**Inquiry under s 81 Crimes (Appeal and Review) Act 2001**

**into the Convictions of the Croatian Six**

# PETITIONERS SUBMISSIONS IN REPLY


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## Application of contemporary standards of fairness

1. Responding to a submission made for the individual Police officers,[1] a doubt or question can arise by virtue of the failure of procedure at the time of the trial to meet modern standards of law and procedure. Where the common law and statute law has changed since 1980-1981, the Inquiry should apply modern law.[2] So, for example, where modern conceptions of fairness in the conduct of a trial are offended by the way a trial was conducted in previous times, those modern conceptions of fairness should inform the view taken by the Inquiry in its report on the convictions concerned. See also pars 32-33 below.

## Motivation for conspiracy charged

2. It is submitted for the individual Police officers[3] that "*(r)eligious, cultural and political animosities between Croats and Serbs*" were "*a likely underlying motivation for the criminal conspiracy alleged and found proven in the 1980 trial*" and "*the motive to avenge terrible inter-communal wrongs was obvious and powerful*."[4] This was not the Crown case at trial. The Crown case was that the accused were motivated by a hatred of the Yugoslav Government.

3. More to the point, the submission unhelpfully elides geopolitical differences with ethno-religious differences. The complexities of the Yugoslavian diaspora landscape in Australia are borne out by a Police occurrence pad entry. In documenting problematic or violent Yugoslavian identities in South-West Sydney, the entry refers to a "*nationalist Serbian group"*. According to Police, this collective of 15-20 Yugoslavians from Cabramatta professed to hate communists and had been responsible for much violence in the Cabramatta area.[5] So too, six Serbs were arrested for plotting to assassinate Tito on his visit to New York and Chicago

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[1] Pages 26-29.
[2] *R v Mercury* [2019] NSWSC 81; *Rodway v The Queen* [1990] HCA 19; 169 CLR 515 at 521.
[3] Pages 35-53, [94]-[146], at [97].
[4] At [146].
[5] Ex 11.50, red p 229-1.

in 1978.[6] It was not Croatians alone that were unenamoured by Tito's brand of communism.

4. The only relevant evidence that a person harboured anti-Croatian or anti-Serb hatred is the evidence that, as a Serb, Virkez hated the anti-Yugoslav Croatians whom he regarded as inheritors of the Ustashe – which is what in fact he called them.[7] Rather than proving the individual Police officers' contention, the submissions[8] citing the photographs of the demonstration in ex 4.1-KKK undercut it since universally they condemn the then Yugoslav dictator, Marshall Tito – there is no reference at all to Serbian people. The submission[9] that demonstrating against Marshall Tito was to evince hatred of Serbs ignores the facts that the town in which Tito was born is in Croatia, not far from Zagreb, and that Tito was half Croatian, half Slovenian.[10] The individual Police officers' submissions on this topic are misconceived.

## How Lithgow explosives manifested there

5. The individual Police officers submit[11] that "*(h)ow and why the large quantity of explosives manifested itself at Lithgow was never really explained by the petitioners*." In our submission, the Lithgow explosives "*manifested*" because Virkez organised for that to happen.

   (a) Virkez was involved in the theft of explosives from the Wallerawang power station – as he (not Bebic) was working at the power station, Virkez had the means to find out where the explosives were kept;[12]

   (b) Virkez was involved in their burial;[13]

   (c) Virkez brought them to the house at Macaulay Street;

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[6] Ex 13.20 at p 71
[7] Petitioners' submissions, [1311]-[1316].
[8] At [102].
[9] At [105].
[10] https://www.britannica.com/biography/Josip-Broz-Tito accessed 20.2.25.
[11] At [147].
[12] Petitioners' submissions, [222].
[13] Petitioners' submissions, annexure B, pp 12-14.

(d) Virkez kept explosives at the house;[14] and

(e) Virkez constructed four potential bombs with them, and put them in his car.

6. Of all the civilians involved in the case, including the Croatian Six, Virkez was the person with a history dealing with explosives, and the expertise to deal with them.[15]

## Submission that Virkez "intruded himself into a real plot"

7. The submission by Counsel Assisting[16] and for the individual Police officers that Virkez "*insinuated himself into a real conspiracy*"[17] ignores the complete absence of independent evidence that, apart from Zvirotic whom he knew from Lithgow, Virkez had associated at all with the Sydney-dwelling individuals comprising the Croatian Six (see also par 43 below). Even in the case of Zvirotic who did know Virkez, there was no evidence that, after helping him move his clothes to Ashfield and then visiting him, in late November-early December 1978,[18] Virkez associated with Zvirotic, or vice versa.

