

**IN THE ROYAL COMMISSION**

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**INTO THE MANAGEMENT OF POLICE INFORMANTS****SUBMISSIONS ON BEHALF OF MR SIMON OVERLAND APM**

- 1 These submissions are made on behalf of Mr Overland APM, in response to the submissions of Counsel Assisting the Royal Commission circulated on 26 June 2020.
- 2 The Royal Commissioner has been invited, by the submissions of Counsel Assisting, to make findings for which there is no jurisdiction and to draw conclusions based on grossly inadequate and, at times, non-existent evidence. The submissions of Counsel Assisting have abandoned any attempt to present a balanced, comprehensive or reasoned view of the evidence, including routinely failing to refer to or acknowledge evidence that contradicts the proposition for which they contend. Overall, the findings recommended by Counsel Assisting are unreasonable as on a proper and complete analysis of all the evidence, all fall hopelessly short of the requisite standard of proof. In addition, they are unsupportable because of jurisdictional and procedural errors.
- 3 There is a grave concern that the Royal Commissioner is being urged to entertain [REDACTED] serious findings against Mr Overland in circumstances where time constraints do not permit a careful and reasoned analysis of the evidence. The submissions of Counsel Assisting are so riddled with errors (of commission and omission) and either contradicted by, or unsupported by, evidence that the Royal Commissioner cannot rely on any assertions, supposed inferences or factual conclusions that are advanced in those submissions without a meticulous consideration of every submission and every footnote reference therein, as well as a detailed review of these responsive submissions and all documents and other evidence referred to in these submissions.
- 4 There is no realistic prospect of the Royal Commissioner being able to perform this task, alone and without the support of Counsel Assisting,<sup>1</sup> while also reviewing and carefully considering dozens of other submissions filed on behalf of other interested parties. Those submissions will doubtless amount to thousands of pages of detailed content, and will refer to thousands of documents and transcript references.

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<sup>1</sup> Hall, *Investigating Corruption and Misconduct in Public Office* at [8.275]; *Re Royal Commission on Thomas' Case* [1982] 1 NZLR 25 at 273: "When a Commission is inquiring into allegations of misconduct ... it is not right that (counsel assisting) should participate in the preparation of the report".

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5 The Royal Commissioner is required to review all of this material and draft the Commission's final report to the Governor of Victoria by 30 November 2020. This leaves the Royal Commissioner less than 4 months to perform these many tasks.

6 The Royal Commissioner has, of course, listened to many days of evidence and reviewed many documents during the hearing and, presumably, in the weeks since then. The Royal Commissioner will be well placed to address the systemic and structural issues that emerge from the evidence. The same cannot be said in respect of specific findings of fact about critical aspects of the conduct of individuals such as Mr Overland, where the relevant facts are challenged in submissions, by reference to a multitude of pieces of oral and documentary evidence.

7 The gross deficiencies in the submissions of Counsel Assisting and the resulting need for these and other submissions to embark on an exhaustive analysis of the evidence that contradicts or tends against the inferences advanced by Counsel Assisting, mean that it will be impossible for the Royal Commissioner to attempt to make serious findings against individuals such as Mr Overland.

8 To do so would be to deny him natural justice at a most fundamental level.

9 Time limitations cannot generally be allowed to exclude the right to natural justice.<sup>2</sup> In *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia*, the Full Court of the Federal Court held that the circumstances revealed that a minister would have required a certain amount of time to consider submissions (which was described as "*a large task*")<sup>3</sup> and that the evidence indicated that the Minister did not have sufficient time to do so. The Minister's decision was set aside because of "*the strong suggestion that the minister simply had insufficient time to read the representations*",<sup>4</sup> which constituted a breach of natural justice.

10 [REDACTED] serious findings are sought against Mr Overland. Notwithstanding that this Royal Commission has gathered evidence over the course of 14 months, resulting in approx. 200 exhibits, over 160 witness statements and over 100 days of *viva voce* evidence, there is a dearth of direct evidence cited in support of the findings sought against Mr Overland. Not

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<sup>2</sup> *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia & Anor* (1996) 149 ALR 78 at 96 (Black CJ, Burchett and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550 at 615.

<sup>3</sup> At 99.

<sup>4</sup> At 100.

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one investigator, Source Development Unit officer, or other person has given evidence to say that he briefed Mr Overland with the level of information which Counsel Assisting suggest Mr Overland knew. The level of knowledge Counsel Assisting seek to impute to Mr Overland is also not supported (and often contradicted) by the extensive diary notes or Source Management Logs before this Royal Commission, in disregard to the High Court's warnings that what should matter most is the proper construction of such contemporaneous notes and documents as exist, and the probabilities that can be derived from those notes and any other objective facts.<sup>5</sup> Significantly, it is also contrary to Mr Overland's sworn evidence.

11 Instead, Counsel Assisting's case against Mr Overland is an inferential one. The Royal Commission's findings should be made on the *Briginshaw* standard of proof. Before any inference sought can be accepted, it must be the most probable inference supplied by the whole of the evidence [REDACTED]

12 The central factual premise on which the submitted findings against Mr Overland rests is that he knew that Ms Gobbo was acting in clear conflict with her ethical obligations to her clients, that she was providing privileged information to her handlers, that this information was being forwarded to and relied upon by investigators, and that this was authorised and approved by him.

13 The evidence relied on in support of this central factual premise does not go close to establishing it.

14 Without the central factual premise, the findings against him cannot and should not be made.

15 It is not sufficient to establish that he knew that Ms Gobbo was an informer – this is not controversial.

16 It is not sufficient to establish that Ms Gobbo acted in clear conflict with her ethical obligations to her clients, or that she was providing privileged information to her handlers – on the evidence presented to the Royal Commission, this is not to be doubted.

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<sup>5</sup> *Fox v Percy* (2003) 214 CLR 118 (Gleeson CJ, Gummow and Kirby JJ) at [31].

<sup>6</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at [2] (*Neat Holdings*).

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- 17 But these facts alone are not sufficient to support findings of improper [REDACTED] conduct by Mr Overland.
- 18 Counsel Assisting examined Mr Overland over the course of eight days and, properly, do not seek any finding that Mr Overland's evidence should be discredited (and also rarely seek to challenge Mr Overland's evidence). However, Counsel Assisting fail to grapple with key aspects of Mr Overland's evidence (set out in Part C below).
- 19 The conclusions advanced by Counsel Assisting are lacking any proper or probative basis. They are based on a highly selective approach to the copious diary notes and transcript available to them, evincing confirmation bias and contradicted by the evidence as a whole. Their narrative often contains misleading summaries of the selective transcript and diary notes they do cite, and their conclusions a jejune analysis of their selective facts and no more than conjecture. The submissions are contrary to Mr Overland's evidence, which Counsel Assisting ignores rather than confronts. In particular:
- a) Counsel Assisting's contended version of events does not acknowledge or recognise the nature and context of the roles occupied by Mr Overland. From 2003 to mid-2006 Mr Overland was Assistant Commissioner, Crime, responsible for 600 staff and with oversight of hundreds of investigations at any one time. From mid 2006 to early 2009 he was then Deputy Commissioner and from March 2009, Chief Commissioner, responsible for running an organisation of 15,000 people with an operating budget of \$2 billion. It is inherently implausible that he could be briefed on matters involving Ms Gobbo at the level of detail suggested by Counsel Assisting. It would be unworkable for anyone in those roles to micromanage each investigation in the way that Counsel Assisting submit Mr Overland failed to do;
  - b) Counsel Assisting's submissions irresponsibly make [REDACTED] allegations against Mr Overland which have no proper basis in the submission (even taking Counsel Assisting's version of events at its highest). Key conclusions are sought in an unsatisfactorily broad, rolled-up manner, failing to identify with any precision which conduct by Mr Overland is impugned in relation to each of the [REDACTED] conclusions sought against him. Scrutiny of any of the key conclusions contended for as against Mr Overland reveals that they have no evidentiary basis because fundamental elements to the offences are entirely missing from Counsel Assisting's version of events;

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- c) the conclusions that the Royal Commissioner is invited to make are based on a faulty, top-down reasoning process that contends that because Mr Overland knew Ms Gobbo was a registered informer, he knew the detail of the information she provided, including precisely who she was informing on and when;
- d) [REDACTED] Counsel Assisting rely on the drawing of inferences, each of which is not of the “greatest degree of likelihood”,<sup>7</sup> on the whole of the evidence, and so cannot be accepted. The inferences sought are impossible to reconcile with:
- (i) Mr Overland’s evidence;
  - (ii) the volume and seriousness of the responsibilities, workload, and position of Mr Overland as AC Crime, Deputy Commissioner and Chief Commissioner;
  - (iii) the fact that the SDU was outside Mr Overland’s chain of command both when he was AC Crime and Deputy Commissioner, and instead formed part of the Intelligence and Covert Support Department;
  - (iv) the policy and structures in place, in response to police corruption, that meant that not only was the SDU separate from the Crime Department and Mr Overland’s responsibilities, but that a “sterile corridor” was to be adhered to (including by Mr Overland);
  - (v) the objective fact that Mr Overland directed (then Crime Commander) Purton, from the outset of registration of Ms Gobbo, to keep “audit trails”;<sup>8</sup>
  - (vi) it being Mr Overland who, in face of strong opposition, made the decision to call Ms Gobbo as a witness, “knowing everything that would flow from that”;<sup>9</sup>
  - (vii) the fact that no SDU officer or Victoria Police investigator called before this Royal Commission, each of whom has been exhaustively cross-examined,

<sup>7</sup> *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [94] (Crennan J).

<sup>8</sup> Exhibit RC1385b, Diary of Mr Simon Overland, 27 September 2005, VPL.0005.0264.0053 at .0260 (3.45 pm); T.12279.8-20 (23/01/20); Exhibit RC0981, Supplementary Statement of Simon Overland dated 17 January 2020 (**Second Overland Statement**), [67].

<sup>9</sup> T.12288 .16-34 (23/01/20).

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gave evidence that he or she told Mr Overland the matters now being imputed to him;

(viii) the diary records and other objective evidence that the Royal Commission has gathered.

20 Two critical and uncontroversial facts are, individually and collectively, fatal to the proposition that Mr Overland knew or believed that he was involved in any improper conduct in respect of Ms Gobbo's role as a human source:

a) On being informed of Ms Gobbo's registration as a human source, he discussed the matter with Commander of Crime, Terry Purton and instructed Mr Purton to keep "*audit trails*" with respect to information regarding Ms Gobbo.<sup>10</sup>

Mr Overland's diary records this instruction.

Mr Overland was not challenged on this evidence.

Giving a clear direction to the Commander of Crime to keep "*audit trails*" in respect of a human source is consistent with only one motivation and mindset of Mr Overland: he wanted, instructed and expected that the dealings by Victoria Police with Ms Gobbo would be ethical and appropriate.

The fact that Mr Overland wanted, instructed and expected that, from at least that point forward, there would be a paper trail evidencing all relevant matters in respect of the information received from Ms Gobbo is impossible to reconcile with a belief or apprehension on his part that her role as a human source was, or would become, improper [REDACTED]

b) Mr Overland joined and supported the decision that Ms Gobbo should be transitioned from informer to witness, despite the vehement opposition of other members of Victoria Police, including the SDU.<sup>11</sup>

<sup>10</sup> See paragraph 83 below.

<sup>11</sup> Exhibit RC09156, Witness Statement of Simon James Overland dated 19 September 2019 (**First Overland Statement**) at [175] to [178].

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This simply would not have occurred, with Mr Overland “*knowing everything that would flow from that*”, if he had “*knowingly engaged in unlawful or illegal or improper behaviour*”.<sup>12</sup>

This evidence of Mr Overland’s insistence that Ms Gobbo give evidence in relation to the Operation Petra matters, which is not disputed, leaves only two possibilities:

- Mr Overland believed that his instruction for an audit trail would have been complied with and would reveal no wrongdoing by him, that his direction that Ms Gobbo could not continue to act for people if she was providing information about them had been followed and that his expectation of appropriate disclosure to prosecutors had occurred; or
- Mr Overland knew or believed that his role in the dealings by Victoria Police with Ms Gobbo were unlawful or unethical, but resisted the fierce opposition from other police officers so as to act in an entirely self-destructive manner by exposing those dealings with Ms Gobbo to scrutiny.

21 Counsel Assisting make no attempt to address these crucial matters, despite them being clearly flagged in evidence. Most, if not all, malign inferences that are urged by Counsel Assisting against Mr Overland collapse in the face of these two facts.

22 Counsel Assisting also fail to grapple with the rather significant and, again, uncontroversial fact that it was Mr Overland who repeatedly urged those responsible for Ms Gobbo to develop an exit strategy for her. The SML from 17 May 2006 records that Ms Gobbo’s “termination process” was discussed between Messrs Overland, White and Smith,<sup>13</sup> and Mr Overland’s evidence (not contradicted by Mr White nor Mr Smith) was that he was the one who raised the need to develop the termination process.<sup>14</sup> This is well under a year after she was first registered as a human source. It has never been suggested to Mr Overland that he did not say this, or that he did not mean it, that he had no basis for believing it would not occur, or that he had anything other than bona fide reasons for

<sup>12</sup> T.12288.16-34 (23/01/20).

<sup>13</sup> See SML for 17 May 2006 (referred to in footnote 1968 to Counsel Assisting’s submissions).

<sup>14</sup> T.11530.28-9 (17/12/19) (“I’m clear in my mind that I raised with them the need to develop the termination process... this was a clear reference that was put to me in the IBAC inquiry.”). Mr White was not asked who raised termination process: T.5292.33-38 (2/9/12). From the transcript of Mr Smith’s examination to which Mr Overland has access, it does not appear Mr Smith was asked about this.

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holding and expressing this view. Mr Overland also gave evidence that he told Mr Moloney that those responsible should be developing an exit strategy for Ms Gobbo.<sup>15</sup> He was not challenged about this evidence. Indeed, it was apparently embraced by Counsel Assisting during cross-examination. The evidence also establishes that again on 11 December 2006 Mr Overland requested that enquiries be made about Ms Gobbo being terminated.<sup>16</sup> Detective Inspector Ryan's diary records that Mr Overland said "*he [Overland] asked me [Ryan] to contact SDU can 3838 be eased out?*".<sup>17</sup> Mr White's diary records that Mr Overland had communicated to Detective Inspector Ryan that he was "*concerned re the exit strategy for Ms Gobbo.*"<sup>18</sup> Mr Overland gave evidence that he was "*always of the view that her role as a human source should be time limited.*"<sup>19</sup> Again, it was never put to Mr Overland that he did not hold that view or that he did not, in fact, want such an exit strategy to be formulated and implemented; or that this expressed view was motivated by anything other than concern for the safety of Ms Gobbo. The apparent thesis of Counsel Assisting is that Mr Overland cultivated, or at least acquiesced in, the ongoing receipt of privileged information because he believed that information was helpful for police investigations. It is therefore logical to assume – and fairness dictates – that there would be some attempt to reconcile this thesis with facts that render it implausible. No such attempt is undertaken.

- 23 Throughout this outline of submissions there is serious and sustained criticism of the content of the submissions from Counsel Assisting. It is acknowledged that Counsel Assisting were dealing with a large volume of evidence and that significant time limitations applied. In our respectful submission, however, this is the very reason why submissions could not and should not have been made that individuals may have committed [REDACTED] statutory breaches. The level of scrutiny and analysis of the evidence that is required for such submissions to have been properly advanced either could not have been, or at least was not, undertaken. It is, of course, the case that errors will be made with the drafting of such a large submission, but here the errors (of commission and omission) are significant in number and in content. Disturbingly, they all fall one way. We have found no instances of errors benefitting Mr Overland. This is telling insofar as it reveals the drafting mindset,

<sup>15</sup> T.11531.22-23 (17/12/19).

<sup>16</sup> This evidence is noted by Counsel Assisting, but not otherwise addressed.

<sup>17</sup> Exhibit RC0312, Mr Gavan Ryan Diary, 11 December 2006, VPL.0005.0120.0187 at .0289. See also the evidence of Mr Ryan at T4267.7-10 (9/8/19).

<sup>18</sup> Exhibit RC0292, Mr Sandy White diary, 11 December 2006, VPL.0100.0096.0468 at .0503.

<sup>19</sup> T.11531.26-28 (17/12/19).



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but its significance is profound from the perspective of the process of submissions and the drafting of the Royal Commissioner's report. It means that the Royal Commissioner must approach those submissions with caution and cannot accept factual assertions at face value.

24 It is respectfully submitted that the Royal Commission should make no negative findings against Mr Overland of possible [REDACTED] statutory breaches or otherwise.

25 It is well accepted that the Royal Commission will make findings of systemic failures, of things that could and should have been handled better. But it is respectfully submitted that the Royal Commissioner cannot, in the face of crucial evidence to the contrary, make adverse findings against Mr Overland personally without simultaneously depriving him, at a most fundamental level, of his right to natural justice.

26 These submissions are structured as follows:

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### A. Counsel Assisting step outside the Terms of Reference

At paragraphs at [1081] and [1935] of the submissions of Counsel Assisting, it is submitted that the conduct of Mr Overland may have constituted breaches of provisions of the *Victoria Police Act 2013* (Vic

28 The findings that Mr Overland may have breached certain legal obligations are impermissible under the Terms of Reference, which require and authorise the Royal Commission to inquire into a number of matters, but do not require or empower the Royal Commission to inquire into conduct which may amount to a breach of any law, regulation or professional standards.

29 There is no express reference in the Terms of Reference to any inquiry into disciplinary misconduct: Counsel Assisting propose, in effect, that such a reference may be read into the Terms of Reference. This would be unsafe and contrary to high authority, the principle of legality and the Charter of Human Rights and Responsibilities.

30 The omission of any explicit reference to inquiring or reporting into whether disciplinary offences may have occurred must have been deliberate, given the obvious examples of terms of reference explicitly providing for that kind of inquiry in the context of other Royal Commissions. For example, the terms of reference of the Royal Commission into Trade Union Governance and Corruption expressly required the Commission to inquire into and report on whether conduct in breach of the law may have occurred. This was evidently a matter of great significance to Commissioner Heydon's analysis of the scope of his powers.<sup>20</sup>

Counsel Assisting's submission that it is an implicit or incidental part the Commission's function to inquire into, and make findings as to, whether named individuals have committed disciplinary offences must be rejected in light of the particular application of the principle of legality recognised in *Balog v Independent Commission*

<sup>20</sup>

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*Against Corruption.*<sup>21</sup>



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<sup>21</sup> (1990) 169 CLR 625.

<sup>22</sup> *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [68] (Gageler J).

<sup>23</sup> (1990) 169 CLR 625 633.8 and 635.8 (citations omitted).

<sup>24</sup> Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001) [7.31], 164-165.

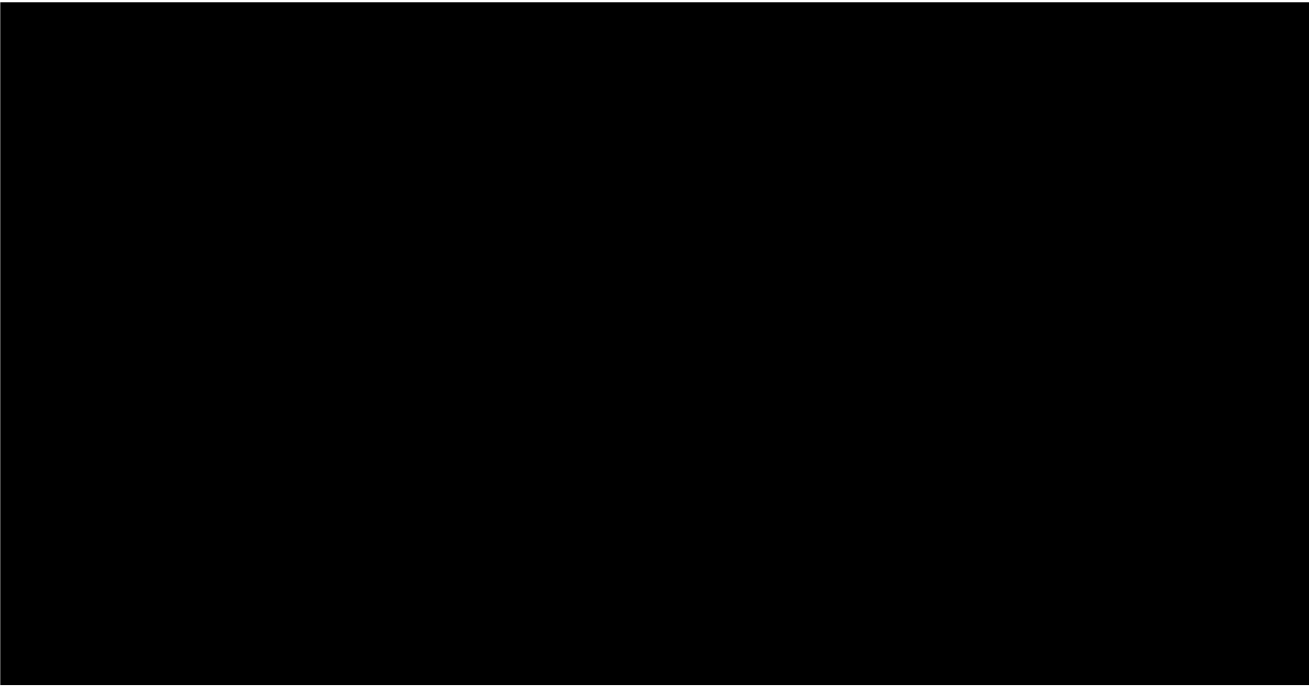
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35 In *Brinsmead v Commissioner, Tweed Shire Council Public Enquiry*,<sup>27</sup> the New South Wales Supreme Court held that the Commissioner in that case did not have the power to make findings that the plaintiff had engaged in criminal or professional misconduct.<sup>28</sup> That was based on the Court's construction of the relevant legislation, the terms of reference and the reasoning of the High Court in *Balog*. Of particular relevance to the present matter, Price J said this (emphasis added):<sup>29</sup>

These legislative provisions suggest that the functions of the first defendant were confined to inquiring, reporting, recommending and in cases of breach of law communicating with the appropriate authority. Confirmation, in my view, that it was not intended that the first defendant have the power to make findings of criminal or professional misconduct is found in the terms of reference [supra] which provide for the Commissioner "to inquire, report and provide recommendations to the Minister". The defendants point to the width of the terms of reference and make specific mention of clause 5 which provides for any line of inquiry which "warrants mention". The Commissioner's powers were limited, to my mind, by the governing words of inquire, report and provide recommendations. Absent from the terms is a specific authority to express a finding of criminal liability or professional misconduct. The Commissioner was obliged to exercise all his powers in good faith and be guided by the terms of reference: *Ross v Costigan (No 2)* (1982) 64 FLR 55.

It is difficult to conclude, without a specific provision, that the legislature intended to confer upon the Commissioner the power to express a finding of criminal liability on evidence, which may be inadmissible in a subsequent criminal prosecution. Although the legislation does not specify the findings that might be made or oblige that admissible evidence be collected, a construction which protects the individual from the risk of damage to reputation or prejudice in criminal proceedings is to be preferred. Such a construction of the relevant legislation would not hinder or prevent the Inquiry from inquiring, reporting and providing recommendations to the Minister on the efficiency and effectiveness of the governance of the Tweed Shire Council.

