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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE JOHN HATZISTERGOS AM
CHIEF COMMISSIONER

PUBLIC HEARING

OPERATION HECTOR

Reference: Operation E19/1595

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON TUESDAY 28 MARCH, 2023

AT 11.00AM

Any person who publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: Yes, thank you. We are now ready to resume and, Mr Cox, you're subject to the same oath that you took at the commencement of your evidence to say the truth. Do you understand?
---Yep.

We will be sitting through till 1 o'clock.

10

MR ENGLISH: Thank you, Chief Commissioner. You may recall, Chief Commissioner, Mr Cox was given a direction pursuant to section 35(2) of the ICAC Act to produce tax invoices - - -

THE COMMISSIONER: Yes.

MR ENGLISH: - - - from Marble Arch to RJS Infrastructure Group relating to the Wollstonecraft project. He's produced three overnight. I hand those to you in hard copy and tender those and they'll be brought on the screen.
20 There's three invoices. Would that be convenient for those invoices to receive the one exhibit number?

THE COMMISSIONER: 83. Exhibit 83.

#EXH-083 – THREE INVOICES FROM MARBLE ARCH PTY LTD TO RJS INFRASTRUCTURE INVOICE NUMBERS '150121', '191021', '23.01.22'.

30

MR ENGLISH: Thank you. And if the first invoice can be brought on the screen, that is invoice number 150121. Can I just provide a copy to Mr Cox so he can just keep an eye on the hard copy when the summary is brought up. You recognise that amount, do you, there 676,754? I'll bring it up for you shortly on the summary screen but it's a figure that correlates with what was on there.---Yes.

And if you have a look you've said, "Credit for partial payment made in June 2020" and it's \$180,000 not including GST. Do you see that?---Yes.
40

And there was a credit that we saw yesterday for 198,000 which would have included the GST.---Yep.

And that was where you said you licked your finger and put it in the air to work out how much might be owed.---Yes.

Does that represent that amount of 198 there that we saw that was paid earlier?---Yes.

- 10 If we can go to the next invoice. Bring that on the screen, please, which is 191021. That says a payment due date of 31/10/21 for \$253,000 including GST. Is that an invoice that was paid by RJS Infrastructure to Marble Arch?---Yes, I think so.

The reason why I ask that is because the bank statements that the Commission has do not go this far in time.---Okay. Yeah.

So that was paid?---It would have been paid, yeah.

- 20 And if we can go, please, to the next invoice which is number, well, it's got the date of 23 January 2022 which is replicated as the invoice number as well. So again, this time that's an amount for \$142,549.99. The Commission doesn't have the bank statements going that far in time but was this invoice paid?---Yes.

It was. Thank you. And if volume 7.4, page 1 can be brought on the screen, please. You'll see there that's that figure of 198,000 which is item number 23. Do you see that?---Yes.

- 30 And then there's that 676,754.70 which is the first invoice on Exhibit 83. Do you see that?---Yes.

All right. If that exhibit can be taken from Mr Cox, please. Chief Commissioner, I hand up a transcript of a call. It's got session number 18937. The call date is 23 November 2020. It's a call between Andrew Gayed and Mr Cox and it bears a time of 14:25:10. I hand that up and tender it.

THE COMMISSIONER: Exhibit 84.

40

**#EXH-084 – AUDIO AND TRANSCRIPT OF
TELECOMMUNICATION INTERCEPT SESSION 18937 FROM
ANDREW GAYED TO AIDAN COX ON 23 NOVEMBER 2020
EXTRACT FROM 14:29:42**

MR ENGLISH: Thank you. And if the transcript that is to be included with the exhibit can be brought up on the screen and then the call please played?

10

AUDIO RECORDED PLAYED [11.20am]

MR ENGLISH: I don't think that's the right call.

THE COMMISSIONER: It sounded like it.

MR ENGLISH: It was?

20 THE COMMISSIONER: We might start it again.

MR ENGLISH: Yeah. Sorry. If that can start again? It might be that the transcript, the - yeah, if we can start there. Okay. Thank you.

AUDIO RECORDING PLAYED [11.20am]

30 MR ENGLISH: So this is a conversation between yourself, Mr Cox, and Mr Gayed where, on page 1, you refer to "that'll sort the Christmas party by itself". Do you see that?---Yes.

And was that that discussion you were having with Mr Gayed about RJS paying for or contributing to the Christmas party?---It was one of a number of discussions, I believe.

40 And did you understand that that Christmas party, that those discussions you had with Mr Gayed, was that a Downer Christmas party or was that just a private Christmas party being organised by the staff working on the jobs that you were also working on?---I, I understood it to be the, the staff on TAP projects.

On the TAP projects?---Yeah.

For all the stations or just the stations you'd worked on?---I think it was all the stations but I'm, I'm not sure.

And on page 2, there's a reference where Mr Gayed said, "I was going to say maybe you should have added an extra 10 on top." What did you understand him to be saying by that?---Look, I think the, so will I give you
10 some context as to the call?

Sure.---I think the call was about we mobilised to the project and then there was an issue with the design and we basically had to stop for a period of time. But we had, like, plant and people and, like, materials onsite, so it was discussing whether, whether we could get paid for that there. And I think what he's saying is put an extra bit on top to cover or, "I was going to say maybe you should have added an extra 10 on top," I think that's the Christmas party reference.

20 For the cost of the Christmas party. Is that right?---Yeah.

And when you said you were referring to a job, that's the Wollstonecraft job, was it?---Yes.

And did you put an extra 10 on top to cover the Christmas party into an invoice?---I don't believe so.

And was that only because the warrants were executed some ten days later or something?---I don't know why. I'm not, I, I'd have to see, I'm not sure
30 if we even put in a delay claim for the lost time. I don't know.

All right. And Mr Gayed says, "I think Laura sent something to Tony." Do you see that, page 2?---Yes.

Do you know who Laura is?---I think she was somebody in the Commercial Team at Downer's.

And are you aware whether that person, Laura, sent anything to Tony in relation to the Christmas party request?---I think she sent an email.

Okay, all right. And did you have any further discussions with Mr Nguyen at or around this time, that you can recall, about the Christmas party request?---Probably, but I can't remember.

All right. Thank you, Chief Commissioner. That's the examination.

THE COMMISSIONER: Mr Schaudin, is it the case you didn't wish to cross-examine?

10

MR SCHAUDIN: Correct.

THE COMMISSIONER: Thank you. Ms Heger?

MS HEGER: Yes, Chief Commissioner, I have some short cross-examination to conduct.

THE COMMISSIONER: Thank you.

20 MS HEGER: Mr Cox, can you hear me from there?---Yes.

My name is Heger, I appear for Downer EDI Works Pty Ltd. I just want to ask you a couple of questions about this Christmas party. Do you understand?---Yes.

When you were initially asked about this yesterday, you referred to a discussion with Andrew Bedwani, correct?---Yes.

30 And I think at one stage you suggested that he might have asked you to pay for a portion of the Christmas party. Was that your evidence?---So prior to the award of the work at Wollstonecraft, I met him for lunch in the city somewhere and he just asked some questions about the project and I think he said something like, "Knowing Andrew Gayed, he'll have already made sure we have an allowance for the Christmas party," something like that.

Well, that's not what you said yesterday. Yesterday you said that Mr Bedwani said, "I'm sure Andrew Gayed will have sorted out the Christmas party." So which one is it?---I don't think there's much difference in what I just said to, to that.

40

Well, on the version you gave yesterday you just referred to Mr Gayed sorting out the Christmas party, but now you're saying he made reference to obtaining an allowance for the Christmas party.---I, I don't know exactly what was said.

You can't remember what Mr Bedwani said, can you?---Not, not, not, I don't have a clear recollection of exactly what was said.

10 Well, I suggest to you he didn't say anything about a contribution or allowance for the Christmas party at that lunch. Is it the case that you just can't remember one way or the other?---Not, I'm not exactly, I'm not crystal clear on exactly the conversation. The conversation was at this stage maybe three years ago. But there was definitely some form of reference to Christmas party.

Mmm. And all he might have been suggesting was that Andrew Gayed was organising the Christmas party. That's right, isn't it?---It's possible.

20 All right. And your evidence is that Mr Gayed did at some point ask for a contribution, is that right?---Yes.

And you said that happened at a site meeting, correct?---Yes.

And you said he was considering hiring a boat for this party, is that right? ---Look, I don't have a clear memory of exactly what happened, but that, that is what I recall.

