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SPECIAL INQUIRY

THE HONOURABLE ACTING JUSTICE ROBERT ALLAN HULME

5 THIRTY-EIGHTH DAY: THURSDAY 3 OCTOBER 2024

**INQUIRY INTO THE CONVICTIONS OF THE CROATIAN SIX**

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<IAN GEORGE CUNLIFFE, ON FORMER OATH(9.34AM)

<EXAMINATION BY MS MCDONALD

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Q. Mr Cunliffe, I want to take you to another document which is immediately after the first interdepartmental meeting.

EXHIBIT 10.1-13 SHOWN TO WITNESS

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Q. This is a two-page document, Mr Cunliffe. You can see it's addressed to the Prime Minister: "Representations by Vico Virkez".

A. Yes.

MCDONALD: Could we go down that page, please?

25

Q. There's a second page, we'll move to that when you indicate, Mr Cunliffe.

A. Yes, I'm ready.

Q. Right.

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MCDONALD: Maybe if we just move it a little bit down. Yes. Stop there, please.

Q. You've read that?

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A. I have.

Q. You refer to it in your statement and you identify that as a document that you drafted; correct?

A. Yes, that's my recollection.

40

Q. But your recollection as set out in your statement is that was not eventually provided to the Prime Minister?

A. I'm certain that that is the case.

45

Q. Yesterday I was asking you some questions about the term that Mr Enfield raised right at the beginning of the second interdepartmental meeting of "agent provocateur".

A. Yes.

50

Q. I suggested that in the documents attached to your statement, that was the

first time that term had been mentioned or raised.

A. Yes.

5 Q. It would appear that this document which was written after the first interdepartmental meeting - sorry, if we go back to page 23. Can you see in the paragraph starting, "We understand"--

A. Yes.

10 Q. --you use the term?

A. Yes.

Q. This document was drafted after the first interdepartmental meeting. In writing this you were relying primarily on information that you obtained during that first interdepartmental meeting?

15 A. Had we received the Farmer letter at that stage?

Q. Yes.

A. So on those two things I would say so.

20 Q. So what was said in the interdepartmental meeting and also that letter that I took you to yesterday afternoon from Assistant Commissioner Farmer.

A. Yes.

25 Q. In neither of the first interdepartmental meeting or in Assistant Commissioner Farmer's letter is there a suggestion that Mr Virkez was an agent provocateur?

A. Not in those words, no.

30 Q. What was recorded in the minutes of the first interdepartmental meeting was Mr Cavanagh saying he was a 'low-low agent'; correct?

A. Yes.

Q. Who got in, I think it was something like, above his head in this bomb conspiracy.

35 A. Yes.

Q. The use of the term by you of "agent provocateur", is this something that you thought of and became concerned about after receiving the Assistant Commissioner Farmer's letter and attending that first interdepartmental meeting?

40 A. Yes.

Q. It was a matter which, in raising it in this draft, it's not based on anything expressly said by Farmer or Cavanagh?

45 A. Correct.

Q. It's something that you thought of and became concerned about that possibility?

50 A. That term, to describe what was happening, yes.

Q. But, at this stage, you really had no details of the Crown case against, at that stage, the Croatian Seven, did you?

A. No. Limited details.

5 Q. Probably details about the number of people that originated in Lithgow with Mr Virkez attending the Lithgow Police Station.

A. Yes.

10 Q. Again, I think you'd been provided with some details about the state charges.

A. Yes.

15 Q. Which were possession of explosives with an intent to cause grievous bodily harm, something like that?

A. Yes.

Q. Also, other charges of conspiracy to murder?

20 A. Yes. So, the other - the third thing which I had and was influencing me was Virkez's own letter.

Q. Yes, but Virkez's own letter, and I can take you to that, he doesn't go into really great detail about the conspiracy or the allegations that the Crown was making in its case against them.

25 A. Not great detail, no.

Q. That really wouldn't have assisted you in determining whether the facts that were being, or the Crown case, was, in a sense, susceptible to an argument that Mr Virkez was acting as an agent provocateur.

30 A. It wouldn't have assisted me greatly, no.

Q. Can you excuse me for a minute?

EXHIBIT 10.4-1A, RED PAGE 352, SHOWN TO WITNESS

35 Q. While that is being done, the memorandum that I just took you to which was addressed to the Prime Minister which wasn't sent, do you recall, did you give that to either Mr St John or Mr Enfield?

A. I didn't give it to Mr Enfield. Mr St John, my recollection is, yes.

40 Q. Was it his decision that it would not be progressed to the Prime Minister?

A. As communicated to me, yes.

Q. Did he give a reason why not?

45 A. I don't recall that he did.

Q. You'll recall from yesterday, this is the first draft of the minutes you made of the second interdepartmental meeting, up on the screen.

A. Sorry, yes.

50 Q. Your evidence, that in your opinion, this is the most accurate and thorough

account of what occurred at that meeting?

A. Yes.

5 Q. Yesterday I raised with you the first comments recorded, Mr Enfield spoke of the dangers?

A. Yes.

10 Q. And that he raised, there it's got the "part played by an agent provocateur". I think eventually in the subsequent drafts, that was changed to "actions by an agent provocateur." Mr Enfield raising that matter, right at the beginning of the meeting and using the term, does that suggest that you had a discussion with him?

A. No.

15 Q. You didn't have a discussion with him--

A. No.

20 Q. --for example, "I've got a concern about whether Virkez was an agent provocateur before the meeting?

A. Not with Mr Enfield, no.

Q. Did you have a discussion with Mr St John about it?

A. I may well have had. I think I did.

25 Q. Indeed, if Mr St John read that memorandum that I just took you to, you expressly raise it in that memorandum.

A. Correct.

30 Q. Could it be that, after your discussion with Mr St John, he's raised it with Mr Enfield?

A. It could well be.

35 Q. I may have asked you this yesterday, but if I did, could you remind me, from this version to the next version, which was either copy B or copy C, there are omissions, deletions from your original. Who made those deletions?

A. I don't recall.

Q. Do you--

40 A. It wouldn't have been me, off my own - off my own bat. It might have been a direction from Mr St John to vague it up a bit.

Q. Can you recall a discussion with Mr St John where you showed him this first draft?

A. No.

45

Q. At the time, would it have been your procedure that you did a first draft of the minutes and then showed it to the person that you reported to who was also present at the meeting, "This is the first draft", or, "This is my draft"?

50 A. This was an unusual event so you talk about procedure. I don't recall another event like it in my time in Prime Minister and Cabinet. I don't recall

whether there was a discussion with Mr St John. I think it's most likely that I gave it to him or had it given to him and we then had a discussion.

Q. You just described as, "Look, this is every unusual. This is unusual"?

5 A. Yes.

Q. Yesterday you agreed that it was a high-level meeting because of the level of seniority and the breadth of the attendees at the meeting?

10 A. Yes.

Q. When you used the word "unusual" were you referring to those two factors?

15 A. No. Sorry, in part those two matters, but also I can't recall any other incident which - any other incoming correspondence, for example, that led to an interdepartmental committee being called, so it was unusual in that respect.

Q. In that what caused the meeting could be traced back to Mr Virkez's letter to the Prime Minister?

20 A. Yes, and interdepartmental committees, and there's a perception from people watching, "Yes, Prime Minister" and "Yes, Minister" - that these are daily affairs but they were not, in that area anyway.

Q. Could we go with Exhibit 10.4-1A now to red page 353. I want to ask you about a comment by Mr Boyle that you recorded, and it's towards the top of the page, and it's about five lines down: "Mr Boyle said that at the meeting with Whitelaw". The asterisk is next to "Mr Boyle" now.

25 A. Yes.

Q. Mr Boyle said, "At the meeting with Whitelaw ASIO had talked over tactics. It was decided on legal grounds that the briefing should be handled in such a way as not to raise the defence of agent provocateur." This recording of what Mr Boyle said it was admitted or deleted in the second version and never reinserted. When you record that, Mr Boyle's initially talking about the meeting between ASIO officers and Assistant Commissioner Whitelaw of the New South Wales Police?

35 A. Yes.

Q. ASIO had talked over tactics. In writing that, was it your understanding that ASIO officials had discussed with Assistant Commissioner Whitelaw tactics?

40 A. Yes.

Q. Did he give any more details about what tactics they were discussing?

A. No.

45 Q. He just the word - there was this discussion over "tactics"?

A. Yes, but what follows gives some colour to that too.

Q. I'm about to move to that. You then record, "It was decided on legal grounds that the briefing should be handled in a way as not to raise the defence of agent provocateur."

50

A. Yes.

5 Q. Again, you record, "It was decided on legal grounds." Was your understanding "it was decided" this is some kind of decision being made by Assistant Commissioner Whitelaw and the officials of ASIO?

A. Yes.

Q. At this meeting?

10 A. At the meeting between them. Yes, it's a little ambiguous. It's not saying it was decided by the IDC that that was the case. I'm referring to what Mr Boyle said had happened at the meeting between ASIO and the New South Wales Police.

15 Q. Then it goes on to say, "The briefing should be handled in such a way as not to raise the defence of agent provocateur."

A. Yes.

Q. When you record "the briefing should be handled", what was your understanding of "the briefing"? Who was that with or between?

20 A. "The briefing" was in reference to what ASIO was telling or to tell the New South Wales Police about what ASIO knew.

Q. They were doing that at this meeting with Assistant Commissioner Whitelaw?

25 A. They were either doing it then or were to do it subsequently, but in such a way as not to raise the defence of agent provocateur.

Q. Another interpretation which I suggest to you, is that it was going to be a briefing that Assistant Commissioner Whitelaw had with the Police Prosecution Unit?

30 A. I don't believe the reference there is a reference to that, no.

Q. Another interpretation would be briefing that--

35 A. Sorry, could I interrupt you there?

Q. Yes.

A. That it was - it's clear from the minutes and from my recollection, that a - such a briefing was to follow from ASIO to the New South Wales Police.

40 Q. Yes, because if you follow down that paragraph you record that Whitelaw had raised the question of briefing the Prosecutions Branch?

A. Yes.

Q. The green light had been given to that but with some provisos?

45 A. Yeah, Mr Boyle had raised the briefing of the prosecuting authorities.

Q. Mr Boyle's informing the second meeting of the interdepartmental committee, that it had been reported to him that Assistant Commissioner Whitelaw had raised the question of briefing the Prosecutions Branch. That's how we read it?

50

A. Sorry, could you repeat that?

Q. Sorry, that was convoluted. What you've recorded here is what Mr Boyle told the meeting?

5 A. Yes.

Q. Mr Boyle is reporting on what he has been told by ASIO officials after they had a meeting with Whitelaw?

10 A. Is it clear that the meeting with Whitelaw wasn't by Mr Boyle, it didn't involve Mr Boyle?

Q. I'll take you back to red page 352.

A. Yes.

15 Q. Towards the bottom there is a paragraph, "Mr Boyle said", asterisk next to it?

A. Yes.

20 Q. "Mr Boyle said that on 16 March 1979 ASIO officers visited Assistant Commissioner Whitelaw of the New South Wales Police and" et cetera?

A. It might be the case that Boyle wasn't involved in that meeting with Whitelaw, but I don't think it's absolutely clear whether he was or not. The fact that he's quoting from a telex might suggest that he's got a report back from other people. I'm not sure if he ever made that clear.

25 Q. What I want to suggest to you, it's clear from your recording that Mr Boyle never said, "I attended the meeting. I said to Whitelaw. Whitelaw said to me." The way you have recorded it is consistent with, Mr Boyle didn't attend the meeting. These ASIO officers did, and they reported back to him?

30 A. It is consistent with that but it doesn't exclude the other possibility, in my submission.

Q. Let's go back to red page 353. Can you see the third question mark?

A. Yes.

35

Q. If we go to again the term "agent provocateur"--

A. Yes.

Q. --"Mr Boyle emphasised that he was not at the discussions with Whitelaw"?

40 A. Indeed. I'm incorrect in what I said before. It's clear that it says he was not there.

45 Q. I think we went off on a little bit of a tangent. I was asking you about where you record that - where is it - "It was decided on legal grounds that the briefing should be handled in such a way as not to raise the defence of agent provocateur." That is referring to the anticipated briefing that Whitelaw was going to have with at least the Prosecutions Branch?

A. Yes, I agree.

50 Q. It was never anticipated in this meeting that any ASIO officers would be

having a meeting or briefing with the Prosecutions Branch?

A. I agree.

Q. Was it raised whether there would be--

5 A. I'm so sorry, just to interrupt, I agree both that there was nothing in these minutes that suggest that, but it's also my clear recollection that the meeting wasn't told anything that suggested that ASIO would be involved in directly briefing the prosecution authorities in New South Wales.

10 Q. Prosecution authorities in New South Wales at that time, because they're being committed to stand trial, it was the precursor to the Director of Public Prosecutions, an entity called the "Clerk of the Peace". Does that ring any bells?

15 A. I don't think there was any discussion at the time - in this meeting or around that time, as to exactly how prosecutions were being handled in New South Wales, but I got the clear impression that there was a briefing out of prosecution briefs, but I didn't have a close working knowledge at that time of those matters in New South Wales.

20 Q. Was anything raised about ASIO officers speaking directly with the officers in charge of the investigation? Within the New South Wales Police a Detective Sergeant Turner or a Detective Milroy they were actually collating all the evidence to be used in the brief of evidence in the trial. Can you recall any discussion about whether a meeting or a briefing would be facilitated with

25 them?

A. Discussion in this meeting?

Q. Mm.

A. I don't recall that there was.

30

HIS HONOUR

Q. There was obviously some knowledge as to the identity of the prosecution people, because at the foot of this page there's reference to certain Queen's

35 counsellors--

A. Yes.

Q. --being the prosecutor?

40 A. Yes, your Honour. I - I - I can totally agree, and that's my clear recollection as well, but there was reference to Mr Shillington being the prosecutor in the case. But certainly no suggestion that I recall or, I think is - is - as is reflected in these minutes that ASIO would be meeting him, briefing him et cetera.

MCDONALD

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Q. Could I take you to red page 354 of this exhibit? First, I'll take you towards the bottom of the page, and the last paragraph, Mr Cavanagh?

A. Yes?

50

Q.



5 "Mr Cavanagh said that the New South Wales Police viewed Virkez as being a participant in the alleged conspiracy but not a prime mover in it. Bebic, [who was another one of the accused], had roped Virkez into the conspiracy. Bebic appeared to be a dominant figure in the alleged conspiracy. Virkez was originally to be involved only as a driver".

10 And then, if we go across the page, "When he was told it would be his task to place bombs in the Elizabethan Theatre containing 1000 people". If I can just pause there. If we go back to red page 354, down the bottom, at this point as you've given evidence, your knowledge of the details of the Crown case against the Croatian Six wasn't very great?

A. I agree.

15 Q. At this point, it appears that Mr Cavanagh has had involvement with the New South Wales Police?

A. I agree.

20 Q. And would appear to have more knowledge about what the Crown case was, what it was alleging?

A. Yes.

25 Q. His account there that although a participant, not a prime mover, and somebody else had roped Virkez into the conspiracy, that would - are you okay, Mr--

A. Sorry, yes, I'm - this is protective in case I start coughing again. I was, in fact, getting out my glasses--

30 Q. Grabbing your glasses. That isn't consistent with Mr Virkez being an agent provocateur, is it?

A. No, it's quite contrary to it.

35 Q. Yes, just relying on your understanding of what that term was yesterday, it is different - or, really, as you said - not consistent with Mr Virkez being an agent provocateur?

A. Yes.

40 Q. I want to ask you about something immediately above that. Can you see towards the end of that paragraph, there's a reference to "explosives were stolen from the workplace of two of the conspirators"?

A. Yes.

45 Q. Do you recall which of the two conspirators were nominated?

A. I don't recall whether they were specified. My impression is it was a reference to Virkez and Bebic--

Q. All right--

A. --at Lithgow.

50 Q. And then, you note this matter that Mr Cavanagh mentioned:

"that Virkez at one stage demonstrated how to make a better bomb to get components for it, had broken down a detonator, a task which is apparently very dangerous and difficult".

A. Yes.

5

Q. That last comment of "a task very dangerous and difficult", was that a comment that Mr Cavanagh made?

A. Yes.

10

Q. Do you recall whether this idea that you've recorded of "a better bomb", whether that was actually a reference to a letter bomb?

A. I didn't ever have the impression that it was.

15

Q. As recorded here, your recollection is it's something about a better bomb?

A. Yes.

20

Q. And what you've recorded there is the extent of Mr Cavanagh mentioning Virkez's involvement or knowledge of explosives, in that he's demonstrated at one stage how to make a better bomb et cetera?

A. Yes, I think reference to "a better bomb" is reference to a better bomb than the experimental bombs that they'd tested in the bush.

25

Q. Which you record just before?

A. Just before. "A better" by what criteria wasn't stipulated.

30

Q. Could we go across to red page 355? I'm taking you to the last sentence in that paragraph. Mr Cavanagh said that New South Wales Police have tended to ignore Virkez's involvement with the Yugoslav Intelligence Service?

A. Yes.

35

Q. That particular comment in these minutes was deleted in the second and never reappeared?

A. I haven't made a close analysis of the differences between different things, but I accept what you're saying.

40

Q. If you can accept that, do you recall why or in what circumstances that was removed?

A. No, I - I cannot.

45

Q. Was anything said further about that? In what way New South Wales Police have tended to ignore Virkez's involvement with the Yugoslav Intelligence Service?

A. No.

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Q. But at this point, at the end of this meeting - and I started going through this with you late yesterday afternoon - a high level member of the New South

Wales Police Force has received a briefing from ASIO officers?

A. Yes.

Q. Whitelaw?

5 A. Yes, I mean--

Q. Assistant Commissioner Whitelaw?

A. --a meeting with Whitelaw and for there to be further meetings, yes.

10 Q. I took you to this yesterday. Mr Cavanagh informed the meeting that the silk who was appearing as Crown Prosecutor had been briefed?

A. Yes.

Q. And although Mr Cavanagh--

15 A. That came out, yes.

Q. I'm taking it step by step, that's what you were told at the meeting?

A. Indeed.

20 Q. And you accepted that--

A. Absolutely.

Q. --at this meeting?

25 A. And it - just quite how that came out, I'm not - I don't recall, but that it did come out and it was put in the minutes, I do recall.

Q. And you recorded it?

A. Yes.

30 Q. So that last comment that Mr Cavanagh said the New South Wales Police have tended to ignore Virkez's involvement with the Yugoslav Intelligence Service, based on the new information that you're receiving at this meeting, your concerns were to a substantial degree ameliorated? Not suggesting totally, but to a substantial degree?

35 A. That by Cavanagh's account the AFP had gone a fair way to doing the right thing, and the ball was now in the hands of New South Wales Police and would be or were in the hands of the prosecutor. ASIO - slightly different position.

40 Q. Can I just stop there. So in respect of the New South Wales Police and prosecution authorities, they were outside the ambit of your control - sorry, when I say, "your" - Prime Minister and Cabinet's influence, control et cetera?

A. Correct.

45 Q. You just had a proviso in that answer where you mentioned ASIO; what were you going to say about--

A. Well, the things that were said above about what Mr Boyle said at the meeting.

50 Q. Yes, but Mr Boyle's reported that ASIO officers have gone and briefed

Assistant Commissioner Whitelaw--

A. Yes.

Q. --given him information?

5 A. Yes.

Q. Given him the green light to talk to the prosecutions?

A. With certain provisos, yes.

10 Q. Well, the provisos, number one was you don't say to them, "Oh, this is all from ASIO"?

A. Well--

Q. It was a non-attributable source?

15 A. Yes, along those lines.

Q. The second matter is this to the matter about the agent provocateur?

A. Sorry, I'm not with you there?

20 Q. Sorry, I'll start again. You spoke about ASIO, and that you looked at what Mr Boyle said, and did you use the word, "the provisos" or something that had come out in Mr Boyle's account of the briefing with Assistant Commissioner Whitelaw that concerned you?

25 A. Yes, I think those - that language is used earlier on in these - in this version of the minutes.

Q. Yes, but at the end of this meeting, accepting what you were told, your concern about New South Wales Police and the prosecutor has been substantially ameliorated?

30 A. Yes.

Q. You seem to have a hesitation about ASIO, and I'm just wondering what was that--

A. Can we go back to the early part of the minutes, please?

35

Q. Yes, are you talking about the second page, red page 353?

A. The previous page, perhaps?

Q. Page 1, red page 352?

40 A. So I'm referring to the first reference to Mr Boyle, about a third of the way down that page. He said that Virkez is an agent run by a YIS officer.

Q. Yes?

A. He, himself, is suspected of being a YIS officer.

45

Q. Mm-hmm?

A. And he doesn't say that the New South Wales Police was - were told that, but rather, he was told - Whitelaw was told that Virkez was a Yugoslav agent. It suggested to me that the very pointed analysis that Mr Boyle gave about Virkez being an agent run by the Yugoslav Intelligence Service and

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being suspected himself of being a Yugoslav Intelligence Service officer has been - might have been watered down in terms of what was told to Mr Whitelaw.

5 Q. All right.

A. That didn't alleviate my concerns totally at all.

Q. You know Mr Whitelaw got a copy as recorded there of this ASIO SIDC-PAV Situation Report?

10 A. Yes. Mr Boyle said that that was the case.

Q. There, Mr Boyle told the meeting that one of the people arrested over the bombing conspiracy had, for at least six months, been informing the Yugoslav Consulate.

15 A. Yes.

Q. You didn't see that document?

A. No.

20 Q. But Mr Whitelaw had received that document.

A. Correct.

Q. Then his account of what was told to Mr Whitelaw in the meeting with the ASIO agents or ASIO officers, I'm sorry, in that it records on red page 352 that Whitelaw was, sorry, told that Virkez was a Yugoslav agent.

