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

STATEMENT OF MARLO BARAGWANATH

INTRODUCTION

1. My name is Marlo Baragwanath. I am the Victorian Government Solicitor (**VGS**) at the Victorian Government Solicitor's Office (**VGSO**), and can say as follows.
2. On 13 December 2018, the Governor in Council issued Terms of Reference for a Royal Commission into the Management of Police Informants (**Commission**). On 7 February 2019, those Terms of Reference were amended (together **the Terms of Reference**). By those Terms of Reference, the Honourable Margaret Anne McMurdo AC was appointed Commissioner (**Commissioner**). I have had regard to the Terms of Reference in preparing this statement.
3. On 30 January 2019, the Commission issued a Notice to Produce to the VGSO requesting production of documents within its scope. The VGSO did not receive the Notice to Produce until 7 February 2019.
4. On 19 February 2019, the VGSO sent a letter to the instructors acting for the Commission to request a variation of the terms of the Notice to Produce (see Annexure 1). On 27 February 2019, the Commission issued a further Notice to Produce in respect of the VGS (see Annexure 2) (together, **Notices to Produce**). The terms of the Notices to Produce permit me, as VGS, to nominate from time to time employees, contractors or representatives of a third party document management service provider as contemplated by orders made in the Supreme Court of Victoria Court of Appeal (**Court of Appeal**) and the High Court of Australia (**High Court**) to assist me with the production of documents in accordance with the Notices to Produce.

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5. On 27 March 2019, the Commission commenced hearings.
6. On 29 May 2019, I received a letter from the Commissioner (**the Commissioner's Letter**) (see Annexure 3). The Commissioner's Letter requests that I prepare a statement that responds to parts A – H of the Commissioner's Letter. Paragraphs 1 – 17 of the Commissioner's Letter set out the context in which my answers are sought. I provide this statement accordingly.
7. Unless otherwise indicated, the information set out in this statement has been obtained by me from documents in the possession of the VGSO, identified by employees of the VGSO who have conducted a review of the documents available to the VGSO.
8. Pursuant to the *Instructions* set out at paragraph (c) of the Commissioner's letter, if information requested in parts A - H is not within my knowledge, I have indicated, so far as I am aware, the details of where the information might be obtained.

PROFESSIONAL BACKGROUND

9. I was appointed the VGS on 19 December 2016. Prior to this role, I had the following roles:
 - 9.1 Director, Office of the CEO, Victorian Building Authority: May 2014 - 2016;
 - 9.2 General Counsel, WorkSafe: 2006 – April 2014;
 - 9.3 Legal Counsel / Senior Legal Counsel, WorkSafe: April 2004 – 2006;
 - 9.4 Legislative Policy Officer, Department of Justice: 2002- 2004;
 - 9.5 Policy Officer, Ombudsman Victoria: late 2001 – 2002;
 - 9.6 Member of the Legal Team, Bristol Royal Infirmary Inquiry, United Kingdom: 1999 - 2001;

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9.7 Solicitor, Phillips Fox: 1997 – 1998; and

9.8 Articled clerk and Solicitor, Mills Oakley: 1996 - 1997.

THE VICTORIAN GOVERNMENT SOLICITOR AND THE VICTORIAN GOVERNMENT SOLICITOR'S OFFICE

10. The VGS, through the VGSO, acts as a legal practitioner for the State, and for entities and officers who perform public functions on behalf of the State.

11. Since 1995, the position of VGS has been held as follows:

11.1 1991 – 2000: Ronald Beazley;

11.2 2001 – 2006: James Syme;

11.3 2006 – 2011: John Cain;

11.4 2011 – 2016: Peter Stewart; and

11.5 December 2016 – present: myself.

12. The VGSO was established as an Administrative Office in relation to the Department of Justice and Community Safety under s 11 of the *Public Administration Act 2004* (the **PAA**). It has no legal personality independent of the State. As the VGS, I was appointed as the Administrative Office Head of the VGSO under s 12 of the PAA. Under s 14 of the PAA, I am responsible to the Secretary of the Department of Justice and Community Services for the general conduct and the effective, efficient and economical management of the VGSO.

13. The VGSO is presently comprised of about 235 employees, about 141 of whom are solicitors. VGSO staff are employed by the VGS on behalf of the Crown pursuant to s 20 of the PAA.

14. Over time, in order to support the role of the VGS, the VGSO has been administratively organised into a number of Branches, each headed by an

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Assistant Victorian Government Solicitor. The names, functions and organisation of the Branches have altered over time. Presently, the VGSO is divided into seven branches:

- 14.1 The Commercial, Property & Technology Branch (**CP & T Branch**);
 - 14.2 The Litigation and Dispute Resolution Branch (**L & DR Branch**);
 - 14.3 The Police Branch;
 - 14.4 The Public Law and Planning Branch (**PLP Branch**);
 - 14.5 The Regulation, Administrative & Disciplinary Law Branch (**RAD Branch**);
 - 14.6 The Workplace Relations & Occupational Safety Branch (**WROS Branch**); and
 - 14.7 The Royal Commissions Branch (**RC Branch**).
15. The VGSO is divided into Branches for administrative convenience. VGSO staff are allocated to Branches so that they may specialise in the work of that Branch, however, VGSO staff may work across Branches and members of different Branches may work together on particular matters.
16. The VGSO Branches are located across a number of geographical locations. The Police Branch is located with Victoria Police at 637 Flinders Street, Docklands. The L & DR and PLP Branches are located at 121 Exhibition Street, Melbourne and the CP & T, RAD and WROS Branches are located at 80 Collins Street, Melbourne. The newly established RC Branch is located at 90 Collins Street, Melbourne.
17. The VGSO has a single a document management system. In some cases, access to electronic files may be restricted. Access to the electronic files held by the Police Branch is generally confined to those working in the Police Branch due to the nature of the work undertaken by that Branch which

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includes matters relating to human sources. Access to electronic files may also be restricted to solicitors or support staff working on particularly sensitive files. Separate hard-copy files may also be maintained which are kept at the physical location of the relevant Branch until they are archived.

BACKGROUND

18. In order to be able to respond to the Notices to Produce and the Commissioner's Letter, I have established the RC Branch. I acknowledge the work of the RC Branch in facilitating my response to the Notices to Produce and the production of this statement.
19. Over the past four months, the team within the RC Branch working in respect of this Commission has comprised:
 - 19.1 two barristers who have assisted with matters arising in respect of the Commission including this statement;
 - 19.2 six lawyers, two graduate lawyers, and several paralegals from across the VGSO's branches, who have assisted with document review and other matters arising in respect of the Commission including this statement;
 - 19.3 a team of up to 10 paralegals who have assisted with document review including by helping discern which of the 1.8 million potentially relevant documents identified as part of the document review process should be considered in response to the Notices to Produce;
 - 19.4 several document management technicians who have assisted with our document database; and
 - 19.5 three external document processing service providers which have assisted with the processing of a very substantial volume of hard copy and electronic data.

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20. The RC Branch has been supported by lawyers and other staff from across the VGSO in assisting me to provide this statement. It has been necessary for me to draw upon such substantial assistance for reasons including the following:
- 20.1 the matters raised in the Commissioner's Letter occurred almost wholly before I was appointed VGS in December 2016;
- 20.2 it has been necessary to review, and attempt to understand the import of, a very substantial volume of materials;
- 20.3 as noted below, in paragraph 29, of the 16 lawyers identified as having been involved in the matters raised by the Commissioner's Letter, only three currently work at the VGSO; and
- 20.4 I have taken the view that it would not be appropriate for me to contact lawyers who no longer work at the VGSO in circumstances where the Commission may call upon those people to give evidence.
21. Only after the substantial work outlined above has the narrative of events dealt with in this statement become clear.

COMMISSIONER'S LETTER

- A: Detail the knowledge of the VGSO, including the identity of relevant persons within the VGSO (whether current or former employees), in relation to the above matters¹ and any other relevant dealings by the VGSO with Victoria Police before the period referred to above, including when and how it became apparent to the VGSO that Ms Gobbo was or might be a human source, both in relation to the investigation and prosecution of Paul Dale and the investigation and prosecution of other individuals.**
22. In order to respond to Part A of the Commissioner's Letter, I have referred to a number of documents held by the VGSO. Some of those documents have

¹ Outlined at paragraph 1 – 17 of the Commissioner's Letter.

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already been identified as part of the VGSO's document review as falling within the scope of the Notices to Produce and have been provided to the Commission. Other documents have been identified in the course of preparing this statement and have accordingly been provided to the Commission more recently.