30 He said that he was considering hiring a boat for a Downer Christmas party. Is that what he said?---I think so.

You're not really sure what he said, are you?---It's three years ago. I can't remember exactly what was said.

All right. Did he suggest that you would be invited to attend this party?---I don't think so. I think it was for the, the staff.

Did Mr Gayed actually say that?---I can't, I can't remember exactly. I don't have a clear recollection.

40 Mmm. So that's just an assumption you made but you can't identify anything Mr Gayed said or did that formed the basis of that assumption, is

that right?---I think there was an email sent in relation to a contribution towards Christmas party.

Is that the one referred to in the transcript that we just went to, an email from someone called Laura to Mr Nguyen?---Yes.

All right. Did you actually read that email?---I don't know.

10 So it's possible that Mr Nguyen just talked about the email to you, is that right?---Yes.

Can you remember what Mr Nguyen said about the email?---It's, it's too long ago. I can't remember exactly what was said.

All right. And aside from this email supposedly sent by someone called Laura at Downer, you have no knowledge of anybody else at Downer approving this request for you to make some sort of contribution. That's right, isn't it?---I don't have any knowledge of that, no.

20 No. As far as you know, it might have just been a thought bubble of Mr Gayed's. That's right, isn't it?---I'm not entirely sure where the request came from.

And you never paid any money to Mr Gayed or Downer for the purposes of any Christmas party that year, correct?---That's correct.

Neither did RJS or Marble Arch, correct?---That's correct.

30 Neither did Mr Nguyen, as far as you know, correct?---As far as I'm aware.

And a boat was never actually hired as far as you know, correct?---I'm not sure on that. I don't know.

All right. I have no further questions, thank you.

THE COMMISSIONER: Thank you. Mr Kalyk.

40 MR KALYK: Thank you. Mr Cox, is it a fair reading of your evidence yesterday that the years 2018-2020 were a bit of a blur to you?---Yep, it was young kids, yeah.

And this is not meant as a criticism of you, but is it fair also to say that your memory of the various details of the goings-on between that period of time is also not very good?---I think, I think my, my memory in general isn't really that great. But, yeah, I haven't, probably haven't had a, you know, haven't been able to remember some of these conversations very well.

10 So your already poor memory is hampered in part by the difficult time you were going through between 2018 and 2020 with your family and personal considerations, correct?---Yeah, I'd agree with that.

And also the fact that these events happened many years ago, correct?
---Yep, the, yep.

And you've said similar words in the course of your evidence at various times, but if you could remember any more detail about the matters that you've been asked about by the Commission, you would have volunteered them, correct?---I've, I thought I've answered the questions I was asked.

20 Correct. And if you could remember further details, you would have volunteered those further details, correct?---Is, is there something I've missed.

I'm just asking the question, Mr Cox.---Well, I've answered the questions I've been asked.

And you were taken to various calls and messages involving or concerning Mr Watters in late 2020 yesterday?---Yeah.

30 And they mostly concerned potential work in relation to Wollstonecraft and Birrong. Correct?---Yeah.

You gave some evidence as to how you interpreted those calls and I want to come to that, but before I do, is it a fair summary of your evidence that sitting here today, you have no independent positive recollection of having any conversation with Mr Watters about paying any kickback in relation to Wollstonecraft, Birrong or any other works in 2020?---Well, the, the audio that was brought up yesterday had reference to it.

40 Perhaps I'll phrase the question again. Leaving aside the calls you were taken to in evidence yesterday, is it fair to say sitting here today you have no

independent positive recollection of having any conversation with Mr Watters about paying any kickback in relation to Wollstonecraft, Birrong Station or any other works in 2020?---Sorry? Can you repeat that again?

I can. I want you to leave aside the calls you were taken to yesterday, okay. Outside of those calls, which I'll ask you about in a moment, is it correct that you don't have a positive recollection of any conversation with Mr Watters about paying any kickback to him in relation to Wollstonecraft, Birrong Station or any other work in late 2020?---The, the, I don't know
10 how you ask, I don't know how I can leave those, like, my memory's vague, right? Well, I don't know how you're asking me to leave those calls out and then try and, I can't remember. I, before yesterday, I couldn't even remember those calls.

Perhaps I'll ask it this way. There are no other conversations outside those calls concerning kickbacks. Correct?---I, I can't say that there weren't any other conversations.

But you can't say that there were?---Okay - - -
20

MR ENGLISH: Can I just - there's an issue between 2019 and 2020 and I just don't want that distinction to be elided in the questioning that's going forward. I just make that point.

MR KALYK: I'm only focusing on 2020.

MR ENGLISH: Okay. Thank you. That makes it clearer.

MR KALYK: Do you understand, Mr Cox? So outside of the calls you
30 were shown in relation to the events of 2020, you can't positively recall any other conversations?---I think I had a conversation about, I think I had a conversation where, and the call yesterday I think discussed it a little bit, where Kevin Watters has explained that because in the different versions of the TAP, they changed the procurement process and I think, so basically he told me that they wanted to package the work up into bigger chunks. I think I had a conversation around that.

And outside of that, there are no other conversations?---Not that, not that I
40 can recall.

And you were taken to those various calls yesterday. You said a moment ago that prior to yesterday, you had no recollection of those calls. Correct? ---I'm, I might have had some, I just wouldn't have been able to remember exactly what was said. I mean, I had some recollection of a call but just not what was said. You know, it's three years ago.

And let me be clear, Mr Cox, I'm not criticising you for the lack of memory. I'm just trying to be clear on what it is you actually remember, that's all. ---Okay.

10

So, just to be clear, your position is that as of yesterday, you had no recollection of those calls in any detail?---Yeah, okay, in detail, yeah.

You might have had some vague recollection of them?---Yeah.

But you didn't recall, for instance, your specific reaction to particular words. Correct?---Okay. Correct.

20 So what I am just asking you, Mr Cox, is that when you were going through those calls and saying what was meant by certain words, what you were doing, weren't you, was sitting today and giving an interpretation of those calls. Correct?---Correct.

You weren't setting out an independent recollection as to a state of mind you had back in 2020.---Can you repeat that?

You weren't setting out an independent recollection of a state of mind you had in 2020.---I don't even know what that means.

30 Perhaps, it's probably sufficient, Mr Cox, what I've already asked you. Mr Cox, you are good at the civil engineering type works that you were performing in 2018, 2019 and 2020 for Downer were you not?---I was good at it.

Yeah, you were good at it.---Yeah, it was good, yeah.

And you were particularly good on difficult brownfield training projects, correct?---I'd say I was, not blowing my own trumpet but I was very good at it.

40

Very good at it. And you said yesterday in your evidence that you don't make money on these kinds of difficult jobs unless you're very good at it or good at it.---I, I don't think I emphasised that enough in relation to Wollstonecraft because some of the things that I did there were, like the engineering side of it was really impressive.

And you understand, don't you, that on major works like this if a subcontractor like RJS does not perform that that affects the head contractor Downer, correct?---Correct.

10

It can affect the head contractor's budget, timing and various other aspects of delivery of a complex project to a client, correct?---Correct.

It's also consistent with your experience that if contractors badly cost works or too aggressively underquote to win work that can increase the prospects of disputes occurring down the track.---Yeah, correct.

Including on the question such as variations, correct?---Yep, correct.

20 And having a poor working relationship between a subcontractor and a head contractor can also increase the prospect of disputes occurring down the track, correct?---Correct.

Success in the kinds of works that you were performing like Wollstonecraft for example were dependent and even heavily dependent on building and maintaining relationships with sufficiently skilled and reliable people, correct?---Correct.

30 Losing a good relationship or a good subcontractor might end up costing the head contractor significantly in the long term.---Correct.

But at the same time, head contractors like subcontractors have their own commercial interests that they have to look after, correct?---Correct.

And different head contractors that you've worked with take different approaches as to how they effect that balance, correct?---Correct.

40 And at mid-to-late 2020, yourself and RJS had never let Downer down on any work you'd performed to that date, correct?---Correct.

You had conversations with Mr Watters from time to time that RJS were keen to take on more work and to prove themselves as a go-to contractor for Downer, correct?---Yeah, correct.

You had conversations where you said that you were particularly interested in certain projects such as Wollstonecraft, correct?---Yeah, I, I, I, Wollstonecraft was the challenge of the, the station because of the logistics. That was what, because it was the project nobody wanted to go near because of the complexity of it.

10

And you expressed an interest in taking on that complex task.---Yeah.