## Virkez's relationship with the YIS

8. The 14 August 1978 telephone intercept report titled "Yugoslav Consulate General Sydney contact with identified and unidentified persons" makes it clear that Virkez was far from a mere supplicant. In this call, as well as passing information on to the Yugoslav Consulate, Virkez was contacting Grce as to whether he knew anything about the gun dealer who purchased guns in Germany for Australia. Virkez also said that it would be advantageous if somebody could obtain employment down on the ships (in Australia) that took meat to Europe. Grce also

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[14] Petitioners' submissions, [1326].
[15] Petitioners' submissions, [1319]-[1364].
[16] CAWS, [1321].
[17] At [15], [147]-[156].
[18] Petitioners' submissions, [1868]-[1871].

said that he was counting on Virkez "*like a good boy*" and that everything was going to be alright.[19]

9. Another example: on 10 February, Virkez told Marheine that one of the proposed victims of the Croatian Six's murder plots was Hamad Suman.[20] Suman was the President of the Yugoslav Association 'Sloga'.[21] As already submitted,[22] when Suman was interviewed by Police, of the seven photographs shown to him (the Croatian Six plus Virkez), the only person that Suman could positively identify by name was Virkez.[23] This is probative because the transcript of a telephone intercept of 26 October 1978 suggests that Virkez may have had some animosity towards Suman well in advance of the arrest of the Croatian Six:[24]

> *"VITO asked GRCE if he knows Hamdija SUMAN. VITO said that he (SUMAN) is a bit 'multicoloured'. VITO mentioned that he knew SUMAN 5 years ago and at that time he was not 'clean'. VITO told GRCE 'keep him under watch, his house too'. Republicans are watching his house too."*

10. This evidence makes it clear that Virkez was more than just a "*community informer*" passing on information and pamphlets to the YIS.[25] He was actively engaged in at least espionage for the YIS. He was *proposing* ways the Yugoslav Government or YIS could act to protect their interests.

11. As of 19 March 1979, Virkez as well as a Paret Saret were seen in ASIO as informants of "*great consequence*"[26] (not low level as Cavanagh had represented in the CCA). In the same document both Saret and Virkez are described as "*high grade informers*".[27]

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[19] Ex 9.1-1, red p 1.

[20] Exhibit 4.2-11, red p 307, Q18-19.

[21] Exhibit 11.4.

[22] Petitioners' submissions, [1490].

[23] Confirmed by the occurrence pad entry of 28 February 1979 [ex 11.50, red p 228].

[24] Ex 9.1-2, red p 2.

[25] Commonwealth's submissions, [28], [43.2], [45.2]; see also CAWS, [1167]-[1175]; Police Commissioner's submissions, [72]-[73].

[26] Ex 9.1-27, at par [2].

[27] Ex 9.1-27, at par [5].

12. It would be a mistake to regard the telephone conversations that Virkez had with Grce as the extent of their relationship.[28] Virkez and Grce planned physical meetings,[29] and had already met near Central Railway Station:[30] The ASIO analyst discussed in par 13 below concluded in 1984 that "*VIRKEZ provides written reports and met with Grce at the Consulate and locations in Sydney*".[31] On 8 February, Virkez was able to describe to Kreckovic where in the Consulate Grce had his office.[32]

13. The submissions by Counsel Assisting[33] and for the DPP[34] that Virkez's status was one of "*an informant or source, not an agent of the Yugoslav government*" rely, amongst other things, upon the assessment of the Director-General of ASIO on about 18 May 1982.[35] That assessment seems to have been overtaken, however, by the opinion of the ASIO analyst author of a minute dated 6 August 1984 that "*the YIS … wanted HRS leaders arrested with bombs or implicated in the plot."*[36] The analyst qualified their opinion by saying, "*(u)nfortunately, the above opinion is only conjecture and is not based on hard intelligence."* But hard evidence on such a subject would necessarily be rare. In addition to reviewing the (ASIO) files immediately related to the alleged 'Lithgow Bombers' plot,[37] the analyst reviewed some ten ASIO reports relating to Virkez,[38] and noted that Grce had been identified as a YIS officer[39] (no longer suspected YIS officer) and concluded that Virkez *was* an agent of the YIS.[40]

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[28] Cf DPP submissions, [29].
[29] See Petitioners' submissions, [1297].
[30] 7 December 1978 intercept report [ex 9.1-7 ].
[31] Ex 10.3-49, red p 187.
[32] Ex 9.1-15, red p 17.
[33] CAWS, [1175].
[34] At par [74](e).
[35] Ex 9.1-81, red p 116.
[36] Ex 10.3-49, red p 187, at par [3].
[37] Ex 10.3-49 at red p 186, at par [1].
[38] Ex 10.3-49, red pp 186-187, at par [2].
[39] Ex 10.3-49, red p 188, at par [3].
[40] Ex 10.3-49, red pp 187, 189.