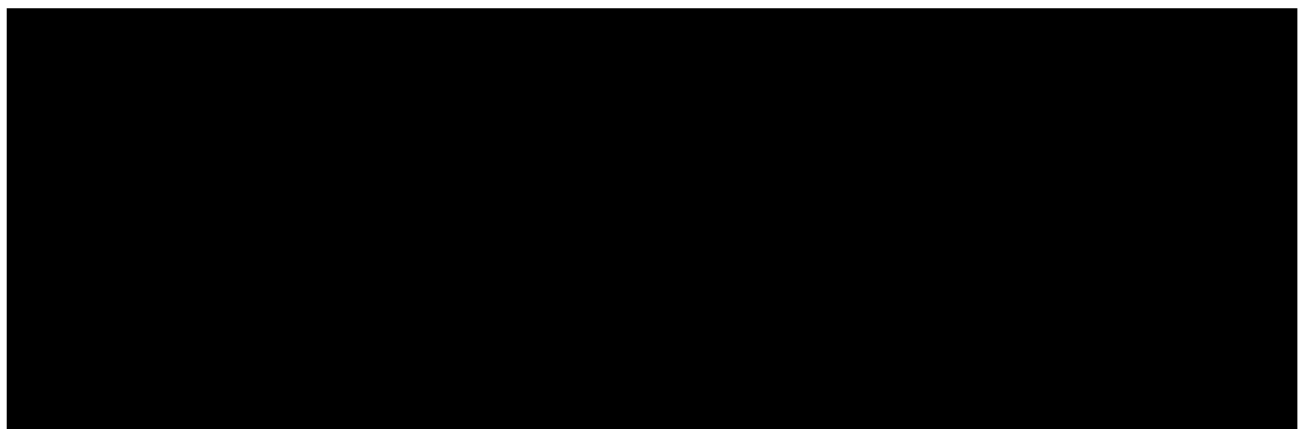
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37 The principle of legality discussed in *Balog* should be applied in interpreting the Terms of Reference of this Commission. Those Terms fall well short of requiring or authorising a finding that [REDACTED] disciplinary offences may have been committed.

38 Two further matters support that construction of the Terms of Reference.

39 First, the Explanatory Memorandum to the Inquiries Bill 2014, in its consideration of the matters which could or should be included in the report of a Royal Commission, listed three other “obligations” relevant to the content of the Royal Commission’s report: those in ss 36 and 37 of the *Inquiries Act 2014* (Vic), and “*the general law, which has the effect that a Royal Commission cannot make any legal findings in respect of a person’s guilt, innocence or liability*”.<sup>32</sup>

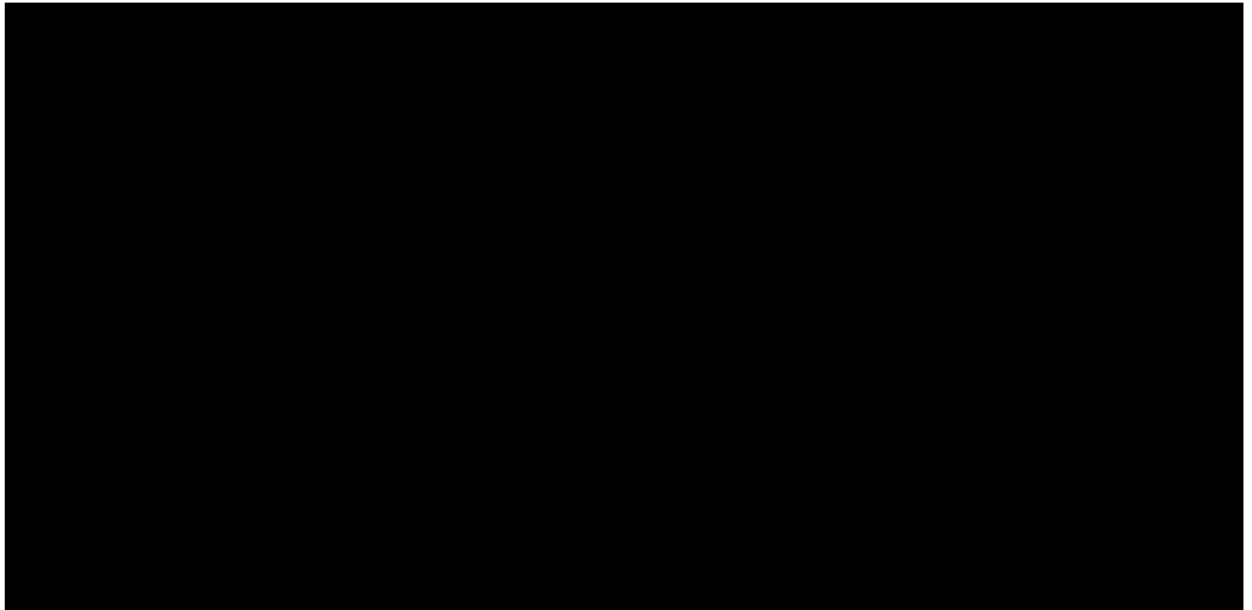


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<sup>31</sup> Ibid at [42] (French CJ, Hayne, Kiefel, Bell and Keane JJ)

<sup>32</sup> Explanatory Memorandum to the Inquiries Bill 2014, p 27.

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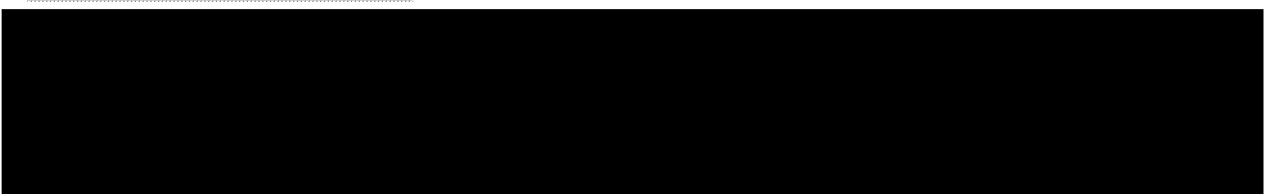


41 Counsel Assisting acknowledge that, by contrast to the terms of reference delimiting the scope of other Royal Commissions, the Terms of Reference in this case make no express reference to “*breaches of laws, regulations or professional standards*”.<sup>35</sup> Nevertheless, Counsel Assisting go on to submit that:<sup>36</sup>

... it is appropriate within the first and second terms of reference to consider whether, in some circumstances, Ms Gobbo and members of Victoria Police may have committed specific instances of [REDACTED] misconduct. That is because such conduct is relevant when considering whether, and to what extent, cases may have been affected (for example whether an accused person may have had an argument at trial for a temporary or permanent stay of proceedings, or for the exclusion of improperly or illegally obtained evidence under s 138(1) of the Evidence Act 2008 (Vic)). Such conduct is also relevant when giving consideration to the conduct of current and former members of Victoria Police in their disclosures about and recruitment, handling and management of Ms Gobbo as a human source, which includes considering the duties and obligations of members of Victoria Police.

42 Mr Overland makes the following submissions in response to that contention:

- a) To justify reading in to the Terms of Reference an implicit power to make the proposed [REDACTED] findings against current and former members of Victoria Police,



<sup>35</sup> Counsel Assisting’s Submissions, Legal Principles – Volume 1 (“CAS1”), [51].

<sup>36</sup> CAS1, [51].

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such findings would need to be a necessary step in addressing one of the paragraphs of the Terms of Reference.

- b) As to paragraph 1 of the Terms of Reference, this empowers the Commission to inquire and report into whether criminal proceedings “*may have been affected*” by “*conduct of Ms Gobbo*”. The paragraph expressly limits itself to the conduct of *Ms Gobbo* only. The express mention of Ms Gobbo excludes that which is not mentioned.<sup>37</sup> Mr Overland was neither a lawyer for, nor informant nor witness in relation to, Mr Thomas or Mr Cooper, nor was he responsible for disclosure in their cases. The findings sought against him are not a necessary step for the purposes of considering whether, and to what extent, the cases of Mr Thomas and Mr Cooper may have been affected by the conduct of Ms Gobbo.
- c) As to paragraph 2, while it is of course phrased in broad terms, it makes no reference whatsoever to any inquiry as to the commission of [REDACTED] disciplinary offences. For the reasons given above, that omission is significant and was must be assumed to be deliberate. A natural reading of paragraph 2, consistent with the principle of legality, is that it is directed to making factual findings as to what the conduct was and does not authorise, let alone require, findings that particular individuals have committed [REDACTED] disciplinary offences.

43 Lastly, the prejudice at issue could perhaps be mitigated partially if the Commission’s findings were not made public, pursuant to section 37 of the *Inquiries Act*. However, that matter is in the hands of the Executive. No assumption can be made that the Executive would withhold publication of the findings relating to Mr Overland, nor that any decision to do so would remain in effect for any particular length of time.

44 In view of the irreparable damage that Mr Overland would suffer if submissions from Counsel Assisting to the effect that he may have [REDACTED] breached the *Victoria Police Act* were made publicly available, it is respectfully requested, on behalf of Mr Overland, that the Royal Commissioner adopt one of the following approaches in respect of this issue:

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<sup>37</sup> See Balog at 632: “... the appellants are able to rely upon the maxim that the express mention of something excludes that which is not mentioned – *expressum facit cessare tacitum*”.

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- a) Consider these submissions on whether it is lawful for the Royal Commissioner to make the findings of statutory breach [REDACTED], make a determination on the issue and provide us with that determination, together with reasons, in order to afford Mr Overland the opportunity to challenge that determination, if he wishes to do so, before the relevant parts of the submissions Counsel Assisting, or a report by the Royal Commissioner on these matters, are made public; or
- b) Refer the question directly to the Supreme Court of Victoria pursuant to s.41 of the *Inquiries Act* (2014).

45 In the meantime, it is respectfully requested that the relevant parts of the submissions of Counsel Assisting remain redacted.

46

[REDACTED] Once said, the slur cannot be unsaid. The unfairness to Mr Overland, if the material were to be published before the permissibility of such findings is established, is particularly acute in circumstances where there is, at the very least, a strong argument to the effect that the submissions should never have been made because the findings could never be made.

## **B. Counsel Assisting's conclusions risk breaches of natural justice**

47 The Royal Commission is required to observe the rules of natural justice. As summarised by Lord Diplock (delivering the Privy Council's reasons) in *Re Erebus Royal Commission*:<sup>38</sup>

The rules of natural justice can.... in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal in England in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at p 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the Judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place

<sup>38</sup> *Re Erebus Royal Commission; Air New Zealand v Mahon* [1984] AC 808 at 820, cited with approval in *Annetts v McCann* (1990) 170 CLR 596, 608-9 (Brennan J).



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before him or would have so wished if he had been aware of the risk of the finding being made.

What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

48 There are six aspects to the content and process of final submissions which deprive Mr Overland of procedural fairness.

49 First, Counsel Assisting present legal conclusions in a rolled up manner, without identifying the extent of the allegation made against Mr Overland or the conduct of Mr Overland relied on [REDACTED]. This is not a pettifogging complaint: Counsel Assisting seek serious findings against Mr Overland, [REDACTED] [REDACTED] which would have a deleterious effect on his reputation. Such findings, as the High Court has consistently warned,<sup>39</sup> should not lightly be made. The corollary is that Counsel Assisting's submissions ought to have particularised the allegations against Mr Overland with a level of detail commensurate with their seriousness.

[REDACTED] In failing to do so, Mr Overland has been "*left in the dark*" as to how, precisely, the allegations against him are framed and so has been deprived of the opportunity to properly respond to the allegations, in breach of the second rule identified by the Privy Council in *Re Erebus Royal Commission*.

50 Secondly, Counsel Assisting often make assertions without identifying any evidence, or, if evidence is relied upon (typically by way of a footnote transcript), that evidence does not support the assertion. As such, the Royal Commission is invited to contravene the first rule identified by the Privy Council in *Re Erebus Royal Commission*. These matters (as they relate to Mr Overland, so far as Mr Overland is able to tell from the exhibits he has been

<sup>39</sup> *Neat Holdings* at [1]; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at [17] (Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Re Day* (2017) 91 ALJR 262 at [16] (Gordon J).

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granted access to) are also identified in the body of and annexure to this outline of submission.

51 Thirdly, and as set out in Sections D, F, G and H below, other submissions made by Counsel Assisting rely on faulty, frequently internally inconsistent, inferential reasoning. If adopted by this Royal Commission, such reasoning would constitute an infringement of the first rule identified by the Privy Council in *Re Erebus Royal Commission*.

52 Fourthly, as identified in the body of this outline of submissions, Counsel Assisting invite findings of fact in relation to matters which were not put to Mr Overland in cross-examination. It has long been acknowledged that, as a matter of fairness, notice of an allegation should be given to a witness in cross-examination.<sup>40</sup>

53 Fifthly, Mr Overland has been required to make these submissions despite the fact that there are documents relied upon by Counsel Assisting that have not been provided to Mr Overland. Such documents have been repeatedly requested.<sup>41</sup> Many were not provided to Mr Overland, despite his requests, until a few days ago (for example, as set out in the paragraph 127(l) below, documents cited by Counsel Assisting in support of their finding sought in relation to Mr Overland being updated on Thomas PII issues<sup>42</sup>). Other documents have not been provided at all. Counsel Assisting was invited to withdraw submissions that relied on documents that have not been provided to Mr Overland despite repeated requests, but declined to do so.<sup>43</sup> A more egregious breach of natural justice is difficult to imagine.

54 Sixthly, and as discussed at paragraphs 3 to 9 above, the time constraints imposed on the Royal Commissioner prevent a proper consideration of the inevitably vast content of all responsive submissions, including those of Mr Overland, together with the oral and documentary evidence relied upon. The denial of natural justice is all the more pronounced as Counsel Assisting typically rely not on direct evidence for the findings against Mr Overland for which they contend, but inferences arising from the evidence. Inferential reasoning is inevitably more factually complicated and complex and can only safely be undertaken when the full suite of relevant facts and competing inferences are carefully

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<sup>40</sup> *Browne v Dunn* (1893) 6 R 67.

<sup>41</sup> By Letters from Corrs Chambers Westgarth (for Mr Overland) to Solicitors Assisting the Royal Commission dated 23 July, 30 July, 3 August, 4 August, 6 August, 7 August and 11 August 2020.

<sup>42</sup> Which documents were only received on 13 August 2020.

<sup>43</sup> By Letter from Solicitors Assisting the Royal Commission to Corrs Chambers Westgarth (for Mr Overland) dated 12 August 2020.

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considered. Time does not permit this careful consideration. To make serious findings against Mr Overland without there being time for this careful consideration is to deny him natural justice.

### C. Victoria Police and Mr Overland's role

55 If Mr Overland's role during the relevant periods at Victoria Police is properly and fairly considered, and if the structures and policies in place at the time are properly and fairly considered, it is impossible to draw Counsel Assisting's inferences in relation to his knowledge and conduct.

#### The senior role of Mr Overland

56 As Mr Overland stated in evidence, the "*role of senior police officers is not widely understood in the community...*", being "*almost seen as beefed up Detective Senior Sergeants or equivalents and in fact so much of your time is on doing things that senior executives would do in other organisations*".<sup>44</sup> As Assistant Commissioner Crime, and more so as Deputy Commissioner, Mr Overland was several layers removed from day-to-day operations. As Assistant Commissioner Crime, the rank hierarchy under Mr Overland in the Crime Department was:

- a) Commander;
- b) Superintendent;
- c) Inspector;
- d) Senior Sergeant;
- e) Sergeant;
- f) Senior Constable;
- g) Constable.

57 During his time as Assistant Commissioner Crime, Mr Overland oversaw a significant range of operational activity, including (as at the date of assuming the role) 36 homicides,

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<sup>44</sup> T.11283.45-12284.4 (23/01/20).

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23 drug operations, 104 sex matters, 19 serious crime matters, 6 organised crime matters.<sup>45</sup> While the “*gangland wars*” and Operation Purana “*really added to the operational workload*”,<sup>46</sup> it was “*one of hundreds of investigations of serious and major crime... conducted by the Crime Department*” while he was Assistant Commissioner Crime.<sup>47</sup> As an example, during just the 12 months starting February 2005, Mr Overland also oversaw the following significant operations in Victoria:

- a) the investigation of the murder in February 2005 of Ms Maria Korp, which gained significant media attention as the “body in the boot murder”;<sup>48</sup>
- b) investigations of fatal police shootings in Shepparton on 19 April 2005 and the murder of Senior Constable Tony Clark on 24 April 2005;<sup>49</sup>
- c) the investigation of the triple filicide by Robert Farquharson in September 2005;<sup>50</sup>
- d) the investigation (and arrests in November 2005) of 17 people across Melbourne and Sydney conspiring to commit a series of terrorist attacks, including bombing the 2005 AFL Grand Final, the 2006 Australian Grand Prix and the Crown Casino, as well as conspiring to assassinate the then Prime Minister;<sup>51</sup> and
- e) operational police matters leading up to and during the Commonwealth Games, which took place in Melbourne in 2006.<sup>52</sup>

58 As well as oversight of operational matters, as Assistant Commissioner Crime, Mr Overland:

- a) oversaw the management of the department, including finance (and its operating budget of \$30-35 million), Human Resources (and its staff of 600), and asset management;<sup>53</sup>

<sup>45</sup> Exhibit RC1385b, Diary of Mr Simon Overland; T.12283.23-36 (23/01/20).

<sup>46</sup> T.12283.43 (23/01/20).

<sup>47</sup> First Overland Statement at [34].

<sup>48</sup> T.12285.32-34 (23/01/20).

<sup>49</sup> T.12285.25-27 (23/01/20).

<sup>50</sup> T.122.85.44-46 (23/01/20).

<sup>51</sup> T.122.86.15-21 (23/01/20).

<sup>52</sup> T.122.85.18-23(23/01/20).

<sup>53</sup> First Overland Statement at [34]; T.12282.46-7 (23/01/20); T.12283.8-11 (23/01/20).

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- b) was a member of the “*Corporate Committee*”, analogous to a board of directors of Victoria Police (as it was the peak advisory decision-making body for the organisation), as well as its sub-committees “*Organisational Development Standing Committee*” and “*Police Operation Standing Committee*”;<sup>54</sup>
- c) was a member of the Ministerial Council on Drug Strategy, a member of the Sentencing Advisory Council, and part of the Australian Crime Commissioners’ Forum, as well as on multiple working groups relating to reform of areas including family violence, delays in the criminal justice system, and prostitution control;<sup>55</sup>
- d) conducted internal disciplinary hearings and sat on CompStat panels;<sup>56</sup>

59 Further, in 2004, Mr Overland was responsible for developing an organised crime strategy for Victoria Police, an extensive process involving Australian and international experts and academics.<sup>57</sup> In 2005, Mr Overland led a Victorian Police review undertaken with Boston Consulting Group to develop the “*Major Crime Model*” in Victoria, and oversaw the subsequent restructure of the Crime Department.<sup>58</sup>

60 In such a senior, significant role, Mr Overland did not have the capacity to be involved in the detail (let alone the minutiae) of operational matters. He would have been grossly neglecting the responsibilities of his role had he sought to do so. He was “*across a huge range of issues... in general you are just briefed on generalities and unless you’ve got a particular reason to burrow and inquire, you don’t; you just take on board what you are told*”.<sup>59</sup> He also had “*complete confidence*” in the “*senior, experienced detectives*” under his command.<sup>60</sup> Counsel Assisting also note (at one stage, early in volume 2) that Mr Overland was not involved in detailed operational matters,<sup>61</sup> but fail to grapple with this later in volume 2, in seeking conclusions which would put Mr Overland right into the nitty gritty of operational matters.

61 Mr Overland was entitled to rely on the fundamental principles of the chain of command and on the fact that instructions given by him were expected to be followed. He would

<sup>54</sup> First Overland Statement at [36]; T.12284.15-47 (23/01/20).

<sup>55</sup> T.12284.35-12285.2 (23/01/20).

<sup>56</sup> T.12285.6-7 (23/01/20).

<sup>57</sup> T.12128.32-43 (22/01/20).

<sup>58</sup> T.12128.32-43 (22/01/20).

<sup>59</sup> T.12286.34-38 (23/01/20).

<sup>60</sup> T.11857.14-18 (19/12/19).

<sup>61</sup> Counsel Assisting Submissions, Narrative – Volume 2 (“CAS2”), CAS2, [403].

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have been derelict in his duty as a senior officer not to so rely, as his duty was to do his job, not to do the jobs of officers several rungs below him in the chain of command. There were sanctions for failing to follow an instruction given by Mr Overland throughout the relevant period. At the relevant time (ie 2004 to 2009), the *Police Regulation Act (Vic)* provided that it was a breach of discipline for a member of the Police to:

- a) fail to comply with a standing order or instruction of the Chief Commissioner (s 69(1)(b));
- b) fail to comply with a lawful instruction given by “*a member of or above the rank of senior sergeant or a person having the authority to give the instruction*” (s 69(1)(d)).

*Development of SDU and the sterile corridor*

62 The structures and policies in place at the time in relation to source management need also be considered. While these are outlined by Counsel Assisting in Chapter 3 of their submissions, the principle of the “sterile corridor” warrants further consideration, as does Mr Overland’s understanding of, and position and responsibilities within, the structures and policies.

63 The SDU was developed from a particularly significant historical background of police corruption, particularly within the drug squad, and a particular problem of corrupt relationships between police officers and human sources.<sup>62</sup> As Mr Overland stated in evidence, when he joined the Victoria Police in 2003, he was aware that “*there had been recent and well documented incidents of corruption within the Crime Department*”, which “*all ... had related in some way to the management of human sources*”.<sup>63</sup>

64 In September 2004 the Chief Commissioner’s Instruction on Informer Management Policy was issued.<sup>64</sup> Mr Overland was well aware of the policy,<sup>65</sup> which purpose was to provide “*a comprehensive approach to informer management with definitions, roles and responsibilities clearly outlined for police managers.*”<sup>66</sup> Mr Overland was also aware that one of the policy responses implemented to deal with the mischief was the implementation

<sup>62</sup> T.11938.40-11939.5 (19/12/19).

<sup>63</sup> First Overland Statement at [151].

<sup>64</sup> T.11333.32-38 (16/12/19).

<sup>65</sup> T. 12305.9-15 (23/01/20).

<sup>66</sup> Ex RC0008 Annexure 35 (Chief Commissioner’s Instruction 6/04), para 1.

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of the “*sterile corridor*”, which was also at that time viewed as world’s best practice<sup>67</sup> and a way in which to minimise the possibility of corruption developing.<sup>68</sup>

65 When the SDU was established, Mr Overland initially wanted it to be part of the Crime Department. However, he was persuaded that if a sterile corridor were to be introduced “*it needed to go all the way to the top*”, which meant the SDU could not sit in the Crime Department, which was responsible for investigations.<sup>69</sup> Further, as Counsel Assisting note in their submissions, the concept of “*sterile corridor*” requires the separation of management of an investigation from management of the human source,<sup>70</sup> and it will be recalled that Mr Overland was the ultimate manager of the investigations in his position as Assistant Commissioner, Crime.

66 Accordingly, during the time in which Mr Overland was Assistant Commissioner, Crime (ie February 2003 to mid June 2006<sup>71</sup>), the SDU not only fell outside his responsibility, but he was aware of the requirement for it being separate from his management. It did not form part of the Crime Department (for which he was responsible). Rather, it formed part of the Intelligence and Covert Support Department (for which he was not responsible). As set out in further detail below, Counsel Assisting fail to grapple with this significant aspect of the Chief Commissioner’s Instruction on Informer Management Policy and the structural features in place separating Mr Overland from the management of Ms Gobbo, in drawing their baseless conclusions against Mr Overland.

#### Registration of Ms Gobbo

67 Mr Overland’s opinion was that any decision to use a human source is a “*legally and ethically complex*” decision, which “*often requires fine judgments and balancing of legal and ethical principles that may compete*”.<sup>72</sup> By definition, the type of person who has knowledge relevant to the identification and prosecution of serious crime “*is invariably ethically, morally and spiritually compromised*”.<sup>73</sup> There is also a very real danger to the physical safety of human sources should the wrong person discover their role.<sup>74</sup>

<sup>67</sup> T. 11939.14-28 (19/12/19).

