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LAW ENFORCEMENT CONDUCT COMMISSION

OPERATION TAMBORA

SUBMISSIONS ON BEHALF OF OFFICER E

1. Affected Person

- 1.1 Section 133(3) of the Law Enforcement Conduct Commission Act 2016 (“the Act”) defines an Affected Person as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.
- 1.2 Senior Constable E is clearly an Affected Person for the purposes of the Act.

2. Counsel Assisting’s Submissions

- 2.1 Counsel Assisting’s Submissions state that the Commission should find that the use of the taser by Officer E in subduing AO was unreasonable and undertaken prematurely and without sufficient attempts being made to establish some form of dialogue with AO to take him peacefully into custody or physically restrain him (See Paragraph 228 of Counsel Assisting’s Submissions).
- 2.2 Counsel Assisting submits that Officer E engaged in an unreasonable use of force in applying several baton strikes at a time when AO was apparently handcuffed and effectively under control of other police officers. It is said this unreasonable use of force was deliberate and going significantly beyond a mere error of judgment in the heat of the moment. It is submitted by Counsel Assisting that this unreasonable use of force was such a departure from an appropriate standard of behavior as to constitute serious misconduct warranting disciplinary consequences (See Paragraph 233 of Counsel Assisting’s Submissions).
- 2.3 Further it is submitted by Counsel Assisting that the Commission should form the opinion that consideration should be given to taking action against Officer E under Section 181D of the Police Act or alternatively the taking of action against Officer E under Section 173 of the Police Act (See Paragraph 238 of Counsel Assisting’s Submissions).
- 2.4 Finally, Counsel Assisting submits that the Commission should consider obtaining advice from the Director of Public Prosecution in relation to Officer E’s conduct and whether further action (that is, the commencement of criminal proceedings) might be appropriate (See Paragraph 239 of Counsel Assisting’s Submissions).



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3. What is serious misconduct?

- 3.1 Serious misconduct is defined in Section 10(1) of the Act as meaning any one of the following:
- (a) Conduct of a police officer... that could result in prosecution of the officer for a serious offence or serious disciplinary action against the officer... for a disciplinary infringement;
 - (b) A pattern of officer misconduct... carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force...;
 - (c) Corrupt conduct of a police officer.
- 3.2 Section 10(2) of the Act defines “serious disciplinary action” as action against an officer... terminating the employment, demoting or reducing the rank, classification or grade of the officer or position held by the officer... or reducing the remuneration payable to the officer...;
- 3.3 Section 10(2) of the Act defines “serious offence” as meaning a serious indictable offence and includes an offence committed elsewhere other than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

4. Action Available to the Commissioner of Police under the Police Act 1990

- 4.1 The Police Act 1990 sets out the procedure that the Commissioner of Police may take pursuant to Section 173 with respect to a police officer’s misconduct or unsatisfactory performance. The Police Act also sets out in Section 181D the procedure where the Police Commissioner does not have confidence in the police officer’s suitability to continue as a police officer having regard to the police officer’s competence, integrity, performance or conduct.
- 4.2 For Counsel Assisting Submissions to be accepted and acted upon by the Commission then the Commission must be satisfied there is sufficient evidence, to the appropriate standard, to justify making appropriate findings of fact and thereafter to make the recommendations urged upon the Commission by Counsel Assisting.
- 4.3 It is beyond argument that if the Commission were to accept Counsel Assisting’s submissions in their entirety then there are the most serious consequences for Senior Constable E.
- 4.4 Those consequences are the potential of being charged with a criminal offence, being dismissed from the NSW Police Force pursuant to action under Section 181D of the Police Act and/or facing disciplinary action under Section 173 of the Police Act 1990.



