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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION SIREN

Reference: Operation E09/1228

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 23 SEPTEMBER 2010

AT 10.05AM

Any person who publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

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

MR PAYNE: Commissioner, before we commence the evidence this morning, there are two things I should put on the record. The first is that prior to Mr Harvey being called on Monday, I had told Mr Gordon, representing Mr Makucha that no adverse interference would be drawn against his client from any failure to cross examine witnesses in this part of the inquiry. And I'd like to record that for purposes of the transcript.

THE COMMISSIONER: Yes. Yes.

10 MR PAYNE: Secondly, Commissioner, I want to correct something that I put to Mr Harvey, in relation to Exhibit P134, I suggested to him that the original of the contract was in the Supreme Court registry, that's not right. It's a copy and the Exhibit page I showed was a copy of a copy. So that's Exhibit P134, and that matter as well I just wish to record.

THE COMMISSIONER: Does that affect any of Mr Harvey's answers?

MR PAYNE: It doesn't affect any of the evidence, no. It doesn't affect any of the answers, but in my respectful submission it doesn't. And, but I
20 wanted to record that.

THE COMMISSIONER: Yes. Thank you.

MR PAYNE: I'm in a position now to call Mr Dollisson.

THE COMMISSIONER: Mr Gordon looks as if he wants to say something.

MR PAYNE: Yes.

30

MR GORDON: Commissioner, I do wish to say something and I'm afraid that as unpopular that it may be, I make an application for an adjournment.

THE COMMISSIONER: I don't think unpopular is the right word. I would call it courageous.

40

MR GORDON: Well, Commissioner, I thank you for those words of encouragement. The position is that I feel obliged to make an application from a professional point of view because as you may or may not know, I only received any instructions in this matter on Sunday morning last. I received at that time a lot of the bundles of Lever Arch folders that sit behind me, some of them are still unread. There are about a dozen of them. In the time available plainly I have neither read all of it, far less have I correlated it, far less have I, in the absence of both an instructing solicitor, of which I have none and a client who does not have a duplicate bundle, to go through and take proper instructions in relation to any or all has proven just about impossible. And I have to say to the Commission, that I have

grave doubts at this stage of whether I am in a proper professional position to represent the interests of Mr Makucha.

THE COMMISSIONER: Mr Gordon, the, the fact that this inquiry would take place at about this time was known for a very long time wasn't it, though not to you.

MR GORDON: No, not to me.

10 THE COMMISSIONER: But to your client.

MR GORDON: Indeed. Sir, I understand that he was represented by other counsel some time ago.

THE COMMISSIONER: That's right. And the Commission has been, before the, the date of this inquiry was publicly announced, the Commission was dealing with other legal representatives, with others who were then legally representing Mr Makucha.

20 MR GORDON: Yes.

THE COMMISSIONER: Mr Makucha has had ample time to have his case prepared. I'm sure that there were sound reasons for him changing his representation when he did. But that's not a matter that this Commission is now practically able to take into account. We have a full programme of inquiries and indeed, are scheduled to start another one on 5 October that cannot be adjourned. And taking into account also the remarks of Mr Payne that there will be no adverse inference drawn against Mr Makucha or anybody else for failure to cross examine on particular points and also
30 taking into account the fact that Mr Makucha will be called to give evidence and he, propositions would be put to him which would be crucial to any finding that the Commission may or may not make against him. And he will have the opportunity to answer those. I do not regard Mr Makucha as not having had a proper opportunity to put his case and not still having a proper opportunity to put his case. And while I sympathise with your personal position, I do not regard the grounds you have advanced as justifying the application that you are making.

40 MR GORDON: Commissioner, I understand that. I would ask you nonetheless to take note that whilst I will do my best, it is only fair and right that I say on the record that there are many documents that I am unfamiliar with and do not now understand the full input of.

THE COMMISSIONER: No, I appreciate that and I think Mr Payne appreciates that. And it's for that reason that he informed you that there would be no Browne and Dunn inference drawn. And I affirm that.

MR PAYNE: Commissioner, I call Mr John Dollisson.

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

MR DOLLISSON: Under oath.

THE COMMISSIONER: You may be seated, Mr Dollisson.

MR PAYNE: Mr Dollisson, what is your full name?---John Anthony Dollisson.

10 And you've made a statement to the Independent Commission Against Corruption in this matter?---I have.

Can I show you a document. Is that the statement you have made?---It is, yes.

Do you tell the Commission that the contents of that statement are true and correct to the best of your knowledge and belief?---They are true and correct to the best of my knowledge and belief.

20 Commissioner, I tender the statement.

THE COMMISSIONER: Yes. The statement of Mr Dollisson will be Exhibit P150.

And, Mr Dollisson, in addition to the material - - -

THE COMMISSIONER: I think that's 148, 148.

MR PAYNE: 148, thank you, Commissioner.

30

#EXHIBIT 148 - STATEMENT OF MR DOLLISSON

MR PAYNE: Mr Dollisson, in addition to the material you have considered and expressed the opinion contained in your statement Exhibit P148 I wish to show you another document which is Exhibit P140 in this Commission. Are you familiar with that document?---Yes, I am.

40 What is it?---It's a marketing document used by the Makucha company in pre or post 1993 to market the signs on Qantas Drive and O'Riordan Street near the Sydney Airport.

And in your opinion based on your knowledge, training and experience in the Australian outdoor advertising market in the period 2009 to date would you expect a client to pay any sum of money for the provision of that document Exhibit P140?---Absolutely not, it's normal marketing material handed out by the outdoor advertising industry.

Thank you. Can I show you another series of photographs. Do you recognise these as colour photographs prepared by your firm?---I do.

And can you tell the Commissioner for what purpose these photographs were prepared?---Commissioner, these are what we call renderings or photo montages of potential outdoor advertising sites used to try and secure an advertiser in the hope of winning their business. Some of them include more detailed drawings of the design, others are more straight forward outdoor advertising structures.

10

And again, Mr Dollisson, based on your knowledge, training and experience would a potential advertiser in the Australian outdoor advertising market in the period 2009 to date be expected to pay any sum of money for the provision of the material that I've just shown you?---Absolutely not, it's part of the practice of outdoor advertising companies to put forward their best ideas at no cost in the hope that they would win their business preferably on a long term basis.

20

You tell the Commissioner that's, as you understand it based on your knowledge, training and experience a universal practice in the Australian outdoor advertising industry in the period 2009 to date?---Correct. It's a universal practice and has been for quite some time.

Commissioner, I tender that group of photographs.

THE COMMISSIONER: Yes. Exhibit P149 is a bundle of photographs used by Australasian Marketing Group Pty Limited in the course of his business.

30

#EXHIBIT P149 - BUNDLE OF PHOTOGRAPHS USED BY AUSTRALASIAN MARKETING GROUP

MR PAYNE: Commissioner, I have no further questions for Mr Dollisson.

THE COMMISSIONER: Mr Gordon.

40

MR GORDON: Just give me just one moment.

THE COMMISSIONER: Yes.

MR GORDON: No questions, thank you.

THE COMMISSIONER: Yes. Thank you, Mr Dollisson, you're excused.

THE WITNESS EXCUSED

[10.15am]

MR PAYNE: Commissioner, I call Mr Gino Malacco.

THE COMMISSIONER: Mr Thangaraj, I think it would, if you, if there is some way in which you could get closer to a microphone it would be helpful. If we could (not transcribable). Yes, thank you. Now, Mr Thangaraj, do you want me to make a section 38 order?

10 MR THANGARAJ: Yes, please.

THE COMMISSIONER: You may be seated. Pursuant to section 38 of the Independent Commission Against Corruption Act I declare that all answers given by Mr Malacco and all documents and things produced by him during the course of his evidence at this public inquiry are to be regarded as having been given or produced on objection and accordingly there is no need for him to make objection in respect of any particular answer given or document or thing produced.

20

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

30

THE COMMISSIONER: Mr Malacco, do you wish to give your evidence under oath or do you wish to affirm the truth?

MR MALACCO: Under oath, Commissioner, thank you.

THE COMMISSIONER: Would you swear Mr Malacco in please.

THE COMMISSIONER: Mr Payne.

MR PAYNE: Mr Malacco, what's your full name?---Louie Gino Malacco.

And you are a partner in a firm of accountants in Sydney, Hall Chadwick?
---Correct.

10

For how long have you been a partner in Hall Chadwick?---Since 2001.

And prior to that time what was your occupation?---I've been an employee
with that firm and its predecessor firm, Love and Rodgers, since 1987,
Commissioner.

Which is at the time you finished your professional qualifications in
accountancy is it?---It's when I finished high school. I started as a cadet at
that firm.

20

I see. And did your study and professional qualifications whilst working
full-time at the firm?---(not transcribable)

You participated in an examination before this Commission on 24 August,
2010?---Correct.

Have you had an opportunity to look at the transcript of that examination
recently?---Yes, I have.

30

Right. Can I show you a document. That is the transcript that you have
examined recently of your examination before this Commission?---Yes, it
is.

Yes, Commissioner, I tender that document.

THE COMMISSIONER: Yes. The transcript of Mr Malacco's evidence at
the compulsory examination on 24 August, 2010 is Exhibit P150.

40

**#EXHIBIT P150 - TRANSCRIPT OF MR MALACCO'S EVIDENCE
GIVEN UNDER COMPULSORY EXAMINATION**

THE COMMISSIONER: And might, I'm going to show you some
documents prepared by Hall Chadwick, they're contained in large volumes,
I think you were present in court when questions were asked of Mr Harvey
at least in part?---Part maybe, yes.

Exhibit P126 which is volume 1, if that could be shown to Mr Malacco and just to orient you, Mr Malacco, the way Exhibit P126, which is volume 1 of the material exhibited to Mr Harvey's statement works is there is a little red number in the top right-hand corner and I'd ask you to go to P370 first of all please.

THE COMMISSIONER: Mr Gordon, do you have a copy, you have this bundle?

10 MR GORDON: I do have this bundle, Commissioner, thank you.

MR PAYNE: Do you have that Mr Malacco?---Yes, I do.

That's a letter written by you is it?---Correct.

On 31 March, 2009?---Correct.

At that time Mr Paul Makucha and Paul Makucha Holdings Pty Limited had become clients of Hall Chadwick?---Correct.

20

What if anything did you know at this time about the involvement of the Sydney Water Corporation in any proposed venture with Mr Makucha?
---Very little. The matter was referred to me by one of my partners, David Kenney, who'd met with Mr Makucha I think a couple of days earlier and as far as I was aware it was a joint venture that Mr Makucha was proposing to put forward with Sydney Water so that was basically my understanding at that stage.

30 MR PAYNE: And had you met at the time you wrote this letter on 31 March, 2009, have you had an opportunity to meet Mr Makucha?---This letter was drafted after I met with Mr Makucha.

And the contents of the letter are things that he told you are they?---They were from what I was able to get from, information that I'd spoken with with David Kenney.

And as you understood it the source of information with Mr Kenney was Mr Makucha?---Correct.

40 At this time had you met anybody from the Sydney Water Corporation?---No, not at all.

And you'll see the letter is actually addressed here to Mr Makucha and Sydney Water Authority, who told you to address the letter to that entity, whatever it is?---No one had specifically told me to address the letter to Sydney Water Authority, but I addressed it in that manner because it was my understanding that I was giving advice to Paul Makucha in relation to forming a joint venture with Sydney Water.

And at all times I take it, as you understood at least, your retainer was with Mr Makucha and Paul Makucha Holdings Pty Limited. You never had a retainer from Sydney Water Corporation or any related body corporate?
---No.

You agree with me?---Yes. Yes.

10 And what was your understanding about how, if at all, this information contained in this letter would be conveyed to one of the addressees namely Sydney Water Authority?---Well at that stage I believed that I was preparing a report or a letter outlining the things that are addressed in this letter of engagement which I would've provided to Paul Makucha for discussing with Sydney Water.

And you understood that Mr Makucha would convey that this letter, somehow or another to somebody to Sydney Water Authority did you?
---Yes. I didn't have any contact details of anyone at Sydney Water at that stage.

20

What if anything were you told prior to writing this letter by Mr Makucha about this proposed joint venture and the Sydney Water Authority?---I can't recall exactly, but I think it was along the lines of the fact that he wanted to enter into a bottling joint venture with Sydney Water Corporation. And he wanted to utilise or he was looking at utilising his group of companies as the joint venture vehicle.

30 And you'll see here in the third paragraph, there was some proposal for incorporating a new wholly owned and subsidiary of Paul Makucha Holdings and derive revenue to realise losses available. Do you see that? It's in the third paragraph on page 370. It starts, You wish to utilise?---Yes.

And you're talking about tax losses there?---Correct.

40 It was your understanding throughout this proposal wasn't it, Mr Malacco explained to you that whatever tax losses may or may not be available in wholly owned Makucha Group companies, they could never be transferred to Sydney Water could they?---No. Well, they, the losses could not be transferred to Sydney Water, no.

And that's, as an experienced accountant that was plain as day to you as soon as the structure was explained wasn't it?---Yes.

And this idea that Mr Makucha would contribute a \$10 million tax benefit to Sydney Water, as it was explained to you, you realised it was not permissible under the Income Tax Assessment Act, 1997 as (not transcribable) was explained I take it?---Yeah, there was no way I could get the losses into Sydney Water Corporation, that's correct.