<sup>68</sup> First Overland Statement at [151].

<sup>69</sup> T.11336.22-25 (16/12/19).

<sup>70</sup> CAS2, [273].

<sup>71</sup> First Overland Statement at [34], [36].

<sup>72</sup> First Overland Statement at [11].

<sup>73</sup> First Overland Statement at [12].

<sup>74</sup> Ibid at [13].

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68 Mr Overland was “*surprised and concerned*” when he learned that Ms Gobbo had been registered as a human source.<sup>75</sup> However, the registration process was undertaken independently of Mr Overland, as covered by Force policy, in a separate area for which Mr Overland did not have management responsibility:<sup>76</sup> He understood that through the SDU process, a close and thorough analysis of the risks and benefits of registering Ms Gobbo had been undertaken. The Chief Commissioner’s Instruction on Informer Management Policy required, before an informer was registered and allocated a registration number:<sup>77</sup>

- a) the preparation of a risk assessment, including risk to informer, “*risk to information – including content, intended use, subsequent dissemination, relevance*”, risk to handler(s), “*risk to Victoria Police*” and “*risk to public – impact on community, harm to public, confidence issues*”;<sup>78</sup>
- b) the Officer in Charge being satisfied that the informer be registered, which involved the Officer in Charge (among other things):<sup>79</sup>
  - (i) assessing the informer’s suitability;
  - (ii) evaluating the identified risks (including in the risk assessment above) and considering potential risks; and
  - (iii) considering risk management strategies,

with the Detective Superintendent, State Intelligence Division, Intelligence & Covet Support (the “Central Informer Registrar”) responsible for the effective implementation of the Informer Management Policy, including providing “*advice and guidance to members in relation to the management of Informers and this policy*”.<sup>80</sup>

<sup>75</sup> First Overland Statement at at [81].

<sup>76</sup> T.11430.11-17; T.11430.13-17.

<sup>77</sup> Exhibit RC0008 (Annexure 35 to the Statement of Neil Paterson dated 22 March 2019), VPL.0002.0001.2214 at .2222

<sup>78</sup> Exhibit RC0008 Statement of Assistant Commissioner Neil Paterson, 22 March 2019, Annexure 35, VPL.0002.0001.2196 at .2202.

<sup>79</sup> Ibid at .2203.

<sup>80</sup> Ibid at .2219, [15].



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69 It was not for Mr Overland to see the risks and benefits analysis prepared by the SDU<sup>81</sup> and he was “*very conscious not to intervene because [he] didn’t think it was appropriate*”.<sup>82</sup> Further (emphasis added):

*I considered very carefully the information that was provided to me. My view was that process should run its course. If the risk assessment done by the professionals by the SDU was such that she shouldn’t be registered, she wouldn’t be.*

*...if I’d intervened in the way you’re suggesting then I think that may well have been a criticism that was made of me and I may have had some difficulty defending.*

70 Mr Overland became aware Ms Gobbo was a human source only once she had been registered and allocated the computer-generated code ‘3838’. To the extent Counsel Assisting seek a finding at [194] that “*throughout this period, and in the months before it, Mr Overland had become aware ...that his investigators were proposing to, and had registered Ms Gobbo as a human source*”, this has no evidentiary basis, is contrary to Mr Overland’s evidence on the matter, and should be rejected. Counsel Assisting rely on diary notes of Mr O’Brien and Mr Purton which say no more than “*Nicola Gobbo to meet with Stuart Bateson*”<sup>83</sup> and “*discussion re Solicitor Nicola Gobbo & Opportunities re Op Quills*”.<sup>84</sup> Counsel Assisting ignore Mr Overland’s own diary note and evidence of this meeting, including his evidence that “*I do not believe that I was informed at this meeting, based on my general recollection and this entry, that I was informed about Ms Gobbo at this meeting*” because in light of his other diary entries at around this time, he believes he would have recorded this information had he been told.<sup>85</sup> There is no suggestion from Counsel Assisting, and nor could there responsibly be such a suggestion, that this evidence from Mr Overland is dishonest or other than his genuine recollection. There is no attempt by Counsel Assisting to explain how or why his diary notes do not support his recollection. It is most unsatisfactory that Mr Overland is left in the position of having to guess at why the finding pressed by Counsel Assisting should or might be made in the face of his oral evidence and documentary evidence to the contrary. Being denied the knowledge of how the case is put against him, he is being denied procedural fairness.

<sup>81</sup> T.11431.21-24 (16/12/19).

<sup>82</sup> 11431.42-43.

<sup>83</sup> Ex RC0109, Mr Terry Purton diary, 6 June 2005.

<sup>84</sup> Ex RC0933, Mr James (Jim) O’Brien diary, 12 September 2005.

<sup>85</sup> Supplementary Overland Statement at [71], [73].

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71 With respect to a Purana Taskforce meeting on 19 September 2005, again Counsel Assisting ignore Mr Overland’s own detailed diary note which does not record being told anything about Ms Gobbo. Counsel Assisting also baldly assert that information provided at this meeting had come from Ms Gobbo “*which must have been apparent to him*” (ie Mr Overland). This is an unsafe and unsubstantiated assumption: Mr Overland was not aware that Ms Gobbo was informing at this stage. Why would it have been “*apparent*” to him the information came from someone who he was not aware was an informer, let alone aware of the type of information she was providing?

72 It is also important to note that Mr Overland was using the descriptor “3838” in his diary entries. In other words, Mr Overland (cognisant of the new policy) took it that the policy had been followed prior to issuing Ms Gobbo with a computer-generated code, including the risk assessment summarised above at paragraph 68.<sup>86</sup>

#### Steps taken by Mr Overland

73 While he did not intervene, and was cognisant of the structures and policies in place separating him from the management of human sources, Mr Overland took steps to allay his concerns. Mr Overland recalls he went to speak with Commander Danye Moloney, Commander of the Intelligence and Covert Support Department, within which department the SDU was located, to discuss Ms Gobbo’s registration and management by the SDU and managing her as a source carefully.<sup>87</sup>

74 Mr Overland was also told Ms Gobbo was becoming a source out of fear for her own safety (in particular from Mr Mokbel and his associates), that she knew about and was facilitating (or was expected to facilitate) the on-going criminal activities of major criminals, and viewed the Victoria Police as a means of extracting herself from a very dangerous and difficult position.<sup>88</sup> He was not aware of a prior occasion when a barrister had been registered as a human source, but Ms Gobbo’s “*circumstances, as they were made known to [him], did seem to be extreme*”. Having considered and reflected on what he was told as to her motivation for becoming a source, he considered the alternate courses of action were

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<sup>86</sup> See also Mr Overland’s evidence at paragraph 69 above, which assumes the risk assessment done had been done by the professionals of the SDU before registering her. To the extent that Counsel Assisting’s submissions indicate (at vol 2 [306]) that the risk assessment was not completed until November 2005, this was not something known to Mr Overland (and Counsel Assisting, properly, do not suggest he did know it; nor was there any line of questioning directed to alerting him to this fact).

<sup>87</sup> T.11325.43-45 (16/12/19).

<sup>88</sup> First Overland Statement at [82].

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probably of higher risk to her than becoming a source: *“it was the least worst decision based on the information I had”*.<sup>89</sup> It was his experience of professional people who find themselves in roles in organised crime that *“they’re not roles they can resign from. They are important to the operation of the syndicate and they tend to have really crucial information about the people who sit at the heart of those syndicates. Therefore they simply can’t walk away; it’s a death sentence to try to do so”*.<sup>90</sup> Mr Overland feared that if Victoria Police did not assist Ms Gobbo at that time, her life would continue to be in considerable danger and that she may well have been killed.

- 75 Mr Overland’s diaries also evidence that Mr Overland told Ms Nixon (then Chief Commissioner) of the registration of “3838”, on 29 September 2005 at 8.45 am. More particularly, his diary entry states:<sup>91</sup>

8.45 am CCP ....

*Purana - re 3838.*

- 76 Mr Overland has no independent recollection of the meeting with Ms Nixon on 29 September 2005, the extent to which he discussed Ms Gobbo’s registration with Ms Nixon, nor Ms Nixon’s response to this briefing.<sup>92</sup> However, it is *“significant”*, in Mr Overland’s view, that his diary entry records that he told the Chief Commissioner about “3838”, because *“it’s not the sort of operational information you would normally tell a Chief Commissioner – I don’t know that I went into the nature of the information that she was able to provide in detail, I just don’t recall, but it just seems logical to me, based on the note, based on the exceptional circumstances in telling the Chief Commissioner something like this, that I made her aware that Ms Gobbo, a barrister, was registered as a human source by that number”*.<sup>93</sup> Mr Overland further reiterated that he believed he told the Chief Commissioner *“because of the unusual circumstances”* of *“a barrister who is providing information”*.<sup>94</sup> His diary entry does not record he told Ms Nixon Ms Gobbo’s name, or that 3838 was a barrister, but as he stated, *“I don’t believe I would have written that down because it would identify 3838 as a lawyer and is potentially a source of compromise ...*

<sup>89</sup> T.11428.30-44 (16/12/19).

<sup>90</sup> T.11339.7-19 (16/12/19).

<sup>91</sup> Ex 1385B, Mr Simon Overland diary, 27 September 2005, VPL.0005.0264.0053 @ 0261 (8.45am)

<sup>92</sup> Exhibit RC0981, Supplementary Statement of Simon Overland dated 17 January 2020 (**Second Overland Statement**), at [78]-[80]].

<sup>93</sup> T.12015.14-27 (21/01/20).

<sup>94</sup> T.12016.45-12017.3, 12017.40-44 (21/01/20).

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*it's often through diary notes and piecing together information that the identity of a source can be disclosed".<sup>95</sup>*

- 77 The timing and context of this conversation is also important.
- 78 On his evidence, Mr Overland became aware of Ms Gobbo's registration on 26 September 2005 and three days later saw fit to mention this to the Chief Commissioner. Under Force policy, he was not responsible for the management of Ms Gobbo: Mr Maloney, another direct report to the Chief Commissioner, held that responsibility. There is no logical explanation for Mr Overland having made this diary entry of a discussion with the Chief Commissioner, so soon after he learned of Ms Gobbo's registration and in respect of an informer for whom he was not responsible, other than that he communicated something of substance about 3838 in that discussion.
- 79 It is troubling that the Royal Commissioner does not have the benefit of hearing Ms Nixon's response to the revelation that Mr Overland's diary recorded him having discussed 3838 with her on 26 September 2005. Ms Nixon was cross-examined before Victoria Police realised that they had been sitting on Mr Overland's diaries and therefore before they were introduced into evidence. There was no attempt to recall Ms Nixon, and no supplementary statement was sought or obtained (at least as far as we are aware).
- 80 The Royal Commissioner is left with evidence (given from understandably imperfect recollections) of a conversation that occurred 15 years earlier and a contemporaneous note that is consistent only with a discussion of some substance having taken place. It is respectfully submitted that the only finding open to the Royal Commissioner on the evidence is that there was a discussion between Ms Nixon and Mr Overland about informer 3838 on 26 September 2005, that it is likely that it was a discussion of some substance, but it is not possible to determine from the evidence precisely what was said.
- 81 Further, Mr Overland gave some key instructions on learning of Ms Gobbo's registration, as set out immediately below.

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<sup>95</sup> T.12010.21-30 and T.12017.46-12018.7 (21/01/20).

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Instructions given by Mr Overland in relation to the use of Ms Gobbo as a human source

82 Mr Overland gave some key instructions at the outset of becoming aware that Ms Gobbo was a human source.

83 On being informed of Ms Gobbo's registration, Mr Overland "*gave instructions to have the Commander of Crime, Terry Purton, fully involved on the matter and have reports made directly to him*".<sup>96</sup> Mr Overland also instructed Mr Purton to keep the information "*with audit trails*". This is recorded in a diary note of Mr Overland from 27 September 2005 of a meeting with Mr Purton, as follows:<sup>97</sup>

*Discussed handling of information from 3838 - ... IR as normal - ... need to keep info extremely tight and with audit trails - ... must not compromise 3838 under any circumstances ...*

84 Mr Overland also gave an instruction that Ms Gobbo should not continue to act for people if she provided information in relation to them, nor should she provide privileged information.<sup>98</sup> He recalls conversations with investigators, including Gavan Ryan and Jim O'Brien, and believed it to be a "*shared understanding*".<sup>99</sup>

85 If Mr Overland had become aware that Ms Gobbo was either breaching legal professional privilege, or continuing to act for people against whom she had informed, against his instructions, he would have:<sup>100</sup>

- a) spoken to Mr Moloney;
- b) "*tried to establish exactly what had gone on and [brought] those matters to an end*"; and
- c) "*made sure that that information was disclosed to relevant authorities at the appropriate time*".

<sup>96</sup> Second Overland Statement at [74].

<sup>97</sup> Ibid at [67].

<sup>98</sup> T.11454.16-23 (17/12/19); First Overland Statement at [114].

<sup>99</sup> First Overland Statement at [114].

<sup>100</sup> T.11327.1-14 (16/12/19).

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Counsel Assisting's invited finding regarding Ms Nixon

- 86 Contrary to the finding invited by Counsel Assisting, as set out in paragraph 80 above, it is respectfully submitted that the only finding open to the Royal Commissioner on the evidence is that there was a discussion between Ms Nixon and Mr Overland about informer 3838 on 26 September 2005, and that it is likely that it was a discussion of some substance, but it is not possible to determine from the evidence precisely what was said.
- 87 While (on her evidence given before Victoria Police found Mr Overland's dairies) Ms Nixon does not recall ever being aware that Ms Gobbo was a human source, that is unsurprising given the passage of time. It is also unsurprising that Ms Nixon thought another female lawyer may be "*Lawyer X*" when the story broke in the media in 2014: it would be consistent with Mr Overland having told Ms Nixon a barrister (or lawyer), who had involvement in Operation Purana matters, had been registered (but not their identity). That "other female lawyer" had, by this stage, come to public prominence, was the subject of criminal investigation by Purana<sup>101</sup> (and ultimately charged<sup>102</sup>), was a (hostile) witness in relation to another gangland murder (the victim being her then partner),<sup>103</sup> also acted for Messrs Mokbel, Williams, and Andrews,<sup>104</sup> and so it is not surprising that there was this confusion.
- 88 Counsel Assisting contend it is "*consistent with [Mr Overland] not informing [Ms Nixon] about her role as an informer at this early stage*" that Mr Overland did not inform Ms Nixon "*as to the significant organisational risks faced by Victoria Police relating to Ms Gobbo's use*". However, such organisational risks would have been immediately apparent to the Chief Commissioner; she hardly needed briefing from an Assistant Commissioner on them. Further, given Mr Overland does not recall what he told Ms Nixon, it is not established on the evidence that Mr Overland did not brief Ms Nixon on these risks. In any event, the absence of evidence of a detailed discussion with Ms Nixon of the risks is consistent with the operation of the Chief Commissioner's Instruction, in that the risks were not for Mr Overland to manage – the risks were for her handlers and that hierarchy to manage (i.e. Mr Dannye Moloney, as the direct report to the Chief Commissioner at that time). Counsel Assisting also point to how Mr Overland did not inform Ms Nixon of the

<sup>101</sup> See CAS2, [1116]-[1117].

<sup>102</sup> CAS2, [1126].

<sup>103</sup> See CAS2, [1124]-[1125].

<sup>104</sup> See CAS2, [1108], [1110].

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threats to Ms Gobbo’s life, “*and again upon his receipt of the SWOT analysis*”<sup>105</sup> – but (unfortunately) such risks are not unusual, and further, there is nothing inconsistent with Mr Overland not briefing Ms Nixon on these matters: again, Counsel Assisting does not recognise the reality of the way in which Victoria Police was structured (the threats to Ms Gobbo were not for Mr Overland to manage; Mr Maloney had responsibility for managing the response to these threats), and the impact of this structure on the nature and content of communications between Assistant/Deputy Commissioner and Chief Commissioner. This submission does not seek to downplay the significance of the death threats, only to recognise the critical contextual matter that such threats were neither unique nor such as to compel the direct involvement of the Assistant Commissioner, less still a discussion of the threats with the Chief Commissioner.

89 Finally, Counsel Assisting contend:<sup>106</sup>

*If Ms Nixon had been told about the proposal to use a criminal barrister in these circumstances, chastened as she was by her experience with Mr Milte, it is likely that she would not have permitted it, or at the very least would have taken steps to determine whether or not it was appropriate, such as obtaining legal advice.*

90 This is faulty, top-down reasoning from Counsel Assisting. Counsel Assisting make no attempt at addressing other inferences, including the consistency or otherwise of Ms Nixon’s conduct on this occasion with her conduct on previous occasions. Counsel Assisting also refrain from any attempt to explain what Mr Overland’s diary entry of his 29 September 2005 discussion with Ms Nixon (“*Purana – re 3838*”) means, if it does not mean that he raised the fact that the informer was a barrister. In order to find that Mr Overland did not raise this fact with Ms Nixon, it would be at least necessary to identify a probable reason as to why Mr Overland would have made this note and, indeed, why he would have raised a meaningless number about an anonymous informer with the Chief Commissioner.

*Mr Overland’s obligation to obtain legal advice?*

91 At [424], Counsel Assisting seek a finding that Mr Overland “*should have ensured that legal advice concerning her proposed use was obtained from the DPP, a lawyer within Victoria Police or the Victorian Government Solicitors Office*” “*when he became aware of*

<sup>105</sup> As to which, see Annexure, item 21.

<sup>106</sup> At [200.3].

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*the proposed use of Ms Gobbo as a human source*". This finding should be rejected. Mr Overland gave evidence as to what could have been done better, including that:

- a) there needed to be guidance and training from the outset to make sure that everyone was on the same page about the obligations of disclosure and processes around disclosure to the prosecution;<sup>107</sup> and
- b) he thought "there should be some legal support embedded" in a unit such as SDU, "who are there and on the spot and able to give advice as required".<sup>108</sup>

92 However, Mr Overland did not manage the SDU (as set out in paragraphs 62 to 66 above). He knew registration of Ms Gobbo involved an analysis of the risks and benefits of her registration, including consideration of the content of the information and the impact on the public's confidence in the Victorian Police (as set out above at paragraph 68(a)). He was aware that a sterile corridor had been established under the Chief Commissioner Instruction, and was conscious not to intervene inappropriately, considering: *"If the risk assessment done by the professionals by the SDU was such that she shouldn't be registered, she wouldn't be. ...if I'd intervened in the way you're suggesting then I think that may well have been a criticism that was made of me"* (see above at paragraph 69).

93 This all tells against the finding sought by Counsel Assisting that Mr Overland should have ensured legal advice had been obtained on learning Ms Gobbo was a human source. A Chief Commissioner Instruction was in place, which required Mr Overland to be divorced from the process. There is no reason to single Mr Overland out as the person who should have ensured this advice was obtained. No similar finding is sought against Commander Maloney – who was responsible for the SDU. No similar finding is sought against the *"Officer in Charge"* – who was responsible for reviewing the risks and benefits analysis before Ms Gobbo was registered. No similar finding is sought against Ms Nixon (who, on any view of Mr Overland's diary note of 29 September 2005 was told something meaningful about informer 3838).

<sup>107</sup> T.12140.46-12141.5 (22/01/20).

<sup>108</sup> T.121142.47-12143.4 (22/01/20).



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Disclosure to the prosecution

94 Mr Overland’s evidence on disclosure to the prosecution was that, because the management of human sources is ethically and legally complex, what should be disclosed to the prosecution is:<sup>109</sup>

- a) “*the history of the dealing with the source and the fact that a source has been involved*”;
- b) “*the circumstances in which they’ve been involved*”; and
- c) “*the information they’ve been involved in providing*”.

95 Mr Overland, in his senior executive role, was not involved in the disclosure process.<sup>110</sup> He assumed that the investigators, who were “*very experienced investigators*”, were making appropriate disclosures to the prosecution of the fact that information had come from Ms Gobbo.<sup>111</sup> Mr Overland had given an instruction of a need for “*audit trails*”, which reflected his expectation that the Police “*needed to be highly accountable for the manner in which information was obtained from Ms Gobbo and used in criminal investigations and prosecutions*”... [I appreciated] the sensitivity of using Ms Gobbo as a human source and [expected] that full and appropriate disclosure would be made to prosecuting authorities when necessary”.<sup>112</sup>

96 One reason for Mr Overland’s expectation of full disclosure to the prosecution was because he appreciated the sensitivity of using Ms Gobbo as a human source. Further, Mr Overland’s experience<sup>113</sup> was that “*organised criminals are very attuned to police methodology and one of the things they look for is how did they get caught, and they look within briefs and they look across briefs to try and look for patterns, to try and identify people who have actually provided information against them*”, meaning risk of exposure was significant.<sup>114</sup>

<sup>109</sup> T.11331.40-44 (16/12/19).

<sup>110</sup> T.11536.20-30 (17/12/19).

<sup>111</sup> T.11332.15-20 (16/12/19).

<sup>112</sup> Second Overland Statement at [75].

<sup>113</sup> From his time at the AFP [REDACTED]

<sup>114</sup> T.11337.10-17 (16/12/19).

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97 Mr Overland reasonably assumed that the use of Ms Gobbo as a source had been disclosed by Victoria Police to the prosecution.<sup>115</sup> His view is (and was) “*you’ve got to give it to the prosecutor and then you make your PII claim from there*”.<sup>116</sup> He referred to the usual practice of defence calling for information reports, that would then be provided, and that he could not see “*how the prosecutor can do the job and how you can actually protect the source properly if you don’t actually make that disclosure*”.<sup>117</sup>

*If there’s information in those information reports that’s come from a confidential source, the prosecution needs to know that, because you actually might want to make a PII claim around that and around a whole series of things, in order to protect the identity of the source because, as I say, sources are often identified because of patterns of information that’s provided and when it’s disclosed to the defence, the accused gets to see it and they kind of go, “There’s only one person who knew all that information, therefore it must be X”.*

98 This is key evidence provided by Mr Overland. Yet it is not addressed at all by Counsel Assisting.

#### **D. Conjecture is unsatisfactory proof**

99 It is not sufficient that a conclusion is the product of Counsel Assisting’s best guess as to what happened. A finding cannot be made on the basis of suspicion or conjecture masquerading as inferential reasoning. There is either a sound factual basis for a submission (and indeed a finding) or there is not. The Commission’s findings should be made on the *Briginshaw* standard of proof. It is also well established that findings of fact require examination and analysis of the evidence gathered by this Commission as a whole,<sup>118</sup> rather than a piecemeal approach.

100 As set out in more detail below, there is a dearth of direct evidence to support Counsel Assisting’s findings sought against Mr Overland. Witnesses such as Mr O’Brien, Mr Ryan, Mr Bateson and Mr White have been called who, if the allegations against Mr Overland were well-founded, might have been expected to give evidence that they briefed Mr Overland on the matters the Commission is being invited to find Mr Overland was briefed on. They have not given that evidence. Diary entries of Mr Overland, Mr O’Brien, Mr

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<sup>115</sup> T.12141.

<sup>116</sup> T.12142.3-6 (22/01/20).

<sup>117</sup> T.12141.25-37 (22/01/20).

<sup>118</sup> See, for example, *Pell v The Queen* [2020] HCA 12 at [58].

