

## INQUIRY INTO THE CONVICTIONS OF THE CROATIAN SIX COMMONWEALTH'S CLOSING SUBMISSIONS

### A. INTRODUCTION

1. The Commonwealth, as instructed by the Australian Security Intelligence Organisation (ASIO) and the Department of the Prime Minister and Cabinet (PM&C), has been given leave to appear at the Inquiry.<sup>1</sup> The Commonwealth's interest in the Inquiry is a consequence of (a) a large number of Commonwealth documents having been produced to, or otherwise obtained by, the Inquiry;<sup>2</sup> (b) a number of former Commonwealth officers having given evidence before and/or statements to the Inquiry; and (c) "Issue 1" of the **Scope of Inquiry** which, in part, concerns the Commonwealth's understanding of the extent or nature of Vico **Virkez's** connection with the Yugoslav Government and its provision of information to NSW Police in relation to that topic.
2. The Commonwealth does not make submissions on the ultimate issues to be determined by the Inquiry – that is, whether there is reasonable doubt as to the guilt of each member of the Croatian Six. Rather, having regard to the Commonwealth's narrow interest in the Inquiry, as explained above, these submissions are confined to the following matters:
  - 2.1. The credibility of the former Commonwealth officers who produced a witness statement to and/or gave evidence before the Inquiry.
  - 2.2. The role of Virkez, if any, with respect to the Yugoslav Intelligence Service (YIS). This is an aspect of Issue 1 of the Scope of Inquiry.
  - 2.3. The Commonwealth's disclosure of information regarding Virkez to the NSW Police. This is also an aspect of Issue 1 of the Scope of Inquiry.
  - 2.4. Specific matters raised in the written closing submissions of Counsel Assisting (CA) and the Petitioners (P) which concern the Commonwealth and/or its former officers.

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<sup>1</sup> See letter from the Department of Communities and Justice to the Australian Government Solicitor (AGS) dated 26 April 2024; T2874.11 – T2874.26.

<sup>2</sup> Where such production has been by Commonwealth agencies, this has been done on a voluntary basis.

**B. CREDIBILITY OF COMMONWEALTH WITNESSES**

3. Four former Commonwealth officers gave evidence before the Inquiry:
  - 3.1. Richard **St John**, who at relevant times held the position of First Assistant Secretary within the Parliamentary and Government Division of PM&C;<sup>3</sup>
  - 3.2. Ian **Cunliffe**, who at relevant times held the position of Senior Advisor, Government and Legal Branch at PM&C;<sup>4</sup>
  - 3.3. Michael **Boyle**, who at relevant times worked in the Headquarters Liaison Group within ASIO;<sup>5</sup> and
  - 3.4. Gary **Barkley**, who at relevant times was a Captain in the Royal Australian Army Ordnance Corps.<sup>6</sup>
4. In addition, Thomas **Sherman**, who at relevant times was the First Assistant Crown Solicitor and, subsequently, the Acting Crown Solicitor within the then-Commonwealth Crown Solicitors Office, provided a statement to the Inquiry but was not requested to give evidence before the Inquiry.
5. The Commonwealth submits that St John, Boyle and Barkley were each helpful and credible witnesses who did their best to assist the Inquiry. They made appropriate concessions regarding the limits of their recollection of relevant events,<sup>7</sup> given the significant passage of time, but nonetheless endeavoured to answer questions to the best of their ability having regard to the documentary material made available to them. The same observation can be made regarding Sherman's witness statement. The Commonwealth agrees with the favourable observations made by Counsel Assisting regarding these witnesses.<sup>8</sup>
6. The position with respect to Cunliffe is more nuanced. While his testimony before the Inquiry likely reflects his honestly held views and beliefs, the Commonwealth submits that,

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<sup>3</sup> T3046.26-28 (St John – Inquiry evidence).

<sup>4</sup> T2875.43-49 (Cunliffe – Inquiry evidence); Ex 15.18, red p 84 at [8].

<sup>5</sup> T3063.25-27 (Boyle – Inquiry evidence).

<sup>6</sup> T2819.11-21.

<sup>7</sup> See, for example, statement of Richard St John (Ex 15.31) red p 265 at [3].

<sup>8</sup> CA[883] with respect to Boyle; CA[1004] with respect to St John; CA[1800] with respect to Barkley.

by and large, his evidence did not involve a fair or objective assessment of the events in question. Rather, he presented as a partisan witness who viewed, and sought to characterise, Commonwealth officials and agencies in the least favourable light. For example, he likened a Deputy Secretary of PM&C to a character from *Yes, Minister*;<sup>9</sup> he claimed that statements made by the then Director-General of ASIO should be taken with a “*grain of salt*”;<sup>10</sup> he claimed that the Acting Crown Solicitor had “*spoken loosely*” in a memorandum to the Commonwealth Attorney-General;<sup>11</sup> he characterised a letter from an Assistant Commissioner of the AFP<sup>12</sup> as “*less than frank*”, “*short on details*” and “*providing scant detail*”;<sup>13</sup> he characterised a senior ASIO officer’s input into the minutes of an interdepartmental committee meeting<sup>14</sup> as seeking to “*hide Virkez’s status as a Yugoslav agent*”<sup>15</sup> and he suggested that a senior officer within PM&C had directed him to “*vague up*” those minutes.<sup>16</sup> None of these contentions and criticisms withstand scrutiny.<sup>17</sup> As Counsel Assisting put to Cunliffe, his evidence to the Inquiry was slanted, not correct or expressed with partiality to criticise or bring into disrepute certain Commonwealth agencies or Commonwealth officials.<sup>18</sup>

7. Further, it was also apparent that, as Counsel Assisting submitted,<sup>19</sup> Cunliffe has “*taken a particular view ultimately of the outcome of the trial, and that has coloured some of his recollections and statements that he has made*” in his evidence before the Inquiry.<sup>20</sup> For

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<sup>9</sup> T3011.43-45 (Cunliffe – Inquiry evidence).

<sup>10</sup> T3032.28 (Cunliffe – Inquiry evidence).

<sup>11</sup> T2999.27 (Cunliffe – Inquiry transcript).

<sup>12</sup> Ex 10.1-14, red p 25-26.

<sup>13</sup> Ex 15.18, red p 86 at [21].

<sup>14</sup> Ex 9.1-51, red p 71.

<sup>15</sup> Ex 15.18, red p 92 at [75].

<sup>16</sup> T2913.39-40 (Cunliffe – Inquiry evidence). Cunliffe made that suggestion whilst having no recollection having discussed the minutes with the PM&C colleague: T2913.42-44.

<sup>17</sup> See also Counsel Assisting’s cross-examination of Cunliffe at: T2950.29-2954.34 (mischaracterising Cavanagh’s evidence to the CCA and Shillington’s summing up to the jury); T2956.40 – 2958.48 (claims that documents produced by the Commonwealth in the CCA appeal were edited so as to be seriously misleading).

<sup>18</sup> T2962.29-32.

<sup>19</sup> T2959.18-20.

<sup>20</sup> See, for example, Cunliffe’s evidence that, in his view, “*in a properly conducted trial, [the Croatian Six] would not have been convicted*”: T2938.10-25; a view he was comfortable expressing despite admitting that his knowledge of the case was based on a newspaper article and that he “*hadn’t been following the case*”: T2938.43-48; see also T2940.4-31 and T2978.35-48.

these reasons, Cunliffe's evidence should be treated with caution. Furthermore, the Commonwealth submits that specific aspects of his evidence, identified in these submissions below, should not be accepted.

### C. ACTIVITIES AND ROLE OF VIRKEZ

8. An aspect of Issue 1 of the Scope of Inquiry is “[t]he extent of the involvement between Mr Virkez and the YIS or UDBa, including whether he was an agent provocateur or a low level agent”.

