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TRANSCRIPT OF PROCEEDINGS

ACT BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM

CHAIRPERSON: MR W. SOFRONOFF KC

CANBERRA

WEDNESDAY, 10 MAY 2023 AT 9.51 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 D. EDWARDSON KC with 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 M. BLACK appeared on behalf of thirteen AFP members

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

MS S. CHRYSANTHOU SC appeared on behalf of MS L. WILKINSON

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

MR SMITH appeared for MS JOHNSON

MR J. QUILL appeared for News Corporation, Nine Network, the Seven Network, the Australian Broadcasting Corporation and the Dailymail.com Australia Proprietary Limited

<THE HEARING RESUMED AT 9.51 AM

THE CHAIRPERSON: Yes, Mr Tedeschi.

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MR TEDESCHI: Chairman, I would like to bring to your attention a matter of concern regarding a news broadcast last night -

THE CHAIRPERSON: Yes.

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MR TEDESCHI: - certainly on Channel 7, which I saw. I don't know if any other media organisations broadcast it. Chairman, for many decades now, the criminal justice system has sought to protect complainants from being questioned, particularly in court, about sexual activity unrelated to the complaint in question.

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THE CHAIRPERSON: Yes.

MR TEDESCHI: And there is extensive legislation in every jurisdiction in Australia to protect complainants in that way. In some jurisdictions, like New South Wales, there is an absolute prohibition on references - reference to other sexual activity.

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THE CHAIRPERSON: Yes.

MR TEDESCHI: In other - some jurisdictions, like in the ACT, it requires leave, and the court has to be satisfied that there's substantial probative value. Yesterday, during questioning of Mr Drumgold by counsel assisting, she referred to an email dated 20 June 2022 from Ms [REDACTED] of AFP Legal to Erin Priestly of the DPP.

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THE CHAIRPERSON: I remember that one, yes.

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MR TEDESCHI: I can provide the reference number if you wish. That was the document that had - that was the email that had five documents listed.

THE CHAIRPERSON: There were attachments.

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MR TEDESCHI: That were attachments, yes. And the fifth document was referred to as a review document.

THE CHAIRPERSON: Yes.

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MR TEDESCHI: Again, I can provide the reference if required.

THE CHAIRPERSON: Yes.

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MR TEDESCHI: That review document was one of the documents that formed part of the investigative review document. On page 5, the last page, there is a reference to an allegation regarding Brittany Higgins and some alleged sexual activity completely -

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THE CHAIRPERSON: Just pause for a moment, Mr Tedeschi. I'm aware that - I know what you're going to say, that - because I'm aware of publications that have repeated

propositions in that document about Ms Higgins that are mere propositions that have - were not used in the trial, were not used in anything and were defamatory of her. And your concern, I take it, is that although this document has been - this particular document you are referring to, and its analogues, have been used openly so that the parties and the public can understand the significance of the non-disclosure of those documents - we will see whether the non-disclosure was right or wrong, but it would be impossible to understand what was being discussed if the significance - the content of those documents wasn't understood. Your concern is that the contents of those documents having been disclosed, they are being misused by the publication of their contents as though those contents might be true. And -

MR TEDESCHI: The way it was broadcast, Chairman, it was at a time when Detective Chief Inspector Boorman's image was on screen -

THE CHAIRPERSON: Yes. Yes.

MR TEDESCHI: - and it was a reference to police inquiries.

THE CHAIRPERSON: Yes.

MR TEDESCHI: So it was portrayed as being that this is something that the police had found out -

THE CHAIRPERSON: Yes, yes.

MR TEDESCHI: - whereas the true source of the information -

THE CHAIRPERSON: Yes.

MR TEDESCHI: - was office scuttlebutt. And I can take you, Chairman, to that information if required.

THE CHAIRPERSON: You don't need to persuade me.

MR TEDESCHI: The vice is, firstly, it would be extremely distressing to Ms Higgins.

THE CHAIRPERSON: Yes.

MR TEDESCHI: Secondly, it would tend to discourage any future complainants from bringing complaints of sexual misconduct or assault to the attention of the police. It is precisely the reason why the criminal justice system of every jurisdiction of Australia has sought to prevent such information being part of a criminal trial. And it exemplifies the very prejudicial stereotyping that the DPP was referring to yesterday.

THE CHAIRPERSON: Yes, I understand that. What is it you want me to do?

MR TEDESCHI: Well, firstly, we would suggest that the precise material - the actual wording on that - in that document should be suppressed or redacted in some way. We would ask you, Chairman, for your information officer or some other appropriate officer to notify the media that it has been either redacted or the subject of a non-publication order. And we would ask you to make some suitable comments about -

THE CHAIRPERSON: All right.

5 **MR TEDESCHI:** - the fact that, on the first day, you asked the media to report this case with responsibility and sympathy.

THE CHAIRPERSON: Yes.

10 **MR TEDESCHI:** The reference on Channel 7 that I saw was the exact opposite of that.

THE CHAIRPERSON: Well, I wasn't aware of Channel 7. I was aware of other media stories of that kind, and I was going to say something about it, not this morning but later in the day. So I think what I will do is make a non-publication direction in relation to those documents. I will do that in a moment. So what I will need to do is to have somebody in - one of counsel assisting identify those particular review documents so that I can refer to them specifically in a non-publication direction. Ms Longbottom.

20 **MS LONGBOTTOM:** I can certainly liaise with my learned friend to identify the precise documents.

THE CHAIRPERSON: Well, you know what they are.

MS LONGBOTTOM: Yes, yes.

25 **THE CHAIRPERSON:** So once they are identified, I will make that direction.

MR TEDESCHI: Thank you.

30 **THE CHAIRPERSON:** So that will be immediate, and we will continue this morning. And over the break, I will draft the - in any event, as soon as the documents are identified, I will make that direction. And I will consider what to say in due course during the course of the day.

35 **MR TEDESCHI:** Thank you.

THE CHAIRPERSON: Is that satisfactory?

MR TEDESCHI: Yes. Thank you.

40 **THE CHAIRPERSON:** And thank you for raising it. Ms Longbottom.

MS LONGBOTTOM: Mr Sofronoff, there are two other matters we need to attend to before commencing evidence today. The first is the tendering of the witness statement of Ms Tasha Smithies.

45 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: I will bring it up. It is WIT.0097.0002.0001.

50 **THE CHAIRPERSON:** Yes. Are you tendering that?

MS LONGBOTTOM: I am.

THE CHAIRPERSON: Exhibit 32.

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<EXHIBIT 32 TENDERED AND MARKED

MS LONGBOTTOM: The second matter with respect to tender concerns the statement of Senator Linda Reynolds. As you may recall, Mr Sofronoff, that was the third document listed in the tender bundle displayed on the first -

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THE CHAIRPERSON: Yes, that's right.

MS LONGBOTTOM: I understand Mr Tedeschi had a preliminary concern about the statement being tendered and so we deferred that.

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THE CHAIRPERSON: Yes.

MS LONGBOTTOM: But it's appropriate to deal with it now, if we could.

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THE CHAIRPERSON: All right. Now, Mr Tedeschi, I understand that there is a particular paragraph of that statement which concerns you.

MR TEDESCHI: I'm trying to locate my copy of it.

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THE CHAIRPERSON: No, that's all right. Let's just talk about it in principle.

MR TEDESCHI: Towards the end of it -

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THE CHAIRPERSON: Yes.

MR TEDESCHI: - there is a section which really has obviously been -

THE CHAIRPERSON: No, I understand. I think your proposition was that that particular paragraph is not evidence; it's really in the form of a submission.

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MR TEDESCHI: Yes. It's more than a paragraph; it's several paragraphs.

THE CHAIRPERSON: It doesn't matter. What we will do is for the moment - for the moment, we will - I will let Ms Longbottom tender the statement, we will redact that paragraph and we can debate it at a more convenient time as to whether it should go out or not go out. All right.

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MR TEDESCHI: Certainly. Thank you.

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THE CHAIRPERSON: So we will postpone your problem to another day, but we will publish the statement without that paragraph.

MR TEDESCHI: Thank you.

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MS LONGBOTTOM: And, Mr Sofronoff, I need to correct myself. It's actually number 12 in the list, not number 3.

5 **THE CHAIRPERSON:** All right. Well then, before that goes up, the paragraph of concern can be redacted.

MS LONGBOTTOM: Yes.

10 **THE CHAIRPERSON:** Anything else?

MS LONGBOTTOM: No.

THE CHAIRPERSON: Yes.

15 **MS WEBSTER:** (Indistinct) for clarity which paragraph (indistinct).

MR TEDESCHI: It's part F, headed Breaches of Duty/Legislation.

20 **THE CHAIRPERSON:** Is that clear enough?

MR TEDESCHI: It starts on page 31 and goes -

MS WEBSTER: Yes.

25 **MR TEDESCHI:** - to the end of the statement.

THE CHAIRPERSON: Yes. Yes, Ms Longbottom.

30 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Mr Drumgold, the trial of the proceeding commenced on about 4 October last year?

MR DRUMGOLD: The trial?

35 **MS LONGBOTTOM:** The trial of the complaint made by Ms Higgins against Mr Lehrmann commenced in October 2022?

MR DRUMGOLD: In October, yes.

40 **MS LONGBOTTOM:** Yes.

MR DRUMGOLD: I don't know the precise date. But, yes, it was around October.

MS LONGBOTTOM: You became Director of Public Prosecutions in about 2019?

45 **MR DRUMGOLD:** 1 January my appointment took place.

MS LONGBOTTOM: By the time you came to prosecute the matter of The Crown v Lehrmann, how many sexual offence assault trials had you prosecuted since becoming DPP?

50 **MR DRUMGOLD:** A lot. I - I - I can't really count. I mean, over 20 years, a lot.

MS LONGBOTTOM: My question might have been unclear. Since 2019, how many -

5 **MR DRUMGOLD:** Since 2019 - again, it depends on your definition of "prosecute". That includes appeals. So when I became Director -

THE CHAIRPERSON: Just - let's stick to trials. Was this the only trial since 2019?

10 **MR DRUMGOLD:** Possibly. I would need to check my records -

THE CHAIRPERSON: Yes.

15 **MR DRUMGOLD:** - but I - none jump out. Certainly there were a lot of sexual assault appeals.

THE CHAIRPERSON: Yes.

20 **MR DRUMGOLD:** But as far as first instance stuff - it's a bit difficult to do first instance stuff, but I - not that I recall is - I think my answer is.

MS LONGBOTTOM: Okay. Can I take you to your statement at paragraph 414.

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** You there observe that you perceived the behaviour of investigating officers at trial was unusual?

MR DRUMGOLD: Of? At trial or -

30 **MS LONGBOTTOM:** You say:

"The behaviour of the investigating police at trial was unusual."

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: What did you mean by that?

40 **MR DRUMGOLD:** I meant there was almost exclusive liaison between the senior members of the AFP involved in the trial and police. And I use the term loosely. They weren't necessarily witnesses; they were the people that I engaged with early.

45 **MS LONGBOTTOM:** Insofar as it concerns police investigators who were witnesses, you would accept, however, wouldn't you - and I think you say this in your statement - that there's no property in a witness?

MR DRUMGOLD: Absolutely there is no property.

50 **MS LONGBOTTOM:** And that is a rule that's reflected in the Barrister Rules, that a barrister mustn't take any steps to prevent or discourage prospective witnesses from conferring or being interviewed by an opponent?

MR DRUMGOLD: I agree.

5 **MS LONGBOTTOM:** What's your understanding of the purpose of that rule with respect to the necessity for a fair trial?

10 **MR DRUMGOLD:** Well, because defence need to be free to do their own proofings of witnesses. They need to be able to access them to ask them questions, and those questions might not necessarily have to come through us.

MS LONGBOTTOM: Operator, can you please display DPP.005.007.1055. Now, Mr Drumgold, take a moment to read that.

15 **MR DRUMGOLD:** Yes, I'm familiar with that document.

MS LONGBOTTOM: So that's an email that you were sent from Commander Joanne Cameron. Was she in SACAT? Where was -

20 **MR DRUMGOLD:** No. No, she was - so she was a commander. So she was a Deputy Chief Police Officer.

25 **MS LONGBOTTOM:** It was sent during the trial, and I understand it wasn't directed to you, but it was communicating to you that Commander Cameron had advised all her staff who might be a witness to avoid communicating with defence counsel prior to giving their evidence. Do you see any problem with that direction?

30 **MR DRUMGOLD:** Not in the context of - of what was happening in the trial. There had been significant problems - so the police that they were engaging with - were there direct communication, it would not have concerned me at all. But I already knew that the police involved had displayed a passionate interest in this matter not proceeding, and that's what concerned me.

35 **MS LONGBOTTOM:** So you perceived that police didn't want the matter to proceed to a trial?

MR DRUMGOLD: Yes.

40 **MS LONGBOTTOM:** Given that belief, you thought it was appropriate that they be directed not to confer with defence counsel?

45 **MR DRUMGOLD:** And, again, my - there was significant communication, and we - we agreed that it was appropriate to have significant communication, for example, between the defence team and the investigator. So the defence were asking the investigator to chase up lines of inquiry, and that was with our agreement. This was what I - what I read this as being concerned with were the most senior police.

50 **MS LONGBOTTOM:** How do you rationalise that direction with the Barristers Rules which require you not to take any step to prevent or discourage prospective witnesses from speaking with defence counsel?

MR DRUMGOLD: Well, again, they had access to the police. They had access to the investigators. This was - my concern was dealing with the most senior police who were not -

THE CHAIRPERSON: But this concerned - we see in the second-last paragraph:

"I have advised my staff that all potential witnesses avoid any communication with defence counsel."

How could that be right?

MR DRUMGOLD: Well, that was our concern. Our concern was that things were occurring that were not in keeping with their obligations.

THE CHAIRPERSON: What obligations?

MR DRUMGOLD: Well, our concern - again, were a defence lawyer to talk to - talk on friendly terms with a police officer, that would normally warm my heart. I would have no difficulty whatsoever. But I'm concerned that I've got a police officer that has committed to writing both inadmissible evidence and then had drawn very strong opinions as a result of that inadmissible evidence and was, in my view, attempting - potentially attempting to feed those views and others to defence counsel.

THE CHAIRPERSON: Mr Drumgold, let's - I will have to look at that - those reviews and analyses by Mr Moller and the others and see what I think about them in due course, and I will ask the officers concerned questions about it. Let's assume, though, for the moment - I haven't formed a view yet, but let's assume for the moment that the opinions expressed by, for example, Mr Moller were wrong-headed - unjustified and wrong-headed and ought not have been written down and ought not have been used. Well, let's also assume that he actually held those views. Normally, when defence speak to police about the case, they may want to - they would want information that would help the defence, and police can give it or not give it as they choose.

MR DRUMGOLD: Okay.

THE CHAIRPERSON: Here, let's assume that one of those officers was going to convey those wrong-headed views. So what? His views are inadmissible. Defence can do what they like with it. Defence, in the end, is subject to the rules of criminal trial procedure and evidence. So what? I mean, it might be upsetting, and you might sense that there's some disloyalty at a human level, but at a professional level - so what's the concern?

MR DRUMGOLD: Well, again, my concern was going to great lengths to feed inaccurate information - or inaccurate assessment of information in the hope of derailing the case. That was my concern.

THE CHAIRPERSON: But how could they do that in that - that is to say, they can feed inaccurate information, but how could it upset the trial? Because defence can't do anything except that which is ethically and legally permitted by the procedures that we all understand at our level of - you know, at our level of practice. So who cares?

MR DRUMGOLD: I mean, all I can -

THE CHAIRPERSON: Why did you care so much?

5 **MR DRUMGOLD:** All I can answer is what was concerning me at the time. There had been so much unusual stuff in this - in this trial. I was trying to quarantine and at least keep it sterile, if I can use those words.

10 **THE CHAIRPERSON:** Have you ever had to do a trial in which you were prosecuting a police officer?

MR DRUMGOLD: Possibly. Nothing that jumps to mind.

15 **THE CHAIRPERSON:** Because, in my experience, when you prosecute a police officer, you have a lot of police against you, and they tend to congregate like bees around honey on what you might think is the wrong side of the bar table, and they tend to spend a lot of time with defence lawyers in the corridors of the court and are undoubtedly doing whatever they can to assist the charged - the accused police officer. But that's just part of the territory. You just get on with it, don't you?

20 **MR DRUMGOLD:** Well, as say, I can only outline what I was concerned about.

THE CHAIRPERSON: All right. Thanks very much.

25 **MR DRUMGOLD:** What was concerning me.

THE CHAIRPERSON: I understand. Thanks.

MR DRUMGOLD: So I didn't write back to her and say, "This shouldn't occur."

30 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: And I think that response perhaps exemplifies the point I'm wanting to engage with you about, which is: do you think those concerns you had at that time were affecting your objectivity?

35 **MR DRUMGOLD:** I was trying to - no. I mean, affecting my objectivity - I was leading evidence. I lead evidence in the same way in this trial as every other trial.

40 **MS LONGBOTTOM:** But in - let's look at this particular decision here. So you know there's no property in a witness. You are forthcoming about that in your statement. Yet knowing that, holding the concerns you had, you decided you wouldn't write back to Commander Cameron and say, "That's not appropriate in this instance"?

45 **MR DRUMGOLD:** Indeed. In the context, we - it was happening every day, and with - we were asked, for example, by one police officer whether it - the defence had approached her asking whether or not they could have a chat, and we said, "Yes, no problem." So whilst I didn't write back, we didn't stand in the way of communication between investigators and defence. And it was entirely appropriate.

MS LONGBOTTOM: Okay. One of the witnesses who gave evidence during the trial was Fiona Brown?

MR DRUMGOLD: Correct.

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MS LONGBOTTOM: Ms Brown was Senator Reynolds' chief of staff at the time of the alleged offence?

MR DRUMGOLD: That's correct.

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MS LONGBOTTOM: Now, the evidence of Ms Brown was relevant to a central issue at the trial?

MR DRUMGOLD: It was complaint evidence. That's right.

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MS LONGBOTTOM: But it was relevant to the issue as to why Ms Higgins didn't proceed with her complaint in about March of two thousand -

MR DRUMGOLD: Yes, also. Yes, that's correct.

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MS LONGBOTTOM: And correct me if I am wrong about this, but as I understand it, in part, that issue turned on whether Ms Brown told Ms Higgins that she could pay her what's called a deferment payment of six weeks' wages to go to the Gold Coast during the election campaign, but if she took that up, her employment would be at an end.

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MR DRUMGOLD: No, not - not entirely. The - the evidence was that when - sorry, I'm going to have to go back a little bit. The evidence was that whenever there's a major political change, like a minister changes portfolio, effectively what happens is all of their staff lose their job and they have to reapply for their job in a new position. They get a six-week deferment on that event. So for example, when Senator Reynolds moved from Home Affairs to Defence Industries, all of her staff from both offices go on deferment and effectively lose their job and have to reapply for a job. And then they - that deferment period is six weeks' pay.

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MS LONGBOTTOM: The evidence was - and I would need to check the transcript. It's been a while since I've read this. But my recollection of the evidence was that there was an election being called - or there was an election called. That effectively - on the event of that election, regardless of whether they were successful or not successful, everybody in the office went on deferment and lost their job and had to reapply for their job. The evidence was that Ms Higgins understood from communications with Ms Brown that if she didn't go to Perth, she would be unsuccessful in obtaining employment following the election. That's - that's how the evidence unfolded.

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MS LONGBOTTOM: Okay. I can take you to the transcript - and I will be pleased if you can correct me if I have misunderstood it, but can we go to WIT.0070.0001.0015_0400.

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MR DRUMGOLD: So where am I reading?

MS LONGBOTTOM: If you can read from about line 21. This is the evidence of Ms Brown. And I read that as saying the evidence of Ms Brown at least was that Ms Higgins was an ongoing employee as opposed to Mr Lehrmann who was in his deferral.

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5 **MR DRUMGOLD:** This related to the movement, as I understood, from Home Affairs - so Ms Higgins was with Minister Ciobo, who was the Minister for Defence Industries, and that was her role. Mr Lehrmann was with Senator Reynolds, who was in Home Affairs. When
10 Minister Ciobo left that ministry - or was not contesting the next election, Minister Reynolds was appointed to the Defence Industries' portfolio, and that would have created a situation where they were all on deferment. Whether or not Mr Lehrmann had not been reappointed and Ms Higgins had been reappointed, I don't know that that was quite established. It - it could be right. But the question that you were posing related to post-election, not at the change of portfolio.

15 **MS LONGBOTTOM:** Can I deal with it this way. Can I suggest that the evidence that Ms Brown gave was that she had offered to arrange a non-standard based work option for Ms Higgins to work out of the Gold Coast, should she wish to do so.

MR DRUMGOLD: Yes, I think that's - that's correct.

20 **MS LONGBOTTOM:** And she denied the proposition put to her that she said to Ms Higgins words to the effect that, "If you don't go to Western Australia, you wouldn't have a job after that." That was on - about 11 October?

MR DRUMGOLD: I will accept that.

25 **MS LONGBOTTOM:** After that, on about 14 October, Ms Higgins returned to give evidence. And during cross-examination, she gave evidence to the effect that Ms Brown had said to her that Ms Higgins would be paid out for the entirety of the election to go to the Gold Coast, but essentially there would be no prospect of a job when she came back?

30 **MR DRUMGOLD:** That was not the flavour of the evidence. The flavour of the evidence was -

THE CHAIRPERSON: Of Ms Higgins?

35 **MR DRUMGOLD:** Of Ms Higgins was - so she had given evidence of this - from my recollection, this evidence might have been in her evidence-in-chief interview. It was led in chief, and she was being cross-examined by it. It was a summary. The evidence was effectively that you would - on deferment, you would get your six weeks and you need not bother applying for your job - or you can apply for your job, but you will be unsuccessful. That was the tenure of the evidence.

40 **MS LONGBOTTOM:** And that was material to an issue in the trial, which was Ms Higgins' state of mind in March of 2019 and whether or not she should make a complaint at that stage?

45 **MR DRUMGOLD:** Yes. It wasn't - I didn't consider it to be a central issue. What - it was part of the mix of reasons why Ms Higgins (indistinct) complaint in 2019. She felt that her understanding was that proceeding with it would be at the cost of her - well, she wouldn't be sacked. But on the triggering of the deferment and the six weeks and when the office started re-employing people, that she would be one of those that didn't make the cut. That was the flavour of the evidence.

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MS LONGBOTTOM: Okay. Operator, can you please display DPP.005.008.5298. Now, Mr Drumgold, this is an email Ms Pitney from your office sent you -

MR DRUMGOLD: Yes.

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MS LONGBOTTOM: - on 14 October after Ms Higgins had given evidence that morning. The effect of the email is that Ms Brown wanted to draw to your attention some matters that she thought put in issue Ms Higgins' evidence. And it's uncontroversial, I understand it, on your statement, that you didn't - you looked at that and you didn't think it was necessary to provide it to the defence?

10

MR DRUMGOLD: Yes. I - I - it was - she had read some media on the article - media on the trial. Had misunderstood what was said. Had interpreted it, as I recall, as some sort of ex gratia payment, which it was never that, and said, "We were not authorised to pay an ex gratia payment."

15

MS LONGBOTTOM: And so are you referring there to - and that was the reason you decided not to provide it to -

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MR DRUMGOLD: Well, it was - so the evidence as a discrete piece of evidence was, "I've read some media articles, and I've misinterpreted the media articles, and I want to tell you and go back and tell the court that my misinterpretation (indistinct) is not correct." That - that was the essence of what was being said.

25

MS LONGBOTTOM: Okay.

