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SPECIAL INQUIRY

THE HONOURABLE ACTING JUSTICE ROBERT ALLAN HULME

5 FORTY-FIFTH DAY: THURSDAY 6 MARCH 2025

INQUIRY INTO THE CONVICTIONS OF THE CROATIAN SIX

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BUCHANAN: May it please your Honour. I'm indebted to Mr De Brennan for the references, if I can put them on the record now, which address the question of where the evidence is in relation to detectives wearing SWOS

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overalls. Firstly, former Detective Godden, at Inquiry Transcript Day 15, page 1054, line 31, he indicated that on training exercises they would wear issued SWOS overalls. Secondly, Detective Turner's notebook has an entry which appears to be in his handwriting, if one reads the whole document,

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which reads, "Produce SWOS uniforms". That's Exhibit 11.75, red page 607. Thirdly, in relation to the Lithgow photographs – Ashworth photographs of police, Exhibit 11.44, detectives wearing overalls at photographs numbered 9, 16 on red page 176; 19 and 20 on red page 177; 20, 26 and possibly also 30 on red page 178. If I could just indicate that photograph 19 appears to be show three different detectives wearing SWOS overalls uniform.

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HIS HONOUR: What Exhibit are those photographs?

BUCHANAN: 11.44.

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HIS HONOUR: Thank you, Mr Buchanan.

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BUCHANAN: Your Honour, at the conclusion of proceedings yesterday, I provided your Honour with a quotation from the report of the Wood Royal Commission that – where a witness told the Commission that manipulation of evidence was something that he learned on the job, in the same way as an apprentice learns a trade, and that another police officer told the Royal Commission of the Armed Hold Up Squad's substantial reputation for corrupt scumdowns, at reference paragraph 44 of the Petitioners' written submissions. This raises questions, your Honour, as to whether the Inquiry should accept the submissions by Counsel Assisting at paragraphs 3237 to 3242, and their reply submissions at paragraph 21, that Detectives Wilson and Harding's timetable of events documents was not a corrupt scumdown.

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We would ask the Inquiry to consider, when considering Counsel Assisting's submissions on this point, to take into account the role played by Harding and Wilson in the bashing of Brajkovic in the CIB interview room, and yet their sworn testimony there was no bashing but instead a free and voluntary Record of Interview. We submit that where it conflicts with Brajkovic's version of events, unless corroborated by a source independent of the police, Wilson and Harding's evidence on those two subjects cannot be accepted.

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I'll come back to the significance of the evidence of Wilson and Harding's role in the bashing of Brajkovic in a moment, but if I could just remind the Inquiry of the modern approach to the evidence of admissions embodied in section 165 of the Evidence Act, that is that evidence of admissions simpliciter may be unreliable and oral evidence and questioning by an investigating official of a defendant that he's questioning, recorded in writing but has not been signed or otherwise acknowledged in writing by the defendant, may also be unreliable. We would submit there's not been evidence led in the Inquiry which would dispel the reservations which are embodied in those provisions in section 165.

We submit that given all the material before the Inquiry about what the Wood Royal Commission described as "process corruption", what we have called "noble cause corruption", the fact that each of the Croatian Six gave evidence in the trial, denying making the admissions attributed to them, means that the Inquiry should prefer their evidence to evidence given by police who allege those accused made admissions in circumstances when the accused were kept isolated from anyone who could corroborate their version of events (*McKinney*). Given the accuseds' denial of making the admissions alleged, the reserve with which police evidence of admissions must be treated, in our submission, going back to at least 1985 in the Inquiry into the convictions of Anderson, Alister and Dunn deprives that evidence of sufficient probative force to be weighed as evidence against each accused.

I turn to the evidence of admissions by Mr Zvirotic. Responding to Counsel Assisting's reply submissions at paragraph 78, we submit that the inclusion, in the Zvirotic notebook interview, of a reference to the expulsion of the Republican Party from the Croatian Inter-Committee Council - that evidence - as to the admission that is - was Jameson, Exhibit 2.1 Day 73, red page 2624, is consistent with Jefferies having provided that information to CIB detectives on the night of 8, 9 February. Contrary to the submission advanced by Counsel Assisting, it does not, we submit, make it - necessarily follow from the fact that Jefferies provided that information to CIB detectives that night, that he did so for the purposes of the Zvirotic verbal, but not for the purpose of what CIB detectives did with all the other accused at CIB that night. There's simply no need for the information provided by Jefferies and Perrin to have been thus confined. When Jefferies gave his evidence to the Inquiry about what the CIB detectives, plural, had been told he said - Inquiry Transcript Day 30, page 2387 - "We would have voiced an opinion along the lines, the Croatian community had more or less expelled them because of their propensity for violence."

I turn to the evidence of admissions by Mr Brajkovic. Taking a step back and viewing the evidence of admissions that police alleged Brajkovic made while at CIB, as your Honour knows, there's a substantial quantity of medical evidence from which it would be inferred that when he was at CIB, as he said he was, Mr Brajkovic was bashed by police. There's also a large quantity of civilian evidence that after his time in the interview room with the detectives Mr Brajkovic appeared to have been bashed. Counsel Assisting reminded your Honour of what Mr McCrudden told the Magistrate the next day at Central

Petty Sessions. The inference that he was bashed at CIB was also supported by the evidence of the enlargements of Mr Brajkovic's special photograph or mugshot. What that means for the convictions, we submit, is twofold. One, the evidence given by police that Brajkovic was not bashed and did not appear to have been bashed was false. Secondly, the evidence given by police that, instead of being bashed in that interview room Mr Brajkovic freely and voluntarily gave a detailed confessional interview, must also be false.

Focusing on Harding and Morris, they were implicated by Brajkovic as having conducted the bashing. Given Brajkovic identified Harding as the main assailant, given Harding said he was in the room with Brajkovic, and given Harding's role in the Steep matter, Harding, it should be concluded, likely was involved in the bashing of Brajkovic. It follows that Harding's evidence of Brajkovic having participated in a free and voluntary interview must have been fabricated. Given that conclusion, we urge, that what happened to Brajkovic in the CIB interview room was that he was bashed by Harding and Morris, rather than participating in a free and voluntarily interview, there are two reasons why Wilson's evidence is suspect. Firstly, he claimed to have conducted a free and voluntarily interview of Brajkovic, which obviously did not take place as he swore or as was recorded, and secondly, Brajkovic said that Wilson put his head into the interview room towards the end of the bashing to find out whether Brajkovic had talked or not.

If those detectives, Harding, Morris and Wilson, cannot be believed in their account of what happened with Brajkovic at CIB, it is rational to conclude, we submit, that there must be a doubt about the rest of their evidence implicating Brajkovic in the alleged bomb plot, namely, the events at Restwell Street, Bossley Park. Harding and Morris said that at Bossley Park they'd have involved – been involved in the apprehension of Brajkovic and the finding of the white plastic bags with explosives inside it, and then Harding claimed to have shown the explosives to Wilson. Wilson corroborated that. If Harding, Morris and Wilson were prepared to lie about events at CIB then, we submit, the Inquiry must have a doubt about the rest of their evidence implicating Brajkovic.

It is not as if there are not reasons to also question the evidence of other detectives who claimed to have seen explosives at Bossley Park. For reasons advanced in our written submissions, the Inquiry should also have reservations about the evidence of Helson and the evidence of Krawczyk where it implicates Brajkovic. In the case, in particular, of Krawczyk, in their reply submissions at paragraph 23, Counsel for the DPP submit that the fact that the two different versions of his statement were produced at the committal hearing suggests Krawczyk was not attempting to conceal the fact that there had been more than one version of the statement created. We submit that on the evidence the more likely conclusion is that the production at the committal hearing, of the version without mention of the white plastic bag, was inadvertent or mistaken. We submit that that creation of the second version of page 3 of the statement, with the reference in it to sighting the white plastic bag with explosives in it, was consistent with Krawczyk trying to take part in a common narrative about explosives having been found at Bossley Park.

Detective Krawczyk, we submit, was also compromised by his evidence that at CIB he collected the white plastic bag containing explosives from the interview room on the third floor containing Wilson, Harding and Brajkovic in order to show it to Mrs Brajkovic on the fifth floor and that he then took the bag back down to the same room with the same men in it. Plainly that evidence cannot sit with the evidence pointing to Mr Brajkovic being bashed in that room by Harding and Morris, rather than being interviewed by Wilson and Harding. The fact that Krawczyk could not, on the occasions he claimed he did, have collected the explosives and then returned them to the interview room in the circumstances he claimed, raises the question of what the source was for the white plastic bag with explosives in it, which were shown to Mrs Brajkovic; see our written submissions, paragraphs 414 to 423.

The same goes, we submit, for Detectives Pettiford and MacKenzie, who took Hudlin's witness statement. In the trial, Pettiford said that MacKenzie brought the explosives to show Hudlin; Exhibit 2.1 Day 126, red page 4196. Although MacKenzie, it appears to us, did not give evidence about that. In the Inquiry, MacKenzie said he had no recall of the Hudlin statement-taking exercise or of collecting explosives to show Hudlin and that, rather than himself, Pettiford could have collected the explosives; Inquiry Transcript Day 21, page 1565. The conclusion as to the impossibility, which is what we submit it is, of the police account of detectives interrupting the claimed Vjekoslav Brajkovic interview twice each to remove and return explosives in relation to Mrs Brajkovic and Mr Hudlin, reinforces the doubt that there ever was a white plastic bag with explosives in it when police were at Restwell Road.

In addition, the collusion by Detectives Harding, Morris, Pettiford, Krawczyk and Helson, in what they told Internal Affairs Sergeant Shepard about their dealings with Brajkovic, summarised, we submit, accurately by Counsel Assisting at their submissions at paragraph 3259, 3272, and the false denials that Brajkovic had been bashed when in the interview room at CIB, necessarily casts doubt upon the evidence of the same detectives that Brajkovic had the alleged explosives at Bossley Park, and it also casts doubt on the claim by the police concerned that the scrumdown in the early hours of 9 February, completed in the midmorning of 9 February, to produce the timetable of events document was not a corrupt scrumdown. It casts doubt on that claim.

In addition, there is the strange feature that neither of the statements of Mrs Brajkovic and Mr Hudlin, taken by police on 8, 9 February, reflect any interest by police, that is to say, respectively, Detectives Bennett and Pettiford, in finding out what those persons could say about the alleged bomb plot or about prior meetings between conspirators or awareness of explosives at the house at Restwell Road. This suggests that the statement-taking exercises with Mrs Brajkovic and Mr Hudlin were not with a view to investigating the alleged bomb plot at all, which leaves the only option of, in reality, a malign purpose in those witness statement-taking efforts, but that is not as important, we submit, as the light that the statement-taking exercises of those two people throws upon the genuineness of the investigation. It gives further reason to doubt that what was happening at CIB was a genuine effort to conduct an investigation into the alleged information from Bebic, let alone the information

which had been conveyed from Virkez.

5 The statement-taking exercises support the conclusion to which we submit the Inquiry should come, that were police bashings not to succeed in obtaining confessions – we would remind your Honour that Mr Zvirotic and Mr Joseph Kokotovic gave cogent evidence that they also were bashed, they in the situation we are now in having the misfortune not to have been as badly bashed as Mr Brajkovic was. The arrests were for the purpose, we submit
10 your Honour would find, of providing an opportunity once the accused were isolated from anyone who could support their version of events, of fitting them up with fabricated evidence that they confessed to terrorism offences.

15 Your Honour has our written submissions, paragraphs 119 to 126, which provides an hypothesis as to why police fabricated evidence and lied. We remind your Honour of it, if – this is not essential of course to a reasonable doubt about the guilt of the accused. But the police officers at CIB, we submit, accepted without question what they were told, particularly by Inspector Morey but also by Inspector Perrin and Detective Jefferies of how dangerous and radical these - before they occurred, targets of the raids in Sydney – were, and
20 what they were told by Morey, Perrin and Jefferies of the Croatia Republican Party's activities and plans. We submit that it would be only human for detectives receiving that sort of information to be repulsed by what they had been told about those plans and about the motivations for the suspects. Anything that the CIB detectives heard, especially on the night of
25 8 February from Special Branch directly or indirectly, would only have fortified their disgust at what would have been seen as “these terrorists” and what they had been planning.

30 Together with the Special Branch detectives who attended the raids, the CIB detectives would have viewed “a few words of verbal”, to quote Rogerson for each of the arrested men and a load up as doing the civilian populace of Sydney a favour in putting these men away, of bricking them up. Once Virkez had sown the seed of the idea that there was a terrorist ring, we submit, in other words, it likely fell on entirely fertile ground. First and most importantly at
35 Special Branch, and secondly at the elite Squads of the CIB. As Rogerson explained, the lawfulness of police conduct thereafter was neither here nor there:

40 “It was the cult. You were doing a community service. It was all done in the interest of truth, justice and keeping things on an even keel, and keeping crims under control. In the old days the safe blower was the smart crim, so they always feared getting a couple of sticks of geli found in their car or in their possession.”

45 Viewed through this lens, we submit, the fabrication by police of their evidence in this case can be seen as an illustration, a rather large case study of the “noble cause corruption”, Justice Woods' “process corruption”, with which the New South Wales Police, we submit, your Honour would conclude was infected in this era. The “noble cause” in this case was the taking out of
50 circulation of these terrorists who planned to carry out explosions which would

have killed and maimed people. Similarly in our submission, detectives inclined to resort to violence to punish these terrorists would have felt justified in doing so. Can I, in conclusion for my segment of these submissions, your Honour, just take your Honour if I can and briefly remind you of the evidence of what it was that each of the accused had been doing on the evening and night of 8 February - even before 8 February

Mr Brajkovic on Wednesday, 7 February, took Mirko Bosnjak, B-O-S-N-J-A-K, a friend, who was a draftsman, to see Mr Brajkovic's block of land that he had bought, on which he was planning to build a house. On 8 February, he spoke with the Special Branch Detectives Krawczyk and Helson about those plans. After Krawczyk and Helson left the Restwell Street house around 7 o'clock, he took the family Thursday night shopping. What I would remind your Honour is also the evidence of the Burwood three and what they were undertaking before the Rogerson raiding team. I do remind your Honour that the leader of that team was Roger Rogerson. They were the family undertaking entirely innocent activities. Ilija Kokotovic spoke of how he was transcribing an article from the journal "Republika Hrvatska", H-R-V-A-T-S-K-A, onto a stencil for roneo-ing, and Mr Nekic was proofreading it. Mr Nekic having come back from having taken his very young son downstairs for his wife to put to bed shortly before the police arrived.

Joseph Kokotovic was not in the attic at all, he was in his flatette. He gave the account, as did his then wife Lydia Kokotovic - with his wife and young child when the police burst into the house. His wife having put out onto the kitchen bench a tub of ice-cream and bowls commensurate with the family intending to have a cooling stack before bedtime. It was the height of summer. Joseph Kokotovic, Exhibit 2.1, Day 43, red pages 1395 to 1396. Lydia Kokotovic, Day 95, red pages 1531 to 1548; Day 118, red page 3880; Day 119, red page 3912. We submit that it is disappointing that Counsel Assisting should, with the greatest of respect, apparently so readily discount the evidence of the accused in their accounts of events that they were engaging in entirely innocent activities and had entirely innocent plans and motivations for their futures, on the basis that they're family members.

You can't trust an alibi witness who is a family member or a member of the same community because they're not to be trusted, they're likely to lie is the implication by Counsel Assisting. We submit that if it be accepted, for the sake of argument, that the accused could be telling the truth about events at around 10pm on 8 February in their respective houses, then who are the people who are most likely to be in a position to provide corroboration if not their families.

I remind your Honour as well that he, on all accounts, at the time the police arrived at about 10pm was getting about the house at 30 Chandos Street, Ashfield clad in nothing more than a pair of sports shorts or a swimming costume or underpants or a garment of that nature, according to police not just Mr Zvirotic. Hardly garbed appropriately, we respectfully submit, we'd ask your Honour to consider, to be in a state of what one would imagine would be heightened tension to receive co-plotters, to conduct a meeting with his co-plotters, to go out and lay bombs to blow up buildings and cause death and

serious injury.

5 Joseph Stipich who was alleged to have nine detonators hidden in a drawer, and to have evidenced a consciousness of guilt about them and as the person to whom they belonged, in what police attributed to him by way of conversation at the house. Despite what police said, Mr Stipich's account was that he was almost asleep, he'd gone to bed when he was woken by his brother and told there were police in the house. These people were not acting, we would submit, your Honour, consistently with what one would expect of men who 10 were about to commit a shocking crime involving explosions and murder and injury to people and buildings. They were acting relaxed. They were playing with their children where they had them. And other than Zvirotic who lived alone, who obviously was taking it easy to say the least, they were enjoying being around their families. Your Honour, thank you for receiving our 15 submissions. I'll pass the baton if I may to Mr De Brennan who will turn to the witness Virkez.

HIS HONOUR: Thank you, Mr Buchanan.

20 DE BRENNAN: Pardon me, your Honour.

HIS HONOUR: When you're ready.

25 DE BRENNAN: If your Honour pleases. Accepting that your Honour is in no way bound by case theories or forensic decisions that were made at trial, your Honour is aware that a case theory that was postulated was that Special Branch and CIB had a motive to get these troublesome men off the streets. At first blush, your Honour, that hypothesis might seem fanciful. However, despite police permissions generally being sought by the Croatian Australian 30 Community before any of their demonstrations, a document from Special Branch dated 26 November 1976 gives the Inquiry a good insight into just how resource intensive these demonstrations could be.

35 In respect of this demonstration on 26 November 1976, police arrangements included the provision of a superintendent, assisted by two inspectors, 30 other uniform police to patrol, six intersections in the vicinity were controlled by traffic police. There were two caged trucks. There was radio equipment manned by a sergeant and a constable. There was a driver on duty in the vicinity of the assembly area, a mobile reserve, two members of the rescue 40 squad, two police photographers from the Scientific Section, the officer-in-charge from Special Branch, six other members of Special Branch, a weekend officer, a static guard, and I could go on and on, your Honour. That's just in relation to one protest.

45 That document also reveals that there had been liaison in relation to that demonstration with the Commonwealth Police, and Commonwealth Police were also tasked with making security arrangements in and around the Double Bay area, as well as other Yugoslav Consulate premises, the Embassy in 50 Canberra as well as various diplomatic personnel. Quite apart from the information exchanges that were doing on domestically, Hamish McDonald,

investigative journalist, in his book, Reasonable Doubt, says that when he went to the former Yugoslavia and visited the archives there, he located a dossier compiled by the Australian Federal Police which was shared with UDBa, dated February 1976 at Belgrade, which was titled List of Yugoslavian Extremist Immigrants in Australia, and he says, after a few explanatory cover notes, the essence of the file is a document titled The Yugoslav Composite List Sixth Edition dated November 1975 and stamped "secret". This was circulated in confidence to federal and state agencies in Australia for reference, but the UDBa was also on the list. It contained 1,732 names of Croatians as well as Serbs and Macedonians, as well as the aliases of 83 of them. It mentions prominent Croatian community leaders.

At the same time that these protests and demonstrations were occurring, New South Wales Police, the material produced by the Commissioner of Police shows, were getting pressure from the Yugoslav Consulate in respect of the demonstrations that were occurring. For example, a demonstration on 26, 27 November prompted a substantial complaint from the Yugoslav Consulate which was directed towards the Premier's Department, and despite the vociferous nature of that complaint which alleged, amongst other things, that Croatian Australians were throwing eggs, bricks, bottles, metal objects and paint, New South Wales Police documents maintained that the Consulate's allegations were not in accordance with the facts and had been significantly exaggerated.

Your Honour, you had the Yugoslavian Consulate, which, in my submission, on the evidence before the Inquiry, was seen as an important strategic partner to Australia, expressing its dissatisfaction with the way in which police were handling the Croatian Australian community, and also, it would seem, that these complaints were exaggerating precisely what had occurred at some of these demonstrations, and so somewhat opportunistically, in my submission, in that general period prior to the arrests, Jefferies, before the Inquiry, gave evidence that the Yugoslav Consulate was seeking to ingratiate themselves to New South Wales Police and he spoke of two or three consuls in particular that were doing this. Putting to one side for a moment that the ASIO documents would indicate that certain personnel working at the Consulate had YIS links, documents produced by the Commissioner of Police make it clear that Special Branch's Detective Inspector Perrin and Sergeant Jefferies, as well as their wives, were invited to such things as balls to celebrate national Yugoslav days in Sydney.

