

AEROPUB02406
10/10/2019

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pp 02406-02455

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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE PETER M. HALL QC
CHIEF COMMISSIONER

PUBLIC HEARING

OPERATION AERO

Reference: Operation E18/0093

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 10 OCTOBER, 2019

AT 10.48AM

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MR ROBERTSON: Chief Commissioner, can I apologise to all for the delay. The delay arises out of matters that occurred late yesterday. Before I deal with the detail of that, can I just deal with some immediate matters of programming and housekeeping. There's a procedural matter that I'll need to deal with in a little bit of detail in a moment, I'll then continue with Mr Clements. I won't be in a position to call Mr Wong today as previously announced. I think it's most likely that I won't be in a position to call Mr Wong this week at all, I'll confirm that during the course of the day, probably by no later than immediately after lunch, but in light of matters, including the matter to which I'm about to turn, there are some matters that need to be dealt with today and Mr Clements will take a little bit more time.

A particular procedural matter arises out of what happened late yesterday at about half past 4.00. You'll recall, Chief Commissioner, that in answer to some of my questions, Mr Clement indicated that there was a meeting that was arranged by Mr Wong in I think 2017 and the meeting was arranged by way of WhatsApp message. You then, Chief Commissioner, made a direction under section 35(2) requiring Mr Clements's phone to be produced for the purposes of forensic analysis. That was originally focussed on the particular communication that Mr Clements immediately referred to, but following some further questioning from me it became apparent that there may well be other material on Mr Clements' phone that may be of relevance, both by way of WhatsApp and also by way of other data. You'll recall, Chief Commissioner, that Mr Clements eventually indicated that he had some hard copies of a series of documents, including some text messages, of which a number of those text messages were ultimately produced to the Commission and which I'll be dealing with in evidence in a moment, including messages that are of some particular and important relevance in relation to this investigation. The Commission then adjourned and I was informed by my learned friend, Mr Lawrence, during the adjournment that there was likely to be privileged communications amongst the WhatsApp messages, in other words there may well be, amongst the WhatsApp messages, some communications between lawyers. That then led to the Commission reconvening somewhat lately.

I'm not sure that the transcript has as yet been made available, but if it hasn't it will be made available shortly, during the course of which there was brief argument as to whether for reasons of privilege you should recall the direction that you made under section 35(2). And can I just have the Independent Commission Against Corruption Act 1988 up on the screen, because the particular issue that arises relates to section 37 of that Act in respect of which I wish to make some brief submissions. There was brief submissions yesterday but you recall, Chief Commissioner, that you took the view, and which I supported, that the matter should be given some further consideration overnight. Can we go please to section 37 of that Act. I'm told the transcript of what I might call the evening session has now been made available online.

THE COMMISSIONER: Good, thank you.

MR ROBERTSON: For those who are interested. The appropriate starting point in my submission is 37(2), which is over the page, which amounts to a general abrogation of, amongst other things, privilege, duties of secrecy and matters of that kind. That, as the Commission will appreciate, is a significant subsection because it involves an abrogation of a very important substantive right that has been confirmed by the High Court on many occasions as being an important substantive right. Plainly enough, subsection 2 is a subsection that might well be described as significant, if not extraordinary, because plainly enough, the parliament took the view that this Commission should be given powers of significant importance, perhaps they may be described as extraordinary powers, in order to facilitate the important work that it has in investigating matters of corrupt conduct and also investigating matters that are referred to it by the NSW Electoral Commission.

And so, importantly in my submission, when one goes to construe subsection 5, which is the subsection that's of particular relevance here, it needs to be construed plainly enough in the context of the Act as a whole, but importantly in the context of subsection 2, where the parliament has taken the view that, at least generally speaking, privilege, duties of secrecy and the like should not be a ground for refusing to answer a question or to produce a document. Plainly enough, that's a substantial incursion on an important substantive right but it's one that the parliament had deliberately drawn its attention to and decided to abrogate it in a very deliberate way.

Subsection 5 then amounts to a limited reinstatement of privilege but a very limited one, as the text of paragraph (b) of subsection 5 indicates. Here we're not dealing strictly speaking with a matter of common law privilege, or general law privilege, we're dealing with any assertion of statutory privilege of the kind that's reinstated by subsection 5, paragraph little (b). That's not to say, of course, that that paragraph is not to be read in light of common law principles, quite the contrary. Plainly enough there's a series of phrases in paragraph (b) that are not defined in this Act, matters such as what an Australian legal practitioner is, professional legal services and, importantly, the concept of privileged communication, and plainly enough those are phrases of a kind that need to be construed in light of the common law background. In that context, can I have on the screen, the decision of the Supreme Court and Independent Commission Against Corruption v. Cripps 1996 NSWSC 372, which addresses the question - - -

THE COMMISSIONER: Did you say Cripps?

MR ROBERTSON: Cripps.

THE COMMISSIONER: I think I recall this case.

MR ROBERTSON: Which you will recall, Chief Commissioner, because it pertains to a matter that arose before you then as an Assisting Commissioner of the Commission. And can I draw particular attention to the page - - -

THE COMMISSIONER: So the judgement of Justice Sully, as I recall.

MR ROBERTSON: Judgement of Justice Sully. And can I go to PDF page 24 of the printout that – or at least the version of the PDF that the operator has. In any event, while that’s coming up, the relevant principle for which the decision in Cripps stands is that the provisions of section 37(5) need to be read in light of the common law background and that it’s apparent from the context in which that subsection was enacted, including the second reading speech, that what – and I’ll read from, it appears to be numbered paragraph 6 on page 25 of the PDF version. Section 37(5)(b) is to be understood as embodying the relevant cognate concepts of the common law, and then goes on to talk about well-entrenched principles of common law and it being of the highest importance. In that paragraph, Justice Sully commences with the word “if”, but that’s to be understood in the context of what goes before, the context of which being that His Honour regards the subsection 5 as picking up principles that arise from the common law.

If we can have subsection 37 of the Independent Commission Against Corruption Act, subsection 37 back on the screen, please. So the particular issue that now arises is whether Mr Clements, assuming he takes the objection, and as I understand it, he does by Counsel, whether he would be entitled to refuse to comply with the direction that you made, Chief Commissioner, to provide his telephone, on the grounds that the thing that he was required to produce is something that contains – you’ll see the word “contains” in the first line of subsection 5(b) – contains a privileged communication passing between an Australian legal practitioner and a person for the purposes of providing professional legal services, et cetera. The burden of the argument in favour of such an objection, if that objection is to be made, and I understand that it is, is to say that it would be open to Mr Clements to say, I’m not producing my telephone at all because, for example, a single email or a single WhatsApp message that involved communications between lawyers may well be found by reference to that phone in the event that that telephone is put through a form of forensic analysis that turns the zeroes and ones into something that’s readable.

In my respectful submission, that would be a startling proposition in circumstances where, as is clear from subsection 2, the parliament has very deliberately directed itself to questions of privilege, and have decided that subject to a somewhat limited exception in subsection 5(b), privilege and grounds of secrecy in matters of that kind should not be a grounds for refusing to provide material. Now that’s not to say for a moment that it would be appropriate for this Commission to require production of a telephone and then go through it with a view to finding privileged communication of the kind that paragraph (b) is directed to. Not at all. But

what it is to say is that merely because there may well be one privileged communication amongst many on a phone, or perhaps in some physical device or physical thing, that that would amount to a basis for refusing to comply with a requirement.

10 Can I perhaps proffer this by way of analogy, putting aside questions of computing and the like, if you, Chief Commissioner required a locked suitcase containing a number of folders to be produced to this Commission, it would be no answer to that requirement to say, well, one of those folders is marked legal professional privilege and therefore the Commission should not have the lot. There may be grounds for thinking in that particular case that in the locked suitcase, in folders other than the one that's marked legal professional privilege, there may well be material that is of significance to the investigation, and whilst at least as a matter of proper exercise of powers, if not a matter of power itself, the Commission either should not or perhaps could not look at the folder marked legal professional privilege. The proposition that the fact that that folder is in amongst others which may have matters that are relevant for an investigation, in my respectful submission, would lead to an absurd result, and one that would be
20 inconsistent with what subsection 37 is attempting to achieve as a whole.

So stepping back then as to the particular issue that arises here, the Commission is presently in custody of Mr Clements' phone, but to hold the position overnight, that phone has not been inspected and has been kept in safe custody. The immediate question is whether that telephone contains, that's the word in (b), contains a privileged communication. Now, in respect of the device itself, as I submitted briefly yesterday evening, what's on that phone in terms of data is, as it were, ones and zeroes. That's not something that could be understood by a human without intervention from
30 something else. The same way as the locked suitcase, one can't see what the data is in it without intervention, in that case using a key.

Can I have on the screen, please, a direction that I submit you should make, Chief Commissioner, with a view to dealing with any concerns in relation to privilege. I've given this to my learned friend, although in fairness to him, he's received it only briefly before we started because it was a matter that I needed some forensics advice with respect to. Paragraph 1 is contemplated a direction that you should make, Chief Commissioner, to the Computer Forensics Unit, which as you know, Chief Commissioner, is a unit that is
40 different from those involved in both the investigations side, the direct investigations side, and the legal advice side of particular investigations, to take such steps as is necessary to obtain data in particular categories. I'll come back to the categories. The ones that are on the screen are broader than the ones that are foreshadowed yesterday for reasons to which I'll come. That's a direction to them, so it's proposed, in relation to a separate unit within this Commission. Paragraph 2 contemplates that in order to turn the ones and zeroes into something that's actually readable, it may be necessary, indeed my advice is that it will be necessary to provide a copy or

image of the underlying data, in other words, the ones and zeroes. Again not understandable by a human without intervention from anyone else, and at that level, in my submission, not something that contains legal advice or privileged communications because plainly enough, what privilege is, at least in its core manifestation, is to protect communications, in my submission section 37 wouldn't be read in such a way as to protect something that no human could understand as a communication.

- 10 So paragraph 2 or direction 2 contemplates that that may be necessary but importantly that is to be stored, see the last two lines, "Stored in a device that is not accessible by persons other than persons within the Computer Forensics Unit." In other words, not accessible by people like me or the investigators involved in the matter. In a sense, direction 2 is unlocking the suitcase with the key, the next step being to see what's in the suitcase. Now, in my advice the next step in the process is that the underlying ones and zeroes get queried with a report that indicates what those ones and zeroes represent at the level of metadata rather than at the level of the substantive data, in other words, one at the first step at the Computer Forensics Unit step will understand that there will be, for example,
- 20 WhatsApp messages and there will be iMessages and they'll understand that there may be communications for example between Mr Wong and Mr Clements, as Mr Clements referred to yesterday, but will not be capable of seeing, without further steps being taken, what the content of those communications are. As it were, that's the roadmap to the ones and zeroes. To extend the suitcase analogy, that's looking at the labels on the folders and seeing that there's one folder saying communications between Mr Clements and Wong and perhaps one folder saying communications between lawyers.
- 30 Direction number 3 says that once that exercise has been done, Mr Clements gets his phone back as soon as is practicable. Paragraph (b) would require the Forensics Department to provide a report to be provided to Mr Clements's legal advisors so they know what's happened in terms of what the steps were that were taken, the steps of which I've just summarised, but the report will need to deal with that in a little bit more detail. In terms of the copy data itself, that is to say the ones and zeroes, that of course is the underlying evidence itself and the particular report that's contemplated by direction 1, paragraph (b) is all that I'll see, all that goes to the – it says
- 40 "Solicitor assisting the Commission" in (b), the better course may well be to provide it to me as Counsel Assisting in the first instance, with a view to me showing it to Mr Clements' counsel in the first instance. That gives him an opportunity, if he wishes to do so, to check what's in the content of that particular report, obviously on appropriate undertakings as to what should happen in relation to that report itself. But I was drawing particular attention to paragraph 3(c). The actual evidence itself is the ones and zeroes and so that needs to be, and in my submission, should be retained, but quite fairly it should be retained in such a way as would prevent any further querying of it being done of the kind that would not be appropriate.

