

MAGNUSPUB01240DOC
15/04/2010

MAGNUS
pp 01240-01298

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INDEPENDENT COMMISSION AGAINST CORRUPTION

THERESA HAMILTON ASSISTANT COMMISSIONER

PUBLIC HEARING

OPERATION MAGNUS

Reference: Operation E09/0560

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 15 APRIL, 2010

AT 9.35AM

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

ASSISTANT COMMISSIONER: Thank you, please be seated.

10 MS RONALDS: Just several matters before I (not transcribable). In terms of continuing the inquiry the proposed date has inconvenienced one counsel so we've had to reorganise it to suit his convenience and so it is now proposed that wherever we reach tomorrow afternoon is where we'll reach tomorrow afternoon, it wouldn't be complete. Mr Romano will be called on Tuesday, 27 April and if still in the witness box, 29 of April, not the 28th, so it goes 27, 29 and then again to suit another counsel, for the same counsel's
20 convenience, it won't be the 30th, if necessary it will be 3 and 4 May. There is some concern about venue so we may be here or may not be here on the 27th and the 29th but counsel will be advised about that. If they have any concerns they can contact the Commission prior to the date and we'll advise about that. There was a major hiccup with the transcription services, not with, not with the Commission but with the transcription service providers last night and due to a technical problem at their end the transcript was not uploaded until seven and a half seconds ago, several copies will be brought in, yesterday afternoon's transcript will be brought in (not transcribable) and I'll distribute those to those who need (not transcribable).

ASSISTANT COMMISSIONER: All right.

MR GELBERT: Commissioner, my name is Maurice Gelbert, I'm standing in place of Mr Stephen Hanley on behalf of Mr Child and I seek authorisation to (not transcribable).

ASSISTANT COMMISSIONER: Yes, Mr Gelbert, you're given leave to appear for Mr Child.

30 MR GELBERT: Thank you.

MS RONALDS: Sorry, just so everyone knows I'm also, after Mr Macklin I'll be calling Ms Furneaux-Cook and then, and then Mr Cummins (not transcribable) Mr Cummins' legal representative was unavailable (not transcribable).

ASSISTANT COMMISSIONER: We're recalling Mr Macklin. Yes, Mr Macklin, thank you, please take a seat.

MS RONALDS: Mr Macklin, you recall that when you were here the other day, I'm sure you recall that, we were looking at Mr Becerra's contract of 2008?---Yes.

Now, during August 2008 do you recall having a conversation with Mr Cummins about someone having raised issues about Mr Becerra being paid, made some payments?---No, I don't.

Well, that was the day before or the day you were going on leave for some time?---No, I don't recall that.

Did you go on leave in August 2008?---Yes, I did.

And what I'd suggest to you happened is that Mr Cummins had a conversation with you and you told him that you'd look at it when you came back from leave. Do you remember that?---No, I don't.

But it's likely it happened?---No, I don't think it did.

Are you saying it didn't happen?---No.

Mr Cummins you say never had that conversation with you?---No.

Did he have a conversation anything like that, that is raising with you that someone had raised with him complaints or issues about Mr Becerra receiving payments on a contract?---No.

Sorry, top-up payments or payments on an invoice extra to his wages?---No.

You say that never happened at all?---Not involving me, no.

Not involving you?---No, I don't recall any conversation, no.

But you do agree that in August you went on leave?---Yes, I did.

Now, in 2009, in April 2009, there was a memorandum from Mr Hullick to Mr Romano about Mr Becerra's employment contract. Did you have any part in drafting that contract?---I can't recall being involved in that memo, Ms Ronalds.

Well, if I could show you, if the witness can be shown Exhibit 171. Now, have you seen this document before?---I have.

You're responsible, aren't you, for drafting employment contracts?---Yes.

Mr Hullick doesn't initiate drafting of employment contracts, I mean, he might ask you to do it but he wouldn't be doing it?---No.

So if I could ask you just to turn over the page and look at the document behind, that's the April 2008 contract, do you see that?---Yes.

And it's signed 2008?---That's right.

10 So it's dated 2 April, 2008. Are you able to recall what role you played in the production of this document?---None.

None. So you don't know where it came from?---No, I don't, I was on leave at the time.

In April 2008?---Mmm, mmm.

So does someone act in your position when you're not there?---Yes.

20 And who would that be?---Sarah Langshaw.

And it would be likely that she would have done it?---No, she didn't.

So you just don't know?---No, I don't know.

If that could be returned and this could be shown, ignore at the very top bit of this series of emails because that's just when they were printed off which is slightly more recently than when they were sent. You see down the bottom - - -?---Yes.

30 - - - there's an email from Mr Dencker to Mr Baird?---Yes.

Now, do you, were you party to any discussions whereby Mr Dencker had said he'd contact Mr Baird about an employment matter?---As, I was here when Mr Dencker gave evidence the other day and I can recall the meeting that he referred to where he - - -

40 But prior to Mr Dencker reminding you about it did you have no independent recollection of it?---I can recall the meeting where Mr Becerra's employment, employment arrangements were discussed.

And was there a decision to change them at that meeting?---Yes.

And what was the reason for the decision?---I can't recall the reason for the decision but my input was to suggest that if Mr Becerra's employment status was to be changed that he should resign as an employee and be engaged as a contractor.

Who initiated the proposal that there be a change?---The General Manager.

Right. And it was to bring a level of distance, wasn't it, within the relationship, that is, the General Manager wanted to move him from being an employee which would be seen to be too close to being a consultant and hence a bit more independent?---I would imagine so.

Well, that was what was discussed, wasn't it?---I can't recall the details of the discussion, Ms Ronalds, but I know that the status of his employment was discussed at that meeting.

10

Right. But what I'm suggesting to you is the reason and that was discussed during the meeting but you can't recall that?---No.

It wouldn't be usual, would it, for Mr Dencker to go to Mr Baird for employment advice, this being HWL Ebsworth, that'd be normally your role, wouldn't it?---Not, not always. I mean, Mr Dencker was someone who would, who was often prepared to take on an issue and try to resolve it.

20

Right. And if you look at the bundle there that this is attached, you'll see there's a memo on the next page from Mr Hullick with some handwriting from Mr Romano. Do you see that?---Yes, I can.

Prior to these proceedings have you seen that handwritten note before?---I have seen the handwritten note, only because I was providing these as part of the section 22 but I can't, no I don't remember seeing it at the time that it was produced.

30

And you know you had the discussion at the executive meeting, did Mr Romano declare a conflict of interest and leave the room?---I'm sorry, which meeting was that you're talking about?

The executive meeting we were just discussing where you decided to change Mr Becerra's employment status?---No, Mr Romano didn't leave the room to the best of my recollection.

Did he declare a conflict of interest and say he couldn't be party any discussions?---I can't answer that, I, I can't remember.

40

But you're saying it was his proposal?---Yes.

Did you say to him you can't make any comment about it because you've got a conflict of interest?---No, I wouldn't have made that comment.

Why not?---It wasn't always a good idea to challenge the General Manager on certain issues.

Why not?---He sometimes reacted in a, in a way that he took things personal and I, I, I felt it wouldn't have been my place to this, sometimes it's just not

a good idea to raise issues like that with the General Manager because he would react in a, in a way that would make life a bit difficult for you.

So what, did you feel intimidated by him?---Not intimidated but you, in my mind it would not be worth something that you would want to pursue. There were certain things that I would try to pursue with the General Manager but there, at that period of time from my recollection it wasn't something that I would want to put my head up and get kicked.

10 Well, in June 2009, that's some two months after the Sydney Morning Herald article?---Yeah.

That's the Befaro, as I understand it you say that that's when you first learnt about Befaro?---Yes.

So you knew and the members of the, and I appreciate you're not a member of the executive, but all knew then, I'm presuming the Herald was correct about that, that there was a relationship between the two of them that was both personal and business?---That's right.

20

And what I'm trying to explore with you is you've indicated that the proposal to change the status came from Mr Romano?---Yes, it did.

And you didn't feel it was your position, was that, that was partly because of the way he'd react and partly because - - -?---Yes.

- - - of where you were in the hierarchy?---Yes.

30 Did you feel it was, if anyone was going to raise it then it should be raised by someone who was an executive, on the executive?---Yes.

And hence more senior and - - -?---Yes.

And is that how things work, is it very hierarchical at Burwood Council?---At times it was, other times it wasn't.

And it's correct, is it not, that after the publication of the Sydney Morning Herald articles Mr Romano became quite volatile about those issues?---Yes.

40 And indeed talked at great length about them?---Yes, he did.

In endless detail about them?---Yes, he did talk about them, yes, yeah.

And meetings became focussed on those rather than the things that the meeting should have been about?---That's correct.

And from the beginning he'd denied all the allegations?---Yes, he did.

And at no stage did you have any independent information one way or the other about whether his response was accurate?---No, I did not.

And so he was in a particular frame of mind by June, by 16 June, 2009 or at the executive meeting in June 2009 that raised the matter?---Yes.

Would that have made you more cautious - - -?---Yes.

10 - - - given that he was more emotional about matters than he had been even before?---Yes.

And was robust in his own defence?---Yes.

And at no stage ever took a step back did he in the sense that he was involved in all sorts of discussions about responses to the Sydney Morning Herald and responses to this Commission during that period?---He I think sometimes said he'd step back but he, to my observation he didn't.

20 He remain an integral decision maker (not transcribable)?---Yes.

And that any suggestion he step back would (not transcribable)?---Yes.

ASSISTANT COMMISSIONER: Mr Macklin, as the HR manager it was your role, wasn't it, to see that employment decisions were being made not by people who had a conflict of interest?---Yes, it was.

That would have been part of your role?---Yes.

30 So when this issue was raised you should have spoken up, shouldn't you?
---I should have, yes.

MS RONALDS: And so if you're looking at the note you say that, that at the time you don't recall seeing it?---This is the briefing memorandum dated
- - -

Yes, with the handwritten note on it - - -?---No.

- - - dated 12 June, 2009?---No, I don't recall.

40 And if I could ask you then to just look at the contract that is behind that, do you see that? Did you produce that document?---I can recall tidying it up.

This is in June 2009?---My recollection is that my HR officer would have, not would have, my HR officer had some role in formatting the document.

Where did it come from, who initiated it?---There was two different documents sourced from the two different legal firms, Maddocks and HWL

Ebsworth. There was some discussion between myself and Les Hullick as to the more suitable document.

And how was it you had two sets of legal advice?---I don't know. I, I, I - - -

Was there an old Maddocks contract from 2008 or 2007?---Yes.

Or was there a new one produced in 2009 by Maddocks?---No, we're talking about this document I'm assuming you're referring to as a - - -

10

Well, it has a 2009 date on it?---I'm sorry, I was thinking of the - - -

Are you right, Mr Macklin? Go back a step?---Yeah, let's go back a step, yeah.

You see behind the handwritten, handwritten note, next page a letter to Mr Becerra dated 12 June, 2009?---Yes, yes. I had no role in this document.

20 Right, now could we just focus on the June 2009, I don't you to be confused about the date?---Yeah, yes.

You had an earlier Maddocks contract in 2007 - - -?---Yes.

- - - that we looked at the other day?---Yes.

That was changed - - -?---Yes.

30 - - - in the ways we've looked at. This one is based obviously on that original draft and then there's later advice from Ebsworth about the other arrangement?---Yes, that's right. I was getting confused there, I'm sorry.

Are we right?---Yes, I'm right now.

I don't want you to be confused. Do you need a moment?---No, I'm fine.

And do you recall now you look at this one, which is essentially is the old Maddocks draft contract and essentially is the one that was signed in 2008, repeated, what role if any did you play in producing the 2009 one?---None.

40 Is it possible a member of your staff did so?---It may be possible.

Or is it possible it came from Mr Hullick or Mr Romano?---It may also be possible it came from Mr Hullick.

But you simply don't know?---I don't know.

It was attached to Mr Hullick's memorandum?---That's right.

But normally you'd be responsible for the contract, wouldn't you?---That's right.

Now if you looking on it, in a few pages in you'll see that Mr Becerra actually signed it on 12 June, 2009. Were you aware of that at the time?

---No, no.

There doesn't seem to be one signed by, well, at least not that I've seen, signed by Mr Hullick or anyone?---That's right.

10

So by June 2009 did you think that there, that Mr Becerra was on a valid employment contract?---Yes.

