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TRANSCRIPT OF PROCEEDINGS

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INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

MELBOURNE

FRIDAY 1 MARCH 2019

(16th day of examinations)

BEFORE THE HONOURABLE ROBERT REDLICH QC

Counsel Assisting: Mr Jack Rush QC

Ms Catherine Boston

OPERATION GLOUCESTER INVESTIGATION

PUBLIC EXAMINATIONS PURSUANT TO PART 6 OF THE INDEPENDENT  
BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011

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*Every effort is made to ensure the accuracy of transcripts.  
Any inaccuracies will be corrected as soon as possible.*

1 COMMISSIONER: Yes, who's to start? Mr Stewart.

2 MR STEWART: Commissioner, it's reasonable to assume that  
3 when Mr Bezzina entered the witness box on 5 February  
4 of this year, it was his belief that he'd taken  
5 Mr Pullin's first statement. He said as much to IBAC  
6 when he went to IBAC, of his own volition, on  
7 20 November 2017 when he was interviewed by Kerrin(?)  
8 Murphy and Barry O'Connor. That is apparent at a time  
9 when he says, "I only took one statement from Pullin."

10 He conceded that his statement of 19 August 1998,  
11 Exhibit 217, in the second paragraph, doesn't suggest  
12 that he took either Sherrin or Pullin's statements, and  
13 he didn't disagree when it was suggested to him that it  
14 supported the view that Mr Pullin made his own  
15 statement.

16 In my submission, sir, that is consistent - - -

17 COMMISSIONER: I'm sorry, I'm not quite following that,  
18 Mr Stewart, could you just explain that in a little  
19 more detail?

20 MR STEWART: Certainly. The position is that Mr Bezzina's  
21 belief has been for some time that he took Mr Pullin's  
22 statement.

23 COMMISSIONER: Yes. When you say "took it", what do you  
24 mean? That Mr Pullin typed it but Mr Bezzina took  
25 Mr Pullin's acknowledgment? What are you actually  
26 saying?

27 MR STEWART: I'm saying, Commissioner, that it was his view,  
28 and you may well recall, sir, that on many occasions  
29 prior to giving evidence before you he said, "I would

1 have done this, I would have done that."

2 As I understand what his position was, was that he  
3 had physically typed the statements and then Mr Pullin  
4 had signed it in his presence, and that Mr Bezzina had  
5 acknowledged it.

6 COMMISSIONER: You think that was his state of mind  
7 in November 17?

8 MR STEWART: Yes, which is at odds with his statement  
9 of August 1998. I only raise it because it doesn't  
10 bear on the major issue to which I wish to shortly  
11 address you, sir; namely, the reason why he signed the  
12 backdated statement and the criticism that has been  
13 made of him in that regard, but I only raise it as that  
14 being indicative and consistent with a man having to  
15 try and recall events that took place more than  
16 20 years ago.

17 COMMISSIONER: Just remind me, Mr Stewart, what's his final  
18 position as to whether he typed the original statement?

19 MR STEWART: His final position is, as he accepted before  
20 you, sir, that he can't quibble or dispute that which  
21 was put to him by counsel assisting that Mr Pullin  
22 typed his own statement.

23 COMMISSIONER: Yes.

24 MR STEWART: I'm conscious not to delve into semantics,  
25 however if I can say this: counsel assisting has  
26 contended that Mr Bezzina has knowingly put his  
27 signature to a false statement, has put his signature  
28 to a statement understanding that what he was signing  
29 was something that was false. That appears on analysis

1 and by admission by Mr Bezzina to be true.

2 But it is submitted that Mr Bezzina at no time put  
3 his signature to a statement, namely, the second one,  
4 the contents of which he believed to be altered or  
5 false, the contents.

6 COMMISSIONER: No, his explanation in his evidence as I  
7 recall it was, he'd believed it to be the very same  
8 content as the initial statement and he had no reason  
9 to think it was other than true.

10 MR STEWART: That is so, sir.

11 COMMISSIONER: But is that really an explanation?

12 MR STEWART: Commissioner, it would seem that, from the  
13 basis of all of what Mr Bezzina has said and written,  
14 his greatest concern was that it not be suggested to  
15 him that he was signing something the contents of which  
16 were false, but accepts what you say, Commissioner,  
17 that to do what he did wasn't right.

18 His priorities seemed to have been misconceived,  
19 in that, his evidence seems to be, "I am signing the  
20 same statement that was previously made some years ago,  
21 be it reformatted or whatever; that's okay, I'm not  
22 signing something different that has been beefed up to  
23 try and implicate Roberts; but it's not okay."

24 COMMISSIONER: Can I ask this, I don't know that we got a  
25 sufficient explanation from Mr Bezzina. If all he  
26 thought was that he was signing a second document which  
27 was identical in its content to the first, why did he  
28 think there was a need to sign a second document at  
29 all?

1 MR STEWART: His evidence before you, sir, has been that he  
2 imagined that it perhaps had been reformatted, and in  
3 fact if one looks at the second statement - leaving  
4 aside that which is most crucial, one of the most  
5 crucial aspects, namely the different content - that it  
6 was different in form to the original statement.

7 In relation to that, Commissioner, if I  
8 could - - -

9 COMMISSIONER: Sorry - - -

10 MR STEWART: Not at all.

11 COMMISSIONER: - - - don't let me divert you from the course  
12 you want to follow.

13 MR STEWART: No, of course.

14 COMMISSIONER: I'll ask these questions at perhaps a more  
15 appropriate point in your submission.

16 MR STEWART: Sir, what he said, and I'm going from the  
17 transcript that I've received, what he said at line 5,  
18 p.159, was effectively that he unreservedly admitted  
19 that the second statement had been signed after  
20 16 August 1998 or certainly was not signed on that day.

21 He did not quibble or, to use a boxing analogy,  
22 duck or weave questions put to him in that respect, but  
23 rather took it on the chin, so to speak. He accepted,  
24 at line 10, p.160, that he did something in relation to  
25 statement-taking that is improper, and "I put up no  
26 excuse for that."

27 He agreed at line 11, p.165, that "there is no  
28 legitimate excuse, if we look at proper  
29 statement-making practices, for me to sign a backdated

1 statement."

2 He admitted, at line 15, p.166 that he appreciated  
3 that, "by that practice being adopted, statements can  
4 come into existence, as this one has, which don't  
5 accurately reflect the process by which the witness has  
6 come to give their account."

7 Finally, sir, in relation to that, he said at  
8 line 6, p.169 - I can't recall if it was at a time when  
9 the Commissioner said to him words to the effect of,  
10 "But don't you see how this looks?", and he agreed that  
11 it wasn't a good look and it shouldn't have happened.  
12 But he told you, sir, that he didn't accept at the  
13 particular time as being false in relation to it: "I'm  
14 re-signing the same statement, I should have given it  
15 more thought, I accept that and I accept I shouldn't  
16 have done that."

17 With respect, Commissioner, you are right, there  
18 hasn't been an explanation given - - -

19 COMMISSIONER: Well, I may be doing your argument an  
20 injustice. You mentioned a moment ago his evidence  
21 that he thought the statement had been "reformatted".

22 MR STEWART: Yes.

23 COMMISSIONER: So, in that sense he proffered an explanation  
24 for why he thought it was necessary to attach his  
25 signature to a second document even though it was not  
26 different to the first. But the difficulty with that  
27 explanation is, it flies in the face, I think, of all  
28 of the other evidence that reformatting of documents  
29 doesn't call for another signature. What do you say as

1 to that?

2 MR STEWART: What I say, sir, is that he was proffering the  
3 only explanation that he could think possible. It may  
4 well be that what he meant, but the word didn't come to  
5 him, and it doesn't make it right, was "efficacy". A  
6 statement is put in front of him by a colleague, he  
7 trusting the colleague, he having no reason to think  
8 that it is anything other than identical to the  
9 previous statement, and he, by signing it, has done  
10 what he thought, wrongly, was okay to do "because I  
11 trust these fellows, I haven't read it, it must be  
12 legitimate, and even if it has not been clearly - there  
13 has not been the regard that should be given to what  
14 takes place when you sign a statement.