#### Virkez's activities

9. Whether Virkez should be characterised as having been an “informant”, an “agent” or even an “agent provocateur” may be something of a distraction. Rather, the Commonwealth submits that the more relevant inquiry concerns what Virkez, in fact, *did* in connection with Yugoslav authorities.
10. Direct evidence of Virkez's activities is found in ASIO's records of intercepted phone calls between Virkez and the Yugoslav Consulate (**ASIO intercept reports**).<sup>21</sup> Those reports are described in detail at CA[814]-[823] and reveal that from at least 9 August 1978, Virkez had been providing information to Veljko Grce, who was employed at the Yugoslav Consulate and was suspected by ASIO to be an Intelligence Officer. The second ASIO intercept report is the only report which records Grce giving Virkez any kind of direction or tasking – namely for Virkez “to bring with him that ‘thing’ he promised to bring” and that Grce wanted Virkez to learn how to use unspecified “gadgets”, although Virkez “*did not appear to be too keen*”.<sup>22</sup> Two ASIO intercept reports also record Virkez and Grce arranging to meet in person.<sup>23</sup> Otherwise, the ASIO intercept reports record Virkez providing information to Grce on what might generally be described as “Croatian activities”.
11. As the Petitioners point out at P[1290], the first ASIO intercept report indicates that Virkez had a pre-existing relationship with Grce.<sup>24</sup> While that appears to be the case, the first ASIO intercept report is the first record held by ASIO of Virkez informing the Yugoslav

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<sup>21</sup> Ex 9.1-1, red p 1 – Ex 9.1-15, red pp 17-19.

<sup>22</sup> Ex 9.1-2, red p 2.

<sup>23</sup> See Ex 9.1-5, red p 6; Ex 9.1-7, red p 8.

<sup>24</sup> Ex 9.1-1, red p 1.

Consulate on Croatian activities.<sup>25</sup> Accordingly, the extent or nature of any prior dealings between Virkez and the Yugoslav Consulate is unclear. The most obvious inference to be drawn is that to the extent Virkez had dealings with the Yugoslav Consulate prior to 9 August 1978, those dealings were of a similar nature to those described in the ASIO intercept reports.

12. There are other documents before the Inquiry which record what Virkez has said, or apparently said, about his own activities with respect to the Yugoslav Consulate and Yugoslav authorities.

- 12.1. The Inquiry has a copy of the affidavit made by Roger **Cavanagh** who, at relevant times, was employed by the Commonwealth Police and then the Australian Federal Police (AFP),<sup>26</sup> and a transcript of Cavanagh's testimony before the CCA. Cavanagh's evidence principally concerned what Virkez said during an interview on 21 February 1980 about his dealings with the Yugoslav Consulate.<sup>27</sup> In his affidavit, Cavanagh deposed that during the interview, Virkez confirmed he had been giving the Yugoslav Consulate "*information about things in the community*" but that he denied being more than a "*casual informant*", or an "*officer of UDBa*".<sup>28</sup> In his evidence before the CCA, Cavanagh explained that Virkez had said he had visited the Yugoslav Consulate on some occasions, including in respect of "*legitimate*" business concerning passports and transferring money, and also to drop in a newspaper or pamphlet and to provide "*general information which is sought by a number of foreign governments, most of which is overtly available but they prefer to collect it in this manner*" and that this occurred over a period of months but "*it was not a regular thing*".<sup>29</sup> Cavanagh's evidence was that he "*formed the impression that [Virkez] was ... carrying out a minor function which is often requested by a number of Governments. ... He was simply providing information*".<sup>30</sup>

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<sup>25</sup> Ex 9.1-46, red p 64 at [4(a)].

<sup>26</sup> Ex 4.3-5, red pp 741-747.

<sup>27</sup> Ex 2.4-10, red pp 9562-9568.

<sup>28</sup> Ex 4.3-5, red p 743 at [6].

<sup>29</sup> Ex 2.4-10, red pp 9563, 9567.

<sup>30</sup> Ex 2.4-10, red p 9564.

- 12.2. Former Detective Sergeant **Jefferies** of the NSW Police Special Branch gave evidence to the Inquiry that during an interview on 10 February 1979, Virkez may have mentioned that he had “*rung*” the Yugoslav Consulate prior to 8 February 1979, although it is not clear what that may have related to.<sup>31</sup> Jefferies did, however, form the view during the interview that Virkez had joined the Croatian Republican Party “*to further Yugoslavia’s cause*”.<sup>32</sup> Jefferies also gave evidence before the Inquiry that, around this time, he was told by an ASIO officer that Virkez had twice offered his services as an agent to the Yugoslav Government, via the Yugoslav Consulate, and had twice been rejected.<sup>33</sup>
- 12.3. Finally, the Inquiry has records of what Virkez told journalist Chris Masters in 1991 about him “*spying for the Yugoslav authorities since the early seventies before the 1972 armed incursion*”,<sup>34</sup> and what he apparently told journalist Paul McGeough, also in 1991, that he had informed the UDBa in 1972 about an Australian “*terrorist team*” entering Yugoslavia and that after this “*he had come under pressure to become a regular informant*”.<sup>35</sup> Virkez told both journalists he was a member of the Serbian terrorist group, the “*Black Hand*”.<sup>36</sup>
13. In determining the nature and extent of Virkez’s activities and involvement with Yugoslav authorities, the ASIO intercept reports should be afforded the greatest weight as they provide an objective and contemporaneous record of Virkez’s dealings with the Yugoslav Consulate. As Counsel Assisting submits at CA[1169], they are the most probative evidence in this regard. The evidence given by Cavanagh and Jefferies is generally consistent with what the ASIO intercept reports reveal. On the other hand, Virkez’s account of his dealings with the Yugoslav Consulate, as given to Masters and McGeough, should be treated with substantial caution. As Counsel Assisting point out, some of the claims made (or apparently made) by Virkez in his interviews with Masters and McGeough were “*inherently implausible*”, “*nonsensical*”, “*not borne out by the records*” (CA[1137]-

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<sup>31</sup> T630.50 – T631.17 (Jefferies – Inquiry evidence).

<sup>32</sup> T586.42 – T587.25 (Jefferies – Inquiry evidence).

<sup>33</sup> T584.15-21, T584.34-49 and T594.12-42 (Jefferies – Inquiry evidence).

<sup>34</sup> Ex 13.2, red p 20.

<sup>35</sup> Ex 15.5, red pp 19-20.

<sup>36</sup> Ex 13.5 [timestamp: 00:27 – 02:31]; Ex 13.5-1, red p 31-1; Ex 13.9, red pp 36, 39; Ex 15.5, red p 19.

[1138]) and ‘*at times fanciful and give[] the impression he is prone to hyperbole and grandiosity*’ (CA[1143]).

14. Finally, the Commonwealth submits that Jefferies is very likely mistaken in recalling that an ASIO officer told him that Virkez twice sought to become an agent to the Yugoslav Government and was twice “*rejected*”.<sup>37</sup> There is no documentary evidence before the Inquiry which support that suggestion.<sup>38</sup> To the contrary, it is inconsistent with the statement made in an ASIO telex that ‘*Virkez is first recorded by this Organisation informing on Croatian activities to the Yugoslav Consulate ... on 9.8.78*’.<sup>39</sup> There is no apparent reason why that telex would misstate, or provide misleading information about, ASIO’s holdings. The more likely scenario is that Jefferies’ recollection is mistaken and that he has conflated this with his recollection of what Virkez told him on 10 February 1979 about having twice approached the Yugoslav Consulate *on 8 February 1979* about the bomb plot and having twice been “*knocked back*” and told to go to the police.<sup>40</sup> Jefferies accepted in his evidence before the Inquiry that he may have conflated those matters.<sup>41</sup>
15. In summary, the most reliable evidence before the Inquiry as to what Virkez actually *did* indicates that he had, from at least 9 August 1978, been providing information to an employee of the Yugoslav Consulate who ASIO suspected to be a Yugoslav Intelligence Officer.<sup>42</sup>

### **Characterisation of Virkez’s role**

16. To the extent it is necessary or desirable to characterise Virkez’s role in undertaking those activities, it is useful to apply the definitions of “informant”, “agent” and “agent provocateur” provided by Boyle in his evidence before the Inquiry and in ASIO documents

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<sup>37</sup> T2365.44 – T2366.5, T2368.23-32 and 2506.21-30 (Jefferies – Inquiry evidence) C.f. P[1292] and P[1603].

<sup>38</sup> Jefferies evidence was that he “*probably did*” record this information in a report within Special Branch, but no such report has been produced to the Inquiry: T2368.45-46 (Jefferies – Inquiry evidence).