And how did you determine that?---Well, that he was continuing to, continuing to perform work in the organisation, that I knew that there was a renewal of his contract in 2008 so that's what I, I - - -

20

As HR manager don't you have a register of employment contracts in some form so that, either a computer form or a book form so that you know when contracts of employees are going to terminate and need refreshing?---We don't have too many fixed term employment contracts but the ones that we, that we do have, no I don't have a register as such but I, I, I know which, myself and my team know which ones are, are on fixed term contracts and there's not that many.

Well, what did you from April 2009 through to June 2009 - - -?---April '09 to June '09?

30

- - - to make sure that Mr Becerra was covered by a written contract?---No, I didn't.

Isn't that your job as HR manager?---Yes.

Well, why didn't you?---I can't, I can't answer that.

40

So then this one starts off in, in June, 2009 after a discussion at the executive. Mr Dencker sends this bundle of documents including the signed contract from Mr Becerra off to HWL Ebsworth for some advice. Now in that bundle there's a series, you might need to take the clip off the top, there's a series of documents stapled sort of individually in each bundle. If I could ask you to turn to the third bundle in, if you follow?---Yep.

There's one down the bottom from you. You see there's an email from you, private and confidential, Ian and David. Do you see?---Yes.

And that's an email you sent to Mr Dencker and Mr Baird with your view of what's happened?---Mmm.

Do you see that?---Yes.

And do you need a moment to read it or have you reread it recently?---I might just read it if that's all right.

That's certainly all right?---Yes. I can recall that.

10 And you see you give a certain advice there. I've provided Les with an amended version that clearly sets out the difference, but unfortunately, do you see that at the top of page 2, the third paragraph down or the second full paragraph?---Page 2. Yep.

Do you see that, I've provided Les with an amended version? Now it's unclear whether you're saying you did that in 2008 or 2009. Do you see the paragraph that I'm referring to?---Yes, I can. Your question was, is it - - -

20 Do you remember whether, what you're referring to there is 2008 or 2009? ---I can because in early 2009 Robert Cummins brought it to my attention that Albert Becerra, his contract and letter of offer was, had that \$200 an hour in reference, in the, in the document and he had some concerns about it. And I read it and I thought it was, it didn't sound right either. I questioned Les about it and to the best of my recollection I, I suggested we, you should, you should look at that because it doesn't make sense in the context of the document, because the salary should, the salary is a figure that includes everything. It can't then include another \$200 an hour. It didn't make sense to me.

30 And that was February, 2009?---Yes. It was when, it was not long before Robert Cummins went on sick leave.

He went on the 16th (not transcribable) this conversation, a week before that?---That's right. It was around about that time. So I - - -

In June, 2009 you're saying I provided Les with an amended version?---I'm referring to the, I have to think back now, I'm referring to when I first made, was made aware of it and I spoke to Les.

So that's February, 2009?---That's right.

40 Because I think we agreed the other day that you hadn't seen the changes in the 2008 contract?---No, I hadn't, no.

So you didn't know about the \$200?---I didn't know.

And you weren't aware the invoices in March, 2008?---No. March, 2008, no, no.

You're aware now what I'm talking about?---The ones that have been produced as evidence, yes.

You didn't know anything about them at the time?---No.

Now down the bottom you say, this is of course if we continue employing Albert. Pat has mentioned to me that he would prefer he was employed as a contractor?---That's right.

- 10 Now that infers that you had a conversation rather than it being discussed more formally at an executive meeting. Would you agree?---Yes.

And does that help you recall that you had also a conversation with Mr Romano?---I can't recall having a conversation with Mr Romano about that issue, but I can recall an executive meeting where it was clear that, that Mr Romano wanted Mr Becerra employed under another arrangement.

Right?---I can't recall a discussion that I've had with Mr Romano, but - - -

- 20 Well, I'm only going by your own words, Mr Macklin?---Well, if I said it in an email, I must've had a discussion, but I can't now recall that discussion.

And then if you turn to the next bundle, down the bottom and over the top to the next page is the email from Mr Romano where he says he disputes your suggestion that Mr Becerra was employed as an employee?---Yes, I remember that email.

Do you remember receiving that?---Yes, I do.

- 30 And what was your reaction to that?---I thought it was incorrect.

And did you, I can't find any reply from you to Mr Romano saying you didn't agree?---I didn't think that it was, I wasn't prepared to challenge him on it.

- 40 Why not?---I can, I can clearly recall receiving the email and, and thinking about it and even thinking about it overnight whether I should respond, but I chose not to because Pat, Mr Romano had some very, my experience particularly towards in this period of time, it wasn't worth challenging, challenging the General Manager on issues like that.

He was making a factually incorrect statement - - -?---I know.

- - - and you're Human Resources Manager, therefore it's an area that falls clearly within your jurisdiction, that is someone's employment status. Would you agree?---Yes.

And he's wrong? You knew that Mr Becerra had been an employee for the last two years?---Yes. Yes.

You knew there. There was no doubt about that?---Yes, of course.

He had contracts of employment signed by Mr Romano?---That's right.

There was never any doubt about his status until June, 2009 was there?
---No.

10

So you decided for self protection. Is that a correct way of describing it to avoid having a confrontation with the General Manager if you would've raised it?---To avoid having a confrontation.

And you didn't think that even sending, if you'd sent an email back saying this isn't right, would that have led to a confrontation?---Yes.

20

So that even if you tried to correct it on paper, so to speak, so there was a record that this was not the view of the Human Resources Manager and it was factually incorrect, that would've led to a verbal response would it?---I felt that it might've, yes.

And you didn't want that to happen?---No.

Beside it really didn't matter about whether he was right or wrong, the document spoke for themselves?---That's right. I knew in my own mind that he was employed as an employee.

30

And you knew there were a number of other factual errors in these, in these paragraphs. Was it your understanding that Mr Becerra was only to be employed on the civic precinct project?---No.

It was your understanding that he was to work on other work?---Yes.

So you knew that was wrong?---Yes.

Now the eight hours, when do you say you learnt about that? Sorry, sorry, you've told us when you learnt about that?---Mmm.

40

And number 6, Council's costs to be fixed to a lump sum cost or retainer for this work. That was never right was it? He was being paid wages?---That's right. Through our salary system.

Yes. On a fortnightly or monthly basis?---Fortnightly.

And he was paid as any other employee?---He was.

So there was no lump sum cost as a retainer for this work?---No. He received annual sick leave, like every other employee.

I hope so. And if I can ask you to turn to the next bundle. You'll see at the first page, sort of down the bottom, there's an email from you to Mr Hullick, saying please find attached a draft letter of engagement. It may require further legal advice. Do you see that?---Yes.

10 And then, it's not actually attached to this one, it's a bit further on, but by this stage, this is the next day, 17 June, you're proceeding on this that Mr Becerra will become a contractor?---That's right.

And then, now this, it gets complicated so you have to go through, and I'm sorry we should've numbered the pages, but the two bundles further on, mine's got a paperclip on it, I don't know if yours does. And it heads, email from Brian Belling, 18 August. Do you see that one?---I've got that. Yes.

20 And then if you turn over two pages do you see an advice from Mr Belling addressed to Mr Dencker?---Yes, I can see that.

So Mr Dencker comes back into the loop at this stage?---He does.

And is that because he's the one who provided the first set of instructions? ---I, yes, I believe so.

But you'd expect to be advised about a contract wouldn't you?---Yes.

30 And Mr Dencker, if you go back to the first page, has sent a copy to you but he's sent it on to Mr Hullick because Mr Hullick was Mr Becerra's supervisor. Do you see that, down the bottom of the first page of that bundle?---Yes.

Now if you go over to Mr Bellings' advice you see at page 1 of it it's got a heading Legal Distinctions. No, first of all have you seen this document before?---(NO AUDIBLE REPLY)

Are you all right Mr Macklin?---Yeah, I'm - - -

40 Have you seen this advice before?---I have seen it, I haven't read it in detail but I have seen it.

Did you receive it at the time?---No.

Or did you only find it when you were doing the 22 response, did you? ---No, I don't, I, I can recall Les Hullick showing it to me briefly but I don't, I didn't read it.

But you're the Human Resources Manager?---That's right.

Wasn't it a concern to you that you were getting legal advice about an employment or contractual relationship?---Yes.

It was a matter that you needed to be across?---Yes.

Why had you vacated the field in relation to this arrangement?---I'm not too sure what you mean.

10 Well, are you saying you didn't consider it carefully to make sure it agreed with what you knew?---For a start it wasn't given to me, it was showed to me by, shown to me by Les Hullick. I can't answer why I didn't read it.

Mr Hullick's not the Human Resources Manager?---No, he's not.

He doesn't have your expertise?---No.

20 That's what you're employed (not transcribable)?---I don't have the same sort of expertise that, of the information in this advice but no, I didn't see it, I didn't read it.

All right. Well, look at paragraph 2.3?---2.3.

Do you see that? We had understood our earlier instruction was to reconstitute the relationship as one of employee - - -?---I'm sorry, I, I, is it, are you referring to the HW Ebsworth letter?

Yes, Mr Bellings' advice, yes. You see on the first page?---Yes.

30 2.3?---I've got 2.1 and 2.2, the Legal Position, 2.

The Legal Distinctions. I think you're looking at the wrong document? ---I'm sorry. Is it 2.2, Legal Distinctions, I'm sorry, I've got it now.

You've got it?---Yeah.

Sorry, we'll attend to the numbering the pages so the next witness doesn't suffer in this way?---No, that's all right.

40 You see the 2.3?---Yes, yes.

We had understood our earlier instruction was to reconstitute the relationship as one of independence but on essentially the same fundamental terms pertaining to the employment relationship. Was that your understanding of the position?---(not transcribable)

That was the basis of the decision, wasn't it?---Yes.

Originally?---Mmm.

But you didn't concern yourself with the rest of the process?---In terms of what?

What happened to Mr Becerra?---No, when you say I didn't concern myself with it I - - -

10 Well, you didn't read this?---No, I didn't, no.

And it seems that there's a gap between June and this is now August?
---That's right.

Did you chase it up at any time to find out what had happened?---No, no, I didn't.

Why not?---I can't explain why.

20 Then there is a September document offered to Mr Becerra?---Yes.

Did you play any role in that?---I didn't but I believe my HR officer may have assisted in, in formatting the document.

Right. In the bundle you've got, I think you've earlier found this inadvertently, there's an email, and I'm sorry, these are slightly out of date order, on 7 July with a draft advice, that's the one you had a moment ago?
---(NO AUDIBLE REPLY)

30 Did you see that at the time do you remember?---Can you just, which one was it again I'm sorry?

There's one dated 19, 7 July?---An email or an advice?

Yeah, an email - - -?---An email.

- - - from Rachel Green to you, Mr Dencker and Mr Hullick, the first one?
---Rachel Green, 17 July.

40 You'll find it on the front page of one of the little clumps?---August, June, I've got one from Rachel Green on 19 June.

All right. Well, just have a look at that one then. That's to Mr Dencker. Do you remember seeing that, Mr Bellings introducing himself and he sets out a consultancy (not transcribable) consultancy agreement and an advice, the draft advice from Mr Bellings. Do you see that? Did you see that at the time?---At the time, no.

Do you recall seeing it and looking at it any time during the course of 2009?

---Yes, I can, once again, as I said before, I don't, I didn't read it in detail but I can recall seeing it.

Can the witness be shown Exhibit 159 and just put those back together again - - -?---Okay.

- - - and we'll put them into semblance of order at a later date. You see that's a letter addressed Dear Albert dated 23 September, 2009?---Yes.

10 And it sets out a whole series of terms of engagement?---That's right.

What role if any did you play in the production of this document?---It looks like a document that I have, may have had some input in. I can't, I can't recall producing it, I, I certainly didn't provide a lot of the information but I may have been involved in formatting it and putting the address up the top.

So not a substantial contribution?---No, no. I don't recall being involved in this document, Ms Ronalds.

20 Can the witness be shown Exhibit 176 please. If you look at paragraph 10 of that document you'll see that it has an agreed amount of 145,000 on a retainer basis?---Yes.

Do you see that?---Yes.

Now, you've just had handed to you the purchasing and tendering procedure that was, as I understand it, in operation at that time?---Yes.

30 Now, you were purchasing services, weren't you, I mean the Council was planning to purchase services - - -?---Yes.

- - - from Mr Becerra?---Yes.

And in my reading of this document it should apply to that contract. Was that your understanding?---It should.