5. Substantial Allegations and the Standard of Proof Applicable

- 5.1 Substantial allegations of wrongdoing and or misconduct are made by Counsel Assisting in his Submissions which are referred to above in these Submissions.
- 5.2 Although there are no particulars of what any individual serious offenses or serious disciplinary actions Officer E may face are provided by Counsel Assisting if his Submissions are accepted by the Commission, then the Commission will be required to make serious findings of facts and recommendations adverse to Senior Constable E.
- 5.3 Section 70 of the Act makes it clear that the Commission is not bound by rules or practice of evidence and can inform itself on any matter in such manner as the Commission considers appropriate in the circumstances.
- 5.4 Whilst the Commission can inform itself in any way it deems appropriate for the purposes of its investigation it is submitted that care needs to be exercised in making any findings of fact upon which recommendations are to be made under Section 133 of the Act when assessing such evidence. For example, if a recommendation is to be made by the Commission regarding the commencement of any criminal proceedings against an Officer consideration should be given as to whether there is sufficient evidence in admissible form to ground a successful prosecution before making such a recommendation.
- 5.5 If the Commission is to make a serious adverse finding against an individual, it is submitted that sufficient evidence, on the balance of probabilities must be present to ground such a serious adverse finding.
- 5.6 It is submitted that the Commission should be guided by the statement of law set out by Dixon J in *Briginshaw v. Briginshaw* (1938) 60 CLR 336 at 362:
- “The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences”*
- 5.7 The High Court emphasized in *Neat Holdings Pty Ltd v. Karajan Holdings Pty Limited* (1992) 67 ALR 449 (“Neat”) that the *Briginshaw* test or principle does not alter the standard of proof namely the balance of probabilities.
- 5.8 The High Court in *Neat* also stated that “the ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or



cogent or strict proof is necessary” where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*; “the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ... “(See Paragraphs 449 – 450 of Neat.)

- 5.9 The requisite test can be put in perhaps the simplest of terms as follows. The more serious an allegation the more stringent will be the requisite degree of satisfaction that the evidence establishes the facts.
- 5.10 The Commission should be guided by the above statements of law when weighing up and assessing the evidence before making any adverse finding of fact against an individual police officer.
- 5.11 The gravity of the consequences of the Commission accepting Counsel Assisting’s Submissions in making adverse findings of fact and adverse recommendations in respect of possible action to be taken against senior Constable E, means that the Commission should not rely upon inexact proofs, tenuous or slight evidence, indirect inferences and/or evidence that is not clear and cogent.

6. Summary of Evidence

- 6.1 In his Submissions Counsel Assisting has set out a detailed analysis of the summary of evidence given to the investigation in paragraph 16 to 28 inclusive. In the most part that summary is accepted as accurate by Officer E.
- 6.2 It is not proposed to repeat the evidence of the various witnesses in these Submissions as the Commission is fully apprised of all the evidence given by the witnesses as well as the Exhibits that have been tendered.
- 6.3 Counsel Assisting in paragraph 197 of his Submissions submits “the evidence given to the Inquiry is not clear cut”. That assessment is accepted as accurate and appropriate. There is a considerable variation in respect of the evidence given by the lay witnesses as well as the Police Officers. There are conflicting recollections by each of the witnesses as to several significant matters.
- 6.4 By way of example reference can be made to the lay witnesses’ versions of what occurred when the Police first attended Lateen Lane on the 11 January 2018. The witness W1 states that when the Police approached AO they said, “get on the ground cunt”, and that they repeated this a good handful of times



(see T63L7 and following). W1 also states that AO did not move towards the Police (see T64L20).