## Consulate's prior knowledge of a bomb plot

14. The submission for the DPP[41] that Kreckovic seemed to have no prior knowledge of a bomb plot overlooks the evidence that, as far as ASIO was concerned, the YIS certainly seemed to have some forewarning. Intercepts showed that, on or before 19 September 1978, another YIS agent in Lithgow, Paret Saret, knew that "*something was going to happen to the Serbian singers*".[42] This suggests that Saret's handler at the Consulate knew "*something was to happen to Serbian singers*" nearly five months before the Croatian Six were arrested. According to ASIO, Saret was not "*intercepted*" after December 1978, arguably leaving the field free for Virkez to move against the Croatians in January-February.

## Virkez's pre-existing relationship with ASIO

15. Counsel for the DPP submit[43] there is no evidence before the Inquiry demonstrating that Virkez provided any information to ASIO. This is not correct. In 1991, Paul McGeough published an interview of Virkez in which he said he used to go to Sydney and ring ASIO in Canberra, that the woman on the switchboard knew his voice and would put him through to a man called [redacted].[44] Virkez said much the same to Chris Masters.[45]

## Virkez's pre-existing relationship with NSW Police

16. The NSW DPP submits[46] that the reason that the 'police evidence' is capable of supporting – and does support – the truthfulness and reliability of Virkez's evidence is because of the absence of any pre-existing relationship between Virkez and the NSW Police, apart from Marheine's knowledge of Virkez. This submission significantly downplays the relationship that Virkez had with NSW Police prior to his visit to Lithgow police station on 8 February. The Inquiry is

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[41] At [71].

[42] Exhibit 9.1-23, red p 34.

[43] At par [55](a).

[44] Ex 13.9, red p 37. [redacted]

[45] Ex 13.5: 19:30 minutes; ex 15.5 p 19.

[46] At [60]-[61].

referred to the Petitioners' submissions in this regard.[47] In addition, there was evidence that Ingram had spoken with Virkez some time before 1979 about a stealing matter (not explosives).[48]

17. The significance of this pre-existing relationship is that nothing much seems to have happened to Virkez, even by way of Police writing up documentation or reports in relation to the allegations, in respect of the allegations of the statue bombing, being a man prone to violence, possessing a loaded shot gun, or the stealing matter. This is consistent with Marheine's evidence to the Inquiry that after interviewing Virkez in relation to the statue bombing, when he was moving around the hotels, Marheine regularly saw Virkez, that Virkez always spoke to him,[49] that Marheine "*got to know him better*" and found out further information about him.[50] Consistent with this pre-existing relationship, on all the evidence despite the claims Virkez made on 8 February, no effort was made by NSW Police to revisit the earlier allegations, particularly the statue bombing.

## Virkez's motive to fabricate evidence

18. Neither the submissions of Counsel Assisting nor those for other parties deal with Virkez's letter to Bogljub Samarzdic,[51] and the clear evidence it provides of a motive to fabricate evidence against the Croatian Six, and particularly against Brajkovic.[52] Further, on the individual Police officers' submissions, given the "*(r)eligious, cultural and political animosities between Croats and Serbs*",[53] the mere fact that Virkez was Serbian would provide sufficient motive for him to fabricate his evidence against the Croatian Six.

19. The DPP submits that "*it is apparent from his evidence that he (Virkez) did not feel under any such threat or pressure*".[54] The submission omits reference to Virkez's

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[47] At [1269]-[1281].
[48] T2880-2881 [ex 2.3-46, red pp 8575-8576].
[49] InqT-Day 3, p 143 L16.
[50] InqT-Day 3, p 143 L12.
[51] Ex 7.5-4, red pp 67-69.
[52] Petitioners' submissions, [1311]-[1316], [1794]-[1795].
[53] At [97].
[54] DPP's submissions, [78].

evidence in the trial that it was "*a very hard question*" whether he felt he was being blackmailed by the Police.[55]