THE COMMISSIONER: And that's achieved through encryption?

MR ROBERTSON: Through a number of devices, really three, encryption, security and leave. Encryption in a sense of turning the ones and zeroes into different ones and zeroes so that if, God forbid, someone was to break into the Commission and steal the device it would be non-readable, with or without the benefit of the kinds of applications that the Computer Forensics Unit of this Commission would ordinarily use. That's the first form of protection, it's in a sense an electronic form of protection. The next form of protection is putting it in the secure evidence holding facility that this Commission has, so that's in a sense a physical form of security, and that would only be accessible with leave of a Commissioner of this Commission. One would expect that one would never need to access that at all, but one could at least conceive of a scenario where someone seeks to tender the report referred to in 1(b), perhaps in criminal proceedings where the rules of evidence apply, and someone objecting to that says, well, I want to ensure the integrity of that report, I want to ensure that the report has actually been produced properly and I want you to repeat the exercise of turning the ones and zeroes into a report so I can confirm that the document that you want to tender in human readable form is actually a correct representation of the ones and zeroes.

THE COMMISSIONER: So do I understand the objective of dealing with it as per 3(c), that is to put the downloaded material which are ones and zeroes, into firstly encrypted form, such that it can't be read or accessed in terms of what communication the encrypted material contains, that that would in effect act if you like as freezing or snapshotting, or perhaps freezing is a better term, freezing the data recorded on the device as at the date of the download. If that were not done and the phone simply returned, and for example inadvertently or otherwise the data on the phone is changed or wiped, if it came to a questions of admissibility at a later point in time in criminal proceedings as to the primary source of the hard copy, that would not be possible, unless it be encrypted and, as I say, frozen as of today's date or whatever date?

MR ROBERTSON: That's essentially so, subject to one qualification, perhaps two. The first one being of course as soon as Mr Clements walks out the door the data will be different, not because Mr Clements will do anything, but because he'll receive a message or send an email, there may well be GPS data, things of that kind. So in terms of freezing the data in time, to use that analogy, that's direction number 2, so to take the image, as it were, keep the ones and zeros in the form that they are now, not the form that they are this afternoon or tomorrow or a year's time or five years' time, so that's the freezing exercise. 3(c) is really the protection exercise to protect against the possibility that, notwithstanding the clear directions of the kind that can be seen on the screen, that someone can't – whether within the Commission or elsewhere – cannot produce some other further report

without your say-so, Commissioner, or the say-so of another Commissioner of this Commission. So 3(c) is really directed at the protection or security side. So to prevent, in essence, breaches of your directions by inadvertence, deliberateness, within the Commission or elsewhere, the freezing exercise is really direction number 2. So in my submission, directions of that kind are appropriate in light of the reinstated privilege in section 37(5). Obviously enough there's the anterior question of whether there's any relevant privilege at all to be claimed, and that turns on whether the phone can be properly understood as containing legal professional privilege material in circumstances where no human could understand any of that without the assistance of some other device. In my respectful submission it would be an anomalous construction of the Act to say, well, just because there might be a few privileged communications that would be capable of being reproduced on the phone, even though the Commission proposes to say, whatever you do don't do that, in my submission that would be an unlikely construction of the Act, particularly in light of both the context of the Act itself and the general context to which the Supreme Court and Cripps referred.

20 THE COMMISSIONER: Can I just clarify, just so that we all share the same understanding of the process, that once the mobile device is processed by forensic staff and results in a successful extraction or downloading of the material, that there are at least two steps. One, that the material that's downloaded is not readable, in form it consists of coded zeros and ones, then the next process would be for the forensic analyst to seek to put in readable form that data that is described in paragraph 1(a) but no other data. Is that right?

30 MR ROBERTSON: That's essentially so. Practically there's two steps bound up in the one step that you've just identified. So step one is, as it were, opening the suitcase with the keys, that's the ones and zeros step. Step two is to understand what, at the metadata level, not the substance but the metadata level, what those ones and zeros represent which then, as it were, tells you that we have, to stress the analogy, there are four folders that are sitting in the locked suitcase. The first folder is full of WhatsApp messages, the second folder is full of emails and so on and so forth. It goes in a greater degree of granular detail than that because that will tell not only that there's WhatsApp messages but there's WhatsApp messages of a particular kind, for example, WhatsApp messages between Mr Wong and Mr Clements. But that's at the metadata level stage. In a sense that's the road map for the details, but at that point in time the Computer Forensics Unit doesn't have the content in human understandable form of the messages. All it's effectively got is the road map to the ones and zeros, and it's then for them, given that road map, to say, well, the Commissioner has asked me to find Ernest Wong communications, he hasn't asked me to find anything to do with lawyers, but he had asked me to find Ernest Wong communications, so I'm not telling the computer program to turn a segment of the ones and zeros from ones and zeros into the communications between Mr Wong and Mr Clements.

THE COMMISSIONER: Right. And it's at that point that it becomes readable by the human eye?

MR ROBERTSON: That's so and that produces the report in proposed direction 1(b) and that's the only thing that it's proposed that I should have access to.

10 THE COMMISSIONER: Well then, once you've arrived at that point, that is to say, that if there are any communications as set out in 1(b), and that has been identified, they have been identified and converted into readable form, the process stops at that point, and the forensic analyst or a lawyer can then read for himself or herself to determine whether there's, in those communications, identified in 1(a) of the directions document, whether there's any legal professional privilege material contained within the communications set out in 1(a)(i) to (v).

20 MR ROBERTSON: Yes, it seems unlikely, but one can't exclude possibilities.

THE COMMISSIONER: No. Well, it may be, for example, that – let's take names off this list, 1(a)(i) to (v), if there was found to be a communication between Mr Wong and Mr Cheah, for example, then theoretically it might be possible that Mr Wong might say to Mr Cheah, "and my lawyer said to me X." That would then be readily identifiable and would be marked as material that may fall within the exception set out in 37(5).

30 MR ROBERTSON: Yes.

THE COMMISSIONER: And is there any reason why, at that very first stage, that the first eyes upon the downloaded material that's been converted into readable form should not be Mr Lawrence, for him to be the very first human to be able to read any communications that have been downloaded that fall within 1(a), to satisfy himself, firstly, as to whether any of them contain any legal professional privileged material that falls within 37(5) of the Act.

40 MR ROBERTSON: I have no difficulty with that, subject to one matter. It may be appropriate for that to be on an undertaking to not discuss the content of that with Mr Clements, because it may be that there's material there that forensic reasons shouldn't be discussed. But that's the only general reservation.

THE COMMISSIONER: Yes, well, the point is, however, it provides, well, it provides the opportunity (a) for someone to determine whether there is any legal professional privileged material falling within 37(5), and (b), there's no reason why that person couldn't be Mr Lawrence.

MR ROBERTSON: I don't seek to say anything against that at all, Chief Commissioner.

THE COMMISSIONER: All right. Thank you.

MR ROBERTSON: I understand Mr Lawrence wishes to be heard against the proposition.

10 THE COMMISSIONER: Yes, I understand that.

MR ROBERTSON: As a matter of procedure, I think his application really is an application for you to recall the order that you made yesterday for the production of the phone.

THE COMMISSIONER: Yes.

MR ROBERTSON: But I'll let him make any application that he wishes to make.

20

THE COMMISSIONER: All right, thank you. Yes, Mr Lawrence.

MR LAWRENCE: All right, thank you, Chief Commissioner. I wonder if we may have section 37(5) back on the screen, of the Independent Commission Against Corruption Act?

THE COMMISSIONER: Sure.

30 MR LAWRENCE: The flaw in the submission of my learned friend is found in the first line of subsection 5 in my submission.

THE COMMISSIONER: Yes, tell us what the flaw is.

MR LAWRENCE: In the second subparagraph, which reads, "the answer to the question would disclose, comma, or the document or other thing contains, comma".

THE COMMISSIONER: Yes.

40 MR LAWRENCE: The question then posed by the statute in the final words of subsection 5 is there is then an entitlement on the Australian legal practitioner or other person to refuse to comply. The entitlement to refuse to comply is enlivened by the circumstance not that the thing would disclose a privileged communication, but rather merely that it contains a privileged communication.

THE COMMISSIONER: Yes.

MR LAWRENCE: That means that the focus of the privilege that is retained in 5(b) is on the act itself of compliance. The act itself of compliance is undertaken by the production of the thing. It's different in respect of a question where the focus is on what the question would disclose. If the wording of subparagraph (b) was on what the document or thing would disclose, then my friend, my learned friend may have a better point, but in circumstances where the focus is rather on what the thing contains, there would seem to be almost an unanswerable conclusion that the Australian legal practitioner or other person is not, or is entitled to refuse to produce the thing that contains when there is privileged communications on the thing. There is not therefore a focus on what will be done with the thing after production, and the submissions that my learned friend has made about the ones and twos and encryption, sorry, zeroes and ones and a process of encrypting that information and what particular staff of the Commission will do and what I may be able to do in terms of reviewing any report first and so forth, all of those submissions relate to what happens after production of the thing, but the threshold question is whether the thing has to be produced, and more importantly perhaps, whether the thing contains privileged information. Now, in terms of that latter question, I can certainly if need be call evidence from my instructing solicitor, but I take it that it's accepted that it's not a mere hypothetical scenario that we're talking about, rather there is a WhatsApp chat group that is in the phone which contains privileged conversations between Mr Clements and his legal representatives.

THE COMMISSIONER: Well, Mr Lawrence, on that point, you made that statement yesterday and I of course unreservedly accept what you say, that it does contained legal professional privilege material in the WhatsApp chat group. I proceed on that basis.

MR LAWRENCE: Yes. And there may indeed also be, or are emails also. So to return finally in this respect to the terms of the statute, I think my learned friend accepts that "the thing" is the phone, and quite fairly put the question to be whether "the thing" contains. "The thing" in my submission, inexorably, it would be concluded, does contain privileged communications, therefore the question is whether the Australian legal practitioner or other person, which of course would be myself, who had the phone yesterday, or Mr Clements, is entitled to refuse to comply with the requirement, and the requirement of course, to go back to the earlier part of the subsection, is the requirement to produce. So those two questions in my submission almost inevitably it would seem are answered in a way that would lead to the conclusion that the privilege exists in respect of the phone.

THE COMMISSIONER: Yes.

MR LAWRENCE: In terms of responding briefly to some other things that my learned friend said, in terms of the analogy with a suitcase, of course if the suitcase was in possession of the witness, then the witness might be in contempt if the witness didn't open it and produce the thing inside it.

THE COMMISSIONER: I don't follow that, because if he was summonsed to produce a suitcase as described in the summons and that's done because there may be investigative material which suggests that there's something in that suitcase that could be relevant to the investigation, then the person concerned would be obliged to attend here with the suitcase in hand and hand it to an officer when called upon to produce it. The Commission's got to have some control over its own processes. In other words, its processes can't be put in the hands of others. What happens from that point on is the question that's now being addressed, and that is how is that suitcase then to be handled, and the contents of it.

MR LAWRENCE: I mean, it's not - - -

THE COMMISSIONER: As a matter of practicalities and common sense.

