Inquiry into the Conviction of David Harold Eastman

for the Murder of Colin Stanley Winchester

REPORT OF THE BOARD OF INQUIRY

Submitted to the Registrar of the Supreme Court of the Australian Capital Territory
pursuant to section 428 of the *Crimes Act* 1900 (ACT)

CONTENTS

INTRODUCTION

1. On 10 January 1989 Colin Stanley Winchester was shot and killed when alighting from his vehicle near his home in Lawley Street, Deakin, a suburb of Canberra. At the time of his death Mr Winchester was an Assistant Commissioner in the Australian Federal Police (AFP). By an indictment dated 29 March 1993, David Harold Eastman (the applicant) was charged with the murder of Mr Winchester (the deceased). On 2 May 1995 the applicant was arraigned and pleaded not guilty. After a lengthy and difficult trial, on 3 November 1995 a jury returned a verdict of guilty. The learned trial Judge imposed a sentence of imprisonment for life.

2. Against a background of a number of unsuccessful appeals and a previous inquiry concerned with the fitness of the applicant to stand trial (the Miles Inquiry), on the 29 April 2011 the applicant applied for an inquiry into his conviction pursuant to Part 20 of the *Crimes Act 1900* (ACT) (the Act). On 3 September 2012 Marshall J granted the application and ordered that there be an inquiry. The General Form of Order is exhibit 1 and a copy is annexure 1 to this Report, together with a copy of my Instrument of Appointment dated 23 July 2013. The paragraphs of the Order are reproduced in paragraph 38 of this Report.

3. The Inquiry commenced in September 2012 before the Honourable Acting Justice Duggan. On Monday 22 July 2013, for reasons associated with a conflict of interest, his Honour withdrew from the Inquiry. On 23 July 2013 I was appointed an Acting Judge of the Supreme Court of the Australian Capital Territory and as the Board of Inquiry to inquire into the applicant's conviction pursuant to the Order made on 3 September 2012.

4. The investigation commenced by Duggan AJ was continued by me. Public hearings at which oral and written evidence was presented commenced on 11 November 2013. From the outset the applicant, the AFP and the ACT Director of Public Prosecutions (DPP) were given leave to appear through counsel. In November 2013 I gave leave to Mr Robert Barnes to appear through counsel.

5. The taking of oral evidence concluded on 12 April 2014. Written and oral submissions were received from persons given leave to appear before the Board. Oral submissions were completed on 15 May 2014.

6. Lists of witnesses (alphabetical and chronological) are annexures 2 and 3 and a list of exhibits is annexure 4.

7. A written summary of issues was provided by Counsel assisting the Inquiry (annexure 5). Written submissions were received from the following entities and persons given leave to appear and are attached as annexures:

    The AFP (annexure 6);

    The Applicant (annexure 7);

    Mr Robert Barnes (annexure 8); and

The DPP (annexure 9)

8. I provide this written Report of the Inquiry pursuant to section 428 of the Act. For reasons explained in this Report, my opinions and recommendations are as follows:

- A substantial miscarriage of justice occurred in the applicant's trial.
- The applicant did not receive a fair trial according to law. He was denied a fair chance of acquittal.
- The issue of guilt was determined on the basis of deeply flawed forensic evidence in circumstances where the applicant was denied procedural fairness in respect of a fundamental feature of the trial process concerned with disclosure by the prosecution of all relevant material.
- As a consequence of the substantial miscarriage of justice, the applicant has been in custody for almost 19 years.
- The miscarriage of justice was such that in ordinary circumstances a court of criminal appeal hearing an appeal against conviction soon after the conviction would allow the appeal and order a retrial.
- A retrial is not feasible and would not be fair.
- While I am fairly certain the applicant is guilty of the murder of the deceased, a nagging doubt remains. The case against the applicant based on the admissible and properly tested evidence is not overwhelming; it is properly described as a strong circumstantial case. There is also material pointing to an alternative hypothesis consistent with innocence, the strength of which is unknown.
- Regardless of my view of the case and the applicant's guilt, the substantial miscarriage of justice suffered by the applicant should not be allowed to stand uncorrected.
- To allow such a miscarriage of justice to stand uncorrected would be contrary to the fundamental principles that guide the administration of justice in Australia and would bring the administration of justice into disrepute. Allowing such a miscarriage of justice to stand uncorrected would severely undermine public confidence in the administration of justice.
- In view of the nature of the miscarriage of justice that has occurred and the period the applicant has spent in custody, and in view of the powers conferred on the Full Court, I do not recommend that the Court confirm the conviction and recommend that the Executive grant a pardon.

- I recommend that the applicant's conviction on 3 November 1995 for the murder of Colin Stanley Winchester be quashed.

Legislative Provisions

9. The relevant provisions of Part 20 of the Act are as follows:

Part 20 Inquiries into convictions

Division 20.1 Preliminary

421 Definitions for pt 20

In this part:

Full Court means the Supreme Court constituted by a Full Court.

inquiry means an inquiry under this part into a person's conviction for an offence (whether summarily or on indictment).

registrar means the registrar of the Supreme Court.

relevant proceeding, in relation to an offence, means a prosecution or other proceeding in relation to the offence, including an appeal in relation to the finding of a court in relation to the offence.

Division 20.2 How to start inquiry

422 Grounds for ordering inquiry

(1) An inquiry may be ordered under this part into the conviction of a person for an offence only if—

(a) there is a doubt or question about whether the person is guilty of the offence; and

(b) the doubt or question relates to—

(i) any evidence admitted in a relevant proceeding; or

(ii) any material fact that was not admitted in evidence in a relevant proceeding; and

(c) the doubt or question could not have been properly addressed in a relevant proceeding; and

(d) there is a significant risk that the conviction is unsafe because of the doubt or question; and

(e) the doubt or question cannot now be properly addressed in an appeal against the conviction; and

(f) if an application is made to the Supreme Court for an inquiry in relation to the conviction—an application has not previously been made to the court for an inquiry in relation to the doubt or question; and

(g) it is in the interests of justice for the doubt or question to be considered at an inquiry.

Example for par (a) to (e)

John has been convicted of murder. Expert evidence that blood found on John's jacket shortly after the murder was almost certain to be the victim's blood was the main evidence connecting John with the murder.

Later DNA testing, by a method developed after all proceedings in relation to the conviction had been finalised (and the time for making any appeal had lapsed), shows that the blood is almost certainly not the victim's blood. This gives rise to a doubt or question about the blood evidence that could not have been (and cannot now be) properly addressed in any relevant proceeding in relation to the murder, and a significant risk that the conviction is unsafe.

(2) The inquiry is limited to matters stated in the order for the inquiry.

(3) If the inquiry is ordered by the Supreme Court, the court may set limits on the inquiry under subsection (2) despite anything in the application for the inquiry.

423 Executive order for inquiry

The Executive may order an inquiry on its own initiative.

424 Supreme Court order for inquiry

(1) The Supreme Court may order an inquiry on application by the convicted person, or by someone else on the convicted person's behalf.

(2) The registrar must give a copy of an application for an inquiry to the Attorney-General.

(3) The Supreme Court may consider a written submission by the Attorney-General or the Director of Public Prosecutions (or both) in relation to the application.

(4) Proceedings on an application are not judicial proceedings.

(5) If the Supreme Court orders an inquiry, the registrar must give a copy of the order to the Attorney-General.

425 Rights and duties in relation to orders for inquiry

(1) This division does not create a right to the order of an inquiry, and does not create a duty to order an inquiry.

(2) Without limiting subsection (1), there is no right of appeal in relation to a decision whether to order an inquiry.

Division 20.3 Inquiry procedure

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428 Report by Board

(1) After finishing an inquiry, the board must give a copy of a written report of the inquiry to the registrar.

(2) Together with the report, the board must give to the registrar, for safe-keeping, any documents or things held by the Board for the purpose of the inquiry.

(3) Even if the board does not comply with subsection (2), the Supreme Court may exercise its powers under division 20.4 in relation to the report.

(4) The *Inquiries Act 1991*, sections 14 (Reports of boards) and 14A (Tabling of reports) do not apply to the inquiry.

Division 20.4 Supreme Court orders following inquiry report

429 Publication of report

(1) The registrar must give a copy of the report of a board of inquiry appointed under division 20.3 to the Attorney-General and the convicted person, together with a copy of any order under this section.

(2) The Supreme Court may make an order that the report, or particular parts of the report—

(a) must not be disclosed to anyone else by—

(i) the Territory; or

(ii) the convicted person (except to obtain legal advice or representation); or

(iii) someone else who obtains a copy of the report; or

(b) may be disclosed only to particular people or on stated conditions (for example, a condition requiring the consent of the court).

(3) The Supreme Court may make an order under this section only if it considers that it is in the interests of justice, having regard to the public interest and the interests of the convicted person.

(4) An order under this section may be enforced in the same way as any other order of the Supreme Court.

430 Action on report by Supreme Court

(1) The Full Court must consider the report of a Board into an inquiry. (2) Having regard to the report, the Full Court must, by order—

(a) confirm the conviction; or

(b) confirm the conviction and recommend that the Executive act under either of the following sections of the Crimes (Sentence Administration) Act 2005 in relation to the convicted person:

(i) section 313 (Remission of penalties);

(ii) section 314 (Grant of pardons); or

(c) quash the conviction; or

(d) quash the conviction and order a new trial.

(3) The registrar must give a copy of the order, together with any reasons given for the order, to the Attorney-General and the convicted person.

(4) This section does not give the convicted person a right to an order of the Full Court mentioned in subsection (2) (b) or (d), or to an Executive pardon or remission.

431 Nature of Supreme Court proceedings

(1) In considering whether to make an order under this part about a report, the Supreme Court—

(a) may have regard only to matters stated in the report, or to documents or things given to the registrar with the report; and

(b) must not hear submissions from anyone.

(2) The consideration of whether to make an order under this part is not a judicial proceeding.

10. The following features of Part 20 merit emphasis:

- An inquiry may only be ordered if the criteria specified in section 422(1) are satisfied.

- This Inquiry is limited to the matters stated in Marshall J's Order of 3 September 2012; that is, it is limited to the matters identified in each paragraph of the applicant's amended application filed 10 August 2012.

- As the Board of Inquiry, at the conclusion of the Inquiry I am required to provide a written Report of the Inquiry to the Registrar of the Supreme Court of the ACT. Speaking generally, the purpose of the Report is to assist the Full Court of the Supreme Court in carrying out its function.

- The Full Court must consider the Report, and only the Report and documents accompanying the Report, and by order confirm the conviction or confirm the conviction and recommend a pardon or quash the conviction or quash the conviction and order a new trial.

11. With limited exceptions, the *Inquiries Act 1991* (ACT) applies. Section 18 requires that the Board comply with the rules of natural justice, but it also provides that the Board is not bound by the rules of evidence and 'may inform itself of anything in the way it considers appropriate...'. Section 18(c) empowers the Board to 'do whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry'. Section 21 empowers the Board to hold private hearings.

12. In the course of the Inquiry extensive investigations have been undertaken and many persons have been interviewed. However, unless otherwise specified, I have had regard only to statements and other material that have been presented in public hearings, together with evidence given at public hearings and in two private hearings. In connection with the subject matter of the private hearing, I have also had regard to documents which have remained confidential by reason of public interest immunity.

13. As will appear in this Report, I have drawn conclusions adverse to persons who provided statements to the Inquiry and gave evidence in public hearings. Section 26A of the *Inquiries Act* requires that the Board must not include a comment in a report that is adverse to a person or entity who is identifiable in the report unless a copy of the proposed comment in the report has first been given to the person, together with a written notice advising the person that the person may make a submission or give a statement in relation to the proposed adverse comment.

14. Notices of proposed adverse comments were served on the following entities and persons:

    The AFP (annexure 10);

    The DPP (ACT) (annexure 11);

    Justice Michael Frederick Adams (annexure 11);

    Mr Robert Collins Barnes (annexure 12);

    Mr John Edward Ibbotson (annexure 11);

    Mr Thomas Anthony McQuillen (annexure 10);

    Mr Richard Thomas Ninness (annexure 10);

    Mr Benjamin Allan Smith (annexure 13); and

    Dr Allan White (annexure 14).

15. The DPP filed a written submission concerning the Notice (annexure 16). Dr White provided a statement in response to the Notice (annexure 15). In addition the written and oral submissions of the AFP, the applicant, the DPP and Mr Barnes also canvassed many of the proposed adverse comments.

Background

16. At about 9.15 pm on 10 January 1989 the deceased parked his car in the driveway of his neighbour's premises. His neighbour was a widow who drew comfort from having a vehicle in her driveway.

17. As the deceased was about to alight from his vehicle, he was shot twice from close range. Death was instantaneous.

18. An Inquest into the deceased's death commenced in May 1989 and concluded in December 1991 with an open finding. However, the Inquest was reopened in November 1992 for the taking of additional evidence. On the 24 December 1992 the Coroner committed the applicant for trial. An indictment dated 29 March 1993 charging the applicant with murder was filed in the Supreme Court of the ACT and, after a number of variations of trial dates, the trial commenced on 2 May 1995 before Carruthers AJ. The jury was empanelled on the 16 May 1995 and returned a verdict of guilty on 3 November 1995.

19. The applicant appealed against his conviction and on 25 June 1997 the Full Court of the Federal Court dismissed the appeal.[1] An application for special leave to appeal to the High Court was granted, but on 25 May 2000 the appeal was dismissed.[2]

20. On 9 June 2000, pursuant to section 475 of the Act, the applicant filed an application for a judicial inquiry into his conviction. By letter of 26 July 2000 from the Registrar of the Supreme Court, the applicant was advised that the Chief Justice had made an administrative decision not to direct an inquiry pursuant to section 475.

21. On 31 May 2001 the applicant filed a further application for an inquiry pursuant to section 475 and, on 7 August 2001, Miles CJ granted the application. His Honour directed that the Chief Magistrate, or a Magistrate nominated by him, 'summon and examine on oath all persons likely to give material information on the matter of the fitness to plead of David Harold Eastman during whole or any part of his trial for the murder of Colin Winchester' (Ex 8).

22. Within a few days of the application being granted, the applicant requested that the Chief Justice establish an inquiry into aspects of the evidence led at his trial. That request was refused, but on 27 August 2001 the applicant again wrote to the Chief Justice renewing his request.

23. The applications to which I have referred were made pursuant to section 475 of the Act which was repealed with effect on 26 September 2001. However, section 475 continued to apply to inquiries ordered prior to its repeal.[3] Section 475 was replaced by Part 20 of the Act pursuant to which this Inquiry was ordered and conducted.

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1 *Eastman v R* (1997) 76 FCR 9.
2 *Eastman v R* (2000) 203 CLR 1.
3 *Legislation Act 2001* (ACT) s 84.

24. The decisions of the Chief Justice led to a number of applications and appeals which can be summarised as follows:

25 February 2002	The applicant sought a review of the decision of 17 August 2001 refusing to enlarge the ambit of the Inquiry or order further inquiry.
20 March 2002	The Director of Public Prosecutions (the Director) brought two proceedings challenging the decision of Miles CJ made on 7 August 2001 directing an inquiry concerning the applicant's fitness to plead. The Director sought both a declaration that the Inquiry was not authorised and judicial review.
3 May 2002	Gray J dismissed both of the applications by the Director.[4]
3 July 2002	The Director having appealed to the Full Court of the Federal Court against the decision of Gray J, the Full Court allowed the appeal and ordered that the decision of the Chief Justice ordering an inquiry be set aside.[5]
28 May 2003	The applicant's appeal to the High Court was allowed and the orders of the Full Court of the Federal Court were set aside.[6]
25 May 2004	Gray J dismissed the applicant's application to review the refusal of Miles CJ to enlarge the scope of the Inquiry or order a further Inquiry.[7]

25. From October 2004 to February 2005 a Magistrate took evidence pursuant to the order of Miles CJ directing an inquiry concerning the applicant's fitness to plead during the trial. On 2 February 2005 the applicant applied for a further inquiry into his conviction pursuant to Part 20 of the Act. It appears that proceedings in respect of the application of 2 February 2005 were held in abeyance until completion of the report by Miles CJ and subsequent proceedings.

26. On 6 October 2005 Miles CJ delivered his report. His Honour concluded that although there would have been a 'question' as to the applicant's fitness to plead on the morning of 22 May 1995, having regard to the trial in its entirety, 'on the probabilities' the applicant was fit to plead throughout. In those circumstances Miles CJ found that no miscarriage of justice had been caused by the continuation of the trial notwithstanding that on the morning of 22 May 1995 the question as to the applicant's fitness remained unresolved. Miles CJ did not recommend that the Executive take any action to set aside the applicant's conviction. The two volumes of the Miles Inquiry Report are exhibits 5 and 6.

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4 *Director of Public Prosecutions (ACT) v Eastman* (2002) 130 A Crim R 588.
5 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360.
6 *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318.
7 *Eastman v Miles* (2004) 181 FLR 418.

27. On 17 November 2005 the applicant commenced proceedings in the Supreme Court seeking a review of the decision by Miles CJ not to recommend that the Executive take any action with respect to the conviction. That application was refused by Lander J on 9 May 2007.[8] In the meantime, the Executive had formally advised the applicant that no action would be taken with respect to his conviction.

28. The applicant appealed against the decision of Lander J and also sought to review the decision of the Executive to take no action. The appeal and application were dismissed by the Court of Appeal on 21 April 2008.[9]

29. The applicant also sought to reopen the original appeal against his conviction. The application was filed on 5 October 2007 and dismissed by the Full Court of the Federal Court on 18 April 2008.[10] Leave to appeal to the High Court was refused on 17 October 2008.[11]

30. As to the application of 2 February 2005 for an inquiry, during September and October 2007 submissions were made to Besanko J who heard and determined the application. On 4 April 2008 his Honour refused the application and delivered detailed and helpful reasons which are annexure 17. The applicant applied for a review of the refusal by Besanko J to order an inquiry and that application was dismissed by Edmonds J on 18 February 2009.[12] An appeal by the applicant to the Court of Appeal was dismissed on 17 August 2010.[13] The High Court refused special leave to appeal against the decision of the Full Court refusing the appeal on the 7 April 2011.[14]

31. The application which led to this Inquiry was filed on 29 April 2011. Marshall J refused the application on 6 March 2012, but that decision was overruled by the Full Court on 30 July 2012 and Marshall J was directed to consider whether an inquiry under section 424 of the Act should be ordered.[15]

32. On 10 August 2012 the applicant filed an amended application for an inquiry. Marshall J granted the application, but the formal order was not made until 3 September 2012. In substance, his Honour ordered that there be an inquiry into the conviction of the applicant for the murder of the deceased in relation to the matters contained in the amended application filed on 10 August 2012.

The Trial

33. As part of the context in which the issues raised in this Inquiry are to be considered, it is necessary to have regard to the circumstances of the trial. As discussed later in this Report, at the time of the trial the applicant suffered from a long standing mental condition. The precise nature of that condition was the subject of evidence in the Miles

[8] *Eastman v Honourable Jeffery Allan Miles* (2007) 210 FLR 417.
[9] *Eastman v Australian Capital Territory* (2008) ACTLR 199.
[10] *Eastman v The Queen* (2008) 166 FCR 579.
[11] *Eastman v The Queen* [2008] HCASL 550.
[12] *Eastman v Besanko* (2009) 223 FLR 109.
[13] *Eastman v Honourable Justice Besanko* (2010) 244 FLR 262.
[14] *Eastman v Honourable Justice Besanko* [2011] HCASL 97.
[15] *Eastman v Honourable Justice Marshall* (2012) ACTLR 37.

Inquiry and before me. For present purposes it is sufficient to note that from time to time during the trial the applicant's mental state was obviously very disturbed.

34. In its judgment on the appeal against conviction, the Full Court of the Federal Court discussed the course of the trial and the applicant's behaviour. In respect of the applicant's legal representation during the trial, the Full Court observed that 'it would not be an exaggeration to describe it as chaotic'.[16] The judgment then highlighted a number of occasions in the trial concerned with the issue of the applicant's representation and cited passages from the transcript which the Court regarded as demonstrative of the applicant's behaviour in the presence of the jury:

> On the first day of the trial, 2 May 1995, Mr Williams QC appeared but only to announce that his instructions and those of his junior and his instructing solicitors had been withdrawn. The appellant sought an adjournment of the trial because he was unrepresented, saying that if the adjournment was not granted he would not take part in the proceedings. The appellant informed his Honour of his reasons for withdrawing those instructions. He said that police intimidation had been 'condoned' by the Court; he claimed that the Court had refused to take contempt proceedings at his request against certain police officers and he claimed that Mr Williams had refused to conduct the defence in accordance with his instructions. The application for an adjournment was refused and the matter proceeded.
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> On 15 May 1995, the fifth day of the trial, Mr Williams QC appeared, informing the Court that he had, once again, been instructed to act on behalf of the appellant. He unsuccessfully sought an adjournment of the trial and a permanent stay of the proceedings. On the next day, shortly after the jury had been empanelled, Mr Williams' instructions were again terminated and the appellant was, once more, without legal representation.
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> On 18 May 1995, the eighth day of the trial, Mr O'Donnell announced his appearance for the appellant but on 22 May (which was the next day of the trial), he advised the Court that he had withdrawn from the case. The appellant, however, made it clear that he had terminated Mr O'Donnell's instructions because he had allegedly walked out of a conference.
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> On 22 May, Mr Peter Baird appeared for the appellant but on the same day he sought leave to withdraw.
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> On 31 May 1995, the 15th day of the trial, Mr O'Loughlin announced his appearance for the appellant, informing the Court that he would be led by Mr Terracini. He sought an adjournment until 12 June to enable him and Mr Terracini to read the brief and prepare the defence. His Honour refused that application, stating that it was his opinion that the appellant had become unrepresented through his own fault. His Honour's rulings on this aspect of the trial have not been challenged on appeal.
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> The matter proceeded with Mr O'Loughlin appearing for the defence until 5 June when he was joined by Mr Terracini. From that date until 29 June,[17] the 30th day of the trial, the appellant was represented by both counsel.
>
> On 29 June[18] the appellant terminated his counsel's instructions. Thereafter, Mr Terracini and Mr O'Loughlin moved in and out of the trial as their instructions were first withdrawn and then reinstated. It cannot be said that the appellant acted with justification in so frequently dismissing his lawyers. If he were justified in terminating their instructions, why then would he have reengaged them on so many occasions? Any suggestion that the answer to that question rests in

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16 *Eastman v The Queen* (1997) 76 FCR 9, 32.

17 The date 29 June appears to have been taken from the Miles Inquiry Report. It is incorrect. The applicant terminated instructions on 26 June 1995.

18 Idem.

an acknowledgment of fault by counsel would be ridiculed by the number of times their supposed incompetence or refusal to accept instructions allegedly justified their dismissal. This is apparent from the following timetable:

Day 33	10 July 1995	Re-instructed
Day 33	10 July 1995	Instructions Terminated
Day 34	11 July 1995	Re-instructed
Day 36	13 July 1995	Instructions Terminated
Day 37	14 July 1995	Re-instructed
Day 39	18 July 1995	Instructions Terminated
Day 39	18 July 1995	Re-instructed
Day 39	18 July 1995	Instructions Terminated
Day 41	20 July 1995	Re-instructed
Day 46	27 July 1995	Instructions Terminated
Day 48	31July1995	Re-instructed
Day 50	2 August 1995	Instructions Terminated
Day 52	8 August 1995	Re-instructed
	11 August 1995	Instructions Terminated
Day 65	31 August1995	Re-instructed
Day 78	25 September 1995	Instructions Terminated
Day 8	03 October 1995	Re-instructed
Day 84	10 October 1995	Instructions Terminated

The circumstances under which Mr Terracini's instructions were terminated for the last time on 10 October were quite astonishing. The appellant claimed (in the absence of the jury) that he had heard Mr Terracini have a verbal altercation with a person in the Courtroom shortly before the commencement of proceedings. He claimed that he heard Mr Terracini say 'Don't you stare at me like that you flea'. It would seem that this assertion was made by the appellant in the absence of counsel after Mr Terracini had informed the Court that all instructions had been terminated, although the transcript does not record the withdrawal of counsel. The appellant told the Court that when he inquired of him, Mr Terracini said that the other person was a police officer but that he refused to disclose his identity to the appellant. The appellant, when addressing his Honour, said that ' ... if my counsel is distracted by a police officer in this court moments before addressing the jury it becomes of interest to me against the background of numerous such incident [sic] going on over the last six years'.

Later the appellant said to his Honour that he was 'determined to make an issue of it'. So it was that when Mr Terracini subsequently refused to name the officer, his instructions were terminated. It was for Mr Terracini - not for the appellant - to make an assessment of the situation; he was the person who had been involved in the altercation; he was the one best able to decide what (if any) action should be taken. As his Honour said, Mr Terracini was 'an experienced, responsible member of the bar' who was 'well aware of his duties to his client'. In an expression of confidence in counsel, his Honour added that he had no doubt that Mr Terracini would have been satisfied that the incident did not in any way operate to the prejudice of the appellant. Regrettably, the appellant would not accept the views of his Honour; he was prepared to see his murder trial proceed without the benefit of counsel if his counsel would not submit to his unreasonable demands.

As from 10 October, the appellant remained without legal representation for the balance of the trial. This summary, which has not included his many changes of lawyers during the period preceding the trial, is indicative of the appellant's inability to work in harmony with his lawyers. It is not difficult to conclude that these many changes would have been disruptive to the trial, adding to the many difficulties confronting the trial Judge and the jury in a very difficult and important case.

To all this must be added a reference to the behaviour of the appellant throughout the course of the trial. He made vile, foul-mouthed, vituperative comments addressed to his Honour and to the Crown Prosecutor which led to the trial Judge having him removed from the Courtroom for part of

the trial. He was placed in a separate room with two-way video-television linkage to the Courtroom. His Honour was able to supervise the sound control so that the volume could be turned down when the appellant's abusive language warranted such action. No doubt that would have presented difficulties to the appellant but they were of his own making. His Honour's decision to deal with the appellant in this fashion is not the subject of a specific ground of appeal. But it is necessary to refer to the circumstances of his lack of legal representation and to his behaviour as they are relevant when considering some of the grounds of appeal.

Some examples of the appellant's behaviour extracted from the transcript are set out below. They indicate, among other things, that there were occasions when the appellant was invited by the trial Judge to cross-examine a witness, only to be met with a tirade of abuse. They indicate also that, even when his counsel was present, the appellant was determined to present his case in the manner that he saw fit. His abusive conduct was not put to the jury as constituting some form of propensity evidence - nor should it have been. But it had a material effect on the trial in matters such as bail and the appellant's removal from the Courtroom. The Crown put to the jury that the appellant's credibility was a significant part of the case and that, for the purpose of assessing his credibility, the jury was entitled to have regard to a variety of matters, one of which was the manner in which the appellant behaved throughout the course of the trial. The defence was, for its part, entitled as it did to put that the appellant was an innocent man who had been 'framed' by the police and whose outbursts in Court were those of an innocent man unjustly brought to trial. The defence also led evidence that the appellant was a kind man, not given to violence. It was put on the appellant's behalf that his frustrations with the Public Service and the police were momentary expressions of short-lived anger. These respective submissions of the Crown and the defence were proper submissions for a jury and it was for the jury to make such use of them as it thought appropriate. In the course of its deliberations the jury was therefore entitled to have regard to the manner in which the appellant had conducted himself throughout his trial for the purpose of their evaluation of all the evidence.

The following extracts from the transcript are selective but they give a reasonable indication of the appellant's behaviour in the presence of the jury:

29 May 1995:
[Constable Connelly had just been called as a witness, and sworn:]

The accused:	Stop judicial condonation of harassment.
His Honour:	Please restrain yourself, Mr Eastman. You are doing yourself no good by behaving in this fashion in front of the jury. Carry on.
Mr Adams:	Yes. Name rank and station?
The witness:	My name is Shane Connelly -
The accused:	Stop judicial condonation of harassment.
His Honour:	Mr Eastman, you must restrain yourself.
The accused:	Your Honour, I have restrained myself. I have been very patient and your Honour has not been prepared to address a matter. I have complained to you about the presence in court of a Sheriff's Officer who has intimidated me and you have refused to take any action.
His Honour:	I did not say I refused to take any action.
The accused:	I raised it -
His Honour:	I said I would deal with it at I pm ...

The appellant raised continuously his complaint of harassment. He perceived, in the conduct of the police and the prison authorities a form of personal victimisation. His call to 'Stop judicial condonation of harassment' was an oft-repeated response to a question from his Honour.

Other examples of this conduct appear during the evidence of Dr Braun:

24 August 1995:

Mr Adams:	Is your name Angelika Braun?

The accused: Stop judicial condonation of harassment by Sergeant Baldwin.

This reaction was repeated a short time later.

His Honour: Mr Eastman, do you have any questions of Dr Braun?
The accused: I have a comment. Stop harassment by Sergeant Baldwin.
His Honour: Please, do you have any questions of Dr Braun?
The accused: Charge Sergeant Baldwin with contempt of court.
Mr Adams: I think that is a no, your Honour.

More extreme examples of his behaviour were as follows:

18 July 1995:
His Honour: My duty is to apply the law, I was - I am bound by my -
The accused: You would not know the law from a bull's foot. You are -
His Honour: I was bound-
The accused: You are a silly old man, and a rather -
His Honour: Yes, very well. You may leave -
The accused: - a rather nasty old man as well.

24 August 1995:
Mr Adams: There is a specific list.
The accused: Listen, shut up, fat arse. Shut up, you stupid fat slob.
His Honour: Look, this has got to stop. Turn the sound off. This has just got to stop. Now, you carry on with your evidence in-chief.
and
His Honour: Yes, I consider it is relevant. There has never been any prior objection to it and I propose to allow it.
The accused: Well, you have got an objection now.
His Honour: Yes, and I have just over-ruled it.
The accused: You corrupt shit.

and
His Honour: Well, now, do you have any questions by way of cross-examination of the witness?
The accused: Yes, I would like to ask your Honour why you are such a corrupt shit.

and
The accused: Yes, I wish to ask your Honour why you are such a lying cunt.
His Honour: Yes, well, I will treat that as no. You are excused, constable.

and
His Honour: Very well. Do you wish to ask the constable any questions?
The accused: Yes, your Honour. I was wondering whether all New South Wales judges are lying corrupt shits.
His Honour: I will prove [sic] that as no. You are excused, constable.

5 September 1995:
Mr Terracini: Well, it is a difficult task.
His Honour: Well, it is not difficult. It is no different from any other case. And the Crown objects, I give a ruling and then an attempt is merely made to circumvent the ruling, which imposes a really quite intolerable strain on me, because I really do not feel that I should have to attempt -
The accused: You poor little thing. Dear, oh dear.

and
The accused: Well, I do not intend to be bullied to that extent. I have my rights -
Mr Terracini: It is now 4.05, your Honour.

The accused:	... and I am not going to continue giving evidence under duress. Now, either you put a stop to it, or I interrupt my evidence until you are prepared to do it ~ your duty as a judge to stop this sort of thuggery, and they are getting the clear message that it's okay with you .
Mr Terracini:	Mr Eastman, if I could just mention this. It is now five past four, your Honour, we could simply raise these matters with your Honour -
His Honour:	I think that we should carry on until 4.15, dealing with the accused's evidence relating to the trial.
Mr Terracini:	Certainly.[19]

Evidence at Trial

35. In order to appreciate the context in which each paragraph of the order is to be considered, and to address any doubt or question as to guilt, it is helpful to gain an overview of the evidence led at trial and the strength of the Crown case. Miles CJ summarised the case in his Report,[20] but it is convenient to have regard to the excellent summary provided in the judgment of the Full Court on the appeal against conviction:

> The indictment was dated 29 March 1993 and was filed in the Supreme Court of the Australian Capital Territory on about that date. On 5 October 1993 a trial date was fixed for 5 April 1994. That date was, however, varied on a number of occasions and for a number of reasons. Ultimately, after listings for 6 February 1995 and 3 April 1995 had been vacated, the case was called on for hearing before Carruthers AJ on 2 May 1995. After hearing preliminary arguments over the succeeding two weeks, a jury was empanelled on Tuesday, 16 May 1995. On 3 November 1995 the jury returned a verdict of guilty and a week later, on 10 November 1995, the appellant was sentenced to imprisonment for life.
>
> During the course of the trial the Crown presented in excess of 200 witnesses. There were almost 7000 pages of transcript and over 300 documentary and other exhibits.
>
> At the time of his death Mr Winchester was an Assistant Commissioner in the Australian Federal Police (the AFP) and the highest ranking police officer serving in the Australian Capital Territory. Death occurred at about 9.15 pm as the deceased was alighting from his car near his home in Lawley Street, Deakin, a suburb of Canberra. Mr Winchester was in the habit of parking his car in his neighbour's driveway. His neighbour, a widow, found comfort in having a car on her premises pointing to the presence of occupants in her house.
>
> When found by his wife shortly after the murder, the deceased was in a slumped position behind the driving wheel of his car; the driver's door was open and his right leg was on the ground. The automatic transmission was in 'park' and the car lights had been turned off. He had been shot twice at close range - once in the back of the head and once in-the-face on the right hand side. According to the medical evidence, the wound to the back of the deceased's head occurred first and was likely to have caused instant death.
>
> Immediately before his death, Mr Winchester had visited his brother, Ken, in nearby Queanbeyan. This visit was not part of a normal routine or pattern and therefore it could not be suggested that the killer was earlier aware of the deceased's likely movements. Mr Ken Winchester said that he had not noticed any other vehicle about when his brother left to go home.
>
> Mrs Winchester said that she heard the sound of her husband's car at about 9.15 pm and that a short time later she heard noises which she described as sounding 'like sharp stones coming up on to the front of the window'. She said that there were two distinct sounds - the second following

[19] *Eastman v The Queen* (1997) 76 FCR 9, 32-37.

[20] Inquiry under s 475 of the *Crimes Act 1900* into the matter of the fitness to plead of David Harold Eastman, Report vol 1. (2005) 6-12 [24]–[48].

immediately upon the first. Obviously, they were the sounds of the two shots that killed the deceased. When Mr Winchester had not come into the house, Mrs Winchester went looking for him and it was then that she found his body. The Crown case was that the shots had been fired from a .22 calibre weapon to which a silencer had been affixed and that supersonic ammunition (such as PMC Zapper) had been used. If that be correct, the use of the silencer would have a muffled the sound of the shots that were fired but not that of the bullets breaking the sound barrier. This would also account for the manner in which Mrs Winchester described the sounds that she heard.

Police officers who attended at the scene of the crime searched the immediate area. Two PMC cartridge cases were found but no weapon was located. Indeed, the murder weapon has never been found. Microscopic examination of the two cartridge cases by Superintendent Prior led him to form the opinion that the murder weapon was a Ruger 10/22 rifle. That conclusion was not challenged by the defence.

The assistance of Mr Barnes from the Victorian Forensic Science Laboratory was sought by the investigating police officers as a matter of urgency. He arrived at the scene of the crime at about 3 am on 11 January 1989 and commenced work in his field of expertise - the collection and interpretation of gunshot residue. Mr Barnes took stub samples from both entry wounds and from selected areas of the car. Later that morning, a police officer, Sergeant Nelipa, vacuumed the ground in the immediate area of the driver's door of the car.

The appellant's car was later impounded and searched for gunshot residue on 18 January 1989. Both Mr Nelipa and Mr Barnes were involved in that search. It will be necessary to return to the subject of the identification of gunshot residue in detail at a later stage in these reasons.
It was the case for the Crown that the murder weapon was a Ruger 10/22 rifle that had been purchased by the appellant from a Louis Klarenbeek, and that at the time of purchase the rifle was fitted with a silencer. Mr Klarenbeek was questioned by the police and gave them a statement, but he died before the trial commenced. During the trial, the defence adduced evidence through Detective Pattenden that he had spoken to Mr Klarenbeek on 28 January 1989 and that he had, on that day, shown him a Photo Board containing several photographs, one of which was of the appellant. Mr Pattenden said that Mr Klarenbeek said that he did not recognise any of the photographs.

The police traced the ownership of the Ruger back from Mr Klarenbeek to a Mr Noel King. Mr King had, in turn, purchased it from a Mr Caldwell. When Mr King sold the rifle to Mr Klarenbeek in October 1988 it was fitted with a telescopic sight and the barrel had been threaded so that a silencer could be fitted.

Mr Caldwell said that over a number of years he had spent his holidays on a particular Reserve where he and his companions had engaged in target practice and rabbit shooting. He took police to the location where, using metal detectors, the police located a number of spent .22 calibre cartridge cases. Ultimately, testing by Mr Prior revealed that nine of those cartridges resembled, very closely, the two cartridges that had been found at the scene of the crime.

Mr Klarenbeek also handed police seven .22 calibre cartridge cases. He said he had recovered them from an area where he had test-fired the Ruger that he had purchased from Mr King. Four of those cartridges were identified by Mr Prior as having been fired by rifles other than a Ruger. His examination of the remaining three led him to conclude that two of them were Stirling brand and one was a CCI brand cartridge case. None of them was a PMC brand. In concentrating his examination on those three cartridge cases, Mr Prior ultimately formed the opinion that one of them had been fired from the same rifle that had fired one of the cartridge cases found at the scene of the crime.

The absence of a PMC cartridge case from the samples handed over by Mr Klarenbeek can be explained as the obvious result of different brands of .22 ammunition being used on different occasions. Evidence that Mr Klarenbeek had used Stirling and CCI brands when he test fired the

rifle has an additional significance that will be discussed when consideration is given to the subject of gunshot residue.

Mr Prior's conclusions were independently supported by Mr Barnes, by Special Agent Richard Crum of the United States Federal Bureau of Investigation and by Chief Superintendent Bernard Schecter, the head of the Investigations Department, Division of Identification and Forensic Science of the Israeli National Police. Although the grounds of appeal anticipated a challenge to the expertise of Mr Barnes (which was not pressed at the hearing), no attempt was made, either during the trial or on the appeal, to question the qualifications of Mr Crum or Mr Schecter. There can be no doubt that the rifle used to kill Mr Winchester was the rifle that Mr Klarenbeek had acquired through Mr King from Mr Caldwell. However, save for the evidence of Mr Webb, which evidence is the subject of challenge in this appeal, there was no other direct evidence that Mr Klarenbeek had sold the rifle to the appellant.

Further, the appellant denied on oath that he had purchased any weapon from Mr Klarenbeek; he also denied that he had ever visited Mr Klarenbeek's premises.

Mr Webb gave evidence that he had seen an advertisement for the sale of various firearms that had been placed in the *Canberra Times* by Mr Klarenbeek on Saturday, 31 December 1988. On arrival at Mr Klarenbeek's house in Queanbeyan that day he was shown several weapons, including a Ruger 10/22 rifle. He noticed that its barrel was threaded so that a silencer could be fitted and that it had a telescopic sight. There were three silencers on the table where Mr Klarenbeek was displaying items which he had for sale. Mr Webb said that as he was leaving Mr Klarenbeek's premises another person arrived. It was necessary for Mr Webb to turn sideways so that the two men could pass on the pathway without colliding. He said he made eye contact, and the other person was not moving out of the way. He subsequently identified that person as the appellant. Mr Webb said that he returned to Mr Klarenbeek's house on Thursday, 5 January 1989 and purchased a Tof .22 rifle. He then noted that the Ruger 10/22 was no longer on display. He said that Mr Klarenbeek did not require him to produce any type of license.

Shortly after the murder, following a television program in which the police appealed for information about Ruger rifles, Mr Webb contacted the police. He told them that he had seen one at Mr Klarenbeek's house but he made no mention of the man who had arrived as he was leaving, nor did he refer to him when he gave a written statement to the police six months later on 28 August 1989. Much later in the year he saw, so he claimed, the appellant on television and recognised him as the man whom he had seen at Mr Klarenbeek's house. In evidence-in-chief he said that he had not mentioned the other man when he first spoke to the police as he did not recall the subject being raised. However, he admitted that in his statement of 28 August he had falsely stated that whilst he was at Mr Klarenbeek's house on 31 December 1988 ‘nobody else came to look at the rifle he had for sale ...’. Mr Webb also repeated that statement when giving evidence on oath at the Inquest. He offered, as his explanation, that he did not want to get involved, that he had visited Mr Klarenbeek during his working hours without his employer's permission and that he was scared for himself and his family. He also assumed that Mr Klarenbeek would have been able to identify the person who had bought the Ruger 10/22 rifle. It was not until sometime late in 1992 that Mr Webb told the police that he had identified the appellant on television some three years or so earlier. It will be necessary to return to Mr Webb's evidence when considering the grounds of appeal.

The Crown led other evidence that pointed to the appellant being the person who purchased the Ruger 10/22 rifle from Mr Klarenbeek. First there was the evidence of a Mrs Mercia Kaczmarowski. She lived in the street behind Mr Klarenbeek’s house. She recalled Saturday, 31 December 1988. She had a friend staying with her and was about to go away on holidays. She noticed a motor vehicle parked outside her home and was attracted to it because it had ‘a very interesting bumper bar’ as well as ‘a new style of number plate for the ACT’. At the request of the police she looked through a book of photographs of different motor vehicles and picked one that she considered to be similar to the car which she had seen. The photograph happened to be one of the appellant's car, a blue Mazda 626 sedan. Next there was the evidence of a Mr Dennis Reid, the proprietor of a sports store in Queanbeyan. His evidence was that a few days before the murder of Mr Winchester

a man brought a Ruger 10/22 rifle to his store, offering to sell it. Mr Reid noted that the rifle had a telescopic sight and no front sight because the end of the barrel had been threaded to fit a silencer. Mr Reid was not interested in purchasing the rifle but told the customer that he might be able to find a purchaser. However, the customer declined to identify himself saying that he would ring Mr Reid at a later time (which he did). The customer's reluctance to leave a telephone number made Mr Reid suspicious - he thought the weapon might have been stolen. He told his son, Peter, to follow the customer but Peter was unable to note anything other than that the customer drove away in a blue sedan.

Mr Reid reported the incident to the police after seeing a television program dealing with the death of Mr Winchester. He was interviewed and shown a Photo Board but was unable to make any positive identification. Much later, in May 1990, Detective Lawler showed Mr Reid a different Photo Board and on this occasion Mr Reid tentatively identified the appellant saying that he was 'reasonably sure of number 5, probably 80 per cent, to that ability, but I couldn't do it 100 per cent'. Later, in co-operation with the police Mr Reid waited in Petrie Plaza, a large public mall in Canberra that was frequented by the appellant. On 25 August 1990 Mr Reid saw the appellant in the plaza join a queue at an automatic teller machine. He recognised the appellant as very similar in appearance to the man who had come into his store, but was not prepared to make a positive identification. He suggested to the police that it might help if he had an opportunity to speak to the man. The police agreed and Mr Reid, on a later occasion, twice approached the appellant at the Jolimont Centre in Canberra and spoke with him. Following this, Mr Reid stated that he was certain that the appellant was the man who had come into his store. The appellant denied visiting Mr Reid's shop but he recognised Mr Reid as the man who had spoken to him at the Jolimont Centre. The appellant claimed that he had never seen Mr Reid before that occasion.

Although the appellant denied purchasing a rifle from Mr Klarenbeek, he did not deny that throughout 1988 he had made numerous inquiries with respect to the purchase of some form of firearm. The Crown led evidence of the appellant's telephone records and was able to match outgoing calls to telephone numbers listed in advertisements for the sale of guns that had appeared from time to time in the Canberra Times. The appellant's explanation was that on 17 December 1987, he had had an altercation with a neighbour, a Mr Russo, and that he was fearful that Mr Russo might attack him. He was seeking a weapon for self protection. He said that he knew that Mr Russo carried a firearm with him in his motor car (an assertion denied by Mr Russo). The appellant's case was that Mr Russo had been the aggressor on 17 December 1987 but that he, the appellant, as the innocent victim, had unfairly been charged by the police with assaulting Mr Russo (the Russo assault charge). The Russo assault charge was of importance to the Crown case as it was said to play a central part in the appellant's motive for the murder of Mr Winchester.

Mr Geoffrey Bradshaw gave evidence that the appellant attended at his premises and purchased a Stirling .22 rifle fitted with a telescopic sight on 10 February 1988. During their investigations the police were able to link this weapon to the appellant as his thumbprint was detected on it. The appellant gave Mr Bradshaw a false name. When asked in cross-examination to explain why he had done that, the appellant claimed that the police would have refused him a gun licence because of the pending Russo assault charge. Shortly after completing the purchase, the appellant returned the Stirling to Mr Bradshaw, claiming that its mechanism was jamming. He did not, however, return the telescopic sight. The appellant claimed that it was broken; he said that he had smashed it and thrown it away.

A few days later, on 13 February 1988, the appellant purchased a Ruger 10/22 rifle from a Mr James Lenaghan (the Lenaghan rifle). Mr Lenaghan said that the appellant did not want a telescopic sight. The appellant walked to and from Mr Lenaghan's house and he had no car in sight. He did not give his name. On 1 May 1988 that weapon was found secreted away in a culvert on the old Federal Highway just outside of Canberra. During cross-examination the appellant admitted to purchasing this rifle and to putting it in the drain. When asked to explain this, he said that Mr Russo had 'moved out and I felt that the extreme danger, at least, was over and there was no need for me to be seriously concerned any longer'. The appellant was unable to recall when Mr Russo had left the neighbourhood - he thought it might have been a month or two after he

bought the Lenaghan rifle. He claimed that because of Mr Russo's departure he no longer had any use for the weapon.

At an early stage of the trial, whilst giving evidence on a voir dire hearing, the appellant had said of the Crown Prosecutor that he had, during his opening address to the jury, recited 'a long litany of outrageously false accusations, accusing me of ... acquisition of firearms which was [sic] all totally false ...'.

When asked in cross-examination to explain why he had made that statement, the appellant claimed that his evidence had been misunderstood and that he had only been referring to the false accusation that he had purchased the murder weapon from Mr Klarenbeek. The Crown answer to this explanation was that the appellant had come to realise the strength of the Crown case that identified him as the purchaser of weapons from both Mr Bradshaw and Mr Lenaghan and that he had therefore found it necessary to modify his story and to admit to the purchase of these weapons, citing his fear of Mr Russo as his explanation. However, this did not explain why the appellant felt compelled to hide the rifle in the culvert.

Bearing in mind that the appellant maintained that he had secreted the Lenaghan rifle sometime before 1 May 1988 (the date of its discovery) for the reason that he no longer had any use for it, it is significant that the Crown was able to lead evidence that in June, and again in November 1988, the appellant was still searching for a firearm. The appellant's diary had been seized during the execution of a search warrant on his flat on 18 January 1989. The numbers and words '24 Adinda Street, Waramanga' were identified as a partially erased entry in the diary. Further inquiries revealed that on 4 June and 29 October 1988, the occupant of those premises, a Mr Scott Thompson, had advertised a Ruger 10/22 rifle for sale in the Canberra Times. He recognised the appellant as the person who called at his home and either then or later tried to buy the rifle at a price lower than that advertised. He also said that the appellant wanted him to make the sale in Queanbeyan in New South Wales, to avoid the need to comply with the ACT's gun laws for registration of firearms.

Mr Ingle, Mr Thompson's flat-mate, also identified the appellant as a person who called one evening in November 1988 to look at the rifle. Neither Mr Thompson nor Mr Ingle were asked any questions in cross-examination by counsel for the defence. As he had previously done, the appellant advanced Mr Russo as the reason behind his further inquiries about the purchase of a firearm. He said, under cross-examination, that sometime in June 1988 he was driving his motor car when he saw Mr Russo travelling in the opposite direction. He said that through his rear vision mirror he observed Mr Russo do a U-turn and commence to follow him for some distance. Fearful that Mr Russo intended to harm him, the appellant decided to make some further inquiries about purchasing another weapon. However, the price that Mr Thompson was asking was, presumably, too much for the appellant. He said that some other incident, the details of which he could no longer remember, caused him to make further inquiries - this time through Mr Ingle later in November 1988. However, the price remained too high. If, as he claimed, the appellant was once again fearful of Mr Russo, there was an apparent lack of urgency in his attempts to acquire a weapon to protect himself. A more likely inference is that he felt compelled to purchase a replacement rifle for the one that he had hidden in the culvert.

It was the case for the Crown that the appellant's alleged fear of Mr Russo was concocted to explain away the cogent evidence that throughout 1988 the appellant was searching for a suitable firearm. The Crown was able to produce a letter written by the appellant to his German pen-friend, Ms Irene Finke, on 24 December 1987. That was a week after the altercation with Mr Russo.

Although he mentioned the fight and told her that he had been charged with assault by the police, he did not suggest any fear of Mr Russo. The Crown also produced correspondence from the appellant to the Housing Trust in which he complained about Mr Russo's conduct. Again there was no mention of him being fearful of Mr Russo; nor did he mention any fear of Mr Russo when he sought to enlist the aid of Senator Reid and the then Shadow Attorney-General, Mr Neil Brown QC.

> He had hoped that they might have been able to exert some influence and have the assault charge withdrawn.
>
> The Crown case placed great emphasis on the appellant's attempts to rejoin the Australian Public Service. These attempts had continued over many years. The Crown contended that setbacks which the appellant encountered along the way had caused him extreme anger about alleged injustices. The Russo assault charge was perceived by the appellant as a further injustice which also had the potential to destroy his chances of re-engagement. The Crown case was that these events caused the appellant great resentment towards the police, and in about December 1988 towards Mr Winchester in particular. In the unusual circumstances of this case, these matters provided the appellant's motive for the murder.[21]

36. The Full Court then dealt with the history of the applicant's employment and dispute with the Australian Public Service (APS) and summarised the applicant's adverse reactions to decisions which were not favourable to his attempt to gain re-entry into the APS. The following passages also summarise the evidence concerning the applicant's history of aggression and violence and his adverse response to a meeting with the deceased on 16 December 1988:

> Evidence was led as to the way in which the appellant reacted to adverse decisions made against him in the course of his campaign to gain re-entry into the Public Service. This evidence was led to show the intensity of his feelings. It was claimed that the appellant made threats of violence to Mr Michael Frodyma and Mr Maurice Kennedy, officers of the Department of Finance, who, in the eyes of the appellant, were perceived to have had some direct or indirect participation in the decision to reject his compensation claim in August 1987. For example, according to the evidence of Mr Frodyma, the appellant threatened 'to come around with a baseball bat' and to knock his 'fucking head in ...'. Mr Kennedy, who was Mr Frodyma's immediate superior, said that he received a phone call from the appellant subsequent to the occasion when the appellant allegedly threatened Mr Frodyma with the baseball bat. According to Mr Kennedy, the appellant shouted at him saying that he (Mr Kennedy) was ' ... a fucking liar, deceitful, and a fucking bastard'. Mr Kennedy continued in his evidence that he said to the appellant that if he did not withdraw the threat to his staff 'the matter would be put in the hands of the police. He did not withdraw and told me 'You are included' in the threat that I understood that he'd made to Mr Frodyma'.
>
> Mr Bewley had been interviewed on television in late 1985 about his dispute with the Commissioner for Superannuation. Shortly after the broadcast, the appellant visited him and they discussed their respective disputes with the Commissioner. Mr Bewley said that the appellant became agitated and eventually said 'well sometimes I just get so frustrated I could just get a gun and kill someone'. Mrs Bewley corroborated her husband's evidence. Neither Mr nor Mrs Bewley was cross-examined. Another example of the threatening attitude of the appellant was provided by Ms Vick who, in 1988, was a member of the staff of Senator Haines. The appellant had approached the Senator hoping that she could assist him in his attempts to obtain re-employment in the Public Service. According to Ms Vick, she considered that the appellant was unhappy and frustrated about his lack of success. Ms Vick said that in one telephone conversation in September 1987 (shortly after the rejection of his claim for compensation), the appellant said to her: 'I'll probably have to kill someone to get the attention paid to the injustice that's being done to me.' Ms Vick said that she asked the appellant should she take him seriously.
>
> When he replied 'Yes' she told him that she intended to report the matter to the police. At that stage of the trial, the accused was represented by counsel. During cross-examination, Ms Vick's evidence about the threat was not challenged. However, she did agree that she did not feel personally concerned by the threat nor did she feel that it was directed towards Senator Haines or any member of her staff.

[21] *Eastman v The Queen* (1997) 76 FCR 9, 14–20.

At this stage in the narrative it becomes necessary to refer, once again, to the Russo assault charge. The appellant had made several attempts to have the charge withdrawn. He had been unsuccessful and the charge had been listed for hearing on 12 January 1989, two days after the death of Mr Winchester. It was the case for the Crown that the appellant had developed an intense hatred for all members of the police force. He saw the Russo assault charge as an example of police corruption and as evidence of ill-will towards him personally. The Crown relied upon the evidence of several witnesses, including Chief Superintendent Mills and Inspector Kirk, to demonstrate the scale and intensity of the appellant's campaign and the great hostility shown by him towards the police.

Mr Mills had met with the appellant on 21 December 1987. According to his evidence the appellant complained that he was the victim of the Russo assault, that his complaint had not been investigated properly and that two police officers, whom he named, lacked impartiality. Mr Mills said that when he told the appellant that he would have Inspector Tomlinson investigate his complaints; the appellant replied that he 'wasn't very pleased with that'. According to Mr Mills, the appellant added that he did not think that Mr Tomlinson 'would be sympathetic to my concerns'. Mr Mills arranged for another officer to investigate the appellant's complaint but later, in February 1988, the appellant rang Mr Mills complaining that the investigation was not being conducted fairly. Mr Mills had yet another officer review the matter. But still the appellant remained unsatisfied. He rang Mr Mills saying of the officer: 'He is inept and on top of that he's corrupt.' Mr Kirk had interviewed the appellant in March 1988 with respect to the Russo assault, shortly after the summons had been served on the appellant.

Mr Kirk recalled that he told the appellant that he had reviewed the file and that he considered that the matter should be permitted to take its course. According to Mr Kirk, the appellant replied 'you are a corrupt person, you are criminally corrupt'.

A neighbour of the appellant, a Mrs Donna Heritage, gave evidence that the appellant had talked to her and to her husband about the Russo assault charge. Both said that the appellant had maintained his innocence. Mrs Heritage went on to say that the appellant accused the police of being corrupt, adding that the appellant said ' ... if it's the last thing he does he will get back at the police'. The evidence of these witnesses, Mr Mills, Mr Kirk and Mr and Mrs Heritage was not challenged. At the time when they respectively gave their evidence the appellant was unrepresented and declined to cross-examine them.

According to the Crown case, the intensity of emotion displayed by the appellant both in terms of his desire to re-enter the Public Service and his ill feelings towards the police; culminated on 16 December 1988. The appellant had earlier sought the assistance of Mr Brown QC in relation to the Russo assault charge, claiming that he was a victim of a police conspiracy. Mr Brown, recalling that the appellant had told him of his efforts to obtain re-employment in the Public Service, said in evidence, 'and my general impression of what he was saying was that he wanted to have this particular matter, that is to say this matter concerning the police, cleared up, I assume because it would enhance his prospects of going back to work in the Treasury'.

Mr Brown said that the appellant had requested him to arrange an appointment with Mr Winchester as he was the senior police officer in the Australian Capital Territory. The appellant had said that he wanted the charge 'dropped'. After some discussion, Mr Brown agreed to write Mr Winchester and was successful in obtaining an appointment to attend with the appellant on Mr Winchester on 16 December. At that meeting the appellant outlined his complaints but Mr Winchester stated, quite firmly, that he would not intervene.

He said that the matter was with the Director of Public Prosecutions (the DPP) and that the conflicting issues should be resolved by a magistrate. According to Mr Brown, the appellant became increasingly agitated, at one stage saying to Mr Winchester: 'If your hoons think they can treat me like this they've got another think coming.'

Mr Winchester defended his officers but still said that he would write Mr Brown with his final answer. By letter dated 20 December 1988, Mr Winchester wrote Mr Brown telling him that he

would not personally intervene. Mr Brown sent a copy of that letter to the appellant. It was the Crown case that this final rejection generated great emotion and anger in the appellant.

The appellant prevailed on Mr Brown to write the Commissioner of Police, Mr Peter McAulay, asking him to intervene on the appellant's behalf. The Commissioner replied direct to the appellant by letter dated 9 January 1989, informing him that he would not intervene. Evidence was called from the office of the Commissioner and from Australia Post which established that this letter would have been delivered to the appellant, in the ordinary course of the mail, at about 9.30 am on 10 January 1989, the day upon which Mr Winchester was murdered.

It was the Crown case that the appellant perceived Mr Winchester's attitude as further evidence of police corruption and as part of a personal campaign against him. In support of that proposition, the Crown pointed to the evidence of Inspector Craft. Mr Craft had met the appellant, accidentally, outside the police building. He was unsure of the date; he thought that it was either 3, 4 or 5 January 1989. He had not applied his mind to the incident involving the appellant until 30 January 1989 when he made a statement setting out his recollection of the meeting. According to Mr Craft, the appellant said to him, pointing generally in the direction of Mr Winchester's office: 'The Executive in this building is corrupt and has a lot to answer for.'

The Crown also relied on the evidence of Sergeant Coutts and Mr Ostrowski. Sergeant Coutts knew the appellant and saw him in the afternoon of the day of the murder in a car park near the city police station. It was a car park that was used to park police vehicles. The appellant was observed looking into several of those vehicles. Independently of these observations the Crown also led evidence that listening devices had subsequently been secretly installed in the appellant's flat. Through those devices the appellant had been heard - presumably talking to himself - uttering words to the effect that he had visited the street where Mr Winchester lived and had noted that he was in the habit of parking his car in his neighbour's driveway rather than his own. The Crown argued that these two pieces of evidence made it relevant that the appellant displayed an interest in police vehicles and their contents only a few hours before the death of Mr Winchester.

Mr Ostrowski was a friend of the appellant and an employee of the Public Service. He gave evidence of occasions when the appellant had spoken to him about his attempts to rejoin the service. He also recalled that the appellant had asked him to inquire whether there were positions available in the Department of Administrative Services where Mr Ostrowski worked. Mr Ostrowski knew that the appellant had received the necessary medical clearance to rejoin the Public Service and was also aware of the pending Russo assault charge.

Mr Ostrowski claimed that he reminded the appellant that 'under the *Public Service Act* anyone with a criminal record would be precluded from entering the Public Service'. According to Mr Ostrowski, the appellant had complained to him that he was innocent of the charge, that Mr Russo had been the aggressor and that he (the appellant) was the subject of victimisation and persecution. Mr Ostrowski was not challenged on these aspects of his evidence by counsel for the defence but the appellant, when giving evidence in chief, maintained that although he had no recollection of discussing the matter with Mr Ostrowski, he would not have taken any notice of what he had said: ' ... with dear respect to Mr Ostrowski, he was pretty astray in his judgment and knowledge of the public service ...'

Another witness, a Mr Dennis Barbara had acted as the appellant's solicitor for a short time with respect to the Russo assault charge. He said that on an occasion in late November or early December 1988, during a discussion with the appellant and after his professional relationship had ended, the appellant had said to him 'I will kill Winchester and get the Ombudsman too'.
On 6 January 1989 the appellant consulted his medical practitioner, Dr Dennis Roantree. The doctor, who gave evidence for the Crown, said that the appellant had told him that he was 'worried about a pending assault charge'. The appellant also told him of his meeting with Mr Winchester.

> According to Dr Roantree, he felt that the appellant exhibited 'extreme anger' and he also described the appellant as 'furious'. Dr Roantree had written in his notes that the appellant said as he left: 'I should shoot the bastard'.
>
> However, Dr Roantree had subsequently crossed that statement out. When asked during his evidence in chief, to explain why he had done so, the witness said that he had previously told police that he was not prepared 'to swear to that'. Later, however, he acknowledged 'that had I not recalled that accurately, I wouldn't have ever mentioned it'. At this stage of the trial the appellant was unrepresented and declined to cross-examine Dr Roantree.
>
> In the peculiar circumstances of this case, this litany of violence, aggression and hate is not merely propensity evidence. If the Crown is to prove, by circumstantial evidence, that the appellant murdered Mr Winchester, facts that are subsidiary to or connected with the act of murder must be established from which the conclusion follows as a rational inference.[22]

37. The Full Court then dealt with authorities concerned with evidence disclosing the applicant's propensity to violence, after which the judgment turned to the question of motive and other evidence in the trial:

> The Crown based its case against the appellant upon a particular relationship that was said to exist between the appellant and the police force in general. It was, said the Crown, a unique relationship that centred upon his hatred for, and frustration with, the authority that the police force had come to represent. His hatred, according to the Crown, came to a climax when he realised that the Russo assault charge would not be dropped. The realisation of that fact, the Crown maintained, then caused his hatred to focus directly upon Mr Winchester in particular. The Crown put its case upon the premise that the relationship between the appellant had transformed into a special relationship, albeit a one sided relationship, that the appellant had with respect to Mr Winchester. In our opinion the Crown was entitled to lead evidence that established both the appellant's general relationship with the police force and his special relationship with Mr Winchester. The particular relationship constituted the context within which the death of Mr Winchester was alleged to have occurred ...
>
> Furthermore, the inclusion of this evidence was justified on the basis that it may have enabled evidence of the offence to be placed in a 'true and realistic context, in order to assist the jury to appreciate the full significance' of what has happened: *R v Beserick* (1993) 30 NSWLR 510 at 515 per Hunt CJ at CL with whom Finlay and Levine JJ agreed.
>
> Drawing the many threads together, the Crown case had, at this stage, developed into a series of propositions that may be summarised in the following terms. First, by the latter half of 1988 the appellant's attempts to gain re-entry into the Public Service had progressed to the point where he had been granted a further medical review, and then the letter from the Commissioner for Superannuation, dated 21 December 1988, offered the appellant a limited opportunity to regain employment. That was a goal that the appellant had relentlessly pursued for over 1O years. Secondly, the pending Russo assault charge - a false charge in the eyes of the appellant - had the potential to destroy (or at least, impair) his chances of getting back into the workforce. Thirdly, the false charge was a manifestation of police corruption and victimisation. Fourthly, the sense of frustration arising out of the appellant's ongoing attempts to have the assault charge withdrawn reached breaking point either at his personal meeting with the deceased or, more likely, when he received the letter from Commissioner McAulay. Finally, driven by his desire to return to the workforce, and overwhelmed by his determination to avenge the injustice he felt he had suffered, the appellant focused his murderous intent on Mr Winchester.
>
> The appellant was first questioned about the death of Mr Winchester on the day after the murder, 11 January 1989. Detectives Thomson and Jackson interviewed the appellant concerning his meeting with Mr Winchester on 16 December 1988 at his home in the presence of his solicitor

[22] *Eastman v The Queen* (1997) 76 FCR 9, 21-25.

(who was, coincidentally, at the appellant's residence in connection with the Russo assault charge). Detective Jackson's evidence, which was not disputed by the appellant during the course of his cross-examination was as follows:

I said: 'I've been informed that at the conclusion of the meeting, you refused to shake Mr Winchester's hand, when it was offered to you. Is that right?'
He said: 'Yes, I did not shake his hand.'
I said: 'I've also heard that you said 'I will not shake your hand until you have fixed it'.'
He said: 'No, I think I said something like, it's not a time to shake hands until it has been resolved.'
I said: 'Did the meeting you had with Mr Winchester make you feel angry towards him?'
He said: 'No, more upset than angry.'
Thomson said: 'Can you tell us what you did last night?'
He said: 'I just drove around. I go for drives quite a lot at night as it relaxes me.'
Thomson said: 'Where would you have gone to last night?'
He said: 'I don't really remember.'
Thomson said: 'Where do you think you would have gone?'
He said: 'I go out each night buy take-away food, either a hamburger or a bucket of chips or a milkshake.'
I said: 'What time do you normally go out at night?'
He said: 'Any time, depends when I am hungry. If I am hungry at 11 at night I will go out and buy a bucket of chips and a newspaper. I don't go to sleep until about two each night and I don't watch TV.'
Thomson said: 'Did you get something to east [sic] last night?'
He said: 'I may have. I don't remember.'
Thomson said: 'If you had bought something last night where would it have been from?'
He said: 'It could have been Lonsdale Street, sometimes I go to George's or the Honey Bunny at Queanbeyan. It just depends where I am hungry.'
I said: 'When you drive, where do you normally go?'

The appellant then gave a description of where he normally drove at night.

When asked if he had been to any of those places the previous night:

He said: 'I may have, I can't remember.'
Thomson said: 'What time did you go out last night?'
He said: 'I don't remember. It could have been any time.'
Thomson said: 'It is important that you try and remember what time you went out and where you went to last night.'

The appellant recollected that it was about 10 o'clock when he got home.

He thought that it could have been about 8 o'clock when he went out.

The interview continued:

Thomson said: 'Can you remember where you went last night?'
[He said]: 'No.'
Thomson said: 'Do you remember speaking to or seeing anyone last night?'
He said: 'No, I don't.'

It would have been quite proper for the appellant to have refused to answer any questions that the police asked him. That is a fundamental right that is available to everyone. But the accused did not exercise that right. He had the benefit of the presence of his solicitor but chose to respond to the inquiries of Detectives Thompson and Jackson by saying that he was unable to recall any detail whatsoever of his movements in the relevant two hours of the preceding evening. The appellant is a highly intelligent man.

That is apparent from many aspects of his evidence and conduct at trial. A perusal of the transcript of the trial also shows that he was a very competent cross-examiner, possessed of an excellent memory. It was open to the jury to conclude, as the Crown argued, that it was wholly inconsistent with his personality, character and ability that he was unable to recall his movements in the preceding evening. It was submitted by the Crown that the appellant was fearful of giving an account of his movements during the night of the murder in case he had been seen by someone; he did not know how much the police already knew but it must have concerned him that they had questioned him so quickly. The Crown submitted that the only explanation for his failure on 11 January 1989 to account for his movements during 8 pm to I0 pm in the preceding evening was that any answer may have incriminated him. Although there were no eye witnesses that placed the appellant in Lawley Street during the night of the murder, there was some evidence pointing to the appellant having been there two nights earlier. The Crown led evidence from a Mrs Newcombe who lived in the same neighbourhood as the deceased. She gave evidence that in the evening of Sunday, 8 January 1989, she had been walking in Lawley Street with her mother and daughter at about 8.30 or 9 pm. She said that she observed a car that was parked outside the house next door to the Winchester's. At that stage, the appellant was represented by counsel and Mrs Newcombe was allowed to say, without objection, that as she passed the car, the person seated in the driver's seat 'moved to position himself so that he would not be seen'. Earlier, Mrs Newcombe had explained that she 'felt uncomfortable about the car being positioned there'. As she returned home from her walk, she retraced her route and she noticed that the car was in the same position. She had intended to make a note of the registration number when she returned home but was distracted by a telephone call. Later, Mrs Newcombe was able to identify the car as a Mazda 626 sedan. As to its colour, she thought that it was 'sort of a turquoisey-bluey-green'. In fact, the appellant owned and drove a metallic blue Mazda 626. Mrs Newcombe's recollection of the registration number was YPQ-038; the appellant's registration was YMP-028. Mrs Newcombe's memory was deficient. YPQ-038 was the registration number of a cream Mazda 323 Hatchback owned by a Ms Betty Fitzgerald. During the weekend of 7 and 8 January 1989 that car was parked in a locked garage in Yarralumla. Nevertheless, the Crown relied on Mrs Newcombe's identification of a Mazda 626 and the similarity between the letters and numbers of the appellant's car registration and those recalled by the witness.

It is now necessary to turn to the evidence that dealt with the identification of the gunshot residue. Amongst the material that had been located by Mr Nelipa when he vacuumed the driveway and surrounding area at the murder scene, were a number of greenish particles and some other particles that were described as severely charred chopped disc propellant particles (the chopped disc particles). Mr Barnes subsequently analysed them and identified the greenish particles as partially burnt propellant particles of PMC .22 ammunition. Interestingly, the chopped disc particles were not consistent with PMC ammunition; they were however, consistent with other types of ammunition of which CCI and Stirling brands were two. If Mr Winchester was killed as a result of two bullet wounds, and if two PMC cartridge cases were found at the murder scene, and if partially burnt propellant particles of PMC .22 ammunition were found at the scene, how does one account for the chopped disc particles that were not consistent with PMC .22 ammunition? The Crown's answer to that question pointed another accusing finger in the direction of the appellant.

A cartridge case contains a primer and propellant. The primer is exploded by impact with the firing pin and burns at extremely high temperatures. It ignites the propellant which provides most of the energy that expels the bullet from the cartridge case and the barrel of the rifle. The propellant also burns at high temperatures. The primer produces hot gases that condense as they cool producing characteristic primer particles that are made up of one or more of the original components of the primer together with, on occasions, very small quantities of material from the bullet or the cartridge case. Primer particles are extremely small and can only be seen by using a scanning electron microscope. Invariably, some part of the propellant will not be consumed by combustion and these partially burnt particles will be left in the weapon and probably on particles in close proximity to the end of the barrel. Propellant particles are larger and particles from PMC .22 ammunition can be seen, with difficulty, by the naked eye.

Mr Barnes undertook a very extensive examination of the various ammunition types that were available in Australia in 1989. He analysed them both before and after firing for particular compounds, shape, colour and behaviour on firing. He found that of the 151 .22 ammunition types available in Australia, PMC was unique when all these factors were considered. Mr Barnes also visited the FBI laboratories in the United States of America and located a further 23 brands of ammunition which he analysed and included in his database; all these could be distinguished from PMC .22 ammunition. The significance of Mr Barnes' investigations was that the presence of the greenish particles in and about Mr Winchester's car was consistent with Mr Winchester having been murdered by the use of PMC ammunition.

However, other propellant particles, namely, the chopped disc particles, had been recovered from the body of the deceased and from the interior of his car. The existence of these chopped disc particles did not necessarily mean that two brands of ammunition had been used in the commission of the crime. The explanation offered by the Crown for the presence of the second ammunition type was this: Mr Klarenbeek had test fired the Ruger 10/22 rifle before he advertised it for sale on 31 December 1988. He had subsequently recovered some of the spent cartridge cases from that exercise. Three of the seven .22 cartridge cases that Mr Klarenbeek handed in to the police on 6 February 1989 were Stirling and CCI brands and one of them had been identified as having been fired by the same rifle that was used to kill Mr Winchester. Mr Barnes gave evidence that he had conducted· investigations to ascertain whether the presence of the two propellant types at the scene resulted from some form of carry-over in the weapon itself. In other words, Mr Barnes investigated whether the chopped disc particles could be explained by their having been trapped in the gun from earlier firings and whether the severe charring occurred as a result of their exposure to the heat of subsequent shots. He used rifles fitted both with and without a silencer for these tests. He found that severe charring was only ever produced when a silencer was used. A silencer is fitted with baffles that muffle the sound. Those baffles collect debris, including propellant and primer particles that may easily be dislodged by movement, such as shaking. As subsequent shots are fired, very hot gases pass over this matter causing it to be further burnt, producing characteristic severe charring. As each further shot is fired, some of these particles are ejected from the barrel. The conclusion that the Crown sought to establish was that the weapon that had fired the two PMC bullets had earlier and recently been used to fire CCI or Stirling bullets. A search of the appellant's Mazda motor vehicle and an analysis of its results confirmed the presence of primer particles that were consistent with PMC ammunition. The same particles were also found in Mr Winchester's vehicle and around the area of both wounds. Propellant particles from PMC ammunition were also found in the appellant's car, in Mr Winchester's car and in the driveway around the car. Finally, chopped disc particles (not consistent with PMC ammunition) were in Mr Winchester's hair and in both vehicles. In addition to the evidence of Mr Barnes, the Crown also called a number of independent expert witnesses with respect to the identification of the gunshot residues. They were Mr Robin Keeley, the Principal Scientific Officer of the Analytical Chemistry Services Division of the UK Metropolitan Police Forensic Science Laboratory; Dr Ari Zeichner, the head of the Toolmarks and Materials Laboratory of the Division of Visual Identification and Forensic Science of the Israeli Police; Professor Shmuel Zitrin, the head of the Israeli Police laboratory dealing with explosives identification and analysis; and Mr Roger Martz, the Unit Chief of the Chemistry Toxicology Unit of the FBI Laboratory in Washington DC. These experts either agreed with Mr Barnes' conclusions and methodology or, at least, did not challenge them.

The final aspect of the Crown case related to recordings of the appellant speaking and whispering to himself in his bedroom throughout 1990 and 1991 and to the transcripts of those recordings. The recordings had been obtained through the use of listening devices that had been installed in the appellant’s flat by the police. The transcripts had been made after enhanced copies of the tapes had been produced by Dr Hermann Kunzel and Dr Angelika Braun. Dr Kunzel was the head of the Speaker Identification and Tape Authentication Section of the German Federal Police. His associate was Dr Braun, a forensic phonetician.

The qualifications of these experts and the other experts in sound or phonetics were not challenged, nor were their experience and integrity. The dispute at trial was limited to the words allegedly spoken by the appellant. If his words were as alleged by the Crown, they amounted,

arguably, to significant admissions of guilt. If, on the other hand, they were as alleged by the appellant, they were innocuous.

The Crown also retained the services of Dr Peter French of the United Kingdom to carry out an independent evaluation of the master tapes and the enhanced tapes. Dr French compiled transcripts from the tapes and examined and verified the transcripts that had been produced by Sergeant McQuillen and Constable Lawson, the police officers who spent literally thousands of hours listening to the tapes as part of their duties in electronic surveillance, and in the preparation of the transcripts.

The defence called Mr C M F Mills, a Forensic Audio Consultant from the United Kingdom. Mr Mills holds a Diploma in Electrical and Electronic Engineering. He is a member of the Professional Recording Studio Association, a member of the Forensic Science Society of the United Kingdom and a member of the British Academy of Experts and an accredited Law Society expert.
Mr Mills explained that the word 'enhanced' meant, in general terms, 'to use electronic equipment or some other means to improve the quality of the recordings and hopefully improve the intelligibility of the speech within those recordings'. Mr Mills rated the quality of the tapes as 'somewhere between extremely poor and poor''.

The defence also called Dr Andrew Butcher. At the time of giving his evidence he was the Foundation Professor of Communication Disorders and the head of the Department of Speech Pathology at Flinders University in South Australia, a position that he has held since 1993.

Asked to express an opinion on the quality of the tapes Dr Butcher said: 'I've been transcribing tapes for over 25 years and I cannot remember recordings of worse quality that I've had to deal with.'

Set out below are the different versions of relevant parts of the transcripts upon which the Crown relied as demonstrating a consciousness of guilt. The first version is that produced by police officers McQuillen and Lawson; then follows Dr French's transcription, Mr Mills' transcription and finally Dr Butcher's transcription. Although there are many differences in the four transcriptions the Crown claims that it can draw substantial support from the similarities. In the quoted passages that appear below, the parts that are in single brackets indicate probably what was said whilst those in double brackets indicate possibly that which was said. In each case dots represent words that cannot be deciphered.

<u>Police Officers McQuillen and Lawson</u>

You drove more slow [sic]. I cannot miss him. You drove more slowly to give - to give me a better chance. In fact, the situation was that I ran out of sight. It's pathetic. And then even when you called the first night and I've missed you that was a very frustrating night and I had to go back again - the next night to kill him. The poor bugger. Then all of a sudden you're dead. That keeps hold on me. So you go back the following night in the same car, same car, the same registration number, the same driver and you 're film crew's the same and tried to set it up again. Finally on the second night you succeed. Honest, it's like trying to shoot miracles, miracle that I haven't lost it. It required about 50 takes before you finally got what you wanted. I mean about the only thing you didn't do, you didn't provide me with a bag full of stones. [Bed creak] Killed him.

<u>Dr P French</u>

You drove more slow (I cannot miss him). You drove more slowly to give - to give me a better chance. In fact the situation was that I ran out of sight. (Its) pathetic and even then when you called the first night (and I've missed you) that was a very frustrating night and I had to go back again the next night to kill him the poor bugger. Then all of a sudden you're dead. That keeps (hold/on) there. So you go back the following night in the same car, the same registration number, the same driver and your film crew's the same and tried to set it up again. Finally on the second night you succeed. Honest, it was like trying to shoot miracles ... it required about fifty takes

before you finally got what you wanted. I mean about the only thing you didn't do, you didn't provide me with a bag full of stones. [Bed creak] Killed him.

Mr C M F Mills

You drove more slowly to give that a chance. In fact the situation was that ... (sight). Pathetic. And then even (after) you call ... and that was a ... (I'm telling you mate) ... I had to (come) back on the (following) night (to kill) the poor bugger ... and I was waiting for ... So you came back the following night ... the same ... the same registration number .. . the same driver and you ... (all) the same ... and try to get them .. . (finally) somehow prophesied ... you ... finally ... done it. I know what it's like to try to shoot some .... finally got what (it) wanted. I mean about the only thing you didn't do, you didn't provide me with a bag full of (something).

Dr A R Butcher

(But) you ... you'd give me a better chance. In fact the situation was (that) ... out of sight. Pathetic. And then even when you called ... and (set) it up ... that was a very frustrating time and I had to come back on the following night (to the kill the poor) bugger. And I was waiting for the ... to come. (Fucking) ... So you go back the following night the same car, the same registration number, the same driver and you ... 's the same and try to set it up again. (Finally), as prophesied you succeed. I know this is like (trying to shoot) ((the)) ... required about ([bang] takes) before you finally got what you wanted. I mean about the only thing you didn't provide me with a bag full of stones.

Another sample from the tapes upon which the Crown relied and the transcriptions of the various experts appears below.

Police Officers McQuillen and Lawson

He was the first man I ever killed. It was a beautiful thing. One of the most beautiful feelings you've ever known. Beautiful feelings ... It's simple. At the end of your life you will never ... [Water pipe noise].

Dr P French

He was the (first) man. He was the first man I ever (killed) ... One of the most beautiful feelings (in a long time) It' simple. At the end of your life you will never believe ... it's not only that [Water pipe noise.]

Mr C M F Mills

He was the first man. He was the first man I ever (killed) ... one of the most beautiful feelings in my (life). It's simple. At the end of your life you will never ((forget)) ... not only that ... I should ((not have killed)).[23]

Scope of Inquiry

38. It was in the context of the evidence and issues at trial, and against the background of the numerous applications and appeals canvassed above, that Marshall J made the order which led to this Inquiry. In substance, his Honour's Order directed an inquiry into the matters stated in each paragraph of the amended application filed 10 August 2012. Those paragraphs are as follows:

[23] *Eastman v The Queen* (1997) 76 FCR 9, 26-32.

1. The applicant's murder trial should have been adjourned no later than 29 June 1995 when material sufficient to raise the question of the applicant's fitness to stand trial was raised on the initiative of the trial Judge at a time when the applicant was not legally represented. At that time the applicant's trial was required by law to be adjourned to the ACT Mental Health Tribunal and the trial which continued without that adjournment was a nullity.

2. At the time the trial Judge raised these matters and the applicant was not legally represented, the prosecution did not assist the court. The prosecution alone was in possession of psychiatric reports from Dr R. Milton submitted between 20 February 1989 and 6 September 1990 commissioned by the Australian Federal Police, the letter of 22 May 1995 to the ACT DPP from solicitor David Lander, raising the applicant's fitness and the prosecution was well aware of earlier approaches by Michael Williams QC and the ACT Public Defender attempting to raise the question of the applicant's fitness.

3. The question of the applicant's fitness to stand trial was not properly and fully before the High Court of Australia when the court considered the applicant's application for special leave to appeal, with the only substantial ground being his fitness to plead or stand trial. The High Court of Australia was not assisted with the transcript of the proceedings of 29 June 1995, in particular trial transcript pages 2132-3 and the case *R v Vernell* [1953] VLR590 and the journal article by Dr A.A Bartholomew, *The Disruptive Defendant* (1985) 9 Crim LJ 327. trial transcript pages 2132-3 was omitted from 9 volumes of appeal books filed in the High Court of Australia by the ACT DPP.

4. When the applicant's fitness to plead or stand trial was raised pursuant to section 475 *Crimes Act* 1900 before Miles AJ in 2005 again the court was not assisted by any reference to proceedings in the applicant's trial on 29 June 1995.

5. The prosecution neglected its duty to disclose to the defence, either before or during the applicant's trial, information casting doubt on the veracity and reliability of a key forensic witness, Robert Collins Barnes.

6. The evidence of Robert Collins Barnes concerning the alleged use by the applicant of a firearm with a silencer attached is in direct conflict with the evidence of a witness who heard the sound of two gunshots at the time of the murder. That witness, Cecil Robin Grieve, gave evidence at the coronial inquest from which the applicant was committed for trial but was not called to give evidence at the trial of the applicant. Further, there was police expert evidence given at the coronial inquest regarding the significance of the sounds heard by Mr Grieve. That expert evidence concluded that a silencer was not attached to the murder weapon. That evidence was not elicited from that expert witness at the applicant's trial.

7. A false written assertion that no witness heard the fatal shots was made by the ACT DPP as recently as 2008 in submissions before Besanko J in a previous and unsuccessful application made by the applicant and the 'credibility' of an expert witness on the question of whether a silencer was attached to the murder weapon was improperly impugned.

8. New protocols for the evidentiary use which may be made of a finding of 'low level' gunshot residues were adopted in Great Britain in 2006, in guidelines on 'the assessment, interpretation and reporting of firearms chemistry cases'. These protocols were unanimously adopted by the Supreme Court (UK) in *Barry George v R* [2007] EWCA Crim 2722 per Lord Phillips CJ. The new protocols have international acceptance.

9. Secondary or 'innocent' contamination of low level gunshot residue of the type referred to in the *Barry George* appeal is likely to have occurred in the applicant's case. There was evidence at the inquest that gunshot residues, including 'low level' or 'rogue' particles were photographed on the same date and in the same photographic studio. This material was later examined preparatory to scanning electron microscope examination in the same room and at the same time. That room had previously been used to store exhibits in an unrelated murder and was also proximate to the Australian Federal Police weapons test firing range.

10. Forensic scientist, Dr James Smyth Wallace, based in Northern Ireland has recently conducted tests on vintage PMC .22 ammunition and has concluded that it is probable that the murder weapon was a shortened rifle rather than one to which a silencer was attached. This is not inconsistent with the findings of the NSW Government pathologist at the autopsy of the deceased and is consistent with what was heard by the witness Cecil Robin Grieve.

11. Gunshot residue evidence central to the prosecution case at the applicant's trial is now explained by new evidence inconsistent with his guilt. Evidence of gunshot residue of PMC manufacture and additional 'low level' residue thought to be of different manufacture and said to be found in the applicant's car may be explained by the new evidence. The new evidence, on affidavit, is that the applicant's car was borrowed and, unknown to the applicant; it was used to go rabbit shooting. A Brno .22 rifle, rifle bag and ammunition was reported to be transported in the boot of the applicant's car. That rifle and rifle bag have been recently secured and safely stored and will be forensically tested.

12. There was evidence provided to the Australia Federal Police by a witness whose name was suppressed at the coronial inquest and who was never called to give evidence at the inquest. The identity of that witness was belatedly disclosed late in 1994 as Robert Buffington. Mr Buffington had provided direct eyewitness evidence that Louis Klarenbeek regularly dealt in illegal firearms, including handguns and shortened rifles, and on an occasion shortly before the murder of Colin Winchester, Louis Klarenbeek had delivered a rifle at a suburban shopping centre in Canberra to a defendant charged with an offence arising out of Australian Federal Police 'Operation Seville'.

13. There is a clear hypothesis contained in the evidence given to the coronial inquest and in available contemporaneous police intelligence consistent with the guilt of others who are in no way connected to the applicant. This material includes the previously considered material in inquest documents MFI 23 and MFI 130 which must be analysed in the context of other evidence led at the inquest, in particular inquest 'also-ran' briefs 20 and 32. The sequence of events disclosed in evidence at the inquest and in MFI 23 relating to the informer, Giuseppe Verduci, raises cogent evidence of a conspiracy to murder Colin Winchester by a number of those directly linked to AFP Operation Seville.

14. The evidence given at the trial of the applicant of a threat made by the applicant to Dr Dennis Roantree on 6 January 1989 was inconsistent with a taped interview with Dr Roantree made on 13 January 1989 and transcribed as inquest document MFI 6. That transcript was suppressed by the Coroner on the application of the Australia Federal Police on 2 September 1993. Dr Roantree's evidence at the applicant's trial given at a time when the applicant was not legally represented is inconsistent with the previously suppressed document. The conversation between Dr Roantree and the applicant when the alleged threat was said to have been made was in the presence of Dr Roantree's unnamed teenage daughter. A statement from her was never obtained or, if a statement was obtained, it was not provided to the defence. A note of the conversation, claimed to be a contemporaneous note was made approximately ten days after Dr Roantree's initial conversation with the police on 13 January 1989 and is inconsistent with that initial account.

15. Evidence was not led at the applicant's trial of the circumstances of the first corroborated meeting between the applicant and the crucial identification Raymond Webb. The statements of persons with Webb at the time of that meeting support the argument that Webb's later evidence was recent invention.

16. Evidence of surveillance tapes of the applicant talking to himself in his home at night was opened by the prosecution and later led as some evidence of a voluntary and reliable confession. The prosecution was at all relevant times, in possession of the psychiatric reports of Dr R. Milton, commissioned by the Australia Federal Police, reporting that the applicant should be regarded as psychotic and at the time he was being surveilled was possibly on medication for a severe mental disorder.

17. Evidence which is not factually correct or which was substantially misleading was led by the prosecution at the applicant's trial and which went unchallenged, was accepted by the Federal Court of Australia as a strong circumstantial case of murder. This evidence was often presented when the applicant was not legally represented and declined to cross-examine. This evidence included inter alia:

    i. Evidence about electoral rolls which was factually incorrect and which could be shown to be so on the face of the roll.

    ii. Identification evidence was led from a witness who had been hypnotised.

    iii. Evidence that the applicant was seen shortly before the murder acting suspiciously in a 'police car park'. That place was in fact a Commonwealth car park and was a public thoroughfare.

    iv. The prosecution alleged that the applicant's fear of Andrew Russo was a concoction, however there was evidence given at the inquest that the applicant had complained to police about Russo's possession of a pump action shotgun and Russo's intention to import a pistol.

18. A review of controversial and now disputed evidence called at the applicant's trial and relevant evidence which was not called at the trial has never been made in the context of the applicant's mental state during his trial, his fitness to stand trial and his fragmented legal representation. It is in the interests of justice that these matters are reviewed in context rather than in isolation.

19. As a consequence of:

    (e) The conduct of the prosecution;

    (f) Misconduct by investigating police;

    (g) The inadequacy of the applicant's defence;

    (h) The failure of the trial Judge to grant appropriate adjournments and oversee the interests of the applicant when he was not legally represented and;

    (i) The applicant's mental illness,

    the applicant did not receive a satisfactory trial. His conviction is unlawful and the finding of guilt is unsafe.

39. For ease of reference, I will refer to the paragraphs of the amended application as paragraphs of Marshall J's Order.

40. At the outset of the Inquiry issues arose concerning the scope of the Inquiry. My 'ruling' of 5–6 February 2014 is annexure 18. The Director challenged my 'ruling' and, belatedly, sought to overturn the order made by Marshall J. On 21 February 2014 the Full Court reserved its decision on that application and an application by Mr Barnes to be joined, but declined to order that the Inquiry cease pending its decision. The Full Court dismissed the application on 22 May 2014.[24]

[24] *Director of Public Prosecutions for the Australian Capital Territory v The Honourable Acting Justice Martin* [2014] ACTSC 104.

41. In my reasons I dealt with the statutory scheme and my general approach to the interpretation of the Order, as follows:

> Statutory Scheme
>
> 9. In essence, part 20 of the Act provides a means by which an inquiry can be conducted into the conviction of a person for an offence in circumstances where the court is satisfied that there is a doubt or question about guilt which should be investigated, but which could not have been properly addressed at trial or on appeal. Not surprisingly, however, the power to order an inquiry is hedged with conditions which must be satisfied before the court may order an inquiry. Those conditions are found in s 422 of the Act and the power to order the inquiry is enlivened only if these conditions are met.
>
> 10. In making the order of 3 September 2012, Marshall J specifically recorded that he had found that the amended application filed on 10 August 2012 complied with s 422(1) of the Act. In other words, his Honour was satisfied that the conditions had been met. Those conditions are as follows:
>
> (a) There is a doubt or question about whether the applicant is guilty of the offence; and
> (b) The doubt or question relates to:
> (i) Any evidence admitted in the trial; or
> (ii) Any material fact that was not admitted in evidence in the trial; and
> (c) The doubt or question could not have been properly addressed in the trial or on appeal; and
> (d) There is a significant risk that the conviction is unsafe because of the doubt or question; and
> (e) The doubt or question cannot now be properly addressed in an appeal against the conviction; and
> (f) An application has not previously been made to the court for an inquiry in relation to the doubt or question; and
> (g) It is in the interests of justice for the doubt or question to be considered at an inquiry.
>
> 11. The conditions to which I have referred are taken from s 422 (1) of the Act, with appropriate adjustments to apply those conditions to the circumstances of the applicant. Marshall J found that those conditions have been satisfied. There has been no attempt to challenge the validity of the order in judicial proceedings.
>
> 12. Upon completion of the inquiry, the Board is required to provide a written report of the inquiry to the registrar of the Supreme Court pursuant to s 428. The Full Court is then directed by s 430 of the Act to consider the report and to decide whether to confirm the conviction or quash the conviction and order a retrial, or quash the conviction. In this process the Full Court is directed by s 431 to have regard only to matters in the report or documents accompanying the report, and is prohibited from hearing submissions from 'anyone'.
>
> 13. When the scheme is viewed in its entirety, from the perspective of the Board a court has found that there is a doubt or question as to guilt of the applicant arising from or in relation to the matters stated in each paragraph of the order. The Board is directed to inquire into each doubt or question as to guilt and to report the result of that inquiry to the Full Court in a manner which will assist the Full Court in carrying out its function.
>
> Submissions
>
> 14. During directions hearings held on 5 August and 4 October 2013, discussions occurred concerning the scope of the inquiry. In substance, the Director of Public Prosecutions

sought particulars from solicitors for the applicant as to the applicant's view of the scope of a number of aspects of the inquiry. The applicant's solicitors responded by letter of 27 August 2013.

15. In a written submission dated 10 October 2013, the Director acknowledged the clarification of a number of issues, but raised the question of critical importance to the approach of the Board in determining the scope of the inquiry. The written submission expressed the question in the following terms: '[T]o ask the board to clarify the extent of its jurisdiction by interpreting the scope of the matters to be inquired into having regard to the jurisdictional limits provided in s 422 of the Crimes Act.'

16. In the written submission, the Director submitted that the Board is required to satisfy itself of 'jurisdictional facts', namely, the fulfilment of the conditions found in s 422(1).

17. Notwithstanding the language in which the written submission is couched, and notwithstanding the language used by counsel for the Director today, the submission leaves no room for doubt that the Director is suggesting that the Board should go behind the order of Marshall J and determine for itself whether the subject matter of the inquiry ordered by his Honour satisfies the conditions specified in s 422(1). For example, the written submission invites the Board to examine whether the subject matter of a particular paragraph of the order was the subject of a previous application and whether the doubt or question could not have been properly addressed at trial. Taken to its logical conclusion, this submission means that if the Board finds that that particular matter was the subject of a previous application or could have been properly dealt with at trial, the Board should decline to conduct the inquiry.

18. Section 422 is in division 20.2 of the Act which confers jurisdiction on the Supreme Court to order an inquiry. The conditions specified in s 422 relate to the jurisdiction of the court, not the Board. Once the Supreme Court has exercised its jurisdiction and ordered an inquiry, the Board is established by the Executive acting pursuant to s 5 of the Inquiries Act 1991. As the Board, I have been endowed with the jurisdiction to conduct the inquiry ordered by the court through the instrument of appointment dated 23 July 2013. That instrument defines my jurisdiction to inquire into the applicant's conviction, 'in relation to those matters contained in the amended application for inquiry filed in the Supreme Court on 10 August 2012 and in relation to no other matter'.

19. The jurisdiction of the Board does not depend on the Board being satisfied that the conditions specified in s 422 have been fulfilled. The jurisdiction to inquire is found in the instrument of appointment coupled with the order of the Supreme Court.

20. As a matter of principle, a body performing an administrative function is required to perform that administrative function in accordance with the instrument or judicial order which confers jurisdiction and directs the performance of that administrative function. It is no part of that administrative function to inquire into the validity of the instrument or judicial order. There is no power to decline to comply with the order because the body performing the administrative function is of the view that the instrument or order is invalid. Applying these principles, it would be inappropriate for me to investigate with respect to each paragraph of the order whether the particular doubt or question satisfies the condition specified in s 422(1).

21. Having made that general observation, I recognise that if the terms of an order lead to ambiguity as to the scope of the particular inquiry, having regard to background circumstances which provide the context in which the order was made might assist in determining the scope of the particular inquiry intended by the executive and Marshall J. Background circumstances could include the submissions made before his Honour in support of the application and whether a particular issue was the subject of a previous application or evidence at trial. In my view, however, having regard to the context in this way, is far removed from the type of inquiry that the Director urged I should undertake with

respect to each paragraph of the order.

22. In support of the proposition that I must be satisfied of the existence of a 'jurisdictional fact', the Director referred to authorities concerned with an administrative body interpreting an order or terms of reference, decisions which were identified as decisions concerning jurisdiction. However, those authorities do not support the director's fundamental contention. For example, in Queensland v Wyvill [1989] 90 ALR 611, a commissioner conducting an inquiry into the deaths of 'Aboriginals or Torres Strait Islanders' in custody was required to determine whether a deceased was an Aboriginal within the meaning of the letters patent. The decision was one of fact upon which jurisdiction depended because the power of the commissioner pursuant to the letters patent was limited to inquiry into a death in custody only if the deceased was an Aboriginal or a Torres Strait Islander. The commissioner was not, however, inquiring into the validity or legality of the letters patent which conferred jurisdiction on the commissioner.

23. The Director has not referred me to any authority which supports the proposition that an administrative body possesses the power to determine whether an instrument or a judicial order conferring jurisdiction on an entity exercising an administrative function is valid.

42. Later in my reasons I dealt with the approach of Marshall J:

52. For the reasons given, I reject that submission. I have no power to go behind the instrument and order with a view to determining whether the order is valid. However, in interpreting the order and considering what the executive and Marshall J intended as the 'matter' for inquiry, it is appropriate to bear in that his Honour was aware of the previous application and could not have intended to order an inquiry into a 'matter' which is identical to the particular doubt or question that was the subject of the previous application.

53. In taking this approach, the history of the application and the circumstances in which Marshall J made the order suggest that a degree of caution is required in endeavouring to determine his Honour's 'intentions' when making the orders, particularly in respect of topics that were the subject of the previous application before Besanko J.

54. When Marshall J first considered the application of 29 April 2011, his Honour was faced with a submission by the Director that the application was misconceived because the existence of the prior application heard by Besanko J was fatal to the later application. His Honour accepted the Director's submission and found that s 422(1)(f) permitted only one application for an inquiry into a conviction. On 6 March 2012 his Honour refused the application and delivered reasons.

55. The applicant appealed successfully against the decision of Marshall J. On 30 July 2012, the Full Court of the Supreme Court of the ACT allowed the appeal and held that s 422(1)(f) was not a broad prohibition against a second application, but provided that only one application could be made 'in relation to the particular doubt or question raised in a previous application'.

56. Following a brief hearing on 6 August 2012 to fix a date for submissions, during which an amendment to the application was foreshadowed, the hearing resumed on 10 August 2012 on the basis of an amended application filed that day. Marshall J specifically asked counsel for the Director whether the Director opposed the application. Counsel plainly stated that the Director did not oppose the application, but sought to remind his Honour that he was required to be satisfied in relation to the criteria in s 422. In the course of the discussion, Marshall J referred to the 'jurisdictional question' which appears to have been a reference to s 422(1)(f) and a question of a previous application. In that respect, his Honour spoke of acting under 'the authority of the Full Court of the ACT Supreme Court', and observed that whether the Full Court decision was right or wrong was not a matter for his Honour. He said he had to 'assume it to be right'.

57. Shortly after those passages, with the exception of s 422(1)(f), his Honour addressed the criteria in s 422 but said that he was 'skipping' s 422(1)(f). It appears likely that his Honour misunderstood the decision of the Full Court and proceeded on the basis that he was not required to consider the 'jurisdictional question' related to the previous application.

58. On 3 September 2012 the application again came before Marshall J apparently for clarification of the terms of the order. However, earlier that day the Director had filed a 16 page written submission effectively back-flipping on the previous consent or lack of opposition and opposing the entire application. It is hardly surprising that his Honour was singularly unimpressed.

59. In the course of the discussion his Honour referred to the fact that the Director had not appeared before the Full Court to oppose the appeal. It might have assisted to ameliorate his Honour's obvious displeasure if the Director, who had appeared personally, had in content or tone apologised for the back flip and late submission, but no apology was forthcoming.

60. After a short and animated discussion, during which there was no mention of specific criteria found in s 422, Marshall J made the order that now binds me. Although in making the order, his Honour specifically stated that he had found the application complied with s 422(1), bearing in mind that his Honour had previously skipped a question of the previous application and the impact of s 422(1)(f), the extent to which his Honour considered the impact of the previous application is quite unclear.

43. In summary, Marshall J determined that there was a doubt or question as to guilt in relation to or arising out of the matters identified in each paragraph of the Order. As both a 'doubt' and a 'question' as to guilt are encompassed by the Order, it is unnecessary to discuss the difference between a 'doubt' and a 'question'.[25] The Order directs an inquiry into the applicant's 'conviction' through the examination of the 'matter' in each paragraph, namely, the doubt or question as to guilt in relation to or arising out of the matters stated in each paragraph.

PARAGRAPHS 1–4

44. Underlying Paragraphs 1–4 is the assertion by the applicant that his trial was a nullity. This assertion has its origins in section 428E(1) of the Act (now repealed) which required that if, during the trial, the 'issue' of fitness to plead was raised by a party or the court, and the court was satisfied that there was a 'question' as to the applicant's fitness to plead, the court was required to order that the applicant submit to the jurisdiction of the Mental Health Tribunal for a determination as to whether he was fit to plead. The applicant contends that the 'issue' of fitness was raised by 29 June 1995 through the conduct of the applicant and reports by Dr Milton, which demonstrated not only that fitness was an 'issue', but established that there was a 'question' to be determined. Dr Milton had been retained by the AFP in 1989, and during the following years through to 1995, to advise about the applicant's mental state. Copies of Dr Milton's reports were provided to the DPP well before the trial commenced.

45. As at 29 June 1995 the applicant was unaware that reports concerning his mental state had been obtained by the AFP from Dr Milton. Further, the applicant submits that the

[25] *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318, 364 [134].

evidence establishes possession by the trial Judge of reports by Dr Milton prior to 29 June 1995, being possession of which the applicant was unaware. In addition, the DPP was in possession of verbal and written communication from the applicant's various legal representatives expressing the view that the applicant was not fit to plead.

46. It is in these circumstances that the applicant submitted that the continuation of the trial after 29 June 1995 rendered the trial a nullity.

PARAGRAPH 1

47. Paragraph 1

> The applicant's murder trial should have been adjourned no later than 29 June 1995 when material sufficient to raise the question of the applicant's fitness to stand trial was raised on the initiative of the trial Judge at a time when the applicant was not legally represented. At that time the applicant's trial was required by law to be adjourned to the ACT Mental Health Tribunal and the trial which continued without that adjournment was a nullity.

48. The 'matter' to which Paragraph 1 is directed is a doubt or question as to guilt because the trial was a nullity. The Inquiry has investigated whether the trial was a nullity by reason of the existence, on or before 29 June 1995, of a question as to the applicant's fitness to plead which, through the operation of section 428E of the Act required that the trial be adjourned and that the trial Judge order the applicant to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the applicant was fit to plead to the charge of murder. The primary thrust of the evidence related to the following topics:

(1) Possession by the DPP on or prior to the 29 June 1995 of reports by Dr Milton and other material reflecting on the applicant's mental state;

(2) Possession by the trial Judge on or prior to the 29 June 1995 of reports by Dr Milton and any other material reflecting on the applicant's mental state;

(3) The failure of the Director and the trial Judge to disclose to the applicant the existence and their possession of reports by Dr Milton; and

(4) Evidence concerning the applicant's mental state on 29 June 1995 and for periods before and after that date which might reasonably reflect upon the applicant's mental state on the 29 June 1995.

49. At the relevant time, section 428E(1) of the Act was in the following terms:

> Where, on the trial of a person charged with an indictable offence –
>
> (a) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the Court; and
>
> (b) the Court is satisfied that there is a question as to the person's fitness to plead to the charge;

> the Court shall order the person to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to the charge.

50. As is apparent from section 428(E), the first question is whether an 'issue' of fitness to plead is raised. If it is, the next step is whether the court is 'satisfied' that there is a 'question' as to fitness to plead. If the court is satisfied that there is such a 'question', the legislation directs that the court 'shall' order the person to submit to the jurisdiction of the Tribunal and responsibility passes to the Tribunal to determine whether or not the person is fit to plead.

51. At the relevant time the Tribunal acted under the *Mental Health (Treatment and Care) Act 1994* (ACT). There was no definition of 'fitness to plead' in either Act, but the criteria by which the Tribunal was governed in 1995 were set out in then-section 68(3) of the *Mental Health (Treatment and Care) Act* (subsequently amended):

> The Tribunal shall not make a determination that a person is fit to plead to a charge unless satisfied that the person is capable of –
>
> (a) understanding what it is that he or she has been charged with;
>
> (b) pleading to the charge and exercising his or her right of challenge;
>
> (c) understanding that the proceeding before the Supreme Court will be an inquiry as to whether or not the person did what he or she is charged with;
>
> (d) following, in general terms, the course of the proceeding before the Court;
>
> (e) understanding the substantial effect of any evidence given against him or her;
>
> (f) making a defence to, or answering, the charge;
>
> (g) deciding what defence he or she will rely on;
>
> (h) giving instructions to his or her legal representative (if any); and
>
> (j) making his or her version of the facts known to the Court and to his or her legal representative (if any).

52. The criteria in s 68(3) essentially reflected the common law position. However, unlike the common law which presumes that an accused person is fit to plead, s 68(3) provided that the Tribunal shall not determine that a person is fit to plead 'unless satisfied' that the criteria are fulfilled in the sense that the person is capable of the matters set out in sub-paragraphs (a) – (j).

53. As I have said, the question as to the applicant's fitness to plead during the trial was the subject of the Inquiry and Report of Miles CJ. Neither Paragraph 1, nor any other paragraph of the Order, directed that I conduct a review of the Miles Inquiry or his Honour's conclusions. For the purposes of my Inquiry and Report, I have had regard to the material presented to Miles CJ and to his Honour's Report and conclusions. As stated previously Volumes I and II of that Report are exhibits 5 and 6. The transcript of the evidence taken for the Miles Inquiry is exhibit 7 and the exhibits to that Inquiry are exhibit 8.

54. While it is no part of my Inquiry to review the Inquiry taken under Miles CJ or his conclusions, the evidence gathered during that Inquiry and his Honour's conclusions provide an important background and context in which the events leading up to and on 29 June 1995 are to be considered. Miles CJ inquired into the applicant's fitness to plead

during the whole or any part of the trial.[26] As his Honour observed at paragraph 79 of his Report, his Honour's Inquiry was 'not concerned with a question or doubt' as to whether the applicant murdered the deceased.

55. Miles CJ was careful to identify two stages of his Inquiry. First, whether at trial there would have been a 'question' as to the applicant's fitness to plead if all the material available to the Inquiry had been made available and known to the court. Secondly, if in those circumstances there would have been a 'question' as to the applicant's fitness to plead, whether or not the applicant was 'in fact unfit to plead at anytime during his trial'.[27]

56. Miles CJ identified 'distinct stages' of the trial when there might have been a 'question' as to the applicant's fitness if the issue had been raised. His Honour identified those stages as follows:

- At the time of pleading not guilty on 2 May 1995 after the withdrawal of Mr Williams, Mr Dalton and Mr Taylor.
- At the time of the further withdrawal of Mr Williams, Mr Dalton and Mr Taylor on 16 May 1995.
- At the time of the withdrawal of Mr O'Donnell and Mr Lander on 22 May 1995.
- At the time of Mr O'Loughlin's seeking advice from the New South Wales Bar Council on 11 July 1995.
- At the time of the disclosure of the Milton reports on 25 August 1995.
- At the time of renewing instructions to Mr Terracini and team on 28 September 1995.
- At the time of the withdrawal of Mr Terracini and team on 11 October 1995.
- On the various occasions when Mr Ninness was to be called.
- At the end of the trial.[28]

57. The 'distinct stages' at which there might have been a 'question' as to the applicant's fitness did not include 29 June 1995. However, as discussed later in this Report, I do not find this absence surprising as nothing occurred on 29 June 1995 to suggest that an 'issue' or 'question' arose on that day.

58. In addressing these questions, Miles CJ identified three heads of evidentiary material:

- The abnormal conduct of Mr Eastman himself (mainly in the trial and recorded in the transcript);
- The opinions of medical experts;
- The opinions of the lawyers, particularly those of Mr Eastman's own lawyers, whom he engaged and dismissed in the early stages of the trial. [29]

59. The medical evidence presented to Miles CJ is discussed in detail in appendix 16 to his Honour's report and is summarised in Volume I [162]–[195]. The evidence of legal

[26] Inquiry under s 475 of the *Crimes Act 1900* into the matter of the fitness to plead of David Harold Eastman, Report vol 1. (2005) [1].
[27] Ibid, 27-28 [85].
[28] Ibid, 71 [201].
[29] Ibid, 70 [199].

practitioners is discussed in detail in appendix 6 of the Miles Report and is summarized in Volume I [129]–[161].

60. Miles CJ identified the only 'live issue' as whether the applicant satisfied two of the criteria found in section 68(3) of the *Mental Health (Treatment and Care) Act* concerned with the capacity to give instructions to legal representatives and making his version of facts known to the court and to his legal representatives. He then discussed evidence concerning events in the trial during May 1995.[30] His Honour gave specific attention to the events in May 1995 because he considered that this was the period during which the case for unfitness to plead being an explanation for the applicant's behaviour was 'at its strongest'.[31]

61. As to the applicant's mental condition, Miles CJ concluded that 'for at least twenty years Mr Eastman has suffered from a Paranoid Personality Disorder which is not a mental illness and is not responsive to treatment.'[32] In particular, his Honour found that the applicant's condition was not a mental illness in the nature of 'schizophrenia, paranoia or psychosis'. His Honour considered that the 'most accurate description in psychiatric terms' was 'Paranoid Personality Disorder with psychotic-like episodes.'[33] In the light of those conclusions, and having found there were only 'two periods when it could be said that Mr Eastman behaved as if he was out of touch with reality',[34] namely, two or three weeks before 2 May 1995 and 'more so during the morning of 21 May in the presence of Mr O'Donnell and Mr Lander', Miles CJ reached a number of conclusions which may be summarized as follows:

- Consistent with his underlying condition of Paranoid Personality Disorder there were times in Mr Eastman's trial when he acted in a way that gave the appearance of behaviour inconsistent with a rational decision to act in his best interest;[35]

- There were times during the trial when Mr Eastman's predisposition to anger and loss of control affected his judgment and was manifested by bizarre behaviour which was clearly not in his best interest. Such examples of his behaviour may have appeared to have deprived him temporarily of the ability to communicate in a meaningful way with his lawyers and with the trial Judge and prevented him from appreciating to a meaningful extent what they were saying to him. Such extremes of behaviour caused some observers and commentators to describe it as 'psychotic';[36]

- The behaviour of the applicant was such that as of the morning of 22 May 1995 the Mental Health Tribunal may have reasonably determined that the applicant was incapable of instructing his legal representatives and was, therefore, unfit to plead. In those circumstances, if the issue of fitness had been raised with the trial Judge on 22 May 1995, there would have been a 'question' of unfitness and the trial Judge would have been obliged to adjourn the trial and direct that the applicant submit to the jurisdiction of the Mental Health Tribunal for a determination whether he was fit to plead;

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30 Ibid, 71–80 [203]–[225].
31 Ibid, 71 [202].
32 Ibid, 86 [243].
33 Ibid, 86–87 [244].
34 Ibid, 85 [238].
35 Ibid, 88 [248].
36 Ibid, 88 [249].

- The psychotic like episodes that occurred on 21 May 1995, and earlier, did not re-occur and on 22 May 1995 the applicant demonstrated that he was capable of giving instruction to his legal advisors and of making his version of the facts known to both his legal representatives and the court if he chose to do so;

- The applicant did not lack the capacity to choose whether to instruct and make his version of the facts known and this capacity was confirmed as the trial progressed. 'To the extent that there was an inability of counsel to get instructions on occasions when Mr Eastman's behaviour was at its most psychotic-like, I think that on those occasions his condition was in the category of temporary episode which could be accommodated by adjournment and the passage of time. It did not constitute or arise from unfitness to plead.[37]

62. At paragraphs 254–271 Miles CJ dealt with events that occurred during the trial which, in his Honour's view, demonstrated that the applicant possessed the capacity to instruct and to make his version known both to his legal representatives and to the court. It is apparent that his Honour also considered that the applicant had a good grasp of the critical issues in the trial. In these circumstances, his Honour concluded that although there would have been a 'question' as to the applicant's fitness to plead on the morning of 22 May 1995 if the 'issue' of fitness had been raised, with the wisdom of hindsight the 'question' was resolved by the end of the same day when the applicant 'demonstrated that he was capable of instructing his legal representatives when he chose to do so.'[38] Further, in his Honour's view, in retrospect the applicant was fit to plead throughout the trial and the Mental Health Tribunal could not have found the applicant unfit except on the morning of the 22 May 1995 and then 'only on the basis of the material before the tribunal was confined to what was available on that time and on that date.' His Honour then emphasised that if the Mental Health Tribunal had found him unfit at that time on 22 May 1995, subsequent events demonstrated that such a finding would have been wrong.

63. This is the context in which the events leading to 29 June 1995 are to be considered. Although it is not part of my function to review the conclusions reached by Miles CJ, having regard to the evidence before his Honour, the events of the trial and the evidence presented to me, I see no reason to doubt that Miles CJ reached the correct conclusions. As appears later in the Report, my own assessment accords with that of Miles CJ.

64. There is one aspect of the basis upon which Miles CJ reached his conclusions that now requires reconsideration. It concerns the question of possession by the trial Judge of reports by Dr Milton. Miles CJ correctly observed that the issue of the applicant's fitness to plead was not raised at trial by the parties and that counsel for the applicant had express instructions not to raise that issue. However, in reaching the view that there was 'not enough material before the trial Judge for him to raise the issue himself',[39] his Honour was not aware of evidence suggesting that prior to 18 June 1995 the trial Judge was in possession of a number of reports by Dr Milton. This issue of possession by the trial Judge is discussed later in this Report.

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37 Ibid, 89 [252].
38 Ibid, 98 [275].
39 Ibid, 98 [273].

Medical Evidence

65. I referred earlier to the medical evidence gathered in the course of the Miles Inquiry and summarized by Miles CJ in his report. Further evidence has been presented during the course of my Inquiry with particular reference to the applicant's mental state on 29 June 1995.

66. As to the diagnosis of the applicant's psychiatric condition, the same differences of opinion exist as were presented to Miles CJ. Dr White maintains his opinion that the applicant suffers from Chronic Paranoid Schizophrenia, but I reject that view. I am satisfied that Dr Milton and others are correct in their view that the applicant has a Paranoid Personality Disorder with obsessional and narcissistic features.

67. Dr Milton prepared a report for purposes of the Inquiry dated 18 November 2013 (Ex 56). It is a very helpful report which provides an overview and commentary with respect to the history of the applicant's condition and the various examinations and diagnoses that have occurred over the years. I found the approach of Dr Milton to be sound and reasonable. It is an approach which stands in contrast to the dogmatic and inflexible approach taken by Dr White.

68. In his report Dr Milton explained the importance of observing a patient over time and how a definitive diagnosis sometimes can only be made after a period of observation:

> Assessing a psychiatric condition could be likened to the way physical conditions are diagnosed. A definitive diagnosis can sometimes only be reached as time passes and the patient is observed over time. For example, one convulsion does not diagnose epilepsy and sometimes its only as time passes does the clinical picture become clear. Initial features sometimes diminish in significance and other symptoms and signs emerge.[40]

69. Applying this approach to the applicant, and in the context of Dr Milton's involvement over the years at the request of the AFP, Dr Milton made the following observation:

> Mr Eastman's behaviour was impossible to predict, although it was clear that he was abnormally suspicious of others and acted aggressively in accordance with those suspicions initially he appeared to be merely an unduly suspicious and aggressive man whose sanity was intact, but the revelations from audio surveillance of his residence were disquieting and obliged me to modify my opinion and to regard him as psychotic, in line with an opinion of a psychiatrist [Dr McDonald] who had treated him earlier. Later it became apparent that this was not the case and Mr Eastman's unusual dramatic utterances when on his own were most satisfactorily explained on the basis of social isolation, narcissism and enjoyment of acting a part.[41]

70. In his report of 18 November 2013 Dr Milton explained the basis on which he prepared reports for the AFP and provided a history of the various examinations and diagnoses by medical practitioners over many years. In substance he argued the case for his diagnosis as opposed to that of Dr White by reference not only to other practitioners, but to the conduct of the applicant over many years.

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[40] Report of Dr Rod Milton to the Board of Inquiry 18 November 2013, 5.

[41] Ibid, 4.

71. Beginning at page 17, Dr Milton dealt with the events of 29 June 1995 as disclosed in the trial transcript and also commented on the applicant's conduct in the Federal Court on 4 July 1995. That history was followed by reference to each of the criteria to be satisfied with respect to fitness to plead. Dr Milton was firmly of the opinion that on 29 June 1995 the applicant was fit to plead. In his view the applicant demonstrated that he understood the proceedings 'perfectly' and was alive to relevant issues (Inq 1146). There were no signs of thought disorder or delusions. Nor was there any sign that the applicant was psychotic. The applicant was rebellious and provocative and, while influenced by his paranoid thinking and narcissism, was not overwhelmed and made a choice to be deliberately provocative.

72. Dr Milton is a very experienced psychiatrist both in terms of the practice of that profession and the application of psychiatric principles to the criminal law. He has had extensive experience in connection with the criminal law, including advising investigating police during the course of investigations about the mental states of subjects and how to deal with such persons. When retained by the police in connection with the applicant, Dr Milton saw his principal role as assisting with public safety. From Dr Milton's perspective, he was trying to provide the police with an understanding of the applicant's nature and possible motive that the applicant might possess. To that extent he saw himself as assisting the investigation (Inq 1167).

73. During cross-examination Dr Milton accepted that he worked on the assumption from the beginning that the applicant had shot the deceased (Inq 1167). He agreed it was implicit in the assumption that Mr Ninness held a 'firm and fixed view' that the applicant was the offender. Dr Milton resisted the suggestion that the police or Mr Ninness pushed that view, but it was 'the underlying assumption' that Dr Milton accepted for the purposes of giving advice to the police.

74. Dr Milton explained that the assumption that the applicant had killed the deceased had nothing to do with his assessment of the applicant's mental state and his diagnosis that the applicant suffered from a paranoid personality and narcissism (Inq 1169).

75. Dr Milton was cross-examined about the development of his views. Although, as reported, from the outset Dr Milton considered that the diagnosis of Paranoid Personality Disorder was the most 'acceptable diagnosis',[42] he said in evidence that he paid due regard to the opinion of Dr McDonald who had treated the applicant in the 1980's and made a diagnosis of Paranoia. Dr McDonald diagnosed Paranoia which he described as a 'rare psychotic condition characterised by well systematised delusions' (Inq 1169). Dr Milton did not discard Dr McDonald's view notwithstanding that, in his opinion, the applicant's behaviour was not consistent with someone suffering from paranoia. Over the years as more information was gathered about the applicant, although from time to time Dr Milton wavered in his views, ultimately it became clear to him that Dr McDonald's diagnosis was not correct. Dr Milton explained that through many years of examinations and observations by experienced psychiatrists and other professional persons, it has been demonstrated that the applicant does not possess a complex set of delusions that characterize Paranoia. If, from time to time, there has

[42] Report of Dr Rod Milton to the Australian Federal Police, 20 February 1989 [17].

been deterioration in the applicant's mental state, such deterioration can be attributed to events of the time and not to the type of deterioration predicted by Dr McDonald. The applicant's responses over the years to changes in circumstances fit his paranoid personality and narcissism.

76. Dr Milton expressed the opinion that the paranoid features of the applicant's mental state dominate his mental state, but there is a very strong component of narcissism which results in the applicant having a 'large measure of narcissism in his behaviour and thinking' (Inq 1135). As to how the feature of narcissism displays itself, Dr Milton said (Inq 1135):

> ... a preoccupation with self, unawareness of other people's feelings, not caring about other people's feelings and sometimes angry outbursts.

77. Dr Milton was referred to his report of 4 September 1992 which included reference to the behaviour of the applicant during proceedings in the Magistrates Court when he picked up a jug of water and hurled it at the Magistrate. After sighting the description of a 'Paranoid Personality Disorder' in a manual of mental disorders, Dr Milton expressed the following opinion:

> Mr Eastman has demonstrated virtually all those features from time to time. After having listened to various tapes of Mr Eastman talking to himself and after having seen him so grossly misinterpret innocent remarks in a sinister fashion, I believe he is, for all practical purposes, psychotic, i.e. out of touch with reality. However, it would be difficult for someone to substantiate this in terms of the present Mental Health Act – that legislation has been altered in recent years as to make it inapplicable in a very large number of cases including this one.[43]

78. In evidence Dr Milton explained how his use of the word 'psychotic' fits with his diagnosis of Paranoid Personality Disorder (Inq 1142):

> Yes, I have said in my report that you can use the word psychotic in a qualitative sense, that is, in regards, say, in schizophrenia, being qualitatively different from other conditions by virtue of hallucinations or delusions, that is psychosis. But it is also used in terms of a quantitative way. As I have said earlier that a paranoid suspicion can be so intense at a particular stage as to describe it of psychotic intensity. What I was conveying to the police which was, I think, something that I tried to convey in my early 1990 report, was that we were dealing with someone whose attitude to life and thinking and reactions was not that of someone who could be predicted on the basis of ordinary feelings and reactions. The use of 'psychotic' was a term that had reasonable acceptance among ordinary people as indicating a serious mental problem.

79. The two uses of the word 'psychosis' were also addressed by Dr Milton in his report of 18 November 2013 (Ex 56, 60 [2]):

> The term 'psychosis' is usually employed in relation to the major functional mental illnesses such as schizophrenia (principally a disturbance of thought) and bipolar affective disorder (principally a disturbance of affect). Mental Health Legislation regards psychosis in a more general manner in terms of such symptoms as delusions and hallucinations.
>
> There are various specific signs of psychosis such as odd behaviour, peculiar speech, a disorder in the form or flow of thought hallucinations, delusions, and elevated or depressed mood. The term

[43] Report of Dr Rod Milton to the Australian Federal Police, 4 September 1992, 6.

> 'psychosis' has a qualitative dimension when used in this context. A thought-disordered or deluded person is qualitatively different from someone who does not have those problems.
>
> On the other hand psychosis may be used in a quantitative fashion, for example, obsessions and compulsions are not regarded as psychotic, but sometimes obsessive behaviour and thinking is so intense and strange that practitioners refer to it as having a 'psychotic intensity'. That is, the obsessional thoughts or compulsive behaviour are so severe, intractable, and sometimes bizarre as to warrant use of the term as a measure of the eccentric behaviour and thinking, the major incapacity and the intensity of the aberrant actions and thoughts.
>
> The paranoid person is prone to suspicions more than other people and these are usually explicable as an extreme extension of normality. Sometimes the paranoid person's suspicions are so intense and unrealistic as to be described as being 'of delusional intensity'. In this instance the paranoid person might be regarded as briefly 'psychotic'.

80. During cross-examination Dr Milton agreed that after the assault upon the Magistrate with the jug of water, his view was shaken and he swung back towards the view of Dr McDonald. However, it was his firm opinion that observation and diagnoses over a number of years have conclusively disproved both Dr McDonald's diagnosis of Paranoia and Dr White's diagnosis of Paranoid Schizophrenia (Inq 1139).

81. Dealing with Dr White in particular, in Dr Milton's view the applicant simply has not displayed the relevant symptoms of Paranoid Schizophrenia, including insidious changes in the ability to think and emotional blunting. He has not shown the decline that is inevitable in a person suffering from that condition and continues to perform quite strongly in an intellectual sense. The clinical notes of treatment while in custody since 1995 demonstrate that the deterioration is 'completely absent' (Ex 52). In Dr Milton's view the extent of agreement amongst psychiatrists that the applicant suffers from a paranoid personality with narcissism is 'remarkable' (Inq 1135).

82. As to the symptomatology of Paranoid Schizophrenia, Dr Milton said in evidence that thought disorder will be present most of the time. Very occasionally it may not be present. In Dr Milton's view, even a highly intelligent person cannot disguise the symptomatology other than perhaps a 'little'. When well developed, the thought disorder is present as part of everyday thinking and speaking and is apparent even to lay persons (Inq 1132). Dr Milton said a highly intelligent person could cover the thought disorder, but could not do it day after day and it would become 'immediately apparent' to an objective observer over a period of days. The same applies to delusions. They could not be concealed over a period of days and would be apparent.

83. Dr Milton was a thoughtful, frank, and impressive witness. I accept his opinion that the applicant suffered and continues to suffer from a Paranoid Personality Disorder and not Paranoid Schizophrenia. This opinion is supported by Dr Bruce Westmore, also an impressive and reliable witness who possesses thirty years of experience in general psychiatry and the application of psychiatric principles to the criminal law.

84. It is unnecessary to set out the details of Dr Westmore's evidence. Like Dr Milton, he took a longitudinal view which demonstrated the absence over many years of thought disorder or psychotic hallucinations. Dr Westmore thought that on occasion the applicant can flip over into a psychosis when very angry, but such psychosis is transient

and not properly described as psychotic. In his opinion the applicant might not possess the ability to control himself on these occasions of extreme anger (Inq 1285).

85. Dr Westmore was taken to the transcript of the Inquiry on 29 June 1995 when the trial Judge made a flippant remark about securing the applicant's safety by revoking bail, to which the applicant responded that His Honour had made an 'asinine' remark. Dr Westmore agreed that the applicant had no trouble picking up the fact that it was a flippant remark and was 'very sharp'. Not only was the applicant listening, but he was 'processing' and 'formulating' the remark in his own mind and was able to 'throw back a response' (T 1292, T 1293).

86. As to the events of 29 June 1995, Dr Westmore said there was nothing to indicate thought disorder, psychotic hallucinations or frank delusions (Inq 1291).

87. Other than Dr McDonald in the 1980s and Dr Robert Tym in 1992, only Dr Allan White has diagnosed a mental illness. Dr White is the only psychiatrist who has diagnosed Paranoid Schizophrenia. He simply would not accept the validity of the opinions of psychiatrists who have observed and treated the applicant over many years. Nor would he acknowledge the absence of essential symptoms of Paranoid Schizophrenia over many years. Under cross-examination Dr White was evasive and kept resorting to unrealistic interpretations of odd symptoms which were readily explicable in terms of the Paranoid Personality Disorder and did not support the diagnosis of Paranoid Schizophrenia. At times Dr White disclosed a tendency to distort the interpretation of symptoms and the significance of behaviours that did not support his diagnosis.

88. Dr Tym saw the applicant on 29 September 1992 in the context of the applicant wanting to adjourn the hearing of an assault charge. In a report of 2 October 1992 (Ex 222) Dr Tym said the applicant appeared to be suffering 'some degree of mental discomfort', but no reference was made to any mental illness or disorder.

89. In circumstances now unknown, Mr Ninness spoke with Dr Tym and provided a history concerning the applicant. Dr Tym did not give evidence and Mr Ninness had no memory of Dr Tym. In a report of 21 October 1992 (Ex 223) Dr Tym expressed the opinion that the applicant suffered from 'a very serious mental disorder, or mental illness, of Delusional Disorder, Persecutory Type'. Dr Tym recommended that an opinion be obtained from Professor Paul Mullen.

90. Mr McQuillen has no memory of Professor Mullen, but it is apparent that he spoke with him. In a report of 14 December 1992 (Ex 221) Professor Mullen referred to a 'detailed history' provided by Mr McQuillen and to the opinions of Dr Tym and other psychiatrists. Professor Mullen said that in the absence of a personal consultation he could not be certain of a diagnosis, but he held 'strong suspicions' that a 'delusional disorder' was present. Professor Mullen did not give evidence.

91. The basis upon which Dr Tym and Professor Mullen reached their views is unknown. Their views in 1992 do not reflect the overwhelming weight of the evidence since then.

92. Miles CJ found that the applicant suffered from a Paranoid Personality Disorder and not a mental illness in the nature of Schizophrenia, Paranoia or Psychosis.[44] In my opinion the evidence I have heard, which now extends into 2013, confirms that finding conclusively. Of course, the issue to be determined is not the particular diagnosis of the applicant's mental state, but rather the question of fitness to plead. However, the proper diagnosis is relevant to the critical issue of fitness to plead and, in particular, to the circumstances that existed on 29 June 1995.

93. In my opinion there is nothing in the events of 29 June 1995, or the events either side of 29 June 1995, to support the suggestion by Dr White that the applicant was not fit to plead on 29 June 1995. Dr White's view is strongly contradicted by the evidence and is not supported by Dr Milton or Dr Westmore. Both Dr Milton and Dr Westmore reject any suggestion of thought disorder or psychotic hallucinations on these occasions. As Dr Milton said, the submissions presented by the applicant in respect of bail were 'as far distant from thought disorder as I think it is possible to get' (Inq 1149). Dr Westmore expressed the view that although the persecutory thoughts extending to the trial Judge were a matter of concern because such thoughts were extreme and abnormal, they were not psychotic.

94. As to the applicant's refusal to cross-examine and his statement to the trial Judge about prohibiting illegal police bugging, and whether such conduct and statements might suggest some sign of disordered thinking or delusion, Dr Milton said (Inq 1150):

> I don't think it was a delusion. I've thought about this quite a lot and I think what we have is suspicion and suspicion that Mr Eastman utilised in his own service by saying that he was being persecuted and thereby casting himself in the role of a victim, which was to his advantage.

95. Dr Milton explained that these were processes of thinking based on incorrect premises of suspicions. They were not delusions, but suspicions and the applicant would do things that were not in his best interest because of choices he took by reason of his narcissism and paranoid nature. In Dr Milton's view poor choices were not signs of disordered thinking or delusions.

96. In respect of the events of 29 June 1995, again Dr White displayed a lack of objectivity and resorted to reliance upon the flimsiest of factors. Asked for examples of thought disorder, he referred to 'tangentiality', loose associations and the applicant being over-inclusive thereby showing an inability to think logically (Inq 1367–1368). This part of Dr White's evidence lacked both credibility and common sense.

97. As to whether the applicant was fit to plead on 29 June 1995, Dr White was evasive and spoke in the vaguest terms of the applicant's beliefs in a conspiracy affecting what he said. He suggested that the applicant was unfit at times, for example when he was being disruptive, which Dr White thought demonstrated a lack of insight and understanding of the effect of his behaviours (Inq 1391). As is plain from my earlier remarks, I reject Dr White's view.

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[44] Inquiry under s 475 of the *Crimes Act 1900* into the matter of the fitness to plead of David Harold Eastman, Report vol 1. (2005) [1] [243].

98. The applicant's written submissions (annexure 7) advance a case that due to the applicant's 'pre-exisiting paranoid condition', he was 'abnormally suspicious' of others and fell out with a succession of lawyers over what the applicant perceived was their failure to stop a 'campaign of real harassment' undertaken by the AFP murder investigation team. As a consequence, the applicant was not capable of maintaining an adequate professional relationship with his lawyers which, in turn, meant that he was not fit to plead because he was not capable of giving instructions to his legal representatives.

99. In advancing this proposition the applicant relied upon the evidence of Dr Westmore. He was of the view that there were times when the applicant became 'so intensely angry and persecuted' that it overwhelmed the applicant to the point where he was unable to control himself (Inq 1285). However, these were transient occasions and not the consequence of a mental illness. Dr Westmore said there may have been times during the trial up to 29 June 1995 when the applicant may not have been fit to plead in the sense that his capacity to give instructions was 'compromised' (Inq 1330). In that context, while the relationship between the client and the lawyer does not have to be perfect, it has to be an 'adequately working relationship' (Inq 1332). Appreciating that the capacity to instruct does not require the capacity to make good tactical decisions, Dr Westmore gave the following evidence as to his understanding of the meaning of 'capable' or 'capacity' in the context of being capable of giving instructions (Inq 1332):

> Well, at first attempt I would say that he has the ability to – the intellectual capacity to, the ability to remember things, to process things, to understand things. So, he can at that level instruct, say, 'I wasn't there. I didn't do it. The story is different from what is alleged'. It's an intellectual process.

100. Dr Westmore agreed that the client must be able to trust the lawyer in the sense of trusting that the lawyer is acting in the client's best interest. From a psychiatric perspective, the client may have the intellectual capacity to disclose information to a lawyer, but if the client holds certain views about the lawyer or their trust in the lawyer is compromised, they may not disclose those matters (Inq 1332, 1333). In that situation there may be an issue of fitness. The fact that persons might act against legal advice in a manner which may not appear, to the external observer, to be rational does not necessarily make the person unfit to stand trial (Inq 1334). Dr Milton was of the view that the applicant was capable of maintaining his relationship with his lawyers if he wished to do so (Inq 1245).

101. Leaving aside the finding of Miles CJ concerning the state of play as at 21–22 May 1995, having regard to all the medical evidence , and to the evidence of legal practitioners which is discussed in the next section of this Report, I reject the applicant's submission that there was an issue as to fitness leading up to 29 June 1995 because there was an issue as to the applicant's capacity to instruct his legal team. No doubt there were periods when the applicant became so irate that he was, for a short period, incapable of giving instructions by reason of his anger, but the evidence falls well short of establishing the possibility that he was incapable of instructing his legal team because he could not form a proper working relationship with them.

Legal Practitioners

102. The applicant withdrew his instructions from all his legal representatives at the conclusion of the evidence of 26 June 1995. Counsel next appeared for the applicant on 10 July 1995.

103. A number of legal practitioners who acted for the applicant gave evidence in the Miles Inquiry. All the evidence of lawyers is summarised by Miles CJ in Volume I of his Honour's report at pages 45–56 [129]–[161]. Greater detail of the evidence given by practitioners who acted for the applicant until 22 May 1995 is set out in Volume II of the Miles Report (appendix 6, 198–221).

104. Mr Winston Terracini SC and Mr Justin O'Loughlin were Counsel for the applicant from time to time, commencing on 5 June 1995. Miles CJ summarised their evidence in the following passages:

> 138. Mr Winston Charles Terracini SC was retained as leading counsel in late May 1995 by Mr George Hovan, solicitor. Mr Terracini first appeared at the trial on 5 June and last appeared on 11 October. He was dismissed and re-engaged on 11 occasions during that period. Mr Terracini's evidence to the inquiry was that he often had difficulties in obtaining instructions from Mr Eastman, but instructions could be obtained through skill and perseverance. He considered that Mr Eastman was capable of understanding difficult areas such as ballistics and gunshot powder evidence, and that when Mr Eastman "chose" to provide instructions on those matters, those instructions were given with "breathtaking clarity and detail". Mr Terracini noted that on each occasion when cross-examination of Commander Ninness was imminent, Mr Eastman would withdraw instructions. There was a period in August 1995 when there was a particularly bitter dispute between Mr Eastman and Mr Terracini. Mr Terracini took advice from the NSW Bar Association and eventually instructions were renewed after Mr Eastman acknowledged that he had previously dismissed his lawyers from time to time so as to manipulate the trial process: see [120]-[121] above and Appendix 9.
>
> 139. Although Mr Terracini considered that Mr Eastman was fit to plead and to give instructions, he suggested to Mr Eastman on several occasions that he consult a psychiatrist. The suggestion was always met with strong refusal.
>
> 140. Mr Justin O'Loughlin was one of the junior counsel to Mr Terracini with a more active role than the other junior counsel. He died after the trial and before the inquiry. During the week of Monday 10 July 1995, after Mr Terracini had suddenly taken ill, Mr O'Loughlin had difficulty getting instructions and conducting the case in Mr Terracini's absence. The difficulties were such that he spoke to Mr PJ Hely QC (later Justice Hely of the Federal Court of Australia), senior member of the NSW Bar Council, relating to his ethical position. (Mr Hely was also the source of the advice given to Mr Williams that he should not raise the issue of fitness to plead contrary to the direction given by Mr Eastman - see above at [129].) Mr O'Loughlin confirmed the conversation in a letter dated 11 July stating that it had become "almost impossible for me to obtain any relevant or rational instructions" from the client. He also confirmed the advice that "if the client continues in his refusal to instruct me, then I will hand the brief back and seek the leave of the Court to withdraw". Indeed Mr O'Loughlin did announce the withdrawal of his instructions on 13 July. … [45]

105. As to others who acted for the applicant from July onwards, Miles CJ summarised their evidence in the following passages:

[45] Ibid, 48–49 [138]–[140].

142. Mr Lewis Tyndall was junior counsel to Mr Terracini for about a week from 17 July. In his view no issue of fitness to plead arose during that time. He considered that the lawyers had sufficient instructions to properly conduct a defence. The problem was that Mr Eastman's instructions were obsessive in detail and time-consuming. Any attempt to expedite the preparation for trial led to rudeness and unreasonable demands on Mr Eastman's part. Mr Tyndall noted that Mr Eastman gave detailed instructions in relation to the documents subpoenaed from the National Crime Authority and also in relation to the surveillance tapes, which Mr Eastman considered privileged.

143. Mr Patrick Burgess replaced Mr Tyndall as one of Mr Terracini's junior counsel at the end of July. He observed that there were times when Mr Eastman could simply not control his anger, and that on some occasions the lawyers were not able to get instructions on particular issues. It occurred to him that there was an issue of mental stability. The issue of fitness to plead was discussed among counsel at times. The conclusion was reached that Mr Eastman had not passed the "legal threshold" of unfitness notwithstanding his emotional disturbance. Mr Burgess thought that Mr Eastman was unwilling but not unable to give instructions.

144. Mr Ian Ross was the Sydney solicitor who instructed Mr Terracini and junior counsel from about 20 July 1995 until 10 October 1995. It soon became apparent to him that there were difficulties in obtaining instructions from Mr Eastman and Mr Ross adopted the practice of taking notes during conferences and other conversations with Mr Eastman.

145. As solicitor, Mr Ross might have been expected to be closer to his client in some respects than Mr Terracini and junior counsel. He thought that although Mr Eastman was 'not normal and that he was a most difficult and demanding client, he could give instructions if he wished'. His statement continued:

'I did consider that he knew what he was doing. He had a clear understanding of the case and the process before the Court. He was perfectly capable of engaging in discussions with lawyers concerning tactics, which he did on several occasions. I can recall no occasions on which it seemed to me that he was incapable of giving instructions had it suited him to do so ...'

146. In his evidence to the inquiry Mr Ross said:

'If, in my opinion, if Mr Eastman wanted to give instructions about something then he gave very clear and concise instructions and if as it appeared to me, he wanted to talk about something else or didn 't want to talk about an issue then he wouldn 't. So how you treated him wasn 't necessarily the determining factor.'

147. Mr Ross' voluminous file was Exhibit 92 in the inquiry. Its contents confirm in a general way the observation that Mr Eastman's instructions on some aspects of the trial were time consuming and obsessive in detail and that on other aspects Mr Ross and the team had difficulty in ascertaining what his instructions were. [46]

106. Leaving aside 21–22 May 1995, it is apparent that not only did the applicant know what he was doing and have a 'clear understanding' of the case, he was 'perfectly capable' of giving 'very clear and concise instructions' if he wished to do so, and equally capable of declining to do so when, for one reason or another, he decided he would not cooperate with his legal practitioners.

107. Legal practitioners from the prosecution team at the trial Justice Michael Adams,[47] Mr Ibbotson and Ms Woodward, provided affidavits and gave evidence in this Inquiry. They were unanimous in their view that the applicant was fit to plead throughout his trial and on 29 June 1995.

[46] Ibid, 50–51 [142]–[147].

[47] By agreement with Justice Adams he was addressed as Mr Adams.

108. Ms Jennifer Woodward was a solicitor in the Office of the ACT Director of Public Prosecutions from November 1991 until January 2004. In August 1993 she commenced working on the matter of the prosecution of the applicant. In substance she was the managing solicitor for the prosecution team. In that capacity she had extensive dealings with the applicant, both face to face and in numerous telephone conversations, some of which were lengthy. Fortunately, Ms Woodward was a prolific note-taker and she recorded her contacts with the applicant in extensive notes. In addition to personal contacts, Ms Woodward had the opportunity of observing the applicant in numerous court appearances and throughout the trial. Details of her contact with the applicant are set out in her affidavit of 18 July 2013 (Ex 12) and in her lengthy statement in the Miles Inquiry dated 28 September 2004 (Ex 8).

109. Ms Woodward acknowledged that it was apparent from her dealings with the applicant and her observations of him that he suffered from some form of mental illness which manifested itself in symptoms of paranoia. However, it never occurred to her that the applicant might be unfit to plead. Ms Woodward explained that her personal dealings with the applicant lasted for about a year until she had a number of 'fairly abusive phone calls' from the applicant and the Director determined that future communication would be in writing. During that period of personal communications she had approximately 50 telephone conversations with the applicant and there was never a time when the applicant was incoherent or appeared to have problems understanding what she was saying. Examples of issues they discussed and the applicant's apparent capacity to understand and deal with the issues are found in the following passage from Ms Woodward's evidence (Inq 823–25):

> Q Can you give his Honour an example of the sorts of things that Mr Eastman might call you about concerning the trial? Would it be when it was on or ...?
>
> A We had some conversations about the lifting of the suppression orders where he understood that he needed – well the issue was that the suppression orders were only going to be lifted to a certain extent, as long as he didn't disclose material that was in that and we had discussions about that. We had discussions about his – he had two AD (JR) applications and about the issues involved in that. One was in relation to the signing of the indictment and the other was the decision to commit him for trial by the Coroner.
>
> Q So when you talk about the suppression orders you mean suppression orders that were made by the Coroner?
>
> A The Coroner, yes.
>
> Q And you go on to say in one of your affidavits that you were going to lengths to try and make sure those suppression orders were lifted so that Mr Eastman could get access to that material?
>
> A Yes, well because we didn't even have access to it ourselves the DPP. All that we were given from the Commonwealth DPP was the – or from the inquest – was what was relevant to the Eastman and what we called the 'Eastman and general section of the inquest'.
>
> Q And you were trying to get hold of all the material so you could pass it on to Mr Eastman?
>
> A Yes.
>
> Q And during some of the phone conversations were you explaining to Mr Eastman what that process involved?
>
> A Certainly, yes.
>
> Q When you spoke to him about that was he responsive?

A Yes, yes.

Q And did he appear to you to be understanding of the process involved?

A Yes he knew what the process – it appeared to me that he knew what the process involved.

Q And when you spoke about the two AD(JR) applications would Mr Eastman explain to you what they involved?

A Well, he'd instituted them.

Q Yes, and was he able to explain to you clearly what they involved?

A Yes, well he'd done notice of motion, affidavit supporting.

Q Did you ever read any of the notice of motion or the affidavit?

A Yes, I was involved in all his proceedings. Had - Nick Cowdery QC appeared for the DPP, in relation to those two. I think it was in front of Jenkinson J.

