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TRANSCRIPT OF PROCEEDINGS

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**ACT BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM**

**CHAIRPERSON: MR W. SOFRONOFF KC**

**CANBERRA**

**TUESDAY, 16 MAY 2023 AT 9.52 AM (AEST)**

MS E. LONGBOTTOM KC with MR J. JONES and MS E. LYNCH appeared as Counsel Assisting

MR M. TEDESCHI KC with MS B. ANNIWELL appeared on behalf of MR S. DRUMGOLD SC

MS C. WEBSTER SC appeared on behalf of Ms JEROME

MR A. MULLER appeared on behalf of MR S. WHYBROW

MS K. RICHARDSON SC with MR C. MITCHELL and MS W. HALL appeared on behalf of the Australian Federal Police

MR C. GNECH appeared on behalf of thirteen AFP members

MS V. EVANS appeared on behalf of MS H. YATES

MR J. MACK appeared on behalf of MR M. GREIG

MR SMITH appeared for MS JOHNSON

**<THE HEARING COMMENCED AT 9.51 AM**

5 **THE CHAIRPERSON:** Mr Tedeschi, I have received your written submissions - yours and Ms Anniwell's written submissions about adducing further evidence. As I understand it, after Mr Whybrow's evidence has concluded today we will adjourn till Monday, and on Monday I will expect Superintendent Moller will be called.

10 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And it follows then that we don't have to deal with this this morning, or do we?

15 **MR TEDESCHI:** Well, can I ask that we do because I would like to ask Mr Whybrow some questions about the issue and perhaps it might be best if he waits outside.

20 **THE CHAIRPERSON:** Well, no, it might not be necessary because what you want to ask Mr Whybrow may not impinge upon your seeking to lead evidence-in-chief about this subject of the police statistics and how they handle sexual offence cases and so on.

**MR TEDESCHI:** Yes.

25 **THE CHAIRPERSON:** So it may be that your questioning of Mr Whybrow will give rise to the objections that I - that I apprehend are going to be made to this being led.

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And we can deal with it then. Is that convenient or not?

30 **MR TEDESCHI:** I'm going to start off straight away by going to that issue and asking him questions, but I'm quite content to -

**THE CHAIRPERSON:** Let's see how we go and who objects and why and see if we can handle it.

35 **MR TEDESCHI:** All right.

**THE CHAIRPERSON:** Go ahead.

40 **MR TEDESCHI:** Mr Whybrow, at one stage, I think, correct me if I am wrong, between 2020 and 2021 you were the President of the local Bar Association?

**MR WHYBROW:** Yes.

45 **MR TEDESCHI:** And I think since 2010 until now you have been a member of the Criminal Law Consultative Committee of that Association.

**MR WHYBROW:** Pro tem from time to time when it sits, yes.

**MR TEDESCHI:** And I take it because you are part of the Bar Association locally, you keep abreast of changes to the law?

5 **MR WHYBROW:** As best as any practitioner does, yes.

**MR TEDESCHI:** And are you aware that the document that was produced by a review committee called something like this: Listen, Prevent, Believe, Heal Report.

10 **MR WHYBROW:** I can't recall it specifically, no.

**MR TEDESCHI:** Do you recall a body known as the SAPR Review Committee, Sexual Assault Prevention and Review Committee?

15 **MR WHYBROW:** Most of my knowledge of that document has come from going through or quickly looking through police statements in this matter.

20 **MR TEDESCHI:** All right. And so as part of your involvement in the Bar Association, were you aware that suggestions had been made in both the media and also within government administration circles that there was a suggestion that police had been undercharging in the ACT in sex cases?

**MR WHYBROW:** No, the first I was aware of that suggestion was in the course of reading into this Inquiry.

25 **MR TEDESCHI:** All right.

30 **THE CHAIRPERSON:** Mr Tedeschi, just so I can understand the issue that's going to arise, I've heard evidence and people are aware that, at least during the course of the conduct of the criminal proceedings, relations between Mr Drumgold and AFP generally were poor, and, in part, it's because of Mr Drumgold's perception of the attitude of police and what police wrote in the Moller report and other documents that he read and how they must have viewed - we will hear about this - how they viewed his reaction to those matters.

35 You want to go wider and say, well, one of the reasons Mr Drumgold felt the way he did and behaved the way he did, in some respects, was because he had some knowledge about the approach police - the AFP took to charging suspects in sexual offence cases. And whether that perception was right or not, it was a perception grounded upon objective facts, for example, the result of the work of a subcommittee that was doing work.

40 And he took that - what they were doing, what the report - what any report said or publication said and formed an opinion about it, and that opinion informed his attitude towards how police were working and whether they were working well or badly in relation to sexual offences. Is that how it runs?

45 **MR TEDESCHI:** That's one aspect. One of three aspects.

**THE CHAIRPERSON:** Just let's pause there on that first one, then.

50 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** So what you would wish to prove to me is that there was this committee and the report that you mention - I've seen that report. You would wish to tender it and say, well, Mr Drumgold saw it and read it and thought about it, and there was a committee doing work into this area and one of his - one or two of his prosecutors went and assisted, or he might have been a part of it. And he took into account what he learned there. And that was one of the things that informed his attitude towards police. So that's step one?

**MR TEDESCHI:** That's step one, yes.

**THE CHAIRPERSON:** All right. And what's step two? What is the other part of it?

**MR TEDESCHI:** Step two is the other side of the coin, the attitude of the police to the DPP.

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** Because they knew that he had been responsible for this committee being set up and they were resentful at the fact that the DPP was, in effect, going back and looking at all of their decision making and -

**THE CHAIRPERSON:** All right.

**MR TEDESCHI:** - coming to completely different decisions.

**THE CHAIRPERSON:** So you want to - you want to establish that -

**MR TEDESCHI:** That's the second.

**THE CHAIRPERSON:** You want to establish that he was doing some review work and forming a - evidently forming opinions about what that meant. Police became aware of that and some police officers, at least, didn't take kindly to it. Right. Now, you will establish that from Mr Drumgold, that he did some work and that he became aware of attitudes, and you will no doubt cross-examine some police officers about that. Is that right.

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** So the third thing is what you wanted to mention?

**MR TEDESCHI:** The third thing is we anticipate making a submission at the end of the day that the approach of the police - what we say is the bizarre approach of the police to the issue of whether or not Mr Lehrmann should be charged was just an example -

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** - of their general attitude and it explains why they took this attitude to this case because it was exactly the same as the attitude they were taking to any case of that kind.

**THE CHAIRPERSON:** Well, it was consistent with what he perceived to be the approach of police or sexual offence cases, and -

**MR TEDESCHI:** It's not a matter of perception in that case.

**THE CHAIRPERSON:** Well, you want to prove that it's true.

5 **MR TEDESCHI:** We want to prove that it's true, that they did have this attitude to sex cases generally.

**THE CHAIRPERSON:** I see.

10 **MR TEDESCHI:** And that this was a classic example of it. Had it not been for all the publicity, had it not been that the alleged offence occurred in Parliament House, this matter would have been dealt with like the other - I think it's 250-something matters that had been, in effect, just ignored by the police.

15 **THE CHAIRPERSON:** Yes. I understand. Now, all right. I understand that. We can put that on the shelf for the moment. The larger issue on the shelf for the moment. In relation to Mr Whybrow, he is a barrister in private practice and from the evidence he's just given, it doesn't sound like he made it his business to become knowledgeable about this issue - important issue because it didn't impinge upon his work. So how is he going to help me on that matter?

20 **MR TEDESCHI:** I -

**THE CHAIRPERSON:** Not very much I would think.

25 **MR TEDESCHI:** I concede - I thought he would have been well aware of all of this as a former President of the Bar Association. I'm surprised that he wasn't aware of it. But it would appear that he can't provide much assistance.

30 **THE CHAIRPERSON:** Well, he doesn't, so that's that. And it follows, then, that Mr Whybrow - you will ask him whatever you want to ask about this and other matters, but in relation to opening up what you want to open up, that can be argued, I guess, when Mr Whybrow finishes his evidence. That would be a convenient point, wouldn't it?

35 **MR TEDESCHI:** Yes. Yes.

**THE CHAIRPERSON:** I will see what Ms Richardson, who is most concerned in it, and others have to say, but we can deal with -

40 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** - the management of the issue when he concludes his evidence.

**MR TEDESCHI:** Now that it appears that he can't assist it, would be quite appropriate to -

45 **THE CHAIRPERSON:** You can move on to other thing, thank you.

**MS RICHARDSON:** Can I just indicate -

50 **THE CHAIRPERSON:** Yes. Yes.

**MS RICHARDSON:** Sorry to rise to my feet, Commissioner, that I haven't read the submissions that's just been provided to me this morning.

**THE CHAIRPERSON:** Yes, me too.

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**MS RICHARDSON:** I will seek the opportunity to respond to it properly.

**THE CHAIRPERSON:** Yes. Yes, of course you will have that.

10 **MS RICHARDSON:** We will deal with that this afternoon.

**THE CHAIRPERSON:** We will deal with that when you can, and whether that's this afternoon or Monday, I don't mind.

15 **MS RICHARDSON:** Because my understanding is Mr Drumgold is not coming back this week to give evidence. So there is no rush.

**THE CHAIRPERSON:** No, there is no rush, so we will deal with it whenever you are ready and everybody's ready.

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**MS RICHARDSON:** May it please the Inquiry.

**THE CHAIRPERSON:** Yes, Mr Gnech.

25 **MR GNECH:** Thank you, Mr Chair. Could a copy of those submissions be brought to me?

**THE CHAIRPERSON:** Yes, in fact, you can have - somebody is going to give you one.

**MR GNECH:** Thank you.

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**THE CHAIRPERSON:** Thank you. We will deal with it when you are all ready to deal with it, obviously. Yes, Mr Tedeschi. I will mark your written submissions Exhibit C in that series of exhibits that - the management exhibits rather than evidentiary exhibits.

35 **<EXHIBIT C - WRITTEN SUBMISSIONS OF MR TEDESCHI AND MS ANNIWELL**

**MR TEDESCHI:** Thank you. Mr Whybrow, did it appear to you during the course of the Lehrmann trial that the police were resentful of the DPP?

40 **MS RICHARDSON:** I object to that question. Could I ask my learned friend, rather than use "the police", to ask questions directed at particular police officers. It's not a matter I can deal with and it's not a question that, in my submission, will elicit any probative evidentiary answer to say "the police" as an amalgam. We have got a specific set of police who are investigating and involved in the trial. It's not fair to my client. It is also not going to assist  
45 you, in my submission.

**THE CHAIRPERSON:** I think that's right, Mr Tedeschi, because, in a different context, your question would make sense and could be answered, but, in this context, because it's possible to identify who he dealt with and any impression that Mr Whybrow has would be  
50 drawn from the behaviour of individuals, or from letters he might have seen from individuals

he hasn't met, it's possible, then, for him to - it's possible for you to be more particular. And if you can't be particular in identifying the people -

**MR TEDESCHI:** Yes, Chair.

5

**THE CHAIRPERSON:** - you can invite Mr Whybrow to identify particular people to help you and me.

**MR TEDESCHI:** Mr Whybrow, did it appear to you that Superintendent Moller during the trial harboured some resentment towards the DPP?

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**MR WHYBROW:** No, my impression from the trial was the opposite.

**MR TEDESCHI:** Did it appear to you that Chief Inspector Boorman during the trial harboured resentment against the DPP?

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**MR WHYBROW:** I don't know if the word is resentment, but he was unhappy with various aspects of the trial, yes.

**MR TEDESCHI:** Did it appear to you during the trial that any of the other police that you came into contact with were resentful of the actions of the DPP or hostile to the DPP?

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**MR WHYBROW:** No, my impression, again, was the opposite.

**MR TEDESCHI:** Did it appear to you -

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**MR WHYBROW:** Sorry, when I say the opposite, I don't mean that they were loving and kind. I meant my impression was that it was Mr Drumgold who was hostile towards the police.

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**MR TEDESCHI:** Did it appear to you that if any of the police that you had contact with during the trial - did it appear to you that any of them had adopted an attitude that, if they had had their way, Mr Lehrmann would never have been charged?

**MR WHYBROW:** During the trial, no, not at all.

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**MR TEDESCHI:** Or before the trial?

**MR WHYBROW:** Not at all.

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**MR TEDESCHI:** Do you think - perhaps if you could pause before you answer this question -

**MR WHYBROW:** Sure.

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**MR TEDESCHI:** Do you think that it is appropriate for police officers to decline to charge in a sex case because behind closed doors they have decided that the complainant has credibility issues?

**MS RICHARDSON:** I object to that question.

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**THE CHAIRPERSON:** Yes, what's your objection?

**MS RICHARDSON:** What is the evidentiary basis in this inquiry to put a question like that.

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**THE CHAIRPERSON:** Well, he is asking a question, not putting anything. But could I ask this, Mr Tedeschi. You are asking Mr Whybrow whether it's appropriate for police to do something, or not to do something in certain circumstances. I don't know what you mean by "appropriate." It's a very plastic word. Secondly, what do I care what Mr Whybrow thinks about such a matter? How is that going to help me determine anything? I would be interested in Mr Drumgold's view because he's an actor with police in that respect. I would be interested in police officers' view because their answer might reveal a wrong way of thinking, for example. But what Mr Whybrow thinks doesn't seem to be anything that can assist me.

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**MR TEDESCHI:** Only the view of a senior criminal law practitioner within the jurisdiction.

**THE CHAIRPERSON:** Well, then -

**MR TEDESCHI:** Might assist you.

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**THE CHAIRPERSON:** Yes, I don't think so, Mr Tedeschi.

**MR TEDESCHI:** If the Inquiry pleases. Mr Whybrow, moving to a different topic, you gave evidence in answer to questions from Counsel Assisting that, in effect, you thought that Mr Drumgold had made the decision about a retrial with undue haste. Would that be fair to say that?

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**MR WHYBROW:** I don't know if I used the words undue haste, but he had five days to consider while the jury was out, like I did, the likelihood that there was going to be a hung jury, so I can't say whether he had turned his mind to it at all. But between the jury being discharged and an announcement that he would retry (indistinct).

