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## SPECIAL INQUIRY

THE HONOURABLE THOMAS BATHURST AC QC

5 TUESDAY 6 SEPTEMBER 2022

**INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG**

Ms S Love for the Commissioner of Police  
 10 Mr D Jordan SC with Ms V Garrity for the Director of Public Prosecutions  
 Dr G Woods SC with Dr R Cavanagh for the Applicant  
 Dr T Waterhouse for the Australian Academy of Science  
 Ms P Moncrieff for Dr A Cala  
 Ms S Callan SC with Ms J L Roy - Counsel Assisting the Inquiry

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AUDIO VISUAL LINK COMMENCED AT 9.03AM

20 CALLAN: Your Honour, there are a number of things to be dealt with at this  
 directions hearing. The first, can I suggest, is your Honour's determination in  
 relation to a number of matters that have been the subject of submissions of  
 late. First, in respect to the focus of the inquiry, including in relation to the  
 specific matters raised by Ms Folbigg as to the conduct of the Crown  
 25 Prosecutor and the officer-in-charge, Detective Ryan at trial. The second is in  
 respect of objections to documents that were tendered at the first directions  
 hearing conducted on 24 June of this year, and the third is, as it were, a formal  
 determination in respect of the application by the Australian Academy of  
 Science for leave to appear.

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JUDICIAL OFFICER: Thank you. In relation to the focus of the inquiry. We've  
 received submissions from Ms Folbigg, the Director of Public Prosecutions and  
 New South Wales Police. Do any of those parties wish to add anything to their  
 submissions? Then I'll give a decision straightaway.

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Submissions on the focus of the inquiry have been received from  
 representatives of Ms Folbigg, the DPP and the New South Wales  
 Police. Counsel assisting also made oral submissions as the first directions  
 hearing as the focus.

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As it is apparent from the direction that was given to me, the order for an  
 inquiry under s 77(1)(a) of the *Crimes (Appeal and Review) Act 2001 (NSW)*  
 was based on a question arising out of evidence that a generic variant  
 (CALM2-G114R) identified in DNA samples from Sarah Folbigg and Laura  
 45 Folbigg has biophysical and functional consequences that may cause cardiac  
 arrhythmias and sudden unexpected death in young children. I will call this, for  
 convenience, the new CALM2 evidence. In these circumstances, there will be  
 a focus on that evidence.

50 However, it would be incorrect for the inquiry to solely focus on that

evidence. What is involved is an inquiry into the convictions. The point was succinctly stated by Blanch J in the Report of the previous inquiry at p 30 to 31, citing from Wood J's *Report of the Inquiry into the Conviction of Timothy Edward Anderson & Ors*. In a passage approved by the Court of Appeal in *Folbigg v Attorney General of New South Wales*, his Honour made the following remarks:

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"It is the convictions which are the subject of an inquiry. Therefore, an inquiry must commence with the fact that a conviction has been recorded and that questions or doubts have been raised sufficient to justify the Governor directing a judicial officer to conduct an inquiry, and to summon and examine on oath all persons likely to give material information. As such, I do not consider my role to be akin to that of a judge and jury in a retrial.

An inquiry is not confined to an investigation of the questions or doubts raised in a petition, or to an investigation of new evidence. It may re-examine evidence in the trial including any matters previously dealt with on appeal. Further, an inquiry may consider any information that may throw light on the convicted person's guilt, whether that information is favourable or unfavourable to the convicted person. It is not fettered by tactical or forensic decisions at trial, or by the way the Crown or defence cases were conducted.

My overall task is therefore to consider the evidence at the trial and the conduct of the trial, in light of the further evidence and submissions received in the Inquiry, in order to determine whether, overall, there is a reasonable doubt as to Ms Folbigg's guilt or as to any matter that may have affected the nature or severity of her sentence."

