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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 FRIDAY, 6 DECEMBER 2013

AT 10.06AM

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

THE COMMISSIONER: Mr Fordham.

MR FORDHAM: Thank you, Commissioner. Can I have document 353 on the screen please and larger font if you could.

10 Mr Kear, the document that I am showing you is your letter to ICAC of 29 October, 2012 which follows on from the ICAC report relating to the contract issue, you understand that?---I do.

And when one looks down the document, if we could scroll it up please and just stop there for a minute, the, the fourth paragraph commences with "I have now reviewed the matter," do you see that?---I do.

And I think you agreed with me yesterday that your review of the matter largely consisted of discussions with Ms McCarthy, correct?---Correct.

20 The comparison of the documents on screen to what was readily available on the internet?---Yes.

And your acceptance of what it was that Deputy Commissioner Pearce had to say to you?---Yes, that's correct, that he had, he admitted that he had done the two allegations that Ms McCarthy had put forward.

30 You had no basis, did you, to assert that there was nothing to investigate in relation to potential corrupt conduct?---Well, because I had asked Steve about the two allegations that Ms McCarthy was making, specifically in relation to not going, put it out for tender and it not being in the correct form and Mr Pearce acknowledging that he had actually done those things that Ms McCarthy had alleged, then I reviewed the ICAC website and documents and quite clearly it showed me that if it was a mistake or negligence it wasn't something that contributed to corruption.

At no point did you go behind the explanation you were given and interview any third party in order to come to the view that you came to, did you?---That's correct.

40 Now, when you go down two paragraphs where, where you summarise what it was that Deputy Commissioner Pearce had done, do you see that, "Following discussions."?---"Following discussions," yes.

Yeah. You say that Deputy Pearce identified two service providers. There's no suggestion anywhere in any of the information you looked at that Deputy Commissioner Pearce looked to any other service providers is there? ---No, that's correct, he didn't put it out to tender and look at any other service providers.

So when you say identified two service providers what he has effectively done is against Government policy gone with two people suggested to him?
---That's correct.

And the reason that you were prepared to tell ICAC that there was nothing to investigate was because you accepted the word of Mr Pearce?---I accepted that he owned up to the allegations that Tara had made.

10 THE COMMISSIONER: Well he didn't just own up to them. He owned up and gave an excuse?---A reason for doing it, yes.

And you accepted that reason?---I did.

Without investigation?---Well he'd actually owned up to it so I didn't see the need to investigate it.

He didn't, he owned up to a much lesser offence?---Yep.

20 So you didn't think it necessary to investigate what would be, were it to be the case a much more serious offence?---I took it that he owned up not a lesser offence but he owned up to the actual allegations that were being made.

Why did you take that?---Because they were the allegations being made.

No, no. No, far more was being made. What was being, what was being made was an allegation of possible corruption and you accepted that there was mere negligence without investigating whether there'd been corruption,
30 is that right?---Yes, I didn't investigate any further than asking Pearce, McCarthy and looking at the contracts.

You just believed, you just believed his explanation without more?---Yes, because I thought it correlated with the allegations.

Yep.

MR FORDHAM: In that paragraph you refer to two service providers being best placed to provide the specific services. Now, on a plain reading that
40 implies some sort of comparison, do you agree with that?---No. What I was saying there was that he identified the two service providers that we now know about and that he believed they were best placed to provide the services because they came from reputable, recommendations came from reputable Government agencies, these people had worked for these agencies before.

You knew didn't you that Mr Pearce had undertaken no form of tender official or otherwise?---That's correct.

You knew didn't you that he had undertaken no comparison of service providers who might be placed to provide the services for you?--I'm not sure that he hadn't looked at any other service providers in any other way but I know he just talked to these two in relation to the contracts.

THE COMMISSIONER: Neither you nor Mr Pearce knew that the two service providers he chose were best placed to provide the services?---I certainly didn't, no.

10

And nor did he?---I can't comment on that, I'm not sure.

So why did you put that in the letter?---Because when I was asking why was the reasons that you did this he ah, he spoke in regards to Karoshi to the fleet manager of the Fire Rescue New South Wales who recommended him to the person that was in charge of the state fleet in New South Wales and that's the person that recommended um, Frank Eggert from Karoshi. The other one, Performance Drivers was recommended by other Government agencies. So he believed that these were the two best providers to provide these services because that was as a result of all those um, inquiries.

20

MR FORDHAM: Do I understand this correctly, that when you wrote this letter you understood that Mr Pearce had done no more than rely on other Government officials in order to decide whether or not these two providers were best placed?---I'm not sure if I knew he'd done any more but I certainly knew that this was the reason he gave me for selecting those service providers.

30

And if we then go to the last page which is 354 the opinion that there has been no corrupt conduct is based on your acceptance of the explanation from Mr Pearce, correct?---Correct. Couple with my understanding of what was corrupt conduct and what wasn't reportable to ICAC as far as the documentations I read from ICAC.

You understood didn't you that the function of ICAC amongst other things was to look into incidents such as these to see whether or not they were corrupt?---I was under the impression that ICAC looked at things that you thought were corrupt.

40

And in expressing that opinion you were informing ICAC that you as the head of the SES had formed the view that Mr Pearce had not engaged in corrupt conduct, that's right isn't it?---That's correct.

And at no stage did you disclose to ICAC that the man about whom you had informed this opinion was a mate of yours, that's right isn't it?---That's correct. I didn't see the need to do that, it never entered my mind to do that.

Now finally and in relation to this issue the letter you have written which culminates in your opinion based on your investigation is on the 29 October 2012, correct?---If you just go back to it, I think it was, that was the date on the top?

Yes?---Yes.

That is the day that you returned to work after your leave in Tasmania isn't it?---That's correct.

10

And so the opinion that you were prepared to give the independent investigatory body was based on returning from Tasmania and one day of investigation that included a conversation with your mate Mr Pearce, that's right isn't it?---Well it also included the conversations I'd had with Ms McCarthy, with Mr Pearce, with Mr Tree, with Mr Scutella and when I returned looking at the contracts in um, in the office and looking at the ICAC documentation.

20

You had no documents to look at when you're in Tasmania did you?---I didn't, no. No, that was the part that I had to wait for when I got back.

And let's be clear about this when you spoke to Mr Scutella from Tasmania he offered no opinion about corruption one way or the other did he? ---That's not my recollection.

30

And when you spoke to Mr Tree he offered no opinion one way or the other in relation to corruption did he?---That's the same, no recollection. I recall that when I spoke to both Tree and Scutella I asked them about a number of issues in relation to this.

You had no information that you could give them beyond the mere reporting of Ms McCarthy, that's right isn't it?---Yes, I explained to them the two allegations and then asked them a series of questions about um, you know whether I needed to come back from Tasmania straight away, whether I needed to stand Pearce down.

40

To go back to my question and in relation to corruption at no stage did you have information beyond the reporting of Ms McCarthy, that's right isn't it?---You're talking about in Tasmania?

Mmm?---Yes.

And if Mr Scutella sat in that chair and told this Commission that he did not offer an opinion on corruption one way or the other do you say he is lying? ---I have no understanding of what the motive was or what his recollection was.

Do you say he's making it up?---No, I, I can only tell you what my recollection of the um, conversation is as I put in my statement.

Mr Tree sat in that chair and said that he did not offer an opinion in relation to corruption when you're in Tasmania or indeed when he returned. Do you say that he is lying?---No, all I'm saying is my recollection of those discussions is as I've stated.

10 Your recollection is coloured by the fact that this all concerns your mate Mr Pearce isn't it?---No, that's incorrect.

Yesterday you told the Commissioner, here is it, no, I've lost it.

Can we have page 243 of the transcript please, line 30. Can you get that up.

20 While we're waiting for that I'll just put the proposition to you the Commissioner asked this question, "So if you were going to discipline Mr Pallier for doing such overtime then you should discipline Mr Pearce for approving it?" answer, "I didn't discipline Mr Pallier over working overtime", Commissioner, "You didn't?" answer, "No", Commissioner, "Not at all?" answer, "Not at all." Do you remember giving that evidence? ---Um, I remember approximate where that was the discussion, yes.

That is wrong isn't it?---No, because we were talking about the decisions that I, the issues that I looked at when I decided the outcome of the Pallier investigation. What were the, what were the issues that led me to the point of offering Mr Pallier to resign.

30 At 244 I asked you this question, "The disciplinary process in relation to Mr Pallier included his excessive use of overtime, didn't it?" You responded with, "The disciplinary," I intimated that that was my question, and you said, "No," and to be fair to you when I said, "Not at all," you said that you didn't take that into account in making your decision, in other words you'd written that one off. But let's just be clear about it, sitting here today you don't deny do you that you launched a disciplinary investigation for the purposes of the Public Sector Management Act into Mr Pallier? ---That's - - -

40 THE COMMISSIONER: Based on overtime.

MR FORDHAM: Sorry?

