CORONERS COURT
OF NEW SOUTH WALES

Inquest:	Inquest into the death of Todd McKenzie
Hearing dates:	27-28 July 2022
Date of findings:	28 October 2022
Place of findings:	Coroners Court of New South Wales, Lidcombe
Findings of:	Magistrate Harriet Grahame, Deputy State Coroner
Catchwords:	CORONIAL LAW – Public interest immunity claim – non-publication orders
File number:	2019/239447
Representation:	Counsel Assisting the Coroner: Mr J Downing SC and M Dalla-Pozza instructed by Mr T Holcombe and Ms C Hill (Crown Solicitor's Office) NSW Commissioner of Police: Mr J Emmett SC and Mr B Kaplan instructed by Ms C Dunn and Ms T Spirovski (HWL Ebsworth) NSW Commissioner of Police: Ms R Atherton (Office of the General Counsel, NSW Police Force) Mr M McKenzie and Mr N Wilkins: Mr W de Mars instructed by Mr P McManus (Legal Aid NSW) Mrs J Wilkins: Mr D Fine (National Justice Project) Senior Constable Foster: Mr D Nagle instructed by Mr G Willis

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Preliminary

Procedural background

1. I am conducting an inquest into the death of Mr McKenzie, who died following a police operation at his home in Taree. A brief of evidence has been prepared which includes material provided by the NSW Police Force.

2. The Commissioner of the NSW Police Force ("the Commissioner") asks this Court to make a range of what I will refer to collectively as "protective orders" over specified information contained in that brief of evidence. The precise orders she seeks are:

    a. Declarations that certain information proposed to be included in the brief attracts principles of Public Interest Immunity ("PII") and, consequently, should be entirely excluded from the brief;
    b. Orders pursuant to ss. 65 and 74 of the *Coroners Act 2009* ("the Act") and the Court's implied powers that certain information in the brief not be disclosed beyond the legal representatives assisting the Court and the experts retained by the Court (which include a Mr Nick Perry, an expert in policing methodology);
    c. Orders pursuant to ss. 65 and 74 of the Act and the Court's implied powers that certain information not be disclosed beyond those assisting me (the legal representatives and Mr Perry) and the legal representatives of the other interested parties; and
    d. Orders for the non-publication ("NPOs") of certain information pursuant to s. 74 of the Act.

3. The hearing of this application occurred over two days (27 and 28 July 2022). I received written submissions from both the Commissioner and from Counsel Assisting me.

4. On 17 December 2022, I had made a decision in respect of the Commissioner's application ("the initial decision"). The Commissioner successfully sought judicial review of that decision (*Commissioner of Police v Attorney General for New South Wales* [2022] NSWSC 595, per Wright J) and obtained orders in the nature of certiorari setting aside aspects of the initial decision. As a number of the orders I made were not challenged, those orders remain operative. Wright J also made an order in the nature of mandamus remitting the matter to me to redetermine the matters his Honour had set aside according to law.

5. It may be noted that, in the period between when the application was remitted to this Court by the Supreme Court and the re-hearing of the application, the Commissioner has refined her claim. Further refinements occurred during the course of the hearing on 27 and 28 July 2022 and in the period subsequent to the hearing.

6. Because aspects of my initial decision were not set aside and because of the various refinements to the application made by the Commissioner since the date of Wright J's decision, the issues remaining in dispute are somewhat confined. At the outset, I should record that these refinements have been of assistance to this Court in determining this complex matter.

The evidence

7. The Commissioner read a total of five closed affidavits in support of her application. The first three were deposed by Assistant Commissioner Walton. These affidavits were the evidence relied upon by the Commissioner at the time of the initial decision.

8. After the remittal, but prior to the hearing, a confidential affidavit of Assistant Commissioner Joseph was prepared and was also read by the Commissioner ("the Fourth Confidential Affidavit").

9. Whilst I have had regard to all this evidence, for present purposes, it is the Fourth Confidential Affidavit that provides the principal evidence in support of the Commissioner's refined claim after the remittal (and it is to that affidavit that the written and oral submissions of the Commissioner and Counsel Assisting were most closely directed). Therefore, it is the Fourth Confidential Affidavit to which I have had most close regard in my decision.

10. During the hearing, the Commissioner sought leave to adduce a further affidavit going to some discrete questions which, Senior Counsel for the Commissioner, Mr Emmett SC accepted was not to that point established by the available evidence. I granted the Commissioner that leave and received a further affidavit of Assistant Commissioner Joseph ("the Fifth Confidential Affidavit"). I have had regard to that affidavit to the extent it has remained relevant (as I describe below, certain concessions made by the Commissioner subsequent to the hearing have meant that a number of aspects of that affidavit were no longer relevant).

11. Three exhibits were tendered during the hearing. A police manual concerning Oleoresin Capsicum ("OC") spray became Exhibit 1, the tender bundle in relation to the Commissioner's claim (comprising five volumes) and the index to that bundle became Exhibit 2, and an Aide Memoire identified the matters as agreed and not agreed between Counsel Assisting and Mr Emmet became Exhibit 3. At the conclusion of the hearing, I made interim non-disclosure orders in respect of Exhibit 3 and certain material in Exhibit 2.

Schedules A and B and the colour coding scheme

12. Consistently with the approach she adopted prior to the remittal and the hearing of this matter, the Commissioner has helpfully prepared (or at least, updated) two schedules, Schedules A and B. Initially, these were dated, respectively, 21 and 22 July 2022. These Schedules outline the various claims for protective orders the Commissioner has made over the information in the brief of evidence. Amongst other things, the schedules describe the claim made, its nature and the subcategory of that claim (columns 3-5).

13. Schedules A and B relied upon by the Commissioner at the hearing were dated, respectively, 22 and 21 July 2022. These documents were provided in a PDF format. After the hearing, as noted below, the Commissioner sought to replace Schedule A with an updated Schedule A. On 8 September 2022, the updated version of Schedule A was lodged. The updated version of Schedule A was provided in PDF version with a further version (in an excel spreadsheet format) also provided.

Matters contained in the 21 July version of Schedule A which appear inadvertently to have been omitted from the 8 September 2022 PDF version

14. Schedule A in the form provided as at 8 September 2022, its excel form, could be interrogated and different spreadsheets produced reflecting the results of any such interrogation. The PDF version of the updated (8 September) version of Schedule A was, I understand, created from a spreadsheet which recorded the results of a particular interrogation made by those representing the Commissioner (which interrogation purported to record all of the information that remained the subject of the Commissioner's claim).

15. The PDF form of updated Schedule A as at 8 September 2022, did not include all of the claims made in the earlier (21 July) version of Schedule A. Those assisting me conducted their own interrogations of the excel spreadsheet version of Schedule A dated as at 8 September 2022. Those interrogations revealed that the excel spreadsheet included references to claims that the Commissioner had made over some information which did not appear in the PDF version of updated Schedule A (but which had been made on the 21 July PDF version of Schedule A).

16. It is apparent that this is the result of some technical error which occurred in the course of creating the excel page from which the PDF version of the updated (8 September 2022) version of Schedule A was created; and, for whatever reason, the interrogations conducted by the Commissioner of the excel document did not capture all the claims which had initially been made.

17. I am confident that it was the Commissioner's intention to press those claims. None were the subject of any express concession made by Mr Emmett during the hearing (the information the subject of such concession, as noted below, was clearly marked in purple highlight). Further, Mr Emmett referred me in oral argument to an item of information (**Tab 91**, **[43]**) and maintained the Commissioner's claim in respect of that information. That information, although included in the excel version of the 8 September Schedule A; did not appear in the PDF version. Further still, as I will explain below, this additional information was of a type which was analogous to other information over which the Commissioner prepared her application.

18. Accordingly, I will proceed on the basis that the claims included in the PDF version of the 21 July version of Schedule A but omitted from the 8 September version remain the subject of the Commissioner's application. For convenience, I have asked those assisting me to prepare a further PDF version of the excel spreadsheet which records these claims. I will refer to this additional PDF document as "Supplementary Schedule A".

19. In summary, the versions of Schedule A that I have relied upon are:

    a. the version of Schedule A provided as at 8 August 2022; and
    b. The supplementary version of schedule A (prepared by those assisting me from their interrogations of the excel version of schedule A provided on 8 September 2022).

Henceforth, I will not generally have any need to refer to the 21 July version of Schedule A (except to the extent that an Aide Memoire prepared by Counsel

Assisting, which I describe below, refers to line numbers that were taken from the 21 July version of Schedule A). Therefore, from this point on in my reasons, unless otherwise specified, a reference to "Schedule A" is to the 8 September 2022 version of it.

The colour coding

20. Schedules A and B have employed a colour coding system which distinguishes the information which is the subject of the various orders sought. That colouring code is as follows:

    a. The information over which a claim of PII is made is marked red;
    b. The information over which non-disclosure orders are sought restricting disclosure to all but those assisting (which, Mr Emmett clarified during the course of the hearing, included Mr Perry) is marked blue;
    c. The information over which non-disclosure orders are sought restricting disclosure to all but those assisting (including Mr Perry) and the other interested parties is marked green; and
    d. The information over which NPOs are sought is marked orange.

21. In their submissions and during the hearing the Commissioner and Counsel Assisting referred to the information by reference to the above colour coding. I will do the same.

The scope of the Commissioner's claim

The refinement of the claim prior to the hearing on remittal

22. As noted previously, not all orders I have made were set aside (or were sought to be set aside) by Wright J in his Honour's decision on the Commissioner's judicial review application. This has reduced the scope of the Commissioner's claim on remittal.

23. Further, as also noted, the Commissioner has significantly refined her claim in the period between the remittal by Wright J and the hearing in July 2022. This has also reduced the scope of the Commissioner's claim.

The seven categories of information the subject of the Commissioner's claim

24. On the basis of the Fourth Confidential Affidavit, Counsel Assisting has divided the Commissioner's claim into the following seven categories and further subcategories, which I will adopt and reproduce.[1]

    1. Category 1 – training and capabilities

    a. Training documents, syllabuses and lesson plans (Fourth Confidential Affidavit [65]). The majority of the information in this subcategory is the subject of a claim for a Blue non-disclosure order. There is some, relatively limited, information,

[1] Counsel Assisting have inserted the numbering (1-7) of the categories that appears below; the alphabetical numbering of the subcategories appears in the Fourth Confidential Affidavit.

which is the subject of a PII application (that information falls within one or more of the other subcategories);

b. *Names of specialist courses (Fourth Confidential Affidavit [87]). A PII claim is made over the names of courses which, the Commissioner asserts, are irrelevant for the purposes of the inquest. A Blue claim is made over the remaining courses (see Fourth Confidential Affidavit [88]-[93]);*

c. *[. From the Fourth Confidential Affidavit's affidavit, Counsel Assisting understood this to be a quite limited subcategory of information; as the only such weapon Assistant Commissioner Joseph identified is (Fourth Confidential Affidavit [96]);*

d. *Entries to buildings (Fourth Confidential Affidavit [101]). Again, Counsel Assisting understood this to be a limited claim as the only pieces of information which have specifically been identified by Assistant Commissioner Joseph as falling within this subcategory is information that suggests that:*

   i. *" (Fourth Confidential Affidavit [101]); and*

   ii. *(Fourth Confidential Affidavit [103]).*

e. *The information falling within this subcategory, Counsel Assisting understood, reveals that (Fourth Confidential Affidavit [107]-[110]). This is subject to a PII claim.*

2. Category 2 – specialist equipment and weapons

a. *(Fourth Confidential Affidavit [121]). A PII claim is made over information that suggests that the ;*

b. *Descriptions of beanbag ammunition. The information particularised in this subcategory, Counsel Assisting understood, was limited to information that suggests that (see Fourth Confidential Affidavit [127]).*

c. *(Fourth Confidential Affidavit [132]). The evidence in this subcategory, Counsel Assisting understood, relates to the involved operative's states of mind and intention in deploying beanbag ammunition against Mr McKenzie (i.e.). Counsel Assisting noted that the information within that*

[2] As will be explained below, this is a type of non-lethal ammunition available to TOU/TORS.

subcategory seemed also to relate to the actual physical effect of beanbag rounds on those shot with them. A PII claim is made over this information;

d. *Ammunition.*

   i. *Counsel Assisting understood that the information that is particularised in this subcategory as being subject to a PII claim to comprise references to the ammunition for M4 rifles (Fourth Confidential Affidavit [139(c)]). and*

   ii. *Information as to the quantity of the ammunition available to TOU operatives and the gauge size of the rifles that discharge beanbag ammunition is subject to a Blue claim for non-disclosure orders (Fourth Confidential Affidavit [142(f)]).*

e. *Specialist equipment and weapons not used. The following specific pieces of information, Counsel Assisting understood, are particularised as being the subject of a PII claim:*

   i. *All references to* [redacted] *(Fourth Confidential Affidavit [149]);*

   ii. *All references to* [redacted]*;*

   iii. *References to the fact that t*[redacted] *(Fourth Confidential Affidavit [153(b)]);*

   iv. *Information that suggests that* [redacted] *(Fourth Confidential Affidavit [153(c)]);*

   v. *Information that indicates that* [redacted] *(Fourth Confidential Affidavit [153(d)).*

   vi. *All references to* [redacted] *(Fourth Confidential Affidavit [156]); and*

   vii. *All references to* [redacted] *(Fourth Confidential Affidavit [161]).*

f. *Tasers carried by specialist operators (Fourth Confidential Affidavit [161]). This is subject to an NPO claim. The following features of the TOU tasers are said to need protection by way of an NPO:*

   i. *Information that reveals that the TOU tasers are not equipped with a camera (Fourth Confidential Affidavit [168]);*

   ii. *Information that reveals that* [redacted] *(Fourth Confidential Affidavit [169]);*

[3] Which, I note is a specie of "less-lethal" ammunition.

iii. *Information that suggests that [redacted] (Fourth Confidential Affidavit at [171]/[172]);*

iv. *Information that reveals [redacted] (Fourth Confidential Affidavit [173]);*

g. *<u>OC Sprays</u>[4]. An NPO is claimed in respect of this subcategory. The following information concerning the OC sprays is said to need protection by way of an NPO:*

i. *Information that indicates that a "foamer" (a particular type of OC Spray) is [redacted] (Fourth Confidential Affidavit [178(a)]);*

ii. *Information that indicates that a [redacted] (Fourth Confidential Affidavit [178(b)]);*

iii. *Information that indicates that it takes 20-30 second for the effects of a discharge of OC spray to be felt (Fourth Confidential Affidavit [178(c)l);*

iv. *The quantities and delivery speed of the OC spray (Fourth Confidential Affidavit [178(d)]); and*

v. *Information that indicates that there is [redacted] (Fourth Confidential Affidavit [178(e)]).*

h. *<u>Beanbag ammunition</u>. An NPO is claimed in respect of this subcategory. The following information concerning the beanbag ammunition is said to need protection:*

i. *Information that indicates that [redacted] (Fourth Confidential Affidavit [185(a)]);*

ii. *Information that indicates that beanbag ammunition [redacted] t;*

iii. *Indications that the [redacted] (Fourth Confidential Affidavit [185(c)]);*

iv. *Information that indicates that officers are [redacted] (Fourth Confidential Affidavit [185(d)]); and*

v. *The make and model of the firearm that discharges beanbag ammunition (which is a Remington).*

[4] I note that there are two subcategory f's in the Fourth Confidential Affidavit.

i. *(Although it is not given a specific category by Assistant Commissioner Joseph, it seems that he has particularised a further NPO application which falls within this category. This is to the mere reference to the fact that the TOU have available "distraction devices" (Fourth Confidential Affidavit [315]).*

3. ***Category 3 – Location and quantity of resources***

a. [redacted] *(Fourth Confidential Affidavit [195]). This is subject to a PII claim;*

b. [redacted] *(Fourth Confidential Affidavit [200]). This is also subject to a PII claim;*

c. [redacted] *(Fourth Confidential Affidavit [209]). This too is subject to a PII claim;*

d. [redacted] *(Fourth Confidential Affidavit [215]). This also is subject to a PII claim;*

e. *The location of officers who might support or supplement the specialist team assembled on 31 July 2019 (Fourth Confidential Affidavit [222]). This too is subject to a PII claim;*[5]

f. *The number of specialist officers and the locations where they are based (Fourth Confidential Affidavit [226]). This is subject to a further PII claim;*

g. *The size of the specialist teams (Fourth Confidential Affidavit [238]). This is also subject to a PII claim; and*

h. *The quantities of equipment and weapons (Fourth Confidential Affidavit [245]). This too is subject to a PII claim.*

4. Category 4 – Radio channel

As Counsel Assisting understood it:

a. [redacted] *is subject to a PII claim (Fourth Confidential Affidavit [253]);*

b. [redacted] *is also the subject of a PII claim (Fourth Confidential Affidavit [255]).*

5. Category 5 – Methodology and tactics – Triggers

As Counsel Assisting understood it:

[5] I note that there is no point (f) in the body of the Fourth Confidential Affidavit in relation to this category.

a. *The Commissioner claims Green non-disclosure orders over the following information:*

   i. *Information that suggests that* [redacted] *(Fourth Confidential Affidavit [262]);*

   ii. *information that reveals that,* [redacted] *(Fourth Confidential Affidavit [262(c)]).*

b. *The Commissioner seeks an NPO over the following information:*

   i. *details of the actions plans - for example, over information that suggests that an EA plan should be developed within 10 minutes of arrival at an incident; and (Fourth Confidential Affidavit [279]);*

   ii. *the template forms for the action plans (Fourth Confidential Affidavit [279]).*

6. ***Category 6 – The iSurv log***

   As Counsel Assisting understood it, the Commissioner seeks NPOs:

   a. *Over the names of the involved officers (Fourth Confidential Affidavit [188]); and*

   b. *Over information that* [redacted] *(Fourth Confidential Affidavit [189]).*

7. ***Category 7 – Breach and hold***

   As Counsel Assisting understood it, the Commissioner seeks NPOs in respect of elements of that tactic (Fourth Confidential Affidavit [281]).

25. As noted, I accept Counsel Assisting's summation as I understand there not to be any dispute as to its accuracy. Indeed, I note that the argument before me proceeded largely by reference to these categories and subcategories.

The position taken by Counsel Assisting to the seven categories of information the subject of the Commissioner's claim

26. In written submissions, Counsel Assisting accepted the following:

    a. That much of the information over which a PII claim has been made is likely to be irrelevant to the inquest. This meant, Counsel Assisting submitted, that it could be removed from the brief without a determination as to whether it attracts PII;

b. That, with one exception[6], it may be accepted that the information marked Blue should be protected by a form of non-disclosure orders;
c. That the information marked Green is appropriately protected by the non-disclosure order proposed; and
d. That some of the information the subject of an NPO application should appropriately be so protected.

The Aide Memoire prepared by Counsel Assisting

27. As indicated above, I received an Aide memoire prepared by Counsel Assisting that was also provided to the Commissioner during the hearing (and which, as noted, became Exhibit 3). This Aide Memoire purported to record the information which was, and was which was no longer, in dispute. I note that the manner it did so was by reference to the line numbers (or more accurately, row numbers) that appeared on the 21 July 2022 version of Schedule A; unfortunately, the line numbers on the 8 September 2022 version of Schedule A are different. Nevertheless, by reference to the 21 July 2022 version of Schedule A, I have been able to ascertain which information was accepted was not in dispute.