THE CHAIRPERSON: That is to say, certain evidence had been given by Ms Higgins; your view was that Ms Brown, having read something in the newspaper, misunderstood what Ms Higgins had said; said that her understanding of Ms Higgins' evidence - that that evidence was untrue; and she wanted to correct that untruth. But in your view, what she regarded as untrue evidence was not evidence that had been given, so there was nothing to be done?

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MR DRUMGOLD: There was certainly a difference between Ms Higgins' evidence and Ms Brown's evidence.

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THE CHAIRPERSON: As it had been given.

MR DRUMGOLD: Correct.

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THE CHAIRPERSON: And, in your view, as Ms Brown had given her evidence.

MR DRUMGOLD: Both had been ventilated.

THE CHAIRPERSON: Yes.

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MR DRUMGOLD: This was a complaint that, "I have heard media, and I have misinterpreted what's been said in the media, and I want to go back to court and say that my interpretation (indistinct)."

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THE CHAIRPERSON: Yes.

MR DRUMGOLD: (Indistinct) it was never advanced -

THE CHAIRPERSON: Yes, there was nothing to correct -

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MR DRUMGOLD: Correct.

THE CHAIRPERSON: - because what she feared had been said had not been said, in her view.

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MR DRUMGOLD: That's - that's my interpretation.

THE CHAIRPERSON: Yes. All right. So it's important to know what was said by Ms Higgins and what Ms Brown asserted had been said by Ms Higgins in order to see if she was starting at shadows or reality.

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MS LONGBOTTOM: Well, perhaps in that respect, can I take you to the transcript at page 616. It is (indistinct) I don't. I'm just pulling up the document number now. Actually, I might - it is WIT.0070.0001.0015_0615. Now, can I ask you to read from about line 25 to 31. Perhaps turn over to the next page.

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MR DRUMGOLD: So I think that's talking about the 1 April meeting.

MS LONGBOTTOM: It is.

25

MR DRUMGOLD: Yes.

MS LONGBOTTOM: And so on the next page -

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THE CHAIRPERSON: Is it between 25 and 30, Ms Longbottom?

MS LONGBOTTOM: That's precisely it, Mr Sofronoff. So you will see there the evidence from Ms Higgins was:

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"They said they would pay me out for the entirety of the election to go to the Gold Coast, but there would essentially be no prospect of me coming back."

MR DRUMGOLD: Yes. So the proposition that Ms Higgins was saying - Ms Brown's evidence was, "We offered her to work from the Gold Coast." Ms Higgins' evidence was, "Yeah, they offered me to work from the Gold Coast, but I was of the very clear understanding that at the end of the election when we all went on deferment - that six-week deferment, that I would be unsuccessful in any application for a job."

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MS LONGBOTTOM: Well, let's look at the actual words she said. That was:

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"They said they would pay me out for the entirety of the election to go to the Gold Coast, but there would be no essentially prospect of me coming back."

That was the actual evidence that she gave.

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MR DRUMGOLD: Well -

MR TEDESCHI: The next sentence as well.

5 **MS LONGBOTTOM:**

"So, yes, they'd pay me out for six weeks, but I would never have a job again."

So that was the evidence that Ms Higgins had given.

10

MR DRUMGOLD: That's what that passage says. But, I mean, I don't have the entire transcript before me.

15 **THE CHAIRPERSON:** Are you saying that if you look at the whole of the evidence that she gave in chief and in cross-examination up to that point -

MR DRUMGOLD: Correct.

20 **THE CHAIRPERSON:** - you would get a different sense of it. We can do that in due course if necessary, but what is the sense that you say that we would gain from it? What's being put to you is that's the essence of it, "They would pay me out for six weeks, but I would never have a job again." What's your -

25 **MR DRUMGOLD:** So she was - she was saying -

THE CHAIRPERSON: - recollection?

30 **MR DRUMGOLD:** - "I can work from the Gold Coast, then there would be an election. Then at the end of the election, I will go on - we will all go on deferment. And when we all apply for our jobs again, I won't make the cut." That's -

35 **THE CHAIRPERSON:** Is your recollection that this sentence that has been drawn to your attention, "They'd pay me out for six weeks," was a short form of saying, "You can work from the Gold Coast for six weeks," or -

MR DRUMGOLD: No.

THE CHAIRPERSON: What was it?

40 **MR DRUMGOLD:** It was saying, "You can work from the Gold Coast" - because the deferment doesn't trigger until the election is completed.

THE CHAIRPERSON: Yes. "You can work from the Gold Coast and be paid as usual."

45 **MR DRUMGOLD:** And then -

THE CHAIRPERSON: Is that it?

50 **MR DRUMGOLD:** Correct. And then, "At the end of the election, you will go on deferment and you need not - and you will be unsuccessful." I mean, of course, the complainant used

hasher words than that, but that's - that was the tenor of the evidence from both evidence-in-chief - and there was not a lot of difference between the two.

5 **THE CHAIRPERSON:** I guess the - perhaps the point that Ms Brown was concerned about - I don't know, but perhaps the point that she was concerned about - you tell me if this was how you read her proposition in the email. Her point was that she would be paid a lump sum, in effect -

10 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: - whereas - are you saying that Ms Higgins' evidence was not that, when read fairly, but that she would be allowed to work from the Gold Coast and be paid her wage as normal until everybody's position is terminated? Is that what you are saying?

15 **MR DRUMGOLD:** That's so. And Ms Brown read it as being some sort of ex gratia lump sum -

THE CHAIRPERSON: Yes, I understand.

20 **MR DRUMGOLD:** - that she said that her and Senator Reynolds didn't have the power to -

THE CHAIRPERSON: And is that the reason that you didn't think there was anything to correct because -

25 **MR DRUMGOLD:** Precisely.

THE CHAIRPERSON: - she wasn't saying a lump sum. The evidence, fairly understood -

30 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: That was not what Ms Higgins was saying.

MR DRUMGOLD: That's right.

35 **MS LONGBOTTOM:** And just so I can make sure I understand it - so accepting that was your perspective about the effect of the entirety of the evidence, insofar as it concerns that specific proposition that's referred to in the second-last paragraph of the email, "They would pay me out for the entirety of the election to go to the Gold Coast, but there would be no prospect of me coming back," Ms Brown goes on to say at the next page, in effect, neither
40 she nor Senator Reynolds had authority -

MR DRUMGOLD: That's right.

45 **MS LONGBOTTOM:** - to pay any staff member out. So that is - that is a piece of evidence or a potential line of inquiry that would go to rebut that specific proposition. What view did you take about that?

50 **MR DRUMGOLD:** It wouldn't rebut that proposition, because there was never - it was never read as being an ex-gratia payment. When read fairly in the context of the trial, no one understood that Ms Higgins had ever advanced a proposition that she would be given an ex-

gratia payment. It was all about the deferment. It was all about keeping your job at the end of - Ms Higgins' perception of her keeping her job - or reapplying - successfully reapplying for her job.

5 **MS LONGBOTTOM:** And so for that reason, you considered that your disclosure obligations were not engaged?

10 **MR DRUMGOLD:** Well, it - it was not - it was - as I say, as a discrete piece of evidence, what was that evidence? That evidence is that Ms Brown had finished her evidence, had read a newspaper article, had misinterpreted what was said and wanted to go to court to say, "That's a lie" -

THE CHAIRPERSON: Yes.

15 **MR DRUMGOLD:** - when it was not a proposition to advance.

20 **THE CHAIRPERSON:** Let me put this to you, I hope succinctly, to wrap it up: that you understood that the tenor of Ms Higgins' evidence was that she was being counselled by Ms Brown that if she wished, she could work from the Gold Coast rather than from Canberra, because she might be more - much more comfortable working from the Gold Coast, and that she could - that might be unusual, but she could work from there and she would be paid a salary. And then at the end of a certain period of the election, well, all positions would be open. And she was being told, on Ms Higgins' evidence, that there was no point in applying because she wouldn't get a job. That was the proposition.

25 **MR DRUMGOLD:** Yes.

30 **THE CHAIRPERSON:** Ms Brown, no doubt reading a report of this sentence that's in front of us, "They'd pay me out for six weeks," thought that what Ms Higgins was saying was that she was being told if she went to the Gold Coast, she would be paid out an ex-gratia payment or a lump sum payment, and that would be the end of her involvement, and there's no point in applying. Two very different things. But your view was that Ms Brown was wrong in her interpretation of what the whole of the evidence was, and she put too much store in the significance of that sentence, which the jury, having heard all of it, wouldn't do, and therefore there was no point in doing anything further with Ms Brown's email because there was nothing in it.

MR DRUMGOLD: That's so.

40 **THE CHAIRPERSON:** I understand.

MR DRUMGOLD: I mean, it was never advanced to the jury by defence or by us that anyone had mentioned anything about an ex-gratia payment.

45 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: (Indistinct) that we were talking deferment.

50 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: Can I shift topics, then. During the course of the investigation, police conducted two what are called evidence-in-chief interviews or EICIs with Ms Higgins. Can you explain to me what an evidence-in-chief interview is and its role in the trial itself?

5 **MR DRUMGOLD:** So it's - it's - as I said yesterday or on Monday, that there's been constant reform in the prosecution of sex matters to do a range of things, to make sure that people bring unbiased minds to the assessment of the evidence, and we (indistinct) perceptions that, you know, you shouldn't be out late at night and all of these sort of things, or you shouldn't wear particular clothes, but also the journey that a sexual assault complainant has through the
10 criminal justice system in removing some of the barriers. One of the problems historically with prosecuting sexual assault matters is complainants have had to go in and tell someone - someone makes a statement and then they go to - used to go to a committal hearing and then give their - have to say it again and then go to trial, and the trauma associated with constantly having to tell these terrible things that have happened to you.

15 So part of the - to reduce the harm is that two - it's part of two - a raft of two things. Police, rather than taking a statement, record the evidence - record what the complainant says and put it on a disk. And that's called the evidence-in-chief interview. And it's called evidence-in-chief because it forms part of their evidence-in-chief. There is then potential for
20 some complainants to have that played at a time before recording - before the trial and record that and the cross-examination, and that's played. In this case, because Ms Higgins fell within a particular category, the process was that she would engage with police, could tell her story once and then could get it down and then she wouldn't have to keep repeating it. And then that disk then becomes the evidence-in-chief interview.

25 **MS LONGBOTTOM:** And as I understand it, as it transpired in about April or May, police advised you or informed you that they were intending to do a second EICI with Ms Higgins?

30 **MR DRUMGOLD:** I don't think they informed me; they - they raised it.

MS LONGBOTTOM: They raised it. And they told you that the purpose of that second EICI, at least in part, was to put to Ms Higgins some inconsistencies in her accounts in the first evidence-in-chief interview?

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And you held some concerns about that?

40 **MR DRUMGOLD:** Well, I held concerns because a subsequent interview would be traumatic on a - on a complainant. That's right.

MS LONGBOTTOM: And you expressed those concerns to police?

45 **MR DRUMGOLD:** Yes. My position was any - if there's an inconsistency, it should be left for defence. Or if there's anything over and above the basic complaint that's needed to be elicited, I can do that at the end of the evidence-in-chief interview. That was my approach. And that's - that's highly desirable that that happens.

50 **THE CHAIRPERSON:** Ms Longbottom, do you want to remove that exhibit from the screen?

MS LONGBOTTOM: Yes, please. Can we remove that exhibit? Mr Drumgold, the second EICI was conducted. Am I right that both of them were conducted by Mr Madders and Ms Frizzell? I suggest that to you.

5

MR DRUMGOLD: Yes, I - I wouldn't argue with that. I don't -

MS LONGBOTTOM: And I suggest -

10 **MR DRUMGOLD:** Yes, no, that is right. Yes.

MS LONGBOTTOM: And I suggest that Mr Madders wasn't a witness that was called at trial?

15 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: But Ms Frizzell was?

MR DRUMGOLD: Yes.

20

MS LONGBOTTOM: Operator, can you please display BOI.0008.0001.0004_0114. And if you can read there, Mr Drumgold, commencing about line 8. You will see it's part of your examination of Ms Higgins, and in part you're referring - if you look particularly at line 33 - to matters that come out of the EICI interview. Mr Whybrow then objects. And then you made a submission before the Chief Justice?

25

MR DRUMGOLD: Yes.

MS LONGBOTTOM: That submission was while the jury were still in court. And you see there you - you see there you say, in effect:

30

"I'm permitted to ask questions about what comes out of the EICI. To say that I couldn't would be to say that the evidence-in-chief - the quality of the evidence-in-chief is determined by the skill sets of those police officers asking in an EICI, which in this case was not high."

35

So that's an expression of your opinion as to the quality of the interviewing skill set in that EICI?

MR DRUMGOLD: The EICI was - looked like a cross-examination. It looked like a defence cross-examination.

40

THE CHAIRPERSON: I'm sorry, I didn't hear that.

MR DRUMGOLD: The EICI looked to me more like a defence cross-examination than evidence-in-chief.

45

THE CHAIRPERSON: Yes.

MR DRUMGOLD: And the point that I was making was the evidence in there was not effectively led in the evidence-in-chief interview. The objection was that I should be

50

prohibited from asking a question because that question had been asked in the evidence-in-chief interview. And my submission was - although colloquially on the run, was that it was - the way that it was elicited was not effective, that I should be permitted to ask a question in a way that is more effective and of more assistance to the jury.

5

MS LONGBOTTOM: I'm not so concerned with the specific objection as we have - the opinion you expressed, sorry.

MR DRUMGOLD: Right.

10

THE CHAIRPERSON: What part of this, what we are seeing on the screen, are you talking about?

MS LONGBOTTOM: It's particularly - it's at the bottom of page 114 the transcript across to the top of page 115. Yes, if you can bring up both screens. Really, from the line, "To do so such" - the second-last line on page 114 through to the end of the first sentence on page 115.

15

THE CHAIRPERSON: So this is - Mr Whybrow has risen to object, so he's addressing the judge, and then Mr Drumgold responds addressing the judge and says, "Something that you are interested in." Is that right, Ms Longbottom?

20

MS LONGBOTTOM: That's right. And precisely what I'm interested in, Mr Drumgold, is the opinion you expressed about the quality or the skill sets of the police officers asking the questions.

25

MR DRUMGOLD: Well - what I'm saying is I'm responding directly to the substance of the - the objection was I shouldn't be allowed to ask questions because police had asked the questions, and I'm saying the police - the way the police asked the questions did not have - I should not be prohibited because then I am limited by their skill sets in leading evidence-in-chief in a persuasive way. So I'm - my submission to her Honour was I should be allowed to ask those questions in a way that does display better advocacy (indistinct).

30

THE CHAIRPERSON: I need a little background on the legal position, because - and I suspect everyone listening does too, because it pertains to how you run these cases under ACT legislation.

35

MR DRUMGOLD: Yes.

THE CHAIRPERSON: So the first point is that in a case like this, the evidence-in-chief of the complainant is recorded - the evidence-in-chief of a complainant is, in the first instance, constituted by her first statement to police in response to questions from police. That's recorded, and one anticipates that that is as comprehensive a statement of the complainant's account as it is possible to get. So that's the first step. You might not achieve that, but that's the intent. Is that right?

40

MR DRUMGOLD: Yes, the general intent is walk into the police station.

THE CHAIRPERSON: Yes.

MR DRUMGOLD: "This terrible thing has happened to me." "We will send you to SACAT. There will be two investigators. We will sit down, and we will take an evidence-in-chief interview of - of the allegation." That then becomes the evidence-in-chief interview. That comes to us instead of a statement. And the witness doesn't have to talk about it again and again and again.

THE CHAIRPERSON: Yes. Yes.

MR DRUMGOLD: I then play that during trial -

THE CHAIRPERSON: Yes.

MR DRUMGOLD: - and can lead - well, the - the Act is silent on it, but there is no - as I point out in there, there is no statutory prohibition on me asking additional questions.

THE CHAIRPERSON: Yes. But in practice, is it regarded that you should be - there is some restraint on your liberty to adduce further evidence-in-chief?

MR DRUMGOLD: No. No. What's - what I ask - so for example, at the time the evidence-in-chief interview is - the complaint is made, I might be aware of more elaboration -

THE CHAIRPERSON: Yes.

MR DRUMGOLD: - or they might have been a bit succinct or there might be some peripheral issues that I will lead. And in this case, I led quite a bit from her. But this was dealing with a specific complaint, that simply because the question was in the second evidence-in-chief interview, that that itself presented a barrier. Now, (a) there's statutory bar, but (b) I might want to ask those questions because I can - I can ask them in a way that is - that a jury might better understand or -

THE CHAIRPERSON: Can I just understand this. Mr Whybrow, at line 37, begins his objections. He says he objects to it. And it seems that he objects to your question just because you are asking for something that Ms Higgins had already recounted in her evidence-in-chief interview. Is that a legally valid objection?

MR DRUMGOLD: No.

THE CHAIRPERSON: So -

MR DRUMGOLD: No, but - no - well, yes and no. I mean, her Honour - my concern at this time is her Honour might rule that it's simply repetitive and -

THE CHAIRPERSON: No, that's - so an objection might be founded upon the basis that what you're asking is repetitive, which doesn't sound to me like much of an objection, I must say. But nevertheless -

MR DRUMGOLD: Well, I think that's the heart of the objection.

THE CHAIRPERSON: But that's the heart of the objection, that it's repetitive, and you are really just trying to re-emphasise what has already been said and - is that right?

MR DRUMGOLD: And I'm saying it is not repetitive. Yes, it has been led, but it's been led in a way that is not of the highest quality -

5 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: - and I'm trying to lead it in a -

10 **THE CHAIRPERSON:** Well, you are trying to justify your - a question that might be regarded as repetitive by saying that you are doing it because she didn't give a fair account of it in her evidence-in-chief interview because of the character of the questioning.

MR DRUMGOLD: That's the effect of what I'm saying, yes.

15 **MS LONGBOTTOM:** And so you expressed an opinion that the character of the questioning was (indistinct)?

20 **MR DRUMGOLD:** Correct. I mean, again, this is - this is not on calm reflection. We are - we are in the middle of a trial, and there is an objection, and you deal with it. You don't send a jury out because a trial would take five months to get through. So on the run, that was - that was the heart of what I was saying.

25 **MS LONGBOTTOM:** And on reflection, do you see any problem with expressing an opinion of that type in front of the jury?

30 **MR DRUMGOLD:** I would accept that if I were writing submissions on this, I would address it differently. I would probably find alternative words to use. But the effect of what I was saying was I - it's not - the reason why I'm saying it's not a repetitive question. That's the effect. Now, again, I'm quite confident that every advocate that leads complex trials makes errors or phrases things in ways on the run in the heat of a trial that they would not do if they weren't in the heat of a trial. And that's - I accept that as a proposition.

35 **MS LONGBOTTOM:** And the reason why you wouldn't do it in the heat of the trial is because there was no evidence - or you hadn't put to Ms Frizzell, for example, that her skill set in conducting the second EICI was not (indistinct)?

MR DRUMGOLD: No.

40 **MS LONGBOTTOM:** Okay.

MR DRUMGOLD: Well, it was not a jibe at the police. It - it was a reference to juxtaposing questionings by two people, one is an advocate and one is a police officer. It was never intended to be a criticism of police.

45 **THE CHAIRPERSON:** Shall we remove that from the screen?

MS LONGBOTTOM: Yes, please, Mr Sofronoff. Now, Mr Drumgold, Senator Reynolds was a witness at trial?

50 **MR DRUMGOLD:** Yes, she was.

MS LONGBOTTOM: And as you say in your statement at paragraph 400, she was an important witness?

5 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And in May of 2022, you held a proofing conference with Senator Reynolds?

10 **MR DRUMGOLD:** Yes, I did.

MS LONGBOTTOM: And if the file note is anything to go by - it's about two and a half pages - it was a reasonably lengthy proofing conference?

15 **MR DRUMGOLD:** I would - I would accept that. I mean, how long is a piece of string? It's - it wasn't a five-minute chat.

MS LONGBOTTOM: Yes. And at the proofing conference was Ms Reynolds' partner?

20 **MR DRUMGOLD:** Yes, I now know.

MS LONGBOTTOM: Now, do you recall if during the proofing conference you said to Senator Reynolds something to the effect that there was no property in witnesses?

25 **MR DRUMGOLD:** I don't recall specifically, but I would normally - if one were to inquire whether one could talk to the defence, I would - I would say, "Yes, we don't own a witness."

MS LONGBOTTOM: Because as we have explored, that's just an uncontroversial proposition?

30 **MR DRUMGOLD:** That's - that's a fact.

MS LONGBOTTOM: Do you -

35 **MR DRUMGOLD:** I don't remember whether I specifically did it or not. I would have to check the - the proofing notes. If it came up, I would do it.

MS LONGBOTTOM: Do you recall if during the proofing conference you discussed the fact that Ms Higgins may bring a civil claim against the Commonwealth?

40 **MR DRUMGOLD:** No.

MS LONGBOTTOM: You don't recollect it or you dispute that you did?

45 **MR DRUMGOLD:** I don't - I don't recollect doing that.

MS LONGBOTTOM: You don't recollect. Okay. But you are aware that as matters ultimately transpired, Ms Higgins did bring such a claim? We can move on -

MR DRUMGOLD: I - I - I was aware of the "lying cow" comment. But I think I was careful not to traverse it because it was uncomfortable. But I am not sure that I was aware that there was civil litigation. I have read somewhere that there was some sort of -

5 **THE CHAIRPERSON:** At the time, you didn't know that?

MR DRUMGOLD: No, I don't believe I did.

10 **MS LONGBOTTOM:** Now, operator, can you please display WIT.0070.0001.0015_0725. So, Mr Drumgold, this is part of your examination of Ms Reynolds. And you will see at about line 10, you refer to making an application?

MR DRUMGOLD: Yes.

15 **MS LONGBOTTOM:** And the application was what is described as a section 38 application?

MR DRUMGOLD: Unfavourable.

20 **MS LONGBOTTOM:** And can you explain to me - and it was limited to a meeting that occurred between Ms Higgins and Ms Reynolds on 1 April of 2019?

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** Can you explain to me what a section 38 application is and what its effect is in terms of how you take the evidence of a witness?

30 **MR DRUMGOLD:** A section 38 application was introduced in the Commonwealth Evidence Act in 1995, and it's carried across into our Evidence Act in 2011. It's a departure from previous law, which was called hostile witness - a hostile witness provision. The tenet of - there are various bases, but for the purposes of this, the tenet is that if a witness says something that is not favourable - and the law says it doesn't have to be unfavourable to our case; it just has to be not favourable to our case - absent intervention, it then becomes untested evidence. And the law talks about cross-examination being the most effective engine
35 of discovering the truth that we have. So we have an adversarial system. So if a witness says something that is not favourable to the case, leave can be granted for the person leading that evidence, who would otherwise be prohibited from cross-examining, to test that proposition, to cross-examine it, or else it goes untested.

40 **THE CHAIRPERSON:** So it used to be the case - just to get it clear - that counsel calls a witness to prove the case, and if the witness, for example, deviates from what the witness was expected to say in evidence-in-chief, then you could apply to the court to have the witness declared hostile. But that was a high bar because you had to prove, really, something - almost malicious intent on the part of the witness. And what changed when the Evidence Act was
45 passed was that - and, sorry, I will go back a step. So if you couldn't have the witness declared hostile - if you got the witness declared hostile, you could cross-examine the witness.

50 But failing that, in most cases, you were just stuck with the negative evidence. And a judge would say, "Well, you called the witness and you called the evidence, and you're stuck with

it.” That was unsatisfactory because your opponent would not cross-examine contrary to the unfavourable evidence. Nobody would cross-examine. The evidence - the unfavourable evidence would be untested, and the judge wouldn't be assisted - or the jury wouldn't be assisted by testing of the evidence. So the statute lowered the bar so that in any case in which
5 a witness did something like that, the judge could give leave to cross-examination by declaring the witness unfavourable. And what you would have to establish to get to that point was much less than what you had to establish under the old common law rules.

