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Ruling on s 37(5) of the *Independent Commission Against Corruption Act 1988* in relation to the production of a mobile phone by a witness

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**Background**

1. The Commission is conducting a public inquiry under s 31 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). The general scope and purpose of which is in the following terms:

*Whether, from January 2015, officials of the New South Wales Branch of the Australian Labor Party, members of Chinese Friends of Labor, political donors and others have entered into or carried out a scheme to circumvent prohibitions or requirements under Part 6 of the Election Funding, Expenditure and Disclosures Act 1981 relating to political donations.*

*The general scope and purpose of this public inquiry is to gather evidence relevant to the allegation being investigated for the purpose of an investigation under s 13A of the Independent Commission Against Corruption Act 1988 (the ICAC Act).*

2. The Commission is investigating the conduct of a number of persons following a referral to it by the Electoral Commission of New South Wales under s 13A of the ICAC Act.
3. The public inquiry commenced on 26 August 2019 and has continued thereafter over a seven week period. On 11 October 2019, the proceedings were adjourned and are programmed to continue in the week commencing 9 December 2019.
4. On 29 July 2019 Mr James Clements was summonsed under s 35 of the ICAC Act to attend before the Commission at the public inquiry. He gave evidence on 9, 10 and 11 October 2019.

5. On 9 October, in the course of giving evidence, Mr Clements was directed to produce a mobile phone device then in his custody. The phone was produced to the Commission as directed. It was subsequently marked as MFI 23.

6. On the same day, a direction was made in the following terms:

*"I issue a direction requiring production of Mr Clements' mobile phone for the purposes of forensic examination in relation to a message said to have been sent by Mr Ernest Wong to Mr Clements on or about 18 July or 19 July, 2017."*

T2378/15-18

7. Mr Clements has been represented at the public inquiry by Mr Lawrence of counsel.

#### **The Provisions of s 37(5) of the ICAC Act**

8. On 10 October, Mr Lawrence made oral submissions in relation to the above direction. In those submissions, Mr Lawrence contended that the mobile phone (MFI 23) contained data that recorded communications that were the subject of legal professional privilege. This material was identified as data held within a WhatsApp chat group, which had been set up to permit communications between Mr Clements and his legal representatives. Submissions proceeded upon the basis that the mobile phone, MFI 23, contained non-privileged communications including emails, SMS messages and other material.

#### **An Electronic Message for a Meeting**

9. On 9 October 2019, Mr Clements was examined on a meeting he had with Mr Ernest Wong at the Starbucks Café opposite the Capitol Theatre. He stated that the meeting had been requested by Mr Wong via WhatsApp: T2377/10-20. Mr Clements said that he still had the message and that it was received on 19 July 2017: T2378/10 at that point in the evidence.

### **Direction for Production of Mr Clement's Mobile Phone**

10. I made the direction under s 35(2) of the ICAC Act for production of Mr Clements' mobile phone for the purpose of examining the above message: T2378/20-50. Mr Lawrence recorded his concern that the order for production would allow "*the wholesale downloading of the phone*": T2378/5-T2380/2. He contended that the order for production "*should be limited to achieve its objective*": T2380/15-20. See also T2383/30-40.
11. Mr Clements was asked by Counsel Assisting to record his iPhone iTunes backup password, which he recorded in writing: T2382/32 – T2383.
12. Counsel Assisting foreshadowed that consideration would need to be given to the kind of search terms that may be appropriate: T2383/43-45. Certain printed out messages from MFI 23 were marked as three separate bundles as follows and to which no claim of privilege is made.

MFI 020 – text message between Ernest Wong and Mr Clements from 20 April 2014 – 20 July 2015.

MFI 021 – screenshots of text messages between Mr Clements and Tim Xo on 7 April 2015.

MFI 022 – screenshots of text messages between Mr Clements and Sarah Adams from 10 April 2015 to 20 April 2015.

Mr Clements' mobile phone was marked as MFI 023: T2389.

### **Messages containing certain Privileged Material**

13. Mr Scott Robertson, Counsel Assisting, discussed certain of the messages with Mr Lawrence, including the issue of legal professional privilege: T2393/4. Counsel Assisting observed that technical staff could be given instructions to obtain certain

communications, but not to provide “communications that are or might appear to be privileged”.

