

**THE STATE OF VICTORIA and OTHERS ats GOBBO****MEMORANDUM OF ADVICE**

1. I have been briefed to advise the State of Victoria on the question whether Ministerial approval should be given to negotiate a settlement of Supreme Court proceedings brought by Ms Gobbo against the State of Victoria and the current and former Chief Commissioners of Police (the **Chief Commissioners**).
2. In summary, my advice is as follows:
  - 2.1 Ms Gobbo will establish liability on the part of the Defendants to compensate her for the loss that she has suffered as a consequence of her agreeing to provide evidence to Victoria Police in return for Victoria Police ensuring that she would "be looked after" and would be "no worse off financially". That liability is founded on promissory estoppel – the principle of equity that prevents a person from engaging in conduct that contradicts assurances given and relied on by another person, where the conduct would offend the first person's conscience and would damage the other person.
  - 2.2 Because Ms Gobbo will be able to establish liability in the State to pay her equitable compensation (essentially, to compensate Ms Gobbo for the financial loss she has suffered from acting in reliance on the promises made to her by Victoria Police), the State has a substantial financial exposure. The most likely amount of compensation ordered would be around [REDACTED] – scenario 2 in the spreadsheet prepared for mediation – together with costs. (I am not in a position to estimate the amount of costs incurred by Ms Gobbo to date.)
  - 2.3 There are good reasons why Victoria Police may wish to avoid public exposure of its dealings with Ms Gobbo; those reasons would justify a premium on the settlement figure of around [REDACTED]

**Factual background**

3. Ms Gobbo was an experienced junior barrister (specialising in criminal defence work) and a registered police informer when, on about 7 December 2008, Dale contacted Ms Gobbo by telephone and asked to see her.
4. Ms Gobbo then spoke to her Victoria Police controller, Sergeant O'Connell, and agreed to wear a listening device when speaking to Dale.
5. Shortly thereafter, Ms Gobbo spoke with Dale in a café and recorded their conversation. In the course of that conversation, Dale said a number of things that provided clear corroboration of evidence that Victoria Police expected would be given by Williams about a conversation between Dale and Williams, which unequivocally implicated Dale in the commission of a double homicide.
6. Ms Gobbo reported to Sergeant O'Connell and, on 17 and 20 December 2008, they discussed the question whether Ms Gobbo would provide a statement to police about her conversation with Dale and give evidence against Dale if he was charged with murder.
7. Sergeant O'Connell has no clear memory of what he said in that conversation but does not deny the version given by Ms Gobbo. According to Ms Gobbo, Sergeant O'Connell said that Ms Gobbo "would be looked after" and that she would be "no worse off financially" if she gave a statement and agreed to give evidence.
8. A few days later, Ms Gobbo spoke again to Sergeant O'Connell and said "Okay -- I'll do it"; and 1 and 2 January 2009, Ms Gobbo gave a formal statement to Victoria Police about the conversation with Dale.
9. The prosecution of Dale for murder proceeded; and the involvement of Ms Gobbo as a key witness against Dale eventually became known, particularly amongst that part of the legal profession and that part of the community on whose confidence and trust Ms Gobbo's professional career as a barrister depended.

10. However, all charges against Dale were withdrawn by the Director of Public Prosecutions after Williams (whose evidence Ms Gobbo would have corroborated) was murdered in prison on 19 April 2010.
11. During 2009, Ms Gobbo withdrew from her practice as a barrister (where she had specialised in criminal defence work) and she now claims that it will be impossible for her to return to active practice at the Victorian Bar. She claims to be suffering a substantial loss of income, as well as incurring expenses for medical treatment.

#### Assessment

12. Given the significance of the investigation being undertaken by Victoria Police into Dale's involvement in two homicides, the version of the conversation between Ms Gobbo and Sergeant O'Connell given by Ms Gobbo is entirely credible.
  - 12.1 Victoria Police would have seen her evidence, about her conversation with Dale, as vital to establishing the credibility of the evidence that would be given by Williams; for that reason, it cannot seriously be doubted that Sergeant O'Connell did say that Victoria Police would ensure that Ms Gobbo would be looked after and would be no worse off financially if she agreed to give evidence against Dale.
  - 12.2 The conversation would have taken place in a context where Victoria Police understood that, if Ms Gobbo did give evidence against Dale, her professional career as a criminal defence barrister would be destroyed.
  - 12.3 I have no doubt that the Supreme Court will find that the representations were made by Sergeant O'Connell to Ms Gobbo and that, in reliance on those representations, Ms Gobbo agreed to give a formal statement to Victoria Police and to give evidence against Dale – actions that plainly had a detrimental effect on Ms Gobbo's career as a barrister.