Mr Jefferies confirmed that he attended such functions. Mr Jefferies said that he was not invited along because they liked him. He said, "They invited me because 'I was a detective at Special Branch that they could deal with.'"

HIS HONOUR: Mr De Brennan, can I just interrupt at this point? The submissions you've made thus far are obviously based upon the evidence that's before the Inquiry. When I subsequently come to go through the transcript of the submissions that are being given to me over these days, I'll be looking closely at all of the submissions and looking at the evidence upon which they're based. If counsel has given me the transcript reference it will

make my task infinitely easier. If I haven't been given the reference it will have the opposite effect upon me. You haven't cited any transcript or exhibit reference so far and I'm just concerned about where you're going, if you're going to continue with this, unless this is just a mere repetition of what's in the written submissions already - if that's the case, that's fine.

DE BRENNAN: I hear what your Honour says, and I can certainly provide references. I should say this is really context before I move to more specific areas of the landscape, but I hear what your Honour says and I can provide references. In my submission, on the available evidence, Special Branch quite literally had a special relationship with the Consulate. On 23 February 1979, there is an occurrence pad entry by Detectives Counsel and Grady in respect of information given to the Yugoslav Consulate concerning a death threat of two of their officers. In this instance, when they spoke to a Mr Cerar, according to the occurrence pad entry, he stated that the Consulate only dealt through the New South Wales Special Branch and arrangements would need to be made with that branch. The exhibit for that is Exhibit 11.50A at red page 229.

The fact that that Yugoslav Consulate would attempt to exert pressure at the highest levels was recognised in a documented conversation between Assistant Commissioner Whitelaw and ASIO, namely an ASIO record of conversation on or about 16 March 1979; Exhibit 9.1-26. In relation to Virkez, that document records that Mr Whitelaw thought it possible that the Consulate General would seek to influence the police to go easy on its informer, that is Virkez. "It is unlikely that the police will accede to representations of that nature", is what Assistant Commissioner Whitelaw is said to have indicated in this ASIO document which can be found at Exhibit 9.1-26 at paragraph 14.

In his letter of 20 October 1979 to the Premier's Department, Zvirotic alleged that Detective Radalj was a Yugoslav sympathiser who had held various posts in the Yugoslav Club at Yugal, he said that club was controlled by the Yugoslav Embassy and otherwise had good connections with Yugoslav diplomats; Exhibit 11.11 at red page 26. In relation to the Yugoslav Club, Yugal, there appears to be some independent corroboration of what he says in his letter in that an ASIO document dated 6 July 1982 entitled "Yugoslav Intelligence Service Further Contacts and Informants", lists a person by the name of Marian Alagich as having affiliations with not only the YIS but also the Yugal Club; Exhibit 9.1-87 at red page 126.

A number of the members of the Croatian Six had raised, well in advance of their arrests, their concerns that UDBa or the YIS was a real concern or threat to them as persons advocating for an independent Croatia. Your Honour might recall one of the documents which attributed a pistol to Mr Nekic in 1972 and he was, thereafter, charged with possession of a pistol. Putting to one side the evidence that suggested that that may have in fact belonged to a Mr Rover, who was also at the hotel at the time. Nekic indicated to members of Special Branch that he had purchased the pistol for his own protection. He stated that he believed there were Yugoslav secret agents in Australia who were out to kill Croatians in particular, and Special Branch say this in the same

document, "Nekic appeared to be a reasonable sort of young man and makes apparent serious attempts to learn English. Does, although, maintain that he intends to return to Croatia as soon as it is free from the Yugoslav yoke". The reference for that is Exhibit 11.76 at red page 811.

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In 1977, Nekic again expressed concern about UDBa being out to get him when he reported to Officer Jefferies that his car, after travelling a short distance, had lost control and upon stopping and examining it, he observed five locking nuts that secured the wheel to the hub to be missing, as were three of the locking nuts from the front rear side wheel; Exhibit 11.76 at red page 1048.

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There's other documents where Nekic is actually meeting with Special Branch, and this is in 8 December 1978, and speaks to Jefferies for the purposes of an interview concerning the current activities of members of the Croatian community in New South Wales. The fact that, at this period in time, that is December 1978, he was willing to sit down and confer with members of New South Wales Police and discuss political matters within the community, in my submission, militates against him simultaneously concocting one of the largest terrorism conspiracies Australia has seen.

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The Special Branch report of Jefferies relevantly reads, and this is at Exhibit 11.76 at red page 807:

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"Nekic, one of the acknowledged leaders of the Croatian Republican Party, indicated to me that he intends to uncover a member of the of the Yugoslav secret police operating within the Australian Croatian community in this State. He sought my advice on how to go about doing this."

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The report goes on to note, "Although Mile has been observed at various demonstrations over the past two years, it had appeared that both he and his wife had lost some of their enthusiasm for Croatian political affairs". There's other documents, and this is at Exhibit 11.76, red page 823, 25 June 1979, where a Mr Popovic sits down with New South Wales Police and says that he had received information from his brother that he could be killed by the Yugoslav secret police in Australia. He also disclosed to Special Branch that an individual named Anic was suspected by many of being UDBa, and Detective Senior Constable Jefferies and Constable McNamara conclude from that foregoing, it would appear that Marko Popovic may very well be in danger from the Yugoslav secret police, and it is certain that he has taken the threats conveyed by his brother and his neighbour very seriously, Exhibit 11.76 at red page 829.

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There's other references, and I won't belabour them. They include members of the Croatian community turning up to Court, handing out brochures in relation to UDBa activity, citing cases in a West German court in these pamphlets where a Stephen Bilandic had apparently established that evidence was fabricated by the YIS against him, intending to discredit and destroy his reputation as an advocate of the Croatian cause, and that's Exhibit 11.50A at

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red page 229.

5 All of these things are raised, your Honour, because, in my respectful
submission, they make the concealment of certain documentations and
documents and facts relating to Mr Virkez more egregious, and in terms of the
10 lack of disclosure generally, we respectfully concur with the submissions of
Counsel Assisting that important and relevant information wasn't
disclosed. We say that it becomes particularly egregious in circumstances
where it is Mr Jefferies who is a prolific author of reports which set out the real
15 and present danger that the YIS posed in New South Wales at that time. It
wasn't some academic or fanciful idea. Mr Jefferies said to this Inquiry in this
evidence that he, and I'm paraphrasing, suspected people that he knew had
YIS affiliations, and the notion that, against the backdrop of all of these
concerns that were raised with him, including by members of the Croatian Six,
20 were not turned over to the defence lawyers at the trial, in my submission, is
something that would cause your Honour concern.

I've addressed your Honour in relation to one case theory that was postulated
at trial on behalf of the Petitioners. What I want to do now, your Honour, is
20 postulate another potential case theory, bearing in mind that there is no onus
on the Petitioners to positively demonstrate an explanation as to why they say
police fabricated evidence in this case, but it really goes to the fact that from
the time of the arrests in Lithgow, there was media and spectacle, and perhaps
25 that was unsurprising in circumstances where Lithgow Police had brought in
the media to take photographs of the alleged items.

HIS HONOUR: You're talking about Mr Ashworth?

30 DE BRENNAN: Yes, your Honour.

HIS HONOUR: Just Mr Ashworth.

DE BRENNAN: Yes.

35 HIS HONOUR: Not the media more generally?

DE BRENNAN: No, your Honour. Just Mr Ashworth, who I understood was
from the media.

40 HIS HONOUR: Yes. Newspaper.

DE BRENNAN: It is submitted that on the available evidence, and of course,
the Petitioners can't identify precisely when, but police quickly became aware
45 of the true status of Virkez, and the fact that he had YIS links, and out of a fear
of being embarrassed, police almost became locked in to pursuing and
prosecuting these men. Harding's impression was that Inspector Morey was
receiving "downward pressure from above to move things along because it
frightened the socks off everyone. The explosives and potential bombings and
50 targets", Exhibit 11.8, red page 21. For the reasons articulated by Counsel
Assisting, by 10 February 1979, we certainly know that Jefferies, as a Croatian

subject matter expert, had learnt of features relating to Mr Virkez, including that he was a Serb, that he was using a Croatian name, that he had been contacting the Consulate, and that he was an ardent Yugoslav, which, for someone with his background and expertise, must have brought home that something was amiss. The fear of embarrassment and/or, as one of the ASIO documents talks about, blundering into a possible untoward situation was borne out in the discussions between ASIO and Assistant Commissioner Whitelaw in or around 14 to 16 March 1979, and specifically, I refer your Honour to Exhibits 9.1-25 and 9.1-26.

By 12 August 1991, and fast-forwarding a number of years, there is a letter from the New South Wales Police Media Unit to the State Commander reporting on the proposed Four Corners program by Chris Masters, and your Honour might recall that Mr Masters had wanted to give New South Wales Police an opportunity to respond to the story that he proposed to publish prior to doing so. That's at Exhibit 11.34, red page 119. That document, in the Petitioners' submission, is instructive in that it states Masters had now contacted Whitelaw, who denied ever hearing the information, and so the suggestion in that document is that Whitelaw was disavowing the notion that Virkez had these links. From a very early stage, it's contended on behalf of the Petitioners that New South Wales Police took steps to conceal records that went to the true status of Virkez, and in this respect, the Inquiry wouldn't take any comfort from Mr Hogue's evidence that he had been informed by former officers of Special Branch that the files compiled by Special Branch and held in a large room had been dumped, burned, or otherwise destroyed when the Special Branch units were disbanded in or around 1993 because the files would've been embarrassing to the government and politicians, as well as to the New South Wales Police Force.

HIS HONOUR: Whose evidence is that?

DE BRENNAN: That comes from Counsel Assisting's submissions at page 239 at paragraph 934.

HIS HONOUR: Whose evidence?

DE BRENNAN: He was Jefferies' offsider, your Honour.

HIS HONOUR: The name, please.

DE BRENNAN: H-O-G-U-E. Your Honour's aware from Counsel Assisting's submissions that, at least in respect of Mr Jefferies, there's this question of this missing report that was prepared following him interviewing Mr Virkez on the 10th, notwithstanding that Mr Jefferies accepted that it would've been caught by the schedule of the subpoena that was issued.

Both the DPP and Counsel Assisting refer to the transcript of Mr Virkez's call to the Yugoslav Consulate on 8 February 1979, and that's Exhibit 9.1-15. The point is made that when analyses that exchange, that the recipient of the call, Mr Kreckovic, did not appear to have any prior knowledge of a bomb

plot. While it is true, in our submission, that Mr Kreckovic may not have had such knowledge, it is incorrect to say, in our submission, that there had been no forewarning of a bomb plot to the Consulate. An ASIO document suggests that on or before 19 September 1978 another YIS agent, Pero Saret, knew that "something was going to happen to the Serbian singers". Exhibit 9.1-23 at paragraph 4, red page 34.

It's our contention that this is a significant document, as it suggests that something was going to happen to these singers nearly five months before the Croatian Six were arrested. What's more, there was no evidence that the Consulate or officials ever took steps to bring this information to police, and one needs to juxtapose that with the call that Counsel Assisting and DPP rely heavily on, on 8 February, where Mr Kreckovic is at pains to tell Misimovic, "You must call police". Notwithstanding that injunction, as a matter of development by the time that it is reported to police it happens almost as a mere afterthought, that is to say that there's an intercept report that noted that Virkez and Mr Kreckovic had spoken with Virkez advising the Consulate of the proposed bombings. The call was made at 1230 hours. At approximately 1530 hours Detective Sergeant Prytherch of the Commonwealth Police was discussing with Mr Cerar details regarding the personal security of several consular officers who were to attend the Serbian singers' performance on 10 February.

Then towards the end of the meeting Prytherch said that it was possible that a bomb hoax could be made which apparently jolted Mr Cerar's memory as to a call made to Virkez at the Consulate earlier that day. The call was reported to Sergeant Prytherch by Cerar, and it's observed that the Yugoslav Consulate General staff made no other attempt to contact the Police Force with details of this bomb attempt. Exhibit 9.1-17 at paragraph 4. In relation to the evidence of Virkez more generally, Counsel Assisting's submissions urge upon your Honour to scrutinise his evidence with great care. We respectfully endorse that approach, but we would go one step further and say applying a contemporary procedural lens in terms of the law today, your Honour, would start from the vantage point that Virkez's evidence is unreliable pursuant to section 165 of the Evidence Act.

HIS HONOUR: That's not what the section says.

DE BRENNAN: Well, insofar as Mr Virkez, on his own Admissions - contestable as they may be - says that he was criminally concerned.

HIS HONOUR: Yes, but section 165 doesn't say his evidence is unreliable.

DE BRENNAN: It's a fact that it may inform unreliability, in my submission, that he is criminally concerned.

HIS HONOUR: No, it's something that may render his evidence unreliable. Not mean it is unreliable. It may be unreliable.

DE BRENNAN: Yes, your Honour.

HIS HONOUR: And for that reason, one would exercise great care and scrutinise it carefully, as the submission of Counsel Assisting was to that effect.

5 DE BRENNAN: Yes, your Honour. The amount of lies that he told would fortify the Inquiry in any finding that he may be unreliable. We say your Honour would have no reservations about him being an unreliable witness, in fact having regard to the totality of his evidence, I won't go through all of it, but briefly his three interviews, there's a suggestion at one point that they were in fact his interviews, then he disavows them. In other material there is a suggestion that he was in the Croatian Army for eight years while pretending to be a Croat and a Catholic. Exhibit 2.1-1, red page 53 to 60. This stands in contrast to other material, for example, his pre-sentence report where he reported that he migrated from Yugoslavia in 1969 to avoid being called up for military service.

In his first interview he contended, that – the first interview attributed to him, he said that the purpose of planting the bombs was "To keep fighting for our country" and "a bit of politics too". In what appears to be a patent lie he claimed membership of the Croatian National Council. At Exhibit 7.1, there is a transcript of a bail application that he made in the Supreme Court on 31 January 1980. He denied signing any of the three interviews, which were attributed to him. His position then was that his position had been forged. In contrast to the idea that he was politically active, he stated that he had been in Australia for nine years and had not been involved in any Croatian demonstrations or been "anywhere with Croats". Exhibit 7.1, red page 7.

By 13 February 1980, both the Department of Prime Minister and Cabinet, as well as the Premier's Department, were in receipt of a letter written by him. He alleged that the statement that police claimed he had given to them was not the same. So another permutation again. He agreed that he had read what they had written, although said he could not read or write in English. He denied that he wanted to blow up buildings voluntarily. He claimed that he was forced to do this, and that he had proof. He claimed that police had said that he had been fighting for Croatia which was untrue. In keeping with this idea that he felt aggrieved by New South Wales Police, he says in that letter, "only the Federal Police can help me as I have proof in some documents which I do not dare to give to the police headed by Neville Wran(?)". In my respectful submission, at times Counsel Assisting conflate this idea of him being a reluctant witness with the overall evidence which would tend to support the notion that he felt aggrieved by New South Wales Police not honouring their bargain as far as he was concerned.

On 24 March 1980, Officer Ingram had prepared a report on his antecedents, and during that process Virkez informed Ingram that he was living in Victoria, that he'd struck trouble with the Serbian community – politically active sector down there, and accordingly he left that area for his own safety after refusing to cooperate with them. Importantly, nothing along those lines was reported by Mr Marheine in his evidence before this Inquiry. That reference is Exhibit 11.15 at red page 47 to 48. Then there's the pre-sentence report. He states

that he'd been a member of the Croatian Republican Party, then later a member of three other groups, the HNO or Croatian National Committee, the HNV or Croatian National Council, and the HOP, Croatian National Liberation Movement. In a further variation again, he states that he was not very active in membership except for involvement in some demonstrations. Then of course we have the disclosures or the answers that he gives to Chris Masters in the 1991 Four Corners Program.

The DPP point to an absence of any pre-existing relationship between Virkez and New South Wales Police as a factor that supports the Crown case at trial. On behalf of the Petitioners, it's submitted that this significantly downplays his relationship with New South Wales Police, even prior to his arrest. Regrettably, there's no contemporaneous notes, at least that the Petitioners have seen, that document the precise circumstances under which Virkez met Mr Marheine and Mr Ingram. At Exhibit 11.75, there is a police entry in a shorthand notebook which says, almost by way of requisitions, that records or statements were required from Marheine and Ingram relating to their first meeting with Virkez. That's at Exhibit 11.75 at red page 604. Again, unless the Petitioners have missed something, a perusal of the brief reveals that there's no such statement specifying how it was that Marheine - the precise circumstances under which he came to meet him.

What we do know is that even prior to the disclosure at Lithgow Police Station on 8 February 1979, he'd been to Lithgow Police Station to speak to Sergeant Marheine the week before. That's Exhibit 7.1-6, red page 17. A conversation reduced to writing between Assistant Commissioner Whitelaw and ASIO noted that Virkez was "a man prone to violence", and that he had been known over some two years to Detective Marheine stationed at Lithgow. Mr Marheine's evidence to the Inquiry was that he had known Virkez for longer, since around 1975, upon receiving an official file from the Canberra Police statue bombing at a church in Canberra. The gravamen of Mr Marheine's evidence was that Virkez had denied the allegations and that nothing had come of it.

Other documentary evidence suggests that enquiries were made by Marheine and Ross Clarke who interviewed Virkez on about 28 December 1977. The report of the interview stated, and this is at Exhibit 11.239:

Misimovic stated that he had changed his name to Vico Virkez and wouldn't do anything like putting a bomb anywhere, and that he has no knowledge of bombs or explosives.

And consistent with what the Petitioners say with Virkez at every opportunity trying to discredit the Croatian Australian Community, this document notes he did volunteer that he was at a Croatian Club at Marrickville three or four years ago and someone spoke to him about bombs and making bombs. They lent him a book on explosives, and he says that he had it in his possession for about five hours and then returned the book to them. They note "Misimovic was super cool at all times when interviewed by police. He speaks very good English".

In a similar way in the pre-sentence report, your Honour will recall that he attributes his bomb making ability to 1972 when he was with Croatians who were preparing for a military incursion. In the years after this interview, and prior to charges being levelled, Mr Marheine indicated that he came to learn that Mr Virkez had changed his name from Misimovic and that he was a Yugoslav. Mr Marheine's evidence to the Inquiry as to, firstly, meeting Mr Virkez in 1975 and, secondly, receiving the name of Virkez in the first instance, is inconsistent with the objective documentation which notes that it was 1977. But also, the documentation received from Canberra Police squarely referred to Virkez as "Mr Misimovic". In keeping with the notion that Virkez was a man prone to violence, the documentary evidence suggests that in addition to blowing up a statue there had been an allegation about an intention to blow up the Morava, which is a Serbian restaurant in Cabramatta. The reference for that is Exhibit 11.234 at red page 1643.

I interpolate, one might think why is a man of Serbian extraction being spoken to about blowing up a Serbian Orthodox Church and a Serbian restaurant? Ingram's evidence at committal was that he knew Virkez from a previous interaction when he had interviewed him about a stealing matter, and that was unrelated to stealing explosives. Exhibit 2.3-46. Another document produced by the Commissioner of Police revealed that at some point a loaded shotgun had been found in his bedroom and that Marheine and Ross Clarke of Lithgow would be making further enquiries in relation to that. Exhibit 11.238 at red page 1647. It is submitted that an inference open to this Inquiry is that Virkez, prior to his arrest was operating as a police informant and known in that capacity to members of Lithgow Police Station.

Your Honour, the Petitioners are not alone in that submission or that contention. Specifically with reference to Exhibit 10.3-49, which is an ASIO document dated 6 August 1984, the relevant ASIO analyst said this: "In addition to the statement that Virkez was a YIS agent, there is some evidence that Virkez may have been a police informant", and it refers to three ASIO reports in that respect. If I could commend your Honour's attention to Exhibit 10.3-49. What is perhaps also striking, given these interactions by Lithgow Police with Virkez for such things as the statue bombing interview, the Serbian restaurant bombing discussions, the suggestion that he was a man prone to violence, the suggestion that he had possessed a loaded shotgun, as well as this stealing matter, is that there appear to be no records held by Lithgow Police certainly that have been produced that speak to any of that.

Marheine's evidence to the Inquiry was that after interviewing Virkez in relation to the statue bombing incident, he got to know him better and found out further information about him. He gave what, in my submission, seemed like some strange evidence, that he would often walk through hotels in Lithgow during general searches and that Virkez would be there and that Virkez would always speak to him. Then there was a suggestion in his evidence that he actually helped Virkez sell his car, and provided him with names of a number of people that could assist. Now, even appreciating that Lithgow was probably a small country town, in circumstances where Virkez had come under notice for these various things, in my submission that does seem unusual, particularly when

coupled with what we say is an attempt by New South Wales to try and play down the role of Virkez following the arrest of the Croatian Six.