25 A. Yes. I think that falls well short of saying that he was an agent run by the Yugoslav Intelligence Service and himself suspected of being a Yugoslav Intelligence Service officer.

30 Q. What was your understanding of an agent run by Yugoslav Intelligence Service officer?

A. We're talking spy-craft here.

Q. I'm sorry, I missed that.

35 A. We're talking spy-craft. We're talking about people who, more than somebody who's in touch with the Yugoslav Consulate ringing up and giving them some information. We're talking about - about spies.

Q. That's your understanding.

40 A. Yes.

Q. Did you seek clarification in this meeting?

A. That's my understanding, including based on my experience over three years with Royal Commission on Intelligence and Security.

45

Q. Did you raise what was meant by Mr Boyle where he used that terminology in the meeting?

A. No, I didn't.

50 Q. Nobody did. It's not recorded as anybody asking and seeking clarification--

A. Correct.

Q. --of that.

A. I thought it was clear what he meant.

5

Q. Then, the reference to Virkez is himself suspected of being a YIS officer, how is that different from him being a Yugoslav agent?

A. Yugoslav, if you said something was an agent of the Commonwealth, that's one thing. If you said that they were an officer of ASIS, that's quite a different thing.

10

Q. But, again, you didn't raise anything in this meeting about ambiguity of that term or what was meant by that term?

A. No, because I thought it was clear.

15

Q. Nobody else raised anything about the ambiguity of terms?

A. No.

20

Q. Nobody, as you've recorded in the minutes, said to Mr Boyle, "We're concerned about the extent of the disclosure to Commissioner Whitelaw"?

A. No.

Q. Because you would have recorded something like that?

A. Yes, I would have.

25

Q. Could we then turn to red page 355? The paragraph commencing, "Discussion took place about whether the Commonwealth had fulfilled its responsibilities in the case".

A. Yes.

30

Q. First matter that's discussed is Mr Virkez.

A. Yes.

35

Q. I won't read it out, but what is stated and I would suggest the conclusion there has been that you've noted Mr Virkez's position, legally represented, possession of all the facts that led to him pleading guilty, and then it was agreed that the New South Wales prosecuting authorities had been given all the facts of the case and it's their responsibility to make decisions, et cetera.

A. Yes.

40

Q. Any concern about whether an agent run by a YIS agent or a member of the YIS himself, as you said, it's not recorded and it wasn't raised by anybody in the meeting when you're, in a sense, discussing conclusions or results of the meeting?

45

A. Correct.

Q. Can you just help me with the next sentence? "The exercise of that responsibility had not, according to ASIO, being-", is that "interfered with"?

A. I believe so, yes.

50

Q. Right.

A. It's not my writing, but, yes.

5 Q. That reflects what you understood Mr Boyle's position to be that, although ASIO had provided a document and information to the New South Wales Police, New South Wales Police and the prosecutorial authorities, their, I suppose, independence and responsibilities haven't been interfered with. It's up to them as to what they do with it?

10 A. Yes. Can I just add that I was the junior Prime Minister and Cabinet officer in this meeting. I was a mid-level public servant in those days. With me was the Deputy Secretary of the Department and the First Assistant Secretary to whom I reported. I wasn't making the decisions and, there's, perhaps, an inference in what you say, that I should have jumped up and said, "No, I disagree because X, Y and Z." I didn't do that.

15

Q. From what you've just said, you didn't perceive that to be your role at the time.

A. Correct.

20 Q. Would it have been frowned upon?

A. Yes.

Q. Because Mr St John was there and--

25 A. It probably would have been a career-limiting move.

Q. What about writing a quick note to Mr St John in the meeting and slipping that to him?

A. I wasn't seated next to him, as I recall.

30 Q. If we can just continue with the conclusions? Then the second issue that was being discussed in this meeting concerning a possible deportation of Virkez.

A. Yes.

35 Q. That's, again, "Look, we don't have to deal with that now."?

A. Yes.

Q. Then the final paragraph, Mr Enfield concluded by saying, "There could be irritations due to allegations at the trial that Virkez was a YIS agent."

40 A. Yes.

Q. Then you've got Mr Newman who was from the Department of Foreign Affairs.

45 A. Correct.

Q. Who makes a comment about, "Yeah, look, Yugoslav might protest, but those protests would not be difficult to deal with."?

A. Yes.

50 Q. Your understanding, when Mr Enfield raised irritations about allegations

that he was some kind of agent, at this point, it was more about international relationships with Yugoslavia?

A. Diplomatic issues.

5 Q. Diplomatic, yes.

A. Yes.

10 Q. Thank you. Just excuse me for a minute. I took you to this document yesterday, but I'll just bring it up quickly. Exhibit 9.1-51, red page 71. You'll recall this was communication you found from Mr Boyle after a version of the draft minutes had been circulated.

A. Yes.

15 Q. Is it your recollection that the version that was circulated was the first version, the one - the exhibit ending in "A" that I took you to?

A. Yes, and that it had been given a limited circulation, initially, I think.

Q. Yes, you gave that evidence yesterday.

A. Yes.

20

Q. The way it operated, you've got Mr Boyle putting forward that he wants or he's requesting parts of your minute to be deleted and an alternative version for his account of what was said at the meeting to be included.

A. Yes.

25

Q. How did this operate to determine whether his preference, as he describes it, is agreed to and implemented, is that your decision or does it become a matter of discussions between your superior or superiors and Mr Boyle?

A. I don't recall it went anywhere.

30

Q. It must have gone, at least, somewhere, because versions 2, 3 and the final version do reflect deletions.

A. Yes.

35 Q. Though the final version, I think you include, "This is my version and this is what Mr Boyle has put"?

A. Yes.

Q. But there are deletions from your quite fulsome first draft minute.

40

A. Yes. When I say it didn't go anywhere, I refer back to what I said yesterday, that this wasn't like the normal process you have in a company or a club where minutes of a previous meeting are considered, amended, if necessary, and confirmed. Those things didn't happen.

45

Q. Excuse me for a minute.

EXHIBIT 10.1-7 SHOWN TO WITNESS

Q. This has been drafted by you, dated 21 May 1980?

50

A. Yes.



Q. Mr Boyle's letter was dated 19 May, the one I just showed you?

A. Yes.

5 Q. This document, you address it to Mr Enfield but through Mr St John with a copy going to Mr Carrington?

A. Yes, Mr Enfield, yes.

Q. The handwriting towards the top, can you see something - is that "discussed" with Mr--

10 A. Enfield. I believe it is from Richard St John.

Q. That was my question, so that's Mr St John's handwriting?

A. I believe so.

15 Q. Then it's got something like - is it maybe "22/5"?

A. Yes, 22 or 27.

Q. Can you interpret what's written after that?

20 A. "Refer my suggestion". I'm not sure what the last word is. Again, from Mr St John I think all of that.

Q. Looking at the substance of that memo or minute that you've written, you attach a copy of the draft minute sent previously and you're now raising Mr Boyle's communication of two days previously?

25 A. Yes.

Q. You make the point that Mr Boyle's paragraph, "makes references to the intelligence status of Virkez and his contact in the Yugoslav Consulate General more rubbery"?

30 A. Yes.

Q. The use of the word "rubbery", what were you meaning by the use of that word?

35 A. Vaguer, if that's a word. Less precise.

Q. You then say, "The final sentence of Mr Boyle's paragraph 2 is a new addition", and then you say, "My notes reveal that at the meeting there was this second proviso: the Police Prosecution Branch should be told in a way to avoid any allegations that Virkez was an agent provocateur." You will recall there was discussion about that?

40 A. Yes.

Q. Then you seek some guidance?

45 A. Yes.

Q. That was your opportunity to raise in more detail what you were concerned about, that you've evidence today, that Mr Boyle's initial comments that he was an agent run by a YIS officer from August 1978, and the suspicion that Virkez was a YIS officer. You haven't raised that expressly in this minute?

50 A. No.

Q. That was an opportunity for you to do so--

A. Oh, yes.

Q. --if you were so concerned?

5 A. Yes, but it was clear to me that Mr Enfield was strongly in Mr Boyle's corner and strongly against me. I could have done that and got slapped down for it.

Q. You were aware of that as at the time that you wrote this minute on 21 May?

10 A. Aware of what, sorry?

Q. You just spoke about you were aware that Mr Enfield--

A. Oh, yes.

15 Q. --was in the corner of Mr Boyle--

A. Yes.

Q. --and you potentially--

A. Yes.

20

Q. --would be slapped down?

A. Yes.

Q. You had that impression on 21 May?

25 A. Yes.

Q. What did you base that impression on?

A. On the things that he said both in the meeting and outside the meeting.

30 Q. What did he say in the meeting that concerned you?

A. Well, that summation about the position, for example.

Q. Are you referring to where it was stated that it was agreed that the New South Wales prosecuting authorities had been given all the facts of the case and it's their responsibility?

35

A. Yes.

Q. That was in your first draft?

A. Yes. It's an accurate reflection of exactly what was said at the meeting.

40

Q. Can I ask you, in that paragraph you talk about the final sentence of Mr Boyle's paragraph 2 is a new addition. Do you see that?

A. Yes, I do.

45 EXHIBIT 9.1-51 SHOWN TO WITNESS

Q. When you were writing that memorandum, this is what you were referring to?

A. I believe so, yes.

50

Q. Can you identify what the new final sentence is?

A. "He was advised that there was no objection to the head of the Police Prosecution Branch being given the information, provided it was not attributed to ASIO."

5

Q. That was in your first draft?

A. Was it?

Q. Yes. That was one of the provisos that you record, isn't it?

10 A. (No verbal reply)

Q. Yes. We won't jump back to it, but if I just read it up. It's recorded, "ASIO had no objections to Whitelaw briefing the prosecution authorities on a non-attributable basis", and that's what's reflected in that last sentence, isn't it?

15 A. Different - importantly different words. No reference to ASIO in the minutes.

Q. I missed that again.

20 A. There's no reference to ASIO in the minutes. It just says, "non-attributable basis."

Q. Isn't that really the same as not being attributed to ASIO? What they're seeking is that the prosecution authorities not be told the source of the information?

25 A. It's along the same lines. I think one is stronger and more direct than the other.

Q. Again you raise in this this second proviso, "should avoid any allegations that Virkez was an agent provocateur." Wasn't it the result of all the discussion at the first interdepartmental meeting and this one, that the facts of the Crown case was that Virkez wasn't an agent provocateur? Do you remember I took you to Mr Cavanagh saying, "Look, he was roped in"--

30

A. Oh, yes.

35 Q. --"Mr Bebic"?

A. They maintained that he was not, yes.

Q. If they were the facts of the Crown case, why are you concerned about recording this second proviso to avoid any allegations that Virkez was an agent provocateur? That's dependent on the facts of the case, isn't it?

40

A. You call them "facts of the case" so allegations.

Q. I'm sorry, when I say, "the facts of the case" I'm referring to the facts that the Crown is putting forward in its case.

45

A. The facts that it's alleging in its case, yes.

Q. Your understanding is you're being told by somebody who had some knowledge, Mr Cavanagh, and you agreed with this, that there wasn't any indication that Mr Virkez was an agent provocateur. It was Bebic who was the main conspirator. He roped in Mr Virkez. Mr Virkez got into something above

50

his head. Mr Virkez originally was just going to drive a car, or be a driver of a car, and then was suddenly being told that he had to plant bombs at the Elizabethan Theatre.

A. Yes.

5

Q. In those circumstances, why are you so concerned about what you describe as the "second proviso", that "Police Prosecution Branch should be told in a way to avoid any allegations that Virkez was an agent provocateur"?

10 A. The minutes, as I wrote them, were I believe accurate as to what was said and what was said is what was said. What Mr Cavanagh said is basically recorded there. I had some doubts about whether that was an accurate reflection of the situation.

Q. Based on what?

15 A. Based on my knowledge of human nature; my knowledge of intelligence and security matters; based on other facts that had come to me about the way the whole thing was conducted.

Q. Right, at that point?

20 A. Yes.

Q. What were those other facts?

25 A. I have difficulty with the chronology going back 44 years, but the question of where the explosives were obtained, how they were obtained, how they came to be in the possession of six, seven, different people, it seemed to me all very fishy.

30 Q. I understand it's been some period of time, and you have an ongoing involvement with the matter, which we'll get to shortly. What was raised and discussed at the second interdepartmental meeting, was that the explosives found at Lithgow were stolen from two of the conspirators' place of work?

A. Yes.

35 Q. My reading of all the material that you had access to at that point, is that you were focusing on Vico Virkez and Lithgow?

A. Yes.

Q. The other conspirators, what happened with them, isn't mentioned at all?

40 A. Correct.

Q. Allegations against them, matters that they were raising in their defence, were not on Prime Minister and Cabinet's radar at all at that time?

45 A. That's correct. I picked up that - I believed that the other members of the Croatian Six, apart from Bebic or--

Q. Mr Bebic?

A. --Bebic resided in Sydney.

Q. Yes?

50 A. And were arrested in Sydney. Talk of Mr Virkez driving and taking things to

Sydney. So, no, I - I had no knowledge about them.

5 Q. I don't quite understand. Other than, as you said, your experience working with the Royal Commission, your view of human nature; what else you were relying upon to think at this point, it's all fishy?

10 DE BRENNAN: Your Honour, I object. I may have misapprehended the evidence, but this witness has been taken to on a number of occasions various incarnations of interdepartmental minutes. In each of those minutes, including the final version, the term "agent provocateur" can be identified on more than one occasion. The minutes, in all of their incarnations, refer back to the original briefings around the report that was shared with Whitelaw. When one goes to that report, which predates any correspondence on behalf of Mr Cunliffe, one can identify that the word "agent provocateur" features in that memorandum, as well.

20 And so, the concern on behalf of the petitioners is this: that if it is suggested that somehow, the concept of an agent provocateur was introduced from nowhere by this witness - and I'm not certain if that's the proposition that is going to be advanced - then it's important to consider the evolution of the documents. And if I could just take your Honour quickly--

25 HIS HONOUR: Mr De Brennan, can I just intervene at this point. The questioning is about his statement a short time ago that by this point, he thought something was fishy. Counsel is simply exploring what was it, what was the basis for him thinking that something was fishy. What's wrong with that?

30 DE BRENNAN: In relation to "fishy", I couldn't possibly quibble with that, but if that's a final point on the back of the propositions that at least, as I apprehended them, was that this term of art, "agent provocateur", came from nowhere, then in my respectful submission, it's important to look at what preceded the departmental minutes, and in particular, the report that was shared with Assistant Commissioner Whitelaw which Boyle is speaking to, and in that document, which precedes all of this, the term "agent provocateur" is used.

40 HIS HONOUR: Well, this is a matter for submissions. Counsel is just exploring the "fishy" comment.

DE BRENNAN: If your Honour pleases.

45 MCDONALD: Your Honour, I did go back at the beginning of the questioning this morning because there was a document which I mistakenly did not take Mr Cunliffe to yesterday. But I've put the position about "agent provocateur", I've asked him questions about how it arose et cetera, but as your Honour has noted, I've now turned to something else, when Mr Cunliffe has given evidence that he's concerned at this particular point that there was something fishy going on.

50

And he's given evidence that, you know, he was relying on his experience, if I can describe it in espionage matters, through the Royal Commission, human nature. I was trying to hone down about at this point, what actual facts did you have that gave rise to, "This is all fishy".

5

HIS HONOUR: Yes.

MCDONALD

10 Q. So Mr Cunliffe, what I'm interested in - and I accept your experience and your comments about human nature, I know it's difficult because there is a chronology of your involvement, and you learn more things as it goes along - but looking at this time, so it's around March 1980, your description of, "Look, I still thought this was all fishy", or slightly fishy or something along  
15 those lines, what facts did you base that on?

A. You mention my experience with the Royal Commission, that's also the experience with the Protective Security Review which went heavily into matters of terrorism and pre--

20 Q. That's fine, I'm not cavilling with that at all--

A. No.

Q. --Mr Cunliffe--

A. But - but I had a considerable background in those things.

25

Q. Yes?

A. The - the things that were said at that meeting, the second in - interdepartmental meeting, the - and at the first interdepartmental meeting.

30 Q. What in particular?

A. In particular, the things that Mr Boyle said that one of the players had for a long period of time or a period - a considerable period of time, been apparently an agent of a YIS member, and perhaps himself a member of the YIS.

35 Q. The time that was stipulated was from August 1978?

A. Yep.

Q. Did Mr Boyle, at that meeting, state that the material that ASIO had in respect of that included Mr Virkez ringing the Consulate and giving some  
40 information about Croatian nationalist affairs, the demonstrations planned in two weeks, and they're going to do this--

A. No.

Q. --did he elaborate on the basis--

45

A. No.

Q. --of which he expressed that opinion?

A. No, my recollection is he did not.

50 Q. So the issue of "fishy", you're focusing on that initial description by

Mr Boyle that you've just summarised?

A. And the things that Mr Cavanagh said, and the things in Mr Palmer's letter.

5 Q. What did Mr Cavanagh say at this second interdepartmental meeting that you thought was fishy?

A. Well, the acknowledgements that Mr Virkez was something more than he had purported to be, namely, a Croatian labourer.

Q. Where was that - could you point that out in the minutes?

10 A. I'm not talking about minutes, I'm talking about his initial letter, for example.

Q. Sorry, Mr Virkez's initial letter?

A. Yes.

15 Q. But that's Mr Virkez's account.

A. Yes.

Q. We're talking about what was said at the second interdepartmental meeting that concerned you?

20 A. Well, I've listed those things, and as you said, to a significant extent, my concerns were alleviated by the assurances which were given by Mr Boyle and by Mr--

Q. Mr Cavanagh?

25 A. Yeah.

Q. I took you yesterday to a document which again seems to be part of what occurred afterwards where you were drafting part of the minutes. I'll bring it up, Exhibit 10.1-6?

30 EXHIBIT 10.1-6 SHOWN TO WITNESS

Q. Do you remember I showed you this yesterday afternoon?

A. Yes.

35

Q. And again, this seems to be after the meeting, you're trying to complete the minutes--

A. Yes.

40 Q. --that's your handwriting?

A. Yes.

Q. And then--

45 A. At the top of it is my handwriting, some more handwriting at the bottom, yes.

Q. And yes, we'll get to that now, if we can move down the document? You couldn't recall that handwriting, could you?

A. I think it's probably Mr St John's handwriting.

50

Q. So that suggests that this issue of--

A. And Mr Enfield's handwriting on the left, I think.

5 Q. Does this suggest that when you're trying to finalise the minutes, and it may be after you've received Mr Boyle's letter, you draft something and it would appear that instead of your account, Mr St John is including, "And it was explained that in providing the intelligence, ASIO was not suggesting that Virkez was an agent provocateur"?

A. Yes.

10

Q. And then, you are of the view that the writing on the left, "Okay with Boyle", and there's actually, I think, there might be some initials under that?

A. I think that - I think that's correct, which, I think, are John Enfield's initials.

15

Q. And so, that would suggest that you provided this to your immediate superior, Mr St John?

A. Yeah, not immediate superior.

20

Q. I'm sorry?

A. Two up superior.

Q. Who was your immediate superior?

A. Brian Cogan.

25

Q. Okay--

A. He was the Senior Assistant Secretary. St John was the First Assistant Secretary, and above him was the Deputy Secretary, Enfield.

30

Q. But it seems here, you're providing this to Mr St John who then is providing it to Mr Enfield?

A. Yes.

35

Q. Which would suggest they have involvement in trying to finalise the minutes of that second interdepartmental meeting?

A. Yes.

40

Q. You recall in your first version of the minutes, there is a reference to of a comment by Mr Cavanagh of Mr Virkez at some stage demonstrating, I think it might have been a new kind of bomb, or something like that?

A. Better bomb, I think it was--

Q. Better bomb?

A. Yeah.

45

Q. Was that the extent of the information that was provided at that meeting about any possible expertise Mr Virkez may have with bombs or explosives?

A. And I think the draft minutes also suggest that he said that he'd dismantled the detonator.

50

Q. Yes, was there any discussion that by breaking down a detonator, it



allowed access to components of the detonator that could be used in a bomb;  
do you remember any details--

A. No.

5 Q. --along those lines? In your statement, you refer to a comment by  
Mr Enfield about Mr Virkez?

A. Enfield?

10 Q. Enfield. I keep on getting that wrong. Mr Enfield shortly after the second  
interdepartmental meeting?

A. Yes.

15 Q. Where Mr Enfield said that Virkez was an explosives expert and that Virkez  
had displayed the ability to dismantle a detonator.

A. Yes.

Q. Do you recall that?

A. Yes.

20 Q. The information that he'd displayed the ability to dismantle a detonator, the  
meeting was told that by Mr Cavanagh.

A. Yes.

25 Q. Mr Enfield's description of Virkez as an explosives expert, were you under  
the impression that that was based on Mr Cavanagh's comments at the  
meeting?

A. No.

30 Q. Were you under the impression that it was based on something else?

A. Yes.

Q. Did he give you an indication of what else it was based on?

A. No.

35 Q. Did you ask him?

40 A. No. Mr Enfield had a background in intelligence and security, I believe,  
specifically, I think, a background with the Defence Signals Directorate, but it's  
the intelligence and security community is, first of all, somewhat separate from  
the rest of, even the public service and there tend to be relationships across  
that community and I, at the time, thought somebody else, somebody in that  
community had told him these things.

Q. That was your supposition.

45 A. It was a supposition.

Q. Mr Cavanagh, at the meeting, although he gave you details about the  
demonstration of building a better bomb and dismantling the detonator, he  
didn't describe to the meeting that, in his view, Virkez was an explosives  
expert?

