

ROYAL COMMISSION INTO THE MANAGEMENT
OF POLICE INFORMANTS

Held in Melbourne, Victoria

On Wednesday, 4 December 2019

Led by Commissioner: The Honourable Margaret McMurdo AC

Also Present

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| Counsel Assisting: | Mr C. Winneke QC Mr A. Woods Ms M. Tittensor |
| Counsel for Victoria Police | Mr S. Holt QC Ms K. Argiropoulos |
| Counsel for State of Victoria | Mr T. Goodwin |
| Counsel for Nicola Gobbo | Mr R. Nathwani |
| Counsel for DPP/SPP | Ms K. O'Gorman |
| Counsel for CDPP | Mr D. Holding Ms A. Haban-Beer |
| Counsel for Police Handlers | Mr G. Chettle Ms L. Thies |
| Counsel for John Higgs | Ms C. Dwyer |
| Counsel for AFP | Ms I. Minnett |
| Counsel for Chief Commissioner of Police | Mr A. Coleman SC |
| Counsel for Mr Cooper | Mr M. Thomas |

09:37:56 1 COMMISSIONER: Yes, I think the appearances are largely as
09:37:59 2 they were yesterday save we have Mr Holt for Victoria
09:38:04 3 Police today. We've got Mr Goodwin for the State and
09:38:09 4 Ms Astrid Haban-Beer for the CDPP and Mr Thomas for
09:38:14 5 Mr Cooper.

09:38:16 6
09:38:19 7 MR WOODS: Yes, Commissioner, there are three matters for
09:38:21 8 submission and perhaps determination this morning prior to
09:38:24 9 the witness being called. They each relate to Ms Gobbo.
09:38:30 10 The first is an application as to whether or not Ms Gobbo's
09:38:34 11 demonstrated that she has a reasonable excuse for not
09:38:37 12 complying with the Notice to Attend. The second is whether
09:38:43 13 a particular witness who gave evidence relevant to Ms Gobbo
09:38:46 14 should be recalled and the third is whether transcripts of
09:38:52 15 the Commission's phone conversations and a draft statement
09:38:55 16 should be tendered to the Commission. Representatives of
09:39:04 17 the witness are in court today in relation to the
09:39:09 18 application to recall. It might be most efficient that
09:39:13 19 that's dealt with first.

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09:39:15 21 COMMISSIONER: It would be, yes.

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09:39:17 23 MR WOODS: That being the case, it's Ms Gobbo's
09:39:20 24 application. There are matters that would probably need to
09:39:23 25 be dealt with in closed hearing so that we can be frank
09:39:26 26 with you. I think we might be able to deal with some of
09:39:29 27 them, given that the Commissioner heard the evidence, we
09:39:32 28 can probably deal with them at high level, but we're in
09:39:36 29 your hands about that. Mr Nathwani might have a view about
09:39:39 30 whether it should be a closed hearing.

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09:39:41 32 COMMISSIONER: Mr Nathwani, Mr Thomas is probably more
09:39:43 33 likely.

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09:39:44 35 MR THOMAS: Yes, we definitely seek the proceedings be in a
09:39:48 36 closed hearing.

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09:39:49 38 COMMISSIONER: All right. I don't expect this will take
09:39:52 39 very long.

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09:39:53 41 MR WOODS: No.

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09:39:53 43 COMMISSIONER: It's probably better to do it in closed
09:39:56 44 hearing. Pursuant to s.26 *Inquiries Act*, access to the
09:40:00 45 inquiry during the application of Mr Cooper, a pseudonym,
09:40:01 46 is limited to legal representatives and staff assisting the
09:40:05 47 Royal Commission, the following parties with leave to

09:40:07 1 appear in the private hearing and their legal
09:40:10 2 representatives, namely the State of Victoria, Victoria
09:40:13 3 Police including media unit representatives, Graham Ashton,
09:40:15 4 Director of Public Prosecutions and Office of Public
09:40:17 5 Prosecutions, Commonwealth DPP, Ms Nicola Gobbo, the SDU
09:40:22 6 handlers, Australian Federal Police, Australian Criminal
09:40:26 7 Intelligence Commission, Mr Cooper. Media representatives
09:40:29 8 accredited by the Royal Commission are allowed to be
9 present in the hearing room. The hearing is to be recorded
09:40:32 10 but not streamed or broadcast. Subject to any further
09:40:36 11 order there is to be no publication of any material,
09:40:37 12 statements, information or evidence given, made or referred
09:40:39 13 to before the Commission which could identify or tend to
09:40:41 14 identify the person referred to as Mr Cooper or his
09:40:45 15 whereabouts. A copy of this order is to be posted on the
09:40:48 16 hearing room door.

09:40:55 17
09:40:55 18 MR WOODS: We'll just wait for those individuals who need
09:40:58 19 to leave to do so.

09:41:03 20
09:41:03 21 COMMISSIONER: It's more a question of people coming in
09:41:06 22 than leaving.

09:41:07 23
09:41:07 24 MR WOODS: It would seem that way. We'll just wait a
09:41:11 25 moment.