MR DRUMGOLD: Yes, you are right. So 30 years ago, the hostile witness rule was an
10 exception to another rule that you could not impeach your own witness.

THE CHAIRPERSON: That's right.

MR DRUMGOLD: Now, with the unfavourable witness rule - it's part of a raft of a number
15 of provisions. So, for example, there's another provision that if you're leading a - you're leading a witness that is only giving - if you are cross-examining a witness and that witness is favourable to your case, objection could be made to you cross-examining that witness. I don't know the provision, but there - instead of focused on rules, it focused on what delivers testing
20 evidence.

THE CHAIRPERSON: Yes. So in the days before this amendment, if I'm cross-examining
a witness and the witness is plainly on my side, then a judge might warn me that because I'm
leading the witness who is plainly favourable to me, the answers will be given - may be given
less weight than otherwise.

MR DRUMGOLD: That's right.

THE CHAIRPERSON: Whereas now, the position is what under the statute?

MR DRUMGOLD: Well -

THE CHAIRPERSON: I might be stopped cross-examining - I might be told, "You can't
cross-examine. Don't lead."

MR DRUMGOLD: You could be.

THE CHAIRPERSON: Is that right?

MR DRUMGOLD: Yes, in certain circumstances. Or the Evidence Act makes provisions for
40 such.

THE CHAIRPERSON: Yes. So the result is evidence-in-chief might turn into
cross-examination, and cross-examination might turn into evidence-in-chief, whatever works
best for getting at the truth.

MR DRUMGOLD: That's right.

MS LONGBOTTOM: And in this particular matter on this day, you made the application. It
was unopposed. And commencing at about line 42, you go on to commence
50 cross-examination of Senator Reynolds with respect to that (indistinct). Now, Mr Drumgold,

you would accept that you have a duty as a prosecutor not to advance allegations without evidence in support?

THE CHAIRPERSON: Or information in support.

5

MS LONGBOTTOM: Or information in support?

MR DRUMGOLD: Yes. Yes.

10 **MS LONGBOTTOM:** Operator, can I please turn to the next page of the transcript. And can I ask you to read, Mr Drumgold, the proposition you put to Senator Reynolds at line 29.

MR DRUMGOLD: Yes, I see that.

15 **MS LONGBOTTOM:** So you are there putting to Senator Reynolds that she arranged for her husband to sit in the back of the court?

MR DRUMGOLD: Yes.

20 **MS LONGBOTTOM:** So the effect of the proposition you are putting to Senator Reynolds is that she organised that her partner be at court?

MR DRUMGOLD: Or facilitated it, yes.

25 **MS LONGBOTTOM:** What evidence did you have to support - or information did you have to support that allegation?

MR DRUMGOLD: Well, the fact that he was in the court.

30 **THE CHAIRPERSON:** That can't be enough.

MR DRUMGOLD: And - well, he lived in Perth and was in the court during the trial. So if you are asking - a strong circumstantial inference that he hasn't just got lost and wandered into a courtroom.

35

MS LONGBOTTOM: So you don't see any problem with putting that allegation?

MR DRUMGOLD: Well, I think it was accepted that it occurred, that she had.

40 **MS LONGBOTTOM:** That's not my question. My question is: did you see any problem in putting that allegation?

MR DRUMGOLD: I felt that there was sufficient - sufficient evidence there. She was a witness in a trial - he knew that she was a witness in a trial, and he ended up sitting in the courtroom. I felt that there was sufficient circumstantial evidence that she had facilitated that.

45

THE CHAIRPERSON: What, for an improper purpose? She had facilitated that for an improper purpose?

50 **MR DRUMGOLD:** To - to monitor what evidence was being given.

THE CHAIRPERSON: With a view to telling her?

5 **MR DRUMGOLD:** Well, I don't - I didn't put that to her, I don't think.

THE CHAIRPERSON: Well, he was plainly monitoring the evidence in the sense that he was there to hear the evidence.

10 **MR DRUMGOLD:** Well -

THE CHAIRPERSON: But that's not what we are talking about.

MR DRUMGOLD: The - the answer to the question is I felt that there was sufficient circumstantial evidence to conclude that she facilitated it.

15 **THE CHAIRPERSON:** But the circumstantial evidence was just his presence, wasn't it?

MR DRUMGOLD: Just his presence in a trial that his partner was giving evidence in -

20 **THE CHAIRPERSON:** Well, of course -

MR DRUMGOLD: - on the other side of the country from where he lived.

THE CHAIRPERSON: But - all right.

25 **MS LONGBOTTOM:** So you put that proposition, which Senator Reynolds rejects. Then you go further at line 33. You put to Senator Reynolds that her partner has been talking to her about the evidence that Ms Higgins gave. What evidence did you have to support that allegation?

30 **MR DRUMGOLD:** Again, supposition from him being in there.

MS LONGBOTTOM: So you had no evidence to support -

35 **THE CHAIRPERSON:** But you know - would you agree with this, Mr Drumgold: there is a difference between asking a witness, "Have you discussed this case with anybody before you gave evidence?" Answer, "No." And this question: "I suggest to you you discussed this case with other people before you gave evidence." Answer, "No." Because the first is an open inquiry, and the second one suggests that you've got information that the answer that comes is false. A big difference, isn't there? Do you accept that there's a difference first?

40 **MR DRUMGOLD:** Potentially, but we are missing one other piece of circumstantial evidence, was that she -

45 **THE CHAIRPERSON:** Just let's - I'm not talking about the case. I'm just asking -

MR DRUMGOLD: Okay.

50 **THE CHAIRPERSON:** - about the ethics of cross-examination. Do you accept that there's a difference between asking whether something happened and putting that it had happened?

MR DRUMGOLD: Not in standard advocacy.

THE CHAIRPERSON: You're not aware of that?

5

MR DRUMGOLD: "Can I suggest to you" -

THE CHAIRPERSON: Yes, please.

10 **MR DRUMGOLD:** - and dismissing the words, "Can I suggest to you," and putting the proposition, in modern advocacy, it - I see it every day.

15 **THE CHAIRPERSON:** You see it every day that proposition - no, I know you think you have a foundation for this, and you may be right that you have a foundation for what you put. So let's put that to one side. I'm asking you about the theory of it. Do you say that an advocate is free to put a proposition as a fact to a witness although the advocate has no basis - has no information to support that proposition?

20 **MR TEDESCHI:** Chairman, I'm sorry to interrupt.

THE CHAIRPERSON: Yes.

25 **MR TEDESCHI:** Can I suggest that the way in which the question was put effectively is this: "Has he been talking to you about the evidence that Ms Higgins gave?"

30 **THE CHAIRPERSON:** Well, let me go ahead, Mr Tedeschi, because we can discuss what actually happened. But I just want to get to - I just want to get to an understanding of Mr Drumgold's appreciation of whether there's any difference between how a question is put as a matter of - which to me seems to be an important difference. But I would like to understand what Mr Drumgold's view is because he too is an experienced advocate. And if I'm wrong about that, then I would like to think about it. But if I'm right about it, I would like to know what his understanding is. But we will come to the actual transaction in a minute. Because once we have got the theory nailed down, we can then talk about what happened.

35 **MR TEDESCHI:** I just felt it is implicit in the question that -

THE CHAIRPERSON: Implicit in my question?

40 **MR TEDESCHI:** Yes, that you are suggesting that he's put it -

45 **THE CHAIRPERSON:** No, no, no. I'm asking theory, Mr Tedeschi. Don't be concerned. I'm not putting to Mr Drumgold anything about how he behaved. We will come to that. So the question I put to you is: do you see a difference between putting a proposition as a fact to a witness and asking a witness whether that is a fact?

MR DRUMGOLD: Not in -

THE CHAIRPERSON: For the one you need a basis; for the other you don't.

50 **MR DRUMGOLD:** Not in contemporary advocacy.

THE CHAIRPERSON: All right. Thanks.

5 **MR DRUMGOLD:** So puttage is - is, I think, the term used. And puttage is generally phrased as I have phrased it but with the intention of - with the clear understanding that that's a question.

THE CHAIRPERSON: Yes. All right. Well, you can - you go ahead, Ms Longbottom.

10 **MR DRUMGOLD:** And, indeed, she's clearly interpreted it as a question because she's answered it.

THE CHAIRPERSON: Well, it is a question, yes. But the kind of question is in issue. You go ahead, Ms Longbottom.

15 **MS LONGBOTTOM:** I just want to make sure I understand this precisely, Mr Drumgold. The first proposition you put to Senator Reynolds is:

20 "You arranged for your husband to sit in the back of the court, didn't you?"
That's correct?

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** Your rationalisation for putting that proposition is that it was an inference that you drew from the fact that he was in the back of the courtroom?

MR DRUMGOLD: Yes.

30 **MS LONGBOTTOM:** Did you consider there might be a myriad of other explanations for why he was in the back of the courtroom?

MR DRUMGOLD: And - and, again, in the context of puttage, I'm saying - I'm really saying, "Did you arrange for your husband to sit in the back?"

35 **THE CHAIRPERSON:** When you say "puttage", is that spelt p-u-t-t-a-g-e?

MR DRUMGOLD: Put - I - you put something to somebody.

40 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: Puttage. It's - so, again, it - what you are deconstructing is a stylistic approach to puttage. What I'm saying to her there, "I'm suggesting to you that your husband - that you arranged for your husband to sit in the back of the court," which is really effectively saying, "Did you arrange for your husband to sit in the back of the court?" And she's clearly taken it as a question, because she's answered it in the negative. So -

THE CHAIRPERSON: Now, from what you just said, the question that you actually put - "You arranged for your husband to sit in the back of the court, didn't you?" - in your

mind, is the same as asking, "Did you arrange for your husband to sit in the back of the court?"

MR DRUMGOLD: Yes. That's correct.

5

THE CHAIRPERSON: You think that's the same?

MR DRUMGOLD: That's correct.

10 **THE CHAIRPERSON:** All right. Thanks.

MR DRUMGOLD: And it's used every day in -

THE CHAIRPERSON: Sorry?

15

MR DRUMGOLD: It's used every day in courts. That type of stylistic puttagge is used every day in courts.

MS LONGBOTTOM: By you?

20

MR DRUMGOLD: Well, by many of my opponents also.

MS LONGBOTTOM: Now - but in relation to that first proposition, you arranged - just to make sure I'm clear, what evidence did you have -

25

THE CHAIRPERSON: I think he's -

MS LONGBOTTOM: He's answered. Okay. Okay.

30 **MR DRUMGOLD:** Sorry, and the fact that she had been seeking transcripts.

MS LONGBOTTOM: Sorry?

35 **MR DRUMGOLD:** She - I think I had a text at this stage that she had been seeking transcripts also. So she had been trying to - there was evidence that she was trying to obtain evidence from the court.

40 **MS LONGBOTTOM:** But what you had been told about those - that SMS - and I can bring it to you, if you want - was that Senator Reynolds was seeking transcripts not for herself but for her lawyers?

MR DRUMGOLD: Right.

THE CHAIRPERSON: At least that's what she said.

45

MS LONGBOTTOM: Yes.

MR DRUMGOLD: At least that's what she said. I mean, my mind had - yes.

50 **MS LONGBOTTOM:** Operator, can you please bring up WIT.0070.0001.0019_0002.

THE CHAIRPERSON: Is this another subject?

MS LONGBOTTOM: It is.

5

THE CHAIRPERSON: Why don't we have a break, then?

MS LONGBOTTOM: Yes. Certainly.

10 **THE CHAIRPERSON:** 20 minutes.

<THE HEARING ADJOURNED AT 11.05 AM

<THE HEARING RESUMED AT 11.31 AM

15

THE CHAIRPERSON: Subject to further direction by me, the matters contained in the following five documents described as the investigative review documents and referred to in the statements of Mr Drumgold and Mr Whybrow - (1) the minute by Marcus Boorman dated 3 June 2001, (2) the report of Scott Moller dated 7 June 2021, (3) the investigation review of Commander Smith dated 2 August 2021, (4) an undated document titled Identified Discrepancies and (5) an undated document titled Discrepancies - shall not be published further.

20

25 For the members of the media, can I explain that the direction I have just given operates in the future, not for the past, and I have made it at this point to maintain the status quo. After lunch, I will hear from Mr Tedeschi if he wishes to make further submissions about whether I should extend that non-publication order for a greater time. But at the moment, and subject to what I might hear from anybody else, I will think about the matter and form a concluded view after hearing submissions from anybody who wishes to make submissions to me afterwards.
30 So I hope that's clear. Yes.

MS CHRYSANTHOU: (Indistinct) material that is presently on the internet that predates your Honour's order.

35 **THE CHAIRPERSON:** Leave it. That has been published.

MS CHRYSANTHOU: And your Honour wouldn't -

40 **THE CHAIRPERSON:** It's like a newspaper that's been printed. It's there. It has been published. While it remains in existence, it's not a further publication. So your client - or -

MS CHRYSANTHOU: Not my client. I've just been asked to clarify this.

45 **THE CHAIRPERSON:** No, it's not your client. Media companies that have things on the internet needn't do anything about them. But you must not write new stories containing the content of those documents.

MS CHRYSANTHOU: Thank you.

50 **THE CHAIRPERSON:** Is that clear?

MS CHRYSANTHOU: Thank you.

THE CHAIRPERSON: And we will review the matter after lunch. Yes, Ms Longbottom.

5

MS LONGBOTTOM: Thank you, Mr Sofronoff. Operator, can you please display.0001.00019_0002. That's up already. So, Mr Drumgold, you will recall that before the adjournment we were talking about the evidence Senator Reynolds was to give at trial. You will see this is a letter directing Senator Reynolds to - a subpoena, in effect, that she be available to attend the trial between 4 October and 4 November 2022?

10

MR DRUMGOLD: Yes.

MS LONGBOTTOM: But it's uncontroversial that your office engaged in discussions with Senator Reynolds and her lawyer about her schedule and arrived at an agreement that she not be in Australia for the period 4 October to 4 November 2022 but that you would accommodate her availability on particular dates?

15

MR DRUMGOLD: I imagine that would have occurred.

20

THE CHAIRPERSON: How many witnesses did you plan to call?

MR DRUMGOLD: I can't -

25

THE CHAIRPERSON: Over 40?

MR DRUMGOLD: I - I'm sorry, Mr Sofronoff.

THE CHAIRPERSON: Anyway -

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MR DRUMGOLD: This was a long time ago. I don't -

THE CHAIRPERSON: No, that's all right. But -

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MR DRUMGOLD: I don't know the precise number.

THE CHAIRPERSON: No, no. I'm asking you the order of number.

MR DRUMGOLD: What I - yeah, again, I -

40

THE CHAIRPERSON: It doesn't matter.

MR DRUMGOLD: It would be in a witness list, the number, and then -

45

THE CHAIRPERSON: Yes. Don't worry about it, Mr Drumgold. Anyway, the usual procedure, as I understand it, is you serve subpoenas on witnesses -

MR DRUMGOLD: Yes.

THE CHAIRPERSON: - to be safe. They might be willing to come, but you always serve subpoenas.

MR DRUMGOLD: Yes.

5

THE CHAIRPERSON: And the subpoenas are always expressed to require an attendance on the day that the trial starts -

MR DRUMGOLD: That's right.

10

THE CHAIRPERSON: - and until excused.

MR DRUMGOLD: That's right.

15

THE CHAIRPERSON: But you don't expect 20 or 30 people to turn up on Monday morning?

MR DRUMGOLD: No, we sort them by consultation.

20

THE CHAIRPERSON: Yes. Thank you.

MR DRUMGOLD: That's right. And that process would have occurred.

25

MS LONGBOTTOM: And perhaps just to assist in clarifying that, can we please bring up WIT.0070.7001.7021_0001. This is one of a series of emails your office sent and received from Senator Reynolds' lawyer at Clayton Utz arriving at dates upon which her evidence could be scheduled. And that was in part because Senator Reynolds was overseas during part of the trial?

30

MR DRUMGOLD: I became aware that she was overseas. But, yes, that - that's what it looks like.

35

MS LONGBOTTOM: But it's uncontroversial that you were aware that your office was accommodating Senator Reynolds' availability amongst her other work commitments to attend and give evidence at trial?

MR DRUMGOLD: We would have done that, yes.

40

MS LONGBOTTOM: Yes. Operator, can you please display WIT.0070.0001.0015_0579. If you could take a moment to read that, Mr Drumgold, particularly from line 10. Just to put this part of the transcript in context, as I understand it, at one stage the trial was scheduled to run for a month. But as events transpired, it occupied less time than that?

45

MR DRUMGOLD: Yes. A whole lot of witnesses were called off.

50

MS LONGBOTTOM: And so on a number of occasions, court finished early, for example, because other witnesses were not available - the next witness wasn't available to give evidence?

50

MR DRUMGOLD: Yes, that's right.

THE CHAIRPERSON: Ms Longbottom, it might help me at least to know what date we are talking about, that is, the Tuesday or Wednesday that Mr Drumgold was referring - referred to in that extract.

5

MS LONGBOTTOM: Well, can I ask you, Mr Drumgold - so this is dated 13 October 2022. So this is the date of the transcript. You are saying there - Mr Sofronoff, are you referring there to line 20 of the transcript?

10 **THE CHAIRPERSON:** No, I just want to - no, we know that the subpoena required her attendance I think on 4 October, and I just want to know what date, Tuesday or Wednesday, it was going to be.

MS LONGBOTTOM: I see.

15

THE CHAIRPERSON: And we saw that there was an arrangement made for Senator Reynolds to turn up on the - I think it was the 18th. So is Tuesday or the Wednesday the 18th?

20 **MS LONGBOTTOM:** That's right. Yes. Can I suggest, Mr Drumgold, that the -

THE CHAIRPERSON: Don't suggest it; just tell him.

25 **MS LONGBOTTOM:** The arrangement was that Senator Reynolds would appear on Tuesday, 18 October?

THE CHAIRPERSON: According to the letter.

30 **MR DRUMGOLD:** Okay. Yes. I accept that.

THE CHAIRPERSON: And the Tuesday, therefore, is the 18th that is being discussed.

MS LONGBOTTOM: Yes.

35 **THE CHAIRPERSON:** Is that right?

MS LONGBOTTOM: That's right. Or the next day.

40 **MR DRUMGOLD:** Again, I'm agreeing with these propositions, but I don't -

THE CHAIRPERSON: Well, you can take it that whatever -

MR DRUMGOLD: I'm lucky enough to have people organising things, so -

45 **THE CHAIRPERSON:** - Ms Longbottom puts to you that comes from documents you can accept.

MR DRUMGOLD: Yes.

50 **THE CHAIRPERSON:** And if there's an error in them, we can fix it up later.

MR DRUMGOLD: Yes, there were some scheduling changes and some witnesses were moved and witnesses came forward and -

5 **MS LONGBOTTOM:** And we can go to the documents if it's necessary, but originally Senator Reynolds was to give evidence on 21 October, but it was subsequently arranged - that was a Friday. It was subsequently arranged that she would give evidence on Tuesday, 18 October, and that was shortly after she flew back into the country from overseas?

10 **THE CHAIRPERSON:** You don't recall?

MR DRUMGOLD: I don't recall. I know that she was overseas, because it triggered a conversation between myself and my opponent. And I know that they were trying to get her back for a - at a particular time and - I think here we were coming to the end of the trial.

15 **THE CHAIRPERSON:** Yes. I think you are going to have to put the chain of letters, if you've got them, Ms Longbottom.

20 **MS LONGBOTTOM:** Yes, I'm content to do that. Operator, can you please go back to WIT.0070.0001.0021_001. And if you can start with _003. So this chain of emails starts with the letter containing the subpoena for Senator Reynolds to attend to give evidence.

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** If you turn to the next page, please, operator, back. On 18 August, Dr Tsacalos -

MR DRUMGOLD: Tsacalos, yes.

30 **MS LONGBOTTOM:** Tsacalos. And Dr Tsacalos was Senator Reynolds' lawyer?

MR DRUMGOLD: I believe it was, yes.

35 **MS LONGBOTTOM:** He writes to Erin Priestly of your office asking if it is possible to schedule Senator Reynolds' evidence for 10 or 11 October. Operator, if you can please go to the next page. Ms Priestly then replies on 18 August indicating that either date is possible and that she will make a note that Senator Reynolds is to give evidence on those dates.

MR DRUMGOLD: Okay.

40 **MS LONGBOTTOM:** And then at the top of the page, there's a further email from Dr Tsacalos indicating there has been a slight change to the Senator's plans - she's now travelling between 7 and 17 October - and asking whether or not it's possible to schedule her to give evidence either on Monday, the 24th, or the Friday, the 21st.

45 **MR DRUMGOLD:** I see that.

MS LONGBOTTOM: Operator, can you please display WIT.0070.0001.0022 (indistinct). You will see at the bottom of the page there, Mr Drumgold, on 26 September, Ms Pitney of

your office seeks confirmation that Senator Reynolds is available to give evidence on 11 October. And at the top of the page, Dr Tscalos responds -

THE CHAIRPERSON: Tscalos.

5

MS LONGBOTTOM: Tscalos responds indicating that he had previously sent an email with respect to her availability and indicated that he hadn't had a response?

MR DRUMGOLD: Yes.

10

MS LONGBOTTOM: Operator, can you please display WIT.0070.0001.0023_0001. There, Ms Pitney is sending an email to Dr Tscalos on 22 September, apologising for not responding and confirming with counsel that 21 October 2022 would be suitable. I suggest that's confirmation with you as counsel with carriage of the matter?

15

MR DRUMGOLD: It would be -

THE CHAIRPERSON: It might have been your junior.

20 **MR DRUMGOLD:** Yes, it would be one of us. We were - we were working out the schedule (indistinct).

THE CHAIRPERSON: Yes. This is the sort of thing you do all the time.

25 **MR DRUMGOLD:** Every - all the time.

THE CHAIRPERSON: Yes.

MR DRUMGOLD: That's right. Basically trying to accommodate the witness's -

30

THE CHAIRPERSON: Yes.

MR DRUMGOLD: - availability and convenience and the court's availability, and we are trying to mesh the two things.

35

MS LONGBOTTOM: And the essential point there, wasn't it, Mr Drumgold, is that you weren't holding Senator Reynolds to the subpoena which required her to be available, in effect, for a month?

40 **MR DRUMGOLD:** No, of course not.

MS LONGBOTTOM: You were scheduling her evidence around her other commitments?

45 **MR DRUMGOLD:** We were trying to accommodate her other commitments, but the primary scheduling priority -

THE CHAIRPERSON: Consistent with her other commitments, provided that the requirements for the trial take precedence.

MR DRUMGOLD: That's right. So we are trying to - we are really trying to fuse the two things together.

THE CHAIRPERSON: Yes.

5

MR DRUMGOLD: (Indistinct) or my staff are trying to do that as best they can.

MS LONGBOTTOM: And then, operator, can you please display WIT.0070.0001.0024_0001. So as part of that accommodation exercise we have been talking about, on 12 October, Ms Pitney of your office emails Dr Tscalos indicating with respect to Senator Reynolds that her evidence is to be on 18 October -

10

MR DRUMGOLD: Right.

MS LONGBOTTOM: - and that the prosecution case is likely to be closed on 21 October, which would make it, of course, problematic for her to give evidence on the 24th, being the other date that had earlier been discussed.

15

MR DRUMGOLD: Further to what Mr Sofronoff said, those estimates would have probably come from myself and my junior as we are planning the running to the end of the trial.

20

MS LONGBOTTOM: Operator, can you please display WIT.0070.0001.0025_0001. You will see there that's a further email from Dr Tscalos indicating to you that she's - or indicating to Ms Pitney that she's overseas. She's looking to see if she can return early, but it's unlikely she would be in a position to give evidence until the following Tuesday or Wednesday.