Issues that remained in dispute

The questions proposed by Counsel Assisting in written submissions

28. As a result of the aspects of my initial determination remaining on foot, the various refinements made by the Commissioner and the position taken by Counsel Assisting, in written submissions, Counsel Assisting proposed that only the following questions required resolution by this Court:

    a. ***Question 1***; whether the claim made by the Commissioner for PII over references to the fact that [redacted] should be upheld. I note that this corresponds with the information described as Category 2(c) by Counsel Assisting.

    b. ***Question 2***; whether the Commissioner's claims for PII over information related to the specialist weapons and equipment available to the operatives involved in the operation preceding Mr McKenzie's death (but which were said not to have been used) should be upheld. This corresponds with the Category 2(e) information described by Counsel Assisting. This included the claim over the following subcategories of information, in particular:

        i. The PII claim over the references to [redacted];
        ii. The PII claim over the fact [redacted]
        iii. The PII claim over references to the fact [redacted];
        iv. The PII claim over references to [redacted]; and

[6] Relating to the gauge size of the firearms used to discharge the beanbag ammunition which, I note, was the subject of the Commissioner's concession by email dated 10 August 2022 and so does not need to be determined.

v. The PII claim over references [redacted]

c. ***Question 3***; whether the Commissioner's claims for PII in respect of most of the third category of information identified by Counsel Assisting (which dealt with questions such as the location and availability of police resources) should be upheld. It may be noted that Counsel Assisting accepted that some of the information falling within that category (in particular, information that suggested that [redacted] and information as to the size of the specialist teams) was irrelevant, meaning it could be excluded. As a result, it was not necessary for me to consider that material.

d. ***Question 4***; whether the Commissioner's claims in respect of information relating to [redacted] (Counsel Assisting's Category 4) should be upheld.

e. ***Question 5***; whether the Court should make the NPOs sought over the following pieces of information (the remaining information over which NPOs were sought, Counsel Assisting accepted, being information over which it was appropriate for the Court to make NPOs):

i. references to the fact that TOU tasers do not have cameras (Fourth Confidential Affidavit [167]);

ii. references to the fact that [redacted] (Fourth Confidential Affidavit [171]);

iii. information that reveals that there is [redacted] (Fourth Confidential Affidavit [178(e)]);

iv. the model of the firearm that discharges beanbag ammunition (Fourth Confidential Affidavit [185]);

v. references to "distraction devices" (Fourth Confidential Affidavit [315]);

vi. information that indicates that there can be a "time-lag" before OC spray takes effect (Fourth Confidential Affidavit [178(c)]);

vii. information that suggests that [redacted];

viii. the list of less lethal tactics that appears in the TORS initial report (Tab 214 of the brief (Fourth Confidential Affidavit [369]); and

ix. the information related to the "breach and hold" tactic (which appears to include how that tactic was implemented (or was sought to be implemented) in the course of the operation that preceded Mr McKenzie's death (Fourth Confidential Affidavit [286]).

f. ***Question 6***, the form of the Blue non-disclosure orders and, in particular, whether the information falling within this category ought to be withheld from the interested parties. This included, particularly, the following questions:

i. Whether disclosure of the gauge size used to discharge bean bag ammunition would be harmful; and

ii. Whether the form of orders should entirely prohibit the interested parties from having access to the relevant information.

29. The Commissioner and Counsel Assisting accepted, and, subject to some very minor exceptions (which were the subject of express argument during the hearing), I am satisfied, that the remaining categories identified by Counsel Assisting did not need to be agitated either because they related to information which had been identified as irrelevant or because Counsel Assisting had accepted that the orders sought in respect of them were appropriate.

30. Counsel structured their oral addresses to me by reference to the above six questions. I will do the same in these reasons.

Further refinements of the Commissioner's claim during and after the hearing

31. I have recorded that, during the July hearing, the Commissioner no longer pressed for orders to be made over the following categories of information:

a. The NPO over "distraction devices" (which relates to question 5(v) above);
b. The NPO over what was described as the "time-lag" in OC spray having effect (which relates to question 5(vi) above);
c. The NPO over particular pieces of information relevant to methodologies (which forms part of question 5(ix) above). The specific pieces of information was an answer given in the directed interview **Tab 84, answers 1004** and **1021**), the NPOs over **Tab 80, answers 1170**, **1171** and **1172** and a further answer given in the directed interview at **Tab 71, answer 405**.

32. After the hearing, the Commissioner, by email dated 10 August 2022 sent by her representatives to the solicitors assisting me, indicated that she no longer pressed:

a. NPOs over the fact that specialist officers use the Remington Model 870 Wingmaster shotgun (I note that this was the subject of question 5(iv)). This included the information specifically identified at paragraph 9(a)-(d) of the Fifth Confidential Affidavit; and
b. non-disclosure orders over the gauge size of firearms used to discharge beanbag ammunition (I note that this was the subject of question 6(i)). This includes the information specifically identified at paragraph 14(a) and (c)-(e) of the Fifth Confidential Affidavit.

I note, in passing, that these were some of the matters which the Fifth Confidential Affidavit had been intended to address.

33. As noted, during the July hearing, Mr Emmett indicated that the Commissioner would provide a further updated version of Schedule A which reflects the information over which the Commissioner no longer made any claim for orders and, on 8 September 2022, the further updated Schedule A was provided. Certain information in respect of

which the Commissioner had withdrawn her claims for protective orders was marked in purple. The Purple material in Schedule A indicates that the Commissioner has withdrawn her claim in respect of information contained in the following references:

a. Tab 9, [354], [519];
b. Tab 71, answers 405;
c. Tab 78, answers 920, 921, 922;
d. Tab 80, answers 344, 365, 952, 1537, 1603;
e. Tab 82, answer 130, questions 132 133, 135, 140, 141;
f. Tab 83, answer 495;
g. Tab 84, answer 433, question 438, answers 563, 790, question 799, answer1004, question 1021;
h. Tab 86, [7];
i. Tab 87, [3], [4];
j. Tab 124 (being all references to Remington shotguns and the gauge size);
k. Tab 131 (being all references to Remington shotguns and the gauge size); and
l. Tab 214, p. 4.

34. As I explain below, in some respects, the Purple information does not accord with the concessions I understood the Commissioner to have made during the course of the hearing.

Additional claims made by the Commissioner subsequent to the hearing

35. The material marked in Purple in Schedule A also indicates that the Commissioner has made some additional claims. The Commissioner has advised that those claims fall within the scope of an existing category of claim but was not previously included due to error. Mr Emmett explained during the hearing that the Commissioner had identified a number of discrete pieces of information which fall within the existing categories, but which through oversight did not make it into the 21 July version of Schedule A.[7]

36. I am satisfied that information falls within the existing categories of the Commissioner's claim. Therefore, I will deal with those additional claims.

Legal principles

37. The decision of Wright J means that there is now considerably greater clarity about the legal principles that apply. Indeed, there was really no significant dispute between Mr Emmett, who, as noted, appeared for the Commissioner on this application (but not prior to the remittal of this matter) and Senior Counsel Assisting, Mr Downing, (who also did not appear prior to the remittal). Both Mr Emmett and Mr Downing submitted that, in determining the PII claim, I would adopt the three-stage process described in *Alister v The Queen*; [1984] HCA 85 and *Sankey v Whitlam* [1978] HCA 43. It was accepted that this three-stage process involved:

[7] See Transcript of hearing on 27 July 2022 at pp. 15 [10] – 16 [1].

a. Identifying the harm to the public interest in the prevention of crime and the protection of the community and individuals that would arise from any disclosure of the information the subject of the Commissioner's application;
b. Identifying the harm to the public interest in the administration of justice that would arise from excluding that information from the proceedings; and
c. Weighing up the respective harms.

38. During his oral address, Mr Emmett identified only one legal issue where there was a potential difference between the Commissioner and Counsel Assisting. That related to a contention, made by Counsel Assisting, that, in the course of the weighing up exercise, the principles of open justice assume an even greater significance in the present curial context than in other contexts. In oral address, Mr Emmett and Mr Downing submitted that it was unnecessary for the Court to determine that question. I agree and will not consider that submission made by Counsel Assisting.

39. Mr Emmett also clarified, during the course of his address that he did not contend that the other interested parties lacked any interest at all in the inquest. This has meant that it was not necessary to address Counsel Assisting's submissions on the effect of what was held in *Annetts v McCann* [1990] HCA 57 in light of Wright J's reasoning in *Commissioner of Police v Attorney General for New South Wales* at [85]; an issue, which I note, occupied some considerable attention in Counsel Assisting's written submissions. I do not make any determination on that issue (although I will briefly return to that issue in the course of dealing with question 6 (concerning the Blue material).

Issues to be explored in the inquest

40. In determining the second and third stages of the balancing exercise described in *Alistair* and *Sankey*, it is necessary, I accept, for me to identify the issues which I intend to explore in the inquest and to assess the materiality of the information the subject of the Commissioner's application with reference to those issues. The issues I intend to explore are set out in an issues list which has been disseminated to the interested parties. The issues list provides:

    1. *What was the nature of Todd's psychiatric condition as at 30 and 31 July 2019?*

    2. *Were adequate steps taken by police on 30 July 2019?*

    3. *Was the initial response by police on 31 July 2019 adequate?*

    4. *Were adequate resources allocated to the response?*

    5. *Was the nature of the negotiation undertaken by Sen Cst Larraine appropriate? What, if any, impact did it have on the events that followed?*

    6. *Were sufficient steps taken to obtain background information about Todd, from family members, friends, treating clinicians?*

7. *Would it have been appropriate, in the circumstances, for the negotiation team to obtain advice from an independent psychiatrist?*

8. *Was the Deliberate Action an appropriate tactical option to take at the time it was executed, in light of the information known about Todd and other options available?*

9. *Was the Deliberate Action adequately planned, resourced and documented?*

10. *Was the decision to use lethal force justified in the circumstances?*

41. I will have particular regard to these matters in my consideration of any harm to the public interest in the administration of justice that would arise from excluding certain information for the inquest and in the relevant weighing up exercise.

Determination of matters in dispute

Propositions of general application

42. Before proceeding to consider the specific questions (and the specific information the subject of those questions), I will make reference to a number of issues of general application which Mr Emmett referred me to. These include:

    a. In relation to information the subject of orders which might be thought to reveal something that is obvious, Mr Emmett submitted there is a difference between what might appear to be obvious in a detached and controlled setting such as a Court and what might appear to be obvious to the subject of a police operation given that more highly charged setting. This was a matter raised in the Fourth Confidential Affidavit at [22]-[25];
    b. Similarly, Mr Emmett submitted that, whilst some information might be in the public domain, there may nevertheless be some harm associated with confirming that information; and
    c. Mr Emmett also emphasised the importance of the mosaic principle (by which a particular piece of information, which on its own might seem innocuous can be harmful when taken together with other information that might be in the public domain, or is otherwise discoverable).

43. I will have regard to these general principles in my consideration of the specific questions remaining in dispute.

44. In assessing the nature of the risk identified by the Commissioner, I will also continue (as I did in my initial decision) to adopt a "risk calculus" approach of the type referred to in *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46; *Commissioner of NSW Police v Deputy State Coroner for NSW* [2021] NSWSC 398 at [58]). The calculus of risk approach involves taking into account the gravity of the risk of harm occurring in addition to its likelihood (*Commissioner of NSW Police v Deputy State Coroner for NSW* at [53]). I accept that a low risk of a very serious harm occurring may, on that approach, justify the upholding of a PII claim or the making of protective orders.

45. In conducting the relevant weighing up exercise, I will have regard to the fact that the present proceedings are civil in nature and do not involve any interference with the liberty of the subject. This was a specific error Wright J identified in my initial decision (see *Commissioner of Police v Attorney General of NSW* at [166]). I will bear in mind his Honour's comments in the same paragraph, including that it is not my role to conduct a "discursive inquiry into any possible causal connection no matter how tenuous, between an act or omission or circumstance and the death of the deceased". At the same time, given the point of this jurisdiction includes to cast public light on issues *Bilbao v Farquhar* [1974] 1 NSWLR 377 at 388), I find that it is nevertheless an issue of considerable importance in the relevant weighing up of the competing public interests.

46. As a further general matter, I note that, with only some limited exceptions, Mr Emmett accepted that Counsel Assisting had made a reasonable case as to the materiality of the information the subject of questions 1-4 to the issues in the proceedings (by which I understand, he accepted that it was relevant and its exclusion would, therefore, cause some prejudice to this Court in terms of being able to exercise its statutory jurisdiction). Accordingly, Mr Emmett accepted, for the most part that the question to be determined was the exercise of the relevant balancing exercise (i.e. the third stage of the process described in *Alistair* and *Sankey*).[8]

47. I will next turn to the specific information remaining in dispute.

Question 1 – The Red claim over references to [redacted]

The information the subject of this claim

48. During his oral address, Mr Emmett took me only to two pieces of information that fell within this subcategory. These were (references to the tabs in the brief of evidence):

    a. **Tab 83** (which was a recorded interview with one of the officers involved in the operation that had preceded Mr McKenzie's death). The claim was made over **answer 515** given by that officer.
    b. **Tab 9** (which was a covering statement of the second officer in charge of the Coronial investigation p 160). A claim was made over **[268]** of that document (which paragraph, I note, reproduced answer 515 of Tab 83).

49. The following information was the subject of these claims:

    "[the operative] explained [redacted]

Commissioner's submissions

50. Mr Emmett stressed that the Commissioner's claim was not over the fact that [redacted] *per se*, rather it was over information that revealed the intention of the officers in deploying that ammunition against Mr McKenzie. The sensitive

[8] Transcript of hearing on 27 July 2022 at p. 16 [25] – [40].

aspect, I understand, was the insight that information might provide into the thinking of not so much of the officers who were involved in this operation but of officers who might be involved in future operations. As I understand it, it was submitted that this would provide the hypothetical subject of a future police operation some advantage in his or her dealings with police.

51. In his oral address, Mr Emmett articulated that harm as follows:

> *"if somebody is in a mental state where they are considering rushing at someone, rushing at police and of course the police need to be mindful of the risk of somebody doing that, even in a suicidal state.* [redacted]

52. Mr Emmett urged me, in assessing the magnitude of this harm, to have regard to the differences between the present, calm and detached, curial setting in which I am considering that information and how the information, if disclosed, might actually be deployed by the hypothetical subject of a future police operation in the context of that operation. As I understand it, that was a particular application of his submissions about "obviousness" to which I have already made reference. Mr Emmett made the following submission:

> *"because it's obvious to us in Court now in a calm environment that something would occur, it may not occur to somebody in the heat of a fast moving situation. Whereas if there has been express coverage of a proposition, there is a greater risk of or if that piece of information is otherwise known, there is a greater risk of it floating to the top of the mind sooner in a high stress environment…."*

53. Mr Emmett accepted the materiality of that information. He submitted that the value of the material to the inquest was low because the information was "*not essentially relevant*". Mr Emmett accepted, however, the perhaps different proposition that "*the effect of the beanbag rounds in this particular case is undoubtedly an important matter*" for consideration.[9]

Counsel Assisting's submissions

54. Mr Downing submitted that this information was material and of high importance to the inquest. This was because the expectation of what the involved officers thought would occur during the operation was an important area for exploration in the inquest, particularly during any oral examination of these persons. As I understand Mr Downing's submissions, this information was material to understanding why the officers reacted the way in which they did during the course of the operation that preceded Mr McKenzie's death.

55. Mr Downing submitted that the harm of including the information was not as substantial as had been articulated by the Commissioner. He noted that the information the subject of the Commissioner's claim went to the involved officer's state of mind rather than the effects of the ammunition in practice. Mr Downing submitted that the hypothetical subject

[9] Transcript of hearing on 27 July 2022 at p. 25 [25] – [33].

of a future police operation would be "*far keener*" to know how the ammunition worked as a practical matter rather than knowing how the officers anticipated it would work in the context of the operation that preceded Mr McKenzie's death. Given that the Commissioner was not seeking protective orders over the [redacted] in the specific case of the police operation that preceded Mr McKenzie's death, the submission was, as I understood it, that the disclosure of this additional information would cause relatively little additional harm.

Determination

The harm that would arise from the disclosure of the information

56. I accept that there is some potential for harm to the public interest in terms of the prevention of crime and the protection of the community and individuals should information [redacted]. Specifically, the potential for harm relates to prejudice to future methodology and the [redacted] in a situation where a person is considering rushing at police or at someone in the presence of police. These matters could, I accept, potentially be grave.

57. However, there are a number of considerations which suggest that the disclosure would not be harmful to the degree the Commissioner has contended. These include the following.

58. ***First***, the [redacted] is, at least to some extent, already within the public domain. It is hard to see how including reference to this fact in the brief of evidence will significantly add to the public body of knowledge about [redacted]. In reaching this conclusion, I accept Assistant Commissioner Joseph's point about "obviousness", but it seems to me that the proposition that [redacted] is information that is of a very high degree of obviousness.

59. ***Secondly***, in relation to the example proffered by Mr Emmett, it seems somewhat artificial to me to expect that the disclosure of this information will cause the hypothetical subject of a future police operation to rush at heavily armed police (as the TOU and TORS operatives were that day) when she or he otherwise would not. In the first place, a person who rushes at heavily armed police is not, it may be presumed, one who is thinking clearly or logically. Moreover, any hypothetical suicidal person caught up in the heat of a police operation, it seems to me, is most unlikely to be more able to recall this specific piece of information simply from any disclosure that may be made in this inquest. To do so (and assuming for present purposes that I were to make no non-disclosure orders in respect of that information) that person would need to have been following the reporting on this inquest in some detail and to remember those details in the midst of the police operation. This would require a high level of mental composure on the part of that hypothetical suicidal person. And the hypothetical suicidal person with that level of mental composure may be thought to be likely to already know [redacted]

60. ***Thirdly***, the arguments Mr Emmett put in respect of "obviousness" to me are really arguments more against the publication of the information (as opposed to arguments that suggest that the information should be withheld entirely from the brief). If there is a

high degree of reporting of the methodology, it might be, I accept, that this piece of information would, in Mr Emmett's words "float to the top of the mind" of a person who was the subject of a future police operation. That does not mean, however, that I should entirely exclude that issue from any consideration (as noted below, I accept that some level of protection of the information is appropriate).

61. ***Fourthly***, I agree with Mr Downing that the real harm that arises from the disclosure of this information arises from the fact that, in Mr McKenzie's specific case, [redacted] This, to my mind, is what is far more likely to cause police to lose the benefit of any potential deterrent effect in any future operation. The Commissioner's concession that no order is sought over information that reveals merely that, in the context of the operation that preceded Mr McKenzie's death, [redacted] means that this fact will, through this inquest, be in the public domain (and, in any event, is revealed by what occurred during the police operation that preceded Mr McKenzie's death which will be the subject of consideration during the inquest).

62. For these reasons, applying a risk calculus approach, I accept that, if the harm did come to pass it would be relatively serious (the impairment of a future police operation could have potentially grave consequences). However, I consider the probability of the harm coming to pass to be low.

The materiality of the information

63. I accept Mr Downing's submissions as to the high degree of materiality of this information. I find that it is relevant to my s. 81 function. In particular, issues 2, 3, and 10 in the proposed issues list draw specific attention to the role of the involved operatives throughout the operation and, in particular, to their ultimate decision to use lethal force. Their reasons for using beanbag ammunition and their expectations as to what was likely to occur after they had done so form, I find an important contextual piece of evidence to the question of the manner and cause of Mr McKenzie's death. For example (and I have formed no concluded view in this regard) [redacted] as appears to have been anticipated by the involved operative may explain the decision of the involved operatives to proceed to use lethal force. To my mind, this is a question that goes directly to the "manner and cause" of Mr McKenzie's death).

64. Noting that, of course, that the effect of making a PII declaration would be to exclude me from considering this information at all, I would be precluded from fully considering the issues posed by s. 81, were I to grant the relief the Commissioner seeks. Worse, I would have only an incomplete picture of the involved operatives' motivations and explanations for acting the way in which they did. Without an ability to consider any such explanations, these officer's decisions to deploy lethal force might seem to be entirely unjustified (whereas, in truth, there may have been some justification or explanation for it).

