

ROYAL COMMISSION INTO THE MANAGEMENT
OF POLICE INFORMANTS

Held in Melbourne, Victoria

On Friday, 21 June 2019

Led by Commissioner: The Honourable Margaret McMurdo AC

Also Present

Counsel Assisting: Mr C. Winneke QC
 Mr A. Woods
 Ms M. Tittensor
 Ms P.A. Neskovic QC

Counsel for Victoria Police Dr I. Freckelton QC
 Mr Purton
 Mr J. Hannebery QC
 Ms K. Argiropoulos

Counsel for State of Victoria Mr G. Hill

Counsel for Nicola Gobbo Mr P. Collinson QC
 Mr R. Nathwani

Counsel for DPP/SPP Mr P. Doyle

Counsel for CDPP Ms C. Fitzgerald

Counsel for Police Handlers Mr G. Chettle
 Ms L. Thies

Counsel for Media Mr M. Hoyne

Counsel for [REDACTED] Mr C. Tran

Counsel for [REDACTED] Mr J. Pizer
 Mr A. Halphen

09:42:02 1 COMMISSIONER: I'll just mention that this is a
09:42:03 2 continuation of yesterday's closed hearing. There seem to
3 be quite a lot of people in court. I might take
09:42:09 4 appearances and then find out who is present in court.
09:42:15 5
09:42:15 6 MR WINNEKE: I appear with Ms Neskovicin, Mr Woods and
09:42:18 7 Ms Tittensor in relation to the application and to assist
09:42:20 8 the Commission.
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09:42:20 10 COMMISSIONER: Thanks, Mr Winneke.
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09:42:22 12 DR FRECKELTON: Your Honour, might I regularise my
09:42:25 13 appearance and, more to the point, correct myself. I
09:42:31 14 appear, with Mr Purton, for Victoria Police in relation to
09:42:34 15 this issue.
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09:42:34 17 COMMISSIONER: When you say correct yourself, do you mean
09:42:37 18 that's who you were appearing for yesterday?
19
09:42:42 20 DR FRECKELTON: Yes, that's right. The Commissioner will
09:42:45 21 recall that I identified the Chief Commissioner. The
09:42:49 22 reason for that was that I did appear for the Chief
09:42:55 23 Commissioner in the Court of Appeal, but more properly in
09:42:56 24 the context of this Commission, it should be regarded as
09:42:59 25 Victoria Police.
26
09:42:59 27 COMMISSIONER: Yes, all right, Dr Freckelton. You were
09:43:02 28 quite insistent yesterday that you appeared for the Chief
09:43:06 29 Commissioner.
30
09:43:07 31 DR FRECKELTON: I was, and I was in error.
32
09:43:07 33 COMMISSIONER: The record is noted accordingly.
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09:43:10 35 DR FRECKELTON: Thank you very much.
09:43:12 36
09:43:12 37 MR NATHWANI: Commissioner, it's just me this morning.
09:43:13 38 Mr Collinson will be here later.
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09:43:15 40 COMMISSIONER: Thanks, Mr Nathwani.
09:43:16 41
09:43:17 42 MR HILL: Commissioner, Mr Hill for the State.
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09:43:20 44 COMMISSIONER: Thanks, Mr Hill.
09:43:21 45
09:43:22 46 MR CHETTLE: I'm here for the handlers, but not on this
09:43:25 47 issue, Commissioner.

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09:43:26 2 COMMISSIONER: Should you not be present then if you're not
09:43:27 3 an interested party?
4
5 MR CHETTLE: I was allowed to be present, but I'll leave if
6 you want me to.
7
09:43:28 8 COMMISSIONER: You did leave yesterday afternoon.
9
10 MR CHETTLE: As I'm not involved in this.
11
09:43:33 12 COMMISSIONER: You have no interest in the matter. All
09:43:35 13 right then. It's probably best that you do leave.
09:43:37 14
09:43:38 15 MR CHETTLE: I'll vacate the premises.
16
09:43:40 17 COMMISSIONER: Yes. Mr Doyle.
09:43:41 18
09:43:41 19 MR DOYLE: I appear for the Director and for the Office of
09:43:44 20 Public Prosecutions.
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09:43:45 22 COMMISSIONER: Thank you.
09:43:46 23
09:43:46 24 MS FITZGERALD: I appear for the Commonwealth Director of
09:43:50 25 Public Prosecutions.
26
09:43:50 27 COMMISSIONER: Thank you.
09:43:51 28
09:43:52 29 MR HOYNE: Hoyne is my name. I appear on behalf of The
09:44:00 30 Herald & Weekly Times Pty Ltd, The Age Company Pty Ltd,
09:44:01 31 Nationwide News Pty Ltd, 7 Network Operations Pty Ltd,
09:44:06 32 Network Ten Pty Ltd and Nine Network Pty Ltd.
09:44:13 33
09:44:14 34 MR TRAN: May it please the Commissioner, my name is Tran.
09:44:14 35 I seek the Commissioner's leave to appear on behalf of a
09:44:17 36 person affected by the issue this morning. That person's
09:44:20 37 been given the pseudonym, I believe, [REDACTED]
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09:44:24 39 COMMISSIONER: Thank you. Thank you, Mr Tran.
09:44:30 40
09:44:32 41 MR PIZER: Good morning, Commissioner. My name is Jason
09:44:35 42 Pizer. I seek leave, with Mr Halphen, to appear on behalf
09:44:40 43 of an individual who has been given the pseudonym
09:44:47 44 [REDACTED]
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09:44:47 46 COMMISSIONER: Yes. I'll give leave to you, Mr Pizer and
09:44:50 47 Mr Halphen, and also Mr Tran, to appear in this application

09:44:53 1 this morning.
09:44:55 2
09:44:55 3 MR PIZER: Thank you, Commissioner.
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09:44:57 5 COMMISSIONER: Are there any other appearances? There are
09:45:03 6 still a lot of people in court. Is everyone in court
09:45:07 7 associated with the legal teams or an accredited media
09:45:12 8 representative? Are there any accredited media
09:45:16 9 representatives present? I understand that they are in the
09:45:21 10 media room, to which these proceedings are being streamed
09:45:25 11 at the moment.
09:45:32 12
09:45:32 13 A couple of matters before we get under way. Perhaps
09:45:35 14 another matter I could clarify, Dr Freckelton. Yesterday I
09:45:46 15 understood, from your submission, and it might have been my
09:45:49 16 error or perhaps just loose language on your part, that the
09:45:55 17 Court of Appeal, in its hearing earlier this week, did not
09:46:01 18 permit the media parties to be present in the Witness
09:46:07 19 Protection Act part of that application, whereas I
09:46:10 20 understand that in fact the media parties indicated that
09:46:16 21 they weren't conceding that they could not be present but
09:46:20 22 they'd already made the submissions they wished to make and
09:46:23 23 to save time and costs, well and truly withdrew.
24
09:46:26 25 DR FRECKELTON: They certainly were not present for the
09:46:28 26 Witness Protection Act component of the proceeding. They
09:46:32 27 were for the earlier part, Your Honour.
28
09:46:33 29 COMMISSIONER: Yes.
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09:46:34 31 DR FRECKELTON: That's my recollection.
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09:46:38 33 COMMISSIONER: My understanding, from what you'd said, was
09:46:40 34 that that was because of a ruling of the Court of Appeal,
09:46:43 35 whereas I've been told since that's not in fact the case.
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09:46:47 37 DR FRECKELTON: I'll check, Your Honour.
09:46:49 38
09:46:49 39 MR HOYNE: Your Honour, I was the person who appeared on
09:46:51 40 behalf of the media interests on that occasion. I can
09:46:53 41 clarify the matter for you.
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43 COMMISSIONER: That would be good.
44
09:46:55 45 MR HOYNE: To be completely frank, what occurred was the
09:46:58 46 Court of Appeal initially suggested that they thought the
09:47:00 47 best way to deal with it was to deal with the Suppression

09:47:04 1 Act orders first and then to deal with the Witness
09:47:09 2 Protection Act matters later because of s.13 of the Witness
09:47:09 3 Protection Act, and they suggested that in that
09:47:10 4 circumstance, the media wouldn't be permitted and they
09:47:12 5 asked if anybody had any difficulty with that approach. We
09:47:15 6 then - I then later made submissions that suggest - that
09:47:18 7 said we weren't going to take an issue with that approach,
09:47:21 8 but that we didn't concede the point that we weren't
09:47:24 9 permitted to be there inevitably and I didn't want anything
09:47:28 10 to appear in their judgment that suggested the media
09:47:32 11 interests weren't permitted to be there by reason of s.13
09:47:35 12 of the Witness Protection Act. And certainly Justice
09:47:38 13 Weinberg, in that instance, said, "If you're going to
09:47:41 14 leave, we don't need to say anything about that."
15
09:47:43 16 COMMISSIONER: So there was no - - -
09:47:46 17
09:47:46 18 MR HOYNE: Correct, there was no formal ruling made one way
09:47:51 19 or the other ultimately.
20
09:47:52 21 COMMISSIONER: In any case, there's a distinction in s.13
09:47:55 22 between "closed court" and "in private", in s.10A(2)(a).
23
09:48:03 24 MR HOYNE: There's certainly different words used between
25 those - - -
26
09:48:03 27 COMMISSIONER: There's a difference in the language used in
28 any case.
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30 MR HOYNE: Yes, that's quite so.
09:48:05 31
09:48:05 32
09:48:05 33 MS NESKOVCIN: Commissioner, can I further assist on that
09:48:08 34 point.
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36 COMMISSIONER: Yes, thank you.
37
09:48:09 38 MS NESKOVCIN: It might assist also to jog Dr Freckelton's
09:48:14 39 memory. There were, as Mr Hoyne indicated, two
09:48:16 40 applications, one in relation to suppression orders and one
09:48:17 41 in relation to s.10A. The court considered that, in
09:48:22 42 respect of the application under s.10 - sorry, not 10A. In
09:48:27 43 respect of the application under s.10, the court was
09:48:31 44 required to hear the matter under s.13, which mandates that
09:48:34 45 the court be closed. So when my learned friend
09:48:39 46 Dr Freckelton said to you yesterday, at transcript 2674,
09:48:43 47 that his recollection was that the court excluded the media