30

**MR TEDESCHI:** Did you, on the day of the discharge of the jury, namely, 27 October 2022, did you speak to Skye Jerome after the jury had been discharged?

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**MR WHYBROW:** I recall that there was a conversation outside of court 3 where there was a lot of people milling about. I can't tell you if it was before or after, but it was after I was aware that it was going to happen, yes.

40

**MR TEDESCHI:** And on that particular day, Ms Jerome was representing the prosecution because Mr Drumgold had gone to a Conference of Australian Directors' meeting in Perth. Is that right?

**MR WHYBROW:** He wasn't there and I was aware of that.

45

**MR TEDESCHI:** And did you during that conversation with Ms Jerome tell her that you had had a meeting with the investigators?

**MR WHYBROW:** I may have said I had - sorry, I told her I had spoken to police about the question of bail, yes.

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5 **MR TEDESCHI:** Did you tell her that you had spoken to the police and that they had suggested that you, Mr Whybrow, contact Mr Drumgold and suggest that Mr Drumgold was not impartial and that he should outsource the decision whether or not to re-run the trial to someone outside of his office?

10 **MR WHYBROW:** That's not my recollection. My recollection is that I said - I raised that subject, but it was me indicating that I had spoken to the police about bail, and I had indicated to them that I thought any decision for a retrial should be outsourced.

**MR TEDESCHI:** So is this what you are saying, that you told Ms Jerome that you thought that Mr Drumgold shouldn't make the decision about a retrial, that it should be briefed out to somebody else?

15 **MR WHYBROW:** That's my recollection of what was involved in that conversation.

**MR TEDESCHI:** And had you previously, before discussing it with Ms Jerome, discussed it with the police?

20 **MR WHYBROW:** I think so.

**MR TEDESCHI:** And were they essentially in agreement with you?

25 **MR WHYBROW:** I don't recall what their response was at all. I remember that the conversation was mainly in relation to the question of ongoing bail for Mr Lehrmann. He hadn't been on bail, and what conditions, if any, they would have.

30 **MR TEDESCHI:** I'm not asking you about the bail conversation. I'm asking you whether you discussed with the police the prospect of you asking Mr Drumgold to, in effect, not make the decision himself about re-running the trial, but to brief it to someone else?

35 **MR WHYBROW:** I don't have a specific recollection of doing so except that I do recall raising that with Skye and so potentially - well, Ms Jerome, so potentially I did raise it with the police, yes.

**MR TEDESCHI:** All right. If you raised it with the police, do you remember what was said?

**MR WHYBROW:** Well, I don't remember saying it, so I don't remember what was said.

40 **MR TEDESCHI:** All right. Later that day, did Mr Drumgold telephone you and seek some clarification about what you had said to Ms Jerome?

45 **MR WHYBROW:** He rang me and asked what I had said to the police or what the police had said to me. And I was quite short with him, told him it was none of his business and hung up.

**MR TEDESCHI:** I suggest that you acknowledged to him that you had made the comment to Ms Jerome about him delegating the decision to someone else?

50 **MR WHYBROW:** I may have.

**MR TEDESCHI:** And I suggest that you stated that you had had ongoing discussions about that with the investigators and that that was none of Mr Drumgold's business.

5 **MR WHYBROW:** The last part I accept. The first part I don't agree with.

**MR TEDESCHI:** Do you agree that Mr Drumgold had a statutory right to make that decision To whether or not there was going to be a retrial?

10 **MR WHYBROW:** Yes.

**MR TEDESCHI:** It was his duty under that statute to make that decision ultimately?

**MR WHYBROW:** Yes.

15

**MR TEDESCHI:** And do you agree that when you and Mr Drumgold, I think within a day or two, went and saw the Chief Justice, it was quite clear to you that the Chief Justice expected there to be a retrial?

20 **MR WHYBROW:** I can't say what the Chief Justice expected. But certainly she wanted to set a trial date immediately so that when we went into court the next day there would be a fixed date.

**MR TEDESCHI:** There was no discussion with the Chief Justice about, "Are you going to make an application, or are you going to make a submission to the Director for a no bill" or anything like that, was there?

25 **MR WHYBROW:** There was no such discussion.

30 **MR TEDESCHI:** And the decision by Mr Whybrow to get -

**MR WHYBROW:** Mr Drumgold.

**MR TEDESCHI:** I'm sorry, to Mr Drumgold, to get a date for the retrial, that didn't in any way prevent you from making representations to the DPP for a no bill?

35 **MR WHYBROW:** No.

**MR TEDESCHI:** Now, I want to ask you some questions in a delicate way, because I understand there has been a suppression order by the Supreme Court about an application that you made on behalf of Mr Lehrmann after the jury was discharged?

**MR WHYBROW:** I went overseas in - at the time that that application was - it was laid and Mr Moses -

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**MR TEDESCHI:** Mr Moses made an application.

**MR WHYBROW:** - of senior counsel was instructed. The view was taken if there was going to be a retrial, then this application - and I was going to remain as counsel for Mr Lehrmann in the retrial, it would be better if I was at - a step removed from this particular application.

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**MR TEDESCHI:** So Mr Moses made an application on behalf of Mr Lehrmann to the Chief Justice?

5 **MR WHYBROW:** An application was filed with the registry and it was going to be heard by the Chief Justice, yes.

**MR TEDESCHI:** Are you able to say whether that application was refused by the court?

10 **THE CHAIRPERSON:** No, you can't go there, I think, because -

**MR TEDESCHI:** The suppression order.

**THE CHAIRPERSON:** Mmm.

15 **MR TEDESCHI:** I think you are right. It's that application which is the subject of the suppression order by the Supreme Court?

20 **MR WHYBROW:** The application itself and the affidavit in support of it - so the orders that we were seeking and the evidential basis upon which we were seeking it were all suppressed by her Honour.

**MR TEDESCHI:** Including her order?

25 **MR WHYBROW:** I don't know if the order itself making the suppression order was -

**MR TEDESCHI:** No, I'm sorry, not the suppression order. If there was an order made consequent upon the application, was that - does the suppression order affect the order that was made?

30 **MR WHYBROW:** The application was made. Before the application was heard, the Director discontinued the proceedings.

35 **THE CHAIRPERSON:** I don't think it's a secret that the application was never heard or determined.

**MR WHYBROW:** Yes. Yes.

40 **MR TEDESCHI:** Now, Chairman, I'm going to now proceed to some questions about the prosecution case itself.

**THE CHAIRPERSON:** Yes.

45 **MR TEDESCHI:** And so I'm going to be referring to actual evidence that was led. I just raise that for your consideration as to -

**THE CHAIRPERSON:** Thank you.

50 **MR TEDESCHI:** - whether there should be either - either the live feed ended or a suppression order. Whatever you think is appropriate.

**THE CHAIRPERSON:** What's the - are you able to tell me freely, and if you would like Mr Whybrow to leave the room that's - we can do that.

5 **MR TEDESCHI:** Yes, please. If he could leave the room.

**THE CHAIRPERSON:** What the line is that you want to pursue?

**MR TEDESCHI:** Yes.

10

**THE CHAIRPERSON:** Would you rather Mr Whybrow left the room?

**MR TEDESCHI:** Yes, please.

15 **THE CHAIRPERSON:** Would you excuse us, Mr Whybrow?

<**THE WITNESS WITHDREW**

**THE CHAIRPERSON:** Now -

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**MR TEDESCHI:** It goes -

**THE CHAIRPERSON:** As everyone knows, I'm not interested in how the trial should have concluded or I'm not interested in whether Mr Lehrmann is guilty or not guilty. I'm not interested in whether Ms Higgins - about Ms Higgins. And consequently - however, I have to deal with the question whether the charge should have been brought. Perhaps, because I don't - I'm not aware yet that anybody is going to be submitting that the charge was not properly brought. I'm not aware that anybody is going to be submitting that.

25

30 Can I ask, is anybody - is anybody going to be submitting to me at the end that I should conclude that Mr Drumgold ought not have presented an indictment because he was not justified by the proper factors in presenting an indictment? Is anybody going to be putting that to me?

35 **MR TEDESCHI:** I take it that includes your Counsel Assisting.

**THE CHAIRPERSON:** Yes, yes, yes. That includes my Counsel Assisting. So the position at the moment is Mr Drumgold was of the view that notwithstanding the views of police about Ms Higgins' credibility, Mr Drumgold was of the view that, applying the orthodox tests, he was duty-bound to present an indictment. Nobody suggested to him so far the contrary, but it's not concluded. And I don't read in the police evidence that I've seen that any police witness says to the contrary. So if nobody asserts to the contrary then it may be that Mr Tedeschi needn't pursue the line that he's going to pursue. So does anybody want to tell me that they are going to submit that Mr Drumgold was wrong in presenting the indictment?

45

**MR TEDESCHI:** Or continuing it.

**THE CHAIRPERSON:** Or continuing it. And, indeed, deciding to pursue a retrial of Mr Lehrmann until the matter concluded in the way that we did. I will have to look at it, but it's one thing for me to consider the matter in the absence of contrary submissions, and it's

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another to receive contrary submissions. So there you are. Nobody is going to submit that Mr Drumgold was wrong in presenting the indictment.

**MR TEDESCHI:** There's another aspect to these questions.

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**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** And that is to highlight to you, Chairman, how bizarre the police approach was, that it was a chase that was overwhelmingly in need of charging.

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**THE CHAIRPERSON:** Well, let's -

**MS RICHARDSON:** I'm sorry to rise to my feet. Can I ask my learned friend to temper his language.

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**THE CHAIRPERSON:** Yes, yes. That's what I was going to say.

**MS RICHARDSON:** Things like "bizarre" -

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**THE CHAIRPERSON:** No, no, I understand.

**MS RICHARDSON:** - in the circumstances where the police made a decision to charge Mr Lehrmann is -

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**THE CHAIRPERSON:** No, I'm with you, Ms Richardson.

**MS RICHARDSON:** May it please the Inquiry.

30

**THE CHAIRPERSON:** Please, Mr Tedeschi, every emotive word that is spoken in this hearing room is of interest as a hook for a story, and I would be grateful if you reserved your advocacy to the end. But I understand what you want to do is examine the question before me that is put to me in due course, that having regard to the nature of the case, it's one that should have been prosecuted, whatever the outcome might be, and whatever one's different judgments might be about the prospects - the actual prospects of success. And that, consequently, police scepticism, if I can put it that way, was misplaced.

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**MR TEDESCHI:** Yes.

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**THE CHAIRPERSON:** Now, all right, you are going to ask the police about that, I'm sure, as you are entitled to do. What's Mr Whybrow's role in this? He's - his view - he was duty-bound to show the weaknesses in the case and do his best to secure an acquittal. That's his professional attitude. His professional attitude isn't going to change. His personal attitude is of no interest to me. His personal beliefs in that respect is of no interest to me. So what are you going to get out of him possibly that would justify asking him about the wrongness or the rightness of police attitudes?

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**MR TEDESCHI:** Chairman, just that he is a person with intimate knowledge of the evidence. He's a person who was there, so he is eminently qualified to make a judgment about the strength or weakness of the prosecution and/or the defence case.

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5 **THE CHAIRPERSON:** I don't think - what you are asking for is a form of opinion evidence about the quality of the case and I don't know that that's going to assist me, because I'm going to be given, I'm sure, an indiscriminate mixture of opinions Mr Whybrow formed in the pursuit of his professional duties, and we all know that as barristers we are supposed to be objective in our approach to a case but, in fact, we become partisan.

10 So I expect that he would say he thinks perhaps it's a weak case. Very well. You would say that, wouldn't you, as defence counsel. You - you provoke yourself into finding every weakness and place yourself in a state of mind in which you can make submissions with sincerity that the jury ought to acquit. So I don't know that I'm going to get anything useful out of Mr Whybrow on that subject.

**MR TEDESCHI:** Chairman, you might recall -

15 **THE CHAIRPERSON:** You will make submissions to me about it, and I'm interested in your submissions.

**MR TEDESCHI:** Yes, yes.

20 **THE CHAIRPERSON:** Based on the evidence you will make submissions and you will pick all of the things, I'm sure, that ought to have borne upon a prosecutor's mind both for and against charging.

**MR TEDESCHI:** Yes.

25 **THE CHAIRPERSON:** With the balance, you will submit, firmly in favour of charging. And I will be assisted by that submission because it will be an analysis - a legal analysis of the task that faced a prosecutor.

30 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And you will be submitting that a rational prosecutor acting properly would have made the decision Mr Drumgold made.

35 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** That is interesting, relevant, and I'm eager to hear it. But I don't know that I really want to hear what Mr Whybrow thinks about all that.

40 **MR TEDESCHI:** I'm also mindful of the fact that, yesterday, he did give evidence that he doesn't - or didn't see that there were any strengths in the prosecution case.

45 **THE CHAIRPERSON:** Yes, I know. But that's his opinion, really. And, you know, as an opinion it's interesting and I will look, but you're going to cover it, Ms Richardson is going to cover it, other people are going to - Counsel Assisting is going to cover it. And I'm more interested in submissions than opinions which are tainted by experience.

**MR TEDESCHI:** If the Inquiry pleases.

50 **THE CHAIRPERSON:** So shall we have Mr Whybrow back?

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** I don't think that worsens your position, Mr Tedeschi.

5

**MR TEDESCHI:** No, I understand.

**<STEVEN MILTON WHYBROW, CONTINUING**

10 **<EXAMINATION BY MR TEDESCHI**

**THE CHAIRPERSON:** Thank you, Mr Whybrow.

15 **MR TEDESCHI:** Mr Whybrow, could I take you, please, to page 37 of your statement, which is paragraph 34.9.

**MR WHYBROW:** Yes.

20 **MR TEDESCHI:** At that paragraph you describe how you met with Detective Inspector Boorman on 20 October.

**MR WHYBROW:** Yes.

25 **MR TEDESCHI:** Outside The Cupping Room coffee shop.