65. I regard this as a significant impairment on the exercise by me of my jurisdiction under s. 81 and, by extension, significant harm to the public interest in the administration of justice should the relevant information be withheld. As set out above, there are concrete grounds to believe that the disclosure of the information the subject of this question would materially assist in determining issues 2, 3 and 10. The consideration of these issues, in my opinion, is directly related to the manner and cause of death and is not an

inquiry which could fairly be described as the conducting of a "discursive inquiry into any possible causal connection no matter how tenuous, between an act or omission or circumstance and the death of the deceased" (see *Commissioner of Police v Attorney General of NSW* at [166]).

66. I further accept, in this regard, that the present proceedings are not criminal in nature and do not involve the liberty of the subject. Nevertheless, the ability of this Court to shed light on issues of public importance arising out of an inquest, provides, in my view, a considerable public benefit, having regard to the role of the Court as described in *Bilbao v Farquhar*). I attach, in assessing the public interest, considerable weight to the importance of the Court's ability to undertake this task in a manner which is unimpaired.

The weighing up exercise

67. For these reasons, I am of the view that the significant harm in excluding this information (in terms of prejudice to the exercise of my jurisdiction) outweighs any harm from its disclosure (which, I am satisfied does exist and could have potentially grave consequences). Accordingly, I decline to uphold the PII claim over this category of information.

Orders that will be made over the information

68. As mentioned, I accept that this information is sensitive as it potentially discloses a future methodology in a way which could potentially be harmful. As previously noted, the risk, whilst not great in terms of its probability of occurring, is relatively serious in terms of its gravity.

69. Accordingly, I will make non-disclosure orders over this information. The non-disclosure orders I make will give it the same level of protection as the information that has been marked Green. The reason why I make orders in the same terms as those sought over information marked in Green, rather than Blue, is that the interested parties, by virtue of their participation in the inquest, already have full knowledge [redacted]e (which, as noted, I find is, in reality, the most sensitive aspect of the information). Given what the family members already know I regard it as artificial and unworkable to keep information about the operatives' intentions in using that ammunition from them.

Question 2 – [redacted]

The information the subject of this claim

70. As noted, this claim covered:

    a. references to [redacted];
    b. references to the fact that [redacted];
    c. references to the fact that [redacted];
    d. references [redacted]; and
    e. references to [redacted].

71. There was initially some uncertainty as to precisely what was meant by the references to [redacted]. Counsel Assisting, in written submissions, assumed that it included references to the [redacted] used by the operatives involved in the operation that preceded Mr McKenzie's death. As Counsel Assisting had noted, this would have made the claim untenable, on the grounds that there were numerous references, in the open material, [redacted] being available and deployed in the course of the operation that preceded Mr McKenzie's death.

72. As I will come to, in the course of his address, Mr Emmett clarified that the reference to [redacted] did not include references [redacted] but, rather, was to other [redacted] not used in the incident. I remain somewhat unclear what those [redacted] actually are. In any event, Mr Emmett specifically clarified that the Commissioner did not make any claim for PII over the fact that [redacted] were used in the operation that preceded Mr McKenzie's death.[10]

Commissioner's submissions

References to [redacted]

73. Mr Emmett took me to a reference in **Tab 82 answers 112** and **115** as an example of the Commissioner's claim over references to [redacted] These answers indicate that one of the shotguns used by the involved operatives was for [redacted] It contained no further elaboration of what those [redacted] were.

74. Mr Emmett also took me to the Red information claimed over **Tab 214**. This was the TORS initial report. During his oral address, Mr Emmett accepted that the references to [redacted] in that document referred to the [redacted] This is made apparent, as Mr Emmett appropriately conceded, by the reference on p. 2 of that report to the words [redacted] under the heading [redacted]

75. Accordingly, Mr Emmett sought instructions to withdraw the Commissioner's PII claim over the reference to [redacted] at Tab 214. The matters marked Purple in Schedule A indicate that this claim has indeed been withdrawn and it is included within the scope of an application for an NPO together with other information in Tab 214. Therefore, I will not make a decision on the PII claim that is no longer pressed. I address the application for an NPO over the information in Tab 214 below.

References to [redacted]

76. Mr Emmett took me to **Tab 84**, **answer 798**. That answer explained that the operational practice was [redacted]

[redacted]

77. Mr Emmett took me to **Tab 84**, **answer 801**. This answer contained information that, Mr Emmett submitted, revealed [redacted]. (It is not entirely clear but I am prepared to accept that the [redacted] rather than the permissions to use the "lethal option" referred to in answers 799-800).

[10] Transcript of hearing on 27 July 2022 at p. 29 [10] – [13].

78. I note in this regard that an apparent reference to the [redacted] being a "less than lethal option" at answer 802 is not the subject of a PII claim.

Submissions of the Commissioner regarding [redacted]

79. Mr Emmett again accepted the materiality of all the information related to [redacted] He submitted, however, that it was "*less centrally relevant*". This was because, he submitted, that information could only be relevant to the Court's recommendation function (under s. 82 of the Act) and not the Court's jurisdiction to make findings pursuant to s. 81.

80. In this regard, Mr Emmett accepted that the functions of this Court included the making of recommendations. He submitted, however, that it was not the Court's "*primary function*". He submitted that this caused the information to be "*at the lower end of significance*". [11]

81. In his oral address, Mr Emmett did not expressly identify the harm associated with the disclosure of the references to [redacted] (which, I note, were mere bare references to that term). In his written submissions, Mr Emmett made the following submission:

> "[77] *The fact that specialist police officers have* [redacted] *at their disposal is not a matter of common knowledge and if disclosed to the public this information could hinder their use and effectiveness …*
>
> *[79] The Commissioner also makes a claim over information disclosing that approval for the use of* [redacted] *as this is said to "revea[l] an attribute of the weaponry that could be used to the advantage of an offender, namely the* [redacted] *". Once again, it is important to be cognisant of the mosaic principle: a sophisticated offender may, either as a result of relevant information already known to them or after they discover such information in the future, be in a position to piece together a picture of when and how specialist police officers are equipped with* [redacted]

References to [redacted]

82. In relation to the claim over [redacted], on the question of the materiality of that information, as I understood it, Mr Emmett relied on the submissions he had made in respect of the [redacted] (that it is, whilst it was relevant, it was less centrally so).

83. In terms of the harm, in addition to the above reference at [77] in his written submissions set out above, Mr Emmett made the submission that the disclosure of the reference to that ammunition "*will tell somebody who knows what to search for what they are".*

[11] Transcript of hearing on 27 July 2022 at p. 31 [21] – [35].

References to [redacted]

84. In relation to the claim over [redacted], Mr Emmett submitted that these were even more remote (and less material). The harm he identified was that the disclosure would alert the hypothetical subject of a future police operation to the fact that [redacted]

Counsel Assisting's submissions

85. Mr Downing submitted that the references to [redacted](understood as being some form of [redacted]and which [redacted] were not actually used in the operation) was material to the inquest. Mr Downing placed particular emphasis on the potential need for that information to be provided to Mr Perry for his expert consideration (a facility that would be lost were PII orders to be granted). The matters that might need to be put to Mr Perry included as to the method in which those munitions might need to be deployed.

86. Mr Downing understood the reference to [redacted] to be to [redacted]of the sort to protect police from the effect of the [redacted] they might deploy. For that reason, Mr Downing submitted that they ought to be considered together with the references to [redacted]since it was necessary to understand what using [redacted]would have involved in practice. Mr Downing ultimately accepted that the references to [redacted] were less material, but submitted that they were nevertheless so. He again emphasised the importance of providing that information to Mr Perry for his consideration.

87. In terms of the need for approvals or permissions to use [redacted] Mr Downing also emphasised a point made in his written submissions. This was to the effect that, without any evidence as to what was involved in obtaining the permissions in practice (and whether there was likely to be any delay or difficulty in obtaining such approvals), there was no evidentiary basis for the Commissioner's contention that including these matters in the brief of evidence would result in any harm to future police operations.

Determination

88. As noted, Mr Emmett formally withdrew the claim over the reference to [redacted]in tab 214. Accordingly, I have not considered this claim.

The harm that would arise from the disclosure of the information

89. I do not think that a strong case for harm to the public interest in the prevention of crime and the protection of the community and individuals has been established in respect of this material.

90. Turning first to the references to [redacted]I note that the references in **Tab 82**, **answers 112** and **115** are indeed nothing more than bare references to [redacted] That reference does not describe what those [redacted]are or, in any detail, what their effects are.

91. As noted, references to such [redacted] being a “less” or “less than lethal” option have not been made the subject of orders. Moreover, there is no claim made over the fact that the TOU/TORS had access to “less lethal” options in the operation that preceded Mr McKenzie’s death, meaning that knowledge of this fact will become available as a result of this inquest. Accordingly, the hypothetical target of a future police operation will know that police have options available to them which are not lethal. It seems to me that this is the fact that might be most harmful to future police operations, (because it is that sort of information which might most readily be regarded as removing the benefit of any deterrent effect of the availability to police of non-lethal alternatives).

92. In any event, because the evidence does not disclose specific details of what those [redacted] are, I have no evidentiary basis for concluding that there would be any harm to future police operations caused by the disclosure of the references to [redacted] While it is submitted that the disclosure of the fact that police have [redacted] could hinder their use and effectiveness, the evidence does not address how those weapons could be hindered in that way. Having regard to evidence in the Fourth Confidential Affidavit at [152] that it is not public knowledge that NSW Police Force specialist officers have [redacted], I would be prepared to infer that some form of harm does exist, but I could not conclude that it is in any way a substantial or significant harm.

93. In relation to the information that reveals that [redacted] (**answer 798** of **Tab 84**) the precise harm of the disclosure of that information was not specified. I do not understand how the prospective subject of a future police operation would behave differently, and to the prejudice of future police operations, armed with that knowledge. Again, I am prepared to infer that some sort of harm may arise but, absent any explanation, of it, I cannot conclude that that harm is substantial or significant.

94. In relation to **answer 801** of **Tab 84**, I accept the point made by Counsel Assisting in written submissions that, without knowledge of what is involved [redacted] referred to in that answer, it is impossible to quantify the harm that would occur. Again, whilst I can infer that some harm might potentially arise, I cannot conclude that the harm is substantial or significant.

95. In reaching the above conclusions, I have had regard to the seriousness of the harm that could potentially occur. Whilst the impairment of a future police operation is a serious consequence, on the available evidence, I am unable to see how the disclosure of this material will result in that consequence given the limited references in the evidence. To the extent that it could have this effect, the probability of this result arising seems to me to be low.

The materiality of the information

96. In my view, the information concerning [redacted] is significantly material to the inquest. The Court is concerned to explore questions of whether there were any non-lethal options available to responding police which they could or should have deployed (considerations of this kind underpins, in particular, issues 4 and 10 on the issues list). It appears to me that [redacted] may well have been one such option. For these reasons, I consider that my ability to explore the question of whether

the [redacted] referred to were a non-lethal option that could, or should, have been explored would be significantly impaired by the exclusion of this information. I regard this as a question which is relevant to the manner and cause of Mr McKenzie's death and as one that is directly relevant to my s. 81 function (and is not a "discursive" inquiry of the type Wright J referred to in *Commissioner of Police v Attorney General*).

97. I accept, as Mr Downing submitted, that it is desirable to put these references to Mr Perry for an opinion as to whether the [redacted] the involved TOU/TORS were equipped with could or should have been used and whether this represented an appropriate alternative in the operation that preceded Mr McKenzie's death. This underscores the materiality of the information the subject of this question. I do not, however, treat the desirably of Mr Perry's opinion as a consideration (in relation to harm to the public interest should the information be withheld) distinct from the issues that I propose to explore in the inquest.

98. I note that, even if it turns out that the responding officers did not have the (non-lethal) [redacted] available to them in the course of the operation that preceded Mr McKenzie' death, a particular matter I would consider in any final hearing is whether, if they had, Mr McKenzie would have died. This causal analysis, I find, forms part of the consideration of the manner and cause of Mr McKenzie's death.

99. In addition, a question for the Court is whether I should make recommendations under s. 82 of the Act that police involved in future operations of a similar nature to that which preceded Mr McKenzie's death ought to have such equipment available. I would not consider making such a recommendation in the abstract or devoid from questions of what could be done as a matter of practical reality; thus any recommendation I would consider would require me to have regard to, amongst other things, questions of resourcing and the type of equipment that is already available to the TOU/TORS when they are deployed in a regional location. This makes information about the [redacted] information that would be, as Mr Emmett appeared to acknowledge during the course of his oral address, material to any recommendation I might make.

100. As noted, Mr Emmett noted that Counsel Assisting had made a reasonable basis for materiality, while maintaining that the information is less centrally relevant and more likely to be relevant to my recommendation function than my function in finding the manner and cause of death.[12] In that respect, I have had regard to Wright J's comments on the recommendation function, which were reflected in Mr Emmett's submissions. That function is of importance to the public interest (having regard to the nature of this jurisdiction, which includes to "shine a light on issues of concern" as reflected in the objects of the Act (see *Bilbao v Farquhar*)).

101. In addition, in order to explore whether [redacted] were, indeed, a non-lethal option which was (or should have been) available to the responding police, I would need to know something of how they are used in practice. To my mind, this makes both the reference to [redacted] material and of considerable value to the inquest.

102. The remarks I have just made apply largely to the references to [redacted] (which, as noted, is a further specie of non-lethal [redacted]). Although I was not taken

[12] Transcript of hearing on 27 July 2022 at p. 28 [9] – [15].

to specific examples during the course of argument, the references in Schedule A make it plain that what is sought to be removed is simply the word [redacted] whenever it appears. I accept that this reveals that the TOU have access to this sort of [redacted] I accept, using a mosaic analysis, that this information could give the potential subject of a future police operation the ability to perform google searches of that [redacted] This might reveal the limitations of that equipment which could be used to the detriment of police to the prejudice of future operations. I accept that this is a harm.

103. I find, however, that this information, referring as it does to a potential non-lethal option that perhaps could or should have been explored in Mr McKenzie's case is significantly material to issues 4 and 10 (and my consideration of the manner and cause of Mr McKenzie death) as well as to my recommendations function. Exploring this issue is not, in my view, an inquiry which could fairly be described as the conducting of a "discursive inquiry into any possible causal connection no matter how tenuous, between an act or omission or circumstance and the death of the deceased" (*Commissioner of Police v Attorney General of NSW* at [166]). Further, even though the present proceedings are not criminal in nature and do not involve the liberty of the subject, I consider there to be a considerable public benefit in the Court being permitted to explore this issue.

104. In summary, I am satisfied that there would be substantial harm to the public interest in the administration of justice if the information the subject of this question were withheld from this inquest. As set out above, there are concrete grounds to believe that the disclosure of that information will materially assist in determining issues 4 and 10 (and impair the ability of the Court to conduct its functions pursuant to s. 81). I also consider the information will materially assist in the exercise of my statutory function to make recommendations in connection with this inquest (under s. 82).

The weighing up exercise

105. For these reasons, I consider that the significant harm involved in omitting the information from the brief outweighs any harm that would be caused by its disclosure (which I find is grave, in terms of its consequences, although slight in terms of its probability of occurrence; given, in particular, the high level of generality of much of the information). Accordingly, I decline to uphold the PII claim over that information.

Orders that will be made over the information

106. Given that there is some sensitivity of this information, I would be prepared to make non-disclosure orders over it. In the present case, having regard to the nature of the interests of the interested parties (as distinct from their legal representatives), I can see no reason why they need to have unrestricted access to that information. It suffices for their purposes were they to know that police had non-lethal options available to them and to get a sense of what those non-lethal options may have been. Further, this category of information is discrete from the other information in the brief and can be withheld from the family without impairing their ability to understand what is contained in the brief and make submissions in accordance with their interest.

107. Therefore, I will make non-disclosure orders of the type proposed in respect of the Blue information in respect of this information (as I will come to, the orders I have proposed in respect of that information will permit the interested family members to have some, but not unrestricted, access to the Blue material),

Question 3 – Location and quantity of resources

108. This question concerns the vast bulk of the Red material that remains in dispute.

Information the subject of this claim

109. The following subcategories of information fell within this class:

a. That [redacted];
b. That [redacted];
c. That [redacted];
d. The location of officers who might support or supplement the specialist team assembled on 31 July 2019;
e. The number of specialist officers and the locations where they are based;
f. The size of the specialist teams; and
g. The quantities of equipment and weapons.

110. In their submissions, Mr Emmett and Mr Downing accepted that whether this information attracted PII was a finely balanced issue. Mr Emmett, with respect, aptly described some of the issues in this category as being at the "*pointy end*" of the question of materiality.[13]

Commissioner's submissions

111. In his written submissions, Mr Emmett, referring to [211]-[212] of the Fourth Confidential Affidavit drew attention to the fact that revealing this information would allow persons with criminal intent to [redacted]

112. In his oral address, Mr Emmett supplemented these submissions in the following respects.

As to [redacted]

113. In relation to the information that [redacted] Mr Emmett submitted that this information was not material at all. He made the following submission:

> *"The fact that equipment had to be collected, that will clearly be before your Honour. The fact that it was stored somewhere, that will clearly be before your Honour and the fact that it was transported to the location, that will be before your Honour."*

114. Alternatively, if relevant, Mr Emmett submitted that this information, if material, was "*at the outer edge of materiality*".

[13] Transcript of hearing on 27 July 2022 at p. 40 [48] – [49].

115. The harm Mr Emmett identified in respect of this information was [redacted]

As to [redacted]

116. In relation to [redacted] Mr Emmett accepted that it was relevant, but submitted that it was only remotely so. He made the following submission:

> *"Your Honour will be interested in timeliness [of the police response], we don't suggest otherwise, but the fact that it was …. [redacted], we say those two discrete matters are not sufficiently material to warrant production, despite the harm."*

Location of the negotiator's van

117. In relation to the ordinary location of the negotiators' van, I understood Mr Emmett to have made substantially similar argument to his submissions in relation to the information [redacted] (that is, that information was material given that the Court was interested in the timing of events, but only remotely so, because it was a discrete matter and the relevant chronology was established by other materials).

118. In terms of the risk harm including this information could have, Mr Emmett again pointed to the risk [redacted] (although he acknowledged that this was perhaps a slightly less serious risk of harm relative to the risks associated with [redacted]).

119. Throughout his oral address on this point, Mr Emmett again emphasised that the information was discrete (and so, more easily remembered).

Counsel Assisting's submissions

120. In his written submissions, Mr Downing drew attention to the timeliness of the police response and the question of adequacy of resources as being questions which were particularly material to both findings under s. 81 and any recommendations that the Court might consider making under s. 82. Mr Downing submitted that these matters were relevant to, in particular, issue 4 on the issues list.

121. Mr Downing also made the following point in his written submissions (at [37]):

> *"An exclusionary order denies this information from being considered at all in the inquest. This will distort the factual matrix presented to the Court and may, in turn, distort any findings that her Honour could make (perhaps, it may be said, in ways which would not be favourable to the Commissioner of Police). In particular, [redacted] for example, explain aspects of the operation that preceded Mr McKenzie's death that may otherwise seem problematic and inexplicable. The Court needs to approach its assessment of the adequacy of the police operation by making an appropriate allowance for [redacted]. The*

Court cannot do so if the relevant category 3 information is entirely withheld. Further, this sort of information may be relevant to potential s. 82 recommendation regarding the availability of resources for future police operations."

122. In his oral address, Mr Downing again emphasised the need for the inquest to have the facility to explore the options available to responding police (having regard to the reality of the resources that were available).

123. One matter Mr Downing particularly emphasised was the potential for the inquest exploring the question of whether, given the prima facie indications that the negotiators who had attended had been unable to develop a good rapport with Mr McKenzie, a replacement team of negotiators could or should have been organised. Clearly, I would observe, that involves consideration of where the available negotiators were and the practical realities that may have been involved in arranging for the attendance of an alternative team of negotiators.