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09:41:12 27 (IN CAMERA PROCEEDINGS FOLLOW)

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09:41:34 1 PROCEEDINGS IN CAMERA:

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09:41:34 3 MR WOODS: Commissioner, it might speed things up if I'm
09:41:37 4 able to explain what my ultimate submission will be.
09:41:39 5 You'll recall that the evidence that was given - - -

09:41:42 6
09:41:42 7 COMMISSIONER: This is Mr Nathwani's application.

09:41:46 8
09:41:46 9 MR WOODS: Yes, it is but I thought if he knows what my
09:41:48 10 position is it might expedite things, and Mr Thomas as
09:41:52 11 well. In my submission, so the evidence that was given was
09:41:57 12 obviously adverse to Ms Gobbo's interests and wasn't given
09:42:01 13 on notice to Ms Gobbo, and as the Commissioner knows it was
09:42:05 14 something the Commission found out about essentially - - -

09:42:07 15
09:42:08 16 COMMISSIONER: As it was happening.

09:42:09 17
09:42:09 18 MR WOODS: As it was happening. Now, there's material
09:42:13 19 we're told that is contrary material that demonstrates, or
09:42:16 20 that shows that that evidence can be, evidence of
09:42:19 21 [REDACTED] can be attacked. In the circumstances it's my
09:42:25 22 submission that Ms Gobbo should be allowed to test that
09:42:29 23 evidence. The way in which I would submit is the most
09:42:34 24 efficient way to test the evidence is that the contrary
09:42:37 25 material, they're text messages as I understand it, should
09:42:41 26 be provided to [REDACTED]. [REDACTED] can decide whether or
09:42:47 27 not he wants to give a written response to those and
09:42:51 28 explain himself and explain his evidence, or his response
09:42:55 29 to those messages. If on the basis of receiving that
09:43:00 30 document Ms Gobbo and her counsel still wish to
09:43:05 31 cross-examine the witness then they should have an
09:43:07 32 opportunity to do so. A number of things could happen,
09:43:11 33 just hypothetically in that written response, it might be
09:43:14 34 that the evidence is confirmed, withdrawn, changed, all of
09:43:18 35 those sorts of things. We simply don't know until the
09:43:21 36 adverse material is put. Then certainly if the application
09:43:27 37 to cross-examine is pressed on the basis of any written
09:43:31 38 material that is provided, it would have to be provided
09:43:34 39 voluntarily too I point out, under the Act, then that could
09:43:38 40 be done by phone hook up rather than the more complicated
09:43:42 41 arrangements that would otherwise have to take place, and
09:43:46 42 simply a pack of documents that were going to be, the
09:43:49 43 witness was going to be taken to could be provided to the
09:43:52 44 witness so he wouldn't need to have a video link for
09:43:57 45 example, and it could simply happen by phone. That is my
09:44:01 46 submission. I'm sorry for jumping up before the
09:44:02 47 application is made but I thought - - -

09:44:02 1
09:44:02 2 COMMISSIONER: It might short-circuit things, we'll see.
09:44:06 3 Mr Nathwani.
09:44:06 4
09:44:07 5 MR NATHWANI: It does. You have in a writing, and I know
09:44:09 6 Mr Thomas does also, the submissions we make. Just as a
09:44:12 7 statement of fact, no criticisms whatsoever, but his client
09:44:18 8 provided evidence absent a witness statement and therefore
09:44:21 9 there was always a possibility where something arose
09:44:25 10 ex improviso as it did, and adverse to Ms Gobbo, that there
09:44:30 11 would be a potential for parties adversely impacted and
09:44:33 12 unaware of what was to come to seek to recall the witness.
09:44:36 13
09:44:37 14 COMMISSIONER: As you know, Mr Nathwani, we have no power
09:44:38 15 to order anyone to make a statement.
09:44:40 16
09:44:41 17 MR NATHWANI: No, no, I understand that. All I'm saying is
09:44:43 18 it's just as a circumstance no statement was given and
09:44:46 19 therefore there was always the live possibility that new
09:44:49 20 material, material that we weren't expecting would come
09:44:53 21 out, and it didn't just come out, there was a whole topic
09:44:57 22 in relation to it which is adverse to Ms Gobbo. It was
09:44:59 23 cross-examined on the basis that it's relevant and
09:45:02 24 therefore if there's any adverse finding to be made against
09:45:06 25 her based on that material we should be given the
09:45:08 26 opportunity, or she should through us to challenge that
09:45:10 27 evidence.
09:45:10 28
09:45:11 29 COMMISSIONER: Yes.
09:45:11 30
09:45:11 31 MR NATHWANI: So, we certainly, even though it's our
09:45:16 32 submission, note the position of the counsel of the
09:45:19 33 Commission on this application.
09:45:20 34
09:45:20 35 COMMISSIONER: Are you content with what's suggested that
09:45:24 36 we provide the material, give [REDACTED] an opportunity to
09:45:28 37 provide a statement and then once you've seen that, then
09:45:31 38 cross-examine by telephone with someone from the Commission
09:45:35 39 having all the documents that you'll be referring to?
09:45:37 40
09:45:38 41 MR NATHWANI: Yes.
09:45:38 42
09:45:38 43 COMMISSIONER: Given [REDACTED] circumstances.
09:45:41 44
09:45:41 45 MR NATHWANI: Yes. I've spoken to Mr Thomas and other
09:45:45 46 counsel at the Bar table responsible for - given
09:45:50 47 [REDACTED] circumstances about the logistics I'm told

09:45:54 1 what's proposed could easily be accommodated.

