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SPECIAL INQUIRY

THE HONOURABLE THOMAS BATHURST AC QC

5 FRIDAY 24 JUNE 2022

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

10 Ms D Tadros for New South Wales Health
 Mr S Robinson for the Commissioner of Police
 Ms R Swift for the Director of Public Prosecutions
 Dr R Cavanagh for the Applicant
 Mr D Eid for Craig Folbigg
 15 Ms S Callan SC with Ms J Roy and Ms N Wootton - Counsel assisting the
 Inquiry

20 AUDIO VISUAL LINK COMMENCED AT 10.03AM

JUDICIAL OFFICER: This is a directions hearing into the commencement of the second inquiry into the convictions of Kathleen Megan Folbigg. On 21 May 2013, Kathleen Folbigg was found guilty of three counts of murder in respect of her children Patrick, Sarah and Laura; one count of manslaughter in respect to her son Caleb; and one count of maliciously inflicting grievous bodily harm in respect of her son, Patrick.

30 She was sentenced to 40 years' imprisonment with a non-parole period of 30 years, which was later reduced on appeal to 30 years' imprisonment with a non-parole period of 25 years, with that sentence to commence from 22 April 2003.

35 Ms Folbigg has over the years presented two petitions to the Governor of New South Wales seeking to be pardoned.

40 The petition presented on behalf of Ms Folbigg on 10 June 2015 gave rise to an inquiry into her convictions pursuant to s 77 of the *Crimes (Appeal and Review) Act 2001* (NSW), conducted by the Honourable Reginald Blanch AO QC. The hearing commenced with his appointment on 22 August 2018, included public hearings, and extensive consideration of medical and scientific evidence and information. That inquiry concluded with a report issued in July 2019.

45 On 2 March 2021 a further petition was presented on behalf of Ms Folbigg requesting that the Governor exercise her pardon power, referring, amongst other things, to evidence of research published in relation to a genetic variant (CALM2-G114R) identified in samples from two of the deceased children, Sarah and Laura Folbigg, which genetic variant has biophysical and functional consequences that may cause cardiac arrhythmias and sudden, unexpected
 50 death in small children.

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On 18 May 2022, I was appointed pursuant to s 77(1)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW) to conduct an inquiry into the convictions of Ms Folbigg, having particular regard to the consequences of the evidence regarding the CALM2 genetic variant.

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It is incumbent upon me, by virtue of s 80 of the *Crimes (Appeal and Review) Act 2001* (NSW), to conduct the inquiry as soon as possible, and on completion I will cause a report of the results of the inquiry to be sent to the Governor pursuant to s 82 of the Act.

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I emphasise at this point that this inquiry is not an appeal against conviction, nor is it a merits or other review of the Blanch inquiry. It is incumbent on me to make up my own mind and report on the results of the inquiry as required by s 82.

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The purpose of this directions hearing is to hear any applications for leave to appear and hear submissions from Senior Counsel assisting and interested parties as to the focus of my inquiry.

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Subject to the progress of the inquiry, I anticipate conducting any necessary oral hearings in November 2022.

Are there any applications to appear?

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CALLAN: Yes.

JUDICIAL OFFICER: Ms Callan?

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CALLAN: Your Honour, my name is Callan. I seek leave to appear with Ms Roy and Ms Wootton to assist you and to examine witnesses.

JUDICIAL OFFICER: You have that leave. Are there any other applications for leave to appear?

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CAVANAGH: Your Honour, my name is Cavanagh. I seek leave to appear on behalf of Kathleen Folbigg.

JUDICIAL OFFICER: Yes, Dr Cavanagh, you have that leave. Any other applications?

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ROBINSON: Your Honour, my name is Robinson. I seek your leave to appear for the Commissioner of Police.

JUDICIAL OFFICER: Yes, Mr Robinson, you have that leave.

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SWIFT: Your Honour, my name is Swift. I seek leave to appear on behalf of the Director of Public Prosecutions.

JUDICIAL OFFICER: Yes, Ms Swift, you have that leave.

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EID: May it please your Honour, I seek leave. My name is Eid, for Mr Craig Folbigg.

JUDICIAL OFFICER: Yes - Mr Eid - you have that leave.

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TADROS: Your Honour, my name is Tadros. I seek leave to appear for the Ministry of Health.