**MR WHYBROW:** Well, we met there, yes.

30 **MR TEDESCHI:** You say in your statement that you raised with him an inquiry that had been made by a columnist for The Australian, Ms Albrechtsen, and you wanted to give him a heads up there may be some inquiries to the police about the investigative review document. Correct?

**MR WHYBROW:** Yes.

35 **MR TEDESCHI:** On 25 October, so five days later, at that stage, the jury were out.

**MR WHYBROW:** They were out on the 20th as well.

40 **MR TEDESCHI:** Okay. And on that day, the 25th, Inspector Boorman sent you message asking if he could have a chat with you over a coffee and you agreed to do so.

**MR WHYBROW:** Yes.

45 **MR TEDESCHI:** You say in your statement:

“He appeared to be anxious, agitated and concerned not to be seen speaking together in direct line of sight of the ODPP.”

50 **MR WHYBROW:** Yes.

**MR TEDESCHI:** What led you to that view?

**MR WHYBROW:** Because he said, "Can we move around the corner so we can't be seen from the DPP's office?"

5

**MR TEDESCHI:** And it was in that conversation that he told you that he was distressed about the prosecution; correct?

**MR WHYBROW:** I can't confirm the exact word "distressed" but words to that effect.

10

**MR TEDESCHI:** Well, you said in your statement he indicated to you that he was quite distressed about this prosecution.

**MR WHYBROW:** Yes.

15

**MR TEDESCHI:** Is that right?

**MR WHYBROW:** Words to that effect. It may have been that word. I didn't put it in quotes, but yes he was quite distressed.

20

**MR TEDESCHI:** And did he tell you that he considered that Mr Lehrmann was innocent?

**MR WHYBROW:** That's what my recollection was.

**MR TEDESCHI:** He didn't just say that he thought that a not guilty verdict was appropriate; he said that he thought that Mr Lehrmann was innocent.

**MR WHYBROW:** Correct.

**MR TEDESCHI:** And then in the context of that conversation, he said to you that if the jury came back with a guilty verdict that he would resign from the police force.

30

**MR WHYBROW:** Words to that effect is my recollection, yes.

**MR TEDESCHI:** You say in your statement that you have never before had a conversation with a police officer of that kind?

**MR WHYBROW:** Correct.

**MR TEDESCHI:** And I take it never since as well?

40

**MR WHYBROW:** Not since October of last year, no.

**MR TEDESCHI:** And it was also while the jury was out that Inspector Boorman asked you to let him know if you heard anything about the jury, and you agreed to do so. And he said to you that he had no confidence that the DPP would let him know about that.

45

**MR WHYBROW:** That's what he said and that was consistent with my observations.



**MR TEDESCHI:** Now, moving to a different topic, you gave some evidence in answer to questions by Counsel Assisting about the approach that was taken by Mr Drumgold as prosecutor to the evidence of Linda Reynolds. Do you recall giving that evidence?

5 **MR WHYBROW:** Yes.

**MR TEDESCHI:** Now, is it correct that when Mr Drumgold opened to the jury in his opening address on 4 October that he made it clear that part of his case is that Ms Reynolds - perhaps I might just get the actual wording of it. 4 October, line 11. Yes, it's  
10 number 0008.0001.0004\_0038. It's a BOI. All right. Could I take to you line 11. In his opening address Mr Drumgold said:

15 "The complainant was and remained increasingly concerned, and you will hear that from her, about potential government interference in the investigation due to political fallout and was very hesitant to produce some private material she feared may be used to attack her, and this included a reluctance to hand over her phone that contained a large amount of private material, including the SMS messages between the complainant and her family and boyfriend and contact details, etcetera."

20 **MR WHYBROW:** Yes.

**MR TEDESCHI:** So, do you agree that right from the beginning of the trial Mr Drumgold made it clear that the evidence of Ms Higgins was going to include a suggestion of potential government interference?

25 **MR WHYBROW:** Yes. He opened on "potential government interference" -

**MR TEDESCHI:** Yes.

30 **MR WHYBROW:** - in the perception or the evidence of Ms Higgins.

**MR TEDESCHI:** And then Ms Higgins actually gave evidence of what she saw as political interference in or - I withdraw that. What she perceived as a political involvement in her complaint. Is that a fair way of putting it?

35 **MR WHYBROW:** She made allegations of either fears or actuality of conversations, etcetera.

**MR TEDESCHI:** That, in her view, were unsupportive of her complaints?

40 **MR WHYBROW:** That was her allegation.

**MR TEDESCHI:** That was her perception.

45 **MR WHYBROW:** That was her perception and, at times, her evidence.

**MR TEDESCHI:** Can you take you please to BOI.0008.0001.0004\_0130. At line 44, please. Question:

"Now, between when you wore it in the early hours of 23 March 2019 and some two years later when you handed it over to police, what happened with the dress during that period?"

5 Answer:

"I kept it under my bed in a plastic bag for a good six months, untouched, uncleaned. I just had it there..."

10 If we go over the page:

15 "...and I felt - I wasn't sure because of all the party-political stuff whether or not - how I could proceed or if I could proceed without losing my job, and so I kept it there. It was like this weird anchor for me. And then once it was very clear that I couldn't proceed and maintain my career, I very symbolically washed the dress and I wore it once more, and then I've never worn it since."

You recall that evidence that she gave?

20 **MR WHYBROW:** Very clearly.

**MR TEDESCHI:** Right. And then at BOI.0008.0001.0004\_0151 at line 34, Ms Higgins gave this evidence. Question:

25 "When was your next meeting with Ms Brown that you recall?"

Answer:

30 "I know it was that week. I believe - I believe it was the Thursday, and it was - it was definitely a lot more formal in tone and at that point it had sort of become political, and she made me re-sign a code of conduct and there was a record of that somewhere."

35 So, once again there, she's suggested that there was a political - a political side to what had happened.

**MR WHYBROW:** She said the words "sort of become political", yes.

40 **MR TEDESCHI:** Yes. And if you could have a look, please, as BOI.0008.0001.0004\_0158 at line 6, please. Having talked about having gone into a conversation that was quite an adversarial space, at line of she says - well, question:

45 "And what problems did you - was it your perception that they were communicating to you?"

Answer:

50 "That this could theoretically be perceived in the broader public sense as a political problem for the Liberal Party with women."

And then she's asked about whether or not the Prime Minister had called an election at that stage. But do you agree that she's there suggesting that her complaint could theoretically be perceived in a broader public sense as a political problem for the Coalition Liberal Government with women voters?

5

**MR WHYBROW:** I didn't understand what was being suggested there, whether it was people who she employed had said this, whether this was her own internal monologue or perception. It wasn't clear. This could theoretically be perceived. What was your perception. So it wasn't clear to me whether this was her - a conversation or just her way of evidence of what she was thinking at the time or perceiving. But she said that evidence. I don't dispute that that was the words.

10

**MR TEDESCHI:** Either way she was suggesting - whether it was conversations or her perception, she was giving evidence that she perceived a potential political problem in her complaint for the Liberal Coalition Government with women voters?

15

**MR WHYBROW:** She said that.

**MR TEDESCHI:** That's what she was, in effect, saying.

20

**MR WHYBROW:** That's what she said.

**MR TEDESCHI:** Yes. Right. Now, having elicited - Mr Drumgold elicited evidence from Ms Higgins about when she had disclosed the alleged sexual offence to various people, including Ms Reynolds and Ms Brown.

25

**MR WHYBROW:** Yes.

**MR TEDESCHI:** And when Mr Drumgold came to cross-examine Linda Reynolds, having been granted permission to do so under section 38 of the Evidence Act, he suggested to Ms Reynolds that she had been coaching the defence. Do you remember that term?

30

**MR WHYBROW:** 100 per cent.

**MR TEDESCHI:** By "coaching", did you understand him to mean that he was suggesting that she had assisted the defence by suggesting lines of inquiry and possible lines of cross-examination of Brittany Higgins?

35

**MR WHYBROW:** I understood it to be an allegation in front of the jury that she was somehow involved in the defence of Mr Lehrmann.

40

**MR TEDESCHI:** That she was involved in the defence by assisting the defence by suggesting lines of inquiry or lines of cross-examination?

45

**MR WHYBROW:** That's part of it, yes.

**MR TEDESCHI:** So he firmly put that to Ms Reynolds?

**MR WHYBROW:** Put it as a positive proposition, yes.

50

**MR TEDESCHI:** And in his closing address, he made it very clear that he was maintaining that suggestion that Ms Reynolds had, in effect, coached - that is, assisted the defence?

5 **MR WHYBROW:** Not withstanding Senator Reynolds denying that, yes.

**MR TEDESCHI:** As a prosecutor, he was not bound by her answer to that, was he?

**MR WHYBROW:** In - if there was other evidence upon which he could justify that submission, absolutely.

10 **THE CHAIRPERSON:** Well, he was bound, wasn't he, because of the - at common law is a collateral evidence rule and what under the Evidence Act ACT is an absolute prohibition to ask questions going to credit and a prohibition against leading evidence going to credit with certain exceptions. None of which were invoked here. So he was bound by the answer at  
15 common law or under the Evidence Act. In short, the result of that denial was that, unless there was some other evidence, there was no evidence that - to support the suggestion that he had made.

**MR TEDESCHI:** Chairman, we don't agree with that.

20 **THE CHAIRPERSON:** No. Well, tell me why, yes.

**MR TEDESCHI:** I will, but I will come to it in the course of questioning Mr Whybrow, if I may.

25 **THE CHAIRPERSON:** All right. You go ahead. All right. Yes. Thanks.

**MR TEDESCHI:** You objected to Mr Drumgold cross-examining Senator Reynolds about that?

30 **MR WHYBROW:** I did. Well, I objected to him making a suggestion as a positive proposition that I was being coached and she was coaching the defence.

**MR TEDESCHI:** And her Honour the Chief Justice allowed the cross-examination?

35 **MR WHYBROW:** Her Honour allowed the cross-examination as to credit of Senator Reynolds, yes.

**MR TEDESCHI:** You are not suggesting, are you, that no reasonable judge in the position of the Chief Justice in this trial could make such a decision properly?

**THE CHAIRPERSON:** We are not investigating any decisions made by the judge during the trial, so I won't allow that question.

45 **MR TEDESCHI:** Having made - having had that decision made by the Chief Justice, having suggested to Ms Reynolds that she had been coaching the defence, I want to take you to the SMSs that Ms Reynolds sent to the defence.

**MR WHYBROW:** To me.

**THE CHAIRPERSON:** Mr Tedeschi, these are the one or two that we looked at the other day; is that right?

5 **MR TEDESCHI:** It's more than one or two.

**THE CHAIRPERSON:** I see. Well, we had better - had better adjourn and you can talk to Ms Longbottom just to make sure that we are not going into redacted material.

10 **MR TEDESCHI:** Yes.

15 **THE CHAIRPERSON:** And if you have to go to it, well, we will deal with that. But I know that a lot of the text messages that were appended to Mr Whybrow's statement were, in my opinion, the subject of a proper response to what he was asked for by the inquiry, but upon review was not something that I was going to look at or that I wanted published. So let's make sure that what you're looking at - - -

20 **MR TEDESCHI:** I'm happy to do that with Counsel Assisting. And perhaps I might explain to you, Chairman, that what I'm attempting to do is to show that there was a proper legal basis for Mr Drumgold make the submission.

**THE CHAIRPERSON:** I understand that. I understand.

25 **MR TEDESCHI:** That it was an acceptable approach for a prosecutor, even if Mr Whybrow would not have done that himself.

**THE CHAIRPERSON:** Yes, I understand. You want to demonstrate that what he did was orthodox.

30 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And that, in that, he had a basis for what he did. Yes. Well, we will adjourn for 20 minutes and then see what you are going to do.

35 <**THE HEARING ADJOURNED AT 10.43 AM**

<**THE HEARING RESUMED AT 11.06 AM**

**THE CHAIRPERSON:** So, Mr Tedeschi, you want to pursue a line relating to those texts?

40 **MR TEDESCHI:** Yes, Chairman. Can I suggest that it would be appropriate for you to go into private session.

45 **THE CHAIRPERSON:** I think that's right. So what we will do is, I regret - I regret the need for this, but as everybody will appreciate, when the Commission seeks statements from witnesses, what we've done is we've asked each witness - Mr Whybrow, for example - to narrate - explain how many meetings you've had with police officers, for example, and in May. And he says that. And if you have any text messages or written communications in relation to that, set them out. So he sets out everything.

Now, as a consequence of that grab-bag approach, which we have to adopt because we don't know where vital information might sit, we get a lot of information that's got nothing to with what we are looking at. And some of it doesn't matter because it's information that nobody is going to be interested in, but other parts of it might be very confidential and personal information pertaining to people who aren't involved in this inquiry. And there are other instances of personal communications of that kind.

So we have in the Commission redacted that kind of material and invited the parties who have given us - witnesses who have given us statements to tell us what they think should be redacted. And now Mr Tedeschi wants to cross-examine on something that's been redacted in that way. Well, he may be entitled to do that, and I will need to hear argument, but in order to be able to hear argument, we need to be able to speak freely. And in the course of speaking freely, we are going to be speaking about the content of those things that are redacted to protect people whose interest deserve to be protected.

So for that reason I'm going to be go into private session and that means that we will close the live feed and the only people who will remain in the hearing room will be the legal representatives of the parties and Mr Whybrow. So I would ask everybody who is not a legal representative of the parties or a member of the Commission staff to - Inquiry staff to please leave the hearing room. Yes.

Now, we have the overflow room next door of course and there may be lawyers there as well as journalists. Any lawyers who are in there who are appears for parties who have been given leave to appear should come in here if they want to follow the proceedings. So I take it that the only people here at the bar table are representatives and nobody else except for Commission staff. All right.

