



**Royal Commission
into the Management of Police Informants**

**Counsel Assisting reply submissions with respect to
Terms of Reference 1 and 2**

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REPLY SUBMISSION: INTRODUCTION AND GENERAL ISSUES

1. Counsel Assisting provide these submissions in order to reply to particular responsive submissions made on behalf of parties.
2. These submissions do not seek to reply to every responsive submission that the Commission has received. When a responsive submission is addressed, these submissions do not seek to respond to each and every matter contained in that responsive submission. Rather, these submissions seek to reply to matters of particular significance which may assist the Commissioner in determining various contested issues or proposed findings.
3. The Commissioner should note that unless Counsel Assisting have specifically withdrawn or conceded a submission contained in their primary submissions, the contents of the primary submissions are pressed, whether or not they are further identified in this reply submission.
4. Unless otherwise stated, reference to the submissions of Counsel Assisting should be taken to be reference to Volume 2, the Narrative Submissions.

PROCEDURAL FAIRNESS

Introduction

5. In a number of the responsive submissions issue is taken with the procedural fairness of the Commission, and allegations of apprehended or actual bias are made against Counsel Assisting.¹
6. For example, Ms Gobbo makes a number of criticisms of the Commission and Counsel Assisting in the Executive Overview and Chapter 1 of her submissions, under the banner of “procedural fairness”. In short, Ms Gobbo asserts that by reason of the “nature and conduct of counsel”² both the hearing rule and the rule against bias have been contravened and she has been denied procedural fairness.
7. Other parties, such as the Handlers, Mr Overland APM (Mr Overland) and Victoria Police have also made similar complaints, including regarding alleged bias.³
8. These submissions should not be accepted. The submissions do not make allowance for the particular circumstances of the Commission’s inquiry, the terms of reference and the different way in which the requirements of procedural fairness operate in the context of an investigative commission of inquiry as opposed to an adversarial court proceeding.
9. Further, when one considers the detail of the complaints, they are often unfounded, and involve a misrepresentation of the evidence and the conduct of Counsel Assisting. While some of the parties refer to the duties of Counsel Assisting,⁴ it should also be remembered that all Counsel have duties when making allegations of serious misconduct, including bias.⁵

The Hearing Rule

Relevant principles

10. Counsel Assisting accept, as we did in Volume 1 of our submissions (Legal Principles) at [58]-[66], that potentially affected persons are entitled to procedural fairness in relation to any adverse findings which might be made against them by the Commissioner.

¹ In *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* (2013) 42 VR 1 (**Victoria Police Special Operations Group**)¹, Kyrou J (as his Honour then was) observed that the duty that the decision-making process be free from actual or apprehended bias is part of the duty of procedural fairness.

² Responsive submissions of Ms Gobbo, [40].

³ Responsive submissions of the SDU, [40], [201], [203]; Responsive submissions of Mr Overland, [19]-[20]; Responsive submissions of Victoria Police, [13.21], [40.16] [52.57], [61.20].

⁴ Responsive submissions of Ms Gobbo, [8]; Responsive submissions of Victoria Police, [9.11].

⁵ Legal Profession Uniform Conduct (Barristers) Rules 2015, r 65.

11. In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,⁶ the Full Court of the Federal Court of Australia said:

It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.

12. The Court in *Alphaone* also observed:⁷

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open to the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

13. However, superior courts have repeatedly stated that the scope and content of a decision-maker's obligation to afford procedural fairness is determined by the particular facts and circumstances of its inquiry.⁸

14. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,⁹ the High Court observed:

It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.

15. In *Kioa v West*¹⁰, Brennan J noted:

The principles of natural justice have a flexible quality which, chameleon-like, evoke a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power...

⁶ (1994) FLR 576, 590 (**Alphaone**).

⁷ (1994) FLR 576, 591–2.

⁸ See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) FLR 576; *Lawrie v Lawler* (2016) 168 NTR 1.

⁹ (2006) 228 CLR 152, 160–161 [26].

¹⁰ (1985) 159 CLR 550, 612 (Brennan J).

16. The scope and content of the obligation to afford procedural fairness is also shaped by matters of practicality, such as the time and resources available to the relevant decision maker, the duration and complexity of its inquiry, the volume of material which the inquiry traverses and budgetary constraints.¹¹
17. Here, the obligation to afford procedural fairness to the parties arises in the context of an administrative inquiry. It is well accepted that the scope and content of the obligation in such a context is not to be equated with the requirements of procedural fairness which govern the exercise of judicial power.¹²
18. The relevant context and circumstances in the present case include the scope of the Commission's powers under the *Inquiries Act 2014* (Vic), the inquisitorial nature of the Commission's inquiry, the Commission's terms of reference, the particular facts and circumstances which inform the Commission's inquiry, the nature of the potentially adverse findings that might be made against affected parties, and Commission's resources, the duration of the Commission's inquiry, and the Commission's reporting deadline.
19. Of particular relevance are the following matters:
 - 19.1. the Commission does not have the power to make any binding or determinative findings of fact or law, nor does it have the power to determine rights;
 - 19.2. the Commissioner's report to the Governor is in the nature of an advisory opinion and has no legal force or effect;
 - 19.3. the Commission's first term of reference requires only that the Commission report as to the extent to which cases *may* have been *affected* by the use of Ms Gobbo. It does not require the Commission to conclude that any case *was* affected, nor to conclude whether the manner in which a case was or may have been "affected" necessarily gives rise to any legal rights, obligations or liabilities. Counsel Assisting's closing submissions have not invited the Commission to make findings beyond that a case "may" have been affected;
 - 19.4. the Commission's findings will not be admissible as evidence of the truth of those findings in any court proceedings, and will not limit, expand or in any way affect the availability of legal redress via the courts, including by way of appeals against conviction or petitions for mercy;
 - 19.5. nonetheless, Counsel Assisting have invited the Commissioner to make significant findings adverse to Ms Gobbo and current or former members of Victoria Police in relation to matters of serious impropriety which, although of no legal effect, have the capacity to cause damage to reputation and entitle those persons to a fair opportunity to be heard in response;
 - 19.6. the Commission's inquiry has been on foot for over 18 months. Vast quantities of evidence and other material (in the form of documents, witness statements and *viva voce* evidence) have been received. The

¹¹ *New South Wales v Canellis* (1994) 181 CLR 309, 324-5, 331 (Mason CJ, Dawson, Toohey and McHugh JJ).

¹² *Ibid*, 329-330 (Mason CJ, Dawson, Toohey and McHugh JJ).

nature and subject matter of the Commission's inquiry has necessitated continuous and quite detailed and complex consideration of public interest immunity (PII) claims raised by Victoria Police in relation to documents and witness statements, which has, from time to time, caused unavoidable delays in the disclosure of material to interested parties, including Ms Gobbo, and has required routine redactions to such documents. The vast majority of the documents received by the Commission have been produced by Victoria Police and almost always subject to some claim for PII. The deadline for the Commissioner's report has been extended twice to accommodate the complexity of the inquiry and the sheer quantity of the material it has been necessary to consider. The final deadline looms. It is within this reality that the Commission is called upon to provide substantive procedural fairness to all the standing leave parties and many others; and

- 19.7. the circumstances surrounding Ms Gobbo's interactions with the Commission have been unique owing to Ms Gobbo's personal circumstances. Ms Gobbo suffers from various medical conditions. Her evidence to the Commission was delayed on a number of occasions due to those conditions. The Commissioner eventually ruled that those conditions did not provide a reasonable excuse for Ms Gobbo refusing to attend to give evidence. However, special procedures were utilised in order to accommodate Ms Gobbo's evidence, having regard to her medical conditions and her other personal circumstances. These personal circumstances also impacted upon the Commission's ability to make documents available for Ms Gobbo's personal perusal in a secure form.
20. The overriding consideration in determining the scope and content of the Commission's obligation to afford procedural fairness is "fairness".¹³ The critical question is whether potentially affected persons received fair notice of the critical issues, facts and evidence which are relevant to the adverse findings which Counsel Assisting have invited the Commissioner to make, and have been afforded a fair opportunity to be heard on those matters and to make submissions in support of their interests. There is no denial of procedural fairness where no practical injustice is shown.¹⁴
21. The requirement of fairness dictates that potentially affected persons be placed in a position where they fairly know what matters and issues are "in the ring".¹⁵ Here, that requirement has been discharged on an ongoing basis throughout the conduct of the Commission's inquiry. The potentially affected persons have been represented by counsel, and the legal representatives for those persons have been afforded access to a vast quantity of documents and transcripts of evidence.
22. Potentially affected persons have been represented by counsel throughout the hearings of the Commission and have had ample opportunity to cross-examine witnesses and listen to evidence and to make and respond to submissions. All of these procedural steps plainly will have placed potentially affected persons on notice of the various matters and issues that are "in the ring" with respect to

¹³ *Lawrie v Lawler* (2016) 168 NTR 1, 59 [333], 62-3 [353]; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 313 (Gibbs CJ).

¹⁴ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [55]-[57].

¹⁵ *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, [44].

their conduct. It should also not be forgotten that Ms Gobbo's conduct as a human source, and the conduct of current and former members of Victoria Police, have previously been the subject of reports by Mr Comrie AO APM and the Hon Mr Kellam AO QC and judgments of the Supreme Court of Victoria, the Court of Appeal and the High Court.

23. The potentially affected persons have also now received comprehensive closing submissions from Counsel Assisting drawing together the evidence upon which they submit the Commissioner should make findings adverse to them, and have been afforded an opportunity to make comprehensive written submissions of their own responding to those submissions, and replying to the submissions of others.

The operation of the rule in *Brown v Dunne*

24. In Victoria Police's responsive submission, it is asserted that Counsel Assisting must have regard to the Commission's obligation to only make findings of fact where satisfied there is a proper basis to do so – and the failure by Counsel Assisting to put a matter or to cross-examine in respect of a matter may not necessarily require a finding to be rejected, but it ought, at the very least, affect the weight attached to that evidence.¹⁶ Victoria Police cites Volume 2 of the Cole Royal Commission into the Building and Construction Industry in purported support of that proposition.¹⁷
25. Such a position appears to underpin many on the complaints with regard to procedural fairness with regard to matters that were not put in cross-examination.
26. It is important to note that, after considering *Brown v Dunne*¹⁸ and contrasting the functions of the courts and the functions of an investigative body such as a Royal Commission, the relevant part of the Cole Royal Commission report states:

*It follows that a Royal Commission is entitled to reject a witness' evidence even if the witness has not been cross-examined in relation to that evidence. Furthermore, the Commission's obligation to conduct an investigation within a specified period of time means that it may not be appropriate for Counsel Assisting to cross-examine a witness about every matter in relation to which his or her evidence may not be accepted. Where, for example, a matter was of peripheral importance to an investigation, or where the weight of evidence in one direction was such that a particular finding was inevitable, cross-examination was not appropriate, notwithstanding that it was subsequently submitted that the witness' evidence should be rejected. If an adverse finding has been made against a witness in this report, then that witness has been given notice of that proposed finding and has had an opportunity to answer it. If no adverse finding has been made, then the Commission's investigation will not damage the rights, interests or legitimate expectations of the witness. In either case, compliance with *Browne v Dunn* was unnecessary.*

¹⁶ Responsive submissions of Victoria Police, p 23, fn 61 referring to Cole Report, Vol 2, 51, [18].

¹⁷ *Ibid.*

¹⁸ (1893) 6 R 67.

Accordingly, I have not rejected any findings of fact that Counsel Assisting submitted should be made solely on the ground that a matter was not 'put' or was not the subject of cross-examination. That said, I of course made findings of fact only where I was satisfied that it was proper to do so, and it was sometimes the case that I attached less weight to evidence that had not been the subject of cross-examination than may have been the case had cross-examination occurred.

27. It is submitted that such an approach should also be taken by this Commission.
28. The Commissioner should bear all the above matters in mind when considering individual complaints about procedural fairness, to which we now turn.

Specific responses to Ms Gobbo's complaints

29. Ms Gobbo's complaints in relation to alleged contraventions of the hearing rule fall into two categories:
 - 29.1. the alleged failure of the Commission to provide her with sufficient time to respond to Counsel Assisting's closing submissions;¹⁹ and
 - 29.2. the alleged failures by the Commission to provide her with timely access to relevant material during the running of the inquiry, and sufficient time to respond to that material.²⁰
30. It is submitted that Ms Gobbo's submissions disclose no contravention of the hearing rule.
31. As to the first category of complaint, it could not seriously be contended by Ms Gobbo that she has had insufficient time to prepare submissions. This inquiry has been on foot for 18 months. Ms Gobbo is a central figure in the inquiry. She has been represented by eminently capable counsel and solicitors throughout the inquiry, who have been present for all relevant evidence and submissions. She gave evidence to the Commission over multiple days and was cross-examined. She has therefore been on notice for many months as to the issues that are "in the ring" relating to her conduct as a human source. This ought to have been apparent to her and her counsel from even a cursory review of the evidence that has been adduced in the Commission's inquiry and the tenor of the questions and submissions made by Counsel Assisting from time to time. Indeed, Ms Gobbo's submission that Counsel Assisting adopted a "pre-conceived narrative" (which is rejected by Counsel Assisting) demonstrates that she has understood, for quite some time, what criticisms were likely to be made of her by Counsel Assisting and, by extension, the critical issues, facts and evidence to which she would need to respond.
32. Ms Gobbo's suggestion that she has only had six weeks to prepare her submissions is simply wrong. She has had many months to consider her position in relation to the evidence and to prepare her responses to the submissions and criticisms that Counsel Assisting were likely to make of her having regard to the matters raised in the evidence and, in particular, in Counsel Assisting's cross-examination of Ms Gobbo. Although it is accepted that some time would have been required for Ms Gobbo to shape and address

¹⁹ Responsive submissions of Ms Gobbo, [64]-[66].

²⁰ Responsive submissions of Ms Gobbo, [47], [50], [51], [53], [54], [56].

her submissions directly to the specific submissions and recommendations contained in Counsel Assisting closing submissions, it is submitted that Ms Gobbo has had ample time to complete this task and that she has, in the event, completed it comprehensively by the filing of robust responsive submissions some 300 pages in length.

33. As to the second category of complaint, Counsel Assisting respond as follows.

Provision of untendered materials.

- 33.1. Ms Gobbo complains that she has not been provided with all untendered materials received by the Commission. But as Ms Gobbo herself concedes, the Commission's obligation to provide procedural fairness does not require the Commission to provide Ms Gobbo with every single document in the Commission's possession which might on some view possibly be relevant. The Commission is not required to disclose information which is in its possession but which the Commission has chosen not to take into account at all in the conduct of the inquiry.²¹ The Commission is only required to provide Ms Gobbo with documents for which there is some legitimate reason to believe (as opposed to a generalised concern or mere speculation) that their contents are relevant, credible and significant.²² Ms Gobbo has not pointed to any document or class of documents to which she has not been granted access, and for which she asserts there is legitimate reason to believe contains information that is relevant, credible and significant.

Provision of statements and exhibits.

- 33.2. Ms Gobbo complains that she was not provided with witness statements and exhibits sufficiently in advance of witnesses giving their evidence to the Commission. Two points are made in response. First, there is no obligation on a Royal Commission or other commission of inquiry, prior to the calling of evidence, to give notice or particulars of that evidence.²³ The obligation to give notice of the evidence upon which potentially adverse findings might be made arises towards the end of the inquiry.²⁴ Here that obligation was discharged by Ms Gobbo being represented by counsel at each hearing at which relevant evidence was adduced, having an opportunity to hear and cross-examine on the evidence, and then receiving Counsel Assisting's closing submissions which marshal and appropriately footnote large tracts of evidence in support of the findings which Counsel Assisting invite the Commissioner to make. No 'practical injustice' has been visited on Ms Gobbo.

²¹ *Minister for Immigration and Border Protection v SZSSJ* (2016) 333 ALR 653, [83].

²² See *Kioa v West* (1985) 159 CLR 550, 628-9; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 590-591; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, [17]-[18]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [32]; *Shields v Chief Commissioner of Police* (2008) 19 VR 33, [41]-[45]; *Shields v Overland* (2009) 26 VR 303, [109]; *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202; *Summersford v Commissioner of Police* [2017] NSWSC 1341, [73]; *Summersford v Commissioner of Police* (2018) 97 NSWLR 831, [68].

²³ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 336 (Brennan J); *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 84 ALR 646, 660 (Wilcox J).

²⁴ *Final Report of the HIH Royal Commission* (2003), Volume 2, [48].

- 33.3. Secondly, the manner and timing of the circulation of witness statements and exhibits throughout the conduct of the Commission's inquiry was largely a product of delays in those materials being produced to the Commission in the first place – often by Victoria Police – and the need for PII claims to be addressed prior to disclosure. This is an example of the requirements of procedural fairness adapting to the facts and circumstances of the particular inquiry and, tellingly, Ms Gobbo points to no specific example of where her ability to cross-examine witnesses was curtailed to such an extent that she has been denied a reasonable opportunity to be heard in response to Counsel Assisting's closing submissions.

Inability of Ms Gobbo to personally view material.

- 33.4. Ms Gobbo complains that the confidentiality undertakings given by her counsel did not permit her counsel to show her particular documents, including ICRs and recordings of conversations between Ms Gobbo and her handlers. She also complains about materials being provided in redacted form. The restrictions on Ms Gobbo's ability to view relevant documents were a function of concerns raised by Victoria Police in relation to the security of those documents and Ms Gobbo's unique living arrangements. The Commission has done the best it can in order to ensure that Ms Gobbo has had a reasonable opportunity to be heard in relation to the contents of all such documents – including by providing the documents to her counsel subject to appropriate undertakings. The issue of redactions is a matter that has plagued the Commission from the commencement of its inquiry. It is a function of the sensitive subject matter of the Commission's inquiry and the myriad of PII claims the inquiry has attracted. In short, rather than constituting a denial of procedural fairness, these are merely further examples of the requirements of procedural fairness being shaped by the particular circumstances confronting the Commission.

Adequacy of time allowed for preparation to give evidence.

- 33.5. Ms Gobbo complains that she was given only two days to prepare with counsel prior to giving her evidence to the Commission and that this was plainly an insufficient amount of time. It is disingenuous for Ms Gobbo to suggest that she was only afforded two days to prepare with counsel for her evidence. To the contrary, she had a substantial period of time spanning many months to prepare for giving evidence.
- 33.6. As stated previously, Ms Gobbo is the central figure in the Commission's inquiry. It was inevitable that she would be summonsed to give evidence. Ms Gobbo had earlier given extensive evidence to the Supreme Court of Victoria in the *AB and EF v CD* proceeding. She was informed on 6 February 2019 of the Commission's intention to summons her to attend to give evidence before the Commission. She was served with a notice to attend to give evidence on 26 February 2019. On 18 March 2019, the Commission accepted that Ms Gobbo had a reasonable excuse for not attending to give evidence based on her medical condition.
- 33.7. Thereafter, there were extensive discussions between Ms Gobbo and the Commission in relation to her capacity to give evidence and the reaching of accommodations for her evidence. This included Ms

Gobbo participating (with her counsel and instructing solicitors) in three recorded conferences with the Commissioner and Counsel Assisting on 20 March 2019, 11 April 2019 and 13 June 2019. On 17 July 2019, the Commission informed Ms Gobbo that it intended to require her to give evidence on 18 September 2019. This date was subsequently postponed to 20 September 2019 and, on 19 September 2019, Ms Gobbo filed medical reports attesting to her inability to attend to give evidence. Further medical reports were produced on 3 and 4 October 2019. On 4 October 2019, the Commissioner did not accept that Ms Gobbo had a reasonable excuse for failing to attend to give evidence and adjourned the matter for further argument on 26 November 2019.

- 33.8. In the event, further medical evidence was produced by Ms Gobbo on 25 November 2019 and 2 December 2019, and a further hearing took place on 4 December 2019 at which the Commissioner formally ruled that Ms Gobbo did not have a reasonable excuse for refusing to attend to give evidence.
- 33.9. On 10 December 2019, Ms Gobbo gave an extensive interview with the Australian Broadcasting Corporation.
- 33.10. During this period and through to February 2020, there was extensive correspondence between the Commission and Ms Gobbo's solicitors in relation to the preparation of a witness statement by Ms Gobbo. It is apparent from the correspondence that Ms Gobbo's counsel and solicitors were in contact with Ms Gobbo throughout this period for the purposes of preparing such a statement. At various stages Ms Gobbo was informed by the Commission that her statement should be provided by 8 March 2019, 15 March 2019, mid-June 2019, 1 September 2019 and 18 November 2019. A draft statement was produced by Ms Gobbo on 9 July 2019 and a final statement was eventually produced on 3 February 2020. Ms Gobbo then gave evidence to the Commission on 4, 5, 6, 7 and 11 February 2020.
- 33.11. In the circumstances set out above, Ms Gobbo's assertion that she only had two days to prepare with counsel for giving evidence does not withstand scrutiny. She had known since February 2019 of the Commission's desire that she give evidence. She was in contact with her legal representatives at various times throughout 2019 and 2020 in relation to the preparation of a statement. And she was aware from 4 December 2019 that she would in fact be required to give evidence – which she eventually did two months later.

Specific instances of unfairness.

- 33.12. Ms Gobbo complains that the unfairness to which she was subjected manifested itself in a number of ways when she gave evidence. Her complaints are as follows:²⁵
- 33.12.1. Ms Gobbo was asked questions about transcripts that she had not heard or read, from up to 15 years ago.²⁶ She responded at times stating she wished to read the

²⁵ Responsive submissions of Ms Gobbo, [56].

²⁶ Transcript of Ms Nicola Gobbo, 6 February 2020, 13327.

transcripts, that she had only heard a limited number of the audio files;²⁷

- 33.12.2. Ms Gobbo indicated she could not answer a particular question as she had not seen the material and had not looked at all the conversations and was criticised for it;²⁸
- 33.12.3. Rather than cure the unfairness, Counsel Assisting asked, "can you just accept I'm putting propositions put to you that is supported by materials we have".²⁹ How could Ms Gobbo answer that?;
- 33.12.4. Ms Gobbo answering she cannot dispute what she does not know;³⁰
- 33.12.5. When Ms Gobbo sought to read a document that she was asked minute detail about, Counsel Assisting replied, "We are trying to get through this without taking too long";³¹
- 33.12.6. Ms Gobbo asking for an opportunity to read a different transcript put to her;³²
- 33.12.7. Counsel for Victoria Police putting material that had not been tendered or served on any party to Ms Gobbo - highlighting the unfairness in a party in conflict controlling disclosure. It was only disclosed afterwards;³³ and
- 33.12.8. Consequently, Ms Gobbo's evidence was that her evidence was accurate and true to the best of her ability, without looking at all the material.³⁴ Ms Gobbo was in effect pointing out the unfairness that had accompanied her evidence.

33.13. When one has regard to the transcript, none of those examples withstand scrutiny nor demonstrate any denial of procedural fairness. They will be considered in turn:

- 33.13.1. It is true that at T13327 Ms Gobbo asked to read a transcript of the conversation between her and her handlers before answering questions about it. She was permitted to so do before questioning continued. No denial of procedural fairness occurred.

It is true that at T13324 Ms Gobbo stated that she had only listened to two of the recordings of her conversations with Source Development Unit (SDU) handlers prior to giving her evidence. But no objection was raised by Ms Gobbo's counsel as to Ms Gobbo being questioned about those conversations, recording and transcripts and, where necessary and appropriate, the recordings were played to

²⁷ Transcript of Ms Nicola Gobbo, 6 February 2020, 13324.

²⁸ Transcript of Ms Nicola Gobbo, 7 February 2020, 13456.

²⁹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13332.

³⁰ Transcript of Ms Nicola Gobbo, 6 February 2020, 13354.

³¹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13359.

³² Transcript of Ms Nicola Gobbo, 7 February 2020, 13444.

³³ Transcript of Ms Nicola Gobbo, 11 February 2020, 13728.

³⁴ Transcript of Ms Nicola Gobbo, 7 February 2020, 13473.

Ms Gobbo or the transcripts made available to her to read. There was no denial of procedural fairness;

- 33.13.2. Contrary to Ms Gobbo's submissions, Ms Gobbo was not criticised for the answer she gave at T13456. In fact, her evidence was accepted. The exchange between Ms Gobbo and the Commissioner was as follows:

COMMISSIONER: All right, we'll finish this area, finish the questioning in this area. I think you want to give an answer, Ms Gobbo?

MS GOBBO: Commissioner, without looking at – the opportunity to read what all the three year conversations with these police and all their notes, I can't - - -

COMMISSIONER: You can't provide an accurate answer?

MS GOBBO: I can't provide a specific answer to each individual client.

COMMISSIONER: I understand that. Is there anything more you wanted to say on this topic?

MS GOBBO: No.

When the exchange is considered, it is immediately clear that Ms Gobbo's submissions have no basis.

- 33.13.3. Contrary to the structure of Ms Gobbo's submissions, her next complaint in fact occurred prior to the matters addressed immediately above.³⁵ Her complaint about being asked by Counsel Assisting at T13332 to accept that he was putting to her propositions that could be supported by the materials in the Commission's possession must be viewed in context. The relevant questions and answers (about her involvement in the [REDACTED] party of Mr Cooper) are as follows:³⁶

MR WINNEKE: You thought that it would be useful if you arranged his [REDACTED] party so you could gather information about the people who would be coming?

MS GOBBO: No, um, they thought - we had a discussion about there being a [REDACTED] party.

MR WINNEKE: Okay, yes?

³⁵ See [56](c) of the Responsive submissions of Ms Gobbo.

³⁶ Transcript of Ms Nicola Gobbo, 6 February 2020, 13332, [17-32].

MS GOBBO: And, um, their - I can't remember the context in which the discussion came about of, um, being the recipient of RSVP's because that would be a way of getting telephone numbers.

MR WINNEKE: Ms Gobbo, can you accept this proposition, that I'm putting to you propositions which can be supported by the materials that we have?

MS GOBBO: Yes, of course.

MR WINNEKE: Do you accept that?

MS GOBBO: Yep.

MR WINNEKE: And you did in fact arrange his [REDACTED] party and you were the person who did receive the RSVP's and send out the invitations, is that right?

MS GOBBO: Yeah, and I'm not, I'm really not trying to be argumentative, but doing the RSVP's is not arranging an entire party.

Ms Gobbo was able to give evidence about her role in relation to the [REDACTED] party, and take issue with the characterisation by Counsel Assisting. There was no unfairness. Counsel Assisting's invitation to Ms Gobbo to accept that he was advancing "propositions which can be supported by the materials" was a reference to propositions which could be supported by the recordings and reading of the transcripts. There could be no suggestion that such an invitation to Ms Gobbo, which she accepted without objection from her counsel, was conducive of any unfairness in circumstances where Ms Gobbo's counsel had the recordings and the transcripts and could easily object to any proposition advanced by Counsel Assisting that was not consistent with those materials. No objection was taken at the time to this line of questioning and Ms Gobbo has not sought to make any supplementary statement to clarify anything which she said in response to Counsel Assisting's questions. There is nothing in this complaint;

- 33.13.4. At T13354, Ms Gobbo was asked by Counsel Assisting about whether she recalled passing a phone between Mr Bickley and Mr Cooper. At the relevant passage Ms Gobbo states to the Commissioner that she's not really in a

position to dispute something that she cannot remember.³⁷ However she noted that:³⁸

MS GOBBO: It just sounds a strange thing that I wouldn't remember, um, something that significant. But anyway, sorry, it might come back to me. Sometimes as you go on it brings back memory, it focuses my mind to memories of things.

Ms Gobbo may not have had a specific recollection of the incident, but she could still potentially give evidence as to whether or not she took issue with that kind of conduct based on her past practices. Indeed, she gave evidence that while she did not have a recollection of such conduct, she thought that she would remember it given that it seemed significant;

- 33.13.5. Ms Gobbo's complaint about Counsel Assisting's comment at T13359 misquotes Counsel Assisting and takes his comment out of context. Ms Gobbo was being asked about her appearance for Mr Thomas at his bail hearing. She responded that she could not recall appearing at the bail hearing. It was entirely uncontroversial that Ms Gobbo had in fact appeared at the hearing. She was not being asked about matters in "minute detail". There was a transcript of her appearance to which her counsel had access. No objection was taken to Counsel Assisting's line of questioning.

When Ms Gobbo could not recall appearing, Counsel Assisting's full comment (which is not reproduced in Ms Gobbo's submissions) was: "*We've got a transcript if you want to see it but I'm trying to get through this without taking too long. If there's an objection – if I'm misstating the position no doubt...*".³⁹ There was no objection from Ms Gobbo's counsel, nor any demand that Ms Gobbo be shown the transcript. That is because Counsel Assisting was not misstating the position.

Further, Ms Gobbo did not (as her submissions seek to portray) request to see the transcript only to be told by Counsel Assisting that he was trying to save time. It was Counsel Assisting who offered to show the transcript to Ms Gobbo if necessary. She declined the opportunity. No "practical injustice" was visited upon Ms Gobbo. Indeed, the very same approach to uncontroversial matters was taken by Ms Gobbo's own counsel in his re-examination of Ms Gobbo, including, for example, at T13784.11ff:

MR NATHWANI: There's an entry in Sandy White's diary on 17 May which in effect

³⁷ Transcript of Ms Nicola Gobbo, 6 February 2020, 13354, [13-14].

³⁸ Transcript of Ms Nicola Gobbo, 6 February 2020, 13354, [14-18].

³⁹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13359, [37-38].

says, and I'll take you to an SML in due course, but Sandy White meets with Overland and Overland is told that you, Nicola Gobbo, are aware that Overland knows of your existence as an informer, okay?

MS GOBBO: I've not seen that, I take your word for it. I'm just saying I'm glad that there is some record that accords with what I recall being told.

33.13.6. Ms Gobbo's complaint in relation to asking to read a different transcript at T13444 also misstates the context. While Ms Gobbo only references T13444, the relevant transcript between 13443 and 13444 reads as follows:

MR WINNEKE: Right, okay?

MS GOBBO: As to whether - if I had the opportunity to look at all of Mr White's diaries or all of the conversations in chronological order I might be able to point to times referable to particular people, um, where these conversations have come up.

MR WINNEKE: Do you recall being told that he might have known of your role as an informer but not the extent or the details of the information that you were providing?

MS GOBBO: No, um, what I was told was that he knew, um, what I was doing and the, um, because there were times when I was saying, um, you know, basically, "Is all of this okay?" Um, you know, to say, I mean I would hope it's obvious that, um, I had issues with, um, being upset about what I was doing and feeling overwhelmingly guilty and raised that with Mr White and others, um, and querying whether it was okay. I mean the jokes about, not jokes, but the comments about there being a Royal Commission one day, um, are indicative of the fact that I wasn't comfortable with what was going on and in, I guess as a comfort, I was told that, um, as far as the police were concerned it was all fine, it was all okay.

MR WINNEKE: Do you say that you had a discussion with a particular handler about the possibility of a Royal Commission?

MS GOBBO: Yes. It was definitely raised on more than one occasion, um - - -

MR WINNEKE: Are you able to say with whom?

MS GOBBO: ---White, but I can't - White and - I would really need, I would need the opportunity to look at the, um, or to listen to the, assuming the transcripts are accurate, but they're often not, the various debriefings I had with them.

MR WINNEKE: Do you say it was in a face-to-face meeting or on a telephone call or other?

MS GOBBO: It could have been either. There were, there was a lot of stuff, a lot of time spent talking on the phone and, like, the examples that you've shown where it's obvious I'm on the phone for an hour and there's half a page of notes, there was a lot more conversation than what are in the notes.

MR WINNEKE: Are you able to identify any particular police officer with whom you discussed Royal Commission potential?

COMMISSIONER: She has mentioned Sandy White, I think.

MR WINNEKE: Aside from Mr White?

MS GOBBO: Probably Anderson because he - I got along very well with him. Um, if anyone it would be more likely to be, um, Green, Fox, Anderson, um, or Smith.

- 33.13.7. Ms Gobbo was being asked to clarify and expand upon an assertion that she volunteered in her evidence. Counsel Assisting asked her to clarify with whom that conversation occurred, to which Ms Gobbo nominated Mr Sandy White but also stated that she would need to check the transcripts of her conversations.

What is clear from this exchange is that this was not (as Ms Gobbo's submissions attempt to portray) a case of Ms

Gobbo being subjected to unfair cross-examination by Counsel Assisting based on transcripts which she had not seen and then seeking an opportunity to read the transcripts. Rather, this was Ms Gobbo making assertions in her evidence and then directing Counsel Assisting to the transcripts in order to verify her assertions. There was no denial of procedural fairness;

Ms Gobbo's complaint about being asked questions by counsel for Victoria Police at T13728 about a document which had not been provided to any of the parties does not disclose any unfairness. Ms Gobbo was shown the document and asked three questions about its contents which she answered without difficulty. Ms Gobbo's counsel then raised an objection to the fact that the document had not been provided to her and requested that it be provided. The Commissioner described this as a reasonable request and invited counsel for Victoria Police to tender the document, which he immediately did. Ms Gobbo's counsel had ample opportunity to consider the document during the course of the day and to re-examine on it if necessary. No re-examination on the document occurred; and

- 33.13.8. Ms Gobbo's complaint about T13473 need to be seen in context. The relevant question and answer are as follows:⁴⁰

MR WINNEKE: Do you say that all of the evidence you've given to the Royal Commission has been true?

MS GOBBO: To the best of my ability, without looking at material, yes.

It is not surprising that Ms Gobbo had not looked at all the material before the Commission. As the above demonstrates, her Counsel was able to object and have material tendered and ask questions about it if it was thought that the assertions of Counsel Assisting were inaccurate or unfair.

34. The above matters, taken individually and/or collectively, do not evince a denial of procedural fairness.

Specific responses to the Handler's complaints

35. The Handlers make a specific complaint based on procedural fairness regarding Mr Sandy White.⁴¹
36. It should be noted that the relevant email dated 26 July 2006 was only produced to the Commission on 27 January 2020, well after Mr Sandy White had finished giving evidence. As observed above, while the fact that the email was not put to Mr Sandy White in evidence might affect issues of weight, Mr

⁴⁰ Transcript of Ms Nicola Gobbo, 7 February 2020, 13473, [25-27].

⁴¹ Responsive submissions of the SDU, [38]-[39].

Sandy White provides no substantive submission as to why the interpretation of the email by Counsel Assisting is incorrect.

37. It should also be noted that Mr Sandy White was examined about the fact that in March 2007, when concerns arose as to disclosure in the upcoming committal of Mr Milad Mokbel, a meeting occurred between the Purana Taskforce and SDU in which there was discussion of Ms Gobbo trying to negotiate a resolution for Mr Milad Mokbel. Following this, Ms Gobbo then attempted to assist in bringing about a resolution, with the Purana Taskforce dealing with her as though she was Mr Milad Mokbel's lawyer (but only behind the scenes). In the event that the matter was not resolved to a plea, there were also discussions between the Purana Taskforce and Mr Sandy White about how not to disclose diary entries which would compromise Ms Gobbo.⁴² That is inconsistent with Mr Sandy White's assertion that he was concerned about Ms Gobbo acting for accused persons, including Mr Milad Mokbel.⁴³

Specific responses to Mr Overland's complaints

38. Counsel Assisting reject Mr Overland's broad submission that time constraints mean that it is impossible for the Commissioner to make serious findings against individuals such as Mr Overland.⁴⁴ As Mr Overland observes, this Commission has gathered and considered evidence over a lengthy period. The submissions of potential misconduct in relation to Mr Overland and others do not arise in a vacuum. The Kellam Report and the *AB v CD* proceedings make that plain. The Commission has heard the evidence and is in a position to resolve competing submissions. Mr Overland has been afforded the opportunity to be legally represented and to make comprehensive submissions. It is no denial of natural justice to make adverse findings against him.

Specific responses to Victoria Police's complaints

39. The submissions of Victoria Police regarding procedural fairness concerning Mr Bateson,⁴⁵ Mr Ryan,⁴⁶ and Mr O'Brien⁴⁷ will be dealt with in detail below.
40. In relation to Victoria Police's "Tranche 2" submissions regarding procedural fairness, the following submissions are made:
 - 40.1. It is submitted by Victoria Police that an example of an obvious breach of procedural fairness is that Counsel Assisting have submitted that Mr Andrew Glow lied in his witness statement but chose not to call him to give evidence, after he had been served with a notice to attend and presented at the hearing on number of occasions.⁴⁸
 - 40.1.1. It is a matter for the Commissioner to resolve the matters raised by Mr Glow in response to Counsel Assisting, however it was simply not possible for Counsel Assisting to examine every witness potentially relevant to the work of the Commission. The fact that Mr Glow was not called to give

⁴² Transcript of Mr Sandy White, 6 August 2019, 4027-4036.

⁴³ Transcript of Mr Sandy White, 6 August 2019, 4018, [38-41].

⁴⁴ Responsive submissions of Mr Overland, [7]-[10].

⁴⁵ See e.g., Responsive submissions of Victoria Police, [14.51].

⁴⁶ See e.g., Responsive submissions of Victoria Police, [25.5].

⁴⁷ See e.g., Responsive submissions of Victoria Police, [52.181].

⁴⁸ Responsive submissions of Victoria Police, Tranche 2, Findings that would breach procedural fairness [11.9], see further p 75 [27.1]ff.

evidence and tested in cross-examination on his statement may be a relevant consideration when considering the submissions of Counsel Assisting and the responsive submissions made on behalf of Mr Glow and the weight of the evidence. However, having regard to those matters, it should be noted that Counsel Assisting submit in the alternative that, even if the Commissioner cannot be satisfied that Mr Glow did know the identity of Ms Gobbo, he was in possession of sufficient information to have obliged him to have investigated and sought further information regarding risks which pertained to the use of Ms Gobbo as a human source.⁴⁹

- 40.2. In relation to Mr Attrill, it is submitted by Victoria Police that he has not been afforded the opportunity to comment in oral evidence on issues raised by Counsel Assisting, and caution should be exercised in adopting factual findings that contrast with his statement.⁵⁰
- 40.2.1. As noted above, it was simply not possible for Counsel Assisting to examine every witness potentially relevant to the work of the Commission. It is accepted that the fact that Mr Attrill was not called to give evidence and tested in cross-examination may be relevant to the weight to be given to the matters raised in the submissions of Counsel Assisting.
- 40.3. In relation to Mr Hatt, it is submitted by Victoria Police regarding the submissions by Counsel Assisting at Volume 2, [641] that:⁵¹
- 40.3.1. while Counsel Assisting cross-examined Mr Hatt about the meeting, he was not cross-examined about whether he understood from the meeting that Ms Gobbo had preparedness to share with police matters which, quite obviously, should have remained confidential as between her and her client;
- 40.3.2. it follows that Mr Hatt was deprived of the opportunity to address the submission now put against him; and
- 40.3.3. for these procedural fairness reasons alone, the Commissioner is compelled not to accept the submission at [641] to the extent that it relates to Mr Hatt.
- 40.3.3.1. It is submitted in response that the fact that Mr Hatt was not cross-examined by Counsel Assisting on this issue does not prevent these submissions being made and accepted. It may affect issues of weight with regard to the evidence relied upon. However, it must be noted that at the time Mr Hatt was questioned by Counsel Assisting there was still a developing picture about what had occurred. In relation to the process regarding the edits to Mr McGrath's statement, Counsel Assisting deal with these matters below with regard to Mr Bateson.

⁴⁹ Submissions of Counsel Assisting, Volume 2, [335].

⁵⁰ Responsive submissions of Victoria Police, Tranche 2, Mr Attrill, [2.7].

⁵¹ Responsive submissions of Victoria Police, Tranche 2, Mr Hatt [35.15].

- 40.4. Victoria Police observe that in Volume 2 at [690.2] Counsel Assisting assert that the conduct of Mr Hatt “may have contributed to a potential injustice”, but submit that the potential injustice is not identified and Mr Hatt should not be left to guess as to the existence of a “potential injustice” to which he is said to have possibly contributed, and that procedural fairness requires it to be identified by Counsel Assisting.⁵²
- 40.4.1. It is submitted that the potential injustice is clear – Mr Thomas was denied vital information concerning the manner in which Ms Gobbo edited the statement of Mr McGrath which was used against Mr Thomas. Victoria Police’s submissions in relation to Mr Bateson are misconceived as will be dealt with in detail below. Mr Hatt’s central role was clear as demonstrated by the concern expressed by Ms Gobbo that he would be cross-examined at committal by Counsel for Mr Williams concerning the process by which McGrath’s first two statements were taken.⁵³
- 40.5. It is submitted by Victoria Police that allegations were not put to Mr Hatt and he has therefore been denied procedural fairness.⁵⁴
- 40.5.1. As above, this is a matter for the Commissioner to determine on the evidence. The fact that matters were not put to Mr Hatt does not mean the findings cannot be made by the Commissioner, they are matters that may go to weight.
- 40.6. It is submitted by Victoria Police that it is not open to the Commissioner to find that the evidence “suggests” that Mr Hatt was aware of the arrangements put in place to protect Ms Gobbo from compromise during the committal proceeding of Mr Orman.⁵⁵ Such a finding cannot assist the Commission. Further, Mr Hatt was denied procedural fairness, and that is another reason why the finding ought not to be made.
- 40.6.1. The submission does not rely upon Mr Hatt’s knowledge of Ms Gobbo representing Mr Orman. The submission relates to monitoring the evidence of Mr Thomas in case it should reveal Ms Gobbo’s involvement advising him. She had also been involved in his statement process.
- 40.6.2. This is also a matter for the Commissioner to determine on the evidence. The fact that matters were not put to Mr Hatt does not mean the findings cannot be made by the Commissioner, they are matters that may go to weight.
- 40.7. In relation to Mr McRae, it is submitted by Victoria Police that in some instances Counsel Assisting fail to have regard to procedural fairness by making findings about matters that were not put to Mr McRae.⁵⁶
- 40.7.1. Again, this is a matter for the Commissioner to determine on the evidence. The fact that matters were not put to Mr

⁵² Responsive submissions of Victoria Police, Tranche 2, Mr Hatt, [36.3]

⁵³ Submissions of Counsel Assisting, Volume 2, [1142.1].

⁵⁴ Responsive submissions of Victoria Police, Tranche 2, Mr Hatt, [36.21].

⁵⁵ Responsive submissions of Victoria Police, Tranche 2, Mr Hatt, [37.9]-[37.10].

⁵⁶ Responsive submissions of Victoria Police, Tranche 2, Mr McRae, [43.4(c)].

McRae does not mean the findings cannot be made by the Commissioner, they are matters that may go to weight.

40.8. In relation to Mr Waddell, it is submitted by Victoria Police that the allegation by Counsel Assisting, that Mr Waddell had proposed to conceal the identity of Ms Gobbo, was not put to Mr Waddell, or any other member that was involved in preparing the confidential affidavits. It is a serious claim that is made, and procedural fairness required that it be put. No explanation is given by Counsel Assisting to the failure to cross-examine Mr Waddell on this issue.⁵⁷

40.8.1. Insofar as this submission might have imputed impropriety on the part of Mr Waddell that was not the intention. It is apparent that Mr Waddell had appropriately sought legal advice and was making a PII claim in an endeavour to protect Ms Gobbo's statement. It is not known what instructions were provided by Mr Waddell to Mr Maguire in relation to Ms Gobbo's history as a human source. The point that Counsel Assisting were making was that Victoria Police was not prepared to provide complete information to the Court to enable the Court to fully understand the relevant circumstances.

The Bias Rule

Relevant principles

41. The criticisms raised by Ms Gobbo and some of the other potentially affected persons in relation to apprehended bias are almost exclusively directed towards the conduct of Counsel Assisting the Commission, not to the conduct of the Commissioner. However, the test for apprehended bias directs attention to partiality of the decision-maker. The test was described in *Ebner Official Trustee in Bankruptcy*⁵⁸ as follows:⁵⁹

...a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

42. A court or tribunal court should not lightly conclude that an allegation of apprehended bias is made out. Reasonable apprehension must be firmly established.⁶⁰ It is a serious allegation which attracts the *Briginshaw* standard.⁶¹ It is one thing to say that there is a chain of reasoning, whose links are of variable strength, from which an appearance of prejudice on the part of the Commissioner may be discerned, but to say that does not of itself answer the question whether apprehension of bias by the Commissioner against Ms Gobbo has been firmly established.⁶²

⁵⁷ Responsive submissions of Victoria Police, Tranche 2, Mr Waddell, [72.8].

⁵⁸ (2000) 205 CLR 337 (*Ebner*).

⁵⁹ *Ibid*, 344, 345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁶⁰ *Firman v Lasry* [2000] VSC 240. [18] (Ashley J), citing *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546, 553-554, *Re Lusink*; *ex parte Shaw* (1981) 55 ALJR 12, 14 (Gibbs ACJ), *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100 (Gaudron and McHugh JJ); see also *Gascor v Ellicott* [1997] 1 VR 332, 342 (Tadgell JA); *Re JRL*; *ex parte CJL* (1986) 161 CLR 342, 352 (Mason J).

⁶¹ *Keating v Morris* [2005] QSC 243, [47] (Moynihan J).

⁶² *Firman v Lasry* [2000] VSC 240. [104] (Ashley J)

43. In *Victoria Police Special Operations Group*,⁶³ Kyrou J conveniently summarised the principles relating to apprehended bias:
- 43.1. the duty that the decision-making process be free from actual or apprehended bias is part of the duty of procedural fairness;⁶⁴
 - 43.2. the test of apprehended bias is objective.⁶⁵ Accordingly, the application of the test of reasonable apprehension of bias avoids any need for a court to attempt an analysis of the likely or actual thought processes of the decision-maker;⁶⁶
 - 43.3. the test is one of possibility, and not probability⁶⁷ [although it should be added that the test depends on whether there is a real rather than remote possibility of bias⁶⁸];
 - 43.4. the application of the test of apprehended bias involves two steps. The first step is to identify the matter that is said might lead a judicial officer to decide a case other than on its legal and factual merits. The second step requires an articulation of the logical connection between that matter and the “feared deviation from the course of deciding the case on its merits”;⁶⁹
 - 43.5. the fair-minded lay observer is a hypothetical figure, who is taken to have a broad knowledge of the material objective facts as ascertained by the appellate or reviewing court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the relevant decision-maker;⁷⁰
 - 43.6. the hypothetical observer should be assumed to base his or her opinion on a fair assessment of the whole of the judicial officer’s conduct in the context of the whole trial or inquiry;⁷¹
 - 43.7. in some cases, the effect of a statement that might indicate prejudice can be removed by a later statement which withdraws or qualifies it. On the other hand, some statements or behaviour can produce an ineradicable apprehension of prejudice. The circumstances of the particular case, and the context in which a later statement was made, will determine whether a preliminary impression may be altered by the later statement;⁷²
 - 43.8. natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.⁷³ Judges may

⁶³ (2013) 42 VR 1.

⁶⁴ *Ibid*, 13 [36], citing *Firman v Lasry* [2000] VSC 240, [12] (**Firman**); *Honda Australia Motorcycle & Power Equipment Pty Ltd v Johnstone (As State Coroner)* [2005] VSC 387, [16] (**Honda**).

⁶⁵ *Ibid*, 13 [37], citing the test in *Ebner* *supra*, 344, [6].

⁶⁶ *Ibid*, 14 [39], citing *Ebner*, *supra*, 345 [7]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 564 [184] (**Jia Legeng**); *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437–8 [33] (**Michael Wilson**).

⁶⁷ *Ibid*, 14 [38], citing *Ebner* *supra*, 345 [7].

⁶⁸ *Young v Judge Nixon* [2008] VSCA 5, [33] (Ashley JA with whom Dodds-Streeton JA and Hansen AJA agreed).

⁶⁹ *Victoria Police Special Operations Group*, *supra*, 13 [40], citing *Ebner*, *supra*, 345 [8]. See also *Michael Wilson*, *supra*, 445 [63].

⁷⁰ *Ibid*, 14 [41], citing *Webb v R* (1994) 181 CLR 41, 73; *Johnson v Johnson (No 3)* (2000) 201 CLR 488, 493, [13] (**Johnson**).

⁷¹ *Ibid*, 14 [42], citing *Firman*, *supra*, [21].

⁷² *Ibid*, 14, [43].

⁷³ *Jia Legeng*, *supra*, 532, [72].

express tentative views in exchanges with counsel, and are not on that account alone to be taken to indicate prejudgment.⁷⁴ Likewise, the making of an interlocutory finding in a proceeding does not, in itself, preclude a judge from sitting on the trial of that proceeding.⁷⁵ However, judges must remain open to persuasion based on the evidence and submissions of the parties;⁷⁶ and

- 43.9. the reasonableness of any suggested apprehension of bias must be considered in the light of ordinary judicial practice and procedure, the nature of the functions performed by the decision-maker and the particular statutory context.⁷⁷ In relation to the Coroners Court (and, it is submitted, the Commission), regard must be had to its inquisitorial nature and the statutory departures from the judicial paradigm.⁷⁸

44. Importantly, Kyrrou J also observed:⁷⁹

When comments are made which are likely to convey an impression of bias to a fair-minded lay observer, a party is not entitled to stand by until the contents of the final judgment are known, and then, if the contents are unpalatable, to attack the judgment on the ground that there has been a failure to observe the requirement of an appearance of impartial judgment.⁸⁰ A litigant who is aware of the circumstances entitling him or her to object on the ground of apprehended bias and who fails to do so, waives the right to object at a later time.⁸¹ Both the timing and the nature of any objection made are relevant to the question of whether a party has waived a right to object on the ground of apprehended bias.⁸²

45. Earlier, in *Vakauta v Kelly*,⁸³ Brennan, Deane and Gaudron JJ held:⁸⁴

Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party

⁷⁴ *Johnson*, supra, 493, [13].

⁷⁵ *Michael Wilson*, supra, 447, [68].

⁷⁶ *Jia Legeng*, supra, 531–2, [71]–[72].

⁷⁷ *Johnson*, supra, 493, [13]; *Jia Legeng*, supra, 533, [78], 538–9 [99]–[102], 562–3 [180]–[182], 564–5 [187].

⁷⁸ *Priest v West* (2012) 40 VR 521, 560–1, [170]–[171].

⁷⁹ *Victoria Police Special Operations Group*, supra, 15, [47].

⁸⁰ *Vakauta v Kelly* (1989) 167 CLR 568, 572.

⁸¹ *Smits v Roach* (2006) 227 CLR 423, 439, [43]. See also *Michael Wilson*, supra, 449 [76].

⁸² *Michael Wilson*, supra, 451, [84].

⁸³ (1989) 167 CLR 568 ('*Vakauta*').

⁸⁴ *Ibid*, 572 (emphasis added).

in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.

46. By failing to object to the judge's remarks at the time they are made, the party waives any right to appeal against an adverse judgment on the ground of what was said at the trial.⁸⁵
47. The thrust of Ms Gobbo's complaint of bias against Counsel Assisting appears to relate to alleged pre-judgment – the embarking upon and adherence to a “pre-conceived narrative”. Notably and unusually, the alleged narrative is not articulated anywhere in Ms Gobbo's submissions.⁸⁶
48. As to the question of “pre-judgment”, in *Gild v The Queen*,⁸⁷ Kyrou and Coghlan JJA held:⁸⁸

*The appearance of impartial justice would be compromised if the words or actions of a judge conveyed the impression that he or she had preconceived adverse views about a party's case and that those views were so strongly held that he or she was unwilling or unable to consider on their merits any submissions made, or evidence adduced, by that party which were inconsistent with those views. However, the expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias.*⁸⁹

49. In *Jia Legeng*, Gleeson CJ and Gummow J observed:⁹⁰

Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. ... The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

50. Ms Gobbo's criticism of pre-judgment also fails to make allowance for the differing position of this Commission (which is an investigative commission of inquiry) and a court. As the plurality held in *Isbester v Knox City Council*:⁹¹

[22] It was observed in Ebner that the governing principle has been applied not only to the judicial system but also, by extension, to many

⁸⁵ *Vakauta*, supra, 572. Toohey J made similar remarks: at 587–8. See also *Kuek*, supra, [67].

⁸⁶ cf *McCloy v Latham* [2015] NSWSC 1879, [14].

⁸⁷ [2017] VSCA 367.

⁸⁸ *Ibid*, [24].

⁸⁹ See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 610 [112]; *Kuek v Wade* [2017] VSCA 329 [66] (*Kuek*)

⁹⁰ *Jia Legeng*, supra, 531 [71] (emphasis added); see also *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *R v Watson*; *ex parte Armstrong* (1976) 136 CLR 248, 264; *Rozenes v Judge Kelly* [1996] 1 VR 320, 333.

⁹¹ (2015) 89 ALJR 609, [22], [23] (Kiefel, Bell, Keane and Nettle JJ) (citations omitted); see also *McCloy v Latham* [2015] NSWSC 1879, [20] (McDougall J).

other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.

[23] How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.

51. A Royal Commissioner (and, by extension, it is submitted, Counsel Assisting) is permitted to take a more active, interventionist and robust role in the conduct of hearings, ascertaining facts and reaching conclusions, than a judge.⁹²
52. There is an air of unreality to Ms Gobbo's allegation of pre-judgment and to her complaint about being singled out for unfavourable treatment. When considering Ms Gobbo's complaints, the Commissioner should have regard to the full context of this inquiry and to the role of Counsel Assisting in any commission of inquiry tasked to investigate conduct involving potentially serious impropriety. In this regard, the following observations are made.
53. The matters set out at [8] of Ms Gobbo's submissions as to the duties of Counsel Assisting are accepted. But the role of Counsel Assisting is nuanced and multi-faceted. As Hall observes in *Investigating Corruption and Misconduct in Public Office*:⁹³
 - 53.1. Counsel Assisting is a participant in all stages of an investigation, at least up to the report-writing stage;
 - 53.2. it is part of Counsel Assisting's function to obtain and call probative evidence that is relevant to a commission's terms of reference (including exculpatory evidence);
 - 53.3. it is the obligation of Counsel Assisting to exercise control over the assessment and adducing of evidence;
 - 53.4. the responsibilities of Counsel Assisting include:
 - 53.4.1. providing advice and assistance to a commission in preparing methodology and procedures;
 - 53.4.2. determining the witnesses to be called and the documents to be produced;

⁹² *R v Carter; Ex parte Gray* (1991) 14 Tas R 247, 260-3 [29]-[34]; *Carruthers v Connolly* [1998] 1 Qr R 339, 3458; *Keating v Morris* [2005] QSC 243, [46] (Moynihan J).

⁹³ Peter M Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures 2nd Ed*, Lawbook Co. 2019, [8.235] – [8.265].

- 53.4.3. selecting the matters for examination in hearings;
 - 53.4.4. establishing or assisting in the establishment of procedures for taking statements and calling evidence; and
 - 53.4.5. interviewing witnesses or supervising their interviewing by commission officers prior to the witnesses giving evidence;
- 53.5. Counsel Assisting may cross-examine witnesses and is expected to test the evidence of witnesses;
- 53.6. Counsel Assisting is expected to make submissions about the findings of fact that are open to a commission to make and the findings that should be drawn;
- 53.7. Counsel Assisting, subject to the direction of the Commissioner, should be encouraged to undertake their role fearlessly and independently; and
- 53.8. Counsel Assisting has no client, does not act on instructions and, in terms of evidence, is limited only by what is relevant to the letters patent.
54. It is undoubtedly true that it is Counsel Assisting's obligation to be even-handed – or as even-handed as the prevailing facts and circumstances reasonably allow. But this does not prevent Counsel Assisting from developing plans and strategies in order to flush out the relevant evidence,⁹⁴ nor does it prevent Counsel Assisting from vigorously pursuing a line of inquiry adverse to a party or witness where the circumstances call for its pursuit. Counsel Assisting has the benefit of receiving and reviewing documents and witness statements prior to their deployment at hearings. They are obliged to interview witnesses where necessary or appropriate. Counsel Assisting has an opportunity to assess all such material, consider its relevance, and to form views as to lines of inquiry for cross-examination at hearings and submissions.⁹⁵ It would be naïve to think that Counsel Assisting should approach their task with an empty mind notwithstanding the opportunity they have for analysis, consideration and reflection and their obligation to meaningfully assist the commission of inquiry in the discharge of its terms of reference.
55. Indeed, it has been observed that, in the context of an inquiry into matters involving allegations of misconduct, it is inevitable that Counsel Assisting will to some extent assume a role akin to a prosecutor in a criminal trial.⁹⁶ Moreover, in any investigation into suspected improper or corrupt conduct by a body wielding investigative powers and possessing important reporting obligations, it would be extraordinary if Counsel Assisting conducted their task without at least a case theory as to the conduct under investigation and that the persons to be examined might reasonably be suspected of having been engaged in that conduct.⁹⁷ Nor is it to be expected that a Commissioner (and, by extension, it is submitted, Counsel Assisting) appointed to inquire into and report upon matters which are highly politically charged should be devoid of a sense of social, political, moral or economic direction.⁹⁸ The main question in the end will be

⁹⁴ *Ibid*, [8.245].

⁹⁵ *cf McCloy v Latham* [2015] NSWSC 1879, [109] (McDougall J).

⁹⁶ *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 273.

⁹⁷ *McCloy v Latham* [2015] NSWSC 1879, [16] (McDougall J).

⁹⁸ *Firman v Lasry* [2000] VSC 240, [22] (Ashley J).

whether a Commissioner is reasonably open to persuasion and is seen to be so.⁹⁹

56. These observations have particular resonance having regard to the circumstances of the present inquiry. The Commission's inquiry did not arise in a vacuum. It was the culmination of a series of events and earlier judicial and non-judicial inquiries which touched upon the same subject matter – namely, the use by Victoria Police of Ms Gobbo, a practising barrister, as a human source against her own clients and their criminal associates. This subject matter was the subject of findings in the Comrie Review, the Kellam Report and, ultimately, the High Court in the *AB v CD* proceedings – where the Court found that Ms Gobbo and Victoria Police had engaged in reprehensible breaches of their respective duties in a manner debased fundamental premises of the criminal justice system.¹⁰⁰
57. The Commission's letters patent are a product of these earlier events and inquiries. The letters patent refer expressly to the Comrie review, the Kellam report and the High Court's findings. Reference is made to the High Court's findings in relation to, *"the conduct of Victoria Police in relation to the informant known as '3838' who was a criminal defence barrister recruited by Victoria Police to provide information about various members of the criminal fraternity...some of whom were 3838's clients..."* Reference is also made to Mr Kellam's finding that there was negligence of a high order in the recruitment, handling and management of Ms Gobbo as a human source. Reference is also made to the fact that three appeals were already underway in relation to convictions alleged to have been affected by the conduct of Ms Gobbo. The letters patent also contemplated that it may become necessary for the Commission to provide information and documents to the DPP which may be relevant to her continuing obligations of disclosure.
58. The letters patent then set out the Commission's terms of reference. The first two terms of reference require the Commission to inquire into the conduct of both Ms Gobbo and Victoria Police in connection with the use of Ms Gobbo as a human source and to make findings as to the number of and extent to which cases may have been affected by that conduct.
59. Having regard to this context, it is entirely unsurprising that Counsel Assisting would have a case theory in relation to the task before them, including in relation to the propriety of the conduct of Ms Gobbo and Victoria Police in relation to the use of Ms Gobbo as a human source. The use of Ms Gobbo as a human source in breach of her ethical obligations and the sworn duties of the police was a matter of judicial record. This Commission, and Counsel Assisting, were tasked to inquire into the full extent of Ms Gobbo's and Victoria Police's conduct, in order to make findings as to the true extent to which the administration of justice in this state may have been subverted. Ms Gobbo is not, as her submissions might have one believe, a peripheral figure who has been disproportionately targeted by Counsel Assisting. The terms of reference place Ms Gobbo and the members of Victoria Police squarely at the centre of the Commission's inquiry. It is therefore simply not to the point for Ms Gobbo to complain that Counsel Assisting have not made recommendations as to adverse findings against other parties, including other lawyers.

⁹⁹ *Ibid.*

¹⁰⁰ *AB & EF v CD* [2018] HCA 58, [10].

60. It follows that it is not enough that Counsel Assisting or, indeed, the Commissioner herself may have a case theory based on investigations undertaken by the Commission or based on relevant events, inquiries and findings which led to the establishment of this Commission. What must be shown is a reasonable apprehension that any such case theory is so firmly entrenched in their minds that, by the time of the conclusion of the inquiry, there exists a reasonable basis for thinking that the *Commissioner* could not consider the evidence on its merits.¹⁰¹
61. Given the seriousness of the allegations made by Ms Gobbo and other potentially affected persons and the requirement that such allegations be proved to the *Briginshaw* standard, it is surprising that the responsive submissions do not address the above legal principles in appropriate detail. In particular, there is a failure to engage with the two-step test set out in *Ebner* by:
- 61.1. first, identifying the matter that is said might lead the Commissioner to make findings other than on the legal and factual merits; and
- 61.2. secondly, articulating the logical connection between that matter and the feared deviation from normal standards of impartiality.
62. As noted previously, the matters raised by Ms Gobbo as examples of conduct giving rise to a reasonable apprehension of bias are almost exclusively conduct of Counsel Assisting. Ms Gobbo's ultimate submission appears to be that all of the matters raised by her would lead a reasonable bystander to apprehend bias from Counsel Assisting against Ms Gobbo.¹⁰² No positive submission appears to be advanced that such conduct gives rise to a reasonable apprehension of bias on the part of the Commissioner – which is the relevant enquiry. Nor does Ms Gobbo, or others for that matter, attempt to articulate a logical connection between the alleged bias of Counsel Assisting and a feared deviation by the Commissioner from an impartial adjudication of facts on the merits. Rather, Ms Gobbo merely submits that, in the circumstances, the Commissioner should be slow to simply accept the submissions made by Counsel Assisting.
63. The short answer to Ms Gobbo's complaints in relation to alleged bias is that, even if it were accepted that the conduct of Counsel Assisting gives rise to a reasonable apprehension of bias on their part (which Counsel Assisting reject), the Commissioner is required to (and no doubt will) reach her own conclusions based on the submissions of all parties – including those submissions which have sought to assist the Commissioner by identifying the alleged bias of Counsel Assisting. It will usually be difficult for a party to forestall the making of a decision on the ground of apprehended bias because the expectation is that the decision-maker will decide fairly on the basis of evidence, even if it might be thought that the decision-maker holds a pre-conceived opinion.¹⁰³ There is, therefore, no logical connection between the conduct attributed to Counsel Assisting and the Commissioner's own consideration of findings of fact to be made on the merits.
64. Indeed, experience demonstrates that throughout the conduct of this inquiry the Commissioner has brought an independent mind to the consideration of contested issues and has not merely deferred to the submissions of Counsel

¹⁰¹ *McCloy v Latham* [2015] NSWSC 1879, [18], [48], [124] (McDougall J).

¹⁰² Responsive submissions of Ms Gobbo, [99].

¹⁰³ *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 279 ALR 468, [55] (Keane CJ, Lander and Forster JJ).

Assisting. This is typified by the Commissioner's recent decision to decline Counsel Assisting's invitation to make findings as to whether particular individuals may have engaged in criminal conduct.

65. Further, Ms Gobbo's allegations of apprehended bias were not made at the time of the impugned conduct by Counsel Assisting. Ms Gobbo has chosen to wait until after all evidence has been completed and submissions have been exchanged. It is arguable in these circumstances that Ms Gobbo has waived her right to object¹⁰⁴ – and particularly in circumstances where Ms Gobbo has never asserted – and still does not appear to assert – that there is a reasonable apprehension of bias on the part of the Commissioner.
66. In any event, it is submitted that Ms Gobbo's specific criticisms of Counsel Assisting's conduct ought be rejected for the reasons that follow.

Specific responses to Ms Gobbo's complaints

67. The allegations of apprehended bias by Ms Gobbo appear to centre on 18 submissions:¹⁰⁵
 - 67.1. The issue of the alleged “pre-conceived narrative”, where some witnesses were treated more favourably than others (in particular it is asserted that Messrs Thomas, Bickley and Cooper were treated more favourably than Ms Gobbo, the SDU, and Purana members);¹⁰⁶
 - 67.2. There was a pursuit of Ms Gobbo and others, and this detracted from a focus on the first term of reference, and beyond two case studies “the Government are hardly helped as to which cases have been truly affected by Ms Gobbo working as a police informer”;¹⁰⁷
 - 67.3. The description by Counsel Assisting of the “burglary”;¹⁰⁸
 - 67.4. The suggestion that Ms Gobbo committed a breach of the *Australian Crime Commission Act 2002* (Cth) or the *Police Integrity Act 2008* (Vic), by referring to the legislation but not then pointing out the statutory defence which Ms Gobbo's explanation clearly enlivened;¹⁰⁹
 - 67.5. Suggesting Ms Gobbo had obtained \$60,000 from Mr Karam by deception despite the legal issue of dishonesty and, more so, that \$50,000 of that \$60,000 represented fees Ms Gobbo received for representing Mr Karam during a trial - where he was found not guilty;¹¹⁰
 - 67.6. Not cross-examining Ms Gobbo about the memorandum to Mr Allan [sic] SC. Not only do Counsel Assisting seek an adverse finding against Ms Gobbo about this (which is a breach of procedural fairness), they do not even refer in detail to Mr Carl Williams' complaints which put the memorandum into context;¹¹¹

¹⁰⁴ *McCloy v Latham* [2015 NSWSC 1879, [30]-[31] (McDougall J).

¹⁰⁵ Although it is submitted there are “too many examples to indicate that Counsel Assisting embarked on a particular narrative with a closed mind and in a biased way”, some are given [72].

¹⁰⁶ Responsive submissions of Ms Gobbo, [70]. See also [81].

¹⁰⁷ Responsive submissions of Ms Gobbo, [71].

¹⁰⁸ Responsive submissions of Ms Gobbo, [73].

¹⁰⁹ Responsive submissions of Ms Gobbo, [74](a).

¹¹⁰ Responsive submissions of Ms Gobbo, [74](b).

¹¹¹ Responsive submissions of Ms Gobbo, [74](c).

- 67.7. Tendering Mr Solomon's statement which was adverse to Ms Gobbo and not calling him for cross-examination, despite having had possession of the statement for a lengthy period of time. Other relevant witnesses were not called, such as Ms Tess Walsh AC;¹¹²
 - 67.8. Referring to the case of the Nguyens. This was never considered evidentially at all and Ms Gobbo was asked no questions about it;¹¹³
 - 67.9. Asking Ms Gobbo if she had sought an ethics ruling relating to conflict when these issues are complex as evinced by one of Counsel Assisting having represented Officer Fox;¹¹⁴
 - 67.10. Counsel Assisting refusing to consider the possible knowledge of colleagues or former colleagues about these matters, including for example Mr Horgan SC, Mr Tinney (now Tinney J), Mr Rapke, and other barristers;¹¹⁵
 - 67.11. The treatment of Mr Bickley as a witness;¹¹⁶
 - 67.12. The unfairness of Ms Gobbo giving evidence in public compared to others who gave evidence in closed court;¹¹⁷
 - 67.13. The treatment of Ms Gobbo when she gave evidence;¹¹⁸
 - 67.14. The reference by the Commissioner in relation to Ms Gobbo feigning illness to get an adjournment for Mr Cooper's plea, which was to "one line taken out of context" indicating "Counsel Assisting's narrative clouded [the Commissioner's] view";¹¹⁹
 - 67.15. The fact that there are no references in Counsel Assisting's submissions to the cross-examination of any other party beyond Counsel Assisting;¹²⁰
 - 67.16. The reticence of Counsel Assisting to make any submissions regarding adverse findings against Mr Pope;¹²¹
 - 67.17. The fact of the closeness of the relationship between the Commissioner and Counsel Assisting, perhaps best demonstrated by the reference by the Commissioner to the first name of one of Counsel Assisting,¹²² and the reference in hearings to Counsel Assisting as "we" and "us"; and
 - 67.18. The treatment of Ms Gobbo concerning her conversation with Counsel Assisting and the Commissioner when she had been deemed to have a reasonable excuse to not attend and give evidence.¹²³
68. These issues will be considered in turn.

¹¹² Responsive submissions of Ms Gobbo, [74](d).

¹¹³ Responsive submissions of Ms Gobbo, [74](e).

¹¹⁴ Responsive submissions of Ms Gobbo, [75].

¹¹⁵ Responsive submissions of Ms Gobbo, [76]-[80].

¹¹⁶ Responsive submissions of Ms Gobbo, [82]-[83].

¹¹⁷ Responsive submissions of Ms Gobbo, [84].

¹¹⁸ Responsive submissions of Ms Gobbo, [85].

¹¹⁹ Responsive submissions of Ms Gobbo, [87].

¹²⁰ Responsive submissions of Ms Gobbo, [88].

¹²¹ Responsive submissions of Ms Gobbo, [89].

¹²² Responsive submissions of Ms Gobbo, [90].

¹²³ Responsive submissions of Ms Gobbo, [91]-[98].

1. The issue of the alleged “pre-conceived narrative”, where some witnesses were treated more favourably than others (in particular it is asserted that Messrs Thomas, Bickley and Cooper were treated more favourably than Ms Gobbo, the SDU, and Purana members).

69. As noted above, it is to be expected that Counsel Assisting would develop a case theory which would underpin the examination of witnesses.
70. As observed by Hall in *Investigating Corruption and Misconduct in Public Office*, citing *McCloy v Latham*¹²⁴ at [9.275].¹²⁵

In McCloy v Latham, supra, one of the grounds relied upon to support the contention of a reasonable apprehension of bias was that the ICAC was pursuing a predetermined case theory that particular persons had engaged in wrongdoing and that publicity demonstrating this or making findings of this nature against certain persons had been a priority in the investigation.

*As to that contention the Supreme Court of NSW (McDougall J) observed that **it would be extraordinary for a body such as the ICAC having powerful and important investigative and reporting functions to launch an investigation, and as part of that inquiry conduct lengthy inquiries, without having at least a “case theory” that the subject matter of the investigation involved corrupt conduct within the Commission’s jurisdiction and that the persons to be examined at the public inquiry might reasonably be suspected of having been engaged in that corrupt conduct: at [16].***

In relation to the submissions made in support of the ground of apprehended bias, the Court observed:

*That consideration is relevant to the present case, because of Mr McCloy’s reliance on the “case theory” supposedly entertained by the Commissioner and by Counsel Assisting. It is not enough that they should have had a case theory based on investigations undertaken by the Commission (including, in this case, the results of compulsory examinations conducted before the public inquiry). **What must be shown is a reasonable apprehension that the case theory was so firmly entrenched in their minds that, by the time of the conclusion of the public inquiry, there existed a reasonable basis for thinking that the Commissioner could not consider on their merits the further evidence given (in the public inquiry) and the submissions put to her, and reach a conclusion, on the essential point, irrespective of the case theory.***

In addition the Court emphasised the need to have regard to the nature of the proceedings stating in that respect:

*[20] again, the articulation of Mr McCloy’s case, as it is done in the summons, **makes no real attempt to come to grips with the essential differences between an inquisitorial body such as the***

¹²⁴ [2015] NSWSC 1879.

¹²⁵ Emphasis added.

Commission, and an adjudicative tribunal, such as this Court, charged with determining the outcome of adversarial litigation. Thus, in many cases, the submissions for Mr McCloy relied on statements of principle relevant to adversarial litigation, without considering the extent to which those statements might be capable of application, with or without modification, to an inquisitorial investigation conducted by the Commission. Further, in many cases, the submissions failed to take account of the statutory framework regulating the Commission's activities.

71. It is submitted that the main complaint under this heading, that Counsel Assisting had a “pre-conceived narrative”, insofar as that is akin to Counsel Assisting having a “case theory”, is misguided. What matters is whether there is a reasonable apprehension that the case theory was so firmly entrenched in the minds of Counsel Assisting that, by the time of the conclusion of the public inquiry, there existed a reasonable basis for thinking that the Commissioner could not consider on their merits the evidence given and the submissions put to her, and reach a conclusion, on the essential points, irrespective of the case theory.
72. Counsel Assisting reject the assertion that Messrs Thomas, Bickley and Cooper were treated more favourably than Ms Gobbo, the SDU, and Purana members. However, to the extent that Counsel Assisting focussed on the potentially improper conduct of Ms Gobbo and current and former members of Victoria Police, that is entirely consistent with, and indeed required by, the first and second terms of reference.
73. Ms Gobbo does not explain how, even if Counsel Assisting did have a pre-conceived narrative, this results in there being a reasonable apprehension of bias on behalf of the Commissioner.

2. There was a pursuit of Ms Gobbo and others, and this detracted from a focus on the first term of reference, and beyond two case studies “the Government are hardly helped as to which cases have been truly affected by Ms Gobbo working as a police informer”.

74. As noted above it was understandable, given the first and second terms of reference, that there was a focus on the conduct of Ms Gobbo and certain current and former members of Victoria Police.
75. This is little more than a superficial and unfair criticism of Counsel Assisting. The third Volume of submissions, for example, considers in detail 124 cases that may have been affected by the conduct of Ms Gobbo and her utilisation as a human source by Victoria Police. Further, there are many additional persons who have been identified and who may have been affected, if there is revealed to be a sufficient nexus between Ms Gobbo's representation and their particular case.

3. The description by Counsel Assisting of the “burglary”.

76. The description of the “burglary” emerged in examination of Mr Sandy White, where from an ICR it was noted that Ms Gobbo had been looking around in other counsel’s offices, and had located subpoenaed phone records.¹²⁶

77. Before the Commission, Mr Sandy White was asked the following questions and gave the following answers:¹²⁷

MR WINNEKE: Do you know what the elements of burglary are, the offence of burglary?

MR SANDY WHITE: Yes, I do.

MR WINNEKE: One would assume that it may well be, I mean who knows, but it may well be that Ms Gobbo has committed such an offence?

MR SANDY WHITE: Yes, that's right.

MR WINNEKE: Now, it would be an extraordinary thing for a barrister to go through another member of counsel's office on a weekend looking for material which might be of interest to her and of interest to the police, do you agree?

MR SANDY WHITE: Yes, I do.

MR WINNEKE: On no view could it be considered that obtaining such material would be appropriate and lawful?

MR SANDY WHITE: No.

MR WINNEKE: I'm not suggesting that it was used but what I am suggesting is it was quite clear to you, if you'd have read this document, that Ms Gobbo was behaving in an entirely inappropriate, if not criminal, way?

MR SANDY WHITE: Yes.

MR WINNEKE: The Commission has understanding that there was no authority for Ms Gobbo to break into or go into these chambers. Assuming that's the case it would be quite conceivable that Ms Gobbo had engaged in criminal conduct?

MR SANDY WHITE: That's a possibility on the face of that entry, yes.

78. Objection was not taken by Counsel for Ms Gobbo at the time of this questioning.

79. The term “burglary” was also used by Mr O’Brien in his evidence.¹²⁸

¹²⁶ Transcript of Mr Sandy White, 15 August 2019, 4674.

¹²⁷ Transcript of Mr Sandy White, 15 August 2019, 4675.

¹²⁸ Transcript of Mr James (Jim) O'Brien, 10 September 2019, 5929, [20].

80. The matter was raised again in the examination of Mr Fox, who suggested that it was not a burglary if something was not removed from the building.¹²⁹ Again, objection was not taken by Counsel for Ms Gobbo at the time of this questioning.
81. For completeness, it should be observed that, insofar as it is relevant, the offence of burglary is committed if a person enters a building or part of a building with the intent to steal.¹³⁰
82. The matter was addressed in cross-examination of Ms Gobbo, and she in effect denied ever having the intention to steal.¹³¹
83. The matter is not alleged as a proposed finding of burglary (or even trespass) in the submissions of Counsel Assisting.
84. Even if this incident should have been characterised as a potential “trespass” rather than a “burglary”, there is nothing that would found a proper allegation of apprehended bias. The focus of the cross examination was the apparent failure of the handlers, being police officers, to identify and question Ms Gobbo concerning her conduct, which may have amounted to criminal conduct. It is to be noted that the Handlers’ position is that they relied on Ms Gobbo to regulate the propriety of her own conduct. These events might have suggested that she was not inclined to do so.

4. The suggestion that Ms Gobbo committed a breach of the *Australian Crime Commission Act 2002 (Cth)* or the *Police Integrity Act 2008 (Vic)*, by referring to the legislation but not then pointing out the statutory defence which Ms Gobbo’s explanation clearly enlivened.

85. There is no reference provided by Ms Gobbo regarding this complaint, and it is not clear what it refers to.
86. If Ms Gobbo is referring to the submissions made at Volume 2, [2403]-[2404], she makes no submissions as to the statutory defence that is “clearly enlivened”.

5. Suggesting Ms Gobbo had obtained \$60,000 from Mr Karam by deception despite the legal issue of dishonesty and, more so, that \$50,000 of that \$60,000 represented fees Ms Gobbo received for representing Mr Karam during a trial - where he was found not guilty.

87. Again, this complaint is not referenced. It appears to refer to the following examination of Ms Gobbo:¹³²

MR WINNEKE:

Over the period of time that you were registered and subsequently you charged him, indeed entirely during the period of time that you were registered from 21 November 2005 through to December 2008, somewhere in the region of \$60,000?

¹²⁹ Transcript of Mr Fox, 13 September 2019, 6368-6369.

¹³⁰ *Crimes Act 1958 (Vic)*, s 76.

¹³¹ Transcript of Ms Nicola Gobbo, 11 February 2020, 13767, [28-35].

¹³² Transcript of Ms Nicola Gobbo, 7 February 2020, 13453, [2-7].

MS GOBBO: Um, does that include the three month trial I did for him where he was acquitted?

MR WINNEKE: Yes, it does?

MS GOBBO: Yes.

88. It was clear that Mr Karam had been acquitted. This was also dealt with by counsel for Ms Gobbo in cross-examination.¹³³
89. However, the point is not whether Mr Karam was acquitted (with Ms Gobbo acting as junior counsel), it is whether he was potentially deceived by Ms Gobbo – namely that she was purporting to provide independent legal advice and representation at the time when she was a registered police informer and actively informing against him and others.¹³⁴ Had Mr Karam known of this, it is almost certain that he would not have retained Ms Gobbo. Whether or not Mr Karam was acquitted is not to the point.
90. As submitted by Counsel Assisting in Volume 1:¹³⁵

By the conduct of accepting briefs and continuing to advise and act for clients, Ms Gobbo was impliedly representing to her instructors and clients that she was a law-abiding independent legal practitioner, who would act in their interests and would not provide any information about her clients or their cases to law enforcement authorities. If she knew that her implied representation was false, and that her clients might not have retained her if they knew of its falsity, she can be said to have likely engaged in the requisite deception for the purposes of ss 81 and/or 82 of the Crimes Act 1958 (Vic).

91. In any event, it is not submitted in Counsel Assisting's final submissions that Ms Gobbo obtained a financial advantage by deception from Mr Karam – rather criminal allegations are limited to Chapters 7 and 11 of Volume 2 (the case studies in relation to Mr Thomas and Mr Cooper respectively).

6. Not cross-examining Ms Gobbo about the memorandum to Mr Allan [sic] SC. Not only do Counsel Assisting seek an adverse finding against Ms Gobbo about this (which is a breach of procedural fairness), they do not even refer in detail to Mr Carl Williams' complaints which put the memorandum into context.

92. This matter is dealt with in the submissions of Ms Gobbo at [569]-[583].
93. The relevant finding sought by Counsel Assisting is at [1011] of Volume 2:

On the evidence, it is open to the Commissioner to find that Ms Gobbo was dishonest in her 12 August 2006 memorandum. That is so because, to her own knowledge, Ms Gobbo had numerous other conflicts of the very kind that Carl Williams was complaining about, as referred to above.

94. Another relevant finding is sought by Counsel Assisting is at [690] of Volume 2:

¹³³ Transcript of Ms Nicola Gobbo, 11 February 2020, 13778, [39-46].

¹³⁴ See Submissions of Counsel Assisting's, Volume 3, 711ff.

¹³⁵ Submissions of Counsel Assisting, Volume 1, [284].

On the evidence, it is open to the Commissioner to find that:

690.1. Ms Gobbo was aware of the circumstances in which Mr McGrath's statements had been made, and therefore the potential weakness in his evidence, and yet she had a personal interest in Mr Thomas not finding out about her role...

95. Ms Gobbo failed to inform Mr Allen SC of her previous role in the editing of McGrath's statement, amongst other things, which was another example of her being conflicted with regard to the representation of Mr Thomas. She accepted that she was significantly compromised.¹³⁶ The main point of Counsel Assisting is that it was dishonest, by omission, for Ms Gobbo in her memorandum to only refer to her acting for Mr Williams as the reason why she was conflicted with regard to Mr Thomas. It was not the mere fact that she had acted for Mr McGrath previously – which was well-known – but that she had a central role in the editing of his statement against the interests of Mr Thomas and others. This does not raise an issue of apprehended bias.

7. Tendering Mr Solomon's statement which was adverse to Ms Gobbo and not calling him for cross-examination, despite having had possession of the statement for a lengthy period of time. Other relevant witnesses were not called, such as Ms Tess Walsh AC.

96. Again, there is no reference provided by Ms Gobbo in relation to this issue.
97. Ms Gobbo does not explain how Mr Solomon's statement was adverse to her, or the matters that she would have raised in cross-examination.
98. Ms Gobbo provides no explanation regarding the relevance of Ms Tess Walsh AC, or the matters that she would have raised in cross-examination.
99. It is for the Commission, assisted by Counsel Assisting and cognisant of the terms of reference and the limitations due to time and reporting requirements, to determine which witnesses will be called and the issues that will be explored in evidence.
100. Further, Ms Gobbo does not refer to any request for Mr Solomon or Ms Walsh AC to be called.

8. Referring to the case of the Nguyens. This was never considered evidentially at all and Ms Gobbo was asked no questions about it.

101. Again, there is no reference provided by Ms Gobbo in relation to this issue.
102. The case of the Nguyens is dealt with at [3226]-[3239] of Volume 2 of the submissions of Counsel Assisting. Notably, no specific findings are sought against Ms Gobbo regarding the Nguyens.
103. Counsel Assisting must have regard to the Commission's obligation to only make findings of fact where satisfied there is a proper basis to do so. As

¹³⁶ Transcript of Ms Nicola Gobbo, 7 February 2020, 13479, [47] – 13480, [12].

observed above, the failure to put a matter or to cross-examine in respect of a matter may affect the weight attached to that evidence.¹³⁷

104. Ms Gobbo does not address how she takes issue with that material relating to the Nguyens or what she would have stated about it if asked. She has been afforded the opportunity to respond to the submissions of Counsel Assisting and has not given any particulars about why the submissions of Counsel Assisting are incorrect or unfair.

9. Asking Ms Gobbo if she had sought an ethics ruling relating to conflict when these issues are complex as evinced by one of Counsel Assisting having represented Mr Fox.

105. Again, this assertion is not referenced.
106. The issue of Ms Gobbo potentially seeking a ruling from the ethics committee was dealt with in evidence, as was an issue about a complaint made by Mr Williams about Ms Gobbo to the Ethics Committee of the Victorian Bar.¹³⁸
107. Ms Gobbo accepted in relation to her conduct with regard to Mr Ahmed and Ms Haynes that there was an “obvious conflict”.¹³⁹ Counsel Assisting asking whether she had thought of seeking an Ethics Committee ruling does not evince any apprehended bias. Indeed, the relevant questions and answers were:¹⁴⁰

MR WINNEKE: Did you know of the existence of the Ethics Committee?

MS GOBBO: Um, yes, I'd been referred to it in relation to another client at one stage.

MR WINNEKE: Right. Do you think it would have been appropriate to get an advice from the Ethics Committee?

MS GOBBO: Oh, in hindsight, yes. In hindsight there's a lot of things that I would have done differently.

108. Ms Gobbo's knowledge about the Ethics Committee and her failure to seek advice or obtain a ruling when conflicted is obviously relevant to the first term of reference.
109. In relation to one of Counsel Assisting having represented Mr Fox, Counsel for the Handlers was aware of this issue and took no objection, prior to the Commission hearing evidence.¹⁴¹ The potential conflict of interest was properly declared by Counsel Assisting. To conflate that situation with Ms Gobbo's admitted and multiple conflicts of interest and her failure to seek advice or a ruling from the Ethics Committee is seriously misguided.

¹³⁷ Cole Report, Volume 2, 51 at [18].

¹³⁸ Transcript of Ms Nicola Gobbo, 5 February 2020, 13132, 13170, 13179.

¹³⁹ Transcript of Ms Nicola Gobbo, 5 February 2020, 13132, [11].

¹⁴⁰ Transcript of Ms Nicola Gobbo, 6 February 2020, 13132, [36-43].

¹⁴¹ Letter RCMPI to Mr Tony Hargraves, 9 September 2019, 1. Exhibit 504.

10. Counsel Assisting refused to consider the possible knowledge of colleagues or former colleagues about these matters, including for example Mr Horgan SC, Mr Tinney (now Tinney J), Mr Rapke, and other barristers.