09:48:46 1 pursuant to s.10A, because the interpretation given was
09:48:50 2 that "in private" meant the absence of the parties, it's my
09:48:54 3 recollection that the media weren't present at that part,
09:48:58 4 for the reasons Mr Hoyne indicated, but also because the
09:49:01 5 court was proceeding pursuant to s.13.
6
09:49:06 7 COMMISSIONER: Yes, thank you. And there's a clear
09:49:09 8 distinction in the language used between s.13 and s.10A(2),
09:49:16 9 with which this application is presently concerned.
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09:49:19 11 MS NESKOVCIN: Yes.
12
09:49:21 13 COMMISSIONER: Thank you.
14
09:49:22 15 DR FRECKELTON: I'm content with all of that, Your Honour.
16
09:49:26 17 COMMISSIONER: Thank you. There's another issue, before we
09:49:28 18 hear from the new parties, that I might raise that has
09:49:31 19 occurred to me overnight, and that is in making the orders
09:49:36 20 that I initially proposed and which Dr Freckelton's
09:49:42 21 application is for me not to make, so that if I did proceed
09:49:47 22 with orders that allowed the accredited - the members of
09:49:53 23 the media accredited by the Royal Commission to be present,
09:49:59 24 whether that should be limited to this hearing room or
09:50:07 25 whether they should be permitted to attend in the media
09:50:12 26 room, which has live streaming. There are advantages and
09:50:20 27 disadvantages either way. Namely, if they're in this room,
09:50:24 28 I can see how many are present and who was present and have
09:50:29 29 immediate control over them. The advantage, as I
09:50:32 30 understand it, of them being in the media room is that they
09:50:41 31 would be under the supervision there of the Commission's
09:50:45 32 media person, who would be able to answer any questions
09:50:47 33 that they had and give them assistance, without disrupting
09:50:53 34 the court. I had thought there was an added advantage
09:50:57 35 in the streaming, in that I thought there was a 15-minute
09:51:01 36 delay to the media room, but that's not so. Although it
09:51:04 37 could be made, there could be a 15-minute delay to the
09:51:07 38 media room, which would add then another layer of
09:51:09 39 protection, but at the moment, there isn't. So I'd
09:51:16 40 appreciate some submissions on that at some point,
09:51:26 41 Dr Freckelton.
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09:51:26 43 DR FRECKELTON: Yes.
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09:51:27 45 COMMISSIONER: And perhaps also from the Commission in
09:51:30 46 rely.
47

09:51:30 1 In addition to the appearances that I've just had
09:51:33 2 noted, I was provided with an email from the
09:51:37 3 representatives of the person who's now [REDACTED]
09:51:52 4 explaining that they couldn't appear today, but they wanted
09:51:55 5 their submissions, that they'd emailed to the Commission,
09:51:58 6 to be taken into account. Have you got a copy of that,
09:52:01 7 Ms Neskovicin?
09:52:02 8
09:52:03 9 MS NESKOVCIN: No, Commissioner.
10
09:52:05 11 COMMISSIONER: Could somebody give Ms Neskovicin - - -
09:52:08 12
09:52:09 13 MS NESKOVCIN: We have, thank you.
14
09:52:09 15 COMMISSIONER: Although [REDACTED] is not a person who is
09:52:14 16 relevant to former police officer Swindells' evidence, to
09:52:24 17 which this application relates, he has an interest in the
09:52:28 18 type of orders proposed here, so I'm inclined to accept the
09:52:31 19 submission on that basis. Does anybody want to speak
09:52:39 20 against that? Have you got a copy of the submission,
09:52:46 21 Dr Freckelton?
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09:52:52 23 DR FRECKELTON: Yes, thank you.
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09:52:52 25 COMMISSIONER: You do have a copy of it?
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09:52:54 27 DR FRECKELTON: Yes.
28
09:52:56 29 COMMISSIONER: Do the other parties have a copy or wish to
09:52:58 30 have a copy?
09:52:59 31
09:53:01 32 MS NESKOVCIN: I beg your pardon, Commissioner?
33
09:53:03 34 COMMISSIONER: I'm just wondering whether the other parties
09:53:05 35 who are represented here wish to have a copy.
09:53:07 36
09:53:07 37 MS NESKOVCIN: It hasn't been distributed. Commissioner,
09:53:10 38 can I just bring to your attention the penultimate
09:53:13 39 paragraph of the email.
40
09:53:14 41 COMMISSIONER: I'm just trying to find my copy, actually.
09:53:17 42 I'm not quite sure where it is.
09:53:21 43
09:53:25 44 MS NESKOVCIN: I do have a spare, I beg your pardon.
45
09:53:27 46 COMMISSIONER: Thank you. It might be quicker. Yes,
09:53:38 47 Ms Neskovicin.

09:53:39 1
09:53:40 2 MS NESKOVCIN: The penultimate paragraph of the email
09:53:43 3 actually requests that the matter be deferred, as counsel
09:53:46 4 for the relevant person is unable to attend.
5
09:53:48 6 COMMISSIONER: Yes.
09:53:50 7
09:53:51 8 MS NESKOVCIN: So that they can make further detailed
09:53:53 9 submissions. That's a matter for you, Commissioner, but
09:53:56 10 having briefly seen the submission, it may be that we can
09:54:03 11 deal with the application, the sorts of issues that this
09:54:08 12 witness may - this person may raise will be covered by the
09:54:15 13 submissions that are going to be made on behalf of the
09:54:17 14 other persons affected and - sorry, I beg your pardon. I'm
09:54:26 15 also told there's another person who - counsel for
09:54:29 16 [REDACTED] is also requesting an adjournment. Commissioner,
09:54:34 17 it might be prudent to - it might be best to deal with the
09:54:40 18 applications this morning and then consider the application
09:54:41 19 for adjournment at the end.
20
09:54:48 21 COMMISSIONER: So is counsel for [REDACTED] present or not
09:54:51 22 present?
09:54:51 23
09:54:52 24 MS NESKOVCIN: Not present.
25
09:54:57 26 COMMISSIONER: So where does this application for an
09:54:58 27 adjournment come from? Is there an email to the Commission
09:55:01 28 or - - -
09:55:02 29
09:55:02 30 MS NESKOVCIN: The email that's before you for [REDACTED].
31
09:55:08 32 COMMISSIONER: Yes, I see that one, in relation to
09:55:09 33 [REDACTED], but in relation to [REDACTED]?
09:55:13 34
09:55:15 35 MS NESKOVCIN: Counsel assisting, Mr Winneke, has received
09:55:18 36 a request on behalf of the solicitor for [REDACTED], or
09:55:23 37 [REDACTED].
38
09:55:27 39 COMMISSIONER: What, an oral request? A telephone request?
09:55:32 40
09:55:33 41 MS NESKOVCIN: An electronic request. He says an email has
09:55:37 42 been sent to the Commission. I'm not sure if the staff can
09:55:40 43 make some enquiries about that. But that's all counsel
09:55:44 44 assisting are aware of.
45
09:55:46 46 COMMISSIONER: I'll ask if anyone can find that email.
09:55:48 47 That would be helpful. Thank you, Ms Neskovicin. Mr Hill,

09:55:55 1 you want to make submissions?
09:55:56 2
09:55:56 3 MR HILL: Thank you, Commissioner, for giving the State the
09:56:01 4 opportunity to get instructions. The State supports the
09:56:03 5 submissions put by the police yesterday on the construction
09:56:05 6 of the Witness Protection Act and broadly on the effect of
09:56:09 7 the suppression orders. With the suppression orders, we
09:56:12 8 support the Commission's approach of being cautious and
09:56:16 9 making non-publication orders and we suggest, respectfully
09:56:19 10 perhaps, there may be some merit in periodically reminding
09:56:22 11 people when things are in closed session and the obligation
09:56:29 12 not to report those matters, to make the media's
09:56:32 13 obligations perfectly clear. Unless there's anything
14 else - - -
15
09:56:34 16 COMMISSIONER: I'm not entirely sure what you support and
09:56:37 17 what you don't support. You're adopting the submissions of
09:56:41 18 Dr Freckelton yesterday, on behalf of - - -
09:56:42 19
09:56:42 20 MR HILL: Yes, on the construction of the Witness
09:56:44 21 Protection Act.
22
09:56:42 23 COMMISSIONER: On the construction of the Witness
09:56:44 24 Protection Act, yes.
09:56:45 25
09:56:45 26 MR HILL: And we're also submitting to the Commission that
09:56:51 27 it should take a cautious approach, separately, for a
09:56:54 28 separate reason, because of the existence of historic
09:56:58 29 suppression orders, and in that - - -
30
09:57:01 31 COMMISSIONER: So you're not adopting Victoria Police's
09:57:05 32 submissions that - - -
09:57:07 33
09:57:08 34 MR HILL: We broadly support it. I haven't gone through
09:57:10 35 the suppression orders myself, so that's why I can't say I
09:57:13 36 adopt their construction.
37
09:57:16 38 COMMISSIONER: There were three points made yesterday by
09:57:19 39 Dr Freckelton and the last two related to the Witness
09:57:24 40 Protection Act, but the first one related to the submission
09:57:33 41 that the proposed orders in respect of Mr Swindells'
09:57:42 42 evidence would be in breach of the suppression order.
09:57:44 43 What's your position on that point?
09:57:46 44
09:57:47 45 MR HILL: We don't have a position on that, Commissioner.
46
09:57:49 47 COMMISSIONER: So you're not adopting that argument?

