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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION NAPIER

Reference: Operation E11/0475

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON WEDNESDAY 29 JUNE 2011

AT 10.10AM

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

THE COMMISSIONER: Mr Alexis.

MR ALEXIS: Thank you, Commissioner. Apologies for the slight delay but Mr Branson's been taking orders. Commissioner, I call Mr Stephen Fenn.

MR HARRIS: Commissioner, may I indicate that Mr Fenn will take an affirmation and he will be seeking the declaration pursuant to section 38.

10 THE COMMISSIONER: Yes, thank you.

MR HARRIS: Thank you.

THE COMMISSIONER: Won't you be seated, Mr Fenn. Pursuant to section 38 of the Independent Commission Against Corruption Act I declare that all answers given by Mr Fenn and all documents and things produced by him during the course of his evidence at this public inquiry are to be regarded as having been given or produced on objection and accordingly there is no need for him to make objection in respect of any particular answer given or document or thing produced.

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**PURSUANT TO SECTION 38 OF THE INDEPENDENT
COMMISSION AGAINST CORRUPTION ACT I DECLARE THAT
ALL ANSWERS GIVEN BY MR FENN AND ALL DOCUMENTS
AND THINGS PRODUCED BY HIM DURING THE COURSE OF
HIS EVIDENCE AT THIS PUBLIC INQUIRY ARE TO BE
REGARDED AS HAVING BEEN GIVEN OR PRODUCED ON
OBJECTION AND ACCORDINGLY THERE IS NO NEED FOR HIM
TO MAKE OBJECTION IN RESPECT OF ANY PARTICULAR
ANSWER GIVEN OR DOCUMENT OR THING PRODUCED.**

<STEPHEN WILLIAM CHRISTOPHER FENN, affirmed [10.11am]

THE COMMISSIONER: Yes, Mr Alexis.

MR ALEXIS: Thank you, Commissioner. Sir, can you state your full name?---Stephen William Christopher Fenn.

Thank you. What's your current occupation?---Public servant.

10 And in what area of the public service are you currently working?---The Crown Lands Division of the Department of Primary Industries.

And are you reporting to any particular position at present?---I'm the Manager of Strategic Projects in Crown Lands South.

I think it's the case, Mr Fenn, that you, as you were entitled to of course, declined to provide the Commission with a statement or participate in a record of interview, is that so?---I had legal advice to not - - -

20 I'm not criticising you, Mr Fenn, - - -?---No, no, that's all right, I'm just - - -
- - - I'm just trying to understand - - -?---- - - - (not transcribable).
- - - not so much for my own purposes but for everyone else in the room that we don't have a statement - - -?---You don't have a transcript.
- - - or a record of interview from you?---No.

30 Now, Mr Fenn, during the period that we're concerned with you were employed as Minister Kelly's Chief of Staff, is that so?---That's right.

And can you tell us when it was that you commenced in that position?
---July 19, 2010. I was 40 years and one day.

You commenced in that position when you had been the age of 40 for one day, is that what you're telling us?---Yes. 40 years old and one day.

Thank you?---Nice start to my forty-first year.

40 All right?---I was seconded over.

And seconded from where?---From the LPMA.

And can I ask you, before the commencement of your work in that position for how long had you worked in the LPMA for?---From approximately October 2008.

And where did you work prior to October 2008?---I was a policy adviser for Minister Kelly.

And for how long were you a policy adviser for Mr Kelly up to October 2008?---I became a policy adviser for Mr Kelly on, after the 2003 state election.

All right. And then can you tell us about your career prior to becoming a policy adviser after the 2003 state election?---I started working with Tony in 10 end of 1998 and before that I was, I had a long and illustrious career in university.

So should we understand, Mr Fenn, that to a large extent you have worked in one or other different capacities for or with Minister Kelly?---Yes, apart from the, the, currently and that period between October 2008 and July 2010.

All right. How would you describe your working relationship with Minister Kelly, particularly during the period when you were his chief of staff?---It 20 was a very close relationship, we had, I had a lot of respect for, for Tony and we just had, I considered him a, a, not only just a boss but a, a, a, a close colleague. I think we shared similar views of the world.

All right. And would you describe the working relationship that you had as one that was open and frank?---Yes.

So that if you had a difficulty or a problem or anything you felt no restraint in raising that and discussing that with him?---No. I, I'd, if I had a issue I'd raise it with Tony.

30 And did you understand or at least did you feel that if Mr Kelly wanted to raise something with you in respect of which he had an issue with he could do so with you?---Yes, that would - - -

And should we understand that in the course of your working relationship there were close discussions on a regular basis about the business of the day?---Yes.

40 Because as his chief of staff it was your prime duty, was it not, to be across the issues of the day so that you could provide all appropriate support to Minister Kelly?---Yes.

Now, could I ask you please to recall to mind when it was that you first became involved in the concept of the state government acquiring the Currawong site?---That's a long history actually. I, look, I, I think it goes back to about, I think there was, originally when Unions New South Wales wanted to sell the site there was some talk, it never went anywhere, about, the idea about, the idea of the positive public value coming out of the

acquisition and not returning, actually bringing Currawong into public ownership so that, that's going back quite some time but nothing concrete came out of those initial discussions I would say.

Do you recall things developing from about early October last year - - -?

---Yes.

- - - in relation to arrangements potentially coming together for that to occur?

- 10 ---Yes, I, I can recall the sort of, I suppose the, the next chapter in that where, where, where there was a, there was, it was the start of let's think about, there's a possibility here of acquiring Currawong around, you know, I think it was September/October, I'm not too sure.

- Now, Mr Fenn, can I show you please, with a copy for you, Commissioner, a document and can I indicate for the record that it exists as annexure A to a statement by a Mr Harding that will be tendered in due course. Can I distribute copies and, Commissioner, you'll see in the bottom right-hand corner we've annotated this document with a 3A and my intention is to have that inserted in a moment into Exhibit 1 in that location. Now, Mr Fenn, do you recall receiving from Mr Watkins the email which is identified on the page I've shown you as the original message on 6 October about the time indicated regarding the subject of Currawong?---I can't recall the particular email.

- 20 Well, looking at the email does it assist in your recalling to mind that you were given to understand in about the first week of October 2010 that there had been a meeting with the general manager of Pittwater Council that week regarding the state park for Currawong idea?---Oh, yeah, I, I would have, I

30 would have read that and noted it.

And do you recall him conveying that the council was totally committed to a joint funded purchase of the site and that he had identified a stream of land and financial arrangements to do this immediately?---I can recall discussions about getting a package together. I can't recall any discussion about joint funded purchase. I, I, I am aware that there was some discussions taking place about putting some council managed land into the package.

- 40 And do you see in this email that on the fourth line there's a reference to a purchase place of around 12 to 13 million?---Yep.

And then if you just drop down a few lines, after some detail concerning the arrangements where Pittwater Council are dealt with there's a reference to the council owning some house blocks that will be given to the Crown to sell and in brackets you see the reference to four to \$6 million as a total value. Do you see that?---Yep, I think I can see that.

Now, can you tell us, please, whether receiving this email was in the course of ongoing discussions you were having with Mr Watkins or any of his staff at the time or whether the- -?---That- - -

- - -communications on this were in the written form that we see?---All I can, obviously Warwick kept me apprised of developments going on within the LPMA and that would have just been a, a sort of a touching base.

- 10 Mmm. All right. So was this sort of email which was sent to you by Mr Watkins part and parcel of him keeping you abreast of how things were progressing, particularly following what is there described as, "A good meeting with the council?"---Yeah. It was just a regular heads-up, an update.

Do you see at the end of the email there's a reference to a pink- - -?---Yep.

- - -being with you tomorrow? And should we understand a pink to be a reference to a ministerial briefing note or document?---Yep.

- 20 And that's what you understood would follow this email, may we take it?
---Yes.

Now, could you turn please to the document behind tab 2 in Exhibit 1 which you'll be shown. You can see the tabs in the folder, Mr Fenn?---Tab- - -

If you go to tab 2- - -?---Oh, yeah.

- - -you'll see pages 4, 5 and 6- - -?---Yep.

- 30 - - -being the October 2010 briefing document. Do you see that?---Yep,
yep.

Now, do you recall receiving this?---Yes.

- And should we understand that when a pink is received in the minister's office it comes to you and you then deal with it with the minister?---Ah, that's, that's normally the case. Sometimes Warwick or senior officers in the LPMA would have brought up a brief directly during, we had a weekly meeting with, with Warwick and his chief of staff over, you know, just, the idea was to make sure that everyone knew what we were doing.

Mmm. So weekly meetings involved you and the minister- - -?---Policy adviser.

- - -as well as Mr Watkins and his chief of staff, Mr Matchett. Is that so?
---Yes. And along with the policy adviser for lands and- - -

Who was that?---Who was that?

Mmm?---Ah, Michael O'Brien.

Right. Now, can you tell us, please, how as best you recall this briefing document at pages 4, 5 and 6 of Exhibit 1 was dealt with?---I, I, I can recall it was, it was discussed during a meeting with the minister and Mr Watkins and Mr Matchett and Mr O'Brien. There was a general discussion about, this essentially said, well, this is the, this is the way forward, this is how, if, if we were to progress this, this is how we would actually go ahead and
10 acquire the site.

Thank you. Now, before I ask the next question, can I just go back for my hat on that email that I circulated a moment ago. Commissioner, could that be treated as part of Exhibit 1 at page 3A?

THE COMMISSIONER: Yes.

MR ALEXIS: Thank you. Now, do you recall being present when the briefing document behind tab 2 was discussed when the minister endorsed
20 in handwriting what we see on page 6?---Ah, yes, I can recall that.

Now, do you recall there being any discussion at all about what we see in paragraph 3.5 on page 5 about the prospective purchase price of \$12 million? Do you see that in the end of paragraph 3.5?---Yeah, that figure was, was bandied around as a, you know, a, a, a, seen as a market value for the site.

And bandied around by who?---Mr Watkins.,

30 And when he was bandying that figure around did he indicate to you and the minister what the basis of his understanding was that the Currawong site could be purchased for \$12 million?---No, I can't recall.

Well, when he was bandying that figure around didn't you think, well, how does he know that this site could be bought for \$12 million?---Well, it would've relied on his professional judgement.

But what was that judgement based on - - -?---I'm not too sure.

40 - - - as you recall it?---I'm not too sure.

THE COMMISSIONER: He's not a qualified, he's not an estate agent?
---Who?

Mr Watkins?---No, no.

So what do you mean his professional judgement?---Well, he's the Director-General responsible for, for example, the whole land valuation component of New South Wales government was under Mr Watkins so - - -

But he wouldn't arrive at a figure, I presume, without there being proper valuations and analyses done by his department?---Well, yes. There was a figure that was used - - -

You say "well", is there any doubt about that?---In terms of what?

10

When he fixes upon a valuation that is based on proper valuations and analyses by his department?---Yes, I'm not too sure at that point.

You've been in the civil service for a long time, you would know what the general procedure is?---The general procedure in the minister's office would be relying on the advice proffered by the Director-General. We're not there trying to dig into the, you know, I wasn't going out there to commission my own valuation. I was reliant on the advice of the department which is the Westminster system.

20

So Mr Watkins tells you that the price is approximately \$12 million and you accept that without further questioning?---Yes.

MR ALEXIS: And, Mr Fenn, from what you could see of the minister and from what you could hear during the course of the discussion was that a subject that the minister appeared to accept without question as well?---Yes, I believe so.

30

Do you recall any reference being made during the course of the discussion around this briefing document and before Minister Kelly executed what he did on page 6 about the existence of any valuation to underpin \$12 million as a fair market price?---Not that I can recall.

THE COMMISSIONER: I don't understand what you mean by the Westminster system in this context?---Well, - - -

40

Are you saying that if the Director-General of the department tells the minister that land is going to be purchased for \$12 million, the minister under the Westminster system is supposed to accept this without question and just accept that as face value and that's your understanding of how your department worked?---No, the CEO signed off a (not transcribable) to the minister when part of it it says approximately, it's approximately a \$12 million purchase price.

Yes. Mr Fenn, I asked you whether there was any discussion about the \$12 million and whether it was based on valuations and analyses - - ?---Which I - - -

- - - and you said to me that under the Westminster system the minister – words to the effect that under the Westminster system the minister simply accepts what the Director-General says and I'm querying that?---Okay.