**<NOT FOR PUBLICATION DIRECTION COMMENCED AT 11.09 AM**

**<NOT FOR PUBLICATION DIRECTION LIFTED AND HEARING RESUMED AT 11.30 AM**

**<STEVEN MILTON WHYBROW, CONTINUING**

**<EXAMINATION BY MR TEDESCHI**

**THE CHAIRPERSON:** Yes, Mr Tedeschi.

**MR TEDESCHI:** Yes, thank you.

**THE CHAIRPERSON:** Are we good?

**MR TEDESCHI:** Can we please bring up document WIT.0031.0001.0003\_0333. I don't know if that raises a difficulty.

**THE CHAIRPERSON:** We will find out. But I should say that I direct that the content of the proceedings that were held in private not be published.

**MR WHYBROW:** We are still in private session, Mr Sofronoff?

**THE CHAIRPERSON:** No, we are not in private session anymore. We dealt with an objection to evidence, and we are moving on.

**MR WHYBROW:** Thank you.

5

**MR TEDESCHI:** Mr Whybrow, you were asked some questions about these two SMS messages from Senator Reynolds to you by Counsel Assisting. Do you recall that?

**MR WHYBROW:** Yes.

10

**MR TEDESCHI:** The first one, Ms Reynolds has written to you.

"Hi, do you have the daily transcript and if so are you able to provide my lawyer?"

15 **MR WHYBROW:** Yes.

**MR TEDESCHI:** Now, you said in your evidence yesterday that there was civil action between Senator Reynolds and Ms Higgins and Ms Higgins is represented by a lawyer. So were you suggesting that it was perfectly appropriate for Senator Reynolds to request the transcript herself rather than through her lawyer?

20

**MR WHYBROW:** She asked for a daily transcript. Sorry, I don't understand the question. Could you ask it again?

25 **MR TEDESCHI:** Well, the question is this: That what I'm suggesting to you is that one possible inference from that part of her SMS to you is that she wanted the transcript to be able to read it herself, as opposed to requiring it to provide to her lawyer for the purposes of a civil action. What do you say about that?

30 **MR WHYBROW:** I say that she asked two questions: Do I have them and can I give them to her lawyer. I can't go beyond that as to what she would have done with them or her intention or whether she would have read them herself or whether her lawyer would have given them to her.

35 **MR TEDESCHI:** Do you agree that in the normal course, it would be the lawyer, her lawyer, who requests the transcript if he or she considers it desirable for civil proceedings to have it?

40 **MR WHYBROW:** It depends on the circumstances and whether it's the first time you had ever spoken to somebody or not. But, yes, that's the usual course.

**MR TEDESCHI:** What stage was the civil action at at that time?

45 **MR WHYBROW:** I don't know, other than that it had been reported that Ms Higgins was suing Linda Reynolds.

**MR TEDESCHI:** It was not imminent, was it?

50 **MR WHYBROW:** I don't know.

**MR TEDESCHI:** There was no desperate urgency for Senator Reynolds to get the transcript for the civil proceedings, was there?

**MR WHYBROW:** I presume not.

5

**MR TEDESCHI:** So what I suggest to you is that one possible interpretation of this first part of her SMS is that she wanted to get access to the transcript of the trial for her own purposes relating to the trial. That's one possible interpretation.

10 **MR WHYBROW:** If you have got a very suspicious one-track mind, then absolutely, yes.

**MR TEDESCHI:** I suggest to you it's one reasonable interpretation.

15 **MR WHYBROW:** I don't think it's reasonable to draw any interpretations from that one text. But that's just me.

**MR TEDESCHI:** And the second part of the SMS asks for - whether you have text messages between Brittany Higgins and a named person?

20 **MR WHYBROW:** Yes.

**MR TEDESCHI:** Now, did you understand that to be suggesting to you that those text messages between Brittany Higgins and that named person might be of assistance to the defence in the trial?

25

**MR WHYBROW:** Mr Chair.

**THE CHAIRPERSON:** Yes.

30 **MR WHYBROW:** I'm just concerned that the answers to these questions may unfairly bring in this information about other people that you may rule to be not in the public domain.

**THE CHAIRPERSON:** I think if we take it a step at a time, what you are being asked is whether you think - whether your judgment was that Senator Reynolds' suggestion to you that you - suggestion to you that certain text messages might be revealing, therefore helpful to you, whether you regarded that as an attempt by her to help you. That's all you are being asked at this moment.

35

40 **MR WHYBROW:** I regarded it as giving me a possible line of inquiry that she thought might be useful. Yes.

**MR TEDESCHI:** And if you could just answer this question, yes or no.

**MR WHYBROW:** Yes.

45

**MR TEDESCHI:** Had you, in fact, already pursued that line of inquiry?

**MR WHYBROW:** Yes.



**MR TEDESCHI:** And, again, if you could answer this yes or no. Did you come to the conclusion that there was nothing of any value for the defence in that line of inquiry?

**MR WHYBROW:** No, that's not correct.

5

**MR TEDESCHI:** All right. Did you come to the conclusion that there was no admissible evidence that you could use as a result of that line of inquiry?

**MR WHYBROW:** No, not necessarily.

10

**MR TEDESCHI:** Okay. But -

**THE CHAIRPERSON:** So he thinks the text message was intended to be helpful. He and his colleagues had done work on that issue and had found something that might or might not be helpful. That's the position we have reached. Do you need anything more? That is to say, what you will submit at the end day is that it was an attempt to be helpful and, indeed, Senator Reynolds wasn't wrong. It seems that there was something there that might have been useful.

15

**MR TEDESCHI:** And by "useful", helpful -

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**THE CHAIRPERSON:** Useful to the defence case.

**MR TEDESCHI:** Useful to the defence.

25

**THE CHAIRPERSON:** Yes, of course, of course. I think you have established that. If that's what you wanted to establish thus far, you've established that.

**MR TEDESCHI:** Thank you.

30

**THE CHAIRPERSON:** I'm just conscious of not treading into -

**MR TEDESCHI:** Yes.

35

**THE CHAIRPERSON:** - dangerous areas.

**MR TEDESCHI:** And just for the purpose of absolute clarity, for those who are not here, you forwarded a copy of that SMS exchange between you and Senator Reynolds to Mr Drumgold?

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**MR WHYBROW:** Yes, and I also indicated to him that that second message, which was like the hot tip about following something through, was something that I wasn't providing him other than so he could have his fears allayed and that in the normal course I would have redacted it, but I didn't want him to feel like I was hiding something improper from him.

45

**THE CHAIRPERSON:** How long have you been in practice as a barrister at that point?

**MR WHYBROW:** 20 years.

**THE CHAIRPERSON:** 20 years or so.

50

**MR WHYBROW:** 21 years.

5 **THE CHAIRPERSON:** And some people might not know this, but part of - one of the things that barristers can do to assist the smooth administration of justice, to assist the judge in the work that has to be done is this, that opponents - opponents' barristers can speak candidly to each other and reveal things - we call it barrister to barrister.

10 **MR WHYBROW:** Yes.

15 **THE CHAIRPERSON:** That's not to be used, but it has - it's intended to have an effect such as, for example, telling your opponent that a particular line of cross-examination for reasons you reveal in confidence will not assist, and you are telling them confidentially it won't assist and why. And the reason you don't want them to ask the questions is because it might harm the witness psychologically or might have some other deleterious effect or something of that kind. So counsel to counsel, you confide in each other to ensure that unnecessary difficulties are avoided. You are familiar with that custom -

20 **MR WHYBROW:** Absolutely. It happens all the time.

25 **THE CHAIRPERSON:** - that we engage in. And that, as I understand it, it might otherwise seem odd for you to be saying, "Would you treat this as redacted", but I understood you to be saying to Mr Drumgold, "You seem to be on a line of cross-examination suggesting something untoward is happening, but here is actually what happened, and as to the second part, keep that to yourself." Is that right?

**MR WHYBROW:** Yes.

30 **THE CHAIRPERSON:** And I think at the bottom there is a response from Mr Drumgold. Anyway. Right. Well, that's -

**MR WHYBROW:** Sorry, that's - this is - a copy on the screen are photographs -

35 **THE CHAIRPERSON:** Of - of -

**MR WHYBROW:** Text messages I sent to Mr Drumgold.

**THE CHAIRPERSON:** Yes. The grey is Senator Reynolds, and the blue is you.

40 **MR WHYBROW:** Correct.

**THE CHAIRPERSON:** Yes, thank you. Yes, Mr Tedeschi.

45 **MR TEDESCHI:** Chairman, I assume that your ruling in relation to the text messages from Linda Reynolds also applies to any text messages from Fiona Brown that weren't seen by Mr Drumgold.

**THE CHAIRPERSON:** Yes, yes.

**MR TEDESCHI:** And also any SMSs from Chief Inspector Boorman to Mr Whybrow that weren't seen by Mr Drumgold.

**THE CHAIRPERSON:** Yes, yes.

5

**MR TEDESCHI:** Moving into a different area, Mr Whybrow, you gave evidence yesterday in answer to questions from Counsel Assisting about your concerns when you found out about an email that Fiona Brown had sent to the DPP office during the course of the trial as a result of seeing a newspaper reference to the evidence of Brittany Higgins.

10

**MR WHYBROW:** Sorry, say that again? I just -

**MR TEDESCHI:** Do you recall giving evidence yesterday about your concerns when you - after the trial had finished you found out about an email that Fiona Brown had sent to the DPP office?

15

**MR WHYBROW:** Yes.

**MR TEDESCHI:** And would you have a look, please, at WIT.0031.0001.0003\_0336. Is that a copy of an email that Fiona Brown sent to you on 21 December? So well after the trial had been concluded - in fact after the matter had been discontinued?

20

**MR WHYBROW:** He forwarded that to me on 21 December and after that, we had a conversation and I asked her to do so .

25

**MR TEDESCHI:** What it contains is a copy of an email that she had sent to various people in the DPP office on 14 October that year.

**MR WHYBROW:** Yes.

30

**MR TEDESCHI:** Now, in that email from 14 October, she sets out in the first - one, two, three - four paragraphs in big writing what apparently had been reported in the paper.

**MR WHYBROW:** Yes.

35

**MR TEDESCHI:** So from the words, "Ms Higgins said Linda Reynolds" until "point of me going to Perth" appears to be a quotation from the newspaper.

**MR WHYBROW:** Yes.

40

**MR TEDESCHI:** Would you have a look, please, at this document. Might I approach?

**THE CHAIRPERSON:** Yes, please do, Mr Tedeschi. And what is that?

**MR TEDESCHI:** It's a newspaper article.

45

**THE CHAIRPERSON:** Thank you.

**MR TEDESCHI:** Dated 11 October 2022. From The Australian.

50

**MR WHYBROW:** Sure.

**MR TEDESCHI:** Can I take you, please, to - the pages are not numbered. It's the third page of that document. Under the heading 10.26 a.m, "I felt very threatened."

5

**MR WHYBROW:** Yes.

**MR TEDESCHI:** There's a -

10 **THE CHAIRPERSON:** Just hold on a moment, Mr Tedeschi. I don't have a copy yet.

**MR TEDESCHI:** Sorry.

**THE CHAIRPERSON:** Thank you. Yes, go ahead. What part were you referring to?

15

**MR TEDESCHI:** On the third page under 10.26 am.

**THE CHAIRPERSON:** Yes. There's a reference there to "Higgins said Linda Reynolds' Chief of Staff Fiona Brown", etcetera, etcetera. That appears to be the same quote as the first paragraph in big writing in Fiona Brown's email?

20

**MR WHYBROW:** Yes.

**MR TEDESCHI:** And then over the page under the heading "I felt very threatened in that meeting", the third - the second entry says:

25

“They said they would pay me out for the entirety of the election. That was 100 per cent. That was a conversation Fiona Brown and I had.”

30 Correct?

**MR WHYBROW:** That's what it says.

**MR TEDESCHI:** And, again, that appears to be a direct quote in the email of 14 October from this copy of The Australian.

35

**MR WHYBROW:** It does, yes.

**MR TEDESCHI:** And then the final entry in the newspaper, "that was a conversation Fiona Brown and I had had" appears to be also in quotes in the email. "That was a conversation Fiona Brown and I had." So, again, that appears to be a quote from the newspaper.

40

**MR WHYBROW:** It does.

**MR TEDESCHI:** Now, Fiona Brown had already given evidence at this time that this article appeared?

45

**MR WHYBROW:** I can't recall. But if you say so, she may have, yes.

**MR TEDESCHI:** Do you recall you gave evidence that the normal order of events was changed during the trial because Ms Higgins wasn't available for a period?

**MR WHYBROW:** I remember all of that.

5

**MR TEDESCHI:** And Ms Higgins was stood down and Fiona Brown was intervened?

**MR WHYBROW:** Amongst another 20 witness, yes.

10 **MR TEDESCHI:** Fiona Brown then gave evidence about her receipt of complaint evidence in - I say that in a loose form.

**MR WHYBROW:** Gave evidence and was cross-examined, yes.

15 **MR TEDESCHI:** And was cross-examined by you and, in particular, she was cross-examined about the question of what discussions there were between her, Fiona Brown, and Ms Higgins about Ms Higgins' work prospects.

20 **MR WHYBROW:** Probably. I don't recall specifically the transcript of what I asked Ms Brown, but I would like to think I did.

**MR TEDESCHI:** So, essentially, Ms Brown was giving evidence that there was no threat to the job position of Brittany Higgins.

25 **MR WHYBROW:** Yes.

**MR TEDESCHI:** That she was given every assistance, every support, every encouragement to go to the police.

30 **MR WHYBROW:** Yes.

**MR TEDESCHI:** And her job was not at threat.

**MR WHYBROW:** Correct.

35

**MR TEDESCHI:** And then subsequently, Brittany Higgins came back to court and gave evidence and her evidence was quite at variance with what Ms Brown had said in evidence on those points.

40 **MR WHYBROW:** Yes.

**MR TEDESCHI:** In particular, Brittany Higgins said that she had made a complaint at various times to Linda Reynolds and to Fiona Brown. Correct?

45 **MR WHYBROW:** That's what Ms Higgins said.