110. After setting out her complaints, Ms Gobbo acknowledges that:¹⁴²

It is well understood that Crown Prosecutors and Judicial Officers cannot be compelled to attend a hearing; it does not however preclude Counsel Assisting considering the evidence and where it takes them with an open mind.

111. It is submitted that it is not a matter of Counsel Assisting failing to have an “open mind”. Ms Gobbo fails to address the real limitations imposed by s 123 of the *Inquiries Act 2014* (Vic) which prohibits the Commission from *inquiring into* or exercising any powers in relation to persons including judicial officers and Crown Prosecutors.

112. That made any such potential adverse findings impossible having regard to the requisite standard of *Briginshaw*.¹⁴³

113. However, as noted above, Counsel Assisting do not base their submissions on the mere fact that people, including current and former barristers, were aware that Ms Gobbo had acted for both Mr McGrath and Mr Thomas. This was well-known. The real issue is that Ms Gobbo had a central role in the editing of Mr McGrath’s statement against the interests of Mr Thomas and others. There is no evidence that Victoria Police told prosecutors about that matter. In relation to this critical issue, Ms Gobbo conceded that she had a huge conflict of interest, and could not properly pursue Mr Thomas’ interests by cross-examination of Mr Bateson to reveal that role, as it would (despite advancing Thomas’ interest, by potentially weakening the case against him) reveal her role, and subject her to the personal risk of harm.

11. The treatment of Mr Bickley as a witness.

114. It is a matter for the Commissioner to determine what to make of Mr Bickley’s evidence. Ms Gobbo does not explain how the approach of Counsel Assisting towards Mr Bickley would result in the Commissioner failing to bring an impartial mind to resolving the matters in dispute.

115. Ms Gobbo’s submission addresses Mr Bickley’s assertion during his evidence that he did not know Mr Cooper prior to meeting him on 24 April 2006 when Mr Cooper wore a wire.¹⁴⁴ Upon Mr Bickley giving that evidence, Victoria Police produced a transcript which demonstrated that Mr Bickley had been at Mr Cooper’s ██████ party in March 2006. On behalf of Ms Gobbo, it is suggested that Counsel Assisting was thus obliged to put to Mr Bickley that he was a liar. In fact, counsel for Victoria Police began exploring this issue with Mr Bickley, but delayed doing so pending the production of the relevant audio file.¹⁴⁵ Counsel for the handlers attempted to challenge Mr Bickley on this evidence – Mr Bickley did not relent.¹⁴⁶

¹⁴² Responsive submissions of Ms Gobbo, [80].

¹⁴³ (1938) 60 CLR 336.

¹⁴⁴ Responsive submissions of Ms Gobbo, [82].

¹⁴⁵ Transcript of Mr Bickley, 18 November 2019, 9393.

¹⁴⁶ Transcript of Mr Bickley, 18 November 2019, 9401.

116. It was in fact Counsel Assisting who put to Mr Bickley that he might have been mistaken about not having met Mr Cooper before 24 April 2006,¹⁴⁷ and suggested to him that he might have been at the Wheat Café at the time of Mr Cooper's event.¹⁴⁸
117. There was no agreement by Counsel Assisting, nor an obligation, to accuse Mr Bickley of lying. Any party who had a basis to assert as much was at liberty to do so.
118. In the submission identified above, counsel for Ms Gobbo also state:

"It should not be forgotten that Mr Cooper in evidence accepted that he had met Mr Bickley on several occasions and that Mr Bickley was at his party, thereby evidencing Mr Bickley's dishonesty."

119. It is thereby subtly suggested that, because of Mr Cooper's evidence, it was clear that Mr Bickley had lied. However what Ms Gobbo's counsel fail to specify clearly is that Mr Bickley's evidence on this point had been given on 18 November 2019, whereas Mr Cooper's evidence on this point was given on 24 January 2020.
120. The relevant part of Counsel Assisting's submissions is at Volume 2, [1308]:¹⁴⁹

The Commission heard conflicting evidence as to whether Mr Bickley asked interviewing police to contact Ms Gobbo, or whether the interviewing police suggested to Mr Bickley that he should contact Ms Gobbo. It is submitted that the Commissioner need not resolve that conflict.

121. Simply put, that submission is underpinned by the fact that it is not necessary to determine, on a *Briginshaw* standard, whether or not Mr Bickley lied in his evidence. That does not evince bias. The use of this exchange to suggest that Counsel Assisting ran a "pre-conceived narrative" against Ms Gobbo must be rejected.

12. The unfairness of Ms Gobbo giving evidence in public compared to others who gave evidence in closed court.

122. It was a matter for the Commission to determine whether witnesses should give evidence in public or in private.
123. Where possible the Commission sought to hear evidence in public. However, it had to balance competing policy considerations.¹⁵⁰
124. In the early days of the Commission, because of constant concerns raised by Victoria Police, and when Counsel Assisting were dealing with the Messrs McGrath, Andrews, Thomas and Cooper matters, proceedings had to be held in private or in a very oblique manner in public. By the time Mr Overland gave evidence, it was apparent that there were less concerns being expressed about the manner in which such evidence could be led in public, for example by the use of pseudonyms, and that continued with Ms Gobbo.

¹⁴⁷ Transcript of Mr Bickley, 18 November 2019, 9408. [44-46].

¹⁴⁸ Transcript of Mr Bickley, 18 November 2019, 9409, [4-5].

¹⁴⁹ Citations omitted.

¹⁵⁰ Inquiries Act 2014 (Vic), ss 24, 26.

125. There was significant public interest in hearing from Ms Gobbo given the criticisms of the High Court in *AB v CD*; *EF v CD*¹⁵¹ and the establishment of the Royal Commission including the first term of reference. Counsel Assisting endeavoured to adduce evidence from Ms Gobbo in a way that protected sensitive information.¹⁵²
126. As recently emphasised in *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants*,¹⁵³ s 26(2) of the *Inquiries Act 2014* (Vic), including s 26(2)(e) of that Act, confers a discretion on the Commissioner.¹⁵⁴ The same is true of s 24(1) of the Act related to the exclusion of persons from proceedings.
127. The criticism of the processes employed by the Commission are not well-founded.¹⁵⁵ In the relevant transcript relied on by Ms Gobbo, it is clear that Counsel Assisting was attempting to ask questions in a manner that did not result in the matters having to be heard in private. In response, it was Counsel for Ms Gobbo who objected and noted that there “may be occasions to deal with certain matters in private”.¹⁵⁶ When, in response, Counsel Assisting approached the issue in “a different way”, Counsel for Ms Gobbo did not object.¹⁵⁷

13. The treatment of Ms Gobbo when she gave evidence.

128. Ms Gobbo complains:¹⁵⁸

...during the cross-examination of Ms Gobbo, Counsel Assisting would frequently cut Ms Gobbo off, talk over her, misrepresent evidence to her and put material to her that Ms Gobbo made clear she had not seen. Counsel Assisting's narrative was such that there was an impression that Ms Gobbo's answers to evidence were irrelevant. It was simply a matter of getting through her evidence as quickly as possible, to allow Counsel Assisting to then criticise her in their submissions.

129. There are no references to support these allegations. It is plain that Ms Gobbo was represented when giving evidence, and objection could have been taken at the time.

130. The one example provided by Ms Gobbo when objection was taken is that:¹⁵⁹

Ms Gobbo was asked questions repeatedly. When complaint was made on her behalf, they were rejected. In fact, on one occasion, the Commissioner's response was:

MR NATHWANI: No, no, this is the same question that we keep coming back to over and over again.

¹⁵¹ (2018) 93 ALJR 59.

¹⁵² See for example the Submissions of Counsel Assisting at Transcript of the Royal Commission into the Management of Police Informants, 5 February 2020, 13115.

¹⁵³ [2020] VSCA 214.

¹⁵⁴ At [31] (Beach, McLeish and Weinberg JJA).

¹⁵⁵ Transcript of Ms Nicola Gobbo, 6 February 2020, 13333-13334.

¹⁵⁶ Transcript of Ms Nicola Gobbo, 6 February 2020, 13334, [44-45].

¹⁵⁷ Transcript of Ms Nicola Gobbo, 6 February 2020, 13335, [4-5].

¹⁵⁸ Responsive submissions of Ms Gobbo, [85].

¹⁵⁹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13311.

COMMISSIONER: *I think it would be quicker if we just get the answer and then we'll move on. All right.*

MR NATHWANI: *Or not repeat it.*

COMMISSIONER: *We'll just get the answer and move on. Thanks, Mr Nathwani. Could you answer the question, Ms Gobbo?*

MS GOBBO: *Sorry, can you say it again, please?*

131. When one considers the relevant questions and answers that followed the objection, it is clear that Ms Gobbo provided relevant evidence; she accepted that in hindsight her health issues provided an opportunity to get the Mokbels out of her life, but said that it did not occur to her at the time for various reasons.¹⁶⁰
132. Counsel Assisting was entitled to press the issue in testing whether Ms Gobbo in reality just wanted to be part of the police and provide information, a proposition that she disputed.¹⁶¹
133. Other complaints about how Ms Gobbo was dealt with as a witness have been dealt with above in the procedural fairness section. They do not, individually or collectively, establish apprehended bias on behalf of Counsel Assisting or the Commissioner. One of Ms Gobbo's complaints is that "...*Counsel Assisting embarked on a particular narrative with a closed mind and in a biased way...*"¹⁶² However, when the Commission's terms of reference are considered against the areas Ms Gobbo was examined upon, the manner in which that occurred and the Commission's obligations to Ms Gobbo, Ms Gobbo's complaint finds no support.

14. The reference by the Commissioner in relation to Ms Gobbo feigning illness to get an adjournment for Mr Cooper's plea, which was to "one line taken out of context" indicating "Counsel Assisting's narrative clouded [the Commissioner's] view".

134. The highlighting of a reference by the Commissioner¹⁶³ concerning the transcript evidence of Ms Gobbo about feigning illness does not indicate a predisposition, but even if it did, it does not indicate that the Commissioner was not open to persuasion. As noted above the real question is how that issue might result in "the feared deviation from the course of deciding the case on its merits".¹⁶⁴
135. In light of Ms Gobbo's previous representations, to both police and clients, it was entirely appropriate for an enquiry to be made concerning the veracity of evidence about her medical conditions. Ms Gobbo herself later agreed with the proposition that she was a "spectacularly good liar".¹⁶⁵ It must also be recalled

¹⁶⁰ Transcript of Ms Nicola Gobbo, 6 February 2020, 13311, [34-42].

¹⁶¹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13312, [4-18].

¹⁶² Responsive submissions of Ms Gobbo, [72].

¹⁶³ Transcript of the Royal Commission into the Management of Police Informants, 20 September 2019, 6615, [29-38] and Transcript of the Royal Commission into the Management of Police Informants, 20 September 2019, 6623, [12], where it was ordered that there should be expert evidence addressing that issue.

¹⁶⁴ *Ebner* (2000) 205 CLR 337 at 345, [8]. See also *Michael Wilson* (2011) 244 CLR 427 at 445, [63].

¹⁶⁵ Transcript of Ms Nicola Gobbo, 7 February 2020, 13473, [19].

that shortly after instructing her Counsel that she was not fit to give evidence, she gave a lengthy interview with the Australian Broadcasting Corporation.

136. Again, it is relevant that no objection was taken at the time of this issue. It does not appear that a submission was made by Counsel for Ms Gobbo that her comment was “one line taken out of context”, or that it had been qualified by her later comments.

15. The fact that there are no references in Counsel Assisting’s submissions to the cross-examination of any other party beyond Counsel Assisting.

137. It is not surprising, given the role and responsibilities of Counsel Assisting, that the submissions focus on evidence adduced by Counsel Assisting.
138. Potentially affected persons have had the opportunity to refer to any additional evidence and raise matters not addressed by Counsel Assisting in their submissions.
139. Ms Gobbo does not explain how this situation could result in any apprehended bias on behalf of the Commissioner, who will have regard to those responsive submissions.

16. The reticence of Counsel Assisting to make any submissions regarding adverse findings against Mr Pope.

140. Mr Pope swore an affidavit dated 2 November 2011 denying having had a sexual relationship with Ms Gobbo.¹⁶⁶ Before the Commission he gave sworn evidence that such a relationship did not occur.¹⁶⁷
141. In evidence Ms Gobbo could not give any detail of any specific occasion of intimacy with Mr Pope, and noted that over the last year she had begun to question her own recollection about it.¹⁶⁸
142. In those circumstances, and notwithstanding the matters raised by Ms Gobbo, there is nothing biased about Counsel Assisting submitting that the Commissioner ought not make a finding that Mr Pope had any sexual relationship with Ms Gobbo.¹⁶⁹

17. The fact of the closeness of the relationship between the Commissioner and Counsel Assisting, perhaps best demonstrated by the reference by the Commissioner to the first name of one of Counsel Assisting, and the reference in hearings to Counsel Assisting as “we” and “us”.

143. It is submitted that there is nothing in this complaint. Again, it is not referenced.
144. Ms Gobbo’s submits that on one occasion the Commissioner mistakenly referred to one of Counsel Assisting by their first name. It is not known whether this in fact occurred. However, assuming it did, it is mystifying how that could be said to demonstrate anything untoward.

¹⁶⁶ Exhibit RC0061 Affidavit of Mr Jeffrey (Jeff) Pope, 2 November 2011.

¹⁶⁷ Transcript of Mr Jeffrey (Jeff) Pope, 1 April 2019, 796, [14-17].

¹⁶⁸ Transcript of Ms Nicola Gobbo, 11 February 2020, 13814, [33-41].

¹⁶⁹ Submissions of Counsel Assisting, Volume 2, [125].

145. Ms Gobbo's counsel suggest that these references to "we" and "us" are to the Commissioner and Counsel Assisting. If such terminology was in fact used, it is not known whether that is the case or whether the Commissioner was referring to the Commissioner and her staff, or the Commissioner and solicitors assisting.
146. In any event, it is not uncommon, if not expected, that the relationship between the Commissioner and Counsel Assisting will be a close one.
147. Further, these criticisms do not bear on the Commissioner's capacity to bring an independent mind to the issues that require determination. Objection was not taken at the time of the purported comments.
148. Even if there was a reasonable basis for this criticism (and it is submitted there is not), it should also be observed that in *Victoria Police Special Operations Group*, Kyrou J noted:¹⁷⁰

Although a coroner conducting an inquest is not in the same position as a judge presiding over the hearing of a civil proceeding with all the trappings of the adversarial system, nevertheless the coroner is performing a function as a judicial officer and must conduct himself or herself as such. This means that the coroner must remain temperate and even-handed throughout the inquest.

In the present case, the Coroner made several sarcastic and flippant comments which were distracting and unhelpful. The Coroner's use of informal and familiar language such as "guys" and "chaps" to describe the plaintiffs was inappropriate. So was the Coroner's tendency to bypass Mr Lawrie and to address the plaintiffs directly, except when she explained the matters set out in s 57(3) of the Act. Also, the Coroner should not have requested Mr Lawrie to disclose the reasons for the plaintiffs' desire to give evidence.

The matters to which I have referred at [64] above might have caused a fair-minded lay observer to wonder whether the Coroner's conduct was unusual, but not to apprehend that the Coroner might have prejudged any issue that she was required to decide. There was simply no logical connection between the over-familiar and over-zealous approach of the Coroner and any prospect that she might perform her duties, in so far as they affected the plaintiffs, in a manner that lacked impartiality.

149. That is a far way removed from once referring to Counsel Assisting by her first name and using the expressions "we" and "us".
150. In *Firman* it was observed in passing:¹⁷¹

The closeness of the working relationship between Counsel Assisting and a Commissioner may well be illuminated by what transpires at public hearings of the Commission. In the present case the transcript of those hearings discloses, in a large number of instances, the apparent closeness of that relationship. The Commissioner, evidently

¹⁷⁰ (2013) 42 VR 1, 18-19 [63]-[65].

¹⁷¹ [2000] VSC 240. [28] (Ashley J).

referring to Counsel Assisting and himself, has very frequently used the term "we" when speaking about things done or to be done.

151. While there were other matters of "concern" identified by the plaintiff, in *Firman* it was concluded:¹⁷²

The critical question is whether, having regard to all the circumstances, to the matters which tend in opposite directions, an appearance of prejudice on the part of the Commissioner adverse to the plaintiff has been firmly established. It cannot be said that the plaintiff has not raised matters of concern; but in my opinion he has clearly not discharged the onus which he carried.

152. In light of the above, there is no merit in these complaints by Ms Gobbo.

18. The treatment of Ms Gobbo concerning her conversation with Counsel Assisting and the Commissioner when she had been deemed to have a reasonable excuse to not attend and give evidence.

153. It should be emphasised that Ms Gobbo was represented throughout this process. She could have, at any stage, refused to take part in the conversations with Counsel Assisting and the Commissioner. The fact that it was accepted that she had a reasonable excuse for not complying with the Commission's notice to attend did not mean she was unable to take part in the conversations with Counsel Assisting and the Commissioner. She did not object to the Commissioner being present, nor to the description that she would be giving evidence, albeit not on oath.¹⁷³

154. There was an issue between the Commission and those acting for Ms Gobbo about whether or not the discussions held on 20 March, 11 April and 13 June 2019 should be published.

155. On 20 March 2019, before the first discussion with Ms Gobbo, there was the following exchange between ██████████ (solicitor for Ms Gobbo) and the Commissioner:¹⁷⁴

██████████: *We are comfortable for it to be recorded, as has been proposed, although we would ask that if a transcript is made of the recording that as a matter of fairness a copy of the transcript be made available to us and we'd also ask that that transcript not be available or used in any dealings with Victoria Police, at least without our, a prior opportunity for us to comment on that. We can elaborate on the reasons for that but the essence of it is that Ms Gobbo has zero trust in Victoria Police and would like to be able to talk freely and openly with you this morning. But obviously to do that it's desirable that she can do so in the knowledge that what she says is not going to*

¹⁷² Ibid, [201] (Ashley J).

¹⁷³ See correspondence from the Commission to Ms Gobbo, 18 and 19 March 2019.

¹⁷⁴ Transcript of Ms Nicole Gobbo, 20 March 2019, 166-167 (emphasis added).

be immediately repeated to police or their representatives.

COMMISSIONER: *Okay. Certainly transcript, as you've been informed, will be made, is being taken and will be made available to Ms Gobbo through you, [REDACTED]. **And we won't be releasing that publicly, and we're certainly not releasing it to Victoria Police without letting you know of our intention and giving you an opportunity to respond. So if you're happy to proceed then on that basis we'll proceed.***

[REDACTED]: *Yes, thank you, Commissioner.*

156. Ms Gobbo took issue with the Commission's interpretation of the relevant italicised part of the transcript, and understood that the transcript would not be published at any stage.¹⁷⁵
157. Submissions were made by Ms Gobbo dated 21 October 2019 submitting, amongst other things, that the conversations should not be published.
158. On 22 November 2019, the Commissioner indicated that she had considered Ms Gobbo's submissions and had determined that.¹⁷⁶

Having given Ms Gobbo, who has been legally represented throughout the life of the Commission and its hearings, every opportunity to provide a statement without fruition, I am satisfied that the Commission should now receive this material to inform itself of matters relevant to the Commission's Terms of Reference 1 and 2. For the moment those exhibits will remain confidential until I have determined the issue of whether Ms Gobbo has provided a reasonable excuse to the Commission for her non-attendance and the documents have been reviewed by Victoria Police for public interest immunity matters.

Whilst I accept there is some considerable weight in the issues raised by Ms Gobbo's counsel, in that these are valid concerns and are themselves relevant to the limited weight that can be given to the material, given that it's unsigned, unsworn and given in circumstances which may have been difficult for her, I am however also conscious that during the interviews she was engaged and responsive and it seems appropriate to me that the Commission should receive the material and inform itself of them.

159. The transcripts of the conversations were then tendered into evidence.¹⁷⁷

¹⁷⁵ Correspondence from Ms Gobbo to the Commission dated 30 September 2019.

¹⁷⁶ Transcript of Royal Commission into the Management of Police Informants, 22 November 2019, 9878, [26-46] (emphasis added).

¹⁷⁷ Transcript of Royal Commission into the Management of Police Informants, 22 November 2019, 9879, [8-21].

160. On 4 December 2019, the Commissioner gave a ruling determining that Ms Gobbo had not established on the balance of probabilities a reasonable excuse for failing to comply with the notice to attend.¹⁷⁸
161. Ms Gobbo could have sought judicial review over those decisions. She did not. She should not now, at the eleventh hour, complain that the decisions were infected by apprehended bias.
162. For Ms Gobbo to conflate this situation with her own breaches of confidence (many of which were admitted by Ms Gobbo herself), is seriously misguided.¹⁷⁹

Complaints of Bias Made by Other Parties

Victoria Police

163. The allegation by Victoria Police that Counsel Assisting have inflamed or incited the Commissioner to hold a biased view against Mr Bateson is dealt with at length in the reply submissions below.¹⁸⁰
164. Other claims of bias made by Victoria Police are also dealt with in detail below concerning:¹⁸¹
 - 164.1. Mr Biggin's knowledge of the circumstances surrounding Mr Cooper's arrest; and
 - 164.2. Mr Flynn's knowledge at the relevant period.
165. Counsel Assisting seek the finding at [839] that: "[o]n the evidence, it is open to the Commissioner to find that the evidence demonstrates that when it suited, or was uncontroversial, the Purana Taskforce had legal advice readily available to it". In response, Victoria Police make an allegation that, because the "unfortunate formulation" only relies on one example (Mr O'Brien contacting Ms Dianne Preston, a solicitor engaged by Victoria Police), that "risks creating an apprehension of bias because it conveys a cynical mind".¹⁸² However, there are many other examples of the Purana Taskforce seeking legal advice:
 - 165.1. On 22 April 2006, Mr O'Brien spoke to Senior Crown Prosecutor Horgan about keeping Mr Cooper ██████████ in custody without charge, and failed to speak with anyone about Ms Gobbo having arrived to advise them both despite being the informer against them;¹⁸³
 - 165.2. In mid to late 2006, Mr O'Brien and Detectives Rowe and Hatt attended a meeting with police solicitors in relation to PII issues in the cases of Mr Milad Mokbel and Mr Carl Williams, and on 15 August 2006 Mr Overland, Mr O'Brien, Mr Bateson, Ms Kerley, Mr Coghlan, Mr Horgan, Mr Tinney and Ms Anscombe held a meeting regarding PII issues in Mr Williams' trial;¹⁸⁴ and

¹⁷⁸ Transcript of Royal Commission into the Management of Police Informants, 4 December 2019, 10404.

¹⁷⁹ Responsive submissions of Ms Gobbo, [98].

¹⁸⁰ Responsive submissions of Victoria Police, [13.21].

¹⁸¹ Responsive submissions of Victoria Police, [40.15]-[40.16], [61.10].

¹⁸² Responsive submissions of Victoria Police, [52.57].

¹⁸³ Submissions of Counsel Assisting, Volume 2, [1831.18].

¹⁸⁴ Submissions of Counsel Assisting, Volume 2, [1657]-[1659], [1671]-[1676].

- 165.3. In September 2008, Mr Johns and Mr Flynn attempted to prevent release of material that would have the effect of revealing Ms Gobbo as a source, but did not inform their Counsel, Mr Gipp or the court.¹⁸⁵
166. In relation to Mr Wilson, it is submitted that it is not open to the Commissioner to make the findings contended for by Counsel Assisting at [2096] because the decision to withdraw Ms Gobbo as a potential witness was a sound one based on all of the information available to those persons responsible for making that decision.¹⁸⁶ Making a finding that withdrawing Ms Gobbo as a witness represented a “loss of opportunity” would demonstrate hindsight bias by focusing on the outcome of the decision, rather than on the reasonableness of the decision and the factors taken into account in reaching it.
167. It is axiomatic that the failure to call Ms Gobbo hindered the investigation. That is not hindsight reasoning – Ms Gobbo had important evidence to give regarding an important issue. Mr Wilson agreed that Ms Gobbo having disclosed privileged information is a matter that should have raised alarm bells.¹⁸⁷
168. It should be noted that in Ms Gobbo’s reply, she refers to examples set out in Tranche 2 of Victoria Police’s submissions at [11.4] to [11.5], [113.15] to [113.22], [114.5] to [114.6] and [116.5] to [116.8] in respect of material that Counsel Assisting included and excluded in their submissions, which it is submitted best demonstrates the troubling approach adopted by Counsel Assisting.
169. It should be noted in relation to these matters that it is not disputed that members of Victoria Police were concerned about Ms Gobbo’s safety. That is accepted. What is significant, however, is that there was also the risk to judicial process and the competing concerns regarding the interests of justice, including the potential for the extent of Ms Gobbo’s use as a human source in other cases to be revealed.

The SDU

170. Regarding the complaints made by particular former members of the SDU commencing at [22] of their responsive submissions concerning the conversation on 28 October 2005 with Ms Gobbo regarding legal professional privilege, the following should be noted:
- 170.1. Counsel Assisting asked Mr Sandy White about the conversation at T3888-9. Mr Sandy White interpreted comments made by Mr Peter Smith after Ms Gobbo said she could not provide privileged information, as meaning that putting aside privilege, the SDU would want to hear other information;
- 170.2. When Counsel Assisting examined Officer Black, he played an audio recording of a conversation between Mr Black, Mr Sandy White and Mr Peter Smith at T8120, and asked the following:¹⁸⁸

MR WINNEKE: ... I suggest to you... there's an exploration about whether or not she could

¹⁸⁵ Submissions of Counsel Assisting, Volume 2, [2993]ff.

¹⁸⁶ Responsive Submissions of Victoria Police, Tranche 2, Mr Wilson, [75.11].

¹⁸⁷ Transcript of Mr Wilson, 4 December 2019, 10440, [42].

¹⁸⁸ Transcript of Mr Black, 23 October 2019, 8120, [18-24].

provide privileged information and at that stage of the game she's reticent to do so, albeit the police are saying, Mr Sandy White's saying, "Look, it's a matter for you but we're more than happy to hear it" , do you accept that proposition?

MR BLACK: Yes.

170.3. When Ms Gobbo was asked questions about this issue, the full conversation was put at T13327. It is accepted that the summary at T13320.36-39 could have been more precise (albeit that Ms Gobbo agreed that the gist of the conversation was that the Handlers wanted her to tell them information which was privileged). The central point in relation to this issue is that the Handlers were willing for Ms Gobbo to determine issues of privilege (even though she was conflicted as a human source), but by mid-2006 that concern had evaporated. As Counsel Assisting asked Ms Gobbo:¹⁸⁹

MR WINNEKE: ... there might be another interpretation of the transcript that I put to you, that the handlers were saying, "We're leaving it to you", in effect saying to you, "If you say it's privileged don't tell us, but we'll leave that up to you"?

MS GOBBO: Yep.

MR WINNEKE: Do you agree with that?

MS GOBBO: Yes.

MR WINNEKE: So that might have been the situation certainly as far as you understood it in the early stages of the game?

MS GOBBO: Yeah. At the outset things were very different to the way they ended up.

170.4. With regard to the complaint of the Handlers regarding errors in the transcript at [30], it should be noted that was a police transcript, and not an error of the Commission. However, even accepting that the comment attributed to Mr Sandy White is incorrect, which it may or may not be, the transcript is of significance, given that Ms Gobbo herself was saying that ethical lines were originally observed but that there were none anymore. It cannot be seriously suggested that Counsel Assisting have no proper basis to pursue a theory that Mr Sandy White was not cognisant of the problems inherent in using a defence barrister as a human source when she was herself stated to him that "there's no ethical standards any more, it's all just out the window".¹⁹⁰

171. Further, a few weeks later, on 3 July 2007, the conversation which is referred to in Volume 2, [2398] took place:

¹⁸⁹ Transcript of Ms Nicola Gobbo, 6 February 2020, 13326, [47] – 13327, [11].

¹⁹⁰ Transcript of meeting between Ms Gobbo, Mr Anderson and Mr Sandy White, 21 May 2007, VPL.0005.0137.0001 at .0194.

MR SANDY WHITE: All right. It's really important for all of us that you don't represent anyone.

MS GOBBO: Mm.

MR SANDY WHITE: I'd hate to think that ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got completely unbiased uncompromised defence.

MS GOBBO: Who's ever going to know about that?

MR SANDY WHITE: Well - - -

MS GOBBO: And there's already 20 people in that category.

MR SANDY WHITE: I know, I know.

MS GOBBO: Sorry.

MR SANDY WHITE: Don't think we haven't thought about this day in and day out.

MS GOBBO: I do.

MR SANDY WHITE: Its – its and I fully expect you would.

172. Counsel Assisting were following an investigative line that had clear signposts; the Handlers knew that there were significant ethical and legal issues concerning the propriety of what they were doing because of the conflict between Ms Gobbo's role as barrister and informer.
173. In relation to the complaint made at [32] of their submissions about the reference by Counsel Assisting to a "burglary", Counsel Assisting refer to the submissions made above in response to Ms Gobbo. Given the circumstances of the incident, including that it occurred on the weekend and without the consent or presence of the barrister, Ms Cure, it cannot be seriously suggested that police officers in receipt of this sort of information should not have been concerned about the conduct of Ms Gobbo, and that Counsel Assisting are biased in pursuing this matter.
174. Mr Fox's response, that he was not concerned because "...like a solicitor's office or chambers I understand many solicitors can work out of" should not be accepted.¹⁹¹
175. Further, the proposition that the Handlers had "lost their way", was not a concept that was without foundation. It comes from an assessment of their supervisor Superintendent Paul Sheridan and was a proposition with which Mr Sandy White agreed.¹⁹²
176. Regarding the issue identified by the Handlers at [40] concerning the interpretation of the note by Mr Peter Smith, it is submitted that there was a proper basis for this interpretation. Notably, Ms Gobbo was concerned that members of the SDU had told others about information she had disclosed, perhaps best demonstrated by Mr Attrill being informed that Ms Gobbo had told

¹⁹¹ Transcript of Mr Fox, 13 September 2019, 6369, [31].

¹⁹² Transcript of Mr Sandy White, 20 August 2019, 4632, [15-41].

police handlers that about the theft of \$20,000 from Mr Ahmed shortly prior to his arrest.¹⁹³

177. However, in light of the matters raised by the Handlers, Counsel Assisting accept that the Commissioner could not be satisfied, on the *Briginshaw* standard, that Mr Peter Smith used the expression “there are very few people that know about your situation”.
178. With regard to the issue identified by the Handlers at [201] regarding SDU members being aware of improper behaviour that warranted a Royal Commission and Mr Black’s diary note, Counsel Assisting submit:¹⁹⁴

On the evidence, it is open to the Commissioner to find that by 24 July 2006, given Mr Black’s notes of the meeting, all of the members of the SDU who attended the SDU meeting on that date knew that Victoria Police’s use and management of Ms Gobbo as a human source represented serious impropriety of sufficient scale and severity to warrant the establishment of a Royal Commission.

179. The Handlers submit “[t]he suggestion that all SDU members were aware of improper behaviour that warranted a Royal Commission was expressly denied by Messrs Black and Richards. There is no basis to find otherwise”.¹⁹⁵ Mr Black gave evidence that he did not know if he actually verbalised the words “Royal Commission” but certainly said this will be the subject of a review”.¹⁹⁶ He denied that he had concerns about improper conduct.¹⁹⁷
180. However the Handlers fail to deal with the following passage of Mr Black’s evidence:¹⁹⁸

MR WINNEKE: When you raised the suggestion that there could be a Royal Commission concerning the future conduct of Ms Gobbo?

MR BLACK: M'mm.

MR WINNEKE: Was that discussed with all of the members at the SDU?

MR BLACK: I think that was a broad discussion as far as whether or not it was a good decision to allow the source to visit Mr Cooper. You know, a consequence of that, you know, it was a rather pretty big event that had taken place. It was the commence of the downfall of the Mokbel cartel. It was a major objective achieved by the Crime Department of Victoria Police and it was - you know, it had been discussed around the office for, you know, a few days, weeks, months.

MR WINNEKE: Right. My question was, was it something that all of the members at that Unit were aware of that

¹⁹³ Submissions of Counsel Assisting, Volume 2, [2008].

¹⁹⁴ Submissions of Counsel Assisting, Volume 2, [1646].

¹⁹⁵ Responsive Submissions of the SDU, [200].

¹⁹⁶ Ibid, [199].

¹⁹⁷ Ibid, [199].

¹⁹⁸ Transcript of Mr Black, 23 October 2019, 8211, [3-12].

you were raising, that is the potential that there might be a Royal Commission into the conduct of the SDU managing Ms Gobbo as a human source?

MR BLACK: I may have not used the specific words Royal Commission. I mean, as I said, these are my notes in a diary from a meeting that went for three and a half hours. But I certainly would have - you know, we knew that everything that we did would be subject to a review. Allowing her to speak to Mr Cooper obviously would draw great scrutiny and so be it.

MR WINNEKE: You're not the sort of - you're not a retiring flower or anything like that, you're a person who's going to put your position forward; aren't you?

MR BLACK: Yes, correct.

MR WINNEKE: And it was an environment in which that sort of robust discussion was encouraged?

MR BLACK: Absolutely, and that helped us make, you know, try and make a better process and better decisions.

MR WINNEKE: And if you were concerned enough to record in your diary the words Royal Commission, it's not something that you would quietly think about yourself, it's something that you would put forward into the debate and discuss, isn't it? This is a significant issue?

MR BLACK: Correct.

181. It is a matter for the Commissioner to determine this issue to the requisite standard. It may be that the expression "Royal Commission" was not used, but that the Handlers were aware of the issues with the use of Ms Gobbo that, at the very least, would be subject to a review which would concern the propriety of those arrangements. It should be noted that Officer Peter Smith used the words "Royal Commission" in December 2008 when the SDU were concerned that Ms Gobbo may be a witness in the prosecution of Mr Dale. Further, Mr Black used the words again June 2009 when concerned that Ms Gobbo may be a witness in the prosecution in relation to Taskforce Briars.
182. In any event, this issue does not demonstrate apprehended bias of Counsel Assisting, and there is no submission as to how this may affect the impartiality of the Commissioner.
183. At paragraphs [203] to [224] of the SDU submissions, exception is taken to the suggestion that Mr Fox gave a dishonest answer to the Commission in relation to a 13 September 2007 entry he made in the ICRs.
184. Given the following, the submission on Mr Fox's behalf is somewhat mystifying.

185. The relevant ICR records that on 13 September 2007, Ms Gobbo provided certain information to her handler, Mr Fox, regarding Ms Mokbel's defence. Mr Fox recorded in the ICR:

- *She mentions that the Roula brief is lacking a statement from [REDACTED] from NAB. He would well and truly convict Roula for these deceptions.*
- *I will tell Jim Coughlin.*

Action: Verbally disseminated above information to Jim Coughlin – Purana.

186. Given that Mr Fox had confirmed in writing in the ICR that he had passed the information on to Jim Coughlan, it was unsurprising that Counsel Assisting put that fact to Mr Fox. The exchange progressed as follows:

MR WOODS: She mentions that the Roula brief is lacking. "A statement from [REDACTED] from NAB. He would well and truly convict Roula for these deceptions. I will tell Jim Coughlan. Action: verbally disseminated above information to Jim Coughlan at Purana." That's the information you received and that's what you did?

MR FOX: I'd have to look at my diary for that.

MR WOODS: You've written it in an ICR. You wouldn't have made it up I take it?

MR FOX: It could be - as I discussed, I've identified anomalies in the ICRs to my diary. My diary is contemporaneous.

MR WOODS: Mr Fox, this was the formal document in which you recorded your dealings with Ms Gobbo and it was the formal document by which other handlers and people within the SDU would see the information that was obtained and see how the information was used. That's the whole point of the ICR, isn't it?

MR FOX: That's correct.

MR WOODS: And you would have taken great care in recording what occurred in the ICR, I suggest that to you?

MR FOX: Yes, to the best of my ability.

MR WOODS: And the best of your ability would have included not recklessly saying that Roula's brief is lacking a statement from someone from the NAB, you wouldn't have written that in simply by accident, would you?

MR FOX: No.

MR WOODS: That was something that Ms Gobbo told you, wasn't it?

MR FOX: It would appear, yes.

- MR WOODS: *And your intention was to pass it on to Jim Coghlan, wasn't it?*
- MR FOX: *Not necessarily.*
- MR WOODS: *So you wrote the words, "I will tell Jim Coghlan" for what reason?*
- MR FOX: *Sometimes to placate the source.*
- MR WOODS: *So she was looking at the ICR, was she?*
- MR FOX: *No.*
- MR WOODS: *So why would you write in the ICR that you would tell Jim Coghlan to keep Nicola Gobbo happy?*
- MR FOX: *Because the conversation, like often these conversations went round and round in circles.*
- MR WOODS: *I suggest to you that you are being dishonest in that answer. It is perfectly clear from this document that you intended to tell Jim Coghlan, firstly, and secondly, you did tell Jim Coghlan that information. What do you say about that?*
- MR FOX: *I'd have to look at my diary.*
- MR WOODS: *So is it your position that if it's not written in your diary then you simply made it up to put it in the ICR?*
- MR FOX: *No.*
- MR WOODS: *What's the explanation then?*
- MR FOX: *That if it's not clear in my diary, it's not necessarily - it could be an error in the ICR. However it could also be that I have, yes.*
- MR WOODS: *It could also be that you have what, I'm sorry, accidentally written that you verbally disseminated it to Jim Coghlan?*
- MR FOX: *No.*¹⁹⁹

187. The submissions on behalf of Mr Fox go on to set out further evidence he gave as to the possible provenance of the words and possible explanations.

188. The Commissioner should take particular note of Mr Fox's words "*however it could also be that I have, yes*". This appears to be an acceptance by Mr Fox that it could be that he did in fact pass the information on to Mr Coghlan.

189. In any event, given:

189.1. Mr Fox's own note in the ICR records that he passed the information to Mr Coghlan;

¹⁹⁹ Transcript of Mr Fox, 13 September 2019, 6325-6326.

- 189.2. Mr Fox's explanation in the witness box was that he recorded it in the ICR "*sometimes to placate the source*" and "*because the conversation, like often these conversations went round and round in circles*"; and
- 189.3. the ICR was not something Ms Gobbo would ever see;
- it is unsurprising that Counsel Assisting put to him that his answer was dishonest.
190. Indeed, given the written record and Mr Fox's answers, it would not have assisted the Commissioner to fail to forcefully challenge Mr Fox's implausible answer.
191. Counsel Assisting are obliged to adduce and, where appropriate, test the evidence. This assists the Commissioner in assessing the evidence and thereby acquit the terms of reference. By the very nature of an inquiry of this kind, neither the Commission nor Counsel Assisting have all of the answers based on the documents adduced – that is why witnesses are called and are asked questions – to determine the truth.
192. If a witness's own written record from the relevant time confirms that something occurred, it is entirely plausible that it occurred. If the witness, in the face of the written document, then denies that what he recorded occurred, and fails to provide a plausible explanation, dishonesty is a very real possibility.
193. Here, Mr Fox first suggested that there may have been a difference between his diary and the ICR. Mr Fox next agreed that the ICR is an important document and he would have taken great care – to the best of his ability - in making the relevant entry in the ICR. Next, Mr Fox suggested that even though he recorded that he passed on the information, in fact he may not have done so.
194. Mr Fox was then asked why he wrote that the passed on the information if he did not in fact pass on the information. Mr Fox's answer "*to placate the source*" is, on any view, implausible, as Ms Gobbo would never have had access to the ICRs. When that fact was put to Mr Fox, the best he could offer was "*Because the conversation, like often these conversations went round and round in circles.*"
195. At that point, there was clear prevarication and obviously untrue answers. Indeed, even now it is not suggested that Mr Fox's answers to those questions were truthful.
196. Given the above, Counsel Assisting was quite entitled to suggest that Mr Fox was being dishonest in his answers.
197. Only once dishonesty was suggested to Mr Fox did he effectively tell the truth and say that he did not know and needed to look at his diary.
198. The fact that Counsel Assisting's suggestion of dishonesty was immediately followed by the proposition that he did intend to tell Mr Coghlan was entirely reasonable, given the fact that that is what Mr Fox's own record says, and he gave a dishonest answer.

199. The fact that Mr Fox later provided a plausible explanation (quite different to the explanation he provided in evidence at the time) is not the fault of Counsel Assisting as Mr Fox now appears to submit.
200. If Mr Fox had not been challenged, the Commissioner may never have received a plausible alternate explanation from Mr Fox and so would have been deprived of the ability to properly assess the evidence. That is the point of cross-examination.
201. The Handlers accept that Mr Fox's note *does* suggest that information was disseminated to Mr Coghlan, but submit the (other) evidence establishes that it was not.²⁰⁰ This is a matter for the Commissioner to determine, but the submission by Counsel Assisting does not demonstrate bias.

²⁰⁰ Responsive submissions of the SDU, [221]-[222].

REPLY SUBMISSION: VICTORIA POLICE & INDIVIDUALS – GENERAL SUBMISSIONS

Reply to Overview

Introduction

202. Counsel for seven identified members of Victoria Police (the Members) submit that Counsel Assisting have wrongly focussed upon the attribution of individual liability in its examination of “what went wrong and why” rather than identifying the root causes.²⁰¹
203. It is submitted that the Commissioner should reject that assertion.
204. As the Commissioner is aware, the preamble in the Letters Patent makes specific reference to the decision and reasons of the High Court of Australia, the Victorian Court of Appeal and the Supreme Court of Victoria concerning the conduct of Ms Gobbo and members of Victoria Police. This conduct was described by the High Court of Australia in the following terms:
- [Ms Gobbo’s] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of her obligations as counsel to her clients and of her duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.²⁰² As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.*
205. With that background the Commission is specifically obliged to inquire into and report upon the number of, and extent to which, cases may have been affected by the conduct of Ms Gobbo as a human source and 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.
206. Necessarily, terms of reference 1 and 2 require the Commission to examine the conduct of individual members of Victoria Police and Ms Gobbo. A failure to examine that conduct would be a failure to discharge the terms of reference.
207. In acquitting their task, Counsel Assisting have as comprehensively as possible sought to examine the conduct of Ms Gobbo and relevant members of Victoria Police, consistently with those terms.
208. The task was onerous and required the examination of hundreds and thousands of contemporaneous documents including thousands of pages of

²⁰¹ Responsive submissions of Victoria Police, Overview, [1.3].

²⁰² See *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.

handwritten diaries which were often provided shortly prior to, during or even after the evidence of a relevant witness and were often inaccurately redacted, making the task even more difficult. Whilst Counsel Assisting were assisted by the provision of statements, all too often they were self-serving and did not deal comprehensively, or at all, with matters of significance, did not make concessions, even appropriate ones, and Counsel Assisting were required to examine witnesses closely in order to acquit the terms of reference.

Failings are primarily organisational

209. Victoria Police accepts that there were systemic failures. It seeks to portray these as primarily “organisational”.
210. It is submitted on behalf of the Members that they acknowledge (with hindsight) that they should have made decisions differently, but despite this acknowledgement of having made wrong decisions, the failings are primarily organisational. Offence is taken to submissions have been made as to impropriety.²⁰³
211. It is asserted that the Hon Mr Kellam AO QC, who conducted one of the earlier inquiries into Ms Gobbo’s use found *negligence*, and no intent to act with impropriety and that Counsel Assisting have not identified evidence that was not before Mr Kellam which puts an entirely different complexion on the conduct.²⁰⁴
212. It is submitted that the Commissioner should reject those assertions.
213. The assertion made on behalf of Victoria Police that Mr Kellam simply found negligence understates the effect of Mr Kellam’s findings.²⁰⁵ It should be borne in mind that, even without that additional evidence, Mr Kellam, whilst not prepared to attribute knowledgeable impropriety to any particular officer, was prepared to conclude that police officers acted with negligence of a high order, rather than mere negligence as suggested in the submissions of the Members. Relevantly, the Letters Patent provide as follows:

An independent inquiry by the Independent Broad-based Anti-corruption Commission, conducted by the Hon Murray Kellam AO QC in 2015, into human source management at Victoria Police found that Victoria Police had failed to act in accordance with appropriate policies and guidelines in their recruitment, handling and management of 3838, and found negligence of a high order and made recommendations for the future recruitment, handling and management of human sources.

214. The reference to negligence of a “high order” is founded on the following passage from the Kellam report (emphasis added):

*This of course hardly explains the serious failure of SDU to ensure that established and mandatory protocols of AOR and RA processes were complied with **by SDU**, nor does it explain why it was that **those senior officers responsible** for the management of SDU failed to ensure that such protocols were*

²⁰³ Responsive submissions of Victoria Police, The failings are primarily organisational, [1.8]-[1.9].

²⁰⁴ Responsive submissions of Victoria Police, The failings are primarily organisational, [1.10].

²⁰⁵ Responsive submissions of Victoria Police, [1.10].

complied with by SDU operatives. That failure, over a significant period of time, can only be described as negligence of a high order.

215. Counsel Assisting's submissions identify significant evidence which was not before Mr Kellam. This includes statement evidence, oral evidence, police notes and diaries, tape recorded conversations between Ms Gobbo and SDU members.
216. It is noted by Counsel for the Members that "Victoria Police accepts primary responsibility for failings in relation to Ms Gobbo, without reservation or excuse".²⁰⁶
217. Notwithstanding this, and the findings of the Kellam report, Victoria Police is unwilling to accept that any individual was at the very least negligent, as though systemic and organisational failures by Victoria Police can somehow arise in a vacuum. Simply put, Victoria Police seeks to elide individual responsibility under the cover of systemic failure.
218. It must be remembered, as noted in our submissions (Vol 1, [388]), during the relevant period the *Police Regulation Act 1958 (Vic)* defined a breach of discipline as including "negligent or careless" conduct in the discharge of duty, and conduct that was "likely to bring the force into disrepute or diminish public confidence in it". For Victoria Police to fail to accept that any individual bears such responsibility, while simultaneously apologising to the Courts and to the Community (but not, it should be noted, to the accused persons who have been prosecuted and imprisoned in connection with their use of Ms Gobbo as a human source), reflects an attempt to shield the actors from bearing responsibility for their actions. That does not reflect a culture of responsible or accountable leadership. It undermines the professed institutional remorse.

The approach of Counsel Assisting has obscured the real issues

219. Effectively it is asserted on behalf of the Members that in seeking to attribute blame to individual officers, Counsel Assisting have set a task for the Commissioner that she cannot achieve, because the truth can no longer be ascertained. Further, it is asserted that Counsel Assisting have compounded the difficulties by "presenting only the evidence that they consider supports their conclusion". It is suggested that this approach has "obscured the real issues". It is submitted that the fact-finding task is complex and may remain incomplete.²⁰⁷
220. It is asserted that it is not possible for the Commissioner to make findings on each disputed fact, and she does not need to "given where the focus should be".²⁰⁸ Effectively, it is suggested that the focus should not be upon the conduct of members of Victoria Police and Ms Gobbo, but rather the root causes.

²⁰⁶ Responsive submissions of Victoria Police, Overview, [1.6].

²⁰⁷ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.15]-[1.18].

²⁰⁸ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.31].

221. It is said that Counsel Assisting have made grave factual errors, and proposed findings that cannot be maintained,²⁰⁹ said to be exemplified by the treatment of Mr Bateson.²¹⁰ It is said that Counsel Assisting seek findings that it is probable that a decorated former officer may have engaged in the impugned conduct without identifying evidence in support of the submission, and ignoring his unchallenged evidence.²¹¹ It is also said that Counsel Assisting propose serious adverse findings founded on manifestly inadequate evidence, such as the finding that it is open to the Commissioner to find that Mr O'Brien knew of Ms Gobbo's assistance in the statement making process of Mr McGrath, noting that he was not the head of Purana at that time.²¹²
222. Issue is taken with each of these assertions.
223. Whilst Counsel for the members assert that the "real issues" are said to be root causes of the failings rather than the attribution of "individual liability", the real issues for the Commission are those that are raised by the terms of reference (as indicated above) and accordingly, those issues must be considered by the Commissioner in order to acquit terms of reference 1 and 2 for the reasons set out above.
224. It is submitted that to eschew making findings concerning the individual conduct of members of Victoria Police and Ms Gobbo, where such findings are open, would ignore what is required by the terms of reference. Further, in order to examine the root causes, it is necessary to examine what occurred.
225. Clearly, where it is possible, and bearing in mind the *Briginshaw* standard of satisfaction, it is necessary for the Commissioner make findings of fact in order to acquit terms of reference 1 and 2.

The approach of Counsel Assisting invites the Commissioner to trespass beyond the Terms of Reference

226. It is submitted on behalf of the Members that issues of conflict of interest between different clients are not within the terms of reference, and that conflicts are not identified with precision, making the submissions difficult to engage with. An example of this is said to be in Counsel Assisting submissions as to Ms Gobbo's acting for Mr Thomas when she had acted for Mr McGrath.²¹³
227. Further, it is said that proposed findings about the statement taking practices of Victoria Police do not fall within the terms of reference.²¹⁴
228. It is submitted that the Commissioner should accept that a mere conflict of interest between two clients, such as the representation of Mr McGrath by Ms Gobbo and then Mr Thomas in circumstances in which each knew of all

²⁰⁹ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.19].

²¹⁰ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.20].

²¹¹ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.27].

²¹² Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.28].

²¹³ Responsive submissions of Victoria Police, The approach of Counsel Assisting invites the Commissioner to trespass beyond the Terms of Reference, [1.32]-[1.34].

²¹⁴ Responsive submissions of Victoria Police, The approach of Counsel Assisting invites the Commissioner to trespass beyond the Terms of Reference, [1.35].

relevant circumstances is not relevant to the terms of reference in this inquiry. Counsel for Ms Gobbo and Mr Bateson have gone to lengths to point out that Mr Thomas was aware that Ms Gobbo had previously acted for Mr McGrath at about the time that Mr McGrath had implicated Mr Thomas. There is no issue that that is the case. The matter of concern is Ms Gobbo's involvement in the process whereby Mr McGrath's statement was changed in a very significant way. The conflict which arose from that, and the knowledge of it by some members of Victoria Police is a matter of relevance.

229. Likewise, it can be accepted that the processes employed by members of police concerning the taking of statements do not, without more, fall within the terms of reference. However, where those processes have involved Ms Gobbo, and in particular, if there is a suggestion of failure to disclose that involvement, then such matters are within the scope of the inquiry.
230. These issues have also been examined as they touch upon the relationship between Ms Gobbo and members of Victoria Police. This can be seen in Chapter 7 of Counsel Assisting's primary submissions, which deals with the development of the relationship between Ms Gobbo and Victoria Police, where Ms Gobbo metamorphosed from someone considered criminally suspect in late 2003 / mid 2004 into an unregistered informer to Purana in 2005, then culminating in the unprecedented step of registering a practising criminal barrister to provide information to police about the clients for whom she was acting and continued to act.
231. Ms Gobbo, by her own admission, was regarded by members of the Purana Taskforce as a "stooge" for those criminal clients and other associates connected with organised crime. It has been submitted on behalf of Mr Bateson that as far as he was concerned, Ms Gobbo was not a proper barrister, and he regarded her as being the legal arm of Carl Williams' criminal crew.²¹⁵ Counsel Assisting certainly do not submit that Ms Gobbo was engaged in the criminal activities of Mr Williams or Mr Mokbel. However, the evidence does suggest that her propensity to associate with such people outside of usual professional circumstances caused police to harbour suspicion.
232. It is submitted that the events of 2004 and 2005, prior to the third registration are relevant to Ms Gobbo's transition to the role as registered human source. Her conduct with respect to Mr McGrath, demonstrated to the Purana Taskforce, that (whilst she still may have been regarded by police as not a proper barrister) she could be relied upon to assist police and to act in the interests of the police. Ms Gobbo had proved her worth. She facilitated the police desire to obtain evidence from Mr McGrath which assisted them to charge Carl Williams for the murder of Michael Marshall. She was no longer to be regarded as the "stooge" that she once was. Mr Bateson said in evidence that in her representation of Mr McGrath, Ms Gobbo had impressed him and acted contrary to the way he thought she would, and that he had indeed probably regarded her as a stooge for Mr Williams and Mr Mokbel prior to that time.²¹⁶ Albeit there are aspects of Ms Gobbo's conduct²¹⁷ and stated

²¹⁵ Responsive submissions of Victoria Police, Stuart Bateson, [14.8], [14.86].

²¹⁶ Transcript of Commander Stuart Bateson, 20 November 2019, 3344, TRN.2019.11.20.01 C.

²¹⁷ In particular, Ms Gobbo's admission that she 'edited' a statement made by Mr McGrath and provided it to police prior to seeking instructions from her client.

motivation²¹⁸ in her dealings with Mr McGrath which are most concerning, and may give rise to a perception that she was furthering her own interests and that of police, it is not submitted that it is open to conclude that Ms Gobbo was not also acting in Mr McGrath's interest.

233. During this period, the police were of the view that a "small cadre" of criminal lawyers who were regularly involved in the representation of organised crime figures were criminally suspect themselves. Ms Gobbo was initially regarded as one of this group. In 2005, Ms Gobbo fed this view, and provided information to Mr Bateson about her colleagues (one of whom was later a client when she was charged by the Purana Taskforce during the year). In this way Ms Gobbo further ingratiated herself as an asset of the Purana Taskforce.
234. In providing the information to Mr Bateson about Solicitor 2, Ms Gobbo also provided information about and against the interests of other clients, Mr Mokbel and Mr George Williams.
235. Evidence was heard as to Ms Gobbo's disenchantment over the relationship which had developed between Solicitor 2 and Mr Mokbel, and the perceived usurping of her role. Mr Biggin referred to his understanding of Ms Gobbo's recruitment having come about as a result of an attempt to 'corral' her provision of information to police into a single location.
236. These matters are all relevant to the circumstances in which Ms Gobbo came to be registered, and, it is submitted, within the terms of reference.
237. Insofar as statement taking practices have been examined, that is limited to matters connected to the terms of reference, and in particular, how Ms Gobbo appeared to have become involved in that process, by looking at and marking up statements, and telling clients to be "truthful". Counsel Assisting has submitted that this commenced with her representation of Mr McGrath in 2004. Following this, Ms Gobbo was used by the Purana Taskforce to review Mr Thomas' transcripts in April 2006, in circumstances where there was concern about the truthfulness of aspects of his account of events, in the knowledge that she might assist as she had done with Mr McGrath, to produce a more credible account before such an account might be committed to a statement. She was then again involved in the process with Mr Cooper. The examination of these matters exposes troubling processes in incremental statement taking practices and failures in relation to disclosure obligations.

No intention to act with impropriety

Introduction

238. This submission on behalf of the Members indicates that the use of Ms Gobbo as a human source has been the subject of inquiry twice prior to the Royal Commission, and there was no finding in either inquiry that members had an intention to act with impropriety.²¹⁹
239. It is noted that:

²¹⁸ Submissions of Counsel Assisting, Volume 2 664. See also RC267, Transcript of meeting between Ms Gobbo, Sandy White, Peter Smith, Steve Mansell, and Paul Rowe, page 24, VPL.0005.0051.0002 at .0025.

²¹⁹ Responsive submissions of Victoria Police, No intention to act with impropriety, [10.1]-[10.13].

- 239.1. the Comrie Review found that Ms Gobbo's handlers had not appreciated the legal and ethical complexities involved in using a legal practitioner as a human source
 - 239.2. Mr Kellam in his subsequent inquiry into the conduct of individual members found the same, and further concluded that the conduct resulted from "negligence of a high order on the part of those responsible for their supervision, guidance, instruction and management", describing the events as "serious systemic failure" by Victoria Police, and that he did not consider the conduct by individual police members resulted from any personal intention to act with impropriety.
240. The submission by the Members essentially reiterates in general terms that the evidence heard by the Royal Commission does not permit of a finding beyond this.
241. Counsel Assisting take issue for the same reasons as above.

Features of the evidence

242. It is submitted on behalf of the Members a number of factors strengthens the proposition that there was no intention to act with impropriety.
- 242.1. That because Ms Gobbo was registered in 1995, 1999 and 2005, and not "run off the books", it can be assumed that officers involved did not act with impropriety.²²⁰
 - 242.2. That detailed notes were kept by the SDU, indicating that officers were aware that their conduct could be scrutinised. There was no selective communications between the police and Ms Gobbo.²²¹
 - 242.3. Likewise, such observations apply to the investigators, who recorded material concerning Ms Gobbo in their diaries, and would have been aware that the SDU would also have been keeping records.²²²
 - 242.4. Decisions were taken in the knowledge that a consequence was the potential disclosure of Ms Gobbo's role as a human source, for example, the decision to call Ms Gobbo as a witness in the Dale proceedings.²²³
 - 242.5. Many people knew Ms Gobbo was a source, and none raised concerns about the appropriate use with the ESD. This suggests that members did not appreciate the unique issues that might arise from using Ms Gobbo in the manner in which she was used.²²⁴
243. In respect of this last matter, it is submitted that four critical factors informed the widespread failures on the part of the many people (100+) who were aware of Ms Gobbo's role as a human source:
- 243.1. confidence in the SDU

²²⁰ Responsive submissions of Victoria Police, Features of the evidence, [11.2]-[11.9].

²²¹ Responsive submissions of Victoria Police, Features of the evidence, [11.10]-[11.15].

²²² Responsive submissions of Victoria Police, Features of the evidence, [11.16]-[11.17].

²²³ Responsive submissions of Victoria Police, Features of the evidence, [11.18]-[11.19].

²²⁴ Responsive submissions of Victoria Police, Features of the evidence, [11.20]-[11.23].

- 243.2. knowledge of Ms Gobbo's use by executive command – the assumption that the propriety had been considered by those who had "gone before"
 - 243.3. members not being trained about the broader professional obligations
 - 243.4. members not contemplating that Ms Gobbo would act contrary to her professional obligations.
244. In relation to Ms Gobbo being registered in 1995, 1999 and 2005, and not "run off the books", the Commissioner should note the submissions in Chapter 9 of Counsel Assisting's primary submissions, concerning Mr Bateson's association with Mr Gobbo prior to her 2005 registration, which indicate that Ms Gobbo had been in an informing relationship, however not registered. In this regard, the Commissioner should note Mr Bateson's position that he did not regard that relationship as an informing relationship.
245. Other than what is referred to in the preceding paragraph, as a general proposition the above points might be accepted, however it is necessary to examine the facts concerning the individual members in order to determine whether taken as a whole they prevent a finding that such officers may have acted improperly.
246. It is through a careful analysis these records that the Commission is able to assess the conduct of members of police. These records (including those identified which enlarge upon the information considered by Mr Kellam and Mr Comrie) provide an understanding of the knowledge and conduct of individual members.
247. The evidence examined by the Commission reveals that some police officers in fact had concerns about the propriety of what was occurring but did not appropriately question it. The failure to raise these issues might reflect reluctance of members lower in the hierarchy to question superiors, particularly those superiors with prominence in the Victoria Police organisation.
248. The critical factors aside, issues associated with the use of Ms Gobbo as a human source were apparent to even relatively junior officers such as Ms Burrows, Mr Rowe and Mr Johns. If these matters were apparent to junior officers, it is hard to explain why more senior officers, did not appreciate likewise and to ensure that it was the subject of legal advice.
249. Similarly, the confidence of those down the line, who did not raise the issue of Ms Gobbo's use as a human source because they knew that Command had considered the matter, serves to highlight the failure of Command to address what were obvious issues, and raises questions as to why the obvious remedy of legal advice was not taken.
250. Mr Kellam was not satisfied with the explanation offered to him for not obtaining legal advice; that there was a concern about exposing Ms Gobbo to the legal adviser which posed an unacceptable risk to her safety. The failure by more senior officers to obtain legal advice or satisfy themselves that legal advice had been sought is significant. One view open is that there was a concern that advice obtained would prevent the use of Ms Gobbo, or alternatively that it would expose what had occurred.

251. Further, the documents show that many officers assumed that notes / records / information concerning informers would not be disclosed in court proceedings. Notes were routinely redacted by investigators without alerting the defence that there was relevant material being withheld and the basis for it. When there was concern that there might be a need to claim PII, steps were taken to avoid this to the extent possible:
- 251.1. Prior to the committal of Mr Milad Mokbel there was a decision that Mr Flynn's diary notes of 22 April 2006 would not be disclosed prior to his giving evidence. Investigators and the SDU engaged in discussion about how they could avoid making a PII claim which would necessitate the court becoming aware of Ms Gobbo's status. It was agreed that the notes would ostensibly be withheld on the basis of relevance and the threat to Ms Gobbo's safety. No PII claim was made.
- 251.2. When Ms Gobbo was transitioned to the status of witness the "barrier / break" concept was developed to provide a basis for the non-disclosure of Ms Gobbo's history as a human source in any subsequent prosecution.
252. It is also apparent from the evidence that investigators were conscious and careful about what information they recorded in their diary as it related to Ms Gobbo. For instance, a significant contrast can be drawn between the notes of investigators and the notes of the SDU when they discussed issues associated with the use of Ms Gobbo (as opposed to intelligence provided by her).

The failure to recognise conflict and obtain legal advice

253. In its response to the submissions of Counsel Assisting, Victoria Police has accepted the inevitable conclusion that a major contributing factor to what occurred was the failure to obtain legal advice at the time of recruitment or when issues began to emerge. In this regard they accept the criticism of Counsel Assisting.²²⁵
254. The organisation then seeks to shield individual members from criticism and individual accountability:
- 254.1. it is asserted that no evidence has emerged which demonstrates any intention or conspiracy to do anything improper or unlawful²²⁶
- 254.2. it is asserted that there is a body of evidence which strongly supports the proposition that those who were engaged in the recruitment, handling and management of Ms Gobbo did not engage in knowing impropriety²²⁷
- 254.3. it is asserted that the failure of members to disclose Ms Gobbo's role during court proceedings can be explained by a lack of clarity on their part about their roles and responsibilities²²⁸

²²⁵ Responsive submissions of Victoria Police, Tranche 2, Why it went wrong, [2.25].

²²⁶ Responsive submissions of Victoria Police, Tranche 2, The responsibility for what occurred is primarily organisational, [2.29].

²²⁷ Responsive submissions of Victoria Police, Tranche 2, Individual Responsibility and Accountability, [2.35].

²²⁸ Responsive submissions of Victoria Police, Tranche 2, The claim of a "failure to take responsibility", [5.14].

- 254.4. there is reference to the panel established by Victoria Police to review the question of disciplinary action which had determined not to take further action based upon determination that the issues occurred for largely systemic reasons. In doing so it considered that there had been “significant learnings”, emotional impacts on members exposed to enquiries about the matter, and that significant time had passed.²²⁹ It is noted that this panel reported to IBAC in late September 2018, around a month before the High Court decision, having received the Kellam Report in February 2015.
255. Submissions apportioning blame to Victoria Police are taken up by individual members.²³⁰
256. There is an irony in some of the submissions accusing Counsel Assisting of having a pre-conceived narrative. Victoria Police, in determining that its members could share the same legal representation in the Commission, effectively determined that regardless of the evidence revealed during the Commission, there would not be a conflict between the organisational interests of Victoria Police and those members, or indeed conflicts between those members themselves. Consistent with the decision of its panel review, this was a pre-determination by Victoria Police that it would not be critical of its members from the outset of this inquiry. This pre-determination occurred in circumstances where Mr Kellam had found that various members of Victoria Police were guilty of negligence of a high order and he did not accept the explanation offered to him about the failure to obtain legal advice.
257. Counsel Assisting are criticised for seeking to attribute blame on individual members. Such members claim “surprise” that they have been the subject of individual criticism, indicating that they had been ready to assist the Commission to identify what went wrong, but now have been diverted from that course. Counsel Assisting should have concentrated on identifying root causes, rather than conducting an examination to individual wrongdoing.²³¹
258. The claim of “surprise” by Counsel on behalf of individual members that have been the subject of submissions by Counsel Assisting should be rejected as nonsense. The terms of reference specifically require the Commission to inquire into the conduct of current and former *members* of Victoria Police in connection with the use of Ms Gobbo as a human source. The Letters Patent from which the terms of reference arise specifically refer to the High Court decision in *AB & EF v CD* which found that Victoria Police were guilty of reprehensible conduct in knowingly encouraging Ms Gobbo to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge their duties. Those Letters Patent also refer to Mr Kellam’s conclusion that various members of Victoria Police were guilty of negligence of a high order, and that a number of appeal proceedings were underway and others were anticipated.
259. It is entirely unsurprising that such members might be criticised after a close examination of their conduct.

²²⁹ Responsive submissions of Victoria Police, Tranche 2, Individual Responsibility and Accountability, [2.39]-[2.40].

²³⁰ Responsive submissions of Victoria Police, Tranche 1, [1.8]-[1.9]; Tranche 2, Mr Cowlshaw, [26.9].

²³¹ Responsive submissions of Victoria Police, Tranche 1, [1.3]-[1.4].

260. A major cause for concern in this Commission was the failure by Victoria Police members to get legal advice when the circumstances plainly called for it. It is the submission of Counsel Assisting that such basic failure cannot be answered by finger pointing or claims of lack of understanding about roles or the ability to get legal advice, particularly by those senior members in the Crime Department and the SDU.
261. Submissions are made generally, and on behalf of numerous individual members, to the effect that, whilst there was a recognition of the “narrow conflict” issue of Ms Gobbo advising clients upon whom she had informed, there was a failure from the time of her registration to adequately understand the “wide conflict” issue associated with her continuing to act for those she was informing upon.²³² This is said to provide the reason for the failure to obtain legal advice.
262. It is submitted that the failure to obtain legal advice was not as a consequence of any failure to recognise that a “wide conflict” of interest existed, but rather a deliberate choice.
263. This can be found for the reasons set out below.
264. First, there is an inherent unlikelihood that there was a wholesale failure by police members aware of Ms Gobbo’s registration or use as a human source, to recognise that legal advice should be taken, about a proposal to use a criminal defence lawyer as a human source against her clients. Even if some members did not identify the issue with precision, as police officers with regular involvement in the criminal justice system, instinctively they would have known that there were potential problems with such a proposal. This is borne out by the fact that even junior officers were alive to potential difficulties with such a proposal.
265. The position of Mr Overland is that he was aware of issues associated with Ms Gobbo’s use as a human source, including the issue of conflict, but considered that it was not his responsibility to ensure that legal advice had been taken.²³³
266. Second, there is evidence that in fact there was concern over whether Ms Gobbo could be used as a human source. A number of junior officers referred to these matters being appreciated and discussed in relation to the use of Ms Gobbo’s information:
- 266.1. Ms Burrows had graduated from the Police Academy in 1998, attained the rank of Senior Constable in 2002, and obtained her first position as a detective in 2003. She said in her statement to the Commission:

I recall that there were concerns about Ms Gobbo’s registration as a human source because of her profession and concerns for her personal safety. I also recall discussions about how to manage her registration as a human source. I do recall that those concerns were discussed amongst our crew and

²³² Responsive submissions of Victoria Police, Tranche 2, The Conduct of the SDU, [66.1]-[69.17]; Responsive submissions of Victoria Police, Tranche 1, Jim O’Brien, [48.25]; Gavan Ryan, [27.60]; Tony Biggin, [43.13]-[43.14], Dale Flynn, [61.8]; Paul Rowe [57.13]-[57.16], [57.21]-[57.24]; Submission on behalf of the SDU, [234].

²³³ Responsive submissions of Mr Overland, [91]-[93].

D/S/S O'Brien and that those concerns were discussed on numerous occasions, including immediately after the initial meeting between D/S Mansell, D/S/C Rowe and Ms Gobbo.

After those initial discussions, I focussed on the Operation Posse investigation and did not give further thought to Ms Gobbo's registration. I was aware that Ms Gobbo was being handled by the DSU and, in my position as a Detective Senior Constable, I assumed that someone of a higher rank had determined that we could receive and act on the information provided.²³⁴

- 266.2. Mr Rowe graduated from the Police Academy in 1999, attained the rank of Senior Constable in 2003, and became a detective in 2004. When Mr Rowe was being questioned over whether he had been involved in any discussion or contemplation of conflict, privilege or confidentiality issues prior to the SDU becoming involved, part of Mr Rowe's response was:

Yeah, we had - and I don't know whether - I don't know who is involved in this conversation, but I know we - I discussed, and I think it might have been with Steve, about, very early stages, whether - you know, once she sort of indicated that this was something that she was at least considering, I think straight away we sort of - it's not like we had to articulate it to each other. She was a barrister and she was Nicola Gobbo. We knew the issues around it and I think the extent of the conversation was, maybe, "Can this be done? If it's going to be done, she's got to be managed by the SDU."²³⁵

- 266.3. Later, he again referred to such consideration:

*Well we were aware of it. I mean we were aware of it at the end of 05 when she's you know when **people are turning their minds to can this even be done.**²³⁶*

- 266.4. Mr Johns had graduated from the police academy in 1999, attained the rank of Senior Constable in 2003 and became a detective in 2005. He had become aware of Ms Gobbo's role as a human source either before or after the arrest of Mr Cooper on 22 April 2006. He said he was surprised about this for a number of reasons, including that she was a lawyer and he had not known a lawyer to act as a human source before. He went on:

At the time, I assumed that by the time the information reached me, those responsible for handling Ms Gobbo and my superiors had considered whether we could act on information she supplied. I did not receive information directly from the SDU. Information came through DI O'Brien or DS Kelly, as they were in contact with SDU members. At the time, I

²³⁴ Exhibit RC118 Statement of Liza Burrows, 10 May 2019, [56]-[57], VPL.0014.0030.0001 @.0009.

²³⁵ Transcript of Detective Sergeant Paul Rowe, 1 July 2019, 3276-3277, TRN.2019.07.01.01.

²³⁶ Transcript of Detective Sergeant Paul Rowe, 19 November 2019, 9511-9512, TRN.2019.11.19.01.

assumed that both the SDU members and DI O'Brien had considered whether we could properly act on information that Ms Gobbo supplied. I do not believe I was told when information came from Ms Gobbo. At the time, I assumed that it was appropriate to do what I was instructed to do.

...

I also assumed that legal advice had been obtained about whether Ms Gobbo could be used as a source. I knew that DI O'Brien had obtained advice about [Mr Cooper] remaining in custody, so I assumed that advice had similarly been obtained about using information that came from Ms Gobbo.²³⁷

267. Third, there is evidence of an appreciation of issues which called for clear legal advice, including an appreciation of the "wide conflict":

267.1. the submissions on behalf of the SDU refer to evidence of an attempt to understand the conflict issue during the relevant period, pointing to various occasions on which they asked questions of Ms Gobbo both before and after Mr Cooper's arrest.²³⁸ This indicates the appreciation of issues for which legal advice should have been obtained.

267.2. On 20 April 2006, at a meeting between Ms Gobbo and members of the SDU there was clear reference to an appreciation of the 'wide conflict':

MR SANDY WHITE: No-one's gunna say that but I'm trying to understand what - the conflict of interest area is not something that we ever deal with, all right, for you and it's - I mean, some people could put up an argument that a person who is a barrister perhaps could never help the police and still represent the person that she's helping the police with. So I'm just trying to get my head around this. Could you - maybe it's even pointless talking about it because you might actually think I'm going

MS GOBBO: Probably but what's the real point?

268. Fourth, as exemplified by Mr Johns' case above, a number of members understood or assumed that legal advice had been taken, reflecting an appreciation of an obvious risk and the obvious action in response.²³⁹

²³⁷ See for example Exhibit RC1332 Statement of Tim Johns, 11 December 2019, 5 [32], VPL.0014.0118.0001 @.0005; Exhibit RC1.3, Transcript of examination of Mr Black, 21 November 2014, 22-23 and 36-37 IBAC.0002.0002.0001 @.0023-0024 and .0037-.0038.

²³⁸ Responsive submissions on behalf of the SDU, [236].

²³⁹ See for example Exhibit RC1332 Statement of Tim Johns, 11 December 2019, 5 [32], VPL.0014.0118.0001 @.0005; Exhibit RC1.3, Transcript of examination of Mr Black, 21 November 2014, 22-23 and 36-37 IBAC.0002.0002.0001 @.0023-0024 and .0037-.0038.

269. Fifth, there is evidence that there was consideration given to obtaining legal advice:

269.1. It was advanced by some witnesses before Mr Kellam at the IBAC that the reason for the failure to obtain legal advice was that confidentiality considerations were paramount and the risks of obtaining such legal advice outweighed the risks of not doing so.²⁴⁰

269.2. In this respect, Mr O'Brien gave the following evidence:

MR HEVEY: *Did Purana, under your command, ever consider any of the ethical issues that might be involved in relation to the use of a barrister who could be acting, at that time, with some of the people she was referring to?*

MR O'BRIEN: *No. I don't think so. Not post the Mr Cooper incident.*

MR HEVEY: *Was there ever any thought process that was gone through by yourself or those within your organisation, "Look, boss, should we get independent legal advice on this to see that we're doing the right thing?"*

MR O'BRIEN: *Well, there was something certainly we considered about, but where do we go?*

MR HEVEY: *Well, you've got the director of the Police Legal Services, then being run, I think, by Mr McRae.*

MR O'BRIEN: *Given the profile of the source, you would only have had to put the scenario up to identify who the source was, regardless of whether it be someone from the Crown or someone outside the Crown.*

MR HEVEY: *Wasn't there anyone in the state or indeed interstate whom you could trust to give independent, hopefully expert advice in relation to the way it could be handled?*

MR O'BRIEN: *I didn't consider there was anybody to do that without some form of a chance of compromise...²⁴¹*

269.3. It is noted that such explanation was rejected as an excuse by Mr Kellam.²⁴²

²⁴⁰ Exhibit RC0113B, Kellam Report, 6 February 2015, 55 and 84, VPL.0007.0001.0001@.0058 and .0087.

²⁴¹ Exhibit RC1.3, Transcript of examination of James (Jim) O'Brien, 12 November 2014, 26-27, IBAC.0002.0002.0004@.0028.

²⁴² Exhibit RC0113B, Kellam Report, 6 February 2015, 55 and 84, VPL.0007.0001.0001@.0058 and .0087.

270. On 18 July 2007, Mr O'Brien and Officer Sandy White, in the context of discussion of consideration of Ms Gobbo becoming a witness against Mr Karam, referred to the potential for the conviction of Mr Cooper, and the conviction of others, to be impacted if Ms Gobbo's role became known. They agreed that legal advice was needed in relation to the "fallout", referring to the fallout from the decision to make Ms Gobbo a witness.²⁴³ When the decision was taken that she would not be a witness, no legal advice was sought, despite an awareness that convictions may have been improperly achieved.
271. The submissions on behalf of the SDU acknowledge that legal advice should have been sought from an early stage, though it was not considered necessary at the time.²⁴⁴ This indicates there had been some consideration, at least, of whether legal advice was necessary.
272. Sixth, it was obvious that issues associated with Legal Professional Privilege (LPP) also called for legal advice which was never obtained. Whilst LPP was recognised as an issue by the SDU, there were apparent uncertainties concerning its application. No Standard Operating Procedure (SOP) was developed so that there would be a consistent approach by handlers in dealing with the information they were receiving from Ms Gobbo. It could reasonably be expected that the drafting of such an SOP would have involved the need for legal advice.
273. Very significantly, without seeking legal advice there was a determination made that intelligence relevant to corruption was *required* to be reported to the ESD *whether or not it was legally privileged information*.²⁴⁵
274. Seventh, risks relating to Ms Gobbo's profession that were understood were not included in any risk assessment. For example, even though LPP was recognised as an issue, it was not referred to or dealt with as a risk in the November 2005 or April 2006 risk assessments. The control measure associated with recognising a risk such as this in the risk assessment would inevitably have pointed to the need to obtain legal advice in relation to understanding the bounds of LPP and the utilisation of information provided by the source.
275. Eighth, there was a failure to obtain legal advice about the use of Ms Gobbo in other situations when the circumstances obviously called for it:
- 275.1. There was no legal advice sought as to the consequence of Ms Gobbo attending to advise Mr Cooper on 22 April 2006, either before or after Ms Gobbo indicated that she would attend, or after she did attend, by either the SDU or investigators. This is to be contrasted with other advice sought on the night about the lawfulness of keeping Mr Cooper [REDACTED] in custody without charge.
- 275.2. On 24 July 2006, concern arose about Ms Gobbo being summoned to the OPI, where her role as a human source might potentially be exposed. In that context at a meeting of SDU members, Mr Black made a note in his diary '*Future 3838? v Royal Commission?*'. In evidence, Mr Black said that he did not know if he verbalised the words 'Royal Commission', but he certainly said, "Listen, you know

²⁴³ Submissions of Counsel Assisting, Volume 2, [2445].

²⁴⁴ Responsive submissions of the SDU, [45].

²⁴⁵ Responsive submissions of the SDU, [18e].

this will be the subject of a review". He acknowledged that at the time this occurred there were suggestions that there could or should be a Royal Commission because of various corruption issues. Mr Black said he had never written a similar note in relation to any other source to the effect that their future use or continued use may result in a Royal Commission, which he understood would at least in part seek to establish whether or not there had been improper conduct, albeit he said he was not concerned about that. Mr Black was asked when he raised this matter whether there was any discussion. He responded that there was broad discussion as to whether or not it had been a good decision to allow Ms Gobbo to visit Mr Cooper, referring to the event having been the commencement of the downfall of the Mokbel cartel, a major objective achieved by the Crime Department which had been discussed around the office for days, weeks and months. He accepted that any review would have involved great scrutiny of the decision to allow Ms Gobbo to speak to Mr Cooper. Mr Black said in raising the issue he was endeavouring to raise awareness that one day someone might review what they had done.²⁴⁶

- 275.3. On 3 July 2007, Mr Sandy White spoke with Ms Gobbo and urged her not to act in conflict and represent Mr Karam, with Mr Sandy White indicating that he would hate to think that "*ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got a completely unbiased uncompromised defence*" and to which Ms Gobbo responded that no one was ever going to find out, and that there were already 20 people in that category. Mr Sandy White responded that he knew this.²⁴⁷
- 275.4. The need for legal advice was considered by members of the SDU and the Crime Department in mid-2007 in the context of the recognition of the "wide conflict" associated with Ms Gobbo's representation of Mr Karam, and concern over this leading to the exposure of her use as a human source in other matters which might lead to convictions being jeopardised. It is submitted that the legal opinion being considered concerned the question exercising the minds of some officers; that is whether use of Ms Gobbo as a human source against clients might be regarded as sufficiently improper or irregular to result in the overturning of convictions or loss of evidence. However, when it was determined that Ms Gobbo would not be called as a witness, it was also determined not to obtain legal advice. The underlying issue, and the potential consequence to trials did not vanish. The inference open is that the advice was only considered necessary if the proposed decision (that is to use Ms Gobbo as a witness) might lead to the exposure of her role, and therefore the risk to convictions.
- 275.5. In a similar vein, in December 2008 and January 2009 when there was consideration of Ms Gobbo becoming a witness against Mr Dale, there was an appreciation of numerous issues associated with Ms Gobbo's use as a human source, including that convictions may be overturned or future prosecutions jeopardised, and the prospect of inquiries including by way of OPI and Royal Commission. Again, there was no legal advice initiated by anyone to allay such concerns. Rather the

²⁴⁶ Transcript of Mr Black, 23 October 2019, 8209-8213.

²⁴⁷ Submissions of Counsel Assisting, Volume 2, [2398].

“barrier / break” concept emerged as a way to avoid having to disclose Ms Gobbo’s role.

- 275.6. Again in a similar vein, in mid-2009, in the context of concern over Ms Gobbo becoming a witness, this time for the Briars Taskforce, there was again consideration that a Royal Commission might be called, as well as convictions being jeopardised, as a result of Ms Gobbo’s use as a human source being exposed. Concerns were raised that any PII argument “could / would fail”. There was no legal advice taken in relation to such concerns.
276. Ninth, the April 2006 risk assessment occurred following the attendance of Ms Gobbo at St Kilda Road Police Station to advise Mr Cooper on 22 April 2006. The risk assessment was updated to identify that Ms Gobbo “in her role as a barrister” had been involved in advising certain high level criminals in making statements to assist police, which might constitute a safety risk if it was perceived that she was acting contrary to the interests of those within the Mokbel group. There was no identification of even the “narrow conflict” risk which was clearly appreciated by this time. A recognition of such risk would inevitably have pointed to the need to obtain legal advice in relation to the police utilisation of Ms Gobbo as a source.
277. Tenth, there was a failure to conduct formal risk assessments after April 2006. The only real assessment of risk was contained within the SML and was limited to risks associated with Ms Gobbo’s safety. Formal risk assessments following this time would have raised numerous concerns about Ms Gobbo’s use beyond those related to her safety, which inevitably would have called for legal advice.
278. It is submitted that it is reasonable to infer from these matters that:
- 278.1. there was contemplation of issues associated with the use of Ms Gobbo of the kind known to require legal advice around the time of, during the initial stages of, and throughout Ms Gobbo’s registration
- 278.2. there was contemplation of legal advice during this time
- 278.3. a choice was made not to obtain legal advice in relation to the use of Ms Gobbo as a human source before, during and after Ms Gobbo’s registration.
279. The propriety of using Ms Gobbo as a human source was a fundamental issue that required an answer from the outset. So obvious was the issue that junior investigators assumed that their superiors had turned their minds to these issues and obtained legal advice. The question as to whether it was appropriate to use Ms Gobbo as a human source in the manner contemplated was not a question that could simply be referred to the SDU or I&CS more broadly and forgotten about by those in the Crime Department. It was the Purana investigators primarily, who would rely on the information to build cases and prosecutions. Regardless of who got the legal advice, those handling and managing Ms Gobbo, and those receiving and using her information, were obliged to ensure that her use was appropriate. That assurance could only ever have come through obtaining of legal advice.
280. As indicated above, the response from Mr O’Brien during the IBAC hearing in 2014 was not to shift responsibility onto the SDU to obtain such advice; rather it was to claim that the risk of compromise in doing so was too high. Even if this were to be accepted, this would not mean that it was acceptable to press

ahead with Ms Gobbo's use in the absence of legal advice. The appropriate response would have been to not proceed.

281. It is submitted that if the notion that advice was not sought because of concerns over the safety of Ms Gobbo is rejected, as it was by Mr Kellam, it can only be inferred that there was concern that the advice would prevent Victoria Police from using Ms Gobbo in the manner desired, or once she had been used, that it might undo the achievements brought about because of it, and / or cause the embarrassment to Victoria Police that had been referred to in the risk assessments.

Matters raised by Victoria Police in Tranche 2 submissions

282. Victoria Police submits that the following errors are "illustrative" of the errors made by Counsel Assisting in relation to the reporting and consideration of the evidence:²⁴⁸

Example 1 – the decision not to use Ms Gobbo as a witness against Mr Paul Dale.

- 282.1. Counsel Assisting are criticised for selectively quoting material and omitting material which identifies concerns for Ms Gobbo's safety. The Commissioner should accept that there were concerns as to Ms Gobbo's safety. Clearly in the relevant decision making, the safety of Ms Gobbo had to be considered and was considered. The point that Counsel Assisting are making is that there were other issues which were very important which concerned the administration of justice. It was ultimately for the Court, not for Victoria Police, to weigh up those competing considerations.
- 282.2. Counsel Assisting point out that when Mr Ashton, upon receiving Mr O'Connor's memorandum, understood the true breath and extent of Ms Gobbo's informing the decision was made to withdraw her as a witness to avoid exposure of Ms Gobbo's role. Further, despite Ms Gobbo being withdrawn as a witness, Victoria Police still had information relevant to the proceeding against Mr Paul Dale which was not disclosed.

Example 2 – the claim of material being withheld from the defence in relation to Mr Thomas

- 282.3. This submission by Victoria Police regarding the purported disclosure by Mr Bateson is misconceived. The relevant material was not disclosed. This is dealt with in detail below.

Example 3 – handwriting on Ms Gobbo's 7 September 2009 letter

- 282.4. Counsel Assisting accept that the inference is not open that the handwriting is that of Mr Wilson, and the evidence indicates that it was the writing of Ms Parsons.

²⁴⁸ Responsive submissions of Victoria Police, Tranche 2, Submissions that are based on errors about the evidence or fail to take into account evidence, [11.5].

- 282.5. There are two references to Exhibit RC1075 in Victoria Police's submission at [91.18] – it is apparent this should refer to Exhibit RC1034.
- 282.6. In relation to the matters submitted at [91.26], it is accepted that Ms Parsons and the VGSO were focussed on matters related to Ms Gobbo's safety and impediments to her entry to the witness protection program. It is not accepted that this was the sole focus of Mr Cornelius and Mr McRae for reasons addressed in the primary submissions, and in respect of Mr Cornelius in this reply.