And I'm querying that in the context of asking you that in your department is that what generally occurred?---Well, this was not a - - -

No, just answer the question please?---No, because this is an exceptional case.

10

Why did you tell me then that under the Westminster system this is all that happened, that is, that the minister would simply accept what the Director-General said about the value of land which is said to be \$12 million without ascertaining on what that \$12 million is based?---Well, there was, there was an indication that the, the property was, I think, bought for around 11, \$12 million by Eco Villages, around that, around the – so - - -

20

How did you know, how did you know that?---Oh, I think it was in, in the, in the press. So, you know, I, I, we were relying on a professional public servant's advice through this brief that, and, and we didn't question why that \$12 million was, why, how they arrived at that price.

That's all I am trying to find out, Mr Fenn?---Very good.

That is that you made no attempt to ascertain what the basis was - - -?---No. - - - of the \$12 million. You took it at face value?---Yes.

30

Face value being the value which Mr Watkins proposed?---Yes.

Without queries or investigation?---No.

MR ALEXIS: And, Mr Fenn, should we understand that the same position obtains in relation to the Newport land referred to in paragraph 3.5, you'll see halfway down there's reference to excess council land adjoining waterfront Crown land at Newport?---Yeah.

40

Valued at approximately 5 to \$7 million?---We would have taken that on face value.

And if you look at paragraph 3.6 where it refers to the proposal that the gifted council land would be subject to private treaty sales at a later date, do you see that?---Yes.

And so should we understand that you and from what you could see the minister took at face value that there was land available that could be the subject of sales in due course to realise funds to assist in the acquisition of

Currawong?---Yes, in the acquisition or, or, or put back into the, to the management of the state park.

And so when the minister came to endorse his approval, the terms of which I'll come to in a moment, was there any discussion at all about the zoning of that Newport land, whether in fact it was worth between 5 to \$7 million?
---No.

10 And whether or not that value could be easily or readily realised?---No.
Did you know what the zoning of that land was?---No.

Did you have any idea as to the step or steps that would have to be worked through in order to enable that gifted Newport land to be sold by private treaty sale?---No.

Did you have any idea understanding from what was said as to how long that process might take?---No.

20 THE COMMISSIONER: Did you make any inquiries about these matters?
---No.

You just took it at face value that you were going to get, that the money would be available from the council, from the council's land?---Well, that land was being offered in kind to, to, as part of the deal.

30 You didn't, you didn't try and find out whether the money from this land that was being offered would be available in six months or six years or 60 years?---No.

MR ALEXIS: So should we understand, Mr Fenn, that in the course of the conversations at the meeting around this document from what you could see and from what you heard the minister executed his approval that we see on page 6 having read the briefing note but without making the inquiries or posing the questions along the lines that have just been put to you. Is that how we should understand it?---Yes.

Now, can you recall to mind whether there was any discussion at all around the terms with which the minister expressed himself in the handwritten words we see on page 6?---Sorry, can you repeat that question?

Of course. Do you recall any discussion around the terms of the approval that the minister wrote on page 6 of his briefing note? In other words, Mr Fenn, just so that I'm clear with you, we don't see do we the word approved with a tick or a signature and that's it?---No, it, it wasn't a - - -

It's a qualified approval, isn't it?---Well, it wasn't an approval to purchase, no, no (not transcribable)

No, so can you tell us please whether there was any discussion around what the minister wrote on page 6 of his briefing note?---No, except for what's there basically, go off and look at doing the, the groundwork but, but before anything further can occur it's got to come back to the minister or, as he said, budget committee, possible budget committee for, for further approval.

- 10 If you turn back to page 5, Mr Fenn, you'll see under the heading Recommendation, in paragraph 4 that in subparagraphs C, D and E approval was expressly sought for what is set out in those subparagraphs, particularly in D, approval to enter negotiations for the purchase of lands to be included in the state park with land acquisition costs to LPMA to be limited up to \$13 million. Do you see that?---Yes.

And then there's the additional subparagraph in handwriting relating to funding through the SRDF and other areas. Do you see that?---Yep.

- 20 So when we look at what was sought to be approved and we see the terms of the actual approval, it's plain, isn't it, Mr Fenn, that all the minister gave approval for was to proceed to negotiations with final approval to come back because of possible budget committee approval?---Yes.

So the approval that was given was limited, having regard to what approval was sought?---Yeah.

Was there any discussion about why the approval that issued from the minister in the terms that we see on page 6 was so limited?---(NO AUDIBLE REPLY)

- 30 If so, what was it?---Well, it was a general, the discussion from what I can recall was that the limit was going to be 13 million. If, if, if it was, if it was, exceeded that, then you have to come back and discuss, but it was basically, the whole tenor of the conversation was in principle, yes, go away and start talking about getting a deal together and, but come back before any, any, anything concrete is decided.

- 40 And should we understand that you at least understood from this meeting that the sort of issues that we've already raised with you, questions of whether a proper value was going to be paid, whether the Newport land would actually realise five to seven million, issues concerning funding, all those sorts of things would be worked through in the ordinary course- - -? ---Yeah.

- - -via the putting up of a budget committee submission?---At that stage depending, you know, either budget committee or come back to the minister for approval

Ah hmm.

THE COMMISSIONER: That's the kind of thing that would ordinarily always go to a budget committee?---No, not, not, not necessarily.

You mean the minister could decide on a \$12 million land acquisition without referring it to a budget committee?---Well, there was a precedence with the Priory. That was, that didn't go budget committee.

That's one case. Any other case?---No.

10 Was the Priory a straightforward transaction, Mr Fenn?---From what I can recall it was a purchase price around \$9 million and there was approval from either the Premier or the Treasurer of the day to, you know, and the, the, the whole negotiation around the Priory was that it would be bought and paid for by additional Crown Land sales.

20 And so that was a transaction where the was indeed permission given to contract from either the Premier or the Treasurer?---Or the Treasurer, yeah, I can't recall who, but yeah, but it did, but the point is it didn't go to budget committee.

And it wasn't decided by the minister alone?---No.

Was there any reason why it didn't go to budget committee?---I can't recall.

MR ALEXIS: Now, Mr Fenn, it was crystal clear, wasn't it, from the time the minister executed the approval that we see on page 6 that Mr Watkins was authorised to negotiate but that he was not authorised to make any commitment for the purchase of the property before coming back to the minister. Is that so?---Correct.

You had no doubt in your mind that that was the position after this meeting and after this minute was signed?---Yes.

From what you could see and hear, the minister had the same view?---Yes.

Now, what happened after the minute was signed on 8 October, what was the next thing you recall occurring in relation to the purchase of Currawong?---I honestly can't recall much prior to 2011 when it sort of come back again.

40 Can I try and assist you?---Yeah.

You asked for the preparation of a submission to go to Treasury, didn't you? ---Oh, the, the, yeah, the budget, yeah, there was a request I, to, to, to formulate a minute ah, either budget or, or full Cabinet, around this purchase.

Well, just have a look at the material behind tab 4 of Exhibit 1 if you would. And do you see at page 9, just using the page numbering in the bottom right-hand corner, there's an email from personnel within the LPMA, the names no doubt you will recognise, the email is from Mr Foster to Mr Harding and to Ms Connolly, you see that at the bottom of the page?---Yes.

And do you see that there is reference in that email to a meeting at the minister's office (minister not present)?---Yes.

- 10 Your name is referred to in company with Mr O'Brien to which you've made reference earlier, I think?---Yes.

And Mr Matchett, do you see that?---Yes.

And there's a reference at the bottom of the page in these terms. "After the meeting S Fenn wants the submission prepared to go to Treasury to get approval - - -?---Yes.

- - - (or not), do you see that?---Yes. Yes.

- 20 So there can be no doubt, can there, that by at least early November 2010 you were directing the officers from LPMA to prepare a - - -?---A budget minute.

- - - submission for Treasury?---Yes.

Why was that?---Well, at the time we were seeking authority to acquire the site.

- 30 Well, you knew that if Mr Watkins' negotiations proved successful your minister would need a document to go up to the budget committee because that's what his endorsement of approval on page 6 told you?---Yes, well, or, or approval of the minister himself.

All right?---Depending on the circumstances.

Now, if you can just come up the page on 9 you'll see that there is a further email passing between LPMA personnel and if you could just look at the first sentence of that email after the word "colleagues", do you have that?

- 40 ---Yes.

And just moving over the reference to acquisition you see there's a reference there to an Ex Co minute - - -?---Yes.

- - - that may need Cabinet or budget committee of Cabinet approval in the first instance, do you see that?---Yes.

Now, what's attributed to you at the bottom of the page is a submission to Treasury would you have understood in November last year there was any real difference between either a submission to Treasury or an executive minute to go up to Cabinet or a budget committee of Cabinet?---Yes. My understanding would be that an Ex Co minute would, requires the sign-off from the Governor which I think an acquisition would require.

Sorry, would require?---Yes, would require.

- 10 All right. In any event it's obvious, isn't it, from - - -?---Sorry, compulsory acquisition would require an Ex Co minute.

THE COMMISSIONER: We're not talking about a compulsory acquisition here?---No, I'm just saying my understanding of an Ex Co minute that I wouldn't, I wouldn't have thought in the ordinary course of business that an Ex Co minute would be warranted in this situation. It would either be, normal course of action would be a minute or otherwise.

- I don't know what you mean. You said you wouldn't need an Ex Co minute
20 you would need a minute, is that what you said?---Yes, a minute to full Cabinet or budget committee.....

I see.

MR ALEXIS: So is what these emails tell you as to what was being sought consistent with what you understood was required at the time?---Sorry, can you repeat that again?

- 30 Is what we see in these emails consistent with what you understood was required at the time, namely, the preparation of a submission for Treasury or a minute for Cabinet?---Yes. My general understanding was that a minute would be required.

THE COMMISSIONER: For Cabinet or - - -?---For budget.

- - - budget committee?---Yes. Depending on the final deal, so to speak. It's all speculation. At that stage I didn't know what the final deal was going to be in terms of what the requirements were.

- 40 Whatever the final deal it would either have to go to the Cabinet or to a budget committee?---No, but in the case of the Priory it didn't - - -

I'm not asking about – I'm talking about this case not the Priory?---I know, but, but - - -

And I'm looking at the minute and looking at the emails to which you've referred?---Yes. At the time I was seeking a, a, a, a minute for budget committee.

Mr Fenn, I'm getting the impression that you are using the Priory as justification for what happened here, is that right?---No. No, it helped inform my – it was similar situation where there was a, a, a proposal to purchase land.

Is it not the case that at the stage we're looking at when we look at these, when these emails passed that what you had in mind was sending a minute to Cabinet or a budget committee meeting in relation to any possible
10 purchase of Currawong?---Yes, that was my intention at the time.

Yeah. But the, the thought of the Priory had not crossed your mind at this stage?---No, we had.

And in what context?---Well, in the context of the, that was another strategic acquisition that was done and that I had recollection of but I wasn't saying I was going - - -

What crossed your mind about it?---Sorry?

20 What crossed your mind about it?---Oh, it was just, just a, it was another very important strategic acquisition.

No, I - - -?---No, I mean, I'm not saying we were, I was thinking we need to go down the Priory route, I was, my preference at the time was as explained in this letter, email, was to produce a minute for full Cabinet or budget.

MR ALEXIS: Mr Fenn, come through please to the material behind tab 5 of Exhibit 1 and do you see at the bottom of page 11 there's an email from you to Mr Watkins of 17 November about 9 o'clock in the morning asking him to hurry up with the budget minute to seek endorsement to negotiate on the purchase of Currawong?---Yes.

Now, can you recall to mind please what the hurry was in mid-November 2010?---I can recall there was generally, you know, November/December is the business end of the year and it would have been nice to have, to have tried to sort some approval to go ahead and, and seek to acquire the site.

THE COMMISSIONER: Mr Fenn, that's hard to understand?---Is it?
40 Okay. Well - - -

Yes. If you look at the terms of these minutes, if you look at the one at the top of the page, "Sorry to pester you on this one but the minister's office is very keen to put up a Cabinet minute ASAP"?---Yes.

Are you saying that's just in the ordinary course of business?---Oh, we were very keen to resolve the approval side of things before, before Christmas.

