

**2022 Special Commission of Inquiry
into LGBTIQ hate crimes**

**Before: The Commissioner,
The Honourable Justice John Sackar**

**At Level 2, 121 Macquarie Street,
Sydney, New South Wales**

Tuesday, 3 October 2023 at 4.33pm

(Day 95B)

Mr Peter Gray SC	(Senior Counsel Assisting)
Ms Claire Palmer	(Counsel Assisting)
Mr Enzo Camporeale	(Director Legal)
Ms Caitlin Healey-Nash	(Principal Solicitor)

Also Present:

**Mr Mark Tedeschi KC with Mr Anders Mykkeltvedt and
Mr Mathew Short for NSW Police, Detective Acting
Sergeant Cameron Bignell, Detective Sergeant Alicia Taylor
and Ms Georgina Wells
Mr Murugan Thangaraj SC for Mr Michael Willing
Mr Ken Madden for Sergeant Geoffrey Steer
Mr Matthew Hutchings for Mr Stewart Leggat
Mr Darien Nagle for Mr John Lehmann
Ms Linda Barnes for Detective Sergeant Penelope Brown
Mr Jim Glissan KC for Ms Pamela Young
Mr Stephen Russell for Detective Sergeant Paul Rullo
Mr Chris McArdle for Ms Emma Alberici
Mr Peter Wood (Re application in relation to Mr Willing)**

1 THE COMMISSIONER: Yes, Mr Wood.
2
3 MR P WOOD: May it please you, Mr Commissioner, on this
4 application, I appear for Mr Willing.
5
6 THE COMMISSIONER: Thank you. I think everyone else in
7 the room is interested or not, as the case may be.
8 Mr Thangaraj is here.
9
10 Mr Glissan, can you just tell me, the application, as
11 you know, in substance is for Mr Willing to be excused from
12 giving any further evidence. What attitude have you got on
13 that?
14
15 MR GLISSAN: We oppose that on the basis - well, I can
16 tell your Honour now very briefly or --
17
18 THE COMMISSIONER: No, you oppose it. That's the first
19 point. Ms Barnes?
20
21 MS BARNES: The same position - opposed.
22
23 THE COMMISSIONER: Counsel Assisting, Mr Gray?
24
25 MR GRAY: I will defer my position until I have heard what
26 the reasons are.
27
28 THE COMMISSIONER: All right.
29
30 Mr Wood, there is an affidavit. You know that I've
31 made some non-publication orders. I've directed - and
32 I will just make sure - that there is no live streaming
33 occurring. I've done that in order to minimise if somebody
34 makes an error or says something untoward, then it won't be
35 at least disseminated as widely as it might otherwise be.
36
37 MR WOOD: May I start with those orders? I don't know
38 whether you have them close to hand.
39
40 THE COMMISSIONER: I don't.
41
42 MR WOOD: On one reading of them - I'm sure this was not
43 intentional - they may forbid me from making these
44 submissions to you.
45
46 THE COMMISSIONER: It wasn't intended that that --
47

1 MR WOOD: I'm sure that wasn't intended.
2
3 THE COMMISSIONER: No.
4
5 MR WOOD: I don't want to walk into --
6
7 THE COMMISSIONER: I would have liked to have achieved
8 that result, Mr Wood, but even I couldn't go that far.
9
10 MR WOOD: No, I didn't think that that was the intention
11 behind it.
12
13 THE COMMISSIONER: If you want me to make it clear, there
14 was no intention in order to prevent you or, for that
15 matter, Mr Glissan, Ms Barnes or anyone else from making
16 submissions about the matter. I will leave it, by the way,
17 to counsel to deal with certain matters discreetly.
18 I won't say any more than that.
19
20 MR WOOD: Having said that, I didn't propose to reveal the
21 contents of the various documents I will take you to very
22 briefly, for that very reason.
23
24 Perhaps I should commence by tendering the statement
25 of Jonathan Milner of 29 September and the exhibit to that,
26 which is JOM-1.
27
28 THE COMMISSIONER: Yes, I will receive that and I will
29 mark that exhibit 1 on this application.
30
31 **EXHIBIT #1 (ON THE APPLICATION) STATEMENT OF JONATHAN**
32 **MILNER DATED 29 SEPTEMBER 2023 AND EXHIBIT JOM-1**
33
34 MR WOOD: Have you had a chance to read that statement,
35 Commissioner?
36
37 THE COMMISSIONER: I have read the statement, I have read
38 all the annexures and I am on top of the materials. So, by
39 all means, take the course you wish to take, but I am
40 familiar with the materials.
41
42 MR WOOD: I will only take you to a few of the documents,
43 and I think it is convenient to do it by reference to
44 tab numbers.
45
46 THE COMMISSIONER: Yes.
47