25

THE CHAIRPERSON: So that's 18 and 19 October?

MR DRUMGOLD: This is jogging my memory. There was some suggestion that if she couldn't get back, we may consider AVL. We were trying to sort of work out a way so that if she was stuck over there, the trial wasn't delayed and we - and it looks - so would prefer to give evidence in person. That seems to be apropos of maybe some discussion around giving evidence from - via AVL.

35

THE CHAIRPERSON: Yes. And she was somewhere in Africa, and it was hard to get flights?

MR DRUMGOLD: She was in Rwanda, and it was coming to an end. There was another dynamic, and I can't - it was something to do with sitting week and whether or not she was compelled to give evidence during a sitting week.

40

THE CHAIRPERSON: We will come to that and see, yes.

MR DRUMGOLD: But that's - we are discussing AVL, can you get flights back. That's what we are essentially talking about there.

45

THE CHAIRPERSON: Yes.

MS LONGBOTTOM: But if you just simply scroll down, operator, to the bottom of that page. Insofar as you're discussing AVL, the date of evidence via AVL is 18 October.

MR DRUMGOLD: Right. Okay.

5

MS LONGBOTTOM: Operator, can you please display WIT.0070.0001.0026_0001. In relation to the - Mr Sofronoff, Mr Drumgold just made reference to the location where Senator Reynolds was overseas. Can I ask that there be a non-publication order in respect of that particular -

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THE CHAIRPERSON: I direct that the actual location that Senator Reynolds visited at the time under discussion not be published. Is there some reason for this? Anyway -

MS RICHARDSON: I don't act for Senator Reynolds, but I'm taking instructions as to why -

15

THE CHAIRPERSON: It doesn't matter. You can figure it out. It just seems odd. Never mind. Let's go on.

MS LONGBOTTOM: So you will see there, Mr Drumgold, at the top of the page, Dr Tsacalos emails on 13 October in the evening indicating some concern because he has seen media reports suggesting that Senator Reynolds is expected to give evidence on Tuesday and reiterating that she is overseas, and she's looking to see if she can get earlier flights, but you would be surprised that she's been called to give evidence on Tuesday without any further communication from you or from your office and seeking urgent clarification.

25

MR DRUMGOLD: Okay. I think we might have been - I can only speculate, but there was, I imagine, some fairly intense media interest in her giving her evidence, and I think we were trying to work out the rest of the trial schedule and exploring options to call her evidence before the end of the trial, and the media might have reported on it. I - I don't know. I didn't read the media around that time, but that's - I'm assuming that that's what he's referring to.

30

MS LONGBOTTOM: But the essential point is your office was working together with Ms Reynolds to accommodate her evidence -

35

MR DRUMGOLD: Yes, we were. Yes, we were.

MS LONGBOTTOM: - and you were aware of that?

MR DRUMGOLD: Yes. Yes.

40

MS RICHARDSON: I'm sorry to interrupt. I can indicate there isn't a sensitivity about the reference to where Senator Reynolds was because we have seen it - it is on the internet as to where she was. There is no sensitivity.

45

THE CHAIRPERSON: The non-publication direction I made a moment ago concerning Senator Reynolds' whereabouts at the time under discussion in evidence by Mr Drumgold is vacated. Go ahead, Ms Longbottom.

MS LONGBOTTOM: Thank you, Mr Sofronoff. Operator, can we now, go please, to WIT.0070.0001.0015_0579. Mr Drumgold, we are returning to where we started, having gone through that chain of emails.

5 **MR DRUMGOLD:** Okay.

MS LONGBOTTOM: You will see at line 12, you state - you understand that Senator Reynolds will be able to attend to give evidence on either Tuesday or Wednesday. So I think that's 18 or 19 October.

10

MR DRUMGOLD: Yes. I would accept that.

MS LONGBOTTOM: The Chief Justice asks whether she is under subpoena. You respond that she is. The Chief Justice expresses her expectation that Senator Reynolds be there on Tuesday and, at about line 27, states that the subpoena required her to be there from the 4th, continuously after that. And can I emphasise the words that follow:

15

"...until you require her, Mr Prosecutor."

20 To that you respond:

"Indeed, your Honour."

25 Now, Mr Drumgold, did you see any problem with not conveying to her Honour at that time that you had been working together with Senator Reynolds to accommodate the giving of her evidence and that you had, in effect, relieved her from the obligation under the subpoena to be available continuously for that month?

30 **MR DRUMGOLD:** Ms Longbottom, that would have been abundantly clear to everybody in the courtroom who has ever been involved in a criminal trial.

THE CHAIRPERSON: It must have been, but what did her Honour mean - what did - I should say, what did you understand her Honour to mean -

35 **MR DRUMGOLD:** I think -

THE CHAIRPERSON: - by making that point that the witness was required to be there continuously?

40 **MR DRUMGOLD:** Everybody - everybody knows that we don't have however many witnesses we need sitting there on -

THE CHAIRPERSON: What did you understand - what was the point that you understood her Honour making?

45

MR DRUMGOLD: Her Honour was saying, "Technically, witnesses are under subpoena the whole time, and I expect them to be here when the court requires them." I had made it clear that there was conversations between my office and Senator Reynolds around scheduling, and her Honour was really emphasising the court is paramount in these circumstances and technically she should be here even - again, this is against the context - everybody in the

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courtroom knows the trial that was this long has been shortened to this long and that she's been moved forward. It was known where she was, and it was known that there were conversations being made to get her back.

5 **THE CHAIRPERSON:** Could I put it to you this way. I think you might agree, then. Everybody knows that witnesses, while formally required to be there at the beginning of the trial, are not actually required to be there at the beginning of the trial.

MR DRUMGOLD: Yes.

10

THE CHAIRPERSON: The Chief Justice knew that as well as anybody else.

MR DRUMGOLD: That's right.

15

THE CHAIRPERSON: And the Chief Justice, being concerned as judges are to ensure the prompt dispatch of court business, was pressing for the witness to be called at the earliest possible date. And in making that comment, you understood her not to be stating her belief that anyone expected the Senator to be there for the whole time, but rather that that being the formal requirement -

20

MR DRUMGOLD: Yes.

25

THE CHAIRPERSON: - those concerned - Senator Reynolds and your staff - ought to ensure that the obligation, while in practical terms capable of being relaxed, nevertheless remains so that in the final degree the witness comes when the witness is required. Is that how you understood it -

MR DRUMGOLD: That's right.

30

THE CHAIRPERSON: - in the dynamic of your debate with her Honour?

MR DRUMGOLD: That's right. It was just to enforce, well, there's the primacy of the court. There's no suggestion that they are going to issue a warrant or anything like that.

35

THE CHAIRPERSON: No, of course not.

MR DRUMGOLD: It is really - the court - technically she's been under subpoena here. I know that the trial has been shortened, so I would - so I expect her to be here.

40

THE CHAIRPERSON: So the - it's - you are saying that in the dynamics of what was happening at that moment when the judge is pressing for the thing to continue and you were explaining that there had been obstacles -

MR DRUMGOLD: Yes.

45

THE CHAIRPERSON: - she was saying, "Well, at the end of the day, the requirement is a requirement, so be here on Tuesday." Because after all, the formal requirement exists.

MR DRUMGOLD: That was how I -

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THE CHAIRPERSON: Is that how you understood it?

MR DRUMGOLD: That's how I understood it.

5 **THE CHAIRPERSON:** You didn't understand it as her Honour being under the illusion that Senator Reynolds was flouting the subpoena by her absence?

MR DRUMGOLD: No. And -

10 **THE CHAIRPERSON:** Thanks.

MR DRUMGOLD: - nobody in the courtroom would have thought that.

THE CHAIRPERSON: Yes. Thank you.

15

MS LONGBOTTOM: And do you recollect if either at that time or subsequently you provided her Honour with a more fulsome explanation as to the reasons why Senator Reynolds -

20 **THE CHAIRPERSON:** A more full explanation.

MS LONGBOTTOM: A more full explanation - thank you, Mr Sofronoff - as to the reasons why Senator Reynolds was unavailable to give evidence on the date?

25 **MR DRUMGOLD:** There was some discussion about where she was in trying to get planes back and - etcetera. I seem to recall those discussions having occurred.

MS LONGBOTTOM: With the Chief Justice?

30 **MR DRUMGOLD:** Yes, I believe so.

MS LONGBOTTOM: Okay.

35 **MR DRUMGOLD:** I mean, I can't recall the words or the date. But we knew that when we were moving things forward - we are negotiating the end of a trial, and an end of a trial that had been shortened significantly, and we were looking - so it was discussed that she was in - I believe it was discussed where she was and that she was endeavouring to get back.

40 **MS LONGBOTTOM:** And do you recollect if that discussion happened in court or was it perhaps a discussion that might have been had in chambers?

MR DRUMGOLD: I can't recall.

MS LONGBOTTOM: Okay.

45

MR DRUMGOLD: I can't recall, I'm sorry. I was getting information from Mr Whybrow where she was, and Mr Whybrow was getting information from her partner.

THE CHAIRPERSON: His side was in touch with the Senator?

50

MR DRUMGOLD: That's right. Her partner was telling Mr Whybrow she's in X, and she's - Rwanda, I think we can say now, and we are trying to get her back, and Mr Whybrow was telling me that.

5 **MS LONGBOTTOM:** And, look, the reason why I ask that, Mr Drumgold, is this exchange is happening with the Chief Justice on 13 October.

MR DRUMGOLD: Okay.

10 **MS LONGBOTTOM:** Operator, if you can please display WIT.0070.0001.0027_0001. So that's an email from the same day where Ms Pitney notes that Senator Reynolds has failed to answer her subpoena, and there is some discussion there about the Chief Justice raising concerns about that and, in particular, Senator Reynolds failing to answer her subpoena during a non-sitting period and that she will not allow the sitting period to delay the trial. I
15 just can't find a particular reference to that in the transcript, and that's why I'm asking -

MR DRUMGOLD: Yes, I -

MS LONGBOTTOM: - if there was any further discussion you're aware about it.
20

THE CHAIRPERSON: Is that a misunderstanding of what happened?

MR DRUMGOLD: No. I was - so there must have been a conversation, because I'm aware of it. I'm aware that there - and it was when I became aware that you can't call a Federal
25 Member during a sitting week. So I don't know how I acquired that information. I didn't acquire it from the document.

THE CHAIRPERSON: Well, when Parliament is sitting, a judge can't order a member of the House of Representatives to leave the House of Representatives.
30

MR DRUMGOLD: Correct. I found that out, and that must have been said in court because it has found its way into this email.

THE CHAIRPERSON: I think what - the substance of what Ms Longbottom is putting to you is that there's an allegation of a failure to answer the subpoena. And as we've seen, there doesn't appear to be a failure to answer the subpoena. But are you aware of the Chief Justice having noted that the Senator failed to answer her subpoena?
35

MR DRUMGOLD: I -

40 **THE CHAIRPERSON:** Or is that a misunderstanding?

MR DRUMGOLD: That transcript - I think the - I think what's happening is someone from my office is doing their best to translate - her Honour said some words, and I - I said, "Well, we will convey that." And I think this is an attempt to convey that. This is apropos of what occurred.
45

THE CHAIRPERSON: Yes. So this is a reference to the transcript that we've just looked at, not to anything else.
50

MR DRUMGOLD: That's right, yes.

MS LONGBOTTOM: So your reading is there is some failure of interpretation in the email that was sent?

5

MR DRUMGOLD: Yes. Possibly so.

MS LONGBOTTOM: Okay. Now, Mr Drumgold, can we go to your statement at paragraph 431. So you are there referring to 26 October, after which, as I understand it, the jury had been deliberating for five complete sitting days. What do you mean by "five complete sitting days"? Just court dates?

10

MR DRUMGOLD: Five - five court dates.

MS LONGBOTTOM: Yes. Okay. Okay. And you say you had given thought to the steps that you might take in the event of a hung jury?

15

MR DRUMGOLD: Yes.

MS LONGBOTTOM: What were those thoughts and what - had you taken any steps at that stage?

20

MR DRUMGOLD: No, I - I had started to think about the retrial - whether or not there would be a retrial. And there's another test - so there's the reasonable prospects of conviction test and the public interest test, but then there's another test in there that relates to retrials. And I had made observations of the jury and observations of the evidence, and I had started to turn my mind to if the jury did come back and say that they couldn't reach a unanimous verdict, whether or not I was satisfied that it should be re-run.

25

MS LONGBOTTOM: Why were you making observations of the jury?

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MR DRUMGOLD: Because I'm a lawyer. That's my job.

MS LONGBOTTOM: How was that relevant to the question of a retrial?

35

MR DRUMGOLD: Well, because I'm - because I - I noticed things in the jury that suggested that there was one person who was not in favour of the others. That -

THE CHAIRPERSON: You were reading the jury. Doing the best we can, we try to do these things.

40

MR DRUMGOLD: Doing my best to read the jury. That's right.

THE CHAIRPERSON: There is silence. You do the best you can. But what you are saying is that your reading of the jury was that but for one juror, you were likely to get a conviction. That's what you thought at the time?

45

MR DRUMGOLD: That was my - that was my (indistinct).

MS LONGBOTTOM: So other than that - so you have said that was one of the matters that you were contemplating?

5 **MR DRUMGOLD:** One of the matters, including the way that the evidence fell. Everybody came up to proof; all of those sort of things.

MS LONGBOTTOM: Because am I right that as part of the things that you are required to consider under the prosecution policy with respect to a retrial, it is the reason the trial ended?

10 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: Whether another jury would be in a better or worse position to reach a verdict?

15 **MR DRUMGOLD:** That's right.

MS LONGBOTTOM: The cost to the community; the cost to the accused; the views of the victim?

20 **MR DRUMGOLD:** That's right.

MS LONGBOTTOM: At that stage, had you engaged with Ms Higgins or her lawyers about the steps that would be taken in the event of a hung jury?

25 **MR DRUMGOLD:** Yes, I believe I had had conversations. I was not - at this stage, the complainant was quite fragile. And a lot of my conversations were through her lawyer. And I had - as we moved through and turned our mind to an increasing chance of a hung jury, I had started to raise with him my thoughts, really with a view to him feeding back Ms Higgins' thoughts. And my preliminary view was that I would - I would retrial the matter.

30 **MS LONGBOTTOM:** And by that stage, had Ms Higgins' lawyer communicated to you her thoughts about the prospect of a retrial?

35 **MR DRUMGOLD:** Possibly. I think what's being lost here is the prism through which - what I was - so the goal was - it's in everybody's benefit to make an early decision. Because if I say, "Let's wait four weeks and I will consider it over four weeks," we lose - we - the next trial moves back. So if a decision can be made at the time that the jury comes back hung, we can grab the earliest possible date. Now, it - that decision might change. Things may vary. But the question was whether or not the preliminary decision to make a - to run a retrial was made. It's in everybody's interests to make that at the earliest possible opportunity.

MS LONGBOTTOM: Can I just step through that.

45 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: So as you've just said, you were aware that the complainant was in a vulnerable state?

50 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: You are not putting in issue that her views on the question of a retrial were relevant to your decision-making about that?

5 **MR DRUMGOLD:** I'm raising my thoughts with her lawyer, who is communicating to her and communicating back to me her thoughts.

MS LONGBOTTOM: Yes. But my question is in terms of your decision-making -

10 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - you don't put in issue that the complainant's views about the question of a retrial were relevant to your decision-making?

15 **MR DRUMGOLD:** It's one of the factors.

MS LONGBOTTOM: Yes. It's one of the factors.

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And am I right to understand you to be saying your thinking was, "I wanted to secure the earliest retrial date and then I could consider it after" -

25 **MR DRUMGOLD:** That's right.

MS LONGBOTTOM: - "at leisure about whether or not a retrial was appropriate." Am I correct in understanding that?

30 **MR DRUMGOLD:** Yes. Yes, but it was more than just a speculative view. It was a preliminary - a preliminary view that it would re-run.

MS LONGBOTTOM: But it would be - would it be right that there are sort of two aspects to that? One is sort of a consideration, albeit through a retrial prism, of reasonable prospects, so having regard to what's happened at trial?

35 **MR DRUMGOLD:** Yes.

40 **MS LONGBOTTOM:** But the other aspect of that is the public interest consideration, which includes the views of the complainant about whether or not a retrial should proceed and the impact on the complainant if that, in fact, happened?

45 **MR DRUMGOLD:** So the reasonable prospect of conviction test is forever there. It's not something that you consider once; it has to be an ongoing reasonable prospect of conviction. So, theoretically, every day you have to be satisfied that there's a reasonable prospect of conviction. Every day you have to be satisfied that there's a public interest in running it. So they are ongoing. What I'm considering is the other provisions. Preliminary - the views of the complainant, the preliminary - and all of these are preliminary decisions. And things can change. So the thought was, "These are my preliminary views. I know that she's been through some experience, but we are now in October. A retrial will give her some opportunity to

repair.” And I felt that there was ongoing reasonable prospects of conviction, so my preliminary view was to grab that trial date.

5 **MS LONGBOTTOM:** But in terms of your view about a period would give her an opportunity to repair, you would accept that her own view about that proposition was relevant?

MR DRUMGOLD: It was.

10 **MS LONGBOTTOM:** Yes. Okay. Now, as it transpired, late in the afternoon of 26 October, you and Mr Whybrow were called to the Chief Justice' chambers?

MR DRUMGOLD: Yes, we were.

15 **MS LONGBOTTOM:** And you were informed about some juror misconduct?

MR DRUMGOLD: That is correct.

20 **MS LONGBOTTOM:** And there was a discussion about retrial. Now, as I understand it from your statement, you indicated to the Chief Justice that you had already decided that there would be a retrial?

MR DRUMGOLD: And Mr Whybrow, yes. That was in the context of whether or not we secure another date there and then.

25 **MS LONGBOTTOM:** Yes. So you indicated there would be a retrial, that the date posed by the Chief Justice, being 20 February, was acceptable?

MR DRUMGOLD: Yes.

30 **MS LONGBOTTOM:** During the course of that exchange, Mr Whybrow suggested to you that you should outsource the decision about a retrial?

MR DRUMGOLD: Yes, he did.

35 **MS LONGBOTTOM:** And you rejected that as a proposition?

MR DRUMGOLD: Yes, I did.

40 **MS LONGBOTTOM:** Why was that?

MR DRUMGOLD: Well, because I'm the Director of Public Prosecutions. I'm the statutory officeholder.

45 **MS LONGBOTTOM:** Did you think that you should give any substantive consideration or invite Mr Whybrow to make what's called a submission in respect to the question of retrial?

50 **MR DRUMGOLD:** Mr Whybrow was always welcome to make submissions about a retrial. We were there asking the question - the preliminary question of whether there should be a retrial and whether or not we should (indistinct). The alternative was that I say, "Well,

let's - let the date go and let's go away and I will wait to hear in you." A - a preliminary decision and securing a trial date can always be undone. But you need to get in - particularly in a sex matter, get the earliest possible trial date.

5 **MS LONGBOTTOM:** So they were the factors that were operating on you on that line?

MR DRUMGOLD: They were the factors in making that preliminary decision.

MS LONGBOTTOM: Okay.

10

THE CHAIRPERSON: I think, from my reading of Mr Whybrow's statement, what you expressed to him about the decision you had made was expressed in emphatic terms rather than in terms that suggested it was a preliminary - a decision that was open to review if submissions were made.

15

MR DRUMGOLD: I don't know. So I don't know how I could displace him.

THE CHAIRPERSON: Sorry?

20

MR DRUMGOLD: I don't know how I could displace that view. Perhaps by saying - or how he would draw that view. I did not saying, "I'm going to re-run the trial on 20 February and there is nothing you can say (indistinct) or persuade me otherwise." It - the nature of the exchange implies it's a preliminary view. So, yes, at this stage we are going to re-run a trial. Let's grab the 20th. Now, things can and did intervene and can always intervene. But by its very nature, grabbing the date at that stage, you only do that if you have drawn a preliminary view that a trial is going to be re-run because (indistinct).

25

THE CHAIRPERSON: Yes.

30

MS LONGBOTTOM: Do you recall if - so as it transpired, the jury was dismissed and the trial was vacated?

MR DRUMGOLD: That's correct.

35

MS LONGBOTTOM: Do you recollect if whether in the intervening days in October you had any discussions with Ms Higgins' lawyers about her views on a retrial?

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MR DRUMGOLD: No, I had had them before. I - when the jury were discharged, I think I was in Perth. I think I had to fly over for a meeting with the other directors. No, but the discussions had been had. I had - I was not going to announce that there was going to be a retrial without consulting her and without her at least knowing that that was going to occur.

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MS LONGBOTTOM: And so did you, in fact, consult Ms Higgins before a retrial was announced?

MR DRUMGOLD: Through her lawyer, yes.

MS LONGBOTTOM: So you went to Perth -

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: - in the immediate aftermath. When did you return?

5 **MR DRUMGOLD:** I can't remember, I'm sorry. What day is it? The Saturday or the Sunday or something like that. I didn't hang around in Perth after the meeting. We had a dinner on the Friday night, I think, and I probably (indistinct).

10 **MS LONGBOTTOM:** Operator, can you please display DPP.005.001.1602. Mr Drumgold, this is the letter that you wrote to Chief Police Officer Gaughan on 1 November 2022. So that's less than a week after the trial had ended?

MR DRUMGOLD: Yes.

15 **MS LONGBOTTOM:** You spoke earlier today about the impact the trial process had had on Ms Higgins?

MR DRUMGOLD: Amongst other things, yes.

20 **MS LONGBOTTOM:** And in terms of that - those other things you mentioned, would you be referring there to things like the intense media scrutiny that followed?

MR DRUMGOLD: That are - they are other things.

25 **MS LONGBOTTOM:** And I understood you yesterday to express concerns about the impact the intense media scrutiny was having on Ms Higgins?

MR DRUMGOLD: That - that was one of the factors, yes.

30 **MS LONGBOTTOM:** Now, in this letter, you sought a number of things, but one of them was a public inquiry at the conclusion of the trial process?

MR DRUMGOLD: Yes. Support for.

35 **MS LONGBOTTOM:** Support for a public inquiry. Did you consult Ms Higgins to seek her views about a public inquiry and the impact that might have?

MR DRUMGOLD: No, I did not.

40 **MS LONGBOTTOM:** Am I right that in terms of - I mean, this letter is, in substance, raising concerns you have about police conduct? Yes?

MR DRUMGOLD: Yes, most of which are well known. But yes.

45 **MS LONGBOTTOM:** And am I correct that there are a number of mechanisms through which those complaints can be ventilated, including, for example, a complaint to Professional Standards?

MR DRUMGOLD: Potentially, yes.

50 **MS LONGBOTTOM:** Why did you choose this approach?

MR DRUMGOLD: Because it was - my concern was there were so many strange things that had occurred and whether or not they were connected. So was there a connection between the passion with which a number of police held that this matter shouldn't proceed; then
5 disclosures of other documents that shouldn't have been disclosed; then questions around people being called in who had other functions - called in to give evidence; and Senator Reynolds' engagement. The question in my mind was, are those things connected? That was really my - what was on my mind. And - and just general - was there a connection between the Federal engagement and the ACT engagement? That - that was the primary question on
10 my mind.

THE CHAIRPERSON: What's the Federal engagement?

MR DRUMGOLD: Well, there were a number of Federal engagements that - that confused me from the start. So from 1 June - on 1 June, I was told that I was getting a brief. I already
15 knew that because I had heard the Federal Commissioner say it in Senate Estimates that I was getting a brief. So it was clear that the fact that I was getting a brief was being communicated in the Federal sphere before it was being communicated to me. Generally, in isolation, not a problem, these things will happen. But then as each event occurred, I started to ask myself the
20 question of whether or not all of these things were related - were interconnected.