It wasn't an emergency was it? This matter had been going on for months? ---That's right.

40 So if I could ask you to turn to page 4. I mean you're familiar with this document aren't you?---I, I have seen it. I don't, I don't use it very often. It's not something that I am involved in. But I produced it as part of the section 22.

If you go to page 4 you'll see there's a different requirement for the quantum of (not transcribable). Can you see there's purchasers from 100 to 150,000?---Yes.

Now as the Human Resources Manager you're responsible, aren't you for organising Mr Becerra's services? Or do you say once it became a contract of services it wasn't really your responsibility?---No, it wasn't my responsibility.

Did you discuss with Mr Hullick at any stage that this needed to be, these terms needed to be met?---No.

10 Do you recall any discussion in exactly when you were attending about if Mr Becerra was going to go a contract services then obviously the usual requirements needed to be met?---No.

And they weren't met were they? None of the steps that were taken, none of the steps set out in that procedure for contracts from 100 to 150,000 were undertaken in relation - - -?---Well, I'd have to check. I'm not familiar with this, with the detail of this document. Not, yes, from reading that, no, it wasn't.

20 And are you able to say, sorry, then there's a gap between September and December. Are you able to explain what happened to the best of your recollection of why the September draft hasn't been received and then there's one for December, 2009?---That's right.

Do you have any explanation to the Commissioner about that gap?---No.

You didn't have any role in it?---No, I didn't.

30 And had you seen that document at the time?---I don't think I had, no, I didn't because it may have, no, I don't recall seeing it, no.

You don't recall playing any role in its production?---Once again, my HR officer may have assisted in the formatting and then putting it on to a letterhead.

But not substantial (not transcribable)?---No. No.

I have nothing further, Mr Macklin is to return later on other matters (not transcribable).

40 ASSISTANT COMMISSIONER: Okay. Does anyone seek to question Mr Macklin at this time?

MS McGLINCHEY: Can I just clarify something that counsel assisting said. Is it the case that Mr Macklin will be coming back?

MS RONALDS: Yes.

MS McGLINCHEY: Because I understood that this is the last time people are, okay, that's fine.

ASSISTANT COMMISSIONER: He will be coming back.

MR CHALMERS: Yes, I am acting for Ammer Issa. I want to ask you some questions. In relation to July, 2009, Mr Issa was called in relation to the wages he was receiving and told that he was earning too much and his wages were amended downwards. Do you know anything about that?---I
10 don't know the detail. I know that the, our worker's comp insurer had contacted us about Mr Issa and there may have been another employee, about the average weekly earnings over a twelve month period. And our insurer advised us that the average weekly earnings should reduce back to his substantive rate, I think, at the time. That's my recollection of that. And my HR officer and I discussed it, I'm sorry, I correct myself, my HR officer I think made contact with Mr Issa and advised him of that.

All right. Now in relation to starting in July, 2009, there was, you rang up
20 Mr Issa in relation to advising him, and I'll go specifically through that telephone conversation, but just so that you know what I'm talking about, generally that there were no special duties available for him any more. Do you remember that telephone conversation?---Yes, I do.

All right. Now just to, just to go through it factually. Mr Issa had been on worker's compensation. Is that right?---Yes, that's right.

And there were times when, when the Council would get a monthly doctors report that he was suitable for light duties?---That's right.

30 And he had been essentially most of the time suitable for light duties from about September, 2008 onwards?---I, well I can take your word for it.

Generally, yeah?---I think so, yes.

And he had worked in the depot, the works depot - - -?---That's right.

- - - until about February, 2009?---I think so, yes.

40 And then he was moved to act, to do work in the Council building itself, helping the engineer, Fred?---That's right. That's right.

Fred Timic?---Fred Simic, yes.

Simic, yes. Now do you know why he was moved from the depot to the office to assist with the engineer, engineers work?---Because he was on suitable duties.

Yes. But he'd been doing suitable duties at the depot. Do you know why he was moved in February, or about February, 2009 away from the depot?
---No, I don't.

All right. Now he continued to do suitable duties. And when you telephoned him on or about July, 2009, so we're back to that phone call I (not transcribable) before?---Ah hmm.

10 Right now, in that phone call you told him that you had, you told him that yourself and Mr Khaled, Khaled - - -?---Yes.

- - - had spoken to Fred, Fred being the engineer that my client was working under (not transcribable)?---That's right.

And that you purported to tell my client that Fred told us that there was no work for you, that there's no work for my client, Mr Issa. Did you say that?---Yes.

20 And you told him not to come, come in the next day?---That's right.

Okay. And you said, and then do you recall that my client said in response to that, a few days ago Fred said that there was plenty of work for me to do and if I didn't have enough at any time he would give me more. Do you remember my client telling you that?---I can recall something like that, yeah.

30 Yes. And did you reply words to the effect, no, I just spoke to Fred, there is nothing for you to do. Don't come in to work tomorrow. You'll get paid as normal. (not transcribable) words to that effect?---Yes.

All right. Now is it the case in fact that you or Mr Khaled never spoke to Fred, never spoke to Fred about work, work being available?---No.

You say you did?---Yes.

Yes. Are you sure of that?---Yes.

40 And, and then he told, and could I suggest to you that, that the reason for the phone call was that you wanted my client outside the Council and not to work at the Council. And that there was indeed ample work for my client to do?---No.

And that, can I suggest that the scope, that the scope of work that my client could do involved work on the drainage boxes?---I believe so. I don't know the details.

But that work was available for my client to do in July, 2009, when you rang him?---No.

Did you check that?---Yes.

So are you saying you checked that there was no available work for my clients to do?---Mr Thinesh told me that there was no more work available for him.

Can I suggest to you that's not correct?---You can but it's not true.

10 Did Mr Romano have any input with you in relation to my client not being able to continue working in his current job at the Council at the time?---Yes.

Was it his suggestion to advise my client that he couldn't work in the office anymore?---No.

Did you approach him?---Did I approach who?

Mr Romano?---No.

20 So how did Mr Romano become involved in my client not continue to work at the Council beyond February - sorry, beyond, I beg your pardon. Did Mr Romano approach you in relation to my client not being able to continue to work in July 2009?---No.

Was there any discussion with Mr Romano about my client - - -?---Mr Romano wasn't happy with, with, with Mr Issa working in the office.

Right?---But that didn't have any impact on my decision.

30 And when did Mr Romano advise you, what period of time did Mr Romano advise that he wasn't happy with my client working at the office?---I can't recall the period of time but it was when Mr Issa was in the office.

Okay. Sorry, could you just answer that question again?---What was the question, I'm sorry?

The question was was it around July 2009 prior to your phone call that Mr Romano advised you that he wasn't happy with Mr Issa working in the office?---Mr Romano advised me, Mr Romano had made it clear to me that
40 he wasn't happy that Ammer was working in the office but not, not at July. Look, it was, he wasn't happy with him working there.

And was that the reason that you moved Mr Issa out of the office?---No.

That's just coincidence?---Yes.

Of course I think you've given evidence this morning to the Commission and in relation to your relationship with Mr Romano around June 2009 that

you didn't want to put your head up or challenge Mr Romano at that time if you thought that something that you might say might be unpopular and not acceptable to Mr Romano?---That's right.

So is this a case where Mr Romano suggested to you that he didn't want my client in the office and you weren't prepared to stand up to him?---No.

10 Now, you told him - now, just how the administration works. You were receiving at that time monthly doctors reports in relation to my client and that was to say that he was suitable for work duties. Do you agree with that? Light duties?---Yes.

Yes. And so you told my client in that phone call that we've been discussing in July of 2009 that you would ring him back on the - you told him not to come into work tomorrow and that you'd ring about midday Monday but if you didn't ring he should ring you. Do you remember that? To see if there was any work available?---Yes, I do recall that.

20 And you didn't ring my client, my client rang you on Monday?---That's right.

Yes. And you told him that you hadn't found anything?---That's right.

Can I suggest to you that it was in that period the phone call having taken place on a Thursday that it was between the period Thursday to - that Tuesday that it was at that stage that you first had discussions with Fred the engineer about whether there are anything available for my client?---I'm sorry?

30 Well, what I'm saying is the phone call that we've just been talking about happened on the Thursday and my client was to ring you back, you were to ring back my client on the Monday?---That's right.

And I've already suggested to you that you never spoke to Fred prior to that and you've disagreed?---Well, that's not correct.

Yes. Can I suggest that you only started speaking to Fred after this phone call?---No.

40 Okay. And were you aware that my client rang up Fred immediately after he'd spoken to you on the phone and that Fred had told him that he had no idea that my client was not going to be turning up the next day, he'd never told you (not transcribable) - - -?---No, I didn't - - -

- - -in that phone call that you've never approached him about whether there were adequate employment responsibilities in the Council?---Are you asking me if I'm aware of that?

Yes?---No, I'm not.

Now, on the Monday you told my client there weren't any duties that he could perform?---That's right.

What checks had you made since you'd last spoken to my client on the Monday about any possible duties that were available at Council?---The process that I would normally follow.

10 Well, do you - - -?---Ask - - -

Sorry, I'll let you finish?---Finding out if there any opportunities for suitable duties.

Did you do that?---Yes.

Do you have any real memory of doing that?---No.

20 All right. Now, on the Monday you said there was nothing available and you told my client to ring back on Wednesday. This is the second phone call you've had with him and you told him to ring back on Wednesday?---I can recall that, yes.

And he rang back on Wednesday?---Well, I think so.

Do you have any independent memory of trying to locate anything for him to do between that Monday and Wednesday?---Yes.

30 So what did you try and do?---To see if there was any available, any available suitable duties.

And you remember doing that?---I can recall, yes, I can recall trying to find if there was suitable duties for Mr Issa.

And did you specifically go up to Fred and say, Fred, are there any things that Issa could do?---On the Wednesday?

Well, between Monday and Wednesday or even - - -?---No.

40 No. And indeed even between the Thursday which was the first phone call we've gone through and the next phone call on the Monday the second one did you talk to Fred about whether there were any other duties that my client could do?---No.

No. And wouldn't he be the logical person given that he'd been working under Fred for a period of about five months, wouldn't he be the logical person to be able to tell you whether there were duties that my client could

perform at the Council?---No, because he'd already told me that there wasn't any.

Now, you never, no one ever rang back my client from July 2009 to the present to say that there's available work? Do you have any memory of yourself or you asking anyone to find out whether there was suitable work for my client on that last phone call on Wednesday?---I can't recall after that phone call on the Wednesday whether I, if there was any opportunities of suitable duties that would come up that I'd be aware of I would consider
10 him.

But other people got duties in the office doing not dissimilar work to my client. Do you agree with that proposition?---Not very often.

But there were some?---At that time I can't recall any.

What about Mr Risteski?---Risteski.

Did he get some work from the office working there or with Fred?---No, not
20 to my recollection.

See, can I suggest to you that the reason that no efforts were made from that Wednesday phone conversation, that's the last of the three telephone conversations we've been discussing that the reason no effort was made for anybody to contact my client to say there were light duties available was because the real reason behind you not being - him being told not to work in the office was that basically Mr Romano didn't want him there. It had nothing to do with light duties being or not being available?---No, I don't
30 agree.

Now, I want to come to the Christmas party. And it's the staff Christmas party in 2009. Okay. Now, my client, you found out that my client was going to the Burwood Council Christmas party. Is that correct?---That's
right.

And you contacted him, first of all orally, and you told him that he couldn't go to the Christmas party?---No.

No, what do you say happened?---I didn't ring him about the Christmas
40 party.

All right, all right, all right. But did he ring you about the Christmas party? ---I don't recall having a conversation with Mr Issa about the Christmas party at all.

You see, isn't it the case that you and he spoke on the phone because he found out that you were stopping him coming from the Christmas party? ---I wrote to him and told him that he shouldn't attend.

Right?---But I, I, I can't recall having a phone conversation with him.

Didn't he contact you and say that he heard that you weren't allowing him to attend the Christmas party and he wanted you to put in writing why it was that he couldn't come to the Christmas party?---I, he may have called me, I'm not too sure. I don't, look, I, I can't, I really can't recall a phone call with Mr Issa. I do recall some letters from his solicitor and I, I wrote to Mr Issa.

10

Yes, well, we'll get to that?---Okay. Look, I can't - - -

(not transcribable)?---I can't recall having a phone conversation with him but I can't say that it didn't occur.