23. The process of document review currently being undertaken at the VGSO in order to respond to the Notices to Produce is an ongoing one. It requires employees and contractors of the VGSO who did not have original carriage of matters to review and reconstruct files from archived materials which are at times stored at different physical and/or electronic locations.
24. The documents that are to be reviewed in order to comply with the Notices to Produce are voluminous and span a period of almost 25 years. They are not stored centrally. Rather, they are contained in different electronic and physical locations across the relevant Branches and off-site archive locations.
25. The Commissioner's Letter at paragraphs [3] and [12] refer to documents that have come to the attention of the Commission, that relate to the VGSO but which had not as at the date of the Commissioner's Letter on 29 May 2019, been provided to the Commission by the VGSO under the Notices to Produce. The process of answering the Notices to Produce, which remains ongoing, has been wide-ranging and has so far involved the production of 15 tranches of documents by the VGSO. The documents identified by the Commission at paragraphs [3] and [12] of the Commissioner's Letter and related documents have now been produced and are referred to in this statement.
26. Throughout this statement, I refer to all documents relating to a certain matter that the VGSO has provided legal services in relation to; documents that have been provided to the Commission in response to the Notices to Produce; documents that will be produced; and documents pertaining to the matters raised in the Commissioner's Letter. These are separate and often overlapping

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categories of documents. The distinction between these categories is made throughout this statement in order to denote that:

- 26.1 in some matters, such as the 'Special Inquiry' matter referred to in paragraph 58, the VGSO has determined that the Notices to Produce require the production of the entire case file and has produced that entire case file accordingly;
- 26.2 in other matters, such as the civil proceedings commenced by Ms Gobbo referred to in paragraphs 42, 43, 45 and 46, the VGSO has determined that certain documents are not captured by the Notices to Produce and, to also avoid inundating the Commission with a large volume of irrelevant documents, the VGSO has only produced relevant documents from such case files; and
- 26.3 because of the ongoing nature of the document review process, VGSO staff have identified certain relevant documents since the Commissioner's letter and have either produced those documents, or are in the process of doing so, as specified throughout this statement.

VGSO staff and former VGSO staff

- 27. Turning to matters specifically relating to Part A, I have reviewed the documents in the possession of the VGSO identified for me by employees of the VGSO in relation to Part A of the Commissioner's Letter.
- 28. These documents identify the following people as having had carriage of the relevant matters discussed below at paragraph 31 onwards:
 - 28.1 Shaun Le Grand: at the relevant times, Mr Le Grand was a Managing Principal Solicitor (**MPS**) in the Police Branch, then the Assistant Victorian Government Solicitor (**AVGS**) in the Police Branch, then the AVGS in the L & DR Branch;

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- 28.2 Stephen Lee: at the relevant times, Mr Lee was the AVGS in the L & DR Branch then the AVGS in the Police Branch;
- 28.3 David Ryan: at the relevant times, Mr Ryan was an MPS in the L & DR Branch;
- 28.4 Greg Elms: at the relevant times, Mr Elms was a Senior Solicitor in the Police Branch, a Principal Solicitor in the Police Branch, an MPS in the Government and Public Law Branch (the predecessor to the PLP and RAD Branches) (**former G & PL Branch**) or the Acting AVGS of the Police Branch;
- 28.5 Isabel Parsons: at the relevant times, Ms Parsons was Principal Solicitor then Special Counsel in the CP & T Branch;
- 28.6 Monika Pekevaska: at the relevant times, Ms Pekevaska was a Solicitor, then Senior Solicitor, then Principal Solicitor then MPS in the L & DR Branch;
- 28.7 Louise Jarrett: at the relevant times, Ms Jarrett was a Senior Solicitor in the Police Branch;
- 28.8 Philip Dodgson: at the relevant times, Mr Dodgson was a Principal Solicitor in the Police Branch;
- 28.9 Laura Vickers: at the relevant times, Ms Vickers was a Principal Solicitor in the former G & PL Branch;
- 28.10 Clara Chan: at the relevant times, Ms Chan was a Senior Solicitor in the CP & T Branch;
- 28.11 Richard Ellis: at the relevant times, Mr Ellis was a Senior Solicitor in the Police Branch;
- 28.12 Amy Galeotti: at the relevant times, Ms Galeotti was a Solicitor in the Police Branch;

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These claims are not yet resolved.**

- 28.13 Jonathan Bayly: at the relevant times Mr Bayly was a Principal Solicitor in the former G & PL Branch;
- 28.14 Penina Berkovic: Ms Berkovic is a Managing Principal Solicitor in the Police Branch:
- 28.15 Jessica Tribe: Ms Tribe is a Principal Solicitor in the L & DR Branch;
and
- 28.16 Rose Singleton: Ms Singleton is a Principal Solicitor in the L & DR Branch.
29. Of these people, only Ms Berkovic, Ms Tribe and Ms Singleton currently work for the VGSO. There are other current and former VGSO legal and administrative staff mentioned throughout the documents reviewed who do not appear to have had supervision or carriage of the files concerned. For brevity, I have refrained from naming such people throughout this statement.
30. Throughout this statement, I also refer to the Executive Director of the Legal Services Department within Victoria Police, Findlay McRae. I understand Mr McRae's previous title was Director of the Legal Services Department within Victoria Police and that this role also involved Mr McRae leading that Department. It appears from the documents that Mr McRae was acting in his capacity as Director of the Legal Services Department in the matters referred to below.

Relevant matters

31. According to the VGSO's documents reviewed and produced to date, the first occasion when the VGS or VGSO could have known of Ms Gobbo's role as a human source is on 23 January 2009 when the VGSO was engaged to assist Victoria Police to negotiate the terms of the entry of Ms Gobbo (then referred to as 'Witness F') into witness protection. Those communications occurred in the context of Ms Gobbo agreeing to provide evidence against former Victoria

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Police member, Paul Dale, in respect of the murders of Terence and Christine Hodson (**Hodson murders**).

32. The letter of engagement and a file note, both dated 23 January 2009, (Annexure 4), and a letter of advice dated 6 February 2009 (Annexure 5), reflect that Stephen Lee had supervision of this matter, and David Ryan and Isabel Parsons jointly had carriage. I am advised that all documents in the possession of the VGSO in relation to negotiations with Ms Gobbo to enter the witness protection program that are captured by the Notices to Produce have been or are being produced to the Commission. These documents are listed in an index at Annexure 6. A selection of documents from this matter deemed to relate to the matters raised in the Letter from the Commissioner are contained at Annexure 7.
33. The VGSO is in possession of an unsigned letter from Detective Inspector Steven Smith of the Petra Taskforce dated 7 January 2009 (Annexure 8). The letter is addressed to Jeremy Rapke QC in his capacity as Director of Public Prosecutions (**DPP**) (as he then was). It relates to a request by Victoria Police of the DPP for an indemnity for Carl Williams in respect of evidence he could give regarding the Hodson murders. The document does not refer to Ms Gobbo as a human source or informer, but it makes reference to her by name, and her role as a legal representative for Paul Dale. I am unable to say when this document came into the possession of the VGSO except to say that it is contained on the file held by the VGSO in respect of the subpoenas issued by Paul Dale during the prosecution brought against him for the Hodson murders. This file appears to have been opened around December 2009, and is discussed in the next paragraph.
34. In about August 2009, the VGSO was engaged to act on behalf of the Chief Commissioner of Victoria Police (**Chief Commissioner**) in response to a summons to produce documents issued on behalf of Rodney Collins on 21 August 2009 (Annexure 9). The summons was issued as part of committal proceedings against Mr Collins in respect of the Hodson murders. In a related

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matter, on about 17 December 2009, the VGSO was instructed to act on behalf of the Chief Commissioner in response to subpoenas that were expected to be issued by Paul Dale in the committal hearing of the prosecution against him for the Hodson murders (*DPP v Dale & Collins*). Mr Dale issued subpoenas addressed to the Chief Commissioner on 27 January 2010, 31 March 2010 and 7 April 2010 (Annexure 9). Mr Collins also issued a subpoena on 5 March 2010. It appears from the documents that Shaun Le Grand and Greg Elms had carriage of these files.

35. Several counsel were variously briefed to appear and/or advise in relation to *DPP v Dale & Collins* matters. Ron Gipp was briefed from at least September 2009, and Dr Stephen Donaghue (as he then was), Lucia Bolkas, and Gerard Maguire were briefed in March 2010. Detective Senior Constable Cameron Davey (**DSC Davey**) and Detective Senior Sergeant Shane O'Connell of the Petra Taskforce (**DSS O'Connell**) appear to have provided instructions. All documents produced to the Commission to date in respect of the *DPP v Dale & Collins* matters are listed at the index at Annexure 9.
36. On 12 March 2010, DSC Davey deposed to a confidential affidavit (Annexure 10). It recites information relating to the Dale matter including:
- 36.1 an outline of the steps undertaken by Victoria Police in responding to the first summons issued by Mr Dale and by Mr Collins;
- 36.2 that Ron Gipp had perused notes and other documents relating to documents falling within the scope of the summons (identified at paragraph 7 of the Affidavit) and that Mr Gipp had confirmed that the redacted parts of such documents fell into categories including irrelevant investigations, 'informer privilege' and the identification of confidential sources; and
- 36.3 legal practitioners for Mr Dale agreed that Mr Gipp would read documents relating to matters including Operation Kyak, the investigation of Andrew Karrison and matters related to Andrew

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Hodson and his firearms charges, and isolate any reference to the identities of informers and disclosures by informers;

36.4 Ms Gobbo had made disclosures regarding Tony Mokbel; and

36.5 if Tony Mokbel or his associates knew that Ms Gobbo had informed police of any of the 'matters' DSC Davey considered this would put Ms Gobbo's life in extreme danger.