THE CHAIRPERSON: Well, they obviously all are related. But the question is you seem to have thought that they are related in some kind of malignant manner.

MR DRUMGOLD: I'm - I'm querying -

THE CHAIRPERSON: Or suspected, I should say. You suspected.

MR DRUMGOLD: I suspected that -

THE CHAIRPERSON: When this was a case which, in its significance, was unique in - I would say in your experience, in most people's experience - unique in that while it was - while forensically it was an ordinary case of its type, as you have observed frequently,
35 on the other hand it involved Parliament House; it involved an emerging political movement relating to victims of sexual offences; it involved the Prime Minister; it involved the Logies. And so it would not be surprising that it would be a case that would be in - one that displaced expected events with unexpected events, such as senior police being involved in overseeing it. The Prime Minister had been involved not in the case but in the matter - the broader political matter. So it wouldn't be at all surprising to see the most senior police having their
40 hands on it, for example. What's it - how could that be suspicious in the context of this case? For example.

MR DRUMGOLD: I'm - I will express that in evidential terms. The question really is, are there enough circumstantial strands to raise concerns? There were certainly a number of
45 circumstantial strands that raised my concerns, and the question was how strong that cable was (indistinct).

THE CHAIRPERSON: One of the things that worried you was the antipathy - the opposition that certain police officers had to commencing criminal proceedings. And one
50 reason why they might have that kind of a view is because of a - and we will find out - in due

course, we will find out. But one reason, sitting where you were sitting at that time, might be what you had - I think I'm right in summarising what you always were worried about, that some investigative police in cases like this have wholly outmoded attitudes about -

5 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: - how victims behave and are expected to behave and jump to - come to the wrong conclusion entirely about the significance of a complainant's behaviour for credibility when the behaviour has no significance for credibility. So that
10 would be an obvious explanation for their antipathy; they are just misguided, misconceived, rather than that they are pursuing some political agenda to suppress the case. I'm just wondering why you had those kinds of suspicions. It's -

MR DRUMGOLD: Well, again, because this - this is in the context of a broader picture that
15 we (indistinct) at this stage. Here is some really strange events occurring in the context of what I concluded was that the criminal justice system was potentially failing sexual assault complainants generally, talking about the SAPR stuff. And we had - I was faced with this microcosm - so effectively, if this did not result in charges, this would have fallen into one of
20 the tranches of the SAPR review, and I - I was posing that there should be an inquiry as to whether or not those things are connected.

THE CHAIRPERSON: All right.

MS LONGBOTTOM: Before writing this letter, had you raised any of those concerns with
25 Chief Police Officer Gaughan?

MR DRUMGOLD: We had had conversations around charging rates and the like. I had raised individual concerns with individual officers. I think I raised the service of material
30 with one of the DCPOs. But no.

MS LONGBOTTOM: Now, in writing the letter -

MR DRUMGOLD: I was effectively raising them with him in this letter.

35 **MS LONGBOTTOM:** You are raising them in substance for the first time in letter?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: And in writing the letter, you must have been conscious that it could
40 find its way into the public domain? Well, it's a letter in which you call for a public inquiry.

MR DRUMGOLD: It's a letter to the Chief Police Officer.

MS LONGBOTTOM: In which you call for a public inquiry?
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MR DRUMGOLD: Yes. Amongst other things. The main concern - the main thrust of the letter was to isolate certain police officers from engaging in the trial to aggravate an already fragile complainant.

MS LONGBOTTOM: I will come to that. But my question is, in writing the letter calling for a public inquiry, it must have occurred to you that it could have found its way into the public domain?

5 **MR DRUMGOLD:** I guess so, yes.

MS LONGBOTTOM: And -

10 **MR DRUMGOLD:** But as I say, most of these things were already in the public domain. There had been extensive reporting on most of the things that I raise in the letter.

MS LONGBOTTOM: So that was your thinking at the time?

15 **MR DRUMGOLD:** Well, that is a factor that went into it. Like - these were not state secrets. There had been extensive reporting on, for example, the service of the documents on defence. There had been extensive reporting on the Reynolds issue. So -

20 **MS LONGBOTTOM:** But you were giving those concerns in this letter the imprimatur of your office as Director of Public Prosecutions. You would accept that?

MR DRUMGOLD: I was raising the concerns with the Chief Police Officer, yes.

25 **MS LONGBOTTOM:** And you as - the authority of your office conveys weight in terms of raising those allegations?

MR DRUMGOLD: It does. It does.

30 **MS LONGBOTTOM:** You spoke a moment before about your concerns around this time about various events. Has it ever occurred to you that your perception of events lacked objectivity?

35 **MR DRUMGOLD:** I mean, there is always a risk that one can lose objectivity and one takes all the measures they can to remain objective. But as I say, this was such a remarkable case with so many remarkable moving pieces, it stood out as being of concern - or potentially as those moving pieces being connected.

MS LONGBOTTOM: Do you consider that this letter lacked objectivity?

40 **MR DRUMGOLD:** It - it raises my concerns and not the counter-argument, if that's what you mean.

MS LONGBOTTOM: No, my question is: do you consider that this letter lacks objectivity?

45 **MR DRUMGOLD:** I - it raises my concerns. It raises my own observations. So -

THE CHAIRPERSON: I guess what you are struggling with is its objective in that you are pointing out things that happened.

50 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: It's subjective in that you add your appreciation of -

MR DRUMGOLD: Yes.

5 **THE CHAIRPERSON:** - the significance of what happened.

MR DRUMGOLD: That's right.

10 **THE CHAIRPERSON:** And somebody can look at it and look at the affair and make up their own minds.

MR DRUMGOLD: That's right.

15 **MS LONGBOTTOM:** And it might be more helpful to consider it in the context of a number of things that you said in the letter. I might start - operator, could you turn to .1606. So it's the last page in the document. If you can read the second-last paragraph. You there request a direction that all police remove themselves from any engagement in the matter beyond being called as a witness. But beyond that, you seek a direction that there be no further contact with defence or other prosecution witnesses. Now, did you see any difficulty
20 with that direction in view of the no property in a witness obligation that's reflected in rule 49 of the Barristers Rules or have I misunderstood what you are saying there?

MR DRUMGOLD: Again, I'm - I'm really looking at, is there connection between Reynolds and the police? But, primarily, I'm trying to keep the police out of the courtroom because of
25 an event that occurred during the course of the trial that raised concerns about - I wanted to put protections around the complainant.

MS LONGBOTTOM: But you are there calling for a direction that police, including police witnesses, have no further contact with defence?
30

MR DRUMGOLD: Well, I'm - I have got in my mind political witnesses.

THE CHAIRPERSON: You have got in mind what?

35 **MR DRUMGOLD:** Political witnesses.

MS LONGBOTTOM: What do you mean by that?

40 **MR DRUMGOLD:** Senator Reynolds, Senator Cash and others.

THE CHAIRPERSON: And you wanted what, that police not have contact with those two?

45 **MR DRUMGOLD:** Yes, because I'm concerned that - one of the questions I'm raising is, is there a connection between Federal interference with ACT Policing? That's - that's the primary concern that I have.

MS LONGBOTTOM: And so just -

THE CHAIRPERSON: But if - if there is this link, it doesn't matter whether they come to court or don't; the link exists. I mean, what is served by saying, "Don't have any contact can the defence"?

5 **MR DRUMGOLD:** Well, some of the questions in my mind hypothetically were, was this a - was this at the time a government minister exerting pressure through the Federal Commissioner onto ACT Policing to make a matter go away?

THE CHAIRPERSON: Why would you think that?

10

MR DRUMGOLD: As I - as I covered, I'm looking at circumstantial strands, I'm looking at an enthusiastic engagement by a Senator and I'm looking at unprecedented pressure being placed on me - an unprecedented passion that a number of police held that this matter shouldn't proceed. And a number of other factors, including them injecting themselves into a suggestion that I should outsource the decision to - in relation to a retrial. There were just

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MS LONGBOTTOM: Did you communicate that direction to defence?

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MR DRUMGOLD: No.

MS LONGBOTTOM: Did you think it was appropriate that you do so?

MR DRUMGOLD: I imagine it would have come up at some point later down the track.

25

MS LONGBOTTOM: What do you mean by that?

MR DRUMGOLD: I imagine we would have had to discuss that at some point down the track.

30

THE CHAIRPERSON: Do you mean if the -

MR DRUMGOLD: In the retrial.

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THE CHAIRPERSON: If there was going to be a trial, then all of this would have - some of the matters you talk about there would have gone further and you would have to speak to Mr Whybrow about those kind of things. Is that what you mean?

MR DRUMGOLD: I would have to, yes. Yes.

40

MS LONGBOTTOM: Can we go to the previous page. And in the second paragraph, you talk there about the conduct of investigators -

MR DRUMGOLD: Yes.

45

MS LONGBOTTOM: - and their attendance at trial and regularly conferencing with defence during the team breaks. Now, why was there any problem with police conferring with the defence?

MR DRUMGOLD: Well, because, in my observation, police had a passion for this prosecution to fail. That - that was my observation.

5 **MS LONGBOTTOM:** Would it be fair to say your operating drive in writing these things was your perception of what was occurring?

MR DRUMGOLD: That would be fair.

10 **MS LONGBOTTOM:** But did you have any basis in fact to be concerned that there was investigator interference?

MR DRUMGOLD: Only their views that were - were clear. And not just their views; the passion with which they held their views.

15 **MS LONGBOTTOM:** But this was a - this was - I mean, as you've spoken about, this was a case that was conducted under intense media scrutiny. Did it ever occur to you that there was pressure on both sides and that that might have been operating on police and how they were acting and that that was something that you should address at a lower level before writing a letter like this?

20 **MR DRUMGOLD:** Communication - there was very little communication during the course of the trial because we - we had effectively closed ranks because we were quite confident that the police had lost objectivity in the matter.

25 **THE CHAIRPERSON:** Tell me this: you saw police officers conferring with defence. And let's assume that, as you have explained, it appeared to you - and it might be true, we will find out - that they would have preferred there to be a not guilty verdict -

MR DRUMGOLD: Right.

30 **THE CHAIRPERSON:** - and were willing to assist the defence by the provision of information if that would help. Let's assume all of that. There is nothing that police could tell defence that was helpful that was not otherwise legally disclosable because anything that is helpful has to be disclosed.

35 **MR DRUMGOLD:** Yes. I - I -

THE CHAIRPERSON: Is that right or not?

40 **MR DRUMGOLD:** Potentially. I mean - but, again, I'm -

THE CHAIRPERSON: You use the word "potentially" a lot, Mr Drumgold.

MR DRUMGOLD: I'm -

45 **THE CHAIRPERSON:** I just wonder -

MR DRUMGOLD: I'm completely blind as to what's going on. What I - I'm seeing what's breaking the surface, and I don't know what happening under - underneath the surface. So

what is breaking the surface are sufficient anomalies for me to be curious about what's happening underneath.

5 **MS LONGBOTTOM:** Why is police engaging with defence an anomaly?

MR DRUMGOLD: Well, again, police aligning themselves with an acquittal is an anomaly.

MS LONGBOTTOM: But that's your perception.

10 **MR DRUMGOLD:** My perception based on what they are telling me.

MS LONGBOTTOM: Based on what who is telling you?

15 **MR DRUMGOLD:** The police. And the way that they are telling me, though - as I say, I've had a year and a half of - starting from the outset, of - of police passionately telling me to agree with them that this matter shouldn't proceed.

20 **MS LONGBOTTOM:** So you felt that there was a lot of pressure on you that the matter shouldn't proceed to charge. But correct me if I am wrong about this: putting to one side the second evidence-in-chief interview, I read your statement as saying you didn't think there was anything unorthodox in the investigation?

25 **MR DRUMGOLD:** I was not able to identify anything unorthodox in the investigation. That's right.

MS LONGBOTTOM: Were you looking to identify something unorthodox in the investigation?

30 **MR DRUMGOLD:** Well, I - I was - there was - no. Well, there was nothing that was jumping out to me. But again, other than the case being about inadmissible evidence and being advanced as strong motives to not proceed with a prosecution. And that -

35 **THE CHAIRPERSON:** If you are correct about that - and it - I haven't heard anyone in opposition yet, so - it's early. But it sounds like you are correct, that these points - some of the points that were being made about credit were misconceived because they could never arise in a trial context. And in any event, I guess you would say - I think you did say, rightly, that every case has credit points in relation to witnesses, and the important question to ask at that stage is, is there a response - an explanation for the credit point? And if there is, well then, it's a matter for the jury. You run the case and let the jury decide.

40
45 So when you look at the police documents that we've - that I've just sealed, you are an educated barrister and a highly experienced trial lawyer, and you know the reality of forensic practice and the significance and lack of significance of the points made by police. But they don't know because they are not educated in law, and they are not experienced in running trials. So wouldn't you just think, "They are pressing this point to me, but that's only because they don't really know what they are talking about"? Wouldn't you come to that conclusion rather than there's a political conspiracy to stop the case?

MR DRUMGOLD: Potentially. As I keep saying, though, all of the - the compounding matters increased my concern to the extent that I - I was very concerned that they - all of these moving parts were interconnected.

5 **MS LONGBOTTOM:** So did you think there was a conspiracy afoot?

MR DRUMGOLD: I had not formed a view solidly one way or another, but I thought that there was enough - enough incidents to make it possible, if not probable.

10 **MS LONGBOTTOM:** These are very serious allegations you make in this letter. They are allegations made with the authority of your office. Do you think "possible" is the right state of mind to make those allegations?

15 **MR DRUMGOLD:** Well, I mean, if you get stuck on adjectives - I felt that there was enough evidence there to justify an inquiry into it.

MS LONGBOTTOM: Now, just so I can clarify, at the bottom of the page in the last paragraph, you there talk about inappropriate interference by investigators?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: So, in part, that is your perception?

25 **MR DRUMGOLD:** It's all my perception, of course.

MS LONGBOTTOM: It's all your perception. So it was inferences that you were drawing based on events that were happening?

30 **MR DRUMGOLD:** That's right.

THE CHAIRPERSON: What is the inappropriate interference that you refer to in the second-last line?

35 **MR DRUMGOLD:** It started from, first of all, seeking my advice - purporting to seek my advice, but then effectively telling me that I should agree to give them the imprimatur to not charge. So it wasn't really seeking my advice at all; it was seeking my imprimatur for them to do what they clearly wanted to do.

40 **THE CHAIRPERSON:** So they sought your advice. You said, "This case is good to go - or will be good to go." And what did they do then that made you say there was interference?

45 **MR DRUMGOLD:** I - I read their pressure on me to agree with - what they were trying to do was not give me an independent - not - say, "Here is some evidence. You draw an independent view." What they were saying is, "Here is some evidence. We want you to draw this view." It was not a seeking of an independent advice; it was seeking my imprimatur to not proceed to charge.

50 **THE CHAIRPERSON:** Now, they are seeking advice, but they want you to - you said they wanted you to support them in not charging. How did they express their request or desire for your support in that respect?

5 **MR DRUMGOLD:** Through the way they were presenting the evidence. But as I - I mean, we are taking one bit - the letter catalogues, you know, as I say, service of documents, trying - what I perceived as a potential attempt to try and remove protections around communication for Ms Higgins; a range of things that I perceived to be interference.

THE CHAIRPERSON: Yes.

10 **MS LONGBOTTOM:** I'm struck by the words you've just used there, Mr Drumgold. I think you said you felt they were pressuring you not to charge through the way they were presenting their evidence. So am I right to understand -

THE CHAIRPERSON: The evidence for the case.

15 **MS LONGBOTTOM:** The evidence for the case. Am I right to understand that was your perception of what was occurring at the meeting as opposed to specific things that were said to you by various police officers?

20 **MR DRUMGOLD:** It was the evidence and how I should interpret the evidence and the conclusions. I mean, it - by the time we got to 1 - the request for advice, it had escalated to saying, "Of course you can't proceed. She's manipulative, and you can't proceed with a manipulative" - so it - it - we were not dealing with subtle words.

25 **MS LONGBOTTOM:** And in framing the contentions you make in the letter, were you careful, for example, in consulting your notes to ensure that the contentious (indistinct)?

MR DRUMGOLD: As best as I could, yes.

30 **MS LONGBOTTOM:** Okay. And in terms of those notes that you would be consulting, that would include, for example, the continuous file note that you have exhibited to your statement?

35 **MR DRUMGOLD:** It would have been a source of my - I think - so I - I was keeping a catalogue of concerns I had.

MS LONGBOTTOM: But as I -

THE CHAIRPERSON: You were keeping what?

40 **MR DRUMGOLD:** A catalogue of concerns I had.

THE CHAIRPERSON: Yes.

45 **MS LONGBOTTOM:** I understood you to be saying in your statement that the purpose of the file note you created on 26 May was to catalogue those concerns?

MR DRUMGOLD: Yes, that's right.

50 **MS LONGBOTTOM:** Okay. Let's go through - I might just take you through a couple of propositions you put in the letter as compared to your file notes.

MR DRUMGOLD: Okay.

5 **MS LONGBOTTOM:** Can we start with the first page of the letter, please, Mr Operator. If it is at all possible, can you display alongside that document DPP.004.001.0336. Now, in the letter, you say:

10 "My immediate perception was that it was not a briefing at all. It was a clear and overt attempt to use loaded characterisations of some very select evidence in an attempt to persuade me to agree with a position police had clearly adopted."

15 In point of comparison, I suggest your file note of that meeting is far more neutral. So the note you make closer to the time simply records that the AFP expressed some concerns with Ms Higgins' credibility.

MR DRUMGOLD: Well, I mean, that's - that's - I accept the file note is reserved, but that wasn't - that doesn't reflect what my state of mind was as I walked away from the 31 March meeting.

20 **MS LONGBOTTOM:** Well, if that was your state of mind and you created the file note for the purpose of recording your concerns, why didn't you record it in the file note?

25 **MR DRUMGOLD:** Well, I didn't adjust the file note. Again, I don't know that they are my words. But what I can say is, yes, I agree. But my perception is not represented in the same vein as - as the time lines.

30 **THE CHAIRPERSON:** I think you said in your - maybe in your statement or maybe in oral evidence that the file note was created by various hands. I think Ms Jerome put - made entries into it, and you made entries into it.

MR DRUMGOLD: Yes.

THE CHAIRPERSON: Is that right?

35 **MR DRUMGOLD:** Yes, that's correct.

MS LONGBOTTOM: And can I take you to paragraph 140(a) of your statement where you say:

40 "The account of events of the meeting of 31 March is consistent with my recollection of the meeting."

MR DRUMGOLD: Yes. Well, again -

45 **MS LONGBOTTOM:** And, in fact, you say -

MR DRUMGOLD: A more sedate (indistinct).

50 **MS LONGBOTTOM:** - at paragraph 138 that you shared the precursor to the continuous file note, which I understand to be your notes of the meeting on 31 March?

MR DRUMGOLD: Yes, that's right.

5 **MS LONGBOTTOM:** But you would accept that there is a stark difference between what's recorded in the file note and how that meeting is described in the letter?

10 **MR DRUMGOLD:** Well, what's recorded in the file - all I can say is those are my perceptions on walking away. I - I - I felt that it was an absolute snowballing on 31 March, as I also say in my statement.

MS LONGBOTTOM: What I'm suggesting to you, Mr Drumgold, is that as at 1 November, your perceptions of those events had been coloured by everything that had happened in the course of the trial and in your engagement with police leading up to it.

15 **MR DRUMGOLD:** Yes, that's possible.

MS LONGBOTTOM: And what you are saying here in the letter may not be an accurate reflection of your perceptions at the time.

20 **MR DRUMGOLD:** Well, certainly your observations as a whole are informed by the collection of - like, your view as a whole are informed by a collection of observations. That's right. But as I keep saying, my perception of the 31 March meeting was that they were trying to snowball the prosecution.

25 **MS LONGBOTTOM:** But that's not recorded in your file note.

MR DRUMGOLD: Those words are not - are not written there, no.

30 **MS LONGBOTTOM:** Can I take you, then, to the next page, .1603. And, operator, can I ask that you pull up the next page of the file note as well at .0337. Now, you there say that a meeting was held on 12 April 2021?

THE CHAIRPERSON: And that's been redacted for some reason, but it's a police officer, isn't it?

35 **MS LONGBOTTOM:** Yes, at the request of a police officer.

THE CHAIRPERSON: Yes.

40 **MS LONGBOTTOM:** That's so, Mr Sofronoff. But, Mr Drumgold, in the evidence you have given to the Board of Inquiry, you state it was, in fact, someone from your office that had arranged that meeting?

45 **MR DRUMGOLD:** Had arranged, but it was requested, I think.

MS LONGBOTTOM: Well, no, that's not what you say in your evidence to this inquiry. You say it had been arranged - and I can take you to paragraph 144 of your statement. You say that it was arranged by Ms Jerome of your office.

50 **MR DRUMGOLD:** Yes, but I understood that to be at the request of Mr Moller.

MS LONGBOTTOM: Can you let me complete, please -

MR DRUMGOLD: Sure.

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MS LONGBOTTOM: - what your evidence is. You say:

"Skye had arranged the meeting in relation to DLSC Madders' involvement in the Lehrmann matter in light of Madders and Tiffen."

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So your evidence to the inquiry is that it was your office who had raised it - who had sought the meeting for the purposes of discussing Mr Madders' involvement in the investigation. So that directly contradicts what is in the letter here.

15 **MR DRUMGOLD:** She may have arranged the meeting, but I - my understanding was that it was requested by Mr Moller.

THE CHAIRPERSON: You are saying the police requested it -

20 **MR DRUMGOLD:** And Skye arranged it.

THE CHAIRPERSON: - and Ms Jerome did the - administratively made it happen.

25 **MR DRUMGOLD:** That was my understanding. My understanding is that he wanted to talk about the Madders issue. So Skye organised the meeting.

MS LONGBOTTOM: And I just wanted to ask you about the Madders issue. If we can go to the file note of 7 and 12 April.

30 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: On 7 April, you telephoned police for the purposes of telling police it was entirely a matter for the AFP whether or not Mr Madders remained involved in the investigation.

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: Why did you need to telephone them to tell them that it was entirely a matter for them?

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MR DRUMGOLD: Well, I was raising it whilst being careful not to direct it them. I was conscious that I had no power to direct someone's engagement, but I was really raising it to invite them to consider his engagement for those purposes. Not because I had made a conclusive - a conclusion about Mr Madders; because I thought, in light of the Tiffen judgment, it would create a potential weakness for him as a witness.

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MS LONGBOTTOM: And so for that same purpose, according to your file note of 12 April 2021, there is another discussion with ACT Police for the purposes of identifying to them that it's entirely a matter for the AFP whether Mr Madders remained involved in the investigation?

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MR DRUMGOLD: That's right.

5 **MS LONGBOTTOM:** Can I suggest to you as well that when you look at the description of the meeting of 12 April in the letter, it is starkly different from what is in the file note about that meeting.

10 **MR DRUMGOLD:** It - it's economic in its - but I - I have a - again, a very clear recollection of the 12 April meeting.

MS LONGBOTTOM: And I guess that's why I'm just a bit perplexed, because I understand you to be saying, "I never ordinarily take file notes of my discussions with ACT Police."

15 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: "I went to the first meeting on 31 March. It was so unusual that I felt compelled to start implementing that practice in this matter." And yet what is recorded in the file notes that you created for that purpose is far more neutral than what is in the letter itself.

20 **MR DRUMGOLD:** I mean, the file notes are just really recording the dates in a brief summary of the meeting. But I'm harking back on my recollection of the meeting. My recollection of the 12 April meeting was that I - my preliminary view was that Mr Boorman had not successfully persuaded me, so someone more senior came in to do it.