THE COMMISSIONER: Based on overtime.

MR FORDHAM: I'm coming to that, I need to do it in bits?---I, that I instigated an investigation into Mr Pallier, yes.

Yes. For the purposes of the Public Sector Employee Management Act?

---Correct.

And you threatened him with, amongst other things, that outcomes could include caution, reprimand, et cetera, et cetera, right through to dismissal, that's right isn't it?---Yeah, that's correct, that's a direct copy from the Public Service Handbook.

10 And in paragraph 4 of your initial letter of 26 September, 2012 you included as one of the allegations of misconduct the amounting of approximately \$59,000 in the last 13 months in relation to overtime?---That's correct, that was one of the items included in the investigation.

So to say that Mr Pallier was not investigated as part of a disciplinary process in relation to overtime is simply wrong isn't it?---It was, if you would say that is, did he, was he not investigated because of the overtime that would be wrong, yes, but we were talking yesterday about the outcome of my decision, what points did I take into consideration when I made my decision to offer Mr Pallier his resignation.

20 Now in relation to the - - -

THE COMMISSIONER: Mr Fordham in transcript 90 and 91 Ms Brus lists the matters on which she was instructed relating to the question whether Mr Pallier's conduct was serious enough to warrant dismissal.

MR FORDHAM: Yes.

THE COMMISSIONER: And she mentions that overtime was an issue.

30 MR FORDHAM: My understanding of her evidence that it's one of the issues that was part of - - -

THE COMMISSIONER: Yes, one of the issues but it was still an issue.

MR FORDHAM: Oh, yes, and I'm - - -

40 THE COMMISSIONER: That's what I don't understand, Mr Kear, the barrister who was acting for the SES in connection with Mr Pallier's claim for unfair dismissal said that there were three matters in which she was told the SES was relying for dismissing Mr Pallier, one of which included overtime?---No, they weren't the three issues that I considered.

So can you explain why - - -?---Well, the - I don't know what the other - - -

- - - it is - - -?---I don't know what the other two were but if it was overtime that wasn't one of the three.

Well, she says, and I'm reading paragraph, on page 90 of the transcript, "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," and then he was asked, "Was there also an issue in relation to the use or alleged overuse of overtime." She replied, "Yes, there was," and it was put to her, "And that was a significant sum of money, wasn't it?" and she said, "Yes, it was in the range of 60 to \$70,000." So she was told that there were three reasons for you dismissing Mr Pallier, one of which included overtime?---I don't know who told her that but when I received the final report after I talked to everybody I needed to talk to then I have to make a decision and what I'm saying is that I considered three issues to be so serious to lead me to the decision to offer Mr Pallier his resignations and the decisions I saw, that I used did not include the issue of overtime.

And did you tell Mrs, Ms Calder that?---I believe we had discussions about that.

20 And did you, you never told Ms Calder that overtime was - - -?---One of the reasons.

- - - one of the reason?---No.

And you never told Ms McCarthy that overtime was one of the reasons?---That I finally considered before I terminated him, no.

30 So when they went to the conciliation proceedings for the unfair dismissal claim their instructions from you did not include the fact that the dismissal was based partly on misuse of overtime?---That's correct. I didn't give them the instructions based on the overtime.

MR FORDHAM: If that be the case why is it that Mr Pearce's notes in relation to the counselling of Mr Pallier were relevant at all?---I'm not sure. I think they were included in, as you know overtime was one of many issues. There was lots of other issues. There was travelling. There was use of facilities et cetera, et cetera, et cetera. So I just imagine they were gathering evidence on all those things. But the three issues that I considered were not, did not include the overtime which, because you would see from the IAB report that they indicated what they would, what, what they referred to me to take through to further disciplinary action and what they didn't.

40 It's the case isn't it though that in your letter to Mr Pallier summarising the outcome of the IAB report that you notified him that the particular 4(a) in relation to overtime was found to have been an instance in which he engaged in misconduct?---Yes, IAB found that, that it had been substantiated that he'd done something wrong in regard to overtime but

three issues that I took into consideration to offer Mr Pallier his resignation were not influenced by those.

Oh, so you say that was relevant background but not something on which you made a decision?---That the issue that I made the decisions was based on the three issues that were recommended by IAB to take through to further disciplinary proceedings.

10 But just to bring it back to the issue at hand the allegation of misconduct that was found and which you recorded to have been found in relation to overtime was overtime on which Mr Pearce had signed off, correct?---Yes, my understanding is that Mr Pearce had signed off on an amount of overtime and he'd also knocked a percentage of overtime back.

Is one of the reasons that you did not advance that particular of misconduct your friendship with Mr Pearce?---No, it was based on the IAB report.

20 Yesterday when being asked about the initial interviews for Mr Pearce when he applied to join the SES you told the Commissioner that Mr Tree was part of the interview panel?---(No Audible Reply)

Do you remember telling us that?---I don't, no.

No, well - - -?---He was part of an interview panel. I'm not sure I was referring to Mr Pearce's or not.

THE COMMISSIONER: Mr Fordham, may I just have a, can you just please tell me where the IAB report is?

30 MR FORDHAM: It's actually not part of the public brief.

THE COMMISSIONER: It should be.

MR FORDHAM: It can be. We can tender it.

40 THE COMMISSIONER: Yes, because Ms Brus says at 95, "From my memory there were seven specific allegations made against Mr Pallier and I think there were only three that were sustained." And she explained that sustained meant sustained in the findings of fact were found to be proven by the investigator, Ms Colbey. And then she said, "And it was on those findings the fact that Mr Kear made his decision to terminate Mr Pallier's employment." And she said, "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." I need to know whether, what the three matters were that the IAB decided had been sustained.

MR FORDHAM: We can do it in a couple of ways. One of which will be I will tender the letter on which we were just cross-examining which sets out

that the particular in relation to the use of overtime was sustained as an allegation of misconduct, there were then three specific other particulars that were to be the subject of disciplinary action from that point forward. What we're not sure about and can't be sure about is because we don't have the material is the contents of Ms Brus's brief and how it was that Mr Pearce's notes became relevant to the IRC proceeding.

10 THE COMMISSIONER: Well she explains it in her evidence. She says it was one of the three matters which had been found to be proven and which Mr Kear relied.

MR FORDHAM: Well it was proven there's no doubt about that. The report deals with at page 35 and following particular 4A which is - - -

THE COMMISSIONER: Sorry, let me just find that please.

MR FORDHAM: You won't have it unfortunately. Can we bring it up, yeah, we'll bring it up. It deals with prior approval for overtime.

20 Now if you go, have you got that up on screen? If you go to the fifth page of the report in the executive summary. Yeah, stop there, go back up.

Commissioner, that is part of the executive summary to the IAB report. Yeah, which deals, which outlines - - -

THE COMMISSIONER: That was the allegation against Mr Pallier - - -

30 MR FORDHAM: And then when one goes through and this is where it becomes relevant when one goes to page 8 and 4A you'll see that it's been substantiated but the mitigating factor and this is what it was that Ms Brus was referring to is in the last paragraph which is that Mr Pearce continued to approve the claims.

THE COMMISSIONER: Yes. But particular 4A has been substantiated.

MR FORDHAM: Yes.

THE COMMISSIONER: So what else would substantiate?

40 MR FORDHAM: Um - - -

THE COMMISSIONER: Particular 5.

MR FORDHAM: Can pull that up as well.

THE COMMISSIONER: That's a different matter.

MR FORDHAM: So at page 6 of the document you'll see there are views as to what's been substantiated and why. So particulars 2 and 3.

THE COMMISSIONER: Some particulars 2 and 3.

MR FORDHAM: 4A.

THE COMMISSIONER: Can you just go on.

10 MR FORDHAM: 5.

THE COMMISSIONER: Just that's - - -

MR FORDHAM: 6, 7. And my belief was 13 but I might be - - -

THE COMMISSIONER: Can you just move the document forward please. And go on. And would you proceed, I just want to read it. Just go on please.

20 MR FORDHAM: Would the Commissioner prefer a paper copy?

THE COMMISSIONER: Yes, please. I don't want to, something else?

MR FORDHAM: That constitutes the back end of the report and annexures, it's a bulky document.

THE COMMISSIONER: Yes.

Well, particular 4A is one of the, is the overtime.

30 MR FORDHAM: That's right.

THE COMMISSIONER: And that's substantiated.

MR FORDHAM: And in a letter which I'm about to tender from Mr Kear dated 6 December, 2012 that listed allegations 2, 3, 4A, 4A, 5, 6 and 7 were found to be misconduct and that in relation to allegations 2, 3 and 7A, that the matters should be dealt with as disciplinary matters.

