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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION VESTA

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 28 JULY 2011

AT 10.05AM

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

THE COMMISSIONER: Mr Newlinds.

MR NEWLINDS: Mr Commissioner, no party wishes to ask Mr Colnan any questions so can I tender the statement of Craig Colnan of 8 June, 2011.

THE COMMISSIONER: Yes. The statement of Mr Colnan will be Exhibit 2. I just want to make sure that the representatives of the media are given copies of these statements.

10 MR NEWLINDS: That will be attended to.

THE COMMISSIONER: And all copies of all statements tendered should be made available. Yes, thank you. That will be Exhibit 2, Mr Colnan's statement.

#EXHIBIT 2 - STATEMENT OF MR CRAIG COLNAN DATED 8 JUNE 2011

20

MR NEWLINDS: Thank you. And can I move to the next witness which is Dr Lang. I think the Commissioner's Associate has extracted his statement. So can I first identify it and then call him.

THE COMMISSIONER: Is it Dr Lang?

MR NEWLINDS: It's Dr Lang.

THE COMMISSIONER: Is he represented?

30

MR NEWLINDS: He's not. And there is a statement which is dated blank March, 2011.

THE COMMISSIONER: Yes.

MR NEWLINDS: And I call Dr Lang.

40

THE COMMISSIONER: Won't you take a seat, Dr Lang. Dr Lang, I need to explain something to you before you give evidence. There is some legal protection that the Commission offers witnesses who testify before it. I need to ask whether you want to take advantage of that and I need to explain to you what that protection is. As a witness appearing before the Commission you are required to answer all relevant questions and produce any document you're required to produce and this you must do by law even though your answer or production may incriminate you but if you object to answering any question or producing any document your answer or the document produced can't be used against you in any civil proceedings or criminal proceedings or disciplinary proceedings.

It is my duty to tell you that that protection doesn't prevent you from being prosecuted or for giving false evidence or for other offences under the Independent Commission Against Corruption Act. Now, the protection may be obtained by you by objecting to any particular question or production of a document. That carries with it a measure of inconvenience because it means you have to be thinking about whether you should object to every question that's asked but we can get over that by me making an order, if you wish me to, to the effect that all answers which you give and any document
10 which you produce will be regarded as having been given or produced under objection so that the protection that's offered will apply to the entirety of your evidence if that's what you wish.

Now, it's a matter for you to decide whether you wish to afford yourself of that protection, sometimes witnesses say they don't want it but that's entirely a matter for you. Do you understand what I said?

DR LANG: I understand, Commissioner, yes.

20 THE COMMISSIONER: What would you like me to do?

DR LANG: I don't require any protection.

THE COMMISSIONER: Yes, thank you. Would you like to give your evidence under oath or do you wish to affirm the truth of your evidence?

DR LANG: Affirmation, please.

<ROBERT DAVID LANG, affirmed

[10.10am]

THE COMMISSIONER: Mr Newlinds.

MR NEWLINDS: Is your name Robert David Lang?---Yes.

And are you currently employed as the Chief Executive Officer at Parramatta City Council?---I am.

10

And is your address C/- Parramatta City Council?---Yes, it is.

And for the purpose of this inquiry, have you made a statement and signed it which bears a date March 2011?---Yes, I have.

Have you got a copy of that with you?---Yes, I do.

As best you can say, are the contents of that statement true and correct? ---Yes, they are.

20

Yes. I tender that statement, Mr Commissioner.

THE COMMISSIONER: Yes, the statement of Dr Lang will be Exhibit 3.

#EXHIBIT 3 - STATEMENT OF DR ROBERT LANG DATED MARCH 2011

30 MR NEWLINDS: Can I just ask you some questions focussing on a, some matters. Firstly, is it right that during the period of your tenure at CEO of the Sydney Harbour Foreshore Authority the Authority was first the consent authority for the purpose of development applications and the like?---Yes.

Secondly, the prosecuting authority for the purpose of prosecuting any breaches of any particular acts concerning property?---Yes.

And finally the landlord for those premises within the Authority's precinct which were available to let?---That's correct, yes.

40

Now, when you arrived at the Authority did you perceive that there was a tension between those various jobs?---Yes, there, there always has been and I think that's an ongoing issue in balancing out under the Sydney Harbour Foreshore Authority's Act it had a, a number of roles to balance and they were the words that were in the Act and they were, that, that's some of the matters you've raised.

Now, I think it's right, isn't it, that since you departed the Authority is no longer the consent authority?---I understand that to be the case, yes.

But it's still the prosecuting authority and it's still the landlord?---I believe so but I'm not as close to that as I was at the time.

10 Can you tell the Commissioner how it was that you sought to manage the competing interests generated by those competing responsibilities within the Authority?---Certainly. The, the Board and I, the CEO of the organisation, were the, the, the determining entities that had powers to, to rule on various matters and there were Chinese walls between the planning side and the property side that ensured that our landowner consent process or our landlord responsibilities were dealt with by an independent part of the organisation to the part that dealt with the planning and assessment.

20 And how, what did you do if anything to ensure that those Chinese walls worked?---It was my role to make sure that the, the differing advice that may be obtained from different parts of the organisation came to me and where appropriate to the Board for them to decide on the balance of, of, of the facts before them, whether or not it was best to go one path or another.

And were there rules in place to prevent people who work in the various departments from speaking to each other about particular properties?
---Certainly there was discussion within the organisation but certainly not the, the ability to influence.

Well, how, how - what did you do to make sure that there was no influence?
---Well - - -

30 Firstly, can I, can I - it is right, isn't it, that the organisation was divided into departments with a director of each department?---Correctly. Structurally there was an executive director looking after the, the properties, the tenants' side of things and there was a different executive director that looked after planning and they both reported to me.

Mr Kelly at the relevant time was the Executive Director of the part of the Authority known as TAMS, Tenant and - - -?---Asset Management Services and that dealt with all the property matters.

40 The consent part of the Authority, what was its department called?---The Planning and Assessment part reported to a different part of the organisation, effectively through Corporate and through Egle Garrick.

And the prosecuting arm?---Depending on the regulations that were involved it could be various parts of the organisation but it could have been in place management area or it could have in the regulatory area, it depends on, on the issue.

And are you able to tell us which particular acts the Authority had, the prosecutorial role?---Under the Sydney Harbour Foreshore Authority Act it had - all its powers were vested in that Act and that, during a number of different regulatory as well as planning assessment responsibilities.

And is this a fair summation of the tensions that could come to bear from the various parts of the organisation, obviously those working within the tenancy part were interested in generating as much rent as they could and having as many buildings with tenants in it as they could?---Yes, that's true.

10

On the other hand those in the heritage part wanted to make sure that the buildings were looked after appropriately having regard to their heritage character?---Absolutely correct. In The Rocks in particular the, the heritage importance was such that that was given a very high level of priority.

And I think that's built into the Act as well as part of the objects (not transcribable)?---Yes it is.

20

And of course the prosecuting people, being prosecutors no doubt they were keen on prosecuting people?---The regulatory side did want to, to perhaps be a little bit more of the policeman than other parts of the organisation would, would prefer.

And obviously the most likely candidates to be prosecuted would be tenants, because they're the people that would be fiddling with the buildings?---Yes, that's correct.

30

And so that would create an obvious tension because no doubt the landlord didn't want their tenants to be prosecuted?---Indeed. And because of the (not transcribable) and responsibilities under the Sydney Harbour Foreshore Authority, it was also very important that the, that the buildings in The Rocks were occupied and filled with tourist friendly tenants who would provide that tourism experience that people expected.

And this might be obvious but let me ask it anyway, it's right is it not that any precinct where there are many shops or outlets, there's at least a perception of benefit to everyone if all the shops are full?---That's correct. Vacancies give the wrong impression of the precinct.

40

The smell of death or at the very least less people come?---A poor tourism experience.

All right. O.K. Now obviously the fundamental obligation of a tenant is to pay their rent and may we take it that from time to time tenants within the Authority's precinct fell short of their contractual obligations to pay rent? ---Yes.

Now how did one manage that if you're able to answer that at such a high level in circumstances where obviously they're the tenant and there is an imperative to keep the property full and so on? Did you have to make a judgement on a case by case basis?---Indeed it was a judgement call. In many cases tenants would seek rental abatements when there was a downturn in tourism for example. Those requests would normally go to the Board if they were more than a couple of months duration. And the Board would consider carefully the benefits of keeping a long standing tenant that has a good product, that we wanted to maintain in The Rocks, for example, versus taking a short term view of saying well they can't pay their rent this month therefore lock them out.

From time to time did the Authority take the decision to strictly enforce legal rights?---Yes, we did. However there was always that balance.

Now that's in relation to rent abatements. Did sometimes tenants simply stop paying their rent for whatever reason and make it clear that they would like an opportunity to catch it up later?---Yes. Those requests also went forward either to me or to the Board and they would be considered on their merits.

And were there occasions where such situations were dealt with strictly in accordance with the, with the rights under the lease, that is locking out and pursuing arrears?---I'd have to say that was fairly rare.

How, how would you say generally such situations were managed?
---Generally people were given some opportunity to catch up. The tourism industry is very cyclical and if there was a feeling that within a few months they would be in a position to be able to fulfil their obligations including paying arrears, then in many cases they were given that opportunity.

Now can I draw your attention to a decision that was made in the middle of 2007 concerning the property 91 George Street, The Rocks, which used to be Costi's Seafood and is now the Guylian Chocolate Shop. Do you know the building?---I'm aware of it, yes.

And do you remember that in about May 2007 there was an application before the Authority or a request before the Authority from the then tenants, that is one of the Kazal companies for two things. The first was for rent abatement because the rent hadn't been paid for a period of time and there was an outstanding amount?---Yes.

And secondly for a change of use to change the allowed use under the lease from I think seafood outlet to chocolate outlet?---Yes, I recall.

Now, just focusing on the state of affairs regarding the Kazals' rent obligations in relation to that property at the time obviously there had been a

number of months where the Kazals had not paid their rent?---Yes, that's correct.

Were you aware that that was happening as the rent was building up, was there a system whereby unpaid rentals were recorded in some way and brought to your attention?---Yes, they were.

10 And were you aware that in that period of time the shop was empty?---The shop was empty and shut because the previous business had actually gone out of business.

And that was the seafood Costi's?---That's correct.

And so you had a position where there had been an assignment of the lease from the Costi's or the Administrator of the Costi's company to the Kazal company?---Yes.

20 The Kazals therefore were the tenants, SHFA had not opposed that assignment?---That's correct.

And they weren't paying their rent?---Yes.

Did you make a decision as to how that situation should be dealt with?
---Yes. At the time the discussions with the Kazal company were to say put forward a new plan, put forward a new shop, if you like, clearly the seafood business was not functioning, we wanted something to happen in there and we encouraged them to come forward with a plan that we could put to the Board that would address that situation and get the shop filled again.

30 And how did you encourage them to pay their rent?---Part of the discussions with them was to keep their rent paid up so that they would be able to maintain the lease and of course these discussions dragged on, it took some months before both matters, both the rental matter and the change of use matter came to the Board.

Now, obviously they didn't bring their rent up to date until close to the time that the positive decision was made?---That's correct.

40 Now, did you perceive that perhaps what the Kazals were trying to do was to exert commercial pressure on SHFA by holding that rent back to at least expedite the process?---That's exactly right.

Now, is there anything unusual about tenants doing that sort of thing?---No, that was quite typical.