09:45:55 2
09:45:56 3 COMMISSIONER: All right then. Mr Thomas.

09:45:57 4
09:45:58 5 MR THOMAS: The application is opposed. As I understand it
09:46:01 6 the application is put on the basis that the Commission
09:46:06 7 should afford Ms Gobbo procedural fairness and therefore
09:46:14 8 recall [REDACTED]. The fact is this: Ms Gobbo has been
09:46:20 9 represented throughout these proceedings, has had
09:46:24 10 instructing solicitors, there has been senior and junior
09:46:28 11 counsel available to Ms Gobbo. It has been a matter that
09:46:32 12 has been well-known before [REDACTED] was called that there
09:46:36 13 was a suggestion that [REDACTED] had [REDACTED] Ms Gobbo [REDACTED]
09:46:41 14 [REDACTED]. This was a matter that one would expect Ms Gobbo's
09:46:47 15 legal representatives would have been well across and be in
09:46:53 16 a position to cross-examine. It would not have come as any
09:46:57 17 surprise whatsoever that there was the evidence [REDACTED]
09:47:02 18 having [REDACTED]. What's more, as I understand it - -
09:47:06 19 -

09:47:06 20
09:47:07 21 COMMISSIONER: But that's not the only point, Mr Thomas.

09:47:10 22
09:47:10 23 MR THOMAS: It's not the only point.

09:47:11 24
09:47:12 25 COMMISSIONER: No, it's not.

09:47:13 26
09:47:14 27 MR THOMAS: What's more, the other point is of course this
09:47:16 28 suggestion of the effort to have [REDACTED] involved in the
09:47:21 29 [REDACTED]

09:47:22 30
09:47:22 31 COMMISSIONER: Whilst he was [REDACTED].

09:47:25 32
09:47:25 33 MR THOMAS: Whilst [REDACTED] Now what is
09:47:27 34 sought, as I understand it, is to then contradict
09:47:31 35 [REDACTED] version of events, which is of course adverse
09:47:34 36 to him, by way of the provision of these text messages.
09:47:39 37 Text messages that were in the possession, as I understand
09:47:42 38 it, of the legal representatives of Ms Gobbo before
09:47:47 39 [REDACTED] gave evidence. Text messages which were not
09:47:52 40 provided to the Commission, despite a Notice to Produce,
09:47:57 41 that covered those text messages. So there was not only
09:48:05 42 the opportunity to cross-examine, there was the material
09:48:09 43 available at the time, and the complaint is made weeks
09:48:15 44 after the event that, well, we didn't have the opportunity.
09:48:21 45 My learned friend was the person who engaged in the
09:48:27 46 cross-examination. He did not seek to have the matter
09:48:30 47 stood down. He did not seek to have the matter adjourned.

09:48:34 1 There was a break between the end of his cross-examination
09:48:39 2 and the beginning of the cross-examination for the police
09:48:43 3 handlers. Nothing occurred. So what's resulted has been
09:48:54 4 as a result of the failure of Ms Gobbo's legal
09:48:57 5 representatives to take up the opportunity that they had.
09:49:05 6 We are in a position that we don't have Ms Gobbo's
09:49:08 7 statement, which I understand has been provided in an
09:49:11 8 unsigned form to the Commission.
09:49:16 9

09:49:17 10 COMMISSIONER: A statement on this topic, there hasn't been
09:49:20 11 one.
09:49:20 12

09:49:20 13 MR THOMAS: I don't know.
09:49:21 14

09:49:22 15 COMMISSIONER: There hasn't been. We don't have any
09:49:24 16 statements from Ms Gobbo on this issue at all.
09:49:27 17

09:49:28 18 MR THOMAS: All right. Well I'm just referring to the
09:49:33 19 reference in the material and obviously, Commissioner, we
09:49:39 20 don't get provided with this material so we've got to
09:49:45 21 guess, where there was an unsigned statement provided along
09:49:51 22 with transcripts of discussions.
09:49:52 23

09:49:53 24 COMMISSIONER: Well that's nothing to do with this issue,
09:49:55 25 that was another issue.
09:49:57 26

09:49:58 27 MR THOMAS: I'm grateful to be told that. We don't know
09:50:01 28 whether Ms Gobbo is going to give any evidence. We don't
09:50:04 29 know if there's any instructions on this point. If there
09:50:09 30 isn't any instructions, why there isn't any instructions,
09:50:13 31 but if there is instructions when those instructions were
09:50:16 32 given. It seems to be well and truly within the power of
09:50:22 33 the representatives of Ms Gobbo to obtain a statement from
09:50:26 34 her on this point and to provide it.
09:50:30 35

09:50:31 36 COMMISSIONER: Well I've asked for that. Not only on this
09:50:35 37 point but on everything and it hasn't been forthcoming.
09:50:39 38