40 THE COMMISSIONER: Yes. Well - - -

MR FORDHAM: And that's the context in which Ms Brus gave her evidence.

THE COMMISSIONER: All right. Well, are you tendering the IAB report?

MR FORDHAM: Yes.

THE COMMISSIONER: The IAB report will be Exhibit 10.

**#EXHIBIT 10 - IAB REPORT INTO ALLEGED MISCONDUCT BY
MR KEVIN PALLIER DIRECTOR FINANCE AND LOGISTICS
DATED NOVEMBER 2012**

10 THE COMMISSIONER: And the end result of all of that, of all of that, Mr Kear, is that the IAB report demonstrates that they found the overtime to be substantiated?---That's correct.

And you must have relied on that in dismissing Mr Pearce?---No, I relied - Mr Pallier.

Mr Pallier?---I relied on three other - - -

How do we know that?---I'm sure there would be a - - -

20

I thought you said that you relied on what the IAB had substantiated?
---There would be a part of the IAB report that indicates - - -

You had an IAB - - -?--- - - - something different.

You had an IAB report which provided that, that a number of allegations had been substantiated?---I did.

30 Didn't you rely on that finding for your decision to terminate Mr Pallier?
---I took from the IAB report the areas that they said required further disciplinary action, I took three of those into my consideration as being serious enough to warrant me to offer Mr Pallier resignation.

Did you put all that in writing?

MR FORDHAM: I'm about to tender a letter - - -

THE COMMISSIONER: Oh, right.

40 MR FORDHAM: - - - in which allegations 2, 3, 4, 4A, 4B, 5, 6, and 7 are noted to have been found to be misconduct and then there's a reference to items 2, 3 and 7B being a recommendation that they be dealt with as disciplinary matters and then - - -

THE WITNESS: Is it possible to bring those three up, Mr Fordham?

MR FORDHAM: I'm about to do that?---Okay.

And then a discussion about what can happen from there and I will tender a bundle of documents dated, the first letter is 20 September, 2012, there is then a letter of 26 September, 2012, a letter of 9 October, 2012 and a letter of 6 December, 2012 about which I have just had the discussion and finally a letter of 24 January, 2013 which is the dismissal letter. The relevance, if I can put it this way, is not, is not the final basis for dismissal, it is the disciplinary action that took place and the discussion in evidence by Ms Brus that in the IRC proceedings the issue of overtime was still live and that the relevance of Mr Pearce's notes was relevant to decisions about whether or not she could call him. Also, the fact that the overtime issue is a background issue and appears only to have been ameliorated because of Mr Pearce's involvement when one reads it. The IAB report makes it clear that one issue they talk about is the fact that Mr Pearce continued to sign off on Mr Pallier's overtime when it was clearly in breach.

THE COMMISSIONER: All right. Well, you're tendering these documents?

MR FORDHAM: Yes.

THE COMMISSIONER: Exhibit 11 is a bundle of documents, the first of which is a letter dated 20 September, 2012 and the last of which is a letter dated 24 January, 2013, the first letter is from Mr Kear to Mr Pallier and the last letter is again from Mr Kear to Mr Pallier.

#EXHIBIT 11 - BUNDLE OF LETTERS:

- 1. LETTER FROM KEAR TO PALLIER DATED 20 SEPTEMBER 2012**
- 2. LETTER FROM KEAR TO PALLIER DATED 26 SEPTEMBER 2012**
- 3. LETTER FROM KEAR TO PALLIER DATED 9 OCTOBER 2012**
- 4. LETTER FROM KEAR TO PALLIER DATED 12 DECEMBER 2012**
- 5. LETTER FROM KEAR TO PALLIER DATED 2 JANUARY 2013**

MR FORDHAM: Mr Kear, I was asking you about the interview panel for the position of Deputy Commissioner. Carmel Donnelly, who is she?---Ah, she was a person that was on a selection panel for one of the Deputy Commissioner positions. She was a person that worked for WorkCover. She was a general manager in WorkCover.

And Kevin Sullivan from the Insurance Council, he also appears to have been on the - - -?---I think it was Carl Sullivan.

Carl, thank you?---Yes.

Now according to the document I'm looking at they appear to have been the two people who comprised the interview panel for the position of Deputy Commissioner and were they the persons on the panel with you when you interviewed Mr Pearce?---There was two interviews Deputy Commissioners. Um, the first one when Pearce got the job and second when Ms McCarthy got the job.

10 I see?---Um, so Tree, Donnelly, Sullivan um, I think um, Bronwyn Jones from RFS, there were a people that were involved in both those panels.

And in relation to both of those panels again at no stage did you disclose your friendship with Mr Pearce in the discussions about whether or not he would be employed?---We had discussions right across the panels, both panels. Um, both panels looked at all the applications received for both positions so there may have, although that we might have only interviewed six there might have been 20, 30 applications in all. So I had conversations with each one of those panel members about how long I've known people,
20 how I've known them from, what projects I've seen them work on et cetera, et cetera, et cetera. Did I use the word "friend" or "mate," I can't recall.

Well yesterday you sat here and told the Commissioner that you didn't disclose a conflict of interest arising out of Mr Pearce being your mate. Do you wish to change that evidence?---Could you repeat what you just said again.

Yesterday you sat here and told the Commission on several occasions that you did not disclose to the interview panels that Mr Pearce was your mate.
30 That's right isn't it?---That's correct. But I did say that I had discussions with them telling them the length of time I knew each of the applicants and therefore um, what would add to their understanding of this applicant. And they did to me. Many of them knew, you know, had people that they knew on the, that were applying for different positions as well.

There's a big difference between knowing someone for a long time and considering them a mate, isn't there?---Yes. There could be, yes.

At Port Macquarie and when issues were raised by Tara McCarthy about Mr
40 Pearce and his integrity one of the things that you said was that you'd known him for 26 years?---No. I haven't known him for 26 years.

But regardless of how long you have known him you agreed with me yesterday that he's been your mate since at least 2008, that's right isn't it?---That's correct.

Just one more thing. And after you had sacked Ms McCarthy you contacted the Ombudsman?---Correct. It was the Deputy Ombudsman I think I spoke to.

Thank you. You also contacted ICAC?---Correct.

You spoke to a Ms Fredman?---Correct.

10 And in contacting ICAC on 17 May, 2013 you told ICAC that you thought that Ms McCarthy would make a complaint?---Yes.

You told ICAC that she, being Ms McCarthy is of the opinion that she was dealt with unfairly?---I don't recall that part.

You told ICAC that she had made allegations of impropriety about colleagues?---Correct.

20 You told ICAC that most of her being Tara McCarthy's allegations have been looked into and disproven?---I recall telling ICAC that I looked, there were several allegations that I looked into by, by myself and by external agencies referring to IAB.

Of course the issues arising out of the contracts were in fact correct weren't they, none of them complied?---That's correct. The allegations that were made against Mr Pearce were true.

The issues arising out of the credit card were at least partially correct weren't they?---Explain to me partially correct?

30 That they'd been inappropriate use of the credit card?---Yes.

The issues arising out of if we like the overtime issue and Mr Pearce's involvement in it they, they were correct?---That he approved overtime and he knocked back some other parts of overtime?

Yeah?---Yes.

40 The issues in relation to Mr Schafer's vehicle they were correct weren't they?---That, no, they weren't but I thought there was no way Mr Pearce had known about that component of Schafer's vehicle.

The issue in relation to inappropriate expenditure in the form of racks, brakes, the use of hotels they were proven to be partially correct weren't they?---They were proven that he'd had, had purchased those items on his credit card certainly not for hotels but the, although he would have paid for them on the, on the credit card, yes.

So it's not entirely correct to say is it that most of her allegations have been looked into and disproven?---Well proven that it didn't require any disciplinary follow up.

Well you formed the view it didn't require any disciplinary follow up didn't you?---That's correct.

10 And you formed that view and I can go through each of them if you like but largely on your acceptance of what Mr Pearce had to tell you?---In some of the those cases, yes. In other cases it was IAB doing the investigations.

In a letter of 22 May, this is document 524, 2013 you wrote a Mr, well the Independent Commission Against Corruption?---22 May, yes.

And was that letter formalising what you'd spoke to Ms Fredman about?---I just have to read it first. I'm down to the last - sorry, your question again?

20 No, no, I was just asking you to read it. That's a letter that you sent following up your discussion with Ms Fredman I take it?---Yes.

And one of the things you say in that letter is a reference to the earlier report to ICAC in the fourth paragraph in October 2012?---That's right. I make a reference there to um, Tara's phone call to ICAC on October 12.

And you make a reference to the fact that ICAC wrote back and said they wouldn't be investigating?---Yes, that's correct. My understanding was ICAC put it through one of the, I'm not sure if I've got the right word committee or commission or panel to look at the, to look at the complaint.