**MR TEDESCHI:** That was at variance with -

**MR WHYBROW:** It was.

50

**MR TEDESCHI:** - what Reynolds and Brown had said in evidence?

**MR WHYBROW:** Correct.

5 **MR TEDESCHI:** And there was also a dispute about the question of - Ms Higgins also gave evidence that, as far as she was concerned, she understood that her job was at threat.

**MR WHYBROW:** That's what Ms Higgins said, yes.

10 **MR TEDESCHI:** She gave evidence that she thought that if she didn't go to Perth that - with the Minister - her Minister, that her job would be at risk.

**MR WHYBROW:** Yes.

15 **MR TEDESCHI:** And that if she went instead home to Queensland, that she wouldn't have a job to come back to.

**MR WHYBROW:** I think that's the effect of her evidence as I recall.

20 **MR TEDESCHI:** Now, do you agree that there was no - there was nothing that Ms Higgins said in evidence about being paid any ex gratia payment?

**MR WHYBROW:** Sorry, say that again?

25 **MR TEDESCHI:** Ms Higgins never gave evidence of any ex gratia payment that she thought that she might get.

**MR WHYBROW:** I can't recall off the top of my head.

30 **MR TEDESCHI:** See, what I want to suggest to you is that these entries in the newspaper article that I've drawn to your attention were all known to you before Ms Higgins gave her evidence. I withdraw that question.

**MR WHYBROW:** Before she was recalled?

35

**MR TEDESCHI:** I withdraw -

**MR WHYBROW:** Before she was recalled?

40 **MR TEDESCHI:** Before she was recalled.

**MR WHYBROW:** Probably, if this is all accurate, yes.

45 **MR TEDESCHI:** I want to suggest to you that Linda Reynolds' email - I'm sorry, Fiona Brown's email contained nothing new by way of information that she could give, and just stated her view that her recollection was different to Ms Higgins' recollection on those points and that you already knew that.

50 **MR WHYBROW:** I got an - sorry, put the proposition again, sorry, Mr Tedeschi. I was reading the email again.

**MR TEDESCHI:** What I want to suggest to that in this email dated 14 October -

**MR WHYBROW:** Yes.

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**MR TEDESCHI:** - there is nothing new from Fiona Brown, that you knew that there was a discrepancy in the evidence about the matters that I've already mentioned between the evidence of Brittany Higgins and the evidence of Fiona Brown, and there's nothing in this email that she advanced to the DPP that was new or unknown to you.

10

**MR WHYBROW:** Yes, there was.

**MR TEDESCHI:** What was new or unknown to you?

15

**THE CHAIRPERSON:** In the email?

**MR TEDESCHI:** In the email?

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**MR WHYBROW:** In the email. In the course of me cross-examining Ms Higgins, apparently a significant witness in the case had emailed - and until I had read the statements -

**MR TEDESCHI:** What I'm asking you is about this email.

25

**MR WHYBROW:** You asked me about the email.

**MR TEDESCHI:** What is there in this email - point to anything in the email -

**MR WHYBROW:** Sorry.

30

**MR TEDESCHI:** - that you didn't know about already when you cross-examined Brittany Higgins.

**MR WHYBROW:** The answer is that a significant witness for the Crown had contacted the DPP and said she's lying.

35

**MR TEDESCHI:** Do you agree that there's nothing in this email by way of new information from Fiona Brown that you didn't already know when you cross-examined Brittany Higgins?

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**MR WHYBROW:** I withdraw that. It was that Ms Higgins's statements are false and misleading, not that she's lying.

**THE CHAIRPERSON:** Could we see the whole email on the screen, please? Thank you.

45

**MR WHYBROW:** I was more interested in the small text than the large text.

**MR TEDESCHI:** Would you answer my question, please? Was - what was there in any part of this email from Fiona Brown that contained information that you didn't know when you were cross-examining Brittany Higgins?

**MR WHYBROW:** From what's reported and what we've just gone through, without re-reading everything, I accept that and certainly are prepared to accept that 100 per cent for the purposes of your question, yes.

5 **MR TEDESCHI:** Accept what?

**MR WHYBROW:** That what's set out as a summary of evidence is evidence that was given prior to that morning.

10 **MR TEDESCHI:** So you agree that there was nothing new?

**MR WHYBROW:** In what's set out there, yes.

**THE CHAIRPERSON:** Mr Whybrow, you can see on the screen the text of the email.

15 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** And after the quote from the newspaper ending with the words "going to Perth", the second-last paragraph refers to the lack of authority to pay.

20 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** Now -

25 **MR WHYBROW:** Sorry, I missed that bit.

**THE CHAIRPERSON:** Do you see that?

**MR WHYBROW:** Yes, I do.

30 **THE CHAIRPERSON:** Just put that to one side at the moment. Ms Higgins said in evidence that she was offered - they offered to pay her six weeks wages to go to the Gold Coast, and then she put it a different way, "That they would pay me out."

35 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** And what is your recollection of Ms Brown's evidence about her conversation with Ms Higgins in that respect, about going to the Gold Coast? Did she give evidence that it was on terms that she would be paid wages? Do you recall that or -

40 **MR WHYBROW:** I'm sorry, I can't recall the specifics of the cross-examination in that level of detail. I haven't re-read that.

**THE CHAIRPERSON:** All right. Thanks. I'm just wondering if - her complaint seems to be - Ms Brown's complaint seems to be, "She says I was - she said I offered to pay her, but I didn't have authority to pay her." And I'm not clear what the significance of that is in the differences between what Ms Brown said in evidence, what Ms Higgins said in evidence and whether it mattered, whether it was significant for Ms Brown now to say "I had no authority to pay. And I didn't state or suggest it."

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**MR WHYBROW:** I can't recall whether or not that was new information. What concerned me when I got this email, which by that stage was well after the event, was that this witness had, mid cross-examination, contacted the DPP's office and indicated that she was disturbed and suggested that there were things that were false and misleading. Whether or not it turned out to be the case that there was no proper basis to recall her or to have her give evidence again, etcetera, was not a matter for the DPP to unilaterally decide. I would have liked the opportunity speak to her.

5  
10 **THE CHAIRPERSON:** Well, yes, there is something in what you say, but, on the other hand, what about this: If Ms Higgins had given evidence-in-chief and had - she was stood down during cross-examination?

**MR WHYBROW:** During cross-examination.

15  
20 **THE CHAIRPERSON:** If Ms Higgins had given evidence-in-chief and in cross-examination to the effect A, B, C, and if Ms Brown then gives evidence interposed not A, B, C; X, Y, Z, and then Ms Higgins comes back into the witness box and repeats A, B, C, it's of no significance forensically that Ms Brown writes to the prosecutor and says, "When she says A, B, C, repeats it again - repeats it - that's false and misleading" because, well, we all know that you're at odds on those points. So you would that she's false and misleading.

**MR WHYBROW:** Agree.

25 **THE CHAIRPERSON:** But that's not news and so, as a prosecutor, I put the email to one side, because nothing can possibly be made of it if - if the way I have described the elements of it to you is accurate. Now, is the way I've described it accurate or not? Because you are obviously disturbed by the fact that this wasn't given to you.

30 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** And what I'm interested in is I can understand your reaction when you get an email like that which uses the words "false and misleading" and you didn't know about it until after the trial is over, but looking at it now, is it not the sort of thing which didn't - whatever Ms Brown's perception of the events was, actually didn't amount to anything and could rightly be put to one side.

**MR WHYBROW:** If the entirety of what she was seemingly urgently contacting about was represented -

40 **THE CHAIRPERSON:** Fairly.

**MR WHYBROW:** - in the four corners of that email absolutely, but upon questioning her it may have been apparent that her complaint extended beyond something that didn't form part of the evidence.

**THE CHAIRPERSON:** I see your point. Your point is that somebody who - a Crown witness or anybody who writes to the prosecutor and says, "This evidence is untrue".

50 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** That's something you are interested in, even if it ends up being nothing. You want to find out that it's nothing. Is that right?

5 **MR WHYBROW:** Correct.

**THE CHAIRPERSON:** I understand that, yes. Yes, Mr Tedeschi.

**MR TEDESCHI:** Mr Whybrow, moving to a different topic.

10 **MR WHYBROW:** Yes.

**MR TEDESCHI:** As a highly experienced criminal lawyer, you must on many of occasions have had the experience of making a comment to your opposing counsel at the bar table on a - what's known as a counsel-to-counsel basis?

**MR WHYBROW:** Yes.

**MR TEDESCHI:** Would you explain what the protocol is about counsel-to-counsel communications?

**MR WHYBROW:** It depends on the context. Counsel will talk about various things of whether they want to call a witness, whether somebody is in a fragile state about something, whether you, you know, can stop early tomorrow or things that are not necessarily in evidence or appropriately to be put - they can cover any range of subject.

**MR TEDESCHI:** Is there a protocol that, on the whole - maybe with some exceptions - that counsel to counsel communications at the bar table are to be kept confidential between counsel and not disclosed to the court?

**MR WHYBROW:** As a prima facie, but if you are going to go against that, you at least let the person know in advance.

**MR TEDESCHI:** Yes. And I take it you must have also had the experience of your opposing counsel saying something rather derogatory or snide about somebody in the courtroom. Maybe even the judge or a juror or a witness?

**MR WHYBROW:** I would think that at - there would be hardly a practitioner of many years' experience who hasn't committed that sin in private conversation themselves.

**MR TEDESCHI:** For example, you must have had the experience yourself or perhaps experienced it on the defence side of a witness who hasn't come up to proof and - to a prosecutor, and the prosecutor says something about, "You know, that was great", or "God, that's a disappointment" or something of that nature.

**MR WHYBROW:** Absolutely, absolutely.

**MR TEDESCHI:** Some comment. And that's obviously not for general consumption, is it?

50 **MR WHYBROW:** No.

5 **MR TEDESCHI:** And when Mr Drumgold said to you in court during a break in the trial - when he approached you and said to you, "Any opinion by those boofheads about the strength of this case is not admissible", that was clearly on a confidential counsel to counsel basis, wasn't it?

10 **MR WHYBROW:** No, I didn't understand that. He was walking past me. I had kept those witnesses on the witness list, having received the executive briefing materials and still considering what, if anything, to do with that, and I thought that was a pejorative comment that - I didn't understand it was a confidential counsel to counsel communication. I thought it was an outburst by the Director in the context of other things he had already said in front of the jury.

15 **MR TEDESCHI:** It was said to you alone. You were on your own at the time?

**MR WHYBROW:** Yes.

**MR TEDESCHI:** So nobody else could hear that?

20 **MR WHYBROW:** Not - I don't - no, there was a lot of people in the court, and it happened at a break. But I don't know that anyone else heard it. Certainly none of the other lawyers in the case would have heard it.

25 **MR TEDESCHI:** And it happened - did it happen immediately after you had come out of court?

**MR WHYBROW:** I think it had occurred immediately upon a - an adjournment of some sort. Whether a morning tea or some break.

30 **MR TEDESCHI:** Yes. And if you take out the word "boofheads", his statement that any opinion by those police officers about the strength of the case is not admissible, that was correct, legally, wasn't it?

35 **MR WHYBROW:** Correct legally. Their opinions as to the strength of the case was - correct.

**MR TEDESCHI:** Inadmissible.

40 **MR WHYBROW:** Not admissible, yes. Inadmissible.

**MR TEDESCHI:** And, of course, his comment they were boofhead, that was never going to play any - any active part in the trial, was it, his view about the police?

45 **MR WHYBROW:** And it never did.

**MR TEDESCHI:** Yes. See, I suggest to you that it was inappropriate for you to refer to that because it was a confidential counsel to counsel throw-away line.

50 **THE CHAIRPERSON:** Refer to that in what?

**MR WHYBROW:** In what context?

**THE CHAIRPERSON:** Where did he refer to that?

5 **MR TEDESCHI:** In his statement.

**THE CHAIRPERSON:** I see, yes.

10 **MR WHYBROW:** I was responding to a subpoena from this Board of Inquiry where, apart from legal professional privilege, I understood that one tells the truth and discloses information. It wasn't, as far as I'm aware, raised with the - in the court.

**MR TEDESCHI:** You were, in fact, asked by the Inquiry a specific question about that. I accept that.

15 **MR WHYBROW:** Yes.

**MR TEDESCHI:** And I accept that it was appropriate for you to respond to that Inquiry. But what I want to suggest to you was that you should have included in your response to the Inquiry that it was clearly a counsel-to-counsel throwaway line that was confidential.

**MR MULLER:** I object. Mr Chair, the witness is now being asked about what was in the mind of Mr Drumgold.

25 **THE CHAIRPERSON:** No, he's being asked whether he - whether, acting properly, Mr Whybrow should have told me that that statement was made under the rules of professional courtesy. He's being asking for his opinion, not Mr Drumgold's opinion. What's your answer?

30 **MR WHYBROW:** Could you direct me to what my answer was in my statement so I can -

**THE CHAIRPERSON:** Yes. What -

35 **MR TEDESCHI:** It is at paragraph 44.3.

**MR WHYBROW:** 44.3, what I've said would, in my mind, suggest that it occurred in the circumstances that you've called for and I didn't need to add, "It was a counsel to counsel". It was, "He approached me and said this."

40 **MR TEDESCHI:** Thank you. Mr Chairman, I now wish to proceed to a document that I understand you have redacted.

**THE CHAIRPERSON:** Yes. What is it?

45 **MR TEDESCHI:** The reference is DPP -

**THE CHAIRPERSON:** Don't bring it up. We will find out what it is.

**MR TEDESCHI:** It's an undertaking by Ms Higgins to Mr Drumgold.

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**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** 005.005.1761.

5 **THE CHAIRPERSON:** Yes, and what did you want to do with that?

**MR TEDESCHI:** What I wish to ask him is this: Mr Whybrow, one of the suggestions that you made yesterday is that Mr Drumgold failed to rein in Brittany Higgins in terms of her public utterances. Do you remember giving that evidence yesterday?

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** It concerns that, Chairman.

15 **THE CHAIRPERSON:** I see. Ms Longbottom?