You said that, had conversations to the effect I should say that RJS was a new company, that it wanted to grow and develop into doing more complex projects like Wollstonecraft, correct?

THE COMMISSIONER: Mr Kalyk, I hesitate to interrupt you but this wasn't a topic that you had foreshadowed if I can say.

20 MR KALYK: Chief Commissioner, if you give me a few more moments I'll explain why it's relevant.

THE COMMISSIONER: Well, no, your correspondence indicated you wanted to talk about North Strathfield.

MR KALYK: And the topic of the conversations in relation to the 2020 projects which is this topic and I can indicate I have about ten more questions on it, that's it.

30 THE COMMISSIONER: All right. Well, you have exceeded the ten minutes you sought.

MR KALYK: I apologise, Chief Commissioner.

THE COMMISSIONER: Well, proceed.

MR KALYK: In the lead-up to Christmas 2020, Mr Cox, RJS had done, agreed to do or was interested in doing a range of projects as a subcontractor of Downer, correct?---Correct.

40

You'd done the Kingswood works.---Yeah, RJS, yeah.

Certain works for North Strathfield?---Yeah.

Won certain Wollstonecraft packages?---Yeah.

And were interested in certain Birrong packages?---Yeah.

The relationship with Downer was progressing well?---Yeah.

10 And accepting, of course, there's always a line with these sorts of things, it would be unsurprising in that context and in this industry that a subcontractor might want to treat a client or its staff who the relationship was with to a Christmas lunch or some other kind of thank you to celebrate the relationship, correct?---Yeah, I guess, yeah.

I want to ask you now about North Strathfield. I want to come to these two points in more detail, but is it again a fair summary of your evidence that there are only two interactions with Mr Watters that you can recall relevant to kickbacks? The first is a text message sent to you in between the
20 provision of an original quotation on 30 September 2020 and a revised quotation on 17 October 2019 - sorry, both 2019 - where you say a kickback was requested by Mr Watters. That's the first one.---Yep.

The second one is your handing over of an amount of cash to Mr Watters in a North Strathfield car park, correct?---Correct.

And had you remembered more interactions or more details about these interactions, you would have said so, correct?---Yeah.

30 I want to ask you just first about the text message. Is it fair to say that you don't remember the exact terms of the text, sitting here today?---Well, I guess these, you know, there's been lots of text messages and stuff brought up on-screen. I'm surprised this one hasn't been produced yet, but it definitely happened.

I'm just asking the question. Is it fair to say you don't remember the exact terms of the text?

40 THE COMMISSIONER: Sorry, you've dropped your voice. Can I just have the question again?

MR KALYK: Sorry, is it fair to say, Mr Cox, that you don't remember the exact - - -?---Yeah, I don't, I don't remember the exact.

And it's possible, is it, that the text was in terms similar to some of the texts we saw yesterday, correct?---Oh, yeah, correct, yeah.

You heard about the job on 10 September 2019 from Mr Nguyen, is that fair?---I believe that was the case.

10 And your evidence is that prior to that first site visit, which I suggest to you was on 12 September 2019, you'd only met Mr Watters once, correct?---I think so.

It was a brief meet-and-greet, correct?---Yeah.

So the site visit that you attended on 12 September 2019 in relation to North Strathfield was the first substantive interaction you'd had with Mr Watters, correct?---Yeah.

20 And the works concerned lowering the floor and wooden benches in a heritage-listed waiting room at the North Strathfield Station, correct?---Correct.

You were told that it was a small part of a larger set of works being delivered by Downer for Transport for NSW?---Are we, are we going through the exact conversation that was held?

Just - - -?---Or - - -

30 I'm suggesting to you that you may have been told by Mr Watters - - -?---I don't know, I, I can't remember.

You can't remember. You may have been. You may also have been told by Mr Watters that it had been a last-minute variation requested by Transport for NSW and needed to be done quickly, correct?---That sounds correct, yeah.

And you were given at that initial stage a design that had a number of items marked TBC, or to be completed or to be confirmed or something like that?
40 ---That sounds correct, yeah.

You then sent a quotation for the works?---Yeah.

You then had a number of discussions with Mr Watters about that quotation, correct?---Yep.

One issue he raised was that Downer was not happy with your exclusion in relation to spoil and waste. Do you recall that?---No.

10 I want to suggest to you that he said that he was concerned that lowering the floor to ground level meant that there might be waste which would be left on the station, correct?---Possibly. I honestly can't remember but - - -

But it's possible.---Possible, yeah.

And he wanted to make sure that whoever would be cleaning up the waste would be you and not Downer, correct?---Oh, yeah, yeah.

20 He also clarified a number of amendments or confirmations to the original design that would need to be reflected in an updated quote. Correct?
---Correct.

After the initial site visit, you did at least one or two - I withdraw that. You did one or two further site visits to prepare an updated quote?---Possibly, yeah.

One of the visits, you took a carpenter with you?---Yeah.

30 Possibly because these were heritage works and needed specialist heritage carpenters?---Yeah, the, the, 'cause originally we quoted a Yellow Tongue chipboard and vinyl floor and then it ended up like a, a heritage type timber. It was, like, box birch or spotted gum or something like that. So the, the floor, it had changed, yeah.

And so to reflect that updated scope, you prepared an updated and appropriately costed quotation. Correct?---Yeah.

And, in your view, that reflected an appropriate and reasonable quote for the works to be performed. Correct?---Yeah.

40 And you cannot say for sure, sitting here today, that you actually included in that quote any allowance for an amount to be paid to Mr Watters?---No.

Now, I won't take you to the detail of them, there were further variations on this job but they were due to unforeseen circumstances. Correct?---Yeah.

And, again, you prepared costings for each of the variations?---Yeah.

And they were, in your view, appropriately costed for the particular work to be performed. Correct?---Yeah.

10 Mr Nguyen has given evidence - Mr Watters, I should flag, I'm just going to turn to the question of cash, payment of cash. Mr Nguyen has given evidence that you asked for the cash to pay Mr Watters after the invoice on the North Strathfield works had been paid at the end of the project. Correct?---I can't remember when it was paid.

But it's possible Mr Nguyen's correct?---Sorry? What was the question?

It's possible Mr Nguyen is correct in saying that you asked him for money to pay Mr Watters at the end of the North Strathfield project?---Yeah, it's,
20 look, there was, I don't know, there would have been a conversation around it, yeah.

And after an invoice had been paid?---I don't know. I don't know when, when, I'm not sure.

It's possible. It's possible, isn't it, Mr Cox?---It's possible, yeah.

And it's commonplace also for Downer to issue a deed of release at the end of the conclusion of a project. Correct?---Yeah, it would be. Yeah.

30 And so in relation to the North Strathfield project, can you take it from me that there were three invoices issued on the documents. The first was issued on 1 December 2019 and had a payment date of 20 December 2019. The second was on 29 January 2020 and had a payment date of 29 February 2020. And the third was on 2 April 2020 and had a payment date of 2 May 2020. Can you take that from me?---Yeah.

Can you also take from me that the deed of release was sent on or around 30
40 March 2020. Correct?---Okay.

Would those dates suggest to you that your account is that the cash said to be handed over to Mr Watters was handed over at sometime between the payment of the first invoice from 20 December 2019 and May 2020 being around the payment of the third invoice?---I have no idea. I have, I have no idea when it - - -

You have no idea when the timing is?---No.

10 Chief Commissioner, I seek relief from suppression in respect of 443PT lines 45 to 46?

THE COMMISSIONER: Sorry? Four?

MR KALYK: 443PT.

THE COMMISSIONER: What line?

MR KALYK: 45 to 46 it looks like. It starts, "Do you recall".

20 THE COMMISSIONER: How long do you have to go? You told me it was ten questions. I've lost count how many questions you've asked since that point. You're up to 25 minutes and you originally told me ten.

MR KALYK: I am very sorry. I can indicate there is very little to go - - -

THE COMMISSIONER: Just we need to schedule - - -

MR KALYK: I apologise.

30 THE COMMISSIONER: - - - other things that are going to follow.

MR KALYK: I apologise. I only have about two more minutes, three more minutes to go.

THE COMMISSIONER: All right.

MR KALYK: Has that portion of the transcript been located?

40 THE COMMISSIONER: Sorry, this is in the public inquiry?

MR KALYK: In the - - -

MR ENGLISH: Chief Commissioner, I think my learned friend, sorry, is making an application that should probably come through Counsel Assisting.