15 COMMISSIONER: But he doesn't have to read it.

16 MR STEWART: No.

17 COMMISSIONER: He's only acknowledging the signature and the  
18 declaration of the person making the statement.

19 MR STEWART: Yes.

20 COMMISSIONER: The point is why, if he thought it was only  
21 the same identical content to a statement which had  
22 already been taken and acknowledged by him, did he  
23 think a second one should be created?

24 This was not some question that was dropped on him  
25 at the very last second, he's been thinking about this  
26 for 12 months or more; ever since Mr Iddles first spoke  
27 to him about the issue of the Pullin statement and  
28 whether there was another one. And certainly, from the  
29 point in time when The Herald Sun came forward with the

1 media announcement that there was a second statement  
2 and it became apparent that he was the person that had  
3 signed the acknowledgement, he's been thinking ever  
4 since about that.

5 So we're then faced with, I acknowledged a  
6 document which I believed to be identical in its  
7 contents to one I previously acknowledged: why do that?  
8 One answer is, well, I was doing this because it had  
9 been reformatted; that's difficult to accept given  
10 that's not a process that's required, to sign and  
11 acknowledge a reformatted document.

12 Then he came forward with another explanation,  
13 which is not the same as the reformatting explanation;  
14 namely, there is a practice that was current within the  
15 Homicide Squad of backdating statements. How does that  
16 sit with the reformatting explanation?

17 MR STEWART: Commissioner, it sits in the context of  
18 something that clearly he did not give a lot of thought  
19 to at the time. We know that, after the expiration of  
20 48 or 72 hours after the murders, Mr Bezzina had no  
21 involvement in the investigation. So, again with  
22 respect, Commissioner, the Commissioner's question is  
23 challenging.

24 However, albeit that he cannot give a definitive  
25 answer to that which the Commissioner asks, the fact of  
26 the matter is, it's submitted, that he has done  
27 something that he may have done on other occasions and  
28 his colleagues may well have done on other occasions,  
29 and that he is then being called upon to think of the

1 reason why he did what he did after the expiration of  
2 almost 20 years.

3 COMMISSIONER: Just pause there, Mr Stewart. You're in a  
4 very difficult position because you're faced with  
5 having to make a submission on behalf of a client who's  
6 proffered a number of explanations which are  
7 inconsistent with each other, and his final position  
8 was, there's a practice in the Homicide Squad of  
9 backdating. Now, every witness thereafter who's come  
10 forward has vehemently rejected that claim.

11 Is it your submission that I should accept  
12 Mr Bezzina's evidence that there was a practice engaged  
13 in, not only by him but others in the Homicide Squad,  
14 of backdating?

15 MR STEWART: It is my position that the Commissioner should  
16 accept, whether it's right or wrong, that was his  
17 belief.

18 COMMISSIONER: We're not dealing with a schoolboy,  
19 Mr Stewart, we're dealing with one of the most  
20 experienced Homicide investigators in this state.

21 MR STEWART: Yes, sir.

22 COMMISSIONER: Who, to the best of my knowledge, had a very  
23 good reputation as an investigator, who will be  
24 thoroughly experienced in the practices of the Homicide  
25 Squad, who presumably would not idly give evidence on  
26 oath that there was a practice of backdating.

27 MR STEWART: Well in fact, as I recall it, he was criticised  
28 yesterday for changing his - altering his position from  
29 that which he said to Neil Mitchell to that which he

1 said before IBAC where, on his oath, he didn't appear  
2 to be as confident of the practice of backdating.

3 But, sir, I unreservedly on his behalf say or  
4 submit that, in respect of every forum in which  
5 Mr Bezzina has written or spoken, albeit that he may  
6 have erred in detail and his recollection may have been  
7 flawed on occasions, I unreservedly on his behalf  
8 submit that the chronology being: first, that he made a  
9 statement on 19 August 1998; second, that he spoke to  
10 IBAC on 20 November 2017; third, that he did an  
11 interview with Neil Mitchell on 19 June 2018, he and  
12 Mr Iddles; fourth, that he swore an affidavit on  
13 15 March 2018; and fifthly, that he gave evidence  
14 before IBAC on 5 February 2019.

15 It is my submission that on every one of those  
16 occasions Mr Bezzina has been honest in his  
17 recollections of what he did, albeit that some of those  
18 recollections are defective - - -

19 COMMISSIONER: Which of them are defective?

20 MR STEWART: The Pullin statement.

21 COMMISSIONER: See, Mr Stewart, you're in a different  
22 position to counsel assisting. Counsel assisting is  
23 making submissions based on what is said to be either  
24 the direct evidence that's given or inferences to be  
25 drawn from evidence that's been tendered. Your  
26 submission's based primarily upon your instructions of  
27 what you say your client says to you.

28 Now, if he's made a number of inconsistent  
29 statements, which of them, if any of them, does he now

1           adhere to and which of them does he accept may simply  
2           be the result of a faulty recollection? Can you assist  
3           me in that regard?

4       MR STEWART: Well, the most clear one is the Pullin  
5           statement which is as significant as any one could be  
6           in terms of an error; that he swore his statement,  
7           making no mention to taking a statement from Pullin  
8           in August 1988, and he swore before you Commissioner,  
9           sir, that he believed that he did. It's not a  
10          180 degrees, but the difference between both are stark,  
11          but neither are untrue.

12       COMMISSIONER: Mr Stewart, I can readily understand why  
13          someone 20 years after an event may forget something  
14          that they've done. I'm more concerned about the  
15          inconsistencies in his explanations at a point of time  
16          when the stark realities of what he had done are known  
17          to him and he's proffering explanations for them: the  
18          reformatting explanation, the practice of backdating;  
19          which of those do you say on your instructions are  
20          based on an acknowledgment of perhaps a faulty  
21          recollection? And which of these explanations does he  
22          adhere to as being correct, or is his position he's not  
23          able to say that any of them are correct?

24       MR STEWART: My instructions in relation to this have been  
25          contained to the circumstances of him signing the  
26          second statement and they are consistent with what he's  
27          sworn and what he has said.

28                 He has no recollection of signing that statement,  
29          he cannot recall doing it, he does not know the

1 circumstances, he does not know who put it in front of  
2 him, he presumes it was Buchhorn as a result of  
3 something Ron Iddles said to him. And then, 20 years  
4 later, he - and, in my submission, the Commissioner  
5 should accept that any inconsistencies are consistent  
6 with him trying to recall, 20 years later, "Why would I  
7 have done this?"

8 And that, that which cannot stand as being  
9 accurate, the reformatting of it, ought not be viewed  
10 as something less than candid or sinister but rather  
11 him, as best he can, trying to think why he did it.  
12 And all he can come up - and the one constant theme is  
13 that he placed his trust in his colleagues and thought  
14 that, for him to be doing it, it must have been  
15 legitimate.

16 But I don't know that I can edify the Commissioner  
17 any more, because he can't. He's going back trying to  
18 reconstruct why it is that he might have done that  
19 20 years ago.

20 COMMISSIONER: But his evidence that there was a practice of  
21 backdating in the Homicide Squad which he proffered to  
22 explain why he, without asking any questions, did what  
23 he was asked to, is that based on a faulty recollection  
24 or is that - can his evidence that there was a practice  
25 which he followed, can that be explained as a faulty  
26 recollection?

27 MR STEWART: Well, sir, he actually, if - - -

28 COMMISSIONER: Yes.

29 MR STEWART: I just need to find the passage because what

1 happened was, he said to Neil Mitchell that there was a  
2 practice. Then before you, sir, his position was that  
3 he may have done it before and may not have done it on  
4 other occasions. Then it was put to him, "Well, what's  
5 the difference between what you said to Mr Mitchell and  
6 what you're saying now?" And he said, "Well, I'm now  
7 before you, sir, and I've had opportunity to reflect."  
8 But if I'm going to put I need to - and - - -

9 COMMISSIONER: Yes. Sorry, is it your understanding he told  
10 Neil Mitchell about this practice of backdating? Is  
11 that your understanding?