09:57:51 1
09:57:51 2 MR HILL: Not expressly, no.
3
09:57:53 4 COMMISSIONER: Thank you. What is your additional point
09:57:55 5 then?
09:57:55 6
09:57:56 7 MR HILL: It is more a suggestion, Commissioner. We've
09:58:01 8 seen how matters are in closed session and we return after
09:58:05 9 a break and there's some confusion as to whether we're
09:58:08 10 still in closed session or not. It's merely a suggestion
09:58:12 11 that perhaps there might be merit in periodically drawing
09:58:14 12 to the media's attention if we are still in closed session,
09:58:18 13 that fact.
14
09:58:19 15 COMMISSIONER: I understand. Yes.
09:58:20 16
09:58:21 17 MR HILL: Thank you, Commissioner.
18
09:58:22 19 COMMISSIONER: All right. I'll hear next from Mr Tran.
09:58:29 20
09:58:30 21 MR TRAN: Thank you, Commissioner. If I may ask, has the
09:58:32 22 Commissioner received a copy of a brief written submission
09:58:37 23 that was provided to counsel assisting this morning? If
09:58:39 24 not, I can hand one up to the Commissioner.
25
09:58:42 26 COMMISSIONER: I think I have, but I would appreciate it
09:58:44 27 being handed up, because I'm just not sure where it is now.
09:58:47 28
09:58:48 29 MR TRAN: While that's being handed up, may I also request
09:58:50 30 that the Commissioner be provided a confidential affidavit
09:58:53 31 of my instructor, Mr Abrams. That was provided to the
09:58:57 32 solicitors assisting this morning.
33
09:58:59 34 COMMISSIONER: I haven't seen that.
09:59:00 35
09:59:01 36 MR TRAN: It's very brief. I don't think I'm divulging
09:59:04 37 anything confidential, just to say the point of the
09:59:06 38 affidavit is to provide at least some evidence to support
09:59:10 39 the submission that use of a pseudonym, or more, would
09:59:14 40 present some risk to [REDACTED]'s safety, it doesn't do
09:59:18 41 anything more than that.
42
09:59:19 43 COMMISSIONER: I just want to make sure that the parties
09:59:22 44 understand what's proposed, and that is that although there
09:59:25 45 would be media representatives accredited by the
09:59:32 46 Royal Commission present, evidence would be given with the
09:59:35 47 use of a pseudonym and there would be a non-publication

09:59:41 1 order - - -
09:59:41 2
09:59:42 3 MR TRAN: Yes.
4
09:59:42 5 COMMISSIONER: - - - in respect of the evidence. That's
09:59:44 6 understood?
09:59:45 7
09:59:45 8 MR TRAN: Yes.
9
09:59:46 10 COMMISSIONER: Yes.
09:59:46 11
09:59:47 12 MR TRAN: Thank you, Commissioner. [REDACTED]'s position is
09:59:49 13 that the media should not be permitted to be in a closed
09:59:53 14 hearing, even if a pseudonym is used and even if
09:59:58 15 suppression orders are made. Before I turn from
10:00:06 16 housekeeping, may I just formally request and make the
10:00:09 17 submission, Commissioner, that that affidavit that was
10:00:11 18 handed up to the Commissioner be treated as confidential,
10:00:14 19 under s.26 of the Inquiries Act. The reason for that is
10:00:18 20 identified in paragraphs 4-8 of my instructing solicitor's
10:00:22 21 affidavit.
22
10:00:37 23 COMMISSIONER: You can sit down while I read that. Thank
10:00:39 24 you.
10:00:40 25
10:00:40 26 MR TRAN: Thank you, Commissioner.
27
10:01:16 28 COMMISSIONER: The affidavit seems to be more in the form
10:01:18 29 of a submission, I suppose.
10:01:21 30
10:01:22 31 MR TRAN: It may be, Commissioner, it may not take matters
10:01:24 32 too far, but part of the purpose of it is also to identify
10:01:27 33 the limited extent to which we, as legal representatives of
10:01:30 34 [REDACTED], have been able to seek instructions from
10:01:33 35 [REDACTED] in relation to this matter.
36
10:02:42 37 COMMISSIONER: Yes. Thank you.
10:02:43 38
10:02:44 39 MR TRAN: Thank you, Commissioner. And may I ask,
10:02:46 40 Commissioner, has the Commissioner had an opportunity to
10:02:48 41 read the written submissions that were provided this
10:02:50 42 morning?
10:02:50 43
10:02:51 44 COMMISSIONER: Yes.
10:02:51 45
10:02:51 46 MR TRAN: I'm grateful. That means I only need, I think,
10:02:54 47 to make two principal points in oral submissions, if the

10:02:57 1 Commissioner pleases. The first is to emphasise the
10:03:01 2 guiding principles, which are from paragraphs 6-29 of that
10:03:04 3 written submission. If I may paraphrase those. In my
10:03:07 4 submission, the Witness Protection Act, and the application
10:03:09 5 of the Charter, require the Commissioner to prioritise
10:03:14 6 safety and certainty, the safety of ██████████ and anyone
10:03:21 7 else who may be affected by the orders that the
10:03:23 8 Commissioner proposes to make, and certainty in the sense
10:03:25 9 that ultimately the Commissioner should control and
10:03:31 10 superintend the information and evidence and its
10:03:35 11 disclosure. In my submission, that is best done by
10:03:37 12 receiving the evidence in closed session and then reviewing
10:03:41 13 the evidence that's obtained, when that evidence can
10:03:46 14 actually be read and examined and considered as to the
10:03:48 15 extent to which it should be disclosed, even to accredited
10:03:52 16 media representatives and even subject to suppression.
10:03:57 17 That's the first point I wanted to make. I don't need to
10:04:00 18 develop it further because it's in writing.

10:04:02 19
10:04:02 20 The second point I wanted to make is just to emphasise
10:04:05 21 paragraph 4 of the written submissions, which sets out
10:04:08 22 ██████████'s contentions about how the balancing act should
10:04:13 23 be carried out by the Commissioner. So here the orders
10:04:16 24 that the Commissioner proposes to make, even with the
10:04:20 25 controls that the Commissioner has proposed, will, in my
10:04:22 26 submission, increase the risk to ██████████, due to, if
10:04:27 27 nothing more than, the human circumstance that there's a
10:04:31 28 risk of inadvertent disclosure, particularly where members
10:04:35 29 of the media may have information in their mind, that
10:04:38 30 doesn't derive from what happens in evidence today, and so
10:04:42 31 there might be a blurring as to what can be disclosed and
10:04:44 32 what can't. In my submission, that's a practical
10:04:48 33 illustration of the risk of inadvertent disclosure. That's
10:04:52 34 on the one hand.

10:04:53 35
10:04:53 36 On the other hand is the respectfully minimal
10:04:59 37 contribution to the administration of justice of having
10:05:01 38 representatives of the media present in circumstances
10:05:04 39 where, if the Commissioner deems it appropriate after the
10:05:07 40 fact, the Commissioner can, I assume, provide to the media
10:05:13 41 the relevant audio or video recording of the evidence and
10:05:17 42 the media can, under the control and supervision of the
10:05:20 43 Commissioner, report on that matter at an appropriate time.
10:05:25 44 Even with the current regime proposed by the Commissioner,
10:05:29 45 as I understand it, the media would not be able to report
10:05:32 46 on it today, I imagine - I don't know but I imagine - and
10:05:36 47 so the occasional interest in very prompt reporting isn't

10:05:42 1 alive today.

2

10:05:43 3 I said I'd make two points. If I may make one final
10:05:46 4 point. I heard something that the Commission said this
10:05:48 5 morning about the difference between the words "in private"
10:05:51 6 in s.10A and "closed court" in s.13 of the Witness
10:05:55 7 Protection Act. In my submission, little weight should be
10:05:59 8 placed on the difference, for two reasons.

10:06:02 9

10:06:02 10 First, it's understandable that s.10A would use the
10:06:06 11 words "in private", because s.10A applies to a variety of
10:06:12 12 bodies, courts, tribunals, boards of inquiry. Given that
10:06:17 13 it can apply to lots of different entities, it makes sense
10:06:22 14 that parliament would not have used the words "closed
10:06:25 15 court", because "closed court" would not be appropriate for
10:06:28 16 all the kinds of bodies that s.10A would apply to. By
10:06:32 17 contrast, s.13 uses the words "closed court" because s.13
10:06:33 18 only applies in the Supreme Court. In my submission, the
10:06:36 19 difference in language doesn't make any difference. The
10:06:39 20 same concept is captured.

10:06:41 21

10:06:42 22 The second reason is when one looks at the explanatory
10:06:45 23 memorandum accompanying the 2016 amending Act which
10:06:51 24 inserted s.10A into the Witness Protection Act, at p.8 of
10:06:57 25 the explanatory memorandum, and I apologise, I don't have
10:06:59 26 it to hand, explains that the purpose of this is to control
10:07:02 27 public disclosure, just public disclosure. So a useful way
10:07:05 28 to understand the words "in private" is to compare it to
10:07:08 29 its contrast, which is public disclose, and, in my
10:07:10 30 submission, where the media does not have a direct interest
10:07:13 31 in the matters the subject of the evidence, it would
10:07:16 32 relevantly be public disclosure and, therefore, not in
10:07:20 33 private, to permit the media to be present.

34

10:07:22 35 COMMISSIONER: We don't have the explanatory memorandum.
10:07:24 36 Can I ask if the Commission lawyers can get a copy of it,
10:07:28 37 please.

10:07:28 38

10:07:29 39 MR TRAN: Just for their assistance, it's the explanatory
10:07:31 40 memorandum to the Witness Protection Amendment Bill 2016
10:07:37 41 and it's p.8 and that says: "Clause 14 amends s.10A of the
10:07:45 42 principal Act to protect certain information about a
10:07:47 43 person's involvement with alternative protection
10:07:50 44 arrangements from being publicly disclosed in a proceeding
10:07:54 45 before a court, tribunal, Royal Commission or board of
10:07:56 46 inquiry." As I read it out, I realise that I misspoke to
10:07:59 47 the Commissioner. The 2016 amending Act didn't insert

10:08:05 1 s.10A, it amended parts of s.10A. It diminishes the force
10:08:14 2 of my submission to a degree, but not wholly, because it
3 still reflects parliamentary consideration of the scope of
10:08:16 4 s.10A and says that it's there to stop public disclosure,
10:08:20 5 but I do need to - - -
10:08:20 6
10:08:20 7 COMMISSIONER: Public disclosure of?
10:08:23 8
10:08:24 9 MR TRAN: Of what there was the amendments to s.10A. The
10:08:26 10 relevant amendments to s.10A there were the insertion of
10:08:31 11 s.10A(1)(c), (d), (e), (f). So in 2016 it was amended to
10:08:42 12 change the various matters which could not be disclosed.
10:08:46 13 If the Commissioner has s.10A in front of her, the
10:08:49 14 Commissioner will recall that there's six subject matters
10:08:54 15 which engage s.10A(1).
16
10:08:57 17 COMMISSIONER: Yes.
10:08:58 18
10:08:58 19 MR TRAN: And the 2016 amending Act amended the third of
10:09:03 20 those matters and inserted the final three of those
10:09:06 21 matters.
22
10:09:07 23 COMMISSIONER: But they're actually not relevant to this
10:09:08 24 application.
10:09:09 25
10:09:10 26 MR TRAN: They aren't, but - I don't know that they aren't.
27
10:09:14 28 COMMISSIONER: It's not disputed that s.10A applies because
10:09:22 29 of s.10(1). That's common ground.
10:09:25 30
10:09:26 31 MR TRAN: Thank you, Commissioner. What this reveals is
10:09:29 32 that in 2016, the parliament turned its mind to the
10:09:33 33 operation of 10A and, in that explanatory memorandum,
10:09:36 34 explained, when they were substantially amending and
10:09:39 35 inserting new paragraphs of 10A, that the parliament
10:09:42 36 considered that what it was doing was restricting "public
10:09:46 37 disclosure" of those matters.
38
10:09:49 39 COMMISSIONER: That doesn't really take us any further,
10:09:50 40 does it, because it's what's - isn't public - the general
10:09:57 41 public's excluded. It doesn't really take the argument any
10:10:00 42 further.
10:10:01 43
10:10:01 44 MR TRAN: It doesn't take the matters too much further, but
10:10:04 45 to the extent that it does, in my submission it weighs in
10:10:08 46 favour of excluding the media. If the Commission pleases.
47