### **WhatsApp Group: Operation Aero**

14. Mr Lawrence stated that there were hundreds of messages on MFI 23. He stated that “that all of those messages would be downloaded onto an ICAC computer. We seek to rescind that. I do take the s 37(5) (b) point”: T2397/30-40. Mr Lawrence observed that this was not based on any reluctance of Mr Clements to disclose any of the messages. The concern was said to be in “a real risk of privileged information, politically sensitive information, deeply personal information on that computer and down the tracks it is simply, it would be simply naive in my view to assess that the information is for all purposes destroyed and could not at some point come out into either – so responsibly we do take the section 37(5) point. . .”: T2397/40 – T2398/2.

### **Submissions**

15. On 10 October 2019 Counsel Assisting addressed the provisions of s 37 of the ICAC Act: 2407/40-47. He referred amongst other matters to “the general abrogation” of the privilege, duties of secrecy and matters of that kind: T2408/2-40. Section 37(5) Counsel noted, was “a limited reinstatement of privilege, but a very limited one as the text of paragraph (b) of subsection 5 indicates”.

16. Counsel Assisting observed that data on the mobile phone requiring download consisted of “ones and zeros”, which “cannot be understood by a human without intervention of something else”: T2410/20-31.

17. Counsel Assisting then proposed directions that should be made “with a view to dealing with any concerns in relation to privilege. . .”: T2410/32 – 40. See also T2410-2414.

18. Mr Lawrence noted at T2418 in relation to a “discretionary exercise” that Mr Clements was willing to sit down with ICAC Investigators and go through his phone “to extract all of the relevant data. . .”

19. At T2418/1-10, Mr Lawrence submitted:

*“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.”*

20. Mr Lawrence added at T2422/32-36:

*“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.”*

21. From T2424/30 to T2425/21, the following exchange took place:

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.”*

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 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 respond, but he doesn't seem to be doing that, with respect. He seems to be propounding a completely different section."*

22. Section 37 of the ICAC Act is in the following terms:

**37 Privilege as regards answers, documents etc**

*(1) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse:*

*(a) to be sworn or to make an affirmation, or*

*(b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a compulsory examination or public inquiry, or*

*(c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.*

*(2) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.*

*(3) An answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A) is not (except as otherwise provided in this section or section 114A (5))*

*admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.*

*(4) Nothing in this section makes inadmissible:*

*(a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or*

*(b) any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or*

*(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.*

*(5) Where:*

*(a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A), and*

*(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission, the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.*

23. Later in these reasons, the terms and rationale underlying the provisions of the s 37(5) are examined. It is sufficient to here observe that the subsection provides a very limited basis for the refusal to comply with the requirements of s 37(1) and (2). Section 37(2) abrogates any ground of privilege, but in s 37(5) limits the removal of privilege (ie “a *privileged communication*” passing between an Australian legal practitioner and a person for the purpose of providing or receiving services), but, importantly only such *privileged communications* “. . . **in relation to the appearance or reasonably anticipated appearance of a person at a compulsory examination or public inquiry before the Commission.** This restriction is consistent with the legislature’s intention to invest the Commission with extremely invasive powers of investigation given the secretive nature of corrupt conduct and other secretive criminal activities.

*“. . . corrupt conduct usually involves acts performed under condition of great secrecy and is often carefully concealed. There is seldom eye witness evidence of corruption. Corruption is thus usually very difficult to detect and prove. It is to reason that the NSW Parliament has given the Commission far-reaching powers to investigate possible corruption. . .”*: Commission Report, Operation Jasper, July 2013 at p 15.

24. At the time MFI 23 was produced to the Commission there was no refusal to produce it under or on the basis of the provisions of s 37(5).

25. When the issue of MFI 23 was the subject of submissions on the next day of the public hearing Mr Lawrence referred to the broad nature of the order suggesting that it has been expressed too broadly. I consider in fairness to Mr Clements I should proceed upon the basis that, at least impliedly, Mr Lawrence was seeking to have the prior direction for MFI 23 to be produced to the Commission, set aside or rescinded with reliance being placed upon s 37(5).

## **Statutory Context: The Legal Meaning of the Provisions of s 37(5)**

26. The task of constructing section 37(5) must begin with a consideration of the text itself, whilst also taking into account the general purpose and policy of its provisions: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41, (2009) 239 CLR 27 at [47] where it was noted that “context” is important. This is so as the process of statutory construction requires a process of deciding what is the legal meaning of a provision by reference to the language of the instrument viewed as a whole: *Certain Lloyds’s Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378, at [23], [24] and [88] and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355.