It is for this reason that the inquiry will include the psychological evidence. It also means that I am entitled and indeed required to examine whether the whole of the evidence shows that there is a real possibility that one or more of the deaths had resulted from natural causes. Whilst undoubtedly the material provided has to be relevant to the question and some relevant evidence will be more cogent than other evidence, the inquiry is not limited by the matters particularised in the Direction or raised in the Petition. That is the basis on which I propose to proceed.

The DPP has suggested that the focus of the inquiry should be limited to the second recital in the Direction given to me, emphasising the statement in that recital of the consequences of the new CALM2 evidence giving rise to the doubt, being the subject of research following completion in July 2019 of the previous inquiry. However, the Direction itself under s 77(1)(a) does not contain such a limitation. Further, the reliance on the passage of Wood J's report in *Anderson* (cited by the report of the previous inquiry to which I have referred above) that in some cases it may be appropriate to concentrate on a single aspect of the evidence, whilst, with respect undoubtedly correct, cannot be read as saying that it is mandatory to concentrate only on the matters

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referred to in the Direction, nor does the Director put her submission so highly. However, the question does arise acutely in the present case as I am of the view that it is appropriate to consider psychiatric and psychological evidence which may affect the view taken of what appears in Ms Folbigg's diaries.

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It will of course be open to any party to argue that the evidence is irrelevant, or that it is otherwise precluded as falling outside an expert's area of expertise: see the passage cited with approval by the Court of Appeal in *Folbigg CA* to which I have referred, which says the inquiry may consider any information that may throw doubt on the convicted person's guilt. I do not think that extends to admitting evidence which would not be properly the subject of an expert's expertise. The Director seems to accept this, as she accepts at [25] of her submissions that it is open to the Judicial Officers to expand the inquiry to consider issues beyond the matters specified by the Governor.

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Whilst I agree that the matters raised concerning the conduct of the Crown Prosecutor may ultimately prove to be entirely irrelevant to my conclusion, and, for that matter, a distraction, I am of the view the consideration could provide information that may throw light on the convicted person's guilt. For these reasons, I propose to permit submissions to be made on this issue. However, I would emphasise that as presently advised such submissions would have to provide cogent reasons as to why they are ultimately relevant to my determination of the inquiry. If those cogent reasons are not provided, no account will be taken of the evidence.

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So far as the conduct of Detective Ryan is concerned, the complaint seems primarily to be that he targeted Ms Folbigg on an assumption based on what was colloquially known as Meadow's Law. That is the belief that one unexplained death of an infant may be called SIDS, a second should be considered undetermined and a third should be considered murder until it is proven not to be. This thinking has of course now been discredited.

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Further, it seems to be suggested in some way, the conviction was tainted by the Detective's selection of witnesses who he believed were influenced or supported by Meadow's Law. The evidence of these witnesses will be examined during the course of the inquiry and if it appears their evidence was based on a misconception of this nature, that will be a relevant factor to take into account. The Detective's conduct in respect of Mr Folbigg, which is complained of, was also the subject of cross-examination of Mr Folbigg at trial and will be examined in the course of the inquiry. Finally, the method of witness selection by Detective Ryan or anyone else seems to be irrelevant in circumstances where the integrity of the witnesses is not being impugned. In these circumstances, I am not prepared to let evidence of the circumstances leading to the charging of Ms Folbigg or the selection of witnesses at the trial to be admitted in the inquiry.

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I think that covers all matters on this issue.

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CALLAN: Yes, your Honour. Unless any party wishes to say anything further, at the directions hearing conducted on 24 June, I outlined (and it's available on

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5 the transcript) what, in my submission, ought be the focus of the inquiry and that is, in my submission, in respect of research and/or medical advances in medical science relevant to the cause of death of each child and the cause of the apparent or life-threatening event in respect of Patrick, and expert medical opinion as to the cause of death of each child and the cause of the apparent or acute life-threatening event in respect of Patrick in light of any relevant new research or advances in medical science. Having regard to your Honour's determination in respect of the specific issues, in my submission, that focus remains appropriate.

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JUDICIAL OFFICER: Does anyone want to say anything in opposition to that?