30 Well can we pull up 366 please.

Have a look at the second paragraph. That's a letter you received in relation to your earlier report to ICAC and what Ms Fredman said in that letter was that given that you, Mr Kear, didn't suspect on reasonable grounds et cetera, et cetera, they won't be investigating the matter further?---That's correct, and there was another letter before that that added another layer as well in regards to what ICAC had done in relation to my first notification.

40 They didn't suspect, you didn't, sorry, I withdraw that. The didn't investigate according to this letter on the basis that you didn't have a suspicion, correct?---That's correct. I'm not sure what they were making their decision on, based on them putting it through their panel.

Well it's pretty clear in this letter they were relying on you and we've been through it this morning, they were relying on your investigation summarised in your letter on the first day you got back at work which if we cut to the chase was largely based on your acceptance of Mr Pearce. That's right isn't it?---I'm not sure what else they were relying on. I'm not sure I understand

the internal process when something in ICAC goes through the panel or the committee or the Commission, that they refer to in the letter that it was before this.

Can we go back to 524. No, 524. And where you say in your letter that ICAC had said they won't be investigating it's the fact isn't it that you were well aware that you had received the letter of 13 November where it was made clear that that lack of investigation was based on your opinion and your view that there was nothing to investigate?---And again it was also
10 based on the understanding that ICAC had put it through some internal process as well. Have you got that letter to bring up?

Yes, we can bring up 366 again for you if you like?

THE COMMISSIONER: No, you can take that that would be correct?---Is it, no, that's the, the middle one.

There's no doubt about that?---Sorry.

20 There's no doubt about that, that it would have gone through an ICAC internal process. But are they, but ICAC would have relied on what you said?---I'm not sure what they rely on in their internal process.

Well there was nothing else to rely on was there?---I, I'm not sure.

Well they hadn't investigated yet. Your intention by that letter was to stop them from investigating?---No.

Wasn't it?---I asked for their, for advice in the first one.
30

But you told them, you said in the letter words to the effect that Mr Pearce had done nothing wrong?---That was my, that was my um, position, yes.

Yeah, that cut ICAC off at the pass didn't it?---So what happens in the internal process?

Yeah, but it had the effect of making ICAC believe that there was no point in investigating?

40 MR OATES: Commissioner, I object. He can't answer that. He can't say what ICAC did.

THE COMMISSIONER: Of course he can answer it. That was your intention wasn't it?---It was, could you, what was my intention?

Your intention was to tell, to bring ICAC under the impression that there was nothing to investigate?---I gave ICAC my opinion that I thought there was no corrupt conduct, that I thought it was a mistake and negligence.

And so that, so that ICAC would not investigate?---But apparently they did in some internal process.

Every complaint goes through an internal process but they didn't investigate as a result of what you said to them. You know that don't you?---No, I don't know what ICAC did.

10 All right?---If it, if, I don't think we brought the letter I was talking about yet have we, Mr Fordham, that middle one.

MR FORDHAM: All I'm doing is looking at two letters, Mr Pearce?---Well there was three.

Sorry, Mr Kear?---Well there was three.

20 Well let's deal with it this way. You wrote a letter containing your opinion that there was nothing to investigate. You agree with that don't you?---I wrote, that was my opinion, yes.

And you agree with the proposition that your opinion was based on what can be best described as a substandard preliminary investigation?---No I don't believe, at the time or now that it was a substandard investigation, or review.

30 You received a letter from ICAC that confirmed that they would not be investigating because, "The Commission has determined that given that you, Mr Kear, do not suspect on reasonable grounds." You received that letter and you don't deny it do you?---I did, no, I received that letter.

And when you wrote this letter on 22 May, 2013 you don't identify anywhere in there that you had made it very clear to ICAC that you didn't think there was anything to look into in relation to the October issues?---I made it clear that my opinion was that he had not entered into any corrupt practice, that it was a mistake or negligence.

Where in the next paragraph you say that there was no ground for disciplinary action?---Which paragraph's that, sorry?

40 Over time, other allegations?---Oh, yes.

Do you see that?---Over time other allegations made by Tara against Steve Pearce investigated by IAB (not transcribable) disciplinary action, yes.

The decision in relation to whether or not there would be disciplinary action in relation to Mr Pearce was one for you wasn't it?---The final decision?

Yes?---Yes.

And in relation to a number of the instances that we've discussed over the last day and a bit your decision not to investigate was based on the word of Mr Pearce, wasn't it?---And talking to Ms McCarthy and, talking about contracts, looking at contracts.

You accept from me don't you that on a number of occasions you asked Mr Pearce for his explanations and you accepted them?---Yes.

10 You didn't look behind them, did you?---Which one are we referring to?

All I'm putting to you is this, that your management of Mr Pearce was coloured by your mateship with him, do you agree with that?---No, I do not.

THE COMMISSIONER: Mr Fordham, if this is an appropriate moment I should make the order that the home address of Mr Pallier is suppressed in Exhibit 11.

MR FORDHAM: Yes, it should be.

20

THE COMMISSIONER: That order is made.

THE HOME ADDRESS OF MR PALLIER IN EXHIBIT 11 IS SUPPRESSED

MR FORDHAM: And then do you see the next paragraph, "These issues do not constitute."?---Yes.

30

And where you say "these issues" what you are clearly referring to are the complaints made by Tara McCarthy aren't you?---Yes.

Thank you, I have nothing further.

THE COMMISSIONER: Yes. Can I have an indication as to who wishes to question Mr Kear?

MR TAYLOR: I don't wish to ask any questions, Commissioner.

40

THE COMMISSIONER: I beg your pardon?

MR TAYLOR: I don't wish to ask any questions.

THE COMMISSIONER: Yes, thank you.

MR HARRIS: I'm in the same position, thank you, Commissioner, I don't propose to ask any questions.

THE COMMISSIONER: Thank you, Mr Harris. Mr Willis?

MR WILLIS: I have some, Commissioner.

THE COMMISSIONER: Yes, proceed.

MR WILLIS: Thank you.

10 Mr Kear, I appear for Graeme Head in this investigation and I need to ask you some questions about your, your meeting with Mr Head. When you went to see Mr Head on 8 May of this year you had in mind that you may need to remove one or other or both of your Deputy Commissioners did you not?---I think we had that conversation, yes.

And before you'd gone to see him did you make some sort of preliminary investigation yourself or preliminary research yourself as to what the mechanism for that might be?---Yes, and I'm not sure if I'd spoken to Crown Solicitors before that but I'd looked at section 77 of the Public
20 Service Management Act, yes.

If I can assist you this way, Mr Kear, it appears from a file note at page 483 of the public brief, and I don't think it's necessary for you to, to bring that up at the moment but that you spoke to an officer from the Crown Solicitors Office on 10 May which was two days after you'd had the meeting with Mr Head, do you accept that?---If that's the dates that you're saying, yes.

All right. But in any event when you spoke to Mr Head you had in mind as a mechanism for removal of one or other of your deputies section 77 of the
30 Public Sector Employment Management Act did you not?---That was one of the things I was, had in consideration, yes.

And what you went to see him about was to obtain advice on the operation of that section, is that right?---And any other advice he had.

All right. And he told you did he not that, to a lay person section 77 of the Public Sector Employment Management Act might seem straight forward but there were, there were other things to consider than simply the wording of the section itself?---I'm, I'm, I don't recall him using the word lay person
40 I'm not disputing that but I remember a discussion around the use of section 77. I think we talked about the Jarrett case.

Yes. Well he stressed to you the importance of procedural fairness didn't he?---Oh yes.

And he stressed to you didn't he that in the context of procedural fairness the affected officer needed to be provided with a reasonable opportunity to respond to the notice of intention that you might give to them?---I don't

recall the exact words, I don't recall the word reasonable I recall the word reasonable I recall that you would need to provide the person with procedural fairness, an opportunity to take some action or do something.

And you recall him you say talking about the case of Jarrett that's Jarrett the Commissioner of Police, is that right?---Deputy Commissioner of Police, yes.

10 And why – I withdraw that. The – in terms of, of providing an opportunity for the person to respond there was consideration of a time frame in your discussion with Mr Head was there not?---I don't recall that.

Well I put to you that Mr Head, a part of Mr Head's advice to you was that there needed to be a time allowed for the officer to respond of, at a minimum of 48 hours and possibly up to seven days?---No, I don't recall that.

20 When you say you don't recall that, Mr Kear, are you saying that that was not said by Mr Head or is it you do not remember?---When I came away from Mr Head's meeting and the things that I recall that wasn't, there was a specific time period to give in relation to procedural fairness that just that you needed to provide them with that.

All right. So you're not saying that, that Mr Head didn't say that?---I'm, I'm not saying that.