10:10:10 1 COMMISSIONER: Yes, all right. Actually, I don't think I
10:10:12 2 do need a copy of that memorandum now, thank you.
3

10:10:15 4 Did you have any submission, Mr Tran, on whether, if I
10:10:21 5 do make the proposed orders, it's preferable for your
10:10:25 6 client to have the media in this hearing room or in the
10:10:31 7 separate media room?
10:10:32 8

10:10:33 9 MR TRAN: Commissioner, in my submission, it would be
10:10:36 10 preferable to have the media in this room, consistent with
10:10:38 11 my submission that ultimately the Commissioner should have
10:10:41 12 superintendence over what occurs.
13

10:10:46 14 COMMISSIONER: Understood. Thanks very much, Mr Tran.
10:10:52 15 Yes, Mr Pizer.
10:10:53 16

10:10:53 17 MR PIZER: Thank you, Commissioner. We seek to make two
10:10:58 18 headline points. The first headline point is that we
10:11:03 19 support and adopt the submissions made by Dr Freckelton, on
10:11:08 20 behalf of Victoria Police.
21

10:11:09 22 COMMISSIONER: I gather you've read the transcript?
10:11:12 23

10:11:12 24 MR PIZER: I have not read the transcript, but
10:11:14 25 Dr Freckelton has given me a summary of what transpired
10:11:18 26 yesterday.
27

10:11:18 28 COMMISSIONER: Yes.
10:11:19 29

10:11:20 30 MR PIZER: And allied to that first headline point is that
10:11:22 31 we support and adopt the submissions just made by Mr Tran,
10:11:25 32 on behalf of [REDACTED].
33

10:11:29 34 Moving to our second headline point, in our
10:11:34 35 submission, the Commission should not depart from the clear
10:11:37 36 regime set out in s.10A of the Witness Protection Act. Put
10:11:44 37 slightly differently, the Commissioner should hold the
10:11:47 38 hearing in private, without the accredited representatives
10:11:50 39 of the media being present, either in this room or in the
10:11:56 40 media room adjacent to this room. But to anticipate a
10:12:00 41 question you might ask me, Commissioner, if there were to
10:12:05 42 be a choice between those two rooms, we would submit that
10:12:09 43 this room is preferable, so that you can exert appropriate
10:12:13 44 control over the media representatives.
45

10:12:16 46 We want to emphasise that we do not in any way seek to
10:12:20 47 impugn or call into question the integrity of any of the

10:12:25 1 media representatives, but, like anyone, they may make an
10:12:31 2 inadvertent mistake. They don't know - I withdraw that.
10:12:36 3 There is a possibility that they may consider that some
10:12:40 4 information is already in the public domain and may make a
10:12:43 5 mistake about that and publish material that should have
10:12:48 6 been not published and they could do so by referring to my
10:12:54 7 client's pseudonym, [REDACTED], and the Commissioner may not
10:13:01 8 know that that pseudonym is already in the public domain
10:13:05 9 and could therefore lead to the original identity of my
10:13:08 10 client.

11

10:13:10 12 COMMISSIONER: But, Mr Pizer, what is proposed is that
10:13:12 13 there would be a blanket prohibition on reporting. So
10:13:15 14 they're allowed to be present, but they can't report.

10:13:18 15
10:13:18 16 MR PIZER: Certainly. I understand what's proposed,
10:13:20 17 Commissioner, but my response to that is that there is a
10:13:23 18 risk of inadvertent disclosure, in contravention of an
10:13:26 19 order of that kind, and the preferable course to adopt is
10:13:30 20 to minimise - in fact, reduce to the greatest extent
10:13:35 21 possible - the prospect of that risk eventuating. The
10:13:38 22 reason for that, we submit, is that if that risk were to
10:13:43 23 eventuate, the consequences to my client, and my client's
10:13:47 24 family, who share his original surname, could well be
10:13:52 25 catastrophic and the appropriate approach, in our
10:13:57 26 submission, is to adopt a very risk-averse solution, that
10:14:02 27 would eliminate the risk of inadvertent disclosure, and
10:14:07 28 that solution is to follow the clear regime contained in
10:14:11 29 s.10A of the Witness Protection Act.

10:14:15 30

10:14:15 31 The only other point, subject to conferring with my
10:14:19 32 legal team, that I wish to make is, echoing what Mr Tran
10:14:26 33 said, if you look at the other side of the equation, if you
10:14:30 34 were to make the order that we submit should be made, what
10:14:35 35 consequences flow for the media representatives? They
10:14:40 36 won't be here, they won't know what happens. But the
10:14:42 37 Commissioner could subsequently make a determination that
10:14:46 38 certain information might be made available to the media
10:14:49 39 and at that stage the media could be in a position to
10:14:52 40 publish information. But before we get to that, the
10:14:57 41 appropriate course to adopt, in our submission, is to avoid
10:15:01 42 risk to the greatest extent possible, that being, in our
10:15:05 43 submission, what underlies s.10A of the Act.

44

10:15:09 45 If the Commission will just bear with me a moment.
10:15:14 46 Unless I can assist you any further, Commissioner, those
10:15:17 47 are our submissions.

1
10:15:18 2 COMMISSIONER: Thank you. We're told [REDACTED] has asked
10:15:30 3 for an adjournment. Is there any more information about
10:15:33 4 that?
10:15:38 5
10:15:40 6 MS NESKOVCIN: I understand there's an adjournment
10:15:42 7 application by email, that's been printed and should be
10:15:47 8 available shortly, Commissioner.
9
10:15:49 10 COMMISSIONER: All right. So in the meantime, perhaps if
10:15:51 11 we now hear from - first of all, I should say the
10:15:53 12 confidential affidavit and submissions on behalf of
10:15:55 13 [REDACTED] will be placed in a sealed envelope and marked
10:15:58 14 not to be opened, except by an order of the Commissioner.
15
10:16:06 16 I was going to hear from the media next.
10:16:12 17 Dr Freckelton, I thought you'd made your submissions?
18
10:16:15 19 DR FRECKELTON: I have. There are three brief responses I
10:16:17 20 should like to make to the matters raised by counsel
10:16:21 21 assisting, which I believe will be able to assist the
10:16:23 22 Commission.
23
10:16:23 24 COMMISSIONER: All right then.
25
10:16:25 26 DR FRECKELTON: But after the media would make sense.
27
10:16:28 28 COMMISSIONER: Well, perhaps before, because then the media
10:16:30 29 will have an opportunity to deal with them.
30
10:16:34 31 DR FRECKELTON: By all means. The first issue I should
10:16:36 32 like to address is that made by my learned friend
10:16:39 33 Mr Winneke, in relation to the meaning of "publish". He,
10:16:44 34 helpfully, drew the attention of the Commissioner to the
10:16:48 35 definition in s.3 of the Open Courts Act. The point that
10:16:52 36 we make in that regard is that "publish", in that context,
10:16:58 37 carries broadly the same meaning that it does under
10:17:00 38 defamation law, namely, one that is very broad.
10:17:04 39 Dissemination - - -
40
10:17:05 41 COMMISSIONER: Yes, and it's the same definition that's in
10:17:09 42 the Inquiries Act, in s.3.
43
10:17:12 44 DR FRECKELTON: Yes.
45
10:17:14 46 COMMISSIONER: Yes.
47

10:17:14 1 DR FRECKELTON: And the key parts of it are dissemination
10:17:17 2 or provision of access to the public or a section of the
10:17:20 3 public, and our short point is that when evidence is given
10:17:23 4 before you and there are other persons present than the
10:17:26 5 parties, that constitutes a provision of access to a
10:17:31 6 section of the public.
10:17:36 7

10:17:36 8 We move then to the issue of the meaning of "in
10:17:40 9 private". It is correct that the two expressions "in
10:17:44 10 private" and "closed court" are used under the Witness
10:17:48 11 Protection Act, but we respectfully adopt the analysis
10:17:50 12 provided to you by Mr Tran and we reiterate our position
10:17:56 13 that "in private" is terminology which communicates that
10:18:05 14 the disclosure of information ought only to be undertaken
10:18:13 15 to the parties, not to extraneous persons, and that that is
10:18:19 16 the ordinary construction of the plain words and if there
10:18:23 17 were thought to be any ambiguity in that regard, a
10:18:27 18 purposive construction ought to be adopted and that would
10:18:30 19 lead to a similarly confined attribution of meaning and
10:18:34 20 were other guidance to be necessary, we urge that
10:18:39 21 application of the rights under the Charter of Human Rights
10:18:44 22 and Responsibilities would reinforce the confined meaning
10:18:46 23 to be given to that expression.
10:18:49 24

10:18:49 25 Our third point is this: similar considerations
10:18:54 26 should apply if the Commissioner moves to the balancing
10:19:00 27 process, if you like, under s.10A(2)(a) of the Witness
10:19:06 28 Protection Act. The prima facie position is that the
10:19:12 29 proceedings in respect of relevant matters should be in
10:19:15 30 private. In other words, there has to be a good and sound
10:19:19 31 and proper reason for the proceedings being conducted
10:19:22 32 otherwise. That accords with the meaning of the words.
10:19:30 33 Again, it's consistent with the whole ideology and purpose
10:19:35 34 of the Witness Protection Act and, similarly, it is
10:19:39 35 consonant with the rights which exist in relation to
10:19:41 36 protection of life under the Charter.
10:19:46 37

10:19:46 38 Various articulations have been proffered in relation
10:19:51 39 to those considerations which might be relevant to the
10:19:56 40 interests of justice. And it is our submission that it is
10:20:01 41 necessary to look closely to the real substance of what
10:20:08 42 those considerations are, in a pragmatic, as well as a
10:20:13 43 principled, sense.
10:20:13 44

10:20:15 45 The two versions which have been ventilated in this
10:20:20 46 Commission are as follows: to have the media present would
10:20:25 47 give a better idea of context of what they can report on