Q And were you instructing him at that time?

A I was instructing Nick Cowdery.

Q Mr Cowdery?

A Yes.

Q And when you come to court today and you say that you were of the belief that Mr Eastman was fit during this trial – you are of that belief, is that right?

A Yes.

Q And it is your opinion – I withdraw that. During the trial it never occurred to you that Mr Eastman was unfit?

A Never occurred to me.

Q Do you take into account things like the phone calls you had with him and ... ?

A Well, the extensive dealings I had with him leading up to that, seeing him represent himself in complex AD(JR) applications, understanding the law. He knew more about the Jury Act than his senior counsel appearing on the first day of the trial. He understood where his senior counsel had made mistakes about the panelling of the jury.

Q So his understanding - you were left in no doubt that he had an understanding of complex court processes?

A Yes, and I made a statement for the Miles CJ inquiry where I was of the view that because of certain things he'd clearly instructed his lawyers - - -

Q Yes?

A concerning particular aspects of the Crown case.

Q Yes and you've - that's in fact, before this inquiry?

A Yes.

Q You've talked about the number of days in court, the various applications leading up to the trial. Mr Eastman was self-represented for most of those, is that right?

A Yes.

Q And are they sort of occasions where he would sit beside you?

A He would sit at the Bar table.

Q I see?

A I sat at the end of the Bar table ...

Q On ... ?

A in court 1 and he would sit - there would be Mr Adams, he would be sitting next to Mr Adams

Q I see. On those occasions, did you ever have discussions with Mr Eastman before or after court?

A I've certainly had a number of conversations with him at court.

Q Was there - what can you tell his Honour about whether or not Mr Eastman was coherent on those occasions?

A I have - I never saw him on an occasion that he was incoherent.

Q And did he appear to you, on those occasions when you were actually in court to understand the court processes?

A Certainly and the ...

110. Ms Woodward said she never saw the applicant apoplectic with rage and she made an informative observation about the demeanour of the applicant throughout the trial (Inq 825):

> The thing that I think that is very difficult to discern from a transcript is the way in which people are using language and there were – there were times when he was disruptive to the trial and would say abusive things to the trial judge but it was never in a rage. It was always very calm and deliberate, no – as if it was – it was planned to enrage the trial Judge but his voice was never raised. It was calm and deliberate.

111. Mr Adams said the applicant never lost his temper during the trial and was measured and deliberate (Inq 3099–3100).

112. From the perspective of Ms Woodward, after a trial date had been fixed the applicant terminated his instructions to legal representatives in order to avoid the trial commencing. Once the trial was underway, he engaged in similar conduct designed to delay the trial and his abusive and disruptive conduct was an endeavour to provoke the trial Judge and Senior Counsel for the prosecution into a reaction which would justify aborting the trial (Inq 601).

113. Ms Woodward was an impressive and reliable witness whose opinions and observations are worthy of significant weight.

114. Mr Adams emphatically rejected suggestions that there was ever a question as to the applicant's fitness to plead and stand trial. He did not detect the 'slightest difficulty' in the applicant understanding the proceedings on 22 May 1995 (Inq 3080) and, in Mr Adams' view, the applicant was 'plainly' and 'unarguably' fit on 22 May 1995 (Inq 3082). From Mr Adams' perspective, in respect of the legal proceedings the applicant was the 'master of his own mind' (Inq 3083).

115. As to the applicant's mental state on 29 June 1995, Mr Adams drew attention to the applicant's submissions in opposition to the prosecution application to revoke bail. He described those submissions as 'logical, coherent, rational and on one level persuasive' Mr Adams said it was 'patent' that the applicant was fit (Inq 3091).

116. This summary of the evidence given by both medical and legal practitioners is not intended to be exhaustive of the evidence. Additional details are found in the

submissions of the applicant (annexure 7 [51]–[71]) and the DPP (annexure 9 [22]–[40]). I have had regard to all the evidence in arriving at my conclusions.

117. In my opinion there were a combination of circumstances and reasons which led to the applicant repeatedly sacking his legal teams. The applicant's paranoid personality and suspicions undoubtedly played a role. However, the narcissistic element of the applicant's personality and his desire to maintain control over the conduct of his legal representatives, as well as his desire to manipulate the course of the trial and to avoid the trial coming to a conclusion, also played a significant role in the applicant's motivation for his conduct. None of these features, either in isolation or in combination, raised an 'issue' as to the applicant's fitness to plead. Like many litigants, no doubt there were moments when the applicant, for one reason or another, was in such an emotional state that he could not give instructions, but those periods were short-lived and did not result in the applicant being unfit to plead.

22 May 1995

118. As I have said, Miles CJ concluded that if the issue of fitness had been raised on 22 May 1995, there would have been a 'question' as to fitness, but by the end of that day the applicant had demonstrated that he was capable of giving instructions when he chose to do so. His Honour was of the opinion that the Mental Health Tribunal could not have found the applicant unfit to plead except on the morning of 22 May 1995 on the basis of the material confined to events of that date. In his Honour's view, if the Tribunal had found the applicant unfit on 22 May 1995, the decision would have been wrong.

119. Counsel for the applicant submitted that his Honour did not apply the correct test and that, in view of all the evidence now available, I should reach a different view from his Honour with respect to the possible result if a 'question' as to fitness had been referred to the Tribunal on 22 May 1995.

120. If an 'issue' as to fitness is raised, and the court is satisfied that a 'question' as to unfitness exists, the court will be in error if it fails to refer the question to the Tribunal unless the court 'is affirmatively persuaded that no Tribunal, acting reasonably, could conclude that the accused was not fit ...'.[48] As I have said, it is not part of my function to review the conclusions reached by Miles CJ, but I am not persuaded that Miles CJ applied the wrong test. In addition, regardless of that issue, I am of the opinion that if a 'question' as to fitness had been referred to the Tribunal on 22 May 1995, no Tribunal acting reasonably could have concluded that the accused was not fit to plead. The totality of the evidence conclusively demonstrates that the applicant was fit to plead on 21 and 22 May 1995.

22 May – 29 June 1995

121. After the events of 22 May 1995, which are canvassed in the Miles Report, nothing untoward occurred in the proceedings until 29 May 1995 when the applicant reverted

[48] *Eastman v R* (2000) 203 CLR 1 106 [319]

to repeating the words 'stop judicial condonation of harassment'. On that occasion the trial Judge warned the applicant that if he continued to be disruptive his Honour would revoke bail and the applicant would be retained in a room below the court (T 764). The applicant maintained his position that he would not cross-examine any witness until his Honour took steps to prevent police harassment.

122. On 31 May 1995 Counsel appeared for the applicant and he continued to be represented until the conclusion of evidence on 26 June 1995 when in the absence of the jury the applicant announced that he had withdrawn instructions from his entire legal team. The applicant then made an application for an adjournment of the trial to 4 July 1995 so that he could prepare and conduct an appeal in the Federal Court on 3 July 1995. The submissions were logical and the applicant did not display any overt disrespect for the trial Judge.

123. On 27 June 1995 the applicant explained to the trial Judge that legal aid had been terminated and repeated his application for an adjournment. The applicant confirmed he was persisting with his withdrawal of instructions and said he had withdrawn instructions 'not because of any dissatisfaction with them but if I may say so, with respect, because of dissatisfaction with your Honour's rulings' (T 1991). The applicant went on to explain that he was unable to give instructions with 'any sense of privacy'. This submission was made in the context of a previous application that the trial Judge direct that no illegal audio surveillance take place which the applicant had suggested involved the police listening to his confidential conversations with his legal representatives. After a brief discussion between the trial Judge and Senior Counsel for the prosecution, the applicant asked if he might have a 'rejoinder' of some of the points made by Counsel (T 1995). He then made lengthy submissions concerning a number of issues that were clearly and logically presented without any hint of disrespect to the trial Judge. The trial Judge ruled against the applicant's application for an adjournment following which the applicant briefly made relevant points, again with clarity.

124. During 27 June 1995 witnesses were called without anything untoward occurring again. The applicant continued to maintain his position that he would not cross-examine until the trial Judge prohibited bugging of his legal conferences. After the jury retired at the conclusion of evidence, the applicant again outlined his position that if the trial Judge was prepared to make an order prohibiting any illegal bugging he would be quite happy to reinstruct Counsel (T 2040). This submission was expressed as made 'with respect'.

125. Dr Roantree gave evidence on 28 June 1995. At the conclusion of that evidence, in the presence of the jury, the applicant explained why he was not represented and said that there had been an attempt to keep the jury 'in the dark' about his absence of representation. He again returned to the refusal of the trial Judge to prohibit illegal bugging of his 'legal conversations' (T 2051, 2052).

126. Two witnesses were called on 28 June 1995 after Dr Roantree without any cross-examination by the applicant. Nothing untoward occurred, but that situation changed during the morning of 29 June 1995. In the absence of the jury the applicant spoke again about police harassment and related to the trial Judge details of a threat to his safety that had occurred during the early hours of the morning when he was at an

automatic teller machine. The applicant related to the trial Judge that the incident had been witnessed by security officers, following which his Honour said (T 2062):

> Well, if you are concerned about your safety we can revoke your bail and you can go into custody and you will not be standing at teller machines at half past one in the morning.

127. Not surprisingly, the applicant was not impressed by his Honour's remark. The following exchange occurred (T 2062, 2063):

The Accused:	Well, that is ...
His Honour:	Mr Eastman, I have listened to you ...
The Accused:	That is really an - that is an asinine remark, really. I mean you ...
His Honour:	Mr Eastman, you - please listen to ...
The Accused:	You say that I have been threatened therefore I should be punished ...
His Honour:	You have your rights as a citizen of this Territory to ...
The Accused:	And you have your duties.
His Honour:	Yes, I know what my duties are ...
The Accused:	And I have complained to the police, as you have been told. Now, like - I want to put it quite clearly on the record because your Honour is treating this in a flippant matter, no let it be ...
His Honour:	I am not dealing in a flippant matter ...
The Accused:	Let it be recorded that if I suffer any injury from Mr Nugent at any stage in the future I will be holding you criminally and legally responsible.
His Honour:	Yes.

128. Immediately after that exchange the applicant asserted that the trial Judge had displayed very obvious bias in the ruling and renewed his request that his Honour disqualify himself. That application was refused and the applicant's response is informative. Rather than an explosion of anger, the applicant said 'and you are refusing it, fine OK…' (T 2064) and proceeded in a clear and logical submission to discuss documents and other matters to which the applicant sought access. After submissions in response by Senior Counsel for the prosecution, the applicant replied in a logical and relevant manner. In quite lengthy submissions and exchanges with the trial Judge the applicant displayed no further disrespect or anger until, upset at the approach taken by the trial Judge, the applicant again spoke of a response of the judge being 'asinine' and 'designed to impede' his proceedings in the Federal Court (T 2077). The applicant then renewed his application for a permanent stay which was refused. He then proceeded to engage in a calm discussion with the trial Judge about other matters.

129. Nothing in the applicant's conduct or submissions suggested any thought disorder or delusional belief processes. Quite the contrary, the applicant's thinking and expressions of his position were made logically and with relevance.

130. Before continuing with the events of 29 June 1995, it is appropriate to complete the picture with respect to the remark by the trial Judge about revoking bail if the applicant was worried about his safety. The transcript and other evidence discloses that the applicant was a particularly difficult person to deal with during the trial and the trial

Judge was faced daily with a most unenviable task. It is readily apparent that his Honour displayed quite extraordinary patience in the face of repeated provocation which was, at times, particularly unpleasant. This is the context in which his Honour made the remark and it was the only occasion on which his Honour made a remark that could be construed as flippant. Ms Woodward viewed the remark as flippant and said it was the only time his Honour did not maintain his 'constant, steady judicial demeanour' (Inq 601). Ms Woodward also said that from the perspective of the applicant his statement that the trial Judge had made an 'asinine remark' was a logical response (Inq 601).

131. Returning to the events of 29 June 1995, after the trial Judge directed that the trial proceed, a witness was called and, at the conclusion of the examination, the trial Judge asked the applicant whether he had any questions. The following exchange took place, at the conclusion of which the trial Judge revoked bail and directed that the applicant be taken to the room underneath the court where he could view the proceedings for the remainder of the day (T 2082–2086):

The Accused:	In view of your Honour's continuing condonation of police harassment and your refusal to make any order whatsoever, prohibiting illegal police bugging of my conferences with lawyers, it is quite obviously impossible - and your Honour knows this - to ask any questions of the witness and I submit that your Honour is conducting the trial in a way which is manifestly unfair to the accused.
His Honour:	If you keep on making statements like that, that are supported by no evidence, but seeking to get publicity as a result of them and seeking to influence the jury, I will take steps which are within my power to stop you. Now, please resume your seat ...
The Accused:	Is your Honour threatening me?
His Honour:	You heard what I said.
The Accused:	Because your Honour makes reflections in front of the jury all the time. When Mr Terracini was cross-examining a witness you said, 'I think you've squeezed enough juice out of that lemon', and you were clearly trying to send a message to the jury that my counsel's proper cross-examination of that witness was flogging a dead horse and had no merit. You ...
His Honour:	I am sending two messages to you.
The Accused:	You were trying ...
His Honour:	Just listen to me.
The Accused:	You were trying to influence the jury against me and against my counsel.
His Honour:	Members of the jury would mind retiring.
THE WITNESS WITHDREW	
JURY RETIRED	
His Honour:	Have you finished, Mr Eastman, or do you want to say more?
The Accused:	Your Honour ...
His Honour:	No, the jury is - I just wanted to know because I am proposing to say something to you in the absence of the jury.
The Accused:	Fine.
His Honour:	If you persist in this disruptive conduct ...

The Accused: Listen, you are the one that is being disruptive.

His Honour: You listen to me.

The Accused: I am not being disruptive.

His Honour: If you persist in this disruptive ...

The Accused: You are threatening my security. You have condoned the Australian Federal Police putting me in physical danger; you have condoned that. You are disrupting the trial yourself. You must know that and you do know it. Now, I am in a situation where I think there is a real possible threat to my physical safety, condoned by the Australian Federal Police.

His Honour: If you keep this up I am having you removed from this court, Mr Eastman. Now, I am giving you a solemn warning, and I have given you warnings before about this and I am giving you another one now. If you persist in this I am having you removed.

The Accused: What exactly is the threat, your Honour? I would just like to get it on the ... In the absence of the jury ...

His Honour: I am going to have you taken down into that room where you can watch proceedings by the video. That is not a threat; it is an exercise of my power to prevent an accused person deliberately disrupting a trial.

The Accused: And what about - will your Honour exercise - now, you have just said you are prepared to do that to me; you have threatened school girls who are taking notes; you will take action against school girls; you will threaten school girls and me. What about the Australian Federal Police? You have taken no action throughout the whole trial to curb the Australian Federal Police. You have threatened the accused with revocation of his bail, over and over again. You have threatened school girls in the public gallery who have taken notes. You have threatened journalists who take a few sketches, but you will not take any action against the Australian Federal Police. What is the accused to do, but to protest about it.

His Honour: Yes, very well. Have you finished?

The Accused: Well, can your Honour answer that question?

His Honour: I do not answer your questions, Mr Eastman. Are you finished, because if so I will bring the jury back in?

The Accused: Well, I ...

His Honour: If you persist, I am having you removed.

The Accused: But, your Honour, surely I am within order to ask for a response to a submission that I put ...

His Honour: There is no evidence before me that would justify my taking any action against the Australian Federal Police ...

The Accused: That is because you flatly refuse to allow the evidence to be given. I offered this morning to give evidence of ...

His Honour: But you have rights as a citizen, as every other citizen in this ...

The Accused: You have a duty as a judge surely.

His Honour: Yes. Well, you are going to persist in this, are you?

The Accused: No, I am not persisting in anything ... In the absence of the jury

His Honour: Well, sit down, or otherwise I am having you removed. Now, you elect you either sit down or I have you removed.

The Accused: May I be heard further, your Honour ...

His Honour:	No, you may not.
The Accused:	... very briefly?
His Honour:	No.
The Accused:	So, if I am knifed you say that that is quite all right?
His Honour:	You are as entitled to the protection of the police as any other citizen.
The Accused:	But I have been denied it, and your Honour is denying me that protection.
His Honour:	I am asking you, are you resuming your seat or are you going to persist in this?
The Accused:	I am not persisting in anything, your Honour. I am not showing any improper defiance to the court.
His Honour:	You are disrupting the trial.
The Accused:	I am not seeking to defy the court, I am a person genuinely concerned for my safety and I am appealing to your Honour for some protection, because I believe the Australian Federal Police have deprived me of that protection and if I get none from your Honour I may be in physical danger. That is the matter that I put to your Honour.
His Honour:	All right, that is it, is it?
The Accused:	So, what is your Honour's response to that?
His Honour:	My response is I do not propose to do anything about what you are complaining about. I want to proceed with this trial, and if you continue to disrupt it you will be removed. That is my response.
The Accused:	So then, if I leave the court, or if I leave the office late tonight, I am in a situation where I am deprived of the normal protection of the average citizen from the Australian Federal Police. That is quite clear. I am deprived of any protection of this court. This individual has made a in the absence of the jury threat to kill, has committed an assault, and then has made a further menacing ...
His Honour:	Are you going to continue with this?
The Accused:	... approach in the early hours of the morning.
His Honour:	Officers, will you take the accused down to the room underneath the court. His bail is revoked and he is to remain there for the remainder of certainly today.
The Accused:	These proceedings are an outrage. An absolute outrage.
His Honour:	You may leave the witness box. I will take a short adjournment.

132. Following his removal from the court, the applicant behaved appropriately, except perhaps for declining to answer when the trial Judge asked whether he had any questions of the witness. After a lengthy exchange between Counsel for the prosecution and the trial Judge, the applicant objected to evidence being called without him being consulted and referred to 'some sort of cosy arrangement' having been made between the trial Judge and the prosecution (T 2112). In the course of an exchange about that issue, the applicant suggested that his Honour had accepted that the material had been served on him by saying words to the effect 'I am sure he has already seen it', an assertion with which the trial Judge disagreed. However, the transcript shows that the applicant was correct.

133. At the conclusion of the oral evidence there was a discussion concerning the admissibility of evidence and the applicant did not reply to a question as to whether he wished to make submissions. The prosecutor then indicated that he opposed the continuation of bail for the applicant. After a copy of the *Bail Act* was apparently sent to the applicant, Counsel for the prosecution advanced a lengthy submission in opposition to bail. During that submission Mr Staniforth from the Legal Aid office attended court and the trial Judge indicated that he had asked Mr Staniforth to attend to discuss providing documentation to the applicant if he was remanded in custody. During an exchange between the trial Judge and Mr Staniforth, the applicant said that he had been trying to attract the attention of the trial Judge without success to make an objection. It appears that the sound system had not been working properly (T 2124-2125).

134. The applicant then advanced an objection to any communication between Mr Staniforth and the trial Judge because of legal professional privilege. The applicant expressed concern that Mr Staniforth was persuaded to 'trot over at the mere request of the DPP' and proceeded to respond to the application that bail not be renewed with a perspicacious opening in the following terms (T 2127):

> This is an opportunistic application, an abuse of process by the Crown to take advantage of some ruckus that occurred between the bench and the accused this morning. Your Honour was not given the benefit by Mr Adams of any history at all of the bail that has been granted to me in this matter, and I believe you should have that before reaching a decision.

135. The applicant's submission continued with a detailed history of the circumstances attending bail. He dealt with each of the criteria in the *Bail Act*. The submission was pertinent and clearly expressed with good grammar. Apart from describing the Crown's attempt as 'rather sneaky, underhand' and 'shoddy', the applicant's language was temperate (T 2131). It was an excellent submission that addressed all the relevant matters clearly and concisely.

136. After a short adjournment the trial Judge gave reasons for refusing to reinstate bail and adjourned the court without any further communication with the applicant.

137. No suggestion was made to the trial Judge by anyone on or before 29 June 1995 that an issue existed as to the applicant's fitness. The assertion in Paragraph 1 that the issue was 'raised on the initiative of the trial Judge' is not supported by the transcript or evidence to the Inquiry. The suggestion that references by the trial Judge to a decision in *R v Vernell* [1953] VLR 590 and an article reported in (1985) Criminal Law Journal 327, *The Disruptive Defendant,* was his Honour's way of raising the issue of fitness, is without substance. *Vernell* was an appeal concerned with the circumstances in which a Judge is permitted to exclude an accused from the court during the proceedings. It is plain from the transcript (T 2083, 2087, 2132), and from his Honour's sentencing remarks, that the trial Judge did not consider an issue as to fitness existed and regarded the applicant as deliberately disruptive and manipulative.

138. The trial resumed on 5 July 1995. The applicant made an application for an adjournment of proceedings pending the result of the decision by the Full Court of the Federal Court. Again, the application was logical and presented eloquently without any disrespect

being expressed to the trial Judge. The application was refused and the applicant then participated in further discussions about the progress of the trial and the evidence. After the jury returned, his Honour addressed brief remarks to the jury about the delay and the applicant took objection to those remarks (T 2148–2149). Further discussion followed about various issues before the jury returned to the courtroom. There is no suggestion that the applicant was anything other than reasonable and logical in the exchanges that occurred between him and the trial Judge.

139. Between the adjournment of the trial on 29 June 1995 and the resumption on 5 July 1995, the applicant had appeared before the Full Court of the Federal Court on 3 and 4 July 1995. He argued his application for leave to appeal against the refusal of the trial Judge to renew his bail calmly and appropriately. During those submissions the applicant expressly conceded that he lost his 'cool' on 29 June 1995 because he felt 'affronted by a sarcastic reply from his Honour'. In his submissions to the Federal Court, the applicant demonstrated a good grasp of the issues and showed no signs whatsoever of any thought disorder or incapacity in any respect.

140. Miles CJ explained his view of the applicant's presentation to the Full Court in the following terms:

> Mr Eastman's presentation and the application to the Federal Court, and his prediction of a constitutional challenge to the trial Judge's appointment, are both inconsistent with the contention that he was unfit to plead and, in particular, incapable of instructing Counsel. The delay in making the challenge is suggestive of a technical decision on his part.[49]

141. The applicant applied for special leave to appeal against the decision of the Full Court. He also filed in the High Court an application for a stay of the trial pending determination of his application for special leave. The applicant appeared before Brennan CJ on Wednesday 19 July 1995 to argue his application for a stay and Miles CJ reported his view of the applicant's presentation in the following terms:

> The transcript of the proceedings in the High Court shows that Mr Eastman conducted the application competently, intelligently and, it must be observed, courteously. He displayed a knowledge of the nature of the application and of what was required for the application to succeed which would be rare amongst legal practitioners who did not practice regularly in the High Court. When questioned by Brennan CJ as to the position in the trial he showed a full grasp of the nature of the proceedings, the history to date, including the applications for leave to appeal to the Federal Court and the current situation in the trial.
>
> In particular, in the course of submissions in the application before Brennan CJ, Mr Eastman accurately described the prosecution case as circumstantial and such as would entitle an accused person 'to lead evidence to show that someone else is the perpetrator or there is a strong possibility that some other person or persons is the perpetrator'. He submitted that he had been deprived of that entitlement by police using listening devices during privileged communications with his lawyers and that a miscarriage of justice would necessarily follow if the trial were to continue. He submitted that a miscarriage of justice would inevitably result from the way in which the Inquest had been conducted.

[49] Inquiry under s 475 of the *Crimes Act 1900* into the matter of the fitness to plead of David Harold Eastman, Report vol II Appendix 7.

> He encountered difficulty in the course of argument when he tried to introduce a ground based on the document MFI23. He showed good sense in not spending long on that argument once Brennan CJ indicated that the document was not before the High Court and could not be used in the application being heard.
>
> Although the application was dismissed on what again might be seen as the inevitable ground that Mr Eastman had not shown that any possible miscarriage of justice at the trial could not be corrected by the ordinary processes of appeal, his conduct at the hearing of the application made the suggestion that he was incapable of instructing Counsel in the trial at that stage wholely untenable.[50]

142. I have read the transcript of the application for a stay before Brennan CJ and I agree entirely with the views expressed by Miles CJ.

143. In an affidavit dated 29 July 1995, sworn in support of an application for bail, the applicant said that on 29 June 1995 he had deliberately continued with his submission knowing that his bail would be revoked. He added (Ex 8):

> I regret that I lost my cool in this way.

Conclusion – Fitness to Plead

144. All the evidence, including the medical evidence, conclusively establishes that the applicant is a highly intelligent person. He repeatedly demonstrated that intelligence during the trial and in his appearances before the Federal Court and Brennan CJ. While he got angry, and to some extent abusive on 29 June 1995, the applicant was always in control and did not at any time disclose any tendency to thought disorder. Quite the contrary; the applicant's presentations were logical and expressed in appropriate language. As I have said, in particular his submission concerning bail, given without time for preparation, was delivered eloquently and addressed all the relevant issues concisely and clearly throughout. The applicant consistently demonstrated an excellent grasp of the issues with which he was confronted.

145. I accept the evidence of Mr Adams and Ms Woodward. I have no doubt that the applicant was fit to plead on and before 29 June 1995. He probably lost self control with his solicitors when apoplectic with rage, but he quickly regained control.

146. In my opinion, even if the trial Judge had been in possession of reports by Dr Milton on 29 June 1995, no issue as to the applicant's fitness was raised on or before 29 June 1995. If the 'issue' had been raised by counsel or the trial Judge, on the material available to the trial Judge, and on the material now available to me, there is no doubt that his Honour would have found that no 'question' existed as to fitness.

147. The doubt or question as to guilt with respect to fitness to plead and to stand trial raised in Paragraph 1 has been conclusively dispelled.

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[50] Ibid.

Milton Reports – possession by trial Judge

148. The fact that the applicant was fit to plead throughout his trial, and more particularly on 29 June 1995, is not the end of questions that arise under Paragraph 1. It is necessary to consider evidence gathered by this Inquiry suggesting that, unknown to the prosecution and the defence, the trial Judge was in possession of reports by Dr Milton early in the trial. Such possession, if established, could raise the question of bias.

149. As discussed later in these reasons, I am satisfied that the trial Judge was provided with reports by Dr Milton as annexures to a confidential affidavit sworn in support of a claim for public interest immunity over documents sought by the applicant. Nothing improper occurred, but this information was not brought to my attention until April 2014, well after I had heard extensive evidence on the topic. I will deal with that evidence before discussing the obvious explanation because it also raises a question as to private contact between the trial Judge and members of the AFP investigation team.

150. In examining this issue it is necessary to canvass the background relating to the reports of Dr Milton commencing in 1989. Mr Richard Ninness was a Detective Superintendent with the AFP and the Operational Commander of the Major Crime Squad in the ACT region. On 10 January 1989 he was designated Operational Commander of the investigation into the murder of the deceased. Mr Ninness spoke to Dr Roantree on 13 January 1989 who informed him that on 6 January 1989 the applicant had made threats against the deceased. Mr Ninness reviewed files and decisions of the Administrative Appeals Tribunal involving the applicant and became aware of issues concerning the applicant's mental instability and aggression, together with a course of conduct that might lead to a motive to kill the deceased. As a consequence of becoming aware of these matters, Mr Ninness was concerned about the potential for violence by the applicant against particular individuals and public safety generally. It was in these circumstances that he decided to retain the services of Dr Milton to provide advice to the AFP concerning public safety, psychiatric diagnosis and profile for the applicant and to assist in opening lines of investigation.

151. Prior to 1995 Dr Milton provided reports to the AFP concerning the applicant's mental state and likely behaviour. Those reports were dated 20 February 1989, 15 January 1990, 15 February 1990, 28 February 1990, 20 and 28 June 1990, 3, 7 and 15 August 1990, 6 September 1990, 21 August 1991, 25 October 1991, 26 and 29 January 1992, 31 March 1992, 6 April 1992 and 4 September 1992. The reports are part of exhibit 15 and leave no doubt that in Dr Milton's view the applicant was, potentially, a danger to the public and to people in official capacities who dealt with him.

152. The history of events relevant to the issue of possession by the trial Judge begins with Mr Alan Towill who was the Registrar of the Supreme Court of the ACT from 1990 to 2001. On 11 September 1992 he made a note of contact he received from Mr Peter Dawson, an Assistant Commissioner in the AFP and the Chief Police Officer of the ACT. The note is annexure AT-01 to the affidavit of Mr Towill (Ex 9). As to the contact by Mr Dawson, the note read as follows:

> Mr Peter Dawson (Assistant Commissioner AFP and Chief Police Officer for ACT) rang me this morning in relation to Mr Eastman. Mr Dawson told me that he had a report from Dr Robert Milton, psychiatrist, which was prepared on Mr Eastman at the request of police. The report had been prepared due to recent outbursts by Mr Eastman in Court and certain telephone calls of a disturbing nature to court officers. Mr Dawson had spoken to Mr Chris Hunt about the report. Mr Hunt suggested that Mr Dawson contact both myself and Mr Thompson, Registrar Magistrates Court. A copy of the report was delivered to me. I was concerned particularly about the threat assessment of page 8 of the report.

153. Mr Dawson's affidavit of 23 October 2013 is exhibit 11. He gave evidence, but had no recollection of the occasion identified in the note of 11 September 1992. He identified Mr Chris Hunt as the secretary of the Attorney General's Department and said he was in regular contact with Mr Hunt.

154. The report by Dr Milton was dated 4 September 1992. It contained disturbing information from the point of view of judicial officers and court staff. Dr Milton reported that 'people in positions of power who do not give Mr Eastman what he wants are at risk' and expressed the view that there was 'a significant risk for the Chief Justice, particularly of a planned homicidal attack.' The report identified other officers and court staff whom Dr Milton considered were at risk of violence from the applicant.

155. In his affidavit of 25 October 2013 (Ex 9) and his evidence Mr Towill said he had no recollection of the call from Mr Dawson. However, he recalled seeking advice from Justice Higgins and speaking to the Chief Justice about Dr Milton's report. Mr Towill sought advice from Justice Higgins because his Honour had disqualified himself from dealing with any matter relating to the applicant and Mr Towill was concerned not to disqualify the Chief Justice from dealing with matters relating to the applicant. At the suggestion of Justice Higgins, Mr Towill put a hypothetical situation to the Chief Justice and, in answer to questions by the Chief Justice, elaborated to the extent of informing the Chief Justice that the police had obtained a report from a psychiatrist concerning the applicant and the report contained a threat or risk assessment in which the Chief Justice was mentioned. The Chief Justice left it to Mr Towill to decide whether the Chief Justice should be shown the report and Mr Towill decided not to do so (Inq 542–571).

156. Mr Towill's note of 11 September 1992 contained the following entries about providing copies of Dr Milton's report to other persons and informing staff of the risk assessment (annexure 2 Ex 9):

> I decided to take the following action in relation to the report:
>
> - Provide a copy of the report to people in the Court I decided were "at risk" i.e. Deputy Registrar Circosta, Roger Evans, Lee Jones, Les Lambert, and Keith Quintall.
> - Provide an oral briefing to other Court staff to matters of general consumption in the report.
> - Provide copy to Phil Thompson (as indicated above).
> - Confer with Chief Justice on the report.

157. In evidence Mr Towill was unsure whether he provided a copy of the report to the people named in his file note. He suspected he would have shown the report by Dr Milton to Justice Higgins, but he had no recollection of giving Justice Higgins or any judge a copy (Inq 547).

158. The evidence of the Deputy Registrar Ms Jill Circosta is covered later in this Report. As to other staff named by Mr Towill, their memories concerning the events described in Mr Towill's notes are vague, but they were all certain that they did not have any dealings with the trial Judge about Dr Milton and did not provide his Honour with any report by Dr Milton.

159. After taking the action described, it appears likely that Mr Towill had little to do with the subsequent events. The question of security in court was the responsibility of the Sheriff who reported to Ms Circosta.

160. The applicant was a regular party to court proceedings and was frequently in contact with Supreme Court staff. He was difficult to deal with. However, for present purposes, the next events of significance began in March 1995 ahead of the trial.

161. Miles CJ was allocated to conduct the trial. However, his Honour underwent heart surgery and on 23 March 1995 Gallop ACJ announced at a directions hearing that the Chief Justice would not be able to conduct the trial. His Honour also stated that the ACT Government had taken steps to appoint an acting judge to conduct the trial and substantial progress had been made in that regard.

162. Mr Ray Thornton was employed by the AFP as a security coordinator within the internal security and audit division. He was not a sworn officer in the AFP. Mr Thornton's usual role centred on internal security and the security of AFP employees. He was not involved in the murder investigation.

163. On 27 March 1995 Mr Thornton sent a minute to Mr Ninness suggesting that in view of the 'impending court appearance', it might be 'appropriate to re-examine the threat' from the applicant. The minute is annexure 1 to the affidavit of Mr Thornton dated 2 November 2013 (Ex 35). Mr Thornton has no independent memory of that minute and could not adequately explain why he would have written it other than the possibility that it was part of a 'watching brief' he was keeping in respect of matters involving the applicant.

164. On 24 March 1995 Mr Ninness attended at the rooms of Dr Milton and provided further information to Dr Milton concerning the applicant. In a report of the same date (Ex 15), Dr Milton observed that the applicant would be under mounting pressure as the trial date approached which was likely to increase his agitation and cause aggressive reactions to minor frustrations. The report concluded with the following:

> These factors make him [the applicant] an even more desperate man than he was in 1988, with increased risk of dangerous behaviour. Paranoid personality disorders are not uncommon, but it is unusual to find someone with the disorder to be as intelligent, persistent, aggressive and abnormally suspicious as Mr Eastman. These qualities combined with the current situation, suggest all reasonable precautions regarding public safety should be exercised in the following weeks.

165. On 28 March 1985, on behalf of Mr Ninness, Constable Paul Jones responded to Mr Thornton and set out a summary of incidents involving the applicant over the previous twelve month period. Constable Jones also annexed a copy of Dr Milton's

report of 25 March 1995. That minute is annexure 1 to the affidavit of Constable Jones dated 15 October 2013 (Ex 31).

166. Mr Thornton said in his affidavit that he had only a vague recollection of the minute from Constable Jones. In evidence Mr Thornton said he has no memory of receiving the minute or the annexed copy of Dr Milton's report (Inq 888). He reconstructed that because the minute did not suggest any action be taken, he would have advised his immediate superior and placed the minute in the 'watching brief file'. Mr Thornton agreed that he would have read Dr Milton's report carefully (Inq 900).

167. Mr Thornton subsequently met with the trial Judge at the direction of Deputy Commissioner Adrien Whiddett. This task was not within the usual scope of his duties, but occasionally he was asked to undertake activities outside the strict parameters of his role. Mr Thornton understood from Mr Whiddett that the trial Judge had concerns for his safety.

168. Mr Whiddett did not remember asking Mr Thornton to speak to the trial Judge, but accepted that he might have done so (Inq 1015–1016). Back in 1990 Mr Whiddett had investigated a complaint by the applicant against Mr Ninness during which he had received a report from Mr Ninness dated 9 May 1990, attached to which were four reports from Dr Milton. Mr Whiddett said he would have read the reports, or at least become aware of the substance of them, and it was quite likely Mr Thornton was given a copy of the reports for future reference with respect to the security of AFP personnel.

169. As to speaking to the trial Judge, Mr Whiddett thought that before the trial he became aware that the trial Judge had requested or was offered protective security during the trial. He learnt that Commander John Vincent, who was then in charge of the AFP's protection element, was planning to speak to the trial Judge. Out of an abundance of caution Mr Whiddett spoke to Mr Vincent and gave him advice that when he spoke to the trial Judge he should avoid any mention of the applicant or the applicant's case (Inq 1019–1020). Mr Whiddett had a recollection that Mr Vincent later told him he had spoken to the trial Judge about personal security issues, but had not said anything about the applicant or the applicant's case.

170. It was Mr Whiddett's impression that the conversation between Mr Vincent and the trial Judge had been face-to-face and, although uncertain, he thought it likely that the conversation had occurred at the residence of the trial Judge (Inq 1015).

171. The possibility that both Mr Vincent and Mr Thornton spoke to the trial Judge was explored with Mr Whiddett. He ventured a possible explanation centred on the relative skills and experience with respect to matters of security (Inq 1023). Mr Vincent was a senior officer, but not necessarily experienced in the area of security, whereas Mr Thornton possessed technical expertise and skills in this area. In that context, having learnt about Mr Vincent intending to see the trial Judge about issues concerning security, Mr Whiddett might have suggested that Mr Thornton become involved. In fairness to Mr Whiddett it needs to be explained that he was pushed to reconstruct a possible explanation.

172. Mr Vincent was adamant that he had nothing to do with the trial Judge. Nor did he speak with Mr Whiddett about the security issue with respect to the trial Judge (Inq 1545–1550). I am satisfied Mr Whiddett is mistaken in his recollection of speaking with Mr Vincent.

173. As to the timing of the meeting with the trial Judge, in his affidavit Mr Thornton said it was approximately 1994 or the beginning of 1995. However, in evidence Mr Thornton acknowledged that the meeting did not occur till after the trial commenced. After being shown a minute dated 23 May 1995 from Sergeant Gough which described detailed close protection arrangements that had been put in place for the trial Judge, arrangements which came as a surprise to Mr Thornton, he was confident that the meeting with the trial Judge took place after the commencement of the trial. He thought the meeting occurred before the minute of 23 May 1995 because he was unaware of the close protection arrangements when he met with the trial Judge. The minute from Sergeant Gough of 23 May 1995 is annexure 4 to the affidavit of Mr Gough (Ex 22).

174. As to meeting with the trial Judge, in his affidavit Mr Thornton gave the following evidence:

> 13. Prior to meeting the Judge, I was given a copy of the report written by Dr Milton. I believe I was at the Court when I was given the report. I cannot remember who gave me a copy of the report however I believe it was an AFP officer.
>
> 14. I read this report before meeting with the Judge. I do not recall if I still had possession of the report while I met with the Judge. I cannot remember who took the report from me or exactly when it was returned to me. I did not take the report with me from the Court.
>
> 15. On 10 October 2013 Counsel Assisting showed me a copy of a report of Dr Milton dated 20 February 1989. I believe that this is the report that I read before meeting with the Judge. Annexure hereto and marked RT-03 is the report of Dr Milton dated 20 February 1989.
>
> 16. My recollection of my meeting with the Judge is not clear. I remember that I did not consider that there was a direct/specific threat to the Judge at the time. As such I only provided oral advice to the Judge in the form of motherhood statements of personal safety and security such as avoiding routine and to be aware of people and the things around him.
>
> 17. I do not recall specifically speaking with the Judge about David Eastman or the content of Dr Milton's report.
>
> 18. To the best of my recollections I did not give a copy of the report of Dr Milton to the Judge.

175. In his evidence Mr Thornton was most uncertain as to where the meeting with the trial Judge occurred. He had a 'feeling' that it took place at the court (Inq 892).

176. Mr Thornton said he was met at court and given a copy of a report by Dr Milton which he read. He thought it was different from the report that had been attached to the minute of 28 March 1995 from Constable Jones and he had a memory that the report contained information about the applicant's parents and upbringing (Inq 892). However, Mr Thornton thought it unlikely that the report of 20 February 1989 was the report he received at court because of the age of that report and its length. It was Mr Thornton's memory that the report he read at court was significantly shorter than the 1989 report.

Ultimately, Mr Thornton agreed that he had no idea which report he received and read before seeing the trial Judge.

177. As to who met Mr Thornton and gave him the report to read, no safe conclusion can be drawn from Mr Thornton's evidence. He had no idea who met him and was unable to remember the gender of the person. He thought it unlikely that it was Ms Circosta because the name meant nothing to him and he had seen her outside the Inquiry hearing room and did not recognize her (Inq 894 and Inq 915).

178. Mr Thornton acknowledged the possibility that he kept the report of Dr Milton in his possession while he met the trial Judge. However, it was his preferred position that he had returned the report to the person who had given it to him before he saw the trial Judge. Mr Thornton was confident that it was only one report and that he did not receive a bundle of reports (Inq 907 and Inq 914).

179. As I have said, Mr Thornton is unable to assist with the identity of the person who met him. However, if Mr Thornton's scant memory is accepted as reliable, it would appear that it was a person from court. He believed he was told he would be met by someone at court before seeing the trial Judge, but he was not expecting a briefing. Mr Thornton did not arrange the appointment with the trial Judge. It was his belief that whoever met him had volunteered the report to him. Mr Thornton also had a 'feeling' that the person who met him and provided him with the report of Dr Milton took him into meet the trial Judge.

180. Mr Marcus Hassall was the trial Judge's associate. He had a vague recollection of the name Dr Milton being connected with the trial, but he did not recall reports by Dr Milton being marked for identification. Mr Hassall recalled that special security arrangements were in place and had a vague recollection that a person, and possibly more than one person, came to see the trial Judge about the issue of security. He thought this meeting occurred in the early stages of the trial, but the names Ray Thornton and John Vincent meant nothing to him. Mr Hassall had no memory of handing a report to the visitor or taking it back (Inq 1050–1066).

181. In evidence Mr Hassall said there were occasions when Ms Circosta met with the trial Judge and they probably discussed security (Inq 1060).

182. As to what occurred during the meeting with the trial Judge, and what he meant in his affidavit by 'motherhood statements', Mr Thornton said the conversation centred on security while the judge was commuting to and from work and the airport. He endeavoured to raise the Judge's awareness of measures he could take such as varying his routes and being aware of whether he was being followed. He had a 'feeling' that he might have suggested that an attack while the Judge was commuting was unlikely. However, he was unable to recall whether he conveyed that view to the trial Judge or whether he tried to reassure him in any way. Mr Thornton said he did not discuss any concerns held by the trial Judge as a consequence of the applicant's behaviour in the trial (Inq 910).

183. During cross-examination Mr Thornton agreed he understood that the trial Judge had expressed his concerns about risks and threats to him from the applicant and this was the reason why he was asked to talk to the trial Judge (Inq 908). It was the risk posed by the applicant rather than a general concern with random threats or risks. In that context it was put to Mr Thornton that in the meeting with the trial Judge he spoke about trial Judge's concerns about the applicant and Mr Thornton replied 'I expect so, yes' (Inq 909). Mr Thornton's evidence continued (Inq 911):

> Q It's natural, isn't it?
>
> A Well, that was the whole circumstance and context in which I was there.
>
> Q Yes. And so given that context, what you were then doing was providing the Judge with advice about his personal security within the context of him being the trial Judge for Mr Eastman's murder trial?
>
> A Yes, yes.
>
> Q And in discussing with the Judge, say, security measures in the course of his travels?
>
> A Yes.
>
> Q From court to home and home to court, the threat that you were concerned with most was a threat from Mr Eastman during that journey?
>
> A Yes, yes.
>
> Q And that's what I suggest you discussed with the Judge?
>
> A Yes

184. Asked if he would accept the possibility that he did provide the trial Judge with copies of reports by Dr Milton, Mr Thornton replied 'no' (Inq 910). It was an answer given with certainty. Earlier in examination Mr Thornton agreed he could not exclude the possibility that Dr Milton was mentioned during the meeting with the trial Judge (Inq 895).

185. The only person with any knowledge concerning the trial Judge being aware of and in possession of reports by Dr Milton is Ms Circosta who, at the time of the trial, was Deputy Registrar and Sheriff. As Sheriff Ms Circosta was responsible for security in the Court. She was also responsible for administrative arrangements relating to the trial Judge. Ms Circosta said in evidence that she believed she discussed his personal and staffing arrangements with him on the telephone before he arrived in Canberra (Inq 637–639). The trial Judge arrived in Canberra on the 30 April 1995 and was sworn in on 3 May 1995. The trial commenced on 2 May 1995, but the jury was not empanelled until 16 May 1995.

186. On the 12 April 1995 Constable Jones made a database entry which is annexure 2 to his affidavit of 15 October 2013 (Ex 31) and also annexure 14 to the affidavit of Ms Circosta dated 29 September 2013 (Ex 19). In that entry Mr Jones recorded contact from Ms Circosta to the AFP in the following terms:

> DETAILS: advised by supreme court registrar jill circosta that justice carruthers wished her to be able to make 24 hr contact with op peat members and vice/versa. this was a precaution for any possible threats or matter that should be bought to the attention of either party by the other party. ms circosta will be the middle point of contact in order that police and justice carruthers

> remain free of any allegation of having an improper working relationship. ms circosta has previously been provided with contact numbers for d/a/sgt gough and cont jones. her contact details are ..... police were advised by ms circosta that justice carruthers may require periodic bomb searches of his vehicle. advised that this would be completed on request.

187. Constable Jones said in his affidavit that the data entry is 'in accordance with my recollection of the arrangement.' In evidence, he said he had no independent memory of this contact with Ms Circosta (Inq 852).

188. The database entry of 12 April 1995 by Constable Jones is the first written record of any contact between the AFP and Ms Circosta in 1995. However, as the entry of 12 April 1995 refers to the AFP 'previously' providing the contact numbers of Acting Detective Sergeant Gough and Constable Jones to Ms Circosta, contact was obviously made before 12 April 1995. Constable Jones had no memory of earlier contact.

189. Ms Circosta had no independent recollection of the circumstances described by the data entry of Constable Jones of 12 April 1995 and could only assume that she initiated the contact with the AFP because of the way the data entry was written (Inq 649). Asked in evidence whether she could recall any discussion with the trial Judge before he arrived in Canberra about security concerns his Honour may have harboured, Ms Circosta said she remembered the judge 'being concerned that Mr Eastman was on bail and he found that a very unusual circumstance, given the charge' (Inq 650). She was unable to recall whether she spoke to the trial Judge about any risk assessment that had been made in relation to the applicant. Ms Circosta said that over a number of years the applicant had been a difficult person to deal with and she could only assume that at some point she would have advised the trial Judge that the applicant was a difficult person.

190. As to the note by Constable Jones that Ms Circosta was to be the 'middle point of contact', Ms Circosta said in evidence that she had no independent recollection of the conversation and could only assume she would have emphasised that it was 'improper' for AFP officers to have any 'direct contact' with the trial Judge (Inq 652). Ms Circosta held that belief at this time. This was a view that both Sergeant Gough and Constable Jones said they also held. Ms Circosta said the trial Judge made clear to her that she was to be the point of contact in order to ensure that there was no suggestion of an improper working relationship between his Honour and the police (Inq 1460).

191. The trial Judge was due to arrive in Canberra on 30 April 1995. Constable Jones wrote a memo on 24 April 1995 referring to the impending arrival of the trial Judge and stating (annexure 15 Ex 19):

> Deputy Supreme Court Registrar Jill Circosta will be meeting him there. She has expressed concern about ensuring his arrival is without incidence. Justice Carruthers will be presiding over the trial of David Harold Eastman commencing next week. Ms Circosta requested a discrete presence of the airport section Police.

192. In evidence Ms Circosta said she believes she would have discussed the issue with the trial Judge, but could not recall who took the initiative. Ms Circosta met the trial Judge at the airport and this was the first occasion she had ever seen him (Inq 649).

193. The trial commenced on 2 May 1995. Ms Circosta said she had contact with the trial Judge on a daily basis and the issue of his Honour's personal security was a topic that he discussed with her (Inq 653).

194. As the trial approached Sergeant Gough and Constable Jones were appointed the liaison officers to the DPP. Sergeant Gough said he provided witness statements to the DPP, arranged for police witnesses to be made available to the DPP, proofed witnesses and responded to miscellaneous requests from the DPP. On 18 May 1995 Sergeant Gough made a note concerning contact from Ms Circosta (annexure 2 Ex 22):

> On the afternoon of Thursday 18 may 1995, Mrs Jill Circosta Deputy Registrar of the Supreme Court, advised that Judge Carruthers had asked for police protection on his behalf as he feared that David Eastman, presently on trial before him, posed a threat to him and his wife.

195. In his affidavit of 15 October 2013, Ex 22, Sergeant Gough said he had no independent recollection of the document, but he recalled that police protection was arranged for the trial Judge at his Honour's request. Ms Circosta said in her affidavit of 29 September 2013 (Ex 19) that the contents of the note by Sergeant Gough 'accords generally' with her memory. She said in her affidavit that she made contact with the AFP at the request of the trial Judge, but asked in evidence whether the contact was at the request of the trial Judge, Ms Circosta replied 'I believe it would've been' (Inq 653).

196. The note by Sergeant Gough of 19 May 1995 included a reference to a proposed 'security inspection' to be carried out on the apartment occupied by the trial Judge on the 19 May 1995. That note identifies Sergeant Gough, Constable Jones and Ms Circosta as the persons who would carry out the inspection. Ms Circosta said in evidence that the trial Judge normally went home on a Friday and she had a memory of going to the apartment, possibly with Sergeant Gough and Constable Jones, for the purpose of deciding what security was required (Inq 655). Sergeant Gough had no recollection of the inspection and Constable Jones said he had the 'vaguest' memory of it.

197. The next written entry of relevance is a memorandum by Sergeant Gough dated 22 May 1995. It relates to telephone contact by Ms Circosta and a request by the trial Judge for additional security arrangements (annexure 3 Ex 22):

> At 16:30 hours Monday 22 May 1995, the Deputy Registrar of the Supreme Court (Jill Circosta) telephoned to advise that Justice Carruthers was very concerned about his personal safety due to the present demeanour of David Harold Eastman. That evening Det/A/SGT Gough and Constable Jones escorted Justice Carruthers to his apartment that evening and briefed him on security options.
>
> As a consequence, Justice Carruthers asked for a close security measures to be put in place together with a duress alarm.

198. Accepting that she made the phone call at 4.30 pm, Ms Circosta said she believed the trial Judge asked her to make the call because of the behaviour of the applicant during the course of the trial of 22 May 1995 (Inq 697). Although she had no memory of reporting back to the trial Judge, Ms Circosta said it was normal practice for her to report that arrangements had been put in place.

199. Sergeant Gough said that after he received the call from Ms Circosta he spoke to the coordinator for the Special Operations Team and briefed him on what was required. He asked the coordinator to provide close personal protection for the trial Judge as soon as possible and advised him that while he was making those arrangements, Sergeant Gough and Constable Jones would escort the trial Judge to his apartment that evening.

200. Sergeant Gough said that he and Constable Jones waited behind the Commonwealth car which was to transport the trial Judge from the court to his apartment. They followed close behind in an unmarked police car. At that time they assumed that the trial Judge had been advised of the arrangements, but apparently the Judge was unaware of the close security and became concerned by the presence of the following vehicle. Sergeant Gough described the events that occurred (Inq 703-707):

Q Did any incident occur before you got back to his apartment?

A Yes, it did. We knew what route the car should have taken to his address in Kingston, but the Commonwealth driver was driving all over the southern suburbs of Canberra, and not making a direct route to the apartment. The Commonwealth car finally stopped in Kingston, where the Judge alighted and went to a bottle shop. We were concerned as to the activities of the Commonwealth car driver, so we approached the car just as the Judge was getting back into the car, holding up our police identification badges, and queried as to why the driver was being evasive. He was saying he was concerned about the car that was following him, and thought it might have been Eastman or an associate of Eastman who was planning to injure the Judge.

Q The driver said that to you?

A Yes.

Q Was the Judge present when that was said by the driver?

A Yes, he was.

Q When you say you showed your badge, did you introduce yourselves to the driver?

A Yes, we approached the front of the vehicle holding up our badges and saying, 'Police, your Honour.'

Q Did you say who you were, your names?

A Yes, and we explained to the Judge that Jill Circosta had asked us to provide close protection that evening and we had done so, and he said it was the first he knew about it.

Q Right?

A And he was alarmed. And when he saw I was approaching the car, he was even more alarmed.

Q Was anything else said at that point?

A Nothing at all, no.

Q What happened next?

A Well, we continued to escort the Judge back to his apartments. He invited us in to the apartment where I briefed him on the security arrangements that the Special Operation Team were organising, which was the replacement of myself and Paul Jones by two specialist officers, the renting of accommodation next door to the Judge's in the apartments by Special Operation Team members, the provision of a number of duress alarm buttons inside the Judge's apartment, and closed circle television cameras at the main entrance to the apartment and the corridor outside the Judge's door.

Q It sounds like you were well briefed by that stage on what the security arrangements were going to be for the Judge. How did you get that information?

A Brett Kidner kept in touch with me and told me what he was arranging. And asked that Paul Jones and I remain in the vicinity of the Judge's front door until Special Operation Team members arrived to take over from us.

Q Was that on 22 May?

A Yes, that evening.

Q All right. Were you invited into the Judge's apartment?

A Yes we were.

Q Were you invited in for a drink?

A He offered us a drink, which we declined.

Q And when you say 'we' was it you and Mr Jones?

A Pardon?

Q Was it you and Constable Jones who were invited in?

A Yes, we were.

Q Was there anyone else present?

A No.

Q Not his wife?

A No.

Q And so you briefed him on the security arrangements that were going to be put into place. Was there a discussion at any time about the Judge's concerns, specifically about his personal security concerning Mr Eastman?

A No he didn't mention his fear at all. He only mentioned how frightened he was when we approached his car at Manuka – at Kingston.

Q And you say Manuka in your affidavit at paragraph 14. Was it Manuka or Kingston that you recall that he'd stopped at the bottle shop and there was that discussion?

A Yes, on reflection, I think it was Manuka.

Q Okay that's fine. Are you able to say how long you were in the apartment with the Judge for on 22 May?

A After he'd returned home from the court?

Q Yes?

A Yes. No more than half an hour.

Q Did you and Constable Jones remain outside his apartment after you'd had that conversation with him?

A Yes, we did, until the arrival of the special operations team.

Q Are you able to remember how long that took?

A Probably another hour, I'd say.

Q When you were in the presence of the trial Judge in his apartment, was there general discussion about threats that Mr Eastman might have made generally to people in the past?

A No, no conversation along those lines.

Q For example, did you share with the Judge the fact that your daughter had made an allegation of assault against Mr Eastman?

A No, certainly not. The judge was very correct in his discussion with us, and did not mention anything, other than the arrangements for his own protection.

Q So there was no discussion then about the trial itself?

A None at all.

Q Was there any discussion about Dr Milton?

A None at all.

Q By that time on 22 May I take it that you'd read the Milton reports?

A Yes I had.

Q Did the Judge raise Dr Milton with you at any time?

A Never mentioned him.

Q Were you the one doing the talking, or was it Constable Jones?

A Me.

Q Because you were the most senior one there?

A Yes.

Q The judge had expressed alarm at the car, is that correct?

A Yes he did, your Honour.

Q He said he'd been frightened, and he was even more frightened or more alarmed when he saw you approaching the car?

A Yes, your Honour. He mentioned that the Commonwealth car driver had told him a car was following his car.

Q Yes?

A And when he parked at Manuka, the Commonwealth car driver told him, "There's that car parked across the road." The judge then went to a liquor store and came back to the car and started to get into the car and saw two people approaching him, and that was when he said he was quite alarmed.

Q Right. Now presumably you said, "Well, we'll follow you back to your apartment"?

A Yes, sir.

Q And indicated that you would have a discussion with him back there about his security?

A Yes, I believe I said that. We talked to him about the security arrangements back at the apartment.

Q And he invited you in to the apartment?

A He did.

Q During the course of the discussion, you were explaining what security you would provide; was anything said at all about the nature of the threat, the seriousness of it, or the lack of seriousness of it, whether these measures would be sufficient; whether they were really needed? Any attempt, for example, to reassure the Judge that, look the threats – you might have said to him, "Look, this is a very serious threat." You might have said to him, "Look, we don't think it's really serious, but this is what we're going to do." You might have said nothing to him about the seriousness of the threat. Was there any discussion along those lines at all?

A No, your Honour, we did not discuss the seriousness of the threat. The main point of my discussion with the Judge was to let him understand that within seconds of there being a problem, he'd have a swarm of Special Operations Team members looking after him. And I emphasised that the closed circuit television cameras that were going to be installed would cover all approaches to his apartment. That the Special Operations Team were in the room

next door, and they would be watching those screens on a 24-hour basis, and that he should relax and have a quiet evening.

Q Thank you.

Yes, Ms Chapman.

Q Mr Gough, did you feel compromised in any way as a result of the fact that you were having this direct contact with the trial Judge at that time?

A None at all, because it was obvious that it would have been quite inappropriate for me to discuss the trial with the Judge and my sole responsibility at that stage was to ensure his safety.

Q Were you yourself conscious not to do those things, not to cross the line. Is that what you're saying?

A Absolutely, yes.

Q And was there any discussion that you were the Police Officer Gough that Mr Eastman had been complaining about in court? ---

A Not at all. Nothing was raised in relation in relation to that matter.

201. Sergeant Gough said there was no mention of bail and he took 'extreme care' to limit the communication to 'security requirements'. He and Constable Jones were inside the premises for approximately four or five minutes.

202. The driver of the car transporting the trial Judge was Mr Edward Moore. In his statement of 3 December 2013 (Ex 73), Mr Moore said he became concerned when he saw a vehicle following him and he asked the trial Judge whether any security was in place to which his Honour replied in the negative. Notwithstanding Mr Moore's concern, the trial Judge directed that he stop at the Kingston shopping centre. When the trial Judge returned to the car, the officers approached and one spoke to the trial Judge informing him that he and his colleague were police security. Mr Moore continued the journey to the premises occupied by the trial Judge and left after his Honour had alighted from the vehicle.

203. A further aspect arising out of the events of 22 May 1995 should be mentioned. Constable Jones made a note in his diary that he contacted the appropriate person within the AFP to obtain a copy of a bomb search video to provide to the trial Judge via Ms Circosta. He could not remember whether he acted on a request or on his own initiative. He agreed it was likely he obtained the video and gave it to Ms Circosta, but he had no memory of doing so (annexure 4 Ex 31).

204. As to the note that Sergeant Gough and Constable Jones briefed the trial Judge on security, in her affidavit of 29 September 2013 Ms Circosta said she was not aware of that briefing. Similarly, she was unaware of anyone from AFP security visiting the Judge personally at court to talk about his Honour's security. She specifically had no memory of Mr Thornton visiting the Judge. Speaking hypothetically, if Mr Thornton had undertaken such a visit, it would have been Ms Circosta's attitude that it was 'quite probably not the best thing to do', but if it was to happen a court officer such as herself should be present. She had no memory of being present at such an occasion (Inq 660).

205. Ms Circosta dealt with the knowledge of the trial Judge about Dr Milton in her first affidavit of 30 April 2013 (Ex 17). She said that during the trial she became aware that

the applicant was behaving in 'an insulting and aggressive manner towards the Judge and court staff' and she had several discussions with the trial Judge in relation to whether the applicant posed a risk to the personal safety of the trial Judge and court staff. Ms Circosta said the trial Judge was becoming 'increasingly concerned for his personal safety' and, as a result of those concerns, she contacted the AFP to organise personal protection. In her affidavit she thought this was about late May or early June 1995, this being an affidavit sworn before Ms Circosta's attention was drawn to the written notes to which I have referred.

206. In her affidavit of 30 April 2013 (Ex 17) Ms Circosta said:

> 6. At about this time, I became aware that AJ Carruthers had in his possession reports prepared by Dr Milton, forensic psychiatrist, concerning the accused. I had been aware of the existence of reports by Dr Milton about Mr Eastman before AJ Carruthers showed them to me. I recall reading at least one of these reports in 1992; I recall that particular report as it referred to me.
>
> 9. I no longer recall whether I knew where AJ Carruthers obtained the report from, but I believe he had approximately 5 reports from Dr Milton in his possession when the trial commenced. I read all of the reports AJ Carruthers had prior to my contact with Dr Milton in June 1995.

207. In evidence Ms Circosta said she did not discuss the role of Dr Milton with the trial Judge until his concerns became 'quite grave' about his security. Ms Circosta's evidence continued as follows (Inq 655–57):

> Q Can you tell us about that, then?
>
> A I mean, I cannot recall the specifics of the conversation, but I – there was a general discussion of Mr Eastman's escalating behaviour, and at that point I believe I discussed the role that Dr Milton had provided in the past but I do believe that at that point he was aware of Dr Milton's involvement previously.
>
> Q And why do you think at that point he was aware of Dr Milton's previous involvement?
>
> A I mean, I just have a recollection that he mentioned it.
>
> Q OK. That he mentioned Dr Milton first?
>
> A Well, I don't know who mentioned it first, but there was a general discussion.
>
> Q I see. So it could have been that you were talking about it and you got the impression that you weren't telling him anything new, is that a possibility?
>
> A: That's correct.
>
> Q: Are you able to – I know you said it was a general discussion – are you able to say when that might have been?
>
> A: I have no idea. It was while Mr Eastman was on bail.
>
> Q: Sure. Now, you say in your affidavits that you saw Carruthers AJ in possession of up to 5 Milton Reports?
>
> A: Yes.
>
> Q: Are you able to say when that was in relation to that general conversation you've told us about?
>
> A: No, I can't recall when.
>
> Q: Was the topic of Dr Milton discussed before you saw him with the Milton reports?

A: I can't recall that now.

Q: Are you able to say where you were when you saw Carruthers AJ with the Milton reports?

A: I believe I was in his chambers.

Q: Can you recall whether you became aware of his possession of Dr Milton's reports while Mr Eastman was on bail or after bail had been revoked?

A: I believe it was while he was on bail.

Q: Did you give Carruthers AJ any of the Milton reports that you saw him in possession of?

A: No, I did not.

Q: Did you discuss with Carruthers AJ how he came to be in possession of them?

A: No, I did not.

Q: Where you surprised that he was in possession of them?

A: I can't recall what my reaction was at the time.

Q: You say in your affidavit that it was up to five Milton reports?

A: Yes.

Q: How certain are you about that number?

A: I'm not certain of the numbers. I believe – I mean, I knew that there were several.

Q: So more than one?

A: I knew there was more than – I knew there were several.

Q: You also say in your affidavit that you read the Milton reports that he had in his possession?

A: Yes, but I can't recall when I did that.

Q: That was going to be my next question: did he give them to you to read?

A: I can't recall that.

Q: You say that you saw up to five of them in his possession. Did he talk to you about them?

A: I can't recall ever discussing the specifically matters [sic] in the reports, but there could have been a general discussion.

Q: What I am trying to differentiate is, say, for example, you walked into his chambers and saw him with up to five Milton reports and said nothing, or whether you walked into his chambers and saw him with five Milton reports and there was some discussion about what he had?

A: I think it arose in the context of a discussion, and then I noticed that he had them.

208. In June 1995 arrangements were made for Dr Milton to travel to Canberra for the purpose of preparing a report for the court concerning the applicant. In her evidence Ms Circosta said she contacted Dr Milton 'because of the judge's rising concerns about Mr Eastman's behaviour on a daily basis in court' (Inq 660). She decided to contact Dr Milton because he had a background relating to the applicant and she assumed she would have discussed approaching Dr Milton with the trial Judge, but she could not recall a specific discussion. In her affidavit of 29 September 2013 (Ex 19) Ms Circosta said she contacted Dr Milton 'at the request of the judge', but in evidence she was unable to recall whose idea it was to contact Dr Milton (Inq 660).

209. Some assistance can be derived from a memo dated 15 June 1995 from Detective Commander Lucas to Deputy Commissioner Allen which refers to contact between Ms Circosta and Mr Ninness (annexure 2 Ex 19):

> On Wednesday 14 June 1995 Mr Ninness advised me that Justice Carruthers had, through the Registrar of the Supreme Court, expressed to DPP further concerns regarding his personal safety. These concerns were not withstanding his receiving personal protection from the AFP Protection Division.
>
> It was therefore decided to seek the services of Dr Rod Milton; a Sydney based Forensic Psychiatrist, to give a further opinion as to Mr Eastman's current state of mind.
>
> Dr Milton is therefore being brought to Canberra to undertake a covert assessment of Mr Eastman with a view to using such an assessment to revoke his bail. His fee and airfare are to be met by the Supreme Court.

210. Ms Circosta said no concerns had ever been expressed to the DPP. She said it would make more sense if the reference to 'DPP' was a reference to 'AFP' (Inq 662).

211. Mr Ninness recalled discussions with Ms Circosta concerning the applicant and suggesting to her that it might help to get an insight from Dr Milton into the applicant and how he might react as the trial was going ahead. He said he did not provide any reports to the trial Judge.

212. On 16 June 1995 Constable Jones travelled to Goulburn and picked up Dr Milton to convey him to Canberra. Dr Milton then met with Ms Circosta, Mr Ninness, Sergeant Gough and Constable Jones.

213. Sergeant Gough did not recall the meeting. Constable Jones had the 'vaguest' memory about the meeting and could not remember any of the discussion (Inq 854).

214. Dr Milton thought it was the police who first spoke to him and asked him to speak to Ms Circosta. He recalled that she spoke about the course of the trial and the safety of persons in the court. In particular she spoke about the safety of the trial Judge outside the court. Dr Milton did not have a clear recollection of any of the details of the meeting with Ms Circosta, but he did not think they discussed his other reports as there would be no reason to do so. Dr Milton said there was no discussion about how his report would be used and he had no memory of any mention of the report being given to the trial Judge, a topic which he thought he would have remembered as such a course would be unusual.

215. Mr Ninness could not recall the meeting. Nor could he recall being made aware of Dr Milton's report to Ms Circosta.

216. Dr Milton's report of 18 June 1995 is part of exhibit 15. It speaks of the applicant possessing 'a long history of aggressive and assaultive behaviour' and refers to a number of charges faced by the applicant. Reference is made to an occasion when the applicant threw a glass water jug from the bar table in the direction of a Magistrate and to aspects of the trial proceedings, including the applicant's insulting statements and his chanting of 'stop judicial condonation of harassment'. Dr Milton concluded in the following terms:

> Although I believe Mr Eastman to be capable of extremely aggressive behaviour, I do not think there is a serious current risk to officers of the Court. His Honour's firm but deliberate approach has contained Mr Eastman fairly well so far, and has allowed the trial to proceed.
> However, I expect there to be further challenges to his Honour's authority and Mr Eastman might act then in a more aggressive fashion. In addition, if he believes that the trial is going seriously against him and at that time focuses his hostility on any particular person in Court that person could be at risk – perhaps withdrawal of bail should be considered at such time.

217. Attached to Dr Milton's report was a list of 158 charges that were outstanding against the applicant, together with 13 pages containing summaries of the facts relating to each charge. These documents were prepared by the AFP.

218. In her affidavit of 30 April 2013 (Ex 17), Ms Circosta said she believed she received the report of 18 June 1995 by facsimile. Ms Circosta said she gave a copy of the report and the attachments to the trial Judge. She also gave a copy to the AFP to assist the AFP with security arrangements, but did not give a copy to the DPP or the applicant's legal representatives. She thought it was unnecessary to provide copies to the parties as the report was in relation to court security only. In evidence Ms Circosta said she would have considered providing a copy of the report to the DPP or the applicant's legal representatives would have been improper (Inq 666).

219. In her affidavit of 30 April 2013 Ms Circosta said she could not recall whether she had any discussion with the trial Judge about the contents of Dr Milton's report of 18 June 1995. From Ms Circosta's perspective the purpose of the report was to 'assist the judge in how he should deal with Mr Eastman's escalating behaviour' and in dealing with the personal protection of his Honour outside the court (Inq 661).

220. Subsequently there were a number of occasions when Ms Circosta spoke to Dr Milton. She said he appeared to take an academic interest in the trial and would contact her from time to time. Dr Milton did not recall speaking to Ms Circosta, but accepted that it was likely that he did speak with her (Inq 1264).

221. Ms Circosta said in evidence that she has no idea how the trial Judge came to be in possession of any reports of Dr Milton other than the report of 18 June 1995 which Ms Circosta requested from Dr Milton. She had no memory of a suggestion that reports should be placed on the court file and was unable to assist as to what might have happened to those reports.

222. The reports of the appeal proceedings following the applicant's conviction, and the report of Miles CJ concerning his Inquiry, all demonstrate that the appeals courts and Miles CJ were unaware that the trial Judge was in possession of reports by Dr Milton before the reports of Dr Milton were a subject of evidence in the trial. Ms Circosta was directed to act as instructing solicitor to the Miles Inquiry, but she was unable to assist as to why information concerning the possession by the trial Judge of the reports was not given to the Inquiry.

223. The possibility that reports of Dr Milton were on the court file at the time the trial Judge became involved was explored. Ms Circosta agreed that it was possible somebody could have taken it upon themselves to put reports on the court file, but she thought that

such an occurrence was unlikely. She put the 1992 report in a separate envelope with notes which she did not want to be accessible in a file (Inq 675–676).

224. The preceding summary of evidence given by Ms Circosta was taken from her statements and evidence to this Inquiry during examination. A number of points and qualifications arising during cross-examination should be noted:

- After her attention was drawn to the statement by the trial Judge that although the reports of Dr Milton had been marked for identification he had not 'seen them' (T 4522), Ms Circosta appreciated that if her recollection was correct, the statement of the trial Judge was incorrect (Inq 1466). However, knowledge of the statement of the trial Judge did not cause her to think that she might possibly be mistaken (Inq 1467).

- Immediately after giving that evidence, Ms Circosta was asked whether it was possible that it was not as early as she recalled it that she saw the reports but, rather, it was later in August 1995 after they had been marked for identification. Ms Circosta replied 'that is possible' (Inq 1467).

- Ms Circosta said she cannot say one way or the other whether she had seen the trial Judge in possession of the multiple reports before she made contact with Dr Milton (Inq 1468).

- Ms Circosta was the solicitor instructing Counsel Assisting in the Miles Inquiry. She agreed that she would have engaged in discussion with Counsel concerning evidence and submissions. She appreciated the importance of Counsel putting submissions to the Chief Justice that accurately reflected the state of affairs. Counsel presented submissions to the Chief Justice based on the judgment of Callinan J in which his Honour stated that the trial Judge had never read the Milton reports because they were not received in evidence at the trial. Ms Circosta agreed she would not have knowingly allowed an inaccurate submission to have been put to Miles CJ, but she does not now know whether it was in her mind at the time and suggested that she might not have connected the two at that time (Inq 1515, 1516).

- Following the cross-examination about the Miles Inquiry, I explained to Ms Circosta it was being suggested to her that because she did not bring to the attention of counsel the fact that the Judge was in possession of reports by Dr Milton before any reports were marked for identification, it might be that her present recollection is wrong and it was not until after the reports were marked for identification that she saw the Judge with them. Ms Circosta responded 'that it could be possible', but in answer to a further question she was not prepared to agree that it was more than possible (Inq 1516).

- As to obtaining the report from Dr Milton in June 1995, Ms Circosta said it was her belief that the trial Judge asked her to obtain a report from Dr Milton and she knew it was after a session in court where the applicant's

behaviour had deteriorated (Inq 1525, 1526). However, asked if it was possible that rather than the trial Judge suggesting Dr Milton, after the trial Judge expressed his deep concerns she spoke to Mr Ninness and he suggested Dr Milton, Ms Circosta replied:

> It's possible but it's is not my best recollection of what happened (Inq 1506).

- Ms Circosta would not concede the possibility that Dr Milton contacted her rather than she contacted him (Inq 1506).

- Asked if there was any doubt in her mind that she gave the report of 18 June 1995 to the trial Judge, Ms Circosta replied 'absolutely not' (Inq 1519).

- As to the timing of the possession by the trial Judge of multiple reports from Dr Milton, Ms Circosta agreed with the proposition that when the reports were marked for identification, the trial Judge did not express concern that Ms Circosta had previously obtained a report from Dr Milton and who had been providing reports to the AFP. She agreed there was never such a conversation nor any alarm expressed that somehow the trial Judge would be compromised by having obtained the report of 18 June 1995. Ms Circosta agreed with the proposition that the absence of such a conversation or concern was consistent with her evidence that she and the trial Judge were well aware of other reports from Dr Milton before the report of 18 June 1995 was ordered (Inq 1532).

- Ms Circosta agreed that when it came to the security of the trial Judge, she gave that issue her 'paramount attention' and her priority was the safety of his Honour. In that context she accepted that she might have put aside any potential concerns as to whether the applicant or his legal representatives should know about the Judge having multiple copies of Dr Milton's reports because she was able to allay such concerns by saying to herself that it was mainly about the security of the Judge (Inq 1533). It was really only in 2013 when Counsel Assisting the Inquiry spoke to her and 'a bright light' was shone on the events surrounding the report of 18 June 1995 that she had cause to carefully consider whether or not it was proper for the trial Judge to have multiple copies of the reports of Dr Milton during the trial (Inq 1533).

- Ms Circosta agreed that she would have made notes of significant events, including the events surrounding the obtaining of a report from Dr Milton. No such notes have been located, but Ms Circosta believes there is another file which has not been located. She said that the paucity of notes produced suggest to her that a file containing notes is missing.

225. Mr Adams, Mr Ibbotson and Ms Woodward were all unaware of any suggestion that the trial Judge was in possession of reports by Dr Milton or that the court had obtained a report from him.

226. Leaving aside issues of compellability, the trial Judge is now an elderly person and I received confidential information concerning his health. In all the circumstances I determined that I would not endeavour to obtain a statement from the trial Judge or call him to give evidence.

Conclusions

227. As to the issue of contact between the trial Judge and members of the AFP in connection with questions of security, I am satisfied that nothing untoward occurred. First, with respect to Mr Thornton meeting the trial Judge in chambers, I am not able to make any finding as to the circumstances in which that meeting was arranged. It was unwise of the AFP, and Mr Thornton in particular, to meet with the trial Judge, but I am satisfied that no conversation occurred concerning the trial or the evidence and the discussion was limited to very general matters of security and precautions that the trial Judge should adopt.

228. Having observed that it was unwise of Mr Thornton to speak privately with the trial Judge, as a matter of practice it is probable that the Associate to the trial Judge was present, but no positive finding can be made in that regard. It should be said that the trial Judge had good cause to be concerned about his security, and the security of his family, and there was nothing improper in the trial Judge making enquiries of court officials as to arrangements for security. Similarly, there would be nothing improper in the trial Judge receiving the visit from Mr Thornton for the purpose of discussing questions of security because of the position held by Mr Thornton, but it was unwise for such a meeting to occur without a record having been made of it. It would have been preferable for the trial Judge to receive his advice from a court official such as Ms Circosta as the Sheriff.

229. Secondly, I am satisfied that the discussions between the trial Judge and Mr Gough and Mr Jones were strictly limited to questions of security and did not include any reference to the evidence or the trial in other respects. It was unfortunate that members of the investigation team were involved in the security task that led to the contact, but I am satisfied that a combination of circumstances led to the need for members of the team to be involved that particular evening and it was not intended that they would permanently be part of the security detail. Similarly, it was not intended that direct contact would be made between the officers and the trial Judge, but the alarm experienced by the driver and the trial Judge resulted in contact which could not have been foreseen.

230. It was unwise of the trial Judge to invite the officers into his residence. His Honour was obviously deeply concerned about the question of security and I am satisfied that his Honour did not intend to engage in behaviour that might have been perceived as inappropriate.

231. If the issue under consideration was an appeal against the decision of the trial Judge to revoke bail, there would be considerable force in an argument that the decision should be set aside because of the contact between the trial Judge and AFP officers for the

purpose of discussing questions of security. At the least, there would be a strong argument that the circumstances gave rise to a reasonable apprehension of bias. However, the critical question for this Inquiry is whether such contact can be said to give rise to a doubt or question as to guilt. In the broader context of the conduct of the trial, in my view the fact that the trial Judge discussed questions of security with members of the AFP does not give rise to any question of bias. The contact was limited to the two occasions described and the conversations did not touch upon the evidence or the trial. They were concerned solely with arrangements for the security of the trial Judge and his family.

232. For these reasons, in my opinion no doubt or question as to guilt arises as a consequence of the contact between the trial Judge and members of the AFP.

233. As to the question of possession by the trial Judge of reports by Dr Milton, prior to receiving additional evidence in April 2014, I was satisfied that the trial Judge was given a copy of the report dated 18 June 1995, but I was extremely doubtful that his Honour was in possession of other reports of Dr Milton before the reports were marked for identification on 17 August 1995. Ms Circosta conceded the possibility that her recollection of the timing could be wrong. She did not raise the issue when Counsel Assisting the Miles Inquiry cited the judgment of Callinan J in which his Honour stated that the trial Judge had not read the Milton reports. It would be surprising if, being aware that the trial Judge had a number of reports in his possession well before they were marked for identification, Ms Circosta had not raised the question with Counsel.

234. I was of the view that it would not be difficult for Ms Circosta to be in error about the timing so many years later. Given the regularity of her contact with the trial Judge, after the reports had been marked for identification it would not be surprising if Ms Circosta saw the reports in the trial Judge's chambers. In such circumstances it would not have struck Ms Circosta as unusual and she had no occasion to think about the timing until approached by Counsel Assisting this Inquiry.

235. It is now clear that the trial Judge came into possession of reports by Dr Milton on about 28 July 1995 when a confidential affidavit sworn by Mr Ninness on 28 July 1995 was filed (Ex 220). The applicant had issued a subpoena for the production of documents concerning listening devices warrants and the affidavit was filed in support of an objection to production on the ground of public interest immunity. Another affidavit and five reports of Dr Milton were included in annexures to the affidavit (20 February 1989, 15 January 1990, 20 June 1990, 15 August 1990 and 26 January 1992).

236. Ms Circosta came into possession of the documents over which immunity was claimed and some of the affidavits filed in support of the claim. It is clear from the transcript that the trial Judge read the material (T 3286 and ruling of Carruthers J, 11 August 1995).

237. Nothing untoward occurred. The filing of the affidavit on 28 July 1995 is the obvious explanation for the recollection of Ms Circosta that the trial Judge was in possession of reports by Dr Milton. Further, when the trial Judge said during submissions that he had

not read the Milton reports, obviously his Honour was referring to the reports that were marked for identification.

238. As to the report of 18 June 1995, Ms Circosta thought the trial Judge had suggested Dr Milton, but Ms Circosta was well aware of the involvement of Dr Milton and when the trial Judge raised questions of security with her it would not be surprising if Dr Milton came to her mind. In my view it is far more likely that the trial Judge expressed his concerns to Ms Circosta and agreed with her suggestion that she obtain a report from Dr Milton.

239. Once the report from Dr Milton was obtained, Ms Circosta had every reason to give it to the trial Judge and no reason to withhold it from him. I am satisfied that she gave a copy of the report to the trial Judge on or about 18 June 1995. The trial Judge should have disclosed his possession of that report, particularly when the prosecution applied for a revocation of the applicant's bail. However, in my view the possession of the report does not give rise to a doubt or question as to guilt. Nor does it impinge upon the integrity of the trial process. The trial Judge was entitled to obtain information concerning his security. It is not unusual for Judges to be in possession of information adverse to an accused person, such as a record of prior convictions, and the mere possession of adverse information is not regarded as a basis for disqualifying a Judge from sitting on a trial by jury or as in some way affecting the integrity of the trial process.

240. As to the AFP pointed out in its written submission, apprehended bias only arises if the relevant circumstances would give rise, in the mind of a fair-minded and informed member of the public to a reasonable apprehension of a lack of impartiality on the part of [the trial Judge] (annexure 6 [55]).[51] I agree with the following passages from the AFP submission which helpfully state the position succinctly (annexure 6 [55]–[58]):

> 55. ... such a fair-minded observer is expected to base their opinion 'on a fair assessment of the Judge's conduct in the context of the whole of the trial' rather than a consideration of a conduct that is claimed to support a claim of bias in isolation (*Michael v State of Western Australia* [2007] WASCA 100 at [61]. He or she would also be expected to have a general knowledge of the legal system and its practices (*Lee v Bob Chae-Sangg Cha* [2008] NSWCA13).
>
> 56. A fair-minded observer could therefore be expected to understand that a judge should be able to receive information relevant to his own safety and that of his court staff without having to disqualify himself or herself. Further what was said about Mr Eastman in the report of 18 June 1995 was no more prejudicial to him than significant amounts of material presented at trial or Mr Eastman's own conduct during the trial.
>
> 57. As noted above, it is also conventional and entirely appropriate for a judge to receive a confidential affidavit in the course of dealing with a public interest immunity claim.
>
> 58. In light of the context of the whole of the trial (and in particular the fact that Carruthers AJ was not the arbiter of Mr Eastman's guilt and there does not appear to be a single ruling or statement of Carruthers AJ that suggests a lack of impartiality on his part) a fair-minded and informed member of the public would not have a reasonable apprehension about a lack of impartiality on the part of Carruthers AJ.

[51] Citing *Webb v R* (1994) 181 CLR 41

241. As I have said, even if the trial Judge was in possession of numerous reports by Dr Milton, including the report of 18 June 1995, in my opinion no issue was raised as to the applicant's fitness to plead and stand trial on or before 29 June 1995 and, therefore, no doubt or question as to guilt arises in that context. Similarly, in my opinion no doubt or question as to guilt arises out of any possession by the trial Judge of reports by Dr Milton on the basis of matters such as reasonable apprehension of bias and integrity of the trial process.

242. The doubt or question as to guilt underlying Paragraph 1 of the Order has been convincingly dispelled.

PARAGRAPH 2

243. Paragraph 2

> At the time the trial Judge raised these matters and the applicant was not legally represented, the prosecution did not assist the court. The prosecution alone was in possession of psychiatric reports from Dr R. Milton submitted between 20 February 1989 and 6 September 1990 commissioned by the Australian Federal Police, the letter of 22 May 1995 to the ACT DPP from solicitor David Lander, raising the applicant's fitness and the prosecution was well aware of earlier approaches by Michael Williams QC and the ACT Public Defender attempting to raise the question of the applicant's fitness.

244. The 'matter' to which Paragraph 2 is directed is a doubt or question as to guilt by reason of the failure of the prosecution to disclose to the applicant or the court the existence of both Dr Milton's reports and correspondence and information received from the applicant's legal representatives concerning the applicant's mental state. The Inquiry has concentrated on the nature and the extent of the material, the circumstances of the Director's possession of such material and the impact of the failure to disclose that material to the applicant and the trial Judge.

245. There is no doubt the prosecution team came into possession of a number of reports by Dr Milton. Ms Woodward was aware of the reports, but in her view they were not relevant to any issue at the trial. She pointed out that the defence had been provided with all the psychiatric material from the applicant's treatment over the years which included the opinion of psychiatrists who had consulted with the applicant and supervised his treatment. By way of contrast, Dr Milton had not seen the applicant. In addition Ms Woodward observed that when the existence of the reports by Dr Milton was disclosed to the applicant during the cross-examination of Mr Jackson on 17 August 1995, and following the provision of those reports by letter of 18 August 1995 (Ex 13), Senior Counsel for the applicant did not raise the issue of fitness to plead or the reliability of the recorded material. No complaint was made to the trial Judge about the failure of the prosecution to disclose the existence of reports earlier.

246. The issue of Dr Milton's reports was canvassed in a meeting of 21 March 1995 attended by Mr Ninness, Mr Adams, Mr Ibbotson and Ms Hunter, a summary of which is recorded in a memo prepared by Ms Hunter.[52] On the last page of the memo are entries related

[52] Affidavit of Ms Hunter 30 October 2013 – Ex 45, 67; annexure 1 and Ex 95, 503.

to tasks to be undertaken as part of the preparation for trial. Those entries include the following:

> We are to check to see whether we have sent the Milton material to the other side.

247. Mr Ninness did not recall discussing this issue. Mr Ibbotson had virtually no memory of anything to do with Dr Milton. Ms Hunter could not recall whether there were discussions about Dr Milton before this meeting and did not have any independent recollection of a discussion at the meeting. Initially Ms Hunter thought it may have been her task to check whether the material had been sent to the defence, but when it was pointed out that other entries have referred to specific persons, including Ms Hunter, who were to undertake tasks, she agreed that the format of the entries suggested it was not her specific task to deal with the Milton material.

248. Ms Hunter said that she regarded Mr Adams as a mentor and he took the duty of disclosure very seriously. She recalled him telling her that disclosure was important because the prosecution were the 'model litigant'. She thought that the defence team had been given access to Dr Milton's report in accordance with the disclosure policy (Inq 1082–1083).

249. Mr Adams had the final say with respect to questions of disclosure. He did not have a memory of the meeting of 21 March 1995 or the issue of disclosing Dr Milton's reports to the defence, but he assumed his answer would have been in the negative. A lengthy cross-examination ensued which was, at times, vigorous. There was nothing improper in the cross-examination and Mr Adams specifically stated that he did not take offence. Throughout, Mr Adams emphatically maintained that the reports of Dr Milton were not relevant to any issue in the trial and no occasion arose that called for their disclosure until Mr Jackson referred to them during his cross-examination on 17 August 1995.

250. The discussion with Mr Adams concerning possible relevance to the recorded statements upon which the Crown relied as confessions is canvassed later in the context of Paragraph 16. In respect of disclosure in the context of the applicant's mental state generally in connection with the applicant's conduct at the trial, and specifically in relation to his fitness to plead, cross-examination commenced with questions as to the possibility that the applicant's mental state might have been a factor in making it difficult for him to sustain relationships with his legal team (Inq 3074–3076):

> Q But it did occur to you that a possibility was that his paranoid personality disorder might have been a factor in making it difficult for him to sustain the professional relationships with his lawyers?
>
> A No I do not agree with that.
>
> Q You do not accept that at all?
>
> A I do not accept it.
>
> Q Did you – did Mr Ninness ever disclose to you that one of the reasons why he was having personal and direct face to face contact with Mr Eastman was because of the advice of Dr Milton?
>
> ....

Q You said that you did not accept that the Paranoid Personality Disorder made it difficult for Mr Eastman to maintain his relationships with his lawyers?

A Yes.

Q Why don't you accept that?

A Because I believed that he sacked his lawyers primarily because they would not make the applications that he wanted them to make, and he sacked them when it was convenient because he hoped that he could disrupt and delay the trial. He repeatedly referred, for example, to Dietrich. He repeatedly sacked his lawyers when we were about to call Dr - Mr Ninness. I think there were other - what I regarded as opportunistic. And he ultimately, following a most extraordinary exposure of his relationship with Mr Terracini, ultimately got Mr Terracini back. He was, I thought, perfectly able to control his relationships with his lawyers when he saw it in his interest. That was my judgement about the matter.

251. Mr Terracini was retained and sacked on more than one occasion. The reference to the exposure of the applicant's relationship with Mr Terracini concerned an occasion when Mr Terracini was retained, but only on the basis that the applicant acknowledged that he had made statements intended to humiliate Mr Terracini in an effort to manipulate the course of the trial.

252. In Mr Adam's view, the reports of Dr Milton were not relevant to any issue in the trial. Notwithstanding an earlier reference by Dr Milton some years before the trial to the possibility that the applicant might have been psychotic, Mr Adams considered the reports as a whole and believed any deterioration in the applicant's behaviour at the trial was calculated and deliberate, carried out with the intention to provoke, and for the purpose if possible of ending the trial (Inq 3079). Such conduct was directed 'entirely to rational ends' from the point of view of the applicant, and to the extent that the conduct was counterproductive to the applicant's interest it showed only that he had bad judgment. From the perspective of Mr Adams, when the applicant was in court 'at all times he was perfectly clear about what he was attempting to do and, indeed, why he was attempting to do it' (Inq 3080).

253. Counsel referred to the letter of 22 May 1995 from Mr Lander, the solicitor acting for the applicant, to the prosecution expressing concern and the opinion that the applicant was not fit to plead. From the perspective of Mr Adams, the reports of Dr Milton did not raise any question that the applicant was unfit to plead. In addition Mr Adams had seen the applicant in court for weeks. As to 22 May 1995, Mr Adams said that the applicant did not demonstrate the 'slightest difficulty' with understanding any of the proceedings (Inq 3080).

254. Mr Adams said it did not occur to him that disclosure of the reports by Dr Milton might assist the defence lawyers in pursuing a line of inquiry about the fitness of the applicant. In that context, Mr Adams was aware that disclosure had been made to the defence of the entire Administrative Appeals Tribunal which included extensive psychiatric material concerning the applicant dating back into the 1980's. Mr Adams added the rider that if Mr Terracini or the next counsel had applied for a consideration of the applicant's fitness, he would have disclosed the reports by Dr Milton because they provided a psychiatric history; not because they suggested unfitness which they did not. Further, if the applicant had shown in court disorganization of thoughts, incoherence, misunderstanding or difficulty dealing with issues, Mr Adams might have made an application if the applicant was unrepresented or provided the material to the

applicant's legal team. However, he detected no such signs and, to the contrary (Inq 3082–3083):

> I also knew that during the very period that Milton, that Dr Milton was making these reports he had appeared in court many times himself. There were affidavits; there were notices of motion written by him all of which clearly showed that so far, at least as legal proceedings were concerned, he was the master of his own mind.

255. As to the possibility that the applicant might be fit and capable for a period and then lapse into unfitness, with those two situations coming and going, Mr Adams acknowledged it was a theoretical possibility. However, he would not accept the possibility that when the applicant was with his lawyers he was unfit, but once he entered the court room he suddenly became well (Inq 3083).

256. I agree entirely with the evidence of Mr Adams. The reports of Dr Milton did not raise the issue of the applicant's fitness to plead and they were not relevant to any issue in the trial. No occasion arose for disclosure in the context of the trial generally or the question of the applicant's fitness.

257. In relation to the issue of the failure to disclose medical reports, the applicant also relied upon the failure of the AFP to disclose to the DPP or the applicant the report of Dr Tym dated 21 October 1992 (Ex 223) and the report of Professor Mullen dated 14 December 1992 (Ex 221). As I have said, Dr Tym expressed the opinion that the applicant suffered from 'a very serious mental disorder, or mental illness, of Delusional Disorder, Persecutory Type' and, although not certain of a diagnosis, Professor Mullen held 'strong suspicions' that a 'delusional disorder' was present.

258. Although the views of Dr Tym and Professor Mullen raise the issue of a mental illness, from the perspective of the applicant there was nothing new in that information. The applicant and his legal team were well aware that Dr McDonald had made that diagnosis in the 1980s. The applicant told the Miles Inquiry that he instructed his lawyers 'that anything relating to mental health was never to be raised'.[53]

259. In these circumstances the failure of the AFP to disclose the reports of Dr Tym and Professor Mullen was of no significance.

260. The doubt or question as to guilt upon which Paragraph 2 is based has been convincingly dispelled.

PARAGRAPH 3

261. Paragraph 3

> The question of the applicant's fitness to stand trial was not properly and fully before the High Court of Australia when the court considered the applicant's application for special leave to appeal, with the only substantial ground being his fitness to plead or stand trial. The High Court of Australia was not assisted with the transcript of the proceedings of 29 June 1995, in particular trial

[53] Inquiry under s 475 of the *Crimes Act 1900* into the matter of the fitness to plead of David Harold Eastman, Report vol 1. (2005) 19 [64].

transcript pages 2132-3 and the case *R v Vernell* [1953] VLR590 and the journal article by Dr A.A Bartholomew, *The Disruptive Defendant* (1985) 9 Crim LJ 327. Trial transcript pages 2132-3 was omitted from 9 volumes of appeal books filed in the High Court of Australia by the ACT DPP.

262. The language of Paragraph 3 is more in the nature of a submission and explanation than an order addressed to a doubt or question as to guilt arising out of proceedings before the High Court. However, I interpreted the 'matter' to which Paragraph 3 is directed as a doubt or question as to guilt in relation to proceedings before the High Court and, particularly, the failure to provide the High Court with a transcript for 29 June 1995. I observed at the outset that it is difficult to envisage how a doubt or question as to guilt can arise in relation to the High Court proceedings.

263. The evidence establishes that the Director and the solicitor for the applicant discussed the material to be placed before the High Court, including sections of transcript to be part of the appeal book (Woodward affidavit Ex 12 [94]–[104]). The applicant's solicitor clearly gave consideration to these questions and did not suggest that the transcript for 29 June 1995 should be part of the appeal book. Nothing untoward occurred and the Director was not responsible for the omission.

264. Further, the omission of the transcript for 29 June 1995 was of no significance whatsoever to the proceedings before the High Court. If the transcript had been included in the appeal book, it would not have had any impact upon the decision of the High Court.

265. The doubt or question as to guilt to which Paragraph 3 is directed has been dispelled entirely. There is no question or doubt as to guilt in this regard.

PARAGRAPH 4

266. Paragraph 4

> When the applicant's fitness to plead or stand trial was raised pursuant to section 475 Crimes Act 1900 before Miles AJ in 2005 again the court was not assisted by any reference to proceedings in the applicant's trial on 29 June 1995.

267. As with Paragraph 3, the language of Paragraph 4 is more in the nature of a submission and explanation than an order addressed to a doubt or question as to guilt arising out of the proceedings before Miles CJ. In substance, Paragraph 4 asserts that his Honour's attention was not drawn to the applicant's conduct on 29 June 1995 as disclosed in the transcript of the trial for that day. While indirectly the assertion in Paragraph 4 seeks to undermine the findings of Miles CJ that the applicant was fit to plead throughout his trial, I did not interpret Paragraph 4 as directing an investigation which revisits the evidence presented to the Chief Justice with a view to determining whether his Honour reached the right conclusion or otherwise.

268. From the outset, I was unable to understand how a doubt or question as to guilt could arise in relation to failure to assist Miles CJ with reference to the events in the trial of 29 June 1995.

269. The applicant did not address any submissions to Paragraph 4.

270. Not only is there no reason to think that Miles CJ overlooked 29 June 1995, that date was mentioned in the course of submissions and there is every reason why his Honour would not have bothered to deal with the events of that day. As I have said with respect to Paragraph 1, the events of 29 June 1995 plainly demonstrate that on that day the applicant was fit to plead. He showed no signs whatsoever of thought disorder or difficulty in understanding the issues and expressing his views. The applicant's conduct on 29 June 1995, and the days preceding and following 29 June 1995, conclusively prove that he was fit to plead on and about that date.

271. The doubt or question as to guilt upon which Paragraph 4 is based has been conclusively dispelled.

PARAGRAPHS 5 – 11

272. Paragraphs 5–11 are primarily directed at evidence concerning gunshot residue and the use of a silencer. This evidence was a critical feature of the prosecution case at trial upon which the prosecution placed great reliance. If accepted, the evidence concerning gunshot residue provided a significant link between the applicant's vehicle and the scene of the crime.

273. To some extent Paragraphs 5–11 can be read together as addressing a doubt or question as to guilt based primarily upon an attack on the reliability of the evidence of the principal prosecution witness, Mr Robert Barnes, coupled with a failure by the prosecutor to disclose evidence reflecting adversely on the credibility and reliability of Mr Barnes. However, within that context, it was necessary to examine each paragraph separately to determine the 'matter' into which the Board was directed to inquire.

PARAGRAPH 5

274. Paragraph 5

> The prosecution neglected its duty to disclose to the defence, either before or during the applicant's trial, information casting doubt on the veracity and reliability of a key forensic witness, Robert Collins Barnes.

275. The 'matter' to which Paragraph 5 is directed is a doubt and question as to guilt by reason of the failure of the prosecution to disclose before or at trial 'information casting doubt on the veracity and reliability' of Mr Barnes. The Inquiry investigated the nature and extent of the information available at the time of the trial that reflected adversely upon the veracity and reliability of Mr Barnes and whether the 'prosecution' was in possession of any or all of that information, but failed to disclose it to the applicant. For these purposes, I regarded the 'prosecution' as not limited to the Director and those instructed by the Director. It included the AFP.

276. The prosecution presented a case to the jury that the applicant was connected to the scene of the murder through gunshot residue found in his motor vehicle (the Mazda). In essence, through the evidence of Mr Barnes, the prosecution contended that PMC brand gunshot residue found on the driveway and in the deceased's vehicle (the Ford)

was indistinguishable from gunshot residue found in the Mazda. Mr Barnes expressed the opinion that some of the residue in the Mazda was PMC.

277. In addressing the issues raised in Paragraph 5, first it was necessary to investigate matters said to affect Mr Barnes' veracity and reliability, which included concerns about his qualifications, disciplinary action taken against him and flaws in his case file and case work. During the course of the investigation further information was disclosed which had to be considered in the context of an assessment of Mr Barnes' veracity and reliability. Once these matters were known, the Inquiry was in a position to investigate the knowledge of those matters possessed by the AFP and the DPP, and whether the 'prosecution' complied with its duty of disclosure.

278. The written submission filed on behalf of Mr Barnes (annexure 8) devoted considerable space to developing an argument previously addressed to the Board that significant areas of the investigation fell outside the scope of Paragraph 5 of the Order. I reject that submission. The various issues were interwoven and it would have been artificial in the extreme to undertake the task of endeavouring to dissect specific matters in the manner suggested by Counsel for Mr Barnes. At the heart of Paragraph 5 is the assertion that there were serious flaws attending the evidence of Mr Barnes of which the defence were not aware because the prosecution failed to fulfil its duty of disclosure. It is impossible to investigate a doubt or question as to guilt in this regard without also addressing other flaws which might reflect on the doubt or question as to guilt that underlies Paragraph 5. In this way Paragraph 5 inevitably led to a detailed investigation of the veracity and reliability of the evidence given by Mr Barnes.

279. In my opinion the investigations undertaken by the Inquiry were authorised by Paragraph 5 of the Order. However, if in some respects the investigation proceeded beyond the limits authorised by Paragraph 5, the interests of the administration of justice more than justified extending beyond the reach of Paragraph 5 to that limited extent. This conviction, and the role played in the conviction by the forensic evidence, have been the subject of great controversy over many years and it is time that the controversy was put to rest. More importantly, unless the controversy is put to rest through a thorough investigation of the issues agitated by the applicant, the possibility that a miscarriage of justice has occurred will not have been resolved.

280. As this Report demonstrates, the investigation by the Board has uncovered serious flaws in the critical forensic evidence and, in my opinion, a substantial miscarriage of justice has occurred. It is both short-sighted and contrary to the administration of justice to suggest that the Board should not have investigated and reported on these matters.

281. Finally by way of introduction to this section of the Report, it is appropriate to discuss briefly the duty of disclosure. The role of a prosecutor and the prosecutor's duty of disclosure have been the subject of considerable attention in recent years. However, the fundamental duty was well-known in 1995. Mr Adams readily and properly acknowledged that the duty included a duty to disclose material which might assist an accused person in the conduct of their defence or which might reasonably lead to assisting the defence through exposing a relevant line of enquiry (Inq 3009–3010).

Ultimately the critical issues centred on the extent of knowledge possessed by the prosecution and whether that knowledge was disclosed to the defence or ascertained by the defence through some means other than disclosure by the prosecution. There was very little contest as to whether the information under consideration should or should not have been disclosed.

282. As will appear in the later discussion, Mr Adams took the view that notes of conferences with expert witnesses to be called by the prosecution were subject to legal professional privilege. However, Mr Adams accepted that if relevant information was conveyed to the prosecution in the course of such a conference, the prosecution duty of disclosure required that such information be disclosed to the defence. It is unnecessary, therefore, to debate the legal principles governing privilege and imputed waiver which were canvassed in *R v Bunting*.[54] It is sufficient to proceed on the basis that, regardless of the question of privilege, the prosecution was under a duty to disclose relevant information to the defence and this position was accepted by Senior Counsel for the prosecution at the time of the trial.

Gunshot Residue

283. The nature of gunshot residue (GSR) and the testing of it was explained by Dr James Wallace, a very experienced forensic scientist from Northern Ireland (report 2 July 2013 Ex 109):

> A round of ammunition consists of a primer, propellant and a bullet all of which are contained in a cylinder shaped cartridge case (shell, case). In .22 inch calibre ammunition the primer is contained around the inner perimeter of the base of the cartridge case (rim fire). The firing mechanism of a firearm consists of a mechanical device which causes a hammer to deliver a blow to the firing pin when the trigger is pulled. The firing pin strikes the primer which contains a mixture of chemicals that are sensitive to percussion. This ignites the primer, which then ignites the propellant.
>
> The burning of the propellant very rapidly produces a large volume of gases in a confined space which causes a rapid and substantial pressure and temperature rise. The pressure forces the bullet out of the cartridge and down the barrel of the firearm. A typical time from the firing pin striking the primer to the bullet exiting the barrel is approximately 0.03 seconds. As a result of the time period and the nature of the discharge process, only partial mixing of the constituents occurs and this accounts for the VERY HETEROGENEOUS nature of GSR.
>
> GSR consists of a complex heterogeneous mixture consisting of four major components. These are primer residue, propellant residue, bullet (lead) residues and gases. These residues exit the firearm mainly from the muzzle and to a much lesser extent from the breech/ejection port.
>
> These residues may and frequently do have a contribution from the cartridge case and from contamination within the firearm due to previous use. GSR's are chemically stable and will remain for years if undisturbed. In this instance we are concerned with primer GSR and propellant GSR. The propellant involved ranges in size from a pin head to a pencil dot. The particles can be seen with the naked eye (depending on the background) or with a magnifying glass. Primer GSR's are at the other extreme where you could fit about a thousand of them on to a pin head.
>
> **Primer GSR**
>
> Primer GSR is inorganic in nature and is extremely small and cannot be seen with an optical microscope. It requires a scanning electron microscope [SEM] which uses an electron beam to image the surface whereas an optical microscope uses visible light. These are the type of residues that are searched for on the hands, face and clothing of persons suspected of discharging a

[54] *R v Bunting and Others* (2002) 84 SASR 378.

firearm. The elemental content of so called primer residues does not originate exclusively from the primer but frequently has a contribution from the bullet and cartridge case. The size of these particles is measured in microns (millionth of a metre, micrometre) and they normally range in size from <0.5 microns (sic >0.5) to >32 microns (sic <32). It is not practical to detect particles <0.5 microns in diameter.

When searching for GSR particles the principal elements looked for are lead (Pb), antimony (Sb) and barium (Ba), either singly or in any combination and they can be and always are in combination with other elements from a list of permitted accompanying elements.

Particles containing lead, antimony and barium and particles containing antimony and barium, have only been observed in GSR and are considered highly characteristic of GSR. Lead, antimony particles and lead, barium particles, although not unique have been found in few occupational sources and are therefore considered to be characteristic of GSR. Lead only, antimony only and barium only particles are also detected but are considered to be of less evidential significance. Particles originating from the bullet are by far the most abundant of all the types of GSR particles. Primers based on lead and barium compounds are known as **2 component primers** (Pb,Ba) and primers based on lead, barium and antimony compounds are known as **3 component primers** (Pb, Ba, Sb).

GSR particles have been noted in a wide variety of shape, size and appearance. They all have the appearance of having condensed from a vapour or melt namely, three dimensional roundness. Ragged or straight edges or corners suggest a mineral origin. The shape and appearance is particularly important in the characteristic category to aid the differentiation from occupational/environmental particles.

Primer GSR is detected by SEM/EDX [Energy-Dispersive X-Ray Spectroscopy]. The samples are collected by dabbing a SEM sample stub (a small circular coin shaped piece of aluminium with a prong on one side and with an adhesive on the other side) over the sampling area numerous times. The sample is placed in the SEM and subjected to a finely focused electron beam. This beam interacts with the surface of the particles and produces certain signals amongst which are signals that can be used to view the particle and determine its size, shape, appearance and elemental content.

One of the signals generated causes the sample to emit X-rays that are characteristic of the elements present in the particle and these are detected and identified by the EDX detector which produces a printout (spectrum) of the elements detected. Thus the SEM/EDX lets us see the particle and its morphology and lets us know what elements are present on the surface of the particle. Such elements occur at a major level, minor level or trace level. SEM/EDX is a non-destructive technique.

Propellant GSR

Note: In my experience discharged propellant particles are always accompanied by a very large number of primer GSR/bullet particles.

Propellant particles are primarily organic in nature and are manufactured in a wide range of colours, shapes and sizes. Modern propellants contain nitrocellulose (NC) as the major oxidizing ingredient. Propellants that contain NC as the only oxidizer are referred to as single base and propellants that contain NC and nitro-glycerine (NG) are referred to as double base. In addition to NC and NG they contain other organic compounds such as 'plasticisers' to improve physical and processing characteristics e.g. dibutylphthalate (DBP); 'stabilisers' to increase the chemical stability by combining with the decomposition products, e.g. diphenylamine (DPA), ethyl centralite (EC); They may also contain a range of inorganic additives to improve ignitability, facilitate handling and minimize muzzle flash. Graphite (carbon) is frequently used and acts as a lubricant to cover the particles and prevent them from sticking together and it also helps to dissipate static electricity.

Thus propellant 'particles' (grains, kernels, granules) contain a range of organic compounds, the detection and identification of which can confirm the particle to be propellant and can often differentiate between propellants with different chemical compositions. Such analysis can be achieved by a technique known as Gas Chromatography/Mass Spectrometry (GC/MS). This technique separates and identifies the organic chemicals present in the propellant. Unfortunately it is destructive as it requires the propellant particle to be dissolved in an organic solvent. Both

primer GSR and propellant GSR particles are chemically stable for a long time period (years) and will remain where they are deposited if left undisturbed.

Barnes – Trial Evidence

284. Two spent .22 cartridge cases were located on the ground at the scene of the crime. Mr Barnes compared markings on those cases with markings on cases fired in the Ruger .22 rifle which Mr Klarenbeek sold shortly before the murder. In substance Mr Barnes expressed the opinion that the markings on a number of cartridges fired in the Klarenbeek weapon possessed markings identical to the markings on the two cartridges from the scene. In this way, on the assumption that the two spent cartridges from the scene represented the two shots fired at the deceased, the Klarenbeek Ruger was identified as the murder weapon. Although there was some cross-examination of Mr Barnes about his qualifications and experience in the identification of tool marks, the prosecution case that the cartridges at the scene represented the two shots fired at the deceased, and the Klarenbeek Ruger was the murder weapon, was never seriously challenged.

285. The spent cartridges at the scene were PMC brand .22 supersonic ammunition. It was to be expected, therefore, that gunshot residue would be found at the scene which matched PMC .22 supersonic ammunition. The critical question was whether the gunshot residue found in the applicant's Mazda 'matched' the residue found at the scene of the crime. The concept of a 'match' is discussed later.

286. As to the identification of types of primer and propellant residues, and in particular PMC residue, in summary Mr Barnes gave the following evidence:

- Primers are comprised of inorganic components which survive through the combustion process of discharge, together with organic materials which do not survive and cannot be recovered or identified after discharge. Referring only to the inorganic components, .22 calibre primers are either two or three component and PMC is a two component primer containing lead (Pb) and barium (Ba) (T 1385–1386).

- Following ignition, very high temperatures are created and primer residue is expelled forward in a vapour or molten state, after which that residue condenses on the surface of propellant because the hot gases condense onto the cooler propellant surface (T 1384–1385).

- Primer residue can only be seen with an electron microscope. It cannot be seen with the naked eye or an optical microscope (T 1379).

- Upon analysis it is common to find traces of antimony (Sb) and copper (Cu) in gunshot residue because the bullet is an alloy of lead with traces of antimony and often coated with copper (T 1384–1386).

- Propellants contain organic elements and are known as either single or double based. A single based propellant contains Nitrocellulose (NC) and a double based propellant contains both Nitrocellulose (NC) and Nitro-glycerine (NG)

(T 1386-1388).

- Propellants also contain substances known as plasticisers, stabilisers and burn modifiers. One of the burn modifiers is called Ethyl-centralite (EC). PMC does not contain Ethyl-centralite (T 1390).

- PMC is a double based propellant containing nitrocellulose and nitroglycerine with diphenylamine (DPA) as stabiliser and dibutyl phthalate (DBP) as a plasticiser (T 1450).

- In the firing process propellant particles are burnt to various degrees. Both burnt and unburnt propellant particles are larger than primer residue and more easily seen (T 1395–1396).

- The first step in examination of primer residue is examination of its morphology which is the shape, size and physical dimensions, together with evidence of formation which enables the examiner to see characteristics which differentiate the residue (when added to composition) from other environmental particles (T 1385).

- The examination of primer residue is conducted with a scanning electron microscope (SEM), together with an analyser known as an energy dispersive x-ray analyser (EDX). This process permits analysis of inorganic elements such as lead, barium, antimony and copper. The SEM/EDX analysis does not analyse organic elements (T 1398 and T 1408).

- SEM/EDX analysis is non-destructive (T 1409).

- In its unburnt state PMC propellant is covered in graphite, but the graphite burns away in the process of firing enabling an examination of the colour of the propellant particle. The 'underlying consistent colour' of PMC is, 'broadly speaking, yellow green' (T 1408).

- In manufacture PMC propellant is comprised of small balls which are subjected to a flattening operation resulting in 'flattened ball' particles of propellant (T 1409).

- After examination of shape and colour, coupled with the SEM/EDX process of examining attached primer residue, analysis of organic components of propellant particles is conducted in a process known as gas liquid chromatography and mass selective detection (GC-MS/GC-MSD) (T 1409–1419).

- GC-MS is a destructive process (T 1373).

- In April 1989 Mr Barnes visited the factory in South Korea where PMC ammunition is manufactured. He test fired a number of rounds of ammunition which confirmed the technical information that PMC contains a two component primer (T 1389).

- Mr Barnes examined in excess of 150 types of .22 ammunition and produced a database 'which brought together the results of [his] analysis of the material that [he] looked at' (T 1411, 1412). The database reflects the morphology, burn characteristics, colour and organic chemistry of the various propellants, together with the inorganic constituents of the primers. As to how many rounds were fired of each type of ammunition, Mr Barnes said (T 1412):

> There was no fixed number fired but certainly dependent on the characteristics which were determined from the examination of the broken down ammunition before firing which was – if there was evidence that there was some variation in the propellant – for example, if there was more than one type of particle present a large number would be broken down and a significant number would be fired. Where it was very clear that only one type existed only two, three, or four shots would be fired.

- Relying on the database and other work he had undertaken, Mr Barnes gave the following evidence concerning the 'uniqueness' of PMC .22 calibre propellant (T 1412):

> Q Now, as a result of that database and other work that you have done in investigating ammunition types and manufacturers, including what you were shown at the factory of PMC, what are you able to say about the uniqueness or otherwise of PMC .22 calibre propellant?
> A What I'm able to say taken globally – by that I mean looking at the post discharge, partially burnt propellant with its attached primer related gunshot residue – I'm able to say that taken overall it is unique in terms of .22 ammunition when compared with the database to which you've already referred.
> Q Now – however, so far as you're - all the .22 ammunition that you examined you have only seen PMC exhibit the particular – or demonstrate the particular profile which was produced by you for the purposes of accumulating the information which was in your database?
> A That is correct.

- Propellant particles at the scene came from vacuuming of the driveway immediately outside the open doorway of the car where the deceased was sitting plus vacuumings from within the deceased's vehicle (the Ford) and a particle from the deceased's hair (T 1413).

- One particle from the vacuumings of the interior of the Ford was a 'chopped disk propellant particle which was colourless to translucent and was clearly dissimilar from PMC propellant and was consistent with propellant used in either Remington or Stirling brand .22 calibre ammunition' (T 1415). The particle from the deceased's hair was different from PMC in both its morphology and composition, but was consistent with CCI and possibly with Remington, Stirling and other ammunitions as well (T 1414).

- Of the balance of gunshot residue from the scene, Mr Barnes said he examined 'a large number' of items and 'was able to identify all the partially burnt propellant as being either PMC or consistent with PMC' (T 1413, 1416).

- The single particle from the interior of the deceased's Ford which was not PMC was contained in a slide marked 7/89-2D(a) and tendered at the trial as exhibit 26.

In answer to leading questions as to the balance of the particles, Mr Barnes agreed that one was consistent with PMC and the others 'were PMC' (T 1416). Mr Bush said he removed 25 green particles and a metallic particle from the vacuuming and placed them on the slide (T 710, 713). Mr Nelipa said that he put a black particle on a slide which was not consistent with PMC but could not identify which slide (T 607).

- In the cabin of the applicant's Mazda, the following particles were located:

    (i) From behind the handle on the driver's side door, in the cavity of the handle, one primer particle 'consistent with PMC or similar ammunitions' (C2) (T 1424). Notwithstanding the presence of antimony, having regard to other inorganic elements that were present, in Mr Barnes' opinion the particle was not three component.

    (ii) On the top of the rear vision mirror, two primer particles consistent with PMC and other types of ammunition (C7) (T 1425, 1426).

    (iii) On the indicator stalk, two primer particles; one a three component particle 'unequivocally not PMC', but consistent with Stirling or any other three component primer ammunition; the other a two component particle consistent with PMC (C12) (T 1426–1427).

    (iv) From the vacuumings of the front driver's side floor (7/89-7D), one charred and heavily burnt chopped disk propellant particle which was not PMC, but was consistent with CCI ammunition 'amongst others' (T 1431, 1432).

    (v) From the vacuumings of the driver's seat, 'a severely burnt flattened ball' propellant particle 'consistent with PMC' (7/89-7E). Mr Barnes said he was unable to use organic analysis to exclude propellants which might contain material foreign to PMC and was asked about being unable to move beyond his opinion that it was consistent with PMC to positively identifying the particle as PMC (T 1433, 1434):

        Q So, it was too small, in effect, for you to do anything more useful than say, first of all, it is ammunition propellant and, secondly, it's consistent with PMC but because you couldn't do the organic chemistry you were unable to determine that it was in fact PMC, is that so?

        A Yes, what I am saying is the final plank in my identification couldn't be put in place. It had the correct shape morphology, and was a flattened ball. It retained its physical form after firing. It was still a flattened ball, it hadn't broken up. It had the right colour on segmenting it. It had, also, a primer related gunshot residue upon it which was consistent with PMC and not three components, but I could not say, by organic analysis, that it had only had present which I know to be present – the principal components of PMC. What I can say, though, is that there was no evidence of any other component which would mean that it was not PMC. Perhaps I am being conservative but what I am saying is – I only say it is consistent because I couldn't put all those five things in place.

(vi) Mr Barnes gave an explanation of the difference between 'charred' and 'heavily burnt'. A charred particle has 'lots of charcoal on it', but is not burnt in the explosion, the gasses having 'put a layer over it of grot, if you like' as a contaminant. A heavily burnt particle has been burnt down to a very small size (T 1434, 1435).

- From the vacuumings of the Mazda boot (7/89–7J):

(i) Slide exhibit 20 (7/89–7J(c)) containing 12 propellant particles, 'consistent similar to PMC ammunition' and 'absolutely not' consistent with any other .22 ammunition which Mr Barnes has seen (T 1444). Mr Barnes was asked if he could go as far as saying the particles were PMC (T 1444, 1445):

Q Is it your opinion that it is PMC or you're unable to go so far?
A It's my opinion that it is PMC partially burnt propellant on the basis that the criteria which I believe I've already explained to the courts.
Q Opinion is that this – these were PMC propellant, is that right?
A Yes, but it goes further than that. We're talking about, as I said, a global assessment of this material. We're not assessing in detail, but overall its characteristics, which include amongst other things and is only one of perhaps five or six layers of assessment, the analysis of the particle, the partially burnt final geometry shape size. In other words, its ability to withstand the trauma if being fired and burned, its shape, its colour, the primer related gunshot residues which are present on its surface.
Q Yes?
A So it's simplistic to say just because it's propellant it must be PMC.
Q Yes of course?
A What I am saying is taken globally one arrives at that conclusion and in no sense am I suggesting to the court that one looks at the organic analysis of the propellant and says it can only be.

Note: Mr Barnes said all particles in 7J(c) were destroyed in the course of his examination (T 1444).

(ii) Slide exhibit 17 (7/89–7J(d)) containing nine green partially burnt propellant particles that 'were indistinguishable when taken globally, that is using the criteria I've already enunciated, were indistinguishable from partially burnt propellant produced on firing PMC .22 calibre ammunition' (T 1445).

Note - these nine particles were destroyed during the examination (T 1445).

Note – asked if these nine particles, and the 12 particles in 7J(c), were consistent with or distinguishable from the PMC propellant particles in the deceased's Ford, Mr Barnes answered 'all I can say is that I can find no differences' (T 1445).

(iii) Slide Exhibit 92 (7/89–7J(e)) contained three 'charred, largely consumed chopped disk particles' of gunshot propellant which were not consistent with PMC and were consistent with a number of other ammunition types including Remington and CCI (T 1442, 1443). These particles were similar to the chopped disk propellant particle recovered from the front seat of the deceased's Ford (7/89–2D(a)). Asked if the particles were indistinguishable from the particle found in the deceased's Ford, Mr Barnes replied with 'within the parameters of the assessment they were indistinguishable' (T 1443).

(iv) From the vacuumings exhibit 17 (7/89–7J) Mr Barnes found 'three severely charred, largely consumed chopped disk fragments' which were not PMC. Two of the particles were consistent with CCI Remington and Stirling and one consistent with Stirling only. A fourth particle was a 'largely consumed flattened ball propellant particle' consistent with PMC (T 1446).

(v) Separate vacuumings were taken from underneath the trim of the Mazda boot (7/89–7K). Mr Barnes said he found in those vacuumings 'one severely charred largely consumed fragment of chopped disk propellant' which was not PMC. Among a large number of other possible propellants were Stirling, CCI and Remington (T 1447). Asked if this particle could be distinguished from the largely consumed chopped disk particle found in the deceased's Ford, Mr Barnes answered:

> No, almost by definition it could not be; but there was certainly nothing to say that it was in any way different.

287. In examination Mr Barnes was asked to consider two possible scenarios for the mechanism by which primer residue found its way into the cabin of the Mazda and, in particular, onto the rear vision mirror, indicator stalk and door handle. First, that after firing the shots the shooter entered the vehicle and, at some stage while in the vehicle, adjusted the rear vision mirror, used the indicator switch and opened the door from the inside to alight from the vehicle. Secondly, a person with no gunshot residue from a shooting, did something in the boot where gunshot residue resided then entered the motor vehicle and undertook the three separate activities described. In response, Mr Barnes confirmed that the scenarios related only to primer residue and spoke about the number of particles, after which he expressed the following opinion (T 1465, 1466):

> Therefore, what I'm saying is it's my opinion that to get it there under those circumstances in these amounts and, in addition, with the particle sizes that we're talking about given what I said earlier which is the large particles don't hang around, they fall off really quickly, so that, therefore, even if you pick them up from the boot the likelihood of you being able to get them into the cabin and transfer them, as has been detailed, is, in my opinion, highly unlikely. In addition you've got to get them to the boot without dropping them off whatever you transferred them from the boot from, right. However, if one were to look now at the first option that an individual, any individual, fires a weapon he very shortly thereafter, and I emphasise it's got to be very shortly thereafter, goes to the vehicle he will, by the very nature of the operation I described earlier, if he's a right-handed shooter, he would have deposited primer related gunshot residue in points which are fairly important, on the back of his right hand. The weapon may well have some contamination on it so

> he'll transfer some probably to the palms of his hand. In the course of handling the weapon he will pick up some residue on the palms of his hand. Now, let us look at where it is in the cabin, and it's in specifically where we're interested aside from on the floor and the seat, three other locations. The back surface behind the latch on the door. I would suggest, and it is my opinion, that the only place that one will deposit a particle in that region is off the back of the hand, not the palm, and of course, the other locations is consistent with the palm. I suggest that if you wish to choose the second alternative which is someone's doing something in the boot and picks up something out of the boot one isn't going to contaminate generally the back and front of the hand in the manner in which will allow you to deposit where it was recovered. And I also add that you can't consider these particles in isolation because there were, in addition, three other particles in the driver's side compartment.

288. Mr Barnes continued to explain that he was talking about at least eight primer related particles that had been transferred. He said although it was not possible to absolutely exclude the second scenario, it had a very low probability of occurrence and the more likely option was the first option (T 1466).

289. During cross-examination it was put to Mr Barnes that the residue found in the cabin of the Mazda was more consistent with coming from the boot of the car than from any other source. Mr Barnes said contamination from the boot could not 'absolutely be ruled out', but from the work he had undertaken and his 'long experience', 'in the balance' it was his view that the residue was not consistent with contamination by the hands of an individual who had been at the boot (T 1450).

Other Experts - Trial Evidence

290. In support of the evidence of Mr Barnes, the prosecution called a number of other expert witnesses.

291. Mr Roger Martz was the Unit Chief of the Chemistry Toxicology Unit at the Federal Bureau of Investigation (FBI) laboratory in Washington, DC. He primarily specialised in propellant and his qualifications are set out in the trial transcript at pages 1562–1563.

292. Mr Barnes visited Mr Martz between 7 and 11 March 1994. Mr Martz understood that Mr Barnes was attempting to identify the manufacturer of propellant found at both the scene of the murder and in the motor vehicle of the suspect. Mr Barnes showed Mr Martz a database he had prepared and Mr Martz supplemented that database from his own .22 ammunition library in which he found 23 types of ammunition which were not contained in the database prepared by Mr Barnes. They examined the additional 23 types in an unburnt condition and were satisfied that they could be distinguished from PMC ammunition (T 1564–1565).

293. In examination Mr Martz was asked to assume that Mr Barnes had conducted his tests properly and, on that basis, whether he accepted the conclusion of Mr Barnes as to the 'apparent uniqueness of PMC .22 ammunition'. Mr Martz replied that the PMC powder was 'very unique' (T 1566). In cross-examination it emerged that the FBI possessed PMC ammunition in its library, some of which was different from the PMC powder that Mr Barnes had brought with him.

294. Mr Martz was given four particles which he marked Q3 (Ex 25 in the trial). He understood the particles came from the victim's car, but during questioning the

prosecutor explained that the reference by Mr Martz to the victim's car was a misunderstanding. The particles came from the driveway of the deceased's home. Mr Martz examined the particles physically, but only analysed one of those particles (T 1567).

295. Mr Barnes also gave Mr Martz a single particle from exhibit 20 in the trial which was a particle marked 7J(c) said to have come from the boot of the Mazda. That particle was analysed (T 1567).

296. Mr Martz said he was not able to distinguish the particles obtained from different sources and they were both consistent with PMC ammunition. They were not consistent with any other powder in the database or the additional 23 that he had found (T 1567).

297. During cross-examination Mr Martz was asked to draw a distinction between saying 'consistent' and giving an opinion that a powder was definitely PMC. Mr Martz said that he was not prepared 'to give a brand name to a smokeless powder based on several particles' (T 1570). He said with the limited number of samples available to be examined and analysed, PMC was the only one that matched, but it was possible that at some time another manufacturer could have made a similar propellant that he did not have in his library (T 1571).

298. Mr Richard Crum of the FBI gave evidence concerning comparisons of tool marks on cartridges. It is not necessary to discuss his evidence.

299. Mr Robin Keeley was the Principal Scientific Officer of the analytical services division of the Metropolitan Police Forensic Science Laboratory. He possessed qualifications as an analytical chemist and extensive experience with ammunition and the attempted identification of ammunition and ammunition residues.

300. Addressing the question of primer residue in the applicant's Mazda and asked to comment on the opinion given by Mr Barnes that it was the residue of a two component primer (notwithstanding the presence of antimony), Mr Keeley confirmed his opinion that a three component primer was a possible source of the residue (T 1601). He said it was a matter of opinion upon which reasonable minds could reasonably differ and, in his view, the explanation given by Mr Barnes for the presence of antimony, while a reasonable explanation, was not the only possible explanation (T 1602). The other possible explanation was the presence of a three component primer. Asked whether the primer was 'consistent' with coming from PMC ammunition, Mr Keeley responded 'yes, it could've' (T 1606), but in cross-examination he said it was possible that it was not PMC ammunition (T 1607). Considered in isolation it was equivocal and there was nothing to say whether one view was more likely than the other (T 1608, 1609).

301. As to the propellant found in the Mazda boot, Mr Keeley thought the situation was different because of the opportunity to compare the results with the database compiled by Mr Barnes. In Mr Keeley's view, the only possible other source in the database was

Cartoucherie Française, a possibility that had been dealt with by Mr Barnes[55] (T 1607). Leaving aside that particular brand he could see no other entry in the database that matched PMC as closely as the propellant found in the boot and at the scene. Propellants from those two sources seemed to be 'indistinguishable' from PMC, but Mr Keeley added the qualification that he could only express the view based on the information he had at his disposal (T 1607).

302. Mr Keeley was asked about two scenarios that had been put to Mr Barnes concerning the residue found in the cabin of the Mazda. First, that the shooter entered the car shortly after the shooting and placed contaminated hands in the where primer residue was located. Secondly, a person picked up gunshot residue on their hands from residue in the boot and transferred it to the interior locations. Mr Barnes had favoured the first scenario and was very sceptical of the second, but Mr Keeley said he was 'considerably less sure' and, in his opinion, both scenarios were 'possible explanations'. He said that in his view there was 'nothing to say about the material found about the car which would suggest that one source is more likely than the other' and that the material in the boot could not be ignored as a possible source (T 1603).

303. Dr Arie Zeichner was the head of Toolmarks and Materials Section, Visual Identification and Forensic Science of the Israeli Police in Jerusalem. He possessed a Bachelor of Science Degree and a Masters Degree, both in Chemistry. He was awarded a PhD in December 1979. Dr Zeichner was highly qualified and experienced in the identification of gunshot residue by a number of methods, including scanning electron microscopy (SEM).

304. At the outset of his evidence Dr Zeichner explained that in Israel the examinations were done only on primer residues. His work had primarily been with explosives not gunshots (T 2605).

305. In March 1994 Dr Zeichner received a number of items from Mr Barnes including:

- C2 – one particle from the interior of the driver's door handle in the applicant's Mazda. In Dr Zeichner's opinion it was a two component primer residue consistent with PMC (T 2608).

- C7 – comprised of seven particles from the rear view mirror of the Mazda, all of which were two component primer particles consistent with PMC primer (T 2609).

- C12 – comprised of four particles from the indicator stalk in the Mazda. In Dr Zeichner's opinion, three of the particles were two component primer particles consistent with PMC primer. However, one of the particles contained antimony which led Dr Zeichner to prefer the view that it was a three component primer inconsistent with PMC primer. Dr Zeichner acknowledged that the particle could have been contaminated with antimony from the projectile which meant that he

[55] Mr Barnes said that Cartoucherie Française ammunition was clearly different from PMC because the propellant was a greenish blue in colour and distinguishable from the colour of PMC. This evidence was contrary to the entry in the database which recorded the colour as 'GREEN–translucent' (Ex 98, 37). It was also contrary to the second database which recorded the colour as green translucent (Ex 89, 60, 124, 155).

could not exclude the possibility that it was a two component primer consistent with PMC. In his experience from experiments he had conducted the possibility of that contamination was 'very small' (T 2608).

306. Dr Zeichner also received a stub marked 2F which was a sample from one of the deceased's wounds. There were 12 particles, several of which were consistent with PMC primer residue, but in respect of two of the particles he preferred the view that their origin was a three component primer inconsistent with PMC primer. While he could not exclude the possibility that the two particles were two component primers consistent with PMC, he preferred the view that they were three component primers 'much more strongly' (T 2615).

307. In respect of the particles which Dr Zeichner considered were three component primers, those from the indicator stalk matched those from the deceased's wound and were of a composition 'consistent with the composition of gunshot residues of various types of ammunition' (T 2607). Dr Zeichner was asked whether it surprised him to find both two and three component primer associated with a single bullet wound. He gave the following answer (T 2609):

> Not – it's not surprising. There are scenarios that are very reasonable that one can fire a – or I would put it another way. The same gun was used to fire different types of ammunition and therefore – although the last firing is with this specific ammunition there is a contamination of previous types of ammunition particles in the – mainly in the barrel of the rifle or other type of gun.

308. Dr Zeichner agreed that the use of a silencer could account for the presence of different gunshot residue particles as the silencer could form a reservoir of particles from previous firings with different ammunition.

309. As to his use of the word 'consistent' in saying that one particle was consistent with PMC, Dr Zeichner said that it meant 'same sort', but he was not expressing an opinion as to the specific identity of the particular particles (T 2627).

310. The issue of contamination from the hands and other circumstances was raised with Dr Zeichner. He agreed that if a firearm that had been fired recently was left in the boot, it would leave gunshot residue (T 2626). Dr Zeichner described the areas on the hand of a shooter which would receive residue and said that the outer aspect of the index finger and thumb are prominent. Similarly, the palm and back of the hand will receive residue which can be transferred to the left hand or another object (T 2639). Contamination of the hands can occur if the weapon itself is contaminated and residue can be transferred from the weapon to the hand when carrying the weapon. Dr Zeichner explained what was really a matter of common sense, namely, that the period a particle will remain on an object depends on the surface, conditions and whether there is any interference with the object (T 2642).

311. Professor Shmuel Zitrin was employed by the Israeli National Police. He possessed a PhD in Chemistry and a Masters Degree in Organic Chemistry. Professor Zitrin had gathered vast experience in the identification of ammunition propellants used in explosives rather than gunshot residues, but the propellants are of the same kind and

are just used in a different way. Professor Zitrin pointed out that he had no practical experience of using organic analysis for gunshot residue (T 2094).

312. Mr Barnes' report and further statements about the report were provided to Professor Zitrin, but he made the point that he did not do any experimental work in relation to the trace materials. He had discussions with Mr Barnes and read the evidence Mr Barnes gave at trial (T 2094).

313. Professor Zitrin was asked to comment on whether it was appropriate to create a database in the way that Mr Barnes had set about to do. He agreed that the methodology of first gathering the information about unburnt powders, followed by creating a database in respect to burnt powders, was an appropriate methodology (T 2097). He was then asked to assume that Mr Barnes used organic profiling in the negative sense of excluding significant organic compounds and he agreed it was an appropriate approach. Significantly, Professor Zitrin said that not only was it the appropriate way to use it, but it was the 'only way possible' and he would not agree to attempting to use it in a 'positive way' by comparing the profile obtained with another powder such as PMC (T 2096). Using these methods in a negative way could lead to a conclusion that one powder is consistent with another because the analysis does not exclude those particular powders. Professor Zitrin agreed that in this process he was confining himself to the organic chemistry and was not having regard to other criteria upon which Mr Barnes had relied in reaching his ultimate conclusion (T 2096–2097).

314. Later in his evidence Professor Zitrin confirmed that in speaking of material being consistent with PMC, from an organic chemistry point of view the material would also be consistent with other ammunition propellants. He emphasised that this process 'does not go to the stage of individualisation of the powder...' (T 2097). While the organic analysis could lead to a conclusion that powder is consistent with PMC in the sense that it did not exclude PMC, 'it does not say according to the organic analysis that it is PMC ...' (T 2098).

315. The applicant was unrepresented on 29 June 1995 when Professor Zitrin gave evidence and did not cross-examine him.

316. This brief summary of the forensic evidence concerning the gunshot residue is sufficient to demonstrate the importance of the evidence to the case for the prosecution. If accepted, the evidence provided a particularly strong connection between the applicant's Mazda and the scene of the crime in circumstances that were, realistically, explicable only on the basis that the applicant was the murderer. The evidence of Mr Barnes and the other experts was never seriously challenged in respect of the critical conclusion that the residue found in the applicant's car was indistinguishable from the residue at the scene. The reliability of the database was not questioned.

Prosecution Closing Address

317. Not surprisingly, in his closing address to the jury Mr Adams emphasised the importance of the forensic evidence and the following factors:

- Mr Barnes was a highly qualified and independent expert (T 6284).

- Mr Barnes had examined all the .22 ammunitions available in Australia, plus the extensive FBI library, and created an 'enormous database' (T 6380).

- 'With minor and irrelevant exceptions', Mr Barnes' conclusions had been supported by 'the battery of international experts called by the prosecution' (T 6381).

- There was no suggestion that the database was 'incomplete or inaccurate' (T 6392) and there was 'no argument about its accuracy' (T 6424).

- Professor Zitrin, 'like other expert witnesses, had had the opportunity of carefully considering Mr Barnes database ...' (T 6424).

- Mr Keeley examined the database and had 'listened to Mr Barnes' evidence in relation to the criteria or distinguishing points, the profile that he used to distinguish and classify those propellants which included PMC' and Mr Keeley 'accepted that information as accurate ...' (T 6425).

- If there was the slightest contradiction of the matters to which Professor Zitrin deposed, the Crown having given notice of all the scientific witnesses to the defence, those contradictions 'could and should have been put to Mr Barnes and Mr Martz, who was also an organic chemist'. So, 'you may take it that there was no material difference or contradiction or qualification of Dr Zitrin's evidence' (T 6425).

- It would be 'completely unreasonable not to accept that PMC .22 propellant can be distinguished from all other ammunition propellants for the reasons and in the circumstances given by Mr Barnes' (T 6393).[56]

- 'The only reasonable conclusion on the whole of the scientific evidence before you which, I have said, is all one way and completely uncontradicted is that PMC propellant is unique' (T 6393).

- The applicant had PMC in his boot (T 6108).

- The applicant had PMC propellant and silencer residue in his car (T 6127).

- The applicant had substantial residues of PMC propellant in his car which was the type of ammunition used in the murder (T 6133).

Jury Directions

318. In summing up to the jury, the trial Judge summarised the evidence and submissions as follows:

[56] This statement was repeated in the same passage because it was 'important' (T6393).

- Referring to the primer particles found in the applicant's Mazda, bearing in mind that the accused had admitted to owning and firing two guns in 1988, the Crown did not suggest that this was a 'particularly significant aspect of the Crown case' (T 6802).

- Mr Barnes gave evidence that PMC propellant can be distinguished from all other ammunition propellant and found no significant difference between the PMC propellant particles vacuumed form the Mazda and those found at the scene (T 6802).

- Mr Adams submitted that Mr Barnes was supported by the overseas experts with regard to the propellant (T 6802).

- Mr Terracini and the applicant attacked the credibility of Mr Barnes with respect to the use of the silencer and his previous evidence to the Inquest that, in all probability, the PMC propellant from the scene came from the same batch as the propellant found in the Mazda (T 6803).

- The accused admitted purchasing .22 ammunition and, while proffering innocent explanations for the propellant particles found in the Mazda, 'at the end of the day' said that he could not account for how they got there (T 6806).

- Mr Adams submitted that there is 'no conflict of significance' in the evidence of the various experts and no expert criticised procedures adopted by Mr Barnes or his views (T 6806–6807).

- As to the 'uniqueness' of PMC, Mr Adams submitted that the procedures adopted by Mr Barnes and his conclusions were 'supported by Martz, Zitrin and Keeley, and the procedures and conclusions of Mr Barnes with respect to the identification of primer particles were supported by Dr Zeichner' (T 6807).

Barnes – Legal Representation

319. Against the background of the evidence and issues at trial concerning the gunshot residue, I turn to matters concerning Mr Barnes and his evidence which it is suggested were not disclosed to the defence. The evidence has raised numerous issues, including the adequacy of Mr Barnes' records and conflicts between his records and reports. Opinions expressed by Mr Barnes have been challenged. It is necessary to identify matters affecting the reliability and veracity of Mr Barnes' evidence and to consider the knowledge of those matters possessed by the DPP and the AFP. The issue of disclosure to the defence can then be addressed.

320. Mr Barnes provided an affidavit to the Inquiry sworn 24 March 2014 (Ex 195) which was prepared with the assistance of his solicitor and Counsel. In addition Mr Barnes gave evidence during which he was examined by both his Senior Counsel and Senior Counsel Assisting the Inquiry. However, against the background of recent significant health problems and operations, Mr Barnes became physically unwell during examination by

Counsel Assisting on Thursday 27 March 2014 and was unable to continue. A medical certificate was subsequently received stating that Mr Barnes would not be fit to resume evidence in the foreseeable future. No further evidence was taken from Mr Barnes, but Counsel for Mr Barnes filed a written submission on his behalf (annexure 8).

321. In addressing the issues that arise under Paragraph 5 and, in particular, in dealing with the events and records of the early 1990s and Mr Barnes' recollection of those matters, it is essential to bear in mind the obvious problems created by the effluxion of time. Not surprisingly, like many other witnesses, Mr Barnes experienced significant difficulties in recollecting details and was required to endeavour to reconstruct events and explanations for numerous matters. The likelihood that records have been lost or misplaced over the years must be carefully considered. After so many years it is important to bear these matters firmly in mind and to avoid arriving at conclusions based on the wisdom of hindsight.

322. In addition to these general matters, I have also had regard to Mr Barnes' obvious ill health and to the additional stress upon Mr Barnes created by his recent poor health and surgical intervention. Mr Barnes was in a particularly difficult position. He knew that his work was under close scrutiny and challenge. The stress of facing intense and detailed questioning concerning his work and conduct in the 1990s should not be underestimated.

323. There is a further factor which should be addressed. It concerns Mr Barnes' opportunity for preparation and his legal representation. In view of assertions made in Mr Barnes' submissions, it is necessary to canvas these matters in some detail.

324. The following discussion includes reference to conversations involving Counsel Assisting. The context of these conversations is taken from contemporaneous notes made by Counsel which have not been tendered. The emails and letters to which reference is made have not been tendered.

325. The submissions filed on behalf of Mr Barnes refer to difficulties in relation to the funding provided for his legal representation. It is not difficult to predict with some confidence that those persons who determined the extent of the funding are likely to hold a different view as to the adequacy of the funding. Regardless of the validity of the opposing views concerning funding, the fact remains that a number of witnesses relevant to the work and evidence of Mr Barnes gave evidence to the Inquiry in the absence of Mr Barnes and his legal representatives. While Counsel Assisting endeavoured to extract the relevant evidence from those witnesses, and to explore the accuracy of the evidence, those witnesses were not cross-examined by Counsel appearing on behalf of Mr Barnes. To that extent Mr Barnes was placed at a disadvantage, as is the Board.

326. The submission on behalf of Mr Barnes asserts that the problem of insufficient funding was 'compounded' by the scheduling and rescheduling of witnesses 'in a manner that would not enable Mr Barnes to conserve funds despite numerous requests that this be done' (annexure 8 [34]). That submission is without substance and is misleading. The Board made every effort to meet the convenience of Senior Counsel for Mr Barnes. The

scheduling of witnesses, and rescheduling, occurred in an attempt to ensure that the witnesses were called at a time when Senior Counsel for Mr Barnes was not committed elsewhere. The Board is not responsible for decisions concerning the funding of Mr Barnes and did not contribute to the problems related to that funding.

327. Paragraph 29 of Mr Barnes' submission refers to an opening given by Counsel Assisting on Thursday 23 January 2014 concerning the forensic matters. The submission asserts that the 'approach foreshadowed' by Counsel took Mr Barnes and his legal representatives 'by surprise' and they 'were unable to contest it or to have input into it'.

328. This submission is misconceived. The occasion of the opening was not an occasion for those given leave to appear to 'contest' or 'have input'. Counsel Assisting gave the opening at my request in order to assist persons given leave to appear to gain an understanding of the issues which Counsel Assisting believed had emerged from the investigation and would be the subject of evidence in public hearings. Counsel provided to all persons given leave, including Mr Barnes, a document by way of working notes which summarised the various forensic issues in a form which identified the relevant material extracted from a vast array of transcript, notes, reports and miscellaneous documents (annexure 19). The implied criticism in paragraph 29 is both baseless and unfair.

329. In paragraphs 9 and 16–35 of Mr Barnes' submission there is an underlying theme that Mr Barnes has been treated unfairly by the Board. In addition to complaints about 'grossly inadequate funding', the following general assertions are made in the submissions, without reference to any material to support them:

- Repeatedly, basic documentation and notice of relevant matters have not been provided to those representing Mr Barnes, this only being rectified on occasion by the good offices and ethical intervention of Counsel for other parties. Witnesses relevant to him have been called without prior notice and key decisions have been made with his being marginalised and his not having an opportunity to make submissions (annexure 8 [9]).

- Mr Barnes only became aware of a need to obtain legal representation independent from that of the AFP and/or DPP in a conversation with Counsel assisting on or about 18 November (annexure 8 [22]).

330. As the following chronology of relevant events, supported by correspondence and notes, demonstrates, the submissions are misleading and misconceived:

- 1 February 2013 –

  A private investigator rang Mr Barnes and advised that he was employed by Senior Counsel for the Eastman Inquiry and asked if Mr Barnes had a few minutes to speak with him. Mr Barnes replied 'No' and terminated the call.