Example 4 – DPP concerns about the use of Ms Gobbo as a human source

- 282.7. It is submitted that Counsel Assisting do not even refer to a file note from October 2014, where the DPP told IBAC that he had a "serious concern" for the integrity of some past criminal trials that had been held in the past decade.
- 282.8. It is not controversial that, by this stage, the DPP had concerns about the integrity of some past criminal trials. It must be remembered that Mr Dowsley published an article revealing the relationship between Victoria Police and Lawyer X on 31 March 2014.²⁴⁹ Up until that time there had been no disclosure to the seven individuals considered in the *AB v CD* proceedings.²⁵⁰ It is unclear what criticism is made of Counsel Assisting by Victoria Police in relation to his issue.

²⁴⁹ Transcript of Sir Ken Jones, 13 December 2019, 11308, [1-3].

²⁵⁰ Transcript of Sir Ken Jones, 13 December 2019, 11308, [18-44].

REPLY SUBMISSION: VICTORIA POLICE & MS GOBBO – THE RECRUITMENT OF MS GOBBO & THE CLAIM THAT THERE WAS NO CORALLING OF INFORMATION

283. The submission by Victoria Police essentially eschews any connection between the informing by Ms Gobbo to Mr Bateson and her subsequent informing to Mr Rowe and subsequent registration by the SDU. It is said that the happenstance of Ms Gobbo's approach to Mr Rowe means that there could not have been a predetermined plan to "corral the information" that Ms Gobbo had been sporadically and intermittently offering to various members of Victoria Police.²⁵¹
284. Ms Gobbo disputes this, submitting that the evidence clearly demonstrates that Victoria Police targeted and recruited her and accordingly there should be a finding that she was actively recruited by Victoria Police.²⁵²
285. Whilst accepting that the contact between Ms Gobbo and Mr Rowe on 31 August 2005 was not planned, it cannot be said that there was no awareness that Ms Gobbo might be capable of assisting the interests of the police and that such an opportunity might arise.
286. The Commission heard evidence about the consideration given by Mr Sandy White and Mr O'Brien in mid-2004 to recruiting Ms Gobbo around the time she was in hospital and considered vulnerable.²⁵³
287. Whilst various parts of the Crime Department may have operated in silos, those that sat above them had an eye in each of the silos. For example, the Purana Taskforce had produced the "Operational Assessment into the Mokbel Criminal Cartel". This was presented at a Purana Taskforce Update meeting in May 2005. At around that time the MDID was embarking on Operation Quills, of which Mr Mokbel was a target. There would naturally need to be some communication to ensure that one was not stepping on the toes of the other.
288. In this regard, on 6 June 2005, those overseeing the Purana Taskforce, including Mr Overland, Mr Purton and Mr Swindells, were informed by written update that "*Nicola Gobbo had attempted to make contact with Operation Purana members offering information. Her motives for this are yet to be established.*" There was obviously discussion about this matter as Mr Purton noted that Ms Gobbo was to meet with Mr Bateson.²⁵⁴ In fact, two days before Mr Bateson and Ms Gobbo had met for the second time. On that occasion she had provided information including about Solicitor 2 and had said that not enough attention was being paid to Mr Mokbel's restrained assets.²⁵⁵

²⁵¹ Responsive submissions of Victoria Police, Tranche 2, Initial motivations of Ms Gobbo and relevant members of Victoria Police, [64.9], [64.16].

²⁵² Responsive submissions of Ms Gobbo, [300]-[301].

²⁵³ Submissions of Counsel Assisting, Volume 2, [671]-[674].

²⁵⁴ Submissions of Counsel Assisting, Volume 2, [1163]-[1164].

²⁵⁵ Submissions of Counsel Assisting, Volume 2, [1157].

289. On the same day, following this meeting, Mr Purton received an update in relation to the arrest and interview of Milad Mokbel by the Lorcha Taskforce. He noted in his diary that Milad Mokbel had called Ms Gobbo for legal representation.²⁵⁶
290. The provision of information to Mr Bateson could better be described as “regular” than “sporadic and intermittent”. Ms Gobbo had given a hint of what was to come on 23 March 2005 when she thanked Mr Bateson for keeping her name out of the committal, provided him information about three of her legal colleagues, and stated that “none of the barristers involved could be trusted and that any approaches to potential witnesses should not be made through them.”²⁵⁷ Mr Bateson met with Ms Gobbo and received information on; 23 May, 4 June, 29 June, 21 July and 23 August 2005. He reported to Mr Ryan after every meeting, in the nature of a handler reporting to his controller.²⁵⁸
291. On 17 August 2005, Ms Gobbo spoke with Mr Flynn following the operation Quills arrests, and mentioned to him that Solicitor 2 was working on behalf of Tony Mokbel and giving instructions to those arrested in the operation, and she also accused her of perverting the course of justice. Mr Flynn said that he would investigate the matter and notified Messrs Shawyer and O’Brien.²⁵⁹
292. On 31 August 2005, when Ms Gobbo presented herself to Mr Rowe, Mr O’Brien gave instructions to put Ms Gobbo on tape. Tellingly, the first person Mr O’Brien spoke to was Mr Ryan.²⁶⁰ It is reasonably open to infer he did this because he was aware Ms Gobbo had been providing information to the Purana Taskforce.
293. On 1 September 2005, Ms Gobbo rang Mr Bateson. Mr Bateson recorded the conversation in his diary, commencing on the top of the page:
- GOBBO initially stated concerned re Solicitor 2’s comments that she would be receiving unedited notes. Reassured that would be resisted. Then spoke of run in with Drug Squad which ended in her crying. Obviously wanted to push that she is not and would not involve herself in any criminal activity. Allowed to vent. A/DDI RYAN informed.*²⁶¹
294. On 14 September 2005, Ms Gobbo contacted Mr Bateson and informed him that she was meeting with Mr Mansell (MDID) and wanted to know if she could inform them of her involvement with Mr Bateson. He said that she could and then informed Mr O’Brien who by that stage was the Acting Officer in Charge of the Purana Taskforce.²⁶²
295. On 15 September 2005, Ms Gobbo spoke to MDID detective, Mr Bartlett at court. She told him that Mr Luxmore was cooking methamphetamine for Tony Mokbel. Mr Bartlett reported this to Mr O’Brien.²⁶³

²⁵⁶ Submissions of Counsel Assisting, Volume 2, [1168].

²⁵⁷ Submissions of Counsel Assisting, Volume 2, [1128].

²⁵⁸ Submissions of Counsel Assisting, Volume 2, [1144], [1157], [1177], [1186], [1216].

²⁵⁹ Submissions of Counsel Assisting, Volume 2, [1310], [1311].

²⁶⁰ Submissions of Counsel Assisting, Volume 2, [1224].

²⁶¹ Exhibit RC0272 Commander Stuart Bateson diary, 15 June 2005, 29, VPL.0005.0058.0233 @.0261.

²⁶² Submissions of Counsel Assisting, Volume 2, [1247], [1248].

²⁶³ Submissions of Counsel Assisting, Volume 2, [1336].

296. The submission by Victoria Police, which refers in terms to Counsel Assisting's reference to Ms Gobbo's recruitment being an attempt to "corral the information" does not deal with the evidence given by Mr Biggin:

My recollection of the conversation with Sandy White is that he told me she'd been registered by Drugs and the reason for that is she'd been speaking to a number of police and there was an attempt to try and actually corral who she was speaking to.²⁶⁴

297. In circumstances where there is evidence that those overseeing various branches of the Crime Department, and those within some of those branches were aware of the matters above, the description of Mr Sandy White as reported by Mr Biggin, is apt.

²⁶⁴ Submissions of Counsel Assisting, Volume 2, [1302], [1506]; of Mr Anthony (Tony) Biggin, 9 October 2019, 7474, TRN.2019.10.09.01.

REPLY SUBMISSION: VICTORIA POLICE, MR RYAN, MR O'BRIEN & MR O'CONNELL – DIARY KEEPING PRACTICES

The lack of diary notes

298. Diary notes, assuming they are accurately recorded, provide a contemporaneous record of events which may be relevant at a later stage of an investigation or in the giving of evidence. In relation to the latter, such notes can be used to refresh memory, or in the event of lost memory, provide a reliable account of events.
299. If accurate notes are deliberately not taken by investigators, there is good reason to question why. The result of such conduct is that the court and the defence are deprived of disclosure. It enables the investigator to later provide an account which might be inconsistent with what actually occurred, denying the tribunal the opportunity to interrogate the credibility or reliability of that account. It also enables the investigator to claim a lack of memory.
300. Despite the ability to use Ms Gobbo's human source code in any diary entry, and the availability of a claim of PII which would, under usual circumstances, avoid disclosure beyond a court, it is apparent that a number of investigators did not take notes, or took limited notes, as to certain matters relating to Ms Gobbo in her role as a human source.
301. Consequently, in evidence to the Commission there were claims of non-recollection and a questioning of records which were not those of the witness. Submissions have similarly been made. It is submitted that in considering such submissions, regard should be had as to whether there was a deliberate decision taken not to take notes, and the reason for it.
302. The Commissioner may also wish to consider whether such matters are relevant to any policy recommendations.
303. Outlined below are a number of these instances.

Mr Ryan

304. Mr Ryan gave evidence that he took caution in making notes about a human source. He said in respect of Ms Gobbo that:

Ordinarily, I would receive information from the SDU by telephone. They would usually refer to the source as a "RHS" or "3838". Due to the type of information, I deduced that the source was Ms Gobbo but never used her name when I passed information on to the relevant investigation team.

Where I received information via the sterile corridor, I would immediately pass it on to the relevant Purana crew. On occasion I would also record it in my diary. I didn't always record the information in my diary because I was extremely security conscious of her safety

*and I was cautious about what I wrote in my diary because it was frequently subpoenaed for production. I feared that information recorded might jeopardise her safety.*²⁶⁵

305. On 19 April 2006, Mr Ryan took part in a meeting with Mr O'Brien and Mr Bateson. Mr Bateson recorded in discussion of supplying "transcripts to 3838 with edits and have her approach [Mr Thomas]". SDU records reveal the carrying out of this plan. Mr Ryan (and Mr O'Brien's) diary note of the meeting did not refer to this proposal.²⁶⁶ A substantial attack is made upon the submissions of Counsel Assisting in respect of this matter, the reply to which is dealt with below. That attack includes reliance on Mr Ryan not having been asked questions about the meeting, although he was. He said that he did not remember a decision to deal with Mr Thomas through Ms Gobbo. The submission also includes reliance upon Mr O'Brien's lack of memory of the event and an innocent explanation of the note provided by Mr Bateson.²⁶⁷
306. The submission on behalf of Mr Ryan refers to the ICR records of dissemination of information about Mr Thomas that came from Ms Gobbo in mid-2006. It is submitted that the Commission cannot be certain that information about Mr Thomas was disseminated to Mr Ryan on those days because it is not recorded in his diaries, and the ICRs contained errors.²⁶⁸
307. On 9 November 2007, Ms Gobbo told the SDU that she had heard Mr Thomas was "really down" and was seriously contemplating telling the Purana Taskforce he would no longer provide evidence in the upcoming prosecution of Mr Orman. Ms Gobbo reported that Mr Thomas needed a visit from the Purana Taskforce to set him straight. She reported Mr Thomas was very stubborn, and if pushed would withdraw his cooperation as a matter of principle. The SDU recorded that this information was reported to Mr Ryan.²⁶⁹ A submission is made on behalf of Mr Ryan that it is not possible to be satisfied to the requisite standard that the information was disseminated to Mr Ryan as he has no recollection of receiving the information, no diary entry recording receipt of it (his diary for this period was not located), and the ICRs contained errors.

Mr O'Brien

308. It is put in submissions on Mr O'Brien's behalf that he took "prolific" diary notes in support of submissions that there is no evidence to support a conclusion that Mr O'Brien directed Purana members to deal with information concerning Ms Gobbo in a way that would protect it from disclosure to an accused person, or in court proceedings.²⁷⁰
309. It is submitted it would be most unlikely that Mr O'Brien would have made any note of such a direction to his investigators. An analysis of Mr O'Brien's diary notes as they relate to Ms Gobbo indicates that his note taking in respect of SDU dealings concerning Ms Gobbo was generally limited to reports of

²⁶⁵ Exhibit RC0310 Statement of Mr Gavan Ryan dated 13 June 2019, 8, [44]-[45], VPL.0014.0039.0001_R1S @.0008.

²⁶⁶ Submissions of Counsel Assisting, Volume 2, [903]-[922].

²⁶⁷ Responsive submissions of Victoria Police, Jim O'Brien, [28.54]; Transcript of Mr Gavan Ryan, 13 August 2019, 4456, TRN.2019.08.13.01.C.

²⁶⁸ Responsive submissions of Victoria Police, Jim O'Brien, [28.152].

²⁶⁹ Submissions of Counsel Assisting, Volume 2, [2870].

²⁷⁰ Responsive submissions of Victoria Police, O'Brien, [48.27], [51.20].

intelligence from the SDU from “3838”, or otherwise brief and uninformative. A number of instances are set out below.

310. The SDU records indicate that on 4 January 2006, Ms Gobbo told her handler, Mr Peter Smith, that Mr Cooper wanted a bail variation so he could fly interstate, indicating if she could achieve this it would enhance her relationship with him. On 5 January 2006, Mr Peter Smith spoke with Mr Sandy White and then Mr O’Brien about the matter. It was determined that Ms Gobbo would be provided with Mr O’Brien’s phone number and advised that he was Mr Flynn’s supervisor and may agree to a request in Mr Flynn’s absence. Mr O’Brien recorded in his diary at 1:10pm, intelligence which he had received from Mr Peter Smith and Mr Black that had come from “3838”. At 3:10pm he recorded in his diary that he returned a telephone call to “solicitor Nicola Gobbo” in relation to an application to vary bail for Mr Cooper. He recorded nothing in his diary about the preceding conversation with the SDU.²⁷¹ In his evidence Mr O’Brien initially disputed that he had such a conversation with the SDU, and then said he had no memory of it. His submission refers only to his interaction with Ms Gobbo in her capacity as Mr Cooper’s legal counsel and fails to deal with the evidence of his earlier interaction with the SDU in which such arrangements were made.
311. In February 2006, when Ms Gobbo was becoming involved in attempting to negotiate a resolution for Mr Thomas, the SDU records discussion with Mr O’Brien about Ms Gobbo’s involvement, including that Mr O’Brien would monitor Mr Bateson’s notes “re sanitising HS involvement in Thomas s’ment”. Mr O’Brien’s diary referred to the meeting with Mr Sandy White, but did not refer to this matter.²⁷²
312. On 15 March 2006, when Ms Gobbo had expressed her unhappiness at her inclusion in the statement of Mr Andrews, Officer Green spoke to Mr O’Brien about the matter recording that the Purana Taskforce did not regard it of significance and that he would arrange or Mr Bateson to speak with Ms Gobbo. Mr O’Brien recorded in his diary that he received intelligence that had come from Ms Gobbo, but did not record the conversation regarding Mr Andrews’ statement.²⁷³
313. Following 22 April 2006, Mr O’Brien had a conversation with Mr Sandy White about their concerns as to Ms Gobbo’s representation of Mr Cooper. He made no diary note of the conversation (nor for that matter did Mr Sandy White).²⁷⁴
314. On 13 August 2006, Mr Green reported to Mr Sandy White that Ms Gobbo had obtained a letter in which Mr Williams had referred to her as a dog. They discussed the court case of Mr Williams which was scheduled the following day and the likelihood of his issuing subpoenas which might compromise her. The SDU records indicates contemplation that the letter might be useful to prevent this, and that Mr Sandy White spoke with Mr O’Brien who agreed, and an entry indicating that Mr O’Brien thought the letter would be very useful.²⁷⁵ It is submitted on behalf of Mr O’Brien that the inference sought to be drawn by Counsel Assisting (that the letter might be useful in resisting disclosure under

²⁷¹ Submissions of Counsel Assisting, Volume 2, [1796], [1899.17] ; Exhibit RC0281 ICR3838 (015), 4 January 2006, 110, VPL.2000.0003.1696.

²⁷² Submissions of Counsel Assisting, Volume 2, [819], [834].

²⁷³ Submissions of Counsel Assisting, Volume 2, [858].

²⁷⁴ Transcript of Mr James (Jim) O’Brien, 6 September 2019, 5748-5749, TRN.2019.09.06.01.C.

²⁷⁵ Submissions of Counsel Assisting, Volume 2, [1013].

any subpoena) could not be drawn, with reference to Mr O'Brien's evidence that he was off duty, had no memory of the discussion and did not have a diary note.²⁷⁶

315. On 18 September 2006, Mr Peter Smith spoke with Mr O'Brien about the potential that he might be contacted by the Victorian Bar Ethics Committee in relation to a complaint Mr Williams had made about Ms Gobbo having a conflict of interest. Mr Peter Smith recorded discussion about Mr O'Brien confirming an investigation into threats by Mr Williams to Ms Gobbo.²⁷⁷ Mr O'Brien's diary recorded him as engaging in supervision and administration during this time. He said he had no recollection of the matter.²⁷⁸
316. On 6 March 2007, a meeting took place between Mr Sandy White, Mr Anderson and Mr Richards of the SDU with Mr O'Brien and various other investigators in the Purana Taskforce. The meeting included discussion about Ms Gobbo who had been approached by Milad Mokbel to assist in negotiating a plea. The SDU was provided with information to provide Ms Gobbo in relation to Purana Taskforce requirements for a plea deal. Mr O'Brien recorded in his diary "Discussion 3838 – Milad Mokbel". When asked about these matters in evidence Mr O'Brien said they were not his notes, that he did not have any direct plan, he was receiving information.²⁷⁹
317. On 30 April 2007, Ms Gobbo told the SDU that Milad Mokbel was very keen to plead guilty, that he was concerned about his wife being in custody and that he wanted to speak to Mr O'Brien. The SDU records indicate that Mr O'Brien was notified of this matter. Mr O'Brien, in the absence of a note in his diary would not accept that he had been given this information. When it was put to him that he might have handed the matter to Mr Flynn who had subsequently attended upon Milad Mokbel, he conceded he may have done this.²⁸⁰
318. On 29 June 2007, the diary of Mr Sandy White records that Mr O'Brien and other investigators attended at a meeting with the SDU to discuss issues related to the committal of Milad Mokbel and his co-accused which was set down a few days hence. The notes indicated discussion of police notes revealing Ms Gobbo's attendance at the police station on the night of 22 April 2006, discussion as to PII (the evidence would suggest the avoidance of making such a claim), and agreement to redact the notes on the basis of relevance and threats to Ms Gobbo.²⁸¹ Neither Mr Sandy White nor Mr O'Brien were examined about Mr Sandy White's diary entry, which had clearly not been appreciated at the time (Mr Flynn and Mr Rowe who were called subsequently were examined about it). The submission on behalf of Mr O'Brien complains that he was not asked about the meeting.²⁸² The examination of Mr O'Brien involved his being questioned as to various entries in his diary regarding interactions with the SDU. His diary did not record this meeting, rather it

²⁷⁶ Responsive submissions of Victoria Police, O'Brien, [52.132].

²⁷⁷ Submissions of Counsel Assisting, Volume 2, [1016].

²⁷⁸ Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5717, TRN.2019.09.06.01.C.

²⁷⁹ Submissions of Counsel Assisting, Volume 2, [2660]-[2663]; Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5814, TRN.2019.09.06.01.C.

²⁸⁰ Submissions of Counsel Assisting, Volume 2, [2708].

²⁸¹ Submissions of Counsel Assisting, Volume 2, [2736]-[2738].

²⁸² Responsive submissions of Victoria Police, O'Brien, 253, [53.53].

recorded that he was performing supervision and administration duties at the office.²⁸³

319. On 17, 18 and 24 July 2007 Mr O'Brien was involved in a series of meetings in which Ms Gobbo's use and future as a human source or as a witness was being discussed, including the discussion of the need for legal advice. These matters are referred to in detail elsewhere in this submission. On 17 July 2007, a Crime Department, Purana Taskforce Update meeting was attended by Mr Overland, Mr Blayney and Mr Brown. Mr Overland took no notes, Mr Brown recorded attending a "Purana Update", and Mr O'Brien recorded "Karam / 3838". Mr O'Brien was asked about whether the subjects "Karam" and "3838" were related and he said he did not know due to the lapse of time.²⁸⁴ After Mr O'Brien had given his evidence, Mr Blayney's diary entry was produced to the Commission. It recorded discussion of obtaining a "hypothetical legal opinion" in relation to Ms Gobbo, which had occurred at the meeting.²⁸⁵
320. On 18 July 2007, Mr O'Brien met with Mr Sandy White to discuss the same issue. Mr Sandy White recorded in his diary a discussion of the possibility of using Ms Gobbo as a witness, the issues that may cause in relation to "political fallout from [the] legal fraternity", the impact on the convictions of Mr Cooper and others, and agreement as to the need for legal advice. Mr O'Brien recorded in his diary that he met with Mr Sandy White in relation to 3838 issues and the witness / informer situation.²⁸⁶ Mr O'Brien's evidence was that whilst he accepted the meeting took place, he did not recall the discussion, and the notes were not his. He did not accept that he and Mr Sandy White had a discussion about the possibility of convictions being impacted or the need for legal advice.²⁸⁷ The submission on behalf of Mr O'Brien, in dealing with the meetings around this time, indicates simply that Mr Sandy White and Mr O'Brien met and discussed the possibility of Ms Gobbo being used as a witness.²⁸⁸ The issues in Mr Sandy White's diary are obliquely referred to in a separate part of the submission, addressing a different proposition. In that submission, it is said that Mr O'Brien had no recollection of having any conversation with Mr Sandy White about the possibility of convictions being impacted if Ms Gobbo's status as a human source became known.²⁸⁹
321. On 24 July 2007, a high level meeting between Mr Biggin, Mr Sandy White, Mr Blayney, Mr Brown, Mr Ryan, and Mr O'Connell took place to discuss the potential for Ms Gobbo to be a witness, the involvement of the Witness Security unit and her future deployment as a human source. It is apparent from notes of two of the other attendees that the issue of legal advice was raised. Mr O'Brien's note of this meeting recorded "Discussion re further handling issues re RHS". In his evidence he was unable to say what was discussed at the meeting.²⁹⁰

²⁸³ Exhibit RC0933 Mr James (Jim) O'Brien diary, 12 June 2007, 74.

²⁸⁴ Transcript of Mr James (Jim) O'Brien, 10 September 2019, 5931, TRN.2019.09.06.01.C.

²⁸⁵ Mr O'Brien was examined about this matter on 10 September 2019. Mr Blayney's diary was produced to the commission in December 2019.

²⁸⁶ Submissions of Counsel Assisting, Volume 2, [2443]-[2445].

²⁸⁷ Transcript of Mr James (Jim) O'Brien, 10 September 2019, 5932-5934, TRN.2019.09.06.01.C.

²⁸⁸ Responsive submissions of Victoria Police, O'Brien, [53.54].

²⁸⁹ Responsive submissions of Victoria Police, O'Brien, [51.12].

²⁹⁰ Responsive submissions of Victoria Police, O'Brien, [53.66].

Mr O'Connell

322. Submissions are made on behalf of Mr O'Connell that he has little independent memory of the man relevant events, and this has impeded his capacity to respond to the allegations made against him.²⁹¹
323. An analysis of Mr O'Connell's diary notes indicates that his note taking, in respect of SDU dealings related to Ms Gobbo in her capacity as a human source, was either limited or non-existent. Frequently when giving evidence, Mr O'Connell stated that because he had no memory or no note of the event, that he was not prepared to accept various propositions put to him on the basis of other evidence.
324. One of these events concerned the use of Ms Gobbo by the Petra Taskforce in the investigation of Andrew Hodson. The SDU recorded fifteen discussions with Mr O'Connell concerning these matters on 29 February, 4 March, 7 March, 9 March, 10 March, 28 March, 1 May, and 23 May 2007. None were recorded in Mr O'Connell's diary.²⁹²
325. Mr O'Connell's submission makes the following point:

*When pressed as to whether he accepted the contents of Mr White's diary, Mr O'Connell replied "... it's difficult for me to accept a document that I didn't create, notes that I didn't make, relating to a conversation that I can't recall. I do apologise for that". In response, **the Commissioner determined that Mr O'Connell's evidence would proceed on the basis that, owing to his lack of memory, it was understood that he had no recollection and could not accept or deny the accuracy of propositions and documents put to him by Counsel Assisting.***²⁹³

326. This submission gives the impression that the Commissioner accepted Mr O'Connell's stated lack of memory. What the Commissioner said was this:

*COMMISSIONER: We understand it's your position, **but to get through the evidence we'll work on the basis that we understand that's your position, you're not - you don't recall it, you're not disputing it, and we'll proceed on that basis if that's satisfactory to you. You've noted very firmly that you have no recollection and you can't accept it or deny it, all right, so we'll go on that basis?***

*MR O'CONNELL: That's fine.*²⁹⁴

327. Relying on his lack of recollection, and due to the absence of notes, Mr O'Connell seeks to provide explanations as to why it should not be considered

²⁹¹ Responsive submissions of Victoria Police, O'Connell, [60.1].

²⁹² Submissions of Counsel Assisting, Volume 2, [3094], [3114], [3130], [3136], [3143], [3145], [3147], [3153], [3154], [3156], [3160], [3162], [3163]; Responsive submissions of Victoria Police, O'Connell, [63.8]; Exhibit RC0882 Mr Wolf diary, 9 March 2008, 18-19, VPL.2000.0001.0098 @.0120.

²⁹³ Responsive submissions of Victoria Police, O'Connell, [63.8].

²⁹⁴ Transcript of Mr Shane O'Connell, 21 February 2020, 14746, TRN.2020.02.21.01.P.

that he and the SDU used Ms Gobbo as part of any plan relating to Mr Hodson. This claim needs to be assessed bearing in mind the following circumstances:

- 327.1. there was discussion of Ms Gobbo's offer of assistance between Mr O'Connell and the SDU, including that Mr Hodson would seek her out if pressure was applied, and the consideration of investigators to have him undergo a polygraph test.²⁹⁵
 - 327.2. the SDU advised Mr O'Connell that it would be better to contact Mr Hodson after hours or on the weekend to improve the chances that he would seek the advice of Ms Gobbo and not another solicitor.²⁹⁶
 - 327.3. Mr O'Connell called the SDU following the interview of Mr Hodson and asked that Ms Gobbo not talk Mr Hodson out of the polygraph test and suggest that it would be safe to participate in²⁹⁷
 - 327.4. the SDU reported to Mr O'Connell information supplied by Ms Gobbo when she spoke with Mr Hodson after his interview with Petra investigators.²⁹⁸
 - 327.5. Mr O'Connell notified the SDU handler when Mr Hodson indicated a change of mind about undergoing the polygraph test, and then called a second time when Mr Hodson had agreed again to undergo the test to inform them that he (Mr O'Connell) did not want contact between Ms Gobbo and Mr Hodson that might lead to Mr Hodson changing his mind.²⁹⁹
 - 327.6. Mr O'Connell notified the SDU handler that investigators were speaking to Mr Hodson about his failure of the lie detector test, and the handler then advised Mr O'Connell that he would let him know if Mr Hodson contacted Ms Gobbo.³⁰⁰
 - 327.7. Mr O'Connell notified the SDU that he had spoken Mr Hodson about his failure of the lie detector test. Subsequently, after Mr Hodson spoke to Ms Gobbo, Ms Gobbo's report of the matter to the SDU was disseminated to Mr O'Connell.³⁰¹
328. Another event related to Mr O'Connell's reading of privileged instructions that had been given by Mr Paul Dale. In 2003, Ms Gobbo had conducted a professional visit to Mr Dale when he was in custody. He provided her with written instructions to hand to his solicitor. Ms Gobbo made a copy of the instructions before doing so. In 2007 she provided these to the SDU. In 2008, Mr O'Connell met with a member of the SDU and was provided with these privileged notes to read. Mr O'Connell spoke with the SDU about these notes on 19 March, 20 March, 21 March and 26 March 2008, including meeting with the SDU handler to read the document.³⁰² He made no diary note of the conversations or the meeting.

²⁹⁵ Responsive submissions of Victoria Police, O'Connell, [63.11]-[63.12].

²⁹⁶ Responsive submissions of Victoria Police, O'Connell, [63.35]-[63.36].

²⁹⁷ Responsive submissions of Victoria Police, O'Connell, [63.45]-[63.47].

²⁹⁸ Responsive submissions of Victoria Police, O'Connell, [63.48].

²⁹⁹ Responsive submissions of Victoria Police, O'Connell, [63.50].

³⁰⁰ Responsive submissions of Victoria Police, O'Connell, [63.53].

³⁰¹ Responsive submissions of Victoria Police, O'Connell, [63.55].

³⁰² Submissions of Counsel Assisting, Volume 2, [3182], [3186], [3187].

329. Mr O'Connell's evidence was that he could not recall seeing the notes written by Mr Dale.³⁰³

330. Mr O'Connell's lack of notes was raised with him in evidence:

MS TITTENSOR: You say you've just got no memory of any contact with the SDU through this period at all; is that right?

MR O'CONNELL: Yeah, that's correct.

MS TITTENSOR: I'd suggest that if you were having contact in the nature that it appears you were in these documents, it'd be something that you would be unlikely to forget?

MR O'CONNELL: No, well, I can't answer that.

MS TITTENSOR: These documents - - - ?

MR O'CONNELL: I simply just can't answer that. All I can suggest to you is that I can't recall these contacts. It's some time ago and I've had a fair bit of water go under the bridge since then.

MS TITTENSOR: These documents suggest that you were involved in the tasking of Ms Gobbo to pretend that she was providing independent legal advice to someone that was suspected of murdering his parents?

MR O'CONNELL: I accept that that's an interpretation from the documents. But these documents weren't created by me. They aren't reflective of my notes, so I can't make any comment as to the accuracy of those notes one way or the other.

MS TITTENSOR: You say that they're reflective of your notes. You just simply make no notes of any communications you've had with the SDU during this period at all?

MR O'CONNELL: Yeah, and that of itself is capable of being interpreted that there was no such conversations and not that I would infer that, but that's also an interpretation that could be drawn if one was inclined to do so.

MS TITTENSOR: That the SDU have coincidentally made up these references that seem to correspond with actual events, is that what you're suggesting?

MR O'CONNELL: Not at all. Not at all. I just have no recollection of these conversations or engagement with the SDU during this period. I can't take that any further.

³⁰³ Transcript of Mr Shane O'Connell, 21 February 2020, 14751, TRN.2020.02.21.01.P.

- MS TITTENSOR: This is one of the most significant murder investigations in the State's history, do you accept that?*
- MR O'CONNELL: It's a significant murder investigation, yes. As they all are, to be honest.*
- MS TITTENSOR: For anyone to have done this, let alone in a case such as this, would be unthinkable, do you accept that?*
- MR O'CONNELL: For anyone to have done, sorry?*
- MS TITTENSOR: For anyone to engage a lawyer to, as a human source, to pretend to provide independent legal advice to someone accused of murder would be unthinkable?*
- MR O'CONNELL: I think I've commented on that already that it would be inappropriate, yes.*
- MS TITTENSOR: I'd suggest to you you just would not forget such a manipulation of the fundamental tenants of our law?*
- MR O'CONNELL: Again, I can't comment on that other than to repeat I simply cannot remember this time frame. It is some, what are we talking, 12, 13 years ago, and up until earlier this week I have never been asked to recall these events or conversations.*
- MS TITTENSOR: I'm suggesting to you that you just simply wouldn't forget these events and that you're not being truthful?*
- MR O'CONNELL: I resent the connotation that I'm not being truthful. That's just inaccurate and completely wrong.*
- MS TITTENSOR: The fact we don't see any diary notes in your diaries reflecting communications with the SDU is a reflection of the fact that you knew what you were doing at the time was very wrong?*
- MR O'CONNELL: That's incorrect.³⁰⁴*

³⁰⁴ Transcript of Mr Shane O'Connell, 21 February 2020, 14763-14764, TRN.2020.02.21.01.P.

REPLY SUBMISSION: VICTORIA POLICE, MR BATESON, MS GOBBO & MR HATT – MS GOBBO’S REPRESENTATION OF MR THOMAS

Matters related to Ms Gobbo’s representation of Mr Thomas

331. The submissions of Counsel Assisting in relation to the conduct of Mr Bateson and Ms Gobbo regarding Ms Gobbo’s representation of Mr Thomas involve the following fundamental matters:
- 331.1. over the weekend of 10 and 11 July 2004, Ms Gobbo played a role in the process of taking statements from the main witness against Mr Thomas (Mr McGrath), during which a draft statement concerning the murder of Mr Marshall was materially changed following the role she had played³⁰⁵
 - 331.2. Mr Bateson failed to disclose relevant information to Mr Thomas (and others accused on the basis of the evidence of Mr McGrath, including Mr Carl Williams) and to the Magistrates’ Court, which failure disguised the circumstances in which the Marshall statement was taken and Ms Gobbo’s role therein³⁰⁶
 - 331.3. the circumstances in which the Marshall draft statement was materially changed, and Ms Gobbo’s involvement, were significant matters about which counsel for Messrs Thomas (and Mr Williams) were prevented from exploring in cross-examination.³⁰⁷
332. Related to the first proposition, Counsel Assisting have referred to evidence that Ms Gobbo had been provided with the draft Marshall statement of Mr McGrath, which she has repeatedly and variously admitted that she “edited”, “altered” or “amended”.
333. The submissions on behalf of Mr Bateson squarely take issue with the suggestion that he had knowledge that Ms Gobbo had edited the Marshall statement or that her involvement with Mr McGrath was somehow improper.³⁰⁸ Ms Gobbo also takes issue with any suggestion of impropriety.³⁰⁹ Whilst Counsel Assisting contends on the basis of Ms Gobbo’s unchallenged evidence that she did edit the Marshall statement, the impropriety or otherwise of her conduct is not central to the submission. Likewise, Counsel Assisting contends that it is likely that Mr Bateson was aware of the editing, but even if he was not, that is not central to the findings that Counsel Assisting have submitted are open against Mr Bateson. Fundamental is the concealment of

³⁰⁵ Submissions of Counsel Assisting, Volume 2, [387].

³⁰⁶ Submissions of Counsel Assisting, Volume 2, [387]-[431].

³⁰⁷ Submissions of Counsel Assisting, Volume 2, [350]-[363], [380]-[382],[420]-[423].

³⁰⁸ Responsive submissions of Victoria Police, Mr Bateson, [13.14(a)].

³⁰⁹ Responsive submissions of Ms Gobbo, [483]-[492].

the circumstances in which Mr McGrath came to make the changes to his statement and Ms Gobbo's involvement in that process.

334. The submissions on behalf of Mr Bateson also squarely take issue with the second proposition, that Mr Bateson concealed relevant daybook entries from Mr Thomas and from the Court, it being asserted that a grave factual error has been made by Counsel Assisting. As will be demonstrated later in these submissions, if an appropriately careful analysis had been carried out by Counsel for Mr Bateson (which Counsel Assisting is accused of failing to do) it would have revealed that the evidence that is said to demonstrate Counsel Assisting's error does nothing of the sort, but merely confirms that Counsel Assisting's submission is correct. A substantial part of the analysis of Counsel for Mr Bateson relies upon the proposition that certain page numbers (15X3 and 15X4) are missing from a relevant exhibit, thus demonstrating, it is said, that Counsel Assisting's submission is demonstrably wrong. To the contrary, Counsel for Mr Bateson are wrong, because a reasonably careful examination of that exhibit reveals that those pages are part of the exhibit, but simply in the wrong order.
335. It is hard to comprehend that the presence of such pages escaped the attention of Counsel for Mr Bateson, given the length of the submission, the importance of the underlying issues, and the serious and offensive aspersions they have cast upon Counsel Assisting within that submission. For example, it is said or suggested that:
- 335.1. this grave factual error exemplifies Counsel Assisting's approach to their task which has "obscured the real issues" in the Commission, whereby there has been a focus upon the conduct of members of Victoria Police rather than an examination of underlying systemic issues³¹⁰
 - 335.2. what is most concerning is that the truth was ascertainable by an assessment of the evidence³¹¹
 - 335.3. it is beyond doubt that Counsel Assisting are wrong in this matter³¹²
 - 335.4. Mr Bateson has been the subject of a grossly unfair accusation³¹³
 - 335.5. the error has distracted Counsel Assisting³¹⁴
 - 335.6. the error has obscured the real issue – being the absence of structures capable of coping with the highly unusual circumstances involving Ms Gobbo³¹⁵

³¹⁰ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.19]-[1.20].

³¹¹ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.23].

³¹² Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.21].

³¹³ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [1.22].

³¹⁴ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [13.21].

³¹⁵ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [13.22].

- 335.7. that Counsel Assisting have not been disciplined or considered and that Counsel Assisting do not seem to recognise the seriousness of what they have put³¹⁶
- 335.8. Counsel Assisting had apparently not considered Mr Bateson's observations that the police pagination may be more significant than the numbers Mr Bateson had placed on his photocopies³¹⁷
- 335.9. had Counsel Assisting paid heed to Mr Bateson's observations, this grave and damaging allegation against Mr Bateson would not have been made.³¹⁸
336. As can be seen from the above, this alleged "grave factual error" was the springboard for much broader criticisms levelled upon the submissions of Counsel Assisting. It is unfortunate that Counsel for Mr Bateson were not more careful before making these criticisms, because quite simply, they are wrong.
337. In its reply the Director of Public Prosecutions (DPP) and the Office of Public Prosecutions (OPP), having considered the submissions of Counsel Assisting and those of the individual police members, submitted:³¹⁹

The depositions from the relevant matter provide clear evidence that day book and diary entries of both Officers Bateson and Hatt, the police members who dealt with Ms Gobbo in relation to the changes to McGrath's statement, were withheld from the parties and the Magistrate.

338. The remaining attack by Counsel for Mr Bateson and Counsel for Ms Gobbo, in submissions which share remarkable similarity in theme, are effectively founded upon apparent misconstructions of Counsel Assisting submissions, those being that:
- 338.1. Counsel Assisting have asserted that Ms Gobbo's previous representation of Mr McGrath at the time Mr McGrath implicated Mr Thomas was unknown³²⁰
- 338.2. Counsel Assisting have wrongly claimed that Mr Bateson and Ms Gobbo kept from Messrs Williams, Andrews and Thomas, the fact that Mr McGrath had previously said to police that he did not believe that Michael Marshall was to be murdered, and improperly ignored evidence that Mr Thomas and Mr Williams were able to cross-examine Mr McGrath on the fact that he changed his account.³²¹
339. It appears disingenuous for Counsel for Mr Bateson and Ms Gobbo to share such remarkably similar criticisms in their responsive submissions and then

³¹⁶ Responsive submissions of Victoria Police, The approach of Counsel Assisting has obscured the real issues, [13.23].

³¹⁷ Responsive submissions of Victoria Police, Mr Bateson, [17.42].

³¹⁸ Responsive submissions of Victoria Police, Mr Bateson, [17.42].

³¹⁹ Reply Submissions of the Director of Public Prosecutions and the Office of Public Prosecutions, [10].

³²⁰ Responsive submissions of Victoria Police, Mr Bateson, [13.4]-[13.8], [13.14(c)], [13.14(3)], [14.30]-[14.40], [14.63]-[14.67], [18.1]-[18.3]; Submissions of Ms Gobbo, [458], [493]-[527].

³²¹ Responsive submissions of Victoria Police, Mr Bateson, [13.14(d)], [14.45]-[14.62]; Submissions of Ms Gobbo, [464] to [482].

also submit in reply that their submissions are somehow fortified by those respective submissions and 'matters of commonality'.³²²

340. As to the first matter, Counsel Assisting have not made this submission at all. To the contrary, Counsel Assisting have set out, in their primary submissions, a considerable body of evidence, which makes it clear that it was known, not just by Mr Thomas, but by lawyers and the Court that Ms Gobbo had acted for Mr McGrath.³²³ What was unknown to persons other than Ms Gobbo and some members of Victoria Police, and which is the focus of the submissions of Counsel Assisting, were the circumstances in which Mr McGrath's statement was materially changed and Ms Gobbo's role in that process.
341. As to the second matter, Counsel Assisting have likewise not submitted that Mr Bateson and Ms Gobbo kept hidden the fact that Mr McGrath had made a prior inconsistent statement to police on 13 November 2003, in which he said that he did not believe that Mr Marshall was to be murdered. That is not relevant to the point made by Counsel Assisting. The point made is that any evidence concerning when, why and in what circumstances the version given by Mr McGrath changed in material ways was obviously relevant, and known to be relevant, to issues litigated in the prosecution.³²⁴ As a consequence of the failure to disclose relevant information to the accused and to the Court, counsel for Mr Thomas and Mr Williams were prevented from discovering in cross-examination, the circumstances in which Mr McGrath had come to change the version that he had given to police. Indeed, the fact that Mr McGrath had given that version to police in November 2003 highlights the significance of complete disclosure to enable the accused to examine the circumstances in which that earlier version changed. If they had been able to examine the circumstances, not only could additional attacks upon Mr McGrath's credit have been made, but it could have provided a solid foundation for significant attacks to be made upon the credibility of the investigation. This matter is returned to later in this reply, because it seems from the submissions of Mr Bateson and Ms Gobbo, if they are taken at face value, that the point is, at best, not understood.
342. Again, it is noted that aspersions have been cast upon Counsel Assisting based on this apparent misconstruction:
- 342.1. that Counsel Assisting had possession of information that made it clear that Mr McGrath was cross-examined about the prior inconsistent statement³²⁵
- 342.2. Counsel Assisting have ignored the evidence that Mr Thomas gave, to the effect that he was aware that Ms Gobbo had acted for Mr McGrath at a time that he had implicated him in the Moran- Barbaro murder³²⁶
- 342.3. that Counsel Assisting "glossed over" evidence that many people knew that Ms Gobbo had acted for Mr McGrath³²⁷

³²² Reply submissions of Victoria Police, Tranche 1 members, 8 September 2020, [2.4]-[2.6]; Reply submissions of Ms Gobbo, 8 September 2020, [792].

³²³ Submissions of Counsel Assisting, Volume 2, [509], [548], [550], [573] to [576], [578], [581], [591], [738] [925] and footnote 1158.

³²⁴ Submissions of Counsel Assisting, Volume 2, [744] to [763].

³²⁵ Responsive submissions of Victoria Police, Mr Bateson, [14.45]-[14.62].

³²⁶ Responsive submissions of Victoria Police, Mr Bateson, [13.5]-[13.6].

³²⁷ Responsive submissions of Victoria Police, Mr Bateson, [13.7], [14.68], [20.55].

- 342.4. an expression of surprise that Counsel Assisting “felt fit” not to refer to such matters at all during hearings or in the extensive submissions³²⁸
- 342.5. that the approach of Counsel Assisting is suggestive of an over eagerness to criticise Mr Bateson.³²⁹
343. Again, it appears that significant effort has been expended by Counsel for Mr Bateson and Ms Gobbo in dealing with contentions not raised by Counsel Assisting, rather than confronting those that have.

The real issue is the non-disclosure of information concerning the circumstances of the change in Mr McGrath’s statement and Ms Gobbo’s role therein

344. The submissions of Counsel Assisting make clear that the relevant issue was the concealment of information relevant to the circumstances of the material change in Mr McGrath’s draft statement concerning the Marshall murder and Ms Gobbo’s role therein.
345. To summarise briefly matters referred to by Counsel Assisting:
- 345.1. In addition to Ms Gobbo representing Mr McGrath during the period he was becoming a witness, and negotiating to resolve charges, it is alleged that she assisted Mr McGrath and the police by making “edits” to a statement Mr McGrath had made which strengthened the case that the Crown sought to bring against Carl Williams for the murder of Michael Marshall.³³⁰
- 345.2. It is said that Ms Gobbo represented Mr Thomas even though her own interests were opposed. “She wanted the information regarding her involvement in the statement making process to remain concealed, for the sake of her own safety as well as her capacity to maintain the trust of her clients and connections in the organised crime sphere”.³³¹
- 345.3. The statement making process is set out in detail in Counsel Assisting’s submissions, including references to Ms Gobbo’s claims that she altered or edited the statements and her fear that unedited notes would fall into defence hands, and her recognition of her conflicted position.³³²
- 345.4. It is put that it is open to conclude that Ms Gobbo was aware of the circumstances in which Mr McGrath’s statements had been made, and therefore the potential weakness in his evidence, and that she had a personal interest in Mr Thomas not finding out about her role in that process, and that Mr Bateson was also aware of that role.³³³

³²⁸ Responsive submissions of Ms Gobbo, [464]-[482].

³²⁹ Responsive submissions of Victoria Police, Mr Bateson, [13.3], [20.17], [20.61].

³³⁰ Submissions of Counsel Assisting, Volume 2, [452].

³³¹ Submissions of Counsel Assisting, Volume 2, [453].

³³² Submissions of Counsel Assisting, Volume 2, [608] to [610] and [619] to [648], [664] to [665] and [689].

³³³ Submissions of Counsel Assisting, Volume 2, [690].

- 345.5. Reference is made to Ms Gobbo's apparent misleading of Justice Ginnane as to her knowledge of the contents of Mr McGrath's statements and her role in his statement making process.³³⁴
- 345.6. Matters relating to the police recognition of the conflict associated with Ms Gobbo's role in the statement process are referred to.³³⁵
- 345.7. Mr Bateson's cross-examination by Mr Faris QC before Justice Teague is then referred to. When Mr Faris asked questions seeking disclosure of relevant material including any other statements of Mr McGrath, signed or unsigned, Mr Bateson gave evidence that, "[t]here is none relevant to these charges."³³⁶ The submission on behalf of Mr Bateson now accepts that the unsigned statement of Mr McGrath of 9 July 2004 was in fact a draft statement,³³⁷ although it is suggested that he assumed that the statement was in electronic form and overwritten by the changes made by Mr McGrath subsequently, and he assumed that the statement provided to Ms Gobbo was not retained consistent with the usual practice of disposing of "redundant versions".³³⁸
- 345.8. Mr Bateson's cross-examination by Mr Faris as to documents relating to the process of Mr McGrath coming to co-operate is referred to. This was a role that involved Ms Gobbo.³³⁹
- 345.9. The significance of Ms Gobbo's failure to cross-examine Mr Bateson as to her knowledge of the draft statements at Mr Thomas' bail application in September 2005 is referred to, along with evidence of Ms Gobbo acknowledging her "huge" conflict and not being able to conduct such examination "for fear of the consequences".³⁴⁰
- 345.10. The fact that Ms Gobbo contacted Mr Bateson on 23 March 2005 to thank him for keeping her name out of the committal hearing.³⁴¹
- 345.11. The concern expressed by Ms Gobbo to Mr Bateson when she spoke to him on 22 May 2005 that Mr Hatt would be cross-examined during the committal proceeding of Mr Carl Williams for the murder of Mr Mark Moran about the process by which Mr McGrath's first two statements were taken, which might reveal her involvement.³⁴²
- 345.12. The concern expressed by Ms Gobbo on 1 September 2005 to Mr Bateson that Solicitor 2 might obtain unedited police notes during the trial of Mr Williams for the murder of Michael Marshall.³⁴³
346. Ms Gobbo was questioned by Counsel Assisting over her failure to cross-examine Mr Faris about matters such as the existence of draft statements, which she would have done if acting in Mr Thomas' best interests. The following questioning occurred in the context of puttage at the same hearing where Ms Gobbo was purporting to represent Mr Thomas, whereby Mr Faris on

³³⁴ Submissions of Counsel Assisting, Volume 2, [691] to [695].

³³⁵ Submissions of Counsel Assisting, Volume 2, [703], [707], [714] to [715].

³³⁶ Submissions of Counsel Assisting, Volume 2, [724] to [729].

³³⁷ Responsive submissions of Victoria Police, Mr Bateson, [14.61], [16.42].

³³⁸ Responsive submissions of Victoria Police, Mr Bateson, [16.9].

³³⁹ Submissions of Counsel Assisting, Volume 2, [727].

³⁴⁰ Submissions of Counsel Assisting, Volume 2, [728] to [729].

³⁴¹ Submissions of Counsel Assisting, Volume 2, [1128].

³⁴² Submissions of Counsel Assisting, Volume 2, [779]-[781], [1142].

³⁴³ Submissions of Counsel Assisting, Volume 2, [1229].

behalf of Mr Williams had asked questions of Mr Bateson seeking disclosure of material such as draft statements:

MR WINNEKE: Right. If you were acting for Mr Thomas you would want to be asking similar sorts of questions, wouldn't you?

MS GOBBO: Yes.

MR WINNEKE: Now, after Mr Faris stopped asking questions you were asked if you wanted to ask any questions and you said no?

MS GOBBO: Okay.

MR WINNEKE: Well do you think that you gave Mr Thomas value for money when you appeared for him on that day?

MS GOBBO: I've got no recollection of even being in this hearing, so I obviously can't - - -

MR WINNEKE: Let's assume you were and let's assume as a barrister you had an obligation to ask questions about whether or not there were draft statements pre-prepared by the main witness against your client, right?

MS GOBBO: Yes.

MR WINNEKE: You knew, didn't you, that there were draft statements?

MS GOBBO: Yes. Well yes - - -

MR WINNEKE: Because you had been intimately involved in the changing of the statement, correct?

MS GOBBO: Yes.

MR WINNEKE: How could you possibly act for Mr Thomas in that circumstance?

MS GOBBO: Well obviously I had a huge conflict.

MR WINNEKE: Right. And it's reasonable to say that you didn't carry out your duty as a barrister on that day, did you?

MS GOBBO: No, I accept there was a conflict, um, but in answer to your earlier question about why I didn't raise the issue of the draft statements, for the obvious reason I couldn't reveal myself so that's why there was obvious conflict.

MR WINNEKE: It's quite apparent, isn't it, that you weren't acting in his best interest, you were acting in your own best interest?

MS GOBBO: Yes, for fear of the consequences, yes.

MR WINNEKE: And in the best interest perhaps of the police?

MS GOBBO: *Um - I'm assuming that, um, not being killed would have been my priority, not the police.*

MR WINNEKE: *Right. And you didn't obviously tell Mr Thomas that there was a draft statement, you certainly didn't tell him about that, did you?*

MS GOBBO: *No.*

MR WINNEKE: *And if you didn't ask any questions about it, of the reason you say you, the reason you would say you didn't ask any questions about it is because to do so would potentially expose your role in acting for Mr McGrath?*

MS GOBBO: *Correct, I could hardly ask Mr Bateson a question that I knew his answer would have to be, um, to reveal myself.³⁴⁴*

347. This evidence clearly encapsulates the point made by Counsel Assisting, and reveals that Ms Gobbo well understood the conflicted position that she was in and the fact that it was based upon information that she and Mr Bateson shared, but of which no-one else in Justice Teague's court was aware. Rather than deal with this evidence, and Counsel Assisting's submission based upon it, Counsel for Ms Gobbo and Mr Bateson appear to studiously avoid confronting it, and focus on the misconstrued claims referred to above. It is quite apparent that Ms Gobbo was not worried about Mr Thomas or Mr Williams knowing that she had acted for Mr McGrath when he decided to co-operate, she was worried about the revelation of her role in assisting Mr McGrath with that course, and her role in bringing about the change in the statement of Mr McGrath concerning the murder of Mr Marshall.
348. In light of the preceding paragraphs, it is submitted that it is clear that the aspect of Ms Gobbo's "role" which is the subject of submissions at [765] and [769], and other submissions about her conflict are to be seen in this context.
349. We note that the DPP and the OPP in their submission to the Commission in reply to interested parties do not appear to have misunderstood the conflict being raised by Counsel Assisting, which indicates that "the revisions to McGrath's draft statement, the concealment of which is the focus of submissions made by Counsel Assisting".³⁴⁵

The significance of Mr McGrath's evidence to Purana

350. It pays to briefly set out some matters which Counsel Assisting submit should be considered when assessing the submissions on behalf of Mr Bateson and Ms Gobbo.
351. Firstly, the importance of the evidence of Mr McGrath in the Moran / Barbaro committal (March 2005), the Marshall committal (May 2005), and the Marshall murder trial (September – November 2005) cannot be understated. Mr McGrath was the person who enabled Purana to break the underworld code of silence and bring charges in relation to a series of organised underworld

³⁴⁴ Transcript of Ms Nicola Gobbo, 6 February 2020, 13277-13278, TRN.2020.02.06.01.

³⁴⁵ Reply Submissions of the Director of Public Prosecutions and the Office of Public Prosecutions, September 2020, [10].

killings, in particular against Carl Williams, whom police had long suspected, but been unable to charge. Mr McGrath was and remains one of the most, if not the most, significant and pivotal witnesses in the history of criminal trials in this country; he gave the Purana Taskforce the breakthrough with his statements in relation to the murders of Marshall, Jason Moran and Pasquale Barbaro.

352. Secondly, any suggestion that a statement of this critical witness had been changed in a highly material way after scepticism was expressed as to its veracity, whether by the informant or his lawyer, would clearly be relevant.
353. Counsel Assisting do not suggest that a previous inconsistent account by Mr McGrath was unknown and that he therefore could not be challenged. It was well known that Mr McGrath had given an inconsistent account when he had first spoken to police on 13 November 2003. He was examined about that matter at the committal proceedings and trial that followed in which Mr McGrath was a witness. The issue raised by Counsel Assisting was that the accused were entitled to test (and they tried to test at the committal) how and why the witness's position came to change, particularly in circumstances in which it was open to suggest that Mr McGrath had a powerful incentive to say what he considered police wanted to hear. That incentive was a possible indemnity for three murders and a sentencing discount on the one to which he was pleading guilty.³⁴⁶
354. This point is highlighted neatly in a passage of cross-examination by Mr Lovitt of Mr McGrath at the committal hearing in March 2005:

MR LOVITT: The Marshall killing. I've said and I'll say it again, I'm asking you about the Marshall killing. Nothing else. That was the one that you'd been charged with. The whole tenor of your approach on 13 November in those tape recorded conversations, including the record of interview, which really was about the Jason Moran, the whole tenor of your discussions with the Police concerning the Marshall killing was you were trying to tell them as little as possible, finding out what they knew or what they believed they knew, wasn't it?

MR McGRATH: Yes.

MR LOVITT: It turned out, of course, that it became more and more apparent, as I put to you before lunch, and I don't want to labour old grounds, it became more and more apparent to you that the police were particularly interested in Carl Williams; correct?

MR McGRATH: Amongst other people, yes.

MR LOVITT: You keep saying that, Mr McGrath, but anybody who listens to those tapes, or just reads the transcripts, I suggest, can see, and you were there, can see that the overwhelming interest of the police was in Carl Williams and his involvement with

³⁴⁶ Submissions of Counsel Assisting, Volume 2, [745]-[751].

Marshall's killing, but mainly with the Jason Moran, Pasquale Barbaro killing; that was obvious, wasn't it?

MR McGRATH: They certainly expressed an interest in Carl Williams, yes.

MR LOVITT: You keep being diffident about that. I suggest that it's plain as a pike staff, Mr McGrath; I don't know whether Mr Bateson's going to deny it or not, but I mean we've got it in black and white in these transcripts. He keeps bringing the conversation back to Carl Williams; he did, didn't he?

MR McGRATH: I'm not entirely sure. There was some reference to Carl Williams, yes.

MR LOVITT: Look, the reason for your diffidence about that topic, I suggest, is that you know that really what's been suggested by the defence here is that you decided that it would be a good idea if you gave the police what they wanted?

355. The fact that Mr McGrath had said to police on 13 November 2003 that he did not believe that there would be a murder makes the point of Counsel Assisting stronger. Even after he had been told by investigators who took the statement from him on 22 and 23 June and 9 July 2004 that any assistance forthcoming to him would depend upon him telling the truth in his statement,³⁴⁷ he still maintained the position that he had given police in the previous November.
356. The importance of the ability to test these matters is further highlighted in a conversation between Ms Gobbo and the SDU on 20 April 2006. It is submitted that this conversation took place in the similar context of Ms Gobbo having been provided with transcripts containing Mr Thomas' account of events, in the hope that Ms Gobbo could assist in bringing about an account from Mr Thomas that was more satisfactory to the Purana Taskforce.³⁴⁸ Ms Gobbo explained to the SDU that Mr Bateson was unable to tell Mr Thomas that Ms Gobbo had "*got Mr McGrath over the line because he can't say anything about that.*" She explained further that Mr McGrath's statements had contained her amendments, and that "*from a defence barrister's point of view, that's a critical thing to cross-examine about, who made the changes, who did this and who worded it. That never came out but I've got to face that the - face the risk of that coming out at the trial ...*".³⁴⁹ The trial to which she was referring was the then impending trial of Carl Williams and Mr Thomas for the murders of Jason Moran and Pasquale Barbaro.
357. An accused must be able to test the evidence thoroughly based upon full disclosure. There cannot be selective disclosure. Without complete disclosure, counsel seeking to test Mr McGrath's evidence were deprived of vital information that shed light on when, how and why the version changed from that which had been given on 13 November 2003 to that given on 13 July 2004.

³⁴⁷ Submissions of Counsel Assisting, Volume 2, [609].

³⁴⁸ Submissions of Counsel Assisting, Volume 2, [903]-[923]. The provision of the transcripts in the manner submitted by Counsel Assisting is disputed by Mr Bateson, Mr O'Brien and Mr Ryan. This issue is dealt with in the next section of the reply.

³⁴⁹ Submissions of Counsel Assisting, Volume 2, [695.2].

On the one hand, it may be that Mr McGrath decided to tell the truth; on the other hand he might have decided to tell a lie. For the purposes of this submission, it does not matter. It may be that Messrs Heliotis and Lovitt were able to cause significant damage to the credit of Mr McGrath at the committal by putting his prior inconsistent version. This is highlighted by Counsel for Mr Bateson and Ms Gobbo, but again, it is of no consequence. The point is, what additional damage to Mr McGrath's credit, or damage to the integrity of the investigation process might have been achieved, had the information been disclosed. It might or might not have made a difference to the outcome, but of course that will be never known. What matters is the potential³⁵⁰ for injustice that arises if relevant information is not disclosed.

358. Thirdly, it is now known that the draft statement that Mr McGrath was prepared to sign on 9 July 2004 (which was never disclosed), subject to his barristers perusal was in fact significantly changed³⁵¹ with respect to matters that counsel for Mr Bateson concede were "not minor matters, but matters front and centre to the committal".³⁵² It is open to conclude that it was only after the involvement of Ms Gobbo (who admitted to the SDU in conversations on 26 September 2005, 20 April 2006 and 21 May 2007, having altered, amended or edited the statement to make it more believable, and doing so prior to getting instructions from him) that the final version came about.³⁵³
359. To be clear, it is not the position of Counsel Assisting that one or other of the versions given by Mr McGrath was true or false, that was for the jury to determine, and obviously is not a matter for this Commission.
360. Counsel Assisting submit that if these matters were known by counsel for the accused at the time of the committal, a challenge could have been mounted upon Mr McGrath and the police investigators (and perhaps also Ms Gobbo) concerning the process in which the final statement came about.³⁵⁴
361. Fourthly, it is submitted that the draft statement (whether or not annotated by Ms Gobbo), was a relevant item of evidence, both in the prosecution of those accused on the basis of Mr McGrath's evidence, and in any application for PII to legitimately conceal the events which occurred between 9 and 12 July, but it was never disclosed to the accused or produced to any court, and only came to light during the course of the Royal Commission.³⁵⁵
362. Fifthly, Ms Gobbo repeatedly stated to her handlers that she was concerned that her involvement in the process whereby the draft statement concerning the murder of Mr Marshall was edited, might be revealed.³⁵⁶
363. Finally, Ms Gobbo conceded that these facts gave rise to circumstances which meant that she could not properly represent the interests of Mr Thomas in an application for disclosure, after he was charged with the murders of Messrs Moran and Barbaro on the basis of the other statement signed by Mr McGrath on 13 July 2004. It is submitted that similarly, she could not properly represent

³⁵⁰ Submissions of Counsel Assisting, Volume 2, [690.2].

³⁵¹ Submissions of Counsel Assisting, Volume 2, [763].

³⁵² Responsive submissions of Victoria Police, Mr Bateson, [14.60].

³⁵³ Submissions of Counsel Assisting, Volume 2, [646]-[648], [695.2].

³⁵⁴ Submissions of Counsel Assisting, Volume 2, [745]-[749].

³⁵⁵ Submissions of Counsel Assisting, Volume 2, [764].

³⁵⁶ Submissions of Counsel Assisting, Volume 2, [646]-[648].

the interests of Mr Thomas in an application for bail in September 2005.³⁵⁷ In addition to the matters above, by that time Ms Gobbo was in an informing relationship with Mr Bateson, albeit not in relation to Mr Thomas, which was a further undisclosed conflict.³⁵⁸

Ms Gobbo's involvement in the statement taking process

364. Counsel Assisting have submitted that Ms Gobbo was involved in the statement taking process of the main witness against Mr Thomas, and that the statement materially changed following her involvement. Relevant events in relation to this submission are summarised below at [387.4] to [387.9].

365. Also of relevance is that:

365.1. when she reviewed the statement of Mr McGrath in respect of the Marshall murder, Ms Gobbo made notes in her court book reflecting her scepticism over two aspects of the statement, and that these were discussed with Mr Hatt who noted them in his diary, along with a plan that Ms Gobbo would canvass the issues with Mr McGrath³⁵⁹

365.2. in subsequent conversations with the SDU on 26 September 2005, 20 April 2006 and 21 May 2007, Ms Gobbo variously described having altered, amended or edited the statement when she was reviewing the statements with Mr Hatt³⁶⁰

365.3. the draft statement which had been presented to Ms Gobbo was taken away by Mr Hatt.³⁶¹ It was not retained by investigators for disclosure purposes, hence there is no way to determine what annotations Ms Gobbo may have made on the statement.

366. Ms Gobbo's clear evidence that she did edit the statements was not challenged on behalf of Victoria Police, Mr Bateson or Mr Hatt, but in submissions issue is taken:

366.1. that Ms Gobbo marked up the unsigned statements or suggest changes³⁶²

366.2. with an "unstated but pervasive assumption that Ms Gobbo's conduct was improper".³⁶³ Ms Gobbo also seems to take issue in relation to such a suggestion saying "[m]uch has been made by Counsel Assisting on the issue of Mr McGrath requesting Ms Gobbo sign his statements before he signed them."³⁶⁴

367. It is necessary therefore to examine the evidence concerning the editing. The evidentiary support for the contention by Counsel for Mr Bateson that Ms Gobbo did not mark up the statements or suggest changes is that:

³⁵⁷ Submissions of Counsel Assisting, Volume 2, [788]-[796].

³⁵⁸ Submissions of Counsel Assisting, Volume 2, [1128], [1140]-[1145], [1157], [1177], [1186], [1216].

³⁵⁹ Submissions of Counsel Assisting, Volume 2, [627]-[628], [632].

³⁶⁰ Submissions of Counsel Assisting, Volume 2, [646]-[648], [695.2].

³⁶¹ Submissions of Counsel Assisting, Volume 2, [628].

³⁶² Responsive submissions of Victoria Police, Mr Bateson, [13.14(a)], [16.1]; Responsive submissions of Victoria Police, Tranche 2, Mr Hatt [35.9]-[35.10].

³⁶³ Responsive submissions of Victoria Police, Mr Bateson, [13.14(a)], [16.17].

³⁶⁴ Responsive submissions of Ms Gobbo, [483].

- 367.1. Ms Gobbo wrote notes in her court book about matters for which she intended to speak with Mr McGrath
- 367.2. she identified these issues to Mr Hatt who also noted them in his diary.³⁶⁵
368. In his submissions, Mr Hatt says that he took Mr McGrath's unsigned statements to Ms Gobbo in her chambers and she reviewed them. It is submitted on behalf of Mr Hatt that Ms Gobbo did not mark up the unsigned statements, nor did she suggest changes.³⁶⁶ However, in his statement, Mr Hatt said that, "Ms Gobbo suggested some minor changes to the statements. On 12 July 2004, DS Bateson and I showed (Mr McGrath) the revised statements. McGrath signed his statements on 13 July 2004." (emphasis added). Insofar as the statement refers to Ms Gobbo having suggested changes, this appears consistent with Ms Gobbo's evidence.
369. Mr Hatt's evidence to the Commission about the matter was less firm than his submissions. When Mr Hatt was first asked about whether Ms Gobbo made amendments to the statements, he said that he was "not sure she had made amendments". He said he thought she suggested amendments to her client but "not to me, I believe". He then said that she did not mark the statements, and the statements that he allowed her to see were returned to him and he took them away. He did however agree this time that she had suggested changes.³⁶⁷ In evidence the following day he again provided a somewhat qualified response; "She didn't actually write on the statements to my understanding".³⁶⁸
370. It is difficult to work out what Ms Gobbo's position is from her submissions. At [442] it is stated that she "reviewed the statements". Then in another apparent misconstruction of Counsel Assisting's submission, at [483] and following, counsel for Ms Gobbo, asserts that "much has been made by Counsel Assisting on the issue of McGrath requesting that Ms Gobbo sight his statements before he signed them". There follows a lengthy examination of the process of "can say" statements and authority concerning the same, concluding with the proposition that "the situation of a 'can say' process is analogous to what occurred when Ms Gobbo was involved in the perusal of the statements prior to Mr McGrath signing ...". It is submitted that this was not a "can-say" statement, and the circumstances are in no way analogous.
371. Regardless of what her counsel are prepared to concede, Ms Gobbo admits that she edited the statement. This is consistent with her previous utterances. She told the SDU handlers variously that she had amended, altered and edited the statements. She also admitted to having done so in her evidence to the Commission: "*I edited them, that that's right*" and "*I certainly at some point looked at them and put corrections or notes on them.*"³⁶⁹
372. Senior Counsel for Victoria Police questioned Ms Gobbo about her reason for doing so:

³⁶⁵ Responsive submissions of Victoria Police, Mr Bateson, [16.7]; Responsive submissions of Victoria Police, Tranche 2, Mr Hatt [35.11]-[35.20].

³⁶⁶ Responsive submissions of Victoria Police, Tranche 2, Mr Hatt [35.9]-[35.10].

³⁶⁷ Transcript of Acting Inspector Mark Hatt, 27 June 2019, 3138, TRN.2019.06.27.01.C.

³⁶⁸ Transcript of Acting Inspector Mark Hatt, 28 June 2019, 3146, TRN.2019.06.28.01.C.

³⁶⁹ Transcript of Ms Nicola Gobbo, 13412, TRN.2020.02.07.01.P.

MR HOLT: Can we turn back then to the statements of Mr McGrath. You recall who Mr McGrath is, and if not please check the document that you have?

MS GOBBO: Yes, I do, yep.

MR HOLT: You had explained in this Commission and indeed you've explained on previous occasions that you edited the statements of Mr McGrath?

MS GOBBO: Yep.

MR HOLT: And you did that for the purposes of checking for any issues that might be inaccurate and therefore effect the veracity of the statements?

MS GOBBO: Yes.

MR HOLT: And you also checked them with another motive, that was to ensure that nothing was in them that might implicate you?

MS GOBBO: Secondary to making sure he got the greatest discount, correct.

MR HOLT: I understand. But both things were important, right, and both required the statements to be read and edited and understood?

MS GOBBO: Yep, yep.

373. Tellingly, in their submissions, neither Mr Hatt, Mr Bateson, nor Ms Gobbo refer to this evidence. It is submitted that it is open to conclude that without seeking instructions from her client, in the presence of a police officer, Ms Gobbo made edits or annotations to a statement of a highly important witness in one of the most significant murder prosecutions that could be imagined. Her admitted motivation was to ensure the witness's evidence would be more believable and ensure that Mr McGrath received the best possible discount. Assuming Ms Gobbo did in fact make edits which, consistent with her evidence, made it clear that Mr McGrath believed that Mr Marshall was going to be murdered, rather than a debt collected, it would not have been lost on police that the case against Carl Williams might thereby be strengthened.³⁷⁰ If such edits were similar to those that found their way into the signed statement, a cynical defence barrister might take the view that these circumstances suggested an endeavour by investigators, Mr McGrath and Ms Gobbo to "cook up" some evidence against Carl Williams,³⁷¹ regardless of whether in fact that was or was not the case.
374. The claims made by Ms Gobbo of altering, editing or amending the statements were against her interest. When speaking to her handlers, she was obviously keen for her involvement in this matter not to be disclosed. Her assertions about editing the statement were made in the context of explaining her fears as to her involvement in the statement process being found out during the court process.

³⁷⁰ Submissions of Counsel Assisting, Volume 2, [747] [763].

³⁷¹ Submissions of Counsel Assisting, Volume 2, [747].

375. Further, the conduct of Ms Gobbo in the manner described is consistent with her later conduct in July 2006 in relation to Mr Thomas. Arrangements were made for Ms Gobbo to speak with Mr Thomas during his statement making process at a time when Mr Bateson told Ms Gobbo that he considered Mr Thomas was “*not being totally truthful re murder matters*”. After Ms Gobbo met with Mr Thomas, and his statements were completed, Mr Bateson made arrangements for Ms Gobbo to review his statements. The day after she had done so, Ms Gobbo reported having “*amended some slightly*”, and in 2008 that she had “*edited all his statements. I corrected them. But no-one ever knows about that*”.³⁷² The Commission received evidence independent of Ms Gobbo that this was the case. The evidence came from Mr Bateson’s own hand; a post-it note from a note book of Mr Buick which had clearly once been attached to a draft statement and which read:

Boris,

Here is the statement. It has some red pen on it. These alterations were made by Nicola last night. If you don’t have this format let me know and I will email to you.

Regards,

*Stu*³⁷³

376. There is no apparent reason for Ms Gobbo to have lied about having marked up the draft statements in some way.

377. It is open to reject submissions of Messrs Bateson and Hatt that Ms Gobbo did not mark up the draft statement concerning the death of Mr Marshall, which Mr Hatt then took away.

378. In the event that the Commissioner concludes that Mr Hatt did take away with him statements annotated by Ms Gobbo, it is likely that Mr Bateson would have learned from his junior officer Mr Hatt about what had occurred, including Ms Gobbo’s comments about, and annotations upon, the draft statement. Both attended upon Mr McGrath together on each of the days that the statements were being taken, and Mr Hatt was tasked to take the statements to Ms Gobbo. As pointed out in the submission of Counsel Assisting, immediately following his meeting with Ms Gobbo, Mr Hatt contacted both Mr Bateson and Mr Ryan.³⁷⁴ This change was significant enough to be discussed with Mr Overland and others at a Purana Taskforce meeting on 12 July 2004, where Mr Purton recorded:

*(Statements) shown to Gobbo – 1 thing to change – didn’t know it’s going to be a murder – NG that’s ridiculous.*³⁷⁵

379. It is submitted unlikely that Mr Hatt would not have discussed this extraordinary turn of events with Mr Bateson and it is unlikely that Mr Bateson would not have seen the annotated statements. It is open to reject Mr Bateson’s submission, and that of Mr Hatt, that Ms Gobbo did not edit the Marshall statement, and Mr Bateson’s submission that he was not aware of the same.

³⁷² Submissions of Counsel Assisting, Volume 2, [967]-[995].

³⁷³ Submissions of Counsel Assisting, Volume 2, [985].

³⁷⁴ Submissions of Counsel Assisting, Volume 2, [627]-[628].

³⁷⁵ Submissions of Counsel Assisting, Volume 2, [638]-[639].

380. The second aspect of the submission of Mr Bateson, which has also been taken up by Ms Gobbo, is the apparent implied impropriety in Ms Gobbo's conduct. Whether or not the conduct of Ms Gobbo in relation to these events was good, bad, prudent or otherwise, would depend upon her motives and instructions at the time of these events. During the examination by Mr Holt, referred to above at [372], Ms Gobbo revealed she had three motivations in relation to her involvement with Mr McGrath through this process:
- 380.1. She wanted to ensure the statement was accurate
 - 380.2. She wanted to ensure he got the best deal
 - 380.3. She wanted to ensure he did not implicate her in some way.
381. In relation to the first two matters, on any view, for counsel to amend a draft statement in a significant murder investigation (or indeed any investigation) in ways that are likely to be material, prior to taking instructions and then return that statement to the police is extraordinary. That it is done because counsel is of the view that the amendments might make the maker of the statement more likely to be accepted and get the "greatest discount" simply highlights the point. Those charged as a consequence of Mr McGrath's evidence should have been able to examine the circumstances in which he came to change his story; and consequently, Ms Gobbo's role in those events should have been disclosed.
382. In relation to the third matter, counsel for Mr Williams and/or Mr Thomas may well have considered Ms Gobbo's motive to act as she did to be relevant and sought to explore that issue. In November 2003, Mr McGrath had been caught red handed. A listening device had captured the killing. He spoke to the police informally following this. There was a good prospect from the outset that Mr McGrath would agree to co-operate with police.³⁷⁶ Consistently with concern that Mr McGrath might implicate her, Ms Gobbo was similarly concerned when Mr Williams was later considering cooperating with police.³⁷⁷ Ms Gobbo had been closely associated with these people. Certainly the evidence before the Commission reveals that in 2004 the police and the prosecution were wary of Ms Gobbo's involvement, and discussed conflict issues with her when it was apparent that she intended to continue to act for Mr McGrath through this process.³⁷⁸
383. At the very least, and assuming the events as described by Ms Gobbo did occur, had the accused known about them, and the material changes to the statements made thereafter, Mr Bateson, Mr Hatt and Mr McGrath could well have expected to be cross-examined closely about them at committal, and there would have been justifiable calls to produce any annotated or edited statements. In circumstances in which it could be anticipated that an attack would be mounted that Mr McGrath was merely giving evidence to assist police in their investigative endeavours and receive a significant benefit from it, it is not hard to imagine that Messrs Lovitt and Heliotis would have had a proverbial "field day" with this information. None of that occurred because the events were not revealed to the accused.
384. Obviously, the question is whether the circumstances were revealed to the Chief Magistrate in a proper application for PII. If all relevant materials,

³⁷⁶ Submissions of Counsel Assisting, Volume 2, [496]-[497].

³⁷⁷ Submissions of Counsel Assisting, Volume 2, [2274].

³⁷⁸ Submissions of Counsel Assisting, Volume 2, [544]-[546], [561]-[562], [574]-[576], [578]-[581].

including Mr Bateson's and Mr Hatt's notes and the draft statement were put before the Chief Magistrate, and the circumstances made clear to enable him to make an informed decision about whether it was appropriate to protect Ms Gobbo, then there could be no complaint about the conduct of Mr Bateson.

385. Of further relevance to Counsel Assisting's submissions, and to matters of relevance to the Royal Commission, is that the conduct of Ms Gobbo, who without instructions expressed her view about the veracity of her client's statements and proceeded to edit them, would have signalled to police that she was prepared to actively assist in their investigative efforts. It is with this background that one can better appreciate the relationship that developed between Ms Gobbo and Mr Bateson, and the similar conduct that occurred in relation to Mr Thomas (in both April and July 2006) and Mr Cooper.
386. The question of Ms Gobbo having marked up the statement or annotated it in some way is relevant to the issue of non-disclosure of that statement to the defence, and whether the purported reason for that non-disclosure ought to be accepted. This issue is considered later in the reply.

Concealment of Bateson daybook entries and draft statement

387. Counsel Assisting have contended that:

- 387.1. On 25 October 2003, Mr McGrath and Mr Andrews were arrested for the murder of Mr Marshall.³⁷⁹ Ms Gobbo subsequently represented Mr McGrath on 13 November 2003, when police made application to interview him in relation to the murders of Messrs Jason Moran and Pasquale Barbaro.³⁸⁰
- 387.2. On 22 March 2004, at a committal mention hearing for Mr McGrath and Mr Andrews, Ms Gobbo spoke with Mr Bateson about Mr McGrath co-operating with the police. They discussed Mr McGrath producing a "can say" statement for the Crown to consider. Mr Bateson recorded these matters in his daybook. He also noted in his daybook that Ms Gobbo was "at pains" to point out that she would not reveal these matters to Mr Carl Williams or anyone else (Ms Gobbo had been acting for Mr Williams in relation to charges that he had threatened to kill Mr Bateson. Ms Gobbo had been regarded by Mr Bateson with suspicion. He agreed with the assessment that he probably thought her to be a "stooge" for Mr Williams at the time).³⁸¹
- 387.3. Ms Gobbo was thereafter involved in negotiations with police and the DPP on behalf of Mr McGrath.³⁸²
- 387.4. In June 2004, the police took statements from Mr McGrath in relation to the murders of Messrs Michael Marshall, Jason Moran and Pasquale Barbaro and commenced taking a statement concerning the murder of Mr Mark Moran.³⁸³

³⁷⁹ Submissions of Counsel Assisting, Volume 2, [496].

³⁸⁰ Submissions of Counsel Assisting, Volume 2, [509].

³⁸¹ Submissions of Counsel Assisting, Volume 2, [543]-[545]; Transcript of Commander Stuart Bateson, 20 November 2019, 9621, TRN.2019.11.20.01.C.

³⁸² Submissions of Counsel Assisting, Volume 2, [551]-[583], [590]-[601], [604]-[607].

³⁸³ Submissions of Counsel Assisting, Volume 2, [608]-[610].

- 387.5. On 9 July 2004, the police attended at the prison with completed statements for Mr McGrath to review and sign. Mr McGrath requested minor amendments and was otherwise prepared to sign the statement, pending approval from Ms Gobbo.³⁸⁴
- 387.6. Ms Gobbo became involved in the statement process of Mr McGrath:
- 387.6.1. On 9 July 2004, Mr Bateson made and recorded arrangements with Ms Gobbo for her to read the statements the following day³⁸⁵
- 387.6.2. On 10 July 2004, Mr Hatt brought the statements to Ms Gobbo's chambers where she read them. Ms Gobbo expressed scepticism over aspects of the statement including Mr McGrath's stated belief that the murder was not premeditated as it was going to be a debt collection. She was also doubtful about his claim not to have been paid for the killing³⁸⁶
- 387.6.3. As pointed out above, it can be concluded that Ms Gobbo edited the statements for the reasons that she stated to the Commission
- 387.6.4. Ms Gobbo rang Mr Bateson. She told him about her scepticism and asked that he expedite arrangements to visit Mr McGrath the next day³⁸⁷
- 387.6.5. On 11 July 2004, Ms Gobbo visited Mr McGrath. Following the visit, Ms Gobbo spoke to Mr Bateson. She told him that Mr McGrath would be "more forthcoming", or "more truthful" or "truthful".³⁸⁸
- 387.7. Mr Bateson recorded in his daybook his communications with Ms Gobbo in relation to these matters on the afternoon of Friday, 9 July 2004, and then on 10 and 11 July 2004. Mr Bateson had three pages of notes relating to 9 July 2004. His communication with Ms Gobbo occurred late in the afternoon and was recorded on the last of those pages. The communication with Ms Gobbo on the weekend of 10 and 11 July 2004 was recorded on a single page. His notes for the following day commenced on a new page.³⁸⁹
- 387.8. On 12 July 2004, Mr Bateson and Mr Hatt visited Mr McGrath in custody. Mr Bateson noted in his daybook that Mr McGrath "made some changes to the Marshall statement re his belief". Mr Bateson and Mr Hatt left the prison and printed the statement. They returned and sought Mr McGrath's signature, who again indicated that he would sign it subject to Ms Gobbo's approval. Later that day, Mr Bateson recorded in his daybook that he spoke to Ms Gobbo "re changes to statement".³⁹⁰

³⁸⁴ Submissions of Counsel Assisting, Volume 2, [620]-[624].

³⁸⁵ Submissions of Counsel Assisting, Volume 2, [625].

³⁸⁶ Submissions of Counsel Assisting, Volume 2, [627]-[628].

³⁸⁷ Submissions of Counsel Assisting, Volume 2, [629]-[631].

³⁸⁸ Submissions of Counsel Assisting, Volume 2, [633]-[634].

³⁸⁹ Submissions of Counsel Assisting, Volume 2, [625]-[648].

³⁹⁰ Submissions of Counsel Assisting, Volume 2, [636]-[637].

- 387.9. On the morning of 13 July 2004, Mr Bateson recorded in his daybook that he spoke to Ms Gobbo and that Mr McGrath was “right to sign statement”. Mr Bateson and Mr Hatt subsequently attended the prison where Mr McGrath signed the statement in relation to the murder of Michael Marshall which was materially changed from that of 9 July 2004; the statement had been changed to make it clear that McGrath believed that the “job had gone according to plan” and the job was not to collect a debt on behalf of Carl Williams but to carry out an execution for Carl Williams.³⁹¹
- 387.10. In August 2004, Mr Williams was charged with murder of Mr Michael Marshall on the basis of this statement made by Mr McGrath. He, Mr Thomas and Mr Andrews were also charged with murders of Messrs Jason Moran and Pasquale Barbaro on the basis of another statement signed by Mr McGrath on the same day. The prosecution case in respect of each of these murders was that Mr Williams had arranged for the murders to be carried out.³⁹²
- 387.11. On 23 September 2004, Mr Bateson was cross-examined by Mr Faris who was seeking disclosure of relevant material on behalf of Mr Williams:
- 387.11.1. Mr Bateson was asked whether there were any other statements, signed or unsigned, by Mr McGrath. He responded, “*There is none relevant to these charges*”. Ms Gobbo appeared representing Mr Thomas and asked no questions of Mr Bateson. Ms Gobbo agreed she had a “huge conflict” and could not reveal knowledge of the draft statements for fear of the consequences. The draft statements of Mr McGrath were therefore not disclosed.³⁹³
- 387.11.2. Mr Bateson was also asked whether any documents existed relating to Mr McGrath agreeing to give evidence. Mr Bateson said, “*I have none in my possession and I don’t believe there is any in existence.*” Mr Faris stated that these things don’t just happen out of the blue and questioned Mr Bateson further, “*And you say there was no documents; does that mean all the discussion and negotiation or whatever occurred about McGrath giving evidence and the benefits for him, whatever they might be, there is no documents relating to that?*” Mr Bateson responded, “*Correct*”. He was asked why and responded, “*Why would there be?*”³⁹⁴
- 387.12. During subsequent committal proceedings:
- 387.12.1. Mr Bateson concealed daybook entries dated 22 March, 9, 10 and 11 July 2004 from Mr Thomas and the Court which

³⁹¹ Submissions of Counsel Assisting, Volume 2, [643]-[644], [763].

³⁹² Submissions of Counsel Assisting, Volume 2, [717]-[718].

³⁹³ Submissions of Counsel Assisting, Volume 2, [724]-[729].

³⁹⁴ Submissions of Counsel Assisting, Volume 2, [727].

disguised Ms Gobbo's involvement in relation to the statement making process³⁹⁵

- 387.12.2. Ms Gobbo's name in relation to other entries in Mr Bateson's daybook was redacted and a PII claim successfully made³⁹⁶
- 387.12.3. The daybook entry of Mr Hatt relating to his visit to Ms Gobbo was not disclosed to Mr Thomas and the Court³⁹⁷
- 387.12.4. the draft statement of Mr McGrath was not disclosed to Mr Thomas or the Court.³⁹⁸

388. In relation to these matters:

- 388.1. Counsel for Mr Bateson has asked Counsel Assisting to withdraw the allegation that Mr Bateson concealed daybook entries from the Court during the committal of Messrs Williams, Thomas and Andrews because they have identified evidence which they submit demonstrates that Mr Bateson must have disclosed those pages.
 - 388.2. Counsel Assisting have not been asked to withdraw the submission that the draft statement was not provided to the accused or the Court, and it is not submitted on behalf of Mr Bateson that the statement was disclosed. Rather, it is submitted that Mr Bateson gave the evidence he did on the assumption that the draft statements had been disposed of, as was usual practice with respect to "redundant versions".³⁹⁹
389. Counsel Assisting have carefully considered the request to withdraw the submission in relation to Mr Bateson's alleged concealment of his daybook entries, however have determined that it would not be appropriate to do so.
390. Counsel Assisting accept that the allegation is serious. It was not made lightly. The Commissioner in considering the matter will of course closely scrutinise the evidence in accordance with the principles in *Briginshaw*, and those matters set out in Volume 1, Legal Principles at [41] to [51].
391. Counsel on behalf of Mr Bateson assert that Counsel Assisting's submissions rest upon a number of propositions concerning the pagination of Exhibit 32, and in particular the absence of the relevant daybook entries within that exhibit. That exhibit contained documents served outside the brief of evidence including investigator and police witness notes, diaries, daybooks and patrol duty returns.⁴⁰⁰ The assertion is not an entirely accurate summary of the submission of Counsel Assisting.

³⁹⁵ Submissions of Counsel Assisting, Volume 2, [742]-[770]; Responsive submissions of Victoria Police, Stuart Bateson, [17.50]. Mr Bateson's daybook entry for 9 July 2004 covered three pages. The allegation by Counsel Assisting relates to the final page, covering the late afternoon period until he went off duty. The daybook entry for 10 and 11 July 2004, was covered on a single page. Mr Bateson's diary entry for 10 and 11 July 2004, indicating that he was on rest days, was disclosed.

³⁹⁶ Submissions of Counsel Assisting, Volume 2, [764].

