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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION DEWAR

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON TUESDAY, 3 DECEMBER 2013

AT 2.05PM

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THE COMMISSIONER: Mr Fordham.

MR FORDHAM: Thank you. Before lunch, and a good while before lunch I asked you about Mr Pallier and in answering my questions you told the Commissioner that he had run an unfair dismissal claim. Do you remember that?---Yes.

10

And were you involved in instructing counsel for that unfair dismissal claim?---Yes I was.

And who was that counsel?---Elaine Brus.

In the course of preparation for the mediation, the compulsory mediation in relation to Mr Pallier's claim was there discussion between yourself, Ms Brus about the importance of contemporaneous notes justifying the SES's position?---Yes there was.

20

Was Ms Calder also involved in that conversation?---Yes she was.

Now just what, so we're clear about it who was Ms Calder?---The manager of Human Resources.

At the SES?---Yes.

Do I understand it correctly that in part Kevin Pallier's defence, if I can call it that, or his justification of his position would be a better phrase, was that he had not been appropriately managed by Mr Pearce?---Yes.

30

In discussions about that issue is that where discussion came about in relation to any documents that might justify the SES's position?---Yes.

Had Mr Pearce produced any records that were supposedly related to his management of Mr Pallier?---I believe so. I never saw them but I believe so.

Were you aware as to whether or not the records that were produced were in typewritten form or in handwritten form?---No I wasn't.

40

In the course of discussions, I withdraw that. Prior to the mediation and on the day of the mediation did you meet in a coffee shop in Wollongong with Ms Brus and Ms Calder?---Yes.

And was there discussion there about the notes that had been produced by Mr Pearce?---Yes.

What if anything did you say?---I said words to the effect of, to Elaine Brus, "You're not going to believe this, Lorna has informed me that she believes that Steve Pearce has falsified evidence."

Now, I want to stop you there and go back. When had Lorna informed you of that fact?---As we were walking to the coffee shop.

Who was Lorna?---Lorna Calder, the manager of HR.

10 And what was it that Lorna said?---She said words to the effect of, "I have concerns in relation to the evidence that Steve produced. I believe that he falsified the diary notes."

Is it the case that in fact what she said that there are a number of options available as to how it was that the diary note may have come about?---I don't recall.

Is it the case that what she said to you was that those options included that they were created after she had asked Mr Pearce for them?---Yes, that's
20 correct.

It was also possible that they'd been made at the time?---I don't recall her saying that.

And it was also possible that they were post dated but closer to the time?---I don't recall her saying that either.

What you remember is a suggestion that one of the possibilities might be that they were falsified?---I recall that as being the only possibility that was
30 raised.

And was that something of concern to you?---Yes.

Why?---Because the falsification of evidence I'd see as a fairly serious matter and it was also critical in the case in relation to Kevin Pallier.

Now Mr Pallier has returned to work at the SES has he not?---Yes, he has.

In a lower position?---Yes.
40

Was, before coming to that position, and don't go into too much detail, but was the preferred position of the SES that he in fact be terminated?---By the SES do you mean Murray Kear?

Well, yes, as its head?---Yes, that's correct.

And how important in your deliberations and your instructions to Ms Brus was the fact that there might be an issue with the falsification or authenticity

of the notes in coming to the decisions that you did on the day?---Sorry, I don't quite understand the question.

All right. One of the issues became that in fact what occurred was an agreement that he return at a lower ranking?---Yes.

Was the fact that there may be some issues with the proof of how it was that he was managed something that you discussed with the barrister?---Yes.

10 Now the - I just want to put a couple of specifics to you and I want to make sure that I get them absolutely correct so please bear with me. Now when I put each of them to you I want you to try and remember as best you can sitting in the coffee shop and tell me whether or not you recollect anything to the effect of this being said. Firstly, that the diary notes were made after Ms Calder's request as a history of discussions?---Yes.

Secondly, they existed but only a summary was provided?---I don't recall.

20 And lastly that they did not exist at all?---Sorry, the third one contradicts the first one.

They being, being - that's absolutely correct, these are all possibilities. Do you remember anything like that being said?---I, I recall the first comment.

THE COMMISSIONER: And you recall the first as a possibility or, or - it's something that I'm not - I don't think I really have understood precisely what your evidence is on this. Do you mind just telling us in your own words what it was that was said to you?---Okay. I recall that there was only one scenario put to me by Lorna Calder, which was that she was of the
30 belief that Steve Pearce had falsified his evidence in relation to the diary notes. I do not recall any alternatives being offered.

MR FORDHAM: Did you raise that information with Mr Kear?---Yes, I did.

When?---Shortly after, the next time I saw him after that, after that day of the hearing.

40 And what did you say to him?---I, I said to him words to the effect of, It looks like we've got another problem with this matter. It appears that there might be some issues in relation to Steve's evidence. There's a suggestion or an allegation that he might have falsified his diary entries.

Now, at that stage you put it as a suggestion or an allegation, what if anything did you think should happen in relation to that suggestion or allegation?---I expected or anticipated that it would be looked into.

When you say looked into what do you mean by that?---That ah, Murray Kear would conduct, you know, some kind of investigation or questioning around it with Steve Pearce.

To your knowledge what if anything did Murray Kear do with that information that you gave him?---At that time I don't know that he did anything.

10 Did he ever say anything to you about what he was going to do as a result of having been given that information?---At that time he said to me, "I don't believe that, I don't have any issues with Steve's evidence."

To your knowledge was – were those allegations ever referred to an independent investigator?---Yes.

When?---After I produced a memorandum to follow up on the issue and, and made a report to Murray Kear as a Public Interest Disclosure.

20 And was that on or about 23 April?---That's correct.

And can we turn up 497, please. So that's an email, sorry, a memorandum you received in response. I'm just going to turn up the document from 23 April?---Sorry, I never received this.

All right. I'm just going to go back a step. Now, I apologise for that. Could you please turn to 436. What is that document?---That's the memorandum that I wrote to Murray Kear reporting the allegations that had been raised by Lorna who was known as Lorna Grange at the time.

30 And she subsequently changed her name to Calder?---Yes.

Now, given the nature of the allegation, what did you expect should have taken place?---Ah, I made a recommendation that the Commissioner should reappoint the independent investigator, Helen Colbey, to investigate the allegations given her prior knowledge of the matter.

THE COMMISSIONER: Okay.

40 MR FORDHAM: Now- - -

THE COMMISSIONER: This is your memorandum?---Yes.

And have you read it recently?---Pardon?

Have you read it recently?---I'm just reading it very quickly then.

All right. Just read it. Is that, is that an accurate statement of what occurred?---Yes.

What was the statement provided by Deputy Commissioner Pearce to Helen Colbey that was thought to have been falsified?---My understanding is it was entries that indicated that Steve Pearce had counselled Kevin Pallier on a number of occasions in relation to his excessive use of overtime.

Well, the document, the second paragraph refers to diary entries and a statement?---Yes.

10 Is the statement something separate from the diary entries or is it part of the diary entries?---Ah, I, I don't know for certain.

Well, what did you understand?---I understood that it was a statement made as part of the investigation into Kevin Pallier.

So it's not part of the diary entries?---No, I understood- - -

It's a separate statement?---There was a statement and there were diary entries to support it.

20

It's a statement provided by Mr Pearce to who?---To Helen Colbey as the independent investigator.

Right. Was that an oral statement or a written statement, do you know?
---I believe it was written.

A written statement?---Yes.

30 Who told you it was written?---I've seen part of that statement, I've seen part of a written statement that Steve Pearce provided.

Where he said what?---I haven't seen this statement in entirety.

I see. But what I'm trying to find out is this. You see that sentence says, "The specific evidence thought to have been falsified was diary entries and a statement."?---Yes.

40 The - what, what was the gist of the false material in the diary entries?
---My understanding is that it was entries into a diary ah, making notes around when Steve Pearce had formally counselled Kevin Pallier in relation to his excessive use of overtime.

And what is the gist of the falsified material in the statement?---It's reference and discussion to his counselling sessions with Kevin Pallier.

I see, and you - - -?---Over his overtime.

And the notion that this material was falsified was given to you by - - -?---
By Lorna Calder it was raised.

At the, at what time, at, was it in the café or was it walking or - - -?---
Originally as Lorna and I were walking to meet Elaine Brus and then we
had a discussion with Elaine about it.

Yes, thank you.

