

AEROPUB02573
14/10/2019

AERO
pp 02573-02580

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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 MONDAY 14 OCTOBER, 2019

AT 3.00PM

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

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

THE COMMISSIONER: Yes. Ms Graham, I understand you appear on behalf of Mr Clements?

MS GRAHAM: I do, Chief Commissioner.

THE COMMISSIONER: Thank you. My apologies for the delay in delivering these reasons, keeping you waiting. In this public inquiry, Mr James Clements was summoned to attend and give evidence. Mr Clements has given evidence over a number of days. On 9 October, I made a
10 direction that he was required to produce his mobile phone for the purposes of forensic examination. The mobile phone was subsequently marked as MFI 23 and it was said to contain a mix of electronic data said to be privileged and non-privileged data which could be brought into existence by
20 accessing the data on MFI 23.

Counsel Assisting the Commission has protocol to protect any such privileged data that may be brought into existence. It has been necessary to consider the relevant provisions of the Independent Commission Against
20 Corruption Act, as an issue of statutory interpretation concerning these provisions was raised on Mr Clements' behalf by Mr Lawrence of counsel in which reliance was placed upon the provisions of section 37(5) as
30 providing a basis upon which Mr Clements could refuse to produce MFI 23.

The relevant considerations on the question of statutory interpretation are set out in reasons which I will shortly publish. I am satisfied that MFI 23 contains privileged communications that can be brought into existence by
30 accessing the data on MFI 23. I am also satisfied that other communications, being communications that are identified in directions set out at the conclusion of these reasons, are available for the purposes of investigations by the Commission in Operation Aero.

Accordingly, the direction I made on 9 October, 2019, pursuant to section 37(1)(c) of the Independent Commission Against Corruption Act, to Mr Clements to produce his mobile phone, MFI 23, is confirmed. I note that the mobile device, MFI 23, has been placed and remains with the Commission's Property Unit and is to remain registered as a property item.

I direct the Computer Forensic Unit of the Investigation Service Section of the Commission to, as soon as practicable, to undertake various steps in
40 relation to the data stored and accessible from MFI 23 as are necessary to reproduce certain communications involving Mr Clements and other persons who are specified and named in the directions set out in my reasons in paragraph 3(a), in respect of the period 1 January, 2015 to date.

I make directions as set out in my reasons under the heading Orders and Directions in paragraph 3 and 4. I also make directions in terms of paragraphs 5 and 6 as set out in these reasons and I direct that Mr Clements have liberty to apply as set out on paragraph 7. Any content on MFI 23 that

is or may be capable of being protected by legal professional privilege is not to be viewed or examined by members of the investigations teams responsible for and involved in the investigations in Operation Aero. I grant liberty to apply on short notice. Now, Ms Graham, on the question of whether you require any stay orders, what is the position?

MS GRAHAM: Mr Clements does not intend to challenge - - -

10 THE COMMISSIONER: Sorry, could just speak into the microphone.

MS GRAHAM: Mr Clements does not intend to challenge the decision in the Supreme Court, Chief Commissioner, so no stay is sought.

THE COMMISSIONER: So he does not require a stay in those circumstances?

MS GRAHAM: That's correct, Chief Commissioner.

20 THE COMMISSIONER: Very well.

MS GRAHAM: Could I raise one issue in relation - - -

THE COMMISSIONER: Sorry, just before you do that. I note that in my reasons, as privilege 9 reflects, I was prepared to grant a stay for a limited period of the orders 3 to 5 if a stay was requested. Ms Graham has indicated that her instructions are that Mr Clements does not wish to apply for a stay. Accordingly, paragraph 9 should be read in light of that circumstance that no stay is sought. Yes. Now, Ms Graham.

30 MS GRAHAM: Chief Commissioner, the draft direction that I have a copy of bears paragraph numbers 1, 1(a), 2, 3 and 4, so I might, if I can, work through those. There's just an issue in relation - - -

40 THE COMMISSIONER: Yes. Could I just interrupt you for one moment? Those draft orders, or directions I should say, draft directions, have been incorporated into the orders and directions set out in my reasons, but the paragraphs have been re-numbered. So I think I'll have made available to you now a copy. I formally publish my reasons in respect of the mobile phone and the issues arising under section 37(1) of the Independent Commission Against Corruption Act. Would you provide Ms Graham with a copy? Otherwise, copies of the reasons are available. And, Ms Graham, you'll see that the specific directions, which sets out the protocol, commences at paragraph 3. You'll see 3(a), (b), and then it goes on over the page, 4, 5, 6, 7 and 8.

MS GRAHAM: Thank you, Chief Commissioner.

THE COMMISSIONER: Sorry, 4, 5, 6 and 7.

MS GRAHAM: Yes.

THE COMMISSIONER: So if you use those reference numbers, please.