12 MR STEWART: That's as I recall it. If, Commissioner, you  
13 just bear with me a moment. Could I just return to  
14 that?

15 COMMISSIONER: Yes, of course.

16 MR STEWART: I might just need a break just to return to  
17 that, sir, and I will?

18 COMMISSIONER: Yes.

19 MR STEWART: Because I remember clearly the exchange.

20 Commissioner, I on behalf of Mr Bezzina don't take  
21 issue with a vast majority - albeit the submission  
22 wasn't long, by counsel assisting of his analysis of  
23 much of that which he said to the Commissioner.

24 However, at line 20, p.1590, namely yesterday,  
25 counsel assisting submitted that the illegitimate  
26 reason why that process was adopted is obvious, and the  
27 only reason that exists was that there was an awareness  
28 of a different statement over ten months or so after  
29 these events. It is my submission that the

1 Commissioner ought to reject that submission. Whether  
2 it is, and clearly it is, that some police members knew  
3 that to be the case, such awareness ought not be  
4 attributed to Mr Bezzina.

5 COMMISSIONER: That is, an awareness of something additional  
6 in the second statement?

7 MR STEWART: Correct, sir, yes. I say that because, albeit  
8 that the Commissioner may have misgivings - with  
9 respect, well-founded misgivings - about what took  
10 place in terms of him signing that statement, that  
11 which is submitted by counsel assisting is contrary to  
12 every word Mr Bezzina has uttered as to that.

13 I concede that there has been some difference in  
14 his recollection, and with the Commission's indulgence  
15 I'll go back to that one when I'm given the  
16 opportunity.

17 COMMISSIONER: Yes.

18 MR STEWART: I concede that there has been some change in  
19 his recollection about details, such as whether there  
20 was a practice and whether he took Pullin's statement,  
21 but there has been no change in terms of what he has  
22 said vis-à-vis what he didn't know.

23 COMMISSIONER: Just grapple, if you would, Mr Stewart, with  
24 my question: can sworn testimony by a witness that  
25 there was a general practice within the squad in which  
26 he worked over many years, a practice which he  
27 followed, can that be explained away as a faulty  
28 recollection, or is that a piece of evidence that you  
29 say I should act upon?

1 MR STEWART: Commissioner, as you are seeking to pursue  
2 that, might I have that five minutes now?

3 COMMISSIONER: I'm happy for you to wait until you've  
4 otherwise finished your submission.

5 MR STEWART: Thank you.

6 COMMISSIONER: And then I'll proceed with others and I'll  
7 allow you to renew the point.

8 MR STEWART: Thank you, because it's obviously, with  
9 respect, central to the Commissioner's thinking.

10 COMMISSIONER: Yes.

11 MR STEWART: It is in respect of that submission by counsel  
12 assisting - and please excuse me, sir, if I need to  
13 read some transcript, but it won't be exhaustive.

14 COMMISSIONER: Yes.

15 MR STEWART: In his evidence at line 10, p.161, he said: "I  
16 would have taken for granted it was just a direct copy  
17 of the initial one and accepted it as being genuine."

18 At p.160, when asked by Mr Rush: "You must have  
19 appreciated when you signed that statement you weren't  
20 at Moorabbin and it wasn't 16 August?" I'm sorry, I'll  
21 turn to another aspect of that, Commissioner, because  
22 that's about the circumstances rather than the  
23 knowledge.

24 But I suppose the two flow into each other, so  
25 I'll come back. Line 26, p.160: "You must have  
26 appreciated, when you signed that statement, you  
27 weren't at Moorabbin and it wasn't 16 August?" Answer:  
28 "I don't believe I appreciated at that particular time  
29 that I turned my mind to." Question: "What did you

1 think you were signing?" Answer: "I thought I was  
2 re-signing Pullin's statement."

3 Line 12, p.161. Question: "So you appended your  
4 signature to a further statement?" Answer: "Well, I  
5 would have taken for granted it was just a direct copy  
6 of the initial one and accepted it as being genuine."

7 COMMISSIONER: And, if you may pause there, that's the  
8 matter that poses greatest difficulty because you're  
9 not able to make a submission that provides an  
10 explanation for why he would have thought it necessary  
11 to do that again.

12 If we exclude the reformatting explanation which  
13 was ultimately overtaken by a practice of backdating,  
14 what is the explanation for, either in this individual  
15 case or in the case of a practice of backdating a  
16 statement, what's the explanation for it?

17 MR STEWART: I can't give one, but what I can say is that it  
18 wasn't, on the basis that his sworn evidence, his  
19 interview and everything that he said where it's been  
20 raised, it wasn't for the purpose to beef up evidence  
21 against Roberts.

22 It may be that I can't go further than that, but  
23 in my submission - because that's what I'm addressing  
24 in relation to what counsel assisting said yesterday  
25 about, that the Commissioner should find that there was  
26 an awareness of a different statement and why it is  
27 submitted that the Commissioner should not so find  
28 and - - -

29 COMMISSIONER: So, you've used the term here, "it wasn't for

1 the purpose of beefing up the evidence." So, beefing  
2 up the evidence can either be including some additional  
3 fact which happens to be true - - -

4 MR STEWART: Yes.

5 COMMISSIONER: - - - and which the police involved in  
6 beefing it up believed to be true.

7 MR STEWART: Yes.

8 COMMISSIONER: Or, in a less likely scenario but one that we  
9 must take account of, inserting something which is  
10 false to beef up the case.

11 MR STEWART: Yes.

12 COMMISSIONER: You say it wasn't either of those things; he  
13 had no reason to think there was any beefing up of the  
14 statement at all which, as I keep saying to you, raises  
15 the question then, why did he think it was necessary to  
16 do this?

17 MR STEWART: And I cannot assist the Commissioner in giving  
18 a response that he's not able to give. But I am able  
19 to say - in fact, I've found the passage here now,  
20 Commissioner, where the Commissioner says to him,  
21 line 27, p.161: "Mr Bezzina, you can see now how all  
22 this looks, can't you? That you acknowledge that there  
23 was a practice within Victoria Police Force that a  
24 statement might be made that excludes relevant  
25 information, and that at a later point of time then if  
26 it becomes important in the investigator's eyes, a new  
27 statement is prepared - that's what's happened here -  
28 and you facilitated that process by being a person  
29 acknowledging the new statement as though it was the

1 original statement taken two years earlier. Answer:

2 "Unwittingly, yes."

3 The Commissioner continues: "But that practice  
4 couldn't follow if anyone who's required to acknowledge  
5 the statement didn't allow it to bear a date and a time  
6 on it which was false?" Answer: "Well, I didn't  
7 believe it to be false because I knew it was the time  
8 and date from that particular evening."

9 He's at cross-purposes with the question.

10 COMMISSIONER: Yes. He was referring to the content of it.

11 MR STEWART: Yes. As Mr Rush, counsel assisting, then asked  
12 him at line 27, p.162: "Surely some explanation must  
13 have been given to you for the reason for you to  
14 re-sign", which is effectively the Commissioner's  
15 question of me.

16 COMMISSIONER: Yes.

17 MR STEWART: Answer: "Yes, it would have, but I'm only clear  
18 on one thing: one particular explanation was not given  
19 to me" - beef it up - "but what other ones were, I  
20 don't know." Question: "An explanation that we needed  
21 to put some meat on the bones of Mr Pullin's statement  
22 could have been given to you?" Answer: "If that were  
23 the case, there was no way knowing I would have been  
24 part of that or signed the document, and that's when I  
25 would have alerted issues as to some form of corruption  
26 in relation to that for me being approached. I would  
27 never implement myself in such a matter."

28 If I can just conclude by saying - in fact, it  
29 goes to the other matter I was going to seek some time

1 for, sir. Line 11, p.163: "Are you saying to the  
2 Commission you now do not recall the explanation that  
3 was given to you as to why you would need to sign a  
4 further statement?" Answer: "What I'm saying is,  
5 that's correct, I don't recall the legitimate excuse  
6 given to me, but what I do know is, had - if it were  
7 Buchhorn and Buchhorn had said to me, 'We need you to  
8 sign this because we need to beef up the evidence  
9 against Roberts or add additional information in his  
10 statement', I would not have a bar of that whatsoever  
11 because I would understand the enormity of having done  
12 that and being part of the potential to pervert the  
13 course of justice."