MR LAWRENCE: There might be various permutations one could tease out about how it might be accessed, but as an analogy it's fundamentally different because here the proposal, and I note that the draft order 2 starts with the word "if", but it's my understanding that the inevitable consequence of the order will be that the contents of the phone, whether in zeros and ones or not, will be permanently stored on an ICAC computer. So hundreds of privileged communications between Mr Clements and his lawyer will be permanently stored in a retrievable way on an ICAC computer. That is not a scenario that emerges in respect of the suitcase hypothetical because a suitcase would be opened, the thing that is sought would be removed and that would be the end of the matter.

THE COMMISSIONER: But the question as to the subsequent storage of what's been extracted, that is data which is the ones and zeros you referred to, which is then encrypted so that it can't be penetrated at all, goes only to the question as to whether there is any possible jeopardy, if you like, in the future.

MR LAWRENCE: Yes.

THE COMMISSIONER: So far as is humanly possible in this world, the answer to that would be no. It would be safely stored and could not be penetrated and even if it was stolen, it couldn't be translated into readable form.

MR LAWRENCE: We certainly don't accept that, certainly don't accept that.

THE COMMISSIONER: Well, in any event it goes to the later question, yes.

MR LAWRENCE: I should say also, Chief Commissioner, that to the extent that this is a discretionary exercise, which of course it is, Mr Clements has indicated yesterday that he is willing to sit down with the ICAC investigator to go through the phone to extract all of the relevant material and indeed, we brought copies of what we apprehended to be the relevant material here yesterday for that purpose. So there is no reluctance on his behalf to have his phone interrogated. Now, my learned friend has put it as an important matter, that it might be relevant in a trial process for there to be some evidence of the metadata and so forth, in other words it's necessary, it's said, for a potential criminal prosecution for a permanent record of the contents of Mr Clements phone to be retained for some indefinite period. If I might say from the bar table, I've been involved in many, many criminal trials involving text messages. I have never seen evidence of that nature led, and indeed Mr Clements, in any prosecution of anybody else, would be a competent and compellable witness and he could and, you might infer, would provide evidence of these text messages. They can be retained in a copied form and the Evidence Act speaks to the admissibility of documents and essentially inferences can be drawn from the face of a document. It is not a threshold of admissibility of a text message that this information be retained, and if my friend is making that submission, in my submission he ought provide authority for it. When I said that this is a discretionary exercise, I'm not suggesting that there is a discretion posed by section 37(5).

THE COMMISSIONER: No, I understand.

MR LAWRENCE: I'm rather saying, Commissioner, that it is well within your discretion to not pursue this evidence in this particular way, and rather to ensure that all of the relevant messages are retained and copied or copied and retained, and if my learned friend is able to then raise a serious contention that some future criminal trial, the prosecution is in some way in potential jeopardy, then he needs to make that submission. But all of the submissions from the bar table about the pressing need to retain the metadata and so forth, in my submission, have no real world application. And the suggestion that that is a forensic purpose that would warrant and justify the retention of privileged communications on an ICAC computer, in my submission, is a bold submission indeed.

THE COMMISSIONER: Well, just I might ask you this, prosecutions for corrupt conduct are unusual. Many trials of course involve activities that are daily fare in the criminal courts, such as drug-related prosecutions, as one example. In a prosecution for corruption, it's a specialised form of criminal prosecution in which of its nature the prosecution concerns proof of conduct undertaken in secret. That's the nature of corruption. So that, in all the trials you have dealt with, do any of those trials, or did any of those trials involve prosecutions for corruption?

MR LAWRENCE: I'm not sure if the answer will assist the Commission, with respect, given that the same rules of evidence apply, but - - -

THE COMMISSIONER: Well, no, simply you are relying upon your experience as to the, on the more practical question, as to whether it's either likely to be required to have strict proof of communications that were recorded on a device, electronic device. So you don't have to answer the question at all, but since you've raised its lack of use in criminal trials that you have been involved in, I ask whether you're speaking from experience
10 in relation to prosecutions of corruption, official corruption.

MR LAWRENCE: Yes, my instructing - - -

THE COMMISSIONER: Well, I mean, you don't have to answer the question, Mr Lawrence.

MR LAWRENCE: No, my instructing solicitor points out that this is not a matter that could lead to a trial for that sort of conduct, given that it relates to electoral law and so forth, but - - -
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THE COMMISSIONER: No, but the nature of the conduct we're investigating here can be characterised – as, I would think, in most if not all corruption matters – by secretive conduct. Communications, et cetera, electronically and otherwise, are pieces of a mosaic that has to be put together in order to be able to prove on circumstantial evidence whether corruption has occurred. And in my experience, evidence in electronic form as to communications can not only be useful but vital in establishing whether corrupt conduct has occurred, and if it is or has occurred, and findings are made by the Commission, and if such matters are referred to the
30 Director of Public Prosecutions, and if the director decides to prosecute, then it's likely that similar evidentiary considerations will arise, it seems to me.

MR LAWRENCE: Yes, it would certainly, in my submission, be useful if Counsel Assisting is relying upon the forensic purpose, that the metadata might be needed in a trial, that the Commission with its very broad experience in these matters provide an instance where such has been required in a subsequent criminal trial.

THE COMMISSIONER: No, no, I don't think it's being put on that basis at
40 all. But you have chosen the words "a serious submission" made in respect of retaining the data. As I understand it, the suggestion made by Counsel Assisting was not, could not be construed as anything other than being a serious submission, and I treat it as such, because one can't foresee of course whether there would be any prosecution, and if so, who the parties of the prosecution would be, and what the precise issues are. But it would be remiss, given that we have a responsibility under the Act, to consider referring matters to the Director of Public Prosecutions as the Act envisages,

a responsibility to ensure that if evidence comes to the attention of the Commission that it not be treated in a way in which the evidence could be either destroyed or lost, for the Director of Public Prosecutions then would not be able to deal with the referral on the basis of the admissible evidence that's available to the Crown.

MR LAWRENCE: Yes. And what I'm saying is, that if that is the forensic purpose, that it not be lost or otherwise inadmissible, that my friend should justify the submission and explain to us exactly why this information is
10 necessary to ensure admissibility, and a good way to do that, in my submission, might be to cite an example of a trial, whether for corrupt conduct or otherwise, or Electoral Commission matters, where that level of detail of metadata has been necessary to prove the content of a text message.

THE COMMISSIONER: Counsel Assisting as of today would not be in a position to possibly predict what might occur in the future, which is subject to the filter of the Director of Public Prosecutions' consideration, at all. So in my view - - -

20 MR ROBERTSON: Can I attempt to assist my friend and the Commission in this way, because he may have misunderstood an aspect of my submissions. I seek the metadata for this investigation. To take an example, whilst my learned friend in support of his submissions at the level of discretion said, well, we've printed out some documents, I wasn't given notice of that in advance of course, they were produced pursuant to a direction that you made, Commissioner, but putting that to one side, taking example of the text message at MFI 21, they don't contain the times at which the particular text messages have been sent. That's an example of
30 some of the metadata that sits underneath the substance of the communications that I seek and which is why I seek more than simply photocopies of parts of the material, I seek the data that underlies it. And one knows from experience, particularly in this Commission, that the metadata can tell many interesting things, particularly when they're read in the context of other objective evidence, because one important matter as you've just alluded to, Chief Commissioner, particularly in a matter of the kind that's before the Commission, is the timing of certain events are matters of some relevance and all those in the room and those observing would have seen that I've put particular attention on times at which particular things have been said to occur, for example their proximity to
40 matters such as when summonses from this Commission have been served. So to be clear to my learned friend at the Commission if it wasn't otherwise clear, I'm not suggesting that metadata is relevant only to a possible prosecution in the future, I say it's relevant to this Commission's investigation.

THE COMMISSIONER: Yes, very well. Yes, Mr Lawrence.

MR LAWRENCE: These issues of the forensic purpose of why the thing is sought and what measures might be put in place to protect privilege in the event that the phone is interrogated, are of course all irrelevant if one accepts that the threshold question is the one posed by the statute, and the one posed by the statute is not what the phone would disclose or what tendency it has to disclose in light of what measures might be put in place, rather the question posed by the statute, and this is really what my friend needs to respond to in my respectful submission, is does the thing contain privileged communications, which really is two questions, what is the thing that is being produced and does it contained privileged communications, and then the next question is, what is meant by the production of the thing. Our submission of course is the production of the thing is the process of transfer of custody of the thing from me to those who assist the Commission. And that is the statutory question posed and my friend's characterisations on a policy level of the outcome, that it's startling or it's absurd or so forth, is no answer to the clear words of the statute and really in my submission it couldn't be clearer. And look, this is of course a 1988 Act, drafted not necessarily in light of the advent of the smartphone and so forth. Now, that's an argument for legislative amendment, that's not an argument to read out words or construe the statute in a fundamentally different way to how it is drafted and was intended to operate.

THE COMMISSIONER: Well then, let's just finish this segment by considering the approach to construction of section 37(5). You would accept, would you not, that the fundamental principle of construction of a particularly provision in an Act is to see the provision in context?

MR LAWRENCE: I would say that the fundamental starting point is the natural meaning of the words.

THE COMMISSIONER: And to get the meaning, the fundamental principle of statutory construction is that the provision must be construed in its statutory context, agreed?

MR LAWRENCE: I would agree that is an important principle.

THE COMMISSIONER: There's a wall of authority which supports that proposition. I can provide you with the references if you want them.

MR LAWRENCE: Oh, I certainly agree, that is indeed a principle of statutory construction. Whether it's the fundamental one, I am not so sure about.

THE COMMISSIONER: Well, I think you'll find the authorities do emphasise the importance, the absolute importance of not construing provisions in isolation but in their statutory context.

MR LAWRENCE: Oh, indeed. It's a fundamental starting point, yes.

THE COMMISSIONER: Well, we're not going to quibble over words. We I think now are in furious agreement with one another.

MR LAWRENCE: Yes.

THE COMMISSIONER: That being the case then, what you haven't addressed is the statutory context. Now, Counsel Assisting has done that but firstly I think statutory context also includes the nature of the nature of
10 the functions of this Commission. They are set out on the Act, in particular section 13 and the first principal function, as distinct from other functions, is for this Commission to investigate. It has been charged with the principal function of investigating any allegation or complaint, that or any
circumstances which, in the Commission's opinion imply, amongst other things, corrupt conduct. The provisions of section 37 fall within that portion of the Act that deals, amongst other things, with powers, powers for use in
public inquiries such as the present. It is necessary then to go to the provisions of which section 37 is located in order to see exactly what is the
statutory context that must be taken into account. The provisions that you
20 rely upon, section 37(5), do not stand alone. They are but one, it constitutes one of now five subsections, it used to be six. The sixth had been repealed. But the section in which section 37(5) finds its place provides this
Commission with extremely extensive coercive powers. The legislature does not, generally speaking, lightly contain a provision for the abrogation of fundamental right of the citizen. It has done that however. It did from
the outset when the Act was established in 1988, and that is to take away the right at law to refuse to answer questions, produce information, as it says whether it's a document or other thing, to this Commission and that is
perhaps the most important statutory context on which 37(5) has to be
30 evaluated. Would you not agree?

MR LAWRENCE: I would agree that that is an important context but it does, Chief Commissioner, seem to be a curious deployment of the principle of legality to say other legislature has seen fit to abrogate a right therefore the abrogation will be taken to an extent that is beyond the words of the statute.