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Ryan, Mr Bateson, Mr White and the SML entries rarely support the findings, and they often contradict them. One striking example: Mr Overland’s diary records he was involved in a major counter terrorism exercise for the entire day on 22 March 2014, when Counsel Assisting seek findings that he was briefed at 11 am that day on Mr McGrath’s potential co-operation.<sup>119</sup>

101 Counsel Assisting rely on a largely inferential case, stating an inference can “comfortably be drawn”,<sup>120</sup> but the test is far more exacting than that. Before the inference sought can be accepted, it must be the *most probable inference*<sup>121</sup> supplied by the *whole* of the evidence,

[REDACTED]

It is not the task of the Royal Commission “to choose between guesses... on the ground one guess seems more likely than another or others”.<sup>123</sup> Conjecture is inadequate in the context of satisfactory proof, even though conjecture itself “may range from the barely possible to the quite possible”.<sup>124</sup>

#### Failure to analyse competing inferences

102 Counsel Assisting must not only satisfy this Royal Commission that the inference is “of a greater degree of likelihood”: it is also “necessary to demonstrate that a competing inference is less likely”.<sup>125</sup> There has been no attempt by Counsel Assisting to assist this Commission by demonstrating that the competing inferences are less likely, even though many of the competing inferences were flagged by Mr Overland during the course of his evidence, including:

- a) Mr Overland noting the inherent unlikelihood that he would have made the decision to call Ms Gobbo as a witness “knowing everything that would flow from that”, if he had also “knowingly engaged in unlawful or illegal or improper behaviour”;<sup>126</sup>
- b) his observation that, during his time as Chief Commissioner, “you’re essentially the CEO of one of the biggest organisations in Australia. You have to delegate and you

<sup>119</sup> Another telling example is set out at Annexure, item 6.

<sup>120</sup> [1894].

<sup>121</sup> *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [94] (Crennan J).

<sup>122</sup> *Neat Holdings* at [2].

<sup>123</sup> *Jones v Dunkel* (1959) 101 CLR 298 at 304 (Dixon CJ); *DIF III – Global Co-Investment Fund L.P v DIF Capital Partners Limited* [2020] NSWCA 124 at [145] (Bell P, with whom Bathurst CJ agreed).

<sup>124</sup> *Carr v Baker* (1936) 36 SR(NSW) 301 at 306.

<sup>125</sup> *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [94] (Crennan J).

<sup>126</sup> T.12288 .16-34 (23/01/20).

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*can't be across the level of detail [Counsel Assisting] seem to be suggesting*".<sup>127</sup>

Counsel Assisting invite the Royal Commission to draw inferences that would require Mr Overland to have known a level of detail as to the information provided by Ms Gobbo, the capacity in which the information was obtained by her, and a handle on the chronology of events and detail (including knowledge of when Ms Gobbo was appearing as junior counsel for various persons), which is not possible for a person in his position to have;

- c) his evidence that the "*sterile corridor*" meant that the management of the source was separate to his purview of management of investigations.<sup>128</sup>
- d) his understanding that she would not act for people against whom she informed, which he believed was being observed as any information sourced from Ms Gobbo of which he was aware appeared to relate to ongoing serious criminal enterprise.<sup>129</sup>

*Inferences cannot be drawn in light of Mr Overland's evidence*

103 Mr Overland has fully co-operated with this Royal Commission. He has provided three witness statements to assist the Royal Commission. He was cross-examined over the course of eight days, and worked over the Christmas and New Year break to assist the Royal Commission with a supplementary statement reviewing his diaries. He gave evidence about matters which occurred between 10 and 17 years ago, which evidence must be filtered through the lens of a significant forensic disadvantage in having left the Victoria Police ten years ago and having very limited access to documents in advance of his giving evidence.

104 As set out further below, Counsel Assisting do not grapple with the significant impediment to acceptance of the inferences they advance, namely that Mr Overland gave sworn evidence contrary to those inferences.

105 This failure to address Mr Overland's evidence on key issues is all the more problematic as there are repeated instances of his evidence not having been challenged in cross-examination. The findings sought are very serious, and the Royal Commission should refrain from making findings that turn on the credibility of witnesses in the absence of

<sup>127</sup> T.11798.1-6 (19/12/19).

<sup>128</sup> See eg T.12211.18-25 (23/01/20).

<sup>129</sup> First Overland Statement at [86].

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cross-examination directed to the frankness or completeness of the evidence.<sup>130</sup> As identified in this submission, Mr Overland's evidence as to key matters was not challenged, and so findings discrediting his evidence ought not be made.

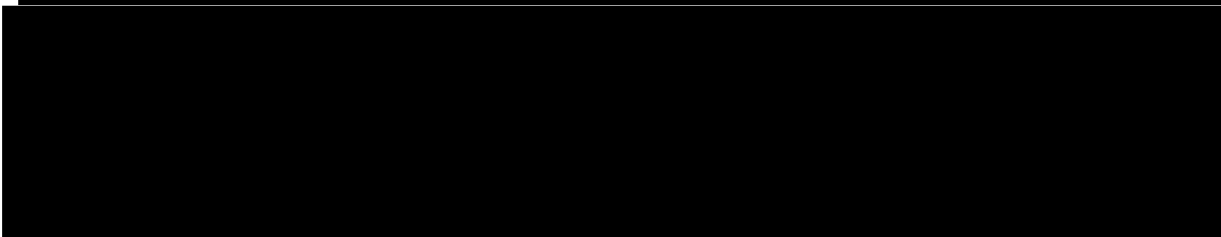
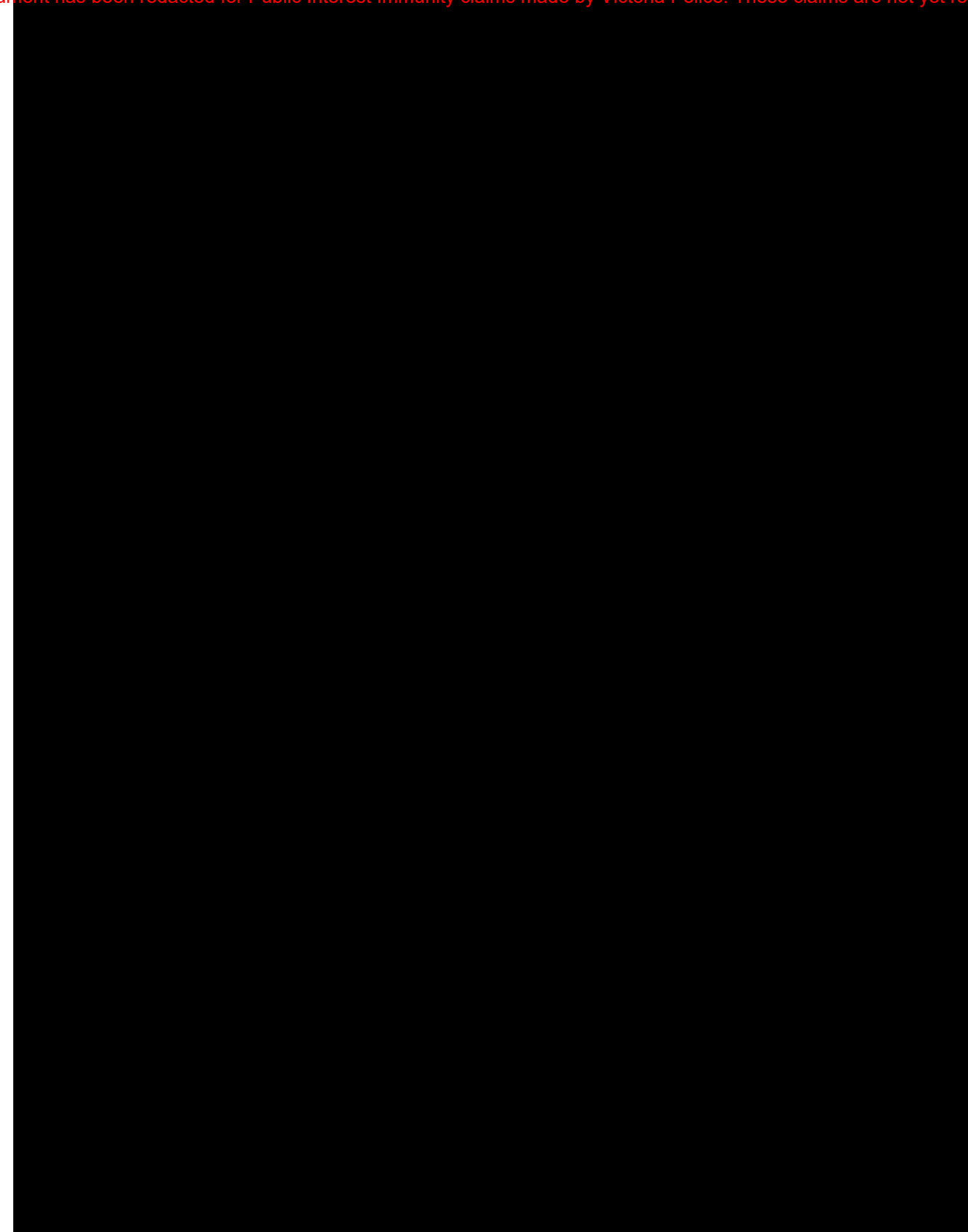
106 It is accepted that time constraints and common sense mean that not all matters could or should have been the subject of cross-examination. It cannot be seriously contended, however, that procedural fairness requirements did not dictate that all factual matters relevant to submitted findings [REDACTED] should have been put to Mr Overland. It is also accepted that the inevitable limitations of human memory when attempting to recall events from many years earlier<sup>131</sup> may provide a basis for challenging Mr Overland's recollection of certain events if that recollection is not supported by objective material and if other evidence suggests that his recollection may be faulty. But such a challenge must actually be mounted by Counsel Assisting – first in cross-examination and secondly in submissions. It is unfair and unacceptable to pretend that the evidence was not given, to refrain from challenging it in cross-examination and/or to decide not to address the evidence in submissions.

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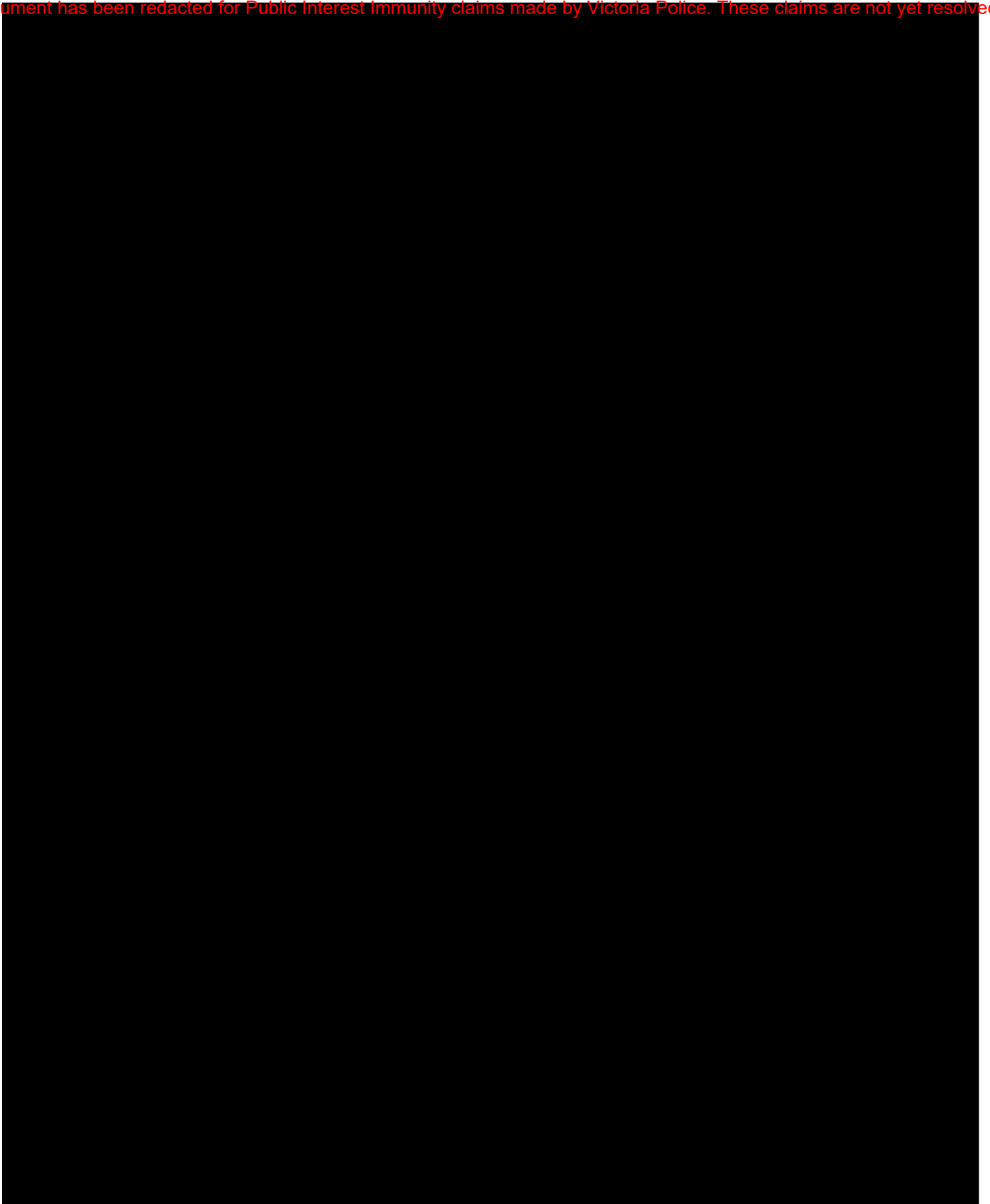
<sup>130</sup> *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [67], [74], [75] (Heydon, Crennan and Bell JJ).

<sup>131</sup> Mr Overland initial's position was that he had not kept a diary when at Victoria Police (T.11347.3 (16/12/19)). That initial memory was informed and shaped by him having been told on repeated occasions by Victoria Police that there were not such diaries (Second Overland Statement at [7] to [9]). Upon the diaries being belatedly produced, he realised that his memory of when he stopped keeping a diary was not correct. Once the diaries were found, the evidence within them supported the evidence he gave in respect of numerous matters (Second Overland Statement at [24]).

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2013 Police Act

- 116 The *2013 Police Act* and its provisions do not apply to Mr Overland.
- 117 The *2013 Police Act* did not come into operation until 1 July 2014.<sup>143</sup> Mr Overland ceased to be a member of the Victorian Police in June 2011, and so does not even meet the definition of “*police officer*”<sup>144</sup> for the purposes of s 125 of the *2013 Police Act*. Rather, he meets the *2013 Police Act*’s definition of “*former member of police personnel*”.<sup>145</sup>
- 118 There is a presumption against retrospective statutory construction.<sup>146</sup> It is to be assumed that clear language will be used if legislation is to have a retrospective effect.<sup>147</sup> Counsel Assisting identify that Schedule 6, item 32 provides that “*Division 1 of Part 7 of this Act applies on and after the commencement day whether the conduct giving rise to the breach of discipline occurred before, on or after that day*”. The clause makes express provision of “*conduct*” which occurred before the commencement day of the Act, but is silent on any intended retrospective effect on persons who were “*police officers*” prior to the commencement day of the Act. Division 1, Part 7 relates to “*Discipline*”. While the conduct the subject of a breach of discipline may have occurred prior to commencement of the *2013 Police Act*, the Act’s retrospective effect is no broader than that. The retrospective intention is not for it to apply to persons who were (but no longer are) police members prior to the commencement of the *2013 Police Act*. This is clear from:

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<sup>143</sup> *Victoria Police Act 2013* (Vic), Endnotes, item 1.

<sup>144</sup> *2013 Police Act*, s 3, definition of “*police officer*”: *police officer means (a) the Chief Commissioner; or (b) a Deputy Commissioner....* The definition does not include persons who were formerly the Chief Commissioner or a Deputy Commissioner.

<sup>145</sup> Schedule 6, item 16.

<sup>146</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 611-12 (Deane J), 642 (Dawson J), 687-9 (Toohey J) and 718 (McHugh J).

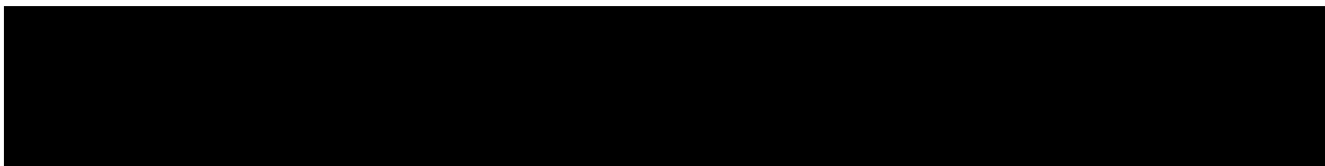
<sup>147</sup> *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [28] (French CJ, Crennan and Keifel JJ).



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- a) the use of “*police officer*” in s 125, and the Act’s delineation between a “*police officer*” and “*former member of police personnel*” (as set out in paragraph 117 above);
- b) ss 126(2), 127(4), and s 132(1), each of which contemplate a police officer in current employment of the Victorian Police (by providing powers to transfer, reduce rank, reduce remuneration, or dismiss the police officer);
- c) the ordinary meaning of “*discipline*”, which is that it applies to ensure persons abide by standards of conduct which they are under an ongoing obligation to abide by.

119 The 2013 *Police Act* and its part dealing with discipline of police officers are of no application to Mr Overland. That is a complete answer to Counsel Assisting’s conclusions regarding potential breaches of this legislation.



#### **F. The Mr Thomas case study**

121 Counsel Assisting’s evidence against Mr Overland in Chapter 7 boils down to no more than inferences that he knew, well over a year prior to her registration as a human source, that Ms Gobbo acted for Mr McGrath, and that he knew, from February 2006 onwards, that Ms Gobbo was acting for Mr Thomas. There is no evidence that Mr Overland was told that Ms Gobbo was informing on Mr Thomas or aware she was informing on Mr Thomas, let alone the extent of her informing.

122 First, it is necessary to review the evidence Mr Overland gave over his eight days of *viva voce* evidence in relation to this case study, which is neither addressed nor challenged by Counsel Assisting.

123 Mr Overland’s evidence was that by a certain time – which he cannot, now, approximately 15 years later, recall with precision – he was aware that Ms Gobbo had acted for each of Mr McGrath and Mr Thomas.<sup>148</sup> His evidence was that he was not aware that Ms Gobbo

<sup>148</sup> McGrath = T.11377.04-19; Thomas = T.11419.11-23 (16/12/19)

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was informing on Mr Thomas.<sup>149</sup> Mr Overland further gave evidence that he recalls having conversations with investigators about the issue of Ms Gobbo not advising or representing persons she was informing on, and based on these conversations “*at no time did I believe that she was acting for people against whom she was informing*”.<sup>150</sup> Similarly, he recalls having conversations with SDU officers that she not provide advice to people against whom she was informing.<sup>151</sup> This evidence has not been acknowledged by Counsel Assisting, let alone grappled with in Chapter 7 of their submissions.

124 Mr Overland was aware that Messrs O’Brien and Bateson attended the prison to speak to Mr Thomas after it had been drawn to their attention that he may be able to assist with various murders, and other matters of interest to Purana. He is unable to recall whether he was aware the information was coming through Ms Gobbo or not, although he acknowledged it was likely that he was getting updates “*in early 2006... that Ms Gobbo was communicating with Bateson with a view to facilitating [Mr Thomas] to roll and assist*”.<sup>152</sup>). Mr Overland described this as “*a very complicated set of circumstances.... [but] that all the rolling of those individuals that went on, there was ...very extensive liaison/consultation with the Director of Public Prosecutions*”.<sup>153</sup>. The involvement of the OPP and Mr Geoff Horgan QC in discussions that Mr Thomas was to roll is supported by the objective evidence, including Mr Bateson’s notes of a meeting on 22 June 2006.<sup>154</sup>

125 Mr Overland recalls that “*there were problems with this witness and the truthfulness of what they were telling us. And I understood I think at one point it was decided not to use them for that reason. I don’t recall whether I knew Ms Gobbo was acting for them or not*”.<sup>155</sup>

126 Mr Overland has no specific recollection, but assumes that he was receiving reports throughout July and August 2006 on the progress of preparations of Carl Williams’ trial and the processes with respect to Mr Thomas’s statements.<sup>156</sup> Mr Overland was not aware that, in July 2006, Ms Gobbo was provided with Post-it notes and a pen and permitted to

<sup>149</sup> T.11474.33 to T.11478.7

<sup>150</sup> T.1131.31-38 (16/12/19).

<sup>151</sup> T.11314.16-18 (16/12/19).

<sup>152</sup> T.11416 (16/12/19).

<sup>153</sup> T.11416.37-46 (16/12/19).

<sup>154</sup> See eg T.11419 (16/12/19) (in which Mr Winneke QC summarises the content of Mr Bateson’s note of the meeting).

<sup>155</sup> T.11419.11-16 (16/12/19).

<sup>156</sup> T.11420.7-12 (16/12/19).

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make comments on Mr Thomas’s statement. He stated that, on hearing of that matter in the witness box on 16 December 2019, it “*causes me some concern*”, and that had he been told he would have “*made sure that certainly the prosecutor was aware of that*” had he known,<sup>157</sup> and would also have wanted to retain any annotations, notes or comments made by Ms Gobbo with respect to the statements.<sup>158</sup>

127 It is now necessary to set out what Counsel Assisting does say in relation to Mr Overland in Chapter 7. The submissions made by Counsel Assisting as to the “*evidence*” against Mr Overland, amounts to this:<sup>159</sup>

- a) Mr Overland was briefed as to discussions that occurred with Mr Horgan on 25 March 2004 regarding the Marshall murder, during which the OPP was told that Ms Gobbo indicated that Mr McGrath was contemplating co-operating with police and pleading guilty to the murder of Mr Marshall – *at [549], [1054.8]*;
- b) On 8 April 2004, Mr Overland was briefed by Mr Allen and Mr Ryan about their meeting with Ms Gobbo on 7 April 2004 and “*the progression of the McGrath issue*” - *at [564], [1054.9]*;

(Precisely what the “*McGrath issue*” is, or the progression of it, is not articulated in Counsel Assisting’s narrative. Moreover, Mr Allen’s diary note – the only evidence Counsel Assisting cite in support of their narrative, being footnote 703 – does not provide evidence that Mr Allan and Mr Ryan briefed Mr Overland on “*the progression of the McGrath issue*” at all. All the diary note records is that Mr Overland was briefed on: *Purana briefing re GOBBO mtg 7/4*.<sup>160</sup>

Footnote 703 of the submissions of Counsel Assisting is just one example of how unreliable those submissions are when purporting to refer to evidence in support of a proposed finding. The document referred to in the footnote simply does not support the submission. And this is no third level matter, where the footnoted evidence is perhaps helpful but not strictly necessary.

As set out above at paragraphs 3 to 9 and in Section B,

<sup>157</sup> T.11420.46-11421.1 (16/12/19).

<sup>158</sup> T.11421.3-5 (16/12/19).

<sup>159</sup> This is a summary of Counsel Assisting’s version of events (other than the matters which appear in parentheses).

<sup>160</sup> Ex RC0249 Mr Andrew Allen Diary, 25 March 2004.

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it is respectfully submitted that, in light of gross deficiencies such as this, in order to afford Mr Overland natural justice, the Royal Commissioner must review every footnoted piece of evidence in respect of any significant finding of fact that is contemplated, as well as addressing every responsive submission and reviewing every footnoted piece of evidence that is relied upon in response to the proposed factual finding.)

