

ROYAL COMMISSION INTO THE MANAGEMENT
OF POLICE INFORMANTS

Held in Melbourne, Victoria

On Thursday, 20 June 2019

Led by Commissioner: The Honourable Margaret McMurdo AC

Also Present

Counsel Assisting: Mr C. Winneke QC
 Mr A. Woods
 Ms M. Tittensor

Counsel for Victoria Police Mr J. Hannebery QC
 Ms K. Argiropoulos

Counsel for State of Victoria Ms C. Fitzgerald

Counsel for Nicola Gobbo Mr P. Collinson QC
 Mr R. Nathwani

Counsel for DPP/SPP Mr P. Doyle

Counsel for Police Handlers Mr G. Chettle
 Ms L. Thies

1 PROCEEDINGS IN CAMERA:
12:21:06 2
12:21:06 3 COMMISSIONER: Yes.
12:21:08 4
12:21:08 5 MR HANNEBERY: Thank you, Commissioner.
12:21:09 6
12:21:10 7 COMMISSIONER: I'll also order that there be no, if I
12:21:12 8 haven't done it already, that there be no publication of
12:21:15 9 anything that is now said in closed hearing.
12:21:19 10
12:21:20 11 MR HANNEBERY: Commissioner, perhaps the first thing I'll
12:21:23 12 raise, I understand that, when I made an objection earlier
12:21:26 13 about the reference to ██████████, that it is still
12:21:31 14 apparently on the transcript and has gone out in the live
12:21:35 15 feed, as I understood it.
12:21:36 16
12:21:37 17 COMMISSIONER: Can you just push the microphone a little
12:21:40 18 closer to you.
12:21:41 19
12:21:42 20 MR HANNEBERY: I understand that the reference Dr Gumbleton
12:21:45 21 made earlier to ██████████, that I asked to be removed, I
12:21:48 22 think has gone out in the live stream. So perhaps I could
12:21:52 23 ask that that be removed from the transcript.
12:21:57 24
12:21:58 25 COMMISSIONER: Apparently I didn't make an order. Does an
12:22:01 26 order need to be made?
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12:22:04 28 MR HANNEBERY: I'd ask that an order be made.
12:22:05 29
12:22:05 30 COMMISSIONER: To remove ██████████ from the transcript and,
12:22:10 31 if it's not too late, from the live - I presume there's
12:22:14 32 some - that's necessary, is it, to comply with the
12:22:17 33 non-publication orders?
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12:22:20 35 MR HANNEBERY: I'm saying in the context in which it's
12:22:21 36 said.
12:22:22 37
12:22:22 38 COMMISSIONER: All right.
12:22:23 39
12:22:24 40 MR HANNEBERY: It's information - - -
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12:22:25 42 COMMISSIONER: If it hasn't already been live streamed,
12:22:28 43 we'll stop it. It's gone, it's just missed out, so it's
12:22:34 44 gone, but we'll make - we'll remove it from the transcript.
12:22:40 45
46 MR HANNEBERY: We can only do what we can do now.
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P. TRICHIAS XXN - IN CAMERA

1 COMMISSIONER: We'll remove it from the transcript.
2

12:22:41 3 MR HANNEBERY: It's the application of Victoria Police that
12:22:44 4 this closed hearing should be closed also to the press.
12:22:49 5 The submission is that this material, that's subject to a
12:22:52 6 suppression order surrounding ██████████, is clearly going
12:22:56 7 to involve evidence now that would have material in the
12:23:02 8 form of bio data and other details that would have the
12:23:06 9 potential and the tendency to identify ██████████. I
12:23:10 10 understand that the Commissioner's ordered that there be a
12:23:14 11 non-publication order, but it's the submission of Victoria
12:23:19 12 Police that, given the sensitivity around the identity of
12:23:22 13 this person, that it serves no purpose having the press
12:23:26 14 here, even with that non-publication order, in that this
12:23:32 15 information should be kept as tightly held as possible,
12:23:40 16 particularly given the nature of the cross-examination that
12:23:46 17 I expect will emerge and the details in which it will be
12:23:53 18 gone into, which may well create further sensitivities. I
12:23:58 19 don't want to make any further point than that, but that's
12:24:01 20 the position of Victoria Police.
12:24:02 21

12:24:02 22 COMMISSIONER: So I suppose your concern is that whilst you
12:24:06 23 can be confident it won't be published in a newspaper or in
12:24:10 24 the media, that there might be loose talk that's picked up
12:24:12 25 and it gets around that way?
12:24:15 26

12:24:16 27 MR HANNEBERY: It's adding more people than, I would
12:24:18 28 submit, is necessary to know this information, at little
12:24:21 29 gain to public knowledge because there's a non-publication
12:24:25 30 order anyway. And it need not be restated how sensitive
12:24:32 31 this material is.
12:24:37 32

12:24:39 33 COMMISSIONER: Does anybody else want to make a submission?
12:24:45 34 Do you have any submission, Mr Winneke?
12:24:47 35

12:24:48 36 MR WINNEKE: Commissioner, I don't know whether it's
12:24:51 37 accepted at all that there's little to be gained by the
12:24:57 38 press and potentially the public hearing about some of the
12:25:02 39 evidence from Mr Trichias which does not identify or tend
12:25:05 40 to identify ██████████. There are a number of matters which
12:25:11 41 may well be of some significance concerning the evidence
12:25:16 42 surrounding Ms Gobbo and her activities which can be
12:25:19 43 reported upon which would not infringe upon anything that
12:25:29 44 would be the subject of suppression orders, non-publication
12:25:34 45 orders. Can I say insofar as ██████████ is concerned, he's
12:25:39 46 given evidence in trials before, in the sense that his name
12:25:48 47 has been de-identified, in other words people don't know

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12:25:52 1 who he is, and the press have been present during the court
12:25:56 2 when he's given evidence. Now, the press understand their
12:26:02 3 obligations, their professional obligations, and they're
12:26:06 4 significant obligations. They understand that if there is
12:26:09 5 an order that suppresses information which might tend to
12:26:11 6 identify the person, they've got to be very careful about
12:26:15 7 what they report. But it's a step further to say that as
12:26:21 8 far as we're concerned, as the police seem to be saying,
12:26:24 9 there's of no interest - there's nothing of any interest
12:26:28 10 outside of matters which concern [REDACTED]. In our
12:26:33 11 submission, there are matters of interest and the press can
12:26:37 12 be relied upon to understand and not breach the orders that
12:26:41 13 the Commission makes.

12:26:44 14
12:26:44 15 COMMISSIONER: At the moment, there'll be a non-publication
12:26:46 16 order in respect of everything that's said in closed
12:26:47 17 hearing. So until a transcript is - a redacted transcript
12:26:52 18 is published, they won't be able to publish anything.

12:26:55 19
12:27:00 20 MR WINNEKE: No.

12:27:00 21
12:27:02 22 MR HANNEBERY: Can I just add as obliquely as I can that,
12:27:04 23 obviously, there are some legislative provisions as well,
12:27:09 24 where certain presumptions apply, that the Commissioner
12:27:16 25 would also have to be conscious of in these circumstances.

12:27:19 26
12:27:19 27 COMMISSIONER: But if there's a non-publication order, that
12:27:21 28 will cover it, won't it? Doesn't that meet my obligations
12:27:25 29 in respect of suppression orders and any legislative
12:27:27 30 provisions?

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12:27:29 32 MR HANNEBERY: Not necessarily, we'd submit.

12:27:40 33
12:27:41 34 COMMISSIONER: I've got a copy of the Act that we're
12:27:43 35 concerned with.

12:27:44 36
12:27:46 37 MR HANNEBERY: Perhaps if I could write this down and hand
12:27:48 38 it up to the Commissioner, it might make me feel more
12:27:52 39 comfortable than trying to come up with different ways not
12:27:56 40 to say anything.

12:27:57 41
12:27:58 42 COMMISSIONER: Yes.

12:28:16 43
12:28:16 44 MR HANNEBERY: I just draw the Commissioner's attention to
12:28:18 45 that.

12:29:26 46
12:29:56 47 COMMISSIONER: I'm looking at the provision you referred me

12:29:58 1 to and what I'm proposing meets A and B.
12:30:07 2
12:30:07 3 MR HANNEBERY: Yes. I suppose it's a matter of
12:30:10 4 interpretation of A.
12:30:25 5
12:30:25 6 COMMISSIONER: Yes, I understand your point. It's not
12:30:40 7 defined elsewhere?
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12:30:43 9 MR HANNEBERY: No, I don't believe so.
12:30:51 10
12:30:51 11 COMMISSIONER: Yes, thank you. Mr Winneke, I think the
12:30:54 12 point might be that - you saw the provision to which
12:30:58 13 Mr Hannebery's referred?
12:31:00 14
12:31:00 15 MR WINNEKE: Yes, I have seen that provision.
12:31:02 16
12:31:02 17 COMMISSIONER: If you look at A and if you look at the last
12:31:05 18 word in A of that provision - or the second-last word
12:31:10 19 before "and".
12:31:11 20
12:31:12 21 MR WINNEKE: Yes.
12:31:12 22
12:31:12 23 COMMISSIONER: It's whether, if I allow the media to be
12:31:15 24 present, that will be complied with.
12:31:19 25
12:31:19 26 MR WINNEKE: Depending on the interests of justice and
12:31:21 27 where the interests of justice lie. If it's not in the
12:31:30 28 interests of justice to hold it in the manner
12:31:34 29 suggested - - -
12:31:34 30
12:31:34 31 COMMISSIONER: Is your submission that if I allowed the
12:31:36 32 media present, it wouldn't be a private hearing, that's the
12:31:42 33 point?
12:31:43 34
12:31:44 35 MR WINNEKE: Look, I think effectively, if the media's
12:31:53 36 present, it could be reasonably said that it's not private.
12:32:01 37
12:32:01 38 COMMISSIONER: But the public's excluded.
12:32:03 39
12:32:04 40 MR WINNEKE: The public's excluded and accredited media
12:32:11 41 who - - -
12:32:11 42
12:32:12 43 COMMISSIONER: It's still a private hearing, isn't it, if
12:32:14 44 the general public are excluded?
12:32:16 45
12:32:17 46 MR WINNEKE: Well, the general public are excluded. I
12:32:19 47 suppose it depends on your definition of the media. I