10 MR FORDHAM: Now, did you actually view any version of the diary
entries yourself?---No.

Did you actually view any version of the alleged statement yourself?---I saw
a few pages at some point but I never saw a complete - - -

Could you go to page 360 for me. 3-6-0. Did you ever see this document
which was authored by Helen Colbey?---Um, I believe so, yes.

20 And just so I'm clear about it is it the case that what was in issue was
whether or not and if so to what extent Mr Pallier had been counselled by
Mr Pearce in relation to the issues for which he was being disciplined?---
That's correct.

Thank you. Now, having raised these issues with Mr Kear did you get a
response from him in relation to what he thought should be done?---After
the memorandum was - - -

30 Yes?---Yes, he informed me that he had spoken to Helen Colbey and she
had advised him that he should interview Lorna Calder in relation to the
matter and he was going to do that.

Now, on or about 14 May, 2013 did you receive a memorandum which is to
be found at page 497 from Murray Kear in relation to the falsification of
evidence, or alleged falsification of evidence?---No, I've never seen that
before. That's authored the day I was sacked.

THE COMMISSIONER: I beg your pardon?---That's authored the day I
was sacked, or dated the day I was sacked.

40 Yes. But you've never seen it?---No.

It wasn't given to you on that day?---No.

And it was in fact, is this the first time you've ever seen it?---Yep.

MR FORDHAM: Now, sorry. Now, was there a meeting of management at
Port Macquarie in late April, early May of 2013?---Um, early April, 8th, 9th,
10th April.

Sorry. I apologise, you're quite right. And who was present by reference to their level of rank if you like, within the SES?---All, the Commissioner, myself, the, a number of directors, the regional controllers and deputy regional controllers, and a few other ancillary people.

Now, in the course of that meeting was there a discussion about issues arising out of your position and Mr Pearce's position?---Yes there was.

10 Who led that discussion?---It was led by Murray Kear and Steve Hall.

And without going into unnecessary detail did Mr Kear offer a summary as to what he saw the problem was?---Yes he did.

And what did he identify the problem as being?---He said words to effect of, It was a values, it was a personality conflict and a values disconnect between Tara and Steve.

20 THE COMMISSIONER: Between Tara and?---Steve.

MR FORDHAM: Being yourself and?---And Steve Pearce.

Did you say anything in relation to that?---I did.

What did you say?---I said it's not a personality conflict, this is about honesty and integrity and professional competency.

30 During the course of that discussion at Port Macquarie did Mr Kear say anything about what would have to happen to one or both of you if you couldn't sort it out?---He did.

And what was it that he said?---He said words to the effect of, I've got a number of options open to me, one of which is to terminate either one or both of them and I will be giving the matter some thought over the new few months.

What is the SEG?---The Senior Executive Group.

40 And did it have a meeting on or about 6 May of this year?---It did.

Were you present?---I was.

Was Mr Kear present?---Yes.

Was Mr Pearce present?---Yes.

During the course of that meeting was anything said about the issues that were arising from the complaints that you had made about Mr Pearce's conduct?---Yes.

10 What was said?---Murray Kear said words to the effect of, I have known Steve Pearce for 26 years. I know him very well. He is an excellent performer. Tara has a misguided view of Steve Pearce. I do not support that view. He is an excellent performer. I am going to have to make some decisions around this which may or may not involve terminating one or both of them.

Did you attend an in-house course at Manly earlier this year and it seems to have been in late April, early May?---Yes, I did.

What was that course?---Strategic command and control run by the Australian Institute of Police Management.

And what was that course directed to?---It was a focus on leadership.

20 And can I ask who by reference to the types of people in attendance were there, so from what agencies?---Ah, emergency services agencies it was targeted at so Fire and Rescue, interstate and New South Wales SES agencies, Police, Federal Police and so on.

In the course of that in-house course were there forums in which leadership were discussed?---Yes.

And did you participate?---Yes.

30 In the course of participation did you say anything to the forum about your views of Mr Pearce?---Mr Pearce, not, no.

Did you say anything about Mr Kear?---Yes.

40 What did you say?---I said in response to a question about my view on his leadership, given that I was working with him, I said words to the effect of, I support everything that's just been said, somebody had just given a summary of their view of his leadership. However, my experience of Murray is that he have difficulties making, he has difficulties making hard decisions when it involves people he knows.

When you - - -

THE COMMISSIONER: Who asked you that question?---Pardon?

Who asked you that question?---Ah, the ah, facilitator of the, of the programme. People, people would come up, people would do a presentation on a leader and then it was thrown to the group to discuss that person.

This would be a leader of some agency?---Not necessarily, some, somebody spoke about Ernest Shackleton for example, you could choose anybody.

Whose idea was it to choose Mr Kear?---A fellow from Fire and Rescue, I can't remember his name.

10 Isn't that an odd thing to do, I mean, just as a matter of interest, to go to a meeting and then nominate some person in, in the public service who's a leader and then invite everyone to criticise him publicly? I mean, what, what is actually the benefit of this?---I, I don't know.

Well, whose idea is it?---That, that was the way the course was run.

Well, what's the purpose of the course?---It's, leadership is the purpose of the course.

Leadership?---Yes.

20 And how is this supposed to teach you leadership?---I guess we were expected to analyse different leaders and whether we saw they were good leaders or bad leaders.

And were you then supposed to be – were you expected to be frank?
---Yes, very much so.

And is this run by the Government?---A private organisation.

30 What are they called?---The Australian Institute of Police Management.

Police Management?---Yes.

MR FORDHAM: And just to finish off the Commissioner's interest in this area, I take it the various government agencies paid this private institution to provide this leadership training?---Yes, and it was quite expensive.

And you all turned up and amongst other things were educated in how it is that one should lead?---Yes.

40 And part of that involved the analysis of various leaders from almost any walk of life?---Yes.

And people would choose someone, give a presentation about them – correct?---Yes.

And then to follow up on what the Commissioner asked you, the floor would be invited to frankly and openly discuss the leader in question?
---Yes, that's right.

Do I assume that frankness and openness is something that you're not afraid to do?---You assume correctly, yes.

Well, on that theory, who's Mr Fitzgerald?---Keith Fitzgerald?

Yes?---Yes. He, he's a director at the SES.

10 And did you ever have a discussion with him about your views in the management of the SES?---Yes, I did.

And in that, in that conversation did you criticise Mr Pearce or Mr Kear?
---Yes, I did.

Who's Mr McTavish?---He's a regional controller at what's called Murrumbidgee.

20 And did you ever have a discussion with Mr McTavish about your views of the management of the SES?---Not that I recall.

What about Mr Murphy?---Yes.

Now, who's Mr Murphy?---He's a regional controller in Illawarra.

And did you ever have a discussion with Mr Murphy about your views on the management of the SES?---Yes.

30 And in that conversation did you criticise either or both of Mr Pearce and Mr Kear?---Not that I recall.

Is it the case that you were in your tenure at the SES not afraid to make criticism of the organisation for whom you were working?---That, that would be true, yes.

And if engaged in conversation would express your views?---Yes.

Did you express those views to amongst other people Mr Kear?---Sorry?

40 Did you express your views to amongst other people Mr Kear?---Yes.

Now, you had received a pay review in January of 2013?---Yes.

Did that involve a meeting with Mr Kear?---No.

Did it involve to your understanding a revisitation of the deliverables that you had signed up to when you commenced at the SES?---It should have, yes.

And- - -

THE COMMISSIONER: Would you mind just – sorry, Mr Fordham. I’m really keen to know what this concept of deliverables is. What is deliverables?---My performance agreement and, and what I was going to achieve during my tenure.

Is that a word used in the public service?---Yes.

10 Meaning?---What you’re going to achieve.

I see.

MR FORDHAM: I’ve become infected with the language. I apologise. If I could go back to something I asked you just before morning tea. You had a performance agreement?---Yes.

20 In that performance agreement, amongst other things, you had been charged with 100 per cent compliance for procurement contracts?---Yes.

It was in the course of exercising that part of your performance agreement that you uncovered the Karoshi/Performance Drivers issue?---Yes.

You were also charged with looking into the overtime budget for the SES? ---Yes.

In the course of that you had uncovered a number of things, one of which was Kevin Pallier’s issues?---Yes.

30 You also uncovered a wider-spread use of overtime that did not necessarily comply with State Government policy?---That’s correct.

And you instituted changes in relation to that?---Yes.