1 MR WOOD: There is a lot of uncontentious historical
2 material in Mr Milner's statement, but could I go to tab 12
3 initially.
4
5 THE COMMISSIONER: Yes.
6
7 MR WOOD: Four pages into that tab, you will find
8 a document dated 24 August 2023.
9
10 THE COMMISSIONER: Yes, I have read that, thank you.
11
12 MR WOOD: I invite your attention particularly to the
13 paragraphs halfway down the page, that is, the second and
14 third paragraphs, and then the material that appears in the
15 following three paragraphs over the page.
16
17 THE COMMISSIONER: Yes.
18
19 MR WOOD: In particular, at about point 9 --
20
21 THE COMMISSIONER: Yes, I have read that.
22
23 MR WOOD: -- which goes to the essence of the issue.
24
25 THE COMMISSIONER: Under the heading "Recommendations"?
26
27 MR WOOD: Yes, indeed.
28
29 THE COMMISSIONER: Yes, I have read that.
30
31 MR WOOD: May I then take you to tab 13. Five pages into
32 that tab, you will find a document dated 13 July.
33
34 THE COMMISSIONER: Yes.
35
36 MR WOOD: That can be very quickly read and understood.
37
38 THE COMMISSIONER: Yes.
39
40 MR WOOD: The consequence of that, your Honour, you will
41 find on the last page behind that same tab, in the document
42 dated 7 August 2023.
43
44 THE COMMISSIONER: Yes.
45
46 MR WOOD: It is really the last paragraph of that that is
47 significant.

1
2 THE COMMISSIONER: I have read that, thank you.
3
4 MR WOOD: Then, penultimately, can I take you to tab 25,
5 the document dated 27 September 2023.
6
7 THE COMMISSIONER: Yes, I have read that.
8
9 MR WOOD: It's the last paragraph on the first page
10 I would invite your attention to --
11
12 THE COMMISSIONER: Yes, thank you.
13
14 MR WOOD: -- together with the following paragraph on the
15 second page, and most particularly the statement that
16 appears in the penultimate paragraph, beginning
17 "Mr Willing".
18
19 THE COMMISSIONER: Yes, I have read that.
20
21 MR WOOD: Finally, behind tab 26, you will find the
22 document dated 29 September 2023.
23
24 THE COMMISSIONER: Yes.
25
26 MR WOOD: Could I invite your attention to the last
27 paragraph on the first page, which again is specific in
28 part to this Inquiry, and then over the page, the
29 explanation is given of a number of factors, which
30 your Honour will see starting at about point 7 on page 2,
31 and there is another one at about point 3 on page 3; and
32 then concerning this Commission, you will see that in
33 point 6 on page 3.
34
35 THE COMMISSIONER: Yes.
36
37 MR WOOD: And then the very strong conclusion you see on
38 the next page --
39
40 THE COMMISSIONER: Yes.
41
42 MR WOOD: -- concerning this Inquiry. This is in the
43 context, of course, of Mr Willing having given evidence on
44 three different occasions before the Commission and the
45 particular topic or topics that have been renewed - and
46 I will come back to those in due course.
47

1 As a matter of principle, we would say the approach to
2 this application should be, first, if there is
3 a reasonable, substantial or compelling reason to excuse or
4 release Mr Willing revealed on the evidence, that should be
5 the end of the inquiry. Whatever forensic and evidentiary
6 fallout there is for Mr Willing or for other parties,
7 including Ms Young, Ms Brown or Ms Alberici, can be dealt
8 with, and should be dealt with, by way of submissions, and
9 the fact-finding process, equally, from the Commission's
10 point of view, should entertain whatever those submissions
11 are and follow from them.

12
13 So if this material demonstrates a reasonable,
14 a substantial or a compelling reason to excuse, which we
15 say it does, then you do not need, we say, to be troubled
16 any further by it.

17
18 You will remember that section 25 penalises a failure
19 of a witness to attend pursuant no doubt to a summons but
20 doesn't penalise it if there is a reasonable excuse. I am
21 sure there is no question of power that you have to excuse
22 or release a witness who has been summonsed, but
23 section 25(1) gives a clue as to the basis upon which that
24 power could properly be exercised, and the adjectival test
25 there is whether there is a reasonable excuse.

26
27 If that submission is not accepted and you consider
28 that some balancing exercise should take place to determine
29 whether Mr Willing is excused or released, then that
30 balancing exercise has to start with the evidentiary
31 material directed towards supporting or demonstrating the
32 excuse or the reason for the excuse.