- c) On 24 May 2004, according to a diary note of Mr Purton, Mr Overland attended a Purana Taskforce update *“regarding the fact that Mr McGrath spoke to Ms Gobbo and was wavering. He wanted Mr Swindells to visit him”* – at [599], [1054.10];
- d) On [REDACTED] June 2004, according to a diary note of Mr Purton, Mr Overland was briefed on Mr McGrath’s sentence and that *“Gobbo – wants to plead to murder ASAP”* and that statements would be taken to the prison in the next two days – at [607], [1054.11];

(What Counsel Assisting omit from this narrative is that Mr Purton’s diary note records that Ms Gobbo’s comments were made while at [REDACTED] Court, representing Mr McGrath, ie: *“[REDACTED] Crt Friday 3 min 2 Gobbo – wants to plead to murder ASAP...”*.<sup>161</sup>

Further, despite repeated requests, Mr Overland has not been provided with a copy of exhibit RC1749 (described as *“Purana Task Force Progress Meeting, undated”*), cited by Counsel Assisting in support of this finding. To make this finding would breach Mr Overland’s fundamental right to natural justice.)

- e) On 1 July 2004, Ms Gobbo was interviewed as part of the investigations of the Hodson murders. Mr Overland was briefed on the interview – at [618];
- f) On 12 July 2004, an unspecified *“view of Ms Gobbo’s found its way to the Purana senior officers including Mr Overland at the next Taskforce meeting”*, *“no doubt from Mr Ryan’s briefing”* (although no evidence is cited in support of this submission at [630]). Later, at [638], there is evidence cited in support of this Taskforce update (Mr Ryan’s evidence and diary) and the meeting is described in the more anodyne terms of being provided with *“an update about the progress with*

<sup>161</sup> Exhibit RC0109, Mr Terry Purton diary, 18 June 2004, VPL.005.0146.0001 at .0079.

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*Mr McGrath*" (at [638]). By [1054.12], it is said that Mr Ryan briefed Mr Overland that "draft statements had been shown to Ms Gobbo, and were to be changed because Ms Gobbo thought that Mr McGrath saying he did not know a murder was going to occur was "*ridiculous*".

(Counsel Assisting do not refer to Mr Overland's own diary notes, which state:<sup>162</sup>

*Operation Purana Update - Mr final read - Marshall, Moran / Barbaro*

*Checked by Gobbo - clarify claims re Marshall -)*

- g) On 19 February 2006, Mr Ryan contacted Mr Overland and Mr Horgan and advised them that Mr Thomas may want to talk to police – at [826]. It is later submitted that "*Ms Gobbo's role in advising Mr Thomas would have been discussed in the telephone conversation.... given the significant issues discussed in that call and Ms Gobbo's centrality to those issues*" – at [1055.1];
- h) On 20 February 2006, Mr Ryan spoke to Mr Overland and "*updated him on the developments regarding Mr Andrews and Mr Thomas*" (at [831]) and there was a Purana Taskforce meeting that afternoon at which Mr Overland was present and "*[i]n the usual course they would have been updated about the progress of investigations*" – at [833], [1054.13]. It is also (incorrectly<sup>163</sup>) asserted that "*Mr Overland was reluctant to concede that by this time he was aware Ms Gobbo was acting for Mr Thomas*" – at [836], [1054.14];
- i) On an unspecified date, Mr Bateson attended a meeting at the OPP with persons including Mr Overland, Mr Coghlan, Mr Horgan – at [897];
- j) Mr O'Brien is said to have briefed Mr Overland "*about the 22 February 2006 and 15 March 2006 discussions with Mr Thomas at [REDACTED] prison*" - at [1054.16]

(This submission is made relying on an extract from Mr O'Brien's diary which was not shown to Mr Overland in cross-examination, and it is entirely unclear from the extract, only provided to Mr Overland on 27 July 2020, that the extract in fact records any briefing between Mr Overland and Mr O'Brien<sup>164</sup>).

<sup>162</sup> Exhibit 1385B Mr S Overland diary, 12 July 2004, VPL.0005.0264.0053 at 0079.

<sup>163</sup> As to which, see paragraph 138 below.

<sup>164</sup> CAS2, [1054.16], footnote 1324, citing "RCMP1.0053.0001.0003 at .0184".

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- k) On 22 June 2006, “in a subsequent meeting involving Messrs Overland, Grant and Bateson it was resolved that Mr Thomas’s account of the Moran/Barbaro murder was not accepted as truthful” – at. [954];

(This submission is made relying on an extract from Mr Bateson’s diary which was not shown to Mr Overland in cross-examination and in fact records:

“Meeting with A/C Overland/Supt Grant re [redacted] resolved not a truthful witness, provides little we did not know will inform OPP of police view meeting with OPP to be confirmed”)

- l) Mr O’Brien updated Mr Overland at some stage (the date is not specified) on “Thomas PII issues re statements”, and in mid-August 2006, he was aware of “PII issues” in handing over the statements of Mr Thomas and Mr Andrews - at [1001], [1054.18].

(This submission is made relying on extracts from Mr Jim O’Brien’s diary from August 2006. These diary extracts have no reference to Mr Overland. Moreover, and contrary to Counsel Assisting’s use of quotes (“Thomas PII issues re statements”), those quoted words appear nowhere in the diary extracts footnoted. Perhaps the quote appears in the parts which are redacted from the version provided to Mr Overland. But if so, Mr Overland has been deprived of his fundamental right to review the evidence and respond. Either way, this finding cannot be made.)

128 Five things are immediately apparent from this summary. First, Counsel Assisting’s submissions cite no direct evidence to support any finding that Mr Overland knew Ms Gobbo was informing on Mr Thomas. Knowledge that a lawyer may be communicating with police in relation to the possibility of her client pleading guilty to a crime is unremarkable and certainly does not give rise to a plausible inference that this constitutes knowledge that the lawyer is acting against her client’s interests. There is no direct evidence in the detailed, contemporaneous Information Records, Source Management Logs or police diary entries. No SDU officer (nor any investigator, nor other person called) gave evidence to this Royal Commission that he or she told Mr Overland that Ms Gobbo was informing on Mr Thomas.

129 Secondly, while elsewhere in Chapter 7 some detail of the information which Ms Gobbo provided (as a registered informer) in relation to Mr Thomas between September 2005

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and June 2006 is set out,<sup>165</sup> no submission is made by Counsel Assisting that this detail was provided to Mr Overland.<sup>166</sup> Rather, the allegation amounts to no more than Mr Overland was aware that Ms Gobbo “*was a human source, who had been engaged by Purana to assist them to convict Mr Mokbel and his associates (one of whom was Mr Thomas)*”.<sup>167</sup> As set out below, this alone is insufficient to support a finding that Mr Overland was aware that Ms Gobbo was representing Mr Thomas while informing on him.

130 Thirdly, Counsel Assisting do not squarely put what it is alleged that Mr Overland knew. There are simply summaries of the facts known to the investigators with day to day responsibility for the operation, and then glib references to Mr Overland being “*briefed*”, without identifying precisely what they say such briefing included.

131 Fourthly, the narrative of Counsel Assisting is presented as if their summaries of facts are uncontroversial and wholly made out by the evidence cited in support. However, on interrogation (and as noted in parenthesis in paragraph 127), the diary notes very frequently do not support the proposition presented – either in part or at all – or are a selective choice by Counsel Assisting of the best diary note to support their version of events, ignoring other diary notes of the same meeting which do not assist Counsel Assisting’s telling.

132 Fifthly, the references to Mr McGrath and the fact that Ms Gobbo acted for him provide no support, indirectly or otherwise, for the contention in respect of which they are advanced. As noted by Counsel Assisting, the briefing of Mr Overland in respect of the Marshall murder occurred on 25 March 2004, before Ms Gobbo was registered and acting as a human source. The relevance of these matters is neither identified by Counsel Assisting, nor apparent.

133 There are a number of other fundamental difficulties with the submissions advanced against Mr Overland, as follows.

*A less sinister version of events*

134 Mr Overland accepts that he came to be aware, at some stage, that Ms Gobbo acted for Mr Thomas. Under cross-examination, Mr Overland stated that he does not “*have a specific*

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<sup>165</sup> CAS2, [807].

<sup>166</sup> Nor was it ever put to Mr Overland in cross-examination that he was informed of any of this detail.

<sup>167</sup> CAS2, [1055.5].

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*recollection*” and finds “*it’s difficult to know when*” he knew she was acting for him.<sup>168</sup> This is unsurprising, given he was giving evidence of matters dating back nearly 15 years.

135 Counsel Assisting equip themselves with exquisite hindsight (and urge the Commissioner to view through the same impossibly artificial and entirely improper lens) by submitting that it can be inferred Mr Overland knew the barrister acting for Mr Thomas from February 2006, given “*Ms Gobbo’s centrality [to issues]*”<sup>169</sup> and Ms Gobbo acting being “*naturally relevant to the discussions that would have occurred*”.<sup>170</sup> This ignores Mr Overland’s evidence that:<sup>171</sup>

you know, I’d be given an update on their status in terms of whether they were rolling or not rolling. I wouldn’t necessarily know, and I don’t believe I did know, who was acting for them. ....

136 In stark contradistinction to the inferences sought to be drawn against Mr Overland, who is said to have known “*from at least February 2006*” that Ms Gobbo was acting for Mr Thomas, it is submitted that only in June 2006 that Crown Prosecutor Mr Horgan SC “*was clearly aware of [Ms Gobbo’s] representation of Mr Thomas*”. It is logically inconsistent for it to be inferred that Mr Overland knew well in advance of Mr Horgan SC, particularly when:

- a) imputing knowledge to Mr Overland in February 2006 requires findings he was told by Mr Ryan in an update Mr Ryan provided to each of Mr Overland and Mr Horgan (see paragraph 127(g) above);
- b) Counsel Assisting’s submissions note Mr Horgan appearing opposed to Ms Gobbo (acting for Mr Thomas), well before February 2006:
  - (i) In September 2004, Mr Horgan cross-examined Mr Thomas before the ACC, at which time Ms Gobbo represented him.<sup>172</sup>
  - (ii) On 17, 23 and 27 September 2004, Mr Horgan SC represented the Crown when Ms Gobbo appeared on behalf of Mr Thomas in mention hearings before Justice Teague at the Supreme Court.<sup>173</sup>

<sup>168</sup> T.11419.11-23 (16/12/19).

<sup>169</sup> CAS2, [1055.1]

<sup>170</sup> CAS2, [1055.3].

<sup>171</sup> T.11478.3-7 (17/12/19).

<sup>172</sup> CAS2, [722].

<sup>173</sup> At [724]-[725].



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- 137 This inconsistent treatment of facts from which an inference is drawn that Mr Overland knew, well in advance of the Crown prosecutor who had made appearances in matters relating to Mr Thomas opposed to Ms Gobbo, is a telling illustration of the unreliability and internal inconsistency of the submissions of Counsel Assisting.
- 138 Counsel Assisting also, unfairly, assert that under cross examination, Mr Overland was “*reluctant to concede*” by February 2006 “*that he was aware Ms Gobbo was acting for Mr Thomas*”.<sup>174</sup> This proposition is wholly unsupported by the page of transcript footnoted by Counsel Assisting. It is also an unfair characterisation of his evidence. First, Mr Overland did not “*concede*” that he was aware by February 2006 that Ms Gobbo was acting for Mr Thomas, let alone give any such evidence “*reluctantly*”. Rather, as noted above, he stated “*it’s difficult to know when*” he knew that Ms Gobbo was acting for Mr Thomas and he did not “*have a specific recollection*”.<sup>175</sup> He did not cavil with Mr Winneke QC on this issue, or otherwise evince a “*reluctancy*” to concede matters.
- 139 In any event, it is unclear why such emphasis is placed by Counsel Assisting on the timing of when Mr Overland became aware Ms Gobbo was acting for Mr Thomas: the timing is of no real significance to determining the critical issue, namely whether Mr Overland was aware she was acting for Mr Thomas while informing on him. There is no reliable evidence Mr Overland was aware at all that Ms Gobbo was informing on him. The perplexing emphasis by Counsel Assisting on the timing of Mr Overland becoming aware that Ms Gobbo was acting for Mr Thomas, together with the incorrect submission that Mr Overland was “*reluctant to concede*”, appears designed to attempt to breathe life into an otherwise hopeless submission of improper conduct by Mr Overland by suggesting that he was hiding something and so must have behaved improperly. The timing issue is not relevant, there was no “*concession*” and no reluctance – and as a result, respectfully, the submission remains hopeless. It must be rejected.

*Legitimate role of defence lawyers in an accused’s co-operation with Police*

- 140 Defence lawyers often play a legitimate, active role in advising their clients who decide to co-operate with the Police in return for a reduced sentence, including involvement in the process of obtaining evidence. Co-operation is often in the best interests of the client, as it is “*common sentencing practice to extend leniency, sometimes very substantial leniency,*

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<sup>174</sup> CA [836], [1054.14].

<sup>175</sup> T.11419.11-23 (16/12/19).

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*to an offender who has assisted the authorities, and in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the steps that will need to be taken to protect the offender when released*".<sup>176</sup> Furthermore, a key principle behind co-operation is (and was at the relevant time):<sup>177</sup>

What is to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless the offender discloses everything which he knows. To this extent, the inquiry is into the subjective nature of the offender's cooperation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.

Again, in order to ensure that such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely cooperated with the authorities whether or not the information supplied objectively turns out in fact to have been effective.

- 141 Many of the submissions made by Counsel Assisting ignore the role that defence lawyers can and do legitimately play, and active involvement they have, when a witness decides to co-operate, while at the same time making unsupportable assertions about what Mr Overland "*would have known*".
- 142 For example, Counsel Assisting state that on 12 July 2004, a "*view of Ms Gobbo's found its way to the Purana senior officers including Mr Overland at the next Taskforce meeting*" and that by 12 July 2004, members of the Purana Taskforce "*were all aware of Ms Gobbo's involvement with Mr McGrath, and her preparedness to share with police, matters which quite obviously, should have remained confidential as between her and her client*" (at [641], emphasis added).

<sup>176</sup> *York v The Queen* (2005) 225 CLR 466 at [3] (Gleeson CJ).

<sup>177</sup> *R v Cartwright* (1989) 17 NSWLR 243 at 252-3, cited with approval in *York v The Queen*, *ibid* and *Farmer v The Queen* [2020] VSCA 140 (Maxwell P, Kaye, Niall JJA).

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143 Mr Overland's diary note for the Taskforce meeting – which Counsel Assisting have ignored in their version of events – records the following:<sup>178</sup>

*Operation Purana Update – Mr final read – Marshall, Moran / Barbaro*

*Checked by Gobbo – clarify claims re Marshall –*

144 Mr Overland gave evidence – again not referred to by Counsel Assisting – that “*I think if it was the process of someone settling a statement and if she was acting for them it would be appropriate for her to see the statement*”.<sup>179</sup> When put to him Mr Ryan briefed Mr Overland that “*draft statements had been shown to Ms Gobbo, and were to be changed because Ms Gobbo thought that Mr McGrath saying he did not know a murder was going to occur was “ridiculous”*”.<sup>180</sup> Mr Overland stated (again not addressed by Counsel Assisting) that he “*had no specific recollection*” of Mr Ryan telling him this, but that: “*It’s perhaps not strictly in keeping with form but she expressed that view, she expressed that view*”.<sup>181</sup>

145 Later in their submissions, Counsel Assisting seek adverse findings relying on the “open” finding that “*Mr Overland knew that Victoria Police was using Ms Gobbo to encourage Mr Thomas to make admissions, enter a plea of guilty and to implicate his associates*”<sup>182</sup> (emphasis added). No cross-referencing is provided to assist the Commissioner to understand the facts from which such an inference can supposedly be drawn, but it could only be the matters identified at paragraphs 127(g), (j) and (k) above. Contrary to these matters establishing any “use” of Ms Gobbo by Victoria Police, each of these matters is entirely consistent with Ms Gobbo acting as Mr Thomas’s lawyer, with an eye to the substantial leniency in sentencing open to him if he provided a “*full and frank co-operation*” with the police, co-operation “*encouraged*” by the High Court (as set out in paragraph 140 above).

146 There is nothing unusual about the participation of a lawyer during the course of a person, particularly a guilty person, co-operating with the police. For example, from Counsel Assisting’s submissions, it appears Mr Papas of counsel was involved in Mr Andrews

<sup>178</sup> Exhibit 1385B, Mr Simon Overland diary, 12 July 2004, 25, VPL.0005.0264.0053 @ 0079

<sup>179</sup> Second Overland Statement at [65]; T.11395.42-45.

<sup>180</sup> [1054.12].

<sup>181</sup> T.11396.8-9.

<sup>182</sup> CAS2, [1056.8], [1056.9].

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deciding to plead guilty and give evidence.<sup>183</sup> There is nothing unusual about a lawyer providing advice in relation to whether or not their client should consider pleading guilty. On the contrary, the lawyer is doing their duty. Another example from Counsel Assisting's submissions: Counsel Assisting record the following exchange made by Thomas with respect to his solicitor (Jim Valos):<sup>184</sup>

*O'Brien: Do you trust him?*

*Thomas: Yeah, Jim's alright. Jim's the one who told me to fucken roll.*

147 Counsel Assisting have failed to grapple with this compelling, competing inference. The inference for which they contend cannot be drawn in the face of this alternate inference, nor in the face of the evidence as a whole, including the following unchallenged evidence of Mr Overland (each of which has not been considered by Counsel Assisting):

- a) Mr Overland considered Mr McGrath to be "*instrumental in the rolling of [Mr Andrews] ... the first person to be "rolled" by Operation Purana*",<sup>185</sup>
- b) Mr Overland was not aware that, in July 2006, Ms Gobbo was provided with Post-it notes and a pen and permitted to make comments on Mr Thomas's statement. He stated that, on hearing of that matter in the witness box on 16 December 2019, it "*causes me some concern*", and that had been told he would have "*made sure that certainly the prosecutor was aware of that*" had he known;<sup>186</sup>
- c) Mr Overland's role was not one of a "*beefed up Senior Sergeant*": he was in a senior, managerial role a number of ranks above the level of involvement of an investigator, with the day to day conduct of the investigation;<sup>187</sup>
- d) the fact that the "*sterile corridor*" meant that information relating to and the management of the source was outside Mr Overland's authority or control;<sup>188</sup>
- e) Mr Overland had given an instruction that Ms Gobbo not continue to act for people on whom she informed, and he believed this to be a "*shared understanding*";<sup>189</sup>

<sup>183</sup> CAS2, [810].

<sup>184</sup> CAS2, [844].

<sup>185</sup> First Overland Statement at [65].

<sup>186</sup> T.11420.46-11421.1 (16/12/19).

<sup>187</sup> See paragraph 56 above.

<sup>188</sup> See paragraphs 62 to 67 above.

<sup>189</sup> See paragraph 84 above.

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f) the chain of command principles upon which police forces including Victoria Police is intrinsically based.

148 As to (e), this was an instruction Mr Overland was entitled to assume was being complied with, given the risk of sanctions for persons under his command if it were not.<sup>190</sup>

The key missing limb

149 Counsel Assisting fail to identify at all, let alone with any specificity, what Mr Overland is alleged to have known about Ms Gobbo's informing on Mr Thomas. This is an insurmountable lacuna in their conclusions against Mr Overland.

150 The submissions appear implicitly premised on a faulty, top-down reasoning process that because Mr Overland knew that Ms Gobbo was a registered informer who had been providing assistance to Purana, he must have known that Ms Gobbo was informing on Mr Thomas. And it is "*implicit*": there is no express paragraph or sentence that deals with this significant and necessary element of the conclusions against Mr Overland. Nor would one expect there to be, because to state the proposition expressly is to expose that it is illogical and unsupportable.

151 At the key factual finding paragraph, [1055], it is submitted that the evidence rises no higher than it being open to the Royal Commission to "*find that ... Mr Overland knew that Ms Gobbo (who he knew to be a human source) was acting for Mr Thomas*" (emphasis added). No finding is said to be open that Mr Overland knew she was informing on Mr Thomas. Yet in the very next paragraph, [1056], an assumption is made premised on it being accepted "*that Ms Gobbo's representation of Mr Thomas while informing on him became known to Mr Overland*" (emphasis added). There is no basis for this significant factual finding that is slipped into the chapeau to [1056]. Counsel Assisting have not identified the facts which they say contend support the conclusion, let alone any probative facts (as required under the "*first rule*" in *Re Erebus Royal Commission*).

152 There is a fundamental issue of procedural fairness, with a rolled up conclusion that Mr Overland "*knew*" Ms Gobbo was informing on Mr Thomas, without it being identified what precisely it is said he "*knew*". For example, was it only something general, such as "*Ms Gobbo is informing on Mr Thomas*"? Was it that Mr Overland was briefed on specific information Ms Gobbo was providing in relation to Mr Thomas, and if so, what was that

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<sup>190</sup> See paragraph 61 above.

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information? Mr Overland is completely in the dark about the facts said to underly the conclusion he “*knew*” (in contravention of the “*second rule*” in *Re Erebus Royal Commission*).

153 Further, Counsel Assisting’s submissions fail to provide any justification for how it can be said that the most probable inference is that Mr Overland knew Ms Gobbo was informing on Mr Thomas in light of the evidence as a whole, which includes consideration of the following:

- a) More than 160 witnesses gave evidence to this Commission. Not one of them gave evidence that Mr Overland was told Ms Gobbo was informing on Mr Thomas;
- b) No diary note, SML log, Information Report, Operation update or other document records that Mr Overland was told Ms Gobbo was informing on Mr Thomas;
- c) Mr White’s diary entry for 17 May 2006 records (according to Mr White’s evidence; Mr Overland does **not** have access to the exhibit) that Ms Gobbo was told that Mr Overland knew of her existence, but that he didn’t know everything that she had done;<sup>191</sup>
- d) Also on 17 May 2006, Mr Overland suggested to Mr White and Mr Smith that they turn their mind to terminating Ms Gobbo as a source<sup>192</sup> – it would be inconsistent for Mr Overland to suggest this in May 2006 (ie in the thick of the developments in relation to Mr Thomas) if, as Counsel Assisting effectively contend he was aware she was providing information on Mr Thomas, approved of the practice and wanted it to continue;
- e) Mr Overland had given an instruction that Ms Gobbo not continue to act for people on whom she informed, an instruction Mr Overland was entitled to assume was being complied with, given the risk of sanctions for persons under his command if it were not;<sup>193</sup>
- f) The ordinary, uncontroversial role which defence lawyers play in acting for witnesses co-operating with the police (in contrast to the mis-characterisation of

<sup>191</sup> T.5292.10-20 (2/9/19); Exhibit RC0292, diary of Mr Sandy White, 17 May 2006.

<sup>192</sup> T.11530.3-T.11531.20 (17/12/19).

<sup>193</sup> See paragraph 61 above.

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this role made by Counsel Assisting in, for example, [1056.8]-[1056.9]), as set out in paragraphs 140 to 146 above;

- g) Mr Overland was aware of and reassured by the extensive liaison and consultation which his investigators were having with the Office of Public Prosecutions,<sup>194</sup> and thought that investigators were making necessary disclosures to the OPP;<sup>195</sup>
- h) Mr Overland was not (as Assistant Commissioner Crime) responsible for the SDU Department, which formed part of Intelligence and Covert Support;
- i) A “sterile corridor” operated to separate Mr Overland from the SDU, being a barrier which Mr Overland saw as reflecting best practice in relation to management of sources and a practice that he was required to comply with by the operation of the relevant Chief Commissioner’s Instruction.

**G. The findings sought against Mr Overland, in relation to Mr Thomas, are not made out**

*Obligation on Mr Overland to ensure legal advice obtained on disclosure?*

154 A finding is sought at [1004] that Mr Overland was “obliged to ensure that legal advice was obtained as to the need for disclosure of police holdings in relation to Ms Gobbo in the trial of Williams”, and in “various trials of other persons” (who are not specified) “whose prosecution relied upon evidence gathered as a result of her use by Victoria Police”.