To the cost of people working at the SES?---Yes.

You were also charged with looking into amongst other things the use of motor vehicles?---Yes.

40 And you did that?---Yes.

Prior to 14 January, sorry, 14 May of this year had you received any warning at all that you were the subject of adverse comment from Mr Kear such that you might be sacked?---No.

Prior to him walking into your room had you been furnished with any document setting out alleged shortcomings in your performance?---No.

Had he at any stage warned you that if you did not change your behaviour that you would be sacked?---No.

THE COMMISSIONER: Did he ever complain that you'd publicly criticised SES or anybody in it?---No.

Did anyone else complain to you about your conduct in that respect?---No.

10 MR FORDHAM: Now, was Mr Morrow with Mr Kear when you were terminated?---Yes.

And how long did this interview take in which you were terminated?---30 seconds to a minute maybe.

20 What if anything was said by Mr Kear to you?---Ah, he said words to the effect of, "I have sought advice from the Public Service Commissioner and from Crown Solicitors. I am terminating you effective immediately under section 77(1) of the Public Sector Employment Act, where there is provision to terminate you for any or no known reason, the reason being I have lost trust and confidence in you. Do you have any questions?"

Were you given any particulars of what it was about what you'd done that had led to him losing trust and confidence in you?---No.

When you were asked if you had any questions what did you respond?---Ah, I said, "No, I will have to seek some advice."

How did you get home that day?---By taxi.

30 Do you know who arranged that taxi?---Murray Kear informed me that he had ordered a taxi.

And when he informed you that he'd ordered a taxi when was it that he informed you of this?---After I said, "No, I don't have any questions, I'll have to seek advice," he said words to the effect of I was to go back to my office, pack up all my things under the supervision of Mark Morrow, surrender my phone, credit card and other items, I was to go downstairs, empty my motor vehicle and a taxi would be there in 30 minutes.

40 In your presence did Mr Kear order the taxi?---No.

Thank you, I'll just be one moment. Nothing further, thank you.

THE COMMISSIONER: Yes, thank you. Mr Oates.

MR OATES: Two things, Commissioner. Prior to you coming back on the bench I had a chat to my friend, some of my colleagues and thought that I might go last if that's suitable to Your Honour.

THE COMMISSIONER: Why should you go last?

MR OATES: Well because it might save time, Your Honour.

THE COMMISSIONER: I think we'd save a lot of time if you went first.

MR OATES: Yes, well, in that case might have to - - -

10 THE COMMISSIONER: I just don't understand it. You're the one who carries the main burden.

MR OATES: Ah hmm, I do.

THE COMMISSIONER: But I don't want, I'm not, is everyone trying to avoid grasping the thistle or what is it?

MR OATES: I don't know what anyone else's attitude is, Your Honour.

20 MR HARRIS: Well I, on behalf of Mr Pearce I'm happy to go first. But I won't otherwise embark on this particular exchange.

THE COMMISSIONER: But I, the, I think, Mr Fordham, what is your attitude?

MR FORDHAM: I don't have a strong view. The only person that I think, actually I should have raised it to my friend, I didn't, but should go last is the person representing Ms McCarthy.

30 THE COMMISSIONER: Yes, that's - - -

MR FORDHAM: That should be - - -

THE COMMISSIONER: That's the general rule.

MR FORDHAM: As to what other order the Commission entitles people to cross examination I don't have a strong view.

40 THE COMMISSIONER: The general practice that I followed is that the person, the counsel representing the person substantially at risk should go first. And the reason for that is they are I would expect be on top of all relevant issues and the others would follow on. And so there would be no duplication. But if you, Mr Oates, if you say that you're prejudiced by that then I don't want to force you to go first.

MR OATES: I don't say that I'm prejudiced by that, your Honour, necessarily, I do say that I'm prejudiced by another issue, by the inclusion of the fourth term of reference today which has taken me by surprise. I've had no chance to discuss that with my client.

THE COMMISSIONER: Well - - -

MR OATES: Another issue is this.

THE COMMISSIONER: Just a moment, let me just deal with one at a time. Mr Oates, apparently what you're saying is not being heard by most of the people in the room, do you mind speaking over the microphone.

MR OATES: My apologies.

10

THE COMMISSIONER: All right. I will - you can, if you say that you're prejudiced by that and I must say I'm really surprised at that but if that's the case you can commence tomorrow morning. What else are you complaining about?

MR OATES: I'm not complaining, your Honour, I'm merely putting submissions, that all.

THE COMMISSIONER: Well, you said there was another matter.

20

MR OATES: Yes, but that's not relevant now because of your decision that I can start tomorrow.

THE COMMISSIONER: Yes, all right. Mr Harris?

MR HARRIS: Commissioner, thank you.

Ms McCarthy, my name is Harris, I'm representing the interests of Steven Pearce. But just briefly please go to the two contracts that you were asked earlier about and that's to do with Karoshi and Performance Drivers. You were I think - - -

30

THE COMMISSIONER: What page is that, Mr Harris?

MR HARRIS: Page?

THE COMMISSIONER: What pages?

MR HARRIS: I don't have a transcript page, your Honour, I am sorry.

40

THE COMMISSIONER: They were mentioned in chief, the pages.

MR HARRIS: Well, it's more her oral evidence and I'll specifically say it's to do with what the conversation with Alan Cook was, Commissioner?
---Yes.

If I may?

THE COMMISSIONER: Yes.

MR HARRIS: Yes, thank you.

He had told you that Steve Pearce had said words to the effect that the SES could pay him \$240,000?---Yes.

Correct, is that, that's what Alan Cook of Performance Drivers told you, correct?---Yes.

10

I think you said, I want to clear this up, you haven't got Mr Pearce's version of that conversation at any time have you?---I, I didn't - - -

THE COMMISSIONER: I'm not sure what you mean, Mr Harris.

MR HARRIS: Well, this is Mr Cook's version of his purported conversation with Mr Pearce at the time or in the process of his being engaged, correct?---That's right.

20 Yeah?---Yes.

It's correct isn't it you've never got Mr Pearce's version of that?---No.

All right. And what had attracted your attention I think, correct me if I'm wrong, is that Mr Pearce appears to have used a precedent that was unorthodox and not in accordance with the approved guidelines?---Yes.

Yeah. All right.

30 THE COMMISSIONER: Well, he used a - I mean the point is, Mr Harris, that he used a precedent which he got from - - -

MR HARRIS: Mr Eggert.

THE COMMISSIONER: - - - the other parties to the contract.

MR HARRIS: Yeah, Mr Eggert, yes.

THE COMMISSIONER: Yes.

40

MR HARRIS: Yes. And when you met with Steve Pearce about this I think that's the meeting where you had said "Don't say anything"?---Yes.

Correct, all right. And where you've told us in fact that Mr Pearce had volunteered that it had or agreed it had been a mistake to use those forms or those precedents for the contractual arrangement?---No, he, he indicated it was a mistake not to go to tender or quote.

All right. All right. Thank you. You've said Karoshi was not well-known in your understanding, is that right?---I said I've never come across them before.

Now that's Mr Frank Eggert's company though isn't it?---Yes.

Or wasn't it, yeah. Well, it was - and you've said for example Performance Drivers is or was a pre-approved consultant?---Yes.

10 You've said Karoshi in your view was not?---Yes.

All right. Do you know whether Frank Eggert himself or any of his other previous companies were, was a pre-approved consultant?

MR FORDHAM: I object to that question. I don't understand that the contract was with Mr Eggert in his personal capacity.

THE COMMISSIONER: Yes.

20 MR HARRIS: That may be the case, yeah.

THE COMMISSIONER: I will allow the question.

MR HARRIS: I think, I think Karoshi was effectively a corporate vehicle for Mr Eggert's services wasn't it?---Yes.

Yeah?---That was my understanding.

30 Well, do we know or do you know was Mr Eggert a pre-approved contractor?---He indicated to me that he was not.

All right. At any time have you spoken to a Mr Bruce Mitchell – and I put to you that he is Director of State Fleet. Do you know him?---I've spoken to him, yes.

All right. Have you had the opportunity to get his view on Mr Eggert in terms of his suitability as a contractor?---No.

40 All right. In relation to Mr Pallier the Commissioner here today had asked you on what possible basis could he have been suspended?---Yes.

Remember this?---Yes.

Because it was apparent at least to a certain degree that his overtime had been approved?---Yes.