- 4 February 2013 –

  Subpoena served on Mr Barnes by email.

- 6 February 2013 –

Counsel Assisting returned a call from Mr Barnes. In a lengthy conversation a number of issues were discussed including the subpoena, confidentiality concerns about documents and expenses to be incurred. A contemporaneous file note made by Counsel records the following concerning a conversation about legal representation:

> I indicated to him that he can apply to the board to have a legal representative present on those matters that concern him – that person may be able to XN and XXN witnesses, present documents, make subs on his behalf. He thought that because my job was to be impartial that I would present all the evidence that he wants to present. I explained to him that there may be differences about what he considers relevant and what I consider relevant and there may also be significant similarities. But I don't represent him or anyone else. Only his lawyer can represent him.

- 28 February 2013 –

Counsel Assisting telephoned Mr Barnes in response to his message. They discussed the materials Mr Barnes had collated and during the discussion Mr Barnes said that others wanted to stop him telling the truth in the Abdullah case. As to legal representation Counsel Assisting made the following contemporaneous note:

> He is entitled to be represented if wishes to resist that [applications by Eastman, DPP and AFP for a copy of documents produced by Mr Barnes]. I explained LPP and PII. I will be recommending copy but with no provision of copies to 'non-parties'. He is content with that. Cannot afford legal representation. Does not believe he needs it because we have to accord him procedural fairness. I agreed that we do and that we will but nevertheless I am not his lawyer.

- 15 July 2013 –

Counsel Assisting wrote to Mr Barnes enclosing a copy of a report by Dr Wallace dated 2 July 2013 and a DVD recording of tests. The letter included the following advice to Mr Barnes that his work would be the subject of adverse evidence and canvassed the question of legal representation:

> The 'forensic' terms of reference (numbers 5–11) concern the evidence presented by you at trial in 1995. Most particularly, number 5 focusses upon what are said to be matters relating to your veracity and reliability as a forensic witness. It is intended that Dr Wallace will be called as a witness before a public hearing of the Board of Inquiry. Based on these matters, including the contents of the enclosed report, I am notifying you that you and your work will be the subject of adverse evidence given at a public hearing.
>
> If you wish, you may provide the Board with a written report or statement prior to the public hearing in response to the report of Dr Wallace.
>
> I can also indicate that the Board will be provided with a copy of a report of Emeritus Professor Hilton Kobus in due course. I will provide you with a copy of that report once received. You will also be given an opportunity to provide the Board with a

written report or statement prior to the public hearing in response to the report of Professor Kobus. I will then advise you of the date by which the Board will need to receive any written response by you to the two reports.

Your Own Legal Advice

As discussed with you in February this year, my role is Counsel assisting the Board of Inquiry. I do not represent or provide legal advice to any other person or entity or witness. It is a matter for you, but you may wish to obtain your own legal advice in relation to this matter. You may also wish to engage your own Counsel to represent you at the hearing when you are called to give evidence. If so, then your Counsel will need to make an application before the Board of Inquiry for leave to appear on your own behalf. I draw your attention to practice direction no. 1 (particularly paragraphs 18 and 31) which can be found on the official website.

- 19 July 2013 –

  Counsel Assisting spoke by telephone with Mr Barnes. He asked for an electronic copy of the report by Dr Wallace and advised that he did not travel overseas because he had a malignant melanoma in his neck. There was discussion about other material.

- 6 August 2013 –

  Counsel sent a letter to Mr Barnes enclosing a copy of materials provided to the Board by the DPP concerning the work of Mr Barnes. Counsel asked if Mr Barnes was willing to meet with Professor Kobus.

- 2 September 2013 –

  Counsel spoke by telephone with Mr Barnes and he confirmed that he had received the CD containing materials from the DPP. Mr Barnes declined to meet with Professor Kobus and stated that he did not believe Professor Kobus was objective. He said that if Professor Kobus wanted anything a request should be made in writing. Counsel asked Mr Barnes if he required anything else at that time to prepare for the hearing and he replied in the negative.

  Counsel recorded that Mr Barnes wanted to know why the AFP or the DPP had not contacted him. Counsel said she was unable to answer that question. Mr Barnes said that the AFP or DPP should be paying for his legal representation and Counsel informed him that he should raise that issue with them. She offered to send contact details. Mr Barnes said the contact details would assist because he did not know who to write to. There was further discussion about various materials and Mr Barnes said that others should be called first so that he could answer. Counsel Assisting said this was likely to happen. Mr Barnes said it was a conspiracy against him and that Mr Ross should face criminal charges over Butterly and Dr Wallace was too emotive. Mr Barnes said forensic scientists should be independent. He also said that if the AFP or DPP chose not to represent him, he would not speak to them.

Counsel Assisting sent an email to Mr Barnes with contact details for the AFP and DPP. In the email Counsel confirmed that Mr Barnes had not yet decided whether he would provide a written report or statement to the Board prior to the hearing. The email advised that hearings would commence on 5 November 2013 and that the Board had set 20 January 2014 for the commencement of hearing the terms of reference concerning the forensic evidence.

- 1 November 2013 –

  Mr Barnes was served with a witness subpoena. He advised the Board by email that he was only available from March 2014.

- 18 November 2013 –

  In a telephone conversation with Counsel Assisting, Mr Barnes confirmed his view that the AFP should be providing legal representation for him. Counsel asked him whether he had made the request of the AFP, to which Mr Barnes responded in the negative and said that the AFP should contact him. Counsel explained the process of obtaining leave to be legally represented and informed Mr Barnes that he could seek leave by writing to her. Counsel also advised Mr Barnes that the government was considering providing funding for a witness who had been granted leave to be legally represented, but this was not confirmed and Counsel did not know the terms of such funding. She advised that the first step was for Mr Barnes to apply to the Board, but that was a matter for him. Mr Barnes responded that he was travelling overseas the following weekend and would not be available until 1 March. Counsel informed Mr Barnes that the timetable for hearings did not permit a delay in calling Mr Barnes as a witness until March and observed that Mr Barnes had been in possession of Dr Wallace's report for some months. She also advised that Mr Barnes should receive the report from Professor Kobus in the post the following day and there were affidavits from Mr Strobel, Mr Wrobel and Mr Ross.

  Significantly from the point of view of representation, Counsel recorded in her note of the telephone conversation that she said to Mr Barnes that 'he may wish for a lawyer to XXN those witnesses on his behalf'.

- 20 November 2013 –

  Counsel emailed Mr Barnes referring to the conversation of 18 November and confirming that again she raised with Mr Barnes the issue of whether he wanted to be legally represented at the hearings before the Board. The letter stated that she had informed Mr Barnes that if it was his intention to be legally represented, he needed to make an application to the Board and the application could be made in writing to Counsel. The letter also confirmed other aspects of the conversation of 18 November, including

Counsel's understanding that the ACT government was considering the possibility of providing some funding to witnesses who had been granted leave to be legally represented. The letter confirmed that the hearings concerning 'GSR' were to commence on 28 January 2014 with the calling of Dr Wallace, followed by Professor Kobus, Mr Strobel, Mr Wrobel and Mr Ross. The letter advised Mr Barnes that Counsel expected to be calling him to give evidence on 10 February 2014 and that he may wish to have legal representation during his evidence and to cross-examine some or all of the other witnesses.

- 25 November 2013 –

  Letter from Mr Barnes requesting leave to appear, funding for legal representation and funding for him as an expert witness.

- 3 December 2013 –

  Email from Counsel Assisting to Mr Barnes attaching a letter and a copy of the Order granting him leave to be represented. The letter advised that Mr Barnes' funding request had been forwarded to the appropriate person, but his request for funding as an expert had been declined because he was the subject of the investigation. Counsel requested that Mr Barnes contact her as soon as he returned from overseas to discuss his legal representation and provision of material to his Counsel.

- 17 December 2013 –

  Counsel Assisting sent a letter to Mr Barnes referring to her letter of 3 December 2013 and advising that an officer of the Board would be providing him with contact details for the person who could discuss with him the level of financial assistance available to him. The timetable was confirmed, including the calling of Dr Wallace and other witnesses on 28 January 2014 and the commencement of evidence from Mr Barnes on 10 February 2014.

- 16 January 2014 –

  A letter was sent to Mr Barnes enclosing a copy of a CD containing the forensic materials organised in bundles Counsel proposed to tender. The letter asked Mr Barnes to advise whether he intended to submit a written response to the reports of Dr Wallace and Professor Kobus.

- In the context of the arrangements for evidence from Dr Wallace to commence on 28 January 2014, and Mr Barnes to commence evidence on 10 February 2014, discussions occurred with Counsel for Mr Barnes. It was known by all parties that Dr Wallace was unable to extend his time in Australia. In order to meet the commitments of Counsel for Mr Barnes, arrangements were made for examination of Dr Wallace to commence on

28 January 2014, but for cross-examination to be deferred until 3 or 4 February 2014. In order to accommodate Counsel's other commitments, it was agreed that following completion of the evidence of Dr Wallace, the calling of other witnesses would be delayed until about Monday 3 March 2014. The rearranging of witnesses for the benefit of Counsel caused considerable inconvenience to a number of the witnesses who had been organised for early February 2014.

- 9 January 2014 –

  Counsel for Mr Barnes advised that he had been briefed, but there was a problem with funding. There was discussion about Counsel's fees. Counsel Assisting agreed to send Counsel the CDs containing the forensic materials which Counsel Assisting proposed to tender.

- 10 January 2014 –

  Discussion between Counsel Assisting and Counsel for Mr Barnes concerning comparative fees of Counsel. Mr Barnes' Counsel subsequently emailed Counsel Assisting advising that he was unlikely to be able to represent Mr Barnes.

- 17 January 2014 –

  Counsel for Mr Barnes proposed deferring the evidence of Dr Wallace until 3 February 2014 and finishing his evidence that week, after which the Inquiry would be adjourned to 3 March 2014. Counsel Assisting advised that the Board intended to commence the evidence of Dr Wallace on 28 January 2014 in order to complete his examination and cross-examination by other parties, but if Counsel for Mr Barnes needed time to prepare, the Board would adjourn to 3 February 2014 in order for Counsel to cross-examine. Other cross-examination of Dr Wallace could be delayed to 10 February 2014. Counsel Assisting noted that the Board would 'rearrange' all other witnesses to accommodate Counsel and his request to recommence forensic evidence on 3 March 2014.

- 20 January 2014 –

  Counsel for Mr Barnes sent an email to Counsel Assisting stating 'thank you again for being so collaborative'. He asked if the Board could delay matters by two days in the week of 3 March because of his other trial commitments.

- 21 January 2014 –

  Counsel Assisting sent to Counsel for Mr Barnes a revised witness timetable.

- 23 January 2014 –

  Counsel Assisting emailed Counsel for Mr Barnes advising of the brief opening on forensic issues that day and attached a copy of the working notes which had been prepared for the assistance of the parties.

- 28 January 2014 –

  Two affidavits were forwarded to Counsel for Mr Barnes, including the affidavit of Mr McQuillen with the attached transcript of the conversation with Mr Barnes on 19 January 1994 (Ex 144). Mr McQuillen gave evidence about the conversation on 19 February 1994, but Counsel for Mr Barnes was not present. Although Mr Barnes dealt with the conversation in his affidavit, Ex 195, no application was made for Mr McQuillen to be recalled.

- 3 February 2014 –

  All Counsel were provided by email with a new witness list because Counsel for Mr Barnes advised that he was available in the week of 10 February 2014. [Those arrangements had to be rearranged because Counsel then advised that Mr Barnes had to keep a medical appointment in the week of 10 February 2014]

- 25 February 2014 –

  Counsel Assisting advised Counsel for Mr Barnes that in the following week Mr Adams, Ms Woodward and Mr Ibbotson would be giving evidence. Professor Kobus was to start the week after on Wednesday 12 March 2014.

- 26 February 2014 –

  Revised timetable sent to all Counsel.

- 14 March 2014 –

  Witness timetable sent to all Counsel, including Counsel for Mr Barnes who advised that he was 'out of play pending resolution of tawdry issues to do with money but his junior may be there and he shall return as soon as matters are resolved'.

- 14 March 2014 –

  Request from solicitors for Mr Barnes late that Friday that the Board to move Mr Wrobel and Mr Strobel from the following Monday. In view of the previous inconvenience to those witnesses through changes in arrangements, the request was denied. Counsel Assisting advised Counsel for Mr Barnes that if he was unable to attend, the transcript would be

available and the Board would hear any application Counsel wished to make for the recall of those witnesses.

- 17 March 2014 –

  Mr Barnes' solicitor sent an email to Counsel Assisting confirming that they would not be in attendance that day because of funding. The email advised that the solicitors would continue to review the transcript and might apply for leave to recall witnesses should the need arise.

331. This chronology does not include every communication with Mr Barnes or his legal representatives. However, it is sufficient to demonstrate that 12 months before he gave evidence Mr Barnes was well aware of the significance of the Inquiry to him and of the fact that Counsel Assisting the Inquiry could not represent him. Mr Barnes was aware, at least from July 2013, that his work would be the subject of adverse evidence given at a public hearing and that as Counsel Assisting did not represent him and could not provide legal advice to him, he might wish to obtain his own legal representation.

332. The brief chronology is also sufficient to demonstrate that every effort was made to assist Counsel for Mr Barnes by rearranging the schedule of witnesses in order to avoid clashes with his other commitments. Dr Wallace was examined by Counsel for the applicant, and by Counsel Assisting, on 28 – 30 January 2014. Counsel for Mr Barnes was present during examination and cross-examined Dr Wallace on 3 and 4 February 2014. He was also present for the examination of Professor Kobus on 12 March 2014 and cross-examined Professor Kobus on 13 March 2014.

333. An affidavit from Mr Barnes was provided to the Board on 22 March 2014. Mr Barnes gave evidence on 24 – 27 March 2014. He was first examined by his Counsel who was present throughout the subsequent examination by Counsel Assisting. There was no suggestion at any time that Mr Barnes had been deprived of an adequate opportunity to prepare for giving evidence or that Counsel needed more time.

334. Following the premature completion of evidence by Mr Barnes due to his poor health, the solicitors for Mr Barnes were kept informed of witnesses to be called. The Board understood from the email of 17 March 2014 that the solicitors for Mr Barnes would continue to review the transcript of evidence with a view to applying for leave to recall witnesses should the need arise. No such application was made.

335. It is simply not true that 'basic documentation and notice of relevant matters' were not provided to those representing Mr Barnes or that witnesses relevant to him were 'called without prior notice and key decisions [were] made with [Mr Barnes] being marginalised' and 'not having an opportunity to make submissions' (annexure 8 [9]). Similarly, it is not true that Mr Barnes 'first became aware of a need to obtain legal representation independent from that of the AFP and/or DPP in a conversation with Counsel Assisting on or about 18 November 2013' (annexure 8 [22]). Further, it is not true that the Board scheduled and rescheduled witnesses 'in a manner that would not enable Mr Barnes to confirm funds despite numerous requests that this be done' (annexure 8 [34]).

General Concerns

336. The starting point for consideration of the various issues that require consideration in relation to Paragraph 5 is evidence of general concerns conveyed to the AFP about Mr Barnes and his qualifications. No information about these concerns was provided to the defence.

337. Mr Dee was a barrister and in 1987 he took up the position of Deputy Director in the Office of the Commonwealth Director of Public Prosecutions. He became aware of the involvement of Mr Barnes in the investigation into the murder of the deceased and, by reason of his prior knowledge of Mr Barnes, was concerned that Mr Barnes should be undertaking such important work. As a Crown Prosecutor in Victoria, and Junior Counsel for the prosecution in the trial of persons charged with the Russell Street Bombing, Mr Dee had the opportunity of seeing Mr Barnes giving evidence and he formed an adverse view of him (Inq 2263). In essence, Mr Dee harboured concerns about Mr Barnes' qualifications and he disapproved of the way Mr Barnes responded to questions in cross-examination by challenging and debating with Counsel.

338. In addition, following the conclusion of the trial, Mr Dee heard Mr Barnes on a social occasion addressing police officers. Two of the persons charged with murder had been acquitted and, in a remark to police, Mr Barnes expressed the view that 'we should have convicted the two who were acquitted' (Inq 2264). In Mr Dee's view this was an inappropriate remark for a forensic expert to have made, particularly to investigating police officers.

339. In his affidavit (Ex 195 [220]–[221]) Mr Barnes said he did not recall the conversation and did not accept that it took place 'in the terms asserted'. He drew attention to the venue and atmosphere of the occasion described by Mr Dee and said he does not recall holding a particular view one way or the other about the result of the bombing trial.

340. Mr Dee said that upon becoming aware of Mr Barnes' involvement in a murder investigation, he would have conveyed his displeasure to senior members of the AFP.

341. On 15 August 1989 Mr Dee sent a memorandum to the Commissioner of the AFP (Ex 130). Mr Dee referred to the work done by Mr Barnes and suggested that it would be 'helpful' if the evidence was checked by another expert in the field of gunshot residue. He suggested that an expert in the 'Home Office' in England was available. He also observed that it would be 'inappropriate' for any original exhibit to be sent overseas.

342. Without being asked Mr Dee expressed the view that the evidence was insufficient to establish the guilt of the applicant beyond reasonable doubt (Inq 2270). Not only is that opinion irrelevant to the Inquiry, it is an opinion based on material known to Mr Dee which is far from complete. Mr Dee's involvement in the Inquest ended in May 1990. He has no knowledge of the evidence given at trial and, in particular, of the evidence by Mr Barnes at the Inquest or trial, other than what he has read in the media. Similarly, he has no knowledge of the qualifications or experience of Mr Barnes with respect to

gunshot residue. It is clear that Mr Dee holds a strong opinion about Mr Barnes, but it is not his opinion, or whether it is well-founded or otherwise, which is relevant for present purposes; it is the fact that he conveyed his concern to members of the AFP.

343. Ultimately the evidence of Mr Dee is of little significance because it went no further than expressing the view that a second opinion was needed.

344. Mr Thomas McQuillen was a Detective Sergeant in the AFP seconded to the investigation team from the outset. He was closely involved with Mr Barnes throughout the investigation and, when the ACT DPP took over in 1992 from the Commonwealth DPP, Mr McQuillen became the main liaison officer between the DPP and the investigation team (Inq 2446). He was also the primary liaison officer between the investigation team and Mr Barnes (Inq 2450–2451).

345. Mr McQuillen said that within the first couple of weeks of the investigation he was present at a meeting between Mr Dee and Mr Barnes at which the work of Mr Barnes and evidence he had located was discussed. He said he was not aware of concerns about the qualifications or work of Mr Barnes, but from early in the investigation it was generally accepted within the team that the work of Mr Barnes would have to be checked by another expert because of the importance of both the case and the potential evidence of Mr Barnes. Asked why nothing was done about reviewing the work of Mr Barnes for approximately two years, Mr McQuillen responded that Mr Barnes had not completed all the work (Inq 2451–2453).

346. Mr Ninness confirmed that from the outset he decided it was important to obtain a second opinion because of the importance of the evidence which he believed would be challenged. He also had in mind the concerns expressed by Mr Dee (Inq 2573).

347. On 2 August 1989 the Deputy Commissioner Operations, Mr Roy Farmer, sent a memo to the officer in charge of the ACT Crime Division concerning the forensic evidence (Ex 129). Mr Farmer wrote that in discussions with Mr Dee, the DPP and, later, Mr Brian McGuire QC, 'the question of forensic evidence disclosed by examinations conducted by Mr Robert Barnes was of concern to both men.' Mr Farmer wrote that it was the view of both the DPP and Counsel that there was a 'need to support the Barnes' findings through a second opinion.'

348. Mr Farmer also commented that Mr Barnes 'might not receive this suggestion in good humour for he may perceive it as a questioning of his standing as an expert witness'. That was an accurate prediction.

349. Concerns about the qualifications of Mr Barnes to undertake the forensic work were conveyed to the AFP in the early 1990s by Professor James Robertson soon after he took up the position of Assistant Secretary/Director of Forensic Science with the AFP in about December 1989. He was peripherally involved in the investigation into the murder of the deceased because he was responsible for a number of AFP officers who were involved in the forensic investigation (Inq 2309).

350. Professor Robertson was aware of evidence given by Mr Barnes at the Inquest, particularly concerning gunshot residue coming from the same batch. He believed Mr Barnes 'over sold' his qualifications and possessed a propensity to 'go too far' in the witness box. In addition it appeared difficult to get information from Mr Barnes, including access to his case files, in order to review his work (Ex 134 [11]).

351. According to Professor Robertson he raised his concerns about Mr Barnes during meetings with the investigators, including Commander Ninness, and the initial response was 'Why are you criticising Mr Barnes?'. Over time his concerns were more readily accepted in the sense that others recognised that there was a problem and a need to have the work of Mr Barnes reviewed (Inq 2337).

352. In a memo of 24 August 1992 (annexure 4 to the affidavit James Robertson Ex 134) the officer in charge of the Major Crime Branch of the AFP wrote that in the early stages of the investigation it was 'mooted' that the evidence of Mr Barnes should be 'validated' by other experts in the field. Reference was made to a meeting involving Professor Robertson, other members of the AFP Forensic Service Division and Victoria Police officers who had been retained for the purpose of conducting a review into the investigations. The minute records that at the meeting it was agreed by all present that the work of Mr Barnes should be reviewed by recognised experts in the field (Inq 2313-2314).

Barnes – Attitude/Objectivity

353. From evidence as to general concerns about Mr Barnes and decisions that his evidence should be reviewed by other experts, I move to the responses of Mr Barnes, over several years, to the prospect and fact of a review and statements by Mr Barnes demonstrative of his attitude.

354. In evidence to this Inquiry Mr Barnes emphasised his independence and impartiality. While acknowledging that some of his opinions could have been expressed in better terms, he maintained that his evidence 'consisted of accurate and professionally formed opinions based on proper scientific methodology' (affidavit of Mr Barnes dated 24 March 2014, Ex 195 [251]). Mr Barnes' evidence concerning his independence echoed sentiments conveyed to Mr Adams and Mr Ibbotson in a conference on 13 May 1993 when he expressed the belief that he was 'very independent'; could be 'critical of police'; 'excludes emotion from his investigation'; 'and the person murdered does not alter what he perceives as his responsibility to examine in an independent and impartial way as he says he examines critically' (Ex 95, 21).

355. As to the question of his work being reviewed by overseas experts, in his affidavit Mr Barnes explained his initial opposition and eventual 'reluctant acceptance' of the review (Ex 195):

> 124 I was opposed to my work being reviewed. I was concerned that it would be viewed as a reflection on my competence and standing as a forensic expert and had the potential to reflect adversely on my role in ongoing cases before the courts. I believed this might have consequences for my work in Victoria, particularly if it became widely known that my work had been disputed in this case. I believed that I was being undermined and was very uncomfortable about this personally and because of the implications I thought it could have

for other cases. It was ordinarily the SFSL position that, if another expert was to be called to disagree with the work of the SFSL witnesses, that was a role for the defence and they should do their work and give their evidence and the jury should decide which evidence was to be preferred.

125 In addition, a policy was in force during at least part of the time that the issue was raised regarding interaction with external experts dealing with the release of case notes and exhibits. This policy did not support a co-operative approach with external experts. Prior to the written policy coming into force, the positions set out in it reflected the attitude of SFSL to these issues.

...

126 I was also concerned that the review would provide opportunities for the defence to undermine the scientific work done in the Winchester case. I was particularly concerned that differences of opinion would 'muddy the waters' and provide opportunities to attack my work. I was concerned that this would make my job in the witness box more difficult and could result in erroneous perceptions as to the expert evidence adduced in the case.

127 As the letter of 25 August 1992 describes, however, I agreed to the review. I would describe this as reluctant acceptance. Although I disagreed with the process, I understood the reasons put forward for it to occur.

128 I continued to be resistant and express my concerns about my work being reviewed throughout the course of the case, but I became resigned to it occurring. Later in 1994, my resistance may have been compounded because I felt that the work had already been reviewed in 1992. Despite my resistance to the process, I co-operated to the best of my ability at all times.

356. The written policy to which Mr Barnes referred is dated 16 April 1993 (annexure 14 affidavit Mr Barnes Ex 195). Paragraph 7 states:

> Any requests for re-analysis will be strongly resisted, regardless of the origin of these requests. The only exceptions will relate to additional items, additional information or significant advances in technology or methodology since the original examination.

357. In evidence Mr Barnes said that initially his attitude was based on the policy that re-examination should be strenuously resisted. He said he was also concerned that unless those examining the work had a complete understanding of his work they might not draw valid conclusions or could draw conclusions which, taken in isolation, were not appropriate (Inq 3803). He said he changed his mind because the people selected were well-renowned in their fields and 'it would certainly help to have that material re-analysed or re-examined and have independent findings in respect of that' (Inq 3803).

358. In a conference with Mr Adams and Mr Ibbotson on 13 May 1993 Mr Barnes said that any replication of his work would need to be considered by his 'superiors' because they had 'difficulty in allowing their work to be reconsidered by some other expert' (Ex 95, 17). Mr Ibbotson recorded in his notes that Mr Barnes said it was the 'Centre's belief that any challenge to their findings should be done in a Court during the trial'.

359. Mr Barnes' resistance to a review was accompanied by obvious anger. On 22 July 1992 Professor Robertson attended a meeting with investigators, Victoria Police and Mr Barnes. In the memo of 24 August 1992 (annexure 4 to the affidavit of Professor Robertson, Ex 134) it was recorded that when the question of a review of the work was raised, Mr Barnes 'became irate' and 'implied that the only way he would consent to a

review of his findings was if he were to discuss the findings personally with the other recognised experts'.

360. One of the officers involved in the review wrote to Mr Ninness on 25 August 1992. He referred to the meeting on 22 July and the importance of the evidence of Mr Barnes, after which he made the following observations (annexure 3 to the affidavit of James Robertson, Ex 134):

> Mr Barnes' addressed the meeting concerning the tests he is presently conducting and the results he was obtaining. The work being conducted by Barnes has not been conducted previously in Australia, although similar testing is taking place in the United States and Great Britain.
> Both Mr Ninness and Mr Robertson strongly made the point that they believed it was necessary to have Barnes' tests assessed by overseas experts, the rationale being that it added weight to any subsequent evidence to be given by Barnes and because of the number of concerns raised at the Inquest.
>
> Mr Barnes strongly resisted such a move stating it would be interpreted as a lack of confidence in his professional ability and could eventually weaken his standing in the field and the Victorian court system. I also expressed concern emphasising the significant role Barnes plays in the investigation of serious crime in Victoria.
>
> The issues were discussed at length with the meeting resolving that Barnes should travel to the United States and Great Britain to validate the procedures he adopted with other leading experts. Mr Barnes agreed to this validation process.
>
> The exact details of this process and funding were left for Mr Robertson to arrange with Mr Barnes.
>
> From the review perspective, I believe this process is essential. The scientific evidence and any subsequent prosecution will be crucial. During the short time I have been conducting the review concerns regarding Barnes' evidence have been raised by many senior members of the Australian Federal Police.

361. Both Mr McQuillen and Mr Ninness said the passage cited accurately reflects the content and tone of the meeting (Inq 2454, 2578). In his affidavit Mr Barnes agreed the letter accurately described his reaction (Ex 195 [123]).

362. Mr McQuillen said that although experts usually resented being reviewed by other experts, in his nine years as a police officer during which he dealt with other experts, he had never seen an expert as resistant to a review as Mr Barnes who repeatedly expressed the view that persons involved in the investigation and prosecution were not showing confidence in him and were not supporting him (Inq 2455).

363. Mr Ninness also had not previously experienced an expert who resisted a review to the extent Mr Barnes was resisting. He received information from Victoria Police that Mr Barnes had an ego issue (Inq 2579). Mr Adams said in evidence to the Inquiry that Mr Barnes was very negative about being reviewed and he attributed that negativity to his 'massive vanity' (Inq 2934). Mr Ninness discussed the issue with Mr Barnes and told him no matter what happened his evidence would be accredited by somebody. He conveyed to Mr Barnes that it was essential to the case that Mr Barnes be proven correct and that if his work had been done in accordance with scientific principles there should be nothing to worry about. From the perspective of Mr Ninness, after the

meeting of 22 July 1992, and after his discussions with Mr Barnes, the resistance to the concept of being reviewed reduced (Inq 2637).

364. In addition to Mr Barnes' resistance to being reviewed, his attitude is reflected in an incident in about mid 1991 about which Mr Nelipa gave evidence. Mr Barnes denied this incident occurred (Inq 3787). However, Mr Nelipa was an impressive witness and, as discussed later, I formed an unfavourable view of the reliability of Mr Barnes in a number of areas. In addition, the incident reflects a lack of objectivity demonstrated by other evidence.

365. Mr Nelipa said he was speaking with Mr Barnes in a car park. Appearing a 'little bit agitated', Mr Barnes struck the bonnet of a car with his open hand palm down and said something along the lines of (Inq 3631):

> Why aren't they arresting Eastman on the basis of the evidence?

366. The written submission on behalf of Mr Barnes makes the valid point that Counsel for Mr Barnes was unable to cross-examine Mr Nelipa. Notwithstanding that disadvantage, in my view it is likely that the incident occurred in the manner described by Mr Nelipa.

367. Mr Barnes travelled overseas in 1992 and consulted with a number of experts, including Mr Keeley. Commander Alan Sing held the position of Senior Liaison Officer at the Australian High Commission in London and was tasked with making 'discreet' inquiries of Mr Keeley concerning the validation of findings made by Mr Barnes. Mr McQuillen was unaware that such inquiries were undertaken and did not know they were 'discreet' (Inq 2527).

368. On 25 November 1992 Commander Sing interviewed Mr Keeley and, in a cablegram of 25 November 1992, Commander Sing reported the results of the meeting in the following terms (annexure 2 to the affidavit of Alan Sing Ex 131):

> Mr Keeley confirmed that he met with Mr Barnes in the Metropolitan Police Forensic Science Laboratory on the morning of 9 October 1992. Mr Keeley said Mr Barnes explained the background of the murder enquiry and showed him a number of photographs of the crime scene, the autopsy and the suspect's motor vehicle. Mr Barnes also showed Mr Keeley a copy of the results of his analytical work.
>
> Mr Keeley did not examine any physical evidence. Mr Keeley said based on the material produced to him by Mr Barnes he was generally in agreement with the views expressed by Mr Barnes.

369. Commander Sing also reported that Mr Barnes had discussions with a firearms expert, Mr Brian Arnold. He said Mr Arnold was not in a position to comment on the validity of the views expressed by Mr Barnes without conducting the same forensic work already carried out by an Australian firearms expert.

370. Mr Keeley undertook to produce notes of his meeting with Mr Barnes (Ex 132). He summarised the information given to him by Mr Barnes and the photographs and documents that he examined. He expressed the view that the proposition that particles found in the cabin of the Mazda were deposited as a result of the applicant using the vehicle after committing the murder was 'a reasonable one', but 'not the only explanation'. Mr Keeley commented on how long residues might remain on internal surfaces in the car and then about residues in the boot and contamination:

> The propellant and primer residue in the boot could have been from a totally unrelated event either before or after the murder, since although they might be similar to the samples from the crime scene they are not unique. They would act as a continuing source of contamination for any hand or object placed in the boot. Likewise the residues on the internal surfaces of the car could have originated from the deposits in the boot.

371. These views were expressed by Mr Keeley in evidence at the trial. There was nothing in the information from Mr Keeley in 1992 that was not eventually disclosed to the applicant and his legal advisors before the trial.

372. On 25 November 1992 Mr McQuillen faxed a copy of Mr Sing's cablegram to Detective Chief Inspector McKenzie who was one of the Victorian officers conducting the review into the investigation. On that facsimile Mr McQuillen wrote:

> Let's panic with dignity. Not as bad as we first thought. I hope

373. Asked why he wrote that message, Mr McQuillen responded (Inq 2460):

> Well - there were some issues that we'd had with Mr Barnes, and they'd come from Mr Barnes himself, that we were trying to undermine his work. I had that clear impression from Mr Barnes, and Mr Barnes had been telling me that these experts were going to destroy the case and that he – that he was very worried about that. Now, when we got this I thought it rather encouraging, in fact, the information that we had received, and I sent Ken McKenzie that, with that quip, 'Let's panic. But if we're going to panic, let's panic with dignity'. It wasn't as bad as I first thought from what Mr Barnes had told me.

374. Mr McQuillen explained that this was an expression he often used. Mr Ninness said he did not know why Mr McQuillen had written those words, but it was a phrase Mr McQuillen used quite frequently. From the perspective of Mr Ninness, the overseas review fell short of what was needed because it was not an in-depth review which included examination of the particles (Inq 2642–2643).

375. As to Mr Barnes saying that the overseas experts would destroy the case, Mr McQuillen said Mr Barnes was concerned that the experts did not have the full facts and the material they were given was not sufficient for them to make an informed decision. Asked why the concern persisted after he told Mr Barnes to take the full picture with him, Mr McQuillen said (Inq 2461):

> Well, going back a step, if you look at it, Mr Barnes objected strongly to anyone looking at his work. He had that factor. We then said to him, 'No, you need to go to experts overseas. Take your material and give it to them.' His objection was that they wouldn't be able to replicate what he did here in the laboratories in Australia.

376. Mr McQuillen was asked further about Mr Barnes' concerns not being allayed because he was able to take the necessary material overseas (Inq 2461, 2462):

> Q So, are you saying that he had strong concerns that an overseas expert would destroy the case even though they'd be able to look at all of his work on the basis they wouldn't be able to do the same work?
>
> A I think I need to explain a little bit. It's more about the lack of confidence in the AFP and the administration in Bob's ability to be able to get the job done without anyone validating it. We wanted it validated. Bob agreed to that and agreed to take all his material across. His underlying current back to me was that this really wasn't necessary and he felt it was an undermining of his professional standing. That's the basis on this comment here. When he gave me that information there I thought, it was in my mind, that we might get back the reports from overseas experts but we didn't.

377. Mr Adams and Mr Ibbotson were also of the view that the work of Mr Barnes and his conclusions should be reviewed by overseas experts (Inq 3328, 2932). They were concerned about his expertise across a number of forensic science areas and wanted his work replicated. As Mr Ibbotson put it, they wanted the experts to take Mr Barnes' work apart to expose any flaws.

378. Both Mr Adams and Mr Ibbotson confirmed that Mr Barnes strongly resisted the idea of a review of his work (Inq 3333, 2934).

379. Leaving aside other issues relating to Mr Barnes discussed later in this Report concerning his work, lack of records and allegations of misconduct, in the period 1989 – mid 1993 nothing has emerged in the evidence to the Inquiry that, considered in isolation from later events, should have been disclosed to the defence. The visit by Mr Barnes to experts overseas was known to the defence. The fact that investigators and prosecutors thought it advisable to have the work of Mr Barnes reviewed is not remarkable. If Counsel for the applicant had thought it useful, the reasons for engaging overseas experts could have been explored with a view to suggesting a lack of confidence in the work of Mr Barnes. However, it is not surprising that such an exercise was not undertaken because it would have served no useful purpose.

380. In my view it would be taking the duty of disclosure too far to suggest that, considered in isolation, the resistance of Mr Barnes to any form of review of his work, and his statement to Mr McQuillen that other experts would destroy the case, should have been disclosed to the defence. In the absence of other evidence, such resistance and pessimism is of negligible probative value in an assessment of the quality and reliability of the work done by Mr Barnes. However, a strong case for disclosure exists when the resistance is considered in conjunction with statements of Mr Barnes about both his role and other experts, including statements to Mr McQuillen on 19 January 1994 to which I now turn.

381. By way of background, it appears that Mr McQuillen had a telephone conversation with Mr Keeley on 11 January 1994. Mr McQuillen made a note (Ex 95, 110) which, from the appearance of the note, he thought would have been made during the conversation:

> Has some reservations about assertions.
> Will put to paper and send next week.
> Will speak Barnes.
> Especially about propellant.
> Bob Barnes emotionally involved.

382. Mr McQuillen had no memory of the conversation and could not say whether he informed the DPP of it. He agreed that 'possibly', the conversation would have set alarm bells ringing and that, as he understood it, the propellant was important. He agreed there would have been a degree of concern and he presumed he would have passed the information on to Mr Ninness (Inq 2475–2477).

383. While acknowledging that it would be his job and that of Mr Ninness to pass on information relevant to the way the DPP dealt with or assessed an important witness, Mr McQuillen said it was a possibility that he would have sat back and waited for something in writing from Mr Keeley before contacting the DPP (Inq 2478).

384. Mr Adams said he was sure he did not see that note. When asked if it was something he should have known, Mr Adams thought he already knew 'in a way', in the sense that Mr Barnes found it difficult to look at his own conclusions objectively (Inq 2904). However, Mr Adams readily agreed that if he had known about the view expressed by Mr Keeley he would have disclosed it to defence (Inq 2904).

385. On 19 January 1994 Mr McQuillen initiated telephone contact with Mr Barnes. Unbeknown to Mr Barnes, the conversation was recorded by Mr McQuillen (CD Ex 144 and transcript annexure 6 to the affidavit of Mr McQuillen, Ex 143). Asked why he taped the conversation, Mr McQuillen said he was not au fait with a lot of the material and he wanted it recorded so everyone would know what they were talking about. Secondly, he was concerned that Mr Barnes might withdraw from involvement and he wanted to be able to brief the investigation team on exactly what had been said. As to why he thought Mr Barnes might withdraw, Mr McQuillen gave the following evidence (Inq 2479):

> A Just from his general demeanour about the fact that these reports had been received and his concerns that the - the manner that they'd come about.
>
> ...
>
> Q All right, so why did you think before you taped this conversation that he was going to withdraw?
>
> A Well, I had a feeling that Bob wasn't happy all along, the whole way through, particularly about the review of his material as I said before. There was this underlying current that we had no confidence in him and that we, in actual fact, were undermining.
>
> Q What, and you thought before you taped this conversation that it had got to a stage where you thought that he was going to withdraw from the case?
>
> A That was one of the possibilities. That he wouldn't supply the material to our overseas experts so that we could get the work done.
>
> Q Is that something he said to you?
>
> A No, no. It's the underlying current that I had.
>
> Q Well, can you be more specific about what he said to you that led you to that belief?
>
> A No I can't.
>
> Q Mr McQuillen, it would have been a very serious thing for someone in Mr Barnes' position to pack up his bags and say 'I'm not doing anything more'?
>
> A Yes, your Honour, it would have been.
>
> Q And I take it this is the first time that had ever happened to you?
>
> A To me?
>
> Q Yes?
>
> A Yes.
>
> Q So, what was it about what Mr Barnes had said or his manner that led you to this serious conclusion that this was a possibility?
>
> A His manner – he's conveyed to me, your Honour, over quite a period that he wasn't happy about the way that his material was being treated. That it was being sent experts that he didn't consider needed to be done and if that was the case why doesn't the AFP just send it somewhere else and leave him out of it. That was the feeling that I had.

386. Asked whether he had expressed his concerns to Mr Barnes before the telephone conversation, Mr McQuillen said he tried to encourage Mr Barnes and assure him he

had their confidence and the work should be put out and made transparent. He said Mr Barnes' attitude was one of 'passive resistance' and he didn't like the method that was being used. Mr Barnes conveyed to Mr McQuillen that he did not like his material being sent to other people in circumstances where he 'sort of had no control' (Inq 2480).

387. As to why he did not tell Mr Barnes that he was taping the conversation, Mr McQuillen said that Mr Barnes would have seen it as a further example of a lack of confidence in him and would not have spoken to him (Inq 2482).

388. The telephone call to Mr Barnes was initiated by Mr McQuillen because Mr Barnes had faxed to him letters of 3 and 11 January 1994 from Professor Zitrin and Dr Zeichner which had been sent to Mr Barnes by Mr Ibbotson. Those experts had been asked to comment on Mr Barnes' report of 19 November 1993.

389. As will appear from the summary of the conversation between Mr McQuillen and Mr Barnes, no issue was taken by Mr Barnes with questions posed by Professor Zitrin (Ex 95, 116). The letter from Professor Zitrin did not express any opinions. However, as will be seen, Mr Barnes strongly objected to the following passage in Dr Zeichner's letter of 11 January 1994 (Ex 95, 126):

> In principle, I agree with the methodology carried out by Mr Barnes regarding the examination of the primer residues in the case.
>
> However, I do not agree with the conclusions: ((a) and (b) on page 11 of the report) drawn by the expert.

390. The section of Mr Barnes' report containing the conclusions with which Dr Zeichner said he did not agree were as follows (Ex 93 report number 4 dated 19 November 1993, 24):

> (a) Distribution
>
> The distribution of particles is absolutely consistent with contamination by the hands of an individual who has discharged a firearm. Contamination has not occurred by transfer of particles from other material/firearms. Additionally, the distribution is consistent with contamination by an individual who has occupied the driver's seat and operated switches/controls. That is, the distribution is consistent with contamination by the driver of the vehicle Mazda '626' YMP-028.
>
> (b) Size and Number
>
> The presence and location of the four large particles can only be attributed to contamination of those sites within the car by hands which had very recently handled and discharged a firearm. Given that these sites within the car were not exposed to primary discharge of a firearm, the time interval between firearm discharge and contamination of the site must be extremely short, certainly not more than approximately 10 minutes under conditions of normal activity and hand motion.

391. At the outset of the conversation on 19 January 1994, Mr Barnes expressed the view that questions posed by Professor Zitrin were 'most reasonable' and said that he would ask the same questions if he were in Professor Zitrin's shoes. After briefly discussing Professor Zitrin, the conversation turned to Dr Zeichner. Mr Barnes said he had a problem with a sentence in the report in which Dr Zeichner said he did not agree with Mr Barnes' conclusion.

392. Mr Barnes read to Mr McQuillen paragraph (a) of his report and observed that Dr Zeichner said he did not agree with it. He then made the following comment (Ex 143, annexure 6, 3):

> Which I think I'm sure I, I would talk him round but that's a separate issue.

393. Mr Barnes then read paragraph (b) from his report and commented that Dr Zeichner did not agree and could not find the micrographs and spectra because 'Ibbotson stuffed him up'. Asked if that material was there, Mr Barnes responded 'of course they're bloody there' (Ex 143, annexure 6, 4).

394. After further discussion about Dr Zeichner's report, Mr Barnes said he had a 'fundamental problem' with Dr Zeichner and the conversation continued (Ex 143, annexure 6, 5–7):

> McQ Therefore you would not be supplying him with anything.
>
> B No what I'm saying Tom is it doesn't matter what he said now, there's a letter on file faxing all round the country, even you got a copy.
>
> McQ Yeap, yeah.
>
> B Which says I do not agree with the conclusions.
>
> McQ Right.
>
> B This will be called and tendered in Court.
>
> McQ Yeap.
>
> B That's what I believe.
>
> McQ Yeap.
>
> B I believe that Mr Zeichner has made a tactical error and shown a lack of expertise in that he has concluded something, but then he's gone on to say he wants to examine things more, and I read that paragraph again. Furthermore in order to assess more specifically the results in the report, I would like to receive answers to the following questions. So, he's given a conclusion but then he says he wants to examine things.
>
> McQ Mmm.
>
> B As far as I am concerned all after that paragraph, however I do not agree with the conclusions drawn by the expert.
>
> McQ Yeap.
>
> B Is irrelevant.
>
> McQ Right.
>
> B Stated his opinion.
>
> McQ Okay.
>
> B See what I mean.
>
> McQ Yeah. Alright we'll leave him.
>
> B <u>You know I know I'll beat him and I can talk him round but, that's not the point. The point is, it's in writing alright.</u>
>
> McQ <u>Right. Okay.</u>
>
> B <u>And as you well know if you call up a document like this it's evidence isn't it?</u>

McQ Yes it can be yeah.

B Knowing our friend in, friends in the DPP it will be. (my emphasis)

395. Mr McQuillen and Mr Barnes then spoke about other aspects of the ballistics evidence, much of which is irrelevant for present purposes. However, in discussing an opinion given by the expert that he could not come to a conclusion as to a time interval between shootings, such as the time reported by Mr Barnes, the comments by Mr Barnes disclose an attitude that is relevant to this Inquiry. After stating that the other expert was 'bloody wrong', the conversation continued (Ex 143, annexure 6, 10):

B ... Then he says as the last sentence and this is the killer. This I believe is a dangerous statement. Now, how can I regard him as anything but, a defence expert. Paragraph five goes on to say I would in order to write a formal report have to examine the entire sets of spent cartridges. He wants to do a re-examination.

McQ Yeap.

B I think Mr Ibbotson ought to, just give these two people's names to Mr Eastman so he can call them as his experts.

McQ Right, yeah.

B That's my attitude.

396. Later in the conversation Mr McQuillen asked about Mr Barnes' 'bottom line' (Ex 143, annexure 6, 12):

McQ What's your bottom line now.

B Well my bottom line is, and this comes back to the other question I asked you before, what is going on you know from the Crown ... It seems to me, quite frankly, there's only you and me that are really fair dinkum about this case. And I wonder whether, and this is a question I wanted to put to you, I, I get a strong impression by the fact that things have been given to people like James Robertson to check, that people don't either trust me, and I guess therefore follows that I'm in some sort of bloody kahoots to try and set up Eastman. And I don't know who I'm in that with but I guess you'd have to say it would be with, Nellipa. And because without, what I'd do, what he found, no case. Alright.

McQ Right.

B So what I'm asking you Tom, you're opinion, what's the real view of your management and the DPP. I, what I find looking at all this is here are people saying they don't trust anything I've done.

397. Mr McQuillen endeavoured to placate Mr Barnes by saying that he had his full confidence and he sympathised with Mr Barnes saying that the DPP had not even made Mr McQuillen aware of the reports. After discussion about Counsel briefed by the DPP, the following conversation occurred (Ex 143, annexure 6, 14–16):

McQ Bob, alright well Bob where do we stand now with your travel overseas.

B Well what do you think Tom. Where, what do you reckon we ought to do.

McQ Well Bob, my honest belief is that I'm I'm, I don't want to see the brief suffer and I don't think you do either.

B No I don't that's why I'm asking you look, you know I could say well bugger you (inaudible)

McQ Yeah .

B ... and I'm not you know I've given my evidence. These guys are defence experts, you know we'll deal with them in Court. But I I'm not going to do that that's why I'm talking to you.

398. Further discussion about the DPP occurred and, following a suggestion by Mr Barnes that a lot of the issues had arisen because of the briefing by Mr Ibbotson, Mr Barnes said (Ex 143, annexure 6, 15):

> And and I'm concerned about these letters coming in because knowing how legal, DPP's operate, they'll make these available for the defence.

399. Mr Barnes said he had to 'see these people now' and commented that they were making life hard for him and for 'the brief'. He observed that cross-examination of him would be extended; there would be arguments with him; and 'they' would keep coming back to the letters stating that the other experts did not agree with the conclusions drawn by Mr Barnes. Mr McQuillen commented that there was nothing in the reports which would harm Mr Barnes as an expert. Mr Barnes responded that this was why he was so annoyed and that 'it's all bullshit you know'. There was further discussion to the effect that there would not be a problem if Mr Barnes had been sent across to brief the other experts.

400. Toward the end of the conversation Mr Barnes made statements which are particularly demonstrative of his attitude (Ex 143, annexure 6, 18–19):

> B And look please don't be harassed because as we've discussed I'm going to work, you know I'm working with you. As far as I'm concerned I'm a I'm a Crown witness, a Police witness.
>
> McQ Yeap.
>
> B I'm not going to see the brief suffer.
>
> McQ No.
>
> B If we don't put a brake on these turkeys I mean, we don't want these bastards putting that sort of stuff in writing. They've got to be told, you don't say I do not agree. You ask questions alright.
>
> McQ Yeap, yeap.
>
> B And that's where you see, the first guy has, you know is excellent you know.
>
> McQ Yeap, yeap
>
> B Some of his questions I think are a pain in the arse Zitrin.
>
> McQ Yeap.
>
> B No-where does he say ... disagrees with anything.
>
> McQ Yeah.
>
> B All he says is prior to my comments I would like to have some additional information.
>
> (my emphasis)

401. In his affidavit Mr Barnes said that having refreshed his memory from the transcript he can recall the conversation with Mr McQuillen. He said his statement that Mr Ibbotson had 'stuffed up' was a reference to the fact that he had 'provided all the information Zeichner was requesting to the DPP for delivery overseas,' but he believed it had not been properly presented (Ex 195 [137]). Mr Barnes said he did not have a good relationship with Mr Ibbotson and disagreed with the way he was running scientific aspects of the case. He thought Mr Ibbotson had briefed other experts in a way that made his job more difficult and, because Mr Ibbotson had no faith in Mr Barnes' work,

he had invited the overseas experts to criticise and undermine it rather than reviewing it.

402. Mr Barnes said in his affidavit that he felt the case had been 'complicated' because Dr Zeichner had disagreed with his conclusions before seeking clarification. He was concerned that disagreements where the other experts did not 'fully understand' his procedures and reasoning would damage the case. He felt the damage had already been done (Ex 195 [138]). This was the point he was making when he spoke about Dr Zeichner having put his view in writing.

403. As to the discussion about his 'bottom line' (Ex 143, annexure 6, 12), Mr Barnes said in his affidavit that he was expressing his concerns about the review in the context of Professor Robertson's negativity and reluctance to work with Mr Barnes. He was frustrated and felt the prosecution case could 'suffer' as a result of all the reviews and the appearance of doubt about his work. 'Specifically', he was concerned that his task of presenting the evidence 'without undue complication' in the witness box would be made 'more difficult' (Ex 195 [139]).

404. Mr Barnes referred to his statement that he was a 'Crown witness' and a 'Police witness' and was not going to see the brief suffer. His explanation of that statement and of his following reference to putting 'brakes on these turkeys' was as follows (Ex 195 [140]–[141]):

> 140 ... I am concerned that these remarks may be misconstrued. They were made in a private conversation between McQuillen and myself in circumstances where I was feeling persecuted because my work was being doubted. McQuillen and I were friends and he was one of my few supporters at the AFP. During our conversation, McQuillen had expressed his support of me on behalf of himself and Rick Ninness. Throughout the conversation we discussed the best way for me to respond to the overseas experts' review of my work and the best way to deal with the other experts so that the prosecution case would be presented optimally. I was employed as a forensic science expert and worked very closely with police investigators. McQuillen knew that I was frustrated at the way the forensic aspects of the case were being run. My remarks on page 18 should be seen in this context. I intended to convey that I wanted to work together with the AFP and the prosecution to assist them to achieve their goals , insofar as that was in accordance with my actual findings and was reassuring McQuillen I was not going to ruin their case by withdrawing from the case or obstructing the preparation of the case. In no way should my comments to McQuillen be interpreted to suggest that I would not present evidence neutrally, independently or in accordance with my honest opinion based on the data. I was then and still remain very aware of my ethical responsibilities to assist the courts dispassionately, whether or not my evidence and interpretations of data assist the prosecution (or defence) case.
>
> 141 This is reflected in the next comment I made:
>
> 'If we don't put the brakes on these turkeys I mean, we don't want these bastards putting that sort of stuff in writing. They've got to be told, you don't say I do not agree. You ask questions alright.'
>
> I did not mean that any disagreement with my work should be hidden I meant that it would be better if the experts asked questions where they did not fully understand the process I had gone through rather than saying that they disagreed with my conclusions without that information (as I believed Zeichner had). This would make my job of presenting the evidence easier. At no stage would I have rejected any review of my work that showed that I had made a mistake or could be proved wrong. I was just concerned that those reviewing my work were fully informed before they put in writing that they disagreed with my

> conclusions. In my opinion, this was best outcome in terms of effective presentation of testing done and conclusions arrived at in the witness box and the best result for ensuring that the prosecution case was not undermined. Peer review can only work effectively if those doing the review understand the basis of the work and how that work has been applied overall. I felt that Zeichner was dealing with the evidence 'piecemeal' and therefore may form a skewed opinion because of this.

405. Mr Barnes did not give oral evidence about his conversation with Mr McQuillen, but I am confident that any evidence he gave would not have improved his position. I have no difficulty in accepting that Mr Barnes was concerned that other experts were not fully and properly briefed, but against the background of his remarkable resistance to a review of his work being conducted by any expert, Mr Barnes' explanation for his statements about his position as a witness and telling the overseas experts that they should not say 'I do not agree' is utterly unconvincing.

406. In response to the notice of adverse comment that Mr Barnes' explanation was 'utterly unconvincing' and that Mr Barnes behaved in a manner 'totally inconsistent with the independence of a forensic expert', in paragraph 95 of Mr Barnes' submission (annexure 8) the response was expressed in the following terms:

> Mr Barnes has provided a compelling account of the circumstances of that conversation that is logical and detailed. Despite the use of intemperate language, the explanation as to that conversation ought to be entirely accepted. Prior to Mr Barnes producing any evidence to the board, Mr McQuillen detailed similar extenuating circumstances to those described by Mr Barnes. He stated repeatedly in response to various parts of the conversation being put to him that he had no concerns about Mr Barnes. He repeatedly refuted the adverse imputations about Mr Barnes put to him.

407. I reject that submission. I remain of the view that the explanation was 'utterly unconvincing'. In addition to the words spoken by Mr Barnes which speak eloquently as to his attitude, I have listened to the recording of the conversation with Mr McQuillen and, on more than one occasion, I have read the transcripts of Mr Barnes' evidence at the Inquest and trial. I have seen and heard Mr Barnes in the witness box. There is a large volume of correspondence and notes of conversations with Mr Barnes. The total picture of Mr Barnes and his attitude emerges with clarity. The material includes statements by Mr Barnes after the conversation with Mr McQuillen which are discussed later in this Report.

408. As Mr Barnes said in his affidavit, he worked 'very closely' with police investigators. Regrettably, it appears that he got too close. Frustrated by the fact that his work was being reviewed and by the views of other experts which he knew would become public through disclosure by the DPP, in a few unguarded moments of conversation with a police investigator to whom Mr Barnes was close, Mr Barnes disclosed his true attitude. He behaved in a manner totally inconsistent with the independence of a forensic expert. He identified himself with the prosecution and plainly demonstrated his bias in favour of the prosecution. Mr Barnes also gave vent to his desire that experts who disagreed with him should be told they could not say so in writing.

409. In reaching these conclusions I have not overlooked paragraph 97 of the submission which refers to the absence of any evidence from a prosecutor or the AFP of a concern about Mr Barnes' competence or lack of objectivity. The submission continued:

> The Board ought to conclude that while ego, stubbornness, rudeness and intemperate language were occasionally evident in Mr Barnes' behavior, hardly phenomena which are unparalled amongst forensic experts, conclusions about bias are unfounded.

410. The submission overlooks the advantage gained during this Inquiry of both observing Mr Barnes in the witness box and reviewing the total picture that emerges from the large amount of material gathered in the course of the Inquiry and presented at public hearings. This is an advantage not possessed by those with whom Mr Barnes was dealing during the investigation and trial. There can be no doubt that 'ego, stubbornness, rudeness and intemperate language' existed, but the totality of the material demonstrates conclusively that the problems with Mr Barnes' attitude extended beyond those features of his personality.

411. Even considered in isolation, the conversation between Mr McQuillen and Mr Barnes on 19 January 1994 should have been disclosed to the defence. It was highly relevant to the challenge in respect of both the opinions expressed by Mr Barnes and his impartiality. However, it is not entirely clear how much information about this conversation was conveyed to the DPP.

412. Mr McQuillen agreed it was a serious decision to tape an expert like Mr Barnes, but said he was not aware of the consequences and did not consider them. He was trying to get a 'feeling from Mr Barnes of what his position was for the AFP and the brief'. It did not occur to him that the tape might subsequently become evidence (Inq 2481).

413. Asked if the conversation caused him concerns about Mr Barnes as an independent expert witness, Mr McQuillen answered in the negative and said it confirmed in his mind that Mr Barnes would cooperate and take his material overseas to consult with the other experts. He assumed he would have spoken with Mr Ninness about the conversation and he might have spoken to the team and played the recording, but now has no recollection of doing so. Mr McQuillen was taken to various passages in the conversation, but maintained that none of those passages caused him any concern about the independence of Mr Barnes. As to the conversation about not telling Mr Ibbotson they had discussed the reports, Mr McQuillen said it was part of his endeavour to placate Mr Barnes (Inq 2482–2485).

414. Mr Ninness did not recall Mr McQuillen mentioning the conversation with Mr Barnes or the taping of it. He said Mr Barnes never expressed to him that he regarded himself as a Crown or police witness and did not want to see the brief suffer. If Mr Barnes had said anything like that to Mr Ninness, it would have caused Mr Ninness concern because he would have realised that Mr Barnes was not talking from an 'unbiased opinion' (Inq 2164).

415. Similarly, Mr Barnes had never expressed a sentiment to Mr Ninness about putting a brake on the overseas experts and telling them they could not say that they did not agree. If Mr Ninness had been informed of sentiments like that, he would have been concerned and have spoken to Mr Barnes about it. From Mr Ninness' perspective, Mr Barnes would have been overstepping the mark and was certainly out of line (Inq 2665).

416. Mr Ninness said if he had known about the conversation he would have informed the DPP of it. Asked if in 1995 he would have been of the view that the information should be disclosed to the defence, Mr Ninness was reluctant to express a view and said it would have been a matter for the DPP. Pressed on the issue in the context of Mr Barnes' statements about being a Crown or police witness and that experts should not put their disagreements in writing, Mr Ninness reluctantly conceded that such information should have been passed to the defence (Inq 2666).

417. Asked about informing the DPP of the conversation and attitudes of Mr Barnes, not surprisingly Mr McQuillen did not have any recollection one way or the other (Inq 2486). However, some assistance is derived from a DPP memo to file concerning a meeting on 16 March 1994 attended by Mr McQuillen, Mr Adams QC and Mr Ibbotson (Ex 95, 215):

> Tom McQuillen relating to Michael Adams recent conversation he had with Barnes describing his stressful state and his derogatory remarks against Ibbotson and Adams and his belief that there was a concerted effort to undermine his work and the fact that he was no longer to be classified as a prosecution witness but a police witness.
>
> Tom McQuillen also advising that Barnes appeared to be having difficulty dealing with Dr Zeichner and Dr Zitrin. ...
>
> Tom McQuillen advising that Barnes just can't accept why his work is being looked at by other experts.

418. The memo of 16 March 1994 is the only record within the office of the DPP of any information being conveyed to the DPP about the conversation between Mr McQuillen and Mr Barnes on 19 January 1994. Mr McQuillen had no recollection of the meeting (Inq 2487).

419. As to why Mr McQuillen might not have disclosed full details of the conversation to the DPP, the relationship between police and Mr Barnes might be relevant. Mr McQuillen worked closely with Mr Barnes from 1989 to 1995. He agreed that a close relationship in these circumstances was built up between the expert and the investigator and eventually Mr Barnes was viewed as almost part of the team. Mr McQuillen made every effort to keep Mr Barnes on-side in what Mr McQuillen described as 'most difficult circumstances' (Inq 2448). It was simply not part of Mr McQuillen's thinking to question the independence of Mr Barnes. Notwithstanding the appearance of a lack of independence from the conversation from 19 January 1994, it did not occur to Mr McQuillen that this was a problem.

420. Mr McQuillen was asked whether it entered his head that he should tell the DPP there was a problem because Mr Barnes had made derogatory remarks and gone off the rails about expert witnesses saying they had to be told they could not say 'I do not agree'. He responded 'I think the DPP already knew...' Mr McQuillen went on to explain that he thought the DPP were aware of the problems with Mr Barnes from their interactions with him and, in particular, Mr Ibbotson was well aware of Mr Barnes' attitude (Inq 2489–2490).

421. Mr Adams was taken through the conversation between Mr McQuillen and Mr Barnes on 19 January 1994. Prior to this Inquiry he was unaware of the conversation (Inq 2940).

Initially Mr Adams gave Mr Barnes the benefit of considerable doubt when dealing with the statement that other experts should not have put in writing that they disagreed with Mr Barnes. He suggested it was no more than Mr Barnes saying that the experts provided an initial view and it was unfortunate that the initial view was in writing because it was incorrect and Mr Barnes would bring him around when the other expert really understood what Mr Barnes had been doing. However, after he was taken through the entire conversation, Mr Adams agreed that 'probably' he would have disclosed the conversation (Inq 2942–2946).

422. Mr Ibbotson had no recollection of such a conversation and agreed it should have been disclosed to the defence.

423. Whatever may have been conveyed to the DPP by Mr McQuillen or other members of the AFP, in addition to the information recorded as being provided by Mr McQuillen, on 16 March 1994 (Ex 95, 215) the DPP must have gained an appreciation of the attitude of Mr Barnes as a result of a conversation with Mr Barnes. Although Mr Ibbotson was the main member of the prosecution team who dealt with Mr Barnes, on 16 March 1994 Mr Adams had a telephone conversation with Mr Barnes while Mr Barnes was at the premises of Dr Zeichner. The DPP memo to file records the following (Ex 95, 215–216):

> There was then a conversation between Michael Adams and Mr Barnes. It was quite clear from that conversation that Mr Barnes appeared to be under stress. He was emotional, made obscene and derogatory remarks against both Ibbotson and Adams and was of the opinion that we were attempting through these experts to undermine his work. He found it offensive that a police officer, namely Prior had been sent to America with the cartridge cases to allow Special Agent Crum to investigate his work.
>
> Barnes was also critical and he believed that Crum had been asked to make a critical assessment and he believed that meant a negative assessment of his work.
>
> He had not seen the requests to the Israelis or to Martz concerning what the DPP required of them because of the belief that it was something similar to Crums and if that was the case he was rather upset at that.
>
> Adams emphasised to Barnes that a critical assessment did not mean a negative assessment, that that was not what we were intending to do but a critical assessment meant an objective independent assessment of his work and that's what we had asked the experts to do was namely look at his material and then decide whether it was necessary to reproduce any of his work at all or whether an assessment could be made on that material. Barnes was still in a (sic) agitated state and was still of the opinion that as a result of the work that had been carried out between himself and Martz in America there was no necessity for him to be in Israel.
>
> …
> Barnes still of the opinion that this was wrong and that he was wasting his time, that he shouldn't have to deal with Dr Zeichner and Dr Zitrin. It should be noted that attempts were made to reason with Mr Barnes, console Mr Barnes and to re-emphasise to him the main reason that he was seeing the various experts, namely for them to give an independent objective assessment of his work.
>
> Barnes demanded that copies of any letter sent to the Israelis, the Americans and Keeley in England regarding what the DPP wished them to do in consideration of Mr Barnes' work should be sent to Barnes. Michael Adams telling Barnes what was in the letter and hence the argument concerning the words 'critical assessment' namely the word 'critical' occurred.
>
> It was quite clear that Barnes did not want to reason and in fact said that he had nothing further to discuss. That he had work to do and he got off the phone.

424. The memo then records that Mr Ibbotson spoke to Dr Zeichner. During the conversation Mr Ibbotson asked if Dr Zeichner had any difficulty talking or dealing with Mr Barnes and he replied in the negative. Mr Ibbotson told Dr Zeichner there was no difficulty in Dr Zeichner showing Mr Barnes the letter from the DPP and Dr Zeichner agreed to do so if it became necessary.

425. The memo then recorded a conversation between Mr Adams, Mr Ibbotson and Mr McQuillen:

> There was then a conversation between Michael Adams, John Ibbotson and Tom McQuillen where it was discussed that Barnes was obviously under considerable stress, it was hard to imagine why, unless there were other factors involved that we are unaware of.
>
> ...
>
> Barnes had made a critical remark during the telephone conversation that Adams and Ibbotson had visited the various experts and had done nothing. It was noted the reason that had occurred is that when Barnes had delivered the material, that is his working notes etc that had originally had been forwarded to the experts, and when JI had travelled overseas it was found that those notes were inaccurate, that was due to various data being in the wrong area, secondly that certain data had not been copied therefore the material was incomplete and lastly that there was no index or no way in which the experts could determine what items in the data represented what items in the report from Barnes. In other words there was no cross-referencing of exhibits in the report to exhibits in the material.
>
> John Ibbotson noted that he had felt quite embarrassed about this when he was in England and Israel visiting the experts as he had been assured by Barnes that the experts, because of their scientific background would understand the material and be able to follow it in accordance with his statement.
>
> JI advising that when he returned from overseas and spoke to Barnes, Barnes had admitted that somebody else had done the copying for him and that he had not checked it and as a result it would have given inaccurate information and secondly he agreed there was no cross-referencing between his statement and the material, hence no expert would have been able to operate on it.
>
> Accordingly, JI had to go through both volumes of material with Barnes to correct it, to index it and then to send further copies to the experts prior to Barnes travelling overseas.

426. The attitude displayed by Mr Barnes did not change. A DPP file note records that on 8 December 1994 during a conference with Mr Adams, Mr Ibbotson and Ms Woodward, Mr Barnes expressed the view that Dr Zeichner was not competent to comment and said he would be very critical of Dr Zeichner when he gave evidence. He said that if necessary he would attack Dr Zeichner's credibility (Ex 95, 330, 332).

427. On 13 December 1994 Mr Ibbotson spoke by telephone with Mr Barnes and the file memo records the following conversation concerning Dr Zeichner (Ex 95, 374):

> Barnes then asked me about our meeting with Zeichner. He said 'Zeichner must be challenged and destroyed. The Crown must destroy him. I won't resign from my point of view. He is a paid defence expert who has said this for money. Zeichner must write a report and kiss and make up with me'.

428. Three days later on 16 December 1994 Mr Barnes spoke to a member of the prosecution team, probably Ms Woodward, and the file note records that he said that he thought 'all the overseas business was ill-advised and all the other stuff was ill-advised.' Mr Barnes is recorded as saying the 'problem' was that 'we need to counter what has been said by the Israelis'. He spoke about the problem in court of having witnesses for the prosecution at variance and said he wanted the 'case to see the light of day in a proper way'. The file note records that Mr Barnes said 'a lot of this could

have been avoided if John Ibbotson had run it properly'. He said that he and Mr Ibbotson, and he and Mr Adams, had 'kissed and made up'.

429. On 19 December 1994 Mr Barnes again was critical of Dr Zeichner and said he did not understand why Dr Zeichner could not agree about a two element particle which Mr Barnes considered unique as a primer residue for PMC ammunition (Ex 95, 383).

430. In his affidavit (Ex 195) Mr Barnes did not discuss the various conversations with prosecutors. He became unwell before being questioned about them. I am satisfied that the file notes to which I have referred accurately recorded the essence of statements made by Mr Barnes.

431. The cumulative effect of all the statements made by Mr Barnes is very telling as to his attitude and lack of independence. He repeatedly blamed the prosecutors for not properly briefing the overseas experts but, as the evidence of Mr Ibbotson establishes, it was the inadequacy of the records provided by Mr Barnes that created the problems when Mr Ibbotson sought to brief the overseas experts. More significantly, the attitude shown by Mr Barnes in his conversation with Mr McQuillen on 19 January 1994 was confirmed by his statements to other persons and, in particular, by his statement to Mr Ibbotson on 13 December 1994 that the Crown 'must destroy' Dr Zeichner.

432. None of the March and December 1994 statements by Mr Barnes concerning Dr Zeichner were disclosed to the defence. After Mr Adams had been taken to a number of entries demonstrative of Mr Barnes' attitude and his criticisms of Dr Zeichner, it was suggested to Mr Adams that these communications should have been disclosed to the defence. He gave the following evidence (Inq 2896, 2897):

> Q [They are] matters, are they not, that should have been disclosed to the defence?
>
> A I think on reflection probably. Although their differences were clear from their reports, but Barnes expressed himself in immoderate language, intemperate language.
>
> Q And the attitude, for example, demonstrated by Mr Barnes saying that Mr Zeichner must be challenged and destroyed?
>
> A Yes, that's silly.
>
> Q It might be silly, but if the defence were wanting to challenge his ... ?
>
> A Objectivity.
>
> Q ... objectivity, it would be useful information, wouldn't it?
>
> A On reflection, I think so, yes.
>
> Q And if the defence as well just simply want to know that one expert has a strong opinion contrary to another expert, that's information that they could use during the trial?
>
> A I think it's useful.

433. In the context of evidence demonstrating Mr Barnes was biased in favour of the prosecution, Counsel referred Mr Adams to passages in his closing submissions in which he attacked attempts by Counsel for the applicant to suggest that Mr Barnes was biased (Inq 3008–3009). Mr Adams acknowledged that if all the material pointing to bias had been disclosed to the defence, Counsel would have been armed with different material as a basis for submitting to the jury that Mr Barnes was biased in favour of the prosecution (Inq 3009–3010).

434. Mr Ibbotson agreed that the various statements by Mr Barnes demonstrative of his attitude and lack of objectivity should have been disclosed to the defence (Inq 3355).

435. Allied to the material concerning the attitude of Mr Barnes to the other experts and to being reviewed is further information, by way of general observations provided to the prosecution, suggesting that there might be reason to doubt the reliability of the work carried out by Mr Barnes. For example, on about 3 December 1993 Mr Keeley told Mr Ibbotson that Mr Barnes was too involved with the crime scene (Ex 95, 100). On 8 December 1993 Mr Ibbotson reported that Dr Zeichner, Professor Zitrin and Mr Keeley were all suspicious of a single person doing all the forensic work (Ex 95, 102). On 9 December 1994 Dr Zeichner and Professor Zitrin told Mr Ibbotson that Mr Barnes was an expert in too many areas. They said Mr Barnes had difficulty in accepting the fact that he was doing something that was 'not accepted' (Ex 95, 364). Mr Adams suggested the reference to 'not accepted' meant Mr Barnes was undertaking work that had not been done before rather than, literally, work that was not accepted scientifically. He pointed out that English is not the first language of Dr Zeichner and Professor Zitrin (Inq 3029–3030).

436. After Mr Adams' attention had been drawn to a number of these entries, and in particular the opinion expressed by Dr Zeichner and Professor Zitrin on 9 December 1994, he was asked whether this was a view of which the defence was entitled to be aware. Mr Adams replied 'I think so' and said that if the defence had asked for the material he would have handed it over without hesitation. Mr Adams then added, 'in fairness', that in his view a general observation that Mr Barnes was attempting to do too much in too many areas did not matter (Inq 2962). The critical question was whether his results were reliable or not. He then gave the following evidence (Inq 2963):

> Q I suppose, though, from the defence point of view, given all the material that said he was not objective and demonstrated a lack of objectivity and a desire to assist the prosecution and they had also from overseas experts a view that he was a person who was emotionally involved who'd spread himself across too many - trying to be an expert in too many areas, et cetera, from a defence cross-examination point of view, it would have been pretty useful ammunition?
>
> A I think so.
>
> Q In combination?
>
> A I agree.

437. The failure to disclose to the defence the material I have discussed was not a failure of minor import. In the context of the importance of Mr Barnes' evidence to the prosecution case in linking the applicant's car to the scene of the murder, it was a particularly significant failure. In contrast to the futile attempts at trial to attack Mr Barnes' credibility and independence, attempts which were successfully ridiculed by Counsel for the prosecution, this undisclosed material would have provided the defence with a firm basis upon which to cross-examine and comment.

Barnes – Disciplinary Charges

438. There was a further issue relating to Mr Barnes about which the AFP was aware and in respect of which the defence were not informed and it appears highly unlikely that any

information was conveyed to the DPP. The issue concerns disciplinary charges brought against Mr Barnes in Victoria.

439. In 1993 Professor Robertson was advised that proceedings were being taken against Mr Barnes in respect of his conduct at the Victorian Laboratory. Professor Robertson cannot remember how he became aware of this matter, but accepted that it could well have been an informal advice by telephone (Inq 2316).

440. Communications within the AFP demonstrate that the AFP was aware of allegations concerning the conduct of Mr Barnes. In a memo of 13 July 1993 (annexure 5 to affidavit of Mr Robertson, Ex 134), Assistant Commissioner Allen wrote that 'a number of weeks ago' he had mentioned to the Deputy Commissioner Operations the issue of 'alleged impropriety' by Mr Barnes and concerns about his behaviour having been expressed to Professor Robertson by Victorian officials. It appears this type of information had also been conveyed to Mr Ninness in early July 1993 because, in a minute of 27 July 1993 addressed to the Assistant Commissioner of the ACT region, Mr Ninness referred to meetings on 7 and 8 July 1993 with Assistant Commissioner O'Loughlin of the Victoria Police and Mr David Gidley, Director of Forensic Science Services in Victoria. In his minute Mr Ninness said they discussed the failure of Mr Barnes to comply with requests from the DPP to finalise reports by the end of June 1993, but also referred to information received by Mr Ninness concerning the conduct of Mr Barnes (annexure 7, Ex 134):

> Assistant Commissioner O'Loughlin reported to me that Mr Barnes was currently under investigation by VICPOL for alleged breached of procedural instructions. These allegations will most probably result in Mr Barnes appearing before the Chief Commissioner or a tribunal in Victoria. I was, however, assured by Assistant Commissioner O'Loughlin that should Mr Barnes be found guilty of the allegations it will not cause any concerns with regard to his credibility as a forensic expert as the allegations relate to a deviation from laid down procedures in administrative handling of correspondence.

441. The assurance to which Mr Ninness referred did not sit well with other information received by the AFP. In the minute of 13 July 1993 from Assistant Commissioner Allen to the Deputy Commissioner (annexure 1 to the affidavit of Mr Allen, Ex 135) the Assistant Commissioner referred to 'unconfirmed advice' that had reached Professor Robertson that 'authorities in Victoria are in the process of charging Mr Robert Barnes with a number of corruption offences'. The minute also stated that an 'unofficial' inquiry of VICPOL indicated that the charges were 'disciplinary'. The minute then recorded advice that Mr Barnes had used State laboratory resources for private work, one example of which was probably a private consultancy from Sunbeam, Mr Barnes having previously given evidence that a Sunbeam electric toaster was responsible for a fire in Victoria. Advice had also been received that Mr Barnes had sought 'personal payment' for the work he conducted on behalf of Sunbeam. The minute concluded:

> I understand certain steps have already been taken to limit any potential damage by way of a challenge to his testimony in the up-coming Eastman Trial, but these latest developments may, I expect, cause you to revisit those measures.

442. On 19 July 1993 the Deputy Commissioner sent a memorandum to Assistant Commissioner Dawson concerning Mr Barnes (affidavit of Mr Dawson, Ex 11, 4):

> Whilst Mr Ninness has advised me that authorities in Victoria are in the process of investigating Mr Barnes, I believe that any charges contemplated are disciplinary. Do we know if this is the case?

> Whilst it already be the case, would you please ensure that we are totally across what is occurring with Mr Barnes and so ensure that the ACT Director of Public Prosecution, and more particularly those directly involved in the preparation of the prosecutions of Mr David Eastman are also fully informed.

443. Assistant Commissioner Dawson was the recipient of both the memo from the Deputy Commissioner and the later memo of 27 July 1993 from Mr Ninness (Ex 134, 5). As mentioned, Mr Ninness wrote of an assurance from Assistant Commissioner O'Loughlin that if Mr Barnes was found guilty it would not cause any concern in regard to his credibility because the allegations related to a deviation from procedures in administrative handling of correspondence. Assistant Commissioner Allen was obviously concerned that this information did not accord with other advice. In the memo of 27 July 1993 he wrote to Mr Dawson in the following terms:

> Earlier advice through forensic sources indicated otherwise, that Mr Barnes had entered an arrangement to do unauthorised work for a firm using VICPOL resources for which he also sought payment. This information should however, be treated confidentially at this time.

444. Mr Dawson made a notation on the file directed to Mr Ninness, 'please note and hold', meaning that the document should be held.

445. As to a notation that the information should be treated 'confidentially', Mr Allen said this was a general admonition meaning 'don't broadcast it' and was not intended to exclude advice to the DPP which he expected would have occurred. He said Mr Dawson would have understood it this way and he was not intending to interfere with due process (Inq 2371). Mr Bates was the Deputy Commissioner, Operations, and he had no recollection of these events (Inq 2376).

446. Mr McQuillen was unaware of the memos to which I have referred, but he knew there were issues concerning the conduct of Mr Barnes and believed he received the information from Mr Ninness. He was not aware that any charges had been laid. Mr McQuillen believed that the issues were administrative in nature and was assured by Mr Barnes that they would not impact on the brief. In those circumstances Mr McQuillen did not consider it necessary to make further enquiries and the question of telling the DPP would not have arisen as, from Mr McQuillen's perspective, no charges had been laid (Inq 2528). He did not know Mr Barnes had resigned and that after the resignation the charges were withdrawn (Inq 2466).

447. Mr Ninness thought he first became aware of suggestions that Mr Barnes was being investigated internally through information that came down the line from senior officers in the AFP. From his perspective, it needed to be acted upon immediately and he spoke to Deputy Commissioner O'Loughlin of the Victoria Police who was responsible for the forensic science area. He also spoke to Mr David Gidley who was the director of the Victorian Forensic Science Services. His report of those meetings dated 27 July 1993 is annexure 9 to his affidavit (Ex 146).

448. Mr Ninness was alert to the potential damage that allegations of misconduct by Mr Barnes could do to the prosecution brief. Back in 1989 Mr Dee had spoken to Mr Ninness and expressed a general concern and Mr Ninness had made inquiries about Mr Barnes in Victoria before the start of the Inquest. In addition, Mr Ninness was of the view that at the time the applicant was committed for trial in December 1992, there had

been verification of the methodology used by Mr Barnes, but the other experts had not had the opportunity to explore his work and it appeared that they had engaged in more of an informal chat during a lunch.

449. Mr Ninness recalled that Assistant Commissioner O'Loughlin of the Victoria Police was not forthcoming with the 'nitty gritty' of the allegations against Mr Barnes (Inq 2646–2647). He accepted the information from Mr O'Loughlin that the matter under investigation was minor and would not affect the brief or the credibility of Mr Barnes as an expert witness. In his minute of 27 July 1993, Mr Ninness reported that he was assured by Mr O'Loughlin that the allegations related to 'a deviation from laid down procedures in administrative handling of correspondence' (Inq 2647).

450. As to the handwritten notation on his minute by Mr Allen that earlier advice indicated that more serious allegations had been made against Mr Barnes, including conducting private work using Victoria Police resources and seeking payment, Mr Ninness said this was the only notification he received of a more serious allegation. It did not trigger an alarm bell because he accepted what he had been told by Mr O'Loughlin and he trusted that Mr O'Loughlin had the matter in hand and would have updated him if there was any change.

451. Mr Ninness thought that back in July 1993 he was not aware that any charges had been laid against Mr Barnes. He thought he subsequently became aware of a report that Mr Barnes had resigned from the Victorian Laboratory and the matter would not proceed, whatever that matter was. He understood the matter to be an internal investigation (Inq 2647). Shown a report of 23 November 1993 from the Victoria Police advising that Mr Barnes had resigned, which did not mention the withdrawal of charges, Mr Ninness said he must have received the information from another source (Inq 2649).

452. The minute by Mr Ninness of 27 July 1993 referred both to the investigation of Mr Barnes for alleged breaches of 'procedural instructions' and to his delay in complying with requests from the DPP to finalise reports by the end of June 1993. At the conclusion of the minute, Mr Ninness wrote:

> On Friday 9 July 1993 I informed Mr John Ibbotson, Assistant Director, DPP of the current status of this matter. I was informed by Mr Ibbotson that he would also pursue Mr Gidley in order that the final report would be completed in the near future prior to being forwarded to Scotland Yard for verification of procedures and methodology.

453. Asked what he told Mr Ibbotson, Mr Ninness said he believed he would have briefed him on the status of Mr Barnes and the information he had been given in Victoria. He said (Inq 2651–2652):

> I was working on the principle, whatever I had I would pass on to the DPP for their information, warts and all so that if they had a difficulty they could be aware of it before a potential problem arose.

454. Mr Ninness said he could not recall whether he informed Mr Ibbotson that there was an internal investigation of Mr Barnes. However, he believed that it was the type of information he would have decided the DPP needed to know and he could not think of any reason why he would not have informed the DPP. Mr Ninness also said that although he had no independent record of it, he believed he briefed Mr Adams 'down the track on some of the issues' about which he had concerns (Inq 2652).

455. Mr Ninness was referred to a DPP file note of a conference on 3 August 1993 involving Mr Ninness, Superintendent Webster, Mr McQuillen, Mr Adams and Mr Ibbotson (Ex 95, 37). Reference was made to Mr Ninness speaking with Mr Gidley and being advised that Mr Barnes was now working full-time on the ballistic evidence. However, there was no mention of the internal investigation (Inq 2653).

456. On 4 August 1993 Mr Ninness wrote to Mr Ibbotson setting out his understanding of the essential discussions that had occurred during the meeting of 3 August 1993, including his advice concerning his meeting with Mr Gidley. Again, no reference was made to an internal investigation of Mr Barnes.

457. Asked why there was no mention in his letter of the internal investigation, Mr Ninness replied that he could not give any valid reason why he did not raise the issue at the meeting. He said there was no reason not to include it in the letter and he did not know why it had been omitted. Informed that neither the AFP nor the DPP have produced any written advice from the AFP about the internal investigation, Mr Ninness said he was unable to recall whether any written advice had been given, but it should have been (Inq 2654–2655).

458. After his attention had been drawn to the lack of documentation, Mr Ninness repeated his belief that he had a recall of addressing the issue with Mr Adams. Asked what detail he provided, Mr Ninness replied that he could not say what detail was given and said (Inq 2655):

> I'm only assuming I definitely briefed him on it because I worked on the principle that we'd inform him of all the problems we had potentially with the brief coming up.

459. A little later Mr Ninness was asked whether it was an assumption or recall and he gave the following answer (Inq 2656):

> I have a recall of briefing Mr Ibbotson and/or Mr Adams. Certainly informing them of it because, as I said, it was important they were aware of all the information available. I can think of no valid reason why they wouldn't have received that information. There's no reason to withhold it.

460. Mr Ninness later said he did not have a clear recollection of briefing Mr Ibbotson and/or Mr Adams, but he recalled discussion in relation to Mr Barnes. He appreciated that the issue of communication with the DPP was important and, when questioned as to his best memory as to whether he informed anyone at the DPP about the internal investigation, Mr Ninness replied 'they were informed' (Inq 2657). Mr Ninness thought they were 'fully across' the issue.

461. In later evidence Mr Ninness said he spoke to Mr Barnes about the internal investigation and was reassured it was a minor issue which Mr Barnes intended to defend. He held that understanding right up to the trial. The information he received from Mr Barnes fitted with the information from Mr O'Loughlin and, to Mr Ninness, it was not a 'big deal' (Inq 2758). He agreed that the issue he was likely to have discussed with Mr Ibbotson on 9 July 1993 was the delay in the completion of the work by Mr Barnes and, when it was put to him that there was no discussion on that day with Mr Ibbotson about a potential breach of procedural instructions, Mr Ninness replied 'I can't recall' (Inq 2759). Mr Ninness agreed the focus was on the timing and the

subsequent records of the meeting of 3 August 1993 and his letter to the DPP of 4 August 1993 suggest that the discussions did not concern the issue of disciplinary proceedings (Inq 2761).

462. As to the possibility of briefing Mr Adams and/or Mr Ibbotson, during cross-examination Counsel drew the attention of Mr Ninness to his various statements in evidence and his lack of certainty. He was asked to assume that Ms Woodward, Mr Adams and Mr Ibbotson would give evidence that they were not told of any internal investigations. Notwithstanding that information, Mr Ninness said he could not think of any reason he would not have told them, but agreed he had no memory of doing so (Inq 2763).

463. Mr Adams said that he was not aware of an investigation concerning Mr Barnes. He recalled the problem of Mr Barnes missing deadlines for the provision of reports, but nothing was communicated to him about an internal investigation or charges (Inq 2931-2932).

464. Similarly, Mr Ibbotson and Ms Woodward were unaware of any investigation or charges with respect to Mr Barnes. Both said that if they had become aware of an internal investigation, even if relating only to minor matters, they would have made a file note of it (Inq 3346–3349, 3312–3313). Mr Ibbotson said he would have informed Mr Adams and, as they were meeting in Melbourne, he believed the issue would have been raised with Mr Gidley and noted (Inq 3348).

465. It was clear to me that Mr Ninness was quite uncertain about conveying information concerning Mr Barnes and the disciplinary matters to the DPP. Mr Adams, Mr Ibbotson and Ms Woodward were all positive that no such information was conveyed to them. I accept their evidence. It is readily apparent that Mr McQuillen would not have thought of advising the DPP and it seems likely that because of the assurances Mr Ninness received that the issues were minor administrative matters, he either made a deliberate decision that it was unnecessary to inform the DPP or the issue slipped his mind.

466. As to the importance of the information known to the AFP, Professor Robertson agreed that asking for payment for private work conducted at the Victorian Laboratory, coupled with removing the letter of request for payment from the records system, appeared to indicate dishonesty. He accepted the proposition that if a scientist is dishonest, it is a matter of great concern because it affects the credibility of the scientist (Inq 2334).

467. From the disclosure point of view, in my opinion it matters not that the DPP was unaware of the investigation into the conduct of Mr Barnes. The officer responsible for the investigation, and other senior officers within the AFP, were aware of the situation. From the point of view of the duty of disclosure, persons in those positions are part of the 'prosecution' by the State.

468. The allegations against Mr Barnes were serious. On 16 August 1993 the Commissioner of Victoria Police served on Mr Barnes the following notice (Ex 168):

> WHEREAS
>
> 1. By Notice dated the 1st day of July 1993, you were given an opportunity of submitting an

explanation to me of the alleged offences specified in the Notice.

2. I have considered the explanation submitted by you in response to that Notice.
3. It appears to me that, being an officer, you are guilty of offences under section 59(1) of the Act.

TAKE NOTICE that pursuant to section 60 (1A) & (2) of the Act, I HEREBY charge you with the following offences:

1. At Melbourne, between the 25th day of May 1992 and the 30th day of June 1992, being an officer, you committed a breach of Regulation 16.2(1) of the Public Service Regulations 1985 in that you undertook and completed private work, that is to say the preparation of a forensic report into a fire at 31 Southey Street, Elwood, for the Sunbeam Corporation Limited, during the hours of business.

2. At Melbourne, on or about the 30th day of June 1992, being an officer, you committed a breach of Regulation 16.10 of the Public Service Regulations 1985 in that you did solicit remuneration from Sunbeam Corporation Limited for services performed, that is to say the preparation of a forensic report into a fire at 31 Southey Street, Elwood, in your official capacity.

3. At Melbourne, on the 26th day of June 1992, being an officer, you committed an act of misconduct in that you released a forensic report on the fire at 20 Mabel Street, Camberwell, to Sunbeam Corporation Limited without authority of the Coroner or the Assistant Coroner.

4. At Melbourne, on the 26th day of June 1992, being an officer, you committed an act of misconduct in that you prepared a forensic report on the fire at 20 Mabel Street, Camberwell, for Sunbeam Corporation Limited which was not in accordance with State Forensic Science Laboratory formats.

   Particulars

   (a) The said report was not on State Forensic Science Laboratory letterhead.
   (b) The said report was signed R.C.Barnes.
   (c) The said report did not refer to your official designation or title.
   (d) The said report implied that it had been prepared by you in your private capacity.

5. At Melbourne, between the 25th day of May 1992 and the 30th day of June 1992, being an officer, you committed an act of misconduct in that you undertook work for Sunbeam Corporation Limited without authorisation from the Director, State Forensic Science Laboratory, in direct contravention of accepted practices at the said Laboratory as laid down in 'Policy Statement No. 1' dated 1 December 1987 and 'Policy Statement No. 13' (undated).

6. At Melbourne, on or about the 30th day of June 1992, being an officer, you committed an act of misconduct in that you prepared and submitted to Sunbeam Corporation Limited an account for payment for work performed which account was not in accordance with accepted State Forensic Science laboratory accounting practices.

469. It is obvious from the Notice charging Mr Barnes with offences that the allegations involved more than minor misconduct in the nature of failure to comply with administrative procedures. The charges included undertaking private work and soliciting remuneration for that work. The circumstances involved Mr Barnes undertaking this work during his working hours at the Victorian Laboratory and using laboratory resources. In addition, the circumstances included an allegation that after Mr Barnes

wrote to the corporation seeking private payment, he sought to have the letter deleted from the laboratory computer system, thereby removing any record of his request.

470. On 21 October 1993 Mr Barnes tendered his resignation with effect from 5 November 1993. The disciplinary charges were withdrawn in late October or early November 1993.

471. Prior to being unable to continue giving evidence, Mr Barnes was not questioned regarding the conduct which was the subject of the charges. In his affidavit Mr Barnes denied any wrongdoing. He said that prior to the issue arising he and Mr Gidley had discussed the possibility of Mr Barnes leaving Victoria Police and joining Mr Gidley in a private forensic consultancy firm. He said this conversation occurred in approximately late 1992 or early 1993 (Ex 195 [233]). In that context, Mr Barnes explained as follows:

> 234 I spoke to David Gidley before I did any private work for Sunbeam. I told him that I had been approached by Sunbeam to do some technical work outside of the scope of the police work. I told him I was going to do it on my own time. He said to me that was 'OK'. I believed that the conversation with Gidley was acknowledgement that it was acceptable for me to do the private work. I accept now that this conversation did not constitute formal approval and I should have sought formal written approval to do private work. I accept that I attempted to downplay the private work I did because I knew that I was not strictly following procedure.
>
> …
>
> 237 In addition, I say that this was an isolated incident that is completely unrelated to the quality of my scientific work and my reliability as an expert....

472. Mr Barnes also said that as far as he can recall the circumstances of his disciplinary proceedings and his departure from Victoria Police were 'well known to the AFP members and the prosecutors involved in the Eastman matter' (Ex 195 [238]). He cannot recall his specific discussions with anyone in particular, but he is sure that he discussed it with numerous people, including Mr McQuillen.

473. In his affidavit, Mr Barnes acknowledged he was 'not strictly following procedures' and should have sought formal written approval. However, he made no comment about seeking private payment or removing a letter requesting payment from the system. Nor did he comment upon undertaking private work during working hours and using the resources of the laboratory for his private work.

474. As to his departure from the Victorian Laboratory, in his affidavit Mr Barnes said that he did not leave 'solely' because of the disciplinary charges. He said he left because there was a 'better career opportunity' at AGAL and 'in the awareness that [he] had experienced difficulties at Victoria Police for sometime and they were set to continue' (Ex 195 [235]). Mr Barnes said he made enquiries about how the charges would proceed if he left and was informed that if he resigned his departure would not be considered as a 'deemed dismissal'. According to Mr Barnes, it was 'not a negotiated resignation' (Ex 195 [236]).

475. In my opinion the AFP should have investigated details of the allegations against Mr Barnes. If a proper investigation had been undertaken in this regard, the full details of the allegations against Mr Barnes would have been known to the AFP and, bearing in

mind the nature of those allegations, I am satisfied that Mr Ninness would have discussed the matter with Counsel for the prosecution.

476. The fact of charges being instituted against Mr Barnes should have been made known to the DPP and the defence. Given the importance of Mr Barnes to the prosecution case, and the issues at trial, even if Mr Ninness thought that only minor matters were involved, the DPP and the defence should have been informed. I have no doubt that if the defence had been informed of disciplinary issues relating to Mr Barnes, even minor issues, they would have investigated and discovered the serious nature of the allegations. At best from the defence perspective, dishonesty by Mr Barnes might have been revealed; at the worst, a lack of compliance with protocols and procedures would have been established. Coupled with other failures by Mr Barnes which are discussed later in the Report, details of the charges and events relating to those charges would have provided valuable assistance to the defence in their endeavours to attack the credibility and reliability of Mr Barnes.

Failure to Disclose – Statements by Experts

477. In addition to the question of disclosure of material concerning the attitude and independence or otherwise of Mr Barnes, a serious issue has emerged concerning the failure to disclose material bearing upon the evidence of Mr Barnes and the overseas expert witnesses.

478. Ms Woodward explained the system used in the office of the DPP for incoming and outgoing material. A record was made of materials received and the identity of the material was entered on a spreadsheet. When material was sent to the defence, either a note was made or a letter enclosing the material formed a record of that event (Inq 3115). However, notwithstanding the system and the best endeavours of Ms Woodward and other DPP personnel, care must be taken before relying upon the absence of any record because mistakes occur, particularly in the course of a trial, and because records are often misplaced over time.

479. In her affidavit of 18 July 2013 (Ex 12), Ms Woodward said that on 21 November 1994 she received a telephone call from Mr Mark Klees who advised her that he had been instructed to act for the applicant. Arrangements were made for Mr Klees to attend the offices of the DPP on 22 November 1994 to collect the brief and other relevant material. During the course of the next week all relevant materials from the Inquest and the trial brief were handed to Mr Klees in both hard copy and electronic form. Ms Woodward recalled Mr Klees attending in a station wagon to collect the large volume of materials.

480. An index of material provided to Mr Klees was signed by him, but Ms Woodward acknowledged that he did not examine the contents of the numerous cartons before signing the index (Inq 3115).

481. Everything in the possession of the DPP was recorded in a database. Relevant correspondence has been produced by the DPP in answer to a subpoena (Ex 97). That correspondence includes letters to solicitors for the applicant enclosing materials relevant to the trial. Similarly, the AFP has responded to subpoenas producing various

materials and Mr Barnes has also produced relevant documentation in answer to a subpoena from the Board.

482. In discussing information not disclosed to the defence, I have had regard to all the material produced in answer to subpoenas and material canvassed in relevant affidavits. Where I refer to material not disclosed to the defence, it should be understood that I am satisfied from all the evidence that the material under consideration was not disclosed to the defence before or during the trial.

483. An issue of importance in respect of which there was a failure to make disclosure to the defence of significant information concerns the databases upon which Mr Barnes relied. It was an important foundation for his evidence concerning the propellant found in the applicant's Mazda. In evidence at trial Mr Barnes said he prepared the databases for the purposes of comparing the residue in the Mazda with ammunition available in Australia, but this evidence did not reflect the true position. The database was prepared by Mr Norbert Strobel for the purposes of a thesis.

484. Mr Adams understood that the work in respect of the database had been done by Mr Barnes. He was not aware of the involvement of Mr Strobel. Nor was he aware the database had been constructed for a thesis rather than case work (Inq 3037).

485. Mr Ibbotson now has no memory of Mr Strobel, but it is clear he was aware of the involvement of Mr Strobel (Inq 3364, 3387). On 3 November 1993 Mr Ibbotson spoke with Mr Strobel and made a file note (Ex 95, 81). The relevant entries in the note are as follows:

> He [Mr Strobel] advising that he worked with Rob Barnes on the gunshot residue analysis and that he did all of the leg work to put together the database that was used and had selected the criteria etc.
>
> He advising that that was done at the direction of Robert Barnes and that once he had tested a propellant that destroyed that particular amount of propellant. Therefore Robert Barnes himself didn't rehash do or check the tests done by Mr Strobel.
>
> He is quite prepared to do a statement if necessary setting out what he did.
>
> He advising that for that to be done an approach needs to be made to Robert Barnes or David Gidley so that they would authorise him to do it.

486. On 12 January 1994 Mr Ibbotson conferred with Mr Barnes and recorded that Mr Barnes would arrange for Mr Strobel to provide a statement (Ex 95, 132).

487. On 11 May 1994 Mr Ibbotson again spoke to Mr Strobel. Mr Ibbotson's file note refers to a previous conversation between Mr Ibbotson and Mr Strobel and to advice from Mr Barnes that Mr Strobel was in the process of doing a report. Mr Ibbotson set out a number of matters to be included in the report (Ex 95, 248):

> (a) His qualifications,
>
> (b) A description of all work he carried out in relation to the murder of Assistant Commissioner Winchester,

(c) Instrumentation he used,

(d) An explanation of the process of instrumentation,

(e) If he worked under the supervision of anybody what that entailed and how he reported his conclusions,

(f) To nominate exhibits he worked on in conjunction with his statement and put in the exhibit reference,

(g) Dates should be included as to when the work was undertaken and also if he received any exhibits from other than Mr Barnes and the dates they were received.

488. Mr Ibbotson advised Mr Strobel that he required the statement before the end of the month and Mr Strobel responded that this should not present any difficulty.

489. Mr Strobel prepared a sworn statement (Ex 107 annexure 2) which fell well short of the detailed statement sought by Mr Ibbotson. The statement was provided to the defence, but it did not fully disclose the true position.

490. First, the statement did not disclose that Mr Strobel prepared the database for the purpose of a thesis rather than case work. In his affidavit of 4 November 2013 (Ex 107) Mr Strobel said that in about November 1992 he was approached by Mr Barnes and asked 'if it was possible to analyse and characterise individual propellant particles' (Ex 107 [4]). According to Mr Strobel, it was agreed he would undertake a project under the direction of Mr Barnes. The project was 'driven' by the Winchester investigation with the aim of determining the following (Ex 107 [5]):

a. Could analytical information be determined from an individual propellant particle?

b. Could ammunition brand/type be determined from an individual propellant particle?

c. Could individual propellant particles from the suspect's vehicle be characterised as having originated from a particular brand of manufactured ammunition?

d. How did propellant particles recovered from the victim's vehicle compare to those from the suspect's vehicle?

491. In evidence Mr Strobel said he was aware that Mr Barnes was using the databases and that the exercise was case work driven. However, he was unable to comment on how Mr Barnes applied the databases to the case work (Inq 3489, 3503).

492. In his report of 27 October 2013 (Ex 108), Professor Kobus made the following observation:

14 An important point is that the thesis was a component of an MC program and therefore the extent of the investigation was defined by the requirements and time frame of the degree. It therefore was not conducted for the purpose of evidence but does provide a valuable understanding of the capacity for propellant identification.

493. In evidence, Professor Kobus explained that it is unrealistic to expect single, tiny particles to be 'highly reproducible in their composition' (Inq 3200). If the entire

cartridge contents are analysed it averages out the composition, but in individual particles there is a need to understand the parameters and the extent of variation likely to be found. Even in compiling an unburnt database lack of consistency within cartridges is a difficulty and this is an area that must be investigated and evaluated in order to apply a propellant database to case work (Inq 3200). Professor Kobus continued to explain (Inq 3200, 3201):

> Q That would involve a lot of work?
>
> A Yes. I mean, it's kind of difficult. I've always found the difficult thing with this – and I've been really wanting to be quite clear on this – there was I thought quite a good study done as a Masters thesis, and then an application to case work, and I don't want to devalue that Masters study because it might be seen to be not quite taken far enough to evaluate a case. So I'm just saying that's in my head. I'm cautious about the process involved in doing a Masters project, it would be quite different to kind of validating something to the extent you'd want to for case work. So, to my mind, probably the easiest way of understanding that would be to tip out half the cartridge case, get a bulk analysis. You would actually know what you're dealing with. That's the profile. Then the next step down, take half a dozen particles from a cartridge case and do that. Now, after you've done three or four ammunitions, you might find there's no difference, in which case you can begin to surmise that there isn't a variation or there is. But I think from single particles inferring an actual composition of the cartridge case may be a step too far in some cases.
>
> Q So, in this case, the unburnt propellant database was constructed from single particle analysis?
>
> A Yes.
>
> Q Sometimes a single particle times three was used for a particular ammunition?
>
> A That's right. ...

494. Professor Kobus said he understood the method involved analysing two particles and, if the analyses agreed, that profile went into the database. If the two did not agree, more analyses were done with a view to establishing a preponderance for the profile. In the opinion of Professor Kobus, a bulk analysis to establish an average profile would have been preferable (Inq 3201).

495. In addition, in order to apply the results to case work, there was a need to understand the detection limit of the equipment. Validation work in regard to the detection levels is required. Further, manufacturer's specifications can change at any time and, in the view of Professor Kobus, there is 'no way of extrapolating any occurrence frequency in a materials database to a whole population at large' (Inq 3203). In order to have a comprehensive materials database, it would be necessary to explore the specifications for a cartridge made at the time the particular cartridge was fired in the commission of the offence. A cartridge made a year earlier or a year later might not contain the same composition. This applies to all the cartridges used in the database.

496. Secondly, the statement provided by Mr Strobel was vague and unclear as to the work he undertook on exhibits in the murder investigation. Mr Strobel did not give evidence at the trial.

497. The reliability and adequacy of the database upon which Mr Barnes relied were the subject of opinions conveyed to the DPP by Mr Martz twice in December 1993 and by Professor Zitrin in April and May 1994 (Ex 95, 107, 113, 245). In addition the defence was not informed of statements by Mr Barnes suggesting there were problems associated with the database or that, in the opinion of Professor Zitrin, explanations by Mr Barnes for 'anomalies' perceived by Professor Zitrin did not satisfactorily explain those anomalies.

498. I will deal with various communications not disclosed to the defence in an approximate chronological order. These communications include the information relating to the databases to which I have briefly referred and other material concerning a second database.

499. On 1 December 1993 a member of the prosecution team spoke by telephone with Mr Martz. The prosecution file note does not identify who spoke with Mr Martz, but the content of the note suggests it was likely to have been Ms Woodward. During the conversation Mr Martz said he could not be as emphatic as Mr Barnes and stated that 'analysis of powder after it has been shot can result in different analysis by different chemists as the powder changes after it is shot ...' (Ex 95, 99).

500. On 3 December 1993 Ms Woodward made a note of a conversation with Mr Ibbotson during which he relayed information conveyed by Mr Keeley (Ex 95, 100). The note recorded that Mr Keeley had a number of questions to be answered by Mr Barnes as a matter of 'utmost urgency'. The note continued:

> If Keeley's concerns are about what other factors Barnes has left out in his methodology and what discrimination Barnes has made. He is concerned that Barnes is too involved in the crime scene.

501. The concern felt by Mr Keeley that Mr Barnes was too involved with the crime scene is to be considered in conjunction with his concern, shared by Dr Zeichner and Professor Zitrin, that one expert was doing all the work. Ms Woodward made a note of a telephone conversation with Mr Ibbotson on 8 December 1993 when Mr Ibbotson rang from Jerusalem. Ms Woodward recorded the following (Ex 95, 102):

> He said that there were some problems with the Israelis, Israelis doubt that they will be able to say that it's PMC and they are suspicious of one man doing all the work. He said Robin Keeley is also suspicious of this. He said that there is (sic) a lot of questions that the Israelis and Robin Keeley want to ask Barnes ... He also asked me to ring Michael Adams to tell him about the problems with the Israelis ...

502. Counsel for the prosecution were also concerned about one person giving expert evidence across a number of forensic areas of expertise, particularly as Mr Barnes did not hold a relevant tertiary degree. He held a certificate in Metallurgy. Hence the decision to retain overseas experts to review his work and conclusions.

503. On 21 December 1993 Mr Adams and Ms Woodward met with Mr Martz and others in Washington. Mr Martz confirmed his earlier indication that he could not be as emphatic as Mr Barnes in specifically identifying PMC. According to the file note, Mr Martz made the following observations about the database and changes in the manufacture of propellants (Ex 95, 107):

> He said his difficulty with being so emphatic is the size of the database that Barnes used. He said

> that Barnes had used a limited library when there could be 999,000 smokeless powders around the world. He said really you have to look beyond what Barnes did.
> He then said that the chemical make-up of the propellants change all the time – that is in the way it is manufactured. He said what was used in PMC at one time could be used in Winchester at another time. He said that ammunition changes all the time. He said that what happens is the propellant gets manufactured in one place and is then purchased by ammunition manufacturers. PMC may have used different propellants at different times.
> ...
> Robert Martz then said Barnes had done an excellent job and that his methodology was quite sound. The only difficulty he had was that in some of his conclusions he is not thinking broadly enough.

504. Mr Adams was asked about not disclosing the information conveyed to him by Mr Martz on 21 December 1993 or, at the least, the failure to ask Mr Martz to prepare a report setting out some of those matters. Mr Adams responded that he thought this was simply a preliminary discussion which they expected would be refined as the case developed (Inq 2974).

505. The view held by Mr Martz that the database was too small was conveyed by Ms Woodward to Mr Ibbotson on 30 December 1993. The file note prepared by Ms Woodward summarised the meeting of 21 December 1993 and the summary included the following (Ex 95, 113 and 114):

> Roger Martz is anxious to look at the cartridges as well, he said that he is unable to be as emphatic as Barnes because he doesn't think that Barnes has looked far enough for his comparisons to PMC. In effect, his database is too small. That concern could be quelled somewhat if there is a specific explanation as to why the database was as it was. ...
> Martz wants a letter explaining what each piece of evidence is, where it comes from and where it is referred to in Barnes' statements. He also wants in the letter an indication of where the statement is to go the letter should also contain advice as to how the different types of ammunition were selected for Barnes' database.

506. In addition to their conversations with Mr Martz on 1 and 21 December 1993, on an unknown date prior to the trial Mr Adams, Mr Ibbotson and Ms Woodward conferred with Mr Martz and Mr Crum. The recording and transcript of the conference are exhibits 95A and 95B (the transcript was not provided by the DPP until 16 April 2014). Mr Martz discussed two meetings with Mr Barnes and what Mr Barnes asked him to do. He discussed the nature of the physical examination of particles and expressed his views about how changes can occur in the powder. Mr Martz spoke about PMC in the FBI laboratory being different from the PMC brought by Mr Barnes from Australia.

507. The report provided by Mr Martz which was disclosed to the defence was particularly brief (Ex 96, 5). It listed the 'specimens' which Mr Martz examined and explained the results in 10 lines. It stated that the largest of four particles from the deceased's car and the single particle from the applicant's car were analysed by GC-MSD and found to be consistent with 'smokeless powder loaded into PMC .22 calibre ammunition'. No mention was made of the database. Much more information had been conveyed in the undated conference.

508. Mr Adams said he thought he regarded the undated conference as a preliminary discussion of the issues rather than the expression of a particular opinion, but he did not have a recollection of the discussion and was relying on the summary provided by

Counsel (Inq 2911). Accepting that the summary by Counsel was accurate, and bearing in mind the brevity of the report provided by Mr Martz, Mr Adams conceded that there was an obligation to disclose to the defence the information provided by Mr Martz in the undated conference and was surprised that disclosure did not occur (Inq 2968). Mr Ibbotson also agreed the content should have been disclosed (Inq 3408).

509. As to events at trial involving Mr Martz, at the outset of cross-examination, Counsel asked whether Mr Martz had any other notes or documents with him. He gave an affirmative response (T 1569–1570). No such notes or documents had been disclosed to the defence. The notes made by Mr Martz were particularly significant to the provenance of the particle which he analysed, said by the prosecution to come from slide 7J(c) (the Mazda boot). Mr Martz recorded the size of the particle analysed which was inconsistent with the 'fragments' described by Mr Barnes. This issue is discussed later.

510. Later in cross-examination it emerged that Mr Martz had participated in a number of telephone conversations with members of the prosecution team and a transcript of a telephone link-up between Mr Martz and three prosecutors was produced. Mr Adams informed the court that the conference was covered by legal professional privilege, but he did not wish to exercise that privilege (T 1572).

511. In evidence to the Inquiry Mr Adams said it was his view that conferences with the experts were covered by legal professional privilege, but that was not a reason for not producing records of the conferences (Inq 2970).

512. Mr Adams re-examined Mr Martz concerning the physical differences identified by Mr Martz between PMC in the possession of the FBI and PMC reported by Mr Barnes (T 1579). That information was not in the conference transcript, but obviously known to the prosecution. It had not been disclosed to the defence. Asked if it should have been disclosed, Mr Adams replied that 'probably it should have been' (Inq 2971).

513. As to the extent of the work undertaken by Mr Martz, Mr Adams agreed that Mr Martz did not conduct a review of all the work carried out by Mr Barnes. Nor did he check the opinions expressed by Mr Barnes against the data that Mr Barnes claimed he had obtained (Inq 2971). These limitations were far from clear at the trial.

514. Returning to the chronological order of the relevant events, on 4 May 1994 either Ms Woodward or Mr Ibbotson telephoned Professor Zitrin and discussed his report of 19 April 1994 (Ex 96, 19). Particular reference was made to page four of the report in which Professor Zitrin spoke of 'unusual results' in 'some cases' from the database. The file note recorded the following (Ex 95, 245):

> Dr Zitrin stating that he cannot really explain this other than to say it is something that would originate from the inherent problematic of using burnt powders.
>
> Dr Zitrin advising that it is not a chemistry problem that is where one stabiliser has changed its chemical composition to another as a result of the burning process.
>
> What he was trying to emphasise by making that statement in that paragraph is that when one is building a database using burnt particles then one would theoretically expect some strange results.

> From his examination of the results of the database his opinion is that most of the results seem to be reliable and he would in fact be surprised when considering the depth and extent of the database and the material being used, namely the burnt particles if there were not some strange results.
>
> Dr Zitrin advising that he will review that paragraph and Mr Barnes' material and see whether he can resolve those strange results.

515. On 24 May 1994 Mr Adams and Mr Ibbotson met with Mr Barnes and discussed a wide range of topics. The file note refers to the relevant passage in the report of Professor Zitrin and records that Mr Barnes advised that the different results could be explained 'logically and clearly' and that he saw no difficulties with what Professor Zitrin had written (Ex 95, 249).

516. The notes of 24 May 1994 recorded that Mr Barnes was to do additional work with respect to the database (Ex 95, 252). That issue was the topic of conversation between Mr Ibbotson and Mr Barnes on 6 October 1994. Mr Ibbotson noted that Mr Barnes said he wanted to 'refine' the propellant database and 'improve' the previous results (Ex 95 p 291). On 7 October 1994 Mr Barnes wrote to the DPP of 'deficiencies' in the propellant database which did not allow for 'definitive identification of gunshot related debris' (Ex 95, 300). Mr Barnes advised that 'quite significant developments' had been 'recently achieved' in the capability to examine and profile gunshot related debris 'to the extent that the deficiencies in our existing database can be overcome'. Mr Barnes wrote:

> Additionally, it should be understood that since the development of the initial database, a very significant number of additional .22 calibre ammunition types have been sourced. These additional .22 calibre ammunition types were available at the time of the murder of Assistant Commissioner Winchester and therefore must be profiled.

517. Mr Barnes proposed the development of a 'propellant library of .22 calibre ammunition' and said the cost to undertake the necessary analysis to produce a 'comprehensive organic profile database for propellants loaded in .22 calibre ammunition' and available during the relevant period would be approximately $25 000 and take approximately three weeks. He sought approval to undertake the work.

518. Contrary to Mr Barnes' written assertion that 'a very significant number of additional .22 calibre ammunition types' had become available and 'must be profiled', Mr Barnes later told the DPP that they had used the same ammunition (Ex 95, 426).

519. The DPP responded to Mr Barnes by letter of 11 October 1994 (Ex 95, 302). The letter confirmed that Mr Barnes would be carrying out 'additional analytical profiling of the propellant in order to overcome deficiencies in the existing database' and that such work would be completed by 31 October 1994.

520. On the assumption that these matters were not the subject of a report or evidence at trial, Mr Ibbotson accepted that disclosure should have been made to the defence (Inq 3393).

521. Ms Woodward spoke with Mr Barnes by telephone on 8 November 1994. She recorded Mr Barnes saying that they were progressing well on the work for the 'partially burnt

propellant database' and that Mr Barnes made a comment on the original database (Ex 95, 306):

> He said that there was one element in some of the compounds in the original database that may not be technically correct. He said that it's not something that really concerns us but it's something that they need to fix prior to giving evidence on that database. He then said that the primer database was almost complete and everything else should be completed in the next few weeks.

522. The defence was never told that Mr Barnes appeared to accept there were deficiencies in the database, that additional .22 ammunition types had been found, or that one element in some of the compounds may not be technically correct. All of this information would have been very valuable to the defence. There was only a passing reference to a second database on 29 June 1995 when the applicant was unrepresented (T 2013).

523. On 15 November 1994 Mr Ibbotson, Ms Woodward and Mr Brewster conferred with Mr Barnes. The notes made by Mr Ibbotson record that they discussed Mr Barnes' concerns with Dr Zeichner and that Mr Barnes provided Mr Ibbotson with a 'database concerning the primer residues and an explanation as to how they went about establishing the database' (Ex 95, 315–317). After discussion about various aspects of Mr Barnes' work, the notes record that Mr Barnes spoke about the 'revised propellant database' and said that while in Washington he had discussed his techniques and a new solvent. Mr Barnes said they were delayed in carrying out further work because they were waiting for a particular solvent and needles to extract the primer from vials after it had been separated.

524. Staying with the issue of a second database, on 16 February 1995 Mr Ibbotson had a lengthy telephone conversation with Mr Barnes and recorded the following (Ex 95, 424):

> Mr Barnes advising that he has done further work by updating the propellant database and that this further enhances his conclusions that the propellant is PMC and he will explain it further when the database has been completed.

525. On 17 February 1995, Mr Barnes told Mr Ibbotson he had completed the new database for both burnt and unburnt propellants in which he had achieved 'similar results with all the ammunition tested' which demonstrated although a propellant might differ in that it was not homogeneous, there was a consistency over the years that did not change. Mr Barnes expressed the opinion that the new database verified the previous database in that variations in ammunitions in the original database were similar to the variations in the second database. According to Mr Barnes, contamination was a non-issue because the rifles were 'scrupulously cleaned' after each firing (Ex 95, 426).

526. The revised propellant database had not been provided by 21 April 1995, only about two weeks before the trial was listed to commence. Ms Woodward wrote to Mr Barnes on 21 April 1995 (Ex 95, 512) confirming that although in December 1994 Mr Barnes had agreed to provide the revised database by 14 February 1995, it had not been received by the DPP. In the letter, referring to material not provided by Mr Barnes, Ms Woodward wrote that the trial was to commence on 2 May 1995 and she had been placed in the 'embarrassing position' of not being able to say that all material had been provided to the defence.

527. There is no record of information being provided to the defence suggesting that Mr Barnes had embarked upon preparation of a revised or second database. Communications in that regard between the DPP and Mr Barnes were not disclosed to the defence. In examination and cross-examination the questions and answers were framed on the basis of a single database.

528. In his affidavit Mr Barnes said the decision was made at AGAL to try and establish a second primer database using a different method of analysis known as Inductively Complete Plasma – Atomic Emission Spectroscopy (ICP-AES). It was intended to create a 'comprehensive primer database that could be added to and continually updated to be used for case work in the future' (Ex 195 [195]). Mr Barnes said he also directed Mr Strobel to set up a second propellant database for the same purpose and to assist in the Winchester case. He said they wanted the second database because 'we were independent of the SFSL and did not have general access to the old database to continue working with it' (Ex 195 [198]).

529. In his affidavit Mr Barnes said the second propellant database did not take their understanding 'very far'. A different solvent was used, but the second database 'was broadly consistent with the first database' (Ex 195 [199]). In addition, as indicated by Professor Kobus to the Inquiry, 'certain anomalies were cleared up' by the second database. Mr Barnes used the example of phenoxazine being detected in the first database, but not in the second. He explained (Ex 195 [199]):

> This reaffirmed my earlier view that the presence of phenoxazine in GC-MS spectra from 1993 was an anomaly and possibly due to a breakdown product caused by the system of analysis which we were using, rather than being a component of the analysed propellant particle.

530. In evidence to the Inquiry Mr Barnes said that the development in the first database of what appeared to be phenoxazine or related compounds 'may well have been an instrument-related issue'. Asked what he meant by an 'instrument-based' issue, Mr Barnes said it meant that it was 'almost certainly' caused by 'heating in the injector port of the GC-MSD at the police laboratory' through the breakdown of either some of the propellant components or the leaching of material used to seal the vials (Inq 3813). He said he did not know exactly what caused the presence of phenoxazine or where it came from, but the second database indicated it was not part of the propellant (Inq 3813).

531. As to the relevance of the databases, Mr Barnes said in evidence that the unburnt propellant database is 'really of no relevance at all' other than to 'scope the ingredients we could expect to find in the propellants or not find'. In other words, it provides 'the range of components likely to be present in the propellants' (Inq 3811).

532. As to the partially burnt propellant database, Mr Barnes said it had direct relevance to the case 'because it provided samples which had been exposed, that is fired, under the same sort of conditions as the questioned samples' (Inq 3811). As to what he meant by 'fired under the same sort of conditions', Mr Barnes said it had been subjected to the same burning and leaching process as the particles recovered in relation to the murder of Mr Winchester. In the tests, of course, the weapon had been cleaned between each

firing and Mr Barnes knew nothing about the state of the weapon used to commit the murder (Inq 3812).

533. Mr Barnes acknowledged that, to his knowledge, no one had previously established a burnt propellant database (Inq 3812).

534. Returning to the chronological sequence, on 7 December 1994 Mr Barnes wrote to the DPP responding to the reports of Dr Zeichner and Professor Zitrin (Ex 95, 325). The letter was followed by a conference on 8 December 1994 between Mr Adams, Mr Ibbotson, Ms Woodward and Mr Barnes during which Mr Barnes was highly critical of Dr Zeichner (Ex 95, 330–334).

535. On 8 December 1994 Mr Adams, Ms Woodward and Mr Ibbotson also conferred with Dr Zeichner. The notes of the conference are quite extensive (Ex 95, 335–338) and they include a detailed explanation by Dr Zeichner of why he disagreed with Mr Barnes concerning the significance of antimony in the results. Dr Zeichner spoke of a possible explanation being a contaminated weapon notwithstanding the belief of Mr Barnes that each firing was done with a clean gun. Other criticisms of Mr Barnes were recorded, including the statement by Dr Zeichner that in one respect Mr Barnes did 'not make a rigorous statement ...'.

536. On 9 December 1994 Mr Adams, Ms Woodward and Mr Ibbotson conferred with Professor Zitrin. Notes were made by both Mr Ibbotson (Ex 95, 340–343) and Ms Woodward (Ex 95, 344–349). Mr Ibbotson noted statements by Professor Zitrin that he had 'not done a complete review of Barnes' work' and it was not correct to say that his reference to 'unusual' results on pages three and four of his report were the only unusual results he had found. They were examples that led to his opinion that Mr Barnes went 'too far in his conclusions' if he was relying on organic chemistry to identify PMC ammunition as the propellant. Professor Zitrin expressed the view that even if Mr Barnes had a satisfactory explanation for the unusual results, it would not resolve the difficulties he had in relation to Mr Barnes' conclusions and the strong opinion expressed by Mr Barnes did not accord with his own opinion (Ex 95, 340).

537. The notes by Mr Ibbotson record a discussion between Mr Adams and Professor Zitrin about the opinion of Mr Barnes concerning PMC propellant. Professor Zitrin made further comments about the database and Mr Adams is recorded as asking 'whether there was an explanation for the anomalies in Mr Barnes' results when you combine those results with the other criteria Mr Barnes had used namely colour and morphology.' Professor Zitrin's response was recorded in the following terms (Ex 95, 342):

> Dr Zitrin replied that he does not challenge Mr Barnes technical competence the problem as he sees it is if the defence demonstrate that although Mr Barnes' work is technically competent but there are anomalies in Mr Barnes' results then those results are challengeable and will taint his final opinion.
> Dr Zitrin questioned whether Mr Barnes had asked himself all the questions that he should have asked himself...

538. Professor Zitrin then referred to issues concerning the ageing of the propellant and the temperature and rate of burning. Various questions were recorded for Mr Barnes.

Professor Zitrin commented on a particular chromatogram dated 28 September 1993 concerning a particle from the vacuumings of the Mazda boot (Ex 95, 342,343).

539. Ms Woodward noted that Professor Zitrin identified two problems with the work of Mr Barnes (Ex 95, 344):

> The first is if Barnes is using organic chemistry in creating possibles and impossibles, it reflects upon his competence.
>
> Number 2 was, 'is there an explanation for anomalies.' He said if the defence can demonstrate that Barnes does not understand some basic things we may have a big problem although Barnes is a very good technician. He said his techniques are very good but he wonders whether he asks himself all the questions that he should ask and answer. He is concerned as to whether his interpretation is correct.
>
> He said a good technician may not think about the aging of the propellant....He said that analytical chemists will criticise Barnes because there are too many parameters in smokeless powder after shooting to say that something is definitely one thing.

540. Ms Woodward recorded that Professor Zitrin identified questions to be asked of Mr Barnes (Ex 95, 345–349).

541. The conference with Professor Zitrin continued on 10 December 1994 with discussions about a number of technical issues (Ex 95, 367–373). Professor Zitrin identified matters which he said undermined the database.

542. On 9 December 1994 Mr Adams, Ms Woodward and Mr Ibbotson had a conference with Dr Zeichner. Various samples were discussed at length and Dr Zeichner explained the basis upon which he disagreed with some of the conclusions reached by Mr Barnes. In notes made by Ms Woodward (Ex 95, 363–366), Ms Woodward recorded the following criticisms of Mr Barnes (Ex 95, 364):

> Zeichner and Zitrin then said that Barnes is an expert in too many area[s]. He said that they have a difficulty in the fact that he is doing something that is not accepted and that he's going to have to accept that he's going to be attacked.

543. The information conveyed to the DPP in the conference on 8 and 9 December 1994 would have been highly valuable to the defence in the attack upon the evidence of Mr Barnes.

544. It was on 13 December 1994 that Mr Barnes spoke about challenging Dr Zeichner and the Crown destroying him (Ex 95, 374). On 16 December 1994 Mr Barnes said 'the overseas business' was ill-advised and there was a need to 'counter' what had been said by the Israeli experts (Ex 95, 375). Ms Woodward was positive she would have informed Mr Ibbotson of the conversation (Inq 3133).

545. On 19 December 1994 Mr Barnes spoke about his perception of the work done by Dr Zeichner and provided his answer to Dr Zeichner's criticisms. The lengthy notes (Ex 95, 376–388) disclose a discussion about a wide range of topics, including a detailed discussion about the preparation of the unburnt and burnt propellant databases. Mr Barnes explained his methodology and approach to identification. He gave reasons for

variations in results and responded to questions by Mr Adams that appear to have been based upon criticisms or questions by other experts.

546. The discussion with Mr Barnes on 19 December 1994 included reference to the disclosed report of Mr Keeley dated 3 June 1994 in which Mr Keeley said there was no evidence about reproducibility, nor of the comprehensiveness of the database. Mr Barnes provided an explanation.

547. The conference continued on 20 December 1994 and included discussion concerning the ballistics evidence (Ex 95, 388–394). A timetable was fixed for the finalisation of various matters and was confirmed by letter of 12 January 1995 from the DPP to Mr Barnes (Ex 95, 398–399). The letter referred to 14 February 1995 as the date for completion of the 'revised propellant database'.

548. On 15 February 1995 Mr Ibbotson spoke with Dr Zeichner and Professor Zitrin. In his notes of the conversations (Ex 95, 413–415) Mr Ibbotson recorded that Professor Zitrin asked whether he could have a response to the issues raised by him in page four of his report concerning the anomalies in the burnt and unburnt propellant databases. Mr Ibbotson read the responses of Mr Barnes in a report of 7 December 1994 (Ex 93, 33–36). Professor Zitrin responded that the explanation provided by Mr Barnes did not answer the anomalies he had listed in his report. Mr Ibbotson was to contact Mr Barnes for more detail as to the differences between the two databases and how they could be compared.

549. On 16 February 1995 Mr Ibbotson spoke with Mr Barnes about his disclosed report of 19 November 1993 and the issues raised by Professor Zitrin. Mr Ibbotson's notes (Ex 95, 420–425) include explanations by Mr Barnes about the unburnt database and the variations between the unburnt and burnt propellants for the same ammunition type. Significant detail was discussed.

550. Later on 16 February 1995 Mr Ibbotson telephoned Professor Zitrin and read to Professor Zitrin his notes of his conference with Mr Barnes earlier that day. Professor Zitrin responded that if reliance could not be placed on the manufacturer's specifications as to the composition of propellant, that fact 'must undermine Mr Barnes' ultimate conclusions'. Mr Ibbotson then recorded the following (Ex 95, 418):

> Although Mr Barnes has provided an explanation Dr Zitrin believes it leads to a problem with the accuracy of the results in that if propellants in some ammunitions are themselves different and have different compounds and the variations can be random then the reliance one can place on the database is reduced.
>
> Dr Zitrin advising that he had thought that the cause for the variations in propellants in particular circumstances was due to a contamination factor that is contamination from earlier firings of ammunition from the same rifle.
>
> JI advising that the contamination might explain the variations in the burnt database but it cannot explain the variations in the unburnt database as there has been no firing.
>
> Dr Zitrin agreeing and saying therefore if one is relying on the manufacturers of the ammunition altering the propellant composition during the course of production then again this leads to unreliability with the final conclusions drawn from that database as one cannot rely upon any

given composition or a given propellant powder of specific ammunition type.

JI pointing out to Dr Zitrin that the whole database is not affected because there are a lot of propellants that had particles that were homogeneous and not different and therefore those propellants within those ammunitions can be reliable.

Dr Zitrin agreeing with this saying that the database is then reduced by a considerable amount as there are a large number of propellants shown that are a mixture of particles from a particular ammunition.

JI advising that he will go back and speak further with Mr Barnes on the question of contamination. Dr Zitrin will review the work he has done and take into account what JI has just told him in relation to the conference notes from Mr Barnes.

551. The issues discussed with Professor Zitrin were taken up by Mr Ibbotson with Mr Barnes in a telephone conversation on 17 February 1995. The notes made by Mr Ibbotson (Ex 95, 426–427) record that Mr Ibbotson sought further information concerning the propellant database and, in particular, where ammunition types showed a mixture of propellants or particles that were not homogeneous. Mr Barnes advised Mr Ibbotson that in relation to 'reworked propellant', the unreliability that could be suggested could only be to a very 'limited extent ...' as the manufacturer was using the same process for the same compounds, but in different quantities. Mr Barnes also offered explanations for other issues.

552. On 21 April 1995 the DPP wrote to Mr Barnes about his failure to complete additional work and the embarrassing position in which this placed the DPP (Ex 95, 512–514).

553. In May 1995 Mr Adams and Mr Ibbotson had a telephone conference with Mr Keeley which was recorded. The transcript of the conference is undated (Ex 95, 515–535). Numerous issues concerning gunshot residue were discussed, including Mr Keeley's opinion. Not all of the material to which reference was made was included in Mr Keeley's report, but Mr Adams did not regard that material as significant (Inq 2957).

554. Unless I have indicated otherwise, none of the material to which I have referred was disclosed to the defence. Many of the file notes are headed:

FOR PROSECUTION BRIEF ONLY

NOT TO BE PROVIDED TO THE DEFENCE

555. Mr Adams said that, generally, in the period 1993 – 1995 it was not the practice of the prosecution to disclose the contents of their conferences with expert witnesses. They were covered by legal professional privilege. Reports were disclosed and notes of conferences would only be disclosed if requested (Inq 3011). If something came out of conferences that was relevant to the defence, Mr Adams would expect such information to be disclosed to the defence, but other material that ended up being collected in disclosed reports did not require separate disclosure.

556. As to the general observation by Dr Zeichner and Professor Zitrin that Mr Barnes was an expert in too many areas, considered in isolation Mr Adams thought the observation 'mattered not'. However, Mr Adams agreed that from a defence point of view, the significance is found in the combination of views that Mr Barnes was emotionally involved and was trying to be an expert in too many areas, coupled with all the material

demonstrating that he was not objective and harboured a desire to assist the prosecution. He agreed that the totality of information would have been 'pretty useful' information for defence cross-examinations (Inq 2963).

557. Professor Zitrin was the only expert who was qualified to deal with the propellant database. Mr Martz had suggested the database was too small, but Professor Zitrin was the only expert who appears to have looked at the propellant database. Professor Zitrin gave evidence at a time when the applicant was unrepresented. Although in a report he referred to 'unusual results', no reference was made in evidence to 'anomalies' or 'problems' with the database.

558. The notes relating to Professor Zitrin's views in this regard, including his view that Mr Barnes' explanations did not answer the problems, were not disclosed to the defence. After Mr Adams' attention had been drawn to the various entries relating to Professor Zitrin, in particular to Professor Zitrin saying that the explanation led to another problem for the accuracy of the database, Mr Adams gave the following evidence (Inq 2984–2985):

Q So, wasn't this important information for the defence to have with - one, Dr Zitrin saw there were anomalies, issues to be more neutral. He asked for an explanation. Mr Barnes had given the explanation and that should have been disclosed too. And Dr Zitrin, well, that very explanation creates more problems?

A Well, it creates the issue of the reliance on the manufacturer's specifications.

Q Yes. No, but he believes it provides an explanation that leads to a problem with the accuracy of the results. And so when you put it altogether, if you are defending someone and you wanted to attack the database this provided a pretty good starting point?

A Yes, and it doesn't appear in Mr Zitrin's report, Dr Zitrin's report?

Q No, and there is no supplementary report obtained from Dr Zitrin to cover these matters.

Look, it's easy in hindsight of course. When things are done on the run and there's so much happening, et cetera, when you look at it now, would you agree that this should have been disclosed along with Mr Barnes' report, the explanation, which you agreed yesterday should have been provided, that this should have been provided to the defence?

A Yes I think so. Certainly the defence should have had this information. The only matter that leads me to qualify the duty of the prosecutor to volunteer the material is that I think my assumption would have been that the defence had access to Dr Zitrin and Dr Zitrin would have told them exactly what he told us. If they were asking – it's a rather obvious question – what's the reliability of Barnes? What's the reliability of the database and so on he would of? And I think we told him to be completely frank. We told them to be completely frank with the defence. That's the only way, really, that I might not have turned my attention to the question.

Q But there is a duty of disclosure on a prosecution about those matters?

A I think so.

Q And I'm not saying that – if you're going to make that assumption then perhaps one needed to check to see whether it had been disclosed in the defence conference with Mr Zitrin given that the prosecution had a transcript of that conference. Because I'm suggesting this was fairly important information for the defence to know, namely that Barnes' explanation for anomalies in the database were not satisfactorily explained in Dr Zitrin's view?

A Yes. On reflection I think that's right.

559. Mr Adams agreed that Mr Barnes gave evidence of his belief that propellant in the applicant's Mazda was PMC. He also agreed that Mr Barnes' reliance on the database was a significant factor in him arriving at that opinion. In that context, Mr Adams' attention was drawn to the statement by Mr Barnes to Ms Woodward on 8 November 1994 that there was one element in some of the compounds of the original database that may not be technically correct. In response to the suggestion that the defence should have been made aware of that statement, Mr Adams answered 'I think that technical errors can be capable of importance'. He agreed it should have been disclosed to the defence (Inq 2987–2988).

560. Mr Ibbotson had only a vague recollection of a second database. Mr Adams did not recall mention of a second database and reconstructed that he probably regarded it as an accumulation on the first (Inq 2989). Against the background of statements by Mr Barnes that a second database was being prepared to remedy deficiencies in the first database, Mr Adams was asked about disclosure (Inq 2990–2991):

> Q Mr Adams, when you look at the totality and it finishes off with Mr Barnes making some reference to deficiencies and then saying, 'I'm doing a second database, in effect, to try and sort all this out,' do you accept that all of that should have been disclosed to the defence?
>
> A I do now. I think that looking at this letter and looking at - as far as I can recall, I think we regarded our duty as being satisfied by the provision of all reports.
>
> Q Yes?
>
> A And the making available of the defence and that our consultations – intermediate, as it were, consultations - I don't think it occurred to us should have been handed to the defence. It didn't occur to us at the time we were making them. Perhaps we should have done a review right at the end checking all the material related and then asked that as a separate question, whether those should have gone to the defence, but we did not do that.
>
> Q Can I suggest ... ?
>
> A I think all I can say is that I think that was the practice at the time - that intermediate consultations were usually not handed over. In this case there was an exception because the notes were so thorough. Usually one would have an oral conference and one might need even to have a note. That was the general approach of the time. But, in retrospect, probably we should have had an audit at the end to have a look at all our material. I don't think we did that. We were just absorbed with the preparation of the trial.
>
> Q And for whatever reason, when the evidence of the one witness who'd considered the question of the database was led, Mr Eastman was unrepresented?
>
> A That's true.
>
> Q For the reasons he gave - whatever reasons - he didn't cross-examine, I don't think?
>
> A Yes.
>
> Q ... And so, therefore - and you didn't lead from Dr Zitrin anything about the database; you just asked him to assume that it was prepared properly?
>
> A Well, that's right.
>
> Q So one way or another, not only did the defence not know about these issues that had been raised and explained and then raised further issues et cetera, but they didn't have an opportunity to put it to the court, and at no time did the court have any information about it?
>
> A True.
>
> Q It's just a combination of circumstances?

A That is so.

561. During cross-examination Mr Adams pointed out that he had already conceded that the differences between Mr Barnes and Dr Zeichner should have been disclosed. He accepted 'now' that the differences between Professor Zitrin and Mr Barnes should also have been disclosed (Inq 3028).

562. Speaking generally of disclosure, it was the view of Mr Adams at the time of the trial that material should be disclosed which might assist the defence. He accepted that assisting the defence included opening up a relevant line of inquiry. However, as mentioned, at that time it was not the practice of the prosecution to disclose notes of conferences with expert witnesses which were subject to legal professional privilege. If, however, information that might assist the defence was disclosed in those conferences, Mr Adams accepted that a duty existed to disclose that information either directly to the defence or through the provision of an additional report. Mr Adams said that if the defence had requested notes of conferences, he would have waived legal professional privilege. At the time of the trial Mr Adams and Mr Ibbotson both believed that the prosecution had fully complied with its duty of disclosure.

563. Ms Woodward understood that notes of conferences with experts and correspondence of experts were subject to legal professional privilege and that a decision was made not to provide that material to the defence. She believed the decision was made by Mr Adams in conjunction with Mr Ibbotson (Inq 3120). Ms Woodward did not make decisions about disclosure. For example, if a letter or report came in from Mr Barnes or another expert, it would be passed on to Mr Ibbotson and if he instructed Ms Woodward to provide it to the defence, she would have done so and either made a note of it or enclosed the document with a letter to the defence.

564. Ms Woodward said she did not remember being a party to decisions about whether notes of conferences or correspondence with experts should be disclosed. She recalled that these types of documents were not to be disclosed because they were covered by legal professional privilege (Inq 3126).

565. Mr Ibbotson was responsible for preparing the brief in relation to the forensic evidence. He had extensive dealings with Mr Barnes and, particularly after Mr Ibbotson left the office of the DPP and was retained purely as a Junior Counsel, Ms Woodward assisted him in the solicitor role (Inq 3226).

566. Initially in his evidence Mr Ibbotson said he did not recall a policy that notes of conferences and correspondence with prosecution expert witness were covered by legal professional privilege and were not to be disclosed. However, as the number of undisclosed documents put to Mr Ibbotson grew, many of which were headed 'FOR PROSECUTION BRIEF ONLY – NOT TO BE GIVEN TO THE DEFENCE', he agreed that such a policy must have been in place (Inq 3412).

567. Mr Ibbotson said from his perspective everything the prosecution possessed should have been provided to the defence. They were dealing with a difficult person who would not hesitate to cause problems which made it even more important to be

completely open. Mr Ibbotson thought all relevant material had been provided to the defence and he could not explain why there had been a failure in this regard.

568. According to Mr Ibbotson, whenever he received oral information or written material he passed it on to Mr Adams. All decisions about the use of such information and material were made by Mr Adams, including decisions as to disclosure to the defence. Mr Ibbotson said that although he would make his opinions known to Mr Adams, the decision rested with Mr Adams.

569. The prosecution policy that conferences with overseas experts were privileged and not to be disclosed to the defence is confirmed by the instructions given to the experts concerning their conferences with defence lawyers. In accordance with a view expressed by Mr Adams in a telephone conversation with Mr Ibbotson on 15 February 1995 (Ex 95, 409a), letters were sent to the experts advising that they were free to hold 'open discussions' with defence lawyers, but 'subject to one restriction' (Ex 95, 410-411, 416):

> The restriction concerns matters covered by legal professional privilege. That privilege attaches to all communication between you and this Office and counsel and covers all discussions, conferences, notes of telephone conversation, draft reports and conference notes.

570. This policy was not supported by the view of the Acting Director of Public Prosecutions previously conveyed to Ms Woodward on 15 February 1994 (Ex 95, 187).

571. As discussed later, it appears that this policy, and late provision of reports by Mr Barnes or a failure by him to provide reports, contributed to the prosecution failure to disclose to the defence a significant volume of material which would have been of valuable assistance to the defence.

Attempts to Influence Experts

572. Before discussing whether there was a failure to disclose reports provided by Mr Barnes, I will deal with a suggestion that Counsel sought to influence the experts. In the context of evidence concerning the views of overseas experts which were in conflict with the opinions of Mr Barnes, Counsel questioned Mr Adams about his attitude to some of the wording in reports prepared by Mr Barnes. In a memo to file dated 17 November 1993, Mr Ibbotson recorded that in respect of a report by Mr Barnes received by the prosecution on 16 November 1993, Mr Adams expressed concern that the report did not 'go far enough when compared to what Mr Barnes said in oral evidence at the Inquest'. Mr Ibbotson advised that Mr Barnes could 'go no further' in relation to the gunshot residue evidence. The note records that Mr Adams was 'still concerned' about the report in comparison with the unequivocal conclusion given at the Inquest that the partially burn propellant 'was in fact PMC'. Mr Ibbotson then noted the following (Ex 95, 85):

> Michael Adams wants Barnes to conform with his oral evidence and at the very least to say that it was indistinguishable from the PMC propellant database but it is also different to the other propellants analysed by Barnes.

573. Mr Adams said he had a vague recollection of discussions about this topic and of Mr Barnes taking a more cautious approach than the approach he took during the Inquest. However, Mr Adams emphatically maintained that he never attempted to persuade Mr Barnes to say anything that he could not conscientiously say. Mr Adams disagreed with a suggestion that he was 'unhappy' with the wording and did not believe that he would have said he was 'concerned' (Inq 3015). He thought he was likely to have said that it would be 'better for the Crown case' if Mr Barnes was able to 'confirm' his previous evidence but, if not, evidence that the residues were indistinguishable was the 'fall-back position' (Inq 3016). Mr Adams disagreed that he would have said that he wanted Mr Barnes to 'conform' to his earlier evidence. From his perspective it was better for the Crown case if Mr Barnes maintained his earlier position but, 'if not, so be it' (Inq 3016). Pressed on the matter, Mr Adams emphatically denied any attempt to get Mr Barnes to go back to his more strident language and said 'I would never attempt that' (Inq 3017).

574. I unhesitatingly accept the evidence of Mr Adams to which I have referred concerning his approach to Mr Barnes' report and evidence.

575. I also accept the evidence of Mr Adams concerning his approach to the reports and evidence of overseas experts. Both Ms Woodward and Mr Ibbotson made notes of a conference with Mr Barnes on 8 December 1994 (Ex 95, 330–334), which included discussions with Mr Barnes about Dr Zeichner's report. In the context of Mr Barnes expressing concerns on this and other occasions about Dr Zeichner's views, Mr Adams was recorded as discussing with Mr Barnes the possibility of confining Dr Zeichner to a purely chemical question and asking Mr Barnes whether, in such circumstances, he would have any dispute with Dr Zeichner. Ms Woodward said she would have paraphrased the conversation, but her words would accurately reflect the substance of the discussion (Inq 3134).

576. During cross-examination Mr Adams was asked about endeavouring to find a way in which two experts called for the prosecution would not be in conflict. Mr Adams accepted that he would endeavour to do so, but only 'conscientiously' (Inq 2965). Again with emphasis, Mr Adams said he would never attempt to censor anything said by the experts (Inq 3012).

577. Mr Adams did not behave in any manner that was inappropriate. It needs to be noted, however, that the way in which the evidence was led minimised the chances of the overseas experts straying into criticisms of Dr Barnes or expressing their concerns.