12:32:22 1 suppose the point is this: people are permitted to be in
12:32:26 2 this hearing room; lawyers, who understand their
12:32:30 3 obligation, members of court staff, who under their
12:32:33 4 obligation.
12:32:33 5
12:32:34 6 COMMISSIONER: That doesn't stop it from being a private
12:32:36 7 hearing. So if I allow accredited media to also be
12:32:40 8 present, it's still a private hearing if I exclude the
12:32:47 9 general public, I would have thought.
12:32:48 10
12:32:49 11 MR WINNEKE: I must say I would have to - and I haven't
12:32:52 12 formulated a view or confirmed a view on that, but as to
12:32:57 13 whether accredited media, who understand their obligations
12:33:00 14 and would not breach material or publish material which is
12:33:05 15 likely to - ultimately the question is if there are matters
12:33:26 16 dealt with which do relate to the paragraphs in that
12:33:32 17 provision, unless it's in the interests of justice, then
12:33:40 18 the hearing must be in private, we accept that. I suppose
12:34:06 19 the answer is this: conceivably, sub-paragraph (a) comes
12:34:14 20 into play and in this hearing, there may be evidence which
12:34:22 21 would fall within sub-paragraph 1(a). Unless it's in the
12:34:28 22 interests of justice - unless it's not in the interests of
12:34:37 23 justice that the media be present, well, they would have to
12:34:43 24 be excluded.
12:34:43 25
12:34:46 26 COMMISSIONER: The advice that I have is that being
12:34:59 27 private, under (a) of that sub-section, should not preclude
12:35:03 28 the media from being present in the hearing room. I think
12:35:11 29 my view, despite what you've said, is that a private
12:35:16 30 hearing once the general public are excluded is a private
12:35:20 31 hearing, even if accredited - - -
12:35:22 32
12:35:23 33 MR WINNEKE: Should not preclude the media from being
12:35:25 34 present.
12:35:25 35
12:35:25 36 COMMISSIONER: It's a private hearing even if the media are
12:35:31 37 allowed to be present, providing that they're not allowed
12:35:35 38 to report. I have excluded the general public, so
12:35:39 39 therefore it's a private hearing, although I've permitted a
12:35:45 40 class of people to be present, including the legal teams
12:35:49 41 and - - -
12:35:51 42
12:35:52 43 MR WINNEKE: And accredited media.
12:35:53 44
12:35:53 45 COMMISSIONER: And accredited media. So it's still
12:35:57 46 private.
12:35:59 47

12:35:59 1 MR WINNEKE: Commissioner, with respect, I agree with that
12:36:02 2 and in addition to that, it may be said that even if you're
12:36:07 3 wrong about that, it's in the interests of justice that the
12:36:10 4 accredited media be here. We would submit that it is in
12:36:13 5 the interests of justice to deal with matters extraneous to
12:36:17 6 the matters which are set out in 1(a).

12:36:19 7
12:36:20 8 COMMISSIONER: I'm not so persuaded about that one, but I'm
12:36:24 9 satisfied that I'm still complying with the legislative
12:36:26 10 provisions by allowing the media to remain present, but
12:36:30 11 with a non-publication order in respect of everything
12:36:34 12 that's said in the private hearing. And I emphasise to
12:36:43 13 everyone present that these orders are made for a reason
12:36:46 14 and they're made because there's a possibility that
12:36:51 15 people's lives could be in danger and so it is imperative
12:36:56 16 that they be followed. Yes, all right then.

12:36:59 17
12:36:59 18 MR WINNEKE: If it please the Commissioner.

12:37:03 19
12:37:04 20 MR HANNEBERY: I don't mean to take up too much time, but
12:37:07 21 if I could - if that's the Commissioner's view, then I'd
12:37:11 22 ask for a moment. I might need to get some instructions
12:37:13 23 about that matter, around this point.

12:37:15 24
12:37:15 25 COMMISSIONER: Yes.

12:37:16 26
12:37:16 27 MR HANNEBERY: I think the position of Victoria Police is
12:37:22 28 that the media presence, accredited or otherwise, would not
12:37:27 29 be consistent with (2)(a) and I'd submit that looking at
12:37:37 30 it, that would effectively put the media in a separate and
12:37:47 31 distinct category from members of the public, in
12:37:54 32 circumstances where - let's just say other bodies that
12:37:57 33 require extreme confidentiality around hearings don't
12:38:03 34 necessarily have and that the concept of privacy, I would
12:38:09 35 say, is innately and consistent with having multiple
12:38:14 36 journalists in a room, even if then there's an order about
12:38:18 37 non-publication, it would seem to be, in my submission,
12:38:21 38 inconsistent with that concept, and given the nature of the
12:38:25 39 legislation and the matters that it's dealing with, I would
12:38:32 40 submit that a very narrow view of what "private" means,
12:38:39 41 namely "private" means those who are necessarily present to
12:38:45 42 ensure the functioning of the proceedings and representing
12:38:56 43 those who legitimately have rights that might be under
12:39:02 44 threat in some way from a finding or some form of evidence,
12:39:08 45 that would be covered by that concept. I think people who
12:39:12 46 are present not for a party, not to do with the Commission
12:39:17 47 proceedings, acting for a separate body entirely with - I'm

12:39:23 1 not saying an illegitimate role, but a separate and
12:39:28 2 distinct role and a separate and distinct function to
12:39:31 3 fulfil, having them present does not seem to be consistent,
12:39:36 4 in my submission, with (2)(a). But if, despite what
12:39:43 5 Victoria Police's submissions are, the Commission is of the
12:39:48 6 view that they should be allowed to stay, I'd just ask for
12:39:51 7 a couple of minutes to get some instructions about that
12:39:55 8 matter.
12:39:55 9
12:39:56 10 COMMISSIONER: All right. We'll adjourn.
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12 <(THE WITNESS WITHDREW)
12:45:03 13
12:54:46 14 (Short adjournment.)
12:54:46 15
12:54:46 16 COMMISSIONER: Mr Hannebery, I understand you need some
12:54:48 17 more time to get instructions.
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12:54:50 19 MR HANNEBERY: Yes.
12:54:50 20
12:54:50 21 COMMISSIONER: During that brief break, I was considering
12:54:52 22 the matter and to assist you in getting those instructions,
12:55:00 23 could I add that whilst I do regard - my view is that it is
12:55:07 24 still a private hearing if the accredited media are
12:55:13 25 present, under (a), but in the first part of that
12:55:22 26 subsection to which you referred, I consider that it is not
12:55:27 27 in the interests of justice to exclude accredited media
12:55:32 28 with the non-publication order that I propose, because it
12:55:38 29 assists them in understanding the context in which they
12:55:42 30 will report upon this inquiry in terms of the public
12:55:54 31 aspects of it, which they will be able to lawfully report
12:55:59 32 upon. So I wanted you to understand that that was also
12:56:03 33 part of my - - -
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12:56:06 35 MR HANNEBERY: Yes. So I'm right in understanding the
12:56:09 36 Commission's view is it's not just simply the
12:56:11 37 interpretation of (2)(a), it's an exercise of discretion
12:56:14 38 under (2)(b) - 10(2)(b)?
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12:56:21 40 COMMISSIONER: 2, just 2.
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12:56:24 42 MR HANNEBERY: Yes, sorry, 10(2).
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12:56:28 44 COMMISSIONER: That's true. That is my view about the
12:56:30 45 meaning of private, but it is also my view that it's not in
12:56:34 46 the interests of justice to exclude the media because they
12:56:37 47 need context. With the non-publication order, the

12:56:43 1 interests of justice are protected and it's in the
12:56:45 2 interests of justice that they be present so that they have
12:56:48 3 the context so that they can effectively and thoroughly
12:56:50 4 report on public matters.
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12:56:52 6 MR HANNEBERY: I think while we didn't specifically discuss
12:56:55 7 that before we understand that Victoria Police - - -
12:56:58 8

12:56:58 9 COMMISSIONER: I just wanted to make that clear so that you
12:57:01 10 understood it when you were getting instructions. Having
12:57:03 11 talked to the legal team during the break, I'm told that
12:57:09 12 the same issue is likely to arise with the next witness.
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12:57:13 14 MR HANNEBERY: Yes.
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12:57:14 16 COMMISSIONER: And that this witness, assuming we proceed
12:57:16 17 with this witness, will take the rest of the day. So the
12:57:24 18 options would be whether we - I know because the next
12:57:28 19 witness has health problems and it might be better for him
12:57:32 20 to proceed at 2 o'clock and for this witness to come back
12:57:35 21 later or we can proceed with this witness and arrange
12:57:39 22 another time for the other police witness, but I'm trying
12:57:47 23 to accommodate the other police witness's health concerns.
12:57:50 24 So you can look into that and see which is the preferred
12:57:53 25 course.
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12:57:55 27 MR HANNEBERY: Which is preferred for him, yes.
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12:57:56 29 COMMISSIONER: For him, that's right, and if you could let
12:57:58 30 the legal team know as soon as possible. We'll adjourn now
12:58:02 31 until 2 o'clock.
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12:58:48 33 LUNCHEON ADJOURNMENT
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13:57:43 1 UPON RESUMING AT 2.08 PM:
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14:00:19 3 MR CHETTLE: Commissioner, before you start, can you excuse
14:00:23 4 Ms Theis and myself, we have no interest in this
14:00:25 5 afternoon's proceeding?
14:00:26 6
14:00:26 7 COMMISSIONER: Very well. Mr Hannebery.
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14:00:29 9 MR HANNEBERY: Thank you, Commissioner, for that time to
14:00:30 10 consider those matters. A couple of considerations have
14:00:33 11 emerged. First, and I think most importantly, it would
14:00:37 12 seem that there are three people who would have a
14:00:40 13 legitimate interest in the ruling that I think would be -
14:00:47 14 in my submission we'd be entitled to at least be given
14:00:49 15 notice about the application with regard to the closed
14:00:53 16 court and who might be comprised of the audience in a
14:09:00 17 closed court. So I submit that, firstly, it would perhaps
14:09:06 18 make sense to ensure that those people are notified about
14:09:10 19 it and they have representation at the Court of Appeal, so
14:09:15 20 it might well be - - -
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14:09:17 22 COMMISSIONER: Who? The media?
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14:09:21 24 MR HANNEBERY: No, the people who might have the most
14:09:25 25 significant interest in the ruling.
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14:09:29 27 COMMISSIONER: Right.
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14:09:30 29 MR HANNEBERY: Namely, the three mentioned in the potential
14:09:33 30 evidence. It would seem that they would at least have the
14:09:41 31 right to express a view and possibly participate.
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14:09:48 33 It would also seem that this is an argument that is
14:09:52 34 going to come up relatively frequently, given the nature of
14:09:59 35 the witnesses coming up. So what I would submit is - the
14:10:06 36 other issue, too, is that we've got the pending Court of
14:10:09 37 Appeal ruling, that may or may not have some impact on it,
14:10:13 38 depending on what's said and what matters are addressed and
14:10:16 39 not addressed.
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14:10:17 41 COMMISSIONER: We don't know when that is going to come.
14:10:19 42 That could be months.
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14:10:21 44 MR HANNEBERY: That's right. I understand that, but at the
14:10:23 45 very least there might be some benefit, I would submit, in
14:10:29 46 perhaps giving notice to the people to whom notice should
14:10:34 47 be given and then perhaps considering the - - -