25 **THE CHAIRPERSON:** I think you said the other day that you have prepared the file notes - and, in fact, I think you said it just a moment ago - to record your concerns?

MR DRUMGOLD: I - in brief summary, yes.

30 **THE CHAIRPERSON:** But there's no concern there.

MR DRUMGOLD: Well -

35 **THE CHAIRPERSON:** You haven't recorded any concern there, but in your - in the letter -

MR DRUMGOLD: It's not a Hansard of my thoughts.

40 **THE CHAIRPERSON:** I know that. But if the purpose was to record concerns, then one would expect the note succinctly, even obliquely perhaps, to record a concern. But what you wrote in your letter very plainly reveals something that you found very concerning, and that anybody would, but the file note made to record your concerns doesn't refer to it. I just - I'm struggling to understand that.

45 **MR DRUMGOLD:** Because - like all notes, it doesn't contain every fleeting thought that you have in your mind and every emotion that you feel. It's a basic dot point of what happened at the meeting.

THE CHAIRPERSON: Well, what happened at the meeting, according to the file note, is that you told Moller something and then you told him something else. You told him

something about Madders and something about your view of the case. But your letter speaks about the effect of things that Moller told you.

5 **MR DRUMGOLD:** And -

THE CHAIRPERSON: So even as a file note, it -

MR DRUMGOLD: 12 April - the letter is more complete.

10 **THE CHAIRPERSON:** Go on. Sorry?

MR DRUMGOLD: The letter is more complete. It's a more complete observation.

15 **MS LONGBOTTOM:** But you would accept, would you not, that the file note, which is completed closer to the time of the events which it records, is the more accurate record for that very reason?

20 **MR DRUMGOLD:** Well, yes. I mean, as - as we have just addressed, as I'm - my meeting - or my observations of 12 April, and indeed my meetings of - my observations of 31 March, are informed by a bigger piece of information.

25 **MS LONGBOTTOM:** And let's - well, let's go to the file note. Can you please turn to .0338, please, operator. So you will see at the bottom of the page there, there's a reference to reflections about a number of matters that cause you concern. Now, an aspect of that is redacted, but can I suggest that it includes some media reports.

MR DRUMGOLD: It could be.

30 **MS LONGBOTTOM:** The first dot point. And perhaps, if necessary, we might give you an unredacted copy of it. Actually, that might be - before I launch into this topic, it might be appropriate if I can provide -

35 **THE CHAIRPERSON:** Well, why don't we adjourn now till 2.15 and you can get the paperwork organised?

MS LONGBOTTOM: Yes. Thank you.

THE CHAIRPERSON: All right. We will adjourn till 2.15.

40 <**THE HEARING ADJOURNED AT 12.56 PM**

<**THE HEARING RESUMED AT 2.30 PM**

45 **THE CHAIRPERSON:** Mr Tedeschi, did you have any other submissions to make on that matter?

MR TEDESCHI: Chairman, we do. I have got a copy of the directions that you have made already.

50 **THE CHAIRPERSON:** Yes.

5 **MR TEDESCHI:** The vice that we would submit should be dealt with is any reference to any sexual conduct or alleged sexual conduct that is unconnected with the alleged offence in question. And our analysis is that it's only in document 1E that there is such an entry. We are not aware of any other entry in any of the other documents. And in fact, even in document 1E, there is only one entry, which is on the final page on the right-hand side -

10 **THE CHAIRPERSON:** There is a broader problem, though, isn't there, that I'm obliged by the statute to conduct these hearings in public unless there's a good reason not to. And as I think I said at the beginning when we started, I've got - there are two purposes: one is to inform the government about the truth so that they can do something, if there is anything to be done; and the second is to inform the public. And they will be informed in my report, but I thought having regard to the kind of matter that this has been - so as I mentioned, it involved the Prime Minister at one point in having to engage with it. So it's a large thing.

15 So having regard to that, it seems to me that it would be wrong to conduct the proceedings in private. But there is a limit, and when people's health and safety is being put in issue, then I have to give serious consideration to closing down the public hearings, restricting the evidence and letting the public know in due course in my report what I find and setting out in my report all the evidence that I've referred to - explaining the evidence that I've referred to - that I've relied upon, rather, to reach my conclusions. So I don't think it's a one document matter, because what's been shown is that there are people who will take advantage of access to what would otherwise be highly confidential material and misuse it. So why shouldn't I close the public hearings?

25 **MR TEDESCHI:** Chairman -

30 **THE CHAIRPERSON:** Does your client have an attitude from - I mean, you submit on behalf of Mr Drumgold, but - I know you haven't taken instructions on this, but what is your sense?

MR TEDESCHI: Look, my submissions in this regard are not as a representative of Mr Drumgold; it's as an officer of the court.

35 **THE CHAIRPERSON:** Yes. Thank you. I appreciate that.

40 **MR TEDESCHI:** And what we would suggest - regarding this particular episode that occurred last night, we would suggest that it's probably too late to have a take-down order of every single reference.

THE CHAIRPERSON: It is, yes.

45 **MR TEDESCHI:** So what we would submit is that you, Chairman, make a request - an urgent request to the media to use all attempts to take down any reference to other allegations of sexual conduct.

THE CHAIRPERSON: Well, they would be wise to without a request. If you cherrypick statements in evidentiary documents that are defamatory and scandalous, nobody is going to regard that as a fair report. And it might be a contempt of the Commission. So I would expect

that I don't have to say anything about that. I would expect that a reputable media organisation would hurry to do it.

MR TEDESCHI: We would nevertheless ask you, Chairman, to make such a request.

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THE CHAIRPERSON: To make a statement.

MR TEDESCHI: It would have strong persuasive force.

10 **THE CHAIRPERSON:** Yes.

MR TEDESCHI: Regarding the future conduct of the inquiry -

THE CHAIRPERSON: Yes.

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MR TEDESCHI: - I would need to take some instructions on the matter.

THE CHAIRPERSON: Yes. All right. Did you - you don't wish to say anything more?

20 **MR TEDESCHI:** Not at this stage.

THE CHAIRPERSON: Thank you. Mr Quill, you seek leave to appear?

25 **MR QUILL:** I do, Mr Chairman. I seek leave to appear on behalf of five media organisations. They are News Corporation, Nine Network, the Seven Network, the Australian Broadcasting Corporation and the Dailymail.com Australia Proprietary Limited.

THE CHAIRPERSON: Yes. You have leave.

30 **MR QUILL:** Thank you, sir. Could I make these submissions, if you like, by way of signpost. And if, Mr Chairman, you seek for further submissions in support of these -

THE CHAIRPERSON: Would you mind addressing me as Mr Chair, if you like, or just Mr Sofronoff.

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MR QUILL: Thank you, Mr Chair. I appreciate the guidance. My submission is ultimately that these documents and the matters contained within them are crucial and key issues in this whole inquiry. And it's bordering on impossible to properly understand, and therefore properly convey to the public, and for the public to properly understand, what it is that this inquiry is considering and looking into.

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The content of these documents look - or demonstrate, if you like, and perhaps explain in some ways, the breakdown of the relationship and trust between the DPP and the AFP. They go to the AFP's conduct. The inclusion, for example, of - if I can use the word - the credit or tendency allegations or rumour, if I can call it that - the inclusion of those in those documents of itself is a critical factor. And it's impossible to properly explain to the public why we've got to where we have got to and what exactly are all the issues that this Board of Inquiry is considering.

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I might say that in terms of reporting of those documents, I've certainly heard what the inquiry has just said a moment ago. I've seen the transcript of what Mr Tedeschi said earlier today and what he's just said a moment ago. That will certainly be passed on to all of my clients. In my submission, the inquiry ought proceed on the basis that there would be fair - that there will be fair reporting. A suppression order -

THE CHAIRPERSON: Now, Mr Quill, you are right to say that it would be impossible for the public to understand what's happening in the proceeding, and the significance of it, without access to the documents. And, largely, access to the documents must be given by a recounting of the content of documents by journalists working for your clients. And the reason why I published - I allowed the publication of those police investigative documents without significant redaction is for the reason that you mentioned, but also because, as you point out, the whole of the content is necessary to understand the issue that's arisen.

The issue is that, so it seems on the one hand, police believe that they had information that advised at least caution in considering charges being brought, and on the other hand, on the part of Mr Drumgold, evidenced a misconceived approach and a damaging approach to the question whether to charge. And one can't understand Mr Drumgold's evidence, for example, unless you have the whole document. But how does it assist public understanding to publish a headline like this:

"Multiple occasions, explosive sex claim in secret Higgins dossier."

A dossier. Another one - you act for the Daily Mail:

"Read the stunning new sex claims police made about Brittany Higgins in an explosive 64-page dossier."

How is that advancing public understanding about the issues in the case? That's just prurient yellow journalism, isn't it?

MR QUILL: Well, Mr Chair, I would respond by saying -

THE CHAIRPERSON: I know you didn't write it, Mr Quill, so excuse my tone.

MR QUILL: Indeed. I didn't. No, not at all.

THE CHAIRPERSON: Excuse my tone.

MR QUILL: Not at all. There's no need to excuse yourself in any way. I understand what is being put to me. Can I respond by saying this: the first submission in response is it is one thing to read a headline, but the -

THE CHAIRPERSON: One of the people reading the headline will be Ms Higgins. And it's not one thing for her.

MR QUILL: I understand - I understand, sir - Mr Chair. But - and no doubt this inquiry is causing - and this whole scenario - all of the events that lead us to where we are today cause Ms Higgins enormous distress. There's no doubt about that. But in my submission, suppressing aspects of this will not suddenly make good that distress for her. When this

inquiry was announced, Ms Higgins made a public statement via her Twitter account saying, "Sunlight is the best disinfectant," which is ultimately a submission I would make to the Board.

5 **THE CHAIRPERSON:** That's on the assumption that people act decently.

MR QUILL: Indeed. And -

THE CHAIRPERSON: On the expectation that people act decently.

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MR QUILL: Mr Chair, can I say this before I go on and respond with further submissions.

THE CHAIRPERSON: Yes.

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MR QUILL: Although I said your tone didn't need excusing, it's noted. And what the Chair is saying is noted and will certainly be noted by my clients, and I will certainly pass on the concerns. I might say, though, the reporting of this matter does require that detail. Now, headlines are headlines. It's the bane of many people. As they say, you try to explain a very, very difficult set of circumstances and issues in a headline. But ultimately - and I might say I

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think it was only the first of the articles that the Chair identified was I - do I have in front of me.

But when you get to the detail of what is actually reported in that, in my submission, it's reported appropriately that this is a - a witness claimed these things and that it had been included in the documents, and that it was reported in that very appropriate way. Now, it might be that the headline taken by itself was not the best way to convey it. That point is made very clear, and I will certainly pass that on to my clients. But it is important to understand this detail to understand the - why it is this inquiry is happening. Indeed, in Mr Drumgold's letter from November last year to Mr Gaughan, he raised these very issues, the apparent stereotyping by the AFP. So one can't really explain Mr Drumgold's concerns and what this inquiry is looking at -

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THE CHAIRPERSON: Are you defending - you are defending these stories, I see?

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MR QUILL: I'm defending -

THE CHAIRPERSON: That makes me think that that's how it's going to go on.

MR QUILL: Mr Chair, can I say this: I haven't had, in the time available to me, enough time to review all of the publications. I can say -

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THE CHAIRPERSON: Well, how much time would you like?

MR QUILL: I'm not sure that it serves any purpose, because what's been published has been published, Mr Chair. All I can say, again, is that your concerns about the manner in which this information ought to be dealt with and reported - those concerns will be raised. Ultimately, I'm not sure that me addressing the inquiry about what has or hasn't been published will be of great assistance, other than perhaps to make a legal submission that I don't really want to try and dodge the inquiry from you, Mr Chair, but to make the submission that the section 21 power talks about confidentiality and to maintain the

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confidentiality. Much of this material is - or in my submission, all of this material probably doesn't maintain that level of confidentiality. But that's a matter that goes to power. I don't wish to make that submission and, in doing so, be said -

5 **THE CHAIRPERSON:** Well, it would be - with respect, it would be wrong, because the - subsection (3) says:

"If the Board is satisfied that it is desirable to do so, because of the confidential nature of any evidence or matter or for any other reason..."

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Now, the "any other reason" here is the effect upon people who are not directly involved in the subject matter of my inquiry. The subject matter of my inquiry is the conduct of people who hold public offices. And, necessarily, the names of Ms Higgins and Mr Lehrmann have to be raised and things about them have to be said. But they - that's the extent of their connection with my inquiry. And to publish, as two of your clients did - I think three of your clients did, the stories that were published I think go so far it actually staggered me. Because this - my staff - my counsel assisting have been freely engaging with journalists to ensure that the - that they had an understanding of the nature of the things that we are inquiring into and had an understanding of the significance of the issues so that whatever stories they wrote, they would have a firm factual and conceptual foundation. And it's - I will tell you it's distressing to think that that kind of free engagement with journalists whom I've trusted has resulted in this.

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MR QUILL: Yes, Mr Chair. Can I - I will respond on the section in a moment. But before I do, I would seek to say this: that I don't want, by responding on that point, to be seen or to be heard to be dismissing in any way, shape or form the concerns that the Chair is raising. I am hearing them loud and clear. Staggering, distressing; they are matters that will be passed on to my client. And I don't - I did want to say something very, very briefly about the section and the power -

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THE CHAIRPERSON: Go ahead. Go ahead, Mr Quill. I will hear everything you need to say.

MR QUILL: Thank you. Thank you, Mr Chair. I do labour that point a little bit, though. I don't want it to be seen that I am making technical legal points and being dismissive of the concerns that the Chair is raising.

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THE CHAIRPERSON: No, you want to make a submission on a point of law, and I need to hear it. That's fine.

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MR QUILL: The point is simply on the section and the power of the section, it is, in my submission, important to read the power in the context of subsection (4), which really sets the parameters such that you start from openness. And it's important to have regard to the importance of open justice if - I'm really paraphrasing that subsection.

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THE CHAIRPERSON: No, that's all right. Let me read it, Mr Quill, and then you can say what you like about it. Give me a moment.

MR QUILL: Certainly.

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THE CHAIRPERSON: Yes. Go ahead, Mr Quill.

MR QUILL: I don't put to you, Mr Chair, that subsection (4) means that the power doesn't exist. In my submission -

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THE CHAIRPERSON: Yes.

MR QUILL: - it really is suggestive that that power - as the authorities - and I deliberately haven't, and don't intend, to take the inquiry to all of the authorities. No doubt, Mr Chair, you are well familiar with the authorities on the principles of open justice and the importance of them. Really, subsection (4) is really designed to say that the power should be used only in, if you like, exceptional circumstances, the authorities talk about.

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When the Chair mentioned a moment ago that one must take into account Ms Higgins' and Mr Lehrmann's position, if you like, as I said earlier and conceded earlier, no doubt these matters are greatly distressful for Ms Higgins and presumably Mr Lehrmann as well. Of itself, though, that in my submission - and particularly in the absence of any evidence that would suggest that the suppression of these specific matters will somehow overcome that distress that they would no doubt be suffering - in the absence of any evidence or any submission to that effect, in my submission, that position - that argument doesn't rise to the level that is justified under the relevant section to empower the making of a suppression order in the type that was made on an interim basis this morning. So the confidentiality, in my submission, has been lost. The -

THE CHAIRPERSON: Just on the confidentiality ground - just to assist you, Mr Quill, I don't consider that the confidentiality element in the section has been invoked. It's the "any other reason", and it concerns the protection of these two young people as far as possible under the current circumstances. And it seems to me that the simplest way to do that is to hold private hearings.

MR QUILL: Yes. Well, one of submissions I was about to make is once you start suppressing elements of this, it does become a slippery slope and you end up suppressing - or having private hearings. In my submission, that is absolutely not in anyone's interests. As I said, Ms Higgins herself said, "Sunlight is the best disinfectant." The whole purpose of this inquiry is to shine a light, if you like, on these matters.

The horse has bolted argument - the lack of confidentiality - goes not just, Mr Chair, to the question of power in the section; it also goes, in my submission, to the "for any other reason" power. And it does that because, the horse having bolted, so to speak - these matters having already been reported, it makes it very, very difficult for the inquiry to make any order that fixes any problem that might have been caused. So the horse has bolted argument goes to both legs of the power.

I might say, I do - on the concern for Ms Higgins and Mr Lehrmann point, I do reiterate the submission that there is, as far as I am aware, no evidence or submission that is able to point to the conclusion, if you like, that the suppression of these documents - the continuation of the suppression order that was made this morning would somehow fix the distress. And I'm using "distress" - I'm perhaps understating it. I don't mean to, Mr Chair. But in my submission, it - there is no evidence that would suggest that that leg of the power is (indistinct).

THE CHAIRPERSON: Well, to put it another way, you are submitting that there's no reason to think that a continuation of the suppression of the evidence that I've suppressed for the moment would have any effect - any palliative effect. Is that right?

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MR QUILL: It would have an effect sufficient enough to justify the making of an order and empower - the empowerment -

THE CHAIRPERSON: Well, it would stop stories like the ones I quoted to you.

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MR QUILL: It would. It would. But my submission is that of itself - there's no evidence to suggest that that occurring would necessarily fix the distress - and, again, I'm using that word -

15 **THE CHAIRPERSON:** No, that's true. That's right.

MR QUILL: Yes. Fix the distress.

THE CHAIRPERSON: I accept that.

20

MR QUILL: The - so I do make that submission. And in doing - in making these submission, again, I wish to again stress that I am not in any way, shape or form - and my clients are not in any way, shape or form - dismissing what it is that the inquiry has said in relation to the concerns about these reports. Those matters are - couldn't be clearer - couldn't be clearer from this morning and more so this afternoon. They are matters that will be taken into account. And in my submission, the inquiry ought lift the temporary order that was - or the order that was made this morning and the matter be reported, certainly be reported cognisant of and aware of the matters raised this afternoon - the matters you, Mr Chair, have raised with me.

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THE CHAIRPERSON: Thank you, Mr Quill. Is that all you wanted to submit?

MR QUILL: It is. It is, Mr Chair.

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THE CHAIRPERSON: Thank you for your assistance. Yes, Mr Tedeschi.

MR TEDESCHI: Chair, we respectfully submit that any media organisation, particularly the large media organisations that are represented by Mr Quill, would realise that such details are suppressed and not admissible in criminal proceedings. These are organisations that every day report criminal proceedings. They must know that such details are completely and utterly irrelevant to criminal trials.

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THE CHAIRPERSON: And the detail of it - what is more - is irrelevant to the issue I'm inquiring into. The substance of it is very important, which is why I freely opened up the document.

45

MR TEDESCHI: Yes. Indeed.

THE CHAIRPERSON: But to repeat under it under the guise of saying, "This is important for you to understand," but instead to headline it as something like a supermarket magazine is - I haven't had the experience, I must say.

5 **MR TEDESCHI:** We also submit, Chairman, that if they thought about it for even a few seconds, they would realise that the publication of such information will discourage future complainants in sex cases from coming forward. And it's quite clear that the basis of the information that's been published is sheer scuttlebutt. We submit that the attitude that's been taken by these media organisations belongs in the Stone Ages, not in a modern approach to
10 allegations of sexual assault, and that you would conclude that this is an egregious infringement of both fair reporting and standards of good reporting. Apart from what we suggested earlier, we would ask you, Chairman, to request - or to consider requesting the publication of your views in the media organisations that have published these entries - your views about the inappropriateness of publication.

15 **THE CHAIRPERSON:** Thank you, Mr Tedeschi. Yes, Ms Chrysanthou.

MS CHRYSANTHOU: (Indistinct) not on behalf of my client, as a person who often appears in these sorts of applications.

20 **THE CHAIRPERSON:** Yes. Would you speak up a little?

MS CHRYSANTHOU: Yes. I will.

25 **THE CHAIRPERSON:** Thanks.

MS CHRYSANTHOU: I'm not usually accused of not speaking up, so I will adjust myself. Usually I get the opposite complaint. Mr Sofronoff, there's three issues: one is the documents in question that have already been reported on; the second is how this inquiry should
30 approach documents of a similar nature going forward over the next few weeks; and the third is the measure that you've already referred to, which is closing the inquiry completely having regard to what's occurred.

Insofar as the first issue is concerned, which is the issue that's being addressed immediately,
35 the difficulty is formulating an order which can be complied with. And with respect to the order that has already been proposed, because of the way that the internet works, if material is online that has been published in the past, every download that occurs in future is considered a publication and could be considered to be a breach of the order that's been made. For example, I had a look over the lunch break at social media, and these articles are being shared
40 and commented upon repeatedly, even after you made the order, by individuals in the community who have no idea that they are technically in breach of an order that was made earlier today.

So the notion of publication on the internet is an ongoing issue, which means that, as
45 currently framed, the order can't really practically be complied with. And that's unfortunate having regard to what you've already described as the nature of the publications that have been made. It seems that up until this point, the only thing that can now be done about the overwhelming media interest in those scurrilous rumours is to note that they are not a fair report of what is happening in this inquiry and any person who is defamed by any of those
50 media organisations have a cause of action that's not protected by fair report.

THE CHAIRPERSON: And what's more, somebody making horrible statements on social media - it's not difficult, is it, to track down the person?

5 **MS CHRYSANTHOU:** No. It's not. And the difficulty with social media is that because of the way that it is set up, the material travels through the internet to people's computers and phones and iPads. I have described it in the past as a virus. It's exponential. And trying to contain what has occurred over the last 24 hours, having regard to the interest of, I think, every media organisation in the country, is an impossibility.

10 **THE CHAIRPERSON:** So submission number 1 is that a non-publication order would be ineffective, and one shouldn't make ineffective orders.

MS CHRYSANTHOU: Yes.

15 **THE CHAIRPERSON:** Yes, I understand that.

MS CHRYSANTHOU: And had the order been sought before the document was circulated, then all of the arguments that my learned friend Mr Tedeschi makes would be rational and real and would need to be considered having regard to particular parts of the document.

THE CHAIRPERSON: Yes.

25 **MS CHRYSANTHOU:** And perhaps we should all consider that going forward before the documents - further documents are released. The next aspect is a procedure going forward which enables the parties to raise those sorts of objections before a document is put online or made public within the inquiry. Having regard to the fact of the intense media interest in these proceeding, which is understandable, I understand that journalists wish to have access to the documents as soon as possible so that they can fairly report on what is happening during the evidence. And that's understandable. But perhaps, collectively, counsel and solicitors involved can formulate an efficient regime by which quick objections can be made before sensitive documents are referred to or made public.

THE CHAIRPERSON: Yes.

35 **MS CHRYSANTHOU:** And it's already done - there has been a redaction process - but perhaps if any parties - having now realised the interest and the way in which these documents are being reported upon, might wish to revisit their position when it comes to the redaction of material.

40 The third issue which you raise, Mr Sofronoff, is making the hearing a closed one. From our perspective - and in this regard, I do speak on behalf of my client - we would oppose that. The work of the inquiry is very important, and it has attracted, understandably, intense media interest all week and even before this week. And it wouldn't be in the public interest in the reporting task that you have to deprive the public of understanding the evidence that is coming out during the evidentiary stage.

45 It would be insufficient to only allow the public to review your reporting at the end without having had the opportunity to watch the evidence, as I know many people are doing, and to be able to read reports of what is happening in the evidence. And the overwhelming public

interest under the Act - as prescribed by the Act by far overwhelms this sort of unfortunate reporting. But it is important that the media understand that the purpose of this inquiry, as you said at the outset, is not to impugn or defame individuals in relation to irrelevant material that happens to appear in documents, which are hearsay upon hearsay, and that they should be warned that that's not a fair report of what is going on in this room.

THE CHAIRPERSON: Thank you, Ms Chrysanthou. I will adjourn to consider what I should do.

