devious political peers.

Mrs Swan and Ms Bird gave evidence that Sirl had angrily criticised them for attending at the trial of the accused. It will be recalled that during the last week of the trial Mrs Swan had attended the court; had seen Shaw as a member of the jury and that she had passed this information to Ms Davis who had in turn told her friend Stephen Reddy. It was Reddy who thereupon disclosed his knowledge of Shaw to the Special Prosecutor.

By the night of Friday, 18 October 1991 the Special Prosecutor was well apprised of Shaw's affiliations and attitude towards the accused. On that evening Cowdery QC had moved to discharge the jury on the basis of Reddy's disclosures.

On that same Friday night a group of Young Nationals had met for dinner. The accused's wife was there and it was in the course of the dinner party that Sirl had turned his angry attentions to the two young women. They left. Sirl's abuse involved his chastising them for attending the trial and for disclosing the presence of Shaw on the jury.

Mrs Swan went on to disclose that after the trial Sirl was staying with Choveaux, and Mrs Swan and Ms Bird had gone to Choveaux's house whereupon Sirl "just started abusing us" on the basis that they had caused "trouble...being at the court". Again they left.

In December 1991 Sirl was at Mrs Swan's house for dinner. By this time Mrs Swan herself had been "investigated regarding the possibility of computer manipulation to get Luke's name on the jury list". Mrs Swan expressed her concerns to Sirl about the investigation when Sirl "volunteered to me that...he was sort of worried too because a Barry

O'Brien had rung him at home...(and that) a telephone conversation took place". Her evidence continued:

> *"All right. Well, tell me about the conversation?---Okay. Well, he said to Victor, to the best of my knowledge, that – – –*
>
> *MR CARTER: Victor is reciting to you, now, what O'Brien said to him?---That's right.*
>
> *Yes, go on?---And he said to Victor along the lines of: there's a party or a dinner party for 12 and we both know a guest or a couple of the guests. And he gave him – from what I recall, he gave him a telephone number and asked him to contact him from a public phone.*
>
> *That is for Sirl to contact O'Brien from a public phone?---That's correct.*
>
> *Yes?---To the best of my knowledge, that was the – that conversation.*
>
> *And the – the use of the phrase, 'a dinner party for 12', did you – did that have any special meaning for you?---Well, for a – for a second, I sort of thought, what's he mean; but then, obvious to what our conversation was about – the CJC and the trial, it clicked in my head that it was the – the jury.*
>
> *Yes.*
>
> *MR HANSON: Did he say when Mr O'Brien said he should ring from this public phone – – –?---Well, from – – –*
>
> *– – – what time of day or night?---Well, I'm sure it was the night time and I had the – I was under the impression that he meant for him to go straight away and ring him from a public phone and I'm sure Victor said something about he was walking down the street at night or something like that, so it sounded like it was in the evening.*

All right. Well, has Mr Sirl spoken to you about the same topic again in more recent times?---Well, I saw him at a branch meeting of the Senior – the Brisbane Central Senior Branch of the National Party, I think, two weeks ago, Tuesday two weeks ago. And I said that I had a subpoena to appear here and I said to him – you know – what if something comes out about – you know – Barry O'Brien because I'd really forgotten it until – you know – we – I'd been subpoenaed and we were all – sort of – talking again about – you know – all that time and whatever and he said to me – he said, 'Oh, look, just forget it. It's untraceable. I'll deny it, if anyone asks me,' well, you know that sort of thing.

And that is about all you can tell us, is it?---I think so. I don't think there is anything else."

It was then that Mrs Swan and Ms Bird spoke to Detective Sergeant Gordon at the Criminal Justice Commission and passed this information to him.

Ms Bird also gave evidence that she was aware from "very early in the trial" that Shaw was a juror, having learned that fact from Robert Martin. She described how Sirl had angrily chastised herself and her friend and had said "that the Shaw family was disgusted with me, that the National Party was disgusted with me, that is was all my fault that it had all come out".

I return to the conversation between Sirl and Mrs Swan in December 1991, the core features of which are that O'Brien had telephoned Sirl at his home, that O'Brien had referred to a dinner party for 12, and that both he and Sirl knew "a couple of the guests", that he then asked Sirl to telephone him, O'Brien, from a public telephone. When Mrs Swan raised the matter again with Sirl more recently Sirl asserted that he would deny it if asked.

I am in no doubt that Mrs Swan was a truthful witness in respect of this matter. The recitation of the material under oath was clearly a painful, emotional and distressing experience for her. She said:

"Yes?---And – like – I – I didn't really understand why – you know – when apparently the computer thing had been cleared up and I didn't know anything anyway. And then – you know – and I came here and told you

whatever I had to tell you. And we were watching the media reports and it seemed pretty clear that that was the sort of thing that you wanted to know – that that was what you were looking for: did people behind the scenes have knowledge about what was going on?

Yes?---and I mean, it's – it's not very nice when it's one of your friends.

Yes?---But we believed that if there was anything there, it should come out."

Sirl was then given the opportunity to respond to this evidence.

Sirl was for a time a school teacher; he holds the degree of Bachelor of Arts and a Graduate Diploma of Teaching. He is currently studying for an economics degree. He too is a student of Griffith University and an active Young National. He knew that Shaw was on the jury for the accused's trial, a fact which he said had "become pretty widely known". As to the knowledge of members of the Brisbane central branch of the Young Nationals he said:

"What circles of persons?---Okay, among the Young Nationals, certainly the Brisbane Central's branch. They all knew about it. And they had been telling people and talking about it, and I've always been of the impression that I thought it was because Rob Martin had simply gone down to the trial and seen him there, and so forth, but I think Rob Martin may have been the first person to tell me, but I'm not sure. I'm not certain, but it certainly got around."

It is difficult to describe appropriately Sirl's demeanour in giving evidence. He is apparently a very intense and highly-strung person whose speech is rapid and at times hard to understand. He appeared to be intensely nervous when giving evidence. The disclosure by Mrs Swan that Sirl had been in contact with O'Brien and that they had conversed "in riddles" had received considerable media publicity before he was called to give evidence. He gave this evidence when Mrs Swan's evidence was put to him:

"Go on?---I remember on this occasion – and this has what has been referred to in the news – I was at a table

with Celie and Alison and they were being very jovial about it and talking about Luke in the jury. And one of the things they thought was a really big joke was that they were saying that these ladies from the Friends of Joh – you know – were really being silly and they'd – they'd said – one of them had said to them that they thought – one of them had said that they believed that that foreman of the jury didn't really like Joh and they were a bit suspicious of him. And they thought that was a big joke.

One of the friends of Joh had said that?---Yes, that's what they had said.

Okay?---I couldn't verify whether that person was or wasn't but that's what they said. And they were saying these things. And I just said, 'Look, you know, keep quiet about it.' And what they did – was then, to ridicule me. Alison frequently makes fun of my voice, my funny mannerisms and things and – they went on about it and – – –

Well, did you explain to them why it should be kept quiet?---I'm not sure on what terms, no. Later on, I had a conversation with Rob Martin and he drove me home.

Yes. Well, did you tell him why – why you thought it should be kept quiet?---I – I told him probably what I've told you and I remember saying to him that I thought things were very serious because I'd actually spoken to a private investigator, a Mr Barry O'Brien."

Accordingly, Sirl was not to deny, as he had earlier asserted to Ms Swan that he would, that he had spoken to O'Brien during the trial. Indeed, he volunteered it, somewhat out of context, when being questioned about his verbal exchange at the Friday night dinner with Mrs Swan and Ms Bird. His evidence continued:

"When did you speak to Barry O'Brien?---During the trial. Again, exact dates are hard to know; obviously before – before this date and – – –

But there is no doubt it was during the trial?---Yes, it was during the trial.

Yes?---I'm certain – I'm sure of that. It seems to be in my mind. I'm very sure of that.

Yes. And you could not tell me at what stage of the trial? Early in the trial or towards the end of the trial?---No, I mean – I'd like to make it understood, too, that I've had no conversations with the CJC. I've not talked to anybody and it's very hard to recall events when I've had no information at hand or spoken to other people, so – – –

That is all right. Well, you can have the weekend to think about it and come back on Monday and tell us any more that comes to mind. But, just doing the best you can at the moment, are you able to put it towards the end of the trial or towards the beginning of the trial?---I think it was towards – – –

I know that is perhaps hard?---Yes. I – given not only the length – I know it wasn't at the end.

Not at the end?---I mean, it could have been in the middle or – or – or – well, I know it wasn't at the end. I – – –

Do you recall it – that it went on for weeks; the trial went on for weeks?---Well, it seems, from my mind, I know there was – because it was in the papers for so long – jury selections and things like that – I – the actual time of the actual empanelment and that – I – this – I wouldn't remember.

All right. Well, what, your present impression is, you spoke to Mr O'Brien perhaps early in the trial?---Yes.

How did that come about?---I got home one day and there was a phone message there: Barry O'Brien.

Did you know a Barry O'Brien?---Yes, I'd heard of Barry O'Brien.

Heard of him?---Yes.

In what circumstances?---He'd been reported in the papers in the Fitzgerald Inquiry and I knew about him. I'd – I'd read chapters in Phil Dickie's 'Road to Fitzgerald' and he's mentioned in that. And so, I thought that – and then, what happened was I was going out to the University.

Did you recognise the name as perhaps the same fellow that you had heard about?---Yes, I thought it was.

You thought it was the same one?---Yes, I thought it was a private – detective.

What, was there something about the message to – – –?---No.

– – – identify him?---No.

No more than the name?---No, I – I would say, probably because of the events that were taking place, it may have framed there. Perhaps it had been reported in the paper at that stage. I do not know – that he was acting in matters. I don't think so, though.

But there was nothing about the message to identify him, other than the name?---No, just the – the name and the telephone number, and ring.

It did not say, Barry O'Brien, Private Investigator, telephone number? It just said, Barry O'Brien?---I think so. I'm sure – – –

Right?---I don't recall, and I – I think – well, that might stick in my mind, but I don't think so.

All right?---And what happened was I went – well – – –

Yes, go on. Tell us?---Oh, sorry. Well, I went out – – –

You knew nothing of Mr O'Brien, up until that point? You had – except what you had read?---Read and heard, yes, and – – –

About him at the Fitzgerald inquiry and in Mr Phil Dickie's book?---Yes. I – – –

And never had any contact with him, up till that point?---I never have.

All right. Go on. You tell us the rest of the story?---I went to Griffith University, and I – and I phoned from there and spoke to somebody.

Well, why did you do that?---Because I was going out there. I was in a hurry.

Why did not you just pick up the phone at home and ring him back from home, there and then, before you went out?---Recalling now, there could be, for possible reasons, but I – I wouldn't speculate now, but – – –

Well, what possible reason could it be that you went and used a public phone at the university?---Well, because I was in a hurry to – probably catch a train. I have to use public transport to get out there, so it may have just been as simple that I needed to run in an awful hurry to get to the train. I mean, I really couldn't say now.

Was it – – –?---But I just went out to the university and chose to phone from there. The person I spoke to – I rang up and asked for Barrie O'Brien. It was a bit of a riddled conversation.

A riddled conversation. Did you get through to Barrie O'Brien?---I presume so.

Well, he responded and said it was Barrie O'Brien?---Yes, I believe so. I hope so.

All right. Well, what can you tell us about the conversation? We might try to unravel it for you?---Yes.

The conversation seemed to be mainly about Luke, but it was talking about things like dinner table – the thing that was reported in the paper. I couldn't remember his exact wording, but that sounds about right. Parties for – – –

What? Somebody said that there was a party for 12?– – –That sort of thing. I mean, I – it was, sort of, really – how would you put it? It was sort of like Get Smartish stuff, or television stuff. It was – – –

Get Smart stuff?– – –Yes. It was like – I mean, it was really – – –

As in Maxwell Smart?– – –It wasn't straightforward. Can I put it that way: it wasn't straightforward. They didn't – – –

Cloak and dagger sort of stuff?– – –Cloak and dagger? Perhaps not, but just – but certainly it was someone who wasn't trying to be obvious, which I thought was odd, actually.

Well, you do recall the expression 'a dinner for 12,' or something like that?– – –Something along those lines, yes.

Yes. And what about the rest of what you saw reported in the paper. We know – we – or we know a couple of the guests. Something like that?– – –That could've been said. I just can't recall. That could've been said, but it may not have been said. Then the person did ask me about Luke. They – they were mainly concerned about Luke at that – in – in the main, and I'm sure I told the person – told O'Brien – it must've been O'Brien, I imagine. I'm sure I said that he was in – enrolled in CAD, and I was asked something – I know, then they must've got direct, because I – – –

What does CAD stand for?– – –Commerce – it's Division of Commerce and Administration. It's a faculty, if you like, I suppose you'd put it the best way, out at Griffith University.

Yes. All right?---And I think I would've conveyed to them that I – that I – I must've conveyed that they – I would've thought he would've been a conservative person, or sympathetic – something along those lines, but – – –

Well, did you tell him he was a Young Nat, or did he know that?---Yes, I think I would've said that. I don't – – –

Who said it? Who said it? Who said it: you or him?---I would've said that. I'm sure I would've said that.

Who took this telephone message?---I don't know.

Well, you – you tell me you got home and found this telephone message to ring Barrie O'Brien?---Yes.

Who took it?---It could've been anyone in the family. We – at home, the practice is, there's always a note pad, or a jotter, or something, near the telephone, and people ring me all the time, and the messages are taken down. I don't know if it was Mum or Dad or – I think my younger brother may have been at home at that stage.

Any idea how or why Mr O'Brien got hold of your name and telephone number?---Well, in terms of – of Luke, I would imagine – just ask me off the top of my head?

Yes. Just give me your best guess. Why was Barrie O'Brien ringing you?---It was widely known around Griffith University – very widely known – that I knew Luke Shaw. That's for – and it would've been, I would imagine, known throughout the Young Nationals. Now, I don't know who would've told Barrie O'Brien that I knew him, but it was certainly not something that wasn't widely known.

All right. If I could take you back to the conversation now with Mr O'Brien. There is this mysterious talk about a dinner for 12, and is there some mention of two of the guests?---Yes.

Yes. What was said about that?---I made mention of a Mr Hedley Friend.

And what did you say about Hedley Friend?---And he didn't seem very interested in Mr Hedley Friend, as well.

But what did you say about Hedley Friend?---I said that I'd become aware – that I believed there was a juror on there named Hedley Friend, and he was a – well, I was aware at that stage he was a trade unionist, and I'm sure I said that.

How had you become aware of that?---I'd – inside the student union office, I'd simply seen something on a – on a jotter in the chairperson's office saying Hedley Friend, along the lines of juror, and it was mixed up with a lot of stuff about the clean team and the SRC elections, and I'd just seen it there, and that concerned me.

What? On a jotting – – –

MR CARTER: Say that again. Sorry. Yes, go on Mr Hanson.

MR HANSON: Say it again. Mr Carter asked you to say it again. A little bit slower, if you would not mind?---Yes, I – I saw – – –

On a jotter?---At some point in time I'd seen – – –

On a jotting pad?---On a jotting pad, or something – something of a similar nature, I'd – I'd seen it laying around the SRC office.

The SRC?---Student Representative Council.

At the university?---Yes.

Yes. What was the jotting? What did it say?---Oh, as I just said, I think it was on the lines of the person's name, something about the jury, and – or juror, and I'm sure it said trade unionist, something along those lines. I did ask

my father about it, because dad had been in the TLC for a period of time. I'm not sure if he was retired at that stage; I think he may have just retired. And he seemed to have recalled coming across a friend at some sort of union meeting and saying he was – he thought he was a metalworker, or something like that, and a big burly fellow, and – but dad's very disgruntled about my involvement with the Young Nationals.

I cannot understand what you are saying, I am sorry?---Sorry?

You are going far to fast?---Oh, dad's very disgruntled about my involvement with the Young Nationals, so he didn't want to know much more about it.

Well, how did you associate this jotting out at the university with Sir Joh's trial, or Sir Joh's jury?---Sorry?

How did you associate this piece of jotting with Sir Joh's trial?---Oh, quite simple. I would've assumed it came from Labor Party sources.

You assumed it came from ---?---Labor Party sources.

What, the jottings did?---Yes. Because the people that were running the union at the time were in the Labor Party.

The people that what?---The people who ---

Were running the union?---The people who controlled the executive at the time, as I understand it – well, this is quite obvious now – are members of the Labor Party. So, I would've just assumed that, and I think that's what I did assume.

And they left a jotting behind?---Yes. It wasn't that uncommon for them to leave all sorts of things behind.

But how did it – how did it connect up with Sir Joh's jury?---Well, I would've probably assumed that that was the – that was the case.

What on earth for?---Well, why else would you have something to do with juror.

He might have been somebody's gardener, coming in to vacuum the swimming pool the next day?---Well, events that have taken place subsequently indicate this person was – – –

MR CARTER: No, no, no. Forget about what happened subsequently. Yes, go on Mr Hanson?---Yes.

MR HANSON: How did you connect this jotting that was left behind with Sir Joh's jury?---It was an assumption that I made.

Yes, but what made you – – –?---I mean – – –

– – – make that assumption? Can you tell me more about the jotting, then, that helps us?---No, I can't, sorry, and I wouldn't have – – –

You just saw a name?---Yes, and some other scribblings, and stuff about – – –

Something about the clean team, you mentioned?---The elections, yes, and that's it. I mean, perhaps at that stage I didn't assume, but I – I'm sure I did. That's all I can say, is I'm as sure in my mind I assumed that – that it did, and I think it was at a later date – I'm sure it was after this event, to be honest about it, I remember walking into the union office one time and Mr Stephen Mitchell chanting 'Joh's going to gaol. Joh's going to gaol,' to me. I got quite a bit of ribbing about this, while the trial was on, from the Labor people, saying that Joh was going to gaol.

But why did you see fit to go and ask your father about this name?---As I have explained, my father was a delegate for the Trades and Labor Council for a long time.

Yes, and you thought he might know him?---Well, as a delegate for the Trades and Labor Council he would meet people from all sorts of fields, so I thought it was a possibility; just curiosity.

Did the jotting mention that this Mr Friend had something to do with the Trade Union movement?---As I recall, as I've said, I believe it said something along the lines unionist or trade unionist.

Sorry, you still have not made me understand how you make a connection between this scrap of paper and Sir Joh's jury?---Sorry?

You have not yet got me to understand how you make the connection between this scrap of paper that you found and Sir Joh's jury?---That was the thing so much in my mind, but I certainly know that I did make that assumption. Maybe it was only an assumption at the time; perhaps I was wrong. I was entitled to make that assumption, but I did, and I guess with the fact that the trial was going on and the ribbings from these people it seemed to me to be a logical assumption at the time. To my mind it was a logical assumption at the time. If it is not a logical assumption to your mind, fine, but I know at the time it was to mine.

All right. So you went and checked with your father and did he confirm that he knew a Mr Hedley Friend?---He said that he knew of a Friend, and he thought he thought he had been involved in some of the Metal Workers or something like that, but he didn't really – he wasn't sure. He wasn't very sure, at all.

Well, now, all of this was before you got the message to ring Barry O'Brien; is that the case?---Sorry?

All of this happened before you got the message to ring Barry O'Brien?---Yes.

How long before?---I wouldn't have thought it would have been very long before. I just really can't recall.

All right. So you get – – –?– – –I cannot recall.

– – – this message out of the blue, and you ring him up, and he starts talking in riddles; is that the case?– – –It certainly is. It is very odd, as I have said.

And in the course of those, you threw in your own riddle and mentioned Mr Hedley Friend?– – –Yes.

Why?– – –Well, I thought it might be important if someone is asking about the thing and there is this potential juror there.

MR CARTER: Asking you about what?– – –About Luke and the trial. The person obviously wanted to know about Luke Shaw.

No, he is talking about a dinner party at 12 and there is a couple of people there that we know?– – –Well, later on he was asking specifically about Luke as I have testified. He asked what division is he in and stuff like that. I mean, this person was talking in riddles, but it seemed to me – it was very odd, your Honour, Commissioner or whatever it is – how do I address you?