<sup>39</sup> Ex 9.1-46, red p 64.

<sup>40</sup> T584.34 – T585.32 (Jefferies – Inquiry evidence).

<sup>41</sup> T2547.5-9 (Jefferies – Inquiry evidence). Jefferies’ confusion about this is also apparent from T2369.5 – T2371.21 (Jefferies – Inquiry evidence).

<sup>42</sup> See also Ex 10.3-49, red p 188 at [5] where an ASIO officer states that “*GRCE was identified [redacted] as a YIS officer*”.

before the Inquiry.<sup>43</sup> Those definitions are conveniently summarised at CA[1166], and are to the following effect:

- 16.1. an informant or informer is the same as a “human source” – that is, someone who reports or passes information to, relevantly, a government authority;
- 16.2. an agent is someone who is “managed” or “under control” of, relevantly, an intelligence service, and is “directed to a particular target to do particular things”;
- 16.3. an agent provocateur is an agent who is “directed to carry out certain actions which will provoke a reaction that the intelligence service can manage”.

17. Virkez is described in a number of ways in documents that are before the Inquiry. Of particular note are the following:

- 17.1. A report prepared by ASIO for the Special Interdepartmental Committee on Protection against Violence (the **SIDC-PAV Report**) describes Virkez as having “*acted as an informer ... to a person suspected by ASIO of being an intelligence official attached to the Yugoslav Consulate-General in New South Wales*” (emphasis added).<sup>44</sup> This is consistent with the ASIO intercept reports, upon which the relevant aspects of the SIDC-PAV Report was based, which describe Virkez as an “*informant*” or “*informer*”.<sup>45</sup>
- 17.2. A letter from Assistant Commissioner Farmer of the AFP to the Secretary of PM&C dated 11 March 1980 states that, in the opinion of AFP officers who had interviewed Virkez (including Cavanagh), Virkez had “*been operating in Australia as an agent of the Yugoslav Government*” (emphasis added).<sup>46</sup> Minutes of an interdepartmental meeting held on 12 March 1980 (**First IDC**) and attended by representatives of various Commonwealth agencies, record that Cavanagh described Virkez as “*a low level agent*” (emphasis added).<sup>47</sup>

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<sup>43</sup> T3085.34-T3086.12 and T3094.2-11 (Boyle – Inquiry evidence); Ex 10.3-50, red p 197.

<sup>44</sup> Ex 9.1-21, red p 30.

<sup>45</sup> Ex 9.1-2, red p 2 and 3; Ex 9.1-8, red p 9.

<sup>46</sup> Ex 9.1-38, red p 55; see also Ex 10.1-8, red p 14 which records Cavanagh describing Virkez as a “*Yugoslav agent*”.

<sup>47</sup> Ex 10.1-12, red p 21.



- 17.3. An ASIO file note made by Director-General Barnett dated 18 May 1982 states that “*whereas ASIO had originally considered [Virkez] to be a YIS ‘agent’, later evidence led us to hold the view that he was an ‘informant’ of the Yugoslav Consulate in Sydney*”.<sup>48</sup>
18. A number of documents created during the period of the investigation, committal, trial and CCA appeal use the term “*agent provocateur*”. However, none of those documents involve a considered assessment by Commonwealth intelligence officials that Virkez was, in fact, acting as an “agent provocateur” in the sense set out at [16.3] above. For example, some documents express a concern that Virkez may be characterised by *others* as an “*agent provocateur*” but do not themselves endorse that view.<sup>49</sup> Additionally, two ASIO documents warrant specific mention. One ASIO document, dated 6 July 1982, refers to Virkez as a “*YIS informant and suspected agent provocateur*”. However, as Counsel Assisting observe at CA[889], that document contains no analysis or elaboration as to the basis for that description.<sup>50</sup>
19. Another ASIO document, dated 31 August 1982, states that Virkez “*was an UDBa agent who set up the arrest of fellow Croatian Republican Party (HRS) members at Lithgow*”.<sup>51</sup> Importantly, however, that claim was made by an ASIO agent, *not* an ASIO officer. Boyle explained in his evidence that:
- 19.1. the term “agent” has a precise meaning within ASIO, in particular “*the agent had to be managed under control*” and, importantly, “[i]n ASIO terminology, an agent is not an officer of the organisation” (emphasis added);<sup>52</sup>
- 19.2. the statement recorded in this document that Virkez “*was an UDBa agent who set up the arrest of fellow Croatian Republican Party (HRS) members at Lithgow*” was made by an agent, not an ASIO officer.<sup>53</sup>
20. Further, the basis upon which the agent made that assertion is not revealed in the document.

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<sup>48</sup> Ex 9.1-81, p 116.

<sup>49</sup> For example, statements attributed to NSW Police Assistant Commissioner Roy Whitelaw in Ex 9.1-26, red p 37. See, similarly, 10.1-13.

<sup>50</sup> Ex 9.1-87, red p 128.

<sup>51</sup> Ex 9.1-88, red p 129.

<sup>52</sup> T3094.2-9 (Boyle – Inquiry evidence).

<sup>53</sup> At T3177.38 – 3179.30 (Boyle – Inquiry evidence).

21. The evidence before the Inquiry falls well short of supporting the inference that Virkez was an agent provocateur – that is, that he had been directed by the YIS to carry out actions designed to provoke a reaction – in connection with the Croatian Six or otherwise. There is no credible evidence that Virkez was, on behalf of the YIS (or anyone else), running a ‘false flag’ operation or otherwise ‘setting up’ the Croatian Six. The Commonwealth, respectfully, agrees with and adopts Counsel Assisting’s submission at CA[1188] that regardless of the labels that different Commonwealth agencies may have affixed to Virkez after the event,<sup>54</sup> the evidence does not establish he was acting as an agent provocateur at the behest of the Yugoslav Consulate or any Yugoslav intelligence organisation.<sup>55</sup>
22. The Commonwealth further agrees with Counsel Assisting’s submission at CA[1169] that “*Virkez was acting primarily in the nature of an informant, although at times he would receive some instructions or suggestions from his contact at the Consulate*” and, at CA[1175], that “*Virkez’s status was one of an informant or source, not an agent of the Yugoslav government*”. That position is supported by the contemporaneous records of Virkez’s activities: the ASIO intercept reports. It is also consistent with Boyle’s account of what he told the second interdepartmental meeting held on 9 April 1980 (**Second IDC**) regarding ASIO’s intelligence holdings with respect to Virkez,<sup>56</sup> as well as Cavanagh’s and Jefferies’ account of what Virkez told them about his dealings with the Yugoslav Consulate.<sup>57</sup>
23. The introduction at P[1303] and elsewhere in the Petitioners’ submissions of additional descriptors of Virkez as a “*Yugoslav spy*” and a “*YIS operative*” does not assist in understanding Virkez’s role. It is unclear what the word “*spy*” means in this context. If it is simply being used to describe Virkez’s activities in obtaining information about Croatian affairs and providing it to the Yugoslav Consulate (or to a person suspected by ASIO of being an intelligence official working in the Yugoslav Consulate), it is no more than a

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<sup>54</sup> Eg Ex 10.3-49, red p 186; Ex 10.3-50, red p 197; Ex 10.3-51, red p 199.

<sup>55</sup> A file note created by the Director-General of ASIO dated 18 May 1982 stated that Virkez’s “*actions on reporting in advance the proposed bombing operation and the Yugoslav reaction to this information, indicated that the Yugoslavs were not masterminding the plot*”: Ex 9.1-81, red p 116, addressed in Boyle’s evidence at T3171.18 – T3172.25 (Boyle – Inquiry evidence).

<sup>56</sup> Ex 9.1-51, red p 71. This account should be preferred over Cunliffe’s, which appears at Ex 10.4-1(A), red p 352. The Commonwealth agrees with and adopts Counsel Assisting’s submission on this point at CA[883] and [1172]. A further reason why Cunliffe’s account should not be preferred is that it attributed to Boyle a claim that Virkez was *himself* suspected of being a YIS officer, a suggestion which is entirely at odds with ASIO’s documented assessment of Virkez.