What was the reasons of not allowing Mr Issa to come to the Christmas party?---Mr Stephen Ellul, the Works Manager, had made me aware that an employee had approached him and paid for Mr Issa and I believe Mr Child to attend the staff Christmas party. Mr Ellul and I had, Mr Ellul had some real serious concerns about that because, because it was, it could possibly be, be a situation where there could be physical conflict. The, I discussed the issue with Steve Ellul and Khaled Azer. It was felt that in the circumstances with Mr Issa that there was a lot of ill-feeling towards him at the depot, the Christmas party was during working time, there would be alcohol consumed and it was our concern that, that the party may, it may erupt and Mr Issa could get assaulted or, or things like that so we had a real concern about that. I consulted with the, with the, with Erin Wilson from Maddocks and discussed the issue and we made a decision to write a letter to Mr Issa advising him not to attend.

20

30

Right. Now, in relation, in relation to that letter can I show you a document. I do have spare copies.

Commissioner, I may have, I have done copies but I may have left them at my seat.

ASSISTANT COMMISSIONER: I think, isn't this already in, Ms Ronalds, the letter about not attending the, is it in any other bundles?

40

MS RONALDS: (not transcribable)?---I can remember the letter because I wrote it.

MR CHALMERS: I've got the original here.

ASSISTANT COMMISSIONER: It's all right he can have a copy.

MR CHALMERS: Yes, I've got copies, I've got copies, they have been located. Perhaps that's the original. Right, now do you have a copy - - -?

---Yes.

- - - in front of you and, right, now, the, what you say in that letter is although, and I'm referring her to the third paragraph, you say, Although you are an employee of Council you are currently stood down from duty as a result of your work-related injury?---That's right.

So was that a lie?---No.

10 Well, that's not the reason you've given to the Commission. The reason you've given to the Commission is, the Commission is that you had fears for his safety?---Well, we had fears for his safety as well as the fact that he was unfit to attend work.

Well, he was fit to attend work, wasn't he? He was fit to attend at that time, restricted duties work?---But there weren't any restricted duties.

Well - - -?---It was Council's position he wasn't able to attend work.

20 ASSISTANT COMMISSIONER: I think the point being made is the Christmas party was probably no more onerous than light duties?---We felt different about that, Commissioner. Mr Ellul and Mr, particularly Mr Ellul had some serious concerns given the feedback that he was getting from his staff that were working with him, who he has daily contact with that, that, that the attendance of Mr Ellul, Mr Issa, would, would cause some serious conflict and we were trying to do our best to avoid that. We were, it was, we were trying to avoid that situation occurring.

30 MR CHALMERS: And in the fourth paragraph you continue with the same reasoning?---Yeah.

I understand that you would like to attend but you would appreciate that given the nature of your injury Council cannot allow you to be placed in a position where you may exacerbate your injury. Do you agree that's there?
---Yes.

40 So you were clearly putting it on the basis that you were scared that he was going to exacerbate an injury by going to a Christmas party?---By getting hurt, yes.

Because of his injury?---By getting hurt.

Because he was under any threat?---But exacerbate his injury by getting hurt.

Come on, are you saying that that, are you saying that you are saying in this letter that there is a fear that, that he will be injured by other people at the Christmas party? That's not what the letter's saying. The letter's saying

that he has an injury and by him attending the Christmas party it could be exacerbated?---Yes, I'm saying that in the letter.

ASSISTANT COMMISSIONER: I'm sorry.

MR CHALMERS: Commissioner, I'm trying to work out whether you're laughing or crying at my cross examination.

10 ASSISTANT COMMISSIONER: I really don't know at this stage but please carry on.

MR CHALMERS: Now, in the second last paragraph you say, you say As a consequence you are advised that you are not able to attend the Christmas party or any authorised Council functions. Do you see that?---Yes, I do.

So you not only say that he can't come to the Christmas party, you're saying that he can't come to any authorised Council functions?---That's right.

20 So you're basically banning him from not only the Christmas party but from Council functions generally?---Yes.

And do you say that's consistent with the fear that, that you say was the basis for creating this letter, that, that he could be assaulted or hurt by other workers, do you say that's consistent with that?---Yes.

But those Council functions don't necessarily involve other workers?---I'm sorry.

30 Those, those Council functions could have a whole lot of, could be a whole type of functions, myriad of functions. You're just banning him completely from Council functions full stop. You see, what I'm going to put to you in relation to this letter and the reason that he was banned from the Christmas party was that this was consistent with Mr Romano's approach that he just wanted to completely isolate Mr Issa away from the Council?---That's not true. In, in particular, in regard to this letter that's not true because Mr Romano didn't know about this until after I'd advised him, after the fact.

40 Yeah but he'd, but you've, you've already given evidence that Mr Romano advised you that he didn't want Mr Issa around the office?---Yes.

Yes, I seek to tender that letter and I've got a number of, I've got a number of copies of that.

ASSISTANT COMMISSIONER: Well, I'll make one of the copies the Exhibit. You can have the original back. We don't need that. Thanks. Yes, well, that will be 187.

#EXHIBIT 187 - COPY OF LETTER FROM MR PETER MACKLIN TO AMMAR ISSA (UNDATED) – ATTENDANCE AT THE DEPOT STAFF CHRISTMAS PARTY

MR CHALMERS: Thank you.

ASSISTANT COMMISSIONER: Mr Macklin who raised the issue that there were no longer any light duties for Mr Issa? Who first raised that issue?--Mr Thinesh from, from my recollection. There was a meeting that I had with Mr Thinesh and I think - - -

Where's he from?--Sorry?

What area is he?--He's an engineer.

Right?--And Mr Azer and myself had a meeting to discuss the suitable duties that Mr Issa was performing. And Mr Thinesh said to me he had, he was struggling to find any more work for him. That the project that he was working on had, had wound up.

All right. And when did you speak to Mr, you spoke to Fred then did you? --Yes.

And Mr Azer together in my office.

At the same meeting or after, after it was first raised by Mr Thinesh or (not transcribable)?--Yes. I think Mr Thinesh had mentioned to me a couple of times that the work, that the work that he was providing had, had started to, to, to dry up. So I organised a meeting with the director and Mr Thinesh to discuss the suitable duties.

So you organised the meeting to discuss that?--Yes. It's my role to do that, to make sure, to monitor suitable duties programmes.

All right. Thank you for that. Yes, well, I don't think anyone else wants to question at this time.

MR LEGGAT: Yes, I want to.

ASSISTANT COMMISSIONER: You do, Mr Leggat. All right.

MR LEGGAT: Mr Macklin, I want to deal with the topic of Mr Becerra's employment. Was the selection process for the employment of Mr Becerra in 2007 something of a charade because his employment was a foregone conclusion?--No, not to my knowledge.

Well, why do you say that? What makes you think it was bonafide?

---Because it was a, it was a normal recruitment process as far as I was concerned. I'd never heard of Mr Becerra before then. The recruitment process was one that we would normally follow. I had been, not, not been told by anyone that he was the preferred candidate. I went and - - -

(not transcribable)?---Positive. I went in the interview, to interview two candidates. And Mr Becerra, in my mind clearly was the best candidate because he had all this experience in, in the project that, that Council had been, was undergoing and I thought well, that makes him a great candidate.

10

Was any pressure put on you to select Mr Becerra?---No.

Had you heard any rumour around the traps that, that no matter what you said, Mr Becerra was going to be appointed anyway?---No.

Thank you.

ASSISTANT COMMISSIONER: Yes, Mr Leggat. Mr Eurell.

20 MR EURELL: Further to Mr Leggat's questions, that, that included Mr Hullick? Mr Hullick had never said to you it was a foregone conclusion? ---No.

You gave some evidence earlier to senior counsel assisting that it wasn't your understanding that Mr Becerra was put on for the sole purpose of dealing with the civic precinct project. Do you recall that?---Yes.

It's possible isn't it that you, although you had that impression that you could mistaken?---No.

30

Do you recall being at an executive meeting of 2 May, 2007? You had many of them so it's probably a difficult question to answer. Can I show you this document?---Yes.

Do you accept that that's a record of the meeting that took place between the executive on 2 May, 2007?---Yes.

And do you see there that you're present at that meeting?---Yes.

40 And do you see there that Mr Dencker is present at that meeting?---Yes.

And do you see that Mr Hullick is absent from that meeting?---Yes.

Can you go to general business, please. Turn over the page, number 5. And do you see that the first item discussed at that meeting under 5.1 was the civic precinct?---Mmm.

And do you see there that the first thing discussed at that meeting regarding the civic precinct was the appointment of Mr Becerra as the principal architect for the civic precinct project?---In the general business, civic precinct.

Is the first item discussed and the first matter discussed within that particular agenda item, is that Mr Becerra was put on for the purpose of dealing, for the purpose of being the architect to deal with the civic precinct project?---That's right.

10

Do you accept that?---Yes.

And so do you now accept that you were mistaken in your understanding of the appointment of Mr Becerra?

ASSISTANT COMMISSIONER: Well, I'm sorry, whatever that says, the actual letter of appointment said primarily. I don't really think it's fair to put it to him in that way, just because the minutes have something recorded in them.

20

MR EURELL: Except to say this, Commissioner. This is a document that records a conversation informing the document you've just referred to which is the employment contract. And the employment contract has in it some terms which are unclear, specifically one that talks about the project. Now to understand that document - - -

ASSISTANT COMMISSIONER: Isn't it after the employment contract? Or am I mistaken?

30 MR EURELL: I don't know that - - -

ASSISTANT COMMISSIONER: And also I don't know that the minutes of a meeting informed the formation of the contract at all, or the letter of offer of employment.

MR EURELL: I think it must follow that a conversation about (not transcribable) of Mr Becerra's employment has to be very clear. The employment contract in the circumstances where he talks about the project - - -

40

MS RONALDS: With the greatest respect, sir, cast long bows and (not transcribable) the next category is. This meeting is, I've not seen this document, it's not been provided to me before despite my request for it to be provided.

MR EURELL: I only got it thirty minutes before this.

MS RONALDS: But the contract was signed in April, this is a meeting in May.

ASSISTANT COMMISSIONER: That's it. I mean - - -

MS RONALDS: It can't possibly be - - -

10 ASSISTANT COMMISSIONER: - - - the terms of employment were entered in April, '07. I don't see how anything said at this meeting somehow then informs what was in that letter.

MS McDONALD: Commissioner, can I support my, my friend in this. There is certainly some, a lack of clarity in relation to what the employment contract entailed and whether, whether it went beyond the civic precinct project or not. Any other document, in my submission, that if some assistance to the interpretation of that contract and, and I would agree that some minutes of a meeting of the executive would tend to assist in that process. And I think that's what my friend set to do, is to put some further evidence to assist in the interpretation.

20

ASSISTANT COMMISSIONER: As I understand it it's just the heading of an item isn't it? If there was any (not transcribable) willing to ask the witness about that. Yes. This just says Albert Becerra has joined Council as principal architect/civic precinct project. You know, I don't see how that, some minute taker has in shorthand put down what was discussed. I mean you're welcome to ask the witness further about his memory of what was discussed there.

30 MR EURELL: I can indicate, Commissioner, that - - -

ASSISTANT COMMISSIONER: Well, your client wasn't at this meeting was he?

MR EURELL: No, he wasn't.

ASSISTANT COMMISSIONER: Well - - -

40 MR EURELL: But, but can I, but he has already given evidence that he had read minutes after these meetings and this, these types records informed everything that my client did post this meeting, effectively. So that's why this is so, so important. And what I was about to say is, and it's an apology to senior counsel assisting, I only got this document ten minutes before I walked into the Commission. I'm arranging for copies to be faxed over. I have made an inquiry and I understand that the minutes of executive meetings aren't in evidence yet.

ASSISTANT COMMISSIONER: Well, I would've thought we'd asked for any documents that Council had about Mr Becerra's appointment. I don't know how broad the notice was. In any case - - -

MR EURELL: I'm seeking to rectify it and I'll come to these questions.

ASSISTANT COMMISSIONER: Yes. All right.

10 MR EURELL: Thank you. Having read that minute can you assist us further now with understanding anything about Mr Becerra's appointment and the scope of his appointment as at April/May, 2007?---No, I can't. My involvement was on the recruitment panel.

Yes.---My understanding was that Mr Becerra was an employee of Council and his principle role was an architect.

Yes. Do you agree that there was some confusion surrounding the appointment of Mr Becerra generally in the executive at Council?---No.