10:20:29 1 and what they cannot report, and it would give an
10:20:34 2 understanding to them of the narrative and an ability to
10:20:38 3 publish as much of the story as is permissible.
4
10:20:43 5 COMMISSIONER: And the other point, in light of the whole
10:20:45 6 history of the matters leading to this inquiry and the High
10:20:50 7 Court's decision in the AB case - - -
8
10:20:52 9 DR FRECKELTON: Yes.
10
10:20:53 11 COMMISSIONER: - - - the advantage is that this is not yet
10:20:56 12 another inquiry into this matter that is held completely
10:21:01 13 behind closed doors, without any public scrutiny
10:21:08 14 whatsoever. So having the media present at least means
10:21:12 15 that there is some oversight, that hasn't existed in
10:21:16 16 previous inquiries, and it's that balancing act between
10:21:20 17 getting that right and making sure that people's safety,
10:21:26 18 and the safety of their families, is protected.
19
10:21:30 20 DR FRECKELTON: Thank you.
21
10:21:30 22 COMMISSIONER: So it's a combination of those things that
10:21:32 23 makes it very strongly a public interest point to have some
10:21:37 24 media oversight of this evidence, although with very strict
10:21:44 25 and careful protections for human safety.
26
10:21:48 27 DR FRECKELTON: Thank you. In terms of those three
10:21:52 28 considerations then which militate in favour of the
10:21:56 29 presence of the media, what we draw attention to is that
10:22:02 30 the mere presence of the media, subject to the
10:22:10 31 circumscriptions of inability to identify the informers or,
10:22:14 32 anything related to witness protection status, would
10:22:19 33 inhibit profoundly what they could do with what they hear.
10:22:24 34 They might subjectively, in their own minds, feel that they
10:22:30 35 understand the context better and feel a sense of
10:22:34 36 satisfaction that they have been present to hear evidence
10:22:38 37 and what is done with it and submissions in respect of it.
10:22:44 38 But, in our respectful submission, that takes the utility
10:22:50 39 of their presence only a very short distance. The media
10:22:56 40 will be able to report on the Commissioner's report. That
10:23:01 41 will be constructed, no doubt, very carefully to take into
10:23:07 42 account any risks and any matters which ought not be in the
10:23:11 43 public domain. The media will be present for substantial
10:23:19 44 aspects of the evidence. The option that was proposed by
10:23:24 45 Mr Tran, we submit, has real merit, in that if a hearing
10:23:28 46 takes place in private, completely in private, not partly
10:23:31 47 in private, not in a qualified way in private, as proposed

10:23:33 1 by our learned friend, but in private, then the
10:23:37 2 Commissioner can look to the transcript, assisted by those
10:23:40 3 helping her, and redact those aspects which are problematic
10:23:46 4 in the terms of the Witness Protection Act and release the
10:23:49 5 remainder to the media, we have no problem with that at
10:23:52 6 all, and that would maximise the capacity of the media to
10:23:57 7 understand what has been transacted in private.
8
10:24:00 9 COMMISSIONER: That will be happening in any case.
10
10:24:02 11 DR FRECKELTON: Yes. But to have the media present and
10:24:05 12 hearing those things which ought to be in private means
10:24:10 13 that we are asking them to unknow what they have learned
10:24:14 14 and it runs a risk of their inadvertently incorporating in
10:24:20 15 their reportage matters which could indirectly identify
10:24:24 16 these persons. And what we say is that it achieves very
10:24:27 17 little. There's the principle that they've been here, and
10:24:29 18 we hear that, but if their hands are effectively kept away
10:24:36 19 from their keyboards in terms of what they do here, in our
10:24:40 20 respectful submission, the advantage of their mere presence
10:24:42 21 is limited indeed, and given the high level of risk
10:24:47 22 involved in this exercise - put as "catastrophic" by my
10:24:54 23 learned friend Mr Pizer, in terms of potential
10:24:57 24 consequences - we say that there is not sufficient in
10:25:03 25 principle or in the specific by way of advantages to be
10:25:09 26 accrued from the mere presence of the media to detract from
10:25:12 27 the prima facie position articulated in s.10A(2), namely
10:25:18 28 that the hearings in respect of such matters ought to be in
10:25:22 29 private, namely only with those parties present who are
10:25:27 30 entitled to be here, not other persons. Thank you very
10:25:32 31 much.
32
10:25:33 33 COMMISSIONER: Yes, Mr Hoyne.
10:25:37 34
10:25:37 35 MR DOYLE: Commissioner, just before the argument with
10:25:40 36 Mr Hoyne proceeds, can I raise a factual question?
37
10:25:43 38 COMMISSIONER: Yes.
10:25:43 39
10:25:46 40 MR DOYLE: I don't seek to make submissions on the
10:25:49 41 substantive matter, but we've made enquiries overnight,
10:25:53 42 Commissioner, as to the suppression order that was raised
10:25:54 43 yesterday which was made by Justice Kaye in the matter of
10:25:58 44 Asling, and the circumstances in which that order was made
10:26:01 45 and whether it was accompanied by closed court orders was a
10:26:05 46 matter raised in argument yesterday.
47

10:26:07 1 So far as we can tell, the court wasn't closed for the
10:26:09 2 evidence of the relevant witnesses in respect of whom
10:26:13 3 suppression orders were made as to any information which
10:26:15 4 might reveal their identity. The court was closed,
10:26:20 5 including to the media, when the dial-in process was
10:26:26 6 undertaken, in order to ensure that their location was kept
10:26:29 7 a secret, and then their evidence was given in open court.

8
10:26:37 9 COMMISSIONER: That's very helpful, thank you. Now
10:26:43 10 Mr Hoyne.

10:26:44 11
10:26:45 12 MR HOYNE: Thank you, Commissioner. There's just a couple
10:26:46 13 of points we wish to make. The first is in respect of
10:26:49 14 Dr Freckelton's most recent point about the lack of utility
10:26:52 15 of having the media present demonstrates a fundamental
10:26:57 16 misunderstanding of the benefits of, and the purposes of,
10:26:59 17 open courts. Even if the media is present for only - with
10:27:04 18 the limitations that are suggested, there is still that
10:27:08 19 level of - there is still that level of oversight that is
10:27:13 20 put on these proceedings, which, as the Commissioner has
10:27:16 21 herself pointed out, hasn't been present to date.

22
10:27:19 23 It also leads to another. If one needs to move beyond
10:27:23 24 the high levels of principle, that I don't need to tell the
10:27:27 25 Commissioner about, that have been constantly repeated by
10:27:29 26 the courts, but which seem to be put at nought by our
10:27:33 27 friends from Victoria Police.

28
10:27:33 29 Beyond those points, there is also the very practical
10:27:36 30 point, if we're going to get involved in that, where there
10:27:42 31 may well be matters which my clients don't know - if
10:27:45 32 they're prohibited, they don't know about them, but they
10:27:50 33 would otherwise be able to make application to this
10:27:53 34 Commission to say that material should not be prohibited,
10:27:57 35 that material should be allowed to be published. And if
10:28:02 36 they're not here and if they don't get to see the whole of
10:28:04 37 the material, that submission can never be made. So in a
10:28:09 38 very practical sense, which is the challenge being laid out
10:28:13 39 by Dr Freckelton, that is the very practical benefit. But
10:28:16 40 in my submission, that isn't even the most important
10:28:18 41 benefit. The most important benefit is the oversight,
10:28:22 42 which as the Commissioner has pointed out has been lacking
10:28:24 43 to date.

10:28:25 44
10:28:25 45 In respect of the submission that I understand
10:28:27 46 Dr Freckelton made yesterday, which was fundamentally as I
10:28:30 47 understand it about the suppression orders and the

10:28:32 1 suggestion was being made that the publication in this
10:28:35 2 Commission might constitute a breach of the suppression
10:28:39 3 order.
4

10:28:39 5 COMMISSIONER: No, the submission was better than that, it
10:28:42 6 was that the proposed orders that I made allowing the media
10:28:47 7 to be present.
10:28:48 8

10:28:49 9 MR HOYNE: Yes.
10

10:28:50 11 COMMISSIONER: Even with non-publication orders would be a
10:28:52 12 breach of the suppression order.
10:28:53 13

10:28:53 14 MR HOYNE: Yes, yes. I beg your pardon. That is so. In
10:28:56 15 my submission that submission ought be rejected on the
10:29:00 16 basis that the simple, the distinction between those two
10:29:07 17 points doesn't move the publication that's referred to - if
10:29:11 18 that was to be prohibited then any statement within this
10:29:15 19 Commission would be prohibited by the suppression orders.
10:29:19 20 One also has to understand how the suppression orders, what
10:29:21 21 they do and don't prohibit. So, for example, the Asling
10:29:25 22 suppression orders, and these are all of the suppression
10:29:28 23 orders made after the Open Courts Act came into force on 1
10:29:32 24 December 2013, they are all made under ss.17 and 18 of that
10:29:38 25 Act, which means they only limit publication of material
10:29:42 26 which comes out of those proceedings. They are not any
10:29:45 27 broader than that. They are proceeding procession orders
10:29:48 28 so they don't prohibit more broadly the prohibition of
10:29:52 29 publication of anything. There are orders that were made
10:29:54 30 before 2013 and these are orders made back in 2007, 2008
10:30:00 31 that are stated more broadly than that which - - -
32

10:30:03 33 COMMISSIONER: I've heard the first submission made, I've
10:30:07 34 heard that said before but I don't know whether it's been
10:30:09 35 definitively ruled on, has it?
10:30:12 36

10:30:13 37 MR HOYNE: Commissioner, I don't think there can be much
10:30:15 38 doubt about it. If one goes to s.17 of the Open Courts
10:30:25 39 Act, the reason this is important is because each - I can
10:30:28 40 take the Commission to them, but each of the suppression
10:30:31 41 orders made after 1 December 2013, each of them are stated
10:30:38 42 to be made under ss.17 and 18 of the Open Courts Act. But
10:30:42 43 what s.17 provides is that a court or tribunal on one or
10:30:48 44 more of the grounds set out in s.17 may make a proceeding
10:30:52 45 suppression order, which is what these were, to prohibit or
10:30:56 46 restrict the disclosure or publication of information or
10:30:58 47 otherwise of a report of the whole or part of any

