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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE PETER M. HALL QC  
CHIEF COMMISSIONER

PUBLIC HEARING

OPERATION TOLOSA

Reference: Operation E17/1221

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 19 MAY, 2022

AT 2.00PM

Any person who publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: Yes, Mr Darams.

MR DARAMS: Yes, Chief Commissioner. I've informed Mr Lloyd of this but on reflection there's a couple of more matters I probably should raise just with Mr Sawyer.

10 THE COMMISSIONER: Yes, very well.

MR DARAMS: The first thing I want to raise with Mr Sawyer is if I could ask that he be shown volume 4C, page 11, first. Mr Sawyer, I apprehend I might know what answers you will give me but I, I want to know whether any of these calls I take you to might job something in your memory. So I just want to give you the opportunity to do it. The first one I want to draw your attention to is item 11. See this is a communication on 23 May, 2016 from you to Mr Osland? It looks like it's probably you leaving a message. ---Right.

20

You don't have any recollection now of what that message was about?  
---No. I'm, I'm sorry, I don't.

Given the timing, that is 23 May, one of the possibilities was that it was in relation to the upcoming meeting that afternoon?---It could well, well have been, yes.

30 Could the witness then be shown page 13? I draw your attention to item 13 on this page. This is communication between you and party B. It says City of Canada Bay, but that's Mr Tsirekas, that's his mobile number there?  
---All right, okay.

So that's who that is. It's 203 seconds so I want to suggest to you it's more likely that a telephone conversation on 25 May to Mr Tsirekas?---Yes, yes.

You don't have any recollection what that was about?---No. I, I wouldn't, no, I don't.

40 No. So then if I could just ask you to focus on the messages at item 17 and 18. 17 is the, again, on 25 May, 2016 at 4.26 between yourself and Mr

Osland, 98 seconds. It's possible that that's a telephone conversation as opposed to a long message.---Yeah, could be.

Yeah. Given the timing here, 25 May, 2016, do you accept there's a likelihood that what you're talking to Mr Osland about is the negotiations over the sale for 231? That's a possibility isn't it?---I couldn't, I couldn't - -  
-

You just don't recall now?---I, no, I, I don't recall that at all.

10

Likewise, if I go to item 18, communication between you and Mr Tsirekas. It looks like it's a message. I take it you have no recollection?---No, I, I, I don't recall what those conversations would have been about.

Go to page 14. Item 32. This is on 26 May, communication between you and Mr Osland?---Yes.

So 40 seconds. So could have been a short conversation or a message that you left?---Yes, yes.

20

And if we go down a few, item 36, 27 May, communication between you and Mr Tsirekas again. See that?---Yes.

Looks like it was a message that you left for him?---Right.

Do you accept that from the duration?---Yeah, it looks, like, short.

Yeah. I'm going to assume unless one of these sticks out in your mind, Mr Sawyer, that you wouldn't be able to assist me if I asked you do you recall what they were about?---No, not, not specifically, no.

30

When you say "not specifically" would there be some general recollection about what they were about, some recollection what they might be generally about?---I'm sorry, that, that long ago, I, I wouldn't be able to recall that.

Then if we go to item 37, 9.57, there's a communication between yourself and Mr Osland?---Yes.

That's either a short conversation or a message that you've left for him?

40

---Yes.

Then the next one down at 10.20, that seems to be quite, well, a longer conversation between yourself and Mr Tsirekas on 27 May?---Yes.

Just going back to your practice around this time in 2016, we know this is a lead-up to a council meeting on 31 May. Was it your practice to have conversations to some effect with Mr Tsirekas in the lead-up to a council meeting?---Not necessarily phone calls or whatever. That, that could have been about any, any range of matters. I can't recall exactly. We, yeah, that, I couldn't say that it was.

10

Then at item 46, this is a call from Mr Colacicco to you on 27 May?---Yes.

Likely to be a telephone conversation, given the duration. You accept that? ---Sorry? What number was that, again?

46.---46. Sorry. Four – yes.

411 seconds?---Yes.