33
34 You then have to take into account where the
35 prospective issues are in the proceedings relevant to the
36 evidence the Commission would like him to give or
37 participants who have been given leave would wish him to
38 give. In that context, we would submit that this focus on
39 the area of the Lateline program, which there has been,
40 clearly, in this round of the hearings, then that is
41 a satellite, attached to a satellite, that is within - or
42 not within the penumbra of the Terms of Reference, fully
43 appreciating your ruling on the Terms of Reference, but
44 even according to that ruling, it could not be considered
45 to be the heartland of the Inquiry. It is a peripheral
46 aspect that informs, according to your ruling, thinking on
47 assessing what is in the heartland of terms (a) and (b) of

1 the Inquiry.

2
3 Perhaps more importantly is to balance up the forensic
4 upsides and downsides from the relevant points of view of
5 the participants in any debate on this. On one view of it,
6 the most disadvantageous aspect of excusing him could
7 rebound upon Mr Willing himself. That's a matter for final
8 submissions and not something here I'm endeavouring to
9 convince you, Commissioner, about one way or the other, but
10 that is an available view.

11
12 Secondly, if one looks at it from the point of view of
13 Ms Young or Ms Alberici or Ms Brown, then, again, on one
14 view, they may be benefited by not having an evidentiary
15 contradictor to their evidence on particular topics. True
16 it is, and it cannot be forgotten, that these topics
17 generally have been explored in great detail already by
18 Counsel Assisting in the previous hearings, so you have the
19 benefit of that, and clearly, together with the submissions
20 on that, together they seem to have been the trigger for
21 the calling of these three extra witnesses.

22
23 Now, all the parties, including Mr Willing, can
24 continue in this Inquiry with submissions based upon what
25 may be perceived to be an absence of perfection or
26 completion of evidence. There is nothing unusual in
27 inquiries, in tribunals or in courts to have evidentiary
28 gaps, and hence we have a series of rules as to how you
29 fill those in the fact-finding process and also in terms of
30 restrictions upon or qualifications to the making of
31 submissions.

32
33 Now, we say if you throw all those factors into the
34 balance, there is only one conclusion that could be
35 reached, and that is to excuse or release Mr Willing from
36 the obligation under the summons. The potential prejudice
37 to him is real and demonstrated by uncontradicted evidence.

38
39 The prejudice, if there is any, to others is far less
40 compelling and can be dealt with in a customary way, and in
41 circumstances where, at least up until the present time,
42 the submissions by Counsel Assisting are in no way
43 suggesting an adverse finding against any of my three
44 opponents on this application, and the evidence that has
45 been led by Counsel Assisting in relation to two of those
46 opponents is not suggestive of a submission to make an
47 adverse finding against them. So you could well take the

1 view that they are a marginal participant only in this
2 debate. The more critical participant is Counsel
3 Assisting, and that is to assist you in making the ultimate
4 factual findings and conclusions to which this evidence may
5 relate, and it is marginal at best.

6
7 Those are my submissions.

8
9 THE COMMISSIONER: All right. Now, two things, before the
10 others say something. The submissions which have thus far
11 been made in writing and expanded upon orally in relation
12 to both Ms Young and Ms Brown have not been withdrawn.
13 They are maintained. That's the first point, as far as
14 I understand it.

15
16 Secondly, if I can take you, please, to tab 13 - and
17 that's the report, one of the confidential documents -
18 without me announcing anything of the sort, in the middle
19 of that page, you will see a sentence beginning "He is".

20
21 MR WOOD: The sentence beginning?

22
23 THE COMMISSIONER: "He is".

24
25 MR WOOD: Yes.

26
27 [REDACTED]
28 [REDACTED]
29 [REDACTED]

30
31 MR WOOD: That's the evidence.

32
33 THE COMMISSIONER: Thank you.

34
35 MR WOOD: But on that, I should have made it clearer that
36 the content of this document really has force, the force of
37 the other documents and what is said in them, and the
38 connections between the two things.

39
40 THE COMMISSIONER: I realise that, but there is no
41 evidence that the person who has produced the three reports
42 has spoken to the person who produced this report, nor the
43 [REDACTED]?

44
45 MR WOOD: No, only at the more general higher level that
46 there was a reference.

47

1 THE COMMISSIONER: Yes. Okay, thank you.

2

3 MR WOOD: And in relation to your first point, it remains
4 true: those criticisms have been made and they have not
5 been withdrawn.

6

7 THE COMMISSIONER: Thank you, Mr Wood, that's very
8 helpful. Mr Glissan?

9

10 MR GLISSAN: I will be very brief, if your Honour please.
11 There is no challenge to the confidential material that has
12 been provided, but a careful and close reading of it, in my
13 respectful submission, suggests that it does not disclose
14 a significant or material difference to the position in
15 which Mr Willing finds himself now, to that in which he
16 found himself when he gave evidence earlier in the Inquiry.
17 When he previously gave evidence, he did so without
18 apparent difficulty, and that that's a relevant factor to
19 be taken into account.