Just keep going thanks, do not worry about me?– – –It was an extraordinary thing; it was very odd and to some extent they progressed I guess in some ways it did bother me. I mean, it was very odd, yes.

MR HANSON: Well, did you end up getting the message across to Mr O'Brien that you thought there was a Trade Unionist on the jury called Hedley Friend?– – –Yes, I'm sure I did that. Like I said, the person – well, Mr O'Brien – must have been Mr O'Brien, seemed to be more interested in Luke Shaw.

MR CARTER: Are you sure it was not Shaw who told you about Friend?– – –No. I had no contact with Luke Shaw during the trial, none whatsoever.

Well, Mr Hanson will come to that, but go on Mr Hanson.

MR HANSON: Are you sure it was not you who contacted Mr O'Brien to let him know that you had some information; did it happen the other way around: that you got in touch with Barry O'Brien to let him know that you had some information about the jurors?---I'm sure I did not contact Mr O'Brien, no.

That you initiated the contact is what I am trying to say; it happened that way rather than the opposite as you tell it?---You mean that I would have phoned Mr O'Brien's office?

Well, whoever – wanted to get a message through to the defence team that you had some information?---I don't believe I ever did anything – I don't believe before that time, as far as I recall, I don't believe I did, no.

Well, you say Mr O'Brien initiated the contact between the two of you?---As far as I'm aware.

Well, what sort of things was he wanting to know about Luke Shaw?---As I said, I think I mentioned – raised the issue of his sympathies – – –

His what?---His sympathies – political sympathies.

Political sympathies, yes?---And I know he did ask about his studies and what division he was in? I know that; I remember that. For some reason I remember saying he was in commerce and administration.

All right.

MR CARTER: Well, what did he say to you about Shaw? What did he say to you? How did it come about?---I really – I just could not remember the whole conversation. The other night when I was thinking of the things that have been in the media and so forth, I've tried hard to remember exact wordings of conversations; I just cannot. I mean, this happened so long ago, but it was odd; I will grant you that.

I probably concede that, but go on.

MR HANSON: Well, were you able to give him any information about Luke Shaw?---Yes, as I've testified, I said that he was in commerce and administration. I can only think – I'm positive I would have said he was a Young National.

MR CARTER: Why would he be asking you about, 'Do you know Luke Shaw'?---Well, I've been asked to give supposition; I suppose – – –

No, no, no, just tell me. You see, what you have told me so far is this: you got a – someone wrote a message on a pad at home for you to ring Barry O'Brien at a certain number?---Yes.

Now, for some reason you associate the particular name with a person who had been mentioned in relation to some other matters; that seems to have come to mind very quickly, and you ring the number and then you have a conversation with somebody who you say is speaking in riddles?---For the most part, yes.

And that person then, you say, asks you about Luke Shaw: 'What can you tell me about Luke Shaw'?---I don't think I actually said – I can't really recall I said, 'What can you tell me about Luke Shaw?' I think that's placing words in my mouth. As I've said – – –

No, I do not want to place any words in your mouth; I thought you were telling him that he was in a particular department at the university and so forth – – –?---Yes, I recall saying that.

Pardon me. All of that assumes that you were responding to some question that he must have asked you about Luke Shaw?---Yes, as I've testified earlier, at the end part the questions seemed more precise; I remember that, because I remember – I'm sure he just asked me like what does he do at university or something like that.

What does – what, just out of the blue: 'What does Luke Shaw do at the university'?–––Somewhere in the conversation. I cannot remember the conversation. I can't remember it as it flowed. I can't remember how it – the opening words. I just – – –

Well, did he say – – – ?–––If I could remember the conversation – I wish I could.

– – – do you know Luke Shaw? Do you know a young fellow at the university called Luke Shaw?–––Yes.

Something like that?–––Yes, well he – – –

Did he?–––Well, he must have if he asked me about his faculty, yes, at some point, I would imagine. Again, I wish I could remember the conversation, because there was – – –

Sure this was not before the trial?–––No. No, absolutely not. I did not know that Luke Shaw was on the jury before the trial, absolutely not, because it came as a great surprise to the people who found out – – –

Well, it is unlikely that he would be on the jury before the trial, because the trial had not started you see?–––Sorry?

It is unlikely he would ask you before the trial, because – for obvious reasons?–––Sorry?

Did he ask you – did he ring you and ask you whether you knew Luke Shaw before the trial?–––Before the trial?

Yes?–––No.

I'm sure it was during – I'm sure it was during, but that is also as I recall it. But then – – –

Well, what you say is that during the trial he rang you and he asked you, 'What do you' – or words to the effect – 'What do you know about Luke Shaw?'?–––Well, I'm not sure if he used those exact words. You see, I – the

problem is I can only remember what information I conveyed. I can remember information at times, but I just cannot remember the exact text of the conversations. I remember the - some of the other quirky stuff because it was just so odd.

MR HANSON: Mr Sirl, did Mr O'Brien tell you who he was and why he was - wanted to talk to you, and why he wanted this information?---No.

Surely you did not respond to his questions just out of the blue without knowing who he is; what is the purpose of the call; why does he want to know about Luke Shaw; what is all this about? Surely - - -?---Yes, that's why - - -

- - - there had to be something introductory before you got to talk to Luke Shaw?---No, I just talked about - I would have asked - 'This is Barrie O'Brien - I've been asked to ring.' That's why I've said it was very odd, and in a lot of ways later on it struck me as very odd, and I think a little bit scary - - -

That is not very surprising - - -?--- - - - a little bit scary.

- - - the way you tell the story to us. But surely you said, 'Well, who are you? Why am I ringing you? Why do you want me to ring you? Who are you? What's your business?---Well, I'd already made the assumption it was a private investigator. I just - - -

MR CARTER: Why would you make that assumption?---Because I'd seen the name. I knew who he was, in terms of the media and so forth.

You are saying that in - some time in 1991 you got a phone call to ring a man called Barrie O'Brien at a certain number, and you make an assumption as to who he is: that he is a private investigator, and that he is an ex-police officer and been involved in the Fitzgerald Inquiry?---Well, all those things were - - -

Been involved in someone's book?---Well, all those things were known - that - I assume that's why I spoke to him. That's - as I said afterwards, maybe I was very unwise to speak to this person, because I - - -

Think about it again over lunch, will you? We will resume at half past 2."

I have quoted at length the above excerpt from Sirl's evidence. It demonstrates to an extent the distinct lack of comfort Sirl experienced when confronted with Mrs Swan's evidence.

I say quite unequivocally that Sirl's evidence on the point is wholly unsatisfactory. It is even ridiculous and almost insults ones intelligence. It requires some analysing.

Mrs Swan places her original discussion with Sirl concerning O'Brien in the context of her expressing her own concern at the fact that her employment at CITEC and her knowledge of Shaw and her membership of the Young Nationals had aroused suspicion. She places the conversation "in December 1991". Other material available to me discloses that Inspector Huddlestone, the Commission's officer who led this part of the investigation, was engaged on it during November/December 1991. It was completed with Huddlestone's report which is dated 11 December 1991. At that time the termination of the criminal proceedings against the accused was recent. I am in no doubt that Mrs Swan gave a truthful and reasonably accurate account of the exchange between herself and Sirl. She did not know of O'Brien and it was Sirl who introduced his name and the contact between them. The thrust of her recollection is clear, namely that:

(a) O'Brien had telephoned Sirl at his home;

(b) that O'Brien gave Sirl a telephone number for him, Sirl, to make contact with O'Brien;

(c) that he, Sirl, had spoken to O'Brien again from a public telephone; and

(b) that part of the conversation concerned "a dinner party for 12" in which the names of Shaw and Friend were mentioned.

The further fact that Sirl stated later that he would deny the contact is no longer relevant. It is Sirl's evidence of the admitted contact with O'Brien that needs to be analysed.

I am satisfied that it was O'Brien who rang Sirl. This fact is confirmed by the evidence of Sirl's father who took O'Brien's call. O'Brien denied it. It cannot be ascertained of course what it was which prompted O'Brien to telephone Sirl. The mere fact that the call was made suggests either that O'Brien and Sirl had had prior contact or that O'Brien had received information from some other source which led to his telephoning Sirl. If O'Brien did not previously know Sirl, then O'Brien must have been told that he should telephone Sirl by some other person who knew both O'Brien and Sirl, and who had told him, O'Brien, that Sirl possessed information which may be of interest to O'Brien. There is no doubt that O'Brien telephoned Sirl. If O'Brien and Sirl were then strangers to each other then the contact must have been initiated by a third person known to both O'Brien and Sirl. After all, if Sirl was a stranger O'Brien had to know the personal details concerning Sirl so as to be able to make the contact.

There is no doubt in my mind that the subject matter of their discussions was the jury - the 12 persons at the mythical dinner, of whom both O'Brien and Sirl knew of two - Shaw and Friend.

Sirl swore that as soon as he noted that "Mr Barry O'Brien" had telephoned, he immediately identified O'Brien as a private investigator and a former police officer who had been mentioned in evidence in the Fitzgerald Inquiry, and whose name had appeared in a book written by Phil Dickie, a former journalist with the Courier Mail whose articles had preceded the establishment of that inquiry.

If Sirl had had no prior contact with O'Brien, how did he know O'Brien's business as a private investigator, and why would he identify the caller as the former police officer whose name had been mentioned elsewhere at least two years beforehand? And one might well ask: why would O'Brien in these circumstances have occasion to ring Sirl rather than any other Young National who was an associate of Shaw? Obviously O'Brien had obtained Sirl's name and telephone number from some source and knew that it was relevant for him to ring Sirl. There was no other subject matter in which they shared a common interest other than the Bjelke-Petersen jury.

I am in no doubt that O'Brien rang Sirl either because they had been in prior contact or because some person with a major interest in the Bjelke-Petersen trial suggested to O'Brien that he ring Sirl. O'Brien's opening gambit concerning "the dinner party for 12" on the occasion when Sirl returned the call, can leave one in no serious doubt that the reference was to the Bjelke-Petersen jury. The contact between these two men cannot be sensibly explained unless they both knew each other previously or were put into contact during the trial by a third person who knew that they had a mutual interest in knowing what one or the other knew. The fact that O'Brien made the first contact suggests that Sirl had information about the jury - of whom they both knew two - which O'Brien was anxious to discuss. He, it will be recalled, had been engaged by Butler to co-ordinate jury inquiries. The fact that his investigations extended beyond the commencement of the trial is relevant in this context.

The next material fact is that Sirl did return the call - by public telephone. According to Mrs Swan, Sirl said that he had been advised by O'Brien to speak to him by public telephone. There is nothing in the evidence of Sirl's father who took the message which advised Sirl to return the call from a public telephone. Taken by itself it was not necessary to return the call from a public telephone. Why not use the telephone in his own home where he received the message? His response to this inquiry, as shown above, needs no further emphasis. Mrs Swan's evidence makes it clear that the requirement to use a public telephone came from O'Brien. If that was not part of the message which O'Brien gave to Sirl's father, and Sirl did in fact use a public telephone, the inference is irresistible that O'Brien and Sirl had had prior contact, and it was agreed that Sirl should communicate with O'Brien only from a public telephone.

Sirl's evidence as to the content of the call is largely unintelligible and is a mixture of evasion, confabulation, prevarication and lies. I reject it as unreliable. After the reference to "a dinner for 12" and the fact that "we know a couple of the guests", Sirl said that O'Brien "did ask me about Luke". There would be little need for O'Brien to ask Sirl "about Luke" during the trial. O'Brien knew about Shaw before the trial. He knew he was a Young National from his inquiries there. O'Brien had assessed him as "Yes ****". He was the first juror chosen on O'Brien's advice. It is simply fatuous for Sirl to expect one to believe that in this conversation after the trial O'Brien asked him "about Luke". Sirl said that he told O'Brien that Shaw was a Young National. But O'Brien well knew that. He had been told it by Crooke before the trial began.

Perhaps one revealing but unguarded remark was made by Sirl which contains a grain of truth.

It is to be found in this question and answer:

> *"Any idea how or why Mr O'Brien got hold of your name and telephone number?---Well in terms of...of Luke Shaw I would imagine...just ask me off the top of my head?"*

Was Sirl revealing that O'Brien got his, Sirl's, name and telephone number off "Luke"?, which would suggest that O'Brien and Shaw had been in contact about Sirl. There was one matter of common interest between Shaw, Sirl and O'Brien, and that was Friend. But more of that later.

I am satisfied that the purpose of the O'Brien/Sirl contact was not designed to enable O'Brien to learn details of Shaw from Sirl. O'Brien had already been sufficiently briefed on that subject.

And again: what was the need for O'Brien to speak in riddles? If O'Brien and Sirl were strangers and the initial telephone call from O'Brien was made on the basis that they were strangers, then it needs to be noted that immediately Sirl returned the call (from a public telephone) he is met with the response concerning a dinner for 12 in respect of which O'Brien and Sirl, two strangers, know two of the guests. Sirl must have been bewildered. He failed hopelessly to adequately explain his response to this person (O'Brien) who was apparently speaking "in riddles". Or perhaps he was not, so far as Sirl was concerned, speaking in riddles otherwise a person like Sirl, a graduate school teacher and Bachelor of Arts, might well inquire for more information – perhaps there was a misunderstanding; perhaps the call had gone to the wrong person; what dinner party? Where? Who are the 12? Who are the two whom we both know? – these are some of the questions any person of average intelligence might ask. Sirl seems not to have done that, nor, it seems, did he have to, but rather sought to explain in ineffectual terms this rather bewildering phone conversation between two strangers, both of whom, it is now known, had a keen and close interest and association with persons involved in the Bjelke–Petersen trial.

Sirl then volunteered the information to O'Brien – "I made mention of a Hedley Friend" – Why? one might ask. Was he to be at the dinner party? Nonetheless for some inexplicable reason Sirl volunteered the name of Hedley Friend about whom Crooke was concerned, but concerned because

Sirl and Pitt were making their investigations into this ALP person, a trade unionist and "a red hot Joh hater". Sirl, having sworn that "he (O'Brien) didn't seem very interested in Mr Hedley Friend", went on to say to O'Brien "that I believed there was a juror on there named Hedley Friend". So the discussion must have been about the jury – otherwise why refer to "the juror – Mr Hedley Friend", and O'Brien had been the chief investigator into the jury panel for the trial. Then Sirl provided the hearing with perhaps the most incredibly fatuous answers of all:

> *"How had you become aware of that?* (namely that Friend was on the jury)*---I'd – inside the student union office, I'd simply seen something on a – on a jotter in the chairperson's office saying Hedley Friend, along the lines of juror, and it was mixed up with a lot of stuff about the clean team and the SRC elections, and I'd just seen it there, and that concerned me.*
>
> *What? On a jotting – – –*
>
> *MR CARTER: Say that again. Sorry. Yes, go on Mr Hanson.*
>
> *MR HANSON: Say it again. Mr Carter asked you to say it again. A little bit slower, if you would not mind?--- Yes, I – I saw – – –*
>
> *On a jotter?---At some point in time I'd seen – – –*
>
> *On a jotting pad?---On a jotting pad, or something – something of a similar nature, I'd – I'd seen it laying around the SRC office.*
>
> *The SRC?---Student Representative Council.*
>
> *At the university?---Yes.*
>
> *Yes. What was the jotting? What did it say?---Oh, as I just said, I think it was on the lines of the person's name, something about the jury, and – or juror, and I'm sure it said trade unionist, or something along those lines."*

In assessing the worth of this evidence I am prepared to assume as true the fact that at that time the SRC was controlled by the sympathisers of the Labor Party.

According to Sirl, the name Hedley Friend meant nothing to him until he went into the SRC office and there saw "a jotter" with the name written on it, further that it said "something about the jury – or juror", and in addition, "I'm sure it said trade unionist – something along those lines".

Therefore, in the course of this extremely curious and unprecedented telephone conversation between these two strangers, Sirl gratuitously mentioned the name Hedley Friend, which Sirl had accidentally seen written on a jotter alongside a reference to "the jury...or juror", and further, that he was a trade unionist. This revealing disclosure about the person who subsequently became the subject of discussion in court, and who was widely discussed in National Party circles, was first discovered by Sirl in, of all places, the office of the Student Representative Council at Griffith University. Sirl assumed the information had come "from Labor Party sources".

In short, Sirl, the Young National Party activist and friend of Shaw's who was on the Bjelke–Petersen jury at the time, accidentally found written on a note pad not only Friend's name, but the fact that he was on a jury and was a trade unionist. But why associate this casual note with the Bjelke–Petersen jury? Sirl tried to explain:

> *"But how did it – how did it connect up with Sir Joh's jury?---Well, I would've probably assumed that that was the – that was the case.*
>
> *What on earth for?---Well, why else would you have something to do with juror.*
>
> *He might have been somebody's gardener, coming in to vacuum the swimming pool the next day?---Well, events that have taken place subsequently indicate this person was ---*
>
> *MR CARTER: No, no, no. Forget about what happened subsequently. Yes, go on Mr Hanson?---Yes.*

MR HANSON: How did you connect this jotting that was left behind with Sir Joh's jury?---It was an assumption that I made.

Yes, but what made you - - -?---I mean - - -

- - - make that assumption? Can you tell me more about the jotting, then, that helps us?---No, I can't, sorry, and I wouldn't have - - -

You just saw a name?---Yes, and some other scribblings, and stuff about - - -

Something about the clean team, you mentioned?---The elections, yes, and that's it. I mean, perhaps at that stage I didn't assume, but I - I'm sure I did. That's all I can say, is I'm as sure in my mind I assumed that - that it did, and I think it was at a later date - I'm, sure it was after this event, to be honest about it, I remember walking into the union office one time and Mr Stephen Mitchell chanting "Joh's going to gaol. Joh's going to gaol," to me. I got quite a bit of ribbing about this, while the trial was on, from the Labor people, saying that Joh was going to gaol."

This evidence defies acceptance by any rational reasonable mind. The only basis for this evidence was Sirl's further evidence that "the people that were running the union at the time were in the Labor Party". Sirl's obviously jaundiced political mind has given way to crude invention. I frankly regard the evidence as blatantly untruthful and incapable of being believed.

On the other hand, I am satisfied that Sirl did inquire of his father about Friend and his union affiliations. Sirl's father confirms that. The questions remain: why did Sirl question his father about Friend? How did he learn that Friend "a trade unionist" was on the jury panel? He did not know Friend. Indeed, there was no objective reason outside the jury room to question Friend's political affiliations. O'Brien had marked him on the list as "maybe yes". That is no doubt why he was not challenged. If, therefore, Sirl's explanation for his concern about Friend (the jotter at SRC) is false, but that he did inquire of his father, a former trade unionist, the inference is compelling that he learned the details from another person who at that time was concerned in matters referable to the Bjelke–Petersen jury

and who had told him. The obvious person was Shaw. This readily explains Sirl's disclosure to Ms McCaull and her disclosure to Crooke. It readily explains why Sirl and Pitt were doing "the detective work" of which Crooke complained. Their informant and the only known person who was in a position in relation to the Bjelke-Petersen jury to learn of Friend's political affiliations so as to make it a cause of concern to the National Party and the accused was Shaw. Friend himself gave this evidence:

> *"All right. Did you reveal to the other members of the panel - other members of the jury, that you yourself had an interest in politics of the Labor persuasion?---I'm quite positive that at least two of the jury panel knew. A discussion took place. There was no reason why other members of the jury panel wouldn't know that, but I am positive in my mind that at least two knew.*
>
> *And that you were - had been a stop steward?---Yes.*
>
> *A union official - that was known to the other members of the jury was it?---I don't know whether you'd call it an official - but yes, as a shop steward they did know.*
>
> *Fairly early in the trial?---I would say, from memory, within the first two or three days, possibly the first day, but at least within the first two or three days."*

It is, in my view, more probable than not that Shaw knew of Friend's trade union association and that this was disclosed by Shaw to Sirl and/or Pitt. I am equally satisfied that O'Brien and Butler soon knew of this revelation and that O'Brien discussed it at least with Sirl. It is probable that this contact between O'Brien and Sirl occurred within the factual context of a concern by those closely involved in the trial that Friend may, by reason of his associations, vote for a conviction. The immediate recipient of that concern was Shaw. It was soon to be revealed to a wider audience.