10:31:00 1 proceeding. So it's only that proceeding. And any
10:31:04 2 information derived from a proceeding. Now this is a well
10:31:07 3 accepted distinction because there are then broad
10:31:11 4 suppression orders that are made under Part 4. Now that
10:31:14 5 doesn't deal with Supreme Court because it deals only with
10:31:19 6 ss.25 of the County Court and s.26 the Magistrates' Court,
10:31:23 7 and you'll see they're much broader and effectively they
10:31:26 8 can prohibit the publication of anything. The reason it
10:31:30 9 doesn't deal with the Supreme Court is they had that power
10:31:32 10 in their inherent jurisdiction. So it's only when the
10:31:35 11 power is exercised in the court's inherent jurisdiction
10:31:38 12 that the court can and does prohibit the publication of
10:31:42 13 information that is not derived from the proceeding.
10:31:46 14 Otherwise it is only prohibition of information that is
10:31:52 15 derived from the proceeding. That is occurred in what I
10:31:54 16 might call the more recent orders. The ones dating back to
10:31:57 17 2007, 2008, I'm prepared to accept that even those, it's
10:32:02 18 not clear whether they were intended to be under the
10:32:04 19 inherent jurisdiction or not but certainly my clients have
10:32:07 20 dealt with them on the basis that they are.
21
10:32:07 22 COMMISSIONER: The order of Justice Kaye that seems to be
10:32:12 23 relevant here.
10:32:13 24
10:32:14 25 MR HOYNE: Yes.
26
10:32:15 27 COMMISSIONER: Was made pursuant to ss.17 and 18 of the
10:32:20 28 Open Courts Act but they're made in very broad terms.
10:32:25 29
10:32:26 30 MR HOYNE: Yes.
31
10:32:26 32 COMMISSIONER: But then orders made by Justice King on 27
10:32:29 33 February 2017 were specifically stated to remain in force.
10:32:34 34 I don't know what those orders were, do you?
10:32:36 35
10:32:37 36 MR HOYNE: Yes, I do.
37
10:32:37 38 COMMISSIONER: I thought you might.
10:32:39 39
10:32:39 40 MR HOYNE: Yes, I will just pull those out. While the one
10:32:45 41 from Justice Kaye, I think in fact he was even Justice of
10:32:50 42 Appeal Kaye at that point in time, the important
10:32:55 43 construction of that depends upon what information is being
10:32:59 44 prohibited to be published and it can only be under ss.17
10:33:03 45 and 18, derived from the proceeding. What was the date,
10:33:09 46 the particular date?
47

10:33:11 1 COMMISSIONER: That one is 6 March 2017.
10:33:14 2
10:33:14 3 MR HOYNE: 2017 or 2007?
10:33:17 4
10:33:17 5 COMMISSIONER: 2017 was Justice Kaye's order.
6
7 MR HOYNE: Yes.
8
10:33:21 9 COMMISSIONER: But he ordered that the order of Justice
10:33:26 10 King on 27 February 2007 remain in force.
10:33:31 11
10:33:31 12 MR HOYNE: Yes, so that was - I have one from 28 February
10:33:35 13 2007. I'd need to take time to identify the particular
10:33:38 14 one.
15
10:33:39 16 COMMISSIONER: They're an absolute labyrinth.
10:33:43 17
10:33:43 18 MR HOYNE: Yes, there are. I'm prepared to concede this
10:33:46 19 much, that there are orders indeed made by in particular
10:33:50 20 Justice King where she did make what appeared to be broad
10:33:54 21 suppression orders, I'm prepared to concede that is what
10:34:00 22 appeared to have occurred and there isn't necessarily any -
10:34:03 23 there hasn't been a revocation. The point I'm making is
10:34:06 24 that it depends, they were made at a point in time which
10:34:10 25 was a substantial point in time ago, not to say they
10:34:14 26 shouldn't be respected now, of course they should, and I
10:34:17 27 know that I've spoken now for longer than I intended, but
10:34:20 28 the real point was that the order that is being proposed to
10:34:24 29 be made now can't possibly constitute a breach of those
10:34:29 30 orders. It just can't possibly.
31
10:34:31 32 COMMISSIONER: That's perhaps a different point. But
10:34:33 33 you're not suggesting that we don't have - we're not bound
10:34:37 34 by non-publication orders in respect of these?
10:34:41 35
10:34:41 36 MR HOYNE: No, I don't make that submission.
37
10:34:43 38 COMMISSIONER: No.
10:34:44 39
10:34:45 40 MR HOYNE: The point that is then made by Dr Freckelton
10:34:48 41 relates about question under s.10A about the necessity of
10:34:55 42 whether it is "in private". Of course it only sets up the
10:35:03 43 starting regime. It doesn't make the determination about
10:35:06 44 what order is and isn't made. If this Commission is to
10:35:10 45 make its determination that it's in the interests of
10:35:13 46 justice that the orders are made, in my submission it
10:35:19 47 doesn't make much difference where one's starting from,

10:35:23 1 whether one comes to the definition that this falls neatly
10:35:27 2 within the definition of "in private" or it doesn't. Of
10:35:31 3 course that analysis needs to be undertaken but in my
10:35:35 4 submission if the fact of the matter is, and in my
10:35:37 5 submission it is, that the interests of justice very much
10:35:42 6 are in favour of requiring whatever level of media
10:35:49 7 oversight, however limited that might be, then that should
10:35:53 8 be undertaken. The suggestion, for example, by Mr Pizer to
10:35:57 9 the extent, "Oh well there might be mistakes made", et
10:36:02 10 cetera, and by other persons, other representatives to the
10:36:06 11 effect we should take a conservative approach. No, we
10:36:12 12 shouldn't. We should take an approach that's in accordance
10:36:16 13 with law and we should take an approach what determines
10:36:20 14 what it is in the interests of justice. In this
10:36:22 15 circumstance my clients have been dealing with these
10:36:24 16 prohibitions for years and years and years and it has never
10:36:28 17 been alleged against any of them, I think I can say that
10:36:31 18 with confidence, that any of them have ever breached it.
10:36:35 19 They take these allegations, they take these prohibitions
10:36:39 20 very, very seriously.

21
10:36:40 22 COMMISSIONER: Indeed, Mr Hoyne, at one point I can tell
10:36:43 23 you during the inquiry, this inquiry, the media informed
10:36:48 24 Victoria Police and my assisting counsel of suppression
10:36:53 25 orders of which we were not aware and suggested that the
10:36:56 26 Commission was inadvertently in breach of them. And we
10:37:00 27 were very grateful to the media for that and then
10:37:03 28 investigated it and found that they were correct.

10:37:05 29
10:37:05 30 MR HOYNE: Yes, so indeed in fact even what happened before
10:37:09 31 the AB orders were published, the Supreme Court went to my
10:37:13 32 instructors who act on behalf of most of the media
10:37:17 33 organisations and my instructors gave the Supreme Court
10:37:24 34 advice over which suppression orders existed for the AB,
10:37:26 35 which demonstrates, Commissioner, the point that was being
10:37:27 36 made before, "There might be these inadvertent disclosures
10:37:30 37 made by the media, the media do not go anywhere near these
10:37:34 38 matters without getting legal advice by persons who are
10:37:37 39 very, very well aware of the orders that have been made.
10:37:42 40 Unless I can be of further assistance they're the
10:37:44 41 submissions I wish to make.

42
10:37:45 43 COMMISSIONER: Did you want to make any submission as to
10:37:48 44 whether it should be in this court or in another - - -

10:37:51 45
10:37:51 46 MR HOYNE: So my instructions are that they would prefer -
10:37:55 47 there are benefits to the media for both. There's

10:37:59 1 obviously a certain level of atmosphere that can be felt
10:38:05 2 within a court, within a room that is not necessarily
10:38:08 3 present from outside.
4

10:38:09 5 COMMISSIONER: Yes.
10:38:10 6

10:38:11 7 MR HOYNE: But there are otherwise benefits for the media
10:38:15 8 being within their room being able to work without
10:38:19 9 interference, interfering with the work of the Commission.
10:38:22 10 But I'm not sure that there's going to be an enormous
10:38:26 11 benefit one way or another.
12

10:38:28 13 COMMISSIONER: Thank you. Ms Neskovicin, perhaps before I
10:38:32 14 hear your final submissions, have we tracked down whether
10:38:36 15 the legal representatives for [REDACTED] has applied for an
10:38:40 16 adjournment?
17

10:38:41 18 MS NESKOVCIN: Yes, Commissioner. An email was received by
10:38:45 19 Commission staff at 10.09 am which is being handed to you.
20

10:38:49 21 COMMISSIONER: Thank you.
10:38:50 22

10:38:51 23 MS NESKOVCIN: It appears that due to unavailability of
10:38:54 24 counsel and solicitors for [REDACTED] an application is
10:39:02 25 made. Commissioner, it's the submission of counsel
10:39:06 26 assisting that the options appear to be for the Commission
10:39:09 27 to reserve its decision to receive submissions on behalf of
10:39:15 28 [REDACTED] and others that can't attend, or alternatively to
10:39:21 29 deal with the application that's presently before the
10:39:23 30 Commission and allow [REDACTED] and others to renew the
10:39:28 31 application at a later point. In our submission,
10:39:32 32 particularly having been before the Court of Appeal on
10:39:35 33 Tuesday and being aware of the matters that [REDACTED]
10:39:39 34 raised and the overlap in interest between the Victoria
10:39:44 35 Police and the other persons who have made submissions to
10:39:47 36 the Commission today, I'm not aware of any other matter
10:39:51 37 that [REDACTED] would put that has not presently been put to
10:39:56 38 the Commission.
39

10:39:58 40 COMMISSIONER: Yes. In respect of [REDACTED]'s application
10:40:02 41 for an adjournment of this matter, I have given that
10:40:08 42 careful consideration, but there is a very pressing need
10:40:14 43 for this Commission to get on with its work. There have
10:40:21 44 been many delays so far in the obtaining of material and so
10:40:24 45 forth and it's really quite imperative that we continue
10:40:27 46 with our work and we can't continually adjourn matters. If
10:40:37 47 the Commission wants to proceed with its work further

10:40:40 1 because of the very extensive submissions made on behalf of
10:40:43 2 Victoria Police and others here today, it's very difficult
10:40:48 3 to see that ██████████ could add anything further and I'll
10:40:54 4 certainly operate on the basis that there are real
10:40:59 5 considerations for the safety of ██████████, and possibly
10:41:05 6 ██████████'s family members, that have to be taken into
10:41:11 7 account by me in making my decision.

10:41:13 8
10:41:14 9 As to the application for an adjournment brought by
10:41:17 10 the legal representatives of ██████████, I note that
10:41:23 11 ██████████ actually has no standing in this case although
10:41:29 12 would certainly have clear interest in other similar orders
10:41:33 13 that might be made in the future and I'll take into account
10:41:36 14 the written submissions provided by the legal
10:41:41 15 representatives for ██████████, but it's certainly no reason
10:41:45 16 to adjourn the application. So the applications for an
10:41:50 17 adjournment are refused.