09:50:40 39 MR THOMAS: Exactly Commissioner. They have been afforded
09:50:44 40 procedural fairness and they now seek to be in a position
09:50:50 41 where our client, who is very concerned about his safety,
09:50:53 42 very concerned about being basically outed, is being sought
09:51:01 43 to be brought back. And they had absolutely every
09:51:05 44 opportunity and failed to take it and it is, with respect
09:51:10 45 to my learned friend, extraordinary that in circumstances
09:51:14 46 where there is an established firm of solicitors, very
09:51:20 47 established, senior and junior counsel, and that this is a

09:51:23 1 witness that one would have thought would be central to
09:51:27 2 their client's position, that they weren't in a position,
09:51:32 3 it appears, to cross-examine on the material that they
09:51:37 4 themselves already had.
09:51:38 5
09:51:38 6 COMMISSIONER: I think you're just repeating yourself,
09:51:42 7 Mr Thomas.
09:51:42 8
09:51:43 9 MR THOMAS: I am now, Commissioner, so I'll sit down. The
09:51:45 10 only further matter is in relation to that second point
09:51:47 11 that, Commissioner, you raised regarding the subsequent
09:51:52 12 meeting. One would think that it's only peripherally
09:51:57 13 relevant to the Terms of Reference, because unless I'm
09:52:06 14 unaware and there's some suggestion that that meeting was
09:52:08 15 proposed or suggested by the police handlers, as opposed to
09:52:12 16 Ms Gobbo being on a frolic of her own, it only would seem
09:52:16 17 to have very limited relevance to the Terms of Reference.
09:52:19 18
09:52:20 19 COMMISSIONER: Limited to credit.
09:52:21 20
09:52:21 21 MR THOMAS: Indeed.
09:52:22 22
09:52:22 23 COMMISSIONER: That's true. Mr Nathwani, is there anything
09:52:25 24 you wanted to say in response?
09:52:26 25
09:52:27 26 MR NATHWANI: No, thank you.
09:52:27 27
09:52:28 28 COMMISSIONER: Mr Woods, anything in response?
09:52:30 29
09:52:30 30 MR WOODS: No, thank you.
09:52:31 31
09:52:31 32 COMMISSIONER: I've listened carefully to the submissions
09:52:33 33 made by Mr Cooper's counsel and I appreciate that it is
09:52:37 34 very upsetting for Mr Cooper to have to come back in the
09:52:43 35 present circumstances, given the concerns about his safety
09:52:50 36 and the genuine concerns about his safety, but I am
09:52:54 37 persuaded that in the interests of procedural fairness to
09:52:59 38 Ms Gobbo it is appropriate to have him recalled by
09:53:03 39 telephone for a very limited purpose. I expect the
09:53:07 40 examination will be very brief in time if it does
09:53:12 41 eventuate. I think that Mr Cooper was excused, so it will
09:53:19 42 probably be necessary to issue a fresh notice to appear.
09:53:23 43
09:53:23 44 MR WOODS: It depends, Commissioner. If the Commissioner's
09:53:27 45 minded to take up my submission of Mr Cooper being provided
09:53:30 46 with the material that's sought to be cross-examined on
09:53:33 47 first and his on advice deciding whether or not he wants to

09:53:38 1 put something in writing, depending on the outcome of that
09:53:41 2 he might not need to be recalled.

09:53:44 3
09:53:44 4 COMMISSIONER: It might not be necessary, all right then.

09:53:46 5
09:53:46 6 MR WOODS: If that happened quite quickly then we'd have an
09:53:50 7 answer to it in a couple of days I would have thought.

09:53:51 8
09:53:52 9 COMMISSIONER: All right then. I do propose to adopt the
09:53:56 10 suggestion put forward by counsel assisting and acceded to
09:54:00 11 by Mr Nathwani on behalf of Ms Gobbo that Ms Gobbo's
09:54:04 12 lawyers will provide the material to Mr Cooper's counsel
09:54:09 13 and to the Commission which they say is relevant and give
09:54:17 14 him the opportunity, if he wishes, to produce a statement
09:54:20 15 in response and we'll deal with it further when we've seen
09:54:30 16 the statement I suppose, that's what we'll do.

09:54:32 17
09:54:32 18 MR WOODS: I think that's right. And the solicitors
09:54:34 19 assisting will be in communication to work out some time
09:54:37 20 lines in which that could happen but we expect it to be
09:54:40 21 quite quick.

09:54:41 22
09:54:41 23 COMMISSIONER: Yes. Hopefully we won't need to have
09:54:44 24 another application in respect of it, it will either be
09:54:47 25 sorted out with a further statement or by arranging for him
09:54:52 26 to give brief, the necessary brief evidence by telephone
09:54:55 27 link. Will that be this year?

09:54:58 28
09:54:58 29 MR WOODS: I would have thought so because it's a very
09:55:00 30 short point.

09:55:01 31
09:55:01 32 COMMISSIONER: It is a very short point, we should be able
09:55:04 33 to tuck it in very easily. That will happen hopefully this
09:55:09 34 year.