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14:10:38 2 COMMISSIONER: It should also be given to the media,
14:10:40 3 shouldn't it?
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14:10:41 5 MR HANNEBERY: Yes, I would have thought so.
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14:10:42 7 COMMISSIONER: Because they were represented in the Court
14:10:45 8 of Appeal.
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14:10:45 10 MR HANNEBERY: Yes. And given that it's not a one-off
14:10:49 11 matter that's going to come up again and it did come up
14:10:53 12 somewhat at short notice this morning, where arguments were
14:10:56 13 being done on relatively short notice, it might be of
14:11:01 14 benefit to everyone if there's a slightly fuller
14:11:04 15 exploration of that second point about the interests of
14:11:07 16 justice and material put before the Commission about that,
14:11:11 17 so that perhaps a more comprehensive ruling can be made
14:11:14 18 about where those considerations lie.
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14:11:17 20 COMMISSIONER: So what are you suggesting?
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14:11:19 22 MR HANNEBERY: That we put that argument to one side for
14:11:23 23 the moment and then come back at a later time with some
14:11:28 24 written submissions, potentially evidence and potentially
14:11:33 25 representation from the three people most affected by it.
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14:11:36 27 COMMISSIONER: And how do we proceed in the meantime, on
14:11:39 28 your submission?
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14:11:43 30 MR HANNEBERY: It would be difficult to proceed in the
14:11:45 31 meantime based upon the ruling that the Commissioner made
14:11:49 32 before lunch. There's obviously other ways we could
14:11:52 33 proceed and I'm not trying to - I'm just trying to be
14:11:55 34 practical now - that would - - -
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14:11:57 36 COMMISSIONER: At the moment it's a ruling and it stands
14:11:59 37 until I change it.
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14:12:01 39 MR HANNEBERY: Yes, that's right, and obviously we can take
14:12:05 40 a course with that if that were the instructions we
14:12:09 41 received. I'm just suggesting an alternative course that
14:12:12 42 might - - -
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14:12:13 44 COMMISSIONER: I'm not understanding what alternative
14:12:15 45 course you're suggesting. You're saying to be put off.
14:12:18 46 Put off until when and what happens in the meantime?
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14:12:22 1 MR HANNEBERY: We could get on with matters in a way that
14:12:24 2 didn't involve the media being in court for hearings that
14:12:30 3 we would not otherwise require them to be.
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14:12:32 5 COMMISSIONER: That would mean that my ruling has no
14:12:35 6 effect.
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14:12:36 8 MR HANNEBERY: In a practical sense that's right, but the
14:12:39 9 alternative might be something that delays things even
14:12:46 10 more. I'm just simply trying to be practical about the way
14:12:55 11 things are gone about and also noting the fact that the
14:13:00 12 Commission's ruling this morning was done in the absence of
14:13:02 13 hearing from those who might otherwise be reasonably
14:13:05 14 expected to have an interest and have a right to have a say
14:13:08 15 about the matter.
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14:13:10 17 COMMISSIONER: I'm still waiting for you to tell me when
14:13:13 18 you're suggesting that that particular application be
14:13:19 19 reopened and stood over until.
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14:13:22 21 MR HANNEBERY: I'll get some instructions.
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14:13:24 23 COMMISSIONER: You have had an hour and a half to get
14:13:26 24 instructions.
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14:13:27 26 MR HANNEBERY: Yes. I've had Tuesday morning suggested to
14:13:34 27 me. That would give a couple of days to inform other
14:13:41 28 people.
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14:13:43 30 COMMISSIONER: What do you say, Mr Winneke?
31

14:13:46 32 MR WINNEKE: Commissioner, firstly, I suppose the
14:13:49 33 Commission should be aware that the particular witness who
14:13:52 34 was the subject of the application is now not relevant in
14:13:55 35 the immediate short-term because Mr Trichias is going to be
14:14:01 36 stood down. In the meantime Mr Swindells is another
14:14:04 37 witness who is proposed to be called. Mr Swindells - there
14:14:09 38 are issues with respect to his health which mean that he is
14:14:12 39 going to give evidence via telephone. For the most part -
14:14:16 40 there is a significant part of his evidence - - -
41

14:14:20 42 COMMISSIONER: And I should say I think Mr Swindells is on
14:14:22 43 the phone at the moment, waiting to give his evidence.
44

14:14:26 45 MR WINNEKE: So the issue as far as [REDACTED] now no longer
14:14:30 46 is relevant but now we've got an issue with respect to
14:14:33 47 [REDACTED], [REDACTED] and [REDACTED] I believe. Are we still in private

14:14:38 1 session?
2

14:14:39 3 COMMISSIONER: I understood we were still in private
14:14:41 4 session. There shouldn't be anybody here - but there are
14:14:44 5 people here who are members of the public, I think.
6

14:14:49 7 MR WINNEKE: There may be one or two. I'm not certain
14:14:51 8 about that. In any event - - -
9

14:14:53 10 COMMISSIONER: Someone is putting their hand up. This is
14:14:55 11 a closed hearing at the moment, I'm afraid. Anyone who is
14:14:58 12 a member of the public, other than the permitted legal
14:15:05 13 people and accredited media, must leave. I'm sorry about
14:15:09 14 the misunderstanding.
15

14:15:21 16 MR WINNEKE: In any event, I'm sure that's a gentleman who
14:15:24 17 could probably well be trusted, but in any event - a former
14:15:28 18 premier.
19

14:15:29 20 COMMISSIONER: Rule of law.
21

14:15:30 22 MR WINNEKE: Rule of law must apply, I agree.
23

14:15:33 24 COMMISSIONER: In Victoria.
25

14:15:34 26 MR WINNEKE: Small and large. So the issues will probably
14:15:38 27 arise with respect to [REDACTED], [REDACTED] and [REDACTED]. Commissioner,
14:15:42 28 the ruling that you've made, and I don't understand it,
14:15:48 29 well, I'm not too sure whether it was a tentative ruling or
14:15:49 30 otherwise.
31

14:15:49 32 COMMISSIONER: It was a final ruling.
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14:15:52 34 MR WINNEKE: The final ruling, as I understand it, is - - -
35

14:15:54 36 COMMISSIONER: I suppose it wasn't in the sense that I was
14:15:57 37 giving - well, I thought the instructions were going to be
14:16:03 38 whether - - -
39

14:16:05 40 MR WINNEKE: It related to [REDACTED], but one assumes that
14:16:09 41 the issues with respect to [REDACTED], [REDACTED] and [REDACTED] are the same
14:16:13 42 and the position as far as counsel assisting is concerned
14:16:17 43 is that the particular provisions enable this hearing to be
14:16:27 44 held in private and a private hearing can include a hearing
14:16:31 45 where particular persons can be identified, sufficiently
14:16:36 46 identified, and if those people include members of
14:16:40 47 respectable accredited media organisations, those people

14:16:43 1 may be permitted into a private hearing, and in any event
14:16:49 2 the Commission was entitled, we would submit, to determine
14:16:53 3 whether or not it's in the interests of justice that it be
14:16:57 4 a completely closed hearing or a hearing in camera, where
14:17:03 5 not even those people are entitled to be present. In our
14:17:08 6 submission, even if that was the case, private meant that
14:17:11 7 those people couldn't be here, in my submission would be it
14:17:16 8 would not be in the interests of justice that they be
14:17:18 9 excluded, for the reasons that the Commissioner set out
14:17:21 10 before lunch.

11

14:17:22 12 COMMISSIONER: I'm just trying to work out how we proceed
14:17:24 13 now. Mr Trichias isn't in the witness box, he is going to
14:17:28 14 be stood down.

15

14:17:29 16 MR WINNEKE: He's been stood down, but my - - -

17

14:17:31 18 COMMISSIONER: He is not going to give evidence again
14:17:33 19 today. Tomorrow we have got Mr Dale coming back.

20

14:17:36 21 MR WINNEKE: Mr Dale is coming back, but the point I make,
14:17:41 22 Commissioner, is that the next witness, Mr Swindells, will
14:17:43 23 refer to [REDACTED], [REDACTED] and [REDACTED], so the same issues will
14:17:47 24 apply as apply with Mr Trichias. So our submission would
14:17:50 25 be that the same order could be made with respect to the
14:17:52 26 evidence of Mr Swindells, that is that the hearing be in
14:17:56 27 private, the private session being the people who are
14:18:02 28 parties to the proceeding, the members of the court staff,
14:18:05 29 and as per your order prior to lunch, people who are
14:18:12 30 acceptable as far as the Royal Commission is concerned,
14:18:14 31 being media journalists from journalist organisations who
14:18:19 32 are, in effect, accredited by the Royal Commission to be
14:18:23 33 within the room, and if they could be sufficiently
14:18:25 34 identified, in our submission it would not be in the
14:18:29 35 interests of justice that they be excluded.

36

14:18:34 37 COMMISSIONER: Yes, all right. What I'm saying is we
14:18:37 38 wouldn't be getting back to Mr Trichias until when?

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14:18:41 40 MR WINNEKE: Probably until Monday.

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14:18:43 42 COMMISSIONER: Tuesday.

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14:18:44 44 MR WINNEKE: Tuesday, I apologise, assuming Mr Dale takes
14:18:47 45 all day. I'm not certain he will. If he could perhaps be
14:18:51 46 on stand-by for tomorrow afternoon, and depending on how we
14:18:57 47 go we might be able to get him back tomorrow afternoon.

1
14:18:59 2 COMMISSIONER: Is there another witness you could put in
14:19:01 3 tomorrow afternoon, a short witness?
4
14:19:05 5 MR HANNEBERY: I think the same issue probably comes up
14:19:06 6 with - - -
7
14:19:08 8 MR WINNEKE: The issue is going to come up again and again
14:19:11 9 in the next little period of time because we're dealing
14:19:14 10 with detectives who were involved in Purana, the
14:19:19 11 investigation of gangland killings leading into the period
14:19:23 12 of registration in September of 2005, so we're dealing with
14:19:26 13 this period. And in our submission a significant period, a
14:19:31 14 significant part of this Royal Commission. And the issues
14:19:34 15 indeed will come up after that, but certainly in the next
14:19:37 16 period of time. The next witnesses will raise these same
14:19:41 17 issues.
18
14:19:43 19 COMMISSIONER: All right. I've made my ruling for the
14:19:48 20 moment. If people want me to - if people want to make -
14:19:53 21 the three named people or the media parties want to make a
14:19:56 22 fresh application, that's up to them. But at the moment
14:20:00 23 the ruling stands. Now, we're due to go on with
14:20:04 24 Mr Swindells. We have some applications about the way his
14:20:06 25 evidence is to be given.
26
14:20:08 27 MR HANNEBERY: Yes.
28
14:20:11 29 COMMISSIONER: It is being given by telephone and we will
14:20:15 30 be as accommodating as possible to him and the way he gives
14:20:19 31 his evidence. I understand it is in his interests for him
14:20:21 32 to conclude his evidence as soon as possible. I'm happy to
14:20:25 33 do that now, but it would be on the basis that he does it
14:20:31 34 by telephone link to a closed hearing, though it would be
14:20:39 35 initially open for him to be sworn and to be taken through
14:20:42 36 preliminary matters, it would be a closed hearing. There
14:20:47 37 was, I think, an application that it not be published until
14:20:54 38 the following day, but I couldn't see any reason why that
14:20:57 39 should be done, but it won't be published in private
14:21:02 40 hearing. The private hearing part won't be published in
14:21:06 41 any case until the transcript is redacted so that part
14:21:09 42 won't be, but the initial part, I can't see why that
14:21:13 43 shouldn't be streamed, that he's sworn or affirmed and just
14:21:16 44 the initial part of his evidence, until we go into private
14:21:18 45 hearing and the private hearing would be on the same terms
14:21:20 46 as I've ordered so far, there being no publication of
14:21:23 47 anything that's said. So therefore there's - I can't see