And you just had to manage that as you saw fit?---Yes, that's correct.

Because did you think at the time it would be good or bad for SHFA simply to lock the Kazals out and try and find another tenant?---It was a, it would've been a bad thing, it was difficult to get good tenants with the right kinds of uses in a tourism precinct, it wasn't just a matter of just picking anything, we had a leasing strategy and it had to be consistent with that.

Right. And at a very high level can you tell us what sort of tenant would not be considered suitable?---Again, being a tourism precinct, for instance, in just filling it with - - -

10

Offices?--- - - - offices or, or, or shops that wouldn't have a tourism related use. We were keen to get good product in there that would be consistent with a tourism precinct and not just something you'd find in the down town of City of Sydney.

THE COMMISSIONER: Dr Lang, if I might just ask you this. My impression as an ordinary resident of Sydney is that driving through The Rocks, especially over a weekend is quite difficult and getting parking is impossible and it's absolutely full of tourists?---Mmm.

20

Why is it difficult to get a tenant?---The challenge is, I think, the rents are quite high in The Rocks and we, it was always the Authority's view that we should charge market based rents. A number of tenants, unless the, the volume of footfall traffic, and I think the figures were some nine million people walked the streets of The Rocks annually, was all very well but some of the tenants found it very difficult to get those, that footfall to walk into their shops and buy their product. So we had a very determined leasing strategy to make sure that we would get the right kind of tenants in there that would in fact be attractive to a tourism market.

30

But in your, I'm just thinking about your statement, that it was difficult to get tenants. I mean, - - -?---When I first started the Foreshore Authority there was a very high vacancy rate and we worked very hard to get the vacancy rate down to less than one per cent during my time at the Foreshore Authority and I think since that time it's also dropped back to a larger figure again. So there is always a certain amount of turnover and getting good quality tenants is always a challenge.

40

Is there not a strong demand from potential shopkeepers to get shops in The Rocks?---Difficult question. At a price, certainly, if we were giving away the shops for free there would be a very strong demand but at the price point that we were pushing them it wasn't an easy task and quite often to get things of the right mix, willing to pay the right kind of rents that we were seeking it wasn't an easy task. We had many shops that remained vacant for some time.

MR NEWLINDS: Is what you mean by your evidence it was difficult to find tenants at the rent that you were seeking to achieve?---Yes, that's correct.

And would it be reasonable to say you can only have so many opal shops?
---That's absolutely correct. One of the great challenges were if were, just say we were willing to have 25 opal shops in The Rocks, you probably would have been able to fill them immediately. But because we wanted to get the mix right, the right levels of cafes and restaurants and tourism shops and shopping experience, sometimes when you get down to those categories it was difficult to get the ones with the right categories.

THE COMMISSIONER: But it seems that it's okay to have two chocolate shops?---There are, I've forgotten how many restaurants there are, Commissioner in The Rocks. But - - -

Chocolate shops.

MR NEWLINDS: But there's a French patisserie around the corner we've heard about which I think sold chocolate. Do you remember that?---Yes, the, yes the French café, yes.

And they protested or objected to - - -?---They did. We were more of the view that having two cafes, even with reasonably similar products, most cafes provide similar products wasn't a problem. It was, you know, there are hundreds of restaurants like that around the place.

THE COMMISSIONER: There's a, it clearly gives rise to a perception, sorry, let me start again. The, I get the impression and perhaps this is putting it crudely, and please correct me if I'm wrong, but SHFA seems to have a policy of massaging its tenants to remove aches and pains so that they can keep the same tenants there for a long time and forgiving breaches and forgiving failure to pay rent and, is that right?---Commissioner, I, I have perhaps a different view. I think the tenants lease mix in The Rocks historically has been with long tenants. Before my time very, very long leases were given and so we were, when I first started at the Foreshore Authority, blessed with a book of leases that had tenures that I would consider to be non-commercial, too long. We have moved to a situation of five leases only, which is the minimum you can give under the Retail Leases Act and we consistently, so to do five year leases from that point onwards. However, we still had quite a backlog of longstanding leases. We did manage to get rid of some long tenants who, whose leases either came to an end or who we brought to an end because they were not paying their rent. But every single one of those was difficult and hard to remove and hard to get out because, both because of the commercial arrangements in place and because of the political situation in which we found ourselves.

THE COMMISSIONER: What, what is the political situation?---Tenants would complain to the Minister if we sought to take action against them, for example, eviction, which we did in a couple of cases.

10 So how often would you evict, how many times have you evicted a tenant over the last 10 years say? Are you able to answer that question?---During my time I can remember two or three down in the Circular Quay area that were very difficult. But they were not paying their leases. They were not providing a product that we thought was very attractive for The Rocks and we deliberately brought their leases to an end.

Thank you, Mr Lang.

MR NEWLINDS: Just getting back to the amount of tourists walking the streets. Would I be right in saying that there are tourists and tourists and there are the backpacker type tourists who might be looking for cups of coffee and then there's the rich American tourists who might buy photographs of Ayres Rock?

20 THE COMMISSIONER: Well Mr Newlinds, I'm not sure about rich American tourists.

MR NEWLINDS: I'm sorry, sorry, rich, rich - - -?---Or ordinary, ordinary Sydneysiders who are there.

30 Yes. And ordinary, well substitute rich Americans for just rich, off cruise ships. And am I right in thinking - - -?---You're right. There is a huge variety of, of visitors to The Rocks and we track very carefully the difference between international tourists, domestic tourists and in fact interstate tourists, domestic meaning Sydneysiders more specifically. And we realised that there was a need to provide an offering to all types of visitors and we deliberately went out about by tracking them and tracking their, their patterns of behaviour and what they needed and as well as marketing to those three groups quite distinctly.

And the Sydney domestic, the local to get them down there, what, do they go down and have their yearly steak at Phillips Foote how else do you get them down there?---We found there was quite a big - - -

40 Sorry to personalise it?---There was a big component of Sydney CBD workers who would come down to The Rocks for lunch or after work for the entertainment areas and the Argyle was very popular with, with local CBD business people. So there were elements of The Rocks that were attractive to the locals.

Now, there seems to be a perception at least in the press that at the precincts dealt with by SHFA there is favouritism given by SHFA towards what might be called large tenants like the Kazals, people who control a number

of premises and perhaps pay in total a lot of rent as opposed to a small tenant who might have just one corner shop. Can you comment on those sort of assertions?---I, I don't believe that to be the case, I don't think there was any favouritism given to any tenant other than to say that where we wanted a particular tenant to come in we would, we would encourage that tenant to get a lease and subject to them signing a commercial lease that the Board approved of and in some cases the Minister needed to approve of leases then that tenant was, was then in place.

10 It's certainly suggested that the Kazals were treated favourably, you've seen those sort of suggestions in the press?---Yes, I have.

From time to time did other tenants make those sort of suggestions to you?
---I think it would be true to say that every tenant pushed the boundaries as hard as they could, the Foreshore Authority under its Act had a number of responsibilities as I mentioned earlier and because of this tourism and heritage requirements tenants knew there was a fair bit of flexibility in making sure that we satisfied the objectives of our, of our Act in dealing with the tenants in a way that was sometimes favourable to them but that
20 was a question of balance and that's what the Act said we had to do.

All right.

THE COMMISSIONER: Mr Newlinds, can I just take something up here.

MR NEWLINDS: Yes.

THE COMMISSIONER: The number of breaches or the category of breaches that tenants have the potential for committing on The Rocks leases are to a degree unusual because of the heritage element, is that right?---Yes.
30 Yes, Commissioner, that's correct.

And their attention between the need to maintain the heritage constructions on the one hand and tenants' desire to modernise and renovate on the other -
- -?---Commissioner, that's the enormous attention. Heritage buildings by their very nature are not fitted out in a way that would be consistent with modern requirements, for example, air conditioning. In many heritage buildings it was impossible to put air conditioning in without destroying the heritage fabric and there was always that debate.
40

And there is a public interest in maintaining heritage matters and there's a private interest in tenants renovating so that they can earn as much money as possible?---That's correct.

And this is an area, I suggest, where unless there is absolute transparency in considerations perceptions of corruption may arise. What I mean is it may be thought that tenants are allowed to get away with changing buildings, destroying heritage factors simply because they are rich and wealthy and

while others who are seeking the same premises complain and it's not clear why SHFA has chosen to allow renovations, for example, to take place. I'm not sure whether, what I'm really asking about, I'm asking you whether this is the case?---Right. It's a very fine line and the challenge is that what would be reasonable base building works for, and we have a very strong heritage section within the Authority who are about heritage conservation and, and maintenance of heritage and they have a very strong voice within the Authority, both to me as the CEO and to the Board. So in most cases their view is going to override pretty well anything else. So even though
10 there may well be, and I do understand, Commissioner, the perception issue I think the reality was that heritage was the number one priority in The Rocks and commercial considerations took a second seat to that.

So the person, if there is a suggestion that a tenant has breached the lease by ignoring heritage considerations would that be investigated by the same person who's responsible for maintaining, in SHFA, be investigated and decided upon by the same person who's responsible for keeping a tenant in the building and deciding whether or not to prosecute for breaches?---No. The answer to that is no. That was the deliberate Chinese walls between the
20 planning and heritage side, quite independent from the landowner/tenant side.

I see. Yes, thank you, Mr Newlinds.

MR NEWLINDS: And if ultimately there was a disagreement as to approach between different departments within SHFA, the varying approaches would be put to you by the Directors of those arms of SHFA and, what, you'd make the call or you'd make a recommendation to the Board depending on the authority level?---That's absolutely correct. The
30 only common point is myself and the Board and I would quite deliberately canvass the views of different parts of the organisation if a matter of some conjecture came up and I would try and understand, because there was merits in everybody's points of view from my position and I want to understand that best so I could form an informed judgement.

Now, what about the political pressure, did you have any perception that what the Government wanted was for you to produce as much money as possible or for you to have your number one priority as to heritage? In other words was there a profit motive built in to this organisation?---The correct,
40 the only answer is no, the only answer is that our Act required us to give priority to things such as heritage in The Rocks. Certainly we were required to act commercially, we couldn't give the leases away but on the other hand we were not there as a profit generating entity for the Government, that wasn't our purpose.

And putting the Act to one side did you ever feel any pressure albeit informal from the political masters to that effect?---Can I say the Board was very strong in supporting the views of the Act of course, and of course the

views of management which is the same and that is to maintaining the heritage was always number one.

10 THE COMMISSIONER: But you have said in an answer to Mr Newlinds earlier that one of the difficulties that you've experienced in deciding whether or not to try and get rid of a tenant for breaching is political pressure?---Yes. Tenants would feel that lobbying the Minister would be, would help their cause and I have to say that if the Minister got enough criticism from the community about an action that SHFA was taking I would hear about it.

MR NEWLINDS: And would you take it into account that the Minister obviously didn't like, is it reasonable to say that in general Ministers don't like adverse publicity?---That's correct.

And when you were hearing about it what was the general message, Sort this out so it's off the newspapers?---That's correct.

20 Did you take that to be any sort of pressure to make a decision in favour of those that were making the most noise and getting in the Minister's ear?---In my view it was a consideration but it wasn't necessarily my driver. Again, I would be sticking with what I believe to be right and if I felt that on this occasion the public pressure was not appropriate then that would be relegated down the list of priorities.

30 THE COMMISSIONER: There's something in this that still, I'd like to find out about, Dr Lang. We've heard evidence that when the Kazals were not satisfied with the decision made by a particular employee of SHFA, a senior officer, they would go to someone higher up and they could even go to the CEO?---Yes.