20 Any recollection now about what that might have been involving?---No. No, sorry.

Then 49 and 50, there are, look like messages sent by Mr Colacicco to you. I might as well ask you this question, I think I know the answer, but do you have any of these messages between you and Mr Colacicco stretching back that far, given that you seem to still have a message from Mr Bartolotta in 2016, I guess I should ask the question, do you have any of these messages between yourself and Mr Colacicco stretching that far back?---Could well have, yeah.

30

Have you checked your phone to see whether you do have messages going that far back?---No, but - - -

You haven't checked?---Not that I can recall, going right back through the phone or whatever, no.

Sorry. We might be at cross-purposes. You gave some evidence the other day about having a message stretching as far back to 2016 between you and Mr Bartolotta?---Yes.

40

You seemed to still have that on your phone because you used that to help you recollect these events. That's right?---Yeah. I went to that specific date.

So how did you do that, can you just help me out? Did you, what, do a search in your phone is it?---No, no, you just, just have a look at, I think the date was 20 May.

2016?---Yes.

10

There was a message in your phone from Mr Bartolotta on that date?  
---Yeah, I'm pretty sure.

Do you have Mr Bartolotta's number saved in your phone as John Bartolotta, do you?---No, I don't.

So how did you, this might sort of circumvent things for us, how did you go to that date of 20 May, 2016?---Because I, I think through the proceedings that date was raised.

20

Sorry, we are at cross-purposes. How did you, when you went to your phone, did you, what, somehow, have you got some search function on your phone for messages that allows you to go to a particular date?---No. I flipped, flipped through to that particular date.

So do you still have messages as far back as 2016 on your phone?---Yes.

I'll come back to that in a moment. Well, perhaps I'll ask you this question. There are a number of these SMSs between you and Mr Colacicco. I take it then that you haven't searched for the messages around this particular date. Is that right?---That's right.

30

If that's right there's a possibility they might still be on your phone. Is that right?---Yeah.

40

Chief Commissioner, I'll come back in a moment in relation to the phone, but the last thing that I want to ask Mr Sawyer some questions about I would need the Commission to vary a suppression order that was made on 16 March, 2020 in relation to a compulsory examination of Mr Sawyer so that I might ask him some questions about some questions I put and answers he gave on that occasion.

THE COMMISSIONER: Yes, very well. In respect of the direction made under section 112 on 16 March, 2020 in respect of a compulsory examination of Mr Sawyer, I vary the order so as to permit Counsel Assisting to put questions to Mr Sawyer, the compulsory examination having been with Mr Sawyer.

10 **VARIATION OF SUPPRESSION ORDER: IN RESPECT OF THE DIRECTION MADE UNDER SECTION 112 ON 16 MARCH, 2020 IN RESPECT OF A COMPULSORY EXAMINATION OF MR SAWYER, I VARY THE ORDER SO AS TO PERMIT COUNSEL ASSISTING TO PUT QUESTIONS TO MR SAWYER, THE COMPULSORY EXAMINATION HAVING BEEN WITH MR SAWYER.**

THE COMMISSIONER: Yes. Thank you.

20 MR DARAMS: Correct. Mr Sawyer, you recall earlier today I asked you who might have handed you or who handed you the envelope at the Nield Park café on 25 January, 2019?---Yes.

My recollection of your evidence is that you couldn't recall who did hand you that envelope.---No. That's right.

30 Could I ask that Mr Sawyer be shown page 603 of the transcript of his evidence. If you need me to do this, Mr Sawyer, I can go back a few pages to show that what we are talking about here or the questions I'm asking you and you are answering on this occasion was about the envelope and the photographs.---Yes.

But you broadly remember me asking you about it. Correct?---Yes, yes, I do.

So then I just want to draw your attention to line 20. You can see the 20 on the side of the page.---Yes.

40 You've effectively accepted what was in your hand was an envelope.---Yep.

Then I show you a photo on page 170 again putting a proposition to you in relation to the envelope. Then I ask you the question, "Yeah, who gave you that envelope?" You gave the answer, "Not too sure. Go, go back. Probably might have been Frank Colacicco," but not sure what it is. So you identified Mr Colacicco out of the persons sitting at the table on that occasion.---That's correct.

Do you remember doing that?---Yes.