**MS LONGBOTTOM:** Unless those matters were within the knowledge of Mr Whybrow, I'm not sure how this assists. It's a matter in respect of which Mr Tedeschi can simply make submissions on the basis of the documents. But unless he's putting to Mr Whybrow documents that were within his knowledge, it doesn't seem to me material.

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**THE CHAIRPERSON:** Yes. Mr Tedeschi -

**MR TEDESCHI:** What I'm attempting to do is to show that his statement was (indistinct) in the absence of knowing about -

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**THE CHAIRPERSON:** No, no. Well, that's right. But it doesn't matter what he would now say if he knew a whole lot of the other things, because what's important for me to understand is that despite - if this is what you will submit, despite Mr Whybrow's criticism of Mr Drumgold for failing to counsel Ms Wilkinson or somebody else in respect of the content of public statements before the trial, you want to show that, unknown to Mr Whybrow, behind the scenes, he was doing certain things in accordance with that kind of sense on his part that he ought to do it.

30

And you will be able to do that, but even if Mr Whybrow were to say in response to your question, "I see now I was wrong", that's not going to help me. But are you going to make that submission, and I will be interested in that submission, because I'm interested in Mr Drumgold's conduct not Mr Whybrow's opinion of that conduct.

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**MR TEDESCHI:** Perhaps I will rephrase the question in this way and if you, Chair, can indicate whether it's an appropriate question or not.

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**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** Mr Whybrow, by suggesting that Mr Drumgold should have reined in Brittany Higgins, did you have in mind that something that he could have done would have been to seek some undertaking from her that she would not make any public comments about the case at all or refer to the trial at all, or in any way interfere with the administration of justice in a way that might be a (indistinct).

50

**MR WHYBROW:** That would be part of it, yes.

**MR TEDESCHI:** I think that's all I need. That's sufficient.

5 **THE CHAIRPERSON:** That's sufficient.

**MR TEDESCHI:** Yes. Thank you. You also gave evidence yesterday expressing criticism of Mr Drumgold for what he publicly said during his media release upon announcing the discontinuation of the Lehrmann matter.

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** One of the criticisms that you had was him referring to the fact that he was still of the opinion that there was a reasonable prospect of conviction. You suggested that that suggested that at least he thought that there was a reasonable prospect of conviction in relation to Mr Lehrmann?

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**MR WHYBROW:** Obviously.

20 **MR TEDESCHI:** And that that infringed his presumption of innocence.

**MR WHYBROW:** Not so much infringed his presumption of innocence, but it was just an unnecessary statement that could only serve to be picked up and, with the imprimatur of the DPP, taken by people in the community to suggest that he had thought he was guilty.

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**MR TEDESCHI:** Do you agree that in order to continue a prosecution, a prosecutor has to be of the view on a continuing basis that there is a reasonable prospect of conviction?

**MR WHYBROW:** Absolutely.

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**MR TEDESCHI:** Right up until the end of a trial.

**MR WHYBROW:** From the moment they lay the charge, continuing until and ongoing.

35 **MR TEDESCHI:** So what I want to suggest to you is that those particular words that Mr Drumgold said about reasonable prospects was no more than what he had said by his conduct in continuing the trial?

**MR WHYBROW:** It was unnecessary. He was, as I understood it declining to proceed with the prosecution on parts of a prosecution policy - and you can make representations. One is reasonable prospects of conviction, and one is public interest. As I understood it, he was taking a decision to decline to proceed with a retrial on public interest grounds, that is, the health-welfare of the complainant and, in that circumstance, there was no need for him to express a View to reconfirm earlier views in that context about the reasonable prospects of conviction. That's what I was concerned with.

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**MR TEDESCHI:** Do you agree that what he said was no more than what he had implicitly said by continuing the trial?

**MR WHYBROW:** Well, to experienced criminal barristers like ourselves, perhaps yes. To the public, I don't think they were going to get that.

5 **MR TEDESCHI:** There had been an enormous amount of public interest in the trial, hadn't there?

**MR WHYBROW:** Yes.

10 **MR TEDESCHI:** Right around Australia.

**MR WHYBROW:** And the world.

**MR TEDESCHI:** And the world. And the action of discontinuing a trial after a jury has disagreed is - it's a difficult one, a controversial one, perhaps, from time to time?

15 **MR WHYBROW:** It could be. It appeared, in the circumstances that Mr Drumgold explained, it was based on a particular factor.

20 **MR TEDESCHI:** It's one of the disadvantages of the Director of Public Prosecutions making a decision not to continue a trial is that, in some circumstances, that decision is made behind closed doors; correct?

**MR WHYBROW:** Yes.

25 **MR TEDESCHI:** And because it's a decision that's made behind closed doors, it might result in some people losing faith in the criminal justice system and thinking that, well, what right does the DPP have to make a decision about this matter when it's been to trial, and it should go to trial again?

30 **MR WHYBROW:** Well, like you and I, we would know that that's not the basis. The lay person may well have those concerns, yes.

35 **MR TEDESCHI:** And I want to suggest to you that it was perfectly legitimate for Mr Drumgold to address those concerns by providing some very basic information, without referring to any evidence, to try and explain in very broad details to the community at large of non-lawyers why the matter was being discontinued.

40 **MR WHYBROW:** I disagree. I felt like it was a pejorative stab at Mr Lehrmann unnecessarily.

**MR TEDESCHI:** Are you aware that over the years there have been criticisms of the absolutely unfettered discretion of the DPP to make a decision to discontinue a matter, a decision that's made behind closed doors?

45 **MR WHYBROW:** Of course.

**MR TEDESCHI:** And that includes some suggestions in the Royal Commission into Institutional Sexual Abuse about the making of such decisions behind closed doors?

50 **MR WHYBROW:** I'm not aware of that myself.

5 **MR TEDESCHI:** Are you aware that the Royal Commission recommended that DPPs should explain those decisions to the community to try and engender some community support and some community knowledge so that it would be a lower risk of the community losing faith in the criminal justice system?

**MR WHYBROW:** That's what he, I understood, was doing by indicating that because of the health of the complainant he was not going to proceed with a retrial.

10 **MR TEDESCHI:** But what I want to suggest to you is that the community was entitled to know that the decision was not based on some view of the evidence in the trial but was based entirely upon personal issues relating to the complainant?

15 **MR WHYBROW:** What he said was, and remained in the Director, his personal subjective view in circumstances where we had not had an opportunity to make representations about that and in circumstances where I had asked him twice to tell me what he was going to say. I still maintain he did not need to say that in order to properly explain to the community the reasons why this was not going to be a retrial.

20 **MR TEDESCHI:** But what I'm suggesting to you is that there is an alternative valid viewpoint that the community is entitled to know in a very basic form the reasons why such a decision has been made. Do you accept that?

25 **MR WHYBROW:** I accept that and he provided them, and it did not need to include that part of it, in my submission.

**MR TEDESCHI:** I suggest to you -

30 **MR WHYBROW:** Sorry, in my view.

**MR TEDESCHI:** - the community was entitled to know that the view that he had had right through the trial until the end of the trial was still the view that he had.

35 **MR WHYBROW:** I disagree. It's as valid as to his view what the jury numbers were, in my view. At that point, it was moot.

**MR TEDESCHI:** So it's minds may differ; is that the case?

40 **MR WHYBROW:** Absolutely.

**MR TEDESCHI:** And in relation to the jury, your view is different to Mr Drumgold's view about the jury?

45 **MR WHYBROW:** Yes.

**MR TEDESCHI:** Your view is different to him about his public announcement on the discontinuance?

50 **MR WHYBROW:** Well, I never got a chance to discuss it with him to see if he could see it from Mr Lehrmann's perspective.



**MR TEDESCHI:** He was not obliged, was he, to consult with you about that or to consult with anyone about what he said?

5 **MR WHYBROW:** I'm not saying he was obliged to. He was not obliged to say more than, "I'm discontinuing the case."

**MR TEDESCHI:** If he had just said, "I'm discontinuing the case" it would have caused legitimate disquiet in the community, I suggest.

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**THE CHAIRPERSON:** Well, that's not a proper question, because the field of battle between you is he said he was stopping the prosecution because of concerns for Ms Higgins' health, and then he added something. So there's no room to be asking if he - what would happen if he just said, "I'm stopping it" and had given no reason.

15

**MR TEDESCHI:** Do you agree that there was a tremendous amount of psychological pressure on Ms Higgins as a result of media attention to the case?

**MR MULLER:** I object, Chair.

20

**THE CHAIRPERSON:** Yes, that's right. You can - you can put that there was a lot of media - we know there was with a lot of media about it all, about lots of aspects of it. But you can't ask this witness about whether that was pressure on Ms Higgins or not.

25 **MR WHYBROW:** I can only comment on Mr Lehrmann.

**MR TEDESCHI:** You're aware that there was a lot of media attention on the case generally?

**MR WHYBROW:** Yes.

30

**MR TEDESCHI:** Had you read in the media that, in fact, Ms Higgins had been subjected to a considerable amount of vitriolic trolling?

35 **MR WHYBROW:** Both the complainant and the accused had been subjected to extraordinarily hateful, uninformed and terrible comments on various platforms. Yes.

**MR TEDESCHI:** And in terms of Mr Lehrmann, in Mr Lehrmann's receipt of that sort of attention, you had concerns for his welfare?

40 **MR WHYBROW:** At times, yes, absolutely.

**MR TEDESCHI:** And -

**MR WHYBROW:** A lot of times.

45

**MR TEDESCHI:** Would it be fair to say that if Mr Drumgold had concerns for Brittany Higgins' welfare for the same reason, that would be perfectly reasonable?

**MR WHYBROW:** Yes. As a human being, he should.

50

**MR TEDESCHI:** And I want to suggest to you that the additional words that he said at that - were a request to the media to try and reduce the psychological pressure on Ms Higgins.

**THE CHAIRPERSON:** Well, that's a matter -

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**MR TEDESCHI:** I withdraw that.

**THE CHAIRPERSON:** - for Mr Drumgold to give evidence.

10 **MR TEDESCHI:** I withdraw the question. It was clear to you, wasn't it, that Mr Drumgold had considerable sympathy for the suffering of Ms Higgins?

**MR WHYBROW:** I was concerned that he had aligned himself with Ms Higgins.

15 **MR TEDESCHI:** And you had a similar degree of concern for the welfare of Mr Lehrmann. Is that right?

**MR WHYBROW:** I did.

20 **MR TEDESCHI:** Yes. So each of you had concern for the party that you were most closely associated with?

**MR WHYBROW:** Well -

25 **THE CHAIRPERSON:** But that's not -

**MR TEDESCHI:** I withdraw the question.

**THE CHAIRPERSON:** Yes.

30

**MR TEDESCHI:** Mr Whybrow, it goes without saying that the criminal justice system throughout Australia is an adversarial system.

**MR WHYBROW:** Yes.

35

**MR TEDESCHI:** And do you agree that an advocate is required at times to make a decision which witness to accept, and which witness to reject when those witnesses give contradictory evidence?

40 **MR WHYBROW:** Sorry, it's for the finder of fact to do, not necessarily for the advocate.

**MR TEDESCHI:** But for an advocate to decide what position he's going to take in submissions about witnesses if he - if an advocate has two witnesses whose evidence conflicts -

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** - then the advocate is entitled to make a decision either that he's going to accept one witness or that he's going to accept another - the other witness, or that he's going

to come to some sort of resolution as to how the two witnesses might have come to disagree.  
Do you agree?

5 **MS LONGBOTTOM:** Mr Sofronoff, it might assist more - obviously, the prosecutor takes a particular role in the criminal justice system as a minister of justice. It might assist the questioning more if Mr Tedeschi can be specific about which advocate he's talking about.

10 **THE CHAIRPERSON:** Yes. The other thing is this, Mr Tedeschi. As a general proposition, of course, it's right that an advocate has to form a case theory and that's based upon - if it's a civil matter, it's based upon the client's instructions. So you advocate the interests of the client. You do that taking into account all the witnesses that - whose evidence you have before you. And provided you don't mislead the court, you can choose which witnesses to call. You don't have to call witnesses adverse to yourself.

15 In a prosecution, the position is entirely different and not - and not at all analogous, because a prosecutor is obliged to present the whole factual circumstances, good and bad, and, of course, as a forensic - as a matter of forensic practice will form a case theory about what prosecutors will put to the jury they ought to accept has happened. But, nevertheless, is obliged to call all the evidence for and against that theory.

20 So, in some circumstances, it may be that it's not open to a prosecutor to adopt the line that the main witness is putting, the account with all of its implications that the main witness is putting, when the prosecutor also has evidence to the contrary. I have listened with interest to Mr Drumgold's evidence to the effect that, having adopted a case theory that Ms Higgins' interests were suppressed for political purposes, he called Senator Reynolds, for example, and regarded it as right to consider that she - to apply for her to be declared an unfavourable witness, which is on the basis, I take it, that the unfavourable witness is not telling the truth as it's being - the truth that's being advanced by the prosecutor. And I haven't thought it through because I have never encountered this. I have encountered hostile witness.

30 **MR TEDESCHI:** It's that line that I want to seek from Mr Whybrow.

**THE CHAIRPERSON:** I know. I know. And -

35 **MR TEDESCHI:** Perhaps I will develop it, if I may.

**THE CHAIRPERSON:** Yes, please do, but I'm interested in that because it seemed to me - it may be because of the content of the Evidence Act and the unfavourable witness concept that's been introduced. Maybe that's why I'm puzzled by it, because we don't have the Evidence Act in Queensland. But I just think it's odd that a prosecutor - and I'm not saying it's wrong because I haven't - as I say, I haven't thought it through. It's new to me. But it just seemed to me to be odd that rather than take the line that, well, Ms Higgins says -

45 **MR TEDESCHI:** Can I suggest -

**THE CHAIRPERSON:** I will stop and let you go on. You go on, Mr Tedeschi and I will stop. I'm thinking out loud now. I should stop doing that, yes.

50 **MR TEDESCHI:** I know what you're going to say.

**THE CHAIRPERSON:** No, go ahead. Now, before I forget I will mark the article headed, "I'm not a monster", by Kristin Shorten and Remy Varga, published in The Australian on 11 October 2022, exhibit 37.