20 You weren't the only person giving instructions to Maddocks about the mechanisms by which Mr Becerra would join Council, were you?---I think, yes I think Les also had some role in that.

And Mr Romano?---I'm not aware of that.

Were you present when Mr Baird gave evidence regarding the invoices for legal work performed at about the time contracts were being drafted for Mr Becerra's appointment?---You mean in this, in this hearing?

30 Yes.---I was here for part of Mr Baird's testimony, evidence but I can't - - -

And do you recall me asking him questions about items on that bill that included contact that the lawyers had had with Mr Romano and yourself at the time that contracts were being drafted?---No.

Do you recall having any conversations with - sorry, just a moment - with the lawyers at Maddocks, do you have any recollection of speaking with them?---About Mr Becerra's contract of employment?

40 Yes.---Yes.

You do?---Yes.

When? At about what time?---When - - -

Let's start with whether he had contact with them at all first. Do you remember having contact with them?---Yes, I, I - - -

Can you say when the first time you had contact with them was?---I can't recall exactly but it was aroundabout the time and I think Ms Ronalds took me through a note from Lindy Richardson the other day.

Yes.---And that was when I would have first had contact with Maddocks about that matter.

Well, it precipitated the drafting of the 2007 contract, did it not?---Yes.

10 Yes. Do you remember ever being part of a conversation with the lawyers or in fact with any member of the executive in which the pros and cons of appointing Mr Becerra as a contractor for services or an employee was discussed and/or decided?---Yes, at, I can recall a discussion a meeting that I referred to earlier when I was being questions by Ms Ronalds about the, Mr Romano advising me that he wanted, that he wanted Mr Becerra employed, the status of his employment changed.

As a contractor?---Yes.

20 And that was, I think you indicated in February '09, is that right?---I can't be for sure, I think it was in 09, I can't remember the exact time.

And that was the first, is that the only memory you have of explicitly discussing whether or not Mr Becerra should be an employee or a contractor?---Yes.

And do you agree that that was, how would you describe the, it was a rather chaotic environment wasn't it at Council at about that time, you had a number of things going on including the ICAC investigation, matters
30 involving Mr Cummins etc?---Yes.

And do you recall whether the decision, were you given any information about the decision Mr Romano had made to make Mr Becerra a contractor as opposed to an employee?---Sorry, could you ask that again.

Did Mr Romano ever tell you why he wanted him as a contractor rather than an employee?---I can't, no, no, not to my recollection.

40 But it was clear to you, wasn't it, that that, that Mr Romano at that point in time said that, it was indicated to you that he had thought Mr Becerra was a contractor throughout his tenure at Council?---Yes, in the email that he, that the email that he responded to me on, yes.

And your evidence at this commission that the relationship was one of employment, is that based on your own clear recollection or do you agree that it is a product of having read the contract that says employment and just concluding that that was what was intended from the outset?---No, it was always intended from the outset that he was an employee.

In your mind?---Yes.

But certainly you agree that as, as at around February 2007 it had never been a topic of discussion or a settled decision by the executive at Council?
---(NO AUDIBLE REPLY)

MS McGLINCHEY: Well, can I just say he's not really in a position, Mr Macklin doesn't attend every executive meeting, he's not in a position to say what the understanding of the executive on the whole was.

10

MR EURELL: I'll add then, to your knowledge?---No.

Thank you. Thank you Commissioner.

ASSISTANT COMMISSIONER: Yes.

MS McDONALD: I have some questions, very briefly. Could the witness please, perhaps that, I'm not sure what documents he has, some kind of pen, but may be some of them should be returned, I'm not sure whether all of them have been tendered.

20

MR EURELL: I'm arranging for, that one's marked and a copy was given to me 10 minutes before I came in, as I said. I'm arranging for unmarked copies of those minutes and hopefully other ones to be faxed to the Commission as we speak. So if it's suitable to the Commission, after I've had an opportunity to give them to Senior Counsel Assisting, I'll seek to tender them.

ASSISTANT COMMISSIONER: We'll have to take them as their given and MFI number. Can you take those minutes and we'll mark them MFI 5.

30

**#MFI 5 – BURWOOD COUNCIL EXECUTIVE TEAM MEETING
MINUTES DATED 2 MAY 2007**

MS McDONALD: Yes. Could the witness please be shown Exhibit 174 and 118 please. 174 and 118. Now Mr Macklin, Exhibit 174 is an email initially with an attachment and you'll see down the bottom of the first page, it appears to be an email from you to Tania Kapell of Recruitment Edge attaching a letter of offer to Mr Becerra. Do you agree with that?---That's right, yes.

40

And do you remember sending that email?---No, I don't remember sending it, do I?

Can you flip over to the attachment which is a draft of the, the contract and as I understand your evidence that was given when Learned Counsel

Assisting was questioning you last week, last week the other day, I've lost track of time, whenever you were here last, you were questioned about receiving a draft from Maddocks.---Yes. And that there had been some changes made in the, from that document to the document that was ultimately signed and I'll take you to that in a moment.---That's right.

But nevertheless, does this seem to be the draft that you received from Maddocks?---It appears to be.

10 And you'll see if you now have a look at Exhibit 118, now this is the final version of the contract that was signed by Mr Becerra.---That's right.

And if you perhaps just open to the first page, you can, we can see straightaway that there is a difference under duties and responsibilities, so if you compare the two contracts and look at duties and responsibilities you'll see that the draft has your duties and responsibilities are outlined in the attachment whereas the final has no reference to an attachment but rather says, your duties and responsibilities will be explained to you by Les Hullick and me at another time. Do you agree with that?---Yes.

20

And your evidence as I understand it is that you have no recollection of how these changes came to be. Is that still your evidence?---When I was here last I think my, my, I was referring to the hours of work.

Yes, you were indeed and there are changes to that as well?---Yeah.

There are a number of changes I'm simply pointing out the one in duties and responsibilities as an example. But there were a number of changes made from this draft that you apparently have sent on to Recruitment Edge and which is then on-forwarded to Mr Becerra - - -?---That's right.

30

- - - and to the one that is the final signed version?---I, I can vaguely recall making that change because from my, to the best of my recollection, it's 2007, that Les and the General Manager would explain the duties to Mr Becerra.

I see. So it's possible in fact that these changes were made by you?---Yes, that change, yes.

40 Yes. And you'd agree with me that your recollection generally of all of these contracts including the ones when we go right up to 2009 is relatively shaky about who exactly did what - - -?---Yes.

- - - in terms of drafting. Would that be true?---Well, except in 2008. I had no involvement at all.

You had no involvement at all in 2008. You had some involvement along with Maddocks in 2007?---Yes. Yes.

And you had some involvement in 2009 but not a lot?---Not a lot, no.

Could you turn to the hours of work in the draft? So you'd agree with me that the draft was the document certainly that you had seen - - -?---Yes.

10 - - - and you on-forward it to Recruitment Edge. Under hours of work you'll see it says, "Your ordinary working hours will be the hours reasonably required to effectively and efficiently manage the project - - -?---Yes.

- - - up to a weekly maximum of 38 hours plus reasonable additional hours averaged over the term?---Yes.

20 Now, can you please as the HR manager explain to me exactly what that means?---The position we had taken with positions of a senior nature in the organisation is that strictly speaking they really only work a 35 or a 38 hour week but, but there are requirements quite often where you'd work longer hours and not get paid. You would not put in an overtime claim for working an extra hour or two hours. So that's what that is attempting to explain. There are times when you will need to work more than 38 or 35 hours a week.

Because effectively you're a member of the senior staff although I understand that Mr Becerra wasn't officially a senior staff member at that - - -?---Not under the terms of the Local Government Act, no.

Yes. But nevertheless he was a professional on the staff - - -?---Yes.

30 - - - and therefore he was expected to work whatever was required for the job?---That was an expectation from the General Manager of most people who were in management roles.

I see. And that really is to cover, well, in fact the word use there is plus reasonable additional hours?---Yes.

So it's countenance that there's a possibility that unreasonable hours are not included in the standard hours of work?---Yes, you could say that, yes.

40 Could you give me an idea of what you would consider to be unreasonable hours?---In, with Mr Becerra's position, no, but - - -

If Mr Becerra was doing - you've become aware of the additional invoices obviously that are the subject of part of this inquiry?---Yes.

If some of that work was being done well late into the night and early hours of the morning because it was additional to the civic precinct project work

would you consider that may well be outside of the scope of reasonable additional hours?---Yes.

Now, did you hear Mr Hullick give evidence to this inquiry or were you not here?---I heard, yes, I think I heard most of it.

10 And the gist of Mr Hullick's evidence as I recollect it is effectively he understood that Mr Becerra right from the beginning was on a contract which was just to do work for the civic precinct project and that differs to what your and Mr Dencker's recollection of it was?---That's right.

Now, Mr Hullick was Mr Becerra's supervisor. Is that right?---That's right.

So he was the one most directly working with Mr Becerra?---That's right.

20 So which (not transcribable) the possibility that there had been a misunderstanding from the very beginning as to the nature of Mr Becerra contract involving the various people, Mr Hullick, yourself, Mr Becerra?
---Yes.

You'd agree with that?---Yes.

And tell me just finally did Mr Becerra play any part in the discussions in 2009 about the changing of his engagement by the Council from an employee to a contractor? Can you remember him being involved in any of that?---No.

30 Was he cc'd into any of the correspondence involving HWL Ebsworth about the legal advice or any of that correspondence?---I don't know. I, I couldn't tell you. I don't know.

You're not aware that he was?---No.

I have nothing further.

ASSISTANT COMMISSIONER: Thank you. All right. Mr Blake?

MR BLAKE: I take it you have Exhibit 145 (not transcribable)?---No.

40 Mr Macklin, please turn to page 25 and 26. (not transcribable) you had no role in drawing the terms of this (not transcribable)?---My recollection in my evidence was that I had some, I played a part in the, in the, in the ad but I would've passed it on to the General Manager and the Director for their approval.

Thank you. So you had seen the ad before the interview?---Yes.

And so far as your own involvement in the interview were you proceeding on the basis that the nature and scope of the role of principal architect was described in the advertisement?---Yes.

Now, can you please go to page 24 which is the directive memorandum. I think you've already said that that (not transcribable) your signature?--- That's right.

10 And that accurately set out in your mind the background, budget implications, (not transcribable) terms and the recommendation?---Yes.

And because your role was it not following the approval by Mr Romano contained in the directive memorandum that you at least had a role in drawing up the (not transcribable) effect to the directive memorandum? ---Yes.

And you had discussions with Maddocks who gave instructions?---Yes.

20 And have you sought in giving instructions to give effect to what was set out in the briefing memorandum, is that correct?---Yes.

So you're aware that, as is completely normal, that the legal document to give effect to the instructions was much longer than a single page?---Yes.

30 If the witness might (not transcribable) that and return that (not transcribable) Mr Macklin. Could Mr Macklin be shown Exhibit 109 please. You'll see within Exhibit 109 there are a few tax invoices (not transcribable) the second one dated 13 April, 2007 and can I direct you to pages 2 and 3 and you'll see that it sets out Date, Professional, Narrative and hours. You can see that?---No, I haven't so can you take me to it again, I'm sorry.

All right, I'm going to repeat that for you. Do you have the tax invoice dated 13 April, 2007?---Yes.

Would you go to page 2 and you'll see, headed a Schedule of Professional Fees and there are four heading to the four columns, Date, Professional, Narrative and Hours?---Yes.

40 Yes. Can I direct your attention just down towards the bottom of that page and you'll see on 11 April (not transcribable) Professional there are two telephone attendances on you. Do you see that?---Yes.

And immediately, well, not immediately below but about the second, the 12 April, a further telephone attendance on you by Lindy Richardson? ---Yes.

(not transcribable) over the page, the second entry, another telephone attendance on 12 April from Lindy Richardson?---Yes.

And those attendance were regarding the drawing up of the contract?---It appears to be, yes.

Now, there was an issue I suggest relating to whether this would be a term contract or a temporary contract. Do you recall that?---No, I can't recall that, no.

10

I'll just show you this email. Can you see (not transcribable) you read I think we've seen the bottom one, 12 April (not transcribable) you'll see above that a letter from Mr Romano to Lindy Richardson copied to Mr Baird referring to clause 29 of the contract and then there is a email from Lindy Richardson to Mr Romano, copied to Mr Baird and yourself?---Yes.

You see the second paragraph in the top email that Ms Richardson says she has spoken to Peter Macklin - - -?---Yes.