Yeah. All right. Isn't it the case, and you know this, that he was suspended because of those issues to do with the non-disclosure of a gift or a benefit?

---I knew of that second-hand, yes.

All right. And, and, and a suggestion of alleged bullying by him?---Yes.

Yeah. And to do with his, well, his relationships with other staff generally. Correct? His demeanour, his interactions?---Not that I recall.

All right. If I can take you also then on please to the evidence about Mr Schafer. And this is the use of the motor vehicle?---Yes.

10

You said that it is an online, I'm sorry, a line item in the NRMA budget? ---Yes.

Am I correct?

THE COMMISSIONER: NRMA budget?

MR HARRIS: Yeah, I think that was what you said?---Yeah.

20 It was- - -

THE COMMISSIONER: Pardon?

MR HARRIS: The sponsorship budget.

MR FORDHAM: If I could rise at this point. The evidence was that the NRMA provided certain moneys which formed the budget for Mr Schafer to use and then this was a line item.

30 THE COMMISSIONER: Yes.

THE WITNESS: Yes.

THE COMMISSIONER: It was a line item in the SES budget.

MR HARRIS: Yes.

THE WITNESS: Yes.

40 MR HARRIS: All right. Thank you. I apologise there. Now, you have spoken to Mr Schafer about that vehicle and it was he who said Steve Pearce had offered him the vehicle to persuade him to come on board at SES. Correct?---Yes.

All right. But you haven't, correct me if I'm wrong, ever obtained Mr Pearce's version of the conversations leading to Mr Schafer's being employed or engaged?---No, no.

And it was a leased vehicle, wasn't it?---Yes.

Yeah. It was part of the SES fleet?---No.

It wasn't?---No, it was not available to anybody else to use.

Now, finally, you told us about Lorna, we knew her as Grange and Ms Calder?---Yes.

10 You said she'd given you a, her belief about the diary entries – this is to do with the overtime?---Mmm.

Firstly when you were walking. Correct?---Yes.

Was that just the two of you, was it?---Yes.

All right. But then you, you two then subsequently joined Elaine Brus, the barrister, at the coffee shop. Is that right?---That's correct.

20 So then there were three of you?---Yes.

All right. And you've said, you said to Elaine Brus, the barrister, at the coffee shop words to the effect, "Lorna believes that Steve Pearce has falsified evidence."?---Yes.

Yeah. And do you say Lorna was present when you gave to the barrister your version of what she'd said?---There was the three of us.

30 The three of us. So you told the barrister what Lorna had said to you on the walk?---I, I gave a summary, a few words, and then Lorna- - -

A version?--- - - -continued.

And then Lorna?---Lorna Calder continued to explained.

All right. All right. And that is where you've already been asked I think about the various possible scenarios- - -?---Yes.

40 - - -in relation to those notes? All right. Thank you, Commissioner.

THE COMMISSIONER: Mr Harris, you have – I'm sure you have read the directions?

MR HARRIS: Yes.

THE COMMISSIONER: And you're aware of the directions relating to the putting of the case on important issues?

MR HARRIS: Yes.

THE COMMISSIONER: I'm just, I'm just - - -

MR OATES: Well, Commissioner - - -

THE COMMISSIONER: I'm, I'm - - -

MR HARRIS: I'm grateful

10

THE COMMISSIONER: - - - making sure that there's no misunderstanding here.

MR HARRIS: Well, there may be a misunderstanding and if I could explain it this way, my client Mr Pearce will be called as a witness and he will give evidence when Counsel Assisting leads you through it as to his versions of the - I don't propose to leave that evidence from him.

THE COMMISSIONER: Well, that's correct, that's not in the practice.

20

MR HARRIS: No. And I understand he's given evidence in a compulsory private hearing.

THE COMMISSIONER: Yes.

MR HARRIS: And I trust that his position on these issues is well known to Counsel Assisting and I anticipate he'll give evidence in accordance with what he's previously said.

30 THE COMMISSIONER: Yes.

MR HARRIS: Yes. That's my position.

THE COMMISSIONER: Mr Harris, I am looking at paragraphs 14 to 17 of the Standard Directions and you're aware of those are you?

MR HARRIS: Yes, I've read those, Commissioner.

THE COMMISSIONER: All right. Well - - -

40

MR HARRIS: Yes, thank you. I'm conscious that when this witness says words to the effect I don't propose particularly if my client wasn't - - -

THE COMMISSIONER: No, I, I agree with that approach and I'm grateful for it.

MR HARRIS: Yes.

THE COMMISSIONER: But I don't have to, I'm sure that you understand what the import of that is and I mean, to be blunt about it I expect that where a witness, where Counsel is going to say that a witness is not telling the truth on a matter of some importance will that be put to the witness in all fairness.

MR HARRIS: Yes. My problem is that the conversations of that this witness has given evidence of and to which I've eluded now in my questions are not ones in general where my client was present.

10

THE COMMISSIONER: I understand that.

MR HARRIS: Yes.

THE COMMISSIONER: All right, that's fine. I am, I wish to make it clear that on no, I'm not criticising you in any respect, Mr Harris.

MR HARRIS: No.

20 THE COMMISSIONER: I'm really just attempting to make sure that there is no misunderstanding between us.

MR HARRIS: Thank you.

THE COMMISSIONER: Yes, thank you.

MR WILLIS: I have not questions, Commissioner.

30 THE COMMISSIONER: Yes. Ms McGlinchey?

MS McGLINCHEY: Thank you. Ms McCarthy, my name is McGlinchey. I represent Lorna Calder in these proceedings. Ms McCarthy, I just want to ask you a couple of questions about your evidence about the conversation that you had prior to the IRC Commission hearing and this of course relates to the allegation that Mr Pearce falsified diary notes, okay?---Yes.

All right. Now, just correct me if I'm wrong, that conversation took place immediately before the three participants went to the Industrial Relations hearing, is that correct?---That's correct.

40

All right. Do you know if at that time a brief of evidence had already been tendered as evidence at that hearing?---I'm not sure.

All right. So do you know whether the diary notes about which we're speaking had already been put before the court?---No, I don't know.

All right. Did Ms, did you, I take it you went to those proceedings and you remained there while the matter was discussed at the Commission?---Yes.

All right. Do you know whether Ms Brus acting as the barrister for the SES alerted the court to the fact that there had been problems with the evidence?--No, she didn't.

She didn't raise anything at the hearing?---No.

All right. Okay. Now just going back to the - - -?---It wasn't a hearing. It was conciliation.

10 Well, I'm sorry, I'm using the wrong word. Conciliation. All right. But that doesn't change the fact that Ms Brus didn't raise any problem, didn't say to the court, "Oh look, we might have to pull back some of our evidence, there may be a problem with it." She didn't say anything like that?---No.

All right. Was there a discussion about that prior to going to the conciliation?---About her saying something?

20 Yes, about whether she should alert to the court the fact that there may be a problem with the evidence?---No.

All right. Okay. Going back to the actual conversation between the three of you prior to going into the conciliation could I suggest to you that Ms Calder never expressed a view that Mr Pearce had falsified evidence? And I'll just elaborate on that so you know where we're going, that in fact what she did was speculate on some possibilities about why diary notes hadn't been produced to her?---That's not how I recall it.

30 All right. Okay. You recall her putting a positive proposition?---I recall her putting forward the proposition that she believed Steve Pearce had falsified evidence.

Right. Well, did you ask her the basis of that belief?---Yes.

40 And what did she say?---She said words to the effect of, "When I asked him if he had any evidence of these meetings with Kevin Pallier he told me that he didn't. I explained to him that that was going to be a huge exposure in our case," or words to that effect, "And then he subsequently at a later date produced written evidence."

So is it your evidence that Ms Calder has said, has told you that Steve Pearce in fact admitted right from the start that there were no records and that he was in fact, came back later and had produced some?---Yes.

And that Ms Calder then went and produced those for the purposes of the IRC conciliation?---I don't know that she produced them for the IRC.

All right. Well, so you're saying that Ms Calder in fact was party to this fabrication of evidence?

MR FORDHAM: I object to that. That doesn't follow at all.

THE COMMISSIONER: No, she's not saying that.

THE WITNESS: No.

10 MS McGLINCHEY: All right. Okay.

THE COMMISSIONER: If you want to try and show that this is by implication something that she said, you're at liberty to do that. The way in which the proposition is put is not fair.