5 Milroy, for example, described him as a "community informer" that would occasionally report on very low level things. Jefferies suggested that he had twice wanted to be an UDBa agent, but was rejected, although didn't really elaborate on to any great degree about how he sort of arrived at that assessment. Your Honour, notwithstanding that Virkez was the one that had tipped off police and set this whole train in motion, having gone to Lithgow on 10 8 February, there doesn't appear to be any evidence before the Inquiry that Mr Marheine, who interviewed him, or any other police officer for that matter, spoke to him again about the statue bombing allegations or the restaurant bombing allegations. Even accepting that they were referred by Canberra Police, given the gravity of the more recent allegations and given that 15 Marheine had that pre-existing relationship, your Honour might think that Mr Marheine would have had occasion to say:

20 "Hey, Mr Virkez, you remember we had these discussions in 1977 about this and this. Hey, the shotgun. Hey, the stealing. Is there anything else you want to tell me in respect of those matters?"

On the evidence, no such follow-up occurred. Counsel Assisting have dealt in some length with this issue of the missing Jefferies report, but your Honour will also recall Mr Jefferies' alacrity for keeping records and index cards and the 25 like, and dossiers, and his evidence that he could even commit things to memory. However, conspicuously in relation to Virkez there was no information, for example, that Virkez was a Serb or that he had infiltrated the Croatian community, and again this relates to someone who's a prolific report writer. In terms of his criminal antecedents, all of Virkez's criminal 30 antecedence have been provided in the material before your Honour, Exhibit 11.86 at red page 1273. The Inquiry would observe that the criminal antecedence card that was started by police on 15 February 1979 lists Virkez's birthplace as being in Croatia. It also records his occupation as a labourer.

35 As is evident from some of the things that were put by Virkez on his bail applications, the notion that he was a labourer is at odds with what he said on these bail applications, namely that he was an electrician's assistant at the time of the arrest, and that's Exhibit 7.6 at red page 120. Despite the evidence of Sergeant Marheine - and Sergeant Jefferies knew about this also - that he 40 had been interviewed in 1977 in respect of that statue bombing, there's nothing in the antecedents card that's before your Honour that makes any reference to this or refers to his alias of Mr Misimovic. That's Exhibit 11.86 at red page 1237.

45 HIS HONOUR: When you're referring to the antecedents, are you talking about what was prepared to go before the Court when he was being sentenced?

50 DE BRENNAN: I should clarify, your Honour. The first thing I was talking about is what might be described as a computerised criminal history before

your Honour. The last point I made dealt with the old fashion criminal antecedent card, which was almost like a cardboard thing that was written up, and I think there was some evidence that you could call up over the phone and find out about--

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HIS HONOUR: So you would expect to be present and you find there's some significance in it not being present, that he had been interviewed about his possible involvement in a bombing which he denied.

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DE BRENNAN: Yes, your Honour, but more specifically is the computerised criminal history bail report, and this is at Exhibit 11.86 at red page 1275. Bearing in mind that that bombing incident expressly referred to him by the name of Misimovic.

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HIS HONOUR: But it was an unproven allegation or suggestion or a suspicion, and you're saying it should have been on his criminal history or his criminal antecedents.

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DE BRENNAN: Two other aliases are provided.

HIS HONOUR: The aliases are another matter, but an unproven assertion that he might have something to do with the bombing in the ACT - is that something you say should be included in records like that?

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DE BRENNAN: Your Honour, on the criminal antecedents card--

HIS HONOUR: Let's not dwell on it. It's a small point.

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DE BRENNAN: Yes. Could I just say this though, in respect of the aliases, in my submission, that would cause your Honour concern, that the computerised criminal history bail report, bearing in mind it came into existence at a later time, refers to two aliases but not Misimovic, and the reference for that is Exhibit 11.86 at red page 1275. At Exhibit 7.6 red page 101 there is an undated handwritten note stipulating that before Virkez's release a telephone call be made to Detective Sergeant Turning of the Breaking Squad or to the duty officer at CIB. The handwritten note suggests that Virkez be released to Detective Sergeant Turner, as advised by a superintendent. The reference for that is Exhibit 7.6 at red page 101. Just in terms of the centrality of Virkez to the conspiracy, the Court of Criminal Appeal said this, and this is at page 57 to 58 of *R v Bebic No 2*:

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"It is important to note that Virkez throughout denied that he was a member of or associated with any Yugoslav intelligence service or engaged in undercover activities in Australia on behalf of the Yugoslav government, and there was no direct evidence that he ever played either role. It was left to the jury. However, as an inference, which they might draw, it seems improbable that they did so. We think that to convict on the first count the jury must have substantially accepted the truth of Virkez's evidence about the conspiracy. They may have accepted him notwithstanding that they

took him to be a Yugoslav agent or something of the kind, but it is unlikely.

5 The Court of Criminal Appeal also said this, that, "In each case there was evidence of possession of explosives and surmounting all was the evidence of Virkez implicating the majority of the appellants". In my submission, the word "surmounting" is important in showing the prominence of Virkez to the Crown case and the interdependent and mutually reinforcing nature of the evidence. Later the Court of Criminal Appeal acknowledged that Virkez's
10 evidence at the trial provided cogent support for the Crown case. That's at page 117 of the decision, which is Exhibit 2.4 in the Inquiry material. In terms of the Court of Criminal Appeal's treatment of his status and his association or not with the Yugoslav Consulate, that was largely predicated on the assessment that was made by Mr Cavanagh when he spoke to Mr Virkez on a
15 gaol visit. It's submitted on behalf of the Petitioners that any such assessment is unreliable, and that is because, contrary to the affidavit that he deposed in the Court of Criminal Appeal, that no formal Record of Interview was taken and that some brief notes of the interview were made but were subsequently destroyed.

20 At Exhibit 9.1-41, an ASIO officer observes, "Mr Cavanagh advised at a Federal Police/ASIO meeting ... that he would soon be forwarding a tape recording of his interview with Virkez to ASIO", and then in contrast at Exhibit 9.1-67 there is an ASIO document dated 3 September 1981 where the
25 author thanks the AFP for looking for the Virkez gaol interview reports, noting that it was understood that Cavanagh had tape recorded his interview. Further, Exhibit 9.1-69 is a memorandum from RR to HQS entitled "Liaison With AFP", which observes that Inspector Fletcher and Superintendent Dillon "had made efforts to obtain the record of interview from
30 Cavanagh without success". The document notes that Cavanagh's files were searched after he "left the division at his own request in early 1981". The document states, "In view of the background of the bad feelings and distrust which existed between Cavanagh and serving officers in C division, the superintendent did not feel inclined to pursue the matter of the interview
35 tape/transcript any further". The reference for that is Exhibit 9.1-69 at red page 94.

This assessment of him being a "low level agent", notwithstanding, it seems, original indications that these discussions had been documented, in no way
40 can be independently verified, like so much in this case, whether it be the police evidence, also the evidence pertaining to Virkez, we have no objective corroboration of his account, and more than that, it seems that, to the extent there was one, it somehow suddenly disappeared in a way that we contend would leave your Honour with real concerns and give rise to a reasonable
45 doubt as to the evidence of Mr Cavanagh, certainly in the Court of Criminal Appeal. At Exhibit 9.1-36 there is an ASIO file note showing that Cavanagh had said in Headquarters on 4 February 1980, that he was to interview Virkez in gaol, and to that end, had offered to put any questions to Virkez that ASIO cared to submit. Indeed, the relevant ASIO case officer states, "I undertook to
50 give Mr Cavanagh some questions at a later date"; Exhibit 9.1-36 at red

page 53. Of course, we have no such questions or what was asked, but significant reliance, notwithstanding the deficiencies in that evidence, is placed on the ultimate assessment that Mr Cavanagh makes.

5 In the Petitioners' submission, Virkez's status went well beyond that of being
an informant or a source, and so much can be gleaned simply by perusing that
first telephone intercept. In my submission, it is plain from that first intercept
that Virkez is not some mere supplicant. He is actively driving
10 discussions. He's talking to Grce, asking him whether he knew anything about
a gun dealer who purchased guns in Germany for Australia. He said it would
be advantageous if somebody could obtain employment down on the ships in
Australia that took meat to Europe, whatever that might mean. Grce also said
that he was counting on Virkez, like a "good boy", and that everything was
15 going to be all right. But the principal submission is that he's not some mere
supplicant on any proper reading of that telephone intercept, and so much is
corroborated by the extract from ASIO in the SIDC-PAV report at
Exhibit 9.1-21 where he's referred to as a driver for those involved in the
proposed bombing operation.

20 The DPP, at 45 and 74 of their reply submissions endorse Counsel Assisting,
endorse this view that whatever the nomenclature might be, he doesn't raise to
this level of an agent of the Yugoslav Government. In my submission, that is
just wholly at odds with the objective evidence. Exhibit 9.1-27 demonstrates
that, as of 19 March, Virkez was seen as an informant of "great
25 consequence". On any view, an informant of great consequence rises beyond
the low level designation that was ascribed to him by Mr Cavanagh and that
was represented in the CCA. In the same document Virkez is described as a
high grade informer. Again, we say goes well beyond the low level
connotations represented by Cavanagh.

30 What would cause your Honour even more concern, in our submission, is that
there's a suggestion in the ASIO material that Virkez is not operating in
isolation or at least there's someone else up at Lithgow who is also deemed to
be an informant or source of great consequence and a high grade informer,
35 and that is one Pero Saret, and we know nothing more about him, but certainly
that is another matter that we say would cause your Honour concern and really
does corroborate what other documents in the ASIO material say when they
refer to the "depth of penetration of the YIS in Australia". On 9 July 1979,
ASIO intercepted a call from an unidentified Australian male who contacted
40 someone at the Russian Consulate about Virkez "in connection with Croatian
business some time ago". Exhibit 9.1-30, red page 43. The implication that
Virkez even has other people calling the Russian Consulate on his behalf to
potentially do some bidding. There is a memorandum dated 9 April 1980
concerning Vico Virkez. This is Exhibit 9.1-46. Amongst other things, the
45 memo opines, "it seems probable, but not certain, that Virkez joined the HRS
on behalf of the YIS".

Dated 6 July 1982, there is an ASIO document entitled "YIS Further Contacts
and Information". This is at Exhibit 9.1-87. Significantly, as of the date of that
50 document, 21 persons are listed to have YIS links operating in Australia, and in

5 a way that would suggest that the document had ongoing legitimacy and
credence, its author states, "The following list of contacts may also be
included in future papers". That is to say, the author of the report took no
issue with the names in the document being used in ASIO publications going
forward. It will be noted that notwithstanding Mr Boyle's evidence to this
Inquiry that the term "agent provocateur" would not be a term that would be
used lightly, Virkez is listed as a "YIS informant and suspected agent
provocateur". Now, it's acknowledged, and acknowledged at once, that
10 Mr Boyle said in his oral evidence that - well it said, "suspected" rather than
"actual", but in my submissions suspected or literal - the designation of Virkez
as being a "suspected agent provocateur" goes well beyond what was
represented by Mr Cavanagh in the Court of Criminal Appeal.

15 What is telling about this document is that it's dated 6 July 1982 in
circumstances where Virkez is said to have departed Australia on
24 December 1980, and so notwithstanding leaving the jurisdiction, that is their
view at that time. Again, there is a reference to this Pero Saret who is listed as
an agent of Salvarinov in this document, and the Inquiry will recall that
20 Salvarinov - there's some evidence - I'm sorry I don't have the source - but
from memory, that he was working at the Consulate. So we've got two people
that appear to be operating in the Lithgow area. Then what we really say is
that the high water mark, particularly bearing in mind the further effluxion of
time, is Exhibit 10.3-49, which is an ASIO document dated 6 August 1984.

25 In this document, the ASIO analyst S5A opined that while there was no
evidence on file that the YIS masterminded the Lithgow plot, it was his opinion
that based - and I need to emphasise this because the author and the analyst
S5A does - he says:

30 "Based only on professional judgment that Virkez was central to a
YIS plan to discredit a potentially violent Croatian organisation, the
Croatian Republic Party. I don't believe the YIS actually wanted
bombs to be planted, but I do believe they wanted HRS leaders
arrested with bombs or implicated in the plot. The aim, ie that
35 Croats particularly HRS members be discredited, was very
successful. The arrests and trials split Croatian separatist groups
and destroyed the HRS. No separatist groups operate without the
fear of YIS penetration, following the exposure of Virkez as an
informant. Suspicion amongst separatists, of each other, has meant
40 that cooperation and unified action is impossible. Unfortunately, the
above opinion is only conjecture and is not based on hard
intelligence."

45 Now, your Honour, given the ASIO analyst caveat that the above opinion was
only conjecture and not based on hard evidence, it might be tempting to
assume that it's devoid of any weight. But in my submission your Honour
would not take that approach, and the reason for that is simple. The likelihood
of a foreign spy ever making it clear in a way that rose to hard evidence that
they were actually working as a spy would be pretty rare. And so the best that
50 the Inquiry could do is look at the objective documentation and the intelligence

at the time, and the preponderance of the ASIO material, that I've taken your Honour to, suggests that Virkez is operating at a level that goes beyond "low level" on our case. Importantly, although the analyst, who is after all an analyst, in acknowledging that his assessment has a degree of conjecture and is not based on hard evidence, does arrive at the view that Virkez is an "agent" proper. That is the designation.

That's important because for all the qualifications that this analyst S5A gives, he doesn't approach the task in a vacuum. He tells us in this document that he had occasion to review the files immediately related to the Lithgow bombers plot. So he's got those in front of him. That's at Exhibit 10.3-49 at red page 186, paragraph 1. Then he tells us that he reviewed some ten ASIO reports related to Virkez, and he sets them all out. Ten reports. So one might infer almost the entirety of the intelligence, and what are his conclusions? Well I'll read them verbatim, "Vico Virkez was an agent of the YIS. The YIS had a second agent reporting on HRS activities in Lithgow". Although it's redacted there, there is other material to indicate that that's Pero Saret. Thirdly, "Virkez changed his name in 1978 from his Serbian name Misimovic to a more acceptable Croatian name Virkez, and YIS officers in Australia involved with Virkez had returned to Yugoslavia before the trials began."

So, your Honour, it's submitted that that document significantly overtakes any other ASIO documents that suggest that he's operating at a lower level, which in my submission are not as rigorous in terms of the number and degree of sources that are analysed. What's important about him designating Virkez an "agent" at this time in 1984, is that by this stage Ian Cunliffe has been doing all sorts of agitation including letters to senior government officials, and if anything your Honour might think, given the real reputational concerns for ASIO that they might be minded to downplay or to sanitise that designation of Mr Virkez being an agent. Your Honour has before you Mr McDonald's book which picks up on some of the difficulties that ASIO was experiencing in the periods leading up to these arrests, and that is confirmed by the article that came in late, of Batarelo in the brief which looks at the ASIO raids, it has the suggestion that the Croatian community is being used as a political football. The takeaway is that in or around this time, at least on our submission, that ASIO would have been concerned about reputational matters, particularly in light of what was being said by Mr Cunliffe.

There is the Four Corners Program and that's all there for your Honour to see. We get further versions again, but what's significant in my submission, notwithstanding all the disclosures that Virkez makes in 1991 that police were coaching him, that he was the best Croatian ever, despite the clear objective evidence that he was operating as a YIS agent, in our submission, he continues to throw up what we say is a diversion in saying that he's a member of the Serbian Black Hand. The Serbian Black Hand, I think your Honour could almost take judicial notice of the fact that it was a World War II or World War I organisation that would seem was no longer operational to any great degree. But in my submission, what is significant, even in that final moment where one might think he throws himself under the bus, he still doesn't disclose those YIS links. He doesn't ever say anything like, "I was reporting to

Grce. I met up with Grce", and there's evidence of that, of physical meetings, which again go beyond this idea that he's just taking orders.

5 It's also wholly at odds with the submission that was made by Mr Shillington that, in effect, he's a just a simple man living a normal life in Lithgow. No, he's not, with respect, your Honour. He's talking about guns on wharves, bringing things in, he's meeting Grce. He calls up even on the high water mark
10 telephone intercept for Counsel Assisting on the 8th, which is put against us as having very little to suggest that there was any notice that these things were going to happen. When he calls up in that conversation he says, "I want to speak to Mr Kreckovic who sits in this corner" or something like that. He knows where people are sitting in the office. In my submission, you could only infer from that that he's a real player and he has been successful in duping
15 many people to believe that he's not operating at that level, if indeed that is what he has done. Again we don't know because we've got very few records from Lithgow police that go to the circumstances in which they met him. We've got no records of Cavanagh, as to what he said. One might think that they would be very important notes, and yet we know nothing.

20 I've addressed your Honour in relation to Virkez, Pero Saret to the extent I can on the limited documentation, but in our submission, your Honour would also be troubled by Mr Topich and what happened with him. The documents reveal that Topich had been charged with stealing explosives, 15 sticks of Johnson
25 TNC gelignite from the Wallerawang Power Station, Exhibit 11.50A at red page 229-10. Virkez in this letter to Samarzdic, which Mr Buchanan has addressed your Honour on at length in terms of it showing the animosity he had towards the Croatian community and Mr Brajkovic in particular, also mentions this, and it's Exhibit 7.5, he said that, "Topich had been involved in the stealing of the explosives with Mr Bebic but received only a caution and a
30 small charge for court costs as he had paid the magistrate, detectives and the barrister each \$2,000, and that was provided to him from the King Tomislav Club."

35 Just on that, in terms of my leader, Mr Buchanan, has addressed your Honour at length as to the inherent implausibility and improbability of the police case, especially in Sydney, as far as the raids are concerned. Virkez nominates in his third Record or it might have been the second Record of Interview, that the Croatian Club King Tomislav would be the site of a bombing. Just working that through for a moment. This is one of the preeminent Croatian clubs. Virkez
40 says that Croatians want to blow up their own club, notwithstanding an allegation that he wants to do that, blow up their club, Virkez, in this letter, alleges that the King Tomislav Club, the subject of the bombings is providing funding of \$2,000 to defend the Croatian Six. I mean, it just makes no sense whatsoever. The same goes in relation to Mr Brajkovic's evidence. He gave
45 an alibi in relation to being at the King Tom Club with his brother, Mr Hudlin, for a music night on 27 January, and the conspiracy as put by the Crown contends that, at least potentially, King Tom was to be the site of explosives.

50 On the one hand, you've got one manager coming along to trial and providing evidence exculpatory of Mr Brajkovic, and on the other hand you've got police

talking to another manager of King Tom saying, "Did you know Brajkovic et al were going to blow up your club". It makes no sense, in my submission.

HIS HONOUR: Is that convenient at this point?

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DE BRENNAN: Yes.

HIS HONOUR: We'll take the morning adjournment.

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SHORT ADJOURNMENT

Just before you resume, Mr De Brennan, I just want to deal with something quick before I overlook it. Mr Buchanan, my question is was unlawful arrest an issue at the trial?

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BUCHANAN: Your Honour did ask that.

HIS HONOUR: I asked about search warrant, no search warrant, and you've indicated that wasn't an issue, but unlawful arrest, I'm wondering whether that's--

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BUCHANAN: It is a separate issue in as much as arrests for the purpose of questioning.

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HIS HONOUR: Yes.

BUCHANAN: Yes. If I can say it from the Bar table, not that I can recall, not that I can also recall having read in the transcript.

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HIS HONOUR: Right. That was a question without notice. So if on reflection you think there's a better answer, you can provide--

BUCHANAN: We'll send your Honour a note.

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HIS HONOUR: Thank you. Sorry, Mr De Brennan.

DE BRENNAN: Thank you, your Honour. Your Honour, I'm gratefully reminded just in relation to the submission that went to potential police embarrassment and a concern about blundering in view of a photographer being called in. There is evidence also before the Inquiry that there was very quickly TV and press coverage of the arrests in Lithgow as well as press coverage of the Sydney arrests. That topic is dealt with in the Petitioners' primary written submissions at paragraph 1144.

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HIS HONOUR: Thank you.

DE BRENNAN: Just returning if I could to Mr Topich and what happened in relation to the charge of stealing that was levelled against him, your Honour might recall the evidence to the effect of a brief wasn't put together in time. Yes, and so the charge wasn't able to proceed. Virkez in the letter that

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I've just outlined says something that's broadly consistent with that. There is also a Department of Immigration and Ethnic Affairs record authored on 2 March 1979 at Exhibit 18.2 at red page 4. This relates to the Commonwealth Police having received allegations in 1965 that Topich was a member of a Yugoslav extremist organisation. However, they were unable to confirm this and were not prepared to raise any objection to his being granted Australian citizenship in 1969.