20

- - - and then included the words temporary contract and you'll see there's a commentary that if challenged certain arguments would be available to Council?---Yes.

And can you now recall having that discussion with Ms Richardson?---No, I can't recall it, no.

You don't doubt it happened, do you?---No.

I tender that email.

30

ASSISTANT COMMISSIONER: Yes. That will be Exhibit 188.

#EXHIBIT 188 - EMAILS COMMENCING 12 APRIL 2007 FROM LINDSAY RICHARDSON TO LES HULLICK, PAT ROMANO AND PETER MACKLIN RE IN-HOUSE PRINCIPAL ARCHITECT

40

MR BLAKE: Can Mr Macklin be shown Exhibit 174, please. Mr Macklin, you were just shown this a moment ago but this (not transcribable) from you sending to Tania Kapell enclosing a letter of offer for Mr Becerra?--- Yes, yes.

At the time that was sent it was your understanding that that would be conveyed to Mr Becerra by - - -?---That's right.

- - - Recruitment Edge for signature or consideration and signature if he agreed?---That's right, yes.

And had you, had you read the offer of fixed term temporary employment, you had looked at that and considered its purpose?---Yes.

And when you undertook that process of consideration did you regard it as giving effect to the nature and scope of the, a position of principal architect as set out in the briefing memorandum?---I, can you just explain, ask me that question again, I'm sorry.

10 Let me just break it down. I think you (not transcribable) you considered the briefing memorandum that set out the nature and scope of the role of principal architect?---That's right.

And you then gave instructions to Maddocks to give an opinion as to the nature and scope of that position as described in the briefing memorandum? ---That's right.

20 And did you regard the offer of fixed term temporary employment as giving effect to the nature and scope of the position of principal architect as described in the briefing memorandum?---Yes.

Nothing further, Commissioner.

ASSISTANT COMMISSIONER: Yes, thank you.

MS McGLINCHEY: Commissioner, I note this morning that Mr Macklin will be coming back, I might reserve my questions for him at that time.

30 MR BLAKE: Commissioner, I'm just told that another document has mysteriously emerged, not by me, but I'm just wondering just in case it, to keep the issue discreet, if not it can be perhaps morning tea now and I'll consider this document and (not transcribable) there could be one or two questions about it for Mr Macklin.

ASSISTANT COMMISSIONER: Yes, all right. We'll adjourn now for 15 minutes.

SHORT ADJOURNMENT

[11.28am]

40

ASSISTANT COMMISSIONER: Thank you. Please be seated.

MS RONALDS: Commissioner, I understand that Mr Blake has no further questions for Mr Macklin. And I don't think anyone else does at this stage.

MR EURELL: I just want to ask one more.

MS RONALDS: Can it wait until next time?

MR EURELL: Oh, yeah, all right. No, it can, it can.

MS RONALDS: I understand Mr Leggat has something to say to you.

ASSISTANT COMMISSIONER: Yes.

10 MR LEGGAT: Commissioner, it's become apparent that the manner in which Council has responded to section 22 notices has been inadequate and I apologise for that. Council takes its obligation pursuant to section 22 very seriously. I'm instructed that Mr Hullick has been the person appointed by Council to deal with the production of documents pursuant to section 22. The Acting General Manager, Mr Dencker has now taken over that role from Mr Hullick and has put in place a process whereby Council's response to every section 22 notice will be revisited and hopefully the omissions will be rectified as soon as possible. And I apologise for that having occurred.

20 ASSISTANT COMMISSIONER: All right. Well, yes, obviously the sooner the better because if there are other relevant documents, it's important to see them before we finish.

MS RONALDS: Indeed. And Commissioner, I know, I thank Mr Leggat for that. It's a matter he and I discussed obviously away from here. But it is of concern when individual witnesses, now Mr Hullick and Mr Romano produce documents that should've been produced under the section 22 notices, that somehow seem to be in their possession but aren't, haven't been produced, when they're clearly covered by the terms of the section 22 notices. So it's a matter of great concern to me that that hasn't happened because they are choosing what to produce, which may or may not be in their interests and what we're not getting we don't know. So we're very concerned about it at the moment.

30 ASSISTANT COMMISSIONER: All right. Well, thank you. Thank you for that Mr Leggat.

MR EURELL: Commissioner, can I just indicate and apologise for producing these documents at late notice, but can I just indicate for the record that the production of documents that have been produced on Mr Hullick's behalf have been a product of very specific requests by me for specific documents that I can see are arising as a result of reading the transcripts and hearing from the witnesses. I don't know what the section 22 notices say, but I don't imagine they are as specific as the instructions I'm giving to Mr Hullick. So just, before any criticism is made of him individually, can I, can I indicate that that's why they're coming up as they are at the moment. And can I also indicate that as soon as I get them I will endeavour to show them to senior counsel assisting.

ASSISTANT COMMISSIONER: Yes. Thank you, Mr Eurell.

MS RONALDS: I recall Mr Cummins.

ASSISTANT COMMISSIONER: Yes. Mr Cummins, I'll just remind you you are still under oath and the section 38 declaration still applies to your evidence.

ASSISTANT COMMISSIONER: Were you finished with Mr Cummins?

MS RONALDS: Yes. Not me - - -

ASSISTANT COMMISSIONER: I think it was Mr Blake.

10 MR BLAKE: I have some questions.

ASSISTANT COMMISSIONER: Yes.

MR BLAKE: Can Mr Cummins be shown Exhibit 155, please. Mr Cummins, can you go to page 4 and look through to page 15?---Yes.

Familiarise yourself with those pages. That's your contract of employment, all of those pages when you applied for the position of director of governance and corporate services?---Yes.

20

And on pages 16 and 17, that appears to be an incomplete document in that we go from, you'll see at the bottom of page 16, section 4 and the next section over the page is section 6. It appears to be incomplete?---Yes.

And would it be correct to say that pages 10 through to 13 are a complete position description?---Yes.

30

And if you go to page 4, you'll see that under the heading, position on commencement, the second paragraph dealt with your duties primarily involving management of the Council's governance and corporate functions as set out in the position description?---Yes.

That was your understanding of the role that you had on May, early May, 2007?---It's my understanding of what this employment agreement says.

40

Yes. And that reflected your role as in practice?---It was obviously the practice of Mr Romano to be very flexible in what roles the staff did, so as far as the employment agreement goes, I just (not transcribable) employment agreement, it's quite clear that there was often times when other work and other focuses came up, yes.

All right. Thank you. And if you go over to page 5 under the heading confidential information?---Yes.

You understood that other than what is required by law you were banned under your contract not to disclose confidential information of the Council to any person?---Yes, I see that.

And you understood that at all times during, since May, 2007?---I didn't really have a need to look at that carefully until February, 2009. But you have understood that obligation haven't you? At all times since May, 2007?---In general terms, yes.

If you go over the page to page 6?---Yes.

10 You'll see the heading Council Policies and Procedures and if you just look at the first paragraph for the moment. You understood in May, 2007 that you were bound by the Council's rules, policies and procedures enforced from time to time?---Yes.

And you sought to do that. Is that the case?---Yes.

And you understood, I take it, even though those rules, polices and procedures weren't set out in the contract, you were nonetheless bound to abide by them?---Yes.

20 And if you go to page 8 you, and look at the heading, Return of Company Property, a strange heading, one I think for a Council, but you understood I take it that if requested by the Council you were bound to return to it all keys, papers, manuals, equipment and any other property belonging to the Council in your possession or control?---Yes.

And can you to page 18, please. From time to time there had been sub-delegations by the General Manager to you of functions or powers conferred upon him?---Yes.

30 And pages 18 and 19 set out the sub-delegations as at, it appears to be 21 May, 2007?---I signed that on 26 November, '07, so - - -

Yes, I know it's signed some considerable time later, but the date of the document is 21 May, 2007. On top of page 18?---The date on the document is 21 May, '07.

Yes. But it was signed by you some six months later?---That's, that seems to be the case, yes.

40 And was that the document enforced in terms of your sub-delegations up to and including the time you went on sick leave in February, 2009?---I believe so. I couldn't tell you definitely. But it's probably what that is, yes.

And do you agree that in carrying out your duties as the director of governance and corporate services, you were subject to direction by the general manager?---Most definitely.

That Exhibit can be returned. Can Mr Cummins be shown Exhibit 121, please. Mr Cummins, you'll see that is a statement dated 13 November and

towards the back of the statement there is the internal reporting policy/protective disclosures act, 1994. Can you please locate that. That document appears to be about fifteen pages from the end of the document?
---Yes.

I think you said yesterday that you were involved in the preparation of this document?---I'm not sure how much I was involved but yeah, I would have been involved in in some, in some way, yes.

10 And you were – and certainly at the time it was adopted, in about May 2008, you would have had pause to read it?---The only protected disclosure I think that came around that time was under the old policy so, it wasn't until February 09 that there was another disclosure that could have fallen into this, so I probably wouldn't have looked at it between that time but Feb 09 I would have looked at it at some point.

I take it, if you go to page 2 it was your understanding, if you look at this section 1.0 that Burwood Council didn't tolerate corrupt conduct, mal-administration or serious and substantial waste of public money.---It says that in the policy.
20

Yes. And your understanding was that the Council operated under that policy?

ASSISTANT COMMISSIONER: I don't really think that's a fair question. It's one thing to put it in a policy I mean, how would he know how the Council was operating.

MR BLAKE: I'm just asking about his understanding.
30

ASSISTANT COMMISSIONER: All right.

THE WITNESS: Answer?

MR BLAKE: Yes.---Well, Burwood Council it seems that there are referring to Council as in the executive members of Council, the Councillors, I don't know what was in their minds whether they did tolerate it or not, you'd have to ask them.

40 And Mr Cummins, you were in general terms familiar with the concepts of corrupt conduct and mal-administration that are defined in Section 4. ---Generally, yes, not specifically regarding the legal definitions up until February but I had a general understanding of what corruption was, yes.

Yes. And mal-administration as well?---Yes.

And with regards to page 6, your understanding from the time that this policy was adopted that disclosures that were protected under the Protected

Disclosures Act, could be made either under an internal reporting system or to the general manager or to an investigating authority if they showed or tendered to show corruption, mal-administration or substantial waste of public money and were made voluntarily?---Sorry, the last, I missed the last part of it.

And were made voluntarily?---That's correct, yes.

10 Yes. And you understood that the investigating authorities included the Independent Commission Against Corruption for corrupt conduct?---Yes.

And included the Ombudsman for mal-administration?---Yes.

20 And you were asked some questions yesterday, I think, about page 7 under, I'm looking at Section 6.0. Under the internal reporting system disclosures could be made to any one of the four persons named there, disclosure co-ordinator, you as the Director of Governance, Corporate and Governance Services, the General Manager or the Mayor.---No, there's also, it says there on point 2, and other directors, so that would have been covered as Ian Dencker.

Yes, thank you.---And Les Hullick.

Yes. The duties of the nominated disclosure officer were set out in Section 7.2.---Yes, I see that.

30 And that, that's set out at your, it's your understanding it's consistent with the responsibilities set out in paragraphs a to g.---I am not, I wasn't completely familiar with that at time in February, no.

You've had occasion to look at it since.---Yes.

40 But in general terms, you understood that the disclosure officer was to receive a complaint, put it in writing, and pass it on to the disclosure co-ordinator for dealing with the complaint.---Not at that time no, because the only other one we've done at that stage was where I was actually the disclosure officer so it seems that that had changed between the old policy and the new one so, I guess I wasn't quite sure, certainly, on 5 February as to how that, that should progress, so, you know, I did my best at the time.

And Section 7.3 set out the responsibilities of the disclosure co-ordinator?---Yes, that's right.

And at the time, or at all relevant times, from May 2008 up until February of 2009 that was Pina Viney?---I now know that that's the case, yes, Pina Viney is the disclosure co-ordinator, yes.

Yes, so you knew at the time, didn't you?---I knew by around the 9th, 5th February I was unsure as to who had, whether it was Pina or myself or who had those exact roles as to what each of us was to do but, it was Pina Viney who is the disclosure co-ordinator, yes.

In about February 2009 did you take steps to find out what your position was and what Pina Viney's position was in terms of this policy?--- Yes.

All right. And how did you find that out?---I looked at the policy.

10

I see. And do you agree with me that it was the responsibility, and I'm looking particular 7.3 of the disclosure co-ordinator to carry out or co-ordinate any internal investigation?---That's what it says in the policy.