5 <EXHIBIT 37 - ARTICLE HEADED "I'M NOT A MONSTER" BY KRISTIN  
SHORTEN AND REMY VARGA, PUBLISHED IN THE AUSTRALIAN 11/10/2020

**THE CHAIRPERSON:** Go ahead, Mr Tedeschi.

10 **MR TEDESCHI:** Mr Whybrow, it often happens in a criminal trial that there are two versions of the one event. For example, a prosecutor might have one witness who says that a person they saw had black hair and another witness who says that the person they saw had brown hair.

15 **MR WHYBROW:** Often more than two. In most bar room brawls, assaults, you might have six different versions of different things.

**MR TEDESCHI:** Yes. And if a prosecutor is of the view that some of the that evidence is unfavourable, he has a right to seek to cross-examine the witness under section 38 of the  
20 Evidence Act?

**MR WHYBROW:** The bar is very low. If the prosecution has a -- in effect a case theory and a witness who, not necessarily exhibiting hostility or being in the other camp, or something of that nature from the prosecution's point of view, is giving evidence that is  
25 inconsistent with that case theory, then section 38 is a very low bar to be able to seek leave to cross-examine about the area of disagreement. I accept that. And that's why I didn't oppose those applications, given the bar was so low.

**MR TEDESCHI:** Right. So if a prosecutor has one witness who says the robber had black  
30 hair and one witness says the robber had brown hair, the prosecutor might want to cross-examine the second within witness to ask that witness, "Well, were you wearing your glassed at the time? And, in fact, isn't there a prior inconsistent statement that you've made" or things like that?

35 **MR WHYBROW:** If identity is in dispute, yes.

**MR TEDESCHI:** If identity is in dispute. That's the sort of -

**MR WHYBROW:** The relevant factor, yes.  
40

**MR TEDESCHI:** - thing that happens if there is a dispute in the evidence.

**MR WHYBROW:** Yes.

45 **MR TEDESCHI:** But then at the end of the evidence, the prosecutor has to make a decision as to, do I accept as my case that the witness is right that the robber had black hair, or do I accept that the witness is right that the robber had brown hair. Or do I take the position that they are both doing their best to tell the truth from their own perception and the reason why - there is a reason why their evidence differs, and it's a reason which means that each of  
50 them had a different perception but neither of them is trying to tell a lie.

5 **MR WHYBROW:** It might be a matter of semantics, but I take the view that it's not for the prosecutor at all to decide which one is right. It's for the prosecutor to make submissions at the end of the case to the body, whether it be a judge, a magistrate or the jury, as to what the evidence was. Where there is some conflict to identify that, it may well be that it's appropriate for a - and it happens all the time - the prosecutor to say, "I submit that you would prefer the evidence of A over B because of these factors."

10 **MR TEDESCHI:** Correct. Exactly. So the prosecutor is entitled to take a position in submissions as to which version the - he or she would suggest the jury would accept and the reasons why.

**MR WHYBROW:** It's got to have an evidential basis, yes.

15 **MR TEDESCHI:** Correct. So in the Lehrmann trial -

**MR WHYBROW:** Yes.

20 **MR TEDESCHI:** - the prosecutor had to take a position in his address in relation to the discrepancies between Brittany Higgins' evidence on the one hand and the evidence of Linda Reynolds and Fiona Brown on the other; right?

**MR WHYBROW:** In different respect, yes.

25 **MR TEDESCHI:** Well, in particular, on whether the complaint evidence was made and, if so, when, and whether Ms Higgins' job was at risk.

**MR WHYBROW:** Sure.

30 **MR TEDESCHI:** Those were the two main issues between those witnesses, wasn't it?

**MR WHYBROW:** There were a number, but, yes, they were two main ones.

35 **MR TEDESCHI:** And do you agree that if - if Mr Drumgold had taken the position, "Well, look, I think Brittany Higgins is quite wrong, and I think that Linda Reynolds and Fiona Brown are right", he would have really been in a position where he probably would have discontinued the prosecution.

40 **MR WHYBROW:** Well, the words "I think" should never come out of any advocate's mouth.

**MR TEDESCHI:** (Indistinct).

45 **MR WHYBROW:** No, I disagree - the question, I don't accept the premise of.

**MR TEDESCHI:** If you take the view that he was going to make a submission to the jury, "Look, I don't think you should accept Ms Higgins on that issue. I think you should accept the other two" -

50 **MR WHYBROW:** The advocate should not say "I think." The advocate -

**MR TEDESCHI:** I submit - I submit.

5 **MR WHYBROW:** I submit, yes. If he has an evidential basis prosecuting that matter that there is a proper basis to put, that you should accept Ms Higgins because she was credible, she was consistent, she was tested in cross-examination, and not shown to have told lies, etcetera, etcetera.

10 **MR WHYBROW:** Yes.

**MR WHYBROW:** It would have been a brave submission in that case, but he was entitled to do that.

15 **MR TEDESCHI:** Right.

**MR WHYBROW:** And then to say -

**MR TEDESCHI:** That's what I wanted to ask you. He's entitled to do that.

20 **MR WHYBROW:** And he needed to have an evidential basis to dismiss or diminish or suggest to the jury reasons why the other person's evidence should be not taken as being very persuasive.

25 **MR TEDESCHI:** Now, in relation to those other two witness, there were a number of options open to him, I suggest. Option number one was they are telling deliberate lies.

**MR WHYBROW:** If you have a basis.

30 **MR TEDESCHI:** If you have a basis. Option number two is, they are wrong, their memory, their accuracy, their recollection is faulty. They are not telling lies, but they've just got it wrong.

35 **MR WHYBROW:** It happens all the time. In the course of evidence, that emerges and there's a basis to put it, yes.

**MR TEDESCHI:** And option number three is, look, they are actually talking about their perceptions. The perception of the two parliamentary witnesses was different to Ms Higgins' perception but that's because they came from completely different points of view. It was a very emotional time and they have just given differing views because they had differing perceptions; correct?

**MR WHYBROW:** Well, I disagree.

45 **THE CHAIRPERSON:** That is - that is Senator Reynolds, Ms Brown and Ms Higgins had different perceptions.

**MR TEDESCHI:** Yes.

50 **MR WHYBROW:** Well, perceptions might be part of it, but perceptions are not admissible in and of themselves. There needs to be some evidence to explore why you had that view.

**THE CHAIRPERSON:** I think what Mr Tedeschi is saying -

**MR WHYBROW:** You're entitled to -

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**THE CHAIRPERSON:** - insofar as, for example, Senator Reynolds said, "I was very supportive and helpful because I did this and this", and Ms Higgins' view - I'm not paraphrasing her evidence - was she was not supportive. You know, "The way she sounded made me feel like it was not supportive." Each of them is - it might be submitted to the jury  
10 each of them is giving evidence of matters that they think are facts but actually are perceptions that have glossed over facts and, therefore, that's why they are in conflict. So neither - neither side of the account is entirely true or entirely false.

**MR WHYBROW:** Well, the difficulty I have in a criminal trial, Mr Chair, is beyond a  
15 reasonable doubt, onus of proof, a perception is -

**THE CHAIRPERSON:** Oh, no, no. That might - that will impinge upon what use the jury can make of it.

20 **MR WHYBROW:** Yes.

**THE CHAIRPERSON:** But I guess what I'm interested in - thank you for that. But what I'm interested in, Mr Tedeschi, it just struck me that the line that was taken by Mr Drumgold was that Ms Higgins' - Ms Higgins said, "I made a complaint." I think Senator Reynolds said, "I  
25 didn't hear about it until much later." That's a matter of fact, all right, the two different accounts, for what it's worth. But then when she gave evidence about -

**MR TEDESCHI:** It's not that simple, Chair. What was actually - the words that were said  
30 might have suggested to Ms Higgins that she had disclosed, but not suggested to the other two witnesses that -

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** - there had been a disclosure.

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**THE CHAIRPERSON:** That's right. So what I'm raising with you is this: It just struck me as odd that the case theory that was put to the jury - and, indeed, the way the case was conducted by the prosecutor in asking for rulings that witnesses be declared unfavourable, was based upon adopting not the line that Ms Higgins can be - Ms Higgins' disinclination to  
40 make a police complaint, which is what this issue concerned, was not reflective of - at all of the fact that her account was false.

It was reflective of the fact that, for good reason or bad - and no doubt in the state of mind in which she herself after - at the time, she - if one accepts her account, she perceived that what  
45 Ms Brown and Senator Reynolds were saying to her really wasn't very helpful to her and wasn't supportive. And that Senator Reynolds and Ms Brown were not giving false evidence, were not to be criticised as being unsupportive at the time, but that they were not as emotionally involved as Ms Reynolds - as Ms Higgins was.

So that's a line that the prosecutor could have taken. But instead he puts to these two that - or at least to Senator Reynolds that she's not telling the truth.

**MR TEDESCHI:** Yes.

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**THE CHAIRPERSON:** So why was that open? Is that something that you should raise at the end in your submissions after - you know, in due course?

**MR TEDESCHI:** I certainly will.

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**THE CHAIRPERSON:** Or is that something that is part of your pursuit with Mr Whybrow for his opinion?

**MR TEDESCHI:** Yes, I want to ask Mr Whybrow about it. What I want to suggest to you, Mr Whybrow, is that a prosecutor in a trial has all of the evidence in his or her head and they have to make a decision which of those three approaches they are going to take. That they are lies, they are mistaken, or just different perceptions but they are all telling the truth. And that it's a very difficult decision for a prosecutor to make, sometimes. It can be a line-ball decision for a prosecutor to make what approach he's going to take. And, ultimately, the prosecutor has to make that decision as best he or she can based on the evidence that's been led.

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**MR WHYBROW:** I accept all of that.

**MR TEDESCHI:** Yes. And what I want to suggest to you is that it was open to Mr Drumgold to take the position that he did in his closing address in relation to those particular discrepancies in the evidence.

25

**MR WHYBROW:** You will need to tell me which particular ones. I have in mind something potentially different to you.

30

**MR TEDESCHI:** The - the issue of whether complaint was made and, if so, when.

**MR WHYBROW:** Yes.

**MR TEDESCHI:** And the question of whether Ms Higgins' job was, in fact, at threat if she went ahead in had 2019 with her complaint, and if she went to Queensland rather than going to Western Australia that her job was in issue. Those were essentially the differences. And what I'm suggesting to you is that do you agree that, of those three positions, Mr Drumgold could legitimately decide to accept the evidence of Brittany Higgins and go with the line that he took in his closing address?

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**MR WHYBROW:** Leaving aside the phrase "accept" because it's not - this is my view. It's not the prosecutor's job to decide anything, to accept or not accept. But I agree that, for example, he could say, "You've heard the evidence of these three people and what was said may or may not be in dispute. What was understood may be inconsistent with what was said, but it's a genuine and honest - for example Ms Higgins genuinely believed when she was told 'Please, let's go and we will support you', that in fact she genuinely and honestly believed they weren't supporting me." He was entitled to put all of those submissions to the jury. It doesn't involve him accepting anything. It only requires him to have a proper basis to make the submission.

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**MR TEDESCHI:** I understand that he could have taken that position, but he didn't take that position, did he?

5 **MR WHYBROW:** What do you mean?

**MR TEDESCHI:** He took the position that he made a submission to the jury that they would accept the evidence of Brittany Higgins and that they would reject the evidence of the other two witnesses. And what I want to -

10

**MR WHYBROW:** It happens all the time, yes.

**MR TEDESCHI:** That happens all the time, doesn't it?

15 **MR WHYBROW:** Yes.

**MR TEDESCHI:** And what I want to suggest to you is that whilst you might not agree with that approach, that it was an acceptable professional approach for Mr Drumgold to take in the context of the trial.

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**MR WHYBROW:** My - my specific criticism and concern about the closing was he raised as some sort of thing that had an evidential basis this political cover-up, this political concerns, this political forces at work when that might well have been Ms Higgins' perception, rightly or wrongly, but when witnesses were called about this, they all categorically denied. And as I said to the jury in my response, the fact that a witness is asked a question and they say no, does not provide evidence of yes. So I did not personally believe there was a proper basis based in the evidence for him to introduce at that stage as a matter of assertion there were political forces at play. Certainly, he could say Ms Higgins perceived them to be. But he didn't say that.

30

**MR TEDESCHI:** It wasn't just Ms Higgins' perception, though, was it? Ms Higgins gave evidence that, if accepted by the jury, could form a basis for a conclusion by the jury that there had been some political influence at work. Do you agree with that?

35 **MR WHYBROW:** Well, you have taken me to the evidence -

**MR TEDESCHI:** No, if you accept Ms Higgins' evidence in its entirety, they were -

40 **THE CHAIRPERSON:** Mr Tedeschi, just putting to you that - leaving aside the propriety of the submission that was made, having regard to Ms Higgins' evidence and all the other evidence that was given, the jury might have concluded that she was right, that she wasn't properly treated, she had complained, she wasn't properly treated, and they might or might not take a further step that this was concerted.

45 **MR WHYBROW:** Sure.

**THE CHAIRPERSON:** They might have stopped at a point of thinking well, two people just - Senator Reynolds and her Chief of Staff just didn't handle it too well.

50 **MR WHYBROW:** Absolutely.

**THE CHAIRPERSON:** And, "I believe everything that Ms Higgins said." They could have come to that view.

5 **MR WHYBROW:** If you accept her evidence, then you would be entitled to, yes.

**THE CHAIRPERSON:** Was that what you are asking, Mr Tedeschi?

**MR TEDESCHI:** Yes, it was.

10

**MR WHYBROW:** Yes, I agree with that. Thank you.

**MR TEDESCHI:** Does it frequently happen in sex cases that there are credibility issues affecting the complainant?

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** You must yourself have done many cases in which a complainant has waited years or even decade before making a complaint?

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** And yet a conviction has been recorded.

25 **MR WHYBROW:** In particular circumstances and particular evidence, yes.