Why?---Oh, well, in the broader context there was a, there was an election looming in March, it would have been nice to get some approval and some clarity on whether we were allowed to proceed with this matter.

Why?---Because it was, I think it was a, I think it was a general agreement that the acquisition of Currawong was a, a positive thing that the community were interested in.

This has been going for more than five years?---Mmm.

- 10 What was the hurry? Why, why, why did it have to be finished by the end of 2010 when it had dragged on for years?---Oh, my, my, my, my belief is that if you can do it, do it, you know, don't try to, don't dilly-dally around. If we can get some approval in place then proceed as quickly as possible. It was - - -

Did you deal with that in every single acquisition in your office, you use that approach?---Well - - -

- 20 If you can do it, do it as soon as possible, every single matter is dealt with in that way in your office is it?---No, this is an exceptional, this is - - -

Well, what exceptional - - -?---- - - - it was, well - - -

What we've trying to find out is what is exceptional about this to such an extent that you were regarding yourself as pestering - - -?---I wasn't pestering.

- 30 Or somebody from your office was pestering Bronwyn because the minister's office is very keen to put up a Cabinet minute as soon as possible. I'm trying to understand what was the haste?---I, it just, there was, there was, you know, the term of government was concluding, it would have been nice to have been able to proceed on this one.

Why?---Because it was a, a, a good purchase. I think it was the general consensus that - - -

But why couldn't it wait? I mean, you are a public servant, aren't you?
---Yes.

- 40 So why couldn't it wait to go through the ordinary channels, through budget committee and - - -?---Well, it would - - -
- - - it could be analysed and valuations be prepared and properly examined, why, why did it all have to be done as soon as possible?---Well, we had, we had Eco Villages proposing a, essentially a privatisation of, of Currawong, they were, they were there ready to buy it off Unions, Unions New South

Wales and, you know, if there was a delay then the opportunity might have been lost to purchase Currawong.

You knew this in November 2010?---I can recall that Eco Villages was there as the potential purchaser of Currawong.

Yes. But in November 2010 was there any risk of anything untoward happening with Eco Villages?---No, there was, there was a - - -

- 10 Or a deal with Eco Villages?---There was a risk that their, I know, I, my recollection is that they were, there was some negotiations over, over the Development Application for the site.

In November 2010?---I can't recall, but, but- - -

Well, can you, can you confine your evidence to what you can recall and not speculation?---Okay.

- I'm trying to find out what the reason was for the haste?---Well, because
20 Eco Villages may have been in a position to get a DA approval for, for private residential development on Currawong.

And who told you that?---I think it was, I can't recall, but I believe it was public knowledge.

- Well, how does, where do you get the public knowledge from, Mr Fenn?
---Ah, papers and, I can't, I can't recall precisely how I gleaned that information but, but I had a general awareness that, that there was a proposal by Eco Villages to, to essentially convert Currawong into private
30 residential development.

MR ALEXIS: Mr Fenn, by November 2010 you were aware no doubt that Minister Keneally, as she then was as planning minister, had refused the - - -?---Hang on, sorry. November 2010?

By November 2010- - -?---Right.

- - -you were aware, weren't you, that Minister Keneally, as she then was as planning minister, had refused the Part 3A development consent under the Environmental Planning and Assessment Act?---I wasn't aware of that.
40

Were you aware that the prospective owner of the site, Eco Villages, had lodged a Development Application with the local council?---Yes.

And in November 2010 you were aware, weren't you, that that Development Application was pending within Pittwater Council?---I can recall generally that, that there was a DA with the council, it was deemed

refused and then there was, the matter was before the Land and Environment Court, but I'm not too sure of time frames.

Well, were you aware that the appeal that was lodged in relation to the deemed refusal was lodged with the Land and Environment Court on 22 December, 2010?---I can't recall that.

So in November, what knowledge did you have about the status of the Development Application at that time?---I can't recall what my
10 understanding was at the time.

Mr Fenn, go back to page 5 behind tab 2, please. And this is within the briefing minute that came to the minister and the approval was endorsed in the way we've discussed. Do you have paragraph 3.8?---Yes.

And may we take it you read this briefing note?---(NO AUDIBLE REPLY)

Mr Fenn?---Yes.

20 So you would have learned from that that there was currently, that is in early October, currently a DA before council in relation to the Currawong site and that consideration should be given to ensuring that no perception is raised that the proposal to enter into a memorandum of understanding with council regarding the proposal to jointly purchase the Currawong site is pre-judging the outcome of the Development Application before council. Do you see that?---Yes.

Now, that was a very delicate situation, wasn't it, as you understood it?
---Oh, it would be, yeah, there was a degree of delicacy there.

30 And it was delicate because the consent authority before which was pending a Development Application was looking at purchasing the site with the state government?---Mmm.

That was a delicate situation, wasn't it, as you understood it?---Yeah, the, the, that looks delicate.

40 So what was the consideration that was being given on that subject matter as is referred to in paragraph 3.8?---I can't recall any consideration being given to that.

Well, Mr Fenn, was one consideration that the council and the LPMA and your minister should move urgently to obtain requisite approvals so that the matter could be dealt with as quickly as possible?---Well, that, that was the general tenor of the- - -

And so when you answered the Commissioner's question earlier about it was a good thing to do and there was a business imperative, isn't the true

position that what was driving this in November and what was driving your requests for an urgent submission, was the fact that Eco Villages had a DA pending in Pittwater Council and something had to happen with it?---No, not my understanding of the matter.

Well, then let me come back to these emails behind tab 5, and particularly I'd invite you too look at the email on page 12. Do you see Mr Matchett on 25 November is writing to Ms Connelly apologising for the pressure but telling her the Currawong Cabinet minute is now critical. Do you see that?

10 ---Yes.

Now, can I ask you to tell me whether you're aware as to why it was on 25 November Mr Matchett would be telling Ms Connelly that?---I can't speculate on that.

Well, we know that about a week or so before you'd emailed Mr Watkins and told him to hurry up?---Yeah.

20 So can I come back to the question. What was critical, what was it that required this to be dealt with urgently in November 2010?---Well, as I previously said, previously said, my, my, my understanding was to seek approval before the end of the year.

Now, at page 13 behind tab 5 you'll see an email that conveys to Mr Matchett the Currawong Cabinet submission. Do you see the subject matter of that email?---Page 13, yes.

30 And if you turn to page 14 and just leaf through if you would pages 14, 15 through to 18. I'll come to the schedules in a minute. But do you recall seeing this draft Cabinet submission- - -?---No.

- - -at the end of November or early December 2010?---No.

Do you recall ever seeing any draft submission for Treasury or for Cabinet or a committee of Cabinet?---No, not that I can recall.

So what happened after you asked Mr Watkins on 17 November to hurry up with the Cabinet submission after November and December 2010, about that subject?---Ah, I can't recall what happened.

40

Well, if you could just look, please, at the draft submission on pages 14 and following and can I ask you whether or not this is the document that, or the type of document, I should more accurately say, that you were asking for and expecting to receive?---This would have been the general form of a minute.

Mmm. And so if you look for example at page 15 and you'll see the recommendations there and you'll see- - -?---Page 15?

Page 15. Thank you. And you'll see that Cabinet approval is sought 3.1 to commence negotiations with landowners. Do you see that?---Yes.

And 3.2, that Cabinet approval is sought for the purchase of the land from Pittwater Council to permit the proposed park?---Yes.

And 3.3, approval for a land swap with respect to Pittwater Council land. Do you see that?---Yeah.

10

And 3.4, Cabinet approval for entering into a memorandum of understanding with the minister of lands and Pittwater Council. Do you see that?---Yes.

And, and then just passing over the matters for note in 3.5 and 3.6, but importantly coming to 3.7, do you see that Cabinet approval was there sought for the funding of the purchase of the lands for the proposed Currawong State Park from the SDF through planning?---Yes.

20

So this document, particularly the terms upon which approvals were sought, was the very thing that you'd been asking for and seeking to have provided with some urgency. Is that so?---That's right.

And you never saw it?---Not that I can recall, no.

THE COMMISSIONER: Is there an explanation for that?---Not from my perspective, I - - -

30

Is this not the sort of document that would ordinarily come to you?---In a completed form, but obviously this hasn't been, this looks like a draft to me.

MR ALEXIS: But can you shed any light at all on the fact that a draft was prepared, a draft was made available it seems according to the email on page 13 to Mr Matchett copied to Mr Harding on 30 November, 2010 and yet as you have told the Commissioner you never saw the draft or a final or anything like what we see from pages 14?---No.

You can't shed any light on that at all?---No, I, I can't recall seeing this minute.

40

THE COMMISSIONER: What was the duty of Mr Matchett to Mr Harding having received a draft Cabinet submission in this form, what were they to do with it in the ordinary course?---Well, they would take it up with their direct report which would've been Mr Watkins.

Beg your pardon?---They would've taken that up with their direct report which would've been Mr Watkins.

MR ALEXIS: Now, Mr Fenn, from page 19 if you would in this draft submission document, you see the material under the heading Financial Impact Statement referenced into a schedule 1 relating to impact of proposal, do you see that?---Yes.

And then budget in schedule 2 for Sector Staffing, over the page schedule 3 Net On-costs?---Ah hmm.

10 And so on and so forth. Now, is this the sort of material that you would ordinarily expect to see in a submission for Cabinet or budget committee? ---I think it was a requirement. It was a requirement for all minutes to have an FIS, financial impact statement.

And so is your recollection, Mr Fenn, that at no time prior to contracts being exchanged for the purchase of Currawong did you ever see a, - - -?---A minute, no.

- - - a minute including the financial impact statement, the form of which we see at pages 19 and following?---No.

20 After December 2010 do you recall ever asking for it?---I can't recall asking for a, for a minute, no.

So - - -?

THE COMMISSIONER: Why not?---I think it just went off my radar and it came back when, when the, the, the sale was finalised in late January.

30 I'm not sure why – I don't understand why it went off your radar because that's what you've asked to be done haven't you?---Yes, but - - -

Why did it go off your radar?---Because I had other matters to attend to. This wasn't - - -

You forgot about it?---Well, I would've relied on my policy adviser to do a lot of the running around on the matters because this wasn't my sole, you know, like this wasn't my, I wasn't turning up to work each day - - -

Who was your policy adviser?---Michael O'Brien.

40 And even though you had understood it to be a requirement for any purchase that a minute be submitted to Treasury or budget committee or Cabinet?---Yes, full Cabinet. Yes.

And you'd asked for that, it never occurred and you never did anything about it?---It wasn't brought to my attention again and I had other matters, more pressing matters to deal with.

MR ALEXIS: Now, Mr Fenn, could I ask you to come through please to page 23 of the material behind tab 5. And I'm drawing attention to an email from the General Manager of Pittwater Council Mr Ferguson to Ms Connolly of 6 December for the purpose only of referring you to a meeting which is there referred to with Tony, that is to say, Minister Kelly the following day, do you see that?---Yes.

Now, do you recall being involved in a meeting with Minister Kelly, Mr Ferguson and the mayor of Pittwater, I think Mr Harvey Rose, on or about 7
10 December?---I don't believe I was at that meeting.

And do you recall understanding from the minister or perhaps another staff member that may have been present what occurred and what the result of that meeting was?---I seem to recall a general sort of, you know, discussion in the corridor, you know, Pittwater came in, it wasn't just solely about Currawong, I think there was some general, general talk about, you know, the matters progressing, you know, the council and LPMA talking to each other.

20 Yes. But did you learn from that that it was necessary for a memorandum of understanding to be worked up so as to finalise the arrangements as between the state and the council?---I wasn't aware of that.

Because the proposal as you well understood from the October briefing note involved swapping of land between the council and the state?---Mmm.

Just have a look at the email on page 24, Mr Fenn. And do you see that Mr Matchett is there telling Ms Connolly about the meeting that I've just referred to and you see in the second line there's a reference to the MOU,
30 that's the memorandum of understanding, should proceed as previously discussed, finalised as a priority?---Ah hmm.

And there's then a reference to the Cabinet decision will likely be made prior to the MOU being finalised, the email then goes on to say that the Cabinet decision therefore is likely to be along the lines "approve the purchase of Currawong subject to finalisation of the MOU," do you see that?---Yes.