37. Based on the review of documents that has been conducted by VGSO staff, I am informed that the VGSO does not have a copy of the documents that Mr Gipp is said to have perused.

38. The VGSO is in possession of an affidavit sworn by DSS O'Connell on 12 March 2010 (Annexure 11) that refers to Mr Gipp as having isolated documents that refer to identities of informers and disclosures by informers, as contemplated in the affidavit of DSC Davey. DSS O'Connell's affidavit refers to documents as exhibited to his affidavit. Based on the review of documents that has been conducted by VGSO staff, I am informed that the VGSO does not have a copy of these documents.

39. The VGSO is also in possession of an unsigned affidavit bearing the name of DSC Davey dated 15 March 2010 (see Annexure 12). It relates to perusal of information reports that refer to 'informer privilege issues' in relation to Tony Mokbel, Azzam Ahmed, Abbey Hayes, Peter Reid and Andrew Hodson. I am unable to say whether these names relate to conduct of an informer nor what DSC Davey intended by the phrase 'informer privilege issues'.

40. On 31 March 2010, Mr Dale's lawyers issued a summons to produce documents addressed to the Chief Commissioner. The cover letter addressed to Greg Elms (Annexure 13) stated:

The documents that we consider that remain outstanding in relation to that Witness Summons are the following:-

[...]

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[4] *The additional documents that were located by Mr O'Connell as a result of my conversation with Mr Gipp on 10 March 2010. On that occasion I asked Mr Gipp for the Informer Management File of Ms Gobbo to be viewed. Mr Gipp returned my call later that day and advised that without admitting that an Informer Management File existed, further documents had been identified...*

41. On 7 April 2010, Mr Dale's lawyers issued a further summons to produce documents addressed to the Chief Commissioner (Annexure 14), requesting production of documents relating to Ms Gobbo, including:

Any informer management file regarding Nicola Gobbo or any other document or set of documents howsoever entitled created in accordance with Victoria Police Informer Management Policy or Manual or otherwise and containing documents including (but not limited to) notes, diary entries, memoranda, letters, reports, SMS's or emails pertaining to any advantage, benefit or negotiations for such advantage or benefit in respect of Nicola Gobbo on account of her status as a witness or prospective witness in the within proceedings.

42. I note that the subpoena also requested documents which related to the civil proceedings issued by Ms Gobbo in *Nicola Gobbo v State of Victoria & Ors* (S CI 2010 2316) (**Gobbo civil proceeding**). In the Gobbo civil proceeding, Ms Gobbo alleged that during the committal hearings of the prosecution against Mr Dale for the Hodson murders, Counsel for the Chief Commissioner 'repeatedly and incorrectly labelled' Ms Gobbo a police informer in open Court (Annexure 15).²
43. All documents produced to the Commission in respect of the Gobbo civil proceeding are set out in the index at Annexure 16.

² Gobbo civil proceeding, Statement of Claim dated 29 April 2010, paragraph 52(b)(v)(d).

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44. On 31 March 2010, the VGSO was engaged to act for the Chief Commissioner in relation to a suppression order application in the *DPP v Dale & Collins* matters (Annexure 17). The engagement letter was signed by Stephen Lee and stated that the matter would be handled by David Ryan. Other relevant documents in relation to this matter are at Annexure 18. The remainder of the documents in the case file held by the VGSO are expected to be produced to the Commission shortly.
45. On 12 May 2010, David Ryan wrote to Victoria Police (Annexure 19) confirming that the VGSO was instructed to act in the Gobbo civil proceeding which was initiated on 29 April 2010 in the Supreme Court of Victoria, naming the State of Victoria, then Chief Commissioner Simon Overland and former Chief Commissioner Christine Nixon and claiming several causes of action and seeking damages.³ The Commissioner's Letter makes reference to the Gobbo civil proceeding at paragraphs [4] and [6]. On 27 October 2011, Mr Ryan was asked to advise on a request from Ms Gobbo for Victoria Police to reconsider its offer of protection and assistance outside the witness protection program (Annexure 20). On 23 November 2011, Mr Ryan provided advice on whether Victoria Police had a duty of care towards Ms Gobbo (Annexure 21).
46. This advice is marked with the VGSO matter number '1123884' which, I am informed, is the number assigned to the matter opened for the instructions received on 27 October 2011. All documents in the possession of the VGSO pertaining to matter '1123884' have been produced to the Commission and are set out in the index at Annexure 22.
47. In about September 2011, the VGSO was instructed to act on behalf of the Chief Commissioner in relation to subpoenas issued by Mr Dale in the prosecution against him by the Commonwealth Director of Public Prosecutions (**CDPP**) for perjury charges arising out of evidence he had given before the Australian Crime Commission (*Buick v Dale*).

³ See also the Statement of Claim at Annexure 15.

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48. The *Buick v Dale* matter was assigned VGSO number '119460'. Documents in the possession of the VGSO pertaining to matter '119460' have been produced to the Commission and are set out in the index at Annexure 23. These documents indicate that Shaun Le Grand and Louise Jarrett had carriage of this matter. Greg Elms also appears to have been involved. Detective Inspector Mick Frewen (**DI Frewen**) and Detective Senior Sergeant Boris Buick (**DSS Buick**) both from the Crime Department of Victoria Police, appear to have provided instructions. Gerard Maguire was briefed as Counsel to provide advice in relation to whether disclosure of certain documents was required.
49. On 4 October 2011, Mr Maguire provided the advice referred to in paragraph [13] of the Commissioner's letter (Annexure 24). This advice is recorded on matter '119460' relating to *Buick v Dale*. The advice identifies the *primary issue of concern relates to document disclosure and potential public interest immunity claims arising in relation to documents the subject of any proposed defence subpoena in the current proceedings*. The advice relates to the subpoenas issued in the earlier committal proceedings for *DPP v Dale & Collins* in relation to the Hodson murders. It sets out that disclosure issues remained outstanding in respect of those matters once those charges had been discontinued.
50. The advice states that subpoenas from the committal called upon materials including *all audio tapes, video tapes, information reports, notes, transcripts, diary entries, day book entries and all other documents (whether in written or electronic form) concerning any discussion, interview, debriefing or conversation with any witness in this investigation*.
51. The advice further sets out that:
- [41] *However, at the time the murder committal proceedings were withdrawn, compliance with the murder subpoena had not been completed. Dale's solicitor had been told that documents existed which fell into the category of materials sought set out above but that a claim of public interest*

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immunity existed in respect of them. None of these documents had been reviewed.

[42] *It was in this context and having regard to the likelihood of a subpoena in the current proceedings, which relate to very different charges, that a limited review of the documents held by the Unit has taken place. A similar review was undertaken in respect of documents held by the Witness Protection Unit. No review of the Petra taskforce documents, now held by the Driver taskforce, has occurred and I do not know what if any material pre-dating the involvement of the Unit exists.*

[43] *Whilst Dale's solicitor has stated that he is content with the disclosure which has occurred in relation to the murder subpoena and will confine any request for additional material to any communications between the police and the source since the murder committal, this position may change once the defence appreciate that compliance with the murder subpoena was never completed.*

The Dale defence

[44] *Dale's defence is that at all times that he was speaking to the source it was on an occasion which attracted legal professional privilege. Legal Professional privilege is now codified in s.118 and 119 of the Evidence Act 2008. S.117 of the Act defines client to include "a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service)." The source denies that Dale was ever a client and says that only a personal relationship existed between them.*

[45] *Furthermore, the circumstances of the recording itself and the fact that Hargraves [sic] acted for Dale during the ACC hearings strongly suggest that there was no engagement of the source as a lawyer to provide legal services such as would give rise the the [sic] requisite relationship. Rather,*

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the recording suggests that the disclosure which occurred was not as required by the Act and at common law, "for the dominant purpose of the lawyer... providing legal advice to the client" or for "the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including a proceeding before the Court) or an anticipated or pending Australian or overseas proceeding, in which the client is or my [sic] be, or was or might have been, a party."

[46] *However, it is clear that the "break barrier" referred did [sic] above not come into existence until about 18 months after the source was first targeted in respect of Dale. Furthermore, that targeting was specifically in relation to the murder of the Hodsons.*

[47] *It might be contended that the instruction given by handlers to the source at the time of the initial targeting, leaves open the contention by the defence that the totality of the dealings between Dale and the source attract a claim of legal professional privilege. The instruction given was that "any meeting was to be in business hours and consistent with professional contact." Whilst such a construction is likely to fail, in the context of the current proceedings it cannot be dismissed out of hand. It remains an issue which it is open to the defence to explore.*

Release of the material.

