INQUIRY INTO THE CONVICTION OF THE CROATIAN SIX

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING

1 INTRODUCTION

1. These submissions reply to the submissions of the following parties:

   a. The Petitioners (dated 29 January 2025) (**PS**);

   b. Mr Bennett (dated 18 February 2025);

   c. The representatives of the 25 former police officers (dated 19 February 2025) (**FPOS**);

   d. The Commonwealth (dated 19 February 2025);

   e. The Director of Public Prosecutions (dated 20 February 2025) (**DPPS**); and

   f. The Commissioner of NSW Police (dated 24 February 2025) (**CPS**).

2. These submissions do not purport to respond to every aspect of the submissions of the other parties. Rather, they reply to overall themes arising in the various submissions as well as correcting any misapprehensions or factual matters that arise.

3. Counsel Assisting otherwise relies on our primary submissions dated 21 December 2024 (**CAS**).

2 DISPOSITION OF INQUIRY

4. The Petitioners submit that the Inquirer would find reasonable doubt as to the guilt of each of the Croatian Six. The submission is founded on two limbs: the fabrication of evidence by police and the fabrication of evidence by Virkez (see PS [1956]).

5. Second, the Petitioners urge the Inquirer to recommend a pardon for each of the Croatian Six in light of the non-disclosure of evidence regarding Virkez at trial (see PS [1931(b)], [1937]-[1943]).

6. As to the first point, the Petitioners state that "…*the question is whether this Inquiry in light of all the material before it, has a reasonable doubt about the convictions - not whether there should have been a doubt in 1981*" (PS [1078]). We respectfully agree.

7. In our primary submissions, we submitted there is a reasonable doubt as to the guilt of the so-called Burwood Trio. We submitted that there was no such doubt as to the guilt of Bebic, Brajkovic and Zvirotic. Counsel Assisting maintains these submissions in light of the submissions of the other parties.

8. In the report of Wood J into the convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn, his Honour said:

> *…So far as any question or doubt may concern a conflict of evidence or the reliability of a witness, or may depend on fresh evidence concerning aspects of the case proven by the Crown, it seems to me that I must weigh those matters and express my own opinion in the report.*

9. Whilst his Honour was presiding over an inquiry under s 475 of the *Crimes Act 1900* (NSW) (now superseded by s 82 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**CAR Act**)), his Honour's comments remain apt to the question of reasonable doubt as to guilt under s 82 of the CAR Act. Our primary submissions considered the totality of the evidence including conflicts in the evidence, the reliability and credibility of witnesses and any fresh evidence, and weighed those matters in coming to the findings.

10. It is submitted that the Petitioners appear to have approached the task differently in some respects, using the evidence to construct hypotheses in support of their submissions that reasonable doubt exists in respect of the guilt of all six men. Respectfully, hypotheses are not enough. What needs to be considered is whether a reasonable doubt as to guilt exists on the totality of the evidence before the Inquiry as opposed to any doubt. The Inquiry has information before it that is both favourable and unfavourable to each of the Croatian Six. It all needs to be considered and weighed in determining whether a reasonable doubt exists.

11. Below we analyse some of the hypotheses of the Petitioners to demonstrate the flaws, inconsistencies and tensions that arise on the evidence in their approach.

12. As to the Petitioners' second point, it is submitted that whilst it is appropriate for the Inquirer to report on all matters relevant to a consideration of a pardon in his report to the Chief Justice, the Inquirer need not express a view about it. It is a matter entirely for the Governor in her disposal of the matter.

13. We would, however, query the utility of a pardon in circumstances where the Croatian Six have served their sentences. The effect of a pardon is to remove a person from the consequences of a conviction, but without displacing the conviction itself.[1]

3 THE PETITIONERS' SUBMISSIONS

14. We reply to the following areas of the evidence that are central to the findings urged by the Petitioners:

    a. The findings of the Wood Royal Commission.

[1] See *Eastman v DPP (ACT)* (2003) 214 CLR 318 at [98] (Heydon J).

b. The relevance of the Stipich case.
c. The "cache" of explosives at the CIB.
d. The failure by police to call the Army.
e. The lack of corroborative evidence of the finding of explosives in the Sydney raids and lack of fingerprinting in all raids.
f. The unreliability of the admissions.
g. The credibility and reliability of Virkez's evidence.

3.1 The findings of the Wood Royal Commission

15. The Petitioners place significant weight on the findings of police corruption by the Wood Royal Commission. The findings are repeatedly used to support the submission that police fabricated evidence against the Croatian Six including through the use of scrum downs, verbals, load ups and assaults. Significantly, the Petitioners submit that corrupt practices could occur only if *every* member of the team at least acquiesced or participated (see PS [317]). The submission is unsound for several reasons.

16. *First*, on this reasoning, the officers at Lithgow, the members of the CIB and the members of Special Branch are all tainted with the same brush. The Inquirer would be cautious about accepting and applying this approach. We have previously submitted that there were a number of involved officers who were removed from the squads of the CIB that were the focus of the Wood Royal Commission. There was no incentive or perceived need by these officers to acquiesce to the 'A Graders'. These officers included Ingram, Marheine, Ray and Pringle.

17. There were also officers of the CIB whom we have found to be reliable and credible witnesses and who denounced or otherwise had no knowledge of corrupt practices in the case. For example, Milroy, one of the Officers in Charge of the investigation, gave consistent and reliable evidence both at trial and before the Inquiry. Cook was an officer who reported corruption when he saw it. We say more about the credibility and reliability of the police witnesses further below.

18. *Second*, it is entirely conceivable that a corrupt practice might have occurred that did not involve the knowledge of all involved officers in an operation.[2]

19. The preferable approach to the findings of the Wood Royal Commission is to understand those findings in the context in which they were made, to use those findings to test the witnesses on their knowledge of the use of any corrupt practices in this case, and then to consider and weigh that evidence against other available evidence.

[2] Bennett gave some evidence on this very topic: T1480.11-36 (Bennett – Inquiry evidence).

20. By way of example, it is open to the Inquiry to find on the evidence that Helson, Krawczyk, Pettiford, Morris and Harding were involved in a scrum down in preparing their response to Internal Affairs regarding Brajkovic's complaint (see CAS [3259]). The similarities and unique nature of certain aspects of their responses makes it more probable than not to point to a corrupt scrum down.

21. On the other hand, it does not follow that every scrum down, conference between police officers, or collaboration on statements was for a corrupt purpose, or that the evidence that followed from these discussions should be rejected. Indeed, the Wood Royal Commission's findings distinguished between a scrum down for a corrupt purpose and a scrum down for a non-corrupt purpose. For example, we have found that the preparation of the Timetable of Events at Bossley Park (Ex 11.89) was less likely a scrum down for a corrupt purpose and was more likely an attempt to collate the order of events of the Bossley Park raid in close proximity to the raid that could later be used by police in the preparation of their statements (see CAS [3237]-[3242]).

22. We have also submitted that Brajkovic was assaulted at the CIB, there being no other reasonable explanation for the injuries sustained by him and there being stark similarities in aspects of the assault with the case of Steep (CAS [3265]-[3273]). Witnesses before the Inquiry denied any assault on Brajkovic. It is less clear who had knowledge of the assault (other than Harding and Morris who were in the room with Brajkovic), but in scrutinising the evidence of the officers involved in the Bossley Park raid, we have submitted that the evidence of some of those officers should be treated with caution and given less weight (CAS [3274]).

23. The Petitioners urge the Inquiry to find that police witnesses colluded in compiling their evidence in respect of every raid (see PS [76]-[94]). Whilst the practice of police conferral in preparing their statements was undesirable, it cannot be said that the practices were always corrupt. Collaboration in the preparation of evidence does not always mean that the probative value that can be attached to the evidence of those witnesses is reduced to nil (PS [94]). It might cause the Inquirer to more closely scrutinise that evidence. It might, however, lend itself to a finding of a more reliable recollection of events.

24. The Petitioners submit there was clear evidence that Turner and Milroy collaborated in the preparation of their evidence and that insofar as the products of that collaboration contained assertions that Bebic made admissions and omitted accounts of the violence inflicted on him, the collaborations to produce such material were scrum downs of the corrupt kind (PS [78]). The Inquirer should not accept this submission. The evidence

does not lend itself to such a finding. For the reasons canvassed previously, Milroy was a credible witness who should not be the subject of adverse credibility findings.