I repeat that after long and, I trust, careful consideration of the point, I am satisfied in accordance with the required standard that Shaw himself disclosed to others, including Sirl, Pitt and probably O'Brien, the details concerning Friend.

Pitt agreed that he and Shaw had spoken to each during the trial, but this subject was not discussed.

O'Brien denied not only the contact with Sirl, but that he ever knew Sirl. He said, inter alia:

> *"...he certainly never rung me; I've never heard of him."*

When asked, "did you ring his household and leave a message for him to ring you?", he replied, "I did not". The evidence of Sirl's father, which I generally accept, that he took the call to his son leads me to the firm conclusion that once more O'Brien was untruthful. His denial of another important matter of fact, like the denial of his handwriting on the list of Panels P and K is disturbing.

I am satisfied that O'Brien's first knowledge of Friend came either from Shaw or from Sirl. Sirl had obviously discussed his knowledge of Friend with others, particularly with Pitt. As pointed out earlier, O'Brien had assessed Friend as "maybe yes". That is probably why Gundelach did not challenge him. He became juror number 4. Other evidence establishes that "the defence team" only learned after the trial of the full details of Friend's trade union affiliations. Ms Cutlack, in an affidavit sworn on 30 October 1991, stated that on 24 October 1991 she made the searches in the union offices. Furthermore, O'Brien did not speak to Donald George Wicks, the administration officer at Evans Deakin Industries, until 30 October 1991.

However, in his letter dated 24 October 1991, in reply to the Special Prosecutor's letter dated 22 October 1991, Mead wrote:

> *"With respect to the comments made by Mr Greenwood QC in the course of the Crowns application to discharge the jury I advise that some time during the first week of the trial, after the jury was empanelled, our investigator indicated that his enquiries revealed that Mr Hedley Friend, juror number 4, was in fact a member of the Federated Iron Workers Association of Australia up until the end of 1989 who had worked at Caincross Docks, probably employed by Evans Deakins and was a very active official at shop steward level with the Union at that site and after 1989 was a member of the Amalgamated Metal Workers Union working for a food processing*

> *factory (probably Edgells) in the Redland Bay area. This information has been confirmed by a number of other independent sources and a subsequent search of the Trades and Labour Council records shows that he is a member of these Unions. The records do not however include his position within these Unions as far as I can gather. At the time I received such information I was sufficiently satisfied with the bona fides of such information that I instructed my Counsel Mr Greenwood Q.C. accordingly and that resulted in the submission made by him and referred to by you in your correspondence."*

According to that letter, it was "during the first week of the trial" that the information concerning Friend first became available. It will be recalled that Friend gave evidence that he revealed his interest in union affairs with fellow jurors "within the first two or three days". It is not unlikely that that was the first knowledge which Shaw had concerning his fellow juror's interest in union matters. It would be remarkable if some outsider, perchance knowing of Friend's membership of the jury, revealed his identity to the defence. Importantly, Mead's letter reveals that the source of the information was "our investigator" who "indicated that his inquiries revealed that Mr Hedley Friend" was a trade unionist. That was a reference to O'Brien. So that, according to Mead, O'Brien learned "during the first week of the trial" about Friend. An obvious source of that information was Shaw, either directly or through Sirl.

The further inquiries by Ms Cutlack and O'Brien after the trial were probably undertaken in the light of what had happened during the application to discharge the jury and because of Drummond QC's letter dated 22 October 1991.

The knowledge of Friend's place on the jury and his trade unionist background became well-known in National Party circles and to the defence team during the trial, in the case of the latter from a time during the first week of the trial. The O'Brien/Sirl contact needs to be seen in the light of that fact.

I am satisfied that Shaw was the first source of the information concerning Friend, and that it came to the defence team via O'Brien, either directly from Shaw or through Sirl to O'Brien.

It is finally necessary to refer specifically to this evidence of O'Brien which he gave when questioned concerning the source of his knowledge about Friend:

> *"Do you recall taking a statement from a Mr Wicks, employer of Mr Friend?---Yes.*
>
> *And we have got the document here. In fact, you can see it. It is in the bundle that is in front of you there?---Yes.*
>
> *You will see it at page 110?---Yes.*
>
> *Is that a handwritten statement by Mr Wicks?---It is, yes.*
>
> *Written by yourself?---Yes.*
>
> *Dated 30 October?---Yes.*
>
> *And we have had some evidence from Mr Wicks. Do you recall going to see Mr Wicks, employer of Hedley Friend?---I do.*
>
> *About that time, the 30th?---I thought that he was interviewed during the trial.*
>
> *Mr Wicks?---Mm.*
>
> *Not Mr Friend. You would not have interviewed Mr Friend during the trial, would you?---No.*
>
> *Were you in touch with anybody on the jury during the trial?---No.*
>
> *Or anybody who was in touch with anybody on the jury during the trial?---No.*
>
> *Have you ever spoken to a Mr Victor Sirl?---No.*
>
> *Do you know the name?---No.*
>
> *It is an unusual name, is not it? Victor Sirl?---No, I don't.*

Never spoken to Mr Victor Sirl?---No.

Ever had any feedback from the jury room during the trial?---No.

Mr Greenwood and others tell us that at some stage – well, in fact, he told the judge, Judge Helman, during the trial that it came to their notice there was a trade union official on the jury. Do you know anything about that?---Well, that came to my notice very shortly after the jury was selected.

Via what means?---By telephone.

Who from?---I don't know now.

Do not know?---No.

MR CARTER: Victor Sirl? Victor Sirl?---I have no recollection of Victor Sirl, so - - -

Did the call come, do you remember, from a public telephone?---No, I don't.

You do not know?---No.

Yes.

MR HANSON: And what was the information?---The information was that a juror – well, whatever number, and I'm not even sure whether they said by name – was a shop steward and – at Cairncross Dock and that that person was on the jury and was an experienced – words to the effect that he was an experienced shop steward.

MR CARTER: Well, tell me more about the call?---Yes. It was one of the people who had been involved in the network.

Well, which one?---I don't know. I didn't keep a note of it.

Whether you kept a note of it or not, did the person identify himself or herself?---I think so, yes.

Was it a male or a female?---A male.

And what was the person's name?---I don't know.

Was it a person you knew?---No.

A stranger?---Yes.

So that really it was in the nature of an anonymous call?---No, I - no, it was - - -

The person - - -?--- - - - someone who had referred to - somehow who had been carrying out inquiries on the jury is what I gleaned from the call.

Well, how did they know to contact you and where to contact you?---The same as anyone else who had been contacted by any of the National Party figures whom I had approached.

So this person who you say rang you was a person who had been enlisted by one of the persons who you had sought to enlist?---That's correct.

It was not a person with whom you had direct dealings - - -?---No.

- - - but a person with whom one of your enlisted group had had dealings, and that person rang you?---Yes.

And you do not know who the person was?---No."

Again, one sees O'Brien's disclaimer concerning any knowledge of Sirl and his resort to some unidentified person unknown to him who anonymously made available the critical information concerning Friend.

I cannot accept this evidence.

11.4 O'Brien's "Investigations" During the Trial

Reference has been made earlier to the memorandum of fees which O'Brien submitted for his services covering the period 20 September 1991 to, and including, 25 September 1991. O'Brien was, however, claiming additional fees for work allegedly done by him on 7 October 1991 and for the period 18 October 1991 to 30 October 1991. When asked about the details of the work to which these charges related he was uncertain. It is clear that the dates for which the fees were claimed were either during or after the conclusion of the trial. On 7 October the trial was in progress; the jury was discharged on the night of Saturday, 19 October 1991. Fees totalling $1,472 were charged for work allegedly done on 18, 19, 24, 25, 29 and 30 October 1991. The only explanation from O'Brien was that the charges probably related to instructions concerning the investigation of Friend, both before and after the conclusion of the trial.

It is clear that O'Brien did on 30 October 1991 interview Donald George Wicks at Evans Deakin Industries to establish that Friend had worked at the establishment, and that he was an active unionist and a member of the Federated Iron Workers' Association of Australia. O'Brien took from Wicks a brief handwritten statement. This work must have involved significantly less than the seven hours charged for work on that day. O'Brien suggested that time may have been spent upon inquiries concerning Friend's membership or associations with the trade union movement. However, it was established by the evidence of Julie Alison Cutlack, a secretary employed in Mead's office, that on 24 October 1991 she attended at the Brisbane Trade Union Centre and Union House and searched the records of the Federated Iron Workers' Union and the Amalgamated Metal Workers' Union, and established Friend's membership of these unions. This was a very simple process and not at all time consuming.

It cannot, therefore, be established precisely what work O'Brien did during the trial and after it had concluded, which involved hours of investigative work on his part.

11.5 The National Party Telephone Register – Sirl/Pitt/Mrs Nioa (née Cairns)

The relevance of this evidence can only be fully understood in the light of other evidence, particularly that of the witness Sean Cousins, who at the

material time, was State President of the Young National Party. Cousins practises as a solicitor at the Gold Coast. His specialty is criminal law.

On the first occasion on which he was called to give evidence he made it clear that it was common knowledge "among members in Brisbane and in south–east Queensland and in particular Luke's own branch" that he was a member of the Bjelke–Petersen jury. He went on to give evidence that he was informed that Shaw had been in touch with "Young Nationals" during the trial.

> *"And are you aware of Luke Shaw, himself, being in touch with the Young Nationals during the trial? Do you know anything about that?---I have no direct knowledge of that.*
>
> *Have you got some second–hand or third–hand knowledge of that?---Yes, I have.*
>
> *What is it?---When you say, during the trial, what – up to what point?*
>
> *Well, before the jury was discharged by the trial judge?---Yes. I recall a discussion with Libby Stoneman and she indicated to me – now again, this discussion with Libby Stoneman I believe was – I believe was at the central council, so I'm not sure whether this was before the jury was discharged or immediately after.*
>
> *All right?---However, she indicated to me that Luke had contacted someone. I'm not sure whether it was herself or perhaps it was Mark, I can't – Mark Pitt – I can't recall, but Luke had contacted either Mark or herself and the gist of the conversation was, he was very concerned about some of the people on the jury wanting to get a particular verdict."*

Ms Stoneman was overseas during the public hearing. She provided a statement denying the facts sworn to Cousins. Whether it was Ms Stoneman or not, I accept the evidence of Cousins that he was informed by a member of the Young Nationals that Shaw had been in touch with a friend or friends in the party and had expressed his concern that some of the jury appeared to favour a guilty verdict.

The question of Shaw's contact with Young Nationals about the content of jury room discussions was developed further with Cousins later in the hearing. He had volunteered additional information to inquiry investigators. He then gave this evidence:

> *"Now, last time you were here you told us that you had been contacted yourself by Mark Pitt and Libby Stoneman, seeking legal advice about the fact that Luke was talking to people during the trial. Do you remember telling us that?---It wasn't quite in that context. I think it was I was contacted either by Mark or Libby, telling me of Luke's conversation with them.*
>
> *I see. All right.*
>
> *MR CARTER: Go on?---And it was – I was advised that Luke had expressed his concerns about some of the jurors on the trial and what they were trying to do, and whilst I don't recall precisely what I told the caller, I in effect said, 'Look, you should have nothing to do with it.'*
>
> *Was it a personal visit or a telephone call?---It was a telephone call, sir. The first – the first time this came to my attention was on the telephone, and it may have been raised again in conversation, but I can't put a time and place.*
>
> *You can remember the telephone call?---As best I recall, sir, I received that information on the telephone call, because I can remember it going through my mind, 'Goodness me, what am I supposed to do; what should I do?'*
>
> *And where did you receive it?---At my office.*
>
> *And you obviously remember it, and you remember the concern that you had about it. What is your best recollection as to who the caller was?---I think it was Libby.*
>
> *Is – and what about – did you discuss it also with Pitt, in a different context, or in the same context?---Sir, it was*

discussed with Mr Pitt in the context that – and this is when I am talking about the evening that the jury had been discharged, and I think – I mean our main concern was to try to find Luke, or to make contact with his family to get a message to Luke, but I can't recall exactly why it was that we were discussing his knowledge or what he had been told about what may have gone on in the jury.

So your best recollection is that your first notice of that came from Libby Stoneman?---It's the first one that I can specifically identify.

Yes, right. Were there others do you think?---Well, it has – it is a matter which has been discussed, sort of, amongst fairly closed circles subsequently to the trial so, sir, that is why I have some difficulty trying to work out exactly what went on during the trial and what transpired subsequent to the trial.

Well, clearly you recall your conversation with Ms Stoneman during the trial, and the concern that you yourself had as a result of the call?---Yes. Because I thought to myself should I contact anybody and tell them about this, and I thought, no, I most certainly shouldn't, and, in fact, none of us should really be having anything to do with it.

But that did not prevent further discussions from taking place about the same subject matter?---No.

And those discussions included discussions with Pitt?--- Yes, yes."

It was in the course of his later evidence that Cousins disclosed relevant information concerning Mrs Nioa (née Cairns), Shaw's first cousin, and a member of the staff of Senator Bjelke–Petersen.

"MR HANSON: Now, do you have any personal knowledge of any contact during the trial between Mr Luke Shaw and his cousin?---It's only hearsay.

All right. So the answer is 'no'. You have no personal knowledge of it?---No.

But you have heard it from other people, have you?---I have, yes.

All right. And who was that that you heard it from?--- The person I first remember me - first remember specifically bringing this to my attention was Mark Pitt. The occasion was the evening that the jury was dismissed or discharged. Shortly after the jury had been discharged, I, after speaking with other members of the party, thought it best that I try to contact Luke and simply advise him that it was probably in everybody's interests that he lie low for a while and especially not make any comment to the media.

All right?---And in the course of making attempts to contact Luke this information was specifically brought to my attention.

All right. And what is it; second-hand though it may be or, perhaps even worse, what is it? What is the information?---Look, I can't tell you exactly what I was told, but the clear gist of what I was told was that Kathleen was Luke's cousin and that Kathleen worked for Flo and that, as a result of that, there were some people not members of the jury who had some idea of what had transpired during the jury's deliberations.

All right. And, what, they obtained this information during the trial rather than after it?---Could you ask me that again?

And the information was made available to these people during the trial rather than after the trial?---Yes, during the course of the trial."

Before proceeding to the evidence of the telephone record book it is also necessary to refer to the evidence of Cousins' wife, Jane Amelia Cousins. She was with her husband at a motel in Bundaberg on the night of Saturday, 19 October 1991 - the night on which the jury announced its disagreement. Pitt was also there. They were attending a Central Council

meeting of the Party. Cousins was anxious to speak to Shaw because of the publicity surrounding him and he wished to give him certain advice. Cousins, his wife and Pitt then went to a telephone and attempted to contact Shaw. Cousins sought Pitt's assistance as to where Shaw might be contacted. Pitt thereupon telephoned the home of Mrs Cairns, Kathleen Nioa's mother, in Brisbane, and having identified himself asked Mrs Cairns: "Would Luke be there?". He was not and the conversation terminated. Jane Cousins was given the impression from Pitt's call to Mrs Cairns that it "seemed a logical place (for Pitt) to look" for Shaw.

Despite her equivocation on the point, I am satisfied that before the trial Mrs Nioa knew her cousin Shaw quite well and that Shaw knew of her employment with Senator Bjelke-Petersen, the wife of the accused. I will deal with the point later.

The telephone record book kept at the office of National Party Headquarters discloses a significant number of telephone calls between Pitt and Mrs Nioa during the trial and indeed a telephone call between Pitt and Sirl concerning "Kathleen Cairns".

There is no record of any telephone contact between Mrs Nioa and Pitt in the months prior to the trial. The record book discloses that she rang the office of the Party where Pitt worked on 4, 7, 11, 21, 31 October, on some of which occasions she is recorded as having been connected to Pitt's phone. On 3 October 1991 the relevant entry records Sirl phoning Pitt at 3.33pm and the name "Kathleen Cairns" appears beside the entry.

None of the relevant persons was able or willing to disclose the reasons for these calls during the period of the trial or to explain the possible reasons why there was this series of calls, whereas in previous months there was none.

I accept Cousins' evidence that he was told that Shaw was in contact with Young National Party personnel during the trial, and further, that he was told by Pitt on the night of 19 October 1991 that information had come to the knowledge of "some people not members of the jury" as to what was being said in the jury room. This disclosure was only possible because "Kathleen was Luke's cousin and that Kathleen worked for Flo and as a result of that" there was information "leaking" from the jury room.

This disclosure by Pitt to Cousins assists in making more intelligible the telephone call from Sirl to Pitt concerning "Kathleen Cairns", particularly

in the light of the O'Brien/Sirl contact and "the detective work" being undertaken by Sirl and Pitt, and the disclosure of it to Ms McCaull, and in turn to Crooke.

I confirm my earlier finding that Shaw was disclosing information from the jury room and that the possible recipients of that information included Sirl, O'Brien, Pitt and Mrs Nioa.

11.6 Shaw and Mrs Nioa – The Telephone Conversation between Mrs Nioa and Senator Bjelke-Petersen on the night of 19 October 1991

Mrs Nioa when interviewed by Counsel assisting me said in effect that although he was her first cousin, Shaw was a virtual stranger to her. Her mother and Shaw's mother were sisters and were members of a large family, and she had as many as 50 first cousins. Shaw, who was one of them, is some years younger than Mrs Nioa, and accordingly, she explained that she rarely saw him and barely recognised him. In interview she recalls an occasion at her work place when she saw a young man from the back and thought he seemed familiar. It may have been Shaw. When she went to the court room where the trial was held to deliver to Senator Bjelke-Petersen some speeches, she noticed Shaw, but did not recognise him as her cousin, but rather queried herself as to where she had seen that face before. The clear impression given by her answers in interview suggested that they were virtual strangers.

More recently other facts emerged – a fellow employee, Ms Del Black, another of the Senator's secretaries, informed the inquiry investigators that before the trial Shaw used to visit the Senator's office and the offices of nearby National Party politicians somewhat infrequently, but on such visits Mrs Nioa had introduced her to Shaw as her first cousin. This was at about the time of the 1989 election; in 1989 at her grandmother's funeral she and Shaw had both attended and had had a discussion about student politics; in January 1988 she and Shaw had joined the same branch of the Young National Party; Shaw was an invited guest to her wedding in September 1992, by which time she added she and Shaw had become "close".

The last mentioned facts are much more consistent with the evidence of Jane Cousins that on the evening of Saturday, 19 October 1991 when her husband was attempting to contact Shaw, Pitt had, as a priority, telephoned the Cairns household in Brisbane to see if Shaw was there. At that time

Mrs Nioa was living at her mother's home. On that evening she was at a party.

I am in no doubt that in September/October 1991, Shaw and Mrs Nioa were not "strangers" to each other; that the one readily recognised the other; that Shaw knew that his cousin was a member of Senator Bjelke-Petersen's small staff and that he had spoken to her there from time to time; that during the trial Mrs Nioa knew that Shaw, whom she knew to be a Young National, was sitting on the jury selected to try her employer's husband, the former National Party Premier.

She maintained, however, that she did not inform the Senator that her Young National Party cousin, Shaw, was the foreman of the jury. The fact that Shaw was a Young National was known to O'Brien at the latest on evening of Monday, 23 September 1991, or the morning of Tuesday, 24 September 1991. One can readily infer that that fact was also known to Butler to whom O'Brien was immediately answerable. It is inconceivable that that fact was not made known to the accused and his wife, the Senator, if they did not already know. I am in no doubt that that fact was also known to Mrs Nioa in spite of her denial. They had after all joined the same Wavell/Clayfield branch of the Young Nationals in the same month of the same year. Other documents produced from Party records also disclose that Mrs Nioa's brother and sister, Leo and Pauline, were associated with the branch which Shaw later joined, the Brisbane central branch or at least associated with persons involved in that branch's affairs.