578. Similarly, Mr Barnes gave evidence in a way that was designed to convey the impression that he was a careful and conservative expert who had used methods that were well accepted in the scientific community. The jury was not told that profiling of GSR and propellant was a 'novel concept' or that Mr Barnes was 'working on the boundaries of forensic science as it existed at that time' (Ex 195 [133]).

Barnes – Reports and Statements

579. In addition to the extensive undisclosed material to which I have referred, by the end of hearings on 9 April 2014 no records had been produced evidencing the disclosure of the following reports and statements:

- 13 April 1994 (Ex 93, 26) – a letter from Mr Barnes addressed to Mr Ibbotson in which Mr Barnes reported on his visit to Mr Martz in March 1994. Mr Barnes reported that he 'submitted partially burnt propellant' from the Mazda for analysis which is a topic concerned with the provenance of the particle identified as 7J(c). The letter also contained details of Mr Barnes' meetings with Dr Zeichner and Professor Zitrin. Details of the examinations conducted were provided and, significantly, Mr Barnes incorrectly reported that Professor Zitrin acknowledged that identification of propellant could be made on the basis of both the physical and chemical characteristics when taken together.

- 15 November 1994 (Ex 93, 32) – letter from Mr Barnes addressed to Ms Woodward clarifying the meaning of paragraph (d) of Mr Barnes' report of 13 April 1994.

- 7 December 1994 (Ex 93, 33) – letter from Mr Barnes to Ms Woodward commenting upon the reports of Dr Zeichner and Professor Zitrin. This letter contained significant information because Mr Barnes was providing an explanation in respect of issues raised by those experts. In particular, he discussed the 'anomalies' identified by Professor Zitrin and said that they did not exist. Mr Barnes sought to explain those matters Professor Zitrin considered were anomalies. This was the only undisclosed correspondence from Mr Barnes about which Mr Adams was asked and he agreed that, 'on the face of it', the letter should have been disclosed to the defence (Inq 2985). Further, and importantly, Mr Barnes gave a chemical profile for PMC which he described as an 'unusual' compositional profile. However, the profile he provided does not match the PMC profile in the 1993 database for 19 of the 20 PMC varieties across the burnt and unburnt propellants. Mr Barnes exacerbated his error by incorrectly reporting that only PMC flattened ball particles displayed such a profile (Inq 3918).

- 11 May 1995 (Ex 93, 49) – statement by Mr Barnes concerning 'continuity of selected exhibits'. The exhibits under consideration concerned various cartridge cases and spent projectiles.

- 19 May 1995 (Ex 93, 51) – report concerning charred chopped disk particles removed from the boot of the applicant's Mazda and labelled 7J(e). The report dealt with the receipt of the slide and the results of Mr Barnes' examination.

- 19 May 1995 (Ex 93, 52) – report concerning primer residues located on partially burnt flattened ball propellant. Mr Barnes identified various particles that were consistent with PMC, but not with other types of ammunition.

- 22 May 1995 (Ex 93, 53) – statement by Mr Barnes identifying exhibits 'presently' in his custody, together with a list of exhibits in respect of which Mr Barnes was in possession of the 'packaging'. The latter group of exhibits included packaging for 7J(c). Mr Barnes concluded the report with the observation that packaging 'not accounted for in the above reconciliation was destroyed during testing of the relevant exhibits.'

- 9 June 1995 (Ex 93, 66) – statement by Mr Barnes concerning the use of organic component profiling by GC-MS in ammunition identification. Mr Barnes explained the role of organic component profiling and emphasised that the 'unburnt and burnt propellant databases are separate and quite independent'. Mr Barnes identified a six stage approach to the criteria upon which he relied in making a positive identification. Those criteria were materially different from the criteria he used in his report of 19 November 1993 (Ex 93, 14). In addition the report does not mention the "unique" shape retention used by Mr Barnes in evidence at the Inquest and trial.

580. Mr Barnes commented that organic profiling was used in the negative sense of excluding or confirming the exclusion of a particular ammunition type on the basis of the presence of a significant organic compound. He noted that it was not suggested that the organic profiles of any two propellant particles would absolutely 'match' and explained the reasons for that view. Mr Barnes concluded with an explanation of the basis upon which the identification of PMC .22 calibre propellant was made 'to the exclusion of all others available at a given time'. This was a statement containing important information from the point of view of the defence and it should have been disclosed.

581. Mr Ibbotson was at a loss to explain why the reports and statements had not been disclosed. He said that all of the documents should have gone to the defence and it 'beggars belief' that they would not have been handed over. From his perspective the entire prosecution brief should have been provided to the defence and the letters to Mr Barnes of 29 September 1995 (Ex 95, 281) and 21 April 1995 (Ex 95, 512) demonstrate an intention to do so (Inq 3361–3362).

582. During the hearings the DPP produced various records relating to disclosure of the reports and statements of Mr Barnes. They included:

- An index of documents provided to Mr Klees on 22 November 1994 (Ex 13, annexure H);

- A list of 'documents released on database to defence' dated 10 February 1995 (Ex 249); and

- Correspondence with defence produced in response to a subpoena issued to the DPP on 18 October 2013 to produce by 1 November 2013 'all correspondence between the Office of the DPP (ACT) and legal representatives for Mr Eastman or Mr Eastman concerning Robert Barnes, Robin Keeley, Roger Martz, Arie Zeichner, Shmuel Zitrin and/or disclosure or requests for disclosure of the forensic case

work materials and reports of Robert Barnes' (Ex 97).

583. None of the eight reports were recorded as disclosed in those records.

584. On 6 May 1995 the DPP provided a further affidavit of Ms Woodward sworn on 2 May 1995 (Ex 248).

585. The report of 13 April 1994 and the letter of 15 November 1994 were not listed in the index of documents provided to Mr Klees on 22 November 1994 (Ex 13, Annexure H). In her affidavit Ms Woodward stated the report and the letter would have been included within Volumes 43 and 44, the contents of which were not listed in the index of documents. Those two volumes each had their own separate index. Ms Woodward told the Inquiry she had not had a chance to look at the indices to Volumes 43 and 44 (Ex 105 and Ex 106). The indices to those volumes included the report of 13 April 1994, but did not include the one page letter dated 15 November 1994. The latter document was not included in the list of 'documents released on database to Defence' dated 10 February 1995 (Ex 249). Nor was the report of 7 December 1994.

586. Ms Woodward told the Inquiry she has a memory that the defence were provided with a 'brief of evidence' on 13 June 1995. She said she went in to work with Mr Ibbotson on 12 June 1995 to ensure that Mr Terracini had all the material because he had 'only come in on 5 June' (Inqu 4294). She said an index was done on that date, being the document annexed to her affidavit headed 'Brief of Evidence against DHE Table of Contents' and including a reference to '407 BARNES, Robert Collins'. It was handed to the defence team with the documents in that index on 13 June (Inqu 4309). The DPP copy of that volume is exhibit 250.

587. Contained in the index to the volume are the 'Clarification of report 15.11.94', the report of 7 December 1994 and the report of 9 June 1995 (Ex 93, 66).

588. There is no record of the brief of evidence being served on the defence on 13 June 1995. Ms Woodward told the Inquiry that during the trial the prosecution would provide a list of all the exhibits and a copy of the transcript to the defence without recording it (Inq 4308, 4331). She said a record was not kept of handing this brief over to the defence in court (Inq 4308).

589. The only evidence about the disclosure of these three reports is Ms Woodward's memory (Inq 4330):

> I just know that on 13 June another folder was given to the defence team including what I believed was all the reports and relevant material up until that date with an updated index.

590. There is nothing about the index to the red folder which, of itself, indicates disclosure to the defence.

591. The index to the folder did not contain all the reports up until 13 June 1995. It did not contain the reports of 11 May 1995, the two reports of 19 May 1995 or the report of 22 May 1995. Ms Woodward did not know why the reports of 11 May 1995, 19 May 1995 (Ex 93, 51) or 22 May 1995 were not included in the brief (Inq 4315–4316). She offered

an explanation for why the report of 19 May 1995 (Ex 93, 52) was not included in the folder (Mr Barnes had made mistakes about the labelling of exhibits on the report), but said she was reconstructing (Inq 4311–4312).

592. Mr Terracini made no mention on 13 June 1995 of receiving a volume of the material from the prosecution in relation to Mr Barnes. His application for an adjournment was based on coming in to the matter late, having experts arranged on behalf of Mr Eastman and not being in a position to cross-examine Mr Barnes without 'having a fairly extensive briefing with them' (T 1404–1405).

593. In relation to disclosure of the report of 9 June 1995 (Ex 93, 66), Ms Woodward told the Inquiry she remembered sending a fax to the defence on 9 June 1995. In her affidavit she said that (Ex 248, [15]):

> On the afternoon 9 June 1995, we received the final four reports from Mr Barnes, three dated 9 June 1995 and one dated 7 June 1995. That afternoon I faxed four reports to Mr George Hovan to provide to Mr Terracini. I have a very clear recollection of 9 June 1995, and the following days for a number of personal reasons.

594. Ms Woodward said she had not seen a copy of the fax cover sheet and surmised that it may have been misplaced, misfiled or lost in the process of archiving the files. She confirmed her recollection of faxing the four reports to Mr Hovan (Inq 4291). She remembered sending the fax later in the afternoon and described in some detail what her commitments were that evening (Inq 4299).

595. Prior to swearing her affidavit and giving evidence, Ms Woodward had not had the benefit of viewing the faxes from Mr Barnes to the DPP of reports on 9 June 1995. The faxes were not produced by the DPP until 9 May 2014, despite the subpoena to the DPP dated 18 October 2013. There was a record of three reports being faxed from Mr Barnes to the DPP on 9 June 1995 (Ex 260), but one of those reports was not faxed until 7.22 pm. Ms Woodward agreed that she could not have faxed the later report because she had left the office before 7.22 pm (Inq 4300). She accepted that her recollection must be mistaken about the number of reports she faxed to the defence on that day.

596. On 13 May 2014, following the completion of Ms Woodward's evidence, the DPP produced the fax from Ms Woodward dated 9 June 1995. This too was covered by the terms of the subpoena to the DPP dated 18 October 2013. An explanation of oversight was provided for the late production in an affidavit of Mr Keegan Lee sworn on 13 May 2013 (Ex 260).

597. The fax records that on 9 June 1995 Ms Woodward sent to defence a statement of Mr Barnes dated 19 May 1995 (Ex 93, 51), a statement of Mr Barnes dated 9 June 1995 (Ex 93, 66) and Mr Barnes' CV. Ms Woodward's memory is correct in terms of sending a fax to defence containing statements of Mr Barnes, but incorrect as to the documents she sent and how many. That is not surprising given the passage of time.

598. In her affidavit of 2 May 2014 Ms Woodward referred to a collation of reports being served on the defence. She remembered that it was served on 13 June 1995 (Ex 248 [5], [10]). She believed it was in a similar format to the reports in Exhibit 94.

When she gave evidence on 12 May 2013, Ms Woodward corrected this aspect of her affidavit. She believed it was probably not until July 1995 when that collation was provided to the defence (Inq 4283).

599. The collated reports produced by the DPP under subpoena (Ex 94) do not contain the reports of 11 May 1995, the two reports of 19 May 1995, the report of 22 May 1995 or the report of 9 June 1995. On 9 May 2014 the DPP produced the original folder of collated reports which is in a very similar format to Exhibit 94 (Ex 251), but could be an earlier version. It is obviously Mr Ibbotson's working folder. It appears as though the text from some of the reports of Mr Barnes was copied onto this format so that he could have his own comments entered amongst the text. There are examples of those comments in exhibit 94 at pages 14, 17 and 21. When he was shown exhibit 94, Mr Ibbotson said 'I'm sure that went to the defence' (Inq 3370), without looking at the exhibit. Shown through parts of the exhibit, Mr Ibbotson said the document was 'certainly not mine' and was not something that he put together to prepare for the trial (Inq 3373).

600. Ms Woodward agreed that a document in that format would not be disclosed to the defence (Inq 4321). Ultimately, she told the Inquiry she could not vouch for the contents of the collated document provided to the defence (Inqu 4324).

601. In summary:

- There is a record of the disclosure of the reports of 19 May 1995 (Ex 93, 51) and 9 June 1995 (Ex 93, 66) to the defence by fax on 9 June 1995 (Ex 260);

- There is no record of the disclosure of the reports of 15 November 1994 (Ex 93, 32) or 7 December 1994 (Ex 93, 33). The disclosure of these two reports relies upon Ms Woodward's memory that the Brief of Evidence was provided to the defence on 13 June 1995; and

- There is no record of the disclosure of the reports of 11 May 1995, 19 May 1995 (Exhibit 93, 52) or 22 May 1995. Ms Woodward infers that the report of 19 May 1995 was disclosed to defence because, during examination of Mr Barnes at trial, Mr Adams referred Mr Barnes to his 'additional note of 19 May 1995' (T 1442) and there was no comment made by Mr Terracini that he did not have it.

602. I have no doubt that Mr Adams, Mr Ibbotson and Ms Woodward made every effort to comply with their duty of disclosure. They were acutely conscious of their ethical duties and endeavoured to fulfil them. In my view it is highly likely that all of the eight reports were disclosed. There is no positive evidence to the contrary. If doubt exists, it relates only to the reports of 11, 19 and 22 May 1995. Non-disclosure of the report of 11 May 1995 would not be of great moment as it related to the cartridges. Although the one page list of 19 May 1995 shows that Mr Barnes got all of the exhibit numbers mixed up for the Ford, the correct exhibit numbers were used in evidence. The only interesting issue emerging from the report of 22 May 1995 is the destruction of the exhibit packaging during testing. While somewhat unusual, this is not a matter of significance from a disclosure point of view.

Ross – Interim Report

603. Finally with respect to undisclosed material relating to the forensic evidence, the full results of analysis of a partially burnt propellant particle found on the driver's seat of the applicant's Mazda (7E(a)) were not disclosed to defence and misleading evidence was given at trial.

604. In the absence of Mr Barnes on sick leave, and in response to an urgent request from the AFP, Mr Peter Ross undertook an SEM/EDX analysis of the particle. Mr Ross has been employed by Victoria Police as a forensic scientist since 1977 working in the Victorian Laboratory.

605. On 20 November 1992 Mr Ross wrote to Mr Nelipa setting out the results of his examination (annexure 2 to the affidavit of Mr Ross, Ex 189). That letter was not disclosed to the defence and the DPP has advised that the DPP has no record of receiving that correspondence.

606. The letter by Mr Ross should have been disclosed to the defence. In substance it was a report of an examination of a particle from the applicant's vehicle. The failure to disclose would not have been significant if Mr Ross had given evidence in accordance with the contents of the letter, but this did not occur.

607. Mr Ross gave evidence at trial that primer residue was associated with the propellant particle and the majority of the residue contained lead, barium and calcium which was consistent with primer residue from PMC ammunition (T 864). That evidence was in accordance with the first paragraph of the letter of 20 November 1992. It also accords with notes made by Mr Ibbotson of a conference with Mr Ross on an unknown date (annexure 3 to Ex 189).

608. The applicant was unrepresented at the time Mr Ross gave evidence and did not cross-examine him.

609. Absent from the evidence of Mr Ross at trial was any reference to additional primer residue attached to the particle from the Mazda which was inconsistent with PMC ammunition. The relevant observations in the letter were as follows (annexure 2, Ex 189):

> However, there were also a number of other primer residue particles which are <u>very likely</u> to originate from other ammunition as they contained various other elements, including tin and antimony. If so, the primer particles must have originated from previous firings or other ammunition in the firearm in question. Nevertheless, although extremely unlikely, it is not possible to say with absolute certainty that these minority primer residue particles had not originated from the same ammunition as that of the propellant particles. If they had, then the propellant particle with its attendant primer residue particles would not be consistent with PMC .22 calibre ammunition. [emphasis by Mr Ross]

610. Having made those observations, Mr Ross wrote that in order to establish with certainty whether the propellant originated from PMC ammunition, it would be necessary to

undertake a destructive analysis of the entire sample. He added that because of the small size of the particle there was doubt as to whether it was sufficient for such an analysis (annexure 3, Ex 189).

611. The problem created by the absence of any reference in evidence to residue inconsistent with PMC ammunition was exacerbated by the trial evidence of Mr Barnes. He said that based on all the characteristics associated with the particle, it was consistent with PMC (T 1433). Mr Barnes gave evidence that by organic analysis, he was able to exclude certain types of ammunition, but he could not put in place the 'final plank' in his identification which was required before he could say the particle was, in fact, PMC.

612. As to the primer residue on 7E(a), Mr Barnes said (T 1433):

> It had, also, a primer related gunshot residue upon it which was consistent with PMC and not three component, but I could not say, by organic analysis, that it had only had present the components which I know to be present – the principal components of PMC. What I can say, though, is that there was no evidence of any other component which would mean that it was not PMC.

613. The last statement made by Mr Barnes was misleading. There was evidence that some of the primer residue was inconsistent with PMC, but it was evidence contained in Mr Ross' letter of 20 November 1992 about which the defence, and the DPP, were unaware.

614. Bearing in mind that Mr Ibbotson conferred with Mr Ross about his work, it is surprising and unfortunate that Mr Ibbotson was not provided with the letter or told by Mr Ross about the residue inconsistent with PMC. However, there appears to be an explanation in the circumstances that attended the work done by Mr Ross.

615. As mentioned, the analysis undertaken by Mr Ross occurred at the request of the AFP and in the absence of Mr Barnes on sick leave. Mr Ross wrote the letter to Mr Nelipa without clearing it with senior personnel in the laboratory (Inq 3716). From the perspective of Mr Ross, the letter was an interim report, but Mr Barnes became extremely angry when told about the letter (Inq 3716). Subsequently Mr Ross was disciplined for sending the letter to Mr Nelipa without approval.

616. File notes made by Mr Nelipa (part Ex 258) reveal that on 30 November 1992 Mr Gidley requested the return of Mr Ross' letter. The request was made by fax in the following terms:

> Detective Sergeant NELIPA, I believe you received by FAX a letter from Mr P. ROSS of SFSL. This correspondence was issued without normal checking and has since been found to be incorrect. It is therefore not an official, authorised report from this laboratory and I request its return so that an official SFSL Report can be formalized. Any decisions or action regarding ROSS' letter should be suspended until receipt of the official report.

617. Mr Nelipa recorded in his notes that on 30 November 1992 he advised Mr Ninness of the request for the return of the letter and that Mr Ninness directed Mr Ross to return it. Significantly, Mr Nelipa also recorded that on 30 November 1992 he handed 'both copies' of Mr Ross' letter to Mr Barnes.

618. Mr Nelipa recorded that on 1 December 1992 a message was sent by fax to Mr Gidley advising him of the return of the letter (described in the notes as a 'report') to Mr Barnes and requesting an official report in due course.

619. As to an 'official report', there is no record in the AFP notes that the AFP received such a report.

620. In these circumstances it is understandable that the AFP did not advise the DPP of the letter from Mr Ross. However, there is no evidence to support the assertion in Mr Gidley's fax of 30 November 1992 that the letter had been found to be 'incorrect' in any respect. Further, notwithstanding his knowledge of the letter by Mr Ross, Mr Barnes made no mention of the work undertaken by Mr Ross or of his result that some of the primer was inconsistent with PMC. Perhaps Mr Barnes believed that the view expressed by Mr Ross was erroneous, but due to Mr Barnes' ill health there was no opportunity to question him about this issue.

Summary – Undisclosed Material

621. In considering the significance of non-disclosure, it is helpful to obtain an overview in summary form of the material not disclosed.

622. <u>Barnes – Attitude/Objectivity</u>

- 22 July 1992 - Mr Barnes' strong resistance to review.
- Mr McQuillen - Mr Barnes said the experts were going to 'destroy the case'.
- 13 May 1993 – statement by Mr Barnes that replication of his work would require approval by his superiors.
- 11 January 1994 – Mr Keeley's statement to Mr McQuillen that Mr Barnes was 'emotionally involved'.
- 19 January 1994 – conversation between Mr McQuillen and Mr Barnes.
- 16 March 1994 – conversation between Mr Adams and Mr Barnes.
- 8 December 1994 - Mr Barnes' comments concerning Dr Zeichner and his statement that if necessary he would attack Dr Zeichner's credibility.
- 13 December – Mr Barnes' statement that Dr Zeichner must be 'challenged and destroyed' and that 'the Crown must destroy him'.
- 19 December 1994 - Mr Barnes again critical of Dr Zeichner.

623. Barnes – Disciplinary Charges

- Information conveyed to the AFP concerning disciplinary issues and charges against Mr Barnes in connection with his work at the Victorian Laboratory.

624. Statements of Experts

- View expressed by Mr Keeley that Mr Barnes was 'too involved in the crime scene'.

- Views expressed by Mr Keeley, Professor Zitrin and Dr Zeichner that they are 'suspicious of one man doing all the work'.

- Database preparation – involvement of Mr Strobel and purpose for which database was created.

- Database size – the view of Mr Martz that the database was too small.

- Database anomalies – views of Professor Zitrin and response by Mr Barnes which did not satisfy Professor Zitrin.

- Database 'deficiencies' - Mr Barnes' letter to the DPP of 7 October 1994.

- Database technical issues – Mr Barnes' statement to Ms Woodward on 8 November 1994 that one element in some of the compounds in the original database may not be technically correct.

- Database revision/second database – various communications about refining the database or creating a second database.

- 8 December 1994 – conferences with Mr Barnes and Dr Zeichner.

- 9 December 1994 – conference with Professor Zitrin including explanation of 'unusual' results being examples only and Professor Zitrin's explanation of problems with the work of Mr Barnes.

- 9 December 1994 – conference with Dr Zeichner in which he explained the basis upon which he disagreed with Mr Barnes and comments by Dr Zeichner (and Professor Zitrin) that Mr Barnes is an expert in too many areas.

- 10 December 1994 – continuation of conference with Professor Zitrin discussing technical issues and identification of matters which Professor Zitrin said undermined the database.

- 13 and 16 December 1994 – statements by Mr Barnes concerning the overseas experts and the need to destroy Dr Zeichner.

- 19 December 1994 – lengthy conference in which Mr Barnes responded to Dr Zeichner's criticisms; detailed explanation of the databases and methodology; reasons for variations in results; response to Mr Keeley's issues concerning reproducibility and the comprehensiveness of the database; and other topics.

- 15 February 1995 - Professor Zitrin's response to the explanations by Mr Barnes.

- 16 February 1995 - Mr Barnes' response to the issues raised by Professor Zitrin and detailed discussions about the database.

- 16 February 1995 - Professor Zitrin's response to Mr Barnes' explanation.

- 17 February 1995 - Mr Barnes' further response to Professor Zitrin and discussion concerning database.

- May 1995 – discussion with Mr Keeley.

Defence Knowledge

625. It is readily apparent that there was a large amount of 'material' not disclosed to the defence. Some, but not all, of that 'material' became known to the defence through reports and information gleaned from the experts. An analysis demonstrates, however, that significant information which would have directly and indirectly assisted the defence was not disclosed.

626. To assist in the preparation for trial, the defence team obtained advice from a number of independent ballistics experts. This included conferences with Dr Andrasko, Dr Wallace, Dr Walsh and Professor Kobus. Before their instructions were withdrawn, in February 1995 Mr Klees and Mr Jefferies undertook conferences with the prosecution experts (Mr Keeley, Professor Zitrin and Dr Zeichner). These conferences provided the defence with information not disclosed by the DPP. The experts raised a wide array of general concerns relevant to the work of Mr Barnes including:

- An impression from Mr Keeley that he was not particularly impressed by Mr Barnes and certainly would be very strong in the witness box in not agreeing with many of his final conclusions (Ex 95, 451);

- Manufacturers' specifications for propellant were unreliable and could change significantly over time (Keeley Ex 95, 452; Zitrin Ex 95, 463; Kobus Ex 98, 223);

- Propellant particles are highly heterogeneous meaning there is a need to consider the variation of propellant within cartridges (Wallace Ex 98, 7);

- No satisfactory explanation had been provided for only focusing on .22 calibre ammunition in the database (Keeley Ex 95, 452). Dr Andrasko went further to state that this was a false assumption and that nothing in the data excluded any other calibre of ammunition (Ex 199, IR–09);

- There was no evidence as to the extent to which the composition of PMC is reproducible (Zitrin Ex 95, 458; Kobus Ex 98, 223);

- Professor Zitrin informed the defence that his laboratories did not identify propellants using organic analysis (Ex 95, 46); and

- Difficulties in correlating the conclusions reached by Mr Barnes with data to support them such that more information is required in order to make a proper analysis of his work (Kobus Ex 98, 220–225).

627. As stated previously in this Report, Professor Zitrin was the only expert to examine substantially the contents of the database. He discussed the anomalies that he identified in his report at page 4. He informed Mr Klees and Mr Jefferies of the following concerns (Ex 95, 453–473):

    - Upon shooting, the ratio of the compounds are expected to change which could be as much as one or two compounds disappearing so for a database the crucial questions are to what extent is it reproducible so that you can make a sensible comparison to the exhibit in question (Ex 95, 458);

    - Even with a very good database, he would not agree that 'the state of art of this subject' permits one to say that one burnt particle belongs to a specific powder (Ex 95, 460);

    - There is 'a kind of a basic latent hidden assumption all over the database that the manufacturer specification for certain powders are the same', that is, that the compositional nature of propellant is fixed over time (Ex 95, 463);

    - He had not gone through the whole database entry by entry (Ex 95, 467);

    - The anomalies in the database may be capable of explanation, however, one cannot present the database without explaining them (Ex 95, 467-468);
    - There were explanations for the anomalies including memory effect and variations in the manufacturing process but it is for Mr Barnes to explain and if an explanation is not given then it may affect the strength of the conclusion drawn from the data base (Ex 95, 468-469); and

    - He believed that solely on the basis of the unpredictability of smokeless powders it was not possible to positively identify a particular propellant type using organic analysis only (Ex 95, 472).

628. The defence conference with Professor Zitrin on 26 February 1995 took place after the DPP became aware of significant information about the database which was not disclosed to the defence. This undisclosed information would have been of assistance to the defence in their conference with Professor Zitrin.

629. Despite the defence conferences with the experts, there was a large amount of information which could have assisted the defence case of which they were unaware, including the explanations given by Mr Barnes to the DPP on 19 December 1994.

630. As to information received by the DPP from Mr Keeley in May 1995, the following was not disclosed and is not recorded as having been conveyed to the defence in their communications with Mr Keeley:

- In relation to Mr Keeley's report querying the comprehensiveness of the database and absence of centre fire ammunition, Mr Barnes advised that centre fire ammunition is not used by the PMC Corporation and that there is no point in looking at centre fire ammunition because what is in or what was located in Eastman's car is not consistent with centre fire ammunition (Ex 95, 387);

- Mr Keeley told the DPP that when he asked Mr Barnes about why he had focussed on .22 calibre ammunition in the boot, his answer was the FBI had used their complete library and had run it through both .22 and other types of ammunition. He did not ask Mr Barnes to show him. Mr Keeley did not believe it was for him to judge how comprehensive the FBI propellant database was but it was his experience with the States that they had inadequate libraries of percussion primer (Ex 95, 523);

- Mr Keeley was not clear what information Mr Barnes had actually run through the library, whether he ran the results from partially burnt propellant or results from unburnt propellant (Ex 95, 523);

- Mr Keeley was of the view that the material in the boot was consistent with PMC, however, he was:

  > … judging this kind of second hand really I haven't done any of the analysis myself, I haven't developed a feel for the material, I've not even seen it. I am looking at photocopies of somebody's results.
  >
  > … in almost second or a third hand way that I got these feel I wasn't at the scene, I've not seen the material recovered, I've not done any of this I'm really relying on some conversations with Mr Barnes and on his notes.

  (Ex 95, 524 & 528); and

- Mr Keeley's lab did not have a database of propellant and residues. His lab had never taken a case as far as to seek to identify gunshot residue (Ex 95, 525-526):

  > We don't use that operationally in case work. We have the capability of doing the analysis the expertise but nearly all investigations are done via the percussion primer residues, the inorganic particle analysis.

631. The failure of the DPP to disclose the content of the conferences with Dr Zeichner and Mr Barnes resulted in the following information that would have assisted in the cross-examination of Mr Barnes and Dr Zeichner concerning the issue of primer residues and credibility in general not being known to the defence:

(i) The antimony in some of Mr Barnes' test firings of PMC seem to be too much to be explained as coming from the projectile, so the likely source of the relatively large concentration of the antimony in those tests results is contamination from previous firings from 3 element primer. A contaminated gun subsequently interfered with the accuracy of the results of the PMC test firings. Dr Zeichner recommended that Mr Barnes be asked about the percentage of particles in the test firings that contained antimony above the level of concentration one would expect through contamination of the projectile and what were the percentage of those particles that did not have any concentration of antimony at that level or below (Ex 95, 362); (Ex 95,354-362). Mr Barnes told the DPP that he could not absolutely exclude contamination, but believes it is highly unlikely (Ex 95, 380);

(ii) Dr Zeichner had done testing on PMC projectiles and he found that the results were not homogeneous. He stated that this was not reflected in Mr Barnes' results. (Ex 95, 548);

(iii) Dr Zeichner of the opinion that Mr Barnes does not make a rigorous statement and explain the presence of antimony in his report of 19 November 1993, page 3 (Ex 95, 336);

(iv) Dr Zeichner's photo of C2 is not a classical shape of gunshot residue (Ex 95, 338). Looking at one of Mr Barnes' result for C2, one may be confident that antimony is present, but from another result it is questionable (Ex 95, 351). Mr Barnes' spectrum is an enormous contrast to Dr Zeichner's spectrum such that on Mr Barnes' spectrum you can detect it to the limit of its concentration (Ex 95, 363);

(v) Dr Zeichner questioned whether calcium is a marker for PMC. Calcium in the concentrations he discovered may either be a minor component of the ammunition or could have arisen through contamination by way of the manufacturing process (Ex 95, 352-353). Small amounts of calcium cannot be a significant marker for gunshot residues because calcium is a very common element in dust (Ex 95, 401);

(vi) Mr Barnes told the DPP that when he first asked the PMC manufacturer if they used calcium in their primer, he was informed no. He subsequently found that calcium was an additive used as a drying agent in the manufacturing process (Ex 95, 383);

(vii) Dr Zeichner offered explanations to the DPP for the presence of other elements in the various spectra results, for example:

- the presence of a high concentration of silicon in some of the C7 spectra, which is not in PMC, could be contamination with dust;

- one spectra shows a high concentration of chlorine which could come from human sweat (Ex 95, 355); and

- the presence of potassium in one of the spectra could be contamination with dust. (Ex 95, 356).

(viii) Mr Barnes told the DPP that he did not select silicon as a discriminator because it is ubiquitous and is, therefore, not useful (Ex 95, 376);

(ix) Mr Barnes told the DPP that he could not understand why Dr Zeichner cannot agree that a two element particle cannot be considered as unique as primer residue for PMC ammunition (Ex 95, 383);

(x) Mr Barnes expressed opinions about the high level of copper on spectra for stub 2F (Ex 95, 388); and

(xi) Mr Barnes considered there had been a 'significant difficulty' in the analyses/interpretation of results of tests because of the presence of high levels of contamination (background) in respect of barium and lead (Ex 95, 263).

632. Ultimately Professor Zitrin's opinion at trial that the particles located in the Mazda were consistent with PMC was premised on an assumption that the technical work relating to the database was properly performed. Despite advice received from the experts, the defence was not aware of the following information which would have assisted in the cross-examination of Mr Barnes and Professor Zitrin:

(i) The existence of the second database;

(ii) Mr Barnes believed there were deficiencies within the first database which needed to be remedied prior to giving evidence (Ex 95, 300, 302, 306);

(iii) Professor Zitrin had not undertaken a complete review of Mr Barnes' work and it was not correct to say that the unusual results in his report were the only unusual results he had found (Ex 95, 340);

(iv) It was Professor Zitrin's belief that if there were technical anomalies in the database, those results were challengeable and it would undermine Mr Barnes' final opinion (Ex 95, 342);

(v) Professor Zitrin saw two specific problems that could undermine Mr Barnes' work (Ex 95, 344):

> The first is that if Barnes is using organic chemistry in creating possibles and impossibles it reflects upon his competence.
>
> Number 2 was, "Is there an explanation for anomalies." He said that if the defence can demonstrate that Barnes does not understand some basic things we may have a big problem although Barnes is a very good technician. He said his techniques are very good but he wonders whether he asks himself all the questions that he should ask and answer.
>
> He is concerned as to whether is [sic] interpretation is correct.

(vi) Professor Zitrin questioned whether Mr Barnes had asked himself all the questions that he should have asked himself. This included whether DPA was in the result because it had been used as a stabilizer or whether it was present because of shelf life. It also included whether there was consistency with propellant residues from one cartridge to another (Ex 95, 342);

(vii) Professor Zitrin recommended that five questions needed to be put to Mr Barnes (Ex 95, 342);

(viii) Professor Zitrin had the feeling that if Mr Barnes did not find something he would state that it was not there. The fact that you did not see something does not mean that it was not there. You can be 100 per cent reliable when you find a compound, but if you do not find it, it is not conclusive (Ex 95, 345);

(ix) Professor Zitrin suggested three possibilities for the anomaly of finding no EC in the unburnt propellant and then a large quantity in the burnt propellant including technical error (unlikely) and contamination in the sample (likely) (Ex 95, 345);

(x) Professor Zitrin did not know what phenoxazine was in the results and had to look it up. It is an oxidation product of DPA, not a by-product of DPA, but it is very hard to say when it was formed (Ex 95, 347, 368);

(xi) Professor Zitrin saw specific problems with the results of the PMC samples at 72-81 of the database when they were compared with the results from the Mazda (Ex 95, 348);

(xii) Professor Zitrin did not accept Mr Barnes' report of 7 December 1994 as an answer for the 'unusual results' in the database listed in his report (Ex 95, 413);

(xiii) Mr Barnes gave a further explanation for the 'unusual results' in the database (Ex 95, 418);

(xiv) Professor Zitrin did not accept Mr Barnes' further explanation for the 'unusual results' (Ex 95, 418):

> Dr Zitrin responding that if one cannot rely on a manufacturers specifications as to the composition of the propellant due to changes in the production of the propellant by either re working or making additions then this must undermine Mr Barnes ultimate conclusions. Although Mr Barnes has provided an explanation Dr Zitrin believes it leads to a problem with the accuracy of the results in that if propellants in some ammunitions are themselves different and have different compounds and the variations can be random then the reliance one can place on the data base is reduced …
>
> Dr Zitrin agreeing and saying therefore if one is relying on the manufacturers of the ammunition altering the propellant composition during the course of production then again this leads to unreliability with the final conclusions drawn from that database as one cannot rely upon any given composition or a given propellant powder of specific ammunition type.

(xv) Mr Barnes gave the DPP a lengthy and detailed explanation of the methodology for the compilation of the first database which was not disclosed in any of his reports (Ex 95, 421–424).

(xvi) On 24 January 1994, Mr Barnes told the DPP that the numbers for the database chromatograms ID 114, 129 and 130 included in the Index for the overseas experts related to an 'old' database and he had to get the correct identification of those items for the current database (Ex 195, 163, 210).

633. The defence did not speak to Mr Martz and only became aware of the existence of a propellant in the FBI database that matched the profile of PMC during the trial.

634. This information must be considered alongside the statements of Mr Barnes that question his objectivity as well as the incorrect and contradictory nature of the information contained in the reports of Mr Barnes.

635. The failure to disclose information relevant to the forensic evidence must be considered in conjunction with evidence demonstrating Mr Barnes' lack of objectivity and bias, coupled with evidence of case file inadequacies and contradictions to which I now turn.

Barnes – Case File Inadequacies and Delays

636. An issue which has emerged during the Inquiry concerns the accuracy and adequacy of the case file maintained by Mr Barnes. Specific examples are canvassed later in the Report, but difficulties experienced by the DPP in gaining access to complete files require consideration.

637. Soon after he was briefed for the prosecution, Mr Adams made clear that he wanted Mr Barnes' work replicated. He advised Mr Barnes of his view in a conference on 13 May 1993 in the presence of Mr Ibbotson (Ex 95, 17). Mr Barnes said replication would have to be considered by his superiors.

638. On 19 May 1993 Mr Ibbotson wrote to Mr Barnes confirming that Mr Barnes needed approximately eight weeks to reproduce his data in relation to (Ex 95, 24):

1. Methodology of propellant analysis,
2. Methodology of gunshot residue,
3. Toolmark identification of the various cases,
4. Laboratory notes on all propellant testing.

639. The letter also confirmed that three copies of the material were required for supply to the independent expert, the defence and the Crown.

640. On 8 July 1993 Mr Ibbotson told Mr Barnes that Mr Adams was planning to visit Mr Keeley in London in early July 1993. Mr Barnes said the material would be ready by the end of June (Ex 95, 31). This timetable was confirmed on 10 June 1993 and Mr Barnes agreed to make five copies (Ex 95, 32).

641. The end of June passed, as did July. On 3 August 1993 Mr Barnes told Mr Ibbotson he had been in New Zealand giving evidence (Ex 95, 41). On 11 August Mr Barnes said the five copies would be ready by the first week of September (Ex 95, 53). The next day Mr Barnes told Mr Ibbotson he knew the matter was urgent, but he needed until the third week of September because he wanted to finish completely the analysis of a .22 calibre ammunition using a 'new system'.

642. Mr Adams and Mr Ibbotson met Mr Keeley in London on 9 September 1993 without Mr Barnes' material.

643. On 21 October 1993 Mr Barnes arrived at the office of the DPP in Canberra with 'five different bundle of documents' (Ex 95, 68). Mr Barnes explained the database methodology and the examination of various gunshot residue exhibits. Each bundle of documents was discussed. However, by 1 November 1993 the final report was not completed and the material was not in a suitable order for overseas experts to inspect (Ex 95, 76, 80).

644. On 9 and 18 November 1993 Mr Ibbotson sent material from Mr Barnes to the overseas experts (Ex 95, 82, 90). He believed everything they needed was sent except for the original exhibits. Mr Ibbotson listed the material as follows:

> The material being forwarded has been divided as follows:-
>
> (a) report from Robert Colin Barnes dated November 1993;
>
> (b) Mr Barnes' notes made at the scene of the crime and at the suspect's vehicle together with gunshot residue analysis dealing with sub-microscopic particles located in the suspect vehicle passenger compartment and analysis of similar particles found at the scene;
>
> (c) analysis of partially burnt propellant located, at the scene and in the suspect's vehicle;
>
> (d) analysis of different types of .22 calibre ammunition (including PMC) in relation to propellant. Analysis of charred particles recovered from the victim's hair, victim's vehicle and the suspect's vehicle;
>
> (e) cartridge case and toolmark identification, cartridge case comparison. Projectile comparison.
>
> We have been advised that that material is to be reviewed by you. You will subsequently provide an interim report.

645. Mr Ibbotson said he would have discussed with Mr Barnes details of the material needed by the overseas experts. In a conference on 16 March 1994, Mr Ibbotson said he had been assured by Mr Barnes that because of their scientific background the experts would understand the material and be able to follow it in accordance with his statement. However, the opposite occurred.

646. On 13 January 1994 Ms Woodward reported to Mr Adams information from Mr Ibbotson that the experts were experiencing difficulty with 'linking up the photographs and material with what Barnes did'. On 16 March 1994 Mr Ibbotson told Mr Adams of both deficiencies in the material and his embarrassment (Ex 95, 217–218):

> Barnes had made a critical remark during the telephone conversation that Adams and Ibbotson had visited the various experts and had done nothing. It was noted the reason that had occurred is that when Barnes had delivered the material, that is his working notes etc that had originally had been forwarded to the experts, and when JI had travelled overseas it was found that those notes were inaccurate, that was due to various data being in the wrong area, secondly that certain data had not been copied therefore the material was incomplete and lastly that there was no index or no way in which the experts could determine what items in the data represented what items in the report from Barnes. In other words there was no cross-referencing of exhibits in the report to exhibits in the material.
>
> John Ibbotson noted that he had felt quite embarrassed about this when he was in England and Israel visiting the experts as he had been assured by Barnes that the experts, because of their scientific background would understand the material and be able to follow it in accordance with his statement.
>
> Jl advising that when he returned from overseas and spoke to Barnes, Barnes had admitted that somebody else had done the copying for him and that he had not checked it and as a result it would have given inaccurate information and secondly he agreed there was no cross-referencing between his statement and the material, hence no expert would have been able to operate on it. Accordingly, JI had to go through both volumes of material with Barnes to correct it, to index it and then to send further copies to the experts prior to Barnes travelling overseas.
>
> It should also be noted that Barnes was fully aware that his work was going to be independently assessed when we had a meeting very early in May 1993 between Michael Adams, John Ibbotson, Tom McQuillen and Mr Gidley and Barnes at the Forensic Science Centre in Victoria.

647. Although Mr Ibbotson had no memory of any of these events, it appears from notes made by Mr Ibbotson that the process of going through the material occurred on 12 January 1994 (Ex 95, 128–132)).

648. Mr Ibbotson sent what he believed was a complete copy of Mr Barnes' material to the overseas experts on 18 February 1994 (Ex 95, 192–197). He believed Mr Barnes had provided the entire case work file, including graphs etc. However, as late as 21 April 1995 the DPP was still chasing a final statement about the sequence of events relating to Mr Barnes' work on exhibits (Ex 95, 512–514). Mr Ibbotson speculated in evidence whether he and others were hoping such a statement would gather up loose ends and additional information into a convenient form for use by the DPP and disclosure to the defence (Inq 3367).

649. As to data supporting Mr Barnes' evidence, Mr Ibbotson was responsible for ensuring that the chain of evidence was fully and conclusively established. He obtained the data from Mr Barnes and 'drilled down' to 'the bottom' of the case work file to ensure everything was in order (Inq 3369).

650. In addition to delays and difficulties with respect to materials to be sent overseas, for nearly two years prior to the commencement of the trial in May 1995 the prosecution experienced significant difficulty in obtaining reports and other materials from Mr Barnes. There are numerous entries in file notes and a volume of correspondence with Mr Barnes which demonstrate that Mr Barnes was constantly failing to meet timelines which were set by him or to which he agreed. The letters from the DPP to Mr Barnes of 24 August 1994 (Ex 95, 274) and 21 April 1995 (Ex 95, 512) are examples of correspondence that provide a picture of the delays and difficulties being experienced

by the prosecution as a consequence of the delays by Mr Barnes. The delays were such that they prompted Mr Ibbotson to say in evidence to the Inquiry that the only occasion on which Mr Barnes was on time was the giving of evidence in court (Inq 3362).

651. The failure to disclose various materials, and the lack of knowledge possessed by the defence concerning the delays by Mr Barnes and the inadequacies in his case work file, are to be considered in conjunction with the nature and extent of inadequacies in the case work file and with aspects of Mr Barnes' work in respect of which there is a question as to reliability. This includes the databases, absence of chromatograms to support opinions and doubts about the provenance of particular exhibits. I now turn to those issues.

Forensic Procedures Development

652. In considering issues concerning the adequacy of records kept by Mr Barnes it is necessary to have regard to forensic practices in the period 1989 – 1995. In some respects practices were different from the standards of practice today.

653. Having been employed in the Victorian Laboratory since 1977, Mr Ross is very familiar with the practices and procedures of the laboratory and the developments in those areas. Mr Ross was a loquacious but impressive witness, and despite his poor relationship with Mr Barnes, I accept his evidence as both truthful and reliable.

654. Developments in the field of forensic science gained momentum in the late 1980s and early 1990s as a result of the Splatt Royal Commission and the Chamberlain case. The developments eventually included the establishment of an accreditation process for Australian forensic science laboratories. However, Mr Ross explained that during the time Mr Barnes was employed at the laboratory, scientists were expected to maintain case files. In his affidavit Mr Ross described what was expected with regards to case files in the following terms (Ex 189, 12 [77]):

> Case files during the time Robert Barnes was employed at SFSL were expected to include handwritten and electronic documentation of the examinations; relevant photographs; hard copy print outs of instrumental data; results of testing; statements and oblique or other reports issued in the matter; and receipts, labels or handwritten records of evidence continuity.

655. In his evidence, Mr Ross confirmed that scientists were expected to make detailed notes of the receipt of items; descriptions; activities undertaken; and interpretations. Photographs taken with the aid of a microscope and printouts generated during SEM and GC-MSD analyses should have been kept in the file (Inq 3712–3714).

656. Mr Ross also explained that during the period Mr Barnes was employed at the laboratory, a process of peer review was in place (Inq 3715). Although more formalised policies came into existence with the move to accreditation, nevertheless, during the period of Mr Barnes' employment the laboratory policy required that all statements be verified before release. Mr Ross pointed out that the nature and extent of the peer review depended upon the person conducting it. Some just read the document and approved of the way it was worded. Others would ensure that the records in the case file supported the conclusions reached by the scientist (Inq 3709–3710.

657. In evidence Mr Ross explained that the managerial hierarchy did not determine who could or should conduct peer review. At times Mr Ross reviewed the work of scientists who were senior to him in their managerial roles. However, there was no occasion when Mr Ross reviewed the work of Mr Barnes and he was not aware of what practice Mr Barnes followed in this regard (Inq 3715).

658. In addition to the direct evidence from Mr Ross of the practices within the Victorian Laboratory, Professor Robertson gave evidence about forensic practices in the late 1980s and the development of improved practices and accreditation procedures during the 1990s. He explained that in the 1980s it was common practice for individual examiners to maintain their own files of work carried out and it was not until the 1990s that formalised processes were developed for the creation and maintenance of single case files. This development took place under the auspices of a group of senior managers from laboratories and police providers of forensic services across the country. Specialist advisory groups were established and guidelines were developed. Accreditation procedures for forensic services and laboratories were also developed (Inq 2304–2308).

659. As I have said, the procedures followed by Mr Barnes in 1989 and the early 1990s need to be assessed in the context of the practices and procedures that existed during those years. It is not surprising that Mr Barnes would have maintained an individual file for his work, but even in the 1980s individual forensic scientists and examiners were expected to keep full and accurate records of work undertaken. Such records should have included printouts of results of analyses. The proper maintenance of records was required to enable another scientist to review the work undertaken and conclusions reached for the purpose of court proceedings (Inq 2329–2330).

660. Professor Robertson agreed that in the 1980s and 1990s it was expected that forensic scientists would maintain records in respect of the proper chain of custody and continuity of exhibits. It was not an acceptable practice to remove case files for protracted periods, although a file might be taken home for overnight if the author was working on a report. As to the removal of exhibits from the laboratory to the home of the examiner or scientist, Professor Robertson said such a practice was 'not acceptable'. In Professor Robertson's view, the developments in the 1990s to which I have referred did not affect the principles governing the keeping of appropriate records, the chain of custody of exhibits and the safe handling of exhibits (Inq 2331–2332).

661. Professor Kobus gave similar evidence about the development of a more 'holistic approach' to case file management during the late 1980s and through into the 1990s (Inq 3163). He confirmed that standard practice in all laboratories required scientists to keep proper records of the receipt and movement of exhibits and what was done with exhibits, including tests and examinations. Results of examinations, including graphs such as chromatograms, should have been recorded and kept with the file (Inq 3163–3165).

662. As a result of the Splatt Royal Commission and the Chamberlain case in particular, forensic science had come under the spotlight in the 1980s and resulted in discussions

within the forensic science community. Developments and improvements already underway were given more impetus. Throughout, the independence of forensic scientists was considered critical and it was expected in the 1980s and through to the 1990s that scientists should tread carefully in reaching conclusions. Hence the quality management control process of peer review (Inq 3166). From the perspective of Professor Kobus, peer review is an important part of the process and helps to ensure that there is a defendable system in place. If he was aware of strong resistance by a scientist to peer review, that would be a matter of concern to him and he would arrange for counselling of the scientist (Inq 3298).

663. During cross-examination Professor Kobus agreed that ever since he started working in forensics proper scientific methods required that scientists keep accurate records of the work they undertake and the results, together with records of their interpretations of the results. Whatever developments might have taken place in recent years, it has always been the expectation of scientists that they would keep proper records (Inq 3292). It has always been part of normal routine for scientists to expect and accept that someone else might wish to check the work. Scientists must be able to identify the work carried out, the opinions reached and the bases for those opinions. Professor Kobus agreed it is 'completely unsatisfactory' for a scientist not to keep and maintain such records and that a failure in this regard would demonstrate 'a fundamental flaw for scientific method' (Inq 3293). He agreed with the proposition that the passage of 20 years 'should not make a jot of difference' to the records required in a forensic case.

664. In that context, Professor Kobus said he was not able to access what he regarded as a properly maintained scientific file in this matter. He received material of a 'mixed nature' (Inq 3293). The unsatisfactory nature of the records included the absence of photographs, particularly in respect of opinions concerning the morphology of particles and as a means of demonstrating a basis for the opinion expressed by Mr Barnes that PMC ammunition retains its morphology under firing better than other types of ammunition. Similar views were expressed by Dr Wallace (Inq 1675).

665. Speaking generally, in evidence Mr Barnes acknowledged the importance of the case file and of maintaining proper records within the case file. As the reporting officer within the Victorian Laboratory, it was his responsibility alone to maintain the case file (Inq 3824). The case file should have contained Mr Barnes' notes; SEM spectra; GC-MSD data; statements or reports; record of work done to test propositions made in reports; information about the database; relevant photographs; hard copy printouts of instrumental data; results of testing; and receipts of case exhibits with records of evidence continuity (Inq 3824, 3825). Mr Barnes said he believed he complied with all of those requirements.

666. In examination Mr Barnes was asked about the evidence of Professor Kobus concerning the absence of a coordinated and integrated case file and he offered the excuse of the 'tyranny of distance' (Inq 3790, 3791):

> Q ... What do you say about that?
>
> A What I say is that with the benefit of hindsight the case file could have been better but by the very nature of this investigation it was really difficult for me to actually take control of

the examinations and that was to a degree exacerbated because I felt that there was a – and I understandably say, your Honour, and I think this is I think just a statement of fact, a degree of tension between the Australian Federal Police senior forensic people – what's his name? I can't remember his name.

Q Professor Robertson?

A Yes. And me or the Victoria Police, because he had recently been appointed and no doubt was growing in excellence the AFP forensic laboratories and in a sense this investigation was taken out of his hands, your Honour. So, I think that was a confounding factor which meant that sometimes exhibits were held back, not all exhibits were provided, and I'm unable to say whether all information was provided but in terms of the specific investigation I felt that the Federal Police communicated with me and told me what was happening but as to when vacummings – items were identified and that sort of thing, I have no knowledge. They just magically popped up, as it were.

Q What was the problem with that?

A What was the problem with that, your Honour?

Q Yes. What was the problem with them popping up?

A Well, under a normal investigative scenario that I would be involved in if it happened in Victoria we would have had oversight of that. The Crime Scene Office would have been working effectively hand in glove with me. We would search the debris together, we would literally progress the case together simply because I could say to him, your Honour, 'I've found this. This is unusual' and he would say, 'Well, actually, I've been looking through this material and I've seen other things that look like this. You should look in there.'

Q Why did that cause a problem with your case file?

A Well because the case file was being maintained over a long period of time, it was being done in an ad hoc way, your Honour.

Q But why would that be? All you had to do was receive the exhibit – the particles, whatever they were – carry out the tests you'd been asked to carry out, write the receipt of the exhibit, write the tests, write up the results and your interpretation, pass that on. What was the problem with maintaining the case file in those circumstances.

A Well, in that context you're putting, none really. I think that's what I did, your Honour.

667. In subsequent evidence Mr Barnes was asked whether he had any doubt that he complied with all the requirements with respect to the case file and he returned to the topic of the prolonged nature of the investigation and the 'tyranny of distance' (Inq 3825):

Q Do you have any doubt about that?

A No. It's just that this case was extremely prolonged and, and I said earlier today, I was in a different location to the Major – to the client if you wish, the Federal Police and the normal interactions which would have occurred had we been together couldn't occur?

Q The fact that it's extremely prolonged doesn't affect your maintenance of a case file though does it?

A No.

Q In fact it might make it more important mightn't it?

A Yes.

Q If it's very prolonged it's more important to keep accurate records.

A That's correct.

Q And being in a different location didn't affect your maintaining your own case file.

A It just made it more difficult, I suppose.

Q How?

A Well, in the sense that I wasn't able to speak, for example, to Sergeant Nelipa face-to-face on a daily basis about what he was doing, what he meant by a particular note, or exactly where he'd found a particular item, those sorts of issues, that's his right.

Q But if you therefore had to do that on the telephone, did you make notes of those telephone conversations that you had had to get that information.

A Well it didn't happen. As a general statement I don't believe that Sergeant Nelipa communicated very often with me at all. It was generally in the form of items being conveyed down to me and a request for examination.

Q And that doesn't affect, in any way, you maintaining the case file we've described.

A No.

Q So, there was nothing about this case preventing you from maintaining a proper case file.

A That's correct.

Q And you say that you did maintain a proper case file.

A I maintained a proper case file.

668. That line of questioning resulted from Mr Mr Barnes' answer in which he returned to the issues of distance and time. Again under further questioning that qualification proved to be lacking in substance.This was not an uncommon experience in the evidence of Mr Barnes. Frequently his attempts to qualify answers were shown by subsequent questioning to be without substance.

669. Allowance must be made for the fact that Mr Barnes was endeavouring to recall events that occurred many years ago and was proffering possible explanations in the absence of a specific memory. However, Mr Barnes was being asked why the case file was inadequate, and resorting twice to the problem of distance and length of investigation was an unimpressive attempt to explain inadequacies in a scientific file.

670. As mentioned, speaking generally Mr Barnes acknowledged the importance of the case file. However, when confronted with notes made by Mr Ross during his audit of Mr Barnes' files identifying problems associated with the files, including a failure to record the basis of an opinion, not only did Mr Barnes take the opportunity to again attack Mr Ross, he said that if Mr Ross had 'bothered' to talk to him and they had sat down and done a peer review, Mr Ross would have asked those questions and Mr Barnes would have given him the answers. Asked if the situation was that he could not comment unless he could see the actual file, Mr Barnes gave the following response (Inq 3939):

> If I can answer in two parts. What he's saying is that it is spelt out but it's is not clearly elicited from his perspective. We're not automated. We all don't write the same way, your Honour, and what I say is the way I present information may not be clear to Mr Ross or Mr Strobel or Mr Kobus however that can be explained.

671. Not surprisingly, the suggestion by Mr Barnes that his notes were adequate because he could explain the basis of the opinion, even though it was not clearly stated in the file, led to questions about the purpose of the case file. As occurred on many occasions

throughout Mr Barnes' evidence, he avoided giving a direct answer because it did not suit the purpose of his evidence (Inq 3939–3941):

Q Mr Barnes, isn't the point of keeping a case file to ensure that it is clear to someone, a scientist when they're looking at the review of your file? Isn't that the whole point?

A I think, your Honour, that's a broader issue. The case file is kept to keep a record of what was examined, what tests were done and ultimately provide the basis for evidence which ...

Q What do you mean It's a broader issue? The question that's being put to you by counsel isn't – isn't it the whole purpose of a case file that another scientist can pick it up, look at it, see what you've done, see the tests you've done, and see the basis of which you've arrived at your opinion without having to have any explanation from you? Isn't that the whole purpose of the case file, is the question that's being put to you.

A Well, it's one view, your Honour, and ...

Q Why is it only one view? Do you have a different view of the case file?

A Because science – yes. Science is, by generalisation, work by talking, by discussion of technical issues because technical results can be subject to expert opinion and interpretation, and therefore in order to understand why I have said something, or why Mr Ross has said something, one sometimes has to as a scientist, say, well, on what basis did you arrive at that? ... (indistinct)

Q But Mr Barnes, isn't that the whole purpose of a case file, to enable another scientist to pick it up and understand what you did and understand the basis on which you arrived at your opinion. Isn't that the whole purpose - one of the purposes, and an important purpose, of the case file?

A Yes, it is one of the purposes your Honour, in brief ...

Q Well, in this instance, do you say that in making your case files you complied with that purpose? In other words, that there was enough in your case files for a scientist to understand what you did and the basis upon which you arrived at your opinion? Or, as you've already suggested to me, does it need you to be able to discuss it with a scientist in order for a scientist to understand it? Can't have it both ways Mr Barnes?

A I understand, your Honour. What I say in relation specifically ...

Q No, we're talking generally.

A OK.

Q You can't have it both ways.

A Right.

Q On the one hand you've said to me, 'If Mr Ross had spoken to me, he might well have understood the basis of it'. On the other hand, there is the purpose of the case file that a scientist should be able to understand it from the case file without talking to you. Now, which is it.

A Mr Ross has said ... ?

Q No, forget about Mr Ross. We are talking generally. Which is it?

A I believe there's a requirement for some communication between the scientists involved.

Q So you do not agree with the proposition that the case file should be self-explanatory to the point where another scientist picking it up can understand what you did and the basis of your opinion.

A No, that's not what I'm saying.

Q Well, that's what I just gave you the options, the two options, and you said that the scientist would have to talk to you. Now, do you or do you not agree, Mr Barnes, that a case file

should be self-contained to the extent that another scientist, properly qualified, could pick up your case file and not only see what you did but understand the basis of your opinion.

A As a generalisation, I agree with what you put to me.

Q And do you say that case files you were responsible for complied with that.

A Yes I do.

672. Mr Barnes is a very intelligent person. He understood the context in which he was being asked questions about the case file requirements, namely, the audit demonstrating inadequacies in the file and the particular issue of the file being self-explanatory as to the basis of an opinion. No problem of faded memory was involved. Mr Barnes avoided answering the question because he knew that the audit of his files disclosed this particular inadequacy, among many. This was not the only occasion on which the evidence of Mr Barnes was lacking in credibility.

673. Mr Barnes left the Victorian Laboratory and moved to AGAL on 5 November 1993 (Inq 3778).

674. He said he believed he took the entire case file with him, but the laboratory would have retained records of all analyses. Mr Barnes said he obtained the permission of the Director of the laboratory, Mr Gidley, to retain possession of the file. When he left he was 'signed off' by persons at different levels within the laboratory from the Director downwards. Mr Barnes acknowledged that normally a scientist moving from one laboratory to another would not retain possession of the case file, but as was often the situation with Mr Barnes' evidence, it took a number of questions to extract that acknowledgement (Inq 3826, 3827).

675. Mr Barnes said that when he moved to AGAL he kept the case file at AGAL and was the only person responsible for maintaining the file. He maintained the file in accordance with the practice described (Inq 3828). He was aware of the importance of the case file as the case was still evolving and he was receiving requests for examinations or further work. Mr Barnes appreciated that the case file was important because it contained the notes and data to back up the opinions he would be expressing at the trial (Inq 3828). When he left AGAL on 5 May 1995 he retained possession of the case file and took it with him to Canberra for the trial. According to Mr Barnes, the file was 'quite ordered and orderly' and, in the lead-up to the trial, he spent 'significant time' with the DPP making sure the file was in order (Inq 3831).

676. Mr Barnes said he was not asked at trial to produce his case file. At the conclusion of his evidence, he took the file home and stored it in a secure area. He appreciated the importance of maintaining the integrity of the file in the event that an appeal was instituted. The file was kept in a locked room in his house, which was the same premises in respect of which a search warrant was executed on 25 January 1996. Mr Barnes said he had no occasion to deal with the case file between returning from the trial and the execution of the search warrant. From his perspective, the file was in the same state as it was at the time he stored it (Inq 3829–3831).

677. In his affidavit Mr Barnes said that when police executed the search warrant at his premises on 25 January 1996 they did not seek his guidance about ensuring that the documents seized were maintained in a particular condition or sequence. It appeared to him that they were seized 'in an ad hoc manner and were put in bags without any system' (Ex 195 [27]). As to the return of the documents 'some months later', Mr Barnes gave the following description:

> 28 ... As best I can recollect, I was provided with several brown paper bags with documents and other items, including those from the Winchester case. The documents and items were not returned in the same manner in which they were stored in my possession. I believe that not all documents and items had been returned, but it was difficult to tell what had and had not been returned. I enquired with the Victoria Police about this, but nothing further was returned. I cannot say which documents relevant to the Winchester case had been retained and which returned. …
>
> 30 ... I did not reorganise the Winchester material that was returned to me after that time. Any semblance of coherency was lost after the warrant was executed. All my files have been moved, archived and otherwise dealt with numerous times. I consider it highly likely that at least some documents relevant to the Winchester case have been misplaced over the intervening decades.

678. In his evidence, Mr Barnes was scathing of the police conduct during the course of the search of his premises. He repeated that the process was designed to intimidate him. He said that there was a 'huge number' of police officers doing 'all sorts of things', including allowing 'sniffer dogs to run through the house' (Inq 3927). Mr Barnes asserted that his offer to provide guidance was rejected and he disputed the description of an orderly and thorough search given by Inspector William Willis, the officer who obtained the search warrant. He said there were people searching all over the premises at the same time and the search was not sequential.

679. Bearing in mind evidence discussed later concerning the failure of Mr Barnes to maintain appropriate records and follow recognised procedures, in an interesting critique of police methodology, Mr Barnes volunteered in evidence that if he had been running the search he would have done it in a 'very disciplined and clinical manner' (Inq 3928). Without knowing the state of the evidence as to how seized items came to be locked in the crime scene section of the Victorian Laboratory, Mr Barnes also volunteered that there was 'no evidence of continuity' in respect of the seized documents and this was 'another example of things going into the Victoria Police black box and then things materialising at the other end' (Inq 3929). Obviously without thinking about his own situation, Mr Barnes accepted that a lack of continuity can create doubt about the reliability of documents and this was why, in scientific laboratories, there are procedures to assure continuity.

680. The attention of Mr Barnes was drawn to the audit undertaken by Dr. Thatcher and the inventory he prepared of the contents of each bag of seized material. Mr Barnes was quick to point out that Dr. Thatcher recorded that 'most bags were sealed with staples' saying 'here we have evidence that bags weren't sealed' (Inq 3930). He repeated that he did not see any bags sealed during the process of the search. Referring to the notes of documents taken from numbered shelves in the shed, Mr Barnes did not accept that the records conveyed an 'orderly appearance' and volunteered that if the scene had been properly searched, the officers involved would have produced a plan showing

precisely where they located the materials. He said the records were 'sign of very poor procedures and search practice' and also a sign of 'very poor management of exhibits and failure to properly document and record them' (Inq 3930). To simply record 'top shelf' was not, in the opinion of Dr. Barnes, good enough. Asked why simply recording 'top shelf' was not good enough, Mr Barnes replied that he was not sure what room or part of the building from which the material was taken was identified.

681. It is understandable that Mr Barnes wanted to defend his work and his reputation. For whatever reason, Mr Barnes was, and remains, unable to accept that any valid reason existed for the issuing of a search warrant and the conduct of the audit. However, the evidence to which I have referred, and in particular the evidence that Mr Barnes chose to volunteer, was demonstrative of Mr Barnes' significant ego. He displayed a touch of arrogance. These traits were recognised by members of the prosecution team who dealt extensively with Mr Barnes. In these and other sections of evidence Mr Barnes also displayed a strong tendency to argue his case and debate with Counsel, a feature to which Mr Dee referred. These passages of evidence were far from isolated occasions on which Mr Barnes displayed these characteristics.

682. Throughout his evidence Mr Barnes demonstrated a willingness to create or reconstruct explanations and to denigrate other persons without any basis for doing so. He was obsessed with attacking the character of Mr Ross and about the motivations of those who obtained and executed the search warrant. He challenged the integrity of Mr Gidley. During questioning as to why he did not examine a large brief case of material returned to him to ensure that everything had been returned, in addition to explaining that he was 'traumatised' and simply wanted to take his material and get out of police premises, as was his regular practice in evidence Mr Barnes embarked upon a lengthy attack against Victoria Police which included an assertion that police deliberately timed the execution of the search warrant to coincide with his son's third birthday (Inq 3934, 3935).

683. In connection with the evidence concerning the search warrant, Mr Barnes' attention was drawn to a letter he wrote to the Deputy Commissioner of Police on 29 January 1996 concerning the warrant. At the time the letter was tendered, Mr Barnes volunteered the following (Inq 3935, 3936):

> ... and I might add, your Honour and you'll see in sub-part B [of the letter] – that I was never told why they were executing a warrant. I said to Willis 'May I see the warrant?' and he held it up in front of me, and I said, 'May I look at it?' and he said 'No, you can't hold it'. And he folded it up and put it back in his pocket.
>
> Q Didn't they give you a copy of the warrant?
>
> A No, they did not, your Honour. The whole process was intended to intimidate me.

684. It was plain in the evidence volunteered by Mr Barnes that he was saying that he did not have an opportunity to read the warrant. However, there were details of the warrant reference contained in the first paragraph of Mr Barnes' letter. He was asked the obvious question as to how he knew the details in the first paragraph. Mr Barnes constructed an explanation that he read the warrant when it was held up; he knew it

had to be executed under the *Crimes Act*; and Mr Willis said 'It's reference 61 (95)' (Inq 3936).

685. Mr Barnes said in evidence that he did not check the documents returned to him and he simply stored them. In his affidavit Mr Barnes said he has produced to this Inquiry those documents he now has in his possession and, after reviewing the documents in the preparation of his affidavit, he is 'absolutely certain' that relevant case work documentation is missing (Ex 195 [32]). Mr Barnes maintained that it has always been his practice to retain the spectra and other relevant documents, and it appears to him that key documents are missing, such as GC-MSD records, note books and diaries.

686. In the context of documents being lost or misplaced, Mr Barnes acknowledged that he signed for the return of documents, but he did not go through the boxes of material before signing. He said the atmosphere was not conducive to him going through the documents. He was not happy about the events and believed that the search warrant was 'fatuous and unnecessary' (Inq 3832). He believed (and still believes) that the execution of the search warrant was intended by Victoria Police to intimidate him (Inq 3832).

687. As to the possibility that the documents were misplaced or lost while in the possession of Victoria Police, in his affidavit of 21 February 2014 (Ex 194) Mr Willis said officers who attended with him to execute the warrant were 'very thorough' and examined each file and document seized. Each item was logged and kept with items found in the same location. Paper bags were used and stapled closed with labels identifying the location from which the contents were taken. The log was later converted to a typewritten record. Collectively, all the items seized filled the rear of a police station wagon.

688. Mr Willis explained that seized items were taken to Broadmeadows Magistrates Court where they were viewed by a Magistrate who directed that they be retained by police until required in court. They were then taken to the Victorian Laboratory where they were stored in a locked examination room. Subsequently they were given to the late Dr Peter Thatcher for processing into the evidence tracking area. Eventually the items were archived if they were not required. The process was handled by Dr Thatcher who compiled a comprehensive report regarding the seized material.

689. At the time of seizure Victoria Police used an exhibit management and tracking system which was later decommissioned. The information was transferred into a Sequel Server database with Trackdown Evidence as the operating system.

690. The records to which Mr Willis referred in his affidavit are annexures to that affidavit.

691. In oral evidence Mr Willis denied any knowledge that the warrant was executed on a child's birthday (Inq 4412). I accept his evidence. I also accept his evidence that he either showed the warrant to Mr Barnes and allowed him to read it, or gave Mr Barnes a copy. Execution of the warrant was delayed while Mr Barnes spoke by telephone with his solicitor.

692. Mr Willis said the search was conducted methodically, room by room. An exhibits officer recorded the material seized and seized items were placed in bags which were stapled closed (Inq 4114–4115). I accept the evidence. Mr Barnes was emotionally involved. His perceptions of events, and his current memory, are not reliable.

693. A second aspect associated with the case file concerns exhibits in possession of Mr Barnes when he transferred from the Victorian Laboratory to AGAL. Mr Barnes said he had permission from Mr Gidley to take the exhibits with him, but as the exhibits were signed out of the storage area of the laboratory to the care of Mr Barnes, no record was made of him removing exhibits from that laboratory to another place. There was no record of what he took to AGAL. Mr Barnes was asked why there was no record and gave the following evidence (Inq 3819):

> Q Why not?
>
> A Because the Director of the laboratory – I had his approval.
>
> Q Was that approval in writing?
>
> A No, it was not.
>
> Q So you and the Director together decided that it was Okay for you to remove exhibits in an ongoing matter from the Victorian Laboratory to AGAL without making a record of it?
>
> A That's correct.
>
> Q Nothing in writing at all?
>
> A That is correct.
>
> Q Is that good scientific procedure Mr Barnes?
>
> A In hindsight, of course not.
>
> Q Why only in hindsight?
>
> A Well, I can't do anything about it now, your Honour, but when I look back ...
>
> Q But why in hindsight, Mr Barnes? One of the important things in the laboratories, even back in the 80s, or before then, was proper record keeping of what was happening with exhibits, continuity of exhibits, chain of evidence. Why in hindsight? You were a man of great experience, as you've told me today, in dealing with exhibits, preserving scene, for example. All of these details were important and you knew it and your Director knew it. Why then on this occasion was there no record made?
>
> A I can't answer that, your Honour. All that I can say is the exhibits were taken from the police laboratory to AGAL, where the work continued.

694. Mr Gidley resides overseas. After initial contact, Counsel Assisting was unable to contact Mr Gidley, despite leaving messages for him. It is obvious that Mr Gidley did not wish to make himself available to be interviewed for the purpose of this Inquiry.

695. Mr Barnes said that if something had happened to him, the exhibits were stored at AGAL. However, no record was made of the exhibits arriving at AGAL or where they were stored. Exhibits were stored in the laboratory, but he did not make a note of that fact (Inq 3819–3820).

Audit

696. The evidence concerning inadequacies in the Winchester case file is to be considered in the light of evidence concerning Mr Barnes' conduct with respect to other files and his disregard of practices and procedures within the Victorian Laboratory. As mentioned, a search warrant was executed at the home of Mr Barnes and a large number of files and other materials were seized. Without being asked, in evidence Mr Barnes volunteered his belief that the execution of the search warrant was intended by Victoria Police to intimidate him. Counsel responded by putting to Mr Barnes that 113 files from the Victorian Laboratory had been found on his premises. He replied that he was not sure how many had been found and whether all related to Victoria Police matters. Mr Barnes was then asked why so many files were at his premises in 1996, some three years after he left the Victorian Laboratory (Inq 3832–3834):

Q How is it that you had 113 case files on your premises from the Victoria Police in 1996? ...

A Because many of them related to gunshot suicides which were potentially likely to come up as coronial matters in the immediate time after I left the laboratory, and it was agreed between Mr Gidley and myself that rather than have me shoving backwards and forwards across Melbourne every time one of these matters occurred I would keep the files until such time as everything was finished, and then by agreement I'd return the files.

Q Did you return the files?

A Well, I never got a chance to.

Q And why is that?

A Because they raided my house.

Q Well, if you left the lab in 1993 ... ?

A Yes.

Q They didn't raid your house until January of 1996?

A That's correct.

Q Why during that period did you not return the case files?

A Because cases were ongoing, for example the Winchester matter.

Q Yes. What about the other 113?

A What about the other? It was - if I had have returned them piecemeal there was to be no point in me holding the files until the matter was over. It was just expedient, your Honour.

Q Sorry, what was expedient, not returning them?

A Not making multiple trips to and from the laboratory.

Q Did you have any contact with Mr Gidley between 1993 and 1996 to discuss not returning the 100 or so case files did you?

A No I had no contact.

Q Are you sure he knew about that? Namely that you'd ... ?

A He certainly knew about that.

Q ... taken so many files from the lab?

A I'm absolutely certain he knew about it.

Q See, as his Honour put to you, there's no documentation at all that's been produced to indicate that Mr Gidley knew that you were taking so many files out of the lab? ...

A That may well be the case.

Q You and he didn't talk about documenting taking so many case files from the lab?

A Well, he certainly didn't.

Q I'm sorry?

A No we didn't talk about that.

Q His Honour: 'So, how was anyone at the laboratory supposed to know that you had these files?'

A Well, as ultimately the Victoria Police did they went through the liaison office record system and that was open to them before I left to do that and as I recollect it was done and the cases that I, files that I kept that they were aware I had.

Q So, somebody had to go through the records in order to find out what you had?

A Yes that's correct. But that was on an electronic database and that was an easy thing to do. They were aware, your Honour, and as I said earlier, the fact that they were aware is demonstrated by their contacting me and asking me to return the file on the Parker/Gibb/Butterly matters and I'm not sure when, sometime in I think '95. I'm not sure when it was but they could have easily, at that point had there been any issue, asked me to return the other files. They didn't.

Q So, did Mr Gidley know that you were taking over 100 files out of the laboratory?

A He knew I was taking those files. I don't know ...

Q And nobody wrote that down?

A No, not that I'm aware of.

Q Mr Barnes, I've got to say I find that quite extraordinary that the director of the laboratory would agree to you taking over 100 files, ongoing current files, with you when you left the laboratory without making a record of it. This is a laboratory – and we're now talking 1993 – this is a laboratory that had been accredited by then? ...

A In 1993 no it hadn't.

Q No? Well, it was going through the process?

A It was just starting the process, your Honour.

Q You believed that you had systems in place that would justify accreditation and yet you were permitted by the director, on an informal basis with no record of it, to take over 100 files out. I've got to say to you, as I sit here and listen to that I find it quite an extraordinary tale. I cannot understand how that could have been allowed to happen. Mr Gidley was an experienced director wasn't he?

A Yes he was.

Q Knew the importance of proper record keeping?

A I'm sure.

Q Yes, all right?

A But what I say, your Honour, is – and I've said it, I think, at least once already – is that the liaison system had a record that I was in possession of those matters.

697. Mr Barnes was then questioned about Mr Gidley instigating a technical and audit review in all his case work and about the report of Dr Thatcher to Mr Gidley dated 9 December 1995 in the following terms (Inq 3835):

As a result; of the 151 official files the seven cases he reported on, but which he never officially was involved in, and the 18 cases he failed to log into the Evidence Tracking Section (for a total of 176 cases) it can be shown that only 22 cases files remain at the Centre. How many of the 154 missing files actually never existed and how many have been removed from the Centre is not known.

698. Counsel suggested to Mr Barnes that such a statement was extraordinary if the Director really had knowledge that Mr Barnes had taken over 100 case files from the laboratory in 1993. Mr Barnes responded that Dr Thatcher was writing to the Director and had not been involved in the discussions between Mr Barnes and Mr Gidley. In answer to further questioning, Mr Barnes accepted that there was no paperwork to support his assertion that he was given permission by Mr Gidley and, in evidence that followed, Mr Barnes volunteered his opinion that the audit was undertaken in order to undermine him (Inq 3836):

Q Given those two pieces of information I suggest it's extraordinary that that was written in 1995 if it truly is the case that the director knew you were taking 100 case files from the lab?

A No it's not extraordinary, your Honour. This process was embarked upon because, as I recollect, the Butterly Inquest was underway and my evidence in the Butterly Inquest is, in essence, that there was no evidence that Mr Butterly had discharged, committed suicide. That left open two options. Either one of the Mr Butterly's accomplices, Gibb or Parker shot him, or the Victoria Police shot him. My evidence was at a time when there was a great deal of consternation about police shootings in Victoria and I am of the opinion that this process was embarked upon to ensure that my opinion was degraded in relation to this matter and also because of my work giving evidence for the defence in other matters and my suitability to give evidence against the Victoria Police would be undermined in the eyes of the legal profession.

Q So, you're suggesting that this technical audit of your work was done with a view to undermining, deliberately undermining you?

A Yes that's what I'm suggesting because had this audit had been done with the pure reasonable objective of ascertaining where the files were it would have been instituted some time prior. For example, when I was asked to provide the case file for the Butterly matter, and the fact that it wasn't, your Honour, I think speaks for itself.

Q Who do you say was responsible for taking this process to deliberately undermine you, Mr Barnes? Who was responsible?

A I believe a principal player in this matter was Mr Ross, and that's evidenced by his affidavit in this matter where he indicates that, as I recollect, he was in communication with Dr Wallace straight after - at an early stage telling him about potential problems with the case. All of these things, this communication, was again laboratory policy. There was a strong animus from Mr Ross towards me.

699. Immediately after Mr Barnes gave that evidence, Counsel put to Mr Barnes that there was a memo from Mr Gidley in 1995 asking Dr Thatcher to instigate the review because of issues that had arisen in the Butterly matter. Mr Barnes responded 'Was there?'. It was apparent that Mr Barnes had not appreciated that Mr Gidley had made the decision to instigate the review. Mr Barnes went on the defensive and endeavoured to justify his position. Having responded 'was there?', Mr Barnes volunteered that the fact that it took Mr Gidley until 1995 to ask Dr Thatcher to instigate the review demonstrates that the only time Mr Gidley became interested in Mr Barnes and the case files was when

the laboratory came under the microscope in relation to the Butterly matter (Inq 3836, 3837). When Counsel endeavoured to point out that the decision of the Court of Criminal Appeal was given in 1995, Mr Barnes denied that suggestion and said the delay was 'highly significant' because it bore directly on his point that 'Victoria Police were well aware of all these things and that decision had no impact in respect of this' because the decision was at least two years earlier than the instigation of the audit.

700. Mr Barnes' argument in this respect is without merit. The decision in the Butterly matter was delivered on 10 August 1995.[57]

701. Mr Barnes also denied that the Coroner became interested in looking at the work done by Mr Barnes because of comments the Appeal Court made concerning his evidence. He suggested that his evidence had been conditional and raised the prospect of contamination, but the prosecutor put too much weight on the evidence and unfairly presented it in his address to the jury (Inq 3837–3838). This was a somewhat biased view of the decision which was concerned with who shot at police. Butterly was deceased and the Crown set out to prove that he had not fired the shot because of the absence of gunshot residue on his hands or clothing. In presenting this case the Crown relied upon the evidence of Mr Barnes which the Court of Appeal summarised as follows:

> However, Barnes went on to give evidence that he had gone to Picnic Point at about midnight on the night of the events, where apparently Butterly was still lying. He said that he had tested the hands of Butterly for gunshot residue but found them to be negative. On this basis he expressed the opinion that the findings were inconsistent with Butterly having fired a weapon shortly before death.
> ...
> Thus the Crown case on these counts, as the Judge told the Jury, depended almost entirely for its proof on the expert opinion evidence of Barnes. Furthermore, it was proof of a negative or exclusionary type; that is that he found nothing which positively pointed to gunshot residue on the hands or (at a later stage) overalls of Butterly and therefore concluded that 'I see no evidence of gunshot residue which supports the contention that he fired a weapon at or shortly prior to the time of his death.

702. The Court of Appeal pointed out that Mr Barnes tested the hands of Mr Butterly some 10 hours after the shooting, in conditions of darkness. The Court observed that 'clearly' the body had been interfered with by a number of people and, in all probability, by a dog, but the evidence did not disclose in what way or by how many people. Although Mr Barnes had tested the sleeves of the other two people involved in the incident because it was a likely place for gunshot residue deposit if a weapon had been fired, it was not until three weeks after the incident that Mr Barnes carried out any tests on Butterly's overalls. Nothwithstanding that delay and the extensive handling of the clothes, the conclusion given by Mr Barnes that he saw no evidence to support the contention that Butterly had fired a weapon at or shortly before the time of his death was based on the 'negative' result obtained from the test of the overalls, as well as the test of the hands.

[57] *The Queen v Heather Dianne Parker* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Charles JA and Crockett AJA, 10 August 1995).

703. The Court concluded that it was sufficient to say that the 'ultimate opinion' expressed by Mr Barnes was not a sufficiently reliable basis upon which the Jury could have rejected eyewitness evidence. The Court found that the verdicts were unsafe or unsatisfactory.

704. The evidence of Mr Barnes in endeavouring to justify his position was one of a number of examples of the willingness of Mr Barnes to create explanations when it suited his purpose. In substance, rather than acknowledging that the laboratory came under the microscope because of comments made about his evidence by the Victorian Court of Criminal Appeal, he maintained that laboratory procedures had been found wanting and he had been made a scapegoat.

705. The evidence of Mr Barnes that the purpose of the audit was to undermine him in the eyes of the legal profession, and that the principal player responsible for the audit was Mr Ross, led to Counsel taking Mr Barnes through various passages in the audit and reports which demonstrate the order of events and the processes through which the audit was ordered by Mr Gidley. Mr Barnes' responses are instructive in a number of respects. The audit material also demonstrates plainly that Mr Gidley was not aware that Mr Barnes' had taken over 100 files with him when he left the Victorian Laboratory.

706. Mr Barnes was first taken to a briefing paper dated 24 May 1996 from Mr Gidley to the Assistant Commissioner (Crime) (affidavit Craig Thornton Ex 102 annexure p 380). It is convenient to set out the relevant paragraphs of that briefing paper because they provide an explanation of the circumstances leading to the obtaining of the search warrant and a brief comment on the result of the audit:

> PURPOSE: To provide the VFSC response to those Coroner's Recommendations relevant to the Centre.
>
> BACKGROUND:
>
> 1. VFSC had considerable involvement in the 'Butterly matter' from the time Butterly and Gibb escaped from the Melbourne Remand Centre (apparently with the assistance of a warder, Heather Parker), on Sunday, 7 March, 1993 to the time Gibb and Parker were apprehended at Picnic Point via Jamieson, 13March, 1993 and when Butterly was found dead.
> 2. Robert BARNES, then a VFSC employee, was called to the Picnic Point scene to undertake Gunshot residue (GSR) sampling. He apparently attended in company with a scientist undergoing GSR training, Mr. Norbet STROBEL.
> 3. The scene examination overall was controlled, from a forensic viewpoint by ex Sen Const. BANKS (resigned from VicPol) and also in attendance as part of the VFSC crime scene team were; Sen. Const. HUDSON, a Crime Scene trainee, Sen. Const. VINCENT, Firearms Examiner, Sen. Const. PATERSON, Photographer and due to the seriousness of the matter, the geographic remoteness and difficulties of the scene, Chief Inspector RICHARDSON attended as the Crime Scene Co-ordinator.
> 4. At that time (3/93), Ch. Insp. RICHARDSON reported at a VFSC management de-brief, that all forensic aspects of the scene were satisfactory allowing for the circumstances of the Picnic Point scene, its remoteness and what had to be done both that night and the next day in meeting investigators needs.

5. Subsequently it was learned, after the trial and Appeal of Parker, that Mr. BARNES' forensic report had been severely criticised and the transcripts were sought to evaluate the issues. These revealed that BARNES had used unsatisfactory terminology based on the results he obtained from his examination and analysis of GSR samples. On checking VFSC records for his Report it was ascertained that the Report had not been authorised for release as per VFSC procedures and no copy existed in central VFSC records held in the Liaison Office. BARNES had on more than one occasion violated Centre procedures and had been counselled on that score. Eventually he was stood aside from his position as Assistant Director (Chem) as a result of an ITD investigation into alleged impropriety in his conduct in regard to a non-VicPol case, and from which he ultimately faced disciplinary charges.

6. The Butterly Inquest of course followed up on the Appeal Court verdict and criticism of BARNES' Report. As a consequence several witnesses, including myself, were called to give evidence about VFSC procedures and the systems in place to check reports and the work of forensic practitioners in general. As well, the Coroner requested some further examinations and testing be carried out by the VFSC. Communication between the Coroner and relevant VFSC staff finalised a regime of additional tests, the main focus of which was duplicate and additional GSR work conducted by Mr. ROSS.

7. Further adverse criticism of BARNES' original work and BARNES' position that he worked and reported in this way in other cases, caused me to direct that an audit be conducted of other BARNES GSR cases, from around this time period. The outcome of that was that it was determined that BARNES had violated Centre case work management and reporting procedures, in a large variety of combinations and permutations. (Dr. THATCHER'S Audit Reports refer; Attachment 1).

8. After an assessment was made of the likely volume of case work records and reports that BARNES could have wrongly in his possession, and the possibility of perjury due to reporting others results, a Warrant was sought to search his residence. A large amount of VFSC case work records and reports were recovered. (Det. Insp. WILLIS and Dr. THATCHER reports refer; Attachment 2).

9. The Coroner's Report now raises some issues with regard to VFSC procedures and quality management systems which I believe unfairly target the Centre rather than BARNES' failure to appropriately comply with existing, at that time (1993), procedures and systems which were in accord with international Accreditation standards.
Further, a significant amount of documented proof as to what existed and the further improvements made since that time, were tendered to the Coroners Court during the Inquest and they are not acknowledged. That, together with comments in the Coroner's Report, para. 8, page 17, where it is virtually stated that improvements in other areas of concern in this matter, are assumed! VFSC also forwarded excerpts from working parties addressing further procedures to close the loop-holes developed and used only by Mr. BARNES.

707. Having read those extracts from the briefing paper, Mr Barnes said he now understood how the audit came about (Inq 3847). However, notwithstanding the reference in paragraph 8 to the issue of whether Mr Barnes could have case work records and reports 'wrongly in his possession', Mr Barnes continued to maintain that the files were in his possession with the knowledge and consent of Mr Gidley (Inq 3847). Reminded of

his evidence the previous day that the purpose of the audit was to undermine him in the eyes of the legal profession, Mr Barnes was asked the basis on which he gave that evidence. His response is illustrative of his unwillingness to directly respond to difficult questions (Inq 3849, 3850):

> Q Mr Barnes, what basis did you have to give that answer that you gave yesterday?
>
> A The examination of Mr Butterly at the scene showed the results of examination of the gunshot residue samples taken showed no evidence that he'd fired a firearm, therefore, it's not open – and, in particular, what was important was that his hands still had dirt and grit on them and dried blood and they weren't – they didn't appear to have been moved and our analysis of those samples showed no evidence of primer related gunshot residues, so, therefore, it wasn't open for me to suggest that he had fired the shot which killed him.
>
> Q You make an allegation there that the process was embarked upon to ensure that your opinion was degraded. ... [Mr Barnes was asked to read again the passage beginning 'I'm of the opinion that this process was embarked upon ...'] And Ms Chapman is asking you on what basis did you have to give that answer, that part of the answer?
>
> A With the benefit of hindsight I am aware that Victoria Police were most concerned about evidence I had given for the defence in the Burwood triple murder, and in fact, written, I think, Superintendent or Inspector Sheridan has written to the effect that they would be ready for me next time.
>
> ...
>
> Q But I'm asking you: What basis did you have to give that evidence yesterday about the reason why you say that process was embarked upon?
>
> A The basis, as I just said, the Victoria Police were very concerned about me giving evidence. I'd attended at the laboratory as a defence expert once or twice to examine the exhibits and they were very resistant to me in their behaviour towards me. And subsequently, due to the documents, which had been released, I became aware that they were communicating within the force that they were going to be prepared for me next time.
>
> Q So, you say that it was the Victoria Police who were embarking upon the process to ensure that your opinion was degraded?
>
> A And as I said, if Mr Butterly didn't shoot himself and neither Mr Gibb or Ms Parker shot Mr Butterly the only reasonable deduction that can be drawn is that he was shot by police.

708. The questioning continued as to the identity of persons in the Victoria Police who were setting out to ensure that Mr Barnes' opinion was degraded. He said there was very strong pressure on him to say that Mr Butterly committed suicide. He said it was his belief that the whole process was engineered by Victoria Police to undermine him so he could not point the finger at them for shooting Mr Butterly (Inq 3850). From the perspective of Mr Barnes, Victoria Police were responsible for the audit. Asked about his previous evidence when he responded to a question as to who was responsible by saying that Mr Ross was the principal player, Mr Barnes said he thought 'We're talking two levels here'. Interrupted when giving his answer, Mr Barnes gave the following evidence (Inq 3851):

> Q No, you were asked yesterday, 'Who was responsible for taking the process to deliberately undermine you?' Today you have said it was the Victoria Police. Yesterday you said it was Mr Ross. Which is it?
>
> A Mr Ross is part of the Victoria Police and my answer yesterday referred specifically to the examination of the technical evidence, your Honour. My answer today refers to the broader aspect of the question.

709. I reject that explanation. There was nothing ambiguous about the question the previous day and it was not limited to the technical aspect. No issue of memory difficulty was involved. This was one of numerous examples of Mr Barnes shifting ground in his evidence when it suited him. On this and other occasions in his evidence Mr Barnes demonstrated that he was willing to be careless with the truth.

710. Mr Barnes was then brought back to his previous evidence that the technical audit was done with a view to deliberately undermining him and he was asked whether, in view of the briefing paper written by Mr Gidley to which his attention had been drawn, he accepted that the technical audit was not done with a view to deliberately undermining him. Again, Mr Barnes failed to answer the question (Inq 3851–3852):

> Q ... Mr Barnes now that I've shown you that memo written by Dr. Gidley about how the audit process came about, do you accept that the technical audit of your work was not done with a view to deliberately undermining you?
>
> A It was done in a response to an external pressure.
>
> Q What external pressure are you know referring to?
>
> A The, I assume, I don't know but from the Coroner in response to the Court of Appeal judgment and the Butterly Inquest was about to start.
>
> Q So, you're suggesting that wasn't an improper pressure?
>
> A Do I think that's an improper pressure?
>
> Q Are you suggesting that pressure, that external pressure you've just referred to, was an improper pressure?
>
> A No, I'm not. What I suggest though is that had the Victoria Police wanted the files, all they had to do was to ask for them all with the Butterly file which they did ask for and I did give them.
>
> Q Mr Barnes, the audit was not just about asking you for your files. I've taken you through the process of how the audit came about, namely you've got a trial, an appeal, a coronial inquest, adverse comments about you, looking for a report, not finding a report, more adverse criticisms and wanting to know where all the files are. That's how the audit came about. Do you accept that?
>
> A No, not entirely. All copies of every report, jurat, were held on a central filing system. One didn't prepare one's own reports and there was a copy at the laboratory. I don't remember whether one was lodged with the agent or not but I believe – I don't know. It's so long ago, your Honour, but I would, I'd be surprised if one wasn't lodged with the liaison office because it had to be signed, sworn by a police officer and that wasn't done at the liaison.

711. Mr Barnes was again referred to the briefing paper and it was emphasised to him that the ultimate question to be asked after he finished reading the briefing paper was whether he now accepts that the audit was not directed for the reasons he had been advancing. After being taken through relevant paragraphs of the briefing paper, Mr Barnes was asked the direct question (Inq 3853):

> Q The question is Mr Barnes: do you now accept that the audit was not done with a view to deliberately undermining you, as you have suggested? That's the question. And what's your answer to the question?
>
> A My view is, your Honour, it was done to undermine me.

712. Mr Barnes was then shown a memo from Mr Gidley to Dr Thatcher dated 27 November 1995 in which Mr Gidley referred to serious questions concerning the laboratory policies and procedures having been raised in evidence and addresses at the Butterly Inquest. The memo observed that there were questions as to whether Mr Barnes followed policies and procedures and directed that Dr. Thatcher 'investigate cases which were undertaken and reported by Mr Barnes, but for which there is no evidence/record of technical and/or administrative views' (Ex 102, 316). Having read the memo, Mr Barnes continued to maintain that the audit was undertaken for the purpose of deliberately undermining his work (Inq 3854).

713. Reference was made in the questioning to the finding in May of 1996 that Mr Barnes' report in the Butterly matter had not been peer reviewed. Mr Barnes responded that his report had been peer reviewed by Mr Paul Murrihy. It was then pointed out that in his evidence in the Inquest Mr Barnes had said his work was checked by both Mr Murrihy and Mr Strobel. In evidence at the Butterly Inquest Mr Barnes said they 'checked the data, ensured that the work was done in accordance with laboratory practice and principles and that it met the required standards in the laboratory' (Inq 3855).

714. Mr Strobel gave evidence in the Inquest that he did not peer review the report published by Mr Barnes in relation to the gunshot residue on the hand of an accused person in the Butterly matter. Taken to that evidence and asked whether Mr Strobel was at odds with his evidence, Mr Barnes claimed that Mr Strobel had said, in effect, that he did a peer review because he had said he discussed the report with Mr Barnes, but did not sign a paper. Secondly, Mr Barnes claimed that at the time there was 'no formal peer review process in place' (Inq 3855).

715. Asked if he put in place a requirement that a book be signed to confirm peer review of reports, Mr Barnes answered in the affirmative, but said the purpose of the book was to enable him to assure himself that people in his area of responsibility were complying with peer review. Faced with the inevitable question as to whether he was saying he was not subject to peer review, Mr Barnes said he was not saying that at all but, in this particular area of gunshot residue examination, at the relevant time Mr Ross was suspended and the only person he could talk to was Mr Strobel. When it was suggested that Mr Barnes would not have permitted Mr Ross to review his work, he replied that in the early stages he went to Mr Ross a lot, but agreed in the latter stages he would not have approached Mr Ross for a review (Inq 3856).

716. According to Mr Barnes, at the time of the Butterly matter peer review comprised having another scientist read through the report, perhaps look at the case notes and then say 'that's ok'. He said it was not a formalised procedure (Inq 3856).

717. Mr Barnes continued to maintain that Mr Strobel reviewed his work in the Butterly matter. He acknowledged that he was training Mr Strobel at the time, but said there was no one else available to undertake the review (Inq 3857).

718. Mr Barnes eventually acknowledged the accuracy of evidence given at the Inquest by Mr Murrihy that there was a process for case work review and also administrative

review. He said that after he and Mr Strobel discussed the technical aspects, the report went to Mr Murrihy for administrative review (Inq 3858). Confronted with the evidence of Mr Murrihy that he was unable to recall reviewing any work undertaken by Mr Barnes, and there was no entry in the case work record book of an administrative review by Mr Murrihy, Mr Barnes maintained that Mr Murrihy conducted an administrative review and 'made the note and signed on the post-it note stuck on the report' (Inq 3859). The post-it note to which Mr Barnes referred related to one particle only, but Mr Barnes maintained it was a satisfactory peer review because Mr Murrihy looked at the report and Mr Barnes discussed it with him.

719. Policy No. 10 dated 16 April 1993 required that all reports issued from the Victorian Laboratory had to be reviewed with regard to '... all observations, measurements, tests, results, conclusions and opinions' in the report. Mr Ross said this policy had been issued at least 12 months earlier (Inq 3711) and, in a less formalised way, the laboratory had been working under a written policy requiring that all statements issued by the laboratory be reviewed since July 1989 (affidavit of Mr Ross, Ex 189 [31]). According to Mr Ross, prior to May 1993 there were no guidelines as to what was involved in the review, but it was the practice for the review to involve the 'inspection of the technical observations and results of the examination that were documented in the case notes with reference to the Statement' (Ex 189 [33]).

720. In evidence Mr Barnes acknowledged that the written policy of 16 April 1993 applied to him (Inq 3860). He was reluctant to admit that it had been in force in slightly different language for 12 months prior to 16 April 1993. He maintained that his reports in the Winchester matter were reviewed, but he was unable to say who conducted the peer reviews; perhaps Mr Ross, Mr Strobel, or Mr Murrihy. Given Mr Barnes' attitude to Mr Ross, it is highly unlikely that he would have asked Mr Ross and I accept the evidence of Mr Ross that he did not peer review any of the work conducted by Mr Barnes with respect to the Winchester investigation.

721. In evidence Mr Strobel said he was aware of the peer review policy and said he did not peer review the work of Mr Barnes with respect to the Winchester matter (Inq 3548):

> Q And given your position at the time at the lab [1993] obviously you wouldn't be someone who would be doing a peer review on Mr Barnes' work?
>
> A That's correct.
>
> Q And you didn't do peer review on his work in the Butterly matter?
>
> A In actual fact I didn't do peer review on anyone.
>
> Q That's my next question. Including the Winchester matter?
>
> A Including the Winchester matter.

722. The evidence of Mr Barnes that the written policy dated 16 April 1993 applied to him is in direct conflict with his affidavit of 24 March 2014 (Ex 195). In that affidavit Mr Barnes specifically dealt with the policy in question:

Peer Review

247. There was no policy requiring me to be peer reviewed during my time at SFSL. I have read Policy No. 10 dated 16 April 1993. I was responsible for this policy being developed and introduced. …

248. Policy No. 10 was introduced at least partially as a response to the actions of Ross in releasing the report in relation to the particle on slide 7/89-7E(a) as described above. I had informally required scientists to abide by the substance of the policy prior to its formal introduction. It was never intended that the policy would apply to supervising scientists such as myself. This would have been practically impossible in any event due to the lack of suitable senior scientists at SFSL with the time and/or willingness to conduct the reviews. Nevertheless I would often seek to have my work reviewed by other scientists as I did by Murrihy in the Parker case.

723. Mr Barnes said in evidence that his statement in paragraph 248 was correct, but it did not mean that he did not have his work checked (Inq 3862). Asked if he seriously put before the Board that it was never intended that the policy would apply to supervising scientists such as him, he answered (Inq 3863):

> Simply because it was not possible, as I said, your Honour, to find people at the same level or more experienced to look at that sort of case work.

724. As to why Mr Ross could not undertake the review, Mr Barnes said Mr Ross had been suspended and Mr Gidley had determined that Mr Ross should not undertake that type of work. According to Mr Barnes, Mr Gidley had given a directive to that effect (Inq 3863).

725. Mr Barnes accepted that one of the issues examined in the audit was whether he had complied with the policy of having his work peer reviewed. He was taken to a briefing paper prepared by Dr. Thatcher and addressed to Mr Gidley dated 9 December 1995 (annexure 16 to the affidavit of Mr Ross Ex 190). The paper was a response to Mr Gidley's memorandum of 27 November 1995. After referring briefly to historical matters, including the removal of Mr Barnes from his position of Assistant Director, (Chemistry) to the position of Premier Case Worker (Chemistry Division), a move prompted by several incidents involving 'procedural transgressions', Dr. Thatcher commented on procedural issues associated with Mr Barnes' work:

> **Procedural Problems**
>
> There are numerous well-documented incidents of Barnes' non-adherence to Centre policies and procedures. In many of these, counselling, disciplining, internal investigations and Departmental investigations were all instigated. However, it was not until certain matters were raised in the Butterly Inquest that transgressions against case work policies and procedures were discovered. As a consequence, the current investigation was ordered. This report details the current situation with all Barnes' case work (so far as can be determined).

726. In evidence Mr Barnes said he did not agree with that paragraph. He described the statements as 'generalisations' which incorrectly implied that there were a number of those events. Asked if he was counselled for non-adherence to Centre policies and procedures, Mr Barnes responded that he was counselled with respect to his human

personal management style when dealing with a complaint which he was required to adjudicate (Inq 3864).

727. The memorandum set out the methodology followed by Dr Thatcher in reviewing information covering the entire period of Mr Barnes' employment at the Victorian Laboratory. One of the conclusions reached by Dr Thatcher was based on an Administrative Review Book which had been introduced by Mr Barnes in 1992 (Ex 190, annexure 16). It was a requirement that cases be signed off in the book by a senior manager prior to the release of any report. Based on a review of the book, Dr Thatcher concluded that between the introduction of the book and Mr Barnes' resignation, Mr Barnes completed 16 cases of which 10 were checked, and 10 were not reviewed prior to the release of the report. Mr Barnes was unable to explain why 10 cases were not signed off (Inq 3865).

728. Mr Barnes was referred to the summary by Dr Thatcher which was in the following terms:

> SUMMARY
>
> The investigation has shown that Barnes had a complete disregard for Centre policies and procedures insofar as case records are concerned.
> All cases have requirements for items, case notes and reports. These requirements exist at both Section and Evidence Tracking level. The investigation has shown that Barnes not only transgressed these policies but also every combination of them. These include:
>
> - Failure to log cases into the liaison system.
> - Failure to return cases to the Evidence Tracking sections.
> - Failure to complete cases.
> - Failure to report on cases.
> - Failure to have cases reviewed.
> - Co-opting other case workers' results.
> - Failure to destroy items after so informing the Evidence Tracking Section.
> - Removal of files from the Centre.
>
> In fairness to Barnes, it must be said that, at this stage, there is no evidence of any dishonesty on his part. Nor is there any evidence of technical incompetence. However, this latter point must remain in doubt until more files are reviewed.

729. Before reading that summary, Mr Barnes agreed that Dr Thatcher was a highly respected forensic scientist who was careful and not prone to exaggeration. Mr Barnes would have expected Dr Thatcher to have approached the task in his usual careful manner. Having read the summary, asked why the Board should not accept that Dr Thatcher reached the correct conclusion in the first paragraph of the passage cited, Mr Barnes gave the following evidence (Inq 3866):

> A I think Mr Thatcher – I say, your Honour, that Mr Thatcher was looking at what was being put in place and looking at what had happened in the past and measuring what had happened in the past against what was being put in place. There is ....

Q You mean he was applying standards at the time of his examination to a time in the past when those standards were not applicable?

A That's correct.

730. As to the second and third paragraphs in the passage cited, and whether there was any reason why the Board should not accept the assessment made by Dr Thatcher, Mr Barnes gave a lengthy answer in which he said that to his knowledge, every case he was involved in would have been logged in. In respect of gunshot residue samples, he and Mr Ross both followed a policy that the samples were examined and generally retained within the electron microscopy area and not logged back in to the Evidence Tracking Section. He said many of the cases were matters of suicide in which the coroner or police would advise that no report was required. There was great pressure within the Centre because of a shortage of staff and it was the policy to only report those matters which required reports. He continued to maintain that Mr Gidley was aware of the removal of files from the Centre. Mr Barnes repeated his belief that Dr Thatcher was applying policies and standards which were not in place at the relevant time (Inq 3867–3868).

731. In respect of the basis upon which he could say that Dr Thatcher had applied the incorrect standards, Mr Barnes found himself in a difficulty (Inq 3868, 3869):

Q Do you have any basis to say that Dr Thatcher has done that?

A Well, I haven't been privy to the review or the details of those reviews. So it's not possible for me to really objectively comment, your Honour.

Q No? So when you say that Dr Thatcher's applying different standards when he's writing this, you have no basis for saying that, do you?

A Well, I do. As I said ...

Q What's that?

A The previous – there were – I don't believe, unless it can be produced, I haven't seen any policies which were extant in '89 or, for example, '86 which covered some of those things. I don't believe that they were mentioned, your Honour.

Q Could I take you to exhibit 191 of this Inquiry. It's a memorandum from Mr Ross to Dr Thatcher dated 21 June 1996. Just read that to yourself.

A Yes.

Q It shows, doesn't it, that Mr Ross is indicating that it's necessary to look at your work in accordance with what was in place at the time.

A Yes, it does.

Q You don't have a problem with that?

A No.

Q So, on what basis do you suggest that Dr Thatcher didn't do that?

A Well that is Mr Ross writing to Dr Thatcher. It's not Thatcher saying what standards he used.

Q Can we then go back to the prior document. Are you actually, Mr Barnes, putting forward anything to suggest that Dr Thatcher has used the wrong standard to judge your work by?

A Well, your Honour, what I'm saying is no policies have been presented in concert with this that I can say, 'Yes, I didn't comply with that policy'.

> Q But you're being asked what can you put forward to support your proposition that Dr Thatcher applied the wrong standards in the sense of applying standards that existed in 1995-96 when this was done as opposed to the standards that existed in '92 for example? What are you putting forward to support that view?
>
> A Well, there was no evidence of which standard Dr Thatcher applied.

732. Mr Barnes was taken back to an earlier passage in the memorandum in which Dr Thatcher spoke of policies and procedures in place prior to the 1992 accreditation initiatives. He agreed that Dr Thatcher acknowledged those matters prior to 1992, but would not accept this passage suggested Dr Thatcher was alert to the fact that there were changing policies over the years and developments. Mr Barnes said he would have expected Dr Thatcher to have identified the policies which were contravened and, as he had not done so, it was not possible to conclude that Dr Thatcher applied the appropriate standards (Inq 3869).

733. The attention of Mr Barnes was then drawn to a position paper dated 6 June 1996 from Dr Thatcher to Mr Gidley (Ex 190, annexure 20). Dr Thatcher referred to policy directives which were issued in April and October 1994 and observed that, prior to the issue of those directives, the laboratory had 'documented quality requirements and each Division had an internal means of measuring compliance with these requirements'. Mr Barnes would not accept that this statement by Dr Thatcher indicated that Dr Thatcher was well aware of the need to apply policies that were in force at the time Mr Barnes was doing the work (Inq 3870). He suggested the position paper demonstrated that prior to the introduction of a case work register in August 1991 there was no 'documentary requirement'. Faced again with the question as to whether the statements in the position paper indicated that Dr Thatcher was well aware that in doing the audit he was required to apply the standards and policies that were relevant at the time, Mr Barnes finally conceded 'in this letter, yes' (Inq 3870).

734. I reject the suggestion that Dr Thatcher did not apply the standards that were applicable at the time Mr Barnes worked for Victorian Laboratory. The fact that he applied those standards is plain from the various minutes written by Dr Thatcher. In addition this view is supported by the evidence of Mr Ross and the following passage from his affidavit (Ex 189 [94]):

> ... case files identified on Dr Thatcher's list of gunshot residue cases were reviewed according to the practices prior to laboratory accreditation. The aim was to establish whether the case file contained sufficient observations, test results and other data to support the opinions given in the Statement

735. In the position paper Dr Thatcher referred to a 'Case Work Report Register' introduced on 22 August 1991. For the period 23 August 1991 to 5 November 1993 the register showed that 23 of Mr Barnes' cases were checked, but of those 10 were 'self-checked' by Mr Barnes. Thirteen of those cases were gunshot residue matters of which three were 'self-checked'. Of the 23 cases in total, only 14 had a copy lodged in the evidence tracking section as required by procedures.

736. Mr Barnes accepted that there was no reason why the Board should not rely upon those figures. However, as to Dr Thatcher's conclusion that nine cases were not checked prior to release, six of those cases being gunshot residue cases, Mr Barnes said the Board should not act upon that conclusion because it showed only that the nine cases were not signed off in the register. Mr Barnes was unable to explain why they were not signed off (Inq 3870–3871).

737. Dr Thatcher concluded his position paper with the following observation:

> There is no pattern to Mr Barnes' compliance or lack of compliance with procedures. This is consistent with the results of all the Barnes' other audits. His behaviour can only be described as erratic and unpredictable. Mr Barnes continues to be extremely difficult to audit.

738. Mr Barnes accepted that Dr Thatcher conducted a serious audit, but he would not accept the audit showed that he was seriously wanting in terms of complying with policy and procedures of the laboratory applicable at the time he was working in the laboratory (Inq 3871). He did acknowledge, however, that the policy of logging items through the system was important because it tracked the arrival of exhibits and allocated a case number. He agreed that continuity is a 'really important thing in forensic science' and that no matter how good the scientist is at doing the work, if the continuity fails there are 'real question marks about the results, potentially' (Inq 3872).

739. There were other conclusions drawn by those who were engaged in the audit which amounted to damning assessments of Mr Barnes' non-compliance with practices and procedures. In respect of gunshot residue cases, Mr Ross expressed the result of his examination of the files in the following terms (Ex 189 [95]):

> Most case files appeared to be incomplete, which made a full technical review impossible.

740. In a briefing paper of 24 May 1996 (annexure 380 to the affidavit of Mr Thornton, Ex 102), Mr Gidley advised the Assistant Commissioner (Crime) of Victoria Police that Mr Barnes engaged in 'persistent avoidance of relevant procedures' and a 'wholesale disregard' for the procedures 'in various combinations'. He described the behaviour of Mr Barnes in this regard as 'unique to that individual' (Ex 102, 386). Mr Barnes disagreed with that conclusion (Inq 3875).

741. Following the Inquest in the Butterly matter, Dr Thatcher and Detective Inspector Paul Sheridan prepared a report dated 2 October 1996 for the officer in charge of the Homicide Squad (affidavit of Mr Thornton Ex 102, 596). They reported that the transgressions by Mr Barnes of laboratory procedures were proved to the Inquest to be 'highly unusual and endemic to Barnes only'. Mr Barnes disagreed with that assessment and said there was no transgression of procedures. He volunteered that the observation that his transgressions were unusual and endemic to him was 'further evidence that the concern was to ensure that the Victorian Laboratory was protected from any further criticism' (Inq 3878). He denied that it was his failure and the scrutiny of his work that was causing the extensive criticism. Mr Barnes maintained that the 'only failure' he could identify with respect to his work was the use of the word 'indistinguishable' (Inq 3878). He was referring to the Butterly matter.

742. As to the audit generally, and leaving aside the Butterly matter, Mr Barnes was asked whether from the audit he accepted any failures on his part. Mr Barnes said he was sure he had made mistakes, but overall he believed his work was done correctly and in accordance with procedures (Inq 3878). As to whether Mr Gidley would make the critical assessments of Mr Barnes without having made all proper enquiries, Mr Barnes gave the following evidence (Inq 3876):

A 'I think Mr Gidley as head of the laboratory was under extreme pressure because a number of problems had arisen from the laboratory. He was seeking to deal with them and I believe I was used as a very convenient scapegoat.'

Q Do you think Mr Gidley would have written something to the Assistant Commissioner of Crime without making all proper enquiries beforehand?

A I think Mr Gidley would have written what was required to maintain his position in the laboratory.

Q. So, is that answer yes or no?

A I don't think he – I think he's – no I don't believe he has made all proper enquiries.

Q As a general proposition do you think he would write something like that without making proper enquiries first?

A Yes.

Q You do?

A Yes.

743. Later Mr Barnes was asked whether he maintained the view that the reports were prepared to protect the laboratory and use him as a scapegoat. In his answer, Mr Barnes again reverted to attacking Mr Ross (Inq 3878–3880):

Q Do you maintain the view that you've just expressed a moment ago that all these reports that were prepared were basically slanted, and unfairly slanted against you, in order to protect the laboratory and use you as a scapegoat.

A Absolutely, your Honour, and I use in support of my contention to you the Snabel case and Mr Ross. Mr Ross caused a major issue but it was dealt with internally and the laboratory moved on, in spite of continuing transgressions. This sort of audit process had never been undertaken against any other scientist, except myself, who left and started doing Defence work.

Q So you're going back to what you said yesterday, that Mr Ross was part of the reason for this audit, deliberately undermined you.

A I think Mr Ross in one of his statements to this Inquiry has indicated that he was approached by the Coroner's Counsel Assisting, Mr Kaiser, and in his statement Mr Ross indicates, as I recollect, that he had problems with me and I suspended him, and therefore he could be construed as highly critical or words to that effect, and he was told he was perfect for the job to look at my work as a peer. I suggest to your Honour that's unacceptable.

Q When you say ...

A Mr Ross should have, as a professional scientist, should have said, 'it's inappropriate that I do this work'.

Q When you say that Mr Ross ... (indistinct) ... what exactly do you mean?

A What do I mean? He was removed from his duties and moved to another area.

...

Q Anyway, are you going back to the evidence that you gave yesterday that Mr Ross was responsible for this audit that occurred to deliberately undermine you?

A No. Mr Ross wasn't responsible for the audit, but he certainly conducted it.

Q Are you saying that it was improper for him to conduct it?

A I believe so. I believe it's a generally held principle that if you have a demonstrable bias, you aren't an appropriate person to conduct an objective administrative review.

Q Didn't Dr Thatcher conduct the audit? All the reports are written by Dr Thatcher, Mr Barnes.

A No, the technical review was undertaken by Mr Ross.

Q But all the reports that you've seen, they're written by Dr Thatcher. Are you saying that's inappropriate?

A The review of the work in relation to the Butterly matter was done by Mr Ross.

Q No, no. Mr Barnes, there was a broad audit by Dr Thatcher of your non-compliance with policies and procedures. The whole period that you worked at the lab. I've shown you the reports.

A Yes, there was a review by Dr Thatcher of my work at the laboratory.

Q Are you saying it was inappropriate for Dr Thatcher to conduct that review?

A No, I'm not saying that at all, your Honour.

744. These passages from the evidence of Mr Barnes concerning the audit are sufficient to demonstrate his unwillingness to acknowledge any significant lack of compliance with policies and procedures, but he allowed for the occasional human mistake. His persistence in this regard flies in the face of extensive material presented to this Inquiry and the conclusions of those involved in the investigation, including Dr Thatcher whom Mr Barnes conceded was highly regarded and careful.

745. I am unable to discern any reason why I should not accept the evidence of Mr Ross and the documentation relating to the audit. The documentation demonstrates that the conclusions reached by Mr Ross and others concerning Mr Barnes' failures were fair and reasonable and well based on the evidence contained in the laboratory records and case files relating to the work of Mr Barnes. I reject Mr Barnes' attack upon the integrity of Mr Ross and Mr Gidley.

746. In dealing with these matters, Mr Barnes steadfastly maintained that the audit was designed to undermine him. He was dogmatic in this position notwithstanding the obvious and sound policy reasons for Mr Gidley's direction that the audit be undertaken and a search warrant be issued. The position adopted by Mr Barnes in this regard, and his unwillingness to acknowledge that he might be mistaken, is demonstrative of the inability of Mr Barnes to accept that his failures were responsible for the audit and search warrant. Mr Barnes is simply unable to acknowledge the weight of evidence against him and he searched for reasons to justify his position. Frequently he reverted to his obsession with Mr Ross and, as he put it, the 'animus' which he perceives Mr Ross had towards him. As a consequence there were numerous occasions when the evidence of Mr Barnes was unsatisfactory. At times when he was in a difficulty, Mr Barnes showed a careless disregard for both truth and accuracy.

747. I am satisfied that the audit of Mr Barnes' files was carried out carefully and in accordance with standards applicable at the time Mr Barnes worked in the laboratory. The various expressions of opinion accurately reflect the essence of the result of the audit, namely, that Mr Barnes frequently failed to comply with laboratory practices and procedures and many of his case files were inadequate in significant respects. Not infrequently Mr Barnes failed to have his reports peer reviewed. As discussed later in this Report, these findings apply to Mr Barnes' work in the Winchester investigation.

Defence – Lack of Preparation

748. Before discussing the issues concerning the work undertaken by Mr Barnes and the opinions he expressed at trial, I will deal with evidence identifying attempts by the applicant's legal teams to prepare for the forensic evidence. While assistance was sought from experts, it is apparent that the preparation was inadequate.

749. Mr Mark Klees commenced acting for the applicant in November 1994. He continued to act until the applicant withdrew instructions in 1995. In late November 1994 Mr Klees drove to Canberra to pick up the prosecution brief which he said filled the entire rear of his station wagon. He then set about investigating the proposed forensic evidence and sought advice from a number of experts, including Professor Kobus. Mr Klees and Junior Counsel, Mr Jeffreys, travelled overseas in February 1995 and spoke with a number of experts including Dr Wallace, Professor Zitrin, Mr Keeley and Dr Zeichner (Inq 2381–2384).

750. In February 1995 Mr Klees issued a subpoena directed to Mr Barnes for the production on 1 March 1995 of his entire file. Discussions with Ms Woodward of the DPP followed concerning the validity of the subpoena and practical problems associated with Mr Barnes producing the entire file in Canberra. Some of these discussions took place with Mr Klees personally, while others involved an assistant in Canberra while Mr Klees was overseas (Inq 2387, 2390).

751. Mr Klees first met with Dr Wallace in Northern Ireland on 20 February 1995. At that time Dr Wallace had not received materials sent to him by Mr Klees (Inq 2388).

752. Notes of the meeting of 20 February 1995 were made by Mr Klees or Mr Jeffreys. It was their practice to make handwritten notes and later dictate a more detailed record using an old cassette dictaphone. The typewritten record is at pages 3-8 of exhibit 98.

753. The notes record that Dr Wallace was given an outline of the prosecution case and that he raised a number of issues with respect to the forensic evidence. Dr Wallace suggested a number of investigations and further tests. He gave advice about issues such as contamination and expressed opinions about possible scenarios that could explain the presence of gunshot residue. The notes record that 'basically' Dr Wallace 'did not agree with any of Barnes' interpretations', indicating that while most or all of Barnes' conclusions were possible, they were not likely or probable. Discussion occurred concerning the use of a silencer and Dr Wallace recommended that an expert or a member of the legal team attend at the PMC factory in Korea to make inquiries

concerning the manufacture of PMC ammunition, with particular emphasis on the chemical makeup of the ammunition and the manufacture of the primer. The notes record discussions about Mr Barnes' conclusions and opinions with respect to the gunshot residue, and PMC ammunition in particular. Dr Wallace indicated that tests he proposed should be carried out would take at least two months.

754. After conferring with Dr Wallace, Mr Klees travelled to Sweden to confer with another expert and returned to Northern Ireland on 24 February 1995. By this time Dr Wallace had received and read the two volumes of material provided by Mr Klees (Inq 2393–2395). The notes of the second conference are pages 9-10 of exhibit 98.

755. Dr Wallace made a number of suggestions about further examinations and tests. With respect to the GC-MSD examinations by Mr Barnes, the notes record the following:

> In relation to the GC analysis, the material in vol 1, is not sufficient for Wallace to be sure regarding the accuracy of the results shown. He says there is no indication regarding the controls, blanks, standards, in relation to this testing. He says he should be running standards and that these should be run in the same runs. He indicated that the tests that were done apparently were done many months in fact years apart and there are problems with instruments changing over time. He has experienced himself where there has been contamination from equipment used, in his case vials, in relation to GC analysis. He indicates he would like to see the results if there were any of the standards and blanks in relation to the analysis and controls in relation to this analysis.

756. Dr Wallace advised that there were at least two different type of ammunition in the boot of the applicant's Mazda and this conclusion was clear from the 'GC results'. He said he was not satisfied from those results as to the type of propellant. He suggested a number of further tests.

757. From his conferences with Dr Wallace and other experts, Mr Klees was well aware of the need to examine the entire file kept by Mr Barnes. As he pointed out in evidence, however, he needed to copy the file and provide it to an expert in gunshot residue because he would not know what he was looking for. Hence the subpoena to Mr Barnes which was returnable on 1 March 1995 (Inq 2416–2417). Mr Barnes did not appear at the directions hearing that day and Counsel had a lengthy discussion with Miles CJ concerning the return of the subpoena and the practical difficulties attached to Mr Barnes producing his entire file in Canberra (Ex 138, 28–32).

758. Of significance, Counsel advised Miles CJ that the documents were vital to the defence case and the material provided by the Crown was insufficient because mass spectra and other documents were required. It was noted that Mr Barnes had said that the vast amount of material to be produced in answer to the subpoena would fill a utility. There was reference to overseas experts requiring the material and to experiments that Dr Wallace wished to undertake.

759. On 3 March 1995 a further directions hearing was held during which Mr Klees gave evidence that it was necessary to delay the start of the trial in order to properly prepare for it. He said their expert required two months preparation and there were other experts to be consulted in addition to those relating to the ballistic evidence; they could not properly prepare for the trial in less than three months.

760. Throughout March 1995 there were regular exchanges between Mr Klees and the DPP. Mr Klees gave evidence that Ms Woodward was always very responsive to his requests. Notwithstanding his attempt to make the appropriate arrangements, Mr Klees never made it to Melbourne to examine Mr Barnes' file (Inq 2406, 2411–2413).

761. On about 29 March 1995 the applicant withdrew his instructions to Mr Klees. The firm of Mr Michael Taylor took over and, although the same Counsel were retained, there was an obvious difficulty in the new legal team coming to grips with the forensic material because the trial was due to commence in a few weeks. Mr Klees left all the material in an office provided by Legal Aid and Mr Taylor took over, but Mr Taylor made arrangements for Mr Klees to continue as a consultant in order to assist the new legal team in getting on top of the forensic material and preparing for a trial.

762. Between late March and the commencement of the trial in 2 May 1995, the legal team was required to deal with a huge amount of material. Mr Taylor 'simply didn't have enough time' to read and understand the forensic material, but Counsel was dealing with that issue (Inq 2434). It was a 'pressure cooker' atmosphere and the applicant took up large quantities of time giving instructions on various matters. In addition there were pre trial applications to be dealt with (Inq 2429–2433).

763. Further attempts were made to arrange for Mr Klees to attend in Melbourne to obtain copies of Mr Barnes' case files. Mr Barnes insisted on being present and Mr Klees had a memory that Mr Barnes raised some issue about Mr Klees being involved because his instructions had been withdrawn (Inq 2406). Ultimately, in the rush to prepare for the trial, the trip to Melbourne was sidelined and no examination of the case file was undertaken.

764. The trial commenced on 2 May 1995 and, on that day, the instructions to Mr Taylor were withdrawn by the applicant. As a consequence the instructions to Mr Klees from Mr Taylor were withdrawn at the same time. Within a short time the applicant reinstructed Mr Taylor, but those instructions were withdrawn in less than 48 hours. All the material gathered in the course of preparation was left in the office provided by Legal Aid.

765. In an affidavit sworn on 29 November 1996 for the appeal against conviction, Mr Andrew Boe referred to conversations with Mr Terracini in October and November 1996. Mr Terracini told Mr Boe that when he accepted the brief the trial was proceeding with the applicant unrepresented and he had been refused adjournments. Mr Boe prepared a draft affidavit for Mr Terracini based on his conversations. At paragraph 15 of the draft affidavit (part Ex 257), the following is stated:

> (i) I had not personally read the entire Barnes residue/source material;
>
> (ii) I had not been provided with any reports obtained by the Appellant's previous trial lawyers concerning the Barnes residue/source material;
>
> (iii) I had not conferred with:
>
> a Any of the Appellant's previous trial lawyers concerning the Barnes residue/source material;

b. Any experts in the field of expertise encompassing the Barnes residue/source material; or
c. Mr Barnes.

(iv) I was not possessed of any relevant and admissible material that suggested that Mr Barnes' evidence should not be admitted into evidence in the Appellant's trial.

766. At the Miles Inquiry, Mr Terracini said he had no memory of paragraph 15 or its contents, nor of any correspondence from Mr Boe about what he was prepared to sign (Miles Inquiry Transcript Ex 7, 660).

767. In addition it should be noted that 11 reports were provided by Mr Barnes after the trial commenced (5 May 1995 x 3; 11 May 1995; 19 May 1995 x 2; 22 May 1995; 7 June 1995; 9 June 1995 x 3).

768. The lack of defence knowledge about the case file and case work inadequacies and flaws is well-illustrated by the absence of cross-examination in respect of a number of critical inadequacies and flaws.

769. It is readily apparent that the defence legal team was woefully under-prepared for the forensic evidence. Preparation for the trial generally was a huge task involving a large variety of factual and legal issues. Within the factual matrix of the prosecution case lay the forensic evidence relating to ballistics and trace materials. The magnitude of the task of properly preparing the case in respect of only the forensic material should not be underestimated. Mr Ibbotson worked full-time on the forensic evidence and listening device material for approximately two and a half years and, in evidence, on more than one occasion he emphasised the size and complexity of his part in preparing the case for trial. He had the distinct advantage of direct and multiple contacts with Mr Barnes and overseas experts. For the prosecution, other practitioners were preparing the remainder of the prosecution evidence.

770. Attempts by the defence teams to prepare for the trial, and in particular to examine and analyse the forensic evidence, were disrupted by repeated sackings. While the defence managed to obtain advice from forensic experts, and to consult with the overseas experts, they started from a position of significant disadvantage and ignorance of the crucial issues which evidence to this Inquiry has highlighted. In a case as complex as the trial under consideration, it was far from satisfactory that defence preparations were still being undertaken well into the trial.

Barnes – Tests, Examinations and Opinions

771. Before discussing conclusions to be drawn in respect of paragraph 5, it is necessary to deal with evidence directly relating to the examinations conducted by Mr Barnes, his notes and reports and the opinions he expressed. The evidence casts severe doubt upon the reliability of crucial evidence given by Mr Barnes connecting the applicant's Mazda to the scene of the murder. This discussion will also highlight information known to the DPP, but not disclosed to the defence, as well as inadequacies not discovered by the DPP.

Mr Barnes – Trial Evidence

772. At trial, Mr Barnes gave evidence comparing gunshot residue at the scene (driveway/Ford) and in the applicant's Mazda in three significant ways.

773. Firstly, he compared green partially burnt propellant particles (PBP) found at the scene with green PBP found in the Mazda, particularly the boot. He identified the particles from the driveway and the Ford as being either PMC or consistent with PMC (T 1413). He expressed the view that the particles from the Mazda boot:

- were consistent with PMC ammunition;
- were 'absolutely not' consistent with any other .22 ammunition which he has seen;
- were 'PMC partially burnt propellant on the basis of the criteria which I believe I've already explained to the court' (T 1444);
- were 'indistinguishable when taken globally, that is, using the criteria already enunciated, were indistinguishable from partially burnt propellant produced on firing PMC .22 calibre ammunition' (T 1445); and
- when compared with the PMC particles in the Ford, he could find 'no differences' (T 1445).

774. Secondly, he compared the 'rogue' PBP from the scene with the 'rogue' PBP in the Mazda, including the boot. They were not consistent with PMC. They were consistent with Remington, CCI or Stirling ammunition, amongst others.

775. Thirdly, he gave evidence that there were 'charred' (rogue) propellant particles from the scene which had been resident in a silencer and 'charred' (rogue) propellant particles in the Mazda, including the boot, which had been resident in a silencer.

776. Through the combination of these comparisons, in substance Mr Barnes gave evidence connecting the Mazda to the scene through both PMC partially burnt propellant and 'rogue' particles. As will be seen, however, the superficial attraction of this evidence was misleading.

Sources of the Partially Burnt Propellant Particles

777. The scene, including the driveway and the Ford, and Mr Eastman's Mazda car were vacuumed by AFP officers. PBP were located in those vacuumings.

Driveway

778. On 11 January 1989 at approximately 7am (T 514), Mr Nelipa vacuumed the driveway area surrounding the deceased's Ford Falcon. The vacuuming of the driveway was

labelled 7/89-1 and was searched by AFP officers in 1989. PBP were located and placed on three slides, 7/89-1B, 7/89-1F and 7/89-1G.

Mazda

779. On 18 January 1989 the applicant's Mazda was seized by the AFP. The Mazda was vacuumed on 19 January 1989. The vacuumings from different areas of the Mazda were labelled with exhibit numbers commencing '7/89-7'. Relevantly, the following areas were vacuumed and labelled:

- The driver's floor: 7/89-7D. This was searched by the AFP in 1989 (no PBP located) and then again by Mr Barnes/Mr Strobel in late 1994 (PBP located).

- The driver's seat: 7/89-7E. This was searched by the AFP in 1989 (no PBP located) and then again by Mr Nelipa on 16 August 1992 (PBP located).

- The boot: 7/89-7J. This was searched by the AFP in 1989 (slides 7/89-7J(c) and 7/89-7J(d)); by Sergeant Nelipa in 1993 (slide 7/89-7J(e)); and then by Mr Barnes/Mr Strobel in late 1994. PBP was located on all three occasions.

- The trim in the boot: 7/89-7K. This was searched by the AFP in 1989 (no PBP located) and then by Mr Barnes/Mr Strobel in late 1994 (one PBP located).

Ford

780. On 7 February 1989, Sergeant Case vacuumed the deceased's Ford (T 661). In total, there were 13 vacuumings from different areas inside the Ford. The only area which did not yield gunshot residue was the driver's seatbelt (T 668). The vacuumings were all labelled with exhibit numbers commencing '7/89-2'. From the vacuumings, Mr Nelipa prepared 12 slides containing PBP (T 608).

Summary of Green Particles

Driveway 7/89-1	**Ford 7/89-2**	**Mazda 7/89-7**
7/89-1B 10 green particles Located by Mr Nelipa 20 January 1989	7/89-2D(a) Front passenger seat 25 green particles Located by Mr Nelipa 9 February 1989	7/89-7J(c) Boot 12 green particles Located by Mr Bush 29 January 1989
7/89-1F Seven green particles Located by Mr Bush 8 February 1989	7/89-2C(a) Driver's seat 13 green particles Located by Mr Bush 11 February 1989	7/89-7J(d) Boot Nine green particles Located by Mr Bush 7 February 1989
7/89-1G Four green particles Located by Mr Bush 8 February 1989	7/89-2H(a) Nearside front floor pan	7/89-7J Boot 2 x GCMS chromatograms dated 1993
	7/89-2I(a) Offside rear floor pan	7/89-7J Boot One particle located by Mr Barnes/Mr Strobel Late 1994
	7/89-2K(a) Centre console	7/89-7E(a) Driver's seat One particle located by Mr Nelipa 16 August 1992
	7/89-2J(a) Nearside rear floor plan	
	7/89-2E(a) Offside of rear seat	

'Rogue' (Non PMC) Particles

Ford 7/89-2	**Mazda 7/89-7**
7/89-2D(a) Front passenger seat One particle Located by Mr Nelipa 9 February 1989	7/89-7J(e) Three particles Located by Mr Nelipa 1 February 1993
AC Winchester's hair One particle	7/89-7J 1993 GC-MS chromatogram
	7/89-7J Three particles Located by Mr Barnes/Mr Strobel late 1994
	7/89-7K One particle Located by Mr Barnes/Mr Strobel late 1994
	7/89-7D One particle Located by Mr Barnes/Mr Strobel late 1994

Evidence at First Inquest - 1989

781. Mr Barnes gave evidence at the Inquest on 31 August 1989, 1 September 1989 and 4 September 1989. It is necessary to consider his evidence because it raises doubts about both the scientific tests that Mr Barnes claimed to have conducted by the time of trial and his general veracity and reliability.

782. By 30 August 1989, Mr Barnes had prepared two reports; an interim report dated 1 March 1989 (Ex 93 p 3) and a statement dated 30 August 1989 (Ex 93, 5).

783. A comment needs to be made about a general deficiency in the reports and statements prepared by Mr Barnes. In his reports Mr Barnes referred to the receipt, examination and analyses of items specified in the reports. However, this was always in generic terms. Mr Barnes failed to identify the specific exhibit reference for the items. This makes it very difficult for the reader to identify the particular exhibit in question and follow the chain of evidence.

784. For example, in his interim report Mr Barnes wrote (Ex 93, 3):

> On Tuesday 31 January, 1989 I received the following samples.

1. Glass cavity slide containing green particles removed from matter collected by vacuuming the ground near the body of Assistant Commissioner Winchester 11 January 1989.

...

4. Glass cavity slide containing green particles removed from matter collected by vacuuming the boot of Mazda YMP-028.

785. It is necessary to rely on other sources to identify those two slides as 7/89-1B and 7/89-7J(c) respectively.

786. In the interim report Mr Barnes wrote that the following slides were received on 8 February 1989 (Ex 93, 3):

> Glass cavity slide containing further green particles removed from the ground near the body of Assistant Commissioner Winchester on 11 January 1989.
> Glass cavity slide containing further green particles removed from the boot of Mazda YMP-028.

787. Other sources identify those two slides as 7/89-1F and 7/89-7J(d) respectively.

788. In relation to the slides received on 31 January 1989, Mr Barnes wrote (Ex 93, 3):

> The green particles collected by vacuuming the ground near the deceased and the green particles removed from the boot of Mazda YMP-028 comprised partially burnt propellent with characteristic gunshot residue on their surfaces. These particles were of similar size composition and morphology. No significant differences were detected between the two groups of particles.

789. As to the slides received on 8 February 1989, Mr Barnes wrote (Ex 93, 3-4):

> These particles were of the same type as those received on 31 January 1989. They comprised partially burned propellant with characteristic gunshot residue on their surfaces.
> The particles were, collectively, of similar size composition and morphology with no significant differences apparent, that is, the two groups of particles were indistinguishable.

790. In the same interim report Mr Barnes wrote that on 22 February 1989 he received 12 glass cavity slides containing particles removed from the Ford. On examination he obtained the following result (Ex 93, 4):

> These particles comprised partially burned propellant with characteristic gunshot residue on their surfaces. The particles were of similar size, composition and morphology when compared with all other particles recovered from the vicinity of the deceased, and particles removed from the boot of Mazda sedan YMP-028. No significant differences were detected between the particles recovered from the vicinity of the deceased and the particles in the boot of Mazda sedan YMP-028. Collectively, the two groups are indistinguishable.

791. No dates are set out in the report for the examination of the particles; no details are provided about the examinations/analyses; and no information is given about the size, composition and morphology of the particles.

792. In the interim report Mr Barnes also referred to test firings using a Ruger .22 calibre rifle, Model 10/22, and .22 calibre PMC 'Predator' ammunition (no dates for these tests identified). He wrote that he examined the particles (no dates or details of examinations) and expressed the opinion (Ex 93, 4):

> These particles were of similar size composition and morphology to particles recovered from the vicinity of the deceased and particles recovered from the boot of the Mazda '626' YMP-028.

793. The information written in the interim report of 1 March 1989 concerning the four slides (1B, 7J(c), 1F and 7J(d)) was identical to the information about those four slides contained in his statement dated 30 August 1989. The only relevant additions in the statement dated 30 August 1989 related to his receipt of cartridge cases on 7 April 1989 and the opinion (Ex 93, 9-10):

> The gunshot residue produced by the RWS, Aussie and Sterling brands of .22 calibre ammunition is dissimilar from that present on and around Assistant Commissioner Winchester and that present in the blue Mazda 626 YMP-028. …
>
> I have conducted an examination of one hundred and twenty eight types of .22 calibre ammunition which are available in Australia. Significant differences were found to be present between PMC 'Predator 22' and 'Zapper' ammunition when compared with other available types. Differences were found to be present in the post discharge residues, that is gunshot residue, in terms of chemical composition, size and morphology (including partially burned propellent morphology) when selected ammunition types were test fired using a Ruger .22 calibre rifle Model 10/22 under identical test conditions.

794. In relation to the examination of 128 ammunition types, no information was given in the statement about the identity of those ammunition types; when test firings were conducted and by whom; the methodology involved in the test firings; when examinations were performed; and what analyses were done.

795. At the Inquest Mr Barnes expressed the following opinions:

- The residue on the PBP from on and around the deceased, from the Ford and in the Mazda was indistinguishable (Inqu 601).

- The primer residue inside the Mazda was indistinguishable in terms of chemical composition, size and morphology from the particles from the scene and from his test firings (Inqu 628).

- Particles found in the driving compartment of the Mazda; the gunshot residue particles in the boot of the Mazda on the PBP; the gunshot residue particles sampled from the rear entry wound of the deceased; the gunshot residue particles sampled off the centre door pillar of the deceased's car; and the gunshot residue particles on the PBP on and around the deceased; were all collectively indistinguishable (Inqu 629):

  > To put it in layman's terms, we tipped them all in a bucket, you gave me or any other expert in the field the task of sorting, the result would be, it is not possible to do that sort, it is not possible to tell those particles apart. They form collectively components of that standard population of residues, gunshot residue produced on the discharge of PMC .22 ammunition.

- Based on the tests he had done, he was in no doubt that the material he found in the Mazda boot was PMC in origin (Inqu 643).

- The PBP from the Mazda boot were indistinguishable from particles produced by test firings and particles recovered from the scene (Inqu 652).

796. In his affidavit (Ex 195), Mr Barnes said the opinions given at the Inquest were based upon the work he had done by that stage (Inq 3896-3897):

> 101 I first gave evidence at the Inquest into Colin Winchester's death on 31 August 1989, 1 September 1989 and 4 September 1989. At this time, as described above, I believe I had:
>
> a. examined particles from the scene and the Mazda as to physical characteristics (shape, dimensions, colour and morphology);
>
> b. conducted SEM/EDX examinations on particles from the scene and the Mazda;
>
> c. conducted test firings of numerous ammunition types and examined them as to physical characteristics both before and after firing;
>
> d. examined the test particles using SEM/EDX;
>
> e. identified the particular quality of PMC ammunition to retain its physical characteristics after firing; and
>
> f. conducted limited GC-FID analysis.
>
> 102 I gave my evidence on the basis of this information set out in paragraph 101. Based on the work I had done, I had excluded all ammunition types available in Australia at the time (other than PMC) as being consistent with the propellant particles found at the scene and in the Mazda boot.

797. An analysis of each of paragraph 101 (a) – (f) is illuminating.

Paragraph 101(a)

798. In relation to paragraph 101(a), Mr Barnes told the Inquiry that the dimensions of the particles were what he would expect to see in partially burnt PMC propellant, but was unable to specify those dimensions other than to say 'less than the minimum size of the unburnt propellant to almost nothing' (Inq 3897). He did not know or could not remember the minimum size for unburnt propellant particles, but believed that SEM photographs would show the dimensions (Inq 3898). He did not take optical photo micrographs (Inq 3899).

799. Professor Kobus said the particles would be very small and needed to be observed under a microscope. Photographs could be taken under the microscope (photomicrographs) to show the morphology. He could not locate any photomicrographs in Mr Barnes' material. He was shown photographs taken by the AFP which were tendered at trial (Ex 22 and 23 at trial; Inq Ex 116). There was a photograph of multiple particles from the driveway (photo 2), a photograph of multiple particles from the Mazda boot (photo 8) and a photograph of unfired PMC particles (photo 3). None of them were photomicrographs. He expressed the following opinion (Ex 108, 11 and 12):

> [the AFP photographs] support Mr Barnes' morphology observations and despite the apparent magnification differences a gross similarity between the particles in the Mazda boot and those at the scene is demonstrated. [However], as the morphology of the propellant particles was used as

> one of the identifying features photomicrographs taken at the same magnification of particles from the scene and the Mazda boot compared with known fired PMC propellant particles should have formed part of the case file information. Recording of microscope observations is an accepted forensic science practice.

800. Dr Wallace made a similar point in his report (Ex 109, 5):

> It is normal forensic practice in the UK, if analysing a propellant particle (or anything) by a destructive technique such as GC-MS, to make case work notes eg size, shape, colour etc., to record the reasons for destructive analysis and to photograph the item before dissolving it in an organic solvent.

801. Mr Nelipa took photographs, but not photomicrographs (Ex 184 [29]). Mr Barnes failed to comply with generally accepted forensic practice by failing to note adequately the size, shape, colour and morphology of propellant particles. Further, he failed to take photomicrographs before the particles were destroyed in organic analysis. Mr Strobel told the Inquiry that the Victorian Laboratory possessed the capacity to take photomicrographs at the relevant time (Inq 3526).

Paragraph 101(b) to (d)

802. Mr Barnes said he conducted SEM/EDX analysis of primer residue of the case work samples. The analysis was actually performed by Mr Wrobel (Ex 179 [14]–[24]).

803. Mr Barnes visited South Korea on 17 April 1989 to obtain information about PMC manufacture (Inq 3900). He was advised the manufacturer used 2 component primer (lead and barium), and included glass (silicon and potassium) and calcium carbonate. This meant there may be silicon, potassium and calcium at trace levels. Mr Barnes said antimony could be present because of the bullet-related contamination and copper may be present because the bullet possesses a copper wash (Inq 3900).

804. Mr Barnes prepared a report dated 7 June 1995 about his visit to South Korea on 17 April 1989 (Ex 93 p 54). Initially he said it took him six years to write a report 'because the information that I received at that time was just information and I couldn't relate it really to anything until the analysis had been done' (Inq 3901). However, when it was pointed out that the SEM work was done in early 1989, Mr Barnes responded: 'we didn't have a complete profile of the materials until much later in the investigation comprising the ammunition' (Inq 3901).

805. In itself this response raises doubt about the opinions Mr Barnes gave at the Inquest in 1989 if, he now says, he did not have complete profiles until much later. Mr Barnes then said: 'there's been no time that I haven't indicated that it was PMC and I think this was just a report to tidy all the scientific facts up or put them together in one coherent report' (Inq 3902). In my opinion Mr Barnes was unable to provide an acceptable explanation for the delay.

806. In the report dated 5 May 1995 (Ex 93, 44), Mr Barnes did not include silicon as a trace component, but did include a reference to zinc (Inq 3902). His explanation for that was that silicon 'tended to be ambiguous and was present in a number of ammunition types whereas the calcium was not; I'm not really sure'. Mr Barnes said zinc and copper are

ubiquitous because every ammunition manufacturer uses copper zinc cartridge cases (Inq 3903).

807. It is apparent that primer can contain not only one or more of the major components (lead, barium and antimony), but also various other trace components.