155 Mr Overland has accepted that the Royal Commission had uncovered failings in this area, and in particular:

- a) there needed to be guidance and training from the outset to make sure that everyone was on the same page about the obligations of disclosure and processes around disclosure to the prosecution;<sup>196</sup> and

<sup>194</sup> See paragraph 124 above.

<sup>195</sup> See paragraphs 95 to 97 above.

<sup>196</sup> T.12140.46-12141.5 (22/01/20).

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- b) that he thought, in retrospect, “*there should be some legal support embedded*” in a unit such as SDU, “*who are there and on the spot and able to give advice as required*”.<sup>197</sup>

156 However, the evidence does not support a finding of there being any specific obligation on Mr Overland to ensure that such a specific piece (or pieces of) legal advice were obtained in 2006 (or in “*various trials of other persons*”). To find such an obligation rested on the shoulders of Mr Overland would be to ignore the evidence (which Counsel Assisting have not grappled with) that:

- a) Mr Overland had “*complete confidence*” in the “*senior, experienced detectives*” responsible for disclosure. It was not his responsibility to supervise or ensure compliance with disclosure;<sup>198</sup>
- b) Mr Overland’s detailed evidence (set out at paragraphs 94 to 98 above) of the process of disclosure, and the basis for his assumption that Ms Gobbo’s role as a source (and the information she had provided, and the circumstances in which it had been provided) was being disclosed to the prosecution when required;
- c) Mr Overland was not aware that Ms Gobbo was engaging in conduct which warranted obtaining legal advice.

157 Further, the “*obligation*” being on Mr Overland and no other senior officer in the chain of command, to ensure that legal advice was obtained on disclosure is not realistic when regard is had to the role Mr Overland played as Assistant Commissioner Crime, not involved in day to day operational matters.

158 Finally, it is unclear to Mr Overland (even now) what role Ms Gobbo played in relation to informing on Mr Williams such that there was a need for disclosure in his trial, for the murder of Mr Marshall. Mr Williams was convicted largely on the evidence of Mr McGrath and Mr Andrews. Ms Gobbo’s only role was as Mr McGrath’s lawyer (well before her registration as an informer), assisting Mr McGrath to co-operate with the Police (or roll).

<sup>197</sup> T.121142.47-12143.4 (22/01/20).

<sup>198</sup> T.11857.14-18 (19/12/19).



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Failure by Mr Overland to allow or alternatively not prevent Ms Gobbo from representing Mr Thomas

159 At [1057] it is alleged that it is open to the Royal Commission to find that “*Mr Overland allowed, or alternatively did not prevent, Ms Gobbo representing Mr Thomas, in circumstances where he knew the matters at [1084.1] to [1084.10] (sic)*”. There are two points Mr Overland wishes to make in response.

160 First, clearly enough this hinges on a finding that Mr Overland knew Ms Gobbo was informing on Mr Thomas – which finding cannot be safely made, for the reasons set out above.

161 Secondly, Mr Overland did take steps to prevent Ms Gobbo continuing to act for people on whom she informed, by issuing the instruction that she not be allowed to do precisely this.<sup>199</sup> At no stage did Mr Overland revoke that instruction. At no stage did he know the instruction was not being followed.

Failure to make enquiries?

162 Counsel Assisting also conclude that “*it is open to the Commissioner to find that Mr Overland should have made inquiries and discovered*” “*Ms Gobbo’s representation of Mr Thomas while informing on him*”. It is asserted that Mr Overland had “*an obligation to make inquiries as to whether his direction was being complied with*” (being his direction that Ms Gobbo could not continue to act for people if she was providing information about them).<sup>200</sup>

163 The basis for this “*obligation*” is not stated. The logical extension of the submission is that the Assistant Commissioner Crime should assume that his directions are not, or may not, be being followed and so should “*make inquiries as to whether his direction was being complied with*”. Does Counsel Assisting contend that this should occur for all, or only some and if so which, important directions? Should it only occur if the Assistant Commissioner Crime has reason to believe that the direction was being ignored, or should it occur with respect to all directions? How frequently should such “*inquiries*” occur? Does the obligation extend to the Commander responsible for the Intelligence and Covert

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<sup>199</sup> See paragraph 84 above.

<sup>200</sup> CAS2, [1058].

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Support Department? Does the obligation extend to those that Mr Overland reported to – and if not, why does the obligation extend so far as to Mr Overland, but not to the Chief Commissioner, who was ultimately responsible for the Crime Department and the Intelligence and Covert Support Department?<sup>201</sup> Does it extend to all departments of Victoria Police for which the Assistant Commissioner Crime is not responsible, or only those the subject of this Royal Commission? If assurances are given by those receiving the direction that the direction is being complied with, should the Assistant Commissioner Crime accept that assurance or should he or she conduct independent investigations to ascertain whether this is the case? Should he assume that everyone in Victoria Police fails to follow instructions, or only some? The ill-formed submission ignores:

- a) that a failure to comply with an instruction of Mr Overland’s amounted to a breach of discipline<sup>202</sup> – meaning the *Police Regulation Act* placed the obligation with the person receiving the instruction to ensure compliance, not on Mr Overland;
- b) that Mr Overland was in a senior, executive role in the Victorian Police at that time, and was not involved in day to day operational matters;<sup>203</sup>
- c) that Mr Overland considered there was a “*shared understanding*”<sup>204</sup> between him and his investigators that Ms Gobbo not continuing to act for people on whom she was informing, and had confidence in the experienced investigators;
- d) that Mr Overland was aware of and reassured by the extensive liaison and consultation which his investigators were having with the Office of Public Prosecutions;<sup>205</sup>
- e) that there was in place a “*sterile corridor*” to limit knowledge in relation to human sources and a new Chief Commissioner instruction and policy setting out the structures and policies to be adhered to in relation to management of sources;<sup>206</sup>
- f) that Mr Overland, in 2006 as Assistant Commissioner Crime, was not responsible for the SDU (which sat within the Intelligence and Covert Support Department) and

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<sup>201</sup> Within which the SDU sat.

<sup>202</sup> See paragraph 61 above.

<sup>203</sup> See Section C above.

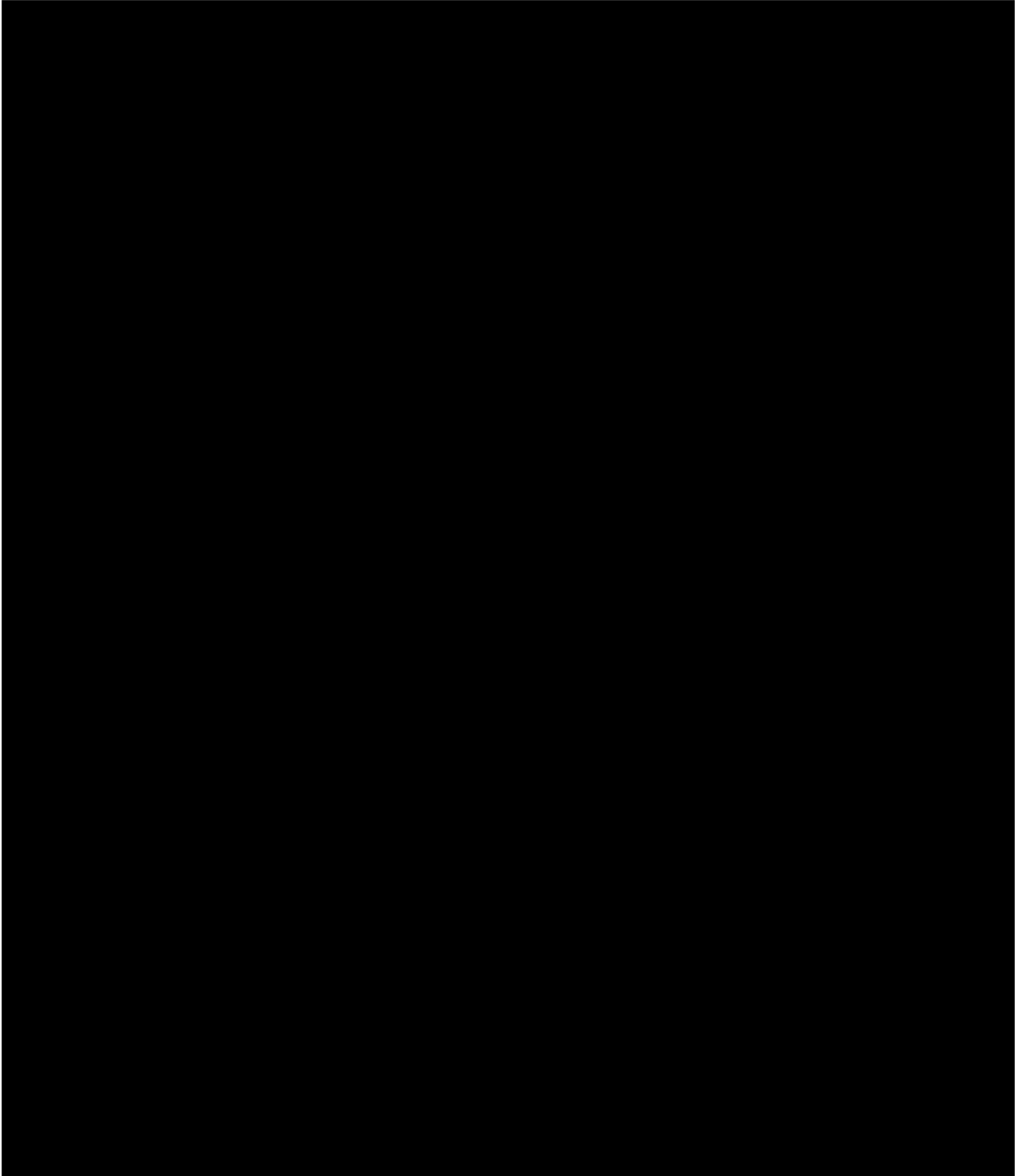
<sup>204</sup> See paragraph 100 above.

<sup>205</sup> See paragraph 184(b) above.

<sup>206</sup> See paragraphs 61 to 65 above.

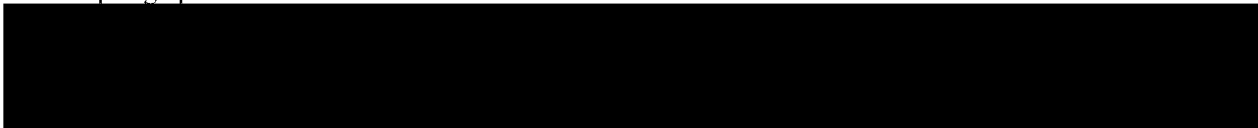
This document has been redacted for Public Interest Immunity claims made by Victoria Police. These claims are not yet resolved.

Mr Overland was very conscious not to intervene because it was not appropriate, in light of the policies surrounding management of sources.<sup>207</sup>

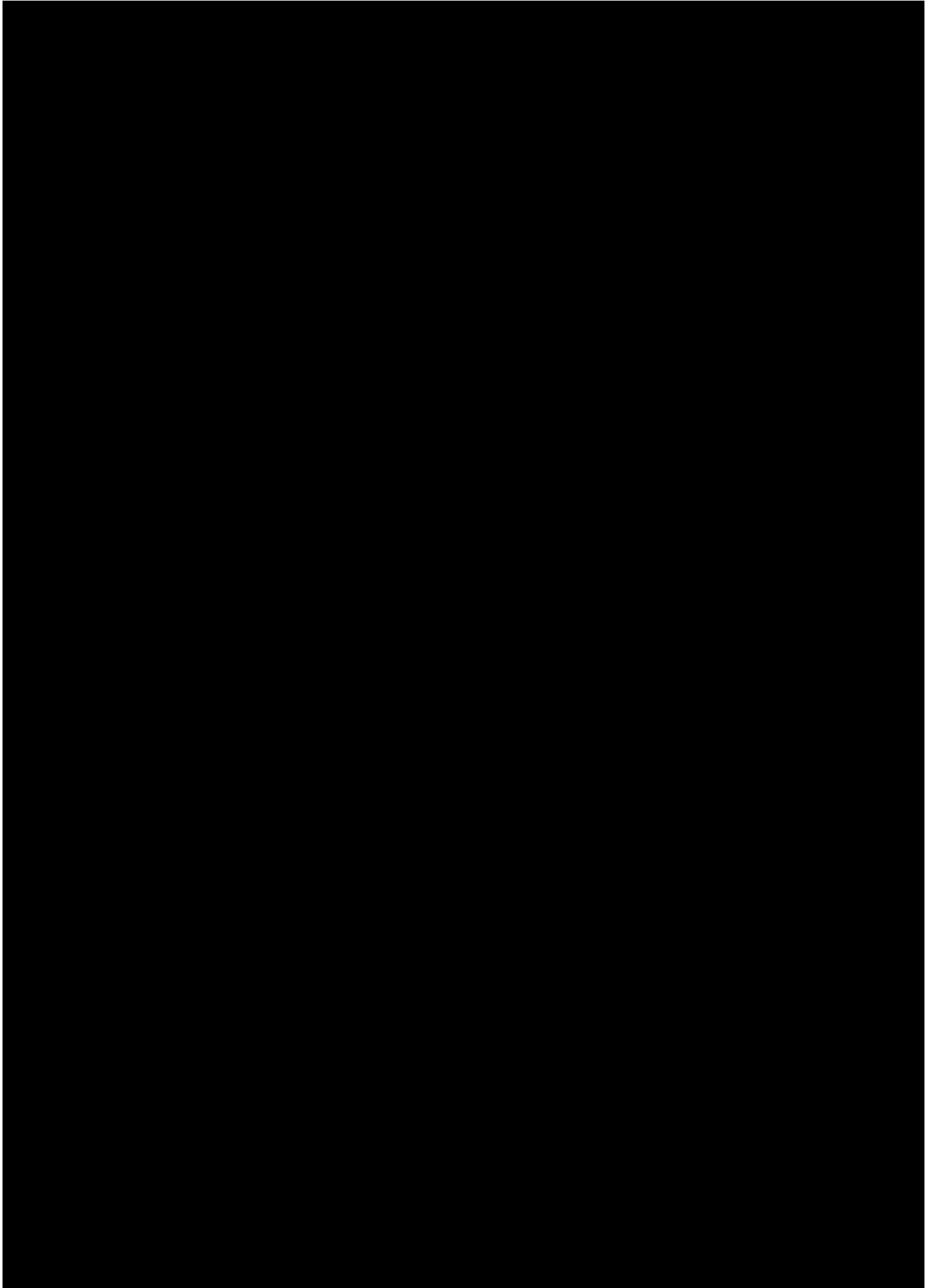


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<sup>207</sup> See paragraphs 62 to 68 above.



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## H. The Mr Cooper case study

- 171 Mr Overland was aware in or around mid September 2005 that Ms Gobbo was providing ongoing information in relation to criminal activity, involving persons including Mr Cooper.<sup>212</sup> The key issue is whether he knew, prior to Mr Cooper's arrest on 22 April 2006, that Ms Gobbo was acting for Mr Cooper.
- 172 Mr Overland's evidence was that he did not believe he knew that Ms Gobbo was acting for Mr Cooper.<sup>213</sup>
- 173 Again, Counsel Assisting have not addressed this evidence in their submissions. There is no submission that Mr Overland gave dishonest evidence in respect of this, or any matter. There is no analysis of evidence going to Mr Overland's credit. There is no discussion of the reliability of his evidence on this, or any issue.
- 174 No investigator has given evidence he told Mr Overland Ms Gobbo was acting for Mr Cooper, and there is no other direct evidence of the conclusion.
- 175 It is contrary to clear authority, not to mention impermissible, to make a serious finding of fact against a person on the basis of inference alone without identifying and dealing with evidence that is inconsistent with the inference in question. Yet that is what Counsel Assisting invite the Commissioner to do here.
- 176 Counsel Assisting assert an inference can "*comfortably be drawn*" that Mr Overland became aware Ms Gobbo was acting for Mr Cooper "*in the meetings identified above*" (without specifying which meeting) in the Chapter relating to Cooper.<sup>214</sup> But when the "*meetings identified*" are reviewed, it is clear that they are a precariously flimsy foundation for any inference. The evidence relied on by Counsel Assisting are meetings:<sup>215</sup>

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<sup>212</sup> T.12191 (22/01/20).

<sup>213</sup> T.11491 (17/12/19).

<sup>214</sup> CAS2, [1894].

<sup>215</sup> This is a summary of Counsel Assisting's version of events as to these meetings.

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- a) on 26 September 2005, of a Purana Taskforce meeting at which there was discussion of the information which Ms Gobbo had supplied as a source.<sup>216</sup>
- b) on 27 September 2005, between Mr Purton and Mr Overland, in which Mr Purton provided information that Mr Cooper “*may roll over*”, and the two discussed the need to ensure Ms Gobbo was not compromised under any circumstances.<sup>217</sup>
- c) on 5 December 2005, in which Mr O’Brien, Mr Purton and Mr Overland met to discuss Operation Posse and no finding is sought by Counsel Assisting as to what was discussed at this meeting.
- d) on 16 January 2020, between Mr O’Brien, Mr Overland, Mr Blayney and Mr Grant, in which the possibility of narrowing Operation Posse to Mr Cooper was discussed.<sup>218</sup>
- e) on 30 January 2006, of a Purana Taskforce weekly update by Mr O’Brien to Mr Overland, Mr Blayney and Mr Purton, the content of which is unspecified by Counsel Assisting;
- f) on 15 February 2006, which occurred solely between Mr Overland and Mr Biggin – who is not (on Counsel Assisting’s submissions) said to have known at this stage that Ms Gobbo was purporting to act for Mr Cooper;
- g) on 19 April 2006, between Mr Overland, Mr O’Brien and Mr Coghlan QC to discuss a “*plea deal*” that could be offered to Mr Cooper on his forthcoming arrest.

177 The only one of the “*above meetings*” that could come theoretically close to supporting Counsel Assisting’s inference is the meeting with Mr Coghlan QC in relation to a “*plea deal*”. As Mr Overland acknowledged in evidence, it is “*possible*” that reference was made to a lawyer, or lawyers, who were acting for Mr Cooper during this meeting. But it is equally possible that the name of the junior barrister who may be, or was likely to be, acting for Mr Cooper was not mentioned, even if Mr Cooper’s lawyer(s) were discussed. None of the context to this meeting which Counsel Assisting enumerate at [1895] point to it being

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<sup>216</sup> At [1769].

<sup>217</sup> Exhibit 1385B Mr Simon Overland diary, 27 September 2005, 513-514, RCMPI.0133.0001.0001 at .0513-.0514

<sup>218</sup> CAS2, [1797].

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“more likely than not”<sup>219</sup> that Ms Gobbo acting for Mr Cooper was mentioned on 19 April 2006:

- a) The adjournment being discussed was one that was to come from the Prosecution, to allow Mr Cooper to be arrested in possession of incriminating evidence. A prosecution-led adjournment could quite easily be discussed without anyone bringing up the name of Mr Cooper’s barrister;
- b) An irresponsible and misleading submission is made by Counsel Assisting that Mr Coghlan became “*aware around this time*” (ie that Ms Gobbo was acting for Mr Cooper). This is wholly unsupported by the evidence cited by Counsel Assisting – a file note from March 2007 – as set out in detail below (see paragraph 182, item K);
- c) Mr Overland’s evidence that he knew Ms Gobbo “*had acted for a whole lot of these people in the past*” does not give Mr Overland a reason to think or question, when Mr Cooper’s name came up again, whether his instruction that Ms Gobbo only inform on persons she was no longer acting for, was being complied with.

178 Counsel Assisting also submit that Mr Overland “*would have taken an interest in whether or not Ms Gobbo was representing Mr Cooper*”, but as Mr Overland countered, given the huge number of people who were under investigation at any one time, he “*couldn’t tell you who was representing pretty much anyone that finished up being investigated as part of Purana, or as part of any investigation that I was overseeing*”.<sup>220</sup> During this period in which it is asserted Mr Overland “*would have taken an interest*” in learning who was Mr Cooper’s *junior barrister* – September 2005 to April 2006 – Mr Overland was also dealing with the investigation of the triple filicide by Robert Farquharson in September 2005, the investigation and arrests of 17 people across Melbourne and Sydney conspiring to commit a series of terrorist attacks, including bombing the 2005 AFL Grand Final, the 2006 Australian Grand Prix and the Crown Casino, as well as conspiring to assassinate the then Prime Minister, and operational police matters leading up to and during the Commonwealth Games which were to take place in Melbourne in 2006. He was in charge of 600 staff and a \$30-\$35 million operating budget. He had a Crime Commander, Superintendents,

<sup>219</sup> Which is the test for inferential findings, as set out in paragraph 100 above.

<sup>220</sup> T.11498

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Inspectors and Senior Sergeants, all in positions increasingly closer to and responsible for the day to day granularity of an operation.

- 179 Further, with all this on his plate, Counsel Assisting mischaracterise (at [1898]) his verbal direction that Ms Gobbo not act for persons she provided information about as something which Mr Overland would have then been at pains to police compliance with, rather than a direction he gave which he assumed the levels of command below him would follow (as they were obliged to do).
- 180 Finally, Counsel Assisting have not reconciled their submission with the evidence of Mr Overland as to what he would have done, had he known that she was informing on a client (set out in paragraph 85 above).
- 181 It is not the most probable inference that Mr Overland knew Ms Gobbo was acting for Mr Cooper by 22 April 2004. Accordingly, the conclusions predicated on this finding (at [1896]-[1897]) cannot be safely made.
- 182 Further, the inferences sought by Counsel Assisting are predicated on matters which Counsel Assisting misleadingly present as uncontroversial “facts”, supported by the evidence they footnote, when this is frequently not the case at all. The errors and mischaracterisations made by Counsel Assisting are as follows:

Item	Counsel Assisting’s submission:	Counsel Assisting’s submission is not supported by the evidence:
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- |           |   |
|-----------|---|
| A. [1799] | Counsel Assisting elevate innocuous evidence about a “ <i>bit of a thought</i> ” to evidence of an inappropriate conspiracy. Mr O’Brien’s evidence was not just that the running of two diaries “ <i>was never implemented</i> ”, as Counsel Assisting frame it. Rather, his evidence was that having two diaries “ <i>not something we’d done before, it was just a bit of a thought</i> ”. <sup>221</sup> |
|-----------|---|

Further, a gratuitous submission is made that “*It is noted that at about this time, generally the amount of detail recorded in Mr Overland’s diaries appears to decrease*”. Willing to wound, yet afraid to strike, Counsel Assisting did not put to Mr Overland that the reduction in the amount of detail recorded in his diary had a sinister link to the “*bit of a thought*” about Mr O’Brien having two diaries. Neither is the submission squarely put here – just inappropriately floated.

<sup>221</sup> T.5547.6-7.



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B. [1800.3] Counsel Assisting incorrectly state that “*Mr Overland directed Mr Biggin that Ms Gobbo was to be protected at all costs*” (emphasis added). Rather, the evidence supports Mr Overland directing Mr Biggin that Operation Posse was a priority and Ms Gobbo was to be protected:

- the diary note of Mr Biggin (relied on by Counsel Assisting) states: “*to be protected re Op Posse a priority*”,<sup>222</sup> and
- Mr O’Brien’s evidence on this point was that “*Mr Overland was telling me that Operation Posse was a priority and the source was to be protected*”.<sup>223</sup>

C. [1814.6] Counsel Assisting incorrectly state that “*Mr Coghlan was told that the adjournment was wanted as there was a ‘much bigger picture’ at play*”.