JUDICIAL OFFICER: Yes, Ms Tadros, you have that leave.

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CALLAN: Your Honour, could I also note for the record that the Australian Academy of Science has expressed an interest in assisting the inquiry and is currently giving further consideration as to whether to seek leave to appear.

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Your Honour has already described the context in which this inquiry is to be conducted, in terms of the chronology of previous Court processes and the 2019 inquiry, which I will refer to as the Blanch inquiry.

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The function of this inquiry is different from that of a judge and jury in a criminal trial. Your Honour's function as Inquirer is to consider the evidence at trial and the conduct of the trial in light of 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. With that in mind, may I address the proposed focus of the present inquiry.

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Your Honour, 22 experts gave evidence at the trial. They included treating doctors, pathologists and experts providing opinions as to the cause of death and other medical matters.

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For the purposes of the Blanch inquiry, a further 19 experts provided reports and/or gave evidence relevant to the cause of death and other medical matters pertinent to consideration, for instance, of Ms Folbigg's diaries.

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A number of the reports tendered in the Blanch inquiry form part of the evidence or information relied upon in support of the petition presented on behalf of Ms Folbigg in 2021.

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However, a number of additional reports, and other information, are also relied upon. There are, on our review, 19 items of evidence relied upon in support of Ms Folbigg's 2021 petition which did not form part of the evidence in the Blanch inquiry, and in saying that, I distinguish evidence from the letters and other expressions of support which also accompanied the petition.

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In particular, those items of evidence include, first, a study published on 17 November 2020 conducted by Professor Toft Overgaard, Professor Schwartz, Professor Vinuesa and colleagues, in relation to a novel mutation in the CALM2 gene of Sarah and Laura Folbigg, along with an article published by Professor Schwartz and colleagues in March 2021 in relation to inherited cardiac arrhythmias, and a number of letters and reports provided by Professor Schwartz.

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Also, there are reports relied upon in support of the petition by Associate Professor Janine Stevenson, Associate Professor David Butt, Dr Sharmila Betts, Dr Kamal Touma and Professor James Pennebaker in relation to the content of Ms Folbigg's diaries.

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That evidence is relevant to what Ms Folbigg's representatives observe, in submissions in support of the petition, are two chief pillars pertinent to her convictions – namely medical and scientific evidence relevant to the cause of death and Ms Folbigg's diaries and evidence bearing upon the interpretation and weight to be given to the content of those diaries.

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Your Honour, as counsel assisting, we submit this inquiry should focus primarily, but not exclusively, upon examining the medical and scientific evidence in light of the most recent information, particularly as to the CALM2 genetic variant.

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For that reason, in our submission, the focus of the inquiry should be upon, first, research or advances in medical science relevant to the causes of death of each child and the cause of the apparent or acute life threatening event in respect of Patrick; and, second, expert medical opinion as to the causes 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.

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With that focus, such scientific and medical evidence must ultimately, of course, be assessed in the context of the balance of the evidence and information which relevantly bears upon your Honour's obligation in s 77(1)(a), and is reflected in the direction from the Governor, to inquire into Ms Folbigg's convictions.

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If any of the other parties present wish to contend for a different focus for this inquiry, this is an opportunity to make submissions, but I do recognise that they may wish to consider their position, having heard what I have just had to say.

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It might also be of assistance, before calling on the parties, if I address several other matters.

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The first is that, at present, we submit the hearing which your Honour has foreshadowed to be conducted in November of this year ought primarily focus on medical and scientific evidence.

45

It is presently suggested that at least the following witnesses should be called to give oral evidence: Professor Peter Schwartz; Professor Carola Vinuesa; and, after consultation with the geneticists based in Sydney, I anticipate a member may be called from amongst their numbers. I also anticipate Dr Kamal Touma will be called.

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Over the coming months I anticipate that your Honour, and the counsel and solicitor assisting team will continue to review the evidence, and to the extent considered appropriate and necessary, seek further expert reports or other

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information which your Honour assesses as appropriate and necessary in the discharge of your task.

5 We will endeavour to provide timely updates and material to the parties, including circulating a proposed witness list and any statements, reports or other evidentiary material obtained.