09:55:10 35
09:55:10 36 MR WOODS: Commissioner, there is another application on
09:55:12 37 Mr Cooper's behalf and it's for transcripts of witnesses
09:55:16 38 who give evidence relevant to his interests. It seems that
09:55:20 39 almost every witness has. We haven't, the Commission
09:55:24 40 hasn't granted standing leave to non-Government parties or
09:55:30 41 police parties or Ms Gobbo, however it might be that
09:55:36 42 something approximating standing leave should be granted
09:55:39 43 for him because so many witnesses have given relevant
09:55:43 44 evidence. The difficulty is the administrative process
09:55:48 45 that will be required to sift through transcript to
09:55:52 46 provide, or to determine which bits are and are not
09:55:55 47 relevant is a very complicated process and against that is

09:55:59 1 an undertaking that both his solicitor and counsel are
09:56:01 2 prepared to give in the usual terms that other potentially
09:56:05 3 affected people have said they would give. I'm not
09:56:08 4 suggesting transcript from closed closed hearings that
09:56:13 5 aren't relevant to him, rather he would be able to get the
09:56:17 6 transcripts that are, that have happened to date and I
09:56:20 7 think he has a number of those, but also those going
09:56:22 8 forward. I think there was a stoppage some time in
09:56:26 9 November and he hasn't had transcript since then. So in my
09:56:31 10 submission he should be entitled to those on the usual
09:56:35 11 undertaking of his counsel and solicitors.
09:56:37 12
09:56:38 13 COMMISSIONER: Could you just clarify what order you're
09:56:40 14 asking me to make?
09:56:41 15
09:56:41 16 MR WOODS: The application as I understand it is that in
09:56:43 17 the manner that an affected person might seek standing
09:56:47 18 leave for a particular witness and whether or not their
09:56:50 19 counsel and solicitor attend the Commission, they're
09:56:53 20 entitled to get the transcript for that witness.
09:56:56 21
09:56:57 22 COMMISSIONER: That is if they have leave, not standing
09:56:59 23 leave. If they have leave.
09:56:59 24
09:57:00 25 MR WOODS: Sorry, if they have leave for that witness. But
09:57:02 26 the point with Mr Cooper is that so many witnesses have
09:57:04 27 given evidence relevant to his interests, not all witnesses
09:57:08 28 mind you, and not all parts of every witness's evidence.
09:57:12 29
09:57:12 30 COMMISSIONER: I understand the point, I'm just wanting to
09:57:14 31 know what order you want me to make.
09:57:18 32
09:57:18 33 MR WOODS: It might be best if I allow Mr Thomas to - - -
09:57:20 34
09:57:22 35 COMMISSIONER: Mr Thomas, could you articulate the order
09:57:24 36 you're wanting?
09:57:26 37
09:57:26 38 MR THOMAS: We would seek transcript which refers to Mr
09:57:27 39 Cooper and we would seek an order that a transcript of all
09:57:29 40 witnesses that have given evidence - - -
09:57:32 41
09:57:32 42 COMMISSIONER: That puts an onus on the Commission and
09:57:35 43 we're very stretched as it is.
09:57:37 44
09:57:37 45 MR THOMAS: Then we give an undertaking - - -
09:57:39 46
09:57:40 47 COMMISSIONER: Hang on. Are we able to do that? Is it

09:57:44 1 possible for the Commission staff to search transcripts and
09:57:49 2 just find out where Mr Cooper's mentioned - - -
09:57:52 3
09:57:53 4 MR WOODS: It's incredibly difficult. I undertook a brief
5 process the other day - - -
6
7 COMMISSIONER: This is the problem.
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09:57:56 9 MR WOODS: The problem is he's spoken about in such guarded
09:58:00 10 terms in opening hearings.
09:58:02 11
09:58:02 12 COMMISSIONER: It's hard to pick up in searches.
09:58:07 13
09:58:07 14 MR WOODS: The various pseudonyms aren't referred to. It's
09:58:07 15 very difficult to pick up on. What has occurred is the
09:58:10 16 solicitors assisting have gone through a list of witnesses
09:58:14 17 to date, and I think that might have been provided, whether
09:58:18 18 or not they've mentioned Cooper has been provided to
09:58:22 19 Mr Cooper's solicitors. So it might be as simple as just
09:58:26 20 getting those transcripts to those individuals, but even so
09:58:29 21 because there's multiple witnesses - - -
09:58:31 22
09:58:32 23 COMMISSIONER: The order would be me for to give him leave
09:58:37 24 in respect of those witnesses, that's easily done.
25
26 MR WOODS: That's correct.
27
09:58:39 28 COMMISSIONER: Then he will get the transcripts. I'm just
09:58:42 29 a bit concerned about standing leave and getting all
09:58:46 30 transcripts for everything.
09:58:46 31
09:58:47 32 MR WOODS: Well, certainly not every single witness has
09:58:48 33 given relevant evidence to his interests. It's simply the
09:58:52 34 administrative process that becomes a very difficult one
35 given all of the tasks that the Commission has in front of
09:58:57 36 it.
09:58:57 37
09:58:58 38 COMMISSIONER: Have we got a list of witnesses that we know
09:59:04 39 - - -
09:59:04 40
09:59:05 41 MR WOODS: Given that solicitors assisting have compiled a
09:59:08 42 list of relevant witnesses, it might be that we'll provide
09:59:13 43 that list to Victoria Police and the State and they can - -
09:59:23 44 -
09:59:23 45
09:59:24 46 COMMISSIONER: They might be able to add to it. They might
09:59:26 47 know other witnesses who have given relevant evidence about