27. In general, consideration of the purpose and policy of the provisions of s 37 of the ICAC Act and the issue of “context” as relevant to s 37(5) include the following considerations:

- (i) The ICAC Act established a Commission with extraordinary powers to investigate, expose and prevent corruption – see s2A of the ICAC Act, Principal Functions. The powers of investigation, conferred by the ICAC Act, extensively override common law rights and privileges and this is for the reasons discussed above.
- (ii) The Commission’s wide coercive powers: include powers:
  - To obtain by Notice in writing, information from a public authority or public official (section 21)
  - To require any person to produce any document or “thing”: (section 22)
  - To enter premises: (section 23)
  - To conduct compulsory (private) examinations: (section 30)
  - To conduct public inquiries: (section 31)

(i) In connection with compulsory examinations and public inquiries, as noted above, the ICAC has power to summons any person to give evidence and to produce any document or things: Section 35. Each of these powers is supported by criminal sanctions for non-compliance: Part 9 of the ICAC Act.

28. By amendment of the ICAC Act, the Commission was empowered to investigate matters referred to it by the Electoral Commission, the current investigation, Operation Aero, being one such matter. Importantly, the legislative scheme establishment by the *Electoral Funding, Expenditure and Disclosures Act 1981* (“The EFED Act”) (since repealed by the *Election Funding Act 2018*) was intended to maintain and enhance integrity and transparency of the electoral processes that, of course, is a matter of high public importance.

29. The activities prohibited or regulated by the EFED Act (and its successor Act) as has been observed are central to the democratic system: see *Report of the Independent Panel Review of the Independence Commission Against Corruption* (The Hon Murray Gleeson AC (Chairs) and Mr Bruce McClintock SC (30 July 2015) at para 8.4.2. The provisions of s 13A of the ICAC Act were enacted as a means of enabling the broad coercive compulsory powers of the Commission under the ICAC Act to be utilised in revealing electoral misconduct: *Report of the Independent Panel Review, para 3.4.4.*

### **The Provisions of s 37(5) of the ICAC Act**

30. The exception to the obligation in s 35(2) requiring a person appearing at a public inquiry to produce any document or other thing in the witness’ custody or control is a reference to:

“. . . document or other thing contains, a privileged communication passing between . . . etc”: s 35(5)

31. The ICAC Act does not define the expression “other thing” or the word “contains”. Mr Lawrence in his submissions contended that the mobile phone device (MFI 23) clearly

is a “thing” referred to in s 37(5) and that that device “contains” the data recording the privileged communications. Accordingly it was contended that the entitlement to refuse to comply with a requirement under s 35(2), namely, s 37(5) applies.

32. Before examining the meaning and application of s 37(5) some general principles, concerning legal professional privilege, the accepted foundation for the privilege and the application those principles to electronic data may be noted.

(i) The rationale for legal professional privilege is that it exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. The privilege is concerned with communications either oral, written (or otherwise recorded), and not with documents per se: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 552 per McHugh J.

(ii) Whilst the importance of legal professional privilege, as a substantive right, has been emphasised in a number of cases in the High Court of Australia that sounded a warning against widening the privilege lest the need for courts to have access to all relevant documents would be unduly undermined: *Propend*, supra, per Toohey J at p 527. There his Honour cited the following statement in *Wigmore on Evidence*:

*“It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”*

(iii) Similarly, in *Mann v Carnell* (1999) HCA 66; 201 CLR 1, at [114] – [124] McHugh J observed:

*“common law doctrine which would extend the scope of legal professional privilege must not go beyond the rationales for the*

*privilege. Any extension of the scope of the privilege beyond that which is necessary for its rationales to be realised is an abrogation of the common law's basal pursuit of truth which is not justified by any countervailing consideration."*

33. In the present investigation, including the public inquiry being conducted under s 31(1) of the ICAC Act, the submissions for Mr Clements would, if accepted, produce or result in an anomalous outcome.
34. If accepted, and the rescission order sought by Mr Clements of the directions were granted, the implications would be surprising. The submission that because mobile phone, MFI 23, has some privileged material on it, the phone itself must be returned to its owner without any examination of its other contents being permissible (that is both privileged material and material not covered by the privilege), would be a startling construction of s 37(5). It would be an outcome that would frustrate and interfere with the very purpose of the investigative capacity of the Commission to gather information in order to determine the existence of possible criminal offences under the *Election Funding, Expenditure and Disclosures Act 1981* as provided for in s 13A of the Act.
35. Over many years, claims of legal professional privilege have been processed in accordance with protocols or procedures, as for example with material seized upon execution of search warrants: see discussion of the same in *Baker v Campbell* (1983) 153 CLR 52; *Allitt v Sullivan* [1988] VR 621 at 642; *Question of Law Reserved (No. 1 of 1988)* (1988) 70 SASR 281 per Doyle CJ at 290, 294, 297.
36. In cases of claims of legal professional privilege made with respect to electronic data on mobile phones, the electronic material must initially be extracted. Specialised procedures are then required. With computerised data the principle concerning legal professional privilege remains the same but it has been required to adapt to the new

electronic environment. In *Tan v Commissioner of New South Wales Police* [2012] NSWSC 1580, it was observed:

*“79. These proceedings raise questions of importance concerning the application of established principles that determine legal professional privilege claims to electronic data captured and stored in the electronic memory of a mobile phone. Whilst in Propend (supra), the High Court enunciated and applied these principles to original and copy documents, the Court was not required to discuss these applications to information in digital or other electronic forms.”* (per Hall J)

37. In *Propend*, supra, Kirby J stated that because of advances in information technology, compulsory process would increasingly involve the multitude of material forms used in effecting communications, observing:

*“. . . Necessarily, the doctrine of legal professional privilege must adapt to a world in which these media are the stuff of disputes concerning criminal and civil obligations and the rights of citizens”* (at p 585)

38. In the present investigation the electronic device (MFI 23) has a mix of digital data (email, SMS messaging, etc) and a mix of communications, some claimed as being the subject of legal professional privilege and the rest are not privileged communications. It is the latter communications, not the former, that the Commission seeks to examine.

39. To initiate the process of accessing the non-privileged material (as identified in the Directions) all the electronic data stored on the device’s memory must be downloaded before procedures are implemented with specialised equipment for the extraction and de-coding of the non-privileged material. It is clear that, as discussed below, mere copying of documents does not infringe or undermine legal professional privilege. So neither downloading digital data nor the process of extraction and de-coding impairs

the communications that are or may be subject of legal professional privilege ie the material referred to by Mr Lawrence as the WhatsApp group material.

40. In *JMA Accounting Pty Ltd v Michael Carmody, Commissioner of Taxation* (2004) 139 FLR 537 a taskforce created by the Australian Taxation Office exercised powers conferred by s 263 of the *Income tax Assessment Act 1936 (Cth)* to enter specified office premises and seize and take copies of relevant documents, most being on computer databases. The Court received submissions which, in effect, challenged the lawfulness of the search and seizure.

41. The Court (Spender, Madgwick and Finkelstein JJ) dealt with issues related to the handling of privileged material in the exercise of the search and seizure power. It stated:

*13. This does not mean that an officer is prevented from conducting his s 263 search, until all claims for privilege have been resolved. The resolution of such claims might take weeks or even months; it is inappropriate for the search to be delayed for that amount of time. To put the matter in its proper perspective it is necessary to recall the purpose of legal professional privilege is to keep secret communications between a lawyer and his client, and where the communication is written, it is to prevent the document from being read. Accordingly, the mere seizure of a document without it being read will not infringe the privilege. : Allitt v Sullivan [1988] VR 621 at 640; Solosky v The Queen (1979) 105 DLR (3d) 745 at 758.*

*14. A good deal of JMA's argument on this aspect depended upon an acceptance of the proposition that legal professional privilege will be infringed if a copy of a privileged document is taken, whether or not the original is read. The proposition is simply wrong. Moreover, there will be circumstances in which it will be proper for the officer exercising the s 263 power to look at a privileged*

*document, including a document for which privilege is claimed, for the purpose of determining whether it might be covered by the privilege. The document should not be looked at closely, merely enough to enable the officer to decide whether the document may be copied. In Allitt v Sullivan . . .Brooking J referred to this as a “lawful violation” of the privilege. The circumstances in which an officer will be entitled to undertake a bona fide examination of a document for this permitted purpose will include cases where no one is present to claim the privilege and when there is a blanket claim for privilege and it is reasonable apparent that the claim is not sustainable.*

42. Accordingly, in a case where communications are made by electronic data the data is made accessible and decoded into readable language. Consistent with observations of the Full Federal Court in the *JMA Accounting* case neither the downloading of digital data nor the decoding of it will infringe any material that is the subject of legal professional privilege. As the Court also observed in that case:

*“6. For the prohibition against examination and seizure of privileged documents to be of any value, there must be some method by which the existence of any privilege can be tested before the documents are read . . .”*

43. In *Kennedy v Baker* (No 2) [2004] FCA 809 Branson J observed:

- (i) That the creation and removal from the premises in that case of the imaged hard drive did not result in the disclosure of any communication to which legal professional privilege might attach [at 14]; and
- (ii) That the operation of the search warrant provision in that case would be frustrated if the mere identification within copied data of a file from which a privileged communication could be brought into existence could retrospectively invalidate the decision to copy the data [at 15].