40 Now, did you understand after that meeting occurred, perhaps from corridor discussion, that work was being done to try and finalise that MOU so that a Cabinet decision could be made subject to that memorandum being finalised?---I wasn't aware of, that, that detail.

Did you ever become aware of that detail?---About the MOU?

Yeah?---I think subsequently I, there was, my, my understanding was that there was always going to be a, a, a deal whereby council put land into the, into the final package so I assumed they would have taken, there would

have been, needed to have been some sort of formal agreement between the LPMA and council for that matter.

Did you ever see it?---No.

So you never saw the memorandum of understanding that's referred to in this email at page 24?---No.

And - - -

10

THE COMMISSIONER: And you have no idea whether one was finalised or not?---I, I can't recall whether, well, it wasn't a specific issue that I, I needed to tick off, yes.

I thought that the use of the council land was critical to the ability of the government to purchase Currawong?---I'm not aware whether, I'm not, I, I can't really answer the critical nature of it, whether it was a deal breaker or not.

20

And you, and I wrong in understanding that it was one of the ways in which the government was going to finance this acquisition was through, partly through land that it was going to get from the council?---I'm not, I'm not too sure whether that was a critical part of the - - -

Well, I'm not asking now if it was critical, I'm asking whether it was part of it?---I'm not aware whether it was or not.

30

MR ALEXIS: Mr Fenn, can I ask you to go back to the October briefing note behind tab 2, page 5. Now, you did read this briefing note either before or during the meeting with the minister when he endorsed his approval, didn't you?---Yes, I would have read it.

Well, if you look at recommendation 4(c) you'll see that approval was sought for entry into a memorandum of understanding with council regarding the proposed joint purchase and other freehold lands and water. Do you see that?---Yeah.

40

Now, it's just not correct, is it to say that you didn't understand that the entry into a memorandum, memorandum of understanding was critical to this transaction, is it?---I, I, I can't honestly answer whether I, whether in my opinion that was a, a deal, it was part of the, part of the package but I didn't know whether if that package fell apart, whether that part of the package fell apart, whether the acquisition couldn't go forward. I can't honestly answer that.

So if I could ask you to come through then to the document behind tab 6.

THE COMMISSIONER: Mr Alexis, I'm getting really troubled about Mr Branson's state of health, perhaps we should - - -

MR ALEXIS: If my learned friend doesn't mind I might just round off on the MOU point and then if it's convenient we'll adjourn. Now, Mr Fenn, behind tab 6 we have a draft of a document entitled "Memorandum of Understanding" and if you turn to the next page of it, page 26 of Exhibit 1, you'll see that the parties to this draft proposed document on the one hand is the minister and on the other Pittwater Council, do you see that?---Yes.

10

And clearly enough if you look for example at the execution page on page 31 of Exhibit 1 or page 6 of the memorandum there is provision there, appreciating of course this is a draft but provision at least in the draft for it to be executed on behalf of the minister by his authorised delegate, Mr Watkins, do you see that?---Yes.

20

Now, are you telling us that at no time either in the November/December period or at any time prior to the commitment being made to purchase Currawong did you ever see this draft memorandum of understanding involving the minister and Pittwater Council?---I, I can't recall seeing, ever seeing the MOU.

And do you recall ever discussing it with Minister Kelly during that period? ---No, no.

And do you have any recollection at all as to whether or not the minister ever received the draft memorandum of understanding?---No, I have no, no recollection.

30

If that's a convenient time?

THE COMMISSIONER: Yes, thank you. We'll adjourn for 15 minutes.

SHORT ADJOURNMENT

[11.11am]

40

MR ALEXIS: Thank you, Commissioner. Mr Fenn, can I ask you to look please to page 34 behind tab 7 of Exhibit 1. And do you see at the top of that page there's an email from Ms Connolly to you and others relating to the subject of the MOU, do you see that in the second line?---Yes.

And do you recall that what travelled with that email was the email below the page from Mr Davis of Pittwater Council to Ms Connolly reporting on a meeting at council the previous night?---Yes.

So you have a recollection of receiving information about that meeting? ---No, no – I don't recall reading that email.

Well, just read the email from Mr Davis to Ms Connolly and let me know when you've done so?---Okay.

So should we understand that in late December 2010 you were given to understand that the council had provided in principle agreement to the concept of the MOU, is that what you understood?---I, not at the time. As I said I, I can't recall reading this email.

- 10 All right. Now, if I can ask you to come to the next page 35 of Exhibit 1 as we roll into the 2011 year in January. Do you recall receiving these emails concerning the progress of the Currawong matter on about 17 January?---I can't recall reading those emails. Or that email.

Well, did you come to learn that by mid January there had been no change in the title and that Eco Villages had lodged an appeal in the Land and Environment Court? You see that in Mr Ferguson's email to Ms Connolly which was forwarded to you?---I, I can't honestly recall whether I knew at that time, but I was, as I said previously, aware that this legal action was moving.

20 So did the advice concerning legal action bring the Currawong matter back onto your radar in January?---Not at that stage, no.

Well, when did it come back on your radar, as you've put it earlier?
---Probably late January.

30 And what was the event in late January that caused it to come back on your radar?---I recall it was the finalisation of the purchase of Currawong by Eco Villages and with that there was the letter from 9 February that the minister signed for the Premier.

All right. Now, do you recall in the course of your work in December, perhaps in early January, speaking with and dealing with Mr Brad Welsh from Premier Keneally's department from time to time?---Yes.

40 And do you recall speaking to him about the subject of Currawong and the intention of trying to acquire that property?---That, that was discussed at, you know, there was no ah, how should I put it, I think Brad and I realised that there was a proposal to acquire the site.

Mmm. And you spoke to him, didn't you, and told him that if the opportunity presented, that you, and by that I mean your minister- - -?
---Mmm.

- - -wanted to purchase the Currawong site?---Yeah. I, I think we made that intention pretty clear to the Premier's office.

And you made that intention clear because you knew that Mr Welsh was the Premier's or one of the Premier's policy advisers?---Yes. It was, it was Brad that I had the closest working relationship with.

And in the course of those discussion he told you, didn't he, something to the effect, you need to put up a budget committee minute?---Well, I, I can't recall what he said but generally he would say that.

10 But from what you knew from Mr Welsh he had a fairly strong view about that subject, didn't he, that these things needed a budget committee minute for approval?---Look, I can't speculate on his personal views, but I, I would, I would not be surprised that he would have said, get a minute up.

Yeah?---And I think that's, you know, the previous year's inquiries were, were probably as a result of that conversation I had.

Mr, Mr Welsh telling you that is consistent with what we've already been through- -?---Yeah.

20 - - -in terms of the working up of that minute?---Yes.

All right. So you've told us I think that the matter was back in your focus of attention at the end of January and that was prompted by news that Eco Villages had purchased the site. Is that- -?---Yeah.

30 - - -how we understand it? Now, do you recall being told at all by your minister that he and the Premier had discussed the proposal to purchase at the conclusion of a Cabinet meeting in late January or early February?---I, I can't recall, but it, it, I would assume that would be a conversation that my minister would have had with the Premier if, if it, if necessary.

But do you recall the minister telling you that he'd spoken to the Premier about the prospect of acquiring the Currawong site and that she had asked him to write to her formally and seek authorisation for his delegate to participate in formal negotiations?---I can't recall that specifically.

What I wish to ask you is this. Do you see behind tab 8 of Exhibit 1 a briefing minute and the letter at 43 and 44 from Minister Kelly to the Premier, do you see that?---Yes.

40 And is your recollection consistent with these documents, particularly the letter from Minister Kelly to the Premier following a request that the Premier made in the circumstances I've just referred to, that is a conversation between the minister and the Premier after a Cabinet meeting in late January or early February?---I couldn't link the two events, but- - -

Well, if you're unable to link those events, can you explain to us how it came to be that the minute behind tab 8 together with the letter that the

minister came to sign was prepared?---My recollection is that there's some, there was, by that stage there was some clarity over the, the, the, the party from whom we were going to, off whom we were going to acquire the site, hence the letter seeking approval to negotiate with a view to purchase.

Now, did you attend the meeting when this minute was discussed together with the form of letter?---I, I can't recall being at that meeting.

10 Do you recall seeing the minute at pages 41 and 42?---I can't recall the, the pink but I can recall the, the letter that went out.

But do you recall the discussion or, or do you recall having any discussions with the minister about the pink, particularly the recommendation contained in paragraph 4 on page 42 and the letter?---I, I can recall some discussion about, you know, this letter being put upstairs to, to see some approval.

Did you read the letter before you went upstairs?---I think I glanced over it, I, I can't, can't honestly say that I read it, you know, read it word for word.

20 Well, what I really want to understand is whether or not you read the letter before, as you understood it, the minister signed the letter and it was walked upstairs?---I would have had a glance at it to make sure that that there was nothing obviously wrong with the letter. You know, I would have been focussing on the, basically what the pitch of the letter was which was, as I said, seeking approval to negotiate the, with a view to acquiring the site.

And the reference to with a view to purchasing the site I gather you take from the second page of the letter on page 44 of the exhibit at the top of the page?---Yes.

30 Now, can I just ask you to come back to page 42 and the recommendation in paragraph 44.1?---Yes.

And when you read the letter did you read the pink which contained that recommendation?---I can't recall digesting the, the pink. I, my main focus was what was going out.

40 Well, when you read the pink you understood I gather that the approval being sought to be granted to the chief executive was to negotiate with the then owner of the Currawong site to secure the purchase of the property? ---Yes, that, that was the general thrust of the - - -

So no approval was sought for the chief executive to purchase the site? ---Well, my, my belief was the letter was to negotiate with a view to purchase.

But when, you've told me you read the pink and my suggestion - - ?---No, I didn't, I didn't, I can't recall reading the, the pink word for word, I was focussed on the letter.

THE COMMISSIONER: Surely you focussed on the recommendation? ---Which was, which was replicated in the letter.

Did you focus on the recommendation in the pink?---I, I can't, I can't recall focussing on that recommendation.

10 Isn't that what you would ordinarily do when you got a pink, you'd look at the recommendation?---You'd go, well, you'd go, well, okay, what's the recommendation, the recommendation is basically negotiate to secure the purchase and then make sure that there's, the letter is appropriate.

So you would, you would examine the recommendation?---Yeah, no, so I can't recall being cognisant of - - -

20 But in the ordinary course you would examine the recommendation in the pink?---In the ordinary course of business, yes.

And this was a special case, wasn't it?---Yes.

So all the more reason to examine it, the recommendation that is?---Yes.

MR ALEXIS: And, Mr Fenn, as chief of staff you would ordinarily review a briefing minute prepared by one of the minister's departments?---I, I, I endeavoured to have a look at every item, item of correspondence that was going up to the minister.

30 And you knew that the letter at pages 43 and 44 had been drafted within Mr Watkins' staff?---Oh, I, I, I would have, I would have assumed I suppose that it would have come from the LPMA somewhere. I, I couldn't say where, exactly who wrote it.

But part of your job was to look at the pink, look at the letter that was being put up to the minister for signature and ensure that they were satisfactory for him to sign surely?---Yes.

40 And in that regard you looked at the recommendation and you read the letter, didn't you?---Well, as I said I can't recall looking through the recommendation but I did, I, I did recall reading that letter.

THE COMMISSIONER: Do you accept that you must've read the recommendation otherwise you wouldn't be doing your job?---Look, I can't recall, I can't honestly - - -

That's not what I'm asking you?---In the normal course of business I would've had a cursory glance through a brief and the accompanying - - -

We've been through this, Mr Fenn, I thought that you accepted that in the ordinary course you would read the recommendations in the pink?---Yes.

And this being a special case there was all the more reason for you to examine it, and you accepted that?---Okay.

- 10 Is that not right? Did you accept it or not?---I'm trying to honestly, I'm honestly trying to state that I cannot remember noting the particular wording of the recommendation.

I'm not asking you do you remember it, I'm asking you whether you must have examined it in the ordinary course of doing your job?---I must have.

MR ALEXIS: Mr Fenn, when you read the recommendation in 4.1 it told you, didn't it, that approval was being sought for the chief executive to negotiate?---Yes.

- 20 It was not an approval that was being sought to allow him to purchase the site?---To negotiate with a view to purchase.