MR KALYK: My apologies.

MR ENGLISH: He seeks a variation to a 112 order.

10 THE COMMISSIONER: A 112 order. I don't have that material here. Is there a copy of it somewhere?

MR ENGLISH: I've got a copy of I think the document Mr Kalyk's referring to.

MR KALYK: It's the final two lines, it should be, on that document.

THE COMMISSIONER: Yes, all right.

20 MR ENGLISH: Chief Commissioner, if you're content with that course, I don't have any opposition.

THE COMMISSIONER: All right, I'll make the variation to allow you to rely on it. Yes.

MR KALYK: Thank you. Mr Cox - - -

MR ENGLISH: It's just for the lines, as I understand, Chief Commissioner, which would be the last two on the page, which would be - - -

30

MR KALYK: Yes.

MR ENGLISH: - - - 45 and 46, lines 45 and 46.

THE COMMISSIONER: Are they the lines you're seeking?

MR KALYK: Yes. Thanks, thank you, Chief Commissioner.

THE COMMISSIONER: The variation is granted.

40

VARIATION OF SUPPRESSION ORDER: THE SECTION 112 ORDER IN RELATION TO EVIDENCE GIVEN BY MR COX IN THE COMPULSORY EXAMINATION OF MONDAY 20 DECEMBER 2021 IS VARIED IN RESPECT OF TRANSCRIPT PAGE 443, LINES 45-46.

MR KALYK: Mr Cox, you gave evidence to the Commission already to this effect. It was asked, “Do you recall where you met Mr Watters when
10 you paid him the cash?” And you said, “In the car park, North Strathfield.”
Do you recall giving that evidence?---Yeah.

And by that you intended to convey to the Commission, did you not, that where you handed the cash over was the car park of the North Strathfield Station, correct?---No, I live in North Strathfield so I actually remember the car park. It was the underground one beside George Street.

That’s not what you said in that piece of evidence, was it?---I don’t know what I said.
20

THE COMMISSIONER: You just said it was in a car park at North Strathfield. You didn’t say anything else.

MR KALYK: “The car park”. “The car park, North Strathfield.”

THE COMMISSIONER: Yeah, yesterday he gave evidence that it was in an underground car park. I don’t know, is there an underground car park at North Strathfield Station?---It’s not underground. It’s undercover. It’s not, like, below the ground but it’s undercover.
30

MR KALYK: I need to put a final few propositions to you, Mr Cox, that at not stage was a kickback ever requested by Mr Watters. That’s correct, isn’t it?---There’s a text message. Like, I’m under oath. There was a text message.

And at no stage was a kickback ever paid to Mr Watters.---It was paid.

You never showed anyone that text, correct?---I showed Tony.

40 The most you may have done is maybe tell Tony about it correct?---Pretty sure I showed him.

And while you claimed in evidence that you'd reached a moral epiphany after the Marble Arch quotation being forged having come to your attention, it's fair to say, Mr Cox, that at the time of these events you had no real issue, did you, with people acting dishonestly to skim money from others?
---The, that Marble Arch quote, I know, I know in that, in that call yesterday I said some things that were awful, but at the time I discovered that quote for Kingswood, I was, that wasn't, I didn't want anything to do with that.

10 You knew that Mr - on your belief - Mr Nguyen, Mr Aziz, Mr Abdi were all profiting at the expense of their employers?---Yeah.

You and Mr Nguyen had agreed together to rip off your own partners, Mr Aziz and Mr Abdi, correct?---They weren't, they weren't my partners. I never had any agreement with them.

You agreed to dishonestly mislead them as to the nature of the project, the Lithgow project, didn't you?---My agreement at Lithgow was focusing on delivering the work as effectively as possible. I did - - -

20

Is that the extent of your answer to my question?---Sorry, I'm not sure - - -

MR SCHAUDIN: Objection. Let the witness finish his answer.

MR KALYK: My apologies. I didn't know the witness wasn't finished. Sorry, Mr Cox, please continue.---I was focusing on trying to deliver the work at Lithgow as cost-efficiently as possible to maximise the profits that I'd make.

30 Is that the extent of your answer to my question?---What was your question?

That you and Mr Nguyen agreed to rip off your own partners. Sorry, I withdraw that. The question was that you agreed to mislead Mr Aziz and Mr Abdi as to the costs involved in that project.---I didn't mislead them because I didn't have any dealings with them.

You agreed for Mr Nguyen to mislead them.---Mr Nguyen - - -

40 Mr Nguyen.--- - - - had, had a, had one agreement with them and another one with me.

And you never told Mr Nguyen that you'd accrued some \$12,000 as per your Marble Arch spreadsheet.---Like that was disclosed at the start but never followed through on.

Based on a call we heard yesterday by early to mid-2020 Marble Arch was heading for insolvency, correct?

10 MR ENGLISH: Chief Commissioner, I don't understand what this has to do with Mr Kalyk's client's interests.

THE COMMISSIONER: Neither am I.

MR KALYK: Can I say there are two final questions.

THE COMMISSIONER: Well, I'm counting now so - - -

20 THE WITNESS: That was basically he was asking me in that call just I suppose generally, like the way I was talking on the calls yesterday gave an awful bad impression but I just am very loose on the phone and talk, you know, lots of cursing. So he was asking me should I be paid before or after I think financial close and I was, I think by the sounds of it it sounded like I wanted to be paid prior so that I'd be able to pay things like BAS.

MR KALYK: Mr Cox, rather than paying Mr Watters a kickback, the more correct position, isn't it, is that you simply told Mr Nguyen that you were going to pay Mr Watters so you could pocket the extra money for yourself. That's correct, isn't it?---No.

30 And indeed to the extent that you did believe Mr Watters wanted a kickback that was your mistaken assumption, correct?---No.

Those are my questions.

THE COMMISSIONER: Thank you. Yes.

40 MR ENGLISH: Just quickly. Mr Cox, you were asked a question by Mr Kalyk for Mr Watters in relation to taking out I think it was business associates to celebrate Christmas lunch or something like that. Do you recall that?---Yeah.

And you said that wasn't uncommon, you agreed.---Yeah, that, that would happen.

Yeah. This is what I want to ask you, had you ever been asked before your dealings with Mr Gayed to pay for a party on behalf of a contractor that you were dealing with in circumstances where you weren't invited to the party?
---No.

10 Thank you. Thanks, Chief Commissioner.

THE COMMISSIONER: Thank you. Yes, all right.

MR ENGLISH: I don't know if unfortunately for Mr Cox he can be excused at this point.

THE COMMISSIONER: Yes, all right. Mr Cox, I'll stand you down at this stage. In the event that circumstances are such that you're required to be recalled you'll be informed but for the present time you can stand down.
20 ---Okay. Thanks.

You'll be advised if the situation transpires that you need to give further evidence.---Yeah.

Thank you. Next. Step down.---Oh, sorry. Thanks.

You're free to go.

30 **THE WITNESS STOOD DOWN** **[12.03pm]**

MR ENGLISH: The witness is Brenden Wakim. Might he be called, please.

THE COMMISSIONER: Yes, please have a seat for the moment.
Mr Bowe.

MR ENGLISH: Mr Bowe I think is for Mr Sanber.
40

THE COMMISSIONER: Oh, sorry. I've got Mr - - -

MR ENGLISH: It was Mr Glover. I think his instructing solicitor is here.

MS HOURIGAN: Yes, that's right, Ms Hourigan.

THE COMMISSIONER: Sorry, what was your name?

MS HOURIGAN: Ms Hourigan, H-o-u-r-i-g-a-n.

10 THE COMMISSIONER: Hourigan. Thank you, Ms Hourigan, have you informed the witness of the availability of section 38?

MS HOURIGAN: Yes, we have.

THE COMMISSIONER: And does he wish to avail himself of section 38?

MS HOURIGAN: Yes, he does.

20 THE COMMISSIONER: Thank you. Now, Mr Wakim, sorry. Is that pronounced correctly, Wakim?

MR WAKIM: Mr Wakim is how I pronounce it, thank you.

THE COMMISSIONER: Mr Wakim, do you wish to take an oath or an affirmation?

MR WAKIM: An oath.