14:21:26 1 that any - that everybody's interests are protected,
14:21:30 2 proceeding in that manner.
3

14:21:33 4 MR HANNEBERY: In those circumstances, I'm confident - I'll
14:21:35 5 check my instructions - but I presume I'll be instructed to
14:21:38 6 make a similar application to what I made in relation to
14:21:43 7 Mr Trichias's evidence, namely, that effectively, firstly,
14:21:51 8 that the presence of journalists does not make it a private
14:21:56 9 hearing and then, secondly, that it is not in the interests
14:22:00 10 of justice and I'd ask on that application that we be given
14:22:04 11 the opportunity to provide the Commission with some written
14:22:07 12 submissions and, indeed, some evidence about that point, if
14:22:10 13 that would assist on that issue of interests of justice.
14

14:22:13 15 COMMISSIONER: The point is that you've known for some time
14:22:15 16 that Mr Swindells and Mr Trichias are giving evidence in
14:22:18 17 this round of hearings, you have had plenty of time to
14:22:21 18 prepare those matters if you want to do it. We have
14:22:25 19 limited time in this inquiry. Time is precious. It is
14:22:29 20 going very slowly. I'm not prepared to adjourn the matter.
14:22:35 21 If people want to make an application to the Commission,
14:22:38 22 they can do so. But I'm not adjourning it for that to
14:22:42 23 happen.
24

14:22:43 25 MR HANNEBERY: In which case perhaps I would ask for a
14:22:45 26 moment to get some instructions on that.
27

14:22:47 28 COMMISSIONER: All right then. We'll adjourn.
14:22:49 29
30 (Short adjournment.)
31

14:48:37 32 MR HANNEBERY: Thank you, Commissioner. Just before we get
14:48:39 33 on with things, I did mention just before we had that break
14:48:42 34 about the Court of Appeal issues. I can say that
14:48:46 35 Dr Freckelton has been appearing in that Court of Appeal
14:48:49 36 matter and he's come down and he's been acting on behalf of
14:48:53 37 Victoria Police in those proceedings and I'd ask that he be
14:48:57 38 given the opportunity to address you about matters that
14:49:01 39 have arisen in those proceedings that may have some
14:49:04 40 significance to the course the Commissioner wants to take.
41

14:49:07 42 COMMISSIONER: At what point, though, is that to happen?
14:49:10 43 When we get to the point of making an application in
14:49:12 44 respect of Mr Swindells or - - -
45

14:49:14 46 MR HANNEBERY: As in now.
47

14:49:15 1 COMMISSIONER: As in now?
2

14:49:16 3 MR HANNEBERY: Yes. I presume we've passed the point where
14:49:19 4 there's an application in relation to Mr Swindells because
14:49:21 5 I think we've had an indication of what the Commission's
14:49:27 6 view is about that.
7

14:49:33 8 COMMISSIONER: How is Dr Freckelton addressing me, in what
14:49:38 9 application and in what respect?
10

14:49:41 11 MR HANNEBERY: It would be relevant to the application in
14:49:43 12 relation to Mr Swindells, because he hasn't - - -
13

14:49:48 14 COMMISSIONER: It will be relevant to Mr Swindells'
14:49:50 15 application?
16

14:49:51 17 MR HANNEBERY: Yes, because that is relating to those
14:49:53 18 particular witnesses that are being dealt with in the Court
14:49:55 19 of Appeal.
20

14:49:55 21 COMMISSIONER: Could you clarify that then, as to - - -
22

14:49:58 23 MR HANNEBERY: I'm probably not the best person to clarify
14:50:01 24 it
14:50:01 25

14:50:01 26 COMMISSIONER: What is the application in respect of
14:50:02 27 Mr Swindells?
28

14:50:04 29 MR HANNEBERY: The application was that it would be a
14:50:08 30 private hearing - sorry.
14:50:13 31

14:50:14 32 DR FRECKELTON: May it please Your Honour, perhaps I should
14:50:16 33 do it directly. My name is Freckelton.
34

14:50:19 35 COMMISSIONER: That sounds a good idea. Yes,
14:50:22 36 Dr Freckelton.
14:50:22 37

14:50:22 38 DR FRECKELTON: Thank you, Your Honour. First let me
14:50:23 39 emphasise that this application is in relation to
14:50:25 40 Mr Swindells, not in relation to anybody else.
41

14:50:27 42 COMMISSIONER: You're appearing for Victoria Police?
14:50:31 43

14:50:32 44 DR FRECKELTON: The Chief Commissioner of Police.
45

14:50:34 46 COMMISSIONER: And Mr Swindells?
47

14:50:39 1 DR FRECKELTON: No, I'm appearing for the Chief
14:50:41 2 Commissioner alone.
3
4 COMMISSIONER: Thank you. Yes.
5
14:50:41 6 DR FRECKELTON: The application relates to extant orders in
14:50:46 7 relation to persons who are likely to be referred to, as I
14:50:52 8 understand it, by Mr Swindells. And I should first like to
14:50:57 9 draw to your attention suppression orders that are extant.
14:51:04 10 Second and related to that, alert you to what is taking
14:51:08 11 place in the Court of Appeal and I'm well positioned to do
14:51:12 12 so on the basis of having argued the matter for the Chief
14:51:16 13 Commissioner this week. Thirdly, I should like to make a
14:51:20 14 brief application in respect of the Witness Protection Act
14:51:25 15 issue in respect of Mr Swindells and reference to ■ ■ and
14:51:31 16 ■
17
14:51:32 18 I don't want to traverse what my colleague,
14:51:36 19 Mr Hannebery, has already argued before you, but it seems
14:51:41 20 to us that as the issues now relate to persons who are the
14:51:50 21 subject of a forthcoming decision before the Court of
14:51:52 22 Appeal, there are perhaps some extra considerations and I
14:51:54 23 should like to alert Your Honour to some of the case law to
14:51:57 24 do with the Witness Protection Act and urge Your Honour to
14:52:01 25 take a narrow construction on the basis of that case law
14:52:04 26 and also the Charter of Human Rights in this State, I think
14:52:08 27 your one in Queensland is coming imminently, in
14:52:13 28 interpreting the relevant provision, s.10(a)(2). It won't
14:52:17 29 take long, in spite all of that precursor.
30
14:52:23 31 COMMISSIONER: Thank you.
14:52:23 32
14:52:25 33 DR FRECKELTON: Your Honour, the Court of Appeal matter
14:52:29 34 related to some 30 suppression orders which are extant in
14:52:35 35 relation to ■, ■, ■, ■ and ■
36
14:52:48 37 COMMISSIONER: Is that ■?
38
14:52:51 39 DR FRECKELTON: No, I think it is ■. The numbers seem to
14:52:54 40 vary for different purposes at times. It doesn't matter
14:52:56 41 perhaps for this purpose who it is but in respect of five
14:53:00 42 persons, all of whom are the subject of Witness Protection
14:53:07 43 Act issues and also are subject to suppression orders. The
14:53:15 44 hearing took place in two tranches before the Court of
14:53:20 45 Appeal and I'm going to be cautious in what I say by reason
14:53:23 46 of, I think, the media still being present, Your Honour.
14:53:28 47 The first was in relation to the suppression orders, whose

14:53:32 1 number I've referred to, and the second was in respect of
 14:53:36 2 Witness Protection Act issues.
 14:53:40 3 In respect of the first, the media were permitted to
 14:53:44 4 be present and they were represented. In respect of the
 14:53:47 5 second, the court excluded the media pursuant to s.10(a)(2)
 14:53:53 6 specifically, because the interpretation given, and I
 14:53:55 7 hasten to say it was without argument, was that in private
 14:53:59 8 meant in the presence of the parties but not others. I
 14:54:05 9 know it doesn't bind you in any way but I simply alert you
 14:54:08 10 to that.

11
 14:54:10 12 In respect of the suppression order issue, the
 14:54:20 13 suppression orders before the court arise under the Open
 14:54:25 14 Courts Act but also the inherent jurisdiction of the
 14:54:28 15 Supreme Court and also under the Supreme Court and the
 14:54:33 16 County Court Act. So it is quite a melange, with the Open
 14:54:39 17 Courts Act coming in to replace the earlier forms of
 14:54:42 18 jurisdiction.

14:54:42 19
 14:54:43 20 COMMISSIONER: That of course doesn't apply to a Royal
 14:54:45 21 Commission.

14:54:45 22
 14:54:45 23 DR FRECKELTON: No, I understand that. But insofar as the
 14:54:47 24 orders under the Open Courts Act are concerned, as Your
 14:54:51 25 Honour would be aware, they arise from s.17 and the
 14:54:57 26 relevant category of s.18(1) is generally (c), namely - - -
 27

14:55:04 28 COMMISSIONER: Is this relevant to me?

29

30 DR FRECKELTON: Yes.

31

14:55:05 32 COMMISSIONER: Or are you just giving me the context?

14:55:07 33

14:55:07 34 DR FRECKELTON: I'm giving you the context. Namely, the
 14:55:10 35 suppression order has come from that provenance and I'm
 14:55:14 36 looking at an order by Justice ██████ made on ██████
 14:55:23 37 2017, which was under the Open Courts Act, but the key
 14:55:32 38 issue was this: it prohibited from publication any
 14:55:36 39 material which may identify or tend to identify persons
 14:55:40 40 known in that proceeding as ██████ and various others,
 14:55:44 41 including but not limited to their names, locations or
 14:55:49 42 images.