MS McGLINCHEY: All right. Okay. Well, I might just leave that, Commissioner.

20 Moving on, not long after that time Ms Calder went away on holidays and when she returned you had a further conversation with her about this matter. Do you recall that?---Yes.

Right?---I recall a conversation.

30 All right. And do you recall that you asked for Ms Calder's support in your complaint against Mr Pearce, do you – is that the substance of the conversation that you recall?---No. The substance of the conversation, assuming we're talking about the same conversation, was to inform Lorna Calder that I had reported the matter to the Commissioner, I wanted to give her warning of that, and that there would be potentially inquiries around that.

And what did Ms Calder say to you?---She told me that was fine, she appreciated that I had let her know. She maintained her view that there were issues around the evidence and she believed that he had falsified it and that she would tell Murray Kear that if asked.

Well, you know she didn't tell Murray Kear that?

40 THE COMMISSIONER: How does Ms McCarthy know that?

MS McGLINCHEY: All right, then. Okay. All right. I'll leave that. Can I suggest to you that in that conversation Ms Calder made it very clear to you that she had never expressed a view to you that Mr Pearce had falsified the evidence, she talked to you about the conversation that was had before the conciliation and she emphasised to you that what she was doing in that conversation was speculating on possibilities?---No, I don't agree with that statement.

Nothing further, Commissioner.

THE COMMISSIONER: Thank you Mr Dunne?

MR DUNNE: No questions.

10 THE COMMISSIONER: Well, Mr Oates, I'm really anxious not to waste time. Is, you should be able to commence your questioning and leave the questioning concerning the fourth item of the scope until tomorrow morning.

MR OATES: I can't do that with respect, Commissioner, because it's really wrapped up in the other three matters in my submission.

THE WITNESS STOOD DOWN

[2.58PM]

20 THE COMMISSIONER: All right. Mr Oates, if that's your attitude – I don't agree with that and I can't understand why you can't begin with the others, but if you're telling me that you can't I will accept that. So we'll adjourn until tomorrow, but I think that we should start earlier tomorrow.

MR FORDHAM: I have some other witnesses I can call now if that would assist, if you wish me to interpose.

THE COMMISSIONER: Yes. All right. But then how long are the witnesses going to be?

30 MR FORDHAM: A few minutes each.

THE COMMISSIONER: Yes. It's a good idea, Mr Fordham.

MR FORDHAM: I thought rather than waste time I'd line some people up.

THE COMMISSIONER: Yes.

MR FORDHAM: I call Mr Mark Frederick Morrow.

40 THE COMMISSIONER: Ms McCarthy, you are of course free to go. If you wouldn't mind coming back tomorrow morning and we'll continue with your evidence tomorrow.

MR DUNNE: If it please - - -

THE COMMISSIONER: Mr Morrow, if you would take the witness box please.

MR DUNNE: If it please your Honour I represent Mr Morrow.

THE COMMISSIONER: Yes, Mr Dunne.

MR DUNNE: I seek a declaration and advise - - -

THE COMMISSIONER: Yes.

MR DUNNE: - - - Mr Morrow will take an oath.

10

THE COMMISSIONER: Thank you. I declare that all answers given by Mr Morrow and all documents produced by him during the course of his evidence at this public inquiry are to be regarded as having been given or produced on objection and accordingly there is no need for him to make objection in respect of any particular answer given or document produced.

20

I DECLARE THAT ALL ANSWERS GIVEN BY MR MORROW AND ALL DOCUMENTS PRODUCED BY HIM DURING THE COURSE OF HIS EVIDENCE AT THIS PUBLIC INQUIRY ARE TO BE REGARDED AS HAVING BEEN GIVEN OR PRODUCED ON OBJECTION AND ACCORDINGLY THERE IS NO NEED FOR HIM TO MAKE OBJECTION IN RESPECT OF ANY PARTICULAR ANSWER GIVEN OR DOCUMENT PRODUCED.

THE COMMISSIONER: Would you swear Mr Morrow in please.

THE COMMISSIONER: Mr Fordham.

MR FORDHAM: Sir, what's your full name?---Mark Frederick Morrow.

And what is your business address?---Level 6, 6-8 Regent Street,
Wollongong.

10

What's your occupation?---At the moment Acting Deputy Commissioner of
the State Emergency Service.

Immediately prior to 8 May this year what was your substantive position?
---Assistant Commissioner, Director of Special Operations.

And from 8 May to 21 May were you appointed to act up?---I was.

And into what position?---Ah, Deputy Commissioner, Operations.

20

In place of whom?---Steven Pearce.

On 14 May, 2013 at about 1.45pm were you approached by Commissioner
Kear?---Yes, I was.

And where were you when he approached you?---I believe I was in my
office.

And did he ask you to go somewhere with him?---Into his office.

30

And when you went in there did he tell you why he wanted to see you?
---Yes, he did.

What did he tell you?---That he intended to terminate Tara McCarthy's
contract that afternoon.

I want to take that back a step. The conversation as best you can what did
he actually say to you about that intention?---I believe it was words to the
effect that he was going to terminate Tara's contract.

40

Did you go somewhere with him after that?---I don't think so.

All right. Did Ms McCarthy come into the office?---Some time later.

Were you there when the, when the termination took place?---I was.

Do you remember - - -

THE COMMISSIONER: I'm sorry, Mr - I'll just ask a question here.

MR FORDHAM: Yes, of course.

THE COMMISSIONER: Do you know why Mr Kear wanted you, came to tell you what he was going to do?---No, I don't know why but the only thing I can assume is that he was preparing me to be available at the time that he intended to terminate her.

10 He wanted you to be a witness?---Yes.

That's the only explanation?---That's the only explanation - - -

I mean I'm not saying it's the wrong explanation but that seems to be - - -?
---No.

- - - the only explanation?---That's the only explanation he provided me.

20 And how long before he actually terminated her did, did this first conversation between you and him occur?---I would only be guessing but I'd say in the vicinity of an hour, possibly a little less.

MR FORDHAM: And in that conversation did he raise with you why he was terminating?---No, sorry, I'll correct the record there. No, I believe the first time I heard that was at the time that it occurred.

And prior to the actual termination taking place - - -?---Yes.

30 - - - had Commissioner Kear raised with you any reasons why it was that he was terminating Ms McCarthy?---Not reasons why he was terminating her, no, I don't recall any conversation around that.

Were you present when the termination took place?---Yes.

How long did it take?---Minutes.

40 Do you remember what if anything Commissioner Kear said, just doing the best you can, I appreciate it's a few months ago?---Yeah. I did make a statement but words to the effect that he called her into the office today to inform her that he intended to terminate her contract under the PS Act and in order to offer her procedural fairness was there anything that she wanted to say in relation to that.

And what if anything did Ms McCarthy say?---She hesitated momentarily and said, No, I'll take that on notice, or words to that effect.

Was anything said about when the termination would take effect from?
---Yes, I believe Tara said, Is this effective immediately?

And what was the answer to that?---“Yes.”

How did Ms McCarthy get home that day?---I escorted her from the building and waited with her until a cab arrived and she left in a cab.

Had that cab been arranged in your presence?---Not in my presence, no.

Had it been arranged in Ms McCarthy’s presence whilst you were there?---
10 Ah, not while I was there. You’d have to ask Ms McCarthy though.

Thank you. Yes, I have nothing further.

THE COMMISSIONER: Yes. Mr Oates, are you ready to question?

MR OATES: I don’t any questions, any, nothing of Mr Morrow,
Commissioner.

20 THE COMMISSIONER: Yes, Mr Harris.

MR HARRIS: No thank you.

MR DUNNE: Nothing from me thank you, Commissioner.

THE COMMISSIONER: Has anyone else, no. Thank you for your
evidence, you’re free to go.

30 **THE WITNESS EXCUSED** **[3.05pm]**

MR FORDHAM: If it pleases the Commission I call Ms Elaine Brus. I
don’t believe Ms Brus is legally represented.

THE COMMISSIONER: No. I can understand why. Ms Brus, do you
want me to make the section 38 order?

MS BRUS: Yes I do thank you, Commissioner.

40 THE COMMISSIONER: I declare that all answers given by Ms Brus and
all documents produced by her during the course of her evidence at this
public inquiry are to be regarded as having been given or produced on
objection and accordingly there is no need for her to make objection in
respect of any particular answer given or document produced.

