

MinterEllison

19 October 2020

BY EMAIL

Solicitors Assisting
Board of Inquiry into the COVID-19 Hotel Quarantine Program
lawyers@quarantineinquiry.vic.gov.au

Dear Solicitors Assisting

Board of Inquiry (Board) into the COVID-19 Hotel Quarantine Program

We refer to our letter dated 15 October 2020, enclosing two email chains responsive to a Notice to Produce issued by the Board on 15 October 2020 (**NTP-163**), and to the Board's letter dated 16 October 2020 in which the Board asked 4 questions in relation to the non-production to the Board of the two email chains.

A more detailed response to the four questions is contained in the attachment to this letter, but we summarise the key matters below.

Over the course of the Inquiry, DHHS identified over 500,000 documents relating to the hotel quarantine program that potentially could be relevant to the Board's Inquiry and provided those documents to us. The email from Mr Braedan Hogan copied to Professor Sutton at 6.43pm on 27 March 2020 and the email from Dr Finn Romanes dated 1 April 2020 were included in the documents provided to us by DHHS in the course of the Inquiry. The confirmatory response from Professor Sutton to Mr Hogan's email at 6:45pm on 27 March 2020 was not included in those materials, but was provided to us after the close of evidence. It was not identified through the search parameters that DHHS utilised.

Given the massive volume of potentially relevant documents, the Board proposed a process by which DHHS limit production of documents to those that were critically relevant, being the documents of most relevance and of greatest assistance to the Inquiry's terms of reference. This initially required production of the 100 most relevant documents in six categories of the first Notice to Produce. We undertook that review process with DHHS. Of the 500,000 documents DHHS provided to us, about 4,000 documents were identified as critical documents and were provided to the Board in the course of the Inquiry.

The document review process required the exercise of judgment, including at times when the issues that would become of most assistance to the Board were unclear. The email from Mr Braedan Hogan copied to Professor Sutton at 6.43pm on 27 March 2020 and the email from Dr Finn Romanes dated 1 April 2020 were not identified as critical documents for provision to the Board. Our observations on why the documents are not critical are set out in the attachment.

In particular, we note that Mr Hogan's email about the hotel quarantine program was sent after the decision had been made to use security guards and sheds no light on who made that decision, or the reasons for it, and simply refers to it as an arrangement already in place. Dr Romanes' email identified his views at an early stage, shortly after institution of the hotel quarantine program, and relates to matters that are addressed in significantly more detail in key planning documents, communications and other documents that have been produced and are in evidence before the Board.

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On 28 September 2020, after the close of evidence on 25 September 2020, a DHHS employee who had been a witness in the Inquiry, enquired as to whether the email from Professor Sutton to Braedan Hogan at 6.45pm on 27 March 2020, the email from Dr Finn Romanes dated 1 April 2020 and two other emails had been provided to the Board. While only the 27 March 2020 email chain between Mr Hogan and Professor Sutton and the 1 April 2020 email from Dr Finn Romanes are relevant to this letter. DHHS is happy to provide copies of the additional emails to the Board, but would be grateful to receive a Notice to Produce prior to doing so, to ensure it is afforded the protections under the *Inquiries Act 2014* (Vic). DHHS is in a position to provide those immediately upon receipt of an NTP.

The witness had not raised these emails in the context of the preparation of the witnesses' statement to the Board. DHHS immediately requested that we identify whether the emails had been included in materials provided to the Board and if not, to raise the 27 March 2020 email chain between Mr Hogan and Professor Sutton with Professor Sutton.

We identified that the emails had not been provided to the Board and raised the email chain between Mr Hogan and Professor Sutton with Professor Sutton. Professor Sutton instructed us he had not read the detail of the email at the time and that the evidence that he gave to the Board was truthful at the time and remains so. In other words, Professor Sutton stands by that evidence which was provided honestly. Professor Sutton further instructed us that he did not consider he needed to clarify his evidence and therefore the email did not need to be provided to the Board for that reason.

Thereafter, DHHS was actively considering whether anything further needed to be done in connection with the emails in the light of legal advice and wider considerations. The integrity of the process and evidence and transparency to the Board were paramount considerations for DHHS. It was still actively considering the matter, and seeking further advice from us, when we received the request from the Board on 15 October 2020.