THE COMMISSIONER: No, no. Well, I think you haven't addressed section 37(2) yet. That's why I raised it as part of the essential statutory
40 context. So I think you must, with respect, not ignore but you must focus upon 37(2) because the reason the legislature has given such an extensive power to this commission is readily understood and that is to say the investigation of corrupt conduct, which is often a secret crime or a secret activity of a non-criminal nature, the proof of which is notoriously difficult.

MR LAWRENCE: Yes.

THE COMMISSIONER: It does require in most cases proof by way of circumstantial evidence, not sometimes wholly but it plays an important part. The legislature has validated and empowered the Commission with this extraordinary power because that's the nature of the task of investigating secret activity as otherwise the Commission would be hard put to get to the bottom of a lot of matters, and in the public interest it is required as one of its principal functions to identify all the known circumstances, be it by question, be it by production of documents or be it by production of other things. So insofar as section 37(5) may be given a broad construction, no, you can't touch that suitcase because it contains privileged material, no, you can't touch that mobile phone because it contains privileged material, that's the broad interpretation, you might say the literal interpretation, but you have to say that - - -

MR LAWRENCE: I'd say literal rather than broad.

THE COMMISSIONER: - - - but if you say that you have to then hold back and say but it only quarantines legal professional privilege in a very limited class. That is to say, communications for the purpose of providing or receiving legal professional services in relation to the appearance or reasonably anticipated appearance of a person at the compulsory examination or the public inquiry.

MR LAWRENCE: Indeed. Indeed.

THE COMMISSIONER: That has been carved out if you like - - -

MR LAWRENCE: Yes.

THE COMMISSIONER: - - - as a very narrow exception. My experience in royal commissions, Royal Commissions Act makes no provision to protect that sort of information – that is, information for preparation for the royal commission – and yet practice has been in my experience, and it has always been honoured as it were, not to require such material to be produced in the royal commission even though there's no statutory protection. But when you come back to this statute, it seems that what has to be addressed is whether accessing a thing is permissible there's two mechanical aspects of the process. One is to produce the thing under a summons, let into this hearing room and produce it, and the next thing is access to the contents of the suitcase or the phone or whatever it may be. And in relation to the question of access, if it's unlocking the suitcase and opening the lid, that's not prohibited. If taking the three files out, two of which may contain highly probative evidence of corrupt conduct, one is marked legal professional privilege, to say that because the three files unfortunately happen to be all part of a package in one suitcase this Commission can't touch or require to be produced so it can touch and read the other two files would seem to throw up the question that the powers of the Commission would be rendered nugatory in many situations, especially

today, with mobile devices which are like the suitcase capable of carrying more material including legal professional privilege. Electronic devices are now the commonplace means of humans communicating with one another. To say that this Commission would be restricted, as you submit under the section, would very much remove out of play the Commission's reach highly probative material which in the public interest it should have but on your argument it can't touch, and I think I'm just putting that argumentatively not by way of a predetermination of the issue but - - -

10 MR LAWRENCE: Certainly.

THE COMMISSIONER: - - - they are the real issues I think.

MR LAWRENCE: Yes.

THE COMMISSIONER: And once you factor those in you say, well, if the section, that is 37(5), is capable of broad construction or a narrower construction, what in statutory context is the construction that should be adopted.

20

MR LAWRENCE: Yes.

THE COMMISSIONER: It seems to me that whilst you have put forward many points which would urge for the broader construction, the whole suitcase, the whole of the phone is off limits because it contains legal professional privilege has massive ramifications.

MR LAWRENCE: I don't necessarily disagree with that, yes.

30 THE COMMISSIONER: And I think from a practical point of view, the practical consequences of interpretation are not irrelevant and help direct whether a broad or a narrow construction should be required by virtue of applying the principles of interpretation.

MR LAWRENCE: Yes. The only things I would say, Chief Commissioner, is of course the question posed by the statute is not about access, it's about production and the focus in my submission should remain on that.

THE COMMISSIONER: Right.

40

MR LAWRENCE: In terms of applicable principles of statutory construction, there is a danger in my submission of taking a legislative purpose and then adopting an approach which says the thing or the interpretation that most advances that purpose is the preferable one because that must have been the intention of the legislature. That's a danger for example in the construction of criminal offences where a criminal offence might have a purpose to prevent a particular sort of activity, but the legislature in drafting criminal offences is not seeking only to achieve the

elimination of crime, they're also seeking to balance the competing interest and liberties of the subject for example. So the interpretation that most advances a purpose is not necessarily the intended interpretation. There is a similar danger in respect of a provision that plainly seeks to preserve a longstanding right or privilege. It is not in my submission to be suggested that simply because the Independent Commission Against Corruption Act seeks to achieve a purpose of exposing corruption and other things, that one would take an interpretive approach to section 37(5) that most advances that purpose, because section 37(5) is about drafting and preserving a
10 fundamental right, not about achieving one particular social outcome.

THE COMMISSIONER: All right. Thank you.

MR LAWRENCE: And in terms of competing principles, I'm a little bit handicapped, Chief Commissioner, because my friend hasn't propounded his alternate right of construction. And for example, my friend has not said how it is that handing over a phone that contains privileged communications is not to produce a thing that contains privileged communications. So if my friend can propound the alternate broader construction, then I can certainly
20 respond, but he doesn't seem to be doing that, with respect. He seems to be propounding a completely different section.

THE COMMISSIONER: But I think the point he made was that legal professional privilege attaches to the communications, not to the document in which the communications might be found et cetera. That's a fairly fundamental point. The communications are the things that are privileged, not the mode by which the message or the communication is made. In other words, it wouldn't matter if it's a document, it wouldn't matter if it's some other object that contains the advice for example, the legal advice, it's the
30 communication that's important. It seems here that on the material I have before me that the mobile device we're talking about contains metadata, cannot be read. The phone itself, the data on it, does not disclose the communication and it's necessary for mechanical means to translate the data into readable form and then the communication is made in words. Now, up till that stage, there is no thing containing a communication, it contains metadata, which is not the same.

MR LAWRENCE: I think there's a misunderstanding, I think there may be a misunderstanding then, because my understanding, Chief Commissioner,
40 is that if you hold the phone and you enter the password and you go into WhatsApp, you can read the privileged communications.

THE COMMISSIONER: Yes. Well - - -

MR LAWRENCE: And that's the thing that we will be handing over.

THE COMMISSIONER: Well - - -

MR LAWRENCE: And we've already given the password too.

THE COMMISSIONER: Yes, that's true. But what is required is production of an original record, the communication, which contains not only the words, the message between client and lawyer for example, but other material which is between non-lawyers, communications by SMS for example. As Counsel Assisting has observed, that material, it's the date, the time, the other metadata surrounding it that makes it valuable from a probative point of view so that it is, when produced, not in readable form. It depends on what mechanical processes that they apply at a later point in time to be able to access any communications. Now, between the time of production, which has occurred, and the beginning of any process, however made, to access information on the phone, there is a regime that would be implemented. You would know with certainty that the only person who would actually read the communication, once they'd been identified from the metadata, would be yourself, to satisfy yourself whether there is or isn't legal professional privilege there and, if there is, it'll be dealt with accordingly. This is not unlike the process that occurs every day, as you know, where police agencies execute search warrants, take away with them the whole computers to be forensically analysed and an independent lawyer may be brought in to determine whether that contains privileged material or not. It's a process that protects privilege. The process of this Commission protects privilege. There is no risk at all of there being any material converted into readable form that would occur. The only readable form of material would be that which falls within 1(a). The only person who will get to see it will be you, in readable form, so you can make a judgement. If, for example, there is no claim for legal professional privilege, your client's rights are being entirely protected, preserved, in terms of information, communications, relevant to this inquiry, this investigation.

Departing from the statutory question for the moment, the real question is, is your client's legal professional privilege placed at risk, and by the process of the stages of opening the suitcase or opening the phone, depending upon what is then done to convert it into readable form, the answer has to be a resounding, so far as I can see and what I am told, no. It could not occur. That is to say no other data on the phone will be converted into readable form. No other person will get to see the material that had been converted by the extraction process in readable form but you, and subject to you having that opportunity and being heard upon it, the process of extraction has run its course. It'll be secured by encryption and storage so that in no way, and from a practical point of view and moving away from the statutory question, is your client's privilege being put at risk. In fact, it's being safeguarded at every step of the way. So at the end of the day, the question really is, well, yes, I will determine of course the statutory question, but at the end of the day, your concerns are being fully met, legitimate concerns, being fully met and I appreciate your client is willing, as you say, to have the alternative exercise of just inspecting the phone or having him go

through it, but for reasons which are apparent it's necessary that it be done forensically. I won't go back over that ground. So - - -

MR LAWRENCE: What if I might say this, Chief Commissioner. What would happen if a federal agency served a warrant on ICAC for the phone?

THE COMMISSIONER: Well, if it was produced and if there was legal professional privilege on it, then the court that issued the summons would be hearing the same argument now.

10

MR LAWRENCE: There is no possibility in my respectful submission of a guarantee to any citizen of the integrity of security of information in the digital age, and on behalf of Mr Clements I cannot blindly and perhaps naively accept assurance that, in my opinion, are unable to be given with absolute and categorical assurance. This is a proposal to store privileged communications on an ICAC computer in circumstances where the citizen is willing to provide the messages, in circumstances where only a speculative proposition is advanced as to why it's necessary.

20

THE COMMISSIONER: All right, thank you.

MR LAWRENCE: And there's no expert evidence that has been led as to any of these matters.

THE COMMISSIONER: Thank you, Mr Lawrence.

MR ROBERTSON: There's a few things I need to correct. There's no suggestion at all that it will be stored on an ICAC computer, as the proposed directions make clear. It's by reference to a storage device, to be put in a secured storage facility. Put another way, a locked cupboard or something along those lines. My learned friend's submissions proceed on an unestablished premise, namely that the thing, the phone contains privileged communication. In my respectful submission, that premise is false. At most it's a device, it's a thing, from which evidence of a privileged communication may be capable of being produced. He's right with respect to focus on the word "contain" in section 37(5), that's the best word he has in that subsection. But the remainder of his argument simply proceeds on a premise that because if his client or he took steps to turn the ones and zeroes into a readable form, putting in a passcode, scrolling down to the right place and having a look at it, he could see it, that it follows from that that within the meaning of the statute, there is a privileged communication contained on that device. In my respectful submission, that's not the correct construction of the word "contain", particularly read in light of the context to which you've drawn attention, Chief Commissioner, to which I've drawn attention as well.

30

40

There's one other aspect of the context that I wanted to draw attention to in chief by reference to Cripps, but it wasn't then available to put on the

screen, but I'll do it now, PDF page 25. And it's to the second reading speech, which was quoted on PDF page 25, there's some italicised material starting at about point 7 of the page. But if I can draw particular attention, about point 8 of the page, there's a sentence starting, "Honourable members should note." It says, "Honourable members should note that in order for the new provision to apply, the communication must be one that would be privileged under the general law of legal professional privilege." In other words, the parliament's not attempting to reinvent the wheel on the narrow form of reinstated legal professional privilege. Obviously enough, as most
10 in this room, at least many in this room have had the experience of, from time to time there will be documents in respect of which that may be subject of a subpoena or a court order, where part of the document may well be privileged and part of the document may well be not. And the answer to that of course is to produce a redacted document. It's not available, for example, to say, well, there is evidence of a meeting with a board of directors where there's strong evidence of unlawful conduct, but there was a lawyer in the room for the last five minutes, and that's recorded in the minutes, and therefore that's a ground for refusing to produce. That just
20 provides an example of the absurdity that would be led in the adoption of my learned friend's approach to construction. The better approach is to say that the ones and zeroes do not contain a privileged communication, but that the Commission should take all steps to ensure that the ones and zeroes are not used to produce evidence of a privileged communication. And I've provided a form of direction that in my submission would achieve that objective.