50 A. I think not in so many words. I'd like to go back, if you--

Q. Do you want to go back and have a look?

A. If you disagree, but I think that's correct.

Q. All right.

5 A. And Enfield was really elaborating on what Cavanagh had said, I thought, probably, from different sources to what Cavanagh's were, but that was the inference.

10 Q. Just clarifying this, your recollection is, although Mr Cavanagh spoke about the demonstration by Mr Virkez, building better a bomb, dismantling a detonator, Mr Cavanagh didn't say, "Look, I think he's an explosives expert", or, "We're of the view that he's an explosives expert", in those words?

15 A. I don't think he did. You'll take me back there, but there was also the evidence that he and Bebic went into the bush and detonated some bombs and so forth, which is also supportive of the notion that Virkez was more than a humble labourer.

20 Q. When, in the corridor, I think this is a corridor meeting, Mr Enfield said that Virkez was an explosives expert, you assumed that he was relying on what Mr Cavanagh said in the meeting and - sorry - you're assuming he was relying on information he had obtained elsewhere?

A. Yes, and elaborating on what Cavanagh had said.

25 Q. In your statement you then said, "Mr Enfield also told us in very clear terms that the Prime Minister should not be involved."

A. Yes.

Q. When he told you that, was that in this corridor meeting?

30 A. Yes.

Q. As you then go on, he didn't explain why.

A. No.

35 Q. You deduced that it could only be of embarrassment to the Prime Minister.

A. That that was his reasoning, yes. When I say a corridor meeting, it was immediately after the interdepartmental committee meeting. We came out and we had a short discussion.

40 Q. Yes.

A. Yep.

Q. After that meeting, and then we're going to turn to January 1981, the matters that were discussed at the second interdepartmental meeting, you were no longer involved in?

45 A. Yes, I think that's fair - that's a fair analysis.

Q. You'll remember there was this kind of second issue about deportation.

A. Yes.

50 Q. If that became a matter, you would assume that was dealt with by other

departments?

A. Yes, by - I mean, there was discussion that Immigration should deal with it with the benefit of advice from the Solicitor General's area or the Australian Government Solicitor.

5

Q. Tracing the chronology, the next development, according to your statement, is that in January 1981, you learned by reading some newspapers that the Croatian Six had been convicted.

A. Yes.

10

Q. In particular, it was a Sydney Morning Herald article that you read and that led to some concerns.

A. Yes.

15

Q. It led to you writing some memorandum.

A. Yes.

Q. Can I first take you to Exhibit 10.1-5, red page 11? You can see down the bottom it's your signature block and it's dated February 1981.

20

A. Yes.

Q. It's addressed to Mr St John.

A. Yes.

25

Q. Underneath you've got a copy to, is it a Mr Reid and Mr Quigley?

A. Yes.

Q. Who are they?

A. My recollection is that Mr Quigley was sitting in Mr Cogan's chair, so--

30

Q. The person you immediately reported to?

A. Senior Associate - Senior Assistant Secretary. Mr Reid might also have been acting in such a position, so, below Mr St John. Now, that's not a signed memorandum. There are initials on the side which I think are of Derek Emerson-Elliott's. He was my junior.

35

Q. Can I just pause you? You spoke about initials.

A. Yes.

40

Q. Where are you looking?

A. Three quarters of the way down the page.

Q. Yes. After, perhaps--

A. At the end of the text.

45

Q. Yes, sorry. "Perhaps we should be considering approaching the New South Wales authorities with our concern"?

A. Yep.

50

Q. That's not your initials?

A. No.

Q. Do you recall whether that was actually forwarded?

A. I don't believe it was.

5

Q. But it reflects, if we go back towards the beginning, that you attach a Sydney Morning Herald article, and you've picked up on something reported in the article that the Crown Prosecutor told the jury that "there is not a skerrick of evidence that Virkez is a foreign agent"?

10

A. Yes.

Q. You refer back to discussions at the second interdepartmental meeting?

A. Yes.

15

Q. Again, you are now concerned about what you were told in that meeting might not have occurred?

A. Yes.

20

Q. Then, you were also concerned that that may eventually had repercussions on the Commonwealth?

A. Yes.

25

Q. Could I then take you to Exhibit 10.1-2, please? This consists of two pages. Just to orientate you, Mr Cunliffe.

A. Yes.

30

Q. Can you see there, putting to one side the handwriting, "Vico Virkez and the conviction of alleged Croatian bombers."?

A. Yes.

Q. If we go towards the bottom of the page, your signature appears?

A. Yes.

35

Q. You can see your paragraph, "You will see from the attached copy of the Sydney Morning Herald article"?

A. Yes.

40

Q. If we go to red page 6.

A. Yes.

Q. That was the article?

A. Yes, I believe so.

45

Q. Could we possibly expand that so that underneath the drawing of the six accused.

A. Yes.

Q. And I think you've put a line against it.

A. Yes, somebody has done so. I don't think me, yes, but.

50

Q. Can you see it records, "In reply, the Crown Prosecutor, Mr Shillington has told the jury it must rely on commonsense", and "He said there is not a skerrick of evidence that Virkez is a foreign agent."?

A. Yes.

5

Q. It's that reporting in this article that concerned you?

A. That did concern me, yes.

Q. If we go back to page--

10

A. I was concerned that if they had been convicted, given things that I thought I knew, which suggested that in a properly conducted trial, in my view, they would not have been convicted.

Q. Your last answer, "that in a proper conducted trial, they would not be convicted".

15

A. Yes.

Q. Are you saying that was your opinion as in February 1981 or is it you're expressing your opinion now?

20

A. No, it was my opinion then and now.

Q. Why, in February 1981, were you of the view that in a properly conducted trial, they would not be convicted?

25

A. Because of the things that Mr Boyle and Mr Cavanagh had told the second interdepartmental committee, in particular.

Q. Is that to do, and I'll describe this broadly, that Mr Virkez was an agent for Yugoslav Intelligence Service?

30

A. Yes.

Q. Or the Yugoslav government?

A. Something of that sort. Either a member of it or an agent of it who had specialist skills in explosives, yes, and he also was, himself, a Serb.

35

Q. Can I just pause there? When did you learn that Mr Virkez was a Serb?

A. He asserted it in his initial letter and it was, I think - agreement was expressed to that proposition in, I think, the Farmer letter, for example.

40

Q. That factor, did you have any knowledge of whether the defence knew about that?

A. No.

45

Q. Other than the matters that you've just raised - and I'm just describing them broadly - that Mr Virkez was an agent for the Yugoslav government, and that he had specialist skills in explosives, did you have any other knowledge of what the Crown case consisted of?

A. The things that I read in that newspaper article, largely. I hadn't been following the case.

50

Q. It recorded that there were admissions by the various defendants?

A. Yes, at a time when I had no faith in unsigned admissions being given to New South Wales Police or the likes of Roger Rogerson.

Q. You knew about Roger Rogerson in 1981, did you?

5 A. I recall I did, yes.

Q. What did you know about him in February 1981?

A. My recollection is that he was a bad hombre, but I don't recall the detail of it.

10

Q. What I'm suggesting is you're having difficulties in demarcating what you knew at particular times, and that a revelation about Mr Rogerson would have been surprising to most people in February 1981. Revelations about Mr Rogerson really came out during the late 1980s and the 1990s.

15 A. Yes. It wasn't confined to Mr Rogerson. The New South Wales Police Force, particular parts of it, at that time had a very bad reputation.

Q. Up until 1982, had you worked in criminal law in New South Wales?

20 A. Sorry, I just need to think through my background so that I can properly answer your question. I was the associate to Sir Cyril Walsh on the High Court. That, in a sense, in working in criminal law; in a sense it's not. We had criminal matters coming to the High Court. I didn't directly work - I spent 12 months practising essentially every day in court in the ACT, which also involved New South Wales in 1974. I also was close to Mr Justice Hope and I recall having discussions with him about things that had happened, which he said concerned him greatly, about apparent malpractice within parts of the New South Wales Police Force, to do with holdups and so forth.

25

Q. What did he say?

30 A. There was a particular case he told me about where police had shot dead a man who conducted a bank robbery I think at Parramatta and taken a very large amount of money. My recollection was it was in the realm of \$250,000 at that stage. Shot him dead on a beach and he never was found. He was suggesting to me, I believed, that there was something pretty rotten in the state of Denmark and New South Wales.

35

Q. When was that conversation?

A. It would have been before this time.

40 Q. You worked in some courts in the ACT in 1974. You were an associate to Walsh J, and you have discussions with Hope J, including a discussion about somebody being shot after robbing a bank, was it--

A. Yes.

45 Q. --and the money disappearing?

A. Yes. I generally followed events, and I think it's fair to say, particularly to do with justice in New South Wales and other places, but New South Wales in particular, and, yes, it was my view that there were serious problems with elements of the New South Wales Police Force at that time.

50

Q. In February 1981?

A. Yes.

5 Q. When you said, "it wasn't a properly conducted trial", are you concerned about the conduct of Maxwell J?

10 A. No. I'm - well, I didn't closely follow the trials. My knowledge of the conduct of the trial is based on pretty much that newspaper article, but I was referring to the fact that what I regarded as vital evidence was not before the jury, and that the Crown Prosecutor, according to the Sydney Morning Herald, was quoted as saying there wasn't a skerrick of evidence to suggest that Virkez was what he really was.

15 Q. Of course there could have been judgments or decisions by Maxwell J that certain evidence or questions weren't relevant?

A. Yeah, could have been.

20 Q. The comment by Mr Shillington could have referred to the evidence admitted and was before the jury, and based on that evidence that was before the jury there was no skerrick of evidence?

A. Yeah, it could have been, yes.

Q. Which could have been a correct statement?

25 A. Could have been. I have limited insight into this whole matter, and I agree with that. I don't know what the Commonwealth Police really told - or the AFP - really told the New South Wales Police. I don't really know what ASIO told the New South Wales Police. I don't know what the New South Wales Police passed on to the prosecutor. It's hearsay.

30 Q. You couldn't form a view on that limited information, that a properly conducted trial would not have resulted in the conviction of the Six?

A. Well, I did.

Q. Based on the limited information that you've just--

35 A. Yes.

Q. --outlined to us?

A. Yes, as one does.

40 Q. Have we still got Exhibit 10.1-2? I'm just taking you to the newspaper article that you attached.

A. Yes.

Q. This document, this is the one that you signed and submitted?

45 A. Yes.

Q. The first paragraph you just refer to the jury's verdict?

A. Yes.

50 Q. The next paragraph you refer to the second interdepartmental meeting?

A. Yes.

Q. There you attach the minutes of the meeting?

A. Mm-hmm.

Q. Do you recall which version?

5 A. I don't recall at the moment, no.

Q. Was it the case that given what was happening with the different versions and where you seem to be getting either directions or suggestions from either Mr St John or Mr Enfield, the minutes were probably either the last version?

10 A. I don't recall.

Q. You then raise in the next paragraph your Sydney Morning Herald article?

A. Yes.

15 Q. You quote the skerrick of evidence?

A. Yes.

Q. Then you conclude, "It would appear that either Mr Shillington has misled the Court on this critical issue, or communications have broken down  
20 somewhere." Then you say in the last paragraph, "If Commonwealth doesn't do anything, there is a grave potential for it to be embarrassed if the truth comes out." You raise, "The potential for injustice to the defendants, and I recommend the New South Wales Government should be alerted, and I attach a draft letter for consideration." I don't think we've got the draft letter. Do you  
25 recall what you wrote in that draft letter?

A. No.

Q. Looking at this document, can you help us with some of the handwriting. If we go to the top of the page, Mr St John?

30 A. That's I think a note from John Enfield to Mr St John.

Q. You might be able to assist us with the handwriting. It's, "Please discuss the issue with Mr Neeves. The PM has not been involved so far and is not to be involved."

35 A. Yes.

Q. Mr Neeves, who is he?

A. I think at this stage he was actually the Secretary of the Federal Attorney-General's Department and later became a judge of the Federal Court.

40

Q. If we can go towards the bottom of the page, can you see next to the date--

A. That's Mr St John's writing, yes.

Q. Again, interpreting handwriting, "I discussed the matter with Mr Neeves and Mr Menzies at the A-G's Department."

45

A. Yes. Mr Menzies - who was I think probably even a Deputy Secretary of the Attorney-General's Department, Federal.

Q. "Mr Menzies will speak to the AFP today to check whether the New South Wales Police had in fact been" - is it something "informed"?

50



A. "Appropriately" I think.

Q. "About Virkez's contacts with the Consulate General"?

A. Yes.

5

Q. If we then jump back to the penultimate paragraph, there's some handwriting in the left-hand corner.

A. Yes.

10

Q. "I do not accept this conclusion."

A. Yes.

Q. Whose handwriting is that?

A. John Enfield.

15

Q. You submitted this. There's obviously been these comments made; directions to have discussions with other people. Were these comments raised with you?

A. My recollection is they were not.

20

Q. For example, Mr Enfield's comment that he didn't accept your assertion that either Mr Shillington's misled the Court or communications had broken down, that was never discussed with you?

A. Correct.

25

Q. Were you told that the plan was to raise it with certain senior people within the Commonwealth Attorney-General's Department?

A. No.

30

Q. Were you told that the upshot of that was that the AFP would be contacted to try and get some more information about what the New South Wales Police had actually been told?

A. No.

35

Q. Did you ever get any feedback from either Mr St John or Mr Enfield or another superior about this memo?

A. No.

Q. Is that unusual?

40

A. (No verbal reply)

Q. I'm talking generally now, where you write a memo and it's forwarded to a superior, that you don't get any feedback or any response?

A. Normally, we would expect to get some feedback from, I would have thought, from Mr St John. John Enfield, I probably only ever spoke to him about three or four times.

45

Q. This was all written in February 1981, you wrote that it was forwarded, you've given evidence you had no response. Within the Department, was that the end of your agitation that something be done about what you had read in

50

the Sydney Morning Herald?

A. My recollection is that is the case, yes.

5 Q. In your statement, and I need just to check dates, in paragraph 87, you say, "In September 1981, I resigned from my position at PM&C", and you went to the Australian Law Reform Commission?

A. Yes.

10 Q. Just to clarify, in paragraph 93, you say, "From September 1983 to about October 1988, I was employed as the Secretary and Director of Research at the ALRC", should that be 1981?

A. Yes. Sorry, back in paragraph 8?

15 Q. I'm sorry, your Honour, it's paragraph 93--

A. Yes.

Q. Sorry, to be fair, we should bring this up. Could Exhibit 15.18 be brought up?

20 EXHIBIT 15-18 SHOWN TO WITNESS

A. I was appointed as the Secretary and Director of Research of the Australian Law Reform Commission.

25 Q. And was that when Justice Kirby was heading it?

A. Justice Kirby was the head of it when I went there, yes.

Q. It's page 11 of the document, I don't have red pages, I'm sorry.

30 WOODS: 94.

MCDONALD: Thank you.

35 Q. Paragraph 87, you say, "In September in 1981"?

A. Yes.

Q. Can we jump down to paragraph 93? There, it says, "From September 1983", that should be September 1981?

40 A. Correct.

HIS HONOUR: So can we go to paragraph 8?

MCDONALD: Sorry.

45 WITNESS: Is that right?

MCDONALD

50 Q. Yes, thank you, your Honour. Can we go back to the first page of page 8? Sorry, page 1, paragraph 8? There, you've got, "From early 1979 to--

A. No, I think that that - that is the correct date, September '83, yes.

Q. Hold on. Can we just pause? What's your recollection of when you resigned from Prime Minister and Cabinet?

5 A. Well, I was at the Law Reform - I was at PM&C for nearly three years, and then, I went to the Law Reform Commission, and I was there for nearly five years to '86. So probably, you know, it probably should be '80 - September '81.

10 Q. So that's paragraph 8?

A. Yep.

Q. And--

15 HIS HONOUR: So paragraph 9 is correct where it says, "In September 1981, I was appointed Secretary and Director of--

WITNESS: Yes.

20 HIS HONOUR: --Research.

MCDONALD

Q. That's correct, Mr Cunliffe?

25 A. Yes.

Q. And then, as you said, you stayed there for five years, and then, you went across to the Australian Constitutional Commission?

A. Correct.

30 HIS HONOUR: So paragraph 93 needs another amendment. Can we go back to 93.

MCDONALD: Yes, your Honour. Could we bring that up, please?

35 HIS HONOUR: So that should be September 1981 to about October 1986.

WITNESS: '86.

40 HIS HONOUR

Q. Is that right?

A. That is correct, your Honour. Sorry, that I've got that wrong.

45 HIS HONOUR: Yes?

MCDONALD: Is that an appropriate time, your Honour?

50 HIS HONOUR: I think so. We'll take a morning break at this point, Mr Cunliffe, you can step down.

## SHORT ADJOURNMENT

MCDONALD

5 Q. Mr Cunliffe, before the break I had asked you some questions about the second interdepartmental meeting, and in particular whether you raised, during that meeting, some concerns, and your answer was at that meeting you were relatively a junior officer compared with the other people attending?

A. Yes.

10

Q. Your role was mainly to take minutes?

A. I don't think I said the latter but, yes.

Q. No, I'm putting that to you.

15

A. Yes.

Q. Your role was mainly to take the minutes or note what was being discussed, with the idea that you would draft minutes or an account of the meeting?

20

A. Yes.

Q. I think I asked you about whether you could have spoken up and said something on a particular issue, and your response was, "It would be a career-limiting"--

25

A. Move.

Q. --"conduct"--

A. Move.

30

Q. --or "move"?

A. Mm.

Q. At that meeting, given the level of your seniority at that stage, there was an expectation that you would not talk or contribute to the meeting?

35

A. Probably that's true.

Q. Is your recollection that you didn't talk or raise any matter during the meeting?

A. That is my recollection.

40

Q. You don't record anything along the lines of, "I said"--

A. No.

Q. --in your thorough file note?

45

A. No. Just coming back to what you said for me to speak up, I mean just after John Enfield had summarised the situation, saying we'd done everything we needed to do, it would have been a career-limiting move for me to jump up and say, "I disagree."

50

Q. The career-limiting move was particularly in respect of that point of the

meeting, when conclusions were being summarised, conclusions from the meeting?

A. Yes.

5 Q. Your recollection is that you didn't speak through the meeting?

A. That is my recollection, and it - the expectation would have been that with John Enfield chairing it and Richard St John being there and being well-briefed about things, that I wouldn't be putting myself forward.

10 Q. As we were discussing immediately before the break, you left Prime Minister and Cabinet in about September 1981 and moved to the Law Reform Commission?

A. Correct.

15 Q. Chronologically, in your statement, your next involvement in this matter is where the convicted Croatian Six file appeals to the New South Wales Court of Criminal Appeal?

A. I think that's correct, yes.

20 Q. You speak about, in your statement at paragraph 88, "I arranged to meet with Mr Sumner-Potts?

A. Sumner-Potts. Later a judge of the District Court.

Q. Right, but at this stage he's still at the bar?

25 A. Yes.

Q. "Who I had previous contact with from university"?

A. Yes.

30 Q. Was he a friend at university?

A. No.

Q. Had you kept in contact with him?

A. No.

35

Q. The way your paragraph 88 is drafted, "I arranged to meet with Mr Sumner-Potts." That indicates that you initiated the meeting?

A. Yes.

40 Q. How did you learn that Mr Sumner-Potts had an involvement?

A. I read I think somewhere, perhaps in the article, that he was one of the counsel representing one or more of the Croatian Six.

45 Q. When you arranged to meet him, at that time did you realise that an appeal had been lodged?

A. Yes.

Q. When you met with Mr Sumner-Potts, did you meet him in his chambers?

A. Yes.

50

Q. In Sydney somewhere?

A. Yes.

Q. What was your discussion with Mr Sumner-Potts?

5 A. About this case.

Q. What did you say to him?

A. "I see that you - the case has been lost and you're appealing to the Court of Criminal Appeal."

10

Q. He would have said, "Yes, we are" and then you said?

A. I said, "The Commonwealth holds information which I think would be useful, given that, as I read it, the trial was conducted on the basis that there wasn't a skerrick of evidence supporting the proposition that Virkez was an agent of the intelligence service of Yugoslav."

15

Q. That's your interpretation of what was reported in that Sydney Morning Herald article of Mr Shillington - part of Mr Shillington's address to the jury?

A. Yes.

20

Q. Did you give Mr Sumner-Potts any more detail at that point?

A. No.

Q. In your statement you then refer to receiving a subpoena requiring you to appear and give evidence before the New South Wales Court of Criminal Appeal?

25

A. Yes.

Q. Did you realise that you were going to be served with a subpoena?

30

A. No.

Q. That came completely out of the blue?

A. Oh, not completely out of the blue. It didn't surprise me.

35

Q. It didn't surprise you because of your conversation with Mr Sumner-Potts that you've relayed?

A. Yes.

Q. Did you have any concerns when you received the subpoena?

40

A. Concerns? Yes, I didn't particularly want to go through what seemed to be coming.

Q. When you said, "I didn't particularly want to go through" what you perceived to be coming, the subpoena was to give evidence before an appeal bench?

45

A. Yes.

Q. You anticipated that you would be asked some questions about the Commonwealth information that you briefly mentioned to Mr Sumner-Potts?

50

A. That I referred to Mr Sumner-Potts, yes.

Q. You'd be potentially cross-examined about that?

A. Yes.

Q. Why was that of concern?

5 A. Because I'd be putting myself out. I would be making myself the focus of attention which I didn't particularly want to do.

Q. When you say, "the focus of attention" is that because you would be giving evidence and speaking about matters that I've been asking you questions  
10 about yesterday afternoon and this morning?

