

**IN THE MATTER OF**  
**THE BOARD OF INQUIRY INTO THE HOTEL QUARANTINE PROGRAM**

**CLOSING SUBMISSION**  
**DEPARTMENT OF PREMIER AND CABINET**

1. The Department of Premier and Cabinet (**DPC**) submits as follows.

**SUMMARY**

**Mr Gaetjens' email**

2. The evidence establishes that Mr Eccles did not draw the contents of the email he received from Mr Gaetjens dated 8 April 2020 (**Mr Gaetjens' email**) to the attention of the Premier.<sup>1</sup>

Finding about passing on the information to the Premier

3. DPC accepts that it is open for the Board to find that Mr Eccles should have drawn the contents of Mr Gaetjens' email to the attention of the Premier, because its contents concerned a significant issue. DPC otherwise makes no submission with respect to this proposed finding.

Findings about “responsibility, accountability and transparency”

4. It is not open for the Board to make findings against Mr Eccles concerning his obligations as Secretary; his “attitude” to “transparency and accountability”; or the “likely” consequences of that “attitude”.
5. These matters were not addressed by Ms Ellyard in her closing submissions, but were addressed by Mr Ihle by way of general submissions concerning three departmental Secretaries, including Mr Eccles<sup>2</sup> (and repeated by Mr Neal QC in brief summation and proposed formal findings<sup>3</sup>).
6. Mr Eccles’ impugned conduct was to not pass on a single piece of information (set out in Mr Gaetjens' email) to the Premier. That sole event constitutes the universe of conduct by him that has been subject of criticism in this Inquiry.
7. Mr Eccles’ conduct does not establish anything generally about his conduct in meeting his obligations as Secretary, or his alleged “attitude” to transparency and accountability.<sup>4</sup>

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<sup>1</sup> T2150.1-34 (Andrews XN).

<sup>2</sup> T2261.18-2262.33.

<sup>3</sup> T2268.40-2269.6.

<sup>4</sup> T2268.44-2269.5.

Further, Mr Eccles' conduct did not "likely" manifest in any particular practices, or "likely" contribute to a loss of opportunities to identify issues which may have prompted better, fuller and more timely action.<sup>5</sup> There is no evidence to support these proposed findings. As Ms Ellyard submitted in closing submissions, "it is not possible to speculate on what the outcome would have been"<sup>6</sup> had Mr Eccles passed on that information to the Premier.

8. To make these proposed findings in the circumstances would be manifestly unjust to Mr Eccles. The proposed findings are generalised and imprecise, their application to Mr Eccles remains unexplained and unexplored, and they were never put to him in examination.

### **Decision on private security**

9. Mr Eccles and DPC were not involved in the decision to use private security in the Hotel Quarantine Program. DPC adopts the submissions and proposed findings of counsel assisting in this regard.<sup>7</sup> This submission does not otherwise elaborate on this issue.

### **MR GAETJENS' EMAIL**

#### **Relevant Facts**

10. It was agreed at National Cabinet on 27 March 2020 that the requirements in respect of the quarantine of returned travellers in designated facilities, including hotels:

will be implemented under State and Territory legislation and will be enforced by State and Territory governments, with the support of the Australian Border Force (ABF) and Australian Defence Force (ADF) where necessary and according to need across Australia.<sup>8</sup>

11. From 27 March onwards, Emergency Management Commissioner Andrew Crisp conducted himself on that basis. At the State Control Centre meeting on 27 March, Commissioner Crisp said:

Again, that was why we went through this particular process, to identify where there was a lack of capability or capacity to undertake any of the phases of this operation. I suggest at this stage we can manage this. The ADF will be doing just exactly what they're doing at the moment, helping us to plan for this particular operation. So at this stage we don't see a need for boots on the ground, so to speak.<sup>9</sup>

12. Similarly, at the State Control Centre meeting the following day, Commissioner Crisp said:

<sup>5</sup> T2269.3-6.

<sup>6</sup> T2219.6-7.

<sup>7</sup> T2208.16-2212.11 (Ms Ellyard); T2265.1-8 (Mr Neal QC).

<sup>8</sup> See extract of minutes of the National Cabinet meeting at DPC.0001.0001.6117, .6123 (part of exhibit HQI0178a\_RP), [6(d)] (emphasis added).

<sup>9</sup> HQI.0001.0004.0080 (exhibit HQI0148(2)b\_RP), T25.6-11.