MS GRAHAM: Indeed. Dealing firstly with the direction in 3(b), which has been described as the first access direction.

THE COMMISSIONER: Yes.

10

MS GRAHAM: For practical reasons it had been proposed on behalf of Mr Clements that first access be granted to each of the legal advisers – Mr Lawrence, myself and Mr Neilson – acting on behalf of Mr Clements in this inquiry. Chief Commissioner, Mr Lawrence - - -

THE COMMISSIONER: Well, then, just sorry to interrupt, what you really want added is that first right of access be granted to either Mr Lawrence, Mr Neilson or yourself, is that right?

20 MS GRAHAM: Yes, I - - -

THE COMMISSIONER: Any one of those.

MS GRAHAM: I'm sorry, Chief Commissioner?

THE COMMISSIONER: Any one of you, Mr Lawrence, Mr Neilson or yourself - - -

30 MS GRAHAM: And myself.

THE COMMISSIONER: - - - have first right of access on behalf of Mr Clements.

MS GRAHAM: Yes, Chief Commissioner, it's the case that Mr Lawrence is based in Dubbo and has duties there as deputy mayor, which frequently require him to be in the Central West.

THE COMMISSIONER: I see. Yes.

40 MS GRAHAM: And I may or may not be in Nauru at the relevant time that the report is available. So it's proposed - - -

THE COMMISSIONER: I see. Well, Ms Graham, I don't see any difficulty with that. So I propose to amend paragraph 3(b) to provide Mr Lawrence of counsel or Mr Neilson, solicitor, is that right?

MS GRAHAM: Yes.

THE COMMISSIONER: Or yourself, Felicity Graham, with access to the report, et cetera.

MS GRAHAM: Thank you. And then the undertaking referred to in the third sentence would of course cover each of the three of the legal advisers.

THE COMMISSIONER: That will be amended to include an undertaking by Mr Neilson and yourself.

10 MS GRAHAM: Yes.

THE COMMISSIONER: Yes, very well.

MS GRAHAM: And then in the first line of order 4, the additional names – Mr Neilson and Ms Graham – ought to be added, please, Chief Commissioner.

MR ROBERTSON: And as I understand it, Chief Commissioner, the idea of that is any one of as distinct from all of them.
20

THE COMMISSIONER: Sorry, couldn't hear that.

MR ROBERTSON: As I understand it, the intended modification is to provide that it be any one of those three, as distinct from all of them. In my submission, it's desirable to keep the numbers small, in particular in light of the proposed undertakings in 3(b), because undertakings of that kind can occasionally cause some difficulties where it's helpful for at least one member of the legal team to not have given undertakings of that kind. But I appreciate the practical difficulties that my learned friend Ms Graham has identified, and I don't have any difficulty with it being any one of those
30 three, as distinct from it being all of those three, if that makes sense.

THE COMMISSIONER: Yes, all right. Any one of Mr Lawrence, Mr Neilson or Ms Graham.

MR ROBERTSON: May it please the Commission.

MS GRAHAM: May it please the Commission.

40 THE COMMISSIONER: Anything else, Ms Graham?

MS GRAHAM: That was the only issue I wished to raise.

THE COMMISSIONER: Ms Graham, before I move on to something else, the protocol as set out in the directions appended to my reasons will be implemented as soon as possible. I appreciate that Mr Clements would wish to have his phone returned as soon as possible, and I'll ask that every

endeavour be made to undertake and implement the protocol as soon as possible, and you kept advised of that.

MS GRAHAM: Thank you, Chief Commissioner.

THE COMMISSIONER: Thank you. Yes.

10 MR ROBERTSON: Can I deal with one other formal matter. Can I have on the screen, please, what I'll describe as the May Ho Yee bundle, and in particular PDF page 10. Since the Commission adjourned, the Commission has been provided with a statutory declaration from Mrs May Ho Yee which addresses, amongst other things, a conversation that she says that she had with Mr Ernest Wong concerning the subject matter of this investigation. Can I draw particular attention to paragraph 28, which is presently on the screen, where Ms Yee, Ms May Ho Yee deposes that during a - - -

20 THE COMMISSIONER: Could I interrupt you for a moment. I think it's appropriate to have the paragraph read and I'll leave it to your discretion as to whether it's all of the paragraphs or only certain of the - - -