And this idea of contributing \$10 million in losses, you understood wouldn't work. What you came up with was a structure ultimately wasn't it, that out of profits if and when derived by some joint venture vehicle, there'd be redeemable preference shares or a separate class of shares issued to Sydney Water and you could stream profits or at least the first 10 million of profits to some Sydney Water entity from that joint venture vehicle. That was your suggested mechanism?---That was my suggested mechanism, correct.

10 So in these documents as we come to them when we read a benefit, the Commission is to understand that as being from profits to be made in the future if any by some joint venture company. Correct?---Correct.

Nothing to do with using in any way tax losses from Mr Makucha's companies in the past?---Not for Sydney Water's benefit, no.

THE COMMISSIONER: Are you suggesting that if a new company was formed in which, which would be partly owned by Sydney Water and partly owned directly or indirectly by Mr Makucha, that that company could take
20 advantage of the tax losses?---The only real benefit of the tax losses were to Mr Makucha himself and his entities.

So there would have to be some vehicle whereby he would make profits which, against which the losses could be set off. Is that it?---Yes. The structure or the way the structure was, was proposed was that the joint venture entity would pay amounts of money to the entities controlled by Mr Makucha for the royalties for the intellectual property that the Makucha Group would've established. And that would've effectively created an
30 expense in the joint venture company and income in the entity controlled by Mr Makucha.

MR PAYNE: And thus it may be a whole lot of potential anti-avoidance problems, I suggest to you that even so far as Mr Makucha was concerned that the only person who could benefit from these tax losses would be Mr Makucha and his wholly owned companies. Correct?---Yes. The losses were only available to Mr Makucha.

And the days of trafficking or transferring losses to new entities in a structure were long gone by 2009 when you looked at this?---Yes.
40

And that was well understood to people experienced in taxation and accounting fields in Sydney in 2009?---Correct.

And you explained that to Mr Makucha I take it?---Yes.

And told him that he should not be telling Sydney Water that he would be contributing a \$10 million tax benefit to them because that shortly put was nonsense?---I explained to Mr Makucha that there was no benefit in Sydney

Water acquiring an interest in his companies to access the losses. That wasn't going to be able to be done.

And did you tell him that it would be quite wrong to tell Sydney Water that he was contributing a \$10 million tax benefit somehow to Sydney Water?
---I didn't tell him that it was wrong to tell Sydney Water, no, but I, I made it clear to him - - -

MR GORDON: I'm sorry to interrupt, I can't hear.

10

THE COMMISSIONER: Yes. Can you speak louder, please?---Sorry, Commissioner?---I, I had made it clear that the, there would've needed to have been an alternate method in which to obtain any benefit out of, out of what Mr Makucha was discussing with Sydney Water.

THE COMMISSIONER: Yes. But the benefit would only be for Mr Makucha, for no one else?---The benefit of the losses were for Mr Makucha's entities, correct. Controlled by him.

20

Alone?---Yes.

MR PAYNE: And just so we're clear, you explained that to Mr Makucha in terms at the outset of this proposal as soon as you'd understood what he was saying about tax losses within his company which you set out in this letter at P370?---Correct.

And that you said you never told him to pass that on to Sydney Water and we'll jump ahead, we'll come to this. Did you ever meet anybody from Sydney Water?---I met with Mr Harvey in September.

30

On how many occasions?---Just the one occasion.

And on that occasion was there any discussion of this topic of tax losses and contributing some sort of tax benefit to Sydney Water?---At that stage the structure had progressed in discussions anyway, a lot further down the track whereby we weren't talking about Sydney Water obtaining benefits from the tax losses, but, but through the preferential shares that allowed them to be paid a preferential dividend.

40

So certainly at least in your presence, nothing was ever said about some sort of tax benefit accruing to Sydney Water as a result of this Makucha proposal?---No, not at that stage, no.

Can I just ask you about the work you did for Mr Makucha and Paul Makucha Holdings. And forgive me, Mr Malacco, I'm not trying to shout at you, but others in the room can't hear unless I speak up. In terms of the work that you did, I suggest to you and we'll come to some detail in a moment, a considerable part of that was getting the taxation and

corporations law aspects of Makucha Group companies in order. Do you agree?---No. The majority of the work was actually discussing the structure and the, the ways we could organise the joint venture entities.

You did however do accounting work - - -?---Yes.

- - - for the Makucha Group companies. Correct?---Yes, we did.

10 And you regularised the taxation affairs of those companies. Correct?---We were bringing those records up to date, correct.

Sorry. As best you could you brought records up to date and caused returns to be filed for a number of years which hadn't been filed by a number of entities?---They hadn't progressed at that stage as yet.

They had not?---They had not, no.

20 So you were just bringing the records up to date for the purpose of trying to get the affairs in order such that tax returns could be filed?---Correct.

And you had dealings also with the Australian Securities and Investment Commission to try and regularise some of the returns for those companies as well?---Yes, we did get a company that had been struck off re-registered and we'd contacted ASIC in relation to the outstanding returns for all of the entities in that group.

30 Yes, because as part of the regulatory arrangements as you understood them in relation to the Makucha Group companies they were behind in their ASIC filings and you assisted Mr Makucha to get those companies records in a state where filings could be made with ASIC. Correct?---That's what we were doing, correct.

And in terms of the re-registration the company had actually been struck off the register of companies. Correct?---Correct.

And so you did the work involved in getting that company re-registered? ---That's correct.

40 And the purpose of that was that that company had available tax losses was it?---Well, the purpose at the end why we did that was obviously because it needed to be done, it had tax losses but also that was near the time where we were looking at or Mr Makucha was looking at finalising the Confidentiality and Business Implementation Agreement and it was pointed out I think it was through the solicitors that that entity had been struck off by ASIC and it needed to get re-registered so that it could progress to some sort of signing.

Is the company we're talking about called Makucha Holdings Pty Limited? ---It is.

As you understood it a party to the Business Implementation and Confidentiality Agreement of 3 December, 2009?---Correct.

And some time after that had been executed you were told by Mr Stafford were you that the company was deregistered?---I can't recall whether it was before or after that time, it may have been after that time, it may well have been after that time because I think I put the forms into ASIC to get the company re-registered in December.

10

Just staying with P370 for a moment and asking about the practice which developed with the organisation you came to learn was in fact Sydney Water Corporation, a state owned corporation in New South Wales what was your expectation at this time about the payment for your services for Mr Makucha and his companies?---Mr Makucha had advised that Sydney Water would be paying for our fees.

20

And was that a blanket advice in that everything that Mr Makucha asked you to do as you understood it Sydney Water would be paying for those fees?---I don't believe it was a blanket advice, no, I think it was on the basis of approval of a cost agreement so anytime that we were asked to do something by Mr Makucha it was accompanied with an engagement letter to go across to Sydney Water for authorisation.

30

And you would only do that work if you received back a signed acknowledgement from Mr Harvey. Is that what you say?---Initially the first, first agreement we sent out were, was very much on that basis that I would only commence working if I got the acknowledgement back from, from Mr Harvey. We were in continual discussions in relation to the structure and I initially had some level of comfort by the fact that Mr Harvey had authorised our initial fees and paid those initial fees, that, that what Mr Makucha was saying was genuine and that Sydney Water would cover the cost merit for our firm so I did progress at other times to do work without actually getting an agreement.

THE COMMISSIONER: Mr Malacco, I just wanted to ask you about that issue. When I look at this letter which is at P370 I note it is addressed to Mr Makucha and Sydney Water Authority?---Correct.

40

Addressed to both?---Yes.

And what is set out there is addressed to them equally, no distinction is drawn between them is it?---No, that's correct.

So when you turn to page 2 and you've got a section on your fees you're telling Sydney Water this aren't you?---Yes.

On the basis that Sydney Water is going to pay your fee?---Correct.

And how did it come about that you thought Sydney Water would pay your fee?---It was advised to me by Mr Makucha.

10 So if I was to be given this document for the first time not knowing the background I would read it as if Hall Chadwick was saying their clients were Mr Makucha and Sydney Water?---I was asked by Mr Makucha to prepare advice for the structuring of the joint venture so I took it as being provision advice for both of them although it was provided through Mr Makucha.

So you thought you were giving advice to Mr Makucha and Sydney Water and Sydney Water was paying for that?---Yes.

20 Do you want to revise your answer to an earlier question by Mr Payne when you said that you thought that your client was only Mr Makucha and not Sydney Water?---Mr Makucha had expressed that he was our client and that basically in dealings Mr Makucha was our client. In preparing the advice for the joint venture I was, I was looking at structuring something which would've been able to be accepted by both, both parties.

Are you saying that as far as you're concerned, you were concerned Hall Chadwick had no contractual relationship with Sydney Water?---Well, in a way the engagement letter was, was prepared so that it was a contractual relationship with Sydney Water and with Paul Makucha.

What do you call the engagement letter?---This is the engagement letter, the document at P370.

30 Why did you tell Mr Payne that only Mr Makucha was your client?---Well, I hadn't had any discussions with anyone at Sydney Water.

It seems to me that you were careful to bring in Sydney Water as your client when I look at the terms of this letter and how it's addressed?---Well, I was providing advice to both parties so - - -

Not only that you were setting out your fees to both?---Yes.

40 So I ask again did you regard yourself once you sent this letter as having a contractual relationship with Sydney Water?---Well, in a way, yes, I was - - -

What do you mean in a way?---Sorry, yes.

And you did so because Mr Makucha told you?---Mr Makucha indicated that the fees would be paid for by Sydney Water.

That doesn't necessarily mean that Sydney Water agrees that you're acting for it does it?---I guess not, no.

Again why did you address this letter to Sydney Water as well as Mr Makucha and a letter which did not only include advice as to the joint venture but included details of your fees and how they were to be paid and the amount?---I was, I viewed it as being advice I was providing for the joint venture so that's why I addressed it, the letter - - -

10 Did you regard the joint venture as your client?---Well, the joint venture was a concept at that stage.

Exactly but before then you, well, I still don't really know what your evidence is. Are you saying that you regarded Sydney Water as your client once you'd written the letter of 31 March or not?---Well, I was providing Water in a way, sorry - - -

Can you just answer that question please?---Yes.

20 MR PAYNE: Can I just take that up with you, Mr Malacco, you regarded yourself as owing obligations to Sydney Water throughout this process, did you?---Yes.

And to the extent that your obligations to Sydney Water on the one hand and Mr Makucha on the other differed how did you resolve that conflict as you had obligations to both?---I didn't think that the, I mean, where I, where I thought that there was an issue I, I discussed it with, with Mr Makucha but I didn't see that, that issue sort of arose. I was looking at trying to do a, the best structure that would be acceptable to both of them so I always had that in the back of my mind.

30 THE COMMISSIONER: So you thought you owed duties to both?---I did, yes.

And didn't they conflict at times?---Um - - -

40 And what was good for Mr Makucha was not necessarily good for Sydney Water and vice versa was it? Isn't that the case?---Well, in terms of the structure I was trying to get the structure right for both of them so I didn't, I didn't necessarily feel as if there were any instances where there was the degree of conflict.

I see.

MR PAYNE: Can I just test that for a moment. You knew that large sums of money were being agreed about property passing from Makucha interests on the one hand and Sydney Water on the other, didn't you?---That was relayed to me, yes.

And you knew didn't you that fixing those sums of money and mechanisms for valuation and so would vitally affect the interests of both parties, Sydney Water on the one hand and Mr Makucha on the other?---Yes.

10 You knew didn't you that if a large number was put on a piece of property that wasn't really worth that one party or the other would be very unhappy, correct?---Yes, but I wasn't, I wasn't involved in any of the negotiations. I was just asked to effectively put in place the structure around what Mr Makucha and Mr Harvey had, had agreed so I wasn't involved in any of those negotiations.

But Mr Makucha was telling you what had been agreed, correct?---Correct.

Did he ever go to your client Sydney Water and say look, I have to discuss these matters with you because I owe you obligations, is this what you want me to do, should, should I be structuring something different because I owe you obligations, Sydney Water?---No, I didn't. I didn't do that, no.

20 THE COMMISSIONER: You were just content for Sydney Water to pay your fees?---I was content to do the work have Sydney Water pay the fees, yes.

MR PAYNE: Malacco, I want to put this to you, we'll come to the detail but I suggest that given what you've told the Commissioner about your belief that you owed Sydney Water obligations, that there were a number of places in relation to this transaction where you have agreed with Mr Makucha to prefer his interests over that of Sydney Water. Do you agree? ---Well, no, I was just merely documenting what had been advised to me so I hadn't been involved in, in, in that part of the or any part of the negotiations.

30 Well, you knew in documenting it in a number of respects, didn't you, that, that what had been agreed, what was being conveyed by Mr Makucha to you about what had been agreed on the face of it was a remarkable deal in favour of Mr Makucha to the detriment of Sydney Water, correct?---Yes, possibly, yes.

40 Well, not just possibly, this intellectual property business was bizarre, wasn't it?---Well, I'm, I'm not an expert on the intellectual property so Mr Makucha had indicated to me that he'd come up with the idea and that's the way intellectual property works. I knew he was discussing the matters with intellectual property lawyers or attorneys so I, I just accepted what, what was being relayed to me.

You're an experienced accountant and tax agent expert though aren't you, Mr Malacco?---Yes.

And in terms of the intellectual property you knew didn't you that Sydney Water had been around in this city for some time?---Yes.

They had an established reputation?---Yes.

And that they owned quite a lot of intellectual property themselves, didn't they, before Mr Makucha came along?---Yes.