THE COMMISSIONER: Mr Lawrence, did you have any comment to make or want to make on the proposed direction, if I'm against you on the statutory point?
30

MR LAWRENCE: Yes, only to say that in the event that the direction is made, we would seek effectively a stay on it, and that we have the opportunity to consider testing the correctness of it.

THE COMMISSIONER: All right. But in terms of the contents of paragraphs 1 to 3, you have no, there's nothing there that you want to draw attention to?

MR LAWRENCE: I haven't had sufficient time to properly consider it.
40

THE COMMISSIONER: All right, well, perhaps you could let us know. I will give a ruling on this during the course of the day, but I'll allow you the opportunity to consider the proposed directions.

MR LAWRENCE: Certainly. Thank you, Chief Commissioner. I should say, Mr Clements just went to use the facilities. He'll be back very shortly.

THE COMMISSIONER: All right. Now, is there anything we can do?

MR ROBERTSON: I'm not sure that there is, other than to indicate that the prospects of being able to get to Mr Wong this week are diminishing rapidly.

THE COMMISSIONER: Yes. All right, well - - -

10 MR ROBERTSON: I'll make some enquiries over the luncheon adjournment, and I will speak to those of my learned friends who are relevant, with a view to trying to reschedule in what's otherwise a busy calendar, as I understand it, for this Commission.

THE COMMISSIONER: Yes, thank you. Mr Clements.

MR ROBERTSON: I recall Mr Clements.

THE COMMISSIONER: I'll readminister the oath. If you wouldn't mind standing, please, Mr Clements, and take the oath.

THE COMMISSIONER: The declaration I made under section 38 yesterday in respect of Mr Clements' evidence continues to apply to his evidence today.

MR ROBERTSON: Mr Clements, you attended the Chinese Friends of Labor event on 12 March, 2015, is that right?---Correct.

10

And you sat at the head table, correct?---Yes.

And Mr Huang Xiangmo was at the head table, correct?---Yes.

Do you recall whether Mr Xu was there?---No.

You don't recall or you think he wasn't there?---I don't recall he was there, but I doubt that he would have been.

20

I take it you spoke to Mr Huang during the night?---I would have said g'day.

But did you have any conversations more than that?---I don't know.

Do you happen to recall whether there was an interpreter there for Mr Huang?---Yeah, I can see from the photo that Holly was there.

Is that to say you've got a recollection that Holly was there or is it just that you've seen the photo?---No, just from the photo, yeah.

30

Was it common for Ms Huang to give translation services when she was at an event?---Yes.

And does it follow from that that if she was at an event, at least in your experience, it would be less likely that Mr Xu was at the event?---Yes.

Do you ever recall being at an event at which Ms Xu and Mr Xu were both present? I'm sorry, I think I've - - -?---Ms Huang. Ms Huang and Mr Xu.

40

I think I've accidentally married the two of those. I'll try again. Do you recall any event during the course of which Ms Huang and Mr Xu were both present?---No, I just don't know.

What role, if any, did you have in the organisation of the Chinese Friends of Labor event of 12 March, 2015?---I, I got, I got Bill Shorten to come along and speak.

Did you take any other steps in connection with that event?---Not that I recall.

You might, for example, have been at a Fundraising Committee event, Fundraising Committee meeting at which the event was discussed in at least general terms, do you agree with that?---Look, I don't recall that, no.

10 But you did attend at least some Fundraising Committee or group meetings in the lead-up to the election of March of 2015, is that right?---I think I would have, yes.

But you don't have a specific recollection of discussing that particular event, is that right?---No.

Did you have any discussions with Ernest Wong in advance of the event regarding the arrangements for the event?---Yeah, he, he, he was, he, he, he asked me to get Bill Shorten. He couldn't get a speaker, he couldn't Bill to agree, so he asked me to assist.

20 And so there was a few communications between you and Mr Wong in relation to that matter.---That's right, yes.

Any other communications with Mr Wong regarding the event that you can now recall?---No, not that I can recall.

30 Focusing on the event itself, the Commission's heard evidence from some to suggest that there's a fair bit of money floating around, fair bit of cash floating around on the event, with people paying for seats and tables and things of that sort. Do you recall seeing anything of that kind?---No.

40 At least as a matter of practice and procedure, who's responsible on the night for collecting any cheques, credit card payments or credit card forms and cash?---So there'd be a table out the front, there was, there was a table out the front and at an event like this you would have a mix of Young Labor people and you'd have to have some Chinese Friends of Labor people there because some of the people wouldn't be able to speak English, and so there would have to be a bit of a mix there. There'd be a list of where you were sitting, like a, you know, to find your table, and it would be at the front of the restaurant.

40 Who was in charge of those Young Labor people and Chinese Friends of Labor people on the night?---That would be Kenrick Cheah.

So is it right that, at least as a matter of practice or procedure, the person who's in charge of what we might call the money collection is Mr Cheah, is that right?---Overseeing it, that'd be correct, yes.

By overseeing it, you mean he's ultimately supervising it, but the actual exercise of collecting cheques and credit card forms and the like is done by Young Labor people, perhaps with assistance of Chinese Friends of Labor, is that right?---That's right.

And then whose responsibility is it to bring the cheques, credit card forms and cash back to head office?---Look, in my view it would be Kenrick.

10 When you say in your view, that's your expectation at the time as general secretary. Is that right?---That's correct, yep.

Did you make that expectation clear to anyone in advance of that happening?---I, I, oh, look, I just wasn't involved at that level.

And who do you say was responsible for ensuring those sorts of matters? ---Well, I mean, Kenrick reported to Kaila but it would be a, it would be a matter of practice I, I, I would assume, Mr Robertson.

20 Well, just to be clear on that matter of practice. Is it the practice that for Labor Action Committees, it's the community relations director who is in charge of ensuring that the money finds its way back to the Sussex Street office, is that right?---Yes.

And when I say money, I mean that in the broad sense of cheques, credit card forms and cash itself?---Yes, yes, yes.

30 Do you recall whether any credit card transaction's actually happened at the event or is the practice, get a form that has a credit card form and bring it back to head office in order to do it?---Look, I think you fill a form out and put your credit card details in. That would be the expectation. I'm not sure if they would have had, like, a thing where you could make a credit card where you could pay, where they could process it there. I just don't know.

But at least from your perspective you'd expect there to be a mix of payment methods, I take it? Some people might pay credit card and some people might pay it by cheque, some people might pay by cash. Is that right?---That's correct, yes.

40 And then what about forms and receipts? Was there also at least an expectation as general secretary for the forms to be obtained with the cash or the cheques or the credit cards on the night?---Yes.

That was your expectation?---Yes.

But again, did you make that clear to anyone in advance of the event?---As I say, I wasn't involved at, at, at that sort of level.

So the answer to my question is no?---No.

But at least your expectation would be forms and cash should come at the same time. Is that right?---Yes.

But you're at least aware, and I think you accepted this yesterday, there were circumstances in which money – sometimes cash, sometimes credit cards, sometimes cheques – would find their way to head office but there wouldn't be an accompanying form. Is that right?---That's right, yes.

10 But is it right that you made clear within the office that forms needed to be obtained in relation to money of that kind?---Yes. Before it was banked.

You've said that to people on a number of occasions. Is that right?---Yes.

You've said that to Mr Cheah, for example?---Yes.

You said that to Mr Wong?---Oh, I don't recall saying it to Mr Wong. I may have.

20 Do you recall saying it to anyone else within the Sussex Street office?---Oh, I would have said it to Maggie. I would have said it, I would have said it at, at, at a, at a, I probably would have said it at, like, an organiser meeting or something early on.

Was it your expectation as general secretary that when money was received on the night – a cheque, a credit card or cash – that a receipt would be provided, some sort of a receipt be provided immediately or was it your expectation that that might happen at some later stage?---Look, I, I just didn't know the, the, the specific way that that, that that, that would happen.
30 I, I mean, obviously receipts needed to be issued. I'm, I'm not, I don't recall how and when those receipts were issued.

So at least at the time of the 12 March, 2015 event, you weren't aware of the procedures that had ordinarily been followed in relation to events of that kind. Is that right?---I just, I mean, how, how the receipts were – how the receipting process worked, I, I just didn't know.

But to be clear, when you became general secretary you didn't completely reinvent the wheel in terms of practices, in terms of donations and things of that kind?---Oh, no. No, no.
40

There were Chinese Friends of Labor events that happened before you became general secretary, correct?---Oh, yes.

And is it right that you, at least in advance of the March 2015 event, didn't take any steps to try and change the hitherto or the previously established practiced or procedures within head office. Is that right?---I mean, the forms, the forms, well, I think the forms were – no. The forms would have

been important before my time as well because of legislation about prohibited donors came in before that. So the forms, other than the, when they changed the law in relation to being able to take donations from corporations, in the Business Dialogue area, I do recall being involved in the changing of those forms.

10 So there may have been some changes between becoming general secretary and the Chinese Friends of Labor event of 12 March, 2015 in relation to forms but otherwise, you left the established practices in place?---Yes, I did.

And at least at that point in time, you weren't aware of how the mechanics of it worked, you get a receipt on the night, does it go back to head office and you get a receipt a few days later, something along those lines?---Yeah. That's right, yep.

But it was at least your expectation that a receipt would be issued to the donors promptly. Is that right?---Yes, and it still is but it doesn't happen.

20 And when you say it doesn't happen, what's your understanding as to why it doesn't happen?---Well, I donated to the Labor Party at the last state election and got my receipt two days before I was required by law to fill out a declaration and disclosure.

Did you ever give anyone permission to send tax invoices or receipts rather than to the donor to someone else?---No.

You were never asked for that sort of permission?---No.

30 You gave a very firm response yesterday when I asked you whether you had given anyone permission to have an unofficial agreement that money from a Labor Party event ends up in some other place. Were you ever asked to approve an arrangement of that kind, in other words, we'll have an event but the money will be deposited somewhere other than an Australian Labor Party account?---Not that I recall, no.

Mr Cheah, for example, didn't come to you and say look, Ernest wants this unofficial agreement - - -?---No.

40 - - - with us that we can earn some money from the Chinese Friends of Labor event and I think it's fair that it goes to friends of Chinese community. Nothing like that?---No.

And if you were invited to give such approval what would you have said? ---I would have said if the Chinese Friends or whatever it's called wants to raise money it can do it itself and not use the Labor Party.

Do you have any recollection of seeing large amounts of cash at the Chinese Friends of Labor event on 12 March?---No, I don't.

You must have seen at least some cash with people paying for tables and things of that kind.---I would have briskly walked past that table, Mr Robertson.

Why would have you briskly walked past that table?---Because I would have been getting in there and getting out and I wouldn't have been standing around at that table.

10 Because you're saying you're at the head table, you've got responsibilities that day and you're not spending your time focusing on who is paying what. Is that what you're saying?---Well, I'm, there's a table where people are paying to get in and I'm not paying, I'm walking in.

But is it right that at least any payments that you could see on that night were payments made at the table at the entrance as distinct from at the tables at which you sit and eat?---Yeah. Look, people may have paid for like, raffle tickets or something but usually the head table people don't buy raffle tickets.

20 The Commission has heard some evidence that there was an envelope on individual tables where people put in amounts of money in order to pay for their seats or their tables. Do you have any response to that evidence?---No, I don't recall that.

You don't recall that happening?---No.