[48] *In my view some limited disclosure of material from the Unit may be required, in particular the initial instruction and any information reports or other materials concerning that initial tasking. The date on which the instructions were given would also need to be disclosed. At the very least the matter will need to be considered by the prosecutor to determine whether redacted copies of the relevant documents should be provided to the defence as a matter of fairness.*

[49] *The appropriateness of making this material available can be tested in a number of ways. First, it might be asked whether the defence has a*

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legitimate forensic purpose in obtaining access to such a document. In my view the answer has to be yes, based both on the content of the document itself and also the implications for the source's credit insofar as it is said that no relationship of lawyer and client existed.

[50] *Secondly, even if public interest immunity was claimed in respect of the document, the issue remains whether its disclosure might be necessary so as [sic] assist in establishing the innocence of the defendant. A Magistrate or Judge may accept that it should be released despite the fact that it would compromise informer identification.*

[51] *A number of other consideration[sic] also arise in the context of the impending committal –*

- (a) *in the absence of disclosure, the source may be induced to provide inaccurate or even false evidence based on the "break barrier" scenario and a contention that there was no targeting of Dale prior to the involvement of Petra taskforce investigators;*
- (b) *in the event of the source being asked questions about the first contact with Dale in respect of the murder investigation a claim of public interest immunity will need to be made. This will have the effect of confirming in the minds of interested persons that the source was an informer at a time prior to the creation of the Petra taskforce*
- (c) *Furthermore, any public interest immunity claim would have to be made on the basis of informer identification and witness security which, if made publicly, would defeat the purpose of making the claim. The Magistrate would have to be provided with confidential material in support of the claim. Such material would have to set out the circumstances in which the source was registered and thereafter deployed not only in respect of Dale but also, potentially, in respect of other persons who were clients.*

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(d) *However, disclosure of the material relating to the targeting of Dale, will confirm that as at February 2007 the source was providing assistance to the unit.*

[52] *The source is not a participant in any witness protection program. Victoria police have not been able to persuade the source to enter their program.* [REDACTED]

[REDACTED] *As a result, I have been instructed that if identified as a long-term police source the safety risks for the source will be extreme.*

[53] *A further complication is the professional role undertaken by the source. Once identified as acting as an informer from February 2007 it is likely that the defence will press to obtain documents in relation to all other dealings between the police and the source on the basis that it will show that the source was providing legal services and advice to other targets at the same time as information was being provided to police. This would form the basis of a credit attack as well as bolstering the proposition that the recorded conversation with Dale was on an occasion which attracted legal professional privilege.*

[54] *If the role of the source were to be fully exposed there is also a possibility that persons such as Mokbel, who was convicted in absentia in March 2006, would seek to challenge their convictions on the basis that it was improperly obtained. It is difficult to predict how such an issue might be raised or played out but there might be an attempt to raise the issue in a venue such as the Court of Appeal. It might also have a collateral effect in relation to the current sentencing of Mokbel for drug trafficking offences after he fled the jurisdiction.*

52. The advice concludes with the following recommendations:

[55] *I suggest that these issues be raised with senior management within Victoria Police for their consideration in the context of the current*

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These claims are not yet resolved.**

committal which is due to commence in November 2011. I suggest that urgent consideration be given to providing a copy of the relevant log entries to the prosecutor for the purpose of determining what if any disclosure is required in the interests of fairness. This may require relevant information reports or members diary entries to also be obtained and reviewed.

53. I am unable to say exactly when the above advice was provided to Victoria Police but note that the VGSO is in possession of a draft copy of the advice dated 28 September 2011 (Annexure 25) and a memorandum of attendance from Mr Maguire (Annexure 26) indicating that a memorandum of advice and disclosure issues were discussed at a conference the same day.
54. I am advised that the VGSO's documents (set out in the index at Annexure 23) disclose that VGSO staff met with Victoria Police and discussed Mr Maguire's recommendations. I have been unable to ascertain from the VGSO's review of the documents what action was taken by Victoria Police in relation to the recommendations from Gerard Maguire including whether the 'relevant log entries' were disclosed. The VGSO's documents indicate that Mr Maguire viewed material related to Ms Gobbo at the Human Source Unit. I am advised that the VGSO does not appear to have this material on file.
55. A selection of documents pertaining to the *Buick v Dale* matter (119460) deemed to be relevant to Part A of the Commissioner's Letter are set out at Annexure 27. These documents also appear to relate to paragraphs [13] and [14] of the Commissioner's Letter.
56. The Commissioner's Letter makes reference to the above matters at paragraphs [4] – [15]. In particular, the Commissioner's Letter identifies at paragraph [5] that correspondence between David Ryan and Superintendent Lardner of Victoria Police suggests that as at 21 May 2010, David Ryan was aware of Ms Gobbo's status as an informer. This advice is marked with the VGSO matter number '942607' which, I am informed, is the number assigned

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These claims are not yet resolved.**

to the matter opened for the instructions received on 23 January 2009 in respect of negotiating terms of entry of 'Witness F' into witness protection (see paragraph 31 above). The Commissioner's Letter at paragraphs [7] – [9] refers to:

56.1 a confidential briefing between Counsel, Mr Ryan and Monika Pekevskva and members of Victoria Police concerning Petra Taskforce, Purana Taskforce and Briar Taskforce's contact with Nicola Gobbo;

56.2 a conference with Counsel and Victoria Police members between 1 and 11 June 2010 and police members Andrew Bona,⁴ Inspector Steve Smith, Senior Constable Cameron Davey, DSS O'Connell and Lloyd DS [REDACTED]⁵ and

56.3 that none of the subsequent written advice by Counsel or the VGSO correspondence in relation to the civil litigation, which was settled in August 2010, refers to issues relating to Ms Gobbo's status as a human source.

57. I have identified documents relevant to the above matters at Annexure 28. Beyond what appears on the face of these documents, I am unable to elaborate on what was known to Mr Ryan and Ms Pekevskva, or what was discussed at any conference, in respect of these matters except to say that these documents appear on the file held by the VGSO in respect of the Gobbo civil proceeding.

58. In about February 2012, the VGSO was engaged by Victoria Police to assist in a 'Special Inquiry' into matters involving human sources, arising out of a review that was to be conducted by Neil Comrie AO, APM. The engagement letter from Stephen Lee to Findlay McRae is dated 1 February 2012 (Annexure

⁴ VGSO staff understand this to be a reference to then Senior Sergeant Bona of the Civil Litigation Division of the Legal Services Department of Victoria Police.

⁵ It is unclear what Lloyd DS [REDACTED] rank was at the time.

**This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.**

- 29). The document describes the scope of work as *to assist Victoria Police in relation to issues involving human sources.*
59. I am advised that an index of documents in the possession of the VGSO in relation to the 'Special Inquiry' that are captured by the Notices to Produce, and a selection of such documents, are at Annexure 30. The documents reflect that Stephen Lee had supervision of the matter and that David Ryan had carriage with involvement from Clara Chan and Jonathan Bayly.
60. The Commissioner's Letter refers to these matters at paragraph [17].
61. The documents contained at Annexure 30 also include two drafts of a document titled *Agreement for the Provision of Consultancy Services* between the State of Victoria represented by Victoria Police and Neil Comrie, AO, APM.
62. The documents disclose that on 9 May 2012, VGSO received a request for advice from Superintendent Steven Gleeson APM addressed to Stephen Lee (Annexure 31). The request for advice sought advice on the following questions:
- [1] *What duties are recognised as existing in regards to police utilising human sources?*
- [2] *In addition to (1) above, what additional duties may extend to utilisation of a human source who may, by profession, be bound by other duties? {whilst this case involved a legal practitioner, for broader application it would be helpful if your advice also considered potential sources from other duty-owing professions, for example parliamentarians, judicial officers, priests or psychiatrists}*
- [3] *What reasonable means (from both a policy and an operational sense), could police utilise to safeguard against potential duty breaches in regard to matters identified in (1) and (2) above? Your response to this question may be more helpful if it was broadly principle based. If in the context of considering this question you would like further detail concerning current*

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These claims are not yet resolved.**

human source risk management processes or the actual operational utilisation of 3838, then please advise and I will brief you accordingly.

[4] *Should a handler upon engaging with a human source be alerted to suspected corruption or criminality of other police then what obligations does the handler have in regard to such information, particularly if disclosure may cause to compromise the identity of the source?*

[5] *Should a source alert a handler that the source has been called to attend an OPI or ACC coercive hearing then what capacity exists for handlers to discuss such matters with the source in the absence of any formal identification to do so?*

...

[6] *In addition to your responses to 1 and 2 (above), what additional duties and statutory responsibilities arise in regard to protected witness?*

[7] *What complexities do VGSO perceive to exist, or special considerations that should be applied, when contemplating if a human source should be utilised as a witness when this might reasonably be expected to involve inclusion in the witness protection program.*

63. The request for advice further states:

I am cognisant of the substantial dealings that VGSO has had in regard to various aspects of this 3838 matter. I am also aware that VGSO has previously provided advice to Victoria Police relating to other complex human source / protected witness matters, which in some instances have progressed to litigation. Given the subject-matter knowledge you have acquired from such involvement, I have concluded that it would be helpful to secure your considered advice relative to the terms of reference provided for in this (3838) review.