10 The mark Sydney Water was registered in a whole pile of categories, correct?---Yes.

You knew, didn't you, that Mr Makucha's idea could not be registered by IP Australia without the consent of Sydney Water, correct?---I wasn't sure what the registration process was.

20 You knew, didn't you, that prior this joint venture coming into existence structures had been put in place so that Mr Makucha could attempt to secure very valuable intellectual property at the expense of Sydney Water, didn't you?---Well, I wasn't, I wasn't sure what the process was in terms of the intellectual property so whether it was registered at the expense of Sydney Water, like I say, I'm not, I'm not an expert on intellectual property matters.

But you were documenting an arrangement where Sydney Water was in the future agreeing to pay vast sums to Mr Makucha in relation to intellectual property, correct?---Yes.

Intellectual property which as you understood it was, he was seeking trademark protection prior to there being any joint venture?---Yes.

30 In those circumstances didn't you, as you told the Commissioner, if you owed obligations to Sydney Water wasn't it incumbent on you to raise those matters with Sydney Water?---It wasn't, it wasn't something I, I, I thought of at that time.

40 Is the position that, the true position that whilst you believed you owed obligations to Sydney Water in your mind you were discharging those by discussing matters with Mr Makucha?---Although, I mean, my, my main client was actually Mr Makucha although I'd addressed these, these letters of engagement to Sydney Water and in a way I was trying to prepare the documentation with the concept that it would be accepted by Sydney Water, my, my main client or my client was Mr Makucha. I mean, it's the way that that evolved so - - -

Is that another way of saying that although you believed you had obligations to Sydney Water you put them out of your mind because you regarded your paramount obligation to your client Mr Makucha?---Well, I, I viewed, I viewed Mr Makucha as my client although I, because I was doing things for the proposed joint venture I, I was looking at structuring the, the, the

structure that this proposed joint venture would go forward with with something that would have been acceptable by, by Sydney Water.

You've given advice I take it on many occasions to parties giving consideration to entering joint venture arrangements?---Yes.

Have you in the past acted for both parties in documenting that?---On occasions, yes, we have.

- 10 And on those occasions did you take instructions from one proposed party only and never have anything to do with the other party?---No, they both have been involved.

Because that, I would suggest to, Mr Malacco, you knew at the time that acting for both, both would be vitally involved, this was a major project, wasn't it, that you were putting together?---Yes.

Potentially many millions of dollars involved?---That's correct.

- 20 Did you ever say anything to Mr Harvey to indicate to him that you recognised that you were also acting for Sydney Water and were protecting his interests?---No, I did not say anything about that.

Because you weren't?---No.

You weren't protecting his interests, you were preferring Mr Makucha's weren't you?---Well, I was viewing Mr Makucha as my client, yes.

- 30 Yes, and so despite what you told the Commissioner, that you regarded yourself as acting for both, you preferred Mr Makucha's interests to those of Sydney Water if there was any possibility of conflict?---I guess that's one way of looking at it, yes.

Well, it's the only way of looking at it isn't it, Mr Malacco?---Yes.

Can I ask you something else about it because, Mr Malacco, it was your state of mind throughout this process wasn't it that Mr Harvey didn't have authority of Sydney Water to bind Sydney Water in any joint venture, that was your state of mind wasn't it?---That was my understanding, correct.

- 40 And indeed at the one meeting in September that you had with Mr Harvey he had said in your presence and Mr Makucha's presence that he did not have authority to bind Sydney Water but rather that any joint venture could only be agreed if the board of Sydney Water agreed?---Correct.

You never, that understanding so far as you're concerned never changed? ---No, it was always my understanding.

And that as you sit here in the witness box today from the time of this first retainer letter it was always your understanding that Mr Harvey was in no position to bind Sydney Water in respect of any part of the joint venture arrangement. Correct?---That's correct.

Correct?---That's correct.

10 THE COMMISSIONER: I take it that's from what Mr Harvey said to you? ---Mr Harvey said to me that he had the authority to negotiate something for a deal with Mr Makucha but any deal needed to be given to the board for approval.

So authority to negotiate but not the authority to agree?---Correct. Yes, negotiate but not to bind, agree, correct.

Did you know what position Mr Harvey occupied in Sydney Water?---I knew he was the Property Asset Manager at Sydney Water.

20 And you knew that the kind of, the various matters that were the subject of the joint venture agreement would ordinarily be far beyond the authority of an asset manager in property?---Well, I, I'd requested from Mr Makucha and I'd also in, in that one conversation I think with Mr Harvey but I'd always expressed to Mr Makucha to find out what his authority was and Mr Makucha would advise me that he had the, he had the authority to, to deal on this transaction.

30 Well, would you mind just answering my question. The question was is that knowing what Mr Harvey's job was namely the Property Asset Manager that the subject matter of the agreement would be far beyond that authority?---It was, some aspects of it, yes, I thought, yes.

Property Asset Manager would not ordinarily deal with intellectual property would he?---No.

And that a Property Asset Manager would not deal with the acquisition of nuclear warships for the purposes of desalinating water would it?---No, I wouldn't have thought so, no.

40 There are many other topics of the agreement which (not transcribable) aren't there?---Yes.

Did this occur to you or was this part of your subconscious mind during the time of these negotiations?---My main focus was the bottling plant so - - -

But the agreement dealt with many matters?---The, the, the end agreement that was prepared by Eakin McCaffery Cox did, yes.

And these were matters that were discussed with you or not?---Some of them were discussed with me, yes.

So is it the case that your belief that Mr Harvey was not authorised to agree anything was based firstly on what Mr Harvey told you and secondly on the objective facts namely the position he occupied at Sydney Water and the subject matter of which you were requested to advise him on?---Yes.

10 MR PAYNE: As an experienced business person, sorry, experienced advisor to business people you understood that things like creating a bank, the issue of tax free bonds, the purchase of the nuclear warship, the transport of water from Alaska to Sydney - - -

MR MAKUCHA: They weren't warships.

MR PAYNE: - - - were all matters far beyond the authority of Mr Harvey as you understood it?---I didn't expect Mr Harvey to sign-off on the approval of those things.

20 But any of those matters?---No.

And indeed in your files business case guidelines from Sydney Water were located. Can I just show you the document and ask you about how that came to be. This is something you received in the course of the structuring advice that you were giving to Mr Makucha and Sydney Water?---Correct.

In what circumstances did it come to you?---Via Mr Makucha.

30 At what time, do you know?---It would've been around July.

So just - - -

THE COMMISSIONER: Prior to 2009?---Sorry, yes.

40 MR PAYNE: Yes. So about four months after this initial letter that we're looking at?---Sorry, it may have been after that, I apologise. If I recall correctly after we had the meeting with Mr Harvey, I'm trying to get my, the exact recollection but after we had the meeting with Mr Harvey I, I'd asked how do we progress this further.

You'd asked who?---I'd asked Mr Harvey at our meeting in September how we progressed this further as in the proposal and I'm fairly certain at that time it was advised that a business plan or a business proposition needed to be put forward to the board and in terms of the method in which it should be relayed to the board that's I'm pretty sure when this document arose.

And by arose you mean you asked Mr Harvey in Mr Makucha's presence how we're going to take it forward and he said, We need a business case to go to the board. Correct?---Yes.

You understood him to be conveying to you and to Mr Makucha that he had no authority himself to make any agreement but that a business case needed to be prepared to go to the board. Correct?---That's my understanding, correct.

10 And Mr Makucha was present during this conversation?---Yes.

You said to me a moment ago that these business case guidelines emerged and you think you were given them by Mr Makucha so that after the meeting in response to your request these guidelines were given to you by Mr Makucha?---I think that's correct, yes.

20 And take as long as you like to read through them but I suggest to you it is plain to anybody at all experienced in business matters that these guidelines indicate that what would need to be done at least according to Mr Harvey's answer to your question, how do we take this forward is that there be some sort of proposal for the approval of the higher authorities in Sydney Water whether the board or not but certainly not Mr Harvey?---That's, that's correct.

And that was then your understanding throughout in continuing to document this matter?---Yes, that's right.

30 You weren't present when the Business Implementation and Confidentiality Deed was signed on 3 December?---No, I wasn't.

Were you consulted by Mr Makucha at any time about this question of authority after this discussion that you had in September when Mr Harvey and Mr Makucha presented you this document?---Sorry, say that again please.

40 Did you have any discussion with Mr Makucha after the September meeting you've told us about in relation to the topic of Mr Harvey's authority?---No, I just understood it that he didn't have authority to sign off on it and we needed to prepare this to go forward, that was my understanding though.

And in terms of the structuring work that you did and fed through to Mr Stafford at Eakin McCaffery Cox do you tell the Commissioner that that was done in order to produce what you understood to be necessary for the Sydney Water board namely a business case?---My initial discussions with Eakin McCaffery Cox was for them to prepare a confidentiality agreement through, through Sydney Water and Mr Makucha and it, in effect it grew to the document that it became whilst Mr Makucha was dealing with Eakin

McCaffery Cox so this, my view was this was always a separate document than the confidentiality agreement.

The business case guidelines?---Yes, that's correct.

Do you tell the Commissioner that you didn't know that the confidentiality agreement had grown into a document having a number of substantive obligations between Sydney Water on the one hand or purportedly Sydney Water on the one hand and Mr Makucha and his companies on the other?

10 ---I was aware that it had grown to that, yes.

And you were shown drafts of this agreement?---I was shown one or two drafts, yes.

And did you ever raise the fact with Mr Makucha what's going on with this business case that Mr Harvey's asked us to prepare?---I think I did relay to him that we needed to get the answers to the, to put forward the business case scenario.

20 Because it was your state of mind that there could be no joint venture agreement until, as you'd been told by Mr Harvey, until the board had agreed?---That's it. That's right. Yes.

And that what Mr Harvey had said in response to your inquiry was, we need to put together a business case?---Yes.

THE COMMISSIONER: For the board to agree?---Correct.

30 MR PAYNE: And that wasn't this draft of the agreement you were seeing?
---No.

That was, as you put it to me earlier, that seemed to be evolving separately?
---Correct.

THE COMMISSIONER: Did you say anything to Mr Stafford about this?
---No, I don't recall that I did, no.

40 When you that Mr Stafford was drafting this agreement did it not occur to you that a very substantial amount of legal fees were being incurred?---I, I did raise the, the issue with Mr Stafford.

And what did you say?---I think I just told him to, to be wary of the fact that, you know, he was incurring a lot of costs in relation to preparing this document.

But be wary, did you explain to him why he should be wary?---Well, I explained to him that there was, there was probably no guarantee that all of this was going to get approval from, from Sydney Water.

And what did he say?---I think he said that he was sort of, because he'd done so much work up until that stage, he almost felt as if the only way that he possibly could get paid was if he did progress it to the end. So I think he was sort of a bit stuck.

Yes. Okay.

10 MR PAYNE: And in terms of this discussion, did you make clear to him you might not get paid, Sydney Water might not agree and Mr Harvey isn't the person who's actually going to sign off on this joint venture?---I, I didn't put it in those terms, but I think I did mention the fact that, you know, if, if it doesn't proceed then, you know, he probably wouldn't get paid.

THE COMMISSIONER: I thought you said that, I may have misunderstood you, please correct me if I'm wrong, that you did say to Mr Stafford words to the effect that, be wary because there's no guarantee that Sydney Water are going to agree to this?---Yes.

20 And Sydney Water, would he have understood that, did you say anything to him or did you not to the effect that Sydney Water is more than Mr Harvey acting alone?---I didn't, I didn't mention that last bit. But I think it was just assumed that by saying Sydney Water, if Sydney Water doesn't approve this that, that you know, there's no guarantee that any of the fees would be paid, so - - -

30 You mean you just assumed that by saying that, you were talking about the board or somebody higher up than Mr Harvey at least?---Yeah, well, I knew that the approval had to be given for the joint venture by, by the board. So if, if the board didn't agree to the, the business case scenario or the agreement, then it wouldn't proceed.

I understand Mr Malacco that that's your evidence. What I'm trying to find out is whether you said anything to Mr Stafford to that effect. Anything that would've led him to at least infer that you were warning him that he, this needed to be signed off by the board. And Mr Harvey alone was not enough?--- I believe I had indicated to Mr Stafford that the, the board needed to sign off on, on this. I believe so, yes, Commissioner.

40 MR PAYNE: Commissioner, I tender those business case guidelines.

THE COMMISSIONER: Yes. The business case guidelines will be Exhibit 151.

#EXHIBIT P151 - COPY OF SYDNEY WATER BUSINESS CASE GUIDELINES

MR PAYNE: You can close that volume, Mr Malacco. And might Mr Malacco be shown Exhibit P127. It's just to (not transcribable) the second chronological volume. And the page numbering works in the same way. And if you can turn forward to P478 in the top right hand corner.

THE COMMISSIONER: What page again, please?

10 MR PAYNE: P478, Commissioner. Exhibit P127, its volume 2 for the benefit of those present, of Mr Harvey's Exhibits. Do you have that? 478, a letter of 22 May, 2009. Do you have that Mr Malacco?---P478, yes, I do.

I'll just ask you, this is addressed actually to Mr Harvey?---Correct.

I take it from the answers you gave the Commissioner earlier, you regarded this as a communication with your client Sydney Water did you?---No. This letter was drafted with, with Paul Makucha and Mr Makucha essentially wanted to document what, what had been instructed to this firm, to Chadwick.

20

THE COMMISSIONER: You say that in the first paragraph?---Yes.