And then they even go to the Board. Is that, is that right?---And probably also to the Minister if they felt that that was the right answer.

That must be a pretty frustrating experience for the senior officer charged with conducting the affairs which are his duty to conduct?---Yes, it was.

40 And changes like that can give rise to perception of corruption?---Yes, they can.

And are there any measures that can be taken to prevent this?---A number of different strategies were put in place to try and minimise that, that kind of interference if I can put it that way, Commissioner, I think our, our processes, our landowner consent processes and our planning processes were very meticulous. We discouraged tenants from trying to use political pressure, however they still did on occasions. There were, I suppose - and this is always a, a tricky situation when you're a government authority, we outsource some of our property functions to agents to try and minimise the,

the, perhaps the direct - perceptions of direct influence or whatever the political pressure may, may bear, it didn't make any difference, the reason being is they knew that the agent was still directed by the Foreshore Authority and therefore political pressure still worked.

There are reports in the media of tenants entertaining senior politicians and that gives rise to perceptions of corruption. Is that a - you're nodding your head?---Yes.

10 You're agreeing?---Yeah.

Is that a, is that a problem that SHFA faces in its decision-making?---Can I say again, the, the, I was never once directed by the Minister to undertake a lease, not undertake a lease, do a thing, I was very clear about that with the ministers that I dealt with. There were always the, I think Mr Newlinds said it correctly when he said there were, the, the Minister would often say to me, fix this problem, you know, I'll leave it to you, do what you think is right but I don't want the, I don't want this controversy. So invariably it was left to me to do what I felt was right.

20

But the, as I understand you the - going outside the line of authority sometimes is beneficial to a tenant?---They felt so thought I don't know if in practice that was actually - - -

Well, it was the perception that that was right and, and because of that perception that's what they did?---Yes.

From time to time?---Yes.

30 And that gives rise to a perception of corruption as well, doesn't it?---Yes, it does.

MR NEWLINDS: But there's nothing unusual about that. You've had experience in the private sector, have you not?---Yes, I have.

And isn't this standard for any - a lot of people when dealing with any organisation, if they don't feel they're getting somewhere with the person they're dealing with they go to that person's superior and up the chain? ---That's absolutely right, in my position as CEO of several organisations I find you become the arbiter of those kinds of issues.

40

Now, what, you said you'd put some procedures in to try and minimise this. What were those procedures?---We had a landowner's consent process that involved several different parts of the organisation from the planning, not the planning, sorry, but from the leasing area through the place management area and so on, that they all need to agree on before a matter came up to me to give the landowner's consent. That gave me a level of comfort that the organisation had been properly consulted with and that I was hearing the

diversity of possible views before we agreed to something and then separately from that was the planning process which, which, after the landowner's consent is given then a planning application can be submitted and then it goes through another rigorous process of its own.

And of course one way to minimise political pressure would be to privatise The Rocks and Darling Harbour and give it to a person driven by the profit motive?---Yes.

- 10 Do you think that would help, taking into account the heritage?---The, the short answer in The Rocks is that it's very difficult to operate fully commercially in an environment such as that. The, the cost of maintaining the heritage buildings in The Rocks are not consistent with the level of revenue one can attain from them.

All right. And can you think of any system that could be put in place that would stop people in a functioning democracy from approaching the relevant minister if they weren't happy with any matter?---No, I cannot.

- 20 And how that minister responds will be driven by his or her particular imperatives?---And indeed and I think our system is very good in if I was to receive a direction from the Minister to do any particular action it would have to be in writing and I'd have to report that in my annual report and ministers therefore are reluctant to do that.

THE COMMISSIONER: Can I something at a much lower level, I have looked at a couple of the leases of SHFA and they're fairly complex. That's not a criticism, but would you agree?---They are complex.

- 30 And there is, there are a number of terms that are used such as basic costs, structural alterations that the meaning of which are not always altogether - - -?---Crystal clear.

- - - clear?---That's true.

And these - issues sometimes arise between SHFA and its tenants which depend really for their resolution if they were to be resolved strictly according to law on the proper meaning of those terms?---Yes, that's correct.

- 40 My impression, I don't know whether you can answer this and I don't know if my impression is right but it's certainly there, is that very often disputes are resolved between tenants and SHFA without consideration being given to the meaning of these terms, the legal meaning?---I think in many cases there was a compromise struck because - - -

Yes, there's no doubt about that?---Yes.

10 But what I'm - and I'm not criticising that for a moment, but would you agree that before a fair compromise is arrived at SHFA should understand clearly what it's rights and obligations are and what the tenant's rights and obligations are?---The difficulty is in defining what is base building works for a heritage building. It's very clear if you do a brand new built, the base building works is the, the plumbing, the electricals, the, the bare walls. In a heritage building that isn't the case. It's actually quite a fuzzy definition because the base building works depends on what era in time, what would be, you've got to provide a billing that's fit for purpose to the extent that it has power and light and plumbing and sewerage but what is available or suitable for a tenant today is very different to what was built a hundred years ago when the building was built so your, your base building works is a fuzzy area that always takes a question of judgment and because every building in the heritage area is different it was very difficult to write a lease that was so prescriptive that could decide for that one particular building what was ours and what was theirs.

20 Dr Lang, you'll forgive me for saying that's not an answer to my question? ---I'm sorry, I'm sorry.

Don't you think it's a good idea before a compromise is arrived at careful consideration should be given to what the rights and obligations of SHFA are and what the rights and obligations of the tenant are?---Yes, that's true. If the, if the Foreshore Authority was to act completely commercially and, and have that profit driven motive that would be - it would stick to the letter of the law of its leases. Unfortunately that wasn't the case.

30 Yes. So in other words it follows from that answer, again please correct me if I'm wrong, that from time to time SHFA arrives at compromises which are not based on the strict obligations of the tenant?---Yes, that's correct.

And if you have other tenants who wish to obtain those premises or other tenants who wish to be dealt with in the same way but are not, that gives rise to perceptions of corruption?---If it had to be considered on the merits of that particular case and it could be different, yes.

40 Because when you're considering, let me withdraw that. When you're considering each case, surely you have to start off with the rights and obligations of each party in each case and then you can make discretionary decisions?---Yes.

When you don't do that and simply arrive at discretionary decisions without giving due regard to what the tenants obligations in fact are, that gives rise to feelings of jealousy and resentment which are harboured by people who want the premises and don't have them and people who have other premises who are treated differently?---Yes, I understand. Yes.

Thank you. And do you think that that is something that just has to keep going or is it something that can be remedied?---I think the way the Foreshore Authority tried to remedy it was to say that in every situation we looked at the extremes. There were some parts of the Authority who would say give them a can of paint and say go for your life. And there were other parts of the Authority saying, well no, this is such an important heritage building, not only do I want to be very specific about every single element of the, you know, works that they might do in there, but I actually might do it myself. I don't even want to let them do it. And so the answer was
10 always somewhere in between those two extremes. But it was, as you're, as you're quite right in pointing out Commissioner, important to understand the two limits, the two extremes of that point of view. But it was always the case we'd have to come to somewhere in between. And I can't imagine a system that would be that definitive that would allow - - -

I agree. I'm not for one moment suggesting that you've got to insist on your legal rights in each case. But these matters, what I do suggest is that there has to be absolute transparency?---Yes.

20 And that for there to be absolute transparency there must be an acknowledgement, a public acknowledgement by SHFA that the rights and obligations are X and Y and notwithstanding that we coming to this compromise. And that should be recorded somewhere so that everybody can see that?---Yes, yeah.

That's not what's happening?---In some case it was. If the works were going through a proper planning assessment process, that planning assessment would publicise the works, the changes, the things that were done and only after the public exhibition of that was the approval or
30 otherwise given.

Yes, thank you.

MR NEWLINDS: Built into a couple of the Commissioner's questions was the proposition that before any discretion or question of judgement was exercised by SHFA, SHFA had failed to or not determined precisely what its legal rights were or were not. Now do you accept as a general proposition that SHFA did not understand what its legal rights were from time to time?
---It was certainly inconsistent. When I first arrived at the Foreshore
40 Authority I thought it was, the process was poorly followed and during the course of my time there I thought we improved the process dramatically. But there certainly was inconsistency, yeah.

Now the question of what is base building work and what is tenants work, as a legal concept that's very easy to understand isn't it?---Yes, it is.

The problem is fact based on a case by case basis isn't it?---Yes, it is.

Working out what fits into that legal definition in reference to actual work that's being done on a particular building?---Yes, that's correct.

10 So is the difficulty caused by a lack of clarity as to legal rights or is the difficulty caused by the inherent difficulty in making the factual judgement involved?---I think the difficulty is if I can use an example, it would be base building works to have one toilet in a building. Many heritage buildings have no toilets and no facilities to put them in. So therefore you've got a fundamental problem that wouldn't be an issue outside of a heritage area. Other heritage buildings did have a toilet, but if it was a café they'd need several toilets. So where does it, where does the Foreshore Authority draw the line? Do we put in the first toilet and then say to the tenant well it's up to you to put in toilet two and three and four and five. Well that's the kind of compromise we're always considering. How much is base building works and how much is not and that fuzzy line is sometimes very difficult to, to come to. Generally the organisation worked it out and went back to the tenant with a reasonable answer. On occasions when the organisation couldn't come to a view it came to me to make a decision.

20

Now in your tenure did it ever get litigious?---No. Not that I can recall.

I'll bite my tongue. I can think of a good recommendation we could make. All right. And was that because you generally took a commercial judgement that having these sort of issues sorted out out of court whilst no doubt generally coming to the right is not really the best way to go commercially?---I'm not sure if I can answer that. Certainly a compromise was always a preferred course of action.

30 THE COMMISSIONER: But the problem that seems to lie at many, at the bottom of many of these disputes is the base building works?---Yes.

40 Well if I might tentatively suggest a solution is change the phrase and have a different concept. I mean what's the point of being wedded to that. Why can't you work out a better way of, of expressing the, the requirements that you would like implemented?---We did have an attempt at that during the time that I was there. We, we moved to what we, we loving called our standard lease form which tried to be clearer about some of those matters. Unfortunately it was a very small percentage of leases in The Rocks because many of them were very long leases that go to many decades and the terms and arrangements that were under every lease were so different to the next one that we had quite a challenge in managing the diversity.

I understand.

MR NEWLINDS: Now can I just ask you some questions about assignments of leases because in relation to the premises at 91 George Street, it's been suggested that the Kazal's obtained that lease by doing no

more than paying a dollar. Now I think what's meant by that is they obtained an assignment for little consideration from a company in some form of insolvency administration. Do you understand, have you heard those allegations, the one, a lease for one dollar?---No, I haven't heard that.

As you understand it is this what happened? The Costi's company went into either administration or liquidation?---Yes.

10 And there was then a transfer of the lease by whoever was in control of the company from the Costi's company to the Kazal's?---Yes, that's correct.

And the consideration was whatever it was, but it was probably a very small amount of money?---And not a matter for the Foreshore Authority.

Well I was going to come to that?---Oh, right.

20 Within the lease itself may we assume that there was a provision to the effect that the Foreshore Authority had to consent to assignments but it couldn't unreasonably withhold consent?---That's exactly what it said.

And is there also something in the Retail Tenancies Act to the same effect, which actually prescribes what matters that can be taken into account? ---That's correct.

MR BEECH-JONES: Retail leases?