10:41:52 18
10:41:52 19 MS NESKOVCIN: Commissioner, I wanted to make a few brief
10:41:55 20 points in response to the submissions that have been made
10:41:57 21 to you this morning.

10:42:00 22
10:42:00 23 First starting with the construction of s.10A(2). As
10:42:05 24 the Commissioner has observed, there is a difference in
10:42:10 25 language between say s.13 of the Witness Protection Act and
10:42:14 26 s.10A(2), the material difference being that in the case of
10:42:21 27 s.13 the Supreme Court is mandated to hear the matter in
10:42:24 28 closed court where an application is made for an order
10:42:27 29 under ss.9, 10 or 20A. Whereas in s.10A, as Mr Tran
10:42:37 30 helpfully observed, that section deals with a number of
10:42:40 31 entities, not just a court or a Royal Commission, and that
10:42:44 32 might explain in part why the legislature thought fit to
10:42:48 33 use the language in 10A(2)(a) "in private" as opposed to
10:42:56 34 "closed court", which would not be applicable to a tribunal
10:43:01 35 or a Royal Commission or a board of inquiry. However the
10:43:05 36 language is also different in this respect. It quickly
10:43:08 37 follows the mandatory word "must" with the words "unless it
10:43:12 38 considers it is in the interests of justice to do so".
10:43:16 39 Secondly, under the Inquiries Act this Commission has very
10:43:20 40 broad powers in relation to how it may conduct itself.
10:43:24 41 It's also to be noted that there are no parties to a Royal
10:43:30 42 Commission. The persons present today have spoken about
10:43:33 43 the parties being present but the media parties not having
10:43:37 44 a sufficient interest being excluded. But as I said, there
10:43:42 45 are no real parties to this proceeding and it is a matter
10:43:45 46 of conjecture as to what the legislature meant by talking
10:43:50 47 about "in private". But in any event the wide powers of

10:43:55 1 the Commission under the Inquiries Act, together with the
10:44:00 2 discretion, assist the Commission in determining the way
10:44:05 3 forward in our submission. It is our submission that in
10:44:10 4 this case the interests of justice do permit the
10:44:15 5 Commissioner to consider that they ought to be present.
10:44:18 6 The interests of justice in the context of this Royal
10:44:22 7 Commission includes the administration of the criminal
10:44:24 8 justice system and the public's confidence in it. There
10:44:30 9 may at some time be an appropriate point for the public to
10:44:35 10 understand what has gone on in private session, and in our
10:44:47 11 submission the media have a very important role to play in
10:44:50 12 assisting the public and the Commission's work in that
10:44:55 13 regard.

14
10:44:55 15 Counsel for ██████████ made a submission about the need
10:44:59 16 to protect safety of the relevant persons whose interest
10:45:03 17 may be affected and in our submission the Commission is
10:45:08 18 able do that by appropriate non-publication orders which
10:45:14 19 would apply to all persons but also, as Mr Hoyne has
10:45:19 20 already submitted, the persons who have been targeted as
10:45:25 21 being in a position to compromise that safety, namely the
10:45:28 22 media parties, well understand the effect of
10:45:31 23 non-publication orders.

10:45:35 24
10:45:35 25 Finally, insofar as Mr Tran and Mr Pizer adopted the
10:45:41 26 submissions of Dr Freckelton yesterday in relation to what
10:45:46 27 it means to publish and the potential breach of the extant
10:45:51 28 suppression orders, it is our submission that, as the
10:45:59 29 Commission has already observed, the language under the
10:46:02 30 Open Courts Act and the Inquiries Act of using the word
10:46:06 31 "publish" means to disseminate by publication to the public
10:46:11 32 or a section of the public, and it is our submission that
10:46:14 33 allowing persons to hear the information while being
10:46:17 34 present in the hearing room does not constitute publication
10:46:20 35 within the meaning of either the Open Courts Act or the
10:46:23 36 Inquiries Act. Furthermore, as we've helpfully been
10:46:29 37 assisted by Mr Doyle this morning in relation to the orders
10:46:32 38 made by Justice Kaye, it would appear that the media were
10:46:36 39 allowed to be present during significant parts of that
10:46:38 40 hearing notwithstanding the suppression orders, and
10:46:46 41 contemporaneous reporting around that hearing time confirms
10:46:49 42 that. There is publicly available media reports in
10:46:53 43 relation to that proceeding which are still available on
10:46:57 44 the Internet today which confirms that the intended
10:47:00 45 operation of Justice Kaye's order was that the media could
10:47:04 46 be present but were bound by the non-publication orders in
10:47:11 47 relation to the matters that prohibited them from

10:47:15 1 publishing or making statements in the media about the
10:47:19 2 matters that were the subject of those orders but not
10:47:23 3 otherwise.
10:47:27 4

10:47:27 5 In relation to the Charter point, Commissioner, can I
10:47:32 6 provide the Commission with a reference where similar
10:47:36 7 points were made in relation to Ms Gobbo's safety in the AB
10:47:42 8 and CD proceedings. The Chief Commissioner in those
10:47:46 9 proceedings made a similar submission in respect of the
10:47:54 10 Charter and the Court of Appeal in its decision determined
10:47:58 11 that that was a matter that fell to be determined in the
10:48:01 12 balancing exercise as one of the public interest
10:48:06 13 considerations, and the reference to that decision is AB v
10:48:16 14 CD [2017] VSCA 338 at paragraph 186.
15

10:48:34 16 Unless there's anything further I can assist, Your
10:48:38 17 Honour.
18

10:48:39 19 COMMISSIONER: No, thank you.
20

10:48:42 21 DR FRECKELTON: Commissioner, I omitted to be responsive to
10:48:46 22 the question you raised earlier in terms of the preference
10:48:49 23 as to which room the media should be in should the
10:48:52 24 Commission ultimately determine that they are allowed. The
10:48:53 25 Victoria Police have a marginal preference for their
10:48:55 26 presence in this room so as to maximise the capacity for
10:48:59 27 supervision.
28

10:49:00 29 COMMISSIONER: Yes, I think there's sense in that. Thank
10:49:03 30 you Dr Freckelton.
31

10:49:07 32 I'm conscious of the need for the inquiry to continue
10:49:13 33 its work and for that reason I'll give extempore reasons.
34

10:49:17 34
10:49:17 35 This application concerns the manner in which a
10:49:20 36 retired member of Victoria Police, Phillip Edward
10:49:27 37 Swindells, is to give his evidence, given some of it
10:49:29 38 concerns persons to whom Supreme Court orders apply
10:49:30 39 prohibiting publication of any material which may identify
10:49:32 40 or tend to identify those persons and given that the
10:49:41 41 Witness Protection Act applies to those persons.
42

10:49:44 42
10:49:45 43 The Commission proposed that Mr Swindells' evidence be
10:49:49 44 given as requested by telephone to accommodate his health
10:49:53 45 issues and that the hearing be closed to the public with
10:49:56 46 pseudonyms used where required and with only the Commission
10:49:59 47 lawyers and staff, the lawyers of those given leave to

10:50:02 1 appear and media representatives permitted by the Royal
10:50:07 2 Commission to be present, together with a non-publication
10:50:11 3 order in respect of everything said in the closed hearing.
10:50:19 4 I also proposed orders that the published transcript be
10:50:24 5 appropriately redacted to comply with the extant Supreme
10:50:31 6 Court orders and the Witness Protection Act.
7
10:50:34 8 Unfortunately Mr Swindells, who was ready to give
10:50:37 9 evidence by phone and whose health was being detrimentally
10:50:42 10 affected by his anxiety about give be evidence, had to be
10:50:46 11 sent away indefinitely. I hope this has not had a
10:50:50 12 detrimental impact on his already precarious health because
10:50:56 13 I had hoped we would have completed his evidence yesterday
10:50:59 14 and that now of course is not possible.
10:51:02 15
10:51:03 16 Dr Freckelton, on behalf of the Chief Commissioner of
10:51:06 17 Victoria Police at that time, but now on behalf of Victoria
10:51:12 18 Police, submitted, first, that my proposed orders were in
10:51:21 19 breach of the Supreme Court orders prohibiting publication,
10:51:28 20 as if some members of the media were present when
10:51:32 21 Mr Swindells gave evidence about those persons, this would
10:51:35 22 be a publication. I reject the contention that there could
10:51:41 23 be a publication in circumstances where there is a
10:51:48 24 Commission order specifically prohibiting publication of
10:51:51 25 any material identifying or tending to identify those very
10:51:55 26 persons. That construction is consistent with the
10:52:06 27 definition of "publish" in the Open Courts Act and in the
10:52:10 28 Inquiries Act, as is the fact that the Supreme Court orders
10:52:19 29 prohibiting publication did not, in terms, exclude the
10:52:27 30 media from the courtroom, where the evidence the subject of
10:52:31 31 the non-publication order was given. Indeed, counsel for
10:52:38 32 the DPP confirmed that that evidence was given in open
10:52:42 33 court and media representatives were present when it was
10:52:46 34 given. I reject that contention, which was also supported
10:53:02 35 by the legal representatives for [REDACTED] and [REDACTED].
10:53:21 36
10:53:21 37 Dr Freckelton's second and third contentions concern
10:53:26 38 s.10A of the Witness Protection Act. It is common ground
10:53:31 39 that s.10A(1) is relevant. Section 10(2) relevantly
10:53:49 40 requires that this Royal Commission "must, unless it
10:53:54 41 considers that it is not in the interests of justice to do
10:53:57 42 so, (a) hold the part of the proceeding that relates to the
10:54:00 43 matter or matters referred to in sub-s.(1) in private and
10:54:04 44 (b) make an order prohibiting or restricting the
10:54:09 45 publication of evidence given before it that, in its
10:54:13 46 opinion, will ensure the matter or matters referred to in
10:54:16 47 sub-s.(1) is not disclosed".

10:54:19 1
10:54:24 2
10:54:28 3 Dr Freckelton contends that a hearing which permits
10:54:37 4 members of the media accredited by this Royal Commission to
10:54:42 5 be present is not a private hearing. He submits that
10:54:45 6 "private" should be construed in accordance with the
10:54:51 7 purpose of the Witness Protection Act in s.1, the objective
10:54:57 8 of the Witness Protection Act in s.3AAA, and the witness
10:55:08 9 protection principles set out in s.3AA(2). The term "in
10:55:13 10 private", he contends, cannot include the presence of
10:55:13 11 media.