We wish to emphasise to the Board that DHHS and its legal team has at all times been transparent with the Board regarding document production and all aspects of the Inquiry. The fact that a different view may now be taken by others about matters of judgment, honestly made, regarding the criticality of these documents at any stage during the Inquiry, does not mean that the non-production of these documents by DHHS was an error, or that DHHS or the legal team have acted in any way improperly.

If you have any queries in relation to this, please do not hesitate to contact us.

Yours faithfully
MinterEllison



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OUR REF: 1305953

Attachment

Background Context

1. As you are aware, in response to the NTP-001 issued by the Board to DHHS on 14 July 2020, with a return date of 24 July 2020, DHHS initially identified hundreds of thousands of documents that were potentially responsive to that NTP. Presently, we have approximately 500,000 documents in our database. Given the extraordinarily compressed timeframes in which we, counsel, DHHS and the Board, were operating, and despite the best efforts of all parties involved, we raised with the Board in a number of telephone discussions with Solicitors Assisting the fact that there were hundreds of thousands of documents which would be responsive to the terms of the NTP.

2. The Board responded by a letter dated 19 July 2020 (**Board's Disclosure Letter**) in which it stated that it *'appreciate[s] and are grateful for [DHHS's] indication, that you think it unlikely that all documents caught by the terms of the Notices will ultimately be helpful to the Inquiry in light of its Terms of Reference'*.

3. On that basis, in the Board's Disclosure Letter, the Board proposed that DHHS produce the documents:

*"which, with the assistance of lawyers assisting her [Ms Kym Peake] and the DHHS, she considers to be most relevant and of greatest assistance to the Inquiry's Terms of Reference (**Critical Documents**)'.*

4. The Board did not require the production of documents responsive to NTP-001 or NTP-026 (which related to genomics information) that did not fall within the Board's description of 'Critical Documents'.

5. In the Board's Disclosure Letter, the Board stated that: *'In the first instance the Critical Documents need **not exceed 100** for each of the six categories identified in the Schedules to the Notices'*.

6. The Board then stated that DHHS would thereafter have an ongoing obligation to produce further Critical Documents as follows:

"The Notices will not be discharged until the evidence gathering phase of the Inquiry is concluded. Accordingly, the Notices will remain extant, and further documents beyond the initial 'Critical Documents' should continue to be provided to the Inquiry pursuant to the Notices until such time as the Notices are finally discharged.

In light of the above, it is our intention (and ought be your understanding) that the obligation to provide additional documents that meet the description of 'Critical Documents' will subsist until such time as the Notices are discharged. The obligation on DHHS will therefore be akin to a party's discovery obligations in civil litigation, informed by s26 of the Civil Procedure Act 2010 (Vic)."

7. By our letter dated 24 July 2020, DHHS produced to the Board the first tranche response to NTP-001, and in our letter we relevantly confirmed the process adopted in the following way:

"5. Mindful of the tight timeframes within which the Board is operating, prior to the service of the Notices, DHHS commenced a thorough process of identifying, extracting, retrieving and transferring to Minter Ellison electronic documents held on its information technology systems, or those of other government agencies on its behalf, which may be relevant to the Board's Terms of Reference.

6. That process, which is typical of the usual process involved in large scale electronic discovery, has to date resulted in approximately 242,000 documents (after de-duplication) having been uploaded into our database.

7. DHHS anticipates providing a smaller but nonetheless significant number of documents to us in the coming days once it has completed this process.

8. *The documents which are considered most relevant and of greatest assistance to the Board's Terms of Reference (Critical Documents) are documents that are stored electronically.*
9. *We have assisted DHHS and Ms Peake in identifying, as expeditiously as possible, the Critical Documents responsive to the Notices.*
10. *The first tranche of such Critical Documents in response to the Notices is produced pursuant to the document management protocols set out in Practice Direction No.1 (Document Management Protocol) and the protocol between the Board and the Crown in the Right of the State of Victoria (Protocol).*
11. *Given the volume of documents relating to the Hotel Quarantine Program and the ongoing targeted forensic review of them that will be required (as we continue to take instructions from DHHS and speak to relevant witnesses about its response to the pandemic), it is possible that some of this first tranche, or later tranches of documents produced as Critical Documents, may not ultimately be considered as such.*
12. *Equally, it is possible that the identification of some documents as Critical Documents will occur only during the course of our ongoing work including the preparation of DHHS's witness statements or that, if any information gaps are identified, further searches will need to be conducted by DHHS.*