14 And it's then when the Commissioner says, line 23,  
15 p.163: "But the fact that you're prepared to sign a  
16 statement at a time which is not the time reflected in  
17 the acknowledgment, does that mean you've done that on  
18 other occasions and not been troubled by doing so?"

19 Answer: "Possibly, sir, yes." Question by the  
20 Commissioner: "So that, if there was a practice, for  
21 example, of leaving relevant information out of a  
22 witness's statement, later on deciding that that  
23 information should be inserted but then creating a new  
24 statement with that additional information in it, but  
25 the statement bearing the date of the original  
26 statement, you could have unwittingly been a part of  
27 that process on other occasions?" Answer: "Yes, sir.  
28 If there was additional information in that second  
29 statement that I was aware of, I would not have signed

1 that, I would have said, go away and get a secondary  
2 statement and you can then sign it because that is the  
3 proper process."

4 Commissioner, line 11, p.164: "So, so long as you  
5 say the later statement had nothing additional in it,  
6 you had no difficulty in signing a statement even  
7 though it bore a date which was not the date on which  
8 you were signing it?" Answer: "Yes, given the fact of  
9 the initial statement."

10 Commissioner says - - -

11 COMMISSIONER: And that's your submission in essence, isn't  
12 it? Your submission to me is, I should not make a  
13 finding that he had some malicious or nefarious - to  
14 use Mr Buchhorn's terms - nefarious or deceitful  
15 purpose?

16 MR STEWART: Yes, sir. And, Commissioner, the Commissioner  
17 could not have been more blunt, with respect, when the  
18 Commissioner said to him at line 24, p.164: "Well, why  
19 on earth did you think it would be okay to do that?"  
20 Answer: "I didn't turn my mind to it, sir."

21 Mr Rush: "There's no legitimate excuse for signing  
22 a backdated statement, is there? What was going to  
23 happen to the first statement?" Answer: "Well, I was  
24 always under the impression it was only the one  
25 statement." Question: "No, but you have signed a  
26 second statement?" Answer: "Yes."

27 That, in effect, is the submission.

28 COMMISSIONER: Yes.

29 MR STEWART: But I will attempt to assist the

1 Commissioner - - -

2 COMMISSIONER: If there's anything further you want to say  
3 you may indicate that before I adjourn, Mr Stewart.

4 MR STEWART: Thank you, sir.

5 COMMISSIONER: Mr Rush, did you want to respond in any way  
6 to that?

7 MR RUSH: I think Mr Bezzina's evidence has been covered,  
8 Commissioner, in that sense.

9 He said there was no legitimate reason for  
10 backdating a statement at p.165, line 14. He agreed it  
11 was common practice at Homicide Squad to sign backdated  
12 statements at p.165, line 28. He couldn't provide a  
13 reason for frequently backdating statements at p.169.1.  
14 Those matters were the foundation of the submission  
15 that was made concerning inferences that were  
16 available.

17 COMMISSIONER: Yes. As I say, Mr Stewart, if you want to  
18 add anything before I adjourn, let me know.

19 MR STEWART: I'm grateful, Commissioner.

20 COMMISSIONER: Mr Trood.

21 MR TROOD: Thank you, Commissioner. Sir, I wish to direct  
22 some submissions to you on behalf of Mr Buchhorn in  
23 respect to really one topic.

24 Mr Commissioner, you will recall yesterday that  
25 learned counsel towards the end of his submissions and,  
26 as it were, drawing the threads together insofar as  
27 Mr Buchhorn was concerned, submitted that there were  
28 very strong inferences available to be drawn from the  
29 various practices that had been outlined by both he and

1 Ms Boston. The actual transcript reference, if it's of  
2 any assistance, Mr Commissioner, is at p.1601 of the  
3 transcript and the passage which I'm about to go to  
4 commences at line 16.

5 In essence, what counsel assisting was submitting,  
6 and quote the passages or ease: "There is, we say, the  
7 very strongest of inferences to be drawn that the  
8 practices that were adopted by Mr Buchhorn were  
9 deliberate in the sense of deliberately going about  
10 enhancing the brief and the theory in relation to the  
11 suspects that were then in the focus of Operation  
12 Lorimer."

13 It's perhaps the very last sentence in relation to  
14 the theory concerning suspects which I have taken to  
15 mean primarily Mr Roberts, but Debs and Roberts for the  
16 purposes of the submission, and the use of the term  
17 "enhancing" is one that has been current during the  
18 course of this and has been used in a particular sense,  
19 particularly as it related to the taking of further  
20 statements from a very large number of Hamada  
21 witnesses, particularly in relation to descriptions.  
22 As the Commission's seen and will find, there were a  
23 very large number of statements where descriptions were  
24 not included in statement No.1 but then there was a  
25 process included.

26 COMMISSIONER: Yes.

27 MR TROOD: So I'm going to make the comment that, in  
28 enhancing the brief, rather than using terms such as  
29 "beefing up", enhancing can, as you just pointed out,

1 be a process whereby police officers add further  
2 information believing it to be soundly based and true;  
3 it could also be for, again as you've just pointed out,  
4 for a completely improper purpose of adding material  
5 which is false/incorrect, however one might like to  
6 describe it.

7 The submission's essentially in two parts:  
8 firstly, that the factual analysis as undertaken of the  
9 various statements and Mr Buchhorn's alleged role, and  
10 role in relation to those, and I'll take Your Honour to  
11 the dates in just a moment; and secondly, whether  
12 there's a need in terms of the overall aims of what  
13 these hearings are all about as to whether such a  
14 finding is in fact necessary for the ultimate task, so  
15 they're in two sections and I'll deal with them  
16 sequentially.

17 The theory in relation to the suspects, Debs, but  
18 more particularly Roberts, to remind you,  
19 Mr Commissioner, the evidence from Mr Collins was that  
20 they became suspects in December 1999. That comes from  
21 p.1027 of the transcript. Certainly, they were  
22 described as prime suspects by 17 March 2000, again by  
23 Mr Collins as a result of some of the diary entries.  
24 The transcript reference for that is p.1018.

25 So, accepting for the purposes of argument that  
26 that earlier date, that is, December 1999, what I would  
27 seek to do is to divide and look at the chronological  
28 order of the statements that Mr Buchhorn is said to  
29 have a role in anyway in, widely or a direct

1 involvement in, both pre and post those dates.

2 Taking them through in chronological order - - -

3 COMMISSIONER: I'm sorry, Mr Trood, could you just explain  
4 to me, and what's the ultimate point you want to make  
5 from this process?

6 MR TROOD: The ultimate submission Your Honour, is that the  
7 factual analysis of the various statements, if one goes  
8 to that date and looks at the starting point in terms  
9 of his involvement of any statements post December  
10 1999, the inference that is invited to be drawn, that  
11 he was involved in enhancing it with the theory in  
12 relation to both of them, there is hardly any material,  
13 there's perhaps only two statements ultimately which  
14 would fit that description, if one takes those dates.

15 COMMISSIONER: You're using the word "enhancing" as either  
16 with an unlawful objective or lawful objective?

17 MR TROOD: In both senses. To deal firstly with the  
18 pre-December 1999 statements as you've been taken to in  
19 submissions and in evidence. The first is Morris,  
20 which the operative date is 1 September 1998; the  
21 second is Ollie, date 7 September 1998; the third is  
22 Gray, 18 September 1998; fourth is Thwaites which is  
23 23 October 1998; the fifth is Gerardi, 25 October 1998,  
24 and the last one that I will include in that section -  
25 and if I can make it clear, as the Commissioner will  
26 probably anticipate, Mr Pullin's statement; it wasn't  
27 conceded by Mr Buchhorn that he took that statement and  
28 the like, and I don't intend to traverse that.