30 MR NEWLINDS: Retail Leases Act Mr Beech-Jones. And in essence does one have to make such judgements by reference to the financial wherewithal of the incoming person?---Pretty well that's the only consideration.

So whilst SHFA was in a position to decide which tenants would come in by reference to matters other than ability to pay when dealing with new leases, when dealing with assignments the position is different isn't it?---Only to the extent that they can show us some financial statements that look credible.

Right. Once they do that you can't say no?---That's correct.

40 THE COMMISSIONER: This is something that I don't know. You could prohibit assignments?

MR NEWLINDS: No you can't as a matter of law, if it's a retail lease.

THE WITNESS: I think, I think the clause was and correctly said by Mr Newlinds, that is we couldn't unreasonably withhold our consent.

MR NEWLINDS: I think you'll find, Mr Commissioner, that under the common law it's a fraud on the power anyway to go outside questions such as ability to pay and (not transcribable)

THE COMMISSIONER: No, I accept that. But the, for the members of the public it's a rather odd situation, especially potential tenants because they, they see that existing tenants get preference for renewal. That's right isn't it?---Under the leasing strategy that the Foreshore Authority is Board approved there was some preference given to an existing tenant if they were renewing a lease.

10 And one way to ensure that the preferences obtained is to get an assignment before the lease comes to an end?---Yes, if you were someone who wished to get into The Rocks in some form and didn't wish to go through the process of being a new tenant, then you would try and buy or get assigned a lease prior to its termination.

If you, I mean is there a system of something tantamount to a public tender when the lease comes to an end?---Yes, an open expression of interest was generally the process that we used and then we'd go through a set of criteria to choose which would be the appropriate tenant.

20 And the way to avoid that for a, for a person wishing to be a tenant is to take an assignment of a lease?---Yes, then you'd have the slight advantage of being an existing tenant but there still were a number of conditions you had to comply with to get renewed.

30 So is there a, does SHFA take into account or is it not available to take into account the fact that the new assignee comes in without the greater stringency that's applied to candidates for a brand new lease?---As I recall, Commissioner, and I can't remember the exact details of the, of the criteria but even in a renewing lease things like the history of the, of the tenant, the product mix being offered by the tenant, the, the financial capacity of the tenant, all these things were still criteria for renewal whether they were an existing tenant or not.

I see. So you did say that the, the advantage was a slight advantage?---Yes.

40 And can you just expand on that? What does that mean?---It meant we wouldn't immediately go to an expression of interest. If they came to an end of a five-year lease then they were given the opportunity to renew subject to the - meeting the criteria only if they didn't or, or we didn't wish to proceed, would it then go to an open market expression of interest process. So they didn't have to compete against the whole market initially.

But when it comes to renewing you'd still scrutinise that carefully?---Yes, that's correct.

Yes, thank you.

THE COMMISSIONER: Now, in relation to the property 99 George Street, The Rocks Café, I think there was a renewal to the Kazals in circumstances where the public tender, the public offer process, was not followed?---Right. Yes, I - - -

Did that happen before your time or you're not sure?---I can't recall but I am aware that that did occur.

10 And there was a report done by Deloitte I think - I'm sorry, I have the wrong property. Okay. Now, just focussing on the Guylian Chocolate Shop, have you for the purpose of the inquiry at my request reviewed the documents that make up the file that record the request by the Kazals made in early 2007 for rent abatement and change of use that led to the ultimate decision made in July 2007 that changed the use?---Yes.

But I don't think a rent abatement?---It did. I think the Board paper did give rental abatement of, of an amount.

20 All right. A rent abatement of \$96,000?---That's right.

Now, leaving aside anything - well, on the face of those documents is there anything that you can see that would suggest that there was anything untoward about that decision in that it was influenced by anyone taking into account intrinsic matters?---No. No, I don't believe so, I think that that was a proper, a proper process. It did come up with a Board paper, the Board made the, made the final decision, I think that was quite okay.

30 Now, there was obviously a change of mind by the organisation between the non-decision in May and the positive decision in July, correct?---Yes.

Now, can you identify what things changed to cause that change of position?---Just from memory I, I, I do recall that the General Manager for The Rocks at the time, Debra Dawson, was one of my sources of advice and she initially was not terribly favourably inclined towards the, the Kazals' initial suggestions and it was only through a matter of some discussion with them and with other parts the organisation that the organisation came around to, to a compromise that I thought was worth putting forward to the board and on that basis getting, from my point of view effectively a consensus across the organisation that I was willing to put it up to the Board.

40 And was there a business plan provided, of some sort, provided in the interim?---That was one of the things we asked for, that we wouldn't put it forward without a business plan and, and a business plan of sorts was produced.

And Mr Kelly I think at an early stage was holding out for all the rent that was in arrears to be paid until the matter was even considered, do you recall that?---I do, that was our commercial position, that we prefer it to the Board

with the rent fully paid up to, to ensure the Board was in a favourable view about the, the, the situation rather than to go to the tenant with both a shortfall in rent and a, another request at the same time.

But in the end you went with a shortfall and recommended an, an abatement?---Yes, we did.

But not of the whole arrears?---That's correct.

10 Now, I take it you now know that in the period the end of May to the beginning of June 2007 Mr Kelly went on a trip to Dubai with Charif Kazal and others?---I didn't know that at the time but I am aware now.

Can you identify from reviewing the documents that record what happened within the organisation in relation to this decision at around that time anything that Mr Kelly did or didn't do which might suggest he didn't bring an independent mind to bear or was in some way influenced?---I can't see anything the papers that would suggest that.

20 And looking at it now as best you can, obviously with the benefit or detriment of hindsight, do you think it was a right decision, and because it's a matter of judgment presumably there are a number of right decisions? ---No, I believe it was the right decision and I think it has stood the test of time. The, the café has, I think, been a very, a very good for The Rocks there.

And can I bring you back then to The Rocks Café at 99 George Street, once again at my request you've reviewed the documents that record the decision that was made and the - that resolved the issue - - -?---Yes, I have.

30 - - - that started with the Kazals' claim for reimbursement for what they said was base works which I think ultimately resulted in SHFA either paying them or giving them a credit of \$335,000 on 2 January, 2007?---Yes.

40 Once again, is there anything in the documents that you've reviewed that allows you to say with the benefit of hindsight that, that the decision favoured the Kazals in a way that was inappropriate?---No, I believe that that was a, a balanced view, the organisation had quite divergent views on this particular matter and it fell to me to make a balanced decision and I, and I came to a view based on the information that was available which was not only Mr Kelly's advice but also advice from other parts of the organisation.

And was, was the issue - well, it seems and correct me if I've got this wrong, but what happened was the Kazals did get development approval to do some work, they then commenced doing the work and what they were saying happened was as they were doing the work it became apparent that other work needed to be done and they did it, albeit without getting formal approval?---Yes, that's correct.

Now they were saying, were they not, in the course of the negotiations, that whilst they hadn't got formal approval that there were people at SHFA who knew what was going on and so they were saying that there was tacit or informal approval?---I was unhappy with that - - -

That's what they were saying, wasn't it?---Yes, that's right, yeah.

10 And so what had happened was the work had been done, completed and then the question of well, what's base work and what's not had to be resolved in circumstances where because there were walls and things you couldn't actually see all the work?---That's correct.

Now, firstly obviously with the benefit of hindsight, the process could have been easier if the Kazals had not gone ahead and done the extra work without formal approval?---Indeed. I was unhappy with the process that had been followed and it was a result of that particular case that I asked for the, the landowner consent process to be improved so that that kind of thing

20

Okay. Now what, what steps did you put in place to try and improve that process?---To get sign off on various parts of the organisation so we could catch these things before they happened rather than after the event and to make sure that the various parts of the organisation's views were taken into account and it wasn't just one person's view in agreeing to or not agreeing to a particular thing.

And presumably to stop people doing unauthorised works - - -?---Yes.

30 - - - the bottom line is someone has to walk around and check if anyone's doing unauthorised works?---Yes.

And is, is there a process to do that, regular inspections or - - -?---Under our place management model there was certainly the General Manager of The Rocks had a small team whose job it was to visit the tenants regularly and part of the perhaps tacit reason for doing that, not only to keep the good relationship with the tenants but also to make sure that the, the assets were, were in good order.

40 MR NEWLINDS: Now, there was a Chamber of Commerce in the area was there not?---Yes.

And I think at a period of time Mr Charif Kazal was the Chairman or President?---He was the President, yes.

Did you from time to time get invited to functions by that organisation? ---Yes, a large number of the authority personnel would be invited to The Rocks Chamber of Commerce functions.

Did you have any difficulty with people in the organisation going to those functions?---No, in fact it was encouraged to do so, it was to maintain a good relationship with the Chamber of Commerce. I had some rules about what kind of, was acceptable behaviour under these circumstances but nevertheless attending was quite okay.

10 Can you tell me what those rules were?---Personally it was I don't drink alcohol at work functions and I go there for the purposes of business networking, not for socialising.

Was that a rule that you imposed on others or was that your own personal rule?---It was my own personal rule but others were, it was very plain to others that that was the kind of behaviour that I expected.

Simply by your example or did you tell people that?---By my example and I encouraged others to follow it.

20 Now, when you arrived at the organisation did you have a view as to enforcing the line between a health business relationship, between someone at SHFA and a tenant on the one hand and an unhealthy relationship that had developed into a friendship or perhaps even a business relationship?
---Yes, when I came into the Foreshore Authority I was very big on code of conduct, on ensuring that everyone in the organisation was trained in what that meant on a gift register which was meticulously maintained and also I put in place what became known as the CEO's 10 Guiding Principles which were behaviours which I found to be the right kinds of behaviour in dealing with any stakeholders and they included things such as honesty and integrity.

30 Now, can I ask for document 1084 be brought up please.

THE COMMISSIONER: Mr Newlinds, while this is being brought up it does seem to me that Dr Lang will continue for some time?

MR NEWLINDS: I'd say at least till 12 o'clock, yes.

THE COMMISSIONER: So - - -

40 MR NEWLINDS: Mr Touma might be here. I think we could safely say not before, well, we could say not before 2.00, that may involve an early lunchbreak but I think anything else would be probably a risk.

THE COMMISSIONER: We perhaps could take, if you would let me know when it will be convenient to take a five to ten minute adjournment between now and 11.45.

MR NEWLINDS: Yes, I will. And what should we do with Mr Touma? We'll discuss it then.

THE COMMISSIONER: That's up to you.

MR NEWLINDS: Well, I'm mindful of the "we stop for no one" edict. My suggestion would be to give him a not before 2.00 marking.

10 THE COMMISSIONER: All right. Mr Touma's evidence will not be taken before 2.00pm.

MR NEWLINDS: Now, Dr Lang, we've got 1084 up which is a document or a bundle of documents that's been added to the very front of folder number 1. It's right, is it not, that Mr Kelly's contract of employment contained a provision that bound him to abide by the Code of Conduct and Ethics for Public Sector Executives?---Yes, it wasn't an employment condition.

20 Now, the document that starts at 1084 is that relevant Code of Conduct? ---Yes.

And we think it's the one that was in place as at 2007?---Right.

I'm not going to take you through it in detail because it speaks for itself but if we could go to 1087 which is page 4 of the actual document. Do you see under the heading Personal and Professional Behaviour, after the first full paragraph there's a paragraph that starts, "Accordingly executives are expected to" and then a number of roman numbers?---Yes.