Well, if you look at 4.1 it says, "negotiate to secure the purchase." Now, you didn't read that as seeking authorisation for Mr Watkins to execute a contract and commit the government to the purchase, did you?---I read it as an authority for, for Mr Watkins to negotiate with the intention should negotiations prove favourable to secure the site.

- 30 THE COMMISSIONER: That's not what it says, Mr Fenn?---But I read it that way.

You're able to understand English ordinarily aren't you?---Generally.

There is nothing in that sentence that authorises the entering into of a contract?---I'm not an expert in contract law, I - - -

It's a matter of English, it's not a matter of law?---Negotiate to secure.

- 40 Yes. Negotiate, you have to negotiate, that's the purpose of the negotiation. And the purpose of the negotiation is to secure the contract but all the authority is is to negotiate, is that not what it said? Am I missing some words there?---No. All I'm trying to say is my honest belief was that the, the - - -

What was your honest belief derived from?---My, my reading of the letter and my understanding at the time.

What was there in your reading that led you to believe that this recommendation was a recommendation to authorise the entering into of a contract when it expressly refers to negotiation?---But to hold – negotiations with a view to purchasing the site. That was my understanding, I'm just trying to be honest here.

MR ALEXIS: Mr Fenn, at the time you read this pink and the letter to be signed by the minister you knew that no Cabinet minute had been provided to you?---Yes, there was no Cabinet minute.

10

You knew that no submission to Treasury had been put up to you?---No.

You knew, because you've told us, I think, that the memorandum of understanding that had been the subject of prior communications had not at that point materialised?---Correct.

And you knew that the letter which the minister was going to sign and send to the Premier made no reference whatsoever to a maximum price or a ceiling price for the negotiations to occur around?---No.

20

Now, in those circumstances may I suggest to you that when you read the recommendation in 4.1 of the pink you understood that it was seeking approval to negotiate in the sense that if those negotiations be successful, further approval, further formal approval would be required when the agreed purchase price was made?---No. My, well, my understanding was that the letter, the intent of the letter was to seek approval to negotiate with a view to purchase.

30

THE COMMISSIONER: At any price?---No, I, well, I, there was already the previous approval about the ceiling being 13 million?

Where's that, Mr Fenn?---In the October pink that went up.

Approval from whom?---From the minister.

What did the minister approve?---He said, there was some reference to approval, you know, up to \$13 million.

40

Approval to do what?---Well, originally it was approval to negotiate. So you've now got an approval which you honestly believe you say is an approval to enter into a contract. Where in this approval is there a reference to the purchase price?---There's, there's no reference to a purchase price there.

So, so if somebody was to read it on its face would it be an approval to enter into a purchase price at the discretion of Mr Watkins?---Ah, yeah, quite possibly.

Is that a normal thing to happen?---I, I can't answer that.

Why not? Why can't you answer that? How long have you been a civil servant?---Oh, since '98.

And you're not able to answer, answer whether it is normal to give a civil servant the authority to enter into a contract on behalf of the government to purchase land at a price within his discretion when it is known that that
10 price would be at least in the millions of dollars?---Mmm. Up, up to \$13 million, yeah.

No, there's no up to anything in this, in this approval?---Okay.

I'm asking you whether that's something that would ordinarily happen?
---I, I, I'm not sure.

You're not sure. Have you ever seen it happen before?---I, I can't, I can't recall seeing it before.

20 So it's unique?---Yes.

MR ALEXIS: Now, Mr Fenn, if your interpretation of the recommendation and the letter be correct, should we understand that if the answer to the minister's letter was yes, then that would have led to Mr Watkins executing a contract and binding the government to the purchase, assuming of course that his negotiations were successful. Is that so?---That, that was my understanding.

30 So should the Commissioner understand that from 9 February, the date of the letter at page 43, you understood that the only thing standing between this letter and Mr Watkins executing a contract was a response from the Premier in the affirmative?---That was my understanding, yes.

So that means, does it, that whereas the prior dealing that you had in relation to the working up of a budget committee minute or a submission to Treasury was not going to occur. Is that so?---No, no, instead this letter was seeking authority from the Premier to, to negotiate.

40 And tell me what the basis of your understanding that in lieu of the working up of a Treasury submission or a Cabinet budget committee minute, this letter was going to work in lieu of that?---How it was going to work? My understanding was that along the lines of the, the Priory that, that if we could seek the authority of the Premier at the time, that would, would not require a full Cabinet or a budget committee, budget committee minute.

Now, just so we're clear with one another, Mr Fenn, we're speaking about the point in time when this letter is walked up to the Premier's office. Do you follow?---Yes.

And if you look at page 43 you'll see a handwritten note which seems to confirm a hand-delivery of this letter to Mr Pooley at 9.30 that day?---Yes.

That's your writing, isn't it?---No.

10 Can you tell us whose writing it is?---It's Michael O'Brien's.

Did the minister to your knowledge hand-deliver this letter to Mr Pooley?
---The minister?

Yeah?---No, I, I, I believe Michael O'Brien did.

Mmm. In any event, your evidence to the Commissioner is that if this letter was met with a responding yes, then there would be no further need for the working up of a Treasury submission or a minute for Cabinet or a
20 committee of Cabinet. Is that so?---That was my understanding, yes.

Tell me what the basis of that understanding is, please?---That if approval was provided, my understanding was that if approval was given by the Premier, then that would be given, that would, that would be the sufficient authorisation to proceed with the acquisition.

Well, you've told me that twice now. Could you attend to my question? I asked you what the basis of that understanding was?---I suppose there was the precedence of the Priory. That was the only one I was aware of whereby
30 there was authorisation to acquire that site without a Cabinet minute or budget committee.

Is it a matter that you spoke to the minister about?---No.

Did he speak to you about it?---Not that I recall.

So is your evidence to this Commission that the arrangements that you had worked through previously about the working up of a Cabinet minute being overtaken by this letter being met with a yes was based on your thoughts
40 and your thoughts only concerning the Priory and nothing else? Is that what you're saying?---Not my thoughts alone, I, I- - -

Well, whose other thoughts did you have the benefit of when you came to that view on 9 February this year?---Well, I believe it was an understanding between myself, the minister and Mr Watkins.

All right. Now, how did you come by that understanding between the minister and Mr Watkins?---I can't recall any specific conversation about that, that principle.

THE COMMISSIONER: Well, then how did you get the understanding? I thought you said it was an understanding between you, the minister and Mr Watkins. Is that right?---Yes, yes.

Well, how do you get this understanding?---Well, it would, well, it must have been some conversation that I can't specifically recall whereby it was, well, if we can get the authority of the Premier, then this will preclude the possibility of, of a minute.

10 That's speculation on your part, is it?---Yes, 'cause I can't, can't recall a precise conversation.

You can't recall, you can't recall whether any conversation was held, as I understand you?---Well, no, I can't recall whether a conversation occurred.

20 So as far as you know, the only basis for your understanding is the Priory? ---That was, that was a, a precedent in my mind at the time.

So the only basis for the understanding, because you can't remember any conversation with the minister or Mr Watkins about it?---No, I can't recall.

So the only basis that you can recall for your understanding is what happened with the Priory?---Yeah.

30 MR ALEXIS: Mr Fenn, at this point in time, namely 9 February, neither you or to your knowledge the minister had seen any draft memorandum of understanding between he and Pittwater Council?---I, I, I couldn't recall seeing any MOU.

So should we understand that the letter from the minister to the Premier, if responded to in the affirmative, would have permitted Mr Watkins to enter into a contract and bind the government to the purchase without you or the minister even seeing the underlying memorandum of understanding between the state and the council?---Well, well, I would have assumed that that matter would have, would have been dealt with by Mr Watkins.

40 But why would you assume that when your minister was to be one of the signatories to the memorandum?---Well, I think, I think Mr Watkins had the delegated authority to enter into that agreement.

Maybe so, but no doubt the minister would want to see the document that his delegate executes on his behalf before it's executed wouldn't he?---Not necessarily.

And as his chief of staff you'd want to ensure that the memorandum was in order before the delegate exercised that authority?---No, I would rely on the advice of the department that - - -

THE COMMISSIONER: Would you be quite happy if Mr Watkins executed this contract without a memorandum of understanding between the government and the council?---My prevailing concern would be to ensure that the purchase was completed without any additional draw upon the budget.

10

Would you mind answering my question?---About the, about the, sorry, what was the question again?

Would you have been quite happy for Mr Watkins to execute a contract for the purchase of Currawong without there being a memorandum of understanding between the government and the council?---I would've relied on the advice of Mr Watkins that those matters were attended to.

Did you get that advice?---Not that I can recall.

20

Did you ask for it?---No, not about the MOU, no.

So what way did you rely on Mr Watkins? I don't understand that because you didn't ask him about it and he didn't say anything to you about it so how did you rely on that?---I relied on the, the, the understanding that the, the deal, so to speak, was going to have no net impact on the budget.

30

Where is that said by 9 February, 2011?---Towards the end of the letter. "I believe that should the site be available for purchase this could be achieved by the LPMA with no additional costs to the budget."

Is that a condition of authority?---Well, yes, I believe if, if, if the, if there was a draw upon the general budget then further approval would have to be sought.

Where does the letter say that?---It doesn't.

I mean, this reference to the budget is simply the recording of a belief by the minister, isn't it?---Yes.

40

Why do you say it's a condition of the authority as at 9 February?---There's an understanding that if there was an additional cost to the budget then we would have to go back.

How do you know there was an understanding to that effect? Firstly, let me ask you, an understanding on whose part?---Understanding of the minister and the CEO.

Which CEO?---Warwick Watkins.

But not the Premier as at 9 February?---I can't answer that.

Well, the letter doesn't suggest to the Premier that the authority is limited by the requirement that there be no effect on the budget?---No, there's a belief.

10 Yes. You think that this authority to, which you say you had a genuine belief, it was an authority you were seeking to contract was being sought in accordance with the ordinary and proper procedures of government?---I was just relying on the, on the precedence of the Priory transaction.

Would you mind answering my question?---Ordinary course of business, no, I think this was an exceptional case.

And what made it an exceptional case?---I suppose the, in terms of the time, timing of the letter, we were getting to the end of the term.

The end of what term?---The, the, the term of the, the current government.

20 And how did that make it exceptional?---Well, we were, I suppose we were at a point where we were running out of time in terms of getting formal approval. There was limited opportunity, I can't recall when the last budget committee met or the full Cabinet but there was a, there was a, we were basically running out of time to get necessary approvals to, to seek to purchase the site.

30 And what is exercising my mind and what I do not understand is why there was a such a need to enter into this contract before the term of this government expired?---Well, there, there was the, the broader context was that - - -

No, no, just answer that question because I'm picking up your reply. I asked you about the haste and you said, well, the term of the government, words to the effect that the term of the government was going to expire? ---Mmm.

40 Now, I'd like to know why that fact engendered such haste on your part as a public servant?---Well, there was, there was decreasing opportunities to get the approvals in place to seek to negotiate and, and - - -

What had that go, what had the possible change of government to do with that?---Nothing in particular. The, the other, the other issue was the court action between the Land and Environment Court.

I do understand all of that but I am taking you up on an answer that you gave when I asked you what was the reason for your haste you replied with, it was words to the effect the election was coming up soon and there would

be a possible change of government?---No, I don't, that wasn't my answer, my answer was essentially that option to have approvals through budget committee or full Cabinet were coming to an end because - - -

(not transcribable)?---Yes, yeah, I, as I say, I can't recall the last Cabinet meeting - - -

- 10 Are you saying that you couldn't have a budget committee meeting in time before the election?---I, I, I believe there were limited opportunities to get, there was obviously a lot of, lot of agencies, a lot of, a lot of ministers were trying to get things through budget committee.

But are you saying that there was no opportunity to have a budget committee meeting in time before the election?---I, I, I can't recall when the last budget committee was.

Then I'll ask you again, what was your haste?---To, to get the necessary approvals in place so Mr Watkins could go off and negotiate.

- 20 Why is it needed so hastily?---Well, my understanding was that the court action with Eco Villages, there could have been a favourable approval given to Eco Villages and the opportunity to, to bring Currawong into the public estate would have been lost.

Yes.

- MR ALEXIS: Mr Fenn, do you recall being out at Homebush Bay on about 16 February in company with Minister Kelly with other ministers including the Premier at a campaign function there?---Yes, there was the, it was at
30 Homebush Stadium and - - -

Do you recall when you were there speaking with Mr Darryl Watkins, one of the Premier's advisers, on that occasion?---Yes.