10 If any other party wishes to have evidence tendered and/or have a witness called to give oral evidence, this can be dealt with, in my submission, in an orderly fashion by application to your Honour. I address this in some procedural directions that I suggest your Honour make today, and I will return to those suggested orders shortly.

15 But can I, for a moment, come back to the Blanch inquiry. We acknowledge that this inquiry is to be conducted by your Honour in an unusual position of occurring shortly after a previous inquiry into the same conviction, prompted in particular by asserted new developments in genetic science.

20 We submit it is appropriate for this inquiry to have the benefit of all of the evidence gathered in the Blanch inquiry, and this inquiry may be conducted more expeditiously, insofar as it is aided by certain of the summaries of evidence contained in the Blanch report.

25 However, to be clear, your Honour's task as directed by Her Excellency, the Honourable Margaret Beazley AC QC, Governor of New South Wales, is to form your own view as to whether there is a doubt in respect of Ms Folbigg's convictions. Accordingly, we submit that your Honour must put the findings and conclusions of the Blanch inquiry to one side. This inquiry is not a review of the Blanch inquiry on the merits or otherwise. Your Honour would similarly
30 put aside the findings and conclusions made in respect of Ms Folbigg's convictions in proceedings previously dealt with in the Court of Criminal Appeal, the High Court, and more recently, the Court of Appeal.

35 As your Honour stated at the outset, it is necessary for you to come to your own views on the whole of the evidence. My role, together with Ms Roy and Ms Wootton, as counsel assisting is to seek to assist you in that task by examining witnesses and making submissions.

40 Now, having said all that, perhaps it would be convenient to hear if any parties are now in a position to make any submissions as to the proposed focus and approach of this inquiry in response to the submissions that I have just made.

45 JUDICIAL OFFICER: Are there any parties to whom I've given leave to appear wish to make submissions? Dr Cavanagh?

CAVANAGH: As there's obviously some matters that can be easily agreed with with your counsel assisting, that being in particular the findings of the last inquiry as not being relevant to this inquiry. That, we understand.

50 JUDICIAL OFFICER: I think I made that clear and I think Ms Callan also made

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that clear, Dr Cavanagh, yes.

5 CAVANAGH: Yes. The extent of the focus of the inquiry, we would like some more time to submit on that, but fundamentally we're in agreement that the focus should be on the medicine, on the science and any advances that have been made. At the moment we're not in a position to have a full team briefed because we haven't been told about funding of that, so that may become an urgent matter. There are others who I would be assisted by, their assistance for Ms Folbigg would be much appreciated.

10 JUDICIAL OFFICER: What steps are you taking to obtain Legal Aid?

15 CAVANAGH: On 23 May, the first attempt was made and no response was given. A series of attempts were made after that as early, again, as most recent as today, and we're told that there may be no funding available for some weeks, if they approve at all. So, that's a difficulty. I'm not sure why that is but I raise it because we do have senior counsel that I'd like assistance for Ms Folbigg from, we also have another junior counsel I'd like assistance from and we have a series of additional expert reports we'd at least like to obtain to assist your Honour.

20 JUDICIAL OFFICER: I can put this on record. Two things. It's plainly desirable that Ms Folbigg has appropriate legal representation and assistance in this inquiry. The second is that I have formed the view that it's in everybody's interests that, subject to giving the matter proper attention of course, the inquiry be dealt with as expeditiously as possible. Ms Folbigg's got a real interest in having that done, as has I think the community generally. So, you can feel quite free to pass those remarks on to whomever you're dealing with as far as Legal Aid is concerned, and also to negotiate with counsel assisting, or not to – counsel assisting can't give you Legal Aid but may be able to point you in some direction which would be of some assistance.

25 CAVANAGH: I thank your Honour for that.

30 JUDICIAL OFFICER: Dealing with the focus and scope of the inquiry, how long do you think you would need to make further submissions in relation to that?

35 CAVANAGH: A couple of weeks.

40 JUDICIAL OFFICER: That seems reasonable, Ms Callan.

CALLAN: Yes, your Honour.

45 CAVANAGH: At the moment I'm in a trial down the road, I've just come here for the purpose of an appearance rather than leave the--

JUDICIAL OFFICER: That's fine. That's fine, I just want to know the time.

50 CAVANAGH: Yes.

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JUDICIAL OFFICER: We'll try not to detain you for too long.