There is a Special Branch document that observes that the charges of possession of explosives against Topich were dismissed at the committal proceedings in 1979 and that same Special Branch document says it further observed that "there was a general belief in the Croatian community" that Stipich "may have been connected to the Yugoslavs". The reference for that is Exhibit 11.9 at red page 22.

I have addressed your Honour in relation to the pre-sentence report where Virkez claimed he was taught to make time bombs by a Croatian group in Geelong in 1972. Again, we say emblematic of Virkez continually trying to incriminate Croatian Australians. On 26 February 1979, consistent with this idea that Mr Virkez was a man prone to violence, there is an occurrence pad entry purporting to capture a gaol conversation between Virkez and a Mr Leziak in which Virkez claims he was making letter bombs, including letter bombs that were sent to the Queensland Premier, Kerr and Fraser some two years earlier. That's at 11.50 at red page 213.

On the bail applications that are made by him, interestingly at times he refers to himself by way of occupation as an electrician's assistant, and also states that if he was granted bail he would be working as an electrician's assistant and states that he was working at the Wallerawang Power Station at the time of his arrest, Exhibit 7.6 at red page 114 as well as 113.

Virkez's expertise in the area of explosives was a matter that was picked up on by Mr Cunliffe in his letter of 13 April 1986 to the Federal Attorney-General in which he alleged that the High Court may have been misled in relation to the extent of Virkez's links. In that letter, Mr Cunliffe made reference to Mr Cavanagh having told various attendees at a meeting on 9 April 1980 that Virkez was an explosives expert and that he had demonstrated this by stripping down a detonator, a very dangerous procedure. The reference for that is Exhibit 9.1 at red page 167.

It's variously asserted that Virkez simply injected himself into a plot that was already well-advanced, in the submissions put against the Petitioners. In the Petitioners' submission, it is not that Virkez injected himself into any plot, but rather that he was devising plots himself. It will be recalled that a telephone intercept suggested that both Virkez and Grce had some animosity towards Mr Suman. That's important because it came well before the arrest of the Croatian Six, and I refer your Honour to Exhibit 9.1-2 at red page 2.

In this ASIO intercept, the following conversation between Virkez and Grce is noted:

"Vito asked Grce if he knows Suman. Vito said that Suman is a bit 'multi-coloured'. Vito mentioned that he knew Suman five years ago and at that time he was not 'clean'. Vito told Grce 'keep him under watch, his house too'. Republicans are watching his house too".

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We say that's of import because, as I say, Mr Suman was nominated as a pro-Yugoslav individual who was the head of a pro-Yugoslav organisation, and the prosecution case was that members of the Croatian Six were to do harm to him, yet this intercept would suggest that in fact Vito and Grce had an agenda against him in that they regarded him as "multi-coloured" and "not clean".

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In our submission that is consistent with Virkez engineering a plot to incriminate and discredit members of the Croatian Six, and he does that in a further way, we say, by, as the analyst S5 said in that ASIO analysis report, that it was very successful in bringing about disharmony within the Croatian independence movement. What you'll see is Virkez trying to sow these seeds of division through creating this disharmony between younger Croatians and the old guard, if you like, such as Mlinaric and Lovokovic. Your Honour will recall that the Crown case was that they wanted to - there was a plot to murder those two men. Of course, they were acquitted in relation to that charge and there was also evidence that suggested that Mr Lovokovic and Mlinaric knew members of the Croatian Six, and even though there had been some disagreements from time to time on matters, that that was not the sort of thing that they understood would be happening.

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Counsel Assisting have placed significant weight on this letter that Virkez provided to Mr Milroy, apparently at a court appearance at Central Local Court on 7 March 1979. This is at Exhibit 11.50 at red page 221. We've addressed on this to a significant degree in the written submissions, but one thing the Petitioners did want to emphasise is the unique context in which this letter is said to have come into existence, and that is this. At the end of the Court appearance at Central, Virkez had apparently evinced an intention to speak to Mr Milroy. An interview initially occurred in the presence of Virkez's barrister, however, Virkez then requested that he be able to confer with Officer Milroy on his own.

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Notwithstanding advice from his counsel that he not confer with police by himself, Virkez appears to have terminated the instructions of his legal representatives, indicating that some other person was now looking after him and that a Liberal Member of Parliament was assisting him. This is at Exhibit 11.50 at red page 221. In my respectful submission, this is yet another example of removing from the equation any possibility of having an objective account of what transpired, and we see it in the confessional evidence in the terms of no support persons, no family members were there, no interpreters. And it was suggested by the DPP, for example, well, that doesn't really matter, because in the main the Croatian Six say that they never gave the admissions that were attributed to them.

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Respectfully, that misses the point. It's not so much what was said in terms of

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admissions. It's the absence of an independent person to confirm whether anything was said in the first place. Given what we know about Virkez and the fact that this letter, it seems, was handed over to Mr Milroy and for reasons that aren't clear, there doesn't seem to have been any attempt to adduce it at trial. Your Honour would not attribute any significant weight to it.

HIS HONOUR: I don't understand the point that you're making in relation to this. You're drawing some parallel between what occurred with the accused in terms of interrogations and the interaction between Virkez and Milroy on a subsequent occasion, what's the significance of, in both of those situations, there was no third person there to confirm?

DE BRENNAN: Had the barrister still been there he could have said, "I saw Virkez hand over this letter."

HIS HONOUR: I understand that, but I don't understand, you're referring to, in relation to this issue, what happened in relation to the interrogations.

DE BRENNAN: In the same way had, for example, an interpreter been sitting down at the CIB in the office with members of the Croatian Six, they could have corroborated whether in fact gelignite was placed on the floor or the desk or not.

HIS HONOUR: I understand that too, but they're two separate things, aren't they?

DE BRENNAN: The point I'm trying to make is that there is often inculpatory evidence that conveniently arises when no one else is around, and that occurs in the context of confessionals, but it also arises in the context of Virkez producing this letter, which on one view is highly inculpatory of--

HIS HONOUR: But you seem to be implying, without stating specifically, that this is part of some master plan that everything inculpatory will occur in circumstances where there is no objective evidence to confirm it. You can't be suggesting that, can you?

DE BRENNAN: I was just seeking to draw some parallels, but I'll move on. There has been significant attention devoted to the issue of disclosure and disclosure principles as they were in the relevant period. As per our written submissions, we say that, distilled to its core, it comes back to the question of fairness and the right to a fair trial and that there's longstanding authority to support that, but what is also put on behalf of the Petitioners is that there can never be any basis for the withholding of information on the basis that it would "blow a hole in the prosecution case", and that that statement that was attributed to Assistant Commissioner Whitelaw would trouble your Honour in terms of the issue of disclosure, and that that statement could never, even taking the most liberal view of public interest immunity, could a legitimate claim be made consistent with that statement.

The Petitioners respectfully concur with Counsel Assisting that the withholding

of certain information was significant and it deprived the Croatian Six from pursuing lines of enquiry that would have been open to them. We respectfully disagree in one respect, and that is we accepted once that the breach of disclosure was significant, but we don't necessarily embrace the proposition that unless the disclosure issue bears on the question of reasonable doubt, your Honour can't have regard to it. That is to say, as I understand Counsel Assisting's submissions, they draw a distinction between reasonable doubt and a miscarriage of justice. They acknowledge, of course, that there can be interplay between those two and a defect in the trial process can inform the question of reasonable doubt, but they say that it doesn't in the circumstances of this case.

We say that your Honour would not be so quick to conclude in the same way as Counsel Assisting has, in a case where Mr Shillington acknowledged in the Court of Criminal Appeal that the material in question could be relevant on the question of credit. In my submission, it is very difficult to delineate in a case like this, where perhaps a miscarriage of justice starts or finishes and what constitutes reasonable doubt, bearing in mind what the Court of Criminal Appeal said, and I've taken your Honour to that earlier, about what we described as the interdependent and mutually reinforcing nature of the case. It's always been put in this case that there are three planks, namely, explosive evidence, the confessional evidence, and the evidence of Virkez. Historically, it would seem that that evidence has been approached in a very segmented way, but in light of the evidence as it now is, we say that it's far more complicated, that there's significant interplay. As the Court of Criminal Appeal acknowledged, that you have Virkez surmounting the other evidence and that can only be greater now, in our submission, in light of the further disclosures that were made in 1991 to Chris Masters.

Prior to that you didn't have any suggestion, for example, that police had been involved in coaching Mr Virkez as to what to say. He put up other things, including that he didn't say them or he didn't sign his Records of Interview, but it never went so far as saying that he was positively coached prior to 1991. In our submission, that's important because the way the case was articulated at trial was, in effect, that you had these three planks and the trial judge gave directions in terms that you had 39 police officers on this side and you had the six on this side and often looked at the case in that bifurcated way. In our submission, we now know a lot more about Virkez which supplants those two areas. Certainly under contemporary law it would be our submission that your Honour would have to apply a very fulsome Liberato direction in which the case wasn't set up as a dichotomy in that way because Virkez, on our case, now goes well beyond a "low level agent", and so the way in which he supplants the case, we say, is greater than it was certainly than what was said before the Court of Criminal Appeal.

Even if your Honour was against us in relation to that submission, it's our position that your Honour is not precluded from considering a pardon as part of your Honour's report writing or court furnishing role, and that the pardoning power isn't simply predicated on reasonable doubt. If I could perhaps take your Honour to the legislation. Counsel Assisting in the main, in their written

5 submissions, rely on 82(2)(a), and the submission is advanced that under that provision, in terms of the quashing of the conviction, your Honour would have to form a reasonable doubt as to the guilt of the convicted person, but in our respectful submission, pursuant to 82(1)(b) your Honour can cause a report to be sent to the Chief Justice in the case of an Inquiry held on the direction of the Supreme Court. If your Honour looks at section 84, your Honour will see there that the Court may quash a conviction in respect of which a free pardon has been granted.

10 We say that because of the Act structured as it is, that your Honour can consider matters that go beyond whether there is a reasonable doubt and consider whether the accused had been deprived of a fair chance of an acquittal in terms of any recommendation for a pardon. Our principal position is that your Honour would have no difficulty in doing so in circumstances where
15 Mr Blanch QC, as he then was in 1986, said, before the High Court, that it would be automatic if - I'm paraphrasing - this material was in the custody and control of the Crown, that a miscarriage of justice would be automatic, and we say that, based on the Crown's concession in the High Court, your Honour could act on that.

20 HIS HONOUR: So is that the Petitioners' preference that I should find that there's been a miscarriage of justice and recommend a pardon?

25 DE BRENNAN: No, your Honour. Of course, the Petitioners are amenable to any form of exculpation that your Honour is considering, and certainly their preference would be that your Honour quash the conviction.

HIS HONOUR: I can't do that.

30 DE BRENNAN: Sorry, that your Honour write a report that would recommend that.

HIS HONOUR: I can't do that either.

35 DE BRENNAN: That the Court of Criminal Appeal--

HIS HONOUR: I would have to find that I have a reasonable doubt as to the guilt of the convicted person or persons.

40 DE BRENNAN: In relation to - and that's why I put it on the basis if your Honour agreed with the submission made by Counsel Assisting that you couldn't consider questions of miscarriage of justice in this case as part of a reasonable doubt - and we say you could because the evidence is interdependent and mutually reinforcing - then you would consider it pursuant
45 to 84(2). But assuming that your Honour is in agreement with Counsel Assisting, we say that that's not the end of the matter and your Honour could still deal with it by way of pardon and then, after the pardon, section 84 makes apparent, that the Court, being the Court of Criminal Appeal, can then quash it after the pardon, and that is made clear by that case of *Rendell*, your Honour,
50 which was the case where Musgrave was criticised in relation to the discharge

of a gun. Your Honour might recall in that, there was an Inquiry in the first instance, not dissimilar to this, under the predecessor provisions, in which a pardon was first granted, but thereafter it was referred under the predecessor provision of 84 and the convictions were quashed.

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So, of course, in the hierarchy of exculpation, the Petitioners would always want the conviction to be expunged, recognising that a pardon does not do that, or the conviction set aside. The submission as to a pardon is made simply if your Honour is with Counsel Assisting that, troubling as the lack of disclosure may have been, it doesn't bear on the crucial and operative question of whether there's been a reasonable doubt. Now, we say it does, but if your Honour agrees with the submissions that have been articulated by Counsel Assisting in that regard, we simply raise that to say that's not the end of it and it doesn't mean that even if your Honour does have a sense of disquiet, has to leave it there under the provision.

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HIS HONOUR: Let me just try and put it the way I think it might be considered from the Petitioners' perspective. First, I should consider whether I am of the opinion there is a reasonable doubt about their guilt. If so, I am then required by section 82(2)(a) to refer - I'm not required to, but I may refer the matter to the Court of Criminal Appeal for consideration of whether the conviction or convictions should be quashed. That's step number one. That would be the best outcome, I would imagine, the Petitioners would like to see.

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DE BRENNAN: Yes, your Honour.

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HIS HONOUR: Secondly, and I suppose it's additionally, I might set out whatever findings I might think appropriate as to the question of guilt, but also as to the question of anything that might be relevant to whether there's a miscarriage, and report that to the Chief Justice. The Chief Justice is then required to provide a report in the Supreme Court and send both reports off to the Governor. The Governor may, on advice obviously, consider the royal prerogative of mercy. That's the alternative outcome I think the Petitioners would like.

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DE BRENNAN: Yes, your Honour.

HIS HONOUR: That I would set out sufficient in my report that might provide a basis for the royal prerogative to be exercised.

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DE BRENNAN: Yes, your Honour.

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HIS HONOUR: And a free pardon granted. But I think you also in your submissions have said that I should recommend a pardon. I'm doubtful about that. That's a matter for the Governor. That's the Governor's exercise of the royal prerogative. Why don't I do what I apprehend Justice Wood did in 1985 in the Alistair Anderson and Dunn Inquiry, simply report all the relevant material that go those questions so that the executive has available to it all of the information it needs to be decide what to do. That's the way I see it.

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DE BRENNAN: Yes, your Honour

HIS HONOUR: Mr De Brennan, do you want to say anything about that?

5 DE BRENNAN: No, your Honour. The final point, your Honour, that we wish
to make is that somewhat strikingly - and this is really consistent with the
improbability point that was put by Mr Buchanan as to the raids, particularly in
Sydney in terms of no SWOS, no Army, very little steps taken by way of
precaution, officers turning up in suits, and all of those matters that
10 Mr Buchanan addressed you on yesterday - we say that the fact that there's
very little post-conviction monitoring of these men is also something that would
cause your Honour concern in terms of the fabricated nature of the police
case. Police, in documentation, say that this would have been one of the most
alarming acts of terrorism this country has ever seen, and yet there's very little
15 material which reports on what happens once these men were either in
custody or released from custody.

For example, at Exhibit 11.9, there's a report of Detective Senior Constable
King, 14 August 1987, in a seemingly nonplus fashion. The file note notes that
20 no ongoing action or surveillance is recommended, and is seemingly content
with the suggestion "perhaps this report might now be recorded and filed at
this Branch for information". Also the fact that Virkez was simply allowed to
return to Yugoslavia with no consideration that there could have been a
retrial or trial aborted in the trial of this length, and I think Mr Blanch QC
25 acknowledged as much in the High Court. He said, "Well, if a certain outcome
eventuates here, your Honours, and a new trial was ordered, Virkez was no
longer in Australia". Exhibit 9.1-72 observes that "Virkez was released from
prison on 21 June 1980 and his whereabouts at the time were unknown. On
19 January 1981, we were informed by the Australian Federal Police that
30 Virkez had departed Australia voluntarily, probably destined for West
Germany, on 24 December 1980. Virkez's details have been included in our
warning systems and to date he has not returned to Australia", Exhibit 9.1-72
at red page 98.

35 And even at the height of the case, in our submission, police did very little
probing into Virkez's antecedents and credibility. It is submitted that the
Inquiry would find this surprising, in circumstances where Virkez at the end of
the day had, on police's case, made a number of false claims against their own
organisation including that he'd been assaulted, that he hadn't written his
40 Records of Interviews, and what not. Your Honour, we say that again this is
consistent with them not being a genuine risk, and in the same way they
turned up to the Sydney raids, they knew the outcome, and so none of these
normal steps were necessary. Thank you, your Honour.

45 HIS HONOUR: Thank you, Mr De Brennan. Ms Gleeson.

GLEESON: Your Honour, because of the exchange of written submissions
between the parties and in particular because of what we take to be the
findings now sought by Counsel Assisting in relation to disclosure, we can be
50 relatively short.

HIS HONOUR: Can you just move the microphone a bit closer, please.

GLEESON: Is that better?

5 HIS HONOUR: No, it's pointing out to the side.

GLEESON: Is that better?

10 HIS HONOUR: That's better.

GLEESON: We're going to address three points arising from Counsel Assisting's submissions. First, we'd like to engage briefly with a topic that was not addressed in the Commissioner's written submissions. That's the manner in which the Inquiry should treat the findings of the Wood Royal Commission when addressing the conduct of the police officers in their investigation of the Croatian Six. The Commissioner doesn't seek to cavil with or detract from the findings of the Wood Royal Commission as they relate to the conduct of some of the officers within the CIB. However, the Commissioner supports the submission of Counsel Assisting which was well made at page 3303 of yesterday's Transcript that it would be wrong to paint the former CIB officers, who gave evidence to the Inquiry, with the broad brush of corruption.

Put shortly, the Inquiry could not reason from the conclusion of the Wood Royal Commission that there was systemic corruption within the CIB to a conclusion that the corrupt practices must have occurred in the investigation and charging of the Croatian Six. The Commissioner endorses the approach of Counsel Assisting that the findings of the Wood Royal Commission are properly used to test the police witnesses' evidence, and weigh that against other available evidence in relation to what they say occurred in their role in the arrests and investigation. While the position of individual officers will be dealt with by their representatives, Mr Woods and Ms Bashir, from the Commissioner's perspective it would not be open to conclude that many of the CIB officers giving evidence in the Inquiry were involved in corrupt practices or that they observed corrupt practices by other investigating officers and condoned them. The better view of the CIB during the relevant period is that, well expressed by Musgrave at Transcript page 493, where he said that he was not part of the clique.

The Inquiry can readily conclude that many of the officers of the CIB were not part of the group that engaged in corrupt conduct on a systemic basis for the reasons that are articulated by Counsel Assisting at paragraphs 16 to 17 and 26 of their reply submissions. I'll turn next to disclosure. The primary areas of dispute between those appearing before the Inquiry are first, who was responsible for the nondisclosure of evidence of Virkez's Yugoslav links to the defence, and second, the effect of the nondisclosure, namely whether it was such as to contribute to a reasonable doubt about the guilt of the Croatian Six.

The second question is obviously the material question for this Inquiry. Counsel Assisting submitted yesterday at Transcript page 3315 that it may not be necessary to resolve the question of who, between the New South

5 Wales Police or the Crown Prosecutor, was responsible for the nondisclosure because that issue is perhaps secondary to the critical question of the effect of the nondisclosure. In the Commissioner's submission, there is another reason why the Inquiry might determine that it is unnecessary to resolve the question of who bore practical responsibility for disclosing the available information.

10 It is that in the absence of so many critical witnesses, it would be neither fair nor reasonable to make a definitive finding in this regard. The Commissioner has taken the position in her written submissions that the evidence pointing to the finding that Shillington QC knew of the relationship between Virkez and the Yugoslav authorities. The Commissioner has also submitted that the Inquiry could not make any finding as to the reasons why the evidence was not disclosed in those circumstances.

15 Having regard to Counsel Assisting's position expressed in the reply submissions and yesterday and the differences between those appearing about what was done with the material available to the New South Wales Police, our submission is that it is neither necessary nor fair to make any finding about responsibility for the nondisclosure. Taking a step back, the Inquiry has, at the start of the analysis, pieces of evidence about Virkez in the hands of the New South Wales Police and the Commonwealth that could've come to the attention of the defence, either by disclosure or in response to subpoenas.

25 At the end of the analysis is the fact that those pieces of evidence were not made available to the defence at the trial of the Croatian Six. Those aren't matters that can be cavilled with in this Inquiry. Between those ends is a number of routes by which the evidence could have come to the attention of the defence. We'll briefly address them by reference to the material in the possession of the New South Wales Police. When disclosure is considered, the route commences with Sergeant Turner and Detective Constable Milroy because they were responsible for preparing the brief for the committal and then the trial.