And do you remember telling him words to the effect that the government were intending to buy Currawong?---Or words to that effect.

- 40 And do you recall raising with him the need for an opportunity for your minister to speak with the Premier about that subject matter?---Yes, I was seeking a meeting between my minister and the Premier.

And that occurred?---That did occur.

And were you present during that meeting?---Yes.

And from what you could see so was Mr Darryl Watkins?---Yes.

And did you hear what was exchanged between the minister and the Premier on that subject?---Oh, from what I can recall there was a, a general, the minister basically explained to the Premier where, where the, where the process was up to and what we were seeking.

10 And did he say we are looking at acquiring Currawong and there is money in the State Property Authority or something to that effect?---I don't think he would have mentioned the State Property Authority but, but he would have, I, my recollection of the conversation was that the minister said basically that the, we can acquire it and have no net, you know, no cost of, to, to, to the budget.

And did he say to your recollection that there are funds there and we can talk to the developer and the council and have negotiations with them? ---Words to that effect, it was the - - -

And did the Premier say "So what, to negotiate."?---I can't recall what the Premier said.

20 And Minister Kelly responded in the affirmative and said, "Yes."?---Mmm. Do you recall that?---I can't recall that, no.

And then the Premier then said, "Well, that's fine so long as it is to negotiate" or words to the effect?---Yes, I can't recall that part of it, but all I can recall is that I suppose the pitch from the minister, this is where it's up to, in the context that a letter had been previously written to her and, you know, what we were trying to get out of that very – it was a chaotic very hot day, very busy, what we were trying to get is essentially hurry up a response from the Premier's office.

30 THE COMMISSIONER: Mr Fenn, are you saying it's possible that the conversation occurred at Mr Alexis has put to you?---Yes, it's, it's possible that the Premier said, "What to negotiate", I can't recall.

And the minister replied in the affirmative, that's possible is it?---Well, it's possible but I can't recall the precise wording.

40 MR ALEXIS: But, Mr Fenn, you've told us that you listened to your minister's pitch and no doubt you were hanging on the response from the Premier because your letter had been delivered and you were still waiting for a reply, correct?---That's right.

And she said to the minister, and this is what you heard, "Well, that's fine, so long as it is to negotiate." That was her response to the pitch wasn't it? ---I, I can't recall the precise wording of the response, but it was a general affirmative, we'll get a letter to you.

To negotiate?---I can't recall the precise - - -

THE COMMISSIONER: But that's something you would've been really interested in?---I honestly can't recall the exact words that the Premier said.

MR ALEXIS: And, Mr Fenn, you would've been very interested in that because that would be inconsistent with what you understood the position to be when you read the pink, particularly paragraph 4.1 and the letter that you knew the minister had sent to the Premier?---Inconsistent.

- 10 Because you have told the Commission that you understood that that letter if responded to in the affirmative would've given authority to negotiate and purchase?---That's my understanding, yes.

The Premier's response, may I suggest, to the minister's pitch was to say, "That's fine as long as it's to negotiate."?---Mmm.

You must've appreciated that she was being quite particular about what she was saying and she was saying, "That's fine to negotiate" so long as it is, "to negotiate."?---Yes.

- 20 Thank you. Now, as you understood it Mr Watkins was either about to or had already started the ball rolling with negotiations, is that so?---I don't recall, I think there was some general, there was obviously the negotiations with council, I can't recall any direct contact between Mr Watkins and the other party at that time.

- But weren't you following up Mr Pooley and didn't you ring him up and tell him that you're waiting on a response to the letter from your minister and didn't he say to you, "Okay, I'll get it sorted" or something to that effect?
- 30 ---Yes, the response to the 9 February letter, yes, seeking approval to negotiate with a view to purchase.

And you were following up Mr Pooley because you knew that Mr Watkins had already initiated contact with the director of Eco Villages and started negotiating?---I'm not aware of that, I can't recall it.

- Well, were you kept abreast of negotiations by Mr Watkins or by Mr Matchett or other personnel from the LPMA during this period?---Not at the point of time of the, of writing this letter or the meeting with the Premier.
- 40 The idea of this letter was to get the authority to go and negotiate.

And that's what you understood Mr Watkins was doing?---He, we were seeking approval to negotiate with a view to purchase, yes, as of 9 February and in that period between.

And you know, because you've already told me, that when the Premier spoke within your earshot to your minister, you knew that she was happy with the situation provided it was negotiations?---I, I can't recall the specific

wording but it was a general, go, go, go out there and, and, and, you know, we'll get a letter back to you to allow Mr Watkins to go off and start contacting the other side.

THE COMMISSIONER: I can understand that you can't recall the specific wording, Mr Fenn, but I take it you can recall the gist of what was said?
---My gist was that there would be a - - -

10 But can you recall the gist of what was said?---That there was a general affirmative, go, go off and, and, and negotiate and, and we'll get a response to you in due course.

MR ALEXIS: Now, you're going to be shown Exhibit 5, Mr Fenn, which is an email from the Department of Premier and Cabinet concerning the subject of the Caretaker Conventions. Do you see that?---Yes.

And you'll notice the date, 14 October, 2010. Do you recall as chief of staff receiving this communiqué from the Premier's Department in October 2010 concerning the caretaker provisions?---Yeah, I can generally recall some, 20 something coming out of the Premier's Department on this.

So should we understand that by the time of the period we're concerned with, namely the events after the minister's letter went to the Premier, you appreciated that the caretaker period would commence on 4 March?---Yes.

And you understood from your discussion with your minister that he similarly was acutely aware of that as well?---Yes.

30 And should we understand that from what you were aware of as chief of staff, that your minister was particularly and acutely aware of the Caretaker Conventions because of his power pursuant of Part 3A of the Environmental Planning and Assessment Act?---It was a consideration at the time.

And there were matters pending during the caretaker period in respect of which your minister was written to expressly by the Premier and told in effect not to exercise Part 3A powers?---Yes. No approvals under Part 3A is my recollection of the letter from the Premier.

40 And should we understand that after the minister's letter to the Premier of 9 February, consideration was given to whether or not any transaction concerning Currawong, if Mr Watkins' negotiations be successful, might affect the provisions of those conventions?---I was, I was, I was eager to ensure that in my, in my view that the necessary approvals were in place before caretaker.

Because may we take it if the approvals were not in place before caretaker, then the Caretaker Conventions would operate as providing some restraint?

---Yes. I think it would be, it was generally agreed that any approval after caretaker would have had to have a very close, you'd need to have a close look at it.

And when you say approvals, we're speaking I gather of an approval to purchase the Currawong site predating the commencement of the Caretaker Conventions?---Yes.

Now, just have a look at the Premier's letter behind tab 9, please, at page
10 47A?---Sorry, tab 9?

Yes, thank you. Tab 9, page 47A. Now, do you recall receiving and reading the Premier's letter on the date indicated?---I can, yeah, I can recall receiving this.

And when you read the letter, did you see in the opening paragraph that after reference to the minister's letter which was seeking approval, the terms of that approval sought were set out to hold direct negotiations with a view to purchasing. Do you see that?---Yes.

20 And then you read the next paragraph- - -?---Yes.

- - -which after the reference to the budget contained the Premier's approval. And do you see at the end she says she looks forward to your advice on these important negotiations?---Yes.

Do you see that? Now, can I suggest to you that when you read that letter you understood that what the Premier was giving approval to was for Mr Watkins to conduct direct negotiations but not to enter into a contract
30 without the result of those negotiations being reported back to the Premier? ---That wasn't my understanding of that, that wasn't my reading of that letter.

Well, how, how did you read it?---I read it as approval to commence negotiations with a view to purchasing the site.

And if that's how you read it can you explain to me what you thought of the Premier's reference to looking forward to your advice on these important negotiations to mean?---I saw it as advice on, you know, whether you'd been able to purchase it or not.

Do you think the letter at least was a little unclear about whether or not it gave approval beyond negotiations?---I agree it's, it's quite vague.

Yeah. And when you read the letter and you perhaps read it again and thought that it was a little vague, what did you do about trying to tighten it up?---Nothing. I just sent it down to the department.

Did you speak to your minister about it?---I, I can recall mentioning to, to the minister that we've, we've got the, the letter from the Premier.

And did you show it to him?---I, I can't recall whether I showed it to him, it might have been one of my advisers. I, I can't recall whether Tony was in the office at the time.

- But when you spoke to minister, Minister Kelly about the letter was it obvious to you that he'd read the letter?---I, I, I can't recall at the time
- 10 whether I, whether the minister, the minister had read it but I, I, he basically, I basically made sure that he, he had got a copy.

And when you spoke to the minister about it did you tell him that you thought it was a little vague?---No.

Why not?---I, I just, I, I looked at it and, and said, there's approval there to negotiate with a view to purchase.

- 20 Yes. But, well, you told the Commissioner a moment ago that you thought the letter was a little vague. What was vague about it I gather was the fact that it didn't contain any reference to approval being given to purchase?
- No, I believe in hindsight, you look at in hindsight and you'd go well, there's, it's only two paragraphs, it's, it's - - -

- But, Mr Fenn, when you read the letter as you've told us you did on the 25th and you thought it was a little vague, it was vague wasn't it because it didn't contain any reference at all to Mr Watkins having approval to actually execute a contract and purchase the site?---No, look, and at the time I didn't, didn't recall oh, this is a vague letter, I need to follow it up and get some
- 30 further advice. I, I, I looked at the letter, in my honest opinion it was an approval and then I just basically got it down to the department.

THE COMMISSIONER: But the Premier asks, says she looks forward to your advice on these important negotiations?---Mmm. I, well, I - - -

Did you not think that well, if she got a contract before she got advice about the important negotiations she might be distressed?---No, I didn't pick that at the time.

- 40 Can you, have you got an explanation for that?---As, as I said, I, I, read it advice as, as advice on whether the purchase has gone ahead or not.

Advice as to whether the purchase has gone ahead or not?---Mmm.

Where do you get that from?---My interpretation of the, the intent of the letter.

So you get, you get it from the words advice on these important negotiations?---Yes, in the context of the previous to hold direct negotiations with a view to purchase. I took that honestly as the approval to

If you, if you are giving someone authority to hold negotiations presumably you have to, or do you accept that you have to explain what the negotiations are going to deal with?---Yes, which would have been in the context of the letter that we wrote to the Premier.

10

And the negotiations were dealing with the purchase, the proposed purchase of Currawong?---Mmm.

So that's what the letter was dealing with, the negotiations for the proposed purchase of Currawong?---Yeah, negotiations with a view to purchase.

Yeah?---No, all, all, all I can say is honestly on that day at that time I took that letter as approval to, to, for, for Mr Watkins to go off and negotiate and if he can secure the deal, then all well and good.

20

MR ALEXIS: Mr Fenn, not a week earlier you had been privy to the conversation between the Premier and Minister Kelly at the ANZ Stadium where as you've accepted I think as best you recall, the Premier said to the minister, "Well, that's fine, as long as it's to negotiate." So- - -
---I couldn't remember the exact wording, but- - -

But you'd accept- - -

THE COMMISSIONER: Word to that effect?---Words to that effect, yeah.

30

MR ALEXIS: And when you read the letter and you read the concluding remarks to which the Commissioner has just referred in this letter, didn't that tell you, and may I suggest, tell you clearly, that the Premier was proceeding on the basis that what was occurring here was negotiations and that no commitment was authorised?---No.

Why not?---'Cause I, I saw it as the letter approving negotiations to proceed with a view to purchase.

40

But if from what you heard at the ANZ Stadium was to be subject to the letter that came back to clarify the position, the Premier's letter hardly clarified the position, did it?---In hindsight, the, there, there, there's an ambiguity there, but at the time I honestly believed that there was approval there to, to negotiate- - -

The Premier's letter, may I suggest, was entirely consistent with what she had said at the ANZ Stadium conversation to your minister about negotiations, wasn't it?---That's your reading of it.

Well, that's what you thought when you read it on 25 February, isn't it?
---No. I thought it was approval to negotiate with a view to purchase. I honestly believed that the, the, it was approval.

THE COMMISSIONER: Did you think that the Premier had changed her mind?---No.