64. On 6 June 2012, Mr Lee and Mr Ryan provided written advice to Superintendent Gleeson APM addressing questions outlined at paragraph 3

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These claims are not yet resolved.**

of the advice (Annexure 32). The advice concerns duties relating to use of human sources. The Commissioner's Letter refers to this matter at paragraph [17].

65. The VGSO is also in possession of a document titled *Victoria Police Human Source 3838: A Case Review By M Neil Comrie AO, APM 30 July 2012* as an Annexure to a confidential Affidavit of John Ross Champion SC, then DPP (see Annexure 33).
66. The Commissioner's Letter refers at paragraph [16] to matters other than the Dale prosecutions where Public Interest Immunity (**PII**) issues and potential disclosure obligations involving Ms Gobbo's use as a human source may have arisen.
67. In March 2012, the VGSO was engaged by Victoria Police to represent the Chief Commissioner in his response to a subpoena issued on 24 February 2012, by Faruk Orman in relation to the murder of Paul Kallipolitis. Shaun Le Grand appears to have had supervision of this matter and Philip Dodgson appears to have had carriage with involvement from Louise Jarrett and Richard Ellis. Gerard Maguire of Counsel was briefed on behalf of the Chief Commissioner.
68. The VGSO appears to have received instructions from ^{Officer Hotham} ~~Officer Hotham~~ of the Human Source Management Unit at Victoria Police ^{Officer Hotham} Sergeant Peter Attard of the Subpoena Management Unit (**Sgt Attard**) and Detective Senior Constable Tony Hupfield of the Homicide Squad (**DSC Hupfield**) also appear to have provided some instructions.
69. I am advised that the documents in possession of the VGSO relating to Mr Orman and relevant to the Commissioner's Letter are set out in an index at Annexure 34.

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These claims are not yet resolved.**

70. In 2013 and 2014, the VGSO acted for the Chief Commissioner in the Inquest into the Deaths of Christine and Terence Hodson (see documents at Annexure 35).
71. In 2014 and 2015, the VGSO acted for the Chief Commissioner in two proceedings seeking to restrain the Herald and Weekly Times Newspapers from publishing material including material tending to identify Ms Gobbo as an informer. An index of documents relating to this matter is at Annexure 36.
72. Between 2014 and 2015, the VGSO was engaged by Victoria Police to provide advice on three separate matters. These advices, and documents relating to them, are discussed below in paragraphs 73 - 78.
73. The VGSO is in possession of a written advice dated 14 April 2014 from Shaun Le Grand to Findlay McRae regarding *witness protection concerns: mandatory report to DHS* (Annexure 37). The advice relates to whether a member of Victoria Police has a mandatory obligation to report their concerns about the welfare of a child of a witness to the Secretary of DHS under the *Children, Youth and Families Act 2005*.
74. The VGSO is in possession of a written advice dated 23 April 2014 from Shaun Le Grand to Findlay McRae titled *3838: Review of handling logs* (Annexure 38). The advice reflects that the writer was provided with:
- 353 pages of extracts from the undated coded logs of various source handlers of Victoria Police recording matters of interest to them arising from apparently hundreds of discussions they had with a human source and lawyer over what seems to have been several years from around the mid 2000's.*
75. The advice concludes with the opinion that:
- [4] *We consider that only a person with a thorough understanding of the persons and information the subject of the log entries and of the criminal proceedings to which those persons were subject could possibly make an adequate assessment of whether the information disclosed to police by*

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These claims are not yet resolved.**

the source deserves any specific attention or justifies any specific treatment. For these reasons it is neither possible nor functionally appropriate [sic] the VGSO to attempt to perform that task.

[5] In the circumstances, an option we suggest is to engage counsel to provide a vetting framework for police members with adequate knowledge of the source's material to identify whether there is information disclosed by the source that had the potential to interfere with justice in a particular case. In particular, whether client legal privilege or confidentiality may have been breached and whether this may have led to evidence being unlawfully, improperly or unfairly obtained and not disclosed before trial or whether an accused's defence or right to silence was improperly impugned in other ways by the source's provision of information to police.

[6] We would be pleased to receive your instructions to brief counsel as proposed. Subject to your views we would recommend Brian Dennis for this task.

76. The advice states in a footnote that, with Mr McRae's approval, the material that was received by the VGSO was destroyed. I assume but do not know whether this is a reference to the '353 pages of extracts' referred to in paragraph 74 above. I am advised that the VGSO does not appear to have this material on file.

77. The VGSO is in possession of meeting minutes indicating that Mr Le Grand met with Brian Dennis in May 2014 following this advice (Annexure 39). These minutes indicate that Mr Le Grand and Mr Dennis met with Findlay McRae, Detective Inspector Monique Swain and Superintendent Steven Gleeson APM as part of the Operation Bendigo Investigation Group. The Minutes state:

The five examples to be investigated by the investigation group were discussed. The examples were gleaned from source management logs and informer contact reports.

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These claims are not yet resolved.**

The role of the investigation group is to ascertain whether 3838 was providing information contrary to the interests of her client, breach of confidentiality and or breach of legal professional privilege.

Three points were identified that need to be answered in order to ascertain above.

- 1) Was the information provided to the police from 3838's clients?*
- 2) How was the information used, by HSMU, investigators or informant?*
- 3) Did the information have an impact on a court outcome?*

BD to provide the investigation team with advice or questions they should ask when assessing the information for relevance and impact.

Action item 1 - MS to compile more information to enable BD to consider framing questions to assist in collating information and provide advice.

Action item 2 – Further research to be conducted regrading precedents, contemporary authorities relating to lawyer/client LPP and confidentiality– SL

Action item 3 – Investigation group to ensure all reporting is extracted directly from SDU holdings and recorded verbatim without summarising. – MS to action

78. Finally, the VGSO is in possession of a memorandum dated 22 April 2015 prepared by Amy Galeotti, signed by Shaun Le Grand and addressed to Findlay McRae titled *Review of draft Victoria Police policy in response to IBAC Report* (Annexure 40). The advice reflects that the writer was provided with a copy of the report produced by the Honourable Murray Kellam AO QC, appointed by the Independent Broad-Based Anti-Corruption Commission into the conduct of Victoria Police in its management and use of Ms Gobbo as a human source (**IBAC Report**), a Victoria Police Manual excerpt relating to Human Sources and the advice by Dr Sue McNicol QC dated 19 December 2014 that formed part of the IBAC Report.

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These claims are not yet resolved.**

79. The advice in relation to the matters set out at paragraphs 72 - 78 is marked with the VGSO matter number '1404672' which, I am informed, is the file number assigned to the relevant matter. All documents in the possession of the VGSO pertaining to matter '1404672' have been produced to the Commission and are set out in an index at Annexure 41.
80. The VGSO is in possession of a number of documents titled *Issue Cover Sheet*. They relate to the matters of [REDACTED] Antonios Mokbel, Milad Mokbel, Dominic Barbaro, Frank Ahec, Rabie Karam and Zaharoula Mokbel. These documents are set out at Annexure 42. These documents are contained in the file held by the VGSO in relation to the request for advice discussed in paragraphs 72 - 79. We have not identified any earlier instances of these documents being provided to the VGSO.
81. In 2015, the VGSO was engaged to provide advice to Victoria Police relating to Operation Loricated. The VGSO is in possession of an Issue Cover Sheet (**ICS**) prepared by Laura Vickers and two Victoria Police members, Acting Inspector Damian Jackson and Senior Sergeant Jenette Brumby, dated 3 July 2015 (Annexure 43). The ICS discusses matters including whether a complaint should be made to the Legal Services Commissioner regarding Ms Gobbo, and whether any action should be taken in relation to criminal offences possibly committed by Ms Gobbo and others. The VGSO is also in possession of an advice from Greg Elms to Findlay McRae dated 9 September 2015 (Annexure 44). The advice concluded that the recommendations made in the ICS are within the scope of the discretion held by Mr McRae and would withstand legal scrutiny if applied.
82. I am unable to comment more specifically on the matters referred to in the Commissioner's Letter at paragraph [5] – [17] other than by referring to the content of documents referred to in this statement.
83. Between 2016 and 2019, the VGSO was engaged to represent the Chief Commissioner in:

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These claims are not yet resolved.**

- 83.1 AB & EF v CD [2017] VSC 350;
- 83.2 AB v CD & EF [2017] VSCA 338; and
- 83.3 AB v CD & Ors, EF v CD & Ors [2018] HCA 58.

(AB & EF Proceedings)

- 84. Stephen Lee then Shaun Le Grand supervised these matters. The solicitors with carriage were (at various times) Monika Pekevaska, Jessica Tribe and Rose Singleton.
- 85. On 18 April 2016, Peter Hanks QC and Emrys Nekvapil provided advice titled *In the Matter of Source 3838: Memorandum on possible disclosure by Director of Public Prosecutions of Identity of A Human Source*. The advice was sent by Stephen Lee to Findlay McRae on 18 April 2016 (Annexure 45). In summary, Counsel advised that:

[7.1] The view the Director has formed about the extent of his obligation is too absolute; it fails to consider whether the scope of that duty is qualified in this case by public interest immunity.