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44

14:55:51 45 So that is one but - - -

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14:55:53 47 COMMISSIONER: Could you just tell me does that suppression

14:55:56 1 order relate to people to be mentioned in Mr Swindells'
14:56:00 2 evidence?
14:56:02 3
14:56:02 4 DR FRECKELTON: Yes. [REDACTED] is one of those.
5
14:56:04 6 COMMISSIONER: [REDACTED] and others or just [REDACTED]?
14:56:06 7
14:56:07 8 DR FRECKELTON: No. This is but one of a number.
14:56:09 9
14:56:09 10 COMMISSIONER: I understand that, I know that.
14:56:10 11
14:56:10 12 DR FRECKELTON: This one is just [REDACTED] Your Honour. I
14:56:12 13 can find the others with a little bit of time.
14
14:56:15 15 COMMISSIONER: It's all right.
14:56:18 16
14:56:18 17 DR FRECKELTON: So the three witnesses, I understand, are
14:56:21 18 [REDACTED], [REDACTED] and [REDACTED] and this is just [REDACTED]. But there are others which
14:56:27 19 we can draw to your attention in respect of the other two.
14:56:32 20 But I understand them to be in similar terms.
21
14:56:34 22 COMMISSIONER: Sure.
14:56:34 23
14:56:35 24 DR FRECKELTON: Our point is a short one in this regard.
14:56:39 25 The Supreme Court has precluded from publication anything
14:56:46 26 identifying or tending to identify persons such as [REDACTED]
14:56:53 27 [REDACTED]. We urge upon Your Honour a broad construction of the
14:56:59 28 concept of publication for these purposes and what we
14:57:07 29 submit to Your Honour is that their identification by a
14:57:13 30 witness before you, with persons other than the parties
14:57:18 31 present, constitutes publication and we're concerned to
14:57:24 32 assist to ensure that Your Honour doesn't inadvertently
14:57:28 33 breach the terms of a number of these orders from the
14:57:31 34 Supreme Court. In short, our respectful submission is that
14:57:39 35 were Your Honour to proceed with the evidence of this
14:57:44 36 witness, and this witness referred to the three
14:57:52 37 individuals, that would constitute publication and
14:57:56 38 inadvertently be in breach of quite a number of orders of
14:58:00 39 the Supreme Court of this State.
40
14:58:04 41 COMMISSIONER: Well, even if there's a non-publication
14:58:05 42 order?
14:58:08 43
14:58:09 44 DR FRECKELTON: Yes, because what's taking place, Your
14:58:11 45 Honour, is that a person giving evidence before you is
14:58:18 46 undertaking the identification in public - it's not an
14:58:22 47 issue of whether the individuals here are precluded from

14:58:27 1 publishing, they are, that's easy. But the issue is there
14:58:30 2 is a publishing taking place by a reason of speaking forth
14:58:35 3 in that defamation sense in public before persons who are
14:58:39 4 not allowed to hear such information.

5

14:58:42 6 COMMISSIONER: I understand the argument, but I would have
14:58:43 7 thought that "in private" meant not in public, so if the
14:58:47 8 general public is excluded and only a limited class of
14:58:50 9 people is allowed to be present, it's a private hearing

14:58:54 10

14:58:55 11 DR FRECKELTON: Absolutely, Your Honour, but it's
14:58:57 12 important, with respect, not to mix the suppression order
14:59:00 13 issue and the s.10(a) issue. And I'd like to address the
14:59:07 14 suppression order issue first, if I might.

15

14:59:09 16 COMMISSIONER: Sure.

14:59:10 17

14:59:10 18 DR FRECKELTON: The suppression order absolutely precludes
14:59:16 19 publication, and even though the class of persons who are
14:59:23 20 not parties is limited by what has been mooted, in our
14:59:31 21 respectful submission it does constitute publication and
14:59:34 22 thereby it does fall foul of the orders made by multiple
14:59:40 23 judges of the Supreme Court of this State.

24

14:59:42 25 COMMISSIONER: I can see why, if it stood alone, it would
14:59:45 26 do so, but if it is together with a non-publication order,
14:59:51 27 it then becomes more - your argument, I think, becomes
14:59:55 28 thinner

14:59:56 29

14:59:56 30 DR FRECKELTON: With respect, no. The harm that might be
14:59:59 31 caused is diminished, we accept that, but this is an issue
15:00:05 32 of principle and it's an important principle, because if
15:00:13 33 there is publication in the sense that I have articulated,
15:00:16 34 it does constitute a breach. The measure contemplated by
15:00:21 35 Your Honour would reduce the extent of damage done by it,
15:00:26 36 but nonetheless it's a breach of orders of the Supreme
15:00:29 37 Court and, in our submission, ought not to happen.

38

15:00:36 39 We say this to Your Honour: the provisions of the Open
15:00:44 40 Courts Act, and thereby suppression orders, as well as the
15:00:46 41 Witness Protection Act, about which I'll address you in due
15:00:50 42 course, ought to be construed rigorously given that the
15:00:57 43 purpose of both pieces of legislation, as set out in the
15:01:01 44 purposes clauses, to which I can take Your Honour in due
15:01:04 45 course, are to protect persons who otherwise are very
15:01:10 46 vulnerable to a range of consequences if publication takes
15:01:17 47 place when it ought not.

1
15:01:20 2 So in our submission, and I'm putting this in the most
15:01:26 3 restrained way that it seems proper to do so, but
15:01:32 4 ventilation by a witness before you which identifies or
15:01:38 5 tends to identify persons who are the subject of
15:01:45 6 suppression orders of the Supreme Court of this State,
15:01:50 7 would be inconsistent with those suppression orders,
15:01:57 8 whatever mitigating measures are adopted. And in those
15:02:02 9 circumstances, with respect, it would be unlawful.

10
15:02:11 11 COMMISSIONER: I understand.

15:02:11 12
15:02:12 13 DR FRECKELTON: That's the first matter I should like to
15:02:15 14 raise before you.

15
15:02:17 16 The second goes to the Witness Protection Act issues.
15:02:29 17 Your Honour is well familiar by now with both sections, 10
15:02:35 18 and 10(a). As Your Honour knows, the default position -
15:02:49 19 and I'm not going to say anything specific about the three
15:02:54 20 relevant persons - but as Your Honour knows, under
15:03:01 21 s.10(a)(2), the default position for the Commission is to
15:03:08 22 hold the party of a proceeding that relates to issues in
15:03:15 23 respect of 10(a)(q), namely, original identities or former
15:03:21 24 identities of participants in the witness protection
15:03:27 25 scheme, in private, unless you consider that to do so is
15:03:31 26 not in the interests of justice.

27
15:03:33 28 Now, Your Honour, we say to you that the notion of "in
15:03:40 29 private" is to be equated to a closed court. There are a
15:03:49 30 number of instances where that terminology has been
15:03:55 31 utilised by the courts and where the expressions of "in
15:04:07 32 private" and "closed" have been used as synonyms. An
15:04:12 33 example of that is X and Y, a [2000] decision of the New
15:04:19 34 South Wales Supreme Court, number 951 of that year, and the
15:04:25 35 alternation of those expressions occurs on a number of
15:04:29 36 instances in the course of the judgment, and it's a
15:04:35 37 judgment of Justice Hamilton. That is perhaps not
15:04:39 38 surprising. What is a touch surprising is that the
15:04:42 39 expression "in private" is used only in s.10(a), but in our
15:04:51 40 respectful submission it could only really have one
15:04:55 41 meaning, namely that the hearing not take place in the
15:05:00 42 hearing of other than the Commissioner, the Commission
15:05:06 43 staff and the parties before the Commission, and that to
15:05:14 44 permit others necessarily changes the situation from a
15:05:22 45 hearing that is in private to one that is partially in
15:05:29 46 private or partially closed or partially open, whichever
15:05:34 47 expression one might wish to employ, but the expression

15:05:40 1 used in the legislation is specific and it is unqualified,
15:05:46 2 it is "in private".
15:05:50 3 Our submission to you is that that expression is clear
15:05:58 4 in its wording, it's an expression of ordinary English
15:06:02 5 usage. It is not otherwise explicated in the legislation
15:06:11 6 and in those circumstances Your Honour is thrust upon the
15:06:17 7 ordinary principles of statutory interpretation to construe
15:06:20 8 the meaning to be accorded to it. And under the blue sky
15:06:28 9 doctrine, and so many other cases, the first place for Your
15:06:32 10 Honour to go is the purpose of the legislation and it is
15:06:40 11 useful for Your Honour also to look to the objectives of
15:06:43 12 the legislation.

13
15:06:46 14 The purpose of the Witness Protection Act is to
15:06:49 15 facilitate the security of persons who are or have been
15:06:51 16 witnesses in criminal proceedings in Victoria or elsewhere
15:06:56 17 in Australia - that's s.1 of the legislation. The
15:07:00 18 objectives of the legislation are set out in s.3AAA. Does
15:07:08 19 Your Honour have a copy of the legislation?

20
15:07:10 21 COMMISSIONER: Yes.

15:07:11 22
15:07:11 23 DR FRECKELTON: The objectives of witness protection are
15:07:14 24 set out in 3AAA and the witness protection principles, as
15:07:19 25 Your Honour will be aware, are in 3AA. I won't read those
15:07:22 26 out to Your Honour. But as you can see under 3AAA, there
15:07:25 27 is a central objective articulated of witness protection.

28
15:07:30 29 COMMISSIONER: Sorry, I don't have those sections.

15:07:32 30
15:07:33 31 DR FRECKELTON: The Witness Protection Act.

15:07:35 32
15:07:35 33 COMMISSIONER: Yes, I have that.

15:07:36 34
15:07:36 35 DR FRECKELTON: 3AAA. It is one of those pieces of - - -

36
15:07:42 37 COMMISSIONER: It is out of order. Yes, I see. Thank you.

15:07:45 38
15:07:45 39 DR FRECKELTON: It doesn't make it easy when Victoria
15:07:47 40 starts to adopt some of the Commonwealth practices of
15:07:51 41 adding multiple letters of the alphabet, Your Honour, but
15:07:54 42 it has.

43
15:07:54 44 COMMISSIONER: I expected AAA would come after A, but it
15:07:59 45 comes before it.

15:07:59 46
15:08:00 47 DR FRECKELTON: That makes a good deal of sense to me but

15:08:04 1 it is not that way. 3AAA articulates a central objective
 2 with witness protection, namely to give practical effect to
 15:08:10 3 the rule of law and advance the public interest in the
 15:08:10 4 efficacy and integrity of the criminal justice system and
 15:08:14 5 it explains why. And the witness protection principles set
 15:08:23 6 out a range of obligations for the Chief Commissioner but
 15:08:28 7 more relevantly in sub-s.(2) set out a range of principles.

8
 15:08:34 9 I won't go through those, Your Honour, but there is a
 15:08:40 10 sequence of authorities in this State which has reflected
 15:08:49 11 upon this legislation, providing some measure of assistance
 15:08:56 12 in its interpretation and each one of them, of course,
 15:09:00 13 starts with the premise of the purposes of the legislation
 15:09:06 14 and the objects sought to be achieved.

15
 15:09:13 16 Clearly enough, the purpose is to accord maximal
 15:09:21 17 protection to those who provide assistance to the police
 15:09:27 18 and to the prosecution and also to support and to give full
 15:09:37 19 effect to the witness protection scheme. Individuals who
 15:09:43 20 are the subject of witness protection are, by their very
 15:09:48 21 nature, in an extremely vulnerable position and what I can
 15:09:52 22 say to Your Honour, and I can provide you with the relevant
 15:09:56 23 material in due course, should it be useful, is that before
 15:09:59 24 the Court of Appeal in respect of the three witnesses is
 15:10:08 25 uncontradicted affidavit evidence from Assistant
 15:10:14 26 Commissioner Paterson as to the particular vulnerabilities
 15:10:17 27 of each one of those persons and the risk accorded to them,
 15:10:24 28 should they be identified, is an extreme risk. Assistant
 15:10:34 29 Commissioner Paterson gives reasons for why he reaches
 15:10:37 30 those conclusions.