I've said it before but I'll say it again, that at this particular point in time we certainly don't see the need for ADF boots on the ground in support of this operation.<sup>10</sup>

13. Accordingly, it was understood by those in control of Operation Soteria (as was the fact) that ADF assistance could be sought if the State identified a gap in its own capabilities. At the commencement of the Hotel Quarantine Program, the view was taken by those in operational control that there was no need for ADF "boots on the ground". Had there been such a gap identified, a request could have been made for the Commonwealth to consider.<sup>11</sup> As to the appropriateness of the decision made, Ms Ellyard observed, "we don't invite [the Board] to find and indeed we say it is not open [for the Board] to find that the ADF should have been engaged."<sup>12</sup>
14. Mr Eccles and DPC had no role in relation to these operational matters.
15. In about early April 2020, Mr Eccles contacted Mr Gaetjens and asked him whether the Commonwealth could provide any financial assistance to Victoria for security in the Hotel Quarantine Program.<sup>13</sup>
16. Mr Gaetjens' email responded:

On the question of assistance with security, I am advised the only deal with NSW was in-kind provision of ADF personnel.

I am sure the Commonwealth would be willing to assist Victoria in a similar way if you wanted to reconsider your operating model.<sup>14</sup>

17. Mr Eccles replied, "Thanks Phil".<sup>15</sup>
18. Mr Eccles does not recall what, if anything, he did with the information from Mr Gaetjens.<sup>16</sup> Whether Mr Eccles provided the information to some person (for instance, a person involved in operation of the Hotel Quarantine Program) is unknown.
19. The Premier gave evidence that:
  - a. he would have ordinarily expected that the availability of a resource of this kind from the ADF to have been drawn to his attention and to the attention of those making policy and operational decisions for the structure of the Hotel Quarantine Program;<sup>17</sup>

<sup>10</sup> HQI.0001.0004.0001 (exhibit HQI0143(3)b\_RP), T22.30-32. See also T1388.8-12 (Crisp XN).

<sup>11</sup> See T1386.10-1387.11 (Crisp XN).

<sup>12</sup> T2218.41-42.

<sup>13</sup> Further witness statement of Christopher Barcroft Eccles dated 16 September 2020 (exhibit HQI0179a\_RP), [19].

<sup>14</sup> DPC.0014.0001.0004 (part of exhibit HQI0180a\_RP).

<sup>15</sup> DPC.0014.0001.0004 (part of exhibit HQI0180a\_RP). See also Commonwealth of Australia, Voluntary submissions to the COVID-19 Hotel Quarantine Inquiry (exhibit HQI0142a\_RP), [28].

<sup>16</sup> T1773.19-24, T1774.4-19, T1774.46-1775.13 (Eccles XN).

<sup>17</sup> T2151.36-45 (Andrews XN)

- b. although he regarded the information contained in Mr Gaetjens' email as "very significant" and as presenting "options", it is difficult for him to speculate on what he might have done with this information had it been given to him;<sup>18</sup>
  - c. he could not presuppose the role that any ADF personnel would play;<sup>19</sup> and
  - d. he did not know whether any ADF resources provided would have been in addition to, or in substitution for, resources already in place.<sup>20</sup>
20. DPC accepts that the evidence establishes that Mr Eccles did not draw the contents of Mr Gaetjens' email to the attention of the Premier. However, it goes no further than that.
21. By the time of Mr Gaetjens' email, the Hotel Quarantine Program had been established and operating for 11 days. Indeed, the evidence demonstrates that the decisions made concerning the mix of security personnel to be used in the Hotel Quarantine Program (including the decision not to use the ADF) were based upon an assessment of the capabilities and resources within Victoria. It was not based on an understanding that ADF resources were not available if required. As explained above at [11]-[12], Commissioner Crisp directed himself to this issue from the commencement of the Hotel Quarantine Program and made the assessment that there was not a need for ADF "boots on the ground".
22. In that light, no inference may be drawn that anything would have been done with the information in Mr Gaetjens' email, had it been conveyed to the Premier (or, indeed, to anyone). As Ms Ellyard submitted in closing submissions: "it is not possible to speculate on what the outcome would have been."<sup>21</sup>

### **Proposed findings**

23. Mr Neal QC set out the proposed formal findings as follows:

Lastly, the matter on which we seek formal findings, we urge formal findings to be made by the Board are the questions touched upon by my learned friend Mr Ihle of responsibility, accountability and transparency. The findings we invite are as follows: there were significant issues which should have been brought to the respective Ministers' attention; the departmental Secretaries were obliged to ensure that they discharged those obligations; for responsible Government to work, it is imperative that Secretaries remain accountable to their Ministers. That accountability starts with discharging fundamental obligations to keep their Ministers informed.