MR PAYNE: And is this an example of what I was asking you about before where you are treating as between your two clients, you are taking instructions from Mr Makucha and putting as it were to Sydney Water proposals Mr Makucha has instructed you to make, take it or leave it, essential elements of the transaction that cannot be removed, et cetera? ---Well, the, Mr Makucha had discussed various dealings with, with Mr Harvey and Mr Makucha requested that we prepare this in terms of documenting, either what had been agreed or what was being proposed.

30

Well, can I take you up on that. In terms of what was being proposed, what you're saying to him is Mr Makucha has instructed you to document something. And then you're saying below here are terms (that Mr Makucha has told us about) which cannot be removed, altered or varied, ie Sydney Water, take it or leave it. Correct?---I guess it's the way you'd read it, yes.

And is this a, a prime example of what, I think you agreed with me earlier as this developed, although you believed you had two clients, you were preferring the interests of Mr Makucha (not transcribable) of Sydney Water?---Well, at this stage Mr Makucha had indicated that effectively I was, well I was acting for, for him in relation to, to the documents for the, the transaction.

40

Mr Malacco, when you start out acting for two clients and one of them comes and says, look, from now on you're acting for me, you know that you have to go to the other client and receive their informed consent before you do anything more don't you?---I guess it wasn't how, how the thing had

actually progressed. So I mean although, although the initial letters and the fee agreements were provided to Sydney Water, it was I guess on the basis that they were, yes, a party to the transaction and that they would, I was informed that they would agree to pay or, but essentially I did actually treat Mr Makucha as being the - - -

THE COMMISSIONER: The sole client?---The client, correct.

10 MR PAYNE: And by this time that's happened at least in your mind, you're going to prefer what Mr Makucha tells you to do over anything that you may have felt you otherwise, obligations you may otherwise have owed to Sydney Water?---Well, yes.

I see. Turn over in that bundle if you would to P494.

MR GORDON: Commissioner, I'm sorry to interrupt. Mr Makucha is expressing considerable anxiety that he does not himself have copies of these - - -

20 THE COMMISSIONER: He can share you with you Mr Gordon.

MR GORDON: I've been trying to do that but he's persisting that he wants his own copy.

THE COMMISSIONER: Well then he must make arrangements one day to copy yours. I, we'll see if we've got a spare copy for him. If we have a spare, we'll lend it to him. If he, if we don't have a spare, you and he should make your own arrangements.

30 MR MAKUCHA: Can I request your permission - - -

THE COMMISSIONER: No. You have a barrister who, who represents you. Be seated please, Mr Makucha.

MR MAKUCHA: He objects to - - -

THE COMMISSIONER: Please sit down.

40 MR PAYNE: Commissioner we'll make inquiries, if we have a copy, we'll lend it as you've suggested, Commissioner.

THE COMMISSIONER: It looks as if one's coming.

MR PAYNE: Thank you. Can we look at P140. Do you have that, Mr Malacco?---I have that, yes.

You are setting out something, and again can I ask you about this. You're writing to the managing director of Sydney Water Corporation, attention Mr Ed Harvey?---Yes.

What was your state of mind about where this correspondence would end up when you wrote that?---With Mr Harvey.

You thought you were writing directly to Mr Harvey?---Ah, I knew that the letter would be taken to Mr Harvey, correct.

10

Taken by who?---Mr Makucha.

Have you ever had that sort of arrangement before in your professional career where you're writing to one of your clients and you give it as a matter of course to the other client to hand deliver it?---I guess no.

20

Did you regard this arrangement that Mr Makucha, I take it had suggest to you, as unusual?---Well, Mr Makucha was going out to Sydney Water almost on a daily basis so he asked me to prepare some documents and then he'd collect them and deliver them directly.

THE COMMISSIONER: Whose idea was it that the letter be addressed to the managing director of Sydney Water Corporation?---Mr Makucha.

Did he ask you that expressly?---Yes, he did.

30

Did he explain why?---I think it was, I can't recall exactly. I think he just wanted to, to, to have it on record that, that it was being provided to Mr Harvey but it was available for, for, for managing director.

MR PAYNE: And so as you understood it, you, you were assisting Mr Makucha to create a paper trail of various agreements along the way, were you?---It appears that way, yes.

Well, I'm asking for what your understanding at the time was?---At the time, yes.

40

You thought you were helping Mr Makucha create a paper trail of agreements so that what, if there was any debate in the future about what had been agreed with Sydney Water, Mr Makucha could produce this and say, I wrote to the managing director and told her all about it?---Um, yes.

Did you ever have a discussion with Mr Makucha about that?---Um, no.

What did he say to you when he asked you to write to the managing director, doing the best you can to recall?---I think, I can't recall exactly, but I think it was along the lines of ah, although we're giving the documents to

Mr Harvey, it was effectively available for Mr Harvey to, to give to the managing director if he, if he so chose.

Mr Makucha told you that, did he?---Yes.

THE COMMISSIONER: But that's very strange, Mr Malacco. In hindsight do you- -?---In hindsight it's strange, yes.

10 And it's strange because if you were writing to Mr Harvey you, you would expect your letter to be addressed to Mr Harvey?---Yes, that's correct.

But if you were seeking to create a false paper trail you might address it to the managing director, give it to Mr Harvey and at the same time know that the prospects of it actually getting into the hands of the managing director are extremely remote, if they exist at all?---In hindsight, yes, that's correct.

MR PAYNE: And just to take you, Mr Malacco, in paragraphs 2 and 3 you recite requests as you understand it made by Mr Harvey for preparation of all necessary documents for legally binding Heads of Agreement?---Ah, yes.
20

You understood at this time, that is May 2009, that Mr Harvey himself had no authority to enter into legally binding Heads of Agreement?---Ah, yes.

And you expected, did you, that these legally binding Heads of Agreement would be entered into on the one, on the one hand between Mr Makucha and his companies and on the other, some higher organs within Sydney Water, if at all?---Yes.

30 Turn over if you would to P535. Tell me when you're there?---Ah, yes.

That's a letter from you to, on the one hand, the managing director of Sydney Water, attention Mr Harvey, and on the other, Mr Makucha?
---Yes.

And again in accordance with this procedure that you had developed with Mr Makucha you gave a copy of the original for Mr Makucha to deliver, as you understood it, to Mr Harvey?---Yes.

40 And again it's addressed to the managing director for the reasons you told me about a moment ago?---Yes.

In terms of this, can we look down the page. The transaction is starting to grow exponentially by this stage. Correct?---Ah, yes.

Were you, Mr Malacco, alarmed when you were told by Mr Makucha that part of the deal involved LPG-powered desalination plant on a ship?---Oh, I thought it was strange.

You thought it was bizarre, didn't you?---I thought it was strange, yes.

What about the next one, nuclear-powered desalination plant and storage of produced water?---Yes.

To your knowledge, other than the research facility at Lucas Heights, how many nuclear reactors are there in Australia?---I'm not aware of any, besides that one.

10 Besides that. To your knowledge, it is a notorious fact, isn't it, that whether or not this country should have anything to do with nuclear powers has been the subject of intense political debate for decades?---Ah, yes.

And yet here you were being asked to document by Mr Makucha some purported agreement about nuclear-powered desalination?---Ah, yes.

You thought that was ridiculous, didn't you?---I thought it very strange, yes.

20 Did you say anything?---No, I didn't.

Did you still think you had any obligation at all to Sydney Water at this point?---I considered Mr Makucha as the, as effectively the client.

And so no matter how strange or ridiculous the proposal from here on for Mr Makucha, you regarded as your professional obligation simply to document it, did you?---Well, I was asked to document it by Mr Makucha so I did.

30 THE COMMISSIONER: I understand you to be saying, Mr Malacco, in fairness to you, correct me if I'm wrong, but by this time you did not regard Sydney Water as your client?---No.

And when did you stop regarding Sydney Water as your client?---Well, effectively it was, because I'd never had dealings with anyone at Sydney Water I'd, I always considered Mr Makucha as my client.

40 Yes, I- -?---I was trying to sort of relay this earlier, but I always considered Mr Makucha as my client and Sydney Water was I guess the party to the joint venture, which I was looking to try and help establish. So I was um, ah, bearing in mind um, the, I guess certain obligations to, to make sure that the deal progressed um, but I, I, I did actually consider Mr Makucha as being my client.

And not Sydney Water?---And, well, no, not, not Sydney Water per se, no.

I do get the sense, and please correct me if I'm wrong, that the nature of your relationship with Sydney Water was extremely vague in your mind and you never really thought about it. Or am I wrong in that?---No, that's

probably correct. That's probably correct. It's, because I was having continual meetings with Mr Makucha I, I just had it that that was my client.

And the fact that Sydney Water were paying your fees, how did you regard that as bearing on the relationship between you and Sydney Water?---Well, I knew that Mr Makucha didn't have the, the funds to pay our fees um, and it's, it's not uncommon under a joint venture arrangement whereby one party puts up the intellect and the, and the work and the other party to actually fund it. So um, I, I'd always viewed it in, in that manner.

10

That is to say that if Mr Makucha was your client Sydney Water was not your client but Sydney Water as part of its obligations under the joint venture would pay your fees, is that what you say?---Yes, that's, that's correct.

The only problem with that is that first letter that you wrote which is a letter addressed to both Sydney Water and Mr Makucha but you say that there was no, I assume that there was no contractual intent with - - -?---No, there was no contractual intent, it was just, I'd phrased it in that way merely to I guess have, because I knew, I knew, I knew it wouldn't progress unless Sydney Water agreed that that would be a fair fee to pay for those services so, and that's, and that's why I addressed it in that, in that manner.

20

Did you regard Mr Harvey as having the authority to retain you on behalf of Sydney Water?---Yes, I did.

Yes, thank you.

30

MR PAYNE: Can I just take up those series of answers. If by this stage you'd formed the view that you weren't acting for Sydney Water, who did you think was?---I thought Sydney Water was, would have been reviewing the things internally.

Have you ever done a major deal like this and received so few comments from the other side of the deal?---No.

40

Have you ever done a deal like this involving this much money where you haven't been contacted on a regular basis by some professional advisor, whether internal or not, but some professional accounting advisor to discuss the details with you?---No, I've undertaken a thing like that, no, where, sorry, the answer to your question is no.

So by this stage just about everything about this deal is becoming completely outside your professional experience?---Yes.

And just in fairness to you, on 535 before we go any further, were you actually setting out this LPG desal plant on a ship and nuclear-powered desal plant because you just couldn't believe that you were being asked to

document it and you were sending yourself to Mr Harvey at least to know what you were told by Mr Makucha or this is a genuine proposal in your mind?---Well, that's what Mr Makucha had advised he'd been discussing with Mr Harvey and whether I thought it was out of the ordinary or strange, he asked me to document it so I did.

THE COMMISSIONER: I thought that he, that this letter had in effect been drafted by Mr Makucha?---No, I drafted it.

10 You drafted it?---It was with - - -

On his instructions?---On his instructions, yes.

MR PAYNE: I see. Turn over if you would to page P539. This is a letter you wrote on or about 11 June, 2009?---Correct.

Again to the managing director of Sydney Water but attention Mr Harvey?--
-Yes.

20 You're setting out fees required for, for this Heads of Agreement and the Shareholders Agreement that we spoke about earlier?---Yes.

Your state of mind at this time was that you were acting for Makucha and his companies alone, Mr Makucha and his companies alone and not for Sydney Water?---Correct.

Nevertheless you were setting out that Sydney Water Corporation would be required to pay all professional costs et cetera in relation to the transaction, including all assignments and intellectual property owned or to be created in
30 the future, any goodwill assigned to the joint venture and associated group of companies of the joint venture?---That's what it says, yes.

You were seeking to create a contractual relationship with Sydney Water by this letter, weren't you?---Well, I don't think I was necessarily seeking to personally create, create a contractual relationship with, or obligation.

THE COMMISSIONER: You were intending to take steps that would result in a contractual relationship weren't you?---Yeah, probably, yes.

40 Why, this, whose idea was it to type in the words "acknowledged by"?---I think it was Mr, Mr Makucha's from early on, that's how he wanted the documents - - -

Now, acknowledged by is different from receipt if acknowledged?---Yes.

You'd accept that?---Yes, yes.

I mean, on, according to ordinary meaning of the English language, the words “acknowledged by” indicate the assent of the person who signs to what is written about those words. Do you accept that?---Yes, I accept that.

But you knew that Mr Harvey had no authority to bind Sydney Water to these agreements didn't you?---Well, I knew he had the authority to put in place the, the entire proposal but I'd been made aware that Mr Harvey had the authority to negotiate the dealings.

10 But this is not a negotiation, this is an agreement isn't it?---Yes, it is.

So why did you put in “Acknowledged by Mr Ed Harvey on behalf of Sydney Water Corporation” when you knew that Mr Harvey didn't have the authority to agree on behalf of Sydney Water Corporation?---That was, I guess it was just a way that I'd been preparing the letters.

Well, Mr Malacco, normally just the way you prepare letters is brought about by reason. I don't so those, in other letters you didn't put those words there, did you? You've put in some but not in all?---I think in, I think in most - - -

Well, not in the beginning?---Possibly not in the beginning, no, but I think in most of the other ones yes.

Why did you put them in?---I think it was just a request by Mr Makucha that the letters be acknowledged.

Well, no, not the letters be acknowledged, what's set out in the letters be acknowledged. I thought you agreed with that?---Yes.