[7.2] If disclosure of information would identify, and endanger the life of an informer, there is a presumption that public interest immunity applies to protect that information from disclosure.

[7.3] That presumption is subject to a limited exception, which arises if disclosure could help to show the innocence of a defendant in a criminal trial. The Director has been unable to conclude that there was any miscarriage of justice. On no view does the limited exception arise in this case.

[7.4] It follows that the Director is not obliged to disclose the information, and it would be wrong and unlawful for him to do so.

**This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.**

[7.5] The Director is also under other legal duties not to disclose the information, at least without completing an examination of all relevant material for the purpose contemplated by Recommendation 12. (We understand that the Chief Commissioner will promptly provide any further material required for that purpose).

[7.6] Finally, if the Director forms the view (following further examination of relevant material) that public interest immunity does not protect the information from disclosure, then the Director should apply ex parte to the Supreme Court to seek a ruling on the correctness of that view, before making any disclosure.

86. On 9 June 2016, Peter Hanks QC and Emrys Nekvapil provided advice titled *Why 3838 is not a party, and has not been advised of the proceeding*. The advice was sent by Monika Pekevskva to Findlay McRae on 9 June 2016 (Annexure 46). In summary, Counsel provided eleven points as to why it was appropriate that Ms Gobbo, identified as 3838, not be provided notice of the proceeding initiated by the Chief Commissioner in the Supreme Court that Friday. The advice contemplates *that the Supreme Court will probably call on [the Chief Commissioner's legal representatives] to explain why no notice was provided to [Ms Gobbo]*. The advice states:

[8] The explanation is that we have a reasonable apprehension, based on past experience that:

[8.1] 3838's psychological state is such that 3838 would not treat this application as completely confidential;

[8.2] 3838 would do something inconsistent with complete confidentiality; and

[8.3] by doing that, would damage the public interest that the Chief Commissioner seeks to protect in the current proceeding.

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These claims are not yet resolved.**

87. On 14 September 2016, Peter Hanks QC, Dr Stephen Donaghue QC, Emrys Nekvapil and Fiona Batten provided advice titled [REDACTED]. The advice relates to the disclosure proposed to be made by the DPP as it related to a document referred to as the [REDACTED] case study'. The advice was sent by Monika Pekevaska to Findlay McRae on 15 September 2016 [REDACTED]. Counsel provided reasons for the opinion that it was not tenable for the Chief Commissioner:

[2.1] to maintain in this proceeding, in the absence of further evidence that disclosure of 3838's role to [REDACTED] would appreciably increase the risks to 3838's safety, that public interest immunity operates to displace the Victorian DPP's duty to disclose 3838's role to [REDACTED] and

[2.2] to delay the resolution of this proceeding in relation to [REDACTED]

88. Counsel further states:

[3] We have formed that opinion on the basis of our review of the [REDACTED] case study (being a document in the Chief Commissioner's possession, but not yet in evidence). We are concerned that there is a real risk that the Chief Commissioner might be criticised for delaying the resolution of this proceeding in relation to [REDACTED] in circumstances where the Chief Commissioner had possession of the knowledge assembled in the [REDACTED] case study, particularly if that case study has not been disclosed to the Victorian DPP or the Court.

[4] If 3838's role is disclosed to [REDACTED] it will be necessary for careful analysis to be given to whether it thereafter remains tenable to oppose disclosure to the other proposed disclosees, with a decision on that question being dependent on a detailed risk assessment that takes into account the current state of knowledge, amongst those affected by 3838's activities, of those activities.

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These claims are not yet resolved.

89. On 6 November 2016, Peter Hanks QC, Emrys Nekvapil and Fiona Batten provided advice titled [REDACTED]. The advice relates to the [REDACTED] case study' and disclosure. The advice was sent by Monika Pekevaska to Findlay McRae and Carol Orfanos on 6 November 2016 (Annexure 48). Counsel was asked to advise on four questions which followed the advice provided on 14 September 2016. Extracts of that advice are as follows:

Question 1: what material can be redacted from the [REDACTED] case study on the basis of public interest immunity?

[14] In this proceeding, the Chief Commissioner seeks a declaration that public interest immunity overrides the DPP's obligation of disclosure. Because of the sensitivity of the proceeding, comprehensive orders have been made, closing the court, suppressing the proceeding and any information derived from it, and requiring the lawyers participating to sign undertakings to keep the information confidential.

[15] At the heart of the case is the principle that public interest immunity protection for the identity of a police informer will give way, in the case of [REDACTED] if there is good reason to think that disclosure of 3838's identity is likely to assist [REDACTED] in having one or more of his convictions quashed. For the reasons set out in our Joint Advice, we consider that, in the case of [REDACTED] that test will likely be met.

[16] Any claim of public interest immunity for the evidence contained in the [REDACTED] case study therefore gives rise to a circularity: it begs the same question as the question asked in the overall proceeding – whether the evidence would assist [REDACTED] to have his convictions quashed.

[...]

Question 2: what, if any, issues may arise if the materials are redacted in the manner currently proposed?

This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.

[20] As we advised on 24 October 2016, the redaction of all diary notes and ICR's other than the entries expressly referenced in ██████████ memorandum, cannot be supported. As we understand it, the documents in the appendices to the ██████████ were considered to be relevant by ██████████ following 4 months of careful work and painstaking attention to detail.

[...]

[23] If, despite our opinion, the Chief Commissioner proposes to file the ██████████ ██████████ in the form proposed, and to provide the case studies to the DPP in a form that is redacted consistently with the criterion presently proposed, we foresee 2 possible issues arising.

[24] First, consistently with the opinion expressed in paragraph 49 of our Joint Advice, we would need to consider whether we can properly press the case for non-disclosure to ██████████ if the Chief Commissioner will not put before the Court the whole of the ██████████ (subject to limited redactions of information: see paragraphs 17 – 18 above).

[25] Secondly, the DPP and the friends of the court are likely to ask the Court to order the Chief Commissioner to produce the case studies and justify any redactions. In that situation, there would be no reasonable prospect of defending the redactions referred to in paragraph [20] above.

[26] It is very likely that the Chief Commissioner will come under increasing criticism for his reluctance to produce relevant material, especially in light of the suppression orders and undertakings in place to protect the material filed in evidence, and where there appears to be no compelling reason why all of the material should not be disclosed, even if officers in Victoria Police now think that much of it is not relevant.

**This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.**

Question 3 and 4: the extent to which the material will be distributed if provided to the DPP and filed in Court, and the risk of the Court allowing further distribution (for example, if 3838 is joined)

[27] At present, the material is covered by a regime of suppression orders and undertakings. It is very likely that, even if the Chief Commissioner is unsuccessful in the proceeding, the suppression orders will remain in place, at least until their expiry in 2021 (and beyond, if there is a basis at that stage for continuing them).

[28] There is a distinct possibility that the Court will grant 3838 access to the [REDACTED] if she is joined as a party. However, it is possible that the Court might be persuaded to confine access to 3838's lawyers, at least initially.

[29] However, we [sic] if the Chief Commissioner is unsuccessful in this proceeding in preventing disclosure to [REDACTED] which we consider very likely for the reasons set out in our Joint Advice, then [REDACTED] would have a much stronger case on an application under s 317 of the Criminal Procedure Act 2009 (Vic) for obtaining access to relevant documents than Mr Karam has in his present application to the Court of Appeal. That is because [REDACTED] would be armed with the advice contained in the letter the DPP proposes to send him.

[30] In our opinion, it is very likely that the Court of Appeal would then order disclosure of some or all of the [REDACTED] to [REDACTED]

90. The VGSO's documents indicate that, on 19 June 2017, a conference was held between Shaun Le Grand, Monika Pekevaska, Emrys Nekvapil, Fiona Batten, Findlay McRae, Carol Orfanos, Fleur Taylor and Detective Superintendent Peter Brigham regarding whether an appeal should be made to the Court of Appeal (Annexure 49).

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These claims are not yet resolved.**

91. Around 30 November 2017, Peter Hanks QC and Fiona Batten provided a note for advice in conference. The note was sent by Monika Pekevka to Carol Orfanos, Detective Superintendent Peter Brigham and Fleur Taylor on 30 November 2017 (Annexure 50). The note states:

[3] *To obtain special leave, the CCP would have to persuade the High Court that:*

[3.1] *the Court of Appeal's judgment involved a question of law:*

[a] *that is of public importance; or*

[b] *on which a decision of the High Court is required to resolve differences of judicial opinion; and*

[3.2] *the interests of the administration of justice require that the High Court consider the Court of Appeal's judgment.*

[4] *In addition, the CCP would need to persuade the High Court that an appeal would have a substantial prospect of success.*

[5] *The judgment of the Court of Appeal involved a question of law – namely, whether the assurances given to EF by VicPol created a duty on the part of the State to protect EF, a duty that outweighed the DPP's duty of disclosure.*

[6] *That is the only possible point in the Court of Appeal's judgment that could provide a foothold for a special leave application.*

[6.1] *That question of law might be said to be one of public importance: see 3.1(a) above; on the other hand, the very specific facts of the present case might work against that characterisation. On balance, this criterion is likely to be satisfied, bearing in mind what the Court of Appeal said: "The protection of EF and her children from harm, and the protection of the integrity of the informer system, raise very significant issues of the public interest whatever view is taken of EF's professional conduct."*

**This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.**

[6.2] *It cannot be said that a decision of the High Court is required to resolve differences of judicial opinion (because there are no such differences): see 3.1(b) above.*

[7] *We do not think that the interests of the administration of justice require that the High Court consider the Court of Appeal's judgment.*

[...]