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<sup>18</sup> T2152.3-9 (Andrews XN).

<sup>19</sup> T2152.25 (Andrews XN).

<sup>20</sup> T2152.27-29 (Andrews XN).

<sup>21</sup> T2219.6-7.

The evidence demonstrates attitudes to transparency and accountability that likely manifested in practices contributing to the problems within the Hotel Quarantine Program. They likely contributed to a loss in opportunities to identify issues which may have prompted better, fuller and more timely action.<sup>22</sup>

24. It is necessary to identify with precision what findings are there proposed with respect to Mr Eccles.

#### Provision of information to the Premier

25. Insofar as Mr Eccles is concerned, one can locate, with respect, only one formal finding that may be open on the evidence. That is the finding that “there were significant issues which should have been brought to the respective Ministers’ attention”.<sup>23</sup>
26. Ms Ellyard submitted as follows:

We do invite you to find that … offers of assistance made … to Victoria by the ADF should have been raised with the Premier, thinking particularly about the apparent availability of in-kind personnel in early April … It would have been appropriate for the Premier to have been made aware of that, although it is not possible to speculate on what the outcome would have been.

But otherwise we submit that the decision to not use the ADF and to, at the start, keep the Victoria Police in an as-needs responsive role only were both appropriate decisions that were open. But as the role of security expanded there should have been a revisiting of whether or not they remained the appropriate people to perform the role.<sup>24</sup>

27. DPC accepts that this finding is open.

#### Responsibility, accountability and transparency

28. The proposed findings in respect of “responsibility, accountability and transparency” are not open.
  29. Ms Ellyard, who had the conduct of the examination of Mr Eccles and the Premier, did not make submissions about these matters.
  30. Mr Ihle, in closing submissions, dealt as a whole with the conduct of three Secretaries: (i) Mr Eccles, (ii) Kym Peake, Secretary of the Department of Health and Human Services, and (iii) Simon Phemister, Secretary of the Department of Jobs, Precincts and Regions.<sup>25</sup>
- Mr Ihle submitted that:

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<sup>22</sup> T2268.40-2269.6.

<sup>23</sup> T2268.43-44.

<sup>24</sup> T2218.47-2219.13.

<sup>25</sup> T2261.18-2262.33.

- a. “a separate question arises as to whether these three Secretaries, each of whom had important roles and accountabilities for the Hotel Quarantine Program, properly discharged their obligations in respect of ministerial briefings”;<sup>26</sup>
  - b. “these issues raise serious questions as to whether their conduct had the effect of unsettling the ordinary processes of the traditional Westminster accountability model”;<sup>27</sup>
  - c. “these matters tend to demonstrate [an] attitude to transparency and accountability that likely manifested in practices that contributed to problems within the Hotel Quarantine Program”,<sup>28</sup> and likely “contributed to a loss in opportunities to identify issues which may have prompted better, fuller and more timely action”.<sup>29</sup>
31. It is immediately apparent that, so far as Mr Eccles is concerned, these submissions and proposed findings are significantly more serious than (and in some respects, inconsistent with) those urged by Ms Ellyard.<sup>30</sup>
32. These submissions and proposed findings go to Mr Eccles’ performance of his essential functions as Secretary, his professional integrity, and his relationship with the Premier.
33. The reasons why these proposed findings are not open with respect to Mr Eccles are as follows.
34. **First**, the proposed findings are “rolled-up” and make no distinction between Mr Eccles, Mr Phemister and Ms Peake. Submissions and proposed findings of this seriousness and gravity should have been made with respect to each individual, and should have identified with precision their particular conduct and the consequences of such conduct. They were not.
35. **Second**, the proposed findings are imprecise, vague and uncertain. In Mr Eccles’ case, none of the following critical matters are identified at all: (i) his “attitude to transparency and accountability”; (ii) his “practices”; (iii) how his “practices” might have contributed to the “problems” in the Hotel Quarantine Program; (iv) the “opportunities” likely lost; or (v) the “action” that may have been prompted. Mr Eccles is entitled to understand, with precision, the findings sought against him. That is a basic principle of fairness.
36. Counsel assisting have not identified how it follows that Mr Eccles’ impugned conduct — to not pass on a single piece of information to the Premier — supports general findings

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<sup>26</sup> T2261.39-42.