30 THE COMMISSIONER: Yes, all right. Please listen to my associate.

THE COMMISSIONER: Please take a seat. Mr Wakim, as a witness you must answer all questions truthfully and produce any item described in the summons or required by me to be produced. You can object to answering a question or producing an item. The effect of the objection is that although you must still answer the question or produce the item, your answer or the item produced cannot be used against you in any civil proceedings or, subject to two exceptions, in any criminal or disciplinary proceedings. The first exception is that this protection does not prevent your evidence from being used against you in a prosecution for an offence under the ICAC Act, including an offence of giving false or misleading evidence, for which the penalty can be imprisonment for up to five years. The second exception only applies to New South Wales public officials. Evidence given by a New South Wales public official may be used in disciplinary proceedings against the public official if the Commission makes a finding that the public official engaged in or attempted to engage in corrupt conduct. I can make a declaration that all answers given by you and all items produced by you will be regarded as having been given or produced on objection. This means that you do not have to object with respect to each answer or the production of each item. Your solicitor, Ms Hourigan, has indicated that she has discussed that with you and it's your wish that I should make that declaration. Do you understand?---I understand.

All right. Pursuant to section 38 of the Independent Commission Against Corruption Act, I declare that all answers given by this witness and all documents and things produced by this witness during the course of this witness's evidence at the public inquiry are to be regarded as having been given or produced on objection and there is no need for the witness to make objection in respect of any particular answer given or document or thing produced.

DIRECTION AS TO OBJECTIONS BY WITNESS: PURSUANT TO SECTION 38 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT, I DECLARE THAT ALL ANSWERS GIVEN BY THIS WITNESS AND ALL DOCUMENTS AND THINGS PRODUCED BY THIS WITNESS DURING THE COURSE OF THIS WITNESS'S EVIDENCE AT THE PUBLIC INQUIRY ARE TO BE REGARDED AS HAVING BEEN GIVEN OR PRODUCED ON

**OBJECTION AND THERE IS NO NEED FOR THE WITNESS TO
MAKE OBJECTION IN RESPECT OF ANY PARTICULAR
ANSWER GIVEN OR DOCUMENT OR THING PRODUCED.**

MR ENGLISH: Thank you, Chief Commissioner. Sir, can you state your full name and age for the record, please.---My name is Brenden Wakim and I'm 47 years old.

- 10 Thank you. What qualifications do you hold, Mr Wakim?---I'm a carpenter. I am also a builder. I have a construction management diploma.

And can you tell the Chief Commissioner what your career experience has been in the last 20 years?---In the last 20 years, so in the very early stages I was actually working in the IT industry. Around that time, probably 17 years ago, I changed from working in IT to doing a carpentry apprenticeship. I then studied at night to get my builder's certificate. I ran my own building company and then started working as a foreman on construction projects. Around 2011 I started working as a foreman on a
20 railway station upgrade at Newtown Station. That was my first introduction to the Transport Access Program. Worked there for a number of years and worked for a few different companies, Laing O'Rourke, Arengo, Gartner Rose, delivering train station upgrades and major infrastructure projects. Around seven years ago I left the private industry and joined Transport for NSW as a construction manager and have been working as a construction manager for most of that time, although there was a period for about 14 months at Transport where I was working as an acting senior project manager.

- 30 Can I ask, when you joined Transport for NSW, what type of contract or employment arrangement were you on?---I was on a full-time - it was a temporary full-time contract for three years, so I was sort of permanent but for a limited time. Towards the end of that period, which was approaching the end of, would have been the end of 2020, I had, that was renewed. I then became fully permanent.

And so you've had experience in rail station projects, including in relation to the TAP program, that's right?---That's right.

- 40 And both on the building side and also on the Transport for NSW side, is that right?---Correct. Private industry and, and the public sector side.

What about New Intercity Fleet projects? Have you been involved in any of those?---No, I have not been involved with the NIF program.

Do you know or can you estimate how many TAP projects you've been involved with over your career?---I would say in the region of around 30 projects at least.

10 And when you joined Transport for NSW did you receive any fraud and corruption training?---Yes, we did. There was a quite an onboarding process with a fairly wide-ranging amount of training that we did, mostly through our online training portal but there was anti-corruption and ethics training that we, we undertaken. I also, in my role as being on Tender Assessment Committees, was required to undertake additional training that covered at lot of the areas involved with corruption as well.

20 And when you were working for other private building companies, was there a similar onboarding process that you recall in relation to fraud and corruption and I think you referenced ethics?---Yes. I certainly remember doing a similar program when I was working at Laing O'Rourke.

Any of the other companies that you worked for, do you remember programs like that?---Not specifically.

30 And did you have any training in relation to probity assessments in dealing with procurement?---Yes. Mostly around the tender assessments that were run. So we would often have a probity adviser within our meetings and at the beginning of each meeting they would run through the various probity requirements that were required because we were in that procurement stage of the projects and they were pretty much enforced with us at each and every meeting.

And that was at Transport for NSW, was it?---Yeah, Transport for NSW, correct.

40 Was Downer the only building contractor you were dealing with when you were at Transport for NSW working on the TAP project?---No. I've worked with many different principal contractors during that time. I would probably say at least six or seven different contractors.

Are you able to tell the Chief Commissioner how you found your professional dealings with - sorry. Let me withdraw that question. Insofar as you were dealing with Downer on a day-to-day basis, what were the roles of the people that you were generally dealing with from Downer?---It did vary a little bit. So in my early dealings with Downer during the, what we call the tranche 1 projects, the, and the tranche 2 projects, I was in the role of construction manager. So that was a lot more site based, going out to site, and I was dealing more with the individual project teams, the, the project managers onsite, the site engineers and, and the people that were, that were based doing the actual construction work. Later on when I was working as the senior project manager I was dealing more with the, the project directors and the, the executives at Downer and that was a more office-based role, dealing with more contract administration, the commercial, legal and contractual side of the project as opposed to the construction side.

How would you describe your dealings with Downer when you were working as a construction manager dealing with the site-based project teams?---Generally quite good. During the tranche 1 projects, the early ones, it was quite cordial. We, we worked quite well together. During the tranche 2 projects the only project I was looking after at that time was North Strathfield. It was a little bit more frayed I would say at that point. The project manager on that project was Kevin Watters and we had a few issues on that job that was causing some tension.

All right. Can you just explain the difference between the tranche 1 and the tranche 2 parts of the project, of the TAP project, please?---Sure. So under the framework agreement, the, the packages of work were handed out in, in tranches of works. So the tranche 1 package of works, I think it was five stations from memory, so Homebush, Harris Park, Toongabbie, Victoria Street and Panania stations. And that package of works was sort of undertaken and then completed on the back of, I guess, and, and the intention of the framework agreement was that these packages of work would be continually handed out. Once, once a package was completed another one would be provided if the, if the work had been done well.

Okay. And what were the stations involved in tranche 2, do you recall? You've mentioned North Strathfield.---Correct. So North Strathfield, Kingswood, Glenbrook and Kingswood.

Sorry, you said Kingswood, Glenbrook and - - -?---Sorry, Hazelbrook.

Hazelbrook.---At the end of tranche 2 there was another project that was awarded to Downer which was unrelated to the TAP program which was the Brookvale bridge project which was a pedestrian bridge in Brookvale.

Okay. You can put that to one side, please. You mentioned that the relationship in relation to North Strathfield and Kevin Watters was more frayed. Can you explain to the Chief Commissioner, please, what you mean by that.---There were a few aspects of that job which didn't quite go to plan.
10 There was an issue with a lift shaft that was installed that was too high for the existing bridge. There was another lift shaft that was attempted to be lifted into position but didn't fit and that had to be lifted back out again. So there were, it just caused some tension on site that these things weren't getting done correctly.

So this is the practical building work involved.---This was the construction. I was in the construction manager role at that point so - - -

Okay. And you spoke also, or you gave some evidence rather about your involvement as the acting senior project manager where you'd be dealing with project directors. Is that right?---Correct.
20

Can you describe your dealings with Downer in that context, please.---Sure. So at the end of 2019 I was asked to step into the role of acting senior project manager and that was at the end of the tranche 2 projects, so those projects were finishing up, and we were soon to provide a letter of notice to Downer for the next tranche 3 package of works. So I took on that role in around September 2019.

Okay. And can I just ask you, if I haven't asked you already, and I don't think I have, the stations associated with tranche 3?---Yes. So the tranche 3 stations were Banksia, Roseville, Wollstonecraft and - - -
30

THE COMMISSIONER: Sorry, just go a bit slower. Banksia, what else?
---Banksia, Roseville, in the North Shore, Roseville, Birrong and then later Canley Vale as well.