If she hadn't changed her mind then how could you think that it was
10 authority to contract?---I read the letter was to hold negotiations with a view to purchase. "I note there was no additional funds and I provide that approval." So to my, my, in my mind the necessary- - -

Well, a week before you'd heard the Premier say words to the effect that the authority was limited to negotiate. Seven days, or a few days later, you get a letter which you understand to mean that she's giving authority to contract. Doesn't that represent a change of mind in anybody's language?
---No. As I said, the, the, the, my recollections from that previous week were, were that there was a positive response from the Premier. My reading
20 of it on 25 February was that in my opinion that the, the necessary approvals were there.

MR ALEXIS: Now, Mr Fenn, do you recall speaking with Mr Pooley on the telephone call on about 15 of 16 March and telling Mr Pooley words to the effect, "We've bought it", in reference to Currawong?---Yeah. I can recall ringing up Mr Pooley. I think that was a Tuesday. It was, it was after the contracts were exchanged.

And how did you come to learn that contracts had been exchanged?---Mr
30 Watkins advised me.

He spoke to you, did he?---Ah, I believe he did, yes.

Or did your minister speak to you about that?---No, I believe it came from Mr Watkins.

And did Mr Pooley say, "What do you mean, you've bought it?" Or something to that effect?---I can't recall him saying that. I, I, my recollection is I informed Mr Pooley of the, the, the exchange of contracts
40 and I can't recall any, anything beyond that, my, my, my conversation and then Mr Pooley went away.

Well, before he went away there was further discussion, wasn't there, and in the conversation he made plain to you that he was shocked by what you'd told him?---I can't recall any shock from Mr Pooley.

Well, he said to you, didn't he, "We are in caretaker mode, how could you possibly exchange contracts?"---I can't, I can't recall that.

And you said, "No, we had approval to negotiate." Do you recall that? ---Yeah, well, I, I, I can't recall saying that but it would have been my belief at the time that yes, we had approval to conclude the, the deal.

But in the very early part of this conversation Mr Pooley raised with you caretaker mode and asked you how you could possibly exchange contracts in light of that. That's so, isn't it?---I, I can't recall the, the issue of caretaker coming up.

10

And when you said to Mr Pooley, "No, we had approval to negotiate" he said to you, "Yeah, you did, you had approval to negotiate but you can't sign anything, we're not even signing off discretionary fund cheques of \$5,000 when we're in caretaker mode. You know we can't do this when we are in caretaker." He said that to you didn't he?---I can't recall him saying that. I, I had a number of conversations with Mr Pooley over those days and I fully understood that he had a completely different understanding of the process.

20

And that different understanding meant that when you had this conversation with him and you announced to him that the property had been purchased he responded by shock and was concerned because of the caretaker conventions?---I can't recall the caretaker conventions being discussed.

Now, did he ask you, do you recall, when the contract was signed and you remember telling him something like, "15th of March" or "yesterday" or something like that?---Yes, there was some – there was some request about, yes, when did this occur.

30

And there was then a flurry of emails between you and Mr Pooley on that subject wasn't there?---My recollection is that Mr Pooley went away and then, and the broad thrust of his inquiries were to try to get as much information as possible.

And in that regard he asked you to supply him with a brief about the steps taken to purchase Currawong?---Not a brief, I can, I can recall him asking for the actual contract and any relevant documents that I - - -

40

And you sent him, didn't you, the minister's letter to the Premier of 9 February and the Premier's reply of 25th?---Yes, I did at some stage.

And then he responded to that, didn't he, and said, "Look, I've already got those because I drafted the Premier's letter. I need a brief to tell me the steps taken to purchase Currawong."?---I didn't know that he had – he definitely didn't disclose that he had drafted that letter.

All right?---He said yes, I can recall him saying, "Yes, I've already got that." And his main request was to get the copy of the contracts.

All right. Now, did you then send to him a briefing note or minute in relation to the steps taken to purchase Currawong?---I can't recall what I said, if there was a brief, if it was emailed and there was a brief attached to it there would've been a brief with the letters. I can recall the two letters because Mr Pooley came back and said, "Well, I've already got those two letters."

10 Yes. And then you received and then passed on a briefing minute about the steps that had occurred?---I can't recall.

Well, have a look at the document behind tab 15, Mr Fenn. And do you see and recognise this two page briefing minute which Mr Costello and Mr Watkins have signed bearing date 16 March? Do you see the documents attached to that briefing note through to page 78?---Yes, this is the brief that attached to the 9 February letter, yes. So this was the package that was sent up to Mr Pooley.

20 Well, that can I suggest to you - - -?---I, I can't recall. I would've sent something, it would've been electronic and I would've just sort of basically in the, in the, in, given that I was just trying to get information as quickly as possible to Mr Pooley I would've just forwarded it on, I assume. If it was sent to me by the department I would've forwarded it on to Mr Pooley.

So as you understand it those in Mr Watkins' department were preparing the minute that we see at pages 68 and 69 with the attachments, it was sent electronically to you and you passed it on to Mr Pooley?---The brief, not a minute.

30 Well, I'm sorry, you're referring to the document at 68 and 69 as a brief are you?---Yes, not a minute.

All right. Now, do you recall reading the brief from page 68 before it was passed on to Mr Pooley?---No.

Do you recall that you then spoke with Mr Pooley and attention was drawn to paragraph 3.5 of the brief in relation to the date in the second last line of 15 February instead of 15 March?---No, I can't recall that being raised.

40 Now, do you recall having a phone conversation with Mr Pooley when he said to you something to the effect, This is a disaster. You've got February on the front but the contract was signed in March?---I can't recall that. I think I would have recalled it if Mr Pooley was expressing those sentiments but I can't recall those, that conversation or those words.

So is your evidence that you can't recall Mr Pooley describing the position as he then saw it as a disaster?---No, I can't recall that.

And do you recall, recall him also saying to you that we could have organised this with O'Farrell, they wanted the purchase of this, something to that effect?---No. I can't recall those, that, that sentiment.

And do you recall him saying to you look, all you needed to do was to get a brief to the budget committee and Keneally would sign it and send it over to O'Farrell to sign or something to that effect?---I can recall some intent to, for the Premier to discuss this matter with the then leader of the opposition but, but I can't recall the, that precise conversation with Mr Pooley.

10

But Mr Pooley was expressing to you some displeasure about the way this had occurred and was telling you, wasn't he, all you needed to do was to get a brief to the budget committee and it would be signed by the Premier and the then leader of the opposition because of caretaker? That's what he was saying to you, wasn't it?---I, I can't recall that, that, that, those words from Mr Pooley.

Do you accept from me that he could have said that to you at the time?---He could have I suppose.

20

And you recall responding to that with these words or words to this effect, Oh, we just thought we had the approval to do it?---Oh, but that would have been raised probably at some stage as part of that conversation, it would have been that our, my belief was that we had the necessary approvals in place so it came as a shock to me as, in terms of when Mr Pooley came back basically saying that, you know, he didn't believe the necessary authorisations were in place.

30

I may have been a bit subtle in my question but I put to you whether you said oh, we just thought we had the approval to do it and you responded by telling me that you thought you have the approvals, namely approvals in the plural in place?---Oh, my - - -

To, to what approval or approvals are you referring to?---The approval to negotiate and approval to purchase if, if the - - -

So - - -?--- - - - if those negotiations proved successful and in keeping with the parameters.

40

Just so we're clear with one another, Mr Fenn, sorry, Commissioner, by approval you're referring to the Premier's letter of 25 February, 2011? ---That's right.

And nothing else?---No.

Thank you. Sorry, Commissioner.

THE COMMISSIONER: No, that's my same question.

MR ALEXIS: Now, you learnt by the end of the week commencing 14 March, contracts having been exchanged on the 15th and the brief to which we've just referred behind tab 15 having been sent on the 16th, you learnt by the end of that week that Mr Watkins had been stood aside pending an internal investigation, hadn't you?---My recollection is that I found on early Friday morning which is why, I'm not too sure what the, was it 18 March? It was the day that Mr Watkins had been, was to be stood aside.

10

And how did you come to learn of that?---It was a conversation with Mr Watkins directly.

And can you tell me what it was that was said during that conversation? ---My recollection of the conversation was that Mr Watkins advised that he was being stood down over this matter and there was just a general conversation after that about, you know, just, Mr, Mr Watkins was quite distressed at the time, I don't think, I don't think he had any, much sleep during that previous night and I suppose general consolation I suppose for, for what he was about to go through.

20

But did he, did he explain to you why?---It was over this, that he had exceeded his authority, I think that was the, it was over the Currawong matter, I, I knew it was over that.

But did he identify in this conversation with you what he understood the problem to be?---I can't recall precisely what he believed was the, the issue, it was a very early morning conversation.

30

Did he discuss anything else with you?---No.

Can you recall where the minister was that day?

Did he discuss with you the minister's itinerary that day?---I can't recall whether he asked for that.

Can you recall where the minister was that day?--March. I can't, without my, without my diary I couldn't recall where he was.

40

Ah hmm. Well, this is the Friday of the week before the elections?
---Mmm.

Now, was anything else discussed in this conversation between you and Mr Watkins on the morning of Friday, the 18th?---No, not that I, I can recall. It was predominantly the fact that Mr Watkins was being stood aside.

Now, do you recall telephoning Mr Pooley on the Friday morning after you'd spoken to Mr Watkins?---Look, I can't recall. I may have.

And do you recall saying to him, "What's going to happen to him?" The him of course being Mr Watkins?---I was, I was genuinely concerned about the welfare of Mr Watkins.

Mmm. And you said to Mr Pooley something like, This is all done for the right reasons, something to that effect?---Yeah, I think I would have said something to that extent.

- 10 And Mr Pooley responded by saying, "Look, I know it's all done for the right reasons but I won't be making the decision about what happens to him?"---I can't recall his, those, those exact, exact words.

When you spoke to Mr Watkins, did you tell him that you were going to speak to Pooley and try and find out what was going on?---I, I, I think there was a general, I, I would have, I, I would have felt responsible to try to find out what exactly was going on, what, what the, you know, how long, what was, what was likely to unfold, what were the processes involved in this.

- 20 And after you spoke with Mr Pooley, did you then have a further discussion with Mr Watkins?---Not that I can recall.

All right. Now, can I show you Exhibit 12, Mr Fenn?---Right.

And can I firstly draw attention to what's contained in Exhibit 12, which is an email from Mr Costello to Minister Kelly, albeit sent from the email address of Ms Hopkins who you probably would understand was Mr Watkins' personal assistant?--- Yeah, I, yeah.

- 30 And the email address commencing [ADDRESS GIVEN], was that Minister Kelly's private email address at the time?--- Yes.

And do you recall seeing this email or the attachments at any time on Friday, 18 March?---No.

- 40 Do you see in the, I'm sorry? Now, Mr Fenn, do you see in the text of Mr Costello's email he refers to the attached pages and he says, "The pages after attachment F identified as the map", and just pausing there if I can, can you turn through to the exhibit and find the map that's referred to with the capital F in the top right-hand corner?---Yep.

Do you have that?---Yep.

And then just come back to the email. You'll see that he then goes on to say that, "The papers after attachment F were not submitted in the original package to Stephen Fenn and Mr O'Reilly." Do you see that?---Yes.

And should we understand that the attachments to this email comprise the brief that we discussed a short moment ago that was sent by you on to Mr Pooley?---Sorry, you mean the, the front, this brief in, in the letter?

If, if you look at the attachment to the email, Exhibit 12, you'll see that it starts with the brief that we discussed a moment ago?---Yes.

And just so that we're clear, if you go back to the document behind tab 15 - - -?---After F you mean, attachment F?

10

THE COMMISSIONER: No (not transcribable)

MR ALEXIS: If you go back to- - -?---Oh, sorry.

- - -tab 15 in Exhibit 1- - -?---Yep.

- - -you'll see that that was the brief that we- - -?---Oh, yeah.

20

- - -dealt with a moment ago which you told us you sent on electronically to Mr Pooley?---Yes.

And you'll see as you thumb through the attachments to that brief, it ends with the map as attachment F?---Yeah.

Now, just come back to Exhibit 12, please. You'll see that what attention was being drawn to there was the pages after the map that had not been submitted in the original package to you and Mr O'Reilly. Do you see that? ---Yes.