10:55:13 11
10:55:13 12 He referred me to a number of cases which did not deal
10:55:20 13 with the construction of s.10A or the meaning of the term
10:55:27 14 "in private" in that sub-section. The cases, however, did
10:55:33 15 support the unconscientious principle of statutory
10:55:38 16 construction, that in determining the meaning of terms in a
10:55:47 17 statute, a purposive construction should be taken.

10:55:53 18
10:55:53 19 I certainly agree that in construing the meaning of
10:55:56 20 "in private" in s.10A, it is necessary to keep in mind the
10:56:01 21 purpose of the Act in s.1, namely to facilitate the
10:56:06 22 security of those who are or who have been witnesses in
10:56:09 23 criminal proceedings, the central objective of witness
10:56:21 24 protection in s.3AAA, namely to give practical effect to
10:56:28 25 the Rule of Law and advance the public interest in the
10:56:31 26 efficacy and integrity of the criminal justice system by,
10:56:35 27 as far as reasonably possible, protecting those exposed to
10:56:38 28 a risk of injury or death by reason of their participation
10:56:41 29 in or cooperation with the criminal justice system, and the
10:56:45 30 witness protection principles in s.3AA(2), relevantly, (a)
10:56:51 31 witness protection and assistance is intended to remove or
10:56:54 32 reduce barriers to cooperation in criminal investigations
10:56:58 33 and prosecutions; (f) the interests of children involved in
10:57:01 34 or affected by the provision of witness protection and
10:57:04 35 assistance should be separately considered and their
10:57:07 36 welfare should be a powerful factor in decision making; (g)
10:57:16 37 there should be public accountability for the operation of
10:57:19 38 the witness protection and assistance provided under this
10:57:21 39 Act, subject to the need to safeguard (1) the health and
10:57:33 40 safety of the person and (2) the effective conduct of any
10:57:40 41 investigation or intelligence gathering in relation to
10:57:43 42 criminal activity and (3) the overall integrity of the
10:57:54 43 witness protection program and the provision of alternate
10:57:58 44 protection arrangements under this Act.

10:58:00 45
10:58:04 46 "In private" in s.10A(2)(a) clearly means not in
10:58:10 47 public. A proceeding can be in private, in my view, when

10:58:20 1 the general public is excluded, even though a specified
10:58:24 2 class of persons are present; here, the staff and lawyers
10:58:30 3 of the Commission, the lawyers for various entities with an
10:58:35 4 interest and media accredited by the Royal Commission. As
10:58:46 5 I have proposed, allowing the media to be present would
10:58:53 6 also be coupled with an order prohibiting the publication
10:58:57 7 of everything said in the proceeding. It seems to me that
10:59:03 8 my construction of "in private" sits comfortably - and such
10:59:07 9 an order is required ordinarily under s.10A(2)(b) - this
10:59:20 10 construction of "in private" sits comfortably with the
10:59:23 11 purpose, objective and relevant witness protection
10:59:26 12 principles under the Act.

13
10:59:30 14 But, as I said when ruling on this matter in respect
10:59:33 15 of Mr Trichias' evidence, even if I'm wrong in my
10:59:40 16 construction of "in private", pursuant to s.10A(2)(a), I
10:59:53 17 consider that - the meaning of "in private" in s.10A(2)(a),
11:00:05 18 I consider that under s.2A(2), it is not in the interests
11:00:11 19 of justice to exclude media accredited by this
11:00:17 20 Royal Commission, given the non-publication order and the
11:00:21 21 order to suitably redact any public transcript. This is
11:00:27 22 because it is important for the media, when they do report
11:00:40 23 lawfully on the work of the Commission and the evidence
11:00:45 24 before the Commission, the media understand the narrative
11:00:49 25 and the context in which evidence able to be published has
11:00:59 26 been given and the non-publication orders operating. This
11:01:05 27 would enable them to perform their work more effectively
11:01:09 28 and to meet their obligations not to inadvertently breach
11:01:16 29 this non-publication order or the myriad of other
11:01:20 30 non-publication orders pertaining to the evidence likely to
11:01:25 31 be called before this Commission.

11:01:28 32
11:01:28 33 Dr Freckelton, however, contended that to allow
11:01:31 34 members of the media to be present, even with a
11:01:33 35 non-publication order, put at risk the safety of those
11:01:38 36 under the protection of the Act and their families and that
11:01:44 37 the public interest in protecting them overwhelmed other
11:01:47 38 public interests. He referred to the Victorian Charter of
11:01:51 39 Human Rights, particularly the rights to life, to family
11:01:54 40 life and to security. He was joined in his submissions by
11:02:00 41 counsel for the State and counsel for [REDACTED] and
11:02:07 42 [REDACTED]

11:02:17 43
11:02:17 44 As Ms Neskovicin, as counsel assisting the Commission,
11:02:26 45 noted, the Charter matters are really subsumed in the
11:02:37 46 question of what is in the interests of justice under
11:02:42 47 s.10A(2). So much was recognised by the Victorian Court of

11:02:54 1 Appeal in AB & CD [2017] VSCA 338, at paragraph 186.

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11:03:10 3 I consider that the order I propose would provide
11:03:16 4 proper protection to the witnesses and their families and
11:03:25 5 would not, contrary to Dr Freckelton's contentions, put at
11:03:31 6 risk the integrity and confidence in the witness protection
11:03:34 7 scheme generally or make others less likely to cooperate
11:03:38 8 with the police and give evidence against violent
11:03:41 9 criminals.

11:03:44 10
11:03:44 11 Another pressing consideration for me, as
11:03:50 12 Royal Commissioner, is that the reasons of the High Court
11:03:56 13 of Australia in AB, CD, EF and CD, which resulted in the
11:04:01 14 establishment of this Commission, place a considerable
11:04:08 15 obligation on me, as Commissioner, to shine light on the
11:04:14 16 conduct of current and former members of Victoria Police in
11:04:16 17 their disclosures about and recruitment handling and
11:04:19 18 management of Ms Gobbo as a human source and the cases
11:04:21 19 which may have been affected by her conduct as a human
11:04:25 20 source. It is imperative that as much as possible of this
11:04:29 21 Commission be held in public to restore community
11:04:33 22 confidence in Victoria Police's practice in the handling
11:04:38 23 and management of human sources, who are subject to legal
11:04:42 24 obligations of confidentiality or privilege, and to restore
11:04:46 25 public confidence in the administration of the criminal
11:04:50 26 justice system in this State.

11:04:55 27
11:04:55 28 On the other hand, I am absolutely committed to doing
11:04:58 29 all I can to ensure the safety of persons under the Witness
11:05:03 30 Protection Act and their families and of the objective of
11:05:12 31 witness protection and the relevant witness protection
11:05:14 32 principles apposite here. Were I to exclude Royal
11:05:21 33 Commission accredited media from the proceedings involving
11:05:29 34 evidence from witnesses such as Mr Swindells, I would put
11:05:33 35 at risk community confidence in this Commission. It would
11:05:41 36 be likely that some would see it as yet another inquiry
11:05:45 37 into these matters held in secret, behind closed doors.

11:05:53 38
11:05:54 39 Since the commencement of this Commission in December
11:05:57 40 and the start of its public hearings in March, the media
11:06:04 41 have reported on the work of the Commission and they have
11:06:07 42 done so appropriately and apparently conscientiously,
11:06:15 43 despite a great number of complex non-publication orders,
11:06:22 44 some made by the Commission, many made by courts well
11:06:25 45 before the Commission was established. On more than one
11:06:28 46 occasion, members of the media have, very properly,
11:06:31 47 informed the Commission of relevant non-publication orders

11:06:36 1 of which neither the Commission nor Victoria Police were
11:06:39 2 aware. As I have explained before, the presence of the
11:06:43 3 media in these proceedings, even when they cannot report
11:06:48 4 the proceedings, will mean that the public can at least
11:06:56 5 have confidence that there is some oversight of these
11:07:02 6 hearings and will ensure that the media is better informed
11:07:09 7 of the work of the Commission. The fact that the public
11:07:21 8 can have confidence the Commission's work is subject to
11:07:23 9 media scrutiny, even if they are not aware of that until a
11:07:27 10 later time, is an important factor. The media will be
11:07:31 11 better placed to accurately report on the work of the
11:07:38 12 Commission on which it is permitted by law to report. It
11:07:46 13 will also be better placed to avoid inadvertently breaching
11:07:50 14 a non-publication order, which could place people's safety
11:07:57 15 at risk.

11:07:57 16
11:08:00 17 After careful consideration of the competing factors
11:08:06 18 relevant in this case to the interests of justice and
11:08:10 19 placing great weight on the safety of those under the
11:08:13 20 protection of the Witness Protection Act and their
11:08:15 21 families, I'm satisfied that their safety will be protected
11:08:21 22 by the orders I propose, which will exclude the general
11:08:25 23 public, which will involve the use of pseudonyms and which
11:08:32 24 will require the non-publication orders and redacted public
11:08:37 25 transcript.

11:08:42 26
11:08:42 27 The orders I propose, I'm satisfied, will not
11:08:45 28 undermine confidence in the Witness Protection Act or in
11:08:52 29 those who give evidence against - or deter those who would,
11:09:02 30 for various reasons, give evidence against violent
11:09:04 31 criminals for continuing to do so.

11:09:06 32
11:09:06 33 It follows that I consider the interests of justice
11:09:06 34 favour the orders I propose. After careful consideration
11:09:09 35 of all the submissions made by Dr Freckelton and counsel
11:09:19 36 for ██████████ and ██████████ and the affidavit material
11:09:23 37 provided on behalf of ██████████ I propose making the
11:09:31 38 orders that I foreshadowed. I will add, however, that I
11:09:36 39 will require the media accredited representatives from the
11:09:41 40 Royal Commission to be present in this courtroom and not in
11:09:45 41 the media room and that there will be no streaming of the
11:09:48 42 evidence.

11:09:51 43
11:09:54 44 Thank you. I think that what we're planning to do now
11:09:57 45 is hear Mr Dale's evidence?

11:09:59 46
11:10:00 47 MR WINNEKE: That's correct, Commissioner.

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11:10:01 2 COMMISSIONER: At some point we'll hear Mr Swindells'
11:10:05 3 evidence.
11:10:06 4
11:10:07 5 MR WINNEKE: I think it likely that Mr Swindells won't be
11:10:09 6 until next week.
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11:10:09 8 COMMISSIONER: Yes, all right. We'll have a short
11:10:12 9 adjournment now. We'll resume in open court with Mr Dale.
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11 (Short adjournment.)
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