CAVANAGH: No, that's all right - I didn't mean that - but that's why I haven't had an attempt to develop the focus. I've been in trial for eight weeks.

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JUDICIAL OFFICER: All right. Anyone else wish to make any submissions at this stage?

10 EID: Your Honour, on behalf of Mr Craig Folbigg, I'm not in a position to necessarily form a view one way or another at this stage. Can I just indicate at this time I have not been able to secure any counsel. Secondly, funding is not confirmed. I wrote to the Department of Justice on 16 June when I first was notified of this inquiry. I have been referred to the Legal Aid Commission, I'm not yet to confirm any form of funding whatsoever; and this morning been
15 served with over 8,000 pages of material and I'm not in a position to form a view one way or another whether the scope is one that we would not make further submissions on.

20 JUDICIAL OFFICER: In relation to the scope of the inquiry, Mr Eid, I think I would have to ask you to make at least preliminary submissions. Have you got any objections to what Ms Callan said, within two weeks, the same as Dr Cavanagh, Ms Callan does propose to tender some documents this morning as I think you know, and subject to hearing from the other parties, I propose to reserve your rights to object to them at some stage in the future if
25 need be.

EID: I think that would be reasonable, your Honour, and I thank you for that.

30 JUDICIAL OFFICER: Thank you. Yes. Anyone else?

SWIFT: No thank you, your Honour, I don't wish to be heard.

ROBINSON: No submissions, your Honour.

35 TADROS: No submissions, your Honour.

JUDICIAL OFFICER: Thank you. You have some documents you wish to tender, Ms Callan.

40 CALLAN: Yes. There are a number of items I propose to tender, which I note to my understanding were served in electronic form late yesterday, so in that way all the parties have access. I recognise, as has been mentioned by Mr Eid, there's been little opportunity for the parties to consider their position and note your Honour's expression as to reserving their right to object if that
45 arises. Could I hand up an index to the material I propose to tender.

JUDICIAL OFFICER: Thank you. Yes.

50 CALLAN: I'll come to it in a moment, your Honour, but as we're about to deal with, we propose to tender all of the exhibits which were tendered--

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JUDICIAL OFFICER: I propose to mark the exhibit list itself as exhibit 1A.

EXHIBIT #1A EXHIBIT LIST, ADMITTED WITHOUT OBJECTION

5 CALLAN: Yes. Your Honour's adopted a numbering system which I submit is a helpful approach to distinguish it from the lettering system which was used in the Blanch Inquiry. The first document to tender is the Governor's Direction for Inquiry dated 18 May 2022.

10 EXHIBIT #1 GOVERNOR'S DIRECTION FOR INQUIRY DATED 18/05/22, ADMITTED WITHOUT OBJECTION

15 Next, your Honour, I tender the exhibits which were tendered in the Blanch Inquiry which are set out in the exhibit list and commence with the exhibit marked A through to the exhibit marked CE. Those documents are in a series of folders which are here in Court on the trolley adjacent to your Honour's Bench.

20 EXHIBIT #2 BLANCH INQUIRY EXHIBIT 1A AND EXHIBITS 2A TO 2CE, ADMITTED WITHOUT OBJECTION

25 Then can I tender a schedule of corrections which was made to expert reports received by the Blanch Inquiry during Phase 2 of the substantive hearing, which plainly enough ought be received by this inquiry, having regard to the corrections which are to be made to some of those expert reports.

EXHIBIT #3 BLANCH INQUIRY SCHEDULE OF CORRECTIONS TO EXPERT REPORTS, ADMITTED WITHOUT OBJECTION

30 Finally, for today I tender the transcript of the substantive hearing in the Blanch Inquiry which was conducted 18 to 22 March 2019 which was Phase 1, 15 to 17 April 2019 which was Phase 2, and 29 April to 1 May 2019 which was Phase 3.

35 EXHIBIT #4 BLANCH INQUIRY TRANSCRIPTS 18/03/19 TO 22/03/19, 15/04/19 TO 17/04/19 AND 29/04/19 TO 01/05/19, ADMITTED WITHOUT OBJECTION

40 I note, your Honour, that there was made in the Blanch Inquiry, and I ask your Honour to make a similar order, that there is non-publication in relation to certain genetic information in relation to Ms Folbigg and her four children. I'll come to the form of that order in a moment.