30 Well, yes, thank you, Mr Payne.

MR PAYNE: And in accordance with the answers you gave me before about a paper trail, you addressed this to the managing director both in Mr Makucha's interests and in your firms just so that there'd be a paper trail at Sydney Water that they were told about these fees that you proposed to charge, correct?---Well, those fees weren't going to us, no, but they were - - -

40 THE COMMISSIONER: Those were payments under the agreement? ---Yes, that's right.

MR PAYNE: All right. Turn over if you would to P577. This is a fee proposal from you to the managing director of Sydney Water attention Mr Harvey and Mr Makucha?---Yes.

This relates to the creation of Sydney Water Bank Pty Limited and the obtaining of banking licences?---Correct.

Again when you were told about this by Mr Makucha I, I take it you regarded it as a very strange proposal?---Yes, I did.

For a public authority in New South Wales to be starting its own bank?
---Yeah, I thought it was strange, yes.

Did you say something to Mr Makucha?---No, I didn't.

10 Was there any reason for that?---Again it was something that Mr Makucha said he'd, he'd discussed with, with him and, with Mr Harvey and he just wanted it documented if, if it went to that stage of progressing so - - -

And this is a fee proposal from you to the managing director of Sydney Water for Hall Chadwick's fees?---Yes, it is.

And it contains the "acknowledged by" writing at least on P579?---Correct.

20 Although this copy at least is not executed?---It was never executed.

It was never executed did you say?---No.

Yes, well, if you turn to P582 it was executed by Mr Makucha but apparently not by Mr - - -?---But not, not by Mr Harvey, no.

Mr Harvey, I see. Turn if you would in the bundle to P609, actually I'm terribly sorry, Mr, Mr Malacco, prior to doing that just go to 606 first of all. Did you ever see any document in this form or any altered form concerning Mr Harvey's authority at any time during your involvement in the process?
30 ---Sorry, can you - - -

Did you see at any time a document either this document or anything - - -?
---I saw this document, yes.

You did see it?---Yes, I did see this document.

I see. Can I draw your attention to the second paragraph. "I wish to confirm it's the intention of Sydney Water to enter into a legally binding agreement in respect to the project once the necessary senior management and board approvals are obtained."?---Yes.
40

Are you clear that you saw this document containing that information or some other version?---It may have been some other version but I, I remember there was a letter that was provided to me back in, pretty sure it was July whereby Mr Harvey had indicated that he had the authority to negotiate the deal and, and put forward a proposal to senior management.

And just to be clear that was what you understood the letter whenever you saw it to convey namely that negotiate but not enter into the deal, that was a matter for Sydney Water's board?---Yes, (not transcribable).

And as you told me earlier that was your understanding throughout?---Yes, that was my understanding.

10 Just to assist you with this have a look at 607, have you seen this document before?---Looking at these, I'm, I'm not 100% certain whether I've seen this documents or not. If they're in my bundle of documents that I produced to ICAC then I would've seen them but I can't recall exactly.

I don't believe they're in that bundle if I can assist you at least to that extent. Have a look at 608 just to complete the picture. All three versions are signed, two have copy written at the top namely 606 and 608. Do you think you saw the document at P608 or can't you be sure?---I can't recall. If it's the documents that I provided then it would've been, there was lots of documents that I - - -

20 And does it follow if it's not doing the best you can to reconstruct you don't think you saw it before?---No, if it's not in the documents I, I, I provided to the Commission then I wouldn't have seen it.

Can we turn over to P609, Mr Malacco. I'm terribly sorry, go back to 608, that is in your documents this version?---It is is it? Okay.

So just to recap that means you regard it as likely that you did see it?---Yes.

30 So that we all understand, the third paragraph down, "You should proceed to provide Sydney Water with your executive summary for the business proposal", is that a reference as you understood back to this business case guidelines P151 that I showed you about earlier on?---Correct.

So this at least, this letter is so far as you're concerned completely consistent with what you had understood Mr Harvey to have told you namely prepare a business case, I'll take it to the board, they have the power to approve it not me?---Yes.

40 THE COMMISSIONER: And, Mr Malacco, can you just look for a moment at page 607, that's the previous page. You see the second paragraph?---Yes.

And you notice that at 608 that paragraph doesn't appear?---Yes.

Are you able to remember whether you saw any letter containing a paragraph such as the second paragraph on page 607?---I can't recall, Commissioner.

MR PAYNE: Just lastly on 608 it's addressed to Mr Makucha at Hall Chadwick Accountants, was all of his correspondence as you understood it coming to you at that point or your firm at that point?---Yes.

And what, you had some process to keep it for him did you?---Well, everything was effectively hand delivered, I can't really recall actually receiving anything that was mailed so all of the documents would've been provided by, especially from Sydney Water, sorry, by hand from, from Mr Makucha.

10

So everything you got from Sydney Water you believe came by hand via Mr Makucha?---Yes.

You don't recollect any occasion where you were given something, you only had one meeting with Mr Harvey, he didn't give you anything on that occasion as you recollect it?---No.

And including P151 the business case guidelines I think as you told me earlier they came subsequently from Mr Makucha?---Yes.

20

And even this document addressed to Mr Makucha at Hall Chadwick you were given it by Mr Makucha?---Yes, I believe that would be the case.

Turn over to P609 if you would. By this time 30 October what's your understanding about the state of readiness of this Business Implementation and Confidentiality Deed by this time?---It was, it was nowhere near ready.

30

Were you working on the sort of business case that Mr Harvey had indicated he needed at this time?---Yes, we'd sort of started a draft and I'd requested Mr Makucha to provide a lot of the input in terms of sales and costings and all those sorts of things.

And what did Mr Makucha tell you about that request?---He said he was working on it.

Was working on it?---Yes.

40

And did you tell him why you needed it namely for a business case to go to Sydney Water's board?---It needed to be included in the proposition for the business case.

And you have a recollection of discussing that matter with Mr Makucha namely Mr Makucha, I need that information for a business case for Sydney Water's board?---Yes. Well, for the executive summary, yes, and the executive summary was to be provided to the board so, yes.

And just doing the best you can can you tell the Commissioner, you're not a tape recorder I know but the words to the effect of the conversation you had

with Mr Makucha or any conversation about this executive summary or proposal for the board?---Well, I'd, initially I'd sat down with Mr Makucha and, and gone over a rough, almost like a cash flow which I'd, I drafted down on a piece of paper, I put that onto an Excel format and then I'd given that, I'm fairly certain I'd given that to Mr Makucha and I said we need to obviously expand on this and there was also a document which I had prepared which indicated what, what Mr Makucha was required to do in terms of preparing the business case or the executive summary and what we would undertake to do so all of that was given to, to Mr Makucha to, to
10 obviously progress the business, business case or business executive summary.

And you've used the term executive summary, is that a term that was used in conversation between you and Mr Makucha about what you understood to be the business case that was to be prepared to Sydney Water's board?
---Yes, the executive summary was how Mr Harvey had referred to it.

I see, in the meeting in September?---Yes, or in correspondence or in terms of preparing the business case proposal, yes. It was called an executive
20 summary.

And that executive summary was a matter of discussion between you and Mr Makucha as you've identified?---Yes.

And you made clear to Mr Makucha that that information was required for an executive summary to go to the board of Sydney Water before any joint venture could be approved?---I'd indicated to Mr Makucha that we needed to prepare the executive summary and the, it was my understanding that we all knew that the executive summary was to go to the board 'cause that was
30 what had been given to us and also in correspondence with, from Mr Harvey.

And certainly in that meeting in September you've spoken about that the executive summary it was clear to you from what Mr Harvey said that that document was what he needed to go forward to the board to get approval if approval was to be forthcoming?---Yes.

And Mr Makucha was there during that conversation?---Yes, he was.

40 Just going back to P609 if you would?---Yes.

This is some sort of pre-exclusivity agreement?---Yes.

And that form of words about acknowledged by us down there, Mr Malacco, did you think Mr Harvey had authority to make this agreement?
---Um - - -

Sorry, I'll withdraw that. First of all, did you regard this as being a proposal to enter into an agreement?---Ah, yes.

And you were doing this at the instance I think of the person you then regarded as your client, Mr Makucha?---Yes.

10 And what did he tell you about this agreement?---Um, well, I, if I recall correctly, I think it was he wanted, Mr Makucha was, was, was keen to, to get, I guess, some money along the um, along the way um, and he, he wanted to enter into an agreement with Sydney Water whereby, as he called it, the exclusivity agreement to um, to, in a way, bind Sydney Water and, and, and Mr Makucha, not to the agreement but to progress the agreement.

To bind Sydney Water you say?---Well, not, not so much, the, the way it was phrased to me was that um, if I recall correctly, was that um, ah, Mr Makucha um, wanted to ah, enter into this exclusivity agreement whereby he would, both parties would only deal with each other or Mr Makucha would only deal with Sydney Water.

20 I see. Can I take you then, you can close that volume, Mr Malacco. Can I take you then to the business implementation and confidentiality agreement. I just want to ask you a few questions about that. Yes, if that might be shown to the witness. The two volumes that I tendered of the business implementation and confidentiality agreement, which is Exhibit P132. Do you, it's P132 and 133, because it's in two volumes. I want to ask you about P132 first of all, which is the first volume. First of all, Mr Malacco, what involvement did you have in the final version of this business implementation agreement?---I wasn't involved in a great deal of preparing this agreement. I was, I think I saw, I may have indicated previously an
30 earlier version, very small drafts. I had discussions with Mr Stafford in relation to the structure but in, and I, I think I examined a table that was included within the, the documents, the flow chart of the entities.

I see?---But I didn't have a great deal of involvement in actually reviewing or preparing the agreements.

40 Dealing firstly with intellectual property issues, so far as they're dealt with in this agreement, do I understand what you told me earlier, that you and your firm, so far as you recall, had very little to do with intellectual property issues. Is that what you say?---Correct.

So that the attempt to buy a company called Sydney Water P Pty Limited, to obtain registered trademarks of Sydney Water for various uses is something that you say you weren't involved in?---I was involved with setting up Sydney Water P as an entity but in terms of actually um, registering any trademarks or anything of that nature, we had no involvement.

Who asked you to set up Sydney Water P?---Mr Makucha.

Did you have any discussion with anyone from Sydney Water about establishing Sydney Water P Pty Limited?---Ah, I know at one stage, I can't recall exactly, but I know at one stage Mr Makucha was in my office and I can't recall whether I actually spoke to Mr Harvey or not or whether he spoke to him, but the, the establishment of the entity was um, ah, was in my understanding done with the acknowledgement of Mr um, Mr Harvey um, and I think one of our engagement letters to set it up was also signed by, by Mr Harvey.

10

And as you understood it, ASIC would want some proof that Sydney Water the entity consented to the creation of this new entity, Sydney Water P Pty Limited?---Ah, well, in terms of registering a company, there's no requirement to, to give authority to, to state that the shareholders want to set up the company and the shareholder in this company was, it was set up purely as um, entity controlled by Mr Makucha.

20

As you understand the position, if Sydney Water had not consented and somebody set up a Sydney Water P Pty Limited, there are steps that they could take legally to have that company removed from the register. Correct?---Ah, yes.

And do you say to the Commissioner that to your knowledge there was some acknowledgement or consent given by Mr Harvey to the creation of Sydney Water P Pty Limited?---Um, yeah, I believe, I believe, yes.

30

And prior to receiving that consent or acknowledgement did you, or to your knowledge did Mr Makucha ever explain to Mr Harvey precisely what was intended to be done with that company, namely to make application for valuable intellectual property in relation to Sydney Water proposed trademark?---Ah, yes. The, very early on when the companies were being established it was discussed that there would be a distribution company, a holding company and an intellectual property company and the Sydney Water P was to be the intellectual property company.

THE COMMISSIONER: The consent that you got or that Mr Makucha got from Mr Harvey- - ?---Yes.

40

- - -was the consent to register the companies using the name Sydney Water as part of the name of the company?---Ah, I believe so. I can't recall exactly but I believe so, yes.

Do you think Mr Harvey had the authority to bind Sydney Water to such a consent?---I hadn't, I hadn't thought about it.

Did you not recognise the name Sydney Water as an extremely valuable trademark?---Ah, yes.

So what was Mr Harvey, the property asset manager, doing in agreeing to a company using Sydney Water's name?---I can't answer that, sorry. I, I, I, I
- - -

It didn't occur to you that Mr Harvey had no authority to give the consent to the use of Sydney Water's name in the title of another company?---Um, I hadn't, I hadn't thought about that, no.

10 MR PAYNE: And just to finish those questions, series of questions from, from the Commissioner, as you understood the proposal from Mr Makucha, it was that before any joint venture was agreed by the board of Sydney Water, he would approach IP Australia and seek to have registered in a company owned and controlled by him, potentially very valuable intellectual property using the mark Sydney Water that related to other categories than what the existing mark was relating to?---Ah, yes.

Did you ever explain to Mr Harvey in terms what it was you understood Mr Makucha was proposing to do?---No.

20 To your knowledge, did Mr Makucha ever explain to Mr Harvey precisely what it was Mr Makucha was going to do?---Um, no, I don't. I mean, I, I, I don't, I don't know what he explained to um, to Mr Harvey.

You did know, didn't you, that Mr Harvey's consent was sought by Mr Makucha to Sydney Water P being the applicant for the extension of the Sydney Water mark in the way that is described in these agreements?
---Ah, yes.

30 I take it you understood that to attempt to obtain very valuable property like this without explaining fully to Mr Harvey what his consent was being sought for might be to mislead him. Correct?---Ah, I guess so, yes.