30 You don't recall, other than in respect of things like raffle tickets you don't recall seeing any substantial amounts of cash being handed around the main floor, for example?---No.

You didn't see, for example, a large bag of cash being given to Mr Wong at the head table?---No.

Do you recall how late in the evening it was when you left the event?---I got out early.

40 So you weren't there during, you know, what I might call the wash up when people are starting to tidy up things and that sort?---I don't even think I stayed for the main.

Do you recall whether you left before or after Mr Huang?---I don't know when he left. I think, I think I, I, I, my recollection is when they started introducing the candidates and the chaos starts I, I got out.

What's the chaos you're referring to now?---Oh, that room is terrible for speaking in.

Within a few days of the event of 12 March, 2015 do you recall whether you had any communications with Mr Wong, and I mean that broadly including you might have bumped into him at an event or you may have had a telephone call or seen him in person?---It's an important question. I'm going to ask you to start again because I wasn't listening for a second.

10 The Chinese Friends of Labor event was on 12 March, 2015, just to emphasise that. That I think was the Thursday of that week. Do you recall whether within say a few days of that event you had any communications with Mr Ernest Wong?---I had lunch with him on the Sunday following the dinner.

And what was the subject matter of that discussion at the lunch?---Well, it was at Mr Huang's house.

The one in Mosman?---Yes.

20 And do you recall what at least in general terms you discussed during that meeting?---It was a quick lunch. I recall a few things. I recall when you go to Mr Huang's house for lunch and any, any sort of Chinese person, any Chinese thing like this you start off with a cup of tea in the tearoom. I remember in the tearoom that I asked through Mr Wong because he was interpreting, there was no interpreter that day. Mr Wong interpreted himself. I remember asking about Li Ka-shing who is a gentleman who is a, who is a Hong Kong based billionaire, one of the richest men in the world, and I was running TV ads which had his face on them. Didn't name him but saying that the Liberals were going to sell the electricity network to a foreign billionaire. He bought the South Australian one. I've got a phone call from Mr Bolkus, Nick Bolkus, who is his lobbyist, a friendly phone call
30 about the TV ads and I remember asking Mr Huang if he knew Mr Li Ka-shing and, you know, what he was like, and I remember that specifically. I remember talking at the actual lunch about we were drinking Grange and I couldn't understand why they don't drink white wine with seafood and trying to sell them on a particular type of French white wine.

Did you have any discussion about the Chinese Friends of Labor event that had just gone?---Look, I, I don't recall.

40 Did you have any discussions about donations?---I don't recall.

After that meeting do you recall when you next had any communications with Mr Wong, Mr Ernest Wong?---Mr Ernest Wong, yes, I do. I, I went to the football that afternoon, it was a Sunday and it was during the campaign but we were negotiating with the NRL over an announcement and I did go to the football. I had a few drinks at the football and afterwards me and some of the other guys from the campaign wanted to go to the Golden Century for dinner and it was Chinese New Year and we couldn't get in, and

so I called Ernest and asked him if he could help me get into the restaurant and he did.

Did you have any discussions with Mr Wong about anything to do with donations?---Oh, no, it was a quick phone call, "Listen, we can't get in, do you know anyone?" And he said, "Yeah, yeah, no problem." And then someone came running down the stairs and got me into the restaurant.

10 And what was your next communication with Mr Ernest Wong after that point in time?---I, I just don't recall.

Did you have, other than what you've said, did you have any communications with Mr Ernest Wong between the last one you referred to and the state election, which was on 28 March, 2015?---Oh, yes, yeah. Look, yes. It would have, I talked yesterday about a Chinese press conference he did when it got really bad with the, the, the Liberals on WeChat smashing us in the Chinese community and he, he did a Liberal, he, he, he did a Chinese media conference. I think I might have talked to him about that, but that would have been a phone call.

20

But again, any question, any discussions about donations, Chinese Friends of Labor or anything of that kind?---No, no, no, no.

And is that the last one you recall in that period between the Chinese Friends of Labor dinner and the election of 28 March?---That's all I can recall, yeah.

30 Did Mr Ernest Wong during that period say words to the effect of, "Mr Huang is going to bring in the money for the Chinese Friends of Labor event," to you?---No.

You're quite sure about that?---Yes.

Did he ever say anything to that effect to you?---No.

So are you saying that no one gave you advance notice that \$100,000 in cash was going to arrive at the Sussex Street office in April of 2015?
---No one.

40 Are you quite sure?

THE COMMISSIONER: Just think, just pause there, just think about that question again, would you?---Well - - -

MR ROBERTSON: No one gave you any express indication, implied indication, nod, anything to suggest that a substantial amount of cash in connection with the Chinese Friends of Labor event of March of 2015 was

going to find its way to the Sussex Street office in or about April of 2015?
---Did you ask that question differently the second time?

I did ask it differently the second time to make it clear that I'm asking it in the broadest possible way.---I don't recall any conversation, and I would recall something like that.

10 Well, what about something more than a conversation, was there any indication from anyone, be it within the Sussex Street office or otherwise, that an extraordinary event in the life of the Sussex Street office was imminent, someone coming in off the street and delivering a bag containing a substantial amount of cash?---No.

Not even a reference without any reference to Mr Huang or anyone else, a substantial amount of cash is going to come in the door?---I think I'd recall that.

20 Now, you now know, don't you, that \$100,000 in cash was banked in the NSW Labor bank account, half in the NSW Labor bank account and half in the Country Labor bank account, on 9 April, 2015.---I do.

When did you first find out that there was \$100,000 in cash to be banked?
---To be banked?

To be banked or has been banked, either way. In advance or before.---The first I ever, the first I recall that was when Mr Johnston put it to me.

30 Well, you must have known, you must have known at least before that. You must have at least known that a substantial amount of cash had been banked in the two parties for which you are the general secretary. You must have known that before Mr Johnston told you that, surely.---No.

You'd agree, wouldn't you, that it was an unusual event in the life of the Labor Party for \$100,000 in cash to arrive in a single delivery on a single day.---I assume that would be, yes.

THE COMMISSIONER: Sorry, are you agreeing with that proposition?
---Yes, I would agree with that, yes.

40 It would be an extraordinary occurrence.---Yes, I, I, I've never heard of that.
I - - -

No, no, just listen to me. Just listen to me.---Sorry, sir.

It would be an extraordinary occurrence for \$100,000 to arrive at Sussex Street and be banked in one lot.---I've never heard of that happening before.

Do you agree with my description that it would be an extraordinary event in the history of Sussex Street for such a thing to have occurred?---Yes.

And as general secretary, of course, it was your responsibility to keep informed about the financial standing and welfare of the NSW Branch of the Labor Party.---Sorry, could you ask that again. I wasn't, not I wasn't listening, I was waiting for the - - -

10 As General Secretary Labor NSW Branch, it was your responsibility to ensure the financial standing and welfare of the branch.---Ultimately, yes.

And so that you could be sure that its financial welfare was in good shape, you'd be kept regularly informed as to, for example, what its income or expenditure had been in a particular period?---Overall, yes.

And how were you kept informed about such matters?---Well, I had briefings before and at the Finance Committee.

20 At the - - -?---Finance Committee.

Finance Committee. And you would have become aware, would you not, had \$100,000 been banked on 9 April, at least by the next Finance Committee meeting, that that had occurred?---Not necessarily, Commissioner.

30 But this would be, as I think you've agreed, an extraordinary event if it did happen, that \$100,000 in cash came into Sussex Street and was banked on 9 April.---Someone would needed to have been, to have told me, Commissioner.

Just answer my question.---Yes.

You've agreed, haven't you, that such an event would be an extraordinary one.---Yes.

And had it occurred, it would have come up, that you'd be made aware of the fact that that had occurred - - -?---Only if somebody told me.

40 - - - the next Finance Committee meeting.---Only if it came out at the Finance Committee meeting.

That's what I'm saying. It's inevitable that you would have found out about it the very next Finance Committee meeting that took place after the \$100,000 cash was taken and banked.---It would have to have been drawn to my attention.

MR ROBERTSON: But are you saying that no one drew to your attention around about 9 April this extraordinary event had happened, that \$100,000

has waltzed in off the street and its found its way into the Sussex Street office?---I would remember that and I don't.

No one, Mr Cheah didn't come to you and say, "Look, look, look what I've got here. I've got a bag of \$100,000 in cash. I'm about to count it"?---No.

So you're quite sure that Mr Cheah had no discussions with you in relation to that matter, is that right?---I'd recall that.

10 Well, when you say "I would recall that" do you mean you're quite clear in your mind that Mr Cheah had no conversations of that kind with you, is that right?---That's correct.

So let's be very clear. Mr Wong, Mr Ernest Wong, did not say to you either on 12 March, 2015 or up to and including 9 April, 2015, "I've got a large amount of cash that's coming into the Sussex Street office," words to that effect?---No.

20 No time during that period at all?---No.

Didn't call you up, send you a WeChat message, whatever, and say, look, get ready, you've got a substantial amount of cash coming that I have organised, or that perhaps Jonathan Yee has organised, is that right? ---That's right.

And Kenrick Cheah didn't say to you, "Look, I've got a big bag of \$100,000 in cash, it's been a great result in the Chinese Friends of Labor dinner"? ---No.

30 At least after the election, you must have been careful to ensure that the money had come in from the various fundraising events associated with the election, would you agree?---Well, if I was told that there was money missing.

40 No, but I'm suggesting something more active. You're the general secretary of the organisation. Surely one of the things that you want is you want the money to be brought in so that it's available to be spent preferably, or at least is available to pay some of the bills that may have arisen from the election. Do you agree?---If I, if it was brought to my attention that we couldn't pay our bills because money was missing, that would be a significant matter.

But are you saying that you didn't take any positive steps to ensure that money that may have been pledged or may have in fact been received by someone has actually found its way into and been banked at the Sussex Street office?---I have no recollection of taking any such steps.

And is it right to say that it would be inconsistent with your practice at the time, because those are matters of detail that you'd leave to others to do, is that right?---Sure. Yes.

And you'd leave it to others to draw to your attention where there's an error, as distinct from you taking positive steps to ensure that pledges and money received in fact find their way into a bank of the Australian Labor Party?
---Yes.

10 But are you saying that no-one in the period from 12 March, 2015, to the 9 April, 2015, came to you and said, "Look, Mr General Secretary, we might have a problem here. We had an event on 12 March, 2015. The election's been and gone. We're now, one week, two week, three weeks, or four weeks away from that event, and at the moment the event has run at a loss, because we only have \$25,000 or so in payments that have been received, and we've already spent more than that in running the event"? Are you saying no-one brought anything like that to your attention?---I have no recollection of anyone bringing that to my attention.

20 Whose job was it at that time within the Sussex Street office to keep track of matters of that kind, such as making sure that the pledges are followed through with, and that money that may have been received by, say, a Young Labor person at an event actually finds its way into the Sussex Street office?
---For this event, it would have been Kenrick Cheah.

And when you say "for this event," that's because this is an event of Labor Action Committee, is that right?---That's right.

30 But that's something that is done at the head office level, is that right, it's not something that's done at the Labor Action Committee level, such as an Ernest Wong or a Jonathan Yee, someone like that, is that right?---Yes.

So your expectation at least of the staff within the Sussex Street office was that Mr Cheah would make sure that money from events and pledges from events would find their way to head office, is that right?---Yes.

And does that mean, then, that it was at least your expectation that it would be Mr Cheah who would be the one who would bring to the office any cash that had been received on the night?---Yes.