A. Yes. Once again, a career-limiting move.

Q. A career-limiting move - you're very high up at the Law Reform Commission?

15 A. Yes.

Q. Was your concern that if you wanted to progress further within the Commonwealth public service, this may be a potentially--

20 A. Career-limiting move.

Q. --career-limiting move?

A. Primarily, yes.

Q. Did you have any other concerns?

25 A. Not really, although to go through the process of being in the witness box and being cross-examined, I had very limited experience of that prior to that time. It's not a pleasant experience.

Q. In your subpoena you talk about discussing the subpoena with the former Hope J?

30 A. Yes.

Q. At the time was Hope J still a member of the New South Wales Court of Appeal?

35 A. Yes.

Q. You worked for him. In addition to working for him had you developed a friendship with him?

40 A. Yes. I worked for him both on the Royal Commission and on the Protective Security Review and, yes, I had.

Q. In your statement at paragraph 91 you said, "I discussed the subpoena with former Justice Hope, and I expressed that I was uncomfortable at the prospect of giving evidence"?

45 A. Yes.

Q. This idea of being uncomfortable at the prospect of giving evidence, are you referring to what you just mentioned?

50 A. Yes.

Q. Being in the witness box, being cross-examined is never pleasant?

A. I'm sorry, more the former things that I said about career-limiting move and putting myself out there.

5 Q. As the centre of attention?

A. Yes.

Q. And what did Hope J say to you?

10 A. He said he would talk to Gordon Samuels who I knew to be one of his closest friends.

Q. And what did you anticipate that Hope J was going to raise with Samuels J?

15 A. I didn't know.

Q. Did you ask Hope J to raise something with Samuels J?

A. No.

20 Q. When Hope J said to you, "I'll raise it with Samuels J", did he give an indication of what?

A. No.

25 Q. In your statement, you record that a little later, you were told by Hope J that he'd spoken to Samuels J who was presiding at the appeal, and Samuels J said that he understood the situation?

A. Correct.

30 Q. Understood the situation - did Hope J give you any more detail about what that situation was?

A. No.

Q. What was your understanding of it?

A. I didn't have a particular understanding.

35 Q. The subpoena that was served on you, was it your understanding that ultimately, it was not called upon?

A. Yes.

40 Q. So you did not give evidence before the New South Wales Court of Criminal Appeal?

A. Correct.

45 Q. The next part of your statement refers to some notes or submissions that you made to two Commonwealth Attorney-General's?

A. Yes.

Q. The first one being Gareth Evans?

A. Yes.

50 Q. Could we bring up Exhibit 10.3-39, red page 163?



## EXHIBIT 10.3-39 SHOWN TO WITNESS

5 Q. Mr Cunliffe, the document commences at red page 163 and goes to 167,  
can you see at the top of red page 163, you have Kokotovic, Bebic and others,  
and then, a summary?

A. Yes.

Q. If we--

10 A. Is that 136, I think, is it?

Q. That's 163. Sorry, if we go down to the bottom of the page, I'm - yes, there  
we are. When I talk about page numbers, it's the exhibit number here.

A. I'm sorry.

15 Q. So it's red page 163.

A. Yes.

Q. And can I just ask, the designation "Secret", is that something you made on  
the document?

20 A. Probably, yes.

Q. All right--

A. I'm not certain of that.

25 Q. Can we then jump to red page 167? That's your signature, and the date is  
12 April 1984?

A. Correct.

30 Q. Could we go back to red page 163? In the first paragraph under  
"Summary", you refer to:

35 "A Commonwealth officer had given evidence to the New South  
Wales Court of Criminal Appeal which in at least two respects  
contradicts what he earlier told me and told a meeting of  
Commonwealth officials."

Do you see that?

A. Yes.

40 Q. Who was the Commonwealth officer?

A. I think I'm referring there to - to Michael Boyle.

Q. So is your understanding that Mr Boyle gave evidence to the New South  
Wales Court of Criminal Appeal?

45 A. I'm not sure.

Q. You weren't called, that subpoena wasn't called upon, did you attend any of  
the days or hearings before the Court of Criminal Appeal?

A. No.

50

Q. Were you getting information or updates from Mr Sumner-Potts?

A. No, I wasn't getting any information from anybody.

Q. Well, how did you know that a Commonwealth officer had given evidence?

5 A. I don't recall, it might have been in a newspaper article.

Q. But your recollection is that's Mr Doyle?

A. Yes--

10 Q. Boyle, I'm sorry--

A. --I don't say that with great confidence, it might have been Mr Cavanagh.

Q. You then say corroborating documents were on the Department of Prime Minister and Cabinet files?

15 A. Yes.

Q. Those corroborating documents, they're the documents that I've taken you to yesterday and this morning?

20 A. Yes.

Q. And also, I haven't gone to every document, but there are other documents that you were showed, and you refer to in your statement?

A. Yes.

25 Q. Where you then say, "But I am told that these files may have been culled", who told you that?

A. I don't recall.

Q. Whoever told you was clearly incorrect, weren't they?

30 A. I - if we're talking about the file from the Legal Branch of the Department of Prime Minister and Cabinet, I believe that that is incorrect, yes.

Q. They were the documents that you had knowledge of?

35 A. Yes.

Q. If there were any of other documents, for example, within the Security Branch, unless they had been brought to your attention, you had no knowledge of their existence?

40 A. I had no knowledge of their existence then, nor now. I'd be surprised if there weren't such papers, but--

Q. And in particular, you've got no knowledge of whether they had been culled at all?

45 A. No.

Q. And then, you say, "I understand they have appealed to the High Court", that information, was that something Mr Sumner-Potts had told you?

A. Might have been. I don't have a clear recollection.

50 Q. Under "Action", you refer to an immediate investigation by the

Commonwealth Crown Solicitor, and then, you set out what, in your opinion, what this investigation should undertake. The Commonwealth Crown Solicitor, is that the same as the now Solicitor General, or is a different role?

A. Different role.

5

Q. Was that a person within the Attorney-General's Department?

A. Yes.

10 Q. And what? The head of the Attorney-General's - I know the Attorney-General's the head of the Attorney-General's Department but kind of--

A. Yes, it's the head of the litigation part of the Attorney-General's Department.

15 Q. You then, if we can in this document go down to trial of six Croatian defendants? You start going into more detail about the Crown case and evidence at the trial?

A. Yes.

20 Q. And indeed, sentences that were imposed?

A. Yes.

Q. And if we go across the page? The first two paragraphs, you continue setting out more details either about the trial or the sentencing et cetera?

A. Yes.

25

Q. Where did you get that information from?

A. From the press, I believe.

Q. In that amount of detail?

30

A. Yes.

Q. Under, "Importance of the Informant Virkez"--

A. Yes?

35

Q. --you say:

"At the trial, an attempt was made by the defence to suggest that Virkez was an agent provocateur, but no evidence was produced of that, and he denied throughout any association with the Yugoslav Intelligence Service".

40

What do you base that on?

A. I don't recall. Michael Sumner-Potts might have told me that, or maybe, I've got it from the newspaper. I don't recall.

45

Q. You then, in that paragraph, refer to the Crown Prosecutor, who was Mr Shillington, in his closing, "There is not a skerrick of evidence to suggest any relationship with the Yugoslav Government"?

A. Yes?

50

Q. Now, that isn't what is what was quoted in the newspaper, was it?

A. I don't recall. It was slightly different language, I think it was with a foreign organisation or a foreign state, or something like that was the - the wording quoted in the newspaper article.

5

Q. I'll just find that.

HIS HONOUR: It says, "skerrick of evidence that Virkez is a foreign agent"--

10

MCDONALD: Yes.

HIS HONOUR: --in the newspaper.

MCDONALD

15

Q. That reference to "is a foreign agent", is different from what you've put in this memo, "Not a skerrick of evidence to suggest any relationship with the Yugoslav government"?

A. Yes.

20

Q. Somebody could be an informant, ringing up occasionally the consulate, that would be at least some form of relationship with the consulate / the government?

A. Yes.

25

Q. Why didn't you refer to what had been reported of Mr Shillington's actual address to the jury?

A. I don't recall.

30

Q. Because you pick up then a Commonwealth Police document that would have disclosed the approach to the Yugoslav Consulate?

A. Yes.

35

Q. Which supports your overall submission in this document, but what I'm putting to you is you have misquoted what Mr Shillington actually said to the jury?

A. As a matter of fine detail, yes, but the thrust of it, I think, is correct.

40

Q. It's not really fine detail. There is a difference between somebody ringing the consulate and informing or dobbing in of other Croat nationalists that there's going to be a demonstration next week, et cetera, from being a foreign agent?

A. Yes.

45

Q. Could we go to red page 165? Can you see the paragraph where you say - you refer to seeing a copy of the affidavit and evidence of Mr Cavanagh until last Friday.

A. Yes.

50

Q. Sorry, this was an affidavit that was filed in the New South Wales Court of

Criminal Appeal?

A. Yes.

Q. You say:

5

"In his evidence, Mr Cavanagh asserted that Virkez was a low-level agent of the Yugoslav Intelligence Service, not a functionary or official. He was one of a lot of members of the community who obtained overtly available material and passed it on to the Consulate General."

10

A. Yes.

Q. That's consistent with what Mr Cavanagh had said to you in the first interdepartmental meeting?

15

A. Yes.

Q. And also in the second interdepartmental meeting?

A. Yes, I think that's probably true. I was doing these things from recollection. I didn't have copies of the document - I hadn't retained copies of the document.

20

Q. Where did you see the document?

A. Which document?

25

Q. You refer to - it seems you're relying on the affidavit and evidence of Mr Cavanagh in the Court of Criminal Appeal.

A. I saw it. I saw that then, but the minutes of the interdepartmental committee meetings, I mean, I hadn't retained a copy of those things.

30

Q. No, but I was just pointing out to you that what Mr Cavanagh, you have reported, said in his affidavit is consistent with what he said to you in those two interdepartmental meetings.

A. Yes, and I'm saying that I accept what you say is correct. At the time I wrote this document, I was not in a position to compare the two.

35

Q. That's okay. Can you go down to the bottom of red page 165? The final sentence, "Mr Cavanagh told the meeting that Virkez was, amongst other things, an explosives expert."

A. Yes.

40

Q. That's not correct, is it?

A. I think that - I think you are correct there. Again, I was - I wrote this note on the basis of recollection of the minutes of those meetings.

45

Q. Then, if we can go to page 166, under the heading, right down the bottom, "Culling of embarrassing materials".

A. Yes.

Q. Again, you assert in that final paragraph on that page:

50

5 "At the time of the hearing in the Court of Criminal Appeal, I was told by two people who were then working within the Department of Prime Minister and Cabinet, that in a reaction to receipt of the subpoena to produce documents, there had been a culling of embarrassing materials from sensitive files and that an instruction had been promulgated by Mr Enfield that care should be taken about allowing such material to go on to files in the future."

A. Yes.

10 Q. Who were the two people then working within the Department of Prime Minister and Cabinet?

A. I don't recall.

Q. You don't remember - I'm sorry?

15 A. Yes, no, I don't recall.

Q. Don't recall their names?

A. No.

20 Q. Were they within the particular section of Prime Minister and Cabinet that you were working?

A. I don't have any recollection of that event.

Q. But that's a very serious allegation that you've put in that paragraph.

25 A. Yes.

Q. That a subpoena has been issued by a Court, seeking documents to be produced and a Government - public servants are culling embarrassing material.

30 A. Yes.

Q. You can't recall who told you?

A. Correct.

35 Q. Indeed, as we have discovered yesterday and today, at least in respect of documents that you either saw or drafted, that was incorrect?

A. Yes.

40 Q. After you sent this, did you get any response - and I'm sorry, I should ask, was this sent to the Attorney-General personally?

A. Yes, I believe so.

Q. Did you receive any immediate response?

45 A. I don't believe that did receive an immediate response.

Q. Do you recall afterwards, that you did receive some communication from, I think it was a Mr Sherman, a Tom Sherman?

A. Yes.

50 Q. To allow you to attend the offices of the Attorney-General to inspect the

Prime Minister and Cabinet file relating to the Virkez matter.

A. Yes.

Q. You took him up on that--

5 A. Yes.

Q. --offer.

A. Yes.

10 Q. Going through the document - sorry - when you attended and went through the documents, to your knowledge, at that point, was there any documents missing?

A. No.

15 Q. No evidence of anything being culled?

A. Correct.

Q. Excuse me. If we then go to Exhibit 10.3-41, red page 169. This is dated May 1984.

20 A. Yes.

Q. You're approaching the Federal Attorney-General again, but this time writing on the letterhead of the Law Reform Commission.

A. Yes.

25

Q. You start off with the comment, "On 12 April 1984, Kirby J handed you a note I'd prepared about the above case."

A. Yes.

30 Q. Is that the document that I've just taken you to?

A. I believe so, yes.

Q. It wasn't mailed. It was relying on Kirby J to hand it personally to the Attorney-General?

35 A. Yes.

Q. In this, you reiterate the concerns that you expressed in the note.

A. Yes.

40 Q. If we go to red page 170, can I suggest that there's some more detail here which may reflect the fact that you read the documents at the

Attorney-General's Department from the file at Prime Minister and Cabinet?

A. Yes.

45 Q. Can I take you to the paragraph commencing, "Before the Court of Criminal Appeal"?

A. Yes.

50 Q. Where you state, "The Commonwealth claim privilege for documents which support the conclusion that Virkez was either an officer or an agent of YIS."?

A. Yes.

Q. Then you state:

5 "In the result, the documents shown to the defence were edited so as to be seriously misleading and to support the conclusion that Virkez was a low-level agent of the YIS, but nothing more."

A. Yes.

10 Q. What did you base that on?

A. I don't have a clear recollection, but I suspect on a reading of the decision of the Court of Criminal Appeal.

15 Q. But the Court of Criminal Appeal would not have said that, "the documents shown to the defence were edited so as to be seriously misleading"?

A. No.

Q. Did you see the subpoena issued--

20 A. No.

Q. --in the Court of Criminal Appeal?

A. No.

25 Q. Did you see any bundles of documents produced by the Commonwealth in answer to the subpoena?

A. No, I didn't.

Q. How could you conclude that the documents shown to the defence were edited so as to be seriously misleading?

30 A. Well, if the documents shown to the Court of Criminal Appeal - admitted into the Court of Criminal Appeal, didn't include the fact that Cavanagh, or the assertion that Cavanagh was something more than a low-level agent, I am of the view that the Court would be seriously misled about the facts.

35 Q. It's not Mr Cavanagh who was the low-level agent, it was Mr Virkez.

A. I beg your pardon, yes.

40 Q. Your complaint there is not to the Court would be misled, because the Court had access to the documents over which privilege was being claimed and then documents that were being released to the defence.

A. Yes. To what extent the Court examined the detail of those documents, I don't know.

45 Q. It makes a decision - you would have realised this from the judgments of the Court of Criminal Appeal - it had to make a decision about documents caught by a subpoena over which privilege was claimed.

A. Yes.

50 Q. Did you know a senior silk, Keith Mason appeared for the Commonwealth in the Court of Criminal Appeal?



A. Yes, I did know that.

Q. Arguing about questions of privilege and what documents in the Commonwealth submission privilege should be upheld over?

5 A. Yes.

Q. You're really not suggesting in that context the Court of Criminal Appeal did not consider the documents over which the Commonwealth was claiming privilege and would have considered whether the claim was valid and should be upheld?

10 A. I don't know what happened in the Court of Criminal Appeal, but I certainly have very high regard for Mr Mason - Mr Justice Mason.

Q. Your assertion that the documents shown to the defence were edited so as to be seriously misleading, and to support the conclusion that Virkez was a low-level agent at the YIS but nothing more, is an assertion that you're making not based on any evidence or knowledge of what actually occurred, in the Court of Criminal Appeal, when documents were produced by the Commonwealth, and the Court considered them?

20 DE BRENNAN: Your Honour, I object. I could be wrong but my understanding is that by this time Mr Cunliffe has read the affidavit of Mr Cavanagh. If that's the case, then there is, in my submission, material in that affidavit that would ground the proposition that it was being advanced, that Virkez was operating at a lower level.

25 HIS HONOUR: Is that right?

30 MCDONALD: That's not my point, your Honour. My point is what Mr Cunliffe is asserting here, that there were documents produced by the Commonwealth that were edited - documents produced pursuant to a subpoena that were edited so as to be seriously misleading.

HIS HONOUR: It's the outcome of the editing that you're focusing on?

35 MCDONALD: Yes.

Q. What I'm putting to you, Mr Cunliffe, is your assertion there about documents being produced, edited to such a degree that they're seriously misleading. As you have given evidence that you were not present at the Court of Criminal Appeal, you did not see documents produced by the Commonwealth; you were not present where arguments were put forward; the state of the documents that were produced. Your assertion here, that the result the documents shown to the defence were edited so as to be seriously misleading, is an assertion that you're making based not on knowledge or fact of what occurred in the Court of Criminal Appeal?

45 A. Apart from the judgments in the Court of Criminal Appeal, I didn't - no, you're correct.

50 Q. On red page 171, you now suggest to the Commonwealth

Attorney-General an alternative way of proceeding, that is, for the Commonwealth to seek to intervene in the application for Special Leave?

A. Yes.

5 Q. To invite the High Court to inspect all of the Commonwealth's documentary holdings relating to the case, not only from Prime Minister and Cabinet but also from the Australian Federal Police and ASIO?

A. Yes.

10 HIS HONOUR: Ms McDonald, can I just ask this: is there sufficient material before the Inquiry for the Inquiry to make up its own mind as to whether anything was seriously misleading or not? If that's the case, what does it matter, with respect to Mr Cunliffe, what his opinion was?

15 MCDONALD: Your Honour, that is correct on the substantive issue. These questions are going to Mr Cunliffe's credit to a certain degree; that it does appear that, as in my submission in some of his answers, he has a particular - if I can describe it as "skin in the game". That he's taken a particular view ultimately of the outcome of the trial, and that has coloured  
20 some of his recollections and statements that he has made in his statement.

HIS HONOUR: Yes, but is it correct to say that in large part, if not entirely, the Inquiry will need to form its own view based upon the documents?

25 MCDONALD: Yes.

Q. In 1985, you received a response from the then Commonwealth Attorney-General Lionel Bowen about your letter and your note to the previous Commonwealth Attorney-General?

30 A. I did receive a response from Lionel Bowen. I don't recall the fine details that you referred to there.

Q. Ultimately in that letter the Attorney-General informed you that the Commonwealth would not be seeking leave to intervene in the High Court application for Special Leave?

35 A. Mm-hmm. I don't recall that, but I accept that.

Q. Just a couple of final matters. In your statement you've included a section about evidence that you gave in the New South Wales Coroners Court?

40 A. Yes.

Q. In an inquest into the deaths of - is it the Balibo Five?

A. Yes.

45 EXHIBIT 15.18, RED PAGE 96, SHOWN TO WITNESS

Q. In paragraph 106, you refer to some of your evidence?

A. Yes.

50 Q. You refer to - you don't name it, but another matter where a decision was

taken that none of this material should be made available, and the Commonwealth Police, indeed, at that meeting said that, "If I ask the question what happens if these things are subpoenaed and they said, 'Well, they won't exist',"--

5 A. Yes.

Q. --"as an officer of the court at the time that troubled me"?

A. Yes.

10 Q. In paragraph 107, and if we can proceed to that, you say, "The words emphasised above were said by Mr Cavanagh at the second interdepartmental committee", and there's a reference to - I won't read it out, that Mr Virkez had attended the Lithgow Police Station?

A. Yes.

15

Q. And had informed on the other conspirators?

A. Yes. Now whether that was the first or the second interdepartmental committee meeting I don't recall.

20 Q. You say in your statement it's the second interdepartmental--

A. Yes, indeed.

Q. --committee meeting.

A. Mm.

25

Q. You did not record in any of your minute, the first minute, anything along those lines from Mr Cavanagh?

A. Yes.

30 Q. Your recollection today was that you did not speak at that?

A. At the second one, yes.

Q. As you told the coroner, "As an officer of the court at that time that troubled me", that would have been a statement and your question that you would have recorded in your very detailed file note?

35

A. No. I think my answer previously was probably incorrect, and I did ask that question, but that was the only thing I think I said at the second interdepartmental committee meeting.

40 Q. Your recollection is now you did say that at the second interdepartmental meeting?

A. I think so, yes. I certainly did say it at one or other of the meetings. I think it was the second one.

45 Q. Not recorded in your fulsome file note?

A. In my reasonably complete file note, no.

Q. As an officer of the court at that time it troubled me you didn't record that?

A. No, indeed. I mean that's inside my head. I probably didn't say that.

50

Q. I know you didn't say that, but what I'm putting to you is you make the comment to the coroner, "I'm concerned about that. I'm an officer of the court. I'm concerned."

A. Yes.

5

Q. You do not record it in your detailed file note?

A. No.

10 Q. Did you know at the time of the second interdepartmental committee meeting, that the defence knew that Mr Virkez had informed on them?

A. No.

Q. Did you know this came out at the committal--

A. Mm-hmm.

15

Q. --that Mr Virkez had gone to Lithgow Police Station and had dobbed them in, told them?

A. No.

20 Q. Given that information, there would be no point in Mr Cavanagh suggesting that if things are subpoenaed on that particular issue, they won't exist?

A. There would be no point, no.

Q. The defence know. Your recollection in paragraph 107 is that incorrect?

25 A. Yes. Sorry, is it incorrect?

Q. Incorrect.

A. No, it's correct.

30 Q. It's not another matter where you have included in your evidence matters which put the Federal Police or other federal agencies in a poor light to this Inquiry?