09:59:31 1 Mr Cooper that can be added to it, then it will be a
09:59:34 2 question of making sure Mr Cooper's lawyers have given the
09:59:40 3 necessary undertaking.
09:59:41 4
09:59:42 5 MR WOODS: Yes, which I understand in writing they've
09:59:43 6 already said they give the undertaking for whatever they
09:59:46 7 receive. It might be then that what we'll do is we'll
09:59:48 8 share the list that has been compiled and provided to
09:59:51 9 Mr Cooper's solicitors with Victoria Police and the State.
09:59:55 10 They can then - - -
09:59:58 11
09:59:58 12 COMMISSIONER: And perhaps the DPP and the Commonwealth
10:00:01 13 DPP. I don't think Mr Cooper is involved with the
10:00:04 14 Commonwealth DPP, is he?
10:00:06 15
10:00:06 16 MR WOODS: We might just give it to parties with standing
10:00:10 17 leave. They might have something to say.
10:00:10 18
10:00:10 19 COMMISSIONER: That might have, but they might be able to
10:00:11 20 add to the list, that's the point I'm making.
21
22 MR WOODS: Yes.
23
10:00:14 24 COMMISSIONER: They might know other witnesses who might
10:00:16 25 have given evidence relevant to Mr Cooper. In principle
10:00:18 26 the notion that Mr Cooper should have leave in respect of
10:00:23 27 the witnesses who have given evidence relevant to him seems
10:00:28 28 to be an appropriate one.
10:00:29 29
10:00:29 30 MR WOODS: That's precisely what I was going to say, and I
10:00:32 31 want to circumvent there being an argument in the
10:00:35 32 background about whether or not he gets the transcripts of
10:00:38 33 certain witnesses. The logic is that he gets the evidence
10:00:41 34 of witnesses who gave evidence about him.
10:00:43 35
10:00:44 36 COMMISSIONER: All right. Nothing more you want to say
10:00:46 37 about that?
10:00:46 38
10:00:47 39 MR THOMAS: Other than not just in relation to the past but
10:00:49 40 in relation to future witnesses, which will be a relatively
10:00:53 41 easy process because as witnesses are called the Commission
10:00:55 42 will know as to which of those witnesses are giving that
10:00:59 43 relevant evidence.
10:01:04 44
10:01:05 45 COMMISSIONER: There are degrees of judgment here, so we
10:01:10 46 can't - we're not representing your client, so you can
10:01:14 47 really tell us when you want leave, Mr Thomas.

10:01:16 1
10:01:17 2 MR THOMAS: Then in relation to the transcripts of all the
10:01:20 3 future proceedings so we can make, we can - - -
10:01:22 4
10:01:23 5 COMMISSIONER: No, you have to establish you've got an
10:01:25 6 interest in them. Now if we discover you have an interest
10:01:28 7 in them, we'll let you know, but we're not making any
10:01:32 8 promises.
10:01:33 9
10:01:34 10 MR THOMAS: Well, with respect, we can't know what we don't
10:01:38 11 have the information for and we can't apply for things that
10:01:42 12 we're not being provided with the information in relation
10:01:46 13 to. So it becomes a nonsense.
10:01:49 14
10:01:49 15 COMMISSIONER: There we go. I've said what I've said.
10:01:52 16 Thank you. Anything else you want to say?
10:01:55 17
10:01:55 18 MR THOMAS: I'm just trying to clarify as to whether
10:01:59 19 there'll be an order which affords procedural fairness to
10:02:02 20 Mr Cooper.
10:02:02 21
10:02:02 22 COMMISSIONER: I've said I'm prepared to give leave to any,
10:02:07 23 for you to appear in respect of any witnesses that give
10:02:13 24 evidence relevant to Mr Cooper's interests.
10:02:18 25
10:02:18 26 MR THOMAS: In future?
10:02:22 27
10:02:23 28 MR WOODS: Mr Cooper would be in no different position to
10:02:26 29 the other affected people who just need to monitor the
10:02:28 30 witnesses who are upcoming.
10:02:30 31
10:02:30 32 COMMISSIONER: Exactly.
10:02:31 33
10:02:32 34 MR WOODS: It is usual for them to come to counsel
10:02:37 35 assisting and say, as has happened in the last few days
10:02:37 36 with some of the other affected people, "These senior
10:02:38 37 police, do they affect my client's interests" and we can
10:02:41 38 simply tell them that and we're happy to do the same for
10:02:44 39 Mr Cooper. I think as a general principle, given the
10:02:47 40 seniority of officers who are now coming before the
10:02:50 41 Commission, many of them will be relevant to Mr Cooper, but
10:02:53 42 we can certainly liaise with Mr Cooper's counsel and
10:02:57 43 solicitors in that regard moving forward and they can
10:03:00 44 freely talk to us.
10:03:01 45
10:03:01 46 COMMISSIONER: What I need from Mr Cooper's lawyers is, and
10:03:06 47 the Commission has already assisted with this in terms of