13. The parallels with the New South Wales case of *Gray v Australian Crime Commission* [2003] NSWSC 111 are remarkably precise.

13.1 In that case, similar representations were made to potential witnesses by the Australian Crime Commission (the ACC), in consequence of which the witnesses agreed to give evidence and suffered consequential loss of income.

13.2 The representations were found to give the witnesses a right to claim equitable compensation from the ACC to cover the losses suffered by the witnesses by reason of their reliance on the promises made by the ACC. See, in particular, [2003] NSWSC 111 at [157]-[159].

I note that an appeal from the judgment of Austin J succeeded in reducing the compensation paid, but the Court of Appeal did not disturb Austin J's finding that the ACC was liable to compensate the witnesses for losses suffered when they acted in reliance on the representations: see *Australian Crime Commission v Gray* [2003] NSWCA 318.

14. In the present case, elements that support the claim for equitable compensation, as identified by Austin J in paragraphs [157]-[159], are present:

14.1 Representations were made by Sergeant O'Connell to Ms Gobbo on behalf of Victoria Police.

14.2 Those representations would be seen as creating or encouraging an assumption on the part of Ms Gobbo.

14.3 That assumption was that a promise would be performed by Victoria Police in favour of Ms Gobbo.

14.4 Ms Gobbo relied on that assumption when she provided the formal statement and agreed to give evidence against Dale.

14.5 The circumstances establish that departure from the assumption on the part of Victoria Police would be unconscionable.

15. There is, as far as I am aware, no serious suggestion that Sergeant O'Connell lacked authority to make the representations on behalf of Victoria Police: given the context of the investigation into Dale's involvement in the homicides, it is inevitable that the Court will accept that Sergeant O'Connell had that authority – whether it be characterised as actual, implied or ostensible authority.
16. It then becomes a question of what losses have, as a matter of common sense, been caused to Ms Gobbo by the failure of Victoria Police to carry out the promises made by Sergeant O'Connell.
17. Having reviewed the material prepared for the mediation and the calculations undertaken on behalf of the State (particularly as recorded on the spreadsheet by reference to 5 different scenarios), the most likely measure of loss suffered by Ms Gobbo, in consequence of her reliance on the representations made by Sergeant O'Connell and the failure of the State to honour those representations, is reflected in scenario 2.
  - 17.1 That scenario assumes 5 years' loss of income as an established junior counsel, with an average gross income of \$350,000, followed by 22 years of reduced income (to age 65), based on the assumption that Ms Gobbo will not be able to return to her former career but will be able to engage in some form of remunerative activity, albeit with a lower annual income.
  - 17.2 I agree with the assessment made by the State's legal advisers that the prospect of Ms Gobbo being granted silk and thereafter increasing her annual income to in excess of \$500,000 is, at best, very remote. Apart from Ms Gobbo's health issues and, as I am told, her expressed intention (before the commencement of this litigation) to leave the Bar, there is a very substantial question whether the Chief Justice would have decided to elevate Ms Gobbo to the position of SC, given what is known about Ms Gobbo's various contacts and friendships with her clients. Perhaps most tellingly, the instructions given to me indicate that XYZ has never appeared as sole counsel at a trial in either the County Court or the Supreme Court. In those circumstances, it is

unlikely that she would be able to obtain favourable judicial references from members of the Supreme Court – which are essential in any application for silk.

### Conclusion

18. I agree with the views expressed by counsel engaged to represent the State and the Commissioners that Ms Gobbo is highly likely to succeed in her claim for some form of compensation; that is, Ms Gobbo will establish that:

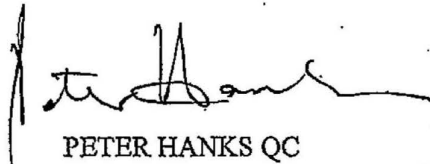
18.1 representations were made to her on behalf of Victoria Police that she would not suffer financially if she gave a formal statement and agreed to give evidence against Dale;

18.2 in reliance on those representations, she made that formal statement and agreed to give evidence against Dale;

18.3 the reliance resulted in her suffering a detriment – namely, the effective destruction of her professional career; and

18.4 it would be unconscionable for the Defendants now to resile from the representation.

19. It highly likely that Ms Gobbo will recover equitable compensation against the defendants; and I believe that the measure of that compensation is most likely to be reflected in scenario 2, as prepared for the mediation. Under that scenario, compensation will be calculated at [REDACTED] plus legal costs. Taking into account the cost to the State and to Victoria Police of litigating the matter (both in professional costs and in reputational cost) it would be appropriate to add a further [REDACTED] to the amount that may be authorised.



PETER HANKS QC

Joan Rosanove Chambers  
9 August 2010