And you, thank you. That can be returned. I'm wondering whether I can be helped as to whether the email, internet and email policy is otherwise in evidence yet.

MS RONALDS: Don't look at me.

20

MR BLAKE: I will proceed as if it's not, if it's an extra tree.

ASSISTANT COMMISSIONER: I think it is, I wouldn't know where.

MS RONALDS: I think it is.

ASSISTANT COMMISSIONER: It's, I can't remember whether it was put in but if you have another copy, you can show the witness that if you like.

30

MR BLAKE: Just for the sake of the transcript, it was by the book. ---There's two policy, I think one was before 1 Jan 09 and then one after.

ASSISTANT COMMISSIONER: While you're looking for that, can I just ask Mr Macklin something. In respect of 7.3 I note that the disclosure co-ordinator is subject to the direction of the general manager and reports to the general manager under this particular section on finding, I mean that would not always be appropriate would it?---I think in this instance, that's why I was so keen to get another general manager to act, so that's why Ian Dencker was appointed so, and I think the email evidence shows that, that

40

that's what did happen, that Pina Viney was to report to Ian Dencker on the matter.

Thank you.

MR BLAKE: Now, can you look at - now, Mr Cummins, you were involved in preparing this policy. Is that correct?---Yes.

And it dealt specifically with internet and emails. Is that correct?---Yes.

And the position with respect to emails I think is recorded on page 2 that personal usage was, of the Council email systems was restricted to reasonable, appropriate and infrequent use only?---That's correct.

And inappropriate emails which were prohibited included matters like inappropriate language and inappropriate topics as set out in the second paragraph. Do you agree with that?---Sorry, what page was that on?

10 On page 2, the second paragraph under Email?---Yes, I see that, yes.

Otherwise what was, what constituted a reasonable use was not defined in the policy?---So it's predominantly for business purposes so businesses of the Council that's - - -

Yes. But within that framework what was reasonable was not defined. Do you agree with that?---I'd agree with that, yes.

20 And within that framework infrequent use what was constituted by infrequent use was not defined was it?---No.

When you say no you're agreeing with me it wasn't defined?---Sorry, yes, I am agreeing with you.

30 Thank you. If you go over to page 4 you'll see that under the heading Internet and Email Monitoring the first paragraph states that the use of both email and internet, sorry, Council monitors the use of both email and internet on a continuous and ongoing basis in accordance with the Workplace Surveillance Act 2005?---I see that, yes.

What requirements or conditions were specified in the Workplace Relations Act?---In the Workplace Surveillance Act?

Sorry, the Workplace Surveillance Act (not transcribable) jurisdiction?---It's a long time ago but I think the main thing is that staff are notified that the surveillance is happening and for what purpose it's happening, various things like that.

40 All right. And I take it that at the time this policy was adopted on 17 December, 2009 you had familiarised yourself with the requirements of the Workplace Surveillance Act?---It's quite a large piece of legislation so I think I would've looked at certainly the parts related to internet and email monitoring.

Yes. And you'll see on the first page the policy while adopted on 17 December, 2008 only became effective as of 1 January, 2009?---That's correct. That's 14 days after the date of adoption which is the timeframe

required under the Workplace Surveillance Act for notification to be given to staff.

Yes. Does it accord with your recollection that the requirements under Part 2 of the Workplace Surveillance Act for computer surveillance included that the surveillance is carried out in accordance with the policy of the employer on computer surveillance of the employees at work?---It's not familiar to me but it sounds, if you say it's there it's there.

10 And you were familiar with that at the time?---I was familiar with this policy at the time.

Yes. And you're familiar with that particular requirement under the Workplace Surveillance Act I'd suggest?---Well, my understanding of that, that element of the legislation is that the policy itself is our use and monitoring of email and internet policy.

Yes. And under the Act the surveillance was required to be carried out in accordance with the policy. You understood that at the time didn't you?
20 ---With, yes.

And you understood I take it that if not carried out in accordance with the policy there would be an offence both by any corporation and any individual concerned in the management of the corporation?---That's my understanding.

Yes. Commissioner, I seek to tender that.

30 ASSISTANT COMMISSIONER: The policy?

MR BLAKE: Policy.

ASSISTANT COMMISSIONER: Have we established it's not already - - -

MS RONALDS: It's not. Apparently, I've been advised I showed it to a witness but I neglected to tender it.

MR BLAKE: Okay.

40 ASSISTANT COMMISSIONER: All right. Well, that will be - - -

MS RONALDS: It floated around but it didn't land.

MR BLAKE: Right.

ASSISTANT COMMISSIONER: And as I understand it there wasn't an earlier internet policy. Was this the first time it was formalised?---This is the first time internet came into it. The previous policy that was enforced up

to 31 December, '08 just referred to emails. So the actual impetus of this policy was to make sure that internet usage was in. So the emails were, email policy was already covered but we wanted it in one policy so instead of having two we updated the email and made it into one policy so it's internet and email.

All right. Well, this policy will be Exhibit 189.

10 **#EXHIBIT 189 - BURWOOD COUNCIL 'USE AND MONITORING OF EMAIL AND INTERNET POLICY' – EFFECTIVE AS OF 1 JANUARY 2009**

MR BLAKE: Now, Mr Cummins, if you turn over a few pages and Exhibit 121 which - it's returned has it? If Mr Cummins could be shown that exhibit. Towards the back, very close to the back there is a ten page letter from Harmers Workplace Lawyers dated 16 March, 2009 addressed to Mr Romano?---Yes.

20

Harmers were your lawyers?---Yes.

And the letter was written on your instructions?---It was written by Harmers on my behalf. My instructions at the time were that they act in my interests 'cause I was quite ill.

30

And you approved its contents?---Most of it. I gave them very liberal instruction as to what to be included because I wasn't in the mental state to make any decisions and my doctors had advised me that, for my lawyers to handle everything basically.

Right. I take it there's nothing in the document that doesn't accord with your instructions?---I'm not sure what you mean by instructions. The information within the letter is information that I gave my lawyers.

40

Right. But there's nothing you want to change in the letter because it's inaccurate or - - ?---No, it's, it's accurate, obviously I had concerns with, from my personal safety at the time so I was certainly worried about things that went in and didn't do on and there's certainly lots of things that aren't in there.

In paragraph 1.5 it sets out that you had become aware of dealings by Mr Romano at which you regarded as being unethical and/or corrupt as defined in the Independent Commission Against Corruption Act?---That's correct. That's what it says.

And do you agree with me that apart from what is set out in section 2 of the letter but for matters in sections 3 to 8 involved conduct that occurred before 5 February, 2009?---That's correct.

And the position is that prior to 5 February, 2009 that you had never made any allegation of corrupt conduct against Mr Romano?---Yes, I had.

10 Okay. When did you make any allegation of corrupt conduct by Mr Romano?---Well, I spoke to Mr Macklin and Mr Hullick about incidents that had occurred. We often, the senior staff often spoke about Mr Romano's behaviour and, and certainly a lot of these things, there was, there's nothing in this letter that Pina Viney didn't know about it, the Protected Disclosures Coordinator so I spoke to lots of people about this stuff.

You prior to 5 February you never sought to make a protected disclosure to the Mayor, did you?---To John Faker, no.

20 Or Ms Furneaux-Cook?---No.

And you never sought to make a protected disclosure to ICAC, did you?---I don't know what you mean by sought, sought to, I did not.

You did not?---I did not, no, I did not.

And you didn't make a protected disclosure to the Ombudsman, did you? ---No.

30 And the true position is that prior to 5 February, 2009 you had no belief that Mr Romano had engaged in corrupt conduct, did you?---Completely incorrect. I had lots of information to suggest he was corrupt but I had no or little evidence that could sustain any sort of a, an inquiry.

Well, why didn't you nonetheless make a protected disclosure, Mr Cummins?---I think it's pretty obvious with what's gone on in the last two weeks why I didn't do that. I was fearful.

Will you please answer my question?---I did. I said I was fearful.

40 Of whom?---Of Mr Romano and his cronies.

And who did you regard as his cronies?---Mr Baird, IPP, Bob Howe.

Anyone else?---The, some of the executive.

And who, which members of the executive were Mr Romano's cronies? ---Mr Macklin, Mr Hullick and to a certain extent Mr Dencker.

And another letter was sent to Mr Romano on 16 March, 2009, wasn't it?---I believe so, yes.

Yes. Mr Cummins, the first two pages are the second letter that was sent by Harmers to Mr Romano dated 16 March, 2009. Is that correct?---It appears to be, yes.

Well, you've got no doubt about it do you?---Well, I didn't, I didn't really look at it at the time so I take your word for it that it is.

10

And in your understanding they were delivered at the same time, weren't they?---No, I wasn't aware of that until I read that in Mr Romano's statement to WorkCover so, yeah, that's, that is disappointing if that happened.

And you were claiming or you were prepared to accept a repudiation to your contract if the Council paid you remuneration of two years of your normal remuneration and your legal fees?---No, at the time I was prepared to accept a significantly less amount than that but my lawyers advised that that the figure that should go in so it went in.

20

And you accept that this was sent on your instructions, don't you?---I approved it but, you know, I was advised that this letter should go out. I certainly didn't give any instructions that it should but I've advised that it should.

You didn't give any instructions it should. It was sent on your instructions, wasn't it, Mr Cummins?---Look, I'm, I'm, I don't, I'm not familiar with instructions. This is the first time I'd ever engaged a lawyer on any matter so instructions do you mean did I approve it, yes, I approved it, yes.

30

Thank you. And your intention was that if Burwood Council paid you a remuneration of 24 months and paid your legal fees you would withdraw the allegations against Mr Romano in the second letter, that was your intention, wasn't it?---Absolutely not.

And you'd agree with me that any, on the assumption that the two letters were received together any reasonable person would have understood that you were claiming as the price for withdrawing the allegations payment of two years' salary and payment of your legal fees. You'd agree with that, wouldn't you?---Absolutely not.

40

I tender that document, Commissioner.

ASSISTANT COMMISSIONER: Yes. The two page letter of 16 March from Harmers will be Exhibit 190.

**#EXHIBIT 190 - LETTER DATED 16 MARCH 2009 FROM
HARMERS WORKPLACE LAWYERS TO MR PAT ROMANO RE
ROBERT CUMMINS**

MR EKSTEIN: Does that include the second letter, Commissioner?

ASSISTANT COMMISSIONER: Well, no, I don't see the point of putting the second letter in again. We'll just make it the, the front letter.

10

MR EKSTEIN: Thank you, Commissioner.

MR BLAKE: Could that exhibit be returned and could Mr Cummins be given Exhibit 13 and 15.

Mr Cummins, can you please go to Exhibit 14, please?---Yes.

20 This contains a string of emails including one by you on the second page sent at 4.59pm in which you, to Mr Romano and copied to other members of the executive and Mr Macklin as well in which you recommended the issue of expenses connected with security equipment go to the Council on an independent file, do you recall that?---Yes, I do.

And following that email do you agree with me that you spoke to Mr Todd Neal of Maddocks about a draft advice which is Exhibit, I should also get you to look at 14, Exhibit 14. Can you recall speaking to Mr Todd Neal? ---Yes.

30 And you discussed the substance of the draft advice which is Exhibit 14, didn't you?---If this is the first draft advice, yes, that was the one that was discussed.

Yes, thank you. And then if you go to Exhibit 15, you passed on the revised advice to Mr Romano on 26 November. Do you agree with that?---Yes.

You'd agree with me that you do not express in the email any disagreement with the advice did you?---That's right. I've already given evidence on this earlier regarding that, yes.

40 So you agree with me that you didn't express any disagreement with the advice. Your answer is yes is it?---Yes.

Now can Mr Cummins be shown Exhibit 121, please. Your understanding as at 26 November was that Mr Romano knew - - -?---Sorry, what year?

2007, was that Mr Romano knew that you'd spoken to Mr Neal from Maddocks?---Well, I'm not sure. In my email back to him I say that I've been forwarded the advice. It was strange the advice came back to me. I

would've thought it would've went straight to Pat, so, I think that's sort outlined in my email. So that's why I asked him, so I'm not sure in his mind whether he'd spoken to Mr Neal, but - - -

Well, it says in the second paragraph, while Mr Neal has requested that (not transcribable) liaise directly with him, that's Mr Romano regarding (not transcribable)?---Yeah, no, he did that in his email He did that in his email. The pages missing, so that's what that refers to. Mr, when Mr Neal sent the email he said, you know, he was implying that I was to go back to him and I obviously hadn't. I thought in my mind that Pat wouldn't like that at the time, so that's why I sent that email to Pat.