35 Sergeant Turner was primarily responsible for this task, but he has passed away and he cannot assist. Detective Constable Milroy assisted Sergeant Turner and gave evidence. The best summation of his evidence on this point was that he was adamant that he or Turner would have passed the various pieces of evidence to the Crown Prosecutors because that was their practice, but he couldn't claim a specific memory of doing so on each occasion. Counsel Assisting has made submissions that Milroy was one of the most reliable and credible witnesses to give evidence before this Inquiry and that he gave the impression of having been a fastidious, competent and honest officer, and that was yesterday at Transcript pages 3227 and 3228.

45 That assessment supports the submission that his evidence should be preferred in relation to the reporting of admissions made by Bebic, that was at Transcript page 3228, and also in relation to the issue of whether Virkez was coached in his evidence, and that was at Transcript page 3325. That being the case, there's no reason for this Inquiry not to accept Milroy's evidence in

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relation to what he and Turner passed onto the Crown Prosecutors.

5 HIS HONOUR: I should just make the comment at that point, Ms Gleeson, that I'm quite aware of the submission made by Counsel Assisting as to what I should make of Milroy's evidence in the context of what they made of his evidence in terms of his credibility, but no one should assume that I am of the same mind.

10 GLEESON: Yes, your Honour.

HIS HONOUR: I'm not saying I'm not. No assumptions should be drawn as to what my finding might be.

15 GLEESON: No, and in this case, I'm endorsing the submissions that your Honour will take into account in expanding some reasons why there should be similar acceptance of Milroy's evidence in relation to disclosure.

HIS HONOUR: All right, thank you.

20 GLEESON: There is a suggestion in some of the cross-examination of Mr Milroy that if he did pass on evidence, in particular of what was discovered by Jefferies between 8th and 10 February about Virkez's role in informing to the Yugoslav Consulate, that it was passed to the police prosecutor shortly after it was discovered. That gives rise to two possibilities. Either Sergeant
25 Brady passed the information to the Crown Prosecutors or he did not and the train in relation to that information ends there.

The police prosecutor, Sergeant Brady, has also passed away. He is unable to assist as to whether he was told about Virkez's Yugoslav links and if so, whether he passed that information onto the Crown Prosecutors either over
30 the course of the committal in relation to the DPP's watching brief or when the file was handed over to the Crown after the committal. There's no evidence either way as to what occurred in relation to information that may have been passed to Sergeant Brady.

35 The Clerk of the Peace, Mr White, was unable to recall whether information about Virkez was conveyed to him or to the Crown Prosecutors. His evidence, based on his recollection, does not assist either way except as to the circumstances of the Crown's watching brief during the committal. That leaves
40 Mr Shillington QC and his junior, Mr Viney. Again, both have passed away. Again, Mr White's evidence was that he had no memory of any meetings at which Virkez's role as an informant of the Yugoslav Consulate was raised. That's at Exhibit 15.17, red page 81 paragraph 36.

45 Mr White also does not recall any meetings between he, the Crown Prosecutors and Mr Cavanagh, and that's at Exhibit 15.17, red page 81 paragraph 35. Mr Cavanagh has also passed away and cannot shed light on what he told the Crown Prosecutors at his meetings with them. In relation to
50 what the Crown Prosecutors were told by New South Wales Police, there are numerous pieces of evidence that we have said in our written submissions

point strongly to the Crown Prosecutors, and in particular Mr Shillington, having been made aware of in relation to the relevant links between Mr Virkez and the Yugoslav Consulate.

5 They include Mr Milroy's evidence as to what he and Turner did, the records of meetings between Turner, Milroy and Shillington with and without Mr Cavanagh and the timing of those meetings and the records in evidence of officers of the Commonwealth as to their satisfaction by Mr Cavanagh that the lawyers for the prosecution had been told of Virkez's Yugoslav links. These
10 are addressed at paragraphs 60 to 64 of our written submissions. Again, neither Mr Shillington or Mr Viney are available to confirm or deny the proposition that they did in fact know through any of these routes.

15 If it's accepted that the Crown Prosecutors did know about Virkez's Yugoslav links, the question then arises about what they did with that information and whether there was some explanation as to why the evidence was disclosed. In the absence of either Mr Shillington or Mr Viney or any record of a decision made in this regard, it's not possible to make any finding about this matter. That creates something of an issue for the Inquiry because it makes it
20 impossible to assess the nature and degree of any irregularity in the trial process and whether it could bear on a reasonable doubt as to the guilt of the Croatian Six.

25 As Counsel Assisting has pointed out, a miscarriage in the trial process alone is not the material question for the purposes of this Inquiry. For example, if the High Court's decisions in *Richardson* and *Lawless* are to be applied in determining the consequences of any nondisclosure of the evidence, it would be necessary to know the circumstances behind the nondisclosure by the prosecutor to determine whether it amounts to misconduct in the context of the
30 trial as a whole and therefore whether there has been a miscarriage in the trial process before turning to whether or not that miscarriage was sufficient to create a reasonable doubt.

35 A similar issue arises in relation to the effect of Mr Milroy's evidence. If his evidence is accepted, there is simply no room for a finding that he was a party to deliberately withholding evidence from the defence and it would not be possible on his evidence to conclude that Sergeant Turner was either. There's no other evidence that assists the Inquiry in relation to the issue of deliberateness. In our written submissions at paragraphs 54 to 56, we deal
40 with the position of Assistant Commissioner Whitelaw in relation to the SIDC-PAV report and his subsequent engagement with ASIO.

45 I won't repeat at lengths the submission we have made about the danger of imputing some intention to conceal the evidence in that document when Whitelaw is not available to shed light on whether the records of the ASIO officers as to what he said were accurate, what was meant by the statements he made to ASIO and what he ultimately did with the SIDC-PAV report within New South Wales Police. Finally, there is the other route by which relevant evidence may come to the attention of the defence and that is in response to
50 subpoenas.

We have addressed at paragraphs 43 to 47 of the written submissions the conclusions that should be drawn about the existence of the report of Jefferies' 10 February meeting with Virkez, which are relevant to whether or not a report could be produced in response to the subpoena that was issued at trial. As to Telex 66/2, there are two answers to Counsel Assisting's submission at paragraph 138 of the reply submissions that a real question arises as to whether members of the New South Wales Police should have done more to alert the Crown Prosecutor, the Court or the defence to the fact that there was relevant evidence in the redacted sections of the Telex that had been withheld from defence.

The first is that it stands against Milroy's evidence that the contents of the Telex would already have been passed to the Crown Prosecutor. That's addressed at paragraph 42 of the Commissioner's submissions. The second is that the document that was produced by the Australian Federal Police and was redacted, was on the basis of a claim for public interest immunity. Your Honour can see that addressed at Counsel Assisting's submissions paragraphs 705 to 706 and to drill down into the particular claim made in relation to the redactions, Exhibit 2.1-36, red page 1014.

The likelihood is that if the Crown or the New South Wales police officers sought to produce or disclose the unredacted portion, it would have been the subject of the same claim by the Commonwealth. In relation to the nonproduction of the SIDC-PAV report in response to the subpoena issued in the Court of Criminal Appeal, what can be said is that this report did not differ materially from the evidence given by Cavanagh during the hearing of the appeal. That is, that Virkez had made the report of the plot to the Yugoslav Consulate and that he had been informing to the Consulate for the previous six months.

This is addressed at paragraph 777 of Counsel Assisting's submissions. Considering all of the above, where does this leave the Inquiry? In our submission, the above considerations are liable to distract from the critical question that was identified by Counsel Assisting, namely that accepting for whatever reason there was no disclosure, what is the effect of this on the fairness of the trial and the guilt of the Petitioners. The Commissioner's written submissions on this aspect are at paragraphs 70 to 76.

They coincide with those of Counsel Assisting and they need not be repeated orally. Taking all of the above into account, the Commissioner's ultimate submission on the findings available in relation to the disclosure issue is that:

1. Available material that was relevant to Virkez's credibility was not disclosed to the defence and could have been used by the defence in cross-examination on his credit.

2. It is unnecessary and potentially unfair to determine whether the Crown knew about the existence of that evidence and therefore who as between New South Wales Police and the Crown bore ultimate responsibility for the nondisclosure.

3. If the Inquiry does consider there to be sufficient evidence to make a finding in that regard, the evidence points to the Crown Prosecutor being aware of the existence of that material and the effect of it, but no finding is available as to the reasons for the non-disclosure, if that occurred.

4. There is no basis for concluding that the non-production of documents in response to subpoenas to New South Wales Police at trial were deliberate or that they materially contributed to the non-disclosure.

5. And in any event, the effect of the non-disclosure was not such as to raise a reasonable doubt as to the guilt of the Croatian Six.

My last submission is in relation to a comment at paragraph 34 of Counsel Assisting's submissions, that the Commissioner's submissions do not engage with the application or lack thereof of the Police Instructions and Emergency Manual. The reason for this is that the Commissioner's leave extends to her interests in the processes and procedures that were in force at the time of the investigation of the Croatian Six. The Commissioner does not understand that there was any criticism by Counsel Assisting of the content of the Police Instructions or the Emergency Manual. The Commissioner does not understand that there was any suggestion that the Police Instructions and Emergency Manual were not made available to officers so as to ensure that they could be complied with.

A number of officers gave evidence that they were aware of the Police Instructions and Emergency Manual, and were trained in their implementation, and these are summarised at paragraphs 557 to 565, 568 and 2002 of Counsel Assisting's submissions. The submissions of the Petitioners about the Emergency Manual and Police Instructions are logically premised on there being effective Police Instructions in relation to treatment of explosives, arrest and interview, and the inferences to be drawn as to various officers' non-compliance with those Instructions. The first part of that proposition, the effectiveness of the Instructions, is not in issue. The material question is the fact of non-compliance with them and the reasons for that non-compliance.

The submission of the Director of Public Prosecutions, which was adopted by Counsel Assisting, that there was a cavalier attitude to the Instructions relating to explosives, provides an explanation for non-compliance that tells against the evidence being planned or fabricated. It does not speak to the adequacy of the Instructions or the effectiveness of their distribution. To the extent relevant, it is a matter that is properly addressed by the representatives of the individual officers. For that reason, the Commissioner has not taken up the time of the Inquiry in addressing the Police Instructions and Emergency Manual. Unless there's anything else I can assist on, your Honour, those are the Commissioner's submissions.

HIS HONOUR: Thank you, Ms Gleeson. Mr Brown, you would be next, but do you want to start at 2 o'clock?

BROWN: Either way. I'll use the time, your Honour. I might as well keep it rolling.

HIS HONOUR: Okay.

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10 BROWN: Your Honour, the position of the Director remains as per the written submissions, namely that, on the basis of the evidence presented before the Inquiry, no reasonable doubt attends the guilt of any member of the Croatian Six. I intend to predominantly spend my time addressing on what are those ultimate questions for your Honour's determination, while also dealing with some of the matters that have been raised in both reply submissions and oral submissions by other parties to date. One of those matters is the relatively discrete issue that Ms Gleeson has just addressed your Honour on which is the issue of Mr Shillington's knowledge or otherwise of the association between Virkez and the Yugoslav Consulate. A number of parties have made submissions on this point in writing urging particular factual findings one way or the other.

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As was put at paragraph 58 of our primary written submissions, your Honour, there may well be factual issues in this Inquiry that simply cannot be resolved one way or the other given the circumstances in which it has taken place, the significant passage of time since the events in question, the incomplete records, the absence of relevant and indeed on this issue crucial witnesses, Mr Shillington, Detective Turner, Roger Cavanagh, amongst others. It's not unknown to the law for a body tasked with factfinding to end up in a position where it simply cannot be satisfied one way or the other on one or more factual issues. It arises acutely in criminal sentencing where differing onuses and standards of proof apply by virtue of *The Queen v Olbrich*, but it can equally arise in an Inquiry such as this where some of the findings contended for should attract a *Briginshaw* standard, that is they should require a state of actual persuasion as distinct from being the product of a mere mechanical comparison of probabilities independent of any belief in reality.

The findings contended for of the primary submissions of Counsel Assisting at paragraphs 1283 and 1286 are of a type that should attract a *Briginshaw* standard and require a state of actual persuasion. While contrary factual findings to those advanced by Counsel Assisting in those paragraphs have been advanced on behalf of the Director at, for example, paragraphs 11(a) to (c) of our primary submissions, it is recognised that your Honour may simply find yourself in a position where you are not satisfied that you have sufficient basis in the evidence, given the shortcomings in the record, to make findings with any confidence one way or the other. I don't say that to resile from the arguments made in writing that the evidence positively supports the inference that Mr Shillington did not know about Virkez's link to the Yugoslav Consulate. I say it in recognition of those shortcomings in the record and in the view of the submission of Counsel Assisting in reply at paragraph 141 that it is an issue that may not ultimately be necessary to resolve.

I agree that your Honour could reasonably arrive at the conclusion that it is not necessary and ultimately not desirable, in the circumstances that Ms Gleeson

has just outlined, to make findings on that issue. If your Honour does consider it necessary to resolve those factual issues surrounding Mr Shillington's knowledge, I rely on the written arguments made both in the primary submissions at paragraphs 89 and following and in reply, and would urge your Honour when considering the evidence of Mr Milroy to have regard to his evidence as a whole and not to look at certain answers given in isolation. That's particularly so in relation to those answers given early in his evidence when he appeared to be wavering under the misapprehension that the DPP or the Clerk of the Peace had conduct of the committal proceedings. That's all I want to say on that topic, your Honour. It's otherwise addressed in the written submissions.

If I can now move to the Petitioners' submissions in reply and respond to a few matters raised in those. Starting at paragraph 1 of the Petitioners' reply submissions, it's not accepted that the authorities cited at footnote 2 stand for the proposition that the Inquiry should apply modern law. Those cases, one of which concerned your Honour of *Mercury*, and *Rodway* is the other case, are both fundamentally concerned with statutory construction and the retrospective operation of amendments to legislation to a prospective, looking forward trial. Attempting to retrospectively apply the product of 45 years of developments in the law to events that took place in 1979 would be to entirely divorce those events from their proper context.

Moving to paragraph 13 of the Petitioners' reply submissions, which refers to the Director-General of ASIO's opinion having been "overtaken" by the opinion of an ASIO analyst, that being in reference to the document at Exhibit 10.3-49, red page 187, that opinion being that the YIS "wanted HRS leaders arrested with bombs or implicated in the plot". Firstly, as the Petitioners' submissions note, that analyst directly states that the opinion is "only conjecture and not based on hard intelligence", and what must also be noted is that on the very same document, at Exhibit 10.3-49, red page 186 - the opinion was directly contradicted by a handwritten note from someone in a supervisory role to that ASIO analyst stating, "Our holdings do not show that Virkez was involved in or indeed instigated the Lithgow plot at the behest of the YIS".

That document was the focus of some of the examination of Mr Boyle at Transcript 3172 regarding the, in essence, hierarchical nature of ASIO and of the need to, for intelligence purposes, at times speculate and hypothesise. That is what the opinion that the Petitioners seek to rely upon is – speculation. It's made clear by the qualification in the opinion itself, and it's noted that it is unsupported by "hard intelligence". Hard intelligence being intelligence of the type that your Honour does have before you in the form of the reports of Virkez's intercepted calls to the Yugoslav Consulate. The next point is going to take a little bit of time, your Honour. So I might pause there if that's convenient.

HIS HONOUR: Very good. Thank you, Mr Brown. We will resume at 2 o'clock.

LUNCHEON ADJOURNMENT

Thank you, Mr Brown.

5 BROWN: Thank you, your Honour. Your Honour, I have been and will
continue to address the Petitioners' submissions in reply. Turning next to
Petitioners' reply submissions paragraph 16, it's put that in reference to
10 paragraphs 60 to 61 of the Director's submissions, "the New South Wales DPP
submits that the reason that the police evidence is capable of supporting and
does support the truthfulness and reliability of Virkez's evidence is because of
the absence of any pre-existing relationship between Virkez and the New
South Wales Police, apart from Marheine's knowledge of Virkez."

15 It is then put that this submission significantly downplays the relationship that
Virkez had with New South Wales Police prior to his visit to Lithgow Police
Station on 8 February. The actual submission that was made at paragraph 61
of our primary submissions was that there is no evidence of a pre-existing
informant arrangement between Virkez and the New South Wales Police. The
material identified by the Petitioners in their reply submissions at paragraph 16
does not suggest that there was any such informant arrangement involving an
exchange of information or a relationship of trust, and so our submission
20 stands.

At paragraph 20 of the Petitioners' reply submissions, reference is made to a
submission at paragraph 85 of our primary submissions: "The DPP submits
25 that Jefferies' attempt to persuade Vice-Consul Cerar to make a written
statement about Virkez's contact with the Consulate is indicative of police
trying to generate admissible evidence rather than concealment", and then
goes on to say that this ignores evidence of later events. The submission
made at 85 specifically states, "as at March 1979", and if there were any doubt
about that the point is otherwise made at paragraph 51, that police were
30 "attempting to obtain admissible evidence of it at that stage".

That is as far as the submission was intended to, and as far as the submission
does go. And I'm not sure that any other inference is available regarding the
actions of Jefferies in seeking to take a statement at that point in time. So the
35 submissions at paragraphs 20 to 21 of the reply submissions are responding to
a point that I never sought to make and did not make. This occurs again at
reply submissions paragraphs 23 to 24. I did not there attempt to distinguish
between the New South Wales Police and the Crown Prosecutors for the
purposes of the obligation to ensure a fair trial. The submissions to which the
40 Petitioners refer, which to give your Honour a reference, are at paragraph 92
of our primary submissions, are dealing with the factual question of who knew
what.

45 That is clear from the context in which the submission is made and from the
submissions as a whole. The point of the submission that is made at
paragraph 92 of our primary submissions is that if Milroy did not perceive
Shillington's submission to be inaccurate - this is a reference to his submission
in the closing address regarding the "not a skerrick of evidence" - then he did
not view Virkez's contact with the Consulate as amounting to evidence that
50 Virkez was a YIS operative, or the like, and accordingly, he is less likely to

have been anxious to pass that information on to Shillington. It has nothing to do with bamboo curtains or the like. I think the position has been made clear in the reply submissions filed on behalf of the Director – exactly what we accept regarding that issue, your Honour.

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At paragraph 26 of the Petitioners' reply submissions, reference is made to the criminal history of Roger Rogerson as qualifying what has been put in our primary submissions, at paragraph 126 of our primary submissions to provide the reference, regarding the absence of findings of guilt regarding corrupt practices. I accept the qualification that Rogerson is someone whose word on matters, if unsupported, your Honour would have serious concerns about accepting. I do not, however, accept that his unreliability would have the spill-over effect contended for by the Petitioners at their reply submissions at paragraph 27. That does not rationally follow.

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At paragraphs 43 to 46 of the reply submissions, the Petitioners address material that tends to indicate that Virkez was aware of certain information due to his prior association with Brajkovic. Counsel Assisting took your Honour yesterday to the notes that were taken by Ingram in his initial conversation with Virkez on 8 February 1979. That's at Exhibit 4.2-95, red page 672, and I'll just read an extract from it rather than having it brought up at this stage:

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"Brajkovic has informed Virkez that he has planted bombs before, has also shown him how to make light-switch-activated bombs...he has a number of these switches in his house".

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As at 8 February 1979, that is information that Virkez conveys to police. If we can go, please, to Exhibit 2.1-91, red page 3104, and have that brought up.

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HIS HONOUR: What's the page number again?

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BROWN: Sorry. I'll give it again. 2.1-91, red page 3104. If we can please scroll down to the bottom half of the page. Your Honour will see below the last writing of "Crown Prosecutor", "Would you describe what those three articles are?" Answer - and this is the evidence of Senior Constable Kilburn for context:

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"A. They are each - each of those three circuits is substantially the same, electrically the same, and they are light-activated switches.

Q. Can you tell us in simple terms what you mean by a light-activated switch?

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A. The circuit consists of a transistor, a light-dependent resistor, and a relay and a battery. The transistor is arranged so that it is a switch."

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And it goes on. If we can just scroll up the page a little bit. Your Honour will see there's a comment from the Crown Prosecutor indicating that that item, which is MFI 13, which becomes Exhibit TTT, was found at Mr Brajkovic's house, or those three circuit boards which comprise Exhibit TTT. That exhibit

from the trial is missing, but your Honour can see the circuit diagrams at - I'll just give the reference rather than having it brought up at this stage - Exhibit 11.228, red pages 1632 to 1633, and those switches are described as item 9 in that document.