- 6.5 That evidence can be compared to the evidence of the witness W2 who says that when the Police Officers approached AO there was no swearing at that time by the Police Office (see T82L5). In addition, W2 states that AO was walking away from the Police when they first approached him (see T81L33).
- 6.6 A third lay witness W3 states that when the Police first approached AO they said words to the effect of “we’re here to help you, buddy just relax. Settle down what’s going on here” (see T29L1 and following). This witness also gave evidence that AO “marched up” to the Police at this time (see T29L34).
- 6.7 There are numerous other examples contained within the transcript of the Investigation where multiple witnesses give quite different and varying versions of events that they each saw simultaneously.
- 6.8 Whilst accepting the Submissions of Counsel Assisting in paragraphs 198 and 199 it is submitted further on behalf of Officer E that the frailty of human memory is well documented.
- 6.9 The events of the 11 January 2018 both from the recollection and perception of the lay witnesses as well as those of the Police Officers can be described as traumatic, horrific and perhaps chaotic. In such circumstances witnesses can and may reconstruct a version of events around fragments of memory. This may lead to a witness having a distorted recollection of what occurred before them. It is submitted that such a witness can present as being confident of their recollection although there may be other more reliable evidence that places a witness’s recollection in doubt. This is not to suggest that such a witness is not trying to be an accurate recollector of events or is being untruthful or misleading in his or her evidence.
- 6.10 Counsel Assisting refers to the evidence given by Officer E at paragraphs 28, 143, 146 and 231. No specific submission is made by Counsel Assisting that the Commission should find that Officer E gave deliberate false evidence or deliberate misleading evidence during the Inquiry. It is submitted on behalf of Officer E that there is insufficient evidence, to the requisite standard, which would justify any such finding and/or subsequent recommendation for action to be taken as a consequence of such a finding being made.
- 6.11 Given the rapidity of events which occurred on the 11 January 2018, which occurred within a short timeframe, inconsistencies in the versions of events given by the witnesses including Officer E are almost inevitable.
- 6.12 There is no evidence of collusion between the four Police Officers who gave evidence in respect of the events in Layton Lane on 11 January 2018. Indeed, the inconsistent versions given by each of the Police Officers involved make it clear that each Officer has his own independent recollection of events. For an adverse finding to be made as to Officer E’s evidence being untruthful and misleading it would incumbent upon Counsel Assisting to identify the



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evidence upon which he relies and to persuade the Commission that there are no competing or other compelling inferences available.

- 6.13 One complicating factor in respect of the evidence given by both the Police Officers and the lay witnesses is the fact that each of them most certainly have viewed the video footage which was shown on the "A Current Affair" program which aired on Channel 9 prior to the investigation being commenced.
- 6.14 Given the edited nature of that coverage it is more than likely that each witnesses' (both lay and Police) version of events may have been affected or contaminated by viewing that media coverage. Unfortunately, it is impossible to assess as to how and to what extent any of the witnesses' evidence was or may have been affected by their viewing the Current Affair program. It is a factor however that needs to be considered when assessing each individual witnesses' evidence.
- 6.15 Given the above it is appropriate for Counsel Assisting to make the submission contained in Paragraph 200 of his Submissions. However even in circumstances where there is video footage or CCTV footage available careful analysis of the contents of such footage is required where that footage is unclear or presents an obscured view of events which are depicted thereon.
- 6.16 At Paragraphs 156 and 157 of his submissions Counsel Assisting deals with Officer E's evidence as to whether AO was on his stomach or not when Police were attempting to handcuff AO. Officer E had a clear recollection during his private examination that AO was on his stomach at the time.
- 6.17 When asked to examine the video recording made by the partner of witness W2 he states that AO was on his side at the commencement of the video. Counsel Assisting asserts that on close examination of the video recording AO was "undoubtedly on his back". It is submitted that Counsel Assisting's assertion in this regard is open to question. Given the obscuring of AO's entire body and the shadowing clearly apparent on the video recording it is arguable that when the video recording commences AO was in fact on his side rather than fully on his back as asserted by Counsel Assisting.
- 6.18 Each of the Police Officers were examined as to whether AO made any threatening moves, verbal threats or acted in an aggressive manner towards each of the Police Officers. There is considerable conflict in the evidence as to whether AO was acting in an aggressive or threatening manner in the presence of the Police.
- 6.19 Given the difficulties associated with the evidence outlined above it is submitted that the Commission could not find as a fact that as far as the Police Officers are concerned AO presented no threat or risk of a threat to them throughout the period of the incident occurring in Lateen Lane.
- 6.20 It is submitted that it is not contested on any version of the matter that AO was when Police arrived in Lateen Lane on the 11 January 2018:



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- (a) Naked;
 - (b) Exhibiting unusual behavior;
 - (c) At times acting in an irrational manner;
 - (d) Apparently drug affected.
- 6.21 There is evidence (some of which is disputed) that AO subsequently was:
- (e) Exhibiting pain tolerance;
 - (f) Non-compliant with Police directions; and
 - (g) Exhibiting unusual strength.
- 6.22 Counsel Assisting quite properly points out that the incident which occurred on Christmas Day referred to in the evidence undoubtedly influenced the actions of the individual Police Officers on the 11 January 2018. Although there is no direct evidence as to the affect on each individual Officer in each case it is more probable than not that each individual Officer was affected either consciously or subconsciously by their knowledge of the Christmas Day incident.
- 6.23 At paragraph 229 of his Submissions Counsel Assisting seeks to draw significant differences between the incident which occurred on Christmas Day and the events of the 11 January 2018. Whilst conceding that the evidence clearly indicates that the incident on the 11 January 2018 was not a violent confrontation from the outset it is submitted that such a distinction does not mean that each individual Officer's actions on the 11 January 2018 were therefore unreasonable and without justification.
- 6.24 There are sufficient similarities between the two incidents (the nakedness, the sweaty body, the agitation, the affectation by drugs or alcohol or both) that either consciously or subconsciously each individual Police Officers' reaction to the circumstances in which they found themselves would be affected by their knowledge of the Christmas Day incident.
- 6.25 The inferred knowledge of the Christmas Day incident of each of the Police Officers involved must have impacted on each of their perception of the actual and or potential threat that AO presented to them on 11 January 2018.
- 6.26 Prior to Senior Constable E deploying the taser AO had been subjected to the use of OC Spray. As far as Senior Constable E was concerned the usual or desired effect of the OC Spray had failed. In those circumstances it is submitted the use of the taser was not premature as submitted by Counsel Assisting.
- 6.27 In isolation the use of the numerous baton strikes by Senior Constable E may prima facie be excessive. From Senior Constable E's perspective, the use of OC Spray and the taser had not had the desired effect on AO. The decisions made by Senior Constable E as to the use of the baton strikes should not be judged solely on the basis of detachment and hindsight from the difficult and confronting situation that existed in Lateen lane in the early hours of 11 January 2018.



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- 6.28 There is no expert evidence as to the reasonableness of the use of force undertaken by each of the Police on 11 January 2018. There is very little evidence as to the exact nature of the training that the Police receive in respect of the use of force. In those circumstances it is difficult to come to a single view as to what is or is not an unreasonable use of force.
- 6.29 There will always be differing views as to what is or is not reasonable. It is conceded that Officer D expresses an opinion which is contrary to the position of Senior Constable E. The existence of a differing opinion as to what was reasonable or not is not conclusive.
- 6.30 The actions of Officer E in deploying the taser and his use of the baton strikes need to be assessed considering the circumstances which confronted him on 11 January 2018. It is not appropriate to make such assessment with the benefit of hindsight without factoring in to the assessment those matters outlined above.
- 6.31 It is also submitted that the matters outlined in Paragraph 7 of these Submissions need to be considered before coming to a conclusion as to the reasonableness of Senior Constable E's actions.

7. Applicable Law – Power of Arrest and Use of Force

- 7.1 Counsel Assisting at Paragraphs 194 to 196 inclusive of his Submissions quite properly points to the powers of arrest and other related functions of a Police Officer pursuant to Sections 230 and 231 of the Law Enforcement (Powers & Responsibilities) Act 2002.
- 7.2 Counsel Assisting's reference to the decision in *R v Turner* (1962) VR30 at 36 is relevant and applicable to the circumstances in which Officer E and the other Police Officers found themselves on the 11 January 2018.
- 7.3 In *Woodley v Boyd* (2001) NSWCA35 at 37 Heydon JA (as he then was) referred to *R v Turner* quoting the passage in the first paragraph of the quotation from *R v Turner* referred to in Counsel Assisting's Submissions. Thereafter the Court went on to state:

"In evaluating what is reasonable, necessary or reasonably necessary the duties of Police Officers must be remembered. In Linley v Rutter (1981) QB128 at 134 Donaldson LJ said:

"It is the duty of any Constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence, does not commit further crimes such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present circumstances. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the Constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption



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of any particular measures without regard to all of the circumstances of the particular case”.

The same duties and considerations apply where a Police Officer is deciding how to affect an arrest. And, in evaluating the Police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment not by reference to hindsight. In McIntosh v Webster (1980) 43FLR112 at 123 Connor J said:

“(Arrests) are frequently made in circumstances of excitement, turmoil and panic (and it is) altogether unfair for the Police Force as a whole to sit back in the comparatively calm and leisurely atmosphere of the Courtroom and there make minute retrospective criticisms of what an arresting Constable might or might not have done or believed in the circumstances”.