And did it occur to you at the time that that's really what was going on here? It was an attempt to obtain very valuable property by using Mr Harvey as a dupe?---I, I hadn't thought about it to that extent really. I mean I was, I was leaving the registration process to the intellectual property lawyers. So in terms of any legal requirements, I, I hadn't given it too many considerations.

40 Looking back at the, your involvement now, do you agree with me that what I put to you was the cases?---Yes.

Can I ask you then just about this charitable trust deed. You're aware that as part of this agreement, and I'm terribly sorry, but it's not separately numbered. Its part of volume 2 of 5 of the Exhibit I've given you. So go behind the first tab, which is 2. Do you see that?---Folder 1 or - - -

Volume 1, folder 1, yes?---Yes.

Behind the second tab, now you need to go about half way in and you'll see it - -?---I haven't got any tabs.

You haven't got a tab, I see. Well just go about three quarters of the way in the document and see if you can find something with Paul Makucha in very elaborate script at the top of the page.

MR GORDON: What page, Commissioner.

10

MR PAYNE: Page number 1 of the Charitable Trust Deed?---Is it P317 or - - -

Mr Malacco, go to P301. Have you seen this document before?---No, I haven't actually.

The Charitable Trust Deed?---No, I can't recall seeing it, no.

I see. Go to P302. You see your name there set out?---Yes.

20

Did you know that there was a Charitable Trust Deed to which you were going to be a foundation trustee?---I discussed with Mr Makucha or Mr Makucha had discussed with me that he wanted to set up a charitable trust of which I would be a trustee, yes. I hadn't seen a document though, no.

I see. And were payments to you there discussed?---No, I can't recall any payment being discussed.

30

Did you agree to become a foundation trustee?---No, I don't think I did. But I, I had no objection against become a trustee of the, of a trust. But I, whether I was specifically asked to consent, no.

What if anything were you told by anyone about the execution of this business, Confidentiality and Business Implementation Agreement on 3 December, 2009?---Sorry, what was I told about the execution of it?

Yes?---Very little.

40

Did somebody tell you that it had been executed?---I think after the event, I think someone had said that they'd executed it, yes.

Who told you that?---I think it may have been either Mr Stafford or Mr Makucha. I can't recall. But someone had indicated that it'd been executed.

Were you surprised?---Yes.

Well, you were still working on this document, this executive summary for the board of Sydney Water weren't you?---Yes.

But you were waiting for information from Mr Makucha about it before that presentation could be made?---Yes.

Did you say anything to anybody when they told you that the deal's been done?---No.

10 THE COMMISSIONER: But you knew that without the approval of the board there could be no deal?---Well, that's, yeah, that's right. Yes.

So you knew that the, did it occur to you that the signature on, Mr Harvey's signature on this agreement had no binding affect?---I was, I was surprised that it'd been executed, but from what I understood the agreement was I think, not that I had read it, but I mean, the, my understanding was that the agreement was to put in place the structure, but again all subject to conditions being met.

20 MR PAYNE: One of those conditions being approval by the Sydney Water board?---I thought that was what was necessary, yes.

Yes, I have nothing further for Mr Malacco, Commissioner.

THE COMMISSIONER: Yes, Mr Stevenson, will you be long?

MR STEVENSON: Not very.

30 THE COMMISSIONER: You won't travel the same route as Mr Payne?

MR STEVENSON: I will certainly not travel that route. Mr Malacco, I'm the barrister for Sydney Water. In answers to some questions that Mr Payne asked you, I think you agreed that you regarded yourself at all times as acting for the joint venture or proposed joint venture or did you need to qualify that evidence later?---I considered Mr Makucha as my client. Although I was preparing something for the benefit of putting together the joint venture, so I, that's how I, that's how I pictured what I was doing.

40 You didn't know of any other accountant or lawyer acting for Sydney Water in relation to - - -?---No.

- - - any proposed joint venture?---No.

And you corresponded directly with Sydney Water didn't you throughout 2009 in relation to matters touching on the proposed joint venture?---Yes, by addressing the letters, yes, I did.

Well, I want to take you to three occasions - - -?---Yes.

- - - which indicate a fourth, where you wrote to Sydney Water directly and only. Do you follow me?---Okay.

Could Mr Harvey, sorry, Mr Malacco be shown Exhibit P126.

THE COMMISSIONER: 126?

10 MR STEVENSON: 126. And this is a document Mr Payne did not take you to. And you've got that could you go to page 388, using the numbers on the top right hand corner?---Sorry, P126?

P126, that's the - - -

THE COMMISSIONER: That's the big folder.

MR STEVENSON: That's the folder.

20 THE COMMISSIONER: That's the whole folder?---Oh, sorry.

Go to page 388?---388.

MR STEVENSON: See on the top right hand corner. Now it should be a letter from you to Mr Harvey on 8 April, 2009?---Yes.

And it's, as you can see, addressed to Mr Harvey at Sydney Water alone, that is not also to Mr Makucha?---Correct.

30 And you refer in the first paragraph to an engagement letter?---Yes.

And you give a quotation of \$66,000 for the fees you describe?---Yes.

And in the third paragraph you say, we also note that you would require additional services for advice regarding shareholders agreements et cetera? ---Yes.

And that you in there is Mr Harvey on behalf of Sydney Water isn't it? ---Yeah, all right, I think so, yes.

40

Well, who else, what other - - -?---Well, looking at the letter, yes, it looks, yes.

And in your last paragraph you say we will commence the accounts upon receipt of funds into our account?---Yes.

And thereafter you started rendering invoices didn't you, all of which were addressed to Sydney Water only?---Yes.

You never addressed an invoice to Mr Makucha?---No.

So it's plain isn't it from this letter of 8 April, 2009 that at least at this date you regarded Sydney Water as your client?---Well, on the very first letter of engagement and free proposal that I, that I issued, I'd actually had both names on there for the (not transcribable)

That's why I'm asking you about this letter you see, and my point - - -?
10 ---Well, I, I received back from Mr Harvey again through Mr Makucha and he had indicated that he would agree to the fee proposal but he wished the, the tax invoice to be amended so it was addressed to Sydney Water Corporation. So that's how I prepared them.

Yes, all right. But my question was don't you agree that the letter I'm showing you at page 388 addressed by you to Sydney Water only shows that you regarded that at that point Sydney Water as being your client?---I don't think it was necessarily meant to regard Sydney Water as my client.

20 Well, you're reciting on, you're stating on paragraph 3 aren't you that you, being Sydney Water, was requiring additional services for advice regarding shareholders agreements, et cetera?---Yes, that's just what it says, yeah.

And you're reciting there aren't you the instructions that you understood you had from Sydney Water via Mr Harvey, aren't you?---Um - - -

What else could it be?---I think it was a letter just indicating the, the, this was for the updating of the records of the Makucha companies.

30 Well, we can all read it, Mr Malacco - - -?---Yeah, I - - -

- - - but I was giving you a chance to explain it. Surely the third paragraph shows that you are reciting instructions that you thought you'd got from Sydney Water?---Well, I hadn't received any instructions from Sydney Water but I mean that's, I guess that's how it would read, yes.

Yeah. You say you hadn't received instructions but what you're saying is you note that Sydney Water will require what you say?---Yes.

40 You're acknowledging aren't you that you'd received some instructions?
---Yes, yes.

And could you, could you close that please and could Mr Malacco be shown Exhibit P127.

MR MAKUCHA: Page number please.

MR STEVENSON: Page 539. I can assure Mr Makucha he'll hear the page number at the same time the witness does. Now, Mr Payne has taken you to this, I'm not going to go through the letter in detail, so to direct your attention to the fact that again its addressed by you to Sydney Water alone?
---Yes, that's correct.

And it sets out a list of deposits required?---Yes.

10 And the third paragraph makes an assertion that Sydney Water is required to pay all professional costs including yours?---Yes.

So again this is a letter by you, isn't it, to Sydney Water as your client?
---Well, I wasn't viewing it as a letter from me to my client, no.

20 So you say it's a letter to someone other than your client expressing a requirement that that other person pay your fees?---It was, it was a letter to Sydney Water I guess indicating what had been conveyed to, to me so it wasn't, I wasn't looking at Sydney Water in terms of this as, as, as my client.

And then to page, the same volume, can you go to page 609, do you have that?---Yes.

And Mr Payne took you to this, again it's a letter addressed by you to Sydney Water alone?---Yes.

30 And in the first paragraph you refer to the letter I've just taken you to, the 11 June one and also a letter of 18 September, 2009 that I can't show you?
---Yes.

And in your second paragraph you say that the letter we're looking at replaces those two letters?---Yes.

And acknowledges that Sydney Water agrees to make the payments you describe?---Yes, it does.

40 This and the two other letters I've shown you to and the letter of 18 September referred to in this one are all surely letters written by you to Sydney Water as your client?---Well, I wasn't, I wasn't looking at, I mean, I wasn't indicating that Sydney Water was a, was, was our client it was just, that was my understanding of, of what the agreement was.

And I want to suggest to you that this practice that these documents show of you writing to Sydney Water from time to time alone is consistent with the evidence you gave earlier that you regarded yourself as acting for the proposal joint venture don't you agree?---Well, yeah, I mean I was acting, I was acting to try and establish the joint venture, yes.

You were acting for the proposed joint venture?---Yes, yes.

And that must mean you're acting for the parties to the proposed joint venture, each of the parties to the proposed joint venture?---Well, I was trying to establish the joint venture or, or put in place the joint venture.

10 If you were acting to try to put in place a joint venture surely do you agree you were acting for the parties, for both the parties, all the parties to the proposed joint venture?---I guess it doesn't necessarily follow that I was, that, just because I'm writing to one party in relation to the formation of, of the proposed joint venture doesn't necessarily mean, I mean I was trying to give advice for the joint venture as a whole.

To the proposed joint venturers?---Yes.

Both of them?---Yes.

20 And it followed that you understood surely that you had obligations to both proposed joint venturers?---Well, I, I viewed Mr Makucha as my client and I, I, I viewed that what I was writing was effectively to, to formulate the joint venture from I guess in a way from his, from his side and I, I had always thought that Sydney Water would come back to me in terms of their proposal.

Well, let's just test this because I'm going to be making some submissions to the Commission in due course about this matter and I want to give you a fair chance to hear what I'm going to submit and respond to it. We've seen three letters that you wrote directly to Sydney Water alone?---Yes.

30 And one of those letters referred to another so there's at least four letters. Do you agree?---Yes. Yes.

All the other letters you had wrote to concern this joint venture were addressed to both Sydney Water and Mr Makucha?---Yes.

And you understood didn't you that Mr Makucha and his companies and Sydney Water were to be the proposed joint venturers?---Yes.

40 And you knew that no other accountant was giving advice as far as you could see to Sydney Water?---That's correct.

And as you knew that no other lawyer so far as you could see was giving, external lawyer, was giving advice to Sydney Water?---Correct.

So surely in those circumstances you understood that what you were doing was yourself giving advice to both members of the joint, proposed joint venture?---I mean I was doing as trying to establish the joint venture but it was, again I viewed Mr Makucha as, as my client and because I wasn't

getting any direct instructions from Sydney Water, I mean I was in a way putting forward the, the, the joint venture as, as how I was looking to structure it to accommodate, to accommodate both parties, yes, but I was viewing it as the interests primarily of Mr Makucha's entities and I'd always expected that there would be input from Sydney Water.

Getting more instructions from Sydney Water but being paid by them, paid by you?---Yes.

10 And I want to put this to you. You understood that you had obligations in these circumstances to both parties to the proposed joint venture. Do you agree or not?---Well, in, in preparing any, any structure obviously I wanted to make sure that it was something that was going to be acceptable to both parties, there's no point going - - -

I think the question was clear. Did you or did you not regard yourself as owning obligations, professional obligations to both proposed joint venturers?---As a matter of, of, of, of due course but I was, I was, had an obligation to, to Mr Makucha.

20

And I want to ask you this question, if there's an expression you don't understand please tell me. Didn't you understand that you had a fiduciary obligation to both proposed joint venturers including, to be clear, an obligation not to place yourself in a position of conflict between the two proposed joint venturers?---Yes.

Now, in that same bundle, could you go to page 526.

THE COMMISSIONER: 526?

30

MR STEVENSON: 526. Now, if you recall being asked some questions by Mr Payne, you recall being asked some questions by Mr Payne concerning the registration of 4 companies by you, all of which had included in their names the word Sydney Water?---Yes.

And you said I think, although to be fair to you, not with, not with great confidence, that you thought you'd had some instructions from Mr Harvey about that matter?---Yes.

40 Now, the companies you registered were, excuse me, Sydney Water Health Pty Limited?---Ah, yes.

Sydney Water P Pty Limited?---Yes.

Sydney Water M Pty Limited?---Yes.

And Sydney Water L Pty Limited?---Yes.

And looking at your letter at page 526 you say at the end of the first paragraph that what you said in the first paragraph was an addition to the 4 companies already registered by this firm?---Yes.

The 4 companies already registered by your firm were the ones I've just mentioned?---Yes.

And in each case the registered office of those companies was Hall Chadwick's office?---Correct.

10

Mr Makucha was the sole shareholder and director?---Ah, yes.

And when I say shareholder, either himself or through- - -?---or his company is correct, yes.

And I want to suggest to you that they were each incorporated on, in May 2009?---Yes.

20

Now, you hadn't sought the permission of anyone at Sydney Water, had you, to use the word Sydney Water- - -?---No.