(emphasis added)

Documents produced to the Board and production process

8. A proper review process (typical of that adopted for large scale matters) was implemented and undertaken for the assessment of the massive volume of documents produced by DHHS - we confirm that process was undertaken with incredible time pressures given the competing tasks presented by the Board's valuable work. We (Minter Ellison) undertook that review process with DHHS. By necessity, urgent judgment calls were made in relation to the critical relevance of documents to be produced to the Board. Those judgment calls were made by all concerned honestly, in good faith and in challenging circumstances, an issue which we raised with the Board openly on a number of occasions.
9. With the exception of the confirmatory email from Prof Sutton to Mr Hogan at 6.45pm on 27 March 2020, which was provided to MinterEllison and Counsel after the close of evidence, the other emails in the chain ending with the email from Mr Hogan at 6.43pm on 27 March 2020; and the email chain dated 1 April 2020 involving Dr Romanes, were amongst the 500,000 documents on our database. It appears that the 6.45pm email was not identified through DHHS search parameters.
10. We confirm that approximately 1,500 documents were produced to the Board by DHHS in 5 tranches in response to NTP-001, and just over 4,000 documents in total.

Whether the documents are "critical documents"

11. We make the following observations regarding the relevance of the two email chains.

Email chain concluding with the email from Professor Sutton to Mr Hogan (6.45pm, 27 March 2020)

12. In accordance with the review process set out in paragraph 8, a version of the email chain concluding with the email copied to Professor Sutton (at 6.43pm) from Mr Hogan on 27 March 2020 was assessed, in the context of responding to NTP-001, as not being critically relevant to the Board's terms of reference.
13. With respect to the email chain concluding with the email of 6.45pm, which was provided after the close of evidence, this was considered after it was provided and raises similar matters.
14. In relation to that email chain, we observe that:

- (a) by the time of the email at 6.43pm on Friday 27 March 2020, the evidence was to the effect that a decision to use private security had been made, and the email does not refer to that decision, simply the fact that private security was to be contracted;
- (b) the email chain does not address who made the decision to use private security; when the decision was made; the reasons for the decision to engage private security, or any complaints or concerns relating to the use of private security.

15. We also note the following in relation to the evidence before the Board:

- (a) the email does not add in any way to the range of other evidence on the issue of who determined that security guards should be used in the program, but refers to a decision already made to use private security by 6.43pm. The email only records that 'private security [was] being contracted to provide security at the hotels with escalation arrangements to VicPol as needed.'
- (b) a number of different witnesses give direct evidence as to the decision to use security guards, to the effect that a decision had been made to use security guards in the program by the time this email was sent. Mr Hogan, the DHHS Agency Commander, appears to have been passing on a number of arrangements already decided upon. For example:
 - Mr Andrew Crisp, the Emergency Management Commissioner gave evidence that he had "already been informed that the DJPR had been allocated responsibility by the DPC for sourcing accommodation and private security ...before the meeting of the SCC on 27 March 2020 at 4.30 pm (**First SCC Meeting**) (T1401.25-27). This is consistent with his statement at paragraph 47 where he said *'It was my understanding at this meeting that the decision to use private security companies, and the allocation off responsibility for engaging them, had already been made, prior to this meeting.*
 - At the First SCC Meeting it was expressed to all parties that the preference of the Chief Commissioner of Police was to use private security, this exchange was recorded and played to the Board in evidence (Ex 145, Recording of State Control Centre Meeting 27 March 2020, DOJ.511.001.0001, played to Board of Inquiry T1379.10- 30).
 - Ms Katrina Currie, Executive Director, Department of Jobs, Precincts and Regions (DJPR), gave evidence (in her witness statement) that she received an email from Alex Kamenev, Deputy Secretary – Delivery and Recovery, DJPR at 12.17 pm on 27 March 2020, which stated relevantly that *'Unni is going to write to us shortly with potential requirements for a cleaning and security workforce to manage people who might be quarantined in hotel rooms.'*
 - Ms Claire Febey, Executive Director, DJPR gave evidence (in her witness statement) that she *'had a working assumption by the time of the First SCC Meeting.... where I test my assumptions with Victoria Police'*, that private security would be used (para 37). And, that *'I do not know who made the decision that private security companies would be engaged in the Program. To my mind, that decision was, however, communicated in the First SCC Meeting, as a directive'* (para 39).
 - Mr Graham Ashton, former Chief Commissioner of Police, gave evidence in his witness statement that *'the decision to use private security guards for the HQP was conveyed to [him] earlier that day [27 March] by Commissioner Crisp'* at a meeting held on 27 March 2020 at 2.00pm, attended by himself, Ms Lisa Neville (Minister for Police and Emergency Services) and Corri McKenzie (DJCS), Commissioner Andrew Crisp and his assistant (para 2.3 and 4.8).