³⁹⁷ Submissions of Counsel Assisting, Volume 2, [628].

³⁹⁸ Submissions of Counsel Assisting, Volume 2, [621]-[622], [724]-[727]; Responsive submissions of Victoria Police, Stuart Bateson, [16.9].

³⁹⁹ Responsive submissions of Victoria Police, Mr Bateson, [16.8]-[16.9].

⁴⁰⁰ Responsive submissions of Victoria Police, Stuart Bateson, [17.28].

392. The contentions of Counsel Assisting are based upon inferences reasonably open arising from the following matters:
- 392.1. The evidence suggests that prior to the committal when Mr Bateson compiled the notes which became Exhibit 32, he made a decision not to include the entries that revealed Ms Gobbo's role in the period 9 to 11 July 2004, even in edited form⁴⁰¹
 - 392.2. an inference that he did not disclose those pages can be drawn from an assessment of the evidence that Mr Bateson gave during the committal, and upon which he was not challenged by the Chief Magistrate⁴⁰²
 - 392.3. the draft statement of 9 July 2004 which was shown to Ms Gobbo on 10 July 2004, and which contained material differences to the one which was ultimately signed on 13 July was not disclosed to the court⁴⁰³
 - 392.4. the matters set out in the statement of Mr Silbert QC, the strength of which are of course lessened given the length of time since the events in question, and the fact that it was not tested by *viva voce* examination.⁴⁰⁴
393. In any case, the point that is said to be fatal to the contention of Counsel Assisting concerns the first point. It is accepted by Counsel Assisting that if it could be demonstrated that Mr Bateson did include the relevant pages of his daybook within the police disclosure materials, and that they were later extracted from Exhibit 32 following discussion with the Chief Magistrate, then the contention of Counsel Assisting would not be open.
394. The relevant evidence concerning the provenance of Exhibit 32 is as follows:
- 394.1. On 16 August 2004, Mr Thomas was arrested and charged with the murder of Mr Moran and Mr Barbaro⁴⁰⁵
 - 394.2. On 30 August 2004, Mr Williams, Mr Thomas and Mr Andrews were directly presented for those murders and briefs of evidence were served upon them that day⁴⁰⁶
 - 394.3. After that presentment, lawyers for the accused wrote letters and issued a subpoena requesting full disclosure of matters concerning Mr McGrath⁴⁰⁷
 - 394.4. On 23 September 2004, a directions hearing took place in the Supreme Court, at which Mr Faris QC, on behalf of Mr Williams was complaining that he had not yet been provided with disclosure of relevant materials concerning Mr McGrath⁴⁰⁸

⁴⁰¹ Submissions of Counsel Assisting, Volume 2, [764.1].

⁴⁰² Submissions of Counsel Assisting, Volume 2, [756]-[758].

⁴⁰³ Submissions of Counsel Assisting, Volume 2, [764.3].

⁴⁰⁴ Submissions of Counsel Assisting, Volume 2, [764.4].

⁴⁰⁵ Submissions of Counsel Assisting, Volume 2, [682].

⁴⁰⁶ Submissions of Counsel Assisting, Volume 2, [717].

⁴⁰⁷ Submissions of Counsel Assisting, Volume 2, [725]-[728]; Responsive submissions of Victoria Police, Stuart Bateson, [17.5].

⁴⁰⁸ Exhibit RC0773 Transcript of proceedings, R v Williams, Andrews and Thomas SCV, Teague J, 23 September 2004, pages 3, 10 to 12, RCMP1.0108.0002.0006.

- 394.5. As pointed out in Mr Bateson's submissions, he was cross-examined by Mr Faris on behalf of Mr Williams, about documents requested in a letter dated 13 September 2004.⁴⁰⁹ It is asserted on behalf of Mr Bateson that he had by 23 September 2004 already provided many documents, "including police notes with Ms Gobbo's name redacted."⁴¹⁰ The footnotes relied upon by Counsel for Mr Bateson do not support this proposition, and further there is evidence that this was not the case. When Mr Bateson was cross-examined by Mr Faris specifically about notes concerning Mr McGrath, he said that most of the notes would be contained in police members' notes "and I am in the process of editing those members' notes now". He went on to indicate that he should be able to provide those notes by the end of the following week.⁴¹¹ In the event, it appears that Mr Bateson provided the additional materials to representatives of Messrs Williams, Thomas and Andrews, and the Crown on 4 October 2004.⁴¹²
- 394.6. Counsel for Mr Bateson outlined the following steps that were involved in the compilation of the police notes and inclusion therein of relevant pages of Mr Bateson's daybook:
- 394.6.1. relevant pages of daybook were identified
 - 394.6.2. they were photocopied
 - 394.6.3. they were paginated at the top right hand corner (the Bateson pagination)
 - 394.6.4. they were reviewed again
 - 394.6.5. they were added to a compilation of various police member notes then all notes were paginated at the bottom right hand corner (the Compilation pagination)⁴¹³
- 394.7. In carrying out this process, Mr Bateson photocopied 275 pages of his daybook.⁴¹⁴ Mr Bateson's explained that his daybook notes were maintained in a folder, and compiled with the latest date on top.⁴¹⁵ Mr Bateson said having compiled the police notes he considered that it would be helpful to paginate those documents in addition to having paginated the hand up brief.⁴¹⁶
- 394.8. Upon its tender, Exhibit 32 was described as "All police notes outside of hand up brief". When the depositions were compiled following the committal, Exhibit 32 was contained between pages 1529 and 2420 of the depositions. This obviously resulted in a third pagination process, in which the deposition page numbers (larger numbers), also on the

⁴⁰⁹ Submissions of Counsel Assisting, Volume 2, [725]-[728]; Responsive submissions of Victoria Police, Stuart Bateson, [17.5].

⁴¹⁰ Responsive submissions of Victoria Police, Stuart Bateson, [17.7].

⁴¹¹ Exhibit RC0773 Transcript of proceedings, R v Williams, Andrews and Thomas SCV, Teague J, 23 September 2004, pages 3, 10 to 12, RCMP1.0108.0002.0006.

⁴¹² Untendered – Diary of Stuart Bateson, 4 October 2004 (VPL.0005.0058.0706 @.0812).

⁴¹³ Responsive submissions of Victoria Police, Stuart Bateson, [17.39]; the suggestion at [17.39(d)] that someone other than Mr Bateson carried out this task is dealt with later in this reply.

⁴¹⁴ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2013-.2289.

⁴¹⁵ Exhibit RC1875 Transcript of Commander Stuart Bateson Examination, *R v Carl Williams, Thomas and Andrews*, 9 March 2003, 801, OPP.0041.0001.0002 @.0801.

⁴¹⁶ Transcript of Commander Stuart Bateson, 20 November 2019, 9591, TRN.2019.11.20.01.C.

bottom right hand corner of each page, were added.⁴¹⁷ Mr Bateson's daybook notes commence with a coversheet on page 2024 and end on page 2315 of the depositions.⁴¹⁸ Within that sequence are pages without Bateson or Compilation page numbers on them, but only deposition pagination, indicating that they were probably provided subsequent to 4 October 2004.⁴¹⁹ In considering these submissions and those of Mr Bateson, it is important to examine the pages with the Bateson and Compilation pagination.

- 394.9. An examination of Exhibit 32 demonstrates that consistently with the way in which Mr Bateson maintained his daybook notes in a folder, the Bateson pagination also occurs in chronological reverse order. This pagination commences with the events of 16 August 2004 (the date of the arrest of Mr Thomas) on page 1 and ends with the events of 21 June 2003 (the date of the murders of Mr Moran and Mr Barbaro) on page 275.⁴²⁰
- 394.10. These pages also contain the compilation pagination. The compilation number on the coversheet of Mr Bateson's section of notes is page 1547 which is found at deposition page 2024. Although the third digit is obscured, so only the first, second and fourth digit can be seen (15X7), by examining pages within the depositions before and after this, or indeed any other page in question, the obscured number (which in most cases is either the second or third digit), can be readily identified. Bateson page number 1 (at deposition page 2301) is likely to be Compilation page 1548, Bateson page 2 is Compilation page 1549, Bateson page 3 is Compilation page 1550 and so on.
- 394.11. There are occasions where it appears that the process of paginating the compilation of notes has resulted in Mr Bateson's notes being copied out of order. For example, Bateson page 19 (deposition page 2278) bears the Compilation page 1566, page 20 is 1567, page 21 is 1568, page 22 is 1570, page 23 is 1569, page 24 is 1571 and page 25 is 1572. Thus, it appears that pages 22 and 23 were paginated in the wrong order in the Compilation pagination process. This can be shown as follows:

Bateson page	Compilation page	Date covered
19	1566	16 June 2004 ⁴²¹

⁴¹⁷ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.0005.

⁴¹⁸ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2012-.2303.

⁴¹⁹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2272, 2281-2285, 2290-2303; Deposition pages 2284, 2293-2297, 2302 – 2315.

⁴²⁰ It seems that when the pages were reordered for the purposes of creating the depositions, there were some errors in the order or pagination, such as pages 2025 to 2027 of the depositions because a belief that the dates in question were 2003, when in fact the year at the head of the daybook was incorrect. Attention therefore needs to be given to the Bateson / Compilation pagination.

⁴²¹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2266.

20	1567	14 to 16 June 2004 ⁴²²
21	1568	26 May 2004 ⁴²³
22	1570	5 and 6 April 2004 ⁴²⁴
23	1569	5 April 2004 ⁴²⁵
24	1571	2 April 2004 ⁴²⁶
25	1572	25 March 2004 ⁴²⁷

395. The submission of Counsel for Mr Bateson relies upon an examination of two consecutive pages of depositions containing the compilation pagination going from 15X2 to 15X5. It is asserted that the two pages in between, 15X3 and 15X4, were the two pages containing Mr Bateson's daybook notes of 9, 10 and 11 July 2004. This is said to reveal the falsity of the submissions of Counsel Assisting, demonstrating that those two pages were photocopied and included in the compilation provided to the Chief Magistrate who determined to exclude them pursuant to the PII claim that had been made. They were therefore legitimately omitted from the tender of Exhibit 32.⁴²⁸

396. A careful examination of the depositions, which Counsel for Mr Bateson accuses Counsel Assisting of failing to carry out, that extends beyond looking at two pages in isolation, reveals the following pagination sequence:

Bateson page	Compilation page	Date covered
1	1548	16 August 2004 ⁴²⁹
2	1549	16 August 2004 ⁴³⁰

⁴²² Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2265.

⁴²³ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2264.

⁴²⁴ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2263.

⁴²⁵ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2262.

⁴²⁶ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2261.

⁴²⁷ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2260.

⁴²⁸ Responsive submissions of Victoria Police, Stuart Bateson, [17.42]-[17.49].

⁴²⁹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2289.

⁴³⁰ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2288.

3	1550	16 August 2004 ⁴³¹
4	1551	16 August 2004 ⁴³²
5	1553	13 July 2004 ⁴³³
6	1554	12 July 2004 ⁴³⁴
7	1552	12 July 2004 ⁴³⁵
8	1555	9 July 2004 ⁴³⁶
9	1556	9 July 2004 ⁴³⁷
10	1557	5 July 2004 ⁴³⁸

397. As can be seen, the two supposedly absent pages (15X3 and 15X4) were not absent at all, they were simply out of order, in the same way that compilation pages 1570 and 1569 were paginated in the wrong order when compiled. Those pages 15X4 (1554) and 1553 (15X3) contained Mr Bateson's daybook notes from 12 and 13 July 2004, respectively, not the page of his notes from the afternoon of 9 July 2004 or the page of his notes covering 10 and 11 July 2004.
398. There can be no other explanation that accounts for the number sequences apparent in Exhibit 32. This demonstrates Counsel Assisting did not make the error attributed to them.
399. It is open to conclude that a considered decision was made by Mr Bateson not to photocopy the two pages covering the afternoon of 9 July to 11 July 2004, pictured in the submissions of Counsel Assisting at [757], as he photocopied pages immediately either side of them.
400. Further, it is open to conclude that Mr Bateson made this decision at the time that he initially photocopied, paginated and compiled his notes in about September or early October 2004, knowing the documents that were being

⁴³¹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2287.

⁴³² Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2286.

⁴³³ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2280.

⁴³⁴ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2279.

⁴³⁵ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2278.

⁴³⁶ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2277.

⁴³⁷ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2276.

⁴³⁸ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2275.

sought by Mr Faris, and, it is submitted, knowing the issues that were likely to be litigated in the committal. The failure to include this material suggests that Mr Bateson had decided not to produce the pages that revealed Ms Gobbo's role, which was central to Mr McGrath's decision to change his evidence in a material way.

401. This is consistent with Mr Bateson's evidence to Mr Faris referred to above at [387.11], wherein Mr Bateson failed to mention the draft statement of 9 July 2004, which he must have been aware of, and his responses to questions relating to the existence of any material relating to discussions or negotiations relating to Mr McGrath.
402. This is also consistent with the absence (in redacted form or otherwise) of Mr Hatt's notes of 10 July 2004 from the Compilation material and the depositions, which Counsel Assisting have submitted was not produced to Mr Thomas and the Court.⁴³⁹ An examination of Exhibit 32 reveals that Mr Hatt's daybook of 30 June 2004 is at page 1674 of the depositions⁴⁴⁰ and it bears Compilation page number 1210. It is immediately followed by an entry of 12 July 2004 which bears compilation page 1211.⁴⁴¹ It is open to conclude therefore that Mr Hatt's daybook notes were not included at the time of pagination of the Compilation material either.
403. Counsel for Mr Bateson contend that "[a]n examination of the underlying pagination shows that another page Counsel Assisting asserts was not produced – 22 March 2004 – was produced". Save for this assertion, nothing further is offered in submissions on behalf of Mr Bateson on this point. Whilst it is not clear how an examination of "underlying pagination" shows that the page was produced, in any event, it is submitted that counsel for Mr Bateson is again wrong. Counsel Assisting did properly put to Mr Bateson in examination that his daybook contained two pages of notes dealing with events on 22 March 2004, and that the first page, which includes notes of discussion with Ms Gobbo about Mr McGrath co-operating appeared not to have been included in Exhibit 32 and made available to the accused, whereas the companion page had been included.⁴⁴²
404. Contrary to the assertion on behalf of Mr Bateson that an "examination of the underlying pagination" shows that the note was produced; such an examination suggests the opposite. The consecutive numbering of the compilation pages may enable the Commissioner to conclude, if it is accepted that other pages were deliberately withheld, that a decision was made not to produce the page when the notes were compiled. Applying the same analysis as that above:

Bateson page	Compilation page	Date covered
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⁴³⁹ Submissions of Counsel Assisting, Volume 2, [628].

⁴⁴⁰ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.1685.

⁴⁴¹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.1686.

⁴⁴² Transcript of Commander Stuart Bateson, 20 November 2019, 9579, TRN.2019.11.20.01.C.

29	1576	24 March 2004 ⁴⁴³
30	1577	24 March 2004 ⁴⁴⁴
31	1578	23 March 2004 ⁴⁴⁵
32	1579	22 March 2004 ⁴⁴⁶
34	1580	12 March 2004 ⁴⁴⁷
35	1581	12 March 2004 ⁴⁴⁸
36	1582	11 March 2004 ⁴⁴⁹

405. The depositions show that Bateson page 32 (Compilation page 1579) is the afternoon entry of 22 March 2004. The fact that the next⁴⁵⁰ page in the compilation is 12 March 2004 (Compilation page 1580) reveals unequivocally that the page with the morning entries in Mr Bateson's daybook including his conversation with Ms Gobbo was not compiled and disclosed. The absence of Bateson page 33 does not show that it was produced; rather it suggests that a page was photocopied and paginated as page 33, but that page was excluded when compiled, either deliberately or accidentally.
406. It would be open to draw an inference from the absence of page 33 in the Bateson pagination sequence, and the sequential pagination of the compilation material, that the page containing Mr Bateson's conversation with Ms Gobbo was originally photocopied and paginated, but a decision was subsequently made not to include it when he compiled and paginated the compilation material. This is consistent with Mr Bateson's submission that he reviewed his paginated notes prior to collation of the compilation material.⁴⁵¹ The exclusion of this page is also consistent with Mr Bateson's decision not to include the two pages covering 9 to 11 July 2004, and the absence of Mr Hatt's notes covering 10 July 2004. Mr Bateson might have sought to exclude Ms Gobbo's name from this page, however the content of it would have raised potentially difficult questions; being a lawyer endeavouring to negotiate on behalf of Mr McGrath,

⁴⁴³ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2256.

⁴⁴⁴ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2255.

⁴⁴⁵ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2254.

⁴⁴⁶ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2253.

⁴⁴⁷ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2252.

⁴⁴⁸ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2251.

⁴⁴⁹ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2250.

⁴⁵⁰ Bearing in mind reverse date sequence pagination.

⁴⁵¹ Responsive submissions of Victoria Police, Stuart Bateson, [17.39(f)].

who was at pains to make Mr Bateson understand she would not go running back to Carl Williams.

407. Counsel for Mr Bateson argues that it is “likely that, on first preparing his notes for disclosure, Com. Bateson did not arrange for his notes for 10 and 11 July 2004 to be copied as he was recorded as being on rest days.” Presumably, the submission is not deliberately couched in this way to convey that Mr Bateson directed a support staff member to photocopy the pages of his daybook only on days that he was rostered on. If it was, it is misleading and inconsistent with Mr Bateson’s evidence in the committal where he described to Mr Lovitt the process by which he photocopied his notes. He explained that they were in reverse order as “*when I write my notes, I then just pile them one on top of the other in the folder so **that’s the way I photocopied them** ...*”.⁴⁵² Also flowing from this is the inherent unlikelihood that he would have ignored pages in his daybook because his diary had him rostered off.
408. As to the asserted likelihood of this explanation for the failure to copy the page, not surprisingly, when Mr Bateson was led on this question by Ms Enbom, he responded, “*Possibly. I don’t know that for certain but possibly. Yeah, I’m not sure.*”⁴⁵³
409. Further, this argument does not account for the failure to copy the page of his daybook concerning 9 July 2004, a day on which he was on duty and as to which he had copied two other pages which did not refer to Ms Gobbo.
410. On the basis of the evidence above it is open to find, as Counsel Assisting have contended, that Mr Bateson’s daybook was paginated for the purpose of disclosure prior to the committal, and that relevant pages containing entries for 22 March, and 9, 10 and 11 July 2004 were missing in the sequence, indicating that a decision had been made prior to the committal not to disclose those pages.⁴⁵⁴
411. Whether or not it could be concluded that Mr Bateson subsequently provided a copy of these daybook pages requires consideration of the further points made by Counsel Assisting.
412. After the initial tranche of disclosure which had been made, additional pages of Mr Bateson’s daybook were disclosed. These are contained within Exhibit 32, and having been provided later, do not feature the Bateson pagination or the Compilation pagination.⁴⁵⁵ The question for the Commissioner to consider is whether, in addition to the provision of those pages Mr Bateson provided to the Chief Magistrate, but not the accused, the pages containing the entries for 22 March, and 9, 10 and 11 July 2004 were also disclosed.
413. It is most unlikely that this was the case. The issue that the Chief Magistrate was called upon to determine was whether redactions to various documents that had been provided to the defence were justified. The committal transcript refers to concerns by the defence over blacked out material:

⁴⁵² Exhibit RC1875 Transcript of Commander Stuart Bateson Examination, *R v Carl Williams, Thomas and Andrews*, 9 March 2003, 831, OPP.0041.0001.0002 @.0801.

⁴⁵³ Transcript of Commander Stuart Bateson, 2 December 2019, 10122, TRN.2019.12.02.01.C.

⁴⁵⁴ Submissions of Counsel Assisting, Volume 2, [764.1].

⁴⁵⁵ *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.2272, 2281 to 2285, 2290 to 2303; Deposition pages 2284, 2293 to 2297, 2302 to 2315.

- 413.1. a call for “*unedited police notes...that relate to police officers visiting Mr McGrath in prison*”⁴⁵⁶
- 413.2. Mr Heliotis indicating that defence had been “*provided with a lot of notes, police notes, in relation to the interviewing by the police of Mr McGrath where much has been blacked out. It wasn’t obvious to us at the time, it is quite obvious to us now that that must relate to these matters, and it is a matter we are going to ask you to look at.*” It was also noted that defence called for all unsigned statements made by Mr McGrath⁴⁵⁷
- 413.3. some extra notes had been provided the previous day which had parts blacked out, and notes that had earlier notes had parts blacked out⁴⁵⁸
- 413.4. Mr Silbert, appearing on behalf of the Chief Commissioner, told the Chief Magistrate that the defence were querying the “editing” in respect of some daybook and diary notes.⁴⁵⁹
414. Mr Silbert outlined the process for the Chief Magistrate to undertake this task. He would receive copies of the edited material together with copies of the unedited material, so that he could compare them and ensure the redactions which had been made were not relevant or would not advance the defence position in any material way. Mr Silbert said that there were 28 pages to be reviewed, and again described that the process was that the Chief Magistrate should “*look at what’s been blacked out on what’s been supplied to the defence, and satisfying yourself that it’s of no value to the defence that it relates to an extraneous matter and isn’t relevant to these proceedings.*” Notably it was indicated that Mr Bateson was photocopying the material for review by the Chief Magistrate; he was not receiving the original documents in their original form.⁴⁶⁰
415. Having examined the documents, the Chief Magistrate indicated that he had examined Mr Bateson in closed session for 20 to 25 minutes (amounting to 13 pages of transcript pages 89 to 102⁴⁶¹), and that redactions were to be removed in whole or in part over two documents.⁴⁶²
416. It is suggested by Counsel for Mr Bateson that the most likely explanation for the daybook entries not being included in Exhibit 32 is that the pages were wholly redacted and those redactions were upheld by the Chief Magistrate and so extracted from the paginated bundle and not included in Exhibit 32. The submission goes on, ‘*Certainly, Mr Silbert QC referred to some pages being “extracted” from the bundle of police notes before Exhibit 32 was created.*’⁴⁶³ It is not clear what Counsel for Mr Bateson is referring to here as Mr Silbert

⁴⁵⁶ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 8, OPP.0041.0001.0001 @.0037.

⁴⁵⁷ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 9-10, OPP.0041.0001.0001 @.0038-.0039.

⁴⁵⁸ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 17, OPP.0041.0001.0001 @.0046.

⁴⁵⁹ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 40, OPP.0041.0001.0001 @.0069.

⁴⁶⁰ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 41, 48-49, OPP.0041.0001.0001 @.0046, 0077-.0078.

⁴⁶¹ Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 41, 48-49, OPP.0041.0001.0001 @.0118 to .0119.

⁴⁶² Exhibit RC1875 Depositions, *The Police v Carl Williams, Andrews & Thomas*, 106, OPP.0041.0001.0001 @.0122.

⁴⁶³ Responsive submissions of Victoria Police, Stuart Bateson, [17.51].

neither said nor referred to such extraction. In describing the process of review the Chief Magistrate was to undertake, he had referred to the disputed material as being “*excerpted*” for comparison purposes. This related to the 28 pages he was to review.

417. It is unlikely that the Chief Magistrate would have agreed to remove the pages relating to Ms Gobbo in their entirety. Mr Bateson acknowledged the importance of the substance of the diary entries on these dates when he gave evidence. His evidence was not that the entirety of those pages would have been redacted. He maintained that it was his memory that only the name of Ms Gobbo was redacted from the notes. There was no removal of what the lawyer was doing, or that the lawyer had expressed scepticism about aspects of the statement of Mr McGrath. He accepted that those parts would be important for those representing Mr Williams, Mr Thomas and Mr Andrews to understand what was going on with respect to the statement.⁴⁶⁴ If the investigator appreciated the significance of those matters, it is unlikely to have escaped the Chief Magistrate. Notably, however, when Mr Lovitt was cross-examining Mr Bateson about the daybook entries in sequence, he went from 9 July straight to 12 July 2004.⁴⁶⁵ As submitted by Counsel Assisting, an analysis of Mr Lovitt’s cross-examination inevitably leads to the conclusion that the defence did not have possession of the daybook entries of 10 and 11 July 2004. Further, consistent with the apparent failure to disclose Mr Hatt’s daybook of 10 July, Mr Hatt was not cross-examined at the committal about any relevant conduct on his part on 10 July 2004.⁴⁶⁶
418. The suggestion that in this process, two relevant pages of notes that had previously been served on the accused were somehow “extracted” appears unlikely. Mr Lovitt, when he tendered the material which became Exhibit 32, was seeking to create a record of notes which had been provided to the defence for the purposes of the later trial. There is no suggestion that pages which were completely redacted were then extracted from material that was ultimately tendered.
419. It is also suggested by Counsel for Mr Bateson that there was a possibility of error on the part of a court officer who compiled the depositions.⁴⁶⁷ This argument cannot be sound if it is accepted that the pages photocopied, paginated and compiled by Mr Bateson can be accounted for. Further, as referred to above, an examination of the transcript of cross-examination of Mr Bateson by Mr Lovitt, in which Mr Bateson was taken through events in chronological order, makes clear that Mr Lovitt was not aware of any relevant events on 10 and 11 July 2004.⁴⁶⁸ Unless Mr Lovitt was given a page that was completely blanked out, including the dates, it is extremely unlikely that the parties had those pages in a redacted form but did not cross-examine upon those events, and then, coincidentally, a court officer failed to compile them into the depositions.
420. Counsel for Mr Bateson argues that in any event, there was no potential injustice as Mr Lovitt did elicit from Mr Bateson at the committal that changes

⁴⁶⁴ Transcript of Commander Stuart Bateson, 2 July 2019, 3425, TRN.2019.07.02.01.C.

⁴⁶⁵ Submissions of Counsel Assisting, Volume 2, [755].

⁴⁶⁶ Exhibit RC1888 Depositions, *The Police v Carl Williams, Andrews & Thomas*, OPP.0041.0001.0001 @.0954 to .0961.

⁴⁶⁷ Responsive submissions of Victoria Police, Stuart Bateson, [17.53].

⁴⁶⁸ Exhibit RC1875 Transcript of Commander Stuart Bateson Examination, *R v Carl Williams, Thomas and Andrews*, 9 March 2003, 848, OPP.0041.0001.0002 @.0848.

had been made to the statement between 22 June and 13 July 2004, not by the Purana Taskforce, but at the behest of Mr McGrath or his lawyers, and he did not pursue the matter.⁴⁶⁹ In fact, it was Mr Heliotis asking these questions on behalf of Mr Williams, but as can be seen by the passage quoted in the submission, Mr Bateson led Mr Heliotis to believe that there had been *minor alterations* prior to the signing of the statement. It seems to be suggested that because counsel did not pursue the matter, it can be of no importance. In the light of what is now known, that answer is misleading.

421. It is likely that if Mr Bateson had pointed out that the changes were not minor, but concerned matters “front and centre to the committal”, that Mr Heliotis would certainly have pursued the matter further on behalf of Mr Williams who was charged with the murder of Mr Marshall.
422. As pointed out in the submissions of Counsel Assisting, Mr Lovitt was also interested in trying to establish the events leading to the signing of the statement:⁴⁷⁰
- 422.1. Mr Bateson was directly asked by Mr Lovitt if there were any drafts statements in existence, including on a computer, of any statement made and which was altered in some way prior to the signing of it on 13 July 2004. Mr Bateson’s response: “*The only draft is, or the only difference that we have recorded is the addresses that we deleted out of the statements.*”⁴⁷¹
- 422.2. Mr Lovitt asked Mr Bateson if the statement of Mr McGrath had been altered between the 9 and 13 July 2004. Mr Bateson’s answer was: “*No, basically – as you can see, there’s that reference there, what happened from there, it was taken to his legal representative at his wishes*”. This was followed by reference to minor changes which had been requested by Mr McGrath during the police visit on 9 July 2004.⁴⁷²
- 422.3. Following this, Mr Lovitt asked questions in order to elicit any evidence at all to establish that Mr McGrath was negotiating with the police⁴⁷³
- 422.4. Mr Lovitt returned to the question of the statement taking process, trying to elicit what happened between the 9 and 13 July 2004, and whether there were any unsigned statements in existence prior to the signing on 13 July 2004. When Mr Lovitt asked what happened to the unsigned statements that existed prior to the signing on 13 July, Mr Bateson’s response was “*They were signed.*” Mr Lovitt followed up if he meant the same documents were signed, and Mr Bateson responded, ‘Yes’.⁴⁷⁴
423. The thrust of Counsel Assisting’s submissions is that it was very apparent to Mr Bateson, and to the Chief Magistrate, that it was of great importance to determine whether any suggestion of inducement had been offered, and whether Mr McGrath had made material changes to his statement. If the Chief

⁴⁶⁹ Responsive submissions of Victoria Police, Stuart Bateson, [17.67 and 17.69].

⁴⁷⁰ Submissions of Counsel Assisting, Volume 2, [752]-[755].

⁴⁷¹ Submissions of Counsel Assisting, Volume 2, [758].

⁴⁷² Exhibit RC1875 Transcript of Commander Stuart Bateson Examination, *R v Carl Williams, Thomas and Andrews*, 9 March 2003, 830-831, OPP.0041.0001.0002 @.0830-.0831.

⁴⁷³ Exhibit RC1875 Transcript of Commander Stuart Bateson Examination, *R v Carl Williams, Thomas and Andrews*, 9 March 2003, 838-839, OPP.0041.0001.0002 @.0838-.0839.

⁴⁷⁴ Submissions of Counsel Assisting, Volume 2, [755].

Magistrate had been aware of what had occurred on 10 and 11 July 2004, he would have been aware that there was in fact a draft statement in existence on 10 July 2004, which contained material differences to the signed statement concerning matters central to the committal in two important respects; first the question of whether Mr McGrath knew a murder was going to occur, and secondly, whether he was improving the statement to assist police to improve his position. As Counsel Assisting have submitted, it can reasonably be inferred that the Chief Magistrate would have intervened had he been aware of those matters which were inconsistent with the evidence given by Mr Bateson.

424. Further, and in any event, the Chief Magistrate cannot have had the benefit of the draft statement which was uncovered in the course of the Commission hearings, and which would have revealed the materiality of the changes that had been made. He clearly should have had that draft statement to determine the PII question. Further, any evidence which suggested that Mr McGrath had tailored his evidence to suit the police case should have been disclosed. If it is accepted that Ms Gobbo did edit the statement as she has claimed that she did, prior to obtaining instructions from her client, for the reasons that she did, the edited statement should not have been disposed of as a “redundant version”, but retained as evidence and disclosed, at least to the Chief Magistrate. It evidently was not.
425. It is open to find that Mr Bateson did not disclose daybook entries initially to accused persons in a redacted form or otherwise, and that he did not disclose them to the Chief Magistrate. As noted above, the DPP and OPP has also submitted that this is clear on the evidence.⁴⁷⁵
426. Further, as indicated above at [388.2], it is submitted on behalf of Mr Bateson that he gave the evidence he did to Mr Lovitt at the committal (and presumably to Mr Faris at the directions hearing) on the assumption that the draft statements had been disposed of, as was usual practice with respect to “redundant versions”.⁴⁷⁶
427. This submission should be considered in light of the evidence which Counsel Assisting submits reveals that Ms Gobbo had marked up the statement during her review of it on 10 July 2004, as discussed above at [364] to [379].
428. Mr Bateson gave the following evidence to the Commission:

MR WINNEKE: Is it the situation at that stage you had destroyed the draft that had been shown to Ms Gobbo and perhaps changed by Ms Gobbo?

MR BATESON: Yes, that's my understanding.

MR WINNEKE: It had been destroyed?

MR BATESON: That's my understanding.

MR WINNEKE: Why would it have been destroyed?

MR BATESON: I think the most important thing is you don't want anything that's not the final exhibit floating about, one for security reasons, and,

⁴⁷⁵ Reply Submissions of the Director of Public Prosecutions and the Office of Public Prosecutions, [10].

⁴⁷⁶ Responsive submissions of Victoria Police, Mr Bateson, [16.8]-[16.9].

two, because I never believed it was evidence until he was willing to sign it.⁴⁷⁷

429. This in itself reveals concerning disclosure practices. This was not a practice where an electronic copy was being progressively overwritten. This was a practice where hard copy draft statements being shown to an accused for signing, the content of which was going to change, were being destroyed.
430. In order to demonstrate the importance of retaining this annotated statement, one can imagine a hypothetical scenario where Mr Bateson provided fulsome answers about the draft statement at the committal. When Mr Lovitt asked what happened to the unsigned statements that existed prior to the signing on 13 July 2004, rather than the response that Mr Bateson's actually gave, "They were signed", the examination might have proceeded something like this:

MR LOVITT: What happened to the unsigned statements that existed prior to the signing on 13 July?

MR BATESON: We took them to Mr McGrath to sign on 9 July.

MR LOVITT: Yes. What happened to those statements after that?

MR BATESON: He wanted a few minor changes to the Michael Marshall one, and he wouldn't sign them until he got the okay from his lawyer. So we took it to his lawyer to show her on 10 July 2004.

MR LOVITT: So as of 9 July, he had requested a few minor changes to the Michael Marshall statement but otherwise was prepared to sign it pending the okay of his lawyer?

MR BATESON: Yes.

MR LOVITT: And so his lawyer then gave it the okay on 10 July?

MR BATESON: Not exactly.

MR LOVITT: What do you mean by that?

MR BATESON: Well, his lawyer expressed scepticism over a number of aspects of the statement.

MR LOVITT: What aspects?

MR BATESON: Well, that he didn't know it was going to be a murder and thought it was going to be a debt collection.

MR LOVITT: What else?

MR BATESON: His claim about not getting paid for the killing.

MR LOVITT: Anything else?

MR BATESON: No, that's it I think.

⁴⁷⁷ Transcript of Commander Stuart Bateson, 20 November 2019, 9600, TRN.2019.11.20.01.C.

- MR LOVITT: *And how do you know she expressed scepticism, did Mr McGrath tell you about that later.*
- MR BATESON: *No, not exactly.*
- MR LOVITT: *How then?*
- MR BATESON: *His lawyer told us. She told Detective Hatt when he showed her the statement. Then she told me when she rang me later asking for me to arrange an expedited visit into the prison to see him the next day. She also edited the statement.*
- MR LOVITT: *She what?*
- MR BATESON: *She edited the statement.*
- MR LOVITT: *Let me get this clear, this was all before she saw her client and got his instructions?*
- MR BATESON: *Yes*
- MR LOVITT: *So the lawyer then went to see Mr McGrath on 11 July.*
- MR BATESON: *Yes, she rang me after she had visited him and told me that he would be more forthcoming or more truthful or something like that.*
- MR LOVITT: *And then you went to see him and he changed his statement?*
- MR BATESON: *Yes.*
- MR LOVITT: *And in what way did the statement change?*
- MR BATESON: *He made it clear that the "job had gone according to plan" and the job was not to collect a debt on behalf of Carl Williams but to carry out an execution for Carl Williams.*
- MR LOVITT: *And that was pretty important for your case against Carl Williams?*
- MR BATESON: *It sure was.*
- MR LOVITT: *And Mr McGrath knew it was important?*
- MR BATESON: *I'm not sure what he knew.*
- MR LOVITT: *Well he got an indemnity for three other murders after that?*
- MR BATESON: *Yes he did.*
- MR LOVITT: *And he got a pretty sweet sentence for this one?*
- MR BATESON: *Yes.*
- MR LOVITT: *Presumably you'd told him previously that he had to be truthful?*
- MR BATESON: *Yes.*

MR LOVITT: *But nevertheless, he had continued to maintain that it was a debt collection and not a murder, even on 9 July 2004?*

MR BATESON: *Yes.*

MR LOVITT: *It was only after his lawyer was sceptical about it that the statement changed?*

MR BATESON: *Yes.*

MR LOVITT: *The same lawyer that told you she thought her client wasn't telling the truth?*

MR BATESON: *Yes.*

MR LOVITT: *The same lawyer that edited the statement before she got instructions?*

MR BATESON: *Yes.*

MR LOVITT: *The same lawyer that started representing my client after he got charged based on another of Mr McGrath statements?*

MR BATESON: *Yes.*

MR LOVITT: *And as far as you know the signed statement reflects the suggested changes made by the lawyer on the unsigned statement?*

MR BATESON: *I believe so.*

MR LOVITT: *It sounds a lot like the lawyer told Mr McGrath he'd get a better deal if he changed his statement to help the police case against Carl Williams?*

MR BATESON: *I can't say what she told him.*

MR LOVITT: *So where is this unsigned statement, I don't seem to have received it in the disclosure materials?*

MR BATESON: *We destroyed it.*

MR LOVITT: *You what?!*

MR BATESON: *We destroyed it. That's what we usually do.*

MR LOVITT: *What do you mean?*

MR BATESON: *Well it's not evidence until he signs it.*

431. No one can know exactly how this matter would have unfolded had the defence been informed that the draft statement had been destroyed, however by considering what might have logically been made of it in cross-examination, the relevance is apparent.
432. Counsel for Mr Bateson refers to the submission of Counsel Assisting as to the non-disclosure of the material by Mr Bateson, as being the time that the "rot set in" and which allowed the "calamitous events" that followed, as emotive. In making this submission, Counsel Assisting were not suggesting that Mr Bateson could have predicted those events, but rather were pointing out that

the non-disclosure may well have had considerable consequences beyond those that Mr Bateson intended. The non-disclosure of Ms Gobbo's role in this matter was followed by similar non-disclosure of the true nature of her role in respect of Mr Thomas and Mr Cooper. Inevitably if the true extent of her role in relation to Mr McGrath was known, it would not have been possible for her to act for Mr Thomas. It is arguable that she also would not have maintained the confidence of those associated with Mr Mokbel. This is a case which serves to highlight the fundamental importance of full disclosure, and the potential consequences of the failure to do so.

433. In relation to these propositions, the Commissioner must examine the evidence carefully, bearing in mind the *Briginshaw* principle. In doing so, it is important to bear in mind the circumstances surrounding the PII application which was made by Mr Bateson in the presence of Mr Sanelli (who the Commission did not hear from, and nor did it hear from the Chief Magistrate who heard the application). The evidence that the Commissioner has is the depositions, including the cross-examination of Messrs McGrath, Bateson and Hatt.

The first misconception – Ms Gobbo's representation of Mr McGrath

434. It is submitted by Mr Bateson and Ms Gobbo, in similar terms, that Counsel Assisting, in making submissions as to Mr Bateson's conduct relating to Ms Gobbo's conflict of interest, have relied upon the assertion that Mr Thomas and others did not know that Ms Gobbo had acted for Mr McGrath when he decided to assist the Purana Taskforce.⁴⁷⁸
435. On this basis, extensive submissions are made demonstrating the many people who were aware that Ms Gobbo had acted for Mr McGrath and accordingly knew of her professional conflict. These were accompanied by accusations that such matters were "glossed over" by Counsel Assisting.
436. Such matters were not glossed over. It was clearly publicly known to many people that Ms Gobbo had previously represented Mr McGrath. Counsel Assisting referred to material revealing the knowledge of others as to Ms Gobbo's representation of Mr McGrath,⁴⁷⁹ for example her appearance for Mr McGrath on 13 November 2003,⁴⁸⁰ her discussions with Mr Horgan, the knowledge OPP solicitor, Ms Anscombe, her 18 February 2005 memorandum to Mr Lovitt prior to the committal of Mr Thomas,⁴⁸¹ and the discussion of her professional conflict and consequent inability to act for Mr Thomas before Justice King on 21 April 2006.⁴⁸² Indeed, as set out in Counsel Assisting submissions, Ms Gobbo in her memorandum to Mr Lovitt said that she had viewed it as inappropriate to appear at the committal due to her involvement in acting for Mr McGrath "*up until the time that he became a Crown witness*".⁴⁸³
437. That professional conflict is not the focus of the submissions of Counsel Assisting. When dealing with the issue of conflict in their submissions, both

⁴⁷⁸ Responsive submissions of Victoria Police, Mr Bateson, [13.4]-[13.8], [13.14(c)], [13.14(3)], [14.30]-[14.40], [14.63]-[14.67], [18.1]-[18.3]; Submissions of Ms Gobbo, [520]-[527].

⁴⁷⁹ Submissions of Counsel Assisting, Volume 2, [509], [548], [550], [573] to [576], [578], [581], [591], [738] [925] and footnote 1158.

⁴⁸⁰ Submissions of Counsel Assisting, Volume 2, [509].

⁴⁸¹ Submissions of Counsel Assisting, Volume 2, [738].

⁴⁸² Submissions of Counsel Assisting, Volume 2, [925].

⁴⁸³ Submissions of Counsel Assisting, Volume 2, [738].

Counsel for Mr Bateson and Counsel for Ms Gobbo have studiously avoided the real conflict that Counsel Assisting repeatedly referred to, and that of which Ms Gobbo was acutely aware; her role in the material change in the statement of Mr McGrath concerning the murder of Mr Marshall.

438. Ms Gobbo was examined in relation to this memorandum, and the knowledge of Mr Thomas of her extended role:

MR WINNEKE: Yes. There's no suggestion in the memo that you'd been involved in plea negotiations and the statement process?

MS GOBBO: Not specifically, no.

MR WINNEKE: Had you told Mr Lovitt that?

MS GOBBO: No, I had told Mr Valos though.

MR WINNEKE: Right. And you hadn't obviously told Mr Thomas?

MS GOBBO: No, because he would tell Mr Williams and I'd be killed.⁴⁸⁴

439. Ms Gobbo was not challenged about these matters by Mr Bateson's counsel or counsel for Victoria Police, which is not surprising, as it appears reasonably clear that Mr Bateson considered such information should not be disclosed to Mr Thomas (for which Ms Gobbo expressed her gratitude on 23 March 2005).
440. If for whatever reason Mr Bateson now claims Mr Thomas was aware of that information, he could have challenged Ms Gobbo about it, or asked Mr Thomas whether he knew that Ms Gobbo had edited Mr McGrath's statements, or was otherwise aware of her involvement on 10 and 11 July 2004, or whether he was aware of the draft statement of 9 July 2004.
441. An understanding of this conflict was relevant to the proper and thorough examination of how the evidence was obtained from this most significant prosecution witness.
442. Counsel Assisting submit (and Mr Bateson denies) that Mr Bateson did not make appropriate disclosure of this fact to Mr Thomas and the court, and that Mr Thomas was not aware of it. Ms Gobbo does not dispute this.

The second misconception – the change in account by Mr McGrath

443. Counsel for Mr Bateson and Ms Gobbo have claimed that Counsel Assisting have wrongly claimed that Mr Bateson and Ms Gobbo kept from Messrs Williams, Andrews and McGrath that Mr McGrath had previously said to police that he did not believe that Mr Marshall was to be murdered.⁴⁸⁵
444. In similar arguments, it is submitted by Mr Bateson and Ms Gobbo that Counsel Assisting have (it seems to be suggested deliberately) ignored evidence which makes it clear that counsel for Messrs Williams, Andrews and Thomas were able to cross-examine Mr McGrath about a prior inconsistent statement that he

⁴⁸⁴ Transcript of Ms Nicola Gobbo, 6 February 2020, 13411, TRN.2020.02.06.01.

⁴⁸⁵ Responsive submissions of Victoria Police, Mr Bateson, [13.14(d)], [14.45]-[14.62].

had made to the police on 13 November 2003, in which he had maintained that he did not believe that Mr Marshall was to be murdered, but rather, he considered his errand was a debt collection.

445. Such evidence was not ignored, because it is patently not the point that Counsel Assisting have sought to make.
446. Nowhere does the submission of Counsel Assisting contain an assertion that Mr Bateson failed to disclose his and Mr Buick's conversations with Mr McGrath on 13 November 2003. Such a submission could clearly not be made, and it has not been made.
447. It has not been, and is not, said by Counsel Assisting that there was no opportunity for Messrs Williams, Andrews and Thomas to challenge Mr McGrath's credit on the basis that he had previously told police that he did not think Mr Marshall would be murdered.
448. Again, both Counsel for Mr Bateson and Ms Gobbo have studiously avoided dealing with the real issue of Ms Gobbo's role in the material change in the statement of Mr McGrath concerning the murder of Mr Marshall. In doing so, the effect of their submissions is that it was enough that Mr Williams who was charged with three murders on the basis of Mr McGrath's statements, and Mr Thomas who was charged with two murders, knew that McGrath had given a prior inconsistent statement to police the previous year. They did not need to know about his draft statement of 9 July 2004 or the way in which it came to be changed. Ms Gobbo's submission ignores the potential effect that Mr Williams' proceedings had upon the resolution of Mr Thomas' proceeding, and regards the matter as a "small issue" relating to the credit of Mr McGrath.⁴⁸⁶ This contrasts with her assessment to the SDU in April 2006 of such matters being critical for cross-examination.
449. The misconstruction of the submissions of Counsel Assisting in this way gives rise to various other submissions by Counsel for Mr Bateson. In particular it is asserted that Counsel Assisting severely criticise Mr Bateson for failing to take steps to prevent Ms Gobbo from acting for Mr Thomas in circumstances where she had previously acted for Mr McGrath (the mere professional conflict).⁴⁸⁷
450. Counsel Assisting do not seek that finding. Such submissions effectively serve to divert the Commissioner from the true nature of the finding sought by Counsel Assisting; that Mr Bateson should have, but did not, take steps to prevent Ms Gobbo from acting for Mr Thomas in circumstances where he knew of her involvement in bringing about a material change to the statement of Mr McGrath and knew it was being concealed from Mr Thomas and the court.

⁴⁸⁶ Responsive submissions of Ms Gobbo [463].

⁴⁸⁷ Responsive submissions of Victoria Police, Mr Bateson, [14.68].

REPLY SUBMISSION: MR O'BRIEN, MR BATESON & MR RYAN – THE PROVISION OF THE THOMAS TRANSCRIPTS TO MS GOBBO

Improper conduct by Mr O'Brien, Mr Bateson and Mr Ryan in relation to the Thomas transcripts

451. Counsel Assisting have submitted that it is open to find improper conduct by Mr O'Brien, Mr Bateson and Mr Ryan in relation to their decision to use Ms Gobbo in her role as a human source to advance Victoria Police's investigative position.
452. In short, it is submitted that after Mr O'Brien and Mr Bateson had a number of discussions with Mr Thomas about his pleading guilty and providing evidentiary assistance to Victoria Police, the investigators were dissatisfied at the truthfulness of Mr Thomas in relation to a number of matters and a stalemate had been reached.
453. On 19 April 2006, a meeting was held involving Mr O'Brien, Mr Bateson and Mr Ryan. It was determined that the Purana Taskforce would not approach Mr Thomas directly any further and instead to supply edited transcripts of their previous conversations to "3838" (as recorded in Mr Bateson's diary entry) and have her speak with Mr Thomas instead. The transcripts were subsequently provided to the SDU. On the night of 20 April 2006, SDU members met with Ms Gobbo when she was shown the transcripts. She read and discussed the contents of the transcripts with them.⁴⁸⁸
454. The responses on behalf of Mr Ryan, Mr O'Brien and Mr Bateson, in disputing the use of Ms Gobbo in such a way, include assertions that:⁴⁸⁹
- 454.1. Ms Gobbo was contacted as Mr Bateson was not sure if his solicitor, Mr Valos, was still acting
 - 454.2. The transcript of Mr Thomas was provided to Ms Gobbo as a lawyer, not as part of her role as a human source
 - 454.3. Mr O'Brien thought it appropriate to inform Mr Thomas' lawyer that they had determined not to deal directly with Mr Thomas further and to give her material relevant to any plea in case Mr Thomas decided he wanted to take that course
 - 454.4. The transcript was provided by Mr O'Brien to Mr Sandy White in a meeting immediately after the meeting of 19 April 2006 between Mr Ryan, Mr O'Brien and Mr Bateson purely for convenience to save Mr Bateson having to arrange a meeting to provide them

⁴⁸⁸ Submissions of Counsel Assisting, Volume 2, [903]-[923], [1059.13], [1064], [1069], [1070.19], [1076].

⁴⁸⁹ Responsive submissions of Victoria Police, Bateson, 94 [22.20] – 96 [22.25]; Ryan 145 [28.33] – 149 [28.69]; O'Brien 294 [52.107] – 295 [52.116].

- 454.5. There is evidence that Ms Gobbo was given rather than shown the transcripts
- 454.6. There is no evidence about how Ms Gobbo was to, or did, use the transcripts of Mr Thomas' own conversations against him to encourage him to make admissions, plead guilty and implicate associates.
455. Related to the allegations above, Counsel Assisting have also made submissions in relation to deliberate conduct engaged in by Mr Bateson to refer to Ms Gobbo as 3838 in order to avoid future potential disclosure of communications relating to Ms Gobbo. It was submitted that when Ms Gobbo raised her involvement in the co-operation of Mr Thomas, on 17 February 2006, Mr Bateson discussed with Mr Sandy White issues associated with references to Ms Gobbo in his diary. This occurred in the context of known issues arising from diary entries of Mr Bateson associated with Ms Gobbo's representation of Mr McGrath. Following this time Mr Sandy White spoke with Mr O'Brien about monitoring Mr Bateson's notes "*re sanitising HS involvement in Thomas s'ment*", and Mr Bateson referred to Ms Gobbo as "3838" in his diary on a number of occasions:⁴⁹⁰
- 455.1. On 18 March 2006 when he spoke to Ms Gobbo about her unhappiness at matters raised about her in the statement of Mr Andrews
- 455.2. On 21 March 2006, when he had communications with Ms Gobbo about issues with the personal partner of Mr Thomas dissuading Mr Thomas from pleading guilty and assisting police
- 455.3. On 19 April 2006, when he, Mr O'Brien and Mr Ryan met and determined to provide Ms Gobbo with Mr Thomas' transcripts in order to advance their dealings with him
- 455.4. On 21 April 2006, after Ms Gobbo had been shown Mr Thomas' transcripts and she spoke with him about the possibility of Mr Thomas pleading guilty and giving evidence (when the immediately preceding entry relating to Ms Gobbo having been called to explain herself before Justice King referred to her by name).
456. The response on behalf of Mr Bateson contends that no finding should be made that such use of Ms Gobbo's informer number was deliberate. The submission essentially asserts that Mr Bateson's evidence that such actions were not deliberate should be accepted, and argues that if he had been attempting to avoid disclosure it would have been more sensible not to make any note at all.⁴⁹¹
457. For reasons including those advanced below, it is submitted that Mr Bateson's conduct was deliberate and engaged in as a means to attempt to avoid appropriate disclosure.

⁴⁹⁰ Submissions of Counsel Assisting, Volume 2, [817]-[819], [834], [870]-[871], [875]-[878], [904], [926], [932].

⁴⁹¹ Response submissions of Victoria Police, Bateson, 97 [22.26]-[22.53].

Uncertainty over Mr Thomas' legal representation

458. If the intention was simply to provide Mr Thomas' legal representative with material relevant to his plea, this material should have been provided to his instructing solicitor, rather than to someone who:
- 458.1. was known to be a human source for Victoria Police
 - 458.2. had a recognised conflict in acting for Mr Thomas given her previous representation of Mr McGrath (as expressly recognised by the Court two days later on 21 April 2006)
 - 458.3. had a conflict unknown to the Court and Mr Thomas for her role in relation to Mr McGrath's statement amendments
 - 458.4. was motivated, along with the police, to prevent disclosure of material held by police which would reveal that latter conflict.
459. Mr Thomas had two other lawyers known to be representing him, other than Ms Gobbo: Mr Jim Valos, his solicitor, and Mr Colin Lovitt QC, his barrister.
460. Evidence establishes that these lawyers were representing Mr Thomas during this period:
- 460.1. On 14 March 2006, Mr Lovitt appeared for Thomas when Mr Bateson was present in court.⁴⁹²
 - 460.2. On 15 March 2006, Mr Thomas spoke with Mr O'Brien and Mr Bateson about whether to continue to retain Mr Valos and Ms Gobbo and in so doing said he had "heaps of confidence" in Mr Valos.⁴⁹³
 - 460.3. On 23 March 2006, Mr Thomas referred again to Mr Valos in the context of his continuing to represent him, albeit that he indicated having spoken to Ms Gobbo and Mr Valos about continuing representation and said that Mr Valos would "relieve himself".⁴⁹⁴
 - 460.4. On 4 April 2006, Mr Lovitt appeared for Mr Thomas in a pre-trial hearing involving the cross-examination of Mr Andrews in the Supreme Court before Justice King. Mr Bateson was involved in facilitating the video link from Mr Andrews' end.⁴⁹⁵ It is to be expected that Mr Lovitt was instructed by Mr Valos to appear on that occasion. Any change of solicitor would have been apparent.
461. There was nothing to suggest either had in fact ceased acting. If there was any concern at all about the status of Mr Valos, a simple phone call would have provided the answer. Mr Valos was aware that Mr Thomas was considering providing assistance to police. As it turned out, he continued to act for Mr Thomas once he entered his plea.
462. Alternatively, Mr Thomas could have been asked who his legal representative was for the purpose of serving relevant material, if it was considered unsafe to provide the transcripts to him in custody.

⁴⁹² Submissions of Counsel Assisting, Volume 2, [854].

⁴⁹³ Submissions of Counsel Assisting, Volume 2, [862].

⁴⁹⁴ Submissions of Counsel Assisting, Volume 2, [855].

⁴⁹⁵ Submissions of Counsel Assisting, Volume 2, [899].

463. The fact that these simple steps were not engaged in is not consistent with the assertion of uncertainty over Mr Thomas' representation, and it is entirely consistent with the intended use of Ms Gobbo in her human source capacity in an attempt to advance the interests of Purana investigators.
464. It is noted that the engagement of Ms Gobbo in this process occurred in circumstances where Mr O'Brien had previously expressed concerns about Ms Gobbo's continued involvement in Mr Thomas' representation. On 23 March 2006, shortly after having spoken with Mr Thomas, Mr O'Brien suggested to Ms Gobbo's handler that she recommend to Mr Thomas that he use another barrister.⁴⁹⁶ The submission on behalf of Mr O'Brien asserts he was not informed following this that Ms Gobbo had claimed she could not think of anyone. One might think in light of his concerns, prior to involving Ms Gobbo in matters concerning future decision-making by Mr Thomas, that service of relevant documents would have been effected upon Mr Thomas' solicitor, or at least he would have checked whether a new barrister had been engaged by Mr Thomas.
465. In suggesting alternative representation on 23 March 2006, Mr O'Brien was clearly appreciative that things might prove complicated if it became known that Ms Gobbo continued to be associated with Mr Thomas when he decided to co-operate with police. That he was prepared to deal with Ms Gobbo in relation to Mr Thomas' transcripts thereafter is indicative of an intention that Ms Gobbo's role in that undertaking was to be a covert one, and not as his lawyer.

The transcript was provided through the SDU simply as a matter of convenience

466. It is asserted in submissions on behalf of Mr Ryan, Mr Bateson and Mr O'Brien that this is a "false issue" and that the provision of the transcript to Ms Gobbo through the SDU occurred simply as a matter of convenience, as it was handed over by Mr O'Brien to Mr Sandy White immediately following the meeting where it was determined Ms Gobbo was to be provided with the material. This was said to have saved Mr Bateson the trouble of arranging a meeting with Ms Gobbo to hand over the material.⁴⁹⁷
467. The evidence when analysed demonstrates that the material was not handed over by Mr O'Brien to Mr Sandy White in the meeting following, rather it was handed over by Mr Bateson to Mr Peter Smith the following afternoon, some hours before the SDU met with Ms Gobbo. This would make sense considering it had been discussed that the transcripts to be supplied would need to have edits made to it.
468. In relation to the unfolding of events:
- 468.1. On 19 April 2006, at 9am, the meeting took place between Mr Ryan, Mr O'Brien and Mr Bateson. Mr Bateson recorded in his diary:

*Meeting with ADDI O'Brien, DDI Ryan re Thomas.
Resolved – Nil further approach from us at this stage.*

⁴⁹⁶ It was asserted in the submissions on behalf of Mr O'Brien that this matter was not referred to in Submissions of Counsel Assisting. This is not so. It is specifically referred to at [891].

⁴⁹⁷ Responsive submissions of Victoria Police, Ryan, Bateson, O'Brien, [22.24(b)], [28.68]-[28.70], [52.133]; see also the evidence of Mr Bateson at 9738.38 to 9739.9.

Supply transcripts to 3838 with edits and have her approach Thomas (emphasis added)

468.2. At 10:12am, Mr O'Brien recorded meeting with Mr Sandy White, Mr Peter Smith and Mr Green. Mr O'Brien's diary does not record any mention of Mr Thomas or the transcript request. It is noted here that whilst the submissions on behalf of Mr O'Brien refer on a number of occasions to Mr O'Brien taking "prolific" diary notes,⁴⁹⁸ the evidence reveals that Mr O'Brien's diary notes as they related to Ms Gobbo were generally limited to reports of intelligence provided by her. On the occasions when there is independent evidence of discussion as to her use and handling, his note taking is either brief and general or non-existent.⁴⁹⁹

468.3. Mr Sandy White's notes of this meeting included:

Request for HS to S/T Thomas

468.4. At 6:15pm, Mr Peter Smith spoke with Ms Gobbo. During this conversation Mr Peter Smith raised the possibility of showing Ms Gobbo transcripts relating to Mr Thomas:

Floated idea of seeing Thomas transcripts would help re talking to Thomas

468.5. At 6:30pm, Mr O'Brien recorded in his diary:

MTC to D/Sgt Bateson re Thomas I/V transcript for Peter Smith DSU

468.6. On 20 April 2006, at 8:30pm, Mr Peter Smith recorded in his diary receiving information from Ms Gobbo that she was "to see Mr Thomas and Carl W on Sat".

468.7. Mr Bateson's diary recorded him as at the Purana office engaging in "further corro / enqs" during the afternoon.

468.8. At 2:25pm, Mr Peter Smith visited the Taskforce Purana offices at the St Kilda Road Police Station where he recorded in his diary:

1425 @ St R [St Kilda Road] – Op Purana

Moran

Supplied gun & knew why

Plan / preparation w/ Carl / [Mr Andrews]

Present a week before also – as a spotter

██████████

Wanted █████ deal b/c stood over

Plan / prep w/ Carl / TM / [Mr Andrews] / Veniamin

██████████ to loc

⁴⁹⁸ Responsive submissions of Victoria Police, O'Brien, [48.27], [51.20].

⁴⁹⁹ See topic dealing with the lack of diary notes as it relates to Mr O'Brien.

Also @ M re Marshall – TM offers contract to [Mr Andrews] & Carl W (Red Rooster)

Must know TM desire for Marshall murder

If no go – no deal

TM - Drug involvement

Carl W – Legal Aid?

[Mr Andrews] s'ment re \$ - ? (465 refuse s'ment)

- 468.9. As referred to below, these issues correspond with matters raised with Ms Gobbo when she was shown the transcript later that night. In that discussion with Ms Gobbo, Mr Peter Smith referred to points which he had been provided by Mr Bateson.⁵⁰⁰
- 468.10. Further, it is apparent that Mr Bateson must have been informed that Ms Gobbo was to see Mr Williams as well as Mr Thomas the following Saturday (22 April 2006), and wanted to know whether Mr Williams was to be represented by or receiving legal aid funding.
- 468.11. At 5:57pm, Mr O'Brien recorded in his diary receiving an update from Mr Bateson in relation to the transcript of Mr Thomas.⁵⁰¹
- 468.12. Ms Gobbo met with Mr Sandy White, Mr Peter Smith and Mr Green at approximately 7:00pm. At one point during the meeting as Ms Gobbo exclaims upon reading something and asks, "*Have you read this?*". Mr Peter Smith replied, "*I have not read it, trust me. I got it this afternoon.*"⁵⁰²
469. This evidence, together with a reading of the transcript (and listening to the audio) of the meeting between Ms Gobbo and the SDU later that night, makes clear that the transcript was provided to Mr Peter Smith by Mr Bateson, with a briefing as to issues to cover with Ms Gobbo, on the afternoon of 20 April 2006.
470. In light of the above, on the evidence, it is open to the Commissioner to reject the submission that "*had Mr O'Brien not been heading off to meet with the SDU, then Com. Bateson would have arranged to attend Ms Gobbo's chambers with the transcripts*".⁵⁰³

Ms Gobbo was not given the transcript to keep

471. The transcript of the meeting between Ms Gobbo and the SDU is indicated to have commenced at 6:56pm and ceased at 1:06am. Correspondingly, the audio file lasts for 6 hours 10 minutes.

⁵⁰⁰ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 158, VPL.0005.0097.0011 @.0168.

⁵⁰¹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 1, VPL.0005.0097.0011 @.0011.

⁵⁰² Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 149, VPL.0005.0097.0011 @.0159; Exhibit RC0282, Exhibit RC0282, Audio of meeting.

⁵⁰³ Responsive submissions of Victoria Police, Bateson, [28.70].

472. Relevantly:

- 472.1. At transcript p.103, timestamp 1:48:35, the conversation turned to matters related to Mr Thomas and Mr Bateson. At this time Mr Peter Smith referred to Mr Thomas, and said, "***I'm only going to have this for one night***".⁵⁰⁴ When taken in context in relation to what followed it is submitted he was referring to the Thomas transcripts.
- 472.2. At transcript p.111, timestamp 1:52:08, it is apparent that Mr Peter Smith was handing the transcript to Ms Gobbo to read, at which time he said, "***browse away, read away, there's a lot there and obviously you can't keep it. You don't want to keep it.***" To this Ms Gobbo replied, "***I don't want to keep it***".⁵⁰⁵
- 472.3. At transcript p.117, timestamp 1:59:36, Ms Gobbo enquired what the significance were of sticky notes on particular pages of the transcript. Mr Peter Smith told her that was how Mr Bateson had given it to him.⁵⁰⁶
- 472.4. At transcript p.117, timestamp 2:03:02, after a period of silence in which Ms Gobbo was clearly reading the transcript she said, "***You don't have to be quiet. You can chat amongst yourselves.***"⁵⁰⁷
- 472.5. At transcript p.117, timestamp 2:03:38, Ms Gobbo said she should have bought some sticky notes and referred to "it" being given back to "him".⁵⁰⁸ Ms Gobbo was clearly referring to her understanding that the transcript would be given back to Mr Bateson, and that she should have been sending it back to him with her thoughts on particular matters.
- 472.6. At transcript p.119, timestamp 2:04:56, there was further talk about sticky notes. Ms Gobbo said, "***I was gunna put sticky notes back on it so when Stuart gets it, he'll say 'What are those sticky notes for?'***"⁵⁰⁹
- 472.7. At transcript p.128, timestamp 2:22:24, Mr Peter Smith enquired if Ms Gobbo had a "fair bit to go" in relation to the transcript, and she responded that she had about 30 pages left. Mr Green told her she

⁵⁰⁴ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 103, VPL.0005.007.0011 @.0113; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 1:48:35, VPL.0200.0002.4224. Quotes in bold are not reflected in the transcript but is audible upon listening.

⁵⁰⁵ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 111, VPL.0005.007.0011 @.0121; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 1:52:08, VPL.0200.0002.4224. Quotes in bold are not reflected in the transcript but are audible upon listening.

⁵⁰⁶ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 117, VPL.0005.007.0011 @.0127; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 1:59:36, VPL.0200.0002.4224.

⁵⁰⁷ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 117, VPL.0005.007.0011 @.0127; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:03:02, VPL.0200.0002.4224.

⁵⁰⁸ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 117-118, VPL.0005.007.0011 @.0127-.0128; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:03:38, VPL.0200.0002.4224.

⁵⁰⁹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 119, VPL.0005.007.0011 @.0129; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:04:56, VPL.0200.0002.4224.

could read it next time if she wanted, she did not have to read it all now. Ms Gobbo said she wanted to read it all now.⁵¹⁰

- 472.8. At transcript p.147, timestamp 2:55:35, Mr Sandy White asked if Ms Gobbo had finished reading the transcript or if she was still going.⁵¹¹
- 472.9. At transcript p.149, timestamp 2:57:06, Ms Gobbo reached the portion of the Thomas transcript in which Mr Thomas was asking whether he could trust Ms Gobbo. There is then a reference to Mr Valos in unflattering terms. There was mirth expressed by those present and Ms Gobbo referred to need for the transcript to be edited before it was ever given to Mr Valos. The response from Mr Green was "*I don't think that **transcript will be going very far***".⁵¹²
- 472.10. At transcript p.170, timestamp 3:24:00, the conversation switches away from an analysis of the Thomas transcript, but they continue to speak about matters related to the request by Purana to speak to Ms Gobbo.⁵¹³
- 472.11. At transcript 185, timestamp 3:36:00, the conversation switches away from matters which had been raised by Mr Bateson with Mr Peter Smith and back to matters relating to Mr Cooper.⁵¹⁴
473. Ms Gobbo appears to have spent over an hour and a half reading and discussing the transcript with the SDU members, and over an hour and three quarters over all discussing matters raised by Mr Bateson with Mr Peter Smith.
474. The time spent pouring over the transcript and the passages above are entirely inconsistent with any notion that Ms Gobbo was being provided the transcript in her capacity as lawyer to take away with her.
475. On behalf of Mr Bateson it is submitted that there is evidence suggesting that Ms Gobbo was given the transcripts (as opposed to only being shown them), which would be consistent with Com Bateson's evidence that they were being provided to Ms Gobbo as Mr Thomas' Lawyer. Contrary to that submission, Mr Bateson said in evidence that she would have been allowed to read them but he would not have liked her to be given the transcripts.⁵¹⁵
476. Finally, the entry in the ICRs under the heading "Thomas Transcripts" reads:
"Shown to HS (at investigator request). HS aware that Thomas has not told the

⁵¹⁰ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 128, VPL.0005.007.0011 @.0138; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:22:24, VPL.0200.0002.4224.

⁵¹¹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 147, VPL.0005.007.0011 @.0157; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:55:35, VPL.0200.0002.4224.

⁵¹² Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 149, VPL.0005.007.0011 @.0159; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 2:57:06, VPL.0200.0002.4224. Quotes in bold are not reflected in the transcript but are audible upon listening.

⁵¹³ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 170, VPL.0005.007.0011 @.0180; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 3:24:00, VPL.0200.0002.4224.

⁵¹⁴ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 185, VPL.0005.007.0011 @.0195; Exhibit RC0282, Audio of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 3:36:00, VPL.0200.0002.4224.

⁵¹⁵ Transcript of Mr Stuart Bateson, 21 November 2019, 9739.

entire truth. HS told that police will have nothing to do with Thomas unless he tells the entire truth."

477. Despite the above, submissions for Victoria Police somewhat inexplicably focus on a complaint that Counsel Assisting have led the Commission down the wrong path and have raised a false issue.

The intention behind involving Ms Gobbo

478. Mr Sandy White had recorded in the SML on 19 April 2006, "*Request for HS to speak to Thomas re truthfulness of statements being made by same*". There can be no reason for this other than to seek to have Ms Gobbo in some way influence Mr Thomas in respect of the information he was providing them.

479. The backdrop to this request was that:

479.1. Mr O'Brien and Mr Bateson had discussions with Mr Thomas on 22 February, 15 and 23 March 2006.

479.2. A stalemate had been reached as between Mr Thomas and investigators.⁵¹⁶

479.3. Investigators were concerned that the account of certain events given to them by Mr Thomas was not in line with the version of events given to them by Mr McGrath and Mr Andrews.⁵¹⁷

479.4. Ms Gobbo had previously been of assistance to the Purana Taskforce in her representation of McGrath. It is noted that these matters were outlined by her to the SDU during the meeting with the SDU on 20 April 2006. When reading the transcript Ms Gobbo reached the point at which Mr Thomas was asking Mr O'Brien and Mr Bateson about continued representation by Ms Gobbo. During discussion about this Ms Gobbo said that Mr Bateson was unable to tell Mr Thomas that Ms Gobbo had "got Mr McGrath over the line because he can't say anything about that". She explained that Mr McGrath's statements had contained her amendments, which from a barrister's point of view would be a critical matter for cross-examination, and that to date none of that had come out.⁵¹⁸

479.5. It is also clear that the Purana Taskforce wanted assistance from Mr Thomas in relation to Mr Tony Mokbel.⁵¹⁹

480. These matters are borne out by Mr Bateson's briefing of Mr Peter Smith in relation to matters of particular interest to Purana investigators, and that those matters went on to be raised with Ms Gobbo during the meeting:

⁵¹⁶ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 107, VPL.0005.007.0011 @.0117.

⁵¹⁷ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 107-110, VPL.0005.007.0011 @.0117-.0120.

⁵¹⁸ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 170-172, VPL.0005.007.0011 @.0170-.0182.

⁵¹⁹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 107, VPL.0005.007.0011 @.0117.

- 480.1. When Mr Peter Smith referred to aspects of Mr Thomas' account to police which Purana investigators considered was not in line with the version of events given by Mr McGrath and Mr Andrews.⁵²⁰
- 480.2. There was discussion of Mr Andrews' allegations that Mr Tony Mokbel had paid for the Marshall murder as Ms Gobbo read a relevant part of the transcript.⁵²¹
- 480.3. When Mr Peter Smith expressed the view that not much might come of Ms Gobbo's visit to Mr Thomas on Saturday if she considered him to have been truthful about a number of matters, Ms Gobbo responded that Mr Thomas was not necessarily being untruthful, but he was not telling the entire truth about matters. The topic of her also visiting Mr Carl Williams was then also raised.⁵²²
- 480.4. In relation to the Moran murder, Mr Peter Smith spoke about Mr Thomas supplying a gun, that he knew why he was supplying the gun, and that he was involved in the planning and preparation with Mr Carl Williams and Mr Andrews, following which he told Ms Gobbo that these were points that had been raised with him by Mr Bateson.⁵²³
- 480.5. Corresponding with the notes taken by Mr Peter Smith, specifically "*if no go – no deal*", Mr Peter Smith told Ms Gobbo that unless Mr Thomas started "*telling more the truth*" that Purana were not going to deal with him.⁵²⁴
- 480.6. Corresponding with the note as to Mr Andrews' statement, and the "465" warrant which had been executed by Mr Bateson, there was a discussion about whether Ms Gobbo would provide a statement and the difficulties which would occur should she ever get in a witness box.⁵²⁵
481. As referred to in Counsel Assisting's primary submissions, following discussion about Purana's unwillingness to deal with Mr Thomas unless he started "telling more the truth", Mr Sandy White told Ms Gobbo that she was the person who would be able to get Mr Thomas to tell the truth, although whether that would be in Thomas' interest was another matter. He said she should not read anything into the matters she was being spoken to about other than it being an opportunity for investigators to get the truth out of Mr Thomas which they did not feel they were getting, and it would be "all well and good" if she could help them do that.⁵²⁶
482. In this context there was reference by Mr Sandy White to Mr McGrath. Ms Gobbo responded that the situation was different to the situation with Mr

⁵²⁰ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 107-110, VPL.0005.007.0011 @.0117-.0120.

⁵²¹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 136-137, VPL.0005.007.0011 @.0146-0147.

⁵²² Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 154-155, VPL.0005.007.0011 @.0164-.0165.

⁵²³ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 157-158, VPL.0005.007.0011 @.0167-0168.

⁵²⁴ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 161, VPL.0005.007.0011 @.0171.

⁵²⁵ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 175-184, VPL.0005.007.0011 @.0185-.0194.

⁵²⁶ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 162-3, VPL.0005.007.0011 @.0172-.0173; Submissions of Counsel Assisting, Volume 2, [918]-[919].

McGrath, who had been “gone for all money for murder”, and that she could not “tip [Mr Thomas] over the edge” if the best deal on offer involved his pleading to a double murder which would involve his giving evidence and putting his life in danger for the rest of his life.⁵²⁷

483. After a discussion about what charges might assist in this regard, there was a discussion about the need for the truth, it being awkward for the SDU to be involved, and the consequent need for Ms Gobbo to speak with Mr Bateson about such matters. Concern was raised as to how much longer Ms Gobbo would be involved in the process.⁵²⁸ Ms Gobbo was subsequently to speak with Mr Bateson the following day.⁵²⁹
484. Consistently with the matters raised above Mr Peter Smith noted in his diary during the meeting with Ms Gobbo:

Won't let Thomas plead guilty to double murder

38 to ring S. Bateson tomorrow

485. The following morning, 21 April 2006, Mr Peter Smith recorded in his diary that he advised Mr O'Brien “re last night”.⁵³⁰ As well as the discussion of Mr Thomas, there had been substantial discussion regarding Mr Cooper and Ms Gobbo’s intention to advise him when he was arrested by the Purana Taskforce.
486. As referred to in Counsel Assisting’s primary submissions, the following day an issue arose when Ms Gobbo was summoned to court to explain why she continued to involve herself in Mr Thomas’ matter.⁵³¹ Mr Bateson recorded in his diary having conducted enquiries in relation to the conflict of interest matter relating to Ms Gobbo, whom he referred to by name, but did not refer to any discussions with the SDU about such matters (as referred to below).
487. At 5:20pm, Mr Peter Smith spoke to Mr Bateson about issues associated with Ms Gobbo’s summons to court. He noted in his diary at the end of this conversation:

*Bateson to talk to HS re Thomas matters as per transcript of yesterday*⁵³²

488. At 5:30pm, Mr Peter Smith spoke to Ms Gobbo. He noted in his diary:

*Bateson to ring @ office soon*⁵³³

489. At 6:25pm, Mr Peter Smith spoke to Ms Gobbo. He noted in his diary:

⁵²⁷ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 163-164, VPL.0005.007.0011 @.0173-.0174.

⁵²⁸ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 164-165, VPL.0005.007.0011 @.0174-.0175.

⁵²⁹ Exhibit RC0282, Transcript of meeting between Nicola Gobbo, Sandy White, Peter Smith, Green, 20 April 2006, 175, VPL.0005.007.0011 @.0185.

⁵³⁰ Exhibit RC0486 Mr Peter Smith diary, 21 April 2006, 192, RCMP.0053.0001.0008 @.0192

⁵³¹ Submissions of Counsel Assisting, Volume 2, [924]-[929].

⁵³² Exhibit RC0486 Mr Peter Smith diary, 21 April 2006, 194-195, RCMP.0053.0001.0008 @.0194-.0195.

⁵³³ Exhibit RC0486 Mr Peter Smith diary, 21 April 2006, 194-195, RCMP.0053.0001.0008 @.0194-.0195.

*Wanting Bateson direct number*⁵³⁴

490. At 6:30pm, consistently with what Ms Gobbo had been told the night before, Mr Bateson rang and spoke with Ms Gobbo. He recorded in his diary:

*S/T 3838 re Thomas possibly pleading guilty and giving evidence.*⁵³⁵

491. Mr Bateson's reference to Ms Gobbo by her human source number is entirely consistent with the use of Ms Gobbo as a human source, and the intention to have her covertly shown the transcript of conversations involving Mr Thomas for the purpose of attempting have her influence Mr Thomas in a way that would be advantageous to the Purana Taskforce.

492. On 22 April 2006, Ms Gobbo visited Mr Thomas in custody. Following this visit she reported to Mr Peter Smith that Mr Thomas was in a bit of a mental slump, he had declined the offer of psychiatric assistance and was very depressed.⁵³⁶

493. On 23 April 2006 she expanded further:

493.1. Mr Thomas wanted Ms Gobbo to speak to Mr Lovitt to obtain his assessment of the strength of the case against him and whether he was "fucked". She expressed the view that this would be Mr Lovitt's opinion and that Mr Thomas would co-operate in such a situation.⁵³⁷

493.2. She referred again to Mr Thomas being very depressed and his needing a "push to come on board totally".⁵³⁸

494. Mr Lovitt was never asked for his view about Mr Thomas' prospects at trial.⁵³⁹

Conclusion

495. Whether the covert provision of the transcript to Ms Gobbo had any actual effect in the advancing of Purana Taskforce's dealings with Mr Thomas cannot be known.

496. What is known is that each of Mr O'Brien, Mr Bateson and Mr Ryan were smart, experienced investigators, and a deliberate decision was made to have the transcripts provided to Ms Gobbo in the manner described.

497. Mr Thomas was charged in relation to a double execution murder. He was considering pleading guilty and co-operating with the police. Such a decision would have profound, lifelong and life-threatening implications. Whether members of Victoria Police considered he was guilty, or that he was going to plead guilty in any event, is neither here nor there. He made clear in his conversations with Mr O'Brien and Mr Bateson his concern to have legal advice

⁵³⁴ Exhibit RC0486 Mr Peter Smith diary, 21 April 2006, 194-195, RCMPPI.0053.0001.0008 @.0194-.0195.

⁵³⁵ Submissions of Counsel Assisting, Volume 2, [930]-[934].

⁵³⁶ Submissions of Counsel Assisting, Volume 2, [936].

⁵³⁷ Submissions of Counsel Assisting, Volume 2, [937]; Exhibit RC0486 Mr Peter Smith diary, 23 April 2006, 200, RCMPPI.0053.0001.0008 @.0200.

⁵³⁸ Submissions of Counsel Assisting, Volume 2, [937].

⁵³⁹ Submissions of Counsel Assisting, Volume 2, [938]-[940].

from someone who would be independent and acting in his best interests. That was his fundamental right.⁵⁴⁰

498. Mr Thomas' fundamental rights were manipulated. The findings as submitted by Counsel Assisting in respect of this matter are open.

⁵⁴⁰ Submissions of Counsel Assisting, Volume 2, [889].

REPLY SUBMISSION: MR O'BRIEN

Introduction to reply submissions concerning Mr O'Brien

499. This part of the reply concerns submissions made on behalf of Mr O'Brien in relation to the following matters:

- 499.1. Mr O'Brien's awareness that Ms Gobbo continued to act for Mr Tony Mokbel in late 2005 and thereafter;⁵⁴¹
- 499.2. Mr O'Brien's lack of understanding about conflict matters relating to Mr Mokbel and Mr Cooper⁵⁴²
- 499.3. Ms Gobbo's representation of Mr Cooper on 22 April 2006⁵⁴³
- 499.4. Matters related to Mr Bickley⁵⁴⁴
- 499.5. Concern over the use of Ms Gobbo and the administration of justice⁵⁴⁵
- 499.6. That issues of conflict of interest were for Ms Gobbo to deal with, rather than himself or Victoria Police⁵⁴⁶
- 499.7. The mid 2007 meetings about the use of Ms Gobbo as a witness or continued use as an informer
- 499.8. Matters related to Mr Thomas⁵⁴⁷

Mr O'Brien's awareness that Ms Gobbo continued to act for Tony Mokbel

500. At paragraph 1334 of Volume 2 of Counsel Assisting's submissions, it is submitted that:

1334. On the evidence, it is open to the Commissioner to find that by 12 September 2005, prior to Ms Gobbo's third registration, at least each of Mr Rowe, Mr Mansell, Mr Hill, Mr Ryan, Mr O'Brien and Mr Overland knew that Ms Gobbo was acting for Mr Tony Mokbel, who was the focus of Operation Quills, and that her use as a human source against her client, Mr Tony Mokbel was being considered.

501. Counsel for Mr O'Brien submits that this finding is not open.⁵⁴⁸ A number of factors are set out, followed by the ultimate submission that:

⁵⁴¹ Responsive submissions of Victoria Police, Mr O'Brien, [50.46].

⁵⁴² Responsive submissions of Victoria Police, Mr O'Brien, [50.47].

⁵⁴³ Responsive submissions of Victoria Police, Mr O'Brien, [52.260]-[52.262].

⁵⁴⁴ Responsive submissions of Victoria Police, Mr O'Brien, [53.13].

⁵⁴⁵ Responsive submissions of Victoria Police, Mr O'Brien, [51.12] and [51.32].

⁵⁴⁶ Responsive submissions of Victoria Police, Mr O'Brien, [52.153].

⁵⁴⁷ Responsive submissions of Victoria Police, Mr O'Brien, [22.20]-[22.25], [52.107]-[52.116], [52.155], [52.158], [52.166]-[52.174].

⁵⁴⁸ Responsive submissions of Victoria Police, Tranche 1, Para 50.44

50.46 *As a consequence, Mr O'Brien had no awareness of the potential for conflict because he distinguished between past offending, for which Ms Gobbo had represented Tony Mokbel, and ongoing offending, which had not been charged and, consequently, in relation to which Ms Gobbo did not act for him. Thus, there is no basis for the Commissioner to find that Mr O'Brien knew that Tony Mokbel was an existing client of Ms Gobbo's in late 2005 and no basis to find that Mr O'Brien knew that she was being considered for use against Tony Mokbel as a client.*

502. However, as set out in Counsel Assisting's primary submissions:

- 502.1. Mr O'Brien had a deep and abiding interest in pursuing Mr Mokbel
- 502.2. It was notorious that Ms Gobbo acted for Mr Mokbel – there was significant publicity concerning this fact
- 502.3. The recruitment of Ms Gobbo ostensibly occurred when Ms Gobbo told Mr Rowe and Mr Mansell about the conflict in her representation of Mr Bickley and Mr Mokbel. Mr Rowe and Mr Mansell were reporting to Mr O'Brien and receiving instructions from him in relation to the approach by Ms Gobbo
- 502.4. Mr O'Brien was in close contact with the members of the SDU, who knew that Ms Gobbo was acting for Mr Mokbel.

503. Further, the Commissioner can take into account evidence concerning events which occurred following this time in drawing an inference about such matters:

- 503.1. Mr O'Brien's diary of 27 September 2005, recording information supplied by the SDU following a debriefing of Ms Gobbo, included reference to Mr Mokbel doing "life" if Mr Cooper or Mr Bickley rolled on him, Mr Mokbel's belief that he would not be charged otherwise the police would have already charged him, and Ms Gobbo's motivation to become a human source being "to get rid of pressure created by work engendered and dictated by Mokbel and life being run by same"⁵⁴⁹
- 503.2. Mr O'Brien's diary of 31 January 2006 recording receipt of information from Ms Gobbo including details in relation to the timing and length of Mr Mokbel's upcoming trial⁵⁵⁰
- 503.3. Mr O'Brien's diary of 13 February 2006 recording receipt of information from Ms Gobbo including that Mr Mokbel was "very cocky re his forthcoming trial".⁵⁵¹

⁵⁴⁹ Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 27 September 2005, 5, VPL.0005.0126.0001 @.0005.

⁵⁵⁰ Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 31 January 2006, 10, VPL.0005.0126.0001 @.0010.

⁵⁵¹ Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 13 February 2006, 10, VPL.0005.0126.0001 @.0010.

503.4. Mr O'Brien's diary of 1 March 2006 recording Ms Gobbo reporting a meeting between Mr Bateson, Mr Bartlett and Tony Mokbel at the Supreme Court a few days earlier⁵⁵²

503.5. Mr O'Brien's diary of 20 March 2006 recording Ms Gobbo reporting that Mr Mokbel had failed to turn up for court that morning.⁵⁵³

Mr O'Brien's lack of understanding of conflict matters relating to Mr Mokbel and Mr Cooper

504. Mr O'Brien submits that:

504.1. he did not believe that Ms Gobbo was offering to provide information about Mr Tony Mokbel in relation to matters for which she was then briefed or had been briefed to act for him in the past⁵⁵⁴

504.2. he did not identify it as a conflict for Ms Gobbo to act for Mr Cooper in relation to his earlier offending whilst informing on him in relation to new offending⁵⁵⁵

505. In considering these submissions, the Commissioner should note:

505.1. The matters referred to in the section of this reply headed "The failure to recognise conflict and obtain legal advice"

505.2. Mr O'Brien was a very experienced detective. He was leading an important taskforce investigating crimes of high public significance

505.3. Mr O'Brien was aware of fundamental principles of the criminal justice system, including the right of every accused person to a fair trial, and the right to be represented by an independent and impartial lawyer to pursue his interests in an adversary trial⁵⁵⁶

505.4. Mr O'Brien's acceptance that if there was concern by police about Ms Gobbo appearing for various people where there might be a conflict it would be appropriate to get advice from the OPP, and that he had some understanding of conflicts of interest⁵⁵⁷

505.5. Mr O'Brien was aware that an important component of Operation Posse was to use Mr Tony Mokbel's current lawyer, Ms Gobbo, to assist Victoria Police to have him convicted and gaoled⁵⁵⁸

505.6. Mr O'Brien could not have been aware of the use of a lawyer against a former or current client before

505.7. Mr O'Brien knew that Ms Gobbo had provided the means to pursue the primary goals of the investigation (namely, information concerning Mr Tony Mokbel, Mr Cooper and Mr Bickley – all of whom she had

⁵⁵² Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 1 March 2006, 13, VPL.0005.0126.0001 @.0013.

⁵⁵³ Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 20 March 2006, 17, VPL.0005.0126.0001 @.0017.

⁵⁵⁴ Responsive submissions of Victoria Police, Mr O'Brien, [50.47].

⁵⁵⁵ Responsive submissions of Victoria Police, Mr O'Brien, [52.227].

⁵⁵⁶ Transcript of Mr James (Jim) O'Brien, 3 September 2019, 5549-5652, 5679.

⁵⁵⁷ Transcript of Mr James (Jim) O'Brien, 3 September 2019, 5463-5464.