**I DECLARE THAT ALL ANSWERS GIVEN BY MS BRUS AND ALL
DOCUMENTS PRODUCED BY HER DURING THE COURSE OF**

**HER EVIDENCE AT THIS PUBLIC INQUIRY ARE TO BE
REGARDED AS HAVING BEEN GIVEN OR PRODUCED ON
OBJECTION AND ACCORDINGLY THERE IS NO NEED FOR
HER TO MAKE OBJECTION IN RESPECT OF ANY PARTICULAR
ANSWER GIVEN OR DOCUMENT PRODUCED.**

THE COMMISSIONER THE COMMISSIONER: Do you wish to give you
evidence under oath or do you wish to affirm the truth of your evidence?

10

MS BRUS: I wish to affirm thank you.

THE COMMISSIONER: Would you give the witness the affirmation
please?

MR FORDHAM: What is your full name?---Elaine Shirley Brus.

And your occupation?---I am technically a barrister but I've retired from my practice. I'm now a management consultant.

10 THE COMMISSIONER: I bet your pardon?---A management consultant.
Management.

MR FORDHAM: And when did you retire?---At the end of September this year.

Where are you practicing from, or working from?---I'm working from home. I'm no longer in Chambers. I've let my Chambers go.

20 Perhaps I won't take your address but are you prepared to give that to the Commissioner if they ask for it?---Absolutely.

Thank you. Up until becoming a management consultant what was your occupation?---I was a barrister since 1993.

And did you have a particular speciality?---Ah, in employment and industrial relations law.

30 And in your career have you been, for at least the portion of your career briefed on a number of occasions by Government instrumentalities?---
Indeed.

Is one of those the SES?---Yes it was.

Did you receive a brief to advise and appear in relation to an unfair dismissal claim brought by a Mr Kevin Pallier?---I did.

40 When you received that brief what did you understand to be the circumstances of his dismissal?---That a number of allegations had been made against Mr Pallier, that some of those allegations had been sustained and that the decision maker being the Commissioner for SES had determined that the conduct that was proven amounted to misconduct and that it was serious enough to warrant dismissal.

Now, correct me if I'm wrong but did part of the material on which you advised include behaviours by Mr Pallier towards fellow staff members?---
Um, yes. There was an allegation as best as I can recall about Mr Pallier's conduct in a meeting of SES, and I have a feeling other personnel and there

was an allegation that he made comments that were either improper or disparaging within the context of those meetings.

Was there also an issue in relation to the use or alleged overuse of overtime?---Yes there was.

And that was a significant sum of money wasn't it?---Yes, it was in the range of I think 60 to \$70,000.

- 10 In the course of your preparation for the conciliation did you become aware of who it was that Mr Pallier had been reporting to?---Yes I did.

Who was that?---Mr Pearce.

And in relation to the issues on which you advised was Mr Pearce a figure that loomed large in the potential proceedings?---Yes he did. His name was peppered throughout the papers that I had been briefed with and in particular in respect of the overtime matter his name appeared as the approving officer for the payment of the overtime to Mr Pallier.

20

Was Mr Pallier expressing a position that justified some or all of the things he was accused of?---It was difficult to ascertain from the documentation that Mr Pallier had submitted in response to the investigation whether he was asserting different facts or whether he was adopting what I would characterise as the best defence is an offence, and there seemed to be an element of that in the document that he had submitted along the lines of, well, if you think I'm bad for doing this, this is what and in particular Mr Pearce has done.

- 30 And in part of that offence was it suggested by Mr Pallier that much of what was being complained about had been signed off by Mr Pearce?---He did make mention of that as I recall.

THE COMMISSIONER: Much of or all?

- 40 MR FORDHAM: Well, there are two issues, in relation to the overtime it was all signed off by Mr Pearce, was it not?---Yes. He, he, I remember him, him, or commenting that the overtime was approved by Mr Pearce and I believe that – I could be wrong on this but it was either the allegation pertaining to obtaining the tickets to the football or the allegation pertaining to the offsite conference was approved by Mr Pearce, but I can't remember which one it was though.

By way of background, and I'll do this in short form unless anyone complains, was there issues in relation to overtime?---Yes.

Was there also an issue in relation to the attendance at a Sydney Swans football game which should have or may have been necessary to disclose?

---Yes.

Was there also issues about the use of an offsite conference facility?---Yes.

Now, in relation to the manner in which Mr Pallier was running, if you like, his side of the argument, how important was the presence or absence of contemporaneous documentation dealing with the management of Mr Pallier?---I – well, as you would probably appreciate, most people in this room would appreciate, lawyers love a contemporaneous note, and in the –
10 with regard to the issue of Mr Pallier’s conduct to Mr Pearce and, and on, and on these matters it was, as I recall Mr Pearce asserted that he had counselled Mr Pallier on one or many of the issues, I can’t remember which ones, and that there were notes to support that he had done that.

Were you ever shown a copy of those notes?---I was provided with a typed document which I understood to be the notes prepared by Mr Pearce.

20 THE COMMISSIONER: A copy of it or the original?---I was shown a document. I don’t know, Commissioner, whether it was a copy or an original. I refer to it as a copy because it was typed and printed.

Yes. Was it explained to you whether Mr Pearce’s notes were in his own handwriting or whether he had immediately typed them?---There was no mention of any handwritten notes in existence.

MR FORDHAM: As a barrister of some years’ experience, did that surprise you?---It, it did, but at that stage it wasn’t something that I was overly concerned about because it was very early days.

30 Could we go to page 335, please.

THE COMMISSIONER: That’s volume 2?

MR FORDHAM: Volume 2. It will be on the screen in front of you there, Ms Brus?---Oh, yes.

And if the person controlling the technology could then go to 336 and then 337. I’ll just let you look at those briefly?---Ah hmm.

40 Now, I appreciate it’s a while ago but do you recognise those as at least copies of a document with which you were briefed?---Yeah, it certainly looks like a document I was provided with.

Now, in the course of your preparation for the conciliation in this matter, did the veracity of those documents come into question?---The veracity of the content of the documents, yes.

Yes?---Yes, it did.

In what context?---I had a meeting prior to the conciliation conference at a coffee shop opposite the Industrial Commission in Wagga which I believe is in Crown Street.

I'll stop you there, do you mean Wollongong?---Sorry, I do mean Wollongong.

Thank you?---I beg your pardon.

10

Carry on?---And we were, sorry, present was myself, Ms McCarthy and she was then Lorna Grange, she's now Lorna Calder, and I was getting some background information about the material that I had been sent, which I might add at that stage was limited to the investigation report undertaken by Ms Colbey from IAB and I believe a supplementary document from Mr Pallier, I might be wrong about that, and certainly a copy of his unfair dismissal application form and I asked questions about, primarily about why the, the, the decision to dismiss had been taken because on my estimation I thought that the material didn't necessarily warrant that action from my

20

experience.
In the course of that discussion did the notes that I just showed you come up for discussion and in particular whether or not they'd been fabricated?
---Those notes, the ones that were just on the screen, I can't say it was those notes. There was a reference to a diary entry or a diary note being - I believe the word was fabricated.

Who used - - -

30 THE COMMISSIONER: Was that just one or more than one?---My recollection - - -

Just one entry?---My recollection is one.

One entry?---That's what I, that's my recollection, Commissioner.

Is that a firm recollection or, or could it be diary notes?---It could be diary notes.

40 Or diary entries?---Or diary entries.

MR FORDHAM: But you've just used the word fabricated?---Yes.

Who was it who used that word?---My, my recollection is not 100 per cent but as far as I can recall it was Lorna Calder nee Grange.

In the presence of who?---Tara McCarthy and myself.

Thank you. I have nothing further.

THE COMMISSIONER: Yes. Mr Harris.

MR HARRIS: Just one thing. I suppose you might concede then if it's not 100 per cent recollection that Lorna had used that word it may well have been Ms McCarthy who used that word perhaps relaying something that Lorna had apparently said to her about it?---I can't, I, I would agree with you as to the first part of your proposition but I can't agree to the second part because I don't know.

All right. Thank you.

THE COMMISSIONER: Ms McGlinchey.

MS McGLINCHEY: I represent Ms Grange in this matter.

UNIDENTIFIED SPEAKER: We can't hear you.

20 MS McGLINCHEY: I'm sorry.

Is it possible that the conversation in which the word "fabricated" may have been used was a conversation about possibilities?