10 Was there a basis why you can recall now that you identified Mr Colacicco?---Because he was sitting right next to me.

THE COMMISSIONER: Sorry, I couldn't hear that.---Sorry. He was sitting right next to me. When I, when I first saw that photo, he was sitting right next to me and I didn't know the person on the other side of me. So that's why I said probably he was sitting there, probably Mr Colacicco.

MR DARAMS: So can I then ask that the witness be shown page 605? I'll draw your attention to line 13. You will see around line 9 I've asked you a question about whether you could assist us as to what the envelope contained.---Yes.

20 Then I ask you another question about if you were to be handed an envelope, would it most likely be Mr Colacicco? Do you see that question? Just before I show you your answer, you might recall there were some questions you raised querying whether to not what was in your hand was an envelope or whether it was a folded piece of paper or something, then we went through the photos. I blew them up for you and you accepted it was an envelope.---Yeah, yep.

30 So you then say, "Well, he was sitting next to me so I assume that, you know, I can't say for sure someone's given me the envelope but he was the one sitting next to me." So that's, do I take it, consistent with the explanation you now just gave, that when you identified Mr Colacicco that was because of where he was sitting in the Nield Park café on that particular occasion?---Yeah.

40 So would you be, can I ask you this, you would say that the – I withdraw that. Your evidence today about not being able to recall, you would say that that's consistent with the evidence you gave on the last occasion which you

identified Mr Colacicco of all the persons, because of where he was located, that's right?---That's right.

And you remember, on the last occasion, I asked you similar questions about whether other individuals gave you the envelope and you said no? Do you remember that?---Yeah.

Yep.---I couldn't recall, yep.

10 Yes, they're the questions that I had, Chief Commissioner.

THE COMMISSIONER: There's no requirement for Mr Sawyer's phone?

MR DARAMS: I just want a short adjournment if I could for the moment. I'm just - - -

THE COMMISSIONER: All right. Not suggesting that - - -

MR DARAMS: No, no, no. I'd just like - - -  
20

THE COMMISSIONER: All right. How long do you want?

MR DARAMS: Oh, I think maybe five minutes.

THE COMMISSIONER: Five minutes, all right.

MR DARAMS: If I could possibly get five minutes.

THE COMMISSIONER: I'll resume at 2.30.  
30

**SHORT ADJOURNMENT**

**[2.23pm]**

THE COMMISSIONER: Yes, Mr Darams.

MR DARAMS: Yes. Thank you, Chief Commissioner. What I will ask the Commission to make is an order under section 35 of the Act requiring Mr Sawyer to deliver to the Commission his mobile phone today. I understand  
40 there's another mobile phone that was used by Mr Sawyer in the relevant periods of time but that's not on Mr Sawyer's possession, so I would ask

that an order be made that that be produced to the Commission by 10.00am tomorrow morning in relation to that, with a second undertaking of the protection of any information on that phone between now and then. We also require the order to be expressed to include the provision of access codes, PINs and passwords and the like.

THE COMMISSIONER: Yes. Just before I call upon Mr Lloyd, Mr Sawyer, two things. Partly because you have been able to use your phone to refresh your memory on things, and the fact that the records are still intact, the Commission's view is that in order to discharge its responsibilities, it should make the necessary searches of relevant material that may be material to the Commission's inquiry. Directions are made from time to time for a witness to produce their mobile phone. Certain undertakings are required and I anticipate that there's no difficulty in you providing the undertakings, but we'll deal with those in a moment. I also want to assure you that the Commission has protocols that it follows to, though the material from the phone is downloaded to permit an examination of relevant material, there is a targeted assessment made of the material. Matters of privacy are, once it's obvious that they are matters of privacy, are not examined and indeed most of the material downloaded is not subject to examination because the search terms that are put in to locate what it is that is relevant to this inquiry, and nothing else, is subject to examination. So I just wanted to reassure you that the Commission is mindful of privacy considerations. The right of privacy is important and therefore the protocols are designed to get the right balance between accessing any material that may be relevant to an inquiry on the one hand, but those who do the actual technical work are trained and act according to protocols, only to go looking for anything that's relevant which comes up from the search. Do you understand what I'm saying?---Yes, I do.