## Concealment of knowledge of Virkez's true status

20. The DPP submits[56] that Jefferies' attempt to persuade Vice-Consul Cerar to make a witness statement about Virkez's contact with the Consulate is indicative of Police trying to generate admissible evidence rather than concealment. This ignores the preponderance of evidence on the efforts to which Jefferies and other NSW Police went to conceal their knowledge of what Jefferies had learned from Virkez on 10 February.[57] Also, the submission does not address the fact that, having failed to obtain a witness statement, Jefferies' knowledge of Virkez's contact with the Consulate was still not disclosed. Further, Jefferies claimed that, in the 10 February interview, he broached with Virkez the matter of whether he was working for UDBA or the YIS,[58] yet in his committal evidence had said that he had not.[59] In the words of Counsel Assisting (citations omitted):[60]

> "*Jefferies also gave evidence at committal that Virkez told him 'nothing new' during the interview. He accepted that based on the evidence he had given to the Inquiry, this answer was not accurate and that Virkez had given him new information about four topics, namely being a Serb, using a different name, contacting the Consulate and pursuing the Yugoslav cause. He agreed that answers he gave at committal were misleading in that they did not reveal the new information he had learnt, but said that he did not mean to mislead*."

21. It is disconcerting that, although Jefferies produced a report of up to four pages capturing some of the disclosures made by Virkez to Jefferies on 10 February, provided it to Perrin, showed it to Turner, and that it was something that would

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[55] Petitioners' submissions, [1480].
[56] At [85].
[57] Petitioners' submissions, [466], [1140]-[1147], [1422]-[1432], [1583]-[1600], [1606].
[58] Jefferies, InqT-Day 9, p 588 L15; p 590 L11.
[59] InqT-Day 9, pp 613-614.
[60] Counsel Assisting's submissions, p 241 at [945].

have generated an index card for Virkez,[61] no copy of the report has ever been produced by NSW Police, notwithstanding that it would have been captured by the terms of the subpoena issued at trial[62] and surely also by the Inquiry's notices to the Commissioner of Police.

22. The submission by the Police Commissioner[63] that Jefferies created no report to Perrin after the meeting with Virkez on 8 (*scil* 10) February should be rejected. It is inconceivable that Jefferies could be wrong about having prepared such a report, presented it to Perrin, and later showed it to Turner and then discussed with Turner its context, having regard to:

(a) the wealth of evidence of reports by Jefferies, showing his practice;
(b) the significance of Virkez's revelations and the necessity for an executive decision to be made about how they were to be handled;
(c) Jefferies' evidence about the report and how it was handled, including that he both showed it to Turner who read it and subsequently discussed its context with him – and that it can be inferred that was the very purpose of those two meetings with Turner; and
(d) Jefferies concessions against his interest that in the committal hearing he "*incorrectly*" denied that there was a report.[64]

## What Shillington QC knew

23. In exploring what Shillington QC knew about Virkez's status, the DPP submits that Milroy did not seem to perceive any issue with Shillington QC's statement in closing that there was "*not a skerrick of evidence*" etc. This is to miss the point. It is of longstanding authority that:[65]

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[61] See CAWS, [928].

[62] Jefferies, InqT-Day 30, p 232 L29.

[63] Commissioner's submissions, [45]; see also first sentence of CAWS, [1247].

[64] InqT-Day 9, pp 607 L33 – 611 L15, especially at p 610 L42.

[65] R v Puddick (1865) 4 F & F 497 (Crompton J) at 499; 176 ER 662 at 663. See also Whitehorn v The Queen [1983] HCA 42; 152 CLR 657 per Deane J at 663-664: a prosecutor's fundamental duty is to act "with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one".

> *"Counsel for the prosecution … are to regard themselves as ministers of justice, and not to struggle for a conviction … not be betrayed by feelings of professional rivalry … [nor] to regard the question at issue as one of professional superiority, and a contest for skill and pre eminence."*

24. Further, the DPP cannot rely on some sort of "*bamboo curtain*" between their office and the Police, since:[66]

> "*to do so will be conducive to miscarriages of justice. The effect on a trial of material non-disclosure is the same whether the agency responsible is the State's investigating or prosecuting authority*."

25. With respect, we agree with the Police Commissioner's submission[67] that the responsible officers of the NSW Police placed all relevant information about Virkez in the Crown Prosecutors' hands. We would add that the evidence is cogent that a combination of Turner, Milroy and Cavanagh ensured that the Crown Prosecutors were fully briefed on the risks of Virkez by virtue of his YIS links (just as Jefferies had ensured that Turner was appraised of those risks and Whitelaw ensured the Police Prosecutor was appraised of those risks). We rely upon our submissions as to the reasons why Shillington QC's "*not a skerrick of evidence*" submission was misleading.[68]

## Rogerson and Musgrave

26. The DPP submits "*there is an absence of any finding of guilt in respect of corrupt practices (including verballing) against any former officer involved in the raids on the Croatian Six*". This is not entirely accurate. In sentencing Rogerson for murder, Bellew J said:[69]

> "*In 1992 Rogerson was convicted of conspiring to pervert the course of justice and sentenced to a term of imprisonment. … In*

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[66] *R v Forrest* (2016) 125 SASR 319 per Kourakis CJ (with whom Kelly and Lovell JJ agreed) at [62]-[63].