20

21 Let me put that into this context: not only, as
22 your Honour just pointed out to my learned friend, have the
23 assertions that are made against Ms Young and Ms Brown not
24 been withdrawn but maintained, but they were advanced today
25 during cross-examination, which presumably was
26 cross-examination on instructions taken by counsel then
27 appearing for Mr Willing, and they amount to a very serious
28 challenge and make very serious assertions against both of
29 those ladies. There is a direct conflict in the
30 evidentiary material as it sits at present.

31

32 What is ordinarily advanced is an opportunity to
33 challenge and an opportunity to cross-examine as to those
34 conflicting materials.

35

36 The question is, as my learned friend said, a forensic
37 one, but it is a forensic one that needs to be determined
38 in the context of the Commissioner's Inquiry on a basis of
39 a plenary provision of procedural fairness.

40

41 If those submissions are to be maintained and not
42 withdrawn, and, indeed, if Mr Willing seeks to continue to
43 be represented by counsel and to cross-examine the
44 remaining witness in this case, then there is a significant
45 risk that the Commission might be seen to have failed to
46 provide that plenary procedural fairness which we have seen
47 thus far in the Inquiry provided by you, Commissioner, and

1 which we anticipate will continue.

2

3 That, put in the simplest of terms, is the reason that
4 I rise to oppose the application, notwithstanding the force
5 of the material that has been produced by my learned
6 friend.

7

8 THE COMMISSIONER: Thank you. Ms Barnes?

9

10 MS BARNES: I echo those submissions as well, your Honour.

11

12 THE COMMISSIONER: All right. Mr Wood, is there anything
13 you would like to say in response?

14

15 MR WOOD: May I take you to tab 26 to refute the first
16 submission of my learned friend Mr Glissan, namely, there
17 was no difference in his position when he gave evidence
18 than his position now.

19

20 THE COMMISSIONER: No, I think on that point, I see the
21 issue you are going to take me to.

22

23 MR WOOD: It is expressly addressed.

24

25 THE COMMISSIONER: I acknowledge that there is an
26 additional stressor and, on one view, of some significance.
27 I accept that.

28

29 MR WOOD: Yes. That same point is made in the previous
30 report that is behind tab 25.

31

32 THE COMMISSIONER: Yes. I follow that.

33

34 MR WOOD: The only other thing I would say, which is not
35 strictly in reply, but it is not prejudicial to my learned
36 friends, is, Commissioner, you made reference to
37 [REDACTED]. That may not be consistent
38 with the prohibition order in relation to - or the
39 non-disclosure order in relation to the content.

40

41 THE COMMISSIONER: Well, I didn't name them, but I do need
42 to clarify what the state of the evidence is so that I'm
43 not mistaken.

44

45 MR WOOD: Indeed. My only --

46

47 THE COMMISSIONER: I certainly would have no intention in

1 referring to any matter in the judgment which would have
2 the effect of disclosing any detail, but I just wanted to
3 know the facts, that's all.
4

5 MR WOOD: I fully appreciate that and I'm not suggesting
6 otherwise. My only suggestion was to suppress that part of
7 the transcript, in case --
8

9 THE COMMISSIONER: I'm happy to make a non-publication
10 order in relation to my question and your answer, but I'm
11 going to proceed upon the basis, though, that the entirety
12 of treatment is as disclosed in the material.
13

14 MR WOOD: Absolutely.
15

16 THE COMMISSIONER: Yes, okay.
17

18 MR WOOD: Otherwise I have no further submissions.
19

20 THE COMMISSIONER: Thank you all. I will give judgment in
21 the morning at 9.30.
22

23 Mr Tedeschi is not here. Mr Hodgetts, would you just
24 inform Mr Tedeschi and others - and you won't need to be
25 here if you don't want to be. Is that what you are rising
26 to tell me, or are you standing because I was talking?
27

28 MR WOOD: I'm in your hands.
29

30 THE COMMISSIONER: All right. Well, keep standing, it
31 looks good. Mr Hodgetts, I will deal with the other matter
32 at 10, as planned, and I will give judgment on this matter
33 in the morning at 9.30.
34

35 MR HODGETTS: Thank you, Commissioner.
36

37 THE COMMISSIONER: All right. I will adjourn, thank you.
38

39 **AT 4.55PM THE SPECIAL COMMISSION OF INQUIRY WAS ADJOURNED**
40 **ACCORDINGLY**
41
42
43
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47

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