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Then we get to the evidence of Mr Brajkovic at trial concerning Exhibit TTT, and for that, if we can please go to Exhibit 2.1-101, red page 3339. Your Honour will see about halfway down the screen, as it now is, the top half of the page, the question's asked, "Are these items in Exhibit TTT are, in fact, circuits, aren't they?" Answer, "Yes, correct". If we go a little further down the page, please. About halfway down the screen as it is now, your Honour, "I'm asking you about the item here. That is a light-dependent resistor". Answer, "Yes". If we scroll down a bit further, please. About halfway, now the question:

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"Q. It works, does it not, by absorbing light?

A. Absorbing light?

Q. Absorbing light.

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A. The lights actually strike the face.

Q. What happens when the light strikes the face?

A. Probably it is a normal resistor. These things."

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If we could scroll down a bit further. The second last question there:

"Q. When light is shone onto it, what does it do?

A. It changes its value.

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Q. It changes its value, and what, does that have an effect on the circuit?

A. Yes."

Then if we scroll over to 3340:

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"Q. What effect does it have?

A: Then the circuit starts to work".

If we go further down the page on Exhibit 3340, if we just pause there, please. Third question down on the screen now.

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"Q. I'm asking you, assuming an electric detonator was fitted to the other end and not a microphone?

A. Yes.

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Q. And assuming that you put light onto the light-dependent resistor?

A. Yes.

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Q. That would have the effect of completing the circuit?

A. Yes.

Q. And exploding the detonator?

A. Yes."

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It is a circuit in the nature of a light-activated switch, the kind of switch that Virkez said on 8 February 1979 that Brajkovic had at his house, and if your Honour goes forward to - I'll just give the reference - the bottom of Exhibit 2.1-102, red page 3344, he's taken to the other circuits comprising Exhibit TTT and is asked:

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"Q. Those have both got light-dependent resistors on them?

A. Yes".

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Then at the top of red page 3345:

"Q. You had been experimenting with this, had you?

A. Yes."

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Here we have another piece of information supplied by Virkez, an obscure piece of information about Brajkovic being in possession of light-activated switches, which is substantiated upon the raid and search of Brajkovic's house. This information is supplied before Virkez is even arrested, before Brajkovic is arrested. This is at a time when, on Brajkovic's evidence, he'd never spoke to Virkez, never had anything to do with him. That's at Transcript 3243.36 and following of the Inquiry Transcript. Brajkovic does not deny that he had those items. He in fact admits to having been experimenting with them. This is exactly the kind of small specific detail that is so effective in resolving where the truth lies in a factual Inquiry like this. Brajkovic's denial that he had ever had anything to do with Virkez prior to 8 February 1979 simply cannot be accepted and his credit is necessarily impugned significantly by this evidence.

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Virkez, on the other hand, is significantly supported by this evidence. He did have interactions with Brajkovic and from those interactions he did come to understand that Brajkovic had light activated switches; light activated switches that could have been used to explode a detonator and it dovetails with the evidence of Mr Ralph regarding Prepack Electronics and Virkez and Brajkovic having both attended that store and bought components there. At paragraph 48 of the Petitioners' reply submissions, again there seems to be some confusion as to what the submission on behalf of the Director at paragraph 23 actually was. As is expressly noted in the footnote to the submission, footnote 27, it is accepted that your Honour can inquire into matters that amount to irregularities in a trial process and can report on such matters, not disputed.

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The specific issue is about whether your Honour should comment on how the pardoning power should be exercised outside of the context of a reasonable doubt about the guilt of one or more of the Petitioners. The Petitioners say at paragraph 48 that in the Rendell matter, under legislation as it then stood,

concealment of potentially exculpatory evidence resulted in a pardon. I have a copy of the judgment I can provide if that is sought, but otherwise I was just proposing to read the relevant paragraphs from Justice Badgery-Parker's judgment, which are, on the version I have, paragraphs 2 and 3, being the first and second paragraphs on page 2 of the document:

"Mr Arthur Riedel, Magistrate, was appointed to conduct that Inquiry and he reported to the Court on 7 June 1989 that it was his opinion that a real doubt now exists as to the petitioner's guilt. Having received that report, Hunt CJ at CL reported to the Governor on 23 June 1989 that in the light of evidence given before Mr Riedel, which for whatever reason, was not available at the trial, he was of the opinion that the conviction was unsafe and unsatisfactory and that there was sufficient doubt as to the applicant's guilt to warrant the grant of a pardon. On 26 July 1989, the Governor of New South Wales granted the applicant a free pardon in respect of the conviction. As the legislation then stood, the grant of a pardon was the only relief available to the applicant."

The recommendation for the grant of the pardon in that case was on the basis that there was sufficient doubt as to the applicant's guilt to warrant the grant of a pardon, not some ulterior basis to do with the failure to disclose information.

HIS HONOUR: It was a reasonable doubt point rather than a miscarriage of justice.

BROWN: Correct, your Honour.

HIS HONOUR: Or a mishap of something in the trial.

BROWN: Yes, your Honour. That may well have been reported on but the basis upon which the pardon was granted was the same sort of basis as would follow from a report under 82(2)(a), that there is reasonable doubt as to the guilt. That's not what's being sought here, or at least not only what's being sought here, and that is why I raised a question as to whether the Petitioners' position is something that your Honour could or should act on. I also support the submissions of Counsel Assisting in this respect - a pardon in the absence of a conclusion that doubt attends the verdicts would be futile, as the conviction would still stand. If your Honour goes to section 84, that Mr De Brennan took your Honour to before, your Honour will note at section 84(4) of the *Crimes (Appeal and Review) Act*:

"However, such an application may not be made in respect of a free pardon arising from an inquiry under division 4 if the matter has previously been dealt with under this division as a consequence of a reference to the Court under section 82(2) (or so dealt with under the corresponding previous review provisions), by the judicial officer conducting the inquiry."

In other words, the avenue to the quashing of a conviction is via the CCA. You

cannot get a free pardon and then use that free pardon to go behind an Inquiry of this nature in the event that there is no determination that doubt attends the guilt of one or more of the Petitioners. That's my reading of the purpose of that section.

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HIS HONOUR: Can you just pause there for a moment while I have a look at that provision? Thank you.

10 BROWN: So with those matters out of the way from the reply submissions, if I can turn to the fact-finding task that leads to the determination of the ultimate questions. An approach that your Honour might take to the fact-finding task is to work your way through the chronology of events and determine which evidence do you accept as reliable and then carry that forward in your assessment. Obviously later events in the chronology are capable of bearing upon the reliability of earlier events, and so this is not a purely linear task but it is one way of approaching the task and it is the manner in which Counsel Assisting have generally analysed the evidence.

20 On this approach, the starting point is Virkez and the question of whether you accept his account of events in his telephone call to the Yugoslav Consulate, substantially repeated in his encounter to New South Wales Police later that day, as being a reliable account of the circumstances in which Virkez found himself. That is, that he found himself in the midst of a genuine conspiracy to engage in a bomb plot involving at least the men Bebic, Brajkovic and Zvirotic. For the reasons given by Counsel Assisting and those advanced in writing on behalf of the Director at paragraphs 67 to 73 of the primary submissions, your Honour would find that Virkez's account of events was a reliable account of the circumstances in which he found himself. He reported to police a genuine conspiracy that was underway.

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In making this assessment your Honour would also draw comfort from the police evidence relating to the find of the explosives and to confessional statements as providing independent support for the account of Virkez for the reasons identified at paragraph 68 of our primary submissions. And acceptance of the evidence of Virkez substantially implicates Bebic, Brajkovic and Zvirotic. He also identifies the object of the conspiracy. The information that Virkez supplies to police leads them to the raid at Lithgow. There's no issue that a substantial quantity of explosives were recovered at Lithgow, that is significant evidence of the means by which the conspiracy was to be put into effect and on Virkez's account put into effect relatively imminently in the early hours of the following day.

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What also occurs during the raid at Lithgow is that Bebic is arrested and supplies the names of Ilija Kokotovic, Joseph Kokotovic and Mile Nekic. Bebic participates in a series of interviews in the days and weeks following and he signs each of them. Your Honour would accept that Bebic genuinely made the admissions set out in those interviews and that they are a reliable account of events in which he was a participant. In part, that is because of Bebic's preparedness to show police on 9 February 1979 the locations where explosives had been concealed and tested. Milroy was asked how this came

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about in his evidence before the Inquiry, at Transcript 270, line 39 and following, "How did that come about?":

5 "Mr Bebic, as he indicated in the Record of Interviews, that he was, he would show, show us where he had buried the explosives, and as a result of that and some of the other comments he made in the interview, he made the arrangements for him to show us those locations which he was very keen to do."

10 Then at 271, line 18 and following, "At this particular location" - in reference to one of the locations to which Mr Bebic directed them - "how would you describe Mr Bebic's demeanour?". Answer:

15 "He was very, as I indicated, very calm. He always seemed to express the view that he wanted to show us to make us understand what they were doing, why they did it, where he'd buried the explosives and where he practiced the bombs to make bombs. So his demeanour was very calm, very keen, very forthcoming."

20 Your Honour has been taken on a number of occasions throughout the course of this Inquiry, including in Counsel Assisting's address, to the photos that appear to support that assessment of Bebic's demeanour on 9 February 1979. So your Honour would accept that Bebic was in a position to and did make substantial admissions regarding his own involvement in the bomb plot, and admissions regarding the extent of his knowledge of the participation of others. It follows that your Honour would also accept that it was Bebic who was in a position to and did supply the names of Ilija Kokotovic, Joseph Kokotovic and Mile Nekic on 8 February 1979, and that the officers from Special Branch and the CIB did not collude to create a fiction that the names had been supplied by Bebic as a pretence for raiding and fitting up those men. Acting on the information genuinely provided by Bebic, New South Wales Police executed what have been referred to as the Sydney raids on the evening of 8 February 1979.

35 Now, Mr Buchanan made reference to what I would call the cavalier attitude submission yesterday in a number of different contexts. That submission, which is at paragraph 183 of our primary submissions, was specifically made in reference to the lack of precautions prior to the raids. It was not made in relation to the lack of a report to the Australian Bomb Data Centre. It was not made in relation to the failure to log items in exhibit books. It was made about the lack of precautions in circumstances where New South Wales Police had no reason to positively believe that there would be no explosives. To the contrary, on the information they had received, they had every reason to be concerned at the prospect of coming across explosives during the course of those raids.

45 During the course of the Sydney raids, New South Wales Police found amounts of explosives at each of Bossley Park, Ashfield and Burwood. Your Honour would find the evidence of New South Wales Police officers relating to the finding of explosives at each of those locations is both credible and

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reliable. In part, that is because of the evidence independent of police and deriving from Virkez and Bebic which explains the source of both the gelignite and the detonators found at each of the Sydney locations. Bebic had supplied Zvirotic with both gelignite and with detonators. This is dealt with at paragraphs 176 to 177 of our primary submissions, which contain relevant extracts from their Records of Interview establishing that point, your Honour.

Now, each of the Sydney based members denied that explosives were found at all. They did not claim an awareness of them but no possession. Take the Burwood trio as an example. None of them pointed to someone else as having introduced or having been responsible for the presence of explosives. It was a flat denial of any awareness of or acknowledgement of those items and their presence. This goes to the point raised by your Honour yesterday regarding joint possession. The contest in the evidence was in stark terms. The explosives were there, or they were not. If your Honour is satisfied that there were there - and I say your Honour would be so satisfied - then given the circumstances in which they were found, there is little scope for concluding that one or more for the Burwood trio were not associated with them. That was not the effect of their evidence or the manner in which their case was run.

This is the first real point of departure between the reasoning advanced by Counsel Assisting regarding the question of the guilt for the Burwood trio and the reasoning for which the Director contends which is set out at paragraphs 261 and following of our primary submissions. Essentially, it is that given the circumstances in which the three men were found, immediately outside the attic room in which the explosives were in plain sight, and accepting the evidence of Virkez within hours of the implementation of the bomb plot, and with Nekic having recently arrived at the address, and further bearing in mind their shared political beliefs, the finding of joint possession is an irresistible one, your Honour.

Now, that finding, if your Honour were to make it, would be of considerable significance to events going forward from that point. It bears generally upon the credit of the police investigation, which the Petitioners seek to broadly impugn as a large scale enterprise of concoction. It bears significantly on the credit of the Petitioners who deny explosives having been found and who otherwise allege having been verbaled by police. It bears upon the circumstances in which the interviews of 8 and 9 February 1979 took place. If no explosives were found at the Sydney raids, then the interviews were necessarily a fiction. But if explosives were found, then your Honour may consider that these men, having been caught in effect red-handed within hours of the execution of the proposed bomb plot, may have been pre-disposed to speak to police just as Bebic spoke to police.

Moving forward to the interviews of the Sydney-based Petitioners, Counsel Assisting have outlined compelling reasons why the Record of Interview with Zvirotic should be accepted as a genuine account of admissions he made that evening. In particular, Counsel Assisting have drawn out at paragraph 70 and following in their reply submissions the detail of the Croatian Republican Party

having been expelled from the Inter-Committee Council as supportive of this being a genuine account. Those submissions and the conclusion that they lead to, that it's a genuine account that should be acted upon, are supported. Further to that point, we've outlined at paragraphs 154 and following of our primary submissions the flow of information arising from the interview with Zvirotic being taken forward in the investigation and being used as a basis for questioning of Bebic, with Bebic in fact confirming details that had been sourced from the interview with Zvirotic.

Coming to the second point of departure between the reasoning advanced by Counsel Assisting and that advanced by the Director, that is the interviews with the Burwood trio. Counsel Assisting reasoned in effect that your Honour could not be satisfied of the reliability of the interviews and should accordingly place no weight on them. The Director contends that it's open to your Honour to be satisfied that the interviews are reliable based on both credit assessments and reasonable explanations for the features that Counsel Assisting have identified as giving rise to concerns. It is accepted that those concerns require careful consideration, but the outcome of such careful consideration should lead your Honour to conclude that, in conjunction with credit findings, the interviews are reliable.

Dealing first with the credit aspects, your Honour has heard evidence in this Inquiry from at least one of the officers involved in each of the interviews of Ilija Kokotovic, Joseph Kokotovic and Mile Nekic. And all officers involved in those interviews gave evidence at trial denying fabrication of the Records of Interview. The recollection of the officers who gave evidence before the Inquiry of having engaged in an elaborate concoction of evidence in a significant trial is unlikely to have diminished over time, and they denied having done so. Your Honour also has the benefit of submissions on behalf of those officers who appeared at the Inquiry that identify reasons in support of an acceptance of their honesty and I endorse those submissions, your Honour.

As is put at paragraph 159 of our primary submissions, what must also be weighed is the credit of the Petitioners in making the allegations, and in that regard at paragraphs 228 and following of our primary submissions, we've identified a number of matters that may be taken to bear upon the credit of the Petitioners, including their denial that explosives were found, which I have just addressed your Honour on. That's the credit aspect of the assessment.

What must also be considered are the matters raised by Counsel Assisting as calling into question the authenticity of the Records of Interview. Those matters are dealt with at paragraphs 136 to 157 of our primary submissions with some additional context at paragraphs 132 to 133. An important aspect of this analysis is recognising any interrelationships between the factors identified by Counsel Assisting, or in other words, the independence of the events in question. Your Honour will see a good example of this reasoning in Counsel Assisting's written submissions at paragraphs 3261 to 3272, which is that part of Counsel Assisting's submissions where they're dealing with Steep and the significance of his allegations to the assessment of Harding's evidence.

Mr Harding's representatives join issue with Counsel Assisting's reasoning at their submissions at paragraphs 291 and following, noting in particular paragraph 303 where its stated:

5 "Even assuming that Smith and Brajkovic did not share a cell, or have direct personal contact, hundreds of other prisoners in the system to whom Steep may have spoken, could have been a conduit to Brajkovic for his fictions against Harding."

10 Now, I don't propose to enter the arena on any proposed findings on that issue. I simply seek to highlight the reasoning and how it is engaged in both directions. It's the type of reasoning, the possibility of concoction, that used to lead to the exclusion of evidence under *Hoch v The Queen* and nonetheless remains relevant to an assessment of the probative value of similar fact
15 evidence. On this example, if there is no conduit between Steep and Brajkovic, then it is on its face unusual that two specific allegations would emerge independent of one another. If there is a plausible conduit, then that undermines the independence of the events and the probative force of the reasoning.

20 That is why, amongst other things, commonalities in the circumstances of the men doing the interviewing and the men being interviewed had been highlighted in the Director's primary submissions at paragraphs 139 to 153. When regard is had to those commonalities, the curious features
25 identified by Counsel Assisting collapse, to some extent. When regard is had to the type of reasoning engaged by Mr Justice Wood in the *Ananda Marga* case, to which we referred in our primary submission at paragraphs 131 and 132, if such reasoning is applied, they tend to collapse further.

30 When regard is had to the content of the interviews themselves and the flow of information as part of the investigation, the hijacking allegation plot is first reported as having been raised by Ilija Kokotovic in his Record of Interview, and that allegation is subsequently raised with Bebic on 9 February 1979. His response is, "The traitor, I get him, or my people get him and kill him. I no say
35 nothing about it. I get killed if I do". It's also information volunteered by Virkez on 10 February 1979, and this is at Exhibit 4.2-11, red page 308 at question 25. Question, "Was anything else that happened?" Answer, and he says various things in response but then says, "Another group was going to hijack an aeroplane."

40 Bearing in mind those matters, it would be open to your Honour to find that the Records of Interview of each of Ilija Kokotovic, Joseph Kokotovic and Mile Nekić represent admissions actually made by each of those men on the evening of 8/9 February 1979. That finding, if made, would dispel any doubts
45 about the guilt of each of those men.

50 There is other evidence independent of the Records of Interview that could otherwise lead your Honour to the same conclusion, and that is set out in the Director's primary submissions at paragraphs 253 and following, and in summary, includes the circumstantial evidence derived from Virkez,

5 circumstantial and direct evidence from Bebic's Records of Interview; and of
conversations with Bebic undertaken by police; the evidence of what it's
submitted your Honour would find to be the joint possession by the three men
of the gelignite and detonators on the evening of 8 February 1979; the
evidence derived from the interviews with Virkez, Bebic and Zvirotic relating to
the source of the detonators and gelignite that were found at locations,
including Burwood; the presence of the men together on the evening of
8 February 1979 within hours of the bomb plot; the shared political beliefs of
the three men which were in common with those of Brajkovic and Zvirotic; and
10 the Record of Interview conducted with Zvirotic in which each of the three men
were directly implicated in the bomb plot.

As outlined at our primary submissions at paragraph 273, Zvirotic states in that
Record of Interview that he gave orders to Brajkovic, Ilija, Joseph, and Nekic,
15 to place bombs in Fairfield and Cabramatta, that all of them in context,
inclusive of Ilija, Joseph, and Nekic, were present when the plan to bomb was
first discussed, and that he gave explosives to Nekic and the Kokotovic
brothers. When that is taken in conjunction with the finding of gelignite in the
attic room on 8 February 1979, with Ilija, Joseph, and Nekic together
20 immediately outside the room at a point within hours of the execution of the
proposed bomb plot, then even leaving aside the Records of Interview, it
cannot be said that there is a reasonable doubt as to the guilt of any of Ilija
Kokotovic, Joseph Kokotovic, or Mile Nekic. Unless there's anything further,
your Honour, those are the Director's submissions.

25 MELICAN: Your Honour, the Commonwealth has been allocated 45 minutes
for submissions. I anticipate I won't need the full allocation. Can I just check,
can your Honour hear me clearly?

30 HIS HONOUR: Yes, I can. That's fine.

MELICAN: The Commonwealth as instructed by the Australian Security
Intelligence Organisation, and the Department of Prime Minister and Cabinet,
has been given leave to appear at this Inquiry, but the interest giving rise to
35 that grant of leave is much narrower than that of the other interested parties
before your Honour, and so the Commonwealth submissions are tailored
accordingly. We have filed written submissions which address four main
topics. The first is the credibility of former Commonwealth officers who gave
evidence before the Inquiry or provided a statement to the Inquiry. The
40 second topic was the role of Virkez with respect to the Yugoslav Intelligence
Service. The third was the Commonwealth's disclosure to the New South
Wales Police of information relating to Virkez, and the fourth were a range of
what you might call miscellaneous matters arising out of the primary
submissions of Counsel Assisting and the Petitioners.

45 I'm not proposing to cover the same territory as my written submissions
covered, and that's for two reasons. The first is your Honour has those
submissions in writing, and secondly, Counsel Assisting, and Ms Epstein in
particular, has covered the substantive issues that affect the Commonwealth in
50 considerable detail, and the Commonwealth adopts Ms Epstein's oral

submissions that were made, and I'll just identify in particular those submissions.