40 And so the exercise that's actually done is that it's Young Labor's responsibility to do the legwork on the night, is that right?---Under Kenrick's supervision.

Under Kenrick's supervision, and possibly with the assistance of either Cantonese and Mandarin speakers, is that right?---That's right.

But the ultimate job, in terms of who has to ensure that the money gets back to head office, for a Chinese Friends of Labor event, that is Mr Cheah's responsibility, correct?---Yes.

Not Mr Ernest Wong's responsibility, for example.---From a head office point of view, it's Kenrick's responsibility.

10 What do you mean by that?---Well, from the, from my point of view, it would be Kenrick's responsibility for making sure that the, that the, that the money came in on the night, back to head office.

But by that are you saying that the procedures of that time may have been sufficiently lax that Mr Cheah left that to someone else, like Mr Wong, to take care of that matter?---Well, I mean, he was liaising with Mr Wong about the running of the dinner.

20 Does that mean the answer to my question is yes? In other words, whilst it might have been your expectation from a head office perspective that Mr Cheah would take care of matters of that kind, in the real world, the procedures may have been sufficiently lax that Mr Cheah might have thought it appropriate to leave that for Mr Wong to coordinate, is that right? ---Possibly, yes.

And of course you accepted yesterday that, at least from your perspective, Chinese Friends of Labor at the time was really Ernest's group, correct? ---Yes.

30 And people, including Mr Cheah, you knew to look up to Ernest as a leader within the Chinese community, correct?---At that point in time, I didn't understand the depth of relationship between Mr Cheah and Mr Wong.

What do you understand the depth of that relationship to be now?---That Ernest is a mentor and I think he, he, he even described him as like being a big brother.

What's the basis of the understanding that you've just summarised in terms of being a mentor and big brother or whatever. How have you come to that understanding?---I think it was at this Commission.

40 Just from this Commission?---I think so, yeah.

Not from discussions you might have had with either Mr Wong or Mr Cheah or someone else?---No.

But you at least knew that when you were general secretary, Mr Cheah and Mr Wong were fairly close, correct?---Well, they, they would need to be working together and, and Mr Cheah and Mr Wong – Mr Wong was in a sense Kenrick's predecessor in the role.

But not just working together as arm's length professional colleagues, they were close in the sense of having a friendship relationship as well. Is that right?---Look, I, I didn't know the extent of that.

Well, you knew that – you might not have known the extent but you at least knew that there was some kind of relationship, a friendship as between the two. Is that right?---Some, some, some sort of friendship but not to the extent that I - - -

10

And you knew that at that point in time, Mr Ernest Wong was seen as a leader within the Chinese community. Is that right?---Yes.

And looked up to as such as a leader in the Chinese community as of course at that time a member of the Legislative Council, correct?---That's right. Yes.

Is it right that on 7 April, 2015, Mr Tim Xu made contact with you to arrange a meeting with you and Mr Huang Xiangmo at your office in Sussex Street?---That's correct.

20

Did that meeting ultimately occur?---It did.

Is that the first occasion on which you had a meeting with Mr Huang Xiangmo in your Sussex Street office?---The first and only.

The first and only time?---(No Audible Reply)

30

Sorry, you need to answer out aloud.---The first and only.

And you're quite clear about that in your mind?---Yes.

There was no meeting beforehand and there was no meeting afterwards? ---No.

You told us yesterday about a circumstance in which Mr Xu came to your office and gave you, I think, a white envelope. Have I got that right? ---That's correct.

40

Other than that time, was there any other times where Mr Xu attended on you in your Sussex Street office other than the white envelope time and the Mr Huang time?---No.

When was the first time that any arrangements were made in relation to the 7 April, 2015, meeting? By which I really mean, was there any advance notice of a desire to have a meeting on that day?---I, I, I, not that I can recall.

Can we go please to MFI 21. Now, one of the printouts that you provided the Commission yesterday were a series of messages between you and Mr Xu of 7 April, 2015. Is that right?---Ah hmm.

And is this the first page of those particular messages?---Yes.

And so if you have a look at the first one, it's described as a text message at 10.04am. Do you see that there?---Yeah, yeah, yeah, yeah.

10 Can I just note for the benefit of the transcript the mobile telephone number doesn't seem to have been redacted on this document.

MR LAWRENCE: Yes. I was just going to raise that.

MR ROBERTSON: But that, of course, will be subject to the 112 direction that you made, Chief Commissioner, at the start of the - - -

THE COMMISSIONER: Sorry, I got distracted. Mr Lawrence is standing up.

20

MR LAWRENCE: I wonder if that MFI might be taken down now.

MR ROBERTSON: I think we might do that.

THE COMMISSIONER: I'm sorry, what's - - -

MR LAWRENCE: I wonder if that MFI might be taken down, which has now occurred. I would ask that that be redacted before it's shown. Certainly not criticising my friend. It was a surprise to him.

30

THE COMMISSIONER: Well, it's not coming up on my screen, I must say. So I'm handicapped.

MR ROBERTSON: We'll make that happen now. I'll move on and someone will give me a note saying - - -

THE COMMISSIONER: Is there a redaction required?

40 MR ROBERTSON: A redaction is required and I only noticed that it was not done when it came up on the screen. That's now being effected. We'll fix that as we go,

THE COMMISSIONER: Thank you. All right.

MR ROBERTSON: But Mr Clements, so Mr Xu contacts you on 7 April, 2015, and asks for a meeting between you and Mr Huang. Is that right? ---Yes.

At least in advance of the meeting, were you aware of what the proposed subject matter of the meeting was?---Not that I can recall.

And you referred, focussing here on the period between the Chinese Friends of Labor event of 12 March and then 7 April, 2015, you said you had a lunch with Mr Huang and Mr Ernest Wong at the Mosman residence during that period. Is that right?---That's right, yep, yep, yep.

10 Were there any other communications that you can recall or any other meetings you can recall with Mr Huang during that period?---No.

So that was the only one between seeing him at the Chinese Friends of Labor dinner on 12 March, you had the lunch on the following weekend and then you next see him on 7 April, 2015. Is that right?---That's as far as I can recall, yeah.

20 Just bear with us for a moment, Mr Cheah [sic]. We'll do it this way. So Mr Xu makes contact with you and seeks to arrange a meeting. Is that right?---Correct.

And the first contact that he made with you I think was by text message. Is that right?---Correct.

And he asks you to contact him by telephone. Correct?---Yeah.

And within a short period of time, within an hour or so, you made contact with him by telephone. Correct?---Yeah.

30 And as best you can recall, what occurred during that telephone discussion? ---It would have been setting up, trying to find a time for Mr Huang to come in and see me.

And you did then arrange a time for that to occur. Is that right?---Yes, yes.

And what was that time?---2.00pm.

And we'll now bring back up MFI 21 onto the screen. So we've got the 10.04am message at the start. Do you see that there?---Yes.

40 And so you then gave a call to Mr Xu after that. Is that right?---Yeah.

And then there's a series of text messages that make arrangements for a 2.00pm meeting. Is that right?---That's correct.

And is it your best recollection that Mr Huang in fact attended on you at around about 2 o'clock on that day?---Yes.

Now, just explain to us how that played out. So I take it you're in your office at the time?---Yeah, so yes.

And how did you, how was it drawn to your attention that Mr Huang was present?---Oh, look, I can't recall, but normally, as I said yesterday, the reception would ring through to my secretary and say, so-and-so's here to see Mr Clements, or send an email and she would walk in and say, Mr Huang's here to see you or there's someone here to see you, I think it's you know, and she would bring them in.

10

Was that the procedure that was adopted for this particular meeting, do you recall?---I just can't recall.

At least for someone like Mr Huang you may well have gone out to reception to usher him through. Would you agree?---Oh, look, it's possible, but I don't think so.

THE COMMISSIONER: Why don't you think so?---That's, I, I, I - - -

20

Just answer that question. Why don't you think so?---I don't think I really walked out to walk anybody in.

Why did you not think so with Mr Huang?---Because unless my secretary wasn't there or someone to walk someone in, it would be unusual for me to walk out and walk someone in.

So do you know what happened, that the secretary rang and said Mr Huang's arrived?---No, I don't know, I'm speculating.

30

Don't speculate.---I'm sorry, I'm trying to give the best answer I can.

You just tell us your recollection. You understand?---That's, I'm sorry, Commissioner, I'm just - - -

No, don't apologise, just be mindful of the fact that we're not interested in you speculating at all about anything. You understand?---I understand, Commissioner.

40

Just backtracking a little bit, when you spoke to Mr Xu about setting up the meeting time, did he tell you the purpose of having the meeting?---I don't recall.

You seem to have a very bad memory. Is it, have you had any - - -

MR LAWRENCE: I object. I object to that.

THE COMMISSIONER: You seem to have very bad memory about many - - -

MR LAWRENCE: I object.

THE COMMISSIONER: Mr Lawrence, would you stop interrupting.

MR LAWRENCE: I would ask that a process be adopted where my objection is heard and determined.

THE COMMISSIONER: No, no. What's your objection?

10

MR LAWRENCE: I object to the suggestion that Mr Clements has a bad memory. It's not based on anything, in my submission, and it is an unreasonable suggestion.

THE COMMISSIONER: It's based on my observations, Mr Lawrence.

MR LAWRENCE: Well, in my - - -

THE COMMISSIONER: Now, would you sit down.

20

MR LAWRENCE: - - - submission, I would ask that those things be carefully considered, and such conclusions be adjudicated upon in due course.

THE COMMISSIONER: Mr Lawrence, I've heard your objection.

MR LAWRENCE: Yes, thank you.

THE COMMISSIONER: You seem to have a bad memory in giving
30 evidence for a lot of things. Is there a reason for that that you're aware of?
---I don't agree that I have a bad memory in giving evidence.

You don't agree. All right. Let's go back to this meeting. This is the very first meeting that Mr Huang had ever had with you at Sussex Street, was it?
---Yes.

What was the purpose of the meeting?---He wanted a meeting with Bill Shorten.

40 I see. And how do you know that?---Because I have a recollection of him asking for a meeting with Bill Shorten. I have a recollection of calling Bill Shorten while he was in the room. I have text messages in my phone referring to me seeking a meeting with Bill Shorten in the days that followed.

And what date was that that you contacted Mr Shorten about - - -?---On 7 April.

7 April. And going back to the question I asked you, when Mr Xu spoke to you on the phone about setting up the meeting time, what did he say the purpose of the meeting was, do you recall?---No.

You don't. You have no recollection at all as to why Mr Huang was wanting to see you that day?---No.

From what Mr Xu said. You don't recall?---No.

10 Is that you don't recall?---I don't recall.

Previously you had met with Mr Huang but in congenial circumstances, his home, restaurants and that sort of thing.---Yes.

But this was the first time he had visited the business premises, your business premises.---To see me, yes.

And you still had no idea why he was requesting this meeting.---I know why he wanted the meeting, he wanted - - -

20

No, no, but from what Mr Xu communicated to you, you had no idea what the meeting was about, is that what you're saying?---No, he just said, he would have just said, "Mr Huang wants a meeting with you."

No, I don't want what he would have said. What did he say?---No, I don't recall.

You don't recall. Thank you.

30 MR ROBERTSON: Can we just go to the next page of the MFIs on the screen so we can close that out. And if you see that there, Mr Clements, that's consistent with your recollection, isn't it, that the meeting was arranged at 2.00pm, is that right?---Yes.

Can we have ready the last page of Exhibit 160 on the screen. You're accepting, I think, that it's possible that you did go out to meet Mr Huang and usher him into your office, would you agree?---It's possible, yes.