30 The other issue that Mr Head spoke to you about I suggest was the impact of the Public Interest Disclosure Act upon your decision making process. Do you recall that?---No, I just recall Mr Head mentioning the Ombudsman's office but no recollection of him actually stipulating any act.

In what context do you recall Mr Head mentioning the Ombudsman?---I recall him mentioning the Ombudsman, the Crown Solicitors and a number of ways that you could assist yourself in the decision that Mr Head said to me was ultimately mine nobody else's.

40 But in terms of the Ombudsman why did you think that Mr Head was advising you to, well I'm sorry, I withdraw that. Was he advising you to contact the Ombudsman's office?---Yes, he was.

Why did you think he was advising you to do that?---That there, with a range of institutions that I needed to advise that the Ombudsman's was one of those institutions.

Was that because he told you that the, the Ombudsman had responsibility for the Public Interest Disclosures Act or the PID Act?---No, I don't recall that.

Right. Look, Mr Kear, what I have to put to you is that on quite a number of occasions in your discussion with Mr Head that the PID Act if I can shorten it in that way was, was mentioned a number of times?---I don't recall it being mentioned.

Right. Again - - -?---I do recall him mentioning the Ombudsman's office.

All right. Again do I take it that you're not saying that he didn't say that?
---No, I'm not.

10

All right. And in fact I put to you that the very last thing that he said to you, you recall, firstly do you recall him walking you the exit from his office?
---Walking me to some sliding glass doors that enter onto the elevator area.

The lift lobby?---Lift lobby, yes.

20

And do you recall him saying to you as he did that, "The first thing you should do on leaving here is seek formal advice on whether or not a PID process is already in place," do you recall him saying that?---No I don't.
No, I recall him saying that if there's anything else I needed that, you know, I could contact him.

And what I put to you is that you told, Mr Kear, as you were leaving that you would contact the Ombudsman's office?---No I don't recall that on leaving. I do recall him mentioning the Ombudsman's office in the meeting, in the meeting room next to his office.

30

You made no notes during your meeting with Mr Head did you?---No I didn't.

Did you subsequently make any notes about your meeting with him?---Ah, I don't believe so.

All right. I have nothing further, thank you Commissioner.

THE COMMISSIONER: Yes, thank you. Mr Oates?

40

MR OATES: Mr Kear, to go back to the documents recently touched upon by Counsel Assisting, they're the documents that concern the ICAC you recall that you wrote a letter on 22 May, 2013? It's page 524? Can that be brought onto the screen please?---Yes.

Look to the second paragraph. It states doesn't it quite clearly your reason for terminating Ms McCarthy's appointment?---Yes, that's, I would say it summarises rather than states every issue.

But what you told the ICAC in clear unequivocal terms was that you terminated Ms McCarthy's contract on 14 May following months of gradually losing confidence and trust in her?---That's correct.

If you go down to paragraph 5 you mentioned allegations made by Ms McCarthy against Mr Pearce?---Yes.

You told the ICAC that those matters were investigated by IAB and by yourself?---Yes.

10

And proven to have no ground for disciplinary action?---Correct.

No ground for disciplinary action doesn't include a statement that some of those matters weren't substantiated against Mr Pearce?---No, that's right.

THE COMMISSIONER: Do you regard putting somebody on a Performance Management Plan as disciplinary action?---No. I, if you call one of the documents that Mr Fordham gave to me listed a number of outcomes to disciplinary action, those are the things that I referred to.

20

But a Performance Management Plan can lead to dismissal?---If, if they didn't fulfil the Performance Management Plan.

Yes, I know?---If they made the same mistake again. But not as a direct result of the Performance Management Plan rather than whatever behaviour or action a person would take.

You only put a person on a Performance Management Plan if you're disciplining them aren't you?---No, no, that's not my understanding, no.

30

MR OATES: When you wrote to the ICAC on 29 October and advised what you'd done in relation to the allegations of Ms McCarthy you were speaking about what you genuinely believed to be the case at the time, correct?---Correct.

And you invited the ICAC didn't you to provide you with further advice on the matter?---Correct.

And that's contained - - -

40

THE COMMISSIONER: The ICAC does not provide advice to anyone except the Government.

MR OATES: But I'm not suggesting that the ICAC should, Your Honour. What I'm suggesting is that's what Mr Kear wrote.

THE COMMISSIONER: Where does he ask for advice?

MR OATES: Page 354.

THE COMMISSIONER: Yes, that's advice as to whether they're going to proceed or not.

MR OATES: I'll ask that, Commissioner.

What advice were you seeking?---Oh, any, any type of advice in relation to this um, issue that I was um, that I was informing them of.

10

How did you perceive the ICAC, what, what role did they play as far as you were concerned?---That to report matters to them for them to further look into so they could make a decision on whether something was corrupt or not.

It's inherent in their name, isn't it, that their investigators, Independent Commission Against Corruption, they investigate?---Yes.

20 THE COMMISSIONER: Your letter at page 353 is essentially a letter saying that there had been some complaints about Mr Pearce, I am satisfied that there's no corrupt conduct and I'm just letting you know that's what I think of the complaints that have been made?---Certainly notification and, and welcomes any further advice that you would have.

MR OATES: So was it your understanding that the ICAC was the specialist investigative body with respect to corrupt matters?---Oh, yes.

You're not an investigator are you?---No.

30 Do you have a background in investigation or fire service?---No.

What's your background, sir, in terms of operations?---Um, I was fire fighter, I also worked in communications area um, and then into leadership and, and management.

You're not a lawyer either?---No.

Is Ms McCarthy a lawyer do you think?---No, I don't think so.

40 Do you know whether she's an investigator, has investigative experience? ---Um, I think um, I'm not sure in regards to Ms McCarthy's involvement in WorkCover whether there was any investigative, you know, accreditations there.

Were you asked by anybody at the ICAC what you had done in the course of forming the view that you expressed in your letter of 29 October, 2012?

MR FORDHAM: I object to that, that's not relevant.

THE COMMISSIONER: The letter speaks for itself, Mr, Mr Kear said he'd reviewed the matter.

MR OATES: Sorry, I didn't hear that, Commissioner.

THE COMMISSIONER: Mr Kear said that he'd reviewed the matter in the fourth paragraph.

10 MR OATES: Yes, yes, I understand that.

THE COMMISSIONER: He told, he told ICAC what he'd done.

MR OATES: Yes, I understand he told them that he'd reviewed the matter.

THE COMMISSIONER: Yes.

MR OATES: My question goes to a different point, perhaps I expressed it poorly.

20

THE COMMISSIONER: Nobody - well, what point do you want to make?

MR OATES: I don't wish to make a point, I just wish to ask the question, Commissioner, about whether the ICAC or any person from the ICA ever spoke to you about what it was in your process that permitted you to come to the view that there was no corrupt conduct?---No, they didn't.

30 Did anybody at the ICAC suggest to you that you should go back to the suppliers and speak to them about whether or not the, there was a connection between the suppliers and Mr Pearce?---No, they didn't.

THE COMMISSIONER: And you didn't tell ICAC that you hadn't spoken to the suppliers so why should - - -?---No, I didn't.

- - - ICAC have said anything to you?---I agree that I didn't tell them that.

MR OATES: But you did ask ICAC in your letter of 29 October at page 354 after you'd expressed your view that you would welcome any further advice on the matter?---Correct.

40

And your answer to the question I asked you earlier about what that meant was anything they wanted to say to me?---Correct.

You were open to suggestion, direction or whatever from this specialist investigative body?---Absolutely.

Ms McCarthy hadn't suggested to you that there was any connection with Mr Pearce and the suppliers - - -?---No.

- - - had she?---No.

And that may be also understandable because she's not an investigator, she wasn't employed by SES as an investigator - - -?---Oh, no, no.

- - - was she?---No.

10 When you spoke to Mr Pearce about the matter, that is the Karoshi and Performance Drivers contracts he told you, didn't he, I think you said this in evidence earlier, that he effectively didn't know where to go to get people for those jobs so he sourced some names through Government contracts.

THE COMMISSIONER: I won't allow that, that is far too leading. That is really an extraordinarily leading question, I won't allow it.

20 MR OATES: How did you understand Mr Pearce came to have the names of Mr Cook and Mr Eggert?---I understood that he had sought advice from other Government agencies, I know he sought advice as I've said before from the fleet manager at New South Wales Fire Brigades or Fire Rescue New South Wales who referred - and that person's name was Mr Flanning, and he referred him to another person that was the head of State Fleet. In regards to the other contract other Government agencies, I believe it was RFS or police or one of the other emergency services that the Performance Drivers worked for.

THE COMMISSIONER: Mr Oates, we have the evidence of Mr Pearce and what he did. This hearsay evidence is irrelevant.