[67] Police Commissioner's submissions, [67].

[68] Petitioners' submissions, [1597]-[1600].

[69] *R v Rogerson; R v McNamara (No 57)* [2016] NSWSC 1207 [at 222].

*2005 he was convicted of giving false evidence and sentenced to a term of imprisonment."*

27. Putting aside for a moment Rogerson's media statements in 1991 about how fabrication of evidence by CIB detectives was "*cult*",[70] it is submitted that convictions for conspiring to pervert the justice and giving false evidence, not to mention murder, would cause this Inquiry concern as to the reliability of his testimony that he saw explosives sitting on a table in the attic at 9 Livingstone Street, Burwood.[71] Given he was the team leader, if Rogerson's evidence on that subject is doubtful, there is necessarily a spillover effect on the other CIB detectives who gave the same evidence. We also rely upon our other submissions about Rogerson lack of a memory of any gelignite when speaking of the raid in 2011.[72]

28. We also rely upon our submissions about the impact on the reliability of the evidence of former Det Musgrave from the conclusions of the Court of Criminal Appeal in the Rendell case.[73]

## Submissions that 'no evidence of a stash'

29. Counsel Assisting[74] and the individual Police officers submit[75] that *"(t)here is no evidence of a "stash" of explosives used to fabricate evidence …*". With respect, this is naïve. The Wood Royal Commission made no pretences about its findings that Police loaded up suspects, in particular Police from the very squads from which the vast number of detectives in this case were drawn. Rogerson made no bones about the fact that Police loaded up people with firearms, gelignite and drugs. The items Police produced that they used to load suspects up must have come from somewhere. Load ups could not occur unless the Police concerned had a stash of such items. In this very case, two firearms disappeared into the

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[70] Petitioners' submissions, [30]-[37].
[71] T1272.5 [ex 2.1-Day 42, red p 1322].
[72] Petitioners' Submissions, [323]-[326].
[73] *R v Rendell* (NSW CCA, 22.6.94, unreported). See Petitioners' Submissions, [678]-[681].
[74] CAWS [3284].
[75] At [18], [44], [344], etc.

custody of Police,[76] and requirements to log or book up exhibits were flagrantly breached. It follows from the evidence that Police from these squads loaded up suspects that there were stashes from which detectives in this case could draw to load up suspects.

## Confessional evidence

30. The individual Police officers rely upon evidence given by former Police officer witnesses in the Inquiry that their knowledge of verbals extended no further than the fact that defence lawyers alleged that Police evidence of admissions was a verbal.[77] The Inquiry should take into account the statement by the Wood Royal Commission that, indeed, defence lawyers had been claiming that alleged admissions were verbals, but the Royal Commission continued:[78]

> *"In the main, the courts were sceptical of these claims, although in the light of the evidence received by this Royal Commission it is now evident that there was much of substance in them, and that many persons were convicted on the basis of tainted evidence. This was a significant factor in the persistence of such practice. Corrupt police were able to trade on the notion of the 'thin blue line' and urge that they had no motive falsely to implicate anyone or to do other than their honest duty."*

31. Thus it was that the 1985 report of the s 475 inquiry into the convictions of Anderson, Alister and Dunn concluded that it was well recognised that evidence of oral admissions was a class of evidence to which doubt and reservations attached "*by its very nature*".[79] The evidence given to the Inquiry by the individual former Police officers is an insufficient basis for this Inquiry to take a different approach. Apart from anything else, the fact that so many individual former officers denied any knowledge ever of what the Royal Commission found to be endemic provides no reason for confidence in their denials of verballing and other misconduct in this case.

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[76] Petitioners' Submissions, [575]-[579].

[77] Eg, at [359] quoting evidence given by Helson to the Inquiry.

[78] Ex 13.13(a), red p 111-4 at [3.116]-[3.117].

[79] Ex 13.41, red p 739.