30

Now, if you just turn over to the next page after the map in this attachment to the email in Exhibit 12, do you have that?---Yes.

And you see it's a letter under the minister's hand of 28 February, 2011? ---Yes.

When was the first time you saw that letter?---I think the first time I saw that was on 25 March, the first time I can recall seeing this letter.

40

And what was the occasion on 25 March that led you to see that letter for the first time?---I was on a train up to Newcastle and I had a package of relevant files around the Currawong matter and this letter was amongst them.

All right. Now, the occasion when you saw this letter in those papers was that an occasion that caused you to look at and read the letter?---Yes.

And when you looked at and read the letter did you realise that it related to the purchase of Currawong and by reason of the date and the way in which

the letter was expressed it appears that the letter was available prior to contracts having been exchanged on 15 March?---As in the date of the letter?

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

Okay. And when you saw the letter and you appreciated what I've just put to you did you think about or consider why it was that you hadn't seen it prior to that, particularly given the brief that had been sent to Mr Pooley back on the 16th?---I had concerns that I hadn't seen it.

10 Yes. And what were those concerns?---Well, I was just wondering why, I was trying to work out whether, when it was written, why I hadn't seen it and, you know, - - -

And what did you do about those concerns?---On 25 March. I, I, I did nothing at the time, this is the day before the election.

20 Did you do anything about those concerns after 25 March?---No.
So you didn't give it any further thought?---Not after 25 March, no.

Did you have occasion to speak to the minister at all about this letter?---No.

And did you have occasion to ask the minister why it was that having been involved as you were around the time of exchange, particularly dealing with Mr Pooley you weren't aware of the existence of this letter?---No, I do recall a conversation, I had a call the previous weekend from Mr Watkins about a letter. Now, I had no idea that it was, there was no obvious
30 connection I can make to this letter, but there was some, I had either a message or a direct call from Mr Watkins saying there's a letter that the minister needs to sign. And I just, you know, the weekend sort of took care of itself and I recall mentioning to the minister about a letter that he needed to sign and he replied that he had already, it had already been signed. I didn't know it was this letter, it was a letter.

So when you put the occasion when you first saw this letter and the recollection you tell us about the communication with Mr Watkins the previous weekend which I think is the weekend of 19 and 20 March, is that so?---Yes, it would've been, yes, something like that.

So when you put those two things together did you then come to realise that this was the letter that was being spoken of?---I didn't realise but I had my suspicions that it could've been this letter.

Yes. Well, it was a little more than suspicion wasn't it, it was obvious to you that this letter had been created around the earlier weekend and

backdated to make it look like it was available before contracts were exchanged?

MR BRANSON: Well, I object (not transcribable) in terms of the (not transcribable), Commissioner.

THE COMMISSIONER: I beg your pardon?

10 MR BRANSON: In respect to this weekend proposition, I mean , I don't think the witness is clear on the sequence of events. He first saw it on a train on 25 March, the letter. Now he's being asked to reconstruct, not from his own knowledge, but from supposition - - -

MR ALEXIS: Can I withdraw the question? I think there's some force in what my learned friend says.

MR BRANSON: Thank you.

20 MR ALEXIS: Mr Fenn, you've told us that over the weekend after that Friday that you spoke with Mr Watkins and understood he'd been stood down and spoke to Mr Pooley to try and find out what was going to happen, you told us that over that following weekend, that's the 19th and 20th, that you'd received a message or a call at least from Mr Watkins speaking about a letter and wanting the minister to sign the letter?---Yes, that's my recollection.

You then told us I think that on the train going to Newcastle the following Friday, the day before the election - - -?---Mmm.

30 - - - you found in the files the letter that we see attached to this exhibit. Is that so? This is the letter of 28 February?---That was amongst the, the package, yes.

And you've told us I think that you thought the letter was suspicious?---I, I was wondering what, what it's origins - - -

THE COMMISSIONER: He had concerns about it.

40 MR ALEXIS: I'm sorry, you had concerns about it and I think you described those concerns as suspicion?---Yes, terms of what, what is the genesis of this letter.

All right. And did you do anything to get an answer to those concerns or that suspicion?---No.

Why not?---It was the day before the election, I had, there was other pressing matters.

Well, did you communicate at all with either Mr Watkins or Minister Kelly about the letter being prepared the weekend before, that is the weekend immediately after the Friday of the 18th.

MR BRANSON: You see, that's what I objected to - - -

THE COMMISSIONER: Well, yes, I think that's (not transcribable)

MR BRANSON: - - - because we, we haven't got the link.

10

THE COMMISSIONER: I understand that.

MR ALEXIS: I'm sorry. I understand, thank you.

Now, Mr Fenn, can I show you another exhibit please, Exhibit 12 can be returned, can I show Exhibit 15. Now, Mr Fenn, do you see the email from Mr Watkins to Minister Kelly via his private email address as well as the email being sent to yourself as well as Mr Costello on Sunday the 20th at about 11.16pm?---Yeah, I, I see it, yes.

20

THE COMMISSIONER: Which exhibits are they, I'm sorry, I missed that.

MR ALEXIS: I'm sorry, Exhibit 15.

THE COMMISSIONER: Exhibit 15.

MR ALEXIS: 15.

THE COMMISSIONER: Thank you.

30

MR ALEXIS: Now, did you receive this email together with the draft statement that was said to be attached?---Well, I obviously received it because my name's there.

40

And did you look at it perhaps not late on Sunday but on the Monday when it was there in your inbox?---I, I did see the, this statement, my recollection this statement was amongst those documents that I saw on the 25th. I, I may have seen it earlier but my, my reading of that first off was that this was in relation to the IAB and I didn't want to really look at it because I, I could have been called up myself, I didn't want to, you know, be accused of, you know, having saw, saw a, having seen someone else's statement.

Now, can I ask what your response was to receiving this email from Mr Watkins attaching, as it says, his draft statement?---Oh, look, my response was that, as I said I thought I shouldn't read it.

Had you spoken with Mr Watkins before receiving this email about the fact that he was going to send it to you?---I can't recall any conversation with Mr Watkins over that matter.

Well, you told us that you'd spoken to him on the Friday, Friday morning I think you said?---Friday the?

18th?---18th, yeah, about, about him being stood down.

- 10 Yeah. And did he tell you during that conversation that he was going to prepare a statement and send it to you?---No, not that I can recall.

Was there any other conversation with Mr Watkins about that subject before this email was sent and received by you?---Sorry, can you repeat that?

Was there any other conversation between you and Mr Watkins about him sending you a draft statement for you to look at?---No, I can't recall any, any, any specific conversation with Mr Watkins over, over this matter.

- 20 So this was received by you in a very unsolicited way, was it?---It just popped into my inbox.

And you're telling us that you didn't look at the statement until the Friday of that week?---I think I opened it and I saw the statement and I, I, I, I formed an opinion that this would have been in relation to a, to the IAB investigation and I thought it was inappropriate for me to look at this given that at this, so that would have been, I, I can't recall when the IAB, the investigator came in and talked to Mr Kelly but for a part of the time I, I, I wasn't too sure whether I was going to be interviewed so in that context I thought it was inappropriate of me to have a look at this.

- 30 Well, did you respond to this email by telling that to Mr Watkins?---No.

You just ignored it, did you?---Ah, yeah, I, I didn't respond to it.

You see in the text he says, "It's a statement in a draft form, I will finalise in the morning?"---Yep.

- 40 Did you communicate with Mr Watkins at all that morning, that is, the morning of the 21st?---I, I can't recall. If it was, it was probably only in the context of where the investigation was up to.

Now, you tell us I think that you read this statement on the Friday of that week?---Ah, yeah.

MR BRANSON: Look, Your Honour, I think the witness said now about ten times he didn't read this statement.

MR ALEXIS: He said he read it on the train going to Newcastle on the Friday.

MR BRANSON: He's on the train, excuse me, may I make my objection?

MR ALEXIS: Of course.

MR BRANSON: Thank you. This is very important.

10 THE COMMISSIONER: Yes.

MR BRANSON: He said clearly and unequivocally that when he realised what the document was and because he wasn't sure whether he was going to be involved in the IAB inquiry, he did not read it.

THE COMMISSIONER: Sorry, Mr Branson.

MR BRANSON: My friend keeps asking questions upon the premise that he read it and he didn't.

20 THE COMMISSIONER: He said that when he received it he didn't read it but he said that when he was on the train on 25 March, on the Friday, he read it.

MR BRANSON: He did not. That's not his evidence, Your Honour. He said that- - -

THE COMMISSIONER: Did you say- - -

30 MR BRANSON: - - -when he realised that what it was- - -

THE COMMISSIONER: You may be right or you may be wrong.

MR BRANSON: Well, I am.

THE COMMISSIONER: But that is my recollection.

MR BRANSON: Well, Your Honour, that's my clear recollection. He said it more than once.

40 THE WITNESS: I, I, I, I - - -

MR BRANSON: No, no, please, you've got to wait for a question. Just don't say anything.

THE COMMISSIONER: Mr Branson.

MR BRANSON: I'm sorry. I beg your pardon. I don't mean to be disrespectful, Your Honour.

THE COMMISSIONER: I know. I've just got a question for you.

MR BRANSON: Thank you.

THE COMMISSIONER: Are you acting for this witness?

10 MR BRANSON: But I have an interest in, in, in, in his answer pursuant to my leave.

THE COMMISSIONER: No, I - - -

MR BRANSON: Do I not?

THE COMMISSIONER: I think you do.

MR BRANSON: Thank you. Because of the way that email's formulated.

20 THE COMMISSIONER: The assiduousness with which you are protecting his interests just perhaps- - -

MR BRANSON: Well- - -

THE COMMISSIONER: - - -cause me to wonder whether you'd taken up his cause. But I do understand that you have an interest in- - -

30 MR BRANSON: (not transcribable) but Mr Watkins purpose to send an email all around the country- - -

THE COMMISSIONER: I'm not sure whether you have an interest in these questions. I understand that Mr Watkins may have, but I'm not sure whether you have and whether Mr Kelly has.

MR BRANSON: I can see where it's tenuous but I'm entitled, am I not, to draw attention to the fact the witness's contradicted the premise upon which my learned friend is putting his questions?

40 THE COMMISSIONER: Mr Branson - - -

MR BRANSON: Thank you, I'll sit down.

THE COMMISSIONER: - - - I accept your standing to make the objection but I think you're at the edge of your standing.

MR BRANSON: Yes, I understand. I accept that.

THE COMMISSIONER: All right.

MR BRANSON: Thank you, Commissioner.

THE COMMISSIONER: Now, Mr Fenn, did you earlier in your evidence say that you read Mr Watkins' statement which is, the second, it begins on the second page of Exhibit 15 on the train to Newcastle on 25 March?---I can't recall reading that, this document.

- 10 Sorry, excuse me. My question is did you say in your evidence about 15 minutes ago, about, that you had read this document in the train when you were going to Newcastle?---I can recall this being one of the - - -

No, I'm just asking you whether you had previously given evidence, because I, there is a difference of memory between Mr Branson and myself and I - - -?---Right.

- - - concede that I may be wrong. My memory or understanding of your evidence, which may be wrong, is that you said that you read this statement in the train going to Newcastle on 25 March. Now, I want to know whether you agree that I'm wrong or whether you say I'm right in my memory and understanding which I concede and I accept may be wrong?---Well, my, my memory may be wrong but my understanding was that I said it was part of a bundle of documents.

Yes?---I don't believe I read that, this document.

You don't believe you said that?---I don't believe I said it.

- 30 All right. Well, we'll all look at the transcript with a great deal of interest.

MR BRANSON: I'll probably be wrong and then I'll come and apologise.

THE COMMISSIONER: No, you don't have to apologise and if I'm wrong, Mr Branson, I will not apologise.

MR BRANSON: Well, I was a bit forceful. I don't expect (not transcribable)

- 40 THE COMMISSIONER: I have said that I may be wrong. Anyway, I think that we'd better at the moment accept - - -

MR ALEXIS: I see the time, Commissioner, and perhaps - - -

THE COMMISSIONER: And perhaps we can go and have a look at the transcript.

MR ALEXIS: - - - now might perhaps be a good time to adjourn and look at the transcript.

THE COMMISSIONER: Yes, very well.

LUNCHEON ADJOURNMENT

[12.55pm]