MR ENGLISH: You mentioned Wollstonecraft as well. Was that right?
---Wollstonecraft, yes.
40

Yeah.---Four packages - four stations originally and then Canley Vale was added in around May 2020.

All right. So what were your responsibilities as a senior project manager dealing with the project directors from Downer in relation to the closing off of the tranche 2 and moving on to the tranche 3 project?---So it was almost two quite separate pieces of work. So closing out the tranche 2 projects was a lot of checking the, all the handover documentation, that the projects were being completed to a manner in which we expect, so, you know, checking
10 those quality documents, finalising the commercial arrangements and making sure that those projects were completed and ready to be handed over to Sydney Trains as the operator and maintainer. Also then we were working through developing what's called the TBE or the target budget estimate for the next package of works. So that involves a 12-week period where we provided Downer some concept designs of what we thought might be possible solutions to make these stations accessible and Downer were then tasked with some, interrogating those designs, doing site investigations onsite to confirm assumptions about the sites and then developing designs and a budget to provide to Transport at the end of the TBE to, to allow us to
20 review and, and determine if we were to proceed and go ahead with those works.

Okay. Bear with me. And is that a process that's set out under the, just bear with me one moment, please - - -?---Sure.

- - - under the TAP program framework agreement between Downer and Transport for NSW?---That's right. It's detailed in the framework agreement that was commenced in 2016.

30 I'll just have the document brought on the screen. It's volume 22.1 and it commences at page 272. So is that the document, the framework agreement you're familiar with?---Yes, it is. Yes.

If we scroll the next page, you can see, I'm sorry, two pages down, you can see there, it's been entered into between Transport for NSW and Downer EDI Works Pty Ltd on 6 July 2016?---Correct.

40 And if page 293 can be brought on the screen, please? You'll see there at 4.5, there's a reference to the target budget estimate development. Do you see that?---Yes.

And is that the process you've just been giving evidence about?---Correct.

And how would you describe your dealings with Downer when you were going through this process of developing the target budget estimates for the tranche 3 stations?---It generally started out quite well, quite collaboratively. We were doing site visits together, discussing options and how we might go about making these stations accessible. It is a very, very busy time. There was a lot of work to get done with, with the designers undertaking investigation works, which might be, you know, survey works, doing bore
10 holes, geotechnical investigations, which can be quite challenging in a live rail environment, with customers on stations. It was hard, as that, as that was developing along and getting towards the end of the process, it was, we, we were quite keen to try and get some indication of expected costs for the project, but that wasn't, wasn't really made clear until the very end when Downer finally submitted the target budget estimate to us. I think it was also delayed. They asked for an extension of time, as well, for a couple of weeks. And when it was submitted, it was well over the budget that Transport had allowed for the project.

20 And when you say "well over" do you recall how much over it was?---I think from memory, it was approximately \$30 million - - -

THE COMMISSIONER: Sorry?---\$30 million over budget.

MR ENGLISH: And when you received that figure that came in, \$30 million over budget, what happened next? Was there discussion with Downer to change scope or to do anything to reduce that cost?---There was. So once the target budget estimate is submitted, Transport for NSW under the framework have 45 days to review the, and discuss the, the proposal.
30 Quite quickly we realised that this was well beyond our budget and there would be no able to sort of cover that by any additional funding that might be sought. It was just a magnitude too high. We then had discussions with, I remember speaking to Andrew Bedwani from Downer at this time about this and I basically then said, he was quite surprised that it was a long way over budget. I hadn't said by how much but he seemed a bit incredulous to be honest.

Incredulous about what as you perceived it?---As I perceived it that they were so far above budget.

40

Okay. But isn't that just a matter of mathematics?---It's, it's hard, it's hard to say exactly what it was but at the time I had a feeling that they had a figure that they were working towards that they, that they were pretty comfortable that they were there or thereabouts with the budget that Transport for NSW had but I don't have evidence to support that.

Okay.---It was just a feeling from the conversation.

10 All right. So you've had the discussion with Mr Bedwani and he's surprised that it's over budget by that figure 30 million.---I don't think I told him at that point. I didn't, I was very conscious not to reveal what our budget was at that time.

So you just told him it was over budget.---Yeah, I said it's well over budget and he was wanting to know by how much. I said, "Look, it's a long way over budget by tens of millions."

20 All right. And what was done to bridge that gap, if anything?---So we had some crisis meetings at Transport with my upper management to work out what we'd do and I presented at that time some possible options about we might be able to go back and re-scope some of these projects and to upgrade these stations with different possibilities so, but quite radical departures from the designs we were working on. So for example Banksia Station we proposed to build a new bridge at that station where currently there's an existing underpass. The underpass leaked and flooded when it rained so we felt at the time that building a new bridge would be the best option to futureproof that station. Once we did the technical investigations on that
30 bridge had blown out considerably. So instead of building a new bridge we then looked at other options to then use the existing underpass as the means of getting people onto the platforms in an accessible manner. The same happened at Birrong. So instead of a new bridge we used the existing bridge there and at Roseville instead of using a new bridge we again used the existing bridge. So we really had to go back through and really rethink about how we were going to deliver these projects and find more cost effective ways of delivering it.

40 All right. I wonder if that page 293 of volume 22.1 can be brought back on the screen. You can see there 4.5(b) it says, "During the preparation of the target budget estimate for each notified project, the proponent must actively

seek innovative solutions through the implementation of value engineering processes.” And you can see that there’s a number of requirements then put onto the proponent.---Correct.

Is it the case that Transport for NSW in relation to tranche 3 was really trying to resource some of these design issues itself to overcome the difference in the budget position between the two parties?---Yes, that’s right. So once we had those meetings with Downer we then went back into a much more compressed redesign phase, I think it was for about eight
10 weeks, to then work up what they, Downer then called a value-for-money option where they were to redesign their proposals and come back with a, a reduced cost for the projects.

And did that value-for-money option, did that end up with a total budget estimate being re-provided by Downer that was acceptable to Transport for NSW?---Correct.

Okay.---As well as considerable redesign costs which we did argue about for quite some time.
20

All right. And if the next page can brought up, page 294, please. You can see there there’s a reference to an independent estimator continuously reviewing the target plus budget estimate, do you see that, as prepared by the proponent?---Correct.

Was that happening by or on behalf of Transport for NSW?---There was an independent estimator provided by WT Partners but they did not get to continuously review. They were continually requesting to review the costings but Downer did not provide them information to write - - -
30

THE COMMISSIONER: Sorry, the what?---So, the independent estimators were requesting the, the pricing information from Downer throughout the target budget estimate development phase but the information, the pricing information was not provided to them until the very last moment.

MR ENGLISH: Well, when you say the very last moment, to your understanding did that give the independent estimator sufficient time to assess the propriety of the target budget estimates as had be re-provided by Downer?---They were under a lot of pressure at that point. So when I say at
40 the last moment, it was probably within the last few days of the 12-week period. So they were under a lot of pressure to review those and to seek

clarifications on various items. There's a, a fair bit of back and forth which normally goes on during that time and at the end of it they're, they're required to issue a certificate saying that they are, it represents, you know value for money, that it is, the, the amounts are reasonable. So they had a very limited time to do it. If they had been given that information earlier we would have given Transport pause much early on in that target budget estimate developed to, to say that these designs, these original scoping designs were simply going to be over budget by a long way. So we would have minimised, we would have saved a lot of time and a lot of that design cost.

I see. So, the lack of time hindered, did it, Transport for NSW's ability to review the target budget estimates as provided by Downer?---That's correct.

And during this period where there's discussion about the value-for-money option and Transport for NSW was waiting for these pricings, or the independent estimator was, how was the relationship progressing with Downer when you were dealing with them in that senior project manager role?---It was getting, it was getting - the relationship was deteriorating but I guess that has to be considered in the context that we were also plunged into the COVID lockdown at that time as well. So we were going through tense contract negotiations and this very stressful redesign period, which had reduced timeframes and then having to adjust doing it all on, in an online environment and no longer sort of working in an office environment, everyone was sort of locked down at home. So I guess if you're having tense meetings when you're all together onsite you can have that bit of banter or few words at the beginning or the end of the meeting to smooth relationships over. I think adjusting to the, an online environment was perhaps a struggle for everyone.

And can you tell the Chief Commissioner, there's something known as a pain/gain clause in relation to managing contractor contracts. Is that right? ---Correct.