This submission is made footnoting transcript of what Mr White told Ms Gobbo: “*Coghlan’s been told ... Purana wants the adjournment because there’s a much bigger picture*”. Mr White was not at the meeting with Mr Coghlan. This is beyond even second-hand hearsay (even putting to one side the inherent difficulties in relying on something told to Ms Gobbo as a reliable summary of what in fact occurred). No transcript reference is cited of Mr White being examined on how he would have been aware of what occurred at a meeting with Mr Coghlan which he was not present at, nor whether a record of what he told Ms Gobbo would be an accurate representation of what had occurred.

Further, Mr Overland’s diary note (footnoted by Counsel Assisting in support of this proposition) records only: *3 pm. Paul Coghlan OPP – with Jim O’Brien re Purana issues Op.*

This diary entry does not support their contended version of what Mr Coghlan was told in this meeting.

No evidence of any diary entry of Jim O’Brien is cited by Counsel Assisting. No evidence of a file note of the OPP is cited (notwithstanding the OPP took detailed file notes, as one would expect of legal practitioners, and which file notes have been corralled by Counsel Assisting: see for example item K below). No transcript recording Mr O’Brien or Mr Overland’s evidence on this issue is cited.

No finding can be made as to what Mr Coghlan was told about the reason for the adjournment, nor when he was told (nor whether Mr Overland was present at the time).

<sup>222</sup> VPL.0100.0029.1112 at 1141.

<sup>223</sup> T.7478.40-45.

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- D. [1914.5] Counsel Assisting repeat their misleading submission that Mr Overland “*told [Mr Biggin] that Ms Gobbo was to be protected at all costs*” (see item B above) and that Mr Biggin’s evidence was that this “*was an unusual thing for an Assistant Commissioner to do*”.

Mr Biggin’s evidence (cited by Counsel Assisting, T.7508) was that it was “*an unusual thing*” “*for an Assistant Commissioner to come to [Mr Biggin], in [Mr Biggin’s] position, and say ‘That particular source needs to be protected’*”.<sup>224</sup>

Further, the Commissioner asks on this page of transcript whether the diary note says “*at all costs?*”,<sup>225</sup> and Mr Woods notes that it does not,<sup>226</sup> and yet still the error/mischaracterisation of the diary note is repeated by Counsel Assisting in their submission.

- E. [1893] Counsel Assisting mischaracterise Mr Overland’s evidence and read into it an implication he knew after Mr Cooper was arrested that Ms Gobbo was acting for him, when Counsel Assisting state that “*he [ie Mr Overland] did not believe he knew that Ms Gobbo was acting for Mr Cooper prior to Mr Cooper’s arrest on 22 April 2006*”, citing two pages of transcript in support: T.11492 and T.11436.

At T.11492, Mr Overland’s evidence is that he does not believe that, as at 19 April 2005, he knew that Ms Gobbo was acting for Mr Cooper.<sup>227</sup>

There is no evidence given on T.11436 at all in relation to Mr Cooper, let alone Ms Gobbo acting for him or Mr Overland’s awareness.

This finding cannot be made.

- F. [1894.5] There is a bald assertion made that Mr Overland “*was aware that Ms Gobbo was providing information which assisted police to obtain incriminating evidence against Mr Cooper*”, without citing any evidence in support, let alone providing any detail as to the information Ms Gobbo was providing of which Mr Overland is alleged to have been aware.
- G. [1894.10] Mr Blayney’s notes (footnoted by Counsel Assisting) record Mr Cooper as described as a “*possible weak link*”. The word “*possible*” is important as it imports speculation into the

<sup>224</sup> T.7508.30-34.

<sup>225</sup> At T.7508.42.

<sup>226</sup> T.7508.44-45.

<sup>227</sup> See T.11491.32 and T.11492.30-31.

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description, yet is deleted in Counsel Assisting's purportedly verbatim quote from Mr Blayney's notes.

No evidence is cited in support of Counsel Assisting's assertion that this "*is consistent with the information Ms Gobbo had provided to the SDU*" and so this finding cannot reliably be made.

- H. [1894.11] The misleading submission/error identified at items B and E above is again made. The actual evidence – that Mr Overland considered Operation Posse a priority and Ms Gobbo was to be protected (see item B above) does not demonstrate the "*awareness*" on the part of Mr Overland which Counsel Assisting seek to infer.
- I. [1894.12] Mr Overland did not suggest, during his oral evidence, that he knew Ms Gobbo was acting for Mr Cooper "*at some stage in this period*" (ie between September 2005 and March 2006, being before Mr Cooper's arrest on 22 April 2006).

The transcript quoted at footnote 2649 does not support the submission advanced by Counsel Assisting at all. That transcript says no more than Mr Overland thought he knew Ms Gobbo "*had acted for a lot of these people in the past*", but as at 19 April 2006 "*I don't believe I knew she was currently acting for him*". It is a wholly unfair to read into Mr Overland's statement that "*I knew she had acted for a lot of these people in the past*" that "*a lot of these people*" included Mr Cooper, and that "*the past*" meant September 2005 to March 2006, rather than a much earlier timeframe (such as, prior to Ms Gobbo's registration).

- J. [1895.4] The error identified at item C above is repeated.
- K. [1895.5] Counsel Assisting rely on a file note dated 14 March 2007 to support an assertion that "*Mr Coghlan QC became aware at around this time [ie April 2006] that Ms Gobbo was representing Mr Cooper*". While acknowledging the file note is dated March 2007, Counsel Assisting (in footnote 2653) erroneously assert that "*Mr Coghlan's response indicated a knowledge of Ms Gobbo's representation of Mr Cooper around the time Milad Mokbel was arrested*".

The file note indicates no such thing. There is no mention of Ms Gobbo's representation of Mr Cooper at all on the page cited in support by Counsel Assisting.<sup>228</sup>

All the file note indicates is that, by 14 March 2007 (that is, approximately a year after Mr Cooper's arrest and 6 weeks after

<sup>228</sup> Viz VPL.6030.0200.3202 at .3203.

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Mr Cooper was sentenced), someone at the conference stated (at .3205, emphasis added):

*Conflict of interest – Nicola Gobbo:*

*In the DPP’s view Nicola plainly has a conflict due to her representation of Tony Mokbel.*

*She also acted in the Milad Mokbel matter for [Cooper’s initials].*

It is not clear this was said by Mr Coghlan. Even if it were, there is nothing in this record to indicate when Mr Coghlan became aware that she had acted for Mr Cooper in “*the Milad Mokbel matter*”, let alone that he became aware “*around April 2006*”.

This finding cannot be made. The only finding that is open is that as at 14 March 2007, Mr Coghlan QC was aware that Ms Gobbo had acted for Mr Cooper in relation to the Milad Mokbel matter.

*Should Mr Overland have known?*

- 183 Mr Overland accepted that, as the person with ultimate responsibility for the investigation, of course he should have known<sup>229</sup> – because he should have been told<sup>230</sup> – that Ms Gobbo was acting for Mr Cooper (at the same time as she was informing on him). He accepts responsibility for her use as a human source in investigations into the Mokbel syndicate conducted under Operation Posse, but at the time he was at Victoria Police did not believe she was informing in breach of her professional obligations.<sup>231</sup>
- 184 Mr Overland was not under an obligation to police compliance with the verbal direction he gave about Ms Gobbo not acting for persons she informed on. As stated above, the *Police Regulation Act* placed the obligation with the person receiving the instruction to ensure compliance, not on Mr Overland. Further:
- a) he gave evidence that he did not think he needed to seek reassurances that his direction was being complied with, as he was left with the impression that it was a “*shared understanding*” between him and his experienced investigators;<sup>232</sup>

<sup>229</sup> T.11494.

<sup>230</sup> T 11524.

<sup>231</sup> First Overland Statement at [113].

<sup>232</sup> First Overland Statement at [114].

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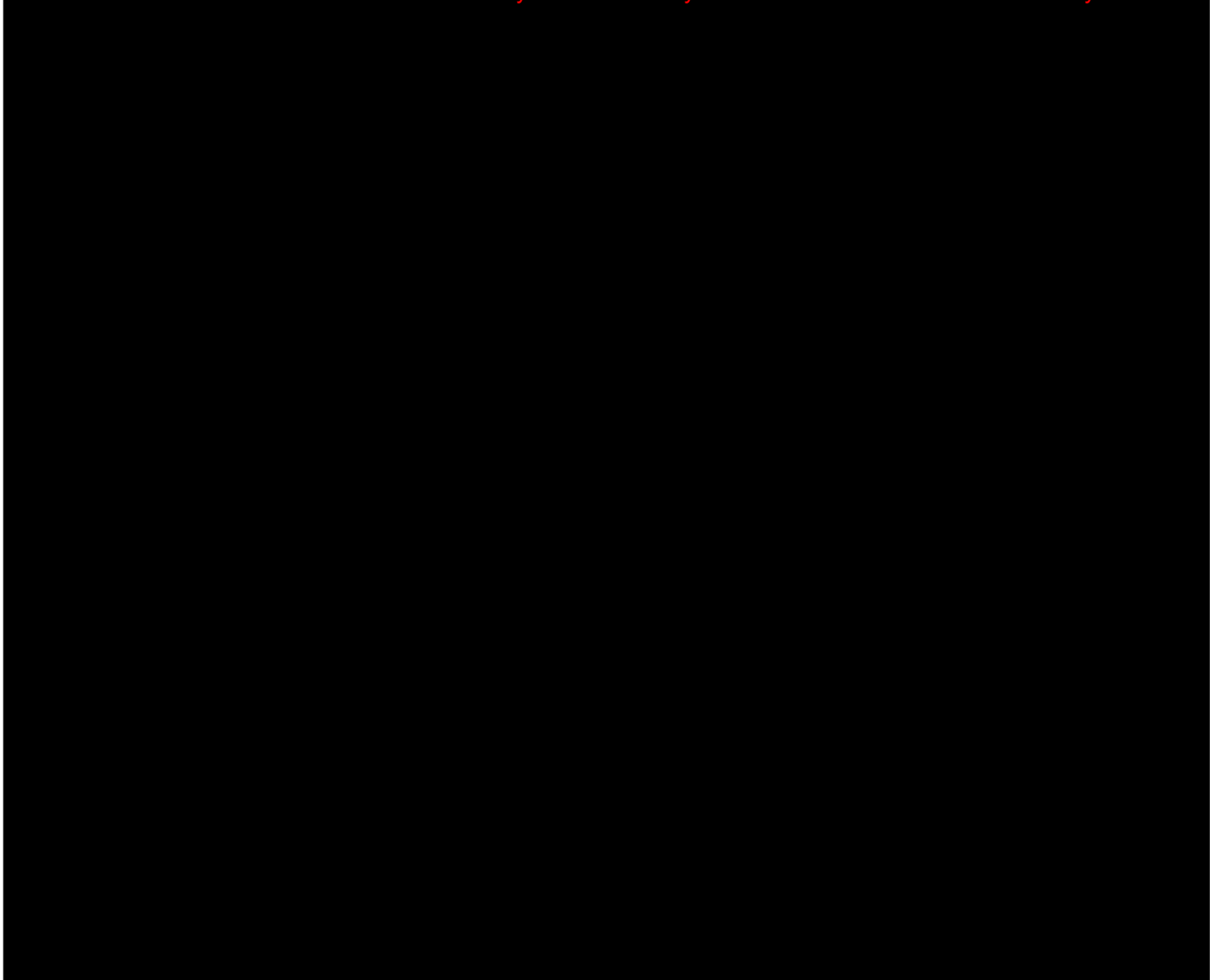
- b) Mr Overland was aware of and reassured by the extensive liaison and consultation which his investigators were having with the Office of Public Prosecutions,<sup>233</sup> to whom he had assumed full disclosure of Ms Gobbo's role had been provided;<sup>234</sup>
- c) he had given Mr Purton the responsibility to remain "*fully apprised*" and keep "*clear audit trails*";
- d) while he agreed he was "*ultimately responsible*", it would be wrong to conflate this with an obligation on him to micromanage the Detective Senior Sergeants with day to day responsibilities for the investigations;
- e) with 600 other staff and all the responsibilities identified in Section C above, it would be impractical (if not impossible) for Mr Overland's obligations to extend to making inquiries discovering matters about who was acting for Mr Cooper, one person being investigated as part of an undoubtedly important operation, but not the only important investigation in the hundreds over which he had oversight at any one time.

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<sup>233</sup> See paragraph 184(b) above.

<sup>234</sup> See paragraphs 95 to 97 above.

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## **I. Mr Mokbel**

189 Since well before he gave viva voce evidence to this Commission, Mr Overland's evidence has been that he was aware, at the time of Ms Gobbo's registration, that Mr Mokbel was (or had been) a client of Ms Gobbo's. For example, his first witness statement states:<sup>239</sup>

My recollection is that I was told Ms Gobbo became a source out of fear for her own safety, in particular from Tony Mokbel and his associates.

I recall that she had crossed professional boundaries in that she knew about and was facilitating (or was expected to facilitate) the on-going criminal activities of major criminals who were, or had been, her clients. My recollection was that she was being threatened or felt threatened by Tony Mokbel....

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<sup>239</sup> First Overland Statement at [81]-[82]

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190 In this first witness statement, Mr Overland also gave evidence that, as best he could recall, “*my understanding in around 2005 was that Ms Gobbo’s role was as a human source against the Mokbel syndicate and that she would not act for people against whom she informed*” (at [86]).

191 Counsel Assisting unfairly mischaracterise Mr Overland’s evidence as resiling from this position, stating that “*further into his evidence Mr Overland became less willing to concede*” his earlier evidence that he “*believe .. but I don’t have a particularly clear recollection*” that he was aware that Ms Gobbo was acting for Mr Tony Mokbel in late 2005 and early 2006 in his Commonwealth drug charges.<sup>240</sup> That is wrong: the lengthy passage quoted by Counsel Assisting at [1429] boils down to Mr Overland again stating that “*I don’t remember exactly when I became aware that [Ms Gobbo] was acting for Mokbel on those Commonwealth charges*” and that he is “*not sure*” that he knew that Ms Gobbo was “*overtly going to Court with Mr Heliotis, representing Tony Mokbel throughout January, February, March of 2006*”.

192 Counsel Assisting also unfairly suggest at [1428] that Mr Overland offered up evidence that “*it was his understanding that the information Ms Gobbo was providing related to other members of the Mokbel syndicate and the intention was not to go directly to Mokbel at the time but to work around him and take out those around him and build a case against him that way*”, only on realising “*an inconsistency*” in his evidence. First, the exposition in [1428] reveals no inconsistency in Mr Overland’s evidence. Secondly, as noted at paragraph 190, it has always been Mr Overland’s evidence that he was aware Ms Gobbo was informing on persons in Mr Mokbel’s syndicate in this time period (ie 2005-March 2006).

193 Counsel Assisting’s submissions also, bewilderingly, go to great pains to describe the *Age* newspaper on 30 March 2006, and the small font caption to a photograph in the *Age* on 30 March 2006 which identified Ms Gobbo as one of Mr Mokbel’s barristers (at [1422] to [1427]). The import of this “*evidence*” is entirely unclear. Mr Overland had already stated that he believed he was aware Ms Gobbo was acting for Mr Mokbel in late 2005, early 2006.

194 In stark contrast, there is no submission (or evidence) directed to the issue of:

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<sup>240</sup> This evidence is given at T.11315.10-14 and T.11315.23-24 (16/12/19).

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- a) the information Ms Gobbo was providing to the Victoria Police in relation to Mr Mokbel in September 2005 to March 2006;
- b) what of that information was known to Mr Overland;
- c) how it is alleged (at [1433]) that Mr Overland was aware that “*Ms Gobbo was informing on [Mr Mokbel]*” in “*between September 2005 to March 2006*”.

195 Again, Mr Overland is left “*in the dark*”, contrary to the Privy Council’s second rule relating to procedural fairness. There is also no evidence (let alone probative evidence) to support the finding sought at [1433] that Mr Overland was aware Ms Gobbo was informing on Mr Mokbel.

196 Instead, the only finding open to the Commission is that in September 2005 to March 2006, Mr Overland was aware that Ms Gobbo was informing on persons in Mr Mokbel’s syndicate. Mr Overland was also aware Ms Gobbo was acting for Mr Mokbel during this time, albeit that he does not have a clear recollection of precisely what he knew as to her role acting for him.

197 The findings sought at [1434] cannot be made, based as they are on an acceptance of [1433]. Further, the findings sought at [1434] disregard:

- a) Mr Overland’s instruction that Ms Gobbo should not continue to act for people if she provided information in relation to them and that she should not provide privileged information (set out at paragraph 83 above);
- b) that Mr Overland went to speak with Commander Dannye Moloney, Commander of the Intelligence and Covert Support Department, within which department the SDU was located, in September 2005 to discuss ensuring she was being managed as a source carefully (paragraph 73 above); and
- c) that, at significant junctures, Ms Gobbo ceased to act as a lawyer and acted, instead as a facilitator of and participant in criminal activity. As noted by Mr Overland at T11314: “*I understand, for instance, that Mr Mokbel when he was - when he had left Australia and was overseas, having fled a Commonwealth trial, that he was continuing to deal with Ms Gobbo. I understood he might make the*



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*claim that he was dealing with her in a legal professional sense, but I didn't think that to be the case."*

198 As to the findings sought at [1435], Mr Overland repeats his submissions at paragraphs 162 to 163 *mutatis mutandis*.

#### **J. Other findings relevant to Mr Overland**

199 The remainder of Counsel Assisting's submissions, as so far as they relate to Mr Overland, are addressed in the Annexure to these submissions.

#### **K. Conclusion**

200 Mr Overland was aware that Ms Gobbo was a practising criminal law barrister and was registered as a human source. His evidence is that he was "*surprised and concerned*" when he learned she was a human source, and "*concerned and appreciated the legal and ethical issues about her role as a human source*".<sup>241</sup> He gave verbal instructions at the time of learning to his Crime Commander Terry Purton that:

- a) Ms Gobbo was not to continue acting for clients on whom she was informing;
- b) Mr Purton was to remain fully apprised;
- c) clear audit trails were to be kept.

201 Mr Overland has acknowledged matters which he could have done better, with the benefit of hindsight. With hindsight, he thought "*there should be some legal support embedded*" in a unit such as SDU, "*who are there and on the spot and able to give advice as required*".<sup>242</sup> Knowing what he now knows, following what emerged during this Royal Commission, he acknowledged that there needed to be better training and guidance from the outset to police officers in relation to obligations of disclosure and the processes around disclosure to the prosecution.<sup>243</sup>

<sup>241</sup> First Witness Statement at [8].

<sup>242</sup> T.121142.47-12143.4 (22/01/20).

<sup>243</sup> T.12140.46-12141.5 (22/01/20).

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202 However, the findings Counsel Assisting invite this Royal Commission to draw in relation to Mr Overland are simply not sustainable. They are findings without a proper basis, based on grossly inadequate (and at times non-existent) evidence and conjecture and would, if made, not only amount to a breach of Mr Overland's entitlement to procedural fairness, but also be fundamentally wrong and a betrayal of the search for the truth to which this Royal Commission is directed.

**Dated:** 18 August 2020

J.J. GLEESON

G. COLEMAN  
Counsel for Mr Overland

CORRS CHAMBERS WESTGARTH  
Solicitors for Mr Overland

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### Annexure – Response to other matters raised in the submissions of Counsel Assisting

CAS	Mr Overland’s submission in response
1. Vol 2, [290]	<p>Counsel Assisting assert that the Informer Management Unit policy was “<i>authorised by Mr Overland on 8 April 2004</i>” without any evidence in support. The document cited at footnote 350 does not show any authorisation by Mr Overland.</p> <p>This finding cannot be made.</p>
2. Vol 2, [1095.6]	<p>As part of a submission in relation to the “intelligence gathering by Purana” relating to the investigation of the Mokbel cartel, Counsel Assisting refer to an email said to have been copied to Mr Overland.</p> <p>Mr Overland, despite repeated requests for all exhibits relating to him, and despite a specific request for the documents referred to in the footnotes to this paragraph (letter from Mr Overland’s solicitors to the solicitors assisting the Royal Commission on 3 August 2020) has not been provided with copies of these documents.</p> <p>Counsel Assisting was invited to withdraw submissions that relied on documents that have not been provided to Mr Overland, but declined to do so. As set out in paragraph 53 of the body of these submissions, a more egregious breach of natural justice is difficult to imagine.</p> <p>This finding can not be made.</p>
3. Vol 2, [1491]	<p>Mr Overland’s evidence was not as simple as “<i>he had no recollection</i>” of the Reward Application (as asserted by Counsel Assisting).</p> <p>Mr Overland’s evidence was he “<i>didn’t really recall being a part of it</i>” (T.11519.10). He agreed that his signature was on the document approving withdrawal of the infringement notice/penalty notice as requested (T.11521.13). His memory was evidently refreshed from seeing the document Mr Winneke QC put to him, as he answered a series of questions, after initially stating he “<i>didn’t really recall</i>” over the course of T.11519 to T.11522.</p>
4. Vol 2, [1512]	<p>Counsel Assisting refer selectively to Mr Biggin’s evidence about his discussion with Mr Overland on 16 February 2006. Mr Biggin also stated in his oral evidence that “<i>You have a human source, one of the first aspects is that you actually provide them with protection</i>”, and that he took Mr Overland’s comment that Ms Gobbo “<i>needs to be protected</i>” as “<i>just a broader protection in relation to any human source</i>”: T.7508.21-25 (9/10/19).</p>
5. Vol 2, [1582]	<p>A submission is made, relying on Mr White’s diary note, that “<i>Mr Overland was advised that Ms Gobbo was aware that Mr Overland knew of her role as a human source, but she understood he did not know the extent of her assistance</i>”. Counsel Assisting’s submission then continues with a gratuitous, unfair comment, not justified by any analysis (and wholly unsupported by the evidence before this Commission), that “<i>This was obviously not true.</i>” What was “<i>obviously untrue</i>”? Applied literally to that which it purports to address, the comment asserts that Mr Overland knew the full extent of Ms Gobbo’s</p>

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CAS	Mr Overland's submission in response
	<p>assistance. Not even Counsel Assisting's unsubstantiated submissions go this far.</p> <p>As set out in the body of Mr Overland's submissions, Mr Overland was not aware of the extent of the information being provided by Ms Gobbo, for reasons including the "sterile corridor", and his very senior role as Assistant Commissioner, Crime.</p>
6.	<p>Vol 2, [1970], [1984]</p> <p>Counsel Assisting refer to a meeting at 9.30 am on 6 June 2006 between Messers Wilson, Masters and Cornelius, which was "joined" by Mr Overland. Counsel Assisting suggest that at this meeting, "Mr Overland disclosed that Ms Gobbo was a human source." In support of the proposition, Counsel Assisting refer only to Mr Overland's oral evidence in <u>December 2019</u>, where Mr Overland stated that he "did not have any recollection of the meeting."</p> <p>Counsel Assisting's invited findings neglect Mr Overland's evidence to the Commission in <u>January 2020</u>, following the receipt of his diaries and other materials from Victoria Police.</p> <p>Mr Overland's diary records that he was at a Organisational Development Standing Committee meeting at 9.30 am on 6 June 2006. Mr Overland's attendance at this Organisational Development Standing Committee meeting (rather than the meeting Counsel Assisting place him at) is also recorded in the minutes of the meeting (Exhibit RC992A). Further, and importantly, the meeting minutes indicate that Mr Overland was assigned action items. Mr Overland's oral evidence in January 2020 on this matter, informed by the above materials, was that "... this was a reasonably important meeting for me, so it's the sort of thing I would do my utmost to attend. The minutes indicate I was there. I assume I was there for the duration (12.00pm)." On being assigned action items, Mr Overland noted "... I think there was a general principle that you wouldn't be nominated to do these things unless you were there to be agree to it...": T.12281.46 to T.12282.5 (23/01/2020)</p> <p>Counsel Assisting's invited finding is to be rejected, in light of the compelling evidence Mr Overland was at a different meeting.</p>
7.	<p>Vol 2, [2046]</p> <p>Counsel Assisting assert that Mr Overland had made a "<i>deliberate decision</i>" "<i>shortly prior to this meeting</i>" [on 27 July 2006] "<i>not to record events in daily diaries</i>". No evidence is cited in support of this submission. It is an inaccurate characterisation of the evidence before the Commission.</p> <p>The evidence establishes that, because of his role and rank, there was no requirement on Mr Overland to keep a diary, and as he became progressively busier he prioritised other tasks over keeping a diary, as he no longer had time to keep recording extensive diary notes: Second Overland Statement at [20].</p> <p>An examination of Mr Overland's diaries also indicates that the entries become less detailed and peter out, rather than support a theory of a "<i>deliberate decision</i>" to stop shortly before a meeting. Further, this was</p>