⁵⁵⁸ Submissions of Counsel Assisting, Volume 2, [1367].

represented). Further, Mr O'Brien became aware that she continued to represent them⁵⁵⁹

505.8. Although Mr O'Brien's evidence was that he has no recollection of junior members expressing concerns to him, it is evident that junior members of Mr Flynn's investigation team were discussing concerns they had, and the evidence confirms that concerns were raised directly with Mr O'Brien⁵⁶⁰

505.9. Mr O'Brien's evidence before Mr Kellam, that there was consideration of getting legal advice in order to assess the appropriateness of the use of Ms Gobbo, however he considered that legal advice could not be received without some chance of compromise to Ms Gobbo.⁵⁶¹

506. Further, the Commissioner should note in relation to Mr Mokbel that:

506.1. Mr O'Brien was aware that the SDU would debrief Ms Gobbo and receive historical information, including confidential information

506.2. On 16 September 2005 Ms Gobbo told the SDU that Mr Tony Mokbel was seeking to bribe a member of the MDID in relation to Operation Quills evidence, and also in relation to the Operation Kayak tapes, which tapes were evidence against him in pending Commonwealth and State trials.⁵⁶² Mr O'Brien knew about these tapes and the significance of this evidence. Ms Gobbo had represented and continued to represent Mr Tony Mokbel in these matters. As submitted above, Mr O'Brien knew of Ms Gobbo's representation of Mr Tony Mokbel

506.3. On 19 September 2005, Mr O'Brien and others were briefed about the 16 September 2005 meeting and outcomes. There was discussion of Ms Gobbo's suggestion of the introduction of a purportedly corrupt officer to Mr Tony Mokbel in relation to the Operation Kayak and Quills evidence⁵⁶³

506.4. On 27 September 2005, Mr O'Brien was involved in discussions about establishing a taskforce to investigate matters disclosed by Ms Gobbo including the allegation that Mr Tony Mokbel was seeking to bribe a corrupt officer⁵⁶⁴

506.5. On 25 October 2005, Mr Tony Mokbel was charged with further Commonwealth offending which was related to Operation Quills. Mr O'Brien referred to this matter in his investigation plan of 21 October 2005.⁵⁶⁵ Ms Gobbo appeared for Mr Tony Mokbel at his bail application. The evidence enables the Commissioner to be reasonably

⁵⁵⁹ Submissions of Counsel Assisting, Volume 2, [1608] (an awareness that Mr Bickley might contact Ms Gobbo for representation upon his second arrest), [1899.17]; Responsive submissions of Victoria Police, Mr O'Brien, [52.233]; Exhibit RC0468 Mr James (Jim) O'Brien diary summaries, 14 March 2006, 6, VPL.0005.0126.0001 @.0006, Ms Gobbo reporting [REDACTED].

⁵⁶⁰ Exhibit RC118 Statement of Liza Burrows, 10 May 2019, [56]-[57], VPL.0014.0030.0001 @.0009; Transcript of Detective Sergeant Paul Rowe, 1 July 2019, 3276-3277, TRN.2019.07.01.01; Transcript of Detective Sergeant Paul Rowe, 19 November 2019, 9511-9512, TRN.2019.11.19.01.

⁵⁶¹ Exhibit RC1.3, Transcript of examination of James (Jim) O'Brien, 12 November 2014, 26-27, IBAC.0002.0002.0004@.0028.

⁵⁶² Submissions of Counsel Assisting, Volume 2, [1344].

⁵⁶³ Submissions of Counsel Assisting, Volume 2, [1354].

⁵⁶⁴ Submissions of Counsel Assisting, Volume 2, [1360].

⁵⁶⁵ Submissions of Counsel Assisting, Volume 2, [1366.6].

satisfied that Mr O'Brien would have become aware of this fact, given the substantial investigation that was about to commence.

507. Given Mr Cooper's association with Mr Tony Mokbel, and his central part in the investigations that Mr O'Brien was overseeing, it is relevant to consider Mr O'Brien's position concerning Mr Cooper, namely:

- 507.1. On 19 September 2005, Mr O'Brien and others were briefed concerning the 16 September 2006 meeting between Ms Gobbo, Mr Sandy White, Mr Peter Smith, Mr Mansell and Mr Rowe. At that meeting, there was discussion of arranging [REDACTED] meeting between Mr Flynn and Mr Cooper. Central to that discussion was the fact that Mr Cooper would not know that this [REDACTED] meeting had been organised by his lawyer and Victoria Police in order to have him agree to assist police by providing incriminating evidence against another of Ms Gobbo's clients, Mr Tony Mokbel.⁵⁶⁶
- 507.2. On 5 January 2006, Mr O'Brien had dealings with Ms Gobbo as Mr Cooper's lawyer in relation to a bail arrangement on the matters in which he was currently charged. Whilst Mr O'Brien's submission seeks to describe this as a straightforward dealing between Mr O'Brien as police officer and Ms Gobbo as a lawyer,⁵⁶⁷ the submission entirely fails to deal with the fact that Mr O'Brien was discussing the matter with Ms Gobbo's human source handlers at the SDU earlier in the day, prior to discussing the matter with Ms Gobbo in the afternoon.⁵⁶⁸ It is submitted that the Commissioner can consider this event to assist in assessing Mr O'Brien's claim that he did not identify any risk with Ms Gobbo continuing to act for Mr Cooper on historical matters whilst informing on him.
- 507.3. In relation to the bail discussion, Mr Cooper was seeking to have his bail varied in order to fly to Queensland in order to gamble. The ICRs confirm that Ms Gobbo told her handlers that she would not normally get involved, however if she could arrange the variation, it would enhance her relationship with Mr Cooper. Ms Gobbo indicated that she would rather deal with Mr Flynn. SDU members spoke to Mr O'Brien. Mr Flynn was on leave and it was determined that Ms Gobbo should ring Mr O'Brien. Mr O'Brien then dealt with Ms Gobbo in her capacity as Mr Cooper's "lawyer".⁵⁶⁹
- 507.4. When Mr O'Brien was asked about the above matter, his evidence was that:⁵⁷⁰
- 507.4.1. he did not have a diary entry of the conversation with the SDU concerning the arrangements
- 507.4.2. he did not accept that the conversation with the SDU occurred, as he did not have a note of it
- 507.4.3. he indicated there might be occasions when he did not write things in his diary

⁵⁶⁶ Submissions of Counsel Assisting, Volume 2, [1354].

⁵⁶⁷ Responsive submissions of Victoria Police, Mr O'Brien, [52.233].

⁵⁶⁸ Submissions of Counsel Assisting, Volume 2, [1796].

⁵⁶⁹ Submissions of Counsel Assisting, Volume 2, [1393].

⁵⁷⁰ Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5275-5727, TRN.2019.09.06.01.

- 507.4.4. he did not know if this was one of those times
 - 507.4.5. he did not accept that he chose not to make a note because to do so would have referred to 3838 arrangements with SDU, and would have revealed 3838 to be Ms Gobbo when she rang him
 - 507.4.6. he indicated that he may have had a conversation about the matter with the SDU but did not recall all of the information or the background to it.
- 507.5. It is open to conclude that Mr O'Brien's failure to record the communication with the SDU in his diary, even by his own admission, was a product of a conflict between Ms Gobbo's role as a human source and a lawyer.

Ms Gobbo's representation of Mr Cooper on 22 April 2006

508. It is submitted by Mr O'Brien that it should not be found that he was informed that Ms Gobbo intended to represent Mr Cooper upon his arrest following a conversation between Ms Gobbo and the SDU to that effect on 20 April 2006. In this regard it is submitted that:
- 508.1. the sole evidence relied upon is a diary note of Mr Peter Smith saying he updated Mr O'Brien⁵⁷¹
 - 508.2. Mr O'Brien's evidence that he was not told of the conversation and the SDU did not raise issues with him more generally⁵⁷²
 - 508.3. it cannot be inferred that he received the detail of the lengthy conversation that had taken place the night before, which is submitted would be unlikely⁵⁷³
 - 508.4. that unlikelihood is said to arise from the fact that the conversation was lengthy, wide-ranging and general in nature, and much did not constitute relevant intelligence of the kind that would be disseminated to Mr O'Brien⁵⁷⁴
 - 508.5. even if Mr O'Brien was told that Ms Gobbo anticipated Mr Cooper would ask for her, and the SDU raised ethical concerns, there is no evidence that Mr O'Brien believed she would actually attend or that he wanted her to attend.⁵⁷⁵
509. On 19 April 2006, Mr Sandy White noted in his diary an intention that investigators would be warned about possible evidentiary consequences if Ms Gobbo were to advise Mr Cooper following his arrest.⁵⁷⁶
510. Mr O'Brien was alive to the possibility that Mr Cooper might request Ms Gobbo and gave evidence that on the basis of discussions he expected the SDU would have a cover story for her non-attendance.⁵⁷⁷

⁵⁷¹ Responsive submissions of Victoria Police, Mr O'Brien, [52.248].

⁵⁷² Responsive submissions of Victoria Police, Mr O'Brien, [52.249].

⁵⁷³ Responsive submissions of Victoria Police, Mr O'Brien, [52.250].

⁵⁷⁴ Responsive submissions of Victoria Police, Mr O'Brien, [52.250].

⁵⁷⁵ Responsive submissions of Victoria Police, Mr O'Brien, [52.251].

⁵⁷⁶ Exhibit RC392, Diary of Sandy White, 19 April 2006.

⁵⁷⁷ Responsive submissions of Victoria Police, Mr O'Brien, [52.259].

511. On 20 April 2006, Mr Sandy White, Mr Peter Smith and Mr Green met with Ms Gobbo. Her intention to advise Mr Cooper was confirmed.⁵⁷⁸
512. Mr Peter Smith made a diary entry on the morning of 21 April 2006 of advising Mr O'Brien what occurred at the meeting the night before.⁵⁷⁹ Whilst he did not record what parts of the conversation with Ms Gobbo that he told Mr O'Brien about, there was no reason for Mr Peter Smith not to tell Mr O'Brien that Ms Gobbo was intent on advising Mr Cooper. This was one part of the conversation which was very relevant for Mr O'Brien to know about. It would be more unlikely that he would fail to inform Mr O'Brien of such a matter if they had previously discussed that Ms Gobbo would have a cover story. Mr O'Brien agreed that it was strange that he was not told Ms Gobbo intended to advise Mr Cooper.⁵⁸⁰
513. There was no evidence given that there were questions asked of the SDU when it came about that Ms Gobbo did turn up to advise Mr Cooper.

Matters related to Mr Bickley

514. Submissions are made about Mr O'Brien's awareness of matters related to Ms Gobbo's involvement in the second arrest of Mr Bickley in June 2006. In this regard it is submitted that:
- 514.1. The entry of Mr Sandy White on 8 June 2006 which records concern that Ms Gobbo might be accused of failing to notify "Horty etc" of the arrest of Mr Bickley indicates that none of those present recognised the conflict that would arise if Ms Gobbo represented Mr Bickley⁵⁸¹
- 514.2. There was no evidence that Mr O'Brien was told by the SDU on 9 June 2006 that Ms Gobbo intended to represent Mr Bickley⁵⁸²
- 514.3. Although Mr O'Brien spoke with Mr Bickley on the day of his arrest, he does not recall being told that Mr Bickley asked for and spoke to Ms Gobbo⁵⁸³
- 514.4. Investigators could not prevent Mr Bickley from asking for Ms Gobbo and were obliged at law to make such contact on his behalf.⁵⁸⁴
515. In considering these submissions, regard should be had to the following:
- 515.1. The evidence demonstrates that there was consideration given by Mr O'Brien and others at the meeting on 8 June 2006 to the risk of Ms Gobbo advising Mr Bickley, as Mr Sandy White noted "Agreed HS not to become involved. Unavailable".⁵⁸⁵
- 515.2. Mr O'Brien was clearly aware of the conflict that would arise, as he had been troubled by it when it had occurred with Mr Cooper

⁵⁷⁸ Submissions of Counsel Assisting, Volume 2, [1824].

⁵⁷⁹ Submissions of Counsel Assisting, Volume 2, [1826].

⁵⁸⁰ Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5754, TRN.2019.09.06.01.

⁵⁸¹ Responsive submissions of Victoria Police, Mr O'Brien, [53.12].

⁵⁸² Responsive submissions of Victoria Police, Mr O'Brien, [53.12].

⁵⁸³ Responsive submissions of Victoria Police, Mr O'Brien, [53.13].

⁵⁸⁴ Responsive submissions of Victoria Police, Mr O'Brien, [53.13].

⁵⁸⁵ Submissions of Counsel Assisting, Volume 2, [1609].

- 515.3. He would have been further troubled when he learned Ms Gobbo had also attended to advise Mr Milad Mokbel following his arrest
 - 515.4. Added to the fact that Ms Gobbo had informed on Mr Bickley, she had also been involved in passing a phone between Mr Cooper and Mr Bickley, and she had advised Mr Cooper who was the witness to be used against Mr Bickley⁵⁸⁶
 - 515.5. The potential for Mr Bickley to contact Ms Gobbo upon arrest was a specific issue being contemplated⁵⁸⁷
 - 515.6. Messrs O'Brien, Flynn and Rowe were at the meeting where the 'unavailability' of Ms Gobbo had been discussed. It is inherently unlikely that if Mr O'Brien had not already been informed by the SDU of Ms Gobbo's plan to make herself available, that he would not have been told of Ms Gobbo's involvement by either Mr Flynn or Mr Rowe subsequently.
516. Issue is taken with the notion that the investigators could do nothing in relation to any knowledge that they might have of Mr Bickley being represented by the human source who was being used against him. It is submitted by Counsel Assisting that the least any investigator could have done was to speak to Ms Gobbo. If Ms Gobbo was determined to make herself available, there was an obligation to seek advice from superiors, or take steps to obtain legal advice, as to what might be done to prevent this, or in the knowledge that it had occurred, as to the potential consequences of it. There is no evidence to suggest that this occurred. It is open to conclude from the failure to seek advice from supervisors or lawyers where it was plainly called for, that there was a determination not to.

Concern over the use of Ms Gobbo and the administration of justice

517. It is submitted on Mr O'Brien's behalf that he:⁵⁸⁸
- 517.1. never considered that the use of Ms Gobbo might be considered by others to be wrong
 - 517.2. never considered that the courts might have concern about the use of Ms Gobbo
 - 517.3. did not appreciate the very real risk to the administration of justice that arose from the use of Ms Gobbo as a human source
 - 517.4. failed to appreciate the risk that persons against whom Ms Gobbo was informing might seek her advice upon being arrested and that she might actually provide such advice.
518. As to the submission that Mr O'Brien did not consider, appreciate, or turn his mind to relevant risks and issues which arose through the use of Ms Gobbo as a human source, the Commissioner should note the matters set out in [505.1] to [505.9] above.

⁵⁸⁶ Submissions of Counsel Assisting, Volume 2, [1414]-[1415].

⁵⁸⁷ Submissions of Counsel Assisting, Volume 2, [1608].

⁵⁸⁸ Responsive submissions of Victoria Police, Mr O'Brien, [51.12], [51.32].

519. Taking those matters into consideration and bearing in mind Mr O'Brien's seniority and experience with investigations and court proceedings in which human sources were used, it is submitted that it is open to the Commissioner to reject Mr O'Brien's submission that he failed to comprehend the risks to the administration of justice posed by Ms Gobbo's use as a human source.
520. Further, in assessing submissions made on behalf of Mr O'Brien, the Commissioner might consider other events involving Mr O'Brien in which, it is submitted, it would have been plain to him that there were obvious risks to the proper administration of justice associated with the use Ms Gobbo as an informer whilst representing Mr Cooper. For example:
- 520.1. the 5 January 2006 discussions concerning Mr Cooper's bail being varied to allow him to travel to Queensland. As set out at [507.3] and [507.4] above, whilst the submission on behalf of Mr O'Brien seeks to describe the dealings as benign dealings with Ms Gobbo in her capacity as a lawyer, it wholly ignores the fact that the SDU were directly involved in the transaction
- 520.2. the events concerning the arrest of Mr Cooper on 22 April 2006. It is submitted that given Mr O'Brien's knowledge prior to 22 April 2006 that Ms Gobbo was acting for Mr Cooper, it is difficult to accept that Mr O'Brien did not foresee the risk that Ms Gobbo would attend to advise and represent Mr Cooper upon his arrest. However, even if it were found that he did not foresee this risk, he knew that it was a matter of great consequence when Ms Gobbo did attend to do so. He had discussions with Mr Sandy White about it.⁵⁸⁹ Given the concerns expressed by Mr Sandy White on 20 April 2006 (before the arrest) and on subsequent occasions, it is difficult to accept Mr O'Brien's claim that he did not turn his mind to this issue.
- 520.3. Mr O'Brien gave evidence that he and Mr Sandy White were troubled by what had occurred with Ms Gobbo's involvement with Mr Cooper but in the end they believed it was an ethical issue for Ms Gobbo, rather than for Victoria Police.⁵⁹⁰ Whilst this evidence is consistent with the claim now made by Mr O'Brien, given Mr Sandy White's concern expressed at various stages⁵⁹¹ and the evidence that he gave, that he even considered arresting Ms Gobbo, it is submitted that the Commissioner should carefully consider Mr O'Brien's claim that he and Mr Sandy White agreed it was merely an ethical issue for Ms Gobbo, before accepting it. If the Commissioner were to find that Mr O'Brien had even a small concern about the consequences with respect to the potential loss of evidence and the interference with the right to fair process of a person who was to be charged with offences carrying the potential of many years in prison, then it may be difficult to accept that Mr O'Brien truly believed that it was only an ethical issue for Ms Gobbo.
- 520.4. The evidence identified and submissions made at [353] to [356] of the primary submissions on behalf of the certain former members of the SDU is relevant in this regard. Of particular note is Mr Sandy White's diary entry that "*Issue with HS representing Cooper after arrest.*

⁵⁸⁹ Submissions of Counsel Assisting, Volume 2, [1924.7].

⁵⁹⁰ Transcript of Mr James (Jim) O'Brien, 10 September 2019, 5933, [39].

⁵⁹¹ For example, in discussions with Ms Gobbo on 20 April 2006 and following, the reference to the possibility of a "Royal Commission", the discussion on 18 July 2007 and the SWOT analysis.

Evidence from Cooper implicating self may not be admissible if counsel not impartial. Agreed: Invest to be warned... Agreed tactical decisions re 3838 made in accordance with investigators” and his evidence that prior to Mr Cooper’s arrest, he discussed with Mr O’Brien the problems arising if Ms Gobbo were to represent Mr Cooper upon his arrest.⁵⁹²

- 520.5. Further, on 26 April 2006 Ms Gobbo and Mr Sandy White had a conversation in which Mr Sandy White indicated that the SDU had spoken with Mr Flynn, who was junior to Mr O’Brien, concerning evidentiary concerns arising from confessions where Ms Gobbo provided advice.⁵⁹³
- 520.6. On 25 April 2006, which was shortly after Mr Cooper’s arrest, and following him implicating his criminal associates, Ms Gobbo attended to advise two of those associates, Mr Milad Mokbel and Mr Cvetanovski. This is of particular significance, given Mr O’Brien’s knowledge of Ms Gobbo’s involvement in Mr Cooper being implicated and her representing him upon his arrest. Mr O’Brien accepts he learned of this “later on”.⁵⁹⁴
- 520.7. A 26 May 2006 ‘handler handover’ document in which Mr Peter Smith indicated to Mr Green that Mr O’Brien was happy to supply copies of Mr Cooper’s statements to Ms Gobbo to ‘check on the quiet but better if not openly involved in the process’.⁵⁹⁵
- 520.8. In relation to her involvement in the arrest of Mr Bickley, on 8 June 2006 in a meeting between Mr Sandy White, Mr Green, Mr O’Brien, Mr Flynn and Mr Rowe, Ms Gobbo’s arrest tips were conveyed to those present. There was discussion that Ms Gobbo should not become involved in representing Mr Bickley and should be unavailable.⁵⁹⁶
- 520.9. From March 2007, Mr O’Brien had significant involvement in matters relating to Mr Milad Mokbel, including:
- 520.9.1. On 5 March 2007, Mr Sandy White recorded various concerns regarding the use of Ms Gobbo, including that Mr Milad Mokbel’s upcoming committal risked creating suspicion by targets that Ms Gobbo assisted police in the recruitment of Mr Cooper⁵⁹⁷
- 520.9.2. The next day, Mr O’Brien and members of his investigatory team were present at a meeting with the SDU. At this meeting there was discussion of Mr O’Brien dealing with Ms Gobbo to resolve Mr Milad Mokbel’s matter as a plea and information was provided to the SDU to give Ms Gobbo, in order to advance negotiations⁵⁹⁸

⁵⁹² Transcript of Mr Sandy White, 2 August 2019, 3826.27.

⁵⁹³ Responsive submissions of the SDU, [354].

⁵⁹⁴ Responsive submissions of Victoria Police, [53.27].

⁵⁹⁵ Submissions of Counsel Assisting, Volume 2, [1594].

⁵⁹⁶ Submissions of Counsel Assisting, Volume 2, [1608].

⁵⁹⁷ Submissions of Counsel Assisting, Volume 2, [2659].

⁵⁹⁸ Submissions of Counsel Assisting, Volume 2, [2660]-[2665].

- 520.9.3. Mr O'Brien's evidence was that this would have been known by the SDU and the Purana Taskforce to represent a significant conflict⁵⁹⁹
- 520.9.4. Mr O'Brien took no steps to determine who the solicitor on the record was for Mr Milad Mokbel⁶⁰⁰
- 520.9.5. Mr O'Brien had discussions with Ms Gobbo in relation to the resolution of Mr Milad Mokbel's matter⁶⁰¹
- 520.9.6. Mr Flynn (Mr O'Brien's most senior investigator) had discussions with Mr Sandy White as to concerns over disclosure of his notes and the need to avoid claiming PII as that would mean revealing Ms Gobbo's involvement to the court⁶⁰²
- 520.9.7. On 29 June 2007, a few days prior to Mr Milad Mokbel's committal, Mr O'Brien and investigators attended a meeting at which issues of disclosure of the notes and Ms Gobbo's attendance were dealt with, including the basis upon which redactions would be made.⁶⁰³
- 520.10. The series of meetings that occurred in July 2007 in which Mr O'Brien was involved, and which related to the potential use of Ms Gobbo as a witness against Mr Karam, included consideration that the impact of Ms Gobbo's use might jeopardise the convictions of Mr Cooper and others, and the need for legal advice. These matters are dealt with in more detail below, in addressing issues raised on behalf of Mr O'Brien.

The mid 2007 meetings about the use of Gobbo as a witness or continued use as an informer

Background

- 521. The background to these facts set out in the submissions of Mr O'Brien is generally accepted. Briefly:
 - 521.1. In April and May 2007, the Purana Taskforce (headed by Mr O'Brien) was looking to end its engagement with Ms Gobbo, whilst the Petra Taskforce (headed by Mr Ryan) was identifying Ms Gobbo as a person of interest in relation to its investigation of the murders of Christine and Terrence Hodson⁶⁰⁴
 - 521.2. On 10 May 2007, a meeting took place between Mr Sandy White and Mr Ryan in which there was discussion of the SDU's proposed exit strategy and information that Mr Ryan was seeking from Ms Gobbo for his investigation. The exit strategy was subsequently delayed, with Mr

⁵⁹⁹ Submissions of Counsel Assisting, Volume 2, [2663].

⁶⁰⁰ Submissions of Counsel Assisting, Volume 2, [2677].

⁶⁰¹ Submissions of Counsel Assisting, Volume 2, [2666]-[2667], [2687].

⁶⁰² Submissions of Counsel Assisting, Volume 2, [2683]-[2684], [2692].

⁶⁰³ Submissions of Counsel Assisting, Volume 2, [2736]-[2740].

⁶⁰⁴ Responsive submissions of Victoria Police, Mr O'Brien, [53.48].

Overland approving that the SDU debrief Ms Gobbo in relation to her knowledge of matters relevant to the Petra investigation⁶⁰⁵

- 521.3. On 21 May 2007, the debriefing took place. The following day Mr Ryan was briefed⁶⁰⁶
- 521.4. On 25 May 2007, Mr Overland took part in a meeting with Mr Sandy White and Mr Biggin. He was briefed in relation to the debriefing, which had occurred with Ms Gobbo for the Petra investigation. There was discussion of the exit strategy, which the SDU had been planning. There was discussion of Ms Gobbo's continued viability to assist the Petra investigation and also the Briars investigation. There was discussion of concern about Ms Gobbo being summoned to the OPI⁶⁰⁷
- 521.5. In June 2007, Ms Gobbo provided information to the SDU about the activities of Mr Karam. Whilst representing Mr Karam at trial, she copied shipping documents given to her by Mr Karam for safekeeping, which document appears to have ultimately assisted the AFP to identify a shipment of ecstasy⁶⁰⁸
- 521.6. On 11 July 2007, Ms Gobbo received a summons to attend the OPI to give evidence. There was concern that this would compromise her role as a human source.⁶⁰⁹

The 17 July 2007 meeting

522. On 17 July 2007, Mr O'Brien briefed Mr Overland, Mr Blayney and Mr Brown. It was at this meeting that Mr Blayney raised the need for hypothetical legal advice in the context that Ms Gobbo might be a witness against Mr Karam and concern over her representation of clients whilst informing on them.⁶¹⁰ It is submitted that the potential risks to the administration of justice posed by Ms Gobbo's use as a human source would have been plain to all who attended that meeting, including Mr O'Brien.
523. The submissions on behalf of Mr O'Brien take issue with Counsel Assisting submissions, which connect the legal advice referred to by Mr Blayney as relating to risks to the administration of justice. In this regard it is said that there is no evidence of this, and that Mr Blayney's evidence was that he did not recall the meeting other than what was in his notes.⁶¹¹
524. It is submitted that submission is wrong, and does not reflect the evidence.
525. Mr Blayney in his evidence provided an explanation as to the two issues the subject of his note:
- 525.1. The reference to changing Ms Gobbo's source number

⁶⁰⁵ Responsive submissions of Victoria Police, Mr O'Brien, [53.48]; Submissions of Counsel Assisting, Volume 2, [2318]-[2324].

⁶⁰⁶ Responsive submissions of Victoria Police, Mr O'Brien, [53.48]; Submissions of Counsel Assisting, Volume 2, [2318]-[2324].

⁶⁰⁷ Submissions of Counsel Assisting, Volume 2, [2331]-[2332].

⁶⁰⁸ Responsive submissions of Victoria Police, Mr O'Brien, [53.48]; Submissions of Counsel Assisting, Volume 2, [2318]-[2324].

⁶⁰⁹ Submissions of Counsel Assisting, Volume 2, [2401].

⁶¹⁰ Counsel Assisting primary submissions at [2414]-[2427].

⁶¹¹ Responsive submissions of O'Brien, [53.50].

- 525.2. The need for a hypothetical legal opinion.
526. He said:
- 526.1. He believed the reference to changing Ms Gobbo's source number arose out of concerns that too many people were becoming aware or suspected she might be informing and this would provide some mitigation⁶¹²
- 526.2. He had been concerned for a period of time in the lead up to the meeting. There was discussion about reviewing her continued use, and he raised the issue that they should also be looking at the legal situation⁶¹³
- 526.3. In the lead up to the meeting, Mr Blayney had discovered that Ms Gobbo was acting for a range of clients that were the targets of the Purana Taskforce and who had been charged by the Purana Taskforce⁶¹⁴
- 526.4. He recalled having conversations with people, potentially including Mr O'Brien, about his concern in relation to the legal situation to try and get an understanding of the legal complications and whether that was something that needed 'work'⁶¹⁵
- 526.5. His reference to the hypothetical legal opinion related to concern about the legal complexities in using her as a human source⁶¹⁶, and he raised the issue of working through scenarios or hypothetical situations that could occur or had occurred during her management to test what that would mean in the context of legality⁶¹⁷
527. It was in response to a question as to whether there had been any acceptance or rejection of the concept of legal advice at the meeting, that Mr Blayney responded that he couldn't recall the meeting *other* than what was in his notes.⁶¹⁸
528. It should be appreciated that this was a discussion in which consideration was being given to whether Ms Gobbo could become a witness against Mr Karam. Ms Gobbo was to potentially be a witness in circumstances where she had been a human source and had provided the crucial evidence to the police whilst representing him in a trial.
529. It makes perfect sense that this would cause consideration of evidentiary issues associated with the use of Ms Gobbo as a human source against Mr Karam, whilst she was acting for him, and the contemplation of legal advice.
530. It is clear that the concerns were not limited to the use of Ms Gobbo in relation to Mr Karam. Mr Blayney had learned of Ms Gobbo being used similarly by the Purana Taskforce. This is also apparent from Mr O'Brien's conversation with Mr Sandy White the next day.

⁶¹² Transcript of Mr John (Jack) Blayney, 3 December 2019, 10232 TRN.2019.12.03.01.

⁶¹³ Transcript of Mr John (Jack) Blayney, 2 December 2019, 10211 TRN.2019.12.02.01.

⁶¹⁴ Transcript of Mr John (Jack) Blayney, 3 December 2019, 10234 TRN.2019.12.03.01.

⁶¹⁵ Transcript of Mr John (Jack) Blayney, 3 December 2019, 10233-10234 TRN.2019.12.03.01.

⁶¹⁶ Transcript of Mr John (Jack) Blayney, 3 December 2019, 10233 TRN.2019.12.03.01.

⁶¹⁷ Transcript of Mr John (Jack) Blayney, 3 December 2019, 10235 TRN.2019.12.03.01.

⁶¹⁸ Transcript of Mr John (Jack) Blayney, 3 December 2019, 10239 TRN.2019.12.03.01.

The 18 July 2007 meeting

531. On 18 July 2007, Mr O'Brien and Mr Sandy White discussed the consideration that was being given to Ms Gobbo's use as a witness against Mr Karam.⁶¹⁹

532. It is relevant to contextualise this discussion within the following events, as well as those outlined above:

532.1. On 3 July 2007, Mr Sandy White expressed concern to Ms Gobbo that she must not appear for persons who may be arrested as a result of the Tomato Tins importation. The exchange demonstrates that he had a clear appreciation that the use of Ms Gobbo potentially compromised convictions:

MR SANDY WHITE: All right. It's really important for all of us that you don't represent anyone.

MS GOBBO: Mm.

MR SANDY WHITE: I'd hate to think that ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got completely unbiased uncompromised defence.

MS GOBBO: Who's ever going to know about that?

MR SANDY WHITE: Well - - -

MS GOBBO: And there's already 20 people in that category.

MR SANDY WHITE: I know, I know.⁶²⁰

532.2. On 17 July 2007, Mr Sandy White and Ms Gobbo discussed the possibility and ramifications of her giving evidence against Mr Karam. Again, concerns were raised as to Ms Gobbo providing advice to Mr Cooper on the night of his arrest. Mr Sandy White specifically indicated that he would discuss the "problems" and "fallout" of Ms Gobbo becoming a witness with Mr O'Brien the following day.⁶²¹

533. Mr Sandy White recorded the meeting with Mr O'Brien in his diary. There was discussion of Ms Gobbo's value as a witness having to be weighed against the 'political fallout from [the] legal fraternity. *ie. will it impact on (Mr Cooper's) conviction and others*'. In this context the note suggests that Mr Sandy White and Mr O'Brien agreed that 'legal advice' needed to be obtained as to the 'fallout'. This was an agreement that legal advice needed to be obtained about whether Ms Gobbo's use as a human source could affect the convictions which had been achieved.

⁶¹⁹ Submissions of Counsel Assisting, Volume 2, [2443]-[2445].

⁶²⁰ Exhibit RC0764 Transcript of meeting between Nicola Gobbo, Sandy White and Fox, 3 July 2007, 120-122, VPL.0005.0136.0001 @.0120-0122.

⁶²¹ See analysis in Submissions of Counsel Assisting, Volume 2, [2347]-[2441]

534. It is open to conclude that the imperative to obtain the legal advice in the circumstances was driven not by the concerns about the risk to convictions (which had been a long held concern), but rather, by the prospect that Ms Gobbo's role as a human source would be exposed, were she to give evidence.
535. It is clear that consideration was given to the following process occurring if Ms Gobbo became a witness against Mr Karam:
- 535.1. her evidence would inevitably reveal that she had provided police with the shipping documents whilst she had been representing Mr Karam
 - 535.2. this would lead to questions about her relationship with Victoria Police and her status as a human source being exposed
 - 535.3. there was a significant chance that this would expose her broader relationship with Victoria Police as a human source
 - 535.4. there was concern that examination of the use of Ms Gobbo as a human source would lead to convictions being overturned.
536. In his evidence regarding his note of this meeting, Mr Sandy White agreed that what he was alluding to was, that if Ms Gobbo's involvement with Mr Cooper was exposed, it could well have an impact upon the appropriateness of his conviction, and perhaps others.⁶²² Mr Sandy White agreed that his concerns as at 18 July 2007 were the same as those that were expressed in the SWOT analysis the following year.⁶²³ Mr Sandy White said that he and Mr O'Brien were both conscious of the potential for impact upon convictions and the necessity for a legal opinion to be sought about such matters.⁶²⁴
537. Mr O'Brien fails to deal with this conversation in submissions other than saying he has no recollection of it.⁶²⁵ It is submitted that the contemporaneous documents demonstrate that the conversation occurred, what its contents were and what Mr O'Brien would have understood about the issues set out.

The 24 July 2007 meeting

538. On 24 July 2007 the regular 2pm Purana Taskforce Update meeting took place. It is apparent that there was further discussion of the issue of Ms Gobbo's future following on from the meeting of the previous week on 17 July 2007 (referred to above).⁶²⁶
539. An instruction was given by Mr Overland that a meeting should be convened to discuss the risks, alternatives and options in relation to the future of Ms Gobbo.⁶²⁷
540. The meeting was arranged for that afternoon. Mr Blayney contacted Mr Biggin, who contacted Mr Sandy White.⁶²⁸

⁶²² Transcript of Mr Sandy White, 3 September 2019, 5418.

⁶²³ Transcript of Mr Sandy White, 3 September 2019, 5418.

⁶²⁴ Transcript of Mr Sandy White, 3 September 2019, 5419.

⁶²⁵ Responsive submissions of Victoria Police, [51.12].

⁶²⁶ Responsive submissions of Victoria Police, Mr O'Brien, [53.57].

⁶²⁷ Submissions of Counsel Assisting, Volume 2, [2468].

⁶²⁸ Submissions of Counsel Assisting, Volume 2, [2468].

541. Mr Biggin noted that the meeting was to discuss the potential for Ms Gobbo to be a witness, the involvement of the Witness Security Unit and her future deployment.⁶²⁹
542. The meeting was accordingly attended by:
- 542.1. Mr Biggin, the Superintendent sitting over the SDU in I&CS⁶³⁰
 - 542.2. Mr Sandy White, head of the SDU⁶³¹
 - 542.3. Mr O'Brien, head of the Purana Taskforce, who had previously used Ms Gobbo's information and obtained convictions on the basis of it⁶³²
 - 542.4. Mr Ryan, head of the Petra Taskforce which had an interest in the future deployment of Ms Gobbo as a human source, and who had been told the day before he was to take over as head of the Purana Taskforce for three months upon Mr O'Brien's pending retirement⁶³³
 - 542.5. Mr O'Connell, who was to be upgraded into Mr Ryan's position⁶³⁴
 - 542.6. Mr Blayney and Mr Brown, who were Superintendents in the Crime Department.⁶³⁵
543. Both Mr Blayney and Mr Biggin referred to legal advice in their notes of the meeting:
- 543.1. Mr Blayney wrote '*Legal issues – considered not appropriate at this stage – poss. explore precedents*'⁶³⁶
 - 543.2. Mr Biggin wrote '*Legal opinion from Judge*'.⁶³⁷
544. It is submitted on behalf of Mr O'Brien that:
- 544.1. Counsel Assisting rely heavily on Mr Blayney's evidence to IBAC, a fair reading of which indicates that his concern was not as to wider issues of the risk to the administration of justice, but the specific issue of information the subject of legal professional privilege, and how the SDU were ensuring that such information was not disseminated. It is said that if he raised those concerns, he would have been given reassurances as to those matters⁶³⁸
 - 544.2. Further, to the extent that those present canvassed the need for legal advice, that potential need was predicated on the possibility that Ms Gobbo would be used as a witness. As the meeting resolved that she would not be used as a witness, the premise for needing legal advice (as the participants understood it) fell away.⁶³⁹

⁶²⁹ Submissions of Counsel Assisting, Volume 2, [2469].

⁶³⁰ Submissions of Counsel Assisting, Volume 2, [2470].

⁶³¹ Submissions of Counsel Assisting, Volume 2, [2470].

⁶³² Submissions of Counsel Assisting, Volume 2, [2470].

⁶³³ Submissions of Counsel Assisting, Volume 2, [2464], [2470].

⁶³⁴ Submissions of Counsel Assisting, Volume 2, [2464], [2470].

⁶³⁵ Submissions of Counsel Assisting, Volume 2, [2470].

⁶³⁶ Submissions of Counsel Assisting, Volume 2, [2471].

⁶³⁷ Submissions of Counsel Assisting, Volume 2, [2472].

⁶³⁸ Responsive submissions of Victoria Police, Mr O'Brien, [53.68]-[53.71].

⁶³⁹ Responsive submissions of Victoria Police, Mr O'Brien, [53.72].

545. Even if the understanding of Mr Blayney as to the issues around Ms Gobbo's use was limited, Mr O'Brien's understanding was not.
546. As referred to above, he had spoken with Mr Sandy White on 18 July 2007 over concerns that Ms Gobbo's use as a witness would lead to fallout including that the convictions of Mr Cooper and others may be impacted, and legal advice was needed to resolve that question.
547. If Mr Blayney did not learn of these serious concerns at that meeting, then it was because he was not properly informed of them by Mr O'Brien who reported to him.
548. When the decision was taken that she would not be a witness, no legal advice was sought, despite an awareness that convictions may have been improperly obtained.
549. It is open to conclude that the above matters demonstrate an awareness of Mr O'Brien that a risk to the administration of justice had arisen from the use of Ms Gobbo as a human source.

Matters related to Mr Thomas

550. It is submitted on behalf of Mr O'Brien that:
 - 550.1. Ms Gobbo was not used in the manner submitted by Counsel Assisting in respect of providing her with transcripts related to Mr Thomas⁶⁴⁰
 - 550.2. he did not know when he first met Mr Thomas that Ms Gobbo was providing the police with information about him. He only came to have that knowledge on 23 March 2006, or shortly before then⁶⁴¹
 - 550.3. Ms Gobbo was not 'informing' on Mr Thomas, although from time to time she talked to her handlers about him. This was generally not disseminated to Mr O'Brien, although there were three occasions in March 2006 when that occurred⁶⁴²
551. In relation to the first matter, this is dealt with in the reply to the submission of Mr O'Brien, Mr Bateson and Mr Ryan concerning the provision of the Thomas transcripts to Ms Gobbo.
552. In relation to the second and third matters:
 - 552.1. The submission does not grapple with the proposition that the manner in which Ms Gobbo was deployed was not confined to the mere provision of information, but included other tasking such as to encourage her purported clients to be truthful, or to assist police, or the provision of draft statements to her so that she might vet them. Consideration needs to be given to the broader notion of 'human source' which Counsel Assisting contend concerns conduct in

⁶⁴⁰ Responsive submissions of Victoria Police, Mr O'Brien, [22.20]-[22.25], [52.107]-[52.116], [52.158], [52.166]-[52.174].

⁶⁴¹ Responsive submissions of Victoria Police, Mr O'Brien, [52.155].

⁶⁴² Responsive submissions of Victoria Police, Mr O'Brien, [52.155].

connection with Ms Gobbo's provision of information to, and otherwise assisting (or attempting to assist), police.⁶⁴³

- 552.2. Mr O'Brien's diary records receipt of information from the SDU that came from Ms Gobbo on 20 February 2006, wherein Ms Gobbo had reported that Mr Mokbel had introduced him to Ms Gobbo in 2000 to 2001.
- 552.3. Mr O'Brien visited Mr Thomas for the first time on 22 February 2006. His diary records that he received information originating from Ms Gobbo on 26 February 2006 that Mr Thomas did not like Mr O'Brien, and that Mr Thomas would ring her after he had been visited by his solicitor, Mr Valos. Mr O'Brien then noted on 27 February 2006 that Mr Valos and Solicitor 2 were having a meeting to discuss Mr Thomas at 9am, and that Mr Valos had spoken to Mr Thomas the previous day but could not work out what he was saying.

⁶⁴³ Submissions of Counsel Assisting, Volume 1, Legal Principles [20], [31].

REPLY SUBMISSION: MR RYAN

Mr Ryan's awareness of Ms Gobbo's ongoing use as a human source against Mr Thomas

553. In Counsel Assisting's primary submissions, it was submitted in relation to Mr Ryan:

1067. Further, due to his involvement in the investigation and prosecution of people Mr Thomas implicated, it is open to the Commissioner to find that Mr Ryan was aware of the continued use of Ms Gobbo (who Mr Thomas understood to be his lawyer) as a human source against Mr Thomas in order to ensure that Mr Thomas continued to agree to implicate his criminal associates, in circumstances where Mr Ryan knew the matters at to [1067. 1]- [1067. 10]

554. In submissions on behalf of Mr Ryan, it was submitted that the allegation in [1067] was "oppressive and unreasonable".⁶⁴⁴

555. However, on the evidence, it is open to find that in the circumstances set out Counsel Assisting's primary submissions, Mr Ryan was indeed aware of the continued use of Ms Gobbo as a human source against Mr Thomas in order to ensure that Mr Thomas continued to agree to implicate his criminal associates.

556. An obvious example is in relation to the dealings on 9 November 2007, set out at paragraphs [2870] to [2872] of Counsel Assisting's primary submissions. Relevantly:

556.1. On 9 November 2007, Ms Gobbo reported to her handler, Mr Fox, that Mr Thomas was considering not giving evidence against Mr Orman at his committal⁶⁴⁵

556.2. Whilst Mr Ryan's evidence was that he did not recall receiving this information,⁶⁴⁶ the ICRs specifically confirm that Officer Fox did indeed pass this information on to Mr Ryan.⁶⁴⁷ In his oral evidence, Mr Fox also specifically confirmed that he had passed the information on to Mr Ryan.⁶⁴⁸

⁶⁴⁴ Victoria Police submissions Volume 1 at para 28.177 onwards. In summary, that is said to be the case because:

1. "...it is not clear what 'involvement' in the prosecution of people Mr Thomas implicated that Counsel Assisting is referring to... Mr Ryan cannot meaningfully respond..." Mr Ryan's absences from the Purana Taskforce are identified [28.178];
2. "...it is not clear how any such involvement had the consequence that Mr Ryan was aware of the 'continued use of Ms Gobbo against Mr Thomas'". Amongst other things, it is submitted that if what is meant is Ms Gobbo's involvement in process of Mr Thomas' statements being taken, there is no evidence that this constituted Victoria Police "using" Ms Gobbo "against" Mr Thomas [28.179];
3. the finding does not follow from particular knowledge it is submitted that Mr Ryan held [28.180].

⁶⁴⁵ Exhibit RC0281 ICR3838 (109), 9 November 2007, 1381, VPL.2000.0003.2967.

⁶⁴⁶ Transcript of Mr Ryan, 13 August 2019, 4515

⁶⁴⁷ Exhibit RC0281 ICR3838 (109), 9 November 2007, 1381, VPL.2000.0003.2967.

⁶⁴⁸ Transcript of Mr Fox, 13 September 2019, 6357.

557. Considering this event alone, it is difficult to see how it can be put on Mr Ryan's behalf that it is "oppressive and unreasonable" and/or there is no basis to assert that Mr Ryan knew of Ms Gobbo's continued use in the way alleged at [1067] of Counsel Assisting's submissions.

REPLY SUBMISSION: MR FLYNN

Introduction to reply submissions concerning Mr Flynn

558. This section concerns submissions made on behalf of Mr Flynn. It deals with the following matters:
- 558.1. Mr Flynn's role and responsibility
 - 558.2. The original plan to encourage Mr Cooper to cooperate with Victoria Police
 - 558.3. Mr Flynn's appreciation of Ms Gobbo's conflict of interest
 - 558.4. Whether or not there was premeditation in the use of Ms Gobbo to encourage Mr Cooper to assist police
 - 558.5. Whether or not Mr Flynn could refuse Mr Cooper's request that Ms Gobbo represent him
 - 558.6. Whether or not Mr Flynn was able to 'undermine' Mr O'Brien
 - 558.7. Issues concerning obligations of disclosure;
 - 558.8. Issues relating to Mr Milad Mokbel, Mr Horty Mokbel and Mr El Hage
 - 558.9. Matters related to Mr Cvetanovski.

Role and responsibility

559. Submissions on behalf of Mr Flynn rely to a significant degree on "delineation of roles" and "strict chain of command"⁶⁴⁹ and the fact that as Mr Flynn was reporting to Mr O'Brien, who was in turn reporting to Mr Overland, and so "*it was therefore reasonable for Mr Flynn to proceed on the basis that there was nothing improper about Victoria Police using Ms Gobbo as a human source.*"⁶⁵⁰
560. Although the submissions on behalf of Mr Flynn characterise certain submissions regarding him as engaging in "*hindsight reasoning*",⁶⁵¹ it is submitted by Counsel Assisting that Mr Flynn was aware at the relevant times that the use of Ms Gobbo as a human source posed risks of interference with the proper administration of justice. The starkest example of this was the first, Mr Cooper. In this instance, knowing there was a serious irregularity in the investigative and post arrest phase of the operation, the evidence indicates that there was a determination to press ahead with charging Mr Cooper, and thereafter fail to disclose to Mr Cooper that his lawyer, Ms Gobbo who advised him when he made the decision to cooperate, not only was an agent of police, but she had also assisted police to arrest and charge him.
561. Mr Flynn subsequently gave evidence in a number of cases, in which Mr Cooper was the witness relied upon. Disclosure of the circumstances of Ms

⁶⁴⁹ Responsive submissions of Victoria Police, [61.5].

⁶⁵⁰ Responsive submissions of Victoria Police, [63.6].

⁶⁵¹ Responsive submissions of Victoria Police, [62.16].

Gobbo's conniving role with Victoria Police to have Mr Cooper further arrested and charged and thereby be influenced to cooperate with police investigative endeavours were relevant issues which Victoria Police sought to conceal not only from the defence, but also from the Court.

562. In those situations, Mr Flynn walked a fine line. It is submitted by Counsel Assisting that an analysis of his conduct indicates that he would make redactions in his records during the ordinary disclosure process in order to avoid Ms Gobbo's role being revealed. When in the witness box if it was possible he would construe questions distinctly aimed at seeking relevant disclosure in a way to avoid it, but that he would not bring himself to lie in the witness box if he was asked a direct question.⁶⁵²
563. It is submitted on behalf of Mr Flynn that he was a candid witness.⁶⁵³ By and large Counsel Assisting agree.
564. It is submitted on behalf of Mr Flynn that he and other investigators:
- 564.1. received information from the SDU and Mr O'Brien which had not been appropriately filtered and assessed, and was therefore blind to the ethical implications of acting on the intelligence
 - 564.2. were caught up unwittingly in Ms Gobbo's 'ethical maelstrom' when the SDU failed to appropriately manage Ms Gobbo's conflicts of interest, and accordingly, that Mr Flynn did not intentionally act with impropriety.⁶⁵⁴
565. It is open to the Commissioner to find that Mr Flynn did not *set out* to intentionally act with impropriety. Mr Flynn was clearly confronted with a dilemma because of the failures of others. However, his own decisions and actions as a senior officer must still be considered and assessed.
566. Indeed, Mr Flynn himself was the senior officer to others, who took guidance and direction from him.
567. The submissions made on Mr Flynn's behalf identify his prioritisation of the protection of Ms Gobbo's identity above all else.⁶⁵⁵ It can be observed that he seemingly became inured to the notion that the administration of justice should be secondary to the concealment of Ms Gobbo's role as a human source. As is apparent from much of the evidence before the Commission, the motivations behind what in fact became deception upon the Courts varied. Clearly it was the overwhelming priority of some to protect Ms Gobbo's safety. Others however appear to have been motivated by the desire to achieve convictions, to protect convictions they had obtained, to achieve success in prosecutions yet to occur, and to protect the façade that the practises used had been beyond reproach.

⁶⁵² Submissions of Counsel Assisting, Volume 2, [2683], [2692], [2737]-[2739], [2746]-[2752], [2606].

⁶⁵³ Responsive submissions of Victoria Police, Dale Flynn, [61.13].

⁶⁵⁴ Responsive submissions of Victoria Police, Dale Flynn, [62.5].

⁶⁵⁵ Responsive submissions of Victoria Police, Dale Flynn, [63.8].

The original plan to encourage Cooper to cooperate

568. The submission on behalf of Mr Flynn takes issue with the suggestion that Mr Flynn was involved in a plan to persuade Mr Cooper to cooperate with police.⁶⁵⁶ It is suggested that Mr Flynn believed that the plan was in fact to arrange a meeting between Ms Gobbo and Mr Cooper so that their relationship would be strengthened.⁶⁵⁷

569. Issue is also taken with the proposition put in [1765] of Counsel Assisting submissions that:

Ms Gobbo began providing information to police about Mr Cooper in September 2005, immediately upon her registration as a human source. At or soon after this time, members of Victoria Police (including Messrs Peter Smith, Sandy White, Rowe, Mansell, O'Brien and Flynn) were fully aware that Mr Cooper was an ongoing client of Ms Gobbo.

570. Mr Flynn's submissions take issue with this paragraph on three bases:

570.1. that Mr Flynn did not know that Ms Gobbo had been registered

570.2. that there is no evidence that Mr Flynn knew she was providing information immediately upon registration

570.3. the ICR in the footnote reference does not identify that information was disseminated to Mr Flynn.⁶⁵⁸

571. As to the first, this was not the proposition in [1765]. The proposition was that she had been registered and that certain individuals were aware that Mr Cooper was an ongoing client of Ms Gobbo.

572. As to the second, the proposition was 'at or soon after this time' (not immediately), Mr Flynn and others were aware that Mr Cooper was an ongoing client of Ms Gobbo (not that he knew she was providing information immediately upon registration). In any case, the evidence demonstrates this:

572.1. On 30 September 2005, Mr Flynn attended a meeting along with Mr Peter Smith, Commander Purton, Inspectors Hill and Hardie, Acting Inspector O'Brien, and DSCs Burrows and Rowe at which there was discussion of human source '3838', information about Tony Mokbel, scenarios involving the introduction of undercover operatives to Mr Mokbel, information that Mr Cooper and Mr Bickley may 'roll', discussion of setting up a new taskforce, and that Mr Flynn was to discuss a tactical plan with Mr Cruze of the [REDACTED] Unit and Mr Sandy White.⁶⁵⁹

572.2. On 1 October 2005, during a meeting between the SDU and Ms Gobbo, she provided information about Mr Cooper and her belief that he respected Mr Flynn and would speak to him in the right environment. She indicated that whilst she could not counsel him to do so, she could support it. It was suggested Mr Flynn could [REDACTED]

⁶⁵⁶ Responsive submissions of Victoria Police, Dale Flynn, [64.20]-[64.29].

⁶⁵⁷ Responsive submissions of Victoria Police, Dale Flynn, [64.19].

⁶⁵⁸ Responsive submissions of Victoria Police, Dale Flynn, [64.11].

⁶⁵⁹ O'Brien diary, 30 September 2005; Purton diary, 30 September 2005; Hill diary, 30 September 2005.

meet him at the Emerald Hotel after Mr Cooper had a few drinks. Ms Gobbo indicated she could then recommend to Mr Cooper that he talked to Mr Flynn about seeking an adjournment of his plea, which would enable him to remain at large until after Christmas.⁶⁶⁰

- 572.3. On 4 October 2005, [REDACTED] diary records that he met Mr Flynn for a full briefing in relation to '3838' and the plan to recruit Mr Cooper.
- 572.4. On 5 October 2005, Mr Flynn, Ms Burrows and [REDACTED] participated in a meeting with Mr Hardie, and Mr Cruze of the [REDACTED] Unit to discuss strategy. Concern was raised for Ms Gobbo if she were to directly introduce the undercover operative. There was discussion of the possibility that [REDACTED] if he agreed to assist the following night. A decision was postponed pending the attempt to recruit Mr Cooper.⁶⁶¹
- 572.5. Following the meeting with the [REDACTED] Unit, [REDACTED] met with Mr Flynn and Ms Burrows to discuss the strategy to approach Mr Cooper. It was agreed Mr Flynn and two others would go to the hotel, then Mr Flynn would approach Mr Cooper and Ms Gobbo.⁶⁶²
- 572.6. On 7 October 2005, [REDACTED] told Superintendent Thomas of the plan to have Mr Flynn [REDACTED] run into Ms Gobbo and Mr Cooper that night.⁶⁶³ This did not proceed.⁶⁶⁴
- 572.7. On 13 October 2005, there was another [REDACTED] meeting planned. It was called off when it was learned that Mr Cooper would have someone else with him.⁶⁶⁵
573. As to the third, the footnote also cited Mr Flynn's own statement which included that his diary recorded contact with members of the SDU on 3, 5 and 7 October when he received information in relation to the Mokbels and Mr Cooper, and that whilst it was never confirmed to him, he was confident the source of information was Ms Gobbo.⁶⁶⁶
574. In evidence, Mr Flynn indicated he did not recall this early strategy to seek cooperation from Mr Cooper; however, the contemporaneous documentary evidence presents a compelling chronology indicating that there was such a plan and that Mr Flynn was a part of it.
575. Not long after this, Mr Cooper's pending plea hearing was adjourned to 1 May 2006. This removed the time-pressure and presented new opportunities for investigators.
576. As is apparent, the Operation Posse investigation plan developed to include a plan to capture Mr Cooper in the course of further offending, which would then be used to motivate him to cooperate.

[REDACTED]

⁶⁶⁶ Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 6 [34]–[36], VPL.0014.0042.0001 @.0006.

Appreciation of Ms Gobbo's conflict of interest

577. It is put on Mr Flynn's behalf that:

577.1. There is no evidence that he appreciated that Ms Gobbo had a conflict of interest between her role as a human source and Mr Cooper's legal representative.⁶⁶⁷

577.2. He did not intentionally ignore issues of conflict, rather understood they would be handled by the SDU, which was not unreasonable.⁶⁶⁸

577.3. He believed at the time that Ms Gobbo could still provide legal advice to Mr Cooper, even though she had provided the intelligence that had led to his arrest.⁶⁶⁹

577.4. He did not believe Ms Gobbo to be a police agent at any relevant time.⁶⁷⁰

577.5. He was entitled to rely upon Ms Gobbo to act in accordance with her professional obligations.⁶⁷¹

578. A member of Mr Flynn's crew, Ms Burrows, gave evidence that their crew, including Mr O'Brien, had discussed on numerous occasions amongst themselves, concerns about Ms Gobbo's registration as a human source because of her profession and how to manage her registration as a human source.⁶⁷² She was aware that Ms Gobbo was being handled by the SDU and assumed that someone of a high rank had determined they could receive and act on such information.

579. Mr Flynn makes a similar claim, which may be accepted to a degree, however it must be remembered that Mr Flynn was and is an intelligent, experienced detective with significant exposure to the criminal justice process. At relevant times Mr Flynn was a Detective Sergeant, Detective Acting Senior Sergeant or Detective Senior Sergeant. He had an understanding of the roles of police, prosecutors, defence lawyers and the courts.

580. Whilst Mr Flynn was perhaps content, at least in the initial stages of Ms Gobbo's use, to proceed on the basis that someone else had made the decision that this could be so, he knew the issue did not simply vanish. Mr Flynn knew throughout the relevant time that Mr Cooper's lawyer was actively working in the interests of Victoria Police. It is submitted that this was a conflict of such significance that it could not simply be resolved on the assumption that others had determined Victoria Police could receive and act on such information.

581. Aside from Mr Flynn generally considering what impact such an unusual scenario might have on his investigation, he had specific cause to consider these issues, for instance when:

⁶⁶⁷ Responsive submissions of Victoria Police, Dale Flynn, [64.12].

⁶⁶⁸ Responsive submissions of Victoria Police, Dale Flynn, [64.17].

⁶⁶⁹ Responsive submissions of Victoria Police, Dale Flynn, [65.32].

⁶⁷⁰ Responsive submissions of Victoria Police, Dale Flynn, [65.34].

⁶⁷¹ Responsive submissions of Victoria Police, Dale Flynn, [65.34].

⁶⁷² Exhibit 118b Statement of Detective Senior Constable Liza Emily Burrows, 10 May 2019, 9 [56]-[57].

- 581.1. as indicated above, he was aware of and participated in a plan in which Ms Gobbo, behind Mr Cooper's back, would assist police to bring about his cooperation
 - 581.2. there was contemplation that Mr Cooper would expect Ms Gobbo to advise him upon his arrest
 - 581.3. Mr Cooper and Mr Agrum asked for Ms Gobbo upon their arrest
 - 581.4. Ms Gobbo attended to advise Mr Cooper and Mr Agrum
 - 581.5. Ms Gobbo attended to advise Mr Milad Mokbel and Mr Cvetanovski.
582. The suggestions that Mr Flynn believed (at the time) that it was in any way appropriate for Ms Gobbo to counsel Mr Cooper to cooperate, or that he simply did not know that she was effectively working for Victoria Police, or that he believed it was reasonable for him to leave it to Ms Gobbo to "sort out" should be rejected. It is submitted that it was clear to Mr Flynn that Ms Gobbo was breaching her professional obligations and that Mr Cooper was not receiving independent advice.

No premeditation in the use of Ms Gobbo to advise Mr Cooper to assist police

583. It is submitted on Mr Flynn's behalf that there is no evidence that he was aware of or part of any premeditated plan to involve Ms Gobbo in advising Mr Cooper to ensure his cooperation with police.⁶⁷³
584. In this respect it is submitted on Mr Flynn's behalf that:
- 584.1. whilst Purana Investigators and the SDU were involved in the discussion of a strategy for the approach to Mr Cooper on 18 April 2006, this meeting also involved members from other covert units and there was therefore unlikely to have been any reference to the involvement of Ms Gobbo in the strategy. Rather, upon the recent discovery of the clandestine laboratory, it was a more high level discussion as to how they would best arrest him in the most incriminating position so as to best motivate him to cooperate with police against his associates.⁶⁷⁴ Counsel Assisting have not submitted, and do not submit, otherwise.
 - 584.2. as to the meeting on 19 April 2006, the evidence supports the position that the focus of the meeting was not on the use of Ms Gobbo, but on tactics based upon her information. Counsel Assisting have not submitted, and do not submit, otherwise.
585. It is further submitted on Mr Flynn's behalf that, in relation to the conversation between Ms Gobbo and members of the SDU on 20 April 2006, wherein Ms Gobbo made plain the issues with her role, and her intention to advise Mr Cooper upon his arrest, this in fact demonstrates that there was no plan among the SDU that Ms Gobbo be used to persuade Mr Cooper to cooperate or to encourage her to advise him upon arrest, and demonstrates that the SDU attempted to dissuade Ms Gobbo from attending to advise Mr Cooper. This, it

⁶⁷³ Responsive submissions of Victoria Police, Dale Flynn, [64.39].

⁶⁷⁴ Responsive submissions of Victoria Police, Dale Flynn, [64.41]-[64.54].

is said demonstrates that Mr Flynn was not part of any plan because there was no plan.⁶⁷⁵

586. Counsel Assisting submit that the evidence reveals:

586.1. Mr Flynn was aware prior to the discovery of the clandestine laboratory that the plan was to put Mr Cooper into a position where Victoria Police had the best chance to 'roll' him and obtain his assistance in relation to a broader plan to prosecute other members of the Mokbel cartel

586.2. as referred to above, Mr Flynn was aware of an early plan for Ms Gobbo to assist police to obtain cooperation from Mr Cooper

586.3. Mr Flynn was aware that Ms Gobbo was providing information for the purpose of Mr Cooper being further arrested.

587. In this way, Mr Flynn was aware of a plan involving Ms Gobbo to put Mr Cooper into a position to ensure his cooperation with police, whether or not it was initially contemplated that she would be involved in advising him to do so.

588. Further, Mr Flynn was aware that Ms Gobbo continued to represent Mr Cooper whilst she was informing on him. It was an obvious consideration that Mr Cooper might turn to her for advice when he was arrested. Clearly the SDU contemplated this and spoke to her about it as early as 9 March 2006.

589. The evidence also demonstrates that Purana investigators were not blind to this issue as the arrest approached:

589.1. During a meeting on 19 April 2006 between Messrs Sandy White, Peter Smith and Green there was discussion about evidentiary issues which might arise if Ms Gobbo advised Mr Cooper as she was not impartial, it was noted that any confessions he made in his interview may not be admissible and that it was intended that he be interviewed prior to there being a recruitment pitch. It was agreed that investigators were to be warned.⁶⁷⁶

589.2. Mr O'Brien said he may have had a conversation with the SDU about evidentiary issues, although he had no memory of it.⁶⁷⁷ He gave evidence that he expected the SDU would have a cover story for her non-attendance.⁶⁷⁸

589.3. Mr Flynn stated that he had a vague recollection of someone saying that perhaps Mr Cooper should be told that Ms Gobbo was uncontactable, which he thought was discussed prior to the day of the arrests.⁶⁷⁹

589.4. During a conversation between Ms Gobbo and the SDU on 26 April 2006, Mr Sandy White said:

- *[We] actually spoke to Dale [Flynn] about whether you should be talking to anybody with a view that, what would be the*

⁶⁷⁵ Responsive submissions of Victoria Police, Dale Flynn, [64.59]-[64.64].

⁶⁷⁶ Responsive submissions of the SDU, [353].

⁶⁷⁷ Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5739.

⁶⁷⁸ Transcript of Mr James (Jim) O'Brien, 6 September 2019, 5720.

⁶⁷⁹ Exhibit RC0538 Statement of Inspector Dale Flynn, 17 June 2019, 9 [50], VPL.0014.0042.0001 @.0008.

*evidentiary outcome if people started making confessions because you'd given them advice ... So that was a little bit murky, and we would have liked to have known the answer to that question.*⁶⁸⁰

590. Given the above, it is open to the Commissioner to find that it is unlikely that the SDU, upon being told by Ms Gobbo on the night of 20 April 2006 that she intended to advise Mr Cooper following his arrest, did not share this information with investigators who would be confronted with the situation in any case. It was not something that could ultimately be hidden.
591. It is submitted that the Commissioner should also consider what occurred following these events:
- 591.1. that on the morning of 22 April 2006, Ms Gobbo was forewarned of the arrest and told not to acknowledge SDU members at St Kilda Road⁶⁸¹
 - 591.2. when Mr Cooper requested to contact Ms Gobbo following his arrest and prior to his interview, he was permitted to do so by Mr Flynn⁶⁸²
 - 591.3. when Mr Cooper asked to contact Ms Gobbo at the point the recruitment pitch was being made to him, that was probably in the presence of Mr O'Brien, Mr Flynn and Mr Peter Smith. Mr Flynn then rang Ms Gobbo and asked her to return⁶⁸³
 - 591.4. when Ms Gobbo attended, she was spoken to in front of Mr Cooper as though she were an independent lawyer
 - 591.5. when Mr Cooper requested to speak with Ms Gobbo and Mr Flynn alone, this was permitted to occur.
592. Accepting that the situation was dynamic, what was occurring was extraordinary and called for some discussion or questioning (at the very least as between themselves, with the SDU or with Ms Gobbo) by Mr Flynn (and others) as to whether it was an appropriate course. But it appears that there was none.
593. It is submitted on behalf of Mr Flynn that one of the reasons he was not acting with impropriety when Ms Gobbo attended for the second time to advise Mr Cooper was that he was not part of any premeditated plan to use Ms Gobbo to persuade Mr Cooper to give evidence.⁶⁸⁴
594. Nonetheless, even absent a premeditated plan to involve Ms Gobbo as Mr Cooper's lawyer, in the sense that a plan was put together in the days leading up to Mr Cooper's arrest, investigators, including Mr Flynn, were certainly prepared to take advantage of Ms Gobbo's attendance once it became known that was what would occur.
595. Without obtaining legal advice as to the implications, Purana Taskforce investigators pressed ahead with Ms Gobbo's assistance. Mr Cooper was 'rolled' and later charged and convicted. The success of Operation Posse was

⁶⁸⁰ Responsive submissions of the SDU, 354; Transcript of conversation between Ms Gobbo, Mr Sandy White and Mr Green, 26 April 2006, VPL.0005.0111.0001. at .0037.

⁶⁸¹ Submissions of Counsel Assisting, Volume 2, [1830].

⁶⁸² Submissions of Counsel Assisting, Volume 2, [1831].

⁶⁸³ Submissions of Counsel Assisting, Volume 2, [1831].

⁶⁸⁴ Responsive submissions of Victoria Police, Dale Flynn, [65.27].

then largely dependent upon the cooperation of Mr Cooper. If proper process was followed, and appropriate disclosure was to occur to those charged, Operation Posse's success would be compromised.

596. The suggestion that the relevant actions and inaction did not involve impropriety is open to be rejected.

Mr Flynn could not refuse Mr Cooper's request for Ms Gobbo as legal counsel

597. It is submitted on Mr Flynn's behalf that when Mr Cooper was advised of his right to a legal practitioner and requested Ms Gobbo be contacted, that he "could hardly have done anything else," as a refusal of such a request might amount to a breach of standing orders and other legislation.⁶⁸⁵
598. It was put on his behalf that:
- 598.1. if he had not complied with this request, any confession or admission made by Mr Cooper obtained during questioning might have been inadmissible at trial⁶⁸⁶
 - 598.2. the exceptions to these obligations as set out in the section 464C of the *Crimes Act 1958* (Vic) did not include the circumstance that confronted Mr Flynn⁶⁸⁷
 - 598.3. he could not have told Mr Cooper that Ms Gobbo was a suspect, as this assumed he was aware of Ms Gobbo's conflict which was not true, and in any case he understood the SDU would handle such conflicts⁶⁸⁸
 - 598.4. he could not reveal to Mr Cooper that Ms Gobbo was a human source, or otherwise tell him that Ms Gobbo could not act for 'unspecified reasons' as that would risk her exposure as a human source."⁶⁸⁹
599. It is submitted by Counsel Assisting that the suggestion that Mr Flynn might have been sanctioned by Victoria Police if he were to take steps to prevent Ms Gobbo's representation of Mr Cooper in circumstances where she was the human source used against him should be rejected. It is ironic that reliance is placed upon concerns by Mr Flynn that evidence might be inadmissible if Mr Cooper was denied access to Ms Gobbo, when in fact the SDU were warning of such concerns if she were to advise him, which in any case would have been obvious to Mr Flynn. Submissions that Mr Flynn would not have been alive to such issues should be rejected.⁶⁹⁰
600. Mr Flynn had a number of options in the circumstances that faced him, including:
- 600.1. assuming Mr Flynn was not aware of Ms Gobbo's intention to advise Mr Cooper that day, he could have sought advice as to a basis upon which he could avoid acceding to Mr Cooper's request, between the time of Mr Cooper's initial request for Ms Gobbo to advise him (2:21pm) and

⁶⁸⁵ Responsive submissions of Victoria Police, Dale Flynn, [64.8].

⁶⁸⁶ Responsive submissions of Victoria Police, Dale Flynn, [65.10].

⁶⁸⁷ Responsive submissions of Victoria Police, Dale Flynn, [65.11].

⁶⁸⁸ Responsive submissions of Victoria Police, Dale Flynn, [65.12].

⁶⁸⁹ Responsive submissions of Victoria Police, Dale Flynn, [65.12].

⁶⁹⁰ Responsive submissions of Victoria Police, Dale Flynn, [67.11].

the time at which contact was facilitated (4:10pm), or the time at which Ms Gobbo first advised Mr Cooper at the station before any recruitment attempt (4:43pm), or the time at which Ms Gobbo attended thereafter to advise him upon the recruitment attempt and prior to his confessional interview (7:15pm)⁶⁹¹

- 600.2. he could have spoken to Ms Gobbo about the inappropriateness of her advising Mr Cooper, and at the very least requested she make herself unavailable
 - 600.3. if Ms Gobbo chose to attend to advise Mr Cooper, Mr Flynn could have and should have taken steps to prevent her representation of him, regardless of whether this would expose her as a human source, and if it did then Victoria Police could offer her protection
 - 600.4. a decision could have been taken not to interview, charge or seek the cooperation of Mr Cooper.
601. Rather, knowing that Ms Gobbo's involvement in providing advice to Mr Cooper (if not her involvement in providing the information leading to his arrest whilst she represented him) represented an extreme irregularity in the criminal justice process, Mr Flynn sought no legal advice, before, during or after this event as to his options or the ramifications as to what had occurred.
602. It is submitted that the Commissioner could find that this was a matter of particular concern, in circumstances where Ms Gobbo was also known to represent others in the Mokbel criminal cartel who were consequently arrested, and Mr Flynn went on to deal with Ms Gobbo as the ostensible legal practitioner of a number of those people.

Mr Flynn could not undermine Mr O'Brien

603. It is submitted on behalf of Mr Flynn that Mr O'Brien was present and knew Ms Gobbo attended, the chain of command determined who was in charge of any given situation, Mr O'Brien and the SDU knew more about the situation than Mr Flynn, and accordingly that it was reasonable in the circumstances for him not to question the approach taken by Mr O'Brien and the SDU.⁶⁹²
604. It is noted that Mr Flynn gave evidence that he thought he may have raised his concern about conflict with Mr O'Brien,⁶⁹³ although he did not give any evidence that he actually did so. It is submitted that it is open to the Commissioner to find that it is highly likely that Mr Flynn raised such concerns with Mr O'Brien, both in the days leading up to the arrest, and on the day of the arrest when the situation eventuated. The lack of notes of any investigator in relation to such discussion cannot be taken as evidence that there was no discussion. Investigators were well aware their notes were subject to disclosure and later scrutiny. The evidence demonstrates that the investigators were careful as to entries which might compromise Ms Gobbo's role as a human source.
605. As referred to earlier, it is open to be accepted that Mr Flynn was led astray as a result of a lack of leadership, however his ability to make decisions on his own behalf cannot be overlooked. Mr Flynn was aware that Mr Cooper's lawyer was a human source, serving the interests of Victoria Police as she

⁶⁹¹ Submissions of Counsel Assisting, Volume 2, [1831].

⁶⁹² Responsive submissions of Victoria Police, Dale Flynn, [65.18].

⁶⁹³ Responsive submissions of Victoria Police, Dale Flynn, [65.15].

purported to provide him with independent advice, whilst he faced three commercial quantity drug charges, and was under pressure to make decisions with lifelong implications. It is submitted that it is no answer for Mr Flynn to stand by and watch such events unfold without question due to “chain of command”. In this regard, it is submitted that the Commissioner might consider Mr Flynn’s own personal duty to uphold the law, however difficult that might have been, despite any submitted constraints arising from “chain of command”.

Disclosure obligations

606. It is submitted on Mr Flynn’s behalf that:

- 606.1. it is not open to find that he knew there was no intention to disclose Ms Gobbo’s role to Mr Cooper or anyone he made statements against
- 606.2. whilst Mr Flynn did not intend to reveal Ms Gobbo’s identity as a human source, he had no intention not to comply with his obligations in relation to disclosure
- 606.3. he understood that protecting Ms Gobbo’s identity was the absolute priority, referred to as the “golden rule”
- 606.4. any disclosure by Mr Flynn of Ms Gobbo’s identity would have been in conflict with his oath as a police officer to protect Ms Gobbo’s life
- 606.5. he was acting in accordance with the path laid down by his superiors.⁶⁹⁴

607. In support, it is submitted that he had no experience in dealing with a human source who was a lawyer, and that he was never provided with information, instruction or training as to how to manage issues that might arise in respect of disclosing a source identity.⁶⁹⁵

608. However, the Commissioner can be reasonably satisfied that as an experienced detective Mr Flynn well understood that the public interest claim of ‘informer privilege’ was not absolute, and that such a decision was for the courts, not for the police.⁶⁹⁶

609. Mr Flynn’s knowledge of these matters is evident in, and can be inferred from, his conduct, including in the cases of Mr Milad Mokbel, Mr Horthy Mokbel and Mr Cvetanovski.

610. From March 2007, Mr Flynn communicated on a number of occasions with the SDU to ensure that ‘court discovery issues’ in relation to Mr Milad Mokbel’s committal were managed,⁶⁹⁷ including:

- 610.1. Discussion with the SDU in relation to Ms Gobbo representing Mr Milad Mokbel in order that he plead guilty so no disclosure of material related to Mr Cooper would be required, and thereafter his dealings with Ms Gobbo as the legal representative of Mr Milad Mokbel to attempt to resolve the matter⁶⁹⁸

⁶⁹⁴ Responsive submissions of Victoria Police, Dale Flynn, [67.18].

⁶⁹⁵ Responsive submissions of Victoria Police, Dale Flynn, [67.19].

⁶⁹⁶ Transcript of Mr Dale Flynn, 30 September 2019, 6750; Transcript of Mr Dale Flynn, 1 October 2019, 6966

⁶⁹⁷ Submissions of Counsel Assisting, Volume 2, [2659]-[2740].

⁶⁹⁸ Submissions of Counsel Assisting, Volume 2, [2659]-[2662].

- 610.2. On 13 March 2007, discussion with the SDU in relation to a claim of PII over Mr Flynn's diary notes which evidenced Ms Gobbo's involvement on 22 April 2006 would involve revealing Ms Gobbo's role as a human source to the court, which was not desired, and that this might be avoided if Mr Milad Mokbel were to plead⁶⁹⁹
- 610.3. On 29 June 2007, discussion with the SDU in which it was agreed that Mr Flynn's notes would be redacted, ostensibly on the basis of relevance and threats to Ms Gobbo, not on the basis of 'informer privilege'.⁷⁰⁰
611. Between August and October 2008, Mr Flynn was involved in Victoria Police's response to a number of subpoenas in the trial of Mr Horthy Mokbel. In the first, again there was avoidance of the provision of Mr Flynn's diary notes evidencing Ms Gobbo's involvement on 22 April 2006. In the second, where Victoria Police were resisting the provision of unredacted information reports based upon information which had been supplied by Ms Gobbo about Mr Cooper. It is apparent Mr Flynn was involved in an outcome which saw the court provided with an affidavit in support of the claim of 'informer privilege' which did not inform the court that Ms Gobbo / Mr Cooper's lawyer, was the informer, but rather:
- 611.1. described the relevant informer as 'informer X'
- 611.2. raised concern that disclosure of the information would cause Mr Cooper to become aware of 'informer X'
- 611.3. described 'informer X' as male.⁷⁰¹
612. In the trial of Mr Cvetanovski in April 2011, Mr Flynn was called to a conference with the prosecutor when the defence proposed to make allegations during the trial as to Ms Gobbo's role with Mr Cooper and Victoria Police. Mr Flynn did not inform the prosecutor of Ms Gobbo's role as a human source at the time of her representation of Mr Cooper, and otherwise did not refer the matter for legal advice in order that a PII claim could be made in the event such matters were not to be disclosed.
613. The Commissioner can be reasonably satisfied that if Mr Flynn was unsure at any time about the process, he was readily able to seek the advice of a superior, or a lawyer. It is evident that even when he had access to lawyers he chose not to ask. Mr Flynn had been involved in Operation Gosford, an investigation into threats being made to Ms Gobbo. It would have been within his knowledge that if Ms Gobbo's role was exposed, whether by court process or otherwise, Ms Gobbo would be offered witness protection.
614. Mr Flynn's conduct in relation to these matters contradict suggestions that he believed the protection of Ms Gobbo was paramount to his obligation to make such PII claims if he did not wish to disclose Ms Gobbo's role. The suggestion that Mr Flynn would have acted in conflict with his oath as a police officer if he had taken steps to make a PII claim, in order to lawfully avoid disclosure, should be rejected.⁷⁰²

⁶⁹⁹ Submissions of Counsel Assisting, Volume 2, [2683].

⁷⁰⁰ Submissions of Counsel Assisting, Volume 2, [2738].

⁷⁰¹ Submissions of Counsel Assisting, Volume 2, [3003].

⁷⁰² Responsive submissions of Victoria Police, Dale Flynn, [67.18].

615. Further, the Commissioner might consider, in respect of a submission made as to the paramountcy of Ms Gobbo's safety over the risk of exposure by appropriate disclosure, that these are not the only two options. Ms Gobbo's safety and the criminal justice process could both have been protected by the third, understandably distasteful option – the withdrawal of charges.

Matters related to Milad Mokbel, Horthy Mokbel, El Hage

616. It is submitted on Mr Flynn's behalf that:

616.1. Concessions he made as to Ms Gobbo being hopelessly conflicted in relation to her representation of Mr Milad Mokbel were made with hindsight and not realised by Mr Flynn at the time⁷⁰³

616.2. Mr Flynn had a very limited understanding of conflicts and understood that Ms Gobbo and the SDU were managing any conflicts⁷⁰⁴

616.3. Mr Flynn could not raise the issue of Ms Gobbo's conflicted status with the DPP, Mr Coghlan QC, as this would have likely put her life in jeopardy, and the "golden rule" prevented him from doing so⁷⁰⁵

616.4. Mr Flynn's reference to the revelation of Ms Gobbo's role as a human source in a court "would create a lot of issues", referred to issues concerning her safety⁷⁰⁶

616.5. It is not open to find that Mr Flynn and Mr Johns acted improperly in securing agreement with defence lawyers to narrow the scope of the 12 August 2008 and the 1 September 2008 subpoena in order to avoid disclosure of Ms Gobbo's role with Mr Cooper

616.6. Mr Flynn, in the context of the matter of El Hage, in dealing with Ms Gobbo as a human source, a lawyer and a victim, believed he was conducting himself ethically and should not be held accountable for the failings of Victoria Police.⁷⁰⁷

617. Such submissions should be rejected, including for the same reasons set out in the subheadings above.

618. When Mr Flynn was asked questions concerning the hypothetical reaction of a judge who found out the true state of affairs in relation to Ms Gobbo's role in respect of Mr Cooper, he agreed that his or her wig might have hit the roof. This matter was put again further on, and Mr Flynn's response was, "*Well, we knew it would create a lot of issues, yes*". This answer came in the context of Mr Flynn having indicated that desire not to claim PII in order to prevent the courts from becoming aware of the existence of a human source was not a "*general type of process or policy*" followed by Victoria Police, rather it occurred in this case because of the unique situation of Ms Gobbo's role as a barrister. He went on to say that they had concerns about her safety, and "*also, you know the legal fraternity and not wanting to keep it, just to keep it in-house as much as possible*".

⁷⁰³ Responsive submissions of Victoria Police, Dale Flynn, [68.4].

⁷⁰⁴ Responsive submissions of Victoria Police, Dale Flynn, [68.6], [68.12].

⁷⁰⁵ Responsive submissions of Victoria Police, Dale Flynn, [68.10].

⁷⁰⁶ Responsive submissions of Victoria Police, Dale Flynn, [68.27].

⁷⁰⁷ Responsive submissions of Victoria Police, Dale Flynn, [68.33], [68.53].

619. These answers, and Mr Flynn's conduct at the relevant time, reveal an awareness that he knew he was not entitled to withhold such matters from the court if the police intended to prosecute such matters.
620. Mr Flynn was aware of the availability of witness protection should Ms Gobbo's status be revealed. He was not entitled to deny the court its role to decide whether material should be disclosed.

Matters related to Mr Cvetanovski

621. It is submitted on Mr Flynn's behalf that:
- 621.1. The matter referred to at [4159.1] of Counsel Assisting's primary submissions is not footnoted and not supported. The date is incorrect, it should be 5 May 2006, and was evidence previously referred to in Counsel Assisting primary submissions at [1851].
- 621.2. The matter referred to at [4159.2] of Counsel Assisting primary submissions is not footnoted and is disputed, as Ms Gobbo's visit to Mr Cooper on 14 May 2006 was only a welfare visit to keep him happy. This matter was also previously referred to at [1851] of Counsel Assisting primary submissions. That the visit was more than just a welfare visit is supported by an entry in Mr Flynn's diary as to his concerns over Mr Cooper's evidence in relation to financial matters and protecting his associates.
622. In relation to these matters, it is suggested on Mr Flynn's behalf that he was subject to a strict chain of command, that Mr O'Brien was completely aware of his role, and the culture of Victoria Police was not such that Mr Flynn could raise these issues over his head.
623. Even if this was to be accepted, it is to be noted that Mr O'Brien retired from Victoria Police in mid 2007. Mr Ryan acted as Officer in Charge until early 2008, when Mr Bernard Edwards took over. Mr Flynn could have raised issues with his new officer in charge at any time.
624. It is submitted on Mr Flynn's behalf that it is critical to assess his decision not to reveal Ms Gobbo's status as a human source to Mr Champion, and not to seek advice from his superiors, in light of his overarching concern that Ms Gobbo's identity as a human source would be exposed.⁷⁰⁸
625. It is submitted that it is open to the Commissioner to accept that this was Mr Flynn's overarching concern. However, it is submitted that it should not be accepted that Mr Flynn's concerns solely related to concerns over Ms Gobbo's safety. As referred to previously, if Ms Gobbo was exposed, witness protection would be available to her. By 2011, Ms Gobbo had agreed to become a witness. Mr Flynn, and others in Victoria Police, knew that the string of convictions they had achieved, and the trials of Mr Tony Mokbel which were still to occur, would be jeopardised upon such exposure.
626. It is submitted on Mr Flynn's behalf:
- 624.1 that it is not open on the evidence to find that Mr Flynn should have disclosed Ms Gobbo's role to the prosecutor or the court to allow for a

⁷⁰⁸ Responsive submissions of Victoria Police, Dale Flynn, [68.68]-[68.69].

claim of PII. Again, it is suggested that Mr Flynn did not have a full understanding of the ethical issues or consequences of Ms Gobbo's involvement with Mr Cooper⁷⁰⁹

- 624.2 that despite Ms Gobbo's ongoing relevance to these matters, Victoria Police had not sought to provide Mr Flynn with instruction or training⁷¹⁰
 - 624.3 his concession that he might have sought legal advice within the police force was made with hindsight, implying that he did not consider it at the time.
627. Such submissions should be rejected, including for the reasons set out above responding to Mr Flynn's submissions concerning Mr Cooper.
628. It is noted that despite Ms Gobbo's ongoing relevance to these matters, and despite Mr Flynn's understanding that there were "a lot of issues", he never sought instruction or training, or legal advice as to the issues he was navigating. Further, he, like all of his colleagues, had sworn an oath to uphold the law.

⁷⁰⁹ Responsive submissions of Victoria Police, Dale Flynn, [68.73].

⁷¹⁰ Responsive submissions of Victoria Police, Dale Flynn, [68.73].

REPLY SUBMISSION: MR BIGGIN

629. In this section of reply submissions deals with:

629.1. Matters concerning Mr Biggin's knowledge relating to Mr Cooper's arrest and his April 2006 audit report

629.2. Mr Biggin's knowledge of other key issues.

Matters concerning the arrest of Mr Cooper and the Audit Report

630. It is put on Mr Biggin's behalf that:

630.1. he did not become aware in February 2006 that Ms Gobbo was providing information about Mr Cooper.⁷¹¹

630.2. he did not know that Ms Gobbo's informing on Mr Cooper provided information against Mr Cooper and led to his arrest on 22 April 2006 until after the audit which he carried out in the days following the arrest.⁷¹²

630.3. he did not know at the time of Mr Cooper's arrest that Ms Gobbo had provided any information relevant to the crime, and that he only learned recently that she provided the information that led to the discovery of the clandestine laboratory.⁷¹³

630.4. he therefore did not know of any conflict of interest when Ms Gobbo attended to advise Mr Cooper on 22 April 2006.⁷¹⁴

630.5. that he was no better informed when he conducted his audit on 27 April 2006.⁷¹⁵

February 2006 meeting with Overland

631. It is submitted on Mr Biggin's behalf that he did not know that Victoria Police was using Ms Gobbo specifically for information concerning Operation Posse, although it crossed his mind that she may have been providing information used by Operation Posse.⁷¹⁶

632. Mr Biggin had known that Ms Gobbo was a human source from at least October 2005 when there was discussion of setting up a new taskforce, which would utilise information provided by her.⁷¹⁷ He was aware that the Purana Taskforce changed focus and Operation Posse commenced under the

⁷¹¹ Responsive submissions of Victoria Police, Anthony Biggin, [39.4], [45.18].

⁷¹² Responsive submissions of Victoria Police, Anthony Biggin, [39.3], [42.32].

⁷¹³ Responsive submissions of Victoria Police, Anthony Biggin, [39.4].

⁷¹⁴ Responsive submissions of Victoria Police, Anthony Biggin, [39.7], [42.43].

⁷¹⁵ Responsive submissions of Victoria Police, Anthony Biggin, [39.7], [44.3].