THE COMMISSIONER: Not may have, was used. Was used. Her evidence, Ms Brus' evidence is that it was used.

MS McGLINCHEY: I'm sorry, Ms Brus, is that your evidence, that it was used?---That's my recollection that that's the word that was used, yes.

30 All right. And is that the, the use of that word, is that what you meant when you said you couldn't be 100 per cent sure or was it something else?---No, it was the - - -

THE COMMISSIONER: It's not really - yes, Ms Brus' evidence was clear. She said that the word "fabricated" was used, she couldn't be 100 per cent certain as to who it was who said, who, who told her about this problem with the evidence, that she thought it was Ms Calder.

40 MS McGLINCHEY: All right.

MR FORDHAM: And just to make sure we're all clear about the evidence my understanding is that whilst not 100 per cent, that it was Ms Calder who used the word "fabricated".

THE COMMISSIONER: Is that right, Ms Brus?---That's right, that's my evidence, yes.

But the word was used?---To the best of my recollection, yes,
Commissioner.

MS McGLINCHEY: In relation to the use of that word “fabricated” is it possible that the context of the conversation was about the possibility of a fabrication?

10 MR FORDHAM: Commissioner, I object to that. Anything is possible. If my learned friends behind me want to put propositions to any particular witness including this one that something did or did not happen in accordance with their instructions then they should do so.

THE COMMISSIONER: I think that generally is correct but I’m aware of the interest that Ms McGlinchey has in putting this question so I’ll allow it.

MR FORDHAM: If the Commission pleases.

20 THE WITNESS: That’s not my recollection of the context of the conversation.

MS McGLINCHEY: Can you just expand on what you, what your recollection is of the context then?---I was, I was stressing to both Ms Calder and Ms McCarthy that I believed that Mr Pearce was going to be central to this case if it were to run because his name and his role as Mr Pallier’s manager was critical particularly given what I saw to be a major problem with the matter of the overtime and we would have to put Mr Pearce into the witness box. I recall that there was a look of I suppose dissatisfaction with that proposal from both Ms McCarthy and Ms Grange at that suggestion. I asked them both why ah, “Is that a problem?” I recall 30 either one or both, I do not know which said, “It could well be.” And there was some comment I believe by Ms McCarthy that Mr Pearce’s management skill, management of Mr Pallier left a lot to be desired and I believe it was then or around about then that the comment was made about the fabrication of the diary notation, or notations.

40 THE COMMISSIONER: And Ms Brus, may I just ask you this. The, I’m not asking now about the conversation but your misgivings as to the strength of the SES’s case against Mr Pallier is, my impression is that your misgivings were based on the fact that at least as regard to the overtime Mr Pearce had approved the overtime albeit late. Am I right in that?---That was certainly one of the key areas why I was concerned, yes.

And can you recall the other areas?---From memory there was seven specific allegations made against Mr Pallier and I think there was only three of those were sustained. And none of them - - -

Sustained by - - -?---Well, sustained in that the findings of fact were found to be proven by the investigator, Ms Colbey.

Right?---And it was on those findings of fact that Mr Pearce, sorry, Mr Kear had made his decision to terminate Mr Pallier's employment.

Ah hmm?---I was concerned that the three matters which had found to be proven didn't on their face appear to be so serious as to warrant dismissal.

10 Well, the overtime, am I correct in thinking that if the overtime had been unauthorised it might have been but once it was authorised by Mr Pearce it was very difficult?---Oh, it puts an entirely different characterisation on it.

Yes?---Approved overtime is by that word approved something which has been given the, the pat of approval.

20 Quite?---Um, so my concerns were primarily that the, on it's face, and at that stage I didn't have a whole raft of information which was one of the reasons why I was having that meeting with Tara McCarthy and Lorna Grange, was to try and find out some more about why the step had been taken to terminate Mr Pallier's employment.

Yes, thank you. Yes, Ms McGlinchey.

MS McGLINCHEY: In that conversation about the fabricated document which document did you think was being referred to?---I did not know because it was a fabricated diary entry that was being referred to.

Had you seen any diary entries?---Not at that stage, no.

30 All right. But you had seen the document which you were - - -?---Not at that stage, no.

You hadn't seen any documents like that?---No. Not to my recollection. My recollection is I was provided with that document after the initial conciliation.

At what stage was the matter up to, had any documents been tendered to the court?---No. Hadn't even been to court at this stage.

40 Okay. So the very initial stage?---Very – we were, we were about half an hour away from going into the initial conciliation and in the, in unfair dismissal claims the first part of the process is a compulsory conciliation before a conciliation commissioner and if the matter can't be resolved at that point in time it then would, well, usually is set down for hearing.

All right. Thank you. Nothing further.

THE COMMISSIONER: Yes. Mr Oates?

MR WILLIS: I have no questions, thank you, Commissioner.

THE COMMISSIONER: You have no questions, Mr Willis. Have I asked you, Mr Oates? I can't remember.

MR OATES: No.

THE COMMISSIONER: Do you have any questions?

10 MR OATES: Yes, Mr Commissioner.

Ms Bruce, did the matter- - -

THE COMMISSIONER: Mr Oates, Mr Oates represents Mr Kear?---Yes.

MR OATES: My apologies, Commissioner, I should have said that. Ms Brus, did the matter settle that day?---Not that day, no.

20 Was there another conciliation or was it settled prior to another conciliation?
---There was, there was another conciliation, I can't – without referring to my diary, it was either a week or two weeks later, and the matter settled after that second conciliation.

After or during?---No, there was, there was certainly progress towards conciliation – sorry, towards settlement in the second conciliation but it didn't finally settle until after the conciliation was adjourned.

30 On the first conciliation date, that with which we're interested here - - -?
---Yes.

- - -you took your instructions from whom?---Ms McCarthy as the senior officer of the two that were present.

Yes. And was Ms McCarthy present during the second conciliation?
---I believe she was, yes.

And you took instructions from her on the second occasion?---I believe so, yes.

40 Did she instruct you to settle the matter on particular terms?---Ah, yes.

Those terms were reinstatement to grade 8/9 or 9/10, I don't recall?
---9/10 as I recall.

Thank you. Did Ms McCarthy instruct you to advise the Commission that there was some query about the veracity of documents which may be utilised in the context of Mr Pallier's claim for unfair dismissal?---Not that I can recall.

Well, you'd recall that certainly as counsel, wouldn't you?---I would, but I have no recollection of those instructions being given and I certainly don't recall ever saying that to Mr Kear.

THE COMMISSIONER: But that's not a matter for the instructing individual, it's a matter for counsel, isn't it?---Mmm.

It's counsel who determines what's proper to tell the court or not?

10

MR FORDHAM: I don't think were at court yet, Your Honour, in the sense that- - -

THE COMMISSIONER: Well I thought the question is court?

MR FORDHAM: As I understand it there was a second conciliation conference.

THE COMMISSIONER: Yes.

20

MR FORDHAM: But it didn't get as far as trial. I could be wrong about that and I'm sure Ms Brus will tell me if I'm wrong.

THE WITNESS: Mr Fordham is correct.

THE COMMISSIONER: Yes. Well, I don't, I don't understand the relevance of the question then. Are you saying that it was, is this something that should have been done?

30

MR OATES: Curious that it wasn't, Your Honour.

THE COMMISSIONER: Well, it's- - -

MR OATES: Be probably a matter for submissions from my point of view.

THE COMMISSIONER: Well, well, I should just make it clear that my attitude is that if – and I'm not suggesting that Ms Brus should have done it at all, but if this is something that has to be disclosed publicly to a judicial officer, that's counsel's job.

40

MR OATES: Your Honour, I don't disagree with what you say about it being counsel's job but I don't – my submission is it's not exclusively counsel's job. There's nothing to prevent a proper appropriate client from telling his or her counsel we need to do this or seeking advice.

THE COMMISSIONER: Well, if your client was a lawyer you'd say that but if your client was a layperson it's the last thing that would be in the client's mind. Anyway, we don't have to debate this, Mr Oates.

MR OATES: No.

THE COMMISSIONER: Not now anyway.

MR OATES: Did Ms McCarthy ever ask you for advice on either of those two conciliation dates or any other time as to what she should do about a suggestion supposedly mentioned by her in her presence that some of the evidence was potentially fabricated?---No, not that I can recall.

10

On the date of the first conciliation did you meet the two clients, if I can use that term, at the coffee shop or did you walk with them to the coffee shop? ---I really don't remember, Mr Oates.