30 MR OATES: My next question may make it relevant, your Honour, Commissioner.

40 Did that source of information as to the potential contractors ring any alarm bells for you in terms of any potential contact or, sorry, connection between Mr Eggert, Mr Cook and Mr Pearce?---It didn't, no, it didn't have any connection with me understanding um, any alarm bells. In fact these were reputable organisations and I knew Mr Fanning from my previous time with New South Wales Fire Brigades and I knew that he was a very knowledgeable man on issues of fleet.

THE COMMISSIONER: Mr Kear, if it comes to your knowledge that an employee of SES has entered into a contract with a third party on behalf of SES and circumstances where the contract is not in accordance with Government regulations and circumstances where there should be a tender and there wasn't and circumstances where the contract contains favourable terms that wouldn't have been contained in the Government contract. Does it not jump out at one that perhaps this employee was conferring some kind of benefit?---No, it didn't.

On the other party?---No, it didn't.

What could the motivation be for conferring the benefit? I mean do you, do you accept that there was a benefit conferred?---To Mr Pearce?

No. To the contracting parties the other contracting parties?---I think the benefit was um, in regards to the termination.

10 No. They got the contract that's the first benefit is they got the contract without any tender?---Oh correct, yes.

And then the contract was in favourable terms?---In regards to the termination period, yes.

Yeah. So doesn't it then occur to you to that you should find out what has led to this extraordinary state of affairs and whether there is some connection?---A connection between Pearce and the contractors?

20 Yes?---No, it didn't because those contractors had come as a recommendation from another party not straight from Pearce.

Yeah.

MR OATES: What he told the Commission that nobody in the ICAC altered you to the possibility that there should be some examination about potential connection between Mr Pearce and the suppliers?---Yes.

30 Ms McCarthy didn't alert you to any such matter?---No, she didn't.

You also spoke to Mr Scutella and Mr Tree did either of those persons, not suggesting they should, not suggesting they have investigative backgrounds, did they, did any of those people, either of those people say to you you better go back and check the connection if there's any, if there is one between Pearce and these suppliers?---No, they didn't.

Did Ms Fredman ever suggest to you that you should do that?---No, she didn't.

40 MR FORDHAM: Look I object to this.

THE COMMISSIONER: Really, Mr Oates, this is a, this horse has been long dead, which you are flogging.

MR OATES: I don't know that I'm flogging anything, Commissioner, I'm just trying to - - -

THE COMMISSIONER: A dead horse.

MR OATES: - - - deal with each, just trying to deal with each aspect that might involve the, the potential advice to - - -

THE COMMISSIONER: There is – we’ve got a, we’ve got a statement from Ms Fredman, we have had evidence from Mr Scutella, we’ve had evidence from Mr Head. None of them said that any of these questions had been asked of them. You didn’t ask them any questions to that effect and in accordance with the ordinary way in which litigation is conducted it would
10 be quite wrong for the Commission to find that any of these parties had said anything of this kind to Mr Kear and it’s quite obvious that the Commission is not going to find this because there is no evidence to that effect. So what is the point of all of this?

MR OATES: It was to what was in Mr Kear’s mind when he wrote that letter.

THE COMMISSIONER: No, no. You’re not asking about what’s in Mr Kear’s mind, you’re asking about questions which these persons, you’re
20 asking whether they said anything to Mr Kear about this issue and the broad mass of the evidence which we’ve heard after the last few days is already to the effect that they haven’t. They didn’t. So what’s the point of all of this.

MR OATES: If you’re content with that, Commissioner, I’ll move on.

THE COMMISSIONER: Well I am. I told you that.

MR OATES: Well I’ll move on.

30 THE COMMISSIONER: Okay, thank you.

MR OATES: You were asked yesterday about your relationship with Mr Pearce. You’ve known him since 2003, became friends in 2008, he was employed in 2010?---Correct.

You, it was put to you by Counsel Assisting that you have entertained him at your home?---Yes.

40 How many, on how many occasions has Mr Pearce been to your home for the purpose a dinner or a meal or a barbeque, or whatever the case might be?---Probably two occasions I recall. Maybe two.

Ah hmm. And on each occasion were there other people there?---Oh yes, yes.

Do you recall the events?---Um, one, one event was when I had all the senior executive group um, so the Deputy Commissioners, all the, all the ah, directors of the senior executive group at our house for a lunch.

And was there another occasion when your son had a birthday party?---
That's correct. Yeah, my eldest son.

How many people were, I'm sorry?---My eldest son, yes.

How many people were present at that party?---Oh, probably around 80.

10 Many of them people with whom you were connected in a work
environment?---Yes.

Was there one occasion where you had some dinner with Mr Pearce and
another fire fighter?---At my home are you talking about or - - -
Yes?---Oh yes ah, there would have been three. There was another occasion
um, a Mr Mears and his wife. That was a, that was a lunch also.

20 And how many times have you been to Mr Pearce's home?---Maybe two or
three times. That, that would be sort of inside his home. I dropped him off
or picked him up on the way to city meetings sometimes.

It was suggested to you that you haven't disclosed and didn't disclose that
he was your mate at particular times in the employment process, is that
correct?---Yes.

Yes. In the Fire and Rescue Emergency Services area are there many
potential applicants for the types of job which Mr Pearce sought?---Yes.
Both in Fire Rescue and other emergency services.

30 They come from a tight area?---The industry, the emergency service
industry, yes.

Not unusual to know people?---Oh, it would be very rare that I didn't know
people that were applying for that level jobs.

THE COMMISSIONER: But it would be rare that a mate would apply for a
job?---Um, no.

40 No, you've had lots of mates who apply for jobs have you?---I have lots of
mates that apply for jobs, yes.

And that you give them jobs?---(No Audible Reply)

That's a cosy relationship?---(No Audible Reply)

Now, do you have lots of mates who you, to whom you give jobs?---No.

Is Mr Pearce the only mate to whom you've given a job?---No. I would
have had other friends in Fire Brigade that I would have given jobs to.

Mates?---Well, mates, friends, yes.

And did you ever disclose beforehand to, in the process of employing them to others or to your superiors that you were about to employ a mate?---No.

So that does end up in a number of your mates being at the SES?---No, I thought you were referring to Fire Brigade when I was talking about my - - -

10 But I'm asking about SES?---I don't think I've, no I haven't, no.

Mr Pearce is the only mate you have employed at the SES?---That's correct. I think I've only had about three panels that I've been on in the SES.

Yes. Yes, Mr Oates.

MR OATES: When you spoke to Mr Scutella and spoke to Mr Tree from Tasmania about the report by Ms McCarthy as to the Karoshi and Performance Drivers contacts you were aware weren't you that those two
20 men knew of your relationship with Mr Pearce?---Oh yes.

That was quite clear, you understood that that, that to be the case?

THE COMMISSIONER: Do you want to give evidence, Mr Oates?

MR FORDHAM: Yes, I object to this. These two - - -

THE COMMISSIONER: I mean, really you know very well that these questions are simply putting words into your client's mouth.
30

MR FORDHAM: Can I raise another objection, Commissioner, which is these two men came and gave evidence. We stood down so that instructions could be sought.

THE COMMISSIONER: Yes.

MR FORDHAM: Now if this was going to be raised one would have thought it would have been put.

40 THE COMMISSIONER: Yes. That thought has occurred to me.

MR OATES: Can I just say something on that point, Commissioner? The Commission has myriad resources. This matter has been under investigation for months. The Commission has Senior Counsel, Counsel, there are investigators, lawyers, et cetera, months to consider these issues and months to consider the material. Not so with my client. He has one person representing him and on Friday of last week I received 1,200 pages of material, not indexed, and I was expected to then get on top of that and

index it and come along ready to run a case in the same way that they have been prepared, that is simply not equitable.

THE COMMISSIONER: Mr Oates, what has that got to do with these questions?

MR OATES: I'm talking about what Senior Counsel just said about me being prepared.

10 MR FORDHAM: Oh, no, hang on. I would like to address that issue. I'm not going to get into the very solid law in relation to particulars and briefs in this jurisdiction. Those two men gave evidence. I did my friend the courtesy of giving him a statement I didn't have to give him. We then adjourned for a period of time so that instructions could be sought as a matter of fairness. He took that opportunity and elected not to ask the question. That's got nothing to do with what he's now raising. He had the opportunity, he didn't put it and he can't put it now.

20 THE COMMISSIONER: Yes, Mr Oates. Anyway, look, the question is leading.

MR OATES: Yes.

THE COMMISSIONER: And I disallow it for that, it's not necessary for me to deal with anything else, just proceed please.

MR OATES: As you please.

30 When you were told by Ms McCarthy that the contracts didn't comply did you turn your mind to whether the contracts should or should not be terminated?---Ah, Mrs, Ms McCarthy and I had a discussion around that, yes.

All right. And you discussed it together?---Yes.