A. Another example?

35 Q. Mm.

A. What other examples are you referring to?

40 Q. I've taken you to examples such as you asserting to the Attorney-General that Mr Cavanagh said that Mr Virkez was an explosives expert at the meeting, when that wasn't said. When you recorded or put forward that Mr Shillington said--

A. I believe it was said, but go on.

45 Q. Your evidence was that Mr Cavanagh did not say that Mr Virkez was an explosives expert at that second interdepartmental committee meeting?

A. He said things down that general track at least.

Q. Are you changing your evidence you gave earlier today--

A. No, I'm not.

50

DE BRENNAN: I object, your Honour. There is evidence in the meetings - there is evidence, as I understand it, of detonation and there's someone being an explosive expert. Both have been mentioned by this witness.

5

HIS HONOUR: It was Mr Enfield who said that.

DE BRENNAN: It was, your Honour, but both of those have been said, and this witness just said there was something along those lines, but perhaps it's useful, in my submission, to identify the respective statements that go to explosives or detonation, because I think that's where the witness is getting confused.

10

HIS HONOUR: It's a matter for him to answer that.

15

MCDONALD: I'm sorry, your Honour?

HIS HONOUR: It's a matter for Mr Cunliffe to give the answers.

20

MCDONALD: I've been through all this.

HIS HONOUR: I note in the document that you recently showed him, at Exhibit 10.3-41, the letter to then Senator Gareth Evans, that he acknowledged that "In an attachment to this letter there are some errors I made in my previous note."

25

MCDONALD: Yes.

Q. Mr Cunliffe, what I'm suggesting to you is that some of your evidence to this Inquiry is slanted or not correct or expressed with partiality to criticise or bring into disrepute certain Commonwealth agencies or Commonwealth officials?

30

A. That is not the purpose of my answers. The purpose of my answers is to give you the truth. And for example, in relation to the paragraph from my statement that we were just looking at, I have the clearest possible recollection of that exactly happening at that meeting.

35

Q. Right--

A. That - that - that he said, Mr Cavanagh said, I think, that if there is a subpoenaing of the records of the Lithgow Police Station, they won't find any records which I took him to mean they would be made to disappear.

40

<EXAMINATION BY MR DE BRENNAN

Q. Mr Cunliffe, my name's Mr De Brennan, I appear for the Petitioners or Applicants that brought the application for this Inquiry. Could I ask that the witness please be shown Exhibit 10.4-1A, red page 352?

45

EXHIBIT 10.4-1A SHOWN TO WITNESS

50

A. Yes?

Q. I apologise, my version, I'm having some difficulties with it. Mr Cunliffe, these are the minutes of a meeting held on 9 April 1980?

A. Yes.

5 Q. You've been asked some questions about this term, "agent provocateur", and--

A. Yes?

10 Q. --it's evident from this document that that is referred to in the first paragraph of the notes?

A. Yes?

Q. And attributed to Mr Enfield?

15 A. Enfield, yes?

Q. And then, if you go down to the penultimate paragraph, there's minutes attributed to a Mr Boyle?

A. Yes.

20 Q. And there, reference is made to a Mr Whitelaw--

A. Yes?

25 Q. --who's an Assistant Commissioner, and if you go down, you'll see there that it says, "In such a way as to avoid allegations that Virkez was an agent provocateur"?

A. Yes.

Q. Could I ask that the witness please be shown Exhibit 9.1-26?

30 EXHIBIT 9.1-26 SHOWN TO WITNESS

Q. Can I ask you, Mr Cunliffe - well, I'll give you a moment just to read that document.

35 A. Yes?

Q. Could I take you to paragraph 5, in particular? You'll see there in that paragraph reads, "representatives in Australia had been attempting to discredit Croatian nationalist organisations by the use of agents provocateurs"?

40 A. Yes.

Q. As you sit here now, is this the document that you think Mr Boyle may have been speaking to?

A. (No verbal reply)

45 Q. In the meeting?

MCDONALD: I'm sorry, I object. When my learned friend says, "speaking to", there is a reference in the minutes to, I think, holding a telex in his hand, or something like that?

50

HIS HONOUR: Quote, "Mr Boyle apparently quoted this from a telex", end quote.

5 MCDONALD: Could I just confirm, is that the particular document that my friend is referring to?

10 DE BRENNAN: This is a document dated 16 March 1979, which mentions Mr Whitelaw. If one looks at the Exhibit 9.1-26, Mr Whitelaw is mentioned, as is that date. It is also referred to--

MCDONALD: Maybe if I can - my question is there's a reference to holding a telex, what seemed to be a telex. My friend's question is that - is he suggesting that that telex, supposed telex, in Mr Boyle's hand is this document?

15 HIS HONOUR: Yes, is that what you're suggesting, that he was--

DE BRENNAN: Yes. Yes.

20 HIS HONOUR: You referred to it as the document he was apparently to speaking to?

DE BRENNAN: Yes.

25 HIS HONOUR: But you're asking whether this is what he has described as a--

DE BRENNAN: Yes.

HIS HONOUR: --telex? Yes, okay.

30 DE BRENNAN: Yes.

Q. In any event, Mr Cunliffe, you'll agree with me that in paragraph 5, that the term "agent provocateur" is raised?

35 A. Yes.

Q. Can I ask you this: these interdepartmental meetings and the one that you had where in the first line, agent provocateur is mentioned--

40 A. Yes?

Q. --how long do you think that went for in total?

A. Oh, probably an hour.

45 Q. And do we take it from that that there were a number of things that were discussed which weren't necessarily reduced to writing in these minutes?

A. Yes.

50 Q. And is it a possibility that in Mr Boyle talking about the communications involving Mr Whitelaw, that the sorts of issues that you reduce to writing in your minutes were elaborated upon?

A. Yes, that - that - that is possible, I have never seen this document. I mean, he had a telex in his hand but as to what was in that telex, I don't have any idea.

5 Q. Did you have any discussions before you went into this particular meeting?  
A. With who?

Q. With any of the attendees, for example, in the corridor?

10 A. The - not with any of the non-Prime Minister and Cabinet attendees.  
With - with Richard St John, certainly.

Q. And sometimes, directly after these meetings, was it the case that people would stay around or congregate and speak further?

15 A. Not on this occasion, except in respect of what I call the corridor conversation with John Enfield and Richard St John and me.

Q. But you, for example, didn't know if Mr Boyle or other attendees had conversations after this meeting?

20 A. No.

DE BRENNAN. I note the time, your Honour.

HIS HONOUR: Mr Cunliffe, we'll take the lunch break at this stage, you can step down.

25 WITNESS: Thank you.

HIS HONOUR: We'll resume at 2.

30 LUNCHEON ADJOURNMENT

DE BRENNAN

35 Q. Mr Cunliffe, you were asked some questions about letter bombs, or whether when you made a notation you might have meant letter bombs.

EXHIBIT 11.50A-19, RED PAGE 229-46, SHOWN TO WITNESS

40 Q. Could I direct your attention, please, to the bottom portion of that page, commencing with, "In the morning Lesiac states".

HIS HONOUR: Just for the record, we've gone from 11.50A-19 to 11.50A-20, red page 229-46.

45 DE BRENNAN

50 Q. You'll see that it reads there, "In the morning Leziak states that he had a further conversation in Croatian with Virkez and the offender, Bubic. They spoke of the killing of 900,000 innocent communists." Virkez then said to Leziak, "I" - as if he was making letter bombs - "I made the letter bombs that



were sent to the Queensland Premier Kerr and Fraser about two years ago." Do you ever recall hearing anything about that in your time at Prime Minister and Cabinet?

5 A. No. That's entirely news to me. Now what I was talking about in relation to the breaking down of detonators, didn't in my mind never have anything to do with letter bombs.

10 Q. I can move on, thank you. You were asked some questions about what you knew of the trial, as opposed to the Court of Criminal Appeal proceedings.  
A. Yes.

15 Q. You gave an answer that you "tried to keep up with affairs" or words to that effect. Can I ask you what you meant by that?  
A. Simply through the media.

Q. Did you maintain your admission as a lawyer during the period of--  
A. No.

20 Q. Did you continue to be a member of professional associations, including law societies and the like?  
A. No.

HIS HONOUR: What period are we talking about?

25 DE BRENNAN: 1979 to '80.

30 WITNESS: Yes. The answer is, no, to those questions. I was readmitted following my time in the Commonwealth, and continued to be admitted as a solicitor up until about 16 months ago when I let my practising certificate lapse.

DE BRENNAN

35 Q. Did you ever hear of a major law reform report dated 1975 called "Complaints Against Police"?  
A. Yes.

Q. You'd accept from me that that was a report that was overseen by Kirby J--  
A. Yes.

40 Q. --and he was assisted by Mr Brennan QC as he then was?  
A. Yes. Sir Gerard Brennan, yes.

45 Q. Given your evidence that you've heard of that report, is it your evidence that at least allegations involving verballing were something that you were aware of as of 1979/80?  
A. Yes, very definitely.

50 Q. And was that something you discussed with legal colleagues?  
A. Yes, my role as the Secretary and Director of Research at the Law Reform Commission involved also what we called "after care" of reports which

had previously been made to the government from time to time, enquiries were made of the Law Reform Commission by the media and other people as to what's the position here, and it was my job to be across those things, and to be able to answer those questions.

5

Q. And just concentrating on the period 1979 to '80, if I could?

A. Yes, okay, which is before I was at the Law Reform Commission, yes?

10 Q. Yes, but does the Inquiry interpret your evidence that later on in your Law Reform Commission role, you had occasion to interpret historical documents that dealt with these matters?

A. Yes.

15 Q. Can I ask, please, that the witness be shown Exhibit 10.3-41, red page 170? And can I apologise to your Honour if I'm struggling a bit with these, my electronics have completely - for this particular exhibit - have shut down.

20 EXHIBIT 10.3-41 SHOWN TO WITNESS

A. Yes?

25 Q. You've quoted there from the Court of Criminal Appeal decision, specifically at pages 57 to 58?

A. Yes?

30 Q. And it says there that, "We think that to convict on the count of conspiracy to bomb" – I'll go on – "the jury must have substantially accepted the truth of Virkez's evidence about the conspiracy"?

A. Yes.

Q. Do you see that?

A. Yes.

35 Q. Was it those comments in particular that led you to be concerned about what you perceived as the true identity of Virkez?

A. Yes.

40 Q. Or the true status of Mr Virkez?

A. Yes, indeed.

Q. And is that the reason that you set out that paragraph?

A. Yes.

45 Q. So just so I'm clear, that although you didn't know necessarily of the fact that there was, for example, explosive evidence; correct?

A. (No verbal reply)

Q. Or did you know that?

50 A. I had picked up somewhere along the lines that the police allegedly

arrested many or all of the six, and that they had sticks or half sticks of gelignite in their possession, that sort of thing.

5 Q. And similarly, I take it you knew even from public sources or media that there was evidence, at least alleged evidence, of confessionals?

A. Yes.

10 Q. But notwithstanding those aspects of the evidence, is it the case that you quoted this because of the centrality of Virkez to the Crown case as a whole?  
A. That is correct.

Q. Could I ask that the witness please be shown Exhibit 10.1-14, red page 25?

15 EXHIBIT 10.1-14, RED PAGE 25, SHOWN TO WITNESS

20 Q. And could I ask you to look at the third paragraph, Mr Cunliffe, where it says the name, "Vitimir Merniovic" - and that's a typographical error - but had not previously come to the notice of the Commonwealth Police?  
A. Yes.

Q. Do you see that?

A. Yes.

25 Q. Were you ever told in 1979 or onwards that Canberra Police had received information about Virkez potentially being associated with a statue bombing of a Serbian church in Canberra, as well as a Serbian restaurant in Cabramatta?  
A. No, that's news to me to this day.

30 Q. And to be fair, that came from Canberra Police, but Canberra Police were, I think, a division of the Australian--  
A. The AFP.

Q. --Federal Police?

35 A. Yes, indeed.

Q. Could I ask you, please, to have a look at your own statement, which is Exhibit 15.18 at red page 90?

40 A. Yes?

Q. And I take you to paragraph (c)?

A. Yes?

45 HIS HONOUR: Sorry, what paragraph?

DE BRENNAN: Paragraph (c) on p 90.

HIS HONOUR: I haven't got the red pages on mine, I'm working on an earlier version.

50

DE BRENNAN: Does your Honour have--

HIS HONOUR: Do you have the paragraph number?

5 DE BRENNAN: Well, it says--

HIS HONOUR: (c)?

10 DE BRENNAN: It's 55.

HIS HONOUR: 55? Okay, thank you.

DE BRENNAN: It's on your Honour's page 7, I think.

15 HIS HONOUR: Yes, thank you.

DE BRENNAN

20 Q. You pick up on something you've done earlier there, but you say this:

"My knowledge derived particularly from my background in intelligence, securities and terrorism matters generally and, in particular, in Croatian terrorism."

A. Yes.

25 Q. You express a view on the modus operandi that Croats may or may not use in relation to terrorist-style acts.

A. Yes.

30 Q. Can I ask you this: based on your expertise in Croatian terrorism, would you find, at least on its face, peculiar that someone who was identifying, at least, at times, as Serbian, was proposing to cause damage to a Serbian church, as well as a Serbian restaurant?

A. Yes.

35 Q. Can I ask you, in the course of your intelligence work and looking at terrorism, in particular, whether you had ever heard of false flag operations?

A. Yes.

40 MCDONALD: Your Honour, I object. I don't know if the witness has given - has actually worked in intelligence. He was assisting Hope J at the Royal Commission, et cetera, but actually working in the field, for example, as an ASIO officer in intelligence, I don't know if we've established that basis of an expertise.

45 HIS HONOUR: Are you referring to his experience working with Hope J in the two Inquiries that have been referred to?

50 DE BRENNAN: I was really picking up on paragraph (c) where he actually says, "My background in intelligence, security and terrorism", in the statement

that - that's what I was dealing with, but I take my friend--

HIS HONOUR

5 Q. But that's a reference to that, is it, Mr Cunliffe, your--

A. Yes, and in particular Protective Security Review which was focused very directly on counter-terrorism.

Q. Yes, okay.

10

DE BRENNAN

Q. In the course of your work with Hope J, and I think you worked with him twice.

15

A. Yes.

Q. Did you hear about false flag operations?

A. I don't recall that I did, but I read widely about terrorism and politically motivated violence, so I expect I did, yes.

20

Q. What was your understanding of false flag operations?

A. That a party would conduct some action of violence or terrorism and try to give the indication that they were somebody other than who they were, somebody - that they were some other entity or country or group that they were wanting to, basically, lower the reputation of.

25

Q. Can I ask you directly, did you ever read or learn about false flag operations specifically relating to the Yugoslav Intelligence Service and/or its apparatus, seeking to discredit diasporan communities if their quest for independence or secession?

30

A. I don't recall that I ever did.

Q. You were asked some questions about the letter that you were asked to consider from Mr Virkez to the Prime Minister Malcolm Fraser.

35

A. Yes.

Q. It was drawn to your attention that in that letter under the hand of Mr Virkez, that he said this, "Only the Commonwealth or 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."

40

A. Yes.

Q. Do you remember that line of questioning?

A. I do.

45

Q. Just in terms of the decisions that you took after receiving Mr Virkez's letter translated, did those sentiments influence, in any way, the steps or decisions you took?

A. They were part of the decision-making process. As I think I said, it seemed to me that what was being alleged was most serious terrorist action that

50

Australia had ever seen, so I thought it required - the Commonwealth, presumably, was across whatever intelligence was held in relation to it and if they weren't, they should be.

5 Q. But just in terms of any decision to raise this with New South Wales Police, did those sentiments by Mr Virkez play any role in you raising this with Commonwealth agencies in the first instance or was that just a by-product of the fact that you were a Commonwealth employee?

10 A. I wasn't seeking to have it go down that track, but it seemed to me that there are a number of very serious issues raised by Mr Virkez's letter which needed some explanation and, on my reading of the response that came back from Mr Farmer, I've thought that an inadequate response to a very serious allegation.

15 Q. Did you know of, whilst you were working for Prime Minister and Cabinet, of a Detective Sergeant Turner?

A. No.

20 Q. Can I, perhaps, give you a few clues and you tell me whether this revives any memory? Were you aware of a New South Wales Police officer at Special Branch that had a particular expertise in Croatian nationalism?

A. No.

25 Q. Did you ever hear of a New South Wales Police officer delivering a report to a judge in chambers?

A. No.

EXHIBIT 10.1-3, RED PAGE 7, SHOWN TO WITNESS

30 Q. Just to orientate you, this is what has been described - I think you didn't quite like the terminology "final" - "the last iteration of the minutes"?

A. Yes.

35 Q. Correct me if I'm wrong. Your evidence was that this wasn't your preferred version?

A. Yes.

40 Q. It was also your evidence that there had been "a lot of hair-splitting" in relation to the contents of these minutes?

A. In relation in particular to what Mr Boyle had said to the meeting, yes, and the way that that was represented in the minutes.

45 Q. Just concentrating on that first paragraph, if I could, you'll see there that - and this is the fourth version - there's the reference to "agent provocateur"?

A. Yes.

50 Q. Insofar as this is the last version, do we take it from that that no one took issue with that term being left in these minutes?

A. Correct.

Q. Further to your evidence a moment ago, if we read down, paragraph 2 of my draft minutes, that involves Mr Boyle and the ASIO representations. That's where disagreement arose?

A. Yes.

5

Q. Could I then ask you to turn to the second page of this, that's red page 8, the first paragraph.

A. Yes.

10

Q. This is where the proposition's advanced, effectively that the Crown Prosecutor had been briefed--

A. Yes.

15

Q. --in relation to Virkez's YIS links. I'm going to suggest to you that the gravamen of this paragraph remains the same in all of the versions?

A. Yes.

20

Q. Does his Honour take it from that again there were no proposed edits or disagreements in connection with this paragraph?

A. Yes.

25

Q. Could I then ask you to have a look at paragraph 57 of your statement, and again this is Exhibit 15.18. You'll see the final sentence of this paragraph reads, "St John" - and just pausing there. St John was one of your colleagues at--

A. He was my boss two up.

30

Q. He had told you - and this following a holiday near a beach somewhere--

A. Yes.

Q. --that Mr Shillington QC indicated to him that he knew about Virkez's Yugoslav intelligence links?

A. Yes.

35

Q. Quite apart from these minutes, you have received information from another source, in the form of your boss, that Mr Shillington was briefed--

A. Correct.

40

Q. --on those matters?

A. I found that very reassuring, and he didn't explain any more about it. He didn't explain how he came to know Mr Shillington, but I - the context of it was that he had chanced on Mr Shillington on a beach in the South Coast of New South Wales, and they'd had a conversation, and that is the tenor of what came out of it.

45

Q. In some of your correspondence you've used the expression that as an officer of the court--

A. Yes.

50

Q. --things concerned you?

A. Yes.

Q. You wouldn't make an assertion of that kind lightly in view of your experience?

5 A. Most definitely not.

Q. It's your evidence before this Inquiry that words to that effect you heard them not just from Mr Cavanagh; correct?

10 A. Yes.

Q. But also--

A. From Mr St John.

EXHIBIT 4.3-5, RED PAGE 741, SHOWN TO WITNESS

15

Q. And I should point out for the record that there is a draft affidavit which is also in the ASIO material at Exhibit 9.1-74 at red page 104. Mr Cunliffe, can I just start with the last thing I mentioned, namely a draft affidavit being in the ASIO material. As you sit here, are you able to shed any light on why a draft affidavit might have been sitting in the ASIO file?

20

A. No.

Q. Just returning to the signed affidavit, your evidence - and please correct if I'm wrong - a moment ago was that you'd read this affidavit?

25

A. No.

Q. You were aware of it?

A. I - I believe I've never seen it before.

30

Q. Never seen it before?

A. No.

Q. It was, however, your evidence in a number of communications, including in your letter, lastly to the Prime Minister, Lionel Bowen, Deputy Prime Minister, I should say - of 30 April 1986, that you were concerned that Mr Cavanagh had downplayed the intelligence links--

35

A. Yes.

Q. --of Mr Virkez?

40

A. Yes.

Q. Could I just ask you to have a look, firstly, at paragraph 4? You'll see there that there's reference to Mr Cavanagh having gone to Parramatta Gaol; do you see that?

45

A. Yes.

Q. Where he interviewed Vico Virkez?

A. Yes.

50

Q. You were aware of that from your meetings?



A. I was aware that he said he had, or the AFP said that a policeman, and I inferred that it was Cavanagh, had had at least one meeting with interviewing Vico Virkez. I don't think I've ever seen the name of J.S Blades before.

5 Q. Just having a look at paragraph 5, you'll see that it reads there, "No formal record of interview was taken"?

A. Yes.

Q. And that some brief notes of the interview were made?

10 A. Yes.

Q. I take it from your previous answer that you never saw any formal record of interview in the course of your career?

15 A. Correct, and the fact that the other things stated in that paragraph, I know nothing of it until now.

Q. Just turning over to paragraph 6 and about halfway down, you'll see here that Mr Cavanagh purports to capture a conversation with Mr Virkez in which Mr Virkez, after making some denials, says, "You are right, but I have only been giving them information about things in the community"?

20 A. Yes.

Q. Do you see that?

25 A. Yes.

Q. And then, if you go down about four or five lines, you should read this, "I suggest to you that you are in actual fact an officer of UDBa"?

A. Yes.

30 Q. And that he said, "No way"?

A. Yes.

Q. And it was your understanding generally of the evidence given in the Court of Criminal Appeal that Virkez was described as a low-level agent; is that correct?