25. At PS [90]-[92], the Petitioners refer to Exhibit 11.121 (a document entitled "List of Witnesses in the Matter of Joseph Kokotovic, Ilija Kokotovic and Mile Nekic for Hearing at the Central Court of Petty Sessions on the 7th May, 1979"), as a document similar to the Bossley Park "Timetable of Events" that was used by police involved in the Burwood raid to refresh recollection. That submission should not be accepted. The exhibit is not in the nature of the Timetable of Events for the Bossley Park raid or the Summary of Events relating to the arrest of the Burwood Trio (Exhibit 11.50A-12). It appears to be a summary made in preparation for the committal proceedings and summarises the evidence that every witness could give. The nature and use of the document is not in evidence before the Inquiry. Importantly, this document was not put to any witness to suggest that it was used to refresh recollection.

26. The above examples highlight the importance of taking a considered approach to the evidence rather than attributing corrupt conduct or acquiescence to corrupt conduct to every officer. To do the latter would mean making adverse credibility findings against every officer who gave evidence at trial and to this Inquiry. The evidence does not support such a finding. We submit that it is equally problematic to discount the evidence of every former police officer on these matters or to discount their evidence on other matters on the basis that they told the Inquiry they had not witnessed nor had knowledge of corrupt practices.

27. The Petitioners' submission goes further to suggest that (PS [962]-[963]):

> *the fact that no former police officer witness in the Inquiry acknowledged the depth of the corruption which the Royal Commission found existed in the CIB squads must give the Inquiry… pause in considering whether weight should be given to the evidence (at trial and in the Inquiry) of these former officers that the Croatian Six confessed their guilt of the charges, let alone their evidence that there were explosives at the residences of the Sydney accused.*

28. Again, it is too simplistic an approach to make a correlation between the evidence given in respect of one matter and the evidence given in respect of another matter. Counsel Assisting accepts that the Police evidence should be carefully scrutinised as against all the evidence. A generic approach to the Police evidence is inappropriate.

3.2 The relevance of the Stipich case

29. The Petitioners submit that "*it can and should be concluded that the Stipic charge was false and was founded on fabricated evidence of possession of explosives*" (PS [597(d)]). The Petitioners submit that this, in combination with other matters, renders

the evidence of what happened to Stipich of substantial probative value when determining the truth or otherwise of the Police evidence against the Croatian Six (see PS [597]-[598]).

30. Our primary submissions have addressed why we say the Stipich case is of little assistance to the Inquiry in its findings about the Croatian Six (see CAS [367]ff, [2822]ff).

31. Further, there is an inherent inconsistency in the Petitioners' submissions about Stipich. On the one hand, the Petitioners acknowledge the significant differences between the Police treatment of Stipich and that of the Sydney-based accused (PS [599]). On the other hand, their ultimate submission is that the way the Willmot raiding party made their case against Stipich of possession of nine detonators bears a striking resemblance to the way the other CIB detectives alleged that the Sydney-based accused possessed explosives (PS [602]). The very differences in the Stipich case to the other Sydney cases (no allegation of possession of gelignite with intention to cause explosions; no verbal admissions; no mention of Stipich by any of the accused in their alleged admissions) coupled with the unsatisfactory state of the evidence about why the matter was dismissed in the Local Court, would cause the Inquiry to give the matter little weight when assessing the case against the five Sydney-based men.

32. It is submitted that the state of the evidence is insufficient for the Inquiry to make the following findings urged by the Petitioners:

    a. the evidence of detonators found at Stipich's premises was fabricated;

    b. McCrudden's account of the circumstances in which Stipich's charge was dismissed is accurate; and

    c. the raid on Willmot was part of an organised operation in which men perceived to be members of the Croatian Republican Party were loaded up and verballed (PS [658], [664]).

33. As to (b) above, in our submission, the reason why Stipich's charge was in fact dismissed is of no relevance to the Inquiry. We adopt the submissions of the DPP at [204] in this regard. Further, to the extent that the Petitioners rely upon Exhibit 9.1-114, red p 213 (see PS [657]), that document recounts an informant telling someone within ASIO the reason the case against Stipich was "dropped". There is no way of testing the reliability of the information contained in that memorandum. It is not stipulated how the informant came to have the knowledge he said he had about Stipich's case. At least, it is at odds with the evidence given by Stipich himself about police finding detonators in his room.

34. As to point (c) above, if that assertion were to be accepted, it begs the question why Stipich was not pursued by Police in the same way as the other men. If police fabricated the admissions of the other men, including each implicating one another as co-conspirators, one would expect admissions to be attributed to Stipich or at least the other men admitting that Stipich was a co-conspirator. The reliance on the Stipich case does not assist the Inquiry in any material way with its findings.

35. In respect of the remaining matters, we refer to our primary submissions at Section 52. We also adopt the submissions of the DPP at [203] as to the relevance of Exhibit 8.1 (PS [616], [648]).

3.3 The "cache" of explosives at the CIB

36. An important limb of the Petitioners' case theory is that Police had a cache of explosives from which to draw upon in order to fabricate the evidence of finding explosives at the residences of the Sydney-based accused.

37. The Petitioners proffer an explanation for Mrs Brajkovic's and Hudlin's evidence that the gelignite cartridges shown to them that night were three in number, intact (not cut in half) and longer than the two half cartridges ultimately photographed and later measured at the Dangerous Goods Branch. It is suggested that (PS [452]):

    a. notwithstanding the contents of their Police witness statements made that night, Mrs Brajkovic and Hudlin were shown three intact, full length AN60 cartridges;

    b. later, in order to have enough gelignite for the product of two of the raids (Ashfield and Burwood) to produce to the Dangerous Goods Branch the next morning, detectives cut the cartridges shown to Mrs Brajkovic and Hudlin in half. Counsel and Grady then produced four half cartridges to the Dangerous Goods Branch as having come from the premises at Ashfield and Burwood respectively; and

    c. on 28 March 1979, Bennett produced to the Dangerous Goods Branch the further two half cartridges as having come from the raid at Bossley Park.

38. There is no other evidence that might support this theory. For one, it assumes that Police had a stash of gelignite at the CIB from which to draw upon and to show Mrs Brajkovic and Hudlin (see PS [451]). The Wood Royal Commission did not consider any cases involving police loading up suspects with gelignite. There was no indication in the findings of the Wood Royal Commission of Police having a stash of gelignite at the CIB. The cases considered involved load ups with rifles or drugs.

39. In our submission, this is significant. Gelignite is a distinct product and Rogerson's comments to the media in this respect ("*a couple of sticks of geli*") do not withstand

scrutiny. The disappearance of Stipich's father's rifle on 8 February 1979, respectfully, is not consistent with CIB detectives having a practice of maintaining a stash of explosives to produce as evidence against defendants (PS [578]). The Inquiry would be careful about drawing correlations like this.

40. Additionally, it makes no sense why, on the Petitioners' hypothetical, it took until 28 March 1979 for Police to submit the gelignite found at Bossley Park to the Dangerous Goods Branch.

41. The suggestion is also made that the gelignite photographed on 16 March 1979 and produced to the Dangerous Goods Branch by reference to the Bossley Park raid may in fact have come from the Moorebank Army Depot on 15 February 1979 as recorded in Milroy's Duty Book (PS [582]). Again, there is no basis for this suggestion. To the contrary, if Milroy, as the OIC was collecting gelignite from Moorebank to be used in the fabrication of evidence against the Croatian Six, why would he choose to record the event in his Duty Book? It does not withstand scrutiny.

42. The Petitioners advance a further submission that the lack of a recording and accounting system used by Police for the explosives found in Lithgow meant there was nothing to prevent the unaccounted detonators being diverted to an improper use (PS [205]). It is far from ideal that there were unaccounted detonators. However, this does not necessitate a finding that they were being diverted to an improper use. The more likely reason is human error in the recording. If there was an intention to take explosives away to be placed in a stash at the CIB and used for improper purposes, one would expect there to have been more unaccounted items of explosives than some detonators. Additionally, we query whether in fact the evidence is sufficient to disclose that there are missing detonators. We refer to the analysis in this respect in the submissions on behalf of Mr Bennett ([130]ff). It is open to the Inquiry to find that there are no missing detonators and that Barkley may have made a mistake in his evidence as to the count at the time of the trial. In any event, it is submitted that whatever the finding on the count of detonators, there is no evidence to support the argument that those detonators were diverted to an improper use; nor that this somehow tends to show a practice by Police to 'stash' explosives.