The only fact apparently withheld from Senator Bjelke-Petersen by Mrs Nioa was the fact that Shaw was her first cousin. It is not easy to recognise a logical reason why Mrs Nioa would withhold this information. She said she did disclose it to Senator Bjelke-Petersen on the night of Saturday, 19 October after the jury had disagreed. That being the case one wonders why she did not disclose it beforehand. It was a valuable piece of information which might have given encouragement to the wife of the accused during a stressful period. Her assertion that she did not may be worthy of no more credit than are her earlier statements that Shaw was virtually unknown to her.

On the other hand, if what Cousins was told by Pitt was true, namely that the relationship between Shaw and Mrs Nioa was a source of the disclosure of confidential jury room discussions, and Pitt was obviously a close associate of the Cairns household and of Shaw, then one can readily understand Shaw's disclosure to Mrs Nioa concerning Hedley Friend, and if

that were so, it is fatuous to suggest that Mrs Nioa would not be seen as a valid jury room informant for her employer, the wife of the accused.

Mrs Nioa's false attempt to dissociate herself from Shaw as a stranger, when put with the other relevant facts of their first cousin relationship and contact, cannot but leave one with the disturbing view that Mrs Nioa was significantly less than truthful. It is useful to assess these known facts in the context of the telephone contact during the trial between Sirl and Pitt and between herself and Pitt.

The inference is clearly available that Mrs Nioa knew of Shaw's place and role on the jury; that she was a possible recipient of Shaw's disclosures from the jury room during the trial, and that she disclosed the information to others including Sirl, Pitt and Senator Bjelke–Petersen. That is not to say that Shaw did not maintain contact with Pitt and Sirl. I am satisfied that he did. Clearly, Mrs Nioa was a logical and trustworthy person to whom Shaw could pass information. At the very least Friend's suggested bias against the accused, whether factual or not, was well–aired in National Party circles during the trial. I am not prepared to exclude Mrs Nioa from the range of persons associated with the National Party who improperly received jury room information from Shaw.

This brings me to the telephone conversation which Mrs Nioa and Senator Bjelke–Petersen had at about midnight on Saturday, 19 October 1991. The trial had concluded only a couple of hours beforehand. Mrs Nioa was at a party when the result was included in a news bulletin. At some time after the conclusion of the trial and before Mrs Nioa returned home, Senator Bjelke–Petersen had phoned the Cairns household to speak to her. She left a message with Mrs Cairns for her daughter to return her call. This she did at about midnight. There are curious features of this event. It seems that the Senator did not inform Mrs Cairns of the result. At least, if she did, Mrs Cairns did not tell her daughter of the result when she returned home, which would be unlikely. If that was the purpose of the Senator's call it was a simple matter for her to leave a message with Mrs Cairns about the result. It was hardly necessary to have Mrs Nioa return her call at that late hour. When asked about the content of the conversation, Mrs Nioa gave this evidence:

> *"...She* (Senator Bjelke–Petersen) *was just talking about the wrap–up and things that had happened and that the foreman was a young National and she was just – and*

then Sir Joh talking to me about what he said to the media outside the court–room, or outside the court."

And again:

"Now what did she (Senator Bjelke–Petersen) *say when she rang you – sorry, when you rang her back? What did she say?---That it was over. And then she told me 'Joh was innocent'. And then she talked about all this legal stuff and then she talked about the foreman of the jury and all the press being everywhere.*

And what did she say about the foreman of the jury?--- That she'd heard he was a Young National.

And is that all she said?---I can't recall the conversation that I had at midnight. No, I would have had a few drinks. I would have gone home, rung her, and she would have been overjoyed at the news.

Did you tell her that that was your cousin?---Well, if she mentioned the name – she must have mentioned the name – and it was either – I – I'm not sure whether I would have told her then or on the Sunday – rung her on the Sunday when it was in all the papers – all the newspapers – – –

To say what?--- – – – on the Sunday morning. To tell Sir Joh to tell his lawyers that that's my cousin.

And why did you think it was necessary to mention that?--Because the press was going berserk and I just thought it was – I didn't know whether it was any assistance to the lawyers, but to let them know."

As pointed out above, it is more probable than not that both Senator Bjelke–Petersen and Mrs Nioa knew before the trial that Shaw was a Young National. Crooke had told O'Brien that fact on 23/24 September 1991 before Shaw was empanelled. As I have said, it is unlikely that Butler did not pass this information to the accused and his wife. Mrs Nioa knew Shaw was a Young National. They had both joined the same branch at the same time. The fact that Shaw was a Young National could hardly

have been the reason for the Senator to ask Mrs Nioa to return her call. Besides one can only wonder at the statement of Mrs Nioa that either then, late on Saturday night, or on Sunday morning she told the Senator that Shaw was her cousin. Clearly by that stage Mrs Nioa well knew of Shaw and his position on the jury. What had happened between then and the earlier occasion when she had seen Shaw on the jury and was curious as to "the face"? And if she knew that Shaw, her cousin, was the foreman why did she wish to reveal that on the Saturday night/Sunday morning? It was as relevant then as a piece of information as it was during the trial. If there was any concern at the conclusion of the trial there must have been equally concern during the trial. If she knew on that night that Shaw was her cousin, why had she not recognised that fact at any earlier time during the trial?

All in all, Mrs Nioa presented as a totally unsatisfactory and unacceptable witness. I am satisfied that she failed to reveal her full knowledge of all of the material facts.

CHAPTER 12

THE FACTUAL ISSUES AND THE PERSONS INVOLVED – AN EVALUATION

It is now necessary that I should return to the beginning and to the major questions with which this inquiry has been concerned.

12.1 The Alleged Polling of Panel Z

All of the questions of fact with which this inquiry is concerned arise in one form or another from the fact that Panel Z, the jury panel specifically selected for the Bjelke-Petersen trial, was dismissed from service on the very morning on which the trial was to begin. This occurred because it was submitted to the trial Judge that there was "a problem", one which at first was not disclosed either to His Honour or to the Crown, but which was later identified to be the alleged polling of Panel Z.

The ex officio indictment against the accused had been presented in the District Court on 15 February 1991. On 19 February 1991, the trial date, 23 September 1991, was fixed. During the long lead time prior to the trial date Counsel was retained and the matter of jury selection had been given some measure of priority in pre-trial discussions. In June 1991, the administrative arrangement for the compilation of a special jury panel had commenced by the Sheriff. On 11 September 1991 Panel Z had first become available and was collected from the Sheriff's Office by some person on behalf of the accused. On the morning of 23 September 1991, the trial Judge was asked to dismiss it from service at the trial for which it had been specifically compiled.

All of this happened because there was said to be "a problem" and the problem was that Walliss, the person first enlisted by Butler to vet the jury, was said to have personally approached potential jurors on Panel Z by telephone so that he could assess them for bias or otherwise determine their political attitudes.

There are some subsidiary issues of fact involved in this; the engagement of Walliss, the involvement of Butler, the engagement of O'Brien, the relationship between Walliss, O'Brien and Butler in this aspect of trial preparation, the nature and extent of the involvement of Mead, if any, in this process are some of the main ones.

All of these latter issues preceded the publication of Panel Z on 11 September 1991. Greenwood QC and, to a lesser extent, Gundelach were both involved prior to that time, but only on the periphery. The central figure was undoubtedly Butler. Let me say at once that it was easy for Butler to attempt to persuade the inquiry that his role was a subordinate one and to thereby seek to deflect attention from his otherwise intimate involvement in the case. Mead was said to be the solicitor on the record; Butler was said to be merely an investigator who was there to do the bidding of others. Nothing, however, could be further from the truth.

Butler, I am satisfied, was the central figure in all aspects of trial preparation. The inexperienced Mead was more of a figurehead who, as the proprietor of a one-man practice, was involved for only the third time in the defence of a client on a trial by jury. Butler had brought the client and himself to Mead as a package. It was Butler who had immersed himself for months in the defence of the accused; it was Butler who had been working with the client and other legal representatives in the defence, both before and after 11 February 1991, the date set for the committal proceedings, which were not held because of the decision to consent to an ex officio indictment. It is not surprising, and in no way to be critical of Mead, that Mead was to leave to Butler most, if not all, of the pre-trial preparation. After all, Mead had his own clients to service and the fact that Butler's occupation of a part of Mead's small office coincided with Mead's receipt of the accused as a client well illustrates not only the close nature of the already existing relationship between Butler and the accused but also the fact that Mead was to provide the office facilities. Butler had already been unduly and inappropriately intrusive in the earlier course of trial preparation when the accused was a client of Lyons, and in particular, of Burns, a member of that firm. That relationship had also been initiated by Butler who again had come to occupy an office at Lyons at the time which coincided with Lyons' acceptance of the accused as a client. It was only after Burns had sought to contain Butler's involvement in trial preparation, and after a problem arose with the payment of Lyons' fees that the client and Butler together went to Mead, the former as a new client, the latter as the one who would be responsible for all major aspects of trial preparation. Butler and Mead were friends and Butler in this new environment was less likely to suffer any real constraints; certainly he was not likely to suffer the reprimands of the kind administered to him by Burns for his aggressive and incompetent intrusion into professional issues such as his hopelessly irrelevant insistence upon a voir dire in respect of Huey who was not even to be a Crown witness.

The dominant role played by Butler and his company, Trial Consultancy Pty Ltd, in the defence of the accused cannot be understated. It was based upon a profound degree of personal admiration and respect for the accused and all that he represented, and Butler's engagement by the accused as an adviser was not merely a matter of great personal satisfaction to him, it also provided Butler with a source of "professional" income; but more than that, it presented Butler with the prospect of destroying the credibility of former police officer Huey, for whom Butler and his new-found client had a mutual disrespect. This combination of disrespect for and suspicion of Huey, combined with his profound respect for his client, was the perfect recipe for an obsession which Butler demonstrated not only in matters relevant to trial preparation in respect of the accused, but also when those associated with this inquiry sought information from him in relation to the facts needed for an effective investigation. His non-cooperation reached the point at which he publicly denigrated senior officers of the Commission and, to an extent, myself. His frequent resort to and apparent availability to the media can only be contrasted with his spirited attempt to obstruct contact with this inquiry.

My findings concerning Butler and the nature and extent of his involvement, however, are based on the evidence, the established facts and the proper inferences to be drawn therefrom, rather than on his pitiful and pitiable attempts to avoid co-operation with the inquiry. Again, not surprisingly, his broader attack on the Commission has Huey as its main focus. It was because of it that he sought exemption from giving evidence.

His evidence, once he gave it, was a tissue of falsity and evasion, and was for the greater part totally unacceptable. His insistence that he had nothing to do with jury selection matters is wholly inconsistent with his deep-seated involvement in all aspects of the defence of the accused. At the same time it is inconsistent with the evidence of those with whom he dealt - from Greenwood QC at the upper end to Walliss at the lower.

Having regard to the appropriate standard of proof, I find myself more than comfortably satisfied of the fact that Butler, contrary to his sworn evidence, was closely and intimately involved with both Walliss and O'Brien in regard to jury selection matters and, in particular, that he and O'Brien whom he engaged to "co-ordinate" the process were mutually concerned in the selection of the best possible or most favourable jury for the trial of the accused. If manipulation of the system and the erection of a scheme designed to mislead the trial Judge and Counsel was to be necessary in that process - then so be it.

As I have attempted to make clear, Butler played a dominant role in all aspects of the trial, including the selection of the jury for the trial of the accused. His degree of involvement cannot be underestimated.

It was Butler who in June/July 1991 first discussed with Walliss the question of jury vetting for the trial of the accused. This was months before 11 September 1991 when the panel was first made available. It was only a few months after the public controversy caused by the polling of the Herscu jury panel. Butler discussed jury vetting processes with Walliss. It is fatuous to suggest that Butler remained ignorant of Walliss' brief and as to how he intended to execute it. Fees were discussed; Butler promised to obtain advice on Walliss' proposals, according to Walliss, although there is no evidence that he did; the discussions which at this early stage Walliss claims to have had with Butler can only be sensibly understood on the basis that Butler, an obviously intelligent man, well knew that Walliss could only engage his "techniques" by personally speaking to jurors. It was Butler who first informed Greenwood QC in July 1991 – about two months prior to the trial date – that Walliss was to be involved in jury vetting. Clearly, Greenwood QC was never told the details of what the Walliss "technique" involved. Had he been, I am perfectly satisfied that he would have forbidden it. Again, it is clear that in discussing Walliss and his engagement with Greenwood QC, Butler withheld the substance of his discussions with Walliss. His only reason for this was the predictable response that in the light of the then recent Herscu controversy, Walliss should be forbidden from personal contact with potential jurors. It is clear on the other hand, that Butler maintained the engagement of Walliss and sought to put him in contact with O'Brien. Butler, Walliss and O'Brien were all known to each other, more or less; each of them was a former police officer.

It is within the context of Butler's engagement of Walliss and O'Brien, and in his establishing the contact between the latter two, in particular, his identification of O'Brien as the co–ordinator of the jury vetting, that one needs to examine the consequences of the finding that Walliss did not telephone jurors or otherwise make personal contact with them, or if he did, his contact was so token and so fragmentary, that it was of little consequence. If it in fact occurred it was well able to be dealt with if the true facts had been disclosed.

The Sheriff's investigations are of major importance.

Within a relatively short period of the conclusion of the trial, the Sheriff was able to contact 95 of the 150 persons from whom the jury was selected, and none could be identified as persons with whom Walliss could have made contact. Nine persons did say to the Sheriff that they had prior to the trial received unsolicited telephone calls at their homes from a variety of callers addressing a variety of questions, but none of these nine can be identified with the alleged form of polling said to have been undertaken by Walliss. The report in Chapter 4.5 addresses in detail the very extensive investigation of the jurors and their households undertaken by Commission staff and the fact that only a few - not more than five - can be even considered as the possible recipients of the alleged Walliss polling.

It is inconceivable that given the validity of the Sheriff's and Commission investigations, Walliss could truthfully have polled 25 to 30 persons (as he told the inquiry) or "about one-third" of the panel (50 persons) (as he had told the Sheriff) in the manner in which he alleged. It remains a remote possibility that all of these persons may have forgotten the particular polling process in which Walliss alleged he had been engaged. The body of the report advances the illogicality in accepting that remote possibility as true.

It is therefore more probable than not that Panel Z was not polled as alleged, or at the very worst, a few only may have been contacted by Walliss.

12.2 Greenwood QC was Misled by O'Brien

Greenwood QC's statement and his evidence details his meeting with O'Brien and Gundelach at the Gateway Hotel late in the afternoon of Saturday, 21 September 1991. The meeting was brief and to the point. It was said to have been arranged by Butler to brief Greenwood QC and Gundelach on the process of jury vetting so far. However, it is probable that it was initiated by O'Brien who had phoned Gundelach on Saturday morning because, as he said, he had information to give Counsel about the jury - information which, according to O'Brien's own evidence, he must have known since about "the previous Monday". The relevant part of the conversation between Greenwood QC and O'Brien occurred in the short period of time it took for Gundelach to purchase drinks at the bar for himself, O'Brien and Greenwood QC.

In that short period O'Brien successfully implanted in Greenwood QC's mind the clear and firm impression that Panel Z had been exhaustively polled personally by Walliss and that the polling had addressed "political" issues. It was, as one witness remarked, "Herscu revisited". It is helpful to quote just one final excerpt from Greenwood's evidence:

> *"Had Mr O'Brien left you with the impression that it was the political leanings of the potential jurors that was being ferreted out – – –?–––Yes.*
>
> *– – – by Mr Walliss?–––Yes, political leanings; political climate of the household. That was what was on.*
>
> *You were not given the information or the impression that all Mr Walliss was after was whether or not the household member to whom he spoke was capable of reaching an unbiased view of a particular current topic?–––No, Mr Hanson.*
>
> *Have you seen what Mr Walliss has to say by way of now describing what he did?–––Yes Mr Hanson.*
>
> *Have you see the affidavit he has given the inquiry?––– Yes, I saw it some time ago.*
>
> *You will see there that that is a copy?–––Well, I've seen a document I – looked like – as if it was going to turn into an affidavit.*
>
> *Well, do you understand that Mr Walliss claims that his method was to pose two sides of a current topic – – –?–– –Mm.*
>
> *– – – to see whether the person was capable of reaching an unbiased decision?–––Mm.*
>
> *Do you understand how he describes the method he adopted?–––No, I don't.*
>
> *Well – – –?–––I can't follow it. But dress it up how you like, and accepting that the tenor of what you say is what Walliss intended, the information available to me at that*

time was that a telephone poll had been conducted; people had been contacted; contacted on the subject of political views and affiliations; questions asked about their private opinions about matters; and really, without going into it any more deeply than that, it was quite enough to disturb me very considerably.

You see – do you understand that as we have it now from Mr Walliss, he posed a current topic to the person on the other end of the telephone and put two sides of an argument, and made his own assessment as to whether that person was a pig–headed sort of a person or a person who could give an unbiased view – – –?– – –Mm.

– – – and that all that he passed back then to O'Brien was not the way these people responded to his questions – not whether they were in favour of or against logging on Fraser Island, for example – but his assessment of whether or not that person was an unbiased sort of person or a bigoted sort of a person. Do you understand?– – –Yes, I – – –

That is how he claims to have conducted his little survey?– – –Mm.

Is that the message you were given?– – –No."

And again:

"Anyway, that is what Mr Walliss claims to have done, but you were not given that impression that that is what he did, and that is what he – – –?– – –My impression was that he rang up to try and find out who might be adverse to Bjelke–Petersen and at the same time who might be favourable to him.

And passed that impression of his back to O'Brien?– – – Yes.

And you got that impression, of course, from O'Brien?– – – Yes.

All right.

MR CARTER: So that you could not really have drawn any distinction between the Herscu case and what Walliss had done?---No."

In the light of the Sheriff's investigation and of the more extensive inquiries undertaken by the Commission it was a demonstrably false impression which was given to Greenwood QC. His immediate response, although not made apparent to O'Brien, was one of alarm which shortly afterwards gave way to unrestrained anger. Butler was not there with O'Brien, but arrived a short time later.

If, therefore, as can be demonstrated objectively and factually, Panel Z was not the subject of an exhaustive poll on political issues, as the Herscu jury panel had been, why did O'Brien mislead Greenwood QC to the belief that it had been?

There are only two acceptable options – either O'Brien innocently and mistakenly misled Greenwood QC or he did so intentionally and deliberately. The first can be rejected because O'Brien, when speaking to Greenwood QC, claimed to be relying on information, including documentary information, which he had allegedly received from Walliss – an arrangement said to have been facilitated by Butler. But if Walliss had not polled Panel Z exhaustively, or, if at all, only superficially, O'Brien must have supported the pretence by purporting to rely on documents from Walliss which O'Brien demonstrated to Greenwood QC to be in his possession. The pity is that Greenwood QC did not seek the documents, nor did he require a conference with Walliss. That may or may not have revealed the deceit. He was, on the other hand, trusting of O'Brien and had no reason to suspect that he may be the victim of a fraudulent pretence or that he was being actively misled. In the light of the presentation to Greenwood QC by O'Brien it is not competent for the latter to say that his was an innocent and unintentional deception, because once he demonstrated that he was relying on information said to have been received from Walliss for his statements that Walliss had exhaustively polled Panel Z, either he had himself been the victim of Walliss' own fraud or he himself was actively deceptive of Greenwood QC. There is no basis at all for regarding Walliss as the chief deceiver. His interest in the trial of the accused was marginal and the least developed of all. Butler's major interest requires no further emphasis. The degree of O'Brien's involvement can now be best assessed not only by reference to his appointment by Butler as the co–

ordinator of jury vetting, but also by reference to his secretive and clandestine involvement with Sirl and others in their joint investigation of the juror Friend whilst the trial was in progress. Furthermore, it is now also obvious that O'Brien falsely disclosed the nature and extent of his own involvement in jury vetting either to Greenwood QC or on oath to the inquiry. According to Greenwood QC, O'Brien told him that he, O'Brien, had done nothing or practically nothing. On oath he disclosed that prior to late Saturday, 21 September, he had set out organising an elaborate network of contacts for a wide distribution of Panel Z; that, according to his claim for fees, he had spent 23 working hours on the process and had travelled 200 kilometres in doing so; that he was to continue with the process on the next day when he would need to travel another 210 kilometres; and that by Sunday night/Monday morning he would have a comprehensive body of information available concerning the Panel Z jurors to properly brief Counsel.