29 Accepting for the moment the argument that's been

1 put forward to you, as in submissions yesterday, that a  
2 direction was given by Mr Buchhorn with respect to that  
3 second statement, the genesis for that is the visit as  
4 shown in the day book and diary entry 21 June 1999.

5 So, again, that is before Mr Debs and Mr Roberts became  
6 the suspects that were ultimately of interest to the  
7 Lorimer Task Force, so all of those statements precede  
8 the nomination of Debs and Roberts as suspects.

9 Turning to those that are of interest to the  
10 hearings and to the Commissioner postdating December  
11 1999, and again in chronological order: there's the  
12 statement of Mr Adams, the date of which is 29 February  
13 2000.

14 Sir, as you're aware, Mr Adams is one of the  
15 police officers who attended on Officer Miller and,  
16 without trying to summarise all his evidence, just to  
17 perhaps give it a bit of background, he attended on two  
18 separate occasions whilst he was doing other matters  
19 and heard some of what Officer Miller had to say when  
20 he was in his near company.

21 Now, he ultimately did make that statement. The  
22 evidence before the Commission is that it wasn't  
23 Mr Buchhorn ultimately who was the person who witnessed  
24 the statement, it was another officer, but the  
25 Commission drew attention to a visit by Mr Buchhorn to  
26 the Academy at a date about six weeks prior to that,  
27 and the evidence from Mr Adams was that he seemed to  
28 think there was a discussion about making a second  
29 statement.

1 Mr Adams's evidence was that - there was some  
2 confusion about this, but he seemed to - to try and  
3 again summarise it: he recalled signing something to a  
4 detective on the night, whether it be a statement or  
5 something else it really wasn't terribly clear  
6 ultimately, but he did say, look, I signed something  
7 and I gave it to a detective.

8 Importantly for my purposes for these submissions,  
9 sir, what Mr Adams said was that he was not asked to  
10 change anything he had said previously, he was not  
11 asked to omit descriptions, and his explanation for not  
12 including details of the conversations with Officer  
13 Miller was that he was uncertain about what Miller had  
14 said as opposed to what other members had said.

15 In my submission, when one analyses the ultimate  
16 statement, it's not one that could be put forward to  
17 found an inference that that is a statement taken to  
18 pursue the theory; it's a statement that has been  
19 taken, it might fall under the first category, that is,  
20 a statement to enhance the brief, and I use that in  
21 perhaps its widest sense, there being an obligation to  
22 enhance a brief to put relevant material on from  
23 relevant witnesses who can have something to say,  
24 whether it be helpful or unhelpful or consistent or  
25 inconsistent with a prosecution case.

26 The second statement, sir, is that of Mr Clarke,  
27 and the date is 5 May 2000. As, sir, you know,  
28 Mr Clarke made the two statements, this is the second  
29 of those statements, it was in fact taken by

1 Mr Buchhorn. It does - I'll be corrected if I'm  
2 wrong - refer back to the first statement and it  
3 contains a number of the details involving what  
4 Mr Clarke saw and heard and did in the immediate time  
5 before Officer Miller is taken by ambulance to  
6 hospital.

7 Now, on any view of it, one would have thought  
8 that they should have been included in that first  
9 statement and were improperly not included at the  
10 direction of the officer who's been named. On any view  
11 of it, they are details which, as Mr Buchhorn  
12 described, if you were a brief supervisor and you were  
13 aware of them, you would give the instruction to  
14 include.

15 Now, true it is that there is reference to the  
16 numbers in that sense, so it might be said that that is  
17 a statement which would further the prosecution case in  
18 that regard, so it's perhaps not in the same - I would  
19 concede not in the same category as the Adams statement  
20 which ultimately doesn't perhaps assist in any which  
21 way. But really, when one analyses it, it is a  
22 statement which is taken - and properly taken - to  
23 remedy an omission which should not have happened in  
24 the first place.

25 The next one is the statement of Mr Edwards,  
26 11 January 2001. Just to recap his role in the  
27 operation - - -

28 COMMISSIONER: Crime scene.

29 MR TROOD: Sorry, sir?

1 COMMISSIONER: Video crime scene.

2 MR TROOD: He's the crime scene video, that's exactly right,  
3 sir. As you will recall, there was a note which talked  
4 about deletion of a crime scene, or something, from a  
5 statement. Ultimately the state of the evidence didn't  
6 reveal what that was about. There were a number of  
7 witnesses: Mr Buchhorn, Mr Collins, and it may well  
8 have been Mr Sheridan, but I'd be corrected about that,  
9 to try and put what that was all about but ultimately  
10 it was not able to be discovered.

11 Suffice to say this, sir, and if I could digress  
12 for a moment, a reading of the transcript will perhaps  
13 not properly reveal this matter and this is why I raise  
14 it. Mr Edwards was the crime scene video. I  
15 understand that the Commissioner has his statement  
16 which was part of the hand up brief and trial material,  
17 that that statement does attest to the fact that he was  
18 the crime scene operator and, no doubt, has many more  
19 details in it about what he did and why he did it and  
20 the like. So, just to dispel any misleading impression  
21 that there wasn't such a statement, there in fact was  
22 and counsel assisting would certainly confirm that.

23 Going back to the inference sought to be drawn and  
24 the submissions, if we accept just for the purposes of  
25 argument that there has been something taken out in  
26 relation to a crime scene video, it is very difficult  
27 to go past the point of saying, (a) you can't assess  
28 its importance but it would appear to be  
29 inconsequential, so it doesn't really advance the

1 theory or the inference, in my submission, in those  
2 circumstances.

3 There's certainly not been anything suggested as  
4 to something important that's been left out of this  
5 witness's statement. If there was some issue which had  
6 been raised either on committal or at trial, I'm  
7 confident we would have heard about it.

8 The last statement is the statement of Ms Poke  
9 which is 12 January 2001. Again, it perhaps falls into  
10 the same category as that of Clarke for the same  
11 reasons. As is clear, she rightly took umbrage at the  
12 suggestions that were being made to Mr Thwaites on the  
13 night, but ultimately that was remedied by the taking  
14 of the statement. Remember, it would fall into the  
15 category, in my submission, of enhancement in the  
16 belief that what was being recorded was true, because  
17 of course there were the contemporaneous notes which  
18 were the source of the important material for Ms Poke  
19 and indeed for Mr Thwaites made earlier.

20 In my submission, if one looks at that division in  
21 the light of the submissions made that I've taken you  
22 to, there is perhaps two statements which might support  
23 such a thing but not to any great degree. In my  
24 submission, a factual analysis of those dates and the  
25 taking of the statements would not, in my submission,  
26 support the submission that counsel assisting made  
27 yesterday afternoon to you.

28 Turning to the second part of the submissions,  
29 these series of hearings have been an investigation

1 into the practices that have come to light; they have  
2 been exposed and they've been exposed publicly which is  
3 clearly an important part of all this.

4 The remaining task for you, Mr Commissioner, of  
5 course, is to draft recommendations, with the  
6 assistance of the Chief Commissioner, for the  
7 elimination of these practices and the safeguarding for  
8 future. Because, if one accepts Mr Buchhorn's evidence  
9 with regard to the brief procedure where there's back  
10 and forth and there is more information, and the  
11 widespread nature of that, you're dealing with a  
12 cultural issue; to put it bluntly, there needs to be  
13 cultural change as a result of that for all of the  
14 reasons that have been indicated - the lack of  
15 transparency and other matters.

16 In my submission, in terms of the measures that  
17 you will look at, assisted by - and that the Police  
18 Force Command need to institute for the future, they  
19 need to work irrespective of the motive of a person who  
20 might be involved in these procedures. So, in other  
21 words, it doesn't matter whether it's for the  
22 enhancement for the proper purpose or an enhancement  
23 for an improper purpose.

24 They need to work obviously across the board, and  
25 to that extent, in my submission, you don't need to go  
26 to the point of making findings, for example, or the  
27 drawing of the inferences that were suggested yesterday  
28 by Mr Rush against Mr Buchhorn.