WOODS: Nothing from our end of the table, your Honour, thank you.

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JORDAN: No, your Honour.

WATERHOUSE: No, your Honour.

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MONCRIEFF: No, your Honour.

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CALLAN: Your Honour, as was ordered by your Honour at the first directions hearing on 24 June, the parties were given an opportunity to indicate any objection to the evidence which was tendered on 24 June. In that respect, there were objections indicated on behalf of Ms Folbigg. It might be convenient to deal with those now.

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JUDICIAL OFFICER: Yes. I've looked at those objections and I can deal with them, as it were, in bulk.

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The majority of Ms Folbigg's objections are made on the basis the evidence is relevant, but is outdated in light of the article by Brohus et al, "Infanticide vs inherited cardiac arrhythmias" *Europace* (2021) 23, 441-450, the existence of updated reports or the erroneous influence of the now discredited Meadow's Law. As for being "outdated" or influenced by Meadow's Law, this seems to me to be rather a matter of submission as to the weight to be given to the evidence and I will set those objections to one side accordingly. Where updated reports have been produced, these reports will be tendered and the earlier reports weighed accordingly.

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Next, Ms Folbigg objects to some chapters of Exhibit 2D, which is a book by J R Duncan and R W Byard entitled *SIDS – Sudden Infant and Early Childhood Death: The Past, the Present and the Future* (University of Adelaide Press, 2018). Objection is taken to individual chapters of that book on the basis of relevance. I will admit the whole of the book, but will only have regard to any part of it referred to by the parties in their submissions.

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Objection is then taken to various aspects of Exhibit 2-H, the Forensic Pathology tender bundle. Most of the objections are for reasons that I have already addressed and the same outcome follows. The balance of the objections concern relevance and other matters about which submission can

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be made as to the weight they should be afforded in due course. I will admit the bundle.

5 Next, Reports of Professors Horne, Elder and Blackwell are objected to, but remain relevant even if it be the case that Caleb is the only remaining SIDS diagnosis, having regard to the classification in the literature. Whilst they may have limited weight in the inquiry, they have some relevance and they will be admitted.

10 Objection is then taken to the reports of Dr Bruce Westmore and Dr Michael Giuffrida. The fact that these reports were prepared for the purpose of sentencing and thus accept the jury verdicts does not render them irrelevant; although again, the weight which may be placed on them may be limited.

15 Finally, Ms Folbigg makes objection to the passages of the transcript of the 2019 Inquiry before Blanch J in which the evidence the subject of the previously articulated objections was given. For the same reasons I have already given in relation to the documentary evidence, these transcript passages will be admitted and submissions as to their weight can be made in  
20 due course.

I think that makes it fairly clear what material is admitted and not admitted.

25 CALLAN: Yes. Your Honour, in relation to the documentary tender on 24 June, your Honour may recall the final tender, Exhibit 4, was the transcript of the substantive hearings in the inquiry conducted by his Honour Blanch J in 2019. Can I supplement Exhibit 4 with a USB that contains recordings of that substantive hearing?

30 EXHIBIT #4 SUPPLEMENTED BY THE ADDITION OF USB CONTAINING AUDIO RECORDINGS OF THE 2019 INQUIRY, ADMITTED WITHOUT OBJECTION

35 Your Honour, there is also a matter of the determination in respect of applications for leave to appear by the Australian Academy of Science.

JUDICIAL OFFICER: I don't think I need to give any reasons in relation to that, just make the orders. It became consensual as a result of the discussions on the last occasion.

40 The Australian Academy of Science is granted leave to appear and be represented by counsel at the inquiry, with such grant of leave limited to the making of submissions addressing:

45 a) suitable experts in the areas of specialised scientific knowledge for the purpose of obtaining relevant evidence;

b) suitable questions/clarifications for experts who are engaged by the inquiry;

50 c) scientifically technical aspects of the inquiry, in particular how that science

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should be approached consistent with appropriate scientific standards and scientific rigour.