⁷¹⁶ Responsive submissions of Victoria Police, Anthony Biggin, [39.4], [45.18].

⁷¹⁷ Submissions of Counsel Assisting, Volume 2, [1482], [1505]; Responsive submissions of Victoria Police, Anthony Biggin, [42.6].

leadership of Mr O'Brien. Mr Biggin was aware of this operation as it was significantly resourced and units under his command provided services to it.⁷¹⁸

633. On 16 February 2006 Mr Overland spoke to Mr Biggin about the need to protect Ms Gobbo. The note made by Mr Biggin of the meeting is indeed slightly different to the way it was recorded in Counsel Assisting's primary submissions. It reads:

- *S/T A/C Overland*
- *re HS to be protected re Op Posse a priority – discuss possible tactics to manage*

634. This meeting took place in circumstances where:

634.1. Mr Biggin had units such as the State Surveillance Unit (physical surveillance), the Technical Surveillance Unit (listening devices), the Undercover Unit and the Special Projects Unit (telephone intercepts) under his Command.⁷¹⁹

634.2. Members from these units had the potential to compromise Ms Gobbo's role as a human source.

634.3. By early February 2006, consideration was being given to involving Ms Gobbo in a covert scenario, potentially in relation to an upcoming event for Mr Cooper, for which involvement she had been interviewed by a member of the UCU.⁷²⁰

634.4. On 7 February 2006, Ms Gobbo had expressed concern that her phone might be the subject of a telephone intercept.⁷²¹

634.5. On 14 February 2006, Mr Biggin had spoken to Mr Sandy White about 'DSU Ops'.

635. Mr Biggin gave the following evidence about this meeting:

635.1. he knew Ms Gobbo was a human source

635.2. Mr Overland told him that Ms Gobbo had to be protected and they were using her for Operation Posse

635.3. it crossed his mind that Ms Gobbo may have provided information in relation to Operation Posse

635.4. he knew at the time that Operation Posse was at that stage only targeting Mr Cooper

635.5. he knew at the time that Mr Cooper was already facing significant drug charges

635.6. it was unusual for an Assistant Commissioner to tell him that a particular source needed to be protected.⁷²²

636. It is submitted on behalf of Mr Biggin that there is no evidence upon which it could be found that Mr Biggin had knowledge of the consideration being given

⁷¹⁸ Submissions of Counsel Assisting, Volume 2, [1512]-[1513].

⁷¹⁹ Responsive submissions of Victoria Police, Anthony Biggin, [41.3].

⁷²⁰ Exhibit RC0281, ICR3838, 28 January 2006, 134; 2 February 2006, 141-142.

⁷²¹ Exhibit RC0281, ICR3838, 7 February 2006, 145.

⁷²² Submissions of Counsel Assisting, Volume 2, [1512]-[1513]; Transcript of Biggin, 9 October 2019, 7503-7505; Responsive submissions of Victoria Police, Anthony Biggin, [42.29].

to using Ms Gobbo in a potential covert operation, despite a member of the UCU having this knowledge.⁷²³ Counsel Assisting agree that there is no direct evidence of this, however, the context of the meeting with Mr Overland is important and needs to be considered, as it sheds light on the purpose of the meeting and why Mr Overland was instructing Mr Biggin to protect Ms Gobbo. From these matters legitimate inferences may be drawn.

637. Mr Biggin's note of the meeting with Mr Overland referred to discussion of possible tactics to manage the protection of Ms Gobbo.⁷²⁴ It is reasonable to infer that such discussion by Mr Biggin would have occurred with knowledge of the fact that Ms Gobbo was providing information and / or assistance to Operation Posse relating to Mr Cooper, as without that knowledge, it would seem difficult for Mr Biggin to put in place strategies to protect Ms Gobbo - it would seem to be necessary information.

Cooper arrest and audit

638. On around 19 April 2006, Mr Biggin was directed by Mr Moloney to conduct a 'broad overview audit' on Ms Gobbo's human source file, which involved him providing a view about whether Victoria Police should continue its relationship with Ms Gobbo.⁷²⁵
639. On 22 April 2006, Mr Biggin was present at the Purana Taskforce office when Mr Cooper was being dealt with. He understood Ms Gobbo to be present representing Mr Cooper,⁷²⁶ and had known for some months that she represented him.⁷²⁷ He also observed Ms Gobbo to be interacting with her SDU handlers.⁷²⁸ Mr Biggin said that he was present as his units would be deployed if Mr Cooper decided to cooperate and he wanted to get a feel for what the next steps of his service provision might be.⁷²⁹
640. On 24 April 2006, Mr Biggin noted that he received a briefing regarding Operation Posse Phases 4 and 5 'as per Op order and notes'. This order included detail of Ms Gobbo's provision of information about members of the Mokbel family and the numerous people working for them, including Mr Cooper, and that her information had led to the identification of the laboratory on 22 April 2006.⁷³⁰ It should be noted that Mr Biggin disputes that he received this order.⁷³¹

Awareness that Gobbo was informing on Cooper

641. It is submitted on Mr Biggin's behalf that he did not know that Ms Gobbo was providing information about Mr Cooper until very recently. This was consistent with initial evidence he gave to the Commission.⁷³²

⁷²³ Responsive submissions of Victoria Police, Anthony Biggin, [42.12], [42.24].

⁷²⁴ Submissions of Counsel Assisting, Volume 2, [1511].

⁷²⁵ Submissions of Counsel Assisting, Volume 2, [1482].

⁷²⁶ Submissions of Counsel Assisting, Volume 2, [1516].

⁷²⁷ Transcript of Biggin, 9 October 2019, 7518.

⁷²⁸ Submissions of Counsel Assisting, Volume 2, [1517].

⁷²⁹ Responsive submissions of Victoria Police, Anthony Biggin, [43.4].

⁷³⁰ Submissions of Counsel Assisting, Volume 2, [1520].

⁷³¹ Responsive submissions of Victoria Police, Anthony Biggin, [43.18].

⁷³² Responsive submissions of Victoria Police, Anthony Biggin, [45.13]; Transcript of Mr Biggin, 7518.

642. However, later in his evidence before the Commission, Mr Biggin was taken to the final ICR that he had nominated in the audit report as having been read by him. This was replete with references to information provided by Ms Gobbo about Mr Cooper. On being questioned about this, Mr Biggin accepted that he must have read Mr Cooper's name throughout the document, and therefore it would have been apparent to him that Ms Gobbo was providing information about Mr Cooper.⁷³³ This was one of numerous ICRs read by Mr Biggin.

Biggin was aware information provided by Ms Gobbo led to Mr Cooper's arrest

643. It was submitted on Mr Biggin's behalf that he did not know that Ms Gobbo had provided the information which had led to Mr Cooper's arrest.⁷³⁴

644. It is noted that in his audit report Mr Biggin referred to Ms Gobbo as a valuable asset who provided excellent information, which had *led to successful outcomes*. In light of Mr Biggin's involvement in the preceding events, and the timing of Mr Cooper's arrest and his audit, this could only be taken to refer to her having provided information leading to the arrest and cooperation of Mr Cooper.⁷³⁵

645. In assessing Mr Biggin's submissions, the Commissioner should consider:

- 645.1. His knowledge that Ms Gobbo was a human source whose information was being used in the Operation Posse investigation
- 645.2. His knowledge that the Operation Posse investigation was targeting Mr Cooper
- 645.3. The instruction to him by Mr Overland in February 2006 that Ms Gobbo was a priority who needed to be protected, in the context of his units being involved in resourcing the Operation Posse investigation
- 645.4. His evidence that it 'crossed his mind' that Ms Gobbo may have provided information in relation to Operation Posse
- 645.5. His attendance on the night of 22 April 2006, and the fact that he had been 'commissioned' by that time to conduct the audit of Ms Gobbo's file
- 645.6. His selection as the person appropriate to conduct the audit report
- 645.7. His reference to receiving a briefing in line with the Operation Order on 24 April 2006 referring to the detail of Ms Gobbo's provision of information, including against Mr Cooper, which had led to his arrest
- 645.8. His reference in the audit report to having seen Ms Gobbo interacting with handlers in an operational setting on 22 April 2006, indicating an attitude that Ms Gobbo's attendance at the police station was part of her human source role
- 645.9. His awareness by at least 27 April 2006 that Ms Gobbo had represented Mr Cooper in circumstances where she had been informing upon him

⁷³³ Submissions of Counsel Assisting, Volume 2, [1539], [1543]; Exhibit RC0281, ICR3838, Transcript of Mr Biggin 7541, 7557-7559.

⁷³⁴ Responsive submissions of Victoria Police, Anthony Biggin, [44.18].

⁷³⁵ Submissions of Counsel Assisting, Volume 2, [1542].

- 645.10. His awareness by at least 27 April 2006 that Ms Gobbo had provided information which had led to the success of Operation Posse
- 645.11. His failure to refer in the audit report to any issues arising from Ms Gobbo's profession as a lawyer, her role in having advised Mr Cooper in the days previous or even generally to the serious conflict which he must have appreciated by that time.
646. It is submitted on behalf of Mr Biggin that, as he said in his evidence, if he had known about the issues that had arisen in relation to Mr Cooper, he would have ensured that they were reported as part of his audit.⁷³⁶
647. It is submitted on behalf of Mr Biggin that his lack of shock at Ms Gobbo's involvement on 22 April 2006 is explicable by his lack of knowledge that she was providing information about Mr Cooper and his unawareness of her conflict of interest.⁷³⁷ The evidence indicates that, if not on 22 April 2006, within days Mr Biggin most certainly understood this conflict. It does not appear that he expressed shock on that occasion either.

Mr Biggin's knowledge of other key issues

648. In mid-2006 there were structural changes and the SDU came to be under Mr Biggin's command.
649. It is submitted on Mr Biggin's behalf that beyond the audit, the inspector, controller and handlers of the SDU did not advise him of key issues that arose during Ms Gobbo's registration, and that these had not been addressed by those involved in approving the registration.⁷³⁸
650. It is submitted that the Commissioner can accept that Mr Biggin, like the inspector below him and members of the SDU, was significantly under resourced.⁷³⁹
651. It is also submitted that the Commissioner can accept that there is no evidence indicating that Mr Biggin was made aware of the full picture concerning Ms Gobbo. For example, there is no evidence that Mr Sandy White or other members of the SDU reported to Mr Biggin about significant matters such as:
- 651.1. The SDU conversation with Ms Gobbo on 28 July 2006 in which Ms Gobbo reported that she had "*chucked ethics out the window and chucked legal professional privilege out the window*".⁷⁴⁰
- 651.2. The SDU conversation with Ms Gobbo on 5 June 2007 in which Ms Gobbo said that if her actions were discovered she would not be able to practise law in Australia again, and it was said by one handler that they did not "*want to keep shitting in the face of the law and the system*".⁷⁴¹
- 651.3. The SDU conversation with Ms Gobbo on 3 July 2007 in which Ms Gobbo was urged not to act in conflict and represent Mr Karam, and in which Mr Sandy White said to her that he would hate to think that

⁷³⁶ Responsive submissions of Victoria Police, Anthony Biggin, [44.09].

⁷³⁷ Responsive submissions of Victoria Police, Anthony Biggin, [43.11].

⁷³⁸ Responsive submissions of Victoria Police, Anthony Biggin, [46.12].

⁷³⁹ Responsive submissions of Victoria Police, Anthony Biggin, [46.5]-[46.11].

⁷⁴⁰ Submissions of Counsel Assisting, Volume 2, [2064].

⁷⁴¹ Submissions of Counsel Assisting, Volume 2, [2347].

'ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got a completely unbiased uncompromised defence' and to which Ms Gobbo responded that no one was ever going to find out, and that there were already 20 people in that category.⁷⁴²

652. There were, however, issues that arose during the use and management of Ms Gobbo which indicated an awareness on the part of Mr Biggin that the administration of justice might be or had been jeopardised. It is submitted that this demanded action on his part to expose those matters to scrutiny and not to conceal them.
653. These matters, addressed below in more detail, included:
- 653.1. The deficiencies in the risk assessments relating to Ms Gobbo
 - 653.2. His involvement in meetings in mid-2007 to discuss Ms Gobbo's potential use as a witness against Mr Karam
 - 653.3. His meeting with Mr Overland and Mr Sandy White on 21 September 2007
 - 653.4. His involvement in events in December 2008 and January 2009 in relation to Ms Gobbo's potential use as a witness for the Petra Taskforce
 - 653.5. His involvement in events in June 2009 in relation to Ms Gobbo's potential use as a witness for the Briars Taskforce.

Deficient Risk Assessments

654. As referred to above, it is submitted that it should have been apparent to Mr Biggin that there were significant issues involved in the use of Ms Gobbo by the time of his audit. Further, Ms Gobbo was the highest risk source known to Victoria Police and part of the reason for his audit was to assess her ongoing viability. This would necessitate an understanding of the risk involved in her ongoing use and management. The updated April 2006 risk assessment was completed shortly prior to his audit.
655. The November 2005 risk assessment included various risks to Ms Gobbo, however the risks relevant to her role in the justice system and the consequential need for control measures were not identified in circumstances where, as was known:
- 655.1. She was a criminal barrister
 - 655.2. She was acting for several members of the Mokbel criminal cartel including Tony Mokbel
 - 655.3. She was having conversations with other law enforcement members about assisting police, including from Purana and the MDID, which may be known to others
 - 655.4. Her stated motivation for assisting police was to rid herself of clients who were a drain on her, specifically those belonging to the Mokbel criminal cartel

⁷⁴² Submissions of Counsel Assisting, Volume 2, [2398].

- 655.5. She had connections to numerous lawyers acting for various crime figures at all levels
- 655.6. She had already provided credible and valuable intelligence and was well positioned to obtain valuable intelligence in relation to the Mokbel cartel
- 655.7. Her potential to provide intelligence on major organised crime figures had not yet been developed to its full potential.
656. Further, in relation to the 'Risk to Victoria Police of Exposure' it was identified that "[b]y virtue of her occupation and position, if she were compromised, her handling could come under extreme scrutiny which could bring embarrassment and criticism to Victoria Police."⁷⁴³
657. The updated April 2006 risk assessment identified that 'in her role as a barrister' Ms Gobbo had been involved in advising certain high-level criminals in making statements to assist police. It was identified that this might be perceived by those within the Mokbel group as Ms Gobbo acting contrary to their interests and posed a safety risk. There was no identification that Ms Gobbo had been engaged as a human source in relation to those 'high level criminals' which posed a risk to the administration of justice.
658. Mr Biggin's evidence was that in conducting the audit he read the November 2005 risk assessment,⁷⁴⁴ then later that he may have scanned both the November 2005 and April 2006 risk assessments. He accepted they should have been read but could not recall doing so.⁷⁴⁵
659. Risk assessments following this point, to the extent they were carried out, were contained within the SML as part of a monthly source review. The risk assessed was confined to considerations of Ms Gobbo's compromise and safety. They took no account of the various other risks required to be considered as part of an assessment including the risk of harm to Victoria Police and the risk of harm to the Public.

Mr Biggin's involvement in the meetings of 24 July 2007 and 6 August 2007

660. These matters are dealt with in further detail at [665] to [678] below.
661. As indicated in the submission on behalf of Mr Biggin, at that point in time, consideration was being given to Ms Gobbo being used as a witness. In that context there were discussions as to the need for legal advice.
662. The submission on behalf of Mr Biggin, and others, suggests that such legal advice related to the use of Ms Gobbo as a witness rather than specifically her use as a human source.
663. The discussion as to making Ms Gobbo a witness was occurring in circumstances where there was growing concern about her safety. Her role in advising Mr Cooper may be exposed during court proceedings, and there was concern that her appearance at the OPI also might expose her whether in future court proceedings or otherwise which would also put her safety at risk.

⁷⁴³Responsive submissions of the SDU, [82]; Submissions of Counsel Assisting, Volume 2, [1374]-[1387].

⁷⁴⁴ Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7549-7550.

⁷⁴⁵ Transcript of Mr Anthony (Tony) Biggin, 9 October 2019, 7551-7552.

The decision for Ms Gobbo to be a witness would involve her entering the Witness Protection Program which would mitigate this risk, which had been raised with Ms Gobbo at a meeting with the SDU on the night of 17 July 2007, in which Mr Sandy White noted '*Witness potential, Fallout if discovered – Witsec issues.*'⁷⁴⁶ The following morning Mr Sandy White updated Mr Biggin and Mr Hardie about Ms Gobbo. Mr Biggin noted that '*Witsec*' was the topic of discussion.⁷⁴⁷

664. Ordinarily there is no need for legal advice when a person becomes a witness. The need for legal advice in this case arose because of Ms Gobbo's history as a human source, which would have necessarily been exposed had she become a witness against Mr Karam as was contemplated. There would immediately have been questions raised as to how she came to copy and provide police with documents given to her by Mr Karam for safekeeping whilst she had been representing him at trial, and consequently what other information she had provided them. It was inevitable that this would have led to exposure of her role in relation to Mr Karam, and then to her role in relation to the Mokbel related investigation. Hence, there had been a discussion:

664.1. between Mr Overland, Mr O'Brien, Mr Blayney and Mr Brown on 17 July 2007 in which Mr Blayney had noted discussion about receiving a 'hypothetical legal opinion', and gave evidence that this related to his concerns about the legal complexities around using Ms Gobbo as a human source and wanting to understand the implications of it.⁷⁴⁸

664.2. between Mr O'Brien and Mr Sandy White on 18 July 2007 in which they had discussed the need to weigh her value as a witness against the '*political fallout from legal fraternity. ie. Will it impact on Cooper conviction + others*', and they had agreed on the need for '*legal advice re fallout*'.

665. Whilst Mr Biggin may not have been present at those earlier meetings, the meeting of 24 July 2007 occurred in this context. It is likely that this meeting was arranged as a result of an instruction given by Mr Overland at the 2pm Purana Taskforce Update meeting.

666. At 2:50pm, Mr Blayney spoke with Mr Biggin (who noted 'HS 3838 Witness / Witsec / future deployment'), who then spoke with Mr Sandy White (who noted 'future viability of 3838 as a witness').⁷⁴⁹

667. The meeting took place at 4:30pm and was attended by:

667.1. Mr Biggin – the Superintendent sitting over the SDU

667.2. Mr Sandy White – the Controller of Ms Gobbo

667.3. Mr Blayney and Mr Brown – Superintendents of the Crime Department

667.4. Mr O'Brien – the soon to retire head of the Purana Taskforce which had been the beneficiary of Ms Gobbo's information and assistance,

⁷⁴⁶ Submissions of Counsel Assisting, Volume 2, [2428]; Exhibit RC0292 Diary of Sandy White, 17 July 2007, 85 VPL.0100.0096.0621 @.0706.

⁷⁴⁷ Submissions of Counsel Assisting, Volume 2, [2442].

⁷⁴⁸ Submissions of Counsel Assisting, Volume 2, [2414]-[2427].

⁷⁴⁹ Submissions of Counsel Assisting, Volume 2, [2468]-[2469].

and had arrested, charged and/or convicted a number of people as a result

- 667.5. Mr Ryan – who was soon to take over as head of the Purana Taskforce, and was the head of the Petra Taskforce, and would continue to maintain an interest in that investigation
- 667.6. Mr O’Connell – who was soon to take over as head of the Petra Taskforce.
668. The Petra Taskforce had an ongoing interest in the deployment of Ms Gobbo.
669. The notes of Mr Sandy White include, “Agreed value of HS as source is outweighed by repercussions and risk to same”. Mr Sandy White indicated that this may have been intended to read, “Agreed value of source as a witness is outweighed by repercussions and risk to same.”⁷⁵⁰ This is a note which is entirely consistent with the discussion he’d had with Mr O’Brien the week before; ie the value of Ms Gobbo as a witness needs to be weighed with the fallout, and as a consequence, legal advice should be obtained if she is to be called as a witness.
670. Both Mr Blayney and Mr Biggin made notes relating to legal advice:
- 670.1. Mr Blayney – *“Legal issues – considered not appropriate at this stage – poss. explore precedents”*
- 670.2. Mr Biggin – *“Legal opinion from Judge”* (this was Mr Biggin’s final note).
671. The need for legal advice would not simply arise from Ms Gobbo becoming a witness. It is submitted that it is inevitable that such legal advice would have been about the extent to which Ms Gobbo’s role as a human source would have been protected should she become a witness, and the potential “repercussions” to other cases. These issues were already clearly appreciated by Mr O’Brien and Mr Sandy White.
672. Mr Blayney’s evidence was that he was led to believe, either by Mr Biggin or Mr Sandy White, that legal advice had previously been obtained, although his continued uneasiness was reflected in his note that they should possibly explore legal precedents.⁷⁵¹ It is submitted on behalf of Mr Biggin and others that Mr Blayney’s perception in this regard was likely as a result of his being assured upon raising concerns about the use of LPP that measures had been put in place to prevent such dissemination.⁷⁵²
673. Following this meeting, on 6 August 2007, a verbal briefing was given to Mr Overland, attended by Mr Biggin, Mr Sandy White, Mr Blayney and Mr Ryan. He was told there were three options:
- 673.1. deactivate Ms Gobbo as a human source
- 673.2. use Ms Gobbo as a witness
- 673.3. continue with ongoing management of Ms Gobbo with no tasking.⁷⁵³

⁷⁵⁰ Responsive submissions of Victoria Police, Tony Biggin, [47.12].

⁷⁵¹ Submissions of Counsel Assisting, Volume 2, [2481].

⁷⁵² Responsive submissions of Victoria Police, Tony Biggin, [47.18].

⁷⁵³ Submissions of Counsel Assisting, Volume 2, [2504].

674. It was determined that Ms Gobbo could not be deactivated as there were continuing 'court issues' in relation to the trials of the various Mokbels who had been charged. These issues related to issues of disclosure which to that point had been avoided.⁷⁵⁴
675. It was also determined that Ms Gobbo could not be a witness as her status as a human source would be compromised.⁷⁵⁵ The reason for this could only have related to "repercussions" other than risks to her safety, which would have been mitigated by entry into the Witness Protection Program. In the context of the previous discussions that must have been the inevitable exposure of her role as a human source against Mr Karam, and then to her role in relation to the Mokbel related investigation, and the risk to convictions that might ensue.
676. It is likely that with the decision not to use Ms Gobbo as a witness, the impetus for obtaining legal advice fell away.⁷⁵⁶ Such concerns should have served as a reason to obtain legal advice to ensure that there had been nothing improper or unlawful about Ms Gobbo's use, rather than as an excuse to conceal that potential.
677. It should also be noted that:
- 677.1. in December 2008 and January 2009 it was again being mooted that Ms Gobbo should be a witness for the Petra Taskforce. The reaction of Mr Biggin and others was not to call for clarity over the propriety or lawfulness of what had gone on. Rather, it was to caution against Ms Gobbo becoming a witness, again in order that her previous history as a human source not be exposed. The reasons for this included the potential for previous convictions and future prosecutions to be jeopardised, and for judicial, government or OPI inquiry into Ms Gobbo's use and management;
- 677.2. In mid-2009 it was being mooted that Ms Gobbo might become a witness for the Briars Taskforce.⁷⁵⁷ Mr Biggin received emails and participated in a meeting where there was reference to the "harm they will bring to the Organisation" if such a course was taken. Such a risk ought to have been considered in risk assessments throughout Ms Gobbo's use as a human source. It was noted that convictions would be at risk, along with the human source management program, and that any PII application would probably fail "given the circumstances surrounding HS". This indicates an understanding that these circumstances had not previously been considered by a Court.

The 21 September 2007 meeting

678. On 21 September 2007, Mr Overland met with Mr Biggin to advocate for the deployment of Ms Gobbo as a human source to [REDACTED] [REDACTED] to assist the Briars Taskforce investigation.
679. Mr Biggin and Mr Sandy White advised Mr Overland that if such a conversation became evidentiary, then Ms Gobbo would then become a witness, either

⁷⁵⁴ Submissions of Counsel Assisting, Volume 2, [2505].

⁷⁵⁵ Submissions of Counsel Assisting, Volume 2, [2505].

⁷⁵⁶ Responsive submissions of Victoria Police, Tony Biggin, [47.19].

⁷⁵⁷ Submissions of Counsel Assisting, Volume 2, [3677].

voluntarily or by compulsion, and there would be a high likelihood of Ms Gobbo's assistance to Victoria Police becoming known.⁷⁵⁸

680. This was consistent with the decision-making which had occurred on 24 July 2007 and 6 August 2007.

The 1 September 2008 subpoena

681. It is submitted on Mr Biggin's behalf that findings should not be made against him in respect of this matter for a number of reasons, including:

681.1. His lack of knowledge as to use of Ms Gobbo against Mr Cooper and the potential impropriety thereof⁷⁵⁹

681.2. The assumption that he was sufficiently aware of the Victoria Police response to the subpoena is not supported by the evidence.⁷⁶⁰

682. In relation to the first matter, as referred to in Counsel Assisting's primary submissions, and above, Mr Biggin was aware that Ms Gobbo provided information against Mr Cooper and also that she advised Mr Cooper when he was arrested and agreed to cooperate. He had also been involved in the discussions around Ms Gobbo's potential use as a witness and the repercussions of that decision. His involvement in meetings in mid-2007 demonstrated that there was a reluctance to obtain legal advice in relation to the use and propriety of Ms Gobbo as a human source.

683. Further, and most importantly, the very email which is the basis for Counsel Assisting's submission in this regard makes clear that there was concern that Mr Cooper himself would become aware of Ms Gobbo's role as the human source against him. Mr Biggin knew that Ms Gobbo had advised Mr Cooper upon his arrest.⁷⁶¹

684. In relation to the submission that Mr Biggin was not sufficiently aware of the Victoria Police response:

684.1. Mr Biggin had been aware of ongoing concerns that Ms Gobbo might be compromised through disclosure in court processes; this was a significant reason she had not been deactivated

684.2. Mr Biggin was aware of the matters referred to in [682] above

684.3. Mr Biggin was informed that counsel had been briefed by the Purana Taskforce in order to claim PII in relation to information reports concerning Mr Cooper where the intelligence had been supplied by Ms Gobbo

684.4. It is likely that if counsel had been briefed about the identity of Ms Gobbo, then Mr Sandy White would have made that known to Mr Biggin

⁷⁵⁸ Submissions of Counsel Assisting, Volume 2, [2563].

⁷⁵⁹ Responsive submissions of Victoria Police, Tony Biggin, [47.34].

⁷⁶⁰ Responsive submissions of Victoria Police, Tony Biggin, [47.35].

⁷⁶¹ Submissions of Counsel Assisting, Volume 2, [3023].

- 684.5. Mr Biggin was informed they had “a win re the PII issue” in the matter and that the information reports had been appropriately sanitised⁷⁶²
- 684.6. Mr Biggin was aware in December 2008 that there were ongoing concerns about the propriety of Ms Gobbo’s use as a human source as referred to in [677] above, which had not to that point been disclosed in court processes.
685. It is submitted that it was incumbent upon Mr Biggin to ensure that counsel engaged on behalf of Victoria Police was informed about the use of Ms Gobbo so that the court could appropriately consider the effect on the admissibility of evidence in the case before it.

⁷⁶² Responsive submissions of Victoria Police, Tony Biggin, [47.38].

REPLY SUBMISSION: MR ROWE

686. The following issues are dealt with in this reply:

- 686.1. Role and responsibility
- 686.2. Understanding of conflict in September 2005
- 686.3. Matters related to disclosure
- 686.4. Matters related to Mr Bickley's second arrest
- 686.5. Matters related to the meeting with the DPP on 14 March 2007

Role and responsibility

687. It is submitted on behalf of Mr Rowe that he never acted improperly or dishonestly.⁷⁶³
688. It is appropriate to point out that, despite the submissions of Counsel Assisting that Mr Rowe did knowingly act improperly, it can be accepted that he and other junior officers like him were put into the position of having to make difficult decisions by reason of a failure of leadership. Very senior members of the organisation were aware of the real risk that the use of Ms Gobbo would not be sanctioned by the court, yet they determined to press ahead without legal advice. Mr Rowe's superior officers, both the head of the Purana Taskforce, Mr O'Brien, and his crew leader, Mr Flynn, were aware, not only that Ms Gobbo had been informing upon clients whilst she purported to represent them, but then further advised them after they had been arrested.
689. It is submitted on behalf of Mr Rowe that he was a credible, candid and reliable witness,⁷⁶⁴ and it is accepted by Counsel Assisting that this was largely the case. Mr Rowe gave evidence both at a relatively early stage of the Commission's hearings and then he returned later in the schedule. There was a significant change in Mr Rowe's demeanour on his second appearance. He had clearly reflected upon the implications of Ms Gobbo's use as a human source by Victoria Police, including its potential effect upon the justice system.
690. It is accepted by Counsel Assisting that Mr Rowe did not set out to act with impropriety. Whatever might be said of Mr Rowe's belief as to the appropriateness of Ms Gobbo's use as a human source prior to Mr Cooper's arrest on 22 April 2006, on that day he knew that Ms Gobbo had provided the information leading to Mr Cooper's arrest, and then advised Mr Cooper upon that arrest. Mr Cooper became a prized cooperating witness and went on to make numerous statements. Mr Rowe, as a Detective Senior Constable, was the designated informant in a number of the cases, which relied upon Mr Cooper's evidence. Neither the court nor Mr Cooper were ever informed that his lawyer was the human source used against him.
691. Of course Mr Rowe was a relatively junior detective put into a difficult position because of the failure of his superiors, but it cannot be ignored that as a

⁷⁶³ Responsive submissions of Victoria Police, Paul Rowe, [54.9].

⁷⁶⁴ Responsive submissions of Victoria Police, Paul Rowe, [55.1].

criminal investigator and an informant he had significant responsibilities in the criminal justice system, and he must carry responsibility for his decisions.

692. Mr Rowe, like others, seemingly became inured to the notion that any potential risks to the administration of justice should be secondary to the concealment of Ms Gobbo's role as a human source, even if it is accepted by the Commissioner that the concealment was motivated by concern for Ms Gobbo's safety.

Understanding of conflict in September 2005

693. It is submitted on behalf of Mr Rowe that it is not open to find that he 'well-understood' that a barrister could not act in conflict between duties owed to his or her client and a role played on behalf of Victoria Police to provide information against that person with a view to his prosecution.⁷⁶⁵
694. In this regard, it is put that Mr Rowe did not understand that Ms Gobbo might be constrained in what non-privileged information she could provide, and in fact strongly believed Victoria Police were duty bound to seek out such information.⁷⁶⁶
695. It is accepted that Mr Rowe:
- 695.1. was significantly less experienced than others involved in dealings with Ms Gobbo around this time
 - 695.2. did not intend that Ms Gobbo would supply what he considered was privileged information
 - 695.3. did not necessarily believe there was anything wrong in Ms Gobbo providing police with information about ongoing crimes.
696. It does not follow, however, from the matters set out above that Mr Rowe thought there could be no issue with Ms Gobbo continuing to represent a client upon whom she had informed.
697. In evidence Mr Rowe was asked about such matters. He indicated that he was aware of obvious risks, including conflict of interest, in using Ms Gobbo as a human source. He referred twice in his evidence to occasions on which he and others had turned their minds to whether such a thing could be done. It was considered that if it were to be done, then Ms Gobbo would have to be managed by the SDU. His evidence was to the effect that he considered the SDU would deal with Ms Gobbo about such issues, and any ethical breaches that occurred were matters for Ms Gobbo. In exploring the issue of conflict, Mr Rowe accepted that Ms Gobbo could not represent two people with conflicting interests. When it was put to him that this would apply to Ms Gobbo working for the police and representing a client at the same time, he balked, indicating the police had many other considerations, pointing to the crime that would otherwise occur. At least when he initially gave evidence, Mr Rowe appeared still to see it as unfathomable that a conflict of interest would get in the way of

⁷⁶⁵ Responsive submissions of Victoria Police, Paul Rowe, [57.5].

⁷⁶⁶ Responsive submissions of Victoria Police, Paul Rowe, [57.17].

Victoria Police receiving information from Ms Gobbo which would assist them to investigate criminal offending.⁷⁶⁷

698. That is not to say Mr Rowe did not appreciate the conflict of interest. It speaks to Mr Rowe's prioritising of fighting crime, and perhaps a lack of thought or concern for the rights of the clients Ms Gobbo continued to represent.

Matters related to disclosure

699. Various submissions are made on behalf of Mr Rowe in relation to disclosure, including that:

- 699.1. In relation to the subsequent non-disclosure of Ms Gobbo's role as a human source, it is accepted there were shortcomings, however there was no deliberate or conscious wrongdoing in his conduct.⁷⁶⁸
- 699.2. Because of the extreme risk to Ms Gobbo and his understanding of the need to protect all sources, it did not occur to him that Ms Gobbo's role might be disclosable.⁷⁶⁹
- 699.3. At the time he was at the Purana Taskforce, Mr Rowe did not appreciate that considerations of a fair trial might require the disclosure of a human source's identity.⁷⁷⁰
- 699.4. He believed the SDU was handling issues that arose from Ms Gobbo's role as a practising barrister, and that it was not his obligation to intervene and tell Ms Gobbo that her actions might need to be disclosed if she continued acting for a person arrested as a consequence of her informing.⁷⁷¹
- 699.5. Issues of disclosure did not occur to him in the context of ensuring evidence was admissible as he believed evidence had been collected separately after Ms Gobbo had pointed them in a 'certain direction'.⁷⁷²

700. Mr Rowe indicated at various times in the course of his evidence that when it was first proposed that Ms Gobbo be a human source there was contemplation of whether the scenario of using a legal practitioner as a human source was even possible:

- 700.1. In the context of questioning as to whether investigators had been warned about Ms Gobbo advising Mr Cooper following his arrest, and whether the issue had filtered through to Mr Rowe, he responded

Well we were aware of it. I mean we were aware of it at the end of 05 when she's you know when people are turning their minds to can this even be done.

- 700.2. Earlier when he was being questioned over whether he had been involved in any discussion or contemplation of conflict, privilege or confidentiality issues prior to the SDU becoming involved, part of Mr Rowe's response was:

⁷⁶⁷ Transcript of Mr Rowe, 1 July 2019, 3276-3278, 3303-3307.

⁷⁶⁸ Responsive submissions of Victoria Police, Paul Rowe, [58.10].

⁷⁶⁹ Responsive submissions of Victoria Police, Paul Rowe, [58.72].

⁷⁷⁰ Responsive submissions of Victoria Police, Paul Rowe, [58.75].

⁷⁷¹ Responsive submissions of Victoria Police, Paul Rowe, [58.79].

⁷⁷² Responsive submissions of Victoria Police, Paul Rowe, [58.81].

*Yeah, we had - and I don't know whether - I don't know who is involved in this conversation, but I know we - I discussed, and I think it might have been with Steve, about, very early stages, whether - you know, once she sort of indicated that this was something that she was at least considering, I think straight away we sort of - it's not like we had to articulate it to each other. She was a barrister and she was Nicola Gobbo. We knew the issues around it and I think the extent of the conversation was, maybe, **"Can this be done? If it's going to be done, she's got to be managed by the SDU."***

- 700.3. Notably, Ms Burrows, also a relatively inexperienced Detective Senior Constable at the time, likewise spoke of such concerns being raised in her statement to the Commission:

I recall that there were concerns about Ms Gobbo's registration as a human source because of her profession and concerns for her personal safety. I also recall discussions about how to manage her registration as a human source. I do recall that those concerns were discussed amongst our crew and D/S/S O'Brien and that those concerns were discussed on numerous occasions, including immediately after the initial meeting between D/S Mansell, D/S/C Rowe and Ms Gobbo.

701. It is not surprising that even junior officers would be pondering such questions, given that it was anticipated that Ms Gobbo, who represented Mr Mokbel, the target of Operation Quills, would provide investigators with information and then potentially deal with them in her capacity as a lawyer. The recording of such matters in police diaries was a complex issue and would require some subterfuge if the MDID were to handle Ms Gobbo as a source. The risk of discovery of Ms Gobbo's role as a result of lawful disclosure obligations would be high. That risk all but disappeared if the SDU became the intermediary for the information. Those senior to Mr Rowe clearly stepped their way through this process.
702. Mr Rowe did come to understand that Ms Gobbo was providing information to police about those whom she continued to represent.
703. Assuming Mr Rowe thought it legitimate that Ms Gobbo could continue to act for clients in matters unconnected to her informing, he could not have failed to appreciate that what occurred with Ms Gobbo upon Mr Cooper's arrest was highly irregular, and that the fact that Ms Gobbo was a human source in the case became highly relevant.
704. In 2007, members of the Purana Taskforce were involved in discussions with the SDU over how they might avoid disclosing Ms Gobbo's role in advising Mr Cooper on 22 April 2006. One way involved members of the Purana Taskforce dealing with Ms Gobbo as Milad Mokbel's lawyer in an attempt to negotiate a plea deal.⁷⁷³ Mr Rowe became aware Ms Gobbo was advising Milad Mokbel through this period.⁷⁷⁴

⁷⁷³ Submissions of Counsel Assisting, Volume 2, [2659]-[2662].

⁷⁷⁴ Submissions of Counsel Assisting, Volume 2, [2668]-[2671], [2724].

705. In case a plea deal could not be reached, there were discussions as to what to do in relation to diary notes, particularly those of Mr Flynn, which revealed Ms Gobbo's attendance. Mr Sandy White and Mr Flynn discussed the difficulty associated with a claim of PII, which would have the effect of revealing Ms Gobbo's status to the court, which they wished to avoid. Mr Rowe was asked whether he had any issues with denying such information to the court. He responded that it was an early stage discussion and that if it got to the point where a decision had to be made about revealing a source or claiming PII, "you've got no choice".⁷⁷⁵ Effectively this was an acknowledgment by Mr Rowe that it was for the court to make determinations about such matters, not the police.
706. On 29 June 2007, shortly prior to the committal of Milad Mokbel and other co-accused, all relevant investigators, including Mr Rowe, attended a meeting with the SDU to discuss disclosure concerns. It was agreed that Mr Flynn's notes would be redacted and not disclosed to the defence. This was to be done ostensibly for reasons of relevance and threats which had been made to Ms Gobbo. There would be no PII claim made as that would require the court to be informed that Ms Gobbo was a human source.⁷⁷⁶
707. It is open to conclude that Mr Rowe would have been aware that the plan involved a deliberate subterfuge to avoid disclosing information to the court, contrary to disclosure obligations on the part of police investigators.

Matters related to Mr Bickley's second arrest

708. It is submitted on behalf of Mr Rowe that:
- 708.1. The submission made by Counsel Assisting that there was clearly an acceptance by the SDU and investigators that Ms Gobbo would represent Mr Bickley following his arrest is not open on the evidence.⁷⁷⁷
- 708.2. He was put in an impossible position when Ms Gobbo answered the call from Mr Bickley because the SDU discussion of 9 June 2006 had not been disclosed to him and therefore he did not perpetuate a ruse.⁷⁷⁸
709. It is noted that at a meeting on 8 June 2006 between the SDU and investigators, including Mr Rowe, it had been agreed that Ms Gobbo should not become involved in the arrest and that she should make herself unavailable.⁷⁷⁹
710. However, following a discussion on 9 June 2006, the stated understanding between Mr Sandy White, Mr Green and Ms Gobbo was that she would advise him, and that she would seek to do so over the telephone to avoid issues that might arise if she attended the police station. Ms Gobbo also spoke of fears that Mr Bickley might reveal her involvement in having passed a phone between he and Mr Cooper to other investigators unaware of her role.⁷⁸⁰

⁷⁷⁵ Submissions of Counsel Assisting, Volume 2, [2685]-[2686].

⁷⁷⁶ Submissions of Counsel Assisting, Volume 2, [2737]-[2738].

⁷⁷⁷ Responsive submissions of Victoria Police, Paul Rowe, [59.12].

⁷⁷⁸ Responsive submissions of Victoria Police, Paul Rowe, [59.34].

⁷⁷⁹ Submissions of Counsel Assisting, Volume 2, [1608].

⁷⁸⁰ Submissions of Counsel Assisting, Volume 2, [1610]; Exhibit RC0281 ICR3838, 324, VPL.2000.0003.1587 @.1910.

711. There is no direct evidence that this information was passed on by the SDU to investigators. Clearly it was information which would be known to be of concern to investigators; Mr O'Brien and Mr Sandy White had been troubled following Ms Gobbo's attendance to advise Mr Cooper, and the issue was of concern enough to be raised during the meeting on 8 June 2006. It seems inexplicable why the SDU would not have shared this information.
712. Following Mr Bickley's arrest on 13 June 2006, the SDU handler received an update from Mr O'Brien. Following this, the handler rang Ms Gobbo to inform her that she should expect a call from Mr Bickley soon.⁷⁸¹
713. Regardless of whether Mr Rowe had been informed that Ms Gobbo was to be involved in advising Mr Bickley, when Mr Rowe facilitated Mr Bickley's phone call to Ms Gobbo at the arrest scene, and Ms Gobbo answered and spoke to him, Mr Rowe immediately understood Ms Gobbo would represent Mr Bickley. Mr Rowe thereafter facilitated two further phone calls between Mr Bickley and Ms Gobbo back at the police station.⁷⁸²
714. It is to be noted that Mr Rowe had arrested Mr Bickley for the offence of conspiring to traffick a large commercial quantity of a drug of dependence. This carried a maximum penalty of life imprisonment. Mr Rowe was aware that Mr Bickley was to be advised by someone who had been involved in providing information and assistance to police against his interests, and someone who had advised the person who was to be the witness against him, Mr Cooper.
715. There does not appear to have been any action taken by Mr Rowe following the phone call to speak to Ms Gobbo or any superior about this obvious issue and what could, or should, be done about it. Nor, if it be the case that investigators were not informed of Ms Gobbo's intention to advise Mr Bickley prior to her answering the phone, is there any evidence of any investigator at least querying the SDU about why Ms Gobbo had advised Mr Bickley when, they had planned that she should be unavailable.
716. It is submitted that in circumstances where:
- 716.1. Mr Bickley had been arrested for a very serious offence
- 716.2. Ms Gobbo was pretending to be an independent legal advisor when in fact she was a police agent
- 716.3. Mr Rowe knew this to be the case,
- even accepting that Mr Rowe may not have expected that Ms Gobbo to be on the end of the phone, the description of the discussion between Ms Gobbo and Mr Rowe as a ruse is apt.

Matters related to the meeting with the DPP on 14 March 2007

717. It is submitted on behalf of Mr Rowe that:
- 717.1. after the meeting with the DPP on 14 March 2007 in which Ms Gobbo's conflict of interest was discussed, Mr Rowe acted appropriately in

⁷⁸¹ Submissions of Counsel Assisting, Volume 2, [1620].

⁷⁸² Submissions of Counsel Assisting, Volume 2, [1621].

following up the matter with the OPP solicitor on 28 and 29 March 2007, in the manner referred to in those submissions.⁷⁸³

- 717.2. it is unfair to criticise Mr Rowe for not disclosing Ms Gobbo's human source role to Mr Coghlan.⁷⁸⁴
- 717.3. the proposed finding that Mr Flynn and Mr Rowe would have been aware that they could have also asked the DPP to take steps to ensure that Milad Mokbel had independent legal representation is not open.⁷⁸⁵ It is noted that this was not the proposed finding. The proposed finding was that Mr Flynn and Mr Rowe would have been aware they could have raised the question of Ms Gobbo's conflict with Milad Mokbel with Mr Coghlan, who would then have been able to take steps to ensure Milad Mokbel had independent legal representation.⁷⁸⁶
- 717.4. the circumstances of Ms Gobbo's involvement with Mr Bickley and Milad Mokbel were different, thus there may have been a different approach to dealing with the issue.⁷⁸⁷
718. It is accepted that Mr Rowe appropriately followed up with the OPP about Ms Gobbo's conflict in relation to Mr Bickley in late March 2007.
719. Mr Rowe said in his email to the OPP in his enquiry:
- It's my understanding that the onus would be on Nicola GOBBO to excuse herself, is this correct? And if she doesn't, is it the case that there would be very little we could do? **The only reason I ask is [Bickley] has been very determined in wanting to use her.***
720. It is unlikely that Mr Bickley's determination was the only reason Mr Rowe was making the enquiry. The Purana Taskforce had been endeavouring to remove Ms Gobbo from involvement with Mr Bickley. Mr O'Brien in January 2007 had personally been involved in making arrangements for Mr Bickley to be advised by an independent solicitor.⁷⁸⁸ Whether this was for reasons of not wanting to have an informer actively represent Mr Bickley in court or for another reason is not clear.
721. It is submitted that Mr Rowe knew it would be wrong for Ms Gobbo to act for Mr Bickley, but not merely for the reason identified by Mr Coghlan.
722. It is not accepted that Mr Rowe's conduct cannot otherwise be criticised, given the other concerning issues arising from this matter:
- 722.1. The conflict was only raised in the first place by the OPP solicitor.⁷⁸⁹
- 722.2. Mr Rowe was in possession of information that to his knowledge Mr Coghlan did not have, and which meant that the consequences of Ms Gobbo acting for Mr Bickley were potentially more significant than Mr Coghlan could have considered.

⁷⁸³ Responsive submissions of Victoria Police, Paul Rowe, [59.48].

⁷⁸⁴ Responsive submissions of Victoria Police, Paul Rowe, [59.49].

⁷⁸⁵ Responsive submissions of Victoria Police, Paul Rowe, [60.14].

⁷⁸⁶ Submissions of Counsel Assisting, Volume 2, [2689].

⁷⁸⁷ Responsive submissions of Victoria Police, Paul Rowe, [60.20].

⁷⁸⁸ Submissions of Counsel Assisting, Volume 2, [2618].

⁷⁸⁹ Submissions of Counsel Assisting, Volume 2, [2626].

- 722.3. He was now seized of knowledge, if he did not already have it, that issues of conflict were of concern to Mr Coghlan, and he could ask the OPP / Mr Coghlan questions about dealing with conflicts of interest.
- 722.4. Mr Coghlan had indicated that Mr Bickley should be reminded that if he did not follow through and cooperate as a witness, he would be charged in relation to the matters for which he was arrested on 13 June 2006. No mention was made by Mr Rowe or Mr Flynn as to the concerning involvement of Ms Gobbo in that matter, either as having advised Mr Bickley as his purported lawyer when he agreed to cooperate, or as having informed upon him in the first place.⁷⁹⁰
- 722.5. Mr Coghlan had referred to Ms Gobbo's conflict with Mr Bickley arising in the context of her representation of Mr Cooper in the Milad Mokbel matter, referring to the Operation Posse charges.⁷⁹¹ It could not have been clearer to Mr Rowe and Mr Flynn that Ms Gobbo's representation of Milad Mokbel would not be tolerated by Mr Coghlan or the courts.
- 722.6. Members of the Purana Taskforce, at that time, were dealing with Ms Gobbo as the legal representative of Milad Mokbel. Mr Rowe was the informant in that matter. Between 8 and 12 March 2007 he was informed in an email, if he didn't know already, that Ms Gobbo was negotiating a deal between Milad Mokbel and the Purana Taskforce.⁷⁹² His evidence was that he became aware Ms Gobbo was acting for Milad Mokbel as a favour for a short period of time. He did not raise any concerns as to this issue either with his superiors or the OPP / DPP.⁷⁹³
723. Whilst it may be accepted that realistically it would have been difficult for Mr Rowe to take the step of disclosing Ms Gobbo's other role, especially with his superior Mr Flynn present, and without having discussed it first, it is submitted that he had an obligation to do something rather than nothing, whether it be raising questions of his line superiors, or alternatively outside his line of authority. He chose not to.
724. In the absence of such questioning, with the knowledge that he had, Mr Rowe's evidence as to his having confidence in those above him and in the SDU dealing with issues of conflict in relation to Milad Mokbel should be rejected.
725. It is submitted that Mr Rowe, and other investigators in the Purana Taskforce were content that the Purana Taskforce would deal with Ms Gobbo as Milad Mokbel's legal representative in circumstances where it would not be apparent to others, such as the DPP, who would have taken steps to address the conflict of interest.

⁷⁹⁰ Submissions of Counsel Assisting, Volume 2, [2628].

⁷⁹¹ Submissions of Counsel Assisting, Volume 2, [2627].

⁷⁹² Submissions of Counsel Assisting, Volume 2, [2668].

⁷⁹³ Submissions of Counsel Assisting, Volume 2, [2670].

REPLY SUBMISSION: MR MOLONEY

726. The following issues are dealt with in this reply:

- 726.1. Role and Responsibility
- 726.2. The SWOT analysis.

Role and Responsibility

727. It is submitted on behalf of Mr Moloney that:

- 727.1. it is not open to find that in his role as Commander of the Intelligence and Covert Support (I&CS) Department he was responsible for, or had responsibilities that included the oversight of the recruitment of Ms Gobbo as a human source.⁷⁹⁴
- 727.2. Mr Moloney's lack of knowledge is consistent with the Chief Commissioner's Instruction, which made no provision for his involvement in the registration of human sources.⁷⁹⁵
- 727.3. Mr Moloney had limited knowledge of Ms Gobbo's handling and management as a source.⁷⁹⁶
- 727.4. an instruction received by him from Mr Overland in July 2005 that he was not to be briefed on two "complex and sensitive" investigations that I&CS were providing services to, carried through to prevent Mr Moloney from learning the true extent of Ms Gobbo's role as a human source, especially in relation to the Purana Taskforce.⁷⁹⁷
- 727.5. his being told by Mr Overland in October 2005 that Ms Gobbo's registration needed to be managed "carefully" or "closely" related only to her welfare but not her tasking.⁷⁹⁸

728. It is submitted by Counsel Assisting that in circumstances in which:

- 728.1. Mr Moloney knew Ms Gobbo was in the process of being formally registered⁷⁹⁹
- 728.2. Mr Moloney knew Ms Gobbo was a lawyer⁸⁰⁰
- 728.3. Mr Moloney knew at least that Ms Gobbo represented organised crime figures⁸⁰¹
- 728.4. it was proposed, and eventuated, that Ms Gobbo was used as a human source against organised crime figures

⁷⁹⁴ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.2].

⁷⁹⁵ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.3].

⁷⁹⁶ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.4].

⁷⁹⁷ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.8]-[56.10].

⁷⁹⁸ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.14].

⁷⁹⁹ Transcript of Dannye Moloney, 20 February 2020, 14563.

⁸⁰⁰ Transcript of Dannye Moloney, 20 February 2020, 14563.

⁸⁰¹ Transcript of Dannye Moloney, 20 February 2020, 14563.

- 728.5. Mr Moloney knew that human source management without such complications was endowed with risk⁸⁰²
- 728.6. Mr Moloney must have known that the registration of a barrister, let alone in these circumstances, was novel and brought with it risks that had not previously been considered by Victoria Police
- 728.7. Mr Moloney was in charge of the Department that was to formally register Ms Gobbo for this purpose⁸⁰³
- 728.8. Mr Moloney was in charge of the Department that was responsible for human source management policy⁸⁰⁴

it is open to the Commissioner to find that Mr Moloney had a responsibility to ensure that the registration and use of Ms Gobbo was lawful and proper. Given the novel circumstances that were presented in this case, Mr Moloney was obliged to ensure appropriate steps had been taken in relation to the considerations of risk around Ms Gobbo's handing and management.

The SWOT analysis

- 729. It is submitted on behalf of Mr Moloney that it is not open to find that he would have understood that Ms Gobbo's role as a human source had not been disclosed in previous court proceedings, for reasons including that:
 - 729.1. He had been a member of the Petra Steering Committee for less than two months and had learned after joining in November 2008 that investigators were considering using Ms Gobbo as a witness.⁸⁰⁵
 - 729.2. The evidence shows that Mr Moloney had possession of the SWOT analysis for a short time and therefore it cannot be inferred that he had adequate time to consider its contents in the detail assumed by Counsel Assisting.⁸⁰⁶
- 730. As to the first matter, prior to becoming Assistant Commissioner of Crime and joining the Petra Steering Committee, Mr Moloney had been the head of I&CS, the department within which the SDU was situated. He had awareness of the use of Ms Gobbo as a human source since 2005.
- 731. As to the second matter, in considering the claim made by Counsel for Mr Moloney that the "evidence shows" that he only had possession of the SWOT analysis for a short time, and thus it cannot be inferred that he had time to adequately consider its content, regard should be had of the following matters:
 - 731.1. The basis for this submission is that although the SWOT analysis had arrived in Mr Moloney's office shortly after 9am, given that his diary for this period is missing, *it may be* that he only read the document shortly prior to 3:30pm when he left his office to deliver it to Mr Overland.⁸⁰⁷ This does not *show* that Mr Moloney did not have adequate time to consider the document.

⁸⁰² Transcript of Dannye Moloney, 20 February 2020, 14572.

⁸⁰³ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.4].

⁸⁰⁴ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [56.4].

⁸⁰⁵ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.3].

⁸⁰⁶ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.2], [58.4].

⁸⁰⁷ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.5].

- 731.2. Mr Moloney gave evidence that it was his conversation with Mr Biggin on 30 December 2008 which was the genesis of the document. On that occasion he told Mr Biggin that Ms Gobbo would be signing a statement. Mr Biggin told him of concerns held by the SDU about the consequences of such a decision. It was decided between them that a document should be prepared dealing with the risks associated with Ms Gobbo becoming a witness.⁸⁰⁸
- 731.3. The content of the Biggin Issue Cover Sheet and SWOT analysis, which was only four pages in length, with the SWOT analysis in simple dot point form, in the submission of Counsel Assisting, contained matters of very serious concern.⁸⁰⁹
- 731.4. That Mr Moloney obviously appreciated that the contents were serious enough to elevate to Mr Overland and the Steering Committee for consideration.
- 731.5. Mr Moloney's statement which reads:

I have sighted a briefing note dated 31 December 2008 and prepared by Officer Black and which was elevated to me by Superintendent Biggin. I recall seeing this document. When I read the document, I thought it should be provided to the Steering Committee for consideration.

Superintendent Biggin had a practice of giving me a verbal briefing about significant matters before they were elevated to me. While I have no independent memory of such a discussion, I think it is highly likely that Superintendent Biggin spoke to me about the briefing note before sending it to me.

On 5 January 2009, I sent the briefing note to DC Overland, with the action "Petra Steering Committee – Consideration". I did so because the briefing note makes clear that the SDU had concerns about the transition and I considered it appropriate for the Steering Committee to be informed of, and to consider, those views.⁸¹⁰

- 731.6. In evidence Mr Moloney said that he thought that the conversation he had which precipitated the SWOT analysis may be the conversation with Mr Biggin referred to in his statement.⁸¹¹
- 731.7. Mr Moloney accepted that some of the issues raised in the document are very, very concerning.⁸¹²
- 731.8. Mr Moloney accepted that Ms Gobbo was a particularly extraordinary human source, who was a criminal defence lawyer, which presented a huge organisational risk for Victoria Police if that was discovered.⁸¹³

⁸⁰⁸ Submissions of Counsel Assisting, Volume 2, [3457]-[3458].

⁸⁰⁹ Exhibit RC1084 Mr Simon Overland Petra Taskforce Folder 2, 2 January 2009, 530-535, VPL.0100.0129.0001 @.0530-0535.

⁸¹⁰ Exhibit RC1629 Statement of Mr Danye Moloney, 5 October 2019, 16-17 [99]-[100], VPL.0014.0070.0001 @.0016-.0017.

⁸¹¹ Transcript of Moloney, 20 February 2020, 14601-14602.

⁸¹² Transcript of Moloney, 20 February 2020, 14602.

⁸¹³ Transcript of Moloney, 20 February 2020, 14603.

- 731.9. Mr Moloney's evidence that he did not regard it as his responsibility to follow up issues in the material, it was the responsibility of Mr Overland.⁸¹⁴
- 731.10. Mr Moloney did not suggest in his statement or in giving evidence that he did not have adequate time to adequately consider the contents of the document. When he was asked if he followed up with Mr Biggin about the concerns raised in the document as to unsafe verdicts and the Mokbel prosecution he did not claim that he was unaware of those matters. The reason for not following this matter up was given as it being Mr Overland's responsibility, not his.⁸¹⁵
732. It is further submitted on behalf of Mr Moloney that:
- 732.1. There is no evidence that Mr Moloney was complicit in, or aware of, any deliberate decision not to provide the SWOT file to Mr Ashton which was inconsistent with his decision to elevate the file to the Petra Steering Committee.⁸¹⁶
- 732.2. It was reasonable to expect Mr Overland to have followed up on issues raised by the SWOT analysis given his rank, his superior knowledge of the Petra and Purana investigations and knowledge of Ms Gobbo's use as a human source.⁸¹⁷
- 732.3. He was not aware of any attempt to protect Ms Gobbo's historical relationship with the SDU from being discovered in subsequent court proceedings and believed her history would need to be disclosed.⁸¹⁸
733. As to the first matter, whilst it might be that Mr Moloney initially intended that the document be provided to all of the committee, it seems that when the meeting occurred Mr Moloney was prepared for the situation to play out in such a way that Mr Ashton was not alerted to matters contained in the SWOT analysis which would have provoked the interest of the OPI.⁸¹⁹ In these circumstances, it is open to find that Mr Moloney at least acquiesced in a decision by Mr Overland not to provide that information to Mr Ashton, in the same manner that he (Mr Moloney) failed to otherwise deal with issues raised in the document which he considered to be very, very concerning.
734. As to the second matter, if it is accepted that Mr Moloney read the SWOT analysis, as is his evidence, he could not have failed to understand that it raised serious issues that required actioning. Amongst the matters raised was the suggestion that if Ms Gobbo's role as a human source was disclosed, convictions which had been achieved may be overturned. This could only have been the case if there had been irregularity in the process of obtaining the conviction.
735. Mr Moloney was the Assistant Commissioner of Crime, the head of the department responsible for the prosecution of Mr Dale, the department which brought the prosecutions which might have been improperly achieved, and the

⁸¹⁴ Transcript of Moloney, 20 February 2020, 14616.

⁸¹⁵ Transcript of Moloney, 20 February 2020, 14601-14620.

⁸¹⁶ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.17].

⁸¹⁷ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.13].

⁸¹⁸ Responsive submissions of Victoria Police, Tranche 2, Dannye Moloney, [58.3].

⁸¹⁹ Submissions of Counsel Assisting, Volume 2, [3511]-[3515].

department prosecuting Mr Mokbel whose case was still on foot. He had a sworn duty to follow up on such matters.

736. As to the third matter, if Mr Moloney did not understand how Victoria Police was planning to guard against the risk of Ms Gobbo's exposure when she first signed her statement on 7 January 2009, this must have become apparent to him in mid-2009. At this time, the SDU raised similar concerns to those in the SWOT analysis when it was proposed that Ms Gobbo might become a witness for the Briars Taskforce. In raising these concerns, they explained that the avoidance of disclosure which was possible with the Petra Taskforce prosecution, could not be achieved in relation to a Briars Taskforce prosecution in which Ms Gobbo was a proposed witness, as her deployment had been handled differently.
737. In relation to these matters, the evidence before the Commission indicates that:
- 737.1. On 3 June 2009, Mr Black and Mr Peter Smith met with Mr Porter, Mr Iddles, Mr Waddell and Mr Glow. The SDU members made clear that there should be full consideration of the ramifications of a decision to use Ms Gobbo as a witness. There was discussion of matters relating to the reasons why disclosure of Ms Gobbo's human source role would not be avoided in a Briars prosecution as it could be in the Petra prosecution, of the way in which Ms Gobbo had been used by the Purana Taskforce (including against Mr Cooper and Mr Mokbel and his family), and concerns over the ramifications of her disclosure, including that it might lead to a review of human source management in Victoria Police. A decision was made to elevate the matter to Mr Moloney.
- 737.2. On 9 June 2009, Mr Porter briefed Mr Moloney and raised the concerns which had been raised with him. It was determined that Mr Cornelius should also be made aware of the matter.⁸²⁰
- 737.3. On 10 June 2009, Mr Porter briefed Mr Moloney, Mr Cornelius and others. Mr Porter said he recalled speaking to a document prepared by Mr Black, which had raised issues similar to those contained in the SWOT analysis.⁸²¹
738. Subsequently, Mr Maguire was briefed to advise both the Petra and Briars Taskforces in relation to all subpoena and discovery issues.
739. By 24 August 2009, Mr Maguire had provided preliminary advice that Ms Gobbo's draft statement to the Briars Taskforce could "probably" be protected from disclosure in the Petra Taskforce prosecution of Mr Dale, but that if Mr Perry was charged with the murder of Shane Chartres-Abbot, it was "probable that the extent of her assistance would become known." That day, the Petra Taskforce Steering Committee was told that an issue concerning Mr Gerard Maguire had arisen. Mr Cornelius made a note of a decision to replace him with another barrister to provide advice to the Petra Taskforce. Mr Moloney was at both Petra and Briars Taskforce Steering Committee meetings when these matters were discussed.⁸²²

⁸²⁰ Submissions of Counsel Assisting, Volume 2, [3697]-[3699].

⁸²¹ Submissions of Counsel Assisting, Volume 2, [3706]-[3717].

⁸²² Submissions of Counsel Assisting, Volume 2, [2764]-[3767].

740. On 21 September 2009, Mr Moloney chaired a Briars Taskforce Steering Committee meeting which was informed of settled advice by Mr Maguire that “witness past will probably be declared to the court at a minimum in prosecution of Dale”. It would have been apparent to experienced police officers, including Mr Moloney, that the effect of this advice was disclosure obligations would likely lead to the exposure of Ms Gobbo’s assistance to Victoria Police during the trial of Mr Dale.⁸²³ It is submitted that in having read the SWOT analysis, Mr Moloney knew the potential ramifications of such disclosure.
741. On around 23 September 2009, Mr Waddell (a Briars Taskforce investigator) spoke with Mr Maguire about his possible engagement. This appears to have related to the interest of the Briars Taskforce in opposing production during the Petra Taskforce prosecution of Mr Dale of the draft statement that Ms Gobbo had made to the Briars investigation. Mr Moloney was involved in discussion with Mr McRae as to legal representation for Victoria Police in relation to Petra disclosure matters. Following this Mr Waddell spoke with Mr Moloney who indicated he would speak with Mr McRae.⁸²⁴
742. It was determined that Mr Ron Gipp of counsel would be briefed for both the Petra and Briars Taskforces.
743. It appears that there was no inquiry by Mr Moloney or anyone else associated with the Petra Taskforce to understand what material was held by the SDU that they might be obliged to disclose.
744. These matters shed light on Mr Moloney’s awareness of the ramifications of the exposure of Ms Gobbo’s human source role, and his understanding of the intention of Victoria Police to disclose such matters during the Petra Taskforce prosecution.
745. It is submitted by Counsel Assisting that the findings contended for in [3541] are open.

⁸²³ Submissions of Counsel Assisting, Volume 2, [3811]-[3820].

⁸²⁴ Submissions of Counsel Assisting, Volume 2, [3825]-[3826].

REPLY SUBMISSION: MR CORNELIUS

746. The following issues are dealt with in this reply:

- 746.1. Knowledge of Ms Gobbo's human source status on 6 June 2006
- 746.2. Events between 25 and 27 July 2006
- 746.3. The meeting on 10 September 2007
- 746.4. The 10 June 2009 meeting
- 746.5. The obtaining of legal advice
- 746.6. The 7 September 2009 letter
- 746.7. The reference to Purana in the MOU
- 746.8. Request for the Informer Management Files during the Dale Committal
- 746.9. The Civil Litigation
- 746.10. Other issues arising from submissions on Mr Cornelius's behalf.

Knowledge of Ms Gobbo's human source status on 6 June 2006

747. It is submitted on behalf of Mr Cornelius that Mr Wilson's diary entry of 6 June 2006 "created a cascade of incorrect records" that created an assumption that Mr Cornelius knew the extent of Ms Gobbo's informer status.⁸²⁵ It is suggested that Mr Cornelius may have left the meeting at the time that Mr Overland informed those present of Ms Gobbo's informer status.⁸²⁶

748. The meeting came about on 6 June 2006 when Mr Grant spoke with Mr Masters in relation to a requested telephone intercept on Ms Gobbo. Mr Masters explained that it related to an inquiry into Richard Shields and that there was OPI interest in the matter. Mr Grant suggested that Mr Masters brief Mr Cornelius in order that he could discuss Operation Khadi with the other heads of department; Assistant Commissioner Overland of the Crime Department and Commander Moloney of I&CS.⁸²⁷ Mr Masters then spoke with Mr Cornelius about "problems with Operation Khadi" and a meeting with Mr Overland that he and Mr Wilson had been requested to attend.⁸²⁸

749. That meeting took place at 9:30am. Mr Wilson's diary states:

9:30 Meeting with A/C [Mr Cornelius], Simon Overland, Phil Masters re Op. Khadi. Coercive hearing discussed involving Nicola Gobbo. Briefed by Simon Overland re Gobbo and involvement as a human source. Need to S/T Sandy White to coordinate issues.⁸²⁹

⁸²⁵ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [22.9].

⁸²⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [22.8].

⁸²⁷ Submissions of Counsel Assisting, Volume 2, [1967].

⁸²⁸ Submissions of Counsel Assisting, Volume 2, [1968].

⁸²⁹ Submissions of Counsel Assisting, Volume 2, [1972].

750. This contemporaneous record indicates that Mr Overland briefed those present at the meeting, including Mr Cornelius, that Ms Gobbo was a human source.⁸³⁰
751. Mr Masters' diary entry of the meeting also recorded an attendance by Mr Overland at the meeting "re Operation Khadi", that the issue of surveillance was raised and that Mr Wilson was to speak to Mr Sandy White.⁸³¹
752. Mr Wilson spoke with Mr Sandy White on the same day.
753. Mr Sandy White recorded in his diary that after attending a training course during the day he called Mr Wilson at 5:45pm. His diary entry records:

C/T Supt Rod Wilson ESD

ESD have joint agreement w/ OPI re invest into activities at Brighton PS.

Intend to use coercive powers to I/V (3838) re knowledge of Shields & John Brown. Were considering T/I re 3838 but thought we'd check w/ TB 1st in case Purana had T/I already.

TB reco S/T Overland. Met w/ same today. Luke Cornelius & Phil Masters present. A/C stated (3838) reg as HS. Also stated DSU were working on exit strategy. Reco S/T Y. (HCF)

Expected HS would not answer qu unless forced by Examiner.

Issue regarding Adam Ahmad & money stolen from him.

MOPF John Brown involved. Poss stole money. Was approached by other police to give it back. Money belonged to TM. Not happy.

Poss gave some back.

** OPI do not know about HS & will not be told.*

Advised RW that list re people who know is growing weekly & very concerned.

Agreed:

Will consider poss that HS will be prepared to S/T issue.

Advised that HS has raised corruption issue re Ahmad but would not discuss it unless he allowed her.

Ahmed has told HS not to talk about it.

To consider issues + S/T RW Thurs or Fri

754. Mr Sandy White also made an entry in the SML that day:

Advised by Super Wilson, ESD that he is aware of source ID. Informed by A/C Overland after being referred to same by Super Biggin when inquiry made re putting T/I on source phone. ESD working with OPI re investigation of Richard Shiels (sic) and [REDACTED], Brighton police. Had intended to subpoena HS (Ms Gobbo) to

⁸³⁰ Submissions of Counsel Assisting, Volume 2, [1972].

⁸³¹ Submissions of Counsel Assisting, Volume 2, [1972]; Exhibit RC1561 Mr Philip Masters diary, 6 June 2006, 1, VPL.0005.0206.0003.

OPI hearings to compel to answer questions then see what occurs on the T/I. Advised by Overland to contact SDU re same. Advised Wilson will consider appropriate course of action and meet with same. Informed by Wilson that Cornelius and Masters also aware of source identity now.

755. It is submitted that these contemporaneous records unambiguously indicate that Mr Wilson told Mr Sandy White that Mr Cornelius and Mr Masters were present when Mr Overland revealed that Ms Gobbo as a human source.
756. Reference is made on behalf of Mr Cornelius to evidence given by Mr Wilson of his recollection of a one-on-one briefing with Mr Overland where the disclosure was made. It is noted that in his statement to the Commission, prior to giving evidence, Mr Wilson said “I do not now recall whether AC Cornelius and Supt Masters were with me with DC Overland briefed me about Ms Gobbo’s status, but they could have been.”⁸³² This evidence changed in the witness box to his having a recollection that only he was present when Mr Overland told him that Ms Gobbo was a human source. He was cross-examined about this and agreed that he had no recollection of Mr Cornelius and Mr Masters leaving the room, that his recollection was inconsistent with contemporaneous records of what he had told Mr Sandy White on the same day, and that his memory could be wrong.⁸³³ Further, it is submitted that a briefing having been given only to Mr Wilson concerning Ms Gobbo being a human source is squarely at odds with Mr Masters making a diary entry that Mr Wilson was to make contact with the head of the SDU. That note suggests that he also was present when the discussion concerning Ms Gobbo concerned.
757. It is also submitted on behalf of Mr Cornelius that records from 2008 demonstrate that Mr Sandy White only “assumed” that Mr Cornelius knew of Ms Gobbo’s status as a human source, pointing to a purported inaccuracy as between an ICR and the SML:
758. The ICR of 25 November 2008 recorded that:
- Persons on steering committee reported to by DI Smith are D/C Overland, A/C Moloney, A/C Cornelius and Deputy Director OPI Graham Ashton, therefore assume all there know identity of HS2958.*
759. The SML of 25 November 2008 made by Mr Sandy White recorded that:
- Petra Steering Committee – Overland, Maloney, Cornelius and OPI director Ashton all aware of HS identity and role.*
760. It is submitted on behalf of Mr Cornelius that the SML, which was a summary of the ICR, was inaccurate and risked amplifying the impact of the original assumption.
761. As was clear in the evidence received by the Commission, the purpose of the SML was not simply to summarise the ICR. It recorded matters that the controller, in this case and primarily Mr Sandy White, regarded to be of significance at the time. The ICR referred to an assumption on the part of the handler as to the state of knowledge of five people, including Mr Peter Smith. The SML, written by Mr Sandy White, related to the state of knowledge of four

⁸³² Exhibit RC0825 Statement of Mr Rodney Wilson, 19 November 2019, 2 [13].

⁸³³ Submissions of Counsel Assisting, Volume 2, [1976]-[1979].

people, not including Mr Peter Smith. Mr Sandy White was possessed of more knowledge than the handler who wrote the ICR. Mr Sandy White knew Mr Overland was aware of Ms Gobbo's status. He knew Moloney, as former Commander of I&CS was aware of her status. He knew that Mr Ashton was aware of her status from the issues related to the OPI and the recent provision of information to him in another investigation. He also knew that Mr Cornelius was aware of Ms Gobbo's role as a human source, having been told by Mr Wilson in 2006. It is submitted that this was not an inaccuracy, rather it was a demonstration of Mr Sandy White's state of knowledge in 2008.

762. The submissions on behalf of Mr Cornelius also point to the possibility that Mr Wilson may have briefed Mr Overland directly, rather than reporting to his superior, Mr Cornelius. Two instances, in August and September 2008, are pointed to where he had directly briefed Mr Overland.⁸³⁴ It should be noted that in July 2008 Mr Wilson had been promoted to the position of Chief of Staff to the Chief Commissioner of Police, Ms Nixon (after which he became Chief of staff to Mr Overland).⁸³⁵ He was no longer reporting to Mr Cornelius.
763. It is most important to note that the submission on behalf of Mr Cornelius suggests that somehow Mr Wilson's diary entry caused a cascade of further inaccurate notes. This submission fails to confront the proposition that Mr Wilson spoke to Mr Sandy White on the day he had attended the meeting with Mr Overland, Mr Cornelius and Mr Masters. The information as to who was present at the meeting was being conveyed by Mr Wilson to Mr Sandy White on the telephone. Mr Sandy White was not copying Mr Wilson's diary notes. In the same conversation Mr Sandy White expressed concern about the growing list of those who knew Ms Gobbo's identity.
764. That Mr Cornelius was briefed in relation to Ms Gobbo's role is also supported by his joint attendance with Mr Overland on 27 July 2006 to speak with Mr Ashton in order to dissuade him from the need to call Ms Gobbo before the OPI.

Events between 25 and 27 July 2006

765. It is submitted on behalf of Mr Cornelius that the meetings which occurred on 27 July 2006 do not allow a finding to be made that Mr Cornelius had knowledge of Ms Gobbo's human source status.⁸³⁶
766. It is argued on behalf of Mr Cornelius that:
- 766.1. Counsel Assisting submissions do not take account of Mr Ashton's diary entry making no reference to Khadi, and his evidence that his diary entry would be a complete record of the subjects discussed at the meeting.
- 766.2. There is no basis for the assumption that following a meeting between Mr Ashton, Mr Overland and Mr Cornelius, the briefing given by Mr Cornelius to Mr Wilson and Mr Attrill (following a meeting with Mr Ashton) was in relation to the same information as that given by Mr Overland to Mr Biggin and Mr Sandy White

⁸³⁴ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [19.2].

⁸³⁵ Exhibit RC0825 Statement of Mr Rodney Wilson, 19 November 2019, Annexure A, 16.

⁸³⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [22.3].

- 766.3. It cannot be presumed that Mr Cornelius canvassed issues relating to Operation Khadi as Mr Wilson's diary entry only referred to 'Gobbo issue' and the OPI wanting to coercively question her regarding the Dale and Hodson matter; the diary entry did not refer to Operation Khadi.
767. The submissions on behalf of Mr Cornelius ignore the context of the meetings in which he was involved, and which provide clarity as to his involvement and his knowledge.
768. First, the evidence demonstrates that following Ms Gobbo being spoken to by the ESD investigator, Mr Attrill, serious concerns arose which were the subject of discussion between Mr Wilson and the SDU, and about which Mr Cornelius was briefed:
- 768.1. On 24 July 2006, when Ms Gobbo had been interviewed by Mr Attrill, various concerns arose including that Ms Gobbo may be providing confidential information about her client, that Mr Attrill had indicated to Ms Gobbo his awareness of her status as a human source and that she might be examined by the OPI. Mr Sandy White spoke to Mr Wilson about these matters. It was suggested that Mr Overland should approach Mr Ashton to brief him about Ms Gobbo's status and request the OPI not take the matter further. A meeting was planned the following day with Mr Biggin to discuss the matter.
- 768.2. On 25 July 2006, Mr Wilson briefed Mr Cornelius. Mr Wilson recorded in his diary: "12:30 Briefed A/C Cornelius re issue re Gobbo". Mr Wilson agreed in evidence he would have discussed the issues which had been raised with him by Mr Sandy White the previous day. Later that day Mr Wilson attended at the meeting with Mr Biggin and Mr Sandy White. He recorded in his diary, "re Gobbo. ESD happy to withdraw her from I/V. Need to brief Overland and deal with Ashton (OPI on the issue)." Mr Sandy White recorded in his diary, "Luke Cornelius briefed. Agrees A/C Overland to S/T Graham Ashton (OPI) re issue. Advise not to pursue..."⁸³⁷
- 768.3. Discussions were had about what might be done to limit the disclosure of Ms Gobbo's role as a human source to Mr Ashton, and for Mr Biggin to speak with Mr Overland.⁸³⁸
- 768.4. On 26 July 2006, Mr Biggin reported to Mr Sandy White that Mr Overland would speak with Mr Ashton about the matter the following morning and would request he take no further action in relation to Ms Gobbo and that ESD be primarily responsible for pursuing the investigation.⁸³⁹
769. Mr Cornelius' evidence was not that he did not receive a briefing by Mr Wilson about the issues raised by Mr Sandy White, rather his evidence was that as Mr Wilson's supervisor he would have been briefed on issues raised by Mr Sandy White and that there would have needed to be a sound explanation for

⁸³⁷ Submissions of Counsel Assisting, Volume 2, [2034]-[2038]; Exhibit RC0828 Mr Rodney Wilson diary, 25 July 2006, 65, RCMP1.0118.0001.0001 @.0065.

⁸³⁸ Submissions of Counsel Assisting, Volume 2, [2041].

⁸³⁹ Submissions of Counsel Assisting, Volume 2, [2044].

Mr Overland to approach Mr Ashton to request no further action on Ms Gobbo, although he could not recall such matters.⁸⁴⁰

770. As a matter of common sense:
- 770.1. if Mr Wilson was representing the ESD position at the 25 July 2006 meeting, he would have needed the authority of his superior to do so. The diary of Mr Sandy White confirms this is what occurred.
 - 770.2. if Mr Cornelius was briefed about issues associated with Ms Gobbo which had been raised by Mr Sandy White, it is a given that he would know that Ms Gobbo was involved with the SDU.
 - 770.3. Mr Overland and Mr Cornelius would hardly attend a meeting with Mr Ashton with the aim of seeking him to have the OPI back off a joint ESD investigation, without Mr Cornelius, as the Assistant Commissioner of ESD, understanding this proposal and the reason for it.
771. Second, Mr Ashton's evidence that there was no discussion other than that referred to in his diary (relating to Operation Air), was clearly wrong. Both Mr Overland and Mr Cornelius walked away from that meeting with information relating to Ms Gobbo on which they gave briefings about the OPI's intentions.
772. A strong inference can be drawn that there was discussion related to the Operation Khadi investigation with Mr Ashton, including that Mr Ashton told them that the OPI would drop off the Operation Khadi investigation and not require Ms Gobbo for examination in that matter, however she was of interest to a separate investigation related to Mr Paul Dale and Mr Hodson.
773. This was the nature of the briefing given by Mr Overland to Mr Biggin and Mr Sandy White which was recorded by Mr Sandy White in his diary.
774. Whilst Mr Wilson's notes of his briefing from Mr Cornelius on events were more economical, "11:30 Briefed by A/C re Gobbo issue. OPI want to coercively question her re Dale / Hodson. Attrill briefed".⁸⁴¹
- 774.1. it is clear he was reporting information arising from the same meeting he had attended with Mr Overland and Mr Ashton
 - 774.2. there would be no need to brief Mr Attrill, the lead investigator in Operation Khadi, if Mr Cornelius had not conveyed information of relevance to that investigation.

The 10 September 2007 meeting

775. It is submitted on behalf of Mr Cornelius that a finding that Mr Cornelius had written and then scribbled out Ms Gobbo's name during the meeting of 10 September 2007 would be speculative and unfair.⁸⁴²

⁸⁴⁰ Submissions of Counsel Assisting, Volume 2, [2036]-[2037].

⁸⁴¹ Exhibit RC0828 Mr Rodney Wilson diary, 27 July 2006, 65, RCMP1.0118.0001.0001 @.0067.

⁸⁴² Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [22.31].

776. For the reasons contained in Counsel Assisting submissions, including the evidence of Mr Overland that his writing of Ms Gobbo's name in his notes this likely indicated that her name was used during the meeting.⁸⁴³

777. It is submitted on behalf of Mr Cornelius that the evidence in relation to this meeting does not reflect his being told of the SDU concerns in relation to the matter, that his notes do not include reference to matters such as Ms Gobbo's prior involvement as a human source, or concerns about a Royal Commission or other concerns which had been raised by the SDU.⁸⁴⁴

778. The submission on behalf of Mr Cornelius does not deal with:

778.1. The meeting having been initiated following Mr Porter's briefing of Mr Moloney about the issues being raised by the SDU the previous day (not related to the Mokbel subpoena, an issue which arose subsequently)⁸⁴⁵

778.2. Mr Porter's evidence that he spoke to a document written by Mr Black which outlined concerns similar to those contained in the SWOT analysis.⁸⁴⁶

The obtaining of legal advice

779. It is submitted on behalf of Mr Cornelius that he sought legal advice upon learning in April 2009 that Ms Gobbo was a human source.⁸⁴⁷

780. This advice was not sought until well after a draft statement had been taken from Ms Gobbo in late May 2009. This legal advice was not for the purpose of assessing the extent and propriety of Ms Gobbo's use as a human source:

780.1. Advice was first sought in June 2009 at the request of Mr Waddell when a subpoena was issued in a trial related to Tony Mokbel over concerns that it would capture the unsigned statement of Ms Gobbo.

780.2. Further legal advice was sought in July 2009 at the request of Mr Waddell when he became concerned about admissibility issues, including issues related to LPP should Ms Gobbo become a witness for the Briars Taskforce.⁸⁴⁸

781. It is apparent that in, around early August 2009, Mr Maguire was then briefed to advise both the Petra and Briars Taskforces in relation to all subpoena and discovery issues.

782. By 24 August 2009, Mr Maguire had provided preliminary advice that Ms Gobbo's draft statement to Briars could "probably" be protected from disclosure in the Petra case, but that if Mr Perry was charged in relation to the Briars case it was "probable that the extent of her assistance would become known." That day, the Petra Taskforce Steering Committee was told that an issue concerning Mr Gerard Maguire had arisen. Mr Cornelius made a note of a decision to replace him with another barrister to provide advice to the Petra Taskforce.⁸⁴⁹

⁸⁴³ Submissions of Counsel Assisting, Volume 2, [2539]-[2551].

⁸⁴⁴ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [22.37]-[22.47].

⁸⁴⁵ Submissions of Counsel Assisting, Volume 2, [3697]-[3699].

⁸⁴⁶ Submissions of Counsel Assisting, Volume 2, [3706]-[3708].

⁸⁴⁷ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [16.1].

⁸⁴⁸ Submissions of Counsel Assisting, Volume 2, [3700]-[3702], [3738], [3742].

⁸⁴⁹ Submissions of Counsel Assisting, Volume 2, [2764]-[3767].

Subsequently Mr Ron Gipp was briefed to deal with subpoena and discovery issues for the Petra Taskforce.

783. It is submitted on behalf of Mr Cornelius that:

783.1. at this time he understood that Ms Gobbo's assistance as a human source was limited to the Briars Taskforce

783.2. he understood that the advice meant that as Ms Gobbo's involvement in the Briars Taskforce was not relevant to Mr Dale's prosecution, then it would be open to argue PII in relation to the Briars matter and that her registration as a human source would not need to be disclosed.⁸⁵⁰

783.3. he does not recall learning about the update to Mr Maguire's advice.⁸⁵¹

784. The evidence indicates that, on 17 September 2009, Mr Cornelius was told of revised advice by Mr Maguire that "witness past will probably be declared to the court at a minimum in prosecution of Dale". It is submitted that it would have been apparent to experienced police officers, including Mr Cornelius, that the effect of this advice was disclosure obligations would likely lead to exposure of Ms Gobbo's assistance to Victoria Police.⁸⁵²

785. In any case, as referred to at [811], by this time Mr Cornelius had become aware that the SDU held extensive holdings which did not appear to him to be limited to the investigation of Mr Lalor and Mr Waters.

786. There was no inquiry by Mr Cornelius or anyone else associated with the Petra Taskforce (such as Mr Moloney, Mr Peter Smith or Mr O'Connell who certainly knew of Ms Gobbo's extended history with the SDU and received this briefing) in order to gain an understanding of what material was held by the SDU that they might be obliged to disclose.

787. It is submitted that this is inconsistent with Mr Cornelius's evidence and his submissions that if he had known Ms Gobbo to be a human source in relation to the Petra Taskforce he would have immediately recognised there were significant problems, due to the long-standing and established principle that using a human source as a witness is fraught with danger, and that further steps needed to be taken.⁸⁵³

788. Further still, there is no evidence of any step taken to claim PII in relation to the Briars Taskforce statement in the Dale proceeding.

The 7 September 2009 letter

789. It is submitted on behalf of Mr Cornelius that:

789.1. He did not read the detail of this letter, as he was briefed on it by Steven Smith when he delivered it to him.⁸⁵⁴

789.2. If he had have read the letter, Ms Gobbo's reference to her unprecedented assistance to Victoria Police between 2005 and 2009,

⁸⁵⁰ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [24.14]-[24.17].

⁸⁵¹ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [24.16].

⁸⁵² Submissions of Counsel Assisting, Volume 2, [3811]-[3820].

⁸⁵³ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [24.5].