The MC contracts. How does that operate to your understanding?---So, for a certain part of the budget, for the deliverables part of the budget, if Downer comes in with their final costs under the amount that they've estimated, Downer are entitled to keep 25% of that saving and Transport takes the other 75%. It only covered the deliverables part of the contract, not the, the other part which is the - I can't remember the correct term but the prelims part of the contract.

Yeah, preliminaries, yeah.---Preliminaries, yep.

And it works the other way too, doesn't it, that - - -?---So the, the, yes, the painshare, if for whatever reason a project goes over budget then both Downer and Transport are sharing that pain, that, that over-budget amount by the same ratio.

10 All right. And both parties have their own people onboard to agree the final target budget estimate, correct?---Yes. So we, we, there was a fair bit of back and forth whereas we went through all the prelims as well as the deliverables component of the estimate that they submitted. We questioned them a fair bit about the number of people they have on the projects, for example, because that was a significant component of the cost, whether the number of people working on the project were required for the entire duration or whether they could be shared between other projects and things like that.

20 And in relation to the issue of - is that part of the preliminaries, the number of staff working on the project?---Yes.

Did you ever determine that Transport for NSW might be paying for the one staff member on two occasions at two different project sites?---Yes, I did. So there was a, more towards when I've actually stepped down from the acting senior project manager role. I was back in the construction manager role. And so during 2021 Downer lost quite an extraordinary number of staff. They - something like 35 people left in 35 weeks, and this is out of a team of 55 people. So there was two aspects to it. We were basically paying for people that were no longer there or we were paying for more experienced senior positions than were actually working, so, for example a senior project engineer might leave and be replaced with a graduate engineer but Transport will continue paying the full rate. The other aspect of it was that on the Metro, so Mr Bedwani and Mr Watters left the Transport Access Program to go work on the Metro projects and there were five stations I believe that they were upgrading, quite similar to a TAP project. I requested from a former colleague who was working on the Metro projects an org chart for the people working on those jobs and noticed that there were perhaps seven names that were the same as the org chart working on the TAP projects.

40

And was that raised with Downer, what you discovered by reference to the comparison of those two org charts?---I provided that information to both the Metro and Transport project teams. I'm not sure what they did with it after that. By that stage I was back in construction management and it was sort of outside my scope of works at that point but I did, I did make the people on both teams aware. So I'm not sure if they raised that with Downer or not.

10 All right. And are you aware as to whether there was any request for timesheets or anything like that as between Transport for NSW and Downer in relation to TAP projects?---When I handed over the reins of the SPM role to my predecessor Jim Hill, I did recommend that a financial audit be done on Downer and I believe that was undertaken, and I understand that that was one of the areas that they were to look at, but I'm not aware of the overall findings of that audit.

20 Okay. Can I just ask you this, in your opinion, when negotiating the TBEs, target budget estimates, what's Transport for NSW's goal?---Our goal really is to get the, you know, each train station made accessible in the most cost efficient way possible.

Okay. And in your view, your dealings with Downer in relation to tranche 3, did you form the view that it shared those goals?---Look, personally, no. I did not feel that we were getting as good value for money as we did with some of our other more specialist contractors.

30 And what were the factual circumstances that led you to forming that view? ---I felt that the Downer team were getting, by tranche 3 the Downer team were getting quite good at manipulating the target budget estimate to be very conservative in their programs and to hold back on the value-for-money options in the design, so they would essentially provide a gold-plated design and then, once they had been awarded the contract, would then introduce all the value-for-money options, which sometimes I believe led to less beneficial outcomes for our customers and the durability of our stations. But, generally, they would introduce the value-for-money options after they'd been awarded the contract and then those savings, they'd then be able to keep 25% of.

40 So can you just explain how that works, that Downer, they present, did you say, a gold-plated design?---Correct. So it, it would be, it would, it would be - - -

And this is for tranche 3?---This is for tranche 3. So they'd present an option to do the job. They'd be quite conservative in the duration, the project duration. Now, a lot of the costs - - -

10 Sorry. By that, you mean they'd say it would take longer than one might ordinarily think the work could be completed in. Is that right?---Correct. I, I understand as a builder, why you'd do that, because you want to factor in various risks, but I think that they had up their sleeve the way that they were
10 actually going to build it and that they could, by using some of those value-
for-money options, build it quicker than that but they, they were then able to
keep all those preliminary costs, plus the 25% gain share on the
deliverables.

20 Okay. When you say then they introduced value-for-money options, what's an example of an option like that?---Okay. So a good example might be at Wollstonecraft Station. So Downer had allowed to install an under-track crossing for services. So we have two platforms on the outside of the track. We have to get power and services from one platform to the other. So they
20 had proposed to dig a fairly large hole in the ground and dig a tunnel underneath the tracks and, and pop it up on the other platform. It's quite an involved piece of engineering to do that. That was what was agreed upon. Once they were awarded the contract, they then ran all the services in an existing pedestrian underpass under the tunnel, so a lot of exposed services that sort of detracted from the, from the station somewhat. Downer were advised not to do that, to stick to the original design but they went ahead and, and did that, regardless.

30 And then that's a cheaper solution, was it?---Yeah. Cheaper solution in terms of time and, and money.

And so in delivering that cheaper solution, they would then benefit from the gain/painshare clause - - -?---Sure.

40 - - - which led to a saving. Is that right?---Which is the intention of the managing contractor but it's the timing of that. I, the intention with the managing contractor under the framework, as you could clearly see there, was that these value-for-money options were meant to be discussed and brought forward at the beginning of the design phase, not after the contract was awarded.

Now, you discovered at some point that a company, RJS Infrastructure Group Pty Ltd trading as RJS Projects, was awarded some subcontracts in relation to the Wollstonecraft job. Is that right?---Correct.

And how did you learn about that?---So under the managing contractor arrangement, when Downer are selecting subcontractors for use on the projects, they would write up a scope of works, send it out to their subcontractors. They would then submit a, a, a summary to us of the, the, the different subcontractors that had tendered on the job and we were to, and they'd provide a, a letter of recommendation outlining why they, why they've chosen a particular subcontractor. And we review that, as well as a matrix showing the, the different costs and criteria through how Downer has selected a particular subcontractor. So for the, there was three packages at Wollstonecraft that went to RJS, civil works, piling works and FRP works. I can't remember which one came through first. But a, the subcontractor recommendation came through on a Friday evening around 6 o'clock and there was a track possession commencing on that Saturday, so a track possession being where the trains are stopped and we're able to jump in and we try and get about two weeks' worth of work done in 48 hours. It's a very intense piece of work and if you miss one of those possessions there are considerable delays. So I got the recommendation on the Friday night. RJS were proposed to be starting work onsite in about 12 hours' time so, yeah, I didn't have, I wasn't very happy about that situation. That was the first I'd heard of RJS and the reason why it triggered something with me is I'd worked in the, on these TAP projects for a long time with lots of different contractors and I hadn't heard of this company before, and after a while you generally know the main players for these types of works.

I'll come back to that in a bit more detail shortly but was that another example of the time pressures being placed onto Transport for NSW by Downer which was effectively forcing you to make a decision in suboptimal circumstances?---Correct.

Can I just ask, in relation to the TAP projects whose responsibility was it to assess the quality of the work that was being provided?---The work is done under at that time was called an AEO framework, so authorised engineering organisation. So it was, Downer would have responsibility to check the quality of the works as too were their designers and Transport for NSW also played a role in that as well.

40

All right. And what was the role of Transport for NSW there in assessing the works?---So we had site supervisors that would go out onsite and do checks on the works but I guess going back, without a full history lesson, going back a generation previously the NSW Government would have had a clerk of works there stationed on a job the whole time checking that, you know, each bar of reo before a concrete slab is poured goes in the right place. Now that's much more pared back so we rely on the designers to come in to do those, to do those checks and the role of Transport is to ensure that those checks are getting done.

10

All right. There was a problem with defects at Banksia, wasn't there?
---Correct.

Do you recall how many defects were required to be rectified on that site?
---Just shy of 600. I know because I raised most of them.

20 So were you performing that site supervision assessment there or was that onto the designers who were doing that?---There's two defects lists on a, on any normal project. The builder would have their own defects list which is a defects and also a punch list of the remaining items they have to, to rectify and complete on a project. The Transport for NSW defects lists is really the client-based project list which is generally developed quite late in the project for the majority of the defects and as getting close to handover. Downer were trying to handover the Banksia Station to us well before it was really ready and so, this is when I was in the construction manager role, myself and my site supervisor Kevin Leahy were going out onsite and just listing everything that hadn't actually been completed or undertaken and normally on a TAP job you'd expect around 100, maybe 150 so Banksia was certainly an outlier in that regard.