5 The grant of leave does not extend to the examination or cross-examination of witnesses, but it does not preclude the Academy from making an application to examine or cross-examine any particular witness.

10 I think I should formally give Dr Cala leave to appear and be legally represented under s 81(4) of the *Crimes (Appeal and Review) Act 2001* (NSW).

15 CALLAN: Your Honour, by way of updates since the last directions hearing, there's been significant progress made in respect of the pursuit of further expert evidence to build on the expert evidence which was before the 2019 inquiry. In that respect and consistent with a desire that has been expressed by those assisting you to the other parties, there has been and will continue to be a level of discussion and engagement with the other parties to ensure that the experts are appropriate in terms of who is briefed, but also that the right questions are asked. Amongst other things, we hope that means that the hearing time can be used in a most effective and efficient manner. To that end, a table setting out the proposed experts to be engaged, the questions or topics to be raised with those experts and the proposed material to be briefed to those experts was provided to the parties last week on 2 September and we welcome response to that material as early as convenient from the parties. What has become apparent through this process, your Honour, is that the timetable, which was fixed on 24 June, is not sustainable, having regard to the time required for certain of the experts to consider and provide reports.

30 Accordingly, those assisting your Honour propose variations to the short minutes of order in a form which was circulated to the parties last week. In effect, what is proposed is that the hearing be conducted in two tranches: That the first hearing be conducted in a block commencing on 14 November and that that would focus on, or address the cardiac and genetic evidence so pertinent to this inquiry; and, that there be a second hearing block which would address psychological, psychiatric and other evidence relevant to Ms Folbigg's diaries to commence in February 2023. Can I confirm your Honour has a copy of the short minutes of order that are proposed? There are eleven orders.

40 JUDICIAL OFFICER: I don't think I do.

CALLAN: If I could hand that up.

JUDICIAL OFFICER: Yes.

45 CALLAN: I'll just confirm the parties have all seen a copy of those. And I'll let the parties indicate, your Honour, their position.

JUDICIAL OFFICER: Yes, Dr Woods SC?

50 WOODS: Your Honour, we have the document which sets out the proposed

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witnesses, admirably and thoughtfully. We've been communicating with Counsel Assisting for the purpose of forwarding the inquiry. There maybe one or two additional suggestions we might make as to whether Counsel Assisting considers that it's appropriate that one or two other experts might be at least consulted, if not called. But we'll do that by Friday so we're clear about that.

JUDICIAL OFFICER: I think that's covered by para 4 of the short minutes of order. But it'll be helpful if you did it early.

WOODS: Yes. We'll do it as soon as we can, your Honour, yes. And we note that the experts who are engaged are relevant and significant people, and we'll keep on maintaining contact with Counsel Assisting.

JUDICIAL OFFICER: That'll be helpful. Does anyone else want to say anything? Mr Jordan SC.

JORDAN: Your Honour, we on behalf of the Director, we don't have any difficulties with the proposed short minutes of order. We have liaised with Counsel Assisting and her team. In relation to what we do consider is something of importance, which is to ensure that your Honour is provided with an appropriate balance of expert witnesses. Obviously there are a number of highly credible experts who are already effectively embedded and attached to the article, which is the essential, sort of crystallise for this further inquiry. And they are all people of high credentials, but we do think it is important that your Honour receives effectively more neutral expertise as well in relation to where those experts have already landed as to their conclusions. And that is essentially what we consider to be one of the Director's principal roles in this inquiry.

We will be engaging again in relation to the psychiatric, psychological diary evidence, and we've already raised with Ms Callan SC a somewhat obvious suggestion, I confess, which is that it would obviously be very relevant and helpful, we submit to your Honour, for once the relevant psychiatric, psychological experts are identified, and we would submit an appropriately balanced range of such witnesses, that there should be an opportunity, subject of course to Ms Folbigg's consent for each of those relevant experts to consult with Ms Folbigg. Their evidence will have much greater weight if they are informed by their own consultations with Ms Folbigg personally. And that is something that we've already raised with Ms Callan SC as something we submit should be of very careful consideration.