29 COMMISSIONER: Mr Trood, as was said at the outset of these

1 public hearings and as was repeated again by counsel  
2 assisting yesterday, I think, it's not been part of the  
3 purpose of these public hearings to ascertain the  
4 motives which underlie these practices, but the mere  
5 fact that the practice occurred in the context of the  
6 Lorimer Task Force has given rise to the issues, the  
7 issue of motive, and that's not a matter about which  
8 the Commission's concerned, that's an issue which will  
9 have to be addressed in another place.

10 MR TROOD: I accept that and I was not trying to cavil with  
11 that; perhaps I'm being a bit sensitive, Your Honour,  
12 but I rather thought that the very last part of the  
13 submission perhaps intruded on that area, which  
14 is - - -

15 COMMISSIONER: Yes, but Mr Trood, insofar as your client is  
16 concerned, I'm more interested in what you have to say  
17 as to whether or not there should be any finding made  
18 that he's given false evidence to IBAC. Were you  
19 proposing to make any submission in that regard?

20 MR TROOD: Well, counsel assisting had not made any  
21 submission yesterday that he had made false - - -

22 COMMISSIONER: That's so, but I should tell you candidly  
23 it's matter about which I'm troubled, and I don't think  
24 I need say any more to you than the fact that, I think  
25 you would be conscious of the fact Mr Buchhorn's  
26 account changed quite significantly, (a) from his prior  
27 evidence, and (b) changed significantly a number of  
28 times during the course of his evidence in the public  
29 hearings.

1           And, of course, one must make great allowance for  
2           the passage of time and the effects on memory, but that  
3           said, in a sense it's a similar question I ask you to  
4           that which I advanced with Mr Stewart; namely, once a  
5           witness is not merely talking about what happened on a  
6           particular occasion but is talking about following a  
7           practice. So just like Mr Bezzina, your client,  
8           ultimately - not initially - but ultimately landed on  
9           the position that he now realises that what he did in  
10          relation to these replacement statements was, he  
11          followed a practice; a practice which was common and  
12          which, he added, he believes is still the case.

13       MR TROOD: That's so.

14       COMMISSIONER: Certainly was the case until the time he  
15          retired.

16       MR TROOD: That's so.

17       COMMISSIONER: And, had he said that at the outset, he would  
18          have saved everyone a lot of time in terms of probing  
19          what actually happened.

20       MR TROOD: That's so.

21       COMMISSIONER: Do you have anything you want to submit to me  
22          about whether or not, given that's his ultimate  
23          position, how does that bear upon the truthfulness of  
24          his earlier explanations?

25       MR TROOD: The difficulty for anyone who is being asked  
26          questions two decades later, and about the minutiae,  
27          about the detail 20 years later, in a situation where  
28          you might have some memories of what's happened, you  
29          might have some memories which are stronger than

1 others; now, that's not an unheard of phenomenon.  
2 Barristers can remember cases they've done many years  
3 ago, and they remember bits of but without the whole,  
4 and sometimes it's because of particular reasons and  
5 sometimes it's not.

6 COMMISSIONER: They'll always remember their wins.

7 MR TROOD: I was going to say, Your Honour, conversely the  
8 losses you always forget about, so Mr Commissioner, you  
9 are right.

10 In defence of Mr Buchhorn, what he has been  
11 provided with for the first time is a number of  
12 documents, particularly the notes, during the course of  
13 this hearing. What his explanation for that is that  
14 that has stimulated his memories as to what has  
15 actually taken place. Again - - -

16 COMMISSIONER: If I may, to assist you in the focus of your  
17 argument, again there's a parallel with Mr Bezzina; the  
18 issues which Mr Buchhorn had to address, namely, how  
19 does it come about that we only have the replacement  
20 statement for Thwaites and Pullin, what's happened to  
21 the original statements that Ms Poke made; that these  
22 were matters about which he would have been seized for  
23 some time before he actually got in the witness box,  
24 given that some of the replacement statements didn't  
25 emerge until the course of the evidence was engaged in.

26 But, as he was seized of those matters why, if he  
27 knew this was a practice that he followed, and was  
28 generally followed, why did he not give that  
29 explanation from the outset? Why did he have, for

1 example, the theory that I engaged with you about very  
2 early in his evidence, perhaps Mr Pullin made the  
3 second statement on the same day immediately after the  
4 first one? Why that evidence if he knew there was a  
5 practice that he followed?

6 MR TROOD: Sir, it is a very common human reaction that,  
7 where one is being accused of improper behaviour,  
8 illegal behaviour, doesn't matter what it is, a very  
9 long time after the event where one has little or  
10 incomplete memory, where one has little and incomplete  
11 documents or other markers to assist the memory  
12 process, that one looks back and tries to look back to  
13 come up with alternative explanations as to why  
14 something might have happened; that's, in my  
15 submission, a very human reaction.

16 There's no particular - in my submission, that's  
17 not a surprising human reaction to being accused,  
18 because clearly - leave aside Thwaites, I'm not sure I  
19 agree with you on the second bit - but certainly  
20 insofar as Pullin, that's correct, because there's been  
21 public accusations and the matter has been in the media  
22 and you've documented those steps to my learned friend.  
23 So, in my submission, that is not a surprising  
24 or - - -

25 COMMISSIONER: So, do you mean that he may well have  
26 forgotten, when he was initially giving evidence, that  
27 there was a practice that he followed of doing  
28 replacement statements and then discarding the earlier  
29 statements?

1 MR TROOD: Yes, because the link is the notes; that's what  
2 his evidence was, it was the notes that had brought it  
3 back and, so summarise his evidence, he said, look,  
4 I've in effect gone back and looked at my practices  
5 when I wasn't in Lorimer, and that accords with that,  
6 and that, as it were, was the mental breakthrough.

7 But again, sir, it is a very, in my submission,  
8 human thing that when people try to remember back to  
9 events of a long time ago and one tries to get any  
10 contemporaneous documents or other markers that one can  
11 use to prompt the memory, that's a thoroughly followed  
12 practice and, in my submission, that appears from his  
13 evidence as to what's taken place here.

14 COMMISSIONER: Yes. Thank you, Mr Trood. Mr Rush, is there  
15 anything you want to say in reply in relation to  
16 Mr Trood's submissions?

17 MR RUSH: Only this, Commissioner: that the evidence of  
18 Mr Buchhorn, whilst my learned friend has referred to  
19 various statements and dates, the evidence of  
20 Mr Buchhorn ultimately was, this was a practice that  
21 was conducted with every police statement, that is, of  
22 going back and getting the corrections and then placing  
23 second statements on the brief.

24 In relation to his knowledge of - what my learned  
25 friend hasn't addressed which was gone into in counsel  
26 assisting's closing submissions, is that, there is a  
27 demonstrated involvement of Mr Buchhorn in the practice  
28 in the Poke statement of 12 January 2001 where extra  
29 material is put into that statement and no

1 acknowledgment that it's a supplementary statement.

2 COMMISSIONER: Well, you don't take issue with that?

3 MR TROOD: That there's no reference; no.

4 COMMISSIONER: You're only concerned about, there shouldn't  
5 be an adverse finding about his motivation?

6 MR TROOD: Yes, and naturally enough, Mr Commissioner, the  
7 matter you've just raised with me. There's some  
8 variation in his practices, I accept that.

9 COMMISSIONER: Thank you, Mr Trood. Before I hear from  
10 Mr Matthews, is there anything else you wanted to say,  
11 Mr Stewart, in relation to Mr Bezzina?

12 MR STEWART: Just for completeness, sir, that tension  
13 between the Mitchell interview and his evidence before  
14 IBAC can be found at line 17, p.165 of the  
15 transcript and line 27, p.170 of the transcript until  
16 line 20, p.171 of the transcript. In many ways, it  
17 confirms more what the Commissioner was saying than me  
18 but I thought it important to identify that passage.  
19 Thank you, sir.

20 COMMISSIONER: Thank you, Mr Stewart. Yes, Mr Matthews.

21 MR MATTHEWS: Commissioner, I seek to seek leave to address  
22 you for what I would think would be ten minutes,  
23 15 minutes, on three topics.