- - -in those names? No. And were you aware of the provisions of section, sorry, were you aware of any provision in the Corporations Act dealing with the registration of companies with identical names of other companies?

---Ah, well, I know you can't register an identical company, a name, sorry, register a name for a company which is identical to another.

30

And you knew of course that there was a company registered at ASIC called Sydney Water Corporation?---Yes.

And I'm not suggesting that the names of these companies is identical for the purposes of section 147 of the Corporations Act was Sydney Water, but you recognised, didn't you, that included in the names of these companies that you registered were names which on any view of it were associated by the public at large with Sydney Water Corporation?---Ah, yes.

40

Did it not occur to you that you should get some consent from Sydney Water to use its name or part of its name in these companies which were incorporated in Mr Makucha's name?---Um, well, because, because Mr Makucha had indicated that Mr Harvey said so I thought, I mean, it wasn't, it wasn't something that ASIC could come back to us on in terms of anything like that.

Is it Mr Harvey telling you that he agreed or is it Mr Makucha telling you that Mr Harvey agreed?---I, I can't recall exactly. I'm pretty sure for most of them it was relayed via Mr Makucha.

Looking at your, looking at your letter at page 526 you say in the first paragraph that further to discussion with Mr Makucha you'd been requested to register 30 additional companies?---Yes.

That is beyond the 4 that we've mentioned?---Yes, that's right.

And if you go to page 533 of that bundle- - ?---Yes.

10 This is an annexure to your letter starting at 530. That's a list of those 30 companies, isn't it?---Yes, that's correct.

All of which, with 2 exceptions, have the names, 3 exceptions, have the name Sydney Water?---Yes.

Or 4 exceptions?---5, yep.

20 And in your letter of 5 June 2009, you are saying to Sydney Water and Mr Makucha that you weren't going to take steps to register those 30 additional companies without being paid?---Correct.

Right. But that was the only thing stopping you, wasn't it, registering those 30 companies?---Um- - -

That they paid?---Yeah. I mean, if I had have received the funds I- - -

You would have done it?---I would have done it, yeah.

Without further ado?---Yes.

30 My suggestion to you is that at this point, 5 June 2009, you were acting, appointed to act in the interest of Sydney Water Corporation as well as Mr Makucha, weren't you?---Well, I mean, I was registering companies with obviously their name on it but I mean- - -

40 Yeah. Couldn't you see that you were in a position of conflict where you were acting for two proposed joint venturers and you were, without consulting one of them, causing companies to be registered which incorporated those in those companies' names, the key two words of Sydney Water Corporation's name?---Well, I mean, I'd have to check but I think, I think there was an engagement letter which had actually been signed by, by Mr Harvey in relation to registering those or some of those companies.

And certainly looking at your letter of 5 June 2009, you haven't had any discussions with Mr Harvey about the proposal to register 30 more companies?---No.

Only Mr Makucha, wasn't it?---Yes.

THE COMMISSIONER: Are you saying that there was an engagement letter between Hall Chadwick and Mr Harvey representing Sydney Water? ---Well, again, the way all of the engagements were, were prepared, there was a letter of engagement that was addressed to both, has, had the addressees Sydney Water and, and um, and Mr Makucha.

In relation to what work?---Oh, it would have been one for the incorporation of Sydney Water Health and there would have been another one for the- - -

10 In relation to each one of the companies you registered?---Yes, yes.

So in registering the companies you were acting on behalf of Sydney Water?---Well, I guess I was acting in, I was acting on behalf of the instructions given by Mr Makucha from- - -

You've got an engagement letter from Mr Harvey?---It was signed off or acknowledged by Mr Harvey, yes.

MR STEVENSON: Well, I don't want to be unfair to you, so are you
20 saying that there was a letter signed by Mr Harvey authorising you to register 4 companies, having the- - -?---I prepared the letters, whether they'd come back signed, I'm not a hundred per cent certain. I can't recall.

THE COMMISSIONER: I see.

MR STEVENSON: Well, I don't know of them so if you, you can point us to them, please, please do?---Well, I know, yeah, but I know don't whether they were signed and sent back so- - -

30 Well, the fact is, you didn't think you needed any. When you caused the 4 companies to be registered in May 2009, each of which had within their names the words Sydney Water, you had no written authority from Mr Harvey then, did you?---I can't recall. Possibly not.

All right. Look, I don't want to be unfair to you so if you do find such a document, please draw it to- - -?---I, I, I, I, I, I can't recall.

- - -the Commission's attention.

40 THE COMMISSIONER: Well, if you find it, you will look for the documents and if you find them- - -?---Yes.

- - -you'll supply them to the Commission?---Yes.

Thank you.

MR STEVENSON: If you turn to page 497 I think in that volume, page 497?---Yes.

And do you see that, to be fair to you, do you see that in paragraph number 6 on the first page of that you do refer to registration of a new entity, Sydney Water Health Pty Limited?---Yes, I do.

And if you to the final page of that letter, page 499?---Yes.

At least on this copy there's no acknowledgement from Mr Harvey?---No. That's correct.

10

So do you recall whether in relation to this company or any other of those four companies you received from Mr Harvey?---Well, there was, there was a separate engagement for Sydney Water L, N and P, I can't recall whether that came back signed. I'm not, I'm not sure.

20

And what authority did you think that Mr Harvey, as a property asset manager would've had if he did sign any of these documents to authorise you to start registering companies with the words Sydney Water in their name?---I mean I took Mr Harvey as having a degree of authority within Sydney Water. But I didn't question whether he had any authority to allow a company to be incorporated with Sydney Water and its name.

And you took, isn't this right, you took Mr Makucha's word for whether or not Mr Harvey had authority?---Yes, I did.

And one matter that was of great concern to you throughout your involvement in these transactions was precisely what kind of authority did Mr Harvey have?---Yes.

30

And you, you told, and you've certainly said in your private examination you persistently asked Mr Makucha about that matter?---Yes, it was asked (not transcribable)

And you were certainly asking questions about his authority to, sorry, you asked Mr Makucha - - -?---Yes.

- - - questions about Mr Harvey's authority to sign the final deal?---Yes.

40

And My Payne has asked you about that?---Yes.

But your questions ranged wider than that. They ranged to the, they dealt with the question of Mr Harvey's authority to deal at all with Mr Makucha or you about this joint venture?---Yes.

And you've told us or you told the Commission in your private examination that Mr Makucha would become abrupt with you when you started raising questions about Mr Harvey's authority?---Yes.

He'd become short with you?---Yes.

He's got a bit of a short fuse hasn't he?---He does, yes.

And what he would say to you were words like this, I don't want to put Mr Harvey off by forcing him to show, show me his authority?---Yes.

10 So what Mr Makucha was saying to you was that he, Mr Makucha, didn't want to start digging with Mr Harvey into what his authority was, especially not to ask for documents in case it scared Mr Harvey off?---Yes. He didn't want to, the way he portrayed it to me was he, he didn't want to - - -

Rock the boat?---Well, not rock the boat but show an element of distrust in Mr Harvey. That's the way he portrayed it to me.

20 Well, didn't cause a very large question mark to rise over your head about whether Mr Harvey had any authority at all to deal with you or anyone else in regards to - - - ?---Well, there was a letter that was signed by Mr Harvey that indicated that he had the authority to negotiate the transaction with Mr Makucha.

All right. Now you had some involvement didn't you in August - - -

THE COMMISSIONER: Sorry, Mr Stevenson. I'm interested in that letter?---Yes.

When did you first see that letter?

30 MR MAKUCHA: Commissioner (not transcribable) I'll give it to you.

THE COMMISSIONER: Mr Makucha - - -

MR MAKUCHA: Yeah.

THE COMMISSIONER: - - - it is not for you to stand up and interrupt. Please sit down. I've asked you very often not to interrupt and disturb the proceedings?---I think it was in July, Commissioner.

40 July, 2009?---2009, yes.

And what circumstances did you see it?---There was a letter that I had drafted which contained I guess some of the elements of the structure that I was looking at, at putting forward. And there were I think in that letter there was, I think a request to acknowledge the fact that he had the authority to, to negotiate the, the transaction.

Was that your idea?---I can't recall whether it was my idea or Mr Makucha's idea, but it was something that I, because we'd discussed his

authority and, and wanting to get confirmation that he had authority to, to deal with Mr Makucha. And it was something that we put in a letter.

But I thought that Mr Harvey had told you persistently, it was the word (not transcribable) that he didn't have authority?---No. He indicated he had authority to discuss the transaction and to put forward the transaction. So effectively to negotiate the deal.

10 But you've told me that he told you persistently that he did not have authority to agree on behalf of Sydney Water to anything?---He, he'd indicated that final sign off had to be given by the board. So he had the authority to negotiate the deal.

What was the point of the letter?---To move the discussions forward.

The letter purports to say that he had, he was authorised by Sydney Water to enter into an agreement doesn't it?---No, to negotiate an agreement.

20 MR STEVENSON: Commissioner, I think it's Exhibit P131, perhaps just to make it a little bit, if he could be shown that. I'm going to show you Exhibit P131. (not transcribable) this is the document you're thinking of and it's one addressed to Mr Makucha but care of your firm?---I think that's it. I'll have to - - -

Is that the - - -?---No. No. This is the September letter. Do you have a July letter there or, this was one of the letters, but there was an earlier letter.

30 THE COMMISSIONER: Yes. You're quite right. You're quite right, Mr Malacco. Mr Stevenson, is there not another letter which deals with the authority of Mr Harvey to enter into an agreement?

MR STEVENSON: Not that I'm conscious of. Not that's in my mind at the moment, Commissioner.

MR GORDON: Would I be able to assist the Commission?

THE COMMISSIONER: Yes, Mr Gordon.

40 MR GORDON: There is letter dated 5 September, 2009 signed by Mr Harvey and addressed to Mr Paul Makucha, Paul Chadwick Accountants. I don't know if it's in the bundle. I can give you a copy of that is of assistance.

THE COMMISSIONER: Yes, thank you.

MR GORDON: Commissioner, I wonder if I could ask your assistance to photocopy - - -

THE COMMISSIONER: Yes.

MR GORDON: Thank you, thank you very much.

THE COMMISSIONER: Can I just, would it, Mr Gordon, would it inconvenience you if we question Mr Malacco about this letter and then later give you the photocopy or do you need the photocopy now?

MR PAYNE: It's in the bundle, Commissioner.

10

THE COMMISSIONER: It's in the bundle.

MR GORDON: 566 (not transcribable)

MR STEVENSON: Mr Malacco, just, sorry, you're leafing through that?
---Sorry.

I've shown you Exhibit P131 which is the 4 September, 2009 document?
---Yes.

20

Your memory is is it that there's another earlier document?---I believe there's another earlier - - -

I'll show you another document just to see whether we can track this down. Looking at that volume, page 566?

30

THE COMMISSIONER: Yes. That's the one that I had in mind. Yes, can you explain the circumstances under which this letter came into existence, please?---if I recall correctly I think it was because we were asking for Mr Makucha to confirm with Mr Harvey that he had authority to, to act on behalf of Sydney Water.

And did you regard this as establishing that, that which you had asked for?
---Yes. Although I am certain, I'm fairly certain that there is another letter even, even before the September letters.

That says what?---That he had the authority to negotiate the transaction with Mr Harvey.

40

Well, this letter, is this the only letter that doesn't mention the words "authority to negotiate". The only letter of authority that doesn't mention the words "authority to negotiate" and "limit the authority to negotiate". Is this the only, do you understand the question?---Not exactly, no, sorry, Commissioner.

The letter at page P566 - - -?---Yes.

- - - is that the only letter of which you are aware from Mr Harvey dealing with authority which does not limit his authority to negotiate any agreement?---If I understand, yes.

Now, is this the first time that Mr Harvey had either orally or in writing indicated that he had the appropriate delegated authority to act on behalf of Sydney Water and dealing with this project?---I think there was an earlier letter, Commissioner.

10 I'm not talking about negotiating now?---Sorry.

I'm just reading the words?---Yes.

That he had the appropriate delegated authority to act on behalf of Sydney Water in dealing with this project?---Yes. I think that was the first time that those words were used in (not transcribable).

20 And how, did you understand that to mean that Mr Harvey was saying that he now had delegated authority to sign off on the agreement?---I didn't read it in that manner, no, I still assumed that the business case scenario needed to go to the board.

Do you know whose idea it was to use the words "appropriate delegated authority"?---No, I don't.

MR STEVENSON: Wasn't this date 10 September, 2009 the date you met Mr Harvey?---I think it was actually, yes.

30 That's the only time you've met Mr Harvey?---Yes.

And that's the occasion that you've told the Commissioner I think in the private transcript and again today on which Mr Harvey said in your presence and in Mr Makucha's presence that he did not have authority to sign any final or binding agreement?---Correct.

He was quite clear to you about that?---It had to go to the board, yes.

40 And it was quite clear so far as you could see that Mr Makucha heard that loud and clear?---Yes.

Well, was there some discussion that you can recall about what letter Mr Harvey was prepared to give about his authority falling short of asserting an authority to sign a (not transcribable) document?---There was no discussion.

See, the words used are, "To act on behalf of Sydney Water in dealing with you on this project" - - -?---Yes.

- - - the "you" seems to be, do you agree, Mr Makucha and Hall Chadwick or just Mr Makucha?---Mr Makucha care of Hall Chadwick, yeah. yes.