3.4 The failure to call the Army

43. It is submitted by the Petitioners that the failure to call in the Army in Sydney supports the case that there were no explosives at the premises (PS [286]). As we submit at CAS [3152]-[3154], there is a distinction in the protective measures that were adopted in Lithgow compared to what occurred in Sydney. It is not so much the failure by Police to

comply with the Emergency Manual or Police Instructions in this respect that should be the focus of the Inquiry, but rather whether the divergence in practice between the Lithgow and Sydney raids can lead to a relevant finding about the reliability of evidence about those raids. We have previously submitted that the failure of Police to comply with procedure is neutral: see CAS [3155]-[3157]; see also [3309]).

44. The Petitioners' argument is premised upon Police having an expectation, prior to the raids, that no explosives would be found at the Sydney premises, or at least knowledge that there would not be anything there, and therefore there was no need to call in the Army. On this argument, there was already a conspiracy afoot by Police to conspire against the Croatian Six and fabricate evidence of finding explosives before they even attended the premises.

45. For the reasons set out at CAS [3155]-[3157], this submission should not be accepted. On any view, there was evidence from Virkez that someone in Burwood was keeping explosives; that Brajkovic taught Virkez how to make bombs in Fairfield; that Brajkovic had a number of "switches" in his house; and that Zvirotic was one of the two "bosses" (see Ingram's rough notes – Exhibit 4.2-95). On this evidence, it cannot be said that Police knew that no explosives would be found and therefore made a conscious decision not to call in the Army. The lack of precautions and failure to call in the Army does not lend itself to the conclusion urged by the Petitioners. As submitted by the DPP at [183], the lack of precautions "*was in all likelihood a product of a cavalier attitude that prevailed at the time and nothing more sinister*".

3.5 The lack of corroborative evidence of the finding of explosives in the Sydney raids and lack of fingerprinting in all raids

46. The Petitioners advance the broad submission that in the absence of corroborative evidence from an independent source, Police evidence of admissions and of possession of explosives in this case should be regarded as *ipso facto* suspect. They submit that it is a class of evidence which should be discounted unless corroborated by an independent source (PS [65]).

47. In our submission, there is no doubt that admissions need to be carefully scrutinised. For this reason, we have submitted that the Inquiry should treat Wilson, Helson, Morris, Harding, Pettiford and Krawczyk's evidence overall with great caution, given the submissions we have made about those officers (see CAS [3274]).

48. The Police evidence about the finding of explosives should be assessed in light of the evidence as a whole. In our submission, it should not be discounted entirely in the absence of corroborative evidence. To do otherwise would lead to an incomplete

consideration of the materials before the Inquiry. A finding against the credibility of a witness means that the balance of their evidence must be stringently assessed. It does not, however, necessitate a conclusion that their evidence is false in all regards.

49. The Petitioners also point to the lack of photographs taken as part of the Sydney raids, in contrast to the Lithgow raid, to make the submission there were no explosives found by Police in the Sydney raids (PS [567]). In our submission, the lack of photographs is insufficient to create a reasonable doubt as to the existence of the explosives. One must consider the surrounding evidence. In each of the Sydney raids the explosives were photographed, albeit not in situ.[3] The explosives were taken to the Dangerous Goods Branch for examination, albeit in the case of the Bossley Park raid, they were taken at a significantly later time. The explosives should have been entered into an exhibit book and were not. However, in respect of the Bossley Park raid, at the very least, the explosives, the clock and other items taken were recorded and accounted for in the Property List created by Wilson on 16 February 1979 (Ex 4.2-30). This serves as another piece of evidence of the items found at the property.

50. We otherwise adopt the submission of the DPP at [189] and [194] that while aspects of the Police procedures employed during the Sydney raids seem irregular by contemporary standards, they must be assessed by reference to the resourcing and technology that was available at the time (see also FPOS [46]).

3.6 The unreliability of the admissions

3.6.1 Overall position on disputed admissions

51. The Petitioners submit that the Inquiry should give no weight to the evidence that the Sydney accused made admissions (PS [990]). Although we accept that the admissions should be carefully scrutinised, in our submission, they should be assessed in light of the evidence as a whole. The starting point should not be to discount the admissions in their entirety.

52. The Petitioners point to the High Court authorities that warn of the dangers of a jury relying upon evidence of disputed admissions (PS [1064]-[1069]). These authorities address the directions that should be given to a jury to inform of the dangers of relying

[3] **Ashfield**: photographed on 3 April 1979 at the Dangerous Goods Branch by Constable Ritchie: Ex 2.1-89, T2971 [red pp 3046-3047] (Trial evidence of Ritchie); **Burwood**: photographed on 3 April 1979 at the Dangerous Goods Branch by Constable Ritchie: Ex 2.1-89, T2971 [red pp 3046-3047] (Trial evidence of Ritchie), Ex 2.1-50, T1614 [red p 1675] (Trial evidence of Counsel), Ex 2.1-90, T3020 [red pp 3096-3097] (Trial evidence of Weatherstone); **Bossley Park**: photographed on 16 March 1979 at Special Breaking Squad office by Henkell of the Scientific Section: Ex 2.1-21, T631 [red p 672] (Trial evidence of Wilson).

upon disputed confessions. However, that is not to say that they are inadmissible and should be disregarded entirely. The Inquiry (like any jury) should carefully scrutinise them.

53. *McKinney & Judge v The Queen* (1991) 171 CLR 468 is cited extensively by the Petitioners (see PS [1065]ff). There, the High Court was particularly referring to dangers of convicting an accused where the only (or substantially the only) basis for finding guilt is a confessional statement made while in police custody, the making of which is not reliably corroborated. On the facts of the Croatian Six, confessional statements are not the only pieces of evidence to be considered against each of the accused.

54. We further embrace the submission of the DPP at [120], echoing the remarks made in the judgment, that the case of *McKinney* represented a change in the law that was, in part, informed by the "*existence and increasing availability of reliable and accurate means of audiovisual recording*" which was not available in 1979.

3.6.2 Applicable Police Instructions

55. The terms of the applicable Police Instruction in force at the time pertaining to arrests and questioning offenders – Instruction No. 31-3 – is also relevant.[4] Paragraph 6 on page 288 (red page 131), relating to Guidelines for questioning offenders, states (emphasis added):

> *The following instructions are **designed as a guide** to members of the Force conducting investigations. Substantial non-conformity with these instructions will render answers to questions and also written statements liable to be excluded from evidence in subsequent criminal proceedings.*

56. The wording suggests that compliance with the Instruction was not intended in an absolutely strict sense, although substantial compliance to safeguard against inadmissibility was advised. It is submitted that this is how that Instruction (and other Instructions) ought to be read.

57. Support for this submission can be found in a number of decisions of the period.

58. Relevantly, in *Commissioner of Police v Baxter*[5] a Police officer was charged with neglect of duty in failing to conform to paragraph (6)(3) of Police Instruction 31, in that he failed to take special measures as was practicable and appropriate to ensure a fair interrogation – namely, failing to obtain an interpreter when requested by the suspect. On the facts of that case, the judge did not regard it as likely that a request for an interpreter at 6pm at night would have had any real chance of success. The officer in

[4] Ex 14.12.
[5] Police Tribunal of New South Wales, 26 November 1987, before His Honour Judge Denton.

question gave evidence that he gave no thought to asking for an interpreter. He believed that the person being questioned had sufficient understanding. The judge accepted this evidence.

59. In *Commissioner of Police v Constable DG Moss*,[6] a Police officer failed to enter certain property in the Miscellaneous Property Book as required by Police Instruction 33. The Commissioner relied on a Police Rule 11(d) which required a Police officer to strictly comply with police instructions. Even so, in that case, the Judge found that the officer's diversion to other duties placed his failure to comply within the category of innocent oversight (see also *Commissioner of Police v Bate and Sawyer,*[7] for similar reasoning).

3.6.3 The content of the admissions

60. The Petitioners submit that the admissions attributed to the Sydney accused were sufficiently similar to the details set out in the first and second screeds for those two documents to have been a likely source of them (PS [1013]). Additionally, it is put that the other sources for the verbals of the accused were (PS [1015-1017]):

    a. the papers Police found in Zvirotic's room at Chandos Street, Ashfield, and seized, relating to the civil action he was taking against Tomo Mlinaric and his accounts of the assault upon him by Mlinaric, and Mlinaric's conduct of affairs at the Croatian Club; and

    b. the records and officers of Special Branch, including information contained in index cards and dossiers.

61. This hypothesis assumes Police gathered these various pieces of information and created admissions attributable to each of the Sydney accused in either handwritten interviews or typed interviews, and that this was done at some time after the raids. The theory points to a highly elaborate and coordinated set of events. The submissions of the DPP at [131]-[132] merit careful consideration in this respect (see also FPOS [17]-[20]).