30

Okay.

THE COMMISSIONER: Sorry, what did mean by that? Say that again.
---Banksia had a lot more defects than any other typical TAP project. I can't recall another TAP project where there were 600 defects to be rectified.

40 At what stage were they seeking to hand over? Were there still defects?
---They were trying to hand that project over in the November of '21 and we didn't finally accept the handover until April, until we were satisfied that those defects had been mostly closed out. There still are some outstanding

but I think now we've got that number down to about 25. But it was, there was a good four or five months where we didn't let Downer hand that project over until we were satisfied that the works had been completed.

MR ENGLISH: All right. Can volume 18.12, page 312, be brought on the screen, please? You will see this is a screenshot of an email of yours when it comes up and I apologise, I don't have it in its native file. So it will be a little bit hard to read.---Sure.

10 Page 312. Yeah. If that can be blown up, please. You can see it's a - that's an email you sent to some staff members at Transport for NSW with the subject line "RJS Group at Wollstonecraft" and it's the 20th, I think, of the 10th, 2020. So you see that?---Yes.

Do you recall sending that email?---Yes, I do.

20 So there you say - is this an email you sent just when you'd been notified that RJS were the subcontractor for Wollstonecraft and they were due to take possession of the site in some 12 hours after the notification?---I think, I'd have to check the, double-check the timing of this. I think I sent this, when I checked with the - let me just go back a step. When I actually checked with the Transport for NSW project manager he advised that whilst the request for approval had come through from Downer that RJS the actual, RJS had actually already been working onsite for a number of weeks. So my approval was somewhat superfluous at that point.

30 Right.---So I then sent this email out to my site team and to make the, the project, the senior project manager who was going to be taking over from me, Jim Hill, because I stepped down from the role about a week before, a week after I sent this email.

THE COMMISSIONER: It's actually very difficult to read.

MR ENGLISH: It is difficult to - - -

THE COMMISSIONER: I'm conscious of the people who are following this on the livestream.

40 MR ENGLISH: I might read it if it assists, Chief Commissioner.

THE COMMISSIONER: Including the dates and times.

MR ENGLISH: So it's 20 October 2020 and sent at 8.57pm, and that's a Tuesday and you've said, "Downer have awarded a number of large contracts for Wollstonecraft Station to RJS Projects prior to seeking Transport for NSW's endorsement to do so." Is that what you were referring to, that you had already heard that they were onsite before Transport for NSW had approved them?---Yes.

10 You said, "You can't find much about this company. It does not have a website and the company address is a residential house." Is that a red flag in respect of this subcontractor?---It certainly was. So I was, I think when I was doing those searches, I think I mentioned it was, like, later on a Friday night. Because there were quite a few RJS companies at that point that had been set up, RJS Civil, RJS Projects, RJS Infrastructure, I, I couldn't the, a website for that company. I think subsequently there was a website but it wasn't immediately obvious. I then did an ABN search on the company to see if I could find something on it and that's where I saw that there was a, an address there. So I looked up the address, expecting to see, you know, a, a yard or an office or something like that, so I was surprised to see a
20 residential house. So that certainly set off a red flag for me.

Then you say, "I asked Andrew Bedwani about the company, what the past experience is and what connection they have to Downer and he seemed very defensive." What did he say to you when you raised those issues with him, that's Mr Bedwani?---I can't remember the exact words as it was a few years about but he seem - - -

THE COMMISSIONER: Sorry, this is about Mr Bedwani at Downer?---Mr Bedwani was I guess my counterpart at Downer. So he was in the role of, I
30 was the, the principal's rep for Transport for NSW and he was the proponent's rep for Downer.

Yes.

MR ENGLISH: So what did he say to you, Mr Bedwani, when you raised those points with him?---He seemed, he, he was quite angry. He was, he seemed incredulous that I should be questioning it, that he said that they had work on a lot of other Transport projects and didn't know what my problem was and it's fine. I think later on in the conversation I basically said that,
40 that I wasn't happy about it, I wasn't happy about the timing and I said, "Don't bother sending through any more recommendations for RJS. I won't

approve anymore of them.” So I believe at that time or around that time there was other sort of building works at Wollstonecraft and at Birrong.

Okay. You’ve said, “Please be aware of this on the weekend. Please check if this company is just subcontracting the work out to other firms. It may be an example” - I think it goes on to say - “of pyramid contracting”.---Correct.

10 You’ve asked for someone to check if the company is just subcontracting the work out to other firms. Did you receive a response to that?---I, not from my site team. I believe the project manager with the initials GP.

Yeah.---Do you know who I’m referring to - did respond back after the possession with some insights in that regard.

20 Okay. And what’s the concern if there’s pyramid subcontracting arrangement for Transport for NSW?---My main concern was around the quality of the works and the durability and warranties in regards to that. It wasn’t, my first thought wasn’t jumping to corruption at that point. The works that they were undertaking the, were quite significant. So the platforms at Wollstonecraft were very old and they were actually beginning to lean out onto the rail corridor. They were at risk, the engineering report said, of collapsing within the next few years. So it’s quite safety critical works that were going to be undertaken. There was challenging engineering to be involved and we wanted experienced and reputable companies to be undertaking such work.

30 What about the fact that if there’s pyramid subcontracting there might be margin on top of margin?---Correct. Yes. That was, the, the, the, you know, there was always going to be those extra margins there, but in the matrix that they’d sent through, RJS was still surprisingly, despite that, I think they were the cheapest bidder. I would have been more alarmed if they were not the cheapest bidder and yet Downer had recommended them.

Okay. The email goes on to say, “The contracts are awarded for over 4.5 million in value and are for piling, platform, civil and FRP work.” So that’s three contracts to that value. That’s right, isn’t it?---Correct. Total value, yes.

40 Total value. You said, “The subcontractor recommendation for this company came through at 5pm on Friday night, literally hours before they were due to start onsite.” And you say, “I might be feeling paranoid, but

something seems very odd about all this.” That’s a statement about how you were feeling at the time, was it?---Correct.

And you said, “I have requested formally that Downer supply further information about this company in previous work they have undertaken.” Did someone from Downer do that?---Yes, they did. Andrew Bedwani later sent through formal correspondence with a PDF attachment that detailed I think the seven previous projects that RJS had worked on for both Downer and John Holland.

10

Okay.---But that was after I’d stepped down from the role. Actually, I don’t think that was provided for maybe another six weeks.

All right. And if we can just zoom out a little bit on this.

THE COMMISSIONER: So those contracts awarded, they were the Wollstonecraft, were they?---Wollstonecraft, yes.

20 MR ENGLISH: If that can be zoomed out, the screen. No. No. No, not zoomed in. Zoomed out a bit more, please. One more. And can it be scrolled up a little. There’s a barcode, if we go up, might have to go zoom out a bit, there’s a barcode on the bottom of this computer. No. Yeah. Do you see that barcode there? Do you see the barcode there?---Yes. Yes.

You may or may not be able to recognise that, but are you familiar with that at all?---Yeah, so that’s the asset tags that we have on our Transport for NSW computers.

30 All right. And if, and if we can go up to page - that’s 312, if we can go to page 308, you can see here there’s a WhatsApp message on the bottom of the page, “Lots of heat in Chatswood. Didn’t want to say anything to you so you don’t lose focus.” Do you see that?---I, yes, I see the message.

Could that be just zoomed in a little bit, please. And that’s on 5/11/2020. And your screenshot is forwarded, or a screenshot of your message, rather, is forwarded just above that. Do you see that?---I see that.

40 And you can take it from me that the phone ending in 802 was used by someone named Nima Abdi. Do you know who that is?---I do know who Nima Abdi is, yes.

And this was sent to Tony Nguyen from RJS, the screenshot of that email. Were you aware of that?---No, I was not aware of that.

You said you were feeling paranoid at the time of your email. How does it make you feel to realise that the email that you sent that we'd just been looking at from I think 20 October 2020 was being disseminated outside of Transport for NSW back to the proponent that you were discussing in that email?---Incredibly disconcerting to know that people supposedly on my own team would be undermining the agency in that manner.

10

Is that a convenient time, Chief Commissioner?

THE COMMISSIONER: Yes. Right. We'll continue your evidence after lunch, Mr Wakim. Adjourned.

LUNCHEON ADJOURNMENT

[1.01pm]