Were your chambers in Sydney?---Yes.

I assume you drove to Wollongong or - - -?---Yes.

20

Yes. When you were sitting in the coffee shop having a meeting how long were you there prior to the matter being raised, that is the fabrication? Was it a long meeting?---It was approximately an hour because I think the, the conciliation from memory was on at 11.00 and I had arranged to meet them an hour before so we would have plenty of time to go through the matters and have a cup of coffee and get ourselves ready to go across to the court.

Because you understandably had inquiries to make as to why Mr Pallier was terminated in view of your assessment of the material, you wanted to allow sufficient time for that to happen?---That's correct.

30

How far into the conference did this suggestion of fabrication arise, in other words, how long before you raised the query or raised the possibility that Mr Pearce might be required to get in the witness box?---I'd be guessing, Mr Oates and my best guess would be half an hour but it is really a guess.

That would make sense, wouldn't it, because the first questions you'd put would probably be why was this terminated, tell me the reasons behind that before you moved on to the evidence which might be available to support the case?---I - that, that would be a fair assessment, I think I opened the conversation as why did this guy get sacked.

40

And Ms McCarthy and Ms Calder were present at the conciliation?---Yes, they were.

Was it in one of the courtrooms where the Commissioner came down from the bench and sat at the back of the bar table or in a conference room?---No, it was in the courtroom. I don't think the Commissioner came off the bench and most of it was actually on the record because the solicitor appearing for Mr Pallier had a number of submissions he wanted to make to the

Commission about what he characterised as procedural flaws in the investigation process so a lot of time at the first conciliation was spent with that being put before the Commission. The Commissioner asked that, that we be provided with a copy of, a written copy of those submissions which were quite lengthy and that was in fact one of the reasons as I recall why the matter was set down for a further conciliation, because those procedural aspects, the Commissioner thought it was unreasonable for us to have to deal with them having only been served with them in the, in the Commission that particular morning and also that there was - perhaps it would give the parties some additional time to pursue settlement discussions if that was possible.

After the conciliation - I'll withdraw that. How long did the conciliation take place, continue?---About an hour I think from memory.

Was there a conference with, with the clients again, using that term, after the conference, after the conciliation?---I don't recall so. We might have but I really have no recollection of it.

20 In the intervening period between the two conciliations, the two conciliation conferences, did you receive material which purported to be notes of Mr Pearce?---I, I received additional material and my recollection is that one of those or whatever, how many pages there are, one of those documents was that typed document which was on the screen a moment ago.

Did you receive any telephone call or other communication from Ms McCarthy in that period?

30 THE COMMISSIONER: Mr Oates, I've let you go a long time but you have no real interest in asking any questions here because you've got no affirmative case on this issue.

MR OATES: It's probably a credit issue, your Honour.

THE COMMISSIONER: It might well be a credit issue but I'm not going to allow, I don't allow general fishing questions.

40 MR OATES: I don't concede that I'm fishing, your Honour, but I don't wish to - - -

THE COMMISSIONER: You have no affirmative case, you are not able to put to Ms Brus any proposition to the effect that her evidence is wrong because you,. your client wasn't there in any of, anything that she did.

MR OATES: Yes, I accept that but unless I'm able to ask such questions I can't get to the potential or, I beg your pardon, the real reason or, I beg your

pardon, the real situation that was occurring in relation to this allegation of, of fabrication.

THE COMMISSIONER: The person who has to get to the root of that is Ms McGlinchey, otherwise it's duplication. She has asked her questions, she's asked the questions on behalf of the person who was there and who, with whom the context exists. There is no context with – no contest with your client.

10 MR OATES: There's a- - -

THE COMMISSIONER: And this is a – I do not – as part of the directions it is expressly stated that cross-examination will only be allowed where there is a genuine interests that counsel has and that interest is that counsel's client has a different version.

MR OATES: Your Honour, I don't cavil with what the directions say.

THE COMMISSIONER: I'm simply applying them.

20

MR OATES: And I mean- - -

THE COMMISSIONER: Mr Oates, I will, I will allow you to proceed on this issue for a very short time longer. So it's up to you to ask whatever questions you want.

MR OATES: As you please, Commissioner.

30 Did Ms McCarthy call you or communicate with you in any way in the tie between the two conciliation conferences and again suggest to you – I withdraw that – and talk to you in any way about an alleged fabrication of diary notes by Mr Pearce in the context of Mr Pallier's case?---I have to answer that in two stages if I can. Yes, Ms McCarthy did all me about the, the matter, the Pallier dismissal.

40 Ah hmm?---And yes, Ms McCarthy did speak to me about the fabrication issue on an occasion when she was in my chambers and we were doing a telephone hook-up with Commissioner Kear in Wollongong and it was either before or after – I think it was after – that telephone hook-up that the situation arose because again my concern about Mr Pearce giving evidence was the subject of our conversation.

Was that prior to the second conciliation?---I believe it was.

THE COMMISSIONER: But after the first meeting?---After the first conciliation and before the second conciliation, as best as I can recall.

So is your evidence that Mr Kear was aware that Ms McCarthy was speaking of a fabrication of- - -?---No, no, no, no, no, no, sorry, Commissioner. The question, that's why I tried to break the answer down.

I see?---The question was whether- - -

I'm misunderstanding you. Can you just clarify that?---Ms McCarthy called me and we, we, we – to set up a telephone hook-up with Mr Kear. Ms McCarthy was in Sydney for whatever reason, I don't know.

10

Is this to discuss the merits- - -?---It was to discuss the issue of the merits of the case.

The merits of the SES's case?---That's right. And my recollection is that either during – either prior to or after that conference with Mr Kear where Ms McCarthy was in my chambers, she raised the issue about Mr Pearce fabricating the diary notes.

And what, and what did she say?---It- - -

20

Well, what was it about, this - - -?---It, it was to the best of my recollection I, I recall saying we have, We have to settle this case, we're going to lose big time. Putting aside everything else if we put Pearce in the witness box and the matter of those diary notes is examined with any degree of - - -

Force?---Thank you, then we could be in all sorts of trouble and I have a recollection that Ms McCarthy said something about, said something like, about, well, why would you fabricate the notes or she, it was, it was a rhetorical question about why would you, why would you make up the diary notes or something like that. Sorry, it's all, it is vague and I do apologise.

30

Mr Oates.

MR OATES: Nothing further, Commissioner.

THE COMMISSIONER: Thank you.

MR TAYLOR: Commissioner, could I ask a short question?

40

THE COMMISSIONER: Yes, certainly.

MR TAYLOR: Ms Brus, I appear on behalf of Ms McCarthy.

THE COMMISSIONER: You better just mention your, your name so that it's on record, Mr Taylor.

MR TAYLOR: Taylor, solicitor, for Ms McCarthy. Ms Brus, am I correct in assuming that prior to the first conciliation conference no documents had

been filed on behalf of the SES in response to unfair dismissal application except perhaps a notice of appearance or something of that nature?---That could be correct, I don't think there was a formal employer's response filed because the turnaround period was too short.

And is it correct to say that in relation to evidentiary matters such as statements or diary notes or those sorts of things, they're not filed until the matter is set down for hearing?---That's correct.

10 So in this case, in the Industrial Commission for Unfair Dismissal, no evidence had been filed as such relating to Mr Pearce's diary notes?
---That's correct.

But your apprehension was that if it didn't settle and it went to a hearing he'd have to put a statement on, he would have to give evidence and he may well be asked questions about it?---That's correct.

Yes, thank you, Commissioner.

20 THE COMMISSIONER: Yes, thank you. Mr Dunne, you don't have, you don't have any questions I take it?

MR DUNNE: No.

THE COMMISSIONER: No. Mr Fordham.

MR FORDHAM: May Ms Brus be excused?

30 THE COMMISSIONER: Yes. Ms Brus, thank you very much for your evidence, you are excused.

THE WITNESS EXCUSED

[3.41pm]

THE COMMISSIONER: That's it for the day, is it?

40 MR FORDHAM: That's all the evidence I have today. What I'm going to do is try and bring forward a few people that were going to be called on Thursday into tomorrow because I apprehend that we will finish what I had planned.

THE COMMISSIONER: Right.

MR FORDHAM: So we are well within time.

THE COMMISSIONER: Yes. Perhaps if you could just inform all parties, all interested parties who's coming tomorrow.