45 JUDICIAL OFFICER: Yes. Can I say two things. Firstly, whilst I admitted those documents and didn't ask for any of the parties to be given leave to appear to raise any objections, I appreciate that you've only just received the list and the objections, I would certainly expect any objections to the material to be forwarded to counsel assisting as soon as possible. I don't propose to make any directions along those lines but you can anticipate receiving a
50 notification from those instructing counsel assisting within about three or four

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weeks confirming that you have no objection to those materials. That should give you reasonable time to deal with it. Have you circulated any short minutes of order, Ms Callan?

5 CALLAN: I have. Your Honour, could I also make, if it's not already plain enough, that whilst I tendered the whole of the transcript and that was done for convenience, to be clear, it's only the witnesses' evidence in that transcript which this inquiry would receive and treat as relevant evidence for your Honour's task. The submissions and other matters dealt with in that transcript
10 are purely matters of record.

JUDICIAL OFFICER: The parties can be assured that whilst I'll look at the transcript of evidence I won't be having any regard to the other material to which Ms Callan's referred.
15

CALLAN: Yes, your Honour, could I hand up the form of order that I propose for today, which has been circulated to the parties for their consideration in advance?

20 JUDICIAL OFFICER: Has anyone got any comments to make in relation to these proposed orders?

EID: No, your Honour.

25 CALLAN: Your Honour, I should - sorry, Dr Cavanagh.

CAVANAGH: Just on a point of clarification on the non-publication order. I understand that there is some genetic DNA material that's been already considered and published on. Is that, if I can say that. I think I'm right on that. I don't recall specifically any documents but I've been informed by my instructing solicitor, there was a spreadsheet but I haven't looked back to that.
30

JUDICIAL OFFICER: I'm not aware of the spreadsheet. I think that Mr Blanch in his report made some reference to some of the genetic material. Now, whether that was meant to be encompassed by the non-publication order, it's certainly been published in the report.
35

CALLAN: Your Honour, my understanding is that the purpose and concern which gave rise to the non-publication order on the first occasion and which we'd seek to have echoed today is in relation to the genetic sequencing data.
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CAVANAGH: I'll try and get further clarification. I won't take up your Honour's time.

45 JUDICIAL OFFICER: I'll make the order now, it won't prejudice your client, because she can have access to it, of course, as can the lawyers.

CAVANAGH: Yes, of course.

50 JUDICIAL OFFICER: If anyone wants to seek some variation to this order at

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any time--

CAVANAGH: I'll consider it further, I'll have discussions with your counsel assisting and see if that can be resolved that way, I doubt.

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JUDICIAL OFFICER: Should there be added to the orders, Ms Callan, an order that direction that the parties make any submissions as to the focus or scope of the inquiry within a period of 14 days?

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CALLAN: Yes, so that would be 8 July of this year.

JUDICIAL OFFICER: Yes.

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CALLAN: Yes, your Honour, and could I observe the orders that we're seeking to have your Honour make are subject to variation and further order. What we've set out is a combination of procedural directions and also a timetable, working towards the orderly conduct of a substantive hearing which we propose would commence on Tuesday 1 November 2022. The estimate at this stage is two weeks. I hope that proves generous in circumstances where we're desirous of ensuring that the hearing can be conducted in a focused way, but ensuring that all parties have a proper opportunity to examine witnesses, but also for witnesses to be called. As your Honour would have observed, the orders that we seek, including providing a sensible opportunity for parties, who wish to place written evidence before this inquiry or have witnesses called to give oral evidence, notify that in advance and so that we can consider the position and seek to achieve it in an appropriate way.

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JUDICIAL OFFICER: I'll make the directions and order in the short minutes of order dated 24 June 2022, which I've initialled and will be placed with the inquiry papers. I'll add an additional order that any of the parties to whom leave to appear has been given make any further submissions as to the focus or the scope of the inquiry by 8 July, I think it is, isn't it, Ms Callan.

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CALLAN: Yes.

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JUDICIAL OFFICER: I don't need to make any directions regarding the Academy of Sciences?

CALLAN: No.

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JUDICIAL OFFICER: No. Has anyone else got anything further? The inquiry will adjourn.

AUDIO VISUAL LINK CONCLUDED AT 10.31AM

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ADJOURNED