And there was a decision made by you - - -?---Yes.

40 - - - that the contracts should be terminated?---Yes, eventually it was my decision, there was a few steps along the way in regards - - -

And what were those steps?---Oh, steps in regards to the conversations with Ms McCarthy about the performance of some of the contractors, not just that they were not compliant.

When you interviewed, sorry, when you spoke to Ms Calder in the context of the allegation of fabrication of notes by Mr Pearce I think the evidence is that Ms Colbey suggested you do that?---Yeah, that's correct, I asked, there was two issues that Ms McCarthy had brought to me, the credit card issue

and the fabrication issue. I had Ms, I had spoken to Ms Colbey on the phone, had her in my office and asked for advice on both of those.

Did Ms Colbey suggest to you you speak to Ms Brus?---Yes, she was the one that - ah, no, she was, suggested I talk to Ms Calder, not Ms Brus. She didn't mention Ms Brus.

Ms Colbey's the specialist independent investigator from IAB isn't she?
---Correct.

10

Why did you dismiss Mr Pallier?---Ah, I offered Mr Pallier to resign and then terminated his services because of three, three issues.

20

Yes?---One was that he had bullied and attempted to take, bullied an officer of the Audit Office of New South Wales in an attempt to have removed from the management letter that they would send us referenced to a gift register as he had accepted gifts without approval. That was one, sorry, both those, the, the, the um, taking of the gifts, not, not reporting them and bullying a um, audit officer, Audit um, Office of New South Wales employee and the second one was that he concealed ah, a report ah, where he owed um, a considerable amount of money um, for the use of his private vehicle that he had done, had IAB done and um, given him that report three or four months ago.

Breaches of trust?---Oh absolutely.

30

Did his position in the organisation have any bearing upon your consideration about whether he should be terminated?---Yes, it did. Kevin was the Director of Finance and Logistics and, and all these areas apart from being an area that he had um, he, you know hid the letter and bullied the office this was all within his portfolio.

He also sat on the State Executive Group didn't he?---Sat on the State Executive Group and the Audit and Risk Committee um, in the organisation.

A person in whose integrity and upon his word you needed to rely?---Oh absolutely.

40

THE COMMISSIONER: Mr Oates, I've allowed you to ask a number of these questions because the reasons for dismissal on Mr Pallier did crop up earlier this morning but you've gone much further now and Mr Kear is making all kinds of allegations against Mr Pallier who's not here, who has not been called as a witness and in circumstances where, where in fact the grounds on which he was dismissed have, have a pretty remote connection with what we're talking about here. The relevance of Mr Pallier's position concerns the issue in substance of the overtime complaint all the other grounds are not part of our consideration.

MR OATES: As I understood the early part of the, the investigation or the hearing, your Honour, there was a suggestion that Mr Pallier was dismissed because of overtime or partly because of the overtime issue.

THE COMMISSIONER: Yes, I know that's what I've said, I've just said the question of overtime is the issue.

MR OATES: And what I asked Mr - - -

10 THE COMMISSIONER: Sorry to interrupt, it is only the issue because Mr Pearce had approved the overtime and it seemed an odd thing to do to take into account the overtime claims in the dismissal proceedings which on the evidence on Ms Brus was the case.

MR OATES: Well, well I'll make submissions in respect to that, your Honour, Commissioner.

20 THE COMMISSIONER: Well that's, then you're entitled to. I'm not stopping you. And the second part of Mr Pallier's evidence that is relevant or Mr Pallier's position is relevant is Mr Kear's conduct was regard to the allegations that there were fraudulent diary entries. It's in those two areas that Mr Pallier's name crops up as a relevant matter in this inquiry. Why – all these other matters that Mr Kear has referred to are not being investigated and have not been investigated by the Commissioner and I do not regard it as fair that these allegations go into, or gone into any depth because Mr Pallier's not here to, to answer them.

30 MR OATES: I thought that there was a suggestion or an invitation to draw inference that my client had dismissed Mr Pallier for improper reasons. (1) Because Mr Pallier had allegedly made some disparaging comments and secondly because of the overtime issue.

THE COMMISSIONER: It's not in the scope of the inquiry. You look at the scope it's got nothing to do with - - -

MR OATES: I'm talking about what I understood to have been the evidence that, sorry, the questions for which were put by Counsel Assisting, I can't identify which ones at the moment.

40 THE COMMISSIONER: For the reasons I've explained I won't allow any further questioning designed to show why Mr Pallier was dismissed.

MR OATES: As the Commissioner pleases. You took Ms McCarthy's complaints about the two contracts very seriously didn't you?---I did.

As a consequence you put Mr Pearce on a Performance Agreement?---Yes. And put a letter on his file.

Have you ever done that with a person of Mr Pearce's rank before?---A Deputy Commissioner rank?

Yes?---No.

10 Why did you terminate Ms McCarthy's appointment?---Oh, over a series of months I became, I came to realise that although Ms McCarthy was efficient in the administration side, the compliance side of the organisation I was working with her and other members of SEG, Senior Executive Group to grow her leadership skills in creating a high performing team in um, having empathy for the, for the team members and it's that leadership qualities, also her ability to implement change management strategies that suited the organisation. So there was a number of those reasons couple with a couple of events in regards to advice I'd got that began to make me realise that there was a loss of trust that I had in her and confidence to do her job.

20 THE COMMISSIONER: You never told her any of that did you?---In the um, in the um, ah, professional development arenas that we were using, sitting down with SEG, sitting down with Pearce and McCarthy, and one on one's I was talking about her ability in those areas.

You never formally put to her that you had complaints against her that put her position in any jeopardy did you?---I didn't formally put down any complaints but it was known to her and Mr Peace that, that - - -

30 Are you saying that you, on occasions when there were other people around, when there were these conference type affairs you put to her that her conduct wasn't, in some respects wasn't all that you expected, is that what you're saying?---I'm saying that in those arenas I spoke quite openly about the performance of both the Deputy Commissioners.

So just describe the arenas?---Ah, we had a number of organisations come in and work with the Senior Executive Group um, lead exec, another person from our Employee Assistance Program and it was either SEG members in those, in those events or just Ms McCarthy, Mr Pearce and I. And, and one of the people from one of the organisations.

40 Did you ever warn Ms McCarthy that lest she changed in specific respects she was in jeopardy of losing her job?---I informed both the Deputy Commissioner that they were both in risk of losing their jobs.

Yes but do you mind answering my question?---I thought I did, Commissioner.

I asked you whether you had ever informed Ms McCarthy that for specific reasons she was in jeopardy of losing her job?---Well they, those times when I spoke about the possibility of either Deputy Commissioner losing

their job I was quite specific about the need to develop high performing teams - - -

Are you saying that, in these arenas as you term them you warned Ms McCarthy that she was in jeopardy of losing her job?---I stated on a number of occasion, Commissioner, that either one or both of them could lose their job and when there was only two in the meeting - - -

10 How long before you actually fired Ms McCarthy did you first say this to her?---Um, it would have been many months.

Well, I note that this was never put to Ms McCarthy?---Sorry, can you say that again?

It was never put to Ms McCarthy that you had warned her that unless she changed her behaviour she would lose her job?---That's what I'm saying, Commissioner, that I did say to Ms McCarthy and Mr Pearce that there was a chance that either one of them or both of them could lose their job.

20 You said this to both of them several months before?---Yes.

But you nevertheless gave both of them a raise after all this had occurred? ---I gave them a raise after that occurred?

Well, what does this tell them? That they're in danger of losing their job?

30 MR FORDHAM: Commissioner, I probably should correct a piece of chronology to be fair which is that the raise was given in February, the statement that either or both would lose their jobs on my understanding of the chronology comes at the Port Macquarie conference which is shortly after the raise and probably in late March or early April. That is then repeated at an SEG meeting which is in 7 May, one week before the sacking.

THE COMMISSIONER: Yes, thank you.

MR FORDHAM: And I apologise.

40 THE COMMISSIONER: Thank you, Mr Fordham. Yes, Mr Oates.

MR OATES: I think you were telling the Commission why it is that you'd the trust and confidence in Ms McCarthy. Were there other aspects of your decision?---Yes, yes.

Can you explain that to us, please?---Well, I think - - -

THE COMMISSIONER: I don't know that this is relevant. These matters, you, when you dismissed Ms McCarthy you never told her of these complaints on that occasion?---On the, on the day of the dismissal?

Yes?---No, I summarised those as trust and confidence.

Well, why, why is it relevant that there were other grounds, Mr Oates, on which Mr Kear loses confidence in - - -

10 MR OATES: The first - - -

THE COMMISSIONER: - - - Ms McCarthy? I mean, the issue is whether Ms McCarthy was dismissed as an act of reprisal.

MR OATES: Yes. That's a, that's how the Commission's framed it.