**MR TEDESCHI:** You must yourself have come across cases, both as a prosecutor and as a defence counsel, where a come complainant has, in effect, dribbled out the complaint over many different interviews and started off with just very minor acts of sexual contact and then only as the interview has progressed does the full story come out?

30

**MR WHYBROW:** Yes.

**MR TEDESCHI:** And sometimes those cases result in conviction?

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**MR WHYBROW:** They do.

**MR TEDESCHI:** In fact, sometimes, there are cases where, for years, a complainant has denied being sexually abused and then has finally come out and made an allegation, and convictions have been recorded?

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**MR WHYBROW:** Yes.

**MR TEDESCHI:** So those are all cases where there are severe or serious credibility issues that can arise during the trial and yet a conviction can be recorded?

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**MR WHYBROW:** Credibility issues are not a one-dimensional thing. A late complaint, an inconsistent complaint, etcetera, will, of course, provide a basis for test the reliability and the veracity of the complaint, but concerns about credibility can extend across a wide range and it will always depend on the individual evidence in an individual case.

50

**MR TEDESCHI:** And would you agree that, in some cases that you've been involved in, the credibility issues that have arisen have been much more cogent than the credibility issues that affected Ms Higgins?

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**MR WHYBROW:** It's hard to think of any cases where there were so many things that the complainant had said which were able to be demonstrated to be wrong or inconsistent or in sometimes said knowing they were wrong but for a reason.

10 **MR TEDESCHI:** But in Ms Higgins' case she had initially complained only a matter of days after the alleged incident and maintained those allegations for some considerable time until the trial?

**MR WHYBROW:** She had complained. She had spoken -

15

**THE CHAIRPERSON:** I really don't want to get into this, Mr Tedeschi. The point you are making is this was a case in which there were credit issues and trials of sexual offences - if they don't have any credit issues, they end up in guilty pleas. The ones that go to trial have credit issues, generally. And this one was one of those.

20

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And the except - well, we can discuss that - one could discuss that. We don't have to here, but one could discuss that but -

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**MR TEDESCHI:** Yes. That's my point.

**THE CHAIRPERSON:** Yes. Well, I think I understand that point.

30 **MR TEDESCHI:** Thank you. Mr Whybrow, in Mr Lehrmann's case, I think you weren't representing him, but, normally, there's a committal proceeding before the trial. Were you representing him at the committal proceeding?

**MR WHYBROW:** No.

35

**MR TEDESCHI:** Mr Korn was?

**MR WHYBROW:** I believe so.

40 **MR TEDESCHI:** And is this the case, that the committal in Mr Lehrmann's case was waived?

**MR WHYBROW:** In most cases in the ACT, there is a paper committal.

45 **MR TEDESCHI:** You have given evidence about the fact that an application can be made to the DPP for a nolle prosequi or no bill? Was any application made in this case?

**MR WHYBROW:** Not to my knowledge.

50 **MR TEDESCHI:** If a case at trial fails to reach the level of a prima facie case -

5 **THE CHAIRPERSON:** Mr Tedeschi, nobody is going to be submitting that the - that Mr Drumgold ought not have presented an indictment. So you are really - I gather wishing to affirm that at each stage of the proceeding, but nobody is going to argue to the contrary. So if that changes, I will be surprised.

**MR TEDESCHI:** Pardon me. Finally, Mr Whybrow, you will be pleased to know -

10 **MR WHYBROW:** (Indistinct) those words.

**MR TEDESCHI:** Yes. I want to suggest to you that Mr Drumgold had a proper basis to put his suspicions concerning the police into his letter of 1 November '22.

15 **MR WHYBROW:** How could I answer that?

**MS RICHARDSON:** I object though to that question.

20 **THE CHAIRPERSON:** Yes. Why, because Mr Whybrow's opinion is completely irrelevant?

**MS RICHARDSON:** But also the question is Mr Drumgold had a proper basis -

**THE CHAIRPERSON:** It's a mischaracterisation of - sorry, go on. I would like to hear you.

25 **MS RICHARDSON:** Firstly, Mr Drumgold himself has withdrawn a number of the bases (indistinct)

**THE CHAIRPERSON:** Yes, that's right. I think -

30 **MS RICHARDSON:** And, in any event, that's the whole point of this Inquiry, is there a basis for (indistinct) and he's asked (indistinct).

**THE CHAIRPERSON:** I don't think you can cover it like that.

35 **MR TEDESCHI:** All I'm seeking to do, Chairman, is to found a basis for submissions to be made at a later time. But I anticipate those submissions are available in any event.

40 **THE CHAIRPERSON:** Yes. You will be submitting in due course that I should look at the content of the letter in particular ways, and those submissions will be based upon what Mr Drumgold put forward in his evidence to justify the statements he made and his evidence about what he wished to maintain and what he didn't wish to maintain any longer. And, of course, upon the factual basis that he had before him to support what he was saying. So that's a long way of saying Mr Whybrow has no opinion about this that can help me. I assume that he was highly critical of your client. So what?

45 **MR TEDESCHI:** I accept that, Chairman. In that event, that completes my questioning of Mr Whybrow.

50 **THE CHAIRPERSON:** Thank you. Now, is there anybody who wants to question Mr Whybrow? Ms Longbottom, do you have any re-examination?

**MS LONGBOTTOM:** I have two matters in re-examination.

**THE CHAIRPERSON:** Yes. It's almost 10 to 1. Shall we - how long are you going to be?

**MS LONGBOTTOM:** I don't expect I will be more than about 15 minutes.

**THE CHAIRPERSON:** I think you should go on and then we will see what other -

**MR WHYBROW:** It will encourage me to be succinct, Mr Chairman.

**THE CHAIRPERSON:** Yes, thank you. Thank you for that. Go ahead, Ms Longbottom.

**<EXAMINATION BY MS LONGBOTTOM**

**MS LONGBOTTOM:** Mr Whybrow, the first matter I wanted to ask you about concerns Senator Reynolds. And you will recall Mr Tedeschi took you to a text exchange with Mr Drumgold that involved providing some information about forwarding on, in effect, some text messages that Senator Reynolds had sent you.

**MR WHYBROW:** Earlier this morning, yes.

**MS LONGBOTTOM:** Earlier this morning, including a text message asking if you had seen text messages between Ms Higgins and Nikki and they may be revealing. You will recall on Monday when I was asking you some questions, I asked you whether or not you indicated to Senator Reynolds whether or not there was any property in a witness. And you spoke about a particular telephone conversation you had with her when you first spoke to her. Am I right that on 27 July, you attended a conference with Senator Reynolds and her lawyers amongst others?

**MR WHYBROW:** That's referred to in my statement, I think.

**MS LONGBOTTOM:** That's right. What I wanted to ask you is whether or not during that conference you specifically asked Senator Reynolds if there was anything that occurred to her at a later date that might be relevant that she should let you know.

**MR WHYBROW:** Yes.

**MS LONGBOTTOM:** Can you tell me, with the benefit of hindsight, is in anything improper in making that suggestion to Senator Reynolds?

**MR WHYBROW:** Not that I can see.

**MS LONGBOTTOM:** And why not?

**MR WHYBROW:** Because there's no property in a witness and if they are prepared to contact me and say, "Hey, I've just thought of this", then they are free to do that. They don't have to.

**MS LONGBOTTOM:** Now, the other matter I wanted to ask you about was the email Ms Brown sent you after the matter had been discontinued in December. I might ask the operator to please bring it up. WIT.0031.0001.0003\_0336. You will recall I asked you, and there was an exchange today as well, about whether or not there was in anything specific in that email that, from your perspective, would have warranted its disclosure. And I think Mr Sofronoff asked you some questions about the evidence that emerged during the trial.

I will leave this in your hands, but from your perspective, would it be of assistance if I took you to the particular parts of the transcript where that issue was the subject of evidence so you can refresh your memory in that respect?

**MR WHYBROW:** I'm not sure. As Mr Chair said, if the evidence was A, B, C, and it was A, B, C, it wouldn't change my view about "I should have had this disclosed." If it was A, B, C, D, E, F, G and A, B, C, F, G, then it's an even stronger position. The fact that a witness had indicated at that time that they were concerned about falsely misleading - I did not want to be confined to just whatever they had said. I wanted at least to be told about it so that I could make inquiries, if Ms Brown was prepared to talk to me. Still, she would not necessarily need to talk to me or have to, and I could make an application to the Chief Justice if something emerged that I wanted to recall either Ms Higgins or Ms Brown, and she could hear that application and make a decision. All of those possibilities were effectively denied to me because this was not passed on. There would have been no difficulty in passing it on because it didn't mean anything necessarily flowed.

**MS LONGBOTTOM:** Yes.

**THE CHAIRPERSON:** I don't think it would be helpful to go through the evidence and try to pick up -

**MR WHYBROW:** Yes.

**THE CHAIRPERSON:** - consistency and inconsistency or whether Ms Brown was right in her view that Ms Higgins had said something surprising and new. We can do that.

**MS LONGBOTTOM:** Certainly.

**THE CHAIRPERSON:** And, no doubt, submissions will be made by others about that. And what Mr Whybrow thinks now doesn't matter to that. And otherwise he has given his view why, notwithstanding no inconsistency, it was a document that should have been shown, and I will hear submissions about that in the end.

**MS LONGBOTTOM:** In that case, Mr Sofronoff, there's nothing further.

**THE CHAIRPERSON:** Thank you. Nothing? No.

**MR MULLER:** Mr Chair, I would like an opportunity to speak briefly with Mr Whybrow. It may be that I have no questions for him.

**THE CHAIRPERSON:** All right. We will do that. Mr Gnech, did you have something?

**MR GNECH:** Mr Chair, I actually have a couple of questions that I think have been before Counsel Assisting, so if I may.

**THE CHAIRPERSON:** You want to ask questions of Mr Whybrow?

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**MR GNECH:** Yes, thank you.

**THE CHAIRPERSON:** Go ahead now, why don't you, Mr Gnech?

10 **MR GNECH:** Thank you.

**THE CHAIRPERSON:** Mr Gnech acts for several AFP officers, Mr Whybrow.

**MR WHYBROW:** Yes thank you, Mr Chair.

15

**MR GNECH:** Mr Whybrow, you said earlier in your evidence that your observation was that Mr Drumgold was hostile towards the police at the trial. What caused you to form that view?

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**MR WHYBROW:** Body language, the - what I've put in my statement about an unnecessary comment about their skill sets in front of the jury. This comment about two of the senior officers being boofheads. And just an observation that there was no real communication between them. And at the end, when Detective Boorman asked me if I would let him know if there was any news about the jury, that did not come as a surprise to me when he said, "I don't have any confidence that the DPP would do it." It was just a culmination of a whole lot of observations.

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**MR GNECH:** And is that relationship consistent with your normal observations during a trial?

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**MR WHYBROW:** In the most part, prosecutors and police may speak a lot, depending on the nature of the case. They may not need to. This was a large case with a lot going on with a lot of moving parts, with a lot of witnesses being on the list and not on the list. It may be that I had more communications with Detective Frizzell than the police and - sorry, than the DPP. I don't know what was going on after court, whether they had meetings, whether they had conferences. I can only give my impression based on what I saw at the court.

35

**MR GNECH:** Thank you. Thank you, Mr Chair

**THE CHAIRPERSON:** Thank you. We will adjourn and -

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**MR TEDESCHI:** I'm sorry, Chairman. There's a matter that I have raised with Counsel Assisting that it could potentially result in you, Chairman, wanting to mention the matter very briefly again today. I don't know if that will happen. I will leave it up to Counsel Assisting to make a suggestion.

45

**MS LONGBOTTOM:** Mr Sofronoff, it might assist if perhaps we adjourn the matter for 15 minutes.

**THE CHAIRPERSON:** Well, we will adjourn now. You can talk to your client and see if you want to re-examination. And when you are ready, let somebody know and I will come back when are you ready.

5 **MR TEDESCHI:** If Mr Whybrow could be excused. It doesn't concern him.

**THE CHAIRPERSON:** Yes, all right. Well, you go and talk to your counsel and then we will deal with each thing in turn. Yes.

10 <**THE WITNESS WITHDREW**

<**THE HEARING ADJOURNED AT 12.55 PM**

<**THE HEARING RESUMED AT 1.21 PM**

15 **THE CHAIRPERSON:** Nothing further?

**MR MULLER:** Mr Chair, no questions.

20 **THE CHAIRPERSON:** Thank you. We will adjourn until Monday at 9.45, when we expect Superintendent Moller to be called as the first of the police witnesses.

**MS LONGBOTTOM:** That's so, Mr Sofronoff.

25 **THE CHAIRPERSON:** Is there anything else I need to do today?

**MS LONGBOTTOM:** Not from my part, Mr Sofronoff.

30 **THE CHAIRPERSON:** No? Does anybody else wish to raise anything that I should think about or do? No? Then, we will adjourn until -

**MR TEDESCHI:** Sorry, Chairman.

35 **THE CHAIRPERSON:** Mr Tedeschi.

**MR TEDESCHI:** I wonder if we should set a time for the argument about the SAPR issue.

**THE CHAIRPERSON:** That other evidence that you wanted to lead?

40 **MR TEDESCHI:** Well, I - it - it might be that I want to question Superintendent Moller.

**THE CHAIRPERSON:** Yes, we will have to do it before that. So why don't - you have provided your written submission. Ms Richardson, why don't you provide a written response for my assistance by, say, Friday afternoon.

45 **MS RICHARDSON:** That's convenient.

**THE CHAIRPERSON:** Or earlier if you can, but Friday afternoon.

50 **MS RICHARDSON:** That's convenient.



**THE CHAIRPERSON:** And we will attack it at 9.45 first thing Monday morning. Is that suitable?

5 **MS RICHARDSON:** Yes. Thank you.

**MR TEDESCHI:** Suitable.

10 **THE CHAIRPERSON:** And if anybody else wants to make submissions, by all means, get it to me by Friday afternoon and we will deal with it on Monday. Thank you. Thank you for your assistance this week.

**<THE HEARING ADJOURNED AT 1.23 PM TO MONDAY, 22 MAY AT 9.45 AM**