5 The first concerns the role of Virkez with respect to the YIS, and in particular, Ms Epstein's submission that the most probative evidence of this comes from the ASIO intercept reports. That's the position we've advanced in writing, and we adopt what Ms Epstein says about that, but further, that what those reports indicate is that Virkez was primarily acting in the nature of an informant, although he would, at times, receive instructions or encouragement and, at
10 times, himself provided suggestions to the Consulate about people to observe, and Ms Epstein made those submissions at page 3322 to 3323 of the Transcript, your Honour.

15 The second component of that as well is that the evidence does not indicate that Virkez was under the day-to-day control or management of the YIS, and that's critical because that is an essential component of the definition of an agent, and that is what's missing here, in our submission, and we adopt what Ms Epstein said about that, but even more importantly, that there is a complete absence of credible evidence that he was acting as an agent provocateur,
20 however that term is understood, and again, those submissions were made at page 3326 of the Transcript. That's the first broad topic that we adopt Counsel Assisting's submissions on.

25 The second concerns the disclosure by the Commonwealth authorities to the New South Wales Police, and with respect to three main pieces of information, so the first is the information that the Commonwealth Police obtained from the Consulate on 8 February regarding Virkez's call to the Consulate on that same day. The second is the SIDC-PAV report, and importantly, ASIO's knowledge that Virkez had been acting as an informant on Croatian nationalist
30 activities. He'd been acting as an informant to a person suspected by ASIO to be an intelligence official operating within the Yugoslav Consulate. The third is the account that Virkez gave to Roger Cavanagh at an interview on 21 February 1980. Ms Epstein has taken your Honour to the documents which make plain that the information I've just described was provided to the New
35 South Wales Police in a timely way. Those documents are also identified in the Commonwealth's written submissions at paragraphs 31 to 46, and I won't say anything further about that.

40 There are some matters, however, that arise out of the Petitioners' written reply submissions and also the submissions made on behalf of the Petitioners this morning, which I intend to briefly respond to. The first concerns the submission made at paragraph 13 of the Petitioners' reply submissions dated 28 February this year, and Mr Brown briefly touched on this as well, but there the Petitioners refer to a file note that was authored by the Director-General of
45 ASIO in 1982, which expressed the conclusion that Virkez was an informant or a source. Your Honour will see about a third of the way down that paragraph that the Petitioners submit that that assessment seems to have been overtaken, however, by the opinion of the ASIO analyst author of a minute dated 6 August 1984, that, "the YIS wanted HRS leaders arrested with bombs
50 or implicated in the plot."

I do propose just to go to that document very briefly. If that could be brought up. It's Exhibit 10.3-49, red page 186. Just while that's being brought up I'll note that this document was the subject of evidence from Mr Boyle, and Mr Brown referred to that a moment ago, but I'll just give the page numbers that I've noted with respect to the Transcript. That was at pages 3138 to 3145, also at 3168 and at pages 3174 to 3176. That covers a number of pages, but the parts of the Transcript that I think are particularly instructive are at page 3143 lines 19 to 35, and page 3168 lines 43 to 50. Mr Boyle gave evidence that this document was authored by an ASIO analyst or likely authored by an ASIO analyst, and your Honour will see, if we scroll down to paragraph 2 of the document, that what the analyst was tasked with was an assessment or analysis of "the question of the status of Virkez and his relationship with the Yugoslav government representatives in Australia through the YIS", and that this "has been closely examined", and the documents that are listed there - your Honour can take it from me, although I can make good this if required - that each of those documents - that begins at paragraph (a) and goes over the page to (j), that's red page 187 - they are the ASIO intercept reports that are before the Inquiry. So that's what the analyst has had before him.

Your Honour will then see at paragraph - I don't think it necessarily has a paragraph number but it's on page 187, if you could just go over the page. The first paragraph under the parenthetic note, the author expresses the view that, "It is clear in my mind that Virkez was an agent of the YIS, reporting firstly to Veljko Grce, and after his departure in January 1979, to Slobodan Kreckovic". Then in paragraph 3 your Honour will see that he goes on to say that, "Despite the conclusion that Virkez was an agent rather than a 'low level informer', as claimed by the AFP" - and I'll just pause there. The AFP didn't describe him as a "low level informer". They described him as a "low level agent", and that came from Roger Cavanagh, but moving on, "Despite the conclusion that Virkez was an agent, there is no information on file to support the claim that the YIS masterminded the Lithgow plot". It goes on to say, "While this might be a reasonable conclusion to reach" - and it refers to a range of factors, a few lines down, your Honour will see the author continues to say, "We hold no information to that effect" - no information. I'll come back to explain why I emphasise those parts of the document in a moment.

If your Honour then turns to red page 190 and paragraph 8 in particular, this is the paragraph that the Petitioners point to in their submissions, and the author there says, "It is my opinion (based only on professional judgment) that Virkez was central to a YIS plan to discredit a potentially violent Croatian organisation, the HRS. I don't believe the YIS actually wanted bombs to be planted but I do believe they wanted HRS leaders arrested with bombs or implicated in the plot". Importantly, at paragraph 9 - and this is something that has been observed on a number of occasions - the author makes plain that, "The above opinion is only conjecture and not based on hard intelligence."

The Petitioners submit that this opinion of an ASIO analyst, which is expressly said to be conjecture and not based on hard intelligence, overtakes the stated

opinion of the Director-General in the document referred to at paragraph 13 of their submissions, and I'll take your Honour to that document in a moment, and they do so, partly at least, on the basis that - and this is how it was put - hard evidence on such a subject would necessarily be rare. Now, this document isn't saying there is not hard evidence. It is saying in that paragraph there's not "hard intelligence", that there is a difference between intelligence and evidence, and that statement in my submission needs to be understood in the context of the earlier parts of this document which I took your Honour to where it was said that there is no information that the YIS was masterminding the plot.

Now, I'll take your Honour to two other features of this document, or one feature of this document and then to a related document, which is on the first page, so it's back at red page 186, if that could be brought up. Mr Brown drew attention to this as well. Your Honour will see handwriting at the top of the page, and Mr Boyle's evidence was that that handwriting was that of the supervisor of the analyst. The relevant part that I'd emphasise is the supervisor says:

"Whether we wish to call Virkez an informant, agent or whatever, our holdings strongly indicate that he was briefed by the YIS to report on separatist matters. However, our holdings do not show that Virkez was involved in, or indeed instigated the Lithgow plot at the behest of the YIS."

That statement by this analyst's supervisor is wholly consistent with what the Director-General said in a note in 1982, which the Petitioners say has been overtaken by this document, and I will just very briefly take your Honour to that. That is at Exhibit 9.1-81, red page 116.

In fact, I will start at page 117 when that's available. Your Honour will see that this document is dated 18 May 1982 and it's signed by T H Barnett, who was the Director-General of ASIO at the time, the head of the organisation. If we go back to page 116, your Honour will see that this is a file note made by the Director-General on 18 May about a meeting he had on that day. So it's as contemporaneous a record as one can get. He says there that he went to Canberra to discuss the Vico Virkez case with the Attorney-General. The list of attendees is set out below and it includes not just the Attorney-General but a range of other senior officials including the secretary of the Attorney-General's department.

In paragraph 2, starting at the second sentence, the Director-General notes that:

"I spoke on Virkez, noting that whereas ASIO had originally considered him to be a YIS 'agent', later evidence led us to hold the view that he was an 'informant' of the Yugoslav Consulate in Sydney, and that his actions on reporting in advance the proposed bombing operation and the Yugoslav reaction to this information, indicated that the Yugoslavs were not masterminding the

plot. Therefore, any suggestion that Virkez's role was provocation on behalf of the YIS was unfounded."

5 Now, that's not some private musing of the Director-General. That is his opinion that he is giving to the Attorney-General of the Commonwealth, and the suggestion that that statement is overtaken by conjecture from an ASIO analyst a couple of years later, which is itself heavily qualified by that analyst's supervisor, should not be accepted in our submission.

10 The next matter I wish to address also arises out of the Petitioners' written submissions.

HIS HONOUR: Can you just pause a moment, please, Mr Melican?

15 MELICAN: Yes, your Honour.

HIS HONOUR: Yes, thank you.

20 MELICAN: Your Honour, the next topic I want to deal with arising out of the Petitioners' submissions concerns paragraph 14 of their reply submissions. My instructor is handing out a document to the parties which I'll come to in a moment. I regrettably printed the wrong document and that was handed out at the luncheon adjournment. He's handing out the right document and I'll explain what that's all about in a moment. Your Honour will see at
25 paragraph 14 of the Petitioners' reply submissions the heading "Consulate's prior knowledge of a bomb plot". In my submission that dramatically overstates what the evidence shows, and I'll take your Honour to that.

30 That point is said to be based on an intercept, or records of intercepts, which show that on or before 19 September 1978, and I'm just reading from the submissions here, another YIS agent in Lithgow, I think there it says Paret Serat, but I think it's Pero Serat knew that "something was going to happen to the Serbian singers". Exhibit 9.1-23 is what is cited in support of that. I'd ask that that be brought up, Exhibit 9.1-23, red page 34. This is an ASIO telex and
35 it's between one part of the organisation and another. It's from RR to HQS. HQS is headquarters, we know that from Mr Boyle; I can't recall what RR stands for, but that is not relevant to what I am speaking about.

40 Your Honour will see at about point 3 of the page, there's a line that begins, "Your confusion is surprising", and this is basically a bit of back and forth between two different areas of ASIO about a range of topics, but in any event, it goes on to say, "Pero Saret is the subject of various intercept reports dating from September 1978" and then it lists those intercept reports. In paragraph 2, it says, "From these reports, it's apparent that he is an informant of the
45 Yugoslav Intelligence Service", and that's relevant. He's an informant, not an agent as was put by the Petitioners. At paragraph 3, it explains that his, being Saret's, "relationship with Vido is that while Saret has been informing the YIS on the activities of the Lithgow bombers for several months, Vido is the one who ultimately informed the police and was arrested", and paragraph 4 is the
50 relevant part that's picked up by the Petitioners.

5 "Paragraph 1 of" a specified report "shows that Saret knew something was going to happen to the Serbian singers. In later reports (numbered above) he identified four of the bombers, explaining they 'are very dangerous'". The first observation to make is that this document says nothing about any bomb plot as is asserted by the Petitioners – that this in some way supports the view that they had prior knowledge of a bomb plot. My instructor has located the intercept report that is referred to in paragraph 4 of this document.

10 It's available on the National Archives website. It's not in evidence before your Honour as far as we can tell. I do propose to tender that, but perhaps I should initially hand it up. I know it's unusual to introduce new evidence in closing submissions, but this is a matter that was raised for the first time in the reply submissions of the Petitioners as I apprehend it, and the document which I propose to hand up will be of assistance in evaluating that submission. It may be that your Honour should see it first and I can address your Honour.

HIS HONOUR: That's a good idea.

20 MELICAN: Just to identify the document, it's an ASIO intercept report. It bears the number 239 at the very bottom and I think that's a number that's been applied by National Archives and it's identified as, "NSW/W.37-78/132" and that's the sequence of letters and numbers that appears in paragraph 4 of the document at Exhibit 9.1-23, and there are two features of this document I just draw attention to. The first is that all it says is, relevantly anyway, "Saret informed Salvarinov", S-A-L-V-A-R-I-N-O-V, "That some singers are coming from Yugoslavia and something is going to happen again".

30 Again, there's no reference to any bomb plot there and in fact what it suggests is something that has previously happened with respect to Serbian singers might be happening again, but then perhaps even more relevantly, just above the COC or case officer comment at the bottom, there's a note that starts with, "T/C" and I think that means transcriber comment. I think that might've been Mr Boyle's evidence. The second sentence, "I believe singer is a codename similar to that of UJAK", U-J-A-K, "Which means Ustashe. Term, 'Singer' was not used before". Make of that what you will, but what that does demonstrate is this material falls well short of the Consulate having prior knowledge of a bomb plot which is what is asserted in the Petitioners' submissions. Your Honour, there were just a few things arising.

40 HIS HONOUR: Should I deal with the--

MELICAN: Sorry, I should tender that.

45 HIS HONOUR: Are you tendering that?

MELICAN: I tender that document, your Honour.

HIS HONOUR: This mostly affects you, Mr Buchanan.

50 BUCHANAN: We have no submissions to make, your Honour.

MELIS: Your Honour, if your Honour is to tender that, that would be Exhibit 10.10.

5 EXHIBIT #10.10 ASIO INTERCEPT REPORT FOR AN INTERCEPT OF
19/09/78 CONCERNING PERO SARET TENDERED, ADMITTED WITHOUT
OBJECTION

10 Your Honour, there were just a number of brief numbers arising out of Mr De
Brennan's submissions that I just want to address briefly, his submissions this
morning. The first was a submission that any assessment made by Cavanagh
with respect to Mr Virkez is unreliable or should be treated as being unreliable,
and I understood that submission to be based on the fact that Cavanagh's
evidence before the Court of Criminal Appeal was that there was no formal
15 Record of Interview that was taken and only brief notes that he later destroyed,
whereas various records that are before the Inquiry at least record
Mr Cavanagh saying that he did take records and maybe even made a
recording of the interview with Virkez.

20 The records before the Inquiry do not explain this apparent inconsistency
between what Cavanagh told the Court of Criminal Appeal in his evidence
versus what he was recorded as telling others within the Commonwealth at
that time, but that does not mean that Cavanagh's account of what Virkez told
him or his assessment of what that meant is unreliable. That is a significant
25 leap in logic and it's not one that we submit should be - that's not a conclusion
we submit should be reached. But in any event, and as previously submitted,
the most probative evidence of Virkez's interactions with the Consulate and
with the official within that Consulate are the ASIO intercept reports that are
before the Inquiry. What Cavanagh says about that, in my submission and I
30 think in the submission of Counsel Assisting as well, is that it's broadly
consistent with what those records say. But to discount what Cavanagh said
altogether just because there's some inconsistency of the kind that has been
rightly identified, is not something that your Honour should accept in our
submission.

35 The next matter that I just wanted to address is the submission made by the
Petitioners that the first telephone intercept makes plain that Virkez was not
some "mere suppliant", and that's a point that's raised in their reply written
submissions as well. Now, no-one is submitting that he was a mere
suppliant, that he was supplicating his contact at the Consulate. That really in
40 my submission misses the point. What he was doing was providing
information to his handler at the Consulate. At times he was making
suggestions of what they might want to do, and at times he was taking some
limited directions or instructions, but to seek to characterise him by reference
to what he is not, namely a mere suppliant, in my submission doesn't assist
45 the Inquiry to ascertain what it was that he was in fact doing at this time.

Two submissions, related submissions, were made and I'll deal with them
together. The first was by reference to a document at Exhibit 9.1-27. I don't
need that to be brought up. I don't have the red page I'm sorry, but in any
50 event that's a document which, as Mr De Brennan pointed out, describes

Mr Virkez as an "informant of great consequence", and Mr De Brennan submitted that this rises well above what Mr Cavanagh said to the CCA in his evidence. A similar point was made with respect to document at Exhibit 9.1-87 in which an ASIO officer has described Mr Virkez as an "informant and suspected agent provocateur", and again the submission was made that that goes well beyond what Cavanagh represented to the CCA.

Now, that's a submission that goes to a couple of points, some that I'm concerned with and some that are not, but what I'm concerned with, and I should address, is that there is no evidence that these documents were available to Cavanagh. So if there's any suggestion that he has underplayed the characterisation of it because he should have known or understood how Virkez was being described in these documents, is not a submission that should be accepted. It might not be one being made. This might be going to a different point, but I just wish to make that clear that there's no evidence that they're documents that Cavanagh had before him or available to him. His evidence was based on his interview with Virkez on 21 February 1980 and to a lesser extent it would seem an interview in March 1980.

There is one matter, and it is the smallest of matters but I ought to raise it, and it arises with respect to Counsel Assisting's submissions-in-chief, and at paragraph 1079, and that submission concerns a document which is at Exhibit 10.1-2 and I would ask that that very briefly be brought up on screen. The document that will be brought up is a memorandum from Ian Cunliffe and it's addressed to various officers of the Department of Prime Minister and Cabinet. At paragraph 1079 of the Counsel Assisting's submissions, they transcribe the handwritten note that appears at the bottom of that page. It might be convenient if you could scroll down and even zoom in on the handwritten notation. That's a notation that's made by Mr St John and I take no issue with the transcription of that but for one word which is potentially of some consequence.

Your Honour will see on the third line of paragraph 1078 it says, "To check whether the New South Wales Police have in fact been unofficially informed about Virkez's contact with the Consulate-General". In my submission, the word "unofficially" is not what appears there. It's either "officially", there's no "un" in front of it, or I think in fact what it says is "appropriately". Now, that's as minor a point as it may get today, but it's one that I've sought to make. Unless there's anything--

HIS HONOUR: It looks like an "I-A-T-E-L-Y" at the end of it. Yes.

MELICAN: Indeed. I think it's "A-P-P-R-O-P-R-I-A-T-E-L-Y", if I've spelt that correctly, but in any event I think it's "appropriately" or if it's not and those p's are in fact f's then it would be "officially". In any event, those are my submissions, your Honour, unless there's anything else I can assist with.

HIS HONOUR: No, thank you, Mr Melican. Yes, Ms Bashir.

BASHIR: Thank you, your Honour. I think I'm next. Your Honour, perhaps if I

could take the Court briefly - this is not in our submissions - but to the sections of the *Court Review and Appeal Act* that your Honour's been talking about with other practitioners today and in particular section 82.

5 HIS HONOUR: The *Appeal and Review Act*, you mean?

BASHIR: *Appeal and Review Act*. Your Honour will see that under section 82, as your Honour's already observed, the actions at the conclusion of the Inquiry is for your Honour to send a report to the Chief Justice, and to, under 1/2, that
10 your Honour may also make a referral.

Then in subsection (3), after considering report furnished to the Chief Justice, the Supreme Court makes its own report to the Governor, and that's important to your Honour because if there is no referral, one goes into subsection (4),
15 which is what the Governor may do if there's only a report to the Governor, but in the event of a referral, that leads us into section 88(2) as to what the Court of Criminal Appeal might do, which then leads us back to section 85, and then when one looks at section 85, section 84 is read as though it is a
20 reference. What could happen then in the Court of Criminal Appeal, even if the referral can only be in relation to reasonable doubt, is that the report is then put before the Court of Criminal Appeal, and one sees that in 85(1)(b), both your Honour's report and the report from the Supreme Court under section 82, and then if one reads on essentially the *Criminal Appeal Act* is invoked, even though the rules of evidence don't apply, and so miscarriage
25 can be considered there in addition to unreasonable verdict.

HIS HONOUR: Yes. All the – subsection (1) of section 6 of the *Criminal Appeal Act* applies.

30 BASHIR: Exactly. Your Honour, the report is of significance, and what's in the report could be of significance, particularly in the event of a referral, even if it's only on parts.

HIS HONOUR: I think I indicated I propose to adopt what I understand Wood J
35 did in 1985 and report on everything so it's all there for people to look at.

BASHIR: Of course, in the event that that happens, people like Mr Bennett do not have a right of appearance, and so, your Honour, we have addressed in great detail in our written submissions the factual findings that we say that your
40 Honour would make insofar as they concern Mr Bennett's evidence, and your Honour, it is our submission that your Honour would find that he was a thoughtful, considered, credible, and reliable witness in his evidence, and that his evidence would be accepted by your Honour, and we rely on our detailed written submissions in full.

45 Your Honour, I really only wish to address some further discrete points that have been raised in the written reply submissions, and in today and yesterday's oral submissions. First of all, we endorse the description of the events overall as fast moving with multiple moving parts, hundreds of
50 witnesses, including scores of police officers, those officers each being

questioned at committal or trial and bearing details of the events, such that looking at the evidence overall, it belies a meticulous coordinated conspiracy against each of the Petitioners, and relevantly for Mr Bennett in relation to Mr Brajkovic, your Honour, in our submission, would reject the Petitioners' submission made here this morning that there was a malign purpose in the witness taking exercise. That was that was directed to the taking of the statement from Mrs Brajkovic. That was made this morning, and your Honour would reject that Mr Brajkovic was loaded up or fitted up with fabricated evidence as to the white plastic bag and explosives being at the home, and also at the CIB, and we rely on our written submissions.