31
 15:10:41 32 That, again, is hardly surprising because persons are
 15:10:44 33 not taken on to the witness protection program unless the
 15:10:49 34 risks are of a significant order and a variety of other
 15:10:55 35 considerations are satisfied.

36
 15:10:56 37 We make these straightforward points, Your Honour, and
 15:10:59 38 I can identify the four relevant cases which have looked at
 15:11:02 39 the witness protection legislation and interpreted it for
 15:11:04 40 different purposes, if that's helpful.

41
 15:11:13 42 But the purpose of the legislation must be effectuated
 15:11:22 43 by an interpretation which gives full meaning and effect to
 15:11:33 44 its purposes, namely to protect the individuals. To do
 15:11:41 45 otherwise would have a range of consequences.

46
 15:11:46 47 First, it would straight out place person's lives at

15:11:51 1 risk. Second, it would reduce the preparedness of the
15:11:57 2 individuals involved to continue to assist. Third, it
15:12:01 3 would undermine the scheme by discouraging people from
15:12:08 4 doing what is in the community interest, namely to assist
15:12:12 5 both the police and the prosecution.
6

15:12:15 7 COMMISSIONER: What's the difference between 2 and 3?
15:12:17 8

15:12:18 9 DR FRECKELTON: The second is that some persons who are on
15:12:23 10 such a scheme have more to offer. I don't wish to say
15:12:28 11 anything in these circumstances about these individuals
15:12:31 12 because of the circumstances in which I'm making the
15:12:34 13 submissions to you, but Your Honour would understand that
15:12:37 14 persons who provide information sometimes have more
15:12:40 15 information that they can give, and if they are not being
15:12:44 16 effectively protected, they'll be disinclined to do that.
17

15:12:48 18 The third goes to the integrity of the scheme itself
15:12:52 19 and people's confidence in it and the preparedness of
15:12:54 20 others who might be minded to assist to do so.

15:13:00 21 Next, the Charter of Human Rights in this State
15:13:07 22 provides a right to life, it provides a right - a variety
15:13:16 23 of rights in respect of family life as well, and also to
15:13:19 24 security. None of these things are remarkable and
15:13:23 25 Australia is, in any case, signatory to a range of
15:13:26 26 international conventions to a similar effect. But the
15:13:29 27 straightforward point that we make to Your Honour is that
15:13:34 28 the charter bolsters the argument arising from the purposes
15:13:39 29 argument that a construction must be given which gives
15:13:44 30 effect to the need, especially to protect life and also the
15:13:51 31 functioning of a family.
32

15:13:54 33 In respect of ■, ■ and ■, I can also inform Your
15:13:59 34 Honour that in the affidavit material before the Court of
15:14:02 35 Appeal there is also information about risks to the
15:14:08 36 person's family members and questions were asked by Justice
15:14:19 37 Weinberg in the course of the hearing about the family
15:14:22 38 members of each of those persons. One of the reasons I
15:14:29 39 raise this with Your Honour is that the contemporary
15:14:33 40 environment - and this is, again, the subject of opinions
15:14:37 41 offered by Assistant Commissioner Paterson, but will be an
15:14:42 42 issue well-known to Your Honour - the contemporary criminal
15:14:45 43 environment is a complex one. Your Honour would have heard
15:14:50 44 of various criminal groupings associated with murders and
15:14:56 45 other forms of violent crime. Much of that occurred a
15:15:00 46 while ago, but what has happened since then is a complexity
15:15:05 47 in the organised criminal environment, resulting in diffuse

15:15:10 1 threats which can be orchestrated by persons who are
15:15:14 2 aggrieved, directly and indirectly utilising not just
15:15:18 3 members of those old groups but others with whom they have
15:15:22 4 now become connected. And Assistant Commissioner Paterson
15:15:28 5 also identified a variety of instances in which retributive
15:15:33 6 action has been taken, not just against persons whose
15:15:37 7 identities have become disclosed, who have assisted police
15:15:42 8 or prosecution, but also against their family members.

9

15:15:45 10 COMMISSIONER: I'm familiar with that material.

15:15:48 11

15:15:48 12 DR FRECKELTON: Indeed. In all of those circumstances, we
15:15:50 13 say that when Your Honour reflects upon the meaning that
15:15:55 14 you should accord to s.10(a)(2) in the context of the
15:16:01 15 witness who is about to give evidence before you, you
15:16:07 16 should give to the meaning of "in private" a strict
15:16:16 17 interpretation, not one which incorporates mitigating or
15:16:24 18 prophylactic measures but one which accords with the
15:16:30 19 following: the ordinary English meaning, the purpose of
15:16:34 20 the Act, and take into account the relevant provisions in
15:16:43 21 the Charter of Human Rights and Responsibilities.

22

15:16:50 23 In those circumstances we urge Your Honour to conclude
15:16:54 24 that "in private" means in closed session, without the
15:17:00 25 presence of anyone other than the parties.

26

15:17:14 27 Your Honour also, of course, has to contemplate what
15:17:18 28 is in the interests of justice. We make the
15:17:22 29 straightforward point that the prima facie position in
15:17:26 30 respect of this very vulnerable category of individuals is
15:17:29 31 that you do it in private, unless you reach a conclusion
15:17:35 32 based upon what might be a range of factors, that it is in
15:17:40 33 the interests of justice that you run the risks of the
15:17:46 34 hearing not proceeding in private. And, clearly, there
15:17:51 35 needs to be information before you which satisfies you as
15:17:56 36 to the interests of justice in conducting yourself in
15:18:00 37 respect of this witness other than hearing the evidence in
15:18:05 38 private.

39

15:18:07 40 I'm not aware of what those interests of justice might
15:18:11 41 be and it wouldn't be helpful for me to speculate, but if
15:18:15 42 your counsel assisting wishes to raise such matters then
15:18:18 43 I'd be pleased to endeavour to respond.

44

15:18:23 45 COMMISSIONER: There might be others that counsel will
15:18:25 46 raise now, having had more time to consider the position,
15:18:29 47 but they were, as I mentioned, the interest of justice in

15:18:36 1 having an informed media report on the workings of the
 15:18:41 2 inquiry so that their being present in hearings that are
 15:18:46 3 not open to the public but are subject to non-publication
 15:18:51 4 orders means that they have a better idea of the context of
 15:18:56 5 matters on which they can report in public and a better
 15:19:02 6 understanding of what they can't report. You would have a
 15:19:05 7 better informed media better able to understand what it can
 15:19:09 8 and cannot report and therefore better able to safely
 15:19:16 9 inform the public about the goings on of the inquiry and
 15:19:22 10 better able to protect the interests of those whose safety
 15:19:27 11 could otherwise be in jeopardy.

15:19:29 12
 15:19:29 13 DR FRECKELTON: Yes. And the Chief Commissioner would
 15:19:32 14 immediately concede that that is a relevant consideration
 15:19:36 15 for Your Honour to incorporate into the evaluation of what
 15:19:40 16 overall is in the interests of justice.

17
 15:19:45 18 What we put to you is that a balancing exercise needs
 15:19:49 19 to take place, taking into account just that factor which
 15:19:56 20 Your Honour has articulated, which goes to the
 15:20:03 21 effectiveness of the Commission, but, of course, there are
 15:20:11 22 a variety of measures that ultimately can achieve aspects
 15:20:17 23 of that aspiration and no doubt Your Honour will be
 15:20:23 24 reflecting on those matters in due course. The Costigan
 15:20:28 25 Royal Commission, for instance, as Justice Weinberg, in the
 15:20:32 26 Court of Appeal, pointed out to the parties, generated both
 15:20:34 27 a public and a private report - or a number of them, in
 15:20:39 28 fact. There can be different versions of what ultimately
 15:20:45 29 come to the attention of the public, but the point that we
 15:20:51 30 make is that in the context of a witness protection scheme,
 15:20:56 31 it is absolutely fundamental that persons who assist the
 15:21:02 32 police and the prosecution, thereby putting their lives and
 15:21:08 33 their family's lives at risk, be able to do so confident
 15:21:13 34 that in no circumstances will persons, other than the
 15:21:19 35 parties to proceedings and judicial officers, learn of
 15:21:24 36 their identity. And if persons in this vulnerable position
 15:21:33 37 were to know that members of the media were also hearing
 15:21:38 38 about this, even though there were suppression orders and
 15:21:44 39 non-publication orders, in our submission that would erode
 15:21:47 40 their confidence as to their protection and, to that
 15:21:52 41 extent, contribute to an undermining of the witness
 15:21:57 42 protection program.

43
 15:22:00 44 We don't say that to be alarmist in any sense, but
 15:22:04 45 persons in this situation are extremely anxious. Your
 15:22:07 46 Honour may have dealt with them in different capacities
 15:22:09 47 yourself - I certainly have - and they are deeply worried

15:22:15 1 about their own wellbeing and their family members, and if
15:22:19 2 they form the view that there will be compromises or
15:22:23 3 attenuations of the absoluteness of protection accorded to
15:22:27 4 their identity, there's a real risk that that is going to
15:22:33 5 have an impact upon the scheme and people's preparedness to
15:22:39 6 cooperate with the police and thereby the system of
15:22:44 7 criminal justice will be the worse.

8
15:22:47 9 So again I confine my submissions to this forthcoming
15:22:54 10 witness, but what Your Honour knows is that three of the
15:22:58 11 individuals are persons whose status as recipients of
15:23:09 12 suppression orders is before the Court of Appeal and it's
15:23:12 13 extremely likely, Your Honour, that the decision will be
15:23:15 14 forthcoming imminently.

15 15
15:23:17 16 COMMISSIONER: You don't know that, do you?

15:23:20 17
15:23:22 18 DR FRECKELTON: It hasn't been formally said by the Court
15:23:24 19 of Appeal, but the Court of Appeal is acutely aware of what
15:23:29 20 Your Honour is doing and of the importance of the issue
15:23:31 21 that it was dealing with.

22
15:23:33 23 COMMISSIONER: I understood no indication was given as to
15:23:35 24 when the judgment would be given, or informal

15:23:39 25
15:23:40 26 DR FRECKELTON: No, but - - -

27
15:23:42 28 COMMISSIONER: That was your apprehension, was it?

15:23:45 29
15:23:45 30 DR FRECKELTON: As someone who's practised here for a long
15:23:47 31 while and appeared in front of all three of those judges on
15:23:50 32 many occasions, I would have some significant confidence
15:23:55 33 that there will be a reasoned decision very quickly indeed,
15:23:58 34 but I can't take it any further than that, of course.