JUDICIAL OFFICER: I don't think I'm in a position to force--

JORDAN: No.

JUDICIAL OFFICER: --that on Ms Folbigg.

WOODS: No.

JUDICIAL OFFICER: I wouldn't do so even if I had the power, quite frankly.

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JORDAN: I'm not suggesting that, and I'm really just putting it out there on the record at this stage.

5 JUDICIAL OFFICER: But obviously any such evidence is going to have greater weight if there's direct consultation. But it's entirely a matter for Ms Folbigg, and I wouldn't expect any decision to be made until the relevant witnesses are identified.

10 JORDAN: Your Honour, that's precisely our position. I just wanted to flag it relatively early, particularly to give Dr Woods SC and those in his team an opportunity to think about that. There is plenty of time. Thank you.

15 WOODS: Yes, your Honour, on that point, there is indeed plenty of time, but our initial position would be that if there are one or two people whom the DPP wishes to have speak to Ms Folbigg as a matter of weight, clearly we think it's important that she might cooperate, and I don't at this stage commit that, but I don't see any reason why it shouldn't occur.

20 JUDICIAL OFFICER: It's entirely a matter for you and your client, Dr Woods SC.

WOODS: Yes.

25 JUDICIAL OFFICER: I'm not going to take it any further today.

WOODS: I should say on that point, your Honour, our position with respect to Ms Folbigg giving any further evidence in the proceedings is that she's already given evidence a number of times, and our position is that unless there's extraordinary reason otherwise, we would rely on the material that's already before the inquiry.

30 JUDICIAL OFFICER: Well, no adverse inference is to be drawn from a failure to give evidence.

35 WOODS: No, of course.

JUDICIAL OFFICER: Anyone else?

40 WATERHOUSE: Yes, your Honour. In relation to the expert engagement letter which the Academy has received last Friday, more time will be needed than the deadline of this Friday that was given originally. So we would like to have an extension until 16 September to be able to consult and respond regarding the topics, and the experts that are proposed, to make sure that they cover the field of expertise required for scientific rigour.

45 JUDICIAL OFFICER: Do you want to say anything about that, Ms Callan SC?

CALLAN: Not specifically. If that's the time that the Academy needs, that is respected and understood. It may however be through communication between now and then, we can seek to narrow down and at least get working

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on briefing of certain of the experts with certain material and questions so that we don't lose time.

5 WATERHOUSE: The other aspect in relation to the questions is that the Academy would like the opportunity to be able to review the questions and assist with putting those together. The table did include some questions, but they were fairly generic high level and some of them would require a bit more sort of scientific finessing to be able to ensure that we do maintain that scientific integrity. So if we would be able to liaise with Counsel Assisting to perhaps circulate the questions with all the parties, or at least with Counsel Assisting to ensure the wording is accurate, and also in relation to the letter of instruction that the background information is scientifically correct.

15 JUDICIAL OFFICER: Well, I'm sure that what you're saying is consistent with the terms of your given leave. Ultimately the questions to be asked will be a matter for Counsel Assisting, who no doubt will take into account your suggestions, because that's what you're here for. But I think it's important to bear in mind that - well, it's a matter for her. Any serious dispute about it can be brought before me for determination. I think that's about as far as I can go at the moment.

20 WATERHOUSE: Certainly, your Honour. I didn't mean to imply that there'll be right of veto. It was more just to contribute in terms of any scientific--

25 JUDICIAL OFFICER: That's fine, yes. Anyone else?

30 WOODS: Your Honour, might I mention one matter. My learned friend who appears for the Director, referred to the possibility that there might be further witnesses to be called on the genetics issues, as it were, to balance. It's true that those representing Ms Folbigg have over the last several years been in contact with a couple of witnesses, but we note that Professor Ackerman is on the list, and Professor Wilde is on the list. These are people with whom our interests, if I can call it that, has had no communication at all.

35 JUDICIAL OFFICER: I appreciate that. But consistent with - and it may well be that no other person will be called. But consistent with the orders, the Director along with anyone else has got the right to access other people.