124. Mr Downing also submitted, in reality it is the objective fact of the delay and when the resources arrived that might be thought to be the most harmful aspect of the operation. He noted that none of these matters were the subject of a claim for PII.

Determination

The harm that would arise from the disclosure of this information

125. As noted, amongst the harm Mr Emmett pointed to (and set out in the Fourth Confidential Affidavit) with respect to the public interest in the prevention of crime and the protection of the community and individuals should the information be disclosed was the [redacted] I accept this.

126. More broadly, I am comfortably satisfied that the disclosure of the [redacted] would be potentially harmful. Amongst other things, I fully accept that disclosure of [redacted] and how long it takes to respond may indeed be exploited by members of the public with criminal intent. Indeed, I did not hear any submission to the contrary. This is a risk that is serious both in terms of its consequence and its likelihood of occurrence.

127. I also accept Mr Emmett's submissions to the effect that the information in this category is largely discrete and, therefore, more apt to be remembered (with the consequence that it might be deployed to the detriment of police in future operations).

128. Having said that, and without in any way wishing to downplay the harm that the Commissioner has identified, I would, however, also accept Mr Downing's submission that, in reality, it is the disclosure of the objective fact of when police were able to respond and the resources they were able to bring to bear that might be thought to be the most prejudicial to police (and to the conduct of future operations specifically). As noted, Mr Emmett made it plain that he was not concerned to exclude questions of the objective timeframe in which police responded from. In addition, the broad resources (in terms of number of officers and negotiators) that were able to respond to the incident will also be disclosed by information which is not the subject of any PII orders.

129. Nevertheless, I accept that the harm associated with the disclosure of this information is not insubstantial.

The materiality of the information

130. I also find, however, that this is information that is of very high importance to the inquest, such that there would be clear harm to the public interest in the administration of justice should the information be withheld. Whilst it is clear that the fact of the delay is an important objective fact, I also regard it as important to understand why the delay occurred. This is for two reasons that concern issues 2-4 that I intend to explore at inquest:

    a. Firstly, it is difficult for this Court to make meaningful findings as to the appropriateness or otherwise of the police operation that preceded Mr McKenzie's death without a full appreciation of the realities of the resources that were available; and
    b. Secondly, it provides a factual basis for any recommendations I might consider making regarding resourcing to police in regional areas.

131. The first point, in particular, in my view, makes the information of the utmost importance to any findings I would be required to make on the question of the "manner and cause" of Mr McKenzie's death. Issues 2-4 concern the adequacy of police response. To make findings in relation to those issues (and whether the operation was a relevant "cause" of Mr McKenzie's death or was otherwise an aspect of the "manner" of his death. I would evidently need to have regard to the realities of the resources that were available on that occasion and where those resources were coming from.

132. To take a hypothetical example (as I have formed no concluded view on these questions), at the conclusion of the inquest, I might consider the delay in Police responding or the deployment of inadequate resources were relevant causes of Mr McKenzie's death.. Were I not to have regard to information of the sort which is the subject of question 3, potential explanations for what might otherwise seem to be an inappropriate delay or an inappropriate deployment of resources would not be available for my consideration. As Mr Downing has submitted, not only does this create, potentially, a misleading picture of what actually occurred, it does so in a way which is potentially to the disadvantage of the Commissioner and the involved officers. I find that the inability of this Court to have regard to evidence relevant to this question to represent a significant detriment to the public interest in the administration of justice.

133. I also consider the information will materially assist in the exercise of my statutory function to make recommendations in connection with this inquest. To continue the hypothetical example in the preceding paragraph, if I made findings that the delay or lack of resources did cause (or were otherwise related to the "manner" of Mr McKenzie's death), I might propose recommendations intended to remedy these matters. Although this could be described as "ancillary" to my primary function, it is nevertheless an important function; and I find that the impairment of it that would be caused by the withholding of that information would amount to a significant impairment of the public interest (again having regard to the role of this Court to shed light on issues of public concern).

134. In relation to information that reveals that [redacted] I accept, as Mr Downing submitted, that this matter is also highly material. It goes to explaining why the involved police acted in the manner they did, what options they had available and why the operation unfolded in the manner that it did [redacted]). If my findings indicated that this caused Mr McKenzie's death, I might propose recommendations in this regard.

135. Accordingly, there are concrete grounds to believe that the disclosure of the information the subject of this question will materially assist in determining issues 2-4 and, therefore, questions of the manner and cause of Mr McKenzie's death. There are also some grounds for considering that the information will be materially relevant to the exercise of my recommendations function. In this regard, although I accept that the inquest is not a criminal proceeding involving the liberty of the subject, there is, nevertheless, a strong public interest, in my view, in this Court receiving this evidence.

The weighing up exercise

136. For these reasons, I consider that there is a very strong interest in being able to consider this information in the course of the inquest. As noted in Mr Emmett's written submissions at [36], "*in undertaking the balancing exercise, the effectiveness or appropriateness of disclosure limitations (such as by the imposition of suppression, non-publication or restricted access orders) may be relevant"*. Having regard to my consideration of a tailored order below, I am satisfied that the public interest in the Court performing its functions having access to the information outweighs the not insubstantial harm that could arise from the disclosure of that information. For reasons set out below, that tailoring order will, I find, serve to mitigate the risk of harm arising from the disclosure of that information.

Orders that will be made in respect of the information

137. As noted, I accept the sensitivity of this information. Having reached the conclusion that it should not be excluded, in my view, it is appropriate that it be protected by a stringent form of tailoring order (of the type discussed in *HT v the Queen* [2019] HCA 40).

138. In written submissions at [72]-[73], Mr Downing proposed a form of tailored order whereby the information the subject of question 3 would be available to the legal representatives of the interested parties and be able to be viewed by the interested parties in the offices of those legal representatives provided a legal representative was present at the time. In addition, copying and electronic transmission of that information could be prohibited.

139. Mr Downing also submitted that, while there would be some risks of inadvertent breach of the orders, it should be accepted to be small. As Assistant Commissioner Joseph has appropriately acknowledged, professional persons can be expected to have a good appreciation of the obligations and duties they have in respect of the protected information (Fourth Confidential Affidavit [41]). It can be expected that the lawyers acting for the family in particular will convey to their clients the seriousness of maintaining

confidentiality, the rationale for doing so and the consequences of any failure to do so. A fair balance between the competing public interest can be achieved by permitting the family access, but in controlled circumstances, whereby their lawyers are present with them at all times when they are accessing the material. Such an approach would also significantly minimise the potential for harm posed by tailored orders to the administration of justice.

140. During oral submissions, Mr Downing elaborated on the form of a tailored order insofar as it concerns names of locations. In essence, the tailoring order he proposed was that only those assisting (including, I understand, Mr Perry) would receive the actual location from where the disparate resources had come. The other interested parties would be provided a specified distance range to replace the specific references to those locations (Mr Downing proposed a distance of [redacted] from the site of the police operation that preceded Mr McKenzie's death, a range which, he noted, took in a number of major centres).

141. Mr Emmett acknowledged the force of that approach (although his instructions remained to seek a PII order over the information).

142. In my view, the course proposed by Mr Downing should be adopted. This course will allow the interested parties to make submissions commensurate with their interest about questions of delay and the adequacy of police resources whilst minimising the risk of this undoubtedly sensitive information being disseminated. (By way of slight digression from this last point, I should record that, during his oral address, Mr Emmett most appropriately acknowledged that the risk of dissemination the Commissioner was concerned about in this case was inadvertent rather than intentional disclosure.)

143. In addition, I am satisfied that this approach (which is further detailed below) minimises practical difficulties that could otherwise be faced by the legal representatives as it distinguishes between the information covered by tailored orders and how other information within the brief of evidence may be dealt with. For completeness, insofar as the provision of the information to an expert gives rise to a risk that the tailored order may not be complied with, I have had regard to Mr Perry's background as a former Assistant Commissioner of New Zealand Police.

144. I will make orders providing for the provision of the information the subject of this question (with references to specific locations replaced with a reference to that location being within a distance of [redacted] from Taree) to the legal representatives of the interested parties on a restricted basis and for interested parties to have limited access to it. I elaborate on the restrictions on provision of and access to that information below. Consistent with Mr Downing's proposal, I will also make orders permitting the Court, those assisting (including Mr Perry) to have access to all such information, including names of locations.

Question 4 – [redacted]

The information the subject of the claim

145. With certain information being excluded on the basis of relevance, Mr Emmett made it plain that the Commissioner's claim was only over information that reveals that:

a. The [redacted]; and
b. That [redacted]

146. I note that one of the matters that Counsel Assisting suggested was irrelevant was the [redacted]. I do not need to make any determination over that information as it will be excluded from the brief.

147. This meant that question 4 was of quite narrow compass. Clearly the two propositions the Commissioner seeks to protect are interrelated ([redacted] – including by way of the publication of findings of this Court in inquests involving deaths occurring subsequent to a police pursuit – therefore, revealing the fact that [redacted]

Commissioner's submissions

148. In relation to this information, Mr Emmett again accepted materiality and noted that while it is not "*central materiality*", it is "*possible to imagine a range of ways in which [that information] may potentially be relevant*".[14] Further, as I understood it, Mr Emmett submitted that, to make any recommendation as to whether some level of oversight would or would not assist, the Court did not require actual evidence tha[redacted].[15]

149. By reference to the mosaic principle (as well as [254] and [255] of the Fourth Confidential Affidavit), Mr Emmett submitted that the harm associated with disclosing this information is that it would leave [redacted] more vulnerable to attack. In particular, Mr Emmett submitted that officers who were actually involved in an operation may not notice such an attack as readily [redacted] and might not be able to respond as quickly in the event of such an attack.

Counsel Assisting's submissions

150. In his oral address, Mr Downing stated that he was not troubled by the first proposition (that [redacted]), although he stated that it was "obvious" that the TOU must have done so. He would not object to that information being removed on the grounds of relevance.[16]

151. In relation to the second proposition, in his written submissions at [42], Mr Downing stated the following in relation to the relevance of the fact that [redacted] to this inquest:

> "… *it is not inconceivable that the* [redacted] *was a factor that goes to the nature and quality of the operation that preceded Mr McKenzie's death. Exploration of the question of whether or not this was the case is, relevant to issue 9 (noting that that issue directs specific attention to the question of whether the deliberate action plan*

[14] Transcript of hearing on 27 July 2022 at p. 48 [3] – [5].
[15] Transcript of hearing on 27 July 2022 at pp. 52 [44] – 53 [2].
[16] Transcript of hearing on 27 July 2022 at p. 50 [47] – [48].

was adequately "documented"). Furthermore, [redacted] were found to have had some negative impact on the operation that preceded Mr McKenzie's death, this could legitimately form the subject of a s. 82 recommendation. For this reason, this information is not only relevant but, potentially, of high value."

152. Mr Downing submitted that a potential recommendation that I might consider, at the conclusion of evidence would be that [redacted] In this regard, Mr Downing made the following submission, specific to the operation that preceded Mr McKenzie's death:

> [redacted] *it may be something that might have caused someone to pause and actually reflect on whether they were aware that in this case, Mr McKenzie was someone who was known, according to intelligence the police already had particular fear around and paranoia around people entering his house."*[17]

Determination

The harm that would arise from the disclosure of the information

153. I accept that the disclosure of information regarding [redacted] could potentially give rise to some harm to the public interest in the prevention of crime and the protectio[redacted] that being a fact which it was agreed was irrelevant). This is a serious consequence, but the likelihood of it coming to pass seems to me to be quite low ([redacted]).

The materiality of the information

154. However, it is also information which, in my view, is highly material to the inquest.

155. I accept Mr Downing's submission as to its relevance to issue 9 and, more broadly, on questions of the quality of the operation that preceded Mr McKenzie's death. The exploration of these issues (particularly, the latter issue concerning the quality of the operation) are, I find, directly related to the question of the "manner and cause" of Mr McKenzie's death. In particular, as Mr Downing has submitted, [redacted], the operation may have been conducted very differently. This is relevant to both questions of the "cause" of Mr McKenzie's death and the "manner" of it. For these reasons, I further find that an inquiry of these matters is not one that is "discursive" or "tenuous" to the "manner and cause" of Mr McKenzie's death; rather, I find, it is directly related to this question.

[17] Transcript of hearing on 27 July 2022 at p. 50 [35] – [43].

156. I also accept that there would be harm to the public interest in the administration of justice should the information be withheld. Even though the present proceedings are not criminal, there is, nevertheless, a very high public interest in the Court being in a position to be able to effectively explore this issue.

157. This information is also relevant to my recommendations function. As noted above, I have had regard to Wright J's comments in relation to the recommendation function. I consider it to bean important function; any prejudice to my ability to make such recommendations would, I find, be harmful to the public interest. Whilst the impairment on my ability to make recommendations is not decisive, I take this into account, in the weighing up exercise.

158. I do not accept Mr Emmett's submission that I could consider making this recommendation in the abstract and without receiving actual evidence that [redacted]. As previously noted, the making of recommendations is not an abstract exercise; it flows from the findings I make as to the manner and cause of a person's death. As such, I would only be prepared to make any recommendations if the evidence established those recommendations were needed (because, for example, the existing practice or procedures were, in some way inadequate). In the present context, any recommendation [redacted] could only, in my view, properly be made were the Court to receive evidence that, at the time of Mr McKenzie's death, it was not.

159. For the above reasons, in my view, this information is highly material and will or likely will materially assist in determining issue 9 and in the exercise of my statutory functions.

The weighing up exercise

160. For these reasons, even applying a risk calculus approach, I conclude that the harm in excluding this information outweighs any harm in disclosing it. I acknowledge that the harm that would arise [redacted]). However, I assess the risk of that occurring is low.

161. Further, the fact that [redacted] is relevant to my functions in this inquest in a range of ways, as set out above in Mr Downing's submissions. This includes exploration of whether there ought to have [redacted] (and whether this was a matter that caused or contributed to Mr McKenzie's death). This is materially relevant to my s. 81 function. I also find that there is a clear public interest in the administration of justice in me having the information available including in the context of any recommendations I consider necessary or desirable to make.

162. Despite Mr Downing's concessions as to the information that [redacted], I am not prepared to exclude that information on the grounds of relevance. For the reasons set out above, it seems to me that, if evidence is admitted (as I think it should be) [redacted]. Accordingly, my conclusions above regarding the information that the [redacted] apply equally to this information.

Orders that will be made in respect of the information

163. I do accept that there is some sensitivity to this information. As the probability of the harm coming to pass does not seem to me to be all that great, I was initially inclined to make this only the subject of a NPO. On reflection, given the serious consequences of [redacted], I will make non-disclosure orders in respect of it (even though it seems to me that the likelihood of this risk coming to pass is low). I do not see any need for this information to be kept from the interested parties (and, in my view, this is a matter on which they may make submissions, commensurate with their interest). Accordingly, I will make Green orders over that information.

Question 5 – NPOs

Disputed information the subject of this claim

164. As noted, Counsel Assisting, in written submissions, accepted that the Commissioner had established an evidentiary basis for some of the NPOs. Without only very limited exceptions (which related to information which, notwithstanding Counsel Assisting's concessions, was the subject of particular argument during the course of the hearing) I am prepared to make NPOs over that information.

165. I further note the concessions made by the Commissioner during and after the hearing. In light of those concessions, I will make no NPOs over the following information/categories of information:

    a. References to "distraction devices".[18] Having regard to the descriptions in Schedule A, it seems to me that **answer 920-922 of Tab 78**; **answer 344** of **Tab 80** and **answers 793** and **794** of **Tab 84** all fall within this category. (As noted below, it seems to me that **answer 365** of **Tab 80** falls within a different category, I would be prepared to make an NPO over that answer);
    b. Information that revealed the "time-lag" in OC spray having effect.[19] It seems to me that **Tab 78 answer 473** falls within the scope of this concession;
    c. **Tab 72 answer 405**;[20]
    d. **Tab 84 answers 1004** and **1021**;[21] and
    e. The fact that the Remington Model 870 Wingmaster shotgun is used to discharge beanbag ammunition (it seems to me that **Tab 84, answer 790**, and the references to Remington in **Tabs 124** and **131** fall within the scope of this concession).[22]

166. This leaves, I understand, the following categories of NPOs still in issue:

    a. references to the fact that TOU tasers do not have cameras;

[18] Transcript of hearing on 27 July 2022 at p. 64 [30] – [32].
[19] Transcript of hearing on 28 July 2022 at p. 3 [10] – [21].
[20] Transcript of hearing on 28 July 2022 at p. 45 [32] – [38].
[21] Transcript of hearing on 28 July 2022 at pp. 47 [24] – 48 [11].
[22] Commissioner's concession by email dated 10 August 2022.

b. references to the fact that [redacted];
c. references to the fact that [redacted]
d. information that suggests that [redacted];
e. the list of less lethal tactics; and
f. the information related to the "breach and hold" tactic.

167. I will deal with each of these matters in turn.

The fact that the tasers have a camera

168. I am not satisfied that the Commissioner has established an evidentiary basis for NPOs over the information falling within this subcategory.

169. The harm that was identified by Mr Emmett with the publication of this information was to the effect that, if the hypothetical subject of a police operation knows she or he is being filmed, that can have a deterrent effect. That benefit, he submitted, would be lost were that person to become positively aware that she or he was not being filmed.[23]

170. As I pointed out to Mr Emmett during the hearing, that seems to be an argument in favour of the TOU operatives wearing body worn cameras.[24] In particular, I would have imagined that specialist groups such as the TOU or TORS, which are tasked with dealing with (even) more dangerous and complicated scenarios than general duties police officers, would be provided with every advantage in terms of safety available that a general duties police officer possesses (given the more difficult and dangerous roles the specialised officers perform). The fact that the Commissioner has equipped general duties police officers with tasers with cameras, but not her specialised officers, provides some evidence (which I do not regard as decisive) that, at an institutional level, the harm pointed to by Mr Emmett is not thought to be significant.

171. More importantly, it does not seem to me that the logic behind Mr Emmett's submissions is made good. In particular, it does not seem to me that it is logical to expect that the hypothetical subject of a police operation, given the stress and heat caused by that operation, would be acting rationally enough to tailor his or her behaviour on the basis of information that suggests that he or she might, or might not be, being recorded. Still less is it logical to suppose that that same hypothetical person would tailor her or his behaviour on the basis solely of any publication that might be made in the course of the inquest that responding police did not (and could not have) recorded Mr McKenzie in the course of the specific operation that preceded his death.

172. To the extent that it is a harm, it is a harm, I find that is very remote. It is so remote, I find, as to not establish an evidentiary basis for the making of this order.

173. Further, I accept, as Mr Downing submitted to me, that there is no detail about the camera used by ordinary police officers, or the warnings that they might need to give to a person that they are being recorded. Therefore, I am unable to assess whether, in the ordinary course, video cameras on the tasers deployed by general duties police do

[23] Transcript of hearing on 27 July 2022 at pp. 60-61.
[24] Transcript of hearing on 27 July 2022 at p. 61 [9].

indeed have some deterrent effect. If I cannot conclude that the presence of cameras on the tasers of general duties police have some deterrent effect, I cannot conclude that their absence on the TOU/TORS tasers will lead to the loss of the benefit of that deterrence.

174. For these reasons, I do not think that an evidentiary basis for orders over this category of information has been established.

175. Schedule A reveals that the following information is claimed merely because in includes reference to the camera:

a. **Tab 9, [236]**;
b. **Tab 79, answer 500**;
c. **Tab 80, answers 581, 582, 589**;
d. **Tab 82, answer 1060**;
e. **Tab 84, answer 489**; and
f. **Tab 137, [62]**.