<sup>27</sup> T2261.42-44.

<sup>28</sup> T2262.29-31.

<sup>29</sup> T2262.31-32.

<sup>30</sup> See Ms Ellyard’s submissions extracted at [26] above.

about his obligations, transparency and accountability, his attitude to such matters, and the likely consequences of his conduct.

37. Further, the making of the proposed findings would plainly lead to further speculation and guesswork. That would be manifestly unfair to Mr Eccles.
38. **Third**, none of these matters were put to Mr Eccles in examination. It was never put to him that his conduct had the “effect of unsettling the ordinary processes of the traditional Westminster accountability model” (a submission said to support the findings sought). It was never put to him that he had some inappropriate “attitude” to transparency or accountability. It was never put to him that his practices contributed to the problems in the Hotel Quarantine Program. In the circumstances, these are extraordinary submissions and proposed findings. Mr Eccles was entitled to an opportunity to respond to them in his evidence. To make the proposed findings in those circumstances would deny Mr Eccles natural justice.
39. **Fourth**, there is no evidence to support the proposed findings, such as they are.
40. As noted, the totality of Mr Eccles’ impugned conduct was to not pass on a single piece of information (set out in Mr Gaetjens’ email) to the Premier. It is that specific conduct against which the proposed findings must be assessed.
41. The proposed findings include general statements about Secretaries’ obligations “to ensure that they discharged those obligations”. It is sought, by those statements, to cast a negative aspersion upon Mr Eccles’ conduct generally (i.e. the discharge by him of his obligations as Secretary). There is no evidence to support any such inference.
42. The evidence also does not support serious findings about Mr Eccles’ “attitude”, in general. Indeed, allegations about Mr Eccles’ “attitude” were not even put to the Premier. Such a conclusion cannot be drawn based solely upon Mr Eccles not providing the information in a single email to the Premier.
43. There is no evidence to support a finding that Mr Eccles’ “attitude” “likely manifested in practices contributing to the problems within the Hotel Quarantine Program”, or “likely contributed to a loss in opportunities to identify issues which may have prompted better, fuller and more timely action”. Counsel assisting did not identify any such evidence. A finding of such seriousness cannot be reached upon speculation or guesswork. Indeed, such a finding would also be inconsistent with:
  - a. the evidence, including that of Commissioner Crisp (referred to at [11]-[12] above) and that of the Premier (referred to at [19] above);

b. Ms Ellyard's submissions that (i) "it is not possible to speculate on what the outcome would have been" and, (ii) the decision not to use ADF resources at the commencement of the Hotel Quarantine Program was an appropriate one. Ms Ellyard had the conduct of Mr Eccles' evidence in the running of the Inquiry.

44. As Mr Ihle noted in closing submissions:

Facts are to be found on the balance of probability with regard to the well-known principles in *Briginshaw*.<sup>31</sup>

45. It is trite to observe that where serious, adverse findings are sought, an increased standard of satisfaction of proof on the evidence must be reached. Serious allegations, with grave consequences, cannot be proved by "inexact proofs, indefinite testimony, or indirect inferences".<sup>32</sup>

46. But, in the present case, counsel assisting propose that the Board make such findings with respect to Mr Eccles, without evidence in support.

47. **Finally**, given the matters above, Mr Eccles' considerable record of outstanding public service also weighs heavily against such general findings.<sup>33</sup> This includes Mr Eccles being made an Officer of the Order of Australia for distinguished service to, among other things, public administration.<sup>34</sup>

48. In the circumstances, to make the proposed findings against Mr Eccles in respect of "responsibility, accountability and transparency" would be a manifest and substantial injustice.

**Dated 5 October 2020**

**R H M ATTIWILL**

**C MINTZ**

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<sup>31</sup> T2235.29-30.

<sup>32</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

<sup>33</sup> See witness statement of Christopher Barcroft Eccles dated 8 September 2020 (exhibit HQI0177b\_RP) (**First Eccles Statement**), [1]-[6].

<sup>34</sup> First Eccles Statement, [6].