30

I just want to reassure you - - -?---No, no. No - - -

You're naturally entitled, as everyone is, to their right of privacy and that will be respected, must be respected.---Yeah, thank you, Commissioner.

Mr Lloyd, is there any matters you want to raise?

MR LLOYD: Yes, Chief Commissioner, with respect. There's no difficulty with the substance of the order that you have proposed in terms of the production of both of the phones and there's obviously no difficulty in including in that access to the relevant codes and PIN numbers and the like.

40

But there are two matters of concern. First, is just the timing of the production of the phone Mr Sawyer has here. I understand there have been some discussions, which may I say respectfully have been constructive and helpful, with Counsel Assisting about this. My application on Mr Sawyer's behalf is that the time for production of that phone be deferred until 10.00am tomorrow on the basis that he will give an undertaking of the same kind that he will give with respect to the phone that's at his home. But I can obviously understand the Commission's concern about the risk of material on the phone being removed or altered, but in the circumstances where Mr Sawyer has had an unfettered opportunity for many years to do that, that is remove or tamper with material on his phone, and he volunteers in the witness box years and years later, as he did today, that there is material, in my respectful submission, the chances of him doing that, in breach of an undertaking, are so low as to warrant him being afforded that convenience, because as you would well know, Chief Commissioner, mobile phones, in the modern world, contain a whole lot of information that people require to live their lives, contact lists and the like. And so I make that application for a variation of the time for production. And those contact details, I'm reminded, may well include medical people, and you know, Chief Commissioner, Mr Sawyer has had some medical problems. That's one variation that we respectfully seek.

The other variation is, noting the respect, helpful comments that you have made about the protocols of the Commission with respect to what material is accessed, in circumstances where this has occurred in the fourth week of this public hearing and when Mr Sawyer has volunteered this evidence as you heard, this would be a case where it would be appropriate and we submit, with respect, necessary to make an order that you would have power to make under section 19, not limiting the production because the production is of the phone, but specifying that subset of material on the phone which will be reviewed. And as you said to me the other day, with respect correctly, in Commissions, in public hearings are entitled to follow the evidence and there's no, not being bound by pleadings or anything of that kind, but in relation to this particular examination of these documents, the two phones, if that is occurring to follow the evidence, well, the evidence volunteered is that there are text messages from May 2016. And there's just no reason at this stage of the public hearing, in our respectful submission, why there would be any need to do anything other than search for those text messages that are referred to in Exhibit 39 in volume 4C, the text messages and phone calls that the Commission has identified – I withdraw that in one sense. It would extend to text messages and any

recorded voicemail messages because that's obviously relevant in terms of following the evidence.

And so, in those two respects, we seek variations of the proposed order. I'm not sure I need to seek a variation to deal with any material on there which may be the subject of legal professional privilege 'cause I do understand there is a protocol that deals with material of that kind, but there may well be material of that kind on the phone and we understand the Commission would not review that in the ordinary course.

10

THE COMMISSIONER: So, Mr Lloyd, your second point is directed, is it, to – so I make sure I understand what you're putting – that there be specification or limitation as to what is searched for rather than there be a wider searching?

MR LLOYD: Exactly. So no limitation in the production stage, but if, and I well understand we're not in the territory of the authorities that you would be well aware of, but if we were in the territory of *Waind v Hill*, where not dealing with production would be dealing with what might be called access, at that stage if you replace access with searching, that the search be limited to SMS or text messages and voicemail messages as recorded in that Exhibit 39, volume 4C document, which is the very thing which records all that history of text messages and voicemail messages at the period of time in concern in May 2016. That would throw up, for example, whether Mr Sawyer has on his phone the 98-second voicemail message from Mr Bartolotta on 20 May, which would be obviously relevant. It would also throw up any messages on there, text messages of the kind that have been the subject of evidence.