THE COMMISSIONER: Was this letter given to you at the meeting you had with Mr Harvey?---I, I don't think, no, I think it came after. I can't recall Mr Harvey giving me this letter at our meeting. Our meeting was quite an informal meeting to, basically to introduce myself and Mr Harvey and - - -

10 And it's at that meeting that the question of Mr Harvey's authority cropped up and was discussed?---I think it came out of the context of when I asked what the next step was in relation to progressing this forward and that's when he indicated that it had to go via the, the executive summary, to draft up an executive summary or a business case scenario so that it could be put forward to the board.

Were you shown this letter or a copy of it?---I believe I have a copy of this letter in my files, yes, but I think it was given to me after that meeting not at the meeting.

20

That day?---No, I don't think it was given to me that day, no.

Within a short time thereafter?---Possibly, probably, yes.

Yes, thank you.

MR STEVENSON: So the order of events was you met with Mr Harvey and Mr Makucha first. Correct?---Yes.

30 Harvey said in your presence and Mr Makucha's presence, I don't have authority to sign off on, sorry, I don't have authority to sign a final binding agreement?---Well, final binding agreement wasn't raised at that stage, it was how do we get this further and he indicated that it needed approval of the board and we needed to prepare a business case scenario to get it to the board for approval.

40 There was some discussion, I'm just trying to jog your memory, there was some discussion on 10 September, 2009 at this meeting as to what authority Mr Harvey was prepared to say in writing that he had?---I would, I can't recall the specifics.

You don't recall the specifics?---Yeah. I mean, yeah.

All right. Just finally can I just ask you to, could Mr Malacco be shown Exhibit P139 which is the slim folder. Could you turn to tab 5 of that folder, Mr Malacco. That should be a letter from you of 6 August, 2009?
---Yes.

Now, see the first paragraph, just read it to yourself. You see you refer to a conversation with Mr Makucha arising from a letter from Sydney Water Corporation of 3 August, 2009?---Yes.

And you recognise Mr Stephen Von Muenster's name as being a gentleman associated with IP Australia?---I wasn't aware who Steven Von Muenster was, I did recall seeing a letter from Stephen Von Muenster about registering IP and it had an address in Surry Hills but it didn't have, it didn't indicate that he was from IP Australia I don't think.

10

I may have misled you. I should just ask you this. Do you know who Stephen Von Muenster was?---No. I thought he was an IP lawyer actually.

An IP lawyer. I may have misled you. So you are referring to a letter that evidently, sorry. Had you seen the letter that you are describing in paragraph 1?---Yes.

Right. So was the letter, and I'm asking because we don't have a copy of this letter, well, I don't. You remember it do you as being a letter as you described signed by Mr Harvey and Mr Harvey said that Sydney Water Corporation had appointed Mr Makucha to act on behalf of Sydney Water in relation to trademarks?---I can't recall the specifics of what the letter said but - - -

20

Just to remind yourself the next paragraph you say that you noted that that letter didn't correspond to your understanding of who owned the intellectual property (not transcribable)?---Yes, I've read that lease.

30

And your understanding drew out didn't it from what Mr Makucha had told you?---Yes.

That was your understanding of who owned the IP?---Well, Mr Makucha indicated he owned the IP, yes.

So Mr Makucha was telling you that he owned the intellectual property in the name of Sydney Water Corporation for certain purposes?---For certain purposes, yes.

40

Did Mr Makucha tell you that he found what he thought was a loophole in the trademarks registration system whereby Sydney Water did not have its name and logo registered as a trademark in respect of certain classes of - - - ?---I don't know whether you'd describe it as a loophole but in essence that's exactly what he indicated that they hadn't registered the trademark for various components of the - - -

The water?---The water, yes.

And he was, did he convey to you that he was very pleased to have made that discovery?---Yes.

Because he could capitalise on it he told you?---That's why we were discussing it, yes.

Someone in Sydney Water has made a blue he said to you did he?---Well, they omitted to register the trademark in the other classes.

10 And he's told you his plan was well, Sydney Water hasn't registered its name and logo in the class which deals with water itself he would do so?
---Yes.

And it was obvious to you that he would need Sydney Water's consent to do that was it not?--Well, as I indicated I don't know a lot about intellectual property and I was leaving that to the intellectual property lawyers as to whether something can be registered or not.

20 I'll show you the 3 August, 2009 letter which Mr Payne has just shown you which I haven't seen before. This is from your file, Mr Malacco, could you just confirm that this document is the letter of 3 August, 2009 that you are referring to in paragraph 1 of your letter of 6 August, 2009?

THE COMMISSIONER: We don't have the documents, it's just been found, it comes from Mr Malacco's file.

THE WITNESS: Yes, that would be that letter, yes.

30 MR STEVENSON: All right. So I tender that letter.

THE COMMISSIONER: Yes. The letter to Mr Stephen Von Muenster signed by Mr Harvey is Exhibit P152. It's of 3 August, 2009.

#EXHIBIT P152 - LETTER FROM MR HARVEY TO MR VON MUESTER DATED 3 AUGUST 2009

40 MR STEVENSON: In paragraph 3 of your letter of 6 August, 2009 you say that Mr Makucha had told you that he'd had a conversation with Mr Harvey - - -?---Yes.

- - - which had the result that Mr Makucha told you that that letter we've just looked at was wrong because it wrongly names Sydney Water as the owner of the intellectual property?---Yes.

And Mr Makucha told you that someone from Sydney Water would be sending you what you call in paragraph 4 a corrected letter?---Yes.

And did you understand that that corrected letter was to come to you from Mr Harvey?---I don't think it was meant to come to me but the way I, the way I recall it that Mr Makucha showed me that letter and he was - - -

You mean now, that letter is the 3 August letter?---Yes, yes.

10 So he showed you the 3 August, 2009 - - -?---No, if I, again, I'm trying to remember correctly but if I remember correctly I was showed that letter by Mr Makucha, that was being prepared by Sydney Water and Mr Makucha had, had stressed or had become upset by the fact that Sydney Water in his words were trying to steal his intellectual property.

So his outrage was that Sydney Water was daring to assert that it was the owner of the Sydney Water logo?---In - - -

That was what was - - -?---In the other asset classes.

20 So Mr Makucha told you that he'd get that corrected and get Mr Harvey to write a letter setting out that Mr Makucha after all was the owner of Sydney Water's logo for those purposes?---Yes.

Even though, of course, to your knowledge, no one on behalf of Mr Makucha had made any application to the trademarks office about any trademark at all?---Not at that stage, no.

Well, you know, don't you, that the trademark application was made on I think 26 August, 2009?---If that's what, I am (not transcribable).

30 You can take that from me?---Yes.

Certainly after the date of your, you certainly understood when you wrote your letter of 6 August, 2009 that no trademark application had been made in respect of class 32 - - -?---That's right.

- - - at all?---Or whatever class it was, yes.

40 So Mr Makucha was asserting to you was he that he was the owner of the Sydney Water name and logo in respect of water for example?---In those classes, yes.

Even though he'd not made any application for a trademark?---I guess so, yes.

And even though the, the mark was exactly the same as the Sydney Water logo that you'd seen on correspondence from Mr Harvey for months?
---Well, I'm not certain how intellectual property works in terms of different asset classes but that's, that's what was related to me, yes.

And you were alarmed weren't you at being confronted with Mr Makucha's assertions that a letter that Mr Harvey had written on Sydney Water letter concerning the proprietorship of Sydney Water's logo was wrong, you were concerned to hear him say that?---Sorry, I was concerned by Mr Makucha or Mr - - -

10 Yes, by Mr Makucha's assertion that Sydney Water had got that, that wrong?---Well, I mean it was, he asked my opinion and I think that, I mean, if, if Mr Makucha was saying that it was his intellectual property and then, yeah, it would have, yeah, it was I guess alarming.

Would you turn your mind to how it could possibly be that Mr Makucha would own the intellectual property in Sydney Water's name and logo as at 6 August, 2009?---Well, as I said, I'm not an, I'm not certain what the process is for registering trademarks or anything else like that.

20 It's a matter of common sense, didn't you apply your mind to the question of how could it possibly be that Mr Makucha could own Sydney Water's name and logo for any purpose at all?---Well, I guess it'd be exactly the same. I mean, I never applied my mind to understand the, the exact, how, the, the trademark applications worked so - - -

All right. Well, you, do you know whether or not the corrected letter you refer to in paragraph 4 ever emerged?---I, I can't recall.

30 And looking at your last paragraph on the first page of the letter you asked for the front page of the letter on the 2nd to be in effect signed by Mr Harvey?---Yes.

And was that to cover your backside because, to be fair, sorry, was that to ensure you had something in your file to confirm that someone from Sydney Water had agreed to what I want to suggest to you are the extraordinary propositions being advanced to you by Mr Makucha?---In effect that's, that's why it was put down, yes.

40 It sounded to your mind didn't it improbable that Mr Makucha could own intellectual property in Sydney Water's name didn't it?---Again, I was leaving that up to the patent attorneys. I'm, I'm, I don't know the registration process of what needs to get filled out before application of the trademarks or - - -

And it struck you as being even more improbable that Sydney Water would agree to anyone else, including Mr Makucha, owning Sydney Water's name and logo for any purpose. Didn't that strike you as being improbable?---I, I mean in hindsight, yes but - - -

But I don't mean in hindsight?---But at that time I wasn't really thinking about it in that point of view because Mr Makucha had expressed that he'd thoroughly researched the intellectual property laws and that was in essence, yes, a loophole or something that had been omitted by Sydney Water.

10 I want to suggest to you that you didn't need to be a trademark lawyer to see that it was improbable in the extreme that either (1) Mr Makucha could possibly be the owner of the intellectual property associated with Sydney Water's name for any purpose, what do you say about that?---Well, I had, I had seen previous letters that were prepared by Griffith Hack for example which indicated correspondence that they were looking at registering those trademarks in the name of Paul Makucha so if that had come from a patent attorney then I was under the impression that was, that it was probable.

20 And didn't it strike you as being even more improbable that Sydney Water would agree with anyone let alone Mr Makucha that anyone else could own its name and logo for any purpose, especially water?---I mean if it had progressed to that stage with someone like Griffith Hack who are the trademark patent attorneys then I had no, I had no reason to, to, to doubt what was, what was being said.

All right. Can I suggest to you you were so concerned about it that you wanted to get Mr Harvey to initial and sign this letter so that you have something for your file?---Well, it was, again it was part of the paper trail to, to show the correspondence that had been acknowledged by, by Mr Harvey.

30 To cover your backside in case things went wrong?---Well, it wasn't, I was never looking at it to cover my backside, it was - - -

I see the time, Commissioner, finally could Mr Malacco be shown Exhibit P138. You can close that folder. Now this is a letter, do you recognise this as a letter you wrote a few days later addressed again to Sydney Water and Mr Makucha?---Yes.

In the second paragraph you say, the letter confirms, sorry, serves to confirm discussions between Mr Makucha and Mr Harvey. Were you present at those discussions or is this - - -?---No.

40 - - - simply you're recording what Mr Makucha has told you - - -?---Mr Makucha told me.

- - - he had discussed with Mr Harvey?---Yes. Yes.

And similarly, is this right, in the third paragraph Mr Makucha is just telling you and you're now recording what Mr Makucha claimed he'd agreed with Mr Harvey?---Yes.

And again can I ask, did you ever see a collected letter of the kind referred to in the first bullet point below your third paragraph?---I, I can't recall. No, I mean I, if it was provided it'd be in my, my documents that I provided. But I can't recall whether I'd seen - - -

Yes, that's all I have Mr Malacco. Thank you.

THE COMMISSIONER: Thank you Mr Stevenson. Mr Gordon, do you have any questions?

10

MR GORDON: Commissioner, yes, I do have a short cross examination.

THE COMMISSIONER: All right. Well we'll adjourn until 2.15.

MR THANGARAJ: Excuse me, Commissioner, I'm sorry.

THE COMMISSIONER: Yes, Mr - - -

20

MR THANGARAJ: Sorry, I'm due at the Crime Commission at 2.30, is it possible - - -

THE COMMISSIONER: I beg your pardon?

MR THANGARAJ: I'm due at the Crime Commission at 2.30. I had understood that we would be, I understand things happen, it's unfortunate that we've taken this long, but if it's possible at all if the cross examination is going to be short to be dealt with immediately, I would greatly appreciate it. If it's not possible, I understand that.

30

THE COMMISSIONER: Well, I'm happy for you to go first, but I would've thought that you would've preferred to go last.

MR THANGARAJ: If I have anything I would prefer to go last, but I'd just like to, to (not transcribable) Mr Gordon if it's possible.

THE COMMISSIONER: How long will you be Mr Gordon?

MR GORDON: (not transcribable) but I imagine about 15, 20 minutes.

40

MR THANGARAJ: If it's possible to do it now I would appreciate that, if it's not - - -

THE COMMISSIONER: Sorry, I would like to cooperate and give you the time.

MR THANGARAJ: I understand.

THE COMMISSIONER: But I'm afraid I have other arrangements that - -
-

MR THANGARAJ: I wasn't aware of that.

THE COMMISSIONER: - - - for which I'm already late.

MR THANGARAJ: I'm sorry, I wasn't aware of that.

10 THE COMMISSIONER: So what are you - - -

MR THANGARAJ: I will speak to my solicitor in my other matter and see if we can delay the Crime Commission.

THE COMMISSIONER: Well, if you wish you can go first. It's up to you. We'll start at 2.15.

LUNCHEON ADJOURNMENT

[12.51pm]

20