Instead, he told Greenwood QC that he himself had done virtually nothing – only that Walliss had comprehensively or exhaustively polled Panel Z on issues which were political and in a manner indistinguishable from the Herscu case. That was what he told Greenwood QC; that is why Greenwood QC was so angry. The true fact was that Walliss had done nothing, or virtually nothing.

In accordance with the appropriate standard of proof I am satisfied that O'Brien actively and deliberately misled Greenwood QC into falsely believing that Walliss had exhaustively polled Panel Z on "political" issues.

If the intention was to re–invigorate the ghost of Herscu, it certainly succeeded. Greenwood QC's immediate response in this brief meeting was one of concern which soon turned to outright anger. All of the events of the remainder of the weekend and up until the trial Judge dismissed Panel Z from service in the trial of the accused at about 10.00am on the morning of Monday, 23 September, were driven entirely by O'Brien's false disclosure to Greenwood QC at the Gateway Hotel on the late afternoon of Saturday, 21 September 1991, that, as in the case of Herscu, Panel Z had been polled for a political response. The degree of Greenwood QC's concern can best be understood by his decision to seek out Macgroarty on the Saturday night and their meeting in Macgroarty's Chambers on Sunday morning. Macgroarty confirmed in interview with Counsel assisting me the degree of concern shown by Greenwood QC. It cannot be sensibly suggested that that concern was other than genuine.

Butler cannot sensibly be divorced from the events of Saturday afternoon. Indeed, he was in telephone contact with Walliss at 4.23pm on that afternoon. It is the fact of the contact, rather than the content of it which is important. It clearly demonstrates Butler's concern and involvement in the jury issue. His only contact with Walliss from the beginning had concerned jury vetting. He shortly thereafter arrived at the Gateway Hotel. O'Brien's visit had been a brief one. Butler arrived as O'Brien was leaving or shortly thereafter. He went to Greenwood QC's room with Greenwood QC and Gundelach. He witnessed Greenwood QC's demonstration of anger at O'Brien's disclosures. It was Butler alone of the three persons in the room who had dealt with Walliss. The other two had never met him. Butler had known since July 1991 that Walliss' process for jury vetting necessarily required personal contact with jurors. How else could one assess whether the mind of a potential juror had the capacity for bias or otherwise without speaking to the person? Yet Butler remained silent through it all. It was Butler who had introduced the name of Walliss to Greenwood QC on 17 July 1991. Butler had engaged O'Brien; Butler had given Walliss a jury list. Obviously in the light of their earlier discussions Butler knew that Walliss would need a jury list. It is probable that the Gateway Hotel meeting with O'Brien had been arranged by Butler. Mead was content to pursue his social engagement at the Gold Coast confident in the knowledge that Butler, as always, was at hand to attend to matters associated with the Bjelke-Petersen trial. It is, in my view, quite improbable that Butler remained ignorant of the Walliss involvement or that he did not liaise closely with O'Brien whom he had appointed as the co-ordinator. Equally, it is wholly unlikely that O'Brien should engage in the deceit of Greenwood QC "on a frolic of his own". He had no reason to act independently of Butler. Butler was the overall activist in the defence of Sir Johannes Bjelke-Petersen and had been since the beginning. O'Brien had recently been recruited by Butler to actively "co-ordinate" jury vetting. One therefore cannot sensibly conclude that O'Brien was intent on pursuing his own agenda with Butler ignorant of what he proposed. The meeting of Counsel with O'Brien was very short. The only relevant contribution to the conference by O'Brien was to falsely disclose the nature and extent of Walliss' polling. The conference was, as I have said, probably arranged by Butler. He obviously intended to be there. It was initiated by O'Brien's call to Gundelach on Saturday morning. When the matter was raised by Greenwood QC with Butler, in anger, the latter failed to disabuse Greenwood QC of the false notion which O'Brien had created. It is inconceivable that as between Walliss, whom Butler had engaged, and Butler himself, that the latter was totally ignorant of the Walliss involvement or lack of it.

I am satisfied that Butler was as involved as O'Brien in the deception of Greenwood QC and Gundelach concerning Walliss' alleged polling. Mead was a mere bystander – more intent on a social weekend than on pre–trial preparation. Greenwood QC was intent only on working through "the problem". He was obviously anxious to discuss it with Macgroarty on that Saturday evening, and, as later arranged, on Sunday; he tried unsuccessfully several times to contact Mead; the client had to be informed and advised and instructions given by him; Greenwood QC was not satisfied to leave that task with Butler; he had earlier demonstrated an insistence that instructions came from Mead, not Butler; he had, like Burns and Martin much earlier, demonstrated his impatience at Butler's irritating insistence on a voir dire involving Huey. Greenwood QC, I am satisfied, on Saturday evening and Sunday was extremely disturbed by the O'Brien disclosures concerning Walliss. He was, I am satisfied, the innocent victim of the manipulative Butler and O'Brien.

Gundelach at all material times stood ready to assist Greenwood QC. He readily concluded that Panel Z could not be used and expressed that view to Greenwood QC. The latter likewise took little convincing that the dismissal of Panel Z was the only alternative. His was the final responsibility to advise. He enlisted Macgroarty's advice before informing the absent Mead from whom he was to receive the client's instructions.

It is clear that the disclosure by O'Brien on Saturday afternoon was the catalyst for all that was to happen and which ultimately concluded with the dismissal of Panel Z on Monday morning.

I do not intend to repeat here what is contained in detail in Chapter 5 concerning the unusual presentation of the argument to the trial Judge by Counsel and his refusal to disclose relevant matters to the Crown. I need only repeat that no adverse inference can be drawn against Greenwood QC, by reference to those matters.

Gundelach, I am satisfied, having himself been misled was always prepared to disclose the nature of "the problem" to Cowdery QC and Needham and the trial Judge, but obviously differed from his leader and took no active part in the preparation of the submission.

12.3 Panel P – A Possible Substitute

The deception of Greenwood QC and Gundelach on the Saturday afternoon is only intelligible if the intention was to ensure that Panel Z would be dismissed from jury service at the Bjelke–Petersen trial. It stands to reason that in the event that that happened, with the approval of the trial Judge, it would be necessary to enlist another or other panels by way of substitution for this trial. An adjournment sine die was another, but unlikely alternative. The trial date had been fixed for seven months. It would only be likely that adjournment was feasible if the circumstances were extreme. The need to abandon Panel Z, however, was not such a circumstance. Other jury panels were readily available. Substitution was a flexible option. It was precisely the option advanced by Counsel. Besides, the dismissal of Panel Z was entirely predictable if the case was indistinguishable from Herscu.

Therefore, if the intended plan involved the discharge of Panel Z, and if the false disclosure by O'Brien/Butler had that intent, the use of a substitute panel or panels was the likely consequence.

It was known from late on Friday afternoon that Panels P and L were to be summonsed with Panel Z for Monday morning. It was not, nor could it have been, known prior to the afternoon of Friday, 20 September 1991, that Panels P and L would be summonsed. That decision could only be made by Hansen, the Deputy Sheriff. But once he made it the fact that Panels P and L would be called in on Monday morning was available to any inquirer of the publicly listed jury information telephone number. For anyone with experience of the criminal justice system that was a well–known fact. It would of course be confirmed with the publication in the metropolitan daily, the Courier Mail, from early Monday morning. I am satisfied that the Courier Mail was Greenwood QC's only source of information that other panels, including Panel P, would be called for Monday.

I am satisfied, however, that O'Brien, and in particular, Butler, had the means of knowing from late in the afternoon of Friday, 20 September 1991 at the latest, that Panel P would be summonsed for Monday morning. Shaw, the avid supporter of the accused, Sir Johannes Bjelke–Petersen, was a member of Panel P. Not only was he known to be a "gung ho Joh supporter", he was a member of the Young National Party and had been identified with the Friends of Joh movement since at least January 1991. The latter had publicly associated itself with the accused from the time the

proceedings commenced. They had also publicly demonstrated their support for the accused and were engaged in raising funds for his defence.

In the context of this trial, one could not imagine, from the point of view of the defence, a more suitable candidate for foreman of the jury, or as a member of the jury, than a committed member of the Young Nationals, a person associated with the Friends of Joh movement who was and had been an outspoken supporter of the high–profile former National Party Premier of Queensland, Sir Johannes Bjelke–Petersen. Such a person was available if Panel P could be substituted for Panel Z.

The compilation of a special panel for this trial, Panel Z, however, presented at the outset an impossible obstacle to the possible empanelment of Shaw. The latter was only possible if Panel Z were discarded, as the panel had been in the Herscu trial. It was well–known that the panel was discarded in the Herscu trial because of the personal contact with jurors on political issues.

On Saturday afternoon Greenwood QC was falsely and deliberately misled to the belief that Walliss had exhaustively polled Panel Z, and to use the words of Greenwood QC's statement, "that apparently Walliss had asked questions designed to ascertain the general attitudes including political attitudes of members of the household". That can be shown to be false.

If it had in fact occurred, it was entirely predictable that Panel Z, like the Herscu panel, would be discarded from use in the trial for which it had been specifically formed. If it was to be discarded on the morning of the trial, the only available substitutes were, from Friday, known to be Panels P and L and Shaw was known to be a member of Panel P.

This hypothesis needs closer analysis because there are considerations which argue against its acceptance.

At the same time one needs to keep very much in mind the fact that the stakes were high. Acquittal, or at worst, a failure to agree, was a jury verdict much more desirable than the conviction for perjury of the former Premier of Queensland.

There are three relevant matters that have to be addressed in this context:

1. the inclusion in Panel Z of Christopher Alexander Robison;

2. the decision by the Sheriff to use Panels P and K on Monday, 23 September 1991; and

3. O'Brien's investigations which involved National Party personnel.

These can be considered in turn.

12.4 Christopher Alexander Robison

Robison was a friend of Butler's. Robison had lived at 63 Gerler Road, Hendra, since about 1980 and in about March 1991 Butler had gone to live at the same address. He remained there for about three to four months, but had left the address by the time Robison was summonsed for jury service as a member of Panel Z.

It was said that Butler was anxious to retain Panel Z because of the prospect of having Robison empanelled as a member of the Bjelke-Petersen jury. This prospect was even more desirable because not only was Robison a friend of Butler, he was also an admirer of the accused and a person who supported the National Party at election time.

Robison knew that Butler was actively engaged in the defence of Sir Johannes Bjelke-Petersen and Butler was, according to Robison, well-aware of Robison's respect for the accused. Indeed, Butler, at Robison's request, had had the accused autograph a book for presentation to Robison. Butler knew that Robison had been selected as a member of jury Panel Z.

On the surface these facts would provide compelling evidence of a preference by Butler for the retention of Panel Z at the trial in the hope that Robison might be empanelled. However, this matter also requires closer analysis.

Robison was called to give evidence to the inquiry. After he had been summonsed Robison's recollection is that he rang Butler to tell him what had happened. At the same time Robison expressed his concern to Butler at being "picked" as a member of the Bjelke-Petersen jury "because of our friendship and because he (Butler) was on the defence team". At that time Robison was unaware of the procedures at a jury trial, but later learned of the practice of the trial Judge asking the jury, once selected, whether there was any impediment to their serving as jurors. Robison had seen "a couple of people stand up" when addressed in this way and he continued "I'm

pretty sure I would have done exactly the same thing". Robison had first attended as a juror a week earlier for the Yorke trial and had on that occasion become aware of the practice of the trial Judge inviting jurors to disclose any objection which there might be to the juror remaining empanelled.

It is clear therefore that from the outset Robison had informed Butler that he had received a jury summons and at a later date – "probably a month before" the trial, Butler informed him that his panel would probably have to attend for the trial of the accused. Therefore, it would seem that before 11 September 1991, when Mead's office first obtained Panel Z Butler knew that his friend Robison would probably be on the panel for the Bjelke–Petersen trial, but he also knew that Robison was concerned because of his friendship with Butler and Butler's involvement in "the defence team". It may be that Robison's estimate of "probably a month" is inaccurate. But in any event, it is clear that at some time before the trial Robison had expressed his concern at being selected as part of the Bjelke–Petersen jury.

This attitude of concern demonstrated by Robison could only have left Butler in doubt as to whether Robison would in the circumstances have accepted jury service on the trial of Sir Johannes Bjelke–Petersen. That doubt could only have been confirmed by Butler's later discussion with Greenwood QC about Robison. When Greenwood QC had first arrived in Brisbane prior to the trial, probably on Tuesday night, Butler had met him at the airport and en route to Greenwood QC's hotel Butler raised with him "this matter of Robison". Greenwood QC's evidence continued:

> *"...He told me that they had received the jury panel, and on perusing that jury panel, he had identified that person as being known to him, and that he would, in Butler's opinion, be a juror who would be more likely to be favourable – very likely to be favourable to Sir Joh politically, and generally. Butler told me that – I said, 'Well, what's your basis for that?' He said, 'Well, I actually shared a house with him in Hendra'."*

Butler then disclosed to Greenwood QC the matters of fact sworn to by Robison. Greenwood QC continued:

> *"...I then had a further conversation with Butler in which I said, 'Well, that is a little bit of a problem. The relationship between you sharing a house is somewhat*

close, but, look, have you seen him since the panel was known to you – or since it has become known to you that this fellow is on the jury,' and he said, 'No, he hadn't seen him,' and I said, 'Well, look, let me just sit on this information. If you – do you run into him anywhere in particular?' He said, 'Well, yes, Brothers Rugby Union Club. He has a drink there, and I run into him there.' I said, 'Well, stay away from Brothers Rugby Union Club. If you see the fellow in the street, or there is any contact at all, any likelihood of a contact, avoid it. Have nothing to do with him at all, even if you might have to be rude about it, and we'll see how things go.' That was the information given to me at that stage. My view of it was then that I was going to let it rest there and at the eleventh hour I was going to question Butler further as to whether or not he'd followed my instructions and whether or not there had been any contact in any shape or form between them. If there had have been, then that would've raised a difficulty. If there hadn't have been then we would've known the situation and the decision on what to do with Robison could then have been made.

Butler's disclosure of the relevant facts to Greenwood QC does not wholly coincide with Robison's evidence. According to Robison, he had told Butler of his receipt of the jury summons and then "probably a month before" the trial he had spoken to Butler again who told him "that my panel was probably for the trial". Little turns on that. What is more important is the fact that Greenwood QC himself was not, for obvious reasons, enthusiastic about Robison as a juror in the Bjelke–Petersen trial because of his friendship with Butler and their mutual dealings with the accused. As Greenwood QC told Butler "...that is a little bit of a problem", Greenwood QC also told him that he would "just sit on this information", and "...we'll see how things go".

Butler, as late as the Tuesday night before the trial, could only have been left in a state of real uncertainty as to whether Robison would be accepted by Greenwood QC as a juror at this trial. Greenwood QC's evidence left me with the definite impression that, whatever Butler's attitude concerning Robison might have been, Greenwood QC himself was less than enthusiastic and was, for proper professional reasons, not committed to accepting Robison as a juror in the trial because of his close involvement

with Butler, whom Greenwood QC well knew had a close personal, as well as a "professional" relationship with the accused.

Therefore, Butler was aware at all material times not only of Robison's personal concern at the prospect that he might be empanelled, but also of Greenwood QC's concern. Robison therefore could not have been regarded by Butler in the week prior to the trial as a serious candidate for selection. The expressed concern of Robison himself and of Greenwood QC was clearly enough to raise in Butler's mind serious doubts that Robison stood any real chance of being empanelled or if, at first empanelled, of remaining as a juror.

To this I should only add my impression of Robison which I formed of him whilst in evidence. I was left with the clear impression that Robison was genuinely concerned at his own position and having been made aware at Yorke's trial of the court practice of inviting jurors to disqualify themselves, it is probable that Robison would, if chosen at the Bjelke–Petersen trial, have disclosed to the trial Judge the same concern he had expressed to Butler. Butler of course had known Robison well for some time. It is not unlikely that Butler had a similar view of Robison's apparent integrity.

Greenwood QC also gave evidence of Butler expressing his concern on the Saturday evening that the dismissal of Panel Z would mean that costs already incurred would be thrown away. He must have been referring to Walliss' fees and possibly O'Brien's. One knows now, and it is probable that Butler also knew then, that Walliss had in fact done nothing or practically nothing and had no legitimate claim for fees. As is pointed out elsewhere, Walliss in fact did not claim any fees. As for O'Brien he had only a short time before told Greenwood QC himself that he had done virtually nothing, although his claim for fees suggests otherwise.

When examined more closely, the matters raised by Butler were, to his knowledge, quite insubstantial and of little consequence in the light of the false disclosure by O'Brien to Greenwood QC that Panel Z had been polled for political content in much the same way as had happened in the Herscu case.

The exact state of Butler's manipulative mind is clearly difficult to fathom. I need only say that his reference, in Greenwood QC's hotel room, to Robison and to the question of costs does not persuade me to reject the inferences which are to be drawn from the matters dealt with earlier, in

particular, the false disclosure by O'Brien to Greenwood QC. The reference to Robison and costs by Butler paled into insignificance in the light of the earlier disclosure to Greenwood QC that Panel Z had been, as in the case of Herscu, polled for a political response by individual jurors.

12.5 The Decision to use Panels P and K

It has to be understood that it was beyond the control of the accused and the defence team as to the course events might take in the event that Panel Z was discarded. Hansen, the Deputy Sheriff, was at pains to emphasise that the decision to use Panels P and K was made by the trial Judge. I have elsewhere rejected that proposition. I am in no doubt that the decision as to which panels should be used was a pragmatic one and Hansen himself was best equipped to decide which of the panels should more appropriately be used. Panels P and K were selected for practical reasons by him, and this was approved by the trial Judge, no doubt relying heavily on the judgment of Hansen whose immediate function it was to ensure that the criminal courts were properly serviced with sufficient jurors.

The fact remains, however, that the defence team had no input into this decision. If Panel P was regarded as a desirable panel because of Shaw, then the fact remained that it was left to Hansen to make the selection. That selection required only the formal approval of the trial Judge. At the same time it is clear that in the Judge's Chambers on the morning of Monday, 23 September 1991, the original submission had suggested the replacement of Panel Z with the other panels which had been summonsed for that day. They were Panels P and L. That was very much a logical submission for Greenwood QC to make because of the fact that P and L were in the precincts of the court and the application to discharge Panel Z was being made at the last minute. Hansen later decided to use Panels P and K.

If therefore the intention to displace Panel Z had the added purpose of replacing it with Panel P, the most that the manipulators could have wished for was the chance that Panel P be selected as a replacement. Whether that chance materialised depended immediately on Hansen who was best placed to suggest the substitute panels to the trial Judge.

There is no evidentiary basis at all for a suggestion that Hansen's support was enlisted by persons who may have been intent on manipulation. The

fact is that Mead's office was given preferential treatment after 10.00am on Monday, 23 September when the Panels P and K were supplied at no cost. This can be shown to be at variance with the treatment given to solicitor Russo on the same morning. However, I am prepared to regard this inconsistency as an administrative malfunction from which no adverse inference should be drawn.

There is one further point which is relevant here. It can be shown to be beyond doubt that the jury lists of Panels P and K which were given to Mead's office by the Sheriff's Office on that morning were generated by the Sheriff's computer on that same morning. This establishes that it is probable that the Panels P and K, which were later found by the inquiry to be in Mead's file, were not received by his office from that source prior to Monday, 23 September. This might lead one to the conclusion that the defence team did not have access to Panels P and K prior to Monday, 23 September 1991.

However, one cannot necessarily so conclude.