16. The Board has also received, before and after the close of evidence, information in relation to phone communications to and from Mr Ashton, which refer to use of private security early in the afternoon.

Brett Sutton Evidence

17. While the email from Mr Hogan to Professor Sutton dated 27 March 2020 had been reviewed for the purposes of disclosure to the Board, it did not come to the attention of DHHS personnel assisting with the Inquiry, the senior legal team or counsel during the course of the hearing. In the course of preparing Professor Sutton's statement and preparing to give evidence, Professor Sutton had not been referred to the email chain.
18. After an extensive evidence gathering process, including many days of witness hearings before the Inquiry and the formal closing of evidence in the Inquiry, a DHHS witness provided the email to the legal team and enquired as to whether the email chain had been brought to the attention of the Inquiry. The witness also provided the email of 1 April 2020, and two other emails. As noted previously, DHHS is happy to provide those to the Board. It was determined that the emails had not and the 27 March 2020 email was then promptly brought to Professor Sutton's attention.
19. Professor Brett Sutton gave evidence to the Board to the effect that he was not aware that security guards were being used in the hotel quarantine program until the Rydges outbreak (T1493.40—43). Professor Sutton has instructed that this email does not alter that evidence, as he did not read or register the relevant content of the email relating to security. He also instructed us that:
- (a) the evidence that he gave to the Board was truthful at the time and remains so – he stands by that evidence which was provided honestly;
 - (b) at the time of receipt of the email he was receiving hundreds of emails per day and he did not read the detail of the email;
 - (c) the original email was an inquiry from the Commonwealth which dealt with the operational matters and information, and he passed that on to others to respond; and
 - (d) his 6.45pm email to Braedan Hogan was not an acknowledgement that he read Mr Hogan's email but rather an acknowledgement that Mr Hogan had assisted and responded to the request.
20. We note that in response to the following question put to Professor Sutton during cross examination by Arthur Moses of Counsel ..*"had you been aware that they (security guards) were being used at the commencement of the Hotel Quarantine Program, would you have raised the same concerns about security guards being used..."*, Professor Sutton responded:
- "I don't think so. I think the wisdom, we have in hindsight is a key element here. I'm not sure anyone at the point in time of decision-making around hotel quarantine commencement might have been able to foreshadow some of the complexities of that workforce. I certainly wouldn't have had sufficient familiarity with it to have made some of the conclusions that I can now make by virtue of having seen some of the complexities play out."(T1504.15-30)"*
21. In short, the effect of Professor Sutton's evidence was that even if he had been aware of the use of private security in the hotel quarantine program at that time, based on what he knew at the time, he would not have been in a position to foreshadow issues with the workforce.
22. We confirm that DHHS was actively considering whether anything further needed to be done in connection with the emails in the light of legal advice and wider considerations. It was still doing so, and seeking further advice from us, when we received the request from the Board on 15 October 2020.
23. We have also been instructed that Professor Sutton is prepared to give further evidence to the Board if necessary.