808. Mr Barnes was shown the available SEM/EDX results for the Ford, driveway, Mazda, PMC ammunition and other ammunition types. The same components including trace components were detected in all of the results, in various combinations, including for Winchester, RWS and Fiocchi brands of ammunition. In relation to the Winchester SEM/EDX results, Mr Barnes gave the following evidence (Inq 3917):

> Q My question is how would you distinguish this from the results that we've been looking at for the scene and the Mazda?
>
> A Well you can't distinguish primer related gunshot residue.
>
> Q You can't distinguish it?
>
> A No, no, not between these.

809. Similarly, Mr Barnes said RWS and Fiocchi could not be distinguished from the scene and Mazda results (Inq 3918).

810. Mr Barnes agreed that by applying (a) to (d) in his paragraph 101, all he could say was that green flattened ball PBP with primer attached to that propellant was found in the Mazda and at the scene (Inq 3954). He said ammunitions which were not green flattened ball and two component could be excluded. He recognised that Dr Zeichner had a different view about excluding three component primer ammunition.

811. The presence of antimony in the primer from the Mazda meant there could be two component primer with antimony present due to bullet contamination (Mr Barnes' view), or it could be three component primer containing antimony (Dr Zeichner's view). Professor Kobus emphasised the highly heterogeneous nature of primer particles due to the conditions under which they are formed. The high temperature and pressure conditions are such that projectile particles can be incorporated within two component primer particles creating the appearance of a three component particle (Ex 108, 3). Professor Kobus expressed the opinion, which I accept, that this is an area where reasonable minds can differ. He would be 'extremely hesitant to put money on either one' (Inq 3314). In his view, it is a 'really difficult field' when you start trying to make decisions based on amounts of material (Inq 3314).

812. Mr Barnes' opinion at trial strongly favouring two component primer with antimony from bullet contamination reflected his bias in seeking to link the Mazda with the scene, believing that two component PMC primer was at the scene. This bias was also apparent in his evidence about the charred particles and the use of a silencer which is discussed later.

813. There is no doubt that SEM/EDX analysis on primer (whether it shows two component or three component primer) is not very discriminating in terms of identifying ammunition brands (Wallace Inq 1914; Kobus Inq 3194). Mr Barnes now says that

'SEM/EDX results alone do not allow a very discriminating conclusion particularly where the unknown particles are not a large population' (affidavit Ex 195 [77]).

Paragraph 101(e)

814. In relation to paragraph 101(e), Mr Barnes' evidence at the Inquest was that PMC is unique in that it retains its shape upon firing (Inqu 611, 612, 651):

> A But, as a general statement, they retain their disk-like shape or morphology. Other particles, whilst they may initially – prior to firing, prior to combustion – display a similar pre-combustion shape, on firing, in the trials conducted, break up…..so the critical point, as I say, is that in post discharge residue, PMC does not equate with any other residue of the types examined.
>
> Q ... that is a characteristic unique to PMC ammunition in relation to the tests that you carried out?
>
> A That is correct.
>
> Q So there might be difficulty in discriminating between that of the others within the 128 other brands that you test fired, but the one that does stand out is the PMC ammunition?
>
> A That is correct. In terms of gunshot residue, that is, the fine deposit, there are in fact other ammunitions which will generate similar residues. However, they do not generate similar post-combustion partially burnt propellant residues ...
>
> Q ... And the partially burnt propellant of PMC predator and zapper is absolutely unique from all other available ammunitions?
>
> A From the results of the survey which I have conducted and the tests I have conducted, yes. Only PMC ammunition produces PBP which retain their essential original shape in copious quantities and which have deposits of – in the four categories we have discussed, which I will detail now if you wish. They are lead antimony barium with copper, lead copper or lead.
>
> Q And so that gives it a signature which distinguishes it from all other available .22 ammunition in Australia?
>
> A That is correct, based on the tests that we have done, yes.

815. Mr Barnes relied upon the 'unique' characteristic of PMC retaining its shape at the re-opened Inquest. His evidence was that PMC PBP had a 'significant characteristic' that is absent in other PBP in that it retains its disk-like character. It was a 'significant characteristic' common only to PMC Predator Zapper ammunition (Inqu 7937).

816. There are no notes available regarding any testing Mr Barnes undertook concerning this significant characteristic, including notes of observations, test firings or examinations. He told the Inquiry he was sure he had made notes at the time.

817. In a report of 9 June 1995 Mr Barnes mentioned retention of 'physical dimension, shape and colour' after discharge as one of the criteria used to identify PMC propellant 'to the exclusion of all other' ammunition available 'at a given time' (Ex 93, 66–67). However Mr Barnes did not prepare a report in relation to this 'significant' and 'unique' characteristic of PMC. Initially he explained (Inq 3961):

> … the work was ongoing at the time and it was – it was developing. The work was evolving. We didn't have all- I didn't see all the exhibits until quite late in the life of the investigation.

818. By way of contrast Mr Barnes included in his interim report of 1 March 1989 reference to the examination and test firings of all .22 calibre ammunition available in Australia, specifically stating that it was 'in progress' and that 'results of this examination will be reported once complete' (Ex 93, 4).

819. Mr Barnes agreed that the work on the retention of shape characteristic would have been completed before trial. He was asked why he didn't prepare a report about this characteristic prior to trial (Inq 3961):

> I prepared a number of reports, and - prior to the trial and I believe that certainly by the time of the trial I had arrived at the position where I felt that this characteristic was - wouldn't be used as an exclusionary characteristic but, rather, as a confirmatory characteristic. So, in other words, I didn't use it to knock things out. By that stage, as I recollect, we had organic analysis to look to as well. And that enabled - that added another level of discrimination.

820. I do not accept that explanation. Mr Barnes was endeavouring to minimise his prior reliance upon this characteristic. This was also evident at paragraph 26 of his affidavit (Ex 195):

> 206 Some characteristics and features were used in a confirmatory manner. This was the case with the overall tendency of the propellant particles to retain their shape and size after burning. I did not use this to exclude any specific ammunition types, but it was information that confirmed or corroborated my conclusions. This applies to the SEM/EDX and GC data insofar as I they provided consistencies in information that was not sufficient to be used in an exclusionary sense.

821. Mr Barnes gave the impression at the Inquest that this was a 'unique' characteristic relevant to the identification of PMC ammunition as opposed to other types of ammunition. At trial he described this feature as 'very characteristic (T1449) and PMC's 'most significant characteristic' (T1543). He used this characteristic for exclusionary purposes at trial.

822. A photograph (Ex 197) was tendered at trial showing what were said to be 'random samples' of unburnt and burnt PMC propellant (T1393). Mr Barnes gave the following explanation to the Jury (T1543):

> Q Would you agree that the most significant identifying feature of PMC propellant is that it's green, the powder is green? ...
>
> A It depends on whether one is talking about in the burnt or unburnt condition. Certainly, before one, if one breaks down a cartridge, its most significant characteristic is that it's a flattened ball propellant, which has got a graphite coating. If one sections it, it appears to be green or yellow green, depending on one's description. If however, one discharges it and fires it in a firearm, and collects the material, its most significant characteristic is, as I have shown in photographs tendered to this court, and they are that it retains, very closely, its morphology, its shape and tends to be very resistant to breaking-up impact damage and the like.

823. At trial Mr Barnes relied upon this retention characteristic to exclude Winchester 818 ammunition, which otherwise had the same colour, morphology and chemical composition as PMC. He said it would be hard to tell the difference between unburnt PMC and unburnt Winchester 818 propellant (T1449). However (T1449–1450):

A PMC is very characteristic in that it retains its morphology, its shape and physical characteristics through the burning process providing it is not consumed completely whereas it was my experience that Winchester 818 when loaded and fired burnt and broke up differently. So therefore I formed the opinion that if one were presented with a population of particles from a firing using Winchester 818 relayed powder and a population of particles produced on firing PMC Zapper or Predator .22 calibre ammunition, one can see the difference. That is in terms of physical characteristics ...

Q Right, so If I can summarise – correct me if I'm wrong – characteristically PMC burns in a way – burns down in a way that retains its shape?

A Absolutely.

Q Whereas characteristically Winchester 818 fragments when it's burnt?

A That's correct.

824. When he was shown this trial transcript, Mr Barnes contradicted his earlier evidence (Inq 3961) and agreed he used the retention of shape characteristic of PMC to exclude Winchester 818 (Inq 3970).

825. Contrary to Mr Barnes' written submission (annexure 8 [118]), Mr Barnes also said at trial that he used this characteristic to exclude other types of Winchester ammunition (T 1450, 1541).

826. The photograph of unburnt and burnt PMC particles tendered at trial (Ex 197) stands in stark contrast to a photograph of such particles in Mr Strobel's thesis (Ex 107 annexure NS1, 51). Mr Strobel's photograph shows different shapes and fragments in post-fired PMC. It conveys a completely different impression from the trial photograph of clean, almost pristine, particles. Mr Barnes rejected the suggestion that he selected the photograph tendered at trial because it supported his argument (Inq 3969). In my view it is highly likely that Mr Barnes chose the photograph carefully with his theory in mind.

827. Mr Barnes agreed that as part of his evidence at trial he set out to explain to the jury that his database was comprehensive. He had gone to the extent of using the FBI database to compare PMC and, out of all the ammunition in that database, only Winchester 818 might match PMC. He said he could exclude it by reason of this characteristic (Inq 3973). As to why did he not prepare a report (Inq 3973):

> I can't answer that, your Honour. All I can say is that I prepared statements and reports as requested or directed by the AFP and DPP and that wasn't one of them. I have no answer.

828. Mr Barnes failed to give a satisfactory explanation for why he did not prepare a report substantiating his view concerning the retention of shape characteristic attributable to PMC. It must be said, however, that it is hardly surprising that Mr Barnes is now unable to recall a reason for not providing a report.

829. Mr Barnes told the Inquiry he believed he would have spoken to Mr Strobel about this characteristic (Inq 3974). However, Mr Strobel said the issue of retention of shape was not specifically put to him at the time by Mr Barnes and they did not discuss it (Inq 3559). He learnt about it after becoming involved in this Inquiry in 2013. Of course, Mr

Strobel's memory may be defective in this regard, but in my view it is likely that his evidence was accurate.

830. I am satisfied that Mr Barnes' evidence at the Inquest and at trial about this characteristic was based on his subjective observations which were not properly documented. It appears likely that Mr Barnes did not discuss this characteristic with Mr Strobel who was the person working with the 151 types of ammunition. If Mr Barnes genuinely believed the PMC shape retention was unique to PMC, and could be used to exclude other types of ammunition, it is the type of feature that almost inevitably would have been the topic of discussion with Mr Strobel.

831. In addition, Mr Barnes' evidence to the Inquiry concerning these issues undermined his evidence at the Inquest and at trial (Inq 3962):

> A But, your Honour, I did not embark on a scientific research project to produce a scientific paper for that purpose. One of the reasons I didn't do that is because I knew that in one sense it would be of limited usefulness because I did know that propellant manufacturers - some propellant manufacturers change the contaminants they used, they change - they mix et cetera, et cetera. So you use it as a tool and it would have required a large amount of work to scientifically establish that as a firm plank on which you could exclude. It would require a very large amount of work.
>
> Q And do you say that you didn't do that work? ...
>
> A Not to that extent.
>
> Q So when you expressed the opinion about the uniqueness of PMC in this regard comparing to the ammunition types that you tested, was that scientifically based? ...
>
> A It was based on my scientific observations, yes.
>
> Q But you're now? ...
>
> A But in terms of undertaking a rigorous scientific investigation, I didn't have the resources nor was it feasible to do that.

832. This was not the impression Mr Barnes gave at the Inquest or at trial.

833. Professor Kobus made sensible observations in his report dated 27 October 2013 (Ex 108 [34]):

> Mr Barnes has made the observation that PMC propellant retains its shape when discharged. This is used as a further property in addition to morphology and composition to identify propellant particles as being from PMC ammunition. I am not familiar with this phenomenon and am not sure what is meant. At first I assumed that it referred to the fact that he was able to identify the colour and morphology (green flattened ball) of PMC in the partially burnt state. However he was able to identify the morphology of other propellant such as chopped disk in the burnt state so it appears it was something more complex. I could not find anything in the case material that supported this observation and other than making this statement there is no explanation of this effect. It therefore appears to be a subjective assessment and if it is to have scientific credibility then it needs to be demonstrated, probably through photomicrographs that can show this feature compared to propellant particles that do not show this effect. I do not believe this property can be used as an identifying feature without this type of support.

Paragraph 101(f)

834. Mr Barnes claimed that he conducted limited GC-FID analysis prior to his evidence at the Inquest in 1989. This is a technique which Mr Barnes said rendered the sample analysed unusable for further analysis because methanol had been used. At the Inquest he gave the following evidence (Inqu 630-631):

> Q Now, Mr Barnes, in relation to the work as it relates to the residue that you have tested, is all that preserved and still in existence? ...
>
> A Absolutely, with the exception of a small amount of propellant particles, PBP which were recovered from in and around the deceased from the Ford, YRO355, and particles recovered from the boot of YMP-028. Those particles, and we are talking in the order of one or two in each case have been dissolved to permit other analyses to be undertaken.

835. Mr Barnes gave this evidence in August 1989, but there was no reference in either of his reports of 1 March 1989 (Ex 93, 3) and 30 August 1989 (Ex 93) to organic analysis or some of the particles being destroyed. Mr Barnes accepted this to be the case (Inq 3977). He was asked why (Inq 3978):

> I don't know why it wasn't included. I can only conclude that the - I'd written the report perhaps before that work was finished, and it was signed on the day it was signed.

836. The only reference to organic analysis in Mr Barnes' notes is on a page on which he recorded receiving slides from the Ford on 22 February 1989 and then listed 12 slides (Ex 92, 7). At the bottom of the page the following was written:

> EXAMINATION:
>
> All slides contain PBP consistent with PMC shape, size morphology physical characteristics
>
> Consistent Organic profile
>
> Consistent GSR (primer related) Pb Ba (Ca) Cu

837. Mr Barnes said this annotation was made after receipt of the slides on 22 February 1989, but was unable to say when he made it because it was undated (Inq 3978). In his report of 1 March 1989 (Ex 93, 3) Mr Barnes wrote that he examined the Ford slides and performed SEM/EDX analysis (non-destructive). He gave evidence that he would make notes of his examination at the time he did the examination, but he did not believe he had done GC-FID before 1 March 1989. This evidence made it difficult for Mr Barnes to explain his notes of 'examination', particularly why 'Consistent Organic profile' was the second dot point in between observations of physical characteristics (made before 1 March 1989) and findings of the SEM/EDX analysis (made before 1 March 1989). An organic profile could only have been obtained by GC-FID analysis. Mr Barnes' best explanation was that these were not the contemporaneous notes of his examination. Rather, this was a summary of the results of examination.

838. Faced with these difficulties, Mr Barnes was obliged to concede that his notes were not helpful (Inq 3980). His suggestion that the notes were a later summary does not sit well with the purpose of the notes as a contemporaneous record. At the least, it is confusing.

There is considerable doubt about the reliability and accuracy of Mr Barnes' notes, including when they were prepared.

839. Mr Barnes told the Inquiry he thought a number of particles from the boot were subjected to GC-FID analysis en masse (Inq 3976), but he could not remember whether they came from the slide 7J(c) or 7J(d). However, this analysis is not mentioned in his report of 30 August 1989 (Ex 93). Those two slides were crucial to the investigation. A competent forensic scientist should have set out in a report full details of the examination and analysis of particles from these slides, particularly as the analysis resulted in the destruction of the particles. Again, if Mr Barnes is to be believed, the written records are deficient.

840. Mr Barnes said he believed he had GC-FID results for PMC and for some of the particles found in the Ford and in the Mazda boot. He said those results showed they were all consistent with PMC as 'they had major peaks or retention times which were the same within the accuracy of the instrument'. However, GC-FID could not identify the chemical component represented by the peaks (Inq 3982). Mr Barnes did not believe he had done GC-FID on propellant from any ammunition type other than PMC, so he did not know if they were consistent or inconsistent with what was in the Mazda boot (Inq 3983).

841. To say the least, it is highly unusual and surprising that none of the GC-FID data for the Mazda was produced by Mr Barnes up to the time of trial, including the period in early 1994 when Mr Ibbotson and Mr Barnes were preparing the materials for the overseas experts. Mr Barnes told the Inquiry he would have kept the hard copy results for the GC-FID on his case file at the time. I reject the suggestion that such data, and a large quantity of other essential data, was all lost by Victoria Police following seizure under the search warrant. The obvious explanation for the failure to produce is that either the tests were not done or, if they were done, the data was destroyed because it did not support Mr Barnes' view.

Paragraph 101 - Conclusion

842. At each step in the analysis of paragraph 101 of Mr Barnes' affidavit (Ex 195), significant problems emerge which undermine both the opinions expressed by Mr Barnes at the Inquest and his credibility. In summary:

- <u>Paragraph 101(a):</u>

  Reliance on physical characteristics was not supported by notes or photomicrographs. Mr Barnes failed to comply with generally accepted forensic practice.

- <u>Paragraph 101(b)-(d):</u>

  Mr Barnes took six years to write a report about his visit to the Korean manufacturer of PMC. His explanation was unsatisfactory. By applying (a) – (d), ammunition that was not green flattened ball could be excluded, but in a positive sense the result could go no further than saying that green flattened ball PBP with

primer attached was found at the scene and in the Mazda. The SEM/EDX results were not very discriminating.

- Paragraph 101(e):

  Mr Barnes' evidence at the Inquest that the retention of shape by PMC burnt propellant is 'unique' to PMC is not supported by notes or a report.

  The sole photograph presented to the jury was not a true reflection of typical PMC burnt propellant.

  Contrary to his initial evidence to the Inquiry that this characteristic was used only in a confirmatory manner, and not to exclude ammunition types, at trial Mr Barnes used this characteristic to exclude Winchester 818 ammunition.

  It is unlikely that Mr Barnes discussed this characteristic with Mr Strobel who was testing 151 types of ammunition in preparation of the database.

  Mr Barnes' evidence to the Inquiry that he did not undertake a 'rigorous scientific investigation' because it would be of limited usefulness was not the impression he conveyed to the jury.

- Paragraph 101 (f):

  Mr Barnes' claim that he undertook organic GC-FID analysis prior to his 1989 evidence to the Inquest is not supported by his reports of March and August 1989. His notes are, at best, confusing leaving considerable doubt as to their date and reliability. There is no data to support the existence of GC-FID analysis in 1989.

843. There was no proper scientific basis for Mr Barnes' unqualified evidence at the Inquest that the gunshot residue at the scene and in the Mazda were indistinguishable. That evidence was based on the examinations canvassed by Mr Barnes in paragraph 101(a) - (d) of his affidavit, which examinations the earlier discussion has demonstrated did not provide a sound basis for such evidence.

844. Similarly, there was no scientific basis for Mr Barnes to say that the material in the Mazda boot was PMC.

845. During evidence to this Inquiry Mr Barnes was given a number of opportunities to answer the question whether he now stood by the evidence he gave on 1 September 1989 to the Inquest as accurate when he said there was PMC in the boot of the Mazda. He finally said (Inq 3985–86):

> I am hesitating, your Honour, because in the ideal world I would test all the other propellants before I offered an opinion. Is it reasonable to offer that opinion after testing only between the unknowns and the PMC? Given the other characteristics which I observed, I couldn't distinguish between them at the time. Is it a reasonable scientific methodology to use? I have used layers of exclusion, and I haven't been able to exclude. Today, if I were to do the testing again, I would do further testing of other propellants.

846. Mr Barnes continued to defend his Inquest evidence on the basis he had test-fired all green flattened ball ammunition types (Inq 3989–3990). However, the examinations identified in paragraph 101(a)–(d) did not justify such positive identification. Mr Barnes did not scientifically establish his claim in paragraph 101 (e) about PMC. On the assumption he performed the GC-FID work he claimed to have done in paragraph 101(f), GC-FID would not permit such an opinion to be expressed. Analysis by GC-FID had limitations, including the inability to identify chemical components. In addition, Mr Barnes had not performed GC-FID on any other ammunition types by that time. There was no sound scientific basis upon which Mr Barnes could give that opinion. His attempts to defend his evidence reflect adversely on his credibility.

847. As to his evidence at the Inquest that the propellant in the Mazda was indistinguishable from propellant produced on test firings and found at the scene, Mr Barnes said that 'in hindsight' he would not have used the word 'indistinguishable' and his opinion would have been 'more conditional' (Inq 3987). In substance Mr Barnes accepted that his evidence at the Inquest was misleading (Inq 3987).

Paragraph 102

848. Mr Barnes agreed paragraph 102 of his affidavit (Ex 195) is wrong. He could not have excluded all ammunition types available in Australia at the time (other than PMC) because he had not undertaken organic analyses of them (Inq 3989).

Forensic Work between First Inquest (1989) and Re-opened Inquest (Nov 1992)

849. In his affidavit (Ex 95), Mr Barnes referred to work undertaken in the period between 31 August 1989 and 15 March 1991:

> 105 I cannot recall what investigations I conducted on the Winchester investigation during this time but testing and analysis would have been ongoing. During this period I believe I was doing substantial work on other cases.
>
> 106 I made a statement on 14 March 1991. I have reviewed this statement. Based on the statement I believe that the work I did around this time was predominantly on cartridges and ballistics, rather than on gunshot residue. I believe this was as a result of developments in the identification of the Klarenbeek rifle. This is supported by the evidence I gave at the Inquest again on 15 March 1991 in relation to investigations I conducted regarding the cartridge cases at the scene and those recovered from the Klarenbeek rifle. I did not give any further evidence about gunshot residue.

850. Mr Barnes then referred to the period between 15 March 1991 and his evidence at the re-opened Inquest in November 1992 (Ex 195 [107]–[115]). He stated that the second half of 1992 was significant because the SFSL obtained a GC-MS machine during 1992:

> 108 The second half of 1992 was significant because the SFSL obtained a GC-MS machine during 1992. When we obtained the GC-MS machine, I wanted to use it to undertake organic analysis on a range of .22 calibre ammunition types in the same way as we had done with SEM-EDX. This was primarily to assist with the Winchester investigation but also to investigate the possibility of expanding our understanding of .22 calibre ammunition more generally. This was ammunition used often in cases we were investigating at that time and we wanted to see if we could improve our forensic work in relation to it.

> 109 We thought we might be able to identify unknown propellant particles with more precision with the benefit of organic analysis. As described above, GC-MS is better suited to the analysis of the composition of propellant than GC-FID or other technology existing at the time. GC-MS identifies specific components in a way that GC-FID cannot. GC-FID only allows a comparison to say that two spectra appear the same and to identify significant or 'obvious' components in broad terms. GC-MS has the capacity to identify precise and trace level organic components with much greater confidence.

851. Mr Barnes also referred to the GC-FID data he produced to the Inquiry on 28 January 2014 in a late answer to the subpoena dated 4 February 2013 (returnable on 19 February 2013 with an extension to 28 February 2013). The data produced (Ex 101A) included:

- a particle described as 'Propellant B from Boot Mazda YMP-028' and marked 7/89-2DC; and
- a particle described as 'propellant A Grain#3' and marked 7/89-2Ca.

852. The problem with the first set of data said to relate to the Mazda is that there was no exhibit from the Mazda with a label of 7/89-2DC. All of the exhibit labels for vacuumings and slides containing particles from the Mazda commenced with 7/89-7. All of the Ford exhibit labels commenced with 7/89-2. It is obvious that the description identifying that the particle came from the Mazda boot conflicted with the marking of the exhibit as 7/89-2DC. The description and the marking unacceptably mixed up the Mazda boot (associated with the applicant) and the scene.

853. Despite this, in his affidavit (Ex 195) Mr Barnes sought to defend the result in his affidavit:

> 111 One particle was marked as '7/89-2DC' and was described as 'Propellant B from Boot Mazda YMP-028' written on it. I cannot recall why this particle had a number 2 in it when all the other Mazda boot particles used the 7J numbering. I believe the detailed description would have accorded with the information Strobel was provided because he was very meticulous about such matters. I am confident this particle was from the Mazda boot.
>
> 112 There is also a particle marked '7/89 – 2Ca' with no further description. I am confident that this particle was from the Ford. The subsequent pages appear to be GC-FID conducted on various PMC, Winchester and RWS ammunition. These would have been 'control' particles. I cannot now recall exactly why Winchester and RWS were the other ammunition types used in this comparison. I believe it may have been because Winchester was very popular ammunition at the time and RWS was the ammunition located on the passenger seat of Assistant Commissioner Winchester's car.
>
> 113 By comparing the spectra for the exhibit particles, it is my interpretation that both the exhibit particles have no significant differences from the PMC 'control' particles and are significantly different to the Winchester and RWS 'control' particles.

854. Mr Barnes told the Inquiry that the '2' should be a '7' (Inq 4022). When it was pointed out to him that there was no slide from the Mazda boot labelled '7DC', he responded, 'I don't know how Mr Strobel arrived at the number'. He said, 'I think there's just been a confusion of writing the number down' (Inq 4022). Mr Barnes then gave the following evidence (Inq 4022):

Q Mr Barnes, this data is a completely unacceptable confusion of information for forensic case work, isn't it? What has been confused here is the accused's car with a scene sample. It's completely unsatisfactory, isn't it? ...

A In terms of the identification number, yes.

Q But it completely demonstrates unreliability about whatever that data might be, doesn't it? You could not present that properly to a court, could you? ...

A I believe it was from the Mazda, and I don't know what Mr Strobel said in evidence, but I think he would have been of the mind that it was from the Mazda.

855. Mr Barnes was told that Mr Strobel gave evidence that he carefully copied down what was written on the exhibit. Mr Barnes maintained a belief that the particle came from the Mazda and the numbering was wrong rather than the description being wrong (Inq 4023–4024):

Q Why might it not be, Mr Barnes, that the label is wrong when it says, 'From the boot of the Mazda'? ...

A I think because that requires bigger error, your Honour. You know, it said from scene to transpose that from boot of Mazda YMP-028 I think was less likely than to confuse 2DC.

Q Mr Barnes, I must give you an opportunity to comment. This strikes me as you wanting to assume that it's from the Mazda and that you have covered your answer accordingly. That you are not approaching this in an even-handed way, this particular issue because all you've said throughout is, 'Well, it's definitely' - or 'I'm satisfied it's the boot of the Mazda.' You have not acknowledged the other side of the equation? ...

A Well, acknowledge that if you take it prima facie the number could be right and the rest of the title could be wrong. I should ...

Q Why didn't you take that view from the outset? ...

A Because ...

Q Look, it could be wrong. It might have not have come from the boot at all. Why have you sought to justify the position that it came from the boot? ...

A Because I believe it did. I'm not trying to justify - - -

Q And let me come back to, then, the question that Ms Chapman asked you? Do you not accept that this is a completely unacceptable confusion within the records of the scientific results? ...

A I accept it is a confusion, your Honour.

Q And it's an unacceptable confusion from a scientific point of view isn't it? ...

A Sitting here now it would appear to be, yes.

Q Even if you had it at the time it will be an unacceptable confusion from a scientific point of view wouldn't it? ...

A Yes but it would be my belief, your Honour, that at the time there was no confusion at all and it's only now that ...

Q See, Mr Barnes, I'm sorry to interrupt. How can you possibly say, how can you possibly believe that at the time there was no confusion when there is a sample that's labelled with contradictory entries? ...

A Yes.

Q One that relates to the Mazda and one that relates to the Ford. How can you say now or express now a belief that at the time there was no confusion? ...

A I believe that at the time I was under no doubt that sample was from the Mazda boot. I agree now when I look at it you can't say that because there is confusion in the labelling ...

Q How can you let something go through like that without an explanation if you're keeping proper scientific, following proper scientific procedures and keeping proper scientific records? It's contradictory on the face of it? ...

A I accept on the face of it, it is, your Honour.

Q And how then can you let it go through and subsequently rely on it as coming from the boot of the Mazda without some form of note or explanation? ...

A It was – I was sure it was from the boot.

Q All right, thank you? ...

A I think Mr Strobel was too.

856. Mr Barnes was asked to accept that if the labelling should refer to the Ford rather than the Mazda, there was still a problem with the numbering because there was no slide from the Ford with a number 7/89-2DC. In response, Mr Barnes said (Inq 4025):

> I can only, at this time, think that the 2DC should have been 7JC but that's all I can say at this time.

857. The GC-FID produced by Mr Barnes concerning Propellant B cannot be relied upon as relating to a particle from the Mazda. The source of the particle is unknown.

858. The written submission filed on behalf of Mr Barnes contended that Mr Barnes made a 'plausible attempt' to explain why he thought the exhibit 'would have been reliable'. This submission misses the point. The significance of the evidence is found in Mr Barnes' starting presumption that the reference to the Mazda is correct. The evidence of Mr Barnes reflected his lack of objectivity and desire to support his opinions. The evidence lacked scientific independence.

Exhibit 7/89-7E(a)

859. The other relevant occurrence between the first Inquest and the re-opened Inquest was the finding of a further particle from inside the Mazda. On 16 August 1992, Mr Nelipa located a PBP particle in the vacuuming of the Mazda driver's seat. At trial, he described this particle as 'one very very small round particle' (T 613). It was placed on a slide and labelled 7/89-7E(a).

860. As discussed earlier Mr Ross gave evidence at trial about his examination of this particle (T 861-864). He told this Inquiry that some time before 10 November 1992, a request was made to the Victorian Laboratory by the AFP for the examination of the particle. Mr Barnes was on leave and Mr Ross was directed to examine the particle. Mr Ross did so and provided a written memorandum to Mr Nelipa on 20 November 1992 (affidavit Ex 189).

861. Mr Ross produced continuity records for 53 items registered on the Prime ITEMS computer system for the Winchester case (1899/999) (affidavit Ex 190 [3], annexures PR-10 and PR-11). Not all exhibits obtained by Mr Barnes from the AFP were logged and recorded on this system.

862. The ITEMS record showed that the 7E(a) was logged in on 10 November 1992 as Item 51 and was issued to Mr Ross on 16 November 1992. It was recorded as returned by Mr Ross on 30 November 1992. It was issued to Mr Barnes on 3 December 1992.

863. In his handwritten notes (Ex 92, 13), Mr Barnes recorded in relation to this 'small charred green particle' that on 20 November 1992 'on advice from SFSL attended and received/examined particle received by Ross 7/89-7E(a)' and on 3 December 1992 'returned in company with Ross 7/89-7E(a). Received (for SFSL Liaison purposes) 7/89-7E(a). Destroyed in organics analysis'.

864. In his supplementary affidavit sworn on 20 February 2014 (Ex 190), Mr Ross referred to his own diary entries regarding his examination of this particle. On 11 November 1992 he discussed the item with two managers and stressed to them that examination must wait until Mr Barnes returned to duty. They both agreed. On 16 November 1992 he noted meeting with the same two managers who informed him that the item must be urgently examined. The ITEMS system records that the exhibit was issued to Mr Ross on that date. He faxed a memorandum to Mr Nelipa to the AFP on 20 November 1992 (Ex 189, annexure PR-2).

865. In that memorandum Mr Ross stated that the PBP particle was contaminated with various foreign materials. There was a prevalence of primer containing lead, barium and calcium on the surface. The morphology of the PBP particle and those primer residues made it consistent with PMC. However, he also noted other primer residue on the PBP particle which were 'very likely' to originate from different ammunition which contained other elements, including tin and antimony. They could have originated from previous firings of other ammunition in the firearm. Although extremely unlikely, that primer could be from the same ammunition as the PBP particle which would mean that it was not consistent with PMC. He noted that it was necessary to perform destructive organic analysis on the PBP particle in order to establish whether it originated from PMC.

866. Mr Ross returned from sick leave on 30 November 1992. He was reprimanded for faxing the memorandum to Mr Nelipa without first clearing it with an appropriate person. He met with Mr Gidley that day and was told he would face a formal disciplinary meeting. Mr Ross was directed to return the item to the Item Liaison store. Asked whether he ever discussed the cause of Mr Barnes' anxiety about the report with Mr Gidley, Mr Ross told the Inquiry (Inq 3716; also 3738):

> To a point. I tried to get my point over that I believed that I was correct. I asked, 'What is Mr Barnes saying?' And David Giddley couldn't tell me. He simply said, 'Barnes says you're wrong.' I tried to – as I said I tried to get my point over and David said, 'That's not the point' and then essentially said, 'You know why this is happening because you released a report without it having been reviewed'.

867. In his affidavit (Ex 195), Mr Barnes stated the following:

> 167 I have read that part of the second Ross affidavit which relates to the continuity of the particle located in slide 7/89 – 7E(a). I cannot specifically recall all the details surrounding that particle. However, based on a review of the second Ross affidavit and the relevant documents exhibited, I believe that what occurred was as follows.

168 I was on leave on 20 November 1992 and someone at SFSL contacted me. I cannot recall who that was; it was probably the person acting in my position at that time. I was told about the new particle and requested by SFSL to attend and examine the particle to see what it was. I came into the laboratory and examined the exhibit in conjunction with Ross. The exhibit would have remained in his possession but we would have examined it together. According to the dates of the SEM results, it is clear that Ross must have begun SEM analysis before 20 November 1992. It may have been that the results were ready and I was called to examine them. I believe we viewed the relevant results together. I believe I gave instructions not to report on the particle until I had returned from leave.

169 I travelled to Canberra and gave evidence in the Inquest on 30 November 1992. I believe I became aware of the report by Ross around this time as the AFP in Canberra may have been asking me about the contents of the report. I was supposed to be the case officer in control and I was not aware of any report. I was furious because the situation made me look as though I had no control over a case for which I had overall responsibility at the Victoria Police SFSL. It was yet another aspect of the difficulties I experienced with Ross' professionalism. I believe I would have spoken to Paul Murrihy (Murrihy) and Gidley about the situation. I received a fax from Murrihy in Canberra on this day regarding the interim report released by Ross. The fax was presumably sent to me so I could understand what had happened and discuss with the AFP. Now produced and shown to me and marked 'RCB-30' is a copy of the fax.

170 I returned to the SFSL in Melbourne on 2 December 1992 (or possibly the day after, on 3 December 1992). I believe that I would have gone to see Ross and ask what was happening with the exhibit and where I could find it. I believe he would have told me he had returned it to SFSL liaison and we would have attended at the liaison office together to collect it and transfer it to me.

171 After I had received it, I would have arranged for GC-MS analysis to be conducted. I cannot recall who did that analysis. It probably would have been Strobel who regularly operated the GC-MS machine and I would have received and interpreted the results. I cannot recall when the analysis would have been done. It probably would have been in the next few days after I received the item on 3 December 1992. The particle was consumed by the GC-MS analysis.

172 Ross was disciplined for his breach of procedure in relation to this slide although I was not directly involved in that process.

868. Given the animosity between Mr Barnes and Mr Ross in 1992 and, in particular, the strong feelings held by Mr Barnes, I consider it highly improbable that together they would have retrieved and examined the particle, viewed the results and returned the item. Mr Ross made notes in his diary regarding this exhibit, but made no notes of any of the events alleged by Mr Barnes. Mr Ross gave evidence that he would have definitely noted such events if they had occurred. He was 'quite intimidated by Mr Barnes at that stage' (Inq 3716). Mr Ross' notes accord with the ITEMS records.

869. Mr Barnes' account conflicts with the ITEMS records. His contention that he and Mr Ross returned the item on or about 3 December 1992 conflicts with the ITEMS report for this exhibit which recorded the return of the exhibit by Mr Ross on 30 November 1992 (the day when Mr Barnes was giving evidence in Canberra).

870. I do not accept Mr Barnes' explanation. His version of events conflicts with evidence of Mr Ross, supported by his notes, which I do accept. Mr Barnes also made notes but they are in conflict with Mr Ross' notes and laboratory records. This is another example of

the inaccuracy of notes made by Mr Barnes. It is one of many examples of his unreliability regarding continuity of exhibits.

871. Mr Barnes gave evidence at the re-opened Inquest on 30 November 1992 in relation to the exhibit 7/89-7E(a) and said he carried out optical and scanning electron microscope examination (Inqu 7936). He said that from those examinations 'it would appear to be indistinguishable from PMC propellant, however, it is possible to conduct further definitive analysis by destructive means' (Inqu 7936).

872. Mr Barnes did not mention the presence of another primer residue on the PBP particle.

873. In relation to organic analysis of PBP particles by that stage, Mr Barnes gave the following evidence (Inqu 7936):

> We've conducted those tests on some of the particles removed from the boot, some removed from and around the deceased, so in point of fact those particles are now in solution and the results of those analyses have shown that the particles in the boot and on and around the deceased are in fact unequivocally PMC propellant.

874. There are no notes of these analyses. Nor is there a report. It is remarkable that Mr Barnes referred to organic (and destructive) analyses performed by him on crucial exhibits as at 30 November 1992 in respect of which he did not produce a report. In addition, Mr Barnes failed to produce any GC-FID data concerning such analyses to Mr Ibbotson when the materials were being prepared for the overseas experts.

875. On the assumption that the analyses were undertaken, by reason of Mr Barnes' failure to prepare a report (and make notes), it is not possible to know how many particles from which of the two slides from the boot were destroyed by this testing.

876. Mr Barnes gave evidence which lacked a proper foundation. The lack of discrimination in SEM/EDX analysis, and the limitations of GC-FID, were such that there was no proper scientific basis for Mr Barnes to make an unequivocal identification of PMC at the re-opened Inquest.

Same batch

877. At the re-opened Inquest, Mr Barnes gave evidence that PBP from the scene and from the Mazda boot probably came from the same batch (Inqu 7949):

> Q Now, in relation to that origin, can you say, and comment as to whether you believe they all come from the same batch?
>
> A I can only speak with respect – because I need to refer to analysis on the particle from the driver's seat – but with respect to the particles from the boot, and from the scene, in our analysis of the range of propellants that we examined, and in looking at specific types of ammunition, it was found that there appeared lot to lot variations in some additives and stabilisers, and that was possible – that could be used to distinguish batch to batch. This characteristic has also been noted by other agencies, in particular the Federal Bureau of Investigation, and what I say is this; that I found no such variation in the additives et cetera present in the material in the boot, and the material on and around the victim at the scene.
>
> Q The deceased?

A So I'm led ...

Q And also – sorry, go on?

A So, I'm led to conclude that it may well be that his PMC propellant is from the same lot.

Q And also, can I suggest this to you, that at the scene, on the centre column near the – on the outside, near the roof of the car, you also found evidence of gunshot residue, correct?

A That's right, on the exterior of the centre pillar.

Q That gunshot residue is similar to the gunshot residue found internally in the car?

A That's correct.

Q YMP-028, is that right?

A That's correct.

Q And again, as you've said, there's absolutely no difference, and you're categorical that the partially burnt propellants at the scene, and in the car and the boot are the same?

A Yes.

Q And, now, from the same batch?

A Yes, in all probability from the same batch.

878. Later, he gave this evidence (Inqu 7973):

Q So can I say this in conclusion then, Mr Barnes, that the finding of the partially burnt propellant on the driver's seat is quite significant in this case now? ...

A Yes, I believe so.

Q In terms of explaining the presence of the gunshot residue in the Interior of the car? ...

A I believe so.

Q And also the gunshot residue in - sorry, the partially burnt propellant in the boot and at the scene, in and around, Assistant Commissioner Winchester having come from a common source, the one source? ...

A Yes.

Q His Worship: Or at least the one batch of PMC ammunition? ...

A Yes. Of course, your Worship, to take that a step further the inference to be drawn from what you've said is that there were a series of events, and fortuitously these deposits have been made so that we end up with a vehicle which is nicely contaminated from ...

Q Mr Ibbotson: Contaminated?

Q His Worship: So it would be an extreme coincidence to look at the other - the option of it being not from the same ammunition is an extreme coincidence. It would have to be an extremely unusual coincidence?

Q Mr Ibbotson: Yes, and as you say the gunshot residue in the car is significant in terms of its size and quantity? ...

A That's correct.

879. Mr Barnes addressed this aspect of the evidence he gave at the re-opened Inquest in his affidavit (Ex 195):

116 I gave evidence at the re-opened Inquest on 30 November 1992. I stated (on page 7949) in relation to the propellant found at the scene and in the Mazda that 'it may well be that his (sic) PMC propellant is from the same lot… in all probability from the same batch'. In 1989,

(e.g. at page 678) I gave evidence that one could not identify an individual particle as belonging to a particular batch of ammunition.

117 I believe I changed my evidence and gave the evidence I did about batches in 1992 because I knew that propellants often vary in their organic compositional profile between lots or batches. They also vary over time due to the breakdown of various components as a result of ageing. I had particular experience with this issue during my time with DSTO where the stockpiling of ammunition that has a tendency to breakdown and change chemical composition is a critical issue. Knowing that, I believe we had begun testing the particles from the case using GC-MS. The GC-MS was more precise at identifying and comparing all components, especially trace components. The GC-MS results showed little or no variation for the particles between the scene and the Mazda.

118 I therefore took the view that the PMC particles were probably of similar production age or batch. I acknowledge that there is a range of other explanations or variables that might account for the lack of variation in compositional profiles that I observed. I regret the words I used in evidence at the Inquest, particularly the phrase 'in all probability'. This was a phrase I used in reference to my opinion that it was inherently improbable given their similarities that the particles at the scene and in the Mazda had not come from a common source. This view can be seen in the exchange I had with the Coroner (at transcript page 7970) where his Honour referred to the 'extreme coincidence' regarding the similarity of the particles found inside the Mazda and at the scene. However, with hindsight, I should not have given evidence regarding batch consistency. I accept that the evidence I gave using the words 'in all probability' was a conclusion beyond that open on the information I had at that time.

119 It is for these reasons that I did not state an opinion regarding a common batch of ammunition at trial. My attitude by the time of the trial is evident under cross-examination (on page 1507) where I stated that I initially believed it may be possible or necessary to match batch or lot (at 1507.6 - 1507.11), but my view by the time of the trial was more conservative - that matching batches would be 'taking the evidence too far' (at 1507.20). I explained this further (at pp 1512 – 1513 and page 1553).

880. Although Mr Barnes has now expressed regret regarding his evidence at the re-opened Inquest, he did not express any such regret, or modify his evidence, when cross-examined about this topic at the trial (T 1507, 1512 and 1513):

Q Well, have you ever held the view that you were able to match up, in effect, the batch of PMC ammunition, as it originally was, from the scene of the murder to Mr Eastman's motor vehicle? ...

A I certainly in the early stages perhaps was of the view that it may have been possible and not necessarily a match to YMP-028, but it may have been possible to match two batches or lots and I still hold that view to some degree that it may be possible but not for all ammunition or propellant types and certainly not all the time.

Q Well, have you ever said that they came from the same batch, that is, pieces of propellant found at the scene came from the same batch as propellant found in Mr Eastman's motor vehicle? ...

A I don't believe so. I believe I may have said that they may have come from the same batch because I saw no differences.

Q Well, in any event, we can't say that, can we?---I don't believe so. I believe it is taking the evidence too far to say that.

...

Q Well, can I ask you again have you ever been of the view that the partially burnt propellants found at the scene and the gunshot residue material, in a general sense, found in the accused's motor vehicle and boot in all probability came from the same batch?

A Well, at a stage, as I said earlier, I felt there was a possibility that we - that that could be the case, but I certainly believe that it is not possible to lock in that tightly.

Q Do you remember giving evidence on your oath in November 1992 at the inquiry in respect of the death of Mr Winchester?

A I remember giving evidence, yes.

Q Do you remember being asked a question at 7946, 'And again as you've said there's absolutely no difference and you're categorical that the partially burnt propellants at the scene and in the car in the boot are the same?' Do you remember being asked a question like that?

A I believe I would have been, yes.

Q And did you answer, 'Yes'?

A I would expect I would have.

Q And you were then questioned, 'And now from the same batch?' And you replied, 'Yes, in all probability from the same batch.' Do you remember giving that evidence?

A I believe I do, yes.

Q You disagree with that now apparently?

A No, what I say is that with the benefit of further work, looking at many propellants I think that whilst no differences were apparent in terms of their makeup between the two lots it's not possible to say with certainty that they are from the same batch.

Q Well, sir, you certainly had the opportunity to answer in that way at the inquiry?

A Well, at that time, as I indicated, I had - in all probability they appeared to be in all respects similar and I still hold that view.

Q But not from the same batch?

A No, I'm not saying that. What I'm saying is that that may well be the case, but I can't absolutely reach that conclusion.

Q Well, you wouldn't even put it as a probability today, would you?

A I can't rule it out, that's all I can say.

Q No, but see, back in 1992 you thought that there was a probability that they were from the same batch. That's not what you're saying today?

A What I'm saying today is with the benefit of a further three and a half years work, which has allowed me to test many, many propellants, what I say is that it's not possible to say absolutely that two propellants - in this case from the car and the scene - come from the same batch. There's nothing to say they don't, and that's all I can say.

881. Mr Barnes did not have a proper scientific basis upon which to found his evidence concerning the same batch. He now recognises this, but contrary to his expression of 'regret' about the use in evidence of the phrase 'in all probability', at trial Mr Barnes demonstrated a defiance and justification that does not sit well with his current 'regret'. This episode reflects adversely on Mr Barnes' credibility.

Report Dated 19 November 1993

882. In his report dated 19 November 1993 (Ex 93, 14), Mr Barnes referred to the examination of the slides he received on 31 January 1989 (7/89-1B and 7/89-7J(c)), 8

February 1989 (7/89-1F and 7/89-7J(d)) and 22 February 1989 (12 slides from the Ford). He repeated what was written in his statement dated 30 August 1989, but made the following additions (underlined):

> [Re 7/89-1B and 7/89-7J(c) received on 31 January 1989],
> The green particles collected by vacuuming the ground near the deceased and the green particles removed from the boot of Mazda YMP-028 comprised partially burnt propellent with characteristic gunshot residue on their surfaces. These particles were of similar size composition and morphology. No significant differences were detected between the two groups of particles when analysed by GLC-MSD . When compared against the burned propellent database, these particles were found to be PMC partially burned propellent. That is, different from all other propellent types in the propellent database aside from PMC propellent. (Ex 93, 17)
>
> .....[Re 7/89-1F and 7/89-7J(d) received on 8.2.89],
> These particles were of the same type as those received on 31 January 1989. They comprised partially burned propellant with characteristic gunshot residue on their surfaces.
>
> The particles were, collectively, of similar size composition and morphology with no significant differences apparent, that is, the two groups of particles were indistinguishable. Both the gunshot residue present on the particles and the compositional profile as determined by GLC-MSD was indistinguishable from that of PMC partially burned propellent and different from all other propellant types in the propellent database. That is, these particles were found to be PMC partially burned propellent.
>
> ……..[Re the Ford particles received on 22 February 1989],
>
> These particles comprised partially burned propellant with characteristic gunshot residue on their surfaces. The particles were of similar size, composition and morphology when compared with all other particles recovered from the vicinity of the deceased, and particles removed from the boot of Mazda sedan YMP-028. No significant differences were detected between the particles recovered from the vicinity of the deceased and the particles in the boot of Mazda sedan YMP-028. Collectively, the two groups are indistinguishable. Both the gunshot residue present upon the particles and the compositional profile as determined by GLC-MSD was indistinguishable from that of PMC partially burned propellent and different from all other propellent types in the propellent database. That is, these particles were found to be PMC partially burned propellent. (Ex 93, 18)
> (my emphasis)

883. The report plainly stated that GLC-MSD (a destructive process often identified as GC-MS) had been conducted in relation to the particles from the driveway, Mazda boot and Ford. The report was deficient in that it failed to specify dates of analysis or address the particular exhibit numbers for the particles which were analysed using GLC-MSD. For example, it was not stated how many particles from the Mazda boot were subjected to GLC-MSD or from which of the two slides, 7J(c) or 7J(d), they were obtained.

884. Subpoenas were issued to the ACT DPP, the AFP, Victoria Police, the National Measurements Institute (formerly AGAL) and Mr Barnes in order to obtain that data. Material was produced by the ACT DPP and Mr Barnes. It is collated in exhibit 91, but as later discussion demonstrates it is inadequate.

885. During the course of this Inquiry it became known that Mr Strobel wrote a thesis for masters course-work in 1993 whilst he was employed at the Victorian Laboratory and was working on exhibits in the murder investigation. The thesis shows that Mr Strobel did the work on the propellant database and analysed case work samples using GC-MS. He wrote in the Introduction section: (Ex 107, annexure NS-1, 24-25):

> On January 10th, 1989 a prominent Australian public figure was murdered. An assassin fired a .22 calibre bullet into the back of the victim's head as he was about to alight from his vehicle parked near his residential address. A second shot was then fired into the side of the victims head above the right ear …
>
> Could the individual propellant particles from the suspect's vehicle be characterised as having originated from a particular brand of manufactured ammunition? Could the brand-type also be determined? How do the propellant particles recovered from the victim's vehicle compare to those from the suspect's vehicle? The project was therefore case work driven and its design was intended to answer the above questions.

886. There was no reference in any of Mr Barnes' reports or communications with the AFP to Mr Strobel's thesis. There is no record in any of the extensive DPP file notes (Ex 95) of Mr Barnes informing the DPP about the thesis. Mr Adams and Mr Ibbotson told the Inquiry they did not know about the thesis (Inq 3037, 3390).

887. The DPP was aware that Mr Strobel conducted some forensic work. Accounts were submitted by Mr Barnes to the DPP for forensic work which included reference to work performed by Mr Barnes and Mr Strobel (eg, Ex 95, 49). Neither Mr Adams nor Mr Ibbotson could remember Mr Strobel (Inq 3037, 3340).

888. According to a DPP file note dated 3 November 1993 (Ex 95, 81), Mr Strobel informed the DPP he worked with Mr Barnes on the gunshot residue analysis and he 'did all the leg work' to put together the database that was used. (Mr Strobel told the Inquiry he would not have said it in that manner (Inq 3531).) He said that once he tested a propellant it destroyed that amount of propellant. The author of the file note wrote:

> Therefore Rob Barnes himself didn't re-do and check the test done by Mr Strobel. If a statement is required then Mr Barnes or Mr Gidley need to authorise it.

889. On 11 May 1994 (Ex 95, 248) Mr Ibbotson noted a telephone conversation with Mr Strobel in which Mr Ibbotson asked for a report to address the following:

(a) his qualifications,

(b) a description of all work he carried out in relation to the murder of Assistant Commissioner Winchester,

(c) the instrumentation he used,

(d) an explanation of the process of the instrumentation,

(e) if he worked under the supervision of anybody what that entailed and how he reported his conclusions,

(f) to nominate exhibits he worked on in conjunction with his statement and put in the exhibit reference,

(g) dates should be included as to when the work was undertaken and also if he received any exhibits from other than Mr Barnes and the dates they were received.

890. Mr Strobel prepared a one page statement dated 23 May 1994 (Ex 107, annexure NS-2). It did not address the matters requested by Mr Ibbotson. Nor was there any reference to the thesis:

> Between the period June 1992 and November 1993 I assisted Mr. Robert Collins Barnes by conducting a series of Gas Chromatographic - Mass Spectrometry (GC-MS) analyses on propellant particles relating to the gunshot death of Assistant Commissioner Colin Winchester. This work was conducted under the direct supervision of Mr. Barnes.
> During this period a number of .22 calibre rounds of ammunition were sequentially disassembled and the unburnt propellant from these cartridges analysed by GC-MS. Each of these types of .22 calibre ammunition were also test fired and partially burnt propellant collected. These PBP were similarly analysed by GC-MS. The resultant data was systematically compiled into a suitable database.
> All notes and results pertaining to case work exhibits were retained by Mr. Barnes. No opinions or conclusions relating to these analyses can be drawn by me in relation to this work.

891. The final paragraph is at odds with the fact that in his thesis Mr Strobel did draw opinions and conclusions.

892. Mr Strobel did not give evidence at trial.

893. Mr Strobel was asked why there was no mention of the thesis in his statement. He said he thought the level of detail was correct at the time. It was accepted by his supervisor, who was probably Mr Metz (Inq 3531). He explained the last paragraph on the basis that it was the policy of the laboratory that only the senior scientist would give opinions (Inq 3532). He agreed there was no reference in his statement to any of the case work samples. His supervisors knew Mr Barnes was the reporting scientist and he wrote the statement as directed (Inq 3533). Mr Strobel said he did not contact Mr Barnes to speak to him about the statement. Nor was there any follow-up from the DPP after he provided the statement (Inq 3533).

894. Mr Strobel examined and subjected the following case work samples to GC-MS analysis (Thesis - Table 8):

Table 8: Descriptions of Recovered PBP.

No.	REF.	ORIGIN	SHAPE	COLOUR
1	7/89-2K(a)	Ford YR0-355 Interior	Flattened Ball	Yellow/Green Translucent
2	7/89-2I(a)	Ford YR0-355 Interior	Flattened Ball	Yellow/Green Translucent
3	7/89-7J	Mazda YMP-028 Boot	Flattened Ball	Yellow/Green Translucent
4	7/89-7J(e)	Mazda YMP-028 Boot	Chopped Disc	Colourless Translucent
5	7/89-7J(e)	Mazda YMP-028 Boot	Chopped Disc	Colourless Translucent
6	7/89-2I(a)	Ford YR0-355 Interior	Flattened Ball	Green Translucent
7	7/89-2D(a)	Ford YR0-355 Interior	Chopped Disc	Colourless Translucent
8	7/89-2D(a)	Ford YR0-355 Interior	Flattened Ball	Yellow/Green Translucent
9	7/89-2D(a)	Ford YR0-355 Interior	Flattened Ball	Yellow/Green Translucent
10	1899/889 Item 6	From Hair Of Deceased	Chopped Disc	Colourless Translucent

895. Mr Strobel also performed GC-MS analysis on a single particle from each of the Ford slides labelled 7/89-2E(a), 7/89-2H(a) and 7/89-2J(a). He did not include those results in his thesis. Those particles were smaller than the others analysed and only nitro-glycerine was detected. That made them unsuitable for database comparisons (Ex 107 [32]).

896. The GC-MSD data for case work samples produced by the ACT DPP and Mr Barnes in answer to subpoenas (collated in Ex 91) is now known to be Mr Strobel's work that he undertook for his thesis in 1993. That GC-MS data was the only GC-MS data produced in answer to the subpoenas for organic analysis performed at the Victorian Laboratory. It was also the only GC-MS data produced by Mr Barnes to the DPP in early 1994 for the review of his work by overseas experts.

Preparation of Materials for Review by Overseas Experts

897. In about January 1994, Mr Barnes produced to the DPP the GCMS data for the case work samples analysed by Mr Strobel for his thesis. As recorded in DPP file notes (Ex

95), at that time Mr Ibbotson and Mr Barnes prepared materials to send to the overseas experts for their review of Mr Barnes' work.

898. Mr Barnes had been aware of the DPP's intention to have his work reviewed since 13 May 1993. In a file note of a meeting between Mr Adams QC, Mr Ibbotson and Mr Barnes it was recorded (Ex 95):

> In relation to Barnes' evidence, Adams wants his work replicated by at least one other expert and then both Barnes and the experts work considered by a third expert. (p 17)
>
> Barnes work is to be assessed then all of his notes and findings have to be copied x3, a copy for the expert, a copy to the defence, a copy to the Crown. (p 21)
>
> To prepare his material for independent assessment he would need 8 weeks and we would have to arrange assistance for him. (p 22)

899. On 10 June 1993 Mr Ibbotson asked Mr Barnes to make five copies of the material and have it ready by the end of June 1993 (Ex 95, 32).

900. On 11 August 1993 Mr Barnes advised Detective McQuillen that he would have five copies of material ready by the first week of September (Ex 95, 52a), but advised the DPP that he would have five copies available by the third week in September (Ex 95, 53).

901. On 18 August 1993 the DPP noted that Mr Barnes had given an undertaking to have his material in finite form by the end of September (Ex 95, 57A).

902. A DPP file note records that in September 1993 Mr Barnes 'forwarded two volumes containing his notes and test results from his analysis of GSR and PBP'. The DPP was given an 'undertaking by Barnes that those two volumes were in a complete and accurate state' (Ex 95, 234).

903. On 21 October 1993 the DPP noted that Mr Barnes arrived with five bundles of documents (Ex 95, 68). However, on 1 November 1993 it was noted that the DPP still did not have the material in final order (Ex 95, 76).

904. On 19 November 1993 Mr Ibbotson wrote letters to the overseas experts enclosing two volumes of materials (Ex 95, 90, 92, 95 and 234), but when Mr Ibbotson travelled overseas to speak with the experts (Keeley, Zitrin and Zeichner) inadequacies were noted (Ex 95, 105 and 230):

> On attending to see each of those experts it was found that Mr Barnes' material was not in a satisfactory state in that some data was missing and that it was not possible to cross-reference the data with Barnes' statement and some of the data was not correctly positioned within the folders.

905. Another problem was recorded (Ex 95, 217):

> There was no index or no way in which the experts could determine what items in the data represented what items in the report from Barnes. In other words there was no cross-referencing of exhibits in the report to exhibits in the material.

906. When Mr Ibbotson returned from overseas, Mr Barnes told him for the first time that somebody else had done the copying for him and he had not checked it. Mr Barnes also agreed there was no cross-referencing between his statement and the material, hence 'no expert would have been able to operate on it' (Ex 95, 218 and 246).

907. Mr Ibbotson told Mr Barnes he would meet with him to go through both volumes to make sure everything was in fact correct and finalise indices for both volumes (Ex 95, 143). They met on 12 January 1994 and 24 January 1994 and 'personally went through each section of material' that had been provided by Mr Barnes in late 1993. Mr Ibbotson noted (Ex 95, 198):

> It was noted certain material had not been copied and as a result copies were provided. Certain material had been incorrectly positioned and this was rectified. Indexes were made for each section.

908. The indices prepared in 1994 are significant (Ex 98, 212-214). They are a contemporaneous record of the material Mr Barnes provided to the DPP, knowing that the material was to be reviewed by other experts as providing the basis for his opinions. That these were the indices to the material provided to the overseas experts in 1994 is confirmed by correspondence between the DPP and the defence in 1995. By letter dated 3 February 1995 Mr Klees wrote to the DPP asking for advice as to what reports, statements or documents were given to Dr Zeichner and Mr Keeley (Ex 95, 11). By letter dated 6 February 1995 the DPP advised Mr Klees that the material provided to those experts 'was delivered to you on the 22nd November 1994 in box No 7 Volume 43, Ballistics Vol. 1' (Ex 95, 13). These are the indices to Volume 43. Those indices are referred to in the affidavit of Professor Kobus sworn on 2 December 1996 for the appeal against conviction as material provided to him in 1995 by Mr Klees as the 'Barnes residue/source material disclosed by the Crown' (Ex 98, 196, 212–214). Index D(1) was an index to the 1993 database and the GC-MS on the case work samples for the green particles.

> <u>Index D(1)</u>
>
> Analysis exhibit 7/89 - 7J – green particle, boot of suspect's car YMP-028
>
> Analysis exhibit 7/89 - 7J – burnt propellant, boot suspect's car YMP-028 (method 2)
>
> Analysis exhibit 7/89 - 2J(a) – green particle, interior victim's car YRO355
>
> Analysis exhibit 7/89 - 2H(a) – green particle, interior victim's car YRO355
>
> Analysis exhibit 7/89 - 2E(a) – 6 green particles, interior victim's car YRO355
>
> Analysis exhibit 7/89 – 2I(a) – burnt propellant, interior victim's car YRO355 (method 1)
>
> Analysis exhibit 7/89 - 2I(a) – burnt propellant, interior victim's car YRO355 (method 2)
>
> Analysis exhibit 7/89 – 2K(a) – burnt propellant, interior victim's car YRO355
>
> Analysis exhibit 7/89 - 2D(a) – Y/green translucent flattened ball. 1 burnt propellant.
>
> Analysis exhibit 7/89 – 2D(a) – Y/green translucent flattened ball. 1 burnt propellant.

909. Index D(2) was the index to the 'Analysis of charred chopped disk particles' and included the GC-MS for the 'rogue' particles.

Index D(2)

Analysis exhibit 7/89 - 2D(a) - clear translucent chopped disk – burnt propellant

Analysis exhibit 1899/889 - item 6 clear translucent chopped disk – burnt propellant

Analysis exhibit 7/39 - 7J(e) - particle from boot suspect's car YMP-028 – burnt propellant

Analysis exhibit 7/S9 - 7J(e) - particle from boot suspect's car YMP-028 – burnt propellant

Analysis exhibit 7/89 - 7J - black particle picked from vacuuming of boot from car YMP-028

Missing GC Data

910. GC data to support the opinions expressed by Mr Barnes at trial is now absent. An important issue is the extent to which GC data is now unavailable because of the passage of time; or whether it is now unavailable because it never existed; or whether Mr Barnes deliberately withheld it.

911. Mr Barnes gave evidence that he maintained a case file when he was at the Victorian Laboratory which included the SEM spectra, GC data, his statements/reports and notes (Inq 3824). He took the entire case file with him to AGAL, including the hard copy records of all the analyses (Inq 3826). He maintained the case file when he was at AGAL in accordance with proper practice (Inq 3828). Mr Barnes gave evidence he was aware of the importance of the case file in that it contained the notes and data to back up the views he was going to express at trial (Inq 3828). He believed that when he left AGAL and gave evidence at trial, the case file contained everything he needed to back up the opinions he expressed (Inq 3829). According to Mr Barnes, when the search warrant was executed at his home on 25 January 1996, the case file was in the state in which he had stored it after he had finished giving evidence, namely, complete and orderly (Inq 3831).

912. I have previously dealt with the evidence of Mr Barnes blaming Victoria Police for losing all his data. I reject that evidence.

913. If Mr Barnes conducted the GC-FID analyses in 1989/1992, and if he conducted GC-MSD analyses in 1993, then it remains unexplained why he did not produce that data when he was working with Mr Ibbotson on the materials for review by the overseas experts. He delayed in providing any of the materials to the DPP until the end of 1993. It was during 1993 that Mr Strobel was doing all the GC-MS work. Mr Barnes' production of the material to the DPP coincides with Mr Strobel finishing his thesis. Mr Barnes never produced any GC-FID analyses. He produced only the GC-MS analyses conducted by Mr Strobel.

914. There were other specific occasions when Mr Barnes had the opportunity to provide his data, but failed to do so. In January 1994 Dr Zitrin made a request for further information which included the following:

> 1. Could I have the mass spectra of the identified compounds (at least one of each of the standard compounds and all the spectra of the compounds identified in the particles from the case)?
>
> ….

5. Clarification of the way in which the conclusions were reached concerning the identification of the particles as PMC ammunition. Comparisons of chromatograms from the extractions from the case and chromatograms from the burnt standards (both graphs and tables) should be presented.

915. That request was communicated to Mr Barnes on 18 January 1994 (Ex 95, 144 and 146). Mr Barnes produced the inadequate material in Volume 43 (Ex 105 and Ex 106).

916. Next, following the difficulties expressed by the overseas experts in cross-referencing Mr Barnes' reports with data, on 25 May 1994 the DPP asked Mr Barnes to provide a statement setting out the sequence of events in relation to the preparation and analyses of exhibit samples, including as far as possible a lay explanation of the processes used to prepare and analyse those items, together with the controls and checks put in place to ensure reliability (Ex 95, 260). The DPP repeated the request for such a statement on 24 August 1994 (Ex 95, 275), 6 October 1994 (Ex 95, 290) and 21 April 1995 (Ex 95, 513). The statement was never provided.

917. Further, there were two subpoenas issued to Mr Barnes in February 1995 by the defence (Mr Klees). One of the subpoenas sought production of all results, details and data from testing of particles. For a combination of reasons the subpoenas were never satisfied. First, Mr Barnes resisted production by requiring a business class airfare, taxis, excess baggage, meal allowance and a fee of $300 per hour. (Ex 95, 429A, 491, 494; Ex 97, 41).

918. Secondly, the applicant dismissed Mr Klees at the end of March 1995. Mr Klees had arranged to go to Melbourne to view the materials, but that trip was delayed. Mr Klees continued to work as a consultant with the new solicitors until the beginning of May. He believed his trip to Melbourne did not occur 'because events were really rapidly unfolding at that stage, as far as his representation and preparation' (Inq 2406).

919. Finally, the DPP asked Mr Barnes to provide data relating to the analysis of one of the two crucial slides from the boot, 7/89-7J(d). Despite numerous requests in 1994, that data was not provided. Problems associated with 7J(d) are discussed later.

920. The problem of missing data is not based on the absence of data in 2014. It relates to the absence of data in 1993 – 1995 and the circumstances in which, over a considerable period, Mr Barnes failed to produce it. All of these matters combine to lead to a conclusion that it is highly likely that Mr Barnes did not perform the analyses he claimed to have performed or the results were not supportive of the opinions he expressed.

Green Partially Burnt Propellant: PMC or Consistent with PMC

921. I now turn to assess the reliability of the analytical results underlying the opinion expressed by Mr Barnes at trial that PBP particles from the driveway, the Ford and the Mazda boot were PMC or consistent with PMC.

Scene – Driveway

922. There were three slides of propellant particles from the driveway vacuuming, 7/89-1.

923. Slides 7/89-1B (10 particles) and 7/89-1F (7 particles) were both in Mr Barnes' possession as at 8 February 1989. No GC-MSD was performed on particles from 1B or 1F by Mr Strobel for his thesis in 1993. No GC-MSD data was provided to Mr Ibbotson by Mr Barnes in January 1994 to be included in the materials for the overseas experts to review. Nor was any GC-FID data provided.

924. In a typewritten Status of Exhibits report (Ex 91, 1), prepared following a request by the DPP to Mr Barnes for a list of exhibits, and whether they had been destroyed, the status of 1B and 1F was described as: 'Intact but unreliable as mixed with methanol'. Mr Barnes gave evidence that all of the GC-FID analysis he undertook involved the solvent methanol. He changed to acetonitrile for GC-MSD (Inq 3991). He stated in his affidavit (Ex 195):

> 86 I recall we used methanol as a solvent for GC-FID. I cannot recall when and how often we used this solvent. I recall discussing which solvent we should use to conduct the GC-FID. I would have discussed this with Cain or whoever was operating the machine, possibly Ross. We were not sure which solvent to use. At the time we commenced analysis, we did not know the composition of PMC ammunition. Some propellants have extra ingredients diffused into their surface layer. They are not uniform in composition throughout. We did not know what we were trying to extract or which solvent would be best to conduct the extraction. Analysing propellants using GC was not widespread at the time and I believe we were aware that methanol had been used before for GC propellant analyses. In particular, I was aware that methanol had been used as a solvent in the analysis of partially burned propellant in the Northern Ireland Forensic Laboratory. I became aware of this when I attended that Laboratory in 1988 specifically for the purpose of a 'technical update' in relation to the processing of crime scenes in Northern Ireland, the analysis of explosives including propellants and management of contamination issues.

925. Contrary to Mr Barnes' evidence, Mr Strobel told the Inquiry he did not have any involvement in using methanol in this case and did not discuss the use of the methanol with Mr Barnes (Inq 3544). When confronted with that evidence, Mr Barnes said Mr Strobel did not do the GC-FID work in 1992. He was not sure who did the work (Inq 3997).

926. Mr Ross said he could not recall mixing any of the particles relating to the Winchester matter with methanol and could not recall doing any analysis for the Winchester case (Ex 189 [54]). He was trialling methanol as part of his research and development work and believed he had more success with isopropanol as a solvent. Mr Ross did not believe that methanol was generally used by the lab as a solvent for GC-FID (Inq 3726–3727).

927. Mr Barnes told the Inquiry he determined that the particles mixed with methanol for GC-FID analysis, although intact, could not be used for further testing. There was uncertainty about what remained in the particle and what had been leached out of the particle into the methanol (Inq 3991–3992). Mr Barnes denied that the 'flip-side of the coin' applied, namely, that if there was uncertainty about what remained in the particle

then there must be uncertainty about what was leached out and, therefore, uncertainty about GC-FID results (Inq 3992–3996).

928. Mr Barnes gave evidence that he did not believe he personally prepared the Status of Exhibits report (Ex 91, 1) (Inq 3999). However, he did prepare the handwritten Status of Exhibits (Ex 91, 30). Against 1B, it is recorded 'intact (destroyed (+) meoh extr)' and 'doubtful'. Against 1F, it is recorded 'intact (destroyed meoh extr)' and 'doubtful'. Mr Barnes told the Inquiry he believed these exhibits were consumed in GC-FID analysis and unreliable for any further use.

929. In essence Mr Barnes noted that all 17 driveway particles had been rendered unusable by the GC-FID process through the use of methanol. However, Mr Barnes was then shown his report of 19 November 1993 (Ex 93, 17) in which he made the following statements about the analysis of the driveway particles (Ex 95, 17):

> The green particles collected by vacuuming the ground near the deceased and the green particles removed from the boot of Mazda YMP-028 comprised partially burnt propellent with characteristic gunshot residue on their surfaces. These particles were of similar size composition and morphology. No significant differences were detected between the two groups of particles when analysed by GLC-MSD . When compared against the burnt propellant database, these particles were found to be PMC partially burnt propellant. That is, different from all other propellant types in the propellant database aside from PMC propellant. (my emphasis)
>
> .....[Re 7/89-1F and 7/89-7J(d) received on 8 February 1989],
>
> These particles were of the same type as those received on 31 January 1989. They comprised partially burnt propellant with characteristic gunshot residue on their surfaces.
>
> The particles were, collectively, of similar size composition and morphology with no significant differences apparent, that is, the two groups of particles were indistinguishable. Both the gunshot residue present on the particles and the compositional profile as determined by GLC-MSD was indistinguishable from that of PMC partially burnt propellant and different from all other propellant types in the propellant database. That is, these particles were found to be PMC partially burnt propellant. (my emphasis)

930. Contrary to Mr Barnes' report, if his handwritten Status of Exhibits report was correct, Mr Barnes' admitted use of the 17 particles on the two driveway slides for GC-FID analysis rendered the particles unusable for GLC-MSD analysis. In that situation, the report of 19 November 1993 that the driveway particles were subjected to GLC-MSD analysis was wrong.

931. Mr Barnes' initial reaction to this suggestion was, 'I don't know. I can't answer that.' He then said: 'Can Mr Strobel shed any light on this? I certainly can't' (Inq 4001).

932. Mr Barnes then suggested that the report was right and his handwritten status of exhibits notes were wrong (Inq 4001). He pointed to incorrect entries in those notes that 1C was 'intact (destroyed meoh extr)' and 'doubtful'. This had to be incorrect because 1C was a metallic particle. He said, 'So obviously I've made some incorrect entries' (Inq 4002). Mr Barnes' explanation fell apart when it was pointed out to him that in the notes an arrow has been added later (apparent on the original) to indicate what was written for 1C was on the wrong line and should have been on the next line

against 1F (Inq 4010). Mr Barnes maintained the error was not in the report 'because the report is a considered document' (Inq 4003).

933. Mr Barnes then clung to his notation against 1B which included '+'. He said that meant there was material left (Inq 4003). However, there was no such '+' sign in the notation against 1F. Nevertheless, he continued to stand by the correctness of his report (Inq 4004):

> All I can say, your Honour, is either the note is wrong or I – or – in that we didn't – there was some left that hadn't been soaked in methanol or we analysed some that had been soaked in methanol. I don't know.

934. A problem for Mr Barnes in giving this evidence was his statement to the DPP on 12 January 1994. The file note recorded the following (Ex 95, 128):

> In relation to the partially burnt propellant found on the ground at the scene of the murder that was partially dissolved in methanol and as a result Mr Barnes believes it would be of no use in any further testing due to the effect of methanol upon it.

935. In essence, therefore, the records compiled at the time, including Mr Barnes' handwritten report concerning 1B and 1F, were confirmed by Mr Barnes' statement to the DPP on 12 January 1994. GC-MSD could not have been undertaken, but when it was suggested to Mr Barnes that there is no reliable indication that any GC-MSD for 1B and 1F was carried out, he said (Inq 4006):

> Perhaps I should think about it, your Honour, but I did receive exhibits which were on slides, and subsequently some time later boxes of vacuumings. Possibly these particles have come from the box of vacuumings, but perhaps if I could have some time to think about that.

936. The next day Mr Barnes said that 'if I said the tests were done in my report, the tests were done'. He maintained that the particles were either not all steeped in methanol and were tested, or some were re-tested using GC-MSD (Inq 4012). Mr Barnes had to concede, however, that his notes contradict his report (Inq 4013).

937. By implication, the use of GC-MSD was also excluded in a meeting with the DPP on 24 January 1994 (Ex 95, 160). Discussion occurred about what exhibits remained intact and what exhibits were to be taken overseas by Mr Barnes for the other experts. The following is recorded (Ex 95, 160):

> Going through the exhibit list and from the scene there are the following exhibits 7/89-1B and 7/89-1F, a total of 17 particles that have been contaminated with methanol. Barnes will take sufficient particles overseas for the independent experts to examine if they wish.

938. This entry is significant. It referred to all 17 particles. If Mr Barnes had used any of those 17 particles for GC-MSD analysis, then the number of particles used in analysis would have been destroyed and less than 17 particles would have existed as at the meeting of 24 January 1994. Mr Barnes was asked about the conflict between his report and the records and his statements (Inq 4016):

> Q Why should I accept that your report is accurate when it says that you analysed what we know to be 1B and 1F? We know you were talking about the samples 1B and 1F. Why

should I accept your report? Why should I not take the view that at the least it is highly likely that you got confused when you prepared your report and when you talked about doing GC-MSD you are not talking – you are mistaken as to the samples on which you did GC-MSD?

A At this time, your Honour, I can't say. That may be a reasonable thing to say but I believe and always believed that I analysed those samples and those results come from those areas without a doubt but I can't prove it today to you and I accept that the documents you've produced to me are not consistent with what I'm saying. But I would never have said that in my statement if I did not do it and believe that it was done.

939. The only reasonable conclusion open is that all 17 particles were used by Mr Barnes for GC-FID testing with methanol. It follows that there was no testing of those particles using GC-MSD analysis. Mr Barnes' written report of 19 November 1993 and his evidence at trial about the driveway particles in 1B and 1F were wrong.

940. The third driveway slide was 1G which did not come into Mr Barnes' possession until March 1994. One of four particles was analysed by Mr Martz. It was consistent with PMC.

Scene – Ford Falcon

941. There were 12 slides prepared from the Ford vacuumings. They were all delivered to Mr Barnes on 22 February 1989.

942. Mr Barnes' evidence at the Inquest was that organic analysis had been performed on some of these particles. He did not prepare a report about that and has no note regarding what Ford slides or how many particles were used. None of his reports specifically referred to GC-FID analysis. He did not produce any GC-FID results prior to trial. He has now produced a GC-FID result for one Ford slide, 7/89-2C(a).

943. The only GC-MSD results for the Ford particles provided by Mr Barnes were those obtained by Mr Strobel for his thesis. The relevant slides are 7/89-2K(a), 2I(a) and 2D(a).

7/89-2K(a)

944. In his notes on 22 February 1989, Mr Barnes wrote that this slide contained six green particles (Ex 92, 15). The chromatogram was dated 2 April 1993 (Ex 91, 1). It recorded 'particle from slide labelled 7/89-2K(a) 1 Burnt Propellant per 4uL Acetonitrile'. It is a single particle analysis. In the Status of Exhibits report (Ex 92, 2), it is recorded that 'some used in analysis small amount remains for one analysis'.

945. Professor Kobus told the Inquiry (Inq 3229) that the peak at 2.45 was NG, at 4.68 was DPA, at 7.02 was DBP, at 7.10 was 2N-DPA and at 8.76 was 4N-DPA.[58] However, there were two peaks at 4.57 and 6.56 which were both bigger than the DPA peak which should have been identified or a reason given for excluding those peaks in the interpretation of the result. Based on those two unexplained peaks, it was his opinion

[58] NG – nitroglycerine' NC – nitrocellulose' DPA – diphenylamine' 2NDPA – 2-nitrodiphenylamine' 4 NDPA – 4-nitrodiphenylamine' DBP – dibutylphthalate.

that the result was 'not a good comparison for PMC' and the 'obvious thing to do' was to run a few more particles (Inq 3230).

946. Mr Strobel gave evidence that the issue 'would have been looked at', but was unable to now say how it was resolved (Inq 3522).

7/89-2I(a)

947. There were two chromatograms labelled 7/89-2I(a). There was a chromatogram dated 2 April 93 for the analysis of 'particle from slide labelled 7/89-2I(a) 1 burnt propellant per 4uL Acetonitrile' (Ex 91, 2).

948. Professor Kobus gave evidence (Inq 3230) that the peak at 2.44 was NG, at 4.67 was DPA, at 7.01 was DBP, at 7.08 was 2N-DPA and at 8.75 was 4N-DPA.[59] However, there was a peak at 4.36 which was in the position for DEP – diethylphthalate. He described the peak as 'a worry' because, if it was DEP, then PMC was excluded or the analysis has 'gone funnily' or there was DEP contamination from somewhere. It needed to be resolved.

949. Dated 5 October 1993, there was a chromatogram for '7/89-2I(a) 6 green particles from Ford sedan YRO 355 7 February 1989'. According to Professor Kobus, the peak at 2.46 was NG and the peak at 7.03 was DBP. He expressed the opinion that 'You'd probably say that's propellant. You wouldn't call it anything more than that' (Inq 3232). Mr Strobel agreed with Professor Kobus' identification of the peaks and said the other peaks looked like very low noise, but if this had been his case work there would be a notation about the interpretation of those peaks (Inq 3521).

950. The two chromatograms add up to the analysis of seven particles from 7/89-2I(a). This is curious given that Mr Barnes noted that the slide contained '2+ green particles' (Ex 92, 15). His notations for other slides include references to 6, 8, 9, 17 and 27 particles which suggest that he estimated there were two particles on the slide, but possibly another. This raises a concern about the continuity of this slide and the accuracy of Mr Barnes' notes.

7/89-2D(a)

951. There were two chromatograms available for this particle. They were both dated 14 October 1993 (Ex 91, 7 and 8). Each was labelled '7/89-2D(a) Y/Green Translucent Flattened Ball 1 Burnt Propellant per 2uL Acetonitrile'.

952. Regarding both chromatograms, Professor Kobus gave evidence that the large peak was NG and the other peak was DBP. Both were missing the marker DPA so they were not specific to PMC (Inq 3237). Dr Wallace agreed and did not believe there was adequate data to support the opinion that the particles were PMC (Inq 1819-1820). The particle could be PMC or any other ammunition of any calibre that contained DPA (Inq 1823).

7/89-2C(a)

953. Only GC-FID data dated 25 June 1992 was available. This was produced by Mr Barnes to the Inquiry on 28 January 2014. Professor Kobus told the Inquiry that without known comparisons or mass spectra he was unable to interpret the chromatogram. Also, because it, the GC-FID, was a different system – different chromatography with changed retention times – he was unable to tie it together with the other case work samples which were analysed using GC-MS (Inq 3183).

954. Dr Wallace was unable to interpret the chromatograms (Inq 1824).

955. There was also an unexplained discrepancy between the evidence given by Mr Nelipa at trial that there were 13 particles on this slide (T 607) and Mr Barnes' notes which record 17 particles (Ex 92, 15).

Other Ford chromatograms

956. There were other chromatograms relating to organic analysis of particles from the Ford. They purport to be analyses of single particles from the slides 7/89-2J(a) and 7/89-2H(a) and six particles from 7/89-2E(a) (Ex 91, 3–5). These results were rejected by Mr Strobel for inclusion in his thesis. He told the Inquiry they only show NG and therefore no interpretation other than that they were propellant could be made (Inq 3522). Professor Kobus agreed with that interpretation (Inq 3238–3239).

Mazda

7/89-7E(a) (Driver's Seat)

957. I have discussed the conflict between Mr Ross and Mr Barnes concerning this particle and reasons for preferring the evidence of Mr Ross. I have also dealt with the qualification to the SEM/EDX result which was not conveyed to the jury.

958. There are no GC-FID or GC-MSD data available for the organic analysis of this particle. Mr Barnes stated that the analysis would have occurred in December 1992 after he and Mr Ross returned the particle to the Victorian Laboratory Liaison office (Ex 195 [171]). No analytical result was produced by Mr Barnes to be included in the materials prepared with Mr Ibbotson at end of 1993/early 1994 for the overseas experts.

959. There is also a discrepancy regarding the description of this particle. At trial Mr Barnes gave evidence that the particle was a single severely burnt flattened ball propellant particle consistent with PMC; not charred (T 1383 and T 1433). In his handwritten note, however, Mr Barnes described it as a 'small charred green particle' (Ex 92, 13). In his report of 13 April 1994 (Ex 93, 22) (no record of this report being disclosed to the defence), he described it as a 'single severely charred particle of partially burnt propellant'.

960. There is no photomicrograph available for this particle. A photograph of the particle was tendered at trial and marked exhibit 28 (T 617). In his report Dr Wallace stated that the photograph was inconclusive, out of focus and could be anything (Ex 109, 13).

961. In addition, as previously discussed Mr Barnes gave evidence at trial that the particle 'had primer on it which was consistent with PMC and not three component' (T 1433). However, on 20 November 1992 Mr Ross reported inconsistency with PMC in relation to some of the primer on the particle. This was not mentioned by Mr Barnes at trial. Nor was it led from Mr Ross (T 861–864). The inconsistency reported by Mr Ross on 20 November 1992 was not disclosed to the defence.

962. Through Counsel, the DPP advised the Inquiry that the DPP has no record to suggest that Mr Ross' interim report faxed to Mr Nelipa on 20 November 1992 was disclosed to the DPP. There were, however, undated handwritten notes by Mr Ibbotson which appear to record a discussion with Mr Ross about his analysis (Ex 189 PR-3). There was nothing recorded in those notes about the existence of primer inconsistent with PMC on the propellant.

963. Dr Wallace gave evidence at the Inquiry that one of the spectra for the SEM/EDX analysis revealed one primer particle on the surface of the propellant particle to have iron at a major level (Ex 90, 140). The presence of iron would make it inconsistent with PMC. Primers do not generally contain iron. It could have come from a steel cartridge case, steel jacketed bullet or a rusty barrel (Inq 1730).

964. At trial Mr Barnes gave the following evidence (T 1433):

> Q And, were you able to determine what kind of ammunition it was?
>
> A I was able to say on the basis of all the characteristics which were previously outlined that it was consistent with PMC.
>
> Q Consistent with PMC, yes?
>
> A But I was unable to, by organic analysis, do other than exclude propellants which might contain ethyl centralite, for example.
>
> Q All right. So, it was too small, in effect, for you to do any more useful than say, first of all, it is ammunition propellant and, secondly, it's consistent with PMC but because you couldn't do the organic chemistry you were unable to determine that it was in fact PMC, is that so?
>
> A Yes, what I am saying is the final plank in my identification couldn't be put in place. It had the correct shape, morphology, and was a flattened ball. It retained its physical form after firing. It was still a flattened ball, it hadn't broken up. It had the right colour on segmenting it. It had, also, a primer related gunshot residue upon it which was consistent with PMC and not three component, but I could not say, by organic analysis, that it had only had present the components which I know to be present - the principal components of PMC. What I can say, though, is that there was no evidence of any other component which would mean that it was not PMC.

965. On the basis of all the data (and there being no organic analysis available), Dr Wallace told the Inquiry that it was not appropriate for Mr Barnes to give the evidence that the particle was consistent with PMC (Inq 1832 and 1836). I agree.

Mazda Boot

7/89-7J(c)

966. There was no organic analysis included in Mr Strobel's thesis for any particles from 7J(c). The only organic analysis for a particle purporting to be from the slide 7J(c) was the GC-MSD performed by Mr Martz in March 1994. According to Professor Kobus, the chromatograms produced by Mr Martz show all the markers for PMC (Inq 3246–3248).

967. Both Professor Kobus and Dr Wallace expressed concern about the provenance of this particle. The Status of Exhibits report as at 12 January 1994 recorded against 7J(c) 'Majority destroyed in analysis, fragments only left for analysis' (Ex 92, 1). Mr Barnes' handwritten notes recorded 'Destroyed (+). Very doubtful' (Ex 92, 29).

968. A file note of a meeting between Mr Barnes and Mr Ibbotson on 12 January 1994 recorded discussions about the exhibit list sent by Mr Barnes to the DPP. Mr Ibbotson and Mr Barnes went through the list and Mr Ibbotson recorded (Ex 95, 128):

> In relation to the partially burnt propellant located in Eastman's car, that is in his boot that has all been used in the test carried out and there is none in existence.

969. On 18 January 1994 Mr Ibbotson sent a fax to Mr Barnes addressing five points including 'please contact me about what exhibits can be taken overseas and also are available for the defence' (Ex 95, 143A). On 24 January 1994 Mr Ibbotson met with Mr Barnes. A file note recorded matters discussed including 'the quantity of partially burnt propellant remaining for independent testing purposes, noting that an amount of each exhibit must be left for defence purposes'. In relation to the applicant's car, the file note record for 7J(c) stated 'there is only remnants left for defence examination and where possible analysis' (Ex 95, 161).

970. Mr Barnes and Mr Ibbotson met on 3 March 1994 and the topics discussed included what exhibits Mr Barnes would be taking overseas, having regard to the fact that sufficient had to remain for possible defence analysis. The following was recorded (Ex 95, 208-211):

> Mr Barnes is fully aware that he must leave sufficient of any of the exhibits back in Australia for possible defence analysis and this is important in relation to partially burnt propellant. In relation to partially burnt propellant the following exhibits only are to be taken overseas –
>
> - 7/891G, being 4 particles found on the ground.
> - 7/891B, 1F, making 17 particles, in relation to 1B, 3 particles are to remain for defence.
> - In relation to 1F, 2 particles are to remain for defence.
> - In relation to Winchester's car 7/892C(a) and 2D(a) are to be taken overseas with sufficient left in Australia for defence purposes.
> - All the remaining partially burnt propellant exhibits are to remain in Australia as there is only sufficient left for defence to test.

971. On 10 March 1994 Mr Barnes called Mr Ibbotson from the United States. He advised that he and Mr Martz had done tests 'which prove that the particles in Eastman's boot are in fact PMC partially burnt propellant'. He read to Mr Ibbotson a report prepared by Mr Martz. He told Mr Ibbotson that K4 in the report represented 'exhibits 7/89-7J(c) which originally were 12 green particles from the boot of Eastman's car the majority of those have been destroyed although Barnes took some fragments with him to America for analysis'.

972. Mr Martz produced a very brief report dated 9 March 1994 (Ex 96, 5). Specimen Q4 is described as 'Propellant #7/89 7J(c), from suspects car'. Q4 was physically measured and chemically analysed by GC-MSD. It was found to be consistent with smokeless powder loaded into PMC .22 caliber ammunition. That type of smokeless powder was not found in any other .22 caliber ammunition in the FBI reference collection.

973. In his report dated 2 July 2013 Dr Wallace referred to the measurements recorded by Mr Martz of the five particles which appeared to have been provided to him by Mr Barnes. Q4 (Exhibit 7/89-7J(c)) was recorded to be 'one flattened ball particle 0.024 inches' (Ex 112 DCP 024 00174). Dr Wallace made the following observation (Ex 109, 12):

> Mr Martz measured the size of the particles and the one from the Mazda was the largest of the five particles he had been given. (0.024 inches(0.6096 mm) as opposed to 0.014- 0.016 inches (0.3556mm-0.4064mm) for the particles from the scene(11,5). He also measured the unburnt propellant size range in PMC Zapper (K13) (which he incorrectly describes as PMC Zapper bullets}. He found the size range to be 0.014 -0.024 inches.
>
> It is remarkable that what Mr. Barnes has described as 'fragments' or 'none at all' or 'remnants' can become a large propellant particle whose size is comparable to the largest of the unburnt PMC propellant particles.

974. Professor Kobus told the Inquiry that the particle inspected by Martz was probably not much smaller than an unburnt propellant particle and did not appear to be consistent with a 'fragment' (Inq 3246).

975. In his affidavit Mr Barnes stated the following in relation to the issues regarding 7/89-7J(c) (Ex 195):

> 161 I have read the following documents relevant to the 7/89 - 7J(c) particles:
>
> a. a memorandum of a meeting between myself and members of the DPP on 12 January 1994;
>
> b. a typed 'Status of Exhibits' document dated 12 January 1994 with handwritten annotations;
>
> c. a handwritten status of exhibits document prepared by me that is undated;
>
> d. a memorandum dated 24 January 1994;
>
> e. a memorandum dated 3 March 1994;
>
> f. a memorandum dated 10 March 1994;

g. my letters and reports about my overseas trip ('RCB-19' and 'RCB-20'); and

h. Martz's report dated 9 March 1994.

Now produced and shown to me and marked 'RCB-23' to 'RCB-29' respectively are the documents referred to above not previously exhibited.

162 I recall conducting GC-MSD analysis on particles with Agent Martz on my trip to the United States. I remember specifically that Martz and I looked through slides with numerous particles and attempted to find a suitable particle to analyse. He selected the largest particle to analyse. I brought the slide with the remaining particles back to Australia with me.

163 Based on the documents referred to above (particularly the record of my conversation on 10 March 1994) and I believe that:

a. the use of the terminology 'particle' and 'fragment' may have varied between Nelipa, Martz, myself and others and has no technical or precise meaning;

b. I took two slides to the FBI including slide 7/89 – 7J(c) that contained particles that had been extracted from the vacuumings taken from the boot of the Mazda;

c. the slide originally contained 12 particles of various sizes. Nelipa would have taken them from the vacuumings and placed them onto the slide and described them as 'particles' regardless of size;

d. GC-MSD or GC-FID analysis was conducted at SFSL on numerous particles working with the largest first and leaving smaller particles behind which I may have considered at one stage were all 'fragments' in relation to this slide. Alternatively, I may have been told this by Strobel or someone else working with the slide;

e. this would explain why I said there were none left by analysis on 12 January 1994. I may not have looked carefully at the status of the remaining fragments and thought at that stage they were all too small to be analysed;

f. the 'V. Doubtful' notations on the handwritten status of exhibits is an indication that I thought the particles were destroyed and that it was very doubtful that there were any particles large enough to be analysed. However, the '+' sign indicates this was a conservative estimate and I may have thought some fragment/s was/were large enough to analyse. This is consistent with the 24 January 1994 memorandum that refers to analysis 'where possible';

g. if the size of that particle is correct as recorded by Martz (0.024 inches) it was a relatively average sized PBP and I would not have described it as 'fragment' if I was aware of it; and

h. the particle was compared against the FBI database and Martz and I agreed that all ammunition types in the database other than PMC were inconsistent with the particle.

164 Based on all the documents I have reviewed regarding the 7/89 - 7J(c) analysis in America, I am confident that a reliable analysis of a particle from the Mazda boot was done at that time.

165 I cannot say why Martz's report and his evidence at trial refer only to one particle being on the slide marked 7/89 – 7J(c). It may be that I had been imprecise in my language earlier

and the other 'fragments' or 'remnants' were so small that they were not worth considering or reporting.

166 I cannot say why the 7J(c) exhibit is not referred to in the memorandum of the meeting of 3 March 1994. I do not recall that meeting. It may be that I discussed 7J(c) at that meeting or previously and it was not recorded. It may be that I looked at 7J(c) after that meeting and decided that some particles may be large enough to be analysed and that they should be taken overseas. I cannot recall, but I am confident that I would have had a conversation with someone, probably Ibbotson, about taking the 7J(c) slide overseas before doing so. I am confident that I would not have taken that exhibit (or any other) overseas without approval.

976. In response to subpoenas dated 4 February 2013 and 4 November 2013, the DPP has produced all file notes now available of all communications between the Office of the DPP (ACT) and Mr Barnes. Mr Ibbotson and Ms Woodward appear to have kept detailed records in the form of file notes, but Ms Woodward gave evidence that the files are now disorganised. It is obvious that documents might have been lost or misplaced.

977. There was no file note of any conversation between Mr Barnes and Mr Ibbotson (or anyone else in the prosecution team) after 3 March 1994 about Mr Barnes taking 7J(c) overseas. From my observations of the detailed file notes that were kept by the DPP, I have no doubt that had such a conversation occurred (as suggested by Mr Barnes at paragraph 166 of his affidavit), it would have been the subject of a file note.

978. By 3 March 1994 it had been made clear to Mr Barnes that all other exhibits (which would include 7J(c)) had to remain in Australia 'as there is only sufficient for defence to test'. The particle described by Mr Martz is well removed from the fragment described by Mr Barnes. There are significant doubts about the provenance of the particle tested by Mr Martz in March 1994. The result, is for that reason, unreliable evidence as to the contents of the Mazda.

7/89-7J(d)

979. There was no organic analysis for any particles from 7/89-7J(d) in Mr Strobel's thesis.

980. Notes of a meeting between Mr Barnes, Mr Adams and Mr Ibbotson on 24 May 1994 record that Mr Ibbotson had 'again reviewed the working notes and data Mr Barnes provided but can't see any reference to any data or results regarding 7/89-7(d)'. Mr Barnes was to 'check his notes and data and provide a report which contains results of his testing alternatively to contact John Ibbotson with an explanation as to what occurred with that particular exhibit' (Ex 95, 254).

981. This situation was confirmed in a letter from Mr Ibbotson to Mr Barnes dated 25 May 1994 (Ex 95, 260):

> Your report 19 November 1993, page 4 at approximately point 6 relating to the glass cavity slide received on 8 February 1989 containing green particles allegedly from the boot of YMP-028, which we believe is exhibit 7/89-7J(d). We could not locate in your notes any organic analysis of that exhibit.

982. In a letter from Mr Ibbotson to Mr Barnes dated 24 August 1994, Mr Ibbotson wrote (Ex 95, 275):

> The report of November 1993 at page 4.6 you referred to green particles removed from the boot and received by you on Wednesday 8 February 1989. It was our belief that this referred to exhibit 7/78-7J(d). You were advised that we could not locate anything in the working notes provided by you concerning the testing of this exhibit. You were to provide a statement relating to the testing of this exhibit and also provide copies of any notes or data obtained in relation to that testing.

983. In a file note of a telephone conversation between Mr Ibbotson and Mr Barnes on 6 October 1994, the following is recorded (Ex 95, 290):

> Re exhibit 7/89-7J(d) Mr Barnes has resolved this satisfactorily. He has found the data on which he based his conclusion. JI will collect this when he comes down on 24 October 1994.

984. Contrary to the assurance by Mr Barnes on 6 October 1994, the issue remained unresolved. In a file note of a conference on 19 December 1994 between Mr Barnes, Mr Adams, Mr Ibbotson and Ms Woodward recorded (Ex 95, 394):

> Letter 24 August 1994, item 3 regarding exhibit 7/89-7J(d). Mr Barnes is still to advise on this matter. That is a particle from the boot of Eastman's car. Mr Barnes to attend to this as a matter of urgency.

985. No chromatograms were produced by Mr Barnes when compiling the material for review with Mr Ibbotson in late 1993/early 1994. There is no record of the data being produced by Mr Barnes and he did not provide a report concerning 7J(d). According to Mr Barnes this 'empty slide' was broken when Mr Barnes moved to AGAL in November 1993 (T 1382).

986. The unreliability of the evidence concerning 7J(d) is obvious.

Vacuuming 7J

987. Two GC-MSD results for 7/89-7J are recorded in Table 8 of Mr Strobel's thesis. There are significant doubts about the provenance of the particles underlying these results.

988. One chromatogram dated 6 April 1993 (Ex 91, 10) recorded the sample name as '7/89-7J From Boot of Mazda YMP-028' and the Miscellaneous Info was given as '1 Burnt Propellant per 4uL Acetonitrile'. Professor Kobus and Dr Wallace gave evidence that the chromatogram had all the markers for PMC (Inq 3239 and 1849). Professor Kobus considered that it compared well with the PMC Zapper chromatograms (Ex 91, 96 and 97).

989. The second chromatogram dated 28 September 1993 (Ex 91, 12) recorded the sample name as 'Green particle picked from 7/89-7J' and the Miscellaneous Info was given as 'Vacuuming of Mazda YMP-028 boot'. Professor Kobus expressed the view that this was a poor result in that NG was the only component that could be identified with confidence (Inq 3309).

990. Neither chromatogram recorded 7/89-7J(c) or 7/89-7J(d) as the sample name. These were the two slides of particles prepared by the AFP and delivered to Mr Barnes in January/February 1989.

991. Mr Strobel gave evidence that the labelling on the chromatograms reflected the labelling on the slide he was given by Mr Barnes (Ex 107 [31]; Inq 3516, 3519 and 3524).

992. On 1 February 1993, Mr Nelipa handed the 7J vacuuming to Mr Prior for transmission to Mr Barnes (Ex 92, 59). There was no ITEMS record of the exhibit having been lodged at Victorian Laboratory liaison office. In his report of 23 November 1993 Mr Barnes stated that 'on 2 February 1993 I received a sealed box containing debris vacuumed from the boot of Mazda '626' YMP-028' (Ex 93, 23). Nothing further was said about the vacuuming in that report. There was no mention of that vacuuming being searched for particles.

993. In a file note of a telephone conversation between Mr Barnes and Mr Ibbotson on 13 January 1994 (Ex 95, 6; the file note should be 13 January 1994, not 13 January 1993), Mr Ibbotson recorded:

> In relation to item 19 exhibit 7/89 7J vacumings from the boot of YMP-028 received on 2 February 1993. Although it is not mentioned in his statement Robert Barnes advising that he has examined those vacumings and has not located any further partially burnt propellant or gunshot residue.

994. Mr Ibbotson and Mr Barnes met on 24 January 1994. In relation to this exhibit 7J, Mr Ibbotson recorded (Ex 95, 161):

> Barnes discovered from the vacuuming from the boot of Eastman's car one charred particle which he extracted and found to be similar to those discovered in exhibit 7/89 7J(e) which are the three charred chopped disk particles located in Eastman's boot. That was destroyed in analysis.

995. This discussion did not relate to these two chromatograms, but rather to a third chromatogram dated 28 September 1993 described as 'Black particle picked from 7/89-7J, Vacuuming of Mazda YMP-028 boot' (Ex 91, 11). The third chromatogram showed EC and was, therefore, inconsistent with PMC.

996. So, by 24 January 1994, there was no reference by Mr Barnes to finding these two particles in the 7J vacuumings even though the dates of the two chromatograms indicate the analyses were performed in 1993. Mr Strobel told the Inquiry he did not search any vacuumings until late 1994 (Ex 107 [42]). The origin of these two particles is a mystery.

997. The two chromatograms were included in the Index prepared for the overseas experts in January 1994. At the meeting on 24 January 1994, Mr Ibbotson queried the 'two sheets of analysis' regarding exhibit 7/89 7J. Mr Ibbotson recorded that 'Barnes to work out which is relevant or whether in fact both are relevant and in what order' (Ex 95, 162).

998. On 3 March 1994 Mr Barnes provided an explanation. He stated that the two analyses of 7J 'were in fact two analysis of the same sample exhibit, a different method was used, but achieved a similar result' and that 'the conclusion is therefore strengthened'

(Ex 95, 209). This explanation is contradicted by Professor Kobus who said the chromatograms did not achieve a similar result; one possessed all the markers for PMC, but the other was a poor result showing only NG.

999. None of Mr Barnes' reports dealt with the two particles or their origin. These particles were not referred to at trial.

1000. Mr Barnes' explanation reinforces the unsatisfactory nature of the provenance of these two 7J particles and the chromatograms (Ex 195):

> Box of Vacuumings - 7/89 – 7J
>
> 183 I no longer have any specific recollection of examining the box of vacuumings marked '7J'. I believe that someone under my direction or I searched the box of vaccumings marked 7J multiple times after I received it. I think it is likely that we conducted a cursory search of the box after we first obtained it and then returned to search it more thoroughly after that.
>
> 184 Based on the GC-MS spectra labelled as '7J' and dated 6 April 1993, I believe the first cursory search may have yielded a single particle that we submitted for GC-MS analysis. Based on the other GC-MS spectra marked '7J' both dated 28 September 1993, I believe we may have located two further particles at a later date and submitted those for further analysis.
>
> 185 It is possible that we had not searched the vacuumings at all at this time and the '7J' spectra were mislabelled for some reason. I believe this is highly unlikely based on Strobel's meticulousness and the fact that multiple particles would have been mislabelled. For the same reasons, I am extremely confident that the particles were from the Mazda boot whether found in the box by us at SFSL or coming from a slide. I did not encounter a mislabelling of the provenance of particles at any time in the course of the Winchester investigation.
>
> 186 I have reviewed a file note of a telephone conversation dated 13 January 1993 that appears to be incorrectly dated and should be 13 November 1994. It records that I have told the DPP that I had examined the vaccumings and had not located any further propellant. I cannot recall this conversation. Based on my belief about the status of the 7J documents set out at paragraphs 183 through to 185 above and assuming this file note correctly records the conversation, I can only surmise that I gave the incorrect information to the DPP in this conversation.
>
> Now produced and shown to me and marked 'RCB-32' is a copy of the file note.
>
> 187 I also cannot explain why there is no record of finding further particles in the vacuumings throughout 1993, particularly in my November 1993 report. The GC-MS results show spectra revealed two 'green' particles that are PMC-consistent. I know that one of these particles was flattened ball because it was described that way in Strobel's thesis. I believe the other would have been flattened ball as well. These particles would not have been very important or significant considering the numerous PMC-consistent particles located in the boot. The other particle was a charred non-PMC particle. I may not have considered this to be significant because it was not severely consumed and charred like the particles located in the Ford, Mr Winchester's hair and on slide 7/89 – 7J(e). I may have simply overlooked this particle.
>
> 188 I note that by the time of the meeting on 24 January 1994 (file note of meeting 'RCB-26') I told the prosecutors about the charred non-PMC particle. This is also recorded in handwritten amendments to the Status of Exhibits report dated 12 January 1994 ('RCB-24'). I do not believe that this indicates that I searched the vacuumings sometime between 13

January 1994 and 24 January 1994. I believe I had simply found or reconsidered data relating to the charred particle that was analysed in September 1993 and corrected the information I gave to the prosecutors. This is based largely on the fact that I told the prosecutors that the particle had been destroyed in analysis by GC-MS on 24 January 1994 and I think it is very unlikely I discovered it after 13 January and had it analysed and then advised the prosecutors. This also supports my beliefs set out in paragraph 185 above that the analysis of at least this particle was not mislabelled but had come from searching the vacuuming.

189 On pages 3 and 4 of the file note of 24 January 1994 there is some discussion of the placement of 7J analyses in parts of the material being organised at that time. It refers to the indices to Part D, copies of which I understand were produced by the DPP and I have reviewed. I have also read a letter to me from Ibbotson dated 18 February 1994 following on from the meeting on 24 January 1994. That letter follows up on a query as to why there are two 7J analyses in the material I have provided. In the meeting on 3 March 1994 (see file note 'RCB-27') I am recorded as stating these were multiple analyses of the one exhibit. On 14 April 1994 I wrote a letter in response to Ibbotson's 18 February letter stating that I had already provided the reason for the two 7J analyses - that two particles were analysed. Based on all these materials, I am certain I provided the three 7J spectra from April and September 1993 referred to above to the prosecutors as part of the case materials I prepared. I appear to have put some in the wrong sections and this has been reorganised. I have explained to the prosecutors that the two 7J spectra (in Part D(1)) are analyses of two different particles by using slightly different GC-MS methods and I confirm this in writing in April. I cannot say why there is no record of any confusion as to where the two PMC-consistent particles marked 7J were located and why they had not been recorded before this time.

Now produced and shown to me and marked 'RCB-33' are copies of the indices, 'RCB-3424' is a copy of the letter from 18 February 1994 and 'RCB-35' is a copy of my letter dated 14 April 1994.

190 I have reviewed the evidence given by Strobel before the inquiry. I agree with his evidence about instructing him to search all the vacuumings at AGAL in 1994 and the results of his searches.

191 I have reviewed my report dated 5 May 1995 and the GC-MS results from 3 and 4 May 1995. Based on those documents, I believe the four particles located by Strobel at AGAL were additional to the particles located in the 7J box in 1993 at SFSL (1993 particles). I cannot recall this, but the wording of the 5 May 1995 statement suggests this to me. Now produced and shown to me and marked 'RCB-36' and 'RCB-37' are the 5 May 1995 report and the GC-MS spectra.

192 Strobel or Geoffrey Buckingham (Buckingham) would have conducted the GC-MS analyses. I cannot recall but I believe that Buckingham may have operated the GC-MS machine in conducting these analyses. He was assisting with operating the GC-MS machine during my time at AGAL. I cannot say exactly how the numbering system for the GC-MS results correlates to the notations in my statement dated 5 May 1995. I cannot definitively interpret the results without the database information, which should be contained within the machine at AGAL. However, I believe that the analyses show ethylcentralite. I believe the results show two different non-PMC particles analysed multiple times each. I believe that they relate to two different particles because there are handwritten annotations on the results that indicate there were reinjections and new injections, because there are two different 'bottles' referred to and because they occurred on two separate days.

193 I believe that my evidence at trial regarding the additional particles located in the box of vacuumings refers only to the particles discovered in 1994 and described in my 5 May 1995 statement. I did not give evidence about the 1993 particles. I cannot say why that occurred. My evidence was based on my memory refreshed from my reports or solely based on what

> was contained in my reports. None of my reports refer to the 1993 particles. It may be that I just overlooked these particles. It may be that I omitted the evidence because I could not verify the particles from my reports and was not sure about the status of that part of my evidence in order to be as conservative as possible in giving evidence that was adverse to the interests of the accused man.

1001. The vacuuming 7J was one of the most important exhibits of the investigation. Neither Professor Kobus nor Dr Wallace could identify any entry in Mr Barnes' notes or reports to explain the origin of the two 7J particles (Inq 1736; 3242).

1002. In paragraph 184 of his affidavit Mr Barnes suggested that two searches of 7J may have been conducted prior to 28 September 1993. This is an unsatisfactory suggestion in light of the absence of any reference to such searches in his report of 19 November 1993. If searching had occurred in 1993 of one of the most important exhibits in the investigation, and further propellant particles were located, it is surprising that nothing was mentioned in the report.

1003. In paragraph 185 of his affidavit Mr Barnes stated that it was possible that no searching occurred in 1993 and that the 7J chromatograms were 'mislabelled' for some reason. He believed this was 'highly unlikely' because Mr Strobel was meticulous.

1004. Having postulated these two unsatisfactory explanations of the provenance of the two particles and chromatograms, Mr Barnes then said he was 'extremely confident that the particles were from the Mazda boot, whether found in the box by us at SFSL or coming from a slide'. It is difficult to understand how a forensic scientist could express such 'extreme confidence' in the face of the significant problems relating to the provenance of these particles and analyses.

1005. Mr Barnes said at paragraph 187 that 'these particles would not have been very important or significant considering the numerous PMC-consistent particles located in the boot'. Again, this is a surprising statement for a forensic scientist to make in relation to one of the most important exhibits in the investigation.

1006. In paragraph 188 Mr Barnes appeared to miss the point that although he mentioned the third non-PMC particle to the prosecutors on 24 January 1994, he made no mention of these two PMC-consistent particles. He stated in paragraph 193 that he did not give evidence about these two 1993 particles. He cannot now say why. Mr Barnes postulated a number of reasons including the possibility that he omitted them because he was not sure about their status and was being 'as conservative as possible in giving evidence that was adverse to the interests of the accused man'. It is difficult to accept how Mr Barnes' lack of competence in regard to continuity of exhibits can be translated by him into a claim that he was acting in the interests of the applicant.

1007. No reliance can be placed on this 1993 data.

1008. The 7J vacuumings were searched at AGAL in 1994. Those searches were the subject of Mr Barnes' report dated 5 May 1995 (Ex 93, 44). Mr Strobel told the Inquiry that he was the one who actually searched the vacuumings in 1994 (Ex 107 [42]). The date of the searching of the vacuuming 7J was not given in the report dated 5 May 1995. In an

'interim report' of November 1994 (contained in a bundle of documents Section 1 – 14 Ex 94), reference was made to the 're-examination' of 7J, but no date was given. However, the reference appeared after the entry for 28 October 1994 when other vacuumings were searched. One flattened ball particle consistent with PMC and three disk particles (not PMC) were detected in 7J. Those particles were the subject of evidence at trial, but no organic analysis was undertaken of the single flattened ball particle (Report of 5 May 1995, Ex 93, 44).

Analyses Summary

1009. The examination undertaken in this Inquiry of essential records of examinations and evidence by Mr Barnes has exposed fatal flaws in evidence crucial to the prosecution case. It is the type of examination that was necessary to discover the flaws. To some extent the DPP was aware of inadequacies, or should have been, but it is clear from the defence cross-examination at trial that the defence were unaware of these flaws.

1010. I have already summarised the issues that arise in respect of some of the evidence given by Mr Barnes at the Inquest and his explanation in paragraph 101 (a) – (f) of his affidavit. In summary, other problems discussed are as follows:

- <u>Particle labelled 2DC:</u>

  The label does not match the Mazda (Exhibits beginning 7) and no Ford exhibit was labelled 2DC. No reliance can be placed on Mr Barnes' assertion that he believes it came from the Mazda. He does not possess any basis for the assertion which demonstrates his bias in favour of his views and a willingness to interpret circumstances to suit that view without a proper scientific basis.

- <u>Particle 7E(a)</u>

  Mr Barnes reconstructed a flimsy explanation about the continuity of this particle which conflicts with records and Mr Ross' explanation which I accept. The evidence given by Mr Barnes omitted results which did not suit the prosecution case, namely, the presence of primer residue other than PMC.

- <u>Evidence at re-opened Inquest</u>:

  Evidence by Mr Barnes that he conducted organic analyses by 30 November 1992 is not supported by any of his notes and Mr Barnes did not mention such analyses in a report. Mr Barnes did not produce GC-FID data to support such analyses when preparing materials to be sent to the overseas experts.

- <u>Same batch</u>:

  Mr Barnes' Inquest evidence that the PBP in the Mazda boot probably came from the same batch as PBP at the scene did not possess a scientific basis. Although Mr Barnes modified his position at trial, he displayed defiance and a justification of

his Inquest evidence that is at odds with his current 'regret'. The Inquest evidence and Mr Barnes' subsequent responses reflect adversely upon his credibility.

- Report 19 November 1993:

  Like other reports, this report failed to meet with established forensic science practice. It did not provide necessary particulars of exhibits and analyses. The only GC-MSD data produced to the DPP was carried out by Mr Strobel for the purpose of his thesis.

- Case File:

  Mr Barnes delayed producing a copy of his case file for reviews by overseas experts. When eventually produced, it was significantly deficient.

- GC data:

  GC data to support Mr Barnes' opinions was not provided to the DPP when Mr Ibbotson worked through the case file material with Mr Barnes to correct the inadequacies that caused problems for the overseas experts. No GC-FID data was produced and only GC-MSD analyses conducted by Mr Strobel were produced.

  Requests for such data were never fulfilled.

  Mr Barnes failed to provide a statement to the DPP despite repeated requests to do so.

  Mr Barnes failed to provide data of the analysis of a crucial slide from the Mazda boot, 7J(d), despite repeated requests to do so.

  Victoria Police did not lose the data.

  The cumulative effect of these matters leads to a conclusion that it is highly likely Mr Barnes did not perform the analyses or the results did not support his opinions.

- Driveway – slides 1B and 1F:

  The contemporaneous records, including the Status of Exhibits report handwritten by Mr Barnes, record that the 17 particles from the driveway could not have been used for GC-MSD analysis. This was confirmed by Mr Barnes orally to the DPP on 12 and 24 January 1994. In the latter conversation Mr Barnes spoke of all 17 particles which precludes destruction of any particles by GC-MSD analysis. The view that no GC-MSD analysis was conducted is also supported by the absence of any GC-MSD data. Mr Barnes' report of 19 November 1993 and, importantly, his trial evidence, were wrong.

- Ford

  Analyses of particles from all slides relating to the deceased's Ford are attended by doubts or limitations previously discussed. Analyses by Mr Strobel of particles from three slides were rejected by him as they showed only NG.

- Mazda Driver's Seat:

  The particle 7E(a) was analysed by Mr Ross, but only through SEM/EDX. He found some primer inconsistent with PMC, but this was not disclosed to the defence and Mr Barnes gave misleading evidence to the jury that there was no evidence of any component inconsistent with PMC.

- Mazda Boot:

  The two slides are 7J(c) and 7J(d). The only organic analysis data for 7J(c) comes from Mr Martz, but there is significant doubt that the particle analysed by Mr Martz came from 7J(c). As to 7J(d), despite requests by the DPP, Mr Barnes failed to produce data to support his opinion. Nor did Mr Barnes produce a report concerning 7J(d).

- Mazda Boot - Vacuumings:

  7J were said to have produced two particles for which two GC-MSD results are recorded in Mr Strobel's thesis. However, there is no reference in any notes or reports prior to the GC-MSD analysis of these particles being located in the vacuumings. Mr Barnes' explanation merely highlights the provenance problems. No evidence was given at trial about these particles.

Reliability of Opinion that PMC at Scene and in Mazda

1011. As to the driveway, two used PMC cartridges were located. There was one reliable GC-MSD result for the driveway (1G). This particle was analysed by Mr Martz and found to be consistent with PMC.

1012. There were no reliable GC-MSD results for the Ford. Mr Nelipa described the particles as green (T 607). In the 1993 database they have been described as green translucent or yellow green translucent. Mr Strobel told the Inquiry that he would not separate yellow-green and green when doing a comparison because it can relate to a difference in the extent to which heat had transferred on firing (Inq 3530).

1013. There were no reliable GC-MSD results for the Mazda. There were partially burnt green particles in the Mazda boot (7J(c) and 7J(d)) and one inside the cabin (7E(a)). Mr Nelipa described the 7J(c) particles as green and consistent with the particles he had been shown from the driveway (T 598). Mr Bush described the 7J(d) particles as green (T 702). Mr Nelipa said the green particles were identical in every respect to the other particles found in the driveway and from the Mazda boot (T 600).

1014. The following table provides a brief summary of the position with respect to green particles located at the scene and in the Mazda:

Summary of 'Green Particles'

Driveway 7/89-1	**Ford 7/89-2**	**Mazda 7/89-7**
7/89-1B 10 green particles Located by Mr Nelipa 20 January 1989 *No GCFID or GCMS results*	7/89-2D(a) Front passenger seat 24 green particles Located by Mr Nelipa 9 February 1989 *GCMS not specific to PMC*	7/89-7J(c) Boot 12 green particles Located by Mr Bush 29 January 1989 *No GCMS results*
7/89-1F 7 green particles Located by Mr Bush 8 February 1989 *No GCFID or GCMS results*	7/89-2C(a) Driver's seat 13 green particles Located by Mr Bush 11 February 1989 *Incomplete GC-FID*	7/89-7J(d) Boot 9 green particles Located by Mr Bush on 7 February 1989 *No GCMS results*
7/89-1G 4 green particles Located by Mr Bush 8 February 1989 *GCMS result for 1 particle*	7/89-2H(a) Nearside front floor pan *GCMS shows NG only*	7/89-7J Boot Two 1993 chromatograms *No provenance*
	7/89-2I(a) Offside rear floor pan *GCMS unresolved peaks*	7/89-7J Boot 1 particle located by Mr Strobel late 1994 *No organic analysis performed*
	7/89-2K(a) Centre console *GCMS unresolved peaks*	7/89-7E(a) Driver's seat 1 particle located by Mr Nelipa 16 August 1992 *No GCMS results*
	7/89- 2J(a) *GCMS shows NG only*	
	7/89-2E(a) *GCMS shows NG only*	
One reliable result – 1 particle from 7/89-1G (Martz)	**Organic analysis not showing all markers for PMC or showing unresolved non PMC peaks.**	**No reliable organic analysis**

1015. If the evidence rises no further than establishing that there were propellant particles in the Mazda boot which were green or yellow/green flattened ball, then there are 67 entries in Mr Strobel's 1993 partially burnt database comprising 56 different types of ammunition which satisfy that criteria. Winchester Wildcat is one of those entries. That was the ammunition brand and type that Mr Bradshaw said he gave to the applicant when he sold the rifle to him in February 1988 (T 2798, 2826). The applicant gave evidence at trial that he fired the Bradshaw rifle with either the ammunition he had previously purchased or the ammunition Mr Bradshaw gave him. The rifle jammed so he returned it to Mr Bradshaw (T 4926). If the evidence had been presented in this way at trial, the applicant would have been in a position to contend that the Bradshaw rifle could not be excluded as a source of the green flattened ball propellant particles in the Mazda boot. It must be said, however, that the timing would have undermined that contention significantly.

Partially Burnt Propellant – 'Rogue' Particles

1016. At trial Mr Barnes gave evidence that there were 'rogue' (non-PMC) particles at the scene and in the Mazda boot. It was his opinion that they were consistent with CCI, Remington and Stirling ammunition, amongst others.

Scene – 7/89-2D(a) and Hair Particle

1017. There were two 'rogue' particles said to have been located at the scene. The first was 7/89-2D(a). The chromatogram was dated 14 October 1993 (Ex 91, 86) and was included in Mr Strobel's thesis. The Sample Name was '7/89-2D(a) Clear Translucent Chopped Disc' and the Misc Info was '1 Burnt Propellant per 2uL Acetonitrile'.

1018. At trial Mr Barnes gave evidence that this was a chopped disk propellant particle dissimilar from PMC and consistent with Remington or Stirling, and possibly other ammunitions (T 1415–1416). Professor Kobus and Dr Wallace were of the view that the chromatogram showed only NG and EC (Inq 1842; 3249). PMC is therefore excluded. Dr Wallace said a lot of ammunition types contain NG and EC (Inq 1842).

1019. There are issues relevant to the reliability of Mr Barnes' observations, reports and notes concerning this particle. Mr Barnes received this slide on 22 February 1989. He made no reference in his examination notes to an anomalous or charred particle (Ex 92, 7). He made no reference to this particle when referring to the Ford slides in his reports of 1 March 1989 and 30 August 1989 or his evidence at the Inquest in September 1989. The first mention of this anomalous particle is found in Mr Barnes' report of 19 November 1993.

1020. In addition, Mr Barnes' notes of examination record 26 'green', 1 chopped disk (Ex 91, 15). Mr Bush gave evidence at trial that he removed 25 green particles and placed them on the slide (T 710 and 713). He also put a metallic particle on the same slide (T 710). Mr Nelipa gave evidence that he put a black particle on whatever slide corresponded with the vacuuming in which he found it. However, he did not identify the slide (T 607). If the slide on which Mr Nelipa placed that particle was 7/89-2D(a), there could have been 25 green particles, one metal particle and one 'rogue' particle.

1021. The mismatch in numbers is another example of the uncertainty and confusion that permeates the notes and other records relating to the forensic work under consideration.

1022. The second 'rogue' particle was located in the deceased's hair. The chromatogram was dated 14 October 1993 and was included in Mr Strobel's thesis. Both Professor Kobus and Dr Wallace identified the presence of EC meaning that PMC could be excluded (Inq 3250 and 1843).

1023. There are issues regarding the reliability of Mr Barnes' evidence about this particle. On 21 October 1993 Mr Barnes told the DPP that he looked at one particle that was fused to the hair of the deceased. It was severely charred, but it had been contaminated with some type of oil. He was able to determine that the charred particle was consistent with Remington or Stirling. (Ex 95, 69).

1024. In his report dated 19 November 1993 Mr Barnes wrote that the particle was dissimilar from PMC and similar to Remington or Stirling when compared against the database. The presence of trace contaminants precluded a more definitive identification (Ex 95, 23).

1025. Mr Strobel analysed this particle. In his thesis he did not mention oil or trace contaminants.

1026. On 24 May 1994 Mr Barnes told the DPP (Ex 95, 255):

> Reliance could not be placed on tests done on that particular particle due to it having been covered in a type of oil which would influence any results. He can say that oil is not body oil and could have many different origins.

1027. At trial, Mr Barnes made no mention of the presence of oil or the unreliability of the result. He said that the particle was not PMC. It was consistent with CCI and possibly Remington or Stirling (T 1414).

1028. Professor Kobus told the Inquiry that if oil was present, it did not provide a lot of interference with the results. He did not see peaks and it did not appear to show contamination from oil (Inq 3250). In his opinion there were two additional peaks for DBP and DPP. He did not know whether Mr Barnes was referring to those as some sort of oil contamination, but they are phthalates used as propellant plasticisers. He said that for Mr Barnes to make the comparison with Remington, CCI or Stirling, he would need to explain why the DBP and DPP have been discounted because, except for one type of Stirling, those ammunition brands do not contain DBP and DPP (Inq 3256).

1029. Dr Wallace told the Inquiry that the chromatogram showed no evidence of contamination (Inq 1731). He considered that the presence of DBP and DPP strongly supported a conclusion that the particle came from a second source and was different to the other 'rogue' particle found in the car (Inq 1843–1844).

1030. In his affidavit Mr Barnes gave the following explanation (Ex 195 [217]):

> 217 I note that I have recently reviewed the GC spectra in relation to the non-PMC particle taken from Colin Winchester's hair, which was given the label 1899/889, as well as the spectra from the non-PMC particles analysed from the Ford and the Mazda. I have heard the evidence given by Dr Wallace and reviewed the evidence given by Professor Kobus in this Inquiry in relation to these particles. Having done so, I remain of the view that aside from the anomalous phthalate peaks in the spectra for the hair particle, the particle from Mr Winchester's hair is otherwise comparable to the non-PMC particles found in the Ford and the Mazda. That is, all of these particles are chopped disc. Organic analysis detects the presence of nitroglycerine and ethylcentralite. These factors do not positively identify the ammunition type but they demonstrate no significant differences and they can be used on an exclusionary basis to exclude PMC. I remain of the view that a contextually sensible explanation for the presence of phthalates is contamination by oil or hair products contained on the strand of hair. This is because those compounds may be present in hair products.

1031. Whether Mr Barnes' current explanation is correct or not, for some unknown reason, he did not explain or refer to this in any of his reports or trial evidence. It would have been a useful point for cross-examination. In his trial evidence Mr Barnes made reference to the 'rogue' particles at the scene, and in the Mazda, all being consistent with CCI, Remington and Stirling ammunition brands, amongst others. This not only suggested a connection between the scene and the Mazda, but also suggested a connection to the murder weapon which had previously fired CCI, Remington and Stirling. However, if the two peaks were propellant plasticisers, their presence would make the particle inconsistent with those ammunition brands.

Mazda Boot - 7J

1032. Three 'rogue' particles from the 7J vacuuming were located by Mr Nelipa on 1 February 1993 and marked 7J(e). His evidence at trial was that they did not resemble PMC propellant and he suspected them to be propellant of another brand (T 615).

1033. Mr Barnes received these particles either on 1 February 1993 or 2 February 1993 (there is a conflict in his reports of 19 November 1993 and 5 May 1995 as to the date of receipt). Mr Strobel included two analyses for 7J(e) in his thesis. They were both dated 14 October 1993 (Ex 91, 11 and 13) and showed the presence of EC which excluded PMC. Both Professor Kobus and Dr Wallace agreed with this (Inq 1842 and 3249).

1034. At trial Mr Barnes said these particles were three largely consumed chopped disk particles, not PMC. They were consistent with Remington or Stirling, but not exclusively (T 1442).

1035. There is an issue about the reliability of Mr Barnes' notes, reports and evidence regarding these particles. At a meeting with the DPP on 24 January 1994, Mr Barnes said that one of the three particles was in fact carbon (Ex 195, 161). In the Status of Exhibits report (Ex 92, 1), it was recorded that 'two destroyed in analysis; third particle analysed, found to be carbon'.

1036. In his report of 19 May 1995 (Ex 93, 51), Mr Barnes made no mention of one of the particles being carbon. Nor did he mention the issue of carbon at trial.

1037. In his affidavit Mr Barnes provided the following response (Ex 195):

> 173 After giving evidence at the Inquest, I continued to receive evidence from the AFP relating to the case. Based on my statements and other documents relevant to this exhibit, I believe that on 2 February 1993 Prior handed me a slide containing three particles that Nelipa had located in the boot vacuumings that he had marked 7/89 - 7J(e). He also gave me the sealed box containing the remaining debris vacuumed from the Mazda boot marked 7/89 - 7J. I cannot explain why there is a conflict between my reports dated 19 November 1993 and 5 May 1995 as to the date I received these items. I assume this was a typographical error and after reviewing the documents I believe the correct date must be 2 February 1993.
>
> 174 I am sure that all three particles that were contained in the slide marked 7/89-7J(e) would have been analysed by GC-MS at some time prior to my November 1993 report based on my comments in page 10 of that report and the spectra labelled 7J(e) on 14 October 1993.
>
> 175 Based on the January 1994 documents and the Status of Exhibits report around that time ('RCB-23'– 'RCB-26'), I believe the other particle was analysed and no significant results were found. This is what I mean when I say it was 'found to be carbon'. All organic components had been consumed. The particle would still have had observable chopped disk morphology and other physical characteristics. If the GC-MS results contained nothing useful, we would not have retained a print-out copy of the spectra. This explains why there are only two spectra marked 7J(e).
>
> 176 Insofar as my reports of November 1993 and 19 May 1995 suggest or state that all three particles were analysed by GC-MS and found to be dissimilar to PMC propellant, this is an error on my part.
>
> 177 Insofar as my evidence at trial makes no mention of the carbon particle, it was based on my reports that made no mention of the carbon particle and I assume I had just forgotten about the carbon particle at the time of giving evidence although it exhibited the chopped disk morphology.

1038. Mr Barnes' response echoes other explanations of conflicts in notes and reports by suggesting error. If so many errors occurred, it does not bode well for the reliability of the forensic evidence.

1039. The response is unsatisfactory. The basis upon which Mr Barnes now claims that the 'carbon' particle would still have possessed observable chopped disk morphology and other physical characteristics is far from evident. There was no note made by him to that effect. The particle was not mentioned by Mr Strobel in terms of its colour and morphology. Mr Strobel did not refer to it in his thesis. There are no notes relating to Mr Barnes' examination of these particles.

1040. Also of concern is Mr Barnes' comment that if the GC-MSD results contained nothing useful, they would not have been retained. Such a process hardly seems consistent with good scientific practice.

1041. There is a chromatogram for GC-MSD organic analysis on 28 September 93, described as 'Black particle picked from 7/89-7J vacuuming of Mazda boot' (Ex 91, 11). PMC is excluded as a source as it shows EC (Inq 3249 Kobus). It was not included by Mr Strobel in his thesis. The provenance of this particle suffers from the same problems as the other two 7J 1993 chromatograms.

1042. As discussed, the vacuuming 7J was searched again in late 1994 by Mr Strobel at AGAL. At trial Mr Barnes gave evidence that three severely charred, largely consumed chopped disk propellant fragments were found (T 1446). He expressed the opinion that they were not PMC. Two were consistent with CCI, Remington or Stirling, amongst others. He said one of them was consistent with Stirling only.

1043. Mr Barnes wrote the following in his report dated 5 May 1995 (Ex 93, 44):

> Three heavily burned chopped disk propellent particle fragments and one heavily burned flattened ball propellent particle were detected. Analysis of the third chopped disk propellent particle fragment (designated 'C') by GC-MS identified the presence of ethyl centralite (EC) in addition to nitroglycerine (NG) In the fragment. The morphology, colour and composition of this fragment are consistent with selected CCI, Remington and Stirling ammunition types.
>
> Analysis of the second chopped disk propellent particle fragment (designated 'B') by GC-MS identified the presence of diethylphthalate and ethyl centralite (EC) in addition to nitroglycerine (NG) in the fragment. The morphology, colour and composition of this fragment is consistent with Stirling ammunition.

1044. There was organic analysis data labelled 7J.Disc, 7J2.d, 7J3.d, 7J4.d and 7J5.d (Ex 91, 15–65) which showed the presence of EC. It is impossible to correlate the description of the particles ('B' and 'C') in the report with that data (Kobus, Inq 3255 Ex 108, 23–26).

1045. Mr Barnes was unable to explain the difficulty in correlating the data and his report. He said the following in his affidavit (Ex 195):

> 192 Strobel or Geoffrey Buckingham **(Buckingham)** would have conducted the GC-MS analyses. I cannot recall but I believe that Buckingham may have operated the GC-MS machine in conducting these analyses. He was assisting with operating the GC-MS machine during my time at AGAL. I cannot say exactly how the numbering system for the GC-MS results correlates to the notations in my statement dated 5 May 1995. I cannot definitively interpret the results without the database information, which should be contained within the machine at AGAL. However, I believe that the analyses show ethylcentralite. I believe the results show two different non-PMC particles analysed multiple times each. I believe that they relate to two different particles because there are handwritten annotations on the results that indicate there were reinjections and new injections, because there are two different 'bottles' referred to and because they occurred on two separate days.

1046. Mr Buckingham told the Inquiry that he and Mr Strobel were the only two operators of the GC-MSD machine at AGAL in 1994/1995. He did not do any case work or analysis on Winchester exhibits. He did not have any experience in gunshot residue and used GC-MSD for drug analysis. Mr Buckingham said he did not have any discussions with Mr Barnes about the Winchester case work. His contact with Mr Barnes was limited to morning greetings in the corridor (Inq 3763, 3764 and 3768). Mr Strobel said that the GC-MSD data dated 3 May 1995 was not familiar to him. For example, it showed a different file system than he was accustomed to seeing. His 'first impulse' was to say it was not done at AGAL. He did not believe he did that work (Inq 3556).

Mazda Boot Trim – 7K

1047. In 1994 one particle was located in the vacuuming, 7K. At trial Mr Barnes gave evidence that it was a severely charred and largely consumed fragment of chopped disk

propellant, not PMC (T 1447). He said it was not possible to conclusively examine it. He said that amongst chopped disk particles are Stirling, CCI and Remington, but also a large number of others.

1048. It is evident that Mr Barnes was basing this opinion purely on appearance of the fragment. In his report dated 5 May 1995 (Ex 93, 45), he wrote that analysis of the fragment by GC-MSD was inconclusive and no particles consistent with primer related gunshot residue were detected. There were no photographs. It is not clear how the organic analysis labelled as '7-89-7K part dis' and '7K.d' on 3 May 1995 (Ex 91, 73–81) correlates with the fragment from 7K.

1049. This is an example of the approach Mr Barnes took in his evidence. On the basis of morphology alone, Mr Barnes was prepared to leave the impression of sameness between this particle and the crime scene particle 7/89-2D(a) (T 1447):

> Q Again, in relation to that particle, and the severely charred, largely consumed chopped disk propellant particle that you found in the Ford, was it - could it be distinguished from that particle?
>
> A No, almost by definition it could not be; but there was certainly nothing to say that it was in any way different.

1050. This is a theme that recurred throughout Mr Barnes' evidence at the Inquest and trial. He was prepared to give the impression that the evidence of comparison, and absence of differences, were much more significant in linking the Mazda to the scene than the evidence deserved.

1051. Dr Wallace disagreed with the evidence of Mr Barnes comparing this particle with 7/89-2D(a). In his opinion the two could not be linked (Inq 1847).

Mazda Driver's Side Floor – 7/89-7D

1052. At trial Mr Barnes gave evidence that one charred heavily burned chopped disk particle was found in the vacuuming 7/89-7D (T 1432). It was not consistent with PMC, but consistent with CCI ammunition, amongst others.

1053. In his report dated 5 May 1995 Mr Barnes wrote (Ex 93, 43):

> One heavily burned chopped disk propellent (sic) particle, was detected. Analysis by GC-MS confirmed the origin of the particle as propellent. The morphology and colour of the particle was consistent with CCI ammunition (amongst others). SEM examination of the surface of the propellent revealed the presence of lead (Pb), barium (Ba) and calcium (Ca) as the principal components of primer related gunshot residue particles on the surface of the propellent. These primer related gunshot residues are consistent with both CCI and PMC ammunition (amongst others) are consistent with both CCI and PMC ammunition(amongst others).

1054. Dr Wallace gave evidence (Inq 1845) that the organic analysis only showed NG. This would explain why Mr Barnes said in his report that 'Analysis by GC-MS confirmed the origin of the particle as propellant'. The organic analysis was unable to provide any further information in terms of exclusion.

1055. It appears that Mr Barnes based his evidence that the particle was consistent with CCI ammunition, amongst others, on morphology (chopped disk) only. Mr Barnes did say 'amongst others', but there were many other types of ammunition containing that morphology apart from the ammunition brands which suited the Crown case.

Identification of 'Rogue' Particles

1056. The 'rogue' particles were all said by Mr Barnes to be clear translucent chopped disk particles. During his evidence at trial Mr Barnes often said that they were consistent with Remington, CCI or Stirling, amongst others. However, Mr Barnes did not say that there were only a limited number of types within those ammunition brands which were clear translucent.

1057. For the Stirling brand, only one out of six of the types was clear translucent upon firing. For the Remington brand, five out of seven were clear translucent upon firing.

1058. Most significantly, for the CCI brand, only one out of the seven types was clear translucent upon firing. This was CCI Stinger. All of the other six types would be excluded based on colour. CCI Stinger ammunition was the ammunition found with the Leneghan rifle. This was the rifle which the applicant purchased from Mr Leneghan on 13 February 1988. That rifle was found in a drain by Mr Woods on 1 May 1988 with Stinger ammunition (T 3049, 3052, 3214). The applicant admitted to purchasing the rifle, firing it, keeping it in his boot and eventually leaving it in the drain (T 4931-4933). If that evidence was accepted or might be true, the Leneghan rifle was a potential source of the 'rogue' particles in the Mazda. Again, however, the timing would have undermined such a suggestion.

Silencer – 'Charred' Particles

1059. At trial Mr Barnes gave evidence that the presence of severely charred partially burnt propellant in small numbers associated with the area of impact was a 'strong' indicator that a silencer may have been fitted to the weapon. He said he had 'never experienced charred particles like that except where a silencer has been fitted however I don't exclude that there exists a possibility that those particles could be created in some way which I have not yet conceived' (T 1430).

1060. Mr Barnes gave evidence about tests he had conducted using a silencer on a Ruger .22:

> What I derived from that is that if one fits a sound suppressor to a Ruger 10/22 and fires a few shots thereafter, regardless of ammunition type, there exists a strong likelihood that one will carry over contaminated partially burned propellant which will be charred, that is, blackened, with the propellant which is expelled with the current shot, and it will be discernible because it will be charred to varying degrees depending on how long it has been resident in the silencer and been exposed to the hot, partially burnt gases and debris, the charring effect.

1061. Significantly, Mr Barnes gave evidence that charring of a particle was a different process to the process involved in the heavy burning of a particle. The first is a contamination issue; the second is a reduction issue (T 1435).

1062. According to Mr Barnes, there were two charred particles found at the scene. They were the 'rogue' particles 2D(a) and the particle in the hair.

1063. In relation to the Mazda Mr Barnes gave evidence that the particle 7/89-7E(a) was not charred (T 1433). This is contrary to his handwritten note that this was a 'small charred green particle' (Ex 92, 13) and his report of 13 April 1994 which described this particle as a 'single severely charred particle of partially burnt propellant' (Ex 93, 29).

1064. In evidence Mr Barnes said the particle from the vacuuming 7/89-7D was a charred heavily burnt particle (T 1432). This is contrary to his report of 5 May 1995 in which he described this particle as heavily burnt (Ex 93, 43).

1065. In relation to the Mazda boot, Mr Barnes gave evidence that 7J(e) were three charred largely consumed particles (T 1452). This is contrary to his prior statements that one of the particles was carbon.

1066. In evidence Mr Barnes said the three 'rogue' particles found in the vacuuming 7J in late 1994 were severely charred (T1446). This is contrary to his report of 5 May 1995 in which he described these particles as heavily burnt. (Ex 93, 44).

1067. Mr Barnes said the rogue particle found in 7K (under the boot trim) was severely charred (T1447). This is contrary to his report of 5 May 1995 in which he described this particle as heavily burnt (Ex 93, 45).

1068. Mr Barnes' submission emphasised that he has acknowledged the 'imprecise use of terminology' in respect of the charring or burning (annexure 8 [137]). It is the changing descriptions which are relevant for present purposes, not Mr Barnes' acknowledgement.

1069. When giving evidence to the Inquiry, it was clear that Mr Barnes was making an assumption that the Mazda was associated with the crime scene as a basis for his opinion that a silencer was used at the crime scene (Inq 3805–3806):

> Q So, how many particles do we have here?
>
> A In relation to the scene, your Honour, as I recollect there was certainly one on the back of Mr Winchester's head, there was one on the passenger's seat as I recollect and I'm not sure that there were any others. In the boot – in the Mazda there were three or four particles that were in that category as I recollect.
>
> Q The Mazda is not relevant to this question, is it?
>
> A I'm sorry, your Honour.
>
> Q Is the Mazda relevant to this question in your view?
>
> A That's a difficult question to answer, your Honour. I'll try and explain why I say that. Because if a silencer were fitted that would explain readily the deposition of significant numbers. If it weren't fitted and the weapon was fired using chopped-disk ammunition on a number of occasions the possibility of multiple drops from an unsilenced weapon cannot be excluded.
>
> Q That's in the Mazda?
>
> A That is correct.

Q Why is that relevant to determining whether a silencer was used at the scene?

A It's not, your Honour.

Q No?

A Sorry I ...

Q Because it assumes that the Mazda – it assumes, doesn't it, if you try and use the Mazda it assumes the guilt of Mr Eastman?

A I couldn't say that, your Honour. All I can say is it connects the Mazda and the scene. That is all.

Q On the question of a silencer, what's in the Mazda is not relevant, is it? Because the only way you could make it relevant is if you assume the Mazda was at the scene. Do you agree with that?

A Yes.

Q So, at the scene, we have two particles. One in the hair and one on the seat?

A That is correct.

Q What is it about those particles that leads you to the view that it's more likely to be a silencer than not?

A Specifically about those particles simply that – well, there was two, and in this context ...

Q Two particles, Mr Barnes. Two?

A They were severely charred and that would suggest a very heavily contaminated rifle but I couldn't put weight on it, your Honour. So, what I'm saying is ...

Q What do you mean by you 'couldn't put weight on it'?

A I'm agreeing with you, your Honour. I couldn't say on that basis that silencer was used.

Q In fact you couldn't really say it was more likely that a silencer was used than not, could you, on the basis of two particles only?

A On the basis of the particles no but there were others that led me to think that it was possible.

Q Such as?

A Such as the lack of stipling on the victim.

1070. Mr Barnes did not make any reference to stipling at the trial in the context of the use of a silencer. He referred to stipling in conjunction with tattooing as an indicator of distance from the muzzle to impact. He stated that there was no tattooing or stippling associated with the deceased's wounds (T 1476).

1071. Dr Wallace conducted tests with regard to the presence of charred particles in both silenced and non-silenced weapons (Ex 109 Test 2, 44). He accessed rifles which had and had not been threaded for a silencer and 'tapped' them out or used a cloth swab. He reported no difficulty in finding charred particles in non-silenced rifles (Ex 109, 51).

1072. There was no trial evidence to suggest that a silencer was attached to the Klarenbeek rifle when prior owners fired CCI, Remington or Stirling through that rifle. Mr Barnes' constant reference to CCI, Remington or Stirling as a possible source of the 'rogue' 'charred' particles rested upon an assumption that prior firings with such ammunition caused the 'rogue' particles to be lodged in the silencer.

1073. Even if a silencer had been used by prior owners, there was no evidence to suggest that the offender had the same silencer as the prior owners, thus causing the 'rogue' particles to be dislodged from the silencer and left at the scene and in Mr Eastman's Mazda.