176. I note that some of this information may be the subject of one of the other claims. In particular **answer 500** of **Tab 79** in addition to revealing the camera, also reveals the model of the taser, where the spare cartridge is kept and inserted. That is specific information of a type which, I accept, could be harmful (it might, on a mosaic analysis reveal some limitation of that taser which could be used to the detriment of police). Accordingly, I will make an NPO over that information.

177. **Answer 589** of **Tab 80** contains a reference to the colour of the taser and to [redacted] That is of the same nature of the category of information about the taser which Counsel Assisting submitted was appropriate for an NPO. Accordingly, I will make an NPO over it.

178. I will, however, not make an NPO over the balance of **[62]** of **Tab 137.** As I discuss below, I am not satisfied that any harm would arise from the disclosure of the fact that the TOU/TORS tasers lack a USB port. I note that I was not taken by the Commissioner to any specific harm that would arise in connection with the publication of that material.

[redacted]

179. I will make an NPO over this information in these categories. In my view, the reasoning applies equally to each.

180. During argument, Mr Downing accepted that this information was intrinsically connected with questions of [redacted] and the differences between those tasers and the tasers used by general duties police (themselves categories of information which Counsel Assisting had accepted merited NPOs).

181. I accept that the [redacted]. Whilst it occurs to me that it is the information about the [redacted] that is the more sensitive (which will already be made the subject of NPOs), I am prepared to accept that NPOs over the visual identifications (the colour of the TOU/TORS tasers and

the existence of the [redacted]) can provide appropriate additional protection against the publication of those features/limitations.

182. For the above reasons, I will make NPOs over the following pieces of information to which I was specifically taken during argument:

a. **Tab 84, answers 771-773, answer 775**.

183. I will also make an NPO over **answer 601 of Tab 80**. Whilst I was not taken specifically to this reference, I accept that this information falls within this same general category.

Information that suggests that [redacted]

184. I was taken to **Tab 83, answer 573**. This answer stated:

> "[redacted]

185. Mr Emmett identified the harm that would arise from the publication of that information as follows:

> "*if somebody knows* [redacted] *they may be able to change their behaviour accordingly in a manner that could render the operation less effective or could increase the risk to either, well to any person involved in the operation…*"[25]

186. It was also submitted by Mr Emmett that that information disclosed something more than what happened in the present case and talked about a general practice[26].

187. It seems to me that this information is analogous to **answer 249** of **Tab 79** that is marked Orange. As I will come to, I have decided to make an NPO over that information. It follows that I should also make an NPO over **Tab 83, answer 573**.

188. It does seem to me that the description of the role of the knife man in **Tab 80, answer 952** falls within a similar category. However, as Schedule A records that this claim has been withdrawn, I will not make an NPO over this information.

The list of less lethal tactics/information that reveals the entire arsenal available to the TOU/TORS

189. During oral argument I was taken only to **document 214** in respect of this subcategory of the Commissioner's claim for NPOs (I have previously dealt with the Commissioner's PII claims over specified parts of that document). The matters marked in Purple in Schedule A (which, I confirm, is a reference to the version of Schedule A prepared after oral argument, on 8 September) records that NPO claims are made over the words

[25] Transcript of hearing on 28 July 2022 at p. 6 [25].
[26] Transcript of hearing on 28 July 2022 at p. 6 [34].

"[redacted] (on p. 1). It was submitted that, in this context, publication of the names of this equipment would reveal the entirety of the TOU equipment.

190. During oral submissions, Mr Downing accepted this and also accepted that some harm would arise.

191. Given the position of Counsel Assisting (and noting, as Mr Downing pointed out, that the question at stake was only a NPO rather than a form of orders which would exclude the evidence entirely or restrict the interested parties from accessing it), it is appropriate for the Court to make an NPO over that information and I will do so (other than with respect to the references to bean bag ammunition which are the subject of the Commissioner's concessions).

192. To my mind, **document 137E** (which I was not specifically taken to) contains information of the same nature, in that it reveals the entirety of the equipment available to the TOU operatives. Accordingly, I will also make NPOs in respect of that information.

193. Schedule A records that the claim for NPOs made in respect of **Tab 85, [37]** over the reference to the TORS have "all" less lethal options available to them was because that paragraph "when read with other evidence, could be used to ascertain the totality of TORS less lethal arsenal". I do not accept that assertion (which, I note, was not the subject of further argument before me). Paragraph [37] is at a high level of generality (and does not disclose what any of those "options" were). I am not satisfied that any orders should be made in respect of that information.

The breach and hold tactic

194. The largest (and most complex) category of information over which NPOs were sought related to the "breach and hold" tactic.

What the breach and hold tactic involved

195. In order to understand the claims that were (and were not) made in respect of that category of information, it is necessary to say something about that tactic and the reasons for its implementation.

196. The material in the brief indicates that the breach and hold tactic was a particular tactic implemented by responding police in the course of the operation that preceded Mr McKenzie's death. It involved, as is suggested by the name, "breaching" the premises (or "stronghold", as Mr McKenzie's residential premises were commonly referred to in the evidence) and "holding" Mr McKenzie to a particular area within it.

197. In the operation that preceded Mr McKenzie's death, the breach and hold tactic was, Mr Emmett explained, sought to be implemented [redacted]). Of course, whether that was the purpose of the involved police for attempting that tactic ([redacted]) are questions for the final inquest; for present purposes, however, I shall accept Mr Emmett's description of the

involved operatives intentions for entering into it (which, as a purely factual matter, I note, appears well grounded in the answers each of the involved officers has given in the course of their directed interviews).

The information about the breach and hold tactic which was the subject of the orders

198. Mr Emmett clarified that he did not seek NPOs over information that revealed merely that the breach and hold tactic had been used in the course of the operation that preceded Mr McKenzie's death. Rather, it was the more detailed explanation of what the officers intended to achieve by using that tactic [redacted]) which was the subject of the Commissioner's claims . Mr Emmett also clarified that it was the information concerning the objective of the tactic or information concerning how that tactic would be deployed in the future which was the information considered by the Commissioner to be the most sensitive Mr Emmett explained the harm that would arise from the publication of that information as again being that, if the prospective subject of a future police operation knew why police were deploying this tactic ([redacted][27]

199. Mr Emmett further clarified that any reference to the fact that this was the objective of the tactic even in the circumstances of the specific operation that preceded Mr McKenzie's death was the subject of the claim. Mr Emmett submitted that the publication of the information in the present case permitted an easy inference as to the reasons officers might deploy the tactic in the future.[28]

200. Mr Emmett further submitted that, if the NPO regime became unwieldy because, for example, this topic was continually being explored during the course of oral evidence, it would be open to me to revisit the NPOs that I have made.[29] As I will come to, I have accepted this submission and it has significantly influenced the approach I have decided to take.

The difficulties in separating the general information from the specific

201. At this point of my reasons, it is again convenient to draw attention to the concerns I have previously raised as to the scope of the NPOs sought by the Commissioner and whether, assuming I made them, they would permit of the legitimate reporting of the inquest. Another concern I held was that the NPOs made were workable and provided sufficient clarity to those who might have cause to report on the inquest as to the matters that could, and could not, be published. I raised these matters in my initial decision (before the Commissioner was represented by Senior Counsel).

202. These questions arise particularly acutely in relation to the NPOs over the information about the breach and hold tactic, given, on the one hand, that this was a tactic that had

[27] Transcript of hearing on 28 July 2022 at p. 15 [17]
[28] Transcript of hearing on 28 July 2022 at p. 15 [45]
[29] Transcript of hearing on 28 July 2022 at p. 16 [1]

been sought to be implemented in the course of the operation that preceded Mr McKenzie's death and, on the other, what Mr Emmett has submitted regarding the inferences that could be drawn from it. In particular, the inferences that might be drawn as to the objective of the tactic in a general or future sense seemed to be difficult to unpick from what had actually occurred in this specific case. Whilst one alternative would be to make a NPO over any discussion at all of the breach and hold tactic, this would preclude reporting on much of the police operation which preceded Mr McKenzie's death (which is, of course, a matter of considerable public interest).

The solution proposed by Counsel Assisting to this difficulty

203. Mr Downing accepted that the Commissioner had established an evidentiary basis for NPOs over some, but not all, of the material falling within this subcategory. Broadly, Mr Downing accepted that information which disclosed, in a general or future sense, why police had implemented the breach and hold tactic could result in some harm and was worthy of an NPO.

204. Mr Downing proposed a solution to the difficulty.[30] This solution involved me making a list of categories over which I would be prepared to make an NPO for distribution to the interested parties. This would provide the other interested parties the opportunity to structure their oral examination of witnesses into information which fell within the scope of the orders (and needed to occur in closed Court) and information which did not. Mr Emmett embraced this course.

205. Mr Downing's proposal has obvious merit. I would record, however, that it does not obviate the need for me to define the scope of these categories or consider how they apply to the specific information in the brief. Further, it does seem to me to be a solution which is perhaps more apt for the non-disclosure orders rather than NPOs (as evidence on a topic subject to an NPO would not necessarily (or indeed often) need to occur in closed court, provided a suitable direction or warning were given to persons present in the Court room).

206. As noted above, I see that the proposal has merit, but I will not make any orders about it at this stage. I would, however, urge the parties to give consideration to this issue in order to facilitate the efficient progress of the hearing.

The specific information the subject of argument

207. I will next turn to the specific information which I was taken to during the course of oral argument.

Tab 8, [238]

208. Mr Emmett took me to **[238]** of **Tab 8**[31]. He submitted that this was an example of information that did more than merely describe the tactic but described, in a general sense, how that tactic might be deployed in a future operation. So as to understand the ambit of the Commissioner's claim in this regard, it is instructive to set out that lengthy

[30] Transcript of hearing on 28 July 2022 at p. 29 [21]-[49].
[31] Transcript of hearing on 28 July 2022 at p. 13.

paragraph in full (I have removed reference to the Inspector's name as that is the subject of suppression orders I have already made and, in my view, it is not desirable for there to be any more dissemination of that name than is strictly necessary):

> "… tactics and execution of a "Breach and Hold" will be comprehensively explained by Inspector … from the TOU. Inspector …. [attached to the TOU unit]'s statement forms part of the brief of evidence and he provides some background on the subject. I think it pertinent at this point however to shed some light on what is a "Breach and Hold" tactic. Information provided by Inspector …. describes it as The Breach and Hold tactic is, as the name suggests, having tactical operators breach, or "break the seal" of a strong hold, which is usually building, and then having those operators "hold" position at or near the breaching point. [redacted] The use of the Breach and Hold tactic has been utilised for an extended period, including prior to my commencement at the Tactical Operations Unit in 1995. The Breach and Hold has evolved over time, [redacted] The tactic itself is not prescriptive, it can be adapted to suit the requirements of the incident. [redacted]

209. I note that the statement of the Inspector referred to in the above passage appears at Tab 173 of the brief. I discuss this document, in some detail, below.

210. From the above passage, Mr Emmett emphasised, particularly, the information suggesting that the tactic [redacted]

211. In his oral address, Mr Downing accepted:[32]

    a. That this paragraph dealt with the intention behind the breach and hold tactic; and
    b. That whilst the disclosure of this information did not pose a "great risk" it did create a risk worthy of implementing a protective mechanism.

Tab 71, answer 143

212. Mr Emmett also took me to **answer 143** of **Tab 71**. Schedule A records that a NPO is claimed over the following information:

[32] Transcript of hearing on 28 July 2022 at p. 30

> *"…* [redacted] *It was not designed as a tactical assault on the house or McKenzie. It was* [redacted] *, you know, if not face-to-face. I didn't expect the, the Negs to move forward, but they could've done it from a side window."*

213. As I understood it, during the hearing, Mr Emmett clarified that the claim was only up to the words "re-commence negotiations", meaning that the words in the above passage which I have underlined were no longer the subject of any claim.[33] However, as I understood Mr Emmett's central argument to be that any reference to the intention of the tactic was to encourage Mr McKenzie to engage with the negotiators, I will treat the words "[redacted] underlined above as though it is still the subject of the Commissioner's claim.

214. In relation to the Commissioner's refined claim, Mr Downing acknowledged that this answer did indeed disclose the reasons why the breach and hold tactic was implemented in a general sense and should, accordingly, receive an NPO for the same reasons as applied to [238] of Tab 8.[34]

Tab 71, answer 144

215. Mr Emmett also clarified that an NPO application was made over the following information in **answer 144** of **Tab 71** marked in bold in Schedule A:

> [redacted]

216. Again, these passages were asserted to describe how the breach and hold tactic might be deployed in future cases[35].

Tab 71, answers 405, 406 and 408

217. Schedule A records that a claim was made over **answer 405 of Tab 71** the bold text in the following answer:

> "I know that it's changed a little bit with the dynamics of, uh, terrorism offences and whatnot, **however in this type of domestic siege, our overarching strategy is to contain and negotiate** and to be quite truthful. I, I don't think we even discussed a DA where, um there was a tactical assault on McKenzie or the house of McKenzie. It's the same, and I'll just say this, whilst it's a

[33] Transcript of hearing on 28 July 2022 at p. 14 [36] – [42].
[34] Transcript of hearing on 28 July 2022 at p. 31.
[35] Transcript of hearing on 28 July 2022 at p. 14.

consideration in some of these mental health incidents, that you leave them alone. But it wasn't a mental, but in the end it wasn't just a mental health incident, he was wanted for serious offences. So that option, um, and not, not that I was likely to do that at any rate, but that option is gone when he's wanted for, um, serious offences and he's making threats to kills his neighbours and the, and the police. So it was an instance where we could just walk away."

218. Mr Downing opposed an NPO being made over this information Mr Downing noted that these references did no more than to refer to the fact that "contain and negotiate" was a tactic that had previously been deployed by NSW Police. Mr Downing noted that, in the open or publicly available findings made by former State Coroner Barnes in the inquest into the deaths arising from the Lindt Café siege ("Lindt findings"), an entire chapter was devoted to the history of "contain and negotiate", being chapter 5. Mr Downing further submitted that those findings went through the history of how "contain and negotiate" had been the "bedrock" of responses to domestic sieges prior to that date.[36]

219. In response, Mr Emmett clarified that, in light of what was publicly available as a result the Lindt findings, he no longer maintained a claim over answer 405. I will not make an NPO over that answer.[37]

220. I note that the same entry within the earlier version of Schedule A also reproduces answers Q406 - "So, when you say walk away, do you mean like, a full withdrawal by the police?" (p. 72) A408 - "that's a consideration in some of these mental health incidents locally". During his oral address, Mr Emmett did not expressly withdraw any claim over those answers. However, as they have not been marked in bold (and Schedule A specified that only the information that was marked in bold was the subject of the claim), I understand that no claim was intended over those answers. In any event, the entirety of answers 405, 406 and 408 have now been marked Purple in Schedule A to signify that they are no longer the subject of a claim. Accordingly, I will not make an NPO over those answers.

Tab 78, answer 538

221. Mr Emmett next took me to **answer 538** in **Tab 78**. It is not necessary to reproduce that answer here; it is enough to record that, I accept that, on its face, that answer described the "thinking behind the [breach and hold] methodology". I accept it would fall within the same category of information represented by [238] of Tab 8 and answer 143 of Tab 72 (and I understood Mr Downing to have made this submission to me)[38].

Tab 78, answer 569

222. Mr Emmett took me to **answer 569** of **Tab 78**[39]. This information recorded, in reference to the execution of the breach and hold tactic the following:

> *"I understand the rationale, if you're doing a breach, you don't want to be doing it when the target's right there".*

[36] Transcript of hearing on 28 July 2022 at p. 39.
[37] Transcript of hearing on 28 July 2022 at p. 45 [38].
[38] Transcript of hearing on 28 July 2022 at p. 17.
[39] Transcript of hearing on 28 July 2022 at p. 17.

223. Mr Emmett described the harm that would flow from that category of information in the following terms:

> *"if they [the hypothetical subject of a future police operation] know that this* [redacted][40]

224. In respect of this information, Mr Downing submitted that no evidentiary basis had been established for the order. He submitted that the information recorded by that answer was so obvious as not to warrant protection by way of an NPO.

Tab 78, answer 928

225. Mr Emmett took me to **answer 928** of **Tab 78**.[41] This answer, I accept, sets out the aims or "idea" of the breach and hold tactic. I understood Mr Downing to have accepted as much.

226. I should record that, during oral argument about this specific piece of information, I raised with Mr Emmett the possibility that, [redacted], this might actually assist in the outcome of negotiations. Whilst Mr Emmett accepted this as a possibility, he submitted that there was also the possibility that this would not assist; [redacted].[42]

Tab 79, answer 249

227. Mr Emmett next took me to **answer 249** of **Tab 79**[43]. This answer provided:

> "[redacted]

228. Again, Mr Emmett submitted that this information was of the sort which would enable the hypothetical future subject of a police operation to frame her or his response accordingly.

229. Mr Downing accepted that this answer did describe how the breach and hold tactic would be deployed in a general sense which could be used by the hypothetical subject of a future police operation to his or her advantage.[44] He accepted that this represented a harm, albeit a limited one.

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[40] Transcript of hearing on 28 July 2022 at p. 17 [33].
[41] Transcript of hearing on 28 July 2022 at p. 1.
[42] Transcript of hearing on 28 July 2022 at p. 18 [18]- p. 19 [9].
[43] There are two parts of answer 249 that is the subject of claims, one marked Orange, which is the present claim, and a further part marked Purple, which is dealt with below.
[44] Transcript of hearing on 28 July 2022 at p. 34, [20].

Tab 79, answer 728 (and answers 499 and 500 of Tab 82)

230. Mr Emmett next took me to the words marked in bold in Schedule A relating to **Tab 79 answer 728**. The effect of this information was to indicate that, during the execution of a breach and hold tactic, the modus operandi of the officers would be to move slowly through a "stronghold".

231. At a later point of his address, Mr Emmett took me to two answers in **Tab 82, answers 499** and **500** which, he accepted, would be determined in the same way as my determination of Tab 79, answer 728.[45]

232. Mr Downing submitted that no evidentiary basis had been established for an NPO over any of that information. He submitted that it was difficult to understand "at a realistic level"[46] that the generic information provided in those answers would be harmful (by which I understood him to submit that that information was of such a level of generality that it could not in any way assist the hypothetical subject of a future police operation and thereby result in any harm to police methodology).

Tab 80, answers 945 and 946

233. Mr Emmett took me to **Tab 80**, **answers 945** and **946**[47]. I note that the relevant entry of Schedule A records that **Tab 943** was also the subject of the claim. Mr Emmett clarified that this aspect of the earlier version of Schedule A was inaccurate and had been prepared in error. He clarified that the claim that was pressed was the third line of answer 945 down to the word "inside" in the first sentence of answer 946.[48] As I understand it, this means that only the underlined words below are the subject of the Commissioner's claim:

> Q943 "Breach and Hold?" ; A943 " So, uh, a breach and hold is where the jobs progressed to a certain, and again, this, we don't do this off, we just don't go, Oh, we've had enough" ; A945 - [redacted] The tactic is to , um , all you do is that you, you either breach the front door, or breach a window, and see what happens. [redacted].

234. Mr Downing, in his submissions, did not oppose the making of an NPO as refined by Mr Emmett.[49]

235. I note, however that Schedule A does not reflect the clarification made during the course of the hearing, as set out above. It continues to record that the entirety of answer 943 as well as 945 are the subject of an NPO (that is, the text continues to be marked in Orange and has not been marked in Purple).

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[45] Transcript of hearing on 28 July 2022 at pp. 46 [46] – 47 [15].
[46] Transcript of hearing on 28 July 2022 at p. 34, [36].
[47] Transcript of hearing on 28 July 2022 at p. 20.
[48] Transcript of hearing on 28 July 2022 at pp. 20 [39] – 22 [30].
[49] Transcript of hearing on 28 July 2022 at p. 34.