<sup>57</sup> See [12.1] – [12.2] above.

synonym for “informer” or “informant”. If it is intended to convey more than this, it is ambiguous. The term “*YIS operative*” has connotations of “YIS agent” or “agent provocateur” which, for the reasons referred to above, is not an accurate characterisation of Virkez’s activities. Further, the suggestion that Virkez was a “*YIS operative*” sits uncomfortably with the, respectfully, correct observation at P[1303] that “*The evidence that [Virkez] acted under the control of the YIS is thin*”.

24. The Commonwealth respectfully agrees with and adopts Counsel Assisting’s submission at CA[1143] as to the absence of credible evidence that Virkez was in contact with, or an informant to, ASIO.<sup>58</sup> The Petitioners’ suggestion at P[1304]-[1307] that Virkez had been reporting to Cavanagh is pure speculation and should not be accepted.<sup>59</sup>

#### **D. COMMONWEALTH’S DISCLOSURE TO NSW POLICE REGARDING VIRKEZ**

25. An aspect of Issue 1 of the Scope of Inquiry concerns the “[k]nowledge of Commonwealth departments and NSW Police about Mr Virkez’ connections [with the Yugoslav government, YIS or UDBa], including what information was relayed to NSW Police and when.”
26. Before addressing the Commonwealth’s knowledge of such matters and its disclosures to NSW Police, it is convenient to identify what NSW Police independently or separately knew or learned about Virkez early in its investigation. That is because such knowledge likely informed any discussions or dealings between NSW Police and Commonwealth officials concerning Virkez.
27. When Virkez attended Lithgow Police station on 8 February 1979 to report the “bomb plot”, he advised Senior Constable Christopher **Ingram** that his real name was Vito Misimovic, which was a Serbian name; that he was in fact Serbian; and that he was using the name Vico Virkez, which was a Croatian name.<sup>60</sup> Detective Sergeant John **Marheine**, who was also stationed at Lithgow on 8 February 1979, was aware from previous dealings with Virkez that he had been formerly known as Misimovic.<sup>61</sup>

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<sup>58</sup> Claims to that effect were made by Virkez to journalists Chris Masters and Paul McGeough in 1991: Ex 13.5-1, red pp 31-1 – 31-2 and Ex 15.5, red pp 18-19 and 21.

<sup>59</sup> Milroy had no awareness of Virkez having ever been an informant to Cavanagh: T330.49 – 331.6, T1867.7-18 and T1874.5-16 (Milroy – Inquiry evidence).

<sup>60</sup> Ex 2.1, red p 53; T95.33-39 (Ingram – Inquiry evidence).

<sup>61</sup> Ex 2.3-45 red p 8554; T143.15-22 (Marheine – Inquiry evidence).

28. As noted earlier in these submissions, on 10 February 1979, Detective Sergeant Jefferies interviewed Virkez.<sup>62</sup> Jefferies' evidence before the Inquiry was that during the interview, Virkez said that he was not Croatian but, rather, Serbian, that he was pretending to be Croatian and that his real name was Vitomir Misimovic.<sup>63</sup> Virkez also told Jefferies that he had approached the Yugoslav Consulate about the bomb plot and was told to go to the police instead.<sup>64</sup> As noted above, Jefferies' recollection, when giving evidence to the Inquiry, was that Virkez may have mentioned having "*rung*" the Yugoslav Consulate prior to 8 February 1979<sup>65</sup> and Jefferies' assessment was that Virkez was an "*ardent Yugoslav*".<sup>66</sup> Jefferies prepared a report of this interview for his superior in Special Branch, Detective Inspector John **Perrin**, and showed a copy of that report to Detective Sergeant Kelvin "Ted" **Turner**, the Criminal Investigation Branch (**CIB**) officer in charge of the investigation.<sup>67</sup> Jefferies also advised Detective Senior Constable Alistair **Milroy**, who was assisting Turner in the preparation of the brief of evidence, that Virkez had been providing information to the Yugoslav Consulate.<sup>68</sup> Milroy understood that Virkez was a "*community source*" or a "*community informer*" and that "*he was passing on information about pamphlets and .... the activities of these groups*".<sup>69</sup> Milroy's evidence to the Inquiry was that this information was provided to the Crown prosecutor.<sup>70</sup>
29. It is against that background that these submissions address the Commonwealth's disclosure of information to NSW Police – specifically:
- 29.1. Information provided by the Yugoslav Vice-Consul to the Commonwealth Police on 8 February 1979 that Virkez/Misimovic had called the Yugoslav Consulate about the "bomb plot".

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<sup>62</sup> Jefferies' evidence about this given at committal and trial is summarised at CA[681]-[688].

<sup>63</sup> T582.26-42, T583.22-23, 35-46 and T584.23-27 (Jefferies – Inquiry evidence).

<sup>64</sup> T584.34 – T585.32 and T630.36 – T631.17 (Jefferies – Inquiry evidence).

<sup>65</sup> T630.50 – T631.17 (Jefferies – Inquiry evidence).

<sup>66</sup> T586.44 (Jefferies – Inquiry evidence).

<sup>67</sup> T581.27-46, T589.15 – T591.16, T597.45 – T599.9, T602.1-5, T629.19-45, T2328.35-39, T2455.45-50 (Jefferies – Inquiry evidence): Jefferies later acknowledged that he may have been mistaken about preparing a report but, later again, accepted that he likely did prepare a report: T2537.23-26 and T2564.41 – T2565.4, respectively (Jefferies – Inquiry evidence).

<sup>68</sup> T294.1-20, T305.29-34 (Milroy – Inquiry evidence).

<sup>69</sup> T293.29-44 (Milroy – Inquiry evidence).

<sup>70</sup> See, eg, T295.16-42 (Milroy – Inquiry evidence).

- 29.2. The SIDC-PAV Report and Virkez's prior communications with the Yugoslav Consulate.
- 29.3. Virkez's letter to the Prime Minister in late 1979.
- 29.4. Information Cavanagh obtained from an interview with Virkez in February 1980.
30. In each case, it is submitted that the Commonwealth made appropriate disclosures to NSW Police.

**Information from Yugoslav Consulate about call from Virkez on 8 February 1979**

31. On 8 February 1979, the Vice-Consul at the Yugoslav Consulate in Sydney advised the Commonwealth Police that earlier that day the Consulate had received a call from "*Vitomir Mesimovic of 6 McLily St, Lithgow*" (sic) who said that he had been instructed with three others, "*Brajkovic*", "*M. Bebic*" and "*A. Zvirkovic*" (sic), to place explosives at a number of specified locations in Sydney.<sup>71</sup> That day, the Commonwealth Police provided that information to NSW Police Special Branch, specifically to Jefferies,<sup>72</sup> and Jefferies' evidence to the Inquiry was that he would have discussed this information with Perrin "*immediately*"<sup>73</sup> and that he thought Perrin informed CIB.<sup>74</sup>
32. On 26 March 1979, Detective Senior Constable John **Krawczyk** of Special Branch directed Turner's attention to this information by way of an entry in a Police "*occurrence pad*", which attached a copy of a Commonwealth Police telex recording the information that had been provided by the Vice-Consul on 8 February 1979.<sup>75</sup> Jefferies' evidence to the Inquiry was that Perrin also raised this information with Turner.<sup>76</sup> Milroy accepted in his evidence

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<sup>71</sup> Ex 10.1-16, red p 30; Ex 10.3-4, red p 83.

<sup>72</sup> Ex 10.1-16, red p 30; Ex 10.3-4, red p 83; Ex 11.50, red pp 208 and 226; Ex 9.1-17, red p 23. See also T696.27-37, T707.45 – T709.5 (Jefferies – Inquiry evidence). Milroy's evidence was that by making the entry in the running sheet at Ex 11.50, red p 208, Jefferies was reporting this information back to Turner: T416.42 – T417.3 (Milroy – Inquiry evidence).

<sup>73</sup> T709.19-23, T2497.4-18 (Jefferies – Inquiry evidence).

<sup>74</sup> T709.45-49, T710.19-18, T2496.29-34 (Jefferies – Inquiry evidence).

<sup>75</sup> Ex 11.50A-59, red pp 229-130 – 229-130A. See also T2176.44 – T2177.41 (Krawczyk – Inquiry evidence). Special Branch received a copy of the Commonwealth Police telex no later than 23 March 1979: T2184.49 – T2185.20 (Krawczyk – Inquiry evidence). Jefferies accepted that the Commonwealth Police may have provided him a copy of that telex on 9 February 1979: T2496.18-20 (Jefferies – Inquiry evidence).