<THE HEARING ADJOURNED AT 3.04 PM

<THE HEARING RESUMED AT 3.19 PM

THE CHAIRPERSON: This is an inquiry that is being conducted according to law. Section 21(1) of the Inquiries Act empowers me to hold hearings. I decided that my Terms of Reference required me to hold hearings in order to get at the truth. Section 21(2) of the Act requires me to hold hearings in public unless I am satisfied that it is desirable for any reason that the hearing take place in public. My Terms of Reference and the public interest in the criminal proceedings and their fate meant that I had to hold hearings in public, not in private. The community, as well as journalists, watching the livestream or reading or viewing various accounts of the proceedings in the media would be unable to understand the oral evidence of witnesses if I declined to open up the relevant documents so that they can be appreciated.

Media accounts created by experienced journalists are vital to the success of a statutory inquiry. Most people will only know about the proceedings through the work of reputable journalists. With that in mind, I and my counsel assisting have freely engaged with journalists to ensure that they can obtain a full understanding of what the evidence means and what may be the significance and ramifications of the evidence. Without that kind of engagement between my counsel assisting and, indeed, engagement by me with journalists, and without making the oral evidence and the documentary evidence available to journalists and the public, the community would have to wait for my report to learn the truth about how various important public officers perform their duties. The community would be denied the precious opportunity to assess the evidence for themselves as it emerges.

It has been put to me that I should restrain publication of some evidence that I believe that the community should be able to see. One issue that I've been investigating is the resistance of the Director of Public Prosecutions to disclose to the defence at the trial documents in which police officers set out some untested evidence, as well as untested information, that they believe made inroads into the credibility of Ms Brittany Higgins as a witness at the trial. Police regarded those documents as an important tool in assessing the case. The Director of Public Prosecutions viewed those documents as nothing of the sort and, indeed, he characterised them as evidence of an attempt to interfere with the administration of justice.

The issue, thus presented, is serious. Mr Drumgold has given evidence about it, and the police officers will be called to give their evidence. If the community and the journalists who serve the community are to follow the oral evidence of the hearing and form their own views as citizens whose vital interests are involved, they have to be able to see the whole of the relevant and significant evidence. However, the public interest is not served by the misuse of the evidence that I make available only for that purpose.

5 This morning, Mr Tedeschi KC brought my attention to some media stories in which
journalists have picked up short statements in the documents, statements that are defamatory
of Ms Brittany Higgins, that are scandalous, which could never have surfaced at the trial and
which have been made available by me only as a small mosaic piece of the whole of the
evidence for the sole purpose that I have explained.

10 To give prominence to a scandalous, unjustified, defamatory and prurient isolated statement
on the pretence that it has some independent importance for an understanding of the issue that
I have referred to is not just low journalism. It does not represent a fair report of the
proceedings. It is actionable. It may constitute a contempt of this inquiry because it involves
an abuse of the access that I have allowed to the evidence before me. It is also a mean and
cruel thing to do to somebody. I know that there have been similar repugnant publications on
social media by individuals. These are also actionable, and it would not be hard to track down
who has posted this kind of material.

15 In the course of many dealings with experienced Australian mainstream journalists as part of
my work over some decades, I have learnt to trust their ethics and their professionalism, and I
have not once been disappointed. My trust has been damaged today. I'm not prepared to
conduct this inquiry in a way that causes avoidable harm. Two young people - Ms Higgins
and Mr Lehrmann - are at the centre of this matter. Their lives have been irrevocably changed
in the course of the last few years. Each of them now has a burden to bear. At least, they will
have to accept that they will be the subject of public discussion and debate for a long time.
But they don't have to tolerate being defamed or maligned.

25 I have been urged to suppress some of the evidence before me to avoid this. I have thought
about whether I should conduct all future hearings in private. I have thought about whether it
would be better, at least to restrict the free engagement that my staff has had with journalists
until now. I've thought about whether I should do any of these things. Pursuit of the truth in
the public eye is very important, but the truth can cost too much, and the cost will be borne
by people who do not deserve to bear it. The simplest and most effective thing for me to do is
to cease holding public hearings and to hear the rest of the oral evidence in private. That
would be easier, and it would be cheaper, than anything else. It will instantly solve for the
future the problem that I am addressing. I'm loath to take such a step that would change the
character of this inquiry.

35 Ms Chrysanthou, who appears today for Ms Wilkinson but who has made submissions to
assist me and not behalf of her client, and Mr Quill, who appeared by leave today for five
media organisations, emphasised to me that the public nature of the inquiry is too important
to be let go. Mr Quill reminded me that the importance of the publicity attached to these
hearings is emphasised by the statute in subsection (4), which requires me, before making a
direction that hearings be private under subsection (3), to take as the basis for my
consideration of the issue the principle that it's desirable that hearings be in public and that
evidence given before the contents of documents lodged with or received in evidence by the
Board should be made available to the public and all people present at the hearing.

45 The subsection provides that I must pay due regard to any reasons given to the Board why the
hearing should be held in private or why publication or disclosure of the evidence should be
prohibited or restricted. It is well for me to remind myself that that is the statutory foundation
upon which I should proceed. In substance, Mr Quill and Ms Chrysanthou submitted that I
should not baulk at the first sign of trouble. I take it that this is particularly so since nobody

has asked me to conduct the inquiry in private. I have decided, with some trepidation and on account of the statements made to me by Mr Quill about the importance which his clients will attach to my concern that I have expressed today - I have decided that I will not cease conducting hearings in public.

5

I have been made very sensitive to the damage that can be done, and it will now take very little more for me to start going about my work in a different way. As to the documents that have been used in this harmful way, Ms Chrysanthou submitted correctly that it would be impossible to formulate a direction that would be effective to suppress or even substantially suppress re-publication of the offending material, and she has demonstrated to my satisfaction that the direction that I made this morning would not have such an effect. I therefore vacate it. In the result, I will do nothing today except ask the media companies that have published this loathsome material to do all that is possible to remove it from the public eye. Thank you, Mr Quill, for your assistance. Yes, Ms Longbottom.

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MR QUILL: Mr Chairman -

THE CHAIRPERSON: You are excused. Thank you for your assistance.

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MR QUILL: Thank you, Mr Chair.

MS LONGBOTTOM: Mr Drumgold, you will recall that before lunch, we were discussing those parts of your letter of 1 November where you touch upon meetings that you held with members of ACT Police between March and June of 2021?

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MR DRUMGOLD: Yes, I do recall that.

MS LONGBOTTOM: Now, the police officers who attended those meetings included people such as Mr Scott Moller, Emma Frizzell -

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: - Mr Boorman -

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: - Mr Moller - I might have already said him.

MR DRUMGOLD: Yes, you have.

40

MS LONGBOTTOM: Mr Madders?

MR DRUMGOLD: Madders, yes.

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MS LONGBOTTOM: And Mr McDevitt?

MR DRUMGOLD: Yes, at the first meeting. Yes, that's right.

MS LONGBOTTOM: You are aware that as part of its investigations, the Board of Inquiry has obtained statements from a number of -

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MR DRUMGOLD: I would be surprised - I would be surprised if you didn't, yes.

MS LONGBOTTOM: Yes.

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MR DRUMGOLD: I'm not - I haven't read many of them, but I'm - I would be surprised if you didn't.

MS LONGBOTTOM: Can you speak up, please?

10

MR DRUMGOLD: I said I haven't read many of them, but I would be surprised if you didn't, was the answer to my question.

MS LONGBOTTOM: The statements have been obtained, and you have at least had the opportunity to review them?

15

MR DRUMGOLD: I've got some, yes.

MS LONGBOTTOM: And I will take you to a couple of specific examples of this. But can I suggest the account given by a number of those police officers of the meetings referred to in your letter differs in substantive respects from your own?

20

MR DRUMGOLD: Okay. Yes.

MS LONGBOTTOM: Let me take you to one example. Operator, can you please display WIT.0044.0001.0001_0001. Can you take a moment to locate it? There seems to be some technical difficulties. I might just put to you a number of propositions arising out of that statement and give you an opportunity to respond. Ms Frizzell in her statement says of the meeting on 31 March -

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30

MR TEDESCHI: Paragraph, please?

MS LONGBOTTOM: At paragraph 199. Was that her understanding was that that was a meeting that your office requested? Do you accept that was the case?

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MR DRUMGOLD: I - I don't know who requested it. I -

THE CHAIRPERSON: Is that the one that you were questioning Mr Drumgold about whether police requested it or whether -

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MR TEDESCHI: Yes.

THE CHAIRPERSON: Yes, that's the one. So that's being put to you -

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MS LONGBOTTOM: No, it's a different one, Mr Sofronoff.

THE CHAIRPERSON: No? I see.

MS LONGBOTTOM: I can orient you and Mr Drumgold. It is the meeting - if you go to DPP.005.001.1602.

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THE CHAIRPERSON: Just while that's being obtained, Mr Drumgold, jurisdictions differ about how to use contrary statements in cross-examining witnesses.

5 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: And in Queensland at least, it would be impermissible to put to a witness, "You say such and such. I put it to you Mr So-and-so says differently."

10 **MR DRUMGOLD:** Okay.

THE CHAIRPERSON: "What do you say to that?" I think that's permissible in New South Wales, but it's not permissible because it can be regarded as a form of intimidation (indistinct).

15 **MR DRUMGOLD:** Okay. I see.

THE CHAIRPERSON: What Ms Longbottom is doing, though, as a matter of convenience - because you are not an ordinary witness in the sense that I don't think you would be intimidated by hearing what somebody says to the contrary. You can deal with it on its merits.

MR DRUMGOLD: I don't know about that.

25 **THE CHAIRPERSON:** It's merely a convenient way of getting at each little piece of it to comment upon.

MR DRUMGOLD: Yes. Thank you.

30 **MS LONGBOTTOM:** So the first proposition I'm giving you to have an opportunity to comment on is that it was your office that requested a briefing on the investigation of the complaint made by Ms Higgins.

35 **MR DRUMGOLD:** Yes, I don't know who - who asked for the meeting or who - I know I was invited to the meeting. But it could well be that - because I know that there was I meeting before that. And it - I - it might have been my team concerned and getting me engaged. I can't remember who had that - who organised that meeting.

40 **MS LONGBOTTOM:** But you accept it's a possibility that the meeting was organised by your office?

MR DRUMGOLD: It could well be, yes.

45 **MS LONGBOTTOM:** Can I give you an opportunity to comment upon this: that during the meeting, you were given a briefing about things arising in the investigation to date, and those matters included risks identified due to inconsistent versions of events.

MR DRUMGOLD: I don't know those words were used.

50 **MS LONGBOTTOM:** Do you accept it's possible that that was discussed?

MR DRUMGOLD: Not being able to recall whether those words were used, I can't not accept it. But that certainly wasn't the tone of the meeting, to my recollection.

5 **MS LONGBOTTOM:** Could you comment upon this proposition advanced by Ms Frizzell: that there were no discussions surrounding decision-making in relation to charging Mr Lehrmann because at that stage the investigation had not progressed enough to make any such determinations.

10 **MR DRUMGOLD:** I agree with that proposition. I wasn't there to make a charging decision - I don't make charging decisions - nor was I there to give advice on a reasonable prospects of conviction, because I wouldn't do that without a brief of evidence. To my understanding, I was there to assist in guiding an ongoing investigation.

15 **MS LONGBOTTOM:** Accepting that to be the case, can we then go back to what you say in your letter about that meeting and, in particular, that your perception of it was an attempt to persuade you to agree to a position police had clearly adopted, namely, that the allegations should not proceed to a charge.

20 **MR DRUMGOLD:** That was my perception, yes.

MS LONGBOTTOM: Do you accept that perception might be skewed given what you've just accepted about the purpose of the meeting and what was discussed?

25 **MR TEDESCHI:** I object to the ambiguity of the question.

MS LONGBOTTOM: Let me rephrase it. Mr Drumgold, you've accepted that there wouldn't have been a discussion at that meeting about charging because it was too early a stage in the investigation?

30 **MR DRUMGOLD:** My perception was that I was -

MS LONGBOTTOM: Could you answer my question?

35 **THE CHAIRPERSON:** No.

MS LONGBOTTOM: Sorry. Okay.

THE CHAIRPERSON: He has to think it through, Ms Longbottom.

40 **MR DRUMGOLD:** My perception was that they were trying to persuade me to agree with a proposition that the investigation should be stopped, that there were "gotcha" moments and therefore no need to proceed further with the investigation. That was the perception that I got.

45 **MS LONGBOTTOM:** Why would they have to persuade you that the investigation should stop when it's their investigation to conduct?

MR DRUMGOLD: Part of my confusion.

50 **MS LONGBOTTOM:** And why, then, have you recorded in your letter that -

MR TEDESCHI: Sorry, I missed that answer. That last -

5 **THE CHAIRPERSON:** "Part of my confusion." He was asked why would they be asking to stop the investigation when it was up to them to stop it or not stop it, and Mr Drumgold said that was part of the reason why he was confused at their approach.

MR TEDESCHI: Thank you.

10 **MS LONGBOTTOM:** And if we can go back to your letter, why then have you described it as an attempt to persuade you to agree with police that the allegations should not proceed to charge? Why have you used that form of words?

15 **MR DRUMGOLD:** Well, because that's the effect of stopping the prosecution - stopping the investigation.

MS LONGBOTTOM: And if we can go back to your file note, DPP.004.001.0336. Why is that not recorded anywhere in your file note?

20 **MR DRUMGOLD:** Yes, I - I don't recall. I don't think those are my words. But as I - as I keep saying, my recollection is different - it is not different, but the force with which it was being presented was much greater than is reflected in those - in that document.

25 **MS LONGBOTTOM:** So you're now saying the words used in that file note with respect to the meeting of 31 March are not your own?

MR DRUMGOLD: I - I had contribution to it, but I don't know that I actually typed those words.

30 **MS LONGBOTTOM:** Can we just clarify, then, your evidence at paragraph 137 of your statement.

MR DRUMGOLD: Yes.

35 **MS LONGBOTTOM:** So you say there that you recorded your short recollections of the meeting on 31 March. You don't still have the document in which you -

MR DRUMGOLD: No.

40 **MS LONGBOTTOM:** - did that, but a version of the contents of that file note are recorded in this document that is Exhibit SD21 -

MR DRUMGOLD: That's right.

45 **MS LONGBOTTOM:** - to your statement.

MR DRUMGOLD: Yes, that's right.

50 **MS LONGBOTTOM:** So is this or is this not your account of that meeting?

MR DRUMGOLD: It's - it's not verbatim. I mean, we weren't - we were recording for cross-reference so that I could - the document was really an aide-memoire for me if - as the meetings went on that I could track back to dates where other conversations occurred, not a complete substance of those.

5

MS LONGBOTTOM: I guess what I'm confused about, Mr Drumgold, is if these things were causing you such concern, why you didn't take a note of them around the time they were occurring.

10 **MR DRUMGOLD:** As I say, I wasn't taking a Hansard of what was occurring. I was making some notes of days and a basic outline of events in case I had to - at a subsequent meeting had to cast my mind back to an inconsistency.

15 **MS LONGBOTTOM:** Can I take you - operator, can you please turn to page 2 of the letter, that is, DPP.005.001.1602. And I understand this is now in the public court book, but correct me if I am wrong about this, operator. Could you please turn up WIT.00333.0005.0001_0001. Mr Drumgold, I'm just bringing up -

MR DRUMGOLD: Okay.

20

MS LONGBOTTOM: - the statement of Mr Moller.

MR DRUMGOLD: Okay.

25 **MS LONGBOTTOM:** And can I ask you to turn, please, Mr Operator, to paragraph 149 of that statement. So you will see there the effect of the evidence Mr Moller gives is that he was expressing concerns about a number of matters, including Ms Higgins' psychological health.

MR DRUMGOLD: Yes.

30

MS LONGBOTTOM: Concerns they had about the pressure and issues associated with continual media reporting and felt that you were dismissive of their concerns.

MR DRUMGOLD: I was certainly not dismissive of her psychological concerns.

35

MS LONGBOTTOM: I guess what I want to explore with you is whether it's possible - you know, as we've said, this was all happening under intense media scrutiny. Is it possible that the pressure that came to bear on you in that context as DPP altered your perceptions of what was happening at the meeting and, equally, as you can see from Mr Moller's statement, the pressures that were operating on police may have been altering their perceptions of what was happening at those meetings?

40

MR TEDESCHI: Two different questions.

45 **MS LONGBOTTOM:** I will start with the first one.

THE CHAIRPERSON: It's - I think Mr Drumgold can answer it.

50 **MR DRUMGOLD:** I can accept we were all under pressure. Every - through the course of the trial, we were all under pressure through the course of the trial. At this stage, I didn't feel

any particular pressure. The pressure that I felt was purely related to the trial itself. That there would be intense media was of concern to me purely because of its compounding effect - its effect - its potential to affect her psychological health and her mental health. The intense media - I had no pressure on me whatsoever. If I said that there was a reasonable prospect of conviction or no reasonable prospect of conviction, neither of those things would have really changed public's perception of me.

MS LONGBOTTOM: I think you just said then that in terms of pressure, that was something that you felt during the trial. Did I hear that correctly?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Do you think it's possible that that pressure that was operating on you during the trial may have affected your perceptions of what was occurring, for example, in relation to police speaking to defence lawyers?

MR DRUMGOLD: No, I don't. I don't - not the media pressure, no.

MS LONGBOTTOM: What other pressures were operating on you?

MR DRUMGOLD: As I conceded, I think I'm reflecting - at the time of the writing, I'm reflecting on a series of events rather than recording individual events.

MS LONGBOTTOM: And you're -

MR DRUMGOLD: So I'm piecing things together. Yes.

MS LONGBOTTOM: And you're reflecting on those events in the immediate aftermath of the trial. This is a letter you wrote less than seven days from the trial being vacated?

MR DRUMGOLD: The concerns I had - I had started to articulate concerns.

MS LONGBOTTOM: But I'm talking particularly about the evidence you've just given about the pressure that you were feeling during the trial. Do you think that pressure may have affected your perception of events as you recorded them in this letter?

MR DRUMGOLD: I don't - I don't think so, no.

MS LONGBOTTOM: Okay. Operator, can you please turn to the letter at DPP.005.001.1604. At the bottom of the page there, Mr Drumgold, you make a number of serious allegations -

MR DRUMGOLD: I do.

MS LONGBOTTOM: - about Senator Reynolds. The first of them is that Senator Reynolds directly solicited transcripts of other evidence to tailor her evidence?

MR DRUMGOLD: Yes. That was my perception.

MS LONGBOTTOM: So there was no basis in evidence?

MR DRUMGOLD: My perception was in the middle - two hours into the cross-examination of the complainant, she had asked for transcripts to be sent to her lawyer.

5 **MS LONGBOTTOM:** Do you think it is appropriate - sorry, I withdraw that. Do you think that you should have committed that perception to writing in a letter coming from you with the authority of your office as Director of Public Prosecutions?

MR DRUMGOLD: I - I didn't think I had a choice but to raise these concerns.

10

MS LONGBOTTOM: But you've said, as I understand it, that was your perception. There was no basis in evidence to -

15 **MR DRUMGOLD:** It was my perception. But having drawn that perception based on my observations, I didn't really think I had a choice but to.

MS LONGBOTTOM: The next allegation you address to Senator Reynolds is that she further engaged in direct coaching of the defence cross-examination of the complainant?

20 **MR DRUMGOLD:** Again, that was my summation of what I read into those text messages - directing Mr Whybrow to particular evidence - to particular text messages.

MS LONGBOTTOM: Are you talking about those portions of the text messages that Mr Whybrow said to you, "I want you to treat these as redacted"?

25

MR DRUMGOLD: I don't think I - that was ever said. "Treat these as redacted"?

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_0333. Can you please focus in on the two boxes under the heading You - 15 October 2022.

30

THE CHAIRPERSON: You had better expand them.

MS LONGBOTTOM: They are the text messages you are referring to?

35 **MR DRUMGOLD:** They are, yes.

MS LONGBOTTOM: Operator, can you please go down to the next box. So these happened sequentially. The message I've just sent you is the latest in time. Before that, Mr Whybrow sends you a message where he says:

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"There is a message in what I'm about to send that I ask you to treat as redacted on the basis it is not something either I or the witness are required to disclose to you but have not blacked out, so you don't think anything sinister has occurred."

45 **MR DRUMGOLD:** I - I don't recall reading that. I accept that it was probably sent.

MS LONGBOTTOM: Did you -

MR DRUMGOLD: "Treat as redacted."

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MS LONGBOTTOM: But these are exceptionally serious allegations you are making, Mr Drumgold. Shouldn't you have taken the care to at least have gone back to the material on which they were based?

5 **MR DRUMGOLD:** Well, it - she had been cross-examined about them with leave of the court. I - I don't really know what "redacted" means, but - what - in that context means. But I didn't understand there to be a condition precedent on receipt of them.

10 **MS LONGBOTTOM:** You further contend that Senator Whybrow did this through direct contact -

THE CHAIRPERSON: Senator Reynolds.

15 **MS LONGBOTTOM:** Senator Reynolds - thank you, Mr Sofronoff - with defence barrister Mr Whybrow?

MR DRUMGOLD: Yes.

20 **MS LONGBOTTOM:** Is that intended to a pejorative statement about Mr Whybrow?

MR DRUMGOLD: Not at all. Not at all. I don't think I have ever suggested that Mr Whybrow did anything inappropriate.

25 **MS LONGBOTTOM:** You further say that Senator Reynolds further organised for her partner to attend the court for the entire trial, with him regularly seeing conferencing with the defence team during the course of the entire trial, that a clear imputation of that is that there was something improper in those discussions. What basis did you have to make that allegation?

30 **MR DRUMGOLD:** Again, as we've covered several times now, the circumstances of it.

MS LONGBOTTOM: The circumstances of it being that -

35 **MR DRUMGOLD:** Of a witness that I'm about to call conferencing with defence in the context of his partner seeking transcripts.

MS LONGBOTTOM: Sorry? Who was seeking transcripts?

40 **THE CHAIRPERSON:** Senator Reynolds.

MR DRUMGOLD: Senator Reynolds.

MS LONGBOTTOM: But you are there talking here about your concerns about her partner?

45 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: So I read this as saying at least that you are imputing something improper in Senator Reynolds' partner attending court.

MR DRUMGOLD: Again, I'm saying that these - these are the concerns and these are the circumstantial strands that gave rise to that particular subset, put in - in the context of the cable as a whole.

5 **MS LONGBOTTOM:** This letter was sent on 1 November.

MR DRUMGOLD: Yes.

10 **MS LONGBOTTOM:** You've now had some months to reflect upon this matter and the matters that you've raised in that letter. With the benefit of that reflection, is there anything in that letter that you consider ought not to have been said?

MR DRUMGOLD: Look -

15 **THE CHAIRPERSON:** Or that you would wish to say, "Well, I wouldn't maintain that now."

MR DRUMGOLD: I may have -

20 **THE CHAIRPERSON:** You believed it at the time, but you don't now; something like that.

MR DRUMGOLD: I may have couched the language more collaborative, but - I mean, frankly, we seem to be talking as though I had an option. I don't - I don't consider that I had an option. After 20 years in this job, this is the last thing that I wanted to do. But I had a reasonably-based suspicion that there was interference in our jurisdiction in a particular prosecution that ultimately had the effect - a very detrimental effect on the complainant. I didn't really think I had an option.

30 **THE CHAIRPERSON:** And the basis for your suspicion that there was interference in a criminal proceeding in this jurisdiction was the attitude displayed by police to you that you have recounted and that they were apparently assisting the defence. What were the other bases?