236. I would further observe that the refinements made by Mr Emmett in the course of his oral address would mean that [redacted] would no longer be the subject of protective orders. Mr Emmett explained to me that the distinction he intended to draw was between information that merely suggested [redacted], which would, Mr Emmett accepted "emerge clearly, that will be before your Honour" [redacted] I would observe at this point, that the submissions made by Mr Emmett again illustrates the difficulty of divorcing the general from the specific.

Tab 80, answer 947

237. Mr Emmett clarified that **answer 947** of **Tab 80** was pressed[51]. I accept that that that answer made reference to the intention of the officers in implementing the breach and hold tactic [redacted]. Again, I do not understand Mr Downing to have submitted otherwise.

Tab 80, answers 970 and 971

238. Mr Emmett next took me to **answers 970** and **971** of **Tab 80.**[52] Again, Schedule A records that only the bold text was the subject of the NPO claim:

> "knife, and [redacted] **where we can, um"; A971 "we've got the advantage. Um , we'll, again, and it's always, it's, it's one step, and then negotiate more permissions. We don't go, so you don't do a breach and hold**, and then go, Righto, it's on us, right, we're"

239. During his oral address, Mr Emmett made a slight refinement to this claim[53]. He explained that only the words [redacted] in answer 970 and only the words between [redacted] in answer 971 were the subject of the claim.[54] Accordingly, I understand it, the refined claim is over the underlined words only:

> "knife, and [redacted] where we can, um" ; A971 "we've got the advantage. Um, we'll, again, and it's always, it's, <u>it's one step, and then negotiate more permissions.</u> We don't go, so you don't do a breach and hold, and then go, Righto, it's on us, right, we're"

240. Mr Downing did not oppose the claim for NPOs as refined by Mr Emmett.[55]

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[50] Transcript of hearing on 28 July 2022 at p. 22, [2]-[9].
[51] Transcript of hearing on 28 July 2022 at p. 23.
[52] Transcript of hearing on 28 July 2022 at p. 23.
[53] Transcript of hearing on 28 July 2022 at p. 24, [4].
[54] Transcript of hearing on 28 July 2022 at pp. 23 [47] – 24 [2].
[55] Transcript of hearing on 28 July 2022 at p. 34.

Tab 80, answers 1166, 1171 and 1172

241. Mr Emmett took me to **answers 1166**, **1171** and **1172** of **Tab 80**.[56] Schedule A records that a claim was made over the following text in bold:

> **A1166** [redacted] **A1170** "And they can't really, we can't really develop that plan until we really know what we're talking about"; **A1171** "**internally, which means we can, we can see what's going on.** That, Reid and myself can see what's going on, **what trip hazards we've got**"; **A1172** "**what furniture we've got, where your doorways are, how they open, where is he, what is he doing. It's all those things you've got to take into consideration."**

242. I note that, since none of answer 1170 was marked in bold, I have not treated it as being the subject of an NPO application.

243. In his oral address, Mr Emmett withdrew the Commissioner's claims over answers 1171 and1172.[57] Mr Downing did not oppose the claim over answer 1166 as, he accepted, that information went to the rationale for deploying the breach and hold tactic ([redacted])[58].

244. I again note that Schedule A does not mark answers 1171 and 1172 in Purple to signify that they are no longer the subject of an application for NPOs (notwithstanding Senior Counsel's clarification as to the scope of the Commissioner's claim).

Tab 84, answers 1004, 1006 and 1007

245. Mr Emmett withdrew the Commissioner's claim over answer **1004** of **Tab 84**.[59] This is reflected in Schedule A. However, Mr Emmett maintained the Commissioner's claim over **answers 1006** and **1007** of **Tab 84** (which were to the effect that, once a breach was effected, the operatives were to wait for further permissions to be obtained).

246. Mr Downing submitted that no evidentiary basis had been established for an NPO over any of these answers. He noted (as he had also pointed out in his written submissions) that answers 1006 and 1007 did not indicate how long it would take to obtain the permissions referred to or whether this was a long or complex process. Without that sort of information, Mr Downing submitted, no harm in the publication of that information had been established.[60]

Tab 84, answer 1009

247. Mr Emmett also maintained his claim over answer **1009** of **Tab 84**[61] which was, I accept, a further answer that recorded the objectives of the breach and hold tactic [redacted]

[56] Transcript of hearing on 28 July 2022 at p. 24.
[57] Transcript of hearing on 28 July 2022 at p. 24 [34] – [41].
[58] Transcript of hearing on 28 July 2022 at p. 35, [1].
[59] Transcript of hearing on 28 July 2022 at p. 47 [19] – [25].
[60] Transcript of hearing on 28 July 2022 at p. 35, [6].
[61] Transcript of hearing on 28 July 2022 at p. 25.

Tab 91, [43]

248. Mr Emmett took me to **Tab 91, [43]** which, he submitted, used similar language to the language used in [238] of Tab 8[62]. (I note that this is an example of information which appears on Supplementary Schedule A but not on the (PDF) version of Schedule A (although it was included on the 21 July version of that schedule).

249. Mr Downing opposed an NPO over this information.[63] He acknowledged that the information in that paragraph [redacted]. However, Mr Downing drew a distinction between the generality of that information and some of the other more specific information [redacted]). Mr Downing submitted that [43] of Tab 91 merely referred to the breach and hold tactic as a tactical option that [redacted]

250. In reply, Mr Emmett submitted that an inference could be drawn in respect of that information.[64]

Tab 173

251. Mr Emmett took me next to **Tab 173** and explained the NPOs sought over that document and submitted that that document disclosed general matters as to the intention of the breach and hold tactic.[65]

252. Mr Downing took me through that document in some detail[66] to explain which parts in respect of which he opposed (or did not oppose) NPOs being made. I have found these submissions particularly helpful to understanding the distinctions that Mr Downing has attempted to draw in respect of much of this material. In particular:

    a. Mr Downing opposed an NPO being made over the heading over [17] of that document as that heading, in Mr Downing's characterisation, really said no more that the breach and hold tactic involved breaching and holding.
    b. The second sentence of paragraph [18], Mr Downing accepted, contained more detailed information about [redacted] that might be used as part of the breach and hold tactic. He submitted that this would be appropriate for an NPO;
    c. As the last sentence of that paragraph was not prescriptive, Mr Downing submitted that it would not be appropriate for an NPO;
    d. Mr Downing accepted that paragraphs [19] and [20] described the rationale behind the breach and hold tactic and so were appropriately the subject of an NPO;

[62] Transcript of hearing on 28 July 2022 at p. 26, [38].
[63] Transcript of hearing on 28 July 2022 at p. 35, [37]- p. 36, [3].
[64] Transcript of hearing on 28 July 2022 at p. 59, [11].
[65] Transcript of hearing on 28 July 2022 at p. 27-28.
[66] Transcript of hearing on 28 July 2022 at pp. 36-38.

e. Mr Downing accepted that [21] was appropriate for an NPO because it revealed the circumstances in which police might consider using the breach and hold tactic;
f. Mr Downing accepted that [22] was appropriate for an NPO because it revealed how any plan to implement a breach and hold tactic would be conceived and executed;
g. Mr Downing opposed an NPO over [23], [24] and [25] because the information contained in those paragraphs was high level and provided no detail about the plan;
h. Mr Downing accepted that the first sentence of [26] was sufficiently specific (in its reference to automatic triggers) to warrant the making of an NPO. The balance of that paragraph, in Mr Downing's submission was general such that no basis for an NPO had been established;
i. Mr Downing accepted that the information in [27]-[29] was sufficiently specific to be appropriately the subject of an NPO;
j. Mr Downing submitted that the reference to particular equipment in [30] made this appropriately the subject of an NPO;
k. Mr Downing submitted that [31] revealed detail of the intent of the tactic and, for that reason, was appropriate for an NPO;
l. Mr Downing accepted that [32] was appropriate for an NPO because it dealt with the standard operating procedures;
m. Mr Downing noted that [33] was the subject of an application for a Green order, which he was not opposing;
n. Mr Downing opposed an NPO being made over [34] and [35] because he characterised the information as being at a high level of generality;
o. Mr Downing accepted that an NPO should be made over [36] and [37] because (he submitted) those paragraphs provided details of and the rationale for the direct action tactic (as to which, see below);
p. Mr Downing opposed orders over [38] and [39] because, he submitted, those paragraphs simply related to record keeping without providing any details about those records; and
q. Mr Downing accepted that [40] and [41] could appropriately be the subject of an NPO because of the level of detail in those paragraphs.

253. For completeness, I note that Mr Downing did not take me to all the parts of the document at Tab 173 over which a claim had been made because that other information did not relate to the question of "breach and hold". I will deal with those matters at a later point of my reasons.

Position of the other interested parties

254. Because the orders the Commissioner sought in this regard did not involve information the subject of a PII claim or information in respect of which the Commissioner sought that the information not be disclosed to the interested parties, the submissions in relation to them occurred in open court and was heard by the representatives of the interested parties, specifically, the representatives of Mr Mark McKenzie (Mr McKenzie's father) and Ms Wilkins (Mr McKenzie's mother). I invited submissions from those interested parties (the other interested parties, who were each police officers had earlier indicated, through their representatives, that they did not wish to make submissions and had been excused by this point of the hearing).

255. On behalf of Mr Mark McKenzie, Mr McManus submitted to me that, from his client's perspective, the NPOs which Mr Downing had indicated he was not opposed to would not cause him any difficulties in terms of the issues which he wished to explore on his client's behalf. That submission was adopted by Mr Fine (who appeared for Ms Wilkins).

Determination of the claims in respect of the information I was specifically taken to

256. As earlier indicated, I have decided, where Counsel Assisting has positively indicated that the orders sought are appropriate, generally to make those orders (subject to limited exceptions where that information was the subject of detailed argument, for example, the argument that had occurred in respect of **[43]** of **Tab 91**). In doing so, I am conscious of the need for the Court to turn its mind independently to these matters. I am also cognisant of the importance of principles of open justice. However, the fact that Mr Mark McKenzie and Ms Wilkins have, through their representatives, indicated that they do not oppose those aspects of the NPO means that, in effect, no-one addressed me in opposition to the orders sought. Furthermore, the fact that Mr Mark McKenzie's and Ms Wilkins' representatives have submitted that they are able to represent their clients' interests notwithstanding the NPOs Counsel Assisting has indicated that he would not oppose fortifies me in my view. I am also cognisant of the fact that I am here concerned with orders that will not preclude Mr Mark McKenzie and Ms Wilkins from having access to the information (or me from having regard to it, as appropriate). Whilst I take into account principles of open justice, which I regard as important in any curial setting, the above matters can justify, in my opinion, a more liberal approach relative to the determination of the Commissioner's claim for exclusionary (Red) or non-disclosure (Green and especially Blue) orders.

257. Whilst I should record that I do remain somewhat sceptical that the distinction between the specific and the general urged upon me by Mr Emmett and in large part accepted by Mr Downing will ultimately prove to be workable, I am prepared to make the orders Mr Downing did not object to at least for now. In this regard, I am comforted that a solution, along the lines proposed by Mr Downing, can be implemented at the final hearing. If a list is prepared setting out the topics over which NPOs are made (although not necessarily coupled with a requirement for those topics to be heard in a closed court), this should go some way to clarifying what can and cannot be published during the course of the hearing (addressing the concerns I have about the need to provide clarity to those who might have an interest in reporting on this hearing). Such a list might also serve to make plain the scope of the Commissioner's NPO orders in relation to this category. I further accept, as submitted to me by Mr Emmett, that I have the ability to revisit these orders at a future time. In my view, this is a strong matter in favour of the Court accepting the NPOs which are not the subject of any opposition. I indicate, in this regard, that I am fully prepared to revisit the NPOs if it becomes apparent that the orders I have made are precluding the legitimate reporting of this inquest or otherwise prove to be unworkable.

258. Accordingly, at a general level, I will make NPOs over the following information:

a. Information which reveals the objectives of the breach and hold tactic and, in particular reveals, [redacted];
b. Information which records how, in the future, that tactic might be deployed; and

c. Information that provides detail of the tactic and, therefore, how it might be deployed in the future.

259. I will not make NPOs over information that merely records that the breach and hold tactic involved breaching and holding, that the tactic had been in use for a long period of time and that the involved operatives needed permissions after entering or over other general information of that kind.

260. Applying the above, I make the following orders in respect of the information I was specifically taken to:

261. In relation to **Tab 8, [238**], I will make an NPO over the underlined words only:

> "…tactics and execution of a "Breach and Hold" will be comprehensively explained by Inspector … from the TOU. Inspector ….[attached to the TOU unit]'s statement forms part of the brief of evidence and he provides some background on the subject. I think it pertinent at this point however to shed some light on what is a "Breach and Hold" tactic. Information provided by Inspector …. describes it as The Breach and Hold tactic is, as the name suggests, having tactical operators breach, or "break the seal" of a strong hold, which is usually building, and then having those operators "hold" position at or near the breaching point. [redacted]The use of the Breach and Hold tactic has been utilised for an extended period, including prior to my commencement at the Tactical Operations Unit in 1995. The Breach and Hold has evolved over time,[redacted] The tactic itself is not prescriptive, it can be adapted to suit the requirements of the incident. [redacted]

262. In my view, whilst the underlined parts record the objects of the tactic and specific information about how it might be engaged in the future, the parts of that paragraph which have not been underlined do not contain specific information about the tactic or otherwise reveal how that tactic might be used in future cases. Therefore, I am not satisfied that it should be the subject of an NPO.

263. For similar reasons, I will make an NPO over the text marked in bold in **answer 144** of **Tab 7**1.

264. In light of Mr Emmett's concession, I will not make any NPO over **answer 405** of **Tab 71**.

265. As earlier indicated, the claims over **answers 406** and **408** of **Tab 71**, have been withdrawn. Accordingly. I will also not make any NPOs over that information.

266. I accept Mr Downing's submissions about the information in **answer 569** of **Tab 78** being so obvious that no harm arises. I decline to make an NPO over that answer.

267. I will, however, make an NPO over **answer 928** of **Tab 78**. This answer, I am satisfied, discloses the general intent behind the breach and hold tactic. Although there does seem to me to be a possibility that the disclosure of this information might, in fact, be of assistance to police, I accept the possibility, pointed to by Mr Emmett, that it might not. This makes an NPO appropriate, in my view.

268. I will also make an NPO over **answer 249** of **Tab 79**. The reference to the standard procedure is an example of a general methodology that may be deployed in future police operations.

269. I will not make an NPO over **Tab 79, answer 728**. In my view, the references in that answer to operatives moving slowly through the "stronghold" does not, for the reasons Mr Downing submitted, reveal anything that could be used to the detriment of police in future operations.

270. Subject to what is said below, I will make an NPO over the parts of **answers 945** and **946** of **Tab 80** that Mr Emmett clarified remained the subject of the Commissioner's claim. However, I will not make NPOs over the balance of that information. In particular, I will not make an NPO over **answer 943** (notwithstanding that Schedule A records that a claim is still made over that information) as it does not contain any detailed information which could warrant the making of orders (which, I infer, is why, at the hearing, Mr Emmett did not press for orders in respect of that information). The same can be said for the second sentence of **answer 945**, and I will not make an NPO over that sentence. In particular, the references in that sentence to breaching a front door or a window in the first part of that answer seems to me to do little more than to describe that the breach and hold tactic involved "breaching". This is a mere description of the strategy rather than a statement of its objective. That sort of general information, in my view, ought not be covered by an NPO.

271. In relation to the balance of the information in answer 945, I am satisfied that this information is detailed and its publication could result in harm to future police operations. In addition, in order to preserve the very reason why the NPOs are claimed over the breach and hold tactic ([redacted] because, from that matter, it could be inferred that the tactic would be used for a similar purpose in any future operations), I find that it is appropriate, despite Mr Emmett's concession, [redacted] also to be the subject of such an order. That information is clearly of the same sort which was elsewhere the subject of the Commissioner's claim and in respect of which Mr Downing had accepted an NPO would be appropriate.

272. In the result, I have decided to make an NPO over the underlined parts of answer 945, as follows.

> Q943 "Breach and Hold?" ; A943 " So, uh, a breach and hold is where the jobs progressed to a certain, and again, this, we don't do this off, we just don't go, Oh, we've had enough" ; A945 - [redacted]. The tactic is to , um , all you do is that you, you either breach the front door, or breach a window, and see what happens. [redacted]

273. I will make an NPO over **answer 947** of **Tab 80**. This is because, I accept, that answer made reference to [redacted].

274. Given the concessions made by Mr Downing, with which I agree, I will make an NPO over **answer 970** of **Tab 80** as refined by Mr Emmett.

275. Although Mr Downing also did not oppose the Commissioner's claims over **answer 971** of **Tab 80** as refined by Mr Emmett during the course of his oral address, I will not make that NPO. Elsewhere, Mr Downing had submitted that no evidentiary basis had been established for an NPO over bare reference to permissions. Answer 971 seems to me to be a further example of information falling within that class.

276. I will make an NPO over **answer 1166** of **Tab 80**.

277. Given Mr Emmett's concessions, I will not make an NPO over **answers 1171** and **1172** of **Tab 80.** Schedule A does not reflect those concessions. In light of Mr Emmett's expressed concessions, I do not understand the fact that this information has not been marked Purple to mean that the Commissioner continues to press her claim in respect of it notwithstanding Mr Emmett's concession; rather, I attribute this to an error in the preparation of Schedule A. In any event, I am not satisfied that a case for harm has been made in respect of publication of that information.

278. I will not make an NPO over **answers 499** and **500** of **Tab 82**. I am satisfied that those answers do nothing more than to describe the self-evident proposition that the breach and hold tactic involves "breaching" premises and "holding" the subject to a particular part of those premises.

279. I will not make an NPO over **answer 1004** of **Tab 84** given Mr Emmett's concession. I will also not make an NPO over **answers 1006** and **1007**. I am satisfied that those answers merely record, at a high level of generality, that police required some form of permission prior to entering a "stronghold". No harm associated with the need to obtain such permissions was articulated.

280. I accept Mr Emmett's characterisation of answer **1009 of Tab 80** as an answer that reveals that [redacted] That being the case, I will make an NPO over that information.

281. I will not make an NPO over **[43]** of **Tab 91**. I note that the Aide Memoire records that this matter was not in dispute (see the reference to line 1812 and noting that that is a reference to line 1812 of Schedule A as it existed on 21 July 2022, rather than the

version of 8 September 2022); however, this was an apparent error, given that the parties made specific submissions in relation to that paragraph (as outlined above). Whilst I accept Mr Emmett's submissions that it is information which is of similar nature to information in tab 8, [238], it is of the same nature as information in that paragraph which I have decided ought not to be the subject of orders. I accept Mr Downing's submissions in this regard.

282. In relation to the information in **Tab 173** dealing with breach and hold, I will make the NPOs Mr Downing accepted was appropriate, but not the NPOs he opposed (I accept Mr Downing's submissions as to the nature of that information, which I have set out above). Accordingly, I will make NPO over the underlined information below:

"17 **Breach and Hold**

The Breach and Hold tactic is, as the name suggests, having tactical operators breach, or "break the seal" of a strong hold, which is usually a building, and then having those operators "hold" a position at or near the breaching point. It does not, as a matter of course, involve having operators enter or physically moving past, or through the breaching point.

18. The use of the Breach and Hold tactic has been utilised for an extended period of time, including prior to my commencement at the Tactical Operations Unit in 1995. [redacted] The tactic itself is not prescriptive, it can be adapted to suit the requirements of the incident.

19. [redacted]

20. [redacted]

21 . [redacted]:

- [redacted]

- [redacted]

[redacted]

- [redacted]

22. [redacted]

[redacted]

- [redacted]

23. The Field Supervisor would provide advice on the available tactical options to progress an incident or to achieve the Police Forward Commander's objectives, including the recommending (or not) of a breach and hold. The Field Supervisor would, based on the assessment set out above, devise a plan as to how the breach and hold is to be conducted. The Police Forward Commander has the overall operational command of the incident site and is required to endorse and recommend the pre-planned action for the breach and hold.