THE COMMISSIONER: Yes.

MR OATES: And I'm endeavouring to display through this man's evidence
20 - - -

THE COMMISSIONER: That there were other grounds.

MR OATES: - - - it was a legitimate, appropriate grounds for her removal.

THE COMMISSIONER: Were these put, what you are now seeking to lead, were they put to Ms McCarthy?

MR OATES: Well, Ms McCarthy may not know what was in Mr Kear's
30 mind, I mean, you've already - - -

THE COMMISSIONER: Well, Mr Kear has said to us that he told Ms McCarthy this at several arenas to use his word. I'm now asking was this put to Ms McCarthy when she gave evidence?

MR OATES: These, these issues were joined in the - - -

THE COMMISSIONER: Do you mind answering my question?

40 MR OATES: No, they weren't.

THE COMMISSIONER: No. Well, you can lead this evidence but I have to tell you that in the light of the fact that Ms McCarthy was not given the opportunity of dealing with these matters that has the capacity to detract from the weight of the replies but you are free to proceed.

MR OATES: Commissioner, the - - -

THE COMMISSIONER: Just proceed, Mr Oates, I'm giving you leave to proceed.

MR OATES: May I make a submission with respect to that - - -

THE COMMISSIONER: Yes.

10 MR OATES: - - - because it's important in terms of the Commission's directions? My client provided a statement with a volume of annexures, they have been in the Commission's possession for some time and they join this issue. Ms McCarthy wasn't - it wasn't suggested to Ms McCarthy by Counsel Assisting that those things hadn't occurred. Your Honour asked yesterday, I beg your pardon, Commissioner, you asked yesterday whether Mr Kear adhered to the truth and accuracy of the statement. That answer was yes to my mind.

20 THE COMMISSIONER: In fairness if you're to, if, if, if some finding is to be made against Ms - which has the effect of reflecting adversely against Ms McCarthy where Counsel Assisting hasn't asked questions dealing with that matter in fairness to Ms McCarthy if you were to make submissions reflecting adversely on her those should have been put to her.

MR OATES: I don't know whether they do reflect that.

THE COMMISSIONER: Well if you don't know it's your problem, that's my, my, that's my attitude, Mr Oates. For you to tell me I don't know that they do is not a helpful submission.

30 MR OATES: Well, Commissioner, all I can say is that we, we joined issue with this matter in the comprehensive statement given to the Commission with the annexures and those matters were there now. Counsel Assisting chose to take some of those matters from my client's statement and introduce evidence from Mr Head and Mr, Mr Tree et cetera.

THE COMMISSIONER: You're repeating yourself, Mr Oates, you've made this submission already.

MR OATES: I didn't think I was but if you - - -

40 THE COMMISSIONER: You were. I have said you are free to proceed if you want to address this matter further you can do so in written submissions.

MR OATES: Yes.

What other reasons were there for losing trust and confidence in Ms McCarthy?---There was a range of issues, working with the team, building trust - - -

THE COMMISSIONER: You've said all that. Time to think of something new?---The, some of the advice that she'd given me in regards to overtime, in regards - - -

10 What advice in regard to overtime?---That um, you may recall the issue of um, a meeting with treasury where Ms McCarthy advised me and, and drafted a memo in regarding the movement of overtime rates for SES officers from what we were paying at actual rates to grade 8 plus \$1 which she later then um, said to me that I did need to implement - - -

Who said that to you?---Beg your pardon?

I beg your pardon?---That I, I said that to Ms McCarthy. Was that the question?

You have said that Ms McCarthy gave you advice about the overtime that - - -?---Yes.

20 - - - the extent of overtime that could be paid?---Yes.

Are you saying that that advice was wrong?---No, what I'm saying is later Ms McCarthy said to me that I didn't have to take that advice that I could have left it at the current rates.

Well there, there's another matter that was never dealt with.

MR OATES: Yes, I put it to her, your Honour, I think I - - -

30 THE COMMISSIONER: Put it to her what?

MR OATES: I think I put that to her. Well I'm happy to be wrong but - - -

THE COMMISSIONER: What was not put to her was that she herself said that what her, that her advice was wrong.

MR OATES: I don't know, yes, that's true, that's true.

40 THE COMMISSIONER: Mr Kear, Mr Kear now - - -

MR OATES: I didn't put that.

THE COMMISSIONER: Mr Kear now says for the very first time Ms McCarthy told him that her previous advice was wrong.

THE WITNESS: No, I'm not saying that, Commissioner, I'm saying that she denied ever giving me that advice.

THE COMMISSIONER: That's put for the first time as well.

MR OATES: But I thought I put it, Commissioner, I, I don't have the transcript reference but I, I thought I did raise that with her.

I think what you put was that the advice was wrong?---I don't, I don't, didn't have those instructions I didn't think.

10 THE COMMISSIONER: You said that that wasn't in accordance with the award.

MR OATES: I, I'll rely upon the transcript, Commissioner, my memory doesn't take me there.

THE COMMISSIONER: Well I accept that and we'll both have a look at that. Just I think, let's try and move on.

20 Do you want to – Mr Oates has asked you about reasons. Are there any other reasons that you want to give for your loss of trust and confidence in Ms McCarthy?---I think I've given them all, Commissioner.

MR OATES: Commissioner, on the issue of the comments by my client that he had previously warned both Mr Pearce and Ms McCarthy that things, they could, one or both of them could lose their jobs, I take what you say about me not having put it. I note Ms McCarthy's in the hearing room, I'd be very happy to put those matters to her in a, if you wish to have her recalled.

30 THE COMMISSIONER: No, I don't wish to have her recalled, I don't think it's appropriate. You had ample opportunity and didn't do it. Proceed.

MR OATES: I have no further questions.

THE COMMISSIONER: Yes, Mr Fordham.

MR FORDHAM: No, thank you, Commissioner.

40 THE COMMISSIONER: Yes, you may, you're excused, Mr Kear.

THE WITNESS EXCUSED

[11.49am]

MR FORDHAM: That's the evidence, Commissioner.

THE COMMISSIONER: Yes. Well, Mr Fordham, when will you be ready to provide written submissions?

MR FORDHAM: I'll just have a quick discussion with Mr O'Neill. If it suits the Commission we can certainly do it by the end of term. If you would like them sooner - - -

THE COMMISSIONER: What's the end of term?

MR FORDHAM: The 20th I believe.

10 THE COMMISSIONER: Well, I take it that the other parties would like longer for their submissions if they just, if they get it by 20 December, assuming that they are, assuming that Mr Fordham and Mr O'Ryan provide, Mr O'Neill, I beg your pardon, provide their submissions by say 23 December - how long, how long do you want Mr Oates?

MR OATES: I'm content to take whatever time you consider's fair under the circumstances.

20 THE COMMISSIONER: No, I want to know what you want.

MR OATES: The end of January, Commissioner.

THE COMMISSIONER: All right. I think end of January's, I understand - - -

MR OATES: I understand it's problematic for you - - -

30 THE COMMISSIONER: - - - that it's the time of the year. Are you going on holiday?

MR OATES: Yes.

THE COMMISSIONER: And I, it's the time of year when most people go on holiday, given.

MR OATES: I'm not, I'm not going overseas. I, if you need to do it earlier - - -

40 THE COMMISSIONER: I know.

MR OATES: - - - I will endeavour to do it.

THE COMMISSIONER: No. I don't want to, I don't want to spoil your holiday, Mr Oates. I have other things I'd like to do but one of the things I don't want to do is spoil your holiday.

MR OATES: Well, I don't, I don't wish you to be in any way humble about that, Commissioner. Please tell me whatever ways you wish to do so. I've been married, I can take direction.

THE COMMISSIONER: I think we should stop this.

MR HARRIS: I'd be, I'd be quite content with that.

THE COMMISSIONER: The end of January?

10

MR HARRIS: Yes, thank you.

THE COMMISSIONER: All right.

MR TAYLOR: No difficulty with me, Commissioner.

20

THE COMMISSIONER: Yes. That's an order, Mr Fordham. I will not be Commissioner at the end of January so I will not be the Commissioner at the time the report is handed down. I'm making that clear. I don't see any difficulties in that. This is a report of a Commission, not my report and a report will be issued in due course after all submissions have come in. The Commission will now adjourn.

30

MR FORDHAM: Before the Commission does my understanding is that this is the last public hearing over which you will preside. I have no authority on behalf of anyone to say this but you have dedicated a significant amount of your life to the service of the people of New South Wales and that probably shouldn't go without comment. And on that basis those of us, the bar table and those of us here I would like to acknowledge that.

THE COMMISSIONER: Thank you. I appreciate that. Thank you very much.

**AT 11.53AM THE MATTER WAS ADJOURNED ACCORDINGLY
[11.53am]**