35
15:24:00 36 So what we say to Your Honour is that, in these
15:24:03 37 circumstances, you should interpret "in private", in the
15:24:10 38 context of this forthcoming witness, as meaning closed,
15:24:15 39 without qualification, and that there is not sufficient
15:24:19 40 before Your Honour properly to enable you to conclude that
15:24:23 41 it is in the interests of justice to proceed in a way which
15:24:30 42 qualifies "in private" in respect of the evidence to be
15:24:33 43 given by this witness.

44
15:24:35 45 COMMISSIONER: Thank you.

15:24:35 46
15:24:36 47 DR FRECKELTON: Thank you, Your Honour.

1
15:24:37 2 COMMISSIONER: Yes, Mr Winneke.
3
15:24:40 4 MR WINNEKE: Commissioner, can I firstly, before I deal
15:24:43 5 with the question of publication and Justice Kaye's order,
15:24:49 6 which is extant, I accept, make this point on the concept
15:24:54 7 of interests of justice: my learned friend appears for the
15:24:59 8 Chief Commissioner of Police, who regularly stands up in
15:25:01 9 the media and indeed who stood up in the press immediately
15:25:06 10 after - in public immediately after the decision of the
15:25:10 11 High Court which roundly criticised the conduct of Victoria
15:25:15 12 Police and, in effect, stated that, in certain
15:25:21 13 circumstances, certain conduct ought be justified. And my
15:25:30 14 learned friend's client regularly attends media
15:25:34 15 organisations and puts the position of the police and
15:25:37 16 justifies the position of the police. He is entitled to do
15:25:40 17 so. But in our submission, this inquiry was set up because
15:25:46 18 of very grave dents put in the reputation of the system of
15:25:51 19 justice by Victoria Police and it is absolutely fundamental
15:25:54 20 that the public is able to see that what is happening here
15:26:00 21 is by way of looking very deeply and closely into the
15:26:05 22 conduct of my learned friend's client and Victoria Police
15:26:11 23 and the police under him. So that's the first point about
15:26:13 24 the interests of justice. It is, in our submission,
15:26:19 25 absolutely fundamental that this Commission, insofar as it
15:26:21 26 is able to, does its work in public so the public can see
15:26:25 27 that if there has been any damage, it is being looked into
15:26:29 28 and with the intent of fixing it.
29
15:26:34 30 Secondly, it is not the intention of this Commission,
15:26:39 31 in our submission, or the orders that the Commissioner has
15:26:41 32 made, to put at risk these vulnerable people, we're told,
15:26:51 33 these vulnerable people who, in certainly some cases, have
15:26:55 34 executed other people and derived a great benefit from
15:26:59 35 assisting police subsequently.
36
15:27:03 37 Now, Commissioner, what is proposed is that an order
15:27:07 38 be made, in accordance with the provisions that are
15:27:15 39 available to the Royal Commission, to prevent publication
15:27:19 40 of anything which would identify or lead to the
15:27:24 41 identification of the people who my learned friend is
15:27:27 42 speaking about.
43
15:27:29 44 The first point is this - and can I deal with the
15:27:33 45 order made by Justice [REDACTED] on [REDACTED] 2017. As I
15:27:39 46 understand it, that was a non-publication order, or an
15:27:43 47 order made pursuant to the provisions of the Open Courts

15:27:46 1 Act, which, as the Commissioner rightly perceives, doesn't
15:27:50 2 apply to this proceeding. However, there are similar
15:27:53 3 provisions which the Commission has recourse to. That
15:27:58 4 order was to the effect that any material which may
15:28:06 5 identify or tend to identify a person known in this
15:28:07 6 proceeding as ██████████, and a name, including, but not
15:28:10 7 limited to, his name, location or image, and the order was
15:28:14 8 made pursuant to 18(1)(c) of the Open Courts Act and is
15:28:17 9 necessary to protect the safety of any person. This order
15:28:20 10 shall operate for a period of five years, so one assumes
15:28:23 11 that that order is extant, as my learned friend says. It's
15:28:27 12 not clear to me, but I have no doubt my learned friend will
15:28:29 13 be able to assist the Commissioner, as to whether or not
15:28:34 14 that meant that there was to be no opportunity for members
15:28:38 15 of the press to be in the court to publish matters which
15:28:44 16 were relevant to the evidence that these people gave.

17
15:28:49 18 I don't know the answer to that, frankly, and it may
15:28:53 19 well be that an answer can be found to that question
15:28:55 20 reasonably swiftly, because if the assumption was that
15:28:59 21 Justice Kaye made an order which meant that no people could
15:29:02 22 be in court, other than the parties, and the court staff
15:29:08 23 and no press could be in the court, in other words a
15:29:12 24 proceeding which was held in camera, the sort of hearing
15:29:15 25 that this state and the courts and tribunals in this state
15:29:19 26 should do their very best to avoid at all times, if that is
15:29:22 27 what His Honour Justice Kaye meant, I think this Commission
15:29:25 28 would be well advised to follow what His Honour meant, what
15:29:31 29 was intended by His Honour.

30
15:29:35 31 As we understand it, if one goes to - and this is,
15:29:43 32 perhaps, only a secondary way of finding out what was
15:29:45 33 intended by His Honour, if you go to the press, articles in
15:29:49 34 the press, you will see that there was considerable press
15:29:54 35 reporting about that case, the case of Asling and, indeed,
15:29:58 36 the evidence that that witness gave on the very day. If
15:30:02 37 one goes to the Herald Sun online or The Australian online,
15:30:06 38 you'll see reporting of that. So all I can assume is that
15:30:09 39 it was understood by those journals who were present, no
15:30:14 40 doubt, or who understood those orders and were told about
15:30:17 41 those orders, that that did not prevent publication of
15:30:20 42 matters at all and it didn't prevent the presence of the
15:30:24 43 media in that proceeding, because on 17 February 2017,
15:30:29 44 there were articles published, in the evening, at 11 pm,
15:30:34 45 and so forth. I can take the Commission to those, if you
15:30:38 46 wish to, but I think the easier situation may be to find
15:30:42 47 out from those who were involved. But it does appear,

15:30:46 1 Commissioner, that it was not intended that that order have
15:30:49 2 the effect as my learned friend has suggested, that it did
15:30:51 3 have or should have. So that's the first point.

15:30:58 4
15:30:58 5 As to the question of publish, that is defined in the
15:31:03 6 Open Courts Act, and I'll tell you, Commissioner, what it
15:31:06 7 is defined as being. "Publish" means to disseminate or
15:31:11 8 provide access to the public, or a section of the public,
15:31:13 9 by any means, including by publication of a book,
15:31:17 10 newspaper, magazine or other written publication broadcast
15:31:20 11 by radio or television or public exhibition, broadcast or
15:31:23 12 electronic communication, and publication must be construed
15:31:27 13 accordingly.

14
15:31:31 15 Commissioner, in our submission the order that the
15:31:40 16 Commissioner proposes would, in effect, ensure that there
15:31:45 17 be no publication. A non-publication order that the
15:31:49 18 Commissioner has suggested, would mean that there could be
15:31:53 19 none of those things, in effect, and of course there would
15:32:01 20 be no public streaming of the evidence, and that's not
15:32:04 21 intended. What is intended is that the hearing be in
15:32:15 22 private in the sense of - I suppose the first point is
15:32:18 23 this: for people to give evidence in this tribunal hearing
15:32:22 24 room, with all of the people here in this room here now,
15:32:29 25 plus accredited or people who are representatives of media
15:32:33 26 organisations, would not be to publish. In our submission
15:32:37 27 that would be absurd, in the same way that one suggests
15:32:41 28 Justice Kaye didn't expect or intend that that order that
15:32:44 29 he made back in 2017 would have that effect.

30
15:32:48 31 COMMISSIONER: Especially when it is coupled with a
15:32:50 32 specific non-publication order.

33
15:32:53 34 MR WINNEKE: A non-publication order. The only people
15:32:56 35 we're really talking about, Commissioner, are a number of
15:32:59 36 people who the Commission would be satisfied who are
15:33:05 37 representatives of media organisations who would be able to
15:33:09 38 be in court, in the same way as they would be able to be in
15:33:13 39 court in any proceeding, including the very proceeding that
15:33:15 40 we're talking about that was run before Justice Kaye. To
15:33:18 41 shut those people out of court, in our submission, is
15:33:21 42 entirely wrong. We are shutting the public out of these
15:33:25 43 courts. The public wasn't shut out of Justice Kaye's
15:33:28 44 court. And it appears that people were allowed to come in
15:33:33 45 and out of the court, and indeed journalists were entitled
15:33:35 46 to be in the court and the witness gave evidence in the
15:33:38 47 court and there was publication, but there was reliance

15:33:43 1 upon, it seems - obviously this can be checked, but I'm
 15:33:47 2 only going on what I see on my learned junior's tablet in
 15:33:54 3 front of her - there was appropriate non-publication orders
 15:33:57 4 and the press, as has always been the case and always ought
 15:34:02 5 be the case, are relied upon to exercise their discretion
 15:34:05 6 and not to breach non-publication orders and, in our
 15:34:08 7 submission they can be entirely relied upon to do so,
 15:34:11 8 because to shut the press out, to shut the public out,
 15:34:14 9 leads to real problems. The sort of problems, in our
 15:34:17 10 submission, which have led to this very Royal Commission.
 15:34:20 11 It is most important that as much of this as can be done as
 15:34:24 12 possible be in public. We can't do this in public, we
 15:34:27 13 accept, but in our submission, it ought be the case that
 15:34:32 14 the members of the press are able to be here to see what is
 15:34:36 15 going on, to assist them to know what they can and what
 15:34:39 16 they can't publish. That's a very significant matter. To
 15:34:43 17 have them shut out is, in our submission, not in the
 15:34:48 18 interests of justice.

19
 15:34:51 20 If I can move away from the suppression orders. In
 15:34:55 21 our submission our learned friend, with respect, is
 15:34:56 22 incorrect to say that the suppression order prevents us
 15:35:00 23 doing what we intend to do, that is by having a number of
 15:35:05 24 journalists in the court.

25
 15:35:06 26 Can I move to the Witness Protection Act. Yes, of
 15:35:13 27 course it's accepted that the Witness Protection Act is
 15:35:17 28 designed to protect people who give evidence. It's not
 15:35:23 29 designed to prevent as much as possible being known about
 15:35:31 30 what goes on in our courts and in our tribunals and in our
 15:35:34 31 Royal Commissions. Again, I don't know what the situation
 15:35:37 32 was with respect to these people before - when they gave
 15:35:40 33 evidence before Justice Kaye, but one assumes either they
 15:35:44 34 did or they didn't have the very significant benefits
 15:35:49 35 associated - I don't know and I can't traverse on that
 15:35:53 36 issue because of the legislative provisions. But what that
 15:35:59 37 Act - and my learned friend is correct - it is designed to
 15:36:03 38 ensure that witnesses are protected insofar as that can be
 15:36:12 39 done, but it doesn't mean that any time a person who is the
 15:36:18 40 subject of the provisions can never give evidence in a way
 15:36:22 41 that means that - must always give evidence in a way that
 15:36:26 42 no-one can ever see what is going on.