24. On the endorsement and recommending by the Police Forward Commander for the breach and hold tactic, the TOU Tactical Commander must contact the Region Commander for approval. As the authorisation is moving away from the original 'contain and negotiate' strategy and there may be an increase in the likelihood of a confrontation, authorisation is sought from the Region Commander to conduct the pre-planned action of a breach and hold. The Region Commander may authorise or decline to authorise the pre-planned action (breach and hold) and this is communicated to the Field Supervisor.

25. Upon receiving the authorisation from the Region Commander, the Police Forward Commander will cause the Field Supervisor to undertake the breach and hold.

26. [redacted]. A range of tactical plans may be considered during a high risk incident. There are numerous variables that will impact of the Police Forward Commanders decision and command of what, when and how various tactical plans may be supported and implemented, or not supported. This could range from maintaining the 'contain and negotiate' posture, implementing the use of 'pre-planned action' with TORS personnel to tactically resolve the situation, through to utilising TOU personnel to conduct a 'Deliberate Action' to tactically resolve a complex incident.

Recent Examples of Breach and Hold refer Attachment A.

27. [redacted]

28. [redacted].

29. [redacted]

30. [redacted]

31 . [redacted]

[redacted].

32. [redacted]

33. [This paragraph is the subject of a claim for a Green category order].

34. The Emergency Action plan is developed by the EA Commander and recommended to the Tactical Commander for endorsement. The Tactical Commander endorses the EA plan and provides advice and a recommendation to the Police Forward Commander that the EA plan be approved. Once approved, the Tactical Commander is able to commit the EA in line with any pre-authorised triggers or unforeseen circumstances that necessitate the committing of the EA.

35. The Police Forward Commander approves the EA plan and may consider defining circumstances that may precipitate committing the EA [the remainder of the words are subject to a claim for a Green category order].

36. [redacted].

37. [redacted].

38. Pre-Planned Action plans are less complex and require less coordination than a Deliberate Action. A 'Pre-Planned Action Plan' will however continue to be based on known intelligence and seek to provide police with a tactical advantage.

39. Record Keeping

The logs and record keeping required during high risk situations will vary between commands and incidents. The Incident and Emergency SOP states that the responsibility lies with the Police Commander for the event. Additional information can be recorded through files, forms, and displays, including whiteboards and map / information boards, or computer systems. Typically logs have been kept by the responding units including the Police Forward Commander, Negotiation personnel (Team Leader), TORS Field Supervisor, and Tactical Commander. The individual unit logs could be hand written, or recorded on an electronic medium such as an iPad.

40. The TOU utilise an application called 'Isurv' which is an apple based electronic application (iPhone, iPad) to record and review information. The iPhone / iPad must be connected to the mobile network (4G) to work. The 'Isurv' application performs a number of functions including the log, flashcards, photobox and maps. The 'log' provides for a record of details of the incident including time date and name of person entering the details. The 'flashcards' are documents in a pdf format that have been uploaded from a desktop computer. The 'photobox' allows for the addition of images that relate to the incident. Maps allows for the use of symbols of points of interest within the area of operation, and indicators of where teams and vehicles may be positioned. Through iPhone / iPad, personnel logged into that incident can view details from the log, flashcards, photobox and maps. Personnel can add information to the log, photobox and maps through their iPhone / iPad

41 . Isurv is not used as a 'chat app' for personnel to communicate between each other. Access to isurv is limited to personnel having the application on their device, and the profile and log in details. Isurv is primarily used by the TOU and Metropolitan Negotiators. The ability and capacity for TORS personnel to utilise this application is limited and dependent upon access to an iPad(s) or iPhone."

Determination of the claims in respect of the other information listed in Schedule A as falling within this category

283. I note that Schedule A also records that a claim for NPOs was made over other information to which I was not specifically taken during the course of argument and which, according to the Aide Memoire, remained in dispute. I have noted that that information included:

a. **Tab 79, answers 661 and 671;**
b. **Tab 80**, **answer 969;**
c. **Tab 82, answer 507**; and
d. **Tab 173A**.

284. Applying the principles referred to above, I decide the following in respect of that information:

a. I will not make an NPO over **answer 661** of **Tab 79**. That answer merely describes a "breach entry" as an entry made by entering through an opening in a structure such as a door or window. It merely describes "holding" as not making an entry. That is a self-evident proposition. It contains no more detailed information about the breach and hold tactic. This is similar to other information which merely describes the breach and hold tactic (as opposed to setting out that tactic's objective) in respect of which I have decided not to make an NPO.
b. I will not make an NPO over **answer 671** of **Tab 79**. This information states merely that breach and hold is a very common tactic in prolonged situations. Not only is this not harmful, but it is also similar to the information disclosed in the Lindt findings and thus on the public record;
c. I will not make an NPO over **Tab 82 question** and **answer 507**. This deals merely with permissions, a class of information which I have determined is not appropriate for any NPO;
d. I will make an NPO over **Tab 80, answer 969**. This information indicates that an [redacted] It falls within the class of information going to the future objective of the tactic which I have accepted is appropriate.
e. I will not make an NPO over **Tab 173A**. Schedule A records that an NPO is sought over the entire document because of references in it to "breach and hold". The document is, in effect a chronology of occasions where a breach and hold was executed in previous operations. The document says nothing about the rationale for deploying that tactic or anything specific about how that tactic had been deployed on those earlier occasions. Therefore, it does not, in my view, disclose how that tactic might be deployed in the future.

Deliberate action/immediate action

Information the subject of the claim

285. During his oral address, Mr Emmett drew my attention to the distinction between the "breach and hold tactic" and references to a "deliberate action plan".[67] As I understand it, the breach and hold tactic was the particular "deliberate action plan" that had been implemented by Police in the course of the operation that preceded Mr McKenzie's death. I will deal separately with the Commissioner's claim over references to deliberate action plans.

286. As noted, Mr Emmett ultimately withdrew the Commissioner's claim over **answer 1004** of **Tab 84**. Part of that answer made reference to the breaching and entering being "a deliberate police action" (in addition to referring to "enclosed spaces").

287. As also noted, Mr Emmett withdrew the Commissioner's claim over **answer 1021** of **Tab 84**. This withdrawal is reflected in Schedule A. This information was over a reference to what was described as a "deliberate action plan". The relevant answer drew a distinction between a "deliberate action" and an "immediate action" and explained the former was proactive and the latter reactive. In relation to that information, Mr Downing had submitted that, because that answer had not provided any detail as to what actually happens within a deliberate action or an immediate action, no evidentiary basis for that order had been established[68].

[67] Transcript of hearing on 28 July 2022 at pp. 25-26.
[68] Transcript of hearing on 28 July 2022 at p. 35 [38].

288. It was the strength of that submission and the extent of information included in the Lindt findings and publicly available, as I understand it, that led Mr Emmett to withdraw his claim over answer 1021.[69] Mr Emmett maintained his claim over the more detailed description of what an immediate action plan looks like which, he clarified, included references to things like forms and typical procedures.[70]. He did not, however, point me to any specific examples in the brief of evidence of such more detailed references.

289. I have inferred, however, that **answers 751, 752** and **808** of **Tab 80** might be examples of this more specific information as referred to by Mr Emmett. This information records that an emergency action plan would ordinarily be formulated within a certain period of time. Schedule A records that the reason why an NPO was made over this information was because it related to "deliberate action".

290. According to Schedule A, another reference to an action plan was at **Tab 79, answer 658**. This recorded:

> *"Yep. So that's just a, an action that's done in the time of our choosing, essentially, that's convenient to us or more advantageous for us to do."*

Determination

291. It seems to me that the information at **answer 751, 752** and **808** of **Tab 80**, **answer 658** of **Tab 79** and **answers 1012** and **1013** of **Tab 84** are of the same character as the information in answer **1021** of **Tab 84** (over which the Commissioner has withdrawn her claim). That information describes, in general terms and in no more detail than has publicly been disclosed through the publicly available Lindt findings that a deliberate action plan is, as the name suggests, something done proactively, rather than reactively. In particular, the time frame described in answers **751, 752** and **808** of **Tab 80** is not sufficiently specific, I find, as to enable me to conclude that any harm would arise from its publication. Indeed, none of that information, in my view, has the character of being the more detailed descriptions of an action plan, what that plan looks like or the procedures that might typically apply to such a plan as alluded to by Mr Emmett in his submissions.

292. For these reasons, all that information must, in my view, be treated in the same manner as the information **in answer 1004** and **1021** of **Tab 84** (over which the Commissioner's claims have been withdrawn). Therefore, I will not make NPOs in respect of any of that information.

Other NPO applications which were not specifically referred to during the hearing

293. There were further NPOs designated in Schedule A to which I was not taken specifically in evidence.

[69] Transcript of hearing on 28 July 2022 at p. 47 [34] – [38].
[70] Transcript of hearing on 28 July 2022 at p. 48 [47].

294. As previously indicated, the Aide Memoire, by reference to Schedule A (in the form it existed as at 21 July 2022), outlined the information which Counsel Assisting did and did not intend to dispute.

295. As also previously indicated, where Mr Downing has described the documents as no longer being in dispute, I am generally prepared to make an NPO over them. Therefore, in the case of information which was not the specific subject of argument before me (unlike, for example **[43]** of **Tab 91**)I will only consider the information on the Aide Memoire which are described as still being in dispute.

296. This included the following documents.

297. The information in **Tab 9 [326]** described the consistency of the foam discharged from the OC sprays available to the TOU and TORS. I note that the Aide Memoire records this as a matter remaining in dispute between the parties. This may be a typographical error as I note that the Aide Memoire indicates other information, of an apparently similar nature (that is, going to the nature of the foam) was information which Counsel Assisting has accepted should appropriately be the subject of an NPO claim (for example, **answers 875** and 877 of **Tab 78**; **answers 600** and **601** of **Tab 79**). In the circumstances, I am prepared to make an NPO in respect of **Tab 9, [326]**.

298. I will make an NPO over **Tab 78, answer 923**. This information, it seems to me, reveals a specific attribute of the distraction devices. I note that this answer has not been marked as Purple on Schedule A (in contrast to answers 920-922). I am satisfied, due to the more specific information contained in that answer relative to answers 920-922, that it falls outside the scope of the concession made by Mr Emmett in relation to distraction devices.

299. I will not make an NPO over **Tab 78B**. Schedule A says that publication of this material would "reveal a methodology that may be deployed in future operations". I am not satisfied that it would have that effect. As I see it, that document merely records what was known to police about the incident at Mr McKenzie's property and how the TOU/TORS was tasked to respond. I cannot see how the disclosure of that specific information discloses any methodology that may be deployed in future operations (and, were I to accept that information of that sort did reveal a future methodology, it seems to me that I would also need to make NPOs about the entirety of the police operation that preceded Mr McKenzie's death; an NPO of a breadth that I would not be prepared to make).

300. For similar reasons to those expressed in relation to **Tab 9, [326]**, I will make an NPO over **answer 1498 of Tab 80** (notwithstanding that the Aide Memoire records it as an area where there remains a dispute between the parties). In my view, that information is of the same character as Tab 9, [326].

301. I will also make an NPO over **Tab 83, answer 157**. Whilst this is again recorded in the Aide Memoire as an area which remained in dispute, I am satisfied that the answer discloses a relatively specific piece of information which could be used to the detriment of police in future operations ([redacted]).

302. I will make an NPO over the specific reference in **Tab 84, answer 792** to [redacted] since, applying a mosaic analysis, I am satisfied that, when coupled with other information, this piece of information could allow the potential future subjects of a police operation to take measures to avoid that ammunition being effective.

303. I will make an NPO over the reference in **Tab 84**, **answer 1225** to [redacted]. That, it seems to me, is a specific statement of methodology which could be deployed to the disadvantage of police in future operations.

304. I will make an NPO over **Tab 84, answer 1446**. I am satisfied that the information in that answer could enable the prospective target of a future operation to work out that a [redacted] a piece of information, I accept, which could be used to the detriment of police in future operations.

305. I will make an NPO over **[7]** of **Tab 111.** Paragraph (g) [redacted]. The balance of the paragraph contains definitions which Counsel Assisting have accepted should be the subject of an NPO (they contain similar information to in Tab 113, [5] and [6], for example.

306. I will not make an NPO over **[8]** of **Tab 111** since, as I characterise it, that information only refers in a general sense to situations where the TOU or TORS may be deployed. It contains, I find, no specific information which could be used to the detriment of police in future operations.

307. I will also not make an NPO over the definitions of special weapons and tactics in **Tab 111, [9]** as I cannot see how any harm would arise from the disclosure of the general information contained within that definition.

308. I will not make any NPO over the process for calling out the TOU or TORS to respond to an incident as described in **Tab 111, [10]** because, once again, I cannot see how any harm would arise from the disclosure of that information.

309. I will make an NPO over the underlined parts of the claimed information of **Tab 123, [6]**:

> "this method however serves as a pain compliance and [redacted]

310. The parts that have been underlined, I am satisfied, record a specific limitation in the devices and procedure which could, potentially, be used by the hypothetical future subject of a police operation to the detriment of that operation. The balance of the information, however, is generic and does not warrant an NPO.

311. I will not make an NPO over **Tab 123, [21].** The information that the devices referred to in that paragraph are not always effective and the reasons why not appear at a high level of generality. I cannot see how any harm would arise from the disclosure of that

information. It is information that is revealed by the circumstances of Mr McKenzie's death.

312. I will make an NPO over part of **[174]** and **[231]** of **Tab 123**. The reference to the [redacted] used in the tasers could, I accept, potentially be used to the detriment of police in future operations (by way of a google or other search revealing some limitation in that battery). I am, however, not convinced that the reference to the lack of any facility to connect a USB (a matter, which it seems to me, is related to the question of whether a camera is equipped on the taser) would result in any harm and I do not make any NPO over that information. This means that I will only make an NPO over the name of the [redacted] that is used.

313. I will make an NPO over **Tab 137**, **[63]** as I am satisfied that this paragraph contains detailed information over the [redacted] a category of information which I have elsewhere accepted to be an appropriate subject for an NPO.

314. I have already referred to much of **document 173**, being the references to breach and hold I was taken to by Mr Downing during the course of oral argument. As noted, that was not the entirety of the Commissioner's claim for NPOs. I deal with the balance here.

315. I will make an NPO over **[11]** of **Tab 173**. This contains a further reference to the definition of "high risk situation" which, in respect of Tab 111, [7] and Tab 113, [5] and [6], I have determined to make an NPO.

316. However, the references to the approval process in **[12]** of **Tab 173** does not contain any specific information which I could conclude would be harmful. I decline to make an NPO over it.

317. I further find that the references to the Police Forward Commander having operational command and the TOU Field Supervisor maintaining a presence in the Police Forward Command in **[14]** and **[15]** of **Tab 173** is not information sufficiently specific as to be harmful. Therefore, I will not make any NPO in respect of that information.

318. Finally, I would note that, whilst the Aide Memoire records that **Tab 270, [4]** was still in dispute, the only information claimed in that paragraph are references (identified in bold on Schedule A) to certain percentages. This same information appears at [20]-[22] of Tab 270. The Aide Memoire records that [22]-[23] were no longer the subject of a dispute. In the circumstances, I would be prepared to make an NPO in respect of the information in **Tab 270, [4]** as well.

Disposition of NPO applications not otherwise referred to in these reasons

319. In an application as large and as extensive as the present application for NPOs, it is possible that I have missed or otherwise failed to deal with certain pieces of information over which the Commissioner maintains NPOs. It is appropriate that the Commissioner has the benefit of NPOs over any information which I may have failed to deal with, at least until such time as someone brings it specifically to my attention and asks me to revisit my determination. Accordingly, to the extent that my reasons do not otherwise deal with any of the Orange material identified in Schedule A as being the subject of an

NPO application (noting, of course, that not all of the information marked in Orange in Schedule A is in fact the subject of an NPO claim; and at certain points only material marked in bold is identified as being claimed), I will make an NPO over that information. I note that I may revisit this order, if the need arises.

Question 6 – The Blue non-disclosure material

320. As noted, there were two sub-questions which the parties agreed needed to be determined.

321. The first sub-question was whether the information relating to the gauge size of the firearm that discharged the beanbag ammunition should be the subject of a Blue non-disclosure order. However, as that matter was the subject of the Commissioner's concession by email of 10 August 2022, I do not need to consider it further.

322. This leaves only the question of whether the interested family members (specifically, Mr Mark McKenzie and Ms Wilkins) should be permitted to have access to the Blue material.

323. I accept, as was submitted to me by Mr Emmett, that any disclosure of the material increases the risk of its disclosure. This point was made in *The Australian Statistician v Leighton Contractors Pty Ltd* (2008) 36 WAR 83 as well as by Wright J in *Commissioner of Police v Attorney General of NSW*. As earlier indicated, Mr Emmett was, in my view quite properly, at pains to say that the risk he was concerned about was a risk of inadvertent, rather than deliberate, disclosure on the part of the family members.

324. I also accept, as Mr Emmett submitted to me, that much of the information is simple and therefore more apt to stick in the mind (increasing the risk of inadvertent disclosure).

325. I further accept, as Mr Emmett also submitted, that, in his decision on the protective orders in the inquest into the deaths arising from the Lindt Café siege, former State Coroner Barnes described a process by which the interests of the interested parties could be protected even without them gaining access to the entirety of the material in that case. That is through Counsel Assisting exploring the same sorts of matters which the interested parties might wish to explore. I would note that the access orders permitted in respect of the Blue orders (particularly in light of the clarification made by Mr Emmett that the information could be disclosed to Mr Perry) means that this facility will be available in the present case.

326. Finally, I accept that, in light of what Wright J has held in *Commissioner of Police v Attorney General,* considerations of procedural fairness alone do not provide a reason for giving this information to the Mr Mark McKenzie and Ms Wilkins. Nevertheless, as noted above, Mr Emmett accepted that Mr Mark McKenzie and Ms Wilkins do have an entirely legitimate interest in these proceedings (albeit an interest that, strictly, might be one that stands apart from an interest recognised by the rules of procedural fairness) and is an interest that lies entirely at my discretion.[71] I intend to exercise that discretion to enable Mr Mark McKenzie and Ms Wilkins to play a role in the inquest.

[71] Transcript of hearing on 27 July 2022 at pp. 13 [26] – [34] and 14 [28] – [29].

327. In his written submissions at [59], Counsel Assisting noted their strong view that it is not appropriate to preclude the interested parties from accessing the material as it is plainly relevant to the inquest and will or very likely will materially assist in determining one or more of the issues that will be explored in this inquest. I accept those submissions.

328. Further, I am satisfied that the risk of disclosure of that information can be ameliorated through a regime proposed by Mr Downing. I have alluded to these issues at an earlier point of my reasons (in the course of my discussion of question 3). Whilst that discussion occurred in the context of the Red information, a similar regime was proposed in respect of the Blue information. In particular, Mr Downing proposed that access to the Red material (which he submitted would not be excluded from the brief) and the Blue material by Mr Mark McKenzie and Ms Wilkins would occur in their lawyer's offices with a lawyer present. No copying or electronic transmission of that material would be permitted. I note that Mr Emmett maintained his primary position (that the material should be excluded). I note that both Mr McManus and Mr Fine, on behalf of Mr Mark McKenzie and Ms Wilkins also did not wish to be heard against Counsel Assisting's proposal.

