



Our ref. 23000715

10 February 2023

Solicitor Assisting the Board of Inquiry

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Dear Office of the Solicitor Assisting

R v Lehrmann – ACT Board of Inquiry – AFP cooperation with Inquiry

1. We refer to the Board of Inquiry announced by the ACT Government on 1 February 2023 in the matter of R v Lehrmann that is to be conducted under the Inquiries Act 1991 (ACT). AGS acts for the Australian Federal Police, an emanation of the Commonwealth executive government in which ACT Policing sits, in relation to the Inquiry. We would be grateful if you could direct any communication regarding the AFP or any AFP members or employees to us at the contact details provided at the end of this letter.

AFP's cooperation with Inquiry

2. The AFP reaffirms its commitment to assist the Inquiry to the fullest extent possible. For the reasons developed below, the AFP's cooperation must proceed on a voluntary basis.
3. It is the Commonwealth's view that the Inquiries Act does not bind the Commonwealth, including individual AFP members.
 - a. Section 121(1) of the **Legislation Act 2001** (ACT) provides that an Act of the ACT Legislative Assembly 'binds everyone, including people who are not Australian citizens and all governments.' The term 'government' is defined to include the Commonwealth. A note to that provision directs attention to section 27 of the **Australian Capital Territory (Self-Government) Act 1988** (Cth).
 - b. Section 27 of the Self-Government Act, in turn, states that, 'except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth.' As the Inquiries Act is not specified in reg 5 of the **Australian Capital Territory (Self-Government) Regulations 2021** (Cth), it follows that the primary position in s 27 applies.
 - c. In respect of particular AFP members (or Commonwealth officers generally), section 121(4) of the Legislation Act states that 'to the extent that an Act does not bind a government, the same degree of immunity extends to a government

entity in relation to an authorised act or omission of the entity.’ A ‘government entity’ is then defined in s 121(6) to include ‘an instrumentality, officer of employee of the government’ and ‘a contractor or anyone else who exercises a function on behalf of the government.’ An ‘authorised act or omission’ is defined in that same subsection to include, for an officer or employee, an act or omission that ‘relates to a matter within the scope of the duties of the officer or employee.’

4. Accordingly, the AFP is not, as a matter of law, subject to the powers set out in the Inquiries Act. It is on that footing that the AFP wishes to cooperate on a voluntary basis. The AFP’s providing information to the Inquiry should therefore not be taken as a concession that the Commonwealth or its officers and employees are bound by the Inquiries Act or subject to any of the Inquiry’s coercive powers.
5. The AFP’s starting point is that assisting the Inquiry falls properly within its functions, such that information may be released to the Inquiry under s 60A(2)(f) of the *Australian Federal Police Act 1979* (Cth). It is difficult, in the abstract, to identify with precision the consequences that may flow from the position that the AFP must take. For example, the provision of information and documents by the AFP to the Inquiry will be subject to compliance with any Commonwealth information-disclosure provisions, should they arise, or suppression orders that may be applicable. Questions may arise on a case by case basis. The AFP wishes to assure the Inquiry that the AFP’s overriding imperative is to be as forthcoming as the law allows.

Subpoena to produce documents issued to ACT Policing on 6 February 2023

6. In this context, we refer to the subpoena to produce documents issued to the Proper Officer of ACT Policing Headquarters on 6 February 2023, under s 26(1)(b) of the *Inquiries Act*. The subpoena states that the Chairperson requires the proper officer of ACT Policing to produce the documents stated in the schedule to the subpoena. The subpoena also states that failure to comply with the subpoena without lawful excuse is a Contempt of Board which may be dealt with accordingly.
7. It follows from the analysis set out above that, respectfully, the AFP considers that the subpoena does not bind ACT Policing (as an emanation of the Commonwealth). With a view to avoiding the need for court proceedings, we are instructed to respectfully request that the Inquiry withdraw the subpoena, or indicate that compliance with the subpoena is not pressed, by **midday on Monday 13 February 2023**. Alternatively, please confirm that the time and date of return is extended having regard to the content of this letter.

Voluntary production of requested documents

8. Nonetheless, the AFP intends to treat the substance of the subpoena as a formal request for documents.
9. The AFP is not in a position to provide all requested documents by 4 pm on Monday 13 February 2023. Some of the categories of documents required in the schedule are broad and will require searches to be conducted, including over hard copy material, and the results of searches reviewed for relevance to the categories and to

identify any information which may be subject to privileges, immunities, or secrecy provisions. We will immediately engage with solicitor assisting the inquiry as to the form in which electronic production should occur.

10. We will provide you with an update on our proposed timing for production of documents early next week.

Contact details

11. Our contact details are:

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Contact: Tony.Giugni@ags.gov.au / 02 6253 7397

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12. The AFP is keen to engage as soon as possible including as to appropriate document production processes.

Yours sincerely



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