1074. The following table provides a summary of the position with respect to the 'rogue' particles:

Ford 7/89-2	**Mazda 7/89-7**
7/89-2D(a) Front passenger seat One particle Located by Mr Nelipa 9 February 1989 *Issue as to provenance* *Charred*	7/89-7J(e) Three particles located by Mr Nelipa 1 February 1993 *One was carbon* *Two charred.*
AC Winchester's hair One particle *Contamination with oil and unresolved peaks* *Charred*	7/89-7J 1993 GC-MSD *No provenance* *No evidence at trial*
	7/89-7J Three particles located by Mr Barnes late 1994 *Impossible to match up GC-MSD* *Charred?*
	7/89-7K One particle located by Mr Barnes late 1994 *No GC-MSD* *Charred?*
	7/89-7D One particle located by Mr Barnes late 1994 *GC-MSD does not assist* *Charred?*

Propellant Databases – 1993-1995

1075. Mr Strobel constructed a propellant database for his thesis in 1993 (Ex 84). This included different ammunition brands, all of which had various types. For example, for

the brand CCI, there were eight ammunition types including Blazer, Mini Mag and Pistol Match. Overall, there were 151 types in the database.

1076. The database included the following:

- A projectile database entry report setting out the weight, coating and shape of the projectile for each ammunition type (Ex 89, 1).

- A cartridge case database entry report setting out the headstamp and description of the cartridge case for each ammunition type (Ex 89, 8).

- A propellant database entry report for unburnt propellant setting out the propellant shape and colour for each ammunition type (Ex 89, 15).

- A propellant component summary report for unburnt propellant setting out the GC-MSD results for each ammunition type (Ex 89, 24).

- A propellant database entry report for burnt propellant setting out the propellant shape and colour for each ammunition type (Ex 89, 37).

- A propellant component summary report for burnt propellant setting out the GC-MSD result for each ammunition type (Ex 89, 43).

1077. A database may only be useful if there is reliable case work data for comparison. Professor Kobus was not aware of a propellant database being used in forensic case work. He was aware that the FBI had a database, but was not sure how they used it (Inq 3200).

1078. As discussed earlier Professor Kobus was of the opinion that there were limitations in using a database of propellants for forensic case work. He made the point that the process involved in doing a Masters project would be quite different from the kind of validation required for case work (Inq 3201). For example, in compiling an unburnt database, you need to evaluate lack of consistency within a single cartridge and between cartridges. That would be done using bulk analysis, not single particle analysis as was done here. He said it was necessary to 'nail down some of the variations that you're dealing with and understand them and know how to cope with them' (Inq 3200–3202). He would also expect to see some validation work to validate the boundaries for interpretation of the peaks (Inq 3203).

1079. Another limitation for case work is the difficulty always associated with a materials database in that the database is at the whim of manufacturer's specifications which can change at any time (Inq 3203). Professor Kobus said it is 'almost like a continual rolling analytical program, updating it every time'.

1080. A further difficulty relates to the date of purchase. Ammunition type at a crime scene in 1989 might have been purchased years earlier. Ammunition could have been made to specifications years earlier which were different. In order to be useful, a database would need to incorporate all of these extensive variables (Inq 3205).

1081. Another difficulty is the unpredictability of the burning process for propellant (Inq 3205). This means that a PBP at a scene might possess some, but not all, of the chemical components of the unburnt propellant.

1082. Professor Kobus expressed the opinion that a database could not provide positive identification of a specific propellant, but may limit the population of ammunition that might have been used by excluding some types (Inq 3207). This was consistent with the view of Mr Peter Ross set out in his affidavit (Ex 189):

> 30. A propellant database can provide very useful information in support of case work examinations. If it is an extensive database, it may be possible to provide evidence in support of an identification of ammunition used in a shooting from the analysis of partly burnt propellant grains recovered at a crime scene. The level of support for this identification will depend on many factors. However, one limitation of such a database is that manufacturers of ammunition occasionally change components, including the propellant. Consequently, information in the database may become obsolete. Such obsolescence will not be detected unless the database is regularly up dated. From this perspective, an unequivocal identification of ammunition on the basis of analysis of recovered propellant grains is not possible. Furthermore, the greater the time difference between the production of the samples used to create the database and those involved in the shooting under investigation, the weaker the support for the identification of the ammunition based on the database.

1083. There were issues with the 1993 unburnt propellant composition database. None of the results had all the markers for PMC chemical composition. DPA was not detected in any of the results (Inq 3208). Mr Strobel told the Inquiry he was aware that Mr Barnes visited the PMC factory, but he was not told about the manufacturer specifications for PMC. He had no idea about that when he was doing his thesis (Inq 3515).

1084. Phenoxazine was detected in some of the results, which was not part of the manufacturer specifications (Inq 3208). Professor Kobus stated that if this was to be used for case work, it would be necessary to go back and do more analyses; do a bulk analysis; and investigate the issue (Inq 3210). In addition, because the manufacturer specifications are not known for the other ammunition types, it is not known whether the single particle analysis was revealing all the components. Bulk analysis would need to be done for use in case work.

1085. There were also issues with the 1993 burnt propellant composition database. The DPA only showed up in one out of the 10 types of PMC ammunition (Ex 89, 45–46). Professor Kobus stated that based on this database work, you would incorrectly say that the most likely PMC composition did not include DPA (Inq 3212).

1086. Mr Barnes did not identify any of these issues in his report dated 19 November 1993. To the contrary, he wrote the following about the database results (Ex 93, 14):

> Specifically, this data was found to be consistent with propellent manufacturing processes and observed physical and chemical characteristics of propellents manufactured by the PMC Ammunition Corporation at Angang, South Korea, CCI Ammunition Corporation, Lewiston, USA, Remington Ammunition, Lonoke, USA and Arms Corporation of the Phillipines (Stirling), Manila, Phillipines.

1087. Mr Barnes was incorrect in reporting that the data was found to be consistent with the PMC manufacturing processes. As indicated above, 19 of the 20 results for the unburnt and burnt PMC did not fulfil the manufacturer's specifications and some of them produced Phenoxazine. This anomaly was not explained in Mr Barnes' report.

1088. In his report Dr Zitrin referred to anomalies in the 1993 databases when comparing the unburnt with the burnt database (Ex 96, 19). There were examples where a chemical appeared in the burnt result, but was not present in the unburnt result. In file notes the DPP recorded that Dr Zitrin found Mr Barnes' explanations of these anomalies unsatisfactory (Ex 93, 36; Ex 95, 384-385, 413, 420, 416).

1089. Professor Kobus provided a chart to the Inquiry summarising these anomalous results (Ex 174). Mr Strobel told the Inquiry that he was not aware of these anomalies at the time of doing his thesis. He said that looking at them now 'for the sake of completeness, it would have been nice to go back and analyse that again, but it wasn't done' (Inq 3512).

1090. On 6 October 1994 Mr Barnes told the DPP that he was keen to run the propellant database again. He wished to refine it to improve the previous results. He estimated the cost at between $15 000 and $20 000 (Ex 95, 291).

1091. On 7 October 1994 Mr Barnes wrote to the DPP stating that 'deficiencies exist in the propellants (sic) database which do not allow definitive identification of gunshot related debris already examined and consequently similar deficiencies are likely to be manifest in data generated from any gunshot related debris recovered in the course of examination arising from Issue 12'. The 'Issue 12' was a reference to a letter from the DPP dated 24 August 1994 in which it was noted that Mr Barnes was going to search the vacuumings of the Mazda boot for primer related residue. It is difficult to see how a revised propellant database was related to that task. Mr Barnes estimated the cost as $25 000.

1092. A report was never prepared by Mr Barnes in relation to the second database. Mr Strobel told the Inquiry that he did the work for the second database after he moved to AGAL. Mr Barnes asked him to create a new database. He believed Mr Barnes was trying to set up a completely independent forensic capability at AGAL which had a capacity relating to imported drugs, but not for propellant investigations. He believed it was for general purposes for the laboratory, but would also as a matter of course be compared with the 1993 database to see if there was consistency (Inq 3549).

1093. Professor Kobus told the Inquiry that the second database was done using a different analytical technique. It was more sensitive. It detected 'a whole pile of other compounds'; up to 5 or 6 extra compounds were found in the propellants (Inq 3223). Phenoxazine did not seem to occur. A different solvent was used. 'So it really was a different thing altogether for me' (Inq 3224). Compounds not listed in the manufacturer specifications for PMC were found which look like products of decomposition (Inq 3225). Some of the anomalies identified by Dr Zitrin in the 1993 database still existed in the 1995 database (Inq 3267 Ex 174).

1094. By way of contrast Mr Barnes told the DPP on 17 February 1995 (Ex 95, 426):

> This new database verifies the previous database in that they have used the same ammunitions and repeated what was done before and achieved similar results, in that ammunitions that showed variations in it's propellant in the original database are showing similar variations in this second database.

1095. Having heard the evidence of Professor Kobus, Mr Barnes gave the following affidavit evidence in relation to the second database (Ex 195):

> 198 I also directed Strobel to set up a second propellant database for the same purposes: to assist in the Winchester case but also to expand AGAL's forensic case work more generally. We wanted to keep a constantly updated and usable database. We also wanted the second database because we were independent of the SFSL and did not have general access to the old database to continue working with it.
>
> 199 The database did not further our understanding very far. We used a different solvent on the second database (dichloromethane (DCM) rather than acetonitrile (ACN)). DCM was quicker for analysis than ACN because it did not completely dissolve the particle so it required less cleaning. I recall the second database was broadly consistent with the first database. The results were fundamentally the same as in the earlier database although certain anomalies were cleared up by it, as Professor Kobus has indicated to the inquiry. For example, no phenoxazine was detected in the 1995 database. This reaffirmed my earlier view that the presence of phenoxazine in GCMS spectra from 1993 was an anomaly and possibly due to a breakdown product caused by the system of analysis that we were using, rather than being a component of the analysed propellant particle.
>
> 200 This second database would have been used in the Winchester case work regarding analyses also done at AGAL. These would also have used DCM and therefore the comparisons would have been done against the AGAL database to ensure accuracy and precision.

1096. The statement by Mr Barnes that the second database 'did not further our understanding very far', does not sit well with his statements to the DPP in 1994 about the need for the database and in 1995 about the results of the database. Nor does it sit well with the evidence he gave at trial when he was recalled on 29 June 1995. This was foreshadowed by the prosecution on 20 June 1995 (T 1667). The topic to be the subject of further evidence concerned the identification of the projectile and was said to arise from Mr Terracini's cross-examination of Mr Martz and Mr Keeley.

1097. When the prosecution recalled Mr Barnes on 29 June 1995, the applicant was unrepresented. Prior to leading the evidence on the foreshadowed topic from Mr Barnes, the following evidence was led (T 2103):

> MR ADAMS: Mr Barnes, you've given evidence earlier in this trial. I wonder if I could first briefly take you to the evidence of Dr Zitrin. You provided to him copy of the data base which you have relied on for the purposes of giving your evidence, is that so?
>
> MR BARNES: That's correct, I provided Dr Zitrin with copies of the data base, both burned and unburned propellants data base, and in addition all supporting analytical data and a subsequent data base which simply corroborated the primary data base which is the basis of the comment from Dr Zitrin.

MR ADAMS: In relation to what I call, during Dr Zitrin's evidence, the questioned propellant particles – that is those that you identified – if I may use the general term, coming from the scene, and those that you identified coming from the accused's motor vehicle, you provided him with your conclusions in a report that was considered by him?

MR BARNES: That is correct.

MR ADAMS: And those conclusions are the conclusions which you have given in evidence before this jury?

MR BARNES: That's correct. (my emphasis)

1098. Dr Zitrin gave evidence on 29 June 1995 before Mr Barnes was recalled. He did not mention a subsequent database. No report was prepared by Mr Barnes or Dr Zitrin about the subsequent database. As at 21 April 1995, the subsequent database had not been provided to the DPP (Ex 95, 513). It seems that Dr Zitrin did not arrive in Australia until 28 June 1995 (T 1993). There was no cross-examination by Mr Terracini on this topic when Mr Barnes was recalled on 17 July 1995.

1099. Professor Kobus told the Inquiry that the 1993 GC-MS case work cannot be applied to the 1995 database because they were done under different methods and the range of compounds was different (Inq 3269). If the aim was to compare case work exhibits with the 1995 database, then those exhibits would need to be run using the same method (Inq 3270).

1100. At the time Mr Barnes suggested to the DPP that a further database was necessary (6 October 1994), it is not apparent which case work samples he was proposing to run through the different GC-MS system. In fact, he did not run any of the propellant particles located between 1989 and 1993 on the different system. In addition, at the time Mr Barnes suggested to the DPP that a further database was necessary, he did not have any new case work particles to run on the different system. Mr Strobel did not start searching vacuumings from the Mazda until 12 October 1994 (Ex 94, 59).

Paragraph 5 – Conclusion

1101. In its written submission (annexure 8), Counsel for Mr Barnes attacked the integrity of the Board, and those assisting the Board, with the following submissions:

- The criticisms made already of Mr Barnes in the course of this Inquiry and those that are foreshadowed have no parallel in Australian legal history. (para [2])

- The attacks mounted personally against Mr Barnes constitute an unreasonable and unjustified set of criticisms upon both his work and his expert work in this case. The criticisms display vehemence and a hypercritical tone that has not characterized criticisms of any expert witness in any Australian judicial inquiry into a conviction previously. (para [3])

- It is deeply troubling that, unlike any comparable Inquiry where there has been a controversy about forensic science evidence, the Board chose not to seek oral or documentary evidence from any independent expert witness (namely any forensic scientist

who had not previously been commissioned by the Eastman defence team) to assist and address any issues of controversy. Those aspects of the Inquiry dealing with such matters should be regarded as fundamentally flawed as a result. (para [8])

- This Inquiry has pursued Mr Barnes with unparalleled zealotry. Despite all of these efforts though, it has not uncovered any dramatic revelations about him. (para [145])

1102. I reject the unsubstantiated contentions advanced by the applicant's Counsel. Necessarily, the Inquiry has undertaken a detailed and searching examination of the forensic work undertaken by Mr Barnes. His evidence was crucial in the trial. A thorough analysis, not previously undertaken, was required in order to uncover the extensive flaws which are discussed in this Report. No 'vehemence' or 'zealotry' has been involved, but the submissions perpetuate the misconceptions and obsessions which dominate Mr Barnes' thinking that anyone who criticizes him or his work is setting out to make him a scapegoat for problems that were not of his making.

1103. The criticisms of Mr Barnes found in this Report are based on the evidence presented to the Board. The totality of the evidence cannot be ignored and it has a devastating impact upon the reliability and the veracity of the trial evidence given by Mr Barnes. Whether the criticisms have no parallel in Australian legal history is beyond the Board's knowledge, but if that assertion is correct it merely serves to highlight the gravity of the flaws that have been exposed.

1104. As to the criticism that the Board did not retain the services of an expert who had not previously had an involvement with the applicant's case, as the AFP acknowledged in correspondence to Counsel Assisting dated 12 April 2013, Professor Kobus is a 'pre-eminent and highly regarded expert in the ballistics field …'. He had very little involvement with the defence, having met with Mr Klees in February 1995 and provided an interim report dated 4 April 1995 (Ex 98, 220). The report concluded that more information was needed in order to make a 'meaningful evaluation of the evidence'. In addition, Professor Kobus provided a two page letter to Mr Ross dated 3 October 1995 having 'skimmed the transcripts relating to the evidence of Barnes, Keeley, Zitrin, Scheckter and Zeichner' (Ex 98, 234). Professor Kobus did not attend the trial or give evidence.

1105. It is clear from all material that Professor Kobus had not formed any fixed views in 1995. He was cross-examined by Counsel for Mr Barnes during the Inquiry and no suggestion was made that he was biased or in any way influenced by his previous contact with the applicant's defence team. Significantly, neither Counsel for Mr Barnes, nor Mr Barnes himself, challenged any aspect of the evidence given by Professor Kobus to the Inquiry.

1106. In the context of expert evidence, Mr Barnes' submission also attacked Dr Wallace. The submission suggested that Dr Wallace had received 'extraordinary sums of money to encourage his involvement in this Inquiry' (annexure 8 [4]). That assertion is not true. While Counsel for Mr Barnes suggested to Dr Wallace that he had been paid in the order of $500 000 since the beginning of 2013, after time for consideration Dr Wallace gave evidence that, for a period of three months working six days a week and 10 hours a day, his earnings after tax and expenses the previous year was £40 000.

1107. For many years Dr Wallace has strongly believed that the forensic evidence given by Mr Barnes was seriously flawed. He has been actively involved in seeking to redress what he considers was an injustice. Although Dr Wallace denied that he has become too emotionally involved, his conduct over the years strongly suggests that there is a serious danger that his views are less than objective.

1108. From the perspective of the Board, as this Report demonstrates, it has been unnecessary to rely upon the opinions of Dr Wallace in any contentious area. It is interesting, however, to note that points made by Dr Wallace about the forensic case work have been proven by the investigations to have been correct.

1109. As I have said, the investigation of the issues arising under Paragraph 5 has been lengthy and detailed, as has the discussion in this Report. Such length and detail could not be avoided. The evidence was crucial to the prosecution case. The importance of the forensic evidence was apparent from the outset of the trial and, in his closing address, Counsel for the prosecution repeatedly emphasized the reliability and importance of the evidence. Counsel ridiculed defence attempts to discredit Mr Barnes and extolled the virtues of Mr Barnes as a leading forensic scientist whose work had been 'critically examined' and confirmed and approved by independent overseas experts (T 6389). These points were made at various stages throughout the prosecutor's final address (e.g. T 6108, 6127–6134, 6285–6287, 6300–6301, 6377–6390).

1110. The power of scientific evidence in jury trials is well known. The criminal Court has recognized for many years that careful directions are required to ensure that juries give proper weight to scientific evidence. There is no suggestion that the directions of the trial Judge were inadequate in this regard, but the importance of the evidence was clear and the trial Judge directed the jury that the critical evidence of Mr Barnes concerning the gunshot residue and his methodology had not been criticized and was supported by the overseas experts (T 6806, 6807).

1111. Perhaps the best indication of how the jury is likely to have viewed the evidence of Mr Barnes concerning the gunshot residue is found in the view of the forensic investigation expressed by the trial Judge when sentencing the applicant:

> This investigation must surely number as one of the most skilled, sophisticated and determined forensic investigations in the history of criminal investigations in Australia.

1112. This Inquiry has proved otherwise. It must be said that the inadequacies were not apparent at trial and the trial Judge has no reason for doubting the reliability of the forensic evidence, but his Honour's view highlights the danger of taking contentious forensic evidence at face value without properly investigating the records and the basis upon which opinions are expressed.

1113. Unknown to the defence, Mr Barnes, gave evidence at the Inquest that lacked a proper scientific basis.

1114. Unknown to the defence, Mr Barnes, who gave critical evidence connecting the applicant's car to the scene of the murder, was far from independent and objective. He regarded himself as a police witness and was biased accordingly.

1115. Unknown to the defence, Mr Barnes regularly failed to comply with accepted forensic practice with respect to his case files and frequently failed to have his work peer reviewed. The failures of the scientist to comply with proper practices led to charges against him, of which the defence and DPP were unaware.

1116. Unknown to the defence, overseas experts expressed concerns about Mr Barnes and aspects of his work, including the database. Explanations by Mr Barnes for perceived anomalies in the database were not accepted as satisfactory.

1117. The evidence is overwhelming that Mr Barnes lacked independence and was biased in favour of the prosecution. If disclosed and presented to the jury, that evidence would have been devastating to Mr Barnes' credibility. Even considered in isolation, this evidence was highly important to the defence in its challenge to the reliability and credibility of Mr Barnes. If such evidence had been coupled with the facts underlying the disciplinary charges and the matters proven by the audit of Mr Barnes' case files, the entire complexion of the forensic case would have changed dramatically. In stark contrast to the situation at trial where defence Counsel was struggling to find any chink in the armour of Mr Barnes, it would have been the prosecution struggling to defend the integrity and reliability of Mr Barnes.

1118. In this context the views of the overseas experts concerning the emotional involvement of Mr Barnes, and his role as an expert in too many areas, would have added weight to the suggestion that the jury could not rely upon the evidence of Mr Barnes. The cumulative effect of these matters is obvious.

1119. Unknown to the defence, Mr Barnes recognised there were deficiencies in his database. The defence and DPP were unaware that the database was created by Mr Strobel for the purposes of his thesis. The defence was not informed that a second database was underway.

1120. Significant information and material which would have directly and indirectly assisted the defence were not disclosed to the defence. The failure by the DPP was inadvertent, but it was a failure with respect to a fundamental feature of a fair trial which left the defence without knowledge of material relevant to the forensic evidence at the heart of the prosecution case.

1121. Conflicts within the forensic records, and between records and reports written by Mr Barnes, permeate the entire forensic investigation. Making due allowance for the problems associated with the age of this matter, explanations by Mr Barnes ranged from unsatisfactory to unacceptable.

1122. The provenance of crucial exhibits is either non-existent or highly doubtful. Fundamental data was not produced prior to trial. In some instances it is apparent that Mr Barnes could not have undertaken the organic analyses upon which he claimed to have based his opinions. In other respects, the contemporaneous accounts strongly suggest that such analyses were not carried out and that Mr Barnes' report was wrong.

1123. These matters undermine heavily the opinions expressed at trial. Competent cross-examination by a fully informed and prepared counsel would have destroyed Mr Barnes' credibility and exposed the conflicts, inadequacies and lack of data to support the opinions.

1124. The cumulative effect of those matters leaves no room for doubt that Mr Barnes' opinion at trial that particles from the Mazda boot were PMC lacked a proper scientific foundation.

1125. Accepting that PMC was the ammunition used for the murder, at best the reliable evidence established that green flattened ball particles were found in the Mazda boot which were consistent with PMC and numerous other types of ammunition, including ammunition the applicant said he fired in rifles which he placed in the boot many months before the murder. In this situation, the presence of particles in the boot was still a piece of circumstantial evidence. Its weight depended on the jury rejecting as a possibility that the source of the particle was one of the rifles the applicant had placed in the boot.

1126. As to the particle on the front seat of the Mazda (7E(a)), while SEM/EDX performed by Mr Ross found primer residue consistent with PMC, he also located residue inconsistent with PMC.

1127. Analysed in this way, it is apparent that the presence of particles in the Mazda would have remained as a piece of circumstantial evidence capable of tending to connect the Mazda to the scene, but in a far less powerful way than the way in which the evidence was presented to the jury.

1128. In essence, there was a failure by the AFP and DPP to comply with the duty of disclosure which was coupled with inadequacies and conflicts within the case file of which the defence were unaware. Similarly, the DPP and the AFP were unaware of those inadequacies and conflicts. Considered in their totality, if a Court of Criminal Appeal was faced with these circumstances, the Court would not hesitate in finding that a miscarriage of justice had occurred. In ordinary circumstances of an appeal soon after a trial, the Court would order a re-trial. Notwithstanding the strength of the circumstantial prosecution case, in view of the integral and critical role of forensic science in the case presented to the jury, and particularly the evidence of Mr Barnes linking the Mazda to the scene of the crime, the Court would not have been in a position to say that no miscarriage of justice had occurred and would have declined to apply the proviso.

1129. The consequences of this finding are discussed in the concluding section of this Report.

PARAGRAPH 6

1130. Paragraph 6

> The evidence of Robert Collins Barnes concerning the alleged use by the applicant of a firearm with a silencer attached is in direct conflict with the evidence of a witness who heard the sound of two

gunshots at the time of the murder. That witness, Cecil Robin Grieve, gave evidence at the coronial inquest from which the applicant was committed for trial but was not called to give evidence at the trial of the applicant. Further, there was police expert evidence given at the coronial inquest regarding the significance of the sounds heard by Mr Grieve. That expert evidence concluded that a silencer was not attached to the murder weapon. That evidence was not elicited from that expert witness at the applicant's trial.

1131. The 'matter' to which Paragraph 6 is directed is a doubt or question as to guilt in relation to the evidence of Mr Barnes that certain gunshot residue at the scene and in the applicant's vehicle was the product of the use of a silencer on the murder weapon. In particular, Paragraph 6 concerns a doubt in this regard based on the evidence given at the Coronial Inquest by Mr Cecil Grieve and a police officer, Mr Ian Prior, who gave expert evidence.

1132. In the letter of 27 August 2013 the applicant's solicitors referred only to the evidence given at the Inquest by Mr Grieve and Mr Prior as standing in conflict with the prosecution case that a silencer was used. If accepted, this evidence might damage the credibility of Mr Barnes who gave evidence that, in his opinion, a silencer was used. Further, Mr Barnes opined that the only explanation for the heavily charred chopped disk particles located at the scene and in the Mazda was the use of a silencer attached to the murder weapon. One of those particles was located in the Ford and one on the deceased. Seven were found in the boot of the Mazda and one on its driver's seat.

1133. Mr Grieve lived at 13 Lawley Street, Deakin approximately six or seven houses away from the deceased's house. He was retired from the armed services after 26 years in the services and had gained significant experience with firearms.

1134. In a statement of 11 January 1989, which he adopted when giving evidence at the Inquest on 22 August 1989, Mr Grieve said he was home between 8.45 and 9.30 pm on the evening of 10 January 1989. While in his kitchen which faced onto Lawley Street he heard two distinct noises, close together, which he believed were shots from a low velocity weapon. Within seconds of the shots he heard a V8 engine start up. The exhaust was louder than usual and sounded as if it had been modified. The vehicle moved away normally, but did not go past his house.

1135. Mr Grieve died before the trial. For some unexplained reason, no application was made by the defence to have the statement of Mr Grieve, and his evidence at the Inquest, read to the jury.

1136. Detective Sergeant Ian Prior was an officer experienced in ballistics. At the Inquest Mr Prior was asked to assume that from about six or seven houses away from the deceased's house, Mr Grieve heard two sounds which appeared to him to be the sounds of a firearm. On that assumption Mr Prior gave the following evidence (Inqu 445):

> Q Would that observation, if correct, tell you anything or not about whether or not a silencer was used on the murder weapon.
>
> A It may have been a fact that a silencer had been used. The cartridges used in the shooting were of a high speed, supersonic, and the silencer does little to reduce the noise of the cartridge – sorry, the noise of the projectile breaking the sound barrier. The silencer reduces the noise of the muzzle blast, but for it to be totally effective then sub-sonic

ammunition must be used. However, the silencer will, as I have said, muffled the sound of the explosion but not the sound of the projectile breaking the sound barrier. Now it takes some distance for that projectile to generate the breaking of the sound barrier. The tests that I have conducted indicate that it needs at least a metre from the barrel to be able to get that sharp crack of the sound barrier and as that distance widens so does the sound increase so that what I am trying to say is that you need at least a metre, in my opinion, from target to muzzle for the sound barrier to break and then it is an audible crack.

Q Well, does it follow, Sergeant, that if a silencer is used and, nevertheless, a crack is heard then the projectile must travel through the atmosphere at least a metre?

A Yes.

1137. Mr Prior gave evidence that from the positioning of the cartridge cases which had been ejected from the murder weapon, he considered the shooting range would be 'reasonably short' meaning a 'metre or less'. He agreed it followed that if the range was less than a metre and Mr Grieve heard the shots at his home, a silencer was not used (Inqu 446). Potentially, given that the prosecution advanced a case that a silencer was used, the evidence of Mr Prior could have been significant in view of the evidence given by Mr Barnes at trial that the first shot to the rear of the head was fired from a distance in the order of 'eighteen to twenty-four inches, possibly as close as sixteen inches', and the second shot to the right cheek was at a distance of 'greater than twenty four inches, but would not be much beyond perhaps thirty, thirty-six inches' (T 1477).

1138. Not only did the defence not seek to have the statement of Mr Grieve read to the jury, when Senior Counsel cross-examined Mr Prior, no questions were asked of Mr Prior about the use of a silencer based on Mr Grieve's version.

1139. In evidence in chief Mr Prior explained that PMC Predator and Zapper are supersonic ammunition. He was asked to assume that 'two sharp cracks like gravel hitting a glass window were heard shortly before the discovery of Mr Winchester's body'. This was the noise described by the deceased's wife. On that assumption Mr Prior was asked whether such a noise would be consistent with the use of supersonic ammunition and gave the following answer (T 892):

> To hear any noise at all there would have to be one or the other and to hear sharp cracks is indicative of a silenced weapon using supersonic ammunition because what you're hearing is the sharp crack of the sound barrier and not the muzzle blast.

1140. Counsel for the applicant cross-examined Mr Prior at some length, concentrating on the ballistics issue such as cartridges, rifling characteristics and types of ammunition. A few questions were asked about the use of a silencer on a pistol (T 1018). In the context of discussing sub-sonic and supersonic ammunition mention was made of bullets striking the deceased at supersonic speed which would explain 'the cracking sound or the thud that indicates the sound barrier' (T 1033). Mr Prior said the thud would relate to the impact of the bullet, and a cracking sound could well be the breaking of the sound barrier (T 1033). He then answered questions about fitting a Ruger pistol with a silencer and the effectiveness of a silencer depending upon whether sub-sonic or supersonic ammunition was used. Responding to a question as to the sound difference if sub-sonic ammunition was used, Mr Prior said there would be a 'very slight escape of gas from the silencer' and, as the bullets would not break the sound barrier, the only noise would be the thud of the bullet hitting the target (T 1034). On that scenario the sound would not

be heard from any considerable distance, but if the ammunition was supersonic there would be a greater chance of hearing it (T 1034).

1141. Mr Prior also gave evidence under cross-examination that although the firing of supersonic ammunition results in two noises, the explosion of gas exiting the muzzle after the bullet has exited and the bullet breaking the sound barrier, only one sound is heard because the noises are so close together. If a silencer is used, only one of the noises would be available to be heard, namely, the breaking of the sound barrier. Mr Prior agreed that the noise of supersonic ammunition could be interpreted like two sharp cracks such as gravel or small pieces of rock hitting a glass window. If the weapon was silenced, he would not expect a 'loud bang' to be heard (T 1035).

1142. The question of the use of a silencer was a live issue at the trial and the defence were contesting the prosecution case as to the use of a silencer. However, notwithstanding that the evidence given by Mr Grieve at the Inquest tended to undermine the Crown case as to the use of a silencer, particularly when combined with the evidence of Mr Prior at the Inquest, no attempt was made to place the statement of Mr Grieve before the jury. In addition, counsel for the applicant cross-examined Mr Prior about noises and the use of a silencer, but chose to rely upon the sounds heard by the deceased's wife rather than the sounds heard by Mr Grieve. Counsel made no attempt to elicit from Mr Prior the view he expressed at the Inquest which was, of course, based on an opinion that the muzzle was more than a metre from the head of the deceased at the time the shots were fired. As Mr Barnes had expressed the view that the shots were fired from less than a metre, perhaps counsel decided to avoid the evidence given by Mr Prior at the Inquest, but that does not explain why no attempt was made to place Mr Grieve's statement before the jury.

1143. Nothing has emerged in the evidence to suggest that the failure to raise the question of Mr Grieve or to cross-examine Mr Prior on the basis of the version given by Mr Grieve was anything but a deliberate decision by Senior Counsel for the applicant. In these circumstances, notwithstanding that, in hindsight, this combination of evidence might have been useful in attacking the opinion given by Mr Barnes, it is difficult to find that the absence of Mr Grieve and Mr Prior's opinion gives rise to a doubt or question as to guilt. This is not one of those exceptional cases where, notwithstanding that a choice has been made, it can reasonably be said that incompetence was involved and led to a miscarriage of justice. In substance there was no contest at trial that the Klarenbeek rifle was the murder weapon and the use or otherwise of a silencer was not of significance in the question of identifying who purchased the weapon. The use by Mr Barnes of the silencer as an explanation for the presence of chopped disk particles did not bear upon the identity of the offender anymore than the use of a shortened weapon could assist in that regard. At best the evidence of Mr Grieve, coupled with the evidence of Mr Prior, contradicted the view of Mr Barnes as to the use of a silencer and, in this way, impacted adversely upon Mr Barnes' credibility.

1144. As I have said, at trial Counsel for Mr Barnes declined to raise the evidence of Mr Grieve. It is reasonable to infer that a deliberate decision was made in this regard. Further, to the extent that the opinion of Dr Wallace was based upon tests that he conducted, those tests lacked scientific rigour (Inq 1993) and must be ignored.

1145. In addition, as the submissions of the DPP point out, in relation to the use of the silencer the defence obtained advice from an expert in the field, Dr Walsh, but decided not to call Dr Walsh at trial because his evidence would not have assisted the defence (annexure 9 [110]–[112]). It appears likely that Dr Walsh was present during the trial evidence of Mr Barnes (T 1538–1539).

1146. In his written submission, the applicant contended that the evidence given by Mr Barnes concerning the use of a silencer was 'inconsistent with the objective evidence' and should be rejected on the basis that it 'has not true foundation and is unsupported by any other scientific opinion' (annexure 7 [97]). On this basis the applicant submitted that it is an 'additional factor' which undermines the reliability of the evidence given by Mr Barnes.

1147. At trial Mr Barnes did not assert an opinion that a silencer was definitely used. In substance he expressed the view that a silencer was probably used, but agreed there was a possibility that a silencer was not used. He explained that the basis of his opinion lay in the tests he had conducted with respect to the emission of charred particles from previous firings. The evidence given by Mr Barnes in this regard was supported by the evidence of Mr Keeley (T 1604–1605). Regardless of the validity of the opinion, there is no substance in the criticism advanced by the applicant.

1148. In these circumstances I am far from persuaded that the issues explored with respect to Paragraph 6 give rise to a doubt or question as to guilt. In my view the doubt or question as to guilt assumed by the terms of Paragraph 6 has been dispelled.

PARAGRAPH 7

1149. Paragraph 7

> A false written assertion that no witness heard the fatal shots was made by the ACT DPP as recently as 2008 in submissions before Besanko J in a previous and unsuccessful application made by the applicant and the 'credibility' of an expert witness on the question of whether a silencer was attached to the murder weapon was improperly impugned.

1150. The 'matter' to which Paragraph 7 is directed is a doubt or question as to guilt in relation to two aspects of the proceedings before Besanko J. First, that a 'false written assertion' that no witness heard the fatal shots was made in submissions before his Honour. Secondly, that the 'credibility' of an expert witness concerning the use of a silencer on the weapon was 'improperly impugned'.

1151. As with previous paragraphs, I found it difficult to understand how these or other matters presented in submissions to Besanko J could give rise to a doubt or question as to guilt.

1152. In the letter of 27 August 2013 to the Board, the solicitors for the applicant explained the relevance of Paragraph 7 in the following terms:

> This TOR merely serves as another manifestation of the persistence with which the DPP in support of the witness Barnes has continued to press the erroneous view in that since no shots were heard

> ergo a silenced weapon must have been used to effect the murder of Mr Winchester. As such it ought to be considered as part of TOR 6.

1153. In other words, the applicant does not suggest that a doubt or question as to guilt can arise by reason of a submission presented to Besanko J. The failure to advance such a suggestion is hardly surprising.

1154. The submission in question was a submission in response to the evidence of Dr Wallace who said he did not agree that there was 'any reliable evidence that a silencer was used'. Noting that the statement by Dr Wallace brought his credibility into question, the DPP submission was as follows:

> [Dr Wallace's] suggestion only begs the question of why no-one in the neighbourhood, let alone the deceased's wife who was relatively close by heard the sounds of an unsilenced rifle discharging ...

1155. The submission obviously placed a particular interpretation on the evidence of the deceased's wife and failed to acknowledge evidence given in the Inquest by Mr Grieve. That evidence is discussed in respect of Paragraph 6. However, the submission cannot possibly have any relevance to a doubt or question as to the applicant's guilt. This is one of a number of paragraphs in the Order which should not have been included in the Order.

PARAGRAPH 8

1156. Paragraph 8

> New protocols for the evidentiary use which may be made of a finding of 'low level' gunshot residues were adopted in Great Britain in 2006, in guidelines on 'the assessment, interpretation and reporting of firearms chemistry cases'. These protocols were unanimously adopted by the Supreme Court (UK) in *Barry George v R* [2007] EWCA Crim 2722 per Lord Phillips CJ. The new protocols have international acceptance.

1157. The 'matter' to which Paragraph 8 is directed is a doubt or question as to guilt arising from new protocols for the use in evidence of low level gunshot residues. In the letter of 27 August 2013 the applicant's solicitors identified Paragraph 8 as directed to supporting Paragraph 6 in the sense that 'low levels of so-called rogue particles' may affect the evidence of Mr Barnes on the use of a silencer. The letter continued:

> That the protocols concerned have been adopted since 2006 demonstrates the deficiencies in the testing procedures used at the time of the murder which protocols are designed to alleviate or obviate. They may also have application to Mr Eastman's contention that the PMC and CCI particles found in the boot of his car may have emanated from Ben Smith's use of that vehicle.

1158. The protocols are irrelevant to the issues raised in Paragraph 11 concerning Mr Smith. As appears later in this Report, the relevant evidence of Mr Smith lacked credit and the doubt or question as to guilt based on Paragraph 11 has been convincingly dispelled.

1159. The protocols (Ex 115) are primarily concerned with the reporting based on a small number of particles containing primer residues and they arose out of a criminal matter which concerned a single particle of residue. Although only a small number of particles

were found in the cabin of the Mazda, on the prosecution case at least twenty one were found in the boot.

1160. The forensic witnesses all agreed that the protocols represent best forensic practice which should have been followed during the period with which this Inquiry is concerned. Ultimately, in the assessment of the work carried out by Mr Barnes, the protocols do not add anything to the evidence of various witnesses or to the assessment of the reliability of the evidence given by Mr Barnes.

1161. No doubt or question as to guilt arises by reason of the protocols; or, to put it in terms of the Order which assumes a doubt or question as to guilt, the doubt or question has been dispelled.

PARAGRAPH 9

1162. Paragraph 9

> Secondary or 'innocent' contamination of low level gunshot residue of the type referred to in the Barry George appeal is likely to have occurred in the applicant's case. There was evidence at the inquest that gunshot residues, including 'low level' or 'rogue' particles were photographed on the same date and in the same photographic studio. This material was later examined preparatory to scanning electron microscope examination in the same room and at the same time. That room had previously been used to store exhibits in an unrelated murder and was also proximate to the Australian Federal Police weapons test firing range.

1163. The 'matter' to which Paragraph 9 is directed is a doubt or question as to guilt arising out of the possibility that the forensic material relied upon by Mr Barnes became contaminated during examinations. The Inquiry has considered the particular examinations and circumstances identified in Paragraph 9 and whether a possibility exists that samples were contaminated and, therefore, the results were unreliable.

1164. The examinations with which Paragraph 9 is concerned occurred in a dedicated examination room set up at the AFP forensic offices for the purposes of storing and examining exhibits in the investigation into the murder of the deceased. The primary officer involved was Detective Sergeant Peter Nelipa who was called to the crime scene following discovery of the deceased's body. Mr Nelipa was thereafter the lead forensic officer of the AFP for the purposes of the investigation.

1165. In his affidavit (Ex 184) Mr Nelipa said he chose a photographic studio room as the examination room because, to his knowledge, that room had not previously been used to store exhibits containing gunshot residue. He understood the room had previously been used in connection with a murder investigation, but the murder weapon had been identified as an axe. The room was located 'far away' from the armoury contained in the building.

1166. Mr Nelipa made various modifications to the room, including the addition of an adhesive mat in the doorway for the purpose of capturing foreign materials on people's shoes. Prior to use, the entire room was sanitized. Each day the room was in use the

bench tops, the furniture and entire floor were vacuumed and the vacuumings were examined for the presence of contaminants. Nothing of significance was found.

1167. In 1992 Mr Nelipa prepared a six page document setting out in detail the steps taken to ensure that exhibits were not contaminated (Ex 184, annexure 2). In addition, in his affidavit (Ex 184 [20–22]) and evidence Mr Nelipa explained the procedure followed during examinations of exhibits. Vacuumings were contained in well sealed photographic paper boxes and remained in the boxes while the examination for relevant particles was conducted. Each examiner sat separately from another examiner and each examiner had only one box at a time open.

1168. Further evidence concerning the issue of contamination was provided by Mr Robin Bush and Mr Phillip Case who were the other two examiners and who, like Mr Nelipa, were experienced forensic officers (Ex 187, Ex 188). Both Mr Nelipa and Mr Bush were impressive witnesses and Mr Case was not examined orally.

1169. In addition to these general considerations, the evidence establishes that there were only two occasions on which exhibits relating to both the applicant and the scene were examined on the same day.

1170. At 11 am on 24 January 1989 vacuuming 7B from the front floor of the Mazda was examined. No propellant particles or primer residue were found. At 2.20 pm the driveway vacuuming was examined. The boxes were not open at the same time.

1171. On 7 February 1989 examinations were undertaken at 9 am (7J) and 4 pm (2A-2H). Again, the exhibits were not open at the same time.

1172. Nothing emerged in the evidence to suggest that exhibits in the murder investigation might have been contaminated by material in the room related to previous examinations or as a consequence of proximity to a weapons test firing range. Nor did anything emerge to suggest that some sort of cross-contamination might have occurred between exhibits during the course of examinations. To the contrary, the weight of the evidence points strongly against contamination of exhibits from any source while they were in the examination room.

1173. The doubt or question as to guilt underlying the order in Paragraph 9 has been convincingly dispelled.

PARAGRAPH 10

1174. Paragraph 10

> Forensic scientist, Dr James Smyth Wallace, based in Northern Ireland has recently conducted tests on vintage PMC .22 ammunition and has concluded that it is probable that the murder weapon was a shortened rifle rather than one to which a silencer was attached. This is not inconsistent with the findings of the NSW Government pathologist at the autopsy of the deceased and is consistent with what was heard by the witness Cecil Robin Grieve.

1175. The 'matter' to which Paragraph 10 is directed is a doubt or question as to guilt arising from tests conducted after the trial by Dr Wallace which led him to the conclusion that the murder weapon was probably a shortened rifle rather than a rifle to which a silencer was attached. The relevance of the use of a silencer is discussed in the context of Paragraph 6.

1176. Dr Wallace was of the view that there were a comparatively large number of particles located at the scene. He acknowledged that this was a subjective view based on his significant experience in the examination of crime scenes. However, the crime scenes visited by Dr Wallace rarely involved the use of a .22 rifle and PMC is generally not available in Ireland. In addition, the quality of PMC is such that it results in a lot of partially burnt propellant (Inq 1792, 1793). Despite this difficulty, the number of particles found at the scene was the sole basis for Dr Wallace's opinion that a weapon with a shortened barrel may have been used.

1177. It is a matter of common sense that as the barrel of a weapon is shortened there is less time for the burning of propellant which results in a greater number of partially burnt propellant particles being expelled (Inq 1789, 3287). Not content with the general principle, Dr Wallace set out to support this view by arranging for tests to be conducted. PMC ammunition was fired through a progressively shortened barrel of a .22 rifle. Dr Wallace did not conduct the tests and I saw a video of the tests which demonstrated vividly that the tests were useless. The methodology was deeply flawed both in the system of catching expelled particles and counting them. It is not unkind to say that one might have expected primary school students to have performed a more scientifically reliable test. Having viewed the video, Dr Wallace agreed it was only marginally short of a disaster (Inq 2073).

1178. Dr Wallace was only able to give a very general view based on his subjective assessment of the number of particles at the scene. There are no published papers or experiments which would enable an assessment to be made with more precision. If Dr Wallace had been called to give evidence at the trial, he could have expressed the general view which would have been of minimal weight in the debate as to whether a silencer was used.

1179. Professor Kobus told the Inquiry that based only on the number of propellant particles no opinion could be formed as to whether it was likely that a weapon with a shortened barrel had been used (Inq 3287).

1180. For these reasons, in my opinion the 'matter' raised in Paragraph 10 does not support the view that the absence of this evidence from the trial gives rise to a doubt or question as to guilt.

PARAGRAPH 11

1181. Paragraph 11

> Gunshot residue evidence central to the prosecution case at the applicant's trial is now explained by new evidence inconsistent with his guilt. Evidence of gunshot residue of PMC manufacture and

> additional 'low level' residue thought to be of different manufacture and said to be found in the applicant's car may be explained by the new evidence. The new evidence, on affidavit, is that the applicant's car was borrowed and, unknown to the applicant; it was used to go rabbit shooting. A Bruno .22 rifle, rifle bag and ammunition was reported to be transported in the boot of the applicant's car. That rifle and rifle bag have been recently secured and safely stored and will be forensically tested.

1182. The 'matter' to which Paragraph 11 is directed is a doubt or question as to guilt arising out of 'new evidence' providing an innocent explanation for the presence of gunshot residue in the applicant's car. The evidence was given by Mr Benjamin Smith who said he had borrowed the applicant's car and had placed his weapon in the boot.

1183. There are two problems with the evidence with respect to Paragraph 11. First, Mr Smith said he borrowed the Mazda in late 1985 or early 1986. Even if he did so and, after shooting a number of rounds, placed his rifle in the boot of the Mazda, the presence of the rifle in the boot in late 1985 or early 1986 could not possibly account for all of the gunshot residue found in the boot in January 1989.

1184. Secondly, for the reasons about to be discussed, the evidence of Mr Smith concerning the borrowing of the applicant's car is utterly without credit.

1185. Mr Smith met the applicant in about 1977-1978 and they became friends. The applicant lived with Mr Smith for a few months during 1978.

1186. Mr Smith said in evidence to the Inquiry that the occasion when he borrowed the applicant's car must have been in late 1985 or early 1986. The applicant visited Mr Smith and his mother and, when the applicant and Mr Smith's mother got into a lengthy conversation, Mr Smith became 'jack of it' and decided to ask the applicant if he could borrow his car and go for a drive. To Mr Smith's surprise the applicant pushed the keys towards him indicating his assent to the request (Inq 1125).

1187. As to why he borrowed the applicant's car rather than take his Fiat, Mr Smith said one of his tyres had a slow leak (Inq 2123).

1188. According to Mr Smith, on the spur of the moment he decided to take his rifle and go shooting. He was careful not to disclose his intention to the applicant because he knew the applicant strongly disapproved of weapons and shooting. Mr Smith said he made sure the door to the room where the applicant and his mother were talking was shut. He quietly got a ladder from outside the house and placed it in the laundry so he could reach into the manhole opening in the ceiling and retrieve his rifle from the roof cavity. He then returned the ladder to its place outside the house (Inq 2125–2126).

1189. Mr Smith said he drove for about three quarters of an hour down the Monaro Highway were he alighted from the vehicle and walked along a creek. It took about three quarters of an hour to drive to the locality, and he spent about two hours shooting before driving back to his home. He was absent from the home for about four hours. On his return, rather than risk being caught endeavouring to return the rifle to its position in the ceiling cavity, he placed it under the house as a temporary measure. Mr Smith

was not sure whether the applicant asked where he had been, but if he did he would have brushed him off by simply saying he had been driving around Inq 2128).

1190. Significantly for the purposes of gunshot residue, Mr Smith said that when he drove to the creek his rifle was in the boot, but encased in a storage bag. However, when he was about to return he saw a person in the vicinity and panicked. He did not take time to put the weapon in the bag. Rather, he placed the weapon in the boot and left quickly. Mr Smith suggested he panicked because although he had registered the weapon when he purchased it in the late 1950's in South Australia, it was not registered in the ACT and he did not want to get into trouble (Inq 2129).

1191. Paragraph 11 is directed to the question whether the gunshot residue found in the boot of the Mazda in January 1989 could have been deposited in the boot when Mr Smith laid his rifle in the boot. According to Mr Smith he discharged fifty or sixty rounds of ammunition, and possibly as many as seventy rounds, and the ammunition discharged included a few rounds of PMC and CCI type ammunition. As it was the prosecution case that the killer used PMC ammunition, and that gunshot residue from PMC ammunition was found in the boot of the Mazda, if the occasion about which Mr Smith gave evidence had occurred shortly before the murder, a strong argument could have been mounted that the placement of Mr Smith's rifle in the boot provided an innocent explanation for the presence of PMC gunshot residue in the boot. However, even if Mr Smith was telling the truth, the placement of his rifle in the boot in late 1985 or early 1986 could not account for the gunshot residue found in the boot in January 1989. Perhaps one particle found in vacuumings from underneath the trim of the boot could have remained in that position undisturbed for approximately three years, but that particle was not from PMC ammunition. There is no suggestion that the remaining particles which were crucial to the prosecution case were in a locality within the boot that would have protected them from cleaning operations such as vacuuming. There is simply no evidence to suggest that the applicant did not vacuum his boot for three years. The only evidence is to the contrary. Mr Smith said the applicant kept his Mazda in meticulous condition.

1192. Leaving aside the impact of a three year delay upon the likelihood that residue from Mr Smith's weapon would remain in the boot to be found in January 1989, there were numerous obstacles within the evidence of Mr Smith that provide an impenetrable barrier to accepting Mr Smith as a witness of truth.

1193. First, Mr Smith did not tell anyone about the occasion of borrowing the applicant's Mazda until after the applicant was convicted of murder and shortly before sentencing. Not only did Mr Smith fail to mention borrowing the Mazda, but his statements to police and evidence to the Coroner strongly point to a conclusion that Mr Smith's version to this Inquiry is untrue.

1194. The first occasion on which Mr Smith gave any indication to any person that he had information relevant to the case against the applicant was after the applicant was convicted of murder and before he was sentenced. According to Mr Smith he saw a man outside the remand centre at Belconnen whom he guessed could be the applicant's solicitor and he spoke to the person who identified himself as Mr O'Donnell. Trusting in

Mr O'Donnell, Mr Smith told Mr O'Donnell about the occasion in question and wrote the names of the ammunition used on a piece of paper which he gave to Mr O'Donnell. Interestingly, although Mr O'Donnell seemed to be excited about the news, it was not until 2008 that Mr O'Donnell contacted Mr Smith and spoke with him at length. I have severe doubts that Mr Smith told Mr O'Donnell about borrowing the car, but ultimately it was not necessary to call Mr O'Donnell because at the conclusion of Mr Smith's evidence I was left in no doubt that his version about borrowing the car was untrue.

1195. In the context of Mr Smith first contacting Mr O'Donnell in November 1995, the involvement of Mr Smith in the investigation into the murder of the deceased began on 23 April 1991 when he was interviewed by police for nearly two hours (Ex 126). A wide range of topics was discussed, but Mr Smith did not mention borrowing the applicant's car. Mr Smith did, however, speak about whether the applicant was likely to lend his car and how well the applicant looked after it:

Q Okay, can you tell me much about his motor vehicle he had around the time of the murder of Mr Winchester?

A Ah, well I thought, he came out to our place, but I think he had this car for a number of years. It was a Mazda, was it a yellow or was it a blue Mazda, I'm not sure. He had a Gallant, I think he sold that because, because I found out that he'd sold that because when he was at Reid he had this Mazda, and it was always, I always remember he was very very fussy about it, it was you know vacuumed and cleaned and you know, he's that sort of a bloke you know, spit and polish on the car, and I was always impressed with the way he used to look after his car.

Q So he had a lot of pride for his car, would you say?

A Oh, yes, yes he did, yes he kept it in very very good nick and you know he was just generally good in that area.

Q Would he be the type of person to lend his motor vehicle to anyone?

A Ah, no, I would say not. He' s very fussy about that, I mean when he stayed at my place and this is at Fisher, I might have asked him at one stage, I mean my car might've been out of rego or something like that, I might've asked him for it, and he, you know he'd almost certainly say no. I remember one very peculiar thing, we were going to go up to Eucumbene together to either do a bit of fishing or shooting and the, I put, I'm putting a roof rack on his car once, and then you know because you have a spanner to put the roof rack on. I put the spanner on the roof, and he said 'Oh, don't do that, don't do that', I said 'Oh Dave I just put it down'. then he turned around he said 'Oh I don't want to go up to Eucumbene with you', and I said 'Oh, why not?' he said 'Oh you, I think you did a bit of damage to my car', you know, I said 'Oh come off it Dave, I was only putting the roof rack on', 'Oh, no, no I'm not going up now'. Oh little things like that.

Q So he got very upset?

A Yes, he could get upset over some things you know, like the dog shit that could upset him, the wind in the television aerial could upset him, but not, I mean he wouldn't get to the extent of being sort of violent about it, but he could be an abrupt sort of person at times.

Q Would you say that he would be the type of person to share driving, to let somebody else drive his car?

A Ah, no, I would be surprised unless, I mean he'd have to be really sick, that's my guess because he was so fussy about it, I mean it was always immaculate inside and out. Because I remember having a good look at it, his Mazda I'm not sure whether it was blue or yellow, but anyway it was his car at the time, and you know just how fussy he was about it.

Q Right and how often would you say he did clean and vacuum his car?

A I'd say he'd be doing it all the time, all the time, he's very fussy about that, you know he

Q Would you say once a week or couple times a week, or

A Ah, well again I'm guessing here, but I would say that if he had a slightest smudge on his car, it would be cleaned off straight away, you know he's that sort of a person. He's, I don't know whether he's still got a car, but if you ever had a look at his cars you'd see that they were unmarked.

Q Right, this tape is again about to come to the end of this side, so I'll just suspend it again at 3. 14pm on the 23rd of April 1991, I'll just go over to the other side.

Okay we're now on the side 2 of the second tape, interview commencing again now at 3.14pm on the 23rd of April 1991. Okay again, discussing David's motor vehicle, you mentioned that there was one occasion where I believe you took David's car, you went fishing or shooting, is that correct?

A No, I didn't, he was going up with me.

1196. The interview of 23 April 1991 was not the only occasion on which Mr Smith failed to mention that he had borrowed the applicant's car and put a rifle in the boot. Mr Smith gave evidence at the Inquest on 2 December 1992. He said the applicant was extremely 'meticulous' about his cars and would 'spit and polish' them to the 'nth degree' (Inqu 8145). Shortly after that evidence Mr Smith expanded on his knowledge of the applicant's habits in respect to his cars (Inqu 8147):

Q All right, you saw it on a number of occasions, this car?

A Yes

Q And it was always, what, spotless?

A Yes, yes. See, he was always – in his personal habits, he was always a very clean chap.

Q And that's both interior of the vehicle and the exterior?

A That's right. Yes, very much so.

Q And had you ever seen the way he would clean the interior of his vehicle?

A Yes, yes.

Q Would that include the boot?

A Yes, the boot.

Q What would he do?

A Well, he would vacuum it, and he used to get the old cloth out, come out and – well, I think he had the, you know, the shiny stuff you buy in bottles; you know, that you apply on the bonnet...

Q Wax?

A Wax, yes.

Q Polishing wax?

A Yes, that's right. Yes, he used to have that.

1197. As to whether the applicant would lend his car, Mr Smith gave the following evidence (Inqu 8171):

Q Did he ever lend his car, so far as you are aware?

A No, he was very particular about the car. He didn't like to lend that to anyone that was a 'sacred cow'.

1198. Mr Smith was questioned at length about why he had not told the police or Coroner that he had borrowed the applicant's car to go shooting and placed his rifle in the boot. There were many areas of Mr Smith's evidence that were marked by evasion and changing versions, but none more so than his attempts to explain his failure to tell anyone about this important event. Initially Mr Smith said he was not asked and did not volunteer information because his rifle was not registered. However, his concern about the absence of registration, also a factor that he said made him panic when a man saw him return to the vehicle after the shooting, was destroyed when it was pointed out to Mr Smith that he had readily acknowledged ownership of the rifle during the interview with police.

1199. In the context of his failure to volunteer any information before November 1995, Mr Smith was asked about his knowledge of developments in the case against the applicant, and in particular his knowledge of reliance by the prosecution upon gunshot residue found in the Mazda. In this respect Mr Smith was at his evasive best. He suggested the fact that police were interested in the use of the Mazda for shooting might have escaped him. Asked when he became aware of the importance of gunshot residue, Mr Smith tended to avoid giving an answer by saying that when he spoke to Mr O'Donnell he had been reading about gunshot residue. Asked again about his knowledge of the importance of the residue, Mr Smith said it was about the time of speaking with Mr O'Donnell (Inq 2172). After being shown various media reports, Mr Smith said it was in the mid 1990's when there was talk of gunshot residue that it raised his interest in that issue. He said he took a 'sort of desultory interest' in the Inquest and he did not think he knew anything about the gunshot residue issue at that time (Inq 2160).

1200. Mr Smith was asked why he did not approach anyone during the trial when there was a lot of publicity, which included publicity about gunshot residue in the boot. He said he did not make the connection and that his awareness of the issue and the importance of his information gradually built up. Ultimately he came to the realisation that the residue could have come from his weapon, but Mr Smith did not have a satisfactory explanation for not immediately going to the defence team.

1201. As to his knowledge of the relevance of gunshot residue in the Mazda, Mr Smith was asked whether the applicant ever spoke to him about it (Inq 2175):

> Q Did Mr Eastman ever give you information about them saying that they'd found gunshot residue in his car?
>
> A No
>
> Q Ever discuss it?
>
> A Never mentioned that, no.

1202. Mr Smith's unusually positive evidence that the applicant did not mention the gunshot residue in his car does not sit well with statements he made to Ms Woodward on 21 June 1994 (Ex 12 [191]–[193]).

1203. Mr Smith had endeavoured to make contact with Justice Gallop about the applicant and Ms Woodward had sent him a letter concerning that attempt. He rang Ms Woodward complaining about her letter and endeavoured to justify his attempt to contact Justice Gallop. During the conversation Mr Smith spoke about the police and the applicant's vehicle. Ms Woodward recorded the following:

> He then indicated that I seemed to think that the police and judges are lilywhite and that he is sure that the police had got hold of David Eastman's vehicle to try and tamper with the evidence to try to produce evidence to convict him. Mr Smith then said that he doesn't like being called a witness for the prosecution because that gives perceptions to the public as well. I want to just be a witness or a witness for the defence. Mr Smith then said that 'I have been reading the ads that you and your clones have been putting in the paper about the independence of the DPP. What concerns me is the blow out in costs if you get independent.
>
> I said to Mr Smith that I 'wasn't prepared to discuss that matter with him'.
>
> Mr Smith then said 'I'm forming a David Eastman support club because I am convinced that he is innocent'.

1204. Mr Smith was asked about the conversation with Ms Woodward and the reference to police getting hold of the vehicle and tampering with evidence. Faced with that statement, and having been told in answer to his question that Ms Woodward made a note of the conversation, Mr Smith said it was possible he made the statement and that 'probably' he got that information off the applicant. It was put to him that by 21 June 1994 he knew about the evidence concerning gunshot residue in the car and he gave the following answer (Inq 2175):

> It's possible. I mean, I don't – to tamper with evidence in the car, that's coming fairly close to it. I must have had my – you now, must have been suspicions then or things had been written down about or comments made in the press and that's possible. But I don't recall him saying that the police were actually tampering evidence. They might have had a look in his car but I don't – I think Ms Woodward's got it wrong there in saying that I – tampered – that I said to her the police were tampering.

1205. The entire note by Ms Woodward was read to Mr Smith and he began by answering that he wanted to be a witness for the defence. Brought back to the topic of the statement to Ms Woodward that he was sure the police were trying to tamper with evidence in the vehicle and the issue of what he knew at the time about gunshot residue, Mr Smith replied (Inq 2176):

> That's possible. I might have known it. I didn't make – I don't make – you know, I haven't got a diary or make notes about everything I said. But I can say this, that I certainly didn't discuss gunshot residue with David until quite a while later after he was in – he spoke about a forensic specialist from Melbourne. I don't know the exact details of this but I think it must have been something that gunshot residue was the thing that was going to nail it.

1206. In answer to further questions, and in particular the suggestion that on 21 June 1994 he knew about the evidence concerning the gunshot residue in the boot, Mr Smith replied 'well, it may be true, it may be true.'

1207. Mr Smith was then asked why he waited almost a year and a half to tell anyone about borrowing the car (Inq 2177):

Well, I wanted to – I probably wanted to get all the facts and see what everybody else had said. I can't give any particular reason why I took that long. One could have done it earlier I suppose but I, you know, that's the date I did it.

1208. Mr Smith went on to say that it was not something that he planned and he 'just wanted to see how important this was'. He then acknowledged that the applicant was a friend and he was so concerned about his welfare that he went to the extent of attempting to speak with Justice Gallop about police harassment. He acknowledged he was so concerned that he told the prosecutor that he was sure police were tampering with evidence and he knew that the applicant was going to stand trial for the crime of murder. Mr Smith agreed that when the trial began it was very serious and he kept up to date by reading media reports. Mr Smith then gave the following evidence (Inq 2178):

Q Now, you please explain to me why, with such concern, you waited till after he was convicted before you came forward to tell someone, anyone, that, 'look that residue in the car didn't come from the murder weapon. It came from my gun'. Why did you wait until he was convicted?

A That's a good question.

Q I hope it is a good question?

A Yes.

Q And I'd like you to answer it and not do what you've done consistently and that is sit back, and think, and wait and try and find an answer. Now, just give me an answer?

A I think it was – I would be listening to what others have to say, reading the reports in the Canberra Times. Maybe I should have done that. I don't deny that. But, OK, I've come out with it afterwards.

1209. Before giving the answer Mr Smith leant back in his chair, paused significantly and deliberately, and then gave his answer.

1210. In March 1995 Mr Smith spoke again with Ms Woodward about the issue of him giving evidence. During that conversation Ms Woodward advised Mr Smith of the identity of the applicant's lawyers and gave him their telephone number. Asked why he didn't contact the lawyers, he again diverted his answer to saying that he had spoken to Mr O'Donnell. Brought back to the issue of why he had not rung the defence team in March 1995 to say he had important evidence about gunshot residue in the boot, Mr Smith reverted to his original position that before he spoke to Mr O'Donnell he did not know how important his information was (Inq 2199).

1211. Shortly after giving that evidence Mr Smith gave significant answers in cross-examination (Inq 2200):

Q Mr Smith, you're a clever bloke, I'm suggesting to you?

A Am I?

Q I'm suggesting you are?

A Yes?

Q You knew in November 1995 that if you said that you put your gun in Mr Eastman's Boot, that would be another explanation for how the gunshot residue got there. You knew yourself that could be important evidence?

A When I mentioned that to Terry [O'Donnell] he said, 'yes, it's important'.

Q You didn't have to mention it to Terry to say that. You knew yourself that that was important?

A Well, that's right, and I chose the appropriate – what I consider to be the appropriate time.

Q You mean that you chose the appropriate time, after Mr Eastman had been convicted?

A Well, that's true, yes. Yes.

Q Mr Smith, the appropriate time – the appropriate time was when Mr Eastman was going to trial wasn't it?

A Well, I think that maybe it was better afterwards, because then we could throw a spanner, as it were, into the works, and say, 'here's something new, let's consider it'. Now, you might say to you, 'yes, well, David spent years in prison, that's not very nice', and you know, I'd have to concede that that's probably true, no issue about it. But...

Q So is your evidence now that you deliberately withheld this information about taking the car for a spin, because then you could keep something up your sleeve for David?

A Well, David would know – once I got it to Terry O'Donnell he would have known about it, but not before then, no.

Q No, and the defence team wouldn't have known about it before then, would they, unless you told them?

A Correct.

Q Ok. So the only way for someone to find out about you on this day you say you took the car for a spin was for you to either tell the police or the prosecution or Mr Eastman's legal team?

A that's right.

Q that's right. And you- and you say you chose not to, is that your evidence?

A Chose not to. Yes, that is. That's correct. (my emphasis)

1212. The topic of delay was also the subject of later cross-examination by other counsel. Reminded of his evidence that the applicant had told him that the gunshot residue 'was going to nail him', Mr Smith agreed he must have had a conversation with the applicant about gunshot residue. When it was put to him that the conversation must have occurred before the applicant was convicted, Mr Smith responded 'that's possible' (Inq 2250). After more questions Mr Smith reluctantly agreed that the applicant said that the residue would, in the future, nail him and he gave the following evidence (Inq 2250-2251):

Q Well, my question to you is why did you not, in that conversation, tell him [the applicant] about your going on the trip in the Mazda and putting you rifle in the boot and it might have been your gunshot residue?

A Good point. Good point. I was of the opinion that David was a person who would shoot himself in the foot. I thought if he knows about it, he'll take it and run with it and perhaps, you know, make a shemozzle of it. Well, I thought, I'm not going to tell him, I'll leave it - leave it a while. I left it quite some time. My fault. Shouldn't have done that should I?

1213. Mr Smith's explanations for the delay lacked any credibility whatsoever, as did his attempts to avoid the implication that the applicant kept the interior of his car meticulous by vacuuming it. Mr Smith was well aware of the significance of his

statement to police, and evidence to the Inquest, that the applicant kept the interior of the vehicle meticulous and vacuumed it. He knew that if the applicant regularly vacuumed the interior of the vehicle, any residue left by Mr Smith's weapon could not account for the residue upon which the prosecution relied.

1214. In the passages earlier cited of the police interview and evidence to the Inquest, Mr Smith plainly stated that the applicant vacuumed the interior of the vehicle, including the boot. However, in his evidence to the Inquiry Mr Smith said that although he remembered the applicant using Mr Smith's hose to clean the car and polish it, he did not recall seeing the applicant cleaning the inside of the vehicle. He gave a positive answer that he had never seen the applicant vacuum his car. Faced with his evidence at the Inquest Mr Smith volunteered 'that's possible'. Asked if reading the transcript refreshed his memory, Mr Smith said the transcript was 'probably' correct and the applicant 'may have used a vacuum'.

1215. Later Mr Smith repeated that the applicant 'may have' vacuumed the car, but said he did not see the applicant vacuum the vehicle and he was assuming that he did so.

1216. Mr Smith's efforts to explain away his previous statements and evidence were transparently false.

1217. In addition to the features to which I have referred, Mr Smith's evidence that he borrowed the applicant's car is contradicted by the evidence he gave during the Inquest. On 2 December 1992 Mr Smith gave the following evidence:

> Q Did he ever lend his car, as far as you are aware?
>
> A No, he was very particular about the car. He didn't like to lend that to anyone, that was a 'sacred cow'.

1218. Mr Smith was asked whether he lied when giving that answer to the Coroner (Inq 2169):

> Q Did you lie when you were giving evidence to the Coroner?
>
> A Well, you see, it was so many years before that. I mean, well, who knows. I may not have - well, just, I didn't mention it. That's true. Perhaps I should have.
>
> Q Then why didn't you?
>
> A I don't know at that particular time. That's a long time ago.

1219. Mr Smith was prevaricating. Immediately after those answers he was warned that he was not obliged to answer any question if he thought the answer might incriminate him. Asked if he agreed that his answer to the Coroner was not accurate, Mr Smith agreed it was not accurate. He was then asked whether he deliberately told an untruth to the Coroner when he gave the answer in question and he responded (Inq 2170):

> No. I don't think – it may have just gone out of my mind what happened years before.

1220. I am satisfied that Mr Smith told the truth to the Coroner, that is, to his knowledge no one had ever borrowed the applicant's car. Further, his evidence that the occasion might have gone out of his mind when he was being asked questions at the Inquest was plainly a fabrication.

1221. Mr Smith's version to the Inquiry is, in itself, highly unlikely. First, according to Mr Smith, knowing that the applicant could be irrational and physically violent, he left his mother alone in the house with the applicant for approximately four hours. In addition, Mr Smith told police that although 'in a way' his mother liked the applicant, 'even she got rather weary of him in the end.' Again, in answering questions about that issue Mr Smith was evasive in his answers, but ultimately admitted that his mother was a bit weary of the applicant. However, he maintained he was not worried about leaving her in the house with the applicant because he was always polite in Mr Smith's house.

1222. Secondly, it is highly unlikely that Mr Smith would surreptitiously get his weapon from the roof cavity and take it in the applicant's car without the applicant's knowledge. The inherent lack of plausibility was well encapsulated in the following evidence given during cross-examination by Senior Counsel for the AFP (Inq 2248–2249):

> Q Mr Smith, in late 1985 and early 1986 you knew that Mr Eastman had an abhorrence to weapons?
>
> A Yes, definitely.
>
> Q And you ...?
>
> A That's been my experience.
>
> Q And you knew he regarded his car as sacred cow?
>
> A Yes.
>
> Q You believed that he'd never allowed anyone to drive his car?
>
> A But I could be corrected on that. I don't – I just think that he did see it as a bit of a sacred cow. He wouldn't lend it. But I could be wrong.
>
> Q And you knew he was extremely meticulous about maintaining his car?
>
> A Yes.
>
> Q And with the Eucumbene experience you'd seen the irrational response that he'd given with the car keys on top of the car?
>
> A Yes.
>
> Q And you'd been his friend since the 1970s?
>
> A Yes.
>
> Q And you knew he could be abrasive?
>
> A Yes.
>
> Q And you knew that he could resort to violence on some things he held deeply?
>
> A Yes. I don't think it was serious violence.
>
> Q And you say that, knowing all those things, you tricked him in late 1985 or early 1986 and took his car and used it for shooting?
>
> A That's right. Most unusual.

1223. I have referred to the main features of the evidence given by Mr Smith and the primary matters which demonstrate the unreliability of his evidence. It is not being unkind to say that Mr Smith put on a performance. It began from the moment he entered the witness box. Immediately upon giving the affirmation, in a dramatic fashion Mr Smith said loudly (Inq 2116):

> What is the truth? Could you care to define the concept of truth?

1224. Asked about that statement, Mr Smith responded (Inq 2150):

> Well, that's what I'm asking you. Would you care to describe the concept of truth? What do you say it is?

1225. Asked if he was telling the truth in the courtroom, Mr Smith said he was and told a tale of speaking with an American diplomat in the 1960's about Vietnam which he sought to use as an example of truth depending upon the perspective of the speaker.

1226. Asked again why he made the comment, Mr Smith answered (Inq 2151):

> Well, it's an interesting – that's an interesting thing cause, you know, you talk as if everybody knows what the truth is. I'm wondering if Mr Martin would like to – care to define what the truth is. Statement of fact?

1227. The topic was again raised with Mr Smith much later in his evidence. Asked whether his statement was a 'bit of a performance' by him, Mr Smith was again evasive (Inq 2245):

> Q Can you answer the question: was it a bit of a performance by you?
>
> A When, when you say 'a bit of a performance', are you suggesting that I was just, you know, saying something for a bit of a laugh, a bit of fun or something like that? I think it's an important question. The truth.
>
> Q You weren't attempting to gather the attention of everyone present here to you, were you?
>
> A Well, I think that everybody in this room wants to know what the truth is. But in my life time I've come across plenty of people who will tell me, 'that is the truth'.

1228. There were other examples of Mr Smith putting on a 'show'. In his demeanour and manner of answering questions, Mr Smith gave the appearance of being an eccentric person, but he is far from unintelligent and was well aware of the significance of his evidence. In the witness box Mr Smith became a storyteller with a certain amount of amusing flair, but whether this was his natural personality or a performance for the occasion is uncertain.

1229. Whatever the reason for Mr Smith's show in the witness box, as I said previously his evidence about borrowing the applicant's car to go shooting was utterly devoid of any credibility. I reject it. It is not surprising that the applicant did not address any submissions to this paragraph.

1230. The issue raised in Paragraph 11 has been put to rest and any suggestion of a doubt or question as to guilt arising out of Mr Smith's version has been convincingly dispelled. To put it another way, there is no possibility that a doubt or question as to guilt arises out of the evidence of Mr Smith.

PARAGRAPH 12

1231. Paragraphs 12 and 13 both concern a hypothesis consistent with the applicant's innocence that a person or persons involved in criminal activities killed the deceased or

arranged for him to be killed. This hypothesis was the subject of evidence at the Coronial Inquest (Ex 2).

1232. Paragraph 12

> There was evidence provided to the Australia Federal Police by a witness whose name was suppressed at the coronial inquest and who was never called to give evidence at the inquest. The identity of that witness was belatedly disclosed late in 1994 as Robert Buffington. Mr Buffington had provided direct eyewitness evidence that Louis Klarenbeek regularly dealt in illegal firearms, including handguns and shortened rifles, and on an occasion shortly before the murder of Colin Winchester, Louis Klarenbeek had delivered a rifle at a suburban shopping centre in Canberra to a defendant charged with an offence arising out of Australian Federal Police 'Operation Seville'.

1233. The 'matter' to which Paragraph 12 is directed is a doubt or question as to guilt in relation to information emanating from Mr Robert Buffington. The information concerned illegal dealings in firearms by Mr Louis Klarenbeek who was the dealer who sold the murder weapon. In particular, Paragraph 12 directed an inquiry into evidence by Mr Buffington that shortly before the murder of the deceased, Mr Klarenbeek delivered a rifle to a person involved in criminal drug activities as part of a group who possessed a motive to kill the deceased. The applicant contended that the evidence of Mr Buffington supported the hypothesis that the rifle Mr Buffington saw delivered was the murder weapon.

1234. Mr Buffington first contacted the police in November 1992. He was interviewed by Detective Sergeant Lawler and said he contacted the police after reading the Sydney Morning Herald about the evidence of Mr Webb. He knew the late Mr Louis Klarenbeek who dealt illegally in weapons. According to Mr Buffington, after the murder of the deceased, Mr Klarenbeek told him he sold the Ruger rifle to a 'civil servant' (Ex 148). Mr Buffington also gave police information about the general involvement of Mr Klarenbeek in the sale of weapons (Ex 148).

1235. Detective Lawler was in charge of the investigation of all the information provided by Mr Buffington in November 1992. He set out the details of his investigation in a statement dated 2 December 1992 (Ex 148) and gave evidence at the Inquest (Inqu 7370–7388, 8306–8311, 8341–8361, 8364–8381, 8497–8500) and documents obtained during his investigation were tendered.

1236. Mr Lawler gave evidence to the Inquiry. No other oral evidence was received by the Inquiry in relation to this paragraph. Mr Buffington died in 2009. Mr Klarenbeek died in 1990. Documentary exhibits were received as listed in exhibit 242. Mrs Klarenbeek and other potential witnesses are also deceased.

1237. The applicant's hypothesis focused on the information provided by Mr Buffington about the involvement of Mr Klarenbeek in the delivery of a weapon at the Hackett shops to someone called [redacted]. The issue is whether a reasonable hypothesis was open that Mr Klarenbeek sold the murder weapon to [redacted] and sold a different weapon from his house on or about 31 December 1988 (the date when the applicant was said to have been seen at Mr Klarenbeek's premises by Mr Webb).

1238. It should be noted that no attempt was made at trial to suggest that the murder weapon was not sold on about 31 December 1988.

1239. It should also be noted that Paragraph 12 contains a factual error in the assertion that Mr Buffington's identity was not disclosed until 1994. His identity was disclosed at the Inquest when he gave evidence in December 1992, but was suppressed from publication (Inqu 8381–8489).

1240. The murder weapon was previously owned by Mr Fynus (Joe) Caldwell. He gave the rifle to Mr Noel King (now deceased) to sell on commission. Mr King sold the rifle to Mr Klarenbeek who advertised firearms for sale in the Canberra Times on 31 December 1988. The murder weapon was one of those firearms.

1241. Mr Caldwell gave evidence at trial that he owned a .22 Ruger rifle when he lived in Victoria. He fired it at Jack Smith's Reserve near Woodside, Victoria. Sometime after moving to live in the ACT, he decided to sell the rifle and gave it to Mr King for that purpose. It was fitted with a Nikon scope and had a leather strap. It was serial number 112-96920 (T 955–973).

1242. Mr King gave evidence at trial that Mr Caldwell came into his shop to ask him to sell on commission a Ruger .22 semi-automatic rifle, serial number 112-96920. At the time the gun was fitted with a telescopic sight, a plaited leather sling, a gun bag and other accessories being a spare magazine and a cleaning rod. He put the serial number 112-96920 in the register on 31 August 1987, but made an error when he wrote the serial number on the receipt he gave Mr Caldwell on 26 August 1987 by putting an 8 instead of a 9 (T 1671–1753).

1243. On 4 December 1987 Mr King transferred the rifle to Mr Thomson, but it was returned to him on 1 February 1988. He wrote the serial number in the register on 1 February 1988, but made an error in the number (he wrote 96290, crossed it out and wrote 96920).

1244. Mr King sold the rifle to Mr Klarenbeek on 12 October 1988. He put a thread on the end of the barrel to take a silencer, but was not sure whether that was before or after Mr Klarenbeek bought the rifle. He put a cap on the end of the barrel and made a silencer that fitted the Ruger. The plaited leather sling, the telescopic scope and the silencer were sold to Mr Klarenbeek with the rifle.

1245. At the Inquest, Mr Klarenbeek adopted the content of his interview with police on 9 August 1989 (Inqu 573). In that interview he told the police he bought the rifle from Mr King for about $250 with a scope and a silencer fitted. Mr Klarenbeek test fired the rifle at a quarry on Captains Flat Road by firing about 5 or 6 rounds. He said the sights were not straight. He tried to fix the sights. He sold the rifle after advertising it.

1246. The Caldwell/King rifle was identified as the murder weapon through a comparison of the two cartridges at the scene with cartridges provided to the police by Mr Klarenbeek and cartridges found at Jack Smith's Lake Reserve where Mr Caldwell said he fired the rifle. Mr Prior (T 899–909), Mr Barnes (T 1483 and T 1495), Mr Crum (T 1581) and Mr

Schechter (T 1652) expressed the opinion that some of the cartridges provided by Mr Klarenbeek and some of the cartridges located at the Reserve were discharged by the same weapon as the cartridges found at the scene.

1247. The applicant submitted there is a reasonable hypothesis that the rifle delivered by Mr Klarenbeek to [redacted] at the Hackett shops was the murder weapon and that Mr Klarenbeek sold a different Ruger rifle from his home at the time of the advertisement.

1248. Mr Buffington told the Coroner that Mr Klarenbeek regularly dealt with firearms. He had seen Mr Klarenbeek dealing in guns and had discussed it with him (Inqu 8419–21). He told police that in December 1988 Mr Klarenbeek said he was going to sell a gun to a [redacted] (Ex 242, ROC Lawler/Buffington 22 November 1992, Inqu 8449). Mr Buffington observed Mr Klarenbeek wrap a rifle in two pieces in newspaper. The gun was not a Ruger and had a lever action (Inqu 8449; Ex 147, 6; Ex 242, ROC Lawler/Buffington 20 November 1992, Q440). Mr Buffington drew a sketch of the gun (Inqu 8449).

1249. Mr Buffington went to the shops with Mr Klarenbeek, but stayed in the car. He saw Mr Klarenbeek get out of the car and give the firearm to [redacted] who was standing with four Italian men at the shops. This occurred in December 1988. Mr Buffington did not know any of the other men (Inqu 8450). He later went with Mr Klarenbeek to an address in Melba and Mr Klarenbeek said 'That's [redacted] (Inqu 8460).

1250. The first difficulty with the hypothesis is that according to Mr Buffington, the rifle delivered by Mr Klarenbeek at the Hackett shops was not a Ruger rifle. Mr Buffington's description did not fit the Caldwell/King rifle, which was a Ruger rifle. In addition, his description of the rifle as having a lever action did not fit the Caldwell/King rifle.

1251. Mr Buffington also had a credibility issue in relation to his evidence concerning the sale of the rifle to [redacted]. As part of the investigation Detective Lawler established that [redacted] did not live at the house which Mr Buffington said Mr Klarenbeek pointed out as [redacted] (Ex 147, 13). [redacted] lived at 3 Jordon Street which was similar in appearance to the house pointed out by Mr Buffington, but Mr Buffington said it was not the correct house.

1252. Detective Lawler also spoke to [redacted] who denied knowing Mr Klarenbeek or Mr Buffington (Ex 242, ROC [redacted]/Allen, Inqu Ex 592F3).

1253. On the assumption that there was a delivery at the Hackett shops as described by Mr Buffington, the only evidence about the gun delivered to [redacted] came from Mr Buffington. His description of the gun did not support the applicant's hypothesis that it was the Caldwell/King murder weapon.

1254. The applicant's hypothesis also relied upon a possible sale by Mr Smith to Mr Klarenbeek of a Ruger 10/22 rifle (this being the weapon sold by Mr Klarenbeek from his home following the advertisement, the murder weapon having already been delivered to [redacted]).

1255. Mr Lawler spoke to Mr Smith in January and February 1991 after searching through Canberra Times advertisements and becoming aware that Mr Smith had sold firearms in October 1987. Mr Smith placed an advertisement on 17 October 1987 for the sale of a Ruger mini rifle, mini Ruger, never fired, $450 ono. (Ex 242, Lawler/Smith ROC 24 January 1991, pp12, 39). An elderly gentlemen with a beach hat bought the Ruger Mini-14 and the Ruger 10/22. The man was German or Austrian or 'something like that' and said he was from Queanbeyan. The Ruger 10/22 had a pistol grip stock, black polycarbon nylon, and a folding paratrooper stock. The barrel was shortened to legal length, which Mr Smith thought was 16", and had a screwed cap for a silencer, silencer, a 30-round magazine and the normal 10-round magazine (ROC 24 January 1991, 31). It did not have a sight (Ex 242, Lawler/Smith ROC 24 January 1991, 38).

1256. The second difficulty with the applicant's hypothesis is that the Smith Ruger 10/22 rifle did not fit the description of the Ruger rifle seen by various witnesses at Mr Klarenbeek's home at the time of the advertisement. No-one referred to black or plastic, nor to a pistol grip or a folding paratrooper stock or a barrel shortened to a length of about 16".

1257. In summary:

- Mr Webb gave evidence at trial that the Klarenbeek Ruger had a telescopic sight with a cover on it and was threaded for a silencer with a cap over the end of the barrel (T 1152 and 1189). He thought the Ruger might have had buckles for a strap (T 1187).

- Mr Richard Hall and his son Mr Justin Hall gave evidence at trial that they saw a Ruger rifle at Mr Klarenbeek's premises threaded for a silencer, but could not recall whether a telescopic sight was attached or not (T 1816, 1818)

- Mr Klarenbeek did not describe the Ruger 10/22 which he sold at the time of the advertisement as having a pistol grip, a folding paratrooper stock or a shortened barrel. He said that the rifle he sold had a sight on it.

1258. The applicant's submissions do not specifically deal with the fact that the description by Mr Buffington of the rifle handed over at the shops did not match the murder weapon, other than to observe that while Mr Buffington 'firmed in his view that the firearm had a lever action, this must be seen in the context of his general ignorance regarding firearms' (annexure 7 [140]). By implication the applicant accepts that the description given by Mr Buffington was inconsistent with the murder weapon, but the applicant seeks to minimise the significance of this inconsistency on the basis that Mr Buffington was generally ignorant of firearms. Even if that attempted rationalisation is accepted, a gaping hole in the hypothesis remains; there is no evidence that the weapon handed over by Mr Klarenbeek to [redacted] at the shops was the murder weapon or a weapon matching the description of the murder weapon.

1259. Other than placing reliance upon the view that 'anything is possible', there is no basis for a conclusion that it is reasonably possible that Mr Klarenbeek supplied the murder weapon to the man at the shops.

1260. The third difficulty with the hypothesis is that Mr Smith failed to identify Mr Klarenbeek as the purchaser of the mini Ruger and the Ruger 10/22 from a folder of photographs. He selected a photograph of someone else (Inqu 7383). Mr Klarenbeek's son told police he never saw his father wear a beach hat (Inqu 7384). Mr Lawler told the Coroner he thought Mr Klarenbeek was probably not the purchaser, but would not eliminate him as the purchaser (Inqu 7386).

1261. Finally, Mr Lawler described his investigation of the information provided by Mr Buffington as complex. It resulted in many of Mr Buffington's claims being contradicted. Detective Lawler set out those contradictions in his statement dated 2 December 1992 (Ex 148) and expressed the view in that statement that Mr Buffington's information could be clearly discredited.

1262. This summary of the evidence gathered with respect to Paragraph 12 is sufficient to demonstrate that the applicant's hypothesis is mere speculation. Further, not only is there an absence of evidence to positively support the hypothesis, it is positively contradicted by Mr Buffington's version, including his description of the weapon delivered at the shops.

1263. The doubt or question as to guilt underlying Paragraph 12 has been dispelled. Nothing arising in the evidence concerning Paragraph 13 alters that conclusion.

PARAGRAPH 13

1264. Paragraph 13

> There is a clear hypothesis contained in the evidence given to the coronial inquest and in available contemporaneous police intelligence consistent with the guilt of others who are in no way connected to the applicant. This material includes the previously considered material in inquest documents MFI 23 and MFI 130 which must be analysed in the context of other evidence led at the inquest, in particular inquest 'also-ran' briefs 20 and 32. The sequence of events disclosed in evidence at the inquest and in MFI 23 relating to the informer, Giuseppe Verduci, raises cogent evidence of a conspiracy to murder Colin Winchester by a number of those directly linked to AFP Operation Seville.

1265. Although Paragraph 13 is directed to the hypothesis consistent with innocence, particular emphasis is placed upon a doubt or question as to guilt arising from the evidence presented at the Coronial Inquest concerning 'briefs 20 and 32' and 'the informer, Giuseppe Verducci'.

1266. In relation to Paragraph 13 I heard evidence given in two private hearings at which Counsel given leave to appear were not present. That evidence is discussed in a confidential report.

1267. In relation to the private hearings the DPP written submissions assert that 'the director maintains a deep concern about the closed hearings and submits that it would be inappropriate for the Board to rely on any evidence provided at those hearings without first giving the parties an opportunity to consider and submit upon it' (annexure 9

[229]). The submission contended that the procedure followed was a breach of the rules of 'procedural fairness' required under the *Inquiries Act* and it would, therefore, be inappropriate for the Board to rely upon the evidence obtained in the private hearings.

1268. Section 18 of the *Inquiries Act* directs that in conducting an inquiry the Board 'must comply with the rules of natural justice'. However, section 18 also empowers the Board to do 'whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry'.

1269. In addition to the broad powers contained in section 18, section 21 of the *Inquiries Act* empowers the Board to take evidence in private and give directions prohibiting or restricting the disclosure of the evidence:

> **Division 3.2 Hearings**
>
> **21 Power to hold**
>
> (1) For the purposes of conducting an inquiry, a board may hold hearings.
>
> (2) Subject to subsection (3), a hearing must be in public.
>
> (3) If a board is satisfied that it is desirable to do so because of the confidential nature of any evidence or matter, or for any other reason, the board may —
>
> (a) direct that a hearing or part of a hearing must take place in private and give directions as to the people who may be present; and
> (b) give directions prohibiting or restricting the publication of evidence given at a hearing (whether in public or private) or of matters contained in documents lodged with, or received in evidence by, the board; and
> (c) give directions prohibiting or restricting the disclosure to some or all of the people present at a hearing of evidence given before, or the contents of documents lodged with or received in evidence by, the board.
>
> (4) In considering whether to give a direction under subsection (3), a board must take as the basis of its consideration the principle that it is desirable that hearings be in public and that evidence given before, or the contents of documents lodged with or received in evidence by, the board should be made available to the public and to all people present at the hearing, but must pay due regard to any reasons given to the board why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

1270. There is a tension between the direction that the Board comply with the rules of natural justice and the broad powers contained in sections 18 and 21 which contemplate that there may be circumstances which justify the Board conducting a private hearing and restricting publication of the evidence. In other words, two aspects of the broad public interest are involved which, at times, may be in conflict leaving the Board to determine which aspect of the public interest should prevail.

1271. The evidence heard at the private hearing concerned information provided to police by an informant. I determined that great risk to the welfare of the informant would be created if the evidence taken at the private hearings was disclosed. The public interest in protecting the identify and welfare of the informant prevailed over the interests of parties given leave in hearing the evidence and being in a position to comment upon it.

1272. In addition, it is doubtful that the issues arising under Paragraph 13 affect a relevant 'interest' of the DPP. Those issues concern an alternative hypothesis that a member or members of a crime group committed the murder. The DPP has a general interest in the administration of justice, but not a specific interest in the issues arising under Paragraph 13 for the purposes of the rules of natural justice.

1273. There is a further expression of 'grave concern' conveyed by the DPP's written submission. In substance the DPP asserted that the applicant appears to have information about the private hearings which was not made available to the DPP (annexure 9 [230]).

1274. This submission is misconceived. All parties were aware that the private hearings related to information conveyed to police which was the subject of a claim for public interest immunity by the AFP when answering a subpoena issued by the Board. The issue was discussed on more than one occasion (Inq 499, 500, 1045, 1233–1239, 2618–2619). Further, the DPP demonstrated this general knowledge in a letter of 25 February 2014 to Counsel Assisting (the letter is not an exhibit):

> I understand that the Board intends to hold a private hearing this Thursday to hear evidence relating to the partially redacted AFP subpoena#12 material.

1275. No party to the Inquiry was in possession of information about the private hearings which was not mentioned in the public hearings in the presence of all parties.

Introduction

1276. Shortly after the murder of Assistant Commissioner Winchester, one line of investigation focussed upon the possibility that a Calabrian organised crime syndicate known as 'Ndrangheta was responsible (Ex 146 [63]). The motive was thought to arise out of the deceased's involvement in a joint AFP/NSW police operation which commenced in 1980 (NSW Police code name for the operation was 'Seville'). The police permitted two plantations of Indian Hemp to be grown (known as Bungendore 1 and Bungendore 2) in order to gain intelligence about the organised crime syndicate through an informant, Mr Verducci. Later police became aware of a third plantation at Guyra.

1277. The deceased took part in the operation from 1980 to 1982 during Bungendore 1. Mr Guiseppe Verducci was responsible for the organised crime syndicate believing that the deceased was corrupt and protecting their interests. It appears that the organisation held that belief until late 1988 (Ex 146, annexure RN-03, 25).

1278. Eleven of the participants in the Bungendore and Guyra plantations (known as the Bungendore Eleven) were belatedly arrested and a prosecution was instigated by the National Crime Authority. The committal commenced in 1988. The police investigation of the murder proceeded upon the basis that members of the crime syndicate possessed a possible motive for the murder by way of 'pay back' for the arrests and prosecution, the organisation having previously believed they had paid for police to 'turn a blind eye' (Ex 146, annexure RN-03, 24).

1279. No oral evidence was heard at the Inquiry in relation to Paragraph 13. Submissions were based on the papers, which included the affidavit of Mr Ninness dated 1 November 2013 (Ex 146) and documents tendered at the Inquest (Ex 243; part Ex 256, 257, 258).

1280. The applicant's submission was outlined in the following broad terms:

> The question of motive featured in the prosecution case against Mr Eastman. It was asserted that Eastman's motive to kill Winchester arose out of Winchester's refusal to intervene in an assault case against Eastman.
>
> In the Coronial Inquest a substantial body of evidence was accumulated about others who had powerful motives to kill Winchester. The 'others' were members or associates of the Calabrian organised crime syndicate referred to as the 'Ndrangheta.
>
> The Inquest documents MFI 23 and MFI 130 and Briefs 20 and 32 (referred to in the Coronial Inquest as the 'also-ran' briefs) identify the nature of the evidence and other available criminal intelligence about the involvement of persons associated with the 'Ndrangheta in the murder of Winchester.
>
> The alternative hypothesis that persons unconnected with Eastman had a strong motive to kill Winchester and were responsible for his murder was not adequately investigated by police.

Coronial Inquest

1281. At the Inquest there was a substantial body of evidence accumulated about the motive of participants in an organised crime syndicate to murder Assistant Commissioner Winchester. The 'Operation Seville Segment' of the Inquest commenced on 18 June 1990 (Inqu 3273). Witnesses were called from the AFP, National Crime Authority, NSW Police, Victoria Police and civilians.

1282. Mr Best from the NCA/AFP gave evidence about his secondment to the NCA to assist with the preparation of the prosecutions which arose out of Operation Seville. He outlined his knowledge of the progress of the Bungendore committals, Mr Verducci's failure after the murder to give evidence for the prosecution as previously agreed and the ultimate unsuccessful outcome of the prosecutions. Mr Best gave evidence that on 12 January 1989 (the date set for subpoena arguments in the Bungendore Eleven committal), on behalf of some of the defendants Dr Woods submitted that the murder could have an impact on his case. There was no record of any application for a witness subpoena addressed to the deceased, but he was named in subpoenas for production of documents. The prosecution never intended to call the deceased as a witness. Mr Best also detailed the meetings he had with Mr Verducci during and after the end of the committals, in particular after the murder (Inqu 3280–3485).

1283. Commander Robert McDonald of the AFP began working on the Winchester murder investigation in June 1989. He gave evidence at the Inquest about a report dated 28 September 1989 he prepared for the Coroner which became MFI 23 (Inqu 5182–5913).[60] In the report Commander McDonald supported the existence of a significant motive to murder the deceased arising out of his association with persons involved in an

[60] McDonald, R. Australian Federal Police, *Suspicion of Calabrian Organised Crime Involvement in the Murder of Assistant Commissioner Colin Stanley Winchester*, 28 September 1989.

Italian organised crime group and Operation Seville. The deceased was perceived as a 'corrupt' police officer who failed to protect the families in return for the money he had been paid. The report recognised a motive based on the deceased's association with Mr Verducci and proffered a link to two individuals, [redacted] and [redacted], who may have been brought over from Italy to commit the murder. The report was based on information received from a number of police informers, interviews with people involved in Operation Seville, information provided by Italian authorities and covert recordings.

1284. Mr McDonald's report concluded:

> The information received, so far, save for [redacted], inferring Calabrian organised crime involvement in this murder, whilst questionable in some details and interesting in others, from an intelligence viewpoint, falls far short on the availability of tangible evidence. To date there has been no firm evidence obtained to support the information received.

1285. MFI 97 at the Inquest (Ex 243) was a report dated 26 April 1990 and titled '*Supplementary Report: Suspicion of Calabrian Organised Crime Involvement in the Murder of Assistant Commissioner Colin Stanley Winchester*'. The author was Detective Superintendent P.J. Donaldson. The report referred to the transcription of tape recordings relied upon in the report MFI 23 as an admission by an organised crime group member to killing the deceased. The tape was re-assessed and it was determined that it did not contain an admission. Nor were the recordings in any way sinister and they did not assist the overall investigation of the murder.

1286. Another report was prepared by the Australian Bureau of Criminal Intelligence in December 1990 and became MFI 130 at the Inquest (Inqu 7122). This report (Ex 243) focussed on the method and motive for the murder. In relation to the motive the report considered the existence of a power struggle between two Italian organised crime families for control of the Indian hemp production and distribution in NSW and the ACT in the 1980s. The report postulated that the deceased may have been murdered because:

- he was perceived by organised crime groups as going against his word to provide protection in relation to the plantations; and/or
- the organised crime groups believed he was going to give evidence about the Bungendore plantations which would threaten senior members in Australia.

1287. In relation to the method of the murder the report drew significant parallels between the murder of Donald MacKay and the murder of the deceased in that they were both:

- public figures;
- publicly opposed to drugs;
- perceived by organised crime as informants against the organised crime families;
- shot in the head with a .22 calibre weapon; and
- shot in association with their vehicles (getting in or out of the car).

1288. The report concluded that, on the balance of probabilities:

> … the murder of Assistant Commissioner Winchester on 10 January 1989 was committed by, or on behalf of, an organised group of Italian residents in Griffith and Canberra to protect the assets and liberty of those persons involved in the past and continued large scale production and marketing of indian hemp in Australia.

1289. Detective Sergeant Brian Lockwood gave evidence at the Inquest about his former role as an AFP Officer, and specifically as Mr Verducci's handler under the instructions of the deceased. He detailed his contact with Mr Verducci from October 1980 to July 1984 (Inqu 3486–3612).

1290. Assistant Commissioner of Crime, Mr Roy Farmer, gave evidence about his knowledge of, and involvement in, Operation Seville (Inqu 3613–3633, 5113–5127 statement of Roy Farmer Inqu Ex 353). NSW police officers Mr Bob Blissett, Mr Robert Shepherd and Mr George Slade gave evidence about their involvement in Operation Seville and the deceased's role (Inqu 3634–3665, 3665–3783, 3821–3892). Victorian police officer, Mr John Weel, gave evidence about the involvement of Victoria Police in one of the Bungendore shipments which was intercepted in Victoria and about the subsequent arrests (Inqu 3892, 3904, 3908–3923).

1291. The informant, Mr Verducci, gave evidence at the Inquest, but often answered questions by saying he did not recall whether things happened or refused to answer on the basis that the answer might incriminate him. He said he had been told by someone prior to the murder that the deceased was going to be a defence witness in the Queanbeyan committals (Inqu 4979). He denied telling Mr Best it could have been the Calabrian mafia who were responsible for the murder, but he did say that if the murder was drug related he might have an idea about who would have done it (Inqu 4982). Mr Verducci confirmed he had been working with the AFP and said it was his belief the AFP had not honoured his agreement with them to pay him for his work.

1292. Mr Verducci said the deceased could have been murdered due to his involvement in setting up the NCA. He denied knowing that the deceased was not involved in Bungendore 2. He thought he was still getting his instructions from the deceased via Mr Lockwood. Mr Verducci said his role was not as an informant, but as a special agent (Inqu 5002–5003). He was in fear for his life. A noose had been hung on his door several times and threats made via letter both before the committals and after the murder (Inqu 5009).

1293. Six of the men known as the Bungendore Eleven gave evidence at the Inquest as to their whereabouts at the time of the murder (Inqu 5374–5421, 5421–5432, 5433–5458, 5583–5609, 6148–6174, 6208–6275).

1294. Two lawyers representing some of the defendants in the Bungendore Eleven committal gave evidence about their intention to call the deceased as a witness for the defence and of their intention to argue a defence of police authorisation (Inqu 5768–5799, 6131–6138).

1295. A local member of parliament gave evidence concerning his belief that police corruption was involved (Inqu 5493–5581, 5609–5680, 5799–5861). A civilian gave evidence suggesting that an officer was corrupt, but the civilian generally refused to answer questions.

'Also-Ran' Briefs

1296. Mr Ninness told the Inquiry that because the Inquest commenced while the police investigation was underway, the investigation of every allegation had to be prepared as a brief of evidence for the Coroner. He said that 'a number of these briefs were related to lines of enquiry which were fruitless, and were ultimately referred to as 'Also-Ran' briefs' (Ex 146, [59]).

1297. Also-Ran brief 20 concerned information provided by a prison informant that an Italian organised crime syndicate ordered the murder. The informant provided the name of the alleged assassin. Detective Peter Drennan gave evidence at the Inquest concerning the investigation of this information (Inqu 1004–1029). The named assassin was out of the country at the time of the murder. The Coroner found there was no truth in any of the information provided by the informant.[61]

1298. Also-Ran brief 32 concerned information provided by a different prison informant about a conversation in Italian he overheard about the murder, the name of the assassin and the location of the weapon. The only Italian in the informant's area of the prison was the alleged assassin named in Also-Ran brief 20. He was not the assassin named by this informant. Detective McQuillen investigated the information and formed the view that the informant was telling lies (Inqu 7411–7422). Based on other information received, Mr McQuillen believed the informant was unable to understand Italian. The Coroner referred to the police investigation which concluded that the informant provided information in his own interest to secure protection within the prison. The Coroner noted that the informant was unable to explain the discrepancies in the timing of the conversation said to have been overheard and was reporting a conversation which he could not have understood because it was in a language he could not speak. Further, there were no records of a person named by the informant as the assassin. In these circumstances the Coroner found the allegation to be unsubstantiated.[62]

Findings Made by the Coroner

1299. Submissions from Counsel Assisting (adopted by the Coroner) were that the evidence at the Inquest had shown:

- The deceased was undoubtedly involved in a police activity which was calculated to place him in a position of some danger;
- It was entirely probable that the deceased was perceived by persons involved in the marijuana plantations as their 'key to protection'; and

[61] Chief Magistrate and Coroner Ron Cahill, ACT Magistrates Court, *Findings of an Inquest into the Death of the Late Assistant Commissioner Colin Stanley Winchester at Canberra on 10 January 1989*, Volume III, (1991) 37–41.

[62] Ibid, 70-73.

- Mr Verducci was far from trustworthy and 'one would never know just how Verducci had represented Winchester to his colleagues, or whether he might have said anything to them which might have established, in the minds of those persons, a motive for the subsequent murder of Mr Winchester'.[63]

1300. The Coroner found that even though the evidence indicated the deceased ceased to be involved in the activities of Operation Seville in about August 1982, before Bungendore 2 commenced, it seemed reasonably clear that Mr Verducci had continued to tell members of the group that they had his protection.64 On this topic the Coroner said:

> The evidence before this Inquest made it tolerably clear that the Italian participants in the plantations generally believed, through Verducci, that they had the protection of Winchester in their Operations in return for a percentage of the crop and/or its Operations. In general, it seems pretty clear that these participants believed that Winchester was a corrupt policeman who was prepared to sanction their illegal activities.[65]

1301. As to Mr Verducci, the Coroner found:

> Mr Verducci was evasive, contradictory and seemed willing to say anything that would serve his purpose. He freely conceded that he was prepared to lie and had done so on many occasions. The mountain of documentary material reveals that Verducci on many occasions was quite contradictory in the information that he was providing. He conceded that should he feel that his life was in danger, he would have no hesitation whatsoever in committing perjury. In those circumstances, the value of any evidence given by a man such as this, would have to be severely diminished.[66]

1302. The Coroner concluded there was no evidence linking any of the organised crime members to the murder of Assistant Commissioner Winchester.

Victoria Police Review

1303. In February 1992 Commissioner McAulay approached the Victorian Police Commissioner and requested that Victoria Police review the investigation. Chief Inspector McKenzie was assigned the task. The Review team met with investigators involved in the Operation Seville segment. By that stage, the investigation was not ongoing.

1304. The Review team was 'extremely conscious of the need to locate 'hard evidence' in comparison to speculation, but was unable to identify any evidence linking any member of the 'Italian community' to the murder'. It was noted to be 'significant that an investigation of this magnitude failed to disclose any evidence' (Ex 243, Victorian Police Review, 60).

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63 Chief Magistrate and Coroner Ron Cahill, ACT Magistrates Court, *Findings of an Inquest into the Death of the Late Assistant Commissioner Colin Stanley Winchester at Canberra on 10 January 1989*, Volume II – Chapter 6 (1991) 18–19.

64 Ibid, 8.

65 Ibid, 5.

66 Ibid, 75.

Trial

1305. During the trial, references were made to MFI 23 and the possibility that the murder was committed by a professional hit man. The applicant's Counsel, Mr Williams QC, applied for a permanent stay of proceedings on the basis that the Inquest was 'flawed'; police investigations were 'inadequate'; the applicant could not receive a fair trial; and to 'require the accused to stand trial in these circumstances would constitute an abuse of process' (T 168).

1306. Mr Williams submitted there was a very strong case to be made that the deceased was murdered by organised crime. He contended that the prosecutor's decision not to lead any of the evidence which might raise a hypothesis consistent with innocence was an abuse of the court's process (T 172, 196). A proper investigation would have taken a genuine hard look at those other potential suspects, one of whom was allowed to leave the country (T 205).

1307. The application was refused (T 214). The trial Judge indicated he would later provide written reasons which would be the subject of a non-publication order.

1308. The prosecutor opened by submitting that the circumstances of the murder were such that it did not require the 'skills of a professional' and could have been committed by an 'amateur' (T 228). He put to the jury that there was no other possible explanation or hypothesis consistent with innocence, in particular the hypothesis that someone else may have committed the crime. The prosecutor invited the jury to dismiss any suggestion that the deceased was killed by elements of mafia or organised crime.

1309. On 1 August 1995 defence Counsel requested that cross-examination of Mr Ninness be deferred until after a ruling as to the use that could be made of MFI 23. On the same day Counsel for the AFP and the NCA applied for the return of MFI 23 from the applicant and asserted a claim of public interest immunity over the report.

1310. In the file of the applicant's solicitors, Colin Daley Quinn (CDQ), there is a file note dated 1 August 1995 (Ex 92 in Ex 8):

> Make it very hard to hand over material to us aim of obtaining stay - Essential material for our defence - then client can seek stay.
> We must make that as hard as possible – we don't want MFI 23. Wants WT out to BRC tonight – otherwise client will take it over himself tomorrow.

1311. On 2 August 1995 the applicant withdrew his instructions to his lawyers before the conclusion of the argument regarding the public interest immunity claim on MFI 23. A CDQ file note of that date records:

> Leave sought to withdraw. I am concerned as is counsel that client is manipulating the system. We haven't told client this, but we perceive it as a difficultly.

1312. Later that day the trial Judge upheld the public interest immunity claims over certain parts of MFI 23, but allowed the applicant to retain the unedited document to prepare

for cross-examination on the basis that any public interest immunity claims could be considered on an ad hoc basis as the case continued (T 3563).

1313. On 3 October 1995 defence Counsel attempted to call Mr McDonald, the author of MFI 23. Mr Terracini SC submitted there was 'a fairly serious effort to investigate whether there [sic] deceased was killed by some kind of gangster because of some association with either organised crime, marijuana selling, et cetera' (T 5721). However, the trial judge upheld the claim of public interest immunity made by the NCA and AFP and Mr McDonald was not called to give the evidence (T 5718–5721, 5763–5765).

1314. As to whether the murder could have been a 'professional hit', during cross-examination the AFP ballistic expert, Mr Prior, conceded that the thought of a professional picking his own cartridges up and dropping different cartridges near the body had crossed his mind on the night of 10 January 1989. He said it was a technique of assassins and hit men to do so (T 993–994). Mr Prior was also cross-examined by counsel for the applicant to establish that based on the projectiles recovered from the deceased, there was no evidence to say whether they were shot from a rifle or a pistol. The fragments were consistent with those from a Ruger .22 pistol and PMC.22 ammunition can be fired through a .22 pistol (T 990–992).

1315. The prosecutor sought to lead evidence of a video reconstruction of the murder before the jury to rebut the defence suggestion that the murder was committed by a professional assassination (T 2030). The application was refused (T 2033).

1316. Mr Richard Crum of the FBI was cross-examined about his involvement in other investigations. He gave evidence of cases where a brass catcher was used to prevent the cartridges being left at the scene of the crime (T 1590).

1317. Detective Paul Spooner was cross-examined to elicit evidence of his involvement in the investigation of persons with Italian backgrounds growing marijuana and their possible connection with the murder. He investigated two people from Adelaide, [redacted] and [redacted]. He was present when a search warrant was executed on [redacted] house. He also followed their movements in and out of Australia (T 3899–3900).

1318. Detective Scott Jenkins was cross-examined about this issue, but did not recall any inquiries concerning [redacted], the [redacted], Mr Verducci, [redacted] or [redacted]. He did not make inquiries in relation to the alleged involvement of criminals from overseas or from the Adelaide area. He did not know who was in charge of investigating allegations that Italian nationals or Italian Australians who grew marijuana were involved in the murder. He gave evidence that Mr Ninness and Mr McQuillen went to Italy, but was not aware of any specific internal police documents by senior police who were of the view that Italian nationals should be investigated (T 3809–3810).

1319. In his closing address, the applicant invited the jury to believe that silencers were something professional hit-men would use (T 6088). He submitted (T 6076):

> If you accept that I am innocent and that someone else was responsible then it is most likely that that someone else was professional and you would conclude that a professional outfit would be

> quite capable of inventing a ruse to throw the police off the investigative track and throwing a couple of cartridge cases on the ground would be one way of doing it.

1320. In closing, the prosecutor repeated the opening submission that the hypothesis that the deceased was killed by a professional assassin was 'preposterous' (T 6105). He submitted there was no credible evidence to support the use of a catcher for the two spent cartridges and referred to an impossible line of coincidences which needed to occur to falsely implicate the applicant. He contended that the use of super-sonic ammunition in a silenced rifle, and leaving cartridge cases behind, were signs of an amateur (T 6264–6265).

Appeal Against Conviction

1321. Ground 3 of the applicant's unsuccessful appeal against his conviction to the Full Court of the Supreme Court of the Australian Capital Territory was as follows:

> The trial Judge erred in ruling that MFI 23 and MFI 3A and 3B should not be adduced as evidence under s.130 *Evidence Act 1995* (Cth).[67]

1322. The Full Court noted that during the trial the applicant sought production of MFI 23 on the basis that the report would provide evidence supporting a reasonable hypothesis consistent with innocence. However, during submissions it was revealed that the applicant was in possession of an unedited version of MFI 23. He was also in possession of MFI 97 and MFI 130. His possession of the reports dated back to the Inquest. The Court observed that the applicant remained in possession of MFI 23 throughout the trial and that although material in the unprotected parts of the report could have been used by the applicant in cross-examination of police officers, no attempt was made to use them in this way. In the words of the Court:

> The appellant had every opportunity at trial to explore the substance of the matters reported in MFI 23 and to attempt to lay an evidentiary foundation for the hypothesis, but chose not to do so.[68]

1323. The Full Court determined that it was 'not correct to say, as the ground of appeal asserts, that the trial judge ruled that MFI 23 should not be adduced as evidence'. The Court noted that although the trial Judge gave a provisional ruling that protected parts of MFI 23 could not be used, the 'real substance of the report was available to the appellant for use' in court, for the legitimate conduct of his 'defence'.[69]

1324. The Full Court observed that the applicant's failure to make use of the unprotected parts of MFI 23, or to ask the trial judge to reconsider the provisional ruling regarding the protected parts, had to be considered in the context of the reports MFI 97 and MFI 130:

> When MFI 23 and MFI 97 are read together, they show, contrary to the theme of the defence case, that lines of inquiry unrelated to the appellant had been the subject of very extensive police

[67] *Eastman v R* (1997) 76 FCR 9, 61.
[68] Ibid, 68.
[69] Ibid, 65.

> investigation, and had failed to produce evidence suggesting that the murder had been committed by the people or organisation the subject of the investigation.[70]

1325. Ground 4 of the Appeal complained that the trial Judge erred in refusing leave to the appellant to reopen the defence case to call certain witnesses in relation to MFI 23, including Mr McDonald[71]. The Crown case closed on 30 August 1995 and the applicant renewed his instructions to his lawyers on 31 August. The applicant gave evidence between 5 and 25 September. Upon completion of his evidence the applicant withdrew instructions to his lawyers, closed the defence case and said he would not address the jury. When the trial resumed on 3 October, Counsel appeared for the applicant and sought to reopen the defence case and call witnesses, including Mr McDonald. The application was opposed and leave in relation to Mr McDonald was refused. The trial Judge ruled that the information in the report was 'hearsay upon hearsay, and even more remote sources of information'. His Honour was of the view that the information did not possess probative value in relation to laying a basis for the alternative hypothesis.[72]

1326. The Full Court determined that the ruling of the trial judge was correct:

> Moreover, as we have already observed, when MFI 23 is considered with the later report MFI 97, the information contained in it fails to disclose evidence suggesting that the murder had been committed by a person or organisation the subject of that investigation.[73]

The Applicant's Alternative Hypothesis

1327. The applicant's submissions are found in annexure 7 paragraphs 149–187. Based on the papers, in summary, the applicant advanced the following propositions:

- The deceased supervised AFP contact with Mr Verducci from 1980 to 1982. He played the dangerous role of a supposedly corrupt police officer and a paid protector of members of the 'Ndrangheta.

- After being arrested in relation to the third plantation near Guyra, Mr Verducci spent six months in custody and agreed to cooperate with the NCA. In March 1988 the NCA belatedly charged 11 men with cannabis offences arising out of the plantations. They were connected by their involvement with Mr Verducci in the cultivation of cannabis. Mr Verducci was given immunity from prosecution and was an essential witness.

- By late 1988 it would have been obvious to those charged that they had not been protected by the deceased. MFI 23 and MFI 130 support the strong inference that the deceased's deception had dishonoured the 'Ndrangheta members and this provided a powerful motive to exact revenge. It was irrelevant that the deceased was unlikely to be a witness. His murder was not to silence him as an important witness, but rather to make an example of him and to assert the power and

[70] Ibid, 66.
[71] Ibid, 71.
[72] Ibid, 72.
[73] Ibid.

authority of the organisation itself. It also provided Mr Verducci with the excuse he needed not to give evidence for the prosecution. The prosecution against the 11 men collapsed.

- The crime group had in mind the killing of the deceased. An informer recounted to police his conversations with Mr Verducci in November 1988 (set out in MFI 23) during which Mr Verducci stated that the 'traitor was for the bullet' and he had to go to Adelaide. This was incorrectly dismissed by the trial Judge as inadmissible hearsay. If Mr Verducci was a co-conspirator then the statements to the informer were not hearsay. The applicant was not represented at the time that issue arose.

- The recorded conversation between Mr Verducci and another on 2 June 1989 records Mr Verducci talking about 'the shepherd who killed Winchester' and saying 'There are two of them. Do you want to know the two of them.' The related information concerning the two 'shepherds', [redacted] and [redacted], is in MFI 23. Although MFI 97 says the translation of part of the covertly recorded conversation involving [redacted] was mistaken, it still reveals that he was discussing the police and later conversations implicated [redacted] in a plan to murder a number of Italian speaking interpreters who were assisting the AFP with their translation services. [redacted] talked about the fact that 'they had caught him – but he's a mad one, inside, and makes our things better'. The plans to execute interpreters working for the AFP is consistent with a philosophy of seeking to silence through intimidation those who might be working against the 'Ndrangheta.

- There was evidence at the Inquest that Mr Verducci knew where the deceased lived.

- Information from Mr Grieve, the resident who lived approximately six or seven houses away from the deceased's house, about hearing a V8 engine start and speed off immediately after hearing two gunshots was more consistent with a V8 in the possession of a local 'Ndrangheta member [redacted], and driven by [redacted], early the following morning to the workshop of Mr [redacted] than with the sound of the applicant's Mazda 626.[74]

- During a covertly recorded conversation between an informer and Mr Verducci in April 1989, Mr Verducci told the informer to 'shut up' otherwise they would both be killed. He stated that 'somebody in Brisbane was talking'. [redacted] had been speaking to the NCA in Brisbane. He was shot, but not killed, on 21 April 1989. He later told the NCA that his two brothers were involved in the murder of Mr Winchester and that his son [redacted] had dealings with an Italian hit-man.

[74] A flat bed V8 Holden utility was stopped at a police road-block in the early hours of 11 January 1989. The driver was [redacted]. A blue Ford Sedan was also stopped at the road-block. The Ford being driven by [redacted].

1328. The applicant's case with respect to the alternative hypothesis suffers from a number of defects. First, although the documentary material and evidence given at the Inquest and trial established that members of the organised crime group possessed a motive to kill the deceased, the Coroner was correct in concluding that there was no evidence linking any of the members of the group to the murder of the deceased. The assertion in Paragraph 13 that the totality of material 'raises cogent evidence of a conspiracy to murder Colin Winchester by a number of those directly linked to AFP Operation Seville' is not supported by that material.

1329. The AFP conducted an extensive investigation into the possibility that members of the organised crime group committed the murder. Much of the information gathered was, necessarily in the circumstances, obtained in a hearsay form and, even in that form, fell short of evidence linking any particular person to the murder. Similarly, it fell short of establishing the existence of a conspiracy to murder the deceased. Although the investigation may not have been perfect because, for example, investigators might have failed to check the alibi of a crime group member by examining telephone records relevant to that alibi, nevertheless it was an extensive investigation which failed to produce positive results.[75]

1330. Secondly, in addition to the lack of evidence, it should not be overlooked that the entirety of the material was available to the applicant and his Counsel before and during the trial. The CDQ file demonstrates that MFI 23 was considered by the applicant and his Counsel during the trial. That file contains notes concerning the use of a private investigator to attempt to locate Mr Verducci and referring to discussions with a person possessing expert knowledge about Italian organised crime. Further, as discussed, the issue was live at the trial and the defence chose not to use the unprotected parts of MFI 23 as a basis for cross-examination for the purpose of establishing that the alternative hypothesis was a reasonable possibility.

1331. Notwithstanding these defects, the material relied upon by applicant establishes or tends to establish the following facts:

- Members of a criminal group involved in illegal drug activities paid money for protection and believed that the deceased received the funds.
- A number of those members were charged with drug offences and believed that the deceased had not honoured his commitment.
- Arising out of these circumstances, members of the crime group possessed a strong motive to kill the deceased.
- Members of the crime group had access to weapons (Buffington).
- Prior to the murder, members of the crime group had in mind the killing of the deceased.

[75] Identifying deficiencies with confidence is particularly difficult because reliance would have to be placed on the absence of records in circumstances where the continuity of relevant records is unknown.

- Immediately after the deceased was shot, a vehicle that sounded like a V8 started up and drove away (Grieve).

- At about 6 am on the morning after the murder, two members of the crime group were out and about. One of them was driving a V8.

- The alibi of one of the members was not properly investigated.

- After the murder statements were made by members of the crime group to the effect that one or more members were involved in the murder.

1332. In referring to 'evidence tending to establish' facts, I have in mind both the hearsay nature of much of the 'evidence' and Mr Verducci's lack of credibility. The issue of Mr Verducci's lack of credibility is canvassed in detail in paragraphs 172–177 of the DPP submissions (annexure 9). As the citation from the Coroner's findings amply demonstrates (annexure 9 [177]), the Coroner was singularly unimpressed with Mr Verducci's evidence.

1333. If the 'evidence' relating to Paragraphs 12 and 13 is considered in isolation from evidence given at the private hearings, suspicion that members of the crime group might have been involved in the murder is raised, but such suspicion falls well short of a reasonable hypothesis. It is 'evidence' which could have been explored at trial.

1334. For these reasons, while the circumstances, in combination, create the suspicion, and would have provided useful material for an address to the jury, they do not support the existence of a doubt or question as to the applicant's guilt.

1335. In my opinion, in the absence of evidence given at the private hearings, this conclusion is inevitable, even if the material relating to Paragraph 13 is considered in conjunction with the information gathered pursuant to Paragraph 12.

Fresh Evidence – Confidential Section of Report

1336. In relation to Paragraph 13 the Inquiry gathered fresh evidence concerning a member of the organised crime group. The fresh evidence was received in two private hearings which were not open to the public and from which all persons were excluded other than Senior Counsel assisting the Inquiry and my associate. Transcription personnel were present during the first hearing, but no transcript was taken of the second hearing. The transcript from the first hearing is subject to a confidentiality order and has not been made available to any person.

1337. Accompanying this Report is a confidential section which explains my reasons for proceeding in this manner and deals with the fresh evidence. If this evidence had been available at the time of the trial, for the reasons discussed in the confidential section, it would have been of significant assistance to the defence in endeavouring to advance the alternative hypothesis concerning the identity of the offender. The consequences of

this evidence in terms of the Inquiry under Paragraph 13 are discussed in the final section of this Report.

PARAGRAPH 14

1338. Paragraph 14

> The evidence given at the trial of the applicant of a threat made by the applicant to Dr Dennis Roantree on 6 January 1989 was inconsistent with a taped interview with Dr Roantree made on 13 January 1989 and transcribed as inquest document MFI 6. That transcript was suppressed by the Coroner on the application of the Australia Federal Police on 2 September 1993. Dr Roantree's evidence at the applicant's trial given at a time when the applicant was not legally represented is inconsistent with the previously suppressed document. The conversation between Dr Roantree and the applicant when the alleged threat was said to have been made was in the presence of Dr Roantree's unnamed teenage daughter. A statement from her was never obtained or, if a statement was obtained, it was not provided to the defence. A note of the conversation, claimed to be a contemporaneous note was made approximately ten days after Dr Roantree's initial conversation with the police on 13 January 1989 and is inconsistent with that initial account.

1339. The 'matter' to which Paragraph 14 is directed is a doubt or question as to guilt by reason of inconsistencies in the statements and evidence given by Dr Dennis Roantree, coupled with the failure to obtain a statement from Dr Roantree's daughter. The evidence of Dr Roantree was significant because he described a consultation with the applicant on 6 January 1989, a week before the murder of the deceased, during which the applicant said 'I should shoot the bastard'.

1340. In evidence before the jury the applicant denied that he used words to Dr Roantree like 'I'll kill the bastard' or that he told Dr Roantree that he felt like pushing the deceased off his chair (T 4891, 5398).

1341. At trial Dr Roantree said his present memory of the consultation 'would be fairly vague' and he was granted permission to refer to notes which he said were made about a week after the consultation at a time when the facts were 'reasonably fresh in his memory' (T 2048).

1342. At trial Dr Roantree said he spoke with the applicant about the issue of job reinstatement and the applicant expressed hope that something would come up in the near future. The applicant said he was worried about a pending assault charge and that he had been to see the Police Commissioner with a political figure, but had not received any help. Dr Roantree described the conversation from that point in the following terms (T 2049 and T 2050):

> A In fact he said he'd been thrown out or virtually thrown out of the office, that was his interpretation of what had happened and his last statement was that he felt like getting up and pushing the commissioner off his chair.
>
> Now, I was washing my hands at the time and I made the comment, 'you can't do things like that. You can't push Police Commissioners off their chair'. And when I returned to my desk I felt there was very extreme anger towards that comment. He said that he wasn't listened to at all and he was furious. I then deflected any ongoing business there and turned to his current condition and we discussed his symptoms at the time. I examined him and I dealt with the medical side of things. And then I began to write some referrals and as I was

writing referrals he – he felt – he said that he felt that he- his condition maybe deteriorating. And I stated that from my observations over the last 10 years I felt that his condition was improving. Then he made the comment that the police should be taught a lesson. Every time something happens he feels – felt that he was suspected and every time he reports – reported anything he got the blame. You then talked to him about what I had written referrals for and finished the consultation and – and that was the end of the consultation [my emphasis].

Q Now, as he left, did he say anything?

A Well I believe that he said, 'I should shoot the bastard'.

Q Now, dealing with that, I think you had that in your note but you crossed it out?

A Yes I did.

Q Why did you cross it out of your note, doctor?

A I believed – my recollection of the events is that I had spoken to the police before I wrote that note.

Q Yes?

A And I'd told them that I thought that I recalled that but I wasn't – It told them I wasn't prepared to swear to that so I took it off my note as well.

Q Why did you tell them that you weren't prepared to swear to it?

A Well, I wasn't particularly happy about having to give – feeling obliged to give evidence about a patient and I didn't want the police to feel that my evidence was too important to them. I wanted them – all I wanted to do was suggest to them that perhaps they should look at this particular person but – but I didn't want to give evidence enough to – to make me the main witness.

Q Right. Now, the conversation that you refer to was a conversation with – I think with Mr Ninness on the 13 January, is that right?

A That's correct.

Q In which you expressed to the police reservations about your recollection of that event for the reasons you've given.

A That's right.

Q The crucial thing however is whatever reason you had for that, what is the state – what was your state of recollection as to the use of those words?

A I believe now that – that had I not recalled that accurately I wouldn't have mentioned it.

1343. Unfortunately, at the time that Dr Roantree gave evidence the applicant was unrepresented. He declined to cross-examine stating that his previous comments applied. When Counsel for the Prosecution pointed out that Dr Roantree was travelling overseas for approximately six weeks from the following Monday, a discussion followed during which the applicant repeated his position that he was without representation through no fault of his own because the trial Judge had refused to make an order that police not 'bug' his conversations with his legal representatives. The applicant referred to bugging during the committal proceedings when police had listened to his conferences with his lawyer. Consistent with his previous ruling, the trial Judge refused to make an order and the trial proceeded. Subsequent applications by Counsel to have Dr Roantree recalled were refused (T 3409, T 4648).

1344. The failure to cross-examine Dr Roantree was significant because the development of the evidence given by Dr Roantree contained features that competent cross-

examination would have disclosed. They were features that should have been known by the jury and would have provided Counsel for the applicant with good grounds for urging that the jury should have a doubt about whether the words 'I should shoot the bastard' were spoken or, if they were, for submitting that they were just a 'passing quip'. It is appropriate, therefore, to briefly canvas the background and development of Dr Roantree's evidence.

1345. Dr Roantree was the applicant's general practitioner for a number of years. There was no dispute at trial that the applicant saw Dr Roantree on 6 January 1989. Following the consultation, Dr Roantree contacted the police because he was concerned about statements made by the applicant. On 13 January 1989 Mr Ninness interviewed Dr Roantree. During the interview Dr Roantree spoke about statements made by the applicant concerning a charge of assault and an interview with a 'high-ranking police officer' in the presence of a 'politician'. It was common ground that the applicant was referring to his meeting with the deceased.

1346. The interview with Dr Roantree on 13 January 1989 was recorded and a transcript is annexed to the affidavit of Mr Jackson (Ex 39). Dr Roantree said the applicant told him he had been 'brushed off' by the Commissioner and 'felt like pushing the Commissioner off his chair'. After explaining to Mr Ninness that he did not take the statement by the applicant seriously and changing the subject, the interview proceeded as follows:

> Roantree: ... but he came back onto the subject, I think as he was leaving the office in the waiting room. Something to the effect that the police should be taught a lesson.
>
> Ninness: He said this to you?
>
> Roantree: Well yes to me. Yes.
>
> Ninness: Yes.
>
> Roantree: and, I'm not sure, I can't swear to it, but I think he said 'I should shoot the bastard'. But I can't be sure...
>
> Ninness: Did he make any other comments about shooting?
>
> Roantree: No that was it. It was just a passing quip as he went out the door, if he said it at all, I'm almost certain he said it, but it was a quip as he went out the door.
>
> Ninness: Was anyone else present at the time?
>
> Roantree: Yeah, my daughter.
>
> Ninness: How old is your daughter?
>
> Roantree: 14

1347. Mr Ninness directed Mr Jackson to take a formal statement from Dr Roantree. Mr Jackson had a vague memory of attending at the surgery. As a matter of standard practice Mr Jackson would have informed himself of the circumstances and information received from Dr Roantree. Mr Jackson did not have a transcript of interview of 13 January 1989, but he said he would have read a database entry made by Mr Ninness. The relevant part of that entry was as follows (annexure 1 to the affidavit of Mr Jackson, Ex 39):

> Dr Roantree contacted Supt Ninness and expressed concern over one of his patients Mr David Eastman. The Dr was interviewed and he stated that on 6/1/89 Eastman had attended his surgery as he was being treated for mental disorders for the past ten years… During the consultation

> reference was being made to A/C Winchester and an interview he had with him and a member of parliament who was not named. The interview was for the purpose of putting a stop to a prosecution of Assault. The case was set down for 12/1/89. Eastman said that he felt like pushing the Commissioner off his chair because of his attitude. Eastman then became very agitated before leaving the surgery and said 'they should be taught a lesson. I should shoot the bastard'. (my emphasis)

1348. Mr Jackson agreed that he would have read the data entry carefully and the words 'I should shoot the bastard' were potentially very important in the context of the investigation into the murder of the deceased. It was Mr Jackson's practice to ask questions and write a statement in narrative form from the answers. He was unable to recall any of the conversation, but agreed it would be a 'fair assumption' that he would have asked about the words 'I should shoot the bastard'. If Dr Roantree had not been comfortable about including any topic in the statement, Mr Jackson would not have included it.

1349. As to the question of any record of the conversation made by Dr Roantree, Mr Jackson said that if he had become aware that Dr Roantree had a note of the words 'I should shoot the bastard', he would have taken possession of the note or a photocopy of it. He would have included a reference in the statement to the making of the note and probably would have annexed it to the typewritten statement that was later prepared from his handwritten notes. He agreed it was a fair assumption that as there is no mention of a note in the statement, it was not produced to him and he was not aware of it at the time of taking the statement.

1350. Mr Jackson prepared a typewritten statement from his handwritten notes which was signed by Dr Roantree on 16 January 1989 (annexujre 3 to the affidavit of Mr Jackson, Ex 39). The statement included the words 'he was making me so angry I should have pushed him off his chair' and, as to the words at the end of the consultation, the typewritten statement was in the following terms:

> At one point he said to me words to the effect of 'the police should have been taught a lesson'. I am pretty certain that this comment had been made towards the end of the conversation, as he was leaving the office maybe.

1351. The words 'I should shoot the bastard' do not appear in the typewritten statement of 16 January 1989.

1352. Not surprisingly, Dr Roantree's memory has fluctuated as to when he made the notes. In evidence at the first Inquest on 6 September 1989 Dr Roantree said he made the notes after signing the statement of 16 January 1989. He said he decided he should write it down to get clear in his own mind exactly what happened (Inqu 721). In 1995 during his evidence at the trial, Dr Roantree said he made the notes about a week after the consultation.

1353. The handwritten notes by Dr Roantree and his typewritten translation of the notes are exhibit 82. The notes include reference to the applicant stating that he was 'very worried' about the assault charge and that he went to see the Police Commissioner with a Liberal politician. The notes continue:

In fact he virtually threw me out. I got so angry I felt like getting up and pushing him off his chair.

1354. The notes record that the applicant said the Commissioner would not listen to him and he was 'furious'. After discussion about symptoms, the notes record that while Dr Roantree was writing out referral forms, the following conversation occurred:

DE: I am concerned that my paranoia may be getting worse.

DCR: Well from my point of view David, you seem to be a lot better now than ten years ago.

DE: Sometimes I feel as though I am becoming worse. (pause) Police should be taught a lesson. Every time something happens I am suspected. Every time I report anything I get the blame.

DCR: I referred you to Mr Profit for Orthotics, pathologist for …blood liquids. You should go in one morning having had no breakfast.

DE: (getting up and opening the door) I should shoot the bastard.

1355. The line 'DE: (getting up and opening the door) I should shoot the bastard' was crossed out by Dr Roantree. At the Inquest he said he put a line through that passage because, although fairly certain the words were spoken, he was not prepared to swear on it (Inqu 721).

1356. Dr Roantree's recollection as to when he made the notes is now different. In an affidavit of 13 May 2013 (Ex 78) he said he believed the notes were written during the period after initially contacting the police when he tried to piece together details of the events that were separate from the clinical recordings. As to why the words 'I should shoot the bastard' were not included in the statement of 16 January 1989, in his affidavit Dr Roantree said:

> I can only surmise that over the three days I developed doubt over my recall of the comment about a shooting and, because I could not be totally sure, I felt more comfortable excluding it from my statement of January 16.

1357. Dr Roantree's reference in his affidavit to developing a doubt over the 'three days' was based upon his recollection in May 2013 that he made the notes before speaking to police. This was also his recollection when he gave evidence to the Inquiry on 23 January 2014.

1358. As to the absence of the words 'I should shoot the bastard' in his statement of 16 January 1989, in evidence to the Inquiry Dr Roantree said this was a deliberate omission because although he thought he had heard the words, he was not absolutely certain.

1359. The doubt in Dr Roantree's mind concerning the words 'I should shoot the bastard', was also a topic discussed during a conference on 21 September 1994 with Mr Adams and Ms Woodward.[76] Notes of the conference made by Ms Woodward are Exhibit 81 and the notes record that Dr Roantree was 'sure' that the applicant said 'the police ought to be taught a lesson'. However, the notes record the following:

[76] Neither Mr Adams nor Ms Woodward were asked about Mr Adams being at the conference, but Ms Woodward's notes refer to Mr Adams speaking to Dr Roantree about opinion evidence.

Dr Roantree had a niggling doubt about whether Eastman said 'I should shoot the bastard', but he said if the words were said there was no qualifier.

1360. In addition to the issue of doubt about the words, the complexion to be placed upon the 'threat' was important. In his first statement on 13 January 1989, three days after the consultation, Dr Roantree described the words as 'a quip' as the applicant went out the door. In evidence at the Inquest Dr Roantree said part of his problem in recalling whether the words were spoken was because it was a passing remark as the applicant was leaving and Dr Roantree did not take particular notice of it (Inqu 729).

1361. This summary of the circumstances relevant to the evidence of Dr Roantree is sufficient to demonstrate that there were significant issues which should have been explored in the presence of the jury. In summary those issues were:

- When Dr Roantree made his notes.
- Dr Roantree's uncertainty as early as 13 January 1989 when he told Mr Ninness that he was not sure and could not swear to it, but he thought the applicant said 'I should shoot the bastard'.
- The absence of reference to shooting the bastard in Dr Roantree's typewritten statement dated 16 January 1989.
- Dr Roantree deleting reference to that passage from his notes.
- The statement by Dr Roantree on 13 January 1989 that the statement 'I should shoot the bastard' was 'just a passing quip' as the applicant went out the door.
- If it had been disclosed, the statement by Dr Roantree on 21 September 1994 to Mr Adams and Ms Woodward that he had a 'niggling doubt' about whether the applicant uttered those words.

1362. Added to those matters is the probability that if Dr Roantree had been cross-examined in a competent manner, he would have given the evidence he gave to the Inquiry that the omission of the words from his statement of 16 January 1989 was a deliberate omission because he was not absolutely certain and, if the words were uttered, it was as a passing quip well after the applicant had settled down from his earlier outburst.

1363. A combination of these matters had the potential to create uncertainty as to whether the words were uttered. Even if the words were uttered, competent cross-examination could have presented quite a different complexion. Rather than the prosecution case of an angry man making a threat to kill,[77] it was a passing quip made by a person who had been extremely angry, but had calmed down and made the 'passing quip' as he left the doctor's consulting room.

[77] In sentencing the trial Judge said that as the applicant was leaving he 'exclaimed ... I should shoot the bastard' (T 6680).

1364. In the context of Dr Roantree's lack of certainty that the applicant said 'I should shoot the bastard', the fact that on 21 September 1994 Dr Roantree told Mr Adams and Ms Woodward that he had a 'niggling doubt' was not disclosed to the defence. However, as Mr Adams pointed out, Dr Roantree's uncertainty in this regard was self-evident and Dr Roantree had used the words 'niggling doubt' in evidence at the Inquest. Bearing in mind that evidence, and the fact that the defence had been provided with Dr Roantree's statements of 13 and 16 January 1989, the statement to Mr Adams and Ms Woodward added nothing to the information already known to the applicant. However, as I have said, none of this was known to the jury.

1365. The AFP submitted that Dr Roantree's reluctance to swear to the threatening words because he did not want to give evidence or be the main witness is an important fact that 'sets the scene against which later statements and evidence by Dr Roantree have to be judged' (AFP final submission, annexure 6 [213]). Further, the AFP suggested that Dr Roantree's statement that the words were just a 'passing quip' is a 'further indication that he was trying to convince the police that they should not regard him as the main witness' (annexure 6 [214]). The implication in these submissions is that no reliance can be placed upon Dr Roantree's professed doubt as to whether the words were said or his statement that the words were just a 'passing quip'. Dr Roantree gave evidence at the Inquest that the words were a 'passing quip' (Inqu 726–727) and, in this Inquiry, confirmed both his statement of 13 January 1989 and his evidence at the Inquest (Inq 1571).

1366. Dr Roantree's concern that he not be regarded as the main witness was the subject of evidence to the jury (T 2049–2050). It would not have detracted from the capacity of a competent cross-examiner to extract the existence of doubt about the words and to change the complexion by eliciting the description that the words were just a 'passing quip'. No doubt various issues would have been argued before the jury, but the defence would have been in a much improved position from the position at trial.

1367. Paragraph 14 also raises the issue of failure to take a statement from Dr Roantree's daughter who was in the surgery at the time of the consultation on 6 January 1989. A police data entry in September 1989 records that Dr Roantree's daughter was 'spoken to' and that she had 'no recollection of the visit'. The entry also records that no statement was 'forthcoming'. The officer who is recorded as having made the entry, Ms Belinda Lawson, said in her affidavit of 20 May 2013 (Ex 83) that she had no memory of making the data entry or of speaking to Ms Roantree.

1368. Ms Roantree said in evidence to the Inquiry that she recalled the applicant attending for a consultation and heard his raised voice from the room in which the consultation was occurring. However she was not able to hear the content and had no memory of the words 'I should shoot the bastard' (Inq 1033). Ms Roantree said she told her father she did not hear what was said.

1369. The failure to obtain a statement from Ms Roantree and to call her to give evidence was not regarded by Counsel for the accused as of any significance. It was plain from Dr Roantree's evidence that his daughter was present in the surgery at the time of the

consultation on 6 January 1989, but no application was made for a statement to be obtained or for her to be called for cross-examination.

1370. If a statement had been taken from Ms Roantree, or she had given evidence, presumably she would have told the jury that she did not hear the words which Dr Roantree said were uttered as the applicant left the room. She would also have said that the applicant was not angry at that time. In this way her evidence would have provided a degree of support for the view of Dr Roantree that the statement was only a 'passing quip' as the applicant left the consultation room. However, as the defence did not request that a statement be taken from Ms Roantree, and as the evidence of Dr Roantree that it was a 'passing quip' would not have been under challenge, there is no basis for a conclusion that the failure to take a statement from Ms Roantree or to call her gives rise to a doubt or question as to guilt.

1371. Although no reference is made in Paragraph 14 to contact between Dr Milton and Dr Roantree, during the evidence it emerged that Dr Milton had a memory of being invited by Mr Ninness to speak to Dr Roantree and of meeting with Dr Roantree. Dr Milton said Dr Roantree was very concerned about his ethical position and Dr Milton gave him support. Dr Roantree had no recollection of speaking with Dr Milton.

1372. It was apparent that Counsel for the applicant was exploring the possibility that through Dr Milton, the police were endeavouring to influence Dr Roantree. However, it is clear that Dr Roantree had already spoken with police and there is no basis for a conclusion that any attempt was made to improperly influence Dr Roantree. Encouragement to cooperate with the police is not, in itself, improper conduct by police or Dr Milton. Further, I accept Dr Milton's evidence as to his motivation for contacting Dr Roantree. Nothing relevant to the Inquiry arises from the conduct of Dr Milton or the police in this regard.

Conclusion

1373. As I have said, in my opinion no question or doubt as to guilt arises from either the absence of Dr Roantree's daughter from the trial or the contact between Dr Milton and Dr Roantree. However, a more difficult question exists with respect to the evidence of Dr Roantree and the failure to cross-examine him.

1374. The failure to disclose to the defence that on 21 September 1994 Dr Roantree said he had a 'niggling doubt' about whether the applicant uttered the words 'I should shoot the bastard' is not, in the circumstances, significant. It was obvious that Dr Roantree possessed a doubt. The difficult question arises out of the failure to cross-examine Dr Roantree on the basis of information known to the defence. In my opinion, a significant piece of circumstantial evidence in the prosecution case, namely, an angry threat to kill the deceased shortly before the murder, could have been removed by competent cross-examination.

1375. If an appeal against the conviction was based upon the circumstances with which I am concerned, the Court of Appeal would be strongly-minded to find that the applicant made a deliberate forensic choice not to cross-examine. The applicant was

unrepresented at the relevant time and, at a superficial level, it is true that he made a choice not to cross-examine. He might well have chosen that course in an endeavour to manipulate the trial process, but it was the decision of a person suffering from a Paranoid Personality Disorder who, as a consequence of past police behaviour and his mental state, was obsessed with his belief and fear that his confidential conversations with his legal advisers were being recorded. In turn, the applicant used these circumstances to justify sacking his legal team and declining to cross-examine. In a practical sense, it was a 'vicious circle' and, as I have said, it might well be that the applicant was endeavouring to derail the trial. He showed poor judgment and did not act in his own best interests, but there was an underlying cause for his conduct found in the combination of previous police behaviour toward the applicant and his Paranoid Personality Disorder.

1376. If Paragraph 14 stood alone, notwithstanding the significance of the evidence of Dr Roantree in the way it was presented to the jury, it could not be said that the circumstances raised by Paragraph 14 give rise to a doubt or question as to guilt. Other evidence produced a compelling case that the applicant harboured a deep hatred of police generally and was furious with the deceased. He made a threat to kill the deceased while talking with his former solicitor in December 1988. If the balance of the prosecution case was left untouched, there remained a strong prosecution case and it would be said that the applicant made a choice not to cross-examine. In such circumstances the likely conclusion of an appeal court would be that no miscarriage of justice had occurred. However, the issues raised by Paragraph 14 do not stand alone and it will be necessary to consider their impact on the question of miscarriage of justice in accordance with Paragraphs 18 and 19 of the Order.