10:03:10 1 past witnesses, is a list of those who they say affect
10:03:19 2 Mr Cooper's interests and an application for leave in
10:03:23 3 respect of those specific people. Moving forward that's
10:03:27 4 the same position.
10:03:28 5
10:03:29 6 MR WOODS: Yes.
10:03:29 7
10:03:30 8 COMMISSIONER: It's a matter for them to apply for leave.
10:03:33 9 The Commission does not have an onus to tell them to apply
10:03:36 10 for leave.
10:03:36 11
10:03:37 12 MR WOODS: Yes.
10:03:37 13
10:03:37 14 COMMISSIONER: That is the position.
10:03:41 15
10:03:41 16 MR WOODS: No doubt that causes difficulty and has for
10:03:44 17 other people in the situation where sometimes they don't
10:03:46 18 know what the evidence is going to be, that's the
10:03:48 19 environment we're in unfortunately.
10:03:51 20
10:03:51 21 COMMISSIONER: That is the environment we're in. Sometimes
10:03:52 22 we don't know what the evidence is going to be either.
23
10:03:55 24 MR WOODS: That's right.
10:03:55 25
10:03:55 26 MR THOMAS: But there are occasions where there have been
10:03:57 27 statements provided. If we have the statements we can
10:03:59 28 undertake a review.
10:04:01 29
10:04:01 30 COMMISSIONER: The trouble with statements being provided
10:04:04 31 is they're subject to PII, and this all takes time and it's
10:04:08 32 not done before the witnesses are called. That's the
10:04:10 33 trouble. If we're able to provide them to you consistent
10:04:15 34 with PII claims, we do so. If we're not able to do that we
10:04:21 35 cannot do it. It's as simple as that, Mr Thomas.
10:04:24 36
10:04:24 37 MR THOMAS: My understanding is that was what was
10:04:27 38 occurring, and then for no apparent reason it stopped after
10:04:31 39 Mr Cooper had given his evidence, as if suddenly it was no
10:04:34 40 longer relevant. So what we're asking is to go back to the
10:04:38 41 situation that existed previously and the arrangement that
10:04:42 42 existed previously, certainly bearing in mind the
10:04:46 43 possibility that Mr Cooper may end up being recalled. Not
10:04:49 44 only in relation to the witnesses that have given evidence
10:04:53 45 but witnesses that will be giving evidence.
10:04:54 46
10:04:55 47 COMMISSIONER: He'll only be being recalled on that very

10:04:57 1 tiny point, on nothing else is he being recalled on, okay.
10:05:01 2
10:05:02 3 MR THOMAS: I totally understand that with respect,
10:05:04 4 Commissioner, but his interests are affected by persons who
10:05:07 5 - - -
10:05:07 6
10:05:07 7 COMMISSIONER: All right. Let's just see. Has there been
10:05:10 8 a change since Mr Cooper gave his evidence in the provision
10:05:13 9 of material to his lawyers?
10:05:15 10
10:05:17 11 MR WOODS: Apparently it has but he finds himself in the
10:05:21 12 same position as other affected people in that he just has
10:05:25 13 to apply in relation to particular witnesses.
10:05:27 14
10:05:28 15 COMMISSIONER: So what were we doing before that we're not
10:05:32 16 doing now?
10:05:33 17
10:05:33 18 MR WOODS: I think there were transcripts provided in
10:05:35 19 relation to some witnesses up until November as I
10:05:37 20 understand it. Witnesses that he had leave in relation to.
10:05:40 21
10:05:40 22 COMMISSIONER: But that's the point. Nothing has changed.
10:05:46 23 The system hasn't changed since he gave evidence. He's
10:05:51 24 given the transcripts in the closed hearings relevant to
10:05:55 25 witnesses - relating to witnesses that are relevant to his
10:06:00 26 interests.
10:06:00 27
10:06:00 28 MR WOODS: Yes.
10:06:00 29
10:06:00 30 COMMISSIONER: But he has to apply for leave.
31
32 MR WOODS: Yes, he does.
33
10:06:03 34 COMMISSIONER: He has to apply for leave and identify those
10:06:05 35 witnesses, it's not for the Commission to do that.
10:06:07 36
10:06:08 37 MR WOODS: Once they're identified he gets the transcripts
10:06:10 38 for those people, that's right.
10:06:13 39
10:06:13 40 COMMISSIONER: I think that's clear, Mr Thomas.
10:06:15 41
10:06:15 42 MR THOMAS: In a catch-22 sense with respect. He can apply
10:06:20 43 for leave on the basis of material he can't have to obtain
10:06:23 44 the material to know what's in it. That seems with respect
10:06:27 45 to be what the position of the Commission is. He will not
10:06:30 46 know necessarily what witnesses are going to be in a
10:06:37 47 position to comment on his interests, particularly those

10:06:41 1 that are higher up in Victoria Police.

10:06:43 2
10:06:43 3 COMMISSIONER: Every potentially affected person is in the
10:06:46 4 same category, they liaise with the solicitors assisting
10:06:51 5 and counsel assisting and they work that out with them
10:06:55 6 beforehand so they know who to apply for leave in respect
10:07:00 7 of. That's what you do.

10:07:00 8
10:07:01 9 MR THOMAS: Well with respect - - -

10:07:02 10
10:07:02 11 COMMISSIONER: Mr Thomas.