30 And can I direct your attention to (iv), the reference to avoid real or apparent conflicts of interest and act in the best interests of the people of New South Wales?---Yes.

And then if we could go to 1088, do you see clause 2.4 towards the top of the page, "Executives should avoid acting in a way that is or could be seen to be unreasonable or could be construed as unlawful discrimination."? ---Yes.

40 And if we could go to 1092 please. Do you see clause 9.1 about gifts and benefits?---Yes.

And if we move down to 9.3 and 4 they deal with gifts?---Yes.

Now, there was a gift register in place was there?---Yes, there was.

But was there a judgement that had to be made as to the value of any gift that could be accepted?---Yes. The person's responsibility was to record matters in the gift register, would bring to my attention immediately any gift

that was of any significance and if I felt that that gift was of too high a value my direction to the staff member involved was either to return the gift or to donate it for, to charity.

Now, just picking an example, a decent bottle of wine as a gift would be acceptable but a bottle of grange may not be?---Absolutely.

10 And a judgement call as to where you'd draw the line on any particular situation?---That's correct. It was a requirement to value the gift and if it was of significant value then it was unacceptable.

Now, can I then direct your attention on that same page to 9.5(ii) which starts with, "In deciding whether to accept gifts or benefits executives should be guided by the following principles". And then number 2, "Executives should avoid all situations in which the appearance may be created that any person or body through the provision of hospitality and benefits of any kind is securing or attempting to secure the influence or favour of the executive."?---Yes.

20 All right. Can I then ask please for document number 1100 to be brought up. And tell me if I'm wrong but have we just looked at the Code of Conduct published by the Premier's Department that related to all senior executives across what might used to have been called the Public Service? ---Yes, under the SES contracts that's the Code of Conduct that is applicable, yes.

Was there also in place at the time, and I'm talking about 2007, a Code of Conduct for staff members issued by SHFA?---Yes, there was.

30 Now, on the screen at 1100 we have what we believe is that Code as at April 2007?---Yes.

40 All right. Can I ask to go please to 1108 and clause 4.4. There is a lengthy statement about conflict of interest but can I just draw your attention to the part that says, "A conflict of interest is a situation where an employee could be influenced or could be perceived to be influenced by a personal interest in carrying out their public duty. The conflict of interest that affects the decision making process may amount to corrupt conduct." And then there are some examples under the heading Possible Conflicts of Interest Include - -?---Yes.

And then the third bullet point is, "Any financial or personal interest that could directly or indirectly influence or compromise you in performing your duties."?---Yes.

And the bullet point above that is "Awarding contracts, ordering goods or services from a person or organisation in which you, a friend or a member of your family has a financial interest." The reason I've drawn your

attention to those particular provisions in those two Codes is that they all have this in common. They speak in relation to conflicts of interest, - - -? ---Yes.

- - - of actual conflicts and perceived conflicts?---That's correct.

MR BEECH-JONES: I object. The second one doesn't (not transcribable) perceived conflicts.

10 THE COMMISSIONER: I can't hear you.

MR BEECH-JONES: The second does not (not transcribable) perceived conflicts.

MR NEWLINDS: Well, that says "A conflict of interest is a situation where an employee could be influenced or could be perceived to be influenced.

20 MR BEECH-JONES: That's very different to perceived conflict. That's where there's an actual conflict but gives rise to a perception of a partial exercise of duties as opposed to a perceived - - -

30 MR NEWLINDS: I'll withdraw whatever part of the question is causing the objection. Did you, when you arrived at the Authority, have an understanding yourself of the difference between actual conflicts or actual bias, that is a conflict that actually causes a partial decision on the one hand and a conflict that doesn't have that effect but could create the perception that there may have been such an effect?---Yes, I did and I made it very clear to the organisation I had a very different standard than perhaps was being applied before, for example, I don't take luncheon appointments with anyone, I would have a cup of coffee with a tenant if I paid for the coffee and the reason I did that is not because of the financial benefit of the cup of coffee but because of the perceptions of it.

40 Okay. Can I ask you this, when you arrived at the organisation did you take some steps to ensure that everyone within the organisation was aware of the various codes that applied and was also aware of your own approach to these topics?---Absolutely. Not only did we have a comprehensive training programme on the Code of Conduct specifically, the Sydney Harbour Foreshore Authority Code of Conduct - - -

All that stuff, is that something you brought into place?---Yes, I did. But I also did presentations and roadshows to all staff about the 10 Guiding Principles which echoed the same Code of Conduct principles.

What are these ten, these are Dr Lang's Ten Guiding Principles are they? ---They are. It was because I felt that organisation needed some guidance in, in what was appropriate behaviour in dealing with stakeholders and that

included such things as communication and honesty and integrity and a bunch of other things as well.

Can you recite them or is that, it's like the Ten Commandments?---It is a bit like the Ten Commandments. And I always said to the staff that these are no-brainers. I don't think anyone would ever have the view that they are not right. They are just what would be commonly considered appropriate behaviour in dealing with the public.

10 Now can you remember whether Mr Kelly went to any of these sessions?---I can't recall specifically, but it would have been very difficult for anyone not to attend.

All right. Did you put in place a system to try and ensure that everyone did attend?---Yes. In fact we did get, I think we got statistics on, on not only existing staff but also newcomers through the induction programme all went through that same training.

20 Now obviously the higher up one gets in an organisation of any type, the more one has to take responsibility for your own actions?---And higher standards are required.

And as CEO, the only people who you were responsible to were the Board and the Minister?---Yes.

Did you take the view therefore that you had to apply a higher standard to yourself?---Yes, I did.

30 Was that one of the Commandments that the more senior the higher the standard?---No it wasn't, but it's a good one. The Newlinds - - -

Yeah, I don't apply that one to myself. Now can I just come, can I come to the cruch, Mr Kelly in May 2007 it seems went on a trip to Dubai with a Mr David and various people from Mr David's company and a Mr Charif Kazal, who I think you know was involved with the Kazal organisation at the time?---Yes.

40 They did so it seems with a view to scoping out potential business opportunities that might be able to be generated for some or all of the people in the group?---Yes.

And someone either Mr David or his organisation or Mr Kazal or perhaps someone else reimbursed Mr Kelly for his airfare and his accommodation expenses in relation to that trip?---Right.

And finally whilst they were over there they went to meetings together, had dinners together and had various social events together. Assume, can you assume that that is what happened?---Yes, certainly.

Firstly did Mr Kelly disclose to you either prior to or after that trip the fact of the trip?---No, he did not.

Secondly, just based on the assumptions that I've asked you to make, if Mr Kelly had disclosed that was what he proposed to do, what would your reaction have been?---I would have told him not to do it. In fact I would have taken every step in my power to prevent him from going.

10 Why?---Because I would have taken it as a conflict of interest. He would be unable to do his job if he was interacting socially with tenants and stakeholders in The Rocks.

And that would just be based on the social interaction involved?---Yes.

If as part of the disclosure he said, well not only is this a social event, we are, that is Mr Kazal and I both expecting that if this gets, this business opportunity gets off the ground we might either have a slice of the action or get a job, would that change your opinion?---No. In fact it makes it worse.
20 It's then a conflict of interest on a different level and in particular it's secondary employment, which would require my specific approval, which wasn't sought.

Now what if Mr Kelly said to you, well it's not secondary employment because really what I'm doing is applying for this job because only at the end of this process will I know if I get a job because what we're doing is trying to create the job and by the way I'm not being paid anything I'm just being reimbursed my expenses.

30 THE COMMISSIONER: And it's my holiday.

MR NEWLINDS: And it's my holiday, yeah. What would your - - -?---If he revealed that to me after having done it or - - -

This is before doing it?---Before doing it again I would have told him don't do it.

All right. And if having made that disclosure to you and having received that advice or direction from you he went ahead and did it anyway what
40 would you have done?---I would have referred it to ICAC and stood him down from his position.

And if having not disclosed it to you he then went on the trip and after he came back he either told you that that's what had happened or you found out from another source, what would you have done?---I would have sacked him.

Now if I can then ask you to assume, all right, I think that's enough. That would be a convenient time, please, Commissioner.

THE COMMISSIONER: Yes. In Exhibit 2 there are bank account details, those details are subject to a suppression order and are not to be published.

EXHIBIT 2 BANK ACCOUNT DETAILS ARE SUBJECT TO A SUPPRESSION ORDER AND ARE NOT TO BE PUBLISHED.

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MR NEWLINDS: The Commission pleases.

THE COMMISSIONER: We'll adjourn for ten minutes.

SHORT ADJOURNMENT

[11.26am]

20 MR NEWLINDS: I have no further questions, Mr Commissioner.

THE COMMISSIONER: Mr Beech-Jones, in the absence of Mr Korn would you like to - - -

MR BEECH-JONES: Yes, your Honour, Commissioner, I would ask that Ms Williams go first.

THE COMMISSIONER: All right.

30 MS WILLIAMS: Thank you, Commissioner.

Dr Lang, my name is Williams and I appear for the Sydney Harbour Foreshore Authority. Is it fair to say that the properties leased by SHFA in The Rocks are each unique in the sense that they each have different heritage features and fabric?---Yes, that's true.

And the heritage fabric within each property has different degrees of significance?---Yes, it does.

40 And in fact the significance of any particular heritage fabric is generally a matter of opinion?---Yes, it is. Different heritage advisors may in fact give you different advice but it's a question of deciding which particular timeframe you'd like that heritage building to represent because many of the buildings have gone through many cycles and you could restore it to its 1820's look or its 1850's look or its 1980's look and they are all different.

And was there a conservation management plan in place for each heritage property in The Rocks?---It, it was our objective to have a conservation

management plan for every single asset, however at the time I was there that role, that task was not fully complete.

And were those plans prepared by the heritage experts within SHFA or by external heritage experts?---I think from memory they were generally done by externals but I, I can't recall the specifics.

And were there heritage orders in relation to some or all of the heritage properties in The Rocks?---I think without exception all of them.

10

Each property also would have no doubt different latent conditions potentially due to its age that may or may not be known to the tenant and to SHFA?---Yes, that's absolutely correct and in fact it's not until you start looking when you're about to start doing work on a building that you then find that it has termites or it has some roof leakage problem that wasn't otherwise apparent until you started work.

And I just want to ask you about the concept of the base building works at a, at a general level first?---Yes.

20

Is it fair to say that base building works are typically considered to be things that affect the integrity of the structure of the building and the essential services to the building?---Generally that's the case but in heritage buildings it can be a little different and that is because of the nature we may decide that a particular feature of that heritage building was a basic requirement of the building and can't be touched or it must be restored to a certain way or certain level.

30

And, and in those cases that restoration would fall within base building works on the basis that SHFA as the landlord of the property had a long-term interest in retaining that heritage fabric and conserving it?---That, that's correct and generally the tenant was only responsible, excuse me, for the fit outs that would turn that base building into a particular type of shop or a retail or a café or whatever.

40

And does that explain, sorry, I withdraw that. Taking into account all of those, those matters and the unique features of each property, is it fair to say then that it's not really possible to come up with one specific definition of base building works that would apply to all the properties in The Rocks? ---That's correct.

The best one can do is have a general definition that then falls to be applied to particular situations, is that right?---Indeed, that's correct.

And because of all these considerations there are various matters, aren't there, that can arise during the term of any lease that simply can't be foreseen at the outset?---Absolutely.

For example, and if I can use 99 The Rocks, sorry, 99 George Street, The Rocks Café as an example, where work's being done to a property, latent conditions such as termite damage may be discovered?---Yes.