20

30 THE COMMISSIONER: Yes. Mr Lloyd, I don't propose to direct that the search be limited in the way you've sought. I'll come to the other issue of timing and production in a moment. Insofar as any search made or assessment being made which is directed towards relevant material in the relevant period, it is impossible for me to formulate an order that would prevent or restrict the technical officers who do this sort of work because the nature of the search undertaken cannot, doesn't respond to such restrictions. This partly depends upon a technical explanation as to how the process is undertaken, but in general terms, my information is that there is a need for the contents, the data on the phone to be firstly downloaded as a whole.  
40 That's the first step. Otherwise they can't get access to any of it.

MR LLOYD: Yes. And may I make it plain, we don't oppose, that is not opposed.

THE COMMISSIONER: No. That's just a mechanical, technical step in the process, without any human intervention other than to trigger the download. The next step involves the formulation of an approach by technicians to then set up a targeted, strategic to targeted, I should have said, or targeted to strategic basis for locating any material that is relevant by reference to certain indicia such as date, name of person, key words which  
10 are likely to throw up material that is relevant. It's necessary, however, to search within the ambit of that scope to see if there's any material that actually does contain voicemail, text messages, bearing upon such matters. It's impossible to predict in advance with any precision as to what dates the relevant cut-off point are, for example. I do emphasise that the Commission is fully alive to its responsibility, for example, in the event of matters that fall into, firstly, a class of legal professional privilege. That material, once it's evident that that's what it is, the search is discontinued, it is not searched. If there is material which is of obviously a highly personal nature,  
20 such as doctors' advice, for example, that too will not be read through once it's evident that that's what it is. There are other protocols around limiting the time that's required for a search. To do a search of material over an extensive basis becomes a lengthy exercise and none of the officers involved in this line of work want to do more than they have to to assist the Commission.

Accordingly, I can't acquiesce in your second request to define an ambit as to the time of production. I'm told that it depends on the amount of data on the phone. If there's a great deal of data, that is to say the phone has a great capacity to store huge volumes of data, that takes considerably longer than if  
30 it's a phone that's not of that capacity, in which case it could be done, the download and the search done, if it's a low-level capacity, within a matter of hours. That bears upon the time at which somebody's without their phone. I take on board what you've said about the low risk that exists that any misadventure could happen to the phone and I understand perfectly what you said about your client. However, there is a requirement, and this is consistent with the way in which these things are handled, for the phone to be handed today to Commission officers. There is a technical officer who has been already contacted to start work on downloading that phone, which will commence this afternoon and may go on overnight. In the morning  
40 we'll be in a position to say whether there's a need to maintain the phone in custody. That's the best we can do. So I'm afraid that Mr Sawyer will be

required to hand over the phone this afternoon for that process to begin. As to the other phone which he has, as I understand, on an older phone at home, the undertaking is directed to him producing it overnight and that the phone is to be not used or tampered with in any way. That phone, too, will be assessed tomorrow as to how long it might take. Inconvenience to people, especially with phones these days that contain so much useful data, is also a factor the Commission takes into account. I anticipate that in the morning, there will be an ability for contacts, for example, on the phone to be, in some way copied, so that Mr Sawyer will at least have all his contacts in the morning but overnight, unfortunately, he will suffer the inconvenience of not having access to his contacts.

I sought to explain as best I can, based on information that's been given to me, the process and the reasons why the Commission acts in these matters as it does. It's not capricious, I can assure you. It's not done without a great deal of thought and with an effort to avoid obvious inconvenience. So, Mr Lloyd, I think I've indicated what I propose to do. Unless there's anything further you want to add?

20 MR LLOYD: No, Chief Commissioner, other than to enquire whether it would be convenient for one or other - - -

THE COMMISSIONER: I'm sorry? I can't hear.

MR LLOYD: I'm sorry. Other than to enquire as to whether it could be convenient for one or other of the legal representatives to appear in person tomorrow to enquire as to the position?

30 THE COMMISSIONER: Well, there'll be no need for counsel, obviously, to appear, you yourself or, but if a solicitor could appear, it's really a question of speaking to the head of the investigations who are dealing with the matter. Mr Sawyer doesn't need to have a lawyer with him. He's not going to be spoken to in terms of the subject matter of this inquiry. So he doesn't need to have his lawyer. If he wants to have his lawyer present or his solicitor present, there's no problem there.