As has been pointed out above and elsewhere in this report, the fact that Panel P would be called in on Monday morning was known from sometime on the previous Friday afternoon. Furthermore, Panel P itself had been displayed in the registry since about 29 August 1991 – five days prior to the commencing date of the sittings, 2 September 1991. The identity of its members was available for public consumption. In addition, the panels for the sittings, including Panel P, were freely available and circulating within the wider legal fraternity and its members. More specifically, O'Brien had the capacity to obtain a copy or copies of Panel P and indeed any other from a confidential source in the office of the Director of Prosecutions. As the body of the report discloses, O'Brien was able to obtain from a source in the Director's office the criminal and traffic offence history of all of the members of Panels P and K on the morning of Tuesday, 24 September. He was therefore well able to obtain copies of the other panels, including Panel P if needs be, at any time after the same had been made available to the Director's office prior to the commencement of the sittings on 2 September 1991.

Therefore, one cannot conclude that some members of the defence team first acquired access to Panel P on the morning of Monday, 23 September 1991. It is probable that this was Mead's first contact with Panel P. It is not unlikely that it was Mead himself who obtained the lists from the Sheriff's Office on Monday morning. The exact identity of the relevant

person cannot be established. O'Brien said that he himself received them only at about lunch time on Monday. Assuming that fact to be true it is, on the other hand, certain that he and Butler were well-equipped to access the relevant panels, including Panel P, at any time since 2 September 1991.

12.6 O'Brien and the National Party

It is probable that O'Brien, when he visited National Party Headquarters at 7.30am on Monday, 23 September to check the list against Party membership, had with him Panel Z. It is also probable that when he or Butler made available the new lists on Monday evening/Tuesday morning for further checking, those lists were Panels P and K. This might suggest that the expectation of O'Brien was that Panel Z was to be used on Monday, but that when Panel Z was dismissed he had to pursue like inquiries in respect of Panels P and K on Tuesday morning. Again, I am satisfied that he had first gone to Dr Lynch's surgery on Friday evening with Panel Z and later on Monday with Panels P and K. It is probable that when he saw Mrs Chapman on Saturday at her home he had with him Panel Z. It is not unlikely that on Monday/Tuesday O'Brien attempted to contact Mrs Chapman a second time and may have done so. Neither has a clear recollection of the second contact. The telephone charging material on the other hand suggests that O'Brien telephoned the hairdressing salon conducted by Mrs Chapman's daughter, and where Mrs Chapman herself assisted from time to time, during the period when it was known that Panels P and K were to be used.

All of these facts, it might be suggested, are only consistent with an intention to use Panel Z on Monday and Panels P and K only after Panel Z had been discharged. This also needs further examination.

If the plan was to effect the dismissal of Panel Z in the hope that the chance of using Panel P might materialise, then all of O'Brien's inquiries with the National Party are not inconsistent with such an intention.

So far as the Panel Z inquiries on Monday morning are concerned, these were really necessary in any event. The process had begun with O'Brien's visit to Mrs Chapman on Saturday. This was before he saw Greenwood QC later on the same day. Mrs Chapman had put O'Brien in contact with Crooke. O'Brien and/or Butler could not necessarily assume that the trial Judge would abandon Panel Z. It was hoped that he would. On the other hand, Greenwood QC had not disclosed his hand to O'Brien late on

Saturday afternoon. He had in fact refrained deliberately from making known to O'Brien at that meeting his deep concern. Rather, he encouraged him to keep working on Panel Z and had done much the same when O'Brien had visited Gundelach's home on Sunday afternoon. O'Brien was never a party to discussions with Greenwood QC concerning the proposed application to discharge Panel Z. Therefore, an abundance of caution was necessary on the part of O'Brien in case the unintended happened and Panel Z was not dismissed. Therefore, as late as on Monday morning it was seen to be necessary to check the National Party records.

One has always to remember in this context that virtually nothing had been done with Panel Z. Walliss had done nothing or virtually nothing. By 9.00am on Monday morning when Butler briefed Gundelach he could pass to him only very sketchy information. The fact that he did brief Gundelach with such information as he had sufficiently evidences the state of Butler's mind that, even though he knew the application was to be made and probably expected that it would succeed, he nonetheless passed to Gundelach the rather paltry information which he had access to by 9.00am on that morning.

Furthermore, once it was certain that Panels P and K were to be used the further check of National Party records in respect of those panels is not inconsistent with prior knowledge on the part of Butler and O'Brien that Shaw, one member only of Panel P, was a member of the National Party and a desirable juror on that account and on account of his known attitudes towards the accused.

I am of the view that on the balance of probabilities the intention to have Panel Z dismissed, based as it was on false disclosures by O'Brien to Greenwood QC, was related to the intention, if possible, to have Panel P substituted with the chance that Shaw may thereby be empanelled.

The fact therefore that Shaw's associations and attitudes were known to O'Brien and/or Butler before Monday, 23 September did not exclude the requirement to pursue more aggressively the inquiries of the National Party and other sources concerning Panels P and K, once it had been established decisively that those were the panels to be used at the trial. As the body of the report discloses a somewhat massive profile had been done by O'Brien of the jurors on Panels P and K – something which I am satisfied had never been done in respect of Panel Z. Shaw was a known Bjelke-Petersen sympathiser. It was not unlikely that there may have been others included on Panels P and K. Hence the need to determine from National

Party sources whether there were others who, like Shaw, could be regarded as likely supporters. As pointed out above, three others were assessed as "Yes****" by O'Brien, although for what reasons remains unknown. My point has simply been to demonstrate that the making of further inquiries at National Party Headquarters, from Dr Lynch or even of Mrs Chapman is not inconsistent with O'Brien/Butler having prior knowledge of Shaw. The fact is that very extensive further inquiries must have been made within the short period after it was known that Panels P and K would be used. The information collected even included the criminal and traffic offence histories of the Panels P and K jurors. In short, the most extensive inquiries were only undertaken after it was known decisively that Panel Z would not be used and the identity of the substitute panels was known. By contrast, little information had been mustered in respect of Panel Z.

12.7 The Knowledge of Shaw

Several people who can be easily identified – at least Cousins, Martin, Pitt, Sirl, Mrs Nioa – and no doubt several others knew of Shaw's political affiliations and of his regard for the accused. At least since 29 January 1991 he had also been identified, at least by Hassall, by those who attended the meeting at Ardrossan restaurant and by those to whom the minutes of the meeting were circulated, as the contact point for the Friends of Joh organisation, irrespective of whether he had sought formal membership of it. It will be recalled also that the date, 11 February 1991, referred to in the minute was the appointed date for the committal proceedings in respect of the charges laid against the accused. Accordingly, there were several people who not only knew of Shaw's allegiances and attitude, it was also known by some that he was to perform jury service. He in fact had been subject to the requirements of jury service since 2 September 1991 and he had previously discussed with others, for example Cousins, that he was about to engage in jury service. Furthermore, it was a matter of public knowledge that the Bjelke–Petersen trial was to begin shortly. Therefore, whilst it cannot be determined with precision how many persons knew of it, it is clear that a not insignificant number of persons knew of the fact that Shaw was about to or was engaged in performing jury service. Shaw and Cousins had even canvassed the possibility that Shaw may be empanelled on the Bjelke–Petersen trial.

It is improbable that either Shaw or Cousins knew of the existence of Panel Z. On the other hand, the more important fact is that there was discussion

with Shaw about his performing jury service. It will be recalled that Cousins was the State President of the Young National Party and a solicitor who practised at the Gold Coast and whose specialty was the criminal law. It is not unlikely that this kind of discussion was had with others.

In short, I am satisfied that Shaw was known by several persons in National Party circles to be engaged in, or about to engage in jury service. It follows that the means of knowing that Shaw had been called for jury service was available to those who were interested enough to identify National Party personnel in that category at that time. O'Brien and Butler were two such persons. Butler in particular had since July 1991 turned his attention to the question of jury vetting. It would be inconceivable that Butler and/or O'Brien would not have pursued by appropriate inquiry the possibility of empanelling in the Bjelke–Petersen trial those persons who were known as sympathetic towards the accused. It was a relatively simple task for competent investigators in these circumstances to be able to identify persons such as Shaw as potentially favourable jurors.

In this context the discussion "in riddles" between Sirl and O'Brien needs to be considered also. It is now known that during the trial O'Brien was sufficiently well–informed by appropriate sources to be able to make contact with Sirl at his home, whom he did not know prior to his involvement in the defence of Sir Johannes Bjelke–Petersen. Of course O'Brien still denies ever having contacted Sirl. As even Sirl himself said in evidence:

> *"Now I don't know who would've told Barrie O'Brien that I knew him* (Shaw) *but it was certainly not something that wasn't widely known."*

Obviously some person did tell O'Brien that Sirl was a valuable contact. Who that was cannot of course be determined. It could have been any one of a number of persons. The important point is that the means of knowledge about Shaw, his contacts and other allegiances was broadly–based and any competent investigator intent on knowing the identity of relevant persons had several obvious sources available to him. It cannot be denied that both Butler and O'Brien were experienced investigators. It will also be recalled that, according to Mrs Swan, Sirl had said that when O'Brien spoke to him he, O'Brien, when referring to "the dinner party for 12", said that "we both know a guest or a couple of the guests" – this was obviously a reference to Shaw and Friend. Clearly, O'Brien knew of Shaw; so too did Sirl; Sirl had learned of Friend from Shaw; some

unknown person had obviously informed O'Brien of that fact and that he should make contact with Sirl. That involved not only identifying Sirl personally, but also required that O'Brien be given his address and telephone number.

I am satisfied that it is more probable than not that Butler/O'Brien had available to them before 23 September 1991 the means of knowing relevant facts and circumstances concerning Shaw and also the fact that at a time coincident with the Bjelke–Petersen trial, he, Shaw, was attending the court as required as a member of Panel P.

12.8 The Disclosures Concerning Friend

As indicated in the body of the report, I am satisfied that Shaw was the source of the information, which was acquired by the defence team and others during the trial, concerning Hedley Friend. It was a gross impropriety for Shaw to disclose to others outside the jury room his "concern" about Friend. More importantly, however, for present purposes, it is indicative of Shaw's attitude towards the accused that he should inform others, possibly Sirl, Pitt, Mrs Nioa and/or O'Brien, of his perception of Friend's attitude as a juror in the Bjelke–Petersen trial. Again, the fact that relevant persons had access to Shaw during the trial indicates the degree of knowledge which such persons had about him and the closeness of the associations which had been developed between them.

O'Brien claimed in evidence that he did not even know that Shaw was a member of the National Party. Crooke's evidence requires the rejection of that claim. At the latest by Monday afternoon/Tuesday morning O'Brien and Butler at least knew of Shaw's political affiliations. Within a short period and during the trial itself it can now be said that Shaw was known to be one who was prepared to breach the confidentiality of the jury room. O'Brien now claims not only that he had had no dealings with Sirl, but also that he did not even know him. Mrs Swan's evidence, the evidence of Sirl's father and even parts of Sirl's evidence require also the rejection of that claim.

O'Brien's false denials of knowing of Shaw's political connections and of discussing Friend with Sirl during the trial – a matter which came to Sirl's knowledge either directly or indirectly from Shaw whilst in the course of jury service – is in the broader context of the evidence a relevant fact

which needs to be considered together with the several other findings contained herein.

12.9 Summary of Findings

At the outset of this Report I addressed the two questions which are inherent in the fact finding process, namely, the nature of the standard of proof in an inquiry of this kind and the question of drawing of inferences from other facts and circumstances in accordance with the required standard. I have now to apply those principles to the facts and circumstances of this case.

I have attempted throughout the body of the Report and in this chapter to identify the facts and circumstances about which I am satisfied in accordance with the appropriate standard of proof. Some of these facts and circumstances are of greater evidentiary value than others. For example, I regard, in particular, two findings of fact as entitled to great weight in the final analysis of the whole body of relevant facts and circumstances. Those findings are, firstly, that Walliss did not engage in the telephone polling of Panel Z at all or if he did, it was fragmentary at best, and of token quality only, and secondly, that O'Brien on the afternoon of Saturday, 21 September 1991, at the Gateway Hotel falsely informed Greenwood QC and Gundelach that Walliss had exhaustively polled Panel Z on political issues relevant to Sir Johannes Bjelke-Petersen - precisely the same factual scenario which had led to the dismissal of the panel in the Herscu case.

I will therefore catalogue the facts and circumstances which, I am satisfied, are established to my satisfaction on the balance of probabilities bearing in mind that that degree of satisfaction has been attained whilst recognising the gravity of making the relevant findings.

1. Walliss did not poll Panel Z at all, or if he did, the polling was token only.

2. Late in the afternoon of Saturday, 21 September 1991 at the Gateway Hotel, O'Brien falsely informed Greenwood QC and Gundelach that Walliss had personally and exhaustively canvassed the jurors on Panel Z in relation to political issues relevant to the accused in a way which rendered the process in practical terms indistinguishable from the Herscu case.

3. O'Brien knew on Saturday, 21 September 1991, that Walliss had not exhaustively polled Panel Z by reference to political issues or at all.

4. O'Brien's intention in falsely deceiving Greenwood QC and Gundelach was to facilitate the discharge of Panel Z from service in the Bjelke-Petersen trial for which it had been specifically formed.

5. The intention of O'Brien/Butler in having Panel Z discharged from service in the Bjelke-Petersen trial was, if possible, to have Panel P substituted.

6. Butler, at all material times, was intimately concerned with and involved in, and was aware of all aspects of pre-trial preparation, including the pre-trial investigations into the relevant jury panels.

7. O'Brien was an active, experienced and competent investigator and had for many years been active in all aspects of investigative work.

8. Butler was at all material times both before and during the trial in close contact with O'Brien and knew that O'Brien's disclosure to Greenwood QC and Gundelach was falsely deceptive and intended to be so.

9. It was a known fact and one which could readily be ascertained by Friday, 20 September 1991 that Panel P, of which Shaw was a member, would be summonsed for jury service on Monday, 23 September 1991.

10. Butler falsely denied that he had any knowledge of matters concerning jury vetting and selection. His evidence that he deliberately dissociated himself from matters concerning jury vetting and selection is false.

11. By the time of the meeting between O'Brien, Greenwood QC and Gundelach in the late afternoon of Saturday, 21 September 1991, nothing or practically nothing had been done by any person towards jury vetting Panel Z which had been specifically chosen for the Bjelke-Petersen trial.

12. By 9.00am on Monday, 23 September 1991, at which time Butler briefed Gundelach in respect of the information which he had available in respect of Panel Z, only a paltry body of material, and in respect of relatively few jurors, was available.

13. By 1.30pm on Tuesday, 24 September 1991, there was made available to Counsel in respect of Panels P and K a detailed and relatively voluminous body of material which, by contrast to the position in respect of Panel Z, evidenced an extensive and time consuming process of jury vetting in respect of those two panels.

14. Shaw had been, at least since 29 January 1991, identified in Young National Party circles as a contact point for those who were interested in identifying with the Friends of Joh movement.

15. Shaw, a member of the Young National Party since 1988, was a known activist in the Party and was known as an avid supporter of Sir Johannes Bjelke–Petersen.

16. Shaw was known by a significant number of persons associated with the Young National Party to be engaged in, or about to engage in jury service at a time coincident with that during which the trial of the accused would be held.

17. Butler had had, at least for some months prior to 23 September 1991, an active association with the Friends of Joh movement with which Shaw had been identified.

18. During the trial Shaw, whilst empanelled as a juror, maintained contact with at least Sirl, or Pitt, or O'Brien, or Mrs Nioa, and breached jury room confidentiality by disclosing his assessment of Friend as a person whom he perceived to be opposed to the accused.

19. O'Brien falsely denied that he knew Sirl, and that he and Sirl had, during the trial, conversed concerning Shaw and juror Friend.

20. There was at all material times both before and/or during the trial a close relationship existing between at least Shaw, Sirl, Pitt and Mrs Nioa, Shaw's first cousin and a member of Senator Bjelke–Petersen's small personal staff.

Based on these findings of fact the question remains as to what inferences can be properly drawn in accordance with the relevant standard of proof.

After due consideration of all of the evidence and of the relevant principles, I am satisfied that it is more probable than not that:

1. Greenwood QC and Gundelach were falsely and deliberately misled by O'Brien, to the knowledge of Butler, to the belief that Walliss had exhaustively and personally contacted and polled the members of Panel Z on issues which were political and relevant to the known political views of the accused and which therefore made the case indistinguishable from the Herscu case.

2. The trial Judge was misled by Greenwood QC to the belief that it was inappropriate to use Panel Z at the trial of Sir Johannes Bjelke–Petersen and that other panels should be substituted.

3. Greenwood QC in making the application to the trial Judge for the dismissal of Panel Z honestly, but mistakenly, believed that what he had been told by O'Brien was true.

4. That the joint purpose of O'Brien and Butler in the deception of Greenwood QC and Gundelach was to effect the dismissal of Panel Z and thus to make available the chance that Panel P, of which it was known that Shaw was a member, might be substituted.

These and other relevant findings of fact can be summarised by my stating my conclusions in respect of each of the questions raised for my inquiry, (See Chapter 1.1).

(a) Very few, if any, prospective jurors on Panel Z or members of their households were approached by any person connected with the defence of Sir Johannes Bjelke–Petersen. This fact was, prior to the trial, known by Walliss, Butler and O'Brien. I cannot answer this question with any more particularity.

(b) Senior defence Counsel did provide the trial Judge with false and misleading information in connection with the defence application to discharge Panel Z from service at the trial. Both O'Brien and Butler knew that the information was false and misleading and that it would be provided to the trial Judge for the purpose of discharging Panel Z from service so that the chance of using Panel

P could become available. Senior defence Counsel in providing the trial Judge with false and misleading information did so in the honest but mistaken belief that what he had been told was true, and without any intention to deceive or mislead the trial Judge.

(c) The procedures used to create prospective jury lists and jury panels were not manipulated to include the name of any person who was subsequently empanelled in the Bjelke-Petersen trial.

(d) No person employed in the Sheriff's Office or in CITEC improperly disclosed information concerning any juror who was subsequently empanelled in the Bjelke-Petersen trial.

(e) Senior Counsel did not provide the trial Judge with false information concerning a juror (Friend) in response to the application by the Crown to discharge the jury on 18/19 October 1991. The substance of this information provided by Senior Counsel was factually true and the source of this information was Shaw.

(f) There is no sufficient evidence available which shows a prima facie case against any person in respect of whom a charge of official misconduct might be brought or which warrants the Chairman authorising a report pursuant to Section 2.24(2) of the *Criminal Justice Act 1989*.

In respect of (f) I should add that I have considered the question whether a report should be furnished to the Director of Prosecutions pursuant to section 2.24(2) in respect of the relevant acts and/or omissions of Butler and O'Brien in misleading Greenwood QC as set out above, and also in respect of the false evidence given by O'Brien to the inquiry that his was not the handwriting on the document which contained the criminal and traffic offence history of jurors on Panels P and K.

In respect of the first matter, any available evidence which may be admissible in a criminal charge is insufficient having regard to the strict requirement of proof, which is applicable to such a charge, namely proof beyond reasonable doubt – a standard of proof significantly different from that which applies to an inquiry such as this.

So far as the false evidence of O'Brien concerning his handwriting is concerned, his later evidence in which he acknowledged that the writing

was his needs also to be considered when assessing the sufficiency of the proof to support a criminal charge. I should refer also to the evidence of Marheine, the handwriting expert, that he would have preferred to have had additional authentic samples of O'Brien's handwriting. His evidence is sufficient to satisfy the civil standard of proof – to which I am subject in these proceedings – and a finding that the handwriting is O'Brien's; similarly that O'Brien falsely told the Commission investigators and the public hearing that it was not. That, however, is insufficient to justify the laying of criminal charges.

Therefore, I have considered it proper to conclude as I have in paragraph (f).

Finally, I need only add that the evidence of Jennifer Jane Kerry Smith and the report of Inspector Huddlestone, dated 11 December 1991 to the Criminal Justice Commission, is relied upon to support the finding that there was no manipulation of the random jury selection system with the Centre for Information Technology and Communications (CITEC).

CHAPTER 13

THE TRIAL OF SIR JOHANNES BJELKE-PETERSEN AND THE LAW AND PRACTICE RELATING TO JURIES

One should be cautious before passing to judgment on matters concerning the present law and practice of juries from the experience of only one criminal trial, in particular, the trial of a high-profile accused in proceedings which will probably become a part of the State's political history.