<sup>76</sup> T699.1-3 (Jefferies – Inquiry evidence).

before the Inquiry that he, too, would have seen the information Krawczyk entered into the occurrence pad.<sup>77</sup>

### **SIDC-PAV Report and Virkez's prior reporting to Yugoslav consulate**

33. The SIDC-PAV Report is dated 28 February 1979.<sup>78</sup> Relevantly, it states:

*34. One of those arrested was to act as a driver for those involved in the proposed bombing operation. For a period of at least six months prior to the arrests, that person also acted as an informer on Croatian nationalist activities to a person suspected by ASIO of being an intelligence official attached to the Yugoslav Consulate-General in New South Wales. Some hours before his arrest that person contacted officials at the Consulate-General and passed them detailed information about the proposed bombings.*

*35. The incident reveals the depth of the penetration of Croatian extremist groups by the YIS in Australia.*

34. There is evidence that NSW Police received a copy of the SIDC-PAV Report on 28 February 1979.<sup>79</sup> Jefferies' evidence before the Inquiry was that he regularly received reports to the SIDC-PAV, that he "would have" seen the SIDC-PAV Report and that he "probably" discussed it with Turner but could not recall whether he in fact did so.<sup>80</sup> When asked why steps were not taken to ensure the defendants were informed of the information contained in the SIDC-PAV Report, Jefferies' evidence was that he "didn't always agree with the information from ASIO or the Federal Police".<sup>81</sup>
35. The SIDC-PAV Report was provided to NSW Police Assistance Commissioner Roy **Whitelaw** by no later than 14 March 1979, being the date on which he contacted ASIO to discuss paragraph 34 of the SIDC-PAV Report.<sup>82</sup> On 16 March 1979, ASIO advised

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<sup>77</sup> T1817.30 – T1818.2 (Milroy – Inquiry evidence).

<sup>78</sup> Ex 9.1-21, red p 30.

<sup>79</sup> Ex 9.1-46, red p 64 at [2].

<sup>80</sup> T650.11-24, T650.50 – T651.19, T652.33 – T653.7, T665.39-45, T2405.6-33, T2502.44-46 (Jefferies – Inquiry evidence). Milroy could not recall being given or shown a copy of the SIDC-PAV Report but he explained that there were numerous occasions where he was attending other duties while Turner progressed the investigation: T1805.39 – T1806.15 (Milroy – Inquiry evidence).

<sup>81</sup> T2406.16-17 (Jefferies – Inquiry evidence). Later Jefferies' gave evidence that he did not accept what was written in the SIDC-PAV Report and that he "often disagreed with information in these reports": T2503.1-6 and T2507.10-11 (Jefferies – Inquiry evidence).

<sup>82</sup> Ex 9.1-25, red p 36.

Whitelaw that Virkez was the informer referred to in paragraph 34,<sup>83</sup> although that was almost certainly already understood by Whitelaw.<sup>84</sup> On that date, ASIO agreed that Whitelaw “*should brief the head of the [NSW] Police Prosecution Branch upon the import of the ASIO information but in a non-attributable manner and in such a way as to avoid the possible embarrassment*” that would occur if allegations were to be made that Virkez was acting as an agent provocateur.<sup>85</sup>

36. The meaning of the first proviso – that the information be provided to the head of the Police Prosecution Branch “*in a non-attributable manner*” – is clear. That is, ASIO was asking Whitelaw that, in briefing the NSW Police Prosecution Branch with the information contained in the SIDC-PAV Report, he not reveal that ASIO was the source of the information. That is unsurprising given ASIO obtained the information recorded in the SIDC-PAV Report through intercepting telephone communications with the Yugoslav Consulate, a matter which was regarded as highly sensitive.
37. The meaning of the second proviso – that the information be provided to the head of the Police Prosecution Branch “*in such a way as to avoid ... possible embarrassment*” – is less clear on its face. The Commonwealth submits that it should be understood having regard to the further explanation which Boyle appears to have provided at the Second IDC. The first draft of the minutes of the Second IDC recorded that Mr Boyle:<sup>86</sup>

*...said the second rider did not indicate that any limitation was put on the information to be communicated to the Prosecutions Branch or the use to which it should be put (e.g. whether it should be taken into account in decisions taken by the prosecuting authorities on the use that could be made of Virkez’ evidence). It was not really a rider at all. Rather it was in the nature of an aide memoire to make clear to the NSW authorities that ASIO was not asserting that Virkez was an agent provocateur – it was simply providing intelligence which could be interpreted in a number of ways.*

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<sup>83</sup> Ex 9.1-46 red p 64 at [3].

<sup>84</sup> Whitelaw’s familiarity with Virkez at that time is clear from Ex 9.1-26, red p 38 at [8].

<sup>85</sup> Ex 9.1-26, red p 38 at [11].

<sup>86</sup> Ex 10.4-1(A) red p 353.

38. This passage was omitted from the third draft of the minutes, which is very likely the version which Cunliffe provided Boyle for comment.<sup>87</sup> However, that sentiment was included in the fourth version of the minutes prepared by Cunliffe, which records Boyle as having stated that “*in providing the intelligence ASIO was not suggesting that Virkez was an agent provocateur*” (emphasis in original).<sup>88</sup>
39. In any event, however the provisos were understood, the evidence before the Inquiry makes clear that the SIDC-PAV Report was disclosed to NSW Police shortly after it was produced by ASIO.

#### **Virkez’s letter to the Prime Minister**

40. In late November 1979, Virkez wrote a letter to the Prime Minister.<sup>89</sup> In that letter Virkez, amongst other things, claimed to be innocent, said he was not a “*Croat*”, claimed to have been beaten by police and that police had falsely prepared a statement in his name. The letter further stated that ‘*Only the Commonwealth or the Federal Police can help me as I have proof and some documents which I do not dare give to this police headed by Neville Wran*’.
41. On 13 February 1980, PM&C provided a copy of this letter to the NSW Premier’s Department<sup>90</sup> and it was subsequently provided to NSW Police.<sup>91</sup>

#### **Cavanagh’s interviews of Virkez**

42. Cavanagh first interviewed Virkez at Parramatta Gaol on 21 February 1980.<sup>92</sup> It appears this interview occurred as a consequence of inquiries made of the AFP by PM&C in response to Virkez’s letter to the Prime Minister and, in particular, Virkez’s claim to have “*proof and some documents*” which he would only show to the Federal Police.<sup>93</sup> There is

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<sup>87</sup> T2985.39 – T2988.4 (Cunliffe – Inquiry evidence).

<sup>88</sup> Ex 10.1-3, red p 7. See also Ex 10.1-6, red p 12 which is discussed in St John’s statement to the Inquiry: Ex 15.31, red p 270 at [37] and [39].

<sup>89</sup> Ex 4.3-10, red pp 762-767; Ex 9.1-115, red pp 214-216.

<sup>90</sup> Ex 11.13, red pp 37-43.

<sup>91</sup> See Ex 11.18, red p 65. Self-evidently, the letter was also passed onto the NSW Police, as a copy of it was produced by NSW Police at trial in response to a subpoena: CA[829].

<sup>92</sup> Ex 4.3-5, red p 742.

<sup>93</sup> See Ex 5.6-10, red p 671-131; Ex 10.1-14, red pp 25-26; Ex 5.6-10, red p 671-119 and Ex 2.4-10, red p 9563. This was also Cunliffe’s understanding: T3021.39-42 (Cunliffe – Inquiry evidence).



no evidence to suggest that Virkez did in fact provide any “*proof*” or “*documents*” to the Commonwealth.