That's correct and I think in the case of The Rocks Café there was also a discovery made during the works in 2006 that some structural work was required to a stone wall, is that correct?---Yes, that's correct.

10 And that stone wall had heritage significance?---Yes, and once we found out about it the heritage people within the Foreshore Authority got quite excited about that.

And that was something that was considered to be at least partly the Authority's responsibility because they had an interest in maintaining that particular wall?---It would be unreasonably to say that that's a tenant fit out.

20 Is it fair to say then that it's also not possible to specify at the start of a particular lease a list of specific works that fall within base building works for that lease and which fall outside that?---Generally it's very difficult to do so. There was also attempts to do so, particularly when a new tenant came in there would be some discussion about what would the tenant do in terms of their fit outs and therefore what the Authority would choose to do in terms of its base building works at that same time. Clearly, there's efficiencies in doing it together rather than just two separate issues. There was always attempts but a hundred per cent perfect, no, never.

30 THE COMMISSIONER: But I take it that there's no magic in the phrase base building works and you can, you can develop your own phrase to - - -? ---Yes.

- - - which is - provides greater clarity and covers matters that are at least foreseeable in a, in a lease?---It always could be subject to things that might from time to time come up.

40 Yes, but it seems to me that, that the concept of base building works is something that regularly gives rise to problems?---Whatever term you call it, I think Commissioner, it still rise to problems, but I think the challenge is and I think Ms Williams is quite right in saying that it is difficult at the beginning of a lease to, to write down specifically what would be relevant for this particular building.

I'm sure it is, but I also would imagine that with the vast experience of SHFA in these matters, that their ingenuity is not beyond devising a definition that reduces the immense scope for conflict that presently exists because there seems to be such an attraction to this particular phrase?---I agree. Some attempt to get more clarity around that would be very helpful.

MS WILLIAMS: Dr Lang, when an issue did arise in relation to any particular lease, it would be necessary for SHFA to take into account not only the strict legal position and how they ought to be interpreted to the facts, but also the competing, the interests that you've just described previously of the Authority in, in the heritage aspects of the building and also the commercial aspects in its position as landlord. Is that correct?
---Absolutely correct. Under the SHFA Act the, the wording of the Act echoes in my mind very strongly. It said we must balance and then it listed about 25 different issues you must balance, including environment, heritage,
10 commercial, tourism and it goes on and on and on. And you look at that list and say how, how do you balance all those things simultaneously. It's always a compromise.

And is it fair to say that that balancing act and the decision taken involves taking into account quite often a large amount of material from different parts of the SHFA organisation?---That's correct.

I think it has been suggested to you in earlier questioning that it would be desirable from the point of view of transparency to publish or create some
20 publicly available record of SHFA's decisions in each particular instance and the reasons for the decisions. Do you recall that suggestion?---Yes, I do. Yep.

Would it be possible for SHFA to publish a, a concise and accurate statement of its reasons without, at least in some instances, disclosing tenants particular financial situations for example?---It's tricky. If I could explain, some things are publicly available. Certainly everything that falls under a development application is publicly available. Everything that falls under a SHFA policy is publicly available. And it would only be the
30 particular non-DA, non-policy matters that are currently not publicly accessible in some form and then you end up with that tricky question of what's, of what might be in fact confidential, private information.

And would those non-policy, non-DA matters include for example decisions about rent abatements for particular tenants? Is that - - -?---No, that's in a policy.

I see. And, but particular decisions about that are publicly available are they?---Oh particular decisions about the rent of a particular tenant is private
40 information, and is not publicly (not transcribable)

And that's for a very good reason is it, in order to protect the tenants privacy?---That's correct. In fact tenants were very protective of information which we were privy to obviously but unable to publicly disclose.

And whilst other tenants can't obtain access to a public record of SHFA's decisions about a particular rent abatement, they can, they do have the

comfort that there's a policy in place that SHFA follows in relation to those decisions?---That's correct. For example the policy under rental abatements was very specific. It was only a certain amount under certain conditions that could be given to certain things.

10 Are there any kinds of decisions that, that SHFA makes that are not either the subject of a published policy or publicly available, that is the decision itself and the reasons for a publicly available - - -?---Very little because under GIPA now and then the Freedom of Information Act, virtually anything was obtainable because we are, well the Foreshore Authority was a government authority that was required to provide pretty well everything except absolutely commercial information to anyone who requested it.

THE COMMISSIONER: Commercial in confidence?---Commercial in confidence, yeah.

Dr Lang, I just want to ask you a couple of questions about 91 - - -

20 Sorry, may I just ask a question here, please, Ms Williams. Is the amount of rental paid by a tenant public knowledge or is that not available?
---Generally not available. When, when leases were provided under FOI from my, from my recollection, Commissioner, and I, and I'm sure others could answer better, that was blacked out.

That's regarded as something that is in confidence?---Yes, yes. However, the market assessments were certainly publicly available.

30 Yes. But as far as, as the new GIPA Act is concerned, it would be, there is a mechanism for determining what's in, what's in confidence and what is not?---Yes.

And if anybody wants to find out they can apply to the particular authority?
---Yes.

And the comfort that the public has generally with the, with the government departments in relation to the new GIPA Act is that proper records are kept by the government department concerned- - -?---Yes.

40 - - -concerning their decisions. Now, is there any reason why that, why people shouldn't rely on the GIPA Act protection and just simply keep a record of all their decisions and the reasons why they came to them?
---I believe they have done that and, and the, the, what was the FOI- - -

I'm not, right, I'm not suggesting they haven't?---Yep.

I don't know?---Yes.

But I'm just asking- - -?---I believe they did.

- - -in principle there's no reason why it shouldn't- - -?---No, no reason.

MS WILLIAMS: Dr Lang, the leases that the authority entered into were generally registered with the Land Titles Office. Is that correct?---Yes, they were.

10 And the front page of the Registered Lease document discloses the annual rent. Is that correct?---Oh, I'm not sure, but that could well be the case, yes.

And, or at least the reference schedule to the lease which would be registered would disclose that. Is that correct?---Certainly if it's a registered lease, I think that information is available, but I'm, yeah.

And the rent review mechanisms would also be contained within the lease?
---Yes.

20 So that someone doing a title search could obtain a copy of the lease and, and understand that information through that copy. Is that correct?
--- I hadn't thought of that. You're quite right.

If I can just ask you one or two things about 91 George Street, the Guylian Chocolate Shop. You were asked some questions about an initial non-approval for the proposed change of use in May 2007 and then a subsequent approval in July 2007. Do you recall?---Yes, I do, yep.

30 The change of use proposed by the tenant in May 2007 was in fact a little different to the change proposed and approved in July 2007. Is that correct?
---Yes, it was.

In May 2007 they were proposing a combined Thai restaurant and chocolate shop. Correct?---That's right.

And then by July 2007 it was a, wholly a chocolate shop proposal that was approved?---That's correct, yeah.

Thank you. I have nothing further, Commissioner.

40 THE COMMISSIONER: Yes, thank you. Mr Korn?

MR KORN: Thank you. And, Commissioner, I'm sorry I was back late but I missed, I missed the cut-off and the door was locked so I couldn't actually get in until someone came along. But I have no questions.

THE COMMISSIONER: Yes. Mr MacCallum, are you, are you here and not Ms Hogan-Doran?

MR MacCALLUM: Yes, Commissioner. I have no questions.

THE COMMISSIONER: You have no questions. Well, Mr Beech-Jones?

MR BEECH JONES: Mr, Dr Lang, could I take you to page- - -

THE COMMISSIONER: Can you just tell Mr, Dr Lang who you are?

MR BEECH-JONES: Oh, sorry, I do apologise. My name is Beech-Jones and I appear for Mr Kelly. Can I firstly take you to volume 1 of the bundle and a memo at page 137 which is addressed to you and concerns 99 George Street, The Rocks?---Yes, I have that.

Now, can I just draw, just draw your attention to the second paragraph which sets out some of the background. Do you see that?---Yes, I do, yes.

And that's consistent with your understanding of what happened?---Oh, in re-reading it I must say I can't recall all this level of detail but it certainly generally consistent with my memory, yes.

All right. But in ballpark terms you, in general terms you can remember this, there was at the time of the, as it were, the original agreement, of the renewal of the lease, an understanding that an amount, a certain amount of money would be spent by the Kazals on 99 George Street, The Rocks, some of which would be base building and some which would be lessees fit-out? ---Yes.

And that the amount spent on base building would effectively be recouped by them via rent abatements or lower rent or something of that kind?---Yes, I understand that.

And then as that work progressed there was a blowout and then a claim by them that of the blowout, a certain proportion was properly attributable to base building costs. Is that right?---Yes, that's right.

Now, that process of doing the work and including that extra base building didn't, didn't involve, and I think it might have been suggested to you, any breach by them of the lease in relation to heritage considerations, didn't it? No breach of anything?

THE COMMISSIONER: Well, are you able to answer that question?---I'm not sure if I have that recollection. I'm, I'm, it's a level of detail I probably just can't recall.

MR BEECH-JONES: All right. At least (not transcribable) There was no, you're not aware of whether there was any consideration given by anyone as to whether what had occurred was something that might give rise to the disciplinary or prosecutorial powers of SHFA?

THE COMMISSIONER: In relation to the tenant?

MR BEECH-JONES: In relation to the tenant?---No, I'm not aware that that was an issue at the time.

And it wasn't even considered at all as even, as anything of that nature at all. Is that right?---Not that I recall, no.

All right. Now, you refer to the changes to the landowners' consent regime that was put in place?---Yes.

10

If you go to page 139 you'll see you've annotated Mr Kelly's note?---Yes, I have.

And you put, "I note your advice and the action taken to ensure future situations are more adequately covered?"---Mmm.

And that's a reference to the landowner consent changes. Is that right? ---Yes, that's correct.

20

Yeah. And they were the landowner consent changes that Mr Kelly outlined in his memo that would be, that he was putting in place and that you approved?---That's correct.

All right. Now, we'll then move to another topic. In your statement do you recall you were shown in the course of preparing your statement for the Commission a conflict of interest declaration from Mr Kelly dated sometime around June 2006?---Yes.

30

And you expressed some puzzlement about that and how it arose and what it was needed for. Do you remember that?---Yes, I do.

Right. Now, can I take you to some material about that matter. Do you remember 100 George Street was, that the board of SHFA in around October 2005 agreed to offer the Kazal interests a lease over 100 George Street, do you remember that?---I don't recall specifics but I'll, I'll take that as given, yes.

But that generally accords with your understanding?---Sure.

40

And do you recall it arose in this way, that there, they in fact had either a lease or a sublease over part of that building?---Yes, I do remember that.

And that there was a, and that the question as to whether SHFA would take, sorry, and the lease over the remainder was coming up?---Yes.

And the question for SHFA was, do we take that directly to the market or do we deal with the Kazals?---Yes.

And a decision was made within SHFA to deal with the Kazals primarily because your ability to go to an open market was impaired because the Kazals were already there and already had a lease over part of it?---That's absolutely correct.

Right?---Yep.

10 And during the course of that process in 2005, external legal advice was obtained from the firm Tresscoxs about the probity of not going to the market- -?---Yes, that's right.

- - -and instead going to Kazals?---Yes.

Now, and do you remember that in 2005 the offer that was made to the Kazals was predicated upon a, some calculations that had been done to that time about an amount to be spent on lessee fit-out and base building costs? ---Okay, no, I don't recall that but again I'm happy to take that as given.