43
 15:36:29 44 In our submission, that is contrary to the whole
 15:36:32 45 notion of open justice and open courts. Section 10(a) says
 15:36:39 46 this, "The section applies if one or more of the following
 15:36:48 47 matters is in issue or may be disclosed in any proceedings

15:36:51 1 before a court or tribunal, a Royal Commission or a board
15:36:54 2 of inquiry". The relevant provision appears to be
15:36:58 3 subparagraph (a). It's certainly not intended to use
15:37:07 4 actual names but it's intended to use pseudonyms.

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15:37:13 6 Sub-section (2) makes it clear that a Royal Commission
15:37:17 7 must, unless it considers it is not in the interests of
15:37:21 8 justice to do so, hold the part of the proceedings that
15:37:24 9 relates to the matter or matters referred to in private.
15:37:28 10 Now, in our submission, the interpretation of the word
15:37:33 11 "private" oughtn't be interpreted in such a way as
15:37:38 12 suggested by our learned friend. Because if you then go on
15:37:44 13 and read - our submission is a private hearing is a hearing
15:37:48 14 which includes a number of people identified, not
15:37:51 15 necessarily those people who are participants in the
15:37:56 16 hearing. Obviously, there are court staff, there are
15:37:59 17 participants and parties and so forth. And in addition to
15:38:02 18 that, the Royal Commission can and will identify a number
15:38:05 19 of particular persons, but only those particular persons
15:38:09 20 who are members of reputable, credible press organisations
15:38:17 21 and who have, in effect, been accredited by this
15:38:20 22 organisation as such, so they'll be identified, and it's
15:38:23 23 anticipated that those people only will be present, and if
15:38:27 24 there are other people who seek to be so accredited and
15:38:30 25 satisfy the Commission that they are of that class of
15:38:33 26 person, they equally can be accredited and be permitted to
15:38:36 27 be in what is, in our submission, regarded as a private
15:38:39 28 hearing.

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15:38:43 30 Privacy or private can be determined by looking at the
15:38:47 31 entirety of the provision. Sub-section (2) says, 'A Royal
15:38:53 32 Commission must, unless it considers it is not in the
15:38:56 33 interests of justice to do so, hold the proceeding that
34 relates to sub-s.(1) in private and (b) make an order
35 prohibiting or restricting the publication of evidence
36 given before it that in its opinion will ensure that the
15:39:13 37 matter or matters referred to in sub-s.(1) is not
15:39:13 38 disclosed."

39
15:39:16 40 So, Commissioner, it would be proposed that an order
15:39:20 41 which has that effect would be made, that there be no
15:39:23 42 publication of any of the information that would identify
15:39:30 43 those matters be published or disclosed and make any other
15:39:35 44 order that it considers appropriate to ensure that neither
15:39:37 45 of the following is made public: matter or matters
15:39:41 46 referred to in sub-s.1, an information that may compromise
15:39:45 47 the security of a person referred to in that sub-section.

15:39:47 1 So in effect it is designed to prevent those matters being
15:39:53 2 made public.
3
15:39:54 4 COMMISSIONER: So the subject of s.10(a)(1) that's the
15:40:00 5 concern in this case is that the pseudonym is regarded as a
15:40:03 6 former identity in (a)?
7
15:40:06 8 MR WINNEKE: No, it's not, because that's not the form of
15:40:10 9 identity, as I understand it. It's the original identity
15:40:14 10 and it's the use of the pseudonym, in our submission, is
15:40:19 11 obviously of great assistance. I think the point that is
15:40:22 12 made is if you put the pseudonym in the context of the
15:40:26 13 evidence that's given, it may lead to the identification of
15:40:28 14 the original person. But ultimately the point is in this
15:40:32 15 case, Commissioner, it's not proposed - the order is - - -
16
15:40:35 17 COMMISSIONER: Is that the argument, that the combination
15:40:39 18 of evidence, the facts surrounding, they might be able to -
15:40:47 19 people might work out the original identity, is that - - -
20
15:40:50 21 MR WINNEKE: That's correct, Commissioner, and that's - - -
22
15:40:52 23 COMMISSIONER: And that's accepted, is it?
15:40:54 24
15:40:54 25 MR WINNEKE: That's accepted. That's why it is accepted,
15:40:57 26 of course, this hearing must be in private
15:41:00 27
15:41:00 28 COMMISSIONER: I just wanted to check as to on what basis
15:41:03 29 10(a), I just wanted to check on what basis 10(a)(1) was
15:41:05 30 activated and now I understand. Thank you.
31
15:41:07 32 MR WINNEKE: As I understand the submission, it is that the
15:41:10 33 original identity of that person or persons would be
15:41:13 34 identified.
35
15:41:14 36 COMMISSIONER: Yes.
37
15:41:16 38 MR WINNEKE: It's certainly not proposed to do anything
15:41:18 39 that would lead to the publication or the putting into the
15:41:21 40 public of the original identity of these people, because
15:41:26 41 this is a private hearing and those people who are in this
15:41:29 42 hearing, all of them would be the subject of a
15:41:33 43 non-publication order. So that's the significance of the
15:41:42 44 non-publication order, in addition to the order that the
15:41:46 45 hearing be held in private. And we're not talking about -
15:41:50 46 so in our submission, a private hearing encapsulates a
15:41:54 47 hearing of the sort that the Commissioner has suggested,

15:42:00 1 identified people and particular people with identified
15:42:05 2 credentials. In our submission that is a private hearing.
15:42:11 3 But even if I'm wrong about that, with respect, it would be
15:42:14 4 in the interests of justice that accredited, sensible
15:42:20 5 people who, on a daily basis, as part of their professional
15:42:24 6 responsibilities, comply with suppression orders or
15:42:28 7 non-publication orders are present to enable them to hear
15:42:34 8 what is going on, not to publish it, but to give them an
15:42:38 9 understanding of the narrative and to give them the ability
15:42:43 10 to publish a story, as much of it as can be published,
15:42:48 11 without identifying these people and without publishing
15:42:53 12 anything that would lead to their identification, but also
15:42:56 13 to hear the other evidence that will fall from the
15:43:01 14 witnesses Mr Swindells and Trichias. The reality is when a
15:43:08 15 hearing of this sort occurs, there's evidence which falls
15:43:13 16 out which can be published in a way that doesn't lead to
15:43:16 17 the identification of these people but gives the press or
15:43:22 18 gives those who are responsible for reporting an idea of
15:43:28 19 the narrative, but in such a way that it doesn't breach a
15:43:32 20 non-publication order or the provisions of the Act.

21
15:43:37 22 So in our submission, what is designed is - what is
15:43:43 23 sought to be achieved is that anything that identifies
15:43:49 24 these people is not put into the public domain. It is
15:43:53 25 impractical for this Commission to hear the evidence - and
15:43:56 26 if you have a look at the statements of these people, every
15:44:01 27 paragraph there's bits of redacted material. On one view
15:44:10 28 we could try and hold hearings in public and simply step
15:44:15 29 around those issues and then every time we get to an issue
15:44:20 30 that might offend this provision, then everyone has got to
15:44:26 31 leave the court and we can all traipse out and then come
15:44:30 32 back in and try and get on with the story. But in our
15:44:33 33 submission the practical way of doing it is the way in
15:44:37 34 which we've suggested. Our submission is it complies with
15:44:41 35 the provisions of the Witness Protection Act, it complies
15:44:45 36 with the - it doesn't breach the suppression orders and in
15:44:49 37 our submission it is the most appropriate way of getting
15:44:51 38 this job done in as public a way as possible, in the same
15:44:58 39 way as in trials where people are charged with murder, on
15:45:04 40 the basis of evidence of people who have committed murders
15:45:08 41 themselves but get benefits for pleading guilty or offering
15:45:12 42 to provide evidence, speaking hypothetically, that sort of
15:45:16 43 evidence can be heard in public.

44
15:45:17 45 In any event, Commissioner, we have a limited amount
15:45:21 46 of time and in our submission that's the best way of doing
15:45:23 47 it.

15:45:29 1
15:45:29 2 MR HILL: I apologise, Commissioner. Could I make a short
15:45:33 3 submission on behalf of the State?
4
15:45:35 5 COMMISSIONER: Yes.
15:45:35 6
15:45:36 7 MR HILL: I'm instructed the State would appreciate the
15:45:38 8 opportunity to consider its position overnight. This issue
15:45:40 9 has only arisen today. We haven't been able to get
15:45:43 10 instructions in the time available. I apologise to the
15:45:45 11 Commission for that. As the Commission understands, this
15:45:47 12 raises very important policy issues for the State.
13
15:45:52 14 COMMISSIONER: So when will you be in a position to make
15:45:55 15 submissions?
15:45:56 16
15:45:56 17 MR HILL: 10 o'clock tomorrow, Commissioner.
18
15:45:59 19 COMMISSIONER: We were going to start at 9.30 tomorrow.
15:46:02 20
15:46:03 21 MR HILL: 9.30.
22
15:46:06 23 COMMISSIONER: I suppose it is a quarter to 4 now. Does
15:46:12 24 anyone want to speak against the application by Mr Hill on
15:46:17 25 behalf of the State to make submissions tomorrow at 9.30?
15:46:23 26 No? All right. We'll adjourn then until 9.30 tomorrow.
15:46:29 27
15:46:29 28 DR FRECKELTON: Before Your Honour concludes for the day, I
15:46:31 29 referred to some authorities and there are five authorities
15:46:35 30 which have interpreted the Witness Protection Act. Could I
15:46:38 31 just identify those for Your Honour because they might
15:46:40 32 provide some assistance?
33
15:46:42 34 COMMISSIONER: Have you got copies for me?
15:46:44 35
15:46:45 36 DR FRECKELTON: I don't, I'm afraid, I didn't have
15:46:47 37 sufficient time but we we can get them for you, or have
15:46:48 38 them sent to your associate overnight. Perhaps for the
15:46:51 39 public record I'll identify what they are. The first is in
15:46:55 40 the matter of the Witness Protection Act 1991, a decision
15:47:00 41 of Justice of Appeal Priest [2018] VSC 810. The next is
15:47:10 42 Chief Commissioner of Police v Herald and Weekly Times
15:47:14 43 Limited [2010] VSC 164, a decision of Justice Beach, who is
15:47:22 44 one of the judges on the Court of Appeal in this matter.
15:47:25 45 The next is re an application under s.10 of the Witness
15:47:32 46 Protection Act 1991, a 2018 decision of Justice Priest
15:47:39 47 Victorian Supreme Court 810. And, finally - those are the

15:47:45 1 ones that we'd draw to Your Honour's attention.
2
15:47:48 3 COMMISSIONER: All right. If we're adjourning until 9.30
15:47:51 4 tomorrow you'd also better give the media the opportunity
15:47:56 5 to appear and the affected persons.
15:49:01 6
15:49:01 7 ADJOURNED UNTIL FRIDAY 21 JUNE 2019
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