PARAGRAPH 15

1377. Paragraph 15

> Evidence was not led at the applicant's trial of the circumstances of the first corroborated meeting between the applicant and the crucial identification by Raymond Webb. The statements of persons with Webb at the time of that meeting support the argument that Webb's later evidence was recent invention.

1378. The 'matter' to which Paragraph 15 is directed is a doubt or question as to guilt in relation to the evidence of Mr Raymond Webb who gave significant evidence in the trial. In particular, the doubt or question to be investigated pursuant to Paragraph 15 concerned evidence not led at the trial of an occasion in 1992 when Mr Webb saw the applicant and the impact of that evidence on Mr Webb's credibility.

1379. The evidence of Mr Webb related to the purchase of the murder weapon. Mr Klarenbeek was a dealer in weapons and it was accepted at the trial and on appeals that the murder weapon was a Ruger rifle sold by Mr Klarenbeek. He had advertised weapons for sale in the Canberra Times on 31 December 1988. Mr Klarenbeek died before the trial, but his statement was admitted to the effect that following the advertisement he sold the Ruger rifle to a male person. Importantly, in evidence at the trial Mr Webb identified the applicant as a person he saw at the premises of Mr Klarenbeek on 31 December 1988. In combination with other evidence, Mr Webb's

identification of the applicant provided a significant connection between the applicant and the source of the murder weapon only a week before the murder and about the time that the murder weapon was sold. Mr Webb was the only witness who purported to identify the applicant as a person who attended at Mr Klarenbeek's premises.

1380. At trial, inconsistencies between the versions given by Mr Webb were explored and were the subject of a direction by a trial Judge (T 6577). Although those inconsistencies are relevant to the Inquiry and Mr Webb's credibility, and they are discussed later in this Report, Paragraph 15 directs an Inquiry as to a doubt or question as to guilt due to the absence at trial of evidence concerning an occasion in 1992 when Mr Webb saw the applicant at the Yarralumla Nursery. Two witnesses were present on that occasion, Mr Leslie Croft and Mr John Mooney.

1381. In 1992 Mr Croft worked with Telecom. He took an interest in the murder of the deceased because he knew the deceased's brother and had been introduced to the deceased on one occasion.

1382. On a Sunday in May 1992, Mr Croft was the supervisor of a group of Telecom workers who were replacing cable in the vicinity of the Yarralumla Nursery. Included in the group was Mr Mooney and they had been joined by Mr Webb shortly before they were approached by a person later identified as the applicant. In an interview with police on 13 November 1992 (annexure 1 to Mr Croft's affidavit, Ex 68), Mr Croft said that the group was standing at the back gate of the nursery discussing the job and thinking about leaving. His description of the contact with the applicant were as follows:

> A A gentleman approached us and I believe he asked a question which related to something like had we seen some backpackers walking around here. And, we said no not, or I didn't actually say it but I believe ah the other gentleman John Mooney or Ray Webb had said no, we had not seen any particular group of backpackers.
>
> Q So when this person's come up and asked you this question there was, the three of you there.
>
> A Only the three of us I believe.
>
> Q And who were they again?
>
> A John Mooney and Ray Webb.
>
> Q And yourself?
>
> A And myself.
>
> …
>
> Q And so this person has approached you and asked you some questions?
>
> A Yes.
>
> Q What happened then?
>
> A Um, as we'd said ah, no we didn't actually see any particular group of people that he had described. He then walked through the back gate of the Yarralumla Nursery that was opened and he headed up through the, through the nursery which was open to the general public. Ah I suppose as he'd gone out of earshot Ray Webb said something to us which, I cannot recall the exact words but he said, maybe something along the line of, that was Eastman, or that's Eastman or that's David Eastman, or do you know who that was that's Eastman, or something like that.

Q Who did, this was.

A Ray Webb.

Q Ray Webb, who did you say that to again.

A He said that to John Mooney and myself. You know. He more or less ah, asked us the question you know do you know who that was or that was Eastman, or something along the line of that but ah I cannot recall the exact words but the conversation that Ray Webb you know, indicated to us that, he knew who that gentleman was who was just.

Q Did he say why he knew who that gentleman was?

A He didn't say why. Ah, we, all knew, the three of us knew, after Ray had said you know that's Eastman or indicated that was Eastman, that ah we knew the um, we knew what David Eastman or whatever it I, say his name as, we knew what he was connected with and, that was the investigation into ah, ah the Commissioner's murder a couple of years previous.

…

Q Did you have any, further conversations about this person.

A Not at that time no…

1383. During the interview Mr Croft gave a brief description of the man he had seen, but said that his description had come from 'general discussions' with Mr Webb and Mr Mooney during the morning of the interview. He said he could not describe the man from that day and was unable to identify the applicant from a group of photographs. As far as Mr Croft was concerned, nothing in the approach by the applicant was out of the ordinary and he did not take any notice of it until after the man had moved away and Mr Webb identified him as the applicant.

1384. In his affidavit of 25 July 2013 (Ex 68), Mr Croft said his recollection of the incident accorded with his interview of 13 November 1992.

1385. Mr Mooney was also interviewed on 13 November 1992. In an affidavit of 17 July 2013 Mr Mooney said the content of the interview accurately reflects the events at the nursery and that since the interview he recalled that the person involved 'seemed to be hanging around most of the time that we were there' (annexure 1 to Mr Mooney's affidavit, Ex 65). In his affidavit Mr Mooney said Mr Webb was the supervisor of the work team.

1386. In the interview of 13 November 1992, Mr Mooney said he was working with Mr Webb and Mr Croft. He recalled seeing the male person walking along the fence at the back of the nursery about 15 or 20 minutes before the male person spoke to the group. The person was carrying a backpack and appeared to be looking for someone or something. Asked to describe the incident, Mr Mooney said:

A Well we were working ah, down in Yarralumla basin, near, at the back of Yarralumla Nursery and a man approached us and er, asked us if we'd seen any other backpackers in the area er, one of the blokes that were around us, he, said 'no'. Anyway he stood there for a couple of seconds and then he just walked away and er, one of the blokes said to us that er 'do you know who that was?' and we said 'no' and he said 'well er, that was David Eastman and we just sort of, didn't sort of say much more about that.'

1387. Later in the interview Mr Mooney repeated that the man had asked if they had seen any backpackers and they had replied 'no'. He said there was nothing unusual in the attitude or demeanour of the person. Asked what happened after they had spoken to the male person, Mr Mooney replied:

> A He just ah, stood there for a second and walked away, and then ah, Ray said to me and Les, he said 'do you know who that bloke was?' And we said 'no'. Ah, he said 'that's David Eastman' and Les and I sort of looked at each other and said, 'oh yeah'.

1388. Mr Mooney said he had seen pictures of the applicant in media reports and it 'sorta' clicked who he was once Mr Webb had mentioned the name. He picked out a photo of the applicant.

1389. On 28 January 1989 Mr Webb gave a statement to police (Ex 84). He said that after seeing the advertisement placed by Mr Klarenbeek in the Canberra Times he went to the premises of Mr Klarenbeek on 31 December 1988. There was no mention in the statement of seeing any other prospective purchaser at Mr Klarenbeek's premises.

1390. Mr Webb gave a second statement to police on 28 August 1989 (Ex 85) and evidence at the Inquest on 22 November 1990. In both the statement and evidence Mr Webb said he did not see anyone else at the premises apart from Mrs Klarenbeek.

1391. In December 1991 the Inquest returned an open verdict. On 24 October 1992 a detective visited Mr Webb's premises to take possession of the telescopic site that Mr Webb had purchased from Mr Klarenbeek. Four days later on 28 October 1992, Mr Webb visited the home of a member of the AFP, Sergeant Peter Scotland. Both Mr Webb and Sergeant Scotland were members of the AFP Fishing Club. Mr Webb told Sergeant Scotland that he had seen the applicant at the home of Mr Klarenbeek. This was the first time that Mr Webb told anyone in authority that he had seen the applicant at Klarenbeek's premises.

1392. In a statement of 16 November 1992 (Ex 76) Sergeant Scotland described the circumstances and content of the disclosure by Mr Webb in the following terms:

> About 7 pm on Wednesday 28 October 1992 a personal friend of mine a Mr Ray WEBB came to my home address. The purpose of the visit was to discuss with me certain aspects of the A.F.P. Fishing competition at Lake Eucumbene due to commence the following day. After an initial conversation about the competition Mr WEBB told me that he had something on his mind that he would like to discuss with myself or a member of the investigating team involved with the Winchester murder inquiry. I then had a lengthy conversation with Mr WEBB which I cannot recount in the first person however the general context of the conversation was as follows.
>
> He recounted an incident to me that had occurred two or three years ago when he had gone to an address in Queanbeyan with the intention of purchasing a .22 calibre rifle. He told me that he wanted his son to be taught in the proper use of firearms safety.
>
> He told me about going to the house and of a Ruger rifle that had been for sale and another rifle. He decided to purchase the other rifle as the Ruger was above his price bracket. After the purchase he then left the rear of the house and walked down the side of the house toward the front yard. As he reached the corner of the side of the house and the front of the house he saw a man approximately 2 metres in front of him and approaching him. This man appeared to be staring

> straight ahead and Ray WEBB thought to himself at the time that this person was going to walk straight over the top of him so he moved to one side to allow the man to pass him.
>
> Ray also told me that he recognised the man as being David EASTMAN. I asked him how did he know that it was EASTMAN and he told me about an incident down the lake when he was working with another two Telecom workers. I asked him if he was sure that the man out at Queanbeyan was indeed David EASTMAN he said he was absolutely sure. I realised that what Ray was telling me may be significant in the investigation into the murder of Assistant Commissioner WINCHESTER.
>
> I had been aware that Ray WEBB had given evidence before the Winchester Coronial Inquiry concerning his purchase of a firearm from a Mr KLARENBEEK a number of years earlier and in light of this I asked him why he hadn't come forward earlier with this information. He said that he had been very concerned for the safety of his wife and son.
>
> I advised him that he must talk to someone on the investigating team about what he had just told me and he asked me to speak with someone on his behalf.

1393. Police formally interviewed Mr Webb on 13 November 1992 (Ex 87). He again said he saw the applicant arriving at Mr Klarenbeek's house as he was leaving. Mr Webb's attention was drawn to his previous interview in which he was asked whether he had seen anyone else at Mr Klarenbeek's house or anyone leaving, to which he had answered in the negative. Mr Webb said he was not asked whether there was anyone walking in and if they had asked that question 'maybe I would have said yes'. After the interviewer made the observation that Mr Webb had 'come here today to be truthful', Mr Webb described seeing another person in the following terms:

> A Well on the first occasion I, went into purchase a rife, and as the statement say I ah, looked through the rifles and , and ah I didn't decide to buy any at that time. And as I was walking out, ah ar chap was walking in. The only reason I, got a good look at him because he didn't move. He just came from, didn't come from the lawn. He came from the house, from the front entrance of the house. And hadn't of I moved away he would have just pushed me aside, so I got a good look at the person. And that's basically it.

1394. Mr Webb said that after reading media reports he realised what he had seen. He said he would have looked at the person for 'probably four or five seconds' and gave a description.

1395. In the interview Mr Webb said he read in the papers that police were after a Ruger rifle and he came forward because when he purchased his rifle from Mr Klarenbeek there was a Ruger for sale at the premises. He said that when he first spoke with police he was 'pretty sure' he did not know who the person was that he saw at the premises and he did not want to get involved anymore than identifying Mr Klarenbeek as the person who had a Ruger rifle. He said 'the guy who sold it should be able to identify who bought it'. Asked if he 'purposely' did not raise seeing another person, Mr Webb replied that he did not want to get involved and he was 'pretty sure' he did not know who it was.

1396. Mr Webb said that when he saw the applicant in the media and realised it was the applicant he had seen at the premises of Mr Klarenbeek, it 'scared the shit' out of him. He was worried that if he went to police the person might be 'after revenge' so he kept quiet.

1397. During the interview Mr Webb said that when he saw the applicant's picture in the media it took him about two seconds to register he was the person Mr Webb had seen at Mr Klarenbeek's house. He was 100 percent sure. In the context of saying that he was 100 percent sure, Mr Webb mentioned the occasion at the Yarralumla Nursery:

> Q And?
>
> A Um, we were working at about, I think it was in May this year, and I recognised him within two seconds again, we were down at the um, parks and gardens in Yarralumla working on Sunday there putting lines into the Nursery there. And I was standing next to, another supervisor there, and I said hey that's Eastman down there talking to one of our guys I said I wonder what he wants. Anyway he said I'm not sure he said, doesn't look like him he looks smaller then the, TV. And I said that's him. Anyway when the other chap walked up I said ah wasn't that Eastman you were talking to, he said yes it was. And ah, I can give you the names of those two people.

1398. Mr Webb gave the names of Les Croft and John Mooney and told police where they could be located.

1399. As to his motivation for coming forward, Mr Webb said the matter had been worrying him; that was the 'main point' and all he was doing was 'clearing his conscience'.

1400. As mentioned, Mr Croft and Mr Mooney were also interviewed on 13 November 1992. In a second statement on 17 November 1992 (Ex 66), Mr Mooney told police that on 13 November 1992 Mr Webb had advised him that the police might want to talk to him about the occasion at Yarralumla. Mr Mooney's statement continued:

> Ray [Webb] told me that he had seen Eastman before entering a house as he was leaving, which he had been to the house to buy a rifle.

1401. Mr Croft also gave a brief statement on the 17 November 1992 (Ex 70, Ex 71) in which he said that Mr Webb had mentioned in conversation that he was lucky not to be under investigation as he was the owner of a Ruger rifle. However, Mr Croft said the only occasion that Mr Webb mentioned the applicant was at Yarralumla.

1402. The Inquest was reopened on 16 November 1992 and Mr Webb gave evidence on 18 November 1992 (Inqu 7784–7832). He was examined about his false statements and false evidence at the first part of the Inquest. He said he withheld information about seeing the applicant because he did not want to be involved. He maintained that the person who sold the Ruger should have been able to identify the purchaser. Within a month of seeing the applicant at Mr Klarenbeek's premises he saw an image of the applicant in the media and felt 'a bit frightened'. As to why he felt frightened, Mr Webb said he thought that the applicant might have been able to recognise him.

1403. Mr Webb also gave evidence of seeing the applicant at the Yarralumla Nursery. He described the incident as having occurred in the presence of Mr Croft and Mr Mooney.

1404. In evidence Webb said he spoke to the AFP voluntarily and no pressure had been put on him. He was reluctant to reveal anything to the AFP because he was worried about his family whom he thought could be in danger, as well as himself. Later in his evidence Mr

Webb repeated that he did not want to become involved, but added that he could not see the importance of the fact that he saw a person at the premises of Mr Klarenbeek. To him it was 'nothing really' and he did not know whether it crossed his mind that the man might be the murderer because he did not see him buy a rifle.

1405. On the same day that Mr Webb gave evidence, records of the interviews with Mr Croft and Mr Mooney were tendered at the Inquest (Inqu 7781 and 7782).

1406. The applicant was represented by Counsel when Mr Webb gave evidence at the trial. He was examined and cross-examined about his inconsistent statements and untrue evidence at the Inquest. Significantly for present purposes, Mr Webb gave evidence about the occasion at the Yarralumla Nursery (T 1172):

> Q Well now, in due course, did you see that person again?
>
> A I did.
>
> Q Where was it you saw him?
>
> A I think it was a Sunday. I was working at Telecom. We were upgrading the Yarralumla Nursery, by putting more lines there, and I seen him approach – it wasn't actually one of my staff but he – the guy I was with Les Croft, it was one of his staff.
>
> Q And what was this person doing?
>
> A I am fairly sure he had a backpack on and he just seemed to be walking around.
>
> Q Alright. Aside from Mr Klarenbeek's house and the television programme that you saw, had you seen him at any other time?
>
> A No I don't think so.
>
> Q When you saw him on that occasion did you recognise him?
>
> A What do you mean on the ...
>
> Q On this occasion that you've spoken about when you where working near Yarralumla.
>
> A Yes
>
> Q How close did he come towards you?
>
> A When I first saw him I think he might have been 30 or 40 metres away and I think he walked up past us. He may have spoke to Les. I think I might have turned around or something. I can't remember.
>
> Q When you saw him on that occasion, what did you feel?
>
> A Had I been by myself I would of turned around and walked the other way.
>
> Q Why?
>
> A Well I recognised him. He probably, you know, recognised me.

1407. Mr Webb identified the applicant as the person he had seen at Yarralumla.

1408. Counsel did not cross-examine the applicant about the occasion at Yarralumla. Nor did the applicant or his Counsel request that Mr Croft and Mr Mooney be called to give evidence.

1409. Paragraph 15 of the Order asserts that 'evidence was not led at the applicant's trial of the circumstances of the first corroborated meeting between the applicant and the crucial identification by Raymond Webb'. Read literally, that statement is not correct.

Evidence of that occasion was led from Mr Webb and Counsel for the applicant chose not to cross-examine him about it.

1410. Paragraph 15 also asserts that ' the statements of persons that were with Webb at the time of that meeting support the argument that Webb's later evidence was recent invention.' However, I am unable to discern how the statements of Mr Croft and Mr Mooney support the contention that Mr Webb's evidence of seeing the applicant at the home of Mr Klarenbeek was an invention. There is nothing in the statements or the events at the Yarralumla Nursery which, in themselves, cast doubt upon the evidence of Mr Webb.

1411. During the evidence of Mr Croft and Mr Mooney to the Inquiry, emphasis was placed upon the failure of Mr Webb to tell Mr Croft and Mr Mooney in May 1992 that he had seen the applicant on an occasion when he went to the premises to purchase a rifle. As mentioned, on 17 November 1992 Mr Mooney told police that when Mr Webb advised him on 13 November 1992 that police might want to talk to him, Mr Webb told him he had seen the applicant entering the house where Mr Webb had attended to buy a rifle. In evidence to the Inquiry Mr Mooney said that at the nursery in May 1992 Mr Webb did not say anything about seeing the applicant on another occasion.

1412. In evidence to the Inquiry Mr Croft said he had a recollection that it was common knowledge within the workplace that Mr Webb believed he had seen the applicant at a house in Queanbeyan on a day that Mr Webb had looked at a rifle. Although the timing of that knowledge is uncertain, Mr Croft believed the knowledge was around the workplace before he was interviewed by police. As mentioned, in his interview with police on 17 November 1992 Mr Croft said he had never heard Mr Webb mention the name David Eastman other than during the conversation at the nursery in May 1992 (Inq 1492).

1413. Mr Webb agreed in evidence that his conversation with Sergeant Scotland on 28 October 1992 was the first time he told police that he had seen the applicant in Queanbeyan in 1989. As to whether he had previously spoken to any of his workmates about seeing the applicant in Queanbeyan, Mr Webb replied (Inq 1587):

> I may have. I'm not sure. I know, well, one person I did speak to about it, he was the one that made me come forward, was – he's since passed on. That was a Mr Oldfield, Ian Oldfield. We had another trip where we used to go up into the mountains and just do a bit of fishing, and I told him about it.

1414. Mr Webb was asked about the content of his conversation with Mr Oldfield (Inq 1588):

> Q Do you recall what you said to Mr Oldfield?
>
> A I can remember it was late one night, it was just around the fire there, and the case came up, and I mentioned it to him what had happened, and I said, 'should I tell Peter Scotland about it? Him being a police officer, he'd have to take action on it. What should I do?'
>
> Q Sorry, did you say – did you ask him whether you should tell Peter Scotland about this?
>
> A I told him I was a bit worried about my safety and that concerned me at the time, and he was closer friends with Peter than what I was, and he said, 'I think you should'.

1415. It was apparent throughout the evidence of Mr Webb that his memory of times and details was poor. However, I did not view his poor recollection as an indication of a lack of credibility. Mr Webb explained that he was 'fairly well shaken up' in the trial and he tried to wipe the events out of his mind. When giving that evidence and explaining that he did not want to be at the Inquiry, Mr Webb displayed genuine distress.

1416. Nothing of particular note emerged during the evidence of Mr Webb. Bearing in mind the direction of Paragraph 15 aimed at the absence of Mr Croft and Mr Mooney from the trial, and the fact that the inconsistencies of Mr Webb's versions had been explored at trial, I did not permit cross-examination of Mr Webb at large about those inconsistencies.

1417. The inconsistencies in the versions given by Mr Webb were explored at trial and were the subject of a direction to the jury by the trial Judge (T 6577). In that context Paragraph 15 directs an inquiry as to whether evidence from Mr Croft and Mr Mooney concerning the occasion at the nursery in May 1992, coupled with the inconsistencies with Mr Webb's previous version, gives rise to doubt or question as to guilt. Bearing in mind that there was no secret about the occasion at the nursery, and Mr Webb was asked about it at trial, I am unable to discern any basis for a conclusion that the evidence of Mr Croft and Mr Mooney gives rise to a doubt or question as to guilt. As I have said, the applicant's Counsel chose not to cross-examine Mr Webb about the occasion at the nursery and no request was made that Mr Croft and Mr Mooney be called to give evidence. There is nothing in their evidence to the Inquiry about the occasion at the nursery which, in itself, is capable of giving rise to a doubt or question as to guilt.

1418. The only matter explored which might be said to impact on this question is the failure of Mr Webb to inform Mr Croft or Mr Mooney while at the nursery in 1992 that he had previously seen the applicant at the home of Mr Klarenbeek when he attended with a view to purchasing a rifle. In other words, when Mr Webb told Mr Croft and Mr Mooney that the person who had made the enquiry about backpackers was the applicant, if Mr Webb had previously seen the applicant at the home of Mr Klarenbeek, he would have added words to the effect that he had previously seen the applicant at premises in Queanbeyan where Mr Webb had attended with a view to purchasing a rifle.

1419. While comments to this effect might have been useful as points to be made before a jury in an attack on the credibility of Mr Webb, in my opinion the failure of Mr Webb to mention in May 1992 that he had previously seen the applicant is of no significance in the context of Mr Webb's evidence. Further, a forensic choice not to call Mr Croft or Mr Mooney was made at the trial at a time when the applicant was represented by Senior Counsel and in my view the absence of Mr Croft and Mr Mooney at the trial does not give rise to a doubt or question as to the applicant's guilt.

1420. As is apparent, at trial Counsel possessed plenty of ammunition with which to attack the credibility of Mr Webb. As the Inquiry pursuant to Paragraph 15 relates to Mr Croft and Mr Mooney and the occasion at the nursery, I did not permit further cross-examination of Mr Webb about the inconsistencies in his versions. However, I have had regard to

those inconsistencies as part of the context in which to determine whether the issues raised under Paragraph 15 support the existence of a doubt or question as to guilt.

1421. For the reasons I have given, in my view the absence of Mr Croft and Mr Mooney from the trial, and the failure of Mr Webb to mention seeing the applicant in Queanbeyan, do not in themselves, nor in combination with all other evidence relating to this occasion and Mr Webb's inconsistencies, support the existence of a doubt or question as to guilt.

1422. The doubt or question as to guilt underlying the order in Paragraph 15 has been convincingly dispelled.

PARAGRAPH 16

1423. Paragraph 16

> Evidence of surveillance tapes of the applicant talking to himself in his home at night was opened by the prosecution and later led as some evidence of a voluntary and reliable confession. The prosecution was at all relevant times, in possession of the psychiatric reports of Dr R. Milton, commissioned by the Australia Federal Police, reporting that the applicant should be regarded as psychotic and at the time he was being surveilled was possibly on medication for a severe mental disorder.

1424. The 'matter' to which Paragraph 16 is directed is a doubt or question as to guilt arising out of the reports of Dr Milton which were not disclosed until well into the trial. The applicant contends that the reports were relevant to the mental state of the applicant at a time when, according to the prosecution case, while talking alone to himself in his residence the applicant made admissions to the killing of the deceased. In substance the applicant submitted that, coupled with the evidence of police harassment, the reports demonstrated that the statements upon which the prosecution relied were both involuntary and unreliable.

1425. In summary, the factual context to be considered with respect to Paragraph 16 is as follows:

- The recordings which the prosecution contended contained admissions to killing the deceased were made on 3 and 22 June 1990, 23 and 29 July 1990 and 7 November 1991. The essential features of the statements were as follows:

  (i) 3 June 1990 – I had to kill him sitting down.
  He was the first man I ever killed, it was a beautiful thing, one of the most beautiful feelings you have ever known.

  (ii) 22 June 1990 – Look I would rather have a man that I've killed He's a wonderful man, a bit of a kiss and then make-up poor bugger I just wanted to get it straightened.

  (iii) 23 July 1990 – I murdered, I couldn't get any response.
  I couldn't wait any longer to commit the crime.

  (iv) I should not have killed.
  No-one was sure I killed the cunt.
  Oh so sorry I killed him I killed him ... took it
  I killed him and that's the truth, I didn't plan it that way.

I had to kill him, but with deep regret go direct to him, you can't ... and um ... I wanted it straightened ... help ... .

(v) 29 July 1990 – Had to go back again the next night to kill him the poor bugger. Finally on the second night you succeeded.

(vi) 29 July 1990 – Looked like I'd have a name if I killed I didn't want to (hit/hurt/hate) anybody I didn't give a bugger, I just wanted to get it straightened.

(vii) 7 November 1991 – You killed him.

- On 16 and 17 May 1995 Counsel for the prosecution opened the case to the jury and included reference to the evidence of recorded admissions.

- In summing up to the jury the trial Judge directed that if the jury was satisfied that any of the recordings contained specific words which amounted to an admission of killing the deceased, such words were 'direct evidence' pointing to the guilt of the applicant. His Honour added that such evidence was not part of the circumstantial evidence and that this 'points up the enormous importance' of the tapes, transcripts and oral evidence (T 6756).

- At the time the prosecution opened the case to the jury concerning the admissions, unknown to the defence the prosecution was in possession of reports by Dr Milton in which he expressed the opinion that the applicant suffered from a Paranoid Personality Disorder. The reports of Dr Milton are exhibit 15.

- There was no suggestion in any of the undisclosed reports by Dr Milton that the admissions might be unreliable by reason of the applicant's mental state. In a report of 15 January 1990 Dr Milton expressed the view that the applicant 'should now be regarded as psychotic (i.e. insane)' (page 5, [27]), but in a report of 15 February 1990 Dr Milton reported that he had listened to tape recordings of the applicant talking to himself in his residence, which included a conversation with an acquaintance, and there was 'no hint of thought disorder, delusions or hallucinations' (page 1 [3]).

- In a report of 28 February 1990 Dr Milton expressed the following view (page 1 [3]):

  I note that in my last report that I said that on balance he would have to be regarded as psychotic i.e. out of touch with reality. This is not so much because there are specific indications of him suffering a recognisable psychosis such as schizophrenia, but rather that taking him as a whole, one would have to say that he is far from normal. The surveillance team generally expressed the same view, observing that his behaviour is unpredictable, irrational, immature and generally unusual.

- On 15 June 1990 Dr Milton listened to the recordings of 3 June 1990 which, according to the prosecution case, contained admissions to killing the deceased. In a report of 20 June 1990, while Dr Milton suggested that the recordings indicated 'a further decline' in the applicant's 'emotional state' (page 1 [2]), he did not suggest that the applicant might have made a false admission by reason of his Paranoid Personality Disorder. As to a general suggestion that the applicant might

make a false admission, Dr Milton wrote that he did not think this was likely (page 3 [3]).

- In the period August 1990 to January 1992 Dr Milton provided a number of reports to the AFP which included reference to the applicant talking to himself in his residence. There is no suggestion in any of the reports that the reliability of the applicant's recorded statements might be affected by his mental state.

- On about 18 June 1995 Ms Circosta gave the trial Judge the report of Dr Milton dated 18 June 1995 (Ex 15). That report referred to a large number of charges faced by the applicant and to the applicant's conduct on a number of occasions, both before and during the trial. Particular reference was made to the applicant's behaviour on 22 and 29 May 1995 (pp 1, 2 [2]–[3]). Dr Milton expressed the opinion that the applicant was capable of 'extremely aggressive behaviour' and addressed the potential risk to officers of the court, including the trial Judge. No reference was made to a formal diagnosis of the applicant's mental state or the recordings upon which the prosecution relied.

- On about 28 July 1995 the trial Judge came into possession of reports by Dr Milton attached to an affidavit of Mr Ninness filed in support of a claim for public interest immunity in respect of documents relating to the listening devices.

- On 8 August 1995 Counsel for the applicant objected to the admissibility of the recordings containing the alleged admissions on the ground of illegality and on the basis that the statements were unreliable because they were made involuntarily while the applicant was asleep (T 3774). The applicant gave evidence on the voir dire in support of the objection, but no medical evidence was led.

- In evidence the applicant said he knew he was being followed by police and found out in December 1989 that his home was bugged. The applicant asserted that he was being harassed, but said the harassment did not create 'great stress'. Rather, the stress was caused by fear for his physical safety (T 3694). The applicant denied making the incriminating statements of 3 June 1990. He claimed he said things to taunt the police and talked in his sleep.

- On 8 August 1985 the trial Judge rejected the objection and ruled that the prosecution could lead evidence of the recordings.

- The prosecution led evidence of the recordings on 8 – 10 August 1995.

- On 11 August 1995 Counsel for the applicant informed the trial Judge that his instructions had been withdrawn. The applicant informed the trial Judge of his reasons for sacking his legal team and applied for an adjournment of the trial on the ground that he was unrepresented through no fault of his own. That application was rejected.

- On 14 August 1995 the applicant was unrepresented and evidence was led of the recorded admissions (T 3976).

- Mr Jackson gave evidence on 16 August 1995 and the applicant commenced cross-examination that day. On 17 August 1995 during cross-examination by the applicant, in the context of suggestions by the applicant that Mr Jackson did not have reason to be concerned about the applicant's conduct, Mr Jackson revealed the existence of the reports by Dr Milton which had been obtained by the AFP (T 4162). This was the first occasion on which the existence of reports by Dr Milton was disclosed. Thirteen reports of Dr Milton between 20 February 1989 and 4 September 1992 were marked for identification (T 4222).

- On 18 August 1995 the reports by Dr Milton were provided to the defence.

- At no time did the trial Judge disclose that he was in possession of the report by Dr Milton of 18 June 1995. Nor did his Honour mention the reports attached to the affidavit of Mr Ninness.

- At no time after the reports of Dr Milton had been marked for identification and provided to the applicant did either the applicant or his Counsel renew the objection to the admissibility of the recordings. In that context it must be noted that the applicant remained unrepresented until 31 August 1995 which was a day after the prosecution closed its case. On 31 August 1995 Counsel advised that he was waiting on advice from the NSW Bar Council as to whether he could represent the applicant and the trial was adjourned to 5 September 1995 when Counsel appeared and applied for the recall of various witnesses. Counsel opened on behalf of the defence and called the applicant to give evidence.

- In his evidence to the jury the applicant drew upon the poor quality of the recordings and submitted that many of the sections relied upon by the prosecution as confessions were indecipherable. He offered innocent interpretations for some of the more incriminating statements (T 4983).

- Expert evidence concerning interpretation of the recordings was led on behalf of the applicant (T 5621).

- On 25 September 1995 Counsel for the applicant advised the trial Judge that his instructions had been withdrawn (T 5653). Counsel was re-engaged on 3 October 1995 (T 5705). The defence case closed on 5 October 1995 and Counsel for the applicant commenced addressing the jury.

- On 9 October 1995 the jury was sent away for a week. The applicant terminated the instructions of his legal team. The applicant commenced addressing the jury on 16 October 1995. As to the recordings, the applicant emphasised the poor quality of the recordings and sought to minimise the significance of similarities between the expert's interpretations of the recordings. The applicant did not refer to his mental state (and no attempt had previously been made to lead any medical evidence concerning his mental state).

- The prosecution closing submissions commenced on 16 October 1995 and concluded on 25 October 1995.

- The trial Judge summed up to the jury from 25 October 1995 to 1 November 1995. No suggestion was made to the trial Judge that any reference should be made to the applicant's mental state.

1426. The recorded incriminating statements were a small portion of the recorded statements. The applicant was recorded talking to himself extensively about a wide range of matters. From the perspective of the prosecution legal team, there was no occasion for disclosure of Dr Milton's reports. Those reports did not suggest any basis for thinking that the applicant's mental state as disclosed by Dr Milton might have had an adverse impact upon the voluntariness or reliability of statements made by the applicant when talking to himself in his residence. The contrary impression was conveyed by those reports. Mr Adams was not aware of advice to the AFP by Dr Milton that maintaining direct face-to-face contact with the applicant might cause the applicant to make an admission (Inq 2918). Nor was he aware of the AFP acting upon that advice and engaging in face-to-face contact for that purpose (Inq 3074).

1427. Leaving aside the conduct of police officers towards the applicant and its relevance to the question of the recorded statements, a topic which is discussed later, and considering only the content of the reports by Dr Milton and the impact of failing to disclose those reports, the applicant's case that a doubt or question as to guilt arises out of the failure to disclose faces a number of difficulties. First, the applicant and his Counsel were in possession of extensive evidence concerning the history of the applicant's mental state which alerted the defence legal practitioners to the possibility of mounting an argument that the recorded statements were not reliable admissions by reason of his mental state. Dr Hugh Veness saw the applicant eight times during the period 1991-1993, but did not record any psychotic features or diagnose a mental condition. The file of the applicant's solicitor, Colin Daley Quinn (Inqu Ex 92, Inq Ex 8), contains a number of references to Dr Veness, including a note of 30 August 1995:

> Veness – if under pressure is person capable of talking in fantasy of guilt?

1428. It was open to the defence to seek an updated psychiatric report with a view to using the applicant's mental state in support of an objection to the admissibility of the evidence. That material could also have been presented to the jury in support of an argument that the statements in the recorded conversations could not be viewed as reliable admissions to killing the deceased. The applicant chose not to take either of these courses.

1429. Secondly, after the numerous reports of Dr Milton were provided to the defence, the objection to the admissibility was not renewed on the basis of information disclosed in the reports of Dr Milton concerning the applicant's mental state. In the light of the failure to lead any evidence from Dr McDonald or other practitioners who had treated the applicant, the failure to renew the objection on the basis of Dr Milton's report is consistent with a choice by the applicant not to rely upon evidence concerning his mental state as a basis for excluding the recorded admissions.

1430. Thirdly, the applicant did not seek to lead evidence from Dr Milton as to his mental state. Nor was any request made that the prosecution call Dr Milton to enable cross-examination of Dr Milton concerning the applicant's mental state. This is hardly surprising as a review of Dr Milton's opinions concerning the reliability of the admissions demonstrates his evidence would not have assisted the applicant.

1431. As to the first recording of 3 June 1990 in which, according to the prosecution case, the applicant was heard to say that 'he was the first man I ever killed, it was a beautiful thing…', Dr Milton reached the following conclusion (Ex 57, 10):

> I regard the utterances as having been made by a person without mental illness in a normal state of consciousness. They are in my view reliable expressions of what was in Mr Eastman's mind at the time.

1432. The second recording was made on 22 June 1990. The applicant made reference to a man he had killed being a wonderful man. Dr Milton expressed the following opinion (Ex 57, 15):

> I consider that Mr Eastman did not suffer from mental illness at the time it was made. I regard it as a reasonable representation of Mr Eastman's thoughts. The admissions in it were, in my opinion, reliable.

1433. The third group of recordings upon which the prosecution relied was made on 23 July 1990. According to the prosecution the applicant was heard to say that he could not wait any longer to commit the crime and that he should not have killed. Significantly, the prosecution asserted that the applicant was heard to say:

> I killed him, and that's the truth, I didn't plan it that way.

1434. Dr Milton reported that he was 'sure' that the applicant was in a 'normal mental state' when the recording was made on 23 July 1990. Dr Milton continued (Ex 57, 18):

> His normal mental state at the time of the recording, the internal consistency of the recording, and its consistency with other aspects of the case, allow me to say that the recording was a reliable admission. Mr Eastman's comments were deliberate, calculating and self-justifying. There was no remorse or shame. The nature of these comments and in particular their coldness and lack of remorse were consistent with Mr Eastman's paranoid personality.

1435. In evidence to the Inquiry Dr Milton disagreed with the opinion of Dr White that 'considerable psychotic turmoil' was present on 23 July 1990 (T 1158–1159). Asked about the significance of the applicant's behaviour when, soon after the recorded admission, the applicant made a telephone call and spoke for 17 minutes, Dr Milton gave the following evidence (Inq 1159):

> A It doesn't fit at all. You have normal communication, then the supposed psychotic utterances, and then suddenly normal communication. If there is some sort of psychotic episode going on, or brain storm or acute psychosis, then one would expect it to continue or to have been present in some way before he made the utterances, but that was not the case.
>
> Q So in that way is it relevant to use this other material, such as the audio and the surveillance material?

A It's quite out of context.

Q And it can assess this situation of there being a turmoil – psychotic turmoil for a short period of time?

A But it's not a switch that you turn on and off.

1436. The fourth group of statements was recorded on 29 July 1990. Again there is reference to the killing and, in particular, having to go back on a second occasion 'to kill him, the poor bugger…'. Dr Milton concluded that the applicant was in a 'normal mental state' at about the time of the recording and that the statements were 'reliable admissions.'

1437. The fifth group of statements was recorded on 7 November 1991. On the prosecution case the applicant made statements such as 'you killed him'. Dr Milton concluded that the applicant was not suffering from mental illness at the time of the recording and that the statements recorded constituted 'reliable admissions' made when the applicant was in a 'normal mental state.'

1438. Dr Westmore first examined the applicant on 10 October 1988. He provided a report to the DPP dated 19 October 1988 (Ex 8).

1439. In evidence to the Inquiry he said that the applicant talking to himself was probably a function of being socially isolated and part of his narcissism. He thought it unlikely that the applicant was hearing voices at the time of the recordings.

1440. As to the reliability of the statements as confessions to the killing of the deceased, Dr Westmore gave the following evidence (Inq 1307–1311):

Q Dr Milton suggested that Mr Eastman may have experienced conflicting emotions in a sense. One, surveillance is all intrusive, can't live a normal life, all the things that he spoke to you about. On the other hand, appealing to his narcissism.

A Yes.

Q ... and feeling important because they were going to all this trouble?

A Yes.

Q Is that a legitimate observation?

A I think so yes. Absolutely yes.

Q And what's of particular interest in respect of the confessions, as they're called, and we're now assuming that the transcripts are correct, is the reliability of those sorts of statements by someone with Mr Eastman's condition, his state at the time – he was under surveillance, his knowledge that he was under surveillance, being listened to et cetera. Do you have any comment to make on all – how these factors might bear upon the reliability of the statements being actual confessions?

A Yes, your Honour, I've been asked to consider this question and it's very difficult. We do know that people who are under extreme psychological distress can make false confessions. There's some very well documented examples of that in the clinical literature involving IRA suspects who made various confessions when interviewed by the British police and later it was clearly evident that those confessions were false. And we know it occurs in other settings in the criminal justice system where in the record of interview room people will make – might make a confession just to end the tension, to give some predictability to their environment at that time. But in the absence of those sorts of things I can't see why he would, on numerous occasions, make certain positive statements about doing something if it wasn't true. But it's hard to understand on the other hand in a man who knew that he

was being listened to at the time, why would he do that? That doesn't make a lot of sense, logically, but at the same time I can't find any other factors which might say he made false confessions.

Q And part of the problem is to understand how his mind was working at the time?

A He would have been intensely persecuted, probably. He was aware that he was being listened to. It's contrary – the statements are contrary to the rest of his apparent behaviour of striving towards an acquittal. It's in sharp contrast to that. It's very hard to explain. As I said to somebody who did ask me about it I – no I would like to speak to him about this and try to understand from him what he was thinking at the time.

Q There was some suggestion, I think, that because of his social isolation over a period with this type of surveillance he might have been prompted to want to say something?

A Yes.

Q I think that came from some of Dr Milton's statements?

A Yes, possibly but again it's so sharply contrasted with everything else, where he fights everything. It's just – and then he hands it on a plate. It just – it's hard, it's a bit incongruous I think.

Q I suppose all of which might suggest that someone who's trying to decide whether it's a true confession should know of, should know about his mental state, of all these competing factors?

A Correct, yes.

Q In order to try and make a proper informed assessment?

A Correct.

Q ... of whether it's a true statement or not?

A Correct, and to speak to him specifically about it as well, a psychiatrist should be doing. Indeed.

Q On the face of it it's not an easy question?

A Very difficult question because of the reasons I've mentioned. I've no doubt he was quite disturbed at the time, with all the factors that were going on, on top of his personality, but the problems are that this is so in contrast to everything else that he has been saying and doing that it's certainly hard to explain.

Q On the first occasion, that's 3 June 1990, that's an occasion when he was, if I can describe it this way, according to the physical surveillance notes, making quite significant attempts to evade surveillance. So it was quite an eventful day in that sense. And he was then home for about an hour between 1 and 2 in the afternoon when he was talking to himself and made this so called confession. And then he left and appeared to be taking photographs of surveillance cars?

A Yes.

Q So it was noted, not just that he was taking photos of cars but he was actually taking photos of the surveillance cars. Looking at the day as a whole how does that fit with his state of mind and what he – the reliability of what he said between 1 and 2?

A Was it possible that for a period of time he became distracted, so distracted by his own inner thoughts that he forgot that he was being listened to for a short period of time? That's possible.

Q Is it also possible that it was distressing him so much this morning that he was making many attempts to get out of the police observations?

A Well, that's the issue that he's, on the one hand, actively avoiding it and then walks into a place and does everything that the police are wanting. So, my only sensible thought about it

is that he becomes so engrossed in his own persecution - persecutory thoughts that he forgot that the room was listened.

Q However, there are times that he deliberately turns the radio on. One assumes to maybe hide or mask what he's saying?

A Yes, some white noise. So maybe it's not all the time that he might have had this problem, but maybe at certain times.

Q Dr Milton did say, as his Honour suggested, that a third reason for why he might have said these things to himself was that, if he had committed the crime, a real need to talk to someone about it. What do you say?

A Again, that's possible but it does seem incongruous that he would do it in an area where he knew he was being listened to, against all his other behaviours.

Q On 22 June 1990, that was a day when he'd been out in the morning and he'd been to see his solicitor and the confession was made during the afternoon when he was at home. He went out again in the evening for a couple of hours afterwards. He was making many phone calls that day, and it appears to be making phone calls to various different solicitors. There's nothing that appears thought disordered in relation to the phone calls, however, in the middle of that day we have this so-called 'confession'. How does that fit with the rest of the day and the reliability of what's being said? Same comments?

A Same comments. I know Dr White is of the view that the transcripts reflect thought disorder, but look, really, I just don't think that's so. If it was thought disorder he would be thought disordered all the time - at other times. But there's nothing to indicate that, and I think when people are talking to themselves they verbalise phrases of what they're thinking or words rather than sentences. That might have been Dr Milton's flow of consciousness comment. But it's extracts from that, which everybody might do. And if anyone was listening to it would sound thought disordered, but I don't think it reflects thought disorder at all.

Q If we are having this, sort of, turn-on auditory dialogue with ourselves, and we sometimes speak some of it, would it necessarily result in getting bits and pieces which don't appear to be properly constructed sentences?

A Correct, but our thoughts are still properly constructed.

Q Having mentioned that, it was on 23 July 1990 and it was late at night when the so-called 'confession' occurred. Immediately afterwards the phone rang and Mr Eastman has what appears to be, according to the transcript, a perfectly logical conversation with the person on the other end of the phone. How does that fit?

A That excludes thought disorder, because that doesn't happen.

Q How does that fit then with the reliability of what he's being muttering to himself before that phone call?

A It might support that what he said was reliable.

Q Why do you say that?

A Because there's sensible construction and understanding of the telephone conversation, and put together there's a continuity of logical thinking or similar logical thinking.

Q There's still that incongruity, though, that Mr Eastman knows that he's being listened to?

A There is.

Q Also with the confession in November of 1991, you're probably aware that Mr Eastman saw Dr Veness in 1991 and 1992?

A Yes.

Q And at that time Dr Veness didn't diagnose a mental illness and didn't prescribe any medication and there's no suggestion of hallucinations, delusions or thought disorder?

A Yes.

Q How does that fit with the reliability of the confession in November '91, just around that time?

A Yes, well, in the absence of psychosis you'd have to put weight on the reliability of the statements. But there's a caveat that I've stated already that people under stress can sometimes make false confessions. But it's usually under different circumstance to the ones that these confessions were made. But we're still left with this incongruous component of it, that it seems to be against everything else he says and does.

Q Sorry, what different circumstances usually ... ?

A The circumstances are usually intense interrogations. That's when all people - people who are frankly mentally ill and will go up to a police station and make a confession.

Q What about someone with paranoid beliefs who's under the intensity of surveillance and the investigation - the ongoing investigation into the murder of Mr Winchester, who feels persecuted by the police and the way that they're conducing their surveillance. Is that the sort of pressure that might produce a false confession?

A It's possible.

Q Particularly when he knows he's the prime suspect?

A It's possible.

Q Now, it's not part of my function to decide whether these confessions were true or false, but we come back to the point in order for a decision-maker to decide whether these were true or false confessions, is it necessary for the decision-maker to be fully informed of the mental state of Mr Eastman?

A Yes, your Honour.

Q And the circumstances surrounding the particular occasions?

A Yes, your Honour.

...

Q Mr Eastman gave some evidence at the trial about these confessions, suggesting that they may have been made during sleep - his suggested explanation for them. That was the extent, really, of his evidence of the confessions themselves. But, there was evidence that at the time he felt very strongly under pressure because of the surveillance, which would fit in with the emotional pressure that you say he must have been under at the time?

A Yes.

Q What about if he believed that by having that white noise there, that he was masking what was being said? Does that take away that incongruity that you've been talking about?

A Well, certainly at that time. But I'm suggesting that maybe there are periods when he fluctuates. There are times when he may have forgotten or may not have had it in the forefront of his mind that he was being listened to. He may have been so engrossed and overwhelmed with his own persecution which is now becoming real in that sense.

Q Or might have wanted to verbalise it? Because of isolation?

A Possibly, and probably due to a combination of factors rather than any single one.

Q Or might have wanted to tease the police?

A Possibly.

Q Can you assume that the surveillance notes indicate an extremely socially isolated existence at that time?

A Yes.

Q Apart really from contact with lawyers or people to whom he was making complaints?

A Yes.

Q Does that support both a pressure to - an emotional pressure which might make him falsely confess, coupled with the surveillance, but also if he did commit the murder, to verbalise it?

A Confess. Correct. It might, yes.

Q That's the incongruity as well?

A It might make him under those circumstances - let's assume he was under particular stress at the time. He's in his only haven away from the hostile world and even there he's not safe, so that intense pressure may have led to a de-compensation, I guess, that made him say things that he might not normally have said.

1441. Dr White first saw the applicant in 1998. Not surprisingly, given his diagnosis of Paranoid Schizophrenia, Dr White was strongly of the view that the statements were unreliable. He said there was a lot of meaningless nonsense being spoken, and in his opinion, the applicant was hearing nasty voices and responding to them.

1442. To a large extent the recordings were indecipherable. Significant debate occurred in the presence of the jury as to whether the prosecution interpretation of the recordings was accurate. However, these issues were before the jury and it is not part of my function to comment upon whether the prosecution view of the interpretation of the recordings, and the reliability of any statements attributed to the applicant, was well founded or otherwise. The question to which Paragraph 16 is addressed centres on the failure of the prosecution to disclose the reports of Dr Milton.

1443. Although Paragraph 16 is founded upon the failure to disclose Dr Milton's reports, it has emerged that the AFP also failed to disclose the reports of Dr Tym (Ex 223) and Professor Mullen (Ex 221) which the AFP obtained in 1992. However, the DPP was not aware of those reports. It is highly unlikely that disclosure to the defence would have had any impact on the approach of the defence at trial. As I have said, aware of Dr McDonald's opinion, the defence did not seek to update their information about the applicant's psychiatric state or to raise it at trial. This is consistent with the applicant's instructions that his mental state was not to be raised.

1444. As part of the examination of Paragraph 16 it is also appropriate to consider the conduct of the police in carrying out surveillance and maintaining face-to-face contact with the applicant. Such conduct is relevant to Paragraph 19, but also to Paragraph 16 when considered in conjunction with the prosecution failure to disclose the reports of Dr Milton. This examination is centred upon the question of whether the conduct of the police was such that, when considered in conjunction with the reports of Dr Milton, it raises a case that the recorded statements were not voluntary and a doubt exists as to their reliability.

1445. In addition, an issue of failure to disclose to the defence material relevant to surveillance and harassment has emerged as a consequence of evidence obtained during this Inquiry. This is discussed later in light of the evidence which explains the nature of the surveillance and other contact with the applicant.

Surveillance/Harassment

1446. The evidence concerning the police conduct towards the applicant should be considered in the context of the circumstances that existed from mid January 1989. The applicant was a suspect and his car was seized on 18 January 1989. Early in the investigation access was gained to the Administrative Appeals Tribunal file which included psychiatric material concerning the applicant's mental state and behaviour. Mr Ninness was the officer in charge of the investigation and in his view it was important to get professional advice as to 'how to handle' the applicant. It appeared to Mr Ninness from all the material he read that the applicant was 'a very unique individual' (Inq 2561). As to what he had in mind when he said 'how to handle' the applicant, Mr Ninness replied (Inq 2561):

> One was the possibility of doing it again if he was in fact the perpetrator, and was to – how to handle him because we gleaned from the information we had that he was, very difficult to be involved with, and I really thought we needed professional advice. I thought a doctor was the best person to give us that on his background.

1447. The decision to seek advice from Dr Milton was entirely appropriate.

1448. The precise date when Mr Ninness first obtained advice from Dr Milton is not clear. Dr Milton's first report is dated 20 February 1989 and he had consulted with Mr Ninness and Mr McQuillen prior to writing the report. Mr Ninness said he was advised that as the senior investigator he should 'keep [his] face in front of' the applicant in order to be seen as an 'immoveable rock' that the applicant 'could not get around' (Inq 2567).

1449. Physical surveillance of the applicant commenced on 13 January 1989 and continued on various dates until 23 December 1992 (affidavit Mr Dean Ex 240). Mr Ninness described the initial purpose of physical surveillance in the following terms (Inq 2562):

> One, we were hoping to gain some information about possible contacts that would lead us to avenues of investigation lines; one was to attempt to locate a firearm and one was to just check his general whereabouts and be concerned about members of the community. We had some information that gave us rise to concern so it was essential we keep Mr Eastman under surveillance at that time.

1450. Commencing on 26 September 1989, listening devices were placed in and adjacent to the applicant's residence for the purpose of obtaining evidence, including identifying close contacts and gaining other information that might lead to lines of inquiry. Electronic surveillance ceased on 11 January 1993 (Ex 240).

1451. There can be no doubt that the aspect of public safety loomed large. In his first report of 20 February 1989 (Ex 15) Dr Milton set out the applicant's personal history, including his psychiatric and behavioural history. Dr Milton reported that there was 'massive evidence of Eastman being aggressive, suspicious, demanding, argumentative and violent.' He described the applicant as a 'typical dangerous paranoid personality' who was not deluded and had 'no hesitation in using violent measures to get what he wants'. Dr Milton expressed the opinion that there was a 'very real concern' that the applicant would commit 'further extremely aggressive acts'.

1452. As to contact between investigators and the applicant, Dr Milton commented in his report that Mr Ninness had adopted a 'direct and forceful manner with Eastman without in any way being threatening' and expressed the view that such an approach would, 'for complex reasons, markedly reduce the danger to which Mr Ninness' was exposed. In addition, Dr Milton reported that apart from investigatory considerations, he believed that continued surveillance was not only justified, but necessary in order to protect the community.

1453. Dr Milton also gave advice concerning the possibility of the applicant speaking with police:

> 65 I note that at present he refuses any form of interview with the police, even though his own solicitor recommends this. It is possible that patience might bring results, however, for he has a great need for self-justification and to explain himself and to assert his control over situations in which he is involved. It must be galling to him to be under surveillance but to be unable to do anything about it.
>
> 66 Although he is used to isolation I believe he currently has a tremendous need to talk to someone, if not about the killing, certainly about things in general. It is of interest that on the night of the killing he used the services of a prostitute and I expect this was because he needed an emotional outlet which was unavailable to him in any other way...
>
> 67 It is unlikely that he can continue to resist this emotional pressure forever. For our part, I think we should wait patiently, observe any changes in him, and use the opportunity for an interview if and when it occurs. I doubt if he will ever volunteer a confession, but to obtain an interview of any kind would be a valuable achievement.

1454. Later in his report Dr Milton repeated his opinion that the applicant suffered from a 'severe form of condition known as Paranoid Personality' and was 'extremely dangerous'. He expressed the view that 'appropriate measures' to contain the extreme danger should be continued and that the applicant was under 'extreme tension' and possessed a 'need to talk to somebody'.

1455. Dr Milton said in evidence he was in favour of overt surveillance. In his opinion the applicant presented quite an extreme danger to some of the persons dealing with him and to the public generally. Dr Milton believed that if the applicant was aware that he was being watched by police, there was less chance that he would do something violent.

1456. In Dr Milton's opinion, while the applicant might 'resent' the surveillance and find it 'galling', on another level he was not adverse to it because it appealed to his narcissism and made him feel important. However, although in favour of overt surveillance, Dr Milton was not aware of any conduct by police intended to provoke or harass the applicant.

1457. Mr Ninness denied that at anytime police deliberately undertook overt surveillance. He said the applicant's demeanour would change frequently, and when he became aware of the covert surveillance, he became 'very very aggressive' and took 'complete control of the situation' causing a great deal of stress to members of the surveillance team and the major crime squad. Contemporaneous internal police memoranda confirm that covert surveillance was extremely difficult to maintain (Ex 164, Ex 165). Independently

of surveillance, Mr Ninness deliberately engineered being in the presence of the applicant in order to be seen as the 'immoveable rock'.

1458. Early in his evidence to the Inquiry Mr Ninness was asked about both surveillance and the tactic of Mr Ninness making his presence felt. He was also asked about the relationship between these activities and the aim of investigators to obtain a confession or statement from the applicant. As to these matters Mr Ninness gave the following evidence (Inq 2562–2565):

Q Was there any link between the physical surveillance that was being undertaken of Mr Eastman, and the fact that he seemed to be talking to himself a lot when he got home?

A Yes. It was – we were drawing a good picture of Mr Eastman and how he behaved. He would start off in the morning quite calm, quite collected and then at about 9 o'clock he'd go in to ringing government offices and especially female secretaries and he'd launch a tirade of his complaint against the poor individual on the other end of the phone, and he could totally switch off within a second. It was quite informative for Dr Milton at that time to get some direction of his behavioural patterns.

Q You'd be aware of course that Mr Eastman made complaints at least by 1990 of harassment by the AFP?

A Yes.

Q You were interviewed because of those complaints?

A I was.

Q I'm focussing on the confessional material for now. One suggestion could be made that there was harassment of Mr Eastman during the time which resulted in him feeling pressured to talk to himself and confess. Was that cause and effect something that was in your mind?

A Most definitely and very concerning.

Q Well, what I'm putting to you is that there was deliberate harassment by the police in order to get some sort of confession?

A That wasn't our approach but certainly I was aware of the dilemma we were in as far as having surveillance on him and it would cause others to think that we were – a campaign of harassment. I was well aware of that.

Q Even if it wasn't – well, do you say it was a campaign of harassment?

A No. Definitely not.

Q Even if it wasn't a campaign of harassment, were you conscious of the possible effect it could have upon Mr Eastman mentally? That is, the surveillance, with what he might then say to himself when he was at home?

A I was consciously aware of that and that was why I was seeking the professional advice of Dr Milton at the time to try and walk me through it. I knew the fine line I was walking, very much so.

Q Were you trying to put pressure on Mr Eastman, let me put it this way, in order to encourage him to talk to himself about the crime when he was home alone?

A No, that wasn't the method we were using. I thought, if anything, he needed to talk to somebody. Dr Milton thought he needed to talk to somebody. So, it was important in the initial stages I keep a face-to-face contact with him as best I possibly could under the circumstances. But we certainly didn't anticipate we'd drive him into talking to himself.

Q Was there any advice that you were getting from Dr Milton which you were implementing to try and get Mr Eastman to talk to himself?

A What he advised was I as a senior investigator keep my face in front of him, that I was seen as the irremovable rock that he couldn't get around. In most instances he would succeed in any challenge he'd take on, but he had to see me as the person that he couldn't get around and I could either - it would attempt to drive him into talking to somebody else or that he'd open up to have an interview with me, which I didn't think he would do, but he may talk to somebody else.

Q And was the advice that if you continued in-his-face, so to speak, that he might talk to himself?

A Possibly, yes.

Q Are you able to say what sort of things that you did along those lines on advice of Dr Milton?

A Well, I kept - we executed a warrant on the 13th, I think it was. And then we seized a fair amount of property from him and I orchestrated a situation where I'd keep going back to take property back. On one occasion we met him at the rear of the War Memorial, myself and Detective McQuillen, and tried to get him to take part in a record of interview. And he was with a female at the time, which we orchestrated. It was a female police officer who was in the car with him. I was hoping that by telling him what we wanted to do with him, he was implicated in the possible murder of Mr Winchester he may talk, open up to the female police officer.

Q Are you able to say about when that was?

A I'm not sure. I'm not sure.

Q 1989?

A It would have been, yes.

Q I take it he didn't open up to that female police officer?

A Sorry?

Q He didn't open up?

A No, he didn't.

Q What do you mean you 'met him' at the rear of the War Memorial? Do you mean you knew he was there and so you turned up or pre-arranged?

A He'd usually go to the Olympic Swimming Pool in Civic and we orchestrated a situation with the policewoman, she was sunbathing at the pool on a daily basis. He struck up a rapport with her and invited her on an outing and he took her to the War Memorial and we knew in advance where they were going.

Q So you turned up?

A So when we went to the memorial and he came out, then we approached him at that time.

Q And so were you - apart from that occasion, were there other occasions when you orchestrated being in his presence, talking to him?

A Just the return of property. And, again, at the swimming pool, I used to go to the swimming pool and he used to swim at the same Olympic pool. I kept - on the advice of Dr Milton, it was important that I keep some sort of visual, even though I didn't talk to him, that he actually saw me there and my presence.

Q Are you able to say how long that methodology took place, over what period of time?

A It didn't go for a lengthy period. It went for probably a month to six weeks.

1459. Apart from the occasion at the Australian War Memorial, Mr Ninness said other specific occasions of engineered contact included the execution of the second warrant and returning property to the applicant.

1460. The details of the occasion at the War Memorial are worthy of examination, as is an earlier occasion when Mr Ninness and Mr McQuillen were involved in returning the applicant's car to him. These occasions are demonstrative of the attitude of the officers and their approach to the applicant in the early stages of the investigation, particularly in view of letters from the applicant's solicitors to the Commissioner of the AFP dated 19 January and 9 March 1989 (annexure 1 to the affidavit of Mr Pilkinton, Ex 180).

1461. The relevant passages from the letter of 19 January 1989 are as follows:

> As you are aware, our client was interviewed at his flat...on 11 January 1989 the day after the death of the Assistant Commissioner. In the writer's presence and after having taken legal advice from the writer, our client voluntarily answered a considerable number of questions put to him by the police officers as to his movements on the night of the 10 January 1989. Our client instructs us that the information he gave to the police officers was his best recollection as to the movements of that evening and given the passage of over a week since that time it is likely that his memory of the evening would be less rather than more clear now. As to our client's previous contact or dealings with the late Assistant Commissioner Winchester, he instructs us that these were limited to the meeting between our client, and the late Assistant Commissioner and Mr Neil Brown QC, MP at Police Headquarters on the 16 December 1988. The circumstances of this meeting are no doubt well known to and well documented by the Australian Federal Police and again our client instructs us that he is unable to assist you any further as to what took place at that meeting. In addition, we are instructed that originals or copies of all correspondence relating to that meeting are in your possession.
>
> In these circumstances our client instructs us that he has given the police as much assistance as he is able to give in relation to the matter and that he does not wish to make any further statements or take part in any further interviews with police and we trust that you will respect those wishes. If, notwithstanding the foregoing for any reason you wish to approach our client in the future either to interview him or otherwise in relation to this matter, our client has asked us that you contact the writer prior to doing so to enable the writer to provide him with advice and be present if appropriate. (my emphasis)

1462. In the letter of 9 March 1989, the applicant's attitude to a further interview was made abundantly clear:

> As you are aware we now act on behalf of the above named. Our client instructs us that you have on a number of occasions requested him to attend at the police station and participate in a formal record of interview concerning allegations you wish to put to him in relation to the death of Assistant Commissioner Winchester.
>
> Our client instructs us that under no circumstances and for the reasons outlined in our letter of 19 January 1989 to the Commissioner of the AFP written by our client's former solicitors will our client agree to a further interview. Our client accordingly instructs us to request you desist from continuing to request he attend at such an interview.
>
> We are further instructed that you still have a number of items of property seized from our client's house following a search of his premises. Our client has asked that in future rather than attend at his private residence for the purpose of retuning property he be permitted to collect same from the police station. We are instructed to ask that you telephone the writer and advise when you are in the position to return any of our client's property so arrangements may be then made for him to attend the police station and collect same. (my emphasis)

1463. Mr Ninness was shown the correspondence of 19 January 1989 and agreed that he ignored the request. He said he acted on the advice of Dr Milton about maintaining a presence during the period January – March 1989 in order to see whether the applicant

would speak to him directly (Inq 2571). Although Mr Ninness had said he wound back the practice of keeping contact with the applicant, he acknowledged that after March 1989 he 'seized upon any opportunity' to be in contact with the applicant and to 'enforce the fact we wanted to interview him especially with the Inquest up and rolling' (Inq 2571). Mr Ninness agreed the tactic was in operation during the period 1989 – 1991. Asked if he engineered the opportunities, Mr Ninness said he could not recall doing so in the 'latter parts' and that after the initial period the opportunities he had to make contact were 'just the return of property' or something to do with 'administrative stuff with regard to seizure of property under the warrant' (Inq 2571). In later evidence Mr Ninness said that regardless of the letter from Mr Pilkinton he believed he was entitled to put things to the applicant (Inq 2701).

1464. The applicant's car was seized on 18 January 1989. It was not long before Mr Ninness engineered a situation in which he could make direct contact with the applicant. On 23 January 1989 Mr Ninness and Mr McQuillen went to the applicant's premises and told him they had finished with his car and he could accompany them and take possession of it. When the applicant suggested he could pick it up later, Mr Ninness told him that he or Mr McQuillen needed to be present in order to release it and if he did not accompany them at that time he would have to wait till they were available. The applicant said he would accompany them to get the vehicle.

1465. Mr Ninness agreed that while travelling to the locality he used the opportunity 'to try and encourage [the applicant] to take part in an interview' (Inq 2793). Mr Ninness maintained that it was a very cordial conversation and he did not say anything offensive. At this time in his evidence Mr Ninness had not been referred to a statement he prepared for the purposes of the Inquest and he gave the following evidence (Inq 2793–2794):

> Q Didn't suggest to him that he's got homosexual tendencies and that he has sex with little boys?
>
> A I don't recall that. No.
>
> Q Well, do you deny that you said that?
>
> A I can't recall.
>
> Q Can't recall? Does that mean you might have, sir?
>
> A I could have been trying to tip him over. I don't know.
>
> Q Trying to what?
>
> A Tip him over.
>
> Q Tip him over what?
>
> A Upset him.
>
> Q Why?
>
> A Put him on edge.
>
> Q For what reason?
>
> A To get an interview out of him.
>
> Q To have him crack?
>
> A Talk to us. Yes.

Q Right. Stop hiding behind his solicitor?

A Yes.

Q So, you might have said to him something like, 'I think you're a homosexual and you have sex with little boys or you fuck little boys'?

A No. I can't - - -

Q No?

A No. Not on.

Q Would not have said it?

A I don't believe so. No.

Q No? Okay. What about trying to suggest to him that you know all about the fact that he has sex with prostitutes?

A Could have said that. Yes.

Q Could have said that?

A Yes.

Q And to trick him up?

A Well, to let him know we knew all about him, his antecedents.

Q Right. Upset him?

A Well, that's where he went on the night of the – of the homicide.

Q But the point of putting it to him is to what?

A Let him know that we were getting a lot of information on him, or gathering information.

Q Okay. And that you know a lot about him, why don't you just talk to us and tell us the truth about what happened?

A Yes.

Q Something to that effect?

A Yes.

Q Now, did you record that conversation in the car?

A Not that I recall. No.

Q No. Did Mr McQuillen?

A Not that I know of.

Q No. So you disagree with the fact that you were in any way aggressive towards him?

A Yes.

1466. After questions concerning voluntariness of any confession that might have followed such an exchange, which is discussed later, the attention of Mr Ninness was drawn to the statement he prepared for the Inquest (Ex 159). The relevant parts of that statement are as follows:

I said: We've made a lot of enquiries about you David and you're a different type of person than I thought we would be dealing with.

He said: What do you mean by that.

I said: Well from everyone we spoke to they tell us that you're quick to challenge every detail which goes against you. You're aware that I regard you as the number one suspect for the killing of Mr Winchester and that we'll be conducting many enquiries into your

past and your contact with Mr Winchester on the 16th December 1988.

He said: Our arrangement was that I won't be questioned by you or any Police.

I said: I'm not questioning you, I'm informing you of what course the investigation is taking. A large part of the investigation is directed at you and not the mafia type killing that the media has been publicising in recent times. We have information in relation to you from the time of the assault by you on Mr Russi (sic) to the time you attended Mr Winchester's office with Mr Brown in an attempt to have the assault charge dropped. Your vehicle has been examined in an effort to fully examine it for evidence of any powder the same of which was found in Mr Winchester's car and his body on the night of the murder. If you put the gun down in the car we may find gunpowder which may be compared.

...

Mr Eastman then went to the rear of the vehicle and opened the boot compartment.

He said: Yes. Hose and bucket all there. I'll just check that the spare tyre is here.

I said: Yes you never know, you can't be too careful.

You frequent brothels David?

Mr Eastman made no reply.

I said: I'm surprised that you engage in homosexual activities with boys David?

He said: What's that got to do with this.

I said: I'm just letting you know the homework we're doing into your background.

...

1467. Counsel for the applicant put to Mr Ninness that he had said words to the effect that the applicant 'fucks little boys'. Mr Ninness responded that it would be heard on the recording. Mr Ninness then gave the following evidence (Inq 2797):

Q The purpose of saying those things is to try and tip him over the edge?

A Tip him over the interview, yes.

1468. As mentioned, after Mr Ninness was questioned about the occasion of the return of the car and, before he looked at his statement, he was asked whether he was aware of the rule concerning voluntariness as it governed the admission of confession. He answered in the affirmative, and asked how a confession after that sort of treatment would be voluntary, he responded that the applicant would have been cautioned and had his solicitor present. He took the view that even though his conduct might tip the applicant over into giving an interview, provided he gave a caution and his solicitor was present the interview would be voluntary.

1469. Mr Ninness accepted that during the month of February 1989 there were at least three occasions when he attended at the applicant's residence using the excuse of returning an item of property to him. He agreed that on one of those occasions the applicant tried to shut the door and Mr Ninness stuck his foot in the door to prevent him from closing it. The evidence continued (Inq 2798–2799):

Q So you could have a conversation with him?

A To return property.

Q Well, it was so you could continue to have a face-to-face conversation with him, wasn't it?

A To make contact with him and to return property.

Q Well, it was so that you could continue to have a face-to-face conversation with him, wasn't it?

A To make contact with him and return property, yes.

Q And to follow the advice you'd been given by that stage from Dr Milton?---

A Yes.

Q Using as many opportunities as you could use, or find, to have that face-to-fact contact to try and get him to agree to have an interview with you?

A Correct.

Q Or to make a confession to you?

A Correct.

Q If he tried to close the door, what right did you have to put your foot in the door and stop him?

A I was handing back property when he went to slam the door at the time.

Q Yes, but what right did you have to stop him from slamming the door?

A Because my arm was in the door, or something.

1470. Mr Ninness was then asked whether on any of the occasions in February he told the applicant that he was concerned about him and his mental health (Inq 2799–2800):

Q Did you have, on any of those occasions in February of '89, a conversation with Mr Eastman in which you expressed to him sentiments to the effect that you were concerned about him. 'I'm concerned about you, David.'?

A Possibly, yes.

Q 'Concerned about your mental health.'?

A Possibly.

Q 'Don't want you to crack up.'?

A Possible.

Q 'Don't want you to end up in an institution.'?

A I can't recall, but possibly.

Q Words to the effect, 'I'm worried about you, David, with all this stress your mental health is going to crack up and you're going to have to be committed to an institution and then you're not going to be fit to plead and this case is never going to be solved.' Words to that effect?

...

Might you have said something like that?

A I possibly could have, yes, in that context.

...

A If you accept you might have said something like that, might that have been an attempt by you to try and show some form of sympathy, to try and make him think that you might actually be concerned about his health?

A Possibly.

Q Perhaps an attempt, consistent with Dr Milton's advice, to try and coax him into confessing to you?

A Yes.

1471. Mr Stuart Pilkinton was a solicitor who acted briefly for the applicant during the first Inquest. He was the solicitor who wrote the letter of 9 March 1989 to which I have referred.

1472. In his affidavit of 6 February 2014 (Ex 180), Mr Pilkinton said that on the Friday after he sent the letter of 9 March 1989 he received a telephone call from Mr Ninness. In evidence Mr Pilkinton explained that he knew Mr Ninness through contact with him in the course of his work as a solicitor and was familiar with Mr Ninness' voice. Mr Pilkinton described the content of the conversation in the following terms (Ex 180 [4]):

> He [Mr Ninness] sounded affected by alcohol and I could hear the background noises in the call which sounded like he was calling from a pub. Detective Sergeant Ninness was abusive and aggressive. His voice was so loud that my friends could hear the tenor of the abuse coming from the phone. Detective Sergeant Ninness said words to the following effect : 'I got your fucking letter. If I want to talk to your little cunt of a client, I'll fucking well talk to him whenever I fucking well like. You can stick your fucking letter where it hurts most.'

1473. In evidence Mr Pilkinton said he had no doubt that the caller was Mr Ninness. Although he could not recall his precise reaction, Mr Pilkinton thought he was surprised by the call and laughed about it thinking it was 'a bit pathetic really'. He said both swear words were used as described in his statement.

1474. Mr Pilkinton could not recall whether he made a note and did not believe that he made a formal or informal complaint to the AFP or the Ombudsman about the telephone call (Inq 3612).

1475. During questioning about an interview Mr McQuillen conducted with the applicant on 26 June 1990, Mr Ninness denied that he ever spoke to a solicitor in the terms described by Mr Pilkinton. He said that during February and March each year he abstained from alcohol and, in particular, during the investigation into the murder of the deceased he was not drinking significant quantities of alcohol.

1476. Mr Pilkinton was an impressive witness and I am unable to discern any reason why I should not accept his evidence as both truthful and reliable as to the essence of the statements by Mr Ninness during the telephone call. It does not surprise me that a person in Mr Pilkinton's position might treat a drunken call of the nature described as a bit of a pathetic joke and not bother to make a note or formally complain about it.

1477. On the other hand, the evidence to which I have referred and evidence discussed later in this Report, plainly demonstrate that Mr Ninness took the attitude that he would talk to the applicant whenever he wished. He paid no attention whatsoever to the letters from the solicitors. In addition, Mr Ninness was prepared to harass the applicant and, in substance, restrain the applicant whenever he saw fit. I would not be at all surprised if, affected by alcohol, Mr Ninness made the telephone call as described by Mr Pilkinton.

1478. I accept the evidence of Mr Pilkinton as both truthful and reliable as to the substance of the telephone call and the fact that it was made by Mr Ninness within a few days of the letter of 9 March 1989.

1479. Returning to events of engineered contact between police and the applicant, the next specific occasion identified in the evidence was the approach at the War Memorial which Mr Ninness mentioned in the evidence earlier cited. Mr Ninness accepted that the events occurred on 17 March 1989. In the passage of evidence cited earlier, Mr Ninness explained that police 'orchestrated a situation' with a policewoman who sunbathed at a pool on a daily basis and struck up a rapport with the applicant. He invited her on an outing and took her to the War Memorial. According to the initial evidence given by Mr Ninness, he and Mr McQuillen waited until the applicant and the policewoman left the War Memorial and were about to depart in the applicant's vehicle. As the applicant got into the driver's seat, Mr Ninness removed the keys from the ignition and requested that the applicant take part in an interview. At the time that Mr Ninness removed the keys from the ignition the female officer was getting into the applicant's vehicle.

1480. Mr Ninness was questioned about why he removed the keys from the ignition (Inq 2808–2809):

> Q Why?
>
> A To prevent him driving off.
>
> Q Why wouldn't he be able to drive off?
>
> A Because I just wanted to enforce my situation. I wanted to let him know we were still investigating him or requesting an interview. That was very early stages of the Inquiry. I think it was probably the second or third encounter with him.

1481. Mr Ninness agreed that the applicant was not under arrest. In that context it was suggested to Mr Ninness that it was a serious step to engage in such conduct and he responded with evidence that was, to say the least, singularly unimpressive (Inq 2809-2810):

> Q Mr Ninness, it's actually a serious step, isn't it, for a police officer to take the keys out of someone's ignition and stop them from going about their lawful business?
>
> A It was a very short space of time and I didn't want to endanger myself or Mr Eastman.
>
> Q What would have endangered you? You could have just let him drive off?
>
> A Well, he could have drove into one of us as well.
>
> Q But you could have just stepped back and let him drive out, surely?
>
> A Could have, yes.
>
> Q So you consider that you were justified because you wanted to tell him that you wanted to talk to him about the murder you thought it was justified to take the keys out of his ignition?
>
> A For safety purposes, yes.
>
> ...
>
> Q You agree, don't you, you had no lawful basis to take [the keys] out of his car and detain him in the way that you did?

A Only for the purpose of security and not endanger anybody.

Q There was no security problem at all, was there?

A Possibly there would have been.

Q The only security issue was one that you had engineered yourself by coming to the door of his car and taking the keys out of his ignition?

A Not correct.

1482. Mr Ninness said he did not believe that his conduct was unlawful. He then gave evidence which exposed the purpose of the exercise (Inq 2811):

Q So did you believe that it's perfectly okay to detain a person who is not under arrest, who hasn't committed any offence and who you just want to detain them while you talk to them? Was that all right, was it?

A We were investigating a very serious matter and I was aware of Mr Eastman's explosive nature at times and he may have exploded at being embarrassed with a female in the vehicle. The purpose of the exercise was to get Mr Eastman to talk to the young lady in the vehicle, after him being made aware of that we were investigating the murder.

Q And so she had been planted in that position in the hope that after you confronted him and agitated him that he might open up to her as they drove off?

A He may, yes. Yes. (my emphasis)

1483. Mr Ninness said that he had the keys for only a 'short space of time' which was a 'minute or so'. He returned the keys to the applicant, but could not recall if he threw them into the applicant's lap.

1484. In subsequent evidence discussed later Mr Ninness said confusion had existed as to the occasion during which he removed keys from the ignition. No keys were removed at the War Memorial as the applicant was a passenger in the female officer's vehicle and she had moved away from the vehicle with Mr McQuillen (Inq 4174–4175).

1485. This Inquiry was not the first occasion that Mr Ninness had given evidence about the events at the War Memorial. He gave evidence during the Inquest on 7 September 1989. During that evidence he was referred to his statement which was exhibit 137 at the Inquest (Ex 160). That statement recorded the commencement of the conversation with the applicant with Mr Ninness saying 'Hello David, how are you going?' and then saying:

> David, I received your letter by your solicitor about not wishing to take part in interviews with us regarding the murder of Mr Winchester.

1486. The statement by Mr Ninness reads that he then told the applicant police had found residue in the applicant's car linking him to the murder and they were 'not going away' because of the letter. He told the applicant they needed to put things to him to give the applicant the opportunity to provide an explanation. Mr Ninness recorded that he told the applicant they had strong evidence implicating him in the murder and the letter did not stop him putting things to the applicant.

1487. By way of explanation, in his evidence to the Coroner Mr Ninness said he was not questioning the applicant; he was putting something to him. Mr Ninness said this was the first opportunity after Mr Barnes had clarified issues concerning the residue powder

to let the applicant know 'we had very strong evidence at that time that linked him to the murder of Mr Winchester.'

1488. Apparently, Mr Ninness was also confused at the Inquest about the occasion on which keys were removed from the ignition. Asked before the Coroner why the keys were removed from the ignition, Mr Ninness said that was a practice he adopted 'when dealing with certain people' such as people who show a propensity for violence (Inqu 816–817). Mr Ninness said the applicant was trying to close the door of the car and he would not allow him to do so. Asked why he did not permit the applicant to close the door, Mr Ninness said he wanted to tell the applicant about executing warrants on the trust accounts the following day. He agreed the applicant said he did not want to speak to him and he chose to ignore that. He denied preventing the applicant from leaving, but was forced to acknowledge that the applicant could not start his vehicle without the keys. He said he allowed him to leave as soon as he requested that he be permitted to leave 'on the second occasion' and after he had told the applicant what he wanted to tell him (Inqu 818). Asked how he returned the keys, he said he threw them on the applicant's lap.

1489. In an interesting interpretation of his dealings with the applicant, Mr Ninness told the Coroner that he had 'bent over backwards to try and assist the applicant' (Inqu 819):

> I have bent over backwards to try and assist your client [the applicant] to come forward and assist the police with their inquiry to eliminate himself as a suspect.

1490. That evidence echoes evidence given to this Inquiry which is discussed later.

1491. Mr Ninness agreed he did not tell the Coroner that the woman in the vehicle was a policewoman. When asked in the Inquest about speaking to the woman, considered in view of his tendered statement, Mr Ninness gave answers which were plainly designed to convey the impression that the woman was spoken to as a stranger (Inq 806):

> Q Was it an attempt by you to embarrass my client in the presence of a female friend?
>
> A No, it was not.
>
> Q Was anything said to her?
>
> A She was spoken to, yes.
>
> Q What was said to her?
>
> A I did not speak to her; Sergeant McQuillen spoke to her.
>
> Q Do you know what was said to her?
>
> A No I do not.

1492. The events at the War Memorial occurred on 17 March 1989. Five days later on 22 March 1989 Mr Ninness and Mr McQuillen deliberately made contact with the applicant on Ainslie Avenue outside the city markets. A statement prepared by Mr Ninness provides a description of the occasion which is demonstrative of both Mr Ninness' attitude to the applicant and the type of harassment of the applicant in which Mr Ninness undoubtedly engaged.

1493. The statement commences with reference to travelling to the area of the city markets and observing the applicant's vehicle parked at the kerb. The relevant actions of Mr Ninness and the conversation with the applicant were then described (Ex 182):

> Detective Sergeant MCQUILLEN parked the Police vehicle behind the Blue Mazda. A short time later I saw David Harold EASTMAN walk to the vehicle and get in the driver's side. Detective Sergeant MCQUILLEN and I approached the vehicle and I positioned my body between the open driver's side door and Mr EASTMAN. I then had a conversation with Mr EASTMAN.
>
> I said: I've spoken to your solicitor again David about your refusing to co-operate in interviews right. No you're not going to shut the door. Excuse me you're not shutting the door I said.
>
> He said: Excuse me I am not obliged to speak to you when I am in the middle of my own affairs.
>
> I said: You said you spoke to your solicitor.
>
> He said: But I suppose.
>
> I said: No you may not shut the door at all. Listen to me for a moment.
>
> He said: The law is I'm not obliged to speak to you.
>
> I said: I'm the law at the moment, I'm the law at the moment, I'm the, shut up for a minute.
>
> He said: I'm sorry.
>
> I said: Shut up.
>
> He said: We have advised several times.
>
> I said: Shut up
>
> He said: That I'm not obliged to speak with you.
>
> I said: I'm telling you that I'm about to execute a number of warrants and your business premises again through the banks, your broker, we're going right through you from top to bottom. I've told you I've got evidence in your car that links you with the WINCHESTER Murder enquiry David.
>
> He said: If you've got these warrants, excuse me.
>
> I said: We've got the warrants and they'll be executed tomorrow.
>
> He said: Now can I have my keys back please. I am not obliged to speak to you sir and I wish to leave straight away.
>
> I said: When I'm finished.
>
> He said: No I am entitled to leave right now.
>
> I said: When I'm finished talking to you, I'm going to put allegations to you.
>
> He said: This is illegal I don't have to speak to you.
>
> I said: I'll tell you what's legal.
>
> He said: And you've been told several times. That technically is an assault.
>
> I said: You know what you can do.
>
> He said Yeah.
>
> I said: I'll see you shortly David.
>
> We then returned to the City Police Station and continued normal duties.

1494. The attitude of Mr Ninness toward the applicant, and the harassing nature of this occasion of contact with the applicant, are self-evident.

1495. On 23 March 1989 Mr Pilkinton wrote to the Commissioner of Police concerning the events of 22 March 1989. The letter stated that on 22 March 1989 Mr Pilkinton spoke with Mr Ninness and confirmed that the applicant would not agree to participate in an interview. The letter observed that despite the applicant's refusal to participate in an interview, Mr Pilkinton was instructed by the applicant that Mr Ninness continued to approach him requesting an interview. The letter continued (Ex 181):

> Just in case it is not already abundantly clear we repeat our client will not under any circumstances consent to being interviewed by the police in respect of this matter.

1496. On 23 March 1989 Mr Pilkinton also wrote to the Ombudsman stating that the applicant wished to lay a formal complaint against both Mr Ninness and Mr McQuillen in respect of their conduct on a number of occasions which were identified in the letter. Those occasions included the events of 17 and 22 March 1989 and other incidents that the applicant asserted occurred in the period of January – March 1989.

1497. Another engineered contact occurred at a swimming pool. Through surveillance Mr Ninness became aware that the applicant swam at the Olympic Pool. It was at the pool at which contact was made with the applicant by the policewoman who accompanied the applicant to the War Memorial.

1498. Mr Ninness was a regular swimmer. He shifted from the Deakin Pool to the Olympic Pool and swam at the same time as the applicant for the purpose of ensuring the applicant could see his presence. He denied swimming over the top of the applicant and said they may have passed each other in the lane purely by chance (Inq 2819). He swam at the same pool only on a few occasions.

1499. As to the response of the applicant to the 'in-your-face' police tactics used in the manner described, Mr Ninness agreed that the applicant complained about his conduct, but said the complaint was toward the 'latter part'. He said the applicant made it clear that he would not be interviewed and would not be bullied (Inq 2566). Mr Ninness gave the following evidence in examination as to his thinking about the possible effect upon the applicant of the police tactics in the early stages (Inq 2694–2695):

> Q What did you think would be the effect upon Mr Eastman of this 'in-your-face' contact from the AFP?
>
> A What would be the effect?
>
> Q Yes. How do you think it would cause him to react, behave?
>
> A Well, any - any aggression or any outburst would come our direction, not anybody else, keep him again focused on where the inquiry was coming from.
>
> Q You were aware, obviously, from the reports of Dr Milton that he had been diagnosed with a Paranoid Personality Disorder?
>
> A Yes, I do.
>
> Q Did you consider how this 'in-your-face' behaviour might cause someone like Mr Eastman with such a disorder to react?
>
> A Also Dr Milton informed us he was a paranoid personality, but he was also dangerous.

Q Anyway, you say that you were acting on Dr Milton's advice that this sort of 'in-your-face' presence may have caused him to talk about it?

A Possibly, yes.

Q How did you think he might react, bearing in mind he had a Paranoid Personality Disorder?

A Well, hopefully it would drive him into talking to somebody or going to the firearm.

Q Right?

A And he'd keep contact with us, and eventually we could break a - build up a rapport with him.

Q That's drive him into talking to somebody, whether that be to himself inside or to somebody else?

A I didn't really think about the inside talking until later on, but that was a possibility, yes.

Q How did he react?

A He was quite disciplined on most occasions. Providing we did not professionally approach. He was quite amicable, up and down the line.

Q Sorry?

A Up and down the line. Not aggressive.

Q And on other occasions?

A He had never shown any really outward signs to me of aggression.

1500. Mr Ninness went on to say that the applicant reacted badly to the surveillance.

1501. Mr Ninness was a very experienced police officer. He had been a detective for about 16 years. He said he had never engaged in this type of behaviour towards a suspect previously and did it on this occasion on the advice of Dr Milton as to the best way to approach the applicant (Inq 2566). He was aware of the 'fine line' he was walking and said his 'great concern' was the safety of 'senior members of the community' and members of the investigation team. Mr Ninness was afraid that the applicant could hurt or kill someone and pointed out that the applicant had been seen at the residences of the Chief Magistrate and one of the surveillance team members. Mr Ninness then gave the following evidence (Inq 2567):

Q So did you have the belief that by being the immoveable rock and constant presence that it might dissuade him from taking any action against other people?

A Yes. And also that he may subject himself to an interview with me.

Q You also must have appreciated that it could easily have appeared to be harassment?

A Definitely.

Q But you decided, notwithstanding it could be seen as harassment, that it was important enough to carry it out?

A Yes.

...

Q So there were two parts to it: one was that protection of the community, if I can put it that way?

A Yes.

Q And the other was you maintaining a presence to see if he would open up to you?

A Yes.

Q Did you consider that - was it part of the advice from Milton, or in your mind at least, that that constant presence of you would cause him to open up to someone else?

A Yes. Hopefully.

1502. Mr Ninness said police were hoping for 'total covert surveillance all the way through it', but the applicant obtained advice about diffusing or seeking out surveillance teams and sought the assistance of a journalist. He described the applicant's behaviour in the following terms (Inq 2567–2568):

> He then embarked on a full campaign of photographing surveillance vehicles, throwing rocks at surveillance team members and verbally attacking them. A lot of the times he got it right but sometimes he accosted members of the public, threw rocks through their windscreens and physically assaulted some on a number of occasions.

1503. According to Mr Ninness, when that type of behaviour developed his state of mind had changed and he did not think that the applicant was going to talk to them. Nor did he think that the constant presence of police officers would cause the applicant to speak to someone else. His major concern was the safety of the public. He also hoped that because of the applicant's paranoid personality he would not be happy about the locality of the weapon and would revisit it. Covert surveillance was set up in the Botanical Gardens where the applicant regularly visited and he did not detect that surveillance.

1504. Mr Ninness said the rock throwing commenced early in 1990 and continued at various times through 1990 and 1991. It was during this period that the listening devices were picking up the applicant talking to himself. As to the relevance of surveillance to the applicant talking to himself, Mr Ninness gave the following evidence (Inq 2569):

Q Did you consider that the surveillance that you were maintaining on Mr Eastman was contributing to that state of mind of Mr Eastman needing to talk to himself?

A I didn't know. Perhaps could have. It may have.

Q Are you saying then that there was no deliberate use of surveillance to somehow cause Mr Eastman during 1990 and 1991 to get into a state of mind where he would need to speak about the murder to himself?

A That's what I'm saying, yes.

Q There wasn't?

A No, there was not.

1505. Evidence in the Inquest commenced in August 1989. Mr Ninness said he did not have any contact with the applicant during the Inquest. Asked if he was aware of contact by other members of the AFP during that period, Mr Ninness said he was aware of allegations about phone calls to the applicant's residence and that Telecom had traced three of the calls back to the City Police Station. He was informed that one of the calls was made by the surveillance team because they did not know whether the applicant was in or out of the flat, and when the applicant answered they did not speak. He had no knowledge of the other two calls that were apparently made from the City Police Station. Speaking from memory only, Mr Ninness said these two calls from the station were not investigated because they could have been made by anyone at the station.

1506. Following complaints by the applicant, Telecom investigations established that the applicant received numerous harassing calls from various localities. Those traced to the AFP PABX were made at 8.49 am on 29 January 1990, 11.52 am on 24 February 1990 and 6.20 pm on 3 March 1990. Mr Ninness denied that the calls were part of the planned investigation process to maintain contact with the applicant in order to get him to confess (Inq 2572). As other calls were made from public telephone boxes, the identity of the caller(s) could not be established.

1507. Mr McQuillen gave evidence that the AFP calls were made to check whether the applicant was in the residence and, also, to ascertain whether devices placed within the residence were working. This evidence initially appeared to be supported by entries in an Occurrence Sheet which Mr McQuillen said was kept as a record of calls made for operational reasons (Inq 4248). However, on closer examination it was clear that the particular handwritten sheet produced was created by Mr McQuillen on the one occasion and was after the three calls were made.

1508. The sheet containing the entries of the calls is a lined sheet on which the page number (21) and entries are all handwritten. A quick perusal of the entries immediately raised a strong suspicion that they were all written on the one occasion. The writing is done with the same pen and is virtually identical.

1509. Secondly, pages 20 and 23, either side of page 21, are blank pages on which the entries are typed.

1510. Thirdly, page 20 contains an entry from 14 February 1990, fifteen days after the date of the first entry on page 21 relating to the first call on 29 January 1990.

1511. Finally, it is beyond coincidence that Telecom wrote to the AFP on 15 March 1990 advising that three calls had been traced to the AFP PABX. Of course, this letter came too late to get the call of 29 January 1990 recorded in date order because the entry for 14 February 1990 had already been made. But the letter prompted the addition of the single page for calls on 29 January 1990 (out of order), 24 February and 3 March 1990.

1512. I am satisfied that no record of the calls was made until after the AFP received the Telecom letter of 15 March 1990. The handwritten sheet was an attempt by Mr McQuillen to fill the gap. The absence of a record, coupled with the conduct of Mr McQuillen in creating the handwritten sheet after the event, strongly suggests that the calls were not for 'operational reasons'.

1513. During cross-examination by Counsel for the applicant it was put to Mr Ninness that making such calls was inappropriate. Mr Ninness' first response was that making calls at night would be 'silly and childish'. He also suggested there might have been a legitimate reason for making such calls, but acknowledged that he had never telephoned the applicant at home at night and he was not aware of any member of the Major Crime Squad having done so. He could not think of a legitimate reason why such a call would be made. The description of the calls as merely 'silly and childish', and the attempt by Mr Ninness to find a justification for the calls, were less than impressive.

1514. After his initial evidence about surveillance and other contact with the applicant to which I have referred, Mr Ninness gave lengthy evidence about Mr Barnes and about Dr Milton in the context of the possibility that the trial Judge was in possession of reports by Dr Milton. The questioning then returned to the question of surveillance and officers maintaining direct contact with the applicant.

1515. Mr Ninness confirmed the opinion received from Dr Milton that if he maintained a presence the applicant might decide to confess to him or, 'more likely', somebody else. He also confirmed the view he held at that time that it was necessary to maintain the presence of 'being in Mr Eastman's face' throughout the period to early 1992 (Inq 2682).

1516. Reminded of his earlier evidence that despite the letters from the solicitors for the applicant asking him not to speak directly to the applicant, he nevertheless tried to engineer situations where he could speak to him directly or, in one situation, where he might open up to a female police officer (Inq 2686), Mr Ninness confirmed that evidence. However, he repeated that such an approach was wound-down after a period of six weeks or so.

1517. The evidence of Mr Ninness to which I have referred was given from 24 February to 3 March 2014. In early April 2014 the AFP produced to the Inquiry a large number of documents relating to complaints made by Mr Eastman concerning both the conduct of police and the internal AFP investigations that followed. Mr Ninness was recalled on 8 April 2014 and gave evidence which was, at times, evasive and involved futile attempts to justify blatantly unlawful conduct. In arriving at these views, and generally in assessing the evidence of Mr Ninness and Mr McQuillen, I have borne in mind the difficult position in which these witnesses are placed in trying to recall decisions made so many years ago, and the reasons for those decisions. However, at times, some of the evidence was plainly evasive and lacking in credibility.

1518. On 15 June 1989 Mr Ninness was interviewed by an officer from the Internal Investigations Division (IID) of the AFP (transcript Ex 214). When he was asked about the incident at the War Memorial, Mr Ninness deliberately refrained from identifying the female person accompanying the applicant as a police officer. He said he cleared this course of action with the Commissioner of Police (now deceased) and deliberately failed to tell the investigator because he was still using the female person as an undercover officer in the course of the investigation.[78] Mr Ninness agreed he was aware that the investigator would be reporting back to the Commonwealth Ombudsman without being given all relevant information (Inq 4156). As to whether in 'some sense' the investigator had been misled, Mr Ninness replied 'perhaps' (Inq 4156). This answer was one of many examples where Mr Ninness was not willing to acknowledge the obvious if the obvious fact might reflect adversely upon him.

1519. Mr McQuillen was also interviewed about the occasion at the War Memorial and, like Mr Ninness, he did not mention that the female person was an undercover officer. He

[78] Approximately 10 months later Mr Ninness disclosed to Commander Whiddett that the female person was an undercover police officer.

said he did not intend to mislead the investigator and was not aware of any situation in which it would be appropriate not to answer IID questions truthfully (Inq 4225).

1520. In the course of the same interview on 15 June 1989, Mr Ninness was asked whether, at the time of the incident at the War Memorial on 17 March 1989, he considered it part of his duties to try and pursue an interview with the applicant. He answered:

> I most certainly do and I'd be very remiss if I didn't pursue this course of the Inquiry.

1521. The attention of Mr Ninness was then drawn to the letter from Mr Pilkinton to the Commissioner of Police dated 9 March 1989, eight days before the occasion at the War Memorial. Mr Ninness agreed that on 17 March 1989 he was aware of that letter. The relevant contents of the letter are set out earlier in this Report and the passage of particular relevance was as follows:

> Our client instructs us that under no circumstances and for the reasons outlined in our letter of 19 January 1989 to the Commissioner of the AFP written by our client's former solicitors will our client agree to a further interview. Our client accordingly instructs us to request you desist from continuing to request he attend for such an interview.

1522. Mr Ninness acknowledged that he did not advise the investigator that he had received a letter from the applicant's solicitor and said he could not recall why he did not inform the investigator of the letter. Asked if standing back and looking at it it could be said that his answer was misleading in the sense that he did not give the investigator everything the investigator needed to know, Mr Ninness said 'it could be perceived that way, but that was not my intention'. When it was put to Mr Ninness that his answer was not accurate, he responded that 'it was what I was feeling at the time' (Inq 4158). Mr Ninness maintained he did not believe the answer to the investigator was misleading, even though he knew that the applicant was not going to cooperate.

1523. The evasiveness of Mr Ninness in responding to these questions was exacerbated by later evidence concerning his answers to another investigator who interviewed Mr Ninness on 24 April 1990. Mr Ninness was asked about the occasion at the War Memorial and repeated his position concerning the possibility of the applicant agreeing to an interview:

> Q14 Can you recall the occasion of why you happened to be at the War Memorial at that time?
>
> A Yes, at that time Mr Eastman had led me to believe that he may take part in an interview with police. I had spoken to his solicitor on a number of occasions, and Mr Eastman, I apologise, I had spoken to his solicitor, but on a number of occasions Mr Eastman had indicated that he may be prepared to take part in an interview. I'd requested that he take part in the interview at the police station, or I would be prepared to go to his solicitor's office of his choice, and the interview would be tape recorded and videoed if he requested, and I was making as much contact as I could with Mr Eastman in an endeavour to obtain that interview. At that stage he was still leaving me with the impression that he may take part in the interview between police and himself.
>
> Q15 So on the 17th March 1989 at the War Memorial, you were proposing to approach Mr Eastman to ascertain whether he'd take part in the interview.
>
> A Yes.

1524. It was put to Mr Ninness that his answer to the investigator that Mr Eastman had led him to believe he might take part in an interview was not correct. Mr Ninness maintained that it was correct saying Mr Eastman was hot and cold. Sometimes he thought he had 'won him around' and held an expectation of getting an interview or of the applicant 'loosening up and warming to us'. On other occasions the applicant would go 'flat cold' (Inq 4162).

1525. Further questioning on the same topic resulted in unimpressive answers in which Mr Ninness repeated that he held the belief that the applicant might cooperate with an interview notwithstanding the terms of the letter from the applicant's solicitor dated 9 March 1989. Mr Ninness endeavoured to justify this belief on the basis that some of the contact with the applicant was 'quite cordial' (Inq 4161), but asked how, in his mind, the 'quite cordial' behaviour displaced the effect of the letter, Mr Ninness replied that he was not dealing with the letter; he was dealing with Mr Eastman and 'lived in anticipation' that he might be able to get 'closer' to the applicant. He said he 'lived in hope' (Inq 4163).

1526. Mr Ninness was asked on a number of occasions what had occurred between the letter of 9 March 1989 and the occasion at the War Memorial of 17 March 1989 to leave him with the impression that the applicant might take part in an interview. He said he could not recall, but it would have been the background in Dr Milton's reports. Asked what he meant by that, Mr Ninness said the fact that the applicant had said 'go away' didn't mean police were going to go away and Dr Milton had advised that they continue to show a presence. In fairness to Mr Ninness, he could not be expected to remember such details so long after the event.

1527. The interview with Mr Ninness on 24 April 1990 moved from the occasion at the War Memorial on 17 March 1989 to events at the city markets on 22 March 1989. Again, Mr Ninness maintained that he was 'still pursuing' the applicant to take part in an interview. He added that the applicant 'had not cut [him] off totally' and had led Mr Ninness to believe that he might take part in an interview. Asked if his answer was true, Mr Ninness initially said he could not recall (Inq 4165). As to whether he would interpret the letter of 9 March 1989 as the applicant, through his solicitor, cutting him off totally, Mr Ninness said he could not recall what was in his mind at that time. Finally he agreed that looking at the letter now, it was cutting him off totally (Inq 4165).

1528. Notwithstanding that acknowledgement, Mr Ninness was unwilling to accept that his answer to the investigator was contradicted by the letter of 9 March 1989. When it was suggested that his answer flew in the face of evidence in the letter that he had been cut off totally, Mr Ninness replied (Inq 4165):

> No, not really. We were still – at that time we were returning property that we'd seized under the execution of a search warrant. And we were taking back property to him in dribs and drabs. As I said, sometimes he was very cordial.

1529. The answer speaks for itself. Mr Ninness was not prepared to accept the obvious; his answer to the investigator was not truthful.

1530. During the questioning by the investigator, Mr Ninness was asked about the applicant's solicitor and mentioned Mr Walker. He told the investigator that a decision had not been made whether the applicant would take part in an interview and he was 'given to understand that Mr Walker wished Mr Eastman to take part in an interview at his office'. Mr Ninness then gave an answer to the investigator that was blatantly misleading:

> Q20 Did either Mr Eastman or Mr Walker rule out the possibility of an interview with police concerning your investigation?
>
> A Not up at that, not up in that period.

1531. As I have said, in evidence to the Inquiry the attention of Mr Ninness had previously been drawn to the letter of 9 March 1989 and the evidence to which I have referred was given in the light of that letter. However, in the context of Mr Walker, Counsel drew the attention of Mr Ninness to the letter of 19 January 1989 which is set out earlier in this Report. That letter was written by Mr Walker and it plainly stated that the applicant did not wish to make any further statement or take part in any further interviews. It also advised that if police wished to approach the applicant or to interview him, the applicant had asked that they contact Mr Walker prior to doing so.

1532. In the light of the two letters, Mr Ninness was asked on what basis he had given the answers to the investigator to which I have referred. He responded that it was 'just a feeling' he had from Mr Walker at that time. He obtained this 'feeling' from conversation with Mr Walker and knew that Mr Walker was trying to encourage the applicant to take part in an interview (Inq 4166). Asked if the answer to question 20 was accurate, Mr Ninness replied 'that's the way I felt at the time'. Asked again whether his answer was accurate when he said that neither Mr Eastman nor Mr Walker had ruled out the possibility of an interview in that period, Mr Ninness reluctantly replied 'perhaps not'. The questioning continued (Inq 4167):

> Q Perhaps not?
>
> A Yes.
>
> Q Plainly?
>
> A It depends what was in my mind at the time.
>
> Q No, it's not a question of what was in your mind, Mr Ninness. You were being asked whether Mr Eastman had, in fact, ruled out an interview. And we know that Mr Eastman, through his solicitors, twice ruled out an interview?
>
> A Yes.
>
> Q That answer wasn't accurate was it? The answer wasn't accurate, was it?
>
> A It could be interpreted that way, yes.

1533. During his evidence Mr Ninness suggested that the investigator had been in possession of the letters from the solicitors. However, faced with the investigator's report discussing whether attempting to secure an interview from someone 'who has presumably not indicated definitely his willingness or unwillingness to be interviewed is harassment', Mr Ninness acknowledged the report indicated that the investigator was not in possession of the letters.

1534. There is further evidence which contradicts Mr Ninness' answer to the investigator that up to 22 March 1989 neither the applicant nor Mr Walker had ruled out the possibility of an interview with police. In a statement prepared for the Coroner concerning the return of the applicant's car on 23 January 1989, Mr Ninness recounted a conversation with the applicant which included a statement by the applicant: 'our arrangement was that I won't be questioned by you or any police'. When it was suggested the answer did not sit well with his response to the investigator, Mr Ninness replied: 'I'm going from my memory ...' (Inq 4172).

1535. As to the occasion at the War Memorial, in another statement prepared for the Coroner (Ex 160) Mr Ninness recounted his conversation with the applicant which included statements by the applicant that the solicitor's letter was quite clear. Mr Ninness agreed this was the second occasion on which the applicant had made it plain to him directly that he was not going to answer his questions. This time when it was suggested that the statement by the applicant did not sit well with his answer to the investigator, Mr Ninness replied 'perhaps not, no'.

1536. The evidence of Mr Ninness concerning the accuracy of his answers to the investigators was, to say the least, unimpressive, as were Mr Ninness' attempts to justify his actions in ignoring the letters. Mr Ninness would not agree that he had a 'blatant' disregard for the letter of 9 March 1989 (Inq 4162), but acknowledged that he 'certainly didn't listen to it' and disregarded it. Asked why he disregarded the letter, Mr Ninness said he was working with the advice of Dr Milton and it was an opportunity to continue to show a presence to the applicant. Asked why he was not respecting the applicant's right to decline to participate in an interview, Mr Ninness responded across a number of questions with the theme that the applicant was a 'totally different character' from any with whom he had previously dealt, was well aware of his rights' and police were investigating a very serious matter (Inq 4162). Mr Ninness said he felt he was justified because it was the applicant, but not because he thought the applicant was guilty.

1537. Mr Ninness accepted that the inquiry by the investigator in April 1990 was an important matter and it was important to give full and frank answers. Asked why he did not give full and frank answers, Mr Ninness replied 'I believe I did at the time' (Inq 4167). Given another opportunity to give a frank answer by the next question 'Seriously?', Mr Ninness replied 'yes'. Mr Ninness disagreed with the proposition that because he did not give the investigator the necessary information, the investigator was not able to assess properly the applicant's complaints of harassment.

1538. Mr Ninness also maintained that disregarding the letters and pursuing an interview with the applicant was lawful conduct. Asked why he considered it was lawful, he replied 'because we were investigating a very serious matter' (Inq 4168). While he accepted that he had not respected the exercise of rights by the applicant, he did not agree that his conduct compromised the investigation. The evidence by Mr Ninness continued (Inq 4168):

> Q You consider it was lawful if Mr Eastman said, 'I don't want to talk to you, stay away from me'. You considered that it was lawful and legitimate for you, nevertheless to ignore that ...
>
> A In the light of the ...

Q ... and stay in-his-face?

A Yes. In the light of the reports by Dr Milton and we're hoping that he'd either lead us to evidence or he may talk to somebody.

Q So the ends, in this instance, justify the means, notwithstanding Mr Eastman's plain indication that he didn't want to talk to you?

A Strong possibility he may have done something that would have implicated him in the crime.

1539. As to the impact of surveillance and the engineered contacts, it was suggested to Mr Ninness that if someone had indicated through a solicitor they did not wish to speak to police and then, on a daily basis, they were constantly being followed by police, it was 'no wonder' that the person might begin to respond aggressively. Mr Ninness replied 'normal people wouldn't, no' (Inq 4170). Under further questioning, however, Mr Ninness agreed it was possible that normal people might get just a 'touch cross' and aggressive.

1540. Mr Ninness accepted that knowing of the applicant's Paranoid Personality Disorder, it raised in his mind the real likelihood that the applicant might respond more adversely than a normal person to being followed in the manner in which the applicant was being followed. Asked if he was concerned about the impact of the police conduct on the applicant's mental state, Mr Ninness responded in the affirmative in the sense that the applicant might assault someone or kill someone. He disagreed with the proposition that the applicant was being harassed and maintained that it was merely close police scrutiny (Inq 4170).

1541. In the context of harassment, taken to his statement (Ex 159) concerning the events of the return of the applicant's vehicle, and to his assertion to the applicant that he was 'surprised' that the applicant engaged in 'homosexual activity with boys', Mr Ninness was asked whether he considered this conduct and statement to amount to harassment (Inq 4173):

Q You don't consider that to be harassment?

A What I was letting him know was that we were doing background work into his previous history.

Q Yes?

A And just letting him know how deep we were digging into his past.

Q You don't consider that was harassment?

A No. I was informing him of something we'd been told.

Q Why were you informing him of what you'd been doing?

A Again, trying to knock him off his perch and he may talk to somebody. He'd spoken to Mr Russo about that particular incident with a Detective McDevitt. And I was attempting to let him know that we were doing a lot of background work into him.

Q You were trying to break him?

A Sorry?

Q You were trying to break him?

A Trying to what?

Q Break him?

A Trying to let him know we were doing a lot of work in his background.

Q Were you trying to break him, Mr Ninness?

A I was trying to get him to a point where he may talk to somebody.

Q Yes?

A And keep in-his-face, as Dr Milton suggested we do?

Q Dr Milton didn't suggest you harass him, did he?

A No, he suggested we keep a presence.

Q A presence?

A Yes.

Q Do you call speaking with him and accusing him of homosexual activities with boys merely keeping a presence?

A Yes. I informed him of what we knew, yes.

1542. In the course of his answers to the investigator on 24 April 1990, Mr Ninness said that his conversations with the applicant had not been aggressive. He maintained in evidence that his conversations with the applicant were not aggressive and said he was trying to 'keep a plateau with him at all times' (Inq 4175). Mr Ninness was then taken to his statement prepared for the Coroner (Ex 182) concerning the events at the city markets and his conversation with the applicant. This was the occasion when the applicant was in his vehicle and Mr Ninness opened the door and stood in the open doorway. It was on this occasion that Mr Ninness removed the keys from the ignition and it is appropriate to set out again the relevant conversation to be considered in the context of whether Mr Ninness behaved aggressively:

Q I've spoken to your solicitor again today David about you refusing to cooperate in interviews right? No you're not going to shut the door. Excuse me you're not shutting the door I said.

A Excuse me I'm not obliged to speak to you while I'm in the middle of my own affairs.

Q You said you spoke to your solicitor?

A But I suppose?

Q No you may not shut the door at all. Listen to me for a moment.

A The law is I'm not obliged to speak to you.

Q I'm the law at the moment, I'm the law at the moment, I'm the shut up for a minute.

A I'm sorry?

Q Shut up.

A We have advised several times.

Q Shut up.

A That I'm not obliged to speak to you.

Q I'm telling you that I'm about to execute a number of warrants and your business premises again through the bank's, your broker, we're going right through you from top to bottom. I've told you I've got evidence in your car that links you with the Winchester murder inquiry David.

A If you've got these warrants, excuse me.

Q We've got the warrants and they'll be executed tomorrow.

A OK Execute them.

Q We're going to go right through you from top to bottom.

A Now can I have my keys back please. I'm not obliged to speak to you sir and I wish to leave straight away.

Q When I'm finished.

A No I am entitled to leave right now.

Q When I'm finished talking to you, I'm going to put allegations to you.

A This is illegal, I don't have to speak to you.

Q I'll tell you what's legal.

A And you've been told several times. That technically is an assault.

Q You know what you can do

A Yeh.

Q I'll see you very shortly David.

1543. In respect of his conduct, Mr Ninness was asked about his authority and whether he was aggressive (Inq 4175–4177):

Q ... Now you've obviously stood and prevented him from shutting the door.

A Correct.

Q Prevented him from leaving.

A Yes.

Q What authority did you have to do that.

A I believe I was investigating a very serious matter and I wanted to try to get through to Mr Eastman.

Q So if you were investigating a shoplifting, would you have had authority to do this?

A No.

Q Why does the fact that you were investigating a serious matter mean that you had lawful authority to step in the doorway and stop him from leaving?

A I had to put every endeavour I believed to get Mr Eastman to cooperate or ...

Q I understand that, Mr Ninness, but you've been a police officer for a long time. You know about what's lawful and what's not lawful?

A Yes.

Q You may think you're justified in taking unlawful steps. That's not the question. The question here is: What lawful authority did you have to prevent him – to stop him from shutting his door and prevent him from leaving?

A It was a very short space of time.

Q Is that the euphemistic way of saying that you agree it was not a lawful act?

A I don't believe it was an unlawful act.

...

Q Absolutely direct statement. You said, 'I'm the law at the moment. I'm the law at the moment. I'm the – shut up for a minute'. He said: 'I'm sorry?' You said: 'Shut up'.

A Yes,

Q Not being aggressive?

A I was making it in a flat tone.

Q ... He said to you, 'We have advised several times.' You said, 'shut up'. He went on 'And I'm not obliged to speak to you'. Not aggressive, Mr Ninness?

A I was letting him know that I was in charge of the situation.

Q Not harassing him?

A I don't believe so.

Q So to stand in the door, prevent a person from shutting their door, telling them they can't shut the door and telling them to shut up on three occasions is not being aggressive?

A Is this the situation of where we were trying to tell him that we were executing a warrant on the bank?

Q You went on to say, you've got the warrants. You spoke about the warrants. So, again, the ends justified the means, do they?

A If I was trying to tell him we were executing the warrant on the bank, I believe definitely he should have been informed.

Q You were assuming, I take it by now, that he was a guilty man, weren't you?

A This is in March? No, not a hundred percent. He was a strong suspect.

Q So you could have been standing in the open car door of an innocent person telling him to shut up?

A Possibly.

Q Preventing them from leaving?

A Possibly.

...

Q He again said, 'I'm not obliged to speak to you sir and I wish to leave straight away'. 'When I'm finished'. 'No I'm entitled to leave right now'. 'When I'm finished talking to you'. 'This is illegal, I don't have to speak to you'. 'I'll tell you what's legal'. Not aggressive, Mr Ninness?

A That is, yes.

1544. Yet again Mr Ninness tried to avoid the obvious implications of his conduct. I reject his evidence concerning his belief as to the lawfulness of his conduct and whether his conduct from the outset was aggressive. I have no doubt that Mr Ninness knew his detention of the applicant was unlawful and he was deliberately forceful and aggressive in his demeanour, actions and words. As Mr McQuillen put it in the context of the investigation generally, Mr Ninness wanted to 'dictate terms' (Inq 4226).

1545. There is a further aspect of the confrontation at the city markets that demonstrated the attitude displayed by Mr Ninness to the applicant. Mr Ninness denied that at the end of the conversation the applicant's statement, 'that is technically an assault', was a response to Mr Ninness thrusting the car keys into an icecream being held by the applicant. Immediately after those words, Mr Ninness said 'you know what you can do', to which the applicant replied 'yeah'.

1546. Mr Ninness said he was referring to the applicant knowing his rights, rather than, in substance, rudely dismissing the applicant's complaint. In my view it is highly unlikely that Mr Ninness was referring to the applicant's legal rights. Mr Ninness had been rude

and aggressive throughout the confrontation. He had attempted to dominate the situation. To put it in colloquial terms, Mr Ninness was telling the applicant where he could lodge his complaint.

1547. I referred earlier to evidence given by Mr Ninness as to the impact of the surveillance and 'in-your-face' activities undertaken by the police. In further evidence Mr Ninness confirmed that he had in mind their approaches might cause the applicant to open up to somebody. He said he was not thinking about what the applicant might do in his house on his own; they were hoping he would talk to someone close to him (Inq 4178). Mr Ninness agreed that daily surveillance turned, necessarily, into overt surveillance by April 1990 and, on occasions, it was having an adverse effect upon the applicant. Asked if it was an adverse effect with regard to the applicant's mental state, Mr Ninness replied 'possibly'. Asked if there was a connection in his mind between the applicant being constantly aware that police were present and the issue of him talking about it, Mr Ninness replied 'not really' (Inq 4179).

1548. As to any connection between maintaining a presence and the applicant talking to himself, Mr Ninness would not accept the proposition that it was an aim or hope that maintaining the presence would result in the applicant talking to himself.

1549. Mr McQuillen first gave evidence on 19 February 2014. He acknowledged that there was a deliberate decision to maintain a presence in the applicant's face which, without being certain, he thought continued until shortly before or at the time of the Inquest (Inq 4227). Asked what he thought police would gain by this presence, Mr McQuillen then said that it was not so much an 'in-your-face' presence, rather, it was a presence on the advice received that the applicant might see Mr Ninness as a person to whom he could talk. He said eventually Mr Ninness came to the view that it was unlikely that the applicant would speak with him.

1550. The significance of the issue of the impact of the constant surveillance and in-your-face contact is discussed later.

1551. Returning to the earlier evidence given by Mr Ninness, in respect of his evidence concerning covert and overt surveillance the attention of Mr Ninness was drawn to a memo to file prepared by a junior solicitor at the office of the DPP, Ms Margaret Hunter, in which Ms Hunter recorded discussions at a meeting of 21 March 1995 between Mr Ninness, Mr Adams QC, Mr Ibbotson and Ms Hunter. Handwritten notes were made of this meeting by Ms Hunter who subsequently typed a typewritten record from her handwritten notes. The typewritten record forming the memo to file is annexure 1 to the affidavit of Ms Hunter dated 30 October 2013 (Ex 45) and is part of exhibit 95 (page 498).

1552. The memo summarised the discussions held at the meeting and identified the number of tasks to be undertaken in preparation for trial. Included in the memo are entries related to surveillance:

> In 1990 Ninness said they changed tack with surveillance and made it covert to lull him into a false sense of security...

> Ninness said he kept on Eastman's back because he believed that Eastman was the murderer and he thought he might provoke him into doing something...
>
> Ninness says when the court [covert] operation was unsuccessful he made them overt because the paranoia was to deter Eastman from doing something bad ...

1553. After reading the relevant entries of the memo concerning changing tack from overt to covert surveillance, Mr Ninness said the entry was not correct. He did not recall any attempt to lull the applicant into a false sense of security. He said he thought he had been trying to explain to the DPP officers that it was the behaviour of Mr Eastman that led to covert turning into overt surveillance. As to whether anything had been said that might cause the person recording the conversation to make a mistake in referring to a change of tack or lulling the applicant into a false sense of security, Mr Ninness said that on reflection it might have been a reference to concealing people in the Botanical Gardens which itself was a change of tack from covert to a more static form of surveillance. He said that 'possibly' they were trying to give the applicant a false sense of security by having in place only static surveillance in the Botanical Gardens so that he thought he was not being followed and might go to where the firearm was secreted (Inq 2688).

1554. Mr Ninness disagreed with the note that he had kept on the applicant's back and denied that he made such a statement in the meeting. He also denied saying anything about provoking the applicant. Mr Ninness agreed he kept close to the applicant and 'in-his-face', but denied he kept on the applicant's back.

1555. At the time of the meeting Ms Hunter was a very junior solicitor at the office of the DPP. She was only two years out of law school and had joined the office on 20 December 1994. She thought the words 'Ninness said he kept on Eastman's back' were her words and not the exact words used by Commander Ninness. She agreed, however, that it was her interpretation of what he had said.

1556. In her affidavit Ms Hunter said she had a vague recollection of the meeting, but in evidence she said she had no memory of Commander Ninness talking at that particular meeting about surveillance or keeping on the applicant's back (Inq 1078). However, although not having a recollection of such a discussion at that particular meeting, Ms Hunter did recall that Commander Ninness spoke to the prosecution team about the surveillance operation that had occurred either before or around the time of the Inquest. She said Commander Ninness spoke about undertaking covert surveillance and changing the surveillance to overt operations. She thought it was something to do with concern for the safety of the Coroner and other people. Her 'take' on the conversation was that the police wanted to make sure that the applicant was aware he was being watched 'so he wouldn't try anything' (Inq 1078–1079). Ms Hunter did not have a memory of any suggestion that the police were endeavouring to harass or annoy the applicant and did not recall any suggestion that police had engaged in deliberate confrontations with the applicant.

1557. Mr Ibbotson had no recollection of the meeting, but he had a recollection of being aware that Commander Ninness 'had engaged in a process of overt surveillance designed to aggravate Mr Eastman and provoke him into some action' (Inq 953). Mr

Ibbotson understood that the methodology 'was sort of like harassment'. He believed it to be an 'attempt to get him moving' by way of getting some reaction.

1558. As to the timing, Mr Ibbotson understood that the police conduct occurred during the investigation, but well before he became involved (which was at the time of the reopening of the Coronial Inquiry in May 1992). He believed it occurred 'years before the trial' (Inq 955). Mr Ibbotson understood that this type of harassment did not occur after the applicant was committed for trial.

1559. During his evidence, without any prompting by Counsel, Mr Ibbotson used the word 'misconduct' when speaking about the methods he understood had been employed during overt surveillance. He said that if he had been aware of police doing anything to harass the applicant in the lead up to or during the trial, he would have reported it and directed that it cease because 'the whole idea was to get a fair trial for this man' (Inq 955). He would have regarded such methods as amounting to misconduct and as interfering with the applicant's right to a fair trial. Prima facie the evidence pointed to an illegal activity because it was an activity designed to entice the applicant to do something they would not normally do as a consequence of 'inappropriate activity' (Inq 957).

1560. Having given that evidence, Mr Ibbotson acknowledged that he has had no personal experience of the investigative stage and appropriate forms of surveillance in the course of an investigation such as the investigation under consideration. He understood that one of the reasons for the surveillance was a real concern that the public were at risk. He agreed that he was not criticizing overt surveillance as such, but his criticism was of deliberate harassment aimed at provoking a reaction (Inq 974).

1561. Mr Adams did not recall any discussion with Mr Ninness about surveillance, but he remembered being aware of the problem with covert surveillance in Canberra. He had a memory of being told that police would show a car outside the applicant's home in the morning so he would believe that he was being followed. He did not recall mention of changing tack. Mr Adams understood the police held grave concerns for the safety of the Ombudsman and believed they had a sound basis for those concerns. Nothing was said to Mr Adams about 'in-your-face' contact or a hope that such a tactic would or might produce a conclusion (Inq 2918).

1562. The issue of covert and overt surveillance was a topic of questions by the IID investigator on 24 April 1990 (Ex 219). Following an answer in which Mr Ninness said it was not possible to use covert surveillance 24 hours a day, and the applicant had the ability to identify most of the surveillance officers, Mr Ninness was asked whether the surveillance included overt surveillance with no attempt to conceal the surveillance from the applicant. He gave the following answer:

> Up until this week, all men involved in surveillance of Mr Eastman have been instructed to be as covert as possible, but unfortunately up until last Friday men have been instructed, who are identified, that's just going to have to be tough luck, that we're going to have to maintain surveillance at all costs. But they are not to make any provocative move towards Mr Eastman or to make any contact, but if it means we're going to lose him, and he's got the ability to lose our

people, and he frequently did when he's been overtly, covertly surveilled. Now if it means that they've got to go overt, unfortunately they'll just have to be overt towards Mr Eastman.

1563. In his later evidence Mr Ninness denied this answer was an acknowledgement of a decision to undertake overt surveillance.

1564. Mr Ibbotson was made aware of overt surveillance. The notes made by Ms Hunter appear to be comprehensive and coherent. The evidence to which I have referred, coupled with the evidence discussed later in this Report, demonstrates conclusively that Mr Ninness and other officers as a group 'kept on the applicant's back' in the belief that he was the murderer and in the hope of provoking him into conduct which would assist the investigation. In the absence of an interview with the applicant, Mr Ninness resorted to 'other methods' such as the 'in-your-face' tactic. Given the behaviour of the applicant in counteracting the covert surveillance, it would not be surprising if Mr Ninness decided to try overt surveillance as a means of both protecting the public and putting pressure on the applicant.

1565. The view that Ms Hunter accurately recorded the statements by Mr Ninness is also supported by the evidence of Mr Headland and Ms Ryan which is discussed later in this Report.

1566. I am left in no doubt that Ms Hunter accurately recorded the substance of the information conveyed by Mr Ninness on 21 March 1995.

1567. After Mr Ninness had been questioned about the meeting of 21 March 1995, he gave the following evidence concerning the maintenance of the 'in-your-face' contact with the applicant (Inq 2689–2691):

Q Could it have been the case, Mr Ninness, that for at least a couple of years you were maintaining a deliberate in-your-face presence with Mr Eastman?

A Yes.

Q You personally?

A Not always, but when possible, yes. Bearing in mind a lot of other things happening during the course of these two years.

Q Why were you maintaining that presence yourself, in relation to Mr Eastman, for that period of time? And I'm talking, to be specific, through to the end of 1991. Do you agree that you were maintaining that approach up to that point in time at least?

A The case probably was he stated to the doctor, 'Believes Mr Eastman should focus on the head of the investigation.'

Q So that advice that you received from Dr Milton about you maintaining an in-your-face presence with Mr Eastman you agreed to practice through at least to the end of 1991?

A Yes.

Q What were you hoping to achieve by doing that?

A I guess - as I said, he had the unique ability to change from tack to tack on a daily basis and it was important that we keep him focused on the murder Inquiry.

Q How is that keeping him focused on the murder Inquiry?

A Well, in the event that he totally put the murder out of his mind and put it behind him, he wouldn't reflect back on the firearm or any possible evidence we may obtain from him.

Q So you maintained that presence yourself in order to keep very much in the forefront of his mind that he was being investigated for the murder?

A Yes.

Q Because you thought that might mean that he might talk to someone about it?

A Or go to the firearm.

Q Go to the firearm or, indeed, talk to himself about it in his house?

A Possibly, yes.

Q Because he'd become so focused on it by your actions that he might talk to himself about it in his house?

A Dr Milton believed that he had a genuine need to talk to somebody about the investigation and about what had transpired.

Q You would have been, of course, aware that whilst you yourself were maintaining that presence with him that there were listening devices in his house?

A Yes.

Q So you saw a direct connection between that presence of yours and what might be captured on the listening device?

A Yes.

Q Up through to 1991 were you also instructing members of the surveillance team to make sure that Mr Eastman was constantly aware and reminded of the fact that he was being investigated for murder? So now I'm moving to not just you personally but also other members of the team could be seen to be around so that it was kept in his mind?

A You're talking about going overt surveillance?

Q Whatever you want to label it as, what I'm talking about is you've said that you've maintained that presence deliberately, did you talk to others about maintaining that presence so Mr Eastman could not forget that he was under investigation for murder?

A The Major Crime Squad members were all aware of it.

Q Aware of needing to do that themselves?

A Yes.

Q Who in the Major Crime Squad were aware of doing that? Was it a small group of people or the entire surveillance team?

A I think the majority of them would know, having access to the Milton reports.

1568. Mr Ninness then agreed that other members of the Major Crime Squad were instructed to adopt the same tactic of getting in the applicant's face, but maintained that they were instructed to do so 'only with a legitimate reason to approach' the applicant (Inq 2691). He said officers of the investigation team were not instructed to engineer situations enabling that type of conduct, but if they were dealing with the applicant they were to make it known to the applicant that they were members of the Major Crime Squad (Inq 2692).

1569. Asked if the officers of the investigation team were to try and get information from the applicant about the murder, Mr Ninness answered 'no, not necessarily'. He said officers were not told to speak to the applicant about the murder, but there was no instruction not to speak to him about it. A 'common sense approach' was expected, meaning it was up to the individual officer.

1570. The process of making contact with the applicant and ensuring he knew officers were from the Major Crime Squad was quite independent of surveillance. This meant that at any time there could have been surveillance of which the applicant was aware and he could have been approached by other officers in respect of another matter. In the latter event the officers would make it clear that they were from the Major Crime Squad and were involved in investigating the murder (Inq 2693).

1571. Against the background of the general evidence to which I have referred, and the specific occasions in 1989 involving the return of the applicant's vehicle and the events at the War Memorial and city markets, I turn to events in the period 1990–1992 in respect of which there are various documents which assist in establishing an approximate chronological order.

1572. Mr Norman Headland is a former officer with the AFP who was admitted to legal practice in 1985. He gave evidence at the first Inquest on 26 April 1990 and before giving evidence acted for the applicant for a period of three or four months. In his affidavit dated 17 February 2014 (Ex 152), Mr Headland said the applicant complained to him on several occasions about 'overt police observations and harassments'. In that context, and against the background of training and experience in surveillance techniques which included delivering a course in surveillance techniques at the Commonwealth Police Officers College, Mr Headland gave the following account of his observations of an AFP officer on an occasion when the applicant attended at Mr Headland's office:

> 6. I also recall interviewing Mr Eastman one day in my office which was located on the second floor of the building and had a very large picture window that overlooked London Circuit. Mr Eastman became very uncomfortable and agitated and asked whether we could shift to another area and pointed across London Circuit towards the parking area. I noticed that Simon Overland of the AFP was standing in the car park across the road staring at the building. I recognised Mr Overland from prior knowledge of him in the AFP. Mr Overland stood there for a good 10 – 15 minutes and appeared to be holding a device in front of his upper chest area which he appeared to be moving up and down. Mr Eastman and I then moved to an office located on the opposite side of the building. I raised my concerns with David Fussell at the time and he also noted Mr Overland's presence.

1573. In evidence Mr Headland described and demonstrated Mr Overland holding the object up to his eyes and looking in the direction of Mr Headland's office for about four or five minutes. He agreed Mr Overland could have been holding binoculars or some other device. He was not able to determine whether Mr Overland was able to see into the office.

1574. In his affidavit Mr Headland said that based on his training and experience in surveillance technique, he considered Mr Overland's behaviour to be 'strange'. He was unaware of any form of surveillance in which officers deliberately make themselves obvious to the suspect or deliberately provoke an interaction with the suspect. From Mr Headland's perspective, if a surveillance officer was seen by the suspect it would usually mean immediate withdrawal from the surveillance team.

1575. In evidence Mr Headland said his affidavit was not sufficiently explicit about covert and overt surveillance. He said he had never been involved in overt surveillance, but knew of

others using that tactic and he had taught about it. As he understood it, overt surveillance was used if police wanted to upset or aggravate the subject in the hope that the subject would do something to assist the investigation. In Mr Headland's view, overt surveillance would not be justified in order to protect the public or specified persons because of the likely effect upon the subject.

1576. Mr Ninness said that through surveillance and the listening post he became aware that the applicant had retained the services of Mr Headland. He accepted that this would have been around 1990. Asked if there was an occasion when the applicant had an appointment with Mr Headland and when he returned Mr Ninness had parked his car in the applicant's carport, Mr Ninness said he had no knowledge of the occasion, but did not deny it (Inq 2820). As to whether he could think of any reason why he might have parked in the applicant's car park, Mr Ninness responded that it might have occurred because there were no other spaces available. He denied that he did it to annoy the applicant.

1577. On 29 March 1990 Mr Ninness wrote to Mr Donald, a solicitor then acting for the applicant (Ex 157). It is apparent from the content of the letter that on 28 March 1990 Mr Ninness and Mr Donald had discussed the applicant's behaviour towards police officers.

1578. Mr Ninness summarised the circumstances relating to surveillance and the applicant's conduct which were of concern to him in the following terms:

> I have been informed by members of the major Crime Squad that your client David Eastman, has in recent days sought out police officers and accosted them, accusing them of harassing him. He has called upon members of the public to act as witnesses. He has made verbal threats to members of my staff telling them they will be dismissed from the Police Force because of their conduct.
>
> Members involved in the murder investigation of Mr Winchester have been issued with instructions when carrying out duties regarding Mr Eastman that they are to make no contact with him unless it is necessary. However it is impossible for members not to have contact with your client when he continually seeks out members of the Police Force and confronts them with allegations of harassment.

1579. The letter also drew Mr Donald's attention to the conduct of the applicant in approaching members of the public and accusing them of being surveillance officers. He referred to the applicant accosting drivers of motor vehicles and striking some of those vehicles in the belief that the vehicles belonged to surveillance officers. Mr Ninness wrote about the applicant failing to exercise proper care when riding his bicycle and the letter continued:

> I am aware of the barrage of complaints you have lodged on behalf of your client, but as members of the Police Force we have a responsibility to the community who may be in possible danger from mentally unstable individuals. Your client is regarded as the principal suspect in the Winchester murder investigation. The actions of your client since coming under Police notice has done nothing to elevate (sic) our fears that he is not responsible for the murder of Mr Winchester. This being the case that Mr Eastman is the principal murder suspect, based on his behaviour it is only fair to assume that he could endanger the life or welfare of another potential victim.

> As your client refuses to cooperate with our investigation we are left with no option but to employ other methods to fully investigate Mr Eastman.
> Unfortunately through lack of cooperation on your client's part, we anticipate a long and protracted Police investigation no matter what the outcome of the current Inquest being conducted by the Coroner.
>
> I request that this letter be brought to the attention of your client so that he may desist from his erratic behaviour which could possibly result in a violent unprovoked attack by your client on a member of the Police Force or a member of the public.

1580. Mr Ninness was asked about the letter and whether it amounted to a threat that the harassment would continue unless the applicant submitted to an interview. He responded that he did not believe it was a threat; it was 'an informative letter' (Inq 2790). Mr Ninness said he expected that the letter would be a point of pressure to control the applicant and agreed his reference to the community being in possible danger from 'mentally unstable individuals' was a reference to the applicant being one of those persons. It was his view that in March 1990 the applicant was mentally unstable.

1581. With regard to the applicant seeking out police officers and accosting them, Mr Ninness said he was talking about surveillance officers rather than those officers who were given the opportunity to confront the applicant. Mr Ninness said he was not happy with the situation, but he did not write the letter with the purpose of agitating or provoking the applicant. He denied that he ever intended through contact with the applicant to provoke him into doing something (Inq 2791).

1582. On 17 April 1990 the officer in charge of the surveillance operations, Detective Sergeant Chris Lines, wrote a minute to Mr Ninness concerning the surveillance operation (Ex 164). He noted that despite the 'covert nature' of the surveillance, the applicant was aware he was being followed and had employed 'counter surveillance techniques'. He referred to the taking of photographs and seeking the assistance of both the public and the media. Mr Lines observed that the applicant had identified 'every member of the Surveillance Unit notwithstanding the covert operation of the personnel' and had also identified all the vehicles despite regular replacements. He expressed the view that it was impossible to follow the applicant covertly for any distance and referred to recent throwing of rocks at surveillance vehicles and chasing personnel following the applicant on foot.

1583. Mr Lines informed Mr Ninness that he had instructed his members to 'restrict close quarters surveillance'. Mr Ninness understood Mr Lines was referring to the type of surveillance where visual contact is maintained with the person being followed. Mr Lines expressed concerns that the covert nature of the ACT Surveillance Unit would be further compromised and recommended the secondment of a surveillance team from another region to continue the surveillance of the applicant.

1584. Mr Ninness said he agreed with the view expressed by Mr Lines for the reasons given by him. In addition, Mr Ninness was aware that morale within the surveillance unit had deteriorated and he was concerned for the welfare of the members of the team. This was part of the reason for the need to rest the members and give them leave.

1585. The need to reassess the operational tactics put in place by Mr Ninness with respect to the surveillance of the applicant was also the subject of a minute from the Deputy Commissioner of Operations, Mr Farmer, to the Officer in Charge of the ACT region dated 8 May 1990 (Ex 165). The minute referred to the applicant embarking on a campaign to 'counter attack' and the use of the forum of the Coronial Inquiry to publicise the situation. Mr Farmer referred to the applicant's tactics having the purpose of seeking confrontation with the police and 'mischievously' creating incidents which were publicised by the media. The difficulty facing the AFP by reason of the applicant's danger to the community was recognised and reference was made to the applicant's criminal history. Mr Farmer identified a 'paradoxical situation' of being accused by the applicant of harassment in circumstances were it was impossible for the AFP to ignore the potential danger to the community and how ignoring such danger would amount to an abrogation of their responsibility to protect the public. He concluded that a strategy of monitoring the applicant's movement must be maintained but it might be time to reconsider the particular surveillance tactics. Mr Ninness believed that he met with the Officer in Charge of the ACT region and discussed replacing the surveillance team with interstate personnel.

1586. In May 1990 Mr Whiddett was Detective Commander, Head of Internal Security and Audit Division of the AFP. He was involved in investigating complaints made by the applicant about the conduct of police officers. On 9 May 1990 Mr Ninness sent a minute to Mr Whiddett in which he outlined the history of the investigation and evidence implicating the applicant in the murder of the deceased (Ex 42, annexure 1). Mr Ninness expressed the belief that the applicant posed a 'potential threat' to public officials and referred to information obtained from Dr Milton as the basis upon which Mr Ninness had implemented 'strategies'. The concerns held by Mr Ninness were summarised in the following sentence:

> I am extremely concerned that Eastman's medical condition will deteriorate and I believe there is a strong possibility that he will commit an act of violence or worse which will cause a death of another person.

1587. Mr Ninness referred to the 'primary objective' of covert surveillance being the location of the murder weapon or other evidence that could link the applicant to the murder. He expressed a belief in the deterioration of the applicant's mental stability and that he posed a real threat to other persons. In these circumstances Mr Ninness wrote that he believed surveillance was justified.

1588. In evidence to this Inquiry, Mr Ninness said his belief as to a deterioration in the applicant's mental stability was based upon information from the listening post about the way the applicant would approach people, together with the applicant's general behaviour. Mr Ninness said sometimes the applicant was very controlled, but at other times he would be strident and upset. He said the applicant's demeanour could turn in a split second.

1589. On 25 May 1990 Mr Ninness circulated a minute to members of the Major Crime Squad setting out the areas of responsibility for members of the team involved in the investigation (Ex 154). Reference was made to members of the surveillance squad maintaining 'close surveillance' of the applicant and to the responsibility of those

officers in maintaining close liaison with Sergeant McQuillen concerning any change in the behaviour of the applicant that might require a change of strategies or security measures being implemented.

1590. Mr Ninness said the minute reflected changes in the surveillance team. He said it was necessary to maintain 'close surveillance' because previous surveillance had frequently lost sight of the applicant and it was important to maintain visual contact.

1591. Attached to the minute was a document headed 'Operational Order' which provided instructions to members of the investigation team. Reference was made to the applicant, 'in recent times', having 'adopted a course of action where he is reversing the role of being the pursuer of members employed on surveillance duties.' Instruction was given that officers who found themselves being compromised or intimidated should 'tactfully withdraw from any confrontation' with the applicant and that, apart from complying with a request to supply their name and badge number, officers engaged on surveillance duty should not engage in conversation with the applicant unless they were in a position to record it or make a written record. This part of the order concluded with the instruction that, as far as possible, officers should have no direct contact with the applicant.

1592. Mr Ninness said in evidence that this minute and operational order amounted to the adoption of the suggestion previously made by Mr Lines concerning changes to the surveillance operation. From Mr Ninness' perspective, it was necessary to maintain the covert surveillance in order to protect the public.

1593. There can be no doubt that with good cause the AFP generally, and Mr Ninness in particular, regarded the applicant as a dangerous person. Mr Ninness was aware of the applicant's record of violent conduct. He and other officers, including senior officers, believed there was a real danger of the applicant causing serious harm to members of the public, police officers and persons about whom the applicant might have held feelings of animosity. The particular persons at risk were identified in a written instruction dated 28 June 1990 (Ex 155) given by Mr Ninness to members of the Major Crime Squad. The AFP had good reason for their beliefs and concerns. Both Dr Milton's opinion and the applicant's conduct over a lengthy period provided strong support for those beliefs and concerns. There can be no valid criticism of a decision by Mr Ninness and other members of the AFP to undertake surveillance of the applicant. Both covert and overt surveillance were amply justified.

1594. It is plain that the applicant embarked upon a course of conduct designed to undermine the surveillance and that his conduct posed a risk to members of the public. Not infrequently the applicant mistook members of the public for police officers involved in the surveillance. In his counter measures the applicant was physically aggressive and posed a significant risk to the well-being of the public. The AFP was faced with a difficult situation and its efforts to maintain covert surveillance were thwarted by the applicant. If, in such circumstances, covert surveillance became overt, provided the officers involved did not intentionally engage in conduct aimed at harassing and provoking the applicant, they were entitled to maintain overt surveillance.

1595. Although I accept that there was a frustrated attempt at covert surveillance, and the AFP was in a particularly difficult situation because there was a need for surveillance but the applicant's counter measures were both successful and dangerous, there is also evidence to support the view that overt surveillance was conducted with the intention of harassing the applicant and, independently of surveillance, pressure was applied to the applicant through the tactic of 'in-your-face' contact.

1596. As to the issue of overt surveillance, I have previously discussed the meeting of 21 March 1995 between Mr Ninness and members of the prosecution team, notes of which were made by Ms Hunter (Ex 95). In addition, I have referred to the evidence of Mr Headland concerning the behaviour of Mr Overland in early 1990.

1597. The view that overt surveillance was undertaken is also supported by the evidence of Ms Eunice Ryan, a solicitor who acted for the applicant from June until October 1990. During the period that Ms Ryan was acting for the applicant she received a telephone call from Mr Ninness who said he was ringing to warn her about her personal safety if alone with the applicant because he was a dangerous person. I am satisfied that in making that call Mr Ninness was motivated by genuine concern for Ms Ryan's welfare.

1598. Ms Ryan's office was on the fourth floor of a building in Moore Street, Canberra City and the window of her office had a view of the corner of Moore and Rudd Streets. In her affidavit of 18 February 2014 (Ex 153) Ms Ryan described an occasion relevant to the issue of overt surveillance:

> 13 ... I recall observing from the office window plain clothes persons who appeared to be police surveillance outside the building. They would remain very close to David Eastman when he was coming and going. In my opinion, they were invading his personal space and harassing him.

1599. In evidence Ms Ryan expanded on her observations of police conduct toward the applicant (Inq 3616–3617):

> Q Were there occasions where you witnessed Mr Eastman being followed at close quarters by police?
>
> A Yes.
>
> Q On how many such occasions can you recall?
>
> A Well, very often when he came to my office. I don't know exactly how many occasions but very often he came along Moore Street and he stopped at the lights at the corner and I could see straight down there because I was often rushing – because he didn't attend the inquest and he only came to my office after the inquest. So, I'd be rushing back from the inquest carrying documents and trying to work out when he was coming so I would be looking out the window regularly and I would see him surrounded by people as he came to the lights. And he was not someone who was ever – you know, every occasion that I saw him apart from that he was never accompanied by anybody, in any occasion I saw him, before I acted for him or when I saw him around Civic, I never saw him with another person, except when people that appeared to be police officers.
>
> Q What did you see? What sort of conduct did you witness?
>
> A Well, they were just up close to him and coming into his space and moving back and I didn't see them actually knock him, but he told me that they knocked him off his bike and they came up right into his face and yelled at him and they came up close to him and

nudged him and he just would go completely off the deep end when he came to my office. He was more stressed and more interested in that than he was in anything else.

Q In relation to your observations of him down in the street, from up in your office, when you speak about people moving into his space, or coming up close to him, even if you could not hear, did there appear to be any exchanges or words being spoken?

A Yes, it was a very uncomfortable - it looked to be a very uncomfortable situation and he wasn't good at ignoring it, he would react.

Q Estimating as best you can, how many such occasions did you witness?

A I don't know, it would be several times a week, for the weeks that I acted, perhaps two or three times a week for the weeks that I acted.

1600. In her affidavit Ms Ryan said that the applicant was 'always beside himself with frustration at the police surveillance when he arrived each day.' She said he told her of incidents of harassment on most days and made a number of statements alleging that the police came very close to him, pushed him off his bike, leant into him and yelled and shouted in his face. She said the applicant was so upset by these matters that at times it was difficult to keep his mind on the issues in respect of which she needed to obtain instructions. In evidence Ms Ryan said the applicant was 'almost obsessed' with what was happening (Inq 3617).