MR LLOYD: Certainly. Thank you, Chief Commissioner.

40 THE COMMISSIONER: Okay. Accordingly, I make a direction under section 35 of the Independent Commission Against Corruption Act for the witness Mr Sawyer to hand to an officer of this Commission this afternoon,

before he leaves the premises, the mobile phone presently in his custody. I further direct that the second phone that's been referred to, which is presently at Mr Sawyer's home, be produced tomorrow by 10.00am and I note that Mr Sawyer consents to an undertaking that that phone will be protected and not used or material downloaded on it.

10 **DIRECTION TO PRODUCE: I MAKE A DIRECTION UNDER SECTION 35 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT FOR THE WITNESS MR SAWYER TO HAND TO AN OFFICER OF THIS COMMISSION THIS AFTERNOON, BEFORE HE LEAVES THE PREMISES, THE MOBILE PHONE PRESENTLY IN HIS CUSTODY. I FURTHER DIRECT THAT THE SECOND PHONE THAT'S BEEN REFERRED TO, WHICH IS PRESENTLY AT MR SAWYER'S HOME, BE PRODUCED TOMORROW BY 10.00AM AND I NOTE THAT MR SAWYER CONSENTS TO AN UNDERTAKING THAT THAT PHONE WILL BE PROTECTED AND NOT USED OR MATERIAL**

20

THE COMMISSIONER: Mr Sawyer, you're happy to give that undertaking?---Yes, I am.

Thank you. Is 10 o'clock tomorrow convenient to you or would you prefer a later time?---No, 10 o'clock will be fine.

10 o'clock.

30 MR DARAMS: Chief Commissioner, might I just add if the order could be varied in relation to the production of or provision of the passwords, the access codes and the like, that Mr Sawyer can give us now and any that he can't, if he could deliver them tomorrow morning at 10.00am?

THE COMMISSIONER: Mr Sawyer, you've heard what's just been said. Are you prepared to provide the details of passwords, access data, so that the phone can be activated?---Yes. Yes, I am, Commissioner. Yeah.

40 Are you prepared to give that information this afternoon to the officers of the Commission?---Yeah, there, there may be some that I've got written

down, passwords I don't recall them off the top of my head sometimes. I've, I've got to look them up - - -

Have you got the password for your current phone and access?---Yeah. Yeah. I've got the password to access the phone, yeah.

Okay. If you could provide that. The benefit of that is, as I've indicated, there is an officer. He'll get straight to work and - - -?---Yeah.

10 - - - try get it downloaded as quickly as possible for you.---Thank you.

Mr Lloyd, the only other issue that's likely to arise in the morning is to explain to Mr Sawyer where the downloading and searching is up to and how long it might take. I can't predict that at the moment but the Commission officers will speak to Mr Sawyer to advise him as to what their estimate is. As I say, they'll try and minimise inconvenience but it does depend upon things such as the capacity of the phone.

20 MR LLOYD: No, we understand, Chief Commissioner. And there'll be someone, one or more of the Legal Team will be here with him for that exercise. Thank you.

THE COMMISSIONER: All right. Very good. The hearing will be adjourned shortly and I think it's proposed that, Mr Sawyer, if this is convenient to him and the legal representatives, return to finish his evidence on Wednesday next. If there's any difficulty arising out of that proposal, counsel will indicate that. Apparently it does suit.

30 MR DARAMS: Chief Commissioner, there likely will be, but could I do this? Could I leave it on the basis that we'll have some conversations with Mr Sawyer's counsel and legal representatives to work out the most convenient time.

THE COMMISSIONER: And Mr Leggat and anybody else?

MR DARAMS: Of course.

40 THE COMMISSIONER: Yeah. Very well. Thank you, Mr Sawyer, you may step down. You are free to go today, thank you.---Thank you.

If you wouldn't mind just waiting though. The Commission officers will speak to you about the arrangements.---Yeah.

Thank you. Very well. Yes. Very well, I'll adjourn.

**THE WITNESS STOOD DOWN** **[3.46pm]**

10 **AT 3.46PM THE MATTER WAS ADJOURNED ACCORDINGLY**  
**[3.46pm]**