35 A. Yes. I've never read these words before.

Q. Understood. Can I ask, please, that the witness is shown Exhibit 9.1-36, red page 53?

40

EXHIBIT 9.1-36, RED PAGE 53, SHOWN TO WITNESS

Q. Do you see that document, Mr Cunliffe?

45 A. Yes, I do.

Q. That simply notes that Mr Cavanagh was going to visit Mr Virkez in gaol on 4 February; you see that?

A. Yes.

50 Q. And this is an ASIO document, but it says whoever this officer is, that they

undertook to give Mr Cavanagh some questions?

A. Yes, I've not previously seen this document or been aware of what it's talking about.

5 Q. Could I ask that the witness be shown Exhibit 9.1-27 at red page 40?

EXHIBIT 9.1-27, RED PAGE 40, SHOWN TO WITNESS

10 Q. And to be fair to you, Mr Cunliffe, this is another ASIO document, so you may not have - I suspect you haven't seen it, but could you just have a read of that, at paragraphs 2 and 5, in particular, please?

A. Yes?

15 Q. You will see there that Mr Virkez - and the date of this is 6 March 1979 - that's one date referred to and then above that, you'll see a date of 19 March 1979.

A. Yes. Was it paragraph 5 of the second one you are drawing my attention?

20 Q. Yes, please.

A. Yes.

25 Q. You'll see that necessarily this is well before the Court of Criminal Appeal proceedings, but paragraph 2, you'll see there that Mr Virkez is described as "an informant of great consequence".

A. Yes.

30 Q. If I take you down to paragraph 5, you'll see that Mr Virkez - he's referred to "Vito" there - is referred to as "a high-grade informer".

A. Yes.

35 Q. In looking at that document, when you were in those interdepartmental meetings, was that the overall impression that you were left with, namely, that Mr Virkez was an informant of great consequence and a high-grade informer?

A. Yes, in particular, from what Mr Boyle said.

EXHIBIT 9.1-41, RED PAGE 59, SHOWN TO WITNESS

40 Q. Mr Cunliffe, could I direct, please, your attention to the final paragraph and, in particular, the final sentence of paragraph 5? You should read there that Mr Cavanagh had advised at a Federal Police / ASIO meeting held in Adelaide on 19 March 1980, that he would soon be forwarding a tape recording of his interview with Virkez to ASIO. Do you see that?

A. Yes.

45 Q. You'd agree with me that that is at odds with what he deposed in his affidavit, namely, that no notes or recording of any interview with Virkez were taken to the Court of Criminal Appeal?

A. It does seem to be at odds with the other.

50 Q. I think your evidence was yesterday, was that based on your dealings with

him, Cavanagh wasn't a person to be trusted?

A. That's the view I formed. I haven't previously seen this document or the previous document that you showed me.

5 Q. Can I just ask you in relation to this affidavit, I think you did mention that you'd seen an affidavit in your letter to - in one of your representations to the Attorney-General or Prime Minister?

A. I don't recall that, but that could be.

10 Q. But your evidence also was that, quite apart from - and this is even before the Court of Criminal Appeal - was that you'd spoken to Mr Sumner-Potts?

A. Yes.

15 Q. I take it that when you met up with him, you discussed the Croatian Six case.

A. That's essentially all we talked about.

Q. That was the sole purpose of the meeting, wasn't it?

20 A. Yes.

Q. It wasn't the case that you were just getting information from media reports.

A. No.

Q. You had actually taken the step of organising the meeting, had you not?

25 A. Yes, I had. He brought me up-to-date with where things were at, in broad terms.

Q. Yes.

A. Yes.

30 Q. You might not remember, but did he have occasion to tell you about some of the things that concerned him in relation to the case?

A. My general recollection is yes.

35 Q. Did he tell you at that point that there were plans to lodge a Special Leave Application to the High Court?

A. I don't recall that, but he could have. Sorry, your Honour.

EXHIBIT 9.1-69, RED PAGE 94, SHOWN TO WITNESS

40 Q. I suspect, again, Mr Cunliffe, that you haven't seen this document, but if I could just ask you to have a look at paragraphs 1 and 2?

A. I believe that I have not previously seen this.

45 Q. But you'll see there at paragraph 2, and it can even be gleaned from paragraph 1, that there's a suggestion that something tangible in respect of a record of interview, whether it be a tape or a hard copy of something exists?

A. Yes.

50 Q. You'll also see that in view of the background of the bad feelings and

distrust which existed between Cavanagh and serving officer in 'C' Division, that because Mr Cavanagh had moved on, the powers that be just leave it there?

A. Yes. Was the 'C' Division within AFP or was that ASIO?

5

Q. I have no idea.

A. But, yes.

10 Q. I know it's been put to you that in your various representations, or at least some of your representations to politicians, that you got what was said, for example, about "skerrick of evidence" wrong, and some other things were said about the content of your letter.

A. Yes.

15 Q. Was the general proposition that you were trying to advance, that you were concerned by the lack of disclosure, at least as you saw it, in this case?

20 A. That is absolutely the case. That was what I was seeking to do, and as I said this morning, those letters that I wrote were based on recollection. I didn't have any documents to refer to to be able to quote more accurately from them, and it seemed to me that the tenor of what I was saying was consistent between the two things. I certainly sought it to be. In sorting this matter - you know, self-praise is worth the paper it's not written on. I've tried to advance the truth.

25 Q. It was also the case that in those representations - and there's been a number both after I think the Court of Criminal Appeal and after the High Court--

A. Yes.

30 Q. --you were trying to implore the authorities to look further into these matters?

A. Yes.

Q. You say things like that in the correspondence, don't you?

35 A. Yes.

Q. "You should speak to officers, you should get access to records", and so it wasn't that you were trying to unilaterally solve the case there and then in that correspondence?

40 A. No, indeed, and there was much about this case that I did not know. I think I've made that point before too. I mean I didn't know what Cavanagh had told the New South Wales Police, what Boyle had told the New South Wales Police, what the New South Wales Police had told the prosecuting authorities. I don't know.

45

Q. One of the things that did concern you, you've given evidence of, was that passage in the Court of Criminal Appeal--

A. Yes.

50 Q. --which really speaks to the centrality of Mr Virkez?

A. Yes.

Q. Is it on that basis that, as you sat here today, that you expressed the view personally that you thought these men should have been acquitted?

5 A. Yes.

Q. Is it on that basis that in various bits of correspondence, and again today, that even though there might be some errors in your correspondence, you maintain that there's been a miscarriage of justice in this matter?

10 A. Indeed, that is correct. The other thing I would point to is in some of the early documents, I think before the interdepartmental committee meetings, I think there's a quote, I think it's from Cavanagh, saying that the New South Wales Police see Virkez as being vital to their case against the Six.

15 HIS HONOUR

Q. Mr Cunliffe, I must have misunderstood, but I was of the understanding that you were concerned about the case having represented a miscarriage of justice, the way it was put before the trial court, but you've just agreed a moment ago that you were of the view that the men should have been acquitted; is that right?

20 A. Yes.

Q. Did you think they were innocent?

25 A. I thought there was a good chance that they were innocent, yes.

Q. Or that there was insufficient evidence to prove their guilt?

A. Yes.

30 DE BRENNAN

Q. Mr Cunliffe, if I could just take you back to your statement at Exhibit 15.18, commencing at red page 84.

35 WITNESS: Sorry, your Honour, could I, in terms of what we were just talking about - I was always of the view that I didn't know everything.

HIS HONOUR: That's part of the reason why I asked you the question.

40 WITNESS: Yes, but on the basis of what I did know, it was said to me if there was a trial and the jurors were told what I had been told about Virkez's position and role and capabilities and so forth - it seemed to me there was a very high likelihood that they would have been acquitted.

45 HIS HONOUR: Notwithstanding what other evidence there might have been in the case against them?

WITNESS: Yes, that's my view. Perhaps I'm naive.

50 DE BRENNAN

Q. Just on that last point as to why you had concerns in relation to this matter, just so I'm clear, one of your concerns was set out in that passage that you quoted from the Court of Criminal Appeal--

A. Yes.

5

Q. --which went to the centrality of Virkez?

A. Yes, and the statement from Cavanagh that the New South Wales Police were saying that they saw their prosecution as depending on Virkez being a willing witness.

10

MCDONALD: Being what, sorry?

WITNESS: Being prepared to give evidence and giving evidence because there was a suggestion at some stage that he was being difficult about giving evidence.

15

DE BRENNAN

Q. And--

20

A. That's why I read - had to write a--

Q. Just in relation to what you knew about the case - and this is after trial - just picking up on this "not a skerrick of evidence" point, in fairness to you, how you had raised this was not just that a miscarriage of justice had occurred, but I think you also used the terminology "all communication had broken down"?

25

A. Yes.

Q. And so, what you were saying was that there also could have been a communication breakdown?

30

A. Yes.

Q. And therefore, potentially, an innocent explanation for what had occurred?

A. Potentially.

35

Q. But the tenor of your letters was to ask others to have a look at these things?

A. Yes.

Q. Could I ask, please, that the witness be shown Exhibit 9.1-72, red page 57? Sorry, I beg your pardon, red page 98?

40

EXHIBIT 9.1-72, RED PAGE 98, SHOWN TO WITNESS

Q. And could I ask you to have a look at the fourth paragraph?

45

A. Yes?

Q. It says there that:

"On 19 January 1981, we were informed by the Australian Federal Police that Virkez had departed Australia voluntarily, probably

50

destined for West Germany on 24 December 1980".

5 You've given some evidence that you've been involved in intelligence and terrorism related work, just looking at that comment, "probably destined for West Germany", in your experience, would it be normal for Immigration and other government authorities to have a better understanding of where a person with the background of Mr Virkez might be heading?

10 A. I would have expected so. I mean, I don't know what's meant by our warning systems and to what extent they extend to informing, for example, the West German authorities that somebody who's been convicted of some pretty serious terrorist things was about to show up.

EXHIBIT 9.1-87 SHOWN TO WITNESS

15 Q. Now, I've shown you a document earlier, Mr Cunliffe, that's the one that speaks of Mr Virkez as an informant of "great consequence"?

A. Yes?

20 Q. And a "high-grade informant"; do you remember that document?

A. I do.

Q. In that document that I showed you, and also, in this one, there is a reference to a person by the name of a Mr Saret, a Pero Saret. Have you ever heard that name?

25 A. I don't recall having heard it, no.

HIS HONOUR: Sorry, where was the reference to that person?

30 DE BRENNAN: If your Honour goes to red page 127? And it's the second one down, it's a pseudonym, Pero Saret.

35 Q. Could you just go to the next page, please, Mr Cunliffe, at red page 128? You'll see there that - and this is a document that purports - from ASIO - that purports to identify Yugoslav Intelligence Service, YIS, further contacts and informants. You'll see on that third page - and this is as of 6 July 1982 - that Mr Virkez is listed as an informant and suspected agent provocateur?

A. Yes.

40 Q. And that's essentially what your view was all along, isn't it?

A. That there was a good chance that that was the case, yes.

Q. Could I ask that the witness be shown Exhibit 9.1-21 at red page 30?

45 EXHIBIT 9.1-21 SHOWN TO WITNESS

A. Again, I've not seen that document previously.

50 Q. Thank you. I think we've already established, Mr Cunliffe, that the four versions of that meeting of 9 April--

A. Yes.

Q. --1980, reference had been made to an ASIO SIDC-PAV situation report.

A. Yes.

5

Q. I expect you haven't seen it before; correct?

A. I think I have in the last couple of days.

Q. Yes.

10

A. But this would seem to fit that description.

Q. But not at the time of your employment?

A. No.

15

Q. But you accept that it's referred to in your minutes?

A. Yes.

Q. And the various incarnations of those.

20

A. Yes. So the reference to it was included, but I didn't see the document at that time.

Q. If you go to paragraph 34, you'll see there that reference is made to this individual and you'll accept from me that this individual is Virkez.

A. Yes.

25

Q. That he was a "driver" for those involved in the proposed bombing operation.

A. Yes.

30

Q. As you sit here now, does that accord with your understanding that he was more than a low-level agent?

A. No, it doesn't accord.

EXHIBIT 9.1-26, RED PAGE 37, SHOWN TO WITNESS

35

Q. Could I ask you to turn over to red page 38? You've already had an opportunity to read this document, at least quickly, but can I ask you to have a look at paragraph 6 as well as 9 and just let the Inquiry know when you've done that, please?

40

A. Yes.

Q. Just in fairness to you, at paragraph 6 it reads, "His view", and you'll see if you go up to paragraph 4, that first word, that is referable to Mr Whitelaw.

A. Yes.

45

Q. Do you see that?

A. Yes.

50

Q. Of course, Mr Whitelaw was the subject of discussion or at least one of your minutes from the interdepartmental committee meeting. Do you



remember that?

A. Yes.

5 Q. Just concentrating on paragraph 6, you'll see a reference to the word "blundering"?

A. Yes.

10 Q. Then in paragraph 9, you'll see a reference to "the police could be embarrassed".

A. Yes.

15 Q. Can I ask you this: in the course of your time at Prime Minister and Cabinet and the various discussions you had about this matter, did you ever hear those sentiments being expressed?

A. No.

20 Q. You didn't hear anything about police having called in media and taken photos and this being all over the news and them being concerned that, in a sense, they were locked in?

A. No. No, nothing of that sort.

25 Q. I'm just turning over the page to 14, you'll see there a suggestion that Mr Whitelaw thought it possible that the Consulate-General would seek to influence the police to go easy on its informer.

A. Yes.

30 Q. It's your evidence that you never knew about a letter from Canberra police relating to anything happening in 1977 with a church or a statue.

A. Correct.

35 Q. But that letter did say, didn't it, that Mr Virkez wanted to speak to Commonwealth Police rather than State Police?

A. Yes.

40 Q. In your experience working in intelligence and terrorism, did you ever hear of foreign States or countries trying to exert pressure or ingratiate themselves to Government agencies here?

A. No.

45 EXHIBIT 9.1-30, RED PAGE 43, SHOWN TO WITNESS

Q. Could you please look at paragraph 2.

A. Yes.

50 Q. You'll accept from me that this is a telephone intercept report--

A. Mm-hmm.

Q. --which purports to capture a call between a male that refers to Mr Virkez seeking the assistance of the USSR Consulate?

A. Yes.

Q. Did you ever hear anything about Virkez having links to, say, the USSR Consulate?

A. No.

5 EXHIBIT 9.1-52, RED PAGE 72, SHOWN TO WITNESS

Q. You'll see there - and accepting that this is an ASIO agent comment--

A. Mm-hmm.

10 Q. --that there's a suggestion that those on trial are innocent and that the charges are framed, but then it goes on and says, "I further believe that Vico Virkez was an UDBa informer and that one other was also at UDBa spy"?

A. Yes.

15 Q. Again, you'd agree that that comment is inconsistent with the evidence that Mr Cavanagh gave before the Court of Criminal Appeal?

MCDONALD: I object, your Honour. This is a report.

20 DE BRENNAN: I don't press it. I won't press it.

HIS HONOUR: I'm struggling with the relevance of some of these things, Mr De Brennan.

25 DE BRENNAN: I'm nearly done, your Honour.

Q. You were asked some questions relating to your letters which dealt with Mr Virkez having explosive expertise--

A. Yes.

30 Q. --I think was the expression?  
A. Yes.

35 Q. In your representations to the Honourable Lionel Bowen of 1986 - I won't get it up but that's Exhibit 9.1-101E, red page 162 - you refer to Mr Cavanagh's comments - this is at red page 164 - "had told the meeting that Virkez was an explosive expert, and that he had demonstrated this by stripping down a detonator"--

A. Yes.

40 Q. --"apparently a very dangerous procedure"?  
A. Yes.

45 EXHIBIT 7.3-5, RED PAGE 46, SHOWN TO WITNESS

Q. Just under "employment" you'll see there that it says, "He showed above-average ability in quickly learning several skills"?

A. Yes.

50 Q. The same employer states that, "Mr Virkez was an excellent worker,

cooperative and friendly". Do you see that?

A. Yes.

5 Q. Then if you turn the page and go to the very bottom paragraph - the line's very hard to make out - you should read Virkez "had claimed he was taught to make time bombs by a Croatian group in Geelong in 1972, and he appears to have obtained some satisfaction in exploding them out in the bush." Do you see that?

A. Yes, I do.

10

Q. Did you ever hear anything about his having involvement at Bega--

A. No.

Q. --in 1972 or Eden?

15

A. No.

Q. I won't take you to it, but on bail application forms that Mr Virkez made that are in the brief before his Honour, Mr Virkez represents that at the time of his arrest he was working as an electrician's assistant, and that he had spent five years in one application or six years, at the Wallerawang Power Station. In your discussions at Prime Minister and Cabinet did you ever hear anything along those lines?

20

A. No.

25 DE BRENNAN: Nothing further, thank you.

HIS HONOUR: Thank you, Ms Gleeson?

30 GLEESON: Your Honour, we had a discussion with those of us at the back end of the bar tables and considered that it might be convenient for Mr Melican to go first.

HIS HONOUR: I'm ambivalent about it. Mr Melican, you'll be a little while, I suspect?

35

MELICAN: Well, your Honour, I don't think I will be. I gave an estimate the other day but that was before I had the benefit of hearing Counsel Assisting's examination. I think I will be very brief, and I, in fact I expect, be finished well before 4 o'clock today.

40

HIS HONOUR: All right, Mr Cunliffe, we're going to be sitting a little bit late today. Would you benefit from having a short break, a five minute break to stretch your legs?

45 WITNESS: I'm right for the moment, thanks, your Honour.

HIS HONOUR: Well, you let me know if you would feel like a break at any time.

50 WITNESS: Yes, yes.

## &lt;EXAMINATION BY MR MELICAN

Q. Mr Cunliffe, my name is Mr Melican, I appear for the Commonwealth, I'm instructed by the Department of Prime Minister and Cabinet and by ASIO.

5 A. Mm-hmm, thank you.

Q. Now, I just want to ask you about a couple of topics, and they are topics that have been covered to some extent by other questioners, but there are just some specific matters I want to clarify with you.

10 A. Yes?

Q. The first topic concerns the second interdepartmental committee meeting on 9 April 1980.

15 A. Yes?

Q. You've been taken to a number of versions of the minutes of that meeting, and I do want to take you to those again just to clarify a couple of matters. Could the witness please be shown Exhibit 10.4-1, and it's the first page of that exhibit?

20 EXHIBIT 10.4-1A SHOWN TO WITNESS

HIS HONOUR: This is 10.4-1A?

25 MELICAN: It's capital A, yes, your Honour.

Q. It's the version of the minutes which I think you've subscribed to, Mr Cunliffe, as your preferred version or the complete version of those minutes. And--

30 HIS HONOUR: And the original version--

MELICAN: The original version, is that what you said?

35 HIS HONOUR: Yes.

MELICAN: Yes, thank you.

40 Q. I think you agreed in some questions that were put to you from Counsel Assisting that you think that this is the version of the minutes that were sent to Mr Boyle for his consideration and input?

A. Yes.

45 Q. I just want to suggest to you that it was in fact the third version of those minutes that were sent to Mr Boyle. If you'll excuse me just for one moment? If I can just take you through those very briefly? What you have on the screen is what you've referred to as the original version, and you'll see that the paragraph that begins with, "Mr Boyle said that Virkez is an agent run by Yugoslav Intelligence Service"--

50 A. Yes?

Q. --that's quite a long paragraph, and it goes all the way down to - well, it may be split into three paragraphs - but it goes all the way down to, "Mr Boyle apparently quoted this from a telex"; do you see that at the bottom?

A. Yes.

5

Q. If I can take you to what I think Counsel Assisting described as the second version which is Exhibit 10.4-1B, red page 356? You'll see here that the second paragraph that begins with, "Mr Boyle" in underlined text--

A. Yes?

10

Q. --is a lot shorter, to begin with?

A. Yes?

Q. There are also, you'll see, some handwritten amendments on this page, so you'll see up towards the top of the screen, your initials in the list of attendees, there's a handwritten amendment--

15

A. Yes?

Q. --to that, there's a handwritten amendment in the paragraph that begins, "Mr Enfield", there's the words, "The part played" struck through, and "actions" has been handwritten underneath that; do you see that?

20

A. Yes.

Q. And then, at the end of the paragraph that begins, "Mr Boyle", the words, "Yugoslav" or the word "Yugoslav" has been struck out and in place of it, it says, "an agent of the YIS"?

25

A. Yes.

Q. And to the left of that paragraph, is an annotation which says - I think it says - "check with Boyle before there is any wider circulation"; is that how you read that?

30

A. Yes, it is.

Q. And do you recognise that handwriting?

35

A. I believe it's the handwriting of John Enfield.

Q. Of John Enfield? Okay. If I can just take you to the next version, which is two pages down at page 358, and this is Exhibit 10.4-1C, red page 358? First of all, you'll see that each of those handwritten amendments which I took you to have been taken in, they've been addressed in this version. So your correct initials appear at the top of the page?

40

A. Yes.

Q. "Actions" has been inserted in the paragraph that begins, "Mr Enfield"?

45

A. Yes.

Q. And in the paragraph that begins, "Mr Boyle", the last line says that "Virkez was an agent of the YIS"?

A. Yes.

50

Q. Can I suggest to you that this is the version that you would have sent to Mr Boyle, having taken in those changes and having been directed by Mr Enfield in that handwritten annotation, to consult with Mr Boyle?

A. I don't believe that's the case, but--

5

Q. And then--

A. --I - I haven't sat down and done a very close comparison analysis--

Q. No--

10

A. --of what's--

Q. --I understand--

A. --written - of the four documents, I'm afraid.

15

Q. There's, perhaps, some further evidence which suggests that this third version is the version that you sent to Mr Boyle.