329. During the exchange with the relevant parties, there was reference to the fact that the contemplated inspection need not necessarily occur in the lawyers' offices, provided it was under the supervision of the lawyer, since the presence of that supervision was the relevant protective factor. Again, I did not understand Mr Emmett, Mr McManus or Mr Fine to have opposed that course.[72]

330. I have decided to adopt this approach in respect of the Red and Blue information[73]. Mr Mark McKenzie and Ms Wilkins will be permitted to have access to the Red and Blue material. However, they will not receive any information about the actual locations from which police were responding and will, instead, receive a version where those locations have been replaced with a version which specifies a distance range of [redacted]. Further, any access must occur under the supervision of the interested family members' legal representatives. Mr Mark McKenzie and Ms Wilkins will not be permitted to copy or disseminate that material. The access can occur either at the offices of those assisting me or at a location and in a manner as may reasonably be proposed by the Commissioner.

331. These measures, I find, will reduce the risk of the inadvertent disclosure of that information. I note, in particular, that Mr Mark McKenzie and Ms Wilkins will not see the information the subject of question 3 (which, I regard as being the information that carries with it the greatest risk, both in terms of the consequences of that risk materialising and in terms of the likelihood of that risk coming to pass). This eliminates them as the source of any inadvertent disclosure in respect of that information.

332. In relation to the balance of the information, whilst I accept that whilst a risk of inadvertent disclosure exists, I refer again to Assistant Commissioner Joseph's very proper acknowledgement at [41] of the Fourth Confidential Affidavit that it may be expected that the lawyers acting for the Mr Mark McKenzie and Ms Wilkins will act professionally and, in particular, will advise their clients as to the importance of

[72] Transcript of hearing on 28 July 2022 at p. 52 [3] – [48].
[73] Where I have found that a public interest immunity claim has not been made out over Red information.

maintaining confidentiality. I find that this will serve to minimise the risk of any inadvertent disclosure.

Disposition of additional claims marked in Purple on Schedule A

333. I will next turn to the new claims made by the Commissioner subsequent to the hearing (marked in Purple on Schedule A). For the most part, these are additional applications for NPOs (although there are a couple of new claims for Red and Blue orders as well).

334. The first additional pieces of information claimed are two passages in **Tab 9, [111**] (which passages are marked in bold). I am satisfied that both passages refer to the object of the breach and hold tactic [redacted]. For reasons already expressed, I will make NPOs over that information.

335. The first reference in **[112]** of **Tab 9** (the material marked in bold), it appears to me, is a mere description of the "contain and negotiate" strategy. For reasons previously given, I will not make an NPO over that information. I will, however, make an NPO over the second reference (marked in bold) as I am satisfied that that information discloses that the object of that tactic was to attempt to re-establish negotiations.

336. I will make an NPO over **Tab 9 [240]**. This answer discloses [redacted]). I am satisfied that the publication of this matter could result in harm to future police operations.

337. I will not make an NPO over **Tab 9, [242]**. That passage, it seems to me, is merely a description of what the breach and hold strategy entails (in effect, that it involves "breaching" and "holding"). For reasons previously expressed, I am not satisfied that the disclosure of this information would give rise to any harm to future police operations.

338. I will cause **answer 183**, **Tab 79** to be removed from the brief. This is a reference to [redacted], information which falls within the category of information which Counsel Assisting accepted was irrelevant.

339. I will make an NPO over **answer 249** of **Tab 79** that is marked Purple because I am satisfied that it reveals a [redacted]).

340. I will not make a Blue order over **Tab 79**, **answer 483.** I will not cause answer **484** to be removed from the brief on the grounds of relevance and will not make any PII declaration over it. To my mind, those answers differ from other information related to training (which, I understand, Counsel Assisting accepted could be removed). These answers relate to training relevant to the use of firearms generally (as opposed to training in firearms which were not used in the operation that preceded Mr McKenzie's death). Given that the evidence in the brief of evidence suggests that Mr McKenzie died after being shot by police, the question of what training they received in the firearms with which Mr McKenzie was shot is, in my view, highly material. Further, it is a matter which, I consider, the family might legitimately explore consistent with their interests. While the harm in the disclosure of this information has not been specifically identified, I am prepared to accept that it is sensitive information. Therefore, I propose to make a Green non-disclosure order over that information.

341. I will, however, cause the bold text in **answer 492** of **Tab 79** to be removed as I am satisfied that it is not relevant. That relates to training in respect of firearms not used in the incident.

342. The references to the location or locations in **question 583** of **Tab 79** will be dealt with in the same manner as the other references to locations which were the subject of the Commissioner's PII claim.

343. I will make an NPO over **Tab 79 answers 591**, **592** and **593** since I am satisfied that it is information which is specific to the particular firearm being discussed and could, together with other information, reveal [redacted]

344. I will make an NPO over the reference to a "[redacted]" in **Tab 79, answer 862**. That information reveals the [redacted] The balance of the answer, however, records only that the tasers were not effective against Mr McKenzie in the operation that preceded his death. For reasons already expressed, I will not make an NPO over that information.

345. As earlier mentioned, I will not make an NPO over **answer 344** of **Tab 80**. The first part of the answer refers to a distraction device, which was the subject of a concession made by the Commissioner. The balance of the answer merely refers to equipment available without disclosing any limitation in that equipment (or purporting to record the entirety of that equipment).

346. I will, however, make an NPO over **answer 365** of **Tab 80** because I am satisfied that this reveals the intent of the officers in deploying particular equipment.

347. I will also make an NPO over the words [redacted] in **Tab 80**, **answer 907**. However**,** I will not make an NPO over the balance of that answer or over **answers 906, 908** or **909** in **Tab 80.** Collectively, these answers merely describe the clothing being worn by Mr McKenzie and refer to the fact that Police had tasers; they do not [redacted]

348. The new claim over the word "beanbag" in **answer 913** of **Tab 80** is a bare reference to that term. It does not reveal an attribute or limitation of that ammunition. I will not make an NPO over it.

349. I will make an NPO over the words in bold in **Tab 83**, **answer 483**. I am satisfied that this contains specific information about the beanbag ammunition which could be used to the detriment of police in future operations (namely, the number of rounds).

350. Similarly, I will make an NPO over **Tab 83**, **answer 495**. I am satisfied that this contains specific information about the Remington Shotgun (namely, the number of rounds). In the initial version of Schedule A, a claim was made for Blue orders over information marked in bold and an NPO over the remainder. I note that Schedule A now records that no claims are pressed, I assume that is in error; the category of information, it seems to me is analogous to the answer in 483. Instead, I understand, the Commissioner intended merely to have withdrawn her claim for non-disclosure orders over the words in bold whilst otherwise pressing the NPO claim.

351. I will make an NPO over **Tab 83**, **answers 560**, and **Tab 84**, **answers 806** and **826**. Again, each of these answers, I am satisfied, [redacted]

352. I have decided to make an NPO over **Tab 84**, **answer 1224.** Whilst it seems entirely obvious to me that [redacted], I accept it is a general tactic of a similar type to other tactics in respect of which I have thought appropriate to make NPOs. In this regard, I take on board Assistant Commissioner Joseph's evidence about "obviousness" and the differences between the circumstances in which I am considering that information and what might occur in the realities of a police operation.

353. The references to the location or locations in **Tab 137**, **[60]** will be dealt with in the same manner as the other references to locations which were the subject of the Commissioner's PII claim.

354. As previously indicated, I accept that **p. 1** of **Tab 214** reveals the entire inventory of the TOU equipment. I am prepared to make an NPO over that information.

The material in Supplementary Schedule A

355. Supplementary Schedule A records that a claim of Red information, that is, a public interest immunity claim, is made over **Tab 8, [278]**, **Tab 81 answer 214** and **tab 82 answer 54**. As noted, these claims were included in the PDF version of Schedule A as at 21 July 2022, remained in the excel version as at 8 September 2022 but, for some reason, have been omitted from the 8 September PDF version. The ground is said to be that this discloses the location and quantity of resources. I agree that this information, on its face, records a location of various equipment and officers. It is appropriate for me to deal with it in the same way as the information the subject of question 3 (making an order substituting the locations referred to therein with a reference to a distance of a range of between [redacted] and making a Blue order over that information).

356. Supplementary Schedule A also records that a NPO claim is made over a number of paragraphs of **Tab 91.** These are recorded in the Aide Memoire as matters which are not in dispute (see the references to lines (of Schedule A as at 21 July 2022) 1798-1813 (noting that [43] of **Tab 91,** as it was the subject of specific argument, has been dealt with, notwithstanding what is recorded in the Aide Memoire). Apart from **[43]** (over which, as previously indicated, I will not make any NPO), I will make NPOs over the information marked in Orange relating to tab 91.

Orders

357. I make the following orders:

Material to be removed from the brief

1. Information in the Brief of Evidence[74] in respect of which:

    a. Column 2 (entitled "Colour/Category) of the Aide Memoire prepared by Counsel Assisting and handed up in Court on 27 July 2022 ("Aide Memoire"; **Annexure D** to these orders) contains the word "Red" and
    b. Where column 4 of the Aide Memoire (entitled "whether there is a need for a determination (i.e. are the matters in dispute") contains the word "no"

    shall be removed from the brief on the grounds of relevance.

2. Pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of the material referred to in order 1.

The Red and Blue material in Schedules A and B

Red material relating to beanbag

3. Subject to orders 9 and 10, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of any information remaining in the brief:

    a. which is described in Schedule A prepared by the Commissioner dated 8 September 2022) ("Schedule A"; **Annexure A** to these orders) and Schedule B prepared by the Commissioner and dated 22 July 2022 ("Schedule B"; **Annexure B** to these orders) as information that is the subject of a PII claim (by virtue of its Red marking); and
    b. in respect of which the subcategory of claim (Schedules A and B, column E) is described as "Bean bag".

Red material relating to [redacted]

4. Subject to orders 9 and 10, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of any information remaining in the brief:

    a. which is described in Schedules A and Schedule B as information that is the subject of a PII claim (by virtue of its Red marking); and

[74] Noting that the Aide Memoire (Annexure D to these orders) refers to line numbers that appear in the version of Schedule A as at 21 June 2022 and the line numbers are different in the most recent version of Schedule A (dated 8 September 2022) (which most recent version is annexure A to these orders).

b. in respect of which the subcategory of claim (Schedules A and B, column E) is described as [redacted]

Red material relating to [redacted]

5. Subject to orders 9 and 10, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of the information remaining in the brief:

    a. which is described in Schedules A and Schedule B as information that is the subject of a PII claim (by virtue of its Red marking); and
    b. in respect of which the nature of claim (Schedules A and B column D) is described as [redacted]

Red material relating to Location and quantity of resources

6. Subject to orders 9 and 10, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of the information remaining in the brief:

    a. which is described in Schedules A and Schedule B as information that is the subject of a PII claim (by virtue of its Red marking); and
    b. in respect of which the nature of claim (Schedules A and B, column D) is described as "location and quantity of resources".

7. Within 28 days of these reasons, the Commissioner is to prepare a version of the documents in the brief of evidence the subject of order 6 whereby any reference to locations which are the subject of order 6 is replaced by a reference to that location being within a distance of [redacted] rom Taree.

Balance of Red and Blue material

8. Subject to orders 9 and 10, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of the material remaining in the brief which is:

    a. otherwise marked Red in Schedules A and B (to the extent that that information is not the subject of orders 3, 4, 5 and 6); or
    b. which is marked Blue in Schedules A and B and not the subject of a concession by the Commissioner identified in my reasons.

Disclosures and inspections that may be made of the Red and Blue material

9. Orders 3, 4, 5, 6 and 8 do not prevent disclosures to and between the following people of the purposes of this inquest:

    a. The Court, Counsel Assisting and the Solicitors Assisting;
    b. Necessary Court staff;
    c. Current officers of the NSW Police Force; and

d. Mr Nick Perry ("the expert").

10. Subject to orders 11 and 12, the information the subject of orders 4, 7 and 8(b) may be inspected by the interested parties in the presence of their legal representatives:

    a. At the offices of the solicitors assisting me (the Crown Solicitor's Office);
    b. At the offices of the legal representatives of the interested parties;
    c. At the Registry of Taree Local Court (by appointment with that Court);
    d. At a police station (by appointment with the Commanding Officer of that police station); or
    e. At such other place as may be proposed by the Commissioner and agreed to by the interested parties.

11. If the information referred to in order 10 is accessed in accordance with order 10(b)-(e), the Commissioner must make that information available for the inspection of the interested parties in the presence of their legal representatives.

12. The method of inspection of the material referred to in order 11 shall be as determined by the Commissioner. However, the Commissioner shall take into account any representations made by the representatives for the interested parties and must not unreasonably withhold her consent to the interested parties' preferred method of access.

13. Except as provided for by orders 10, 11 and 12 neither the interested parties nor their representatives shall otherwise inspect the information referred to in orders 10 and 11.

14. The interested parties shall not copy or disseminate the information referred to in orders 10 and 11.

15. The parties have liberty to apply, particularly in relation to the question of the method of access as contemplated by orders 10-12.

<u>The Green material in Schedules A and B</u>

16. Subject to order 17, pursuant to ss. 65 and 74 of the *Coroners Act 2009* and the Court's implied powers, there shall be no disclosure (by publication or otherwise) of:

    a. the information that is the subject of order 3;
    b. the information that is the subject of order 5; and
    c. the information in the brief of evidence which is marked Green in Schedules A and B.

17. Order 16 does not prevent disclosures to and between the following people of the purposes of this inquest:

a. The Court, Counsel Assisting and the Solicitors Assisting;
b. Necessary Court staff;
c. Current officers of the NSW Police Force;
d. Mr Nick Perry;
e. The legal representatives of the interested parties to the inquest; and

18. The interested parties shall not copy or disseminate the information the subject of order 16.

<u>The Orange material in Schedules A and B</u>

19. Subject to order 20, and until further order, there is to be no publication of the information in the brief of evidence which is:

    a. marked Orange on Schedule A and
    b. which is described in that schedule as being the subject of a claim for an NPO.[75]

20. Despite order 19, there may be publication of the following information marked Orange on Schedule A and which is described in that schedule as being the subject of a claim for an NPO:

    a. Tab 8, [238], other than the words:
        i. [redacted]
        ii. [redacted]
        iii. The final four sentences of that paragraph;
    b. Tab 9, [236];
    c. Tab 78 answer 473;
    d. Tab 78 answer 569;
    e. Tab 79, answer 500 (other than
        i. the word [redacted]; and
        ii. the words between "[redacted]";
    f. Tab 79 answer 661;
    g. Tab 79, answer 658;
    h. Tab 79, answer 671;
    i. Tab 79, answer 728;
    j. Tab 80, answers 581;
    k. Tab 80, answer 582;
    l. Tab 80, answer, 589 other than:
        i. the word [redacted]"; and
        ii. the words from "[redacted]" until the end of the answer;

[75] Noting that, at various points, Schedule A reproduces material but specifies that only certain parts of it, marked in bold, are the subject of a claim for orders.

m. Tab 80, answer 751;
n. Tab 80, answer 752;
o. Tab 80, answer 808;
p. Tab 80, answer 943;
q. Tab 80, answers 945 other than:
    i. The words: "[redacted] and
    ii. The last 3 sentences of that answer;
r. Tab 80, answer 970 other than the words from "[redacted]
s. Tab 80 answer 971;
t. Tab 80 answer 1171;
u. Tab 80 answer 1172;
v. 8Tab 82, answer 499;
w. Tab 82, answer 500;
x. Tab 82, answer 507;
y. Tab 82, answer 1060;
z. Tab 84, answer 489;
aa. Tab 84, answer 793 and 794;
bb. Tab 84, answer 1006;
cc. Tab 84, answer 1007;
dd. Tab 84, answer 1012;
ee. Tab 84, answer 1013;
ff. Tab 85, [37];
gg. Tab 111, [8];
hh. Tab 111, [9];
ii. Tab 111, [10];
jj. Tab 123 [6] other than the words "[redacted] to the end of the paragraph);
kk. Tab 123, [7];
ll. Tab 123, [174] (other than the words "[redacted]");
mm. Tab 123, [231] (other than the words [redacted]");
nn. Tab 137 [62];
oo. Tab 173 other than:
    i. Paragraph [11];
    ii. The second sentence of [18];
    iii. Paragraph [19];
    iv. Paragraph [20];
    v. Paragraph [21];
    vi. Paragraph [22];
    vii. The first sentence of paragraph [26];
    viii. Paragraph [27];
    ix. Paragraph [28];
    x. Paragraph [29];
    xi. Paragraph [30];
    xii. Paragraph [31];
    xiii. Paragraph [32];
    xiv. Paragraph [36]; and
    xv. Paragraph [37].

21. The parties have liberty to apply in respect of the NPO orders.

The Purple material in Schedule A

22. The following information marked in Purple on Schedule A shall be removed from the brief:
    a. Answer 183, Tab 79; and
    b. The passages marked in bold in the entry of Schedule A relating to Answer 492 of Tab 79.

23. The following information marked in Purple on Schedule A will be dealt with in accordance with orders 6, 7 and 9-15 (Red material related to location and quantity of resources)

    a. Answer 583 of Tab 79; and
    b. Tab 137, [60].

24. The following information marked in Purple on Schedule A will be dealt with in accordance with orders 16-18 (the Green information):
    a. Tab 79 answer 483; and
    b. Tab 79 answer 484.

25. Until further order, there is to be no publication of the following information marked in Purple in Schedule A:
    a. The passages marked in bold in the entry of Schedule A relating to tab 9, [111];
    b. The second passage marked in bold in the entry of Schedule A relating to tab 9, [112];
    c. Tab 9, [240];
    d. Tab 79, answer 249;
    e. Tab 79 answer 591;
    f. Tab 79 answer 592;
    g. Tab 79 answer 862;
    h. Tab 80, answer 365;
    i. Tab 80 answer 907 (over the words [redacted] only);
    j. Tab 83, answer 483;
    k. Tab 83, answer 495;
    l. Tab 83, answer 560;
    m. Tab 83, answer 806;
    n. Tab 83, answer 826;
    o. Tab 84, answer 1224; and
    p. Tab 214, p. 1.

Material in Supplementary Schedule A

26. The material, which is described in Supplementary Schedule A (**Annexure C** to these orders), will be dealt with in the following manner:

    a. The information remaining in the brief of evidence:
        i. which is marked Red in Supplementary Schedule A and

ii. in respect of which the nature of claim (column D) is described as “location and quantity of resources”.

will be dealt with in accordance with orders 6-7 and 9-15;

b. Until further order, there is to be no publication of the material in the brief of evidence which is marked Orange in Supplementary Schedule A which relates to Tab 91 other than in respect of Tab 91, [43].

Ancillary matters

27. Within 28 days of these reasons, the Commissioner is to prepare a version of the documents in the brief of evidence the subject of these orders with:

    a. The material the subject of orders 1 and 22 removed;
    b. The material the subject of order 8(a) marked in Red;
    c. The material the subject of orders 4, 6, 8(b), 23 and 26(a) marked in Blue;
    d. The material the subject of orders 3, 5, 16 and 24 marked Green; and
    e. The material the subject of order 18, 25 and 26(b) marked Orange;

    and lodge two copies of same with the registry.

28. Should the Commissioner mark any documents in Red pursuant to order 27(b), she is to provide the Court with a document identifying the material the subject of order 8(a) within 28 days of these reasons.

29. Within 28 days of these reasons, the Commissioner is to prepare a version of the documents in the brief of evidence the subject of these orders with:

    a. The material the subject of order 1, 8(a) and 22 removed;
    b. The material the subject of orders 6, 23 and 26(a) removed;
    c. The material the subject of orders 4, 7 and 8(b) included and marked Blue;
    d. The material the subject of orders 3, 5, 16 and 24 marked Green; and
    e. The material the subject of orders 18, 25 and 26(b) marked Orange;

    and serve one copy on the legal representatives of each of the other interested parties.

30. Orders 9-15 apply to the documents prepared pursuant to order 29(c).