40 It's not your usual practice but it's possible that you did that on this particular occasion, is that right?---Yes.

Can we go, please, to the last page of Exhibit 160. Mr Clements, would you agree that this handwritten document sets out, at least in general terms, the layout of the Sussex Street office as at April of 2015?---Yes.

And so the position of your office is correctly identified, is that right?---Yes.

That's obviously the general secretary's office, correct?---Yes.

And the one immediately above it, I take it that was Ms Murnain's office, is that right?---Next to Ms Murnain, yep, yep.

The one immediately up the page from your office, is that right?---Yes, yes.

And I take it that the ordinary route to get to your office would be the one indicated with the dashes and the arrows on this particular document, is that right?---Well, there's two ways.

10

That's why I was asking it the way that I did. The way that you would ordinarily access your office from the reception desk would be in the direction shown by the dashes and the arrows, do you agree?---Yes.

And do you agree that Mr Cheah's desk was the one that's marked as "Kenrick desk" that we can see towards the middle of the page?---Oh, look, I, Kenrick's sat in different spots at different times. If that's where he says he's sat, I accept that.

20

But he didn't have a separate office, is that right?---Oh, no, no.

And the area that we can see "Kenrick desk" and a series of other desks, that's essentially an open plan type area, is that right?---Yep, yep, yep.

They're not individual offices.---No.

They're, as it were, cubicals. Is that right?---Yes.

30

Now, at this meeting on 7 April, 2015, I take it that Mr Xu was also present, is that right?---Yes.

Do you recall whether Mr Xu or Mr Huang were carrying anything during the course of the meeting?---No, I don't recall.

Do you recall whether you were given anything during the course of the meeting?---No, I don't recall.

40

Well, are you quite sure you weren't given anything or is it possible that you were given something?---Look, from time to time you would be given things like bottles of wine or something like that. I don't recall whether I was or I wasn't.

So is it right to say that it was not uncommon for Mr Huang Xiangmo to give you a gift?---Yes.

We've heard of a startling example yesterday of cash in a wine box for example. Correct?---Yes, yes.

But there was also other occasions where instead of cash being in the wine box there might have actually been wine. Is that right?---Yes.

And so it's quite possible, isn't it, that either Mr Xu or Mr Huang gave you a bag that had something in it during the course of your interaction with them on 7 April, 2016. Would you agree?---It's not impossible.

10 Well, you'd at least accept that it's possible that one or both of them were carrying a bag during the course of 7 April, 2015 when they were in the Sussex Street office. Would you agree?

MR LAWRENCE: I object. To raise an issue, it's been repeatedly stated that the Commission is not interested in speculation or hypotheticals which quite clearly has meant the Commission is not interested in what people think might have happened if that is not an account from the person's memory yet my friend repeatedly and continually engages in a process where he seeks exactly such evidence and he accompanies it on occasion with adjectives such as startling, and I would add that as a further submission as to objectionable conduct.

20

MR ROBERTSON: I press the question.

THE COMMISSIONER: Mr Lawrence, this is a question of a different category to the ones I've been indicating more than once with more than one witness that I'm not interested in speculation when witnesses persist in saying I would have done this, I would have done that. My observation has been focused on that sort of evidence which is totally unhelpful to the Commission for obvious reasons, firstly, it doesn't answer the question and secondly, it does engage in some form of speculation, have no use to this Commission. But this question is a question that is in a different category and that is to ascertain from the witness, he was there, as to whether something was possible or not possible. Now, what's wrong with that? That's not speculation that's a conventional question put.

30

MR LAWRENCE: It seems to be precisely the same thing to me but - - -

THE COMMISSIONER: Well, that's where we differ. I allow the - - -

40 MR LAWRENCE: Yes, and it's confusing in my submission when such inconsistent approaches are taken.

THE COMMISSIONER: Thank you. I allow the question.

MR ROBERTSON: Mr Clements, you're not in a position to deny the possibility that either or both of Mr Xu and Mr Huang were carrying a bag during the course of being at the Sussex Street office on 7 April, 2015. Do you agree?---I am not in a position to categorically deny that.

You don't have a specific recollection of that one way or the other. Is that right?---That's correct.

And I think you're accepting that it's possible on your memory that you were given a gift during the course of your interaction with Mr Huang on 7 April, 2015. Is that right?---That's possible.

But you don't recall what the particular gift was. Is that right?

10 MR LAWRENCE: I object to that.

THE WITNESS: Well, the only thing it would have been would have been wine.

MR LAWRENCE: Just object to - - -

THE COMMISSIONER: Sorry, what - - -

MR LAWRENCE: - - - the series of two questions. It was put in the
20 previous question it's possible on your memory. That in my submission is apt to produce a very confusing answer in terms of what it means.

THE COMMISSIONER: Perhaps you could reformulate the question and put it again.

MR LAWRENCE: And the second question rather aggravated it.

MR ROBERTSON: You're not in a position to deny that you were given a bag during the course of your interaction with Mr Huang and Mr Xu on 7
30 April, 2015. Correct?---I'm not in a position to categorically deny the possibility that they had a bag which included a gift for me at that meeting.

Now, then at some point you and Mr Xu and Mr Huang are in your office. Is that right?---Yes.

And doing the best you can, what was said by you and what was said by Mr Huang through Mr Xu and what was said, if anything, by Mr Xu on his own behalf as best you can now recall?---That Mr Huang would like a meeting with, would like to meet Bill Shorten, he would like to seek, you
40 know, have a lunch or a dinner with Mr Shorten and could I facilitate that, and I said, "Yes, of course." And I believe I called Bill Shorten while they were sitting there.

So is it your evidence that the discussion had absolutely nothing to do with any questions of donations, it only had to do with questions of arranging a meeting with Mr Shorten. Is that right?---I don't recall specific conversations about donations.

Well, is it possible that there was at least some reference, at least in passing, to donations?---Could have been.

Is it possible that during the course of your interaction you were handed a bag that had some cash in it?---No.

Are you quite sure about that?---Yes.

Quite sure about that on your oath?---Yes.

10

During the course of that day, were you given any disclosure forms by Mr Huang, by Mr Xu or by anyone else?---No.

Do you have any recollection of ever being given any disclosure forms in relation to the Chinese Friends of Labor event of 12 March, 2015?---No.

20

So you'd be aware that Mr Cheah has given evidence to this Commission, in the same seat that you're sitting in, to say that during, that sometime in April, perhaps the 7th, perhaps the 8th, you provided him with a bag that had cash in it and you also provided him with forms. Are you aware that he's given that evidence?---I am.

Do you deny that that evidence is true?---I deny that evidence is true.

You deny that on your oath. Is that right?---I deny that on my oath.

When is the next time you had any communications with Mr Huang after 12 March, 2015?---We had dinner, or dinner with Mr Shorten shortly after.

30

When you say shortly after, you mean within a few days or something, is that what you mean?---A few weeks.

Within a few weeks. Were there any other meetings around that time arranged with Mr Xu, do you recall, sorry, arranged by Mr Xu, I should have said?---Not that I can recall.

And have you now told us the extent of what you can recall by way of words exchanged at the meeting on 7 April, 2015 at the Sussex Street office?---Yes.

40

Well, did you say anything during the course of that meeting? I think you've told us what Mr Huang has said, not so much you.---Yeah, I would have said, "Yeah, yeah, of course I'll get you a meeting."

Do you recall roughly how long that meeting took?---10 to 15 minutes maybe.

And then what happened after the meeting had come to an end?---(No Audible Reply)

Did you see Mr Huang out for example or how did that proceed, as best as you can now recall?---I, I just can't recall.

10 What was your usual practice, would you usually see someone to the door or would you leave them to find their own way?---No, I wouldn't leave them to find my [sic] own way, I'd open the door, my secretary would, who sat directly behind the door would stand up and I would shake hands and she would walk them out.

So back to a previous question, just to be clear about it. When did you find out that a substantial amount of cash had been banked on 9 April, 2015?
---As far as I can recall, when Mr Johnston asked me about it.

THE COMMISSIONER: When was that?---(No Audible Reply)

20 MR ROBERTSON: You're referring now to the fact that you participated in a compulsory examination. Is that right?---I am.

And to assist the witness and the Chief Commissioner, that was on 25 May, 2018. That's consistent with your recollection, isn't it?---That's correct.

And so you didn't know, is it right that you didn't know about \$100,000 in cash being banked until that point in time?---That's correct.

30 Even though I think you've now accepted that that was an extraordinary thing to happen on your watch as general secretary. Do you agree?---Yes.

Can we go please to the larger CCR document for 2015, please. What I'm just going to show you just before lunch, Mr Clements, is some records that the Commission has obtained from your telephone and from Mr Xu's telephone for the period of January 2015 to June of 2015. Do you see that there?---(No Audible Reply)

The period's at the top of the page. Do you see that?---(No Audible Reply)

40 Sorry, you need to answer out aloud?---Yes.

And just so you understand this document, obviously in the first column the date is the date, the time is the time at which the call is originating. Phone service A is the originating telephone, phone service A user is the individual of the phone, phone service B is the recipient, phone service B user is the name of the recipient. Then there's the duration of the call and then there's the approximate location of the phone service and you'll see that there's a blip in the communications on 7 April, 2015. Do you see that there?---Yep.

And you've given evidence about a number of those communications by way of short-message service message and by telephone calls and things of that sort. Do you see that there?---Yep.

Are you seriously suggesting that it was coincidence that you were having the meeting with Mr Xu and Mr Huang only two days before, as we now know, \$100,000 in cash had been banked at the Sussex Street office?

10 MR LAWRENCE: I object. He hasn't made any such suggestion that it was a coincidence.

THE COMMISSIONER: Sorry?

MR LAWRENCE: He hasn't made any suggestion that it's a coincidence.

THE COMMISSIONER: Well, perhaps you can re-form it.

20 MR ROBERTSON: Well, I'll withdraw the question and put it this way. Would you agree that there was a blip in communications between you and Mr Xu on 7 April, 2015, by which I mean there was a period of time before then that you didn't have any communications with Mr Xu and there was a period of time after that where you had only limited communications with Mr Xu? Do you agree with that?---Sure, yep.

And despite that being drawn to your attention, are you seriously saying that your meeting had absolutely nothing to do with the \$100,000 that was ultimately banked in the office that you administer as general secretary on 9 April, 2019. Is that right?---Yes.

30 Is that a convenient time, Chief Commissioner?

THE COMMISSIONER: Yes.

MR ROBERTSON: In fact, before I do that, I tender the document on the screen, being call charge records between Mr Clements and Mr Xu for the period of 19 January, 2015, to 30 June, 2015.

40 THE COMMISSIONER: Yes. The CCR summary document in respect of the period 7 April, 2015, and 9 April, 2015, between Mr Clements and Mr Xu will be admitted and become Exhibit 325.

**#EXH-325 – CALL CHARGE RECORDS FOR PERIOD 19
JANUARY 2015 AND 30 JUNE 2015 BETWEEN CLEMENTS AND
XU**

MR ROBERTSON: And I tender MFI 21, which were the text messages produced by Mr Clements in relation to 7 April, 2015.

THE COMMISSIONER: Yes. The MFI will become Exhibit 326.

**#EXH-326 – TEXT MESSAGE EXCHANGE BETWEEN TIM XU
AND JAMES CLEMENTS ON 7 APRIL 2015 (PREVIOUSLY MFI-
021)**

10

MR ROBERTSON: Please the Commission.

THE COMMISSIONER: Yes. Very well. I'll adjourn and resume at five past 2.00.

LUNCHEON ADJOURNMENT

[1.03pm]