- 7.4 In the State of NSW v Nominal Defendant 2009NSWCA225 at 46 Beasley JA (as she then was) stated:

“The surrounding circumstances have to be considered, including the nature of the possible offence involved, the need to make quick decisions as to whether to take action and if so, what action to take. Indeed, many such decisions of their nature will be almost spontaneously reactive to the circumstances presenting themselves to the Police Officer. The Police Officer is also required, in the same short period of time, to weight up whether, in making a decision to take action, the safety of the public outweighs the need to take action”.

- 7.5 When assessing the evidence and the actions taken by Senior Constable E on 11 January 2018 each of the matters referred to in Paragraphs 7.2 to 7.4 need to be considered and given weight before making any adverse findings.

8. Conclusions and Submissions

- 8.1 It would be quite easy to dissect Senior Constable E’s (and the other Police Officers) recollection of the event that occurred on the 11 January 2018 and conclude that, because aspects of the recollections are not corroborated by all the other witnesses that such evidence is false, misleading or simply incorrect.
- 8.2 Such an analysis as referred to in 8.1 above needs to be tempered and considered in light of the circumstances in which Senior Constable E and the other Police Officers were confronted with on the 11 January 2018 and the need to consider those matters outlined in Paragraphs 6 of these Submissions.
- 8.3 Senior Constable E conceded during his evidence at Transcript page 413 that in one respect he could have taken different action on the morning of the 11 January 2018. That concession is appropriately made by Senior Constable E.
- 8.4 With the benefit of hindsight and detachment from the actual circumstances confronting the Police at the time of the incident on 11 January 2018 there may well be several options which were available to Constable E other than the use of the taser and the baton strikes. However, that does not mean that the actions of Senior Constable E on 11 January 2018 were unlawful or totally unreasonable.



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- 8.5 It is submitted that the Commission should not find that Senior Constable E's actions on 11 January 2018 constituted serious misconduct as defined under the Act.
- 8.6 It is submitted on behalf of Senior Constable E that the evidence does not justify an adverse finding such that a recommendation should be made by the Commission that advice should be sought from the Director of Public Prosecutions with respect to the prosecution of Senior Constable E for a specified criminal offence.
- 8.7 It is further submitted on behalf of Senior Constable E that the Commission should not express an opinion that consideration should be given to the taking of action against Senior Constable E under Section 181D of the Police Act.
- 8.8 It is also submitted on behalf of Senior Constable E that the Commission should not express an opinion that consideration should be given to the taking of reviewable action within the meaning of Section 173 of the Police Act 1990 against Senior Constable E.
- 8.9 At present the identity of the Police Officers and lay witnesses involved in this Investigation is protected by the use of codenames and appropriate Suppression Orders pursuant to the Act. It is submitted that those Suppression Orders should continue.
- 8.10 Notwithstanding the publicity already created by the Current Affair Programme story having been aired some time ago there is nothing to be gained by lifting the Suppression Orders.
- 8.11 If the Suppression Orders were lifted there is a real risk that the welfare and well being of AO may be adversely impacted. Given the size and population of the Byron Bay area even if a continuing Suppression Order was made only as to the identity of AO there is a risk that he may be subject to unwarranted attention.
- 8.12 Similarly, if the Commission does accept the Submissions of Counsel Assisting as to the laying of possible criminal charges against Senior Constable E then lifting the existing Suppression Orders may adversely impact of any such charges. If the Suppression Orders are lifted, then there is a real risk that Senior Constable E could not receive a fair trial due to adverse publicity prejudicing the judicial process.
- 8.13 Finally, it is submitted that these Submissions should not be made available to the Public. Once again to do so may adversely impact on the judicial process should any criminal charges be laid against Senior Constable E.



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8.14 In addition, if any disciplinary action is to be taken against Senior Constable E the publication of these Submissions may compromise any fair hearing in respect thereto.

Dated: 20 July 2018

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Michael Taylor- Solicitor for and on behalf of Senior Constable E