24 COMMISSIONER: Yes.

25 MR MATTHEWS: First, as to the scope of your findings;  
26 second, as to our, that is, my and my instructor's role  
27 and participation in these public examinations, what we  
28 can and cannot do; and third, the significance of the  
29 evidence obtained by these public examinations and

1 indeed by the broader Gloucester operation to the  
2 Supreme Court hearing to commence in May in relation to  
3 Mr Roberts's case.

4 So, I seek leave on those three topics to make  
5 very confined submissions, and one thing I would want  
6 to say, if I might foreshadow, is that this operation,  
7 this investigation and indeed the public hearing aspect  
8 of it, when one looks at the Roberts case in  
9 particular, demonstrates the utility of this body,  
10 resourced as it is and with the capacity to have public  
11 examinations, demonstrates the very real value to the  
12 administration of justice of this body and these  
13 processes. If I might foreshadow that.

14 I'm not going to descend into evidence, and I'll  
15 explain why but - - -

16 COMMISSIONER: Look, rather than have a threshold debate,  
17 Mr Matthews, about the headings - because, I must say,  
18 I'm immediately troubled by the notion that you want to  
19 make submissions about the significance of any findings  
20 that are made here with respect to the Supreme Court  
21 proceedings, but rather than debate that why don't you  
22 start and - - -

23 MR MATTHEWS: Yes, it's almost as long.

24 COMMISSIONER: - - - I'll give you leave to make some  
25 submissions, but we'll see how we progress.

26 MR MATTHEWS: Indeed, I was going to suggest that, it's  
27 probably about the same amount of time.

28 On the scope of your findings, Commissioner, you  
29 have said from beginning to end and counsel assisting

1 re-affirmed yesterday, that it is not your role to  
2 review the convictions, those are for other established  
3 processes. I think it's important that I say that  
4 those processes are in train at the moment, that  
5 there's been a reference to the Supreme Court as to the  
6 credibility of the alibi evidence now provided in  
7 Mr Roberts's case; that is to be heard over several  
8 weeks starting on 8 May by a bench of three judges.  
9 That will include, and this is the important point,  
10 Commissioner, a detailed review of the circumstantial  
11 case against Mr Roberts as the necessary backdrop to  
12 answering the question referred by the Attorney, and of  
13 course the evidence of what Senior Constable Miller  
14 said forms a part of that circumstantial case.

15 COMMISSIONER: The brief of that referral has been indicated  
16 by the court, has it, Mr Matthews?

17 MR MATTHEWS: Yes, Commissioner, it has been, with the  
18 agreement of the parties that there's a two-staged  
19 process: that first there's a review of the entire  
20 circumstantial case then and now, and then the second  
21 is the hearing of viva voce evidence from a number of  
22 witnesses called by Mr Roberts, including Mr Roberts.

23 COMMISSIONER: Yes.

24 MR MATTHEWS: Given that upcoming hearing and the scope of  
25 your inquiry, Commissioner, as revealed in the witness  
26 summonses and indeed in the media release that  
27 announced these public examinations, you Commissioner,  
28 with respect, should confine yourself to issues of  
29 processes of taking statements and the like -

1 processes - and - - -

2 COMMISSIONER: Which is what I indicated to Mr Trood.

3 MR MATTHEWS: Yes, Commissioner. And not, I respectfully  
4 submit, make findings or comments for that matter as to  
5 the credibility or reliability of evidence of what  
6 Senior Constable Miller said. That is important,  
7 Commissioner, and I note that counsel assisting have  
8 not made any submissions to the contrary to what I just  
9 put to you.

10 COMMISSIONER: It's not proposed that we would venture into  
11 that area, Mr Matthews.

12 MR MATTHEWS: Nonetheless, given its importance, it's a  
13 point that I submit should be made.

14 COMMISSIONER: Yes.

15 MR MATTHEWS: That's what I wanted to say about the scope of  
16 your task, Commissioner. Can I move to the second  
17 topic, which is our role, that is my and my  
18 instructor's role and participation in these public  
19 examinations.

20 We are not in a position to make submissions  
21 responding to those of counsel assisting, we've not had  
22 access to various materials, the transcripts of private  
23 examinations and a variety of other documents. As you  
24 would appreciate, Commissioner, we have made requests  
25 for materials prior to the public examinations; they  
26 were denied.

27 Our opportunity to make submissions about the  
28 product of this operation will come at the Supreme  
29 Court as I have foreshadowed, and it will be done in

1 the context of a much larger body of material bearing  
2 on the issues of reliability and credibility of  
3 evidence of what Senior Constable Miller said.

4 I should just though say this in part; that had we  
5 had access to full materials we might have urged you,  
6 for instance, Commissioner, to consider very carefully  
7 the credibility and the reliability of the evidence as  
8 to Detective Kelly's role in the taking of statements  
9 at Moorabbin on 15 and 16 August.

10 MR RUSH: I really do object.

11 COMMISSIONER: Just a moment, Mr Matthews. Have a seat for  
12 a moment, Mr Matthews.

13 MR RUSH: Speculation of what Mr Matthews may have submitted  
14 or may not have submitted if he'd had access to full  
15 materials is clearly irrelevant, and for him to base  
16 comments about the role of Detective Kelly at  
17 Moorabbin, without any form of basis; he was denied  
18 access to materials, therefore he shouldn't be  
19 commenting in matters that he has clearly indicated  
20 he's incapable of commenting on because he didn't have  
21 the materials.

22 MR MATTHEWS: I don't take it any further except to observe  
23 that I have had access to the committal and trial  
24 transcript of what was said by Clarke, Thwaites and  
25 Poke on these issues.

26 COMMISSIONER: Mr Matthews, I'll be disappointed if it were  
27 the case that you or your instructor have had a sense  
28 that in any way IBAC's been obstructive to you gaining  
29 access to any information that would be relevant to the

1 scope of the public hearings as you've already  
2 formulated. I don't quite follow what your point in  
3 any event is then.

4 MR MATTHEWS: Perhaps the ultimate point is another one  
5 which is about where to from here, which is what I was  
6 going to deal with under the next topic.

7 COMMISSIONER: Yes.

8 MR MATTHEWS: But, to take the example of the  
9 cross-examination of Ms Poke, in the context of a  
10 coercive process such as this, and at the hour of the  
11 day, I desisted from asking questions directed to that  
12 very issue.

13 COMMISSIONER: Mr Matthews, as we dealt with each witness I  
14 permitted you to make an application for leave to be  
15 heard to cross-examine and you diligently exercised  
16 that opportunity.

17 If there were things that you wanted to explore  
18 with Ms Poke, if there was material that you felt you  
19 should have that you didn't have, you had an  
20 opportunity to raise those issues. I don't think it's  
21 helpful or appropriate for you, through a closing  
22 address, to ventilate any deficiencies that you think  
23 you can identify which you didn't seek to avail  
24 yourself of at the time.

25 MR MATTHEWS: Perhaps, and I won't take the matter further,  
26 Commissioner, but perhaps the position is that we  
27 misunderstood our capacity to obtain those materials,  
28 in the context of seeking leave, having had the  
29 response we'd had previously. But, be that as it may,

1 I don't seek to further - - -

2 COMMISSIONER: Mr Matthews, I don't follow why that would be  
3 so. And, in relation to any witness, if you are able  
4 to persuade the Commission that there was a legitimate  
5 basis for you to ask questions, if as part of that  
6 process you needed access to some material,  
7 information, exhibit that you hadn't previously been  
8 able to see, I don't know why you would have thought  
9 yourself constrained not to raise it.

10 MR MATTHEWS: Well, the position was, I did, and we  
11 pressed - for instance, there's been a question arising  
12 about a complaint made to an Officer Cooper, as an  
13 example, on or around the night of the statements being  
14 taken at Moorabbin and we haven't been able to gain  
15 access to that.