62. The Petitioners' theory also assumes that Police charged all the accused on 8 and 9 February 1979 and then worked backwards to fabricate the evidence that founded the charges. On any view, this scenario would have taken a meticulous amount of coordination and liaison amongst Police. It does not withstand scrutiny. The officers from Lithgow (Milroy and Turner in particular) had returned to the CIB on Saturday, 10 February 1979, collating what was needed for the brief of evidence against all accused.

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[6] Police Tribunal of New South Wales, 26 August 1986, before His Honour Judge Muir.
[7] Police Tribunal of New South Wales, 29 May 1985, before His Honour Judge Smyth.

The running sheets before the Inquiry begin on 13 February 1979 (Exhibit 11.50A) and show that enquiries were being made in respect to all accused and aspects of the case early on. The Timetable of Events for the Bossley Park raid was created in the early hours of 9 February 1979 and completed later that morning. The evidence paints a picture of an active investigation, not of a conspiracy to take discrete pieces information and fabricate evidence against each of the accused that was consistent and could withstand scrutiny before a jury.

63. It is submitted by the Petitioners that a common feature of all the verbals is the absence of factual details not already known to Police (PS [1019]-[1020]). This submission does not hold true in respect of the allegations pertaining to the murder/hijacking plots. Those matters were not in the screeds but appear in various admissions made by the accused in their interviews.

64. It is also put by the Petitioners that there is vagueness in the admissions which is consistent with the alleged admissions having been fabricated (PS [1021]ff). They submit that because of the unusual nature of such events, people who receive explosives and have meetings about bombing conspiracies are likely to have a clear idea about when such events occurred. Further, there was purpose to this vagueness, as attributing dates to such events undermines any alibi that an accused might have for a precise date (PS [1023]). These arguments should be carefully considered by the Inquiry. It is true that the admissions are expressed at a certain level of generality. The counter-argument is that precise dates were not recalled by each accused. In our submission, the admissions must be considered by reference to the entirety of the evidence that we have previously summarised.

65. The Petitioners invite the Inquiry to give no weight to the evidence that senior officers confirmed with Bebic the accuracy of the purported records of interviews and that he had no complaints. They rely heavily on the comments of Rogerson (see PS [711ff]). We again raise the reliability of anything Rogerson told the media. Secondly, we reiterate what we said in our primary submissions about Pringle and Ray being sufficiently independent from the squads of the CIB to be reliable witnesses (see CAS [3094]-[3095]).

66. There are other specific aspects of the Petitioners submissions around the various admissions that require further scrutiny.

3.6.3.1 Bebic

67. Bebic gave inconsistent evidence about his involvement in stealing the explosives (PS [219]). This reflects poorly on his credibility. He also denied knowing how to draw a

bomb but then went on to do the drawing (apparently because he felt under threat). There is an inherent inconsistency in this evidence. *First*, the drawing does resemble bomb components.[8] The Inquiry has Milroy's evidence about the explanation Bebic gave him about how the bomb worked as he did the drawing (CAS [1463]; [1502]; [1700]; [3076]-[3077]). *Second*, there is no logic in the idea of Milroy threatening Bebic to make the drawing if, on Bebic's case, police fabricated the admissions against him. If this was true, why would police require a further piece of evidence in the nature of a drawing like this?

68. An important aspect of the evidence is the visits to the sites around Lithgow. If Police assaulted Bebic and fabricated his confessions, why then ask him (and not Virkez alone) to take them to the various locations around Lithgow where the explosives were hidden? Police already had one person (Virkez) willing to talk and implicate the others. It is unlikely that Police would not use Virkez alone to gather their evidence if Bebic was uncooperative.

3.6.3.2 Burwood trio

69. The Petitioners observe that in his interview with Uzunov, Rogerson omitted reference to finding gelignite or anything upstairs at the Burwood house (PS [323]-[326]). However, what Rogerson said in the interview must be looked at in totality. In the same interview, Rogerson also did not remember who was at the premises. He also denied planting any evidence at the raid. His interview only goes to demonstrate a clear lack of memory and unreliability as a witness.

3.6.3.3 Zvirotic

70. Counsel Assisting submits that clarification is required about two factual matters relied upon by the Petitioners to support the allegation that Zvirotic's interview by Police was a fabrication. The Petitioners refer to the following statement attributed to Zvirotic in his record of interview (PS [839]):

> *Fabian Lovokovic, we kill him too. Like I say before or like I told you before, we Croatian Republican Party. Fabian kick us out of inter-committee council. He traitor too.*

71. *First,* the Petitioners submit that the Croatian Republican Party was at the time of trial and had always been a member of the Inter-Committee Council, thereby undercutting this aspect of Zvirotic's interview (PS [840]).

72. As the Petitioners note, the extracts of the minute book of the Inter-Committee Council are not before the Inquiry (PS [841]). However, during the committal proceedings,

[8] Ex 4.1-Q.

Djurvja Avdic was called by the prosecution. Avdic was the "minute secretary" for the Croatian Inter-Committee Council. She was taken to minutes of meetings of the Council in November and December 1977, as well as June and July 1978.[9]

73. The Police prosecutor sought to tender the minutes of the meeting of 24 July 1978 at committal[10] although following objection, ultimately did not do so.

74. In the course of argument about their admissibility, reference was made to the content of the minutes. It is apparent from the transcript that the minutes of the meeting of 24 July 1978 recorded the Croatian Republican Party being expelled from the Inter-Committee Council.[11] Further, in the course of debating the relevance of the minutes, the prosecutor noted that in attendance were Zvirotic and Nekic on behalf of the Croatian Republican Party.[12] By reference to the minutes, Avdic confirmed that Zvirotic and Nekic had also been present at previous meetings on behalf of the Croatian Republican Party.[13]

75. In her oral evidence, Avdic confirmed that a vote was taken at the Council's meeting on 14 November 1977 and it was decided that the Croatian Republican Party would be excluded from the Committee. She also confirmed that Lovokovic and Mlinaric had been members of the committee that night.[14] Why this was the subject of debate or vote on two occasions is not clear from the transcript.

76. Avdic also gave evidence, by reference to the minutes of the meeting, that Brajkovic was present at a later meeting on 13 March 1978 as a member of the Republican Party. On that day, Brajkovic and another member of the party asked for the Croatian Republican Party to take part in a celebration of the Croatian National Day, which was refused.[15]

77. Avdic was not called by the Crown at trial. She was called on behalf of Zvirotic on the voir dire and asked some preliminary questions, following which Lloyd-Jones indicated there had been a mix-up in witnesses and no further questions were asked.[16]

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[9] See Ex 2.3-53, red pp 9003-9006 (Avdic).
[10] Ex 2.3-53, red p 9006.
[11] Ex 2.3-53, red p 9006. See also objection by Mr McCrudden at red p 9007 which refers to the relevance of the minutes being an "intrinsic absurdity", stating that "because they were expelled from a meeting, they there upon decided to commit acts of terrorism against the community".
[12] Ex 2.3-53, red p 9008.
[13] Ex 2.3-53, red pp 9009-9010 (Avdic).
[14] Ex 2.3-53, red p 9013, 9017-9019 (Avdic).
[15] Ex 2.3-53, red p 9021-9022 (Avdic).
[16] Ex 2.1-70, red pp 2572-2573.

78. Accordingly, there is evidence before the Inquiry that supported the veracity of what Zvirotic had said in his interview, namely that the Croatian Republican Party had been expelled from the Inter-Committee Council. On one view, the fact of the inclusion of this statement in Zvirotic's interview may strengthen the credibility of the Police account about the interview. The Croatian Republican Party's expulsion from the Council was a relatively obscure fact. If the interview were indeed a fabrication, it was a surprising inclusion. Moreover, the source of this information must have been Jefferies. The Inquiry would need to accept that Jefferies had provided this information to CIB detectives for the purpose of a verbal against Zvirotic, but did not consider it relevant to the other members of the Croatian Six.

79. *Second*, the Petitioners appear to submit that Zvirotic's reference to "*we Croatian Republican Party*" is indicative of the interview being fabricated, as there was no evidence of Zvirotic's membership of the party (PS [838], [1227]-[1231], [1722]). However, Avdic's evidence at committal tends to support the proposition that Zvirotic *was* a member of the Croatian Republican Party, or at least held himself out to be one. It also further calls into question Zvirotic's credibility in light of the evidence given by him at trial referred to at CAS [329] and [331].