43. What Virkez told Cavanagh, and Cavanagh’s assessment of that information, is recorded in a number of documents that are before the Inquiry:

- 43.1. A letter from AFP Assistant Commissioner Farmer to the Secretary of PM&C dated 11 March 1980. That letter relevantly states:<sup>94</sup>

*Following consultation with the New South Wales officers in charge of the case, VIRKEZ has been interviewed by officers of this Force on two occasions and the following points have emerged, viz.,*

*...*

- (b) VIRKEZ, in the opinion of the interviewing officers, has been operating in Australia as an agent of the Yugoslav Government and it was in this connection that he became involved with the Croatian Republican Party (HRS). He was the original informant in the matter to both the N.S.W. Police and to the Yugoslav Consulate-General in Sydney.*

- 43.2. Cavanagh’s affidavit evidence and oral testimony from the CCA proceedings. That evidence is described at [12] above. Additionally, Cavanagh gave evidence to the CCA that he “*formed the impression that [Virkez] ... was not an agent in the true sense*”<sup>95</sup> and he agreed with the proposition that the type of “*agent*” referred to in the 11 March 1980 letter from Assistant Commissioner Farmer was the type of agent he had earlier described in his evidence, namely, “*one finding out about newspapers and pamphlets and the like*”.<sup>96</sup> Cavanagh was further asked if being a “*low level agent*” meant that Virkez “*was under the instruction of the Consulate-General*” to which he answered “*Not necessarily day to day instruction. It would simply mean he had been asked in general terms to provide community information*”.<sup>97</sup>

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<sup>94</sup> Ex 9.1-38, red p 55.

<sup>95</sup> Ex 2.4-10, red p 9564.

<sup>96</sup> Ex 2.4-10, red p 9566.

<sup>97</sup> Ex 2.4-10, red p 9566.

43.3. Minutes of the First IDC. Those minutes record that Cavanagh believed Virkez to be a “*low level*” agent for Yugoslav Government who “*got out of his depth*” when he became involved in the bombing conspiracy.<sup>98</sup>

44. Cavanagh conducted a second interview with Virkez on 7 March 1980, but it appears that nothing pertaining to his connection with the Yugoslav Consulate was discussed on that occasion.<sup>99</sup>

45. The Commonwealth respectfully agrees with Counsel Assisting’s submission at CA[850] that the evidence before the Inquiry suggests that Cavanagh’s interviews with Virkez were conducted following consultation with Turner and Milroy. Further, the evidence before the Inquiry indicates that Cavanagh advised NSW Police about the outcome of his interviews with Virkez. That evidence includes the following:

45.1. The day after interviewing Virkez, Cavanagh met with Turner, Milroy and David **Shillington** QC regarding the “*Croatian matter*”.<sup>100</sup> While there is no record of what was discussed, the Commonwealth agrees with Counsel Assisting that “[t]he timing of the conference ... strongly supports the inference that Cavanagh informed those present ... of the outcome of his discussions with Virkez”.<sup>101</sup> This is consistent with what is recorded in all versions of the minutes of the Second IDC that Cavanagh had said that “*the Prosecutor, Mr Shillington, is fully informed on the background to the case [and] knows all about Virkez’ YIS links*” and that AFP Assistant Commissioner Farmer stated that “*the AFP has held nothing back from Ted Turner of the NSW Police*”.<sup>102</sup> Significantly, Farmer and Cavanagh made those statements having met with Turner and Milroy on the morning of the Second IDC.<sup>103</sup>

45.2. Milroy’s evidence to the Inquiry was that after Cavanagh spoke with Virkez, Cavanagh advised Turner and Milroy of his views about “*what Virkez’s role was in relation to the information he’s provided to the Yugoslav consulate*”<sup>104</sup> and that he

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<sup>98</sup> Ex 10.1-12, red p 21.

<sup>99</sup> Ex 4.3-5, red p 744 at [7].

<sup>100</sup> Ex 11.71(B), red p 417.

<sup>101</sup> CA[1269].

<sup>102</sup> Ex 10.4-1(A), red pp 353-354; Ex 10.4-1(B), red p 356; Ex 10.4-1(C), red p 358; Ex 10.1-3, red p 8.

<sup>103</sup> Ex 11.71(B), red p 437.

<sup>104</sup> T300.48 – T301.17 (Milroy – Inquiry evidence).

was “a community source, and he was passing on information to the ... Consulate about the activities of the groups ... Handing out pamphlets and things”.<sup>105</sup> Milroy’s evidence was that Cavanagh did not describe Virkez as an “agent provocateur”.<sup>106</sup> Milroy did not make a record of the information provided by Cavanagh.<sup>107</sup>

45.3. Cavanagh’s evidence before the CCA was that “the major thing that was passed on to the New South Wales police was that in my opinion [Mr Virkez] was not a professional agent”. Cavanagh provided this information to “a number of officers [he] was dealing with at the time” one of whom “would have been Det Sgt Turner who was the officer in charge of the case” and that Cavanagh had a conference with Turner “as a result of this particular interview”.<sup>108</sup> Cavanagh could not recollect the exact words he used to describe Mr Virkez’s status when speaking with Detective Sergeant Turner, “but what [he] would have told Turner, if anything: he’s just like a lot of others in the community, he has been handing material on from time to time but he is certainly no professional agent”.<sup>109</sup> Cavanagh was not aware of “this information being passed to any more senior officer of the New South Wales police apart from Det. Turner”.<sup>110</sup>

46. The Commonwealth submits that the Inquiry would find that the essential features of Cavanagh’s interview with Virkez on 21 February 1980 were disclosed to the NSW Police shortly after the interview occurred.

## **E. OTHER ISSUES**

47. The Inquiry has received evidence concerning a number of additional issues which concern the Commonwealth and/or its former officers which are briefly addressed here.

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<sup>105</sup> T341.24-29. See also T333.50 – T334.14 (Milroy – Inquiry evidence). Milroy’s evidence as to the timing of this may be somewhat confused: see, eg, T392.20-50, T393.11-19 and T1813.37-T1814.3 (Milroy – Inquiry evidence).

<sup>106</sup> T394.20-21 (Milroy – Inquiry evidence).

<sup>107</sup> T397.7-13 (Milroy – Inquiry evidence).

<sup>108</sup> Ex 2.4-10, red p 9568.

<sup>109</sup> Ex 2.4-10, red p 9568.

<sup>110</sup> Ex 2.4-10, red p 9568.

### **Alleged conversation between St John and Shillington regarding Virkez**

48. In his evidence before the Inquiry, Cunliffe claimed that he had a conversation with St John before the start of the trial of the Croatian Six in which St John recounted a recent conversation he (St John) had had with Shillington. According to Cunliffe, the conversation between St John and Shillington occurred on a beach on the South Coast of NSW and involved Shillington stating “*that he knew about Virkez’s Yugoslav intelligence links.*”<sup>111</sup>
49. St John, in his evidence before the Inquiry, stated that he had no recollection of having had this discussion with Shillington and was confident that it did not occur.<sup>112</sup> The Commonwealth respectfully agrees with and adopts Counsel Assisting’s submission at CA[1004] that St John’s evidence on this point was credible and logical and that it does not stand to reason that a senior and experienced public servant such as St John would have had a conversation of this nature. St John’s evidence about this should be preferred over Cunliffe’s.

### **Cunliffe’s meeting with Sherman**

50. On 19 April 1984, Cunliffe attended the Commonwealth Crown Solicitors Office to meet with Sherman and review documents relating to the Croatian Six matter.<sup>113</sup> This was arranged in response to claims made by Cunliffe that he had been told by two employees of PM&C that “*in reaction to receipt of [a subpoena to produce documents in the CCA appeal], there had been a culling of embarrassing materials from sensitive files*”.<sup>114</sup>
51. Immediately following Cunliffe’s attendance, Sherman prepared a memorandum to the Commonwealth Attorney-General which set out a contemporaneous account of the meeting.<sup>115</sup> The first paragraph of the memorandum stated:

*Mr Cunliffe attended at my office today and perused the documents which were produced to the New South Wales Court of Criminal Appeal in the abovementioned matter. After having perused the documents, Mr Cunliffe said to me he was satisfied all material documents were produced to the Court. I specifically asked Mr Cunliffe*

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<sup>111</sup> Ex 15.18, red p 90 at [57].

<sup>112</sup> Ex 15.31, red p 271 at [46]; T3058.38-T3059.31.

<sup>113</sup> Ex 10.3-40, red p 168.

<sup>114</sup> Ex 10.3-39, red p 166.

<sup>115</sup> Ex 10.3-40, red p 168.