16 Perhaps that really ultimately should have been a  
17 matter I pressed, but I don't say this to say that - I  
18 mean, it's a very interesting question as to how a  
19 party in Mr Roberts' rather particular position  
20 participates in this, mindful of the task that you have  
21 and mindful of the fact that you have highly competent,  
22 if I may say with respect, counsel assisting - - -

23 COMMISSIONER: Yes, and conscious of the fact, as you stated  
24 at the outset of your submission, that the scope and  
25 purpose of these public hearings is quite different to  
26 the interest that you have and that you're pursuing in  
27 the Supreme Court; quite different.

28 MR MATTHEWS: Indeed, indeed. But I can do no more than  
29 point again to the example of the question of

1 credibility and reliability of witnesses who have given  
2 previous very different accounts of why statements  
3 weren't taken that night, why they didn't include  
4 certain matters. But I am mindful also that - - -

5 COMMISSIONER: But, Mr Matthews, as you already implicitly  
6 recognise from your submission, our focus was upon the  
7 process that was followed with these witnesses, not  
8 with the matter that is of interest to you and will be  
9 pursued elsewhere; namely, whether or not these  
10 witnesses were giving an honest account of what  
11 occurred, whether or not there was or was not  
12 contemporaneous material which supported their account;  
13 they're not matters about which we are concerned.

14 MR MATTHEWS: The question of Mr Kelly's role is - as an  
15 example of where Mr Roberts' objectives and where the  
16 Commission's objectives coincide; you are considering  
17 the question of whether Detective Kelly intervened in  
18 the way that has been alleged by the witnesses. On  
19 that issue, as I said, we would urge great caution in  
20 accepting that account at this point, but I can't take  
21 that any further because I don't have access to the  
22 body of the material.

23 COMMISSIONER: I don't follow why that would be so,  
24 Mr Matthews.

25 MR MATTHEWS: Well, just to take two aspects: that is not  
26 what the witnesses have said previously, they've said  
27 something different previously under oath or  
28 affirmation, and secondly - - -

29 COMMISSIONER: Mr Matthews, before the public hearings

1 commenced, the Commissioner already had sworn testimony  
2 from Mr Kelly and anything that Mr Kelly said about the  
3 practices he followed were, if anything, admissions  
4 against interest in which he had to acknowledge a  
5 process which he now recognises was quite  
6 inappropriate. His account of that of Ms Poke and  
7 Mr Thwaites is all to the same effect, together with  
8 the fact that he made an entry in his diary - I'm  
9 sorry, Mr Miller made an entry in his diary - I'm  
10 sorry, Mr Thwaites made an entry in his diary  
11 immediately after Mr Thwaites had his statement taken  
12 as the objective evidence shows there was a statement  
13 of Mr Thwaites well before the ultimate statement made  
14 by him being a replacement statement.

15 I'm not left in any doubt at all about that  
16 process which was fundamental to the very first  
17 practice that we were focusing upon; namely that, you  
18 don't necessarily include in an account evidence which  
19 involves a description of an offender.

20 MR MATTHEWS: And I can't take that matter any further  
21 because I'm not privy to what you're privy to,  
22 Commissioner, and that is the interesting question that  
23 arises, as to a party with four and a half years of  
24 studying this case with a microscope can assist as to  
25 that question of fact, but I can't take it any further,  
26 Commissioner.

27 COMMISSIONER: Yes. I mean, there are issues we've not  
28 explored which we've covered that of course will be  
29 explored in another forum.

1 MR MATTHEWS: Yes. If I might go to the significance of  
2 evidence and I should put your mind at ease, that is  
3 very much for another place, but there is just one  
4 aspect under that heading that I would seek to cover.

5 COMMISSIONER: Yes.

6 MR MATTHEWS: Perhaps it's to state the obvious that,  
7 without saying anything about the ultimate cogency of  
8 the evidence or its place in the bigger matrix of  
9 evidence, much of what IBAC has uncovered has not  
10 previously been available, as I think is very clearly  
11 the evidence before IBAC.

12 I can say, Commissioner, that there's a court  
13 book being prepared and I would anticipate that the  
14 public hearing transcripts will, in their entirety, be  
15 in that court book along with at least a significant  
16 number of the exhibits that have been publicly released  
17 to date, such is the value of this process and of a  
18 body with these powers and resources.

19 I can also foreshadow, as might be anticipated,  
20 that there are further materials that we will seek  
21 through the proper processes, and we're aware of the  
22 position under the Act but - - -

23 COMMISSIONER: And you may rest assured, Mr Matthews, that  
24 to the extent that IBAC's permitted to do so, we'll  
25 facilitate whatever is necessary in terms of furnishing  
26 evidence to the Supreme Court.

27 MR MATTHEWS: That is, with respect, of great comfort  
28 because it is a matter at the front of mind of, I  
29 suspect not just our side of the Bar table in the

1 Supreme Court, and I'm indebted to you, Commissioner,  
2 for that indication.

3 Just on that topic, I notice that something has  
4 been said yesterday about further persons coming  
5 forward, another 15 persons coming forward, and it may  
6 well be that that is now taken further by IBAC, I  
7 imagine it will be. But that is another aspect. If  
8 any of that touches upon Lorimer or the trial or  
9 committal of Roberts, then that is also material we  
10 would be very keen to know about at the earliest  
11 opportunity.

12 The final topic - well, it's actually an aspect of  
13 our participation, sir, and it's the final thing I wish  
14 to say, is that, as I think I foreshadowed yesterday  
15 although I got the number wrong; we have participated  
16 in this unfunded. We've had correspondence with the  
17 Commission and we understand that the Commission is not  
18 in a position to do anything about that itself, but we  
19 would venture to say that we are probably the only  
20 lawyers who have participated - and we think usefully -  
21 without funding for 16 days.

22 I just note on that topic, sir, that there's a  
23 vast body of material here, and more hands on deck, the  
24 better. There were aspects of the Morris and Gerardi  
25 statements that we drew to the attention of counsel  
26 assisting that have then found their way into what I  
27 might say were prominent places in the submissions made  
28 to you yesterday. So, we would like to think that we  
29 have been of assistance in our participation - I'm not

1 seeking a response about that.

2 What I mean to say is, that's an aspect of why we  
3 had to be here because, (1) for instance in relation to  
4 the Gerardi matter, the only way that came to our  
5 attention was by looking at the screen at another  
6 aspect to what counsel assisting was questioning the  
7 witness about and seeing his name on that exhibit.

8 We've had to be here, we've had to be here to deal  
9 with issues of legal professional privilege when they  
10 arose and we assisted on that; we had to deal with  
11 suppression on a very significant matter early on.  
12 We've had to be here.

13 Where we're at at the moment is that, we've had no  
14 joy so far with Legal Aid under their public interest  
15 guideline. Commissioner, I venture you've heard things  
16 said like this in your previous life before, but any  
17 indication that you can give, Commissioner, that it has  
18 been in the public interest ultimately, in terms of the  
19 administration of justice, that Mr Roberts has been  
20 represented throughout may well be of great assistance  
21 to us in our efforts with Victoria Legal Aid.

22 COMMISSIONER: Well, Mr Matthews, I think that issue would  
23 be best explored between your instructor and the chief  
24 executive officer of IBAC. If there are any  
25 representations that should be made which IBAC should  
26 support, I think they need to be the subject of  
27 appropriate discussion and consideration.

28 MR MATTHEWS: We will pursue that course directly.

29 COMMISSIONER: Anything else?

1 MR MATTHEWS: No.

2 COMMISSIONER: I do appreciate it's not been an easy task  
3 for you, Mr Matthews, in the sense that you have  
4 recognised the real limitations in the scope in the way  
5 in which you can contribute to the process and I thank  
6 you and your instructor.

7 MR MATTHEWS: Thank you, Commissioner.

8 COMMISSIONER: Mr Rush, are there any other outstanding  
9 matters?

10 MR RUSH: No, Commissioner.

11 COMMISSIONER: Well then, that concludes the public  
12 hearings. I see that members of Mr Miller and  
13 Mr Silk's families have been here throughout the  
14 proceedings. I do hope sincerely that it has not been  
15 too difficult for you and that you appreciate the  
16 narrow focus of the issues that we've been exploring.  
17 So, adjourn the hearing.

18 Hearing adjourns: [11.38 pm]

19 HEARING ADJOURNED

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