1601. Mr Ninness' attention was drawn to the evidence of Ms Ryan and, in particular, to paragraph 13 of her affidavit (cited earlier). He said officers were not under instruction to follow the applicant to his solicitor's place of business, but just to follow him and keep him under surveillance. If the applicant entered the solicitor's place of business, the officers were simply to maintain the surveillance (Inq 2735). Notwithstanding the applicant's ability to counteract the covert nature of the surveillance, the officers were instructed to avoid contact and to endeavour to maintain covert surveillance.

1602. Against that background, Mr Ninness was asked whether he could explain the conduct to which Ms Ryan referred as invading the applicant's personal space. Initially Mr Ninness responded that he did not know how close the officers were to the applicant, but asked to respond on the assumption that they were close enough to invade the applicant's personal space; Mr Ninness said such conduct would be contrary to his instructions (Inq 2736).

1603. The evidence to which I have referred concerning the question of covert and overt surveillance relates to 1990. On 19 November 1992 Mr Ninness sent a memo to Detective Superintendent Kerrigan for circulation to all members of the surveillance team (Ex 156). The minute instructed all members to 'maintain COVERT surveillance on the target at all times where possible'. Reference was made to the likelihood that the applicant would carry out counter-surveillance measures and that it was of the 'utmost importance' that members 'carry out their duties in a professional way and take no action that can be interpreted as being harassment of [the applicant]'. Instruction was given that if approached by the applicant, the surveillance officers were to 'tactically withdraw without engaging in any conversation or behaviour that may be interpreted as harassing or unprofessional behaviour.'

1604. Mr Ninness also wrote that he was aware of the 'enormous stress' placed on members of the team by the actions of the applicant. He emphasised the importance of maintaining the 'integrity of the murder investigation'.

1605. Each member of the surveillance team signed the minute to indicate that they had read it.

1606. Independently of the surveillance, as I have mentioned Mr Ninness gave evidence that the practice of taking opportunities to make contact with the applicant and to reinforce the message that the officers were part of the Major Crime Squad continued into 1991. However, later in his evidence Mr Ninness changed his position and said that from about March 1989 to June 1990, when an interview took place between Mr McQuillen and the applicant, there was no desire to implement Dr Milton's previous advice about maintaining contact with the applicant (Inq 2744).

1607. Asked if anything was being done between March of 1989 and June 1990 to try and implement the advice of Dr Milton, Mr Ninness replied 'not intentionally'. He suggested there were unintentional events that were working towards the goal of Mr Eastman confessing, namely, 'when he was arrested and charged for offences' (Inq 2745). Mr Ninness then explained (Inq 2745–2746):

> Q What are you referring to there?
>
> A Some members of the Major Crime Squad were involved in the apprehension and the processing a charge against him.
>
> Q Were those people directed, at that time, to make sure that Mr Eastman knew that he was being investigated for the murder of Mr Winchester?
>
> A Not directed as such, no.
>
> Q How do you know then how those Major Crime members dealt with Mr Eastman when they arrested him for other matters?
>
> A I don't.
>
> Q What do you base your evidence on then that those occasions were occasions when it was used to bring back to Mr Eastman's mind that he was under investigation?
>
> A Mr Eastman was well aware of all members of the Major Crime Squad because we had executed three warrants on him at that time, so he was quite familiar with all of them.
>
> Q So do you say that just merely the fact that Major Crime had arrested him for other crimes was all that was happening to ensure that Mr Eastman was aware that he was being investigated for murder?
>
> A Correct.
>
> Q But those officers, when they arrested him for other matters, weren't directed to say anything about the murder of Mr Winchester?
>
> A They were not.
>
> Q Did they, as far as you're aware?
>
> A Not to my knowledge.
>
> Q So do you say you completely backed off, from March of 1989 through to the middle of 1990, from Dr Milton's advice about how to get a confession?
>
> A Yes.

1608. Mr Ninness said he did not recall having in his mind a decision to re-implement the advice of Dr Milton about maintaining contact in the hope of obtaining a confession. Asked to identify the strategy in the middle of 1990 to implement Dr Milton's advice, Mr Ninness replied that he believed they had backed right away from the belief that they would obtain an interview from Mr Eastman (Inq 2747). However, the evidence of Mr Ninness in this regard faced difficulties when contrasted with the conduct of Major Crime Squad officers in the middle of 1990 and through to 1994. Throughout that period members of the Major Crime Squad were involved as informants in repeatedly charging the applicant with relatively minor offences that would normally be handled by uniformed police officers.

1609. In the context of an interview conducted by Mr McQuillen with the applicant on 26 June 1990, details of which are discussed later in this Report, Mr Ninness was asked about arrests of the applicant in 1989 – 1990 for assault–type of offences. He gave the following evidence about persons involved in carrying out the arrests for those types of offences (Inq 2747–2748):

> Q Why was Major Crime involved in carrying out the arrests?
>
> A They weren't at all times; only some of the occasions.
>
> Q Why?
>
> A It was reported in the surveillance team back to the Major Crime.
>
> Q Why not just give it to the uniform boys?
>
> A Most of the time it was.
>
> Q Mr Ninness, was there or was there not a directive that Major Crime would become involved in those arrests or not?
>
> A I don't believe there was a directive.
>
> Q Do you say that it was just by chance that some of the Major Crime members would be involved in those arrests?
>
> A Can't say by chance but by sheer knowledge that the surveillance team report back to the Major Crime Squad or the listening post that an offence had taken place in their - in their presence and they'd witnessed it. Then perhaps the Major Crime Squad would step in and charge him or ...(indistinct)...
>
> Q The question is, why would the Major Crime Squad step in, if that's the case, rather than send uniform around?
>
> A I repeat my answer before - referred from the surveillance team back to the Major Crime Squad unit, who man the listening post and may have acted on their own initiative at that time.
>
> Q Why would they want to be bothered with doing that, given that they had a major crime to investigate?
>
> A We still had an interest in Mr Eastman.
>
> Q What was the interest in Mr Eastman in getting Major Crime to arrest him for other offences? How was that pursuing the investigation?
>
> A It maintained involvement with Mr Eastman.

1610. Mr Ninness was hedging his bets and his explanation was unconvincing. He was confronted with a list of outstanding charges against the applicant as of 24 October 1994 (annexure 3 to the affidavit of Ms Circosta 29 September 2013, Ex 19). Other than

the charge of murder, there were 157 outstanding charges, including 128 involving harassing, menacing or offensive phone calls. Many of the informants were members of the Major Crime Squad and, in particular, Mr McQuillen was the informant in respect of 35 offences. Mr Ninness was unable to explain, for example, why Mr McQuillen was the informant in respect of a number of harassing telephone calls made by the applicant in August 1990, but when he was asked whether it could be part of a strategy to keep Major Crime and the murder of the deceased in the applicant's face, Mr Ninness replied 'I don't believe so at that time, no'. When it was suggested to Mr Ninness that it was a deliberate attempt to implement the advice of Dr Milton, in the sense of keeping Major Crime in the applicant's face in order to encourage him to confess, Mr Ninness responded 'I deny it, it's not true.'

1611. Mr Ninness acknowledged that even if a complaint was made to Major Crime, the response could have been to send another Detective or a uniform officer. Asked why one of the Senior Officers of the Squad was, repeatedly, becoming involved in relatively minor offences, Mr Ninness said he did not know exactly the circumstances or how the contact was made by the complainant to police. Asked again why the response could not have been to say that someone would be sent immediately, and to send another Detective who was not connected with Major Crime, Mr Ninness responded that perhaps they were trying to 'keep total control over the contact with Mr Eastman' (Inq 2752). Mr Ninness then gave the following evidence (Inq 2752–2753):

> Q That appears to be the answer, you're trying to keep contact with Mr Eastman, weren't you?
>
> A Yes.
>
> Q Yes. So there still was, wasn't there, even into '91, the implementation of the policy when the opportunity - at least when the opportunity arose, to be there in-his-face?
>
> A I'd agree with that, yes.

1612. Having attempted to resile from on his earlier evidence, when faced with the repeated involvement of Major Crime Squad officers as informants in minor matters, particularly Mr McQuillen, reluctantly Mr Ninness conceded that the tactic of maintaining contact with the applicant as suggested by Dr Milton remained in operation into 1991. However, he maintained that by August 1991 he had given up trying to convince the applicant to submit to an interview (Inq 2825). He gave up after the commencement of the Inquest and maintained that the involvement of Major Crime Squad officers as informants was nothing to do with trying to obtain an interview. When asked about taking every opportunity to be in contact with the applicant as late as the end of 1992, Mr Ninness responded 'not by our doings, no'. By that statement he meant that if the applicant got arrested for summary offences the contact was not the doing of the police.

1613. Mr McQuillen was asked why he was the informant in so many matters and said it was an administrative decision to handle all the briefs from a central point because they were dealing with so many political figures and persons in positions of authority. Essentially it was for reasons of expediency. However, under close questioning Mr McQuillen accepted that it was not 'pure coincidence' that it had the effect of maintaining their presence with the applicant. He said that maintaining presence had 'some role', but the major role was administrative (Inq 4261–4262).

1614. A significant feature of the evidence concerning the conduct of Major Crime Squad officers in 1990 relates to the interview conducted by Mr McQuillen with the applicant on 26 June 1990. The applicant had been arrested on 25 June 1990 and charged with assaulting a member of the surveillance team by throwing a rock at the officer which struck him on the hip. The applicant was placed in the City Watch House, where he was held overnight. From the interview conducted the next day by Mr McQuillen, it appears likely that the applicant had been consulting with his solicitor at the City Police Station and, while his solicitor was absent and he was waiting for a medical officer, Mr McQuillen took advantage of the opportunity and interviewed the applicant.

1615. Mr McQuillen was not the informant and had no reason to become involved in the matter. As to why he spoke with the applicant, Mr McQuillen said it was to ask the applicant for an interview and 'to just have a general conversation with him' (Inq 4235). I reject that explanation. Plainly it was not true. Pressed about the explanation, Mr McQuillen resorted to saying that the conversation was not a formal interview and it 'degenerated'. Also pressed as to the purpose if it was not a formal interview, Mr McQuillen said he intended to let the applicant know the Commonwealth medical officer and food were coming and his solicitor might be back.

1616. That evidence was nothing short of nonsense. Not only had the applicant consistently refused to speak with police since early 1989, his solicitors had written letters to that effect in 1989. In June 1990 the applicant's attitude had, yet again, been made clear directly to Mr McQuillen. On 6 June 1990 under the guise of advising the applicant that he was preparing a report concerning complaints against the applicant about telephone calls and possible criminal damage to a police vehicle, Mr McQuillen attended at the applicant's premises and knocked on the door. From inside the premises, the applicant told Mr McQuillen to 'clear off' (Ex 227). The applicant then opened the door and told Mr McQuillen that Mr McQuillen had been told before that if he had anything to say he was to see the solicitor, Mr Pappas. The applicant then told Mr McQuillen to 'clear off' and not to come to the door again.

1617. On 7 June 1990 Mr Pappas wrote to the AFP referring to a conversation the previous day between Mr McQuillen and his secretary. He confirmed in the letter that he was instructed to accept service of any process issued by the AFP and directed to the applicant. The letter continued (Ex 228):

> My client wishes to reiterate that he does not wish to speak to police personally and in that regard I wish to register a complaint concerning the way Sergeant McQuillen and Constable Cotterill attempted to speak to Mr Eastman on the morning of Tuesday the 6th of June. ...

1618. On 11 June 1990 Mr McQuillen attempted to serve the applicant with a summons in London Circuit. When the applicant refused to accept service, Mr McQuillen threw the papers at his feet (Ex 229).

1619. In addition to those matters, the content of the interview conducted by Mr McQuillen on 26 June 1990 also demonstrates that it had nothing to do with advising the applicant that the medical officer and food were coming or asking the applicant for an interview. Notwithstanding Mr McQuillen's denial, the plain purpose of the interview was to

harass the applicant about his failure to speak to police about the murder of the deceased and to maintain the pressure on the applicant in pursuance of the 'in-your-face' tactic which police had deliberately pursued with vigour since early 1989.

1620. The interview of 26 June 1990 had nothing to do with the matters for which the applicant had been arrested and in respect of which he was still in custody. It was an interview conducted when the applicant was in custody and not free to leave the police station. No caution was given to the applicant that he was not obliged to answer questions.

1621. The recording of the interview and the transcript are Ex 145. The interview began with reference to the solicitor leaving and being expected back. It is readily apparent that Mr Eastman was alert to Mr McQuillen's intention as early in the conversation he made reference to it being a 'nice day isn't it'. The interview continued:

Q We on that again, are we?

A Yeah. Nice weather we've been having. Delightful.

Q Lovely weather.

A Yeah.

Q Mmm. So where do we go from here, David?

A Nice day, isn't it? Nice, beautiful weather we've been having.

Q Where do we go from here?

A Beautiful weather.

Q Back to the Ombudsman's office?

A Nice weather we've been having.

Q Have you ever thought about talking about ah where you were on the Tenth of January?

A Isn't it a beautiful day?

Q You've never thought about it?

A Nice weather we've been having.

Q It would have been a lot easier if you had have.

A Delightful weather. What a nice day it is.

Q I think we've covered the weather sufficiently.

A Ha ha.

Q What about the Tenth of January?

A Lovely weather.

Q Nineteen Eighty Nine.

A Beautiful weather.

Q You don't want to discuss that at all?

A Delightful weather we've been having.

Q For a man of your intelligence, David.

A What a nice day it's been.

1622. The interview continued in the same vein until the applicant said Mr McQuillen really had to speak to his 'friend' Mr Ninness 'for his own sake'. That prompted a response from Mr McQuillen who asked the applicant whether he was threatening Mr Ninness. The applicant replied in the negative and asserted that earlier Mr Ninness had sent everyone out of the room, including the tape recorder, and said that he was going to destroy the applicant.

1623. As the interview progressed Mr McQuillen referred to the conduct of the applicant in ringing and abusing persons and described it as 'abominable'. Mr McQuillen accused the applicant of not being 'game' to give evidence before the Coroner. He was baiting the applicant. He called the applicant a 'silly duffer' and, later, said it was 'funny' how the applicant wanted to talk to police when he had a complaint, but when police wanted information he would not talk to them.

1624. The conversation went back and forth between Mr McQuillen and the applicant and it must be said that the applicant did not shy away from responding and baiting Mr McQuillen. However, it was obvious that the applicant would not say anything about the murder, but Mr McQuillen kept at him. He accused the applicant of hiding behind a 'veil' and of committing criminal offences. Mr Eastman spoke about being harassed and of Mr McQuillen arranging to be in a foyer for the purpose of harassing the applicant when he came out to the foyer after being interviewed for a job. Mr McQuillen responded in a taunting manner by asking what was wrong with him saying 'G'day' in a polite and courteous manner. Mr McQuillen then returned to the accusation that the applicant was hiding behind a veil and asked why the applicant had to go through a solicitor rather than coming and talking to the police. Repeatedly Mr McQuillen asked why the applicant had to hide behind a veil. The conversation included repeated questions by Mr McQuillen as to where the applicant was on 10 January.

1625. Well into the conversation Mr McQuillen specifically told the applicant that 'David Harold Eastman... is the suspect and possible murderer...of Assistant Commissioner Winchester' and added the words 'true or false?' He then repeated 'true or false David?' and asked 'what, what is there that will make you talk about it?' Mr McQuillen told the applicant that the applicant had a 'moral dilemma' in having to decide whether or not to talk about the matter and stated to the applicant that the applicant's 'own peace of mind' was 'disintegrating totally'. Mr McQuillen then repeated that statement.

1626. During the exchanges the applicant endeavoured to turn the conversation around to Mr McQuillen's principles and conscience. He said Mr McQuillen was a 'decent bloke' and predicted that Mr McQuillen would leave the police one day or would have to compromise his principles. Mr McQuillen responded that he had the highest principles and his one aim was to solve the murder and the applicant was hiding behind a veil and the 'ridiculous idea' that police were harassing him. Mr McQuillen repeated his taunt of 'Why won't you talk to us?' and 'Why do you hide behind this veil?', and followed with a statement that there was no harassment; it was part of the applicant's 'paranoia'.

1627. The applicant challenged Mr McQuillen about the practice of police following him closely and asked what they were achieving. Mr McQuillen replied 'the safety of the public' because of the applicant's 'propensity to violence'. He said there was no

'psychological harassment' and that it was in the applicant's mind only. Later he again repeated that it was paranoia.

1628. The taunting and the baiting continued for page after page of transcript. It included Mr McQuillen repeating seven times in a row the words 'murder of Assistant Commissioner Winchester'. Those repetitions were followed with the statement 'committed by David Harold Eastman' repeated twice. Mr McQuillen accused the applicant on more than one occasion of not even recognising the fact that the deceased had been murdered and he challenged the applicant to deny that he was involved. He posed the question why the applicant would evade talking to the police and what did he have to hide. Mr McQuillen finished by saying he had enjoyed 'our discussion' and he began to say that if the applicant wanted someone to talk to about 10 January he would be available. Mr McQuillen did not complete that offer because the applicant responded by telling Mr McQuillen that he was not entitled to pester the applicant for interviews. In response Mr McQuillen said that he was not pestering the applicant; he was just telling him that he was available.

1629. Mr McQuillen said he knew he could not have used the interview in a court of law. Asked why he pursued the manner of questioning apparent from the content of the interview, Mr McQuillen replied that he was 'goaded' (Inq 4236). Mr McQuillen reluctantly acknowledged that from the outset when the applicant was referring to the nice weather, the applicant was not interested in talking to him and wanted to avoid doing so (Inq 4237).

1630. Mr McQuillen accepted that he began with the theme of the applicant not talking about the events of 10 January and it was a theme with which he continued to the end of the interview. He acknowledged that he did not give up and continued to pursue the theme notwithstanding the applicant's responses. As to what effect he thought this pursuit might have upon the applicant, Mr McQuillen said he did not recall what he thought 'but probably that he would think about it', meaning that he might eventually talk to them (Inq 4238). He denied a suggestion that he knew the applicant was not going to talk to them and was hoping that he might talk in his home and be recorded on the listening devices.

1631. As to the references to the applicant's mental state disintegrating, Mr McQuillen said he was of the view that the applicant was losing 'situational control' meaning that he had lost the support of his solicitor, Mr Donald, and was making threats against people. Asked what he thought he would achieve by pointing out to Mr Eastman that his own peace of mind was disintegrating, Mr McQuillen replied that the applicant had said Mr McQuillen's peace of mind was disintegrating and it was a 'reaction' from him (Inq 4239).

1632. The attention of Mr McQuillen was drawn to his references to the applicant's paranoia about harassment. He said he did not think there had been any harassment of the applicant. Mr McQuillen would not even accept that there was an element of truth in the applicant's thinking that he was being harassed (Inq 4240). Asked whether his repetitions of the words 'murder of Assistant Commissioner Winchester' were harassing, Mr McQuillen replied 'it could be perceived as harassing, yes'. As to why he

was harassing the applicant during the interview, Mr McQuillen replied, in a truthful answer (Inq 4240):

> I think I was emotionally involved at that stage and it just overcame me and I kept at it.

1633. At the conclusion of questioning about the interview, in the light of an overview of police conduct commencing in 1989, Mr McQuillen was asked why the Board should not draw the obvious inference that the police conduct went beyond legitimate investigatory techniques and well into the realm of harassment. Mr McQuillen responded that it was not a normal investigation; it was unique in every sense of the word; and dealing with the applicant caused all sorts of issues which police tried to resolve 'in a manner that would have an outcome'.

1634. Mr McQuillen then gave evidence which came very close to acknowledging that he did not approve of the methodology that was directed by Mr Ninness (Inq 4243):

> Q When Mr Ninness stood in the door, took the keys out of the ignition and prevented him from leaving, do you regard that, in the circumstances, as unlawful activity?
>
> A It can be seen one way or the other, your Honour, yes, I presume, it all depends.
>
> Q Mr McQuillen did you find this course of conduct in which the police engaged distasteful, difficult for you?
>
> A I wouldn't say difficult, but somewhat different. It wasn't my normal method of working.
>
> Q Do you recall in that interview that you conducted that Mr Eastman said to you, 'you're not a bad bloke, you're quite a decent bloke'. Or words to that effect?
>
> A Yes he did.
>
> Q He suggested that you, deep down, didn't approve of what was happening, was he right?
>
> A I don't say I didn't approve, your Honour, it was not my methodology, it was Mr Ninness' methodology.
>
> Q It was not a methodology you would have adopted?
>
> A Possibly not, no.

1635. Mr Ninness said he did not know anything about the circumstances leading to the arrest of the applicant prior to Mr McQuillen speaking to him. He had no memory of being present. He agreed that from the transcript it might be construed that an opportunity was taken by Mr McQuillen to present an 'in-your-face presence to [the applicant]' (Inq 2697). He said he did not know if Mr McQuillen was ignoring the letters stating the applicant would not partake in an interview about the murder of the deceased, but agreed that he was trying to get the applicant to talk and to that extent he was ignoring the letters. He said he believed he was entitled to put questions to the applicant or inform him of things (Inq 2698).

1636. Mr Ninness denied the allegation made by the applicant during the interview that Mr Ninness had said he was going to destroy the applicant. He denied ever having made such a statement.

1637. The attention of Mr Ninness was drawn to the repeated statement by Mr McQuillen such as 'what have you got to hide', 'why do you hide behind the veil', 'where were you

on 10 January' and 'why don't you talk to police'. He then gave the following evidence (Inq 2699–2700):

> Q Mr Ninness, how would you describe that method of conversation by McQuillen to Mr Eastman?
>
> A Just trying to open him up to get him talking, I imagine, by the questions I've asked.
>
> Q It's harassing?
>
> A Any other person would say, 'Yes', but David Eastman is well aware more than any other member of the community about his legal rights and what he can and can't say.
>
> Q Well, you'd been already advised about how he wanted to exercise his legal rights the year before?
>
> A Yes.
>
> Q But you and Mr McQuillen seem to have decided not to comply with that request?
>
> A Not totally, no.
>
> Q Well, not at all, really. Here is Mr McQuillen speaking to Mr Eastman.
>
> A Well, like I said, David Eastman was well aware of his legal rights and he knows how to represent himself better than any barrister I've ever met.
>
> Q Why does that make it all right for you and Mr McQuillen to have a conversation with him in this manner?
>
> A Well, he's still putting questions to him.
>
> Q Indeed. Why does it make it all right?
>
> A Well, I can't see him doing anything dramatically wrong, he's just putting questions to him. He's choosing not to answer him. That shouldn't prevent him putting questions to him.
>
> Q But it was contrary to the letters that you'd received from the solicitor, back in 1989?
>
> A Yes.

1638. Mr Ninness agreed that Mr McQuillen kept at the applicant and would not desist. It was then put to him that the interview was harassing and he replied 'if you interpret it that way, yes.' Asked if he interpreted that way, Mr Ninness responded 'could be, yes'.

1639. With respect to the passage in which Mr McQuillen told the applicant that the applicant's own peace of mind was disintegrating totally, Mr Ninness said that statement did not reflect his view and he was 'certainly not' trying to break the applicant. Mr Ninness said he thought the applicant was 'more attuned in what was going on than at any other stage' (Inq 2702).

1640. After lengthy passages of the interview had been canvassed, Mr Ninness was asked how this form of questioning could be justified and ultimately accepted that it was not appropriate police conduct (Inq 2704):

> Q What could possibly justify this? We've just been through a number of pages where he's talked about his paranoia and so on. What could possibly justify this?
>
> A Sorry?
>
> Q What could possibly justify Mr McQuillen talking to Mr Eastman in this manner and with this content?
>
> A I don't know what was in his mind when he was questioning.

Q No. Forget what's in his mind. We can ask Mr McQuillen about that. But from your perspective, what could possibly justify what Mr McQuillen has been doing in these last few pages?

A I think he's trying to open him up and get him talking to him.

Q Do you suggest that that's acceptable police conduct?

A Again I don't know the mood of the meeting and what was going on in there.

Q Don't worry about the mood. We're talking about the content of what's being put over particularly the last umpteen pages that you've just been taken through?

A He was pushing - - -

Q Do you suggest this was acceptable police conduct?

A He was pushing pretty hard. Yes.

Q Is that a polite way of saying you accept it was not appropriate police conduct?

A Correct.

1641. Counsel then drew Mr Ninness' attention to the passages where Mr McQuillen said seven times in a row 'murder of Assistant Commissioner Winchester' and Mr Ninness was again asked whether such conduct was acceptable (Inq 2705):

Q Its just not acceptable, is it?

A ---(*No Audible Reply*)

Q Sorry, that answer was you agree with that?

A It didn't advance it. No.

Q Sorry?

A It didn't advance it anywhere.

Q No, but it's not acceptable police conduct is it?

A No.

Q No.

Q When you say it didn't advance it, this is obviously an 'in-your-face' reminder to Mr Eastman that he's the main suspect for murder, isn't it?

A Yes.

Q He could be left under no illusions about that?

A No.

1642. Mr Ninness maintained he had no memory of discussing such a conversation with Mr McQuillen before or after it occurred. In Mr Ninness' view, Mr McQuillen had not made a deliberate decision to get into the face of the applicant because, from the statements heard in the listening post on 3 and 22 June 1990, it appeared that the applicant might talk about the murder. He emphatically denied that looking back on it now, it could be seen that the 'in-your-face' approach had successfully resulted in the applicant making admissions (Inq 2706).

1643. During cross-examination by Counsel for the applicant, the topic of the interview by Mr McQuillen was revisited. In that context, and bearing in mind that on this occasion the applicant had been arrested for an altercation with a surveillance officer who was a member of Major Crime Squad, Mr Ninness was asked whether it would have been

obvious that if a Major Crime Squad Officer were to interview the applicant he would not react well. Mr Ninness replied 'perhaps, yes'. He agreed it could have been in the minds of members of the Squad that their presence might inflame the situation and he was asked why, in those circumstances, arrangements would not have been made by someone who was not a member of the Major Crime Squad to deal with the applicant (Inq 2784–2785):

> A He would have tied up the whole police force in dealing with Mr Eastman. It was best it stayed under one umbrella.
>
> Q I see. So was there a policy decision made that when Mr Eastman was arrested, where possible members of the Major Crime Squad would deal with it?
>
> A I think a lot of the charges resulted as a result of the Major Crime Squad members being involved in the surveillance period. And then - - -
>
> Q Well, that might be, but was there a policy decision made that where possible it would be members of the Major Crime Squad who would take control of charges against Mr Eastman?
>
> A It wasn't a policy issue, no.
>
> Q Was it a practice?
>
> A It was a discretion to be used by the members.
>
> Q As it turned out, it looks like most of the time the discretion was exercised in favour of members of the Major Crime Squad doing the job, yes?
>
> A That's right.

1644. Mr Ninness was then asked if it was appropriate to speak to the applicant after his solicitor had left, bearing in mind the previous correspondence indicating that the applicant did not want to be interviewed about the murder. He was not willing to accept the proposition that it was inappropriate and referred to the fact that the applicant had been informed he was entitled to have his solicitor present. The question was repeated and he said he did not know what was in Mr McQuillen's mind at the time. The question was again repeated and Mr Ninness responded 'Well, he probably seized upon an opportunity'.

1645. The questioning continued suggesting that Mr Ninness resented the refusal to participate in an interview. Mr Ninness denied that he resented it, but agreed he was not happy about it. He again acknowledged that he chose to ignore the correspondence and that in the period 1989 into early 1990 the 'other methods' he employed included the tactic of taking opportunities for face-to-face contact with the applicant. Mr Ninness denied, however, that at anytime they harassed the applicant and he did not view these face-to-face occasions as amounting to harassment. They were just the deployment of 'other methods' (Inq 2788).

1646. Mr Ninness acknowledged that in early 1990 he wanted to make it plain to the applicant that he was going to be subjected to a long and protracted investigation. He then gave some interesting evidence (Inq 2788–2789):

> Q And that the pressure would be maintained on him?
>
> A That, if we took part in an interview, we could put it before the Coronial inquiry and we may even defuse it; he may have been eliminated as a suspect.

Q Did you seriously believe that an interview with Mr Eastman might exclude him as a suspect?

A It was possible.

Q Mr Ninness, you had the threat from Dr Roantree, you had the meeting with Mr Winchester. You had all the background material about Mr Eastman and, in addition to that, you already had an interview with Mr Eastman, which seems to have been overlooked thus far in the questioning. Mr Eastman had been interviewed very soon after the murder and had given an account of his movements. Is that correct?

A Yes.

Q There was some vagueness about his account but he had given an account about his movements. Are you seriously suggesting that, in the period to 1990, it occurred to you that he might be able to exonerate himself or exclude himself as a suspect?

A Your Honour, all during that period, the elephant in the room was still the mafia and we were conducting a lot of inquiries in relation to that and at any one time it could have been a fact that we may have apprehended somebody else for the murder, and ...

Q Might have, on the other inquiry, but did it seriously cross your mind that anything Mr Eastman said to you might exclude him as a suspect?

A He may have been able to refute the reason for the powder residue in the vehicle, he may have been able to come up with a reason why he threatened Mr Winchester in front of Dr Roantree. There may have been a myriad of reasons - he could have come forward with some sort of explanation.

Q To actually exclude him as a suspect?

A Well, not totally exclude himself but it certainly would have opened some ...

Q That was the basis of my question. You said he might have excluded himself as a subject?

A Possibly.

Q That's why I'm questioning whether you seriously believed that, on top of which you knew he was a violent and aggressive individual?

A Yes.

Q Who had demonstrated his violence towards members of the police force and members of the public. Correct?

A Yes.

Q On top of which you had him being surveilled at places such as the homes of investigators or a home of an investigator, the home of other prominent people. Is that right?

A Yes.

Q You didn't seriously expect himself to exclude himself in an interview, exclude himself from being a suspect?

A I thought he may have come forward with reasons why certain things were there that may have weakened the impact of what we had.

Q Might have but he'd have remained a suspect, wouldn't he, unless he had some iron-clad alibi, like he'd been in the lockup all that night or in a hospital bed?

A True. True.

Q You were really wanting an interview so that you could use the opportunity to get him to confess?

A Possibly, yes.

Q That was more likely, wasn't it; that was the real motive?

A Course.

1647. I reject Mr Ninness' evidence that in 1990 he thought it was possible that, in an interview, the applicant might eliminate himself as a suspect. There is no doubt that by 1990, Mr Ninness possessed an unshakeable belief that the applicant was the murderer.

1648. As to the relevance of the ongoing contacts to the making of the recorded confessions, the first recorded statement upon which the prosecution relied as a confession occurred on 3 June 1990. Asked what effect ongoing contacts had upon the applicant, Mr Ninness said he was very concerned for the safety of others, but on the professional advice of Dr Milton 'that may have been the way we had to keep going' (Inq 2696). Mr Ninness pointed out it was not a daily occurrence, rather, it was 'quite spasmodic' and quite lengthy periods would elapse between the contacts. Mr Ninness acknowledged that he believed they might have been on the right track, but he knew they were walking a fine line in the manner they were conducting themselves. Police conduct could have been construed as harassment, but that was not their intention. Their intention was to secure public safety and produce the result of a confession.

1649. The second recorded statement upon which the Crown relied occurred on 22 June 1990. Mr Ninness acknowledged that 'possibly' they might have thought they were on the right track in the sense that the in-the-face approach was probably producing the results they needed (Inq 2697).

1650. During cross-examination Mr Ninness said he completely gave up on the idea of being able to persuade the applicant to participate in an interview after the commencement of the Inquest. It was put to him that he was using every opportunity throughout the entire investigation up to the trial to try and force the applicant to 'crack' and he denied that assertion. He then gave the following evidence (Inq 2826):

> Q And trying to get him to submit to confessing to you?
>
> A Not correct.
>
> Q Or to submit to an interview in which you could interrogate him? That was your desire, wasn't it?
>
> A Early in the piece, yes.
>
> Q It continued?
>
> A Not for that purpose, no.

1651. In re-examination Mr Ninness was asked by what he meant when he said 'not for that purpose, no' and he referred to his earlier evidence that from the end of March 1989 he had no further contact with the applicant. He repeated that he decided for himself that the applicant was not going to confess to him, but he agreed there was a possibility he might confess to someone else. He acknowledged the presence of the listening device at the applicant's residence and said that although he had abandoned the possibility that the applicant might confess to him or another officer or someone else, in his mind there remained the possibility that the applicant might talk to himself about the murder (Inq 2888). Mr Ninness then gave the following evidence (Inq 2889):

> Q And so part of that methodology of having Major Crime deal with him, of having Mr McQuillen speak to him, was to ensure that he would have the murder paramount in his mind and he may talk about it on the listening device?

A Yes.

1652. Having made that acknowledgment, very shortly after Mr Ninness took a step back:

> Q What I'm suggesting as well that, part of the methodology of speaking to Mr Eastman like Mr McQuillen did was to see whether Mr Eastman would then go home and talk about the murder to himself and you'd get the evidence on a listening device?
>
> A That's a long bow. I can't agree with that.
>
> Q Well, you've told us that the methodology was to keep it in the forefront of Mr Eastman's mind?
>
> A Yes.
>
> Q And Dr Milton's advice was that he may talk to others or talk to himself about it?
>
> A Yes.
>
> Q So, by keeping it in the forefront of his mind and Mr McQuillen talking to him about it, one option is that he might talk to himself about it on a listening device?
>
> A May do.
>
> Q Do you say that you didn't connect the two at that time?
>
> A That wasn't planned, no. As can be seen from the antecedents of Mr Eastman, he quickly goes to a different topic.

1653. The attention of Mr Ninness was then drawn to his draft affidavit (Ex 166) in which he made reference to the advice of Dr Milton. Mr Ninness then accepted that in 1990, in his mind, there was a link between Dr Milton's advice and the fact that the listening devices could be used to gather evidence against the applicant concerning his involvement in the murder.

1654. The possibility that the applicant might incriminate himself in the confines of his premises was clearly in the minds of investigators. In an affidavit sworn on 14 February 1990 in support of obtaining a listening device warrant, Mr Ninness said the advice from 'practising psychiatrists' other than Dr Milton was as follows (Ex 220 [25]):

> ... [T]here is a very high probability that Eastman will either identify a person with whom he can confide and in all likelihood confess his involvement in the murder or will continue talking to himself in such a manner as to afford evidence regarding this involvement in the commission of this offence.

1655. There is no direct evidence as to the identity of the psychiatrists from whom the advice was received. They might have been Dr Tym and Professor Mullen.

1656. As to the prosecutors drawing a link between police conduct and the recorded statements of the applicant talking to himself, according to a DPP file note of 10 January 1994 (Ex 95, 121–123) Mr Adams drew attention to evidence at the Inquest concerning attempts by Mr Ninness to provoke the applicant. Mr Adams requested that the provocative incidents be identified. He wanted to compare the incidents with the recorded statements to see if there was any 'correlation' between Mr Ninness' attitude and the applicant's recorded statements about Mr Ninness.

1657. On the same day Mr Ibbotson asked Mr McQuillen to check and Mr McQuillen responded that by the time a listening device was used Mr Ninness had stopped having contact with the applicant (Ex 95, 124a).

1658. The note of 10 January 1994 concerns a 'correlation' between police conduct and the applicant's recorded statements, but it relates only to statements recorded about Mr Ninness. Although Mr Adams did not recall the conversation or topic, he said the note reflected a 'common sense thing to do' (Inq 2921). From the perspective of the Inquiry, the conversation did not relate to the recorded admissions.

1659. As to the conversation between Mr McQuillen and the applicant on 26 June 1990, neither Mr Adams nor Mr Ibbotson had a memory of it. However, it appears likely that Mr Ibbotson saw a copy of the transcript. On 4 June 1993 Mr Ibbotson spoke with Mr McQuillen by telephone and noted that Mr McQuillen was to forward to him the record of interview that Mr McQuillen had with the applicant in September 1991 (Ex 95, 29a). On 8 June 1993 a DPP file note recorded that on 7 June 1993 Mr McQuillen presented a 'copy' of the record of conversation Mr McQuillen had with the applicant in '1990 at the City Police Station'. The note does not give more information as to the date of the conversation (Ex 95, 29b).

1660. In the context of police conduct, evidence was led that in 1998 a former AFP officer, Sergeant Cliff Foster (deceased), alleged that in November or December 1990 at a social function Deputy Commissioner Ray Farmer bragged about how police were 'trying to send Eastman nuts' and were making harassing calls (affidavit of Mr Boersig, Ex 217). Mr Foster claimed Mr Farmer said police should use public telephones. The occasion was a reception at Parliament House for a visiting Italian Judge.

1661. Mr Farmer gave evidence and strongly denied making any such statement. He was an impressive witness. I very much doubt that Mr Farmer made the remarks attributed to him by Mr Foster, but even if he did, the remarks would add very little to the conclusions I have reached from other evidence.

Conclusion Surveillance/Harassment

1662. I have not endeavoured to canvass every occasion of contact between police and the applicant. Nor has this Inquiry attempted to investigate voluminous complaints made by the applicant concerning the conduct of police. In summary, the principal matters concerning police conduct are as follows:

- Physical surveillance of the applicant commenced on 13 January 1989 and continued at various times until 23 December 1992.

- Listening devices were placed in and adjacent to the applicant's residence from 26 September 1989 and remained in position until 11 January 1993 (affidavit Peter Dean Ex 240 [9]).

- From the outset of the investigation in January 1989 the AFP had advice from Dr Milton that the applicant suffered from a Paranoid Personality Disorder and was a danger to the community and particular persons within the community.

- From the outset the AFP had advice from Dr Milton that notwithstanding the applicant's refusal to participate in an interview with police, the applicant possessed a 'great need for self-justification and to explain himself' and it was possible that 'patience might bring results' in respect of an interview (Dr Milton 20 February 1989, 15).

- From the outset Dr Milton advised that overt surveillance was appropriate, as was Mr Ninness maintaining a solemn presence. From the perspective of Mr Ninness, he was advised to keep his face in front of the applicant in order to be seen as an 'immoveable rock' that the applicant could not get around (Inq 2567).

- In Dr Milton's view, while the applicant might resent the surveillance and find it galling, on another level he was not adverse to it because it appealed to his narcissism and made him feel important.

- Dr Milton was not aware of any conduct by police intended to provoke or harass the applicant.

- On 18 January 1989, the applicant's car was seized.

- On 19 January 1989 Mr Walker wrote to the AFP advising that the applicant did not wish to make any further statements or take part in any further interview with police (part Ex 180).

- In evidence Mr Ninness agreed that he deliberately ignored the request contained in that letter and subsequent correspondence from the applicant's solicitors.

- On 23 January 1989 Mr Ninness and Mr McQuillen engineered face-to-face contact with the applicant by using the return of his car as an excuse to be in the applicant's presence. Mr Ninness agreed that he used the opportunity to try and encourage the applicant to take part in an interview and, before seeing a statement he had prepared for the purposes of the Inquest (Ex 159), said that the conversation was very cordial and he did not say anything offensive.

- During the conversation on 23 January 1989 Mr Ninness told the applicant that he was the number one suspect and police would be conducting many enquiries into his past. In response to the applicant stating that the arrangement was that he would not be questioned by Mr Ninness or any police, Mr Ninness responded that he was not questioning the applicant; he was informing him of the course the investigation was taking.

- During the conversation on 23 January 1989, Mr Ninness said 'you frequent brothels David' and then said that he was 'surprised' that the applicant engaged in homosexual activities with boys. When the applicant asked what that had to do

with the investigation, Mr Ninness responded that he was just letting the applicant know the 'homework' that police were doing into the applicant's background.

- In February 1989 there were at least three occasions when Mr Ninness attended at the applicant's residence under the guise of returning an item of property to him. On one of those occasions the applicant tried to shut the door and Mr Ninness stuck his foot in the door to prevent it closing.

- Mr Ninness agreed that on one of the occasions in February he might have said to the applicant that he was worried about the applicant because, with all the stress, his mental health could crack up and he would be committed to an institution; then he would not be fit to plead and the case would never be solved.

- On 9 March 1989 Mr Pilkinton wrote to the AFP advising of instructions from the applicant that under 'no circumstances' would the applicant agree to a further interview (Ex 180). The letter requested that the police desist from continuing to request that the applicant attend for an interview. In addition, the letter conveyed to police the applicant's wish that in future the applicant be permitted to collect his property from the police station rather than police attending at his private residence.

- Within a few days of the letter of 9 March 1989 from Mr Pilkinton to the AFP, Mr Ninness telephoned Mr Pilkinton. In an abusive and aggressive voice, using four-letter words, Mr Ninness said he had received the letter and would talk to the applicant whenever he wished and Mr Pilkinton should stick his letter 'where it hurts most'. It is likely that Mr Ninness was affected by alcohol when he made the telephone call.

- On 17 March 1989 while the applicant was in company with an undercover female police officer, Mr Ninness and Mr McQuillen engineered contact with the applicant at the War Memorial. Mr Ninness used the pretext of informing the applicant of their intention to execute warrants on his trust accounts the following day. The applicant made it plain that he did not wish to speak with Mr Ninness but, as on other occasions, Mr Ninness chose to ignore the applicant's statements in that regard.

- On 22 March 1989 Mr Ninness and Mr McQuillen deliberately made contact with the applicant on Ainslie Avenue outside the city markets. When the applicant was in the driver's seat of his vehicle, Mr Ninness removed the keys from the ignition and stood in the open doorway preventing the applicant from closing the door. In a confrontational and aggressive conversation, and while unlawfully detaining the applicant, Mr Ninness told the applicant on more than one occasion to shut up and that he was 'the law' at the moment. The applicant repeated that he was not obliged to speak with Mr Ninness and was entitled to leave. When the applicant used the words, 'that technically is an assault', Mr Ninness told the applicant that he knew what he could do, plainly intending to convey rudely his rejection of the applicant's complaint.

- On 23 March 1989 Mr Pilkinton wrote to the AFP concerning the events of 22 March 1989 and repeated that the applicant would not, under any circumstances, consent to being interviewed by police (Ex 181).

- Another engineered contact during the first half of 1989 involved Mr Ninness attending at the Olympic Pool where he was aware the applicant regularly swam.

- Surveillance and engineered face-to-face contact with the applicant continued through 1990 and into 1991.

- Surveillance of the applicant varied from covert to overt and back to covert. Not infrequently the applicant converted covert surveillance into overt because he regularly and aggressively took steps to confront the surveillance officers.

- At times the applicant mistook members of the public for surveillance officers and behaved aggressively towards them.

- Early in 1990 while the applicant attended at the office of his solicitor, Mr Headland, Mr Overland of the AFP conducted overt surveillance from a car park across the road from the building in which Mr Headland worked.

- On 29 January 1990 police made the first call to the applicant's premises.

- On 24 February 1990 police made the second call to the applicant's premises.

- On 3 March 1990 police made the third call to the applicant's premises.

- On 29 March 1990 Mr Ninness wrote to the applicant's solicitor, Mr Donald, concerning the applicant's behaviour and the responsibility of the police to protect members of the community who might be in danger from 'mentally unstable individuals' (Ex 157). This was a reference to the applicant being 'mentally unstable'. The letter also advised that because the applicant refused to cooperate with police, they were left with no option but to employ 'other methods' to fully investigate the applicant.

- On two or three occasions a week between June and October 1990, while the applicant was walking to the office of his solicitor, Ms Ryan, in Moore Street Civic, officers invaded the applicant's personal space and harassed him.

- On 3 June 1990 the applicant made the first of the recorded statements upon which the prosecution relied as an admission of guilt.

- On 6 June 1990 Mr McQuillen attended at the applicant's residence on the pretext of advising the applicant of complaints against him and of his intention to prepare a report. The applicant made it plain that he did not wish to speak to Mr McQuillen.

- On 7 June 1990 the applicant's solicitor wrote to the AFP reiterating that the applicant did not wish to speak to police personally and registering a complaint about the behaviour of Mr McQuillen on 6 June 1990.

- On 11 June 1990 Mr McQuillen attempted to serve the applicant with a summons in London Circuit. When the applicant refused to accept service, Mr McQuillen threw the papers at his feet (Ex 229).

- On 22 June 1990 the second of the recorded statements by the applicant talking to himself upon which the prosecution relied occurred.

- On 26 June 1990, while the applicant was in custody, Mr McQuillen spoke with the applicant in a plainly harassing and, at times, abusive manner.

- On 23 July 1990 the third recorded statement occurred.

- On 29 July 1990 the fourth recorded statement occurred.

- On 7 November 1991 the fifth recorded statement occurred.

- From the middle of 1990 through to 1994 members of the Major Crime Squad were involved as informants in repeatedly charging the applicant with offences, many of which were relatively minor offences, that would normally have been handled by uniformed police officers.

1663. Against this background, and in the light of the evidence to which I have referred, I have no doubt that during the period 1989-1991 police conduct was deliberately aimed at harassing the applicant with a view to upsetting him and provoking him into reacting. In making that observation I do not overlook or underestimate the difficult situation in which investigators found themselves. Police had good reason to be gravely concerned about the welfare of the public and of specific persons in authority. Dr Milton had given the clearest advice that the applicant was a dangerous person. The applicant had repeatedly proven that he was capable of physical violence. Both covert and overt surveillance of the applicant were more than justified on this ground alone. In addition, police properly regarded the applicant as a suspect, and eventually as the principal suspect, in the murder investigation and both forms of surveillance were justified on the ground that the applicant might engage in conduct relevant to the investigation.

1664. Overt surveillance was supported by Dr Milton and was, in my opinion, plainly justified. The applicant reacted badly to the overt surveillance, but police were not obliged to desist by reason of that reaction if the circumstances dictated that overt surveillance was necessary for the protection of the public and specified persons in authority. It should also be borne in mind that the applicant's aggressive counter-surveillance activities meant that, frequently, covert surveillance was not feasible. In addition, the applicant's conduct in this regard resulted in him having face-to-face contact with surveillance officers which those officers could not avoid without ceasing the surveillance and placing the public at risk.

1665. In addition to the surveillance, Mr Ninness decided that he should dictate the terms of the investigation and contact with the applicant. Mr Ninness wanted to knock the applicant 'off his perch' (Inq 4173) by harassing the applicant and upsetting him. Although Mr Ninness initially might have hoped that his presence would encourage the applicant to undertake an interview with him, that hope was dashed very quickly when solicitors' letters arrived at the AFP and the applicant made it plain in direct conversation with Mr Ninness that he would not participate in an interview. Thereafter, Mr Ninness blatantly disregarded the applicant's rights and set in place tactics which ensured regular face-to-face contact between members of the investigation team and the applicant in circumstances which were designed to harasss and provoke the applicant into a reaction.

1666. The tactics adopted by Mr Ninness and others were the 'other methods' of which Mr Ninness spoke in his letter to the applicant's solicitor on 29 March 1990 (Ex 157). Knowing that the applicant suffered from a Paranoid Personality Disorder, and aware that keeping the murder investigation in the forefront of the applicant's mind might, in the applicant's social isolation, push the applicant to a breaking point where he would feel compelled to talk to himself in the confines of his home, Mr Ninness and others played on the applicant's mental state both in their conduct and in their conversations with him. The harassing and provocative conduct was undertaken with the deliberate intention of provoking the applicant into saying something incriminating which could be recorded on listening devices in his home.

1667. In following this course of action, police relied on the advice of Dr Milton concerning the applicant's mental state and his need to tell someone or talk to himself about the murder. However, it must be emphasised that Dr Milton did not advocate, and was not aware of, the type of activities that have emerged in the evidence which amounted to harassment and provocation of the applicant.

1668. As to the propriety of the conduct in which the police engaged, care must be taken not to immediately jump to condemnation with the benefit of hindsight. The investigation team was in a difficult position. They had identified a suspect and received advice from Dr Milton about how to handle that suspect. The suspect was a danger to the community and specific persons in authority. Protection of the public and those persons was paramount. Leaving aside statutory and common law requirements for situations such as interviewing suspects, there is no set of 'The Marquess of Queensberry Rules' by which investigating officers must abide in carrying out investigations into serious crime. Or, to use the phrase adopted by the Full Court in discussing the applicant's appeal against conviction, police were not obliged to observe the 'social niceties'.[79] Police are entitled to use legitimate methods and, in the particular circumstances involving the applicant and his capacity to adopt counter-surveillance tactics, police were entitled to engage in overt surveillance and to maintain a visible presence.

1669. Having made those general observations, it must be said that there were occasions when police crossed the line and engaged in both unfair and unlawful conduct toward the applicant. For example, verbal harassment of the type described by Mr Ninness

[79] *Eastman v R* (1997) 76 FCR 9, 110.

when collecting the applicant's car, sticking a foot in the door of the applicant's premises and the aggressive confrontation at the city markets were occasions of conduct which forms no part of legitimate investigatory techniques. Similarly, repeatedly surrounding the applicant and invading his personal space on the street is not acceptable conduct on the part of investigating officers. Nor was the conduct of Mr McQuillen during the interview of 26 June 1990. The inappropriate nature of the conduct is exacerbated when regard is had to the applicant's mental state and the intention of police to play upon and aggravate that mental state.

1670. In addressing the conduct of police, Counsel for the AFP emphasised that their conduct 'should be judged by the standards prevailing at the time of their conduct'. The written submission continued as follows (annexure 6 [326]):

> Whilst the Board may take the view that it is improper for police officer to continue to attempt to speak to a suspect who has indicated, through his lawyers, that he does not wish to speak to police, the following contemporaneous documents strongly suggest this was not the prevailing view 25 years ago when a serious offence was being investigated.

1671. The written submissions then cite a statement by Mr Whiddett in his report of 1 May 1990 (Ex 219) which referred to the 'inherently unclear parameters' of the term 'harassment'. That was a statement made by Mr Whiddett without the extent of the knowledge possessed by the Board.

1672. The submission also referred to a statement in the Commonwealth Ombudsman's Report of 22 June 1990:

> I do not consider it was unreasonable for Commander Ninness to persist for a short time in seeking an interview despite the solicitor's advice. Nor do I consider such approaches constitute harassment. The same conclusion applies to approaches by other members of the investigative team.

1673. I have not investigated the detail of the information provided to the Ombudsman. It is apparent in some respects, however, that the Ombudsman was not given the full picture because that picture was not conveyed by Mr Ninness and Mr McQuillen to the investigators. However, regardless of the precise details, the Ombudsman was concerned with persisting for a 'short time' in seeking an interview despite the advice from the solicitor. It is obvious that the Ombudsman was not in possession of the information now possessed by this Inquiry.

1674. It may well be that attitudes towards police tactics have changed since the late 80s and early 90s, but I am not dealing with standards that prevailed in the 1800s. From a memory perspective, 1989 is a long time ago, but it is not ancient history with respect to proper and improper police methods of investigation. When the full details are exposed, the conduct to which I have referred was inappropriate by the standards applicable in the period 1989 – 1995.

1675. Having reached that conclusion it is necessary to consider the consequences and implications of such conduct in terms of both Paragraphs 16 and 19. However, before dealing with those issues in the context of Paragraph 16, it is appropriate to canvass an

issue of disclosure which arose during the course of the evidence concerning surveillance and harassment.

Surveillance – Failure to Disclose

1676. Independently of the relevance of police conduct to issues such as the recorded confessions and the fairness of the trial, the evidence established that the prosecution failed to disclose to the defence the statements made by Mr Ninness on 21 March 1995 concerning surveillance and 'keeping on the applicant's back'. This question of failure to disclose arises in the context of evidence the prosecution chose to lead at trial concerning the nature of surveillance.

1677. At trial, initially the prosecution did not lead evidence of general surveillance activities. Evidence was lead from Mr Jackson of particular surveillance duties on 28 August 1990 in the vicinity of the Jolimont Centre when he saw the applicant seated on a bus. The prosecutor explained that this evidence was relevant to the evidence of Mr Reid who saw the applicant in the Jolimont Centre on the same day (T 3611).

1678. The applicant cross-examined Mr Jackson about the occasion at the Jolimont Centre and asked Mr Jackson about the instructions he received concerning his role in the surveillance. During one of his answers Mr Jackson said it would have been physically impossible to have kept the applicant under surveillance at all times and 'remain covert' (T 4113). That answer led Mr Eastman to ask whether Mr Jackson's instructions were to remain covert at all times and to further questions about Mr Jackson's objective. Mr Jackson explained that the surveillance related to arranging an opportunity for a potential witness to identify the applicant. Numerous questions followed about keeping logs and the applicant then asked about Mr Jackson's awareness of many complaints by the applicant and his legal representatives concerning harassment of the applicant by police officers engaged in 'this alleged surveillance operation'. Mr Jackson responded that he was not aware of any complaint about the surveillance operation relating to the Jolimont Centre. The applicant observed that his question was not limited to the Jolimont occasion and asked about complaints regarding harassment by officers engaged in 'alleged' surveillance operations generally. Mr Jackson responded that he was aware that the applicant had instigated a number of complaints.

1679. The applicant continued asking questions about general surveillance activities, after which his questioning returned to the Jolimont occasion. The questioning elicited Mr Jackson's view that the applicant was a threat to the general public. That evidence appears to have prompted the applicant to allege that Mr Jackson and other officers had harassed him repeatedly. The applicant cross-examined Mr Jackson about his complaints concerning the conduct of police and eventually Mr Jackson revealed the existence of reports by Dr Milton.

1680. As to the question of overt and covert surveillance, the applicant questioned Mr Jackson as to how covert surveillance could achieve protection of the public. This led to evidence from Mr Jackson concerning the applicant's 'anti-surveillance tactics' (T 4163) and to the applicant suggesting that the surveillance activity had as its 'primary

objective' harassment of the applicant and provoking the applicant into some reaction (T 4164).

1681. After further lengthy questioning about the Jolimont occasion, the applicant produced a photograph of Mr Jackson, apparently taken when Mr Jackson was engaged in surveillance activities. Questions followed about 'so-called covert surveillance' (T 4195), including an incident the applicant asserted occurred on 18 March 1989 in the vicinity of the Lakeside Hotel and in respect of which the applicant suggested to Mr Jackson that Mr Jackson had no desire to remain covert (T 4196).

1682. In re-examination Mr Adams led evidence from Mr Jackson concerning particular surveillance activities about which the applicant had questioned Mr Jackson. In respect of occasions on which the applicant spoke to Mr Jackson, a direct question was asked as to whether Mr Jackson was attempting to be covert or was careless or indifferent as to whether he was seen or not. Mr Jackson responded that his intention at all times was to remain covert (T 4222).

1683. The evidence concerning surveillance was given by Mr Jackson on 17 August 1995. Mr Adams recalled Mr Ninness on 30 August 1995 and elicited from him that surveillance of the applicant commenced in January and remained in place until August of 1990. Mr Ninness was then specifically asked about the question of covert and overt surveillance (T 4610):

> Q Now, during that period what directions did you give as to whether the surveillance should be covert or overt?
>
> A The surveillance was directed to be covert where possible throughout the entire operation.
>
> Q Did you place that surveillance on the accused to intimidate or harass him in any way?
>
> A No, I did not.
>
> Q What were the purposes, briefly please, of the surveillance?
>
> A Surveillance was placed on the accused to monitor his movements in an effort to possibly link him with evidence we believed in his possession would link him to the Winchester murder investigation, and much later it was put on for the purposes, or maintained for the purposes of security.

1684. Mr Adams then led from Mr Ninness that in respect of his decision concerning the nature and extent of appropriate surveillance he had regard to the reports of Dr Milton which had been marked for identification during the evidence of Mr Jackson.

1685. After discussion about minutes prepared by Mr Ninness concerning surveillance operations, evidence was led from Mr Ninness that on approximately two or three occasions after August 1990, there were further small periods of surveillance. As to the question of covert or overt (T 4612):

> Q Again in relation to those periods of surveillance, what was the instruction as to whether they should have been covert or overt?
>
> A Well, one of those times was not mobile - they were placed in secure positions close to the accused's residence at Reid and another group was strategically placed across Black Mountain and they were instructed to maintain a non-visible presence.
>
> Q After 7 August 1990, was there any mobile surveillance of the accused?

A Yes, later in 1992, after the accused again came under notice after speaking to Mr Webb, he was put under surveillance at that time, up until the resumption of the inquest.

Q Again, were the officers directed to remain covert or to be overt in that regard?

A To be covert.

1686. The evidence given by Mr Jackson that he endeavoured to remain covert in his surveillance activities concerned two specific occasions about which he had been questioned by the applicant. However, the evidence given by Mr Ninness was not restricted to specific occasions. He said his instructions were that if possible, at all times surveillance was to remain covert. In addition Mr Ninness said the purpose of the surveillance was not to harass the applicant. This evidence was in direct conflict with the statements made by Mr Ninness to Mr Adams, Mr Ibbotson and Ms Hunter on 21 March 1995.

1687. If Mr Ninness had told the prosecution prior to being recalled that at all times the instructions were that the surveillance was to remain covert, that statement and the conflicting statement made on 21 March 1995 should have been disclosed to the defence before Mr Ninness was re-examined. If the prosecution did not know what answer Mr Ninness would give in re-examination, once he had given his evidence the previous inconsistent statement made on 21 March 1995 should have immediately been disclosed to the defence.

1688. Ordinarily, a dispute about police conduct and surveillance activities would not possess any relevance to the critical issues at trials. However, the applicant having raised the issue of harassment and surveillance, the prosecution sought to rebut the version being advanced by the applicant by leading evidence in re-examination from Mr Ninness that at all times it was the intention that the surveillance remain covert. In substance, the prosecution attacked the applicant's credibility in respect of his complaints of harassment and covert surveillance.

1689. Mr Adams told the Inquiry that if he had appreciated at the time that the evidence of Mr Ninness was 'at odds' with the notes of the meeting of 21 March 1995, he would have disclosed the notes (Inq 3068, 3070).

1690. The prosecution having chosen to recall Mr Ninness and to lead the evidence to which I have referred, it was incumbent on the prosecution to disclose to the defence any evidence which conflicted with the prosecution evidence in this regard and which might have assisted the defence. Disclosure became a live issue when the evidence in re-examination conflicted with the statement by Mr Ninness on 21 March 1995.

1691. I am satisfied that, at all times, Mr Adams endeavoured to comply fully and properly with the prosecution's duty of disclosure, but the prosecution failed in its duty to disclose either the notes of the meeting of 21 March 1995 which recorded the conflicting statement by Mr Ninness, or the information given by Mr Ninness in the meeting. Cross-examination of Mr Ninness using those notes and, if necessary, the calling of evidence from Ms Hunter who compiled the notes, might have been a significant step in bolstering the credibility of the applicant and damaging the credibility of Mr Ninness.

Donald – Listening Product

1692. Finally, before discussing the conclusion reached in respect of Paragraph 16, it is appropriate to canvass evidence concerning the recording of confidential communications between the applicant and his solicitor.

1693. Prior to being shown any documents concerning the listening device material, Mr Ninness acknowledged there was a period when the applicant was recovering from a motor vehicle accident and his solicitor attended at his residence to obtain instructions. Those conversations were recorded through the listening devices, but Mr Ninness said he was aware of the solicitor issue and did not want to be seen to be using those conversations. He thought a system had been put in place by which such conversations were removed, but he did not know how that was achieved. Mr Ninness thought the conversations were not transcribed.

1694. Mr Ninness said he became aware that someone had told the solicitor for the applicant at a social gathering that she had been typing up conversations between the applicant and his solicitor. He was unable to recall whether that issue had been raised with the Coroner.

1695. After Mr Ninness had given that evidence, the DPP produced for the first time a statement of Mr McQuillen dated 22 March 1995 (Ex 161), together with a memorandum from Acting Assistant Commissioner Worthy dated 28 December 1989 identified as a protocol for the use of listening device products (Ex 162). In the statement Mr McQuillen explained that when listening post number one was established very shortly after the murder, there was no specific protocol in place with respect to conversations recorded between the applicant and his solicitor. At that time the operators were instructed to log all conversations overheard in the applicant's residence and those conversations were later 'assessed for any transcription'.

1696. The statement then explains the events concerning the applicant and his solicitor:

> In mid December 1989 it became public knowledge that the Police were transcribing conversations between the Target and his solicitor Mr Warren Donald. As a result a protocol was introduced for the recording and logging of any of those conversations. On 20 December 1989 Commander Worthy issued Policy in relation to the protocol to be used when there were conversations between the Target and his solicitor. Tapes containing any conversation between Eastman and his solicitor were identified and removed from other listening device holdings. Any conversation between Eastman and his solicitor that was considered relevant could be transcribed. Any such transcription and all tapes containing the conversations were delivered to the office of the Assistant Commissioner where they were secured in his 'B' class safe. All listening post operators and monitors were made conversant with this policy and abided by it.

1697. The protocol issued by Commander Worthy stated as follows (Ex 162):

> To facilitate the formal request of the Coroner, the following procedures will apply;
>
> a. Tapes containing any conversation between Eastman and his solicitor are to be identified and removed from other listening device holdings;

b. Conversations between other parties that are considered relevant are to be transcribed from such tapes and secured in the normal manner;

c. Should any conversation between Eastman and his solicitor be considered relevant to the investigation that specific conversation may be transcribed;

d. Any such transcripts and all such tapes will be delivered to the Office of the Assistant Commissioner where they will be secured in his 'B' class safe and;

e. Secure storage presently in place within the Major Crime Branch will continue for all other listening device products. (original emphasis)

1698. Mr Ninness agreed that the protocol was addressed to him as the officer in charge of the Major Crime Squad. Having read the document, Mr Ninness believed he would have been involved through discussions in the preparation of the protocol. He accepted that on the face of it the conversations between Mr Eastman and his solicitor were privileged and other people should not have had access to them. Mr Ninness said he did not know how the direction to transcribe a privileged conversation if it was 'relevant to the investigation' could be justified as he was not the author of the protocol. Asked for his view in 1989 as to whether it would have been appropriate for police to transcribe such privileged conversations, Mr Ninness said they should not have been transcribed (Inq 2847).

1699. Mr Ninness accepted that on one view the protocol could mean that the transcription would be placed immediately in the safe and no one would have access to it, but on another view it was permissible to make use of the information contained in the conversation. Asked if it was a view held within Major Crime that it was appropriate to listen and make use of such material that might be regarded as relevant to the investigation, Mr Ninness replied 'I don't recall'.

1700. Neither Mr Adams nor Mr Ibbotson could recall the issue of surveillance monitors recording conversations between the applicant and his solicitor, Mr Donald. Neither of them could recall seeing the protocol. Mr Adams said he found the protocol 'unusual', but agreed that such a word amounted to an understatement and, given the applicant's paranoid personality, he thought the applicant would be very angry with the protocol (Inq 3046). If asked, Mr Adams would have advised that the protocol was inappropriate.

1701. Although Mr Adams and Mr Ibbotson could not recall the issue of recording conversations with Mr Donald, the question of a typist informing a solicitor that she had been typing conversations of the solicitor rang a bell. That issue was a topic of discussion between Mr Adams and Mr Ibbotson following a conference with members of the Major Crime Squad on 7 April 1993. Mr Ibbotson made a file note (Ex 95 page 14):

15. Also in relation to the taped intercepts there is apparently a tape which sets out the Solicitor Warren Donald, being at Eastman's house, advising Eastman that his house is bugged and searching for that bug without success. We are to obtain a copy of that transcript and also a copy of the statement made or any record of interview by the informant typist that let on to Warren Donald that Eastman's conversation was being recorded by the police.

1702. On 13 April 1993 Mr Ibbotson wrote to Mr McQuillen setting out matters for attention following the conference on 7 April 1993 (Ex 95, 15). Included in the list was the supply of a copy of the tape and transcript concerning the search of the applicant's residence

by Mr Donald and the applicant when looking for the listening device; and obtaining a statement from the person who alerted Mr Donald to the existence of that device.

1703. On 1 November 1993 Mr Ibbotson reported to Mr Adams concerning matters outstanding which included the listening device product of conversation between Mr Donald and the applicant. The notes record that the DPP had a copy of the transcript and needed a statement concerning that transcript (Ex 95, 77). The DPP has been unable to locate a transcript for this Inquiry.

1704. Mr Ibbotson speculated that in respect of the recorded confessions, the prosecution might have wanted to prove that the applicant was aware that his premises were bugged. Mr Donald gave evidence in the trial concerning the applicant declining to take part in an identification parade and indirectly touched upon the question of a listening device. He said that in December 1989 he saw members of the AFP at a social function in company with a female person who spoke to him and indicated that it was 'good to put a name to a face'. She referred to a particular conversation between Mr Donald and the applicant 'that caused certain suspicions' to be raised in Mr Donald's mind. It was a 'professionally confidential' conversation that had occurred at the applicant's premises (T 798).

1705. Against that background Mr Ibbotson was asked about the applicant expressing concerns during the trial that his premises were being bugged and he was unable therefore, to have confidential conversations with his solicitors and provide them with instructions. Mr Ibbotson said if asked to do so he would have obtained an assurance from the AFP that no listening devices were in place during the trial, but he could not recall doing so and did not have memory of a solicitor for the AFP assuring the trial Judge that nothing unlawful was occurring.

1706. The behaviour of the police in recording and transcribing confidential communications between the applicant and his solicitor was far from satisfactory, as was the protocol. However, these events occurred a few years before the trial and they do not impact upon the issues raised in Paragraph 16.

1707. At a more general level related to the fairness of the trial, the applicant constantly sought re-assurance that his communications with his legal team were not being overheard and recorded by the AFP. Against the background discussed, his Paranoid Personality Disorder probably resulted in the applicant becoming obsessed with this issue. However, there is no evidence that the police were using a listening device in 1994 or 1995. Nor is there any evidence of unlawful or unfair conduct by police in this regard during those years.

Conclusion – Paragraph 16

1708. Paragraph 16 is founded upon a failure of the prosecution to disclose to the defence the reports of Dr Milton. However, for the reasons previously discussed, if the failure to disclose the reports by Dr Milton is considered in isolation from the conduct of the police, no doubt or question as to guilt arises as a consequence of the failure to disclose those reports. As I have said, following disclosure of Dr Milton's report the applicant, through his Counsel, did not renew the objection to the admissibility of the recorded

statements. The applicant did not seek to call Dr Milton or any other medical practitioner to give evidence that his mental state meant that any recorded confession was likely to be unreliable. As discussed, Dr Milton is firm in his contrary view.

1709. In these circumstances, the doubt or question as to guilt raised by the failure to disclose the reports of Dr Milton has been convincingly dispelled.

1710. Associated with the failure to disclose the reports of Dr Milton is the issue of the impact of police surveillance and harassment, coupled with the failure to disclose the statement of Mr Ninness which was contrary to his evidence concerning the nature of surveillance.

1711. I have indicated my view as to the propriety of the police conduct which amounted to harassment, but there is no evidence to suggest that the police conduct resulted in the involuntary making of the recorded admissions or the making of false admissions while the applicant was talking to himself. In particular, to the extent that the recorded statements were admissions of guilt, I have rejected the evidence of Dr White and I accept the evidence of Dr Milton that there is nothing in the circumstances which suggests those statements were not reliable statements of fact. I appreciate that Dr Milton was not aware of the extent of police conduct. Nor was he aware of the harassing nature of the conduct. However, leaving aside Dr White, there is no evidence to suggest that such harassment and provocation resulted in unreliable statements by the applicant to himself with respect to the murder of the deceased.

1712. In addition to the absence of evidence establishing a causal link between the conduct of the police and the making of the recorded statements, other evidence tends to support the contrary view. The medical evidence strongly suggests that the applicant's need to talk to himself arose out of his social isolation and narcissism. He spoke about many issues. In the encounters with police, the applicant was never overborne or intimidated. With respect to the surveillance, the applicant mounted a successful counter-surveillance campaign. That campaign included enlisting the aid of the media which resulted in the publication of articles about the surveillance in the Canberra Times, including photographs provided by the applicant of surveillance vehicles (Ex 262 and 263).

1713. The applicant's response to the harassment was well demonstrated in the interview conducted by Mr McQuillen on 26 June 1990. As the written submission of the AFP pointed out (annexure 6 [314.c]), the applicant was calm throughout and clearly in control of his thoughts and emotions. At times, the applicant treated Mr McQuillen and what Mr McQuillen was saying with disdain.

1714. There is no doubt that the applicant was angered and frustrated by the conduct of the police, but to a considerable extent that anger and frustration arose from the constant surveillance which was, in the circumstances, well justified. In addition, from the perspective of the applicant, the harassment was not a source of 'stress'. In evidence given during the voir dire at the trial, the applicant's Counsel put a leading question to the applicant which did not elicit the response which Counsel was seeking (T 3694):

> Q And naturally you were under a fair bit of stress during this time because of the surveillance or the following of you, I should say, amounting to harassment?
>
> A Well, no, the harassment, even if unjustified, would not create a great stress. It was the specific fear of my physical safety based on the advice that I'd had from an experienced barrister who was a former officer ...

1715. The absence of a causal connection between the conduct and the making of the statements is also a fatal flaw in the argument that the evidence of the recorded statements should have been excluded in the exercise of the discretion.

1716. It is apparent from the previous discussion that in my view, notwithstanding the difficult position in which police investigators found themselves, the nature and extent of inappropriate police conduct demands judicial disapproval. When the Full Court spoke of the conduct of the police as 'not such that it should attract curial disapproval', the court was not aware of the nature and extent of inappropriate police conduct disclosed in evidence given to the Board.[80]

1717. Counsel for the applicant sought to rely upon the decision of the High Court in *Bunning v Cross*,[81] and a multitude of subsequent authorities, which concern discretionary exclusion of relevant and reliable evidence because the public interest in marking the Court's disapproval of the conduct involved in obtaining the evidence outweighs the public interest in placing admissible evidence before the tribunal of fact. It is unnecessary to discuss those decisions because at the relevant time section 138 of the now-repealed *Evidence Act 1995* (ACT) applied to the application to exclude the recorded admissions. Central to the exercise of the power conferred by section 138 to exclude relevant evidence was the condition of a causal link between the improper conduct of police and the obtaining of the recorded admissions. As I have said, that causal link is missing.

1718. Even if *Bunning v Cross* had applied, and the trial Judge had been fully informed of the circumstances, I doubt that his Honour would have excluded the evidence. While judicial disapproval of police conduct would have supported exclusion, the absence of the causal link, coupled with the seriousness of the charge and the absence of evidence to suggest doubt about the reliability of the recorded statements, would have strongly supported the admission of the evidence.

1719. For these reasons, notwithstanding my disapproval of the police conduct, these issues raised under Paragraph 16 do not support a finding that the doubt or question as to guilt underlying Paragraph 16 has been confirmed. Similarly, with respect to the failure to disclose the contradictory statement by Mr Ninness, while disclosure might well have assisted the defence to bolster the credibility of the applicant and to damage the credibility of Mr Ninness, these matters do not impinge upon the issues raised under Paragraph 16.

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[80] *Eastman v R* (1997) 76 FCR 9, 110.

[81] *Bunning v Cross* (1978) 141 CLR 54.

1720. For these reasons, in my view the doubt or question as to guilt underpinning the Order in Paragraph 16 has been dispelled. However, the issues discussed with respect to Paragraph 16 may have a relevance with respect to Paragraph 19 which is discussed later in this Report.

PARAGRAPH 17

1721. Paragraph 17:

> Evidence which is not factually correct or which was substantially misleading was led by the prosecution at the applicant's trial and which went unchallenged, was accepted by the Federal Court of Australia as a strong circumstantial case of murder. This evidence was often presented when the applicant was not legally represented and declined to cross-examine. This evidence included inter alia:
>
> a) Evidence about electoral rolls which was factually incorrect and which could be shown to be so on the face of the roll.
>
> b) Identification evidence was led from a witness who had been hypnotised.
>
> c) Evidence that the applicant was seen shortly before the murder acting suspiciously in a 'police car park'. That place was in fact a Commonwealth car park and was a public thoroughfare.
>
> d) The prosecution alleged that the applicant's fear of Andrew Russo was a concoction, however there was evidence given at the inquest that the applicant had complained to police about Russo's possession of a pump action shotgun and Russo's intention to import a pistol.

1722. The 'matter' to which Paragraph 17 is directed is a doubt or question as to guilt arising out of evidence led at trial which the applicant asserts was not 'factually correct' or was 'substantially misleading', some of which was led when the applicant was not legally represented and declined to cross-examine. Four sections of evidence are identified and it is the combination of those misleading sections of evidence which the applicant contends gives rise to a doubt or question as to guilt. It will be necessary, therefore, to consider each section individually before examining the cumulative effect of any evidence that was factually incorrect or misleading.

PARAGRAPH 17 (a)

1723. The assertion underlining Paragraph 17(a) is that the prosecution relied upon factually incorrect evidence concerning the applicant's examination of electoral rolls. The prosecution presented a case that the deceased was not listed in the phone directory, but his address could have been discovered by an examination of the electoral rolls. As the evidence established that the applicant inspected the supplementary electoral roll, this was the means by which the applicant was able to ascertain the deceased's home address.

1724. Ms Rosemary Matheson worked for the Australian Electoral Commission in the late 1980s. She gave evidence at trial that as at 17 February 1988 the deceased's name was not included on the electoral roll, but it was added to the supplementary roll in March 1988. The additions were made to the supplementary roll on a weekly basis. The deceased's details first appeared on the main electoral roll in October 1988.

1725. The official roll was kept at the front desk, but in order to examine the supplementary roll it was necessary to ask for it. Ms Matheson saw the applicant in the electoral office between the end of May and December 1988 on more than one occasion. He asked to examine the supplementary roll.

1726. Ms Gabriel Paten also worked at the Australian Electoral Commission in the late 1980s. She gave evidence at trial that the applicant asked to see the supplementary roll on approximately five occasions from November 1987 into 1988.

1727. The error relied upon by the applicant was an assertion by the prosecution at trial that the deceased's name only appeared on the supplementary list which provided the link with the applicant's examinations of that list. However, as the deceased's name and address appeared on the main roll from October 1988, there was no link between the applicant's request to view the supplementary list and obtaining the details of the deceased's address.

1728. In one sense there was an error by the prosecution, but as the evidence established that the applicant examined the supplementary roll between May and December 1988, for the period May to October 1988 there was no factual error. As the evidence stood at trial, it is a point of minimal significance. However, after oral evidence to the Inquiry had finished, solicitors for the applicant searched the National Library records and discovered a microfiche version of the roll dated 22 April 1988 containing an entry recording the deceased's name and address. In an affidavit dated 29 April 2014 (Ex 255) Ms Paten explained that the microfiche version began to replace the hard copy for public inspection in about 1988. It remains unclear whether the applicant could have examined a microfiche version, but the trial evidence of both Ms Matheson and Ms Paten suggests he was given hard copy versions. In these circumstances it appears that the evidence given at trial was correct, but in any event the issue is of minor significance.

1729. The doubt or question as to guilt underlying Paragraph 17(a) has been dispelled.

PARAGRAPH 17(b)

1730. Paragraph 17(b) merely asserts that 'identification evidence was led from a witness who had been hypnotised'. No explanation is given as to how the evidence of the witness was either 'not factually correct or was substantially misleading'. In a letter of 27 August 2013 to the Inquiry, the applicant's solicitor identified the basis of this complaint in the following terms:

> In relation to (b) above Mrs Anne Newcombe was the resident of Deakin who had been hypnotised. When first spoken to by police about a registration plate of a suspect vehicle, she remembered only a 'Y' and and an 'O'. She reported to police after hearing of the murder, 'the first number which came to mind was YPQ-038'. She was then hypnotised and later gave firm evidence regarding that number: See transcript of 27 July 1995 at pages 3241–3252.

1731. In her first report to the police, Ms Newcombe reported seeing a vehicle in the deceased's street and gave the following description:

- The vehicle was turquoise blue or similar and looked like a Mazda or Datsun.
- Male sitting in the car and sunk down as if trying to hide.
- Observed the registration, but had forgotten it by the time she got home.
- Recollected that the registration number was YPQ-038.

1732. The observations made by Ms Newcombe occurred on 8 January 1989. Her first report to the police was made on 13 January 1989 and she gave a statement four days later on 17 January. Similar details were given. Hypnosis occurred on 18 January 1989.

1733. Ms Newcombe gave evidence at both the Inquest and trial (T 3241–3251). She described the vehicle and gave the registration number as YPQ-038. Counsel for the applicant cross-examined Ms Newcombe about the hypnosis (T 3246). She gave evidence that with hypnosis she was unable to 'come up with anything more clear'.

1734. The number given by Ms Newcombe was not the number of the applicant's vehicle. However the prosecution relied upon her description of a car similar to the applicant's vehicle being seen in the close vicinity of the deceased's address occupied by a driver who was alone and attempted to avoid being seen. It was a piece of circumstantial evidence based on the similarity in car type, colour and registration between the vehicle seen by Ms Newcombe and the applicant's vehicle.

1735. The issue of hypnosis was before the jury and was mentioned by the trial Judge in summing up (T 6704–6708). It was part of the material before the Appeal Court. There is no basis for the assertion that factually incorrect or substantially misleading information was provided to the Appeal Court in this regard.

PARAGRAPH 17(c)

1736. Paragraph 17(c) asserts that the claim that the applicant was seen shortly before the murder acting suspiciously in a 'police car park' was incorrect as the area was a 'Commonwealth car park' and a public thoroughfare. In the letter of 27 August 2013 the applicant's solicitor explained the basis of Paragraph 17(c) as follows:

> In relation to (c) above it was suggested that Mr Eastman was acting suspiciously in a 'police car park' when in fact the car park was not a 'police car park' but a thoroughfare and car park open to and used by the public.

1737. The prosecution called evidence from Constable Trevor Coutts at trial that on 10 January 1989 he saw the applicant in a car park behind the city police station looking in the rear window of several police vehicles (T 3169–3181). He said there was a section set apart for Commonwealth cars, including police cars. He saw the applicant walk down the footpath from the direction of the court, turn into the car park and look in the rear windows of the vehicles. The applicant then walked down through the car park towards the Lakeside Hotel.

1738. Counsel for the applicant cross-examined Mr Coutts about the location of the car park and the applicant's actions as he walked through it. The cross-examination referred specifically to the area as a 'Commonwealth car park', but Mr Coutts explained it was a public car park that had a designated area to be used by Commonwealth cars. Mr Coutts thought there was a sign to the effect 'police parking or Commonwealth vehicles only'.

1739. In closing to the jury Counsel for the prosecution submitted that on 10 January 1989 'the accused was seen in the car park behind City Police Station where the police cars were parked' (T 6247–6248).

1740. The complaint in Paragraph 17(c) is without substance. There is no possibility that the Appeal Court was misled and neither alone nor in combination with other matters is this issue capable of giving rise to a doubt or question as to guilt.

PARAGRAPH 17(d)

1741. Paragraph 17(d) concerns an allegation by the prosecution that the applicant's professed fear of Mr Andrew Russo was a 'concoction' by the applicant created to explain his purchase of a rifle. The applicant contends that this assertion by the prosecution was contradicted by evidence given at the Inquest that the applicant had complained to police about Mr Russo's possession of a pump action shotgun and Mr Russo's intention to import a pistol.

1742. In the letter of 27 August 2013, the applicant's solicitor referred to a previous letter of 20 December 2012 in which the basis of Paragraph 17(d) was explained:

> Regarding (d), we refer you to the transcript of the Inquest dated 4 September 1989. Evidence on this issue was given by Constable Ian Walker at pages 694-697 and by Sgt Raymond Arthur Fitzpatrick at pages 698-705. The thrust of the evidence is that Mr Eastman was concerned that Mr Russo carried a 7-shot Bentley pump action shotgun when he travelled at night and apparently a complaint by Mr Eastman of Mr Russo's attempt to import a pistol was reported to police. Police officers confirmed this in their evidence given at the Inquest.

1743. As part of the prosecution case, evidence was led that from early 1988 the applicant was seeking to purchase a rifle. He contacted a number of people who advertised weapons for sale. In February 1988 he purchased a rifle from a Mr Geoffrey Bradshaw, but returned it the same day claiming it had jammed. Three days later the applicant purchased a rifle from a Mr James Lenaghan which was found on 1 May 1988 in a culvert on the old Federal Highway. The applicant gave evidence that he was looking for guns because of his fear of Mr Russo following an assault upon him by Mr Russo in December 1987.

1744. In closing, the prosecution submitted that the applicant's claim that he was looking for a weapon because of his fear of Mr Russo and for self-defence was a concoction and inherently absurd.

1745. The incident between Mr Russo and the applicant resulted in a charge against the applicant of assaulting Mr Russo. It was that charge which the prosecution claimed gave rise to the applicant's fear that if he was convicted of assault he would not be able to rejoin the APS. It was in respect of the charge of assaulting Mr Russo that the applicant attended upon the deceased and sought the withdrawal of the prosecution.

1746. Evidence was led at trial that the applicant complained to police that Mr Russo was in possession of a shotgun (Livingston T 2774, Castle T 3041 and Pitkethly T 3106). Officers also gave evidence concerning a complaint by the applicant that Mr Russo might have imported a pistol (Fitzpatrick T 2869, Castle T 3043 and Pitkethly T 3105). None of the officers who gave evidence supported the applicant's case that he was in fear of Mr Russo.

1747. There is no substance in Paragraph 17(d). The evidence at the Inquest to which Paragraph 17(d) refers was given at trial. There is no basis for the assertion that the Court of Appeal was misled.

Conclusion – Paragraph 17

1748. For the reasons I have given, in my opinion no doubt or question as to guilt arises in respect of any of the issues raised in Paragraph 17, either considered alone or in their cumulative effect. The doubt or question as to guilt upon which Paragraph 17 is based has been convincingly dispelled.

PARAGRAPH 18

1749. Paragraph 18

> A review of controversial and now disputed evidence called at the applicant's trial and relevant evidence which was not called at the trial has never been made in the context of the applicant's mental state during his trial, his fitness to stand trial and his fragmented legal representation. It is in the interests of justice that these matters are reviewed in context rather than in isolation.

1750. As I observed in my ruling concerning the scope of the Inquiry, it is not easy to discern the doubt or question as to guilt to which Paragraph 18 is directed. Nothing has emerged during the Inquiry to alter my interpretation which was explained in reasons delivered on 6 November 2013 in the following terms (Inq 495):

> As a general observation, it must follow from the purpose of the Inquiry, in addressing the doubts or questions as to guilt identified in each paragraph, that the Board cannot determine whether a particular doubt or question has been confirmed or dispelled without having regard to all of the evidence. This includes an assessment of the weight of the evidence and the strength of the prosecution case. The totality of the evidence for these purposes must include material that is the subject of each and every paragraph of the Order.
>
> The view that I have expressed might not have been shared by Marshall J. I interpret paragraph 18 as meaning that the matter to be investigated is a doubt or question as to guilt arising out of the matters which are the subject of the other paragraphs of the Order, considered in their totality, and in the context of the applicant's mental state during the trial, his fitness to plead and fragmented legal representation.

The Inquiry pursuant to paragraph 18 is unlikely to involve any evidence additional to the evidence obtained in respect of other paragraphs, but it will involve consideration of the evidence in its totality, including the trial evidence and the fragmented representation.

1751. No evidence independent of evidence relating to other paragraphs has been led in respect of Paragraph 18.

1752. To the extent that Paragraph 18 of the Order implies that there is a doubt or question as to guilt arising out of consideration of the evidence and issues raised in all of the paragraphs, considered in their totality in the context of the fragmented legal representation, as will appear later in the Final Assessment and Conclusion sections, in my opinion the doubt or question as to guilt has been confirmed.

PARAGRAPH 19

1753. Paragraph 19:

> As a consequence of:
>
> (e) The conduct of the prosecution;
>
> (f) Misconduct by investigating police;
>
> (g) The inadequacy of the applicant's defence;
>
> (h) The failure of the trial Judge to grant appropriate adjournments and oversee the interests of the applicant when he was not legally represented and;
>
> (i) The applicant's mental illness,
>
> the applicant did not receive a satisfactory trial. His conviction is unlawful and the finding of guilt is unsafe.

1754. At the heart of Paragraph 19 is the assertion that a doubt or question as to guilt arises out of three matters:

(i) The failure of the applicant to receive a 'satisfactory trial'; and

(ii) The fact that the conviction is 'unlawful'; and

(iii) The fact that the finding of guilt is 'unsafe'.

1755. The Order directs that in addressing the question as to whether a doubt or question as to guilt arising from these three matters has been confirmed or dispelled, the Board should enquire into the matters specified in sub paragraphs (e) – (i) of Paragraph 19.

PARAGRAPH 19(e) – THE CONDUCT OF THE PROSECUTION

1756. As to the conduct of the prosecution, in the letter of 27 August 2013 the applicant's solicitor identified the following aspects of the conduct of the prosecution to be investigated:

> (i) Complicity with the AFP in relation to the use of lock/step surveillance techniques against the defendant in order to adversely affect his mental health;
>
> (ii) Failure to disclose the reports of Dr Milton before and during the trial;

(iii) If established, the DPP's involvement in having engaged in ex parte communications with the trial Judge about revocation of the defendant's bail without the knowledge of the defendant or his legal representatives;

(iv) Failure to properly exercise his [the prosecutor's] duty to the Court in relation to the defendant's fitness to plead by withholding relevant information about Eastman's mental health as reported to them by Dr Milton in his various reports;

(v) Failure in or neglect of his [the prosecutor's] duty to disclose to the trial Judge during the trial concerns about Eastman's fitness to plead which had been raised with the prosecutor by Eastman's lawyers;

(vi) Failure to disclose to the defence information casting doubt on the veracity and reliability of the forensic witness Barnes;

(vii) Failure to disclose material relevant to the issue of the investigating police not adequately investigating other aspects including the Italian suspects as referred to in 'TOR 13' above.

(i) Complicity with the AFP

1757. There is no evidence that the DPP or any person connected to the prosecution was involved in any way with the AFP in relation to surveillance techniques used with respect to the applicant. There is no basis for this assertion.

(ii) Failure to disclose - Dr Milton

1758. As canvassed earlier in the Report, the prosecution was in possession of reports by Dr Milton and did not disclose their existence to the applicant. However, for the reasons discussed I am of the opinion that there was no duty on the prosecution to disclose those reports to the applicant. Further, after the applicant became aware of the reports on 17 August 1995, and copies were provided to the applicant and his legal advisers on 18 August 1995, neither the applicant nor his counsel raised with the trial Judge any concerns based on the failure to disclose the reports. No application was made in any respect after the reports had been provided to the defence. Even if the view was taken that there was a duty to disclose the reports of Dr Milton, the failure to disclose did not have any relevant impact.

(iii) DPP ex parte communications with trial Judge

1759. There is no evidence that the DPP engaged in communication with the trial Judge about the revocation of the applicant's bail other than in the course of open proceedings in Court.

(iv) and (v) Failure to Comply with Duty re Fitness to Plead

1760. As discussed earlier in this Report, in my opinion there was no failure by the prosecutor with regard to the reports of Dr Milton and the applicant's fitness to plead. For good reason, members of the prosecution team were, throughout, satisfied that the applicant was fit to plead. Miles CJ found that the applicant was fit to plead throughout his trial and I agree with that assessment. The reports of Dr Milton did not raise an issue as to the applicant's fitness to plead and the views expressed to the prosecution by members of the applicant's legal team did not, in the circumstances, give rise to a duty on the prosecutor to raise the matter with the trial Judge. Whatever may have occurred in

private between the applicant and his legal representatives, the prosecutor was entitled to reach his own conclusion and he made a judgment based on good grounds. I have no doubt that the judgment was correct.

(vi) Failure to Disclose - Barnes

1761. This issue is discussed at length with respect to Paragraph 5 of the Order. That discussion identifies the nature and extent of the information concerning Mr Barnes that was not disclosed by the AFP and/or the DPP in breach of the duty of disclosure. I emphasise my finding that no-one in the AFP or the prosecution deliberately engaged in a breach of duty by intentionally withholding from the defence information which the person knew should be disclosed. Mr Adams accepted that ultimate responsibility lay with him, but given the enormous amount of material with which he was grappling, necessarily Mr Adams relied on others to raise the issue of disclosure with him. Mr Adams and others in the prosecution team adhered to the highest standards of ethical conduct. The failures to disclose were inadvertent and occurred as a result of a combination of circumstances.

1762. The consequences of the failures to disclose are discussed in the final section of this Report.

(vii) Failure to Disclose – Alternative Hypothesis

1763. To the extent that the applicant asserts there was a failure by the prosecution to disclose material relevant to the inadequacy of the investigation of other suspects, including the organised crime hypothesis, the assertion is not borne out by the evidence. There is no substance in this particular issue.

PARAGRAPH 19(f) – MISCONDUCT BY INVESTIGATING POLICE

1764. In the letter of 27 August 2013 solicitors for the applicant identified the following matters as particulars of the misconduct by investigating police:

(i) Employing lock/step surveillance techniques against Eastman;

(ii) Communicating ex parte with the trial Judge and providing him with copies of psychiatric reports of Dr Milton;

(iii) Communicating ex parte with the trial Judge about revocation of Mr Eastman's bail during the trial.

Lock/Step Surveillance

1765. 'Lock/step surveillance' is a term that has been used to describe overt surveillance involving close contact with the applicant. The details of the surveillance, and other activities involving contact with the applicant, have been discussed in the context of Paragraph 16. I have found that police were justified in engaging in overt surveillance, but not in adopting a course of conduct which amounted to harassment of the applicant. However, that surveillance and conduct occurred a number of years before the trial and there was no evidence of any such conduct in 1995. There were numerous

complaints by the applicant during 1995 about the conduct of police, but the applicant chose not to give evidence to the Board and I do not regard his complaints as evidence for the purposes of this Inquiry. The applicant demonstrated during the trial that he was prepared to give false evidence and to make false statements to the trial Judge. He sought to manipulate the trial process by repeated sackings of his legal teams. I could not safely rely upon his evidence at trial unless it was independently corroborated.

1766. As has been discussed, the applicant suffers from a Paranoid Personality Disorder and there can be no doubt that he experienced a range of reactions to the conduct of police prior to 1995. Dr Milton explained that on one level the applicant might almost enjoy the notoriety and contact. On another level, it could cause frustration and anger. Dr Westmore agreed that harassing conduct could exacerbate the applicant's paranoid beliefs.

1767. In view of the applicant's Paranoid Personality Disorder, and the evidence of Dr Westmore, it is not an unreasonable conclusion that the harassing conduct of police in the early years might have contributed to the applicant's obsession with bugging at the time of the trial. However, it would be stretching the boundaries too far to find that harassment in the early years contributed to an unsatisfactory or unfair trial. In my assessment, it would not have mattered how the police behaved; the applicant would have behaved in exactly the same way during the trial. As I have said, police were entitled to engage in surveillance, both covert and overt, and their conduct in going beyond proper surveillance techniques and engaging in harassment added little, if anything, to the applicant's mental state and beliefs at the time of the trial.

(i) Ex parte communication – Dr Milton's reports

1768. The extent of the communications between investigating police and the trial Judge have previously been discussed at length. I have found that although in some respects the contact outside court was unwise, nothing untoward occurred and no doubt or question as to guilt arises from the fact of those contacts and communications. In addition, there is no evidence that investigating police provided the trial Judge with copies of reports by Dr Milton.

1769. In my view, the communications between investigating police and the trial Judge outside court are irrelevant and are of no impact on any issue raised in this Inquiry. In particular, they have no impact on whether the applicant received a satisfactory trial or whether the finding of guilt is unsafe.

(ii) Ex parte communication – Bail

1770. There is no basis for suggesting that investigating police communicated ex parte with the trial Judge about the revocation of the applicant's bail during the trial. This issue is without substance.

PARAGRAPH 19(g) - THE INADEQUACY OF THE APPLICANT'S DEFENCE

1771. No particulars of the alleged inadequacy of the applicant's defence were provided in the letter of 27 August 2013. In oral submissions concerning the scope of the Order, Counsel for the applicant stated that the applicant could not assist with identifying possible matters to be investigated with respect to this question. Further, Counsel disavowed any suggestion that the Board should search the record of the trial for the purpose of identifying inadequacies to be investigated.

1772. No evidence has emerged identifying a specific inadequacy except to the extent discussed with respect to the failure to cross-examine Dr Roantree and the issues raised under Paragraph 5 with respect to Mr Barnes. Two aspects were involved in Paragraph 5. First, information was not disclosed to the defence that could have been used as the basis for a cross-examination and further investigations by the defence. Secondly, Counsel for the applicant was placed at a severe disadvantage because the defence had not fully investigated the work done by Mr Barnes, the chain of evidence with respect to samples and the adequacy of the records maintained by Mr Barnes. The failure in this regard occurred through a combination of circumstances, the primary circumstance being the applicant's sacking of his legal team shortly before the trial which prevented an adequate investigation with respect to Mr Barnes.

1773. The impact of the inadequate preparation is discussed in the context of Paragraph 5 and in the final section of this Report.

PARAGRAPH 19(h) - FAILURES BY THE TRIAL JUDGE

1774. In the letter of 27 August 2013 the applicant's solicitor stated that a summary or schedule of the trial's transcript would be prepared identifying occasions when adjournments should have been granted by the trial Judge. Such a summary has not been provided.

1775. It is almost impossible nearly twenty years after the trial, and particularly in view of the extraordinarily difficult circumstances with which the trial Judge was confronted in this trial, to assess whether there was a failure by the trial Judge properly to ensure that the interests of the applicant were adequately protected when he was not represented. I am unable to discern anything from the transcript which suggests that the trial Judge failed in this regard, particularly bearing in mind the difficulties posed by the applicant's conduct. The trial Judge, correctly, assessed that the applicant was endeavouring to manipulate the trial. This much was admitted by the applicant when he acknowledged his wrongful sacking of Mr Terracini. In a statement dated 28 January 2005 to the Miles Inquiry, the applicant's former solicitor Mr Ian Ross made the following pertinent observation (annexure 1 to the affidavit of Mr Ross, Ex 199):

> When I first became involved in the case, I recall that there was much talk between Mr Eastman and the barristers as to the meaning of *Dietrich* case. I recall that a copy of the case was obtained from the library and also copies of subsequent cases. I recall that the team came to the view that

> Mr Eastman's view was that in such a complex and difficult murder trial as this if he did not have a lawyer acting for him then he could not be convicted.

1776. With the wisdom of hindsight and full knowledge of the applicant's mental condition, there might have been occasions when the trial Judge could have taken action to assuage the applicant's professed concerns and difficulties. For example, either his Honour could have made an order that any recording device capable of overhearing the applicant talking to his solicitor be removed/decommissioned or he could have insisted that the AFP give an express and unambiguous undertaking to the court that no-one was undertaking audio surveillance of the applicant. If the applicant was genuinely concerned about this issue, such steps would have assuaged that concern. If this issue was merely being used by the applicant as a means of endeavouring to halt the trial by excusing his sackings of his legal teams, the foundation for the excuse would have been removed. In addition to these matters, with full appreciation of the applicant's mental condition, perhaps there were occasions when the trial Judge might have taken a more lenient approach to applications to recall witnesses once the applicant was legally represented.

1777. However, these observations are made with the benefit of both hindsight and much more information available to the Board than was available to the trial Judge. In the circumstances with which the trial Judge was faced, and in his Honour's state of knowledge, there is nothing to support the assertion that the trial Judge failed in any respect to conduct the trial properly or to oversee adequately the interests of the applicant when he was not represented.

1778. In the applicant's written submission, reference was made to 'a perception of bias on the part of the trial Judge ...' (annexure 7 [241]). Particulars were set out which were centred on possession by the trial Judge of reports by Dr Milton and the failure to disclose such possession (annexure 7 [241]).

1779. For the reasons discussed, I reject the submission.

PARAGRAPH 19(i) - THE APPLICANT'S MENTAL ILLNESS

1780. The applicant's solicitor wrote on 27 August 2013 that the reference in Paragraph 19 to the applicant's mental illness is not intended to supplement the case advanced by the applicant under Paragraphs 1-4. However, it is a factor which cannot be ignored in considering whether there is a basis for concluding that the applicant did not receive a satisfactory trial and the finding of guilt is unsafe.

Satisfactory Trial

1781. The applicant's Paranoid Personality Disorder, coupled with narcissism, permeated the entire trial process. It was a significant factor in the applicant's decision-making. While it is true that the applicant is intelligent and made decisions concerning the conduct of the trial and his defence, and he was fit to plead and make those decisions, by reason of his Paranoid Personality Disorder and narcissism many of those decisions were not true 'forensic choices'. They were so heavily influenced by the applicant's paranoid beliefs

and obsessions that the applicant made choices which were not in his best interests. In a very broad sense, those decisions led to a trial full of unsatisfactory moments and features.

1782. Ordinarily, a decision not to cross-examine would be treated by an appellate court as a forensic decision by which the convicted person was bound and about which the convicted person could not be heard to complain on appeal. However, as I have said, although the applicant was fit to plead and make decisions, it is impossible to avoid the strong impression that the trial was less than satisfactory because the applicant's mental condition was responsible for decisions that worked strongly to the disadvantage of the applicant.

1783. The evidence concerning Dr Roantree is a good example of an unsatisfactory feature of the trial. As I have explained, the prosecution presented the evidence of Dr Roantree as establishing that shortly before the murder, the applicant was an angry man who uttered a serious threat to kill the deceased. However, if Dr Roantree had been competently cross-examined, an entirely different complexion would have been placed on the events at his consulting rooms. The upshot would have been exposure of Dr Roantree's doubt as to whether the words 'I should shoot the bastard' were said. More importantly, it would have been established that if the words were spoken, Dr Roantree viewed them as no more than a passing quip after the applicant had calmed down and was leaving the consulting rooms.

1784. The circumstances surrounding the forensic evidence, and in particular the evidence of Mr Barnes, provide another example of an unsatisfactory feature associated with the trial. Proper defence preparation to challenge the evidence of Dr Barnes was prevented by the applicant's conduct in sacking his legal teams. Preparations were well underway for Mr Klees to examine Mr Barnes' files. If he had done so properly, deficiencies in the file would probably have been revealed. However, Mr Klees was sacked and the arrangements for inspection never came to fruition. The trial started and the defence legal team never undertook the preparation necessary to reveal the deficiencies which have been exposed during this Inquiry. Significantly, Mr Terracini first appeared for the applicant on 5 June 1995 and, having cross-examined a number of witnesses on 5 – 7 June 1995, was faced with the commencement of evidence by Mr Barnes on 13 June 1995.

1785. These are examples of choices made by the applicant which, in a legal sense, he was capable of making. However, they were choices brought about as a direct consequence of the applicant's mental condition. His belief that he could manipulate the trial by sacking his lawyers was not a 'normal' belief. Nor was his obsession with police listening to his conversations with his lawyers 'normal'. A 'normal' person would not use the refusal of a trial Judge to condemn such unproven conduct and order it to cease as a reason for refusing to cross-examine witnesses.

1786. The applicant and his legal teams understood the issues in the trial and the relevance and importance of the forensic evidence. But more than a general understanding of the issues and evidence was required. While the defence received advice from experts about forensic matters, it is apparent that the sackings left the legal team without

adequate time to discover, analyse and grapple with the critical issues affecting the evidence of Mr Barnes.

1787. The extent of the work required to prepare properly for the trial, and in particular for the forensic issues, should not be underestimated. The size and complexity of the task was recognised by Mr Ibbotson who devoted a large percentage of his time to forensic issues. This was not a case in which discovery of relevant matters and proper preparation in respect of the forensic aspects could be achieved in a few weeks.

1788. The failure of the defence in this regard is not surprising in view of the applicant's repeated sackings of his legal teams. While it might be said that the sackings were his deliberate choice, there is no escaping the fact that they were instrumental in causing inadequate defence preparation. It is highly unlikely that the applicant fully appreciated the deleterious impact his sackings had on the defence preparations, particularly in the forensic areas.

1789. These observations are not to be considered in isolation from the failures to disclose materials that would have directly assisted the defence or led to significant lines of enquiry. Those failures related to material concerned with Mr Barnes' attitude, lack of independence, lack of proper records, inadequate technical work and opinions. When these features are considered in their cumulative effect, and in combination with the other unsatisfactory aspects associated with the trial, it is impossible to avoid the conclusion that the trial was far from satisfactory.

Conviction Unlawful

1790. As to the assertion in Paragraph 19 that the conviction is 'unlawful', the only basis upon which it could be said that the conviction was unlawful is the claim in Paragraph 1 that the trial was a nullity because there was a question as to the applicant's fitness to plead which should have been determined by the Mental Health Tribunal. For the reasons discussed with respect to Paragraph 1, I reject that assertion. I am satisfied that no issue was raised as to the applicant's fitness and there was no basis upon which it should have been raised before the trial Judge or by the trial Judge. Further, if an issue had been raised, the trial Judge would inevitably have found that there was no question to be determined by the Mental Health Tribunal.

Finding of Guilt Unsafe

1791. The final assertion in Paragraph 19 is that as a consequence of the matters identified in sub paragraphs (e)-(i) of Paragraph 19, the finding of guilt is unsafe. In this context it is convenient to adopt the approach authorised by Paragraph 18 of the Order and to consider, in their totality, all the matters raised under each of the paragraphs and the trial evidence in determining whether the doubt or question as to guilt that underpins Paragraph 19 of the Order has been confirmed or dispelled. In this process it is relevant to bear in mind those features of the trial which have led me to the conclusion that, in a number of respects, the trial was less than satisfactory.

FINAL ASSESSMENT

1792. In order to assess the impact of the failures to disclose and doubts cast upon the evidence of Mr Barnes, coupled with the issues concerning the failure to cross-examine Dr Roantree and other unsatisfactory aspects of the trial, it is necessary to examine those matters in the context of the remainder of the prosecution case. In this process it is helpful first to consider the strength of the prosecution case in the absence of the evidence of Dr Roantree and Mr Barnes' opinion that particles in the Mazda were PMC.

Prosecution Case

1793. In brief summary,[82] omitting the evidence of Mr Barnes and Dr Roantree, the prosecution case at trial was as follows:

- The deceased was shot as he was about to alight from his car parked in the driveway of a neighbour's premises immediately next door to his home. He was shot twice at close range; once in the back of the head and once in the right-hand side of his face.
- Prior to his death the deceased had visited his brother in Queanbeyan. As the visit was not a regular occurrence, there was no suggestion that the offender could have had prior notice of the deceased's movements that evening.
- During his efforts over a number of years to gain re-entry into the public service, the applicant demonstrated very intense feelings of anger when decisions were made adverse to his interests, to the extent that in March 1988 he made the statement (T 2379):

  > I'll probably have to kill someone to get the attention paid to the injustice that's been done to me.

- The applicant was charged with assault and believed that if convicted of the assault, he would be denied re-entry into the public service.
- In the course of dealings with police concerning the assault, the applicant demonstrated an intense hatred for members of the police force generally. In December 1987, he wrote to a penfriend in Germany (T 4979):

  > Now I want to kill the neighbour, his friends and the bastard police as well.

- On 16 December 1988 the applicant met the deceased in an attempt to have the charge of assault withdrawn. When the deceased firmly indicated that he would not intervene, the applicant became very agitated and said (T 3336):

  > If your hoons think they can treat me like this they've got another thing coming.

- In December 1988 the applicant threatened to kill the deceased. He spoke with his former solicitor and said 'I will kill Winchester and get the Ombudsman too' (T 2724).

[82] A summary prepared by the AFP is found in its written submission (annexure 6 [18]–[23]).

- By letter of 20 December 1988 the deceased wrote to the barrister who had accompanied the applicant to the meeting advising that he would not intervene. The barrister sent a copy of the letter to the applicant.
- Subsequently the barrister wrote to the Commissioner of Police asking him to intervene, but the Commissioner replied in a letter to the applicant dated 9 January 1989, stating that he would not intervene. In the ordinary course of the mail, the letter from the Commissioner would have been delivered to the applicant at about 9.30 am on 10 January 1989, which was the day the deceased was murdered at about 9.15 pm.
- The combination of evidence established a strong motive for the applicant to kill the deceased.
- Between 3 and 5 January 1989, by chance, the applicant came into contact with an inspector of police outside the police building. Pointing generally in the direction of the deceased's office, the applicant said 'the executive in this building is corrupt and has a lot to answer for'.
- The murder weapon was a Ruger 10/22 rifle (the Klarenbeek weapon). Mr Klarenbeek died before the trial.
- The murder weapon was advertised for sale on 31 December 1988 (no sale price proved). Mr Webb gave evidence that he attended at Mr Klarenbeek's premises at about 8.30 am on the day of the advertisement and saw a Ruger 10/22 rifle. As he was leaving, Mr Webb saw another man arriving whom he eventually identified as the applicant. When Mr Webb returned to Mr Klarenbeek's premises on 5 January 1989, the Ruger 10/22 was no longer on display.
- Mr Klarenbeek was shown a group of photographs on 28 January 1989, including a photograph of the applicant, and did not identify anyone from the photographs.
- A witness who lived in the street behind Mr Klarenbeek's house saw a motor vehicle parked outside her home at about 2.30 pm on 31 December 1988. Subsequently she was unable to identify a vehicle from a group of photographs, but described a blue metallic vehicle; about 8 years old; a Japanese vehicle or a Holden Commodore (T 3421). The witness said she was not aware of makes of cars and the make could be anything.
- On 1 January 1989 the applicant withdrew $200 from an ATM.
- On 8 January 1989 a male person took a Ruger 10/22 rifle into the sports store of Mr Dennis Reid and offered to sell it to him. Like the Klarenbeek weapon, the end of the barrel had been threaded to fit a silencer. Mr Reid told the person that he might be able to find a purchaser, but the person declined to identify himself saying he would ring later. Suspicious because the person would not leave a telephone number, Mr Reid told his son to follow the man and the son observed the man drive away in a blue sedan. The applicant's Mazda was blue.
- When first interviewed by police and shown a photo board, Mr Reid was unable to make a positive identification. Subsequently shown a different

photo board, Mr Reid tentatively identified the applicant. On 25 August 1990, in a pre-arranged exercise, Mr Reid saw the applicant in a shopping mall and believed the applicant was very similar in appearance to the person who had sought to sell the Ruger to him. On a later occasion Mr Reid approached the applicant twice in the Joliment Centre and, after the applicant spoke to him, Mr Reid was certain that the applicant was the person who had come into his store.

- Positive proof that the applicant was the purchaser of the Klarenbeek weapon depended upon the evidence of Mr Webb which was marked by Mr Webb's previous denial on oath that he had seen anyone at the Klarenbeek premises on 31 December 1988. Absent the evidence from Mr Webb, the prosecution case that the applicant was the purchaser was incapable of rising above the circumstantial evidence that a blue car was in the street near the Klarenbeek premises on 31 December 1988; the withdrawal of $200 by the applicant on 1 January 1989; and the evidence of Mr Reid that the applicant sought to sell him the same type of weapon on 8 January 1989, two days before the murder.
- During January, June, October and November 1988 the applicant responded to advertisements for the sale of firearms including Ruger .22 rifles. The applicant's search for firearms commenced after he was charged in December 1987 with assaulting Mr Russo. When purchasing a weapon from Mr Geoffrey Bradshaw on 10 February 1988, the applicant wrote out a false name and address. The applicant claimed in evidence that he gave a false name and address because police would have refused to give him a gun licence. Not long after the purchase, the applicant returned the weapon to Mr Bradshaw claiming that it had jammed. He did not return the telescopic sight. On 13 February 1988 the applicant purchased a Ruger from Mr James Lenaghan which was found on 1 May 1988 in a culvert on the old Federal Highway outside Canberra.
- The applicant claimed he was looking for a weapon because of his fear of Mr Russo. Evidence was called that the applicant complained about Mr Russo to various persons, but did not express fear of Mr Russo.
- The Crown alleged that the applicant lied on oath during a voir dire when he said that the accusations about his acquisition of firearms was 'all totally false' (T 5063).
- On 10 January 1989, the morning of the murder, the applicant was seen in a car park adjacent to the police building looking into the rear of police cars.
- Between May and December 1988 the applicant attended at the electoral office on more than one occasion and asked to look at the supplementary electoral roll. The deceased's name and address appeared on the supplementary roll on 2 March 1988 and remained on the supplementary roll until 21 October 1988 when they were placed on the official role.
- In relation to the purchase of weapons in 1988, and the examinations of the electoral rolls between May and December 1988, the applicant did not meet the deceased until 16 December 1988.

- On 8 January 1989 a witness saw a car parked outside the house next door to the deceased's house. As she walked past the car, the driver moved to position himself so that he would not be seen. When the witness was returning from her walk, the car was in the same position. The witness later described the car as a turquoise-bluey-green Mazda 626 sedan registered number YPQ-038. The applicant owned a blue Mazda 626, but the registration number of his vehicle was YMP-028. The registration number recalled by the witness belonged to a cream Mazda 323 hatchback which was locked in a garage at the relevant time.
- The deceased was shot at approximately 9.15 pm on 10 January 1989. For a period of about half an hour between 11 pm on 10 January 1989 and 2.30 am on 11 January 1989 the applicant was with a prostitute.
- On 11 January 1989 the applicant was questioned as to his whereabouts the previous evening. He said he just drove around and did not really remember where he went. He spoke about sometimes going for a drive to buy food in the evenings and various places he often visited. The applicant said he might have visited any of those places the previous night, but could not remember. He also said he could not remember what time he went out but, pressed, he thought it could have been about 8 o'clock when he went out and 10 o'clock when he returned. Specifically asked whether he could remember where he went the previous evening, the applicant responded in the negative. As the Full Court observed in discussing the applicant's appeal against conviction, during the trial the applicant demonstrated an excellent memory and it was open to the jury to conclude that his inability to recall his movements the previous evening was 'wholly inconsistent with his personality, character and ability'.
- Statements by the applicant covertly recorded when he was talking to himself in his residence were capable of being viewed as admissions of guilt of the murder. The quality of the recordings was, at times, particularly poor, but it was open to the jury to accept that the applicant made statements which the prosecution relied upon as admissions to killing the deceased including the following:

  (i) 3 June 1990

  I had to kill him sitting down.

  He was the first man I ever killed, it was a beautiful thing one of the most beautiful feelings you have ever known.

  (ii) 22 June 1990

  Look I would rather have a man that I've killed he's a wonderful man, a bit of a kiss and then make-up poor bugger I just wanted to get it straightened.

  (iii) 23 July 1990

  I murdered, I couldn't get any response.

  I couldn't wait any longer to commit the crime.

  I should not have killed.

  No-one was sure I killed the cunt.

Oh so sorry I killed him. I killed him ..... took it.

I killed him and that's the truth, I didn't plan it that way.

I had to kill him, but with deep regret go direct to him, you can't ... and ummm .... I wanted it straightened ..... help .....

(iv) 29 July 1990

Had to go back again the next night to kill him the poor bugger.

Finally on the second night you succeeded.

(v) 29 July 1990

Looked like I'd have a name if I killed, I didn't want to (hit/hurt/hate) anybody I didn't give a bugger I just wanted to get it straightened.

(vi) 7 November 1991

You killed him.

- Primer gunshot residue was found in the Mazda boot. Some of it was consistent with the type of ammunition used in the murder (PMC), but only to the extent that it was two component residue.
- Gunshot propellant particles found in the Mazda boot, and one particle on the front seat, were consistent with PMC, but only to the extent of being green flattened ball. They were consistent with at least 56 other types of ammunition, including ammunition sold by Mr Bradshaw with the rifle in February 1988. PBP in the boot was also consistent with ammunition found with the Lenaghan file.

1794. It is readily apparent from this brief summary that in the absence of the evidence of Dr Roantree and Mr Barnes' opinion that particles in the Mazda were PMC, the prosecution case would have relied heavily on the evidence of Mr Webb and the recorded statements, together with the applicant's statement to police on 11 January 1989. As discussed previously, the evidence of Mr Webb was open to strong challenge by reason of his previous inconsistent statements, including his lie on oath at the Inquest when he said he did not see anybody at the premises of Mr Klarenbeek.

1795. As to the recorded admissions, bearing in mind the poor quality of the recordings, in the absence of other evidence implicating the applicant in the murder it would have been dangerous for the jury to have relied upon the prosecution interpretation of the statements as the sole basis for a finding of guilt.

1796. The importance at trial of the evidence of Dr Roantree and, in particular, the opinions expressed by Mr Barnes, should not be underestimated.

1797. As to the evidence of Dr Roantree, if he had been competently cross-examined his evidence would have added little to the remainder of the prosecution evidence. First, the doubt felt by Dr Roantree as to whether the words were spoken would have been properly explored. Secondly, the complexion to be attributed to the words would have changed dramatically from the complexion presented at trial. The applicant became angry during the course of the discussion about the meeting with the deceased. He became irate when Dr Roantree suggested that the applicant could not push the deceased off his chair. In Dr Roantree's view the anger was directed at Dr Roantree's

comment. However, typical of the applicant, that anger quickly disappeared. The 'threat' was not made in anger and was in the nature of a 'passing quip' as the applicant went out the door.

1798. The opinions of Mr Barnes positively linking the applicant's vehicle to the scene of the crime were undoubtedly of crucial importance to the prosecution case. As I have said, absent those strong opinions, the circumstantial connection would have remained, but in a much less powerful form.

1799. In addition, if details of the police harassment had been placed before the jury, it might have damaged the credibility of Mr Ninness, and possibly other officers, and supported the credibility of the applicant.

1800. If an accurate complexion is placed upon the evidence of Dr Roantree and the strong opinions of Mr Barnes are ignored, and if regard is had to the police harassment, nevertheless a strong circumstantial case remains if the recorded statements are included. However, there were significant flaws in the trial. There was a failure in respect of a fundamental feature of a fair trial through the failures to disclose; the admission of highly incriminating opinions which should have been excluded or, if admitted, would have been shown to lack a proper scientific foundation; and other unsatisfactory features that attended the trial which have been canvassed in this Report.

1801. The combination of these flaws demonstrates that the applicant did not receive a fair trial. He was denied the opportunity of a trial following full disclosure of all relevant material and a trial conducted on the basis of evidence properly received and tested. To a significant extent the applicant contributed to unsatisfactory aspects of the trial and the inadequacy of the defence preparation, but the applicant's conduct in this regard was influenced by his mental abnormality.

Role of the Board

1802. The Instrument appointing me as a Board of Inquiry directs that I inquire into the 'conviction' of the applicant 'in relation to those matters contained' in the amended application which became the paragraphs of the Order of Marshall J. His Honour made the Order on the basis that in respect of each matter raised in the paragraphs of the Order there is a 'doubt or question' about whether the applicant is guilty of the murder. I am required to consider the doubt or question raised in each paragraph. My task is then to report in such a way as to assist the Full Court in carrying out its function pursuant to section 430 of the Act which, in essence, is to decide whether the conviction should be confirmed, quashed or quashed with an order for a new trial.

1803. In a context of the Miles Inquiry pursuant to section 475 of the Act (now repealed), on an application for review of the report delivered by Miles CJ, and prerogative relief in respect of that report, Lander J made the following pertinent observations:

> [47] The main purpose of the section when the process is initiated by a Judge is to obtain all the information on the doubt or question and provide a report to the Executive so that the Executive might know whether a miscarriage of justice has or might have occurred. ...

[48] ...

[49] Where the inquiry is into the guilt of the prisoner, the real question is whether there has been a miscarriage of justice such that the conviction should not have been entered because guilt was not established or not been entered because of a flaw in the process which, perhaps, meant that the prisoner did not have a fair trial or lost the chance of an acquittal. That means that the Judge when writing the S475 report should ordinarily address a number of matters to enable the Executive to dispose of the matter justly.

[50] The Judge must identify the doubt or question and discuss and determine whether the evidence the Judge has directed be taken allows it to be said that the doubt or question is dispelled or been confirmed so that the Judge can be satisfied that something has gone wrong. In the end, however, the Judge must address the questions to which I have referred. The Judge should also, if he or she is of the opinion that a remedy ought to be granted, opine on the appropriate remedy for the consideration of the Executive. Because the Executive must dispose of the matter justly, it needs that sort of assistance from the Judge. If the Judge is of the opinion that the prisoner has not been the victim of a miscarriage of justice in the sense that the prisoner had a fair trial and did not lose an opportunity for a verdict of acquittal, then the Judge must say so because otherwise the Executive could not dispose of the matter justly.

[51] To put it another way, the Judge's report must contain whatever is necessary to advance the purpose of the section which, in modern usage, is to ensure that a convicted person, who has exhausted that person's appeal rights, does not continue to be the victim of a miscarriage of justice. [83]

1804. In *Eastman v Director of Public Prosecutions* (ACT)[84] the High Court was concerned with the interpretation of section 475 of the Act. In the leading judgment with which Gleeson CJ and Gummow, Kirby, Hayne and Callinan JJ agreed, Heydon J referred with approval to observations of Wood J in a report of an inquiry held under section 475 of the *Crimes Act* (1900) (NSW). His Honour quoted the following passages:

> ... Guilt has the meaning given to it in the trial process, that is, guilt established beyond reasonable doubt. So far as any question or doubt may concern a conflict of evidence or the reliability of a witness, or may depend on fresh evidence concerning aspects of the case proven by the Crown, it seems to me that I must weigh those matters and express my own opinion in the report. So far as the question or doubt may concern a possible miscarriage of justice or involves the possibility that the convictions were improperly obtained, due to some error in the trial process, it seems to me that I must explore whether or not there was a mishap, and report my conclusion both as to its occurrence and as to its significance in relation to the guilt found by the convictions.
>
> Questions arose in the Inquiry whether it was proper for consideration to be given to whether or not further evidence now available might have brought about a different jury verdict, and whether or not the jury verdict might have been different if, absent any mishap shown to have occurred, the trial might have been conducted differently. In order to discharge my function I believe it is necessary to consider and report in some detail on the new evidence and on the facts concerning any suggested error or mishap in the trial process and on its practical implications, so that the Executive may have the material needed to dispose of the matter as shall appear to it to be just.
>
> ...
>
> For example, if I were to conclude at the end of the Inquiry that at the trial there was a miscarriage of justice in some respect, yet the jury would certainly have returned the same verdict if the matter complained of had not arisen ... , I do not believe that I could discharge my function by a simple conclusion that there was no doubt or question. Unlike the Court of Criminal Appeal, I do not believe that I could myself have resort to a process akin to the application of the proviso to Section 6(1) of the *Criminal Appeal Act (1912)*. In such a case I consider that I would have to report

[83] *Eastman v Miles* (2007) 210 FLR 417, 427 [47]–[51].

[84] (2003) 214 CLR 318.

> in relation to the questions or doubts concerning the matter or matters involving a miscarriage of justice, and for the benefit of the Executive express my opinion as to their significance for the finding of guilt. [85]

1805. Later in his judgment, Heydon J observed that Wood J assumed that the Inquiry 'was not limited to guilt in fact', but included 'the extent to which a flaw in the process leading to conviction cast light on guilt in fact'.[86] Heydon J noted that the view of Wood J had been 'persuasive' and that if an accused person has lost a chance of acquittal which was fairly open, an appeal would be allowed subject to the operation of the proviso. This was a reference to the common form of legislation across Australia, including section 37O of the *Supreme Court Act 1933* (ACT) which governs the approach of a Court of Appeal on an appeal against conviction. Section 37O provides:

> **Orders on appeal**
>
> ...
>
> (2) The Court of Appeal on an appeal against conviction must–
>
> (a) allow the appeal if it considers that–
>
> (i) the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or
>
> (ii) the judgement of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or
>
> (iii) on any other ground there was a miscarriage of justice; or
>
> (b) dismiss the appeal.
>
> (3) However, the Court of Appeal may also dismiss an appeal against conviction if it considers that–
>
> (a) the point raised by the appeal might be decided in favour of the appellant; but
>
> (b) no substantial miscarriage of justice has actually occurred.

1806. Having mentioned section 37O of the *Supreme Court Act*, I emphasise that neither I nor the Full Court are directed to apply section 37O or to approach the matter as if it is an appeal against conviction. However, as Lander J observed in the passage earlier cited, the 'real question' is whether there has been a miscarriage of justice. In that context, given the task of the Full Court, if a miscarriage of justice has occurred it will be necessary to consider the nature of the miscarriage and, when addressing the consequences of the miscarriage, it will be of assistance to have regard to the approach of appellate courts to the application of section 37O of the *Supreme Court Act* which empowers the Court to dismiss an appeal if it considers that 'no substantial miscarriage of justice has actually occurred' ('the proviso').

1807. My task, therefore, involves providing the Full Court with assistance in respect of these issues.

Miscarriage of Justice - Proviso

1808. In *Weiss v R*[87] the High Court determined that the term 'miscarriage of justice' in the equivalent Victorian legislation meant '*any* departure from trial according to law,

[85] *Eastman v DPP* (2003) 214 CLR 318, 356 [111].
[86] *Eastman v DPP* (2003) 214 CLR 318, 365 [136].
[87] (2005) 224 CLR 300, 308 [18].

regardless of the nature or importance of that departure'. The Court explained that when the term 'miscarriage of justice' is understood in this way, the word 'substantial' in the proviso has work to do. In *King v R*[88] the joint judgment of French CJ, Crennan and Kiefell JJ noted these aspects of the decision in *Weiss* and observed that whether an error of law or procedure at trial resulted in an accused losing 'a fair chance of acquittal' was a matter to be addressed when considering the application of the proviso.

1809. As I have said, in my opinion there were flaws in the trial and the applicant did not receive a fair trial. The verdict was reached in circumstances where significant material was not disclosed by the prosecution; critical evidence was seriously flawed; evidence of a threat to kill was not properly tested; and the jury was left with the impression that the applicant's complaints about police conduct were utterly bereft of any foundation.

1810. In testing the impact of the flaws by reference to the approach required on appeal to the application of the proviso, the following passages from the judgment of the High Court in *Weiss* are apposite:

> **[35]** The fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. In so far as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do. Rather, in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'.
>
> ...
>
> **[39]** Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.
>
> **[40]** Reference to inevitability of result (or the converse references to 'fair' or 'real chance of acquittal') are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to 'the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record'. But reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed by criminal appeal statutes, in this case, s 568(1) of the *Crimes Act*. It suggests that the appeal court is to do other than decide for itself whether a substantial miscarriage of justice has actually occurred.
>
> **The statutory task and the proviso**
>
> **[41]** That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.

[88] (2012) 245 CLR 588, 611 [54].

[42] It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.

[43] There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not "to speculate upon probable reconviction and decide according to how the speculation comes out". But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt.

[44] Next, the permissive language of the proviso ('the Court … *may*, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal … ') is important. So, too, is the way in which the condition for the exercise of that power is expressed ('if it considers that no *substantial* miscarriage of justice has *actually* occurred'). No single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

[45] Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind. [89]

[citations omitted]

1811. The following points arising from those passages in *Weiss* merit emphasis in the context of this Inquiry:

- In considering the application of the proviso, a court of criminal appeal is required to decide, for itself, whether a 'substantial miscarriage of justice has actually occurred', not to attempt to predict what a jury, past or future, would or might do.
- The court is required to make its 'own independent assessment of the evidence' in the same way as it does when determining whether a verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence (or is 'unsafe').
- Based on that assessment, the court must determine whether the accused was proved guilty beyond reasonable doubt.

[89] *Weiss v R (2005)* 224 CLR 300, [25]–[45].

- If the court cannot reach the 'necessary degree of satisfaction', the proviso will not apply.
- The fact that a jury returned a verdict of guilty 'cannot be discarded' and is part of the record of the trial to which the court must have regard.
- While the court must not 'speculate' upon the probable reconviction, there are some cases in which it is possible to conclude that the error in the trial would or should not have had any significance in the jury reaching the verdict.
- 'It cannot be said that no substantial miscarriage of justice occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved [guilt] beyond reasonable doubt.'
- Notwithstanding a determination by the appellate court that guilt was proven, cases involving a 'significant denial of procedural fairness at trial' might justify the court allowing the appeal and ordering a retrial.

1812. The circumstances in which a denial of procedural fairness will preclude the application of the proviso are not capable of tight definition. In a joint judgment in *Wilde v The Queen*,[90] Brennan, Dawson and Toohey JJ held that the proviso could not be applied if the flaw in the trial 'is such a departure from the essential requirements of the law that it goes to the root of the proceedings.' This passage was cited with approval in the judgment of the High Court in *Lee v R*,[91] and the judgment expressed the principle in the following terms:

> In a case where impropriety or unfairness permeated or affected a trial to an extent where it ceased to be a fair trial according to law, an appeal court could not dismiss an appeal on the basis that there had been no substantial miscarriage of justice.

1813. It is also helpful to bear in mind the question as to whether the flaws in the trial resulted in the applicant losing a chance of acquittal that was reasonably open to him. The significance of this question was discussed in the joint judgment of Brennan, Dawson and Toohey JJ in *Wilde v The Queen*:[92]

> Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost 'a chance which was fairly open to him of being acquitted' to use the phrase of Fullagar J in *Maraz v The Queen* or 'a real chance of acquittal' to use the phrase of Barwick CJ in *Reg v Storey*. Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside: See *Driscoll v The Queen*; *Reg v Storey*; *Gallagher v The Queen*. Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed: See *Maraz v The Queen*. The loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice. The question whether the jury would inevitably have convicted falls to be determined by the Court of Criminal Appeal. It is a question which the Court of Criminal Appeal must answer accordingly to its assessment of the facts of the case.

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90 (1988) 164 CLR 365, 372–373.
91 [2014] HCA 20 [47].
92 (1988) 164 CLR 365, 371–372.

1814. As to the particular significance of the failures to disclose relevant material, two High Court decisions are of assistance. In *Grey v R*[93] the High Court considered the effect of a failure to disclose a letter of comfort provided by police to an important Crown witness. The Crown presented the witness as reliable and portrayed his involvement in the events of the criminal conduct as non-existent or entirely innocent. However, the letter of comfort demonstrated that the witness had been deeply involved in the events. In their joint judgment, Gleeson CJ, Gummow and Callinan JJ made the following observations as to the value of the letter to the defence:

> [18] It is not difficult to imagine a fertile area of cross-examination that could have been tilled by the appellant on the basis of this false statement to whose makers Mr Reynolds was patently beholden. The letter should have been provided to the appellant, as is correctly conceded in this Court by the respondent. Its revelation and admission into evidence could have put quite a different complexion on the case for the appellant and the way in which it was conducted. [94]

1815. Their Honours concluded that there had been a miscarriage of justice and declined to apply the proviso:[95]

> [23] For the reasons that we have given, there has been a miscarriage of justice in this case. It was not a miscarriage to which the fresh evidence rule applied. It is one thing to say that the defence knew or could have found out about various aspects of unsavoury behaviour on the part of Mr Reynolds but an altogether different thing to say that it knew of the special relationship between Mr Reynolds and the police. And although it might also be possible to say that a lucky (if extremely risky) question of him might have elicited an answer which revealed the existence of the letter of comfort and perhaps even its contents, there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled. Nor can we accept, in any event, as the Court of Criminal Appeal held, that reasonable diligence before or during the trial would have unearthed the letter.
>
> [27] Because of the over-arching importance of Mr Reynolds' evidence at the trial and the weight that the prosecution placed upon his reliability, we are unable to say that, had the letter been made available to the appellant so that he could cross-examine on it and introduce it into evidence, he would inevitably have been convicted. He has lost thereby a fair chance of acquittal.

1816. In a separate judgment, Kirby J made the following observations which are of assistance in the matter under consideration:

> [53] This Court has pointed out many times that the proviso appears in a section that does not negate the fundamental principle of the administration of criminal justice in Australia. This is that no person should be convicted of a serious crime except (where applicable) by the verdict of a jury after a fair trial held according to law. If the trial ceases to be a fair trial according to law, the verdict of guilty, and the criminal conviction that follows it, is intrinsically flawed. It is then no part of the function of a Court of Criminal Appeal to hold that the accused is 'so obviously guilty that the requirement of a fair trial according to law can be dispensed with'. The proviso has no application to such a case. Nevertheless, in a 'relevantly fair trial' error, impropriety or unfairness may occur that does not deprive the trial of its essential attributes as such. In those cases, the evaluation required by the proviso must be performed.
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> [55] In cases where credibility is in issue and where the jury's assessment of the truthfulness of a vital prosecution witness might be important for their verdict, the admission of inadmissible

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93 (2001) 184 ALR 593.
94 Ibid, 598 [18].
95 Ibid, 599–601, [23]–[27].

> evidence, the rejection of admissible evidence or the unavailability of significant and relevant evidence that later comes to light may, in a particular case, occasion such a miscarriage of justice that a guilty verdict should not stand.[96] [citations omitted]

1817. In *Mallard v R*[97] the joint judgment of Gummow, Hayne, Callinan and Heydon JJ noted that the decision in *Grey* 'stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty'.[98] The decision in *Mallard* concerned the failure of the prosecution to disclose forensic evidence which was capable of refuting a 'central plank' of the prosecution case with respect to the murder weapon. The undisclosed evidence was also capable of discrediting the reliability of confessional evidence upon which the prosecution case was heavily dependent. In that context the joint judgment made the following observations:

> It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded.[99]

1818. Kirby J declined to apply the proviso on the basis that it was 'impossible to conclude that the errors which occurred in the appellant's trial can be described as insubstantial so as to warrant dismissal of the appeal under the proviso'.[100] His Honour undertook a review of the approach of courts, nationally and internationally, to the prosecution duty of disclosure. The following passages from his Honour's judgement are helpful:

> **[81]** *The applicable principles*: The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.
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> …..
>
> **[83]** Ultimately, where there has been non-disclosure or suppression of material evidence, which fairness suggests ought to have been provided to the defence, the question is whether the omission has occasioned a miscarriage of justice. This is so both by the common law and by statute (and in some jurisdictions by constitutional mandate). The courts are guardians to ensure that "justice is done" in criminal trials. Where the prosecutor's evidentiary default or suppression "undermines confidence in the outcome of the trial", that outcome cannot stand. A conviction must then be set aside and consequential orders made to protect the accused from a risk of a miscarriage of justice. At least, this will follow unless an affirmative conclusion may be reached that the "proviso" applies — a conclusion less likely in such cases given the premise.

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96 Ibid, 607–608 [53]–[55].
97 (2005) 224 CLR 125.
98 Ibid, 133 [17].
99 Ibid, 135 [23].
100 Ibid, 157 [89].

> **[84]** In a case of very limited non-disclosure which the appellate court concludes affirmatively to have been unlikely to have altered the outcome of the criminal trial, the proviso may be applied as it was in *Lawless*. However, in a case where the non-disclosure could have seriously undermined the effective presentation of the defence case, a verdict reached in the absence of the material evidence (and the use that the defence might have made of it) cannot stand. Such was the case in *Grey*.
>
> **[88]** A reflection upon the consistency with which the principles are expressed and applied in the foregoing cases in courts of high authority confirms a conclusion that, in the present case, especially when viewed in combination, the many instances of prosecution non-disclosure and of the suppression of material evidence results in a conclusion that the appellant's trial cannot enjoy public confidence. This is another way of saying, in terms of the Code, that the jury's verdict is unreasonable or unsupportable in the light of the "whole case", as it is now known. [101] [citations omitted]

1819. Applying these principles and, in particular, the words of the joint judgment in *Mallard*, because of the 'over-arching importance' of Mr Barnes' evidence, and the weight the prosecution placed upon his reliability, I am unable to say that had full disclosure been made and the material been made available to the applicant so that he could cross-examine on it, the applicant would inevitably have been convicted. He has lost thereby a fair chance of acquittal. While the remainder of the evidence presented a strong circumstantial case against the applicant, it was a case inextricably woven around the forensic evidence of Mr Barnes. The fabric of the case would have changed completely and, in the words of Counsel for the applicant (Inq 4616):

> The entire landscape of the trial, the entire underpinning of the conviction is forever permeated by the reliance that was placed upon the forensics and which has now fallen and crumbled to pieces.

1820. Further, even if I was of the view that guilt was proven, in my opinion the trial involved such a significant denial of procedural fairness that it would be inappropriate to apply the proviso. The failures to disclose relevant information were inadvertent, but they had the effect of seriously undermining the capacity of the defence to attack a 'central plank' in the prosecution case. Further, the absence of disclosure prevented the jury from being made aware of evidence strongly demonstrative of Mr Barnes' lack of independence and objectivity. To adopt the words of Kirby J, the non-disclosure 'seriously undermined the effective presentation of the defence case'.

1821. In addition, independently of the failure to disclose, evidence of which the AFP, the DPP and the applicant were unaware establishes serious flaws attending the case file and case work of Mr Barnes. Those flaws related to a range of evidence given by Mr Barnes which, importantly, included the critical evidence linking the applicant's car to the scene of the crime.

1822. Approached another way, Paragraph 19 asserts that 'the finding of guilt is unsafe'. The task of the Court of Criminal Appeal in dealing with this ground of appeal was confirmed by the High Court in *SKA v The Queen*:

> 11 It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen* by Mason CJ, Deane, Dawson and Toohey JJ:
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> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that

[101] Ibid, 155–157 [81]–[88].

upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

12. This test has been restated to reflect the terms of s 6(1) of the *Criminal Appeal Act*. In *MFA v The Queen* McHugh, Gummow and Kirby JJ stated that the reference to "unsafe or unsatisfactory" in *M* is to be taken as "equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'."

13 The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses. However, the joint judgment in *M* went on to say:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

Save as to the issue whether the Court of Criminal Appeal erred in not viewing a videotape of the complainant's police interview, to which reference will be made later in these reasons, this qualification is not relevant to the present matter.

14 In determining an appeal pursuant to s 6 (1) of the *Criminal Appeal Act*, by applying the test set down in *M* and restated in *MFA*, the Court is to make "an independent assessment of the evidence, both as to its sufficiency and its quality". In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated:

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'." [102] [citations omitted]

1823. If I applied that test, I would find that although there is evidence upon which a jury could convict, it would be dangerous to allow the verdict of guilty to stand. The verdict was reached in circumstances where, unknown to the jury, the crucial scientific expert witness lacked independence and objectivity; critical evidence was seriously flawed; independent overseas experts had not fully reviewed the work undertaken by the crucial scientific witness; evidence of a threat to kill was not properly tested; and the jury was left with the impression that the applicant's complaints about police conduct was utterly bereft of any foundation. On this basis I would not apply the proviso.

1824. In this discussion I have avoided endeavouring to classify evidence that has emerged in the Inquiry as either 'fresh' or 'new' evidence.[103] In my view, in particular circumstances, the distinction is of no practical consequence.

1825. Of critical importance are the inadequacies and flaws in Mr Barnes' case file and case work. These features are coupled with evidence demonstrating that Mr Barnes lacked independence and objectivity. While it might be argued that diligent work by the defence would or should have discovered the inadequacies and flaws, and perhaps Mr Barnes' lack of independence, it is apparent that Mr Barnes was adept at deflecting attention from these matters. Notwithstanding at least two years intensive work, with

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[102] (2011) 243 CLR 400, 405 [11]-[14]

[103] *R v Abou-Chabake* (2004) 149 ACrimR 417 [63].

the advantage of direct access to the AFP and Mr Barnes, the inadequacies, flaws and lack of independence were not discovered by Mr Ibbotson. In these circumstances it is difficult to criticise the defence in this regard.

1826. The evidence concerning Dr Roantree is not fresh evidence. It was known to the defence at trial. However, as discussed, in my view the decision of the applicant not to cross-examine Dr Roantree should not be regarded as a true forensic choice made following an assessment of the best course to adopt in the interests of the defence case.

1827. There is a further matter to be considered in this final assessment. It concerns the alternative hypothesis raised in Paragraph 13.

1828. As I have said, leaving aside the fresh evidence discussed in the confidential section of the Report, the evidence relevant to Paragraph 13 establishes a number of matters relating to members of the organised crime group, including the existence of a motive to kill the deceased. However, those matters fall well short of positively pointing to the group or an individual member as the offender. Suspicion is generated, but it does not rise to the level of a possible hypothesis.

1829. The fresh evidence heard in private hearings adds a new dimension. It is now impossible to predict how that evidence would be received by a jury today, or what weight would have been given to it in 1995. But it cannot be ignored. The fresh evidence potentially lifts suspicion to the level of a reasonable hypothesis consistent with the applicant's innocence. I emphasise this conclusion is reached on the basis that the 'evidence' concerning the alternative hypothesis is taken at face value. As I said, most of that 'evidence' is in a hearsay form and the credibility of the primary witness, Mr Verducci, is decidedly suspect.

1830. In this position of uncertainty with respect to the evidence obtained in the private hearings, the appropriate conclusion is that such evidence adds weight to the view that the conviction cannot stand. In terms of the legislation and order directing this Inquiry, the doubt or question as to guilt underlying Paragraphs 5, 13, 16 and 19 has, by a combination of the evidence relating to those paragraphs, been confirmed.

CONCLUSION

1831. The applicant did not receive a fair trial according to law. He was denied a fair chance of acquittal. As a consequence, a substantial miscarriage of justice has occurred.

1832. The issue of guilt was determined on the basis of deeply flawed forensic evidence in circumstances where the applicant was denied procedural fairness in respect of a fundamental feature of the trial process concerned with disclosure by the prosecution of all relevant material. In addition, evidence of inadequacies and flaws in the case file and case work of the key forensic scientists were unknown to everyone involved in the investigation and trial.

1833. A substantial miscarriage of justice occurred in 1995, as a consequence of which the applicant has been in custody for almost 19 years. For numerous reasons, a retrial is not feasible. Notwithstanding that the question of a retrial could arise for consideration of

the Full Court, the DPP did not undertake any investigations in that regard and declined to make submissions concerning this issue. In my view, the passing of so many years, coupled with the death of numerous witnesses and publicity prejudicial to the applicant, mean that a further trial would be unfair both to the prosecution and to the applicant. A retrial would not be in the best interests of the community.

1834. The AFP and DPP contended that even if the evidence of Mr Barnes is put aside, and the evidence of Dr Roantree is modified, an overwhelming case exists against the applicant. On this basis they submitted that I should recommend that the conviction stand. As part of this submission the DPP contended that I should have regard to material not led at trial concerning Mr Klarenbeek (annexure 7 [128]). Leaving aside issues of admissibility, in my view the competing arguments would result in this additional evidence having minimal impact.

1835. I am unable to agree with the submission that the case is 'overwhelming'. While a strong circumstantial case remains, based on the admissible and properly tested evidence the case for the prosecution is not overwhelming. There is also material pointing to an alternative hypothesis consistent with innocence, the strength of which is unknown.

1836. I am fairly certain that the applicant is guilty of the murder of the deceased, but a nagging doubt remains. Regardless of my opinion as to the applicant's guilt, in my view the substantial miscarriage of justice suffered by the applicant should not be allowed to stand uncorrected. To allow such a miscarriage of justice to stand uncorrected would be contrary to the fundamental principles that guide the administration of justice in Australia and would bring the administration of justice into disrepute. Allowing such a miscarriage of justice to stand uncorrected would severely undermine public confidence in the administration of justice.

1837. In view of the nature of the miscarriage of justice, and the lengthy period that the applicant has spent in custody, and in view of the powers conferred on the Full Court, I do not recommend that the Court exercise the power in section 430(2)(b)(ii) to confirm the conviction and recommend that the Executive grant a pardon. The Legislature determined that the Full Court should possess wider powers than the Executive power of pardon to be exercised in appropriate circumstances. In my opinion the circumstances disclosed by this Inquiry strongly support the exercise of the power to quash the conviction (section 430(2)(c)).

1838. For these reasons I recommend that the conviction of the applicant on 3 November 1995 for the murder of the deceased be quashed.