80. Avdic's evidence also establishes the connection between Brajkovic and the Croatian Republican Party (cf PS [1223]-[1225]).

3.7 The credibility and reliability of Virkez's evidence

3.7.1 Overview

81. Before turning to some specific matters not addressed in our submissions in chief, Counsel Assisting notes that several broad themes arise from the Petitioners' submissions on Virkez. *First*, the Petitioners portray Virkez as a Yugoslav agent or spy[17] who had infiltrated Croatian groups for an extended period of time[18] and who had significant expertise in explosives.[19] *Second*, Virkez was an "agent provocateur" in the sense that he framed the Croatian Six and told lies to Police about the conspiracy.[20] *Third*, Virkez hated the Croatian organisations he believed to be "Ustashe" and was

[17] The petitioners allege Virkez's contact with the Yugoslav authorities dated to the period between 1970 to 1973 (see PS [1288]), and at least by 1978, was operating as an agent or spy of the Yugsolav government (PS [1292], [1295]-[1296], [1303]). See also PS [1639]-[1642].
[18] See eg PS [1280] (Virkez's involvement in the bombing of the statue at the Canberra church in December 1977 is evidence of a history of engineering a false flag incident); [1318] (Virkez's membership of Croatian organisations), [1558] (Virkez had joined Croatian groups in Geelong in 1971).
[19] PS [1322]-[1343], [1348]-[1354], [1362].
[20] PS [1639]-[1642].

motivated by that hatred in framing the Croatian Six (including because he saw himself as being a member of the Black Hand).[21] *Fourth*, specific aspects of Virkez's conduct are consistent with him having framed the Croatian Six.[22]

82. *Fifth*, there are significant reasons to doubt Virkez's records of interview and evidence given at trial.[23] On this point, the Petitioners submit both that Virkez told lies to Police in his records of interview (including that he was a Croatian "*fighting for our country*"[24]) but also submit that the records of interview might have only been brought into existence after the fact, thereby suggesting that they were a fabrication by Police.[25]

83. *Sixth*, Police possibly used force against Virkez to induce him to sign his records of interview and told him what evidence to give at trial (again possibly by force).[26] *Seventh*, Police advised Virkez to plead guilty.[27]

84. Some aspects of the case theory propounded by the Petitioners do not sit easily together. For example, the Petitioners submit that "*the ever expanding claims that Virkez fed Police about the conspiracies alleged […] were the mark of a fantasist or a liar or both*" and suggest Virkez was a Yugoslav spy who "*bore a particular animus against the Croatian Six*" (PS [1393], see also PS [1533]). However, the Petitioners also suggest that Virkez's records of interview were fabricated by Police, that Virkez had to be convinced by Police to plead guilty, and that Virkez was told what evidence to give by Police (possibly by force).

85. If Virkez indeed bore the animus suggested and sought to frame the Croatian Six, it would be surprising if he was unwilling to plead guilty, thereby depriving Police of an important aspect of their case against the Croatian Six (namely his own evidence). Further, if he pleaded not guilty, Virkez ran the risk that the Croatian Six would be acquitted, along with Virkez himself.

86. It is perhaps more likely that things were how they were conveyed: Virkez approached the Police on 8 February 1979 because he was scared about the situation which he was in, but (consistent with his letters to the Prime Minister and other authorities), he later found himself in gaol, facing serious charges, and was indignant that this was the case

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[21] See eg PS [1311]-[1316], [1551]-[1552], [1602]-[1605].
[22] See eg PS [1346]-[1347] (accusations about Brajkovic and letter bombs); [1370]-[1372] (Virkez's conduct in burning the cardboard boxes that held explosives prior to the Police raid on 8 February 1979).
[23] PS [1376]-[1400], [1412]-[1421], [1477], [1504]-[1514].
[24] See eg PS [1376].
[25] See eg PS [1377]-[1381].
[26] PS [1448]-[1453], [1514], [1627].
[27] PS [1469], [1510].

after having reported the conspiracy to the Police. He believed he did not deserve to be in gaol because he had reported on the planned crime.

87. This case theory is consistent with there being an actual conspiracy afoot among members of the Croatian Six (although not necessarily all of them). It is also consistent with Virkez's initial account to Police and the Yugoslav Consulate being truthful. Of course, it does not mean that the Inquiry should not carefully scrutinise all aspects of Virkez's claims.

88. The Petitioners do not bear any onus in this Inquiry. It is the task of the Inquiry to weigh up all of the competing evidence. But this example demonstrates that some caution is required before ascribing an improper purpose to Police or Virkez or viewing aspects of the evidence in the manner urged by the Petitioners. Much of the evidence is equivocal. While it *may* support the case theory proposed by the Petitioners, it may also support the Crown case at trial. The entirety of the evidence before the Inquiry must be considered and weighed.

89. For the same reason, the Inquiry should be cautious before simply discarding all of the evidence and accounts given by Virkez as "worthless" (cf PS [1578], [1643]).

3.7.2 Bombing of the statue at a Canberra church in December 1977

90. At [1280(b)], the Petitioners submit that Virkez's likely involvement in the bombing of the statue at the Canberra church in December 1977 is evidence that Virkez had a history of engineering a "false flag" incident to "cast public odium on Croatian separatists".

91. Counsel Assisting submits that the Inquiry should approach the evidence about the bombing of the Canberra church with some caution, and that the evidence does not rise so high as to support the inference suggested by the Petitioners.

92. The evidence of Virkez's involvement in the bombing rises no higher than a suspicion. As set out at Part 29.1 of our submissions in chief, Virkez was named in an anonymous tipoff to the Free Serbian Orthodox Church, and inquiries were made of him by Lithgow Police as a result, at the request of the ACT Police. No charges were laid or further investigations pursued.

93. Otherwise, the only other evidence before the Inquiry as to Virkez's involvement in the incident is (1) the statement of Branko Kolak;[28] and (2) Bebic's evidence at trial that Virkez had told him he was "charged for bombing in Canberra".[29]

94. Kolak's evidence turns upon several levels of hearsay: two Croatian men apparently told Kolak that Virkez had been involved in a group which blew up a statue of a Serbian war hero in Canberra and was the only one to escape arrest. There is, however, no evidence that there was a group of people involved in the incident in Canberra, nor that anyone was in fact arrested. Exhibit 14.1, the Commonwealth Police Force training document on Croatian National Separatism, refers to the incident but does not (unlike one of the other incidents) refer to the arrest of any offenders.[30] Kolak's evidence should therefore be treated with caution.

95. Similarly, there is nothing to suggest that Virkez was charged with any bombing in Canberra (it is not, for example, referred to in his antecedents on sentence). Therefore, Bebic's evidence does not establish that Virkez was in fact involved in the Canberra incident.

96. Taken at its highest, the evidence before the Inquiry is capable of establishing that Virkez was suspected of being involved in the bombing, and may have spoken about it to Bebic in terms that inflated his actual involvement. However, there is no evidence that others were arrested so as to enable a conclusion that this was a "false flag" incident, nor that would enable the Inquiry to conclude that Virkez was in fact involved in the incident.

97. Similarly, there is no evidence that Marheine did not take up a further investigation into Virkez's involvement in this incident after 8 February 1979 because of "another agenda", for example, from CIB or Special Branch detectives (cf PS [1310]). There is insufficient evidence about why the investigation in relation to the bombing of the statue was not pursued in December 1977, but in any event, it was a matter within the jurisdiction of the ACT Police. There would be no reason for Marheine to have renewed inquiries, which he had made only at the request of interstate authorities.

[28] Ex 5.12-2, red p 1056-3, [16]: see PS [1277].
[29] Ex 2.1-98, red p 3213 (Bebic).
[30] See CAS [810].

3.7.3 Virkez's experience in handling explosives

98. Nothing about Virkez's expertise in electronics sets him squarely apart from all other members of the Croatian Six. As to his technical capabilities (PS [1320]-[1321]), Brajkovic and Joseph Kokotovic also had qualifications in electronics.

99. As to his prior experience in explosives (PS [1322]-[1324], [1355]-[1361]), it may be accepted that Virkez made statements to a probation and parole officer and also to Chris Masters that suggested he had been taught some bomb-making skills by a Croatian group in Geelong in 1972: see PS [1322]-[1324]. Further, by his own admission, Virkez had experimented with making letter-bombs[31] and had a page of instructions about making letter bombs in his "little red book".[32] However, overall, the evidence does not establish that Virkez had particular expertise in bomb making (cf PS [1362]-[1364]).