On the other hand, it may be that the sense of urgency which such a trial will generate will inevitably expose the faults in the system and the excesses which lead to the abuse of it.

Plainly, the composition of the jury in the trial of Sir Johannes Bjelke-Petersen was seen as a critical matter from the beginning. On 15 July 1991 Greenwood QC was retained to lead for the defence at the trial appointed to begin on 23 September 1991. On 17 July 1991 he was in Brisbane to confer with the client and with those who were to instruct him. At that conference the procedures for jury vetting were discussed as a matter of some priority. Even before 17 July 1991, Butler had explored with Walliss a process for investigating the jury panel. The panel was not to be published until 11 September 1991 and then only because Yorke was to stand trial on 16 September 1991. So that even before Counsel was retained and briefed the process for jury vetting had already been discussed between Butler and Walliss. Even before Counsel was briefed to the point of advising in detail on evidence, the matter of jury selection and a process for facilitating it was already underway and itself had become the subject matter of Senior Counsel's advice.

Perhaps this is not surprising given the political and legal environment in which the trial was to occur. Other high-profile figures including the Commissioner of Police and Ministers of the Crown had been tried in the criminal courts of the State. The trial of the former Premier, a widely-known and somewhat controversial figure, was now about to begin.

Not surprisingly, his legal advisers turned their minds to the question of jury selection as a matter of priority. So important was it perceived to be that persons who claimed special expertise were sought after and it was acknowledged that the client would have to bear the cost of the comprehensive inquiries which it was assumed would be undertaken. Walliss quoted his fee to be $600 per day. Later when a second investigator O'Brien was enlisted he was to submit an account for $4,261.60 for "investigations", the major portion of which were said to have been conducted in the four days prior to the commencement of the trial.

This evidence would suggest then that the practice of jury vetting and its importance in a particular case has even led to the development of a specialty in jury vetting capable, it would seem, of being exercised by those who claim some skill in it. Perhaps it is relevant to observe that the two investigators hired in this case were both former experienced police officers whose "professional" charges are significantly in excess of the daily earnings of their former colleagues.

The experience in the Herscu case has been dealt with in an earlier report of the Commission published in March 1991.

These few preliminary statements of fact provide sufficient background to the abuse of the system which I am satisfied occurred in this case. The trial Judge, the Chief Judge of the District Court, an experienced and highly–regarded Judge in the law and practice of the criminal courts was deceived; so too was the Senior Counsel who led for the defence. The core of the deceit was the assertion that the members of the jury panel, which had been especially compiled for the trial, had been canvassed comprehensively by Walliss before the trial to determine their political attitudes in a manner indistinguishable from the Herscu case. This assertion was demonstrably untrue. However, the mere making of the claim led to the making of an application to discharge the panel and at the same time was the cause of significant disruption to the proper administration of the court. More importantly, it led to the substitution of a panel which contained a juror whom it was known was favourably disposed to the accused and one who was not only a political affiliate but a person who had voiced his avid support for the accused.

In the Herscu case the polling of jurors had admittedly occurred and in that case the polling was frankly political. The jury panel was discharged. Paradoxically, in this case, the claimed polling was also said to be political but it had not in fact occurred. The result, however, was the same – the jury panel was discharged. In each case the jury system was misused. In the first case the jurors themselves complained that their privacy had been invaded and that they had been the subject of attempted manipulation. In this case Counsel for the accused had complained, on the basis of what he was told, and he had sought the discharge of the jury panel lest his client might be prejudiced. In each case the source of the complaint was the allegation of jury vetting.

One might therefore readily conclude that jury vetting is intrinsically evil in the relevant sense and therefore to be forbidden. Such a hasty conclusion may be too simplistic. The matter requires closer analysis.

There are two well–understood propositions which are accepted as valid and fundamental in any discussion about trial by jury. Firstly, the jury panel must be

randomly selected; secondly, there is a statutory right in an accused person to raise objection in the course of the selection of those who are to try him/her.

In respect of the first, there is no present cause for concern that the panels are not selected randomly. That question was one matter raised for my inquiry because of the employment of Mrs Swan, a Young National, a friend of Shaw, and a supporter of the accused, in the office of CITEC. Full inquiry has established that there was no capacity for her to manipulate this part of the system.

In respect of the second, the fact that the statute gives to an accused a limited right to object in the course of the selection of his/her jury assumes a right in him/her to have some input into the process which determines who shall comprise the jury for the trial.

A fair and just system of jury selection should therefore reflect the desirable balance between, on the one hand, the need for the random selection of the jury, and on the other, the limited statutory right in the accused to accept or reject some at least of those from whom the jury to try him/her is to be selected. It is true, but often overlooked, that the right to challenge is the right of the accused. It is he/she who by the statute is given the statutory right either to accept or reject those who are randomly chosen to constitute the panel. Yet it is a rarity in the criminal court for the accused person to voice his/her own objection. Rather, he/she has become a mere spectator who merely witnesses the process which is apparently controlled by others. The rationale of this spectacle is that the accused has delegated the right of challenge to Counsel whom, it is assumed, knows best and who is better equipped to select the jury more favourably disposed to the accused. The criteria adopted for this selection process are invariably simplistic and shallow – the jurors address or occupation or his/her appearance or mode of dress or sex may be a sufficient bar to a person's acceptance for jury service.

It is unquestionably true that the accused should have the limited right to decide the composition of the jury. He/she is entitled to reject one whose antipathy or enmity towards the accused is well–known, or to accept one who is known to the accused as likely to behave in a fair minded way. But the right is a limited one and common experience dictates that, given the random character of the panel selection, any accused person is likely to know personally very few, if any, of those who constitute the panel. The limited right to challenge, however, will give to the accused sufficient protection by enabling him/her to exclude those known or thought by the accused to be unacceptable.

What I have just said is true in those cases where the trial takes place in a capital or provincial city. It is less likely to be true in those small cities and towns where

it is unlikely that the accused will not know or be known to a significant number of jurors. In that case the right to accept or reject is more meaningful.

In short, the right to challenge, which is not negotiable, should be exercised for perceived good reason, no matter how idiosyncratic that reason might be, and whether objectively valid or not. The notion that a person randomly selected for jury service should be excluded and denied the right to perform this public service simply because Counsel for the defence for no good or valid reason decides in some whimsical way that that should be the case is not only offensive, it is contrary to the principle which lies behind the right of challenge which is confirmed by statute.

The right of challenge is a limited one. A numerical constraint is imposed depending upon the nature of the offence. The more serious the offence and the more onerous the likely penalty upon conviction the more extensive is the right to challenge. The good sense in this rule is obvious. An unlimited right of challenge would of course be an undue and onerous imposition upon the proper administration of the courts. Undue delay and unnecessary obstruction would be the inevitable result.

Therefore, the present law and practice concerning jury selection is designed to balance these two competing basic principles – firstly, the desire for random selection, and secondly, the limited right in an accused person to either accept or reject one or more of those randomly selected.

Yet, there has become engrafted on to this basically good system the excesses and the abuses involved in jury vetting. Reference has been made in passing to the parasitical like attachments which, under the guise of a quasi-professional specialty, have developed to support the practice of jury vetting. This is far removed from and the very antithesis of recognising a limited personal right in an accused person to accept or reject those whom he/she believes will either treat him/her fairly or unfairly. The abuses which one identifies with jury vetting are likely to be more excessive, the longer the time made available to facilitate the process.

The thrust of section 23(2) of the *Jury Act* is that the jury list for a particular trial is to be available to an accused five days before the sittings. Herein lies the problem. One cannot easily determine the logic behind that provision. Why is five days thought to be the appropriate period? Was it thought that the accused needed this period to be able to recognise those whom he/she would accept and those whom he/she should reject?

In any event, it is clear that the rule operates unevenly between accused whose trials involve the use of the same jury panel at different times during a sittings.

The Bjelke-Petersen trial is a good example. Panel Z was especially compiled to service the jury requirements for the trials of Yorke and Sir Johannes Bjelke-Petersen. The former's trial was appointed to commence on 16 September 1991, the latter on 23 September 1991. By reason of the statutory provision the details of Panel Z were revealed on 11 September 1991. Yorke had five days to peruse it; Sir Johannes Bjelke-Petersen had 12 days. That position is clearly indefensible. Even if jury vetting is to be regarded as acceptable the present rule will operate unfairly between accused. Those tried later are advantaged over those tried earlier. That is clearly unfair and unjust.

It is established by this inquiry that Yorke had access to Panel Z five days before his trial which was appointed to commence on 16 September 1991; Sir Johannes Bjelke-Petersen had 12 days.

Yet, paradoxically, those accused who were to be tried before jurors on those panels selected for the sittings appointed to commence on 2 September 1991 were not afforded the same luxury. Inquiries have been made of several competent and experienced criminal law practitioners and they have unanimously stated their experience to be that it is impossible in the usual course to obtain a copy of the jury list from the Sheriff's Office prior to late in the afternoon of the day immediately prior to the commencement of the trial. The reason for this is that a court official in the Sheriff's Office will determine for the first time only late in the afternoon prior to the trial how many and which of the available panels will be summonsed for the next morning.

The result in such cases is, therefore, that the apparent purpose of section 23(2) of the *Jury Act* is rendered nugatory. Lip service is paid to the statutory provision by sticking up in the registry the various panels called for the sittings five days prior to the first date of the sittings. But that is a meaningless exercise for those charged with the responsibility of defending clients in trials during the course of the sittings for the obvious reason that the particular jury for the particular trial is not determined until late in the afternoon of the day immediately preceding the trial, unless of course a special panel has been formed for a particular trial or trials, as happened for the trials of Yorke and Sir Johannes Bjelke-Petersen. In that case, since fixed dates are allotted and a special jury panel assembled, the list is made available at least five days before the first date on which the special panel is to be used. That was the position in Yorke's case; the farcical position which thereby emerged in the Bjelke-Petersen case was that the jury panel was available 12 days

before the commencement of the trial, which seems to be a clear breach of the letter and the spirit of section 23(2) of the *Jury Act*.

This brief summary of the position demonstrates the uneven application of the provision of the Act concerning the availability to accused persons of the jury lists. In most cases it is available only on the evening before the trial; in the cases of Yorke and Sir Johannes Bjelke-Petersen the list was made available five and 12 days respectively before the commencement date of their respective trials. It is inevitable, therefore, that those who are given a fixed date and for whose trial a special panel has been assembled will be afforded a significant advantage. The unfortunate consequence is that it is in those cases that jury vetting becomes more aggressive, which in turn makes more likely the prospects of abuse.

More importantly, however, it is clearly unfair and unjust that certain accused are afforded an apparent advantage over others who are tried in the same court.

One cannot, however, properly address the issue of the time allowed for jury vetting in isolation.

The legitimate requirements of a just and fair criminal justice system do not demand that a jury list for a criminal trial, as in the Bjelke-Petersen case, should be available for 12 days prior to the trial, nor indeed for five days as in the case of Yorke. Clearly, the accused and those acting on his/her behalf do not require such periods of time to identify the persons whom the accused might legitimately want to accept or reject for jury service in his/her case. Commonsense dictates that a much shorter period is adequate.

Not only does the adoption of a shorter period sufficiently satisfy the limited right of the accused to properly exercise the right of challenge, it also avoids the wholesale invasion of privacy which is inevitable with undisciplined jury vetting. Jury service is a public duty. That is one of the reasons for the panel being selected randomly. Jury service should also be attended with an acceptable level of anonymity. The latter will never be capable of achievement particularly in cases which attract publicity. On the other hand, there can be no justification for a more aggressive invasion of privacy of the jurors selected randomly for a high-profile case or in those cases where the resources of the accused are more extensive than in the case of the impecunious accused.

Logic, justice and good sense therefore demands that the current law and practice of publishing jury lists for a period commencing five days before the commencement of a criminal sittings is in urgent need for reform.

Either the reform should eliminate entirely the publication of the jury list before the commencement of the trial or it should allow limited access to the list for a limited time only, sufficient to enable the accused to instruct those to whom he/she has delegated the right to challenge.

The first option is the rule adopted elsewhere, for example, in the criminal courts of New South Wales. The abuses of the system which occurred in the Bjelke–Petersen trial and others, and which have unnecessarily consumed considerable valuable resources, would never have been possible with that system in place. The prospect for jury vetting is thereby eliminated.

The second option is for limited access for a limited time only prior to the commencement of the trial. This seems to be the preferable course because it enables the accused to have some time to recognise particularly the persons who might deny him/her a fair trial for extraneous reasons. The difficult question is: how much time?

In my view, the demands of a fair and just system which gives due recognition to the legitimate rights of the Crown, the accused and the jurors themselves are met by the following provisions:

1. The practice of publishing jury lists by displaying them in any public place should cease.

2. Two copies of the jury list which has been selected by the Sheriff for use at a particular trial should be made available to an accredited representative of the Crown and of the accused and to no other person before the commencement of the trial.

3. It should be an offence for any person into whose possession the list is given or who has control of the list for the purposes of a particular trial to reproduce it by any means and/or to give it to any person other than the accused and his/her legal representatives.

4. Unless otherwise ordered by the trial Judge, the list should not be made available to the persons referred to in paragraph 2 hereof by the Sheriff or his/her delegate earlier than 4.00pm on the working day immediately prior to the commencement of the trial or the time of the day at which the office of the Sheriff closes in the ordinary course of business, which ever is the later.

5. If the trial of an accused is appointed to commence on Monday, the jury list should not be available prior to 4.00pm or other time referred to in paragraph 4 hereof on the previous Friday.

6. Immediately the selection of the jury is completed in any trial, the accused or if he is represented by solicitor or Counsel, that other person, shall forthwith return to the Sheriff's officer in the court the two copies of the jury list and he shall be responsible for the immediate destruction of those lists.

These provisions are not intended to be exhaustive and are not drawn in a decisive final form, but rather are designed only to indicate the thrust of any reform. That thrust is focussed on the concept of giving access for a limited time to the limited range of persons who are the delegates of the accused to exercise his limited right of challenge.

One can argue about the period of time which ought to be allowed. The result is an arbitrary one and there is an apparent inconsistency if the trial begins on Monday. However, experience suggests that in the usual case sufficient time is allowed to service the legitimate interests of the accused if the list is made available on the afternoon of the last working day immediately prior to the trial. It may need to be recognised, however, that in a particular case the time allowed may be unreasonably short. This may be the case where the panel is a particularly large one because of the requirements of the particular trial, but even in such a case the period allowed should only be sufficient to permit the accused to reasonably inform him/herself of the contents of the list and to instruct those defending.

The requirement for limited distribution, the prohibition upon reproduction, and the provision for return and destruction of lists are designed to cope with the abuses which attend the unlimited and undisciplined reproduction and distribution of jury lists during the currency of any sittings.

It may be suggested that the above provisions operate unfairly in the case of the institutional users of the criminal justice system such as the Director of Prosecutions and the office of the Public Defender. I have considered and reject that suggestion. The resources of each office should be sufficient to permit the introduction of appropriate procedures to meet the requirements of the rules.

There are several other issues which emerge in any discussion of the law and practice relating to juries, for example, the use of unlimited peremptory challenges on "the first round" of the process of jury selection. This Report is not intended to

address all such issues, but only those which are relevant to the evidence which emerged in this inquiry concerning this particular trial.

The evidence establishes that Shaw was the first juror who was neither challenged by the defence nor stood by by the Crown. Prior to his selection Gundelach had challenged every other juror whose name was called. There were about 20 to 25 of them. Plainly, Shaw and the other three, whose names were marked "Yes ****", were to be given priority in the selection process. That is understandable. What is objectionable, however, is that the 20 to 25 who were rejected were probably rejected for no good reason at all. One might question whether that practice is consistent with the limited statutory right which the Act gives to an accused to challenge jurors. The statutory right of challenge was no doubt given so that the accused would have sufficient opportunity to exclude those whom it was thought might decide unfairly and so deny the accused a fair trial. It is not apparent from the legislation that the right of challenge should be available for exercise for some perverse reason or for no reason at all. Therefore, the unlimited right to challenge during "the first round" of the process has become more of a forensic tactic rather than the exercise of a legitimate right in the accused to exclude someone whom it is thought might act unfairly.

It is difficult, in my view, to support retention of the practice of permitting an unlimited challenge during "the first round".

What is regrettable is that the practice is also used improperly by the Crown. The Crown, it is said, is the perfect litigant. Jury service is a form of public service. It is incongruous, therefore, that the representative of the Crown, the Crown Prosecutor, should stand by jurors and deny those persons the opportunity of performing their public duty for no good or apparent reason. Anyone who has had experience in the criminal court knows that it is a common practice for the Crown to reject jurors persistently for no good reason – indeed, for no reason at all. The practice is offensive. It is also inconsistent with principle.

One other such issue, and it is a matter of general application, is concerned with the availability and use of the criminal and traffic offending history of individual jurors.

Because of the statutory disqualification of certain otherwise eligible jurors by reference to criminal history, it is necessary for the Sheriff to elicit from the Police Department the details of any relevant criminal history of those randomly selected for the panel. As has been said earlier, the jury lists are also forwarded to the Department of Transport so that traffic offence history can be forwarded to the

office of the Director of Prosecutions. The Director also receives the details of the criminal history which is forwarded to the Sheriff.

This practice of the Crown's receipt of the offending history of jurors is one of long standing and has been the subject of considerable judicial comment. Some of this is collected in the Commission's Report in respect of the Herscu trial (March 1991). If the offending history is not such as to require statutory disqualification there seems to be no reason why the information should not be shared equally between Crown and the accused. Perhaps the assumption is made, wrongly and too quickly, that it serves the interests of justice to pass that information to the Crown only. That may be only superficially correct. The exigencies of a particular case may make the same information as useful and relevant for the accused in deciding whether to accept or reject a particular juror.

Needless to say the unauthorised disclosure of this kind of information by the office of the Director to O'Brien, such as occurred in this case, was reprehensible and the internal procedures of that office should be designed to prevent its repetition.

This inquiry was only necessary because the Special Prosecutor and the learned trial Judge expressed their concerns at what had occurred or at what was alleged to have occurred. The source of their concern can now be identified as so-called jury vetting which has developed into an undisciplined and dangerous, yet at times sophisticated appendage to the criminal justice system. Unless it is contained, its excesses will in one form or another continue to impact upon the quality of criminal justice administered in the courts. One has only to review the unnecessary problems which the supposed polling of Panel Z caused for the trial Judge in the case and for the proper administration of the District Court, to identify the problems which it may create. Furthermore, the public perception of fairness and justice in the criminal courts is likely to be jaundiced if the uncontrolled pre-trial vetting of jurors and the development of personal profiles of individual jurors is to be permitted and/or facilitated. The current system is designed to facilitate the abuse of it by over aggressive, excessive and offensive jury vetting. Reform is therefore essential.

My purpose has been to identify only the problems which were exposed by this inquiry in this case. But the problems of jury vetting are likely to extend beyond this case. They and the solutions to them are matters of broader application. That is why the final reform proposals should reflect the corporate view of the Litigation Reform Commission.

APPENDIX 1

RESOLUTION TO CONDUCT AN INVESTIGATION

AND APPOINT AN INDEPENDENT QUALIFIED PERSON

WHEREAS:

1. The Special Prosecutor, Mr D P Drummond QC, in a memorandum dated 28 October, 1991 to the Chairman requested that the Criminal Justice Commission (the Commission) investigate the following matters which arose in connection with the trial of Sir Johannes Bjelke-Petersen:

   (a) possible polling of potential jurors to ascertain their views on a political matter;

   (b) possible manipulation by the defence of the jury panel/s from which the jury was to be selected so as to ensure that the jury was selected from a panel containing a potential juror who was known to the defence to be favourably disposed to the accused;

   (c) possible misleading of the court by senior defence counsel as to information he claimed to possess concerning a juror on the Bjelke-Petersen trial being a very active official at shop steward level of one of the unions affiliated with the Australian Labor Party; and

   (d) possible interference with the procedure for creating jury panels, that is, whether the computer process utilised for selecting juries was tampered with to add a name of a prospective favourable juror.