And apart from the communication by email on 26 November, Exhibit 15, you didn't discuss the matter with Mr Romano on or after that date did you?---No.

And Mr Romano, you accept that Mr Romano wouldn't be known as at 26 November, that you still disagreed about this would he?---Of course he did.

20 You did nothing Mr Cummins to indicate your ongoing disagreement to Mr Romano did you?---I did not retract any of the other issues I had in the original email. So, if he had of thought that was happy, you know, he was wrong. Of course he knew I didn't care and that, and that came out obviously later on when he said I've been told it's wrong but I'm going to do it anyway. He still knew I had doubts about this project.

That's just an assumption you're making, Mr Cummins, isn't it?---No, it's a fact.

30 You certainly never conveyed your ongoing disagreement to Mr Romano did you?---No. After that I've been put firmly in my place and I was obviously very fearful of raising it again.

And the conversation in paragraph 40 of Exhibit 121, never took place did it?---I don't even have to look at it because it's in, if it's in my statement it did take place. I'll just have a look. Yes, it did take place.

Thank you. That Exhibit can be returned. Mr Cummins, you gave some evidence yesterday, you were asked a question, this is page 1213 of the transcript, that your view is that you have been subject to some actions and response to the stand you took in relation to the disclosure by Mr Saad. And you said that's correct. Do you recall that evidence?---Well, the disclosure by Mr Macklin to me is more accurate, because I never spoke to Mr Saad.

Now when you answered that question that's correct, you were referring that conduct, which has taken place since 10 February, 2009. Is that correct?---By Mr Romano, yes. I think he became aware on 10 February, 2009.

So, I understand when you're referring to actions in response to your stand you're referring to actions that took place on or after 10 February, 2009?
---Regarding Mr Romano, yes. But there was obviously some things happened between the 5th and the 9th which contributed to my health deteriorating. But from Mr Romano's perspective, I understand he didn't find out about it until the 10th, so if it's to do with Mr Romano, then it's from the 10th onwards.

10 All right. Thank you. And you gave, and counsel assisting asked you to explain to the Commission what you saw as those actions and you set out in some detail the various actions. Do you recall that evidence?---Yes.

And some of the actions were those of Mr Romano?---Some, yes.

Some were those of other Council officers?---That's correct.

And some were actions of the Council's lawyers?---That's correct.

20 And is it your belief that all those actions that you referred to were undertaken with the motive of taking retribution against you for seeking to deal with the disclosure of Mr Macklin?---Partly and all just because my general anti-corruption stance and also that I'd disclosed issues to Pina Viney about Mr Becerra's contract. And I'd also disclosed those concerns to Mr Macklin. Those concerns were then relayed to Mr Romano. So he knew full well on 10 February that I was investigating Mr Becerra and that I was, I was helping to do the investigation into the 187 Edwin Street issue.

I'd just like you to answer my question, please?---I thought I did. Sorry.

30 Is your belief that all of those actions were undertaken with the motive of taking retribution against you for seeking to deal with the disclosure from Mr Macklin?---At least in part, yes.

ASSISTANT COMMISSIONER: Yes. I'm sorry, I think, he did answer the question and he said in part and also because of previous anti-corruption actions he'd taken.

40 MR EKSTEIN: That's my submission, Commissioner, I believe he gave a complete answer to that very question.

MR BLAKE: And the other actions is that, were they actions also that occurred between 5 February and 10 February?---I don't know which one's you're referring to.

Well, you're the one, you know what you're referring to, Mr Cummins?

ASSISTANT COMMISSIONER: I'm sorry, the question's not clear. Do you mean were his other anti-corruption actions between those dates or - - -

MR BLAKE: Yes?---The main things obviously, I'm coming from a, from a prospective of, of the impact on me psychologically and they were the statements made by Ms Viney and Mr Walker which obviously, I don't hold them responsible for threatening me directly, but obviously they'd been bullied and they'd been conditioned so well that they were thought, because I was investigating Mr Becerra that my life was in danger.

10

Thank you. Now can Mr Cummins be shown Exhibit 121, please. All right. The first incident that occurred was regarding this protected disclosure. It was a conversation between you and Mr Macklin wasn't it?---Yes.

Mr Macklin came and spoke to you. Correct?---That's right, he came to my office.

And he told you that he had a discussion with Mr Dardano and that he had indicated that, that's Mr Dardano had indicated that there was an employee who said that he was doing some work for Mr Becerra during work hours? ---No, that's not correct. Mr Macklin didn't mention Mr Dardano at all at that stage. Mr Macklin came to my office to make a complaint to me that he tried to discuss the matter with Mr Azer and Mr Azer didn't want to know and that the complaint was about, you know, that Joe Saad had fingered a few people at the depot and Albert Becerra for being corrupt and I mean the, the issue is well-known now.

20

And Mr Macklin told you that he hadn't at that stage spoken to the employee?---I wasn't, I don't know what he said but I was under the impression that he already had and that he was going to speak to him again and get more details. So I may have been mistaken but that's the impression I got from the conversation.

30

Mr Macklin said that he'd have to speak to the employee to find out what had happened?---He gave me a lot of details so I think the only, the only thing he needed to speak to the employee about was, you know, to get further details and also on, on my advice to make sure this, this guy who was in danger was, was to be protected under the Protected Disclosures Act. The fact is that Peter Macklin's disclosure to me was protected but because Joe Saad had only told either Macklin or Dardano his, his verbal protected disclosure was not protected at that stage under the Act.

40

Mr Cummins - - -?---It was only protected under the Code of Conduct at that stage.

I was just speaking to you about what Mr Macklin said to you?---It's all very relevant though.

Well, you just might answer my question please. It will go a lot more quickly. Mr Macklin said to you - sorry I withdraw that. You said to Mr Macklin in that first conversation, "This could be our jobs over this" didn't you?---I don't recall stating that, saying that but I may have said it, it was obviously a pretty stressful time. I doubt whether I would've said that in, in that first meeting, it probably was a few days later when the stress levels and anxiety were really kicking in.

10 And you said to him you thought there was a whole lot of corruption going on?---I would've said words to that effect after I'd looked at Becerra's contract.

Well, I'm suggesting you said that to Mr Macklin on the first occasion that you spoke about this?---No, definitely not.

You've seen Mr Macklin's statement for the worker's compensation claim haven't you?---Yes, I have seen it, yes.

20 And you know that Mr Macklin says that in his statement in paragraph 11 don't you?---I don't have a copy of that. I may - do you want me to look at it?

Well, you've read it carefully to prepare your response to it didn't you?---I prepared my response in June 2009 so - - -

And at the time you prepared that response - - -?---I would've read it carefully, yes.

30 You read it carefully. And you didn't mention any disagreement with paragraph 11 of Mr Macklin's statement and your response did you?

MR EKSTEIN: Commissioner, I don't mean to interrupt my friend but I think if we're asking questions about a document he should be shown the document not be forced into some sort of memory test.

ASSISTANT COMMISSIONER: Yes. I think that's fair enough.

40 MR BLAKE: Do you just want to refresh your memory?---Yeah. Which paragraph, sorry?

You've made no comment I suggest about paragraph 11 of Mr Macklin's statement have you in your response?---No, I can't answer that unless I read the whole thing.

Would you just like to quickly peruse it? I couldn't find any. You know your own document don't you, Mr Cummins?---As, as I said I haven't had reason to look at this properly since 12 June, 2009 so - - -

If there's no comment about paragraph 11 in this document that's because you agreed with it didn't you?---Not necessarily. I mean this is a worker's compensation issue, it's about how I was bullied not other statement I made so it's completely, as far as StateCover is concerned, this document is for StateCover not for the ICAC so I can't really answer that, I'm not sure.

10 And on the 5th, sorry, before that. You started looking at some emails on 5 February. Is that correct?---Well, I actually started looking at emails on 1 February. When the policy was brought in I spent the first month which was January looking at internet usage and prepared detailed reports on that and, and found issues with cyber-bludging and various other issues which were to be reported to the next exec and my intention and, and I did start that in February was to concentrate on emails so I actually was already testing the system and using the email monitoring system from 1 February.

20 And you say in paragraph 95 of Exhibit 121 you, on 5 February you commenced a preliminary analysis of Internet and email use by Mr Becerra and Mr Romano?---Well, that's what it ended up being but at that time I was fishing really, I mean, I had no details as to what had gone on so I was, in reality I was testing the system to see what it could do because I was, it was brand new and obviously during that time I looked at the last couple of weeks of emails and found some emails which certainly raised an interest to me regarding what was happening with the disclosures that were made at that time and just general issues of corruption of Mr Becerra's contract. You know, I would have seen those emails within the next few days anyway I would imagine but obviously in the context of what happened in Mr Macklin's statement, it becomes relevant to the ICAC and to this Commission, yes.

30 Did you start looking at the emails of Mr Becerra and Mr Romano together? ---No, I, at that stage Mr Romano was in my mind not involved at all so I think I did Steve Child first, maybe Albert second and then I saw the emails from Albert and Mr Romano, sorry, I didn't see anyone's emails, it's all just metadata, the system wasn't set up to actually read the emails so to this day I've not read anyone's email but I could see the headers and that was it.

40 Thank you. In Exhibit 121 you've set out some documents that appear, that are the searches that you did or some form of record of the searches you did?---Yes.

Yes?---That's the printout from the software, from the screen, there's a print function on it, it allows you to print the search results and they're just the search results.

And this is annexure 24. Can you go to that please?---Yeah.

Now, just looking at the first page you'll see the sender is poppy@archb.com.au, do you see that?---Yeah, that's correct.

Now, is that a search that you did of that email address?---Yeah. It says at the top sender is so obviously at that stage I must have, I'm not sure if this is in the order, in the chronological order but obviously when I did Steve Child and, and Albert, looked at their emails, I could see emails between Albert and Poppy so I did a search of the emails received from Council from Poppy and then obviously saw that a lot of those were going between Poppy Becerra and Pat Romano which was obviously of interest.

10 You searched for poppy@archb.com.au, correct?---Yes, I'd already seen her as a recipient so I put her in as a sender to see if there was any, I assume that's what I did there.

And I think if you go over about six pages that the sender is all poppy@archb.com.au then there is a sender albert@archb.com.au?---I'm sure there is, yeah.

And you did a search of that email address. Is that correct?---That's right, yes.

20

And that's two pages and then some more searches at poppy@archb.com.au?---Yeah, I think, I think there's, what happened was I was, because it was, you know, it was the brand new the software, I did it by month and then I realised you could do it by, you know, more than the term of that month so it may, it may overlap and double up so - - -

30 And there is then a search about halfway through the documents, a single page of hui@archb.com.au?---Yeah. There was a, that's a partner at Architects Becerra who I obviously saw had sent an email so I was just seeing whether they were sending other emails and I think there was only one result for that so that wasn't, it wasn't important but I had it as a result so - - -

And Mr Cummins, you had no authority under the email policy to search any other person's email address, did you?---I didn't, I didn't look at anyone's email, I searched through, I searched via emails that had been received by Council so certainly in my mind and to this date I, I certainly don't think I breached the, the policy or the Act.

40 All right. Poppy Becerra wasn't a Council employee was she?---No.

And you searched her email address, didn't you?---No, I was, I was searching - - -

ASSISTANT COMMISSIONER: I'm sorry, Mr Cummins - - -?---Yeah, sorry.

What sort of a policy would it be if you couldn't see who was sending emails to the Council?

MR BLAKE: Well, I asked him did he search that address. I mean (not transcribable)?---(not transcribable)

10 ASSISTANT COMMISSIONER: I don't see how he could search that address, wasn't he using the Council - - -?---Yeah, no, I didn't, I obviously was just looking for her emails on the Council system, there was no, there was no way I could look in, into her systems or into her emails so, it's a keyword search essentially to see who, who had sent her emails from Council and who she'd sent emails to at Council. There's no way I could have seen who she sent emails to in her private world or, you know, if she'd sent an email to someone outside of Council that wasn't going to show up in that system.

MR BLAKE: Thank you for clarifying that.

20 MS RONALDS: I note the time, Commissioner.

ASSISTANT COMMISSIONER: Yes, thank you. We will adjourn until 2 o'clock.

LUNCH ADJOURNMENT

[1.02pm]