[9] *Overall, we do not think that any appeal would have a prospect of success. For that reason, and the other reasons outlined above, special leave to appeal is very unlikely to be granted.*

92. On 3 December 2017, Peter Hanks QC, Saul Holt QC and Fiona Batten provided advice titled [REDACTED] I have been unable to ascertain from the VGSO's review of the documents when this advice was sent to Victoria Police. In summary, Counsel was asked to advise whether the Chief Commissioner had an arguable basis for seeking special leave to the High Court, given the risk to life and other circumstances of the case. The advice states:

Opinion:

[2] *We recognise that there are reasons why our client may wish to seek special leave to appeal.*

[2.1] *The stakes are high: AB has a duty to protect EF from harm; and, if the letters are sent, EF will face almost certain death.*

[2.2] *The case raises questions of public importance – in particular, the protection of the integrity of the informer system.*

[3] *We also recognise that it is open for AB to argue that the Court of Appeal erred: that the duty of care is of a public character, and in the circumstances of this case, the public interests against disclosure*

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These claims are not yet resolved.**

(including the duty of care owed to EF), outweigh the public interest in disclosure.

[4] *However, we reiterate that, in our view, the High Court is very unlikely to grant special leave, largely because any appeal would have no real prospect of success.*

[5] *Our client would need to persuade the High Court that the issues raised are of a general public importance, and that the administration of justice requires the grant of special leave.*

[...]

93. Prior to this advice, on 30 November 2017, I met with Mr McRae and other members of Victoria Police and discussed whether the Chief Commissioner should apply for special leave to the High Court. At that meeting, I recall being asked for advice on whether such an application would be consistent with the Model Litigant Guidelines. I also recall being advised that the level of risk posed to Ms Gobbo if the proposed disclosure were made by the DPP remained extreme.

94. By letter on 4 December 2017, I wrote to Mr McRae and stated as follows (Annexure 52):

Should the Chief Commissioner of Police instruct our office to seek special leave to the High Court of Australia, I consider that such an application would be consistent with the Model Litigant Guidelines, given the grave level of risk involved to EF and EF's children, and related matters of public importance, such as the integrity of the informer system.

Further, I consider that, consistent with the note provided by Counsel on 30 November 2017, that (sic) the weight to be placed upon the State of Victoria's duty to protect EF and EF's children provides a foothold for a special leave application.

**This document has been redacted for Public Interest Immunity claims made by Victoria Police.
These claims are not yet resolved.**

Finally, I note that EF's lawyers today confirmed that their client will apply for special leave to the High Court.

95. This letter was prepared by Monika Pekevskva, Shaun Le Grand and myself, and settled by Peter Hanks QC.

96. On 31 January 2018, Peter Hanks QC, Emrys Nekvapil and Fiona Batten provided advice titled *In the Matter of Suppression Orders in Various Proceedings: Memorandum of Advice*. The advice was sent by Jessica Tribe to Carol Orfanos and Fleur Taylor on 31 January 2018 (Annexure 53). In summary, Counsel were requested to provide advice on three questions:

[3.1] First, would the suppression orders prevent the disclosure proposed by CD?

[3.2] Secondly, what would be the impact on the suppression orders of a decision by the High Court either refusing special leave or (if special leave be granted) dismissing the appeal?

[3.3] Thirdly, on the assumption that one or more of the suppression orders continues to operate, what variations would need to be made to ensure protections against social media reporting of the protected subject matter, whether any references made in postings or articles are direct or indirect.

97. On 18 April 2018, Saul Holt QC provided advice titled *AB & EF v CD* agreeing with the advice provided by Mr Hanks QC, Mr Nekvapil and Ms Batten on 31 January 2018. The advice was sent by Monika Pekevskva to Carol Orfanos, Fleur Taylor and Superintendent Peter Brigham on 19 April 2018 (Annexure 54).

98. As part of the AB & EF Proceedings, Counsel has provided advice on peripheral matters such as legislative reform and issues relating to the Commission. I am advised that these advices do not appear to be captured

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by the Notices to Produce or the matters raised in the Commissioner's Letter, and that they have not been produced on that basis.

99. Between 2016 and 2019, the VGSO has been engaged to represent the Chief Commissioner in relation to applications for leave to appeal convictions by Antonios Mokbel, Rob Karam and Zlate Cvetanovski, and in respect of a request for information by Faruk Orman. The VGSO has not produced any documents to the Commission relating to these ongoing matters.
100. On 1 October 2018, the VGSO was instructed by Victoria Police to provide advice in relation to the utilisation of six human sources, not including Ms Gobbo, who worked or had previously worked, within the legal system. The VGSO is in possession of a document dated 1 October 2018, from Carol Orfanos, Deputy General Counsel, Victoria Police, which matches this request. The request is directed to Greg Elms (Annexure 55). The document refers to three Human Source files having been hand delivered to the VGSO. In respect of each, the VGSO is requested to advise whether the subject source at the time of their interaction with police:
- 100.1 was subject to legal professional obligations by virtue of their role as a legal advisor; and
- 100.2 breached any legal professional obligations.
101. By letter dated 16 October 2018, the VGSO provided advice on these matters. The letter of advice is addressed to Findlay McRae (Annexure 56).
102. On 29 March 2019, the VGSO on instructions from Victoria Police briefed Brendan Murphy QC to consider the VGSO's advice dated 16 October 2018 and provide advice.
103. On 21 May 2019, Mr Murphy QC, Morgan McLay and Kyle McDonald of Counsel provided the requested written advice. On 11 June 2019, Morgan McLay and Kyle McDonald provided supplementary advice. I understand that the VGSO on instructions from Victoria Police is now seeking further

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supplementary advice. These advices and the brief to Mr Murphy QC fall outside the time period covered by the Notices to Produce. VGSO staff are seeking to clarify this issue with the Commission.

104. Since 2018, the VGSO has been, and continues to be, engaged to represent Victoria Police in relation to certain aspects of Operation Landow.

Other matters

105. At paragraph [16] of the Commissioner's letter, reference is made to the following:

During the period in which Ms Gobbo acted as a human source, in relation to the matters other than the Dale prosecutions, such as the matter of Antonios Mokbel, there would almost certainly have been many PII issues and potential disclosure obligations involving issues related to Ms Gobbo's use as a human source.

106. Since receiving the Commissioner's letter, VGSO staff have located 16 files relating to Tony Mokbel.
107. Of these, four are ongoing files relating to a freedom of information application made by Mr Mokbel in 2016, an application for leave to appeal made by Mr Mokbel in December 2017, human rights charter issues and the recent assault on Mr Mokbel in prison.
108. A further nine files relate to matters including asset confiscation matters, various judicial and administrative review proceedings, a subpoena for health records belonging to another prisoner, and human rights charter issues. The only documents of any significance we have identified from these files are two documents referring to Ms Gobbo by name. These documents do not make any mention of Ms Gobbo's status as an informer. They are set out at Annexure 57.

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109. The remaining files we have located relate to subpoenas issued by Mr Mokbel in 2009, 2010 and 2011. These files do not make any mention of Ms Gobbo's status as an informer. It is unclear whether these documents are captured by the Notices to Produce. VGSO staff are seeking to clarify this issue with the Commission and will produce these files to the Commission once this issue is resolved.
110. VGSO staff have identified 13 files relating to Paul Dale in addition to the file held by the VGSO in relation to Inquest into the Deaths of Terence and Christine Hodson. Of these files:
- 110.1 three are summarised above in paragraphs 33 - 44 and 47 - 55, and are being produced in full to the Commission;
- 110.2 nine relate to matters including the civil proceedings commenced by Mr Dale against the State of Victoria and do not appear to contain documents that are captured by the Notices to Produce or which are relevant to the matters raised in the Commissioner's letter; and
- 110.3 one is the civil proceeding currently being brought against the State of Victoria by Andrew and Mandy Hodson in respect of which production of material to the Commission is still being considered.

B Provide details of any other person or organisation who you believe was or might have been aware that Ms Gobbo was a human source, including the basis for such belief.

111. Other than what is disclosed in the documents described above, I do not hold a belief about who was or might have been aware of Ms Gobbo's identity as a human source at any particular time.

C Provide details as to whether any concerns were raised at any time by the VGSO, members of Victoria Police, or other policing or law enforcement agencies (for example the AFP, the Office of Public Prosecutions, the Commonwealth Director of Public Prosecutions) as to

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the use of Ms Gobbo as a human source and the possibility of the need to disclose such matters to accused or convicted persons, the prosecution or the courts, including whether the question of obtaining legal advice was raised and what, if anything, was done about such concerns.