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CAS		Mr Overland's submission in response
		never squarely put to Mr Overland in cross-examination, and again the submission is not squarely put here – just inappropriately floated.
8.	Vol 2, [2048]	Counsel Assisting leap from an observation that they have been unable to find a record made by Mr Cornelius or Mr Overland which record and justify their decision to remove Ms Gobbo from the investigation, to a submission that neither made one because they should have. The finding sought by Counsel Assisting should be rejected. There was no requirement or obligation on Mr Overland to keep records, and the demands of his position were such that it was simply impossible to record every meeting and decision. Further, this was never put to Mr Overland in cross-examination.
9.	Vol 2, [2086]	Mr Overland's evidence is not properly summarised. While Mr Overland did state that he understood Sir Ken's point of view with respect to the OPI and Victoria Police (as described by Counsel Assisting) " <i>sinking or swimming together in a joint operation</i> ", he also elaborated:  <i>"I understand that point of view. ... It's a reasonable point of view, but there are other points of view as well that can also be reasonable depending on the circumstances at the time"</i> : T.11692.47-11693.5 (18/12/19).
10.	Vol 2, [2223]	Mr Overland did agree, in his viva voce evidence, that the issues described in this paragraph were matters with which Ms Nixon was concerned about.  However, what is important, and yet omitted from Counsel Assisting's narrative, is they were also matters with which Mr Overland was concerned: as he stated in response to being asked " <i>you were aware of her concerns?</i> " " <i>Well, I think I put this document together</i> ": T.11867.35-6 (19/12/19).
11.	Vol 2, [2284]	No finding can be made that Mr Overland told Mr O'Brien that he had decided that Ms Gobbo would be called as a witness to an OPI inquiry. As evidence in support of their contention, Counsel Assisting cite evidence of Mr O'Brien only. Mr O'Brien's version of events was not put to Mr Overland.  Mr Overland's evidence was that he was aware in July 2007 that Ms Gobbo had been summonsed to the OPI in relation to the Dale IR 44 investigation: T.11756.39-43 (19/12/19).] He did not give evidence that he played any role in the decision making process to call her as a witness to the OPI. It was not part of Mr Overland's purview to decide who was called as a witness to an OPI inquiry.
12.	Vol 2, [2331]	The submission in the last bullet point (" <i>It was agreed that Mr Overland would monitor the OPI for any request for Ms Gobbo to be subpoenaed to a compulsory hearing...</i> ") is not supported by the evidence.  An SML entry, and Mr White's diary entry, are the only evidence cited in support of this finding (CAS2, footnote 3278). <ul style="list-style-type: none"> <li>• The SML does not record this being agreed at all.</li> <li>• Mr White's diary entry was put to Mr Overland as stating "<i>The SDU to monitor OPI re request for her to be subpoenaed for compulsory hearing</i>" (emphasis added): T.11738.33-36</li> </ul>

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CAS	Mr Overland's submission in response
	<p>(19/12/19). Mr Overland was never afforded the opportunity to respond to the suggestion that it stated "<i>Mr Overland would monitor the OPI...</i>".</p>
<p>13. Vol 2, [2405]-[2413]</p>	<p>The purported summary of the evidence in this section is selective, fails to address key evidence on the issue and is therefore misleading. The finding open on the evidence, as a whole, is that Mr Ryan raised with Mr Overland the SDU's concern about protection of the identity of Ms Gobbo as a human source in relation to Ms Gobbo appearing before the OPI. This accords with:</p> <ul style="list-style-type: none"> <li>A. Mr Overland's evidence that concerns were raised with him about Ms Gobbo's appearance before the OPI, with the concern being about the general issue of the protection of the identity of the source, but that Mr Overland "<i>was not concerned about her being called in front of ... a confidential private OPI hearing</i>": T.11757.6-27 (19/12/19) (which evidence is not grappled with in Counsel Assisting's submissions); and</li> <li>B. Mr Ryan's evidence that he "<i>had a discussion with Deputy Commissioner Overland in which I told him about my concerns for the safety of Ms Gobbo if she was called to give evidence before the OPT</i>" (Ex RC0310, statement of Mr Gavan Ryan, 13 June 2019, at [80]).</li> </ul> <p>In addition, Mr Overland's further evidence on this issue (which Counsel Assisting do not grapple with in this section) was: "<i>I know it's suggested I had a conversation with Mr Ashton. I don't remember that and I don't believe I did. I've seen other evidence that says it was Gavan Ryan who went and spoke to Mr Ashton. I had no involvement in this as best I can recall and as best I can tell. So I'm not sure why these notes indicate as they do</i>": T.11758.25-31 (19/12/19).</p> <p>This is supported by Mr Ashton's evidence, in which he states he had a conversation with Mr Ryan on 19 July 2007 (referred to at CA, vol 2, [2447]) but does not refer to any conversation on this issue between he and Mr Overland.</p> <p>In contrast, the diary notes relied on by Counsel Assisting are often second or third-hand hearsay of conversations – eg at meeting between Messrs Richards, Smith and Fox, someone told Mr White that Mr Gavan Ryan (not present at the meeting) had spoken with Mr Overland about the OPI issue (at [2412]) – or intentions to speak with Mr Overland (eg "<i>enquiries were being made of Mr Overland</i>" at [2405]). This is not probative evidence that any such conversation occurred, and no finding can safely be made based on them.</p>
<p>14. Vol 2, [3113]</p>	<p>Mr Overland's position in relation to advice that might potentially have been given to Mr Andrew Hodson, by a different lawyer in different hypothetical circumstances was more nuanced than how it is summarised by Counsel Assisting. It is worth setting out the relevant transcript in order to assist the Commission (T.11793.45-11794.23 (19/12/19)):</p> <p><i>If your investigators are using the fact that your informer is a barrister, or a lawyer, to whom, whether or not you're hoping to exclude him or</i></p>

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CAS	Mr Overland's submission in response
	<p><i>not, it's troublesome, who knows what he might say, he might fail the polygraph test, who knows? It's troublesome, isn't it?---Well, I don't think it's that troublesome. I don't think I knew about it, but I don't think it's that troublesome.</i></p> <p><i>If you knew about it you might have said, "Don't worry about it, go ahead it's a good plan"?---No, I think that's trying to put words in my mouth.</i></p> <p><i>I mean it's no good if he goes to an independent lawyer who says, "No, don't take a polygraph test, that's no good. Don't do that". That would be the conservative advice an independent lawyer would say, "Don't do a polygraph test"?---I understand that.</i></p> <p><i>And there goes your plan?---I think we were trying to, as I said, rule him out, not rule him in.</i></p> <p><i>Well, who knows. It's just not appropriate can I suggest to you?---Okay, you can suggest that.</i></p> <p><i>Do you agree or disagree?---I'm not sure I agree.</i></p>
15.	<p>Vol 2, [3282]</p> <p>Counsel Assisting's submission is not squarely put here. To the extent Counsel Assisting's submission seeks a finding that either Mr White had spoken to Mr Overland, or that Mr Overland had spoken to Mr Ashton, in 2008 in relation to Ms Gobbo being called to an OPI hearing, such finding cannot be made because it is:</p> <ul style="list-style-type: none"> <li>• inconsistent with the evidence as a whole;</li> <li>• based on one SML entry, open to multiple interpretations, which does not amount to probative evidence.</li> </ul> <p>Further, their submission ignores Mr Overland's evidence on the issue. Mr Overland stated that his recollection was Ms Gobbo was called before the OPI twice. He does not recall having been aware of a possibility that she might go back a third time: T.11801.40-11802.44 (19/12/19).</p> <p>Further, the only evidence cited by Counsel Assisting in support of their proposition is an SML log entry from 13 August 2008, from which it is unclear whether the record is reporting recent events or is a reference back to the 2007 OPI hearing (as to which, see the submissions above at item 13). As Mr Overland stated in evidence: "<i>I think that goes back to earlier entries.... I'm not sure it's quite right</i>" – that is, because of his evidence above (at item 13) that he does not believe he spoke to Mr Ashton – "<i>but I think that's what it references back to</i>": T.11802.32-37 (19/12/19).</p>
16.	<p>Vol 2, [3397]-[3405]</p> <p>The summary by Counsel Assisting of the meeting on 5 December 2008 is neither comprehensive nor accurate. On the evidence, the Commission should find that at the time of a breakfast held in a café on the morning of 5 December 2008, the concept of Ms Gobbo being used as a witness was still "<i>hypothetical</i>" (T.11826.39), with the risks and benefits to that decision still being considered. Mr Overland had yet to make a decision, as Counsel Assisting have pointed out in the first sentence to [3404]. Mr Overland accepts the first sentence of [3404] ("<i>Mr Overland was adamant that he had not formed a view that Ms Gobbo was wanted as a witness until after she had recorded the conversation with Mr Dale, which he described as "the clincher" when</i></p>

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		<p><i>the words of Mr Dale were said to provide credit to the assertions that had been made by Carl Williams.”)</i></p> <p>Contrary to the submission made by Counsel Assisting (in the second sentence of [3404]), the contemporaneous written records cited by Counsel Assisting are all consistent with no decision having been made, and the question still being one in the hypothetical realm (see, for example, the consistent use of “if” in the ICR quoted at [3398]).</p>
17.	Vol 2, [3485]	<p>This proposed finding in respect of “<i>would have been clear</i>” to “<i>anyone aware of the contents of this SWOT analysis</i>” is to be rejected. It is not the most probable inference, on a review of the SWOT analysis, that a person would take away from a review of it that Ms Gobbo’s role as a human source had not been disclosed in any court proceeding. Taking each bullet point of Counsel Assisting’s in turn:</p> <ul style="list-style-type: none"> <li>• The reference to “<i>judicial review</i>” in the SWOT analysis is to “<i>judicial review of police actions in tasking and deploying one their own</i>”, which does not indicate a failure to disclose in prior Court proceedings. As Mr Overland stated in cross-examination, in relation to his reading of the SWOT analysis line “<i>OPI review... unsafe verdicts and possible appeals</i>”: “<i>all of those were potential risks ... right from the very outset.... one of the many advantages that organised criminal figures have is they’ve normally got a lot of money and they have very able criminal barristers defending things and taking every point, so I expected that these things would be challenged... it’s not unusual in that process for suggestions to be made that police actions or conduct is somehow improper</i>” (T.12277.43-12278.20, 23/01/20).</li> <li>• Clearly, using Ms Gobbo as a public witness added a layer of risk to her being exposed as an informer – this would not indicate to a reader proper disclosure had not occurred in the past, because under proper disclosure, the human source’s identity is still protected.</li> <li>• This third bullet point is presumably also a reference to the risk “<i>OPI review... unsafe verdicts and possible appeals</i>”, and Mr Overland’s comments at bullet point 1 about criminal barristers taking every point is repeated.</li> </ul>
18.	Vol 2, [3486] – [3496]	<p>Counsel Assisting’s submissions in respect of the 5 January 2009 delivery of the SWOT analysis ignore important evidence. It is important to note Mr Overland’s evidence, which is glossed over by Counsel Assisting. Mr Overland readily offered up that, while he did not recall having seen the SWOT analysis, “<i>I agree with everything that’s contained in it. I think it is a reasonable document in terms of setting out the situation</i>”: T.11837.44-11838.11 (19/12/19). Mr Overland, again, later stated that, while he does not recall seeing the SWOT analysis, “<i>I recall being very clear about the views of the SDU and their concerns</i>”: T.12224.3-4 (23/01/20). And further:</p> <p><i>I was well aware of those risks. I thought those risks had existed for some time. I thought we were managing them. I thought the most sensible [thing] to do at that point in time in all the circumstances was</i></p>



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		<p><i>to transition Ms Gobbo from a source to a witness and get her into witness security so that she was protected. I had no knowledge of the matters that have been brought to my attention [during cross-examination] about the conflict of interest and the lack of discovery and those sorts of things. I wasn't trying to cover anything up here. I was simply trying to deal with a difficult situation. I was a Deputy Commissioner of Police at the time. I think I was at an appropriate level to be dealing with these issues and ... did I mention these things to the Chief Commissioner? Not necessarily. I thought they were matters I was managing, the OPI was involved in managing them, Mr Cornelius was involved in managing them, so I thought they had a sufficient level of focus at a sufficiently senior level in the organisation.</i></p> <p>T.11862.37-T.11863.13 (19/12/19).</p>
19.	[3493]	<p>It is unclear why, in their narrative, Counsel Assisting emphasise that Mr Overland did not accept the proposition that the document was a “bomb” that could have made his impending position as Chief Commissioner of Police untenable. This proposition (which Mr Overland did not accept under cross-examination, and continues not to accept) does not accord with the fact that it was Mr Overland who, in the face of opposition from the SDU, decided to call Ms Gobbo a witness, “<i>knowing everything that would flow from that</i>” (T.12288.10). If Mr Overland was so concerned with his own career security, the path of least resistance would have been not to have turned Ms Gobbo into a witness.</p>
20.	[3495]-[3496]	<p>In relation to the folders of material shown to Mr Overland, important evidence omitted from Counsel Assisting's summary is that the “<i>folder which contained various documents</i>” shown to him was marked as an Ethical Standards Department file.</p> <p>Further, Mr Overland, on inspecting the folder for the first time in the witness box on 19 December 2019, gave evidence that:</p> <p><i>I don't remember storing [documents] in this way. It wouldn't have been stored as an Ethical Standard Department file ... this may have been compiled subsequent to me leaving Victoria Police... I haven't seen it in this form before.</i></p> <p>T.11848.33-T.11847.8 and T.11847.31-T.11848.1 (19/12/19).</p> <p>It is also important to note that the document described by Counsel Assisting as “<i>No 161 – Original Biggin memo and SDU SWOT analysis... </i>” is <i>not</i> one of the documents in the “<i>Ethical Standards Department file</i>” which contains Mr Overland's handwriting.</p>
21.	[3538]	<p>This finding as to the Biggin memo and SDU Swot analysis ought be rejected, and the Commission ought to find that the SWOT analysis may have found its way to Mr Overland's office, but it was not brought to Mr Overland's attention because:</p> <ul style="list-style-type: none"> <li>• Mr Overland does not recall seeing it, and (as noted by Counsel Assisting at [3493]) it is the type of document one would recall seeing.</li> </ul>

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		<ul style="list-style-type: none"> <li>The SWOT analysis was found in an "<i>Ethical Standards Department file</i>" which was compiled by someone other than Mr Overland, possibly after Mr Overland left the Victoria Police. The SWOT analysis contained in the "<i>Ethical Standards Department file</i>" does not have Mr Overland's handwriting on it. Accordingly, it is not the most likely inference that all documents in the "<i>Ethical Standards Department file</i>" were documents which had come to Mr Overland's attention (for the reasons at item 20 above).</li> </ul> <p>In any event, Mr Overland was aware of the risks as identified in the SWOT analysis, and was of the view that they had existed "<i>for some time</i>" (as set out at item 18 above). This is not evidence that he received the document, but rather had also, independently, formed the same view that the SDU had. It is somewhat perplexing that Counsel Assisting go to great pains to seek to have an inference drawn that Mr Overland received the document, when Mr Overland was readily able to assist the Commission by offering up that he agreed with all the risks set out in the document.</p>
22.	[3539]	<p>This finding as to Mr Overland's awareness of Ms Gobbo's role as a human source not having been previously disclosed is to be rejected.</p> <p>As set out in the body of Mr Overland's submissions at paragraphs 60 to 61 and 156, Mr Overland was several positions removed from the disclosure process, but had "<i>complete confidence</i>" that his "<i>senior, experienced detectives</i>" were making proper disclosure. He has provided cogent reasons (set out at paragraphs 60 to 61) as to how he did not consider that Ms Gobbo's identity as a human source could continue to be shielded from sophisticated criminals for so long without fulsome disclosure being made to the prosecution to ensure that her identity was not picked up from patterns of information across prosecution briefs.</p> <p>As set out at item 17 above, Mr Overland could be aware of all the risks identified in the SWOT analysis without considering any had arisen from a failure to make disclosure in other proceedings.</p>
23.	[3541]	<p>This finding in respect of the SWOT analysis is to be rejected.</p> <p>Addressing Counsel Assisting's bullet points in turn:</p> <ul style="list-style-type: none"> <li>Counsel Assisting do not state what legal advice Mr Overland ought to have obtained in December 2008. By making the decision (sometime after 5-7 December 2008, when Ms Gobbo records her conversation with Mr Dale) to turn her into a witness, Mr Overland was choosing the path where he knew "<i>everything that would flow from that</i>". So what type of advice ought Mr Overland have obtained? Is the contention that Mr Overland ought to have sought advice on whether Victoria Police was better off not taking a risk of opening itself up to "<i>everything that would flow from that</i>"? Or is it that legal advice ought to have been taken on another topic? Counsel Assisting's conclusion is too vague, and Mr Overland is left "<i>in the dark</i>"/unable to properly respond to the finding sought against</li> </ul>

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	<p>him. Nor was any of this put to Mr Overland in cross-examination.</p> <ul style="list-style-type: none"> <li>• Mr Overland had already discussed many of the risks with members of the SDU at the breakfast meeting on 5 December 2008 (see item 16 above). Mr Overland was aware of the risks, having formed his own view independently on these issues. There was no obligation or need for an Assistant Commissioner of Victoria Police to further follow up the concerns, which he well understood, with the SDU (even if he had reviewed the written SWOT analysis, which is rejected for the reasons set out above).</li> <li>• Counsel Assisting do not squarely put in their submission what “matters” Mr Overland ought to have raised with the OPI at this time. Mr Overland is again left “<i>in the dark</i>”/unable to properly respond to the finding sought against him. Nor was this put to Mr Overland in cross-examination. To the extent the “matters” Mr Overland ought to have raised were related to disclosure issues, for the reasons set out above at item 22 these were not known to Mr Overland.</li> <li>• Mr Overland refers to the explanation he gave as to why he does not believe he raised the issue with Ms Nixon above at item 18.</li> </ul>
24.	<p>[3789]</p> <p>This finding about Mr Overland knowing, upon reading her letter of 7 September 2009, of the non-disclosure of her role as a human source, is to be rejected for four reasons.</p> <p>First, by this time Mr Overland was Chief Commissioner of Police: “<i>whilst I thought I’d been busy as an Assistant Commissioner and Deputy Commissioner this was a whole new level of business</i>” (T.11890.38-42).. He does not recall the letter with any precision: as he stated under cross-examination, he “<i>assumed</i>” he had seen it (T.11887.5-7).., but at least by the time of the second letter, “<i>most of it was just being referred to Finn McRae to deal with</i>” (T.11890.26-27).</p> <p>Secondly, the proposition that Mr Overland would have realised, on reading this first letter, that Ms Gobbo’s role had not been disclosed or revealed in legal proceedings was not put to Mr Overland in cross-examination. Counsel Assisting deprive Mr Overland the opportunity to properly respond, as they did not put to him which parts of the letter reveal Ms Gobbo’s role as a human source was not revealed.</p> <p>Thirdly, the letter is capable of being read in a way consistently with disclosure having been properly made. This point is made good by the fourth point.</p> <p>Fourthly, as stated in Mr Overland’s evidence, Mr McRae was responsible for management of legal issues, including the “<i>written correspondence [Ms Gobbo] sent to Victoria Police... that culminated in legal action</i>” (First Overland Statement at [3787]). Eventually, the VGSO were instructed and counsel were also briefed, including Ms Rowena Orr QC (exhibit RC0965) and Mr Michael Rush QC (exhibit RC 0964) (both junior counsel at the time). If Mr Overland ought to have realised there had been issues with disclosure having (briefly) read</p>

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		the first letter, the logical extension would be that, his legal team carefully reviewing the first letter (and subsequent letters) from Ms Gobbo, in more detail than Mr Overland, ought to have also realised a failure to disclose Ms Gobbo's role in earlier prosecutions. There is no reason why Mr Overland is singled out for the purposes of this finding.
25.	[3790]	This finding in respect of the consequences of Mr Overland's alleged knowledge of non-disclosure falls away for the reasons set out in item 24 above.
26.	[3871]	<p>Mr Overland's answer in response to being asked "<i>what issues there might be should disclosure occur</i>" in relation to the second letter Ms Gobbo sent has not been fairly summarised by Counsel Assisting.</p> <p>First, Mr Overland's evidence was he is not sure he was reading Ms Gobbo's letters by this stage (ie by letter two): T.11890.36-37 (19/12/19).</p> <p>Secondly, Mr Overland stated, "<i>having read it now.... I would take that as a general reference to the sorts of concerns I've expressed in the past about the mere fact that as a barrister she has been informing</i>" (before continuing on to say and clearly it is also related to her frustrations about Mr McGrath [REDACTED]: T.11891.16-20 (19/12/19).</p>
27.	[3872]	This finding as to what he should have understood from reading Ms Gobbo's letter ought be rejected for the reasons set out in item 24 above
28.	[3918]	<p>This is another example of a submission not squarely put, but rather inappropriately floated, by Counsel Assisting.</p> <p>Contrary to Counsel Assisting's submission, Mr Overland was not "<i>very aware</i>" of other relevant documents in the form of the letters from Ms Gobbo that should have been provided to Mr Gipp. He was then Chief Commissioner of Police. He is not even sure he read Ms Gobbo's letter after the first letter (see item 26 above).</p> <p>Further, the letter from Mr Hargreaves was sent to the VGSO, who were the solicitors for Mr Overland in the legal action brought by Ms Gobbo. If Mr Overland should have provided to Mr Gipp the letters of Ms Gobbo, then the logical extension of this submission is so too should have the VGSO. In other words, there is no reason why Mr Overland is singled out for the purposes of this finding.</p>
29.	[4111]	<p>Counsel Assisting submits that Mr Overland did not inform he Minister that the risk posed by the relationship between Victoria Police and Ms Gobbo was far greater than that represented by the settlement the Minister had authorised. This proposition was not put to Mr Overland. He has had not opportunity to respond to it and no finding should be made to this effect.</p> <p>Further, as noted at [4100]-[4101] of Counsel Assisting's submissions, the Minister was more than adequately briefed from a briefing paper by the Victoria Police Director of Legal Services, which paper was supported by Senior Counsel.</p>
30.	[4135]	Counsel Assisting have misstated the evidence in relation to the conduct or inaction by Mr Jones. The sentence that Mr Overland was involved in " <i>compromised decision making</i> " and " <i>was conflicted</i> " as to the issue is

This document has been redacted for Public Interest Immunity claims made by Victoria Police. These claims are not yet resolved.

CAS	Mr Overland's submission in response
	presumably intended as a reference to Mr Jones' views, but sloppy drafting has resulted in it being presented as objective fact. This is not supported by the evidence. Properly drafted, the submission would have noted that these views are nothing more than Mr Jones' own, irrelevant, supposition on whether the Chief Commissioner would approve a review, and should be rejected.