100. Further, Bebic also had experience with explosives. In his evidence at trial, Bebic admitted to having visited the sites around Lithgow where the explosives were located, both with Virkez but also alone, including for the purpose of experimenting with the explosives.[33] Moreover, Bebic had previously been taught about using explosives, during his time serving in the Yugoslav Army.[34] Accordingly, both men had some level of skill in explosives. The comments about Bebic's intelligence (PS [1361]) should be given no weight in assessing his capabilities with explosives.

101. There is nothing inherently implausible about Virkez's claim that he was taught bomb-making by Brajkovic (cf PS [1329]-[1331], [1346]-[1348]). As with all aspects of Virkez's accounts, it must be assessed with caution. However, Virkez told Ingram this detail at the outset on reporting to Lithgow Police on 8 February 1979. As with the other matters he told Ingram, it has a ring of truth. Moreover, the notes made by Virkez in his "little red book" about constructing a letter bomb are consistent with him learning how to make the device, conceivably on someone's instruction.

102. Virkez told Marheine about the letter bomb with which he had experimented. The report from the Australian Bomb Data Centre dated 27 February 1979 advised that the proposed switching mechanism on the letter bomb that was recovered would not have functioned as intended.[35] Further Barkley's evidence suggested that Virkez was

[31] Ex 4.2-11, red pp 309-310, Q36-40, 45-46.
[32] Ex 4.2-15, red pp 316-317; 4.2-46, red pp 414-415: see CAS [609].
[33] Ex 2.1-98, red p 3211-3212 (Bebic). See also Ex 2.1-3, red p 100 (Bebic (voir dire)); Ex 2.1-94, red pp 3180-3131 (Bebic): see CAS [1579]-[1580].
[34] Ex 2.1-98, red p 3211 (Bebic); see PS [1360].
[35] Ex 20.69, red p 156.

"misguided" about how he thought the letter bomb would be initiated, and that as put together, the letter bomb would have injured or killed the person constructing it.[36] This does not indicate a man with particular expertise in explosives.

103. At PS [214], the Petitioners refer to the explanation given by Bebic about possessing the explosives, as endorsed by Wright J as being inherently plausible: namely, they could be used to mine opals in South Australia. It is indeed inherently plausible that the reason why Bebic and Virkez initially stole the explosives was for the purpose of mining opals. This would also explain why the explosives were stolen before the initial discussions about the bombing conspiracy (they were stolen in November or December 1978,[37] whereas the initial meeting took place some time in mid to late January 1979).[38] It also provides an explanation of why Topich (in respect of whom there was no other evidence connecting him to the conspiracy) might have been involved in the theft of the explosives (if that was true as alleged by Police) and why it was Virkez and Bebic (who played a lesser role in the conspiracy as alleged by the Crown) who were responsible for their theft.

104. However, the fact that this might have been what motivated the theft of the explosives is not to say that Virkez and Bebic's motivations in respect of those explosives did not change over time. It is entirely plausible that, having met with Bebic and Virkez in January 1979, and learnt that they possessed explosives, the idea to re-direct the use of those explosives was suggested by one of Brajkovic or Zvirotic. The Inquiry need not draw any conclusion to this effect, but this case theory would be consistent with the evidence about how the explosives were obtained by each of the accused.

3.7.4 Reference to the Croatian Republican Party and other matters in the first screed

105. The Petitioners submit that the reference to the Croatian Republican Party in the first screed is suggestive of that information being supplied by Special Branch (not by Bebic or Virkez), which in turn supports the inference that the names of the Burwood trio were nominated by Special Branch and did not emanate from Lithgow (see PS [618], [995], [1190]-[1196]).

106. In assessing this submission, it should be recalled that there is no comprehensive account of what Virkez told Ingram when he initially attended Lithgow Police Station.

[36] T2845.5-12 (Barkley – Inquiry evidence).
[37] CAS [1599].
[38] CAS [3132]-[3138].

Ingram's notes[39] do not purport to be comprehensive. Ingram explained at committal that in taking the notes, his main concern was "to obtain as much information as possible and relay it as quickly as possible."[40]

107. When Ingram first gave evidence at committal, his evidence in chief omitted any reference to having spoken to Virkez at Lithgow Police Station.[41] This was because Virkez's identity as the informant was yet to be revealed. No questions were asked that would have elicited a response about his knowledge of the Croatian Republican Party on 8 February 1979.

108. Ingram was recalled as a witness at committal after Virkez's status as the informant was revealed.[42] He was asked questions about his initial conversation with Virkez on 8 February 1979. He said he did not remember exactly what the conversation was, but Virkez told Ingram that he knew of bombs. He did not take any further notes once Marheine had arrived and spoken to Virkez, nor did Marheine take notes.[43]

109. The same logic applies to other submissions advanced by the Petitioners about the content of the first screed, for example the reference to Virkez having 30-50 kg of explosives in his possession: PS [998].

110. Marheine gave evidence at committal that he had never before heard of the "Croatian National Council" before conducting his interview with Virkez on 8 February 1979, or "of any other political party of a Croatian basis that was dangerous".[44] Although this might tend to suggest that there was no mention of the Croatian Republican Party that emanated from Lithgow, it is inconclusive. It must be remembered that this information was relayed many months after the conversation at the Police Station on 8 February 1979. It is possible that the conspirators' political affiliations did not stick in Marheine's mind in the same way that other information conveyed that day did.

111. Overall, we submit that there is insufficient evidence that would support a finding that the information in the first screed did not emanate from Lithgow by virtue of the reference to the Croatian Republican Party.

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[39] Ex 4.2-95.
[40] Ex 2.3-46, red p 8572 (Ingram).
[41] See Ex 2.3-11, red p 6293 (Ingram).
[42] Ex 2.3-45, red p 8561 (Ingram).
[43] Ex 2.3-45, red p 8563 (Ingram).
[44] Ex 2.3-9, red p 6170 (Marheine).

3.7.5 Virkez's record of interviews and evidence at trial

112. In our submission, the Inquiry would not find that Virkez's records of interviews were fabricated by Police or otherwise involuntary (cf PS [1377]-[1381]). They were signed by Virkez, who later gave evidence consistent with them (see also our submissions at CAS [1190]-[1199]). In his third record of interview on 10 February 1979, Virkez made admissions about preparing the letter bomb. The Army attended as a result.[45] On 11 February 1979, Barkley attended Lithgow Police Station with Major Statton and spoke to Virkez about the letter bomb.[46] Accordingly, Virkez's records of interviews should be accepted as contemporaneous accounts of what Virkez told Marheine and Ingram.

113. There is some force in the Petitioners' submission that Virkez's claims – from his initial attendance at Lithgow Police station, to his various police interviews, to his evidence at trial – expanded in scope (see eg PS [1392]). However, the fact that additional evidence was given at trial than Virkez had volunteered to Police between 8-10 February 1979 is not of itself cause to question the reliability of his evidence. The evidence at trial referred to at PS [1412] emerged in response to specific questions that were posed by the Crown Prosecutor. It is the nature of viva voce evidence that a witness may elaborate on what he or she has previously said. In his records of interviews, Virkez had referred to other meetings with the Croatian Six. In his first record of interview, for example, the following exchange occurred:[47]

> *Q41.* *When was it decided to do this?*
> *A41.* *Well it was all the time on something but as time is changing and the situations are changing it is always something different. We was discussing different things to do for a couple of months but we have been discussing planting these bombs over the last three weeks.*
>
> *Q42.* *Where have you discussed doing this?*
> *A42.* *Down in Sydney at Brajkovic's place and at Zvirotic's place.*

114. As such, Virkez's evidence at trial of the January meetings was not wholly omitted from his interactions with Police. The fact that further details emerged at trial is not of itself suspicious. In this respect, the submissions of the DPP at [77]-[78] should be accepted.

115. It is also true that, based upon our previous assessment of the facts, some of the evidence Virkez gave at trial was untrue or misleading. Most significantly, Virkez denied having had contact with anyone who he believed to be associated with any of the

[45] See eg Ex 20.63; Ex 20.71.
[46] T2843.38-2845.11 (Barkley – Inquiry evidence).
[47] Ex 4.2-8, red p 298.

Yugoslav intelligence services[48] and gave false information about why he had the phone number of the Yugoslav Consulate in Sydney.[49]

116. These are matters that undermine Virkez's credibility. Moreover, the Inquiry would carefully scrutinise Virkez's evidence given that it is now known that he was reporting on the Croatian community to the Yugoslav Consulate and had had contact with the Consulate since at least August 1978. This was not information available at trial and also bears upon his credibility. It establishes a motive to lie and a reason why he might have fabricated evidence or otherwise embellished the truth.