32. Counsel for the DPP submit *"(o)n the basis of the technology readily available and the prevailing standards of the time, there was nothing more that could reasonably have been expected to be done by police to verify the process*."[80] What could have been done was to allow the accused a witness of their choosing (such as a relative), or at least a Croatian interpreter to assist in any interview that occurred. The Petitioners urge the applications of the *principle* underlying the decision in *McKinney*[81] that there is a forensic problem where Police give evidence of admissions where the accused was held in isolation from anyone who could corroborate their account.[82]

33. Counsel for the DPP address Counsel Assistings' concerns with the confessional evidence obtained from members of the Croatian Six.[83] Seven factors are identified which Counsel Assisting contend serve to cast doubt on their reliability.[84] The DPP proceeds to deal with these in turn. However, as the DPP acknowledges,[85] these concerns do not stand alone but must be considered cumulatively. It would be one thing for there to be a few questionable features in relation to the admissions purportedly made. However, in the case of the Croatian Six, there are many. As was pointed out by the Inquirer, the commonality across the confessional evidence is striking.[86]

34. Presumably with reference to the LEPRA regulations, which mandate certain protections including support persons for people of non-English speaking backgrounds, the DPP submits[87] that modern legislative provisions would not have any work to do in that the accused "*do not claim to have been pressured or manipulated into making admissions due to a power imbalance, they deny making admissions at all*." With respect, and quite apart from the fact that even at this Inquiry some 45 years on, his Honour had difficulty understanding 50% of what

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[80] At [123].
[81] [1982] HCA 67; 151 CLR 1
[82] Petitioners'' submissions, [1075]-[1079].
[83] DPP's submissions, [136] ff.
[84] CAWS, [3159]-[3167]
[85] At [138].
[86] InqT-Day 16, p 1133 L7 (re Counsel) & InqT-Day 17, p 1252 L12 (re Grady).
[87] At [160].

Mr Brajkovic was saying,[88] this is not to the point. The real utility of having a support person is that such a person would have provided objective corroboration – in the form of an independent third party – as to whether police questioning and a voluntary confession occurred in the first place. What has work to do in this Inquiry is the principle from the decision in *McKinney*[89] which recognises the special position of vulnerability of an accused to fabrication of confessional evidence when held in custody in isolation from people who would be in a position to corroborate that accused in their version of events.[90]

## Cameras

35. The individual Police officers submit that the evidence of former Det Howard was credible and consistent with the evidence as a whole that detectives had to apply to the Scientific Section if they wanted something photographed, "*and they would get there when they were ready*."[91] This submission can be accepted only if the Inquiry ignores the evidence of the lengths to which Police went in Lithgow to obtain photographs of explosives in situ when no photographers from the Scientific Section were available.[92]

## Ingram's sighting of Bebic emerging from back door of house

36. The submissions for the individual Police officers[93] in relation to Mr Ingram include the claim "*When the 'raid' at Macauley St occurred, Bebic emerged from the house with what appeared to be a rifle*." While indeed some Police said that, this has the potential to mislead. Ingram was notable for his consistent evidence that Bebic had nothing in his hands when he emerged from the house – he was holding his hands in the air.[94]

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[88] InqT-Day 42, p 3192 L26.
[89] [1991] HCA 6;171 CLR 468.
[90] See Petitioners' submissions, [1075]-[1080].
[91] At [397].
[92] Petitioners' Written Closing Submissions, [150]-[156].
[93] At [415].
[94] Ex 4.2-20, red p 336, at par [10]; T28.2 [ex 2.1-Day 3, red p 49]; InqT-Day 3, p 104 LL17, 32.

## Milroy

37. The submission is made by Counsel Assisting,[95] echoed by counsel for the individual Police officers,[96] that Milroy can be accepted as a witness of truth is not, with respect, consistent with his demeanour at the Inquiry. The assessments of Mr Milroy's credibility give insufficient weight to the evidence of Ingram of hearing two officers speak of Bebic complaining about being bashed,[97] officers whom in all likelihood were Turner and Milroy. In addition, they overlook that Milroy volunteered to the Inquiry there had been one meeting, at CIB, with Cavanagh[98] – but purported to be unable to recall all the other meetings with Cavanagh or that he took part in meetings with others at the Commonwealth level.[99] It stretches credulity to claim a lack of a recollection of meetings with Cavanagh that also involved the Crown prosecutors, and journeys to AFP Headquarters, indeed a two day trip to Canberra which included meetings with Cavanagh, a meeting with AFP Insp Headland and A/ Commissioner Farmer[100] – all undoubtedly in relation to Virkez – and likely after-work refreshment with Cavanagh.[101] It is submitted that Cavanagh was a sensitive subject for Milroy given Cavanagh came from a different organisation and plainly was providing intelligence to Turner and the Crown prosecutors.