Chain of Command Email Chain

24. As stated above, there was in place a proper process for the review and assessment of whether documents were critical documents to be produced by DHHS to the Board and the email chain involving Dr Finn Romanes was assessed not to be critically relevant.
25. In respect of this email chain involving Dr Finn Romanes, we note the following:
- (a) the email from Dr Romanes was dated 1 April 2020, and was sent in the first week of the Hotel Quarantine Program. It is the last email in a chain of emails, the prior emails have the subject matter 'Smoking Policy – Operation Soteria' and discuss preliminary ideas about managing smoking at the hotels;
 - (b) the email expresses the subjective view of Mr Romanes at that time (in response to resolving smoking and fresh air breaks); and
 - (c) the email appears to respond to the issues of exemptions and compliance with the directions. It does not address the broader, overall responsibility for the hotel quarantine program.
26. We confirm that DHHS produced the Operation Soteria Plan v 1 and the Physical Distancing Plan to the Board and that those documents contain a description of the chain of command.
27. For example, the Operation Soteria Plan sets out the details of the agencies involved and who was responsible for what components – see section 3 “Operation Soteria – Execution.
28. Further, the Physical Distancing Plan which was in evidence in Dr Romanes’ statement (paragraph [35] - DHS.5000.0123.3240 and DHS.5000.0123.3241) explains the authorising environment in detail from p 3 and characterises the chain of command in a more narrow way, for example, p 11 (after the preceding 8 pages explaining the detail):

Chain of command for enforcement and compliance

It has been agreed with the Chief Health Officer and Deputy Chief Health Officer that the chain of command for matters relating to physical distancing (especially and including enforcement and compliance actions) interventions – in particular the compliance and enforcement activities relating to directions - is:

- Chief Health Officer to
- Public Health Commander to
- Deputy Public Health Commander (Planning) to
- Director Health and Human Services Regulation and Reform to
- Manager Environmental Health Regulation and Compliance to (where necessary
-
- Victoria Police).

29. Accordingly, the email chain was not viewed as a document that was critically relevant to the Board's Inquiry.

The issue of NTP-163

30. We note that in its 16 October 2020 letter, the Board stated: *'when asked to produce these documents yesterday, you advised that you did not consider these documents to be captured by the Notices to Produce previously issued and requested that a new Notice to Produce expressly referring to these documents be served'*.
31. It is important to note that the request for a new notice to produce was only to ensure the appropriate path for the production of the documents. We confirm that at all times DHHS' instructions were to ensure full and complete cooperation with the Board's requests, including the provision of these emails promptly to the Board.
32. For further clarification we note that:

- (a) when we received the email from the Board at 1.13pm on 15 October 2020 seeking production of the documents by 3pm, we expressed a concern that the documents may not fall within the Notices to Produce;
 - (b) such concern arose because, for example:
 - (i) they had been assessed as not being critical documents; and
 - (ii) the notices had been discharged - the Board's letter dated 19 July 2020 indicated that NTP-001 would '*not be discharged until the evidence gathering phase of the Inquiry is concluded*'.
 - (c) if they were not covered by an existing Notice to Produce, our client would not be afforded the protections under the *Inquiries Act 2014*;
 - (d) as you know, throughout the course of the Inquiry, the practice has been to seek a notice to produce documents and we have engaged with the Board at all times on that basis; and
 - (e) we confirmed that our client was prepared to waive the 7 day time frame required for responses to the Notices to Produce and, in fact, produced the emails within several hours of receipt of NTP-163.
33. In our discussions with the Solicitors Assisting, we did not intend to convey that we or DHHS insisted on a Notice to Produce being provided or to indicate that our client would not produce the documents unless one was provided. As it happens, the Board issued the Notice to Produce before we had the opportunity to finalise our letter to the Board enclosing the documents.
34. Also, since responding urgently on 15 October 2020, we have undertaken further searches to identify documents responsive to NTP-163, and have identified further documents which are **enclosed** that may fall within its terms.

Assistance to the Board

35. DHHS has sought to ensure that the Board is provided, through this letter, with an understanding of the thorough and considered process that DHHS and its legal advisors have undertaken in respect of document production. While nothing in this letter is intended to waive legal professional privilege in relation to communications between DHHS (or any DHHS witness) and its legal advisers for the purpose of being provided with legal services in connection with the Inquiry, we have sought to provide as much information as possible to address the Board's queries. We would be pleased to assist the Board further as required.