We've gone into some great detail in our written submissions about the fact that there's no doubt that Mrs Brajkovic, in the early hours of 9 February, was shown the white plastic bag and its contents, inclusive of the gelignite and detonators, and her statement was taken recording that, and recording the fact she said she'd never seen those items before, and our submissions in that respect, and why your Honour would accept Mr Bennett's evidence in as to how the statement was taken, read, and signed by Mrs Brajkovic, and what she was shown, that's all in our written submission, and I don't propose to traverse it again.

This does lead into addressing the submissions of the Petitioners about there being a stash at the CIB, or Lithgow explosives being a source for items, and I did want to go into some further detail about the unaccounted for detonators which we submit are fully accounted for, and otherwise, the stash relies on what I'll call the Wood Royal Commission and Rogerson submissions, and we adopt what Counsel Assisting has said, including Counsel Assisting's reply at paragraphs 38 and 39, and we've addressed that ourselves in our written submissions at paragraphs 120 to 128 and 140.

Just in terms of our submission that there aren't any unaccounted for detonators from Lithgow, first, the Lithgow explosives, your Honour, of course, were all still in Lithgow - that includes the detonators - at the time that Mrs Brajkovic's statement was taken. Number one. Secondly, Mr Barkley's evidence at trial - and I can take your Honour to this. I don't ask that it be brought up. I'll just give your Honour the references, but at 2.1-12, red page 381 to 383, he was, in our submission, demonstrably mistaken in saying that police took all the detonators, and that's at 381, about line 40, and that at the time of the full check, he refers to the 51 detonators from Hassans Wall. That's at 382.45, and at Transcript 383, that he had not seen any of the other detonators found since, but he was now holding 20 number six detonators from the boot. Would your Honour like me to bring it up and show your Honour exactly where?

HIS HONOUR: I've been through it all. I'm just looking at my notes of Barkley's evidence.

BASHIR: Thank you, and that he has the four from the car. Then he comes back the next day in the trial at 2.1-13 on red page 396 to 7. He does refer at the top of page 397, finally we say, to the eight short delay detonators, and it's

those eight detonators that are said to be unaccounted for. He also, at 397, after explaining about the 11 half sticks of gelignite and describing those and describing detonators, he says that the explosives in his depot have not been moved at all, and that's quite important evidence, and we say that on the basis of that statement, and also his own - the more contemporaneous documents and reports, the eight were in fact there at all relevant times. If I could ask that Exhibit 15.12 be brought up, at red page 38, first of all. Your Honour can see at point 7 now, is towards the end of the line, is the "quantity of the eight ICI electric short delay detonator L-series", and your Honour will see at the very end of that passage a reference to the "15 detonating relay connectors".

Relay connectors or connectors are different to detonators, and we make this point in our submissions that the Petitioners are simply wrong and mixed up when they refer - could we go back to 37, to page 37, number 37 and then 10. Yes. It says there's explosives and I just pause there. Your Honour may recall - and the reference to where the evidence is found is in our submissions at paragraph 133, that Captain Barkley said, "explosives" - he's referring there to gelignite and detonators when he says, "explosives" - "are being stored at 223 Supply Company and waiting for this action", and then it's the connectors that he says are being held by the Ballistics Section. So there are no missing detonators when this report is done on the Monday, 12 February, and then if we could, please, have brought up Tab 20.64. This is Major Smith's report of 27 February.

In our written submissions we've give your Honour the references to how this is sourced from Barkley, and Barkley accepted that was the case. He was on the phone while they go through it. Red page 149, item 3, we see the eight detonators and then at page 150 at the very end, "Barkley is holding the following items for New South Wales Police", and item D is "all of the detonators except the four found in the glovebox", which is exactly what Musgrave's evidence was, that he had the four, which he didn't take back till 3 April. At all relevant times, particularly if one accepts Barkley's evidence that nothing then moved from his store, at all relevant times there are no unaccounted for detonators.

Then just looking at the Petitioners' reply submissions at paragraph 39 where we are said to have mischaracterised the evidence, first of all, we don't accept that and if your Honour goes to those passages that we refer to in Mr Brajkovic's own evidence at Exhibit 2.10-17, red page 565, Brajkovic there gives evidence of having a conversation he says with Krawczyk outside the house as he does at Exhibit 2.1-100, red page 3289, outside the house, and if I could ask that Exhibit 2.1-100, red page 3289 be brought up, and down towards the bottom of the page is what we say was a slip in the evidence. Just the second question from the bottom he's asked this, "You got to the stage of going into the house. What happened then?" "When I entered the house" - and he starts listing where everyone was located, so he says, "There was my wife and my daughter sitting around the kitchen table near the door, and on the first seat my brother-in - no, Detective MacKenzie standing near the door."

Then he gets down to, "Detective Pettiford were looking in the kitchen". He's asked, "Where was your brother-in-law, do you know?" "The brother-in-law was sitting on the bed and Detective Krawczyk was looking in the bookshelf and putting the books in the box". We say that's a slip, and because the
5 Petitioners still insist on submitting that it was Krawczyk who brought him into the house. If your Honour reads on, and I won't take your Honour to the rest of it, but in terms of the questions over the page at 3290 he asks, "Who's in charge, and what's this all about?". That's not a conversation with Krawczyk inside the house. So in fact it's our submission that it is the Petitioners who
10 have mischaracterised the evidence, and your Honour would not accept that Krawczyk took Mr Brajkovic into the house. Your Honour would find that Detective Krawczyk drove the lead car, and he entered the home with Detective Sergeant Wilson and Mr Bennett.

15 Your Honour, the search warrant submission doesn't really concern Mr Bennett, but we just point out this evidence - and Mr Bennett didn't undertake any search in any case is his evidence - but he did give evidence that on their entry Mrs Brajkovic gave permission for police to look through the house, and that's in his statement, Exhibit 4.2-28 at paragraph 3. Wilson
20 asked, "Can we have a look through the house?". Ms Brajkovic says, "Yes, but he's not here". Of course, in Mr Brajkovic's case the explosives were found outside and then that evidence of the discovery of the explosives in the white plastic bag is relevant then to the search and whether it was a legal search.

25 Your Honour, in terms of the timetable, we've made some very detailed submissions as to why, certainly insofar as any involvement and knowledge of Bennett, it could not be found to be corrupt and that's at paragraphs 149 to 157. Indeed, most of what is in there is really not disputed. Then at the reply
30 submissions of the Petitioners, paragraph 40--

HIS HONOUR: Sorry, which paragraph?

35 BASHIR: Paragraph 40.

HIS HONOUR: 40, yes.

40 BASHIR: Where it's said to hold Mr Brajkovic to an impossible standard. Your Honour, certainly we don't do so, and we accept, your Honour, that the function of the evidence and the evidence in the bail application before Justice Yeldham was necessarily truncated, but what we're not doing is - what we do in relation to the evidence before Yeldham is to rely on what was said, and the difference between what was positively put and the great change that comes
45 later. But more so we rely on the Shepard interview where we do repeat there was no restriction on Mr Brajkovic and we have gone into detail as to his own evidence accepting that, although he tries to retract it later. Our submissions at paragraphs 160 to 163 address that directly, and on the face of the interview itself he wasn't so confined and in any case he clearly didn't regard himself as confined because of the answers that he gave.
50

But on three separate occasions, in the face of questioning of the trial prosecutor, there in response to my questioning and also in response to your Honour's questions, he accepted that there weren't any restrictions put on him by Sergeant Shepard. In relation to the reply submissions paragraph 42 - your Honour, 41, we rely on our written submissions, and we've made a submission right the end of our submissions about that particular passage, but 42, this was a slip, and we reject the characterisation of our submission here. We accept, your Honour, at the end - your Honour will see towards the end of that paragraph the three matters that the Petitioners say should be taken into account. Firstly, the different purposes of each of the occasions. Secondly, limitations with the English language. And, your Honour, we accept that, however we do note that there were translators in the trial, although not here. Then thirdly, we accept that he was someone who hadn't given evidence in a trial context before. But we say taking all of those things into account, your Honour would nevertheless make all of the findings comfortably that we ask your Honour to make.

Now, in relation to this exchange about on the "wall" or which they now say should be "court". Your Honour will reject that, and I will show your Honour why. First of all, Mr Brajkovic, here I questioned him about this exchange on 6 November 2024 at Transcript 321, line 22, to 3212, line 4, and Mr Brajkovic didn't make any such correction. I took him to the evidence where his Honour Justice Maxwell said, "You have knowledge that this FM microphone came from your house?". Mr Brajkovic replied - and this is in the trial - "It was on the wall when the detective presented the batteries and alleged it was used, intended to be used in some kind of a bomb". And I said, "Do you see that?". And I put - he says, "Yes". I said, "You were telling his Honour that the detective in the workshop showed you an item and said it was intended to be used in a bomb, weren't you?". And he said, "This is his Honour is it, you have knowledge", and he repeats the question and answer back, and says this, "That it was in my house but it was used for the FM microphone and detectives did not accept what I said, that is that FM microphone, they allege said that battery it's going to be used for a bomb. It's not true".

So Mr Brajkovic embraced that he gave that evidence in the Court, and moreover when the word "wall" was used, "it was on the wall", he's talking about the FM microphone. So it makes absolutely no sense to change the word "wall" to "court", as is suggested by the Petitioners, and it is a slip, your Honour. We stand by our submission that this slip in the trial was about a conversation about bomb components, and that lends support to explosives being in the workshop when Mr Bennett - that's exactly where Mr Bennett later saw them in the plastic bag.

Then there's another matter, your Honour, that came up in oral submissions that we just wish to draw attention to. Senior Counsel for the Petitioners made a submission referring to Mr Hudlin's evidence that he saw blood on the right ear of Mr Brajkovic. That came from the Internal Affairs statement of Mr Hudlin at 11.170 at paragraph 6, and in that paragraph, also Mr Hudlin says that he exclaimed, "Why did you have to bash him so hard?" He also says that the observation was at a time when Mr Brajkovic was flanked by detectives with

two detectives on either side. Your Honour, we would just say in relation to that, that your Honour should, first of all, take into account that Mr Hudlin's evidence, in our submission, is unreliable on many other matters, but also take into account the submission of Milena Brajkovic to the Internal Affairs at 11.169 at paragraph 6, where she doesn't say anything about discussions about injuries.

Also, when your Honour goes to see Mr Hudlin's evidence on the voir dire in relation to what he saw - I'll just give your Honour the references. 2.1-18, red page 613 and 615 where he refers to swelling on the face, and he now says a cut on the forehead, and he says then - he says to the detectives that he, Hudlin, was with - "Why did you do that?" Then the trial evidence at 2.1-104, red page 3449, there's, again, no mention of blood on the ear or neck, and again, Hudlin did see Mr Brajkovic in custody in the next days when his injuries were undoubtedly more prominent, and it may be that his memory was muddled by that, but the photos the next day with the different exposures, which is Exhibit 4.1WW, is also a measure of what was visible those several hours later when those photographs were taken. It's an independent record.

I take your Honour to all of that to make this submission in addition to what we have in our written submission: that it is entirely reasonable that Bennett would not have been able to see any such injuries from 20 metres away where his desk was, especially in circumstances where, on everybody's account, Mr Brajkovic was flanked by police, and your Honour, we make that submission even if Mr Hudlin's evidence about seeing blood is accepted. Your Honour has the evidence before the Court where Mr Bennett accepted he wouldn't necessarily have been able to see any injuries, if there were the injuries. That's all we say about that. I just wanted to take your Honour to that.

Your Honour, just in relation to the allegations of Mr Brajkovic against Mr Bennett, we've gone into a lot of detail in our written submissions about those allegations, and in relation to the inconsistencies, the additions, and of all of the various accounts, and it is our submission your Honour simply cannot accept any of those accounts of Mr Brajkovic insofar as Bennett, and your Honour, we note that the allegation as to the apology was not even asserted by his counsel at the trial in relation to Mr Bennett. Your Honour, that is before the jury. Your Honour would accept Mr Bennett, in conclusion, as a witness of truth, including his repeated denials of any knowledge of an assault on Mr Brajkovic.

HIS HONOUR: Dr Woods.

WOODS: Your Honour, might I have five minutes to rearrange myself?

HIS HONOUR: Yes.

SHORT ADJOURNMENT

Yes, Dr Woods.

WOODS: Thank you. Your Honour, the 25 gentlemen for whom I appear, instructed by Mr Madden, all have given evidence. Their material, or at least their written submissions are set out in part (b) of our document. The first part of the document is a series of generalisations about the case which apply across the board to each of these 25 former police officers. I don't intend to go through these all in detail because I know that your Honour has done so or will. I do want to make some brief references to them. As set out in part (a) from pages 34 onwards to about 53, we talk about the history of the relationship between Serbian and Croation peoples in Australia and overseas, and the longstanding animosity which had existed between them over many years.

The political background, which is referred to by Counsel Assisting as well, and by some other people, is a context in which this unfortunate event occurred. I won't go through it in detail, but Dr Bosworth, now retired as a professor of history at Oxford, gave evidence for the Crown in the trial, and he talked at length about the difficulties between the two groups, the history, the passions between Serbs and Croats over many years, and that provides not a specific motivation but a general broad motivation for the events that brought us here, not only today but for many months. That material is before your Honour and I won't go to it in detail. We refer to complexities at page 6 of our written submissions, which may be encompassed as follows.

The case presented by Mr Buchanan and Mr De Brennan for the Petitioners is one which contemplates, we say, so elaborate and complex a series of events that it's highly unlikely, and in fact, that it didn't happen. My clients, most of them were called together suddenly on the afternoon of the 8th, most of them from CIB associated groups, but others not. Some of them not known to each other. In the context where speed was of the essence, some of them were rushed up to Lithgow to deal immediately with what was before them, and some of them stayed back in Sydney to take part in the various raids of which evidence has been given.

Taken as a whole, the suggestion of an overarching conspiracy is, we say, untenable. It's certainly true, and the Wood Royal Commission, which we recognise is an important Inquiry and Report, speaks of a series of inquiries conducted by his Honour, and we've heard much said about the conclusions drawn by the Report, but the Wood Report doesn't overgeneralise. It doesn't say that everybody connected with the CIB, at that time in the mid 1990s or in the previous decades, was a crook. Certainly, a great deal of misbehaviour was unearthed, but that doesn't mean that the people involved in this case did wrong, and in fact, although the Inquiry by his Honour resulted in very elaborate and comprehensive reports, not one of the 25 police officers whom I represent was convicted of any offence arising out of those matters, or indeed, out of anything else, although some of them were called before the Wood Royal Commission, and there were references in several cases to the DPP, but nothing eventuated, or if it did eventuate, nothing was the outcome.

The background searches are described at page 11 of our written submissions. We make the point at page 11 that it is interesting to talk about

the law now and the criminal practice now in contrast to how it was then, and Mr De Brennan has spoken this morning about looking at the events in question here through a modern lens, and that's a possible approach, but realistically, it's important to bear in mind that we wouldn't be here today if current procedures were in place. If it were necessary for the interviews to have been conducted in front of a camera with a recording device attached, and transcript available, none of this would have taken place, and your Honour's made it clear from the beginning of the Inquiry that it's not a question of the law having overtaken events.

Your Honour is looking at events 1979, 1980, but it is sad, in a way, that the decisive weapon of the electronic device was not available, but it wasn't, and the record of interview system that was used for the interviews in this case were more or less standard. Your Honour will recall, perhaps not quite as much as I do, your Honour, but your Honour knows that the standard procedure was the record of interview. One police officer interrogating, one person typing or writing something down. This was very common, and it wasn't regarded at that time as unacceptable.

There were glimmerings of change. My friends have pointed out the comments in the High Court in *McKinney and Judge* a bit later, and it's true that for a person to be held in police custody and interrogated is a disturbing experience, and it would better if it were done in front of a television camera or in front of one or more wholly independent witnesses, and in many cases in this instance, that didn't happen.

However, it needs to be said on behalf of my clients that it was a very urgent thing. We adopt the emphasis placed by Counsel Assisting on the ASIO recording of a telephone call at the Yugoslav Consulate on 8 February 1979, and if your Honour looks at that, and your Honour, no doubt, will, it smacks of being genuinely a situation where Virkez is floundering. He rings up. He indicates that he's a bit concerned about it. The Yugoslav Embassy tells him to go to the police. Reading that through, it has the ring of truth, and it has the ring of truth as reflecting the third option referred to by his Honour Mr Justice Samuels when the matter went to the Court of Criminal Appeal. And various possibilities were canvassed before that Court, and Mr Justice Samuels said that the third option, the third possibility which was available, was that Virkez had more or less intruded himself into what was a real bombing plot. It would seem that ultimately the jury accepted that, and we put it to you that on the whole of the evidence that is the most plausible explanation of what happened.

Now, there was some evidence given about Mr Milroy making inquiries about the early background of Virkez, and Mr Milroy was asked why he hadn't enquired in more detail about Mr Virkez at Geelong. Your Honour, this case isn't about Geelong and the events of 1972, but it's not irrelevant because as we've just heard from Mr Melican representing the Commonwealth and ASIO this question of what exactly was Virkez in relation to the Yugoslav Embassy or Consulate, is of some considerable importance. And I invite your Honour to consider this possibility. Given the peculiar background of Virkez, the different stories that are told about when he arrived and what he did, not entirely clear,

but we recognise that he had some connection with the Consulate, and he rang them up.

5 Whether he was at the lowest level a community informant or something higher, an agent - as to which Mr Shillington told the jury there was not a skerrick of evidence - whichever is accurate - one asks in relation to the 1972 events, given that he had that connection with the Consulate and possibly with YIS in some way, whatever it was, is it possible that he stumbled onto something in 1972? Because as Mr McDonald points out in his book,
10 "Reasonable Doubt" - that's one of the events that are a background to these events - had he been involved as a community informant for some time? If it's true that he had some connection with the 1972 events and was pushed away by them, has he told the Embassy about it, or the Consulate, and certainly there were a number of people who were training for it - went to Yugoslavia in
15 1972, attempted at an incursion, and were all shot or otherwise disposed of.

It's entirely possible, we say highly likely, regardless of that, what occurred here was that Virkez doing somebody's business, his own or something on behalf of the Consulate, has stumbled on something real. There can't be and
20 has been no serious suggestion that the large quantity of explosives found at Lithgow was planted by my clients or anybody else connected with the New South Wales Police. Now, your Honour, we spell this out in the written submissions, we refer you to, as a general proposition, to the unhelpful support that might be provided by Mr Rogerson, who's been referred to by my learned
25 friends, and that is very unhelpful support for this Inquiry. It is true that some things that he says actually are reflected in the Wood Royal Commission, but if so, accept the latter report rather than unhelpful Roger.

I point out as well, your Honour, that the gentlemen whom we represent were
30 at the relevant time not senior people. They were mostly - more or less experienced, they had some years' experience, but they certainly - they weren't commissioned officers or people making decisions at a high level. And in this case there's been quite a lot of evidence directed towards the suggestion that there was in fact a high level coverup. Many witnesses who
35 might have been able to give evidence are deceased and the Counsel Assisting have helpfully recorded a regrettably long list of those unavailable witnesses. At page 12 we emphasise what your Honour will obviously understand, the 45 years passing doesn't assist the memory, and a number of our clients gave evidence in which they've been confused or made mistakes or
40 simply got things wrong, attributable to the lapse of time.

There have been a number of things said by my learned friend, Mr Buchanan and Mr De Brennan, about the absence of protective gear or warnings about dangers, and this is developed by the Petitioners to argue the point that there
45 were, in fact, no explosives found in these searches, Bossley Park, Burwood and so on. It didn't happen at all, and there were no real dangers because the police knew that it was a hoax. They were pretending to raid and pretending to search, pretending to find things, knowing that they were going to fake by the combined and coordinated fraudulent evidence of multiple police officers, a
50 castle of lies to convict their clients. We reject that entirely.

5 It may be true that they didn't all wear protective gear of the kind that we know about now. Since 9/11, all across the western world, police forces have been kitted out with protective gear which looks remarkably like things from Star Wars, and in 1979, police didn't have that. The protective gear issued to them was considerably more limited than it is today.

10 Suggestion is made that they knew it was a fake and a setup, so they weren't worried. They didn't call the next-door neighbours into bomb shelters or take other precautions. It may be possible to say in retrospect that police should've worn protective gear, elaborate precautions being taken to clear the neighbourhood, but the decisions they made were operational, your Honour, made in hurried circumstances under pressure, and particularly in a context where they were concerned to protect the public interest, as they were duty bound to do. Your Honour, I'll certainly be another hour tomorrow. Is it a
15 convenient time?

HIS HONOUR: Yes. That's fine.

20 ADJOURNED PART HEARD TO FRIDAY 7 MARCH 2025