117. However, this does not mean that the Inquiry should discount the entirety of Virkez's accounts. They should certainly be approached with caution. It is necessary to assess the evidence as a whole. As we submit in Section 32.3 of our submissions, significant weight should be placed on Virkez's call to the Yugoslav Consulate. Further, key aspects of Virkez's interviews withstand scrutiny, including his account of the 26 January 1979 meeting: see Section 32.4.

118. In our submission, it is not relevant what the jury would have made of Virkez's evidence in light of the matters that now call into question his credibility: cf PS [1516]. The task for the Inquiry is not to determine whether error occurred in the trial processes, but rather, having regard to all of the evidence before it, to form a view as to whether there is reasonable doubt about the guilt of the Croatian Six.

119. Finally, a factual correction: the Petitioners suggest at [1475] that only one of Virkez's records of interview was supplied to the defence. This is incorrect: each of Virkez's interviews were exhibits at committal and accordingly were available to the defence.[50]

3.7.6 Virkez's status vis-à-vis Yugoslav authorities

120. As we note at CAS [1166]-[1169], the documents before the Inquiry use different terminology to describe persons with associations with foreign governments. Likewise, the Petitioners refer to varying terminology in their submissions.

121. Insofar as the Petitioners' ultimate submission is that Virkez performed "spying functions" on the Croatian community (PS [1303(a)]), that much can be accepted. The evidence establishes that Virkez provided information on the Croatian community to the Yugoslav Consulate.[51]

[48] Ex 2.1-36, red p 1023 (Virkez).
[49] Ex E.1-36, red p 1023 (Virkez).
[50] See Ex 4.2-8; Ex 4.2-10; Ex 4.2-11; Ex 2.3-7, red p 6022; Ex 2.3-9, red pp 6179, 6181.
[51] See CAS [1169].

122. However, Counsel Assisting submits that the Inquiry should approach with caution the claim that Virkez "did what he did in relation to the Croatian Six as a YIS operative": PS [1303(b)]. As the Petitioners note at PS [1303], the evidence that Virkez acted under the control of the YIS "is thin". The high point is the ASIO telex of 9 April 1980.[52] The references to Virkez's links to the YIS should be read in context:

> *4. Relevant information pertaining to Virkez is as follows:*
>
> *(A) Virkez is first recorded by this organisation informing on Croatian activities to the Yugoslav Consulate, in particular Veljko Grce, a suspected Yugoslav Intelligence Officer, on 9.8.78. He reported on the activities of the Croatian National Council (HNV), the Croatian National Resistance (HNOPTOR) and the Croatian Independence Central Committee (CICC). From a police interview, it was ascertained that he was involved as a member of the Croatian Republican Party (HRS).*
>
> *(B) Pseudonyms of Cale and John Tillen were used on occasions in Vikrez' STD conversations to the Yugoslav Consulate. It can not be positively determined how Virkez was recruited to work for the Yugoslav Intelligence Service (YIS). However, Virkez' attitude when speaking to the Consulate revealed a certain unwillingness to associate with his "compatriots" (i.e. the Croats) and a marked lack of empathy either for their goals or methods. Thus it seems probable, but not certain, that Virkez joined the HRS on behalf of the YIS.*

123. This telex – which was a briefing note provided to Boyle prior to attending the interdepartmental meeting on 9 April 1980[53] – appears to simply reiterate the content of the intercepts available to ASIO at the time and provide the author's interpretation of those intercepts. The Inquiry can have regard to the intercepts to make its own assessment of Virkez's relationship with the YIS. In Counsel Assisting's submission, they do not establish that Virkez was a "YIS operative". Rather, as set out at CAS [1169], the evidence suggests he acted in the nature of an informant, although at times he received instructions or encouragement from his handler at the Consulate. There is nothing to suggest Virkez was directed to deliberately seek out a connection with the members of the Croatian Six, or was receiving instructions in relation to the bombing plot.

3.7.7 The implications of the non-disclosure of information relating to Virkez's ties to the Yugoslav Consulate

124. The Petitioners submit that the common law of disclosure applied in 1980-1981 (PS [1905], [1914]). Respectfully, this is not a correct statement of the law at the time of the trial. As set out in Section 13.1 of our submissions, although the concept of a fair trial has long been recognised, the duty of disclosure is a recent concept, first recognised

[52] Ex 9.1-46, red p 64: see PS [1291].
[53] T3087.48-T3088.31 (Boyle – Inquiry evidence): see CAS [878].

by the High Court in *Grey v The Queen* (2001) 184 ALR 593. In contrast, at the time of the trial of the Croatian Six, the common law was not so developed.

125. The submissions of the Commissioner of Police at [14]-[29] and the submissions of the Former Officers at [66]-[71] contain summaries of the relevant principles relating to disclosure that we respectfully adopt. In addition to those authorities, the decision of the Court of Criminal Appeal in *R v Saleam* (1989) 16 NSWLR 14 is relevant to the state of the law at the time of trial. There, the appellant had issued a subpoena in the Court of Criminal Appeal to the Commissioner of Police seeking production of every document relating to the investigation and prosecution of the offences with which the appellant and a co-accused had been charged, together with the reports of any investigation into allegations of perjury committed by the principal Crown witness in the committal proceedings and at the trial. The Commissioner objected, including on the basis that the subpoena was too wide and there was no legitimate forensic purpose for which production of the documents was required.

126. Hunt J (with whom Carruthers and Grove JJ agreed) commented on the breadth of the subpoena in the following terms (at 17C-D):

> *The width of the subpoena certainly on its face cast doubt upon the legitimacy of the forensic purpose for which the production was required. Again on its face, the subpoena appeared to be no more than yet another manifestation of the currently fashionable ploy of achieving, in effect, a one-sided (and impermissible) discovery against the police by having a call made upon such a subpoena shortly before the trial. It also appeared to be a variation of another currently fashionable ploy of making allegations of misconduct against the investigating police officers in the hope that the subsequent investigations by the Police Internal Affairs Branch and (where appropriate) by the Ombudsman will turn up something to be used on the issue of their credit at the trial.*

127. Hunt J continued (at 18C-D):

> *In my view, when a trial judge is faced with a subpoena of this kind, he should require counsel for the accused to identify expressly and with precision the legitimate forensic purpose for which he seeks access to the documents, and the judge should refuse access to the documents until such an identification has been made. Sometimes that purpose will not become apparent (even to counsel for the accused who had advised the issue of the subpoena) until the trial has been under way for some time (cf Waind v Hill [1978] 1 NSWLR 372 at 385), and the judge's initial refusal to permit inspection should always be open to review.*

128. Hunt J concluded that the appropriate test to be applied in determining whether access should be granted to subpoenaed documents is that it is "*"on the cards" that the documents would materially assist the accused in his defence*" (at 18E). This was not a narrow test: "*an accused is prima facie entitled to inspect any document which may give him the opportunity to pursue a proper and fruitful course in cross-examination*" (at 19C).

129. However, it should be emphasised that Hunt J was speaking of the test applicable to subpoenas issued by an accused person. His Honour made clear that it remained the position that there was no discovery in criminal cases (see 19D, G).

130. This authority and those canvassed in the Commissioner's submissions indicate that the common law duty of disclosure, as it exists today, had not been recognised by the courts at the time of the trial of the Croatian Six. The modern position cannot be retrospectively applied.

131. Nonetheless, in this case, material was withheld from defence responsive to subpoenas issued at trial and on appeal: see CAS Section 32.5. As such, material was withheld from defence which, according to the law at the time, should have been provided.

132. We address the implications of the non-disclosure of information relating to Virkez's ties to the Yugoslav Consulate at Section 32.6 of our submissions in chief. Reiterating our submission there, the test to be applied by the Inquiry is not whether there was a miscarriage of justice (cf PS [1937]-[1943]). Rather, the question is whether there is reasonable doubt about the guilt of the Croatian Six. The non-disclosure does not itself enable the Inquiry to draw a conclusion that reasonable doubt exists and, in the circumstances of the case, we submit that the non-disclosure here does not result in reasonable doubt about the guilt of the Croatian Six.

4 SUBMISSIONS OF THE COMMISSIONER OF POLICE

133. The Commissioner does not accept a number of Counsel Assisting's proposed findings but does not wish to be heard on them (see CPS [4] and Annexure A).