## **Conclusions**

44. I am satisfied that MFI 23 contains privileged communications that can be brought into existence by accessing the data on MFI 23.

45. I am also satisfied that other communications which are identified in the Orders and Directions as set out in these reasons are available for the purposes of the investigation in Operation Aero.

## **Orders and Directions**

1. The direction made on 9 October 2019 by the Commission pursuant to s 37(1)(c) of the *Independent Commission Against Corruption Act 1988* to Mr James Clements, a witness appearing before the Commission at the public inquiry in Operation Aero, to produce his mobile phone, MFI 23, is confirmed.
2. The mobile device MFI 23 has been placed with and is to remain with the Commission's Property Unit and is to remain registered as a property item.
3. I direct the Computer Forensics Unit of the Investigation Services Section of this Commission to, as soon as practicable:
  - (a) take such steps in relation to the data stored on or accessible from MFI 23 as are necessary to reproduce any Communications between James Clements and one or more of the following persons during the period from 1 January 2015 to date:
    - (i) Tian (Tim) Xu;
    - (ii) Xiangmo Huang (aka Changran Huang);
    - (iii) Wun Chi (Gary) Wong;
    - (iv) Ernest Wong;
    - (v) Kenrick Cheah; and

(b) provide any of Mr Lawrence, and Ms Graham of counsel, or Mr Neilson, solicitor with access to a report or other document ("**Report**") that contains (but only contains) Communications of a kind referred to in subparagraph (a) on the undertaking of the person given access to the report:

(i) not to copy the Report or any part of it without leave of a Commissioner;

(ii) to return the Report to the Computer Forensics Unit promptly on its request;

(iii) not to discuss the contents of the report with Mr Clements without leave of a Commissioner.

4. I direct that the Report not be provided to any person other than Mr Lawrence, and Ms Graham of counsel, or Mr Neilson, solicitor or any person forming part of the Computer Forensics Unit until further direction of a Commissioner. The purpose of this direction is to provide Mr Clements with an opportunity to, by his counsel, make any submissions that he may wish to make as to whether the Report should be provided to the investigations and legal teams responsible for the investigation known as Operation Aero. This direction does not prohibit:

(a) the Computer Forensics Unit advising any officer of the Commission or Counsel Assisting that the Report has been prepared (provided that such advice does not disclose any part of the substance of the Report); or

(b) any officer of the Commission or Counsel Assisting making arrangements of a logistical nature to give effect to paragraph 3(b) and this paragraph of these directions.

5. If, for the purposes of complying with paragraph 3 of these directions, it is necessary for the Computer Forensics Unit to copy data stored on or accessible from MFI 23 in respect of which it is possible to reproduce Communications other than Communications of a kind referred to in subparagraph 3(a), such copied data ("**Copied**

**Data**") is to be stored only on a storage device or devices in respect of which the Copied Data is not accessible by persons other than persons employed in the Computer Forensics Unit.

6. As soon as practicable after paragraph 3 of these directions has been complied with:
  - (a) MFI 23 is to be returned to Mr Clements or his legal advisers;
  - (b) Mr Clements or his legal advisers are to be provided with a report prepared by a person within the Computer Forensics Unit of this Commission that sets out, in summary form, what steps were taken to comply with paragraphs 3 and (if applicable) 5 of these directions; and
  - (c) the Computer Forensics Unit is to encrypt any Copied Data and store the device or devices on which the Copied Data is stored in the Commission's secure evidence holdings facility and such device or devices are not be accessed by any person without leave of a Commissioner.
7. I direct that Mr Clements has liberty to apply in relation to the Copied Data and any device or devices on which Copied Data is stored including a direction requiring the Copied Data to be deleted or a direction requiring the device or devices on which the Copied Data is stored to be provided to Mr Clements.

In these directions: "**Communications**" includes text messages, iMessages, emails, WhatsApp messages, WeChat messages and emails and includes any data, metadata or other evidence of or associated with any communication including call logs and calendar entries.

8. Any content on MFI 23 that is protected by legal professional privilege is not to be viewed or examined by member of the investigations or teams responsible for the investigation known as Operation Aero.

9. I stay Orders 3 – 5 until 12:00 pm, Tuesday 22 October 2019. I grant liberty to apply on short notice.