*whether there was any further investigative action for me to take in this matter, he said no.*

52. In his statement given to the Inquiry, Cunliffe took issue with the accuracy of this paragraph of the memorandum.<sup>116</sup> Specifically:

52.1. Cunliffe stated that he did not recall Sherman having told him that the documents he reviewed were the documents that had been produced in the CCA. However, a letter to the Commonwealth Attorney-General authored by Cunliffe shortly after his meeting with Sherman stated *“I am grateful for having been given the opportunity to refresh my memory about the papers on the file of the Department of Minister and Cabinet (sic) which I am told was produced to the New South Wales Court of Criminal Appeal”*.<sup>117</sup> When confronted with this letter in his evidence before the Inquiry, Cunliffe conceded that Sherman had told him that the documents he reviewed were the documents produced to the CCA.<sup>118</sup>

52.2. Cunliffe denied saying he was *“satisfied all material documents were produced to the Court”*. In his evidence before the Inquiry, Cunliffe reiterated that he was *“very confident that I did not say that”*.<sup>119</sup> However, in the same letter to the Commonwealth Attorney-General as referred to immediately above, Cunliffe had stated that he was *“pleased to say”* that the PM&C file he had reviewed (and which he had been told was produced to the CCA) *“appears to contain all relevant papers”* except for draft letters that *“are not of any significance in the present context”*.<sup>120</sup> When confronted with this in his evidence before the Inquiry, Cunliffe sought to recharacterise his concern as one regarding the absence of documents from PM&C’s Security Branch.<sup>121</sup> However, for the reasons explored with Cunliffe in his evidence before the Inquiry, that explanation is inherently unconvincing.<sup>122</sup>

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<sup>116</sup> Ex 15.18, red p 95 at [96].

<sup>117</sup> Ex 10.3-41, red p 169.

<sup>118</sup> T2995.48 – T2996.1 (Cunliffe – Inquiry transcript).

<sup>119</sup> T2996.27 (Cunliffe – Inquiry evidence).

<sup>120</sup> Ex 10.3-41, red p 172.

<sup>121</sup> T2997.12 – 2999.1 (Cunliffe – Inquiry transcript).

<sup>122</sup> T2997.12 – 2999.1 (Cunliffe – Inquiry transcript).

52.3. Cunliffe denied that Sherman asked him whether there was any further investigative action for Sherman to take. When asked if he was suggesting that Sherman's account of this part of the meeting was an invention, Cunliffe said he "*wouldn't go so far*".<sup>123</sup> He also accepted that in the ordinary course of events, a contemporaneous record should be preferred over a recollection summoned 40 years after the fact.<sup>124</sup> While Cunliffe appeared to regard this circumstance as falling outside of the ordinary course, the basis for that view was unclear.

53. In his statement to the Inquiry, Sherman explained that he would not have attributed statements to Cunliffe in his memorandum if Cunliffe had not made those statements.<sup>125</sup> It should not be lightly concluded (and, indeed, should not be lightly suggested) that Sherman, then the Acting Crown Solicitor, would mislead the Commonwealth Attorney-General. That suggestion is contradicted by Cunliffe's own statements made to the Commonwealth Attorney-General at that time, as described above. Cunliffe's claim that Sherman had "*spoken loosely*"<sup>126</sup> in the memorandum should not be accepted. Indeed, it is an example of Cunliffe seeking to unfairly characterise a Commonwealth official in an unfavourable light.<sup>127</sup> The account of the meeting between Sherman and Cunliffe recorded in Sherman's contemporaneous memorandum to the Commonwealth Attorney-General should be preferred over Cunliffe's.<sup>128</sup>

### **Commonwealth's response to subpoenas issued at trial or on appeal**

54. Numerous subpoenas were issued to Commonwealth agencies during the trial and appeal. In response to some of those subpoenas, claims of what was then known as Crown privilege (now public interest immunity) were made. Those claims were supported by evidence, and in some cases involved affidavits sworn by the Commonwealth Attorney-General and submissions made by eminent Senior Counsel. The claims were considered and determined by either the trial judge or the appeal judges. The claims of Crown privilege were made and determined having regard to the circumstances that existed at the time. The material before the Inquiry does not permit the re-examination of the decisions to claim Crown

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<sup>123</sup> T12999.44-45 (Cunliffe – Inquiry transcript).

<sup>124</sup> T2999.47 – T3000.10 (Cunliffe – Inquiry transcript).

<sup>125</sup> Ex 15.32, red p 275 at [33].

<sup>126</sup> T2999.27 (Cunliffe – Inquiry transcript).

<sup>127</sup> See [6]-[7] above.

<sup>128</sup> Counsel Assisting also submit at CA[1122] that "*it is more probable that Sherman's contemporaneous account of the meeting is correct*".

privilege or the decisions to uphold those claims. Appropriately, neither Counsel Assisting nor the Petitioners' urge the Inquiry to do so.

55. One matter raised by Counsel Assisting in respect of ASIO's response to a subpoena should be addressed briefly. At CA[1258], Counsel Assisting suggests that ASIO considered a Crown privilege claim over the SIDC-PAV Report was justified on the basis that the report overstated the relationship between Virkez and the Yugoslav Consulate. The document upon which that suggestion is based does not indicate that this was ASIO's view.<sup>129</sup> Rather, it indicates that ASIO simply identified this as *a* consideration relevant to the Commonwealth Attorney-General's concerns about whether the privilege claim would result in a miscarriage of justice. It was not expressed to be the (or even a) *basis* for, or to justify, the claim. Rather, the basis or justification for the claim is addressed in paragraph 4 of the document, which describes the harm that would flow from disclosure of the SIDC-PAV Report.

#### **Other allegations with respect to Cavanagh**

##### ***Allegation that Cavanagh assaulted Virkez and forced him to sign a false statement***

56. There is no evidence which corroborates Virkez's claim in his interview with Masters in 1991 that on 8 February 1979, Cavanagh came to Lithgow and beat him up and forced him to sign false statements (or, indeed, that Cavanagh did such things on any other occasion).<sup>130</sup> This allegation is referred to by the Petitioners' at P[1569]-[1570] and P[1627]. The suggestion that Cavanagh was involved in any such assault is discredited by (a) the absence of any corroborating evidence that Cavanagh attended Lithgow on 8 February 1979;<sup>131</sup> (b) Virkez's initial claim to Masters that he did not know the men who assaulted him and never saw them again;<sup>132</sup> (c) the claims made in Virkez's letter to Prime Minister Fraser in late 1979 which alleged mistreatment at the hands of NSW Police and sought assistance from the Commonwealth or the Federal Police;<sup>133</sup> and (d) the absence of a claim that Cavanagh assaulted him in either his interview with an Immigration official on 23 April 1980 or his letter to the Immigration Minister dated 9 September 1980 in which he made a

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<sup>129</sup> Ex 10.4-4, red p 362.

<sup>130</sup> Ex 13.5, approx. 17:50 – 20:30 minutes.

<sup>131</sup> E.g. Neither Milroy nor Jefferies had a recollection of Cavanagh being in Lithgow on that date: T331.8-19 (Milroy – Inquiry evidence), T2473.43-48 (Jefferies – Inquiry evidence).

<sup>132</sup> Ex 13.5, 18:00 minutes.

<sup>133</sup> Ex 4.3-10, red pp 762-763.

number of other complaints about the Federal Police.<sup>134</sup> Virkez's allegation should not be accepted.

***Allegation that Cavanagh coerced Virkez to plead guilty and coached him to give false evidence***

57. Virkez claimed in a letter to the Minister for Immigration dated 9 September 1980 that Cavanagh asked him to plead guilty to the “*charge of conspiracy to explode bombs*”, sought his agreement to testify against the Croatian Six and accompanied him (together with two CIB detectives) to the Yugoslav Consulate to arrange for a Yugoslav passport to be issued to him.<sup>135</sup> This claim by Virkez is referred to by the Petitioners' at P[1470], following an earlier submission at P[1461] that there is a “*question*” as to the circumstances in which Virkez came to plead guilty.
58. Milroy had no recollection of NSW Police having asked Cavanagh to visit Virkez “*to see whether he could assist in getting Virkez to plead guilty, and to give evidence against his at that stage co-defendants*”.<sup>136</sup> Wilson, who attended Parramatta Gaol on 7 March 1980 along with Cavanagh to visit Virkez, had no recollection of a conversation along the lines of what Virkez alleged in his letter to the Minister for Immigration.<sup>137</sup>
59. As Counsel Assisting submits at CA[1226], while it is “*conceivable*” that Virkez's plea was discussed during Cavanagh's visit, the circumstances of the visit make it unlikely that it involved Cavanagh *coercing* Virkez to plead guilty and give evidence for the prosecution.
60. Relatedly, the Commonwealth respectfully agrees with Counsel Assisting's submission at CA[1229] that there is insufficient evidence to establish that Cavanagh was involved in coaching Virkez to give false evidence implicating the Croatian Six.