⁸⁵⁴ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.6].

which included but was not limited to the successful prosecution of numerous significant organised crime figures, would have leapt out at him.⁸⁵⁵

- 789.3. He was not involved in drafting any of the letters in response to Ms Gobbo.⁸⁵⁶
790. This was a letter in which Ms Gobbo threatened to commence legal proceedings, and signed off indicating that “*I need not remind you of the difficulties that Victoria Police may encounter if some or any of my past assistance comes out in the prosecution of Dale.*”⁸⁵⁷ Whilst Mr Cornelius may have received the letter at the beginning of the meeting, it does not follow that the only opportunity for him to read it was in the meeting. He was the Chair of the Petra Taskforce Steering Committee. The success of the prosecution of Mr Dale hinged upon Ms Gobbo giving evidence. The Steering Committee was significantly frustrated by Ms Gobbo’s refusal to enter the witness protection program, the previous month having convened an extraordinary general meeting.⁸⁵⁸
791. The evidence indicates that Mr Cornelius was involved in the response to the letter:
- 791.1. A handwritten note on the Petra Taskforce written update of 7 September 2009 indicated that Mr Cornelius was to meet with Mr McRae to formulate a response.⁸⁵⁹
- 791.2. He attended a meeting at the Chief Commissioner’s office in relation to the matter on 8 September 2009.⁸⁶⁰
- 791.3. He attended a meeting with the VGSO in relation to the matter on 9 September 2009, where discussion included Ms Gobbo having more concern about the evidence protection which might be afforded by the *Witness Protection Act* than the protection of her personal safety.⁸⁶¹
- 791.4. He had a meeting with Mr McRae, Mr Peter Smith and Mr Alway on 14 September 2009 following which the responsive letter was signed by Deputy Commissioner Walshe and delivered to Ms Gobbo.⁸⁶²
792. In these circumstances, it is submitted that the evidence supports an inference being drawn that Mr Cornelius read the letter.
793. Further, that Mr Cornelius was given this letter is an indication that there was no deliberate strategy by Victoria Police not to share with him the fact that Ms Gobbo had been of assistance to the Purana Taskforce. If anything, there was an agreement to which Mr Cornelius was a willing party, that he would be shielded from knowledge of what her assistance had entailed.

⁸⁵⁵ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.8].

⁸⁵⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.10].

⁸⁵⁷ Submissions of Counsel Assisting, Volume 2, [3706]-[3708].

⁸⁵⁸ Submissions of Counsel Assisting, Volume 2, [3753].

⁸⁵⁹ Submissions of Counsel Assisting, Volume 2, [3786].

⁸⁶⁰ Submissions of Counsel Assisting, Volume 2, [3792], [3801]-[3802].

⁸⁶¹ Submissions of Counsel Assisting, Volume 2, [3792], [3804] [3805].

⁸⁶² Submissions of Counsel Assisting, Volume 2, [3792], [3807].

The reference to Purana in the MOU

794. It is submitted on behalf of Mr Cornelius that:

- 794.1. Mr Cornelius was “peppered” with questions by Counsel Assisting about the reference to the Purana Taskforce contained in an earlier version of the MOU prepared in respect of Ms Gobbo’s entry into witness protection.⁸⁶³
- 794.2. As referred to in a VGSO file note, Mr Cornelius telephoned someone to check what this reference related to and was told that the reference to Ms Gobbo’s other assistance was not relevant to the MOU, which explained why it may have been removed from the final version of the document.⁸⁶⁴
- 794.3. Mr Cornelius’s experience was that MOU’s were often recycled, and he may have assumed the reference to the Purana Taskforce to be a drafting error, left over from another MOU in an unrelated Purana Taskforce matter. This would explain why he was prepared to accept an explanation from his senior investigations officer that the reference was irrelevant.⁸⁶⁵
- 794.4. The reference to Purana was very small in what was a lengthy document.⁸⁶⁶
- 794.5. Given Ms Gobbo’s role across all three investigations had been deliberately obscured from him, it is not fair to suggest this should have triggered alarm bells.⁸⁶⁷

795. This last matter was not proffered by Mr Cornelius in his evidence to the Commission. When it was put to Mr Cornelius that this indicated that Ms Gobbo had involvement with Purana, he said he had no basis to ask further questions and that he may have assumed that it related to Ms Gobbo’s assistance in an active inquiry.⁸⁶⁸

796. This was not a recycled MOU, it was a further draft agreement in which Ms Gobbo had inserted reference to assistance to the Purana Taskforce. Mr McRae spoke with Mr Cornelius about the document after he had been briefed on it, then Mr Cornelius and Mr McRae attended a meeting to discuss it.⁸⁶⁹

797. It is submitted that this should have put Mr Cornelius on notice. Indeed, it is apparent that when the issue arose during the meeting, he actually did enquire; the VGSO noted he rang to check on Ms Gobbo’s other assistance. Mr Cornelius’s evidence was he could not recall what he was told. His instructions after the phone call were to remove reference to assistance by Ms Gobbo in relation to any other investigation.⁸⁷⁰

⁸⁶³ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.14].

⁸⁶⁴ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.15].

⁸⁶⁵ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.16].

⁸⁶⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.17].

⁸⁶⁷ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.19].

⁸⁶⁸ Transcript of Assistant Commissioner Luke Cornelius, 12523-12525.

⁸⁶⁹ Submissions of Counsel Assisting, Volume 2, [3836]-[3843].

⁸⁷⁰ Submissions of Counsel Assisting, Volume 2, [3841].

Request for the Informer Management Files during the Dale Committal

798. It is submitted on behalf of Mr Cornelius that:

- 796.1 he was insistent in his evidence that he would remember if he was told that there had been a request by the defence for Ms Gobbo's informer management file during the Dale Committal, and that he did not find any documents suggesting he had been told about such a request
- 796.2 that he was not told about his request is consistent with a deliberate strategy by Victoria Police not to share the extent of Ms Gobbo's status as a human source with him.⁸⁷¹

799. This submission fails to deal with the following sequence of events:

- 797.1 On 10 March 2010, Mr Steven Smith and Mr Shane O'Connell, met with Mr Sandy White and discussed the defence request for Ms Gobbo's informer management file, and associated issues including the entitlement of defence to know whether there were prior inconsistent statements, and that disclosure of the file would reveal Ms Gobbo's assistance to police at the time of the Mokbel investigation.⁸⁷²
- 797.2 On 11 March 2010, Mr Steven Smith notified the HSMU of the defence request, and sought permission to access the file to identify documents which may need to be produced. The request indicated that Mr Steven Smith understood the ramifications which had been discussed at length with Mr Sandy White and that he would bring it to the attention of the Steering Committee (of which Mr Cornelius was the Chair)⁸⁷³
- 797.3 Later that day Mr Peter Smith recorded in his diary providing Mr Cornelius with a briefing relating to the conduct of the committal, and which included the subject "informer management file".

The Civil Litigation

- 800. It is submitted on behalf of Mr Cornelius that the evidence demonstrates that Mr Cornelius was deliberately isolated from the extent of Ms Gobbo's role as a human source.⁸⁷⁴
- 801. The submission first points to an email, dated 21 May 2010, which stated that Mr Cornelius "had no awareness of the Purana detail", contrasted in the email to his knowledge of Ms Gobbo's association with the Petra and Briars Taskforces.⁸⁷⁵ This is said to demonstrate that Mr Cornelius was not aware of the full extent of Ms Gobbo's role as a human source, in that he was not aware of the extent of her dealings with the Purana Taskforce.
- 802. The Commissioner may accept that Mr Cornelius was not aware of the extent of Ms Gobbo's dealings with the Purana Taskforce, however it is submitted that, given what he knew, this represents part of his failing. Mr Cornelius was

⁸⁷¹ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [16.1], [22.48]-[22.49].

⁸⁷² Submissions of Counsel Assisting, Volume 2, [3950]-[3951].

⁸⁷³ Submissions of Counsel Assisting, Volume 2, [3956].

⁸⁷⁴ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [16.1], [20.2].

⁸⁷⁵ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [20.4].

aware that details of Ms Gobbo's role as a human source for the Purana Taskforce were being deliberately withheld from him.

803. The email demonstrates that, in circumstances where Mr Cornelius indicated he would have been obliged to inquire, he did not take steps to do so.
804. Further reliance is placed upon a note from a meeting attended by Mr Cornelius and others regarding "Witness F Status" dated 21 June 2010.⁸⁷⁶ This included a section seeking confirmation of the status of Ms Gobbo in each investigation. The handwritten notes of Mr McRae indicate that Ms Gobbo had the status of a "witness only", and a "potential witness" in relation to Petra and Briars. In relation to Purana it was noted "Not working for VicPol as human source, "middle person – not a witness or source", "no value to ongoing investigations – possible witness". These notes represented Ms Gobbo's status to the organisation at the time of the meeting, not at any earlier time. They do not support the proposition that Mr Cornelius did not know that Ms Gobbo had been a human source in relation to each of those investigations.
805. Whilst it may be the case that the withholding of such information occurred on the basis of the "need to know" principle, Mr Cornelius, knowing that Ms Gobbo was in fact a human source for the Purana Taskforce (and the Petra Taskforce) had obligations as the Assistant Commissioner of the ESD to inquire into the extent of her use as a human source.

Other issues arising

806. Whilst the submissions on behalf of Mr Cornelius deal with a number of issues, as referred to above, there are various matters in Counsel Assisting's submissions which are not dealt with and which bear directly upon the likelihood that he knew of Ms Gobbo's role as a human source earlier than he is prepared to concede, and to an extent greater than he was prepared to concede in evidence.
807. From the time of the first Petra Taskforce Steering Committee meeting in April 2007, Mr Cornelius understood that Ms Gobbo was a significant person of interest for Petra investigators, and she was to be examined at the OPI. He knew that Carl Williams required significant corroboration if charges were ever to be laid, and that Ms Gobbo was an important source of corroboration for Carl Williams who was alleging that his contact with Mr Paul Dale had occurred through her. The evidence demonstrates a lack of inquiry by Mr Cornelius about Ms Gobbo throughout the course of the investigation in circumstances where it is to be expected he would want answers.
808. In October 2007, Mr Wilson had a discussion with Mr Waddell about bringing Ms Gobbo before a coercive hearing. Mr Wilson noted the need to discuss it further with Mr Overland. He then had a meeting with Mr Cornelius that afternoon during which he provided an update in relation to the Briars Taskforce investigation and the need to further discuss '3838'. Mr Cornelius recalled a conversation about bringing '3838' before the coercive body. Mr Cornelius at the time was the Chair of the Briars Taskforce, and Mr Wilson's superior. It is submitted that as a matter of logic, that in order to have a

⁸⁷⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [20.6].

discussion about whether to bring Ms Gobbo before a coercive hearing, Mr Cornelius would have to have known who she was.⁸⁷⁷

809. In March / April 2009, the time at which Mr Cornelius told the Commission he learned that Ms Gobbo was a human source:
- 809.1. he was content to assume that Ms Gobbo had been registered as a human source and only providing information in relation to the Briars Taskforce and asked no questions to determine otherwise
- 809.2. he said he also learned for the first time that his investigators had previously interviewed Ms Gobbo in January 2008 but was not concerned as to why he had not been told about this. Given that Mr Cornelius knew of Ms Gobbo's use for the Briars Taskforce (as '3838') in September 2007, if it were the case that she had been registered for the specific purpose of assisting Taskforce Briars, it is submitted that it would seem strange that investigators would need to interview her.
- 809.3. despite knowing that Ms Gobbo had recently agreed to record a conversation with Mr Dale and become a witness against him, and even though it might have implications for that case if she did, he made no inquiry as to whether Ms Gobbo might have provided information used by the Petra Taskforce.⁸⁷⁸
810. Mr Cornelius's actions in failing to inquire when he found out the objectively extraordinary circumstances in which a barrister was a human source contradict his assertions that he would have made inquiries if told this information at an earlier time.⁸⁷⁹
811. There is evidence that Mr Cornelius knew that Ms Gobbo's involvement as a human source was broader than her assistance to the Briars Taskforce; for instance:
- 811.1. An email from Mr Waddell on 1 June 2009 to Mr Cornelius, in which he sought Mr Cornelius's assistance to obtain further material from the SDU. He referred to there being a 'vast quantity of material' and explained that the material he had previously been supplied had been based only upon a search of the name Waters. He requested that the SDU holdings be searched for any reference of information about various other names including those of three lawyers.⁸⁸⁰
- 811.2. It is submitted that it would not make sense to be requesting filtered information from a vast quantity of material, if Ms Gobbo had only been providing information relating to the Briars Taskforce.⁸⁸¹
- 811.3. Mr Cornelius said in his statement to the Commission that he recalled when Mr Waddell started reviewing SDU materials he was advised they had 'extensive holdings' which did not seem right to him if Ms

⁸⁷⁷ Submissions of Counsel Assisting, Volume 2, [2582]-[2585].

⁸⁷⁸ Submissions of Counsel Assisting, Volume 2, [3623]; Transcript of Assistant Commissioner Luke Cornelius, 24 January 2020, 12375.

⁸⁷⁹ Submissions of Counsel Assisting, Volume 2, [3620].

⁸⁸⁰ Submissions of Counsel Assisting, Volume 2, [3662]-[3664].

⁸⁸¹ Submissions of Counsel Assisting, Volume 2, [3665]-[3688].

Gobbo had only provided information in relation to Mr Lalor and Mr Waters.⁸⁸²

812. He made no inquiry to determine what assistance Ms Gobbo had provided beyond the Briars Taskforce investigation.
813. Again, his actions in failing to inquire, when he suspected that Ms Gobbo's role as a human source with the SDU went beyond that related to the Briars Taskforce investigation, contradict his assertions that he would have made inquiries if made aware of this information at an earlier time.⁸⁸³
814. On 5 August 2009, an extraordinary meeting of the Petra Taskforce Management Committee took place in relation to issues around Ms Gobbo's entry to the witness protection program. During the meeting Mr Steven Smith gave a briefing aided by a document providing a summary of interactions with Ms Gobbo and her attitude to witness protection negotiations. A number of entries referred to her seeking large amounts of money in relation to asset seizures made by police for which she claimed credit. On 12 August 2009, at Mr Cornelius' request, Mr Peter Smith provided Mr Cornelius with a document containing this information. When asked about this in evidence Mr Cornelius said he did not recall attaching any credibility to the claim.⁸⁸⁴ Such evidence would have added to Mr Cornelius's understanding of the type of matters in which Ms Gobbo had previously assisted the police. Neither Petra nor Briars involved asset confiscation. Purana investigations had been a significant source of asset recovery.
815. As referred to earlier, in November 2009, Mr Cornelius was involved in meetings in which there was discussion about a draft MOU which had been amended by Ms Gobbo. Her proposed amendments meant that the agreement included reference to her assistance to the Petra, Briars and Purana Taskforces. The VGSO file note of the meeting indicated that Mr Cornelius rang to check what assistance Ms Gobbo was giving in other matters. He then instructed the lawyers that the agreement should be limited to Ms Gobbo's assistance to the Petra Taskforce. Mr Cornelius told the Commission that the reference to the Purana Taskforce did not trigger further enquiries by him as it was not relevant to the reason he was seeking to have Ms Gobbo enter the Witness Protection Program.⁸⁸⁵
816. The submissions on behalf of Mr Cornelius refer to these last two matters as merely 'clues'.⁸⁸⁶ However, in reply, it is submitted that they were clearly more than that. As is apparent from evidence related to the civil litigation, discussed above, Mr Cornelius had become aware that Ms Gobbo had been of assistance to the Purana Taskforce, but had been content to be shielded from details as to that assistance.
817. His reaction to the knowledge of Ms Gobbo's involvement with Victoria Police in relation to Petra and Purana, but especially the latter, appears to be in contrast with evidence given by him that:

⁸⁸² Submissions of Counsel Assisting, Volume 2, [3668].

⁸⁸³ Submissions of Counsel Assisting, Volume 2, [3620].

⁸⁸⁴ Submissions of Counsel Assisting, Volume 2, [3753]-[3764].

⁸⁸⁵ Submissions of Counsel Assisting, Volume 2, [3837]-[3843].

⁸⁸⁶ Responsive submissions of Victoria Police, Tranche 2, Luke Cornelius, [23.2].

- 817.1. he would have understood that it would be extraordinary to use a barrister, in particular a criminal defence barrister, as a human source
 - 817.2. he would have understood the implications of Ms Gobbo, whom he knew to represent key underworld figures, being a human source for the SDU in circumstances where Mr Overland was interested, including her likely use by the Purana Taskforce
 - 817.3. he would have recognised such a situation to be fraught with risk and would have asked questions in order to understand whether any information being provided was subject to legal professional privilege, or whether she was acting for those she was informing on
 - 817.4. he would have wanted to be satisfied that there was significant oversight of any such arrangement, that legal advice had been obtained, and that there were definite boundaries or parameters in place.⁸⁸⁷
818. Until approximately mid 2010, Mr Cornelius was the Assistant Commissioner of ESD. It is submitted, for all the reasons above that Mr Cornelius must have known that Ms Gobbo was a human source earlier than he is prepared to concede, and to an extent greater than he is prepared to concede. Even if Mr Cornelius only had reason to suspect Ms Gobbo's assistance to the Petra or Purana Taskforces, it was incumbent upon him to inquire as to whether the use of Ms Gobbo, which he knew was fraught with risk, had been improper in any way, or was relevant in the prosecution of Mr Dale in any way.
819. It is submitted that the evidence as a whole demonstrates that whilst there may have been a deliberate strategy to keep detail of Ms Gobbo's involvement from Mr Cornelius in relation to matters other than the Petra and Briars Taskforce, he was a willing party to that strategy. In circumstances where there was a clear "need to know" by Mr Cornelius, there was a contentedness by him not to know.

⁸⁸⁷ Submissions of Counsel Assisting, Volume 2, [3620].

REPLY SUBMISSION: MR OVERLAND

820. A number of matters referred to by Mr Overland in his responsive submissions are dealt with in this reply, namely:
- 820.1. Mr Overland's awareness of Ms Gobbo informing upon Tony Mokbel
 - 820.2. Mr Overland's evidence that he gave instructions to investigators that Ms Gobbo should not act for those upon whom she was informing
 - 820.3. Mr Overland's responsibility to ensure appropriate legal advice was obtained
 - 820.4. Mr Overland's direction to keep 'audit trails'
 - 820.5. Mr Overland's expectation that Ms Gobbo's identity would be revealed during court proceedings
 - 820.6. The SDU, and the registration, handling and management of Ms Gobbo falling outside the ambit of Mr Overland's responsibility
 - 820.7. That Mr Overland repeatedly urged an exit strategy for Ms Gobbo
 - 820.8. Mr Overland's involvement in the decision to transition Ms Gobbo to a witness
 - 820.9. Mr Overland's knowledge of Ms Gobbo's involvement with Mr Cooper
 - 820.10. Mr Overland's knowledge of Ms Gobbo's involvement with Mr Thomas.

Mr Overland's awareness of Ms Gobbo's informing on Tony Mokbel

821. Counsel for Mr Overland state that it is "bewildering" that Counsel Assisting seek to establish that Mr Overland was aware as at 30 March 2006 that Ms Gobbo had been representing Mr Tony Mokbel.
822. The reason why Counsel Assisting sought to do so was that Mr Overland's position as to when he knew of this fact changed during his evidence as follows:
- 822.1. Mr Overland was asked when he became aware that Ms Gobbo acted for Mr Mokbel. He said it was difficult for him to be confident that he knew she was acting for Mr Mokbel at around the time of her registration. He said it was clearly something that he became aware of down the track. When asked what he meant by that he said he believed it was around the time of the Commonwealth charges, around the end of 2005 to early 2006.⁸⁸⁸
 - 822.2. Mr Overland accepted that the desire of the police was that Ms Gobbo provide information to Victoria Police to enable Mr Mokbel to be 'put away'.⁸⁸⁹

⁸⁸⁸ Transcript of Mr Simon Overland, 16 December 2019, 11353.

⁸⁸⁹ Transcript of Mr Simon Overland, 17 December 2019, 11442-11443.

- 822.3. If Mr Overland was aware of Ms Gobbo's representation of Mr Mokbel, this would contradict his evidence that he instructed that Ms Gobbo could not act for those she informed upon. Accordingly, it was put to Mr Overland that he could not have it both ways; it could not be that he gave that instruction if he was aware that she continued to represent Mr Tony Mokbel.⁸⁹⁰
- 822.4. Mr Overland then said that his understanding was that Ms Gobbo was 'informing more against those around Mokbel' and that this was with the intention of building a case against him, saying that it was 'messy'.⁸⁹¹
- 822.5. Mr Overland was then asked how it was that she continued to overtly act for Mr Mokbel throughout the end of 2005, and throughout January to March 2006, which was all known to him. Mr Overland responded that he was not sure it was known to him. He said he did not remember when he became aware Ms Gobbo was acting for Mr Mokbel on those Commonwealth charges.⁸⁹²
- 822.6. Following this Counsel Assisting put before Mr Overland the front page newspaper article from 30 March 2006 quoting and picturing Mr Overland, which went onto the second page. Mr Overland said he recalled the article.⁸⁹³
- 822.7. Mr Overland was then shown the full front page and second page, which included another article about Mr Mokbel having absconded from his Commonwealth trial, and which on the second page included a photo of Ms Gobbo who was identified as Mr Mokbel's barrister.⁸⁹⁴ It was put to Mr Overland that he would have known at this time that he would have known Ms Gobbo had been acting for Mr Mokbel. He responded that he may have, but he was not a great reader of the media.⁸⁹⁵
823. In any event, Mr Overland now accepts that at the time of her registration, Mr Tony Mokbel was or had been a client of Ms Gobbo's. Mr Overland says however, that there is no submission, or evidence, demonstrating that he was aware that Ms Gobbo was providing information to Victoria Police about Mr Tony Mokbel from September 2005.⁸⁹⁶
824. In considering those submissions, the Commissioner should have regard to the following matters:
- 824.1. On 12 September 2005, Mr O'Brien discussed with Mr Overland recent events in relation to Ms Gobbo and the opportunities she now provided in relation to Operation Quills. This was an investigation targeting Mr Tony Mokbel.⁸⁹⁷ Whilst Mr Overland relies on the absence of a note in his diary and his lack of recollection to the contrary, a strong inference exists that Mr Overland would have been given some information as to how Ms Gobbo came to be dealing with police, including her concerns

⁸⁹⁰ Transcript of Mr Simon Overland, 17 December 2019, 11443.

⁸⁹¹ Transcript of Mr Simon Overland, 17 December 2019, 11443.

⁸⁹² Transcript of Mr Simon Overland, 17 December 2019, 11443.

⁸⁹³ Submissions of Counsel Assisting, Volume 2, [1431].

⁸⁹⁴ Submissions of Counsel Assisting, Volume 2, [1442]-[1428].

⁸⁹⁵ Submissions of Counsel Assisting, Volume 2, [1432].

⁸⁹⁶ Responsive submissions of Mr Overland, 70-72 [189]-[194].

⁸⁹⁷ Submissions of Counsel Assisting, Volume 2, [194], [1331].

of conflict between the interests of Mr Mokbel and Mr Bickley. Mr O'Brien's note and evidence in this regard are at odds with Mr Overland's recollection.⁸⁹⁸ Counsel Assisting referred to this in their primary submissions. Despite Mr Overland's complaint at [70] of his submission, Mr Overland has not properly dealt with the evidence in this regard. In the face of Mr O'Brien's diary note and his oral evidence on this point, it is more likely that the absence of this detail in Mr Overland's diary is explained by the fact that Mr Overland did not record it, rather than the conversation having not occurred. In light of the foregoing, it is open to the Commissioner to find that Mr Overland was aware of the proposal to obtain information from Ms Gobbo in relation to Mr Tony Mokbel.

- 824.2. On 26 September 2005 (following meetings between Ms Gobbo and the SDU on 16 and 21 September 2005) Mr Overland was present at a meeting where there was discussion of Ms Gobbo's registration, information Ms Gobbo had provided concerning Mr Tony Mokbel's activities, and that Mr Tony Mokbel had asked her to assist in the drafting of an exculpatory statement from Mr Bickley.⁸⁹⁹
- 824.3. On 27 September 2005 (following a further meeting the previous night with Ms Gobbo), Mr Overland had a meeting with Mr Purton where he was told, amongst other things, that Mr Cooper may roll over (of itself, it is submitted, immediately a cause for concern that she was acting for Mr Cooper), that Mr Tony Mokbel was concerned about Mr Bickley implicating him (again, it is submitted, a cause for concern that she was acting for Mr Bickley), and the potential for the introduction of an undercover agent to Mr Tony Mokbel [REDACTED] [REDACTED]. Those tapes were to be relied upon in both Commonwealth and State trials pending against Mr Tony Mokbel. This last matter was not only related to Mr Tony Mokbel, but directly bore upon the very trials pending for Mr Tony Mokbel in which Mr Overland knew Ms Gobbo to be representing him.⁹⁰⁰
- 824.4. On 21 October 2005, Mr Overland approved the Operation Posse investigation plan which referred to information having been provided by a human source that Mr Tony Mokbel was concerned about being implicated by Mr Bickley, that various people were "cooking" methylamphetamine for Mr Tony Mokbel, and that Mr Tony Mokbel was attempting to source a corrupt detective within Victoria Police to gain access to tape material from both Operation Kayak and Operation Quills (this being the investigation in which Mr Bickley had been charged).⁹⁰¹
825. Further, it was said by Mr Overland in the course of his evidence that it was his understanding that Ms Gobbo was 'informing more against those around Mokbel', providing information about other members of the syndicate in order that a case could be built against him.⁹⁰²
826. Whilst this appears to acknowledge his awareness that she was also providing information about Mr Tony Mokbel, even if this was not the case, it is submitted

⁸⁹⁸ See below at 845.4.2.

⁸⁹⁹ Submissions of Counsel Assisting, Volume 2, [1358].

⁹⁰⁰ Submissions of Counsel Assisting, Volume 2, [1361].

⁹⁰¹ Submissions of Counsel Assisting, Volume 2, [1365]-[1366].

⁹⁰² Transcript of Mr Simon Overland, 17 December 2019, 11442-11443.

that Mr Overland, with his significant experience in the criminal justice system, and someone legally qualified, could hardly have contemplated that the administration of justice would be served by Victoria Police using the lawyer of Mr Mokbel to indirectly implicate him in criminal offending.

Mr Overland's claim that he gave instructions that Ms Gobbo should not act for those upon whom she was informing

827. Mr Overland submits that he gave instructions to his investigators and those managing Ms Gobbo that she could not continue to act for those upon whom she was informing.⁹⁰³
828. It may be observed that Mr Overland gave evidence to the Commission that at around the time Ms Gobbo was registered he was aware of various risks and concerns related to her use:
- 828.1. He was aware that Ms Gobbo practised in the very area in relation to which she was providing information to Victoria Police⁹⁰⁴
 - 828.2. He was aware of the potential implications arising from Ms Gobbo's profession and the fact that she was a human source⁹⁰⁵
 - 828.3. He was aware that she owed professional, legal and ethical duties to clients and the court⁹⁰⁶
 - 828.4. He was aware that she had a secret role as an agent of the police whilst providing information against criminals⁹⁰⁷
 - 828.5. His concerns as to the use of Ms Gobbo by Victoria Police arose from:
 - 828.5.1. The possibility she might breach duties of privilege or confidence owed to clients
 - 828.5.2. The possibility she might continue to act for clients about whom she had secretly provided information to police⁹⁰⁸
 - 828.6. He was aware that if Ms Gobbo acted contrary to the interests of her clients, and in the interests of Victoria Police, there could be serious consequences to the trial of any such person.⁹⁰⁹
829. Mr Overland said he expressed such concerns to both his investigators and those managing Ms Gobbo on a number of occasions,⁹¹⁰ and it was his understanding that Ms Gobbo would not act for people against whom she was informing.
830. Similarly, Mr Overland had said in evidence to Mr Kellam in 2014; "I do recall being very clear with my investigators and her managers that Ms Gobbo could not provide information or be tasked in relation to current clients". He said he

⁹⁰³ Responsive submissions of Mr Overland, [73], [84].

⁹⁰⁴ Transcript of Mr Simon Overland, 16 December 2019, 11312.

⁹⁰⁵ Transcript of Mr Simon Overland, 16 December 2019, 11312.

⁹⁰⁶ Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹⁰⁷ Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹⁰⁸ Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹⁰⁹ Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹¹⁰ Transcript of Mr Simon Overland, 16 December 2019, 11313-11314.

clearly recalled speaking with Mr Sandy White and Jim O'Brien about such matters.⁹¹¹ He confirmed this in his evidence to the Commission.

831. In his evidence to the Commission Mr Overland said he also recalled giving such instruction to Mr Ryan.⁹¹²
832. In his evidence to the Commission he also said that he recalled discussing these issues with Danye Moloney, the Commander of I&CS with line supervision over the SDU.⁹¹³ In 2014 he had indicated to IBAC that whilst he may have discussed issues with Mr Moloney, he had no recollection of it.⁹¹⁴
833. In the submission on behalf of Mr Overland it is also asserted that he gave such instruction to Crime Commander Terry Purton.⁹¹⁵
834. Mr Overland told the Commission that whilst he had provided instruction that Ms Gobbo not represent persons she acted for, he could not recall ever seeking assurance that Ms Gobbo was not advising or representing such persons.⁹¹⁶
835. If Mr Overland gave such directions, it seems that those instructions were ignored, as there is considerable evidence before the Commission that makes it clear that Ms Gobbo did in fact provide incriminating information to the SDU about people for whom she continued to act. Alternatively, Mr Overland gave no such clear instructions. The Commissioner will need to determine whether or not Mr Overland gave such an instruction, given that there appears to be little or no evidence to support the position, save for Mr Overland's assertion.
836. The Commissioner may consider there to be a number of options as to the question of Mr Overland's recognition of the risks and his response to those matters.

Option 1: Mr Overland did not identify risks relating to conflict associated with using Gobbo as a human source and therefore did not provide any instruction to his investigators or those managing Ms Gobbo

837. Many police of senior ranks have submitted to the Commission that they failed to identify risks associated with using Gobbo as a human source, in that:
- 837.1. whilst they may have appreciated the need to ensure they did not receive privileged information in relation to cases in which Ms Gobbo was then acting
- 837.2. they distinguished this from her ability to provide information about those clients in relation to continued offending

⁹¹¹ Exhibit RC1.13 Transcript of IBAC examination Simon Overland, 22 November 2014, 39 IBAC.0002.0001.0005.

⁹¹² Exhibit RC915 Statement of Mr Simon Overland, 19 September 2019, 21 [114] COM.0014.0001.0001.@.0021; Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹¹³ Transcript of Mr Simon Overland, 16 December 2019, 11325.

⁹¹⁴ Exhibit RC1.13 Transcript of IBAC examination Simon Overland, 22 November 2014, 44-45 IBAC.0002.0001.0005.

⁹¹⁵ Responsive submissions of Mr Overland, 73 [200].

⁹¹⁶ Transcript of Mr Simon Overland, 16 December 2019, 11313.

- 837.3. they did not consider issues of conflict of interest in relation to Ms Gobbo being able to continue to act in the best interests of her client and consistently with her obligations to the court.
838. In relation to these submissions, it is noted that a number of members of lower rank, such as DSC Burrows, recalled there being discussion about issues amongst her crew (including Mr O'Brien) concerning the use of Ms Gobbo as a human source, including concerns because of her profession.
839. It is submitted that a more realistic proposition is that members of senior ranks (and others) were aware of risks associated with Ms Gobbo continuing to represent those that she was informing upon, however were content to allow the situation which they justified to themselves.
840. It is to be expected that Mr Overland, particularly as someone with legal qualifications, would have identified the significant legal and ethical complexities involved in a decision to use Ms Gobbo in such a manner.
841. Whilst it may be reasonable to conclude that Mr Overland would have identified such obvious risks to the administration of justice and instructed his officers to exercise great care, which is his stated position, it may be that such risks simply did not occur to him, but by the time he did learn of Ms Gobbo's conduct, and the potential that trials may have been affected, matters had progressed too far and he was unwilling or unable to admit error on his part.
842. However, it is submitted that the Commissioner should be slow to make such a finding because Mr Overland eschews it. That is not his evidence. His clearly stated position is that he was aware of such risks to the administration of justice in Ms Gobbo's use from the first time he learned that Ms Gobbo was providing information to police. This should be accepted by the Commissioner.

Option 2: Mr Overland identified the risks associated with using Ms Gobbo as a human source and provided instruction to investigators and those managing Ms Gobbo that she could not continue to act for those upon whom she was informing

843. As indicated above, this is Mr Overland's stated position.
844. In relation to the second aspect, that is that Mr Overland instructed investigators and those managing Ms Gobbo that she could not continue to act for those upon whom she was informing:
- 844.1. Mr O'Brien disputed that he was ever given any such direction.⁹¹⁷ Mr Sandy White similarly denied being given such an instruction. He did, however, say that explicit directions had been given by Mr Overland in relation to priority being given to ensuring the protection of Ms Gobbo's safety.⁹¹⁸
- 844.2. Mr Overland also refers in his submissions to his evidence to the Commission that he recalled such a discussion with Mr Moloney,⁹¹⁹

⁹¹⁷ Responsive submissions of Victoria Police, O'Brien submission, 271 [51.12].

⁹¹⁸ Responsive submissions of the SDU, [18(f)].

⁹¹⁹ Responsive submissions of Mr Overland, [73].

however he had no such recollection when he was asked about it in 2014 before Mr Kellam.⁹²⁰

- 844.3. Mr Overland's memory may not be reliable in relation to these events. Prior to the discovery of diaries kept by him for a significant period between 2003 and 2007, his evidence was that he did not keep diaries at all whilst he was at Victoria Police.
 - 844.4. when, on 27 September 2005, Mr Overland was briefed by Mr Purton about plans in relation to Ms Gobbo, he wrote notes in his diary of instructions he had given relating to the protection of Ms Gobbo from compromise. In contrast, there were no notes of any instructions directing that Ms Gobbo could not continue to act for those she was informing upon, or the consequences that might have on court proceedings.⁹²¹ The Commissioner might also observe that such an instruction seems to be at odds with the evidence of a number of members who have said that the question of who Ms Gobbo acted for was for her, and not for Victoria Police. It seems that Mr Overland accepts that given Ms Gobbo was in effect acting as an agent of Victoria Police, she could be told who she could act for and who she could not.
 - 844.5. there is no record of any such instruction having been given or received by investigators or the SDU, in circumstances where the documents produced to the Commission, and evidence adduced before it, indicate that the SDU were not as reluctant as investigators to make notes about Ms Gobbo.
 - 844.6. if such an instruction was given by Mr Overland, it is to be expected that there would be evidence of consideration and discussion about how the arrangements with Ms Gobbo would work, given that she would have to cease acting for numerous clients. There is no such evidence, and no one has given evidence of any such discussion.
 - 844.7. it is hard to imagine Purana investigators and the SDU acting contrary to such instructions, especially when disobedience could so easily be detected.
 - 844.8. there was no questioning by Mr Overland of Mr O'Brien or anyone else in March 2006, by which time it would have been patently obvious to him that Ms Gobbo had continued to act for Mr Tony Mokbel in circumstances where she was informing on him, and informing on others with a view that he would be arrested and implicated in further offending. In such circumstances she would clearly not be acting in his best interests.
845. That Mr Overland did not provide such instruction is also borne out by the following circumstances:
- 845.1. Mr Overland understood that Ms Gobbo was being used to provide information against the Mokbel syndicate of which Mr Tony Mokbel was the head.⁹²²

⁹²⁰ Exhibit RC1.13, Transcript of IBAC examination Simon Overland, 22 November 2014, 45 IBAC.0002.0001.0005.

⁹²¹ Responsive submissions of Mr Overland, [83].

⁹²² Transcript of Mr Simon Overland, 16 December 2019, 11315.

845.2. Mr Overland understood that Ms Gobbo became a human source in an attempt to extricate herself from Mr Tony Mokbel and his associates, as she could not walk away without her life being in danger.⁹²³

845.3. Mr Overland's contradictory view that Ms Gobbo becoming a source was the "least worst decision", as she was unable to walk away from her role representing Mr Tony Mokbel and his associates.⁹²⁴

845.4. Mr Overland was aware Ms Gobbo was not acting in Mr Tony Mokbel's interests, for instance:

845.4.1. on 12 September 2005, Mr Overland discussed with Mr O'Brien the recent dealings between Ms Gobbo and the Police. Mr O'Brien noted:

Discussion re solicitor Nicola Gobbo + opportunities re Op Quills to consider ACC hearings to Discussed recent AFP investigation re Mokbel + A/C query re Mokbel State charges brief + time frames

845.4.2. Mr O'Brien stated that on 12 September 2005 he was asked by Mr Overland to assume formal management of the Purana Taskforce. The contemporaneous note suggests he did have a discussion with Mr Overland about Mr Gobbo with Mr Overland. The reference to 'opportunities' is undoubtedly a reference to utilising Ms Gobbo as an informer against Mokbel. Operation Quills was an operation targeting Mr Mokbel. Ms Gobbo had come to talk to police about Mr Mokbel by virtue of her representation of Mr Bickley in Operation Quills and her concerns about representing the conflicting interests of Mr Bickley and Mr Mokbel. It is to be inferred Mr O'Brien explained this to Mr Overland in discussion of what opportunities she could bring to their investigation. Mr O'Brien gave evidence that it was obvious from his note that he discussed with Mr Overland Ms Gobbo coming in as an informer.⁹²⁵ That Mr Overland did not record the details in his diary or remember the meeting, is a matter that the Commissioner should consider, but it does not prevent a conclusion if it is reasonably likely that he was made aware. Mr Overland's ability to recall matters was far from perfect.

845.4.3. on 27 September 2005, he was told of information provided by Ms Gobbo relating to Mr Tony Mokbel's concern that Mr Bickley might 'roll over', and he was briefed on a potential strategy involving Ms Gobbo introducing an undercover operative to Mr Tony Mokbel in relation to a possible intention to [REDACTED].⁹²⁶

⁹²³ Transcript of Mr Simon Overland, 17 December 2019, 11442.

⁹²⁴ Transcript of Mr Simon Overland, 17 December 2019, 11442.

⁹²⁵ Transcript of Mr James (Jim) O'Brien, 4 September 2019, 5514-5515.

⁹²⁶ Submissions of Counsel Assisting, Volume 2, [1700].

845.4.4. Such information was also referred to in the Operation Posse Investigation Plan approved by Mr Overland on 21 October 2005.⁹²⁷

845.5. Ms Gobbo represented, and continued to represent, Mr Tony Mokbel in relation to those Commonwealth and State charges, in circumstances in which Mr Overland must have been aware of such representation.⁹²⁸

Option 3: Mr Overland identified the risks associated with using Ms Gobbo as a human source and failed to direct his investigators and those managing Ms Gobbo

846. It is submitted therefore that Mr Overland:

846.1. identified the risks associated with using Ms Gobbo as a human source, including the potential for serious consequences to subsequent criminal proceedings

846.2. failed to direct his investigators and those managing Ms Gobbo that she could not continue to act for those she was informing against or, alternatively, could not inform against people for whom she was acting or had acted.

847. That such instruction or instructions were not given by Mr Overland must be seen in the context that:

847.1. never before had a lawyer been used in such a manner; a manner which must have been appreciated by Mr Overland to be extraordinary.

847.2. an earlier Purana strategy to target members of criminal networks to testify against others was recognised by Mr Overland as involving complex legal and ethical issues such that he had consulted with the DPP and senior crown prosecutors about those matters before engaging in such undertakings.⁹²⁹

847.3. Mr Overland recognised that the use of human sources in general could be ethically and legally complex, and Ms Gobbo's case was very complex.⁹³⁰

847.4. Mr Overland was aware of the serious consequences to criminal proceedings of any such person if Ms Gobbo was acting contrary to their interests.⁹³¹

847.5. at no stage thereafter, did Mr Overland make any inquiry as to whether Ms Gobbo was acting for, or continuing to act, for those about whom she provided information, noting in particular that:

847.5.1. her continued representation of Mr Tony Mokbel must have been apparent to him⁹³²

847.5.2. his evidence when asked about his awareness of Ms Gobbo's representation of Mr Cooper at the time he and Mr

⁹²⁷ Submissions of Counsel Assisting, Volume 2, [1364]-[1367].

⁹²⁸ Submissions of Counsel Assisting, Volume 2, [1095.6], [1097.4], [1417]-[1432].

⁹²⁹ Submissions of Counsel Assisting, Volume 2, [415]-[419].

⁹³⁰ Transcript of Mr Simon Overland, 16 December 2019, 11330-11331, 11442, 11702.

⁹³¹ Transcript of Mr Simon Overland, 16 December 2019, 11313.

⁹³² Transcript of Mr Simon Overland, 16 December 2019, 11313-11314.

O'Brien met with the DPP, Mr Coghlan, in the days prior to his arrest was: *'I think, look I think I knew she had acted for a lot of these people in the past. But I'm not clear whether I knew – I don't believe I knew she was currently acting for him'*⁹³³

- 847.5.3. the likelihood, if he didn't already know it, that he learned of Ms Gobbo's representation of Mr Cooper around this time as he and Mr O'Brien were discussing with the DPP, Mr Coghlan QC, the possibility of obtaining an adjournment of Mr Cooper's upcoming plea hearing.⁹³⁴ This matter is considered below at [906] to [916].
848. In the submissions of Counsel Assisting, if Mr Overland had provided such an instruction, it would have meant that further use of Ms Gobbo was impractical. If Ms Gobbo ceased to act, not only would she ostensibly have put herself in danger, she would have lost the confidence of and access to the very people she was supposed to be informing upon.
849. It is recognised that Mr Overland should not be alone in any such finding. The plan to use Ms Gobbo was being considered by other very senior police with relevant responsibilities who were experienced with human source management and investigations involving human sources. It could not be that Mr Overland was the only senior member of police who appreciated the existence of such concerns and chose not to question them.

Failure to ensure appropriate legal advice

850. Submissions on behalf of Mr Overland suggest there was no obligation upon Mr Overland to ensure appropriate legal advice was obtained, noting amongst other matters that he did not manage the SDU and the policy required him to be divorced from the process of her risk assessment.⁹³⁵
851. The Commissioner should note the following matters. Mr Overland oversaw the Crime Department. His officers were responsible for the investigation, and the laying of charges. The Crime Department could not eschew the responsibility of ensuring that the evidence founding the charges they brought had been obtained appropriately. In circumstances where Mr Overland understood that it was proposed to (and that investigators ultimately did) gather evidence based upon the legally and ethically complex scenario of using a lawyer to inform on those she was representing, there was an obligation upon investigators and those overseeing them to ensure that the evidence to be relied upon would not be tainted in any way.
852. The effect of any legal advice, if it had been sought, would at the very least have included restrictions similar to the instructions Mr Overland has claimed he had given; that Ms Gobbo could not continue to act for those upon whom she was informing. This would have rendered the use of Ms Gobbo as a human source impractical for the reasons referred to above.

⁹³³ Submissions of Counsel Assisting, Volume 2, [1895.7].

⁹³⁴ Submissions of Counsel Assisting, Volume 2, [1895].

⁹³⁵ Responsive submissions of Mr Overland, [91]-[93].

853. It is submitted that these reasons, in combination with the matters referred to in [847] above indicate that the decision not to seek legal advice in relation to Ms Gobbo's use was deliberate.
854. This is further borne out when one considers Mr Overland's response in December 2008 and January 2009, when he was informed of possible outcomes arising from the use of Ms Gobbo, should she become a witness and her role as a human source be exposed. Those possible outcomes revealed concern on the part of those who had been managing Ms Gobbo that her use might have been contrary to the administration of justice in that:
- 854.1. previous convictions and future prosecutions, such as that of Mr Tony Mokbel, might be jeopardised
- 854.2. there may be government, judicial or OPI inquiry into her use.
855. Mr Overland's response when he was told of these matters was not to inquire any further as to the basis of such concerns.
856. In the circumstances known to him in 2005, the failure to ensure appropriate legal advice was taken at the outset was most serious.
857. The further failure to inquire into, report to the Chief Commissioner and obtain legal advice upon his becoming aware of the matters raised in [854] ought be viewed as an even more serious failing.

Direction to keep 'audit trails'

858. Mr Overland submits that his instruction to Mr Purton to keep 'audit trails' is inconsistent with any belief or apprehension that Ms Gobbo's role as a human source was, or would become, improper or unlawful, and was reflective of his expectation that 'full and appropriate disclosure would be made to prosecuting authorities when necessary'.⁹³⁶
859. The relevant diary entry referred to by Mr Overland is dated 27 September 2005. It first records Mr Overland being provided with details from a debriefing of Ms Gobbo by the SDU. This included discussion of a possible strategy involving the introduction of an undercover operative to Mr Tony Mokbel in relation to the possibility that he would [REDACTED] [REDACTED].⁹³⁷ At that time Ms Gobbo was representing Mr Tony Mokbel in relation to both Commonwealth and State charges, trials of which were pending. Both prosecutions relied upon those tapes.
860. Following this, Mr Overland's diary entry indicated discussion of matters relating the handling of information received from Ms Gobbo:

Discussed handling of information from 3838 – highly sensitive

IR as normal – Contact reports held by TP

Discuss with Ian Thomas re management – need to keep info extremely tight and with audit trails

⁹³⁶ Responsive submissions of Mr Overland, [19(d)(v)], [20(a)], [83].

⁹³⁷ Submissions of Counsel Assisting, Volume 2, [1700].

Investigation strategy being developed – Monday – Part of Purana

Must not compromise 3838 under any circumstances particularly with proposal [REDACTED] – need to ensure 3838 not burnt in any plan

861. Those parts in bold were not reproduced in the excerpt referred to in submissions for Mr Overland.⁹³⁸ An analysis of the whole entry provides a different complexion than that contended for by Mr Overland.
862. During the relevant period Ian Thomas was either the Superintendent or Acting Commander of I&CS, the Department in which the SDU was situated.
863. It is apparent that the instruction to keep audit trails, as with his recording of the 'need to ensure 3838 not burnt in any plan', was not given for the purposes of ensuring the ability to make 'full and appropriate disclosure'. The directions were made with a different purpose in mind. It is submitted that it was a demonstration of Mr Overland's concern to avoid compromise of Ms Gobbo's identity. It is likely that he wanted to ensure that the SDU information was only given to those who should have it, and that a record was kept to ensure that it could be ascertained who held such information. This can be considered in the context of Mr Overland's experience with the Hodson murders which had occurred in circumstances where a file containing records demonstrating Terrence Hodson to be an informer had gone missing and was leaked.
864. Mr Overland was an experienced police officer who was cognisant that there would be disclosure obligations in subsequent proceedings. In this regard he instructed that information reports were to be 'normal' and held by Mr Purton. He was aware that the 'normal' situation in relation to the intelligence contained in information reports, and thus that which would potentially be disclosed to the courts, was that it would be sanitised; these reports would not indicate the source of the intelligence within. Informer privilege operates to ensure that, but for in the most exceptional circumstances, the identity of an informer would not be revealed.

Mr Overland's expectation that Ms Gobbo's identity would be revealed during court proceedings

865. It has been submitted on behalf of Mr Overland that he understood that his very experienced investigators were making appropriate disclosure as to the use of Ms Gobbo as a source, and that he expected that Ms Gobbo's role would be revealed during the court process. It is said that his expectation of full disclosure arose because of his appreciation as to the sensitivity of using her as a human source and his belief that her risk of exposure was significant given criminals were attuned to looking across briefs of evidence to identify patterns.⁹³⁹
866. If, as he claimed, Mr Overland always understood that the use of a barrister as a human source was contentious and therefore subject to challenge,⁹⁴⁰ and he truly anticipated disclosure and examination of Ms Gobbo's role during the

⁹³⁸ Responsive submissions of Mr Overland, [83].

⁹³⁹ Responsive submissions of Mr Overland, [20], [94]-[98]; Transcript of Mr Simon Overland, 19 December 2019, 11333, 11754.

⁹⁴⁰ Transcript of Mr Simon Overland, 19 December 2019, 11824.

court processes, it cannot be imagined that he would have forged ahead in the use of Ms Gobbo without having first sought some reassurance about its legality and appropriateness, lest Ms Gobbo be compromised for nought.

867. A genuine belief that there was to be full disclosure to the prosecution would be evidenced by an engagement with the DPP. Mr Overland had engaged with the DPP in relation to Purana's early strategy to target members of criminal networks to testify against others, where he had appreciated legal and ethical complexities existed.

868. The information received by Mr Overland during Ms Gobbo's use would have led him to understand that Ms Gobbo's role had not been dealt with during the court process:

868.1. On 17 July 2007, Mr Overland was present at a meeting with Mr Blayney, Mr O'Brien and Mr Brown. There were discussions as to the possibility that Ms Gobbo would be a witness in the Karam matter. Mr Blayney raised concerns about the legal complexities involved in Ms Gobbo's use as a human source. It must have been appreciated by those present that Ms Gobbo had been informing on Mr Karam at the same time she had been informing upon him. Mr Blayney suggested that a hypothetical legal advice be sought to work through various scenarios. If Mr Overland had understood that Ms Gobbo's use as a human source had been approved in court processes to that point, this would have been raised. The evidence indicates it was not. Rather, Mr O'Brien and Mr Sandy White discussed the potential for overturned convictions and legal advice the following day.⁹⁴¹

868.2. On 6 August 2007, Mr Overland was involved in further discussion of the issues involved in Ms Gobbo's use as a witness in the Karam matter or continued use as a human source. Mr Overland was briefed that Ms Gobbo could not be deactivated, nor could she become a witness, for reasons relating to the avoidance of compromise of her identity as a human source through court processes.⁹⁴²

868.3. In December 2008 and January 2009, Mr Overland was informed of possible outcomes arising from the use of Ms Gobbo should she become a witness and her role as a human source be exposed. Those possible outcomes revealed concern on the part of those who had been managing Ms Gobbo that her use might have been contrary to the administration of criminal justice and that:

868.3.1. previous convictions and future prosecutions, such as that of Mr Tony Mokbel, might be jeopardised

868.3.2. there may be government, judicial or OPI inquiries into her use.

869. The concerns being raised by the SDU were not consistent with a court having previously determined whether disclosure of Ms Gobbo's role was required as would be expected.⁹⁴³

⁹⁴¹ Submissions of Counsel Assisting, Volume 2, [2414]-[2427].

⁹⁴² Submissions of Counsel Assisting, Volume 2, [2506].

⁹⁴³ Submissions of Counsel Assisting, Volume 2, [3485].

870. Mr Overland never made any inquiry into such matters, either with the SDU or his investigators, before or after these concerns were raised with him in December 2008 and January 2009.⁹⁴⁴
871. Counsel Assisting have accordingly submitted that the Commissioner should not accept that Mr Overland was unaware that Ms Gobbo's role as a human source had not been disclosed previously.⁹⁴⁵ Nor should it be accepted that he had that expectation from the outset.

Ms Gobbo's registration, handling and management was not Mr Overland's responsibility

872. Mr Overland submits in response to a number of Counsel Assisting submissions, that the SDU was outside his chain of command both when he was Assistant Commissioner Crime and Deputy Commissioner, and instead formed part of the Intelligence and Covert Support (I&CS) Department.⁹⁴⁶
873. Counsel Assisting do not submit that Mr Overland was alone responsible for Ms Gobbo's registration, handling and management as a human source, however it is submitted that he was in part responsible and the evidence demonstrates that he did play a significant role in such matters:
- 873.1. Mr Overland said in evidence; "*While I did not specifically authorise her role, equally I did not stop it for the reasons I have set out in this statement...*"⁹⁴⁷ This was an acknowledgement that Mr Overland would have had a say in Ms Gobbo's use as a human source.
- 873.2. Mr Overland told IBAC in 2014 and confirmed in his evidence to the Commission that he issued an instruction to both investigators and those managing Ms Gobbo, namely Mr Sandy White, that she should not continue to represent those she was informing upon.
- 873.3. On 26 September 2005, he diarised an instruction at a Purana Taskforce Update meeting of the '*need to manage this source very carefully – [Terry Purton] to be fully involved*'.⁹⁴⁸ Mr Purton was the Commander of Crime, under his Command.
- 873.4. On 27 September 2005, he diarised the need to ensure that Ms Gobbo was not compromised or 'burnt' in any plan involving the introduction of an undercover operative, as referred to above at [860].
- 873.5. On 21 October 2005, he approved Operation Posse, which was to use Ms Gobbo's ongoing information, and he thereafter received regular briefings in relation to that Operation, including in relation to Ms Gobbo.⁹⁴⁹
- 873.6. On 16 February 2006, Mr Overland instructed Mr Biggin that Ms Gobbo was a very significant source and her protection was to be a priority, and there should be discussion of tactics to manage her protection.⁹⁵⁰

⁹⁴⁴ Submissions of Counsel Assisting, Volume 2, [3541].

⁹⁴⁵ Submissions of Counsel Assisting, Volume 2, [3539].

⁹⁴⁶ Responsive submissions of Mr Overland, [19(d)(iii)], [62]-[68], [92].

⁹⁴⁷ Submissions of Counsel Assisting, Volume 2, [1420], [1435], [1890.4].

⁹⁴⁸ Submissions of Counsel Assisting, Volume 2, [194].

⁹⁴⁹ Submissions of Counsel Assisting, Volume 2, [1364]-[1367], [1787], [1797], [1799].

⁹⁵⁰ Submissions of Counsel Assisting, Volume 2, [1511]-[1512].

- 873.7. In March 2006, when concerns arose that Ms Gobbo's phone was being intercepted by the AFP, Mr Overland was involved in making an inquiry with the AFP.⁹⁵¹
- 873.8. On 17 May 2006, following the ostensible success of the Operation Posse investigation plan, Mr Overland took part in a meeting with Mr Sandy White and Mr Peter Smith of the SDU in which they discussed the process for withdrawal of Ms Gobbo as a human source.⁹⁵²
- 873.9. In June and July 2006, Mr Overland became involved when it became apparent that the OPI and ESD in Operation Khadi were planning to summon Ms Gobbo to a coercive examination and there was an application to put a telephone intercept on her phone. This included Mr Overland informing a number of people about Ms Gobbo's identity as a human source. Mr Overland's involvement was sought by Mr Biggin and Mr Sandy White. As a consequence, he met with Mr Ashton of the OPI in which the matter of Ms Gobbo being called for coercive examination was discussed.⁹⁵³
- 873.10. In December 2006, upon being told that Ms Gobbo had received death threats, Mr Overland sent a message to the SDU enquiring whether Ms Gobbo could be 'eased out'.⁹⁵⁴
- 873.11. According to the submissions on behalf of Mr O'Brien, in April and May 2007 the Purana Taskforce was looking to end its engagement with Ms Gobbo, whilst the Petra Taskforce was identifying her as a person of interest in relation to the execution of Terrence and Christine Hodson.⁹⁵⁵ Mr O'Brien spoke about these matters with Mr Overland on 19 April 2007.⁹⁵⁶ The SDU had been discussing the need to deactivate Ms Gobbo in the days prior to this.⁹⁵⁷
- 873.12. According to the submissions of Mr O'Brien, the competing interests coalesced in a meeting between Mr Sandy White and Mr Ryan on 10 May 2007, after which Mr Sandy White noted it was necessary to "delay exit strategy pending DC approval for conversation with HS re Dale etc:" Mr Overland approved such a conversation on 16 May 2007, it took place on 21 May 2007, and Mr Overland was briefed by Mr Sandy White on 25 May 2007.⁹⁵⁸ Following this the SDU was no longer planning an exit strategy, considering her value to be high, particularly in relation to 'corruption issues and murder investigation involving serving and ex police'.⁹⁵⁹
- 873.13. Following the service of an OPI summons on Ms Gobbo on 11 July 2007, with resulting concerns about her being compromised, Mr Overland became involved in the issue.⁹⁶⁰

⁹⁵¹ Submissions of Counsel Assisting, Volume 2, [2762].

⁹⁵² Submissions of Counsel Assisting, Volume 2, [1581]-[1586].

⁹⁵³ Submissions of Counsel Assisting, Volume 2, [1966]-[2081].

⁹⁵⁴ Submissions of Counsel Assisting, Volume 2, [1726].

⁹⁵⁵ Responsive submissions of Victoria Police, Tranche 1, 342 [53.48(a)].

⁹⁵⁶ Submissions of Counsel Assisting, Volume 2, [2284].

⁹⁵⁷ Submissions of Counsel Assisting, Volume 2, [2282].

⁹⁵⁸ Responsive submissions of Victoria Police, Tranche 1, 342 [53.48(b),(c)]; Submissions of Counsel Assisting, Volume 2, [2331].

⁹⁵⁹ Submissions of Counsel Assisting, Volume 2, [2341].

⁹⁶⁰ Submissions of Counsel Assisting, Volume 2, [2405]-[2413].

- 873.14. Following Ms Gobbo's information to the SDU in relation to Mr Karam in June 2007 which assisted in the discovery by the AFP in a shipment of ecstasy, there was contemplation that Ms Gobbo might become a witness. On 17 July 2007, Mr Overland was present at a meeting where issues around Ms Gobbo were discussed, including as to her safety, and also as to the legal complexities involved in her use, with Mr Blayney suggesting a hypothetical legal advice be obtained at this meeting.⁹⁶¹
- 873.15. On 24 July 2007, Mr Overland instructed members of the Crime Department to convene a meeting to discuss options as to Ms Gobbo's future as a witness or otherwise. The meeting was attended by various Crime Department officers (Mr Blayney, Mr Brown, Mr Ryan, Mr O'Brien and Mr O'Connell) along with Mr Biggin and Mr Sandy White. It was agreed that Mr Overland would be briefed on the issues discussed.⁹⁶²
- 873.16. On 6 August 2007, Mr Overland was briefed by Mr Biggin, Mr Sandy White, Mr Blayney and Mr Ryan about the options as to Ms Gobbo's future. It was determined that Ms Gobbo would not be a witness, that she could not be deactivated, and that she would continue to be managed as a human source without tasking and with any intelligence being risk assessed prior to dissemination. There was discussion about the use of Ms Gobbo as a human source by the Briars and Petra Taskforces.⁹⁶³
- 873.17. On 21 September 2007, Mr Overland met with Mr Biggin and Mr Sandy White to discuss the use of Ms Gobbo [REDACTED] Mr Waters [REDACTED] for the benefit of the Briars Taskforce investigation.⁹⁶⁴
- 873.18. In August 2008, Mr Overland spoke with Mr Ashton about dispensing with the need to recall Ms Gobbo to the OPI.⁹⁶⁵
- 873.19. In August 2008, Mr Overland gave a direction to Mr Moloney (the Commander of I&CS) to supply Mr Ashton with details of human sources, including Ms Gobbo.⁹⁶⁶
- 873.20. From 3 December 2008, Mr Overland was significantly involved in discussions in relation to the tasking of Ms Gobbo to record a conversation with Mr Dale, and in the face of opposition from members of the SDU and their superior, made the ultimate decision that she should transition from human source to be a witness in his trial.⁹⁶⁷
874. It is clear from the matters raised above, that Mr Overland had the ability to exercise authority and influence in the recruitment, handling and management of Ms Gobbo as a human source, and that he did so throughout her period of her registration.

⁹⁶¹ Submissions of Counsel Assisting, Volume 2, [2414]-[2427]; Responsive submissions of Victoria Police, Tranche 1, 342 [53.49]-[53.50].

⁹⁶² Submissions of Counsel Assisting, Volume 2, [2468]-[2482].

⁹⁶³ Submissions of Counsel Assisting, Volume 2, [2504]-[2509].

⁹⁶⁴ Submissions of Counsel Assisting, Volume 2, [2563].

⁹⁶⁵ Submissions of Counsel Assisting, Volume 2, [3282].

⁹⁶⁶ Submissions of Counsel Assisting, Volume 2, [3291].

⁹⁶⁷ Submissions of Counsel Assisting, Volume 2, [3391]-[3431], [3467]-[3539].

Mr Overland's urging of an exit strategy

875. It is submitted on behalf of Mr Overland that Counsel Assisting have not dealt with the fact that Mr Overland 'repeatedly' urged an exit strategy. It is said that this is inconsistent with any notion of his cultivation, or acquiescence in, the ongoing receipt of privileged information because he believed it to be helpful for police investigations.
876. It is noted that the submission on behalf of Mr Overland raises his involvement in two matters, a meeting on 17 May 2006 and his enquiry on 11 December 2006. In assessing Mr Overland's intentions as to the continued use of Ms Gobbo, the Commissioner should have regard to the following matters:
- 876.1. On 17 May 2006, Mr Overland's attendance at a meeting with members of the SDU where discussion was held as to a reward for Ms Gobbo and the process for her withdrawal as a human source.⁹⁶⁸
- 876.2. On 11 December 2006, Mr Overland made an enquiry of the SDU about whether Ms Gobbo could be 'eased out' upon learning she had received threats.⁹⁶⁹
- 876.3. In April and May 2007, the Purana Taskforce was looking to end its engagement with Ms Gobbo, whilst the Petra Taskforce was identifying Ms Gobbo as a person of interest in relation to the murders of Terrence and Christine Hodson.⁹⁷⁰
- 876.4. On 10 May 2007, a meeting took place between Mr Sandy White of the SDU and Mr Ryan of the Petra Taskforce to discuss Ms Gobbo, including the proposed exit strategy and a proposed debriefing of her in relation to matters related to the Petra Taskforce investigation. It was determined to delay the exit strategy pending approval by Mr Overland for the debriefing of Ms Gobbo.⁹⁷¹
- 876.5. On 16 May 2007, Mr Overland gave his approval for the debriefing of Ms Gobbo.⁹⁷²
- 876.6. On 21 May 2007, the debriefing took place.⁹⁷³
- 876.7. On 22 May 2007, Mr Ryan was briefed as to Ms Gobbo's debriefing and was to brief Mr Overland.⁹⁷⁴
- 876.8. On 25 May 2007, Mr Overland met with Mr Sandy White. They discussed the debriefing of Ms Gobbo, the SDU desire to exit Ms Gobbo without bitter recriminations given her object had been to have the Mokbels out of her life, concerns over the OPI summoning her to a compulsory hearing, and her 'ongoing viability' as a human source in relation to the investigations of the Petra and Briars Taskforces. It is

⁹⁶⁸ Submissions of Counsel Assisting, Volume 2, [1581]-[1586].

⁹⁶⁹ Submissions of Counsel Assisting, Volume 2, [1724]-[1727].

⁹⁷⁰ Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

⁹⁷¹ Submissions of Counsel Assisting, Volume 2, [2319]-[2320]; Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

⁹⁷² Submissions of Counsel Assisting, Volume 2, [2323]-[2324]; Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

⁹⁷³ Submissions of Counsel Assisting, Volume 2, [2326]-[2328]; Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

⁹⁷⁴ Submissions of Counsel Assisting, Volume 2, [2358]; Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

apparent that the SDU did not continue with its planned exit of Ms Gobbo following this meeting, instead referring to her value as a human source remaining high, particularly in relation to corruption issues and murder investigations involving serving and ex-police.⁹⁷⁵ This referred to the Petra and Briars Taskforce investigations, both of which Mr Overland had significant interest in.

- 876.9. In June 2007, whilst she was appearing on behalf of Mr Karam in his trial, Ms Gobbo copied and provided the SDU with documents given to her for safe keeping by Mr Karam. This information assisted law enforcement authorities to identify the 'Tomato Tins' ecstasy shipment. She was thereafter tasked by the SDU in relation to that investigation.⁹⁷⁶ It is apparent from his subsequent discussions as to Ms Gobbo potentially being a witness against Mr Karam that Mr Overland was informed of Ms Gobbo's role in this matter.
- 876.10. In July 2007, concerns about compromise of Ms Gobbo's role arose when she was summoned to appear before the OPI. These concerns were elevated to Mr Overland.⁹⁷⁷
- 876.11. On 17 July 2007, a discussion about Ms Gobbo took place between Mr Overland, Mr O'Brien, Mr Blayney and Mr Brown. There was discussion about the mitigation of risks associated with Ms Gobbo's compromise and the potential for her to become a witness against Mr Karam. Mr Blayney raised his concern about the 'legal complexities' involved in the use of Ms Gobbo as a human source and suggested that they receive a hypothetical legal opinion.⁹⁷⁸
- 876.12. On 24 July 2007, Mr Overland instructed members of the Crime Department to convene a meeting to discuss options as to Ms Gobbo's future as a witness or otherwise. The meeting was attended by various Crime Department officers (Mr Blayney, Mr Brown, Mr Ryan, Mr O'Brien and Mr O'Connell) along with Mr Biggin and Mr Sandy White. It was agreed that Mr Overland would be briefed on the issues discussed.⁹⁷⁹
- 876.13. On 6 August 2007, Mr Overland was briefed by Mr Biggin, Mr Sandy White, Mr Blayney and Mr Ryan about the options as to Ms Gobbo's future. It was determined that Ms Gobbo would not be a witness, that she could not be deactivated, and that she would continue to be managed as a human source without tasking and with any intelligence being risk assessed prior to dissemination. There was discussion about the use of Ms Gobbo for the Briars and Petra Taskforces.⁹⁸⁰
- 876.14. On 21 September 2007, Mr Overland met with Mr Biggin and Mr Sandy White to discuss the use of Ms Gobbo [REDACTED].⁹⁸¹

⁹⁷⁵ Submissions of Counsel Assisting, Volume 2, [2331], [2341]-[2342].

⁹⁷⁶ Submissions of Counsel Assisting, Volume 2, [2343]-[2344], [2797]-[2800]; Responsive submissions of Victoria Police, O'Brien, 342 [53.48].

⁹⁷⁷ Submissions of Counsel Assisting, Volume 2, [2401]-[2413].

⁹⁷⁸ Submissions of Counsel Assisting, Volume 2, [2418]-[2427].

⁹⁷⁹ Submissions of Counsel Assisting, Volume 2, [2468]-[2482].

⁹⁸⁰ Submissions of Counsel Assisting, Volume 2, [2504]-[2509].

⁹⁸¹ Submissions of Counsel Assisting, Volume 2, [2563].

- 876.15. Around 16 April 2008, Mr Overland became aware that Ms Gobbo's car had been set alight in an escalation of the threats to her.⁹⁸²
- 876.16. On 5 September 2008, Mr Overland was briefed by Mr Wilson in relation to prison letters in which Carl Williams discussed Ms Gobbo's role with the Purana Taskforce.⁹⁸³
- 876.17. In December 2008, Mr Overland became involved in the decision that Ms Gobbo should be transitioned from a human source to a witness.
877. Noting the above, it is submitted that:
- 877.1. In May 2006, Mr Overland was content to have Ms Gobbo exited as a human source following the success of Operation Posse.
- 877.2. In December 2006, Mr Overland was conscious that Ms Gobbo's role as a human source should not be compromised and considered the best course was having her 'eased out'.
- 877.3. From May 2007, Mr Overland thought Ms Gobbo would be of further use to new investigations which had been established and he was content that she remain a human source.
- 877.4. In July and August 2007 there was contemplation of Ms Gobbo becoming a witness or being deactivated. Mr Overland was involved in decision making that she should remain a human source and be used in the Petra and Briars investigations. This occurred in circumstances where there was questioning of the 'legal complexities' occasioned by her use as a human source, and for which no legal advice was taken.
- 877.5. In December 2008, Mr Overland had reached a point where various issues were coalescing and decisions as to Ms Gobbo's future status needed to be made. His decision making is examined further in the following paragraphs.

The inherent unlikelihood Mr Overland would have decided to transition Gobbo from human source to witness if he was aware of her inappropriate use as a human source

878. Mr Overland submits that his insistence that Ms Gobbo give evidence in relation to the Petra matters permits of only two possibilities:
- 878.1. His belief that his instruction that an audit trail would have been complied with and would reveal no wrongdoing by him, his direction that Ms Gobbo could not continue to act for people if she was providing information about them had been followed, and his expectation that appropriate disclosure had occurred
- 878.2. He knew or believed his role in relation to Victoria Police dealings was unlawful or unethical but acted in a self-destructive manner to resist opposition against such a decision and expose their dealings with Ms Gobbo to scrutiny.⁹⁸⁴

⁹⁸² Submissions of Counsel Assisting, Volume 2, [3218].

⁹⁸³ Submissions of Counsel Assisting, Volume 2, [3323]-[3329].

⁹⁸⁴ Responsive submissions of Mr Overland, [20], [102].

879. Matters related to various aspects of the first possibility are dealt with above.
880. In relation to the second possibility, the nature of the concerns raised with Mr Overland in December 2008, and more formally in the SWOT analysis in January 2009, made clear to Mr Overland that disclosure of Ms Gobbo's role had not previously occurred. It could not be that past convictions and future prosecutions might be jeopardised, or that there would be such serious concerns about judicial, OPI or government inquiry if Ms Gobbo's role had been previously examined and sanctioned by the court. Effectively the SDU were arguing that Ms Gobbo should not be a witness as there was a risk of her exposure as a human source in court processes. They did not want any such examination of the handling and management of Ms Gobbo to occur – they wanted these issues to remain hidden. Mr Overland submits for this reason that his decision to transition Ms Gobbo to the role of witness would not have occurred had he been aware of her inappropriate use.
881. The actions of Mr Overland do not simply permit of the two possibilities outlined above. There were risks to Victoria Police and Mr Overland in whatever decision was made. Consequently, Mr Overland had to engage in a balancing process:
- 881.1. There was significant risk to both Ms Gobbo and Victoria Police associated with Ms Gobbo continuing to be used as a human source or being deactivated without becoming a witness. Ms Gobbo had been the subject of escalating threats. If she had come to any harm, the inevitable inquiry or Royal Commission would almost certainly have revealed the extent of her role as a human source, and put in jeopardy the convictions which had been achieved and the prosecutions on foot. Mr Overland was aware of this very real risk, and no doubt also aware of the professional consequences to him of any such inquiry.
- 881.2. In transitioning her to the role of witness, it would have been expected that the risk of harm being occasioned to Ms Gobbo would be significantly mitigated by her engagement in witness protection. As referred to above and in Counsel Assisting's submissions, Victoria Police had managed to avoid disclosure of Ms Gobbo's role in court processes to that point. Whilst there remained a risk of disclosure and exposure of Ms Gobbo's human source role during court proceedings, and the consequent issues which might flow from that, this was mitigated by the 'barrier / break' put in place to separate Ms Gobbo's dealings with Petra from her previous dealings with the SDU. In addition to the above, Mr Overland would secure what he regarded as important evidence against Mr Dale. This really was the only decision that Mr Overland could make.
882. As referred to by Mr Biggin in his memorandum in his provision of the SWOT analysis:

There are a number of organisational risks to Victoria Police – the SDU are prepared to expand upon these to Taskforce Management.

The purpose of this paper is to ensure that decision makers are in possession of relevant information to allow proper decisions to be

*made. Decisions made today may have long term implications for Victoria Police.*⁹⁸⁵

883. Mr Overland's evidence to the Commission, and repeated in his submission, was that he was well aware of the risks outlined in the SWOT analysis and had understood they existed for some time. That can be accepted. He said that whilst he did not report these risks to the Chief Commissioner, they were risks that he was managing, and that Mr Ashton and Mr Cornelius were also involved in managing.⁹⁸⁶ Mr Overland challenges the submission of Counsel Assisting that he was aware that Ms Gobbo's role had not previously been disclosed.⁹⁸⁷ He also challenges the submission made by Counsel Assisting that he received the Biggin memo and SWOT analysis.⁹⁸⁸
884. Mr Overland has sought to characterise the matters identified in the SWOT analysis as simply 'risks' which had existed from the outset of Ms Gobbo's use. The matters raised in the SWOT analysis were more than that. One weakness identified was '*possible OPI / Government review into legal / ethical implications.*' This was an indication that there were legal and ethical implications of Ms Gobbo's use that had not been grappled with from the time of her registration. One threat brought about by Ms Gobbo's use as a witness was identified as '*judicial review of police actions in tasking and deploying one of their own*'. This was an indication that there had been no judicial sanction given to Ms Gobbo's use previously. If Victoria Police had disclosed its dealings, at least to the court, there could be no such threat. Another threat was identified as '*OPI Review – Serving barrister assisting police; consideration of unsafe verdicts and possible Appeals; prosecutions (Mokbel) & future?*' This was a clear indication that the police had used Ms Gobbo, in the knowledge that the OPI might have concerns about using a barrister in such a way, and that her use might have led to convictions being improperly achieved. This suggested that no judicial sanction had been given to her use. Similarly, the suggestion that outstanding Mokbel related prosecutions might be jeopardised, would indicate that Ms Gobbo's use had not been litigated previously.
885. Counsel Assisting submit that Mr Overland's suggested benign interpretation of the SWOT analysis at number 17 (page 80) of his submission is difficult to accept. In fact, the SDU were not concerned about risks that had existed 'right from the very outset'. The suggestion of Mr Overland that the SDU members had in effect become skittish about criminal barristers taking every point and making allegations which might lead to OPI review and overturned convictions can readily be rejected. If officers and Mr Overland were of the view that their conduct was unimpeachable, what fear would they have from the OPI? On the other hand, if the SDU officers were conscientiously raising serious issues about what had occurred, then why not find out what their concern was, and direct that steps be taken to address it?
886. As to Mr Overland's evidence and submission of having already been aware of the existence of risks of the nature identified in the SWOT analysis, if he was not aware of them before mid-2007, it is apparent that he was informed of them at around this time in the context of discussions as to the use of Ms Gobbo as

⁹⁸⁵ Exhibit RC1084 Mr Simon Overland Petra Taskforce Folder 2, 530-535 VPL.0100.0129.0001 @.0530-.0535.

⁹⁸⁶ Responsive submissions of Mr Overland, page 80-81 [17]-[18].

⁹⁸⁷ Responsive submissions of Mr Overland, page 80 [17], 82 [22].

⁹⁸⁸ Responsive submissions of Mr Overland, page 81-82 [20]-[21].

a witness against Mr Karam. These matters and their background are dealt with in Counsel Assisting's submissions,⁹⁸⁹ and further in this reply at [521]-[549].

887. Notably, on 17 July 2007, Mr Blayney recognised the legal implications of Ms Gobbo's use as a human source and suggested that a hypothetical legal advice be obtained. There is no evidence that any reassurance was given that a court had sanctioned Ms Gobbo's use in any case by this time.⁹⁹⁰
888. On 6 August 2007, similar issues had arisen with respect to the question of whether Ms Gobbo could be utilised as a witness against Mr Karam. Mr Overland was briefed as to the options available for Ms Gobbo's future – as a witness, as a source, or neither. As to the consideration of Ms Gobbo being a witness, her evidence against Mr Karam would necessarily reveal that she had been representing Mr Karam at trial at the time she handed over the shipping documents which led to the ecstasy seizure. It was inevitable that there would be questions about her role with the police, which would lead to revelation of her informing against other clients. Mr Sandy White and Mr O'Brien had discussed the fallout that might arise from this, including impacts upon the convictions of Mr Cooper and others, and the consequent need for legal advice. A decision was taken at the meeting with Mr Overland that Ms Gobbo should not be a witness as the risk of her compromise was too great. Mr Overland's evidence that he was well aware of matters of this kind raised in the SWOT analysis is consistent with Mr Sandy White's evidence that it was probable that he raised such issues with Mr Overland in the meeting on 6 August 2007.⁹⁹¹
889. In early December 2008, these issues arose again when there was contemplation of using Ms Gobbo as a witness against Mr Dale. On 5 December 2008, Mr Overland attended a meeting with Mr Biggin and members of the SDU, which Mr Biggin recorded in his diary as being to address 'options, tactics & risk assessment'. Counsel Assisting has made submissions suggesting that Mr Overland had determined already to use Ms Gobbo by this time.⁹⁹² It is submitted on behalf of Mr Overland that his decision was not made until after Ms Gobbo had recorded Mr Dale.⁹⁹³ Regardless of which is correct, at this meeting there was contemplation that Ms Gobbo would become a witness and the risks associated with such a course. Mr Overland gave evidence that he would have wanted to understand the risks associated with such a decision. SDU records indicate their concerns at this time including the risk of a Royal Commission, previous convictions being open to claims of being unsafe, either because of Ms Gobbo's involvement or because of privilege issues, and future prosecutions related to Mr Mokbel being jeopardised.⁹⁹⁴
890. Also at that meeting the concept of the 'barrier / break' was discussed; the idea being to minimise the risk of disclosure of Ms Gobbo's historic role with the SDU. This involved having investigators in the Petra Taskforce deploy Ms Gobbo to record the conversation with Mr Dale rather than it being done by or through the SDU. In this way, investigator notes, which would later be

⁹⁸⁹ Submissions of Counsel Assisting, Volume 2, [2414]-[2445], [2468]-[2484], [2504]-[2509].

⁹⁹⁰ Submissions of Counsel Assisting, Volume 2, [2414]-[2427].

⁹⁹¹ Transcript of Mr Sandy White, 3 September 2019, 5421-5422.

⁹⁹² Submissions of Counsel Assisting, Volume 2, [3391]-[3392], [3395], [3400]-[3404].

⁹⁹³ Responsive submissions of Mr Overland, page 79 [16].

⁹⁹⁴ Submissions of Counsel Assisting, Volume 2, [3397]-[3405].

disclosed in court proceedings, would not reveal any SDU involvement with Ms Gobbo.⁹⁹⁵

891. Mr Overland agreed that he discussed the suggestion of the 'barrier/break', by having Petra investigators deploy Ms Gobbo to tape Mr Dale. Whether or not Mr Overland had determined, as at 5 December 2008 to proceed with the plan, his evidence was that if did proceed, this was the manner in which it needed to happen.⁹⁹⁶ That is what occurred a couple of days later.
892. As to Mr Overland's contention that there should be no finding that he was provided the SWOT analysis on 5 January 2009, his submission ignores the evidence of Mr Moloney, who said that because of the significance of the documents, he delivered them to Mr Overland by hand. He recalled that Mr Overland spoke in general terms about the SWOT analysis at the Petra meeting in the presence of he and Mr Ashton (the OPI representative), in effect downplaying the matters raised therein. To Mr Moloney's recollection, Mr Overland did not refer to the possibility of OPI review.⁹⁹⁷
893. Whilst Mr Overland says that it should be found that the SWOT analysis was not brought to his attention, he nevertheless appears to be ambivalent about it and is perplexed as to why Counsel Assisting have sought to draw an inference that he received it. However, no inference need be drawn to make the finding suggested by Counsel Assisting, as there is direct and unchallenged evidence from Mr Maloney, which Mr Overland has left alone. It is telling that he has ignored it, and suggests that he is not ambivalent about such a finding. Counsel Assisting submit that Mr Overland's conduct upon the receipt of this document is damning.
894. When Mr Overland was asked in evidence about whether he raised with Mr Ashton the SDU members' concerns:
- 894.1. about a review of the use of a practising barrister as a human source
 - 894.2. that there may be consideration of unsafe verdicts
 - 894.3. that current prosecutions related to Mr Mokbel may be the subject of question marks,
- he said he could not recall if he told Mr Ashton about those matters.⁹⁹⁸
895. Having been shown the SWOT analysis, Mr Ashton said he did not believe that he had seen the document as he would have recalled the references to the OPI. He gave evidence that matters raised within the SWOT analysis should have led to a notification to the OPI, and been provided to the Chief Commissioner.⁹⁹⁹
896. Mr Cornelius, who was the Assistant Commissioner of ESD, gave evidence that he was never shown the SWOT analysis, nor were the concerns within it

⁹⁹⁵ Submissions of Counsel Assisting, Volume 2, [3406]-[3408].

⁹⁹⁶ Transcript of Mr Simon Overland, 19 December 2019, 11826.

⁹⁹⁷ Submissions of Counsel Assisting, Volume 2, [3406]-[3408].

⁹⁹⁸ Transcript of Mr Simon Overland, 19 December 2019, 11857-11858.

⁹⁹⁹ Submissions of Counsel Assisting, Volume 2, [3518] [3522].

raised with him. Mr Cornelius accepted that this would have led to a significant review by the OPI.¹⁰⁰⁰

897. Regard should be had to the fact that in the face of Mr Overland's decision that Ms Gobbo should become a witness, Mr Biggin commissioned the SWOT analysis, aware that to do so was a 'career limiting' move for he and his unit. He wanted the matters in the SWOT analysis documented should things go 'completely pear shaped' in the future.¹⁰⁰¹ Mr Overland, being aware of the hierarchical structures in the police force, would have appreciated this was a significant decision taken by Mr Biggin, to put these significant matters in writing. He could have been in no doubt that Mr Biggin, a long serving and respected police officer, had real concerns about what had gone on within his unit.
898. It is submitted that a responsible Deputy Commissioner, who claimed to have had underlying concerns about the use of a barrister as human source, would not have responded in the way he did. He did not inquire further. He sought no explanation from Mr Biggin or the SDU despite the offer to expand upon their concerns. He did not refer the matter to the OPI, or put the SWOT analysis into Mr Ashton's hands. Accepting the evidence of Mr Moloney, he 'talked it down', and did not highlight concerns held by the SDU members that the OPI might want to investigate. He did not bring the document to the attention of Mr Cornelius. This is despite the fact that Mr Moloney had marked it for the consideration of the Petra Taskforce Steering Committee.
899. It is submitted that Mr Overland had weighed up his options before 5 January 2009 and he had determined around that time that Ms Gobbo was to be a witness.
900. It is submitted that he was aware that the risk of exposure through court processes had been minimised to the extent that it could be, by the use of the 'barrier / break' mechanism. The use of this mechanism had been implemented:
- 900.1. Ms Gobbo was deployed by the Petra Taskforce to record Mr Dale.¹⁰⁰²
- 900.2. on 12 January 2009, the SDU met with Ms Gobbo for the last time. There was clearly no expectation of her role as a human source being exposed, and in fact discussion that this was to be avoided by the SDU stepping back and her prior role not being referred to in investigator notes.¹⁰⁰³
- 900.3. further concerns raised by the SDU in mid-2009 about Ms Gobbo's exposure as a human source if she were to be a witness for the Briars Taskforce, because of the fact that her use as a witness could not be divorced from her use as a source (in contra-distinction to the situation with her recording of Mr Dale), make clear that in relation to the Petra Taskforce, a strategy had been devised such that Ms Gobbo's role as

¹⁰⁰⁰ Submissions of Counsel Assisting, Volume 2, [3593]; Transcript of Mr Cornelius, 24 January 2020, 12359-12361, 12366, 12369.

¹⁰⁰¹ Submissions of Counsel Assisting, Volume 2, [3481].

¹⁰⁰² Submissions of Counsel Assisting, Volume 2, [3409], [3414]-[3418].

¹⁰⁰³ Submissions of Counsel Assisting, Volume 2, [3573]-[3579].

a human source, and SDU material, was not intended to be disclosed during the Dale murder prosecution.¹⁰⁰⁴

901. As indicated above, there was a risk of Ms Gobbo's role as a human source being exposed regardless of whether Ms Gobbo became a witness, remained a human source or was deactivated. The suspicion of Ms Gobbo's role with Victoria Police had been growing, as had the threats toward her. If Ms Gobbo was not in witness protection, the risk of harm to her was greater. If she was harmed, given the history of human source management at Victoria Police, an inquiry would inevitably follow. There would be very close scrutiny of the legal and ethical implications of the use by Victoria Police of Ms Gobbo as a human source which had the potential to undermine convictions and prosecutions.
902. Whilst there could be no guarantees that, in transitioning Ms Gobbo from human source to witness, her role as a human source would not be exposed, steps could be and had been taken to avoid this. The risk of harm to Ms Gobbo would be significantly mitigated by witness protection, which would reduce the risk of an inquiry into her use.
903. The consideration by Mr Overland of these matters is reflected in his evidence:

MR NATHWANI: So let's just put this into context. If she was to become a witness, Paul Dale potentially could have motive to harm her?

MR OVERLAND: Yes.

MR NATHWANI: She was at risk of being revealed as a source wider, so Mokbel, gangland villains, all of those as part of the Mokbel cartel?

MR OVERLAND: Yes.

MR NATHWANI: Waters?

MR OVERLAND: Yes.

MR NATHWANI: All these people who were dangerous individuals as far as you were concerned, and you still decided it was the least worst option for her, her way out to turn her into a witness?

MR OVERLAND: Well it was because, and as some of the matters you've put to me this morning indicate, I mean clearly people were becoming more and more suspicious about her. If she wasn't turned into a witness and remained in the community at large, then her life was in very real danger. At the point of the investigators asking her whether she would become a witness, which is what happened and she initially agreed, I felt that the best option was to keep her alive was to actually have her go into witness protection at that point.

MR NATHWANI: The reality is the best option was for her to just walk away?

¹⁰⁰⁴ Submissions of Counsel Assisting, Volume 2, [3655], [3658].

MR OVERLAND: Well, the best option would have been for her to walk away a long time ago, but that didn't happen.

MR NATHWANI: But had she walked away you wouldn't have got Dale?

MR OVERLAND: Well I don't think it was as simple as her just walking away. I think that my understanding was there real difficulty in getting her to walk away and cooperate in all of that and that I feared that if we abandoned her, that she would just be killed and that there would then be a series of inquiries into how it was that she had been murdered.

904. Ultimately, Mr Overland decided that the 'least worst' option was that Ms Gobbo should become a witness.
905. Seen in this context, it is open to the Commissioner to find that the decision by Mr Overland to transition Ms Gobbo to the role of witness was not a case of self-destruction, rather it was a matter of self-preservation.