20 All right. Do you remember that the question was then revisited in 2006? ---No, I'm sorry, it's just a level of detail I just can't recall.

All right?---Certainly the question of base building works would no doubt have come up but I just can't remember the details of it.

All right. Well, can I firstly show you this memorandum of 16 August which I tendered the other day. I just don't know if it got a marking or it was put in- - -

30 MR NEWLINDS: It's been put in a folder somewhere.

THE COMMISSIONER: What page?

MR NEWLINDS: 16 August. What date? 16 August.

THE COMMISSIONER: It will be, it will be in the folder in its chronological sequence I think. 16 August 2006?

MR BEECH-JONES: And 6.

40 THE COMMISSIONER: 62A I'm told.

MR BEECH-JONES: 62A?---The Board paper, yes?

The Board paper, do you see that?---Yes, I do.

August 2006?---Yes.

Okay. And you'll see that the issue raised is consideration of provisions, the proposed lease of 100 George Street, The Rocks to La Mela Pizzeria, you see that?---Yes, I do.

“Following the review of capital investment and rental considerations for the property”, you see that?---Yes, I do.

And if you go down to the heading Previous (not transcribable) Advice, do you see that?---Yes, I do.

10

If you just read that paragraph to yourself. Have you read that?---Yes, I have.

And do you see that there's a reference to discussions, “a fit-out of \$3 million minimum in 2005 with the matter being discussed in June 2006 where the Board were advised of revised capital investment requirements.”?---Right.

Do you see that?---Yes.

20

And there was a reference to the Board determining that “Further investigation of the proposal should be undertaken to review all options available.” See that?---Yes.

And do you remember that shortly after this, that is, 16 August, 2006 Mr Kelly sent you a memo attaching a further probity advice from Deloitte, again, revisiting the question of whether in light of the new discussion of capital requirements it should go to the market or stay with the Kazals. Do you remember them doing that?---I, I don't remember the outcomes but I'm, again, I'm vaguely remembering the situation, yes.

30

All right. Well, just to make it clear I'm going to, need some help with the paperwork, the precise page.

THE COMMISSIONER: Why don't you just lead the witness, Mr Beech-Jones.

MR BEECH-JONES: Well, it should be, I just wanted you to note where it is.

40

THE COMMISSIONER: All right.

MR BEECH-JONES: And it should be - - -

THE COMMISSIONER: Do you need help in finding where it is?

MR BEECH-JONES: I do need, it should be around - - -

THE COMMISSIONER: What's the document?

MR BEECH-JONES: 60A. It should be around 60 - - -

THE COMMISSIONER: What is the document?

MR BEECH-JONES: It's a memorandum of 6 September, 2006.

THE COMMISSIONER: 76A.

10

MR BEECH-JONES: 76A I'm told. Do you see that?---Yes, I do, yes.

Now, you'll see in the first paragraph there's a reference to the intent of the May 2006 ICAC Guidelines?---Yes.

Did you understand what they were?---Yes, I did. It was about exclusive dealing as I recall.

20

You understood that the set of guidelines to be followed when determining whether to go by way of an open market or tender process as opposed to direct dealings?---Yes, that's correct.

Right. And if you go back to page 41, sorry, 46. You'll see an extract from those guidelines?---Yes.

See that? And if you turn over the page to 47 you see the third matter down under the checklist, "Obtain conflict of interest declarations from persons associated with the project." Do you see that?---Yes.

30

And does that refresh your memory as to the context in which Mr Kelly's conflict of interest declaration of 21 June, 2006 arose, namely, addressing these direct dealings guidelines in the context of the reconsideration of the lease over 100 George Street?---I can't say that I recall it when it was first raised with me. On reading it again now it makes sense but I didn't join those dots at the time.

Now, while we're on the question of conflicts I think you were taken to page 1108 which would be volume 3. So maybe if I could ask you to close up that volume and take it there?---Yes.

40

Now, you see under the heading there Conflict of Interest, do you see that?---Yes.

Now, again, I think you described this, you're a person, to use your words, you had a very different standard to others, is that right?---Yes.

So you regarded yourself as having a very high standard of approach when dealing with questions of conflict?---And probity and in fact the whole Code

of Conduct arrangements, compared to what was, had previously been the Foreshore Authority's, you know, position prior to my time as CEO.

10 All right. Now, you may not have approached this as a lawyer but did you have any understanding as whether your approach to conflicts did you assess as against the Code of Conduct that's set out there at 1108 or did you just consider well, if you comply with what I do you should comply with 1108?---No, I'm a longstanding State Government bureaucrat, it's been my career for 35 years and I'm very familiar with the State Government's Code of Conduct and I've always applied my standards consistent with that. In my view the SHFA Code of Conduct is supplementary to it but doesn't override the State Government's requirements.

All right. Well, I just ask you to look at 1108 under the heading Conflict of Interest and you'll see there's a reference in the second line to the person having "a personal interest in carrying out their public duty." Do you see that?---Yes.

20 And at the base of it did you understand with this concept of conflict of interest there needed to be either a conflict between two duties owed by the employee or a conflict between an interest they had in something and the carrying out of their duty?---Yes.

Okay. And of the two conflict type matters I've just identified to you the one that's identified there is the conflict between interest and duty, do you agree with that?---Yes, that's right.

30 The classic example being in the case of SHFA or an employee of SHFA has a personal interest in say a company that's taking up or seeking to take up a lease?---Yes.

Right. And I know this is probably fairly obvious, their personal interest is in their advancement of their, perhaps getting a lease at better terms - - -? ---Sure.

- - - and conflicts with their duty of fidelity to SHFA to get the best possible terms under the lease, is that right?---Certainly.

40 And in fact some time in 2005 an employee of SHFA disclosed that they had an interest in a family company that was seeking a lease at SHFA, is that right?---Yes, that's correct.

And you became aware of that, is that right?---Yes, that's right.

And what action did you take in response to that?---Had some discussions with the person involved, initially stood her down from dealing with that group of tenants and then ultimately she resigned.

All right. How long did that process take?---Can't recall but it wasn't very long.

Well, she was an employee, sorry. The lease that she made the disclosure in relation to concerned an area of The Rocks, sorry, of SHFA that she was dealing with, is that right?---That's correct, yes.

10 And did she, she stayed employed by SHFA while that process of considering that tender occurred, is that right?---In a different part of the organisation, yes.

And then ultimately that family company was successful, is that right?
---Yes.

And then that went to the Board, is that right?---Yes, the lease did, yes.

THE COMMISSIONER: What went to the Board?---The lease.

20 MR BEECH-JONES: The lease went to the Board for approval, is that right?---Yes, that's right.

And the Board became aware that the successful tenderer was a company associated with an employee of SHFA, is that right?---Yes, that's right.

And did you indicate mistakenly that you weren't aware of that?---I can't recall if, no, I just don't recall.

You can look at volume 3 at page 995?---I don't have that.

30 Volume 3, page 995. If you don't have volume 3 we'll just get it for you?
---I can see it on the screen.

Oh, you can see it on the screen?---Yeah, yep.

If you go down the bottom - - -?---Sorry, I do recall that situation now, yes, that's quite right. I mistakenly told the Board meeting one thing but I was reminded that I actually had received an email prior.

40 All right. Well let's just get, it's an email from yourself to the Board?
---Yes.

And you're saying to the Board, I'd like to correct a statement that I made at the Board meeting today regarding _____'s declaration of interest in a property at The Rocks Centre. Do you see that?---Yes, I do.

By the way was there - - -

MR NEWLINDS: By the way, a lot of people just, if I could just interrupt, I think from discussions I've had with Dr Lang, he would prefer that Ms 's name was suppressed. Because apparently this was an embarrassing and difficult issue for her.

MR BEECH-JONES: All right. O.K.

THE COMMISSIONER: Yes, there will be a suppression order in relation to Ms 's name, Ms 's name.

10

SUPPRESSION ORDER IN RELATION TO MS 'S NAME

THE COMMISSIONER: Can I just stop you for a moment while we try and find the document. Yes, thank you.

MR BEECH-JONES: Thank you. Now just while we're there on what Mr Newlinds just raised, Dr Lang, the name of the successful applicant in the, a the end of the first paragraph of that email, is that company associated with (not transcribable) in question?---Yes, I believe it was owned by her, some relatives of hers.

20

Right. Now just coming back to, what was the statement that you made that you needed to correct?---As I remember it now I think the, the question of 's conflict of interest came up and I said at the time I didn't recall it. And then after the Board meeting, Garrick and I were talking about it and I said, oh, I've made a mistake and I need to advise the Board immediately, and I did so.

30

THE COMMISSIONER: You didn't know about, I didn't quite catch that? ---I was mistaken, yes, the mistake I made was that I didn't recall that she had told me about it via email.

She had made, she had made a declaration of the conflict of interest beforehand?---That's correct.

Yes.

MR BEECH-JONES: I think I may have asked you this, was that employee, she was still working at SHFA at this point in time?---Yes, she was.

40

THE COMMISSIONER: But did you say in a different department?---I had moved her sideways into another area so that the conflict was dealt with.

You thought it was dealt by the Chinese Law concept?---She simply wasn't in an area that dealt directly with the tenants any more, so - - -

Right.

MR BEECH-JONES: Now how did it come up at the Board? How did the Board find out about it, if you indicated you had no, you couldn't recall it? ---I can't recall the specifics, but it probably was revealed in the Board paper or at least a discussion. It certainly wasn't separate, it was, it was a known, a known fact. But with the Board asking whether I personally knew and I didn't recall at the time that I was asked, but I did recall afterwards.

10 Sorry, I didn't ask you whether it was a secret, I was just asking if you indicated to the Board you didn't personally know, they must have found out from somewhere else and I'm asking how they found out?---I just can't recall it. It could have been in the Board paper, but I just don't recall.

I mean if your, if your mind was so attuned, as I suggest you sought to convey the conflicts, it's a pretty amazing thing to not remember when you were asked about it by the Board isn't it?---(not transcribable) I didn't remember is that she personally advised me, the, I think I was aware of the Code, of the conflict, but at the time I couldn't think whether she'd told me
20 about it beforehand or not. And so the critical date was when was I told. And, and what I discovered was that I was told on 7 March, 2005, which was quite some time before 22 February, 2006. So a year had passed and it had slipped my mind.

THE COMMISSIONER: But what was the Board discussion?---It was about that particular lease, the Find Foods lease.

And, and did the topic of conflict of interest crop up in that discussion?
---Commissioner, I just can't recall why it came up, but in considering - - -

30 Yes, but did it come up?---I think yes it did and because that's why the Board asked me whether I knew about it beforehand and I said that I didn't. At the time I had forgotten a year before she had told me.

So are you saying that the issue cropped up, it was recognised that there was a conflict of interest?---At that time, yes.

And someone asked a question whether you knew about it?---Well in advance.

40 And you said no?---I said I didn't, I didn't recall at the time and subsequently I was wrong.

Yes.

MR BEECH-JONES: Right. So you indicated to them you didn't, sorry did you indicate to them you didn't know of the conflict?---No, I knew of the conflict, but the question was when, when did I know of the conflict and the

answer was well I knew about it back on 7 March, 2005. But I didn't remember that at the time.

I just want to ask you about something that you answered to Mr Newlinds. Now firstly you recall he put to you a scenario concerning Mr Kelly going to Dubai in May 2007?---Yes.

10 And in answer, and in part of that scenario he indicated that when Mr Kelly went he attended dinners and so forth with Mr Charif Kazal. Do you see that, do you recall that?---Yes.