2. On 6 November, 1991 the Commission acting on internal legal advice determined that it only had jurisdiction to investigate matter (d) referred to above.

3. An investigation by the Commission into matter (d) was thereafter commenced and is continuing.

4. An advice of the Solicitor-General was forwarded to the Commission on 7 July, 1992 by the Special Prosecutor stating that the Commission has jurisdiction to investigate matter (b) referred to above.

5. Independent advice was obtained by the Commission from Mr R V Hanson QC on 29 September, 1992 stating (for reasons not entirely the same as those of the Solicitor-General) that the Commission has jurisdiction to investigate all matters raised in the memorandum dated 28 October, 1991; and

6. A further advice of the Solicitor General was forwarded to the Commission by the Attorney-General on 29 September, 1992 confirming his previous advice that the Commission had jurisdiction to investigate matter (b) referred to above and

providing other opinions which the Attorney-General thought may have been relevant to the Commissions consideration.

AND WHEREAS:

1. Officers of the Commission have previously been involved in the investigation of the conduct of the former Premier and have prepared under the direction of the Chairman briefs of evidence for the consideration of the Special Prosecutor; and

2. Some of those persons associated with the defence at the Sir Johannes Bjelke-Petersen trial have been highly critical of the Commission and have alleged bias by the Commission in the investigation of certain matters.

THE COMMISSION HAS RESOLVED in pursuance of the provisions of section 2.10 of the Criminal Justice Act 1989 (the Act) and all powers thereunto enabling, to act upon the advice that the Commission has jurisdiction to investigate all the matters raised in the memorandum dated 28 October, 1991 and thereby widen its current inquiries to investigate all the said matters.

THE COMMISSION HAS ALSO RESOLVED that pursuant to section 2.53(1) of the Act an independent qualified person be employed to conduct the investigation as widened, hold public or private hearings, as may be meet, and report upon the investigation to the Commission.

DATED AT BRISBANE THIS 2nd DAY OF October 1992

Professor J Western
Commissioner

Dr J Irwin A.M.
Commissioner

Sir Max Bingham Q.C.
Chairman

Mr L Wyvill Q.C.
Commissioner

Mr J Kelly
Commissioner

RESOLUTION FOR THE ENGAGEMENT, PURSUANT TO THE PROVISIONS OF SECTION 2.55 OF THE CRIMINAL JUSTICE ACT 1989, OF THE HONOURABLE W.J. CARTER QC; AND ASSOCIATED MATTERS

WHEREAS:

1. The Special Prosecutor, Mr D P Drummond QC, in a memorandum dated 28 October 1991 to the Chairman requested that the Criminal Justice Commission ["the Commission"] investigate the following maters which arose in connection with the trial of Sir Johannes Bjelke-Petersen:

   (a) possible polling of potential jurors to ascertain their views on a political matter;

   (b) possible manipulation by the defence of the jury panel/s from which the jury was to be selected so as to ensure that the jury was selected from a panel containing a potential juror who was known to the defence to be favourably disposed to the accused;

   (c) possible misleading of the court by senior defence counsel as to information he claimed to possess concerning a juror on the Bjelke-Petersen trial being a very active official at shop steward level of one of the unions affiliated with the Australian Labor Party; and

   (d) possible interference with the procedure for creating jury panels, that is, whether the computer process utilised for selecting juries was tampered with to add a name of a prospective favourable juror.

2. Officers of the Commission have previously been involved in the investigation of the conduct of the former Premier and have prepared under the direction of the Chairman briefs of evidence for the consideration of the Special Prosecutor; and

3. Some of those persons associated with the defence at the Sir Johannes Bjelke-Petersen trial have been highly critical of the Commission and have alleged bias by the Commission in the investigation of certain matters.

AND WHEREAS:

1. On 2 October 1992 the Commission resolved to act upon advice that the Commission has jurisdiction to investigate all the matters raised in the memorandum dated 28 October 1991 and thereby widen its current inquiries to investigate all the said matters; and

2. On 2 October 1992 the Commission further resolved that pursuant to section 2.53(1) of the Criminal Justice Act 1989 [the CJ Act] an independent qualified person be employed to conduct the investigation as widened, hold public or private hearings, as may be meet, and report upon the investigation to the Commission; and

3. The Honourable W J Carter QC has agreed to conduct the investigation as widened, hold public or private hearings, as may be meet, and report upon the investigation to enable the Commission, the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed by the CJ Act;

4. The Honourable W J Carter QC is presently unable to provide his services on a full-time basis because of his obligations arising from his inquiries into Operation Trident: and

5. It has come to the Commission's attention that in relation to matter (c) that senior defence counsel for Sir Johannes Bjelke-Petersen provided the trial judge with information that one of the jurors was a very active official at shop steward level of two affiliated unions of the Australian Labour Party.

THE COMMISSION HAS RESOLVED that the matters to be investigated arising out of the memorandum dated 28 October 1991 include the possible misleading of the court by senior defence counsel as to information he claimed to possess concerning a juror on the Bjelke-Petersen trial being a very active official at shop steward level of two affiliated unions of the Australian Labor Party

AND FURTHER THE COMMISSION HAS RESOLVED pursuant to section 2.55 of the Act to engage the services of the Honourable W J Carter QC for the sole purpose of investigating the matters raised by the Special Prosecutor in the memorandum of 28 October 1991, and any related matters and reporting thereon to enable the Commission, the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed by the CJ Act.

AND FURTHER THE COMMISSION HAS RESOLVED that, only in the event that the Honourable W J Carter QC considers it is necessary to hold public or private hearings, he be then employed pursuant to section 2.53(1) of the Act for the sole purpose of investigating the matters raised by the Special Prosecutor in the memorandum of 28 October 1991, and any related matters, and reporting thereon to enable the Commission, the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed by the CJ Act.

DATED at BRISBANE this NINTH day of OCTOBER 1992.

Professor J Western
Commissioner

Dr J Irwin A.M.
Commissioner

Mr L Wyvill QC
Commissioner

Mr J Kelly
Commissioner

APPENDIX 2

QUESTIONS JURY PANEL MEMBER

TIME

DATE

LOCATION

INTRODUCTION

PERSONAL DETAILS – FULL NAME – DATE OF BIRTH – PRESENT ADDRESS – OCCUPATION

MAKING INVESTIGATION INTO THE SELECTION OF THE JURY FOR THE TRIAL OF SIR JOHANNES BJELKE-PETERSEN CONDUCTED DURING SEPTEMBER AND OCTOBER 1991.

1. Q. WERE YOU A MEMBER OF A JURY PANEL WHICH WAS REQUIRED TO ATTEND THE DISTRICT COURT BRISBANE IN SEPTEMBER 1991.

   A.

2. Q. DID YOU ATTEND THE DISTRICT COURT BRISBANE AS PART OF THAT JURY PANEL

   A.

3. Q. WERE YOU EVER EMPANELLED AS A JUROR

   A.

4. Q> DO YOU KNOW THE IDENTIFYING NAME OF THE JURY PANEL

   A.

5. Q. FROM INFORMATION HELD BY US THE JURY PANEL WAS NAMED PANEL Z OR (OTHER PANEL LETTER)

6. Q. HOW WERE YOU NOTIFIED YOU WERE PART OF JURY PANEL Z OR PART OF A JURY PANEL

   A.

7. Q. (DEPENDING ON THE PREVIOUS ANSWER) – WERE YOU NOTIFIED BY THE SHERIFF'S OFFICE OR WHAT DID THE SHERIFF'S OFFICE TELL YOU

A.

8. Q. WHERE WERE YOU LIVING AT THE TIME WHEN YOU WERE NOTIFIED

A

9. Q. WAS THAT ADDRESS YOU WERE RECORDED AS LIVING AT ON THE ELECTORAL ROLL AT THE TIME.

A

10 Q. WHO WAS LIVING WITH YOU AT THAT ADDRESS AT THE TIME (IF THE ANSWER TO THE PREVIOUS QUESTION IS "NO" THEN IT WILL BE NECESSARY TO ASCERTAIN DETAILS OF THE ELECTORAL ROLL ADDRESS AND WHO WAS LIVING THERE AT THE TIME)

A

11. Q. AT THE TIME OF BEING NOTIFIED THAT YOU WERE PART OF THE JURY PANEL DID YOU HAVE A TELEPHONE AT YOUR RESIDENCE (IF LIVING AWAY FROM ELECTORAL ROLL ADDRESS, ASCERTAIN SAME INFORMATION RELATIVE TO THAT TELEPHONE NUMBER)

A.

12. Q. WAS THE NUMBER LISTED IN THE WHITE PAGES TELEPHONE DIRECTORY AT THE TIME

A.

13. Q. UNDER WHAT NAME

A

14 Q. WERE YOU TOLD WHAT WAS EXPECTED OF YOU AS A JURY MEMBER

A.

15. Q. WAS THERE ANY INDICATION AS TO HOW LONG YOU MAY HAVE BEEN REQUIRED IF YOU ACTUALLY GOT ON THE JURY

A

16. Q. WERE YOU AWARE WHAT PERSONS WERE BEING TRIED AT THE DISTRICT COURT PRIOR TO YOU BEING ON THE JURY PANEL

A.

17. Q. WERE YOU AWARE WHAT TRIAL YOU COULD HAVE BEEN INVOLVED IN AS A JUROR AFTER BEING NOTIFIED THAT YOU WERE PART OF THE JURY PANEL

A.

18. Q. AFTER BEING NOTIFIED THAT YOU WERE PART OF THE JURY PANEL WERE YOU APPROACHED IN ANY WAY BY ANY PERSON IN THE FORM OF A SURVEY SEEKING YOU OPINION ON ANY MATTER

A.

19. Q. (IF YES) WHO, HOW, WHEN, WHERE, WHAT. WHY. (e.g. TYPE OF SURVEY – RADIO STATION)

A.

20. Q. AFTER BEING NOTIFIED THAT YOU WERE PART OF THE JURY PANEL ARE YOU AWARE OF ANY MEMBER OF YOUR FAMILY OR HOUSEHOLD BEING APPROACHED IN ANY WAY BY ANY PERSON IN THE FORM OF A SURVEY SEEKING THEIR OPINION ON ANY MATTER

A. (IF YES) WHO, HOW, WHEN, WHERE, WHAT, WHY

21. Q. WE HAVE BEEN TOLD THAT PERSONS WERE SURVEYED ON SUCH SUBJECTS AS "LOGGING ON FRASER ISLAND", "WALLY LEWIS AND THE BRONCOS OR WAYNE BENNETT" OR THE "WET TROPICS". DO YOU RECALL EVER BEING SURVEYED ON THOSE SUBJECTS IN THE TWO WEEKS PRIOR TO YOU BEING REQUIRED FOR JURY SERVICE.

A.

22. Q. ARE YOU AWARE OF ANY MEMBERS OF YOUR FAMILY OR HOUSEHOLD EVER BEING ASKED OVER THE TELEPHONE IN A SURVEY TYPE SITUATION ABOUT "LOGGING ON FRASER ISLAND", "WALLY LEWIS AND THE BRONCOS OR WAYNE BENNETT" OR THE "WET TROPICS" IN THE TWO WEEKS PRIOR TO YOU BEING REQUIRED FOR JURY SERVICE

4

A.

23. Q. AFTER BEING NOTIFIED THAT YOU WERE PART OF THE JURY PANEL ARE YOU AWARE OF ANY MEMBERS OF YOUR FAMILY OR HOUSEHOLD OR YOUR FRIENDS, NEIGHBOURS OR ASSOCIATES BEING APPROACHED IN ANY WAY BY ANY PERSON SEEKING INFORMATION ABOUT YOU

A.

24. Q. DO YOU RECALL READING A NEWSPAPER ARTICLE CONCERNING MEMBERS OF YOU JURY PANEL BEING POLLED ON SUBJECTS

A.

25. Q. ARE YOU AWARE OF ANY OTHER MEMBER OF THE JURY PANEL OR THEIR FAMILY, FRIENDS OR ASSOCIATES BEING SURVEYED IN ANY WAY ALONG THE LINES AS I HAVE ALREADY MENTIONED

A.

26. Q. IS THERE ANYTHING YOU WISH TO SAY IN RELATION TO THIS MATTER

A.

QUESTIONS NON JUROR

TIME

DATE

LOCATION

INTRODUCTION

PERSONAL DETAILS – FULL NAME – DATE OF BIRTH – PRESENT ADDRESS – OCCUPATION

MAKING INVESTIGATIONS INTO THE SELECTION OF THE JURY FOR THE TRIAL OF SIR JOHANNES BJELKE-PETERSEN CONDUCTED DURING SEPTEMBER AND OCTOBER 1991.

1. Q. DO YOU KNOW (NAME PERSON ON JURY PANEL)

   A.

2. Q. HOW DO YOU KNOW (NAME PERSON ON JURY PANEL)

   A.

3. Q. DO YOU KNOW WHERE (NAME THE PERSON ON JURY PANEL) WAS RESIDING IN SEPTEMBER 1991)

   A.

4. Q. WHERE WERE YOU RESIDING IN SEPTEMBER 1991

   A.

5. Q. (OBTAIN DETAILS WHO ELSE WAS RESIDING ONE OR BOTH ADDRESSES TO THEIR KNOWLEDGE)

   A.

6. Q. (OBTAIN DETAILS IF TELEPHONE AT ONE OR BOTH

LOCATIONS AND TELEPHONE NUMBERS AND IF LISTED IN WHITE PAGES AT THE TIME)

A.

7. Q. ARE YOU AWARE THAT (NAME PERSON ON JURY PANEL) WAS LISTED ON A JURY PANEL AND WAS REQUIRED TO ATTEND THE DISTRICT COURT BRISBANE DURING SEPTEMBER 1991

A.

8. Q. (IF ANSWER "YES") WHEN DID YOU BECOME AWARE OF THIS

A.

9. Q. HOW DID YOU BECOME AWARE OF THIS

A.

10. Q. DURING SEPTEMBER 1991 AND IN PARTICULAR PRIOR TO THE 23RD SEPTEMBER OF THAT YEAR, WERE YOU SURVEYED BY TELEPHONE OR ANY OTHER MEANS (FOR NON TELEPHONE SUBSCRIBERS USE THE WORDS "BY ANY MEANS") BY ANY PERSON SEEKING YOUR OPINION ON ANY MATTER

A.

11. Q. (IF YES) WHO, HOW, WHEN, WHERE, WHAT, WHY. (TYPE OF SURVEY e.g. RADIO SURVEY)

A.

12. Q. WE HAVE BEEN TOLD THAT PERSONS WERE SURVEYED ON SUCH SUBJECTS AS "LOGGING ON FRASER ISLAND", "WALLY LEWIS AND THE BRONCOS OR WAYNE BENNETT" OR THE "WET TROPICS". DO YOU RECALL EVER BEING SURVEYED ON THOSE SUBJECTS DURING SEPTEMBER 1991.

A.

13. Q. ARE YOU AWARE OF (NAME THE PERSON ON JURY PANEL) OR ANY MEMBER OF HIS\HER FAMILY OR HOUSEHOLD BEING SURVEYED ALONG THOSE LINES

A.

14. Q. ARE YOU AWARE OF ANY PERSON BEING QUESTIONED ON

BACKGROUND INFORMATION ABOUT (NAME PERSON ON JURY PANEL) DURING SEPTEMBER 1991

A.

15. Q. IS THERE ANYTHING YOU WISH TO SAY IN RELATION TO THIS MATTER

A.

APPENDIX 3

K1	ANGUS, B	
K4	BEBBINGTON, A	TRAFFIC x 1 STALKING x 1
K5	BETTS, S	YES *
K6	BLAIK, P	Maybe yes
K9	CULLEN, A	TRAFFIC x 1
K10	DILBEKS, Z	NO x
K11	EGGLETON, H	TRAFFIC x 1
K15	GEBHARD, P	
K16	GLYNN, B	NO
K17	GRIMA, M	TRAFFIC x 2.
K18	GUTUGUTUWAI, W.	NO
K20	HEATON, J	NO x
K21	HEAZLEWOOD, R	
K22	HULME, G	Maybe yes TX1
K23	IRWIN, A	Maybe yes
K24	JOHNSON, A	UIL x 3.
K25	JOHNSON, M	NO xx
K26	LAKATOS, M	NO x
K28	LYTTLE, K	
K31	MCINNES, V	
K32	MCKENZIE, E	NO
K33	MUNNINGS, C	
K35	NETTING, R	
K40	PERKINS, D	YES *
K41	REUBEN, P	NO FALSE ARREST x 1 ASSAULT x 2.
K42	RICKER, G	
K44	ROGERS, C	NO
K45	SALM, C	NO
K46	SEAGROTT, K	NO x TX1

K47	SEMPF, M	NO	Tx1
K49	SHEA, M	Maybe yes	
K50	SHEPHERDSON, R	Maybe yes	Tx4.
K52	SMITH, S		
K54	SOUTER-ROBERTSON, N	Maybe yes	
K55	STEWART, C	NO	Tx2.
K56	STOKES, R	NO x	Tx1 & offline x1.
K59	SWANSON, M	NO	
K60	TORKINGTON, R		
K62	WHITE, W	NO	
K63	WILSON, K	NO x	
K64	WOODALL, S	NO	
K65	ZANUTTINI, T	YES. ****	
K67	BURGESS, G	NO	
K68	DRAY, J	NO	
K69	EVANS, T	NO	

P1	ANDERSON, J	NO	
P4	BAKER, L	NO	Tx 1
P5	BIEBER, A	NO	
P6	BILL, K	YES	Tx 2.
P7	BOWES, J	NO x	obstruct police x 1
P8	BYERS, J	NO x	
P9	BYRNE, R	NO	
P10	CHANDLER, H	YES ****	
P11	CHEAL, V	NO	
P12	CLARKE, G	NO	Tx 1
P13	COOPER, R	NO	
P14	DWYER, P	Maybe yes	
P15	EDMINSTON, D	Maybe yes	
P16	ELLWOOD, P	NO	
P18	FOOT, A	YES	
P19	FREUDENBERG, E.	NO	Tx 1
P20	FRIEND, H	Maybe yes	
P21	GORISS, G		
P22	GOSS, G	NO x	Tx 1.
P23	GRANT, T		
P24	HADDOCK, D		
P27	JONES, S		UIL x 1.
P28	KAMEUS, B		Tx 1.
P29	LE, H		
P30	LIMOND, K	NO	
P31	MARR, G	NO	
P32	MARTIN, M		Tx 1
P33	MCFARLANE, A		Tx 2.
P34	MCKAY, V		

P35 MCLAUGHLIN, M YES ****

P36 MCMILLAN, N NO ULx1; Tx1; Ox1 (indecent manner).

P37 MCSWAINE, B

P38 MERRETT, J NO x Tx1

P39 MIDDLETON, S Tx1

P40 MILLER, G Tx1

P41 MITCHELL M

P42 MORAN, F

P43 PAGET, S NO

P45 PATTERSON, B NO

P46 POELING-OER, P.NO

P47 REES, C Tx1 ULx1.

P48 REES, E

P49 REHM, C

P50 SHAW, L YES ****

P51 SHEEHAN, B YES Tx3.

P52 SIMONSEN, K

P53 STANLEY, J Maybe yes Tx2.

P54 STEELE, S Maybe yes

P57 STUCKEY, S

P58 TARNAWSKY, M

P59 TIERNAN, A Maybe yes

P62 WALLER, D

P63 WALLACE, P

P64 ZIMITAT, M NO

P66 BEDWELL, S ULx1

P67 LANDELLS, T Tx1

P68 MARIOUKLAS, G Tx1.

P69 MCCLOUNAN, G

P70 POWELL

P71 SITTON Tx1.

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Date of Issue	Title	Availability	Price
May 1990	Reforms in Laws Relating to Homosexuality - an Information Paper	In stock as at time of printing of this report	$ 7.80
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Date of Issue	Title	Availability	Price
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Date of Issue	Title	Availability	Price
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