***Allegation that Cavanagh was involved in concealing information from defence***

61. While it is accepted that Cavanagh had several meetings with NSW Police investigating officers and prosecutors,<sup>138</sup> the evidence does not support the inference contended for at

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<sup>134</sup> Ex 18.5, red p 10 and Ex 18.4, red p 7, respectively. Virkez's letter to the Immigration Minister, in particular, gives the strong impression that his interviews with Cavanagh in early 1980 were the first occasions on which he met Cavanagh.

<sup>135</sup> Ex 18.4, red p 8.

<sup>136</sup> T1866.21-24. See also T1868.14-28 and T1874.41-T1875.2 (Milroy – Inquiry evidence).

<sup>137</sup> T2011.42 – T2012.7 (Wilson – Inquiry evidence).

<sup>138</sup> See Petitioners' submissions at fn 3377.



P[1632] that Cavanagh had “*influence on*” the compilation of the brief of evidence and the presentation of the Crown case beyond providing information to NSW Police about (and a proposal that Cavanagh give evidence at the trial about) “*background information on Croatian Terrorist movements in Australia*”.<sup>139</sup> Preparation of the brief of evidence with respect to the Croatian Six was the responsibility of Milroy and Turner.<sup>140</sup> Milroy’s evidence to the Inquiry was that Cavanagh was “*not involved in the investigation in any shape or form*”.<sup>141</sup> While, as noted above, Cavanagh’s interview of Virkez on 21 February 1980 followed consultation with NSW Police, the interview appears to have been a consequence of Virkez’s letter to the Prime Minister in which he requested to meet Federal Police, and PM&C’s inquiries with the AFP about the matters raised by Virkez.<sup>142</sup> Accordingly, the evidence suggests that the primary purpose of Cavanagh interviewing Virkez was to obtain information about the issues Virkez had raised and to report back to PM&C, and that it was not a step taken as part of, or to advance, the prosecution of the Croatian Six.

62. The further submission at P[1632] that Cavanagh was involved in the concealment from the defence of his assessment of Virkez is unsupported by the evidence. It is pure speculation. It is submitted that the Inquiry would not accept the Petitioners’ invitation to draw such a serious inference on the basis of such scant material. Similarly, while it may be “*conceivable*”, as Counsel Assisting submit at CA[1229], that Cavanagh instructed Virkez not to refer to his prior contact with the Yugoslav Consulate when giving evidence at the trial, the evidence fall well short of providing a safe foundation for drawing such a serious inference. In any case, as Counsel Assisting submit at CA[1229], that question does not need to be resolved as the Inquiry can proceed on the basis that Virkez did not reveal his contact with the Yugoslav Consulate in his evidence at trial.

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<sup>139</sup> Ex 10.1-12, red p 22. This is likely the “specialist assistance” referred to in the letter from the AFP to PM&C dated 11 March 1980: Ex 9.1-38, red p 55. This is consistent with Milroy’s evidence to the Inquiry: T1814.5-19 and 1815.11-19, although c.f. T1823.44 – T1824.3 (Milroy – Inquiry evidence). It is also consistent with Cunliffe’s understanding: T3022.46 – T3023.3 (Cunliffe – Inquiry evidence).

<sup>140</sup> T277.20-24, T281.20-30, T333.7-9 (Milroy – Inquiry evidence).

<sup>141</sup> T344.50 – T345.3 (Milroy – Inquiry evidence).

<sup>142</sup> In his evidence before the CCA, Cavanagh stated that he conducted the interview “*purely as a representative of [PM&C] to satisfy myself of [Virkez’s] bona fides*”: Ex 2.4-10, red p 9563.

### **ASIO official history**

63. The Commonwealth respectfully agrees with and adopts Counsel Assisting's submission at CA[1148] that little weight should be placed on the remarks made in *The Secret Cold War, The Official History of ASIO, 1975 – 1989 (The Official History)*.<sup>143</sup> While those remarks evidently reflect the opinions of the authors of The Official History, they are not supported by the evidence before the Inquiry, which includes a large volume of ASIO material.

### **Minor matters arising from Counsel Assisting's and the Petitioners' submissions**

64. While none of the following matters are of significance to the primary issues raised by this Inquiry, they are noted for completeness below.
65. At CA[869], Counsel Assisting identify "HQ telex 4368" as Ex 9.1-47. However, "HQ telex 4368" appears at Ex 9.1-46, which is the document that records the briefing given to Boyle ahead of the Second IDC.<sup>144</sup> The document at Ex 9.1-47 was Boyle's report to ASIO Headquarters following the Second IDC.<sup>145</sup> That report *refers to* "HQ telex 4368" and states that Boyle's relied on that telex for the purposes of the Second IDC.<sup>146</sup>

66. At P[768], the Petitioners state:

*On an unknown date, an ASIO agent recorded that Bebic was considered in "ASIO statements [to be] a simple man without much intelligence" and that it would have been beyond his capacity to put explosives together.*

67. This passage mis-quotes Ex 10.3-22, red p 123. The quoted words "*ASIO statements*" do not appear in that document. Rather, the relevant passage from that document reads "*This comment about BEBIC is in accord with Agent statements about BEBIC being a simple man without much intelligence*" (emphasis added). That passage appears as a "C.O.C" or "case officer comment" – that is, a comment made by an ASIO case officer. As explained at [19] above, the reference in the case officer comment to an "Agent" is not a reference to an ASIO officer but, rather, to a person in the community who acted as an agent on behalf

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<sup>143</sup> John Blaxland and Rhys Crawley, 2016, Allen & Unwin: Ex 13.17, red pp 134-149. See also the remarks raised by Counsel Assisting at CA[1146].

<sup>144</sup> T3087.47 – T3088.2 (Boyle – Inquiry evidence).

<sup>145</sup> T3088.28-47 (Boyle – Inquiry evidence).

<sup>146</sup> See Ex 9.1-47, red p 66 at [2]; T3089.17-24 (Boyle – Inquiry evidence).

of ASIO. Accordingly, a statement attributed to an “*Agent*” should not be understood as representing the views of an ASIO officer or ASIO as an organisation.<sup>147</sup>

68. At P[1214], the Petitioners refer to an “*ASIO minute*” at Ex 10.3-47, red p 184. That minute appears to be signed by Barry Leader, then a Senior Assistant Secretary within the Australian Government Solicitor,<sup>148</sup> and does not appear to have originated from ASIO.
69. The Petitioners contend at P[1255] that there is reason to believe that Cavanagh was the author of the training manual entitled “Commonwealth Police Force Training Centre, *Croatian National Separatism: The Australian Experience: 1961-1979*”.<sup>149</sup> While it is *possible* that is correct, that is no more than speculation.

## F. CONCLUSION

70. For the reasons developed in these submissions, the Commonwealth submits:
- 70.1. the most reliable evidence before the Inquiry indicates that Virkez had, from at least 9 August 1978, been providing information to an employee of the Yugoslav Consulate who ASIO suspected to be a Yugoslav Intelligence Officer;
- 70.2. having regard to those activities, Virkez is best characterised as having been an informant of the Yugoslav Consulate;
- 70.3. the Commonwealth made appropriate disclosures to NSW Police of information the Commonwealth was aware of concerning Virkez’s links with the Yugoslav government.

19 February 2025



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Peter Melican

Counsel for the Commonwealth

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<sup>147</sup> The documents discussed at P[1779], CA[890] and CA[1157] should be understood in this way.

<sup>148</sup> See, eg, Ex 10.3-53, red p 224; Ex 10.4-9, red p 372.

<sup>149</sup> Ex 14.1.