And you said something that, I think you indicated, you indicated further things but firstly that the social interaction was a matter you had a concern with. Is that right?---Yes, that's right.

Now we, so was that a subject matter of Dr Lang's Ten Commandments, social, social interaction with tenants?---No, not specifically. It's certainly covered in the Code of Conduct.

20 All right. So it's certainly covered in the - - -?---The Code of Conduct.

Whereabouts is that covered?

THE COMMISSIONER: Can we get to the Code of Conduct so he can look at it?

MR BEECH-JONES: Oh sorry, yes, that's, it's in volume 3 you can take it to two parts.

30 THE COMMISSIONER: (not transcribable) page?

MR BEECH-JONES: 1108 is the SHFA Code of Conduct.

THE COMMISSIONER: 1108.

MR BEECH-JONES: And 1087.

40 THE COMMISSIONER: That's in, are you talking about, is it in that, in the bundle or is it in the witness statements? Look we have to differentiate between the bundle, I know it's difficult, the way in which it's been put together, but we have to differentiate between the statements and the bundle.

MR BEECH-JONES: I don't have (not transcribable)

THE COMMISSIONER: I understand. But when it's numbered, you're giving a number I keep looking in the bundle and it's not in the bundle, it's in the statements.

MR BEECH-JONES: I blame Mr Newlinds for this.

THE COMMISSIONER: I should say that this is a document that should be in the bundle.

MR NEWLINDS: Well, it's in my bundle so I don't know why it's not in anyone else's.

10 THE COMMISSIONER: Mr Newlinds, I know that you're only concerned about what you have but I'm actually concerned about what I have as well.

MR NEWLINDS: Yes. Well, I'm very concerned about what you have.

THE COMMISSIONER: That's a change.

MR NEWLINDS: Mine has got page 1087 on it, that's the best that I can do.

20 THE COMMISSIONER: Where is it?

MR NEWLINDS: 1087 is all I can say.

THE COMMISSIONER: 1087. And that is of the statements folders. And where does Mr Beech-Jones have it?

MR BEECH-JONES: He has it in 1087 of volume 3.

30 THE COMMISSIONER: That must be of the witness statements. Does yours have a label on it?

MR BEECH-JONES: It has no label, no index but I'll pass over that. I think it is statements because there are some statements floating around in here so I'll take it on the basis the last two volumes I've got are statements. So 1087, Commissioner, has towards the top heading To Personal and Professional Behaviour.

THE COMMISSIONER: And this is part of somebody else's statement.

40 MR BEECH-JONES: That's part of Mr Stevens' statement I think. It begins at 1054.

THE COMMISSIONER: Yes.

MR BEECH-JONES: Now, Dr Lang, taking you back firstly to the Code of Conduct and Ethics for Public, Senior Public, for Public Sector Executives and under the heading "Personal and Professional Behaviour" in 1087 and I'm not suggesting that that is the only part that might be relevant, is there

some part of that that deals with social interaction?---It's not the, the part that I was thinking of - - -

THE COMMISSIONER: Is there, there is another Code of Conduct?---Yes.

Are you thinking of that or are you think of this one?---I was thinking of the Sydney Harbour Foreshore Authority's Code on 1108.

MR BEECH-JONES: Yes.

10

THE COMMISSIONER: 1108.

MR BEECH-JONES: 1108 and that's the SHFA Code of Conduct - - -?
---Yes.

20 - - - which I took you to a minute ago which begins at 1100 and then there's a part, 1108 and if you could perhaps direct, direct us to where the reference to social interaction is in there?---Yes, under the first dot point under the heading "Possible conflicts of interest include making a decision affecting a family member or friend." If you're having social interactions with someone and they become your friend then it becomes impossible for you to make a decision that affects them.

All right. That requires (not transcribable) thank you for that and if you just go above that you'll see the phrase "personal interest" which is what I took you to?---Ah hmm.

And you see that?---Yes.

30 So the relevant social interaction has to reach the point in time at which they become a friend, do you agree?---Indeed, yeah.

And if it doesn't reach that point in time then the personal interest does not arise, do you agree?---As long as not affecting the impartiality of the, of their duties, yeah.

40 Right. And on what you were told by Mr Newlinds I suggest you weren't in a position one way or another to conclude whether Mr Kelly and Mr Charif Kazal answered the description friend, were you?---I think that level of, of interaction would absolutely in my mind be a friendship.

All right. Can you at least accept this, that minds might reasonably differ as to when that label can be applied in a particular given set of facts, you'd agree with that?---Possibly but I think in a business situation one needs to be very careful about any kind of social interaction that would be perceived as a friendship.

All right. But in the world in which we exist there are, there is a spectrum of social interaction and people's perspectives as to how friendly or not they may be with another person can differ depending on who is being asked?
---Certainly.

Right. Now - - -

THE COMMISSIONER: If I understand you the arbiter is whether it could affect the partiality of the decision?---That's correct.

10

MR BEECH-JONES: And so your, your guide as to whether you hit the level of friend is whether you, it, it, it can affect your, your capacity to carry out your duties objectively, is that right?---I think as a consequence if you're a friend then you can't. I think the, the challenge is beyond normal business relationships any level of friendship is a problem.

Right. But you'd agree that's not what page 1108 says, is it?---It's clearly an example.

20

(not transcribable)?---Yes, certainly.

And that's not what Dr Lang's, any of Dr Lang's 10 commandments said expressly, is it?---I didn't say no you must not socially interact with anyone no, that wasn't one of the 10 commandments.

Right.

THE COMMISSIONER: Well, I'm not sure about that Mr Beech-Jones. I mean, I don't know how important it is but if you look at 4.4 and he first
30 three lines it's arguable that that's what it means.

30

MR BEECH-JONES: Right. I think we're all in an area where we're debating, I'm debating a submission with a witness but it was - - -

THE COMMISSIONER: I think that's correct. I really do think that these are matters that are best left to argument.

MR BEECH-JONES: I do accept it, I've been posed with a - - -

40

THE COMMISSIONER: No, I understand that.

MR BEECH-JONES: - - - a hypothetical (not transcribable)

THE COMMISSIONER: I do understand that. I mean, it has occurred to me that this is a - we're dealing here with Dr Lang's opinion.

MR BEECH-JONES: Yes. Could I then without - taking that on board just perhaps limit it in this way, moving away from the hypothetical that

Mr Newlinds gave you, just dealing with an employee of SHFA who's going off seeking job interests?---Yes.

A situation you would have been familiar with?---Certainly.

Okay. Now, and you're also aware of a general - that at least in some cases employees who are looking for other work don't necessarily want their existing boss to know that fact?---Certainly.

10 Right. And if, needless to say, if the interview is with - of someone who is not a client or tenant of SHFA then that is not something you would expect them to waltz in and start telling you about?---Indeed, if they were not a stakeholder of, of SHFA in any form, because we have customers and suppliers as well as tenants.

You agree with that?---Yes.

20 Okay. Take that example then move it forward to the persons having something a little bit more onerous such as attending a weekend course with a potential employer where their aptitude was being demonstrated, the same situation, is that right?---Indeed, depending on, yeah, who.

30 Take that next to a, to a situation where they were assisting them with a tender that involved future projects?---I, I have a problem with that. If that's, that's secondary employment and that requires my specific approval which, which would need to be sought and I'd need to in, in approving that I would need to consider very carefully what kind of advice has been given, whether or not that impacts SHFA business in any way, a whole bunch of other issues as well.

Right. And so just to be clear, firstly you would regard that as secondary employment?---Yes.

Is that right? You - - -?---Even if there was no, no remuneration it's still secondary - - -

I understand you, even if there's no pay you'd regard that as secondary employment?---Yes.

40 You wouldn't be looking at that through the conflict of interest part of 1108 that we talked about, would you?---Again, depending on who the, the party was but assuming for a moment that it wasn't a party that was in any way connected with the Foreshore Authority, then, yes.

Yes. And equally, the considerations that you would give as to whether you approved it I think were?---Whether or not the, the kind of advice would be of a nature that would conflict with their duties at the Foreshore Authority or conflict with the Foreshore Authority's best interests, things like that.

And partly if you were to be told that that would involved say work overseas that would at least to some extent ameliorate that concern, wouldn't it?---Again, it depends. If the, if the work was being conducted overseas but would impact a business that had a presence here in Australia that could be still a problem.

Yes, bearing in mind your comments, Commissioner, those are the questions I wanted to ask.

10 THE COMMISSIONER: Yes, thank you. I mean, so there's no misunderstanding, Mr Beech-Jones, I do not regard Mr Lang's opinion as irrelevant but it remains an opinion and the issue as to whether there's a conflict of interest is for the Commission to decide on the - in regard to the criteria that ordinarily applied in determining whether or not there is a conflict of interest and not on a matter of opinion.

MR NEWLINDS: Well, can I add to that? The submission I'm going to make as to whether what Mr Kelly made was a disciplinary matter which would result in summary dismissal ultimately has to be determined
20 objectively, albeit Dr Lang's opinion would have some relevance to that objective question so I'm certainly not going to say - - -

THE COMMISSIONER: I would say you've put it far better than I did.

MR NEWLINDS: I'm certainly not going to say that Dr Lang's opinion is the be all and end all, albeit respected.

THE COMMISSIONER: That's why I said not irrelevant. But it really in the end is going to be a matter for argument.
30

MR BEECH-JONES: Well, I'll, I'll leave it at that then, on that basis.

THE COMMISSIONER: Very well. Now, Mr Newlinds?

MR NEWLINDS: I just have one question which doesn't arise but it might clarify some evidence that was given earlier, may I ask that? You, you, let me start again, you were referring to the situation when we were talking about the base building definition and the difficulties, how there were a whole lot of old leases that had not run their course?---Yes.
40

And that you brought in what was referred to the standard lease?---Yes.

Now, if you can't remember this detail, tell me, and we might show it to you later and just get you to tell the Commissioner's staff. But in 2007 there was a new filed memorandum filed at the Registrar-General's office signed by you. Is that the standard form that became part of each lease thereafter? ---Indeed, that was around the timeframe that we did that.

All right. Well, I think we can turn that up and tender that at some stage without the need for you to come back. I have no further questions.

THE COMMISSIONER: Yes.

10 MR NEWLINDS: Now, there's just one matter, Commissioner. There are going to be, I understand, some recommendations as to what SHFA might be able to do to improve their systems. Now, I'm not sure if Dr Lang's the appropriate person because he, he no longer works there but it just may be that we might want to call him back if there's a dispute about those matters and get his opinion. So can I ask for him to be not formally released but we'll certainly - we understand he's a very busy man and we'll give him as much notice as we can if we do need him.

THE COMMISSIONER: Yes. I'm sorry that you've not finally removed this albatross, Dr Lang, but we - if you're needed we will try and give you as much notice as we can?---Thank you, Commissioner.

20 And it won't take long I don't think. Thank you for your help, you're excused for the time being.

THE WITNESS EXCUSED

[12.30pm]

THE COMMISSIONER: Mr Newlinds, does that mean we don't have another witness now, do we?

30 MR NEWLINDS: Yes, we don't have another witness so might I ask that we can make it 2 o'clock to take Mr Touma's evidence. We then have scheduled Nadine Burch. Your associate might get out her statement and have that ready. She has got a statement.

THE COMMISSIONER: Yes, thank you. We'll adjourn until 2.00pm.

LUNCHEON ADJOURNMENT

[12.31pm]