40 WOODS: Certainly. I don't dispute that for a moment.

45 CALLAN: Your Honour, there's just one final matter, and it does engage with this question of expert engagement. To be clear for the record, in the 2019 Inquiry there was some reference made in the oral evidence, for instance, of Professor Vinuesa, to the desirability at that point in time of Ms Folbigg undertaking further cardiac testing. We have taken that up with both those representing Ms Folbigg, but also in preliminary conferences with Professor Skinner, Kirk, Vinuesa and also Professor Schwartz, and it seems in particular that there is no current indication by those individuals that there would be utility in such cardiac testing. We are guided primarily by those experts in relation to the topic. The reason I raise it is because we are certainly concerned to

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5 ensure that there be no gap in the evidence that undermines the effectiveness of the hearing that's conducted in November. So that's the position as we are currently advised in relation to such cardiac testing. But if any party, or for that matter, any expert that we engage with indicates that there is a relevant need for testing to occur, we will take that up in correspondence.

JUDICIAL OFFICER: Thank you. Anyone else?

10 WATERHOUSE: Your Honour, there's just one other aspect in relation to the hearing beginning on 14 November, which has been moved by two weeks. Mr Graham SC and I have taken this matter pro bono to try and make sure that the Academy has the best representation and can promote and assist the commission with scientific rigour. But ultimately we are already committed for those last two weeks in November at this stage, and we were - I  
15 was asked to confirm whether or not those dates could be perhaps vacated and the hearing commence in fact in February so that the whole hearing is done at the same time. I don't know how other parties are placed in that regard. But that is my submission.

20 WOODS: Your Honour, can I say that from our perspective, we would prefer the genetics matter to be dealt with initially. It's the central focus, but of course I understand the position my friend takes. That's my first thought.

25 MONCRIEFF: Your Honour, in relation to Dr Cala, I was not aware of these dates, and so I haven't checked Counsel's availability, but that's all I can say for the moment.

JUDICIAL OFFICER: Thank you. Mr Jordan SC?

30 JORDAN: Your Honour, we can accommodate the November dates as they currently stand, and although we're a little unclear as to how long it might run for, but I've got some more information from Ms Callan SC on that. I don't know to what extent your Honour has any view as to how long that first block would run.

35 JUDICIAL OFFICER: We had hoped to conclude it in a week. But my estimate is that, for what it's worth, and I've never been good at guessing these dates, so it could run over a week. That's how I've discussed it with Counsel Assisting.

40 JORDAN: Yes. Certainly from the Director's perspective, we can accommodate that, and we are of course sensitive to the overall urgency of these matters.

45 JUDICIAL OFFICER: Yes. Well, I want to say something about that. I'm not prepared to vacate these dates. I understand your position and sympathise with it, and I don't know whether there's a possibility of getting any funding, because for what it's worth, I'll certainly indicate on the transcript that I regard the Academy's assistance of value, but it seems to me the most practical way  
50 of dealing with this is by the two hearings, which is agreed by what I might

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describe as the two principal protagonists. And I should add this, but the November dates aren't something new. The November dates have been there since the outset. It was only because the difficulty with the other evidence that we've truncated it. So I'm not prepared to do it, I'm sorry.

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MONCRIEFF: May it please the Court.

JUDICIAL OFFICER: Can I just say this. It goes on from what I've just said a moment ago. It's plainly in everybody's interest and consistent with providing an appropriate hearing that this matter be determined as quickly as possible. Obviously it is in Ms Folbigg's interests, whatever be the outcome, that the result be given. This timetable I think is manageable, but I would really urge the parties to ensure, to the extent possible, there's no further blowout, because I do think it is very important the matter be determined as quickly as soon as possible.

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Anything else?

CALLAN: No, your Honour, not from my part.

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AUDIO VISUAL LINK CONCLUDED AT 9.34AM

ADJOURNED TO MONDAY 14 NOVEMBER 2022