EXHIBIT 10.1-3, RED PAGE 7, SHOWN TO WITNESS

20

Q. This is the version of the minutes that has sometimes been referred to as the final version, although I accept there's a question as to whether or not it was ultimately finalised, so to speak, but you've seen this document a number of times, Mr Cunliffe.

A. Yes.

25

HIS HONOUR: It would be called the fourth version, then, perhaps.

MELICAN: I think the fourth version is appropriate. Thank you, your Honour.

30

Q. Now, in this version, you'll see that it's the same - I'll suggest to you it's the same as the third version. It's got the correct identification of your initials at the top. In the paragraph beginning "Mr Enfield", it says, "because of actions by an agent provocateur".

A. Yes.

35

Q. Then it sets out a further paragraph and then underneath that, it says, "Paragraph 2 of my draft minutes", and it gives two alternative versions of paragraph 2. The first is said to be "paragraph 2 of my draft minutes".

A. Yes.

40

Q. And further below it says, "The paragraph 2 preferred by ASIO".

A. Yes.

Q. Can I just suggest to you or maybe you can take it from me that "paragraph 2 of my draft minutes" is identical to version 3?

45

A. Yes.

Q. It's not identical to the version that appears in version 1.

A. Mm-hmm.

50

Q. Does that suggest to you that, having put these two in the fourth version, and drawing a comparison between what your preferred version is against ASIO's, that it was version 3 that you provided Mr Boyle for his comment?

A. That seems to make some sense.

5

Q. Yes.

A. Can I see the bottom of that document?

Q. Certainly.

10

MELICAN: If that could be scrolled down?

Q. It is cut off somewhat at the end of that page, but it does go over to the following page, but, please, look at that, if you think that would be of assistance.

15

A. Yes. Yes.

Q. Now, as has been canvassed in questions that have been put to you, Mr Cunliffe, Mr Boyle did ask for some amendments to these minutes and we've seen the result of that in the document that's before you, but I just want to take you back to the letter that Mr Boyle sent the Department of Prime Minister and Cabinet in which that was requested.

20

A. Yes.

Q. That's Exhibit 9.1-51, red page 71. I know you've seen this a couple of times now, but can I just can you to read the proposed text that Mr Boyle has asked to be included that's indented?

25

A. Yes.

Q. Let me know when you've read that.

30

A. Yes.

Q. You would have observed that in that paragraph there's no reference to Mr Virkez being an agent--

35

A. Yes.

Q. --of the Yugoslav Intelligence Service.

A. Yes.

Q. Or of him being a suspected YIS officer.

40

A. No, correct.

Q. What it describes is - and I won't read it out - but it says that "ASIO information indicated that Virkez had been reporting since August 1978--

45

A. Yes.

Q. --to a suspected Yugoslav Intelligence Service officer working in the Yugoslav Consulate-General."

A. Yes.

50

Q. It then refers to information being passed to New South Wales Police Special Branch and further down it refers to some exchanges that had occurred with Assistant Commissioner Whitelaw. In paragraph 2, Mr Boyle explains that his re-wording of the paragraph is on the basis of - I apologise, it's paragraph 3. Thank you. He explains that his rewording of the paragraph is on the basis of his recollection of what he had said and information given to him by headquarters for use at the meeting.

A. Yes.

Q. It's this proposed paragraph 2 that you have taken issue with and is, as you say, is inconsistent with your own preferred version of that paragraph. That's a fair statement, Mr Cunliffe?

A. Yes, and with my recollection of what he, in fact, said.

Q. Now, I just want to take you to a couple of documents. You've seen one of those documents before. You haven't seen it before this Inquiry, but you've seen it a couple of times during the course of this Inquiry.

A. Yes.

Q. It's the SIDC-PAV report.

A. Yes.

Q. It is at Exhibit 9.1-21 red page 30. If that can be brought up on the screen. You've said, and this appears to be the case, that you weren't given a copy of this document at the 9 April 1980--

A. Correct.

Q. --ABDC meeting, but this document was referred to during the course of that meeting.

A. Correct.

Q. By Mr Boyle, I gather.

A. Yes.

Q. If you look at paragraph 34, I want to suggest to you that the substance of that paragraph is consistent or broadly consistent with Mr Boyle's preferred paragraph for inclusion in the minutes of that meeting. I'll just give you a moment to read that.

A. Yes.

Q. Do you accept that it's broadly consistent?

A. I think that those two things are broadly consistent, yes.

Q. I just want to take you to one further document. This is not a document that you will have seen before. It's Exhibit 9.1-51 and I'll give the red page in a moment.

HIS HONOUR: 71.

MELICAN



Q. Sorry, I've given the wrong exhibit number. It's Exhibit 9.1-46 and it's red page 64. This I think is what was described at this time as a telex. Is that how you identify or would describe this document?

A. It has the indicia of being a telex, yes.

5

Q. You will see at the top there's a classification of "secret" - has been applied to it?

A. Yes.

10

Q. Two lines down it's given a date of 9 April 1980 - so that's the day of the interdepartmental committee meeting.

A. Yes.

15

Q. I'll just ask you to assume for a moment that this is a document that was provided to Mr Boyle, for the purposes of his participation in that meeting.

A. Yes.

20

Q. You'll see in the heading that it refers to a teleconference between Boyle / - and then there's a redacted name.

A. Yes.

25

Q. One would expect that's an ASIO name, and it's a teleconference from the previous day, 8 April 1980 concerning Vico Virkez.

A. Yes.

30

Q. In paragraphs 2 and 3 of that document, there are references to, first, the SIDC-PAV report, which I took you to a moment ago.

A. Yes.

35

Q. There's a reference to an Assistant Commissioner of New South Wales Police, R Whitelaw, and some information about what he was given, including that he was informed of the identity of the Yugoslav informant by ASIO on 16 March 1979. What I want to direct your attention to is the following paragraph, so it's paragraph 4(A). Can I just give you a moment to read that.

A. Yes.

40

Q. Again, I would suggest that that is broadly consistent with both the SIDC-PAV report and Mr Boyle preferred version of paragraph 2 of the minutes of the IDC meeting?

A. I think they're rather different from one another.

Q. Sorry?

A. They're rather different from one another.

45

Q. Can I suggest to you that here in this version of the document, it's saying that "Mr Virkez is first recorded by this organisation informing on Croatian activities to the Yugoslav Consulate", in particular a particular individual who is a suspected Intelligence Service officer.

A. Yes.

50

Q. That sentiment appears in both of the previous--

A. Yes.

Q. --documents I took you to. Do you accept that?

5 A. I do. This doesn't go on to say the other things that I recall being said at the meeting.

Q. No, but in terms of what Mr Virkez was doing as an informant to the Yugoslav Consulate, it's consistent with what those other two documents are conveying.

10

DE BRENNAN: I object, your Honour. My learned friend has earlier taken the witness to Exhibit 9.1-21 at red page 30, which is the extract from the SIDC-PAV report. What my friend omitted was paragraph 35 which says, "The incident reveals the depth of the penetration of Croatian extremist groups by the YIS in Australia." In my submission, that coupled with the word "driver" means that there are differences, your Honour, with respect.

15

HIS HONOUR: Differences with another document, but Mr Melican is asking about this document at Exhibit 9.1-46, and asking whether there's consistency between that and what appears in the minute.

20

DE BRENNAN: The only thing was that in fairness to the witness, he wasn't taken to paragraph 35 which proceeded directly under, and in my submission that's important context to leave it simply to 34 without the next paragraph which says, "The incident reveals the depth of the penetration of Croatian extremist groups by the YIS in Australia."

25

MELICAN: I might be able to do it in another way that addresses my friend's objection.

30

Q. I'll put it to you this way, Mr Cunliffe: in neither the SIDC-PAV report or the extract that I took you to, nor in this telex document that I took you to, is there a statement that Mr Virkez was an agent of the Yugoslav Intelligence Service.

35

A. I certainly accept that, but what was said at the meeting went beyond that.

Q. I'll come to that in a moment. And neither of them refer to Mr Virkez as being himself a suspected YIS officer either, I put that to you; that's right?

A. Mm-hmm? Neither--

40

Q. Neither of the two documents I've taken you to--

A. Yes, yes, yes indeed--

Q. --refer to him in those terms?

45

A. Indeed.

Q. They do refer to a suspected Yugoslav Intelligence Service officer working in the Yugoslav Consulate--

A. Yes.

50

Q. --they both refer to that, but they're not referring to Mr Virkez in connection with that statement?

A. I - I agree with that, yes.

5 Q. They're referring to, in that context, to the person to whom Mr Virkez was providing information; that's right, isn't it?

A. Indeed, a different point.

10 Q. Is it possible, Mr Cunliffe, that when Mr Boyle was describing ASIO's understanding of the status of Mr Virkez, that you misheard what Mr Boyle was saying such that you had understood the reference to the suspected intelligence officer as being Mr Virkez when, in fact, Mr Boyle was referring to the person to whom Mr Virkez was reporting? Is that possible, that you misheard it?

15 A. Oh, it's possible, but I don't think it's the case.

Q. It's also possible perhaps that Mr Boyle may have expressed himself poorly or in a slightly clumsy way, which may have given you the impression that that is what he was conveying, that Mr Virkez was the suspected YIS officer, when in fact, that wasn't what he was intending to convey; you accept that's a possibility?

20 A. That's a possibility because if he was talking about some pretty delicate security matters, and I would be surprised if somebody who had the amount of experience, that I don't think Mr Boyle did have at that time, would make that error.

Q. Your statement is Exhibit 15.18. I don't have the red pages for my copy, but it's on page 9, paragraph 71, it's red page 92. You say that in your opinion, Mr Boyle was seeking to prevent the minutes of the meeting spelling out that Virkez was a Yugoslav agent?

30 A. Where are you referring to there, sorry?

Q. Sorry, I'll slow down. You'll see paragraph 71 on the--

35 A. 71? Yes?

Q. --screen?

A. Yes?

40 Q. In that paragraph, you say in the second sentence, "In my opinion, Mr Boyle was seeking to prevent the minutes of the meeting spelling out that Virkez was a Yugoslav agent"; do you see that?

A. Yes.

45 Q. And if you can scroll down to paragraph 75? You say, "As I noted above in this statement", I think it should say, "Mr Boyle requested that amendments be made to the minutes which in my opinion indicated that ASIO sought to hide Virkez's status as a Yugoslav agent"?

A. Yes.

50 Q. Do you maintain that that's what Mr Boyle was seeking to do; is that still

your opinion?

A. Yes.

5 Q. Can I suggest to you that that's a very unfair characterisation of what Mr Boyle was seeking to do?

A. Yes.

Q. Do you accept that?

10 A. I understand you, what you're saying, but I think he was seeking to have watered down what he'd said at the meeting.

Q. Isn't it possible as you've accepted, that you may have misheard--

A. Oh, yes.

15 Q. That's possible?

A. That's possible.

Q. And it's possible that he may have not expressed himself as clearly as he should have, and he conveyed something in one way that you took to mean what your preferred version of the minutes is when that isn't what he intended to mean; that's possible?

20 A. Unlikely, but possible.

Q. And it's likely, isn't it, that what Mr Boyle was seeking to do in putting to you a version of paragraph 2 that he was comfortable with, was seeking to ensure that the minutes of the meeting recorded what ASIO's position was in respect of Mr Virkez at that point in time?

25 A. That's a possible interpretation of what happened, yes.

30 Q. So they're all possible interpretations--

A. Yes.

Q. --but your view is that what he was seeking to do was to cover up ASIO's position in respect of Mr Virkez?

35 A. Well, cover up's a strong term, to water down what he had said at the meeting.

Q. I just want to turn to another topic. Just jumping forward in the chronology, you've been taken to a note that you prepared that was addressed to then Attorney-General, Gareth Evans, which was the version that was hand delivered by Kirby J, that's the original version that you drafted. You recall being taken to that document?

40 A. Yes.

Q. And in that document, you raised a concern that you had been told by two officers of the Department of Prime Minister and Cabinet that in response to subpoenas having been issued in the appeal proceedings, relevant documents were being culled or destroyed; do you recall that?

45 A. Yes.

50

Q. In response to raising those issues, about a week later, you were invited to attend the office of - I think it was the Attorney-General's Department to review the PM&C file in respect of this matter; do you recall that?

A. Yes, the file from the - the Legal Branch Government Division.

5

Q. From the Legal Branch Government Division. And that was the file that--

A. I mean, that - that was what I was shown.

Q. And that was the file that you would have contributed documents--

10

A. Yes.

Q. --yourself, that would contain documents that you would have been privy to during the course of your involvement with this matter?

A. Yes.

15

Q. You attended that office - that office being the Attorney-General's Department's office - on 19 April 1984, and on that day, you met with Tom Sherman, who was the Acting Crown Solicitor; do you remember meeting Mr Sherman?

20

A. I do, very clearly.

Q. You do? Yes, and can Exhibit 10.3-40 be brought up on the screen, it's red page 168?

25

EXHIBIT 10.3-40, RED PAGE 168, SHOWN TO WITNESS

A. This was the Attorney-General's Department in Canberra on this occasion.

Q. I don't think the document records where it was, but your memory was it was in Canberra?

30

A. Yes.

Q. In fact, it's just been pointed out that at least the letterhead of this document refers to Attorney-General's Department, Canberra, thank you. Following your meeting with Mr Sherman and your review of that file, Mr Sherman prepared this file note for provision to the Attorney-General?

35

A. Yes.

Q. Which he's reporting on the outcome of your review of the file at the Attorney-General's Department's office?

40

A. Yes.

Q. I know that you've seen this file note for the purposes of preparing your statement?

45

A. Correct.

Q. And I just want to take you to a couple of parts of this file note. You'll see in the first statement, under the words, "Attorney-General", sorry, the first paragraph, the first sentence says

50

"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 above mentioned matter."

5 And the "above mentioned matter", of course, is the matter of - was described as "Kokotovic Appeal"?

A. Yes?

10 Q. Now, in your statement - I don't need this to be brought up, if this document could stay on the screen. But in your statement at paragraph 96, you say, "I do not recall Mr Sherman having told me that these were the documents that were produced in the CCA"; do you recall saying that in your statement?

A. I do.

15 Q. And is it the case that sitting there today, you don't recall Mr Sherman telling you that?

A. Correct.

20 Q. Can the witness please be shown Exhibit 10.3-41?

EXHIBIT 10.3-41, RED PAGE 169, SHOWN TO WITNESS

25 Q. Sorry, red page 169. This is the second letter that you wrote to the Attorney-General about a week and a half following your review of the file at the Department of Prime Minister and Cabinet--

A. Yes?

30 Q. --it's dated 30 April 1984. I won't take you to it, but your signature appears on the last page of this letter; you recognise this as the letter you sent to the Attorney-General?

A. Yes.

35 Q. And you'll see about halfway down the page, there are a series of dot points that begin - well, there are two that begin with the word "because", and I just want to direct your attention to the paragraph, the first sentence of the paragraph that follows immediately after that?

A. Yes?

40 Q. You can read that? And you say, "I am grateful for having been given the opportunity to refresh my memory about the papers on the file of the Department of Prime Minister and Cabinet--

A. Yes?

45 Q. --which I am told was produced to the New South Wales Court of Criminal Appeal"?

A. Yes.

50 Q. So I take it you now accept that Mr Sherman did tell you on 19 April when you inspected those documents that the material you were inspecting is the material that had been produced to the Court of Criminal Appeal?

A. Yes.

Q. I'm sorry to do this, but can we go back to Exhibit 10.3-40, red page 168, which is the file note of--

5 A. That is to say that those papers were produced to the Court of Criminal Appeal.

Q. Yes.

10 A. Mr Sherman told me.

Q. Yes.

#### EXHIBIT 10.3-40 SHOWN TO WITNESS

15 Q. I want to take you to the second sentence of the first paragraph, and that reads, "After having perused the documents, Mr Cunliffe said to me" - and "me" is Mr Sherman here - "that he" - Mr Cunliffe - "was satisfied all material documents were produced to the Court"; do you see that sentence?

20 A. Yes.

Q. And in your statement, you say at paragraph 96, "I did not say that I was satisfied all material documents were produced to the Court"?

A. Yes.

25 Q. Is it your recollection today that you positively did not say that, or are you saying in this paragraph you just don't recall saying that?

A. I'm very confident that I did not say that.

30 Q. Well, can I take you back to your letter to the Attorney-General, dated 30 April 1984, it's Exhibit 10.3-41, red page 169.

A. Yes.

Q. And if I can take you to red page 172.

35 A. Yes.

Q. And the last paragraph on this page says - and this an annexure or an appendix that you prepared to accompany that document:

40 "I am pleased to say that the Department of Prime Minister and Cabinet file on this matter appears to contain all relevant papers except draft letters which were prepared for the then Prime Minister to send to the New South Wales Premier. Those draft letters are not of any significance in the present context".

45 A. Yes.

Q. If you could just keep that there. What you're saying there in that paragraph is that you've reviewed the file, and the file is intact. That's the gist of what you're saying, isn't it?

50 A. Yes. I - I reviewed the file which I recognised as the file containing the papers that I was familiar with from the Legal Branch, and it was intact.

Q. And so, in circumstances where you are satisfied now that the file that you reviewed had been provided to the Court of Criminal Appeal - you accepted that a moment ago - and that file was intact--

A. Yes?

5

Q. --do you think now that it is correct that you would have said that you were satisfied that all material documents, which is clearly a reference to the documents you had been reviewing, had been produced to the Court?

A. (No verbal reply)

10

Q. Sorry, I'm back at the file note that is Exhibit 10.3-40.

A. On reflection, it's surprising to me that there was really nothing on that file from the Security Branch, for example.

15

Q. You weren't in the Security Branch, were you?

A. No, I wasn't.

Q. Just going back to the chronology. You had raised an allegation that documents were being destroyed?

20

A. Yes, that had been suggested to me, and I really don't remember who did suggest that.

Q. I think an objection was about to be made.

A. It was seriously made.

25

Q. A suggestion or information had been given to you by people within the Department of Prime Minister and Cabinet, that documents were being culled?

A. Yes.

30

Q. The information you had been given is that this was in response to a direction that had been given by Mr Enfield, the Deputy Secretary of the Department of Prime Minister and Cabinet?

A. Correct.

35

Q. In response to that very serious issue that you had raised, you were given an opportunity to review the PM&C file. That's right, isn't it?

A. The PM&C file which covered papers from the Government Branch.

40

Q. You said in your letter to the Attorney-General, that - you've said in that letter two things. One is, "I'm pleased to say that that file appears to contain all the relevant papers except for some irrelevant documents." That's what you've said in 1984. That's right, isn't it?

A. What I'm referring to there is there hasn't been any culling of the file - of the file that I was looking at, yes. Whether there are other files, I say nothing of

45

Q. I might just cut to it. In this file note, Mr Sherman, who is an Acting Crown Solicitor--

A. Yes.

50



Q. --is expressing to the Attorney-General the outcome of his discussion with you, isn't he?

A. Yes.

5 Q. This is a contemporaneous record that he made, and he is saying here that after having perused the documents, you said that you were satisfied all material documents were produced to the Court. I'm putting to you that that's consistent with your own representations to the Attorney-General, that the file was (a) intact and (b) your acknowledgment that you had been told it had been  
10 produced to the Court of Criminal Appeal?

A. Yes, that file.

Q. I'm suggesting to you that what Mr Sherman has said in this sentence, the second sentence of that first paragraph, is accurate. Do you accept that?

15 A. No. If you modify it to say, "from the file produced we've produced to the Court" I would.

Q. Sorry, can you just say that again, I didn't catch that.

20 A. I was satisfied that all material documents from the Legal Section Government Branch's file were produced to the Court, on the basis of my inspection of that file and of what Mr Sherman told me.

Q. You haven't distinguished between different sections of the Department of Prime Minister and Cabinet's files, when you've said to the Attorney-General in your letter, that you're satisfied that everything is still there, did you?

25 A. What exactly did I say in that letter? Can you take me to that?

Q. I'll take you back to it. It's Exhibit 10.3-41 and it's red page 172, and I'll just let you read the final paragraph on that. You can tell me where you've drawn that distinction, if you have.

30 A.

"I'm pleased to say that the Department of Prime Minister and Cabinet file on this matter appears to contain all relevant papers, except draft letters which were prepared for the then PM to send to the New South Wales Premier. Those draft letters were not of any  
35 significance in the present context."

I stand by that. But what I was talking about there was a file which I inspected, which was the file covering the papers of the Government Branch.

40

HIS HONOUR

Q. You only refer to the Department of Prime Minister and Cabinet.

45 A. Yes.

Q. Not to any branches, and you refer to the file for that Department. File singular.

50 A. "The Department of Prime Minister and Cabinet file" - it did not occur to me at that stage that there was likely to be another file with the Security Branch, and on reflecting back on it, I'm just surprised that there was nothing on that

file from the Security Branch.

MELICAN

5 Q. You've put on a statement in this matter where you were saying that propositions or statements which were made by the Acting Crown Solicitor to the Attorney-General about what you had said--  
A. Yes.

10 Q. --are not right.  
A. Yes.

Q. That's a very big statement to make, isn't it? You accept that?  
A. My recollection of what was said at that time, does not include - I don't  
15 believe that I said those two things to him.

Q. I understand that's your evidence, but I'm just putting to you--  
A. Yes.

20 Q. --that that's a very big claim to make--  
A. Yes.

Q. --that an Acting Crown Solicitor--  
A. Yes.

25 Q. --has, would you say, misled the Attorney-General in what he said here?  
A. I'm not suggesting that he deliberately did so, but he's spoken loosely.