38. We respectfully disagree with Counsel Assisting that Milroy can be regarded as credible because he gave evidence that the prosecutors were told about Virkez having been in contact with the Yugoslav Consulate.[102] This was no detriment to Milroy. The prosecutors were part of a different agency, to whom, as a Police officer, Milroy owed no duty of loyalty and with whom he would be unlikely to have shared an esprit de corps.

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[95] CAWS, [1783]-1790].

[96] At [615].

[97] See Petitioners' Written Closing Submissions, [724]-[725].

[98] InqT-Day 5, pp 300-301.

[99] InqT-Day 5, pp 304

[100] Ex 11.71(B), red p 436-437. Headland had been involved with Cavanagh in the raid on the Croydon house of the Kokotovic brothers in 1973 [exs 5.13 pp 1057-1061; 20.1-20.8; 20.5, red p 11; 20.6, red pp 13-14].

[101] Petitioners' submissions, [1632], fn 3377; InqT-Day 25, pp 1869-1871.

[102] CAWS, [1786].

## Events on entry of Brajkovic into house at 16 Restwell Road

39. The submissions for Mr Bennett[103] mischaracterise Mr Brajkovic's evidence. First, there was no reason why Brajkovic could not ask Krawczyk what was going on both outside and inside the house. Krawczyk was the one detective whom Brajkovic was entitled to think he knew. There was no 'slip' in Brajkovic's evidence at trial. He entered the house with Krawczyk and, answering a question "*what happened then*", described what he saw . One of the things he observed was that Krawczyk was searching the bookcase.[104]

## Submitted inconsistencies in Brajkovic's accounts of events

40. The submissions for Mr Bennett, more than once, draw conclusions of dishonesty from differences in versions Mr Brajkovic gave of events in the workshop/study in his house.[105] This holds Mr Brajkovic to an impossible standard. The functions of his evidence in the bail application hearing before Yeldham J and in the account he gave to Sgt Shepard were markedly different from the function of his testimony in the trial. It is not to be expected that everything he said in the trial should have been included in his evidence before Yeldham J and in his account given to Shepard. In the bail application, Yeldham J was impatient with Brajkovic because he was representing himself and so the account Brajkovic gave to that judge was "*the short form*".[106] Mr Brajkovic explained that Sgt Shepard told him to confine his account to the events the subject of the complaint he had written to the Premier.[107] This is highly likely to have been the case. As it was, the Shepard record of interview occupied two days.

41. Counsel for Mr Bennett continues to claim that Brajkovic was trying to discredit Bennett.[108] In the Inquiry, Brajkovic rejected the suggestion, saying that Bennett was "*the only one officer that was civilised there*", that "*he tried to be nice to me*"

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[103] Page 14 at [44].
[104] T3211.8 [ex 2.1-Day 100, red p 3289].
[105] Page 14 at [44].
[106] InqT-Day 42, p 3202 L39.
[107] InqT-Day 43, p 3259 L11.
[108] Cf Bennett submissions, [169].

and that he was the only one that Brajkovic would "*praise as the good person, the good man.*"[109]

42. The submission[110] that Mr Brajkovic made a "*slip*" in telling the trial court that the FM microphone "*was on the wall when the detective presented the batteries and alleged it was used, intended to be used in some kind of bomb*"[111] is an exaggerated attempt to see guilt in anything Brajkovic said. As was clear when Brajkovic gave the evidence in the trial and as Brajkovic explained in the Inquiry, this was a reference not to conversation with detectives in the study/workshop but to the allegations that detectives made *in the broader case* that the batteries were to be used in some kind of bomb.[112] It is hardly likely that Brajkovic talked with Wilson about the batteries being part of a bomb when, according to Wilson, Brajkovic was not in the room when he located the batteries.[113] When considering the matters painted as inconsistences in Brajkovic's accounts, the Inquiry should take into account (1) that there were different purposes of each of those occasions, (2) his limitations with the English language and (3) that, unlike the detectives, he had no training in evidence-giving and was not a professional witness. We submit that the word "*wall*" in the trial transcript was a typographical error for "*court*".