134. The submissions do not engage with the application, or lack thereof, of the Police Instructions and the Emergency Manual.

135. The sole matter that is addressed is the role of the NSW Police in the conduct of the trial. We rely on our primary submissions in this respect other than on two matters that concern the Commissioner's submissions and those of the DPP.

136. *First,* the Commissioner submits at [30]-[34] that as at 1979-1980, decisions as to the conduct of the trial, including what material should be disclosed to defence, were determined by the Crown Prosecutor, upon receipt of the police brief of evidence. The Commissioner submits that the Inquiry should accept that what Milroy and Turner knew about Virkez's role in informing to the Yugoslav authorities was conveyed to the Crown Prosecutor ([38], [44], [63]) but that the Inquiry should not find that the Crown deliberately and wrongfully withheld information from the defence (at [66]-[67]).

137. While it may be accepted that the Crown Prosecutor was responsible for decisions about disclosure at the time of the trial, our submissions at Section 32.5 address material withheld from defence at trial that was responsive to subpoenas issued. Two documents are relevant to NSW Police. The first is Telex 66/2, which was within the possession of NSW Police at the time of trial. That document was produced in a redacted form pursuant to a subpoena issued to the Commissioner of Federal Police: see Section 25.1.2. The redactions masked the information about Virkez having contacted the Yugoslav Consulate on 8 February 1979.

138. Although the subpoena was not directed towards the Commissioner of Police, the evidence was that either Milroy or Turner were in Court throughout the trial.[54] In circumstances where (1) the telex was within the possession of the NSW Police; (2) Milroy and Turner, as officers in charge, had access to the running sheets that referred to the telex (CAS [919]) and presumably would have read them; and (3) one of Milroy or Turner would have been in Court when the redacted telex was produced, a real question arises as to whether members of the NSW Police should have done more to alert the Crown Prosecutor, the Court or defence to the fact that there was relevant evidence in the redacted sections of the telex that had been withheld from defence.

139. The second document is the SIDC-PAV Report. As discussed at CAS Section 32.5.1.4 and [1278]-[1279], the SIDC-PAV Report was in the possession of NSW Police and was responsive to the subpoena issued in the CCA. Despite this, it was not produced. Regardless of the entity formally responsible for disclosure at trial, NSW Police had an obligation to produce the SIDC-PAV Report but did not.

140. Nonetheless, our submission that material may have been deliberately withheld from the defence (CAS [1278]) should be considered in light of the DPP's submission at [85] that at least initially, when attempts were made to obtain a statement from the Vice Consul for Yugoslavia on 8 March 1979, NSW Police were taking active steps to obtain evidence of Virkez's contact with the Yugoslav Consulate, rather than conceal that information.

141. *Second*, the Commissioner and the DPP join issue on the question of Shillington's knowledge at the time of the trial. In Counsel Assisting's submission, this issue is ultimately not necessary to resolve. The point of significance for the Inquiry is that there was material in the possession of NSW Police of relevance to Virkez's credibility that was not disclosed to defence. Regardless of whether this was known by the Crown Prosecutor (and whether or not any deliberate decision was made to withhold

[54] T282.35-41 (Milroy – Inquiry evidence).

information: see DPPS [109]), the non-disclosure resulted in a significant error in the trial process, albeit one that we ultimately submit does not result in reasonable doubt about the guilt of the Croatian Six.

5 SUBMISSIONS OF THE DPP

142. We adopt the DPP's submission that reliance can be placed on material that was not admissible against an accused at trial insofar as the Inquirer is satisfied the material to be relied upon is in fact reliable and bears upon the question of whether there is a reasonable doubt about the conviction of each of the Croatian Six (see DPPS [9] and [167]-[171]).

143. Counsel Assisting also adopts the DPP's submission at [172] about the asserted unlawful purpose in the raids. It is not the task of the Inquiry to second guess whether evidence would have been deemed inadmissible had an objection been taken at trial. (cf PS [971]-[980], [1955]).

144. The DPP has referred to further evidence adduced at trial that shows an association between Brajkovic and Virkez, namely the evidence that they both attended an electronics store on Parramatta Road to purchase some electrical parts. The evidence is reliable and is a further piece of information implicating Brajkovic in the conspiracy, connecting Brajkovic with Virkez and pointing to the reliability of the information Virkez provided police (DPPS [240]-[243]ff).

145. In respect of any disputed findings, we rely on our primary submissions.

6 SUBMISSIONS OF THE COMMONWEALTH

146. We make no written submissions in reply.

7 SUBMISSIONS ON BEHALF OF THE 25 FORMER POLICE OFFICERS

147. The former police officers submit that the Inquiry is no better placed than Maxwell J was in 1980 to determine the issue of whether Brajkovic was assaulted. Further, it is submitted that the Inquiry is in fact at a comparable disadvantage given a number of witnesses are deceased and unavailable, whereas Maxwell J had the advantage of hearing and seeing all the relevant witnesses (see FPOS [277]).

148. Certainly, the historical nature of the Inquiry has necessarily meant that witnesses are no longer available to give evidence. However, this Inquiry has been extensive and exhaustive. It is not limited by the rules of evidence and it has had access to evidence that was not before the trial, including the Internal Affairs investigation. In the absence of any other plausible or reasonable explanation, it is open to this Inquiry to make a

positive finding, for the first time, that Brajkovic was assaulted. We do not accept the submission that his injuries were "likely self-infliction in the custodial context" (see FPOS [285] and [542] for example).

149. It is submitted on behalf of the former police officers that it is consistent with Brajkovic's foundational guilt and with his admission at the Bossley Park house ("*I make bomb*") that when he was later being interrogated at the CIB he would voluntarily make further admissions (see FPOS [283]). We do not accept this proposition. There is no obvious correlation between the two events, as urged by the Police. To the contrary, Brajkovic was in two very different environments at his home when Police arrested him and when he was later taken to the CIB, naturally anxious that his wife, child and brother-in-law were also brought to the CIB in the early hours of the morning and separated from him. It is not difficult to imagine his resistance to speak and cooperate that ultimately led to an assault upon him. In any event, the ROI was excluded from evidence at trial and likewise here, we submit that any admissions therein should not be relied upon.

150. The submission made by the former police officers at [288]-[289] is misconceived. The point about the spelling of 'Yasser' or 'Yassir' is not about the correct spelling or otherwise of the name. Rather, our submissions point to the fact that both Helson's and Krawczyk's reports to Internal Affairs referred to Brajkovic saying that that Croatians must follow the example of "Yassir Arafat" and spelt the name the same. It is a further example establishing collusion by the officers in their response to Internal Affairs. It is also a further example that counters the submission made on behalf of the Police that "*it is possible and indeed probable that these police would have had a similar thought coincidentally*" (see FPOS [285]).

151. It is further submitted by the former police officers that reference to a towel by Brajkovic only arose when "*by some avenue or other of prison gossip, an allegation by a prisoner called Steep came to the ears of Mr Brajkovic*" (see FPOS [295]-[296]). The Inquiry would be at the very least troubled by the similarities between Brajkovic's allegations against Harding and those made by Steep. We have elaborated on these similarities in our primary submissions including Harding's evidence during the Steep matter that there had been a "violent struggle" between him and Steep on the way to the interrogation room and Harding putting Steep into a "headlock" (see CAS [3266]).

152. A point of clarification needs to be made in response to [298] of the former police officers' submissions. Counsel Assisting's statement during the hearing on 5 August 2024 (at T 1647) that there does not appear to be any full transcript of the Steep trial preceded the Inquiry receiving transcripts (and other records) related to Steep. The

relevant Court records relating to Steep are Exhibits 15.21-15.30 in the Inquiry. These documents were issued to parties on 25 October 2024.

8 SUBMISSIONS ON BEHALF OF JAMES BENNETT

153. Counsel Assisting adopts the submission made at [69] on behalf of Bennett, namely the fact that there were inaccurate estimates of the gelignite given at trial by some police witnesses, does not raise sufficient doubt as to what was located at the scene and shown to Brajkovic and Hudlin.

154. As to the submission made on behalf of Bennett at [147], it is submitted that there is insufficient evidence for the Inquiry to be satisfied that Bennett had knowledge of the assault on Brajkovic. Unlike the officers referred to at CAS [3274], there is insufficient evidence from which the Inquiry could make adverse credibility findings against Bennett sufficient to question his evidence about his lack of knowledge of an assault on Brajkovic.

Date: 28 February 2025

Christine Melis

Talia Epstein

Counsel Assisting the Honourable Acting Justice R A Hulme