Mr Overland's awareness of Ms Gobbo's involvement with Mr Cooper

906. It is submitted on behalf of Mr Overland that the submissions of Counsel Assisting do not deal with Mr Overland's evidence that he did not believe he knew Ms Gobbo was acting for Mr Cooper.¹⁰⁰⁵
907. As referred to in [825], Mr Overland understood that Ms Gobbo was informing on other members of the Mokbel syndicate in order that a case could be built against Mr Tony Mokbel (and others).¹⁰⁰⁶
908. Mr Overland was told in a briefing on 27 September 2005 (consequent upon a debriefing of Ms Gobbo the night before) that Mr Cooper may roll over. This immediately would have suggested to Mr Overland that Ms Gobbo had knowledge of Mr Cooper's legal position.¹⁰⁰⁷
909. On 16 January 2006, Mr Overland was present at a meeting regarding the possibility of focusing on the rolling of Mr Cooper in order to achieve the aims of Operation Posse, noting that Mr Cooper was considered a possible 'weak link'.¹⁰⁰⁸
910. Mr Overland was aware Ms Gobbo not only represented Mr Tony Mokbel, but also members of the Mokbel syndicate.¹⁰⁰⁹ As referred to in [824] to [826], Mr Overland was aware that Ms Gobbo was representing clients, including Mr Mokbel and Mr Bickley, whilst informing upon them. As referred to in [844]-[846], it should be accepted that Mr Overland provided no instruction to the effect that Ms Gobbo could not represent those she was informing upon.

¹⁰⁰⁵ Responsive submissions of Mr Overland, 61 [171].

¹⁰⁰⁶ Transcript of Mr Simon Overland, 17 December 2020, 11442-11443.

¹⁰⁰⁷ Submissions of Counsel Assisting, Volume 2, [1361].

¹⁰⁰⁸ Submissions of Counsel Assisting, Volume 2, [1797].

¹⁰⁰⁹ Responsive submissions of Mr Overland, 70-71 [189]-[190].

911. The submission on behalf of Mr Overland refers to a meeting between Mr Overland, Mr O'Brien and the DPP, Mr Coghlan QC, on 19 April 2006. The submission refers to this being a meeting at which a plea deal for Mr Cooper was discussed with Mr Coghlan, and therefore it was "possible" that a reference was made to the lawyers acting for Mr Cooper.
912. Mr O'Brien recorded the purpose of the meeting in his diary as "re strategic direction re Op Posse".¹⁰¹⁰ The clandestine laboratory had been discovered the previous day. The Purana Taskforce had not yet determined when arrests would be made and the plan to 'roll' and use Mr Cooper put into effect. Given Mr Cooper's plea hearing was scheduled for 1 May 2006, at which time it was expected he would go into custody, time was running out. Ms Gobbo was to represent Mr Cooper at that plea hearing and had previously been engaged in discussions with SDU members as to how such an adjournment might be brought about. It was resolved she would not be able to bring this about and that the DPP should be asked directly. This was conveyed to Mr O'Brien.¹⁰¹¹
913. Thus, amongst the matters discussed by Mr Overland and Mr O'Brien with Mr Coghlan QC was the possibility of an adjournment of Mr Cooper's upcoming plea hearing in order to assist with future decision making in relation to the investigation.¹⁰¹² In the context of the matters raised above, the inherent likelihood is that in discussing such matters with Mr Coghlan QC there would be discussion about the representation of Mr Cooper.
914. When being asked about his meeting with the DPP and upon it being suggested to Mr Overland that he would have known that Ms Gobbo was Mr Cooper's barrister, he responded, "*I think, look I think I knew she had acted for a lot of these people in the past. But I'm not clear whether I knew - I don't believe I knew she was currently acting for him.*" (underlining added)¹⁰¹³
915. Added to this, when Mr Overland was told in December 2008 and January 2009 of concerns that exposure of Ms Gobbo's role as a human source might lead to the jeopardising of convictions obtained and future prosecutions ('mostly Mokbel and spin offs'), he made no inquiry as to the basis of such concerns.¹⁰¹⁴
916. On the basis of these matters it is open to find that Mr Overland knew of Ms Gobbo's representation of Mr Cooper during this period, alternatively, if he did not know, he should have known.

Mr Overland's awareness of Ms Gobbo's involvement with Mr Thomas

917. On behalf of Mr Overland issue is taken with the propositions that:

- 917.1. Mr Overland knew from at least February 2006 that Ms Gobbo was acting for Mr Thomas.¹⁰¹⁵

¹⁰¹⁰ Exhibit RC0933 Diary of Mr O'Brien, 19 April 2006, RCMP1.0053.0001.0003@.0217.

¹⁰¹¹ Submissions of Counsel Assisting, Volume 2, [1814], [1895].

¹⁰¹² Submissions of Counsel Assisting, Volume 2, [1814].

¹⁰¹³ Submissions of Counsel Assisting, Volume 2, [1894].

¹⁰¹⁴ Submissions of Counsel Assisting, Volume 2, [3397]-[3405], [3481]-[3516].

¹⁰¹⁵ Responsive submissions of Mr Overland, 48 [136].

- 917.2. Mr Overland was aware Ms Gobbo was informing on Mr Thomas.¹⁰¹⁶
- 917.3. That Mr Overland should have ensured appropriate legal advice was taken in relation to disclosure obligations¹⁰¹⁷
- 917.4. That Mr Overland should have made inquiries and discovered Ms Gobbo's role as a human source in relation to Mr Thomas.¹⁰¹⁸
918. Further, it is submitted that many of the submissions of Counsel Assisting ignore the role that defence lawyers can and do legitimately play, and the active involvement they have, when a witness decides to co-operate.¹⁰¹⁹
919. It is submitted that the evidence establishes that:
- 919.1. Mr Overland had been heavily invested in Operation Purana and had significant interest in the co-operation of Mr McGrath, so much so that he personally visited him in custody.¹⁰²⁰
- 919.2. Mr Overland was aware of Ms Gobbo's representation of Mr McGrath when he was negotiating his plea and co-operation.¹⁰²¹
- 919.3. On 12 July 2004, Mr Overland was at a meeting which was informed that Ms Gobbo had viewed Mr McGrath's statement, her view that Mr McGrath's account that he did not know that a murder was to occur was 'ridiculous', and that this aspect of the statement was to be changed.¹⁰²² As indicated in the submissions of Mr Overland, his diary entry recorded "Checked by Gobbo – clarify claims re Marshall".¹⁰²³ Mr McGrath's evidence in respect of this matter made the allegation of murder against Carl Williams more viable.
- 919.4. In September 2005, Mr Overland was aware that Ms Gobbo became a human source and was being managed by the SDU.
- 919.5. As referred to in [846]-[848], it should be accepted that Mr Overland provided no instruction to the effect that Ms Gobbo could not represent those she was informing upon.
- 919.6. Between 6 and 13 February 2006, Mr Overland was updated in relation to the process of Mr Andrews agreeing to roll and assist, including meeting with the DPP and Mr Horgan.¹⁰²⁴
- 919.7. It is reasonably open to conclude that Mr Overland became aware that Ms Gobbo was providing legal representation to Mr Thomas from 19 February 2006.¹⁰²⁵

¹⁰¹⁶ Responsive submissions of Mr Overland, 41 [121].

¹⁰¹⁷ Responsive submissions of Mr Overland, 55 [154].

¹⁰¹⁸ Responsive submissions of Mr Overland, 57-58 [162]-[163].

¹⁰¹⁹ Responsive submissions of Mr Overland, 50 [141].

¹⁰²⁰ Exhibit RC0915 Statement of Mr Overland, 13 [67], COM.0014.0001.0001@.0013.

¹⁰²¹ Submissions of Counsel Assisting, Volume 2, [564], [599], 607], [630], [638]-[641].

¹⁰²² Submissions of Counsel Assisting, Volume 2, [630], [638]-[641].

¹⁰²³ Responsive submissions of Mr Overland, 45 [127f].

¹⁰²⁴ Submissions of Counsel Assisting, Volume 2, [809]-[811].

¹⁰²⁵ Submissions of Counsel Assisting, Volume 2, [809]-[811].

- 919.8. In February and March 2006, Mr Overland was aware that Mr O'Brien and Mr Bateson were attending at the prison to speak with Mr Thomas.¹⁰²⁶
- 919.9. On 30 March 2006, Mr Overland attended along with Purana investigators at a meeting with the DPP.¹⁰²⁷
- 919.10. Mr Overland agreed that if Ms Gobbo was communicating with Mr Bateson with a view to facilitating Mr Thomas to 'roll and assist' it was likely he was getting those updates.¹⁰²⁸
- 919.11. On 22 June 2006, Mr Overland was involved in a meeting with Mr Bateson where it was resolved not to accept Mr Thomas as a truthful witness. In this regard, Mr Overland told the Commission he received updates about whether Mr Thomas would cooperate and recalled there being issues about his truthfulness.¹⁰²⁹
- 919.12. In a fashion similar to Ms Gobbo's assistance to effect changes to Mr McGrath's statements, Ms Gobbo was also used by Victoria Police to influence Mr Thomas:
- 919.12.1. In April 2006, senior Purana investigators used the SDU to provide Ms Gobbo with transcript of meetings between Mr Thomas and Purana investigators, in a bid to improve his truthfulness and to influence negotiations with Mr Thomas.¹⁰³⁰
- 919.12.2. Between 11 and 13 July 2006, arrangements were made for Ms Gobbo to speak to Mr Thomas when Mr Bateson considered he was 'not being totally truthful re murder matters'.¹⁰³¹
- 919.12.3. On 18 July 2006, Ms Gobbo was brought into the Purana Taskforce offices to read Mr Thomas' statements prior to them being signed. There is evidence of Ms Gobbo having made alterations to at least one of the statements. A post-it note was discovered by the Commission inside Mr Buick's daybook for the entry of 19 July 2006 which read, "Here is the statement. It has some red pen on it. These alterations were made by Nicola last night...".¹⁰³²
- 919.13. Mr Overland said he assumed 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' statements.¹⁰³³
- 919.14. In August 2006 Mr Williams made complaints to the court and professional bodies including the Bar Ethics Committee about Ms

¹⁰²⁶ Submissions of Counsel Assisting, Volume 2, [867]; Transcript of Mr Simon Overland, 16 December 2019, 11416.

¹⁰²⁷ Submissions of Counsel Assisting, Volume 2, [897].

¹⁰²⁸ Transcript of Mr Simon Overland, 16 December 2019, 11416.

¹⁰²⁹ Submissions of Counsel Assisting, Volume 2, [954]; Transcript of Mr Simon Overland, 16 December 2019, 11419.

¹⁰³⁰ Submissions of Counsel Assisting, Volume 2, [903]-[923].

¹⁰³¹ Submissions of Counsel Assisting, Volume 2, [971].

¹⁰³² Submissions of Counsel Assisting, Volume 2, [974], [979].

¹⁰³³ Transcript of Mr Simon Overland, 16 December 2019, 11418-11420.

Gobbo having conflicts of interest in respect of her dealings with Mr Thomas.¹⁰³⁴ Mr Overland was aware of such complaints.¹⁰³⁵

- 919.15. On 15 August 2006, Mr Overland attended a meeting with the DPP and Mr Horgan along with Purana investigators at which there was discussion of PII issues associated with handing over the statements of Mr Thomas and Mr Andrews.¹⁰³⁶ It is submitted that a strong inference is open that Mr Overland became aware that Mr Thomas signed numerous witness statements against Carl Williams and others.
920. It is accepted that the scale and nature of Ms Gobbo's assistance as a human source differed significantly as between Mr Thomas and Mr Cooper. It is also accepted that there is no direct evidence that Mr Overland was told that Ms Gobbo was 'informing' on Mr Thomas.
921. Counsel Assisting submit that an inference is open to be drawn as to Mr Overland's knowledge of Ms Gobbo's use as a human source¹⁰³⁷ against Mr Thomas. Mr Overland knew that Ms Gobbo previously represented Mr McGrath, and that this extended to an influence as to his statement change. He was thus aware Ms Gobbo had a conflict in advising and acting for Mr Thomas. It was known to Mr Overland that Mr Thomas' truthfulness was a significant issue. It clearly became known to Mr Overland that this issue was subsequently resolved; Mr Thomas went on to make multiple statements. Most significantly, Mr Overland was aware that Mr Thomas' lawyer was a human source, serving the interests of Purana, whilst at the same time acting as legal representative to Mr Thomas who was making decisions with lifelong implications.
922. Regardless of whether Mr Overland might have considered Ms Gobbo's conduct in relation to Mr Thomas as part of her informing, in the circumstances that were known to him, it would be reasonable for him to conclude that Ms Gobbo's negotiating on behalf of Mr Thomas, whilst at the same time being an informer, could give rise to complex issues of the sort that could be resolved by the provision of legal advice. When asked if he was concerned given his knowledge that Ms Gobbo had acted for Mr McGrath and was now acting for Mr Thomas and that she was an agent for Victoria Police, and apparently assisting police in getting that person to roll and cooperate, Mr Overland appropriately conceded that "*[i]t was a very complicated set of circumstances but I make the point that with all the rolling of those individuals that went on there was, you know, very extensive liaison / consultation with the Director of Public Prosecutions.*" It would be reasonable to conclude that the prime matter that would have struck Mr Overland as giving rise to complexities was the fact that the person engaging in discussions with police on behalf of Mr Thomas was a person who was an informer, who was primarily informing the Purana Taskforce, which was the investigation unit that had charged her client.
923. Mr Overland was then asked if he had informed the DPP that Ms Gobbo was a human source. He said he had not. He was asked whether he had given the DPP full knowledge, and he agreed that he had not. He conceded that 'full

¹⁰³⁴ Submissions of Counsel Assisting, Volume 2, [1005]-[1007].

¹⁰³⁵ Transcript of Mr Simon Overland, 16 December 2019, 11413, 11421.

¹⁰³⁶ Submissions of Counsel Assisting, Volume 2, [1000].

¹⁰³⁷ Submissions of Counsel Assisting, Volume 1, Legal Principles, [20] and [31].

knowledge' would have included the fact, known to Mr Overland, that Ms Gobbo was an informer, and he did not provide that knowledge.¹⁰³⁸

924. If Mr Overland recognised that the circumstances were very complex, and his attitude was that the DPP could be informed about Ms Gobbo's role as a source, then there would have been good reasons for him to raise his concerns with the DPP and the opportunity to do so in his discussions with the DPP on 15 August 2006. He did not, on this or any other occasion, raise his concerns about such complexities.
925. Mr Williams was rightly concerned about Ms Gobbo's role. The police held information which would have revealed to him Ms Gobbo's involvement in the cooperation and statement processes of both Mr McGrath and Mr Thomas, two of the witness against him. This information was denied to him, as well as to the DPP and to the court. In circumstances where Mr Overland knew or had reason to believe that this information would not otherwise be disclosed by his investigators, he was obliged to ensure that it would be, or at least to ensure that legal advice was obtained.

¹⁰³⁸ Transcript of Mr Simon Overland, 16 December 2019, 11416-11417.

REPLY SUBMISSION: MR ASHTON

Operation Khadi

926. It is submitted on behalf of Mr Ashton that he did not learn that Ms Gobbo was a human source in 2006, or before mid-2007.

Mr Ashton was not involved in meetings between SDU and investigators relied upon

927. It is pointed out that Mr Ashton was not involved in any of the meetings between SDU members and Victoria Police investigators between May and July 2006, upon which Counsel Assisting rely to conclude that Mr Ashton was told Ms Gobbo was a human source and engaged in decision making on that basis.¹⁰³⁹

928. Clearly that is correct, however, the records evidencing these meetings and what was discussed in them are important for an understanding of the background and context to the events under consideration. They reflect the understanding of those involved at the relevant time and assist in the drawing of inferences in the events that need to be considered.

929. It is clear that when the concern about Ms Gobbo being a person of interest and the target of surveillance in the Operation Khadi investigation first became known by the SDU, there was an agreement that Mr Ashton would not be told of Ms Gobbo's status.¹⁰⁴⁰

930. Later, when the concerns became more pressing, that position appears to have changed. The records demonstrate that as events unfolded, it became apparent to the members of the SDU and ESD that Mr Ashton needed to become involved to avoid the potential problems that might arise if Ms Gobbo was called before the OPI. It is significant that these members recognised that in seeking to have Mr Ashton call off his own investigators, he would need to be given an explanation for the request, and that explanation involved Mr Ashton being told of Ms Gobbo's identity. The issue discussed was not that he should not be given this information, but how to limit the spread of this information to others.¹⁰⁴¹

931. Further, it is submitted by Counsel Assisting that the evidence demonstrates that Mr Overland and Mr Cornelius were also involved prior to and in anticipation of the 27 July 2006 meeting with Mr Ashton.¹⁰⁴²

932. Mr Cornelius (who also disputes learning of Ms Gobbo's status as a human source at this time) accepted that there would need to be a sound explanation for Mr Overland to approach Mr Ashton with a request that no further action be taken in relation to Ms Gobbo in the Khadi investigation.¹⁰⁴³

¹⁰³⁹ Responsive submissions of Mr Ashton, [97].

¹⁰⁴⁰ Submissions of Counsel Assisting, Volume 2, [2005].

¹⁰⁴¹ Submissions of Counsel Assisting, Volume 2, [2033]-[2042].

¹⁰⁴² Submissions of Counsel Assisting, Volume 2, [1966]-[1989], [2034]-[2044].

¹⁰⁴³ Submissions of Counsel Assisting, Volume 2, [2037].

The 27 July 2006 diary note of Mr Ashton does not refer to Khadi

933. It is submitted on behalf of Mr Ashton that:

933.1. the sole record of the 27 July 2006 meeting between Mr Ashton, Mr Overland and Mr Cornelius is Mr Ashton's diary note which does not refer to any briefing in relation to Ms Gobbo, nor any decision in relation to calling her to a hearing in respect of Operation Khadi¹⁰⁴⁴

933.2. The content of the diary note is ignored, which it must be to justify the conclusions drawn, which is an example of Counsel Assisting trying to force their hypothesis onto objective facts recorded in contemporaneous material.¹⁰⁴⁵

934. The assertion on behalf of Mr Ashton is simply wrong. The submissions of Counsel Assisting specifically refer to Mr Ashton having a diary entry recording the meeting, which records discussion of Operation Air, but nothing about Operation Khadi.¹⁰⁴⁶ Given that other evidence appears to overwhelmingly support a conclusion that a decision was in fact made at that meeting that Ms Gobbo would not be called to the OPI, and therefore there must have been a discussion about the issue, Counsel Assisting go to some lengths in considering why there may have been no note created about such a decision.

935. It is extraordinary that Counsel for Mr Ashton could then assert that the content of the diary is ignored and then use this falsity to mount an attack on Counsel Assisting suggesting that this is "an example" of Counsel Assisting trying to force their hypothesis onto objective facts recorded in contemporaneous material.

936. It seems to be suggested by this submission that it was impossible in these circumstances for Mr Ashton to have spoken to Mr Overland and Mr Cornelius about anything other than Operation Air. It is submitted that this defies common sense.

937. The evidence demonstrates:

937.1. On 24 July 2006, a discussion occurred between Mr Sandy White and Mr Wilson about the possibility of Mr Overland approaching Mr Ashton and briefing him about Ms Gobbo's status as a human source, with a request that the OPI take no further action¹⁰⁴⁷

937.2. On 25 July 2006, a meeting occurred between Messrs Biggin, Sandy White, Peter Smith and Mr Wilson where it was agreed that Mr Overland should speak to Mr Ashton and ask that the OPI not pursue Ms Gobbo. Mr Biggin was to speak with Mr Overland about this matter and discuss whether the information about Ms Gobbo's identity as a human source could be limited to Mr Ashton¹⁰⁴⁸

937.3. Mr Wilson had met with Mr Cornelius after the meeting on 24 July 2006 and reported at the meeting on 25 July 2006 that Mr Cornelius had been briefed, and he agreed Mr Overland should speak to Mr

¹⁰⁴⁴ Responsive submissions of Mr Ashton, [98].

¹⁰⁴⁵ Responsive submissions of Mr Ashton, [10].

¹⁰⁴⁶ Submissions of Counsel Assisting, Volume 2, [2045], [2074].

¹⁰⁴⁷ Submissions of Counsel Assisting, Volume 2, [2033].

¹⁰⁴⁸ Submissions of Counsel Assisting, Volume 2, [2041].

Ashton about the issue. He recorded in his diary, "Luke Cornelius briefed. Agrees A/C Overland to speak to Graham Ashton (OPI) re issue. Advise not to proceed"¹⁰⁴⁹

- 937.4. On 26 July 2006, a meeting occurred between Mr Biggin and Mr Overland concerning the proposed meeting with Mr Ashton.¹⁰⁵⁰
- 937.5. On 26 July 2006, Mr Biggin informed Mr Sandy White that Mr Overland was meeting with Mr Ashton the next morning where he would request Mr Ashton take no further action in relation to Ms Gobbo in the Operation Khadi investigation and request that Victoria Police take primacy over the investigation¹⁰⁵¹
- 937.6. A belief by SDU members and ESD investigators that Mr Ashton would need to be told of Ms Gobbo's status in order for this to occur, and an acceptance by Mr Cornelius that Mr Ashton would need good reason to request no further action on Ms Gobbo¹⁰⁵²
- 937.7. On 27 July 2006, a meeting took place between Mr Ashton, Mr Overland and Mr Cornelius
- 937.8. Following the meeting:
- 937.8.1. Mr Cornelius briefed Mr Wilson about the "Gobbo issue" and said the OPI wanted to coercively question her in relation to the Dale and Hodsons matters. Mr Wilson recorded that Mr Attrill was briefed. Mr Attrill was the primary ESD investigator for Operation Khadi and who had dealt with Ms Gobbo¹⁰⁵³
- 937.8.2. Mr Overland briefed Mr Biggin and Mr Sandy White regarding Ms Gobbo and the OPI. Mr Sandy White recorded being told that the OPI would drop off matters relating to Operation Khadi and there would be no requirement to examine Ms Gobbo. They were further told of OPI plans in relation to the Hodson murders, and an intention to examine Ms Gobbo at some point in the future about those matters. It was agreed that Ms Gobbo could be told she would not be called to the OPI in the Operation Khadi investigation.
- 937.9. On 28 July 2006, Ms Gobbo was told she would not be called upon by the OPI to make a statement, nor would she receive a summons in relation to the Operation Khadi investigation.¹⁰⁵⁴
938. It is submitted that the overwhelming inference to be drawn from these facts is that Mr Ashton discussed matters with Mr Overland and Mr Cornelius which were not the subject of entry into his diary, and that these included both the Operation Khadi investigation and the Hodson murder investigation. As well as the content of the briefings provided by Mr Cornelius and Mr Overland following the meeting it is to be noted that:

¹⁰⁴⁹ Submissions of Counsel Assisting, Volume 2, [2034]-[2038].

¹⁰⁵⁰ Submissions of Counsel Assisting, Volume 2, [2044].

¹⁰⁵¹ Submissions of Counsel Assisting, Volume 2, [2044].

¹⁰⁵² Submissions of Counsel Assisting, Volume 2, [2033], [2037], [2041].

¹⁰⁵³ Submissions of Counsel Assisting, Volume 2, [2053].

¹⁰⁵⁴ Submissions of Counsel Assisting, Volume 2, [2062]-[2063].

- 938.1. there was no reason for Mr Attrill to be briefed if what had only been discussed was the Hodson murder investigation
- 938.2. Ms Gobbo could not have been told with confidence that she would not be called as a witness in the Operation Khadi investigation unless that is what Mr Overland had been assured.
939. The absence of the discussion from Mr Ashton's diary may have been for a number of reasons. It may not have been the primary purpose of the meeting, and the meeting about Operation Air provided an opportune time to canvass the issue relating to Ms Gobbo. It is known that Mr Ashton had concerns about his diary not being protected from subpoena in court proceedings. An investigation relating to the murders of the Hodsons, for which a serving police officer was a prime suspect, was one of the most significant investigations in Victoria Police. Mr Ashton's concerns may have been particularly heightened in relation to this matter.

Mr Ashton did not have the authority to withdraw Ms Gobbo from the investigation

940. It is submitted on behalf of Mr Ashton that he did not have the authority to determine whether or not Ms Gobbo would be called to an OPI hearing if such a hearing had been planned, and that he would need to consult with the Director of the Legal Department and the investigator, Mr Kapetanovski.¹⁰⁵⁵
941. Counsel Assisting do not suggest an OPI hearing had been set down, certainly no summons had been issued when these events occurred. This is acknowledged in the submissions of Mr Ashton.¹⁰⁵⁶
942. In terms of Mr Ashton's authority in relation to the investigation, he held a similar position to Mr Cornelius who sat over the ESD investigators. Operation Khadi was an investigation being conducted pursuant to a joint agency agreement, which had been signed by Mr Ashton and Mr Cornelius. That agreement referred to the overseeing investigators from each agency, Mr Kapetanovski from the OPI and Mr Wilson from ESD. They reported to Mr Ashton and Mr Cornelius.
943. Mr Ashton was superior to Mr Kapetanovski, who reported to him. If Mr Ashton had determined that the OPI wished to keep its powder dry in respect of Ms Gobbo because the Hodson investigation took precedence, he had clear authority to do that.
944. The evidence bears out that this is what occurred. After Mr Overland and Mr Cornelius left the meeting with Mr Ashton, Mr Overland confidently told the SDU that Ms Gobbo could be informed that she would not be called by the OPI in respect of the matters the subject of the Operation Khadi investigation. And she wasn't.

Alternative explanation

945. It is submitted on behalf of Mr Ashton that given there were no OPI hearings scheduled in relation to Operation Khadi, the more likely construction of events is that Mr Overland and Mr Cornelius raised with Mr Ashton the suggestions

¹⁰⁵⁵ Responsive submissions of Mr Ashton, [105].

¹⁰⁵⁶ Responsive submissions of Mr Ashton, [111].

made by OPI investigators that there would be a hearing in which Ms Gobbo was called. In response, Mr Ashton confirmed that no hearings were planned, but explained there were plans in relation to the Hodson murder investigation.¹⁰⁵⁷

946. As indicated above, it is accepted there were no OPI hearings which had been scheduled at the time Mr Ashton met with Mr Overland and Mr Cornelius.
947. There was clearly an appreciation on the part of ESD investigators, conveyed to the SDU, that the OPI were intending to summon Ms Gobbo for this purpose:
- 947.1. The concerns first arose in the context of the ESD arranging for a telephone intercept on Ms Gobbo's phone in anticipation of Ms Gobbo receiving a summons to an OPI hearing.¹⁰⁵⁸ These steps would not have been taken without a definite plan
- 947.2. On 16 June 2006, there was discussion between Mr Wilson and Mr Kapetanovski about legal professional privilege issues and whether Ms Gobbo could be compelled to provide confidential information, acquired in her capacity as a lawyer, at an OPI hearing¹⁰⁵⁹
- 947.3. On 21 July 2006, ESD investigators met with OPI investigators. The ESD investigators were aware of the issue by this point and proposed that they meet with Ms Gobbo "informally". This was met with disagreement by OPI investigators who were intent on coercively examining Ms Gobbo. They considered an earlier approach by the ESD would jeopardise their hearing by removing the element of surprise. There was no suggestion that such a hearing would not go ahead, despite the ESD indicating they would proceed to meet with Ms Gobbo informally¹⁰⁶⁰
- 947.4. On 24 July 2006, when Ms Gobbo was spoken to by Mr Attrill and Mr Swindells, the ESD investigators, she asked if the matter was likely to end up the OPI. She was told it would. She asked if she was likely to be summoned and was told that wasn't known¹⁰⁶¹
- 947.5. The matters raised at [937.1] to [937.9] demonstrate that the ESD, the SDU and their superiors shared the belief that there continued to be an intention that Ms Gobbo would be called before the OPI.
948. Further, Mr Ashton was not simply being asked about the intention to conduct an OPI hearing. The request was for the OPI to effectively withdraw from the joint investigation so that Victoria Police took primacy. As reported by Mr Overland and recorded by Mr Sandy White subsequent to the meeting with Mr Ashton, "*OPI happy to drop off John Brown and Shields issue*".¹⁰⁶²
949. In the event, the OPI did drop off the investigation, particularly in respect of Ms Gobbo. Questions they had regarding Ms Gobbo were asked of the ESD.¹⁰⁶³ A report was prepared by the ESD in November 2006. This was forwarded to the

¹⁰⁵⁷ Submissions of Counsel Assisting, Volume 2, [113].

¹⁰⁵⁸ Submissions of Counsel Assisting, Volume 2, [1965]-[1966].

¹⁰⁵⁹ Submissions of Counsel Assisting, Volume 2, [2009].

¹⁰⁶⁰ Submissions of Counsel Assisting, Volume 2, [2012].

¹⁰⁶¹ Submissions of Counsel Assisting, Volume 2, Exhibit RC0253, Summary of meeting between Ms Gobbo, Mr Swindells and Mr Attrill, 24 July 2006, VPL.2000.0002.0011@.0015.

¹⁰⁶² Submissions of Counsel Assisting, Volume 2, [2055].

¹⁰⁶³ Submissions of Counsel Assisting, Volume 2, [2060].

OPI who prepared a report in identical terms, save for matters of form. Ms Gobbo was referred to in excess of 100 times in the report and was centrally or peripherally relevant to many of the significant matters the subject of the investigation and report.¹⁰⁶⁴ No statement was taken from her, as statements were taken of the very many others in the course of the investigation.

950. Simply put, the alternative explanation of Mr Ashton does not explain the change in direction of the OPI investigation.
951. As appreciated by those in the meetings in the lead up to his meeting with Mr Overland and Mr Cornelius, and as stated by Mr Cornelius himself, Mr Ashton would have needed an explanation before proceeding in such a manner. It is apparent that those in Victoria Police expected that this explanation would need to involve his being told about Ms Gobbo's status as a human source.¹⁰⁶⁵
952. There is no record of what Mr Ashton was told that caused him to accept the change in direction of the Operation Khadi investigation. Counsel Assisting have submitted that the reasonable inference can be drawn that he was told about Ms Gobbo's human source status from the events preceding the meeting outlined in the submission of Counsel Assisting, and which have been discussed again in this reply.
953. It is of course a matter for the Commissioner whether she is prepared to draw this inference. The evidence must be examined carefully, bearing in mind the principles in *Briginshaw*, set out in Volume 1, Legal Principles at [41] to [51].

The significance of the timing of Mr Ashton's knowledge

954. It is submitted by Counsel for Mr Ashton that there is no benefit to Mr Ashton trying to fix his first knowledge about Ms Gobbo to July 2007 rather than a year earlier.¹⁰⁶⁶
955. It may be considered that knowledge of Ms Gobbo's role as a human source in 2006, when significant arrests were being made by the Purana Taskforce, might have provided greater reason to scrutinise the use of a lawyer in this way. Ms Gobbo was known to represent those who were the targets of the Purana Taskforce.

The SWOT analysis

956. It is submitted that although Mr Ashton was not shown the SWOT analysis, the submissions of Counsel Assisting argue that he should nonetheless have reacted as if he had seen it.¹⁰⁶⁷
957. In support of this the submission outlines Counsel Assisting submissions in three paragraphs:
- 957.1. [3544] relating to a submission that there was a failure to provide independent oversight of police integrity by failing to inquire into the relationship between Ms Gobbo and Victoria Police

¹⁰⁶⁴ Submissions of Counsel Assisting, Volume 2, [2094]-[2095].

¹⁰⁶⁵ Submissions of Counsel Assisting, Volume 2, [2033]-[2042].

¹⁰⁶⁶ Responsive submissions of Mr Ashton, [140].

¹⁰⁶⁷ Responsive submissions of Mr Ashton, [166].

- 957.2. [3545] relating to his knowledge that Ms Gobbo was a criminal defence barrister and a human source, extraordinary in itself, and that she had been managed by the SDU for a lengthy time, that those managing her were raising concerns regarding her, and his knowledge that human source management was the major risk faced by Victoria Police and the focus of most OPI investigations
- 957.3. [3485] indicating that anyone aware of the contents of the SWOT analysis or knowledge of the concerns raised within it would know her role had not been disclosed in a court proceeding, as the SWOT analysis would not otherwise have raised concerns about OPI, government or judicial review, or about convictions and prosecutions being jeopardised.
958. The submission of Counsel Assisting does not contend that Mr Ashton should have reacted as if he had seen the SWOT analysis.
959. As can be seen, the paragraphs relied upon in support of the argument are not chronological. The first two paragraphs specifically follow [3543] which states:
- The evidence indicates that the [SWOT analysis] was not provided to Mr Ashton, which appears to have been a deliberate decision.*
960. The third paragraph is from an earlier part of the submission and clearly relates to people with knowledge of the SWOT analysis.
961. The thrust of the submission of Counsel Assisting was that in any case, at least by that time, Mr Ashton had enough knowledge that he should have been making inquiries in his role, which involved independent oversight of Victoria Police.

The June 2011 Solomon letter

962. It is submitted on behalf of Mr Ashton that Counsel Assisting misconstrued the evidence relating to a letter written by Mr Solomon to Mr Overland in January 2010 at the request of Ms Gobbo.¹⁰⁶⁸
963. In support of this it is argued that the letter must be understood in its proper context, that it clearly focused upon Ms Gobbo's physical and mental health issues regarding her entry into the Witsec program.¹⁰⁶⁹
964. It is argued that the conclusions contended for by Counsel Assisting should not be accepted for reasons including, that although Mr Ashton was aware of Ms Gobbo's use by the Petra and Briars Taskforces, he also knew she had been managed by the SDU, and the mere fact that a human source was a barrister did not require intervention.¹⁰⁷⁰
965. Whilst the letter may have been written in the context of concerns over Ms Gobbo's health and issues about the Witsec program, it raised other issues to which Counsel Assisting submit that Mr Ashton should have been alive.
966. In light of Mr Ashton's previous knowledge of Ms Gobbo's use as a human source, her role representing organised crime figures, and a paragraph in

¹⁰⁶⁸ Responsive submissions of Mr Ashton, [176].

¹⁰⁶⁹ Responsive submissions of Mr Ashton, [180].

¹⁰⁷⁰ Responsive submissions of Mr Ashton, [183].

which it was said that Ms Gobbo had alluded to assisting police with “Major Organised Crime investigations in the past” was worthy of attention.

Response to Maguire advice, Tomato Tins, Mokbel concerns

967. It is submitted on behalf of Mr Ashton that there is no basis to conclude that he failed to take reasonable steps to ensure that concerns about Ms Gobbo’s role as a human source in respect of the prosecutions of Mr Tony Mokbel and the Tomato Tins prosecutions were properly investigated and considered, and/or brought to the attention of the prosecuting authorities.¹⁰⁷¹
968. In support of this submission it is argued:
- 968.1. in respect of the Commonwealth Tomato Tins prosecution, that Ms Gobbo had herself made disclosure on 28 August 2011 to Ms Breckweg, who had also reviewed the SML¹⁰⁷²
- 968.2. in respect of the State prosecution of Mr Tony Mokbel, that Mr Ashton had evidence that, arising out of the discussion on 3 November 2011, Mr McRae was to discuss the Mokbel matter with the OPP, and that he initiated an independent investigation of all the impacts across every matter that Ms Gobbo potentially had involvement.¹⁰⁷³
969. Effectively, this amounts to an argument that as of 3 November 2011, Mr Ashton had done enough. The submission of Counsel Assisting is that he did not do enough.
970. Ms Breckweg was a solicitor working on the Dale prosecution, not the Tomato Tins prosecution. Appropriate disclosure and the addressing of such concerns cannot have been effected in such a manner. Mr Ashton would know this. The very reason the issue was being raised in the 3 November 2011 meeting was because it had not been dealt with and something needed to be done. There was specific concern raised at the meeting that there might be an issue given Ms Gobbo’s role as a lawyer to one of the accused and that she had been the “originating source”. Mr Cartwright recorded that Mr McRae was to consider the requirements of disclosure of Ms Gobbo’s role in this matter.¹⁰⁷⁴
971. Further, following the 3 November 2011 meeting, Mr Ashton received the O’Connor document on 7 November 2011.¹⁰⁷⁵ Whilst this was prepared in response to the requests of prosecutors in the Dale case, this document should have served to magnify the already great concerns over the use of Ms Gobbo as a human source by Victoria Police. There is no evidence that Mr Ashton did anything with this information.
972. Whilst Mr Ashton reported concerns about the Tomato Tins case and discussed issues with the Mokbel case with Mr Cartwright and Mr McRae, that did not mean that he was able to wipe his hands of responsibility. He was the Assistant Commissioner of Crime, overseeing the department that had used Ms Gobbo’s information in very many investigations, and from which very many charges had been laid and significant convictions obtained.

¹⁰⁷¹ Responsive submissions of Mr Ashton, [185].

¹⁰⁷² Responsive submissions of Mr Ashton, [187]-[188].

¹⁰⁷³ Responsive submissions of Mr Ashton, [190].

¹⁰⁷⁴ Submissions of Counsel Assisting, Volume 2, [4326].

¹⁰⁷⁵ Submissions of Counsel Assisting, Volume 2, [4340].

973. There appears to be no evidence that Mr Ashton followed up about either the Tomato Tins matter or the Mokbel matter, or indeed the concerning information about the extent of Ms Gobbo's informing that he admitted was brought home to him when he read the O'Connor document of 7 November 2011.
974. As to the submission that Mr Ashton initiated an independent investigation of all the impacts across every matter that Ms Gobbo potentially had involvement,¹⁰⁷⁶ the discussion at the 3 November 2011 meeting involved issues of governance of human sources, resulting in Mr Cartwright's plan to discuss the matter with Mr Pope, the head of I&CS to ensure there was appropriate governance in relation to the issue of a legal practitioner being a human source.¹⁰⁷⁷ This, it seems led to the Comrie Review. The Comrie Review was not an investigation into the potential impact Ms Gobbo had on cases, it was review of the adequacy of policy, procedures and guidelines.¹⁰⁷⁸ Whilst it might be argued that Mr Ashton had nothing to do with the terms of reference,¹⁰⁷⁹ the very fact that the review was confined within I&CS meant that the cases that had been run, and the investigators that ran them, would not be part of any such investigation or review.

¹⁰⁷⁶ Responsive submissions of Mr Ashton, [180], [199], [205].

¹⁰⁷⁷ Submissions of Counsel Assisting, Volume 2, [4325]-[4326].

¹⁰⁷⁸ Submissions of Counsel Assisting, Volume 2, [4388].

¹⁰⁷⁹ Submissions of Counsel Assisting, Volume 2, [195].

REPLY SUBMISSION: SDU

975. The following issues are dealt with in this reply:

- 975.1. The suggestion that prior to the High Court decision there was a policy that put the protection of the source identity over the administration of justice
- 975.2. Disclosure issues
- 975.3. Risk Assessment issues
- 975.4. Conflicts of interest
- 975.5. “Relationship ending event” ultimatum
- 975.6. Matters related to Mr Cooper
- 975.7. Matters related to Mr Thomas
- 975.8. The meeting of 24 July 2006.

The High Court displaced the policy that a source’s identity must be protected

976. It is submitted on behalf of SDU members that prior to the High Court decision in *AB v CD* there was a policy that put the protection of the source identity over the administration of justice:

*The High Court upheld Ginnane J’s judgement. His Honour had to balance two conflicting public policy issues, namely disclosure to an accused and protection of the identity of an informer. Victoria Police was clearly of the view that the risk to Ms Gobbo’s life meant that her identity should not be disclosed. It was only when the High Court upheld the need to disclose Ms Gobbo’s identity that **the long-established policy that a source’s identity must be protected** was displaced. Prior to that decision, it is clear that Victoria Police and the SDU specifically believed that there was a real risk to Ms Gobbo’s life if her role as an informer was revealed. The role of the SDU included ensuring that her identity was not so revealed. That was their job. It was the same for all high risk informers, not just Ms Gobbo.¹⁰⁸⁰*

977. No such policy ever existed.

978. The long-established policy was that if the police wished to avoid disclosing information on the basis that it would expose the identity of a human source, a claim for PII, often referred to as “Informer privilege”, would be made on behalf the police. In such cases the court would determine whether the need to protect the identity of the source would interfere too greatly with the accused’s right to a fair trial. If the interference was too great, the PII claim would not be upheld. If the police still did not wish to disclose the identity of the human

¹⁰⁸⁰ Responsive submissions of the SDU, [6].

source, then the prosecution could not proceed as the accused could not receive a fair trial.

979. The submission effectively argues that the members of the SDU had no awareness of “informer privilege”, as there never would be any need to protect a human source with such a PII claim if the human source identity must be protected.

980. The reality in this matter is that the law, which provided that PII claims of “informer privilege” are to be determined by the Courts, was “displaced” by members of Victoria Police, including the SDU, who, it is submitted deliberately ensured that either no such claim was made, or where it was, that the court was not given all of the relevant facts to enable a just determination of the claim.

981. That members of the SDU were alive to the potential or actual compromising of the justice system is apparent from the following examples:

981.1. The November 2005 Risk Assessment which indicated that if Ms Gobbo were compromised her handling could come under extreme scrutiny which could bring embarrassment and criticism to Victoria Police¹⁰⁸¹

981.2. On 19 February 2006, when Ms Gobbo was involving herself in Mr Thomas’ dealing with the police over his potential to cooperate, Mr Sandy White and Mr Green discussed concerns that Mr Bateson might make entries in his diary compromising her. When Mr Sandy White spoke to Mr Bateson, the latter said he had not yet made diary entries of his contact with Ms Gobbo and was aware of the “issues” involved¹⁰⁸²

981.3. The use of the SDU to hide Ms Gobbo’s involvement in Mr Thomas’ representation, including the provision of transcripts to her in April 2006 for the purposes of progressing Purana Taskforce negotiations with him about his pleading and co-operating¹⁰⁸³

981.4. The 20 April 2006 conversation between Ms Gobbo, Mr Sandy White, Mr Peter Smith and Mr Green in which there was discussion of Ms Gobbo attending to represent Mr Cooper and the potential of Mr Cooper’s confession not being admissible if his counsel was not impartial, about which investigators were to be warned

981.5. In the same conversation Mr Sandy White indicated a broader appreciation about conflict of interest when he said that it might be argued that a barrister could never help the police and still represent the person she was helping the police with. Ms Gobbo’s response indicated this was probably so¹⁰⁸⁴

981.6. Mr Sandy White’s evidence that he was so concerned when Ms Gobbo attended to advise Mr Cooper that he considered arresting her¹⁰⁸⁵

¹⁰⁸¹ Submissions of Counsel Assisting, Volume 2, [1378].

¹⁰⁸² Submissions of Counsel Assisting, Volume 2, [819].

¹⁰⁸³ Submissions of Counsel Assisting, Volume 2, [903]-[923], and Reply submission in relation to Mr Ryan, Mr O’Brien and Mr Bateson regarding this matter.

¹⁰⁸⁴ Submissions of Counsel Assisting, Volume 2, [1824]; Responsive submissions of the SDU, [353].

¹⁰⁸⁵ Submissions of Counsel Assisting, Volume 2, [1924.7].

- 981.7. Subsequent discussion between Mr Sandy White and Mr O'Brien about concerns arising from Ms Gobbo's attendance to advise Mr Cooper¹⁰⁸⁶
- 981.8. On 26 April 2006, there was conversation between Ms Gobbo and Mr Sandy White in which he indicated the SDU had spoken with Mr Flynn about evidentiary concerns arising from confessions where Ms Gobbo provided advice¹⁰⁸⁷
- 981.9. In the 26 May 2006 handler handover document when Mr Peter Smith indicated to Mr Green that Mr O'Brien was happy to supply copies of Mr Cooper's statements to Ms Gobbo to "check on the quiet but better if not openly involved in the process"¹⁰⁸⁸
- 981.10. In relation to Ms Gobbo's involvement in the arrest of Mr Bickley:
- 981.10.1. On 8 June 2006, in a meeting between Mr Sandy White, Mr Green, Mr O'Brien, Mr Flynn and Mr Rowe, Ms Gobbo's arrest tips were conveyed and there was discussion that Ms Gobbo should not become involved in representing Mr Bickley and should be unavailable¹⁰⁸⁹
- 981.10.2. On 9 June 2006, in a meeting between Ms Gobbo, Mr Sandy White and Mr Green there was acceptance that Ms Gobbo would advise Mr Bickley and discussion as to keeping her representation of him unknown to others¹⁰⁹⁰
- 981.10.3. On 13 June 2006, Ms Gobbo advised Mr Bickley, he rolled and made statements.¹⁰⁹¹
- 981.11. In the 12 July 2006 conversation between Ms Gobbo, Mr Peter Smith and Mr Anderson in which Ms Gobbo worried that a "clever barrister" might work out what she had been doing and there was discussion of the "amazing test case" that would follow¹⁰⁹²
- 981.12. During the SDU meeting of 24 July 2006, when there was concern Ms Gobbo would be called before the OPI, Mr Black wrote in his diary, "Future 3838? v Royal Commission?" indicating discussion of such matters during the meeting, regardless of whether the words "Royal Commission" were used¹⁰⁹³
- 981.13. On 28 July 2006, there was a conversation between Ms Gobbo, Mr Sandy White and Mr Peter Smith during which Ms Gobbo referred to repeatedly chucking ethics out the window, LPP out the window and her career out the window "if any of this ever came out", and indicated she wouldn't even be covered by insurance¹⁰⁹⁴
- 981.14. On 22 August 2006, there were discussions between Mr Biggin, Mr Black, Mr Green and Mr Fox over the OPP request for the transcripts of Mr Cooper's interviews which were said to have in part detailed his discussion with Mr Cooper, and a determination to schedule a meeting

¹⁰⁸⁶ Submissions of Counsel Assisting, Volume 2, [1924.7].

¹⁰⁸⁷ Responsive submissions of the SDU, [354].

¹⁰⁸⁸ Submissions of Counsel Assisting, Volume 2, [1594].

¹⁰⁸⁹ Submissions of Counsel Assisting, Volume 2, [1608].

¹⁰⁹⁰ Submissions of Counsel Assisting, Volume 2, [1610].

¹⁰⁹¹ Submissions of Counsel Assisting, Volume 2, [1612]-[1624].

¹⁰⁹² Submissions of Counsel Assisting, Volume 2, [1635].

¹⁰⁹³ Submissions of Counsel Assisting, Volume 2, [1644].

¹⁰⁹⁴ Submissions of Counsel Assisting, Volume 2, [2064].

with Mr O'Brien and Mr Flynn as they did not want the interview tapes released to the OPP¹⁰⁹⁵

981.15. From March 2007, the involvement of the SDU in ensuring that "court discovery issues" in relation to Milad Mokbel's committal were managed,¹⁰⁹⁶ including:

981.15.1. Discussion with Purana investigators in relation to Ms Gobbo representing Milad Mokbel in order that he plead guilty so no disclosure of material related to Mr Cooper would be required¹⁰⁹⁷

981.15.2. Discussion with Ms Gobbo and Purana investigators in relation to how to handle diary notes evidencing Ms Gobbo's advice to Mr Cooper on 22 April 2006, including that they would avoid claiming PII as that would involve revealing Ms Gobbo's involvement to the court¹⁰⁹⁸

981.16. On 17 April 2007, at an SDU Unit meeting during which Mr Sandy White, Mr Peter Smith, Mr Black, Mr Richards and Mr Fox were present, notes of Mr Black which reveal discussion that:

981.16.1. Ms Gobbo had been involved in providing privileged advice to clients, even after having done so with Mr Cooper, which may be overturned by an appeal court

981.16.2. The need to balance the risk of appeals against the duty of care owed to Ms Gobbo, the need for control and compliance with policy¹⁰⁹⁹

981.17. On 5 June 2007, during a meeting between Ms Gobbo, Mr Fox and Mr Anderson there was discussion over concern that Ms Gobbo should stop representing people when she had a conflict of interest, including:¹¹⁰⁰

981.17.1. Ms Gobbo indicated that if discovered she would not be able to practise law in Australia again, the number of clients who would sue her for ethical breaches, and what might happen in the profession

981.17.2. There was reference to the frequency of Ms Gobbo's conflicts and Mr Anderson indicated that "it's not something we want to keep shitting in the face of the law and the system"

981.17.3. There was discussion that her conduct might not amount to breaking the law, but it being frowned upon

981.17.4. Ms Gobbo indicated that she thought she could separate privileged matters in the beginning but it became too hard.

¹⁰⁹⁵ Submissions of Counsel Assisting, Volume 2, [1690].

¹⁰⁹⁶ Submissions of Counsel Assisting, Volume 2, [2659]-[2740].

¹⁰⁹⁷ Submissions of Counsel Assisting, Volume 2, [2659]-[2662].

¹⁰⁹⁸ Submissions of Counsel Assisting, Volume 2, [2683], [2692], [2697], [2781], [2738].

¹⁰⁹⁹ Submissions of Counsel Assisting, Volume 2, [2282].

¹¹⁰⁰ Submissions of Counsel Assisting, Volume 2, [2347].

- 981.17.5. Mr Anderson told Gobbo that she could not “lag on” clients and represent them and she should have had that agreement from the beginning
- 981.18. On 3 July 2007, during a meeting between Ms Gobbo, Mr Sandy White and Mr Fox, in which there was discussion over Ms Gobbo’s role with Mr Cooper being exposed in the committal:¹¹⁰¹
- 981.18.1. Mr Sandy White asked Ms Gobbo if Mr Cooper was going to lie or claim privilege about the matter
- 981.18.2. Ms Gobbo told those present that she had informed Mr Cooper of events which had occurred in court the previous day when there was known to be an order for witnesses out of court
- 981.19. In the same meeting there was discussion to the effect that Ms Gobbo could not act for any persons arrested as a consequence of her involvement with Mr Karam after she had provided the bill of lading which had led to the discovery of the Tomato Tins shipment. In the conversation Mr Sandy White said he would hate to think that “ultimately a conviction could be overturned because there was an allegation or suggestion or a bloody inquiry in relation to whether he got a completely unbiased uncompromised defence” and Ms Gobbo responded indicating that no one was ever going to find out, and that there were already 20 people in that category¹¹⁰²
- 981.20. On 18 July 2007, there was a meeting between Mr Sandy White and Mr O’Brien to discuss issues related to Ms Gobbo’s continued status as an informer, or the proposal she might be a witness, in particular against Mr Karam. These issues had been discussed the previous day in a meeting involving Mr O’Brien, Mr Overland and Mr Blayney. The notes of Mr Sandy White indicate they discussed the “political fallout” in the legal fraternity that would occur if Ms Gobbo’s role as a human source was exposed, including the impact on the conviction of Mr Cooper and others. They agreed on the need for legal advice¹¹⁰³
- 981.21. On 24 July 2007, there was a further meeting attended by Mr Sandy White with Mr Biggin, Mr O’Brien, Mr Blayney, Mr Brown, Mr Ryan and Mr O’Connell to discuss Ms Gobbo’s viability as a witness and future deployment. The meeting contemplated receiving legal advice, exploring precedents and getting the opinion of a judge, although this was not pursued¹¹⁰⁴
- 981.22. On 6 August 2007, Mr Overland was briefed as to the plan in relation to Ms Gobbo by Mr Sandy White, Mr Biggin, Mr Blayney and Mr Ryan. The reason she could not be a witness was that her human source status might be compromised. The reason she could not be deactivated was that they still needed to communicate in relation to “court issues” (ie. Disclosure) in relation to the various Mokbel trials¹¹⁰⁵

¹¹⁰¹ Submissions of Counsel Assisting, Volume 2, [2753].

¹¹⁰² Submissions of Counsel Assisting, Volume 2, [2398].

¹¹⁰³ Submissions of Counsel Assisting, Volume 2, [2443]-[2445].

¹¹⁰⁴ Submissions of Counsel Assisting, Volume 2, [2468]-[2477].

¹¹⁰⁵ Submissions of Counsel Assisting, Volume 2, [2504]-[2507].

- 981.23. On 21 November 2007, Mr Peter Smith recorded an update from Mr Fox that Mr Flynn had been asked in the witness box during the committal of Horthy Mokbel if Ms Gobbo had been present when Mr Cooper had “rolled” and had said “no”¹¹⁰⁶
- 981.24. In March 2008, Mr Sandy White, Officer Wolf and Mr Fox were involved with the Petra Taskforce to steer Mr Andrew Hodson towards Ms Gobbo for the seeking of legal advice, and that any advice she gave would be of assistance¹¹⁰⁷
- 981.25. In August and September 2008, SDU members including Mr Sandy White, Mr Peter Smith, and Mr Green were involved in discussions with Purana investigators concerning subpoenas received relating to the trial of Mr Horthy Mokbel which might expose Ms Gobbo’s role as a human source:
- 981.25.1. The first subpoena again raised concerns about Mr Flynn’s diary notes as to Ms Gobbo’s attendance to advise Mr Cooper on 22 April 2006
 - 981.25.2. The second subpoena raised concerns that information reports would allow both Mr Horthy Mokbel and Mr Cooper, the main witness, to understand who the informer was against them (being Mr Cooper’s lawyer, Ms Gobbo)¹¹⁰⁸
- 981.26. On 3 December 2008, in a discussion between Mr Sandy White, Mr Peter Smith, Mr Green and Mr O’Connell relating to Petra Taskforce interest in Ms Gobbo as a witness, Mr O’Connell was told that Ms Gobbo’s previous assistance may bring scrutiny on the department and accordingly there was a need to balance her value as a witness with the risk of exposure¹¹⁰⁹
- 981.27. On 5 December 2008, in preparation for a meeting with Mr Sandy White, Mr Black, Mr Biggin and Mr Overland, Mr Peter Smith outlined possible outcomes arising from the use of Ms Gobbo should she become a witness and her role as a human source be exposed. These included:¹¹¹⁰
- 981.27.1. The perception of Ms Gobbo passing on privileged information and it being used by police
 - 981.27.2. The risk of a Royal Commission as a result of this
 - 981.27.3. The jeopardising of future prosecutions (mostly Mokbel and related cases)
 - 981.27.4. Previous convictions being open to claims of being unsafe because of Ms Gobbo’s involvement and privilege issues
- 981.28. When the SDU concerns about exposure were discussed the “barrier / break” strategy was devised to avoid disclosure of Gobbo’s role if she became a witness¹¹¹¹

¹¹⁰⁶ Submissions of Counsel Assisting, Volume 2, [2606].

¹¹⁰⁷ Submissions of Counsel Assisting, Volume 2, [3060], [3092]-[3104], [3130]-[3158].

¹¹⁰⁸ Submissions of Counsel Assisting, Volume 2, [2962]-[2974], [2933]-[3028].

¹¹⁰⁹ Submissions of Counsel Assisting, Volume 2, [3388].

¹¹¹⁰ Submissions of Counsel Assisting, Volume 2, [3398].

¹¹¹¹ Submissions of Counsel Assisting, Volume 2, [3406]-[3408].

- 981.29. On 30 December 2008, in a conference call involving Messrs Black, Peter Smith, Green and Richards they discussed issues for inclusion in a SWOT analysis. Notes indicate issues were raised including “issues with existing court cases”, “Appeal issues with former clients re unsafe verdict”¹¹¹²
- 981.30. The SWOT analysis written on 31 December 2008, contributed by Messrs Black, Peter Smith, Green, Richards and Anderson also indicated awareness of these issues and the possibility of OPI, Government or judicial review into the legal and ethical implications of using a serving barrister as a human source¹¹¹³
- 981.31. The 12 January 2009 meeting involving Ms Gobbo, Messrs Sandy White, Green and Fox which acknowledged that the biggest threat of exposure of her role as a human source as a witness were police notes, and that it could never come out because only one of the investigators, Mr O’Connell, knew about her role as a human source¹¹¹⁴
- 981.32. On 29 May 2009, Mr Black met with Mr Iddles and discussed the Briars Taskforce plan for Ms Gobbo to be a witness. His note referenced concerns about her dual role as a source and giving legal advice to clients, and that disclosure of her role would initiate a Royal Commission with perceived unsafe verdicts and current prosecutions being subject to review¹¹¹⁵
- 981.33. On 3 June 2009 Mr Black briefed Inspector Glow as to the problems with her use – she was a tasked source, an active barrister, visiting clients who think they have privilege and are speaking with their legal representative, she then passes the information to police, she then continued to act for the client and convinces them to plead guilty¹¹¹⁶
- 981.34. Along with Messrs Black, Peter Smith and Sandy White also became involved in discussions around this time relating to concerns about the exposure by Ms Gobbo if she was a witness for Briars¹¹¹⁷
- 981.35. On 10 March 2010, following the commencement of Mr Dale’s committal, the defence were seeking disclosure of material that would reveal Ms Gobbo’s role as a human source. Mr Sandy White met with Mr O’Connell and Mr Peter Smith to discuss the matter. There was discussion as to not wanting to disclose her role as a human source, the belief that Ms Gobbo might not give evidence and the need to respond to the defence subpoena if she did not. It was indicated that revealing the fact that Ms Gobbo was a human source several years prior to her involvement with Petra would compromise her and confirm her assistance at the time of the Mokbel investigation¹¹¹⁸
- 981.36. On April 2011, an issue arose during the trial of Mr Cvetanovski in which Mr Cooper was again giving evidence. Defence counsel had indicated an intention to cross-examine Mr Cooper about a conspiracy involving Ms Gobbo, Mr Cooper and the police to have him making

¹¹¹² Submissions of Counsel Assisting, Volume 2, [3461]-[3462].

¹¹¹³ Submissions of Counsel Assisting, Volume 2, [3484].

¹¹¹⁴ Submissions of Counsel Assisting, Volume 2, [3579].

¹¹¹⁵ Submissions of Counsel Assisting, Volume 2, [3654]-[3656].

¹¹¹⁶ Submissions of Counsel Assisting, Volume 2, [3679].

¹¹¹⁷ Submissions of Counsel Assisting, Volume 2, [3674], [3675], [3677].

¹¹¹⁸ Submissions of Counsel Assisting, Volume 2, [3950].

false statements. The prosecutor called a meeting of police involved. A number of people from the SDU were informed of events including Mr Peter Smith and Mr Richards. A new member, Mr Pearce, was sent along with the investigators to the meeting with the prosecutor to whom no disclosure was made. Nor was any claim otherwise made for PII.

Disclosure issues

982. A number of submissions were made about issues relating to disclosure, including:
- 982.1. The SDU's concerns to ensure Ms Gobbo's safety overrode considerations of "what can now be seen" was required by way of proper disclosure¹¹¹⁹
 - 982.2. The SDU did not fully appreciate that the public interest would favour disclosing Ms Gobbo's role such that it would override the public interest in preserving her anonymity¹¹²⁰
 - 982.3. The SDU saw issues relating to disclosure as matters for the investigators¹¹²¹ and the management of matters involving subpoenas as a matter for the HSMU (via the Subpoena Management Unit)¹¹²²
 - 982.4. Members of the SDU understood the importance and gravity of disclosure, attested to by their record keeping, and that such records were not immune to subpoena¹¹²³
 - 982.5. Mr Sandy White was of the view that records such as ICR's were "easily discoverable", albeit that they were not volunteered to defence as a matter of course¹¹²⁴
 - 982.6. Mr Sandy White knew that an appropriately framed subpoena would capture SDU records.¹¹²⁵
983. The members of the SDU were all experienced detectives of at least ██████████ level and aware of the existence of PII as it related to informers. On 16 September 2005, at the very first meeting with Ms Gobbo there was discussion of concerns about her role being discovered. During the course of that discussion disclosure issues were raised and there was an acknowledgement by Mr Sandy White that the "informer privilege" was not absolute. Further to this, Ms Gobbo raised concern that the mere claiming of PII was likely to expose her as a human source.¹¹²⁶
984. The SDU went on to become involved in discussions with investigators as to the ways in which they could avoid disclosure and the need to claim PII in order to protect revelation of Ms Gobbo's role as a human source, including the need to avoid informing the court of Ms Gobbo's role.
985. It is submitted that the submission to the effect that the SDU records were easily discoverable should not be accepted. It was the norm that such records

¹¹¹⁹ Responsive submissions of the SDU, [48].

¹¹²⁰ Responsive submissions of the SDU, [48].

¹¹²¹ Responsive submissions of the SDU, [54].

¹¹²² Responsive submissions of the SDU, [285].

¹¹²³ Responsive submissions of the SDU, [273].

¹¹²⁴ Responsive submissions of the SDU, [273].

¹¹²⁵ Responsive submissions of the SDU, [273].

¹¹²⁶ Submissions of Counsel Assisting, Volume 2, [1349]-[1353].

were inaccessible, save perhaps when a human source became a witness. Such a subpoena would only be issued if an accused had somehow learned that their own lawyer was the human source against them, a piece of information which was jealously guarded.

986. Whilst the SDU and investigators might have had different roles and responsibilities, it should be found that all members had an equal obligation to uphold the law. SDU members, like any other police member, were not entitled to sit by in the knowledge that relevant material was not being provided to a court and an accused may therefore not be receiving a fair trial.¹¹²⁷

Risk Assessment issues

987. The SDU take issue with the submission of Counsel Assisting in respect of matters relating to the risk assessment process in a number of ways, including:

987.1. that there was a failure by Mr Peter Smith and Mr Black to identify and/or record risks that using Ms Gobbo against persons who were her clients could be improper and unlawful, had the potential to interfere with the administration of justice and should have been the subject of legal advice. They point out that the main factors contributing to those risks were recorded, and anyone reading the risk assessment would appreciate such risks were present¹¹²⁸

987.2. that the submission that the SDU approach to risk assessment and risk mitigation was “lamentably inadequate”.¹¹²⁹ They point out that every significant issue relevant to risk was documented in ICR’s, summarised in the SML and discussed at management meetings, and the fact that Ms Gobbo remained alive was evidence that the SDU’s risk mitigation strategy was not “lamentably inadequate”¹¹³⁰

987.3. that the submission of Counsel Assisting has apparently been taken from the Comrie Review.¹¹³¹

988. The purpose of a risk assessment in human source management was to identify risks in the five categories outlined in the force policy, and to put into place control mechanisms to mitigate those risks as far as possible.

989. As the SDU submission points out, and as indicated in Counsel Assisting’s submissions, the November 2005 risk assessment carried out by the SDU contained details of factual matters which should have alerted those reading it to potential issues in relation to the registration of Ms Gobbo. These included the following:

989.1. she was a criminal barrister

989.2. she was acting for several members of the Mokbel criminal cartel including Mr Tony Mokbel

¹¹²⁷ Submissions of Counsel Assisting, Volume 2, Volume 1 [383].

¹¹²⁸ Responsive submissions of the SDU, [91].

¹¹²⁹ Responsive submissions of the SDU, [86].

¹¹³⁰ Responsive submissions of the SDU, [88].

¹¹³¹ Responsive submissions of the SDU, [89].

- 989.3. she was having conversations with other law enforcement members about assisting police, including from Purana and the MDID, which may be known to others
 - 989.4. her stated motivation for assisting police was to rid herself of clients who were a drain on her, specifically those belonging to the Mokbel criminal cartel
 - 989.5. she had connections to numerous lawyers acting for various crime figures at all levels
 - 989.6. she had already provided credible and valuable intelligence and was well positioned to obtain valuable intelligence in relation to the Mokbel cartel
 - 989.7. her potential to provide intelligence on major organised crime figures had not yet been developed to its full potential
 - 989.8. by virtue of her occupation and position, if she were compromised, her handling could come under extreme scrutiny which could bring embarrassment and criticism to Victoria Police.¹¹³²
990. Whilst the factual details listed above were evident within the document, there was no identification of the risk that they posed, and therefore no mitigation strategy adopted. A mitigation strategy would likely have involved consideration of whether Ms Gobbo could continue to represent those she was providing information about, the limits to the way in which she was able to assist police, and accordingly the need for legal advice as to such matters.
991. The updated April 2006 risk assessment identified a number of other matters, including:
- 991.1. The identity of a number of those on whom she was informing and associated risk of compromise to her human source role
 - 991.2. The prospect of compromise by way of telephone intercepts by another law enforcement agency
 - 991.3. That “in her role as a barrister”, Ms Gobbo had been involved in advising certain high level criminals making statements to assist police which might be perceived by those within the Mokbel group as her acting against their interests.¹¹³³
992. This category included a new control measure indicating that if Ms Gobbo was dealing with individuals who might make statements against police, she should pass them to a new legal representative.¹¹³⁴
993. As is apparent from the matters referred to in [981], by the time of the second risk assessment and following this time, the SDU had appreciated significant risks associated with the use of Ms Gobbo, in particular risks which would affect the administration of justice.
994. The focus of the risk given primacy by the SDU was that of Ms Gobbo’s safety, which was but one of the categories of risk which was supposed to be

¹¹³² Responsive submissions of the SDU, [82]; Submissions of Counsel Assisting, Volume 2, [1374]-[1387].

¹¹³³ Submissions of Counsel Assisting, Volume 2, [1528]-[1532].

¹¹³⁴ Submissions of Counsel Assisting, Volume 2, [1528]-[1532].

addressed in a formal risk assessment carried out on a monthly basis. This risk to Ms Gobbo's safety was largely achieved by preventing compromise to her identity. It is submitted that the prevention of compromise to her identity involved compromise to the administration of justice.

995. The ICRs and SMLs did not identify the risks to the administration of justice, or outline control measures to prevent such abuses, although they have allowed the identification of many of them.
996. Given the clear awareness of members of the SDU of such risks, including that convictions had potentially been obtained in circumstances the Court of Appeal might consider to be unsafe, the submission that the approach to risk assessment and risk mitigation by the SDU was "lamentably inadequate" is apt.
997. It is submitted that the failures in this respect should not be borne by the SDU alone. As the SDU submission points out these risks were very apparent to anyone reading the document, including their supervisors responsible for approving the registration and condoning its continuance. Further, these facts were known outside I&CS, especially to those within the Crime Department who were to use Ms Gobbo's information and who clearly had sway in her registration and continued use.
998. As referred to in the SDU submissions, the timing of Ms Gobbo's recruitment was significant for a number of reasons including that the SDU was still in its infancy and there was some scepticism and resistance by investigators who were being asked to hand over high risk human sources.¹¹³⁵ There was a need to ensure the SDU was well received, which meant investigators receiving valuable intelligence in a timely manner. It is reasonably clear that the recruitment of Ms Gobbo provided significant opportunity to demonstrate the value of the SDU.
999. Notably, by the time the first Risk Assessment was being compiled and considered in November 2005, Ms Gobbo had already been given a registration number and her intelligence was already being used including in relation to the development of the Operation Posse investigation plan. This plan had been approved and had brought about a refocus and change of resourcing at the Purana Taskforce, and the plan involved the continued use of Ms Gobbo as a human source. The identification of the obvious risks and control measures would inevitably have curtailed the ability to use Ms Gobbo in the way that was being envisaged. This perhaps provides some explanation for the failure to identify and mitigate the obvious risks at the outset, and into the future when issues relating to the administration of justice were clearly on the minds of those within the SDU. It may also explain the failure by Mr Biggin to identify such issues when he conducted his audit in April 2006.
1000. In this regard, it is to be observed that the first time that risks relating to the administration of justice were presented in one document was in December 2008. The documentation of these risks at that time was not for the purpose of mitigating the risk to the administration of justice. Rather, it was for the purpose of trying to convince those making the decision about Ms Gobbo's future status not to use her as a witness, so that any miscarriages of justice that may have occurred, would remain hidden.

¹¹³⁵ Responsive submissions of the SDU, [55].

Conflicts of interest

1001. It is submitted on behalf of the members of the SDU that they had a narrow understanding of conflict of interest, however they endeavoured to understand and deal with the issue as best they could. In this regard it is said:

1001.1. they understood Ms Gobbo should not act for people upon whom she had informed and told her not to do so

1001.2. they did not perceive a conflict arising from Ms Gobbo informing on current clients regarding unrelated ongoing criminal activity

1001.3. they did not perceive any issue with Ms Gobbo providing information about ongoing serious criminal activity whilst being retained by Mr Mokbel in relation to his Commonwealth charges, with their focus being upon avoiding LPP issues.¹¹³⁶

1002. To demonstrate the SDU's lack of understanding, the submission points to the seeking of advice about conflicts of interest both prior to and after Mr Cooper's arrest. Unfortunately, this enlightenment was sought from Ms Gobbo.¹¹³⁷ The issue was not resolved by her, if anything it would have elevated concerns as to the use of Ms Gobbo as a human source.

*MR SANDY WHITE: No-one's gunna say that but I'm trying to understand what - the conflict of interest area is not something that we ever deal with, all right, for you and it's - I mean, **some people could put up an argument that a person who is a barrister perhaps could never help the police and still represent the person that she's helping the police with.** So I'm just trying to get my head around this. Could you - maybe it's even pointless talking about it because you might actually think I'm going*

*MS GOBBO: **Probably but what's the real point?***

1003. If it was the case that members of the SDU did not, from the outset, appreciate the intricacies involved in conflicts of interest, then, it is submitted, it was something they were obliged to seek advice about. It was not good enough to be seeking advice from the human source with whom they were dealing.

1004. These were experienced detectives. Whilst they may have reasoned some moral justification for Ms Gobbo's continued involvement in the representation of those she was informing on, or in not disclosing the fact that she was doing so, it is clear from the evidence referred to in [981] that, especially as time went on, they knew they were jeopardizing the administration of justice in doing so.

1005. Further, responsibility cannot be denied on the basis that members of the SDU made efforts to dissuade Ms Gobbo from acting for those she had informed

¹¹³⁶ Responsive submissions of the SDU, [234].

¹¹³⁷ Responsive submissions of the SDU, [236]-[238].

upon. The SDU had let it be known that they would never betray her role as a human source, regardless of her choices.

The “relationship ending event” ultimatum

1006. Issue was taken on behalf of the members of the SDU with the proposition that Ms Gobbo should have been told that, if she placed herself in a conflicted situation, her role would be exposed to her clients or a claim for PII would be made.¹¹³⁸

1007. Instead, it is said that it would have been beneficial if Ms Gobbo had been told she could no longer provide information to Victoria Police if she placed herself in a conflicted situation. It is suggested that this type of ultimatum was in fact used during the latter part of Ms Gobbo’s registration period when she was told that if she acted for certain people it would be a “relationship ending event”.

1008. The examples pointed to as demonstrating this proposition are:

1008.1. An ICR from 15 June 2007.¹¹³⁹ During this meeting between the SDU and Ms Gobbo there was discussion about Ms Gobbo’s stress levels and whether she would be better or worse off if the relationship continued. Mr Sandy White gave her the option of ending the relationship. This was nothing to do with an ultimatum in relation to conflicts of interest.

1008.2. The evidence of Mr Sandy White at transcript page 4036.41 is referred to.¹¹⁴⁰ When one examines this, it reveals Mr Sandy White being asked if Ms Gobbo was ever given an ultimatum and told the relationship would end because of concerns about the system of justice they were supposed to be upholding. Mr Sandy White said he recalled the term “relationship ending event” being used at one or more points in the relationship but could not recall the context.

1008.3. The evidence of Mr Sandy White at transcript 4156.22 is also relied upon.¹¹⁴¹ When one examines this it reveals Mr Sandy White being asked a question which suggests such an ultimatum in relation to Ms Gobbo acting for Mr Tony Mokbel. However, Mr Sandy White was being asked about an ICR of 12 June 2007 in which Ms Gobbo was talking about her stress levels and running through her various options which she cited as: i) Deal with the SDU only; ii) Deal with the SDU and Tony Mokbel; iii) Act for Tony Mokbel and end relationship with the SDU.

1009. The only other apparent evidence of a “relationship ending event” is found:

1009.1. On 25 May 2007, when Ms Gobbo was told by her handler that her human source relationship with the SDU would be terminated if she continued to be involved with the importation with Mr Karam and Mr Mannella contrary to the instructions of the SDU. Ms Gobbo responded

¹¹³⁸ Responsive submissions of the SDU, [264].

¹¹³⁹ Responsive submissions of the SDU, [265].

¹¹⁴⁰ Responsive submissions of the SDU, [265].

¹¹⁴¹ Responsive submissions of the SDU, [265].

that she would not get involved in any “relationship ending events”;¹¹⁴²
and

1009.2. On 3 and 4 July 2007, when Ms Gobbo was threatening to end the relationship due to her unhappiness at being told she was to have a new handler.¹¹⁴³

1010. It is apparent that the SDU were willing to threaten to end the relationship if Ms Gobbo became involved in the drug offending of those she was informing on. However, there does not appear to have been any ultimatum arising out of concern that Ms Gobbo was acting for people in circumstances of conflict.

1011. It was further submitted that the SDU were limited in what they could do in relation to preventing Ms Gobbo from acting for those with whom she had a conflict. They could not choose to expose, or threaten to expose Ms Gobbo, as this went against every rule and policy to protect the source identity.¹¹⁴⁴

1012. Such decisions about the protection of source identity, where a case was on foot, were not for Victoria Police to make. As referred to earlier, these were experienced detectives who knew that the informer privilege was not inviolable.

Matters related to Mr Cooper

1013. It is submitted on behalf of the SDU members that:

1013.1. There were limitations to the understanding of members of the SDU concerning disclosure and relevance such that Mr Sandy White and others did not understand that the manner in which they used Ms Gobbo, including her deployment against Mr Cooper in order that he might be compelled to give evidence was improper or unlawful

1013.2. Their belief that as a result of his third set of charges he received “the best deal of the century in terms of his sentence”

1013.3. That following his arrest he was represented by an experienced solicitor and Queens Counsel, both independent of Ms Gobbo

1013.4. When disclosure issues arose in relation to Ms Gobbo’s role with Mr Cooper during subsequent matters, such as the trial of Horthy Mokbel, Mr Sandy White’s greatest concern was that Ms Gobbo would be killed if compromised

1013.5. He did not think to a significant degree about whether the disclosure might jeopardise Mr Cooper’s conviction

1013.6. It cannot be found that Mr Sandy White would have considered the next step that Mr Cooper’s evidence might be “fruit of the poisonous tree”.¹¹⁴⁵

1014. It is further submitted on behalf of the SDU, amongst other matters, that:

1014.1. It was not improper for the SDU to receive and disseminate intelligence from Ms Gobbo in relation to Mr Cooper’s ongoing criminal activity

¹¹⁴² Exhibit RC0281, ICR 3838, 25 May 2007, 856.

¹¹⁴³ Exhibit RC0281, ICR 3838, 3 July 2007, 976, 987.

¹¹⁴⁴ Responsive submissions of the SDU, [267]-[268].

¹¹⁴⁵ Responsive submissions of the SDU, [275].

- 1014.2. Members of the SDU involved did not want Ms Gobbo to attend to advise Mr Cooper on his arrest, but she made clear she would
- 1014.3. They did not believe there was any way to prevent Ms Gobbo from attending
- 1014.4. There was a concern about the admissibility of admissions made by Mr Cooper which was raised with investigators
- 1014.5. It was a matter for investigators to determine whether Ms Gobbo would be allowed to see Mr Cooper
- 1014.6. The SDU did not believe Ms Gobbo's attendance would have an irreparable effect on the course of justice, as Mr Cooper was going to cooperate whether Ms Gobbo attended or not.¹¹⁴⁶
1015. As is apparent from the matters listed above in [981], members of the SDU, and especially Mr Sandy White, were cognisant of the potential unfairness that occurred in relation to Ms Gobbo's deployment against Mr Cooper, his subsequent conviction, and also to the convictions of others following.
1016. Indeed, it is telling of the attitude towards these issues that, a number of years later, and when in the witness box before this Royal Commission, Mr Sandy White and Mr Peter Smith explained their personal views as to the use of Ms Gobbo against her clients who had been accused of criminal activity as follows:

(Sandy White)

MR WINNEKE: You'd be quite content, would you, for your barrister to be providing information against your interests whilst pretending to act in your interests?

MR SANDY WHITE: I don't think somebody that is being represented by a barrister and then goes and tells that barrister about cooking amphetamine in clandestine labs or importing four and a half tonnes of MDMA is in much of a position to be too upset about that.¹¹⁴⁷

(Peter Smith)

MR WOODS: What I was asking you though is whether or not in your view a person who is a client of Ms Gobbo's, who has had Ms Gobbo (a) representing them, whilst (b) at the same time working against their interests, would feel that they had been fairly dealt with by the justice system?

MR PETER SMITH: Well if they had been involved in criminal activity it wouldn't matter.¹¹⁴⁸

¹¹⁴⁶ Responsive submissions of the SDU, [321].

¹¹⁴⁷ Transcript of Mr Sandy White, 31 July 2019, 3682.

¹¹⁴⁸ Transcript of Mr Peter Smith, 11 September 2019, 6158.

Matters related to Mr Thomas

1017. It is submitted on behalf of members of the SDU that:

- 1017.1. Ms Gobbo's involvement with Mr Thomas related to her acting as his lawyer and that her intention was to assist him to get the best possible discount for his assistance¹¹⁴⁹
- 1017.2. She was not "informing" on Mr Thomas but simply providing the SDU with information about her movements and activities as they related to him which bore upon considerations of safety¹¹⁵⁰
- 1017.3. There was no sinister motive behind the SDU's provision of the transcripts to Ms Gobbo on 20 April 2006, that Mr O'Brien provided the transcripts to Sandy White to pass onto Ms Gobbo as a shortcut¹¹⁵¹
- 1017.4. Submissions made in relation to Mr Sandy White's knowledge and involvement in matters related to Mr Thomas, including that Victoria Police was using Ms Gobbo to encourage Mr Thomas to make admissions, plead guilty and implicate associates (or alternatively that Victoria Police was allowing her to do so in circumstances where she was assisting police) have no basis.

1018. The contention that Ms Gobbo's role was purely that of a lawyer must be understood in the context that:

- 1018.1. She had a known conflict with Mr McGrath and for that reason had not been appearing for Mr Thomas in court other than in "non-contentious" hearings
- 1018.2. Mr Thomas and others were not aware that she had represented Mr McGrath in circumstances in which she was involved in the changing of his statement
- 1018.3. Prior to being registered by the SDU she had been providing information, albeit not information about Mr Thomas, essentially as an unregistered informer, to Mr Bateson, who was significantly involved in the prosecution of Mr Thomas
- 1018.4. She had since formalised her role as an agent of the police when she was registered by the SDU
- 1018.5. Her stated motive in becoming a human source involved ridding herself of clients such as Mr Tony Mokbel and his associates
- 1018.6. She provided information about Mr Thomas to the SDU from September 2005 including that he, along with Mr Cooper, would have sufficient information to put Mr Tony Mokbel away for a long time¹¹⁵²
- 1018.7. The ICR of 2 February 2006, in which Ms Gobbo was being [REDACTED], under the heading of [REDACTED]

¹¹⁴⁹ Responsive submissions of the SDU, [137].

¹¹⁵⁰ Responsive submissions of the SDU, [138].

¹¹⁵¹ Responsive submissions of the SDU, [146].

¹¹⁵² Submissions of Counsel Assisting, Volume 2, [806]-[807].

immediately after the decision was made that Ms Gobbo should be provided the transcripts

- 1022.2. The transcripts were provided the following day by Mr Bateson to Mr Peter Smith, along with a briefing as to issues that Ms Gobbo should be spoken to about, including concerns as to Mr Thomas' truthfulness about certain matters
 - 1022.3. Ms Gobbo was allowed to read the transcripts that night, but not to keep them
 - 1022.4. Ms Gobbo was spoken to about matters raised by Mr Bateson with Mr Peter Smith
 - 1022.5. Ms Gobbo spoke to Mr Bateson (who recorded in his diary speaking with "3838") the following day about Mr Thomas possibly pleading guilty and giving evidence
 - 1022.6. Ms Gobbo subsequently visited Mr Thomas and reported back to the SDU about his likelihood of cooperating, his depressed state and his needing a "push to come on board totally".
1023. It is submitted to be apparent that Ms Gobbo was secretly provided with the transcripts by the SDU in her capacity as a human source in order that her awareness of such issues might assist to advance negotiations between Mr Thomas and the Purana Taskforce.
1024. Whilst it is apparent that Mr Sandy White and the SDU were discouraging Ms Gobbo from continuing to involve herself with Mr Thomas, they took no other steps to do anything about it. When it was convenient to use her in her capacity as a human source to advance the ends of the Purana Taskforce and Victoria Police, they did so. It is significant that this occurred in circumstances where Mr Sandy White and the SDU were aware that the court was making clear its concern to protect its processes. They knew that on 21 April 2006 Ms Gobbo was summoned before the Supreme Court to explain her apparent continuing contact with Mr Thomas, because she had previously acted for Mr McGrath (not because it was known that she had been involved in the changing of Mr McGrath's statements). It was made very clear that she had a conflict and was not to be involved in his representation in relation to the matters then before the court.

The meeting of 24 July 2006

1025. On 24 July 2006, Ms Gobbo rang the SDU expressing extreme displeasure after having been visited by ESD members involved in the Operation Khadi prosecution. Ms Gobbo was upset that they had information she had provided to the SDU in confidence, and which information she said had been given in breach of LPP. She was also upset that the investigators appeared to know she was a human source.¹¹⁵⁸
1026. Issue is taken in the SDU submissions with the attribution of a quote from Mr Peter Smith's diary where he recorded a conversation with Ms Gobbo following her meeting with the ESD investigators. The quote, "there are very few people who know about your situation" was said to have been something said by Mr Peter Smith, and Counsel Assisting submitted that it was open to find this was

¹¹⁵⁸ Submissions of Counsel Assisting, Volume 2, [2019].

a deliberate deception upon Ms Gobbo given SDU concerns in period before as to the growing number of people aware of her status. The SDU submissions indicate that this was a quote from Ms Gobbo to Mr Peter Smith of something which had been said to her by an ESD investigator. It was this that led her to believe they knew of her status as a human source. Counsel Assisting concede that this likely to be the case and withdraw the submission and allegation that has been made.

The Paul Dale notes

1027. It is submitted on behalf of the SDU that the conduct of the SDU in receiving and retaining these notes was not improper and it serves as an example of the SDU “quarantining” information they deemed to be legally privileged.¹¹⁵⁹

1028. The submissions on behalf of the SDU also indicate:

1028.1. The SDU initially avoided handing over the notes to investigators, Mr Davey and Mr Solomon, on the premise they had already been shown to Mr Ryan and were of no value¹¹⁶⁰

1028.2. Despite being advised by the SDU that the notes were privileged, investigator Mr O’Connell insisted on seeing the notes and was shown them, whereupon he satisfied himself they were privileged after which the notes were retained by the SDU.¹¹⁶¹

1029. It is not entirely clear how this is an example of the SDU successfully “quarantining” legally privileged information.

Information from Ms Gobbo concerning Zaharoula Mokbel noted by Mr Fox as “Action: Verbally disseminated above information to Jim Coughlin – Purana.”

1030. The complaint contained in paragraphs [203] to [224] of the submissions on behalf of the SDU is addressed at paragraphs [183] to [201] above.

¹¹⁵⁹ Responsive submissions of the SDU, [227].

¹¹⁶⁰ Responsive submissions of the SDU, [231].

¹¹⁶¹ Responsive submissions of the SDU, [232].

CONCLUSION

1031. The above submissions in reply are provided to assist the Commission to make significant findings in what the Court of Appeal has observed:¹¹⁶²

...might prove to be one of the greatest scandals of our time in relation to the workings of the criminal justice system.

1032. It is submitted with respect that, having had the advantage of considering the evidence and submissions, such a description is apt.

1033. Counsel Assisting have not lost sight of the seriousness of the matters being considered, the impact on those who have been subject to criticism and those who have been potentially unfairly convicted, and their responsibilities to fairly and impartially assist the Commission.

1034. It should come as no surprise to Ms Gobbo, and some current and former members of Victoria Police, that their conduct has come under close scrutiny and at times called for serious criticism.

1035. It should be noted that Ms Gobbo, for example, accepts that she engaged in the *actus reus* of an attempt to pervert the course of justice,¹¹⁶³ often acted in circumstances of conflict of interest,¹¹⁶⁴ and breached confidentiality and legal professional privilege.¹¹⁶⁵

1036. Individual members have admitted that serious mistakes were made, and Victoria Police as an organisation has admitted systemic failures. However, they then seek to walk a delicate tightrope. When issues of individual responsibility are raised those parties seek to caricature the ascribing of any such responsibility as “hindsight reasoning”, “confirmation bias” or evincing a “pre-conceived narrative”.

1037. While Counsel Assisting have been criticised for focussing on individual misconduct at the cost of considering systemic failures, it is submitted that when one carefully considers the submissions made against Counsel Assisting and the evidence, there is a different cause for concern.

1038. By raising issues of alleged denials of procedural fairness and alleged apprehended bias, and by attacking the impartiality of Counsel Assisting and by inference the Commission, one cannot help but be concerned that such complaints are made, at least in part, to elide individual responsibility and attempt to frame public opinion and diminish the findings and recommendations of this Commission.

1039. However, when one carefully considers the above issues it is submitted that the findings sought by Counsel Assisting are appropriate, and indeed necessary to restore the confidence of the Victorian community in the vital work of legal practitioners and Victoria Police.

¹¹⁶² *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214, [57] (Beach, McLeish and Weinberg JJA).

¹¹⁶³ Responsive submissions of Ms Gobbo, [193], [690].

¹¹⁶⁴ Responsive submissions of Ms Gobbo, [25], [149].

¹¹⁶⁵ Responsive submissions of Ms Gobbo, [687].