10:07:03 12
10:07:03 13 MR THOMAS: Commissioner, it is a ridiculous position to
10:07:05 14 say he will seek leave - - -

10:07:07 15
10:07:07 16 COMMISSIONER: Mr Thomas, I have told you, I have told you
10:07:10 17 what my ruling is. Sort out with past witnesses the list
10:07:16 18 with the lawyers assisting the Commission, which ones in
10:07:21 19 the past that you haven't got leave for you need leave for.
10:07:25 20 In the future liaise with them and apply for leave for
10:07:28 21 those who will affect your interest. You say you don't
10:07:31 22 have the statements, that might be true. Liaise with the
10:07:34 23 lawyers for the Commission. They will give you some
10:07:36 24 indication as to whether or not it affects your interests,
10:07:39 25 all right.

10:07:40 26
10:07:40 27 MR WOODS: Just to explain how that happens on a basic
10:07:44 28 level. We regularly receive emails from the counsel and
10:07:47 29 solicitors who are representing potentially affected
10:07:51 30 people. When those names of the next witnesses come up on
10:07:55 31 the web page we will receive emails, both my instructing
10:07:59 32 solicitors and us counsel saying, "Can you tell us whether
10:08:03 33 or not this person might affect our interests?" We give
10:08:05 34 them a simple yes or no. They then make their application
10:08:10 35 and it's either supported or not supported. That's what
10:08:12 36 I'd invite Mr Cooper's people to follow and I'm happy to
10:08:14 37 discuss that more with them outside the Commission.

10:08:15 38
10:08:15 39 COMMISSIONER: I've given my ruling. If you want the
10:08:18 40 transcripts you have to apply for leave to appear in
10:08:21 41 respect to those witnesses. For past witnesses that you
10:08:24 42 haven't got leave for, liaise with the solicitors
10:08:29 43 assisting, who provide a list which they think might help
10:08:33 44 you. That will also be provided to those with standing
10:08:38 45 leave, they might be able to add some to those. In going
10:08:40 46 forward liaise with them as to what witnesses are likely to
10:08:41 47 give evidence with respect to your client and apply for

10:08:43 1 leave. That is the procedure. Understood? Thank you.
10:08:46 2 All right, we'll deal with the next matter now, thank you.

10:08:48 3
10:08:49 4 MR THOMAS: If I may be excused.
5

10:08:51 6 COMMISSIONER: Thank you. What's the next matter? I think
10:08:53 7 that means we can go into open hearing?

10:08:55 8
10:08:56 9 MR WOODS: It does, Commissioner. The two remaining issues
10:08:58 10 are the reasonable excuse application and then the
10:09:01 11 transcripts and draft statement being tendered.

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11:03:49 1 PROCEEDINGS IN CAMERA:

11:04:27 2
11:04:27 3 MR NATHWANI: I'm sorry we've had to go into closed. I
4 remember on the last occasion we went into closed there was
5 an issue where in fact recording equipment carried on
11:04:42 6 recording and we had to stop to reset it and the like.

11:04:42 7
11:04:42 8 COMMISSIONER: It's not being streamed, it's recorded.

11:04:44 9
11:04:45 10 MR NATHWANI: I can just see it is typing on here. Last
11:04:49 11 time we had to shut down the whole system so Mr Holt wasn't
11:04:54 12 aware that - - -

11:04:54 13
11:04:54 14 COMMISSIONER: Do we have to shut down the system? Why do
11:04:54 15 we need to do that? What is the problem then?

11:05:11 16
11:05:12 17 MR WOODS: I think the issue is, Commissioner, that if it's
11:05:14 18 transcribed then it makes it's way into the transcript at
11:05:18 19 the end of the day, whereas if we pause the proceeding and
11:05:21 20 someone from Epiq can excise that part of it - I might be
11:05:21 21 wrong about that.

11:05:26 22
11:05:26 23 MR NATHWANI: And the Live Note I think as well. The Live
11:05:29 24 Note carries on everything I say and will remain there
11:05:30 25 until the end of the day.

11:05:30 26
11:05:31 27 COMMISSIONER: Can't we at the end of the day - so we can't
11:05:33 28 use the live transcript?

11:05:35 29
11:05:35 30 MR NATHWANI: It just means, for example, if Mr Holt or
11:05:37 31 anybody were to look at the Live Note.

32
33 COMMISSIONER: If it means we can't use the live transcript
34 until the end of the day, we've got to deal with it.

35
11:06:13 36 MR NATHWANI: If it assists, another way of dealing with it
11:06:16 37 is we could park on this and deal with the next argument,
11:06:22 38 but I imagine some of my next submissions will be based on
11:06:25 39 the decision of this.

11:06:30 40
41 MR WOODS: Apparently Epiq don't take long to get here when
11:06:30 42 they're on notice so if we were to take the break now we
11:06:33 43 could probably deal with it in the usual way I think, which
11:06:35 44 is that they could break the transcript and - - -

11:06:38 45
11:06:38 46 COMMISSIONER: Is that the best thing?
11:06:53 47

11:06:53 1 MR WOODS: It's fair enough that Mr Nathwani gets a free
11:06:56 2 hand to address these things too.

11:06:58 3
11:06:58 4 COMMISSIONER: Okay, we'll take the midmorning break.

11:08:44 5
11:08:44 6 (Short adjournment.)

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