112. Other than what is disclosed in the content of documents described above, I am not aware of whether concerns were raised by the VGSO, members of Victoria Police or other law enforcement agencies about Ms Gobbo's use as a human source and the need to disclose such matters to accused or convicted persons, the prosecution or courts, prior to my appointment as VGS. Since my appointment in December 2016, the question of disclosure of Ms Gobbo's identity as a human source to accused persons or convicted persons was the subject of various advices from Counsel set out above in answer to Part A.

D Provide details of any legal advice that was provided by the VGSO, or any person connected with the VGSO, in relation to the use of Ms Gobbo as a human source, including the substance of such advice; when it was obtained; and to whom it was provided.

113. Please refer to my response in relation to Part A of the Commissioner's Letter. Other than those matters, I am not aware of any further legal advice provided by the VGSO or any person connected with the VGSO in relation to the use of Ms Gobbo as a human source.

E Provide details of any other human source who, to your knowledge, has provided information or assistance to Victoria Police who were subject to legal obligations of confidentiality or privilege.

114. In about October 2018, the Police Branch was instructed to provide advice in relation to other sources who potentially owed legal professional duties. This matter is described above in paragraphs 100 - 103.

F Provide details of any legal advice sought by Victoria Police or provided to Victoria Police in relation to the potential use of a human source or

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information obtained from a person who might be subject to legal obligations of confidentiality or privilege.

115. Please refer to my responses to Parts A and E of the Commissioner's Letter, above.

G In relation to the period between 2005 and 2012 outline the relationship between the VGSO and any internal department within Victoria Police, and the mechanism by which members of the Victoria Police seek advice from the VGSO.

116. The VGSO provides independent legal services to Victoria Police. Such services are provided primarily by the Police Branch and the L & DR Branch.

117. The Police Branch is unique amongst the VGSO Branches in that it only has one client, the Chief Commissioner. The Police Branch is located with Victoria Police at 637 Flinders Street, Docklands. The Police Branch advises Victoria Police about its powers, duties and responsibilities in a wide range of legal matters, relevantly including subpoenas and summary prosecutions.

118. The L & DR Branch provides advice to a wide range of Government clients including Victoria Police. The L & DR Branch is located at 121 Exhibition Street, Melbourne. The L & DR Branch provides legal services to Victoria Police primarily in civil matters including civil litigation, inquests and inquiries.

119. From time to time, the VGSO's other Branches also provide legal services to Victoria Police.

120. Today, I understand that legal services are ordinarily requested by Victoria Police from the Police Branch via the following pathway:

120.1 when Victoria Police requires legal advice or representation from the VGSO, the police member(s) with carriage of the matter prepares an Issue Cover Sheet (**ICS**) describing the background of the matter and what is required;

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- 120.2 the ICS is considered by the police member's superior officers with approval being required by a member ranked Inspector or higher;
 - 120.3 if approved, the ICS is provided to the Staff Officer to the Executive Director of the Legal Services Department whereupon it is allocated to the VGSO via the Staff Officer together with any other relevant documents;
 - 120.4 depending on the matter and the issue being dealt with, instructions may be provided by the Legal Services Department and/or the member(s) with carriage of the matter;
 - 120.5 advice is provided by the VGSO back via the same pathway;
 - 120.6 once a matter is on foot, advice may in some cases be requested by the police member with carriage of the file without the need for a further ICS.
121. To the best of my knowledge, legal services are requested by Victoria Police from the L & DR Branch in the vast majority of cases via the Superintendent of the Civil Law Division in the Legal Services Department of Victoria Police. Currently, this position is held by Superintendent Belinda Bales. I do not know whether the Civil Law Division produces an ICS for such requests.
122. While, I am unable to say exactly how legal services have been requested by Victoria Police before I joined the VGSO in December 2016, I am advised by my staff that:
- 122.1 prior to early 2011, the Police Branch opened files upon receiving instructions directly from the area of Victoria Police concerned, not necessarily through the Legal Services Department as contemplated by paragraph 120. The finalised advice was addressed and sent to the area member concerned, or often to the relevant superior commissioned officer. In early 2011, a Victoria Police member who had recently commenced a rotation as Staff Officer to the Executive

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Director of the Legal Services Department sought to streamline how Victoria Police engages the Police Branch, and the process in paragraph 120 was implemented, including the process of all written advice being logged through the Legal Services Department and addressed to the Executive Director of the Legal Services Department, copying in relevant members;

- 122.2 the Police Branch also has standing instructions from the Legal Services Department within Victoria Police to take oral advice requests directly from members of all ranks, especially for matters requiring urgent on-the-spot operational advice or court attendance. Common requests are for representation at court after a member has made a PII claim during questioning in the witness box, queries about whether the VGSO has previously advised on a particular issue, and queries about how the member can obtain VGSO advice as per paragraph 120. For matters that require detailed consideration or court attendance, ordinarily a file is generated through the Legal Service Department as per paragraph 120. If urgent court attendance is required, initial instructions to brief counsel are often obtained directly from the Legal Services Department.
- 122.3 I understand that, until some-time in 2007, the Police Branch was referred to as the Legal Adviser's Office. I understand the Legal Adviser's Office was renamed the Victoria Police Branch and that it later became known as the Police Branch;
- 122.4 due to the frequency of the work, the Police Branch regularly receives instructions directly from relevant units in Victoria Police to settle documents in support of and appear for the applicant police member in applications under the *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 1999*;

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- 122.5 the Police Branch provides legal services to Victoria Police on retainer and letters of engagement are not normally provided by the VGSO in matters being handled by the Police Branch;
- 122.6 in some cases, particularly high-profile and/or sensitive matters, instructions are provided to the VGSO directly by the Executive Director of Legal Services;
- 122.7 from the VGSO's review of the documents, I am advised that in some cases the VGSO briefed Counsel who then appears to have liaised directly with the police member(s) with carriage of the matter and provided legal services including reviewing and redacting documents. I am advised that this still occurs from time to time in urgent subpoena/PIL claims and in summary prosecution matters where Victoria Police prosecutors are not available or do not have capacity to appear for the informant; and
- 122.8 Victoria Police also has its own dedicated legal division known as the Legal Services Branch with a departmental head. In this way, Victoria Police have their own internal resources for the provision of legal advice as well as the ability to access legal advice through the Police Branch, other Branches of the VGSO and Victorian Government Legal Services Panel law firms.

H Provide details of any other matters considered relevant to the Commission's terms of reference.

123. At paragraph [3] of the Commissioner's letter, reference is made to the following:

It appears that the VGSO represented Victoria Police in resisting disclosure of material relating to the Petra Taskforce, including in relation to evidence given by Inspector Steve Smith in March 2010 at the committal of Paul Dale and Rodney Collins at which we understand the VGSO briefed Lucia Bolkas of

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counsel (we note we have not been provided by the VGSO with material relating to instructions by Victoria Police or advice given to Victoria Police as to these matters).

124. I say the following regarding the absence of documents identified to date regarding the Dale matter with specific reference to the VGSO's processes for identifying relevant documents in response to Notices to Produce:
- 124.1 current VGSO staff members with any background knowledge of a matter being investigated by the Commission have been requested to identify files that are likely to be relevant to the Terms of Reference. These files have been retrieved and reviewed;
 - 124.2 those VGSO staff, overseen by senior staff, have compiled several lists of search terms based on their understanding of matters being investigated by the Commission and the terms of the Notices to Produce as they have been served;
 - 124.3 the search terms have been entered into the VGSO's electronic database to identify potentially relevant files;
 - 124.4 VGSO staff have retrieved materials in which the VGSO has acted for Victoria Police in the order of 1.8 million documents;
 - 124.5 VGSO staff have used their best endeavours to search the 1.8 million documents and have identified 228,000 documents that are potentially responsive to the Notices to Produce;
 - 124.6 the 228,000 documents were reviewed by VGSO staff and paralegals to confirm whether they are within the scope of the Notices to Produce;
 - 124.7 VGSO staff have retrieved over 500 archive boxes of potentially relevant hard-copy files from which 240 boxes of materials have been identified as relevant and reviewed; and

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- 124.8 to date, the VGSO has produced over 3000 documents to the Commission.
125. VGSO staff have been, and are continuing to, conduct manual searches to identify any other documents that are within the terms of the Notices to Produce.
126. As far as I am aware, all VGSO staff whom originally had carriage of the matters described above no longer work for the VGSO save and except for those identified in paragraph 29. This may have had an impact on the efficiency and potentially the accuracy of the processes behind identifying documents that respond to the Notices to Produce, since VGSO employees are undertaking the review of documents without the benefit of direct knowledge of the content of those files or the location of the documents in relation to them.
127. The work of identifying relevant documents is not yet complete and to the extent that further material is identified, it will be provided to the Commission as soon as practicable.

Dated: 13 June 2019

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Marlo Baragwanath
Victorian Government Solicitor