35 **MR DRUMGOLD:** As I've said, a collection of the strands from the start. Now, the Commonwealth were involved in it early. I - I knew that. There was evidence at least Ms Higgins was concerned about political interference. Then there was evidence from the very outset, as I indicated, I found out that I was going to receive a brief from the Federal Commissioner, not from ACT Policing. And from that point on, there was - there was pressure - I felt that there - I felt that I was - they - I felt that the plan may have been, if they can convince me to give them the imprimatur not to charge, then a political matter would do away. That was my first presumption. And then as time went on, I felt that their interests aligned with a unsuccessful prosecution because then that would - that was my fear.

45 **MS LONGBOTTOM:** Did it occur to you insofar as at least it concerned the Federal Commissioner of the AFP that the reason that he might be making comment about the prosecution was because the alleged offence occurred in Parliament House, and he was addressing those matters in a Senate Estimates Committee?

50 **MR DRUMGOLD:** Like any single circumstantial strand -

MS RICHARDSON: I just rise to my feet. I just have a concern about parliamentary privilege.

5 **THE CHAIRPERSON:** Well, have a seat, Ms Longbottom. Let's have a discussion about that, because my understanding of the scope of parliamentary privilege, relevantly, is that what's said in Parliament or said to Parliament, looked at broadly, that is, judging broadly what is said to Parliament or what is said in Parliament, is not to be questioned or impugned in, among other places, an executive commission of inquiry. But often there's a great deal of sensitivity, it seems to me, in courtrooms and in inquiries about parliamentary privilege, and
10 it's treated as though anything that's said in the parliamentary context can't be repeated.

And I don't think that's the - at all the effect of the principle, because newspapers repeat what's said in Parliament all the time. And that was all dealt with when Hansard was prosecuted in 1600 and something and was permitted to go - and later was permitted to
15 publish. So what we are doing here is - there is something that Mr Drumgold heard about a brief that would be given to him. He thought it was peculiar to hear it from that source rather than the orthodox source. The fact that it was said in the Senate, "A brief will be coming to the DPP," is a fact. Nobody is questioning or impugning it. So how is it prohibited from being referred to?
20

MS RICHARDSON: I raise this only as an amicus, Commissioner -

THE CHAIRPERSON: Yes.

25 **MS RICHARDSON:** - because it is not my privilege and it is a question for the -

THE CHAIRPERSON: Yes. Thank you.

MS RICHARDSON: It's purely a matter for the inquiry.
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THE CHAIRPERSON: Thanks. But if - I'm not shutting down anybody raising matters. Certainly I'm not shutting - I don't want to shut down any assistance that's given to me. I would like all of it that you would want to give.

35 **MS RICHARDSON:** The matter I would just bring to the inquiry's attention is that the Parliamentary Privileges Act in section -

THE CHAIRPERSON: Yes. What does it say relevantly?

40 **MS RICHARDSON:** It relevantly provides restriction on a court or a tribunal. So in my submission, the fact that the media generally reports on Parliament is not an analogue because they are not a court or a tribunal. So the relevant limitation -

THE CHAIRPERSON: But that's because I can call it into question as part of the executive, and I mustn't do that.
45

MS RICHARDSON: Yes. So in subsection (3) - section 16, subsection (3), the chapeau says:

50 "In proceedings in any court or tribunal, it is not lawful..."

THE CHAIRPERSON: To?

MS RICHARDSON:

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"...for evidence to be tendered or received, questioned asked or statements, submissions or comments made concerning proceedings in Parliament by way of or for the purpose of..."

And there it lists -

10

THE CHAIRPERSON: And what are the relevant purposes?

MS RICHARDSON: The relevant things are, for example, otherwise questioning or establishing the credibility, motive, intention or good faith of any person.

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THE CHAIRPERSON: There you go.

MS RICHARDSON: And - but also here, subsection (c), drawing or inviting the drawing of inferences or conclusions, wholly or partly from anything forming part of those proceedings. So what I my learned friend - in my submission, she could put similar questions to this witness in the sense of, "You heard things in the media about what Commissioner Kershaw had said."

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THE CHAIRPERSON: Yes.

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MS RICHARDSON: That is probably a permissible approach. But the direct route which, in my respectful submission, she has used, which is to put a proposition to this witness about what has been said in Estimates and asked an inference to be drawn from it -

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THE CHAIRPERSON: But the inference she's asking to be drawn from it is what Mr Drumgold did, not what the Commissioner did or said in the Senate.

MS RICHARDSON: In my submission, it goes broader because this witness has raised a suggestion that there's some type of political interference or inference to be drawn from the fact that Commissioner Kershaw has said something about the fact that advice will be sought from the DPP. So that is, in my submission, squarely in the territory of section 16, which is drawing an inference or questioning the motive of a person based on something that has been said in (indistinct).

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40

THE CHAIRPERSON: I don't - Mr Drumgold, were you referring to - just so we are clear, were you referring to something said in Estimates as support for your belief that there was something political happening?

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MR DRUMGOLD: I'm saying I found out that the brief was coming to me via -

THE CHAIRPERSON: Because the Commissioner said something in the Senate.

MR DRUMGOLD: That's right. That's correct.

THE CHAIRPERSON: So it's a fact that that's when you learned about it. I don't think anybody is - I don't think he's asking me to infer anything from the fact that the Commissioner said something in the Senate. So we will just proceed. But if I'm wrong, somebody is going to tell me.

5

MS RICHARDSON: There is just one other matter -

THE CHAIRPERSON: Go ahead. Go ahead.

10 **MS RICHARDSON:** - only that -

THE CHAIRPERSON: You might tell me. Go ahead.

15 **MS RICHARDSON:** The scope of section 16(3)(c) is broader. It forbids the drawing of any inference from something that has been said in Parliament.

THE CHAIRPERSON: Yes.

MS RICHARDSON: So -

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THE CHAIRPERSON: Yes, but we are not drawing - I see what you are saying.

MS RICHARDSON: Well, I think the witness was certainly asked -

25 **THE CHAIRPERSON:** No, I see what you are saying. Yes. Why don't you move on to something else and I will have a look at this overnight and we can revisit it if it becomes important. Ms Chrysanthou, did you want to say something?

MS LONGBOTTOM: We may be able to ask the question in a different way, Mr Sofronoff.

30

THE CHAIRPERSON: Well, just have a seat for a moment. Ms Chrysanthou wants to make a submission.

35 **MS CHRYSANTHOU:** (Indistinct) substantial detail in two relatively recent defamation cases, where one finds the fount of all knowledge on most matters. *Barilaro v - Rares J* in *Barilaro v Shanks-Markovina (No 2)* [2021] FCA 950, where his Honour very carefully looks at the scope of subsection (3) of section 16. But more relevantly - and I'm just getting the citation - the Full Court considered these issues in the litigation between Senators Hanson-Young and Leyonhjelm on the question of parliamentary privilege and things that were said in Parliament and then used in the proceedings.

40

And I think in respect to what my learned friend said, one of the key issues in interpreting subsection (3) is whether you are impugning the proceedings themselves in connection with the proceedings. And I will just get the Full Court reference for everyone, where three judges of the Full Court very carefully looked at this issue. The Full Court decision is - sorry. I didn't realise this was coming up. It is *Leyonhjelm v Hanson-Young* [2021] FCAFC 22. It is perhaps reported, but I just don't - haven't had the chance to check that. And these precise issues are looked at -

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50 **THE CHAIRPERSON:** Thank you.

MS CHRYSANTHOU: - having regard to what my learned friend Ms Richardson just said.

5 **THE CHAIRPERSON:** Thanks. Ms Longbottom, why don't you jump to another line and we can look at this overnight. And if you still want to pursue it, we can pursue it.

MS LONGBOTTOM: I can do that. Mr Drumgold, this letter was sent on 1 November.

10 **MR DRUMGOLD:** Yes, it was.

MS LONGBOTTOM: A month later, on 1 December, you decided to discontinue the prosecution of Mr Lehrmann. Now, that decision was principally informed by some medical information you had been provided about Ms Higgins?

15 **MR DRUMGOLD:** That's correct.

MS LONGBOTTOM: Did you seek the views of ACT Police as part of making that decision?

20 **MR DRUMGOLD:** No, because it was a public interest ground. I - I - I certainly had a phone call with the Chief Police Officer.

25 **MS LONGBOTTOM:** So - and I'm paraphrasing here, but the 2021 prosecution provides that should ordinarily occur or should occur whenever practicable. But I take it your view was because of a particular basis upon which the prosecution was being discontinued, that wasn't critical in that case?

MR DRUMGOLD: That - that's right.

30 **MS LONGBOTTOM:** Do you recall when that phone was?

35 **MR DRUMGOLD:** It was - it was after I had received the evidence and before I had made the decision, and that was - I can't recall precisely, but that was over a course of about a week. I got - I received the evidence. I reflected on the evidence. I consulted my team. We kind of went through different hypotheses. And at around that time, I called Mr Gaughan, had a conversation with him and then I spoke to the representative of - for Ms Higgins and informed him. And then we were putting, collectively, measures in place to - safety measures in place for the complainant - for the former complainant (indistinct).

40 **MS LONGBOTTOM:** I just want to give you an opportunity to comment upon this, Mr Drumgold. Mr Gaughan has given a statement to the Commission - the Board of Inquiry, rather. And at paragraph 96.4 of that statement, he denies that you spoke to him before you made the decision to discontinue.

45 **MR DRUMGOLD:** Before I had actually formed the decision? That could be right. I had - I had spoke to him before I announced it.

50 **THE CHAIRPERSON:** Does anything turn upon the precise time point of time, whether it was before or after Mr Drumgold made his decision?

MS LONGBOTTOM: It's relevant in this respect, Mr Sofronoff: the prosecution policy that Mr Drumgold published states that the views of ACT Police should occur - should be sought whenever practicable in making decisions of that type. So that's the relevance of the question.

5 **THE CHAIRPERSON:** But say he didn't. Does it matter?

MS LONGBOTTOM: Well, I'm really just giving Mr Drumgold an opportunity to comment upon the contrary account that's given by the ACT Chief of Police.

10 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: My recollection is I certainly had a conversation with Mr Gaughan prior to making a public announcement. You use the word "decision", and decision is a process, not an event. Whereabouts in that process, I don't - I can't quite recall.

15

MS LONGBOTTOM: And - and let me correct the record in this respect. The evidence the ACT Chief of Police has given is that to the best of his recollection, either the afternoon before or the morning of 1 December 2022, but definitely before you gave a press conference to formally announce the charge had been withdrawn, you called him and told him that you had withdrawn the charge. Is that consistent with your -

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MR DRUMGOLD: That - that accords with my recollection.

MS LONGBOTTOM: Okay. Now, on 2 December, you issued a media release in relation to that decision?

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MR DRUMGOLD: Yes, I did.

MS LONGBOTTOM: Now, as I understand it - and we can pull this up. Could you please pull up DPP.004.001.0033. I'm just taking you to the 2021 prosecution policy.

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: It speaks to the parameters of a decision to publish reasons for a decision to no longer proceed further with a prosecution. Can you just speak to what your understanding of the parameters of that aspect of your role are? In particular, things that you can and cannot say?

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MR DRUMGOLD: I don't know. I can - do you want me to read it?

40

MS LONGBOTTOM: I don't need you read it out loud. I guess what I'm particularly interested in your view on is when, as was the case here, you have determined to discontinue a prosecution -

45 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - that leaves the accused in a situation where they are - the complaint hasn't been decided by the constitutional arbiter of facts?

50 **MR DRUMGOLD:** In every matter, yes.

MS LONGBOTTOM: But they are entitled under our criminal justice system to the presumption of innocence?

5 **MR DRUMGOLD:** That's correct.

MS LONGBOTTOM: How do you take those matters into account - will you accept they are matters that you need to take into account when publishing reasons about a decision to discontinue?

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MR DRUMGOLD: They are.

MS LONGBOTTOM: What do you say is the appropriate parameters of what you should do when publishing reasons to address that?

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THE CHAIRPERSON: That's a bit hard to answer, Ms Longbottom.

MS LONGBOTTOM: Okay. Let me do it in the particular context of the statement.

20 **THE CHAIRPERSON:** You are really addressing the last part of Mr Drumgold's statement

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MS LONGBOTTOM: I am, yes.

25 **THE CHAIRPERSON:** - and why he made it and whether he thought it was a proper thing to do or - is that right?

MS LONGBOTTOM: That's precisely it.

30 **THE CHAIRPERSON:** Why don't you explain that. You know you have been criticised about it, so why don't you tell us why you thought you should say that and why it was right to do it.

35 **MR DRUMGOLD:** This is the issue relating to the complainant herself, we are talking about?

MS LONGBOTTOM: Yes. Would it help if I put the statement up so you can see it?

40 **MR DRUMGOLD:** No, I - it's burnt in my memory.

MS LONGBOTTOM: Okay. Well, I might put it up in any event so that others can see it. BO1.008.001.0001_0001. BOI. While that's coming up, I'm just interested in the comment you've just made that it's burned on your memory. Can I ask why you said that?

45 **MR DRUMGOLD:** Because I - I probably shouldn't have done it.

MS LONGBOTTOM: Okay. So why do you say you shouldn't have made that comment?

MR DRUMGOLD: Because it was on my part naive that it would have any benefit. I think the trust in the media that Mr Sofronoff appears to have lost today was lost on me following that. I - I foolishly thought that they might give her a break.

5 **MS LONGBOTTOM:** So that was your intent?

MR DRUMGOLD: That was the intent.

MS LONGBOTTOM: But you accept, in retrospect, that was in error?

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THE CHAIRPERSON: But why do you now think it was an error?

MR DRUMGOLD: Because I - it -

15 **THE CHAIRPERSON:** Because of the way it was treated?

MR DRUMGOLD: Because on a cost benefit, at the time - I now realise there is no benefit in doing it. It just fed the pack.

20 **THE CHAIRPERSON:** And what was the cost?

MR DRUMGOLD: The cost was making unnecessary - making additional statements. That was the cost. And the benefit was that I thought it may - bearing in mind at this time she was very precarious. I knew that this decision would impact her state of mind. I was really just trying to lighten the load in some way that would be borne upon her.

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MS LONGBOTTOM: Did you turn your mind to the impact of that statement on Mr Lehrmann, who was entitled to the presumption of innocence?

30 **MR DRUMGOLD:** Yes, no, I've got sympathy for everybody involved in this case. Cases like this have no - no winners and no losers. They only have losers and losers. Before me, however, was a complainant in a very vulnerable position, and I had quite solid evidence of that very vulnerable position.

35 **MS LONGBOTTOM:** So that was weighing heavily on you at the time?

MR DRUMGOLD: Yes. Yes, it was.

MS LONGBOTTOM: And I do need to press you for an answer to the question I just posed. Accepting that was a heavy weight on you when you were making the decision about issuing this statement, did you turn your mind to the impact that statement might have on Mr Lehrmann, who was entitled to the presumption of innocence?

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MR DRUMGOLD: I don't know that it impinged the presumption of innocence. So it - possibly not as much as I should have.

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THE CHAIRPERSON: So, in summary, you are aware of Ms Higgins' fragile condition, and the discharge of the jury of the trial must have had a great effect on her. It would on anybody. And announcing that there would be no retrial you were concerned would have an effect on her, which would - and not a good effect. And you were trying to alleviate the effect

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of the pain that would be caused by the official announcement you were making by a statement of moral support because - of saying, well, you believe the case was always a good one. Is that a fair summary?

5 **MR DRUMGOLD:** Yes, my hope - I think the goal was that the media might at least back off for a little while until she could heal. That was the vague hope.

THE CHAIRPERSON: Ms Longbottom, how much longer do you think you've got to go?

10 **MS LONGBOTTOM:** There is one last series of questions I needed to ask Mr Drumgold, and it will take no more than five minutes.

THE CHAIRPERSON: All right. Well, we will continue.

15 **MS LONGBOTTOM:** Mr Drumgold, can I take you to paragraph 471 of your statement.

MR DRUMGOLD: Yes.

20 **MS LONGBOTTOM:** You refer there to a telephone conversation you had with a journalist from The Guardian.

MR DRUMGOLD: I do.

25 **MS LONGBOTTOM:** How do you pronounce his name? Is it Mr -

MR DRUMGOLD: Knaus.

30 **MS LONGBOTTOM:** Mr Knaus. So this the day after you made the discontinuance announcement.

MR DRUMGOLD: Yes.

35 **MS LONGBOTTOM:** But as you say in your statement, you have read an article in The Australian newspaper while you were on the phone.

MR DRUMGOLD: Yes, I was directed to an article.

MS LONGBOTTOM: He directed it to you.

40 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And at paragraph 478, you say you were feeling highly emotional during that phone call and perceived that a personal attack had been made against you in that article?

45 **MR DRUMGOLD:** "Perceived" probably puts it a little bit low. But, yes, I was quite confident that there was a personal attack.

50 **MS LONGBOTTOM:** Now, during that conversation, did you tell -

MR TEDESCHI: Chairman, I was under the impression that this was another section of the inquiry that was going to be at the end. The list that has been -

5 **THE CHAIRPERSON:** I'm sorry. What do you mean, Mr Tedeschi?

MR TEDESCHI: The list of witnesses that's been produced has Mr Drumgold being recalled on the question of the FOI application.

10 **THE CHAIRPERSON:** I see.

MR TEDESCHI: This really relates to that.

THE CHAIRPERSON: I see. Well, that might well be so. Why don't we adjourn, then, and sort this out -

15 **MS LONGBOTTOM:** Yes.

THE CHAIRPERSON: - and see how we proceed. You might talk to Ms Longbottom and explain what the problem is, and I'm sure -

20 **MR TEDESCHI:** Thank you.

THE CHAIRPERSON: Well, other than that, you've got nothing more for Mr Drumgold? Is that right?

25 **MS LONGBOTTOM:** That's it, Mr Sofronoff.

THE CHAIRPERSON: Mr Tedeschi, you might know - you might be the best person to ask. Who is going - who is on first?

30 **MR TEDESCHI:** Chairman, I have an application to make -

THE CHAIRPERSON: Yes.

35 **MR TEDESCHI:** - in relation to the questioning of Mr Drumgold.

THE CHAIRPERSON: Mmm.

40 **MR TEDESCHI:** Mr Drumgold's statement was made before any of the other statements were made available to him and his legal advisors.

THE CHAIRPERSON: Yes.

45 **MR TEDESCHI:** So there's a whole host of material in chief that hasn't been covered by counsel assisting that I would want to cover in chief. In addition to that, after his statement was produced to the inquiry, there was a change to the Terms of Reference in a way which really very directly concerns him.

50 **THE CHAIRPERSON:** Yes.

5 **MR TEDESCHI:** So there are some other issues that arise relating to those Terms of Reference that we would wish to cover in chief. Now, what I would seek to do now is to lead him in evidence-in-chief on those additional issues. I certainly won't go over the same material that counsel assisting has done, but there is additional material in chief so that those counsel representing the other parties can then cross-examine him on it -

THE CHAIRPERSON: Will be aware of it. Yes, I see.

10 **MR TEDESCHI:** - and be aware of it.

THE CHAIRPERSON: Well, why don't you talk to Ms Longbottom about it, and rather than telling me all about it, tell her all about it.

15 **MR TEDESCHI:** I have.

THE CHAIRPERSON: Yes. And is there opposition?

MR TEDESCHI: And there is opposition to it, yes.

20 **THE CHAIRPERSON:** I see. Well, what's the best way to proceed without -

MR TEDESCHI: Well -

25 **THE CHAIRPERSON:** - having argument until 5 o'clock but also allowing you to know what's going -

MR EDWARDSON: Well, your Honour, for my part - I have taken instructions on this matter, and for my part I would prefer that I know precisely what Mr Drumgold says in chief.

30 **THE CHAIRPERSON:** Before you -

MR EDWARDSON: Exactly.

35 **THE CHAIRPERSON:** - before you cross-examine.

MR EDWARDSON: So for my part at least - and I have taken instructions from Mr Whybrow - we have no resistance to that application.

40 **THE CHAIRPERSON:** No problem with that. Before I hear from Ms Longbottom then, I understand what you want to do, you want to lead material that if the inquiry had proceeded in a different way would have been the subject of a statement probably -

MR TEDESCHI: That's right.

45 **THE CHAIRPERSON:** - and should be led. And you would say that that's convenient because everybody who follows you, who has got an interest in putting matters to Mr Drumgold, will have the whole story.

50 **MR TEDESCHI:** That's correct.

THE CHAIRPERSON: Otherwise traditionally you would come at the end just before Ms Longbottom and that's not possible.

MR TEDESCHI: That's right.

5

THE CHAIRPERSON: That sounds sensible.

MR TEDESCHI: And I would not seek to re-examine him now on the material that -

10 **THE CHAIRPERSON:** You would what?

MR TEDESCHI: I would not seek to re-examination him on the material that's been raised.

THE CHAIRPERSON: Yes, I understand. You wait until the end and sweep it all up.

15

MR TEDESCHI: Yes.

THE CHAIRPERSON: Well that seems to make sense to me. Can I hear from everybody else before I hear from Ms Longbottom.

20

MS RICHARDSON: I don't seek to be heard on the matter.

THE CHAIRPERSON: All right. Mr Black?

25 **MR BLACK:** Not opposed, your Honour.

THE CHAIRPERSON: But can you tell me if you have no view or whether you have - whether you support Mr Tedeschi.

30 **MR BLACK:** No, I support it. I support Mr Tedeschi, your Honour, yes.

THE CHAIRPERSON: Yes. Ms Chrysanthou?

35 **MS CHRYSANTHOU:** I have no view other than to inquire politely as to how long that would take. Just from the perspective of our - the fact we are sitting here.

THE CHAIRPERSON: How long do you think it would take, Mr Tedeschi?

MR TEDESCHI: My best estimate is half a day.

40

THE CHAIRPERSON: All right.

MS CHRYSANTHOU: Our view is if we can cross-examine Mr Drumgold this week then we are content with whatever occurs.

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THE CHAIRPERSON: Yes. And who is going - assume Mr Tedeschi goes next, who is going after - who goes first?

MS RICHARDSON: I'm currently proposed to go next.

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THE CHAIRPERSON: You will. And how long do you think you will be Ms Richardson. It is hard to say but doing your best?

5 **MS RICHARDSON:** Probably about -

THE CHAIRPERSON: Two hours. All right, well it sounds promising Ms Chrysanthou.

MS CHRYSANTHOU: Yes.

10 **THE CHAIRPERSON:** Is anybody else going to ask questions of Mr Drumgold?

MR EDWARDSON: I will be.

THE CHAIRPERSON: You will, of course.

15

MR EDWARDSON: Yes, I will. It's difficult to say and that's one of the reasons why I wanted to hear what Mr Tedeschi wanted to ask first. I'm guessing, and that's a really - a couple of hours at the most.

20 **THE CHAIRPERSON:** Yes. And are you going to follow Ms Chrysanthou or is she going to follow you?

MR EDWARDSON: I think I'm actually pretty much last before - right at the end.

25 **THE CHAIRPERSON:** You don't have to be because if she wants to be somewhere else next week it may be -

MR EDWARDSON: I will discuss with that with my colleagues, your Honour.

30 **THE CHAIRPERSON:** Ms Longbottom, I think you mentioned to me that Mr Tedeschi had in mind leading some evidence-in-chief but now that he's explained it, it seems to make sense. What do you say?

35 **MS LONGBOTTOM:** I don't have a strong opposition to it, Mr Sofronoff, particularly having heard what other members at the bar table have said.

THE CHAIRPERSON: All right well that's how we do it. You go next in the morning after Ms Longbottom. All right. And then you might give me a running list so I know - you can always change it - so I know who is the order in which you are going to examine. Thank you, Mr Drumgold. We will adjourn until tomorrow. Thank you.

<THE HEARING ADJOURNED AT 4.15 PM TO THURSDAY, 11 MAY 2022 AT 9.45 AM