43. The DPP submits[114] that Virkez's awareness in March 1979 that Brajkovic resided with his brother-in-law undercuts Brajkovic's claims that Virkez manufactured his evidence against him drawing upon what he learned in the committal hearing. This is not correct. For a period of time, the Croatian Six and Virkez were held in custody together if only in court cells.[115] Because of Milroy's account of Virkez telling him on 7 March that Brajkovic said he watched the Police using binoculars,[116] the Inquiry knows Virkez heard Brajkovic talk about what happened on the night of his arrest. The Inquiry knows this because Brajkovic always said that he watched the Police using binoculars, so it can be accepted that Virkez

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[109] InqT-Day 42, p 3212 L29.
[110] At [79]-[80].
[111] T3217 [ex 2.1-Day 100, red p 3294].
[112] InqT-Day 42, pp 3211 L40 – 3212 L3.
[113] Ex 4.2-31, red pp 367-368, at pars [5]-[6].
[114] DPP submissions, [243].
[115] Cf Brajkovic, InqT-Day 43, p 3247 L35 – 3248 L19.
[116] Ex 11.50A-29.

heard Brajkovic speak about it. Given Hudlin played a role in the events of both the evening and the night of 8 February, it is hardly surprising that, in any account he gave of the events of 8 February shortly afterwards, Brajkovic mentioned his brother-in-law as having been living with him and his wife.

## Source of electronics component in ex TTT – Virkez's claim to have gone electronics shopping with Brajkovic

44. Counsel for the DPP make submissions[117] about the trial evidence of Ian Ralph, managing director of Pre-Pak Electronics, about the origins of an electronics component (a reed relay) attached to a circuit board (ex TTT) found at Brajkovic's house which had a marking on it indicating it was manufactured by the "Plessey company". Virkez claimed that on 7 January he had gone with Brajkovic to a shop (which could have been Ralph's shop) and purchased the switches attached to ex UUU – a different piece of circuit board found in the boot of Virkez's car.[118]

45. The DPP points[119] to Ralph's evidence that he was the sole retailer of the Plessey components concerned. Virkez may have got his electronic components from Pre-Pak, although the Dick Smith catalogues found in the Virkez's car and at Hassans Wall[120] suggest Virkez may also have had other sources. But the evidence of Mr Ralph is a doubtful basis on which to draw conclusions about Brajkovic. It was not explained how Ralph was able to say what Plessey did with all its components. There was no evidence excluding the possibility that other wholesalers or retailers bought direct from Plessey.

46. Illustrative of the problems with Ralph's evidence was the fact that Jack Hudlin worked at the Plessey factory.[121] He knew nothing of electronics (he was a maintenance fitter) but he said that from time to time he brought home and gave Brajkovic electronic components he had obtained at the factory. Supporting Hudlin as a reliable witness, when shown the Plessey component attached to

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[117] DPP's submissions, [240]-[242].
[118] T983 [ex 2.1-Day 36, red p 1033].
[119] DPP's submissions, [240].
[120] See Petitioners' submissions, [1327]-[1328].
[121] Ex 4.1-KKKK, red p 259.

ex TTT, Hudlin said it was smaller than the items he brought home.[122] The point is that it showed that the Crown case that Pre-Pak was the sole source of Plessey electronic components was incorrect.

## Submission re Bebic's 'evidence' against Zvirotic

47. The submission for the DPP that "*Bebic was reliable in his evidence implicating Zvirotic both at Macauley St and in his record of interview across 8 – 9 February 1979*"[123] should not be taken literally. Bebic gave no such evidence.

## Report can recommend exercise of pardoning power

48. Counsel for the DPP submit[124] that the distinction in Part 7 *Crimes (Appeal and Review) Act 2001* between the subject-matter of Division 3 (Applications to the Supreme Court) and the subject-matter of Division 2 (Petitions to the Governor) means that it is doubtful that a report following an inquiry ordered under s 79(1)(a) should include recommendations as to the exercise of the pardoning power. This does not follow from the language of those divisions. In the case of an inquiry ordered under s 475(1) *Crimes Act 1900* (ACT), a counterpart to the NSW provision in like terms and predecessor to s 79(1)(a) *Crimes (Appeal and Review) Act 2001*, the High Court considered that such an inquiry could inquire into matters other than guilt such that where the inquiry was successful from the convicted person's point of view it could lead to a pardon.[125] In the *Rendell* matter, under legislation as it then stood, concealment of potentially exculpatory evidence resulted in a pardon.[126]

49. Sub-section 82(1)(b) *Crimes (Appeal and Review) Act* requires the Inquirer to "*cause a report of the results of the inquiry*" to be sent to the Chief Justice. A stipulated circumstance in which it would be appropriate to consider the exercise of the pardoning power is a "*result of the Inquiry*".

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[122] T3389.4 [ex 2.1-Day 103, red p 3472].
[123] At [248].
[124] DPP submissions, [23].
[125] *Eastman v DPP (ACT)* [2003] HCA 28; 214 CLR 318 at [103].
[126] *R v Rendell* (NSWCCA, 22 June 1994, unreported).

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