30 MR ROBERTSON: Yes. I was proposing to read the particular paragraph to which I've just drawn attention, or the particular section, focussing first on paragraph 26. Ms Yee says, "I went upstairs into a private room where Mr Wong was having lunch and he asked me what I said at the ICAC. I assumed that Jonathan must have told him that I had been required to give evidence at the private examination." And then jumping to paragraph 28, "After I had told Mr Wong what I could recall, I remember him saying words to the following effect to me, 'You should continue to tell the same story.'" So now we have some evidence from Mrs May Ho Yee that there was a conversation along the lines of what a number of other witnesses in what I might describe as the Emperor's Garden set have indicated, namely a meeting with Mr Wong privately in which Mr Wong has identified advice or direction as what should be said to this Commission. Can I indicate that the document that is presently on the screen is a document that's styled as an affidavit. Since that document was first provided to the Commission, Mrs Yee – in a document that's also part of this bundle, a statutory declaration made on 10 October, 2019 – gives evidence that she has given further consideration to the matter, including to what's said on the page that's currently on the screen, and that on reflection, although she's identified in the affidavit that's on the screen that that occurred in connection with the compulsory examination, the private hearing, on reflection, she has indicated that her best recollection is that it in fact happened after she received the summons to participate in the public inquiry.

So part of the bundle that I'll tender in a moment includes a statutory declaration of 10 October, 2019, where Mrs Yee clarifies and to some degree corrects what I've just identified on the particular page. I might just

tender the next page as well, if we can. You will see that, consistent with what Mrs Yee said during her evidence in the public inquiry, she indicates at paragraph 36 that she's sorry for having given false evidence to the Commission in her compulsory examination and she has sought to clarify the key matters in this document styled affidavit, as well as in the statutory declaration itself. I should indicate, of course, that in the event that any interested party considers that they should have an opportunity to cross-examine Mrs May Ho Yee on the subject of matter of this affidavit and the statutory declaration as well, they should draw that to my attention. But can I indicate that once the documents on the screen and the bundle is tendered, it will then be the position that 11 of the 12 putative donors, in relation to the \$100,000 the subject of particular focus in this investigation, will then have admitted that they didn't make contributions of \$5,000 or \$10,000 in connection with the Chinese Friends of Labor event in 2015. The 12th of the putative donors, of course cannot give evidence because that's Dr Liao who of course, as is now known, is deceased. In relation to the 10 natural person putative donors who have given evidence in this Commission – or that is to say nine of the 10 have given evidence before this Commission – all of those nine have now given evidence that Mr Wong gave them advice or direction as to what they should say in connection with inquiries either before this Commission or before the Electoral Commission. And again, of course, the tenth of the 10 natural person punitive donors is Dr Liao, who of course is not in a position to give evidence that kind.

So with that explanation and summary, I tender the bundle of documents that appears on the screen, which is comprised of the following documents. First, the document styled Affidavit of May Ho Yee, dated 26 September, 2019. Next, a document styled Affidavit of Yuning Wang, dated 26 September, 2019, which is a document from an interpreter, who says that they've interpreted the English form of the document styled affidavit to which I've just drawn attention. Next, a statutory declaration made by Mrs Yee on 10 October, 2019, which is the document that provides the clarification and correction of the kind that I've summarised. And, finally, a statutory declaration of Yuning Wang, made on 10 October, 2019, which declares as to the translation of Mrs Yee's statutory declaration of 10 October, 2019. I tender those four documents as a bundle.

THE COMMISSIONER: Yes. I think we're up to Exhibit 329, aren't we? Very well. Well, there's four documents. The two affidavits and two statutory declarations, in the order in which you've stated them, will respectively become Exhibits 329, 330, 331 and 332.

MR ROBERTSON: Can I respectfully suggest that they might be marked as a single exhibit, because to make sense of the documents styled affidavit, one also wants to see the statutory declaration that clarifies it.

THE COMMISSIONER: All right. We'll do it this way. In the order, the four will be marked 329A, 329B, 329C, 329D. Is that all right?

MR ROBERTSON: May it please the Commission.

**#EXH-329A – DOCUMENT STYLED AFFIDAVIT BY MAY HO YEE
DATED 26 SEPTEMBER 2019**

10 **#EXH-329B – DOCUMENT STYLED AFFIDAVIT BY YUNING
WANG DATED 26 SEPTEMBER 2019**

**#EXH-329C – STATUTORY DECLARATION BY MAY HO YEE
DATED 10 OCTOBER 2019**

20 **#EXH-329D – STATUTORY DECLARATION BY YUNING WANG
DATED 10 OCTOBER 2019**

THE COMMISSIONER: Now, Mr Robertson, just in relation to the new material that's now in evidence from Ms May Ho Yee, it may be that other parties or participants in this public inquiry were not expecting that evidence would be tendered today, and I just wonder whether some form of confirmation or notification could be provided to those who may have an interest.

MR ROBERTSON: I'll ask Mr Johnston to send an email to that effect.

30 THE COMMISSIONER: Yes, thank you. Is there anything else?

MR ROBERTSON: Nothing for my part.

THE COMMISSIONER: Very well. Thank you. Yes, then I'll adjourn.

**AT 3.27PM THE MATTER WAS ADJOURNED ACCORDINGLY
[3.27pm]**