Q. Sorry, I think will be the last time I go back to this document. In Exhibit  
30 10.3-40, red page 168, again that's the--  
A. Yes.

Q. --file note, the last sentence of that first paragraph says, "I specifically  
35 asked Mr Cunliffe whether there was any further investigative action for me to take in this matter, and he said, 'No'." Again, in your statement you've said you did not say that to him. Do you stand by that?  
A. Yes, I do.

Q. Did Mr Sherman say anything approaching, or similar to, or ask you  
40 anything similar to, whether there's anything further he could do or any further action that should be taken? Did he say anything like that?  
A. I don't recall him saying anything like that.

Q. Are you suggesting that's an invention of his in this file note?  
45 A. I wouldn't like to go so far.

Q. I suggest to you that this contemporaneous record that was made on the  
day of your visit, is a more reliable record of what was said to you and what  
you said to Mr Sherman, than what you can recall now. Do you accept that?  
50 A. In the ordinary course of events, that's correct. The words that I have

difficulty with are his words "any further investigative action" for him to take. I don't think I ever cast a request so broadly as to justify the use of those words.

5 Q. You qualified your answer to my last question by saying in the ordinary course of events you would accept that a contemporaneous record is more reliable than your memory of something that happened 40 years ago. Why do you suggest that this does not fall within the ordinary course of events?

10 A. Because my recollection is quite different but, yes, I recognise that the law tends to prefer contemporaneous notes to recollections made a considerable time later.

Q. The law prefers that because they tend to be more reliable?

A. Tend to be, yes.

15 <EXAMINATION BY MS GLEESON

Q. Mr Cunliffe, my name is Gleeson and I appear for the New South Wales Commissioner of Police. I just have a few questions for you.

20 A. Okay.

Q. Can I start with some answers that you've given to Counsel Assisting about your professional background?

A. Yes.

25 Q. I think you've given some evidence that as at 1979 you were not an admitted legal practitioner and were for some time after that?

A. I had been admitted but I let my practising certificate lapse.

30 Q. In the period prior to 1979 when you had been admitted, had you ever been involved in a criminal trial?

A. Yes.

Q. On how many occasions?

35 A. Oh, multiple occasions, but in lower courts.

Q. You've also given some evidence about your knowledge of a Detective Sergeant Turner of the New South Wales Police?

A. I've said I didn't have any knowledge of him.

40 Q. Just to clarify, did you at any time during the period 1979 to 1986, have any dealings with the New South Wales Police Force officers, in relation to the Croatian Six?

45 A. Well, there was that suggestion that the Prime Minister and Cabinet should meet with Turner, and I just don't recall whether there was any communication directly with Turner. I don't think there was. I think--

Q. I'll come to that, but sitting here you don't have any recollection of any dealings that you had with Detective Sergeant Turner or anyone else from the New South Wales Police?

50 A. Correct.

Q. Can I take you first to some questions that Counsel Assisting had asked you in relation to paragraphs 106 and 107 of your statement. That is the evidence that you gave to the New South Wales Coroners Court in relation to the Balibo Five.

5 A. Yes.

Q. You agreed with Counsel Assisting that your account of what Mr Cavanagh had said in your statement at the second interdepartmental meeting, was not recorded in any of the minutes that were prepared, in relation to the interdepartmental meetings. Do you remember that?

10 A. An answer I gave today?

Q. Yes.

A. Which comments are you referring to?

15

Q. The comments that you made to the effect that Mr Cavanagh had said during the second interdepartmental meeting, that if the New South Wales Police were asked to produce--

A. Yes.

20

Q. --records in relation to Mr Virkez informing the Lithgow Police of the alleged conspiracy, those documents wouldn't be found.

A. Yes.

25 Q. You remember that?

A. I do.

Q. You agreed with Counsel Assisting that that account was not recorded in any of the minutes of the interdepartmental meetings?

30 A. I do, yes.

Q. Do you also agree with me that that account did not appear in any of the representations you made, either to your superiors in the Department of Prime Minister and Cabinet, or to the Attorney-General, between 1981 and 1986?

35 A. I do agree with that. I didn't see that as being central to the issue that I was concerned with.

Q. It was a matter of some importance, wasn't it, if the New South Wales Police weren't going to be producing relevant information in relation to the trial?

40

A. Yes.

Q. You've given evidence here today of considerable concerns that you had, about there being a miscarriage of justice, arising from the information that would be made available to the defence?

45

A. Yes.

Q. It would be an important matter, wouldn't it, on top of the matters that may concern the information coming from the Commonwealth, that there was a suggestion made by an officer of the Commonwealth Police that the New

50

South Wales Police were going to also act in order to conceal relevant evidence from the defence.

A. Yes, an important matter, but not centrally one of my responsibility.

5 EXHIBIT 5.6-10, RED PAGE 671-119, SHOWN TO WITNESS

Q. You can see here that this is a note. I take it this is in your handwriting.

A. Yes.

10 Q. If you go over to the second page, you can see that that's your signature, and a date of 21 January 1980.

A. Yes.

15 Q. We go back to the first page. You can see there that this is a note that says, "I phoned Acting Commissioner Farmer today."

A. Yes.

Q. Then he gives some information in relation to someone described as his man involved in the case.

20 A. Yes.

Q. I think you said in your statement that that was a statement in relation to Mr Cavanagh.

A. I inferred that that is who he was referring to, yes.

25

Q. You can see in what is the second handwritten paragraph there, it says, "Virkez is kept isolated from co-defendants for self-protection."

A. Yes.

30 Q. "They know he dobbed them in."

A. Yes.

Q. I'll come to a question about that, but if we can over to the next page. I just wanted to ask you about the paragraph on this page. This is my interpretation of your writing, so please correct me if I'm wrong.

35

A. Sure.

Q. "Farmer confirmed that on day in question, Virkez tipped off Yugoslav authorities at 11am and Lithgow Police at 3pm."

40

A. Yes.

Q. "Yugoslav authorities passed up to"--

A. "Passed information".

45 Q. "Passed"--

A. "Info".

Q. --"information to"--

A. "New South Wales Special Branch".

50

Q. --"New South Wales Special Branch."

A. Yes.

5 Q. Then it says, I think, "Breaking Squad did", and then I cannot read the last word.

A. "Operation".

10 Q. "Did operation". There, the representation is that the Yugoslav authorities themselves informed the Special Branch, and that's of the New South Wales Police.

A. Yugoslav authorities passed information to the Special Branch, yes.

15 Q. Yes, so that there was a direct communication on about that day of a person, who may later become known as Mr Virkez, informing of the alleged conspiracy to the Yugoslav authorities.

A. Yes, that's what Farmer told me. Yes.

20 Q. Then if you go back to page 119, there is the assertion that the co-defendants know that Virkez dobbed him in.

A. Dobbed them in.

Q. Dobbed them in.

A. Mm-hmm.

25 Q. At that stage, you had been informed by Commissioner Farmer that the New South Wales Police had been told that the co-defendants at least knew or suspected that Virkez was an informant to police.

A. Sorry. Could you repeat the question, please?

30 Q. At that stage, you knew at least that the co-defendants suspected that Mr Virkez was an informant to police.

A. What do you derive that from?

35 Q. That's what Commissioner Farmer is telling you, isn't it? It's that--

A. They know.

Q. --they know he dobbed them in.

40 A. The six know that Virkez dobbed them in, but where he got that information from is not - and what else has been done with that information is not apparent from - from the note.

Q. You are at least being told from Commissioner Farmer on his information--

A. An Assistant Commissioner, I think he was, but yes.

45 Q. Yes. That you were being told--

A. Yes.

Q. --that the defendants have a suspicion that Mr Virkez is the informer to police.

50 A. Yes. In fact, that they know, according to Farmer, that he dobbed them--

Q. Yes, and can I ask you to accept something you may not know about, which is that an officer of the police at Lithgow gave evidence during the committal hearing that Mr Virkez informed the police at Lithgow of the alleged conspiracy on 8 February 1979.

5 A. Yes, I accept that.

Q. If you accept that, then it follows, doesn't it, that at the time of the second interdepartmental meeting, there would be no reason for Mr Cavanagh to suggest that the New South Wales Police would have any reason to seek to  
10 conceal the fact that Mr Virkez was an informant, would they?

A. I think you're using informant in a different sense to what I have been using it as.

MCDONALD: Your Honour, could I just object, but maybe suggest an informant to the Lithgow Police - because that's what Mr Cavanagh was  
15 speaking about - the Lithgow Police, or documents would be destroyed about being an informant to the Lithgow Police.

HIS HONOUR  
20

Q. Yes.

A. That is all correct, your Honour. Talking about that matter, I took Mr Cavanagh to be saying the papers indicating that Virkez had come to the Lithgow Police Station would be - would--  
25

Q. They'd disappear.

A. Yes, they'd disappear. Yes.

GLEESON  
30

Q. What I'm suggesting to you is that at the time of the second interdepartmental meeting--

A. Yes.

Q. --in 1980, there would be no reason for Mr Cavanagh to make that assertion if the defendants already knew that that was the fact.  
35

A. Yes.

HIS HONOUR: Wasn't he asked about this yesterday?  
40

GLEESON: I don't believe so.

HIS HONOUR: Or this morning.

GLEESON  
45

Q. Not according to my notes of when it was taken to him this morning.

A. There would be no good reason. I agree.

Q. You gave some evidence to Counsel Assisting today about your  
50

knowledge that Mr Virkez was a Serb.

A. Yes.

Q. Do you remember that?

5 A. Yes.

Q. My note says that you said that that came from Mr Virkez' letter.

A. Yes.

10 EXHIBIT 4.3-10, RED PAGE 763, SHOWN TO WITNESS

Q. This is the second page of the letter, you'll remember.

A. Yes.

15 Q. You can see at the top, in the first line of the letter, the second sentence says, "I am not a Croat, and I do not have anything against anyone."

A. Yes.

20 Q. You're welcome to read the letter, but can you accept from me that that is the only assertion made about his nationality in this letter, and there's no suggestion in the letter by him that he is a Serb?

A. Could I see the first page of that letter, please?

Q. Certainly.

25 A. In the big paragraph around the middle of the first page, he said, "I am not - I was not a Croat."

Q. Yes.

30 A. And he said he was a Yugoslav. Yes, he didn't say directly that he was a Serb.

Q. Yes, and I take it it goes without saying that the then citizens of the Republic of Yugoslavia encompass more than simply Serbs and Croats.

A. Yes.

35 Q. I believe the second source of information that he was a Serb was the letter from Assistant Commissioner Farmer of 7 January 1979.

A. That's my recollection.

40 Q. 1980. I'm so sorry. We've been over that misdate. I can take you to that too, but do you accept from me that it makes no reference to Mr Virkez being a Serb?

A. Could you take me to it, please?

45 Q. Certainly. It is Exhibit 10.1-14, red page 25.

A. In that first letter from Mr Virkez, they're also references at the end of that paragraph to the Croats knowing that they'd been dobbled in. He speaks in a way which is consistent, I think, with him saying, "Well, I'm not one of them. I'm something else".

50



Q. It arises, I think, from the fact that part of his complaint was that he was being kept in isolation for his own protection.

A. It might arise from that, but I think he's saying pretty plainly there that he's a Yugoslav, and not a Croat, and an Australian citizen.

5

Q. The document at Exhibit 10.1-14 is now up on the screen. If you want to read over that and the next page.

A. Thank you. Could I see the second page, please? Yep. I agree with you.

10

Q. Can you go back to the first page, please? You'll remember in your note of your conversation with Assistant Commissioner Farmer, you had made a record of the Yugoslav authorities having communicated with the Special Branch.

A. Yes.

15

Q. Can I show you, at the bottom of the second paragraph on this first page--

A. Yes.

20

Q. --you can see in the last two lines, "On receipt of the information, the Commonwealth officers immediately passed it to Special Branch."

A. Yes.

25

Q. It's likely, in your note of your call from Assistant Commissioner Farmer, either he's misspoken, or you've mis-transcribed what he said as to the fact because it's more likely that he's put the correct position in writing.

A. I'm confident that I wrote down what he said, but yes. He said - suggests that the Consulate-General had passed the information on, whereas this says that that was passed to the Commonwealth officers, who immediately passed it to the Special Branch. Yes.

30

Q. Can I move now to the first interdepartmental meeting? Could the witness be shown Exhibit 10.1-12, red page 21?

EXHIBIT 10.1-12, RED PAGE 21, SHOWN TO WITNESS

35

A. Yes.

40

Q. You've been taken to this document a few times. I just want to draw your attention first and again to under the first entry for Mr Cavanagh. He gives an account of having interviewed Mr Virkez in Parramatta Gaol?

A. Yes.

45

Q. He then immediately says after that, that he has a belief that Mr Virkez is a low-level agent?

A. Yes.

50

Q. You'd infer from that, that his formation of that opinion arises from him having interviewed Mr Virkez in gaol; do you agree with that?

A. No.

Q. Why not?

A. Well, he doesn't say that or suggest it. That's probably the case, but he doesn't say that.

5 Q. To the extent that there's any alternative to that, he's got other information not recorded in your minute--

A. Correct.

Q. --to the effect that--

10 A. And not stated at that meeting.

Q. Do you agree with me that to the extent that he's got a description of Mr Virkez being a low-level agent, that's the first description of the degree of Mr Virkez's involvement with the Yugoslav authorities beyond him having informed the Yugoslav Consulate or being described as an agent; do you agree with that?

15 A. I believe that's correct, yes.

Q. The minutes record that Mr Boyle of ASIO was present at this meeting?

20 A. Yes.

Q. The minutes don't recall that Mr Boyle cavilled with that description at all by Mr Cavanagh?

A. Did he cavil with it, did you say?

25

Q. Cavilled with the description by Mr Cavanagh?

A. Yes, I agree, and I am confident that the minutes are correct in that regard, that Mr Boyle didn't say anything on that subject.

30 Q. If we can go over to red page 22--

HIS HONOUR: Mr Boyle wasn't at this meeting, was he?

GLEESON: The minutes record that he was.

35

HIS HONOUR: Yes, he was, yes.

GLEESON

40 Q. I direct your attention to the section underneath the name "Mr Emerson-Elliott"?

A. Yes.

45 Q. You were asked about Mr Emerson-Elliott's remarks and Mr Cavanagh's responses by Counsel Assisting?

A. Yes.

50 Q. You can see in the second sentence in that section he said that the Commonwealth had knowledge of Mr Virkez's true role in the matter on an official basis as the Consulate-General had alerted the Commonwealth Police

of Virkez's tip-off?

A. Yes.

5 Q. You can see that, and then another four lines down the sentence commenced, "Mr Emerson-Elliott asked Mr Cavanagh how he intended to reply if asked whether Mr Virkez was an informer"?

A. Yes.

10 Q. Then he makes reference to Virkez's co-defendants or Virkez himself?  
A. Yes.

Q. It follows from that, that Virkez's co-defendants would have to have some level of knowledge or suspicion about him having informed to the Yugoslav Consulate.

15 A. Yes.

Q. Do you agree with that?

A. Yes.

20 Q. Cavanagh's response was that he would have to give evidence of what he knew officially and then you put in what Counsel Assisting asked you to confirm was your inference that arose from that?

A. Yes.

25 Q. I suggest to you that Mr Emerson-Elliott's question was directed to what the Commonwealth knew on an official basis because it came from the Consulate-General? You can see that in his question?

A. I can see those words, but I'm not sure what your question is.

30 Q. The question is if Mr Cavanagh then responds that he would have to give evidence of what he knew officially, that would encompass the information received from the Yugoslav Consulate about Mr Virkez's information to them; do you agree with that?

35 A. I took him to be drawing a distinction between evidence, facts, that he knew officially, but other things that had come his way that he wasn't - he wouldn't disclose.

Q. But Mr Emerson-Elliott's concern was about what evidence Mr Cavanagh would give to the Court based on the information he had received officially.

40 A. What evidence he would give and he said he would give evidence that he knew officially but not implicitly but not unofficially.

Q. But do you agree with me that Mr Emerson-Elliott's concern was what Mr Cavanagh would say in evidence--

45 A. Yes.

Q. --based on the information he had received officially from the Yugoslav Consulate--

50 A. No.

Q. --that Mr Cavanagh's answer that he would give a response based on what he knew officially was a complete response to Mr Emerson-Elliott's question?

A. I don't agree.

5 Q. I take you now to Exhibit 10.1-9, red page 15.

A. Yes.

10 Q. This is a memorandum that you wrote on 2 April 1980 to Mr St John and Mr Cogan, and if you go to page 18 you'll see those two matters, that your name and the date are on the last page of this memorandum?

A. Yes, and my signature is there, yes.

15 Q. This is, I suggest to you, one of the representations that you had made to other members of the Department of Prime Minister and Cabinet in relation to your concerns about the evidence that may be given to the Court and the need for Commonwealth-sourced information to be provided to defendants?

A. That's the general context of it, yes.

20 Q. You can see on the bottom of red page 15, paragraph 4, you've recorded there that Mr Virkez's letter was referred to the New South Wales Premier's Department for comment?

A. Yes.

25 Q. But that no reply had been received?

A. Yes.

Q. Do you remember getting a reply from the New South Wales Premier's Department?

30 A. I don't, but that's been amended to read "No substantive reply has been received", corrected, but at what stage that happened, I don't know.

Q. That is in handwriting above the words, "No reply has been received"; is that correct?

35 A. It is.

Q. Just for the record, that's--

A. I don't know who's that.

40 Q. But you can see that the word "substantive" has been inserted in handwriting?

A. Yes, indeed, and it's not my handwriting.

45 Q. As at the date of this memorandum, approaches that had been made to what I think you've described to Counsel Assisting as the appropriate counterpart for communications between the Department of Prime Minister and Cabinet and New South Wales authorities had been made but no satisfactory response had been received?

A. Well, no substantive reply had been.

50 Q. I presume that when it was forwarded, Mr Virkez's letter was forwarded to

the New South Wales Premier's Department, it was done for the purposes of obtaining some satisfactory or substantive answer?

A. Yes. It was opening the batting, but how the batting order would go after that wasn't clear at that point.

5

HIS HONOUR: Ms Gleeson, I assume this has some relevance to your client, does it?

GLEESON: Yes, I'm coming to the relevance to my client in the same document.

10

Q. If you can then go across to page 18. Actually, I will go back to page 17 first. Paragraph 13 at the bottom of the page outlines the latest developments in the matter that Mr Emerson-Elliott had discussed with Mr Cavanagh?

15

A. Yes.

Q. If you go across to the top of page 18, it's detailed "a Chief Inspector Turner of the New South Wales Police will be in Canberra on 9 April"?

A. Yes.

20

Q. "Mr Cavanagh wondered whether we wished to speak with him"?

A. Yes.

Q. Then if you go to the bottom of that page, you state, "In my opinion, we should not take up Mr Cavanagh's invitation to speak with", what's described as, "Chief Inspector Turner of the New South Wales Police"?

25

A. Yes.

Q. In the same letter you've observed that communications with the New South Wales Premier's Department had not yet yielded any substantive response?

30

A. Correct.

Q. You're now being invited to go to a different source, being an officer who one would infer would be involved with the Croatian Six investigation?

35

A. Yes, I presumed that that would be the case.

Q. That was an opportunity to articulate to them your concerns that the New South Wales Police both had and had supplied to defence all of the information that you thought might be relevant to the trial of the Croatian Six?

40

A. It would have been, yes.

Q. But you didn't take it up?

A. No.

45

Q. Is there any reason beyond what you have told Counsel Assisting that there were appropriate counterparts for communications between State and Federal Governments, was there any reason why that opportunity wasn't taken up?

50

A. Well, it wasn't, plainly, my decision, first of all, I'm seeking guidance on it,

and the people up the line agreed that that was not an appropriate course of action. In my mind, for the Department of Prime Minister and Cabinet, which has a coordinating role, liaison role, but an overseeing role, to be talking directly with the New South Wales Police Force was not how things should be done.

Q. Just so I understand this, this is during a period in which you've told this Inquiry you held quite serious concerns about the potential for there to be a miscarriage of justice in relation to non-disclosure of material that was held by the Commonwealth?

A. Yes.

Q. Certainly it emerged from the first interdepartmental meeting that that was shared by other members of that meeting, including Mr Emerson-Elliott?

A. Yes.

Q. But there was an opportunity here to set the matter straight with the New South Wales Police Force and then, presumably, the prosecuting branch and ultimately the Crown Prosecutor and you didn't take it up?

A. We didn't take it up, yeah.

Q. The only reason for that was protocol?

A. No, I didn't quite say that. It was certainly protocol, but, I mean, protocol would have involved going in a different direction. Maybe proposing as a counterpoint a meeting with the Premier's Department.

Q. Yes. Was that ever taken up?

A. No. Events were moving pretty quickly at this point.

Q. Even if events were moving quickly, it's April 1980, the trial is imminent. Surely the Department of Prime Minister and Cabinet it make communications to the New South Wales Premier's Department if there is an urgent matter in relation to a pending New South Wales trial that should be addressed by way of a meeting; would you agree with that?

A. There could have been.

Q. But it didn't?

A. It didn't. If I'd been the deputy secretary, probably that's what we would have done.

BUCHANAN: Sorry, I didn't hear that last answer. Can you just--

WITNESS: If I had been the deputy secretary, we might well have gone down that track, but Mr Enfield was of that school of bureaucrats who you see in "Yes, Prime Minister" and "Yes, Minister", not to get involved.

GLEESON

Q. I take you now to Exhibit 10.1-8, page 14.

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HIS HONOUR: I think we can do that in the morning.

<THE WITNESS WITHDREW

5 ADJOURNED PART HEARD TO FRIDAY 4 OCTOBER 2024 AT 9.30AM