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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 2.20PM

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

MR STEVENSON: Commissioner, there's one, one matter I should put to Mr Malacco.

<GINO MALACCO, on former oath

[2.20pm]

MR STEVENSON: Mr Malacco, one further matter, remember I was asking you some questions before lunch about the circumstances in which you caused to be registered four companies which had in their names the words Sydney Water?---Correct.

I mentioned section 147 of the Corporations Act - - -?---Yes.

- - - in that regard. Can I just show you that section and some regulations. You see section 147 of the Corporations Act, it says that a name is unavailable to a company for which it is unacceptable for registration under the regulations, do you see that?---Yes.

Now did you turn your mind to the question of whether the name of Sydney Water Health and the other Sydney Water names were or were not unacceptable for the purpose of the Corporations Act and the Regulations? ---No, I didn't turn my mind to that.

I think on the second sheet there you have the Corporations Regulations, Schedule 6?---Yes.

And do you see if you go to, there's a heading Part 2, names unacceptable for registration, do you see that?---Yes.

And I think that parts have been highlighted and it says for paragraph 1471(c) of the Act a name is acceptable and then dropping down to (d) the context in which it is proposed to be used the name suggests a connection with, dropping down to (vii) a department, authority or instrumentality of the government or a state or territory?---I see that, yes.

My question is did you apply your mind to those regulations?---No, no, I didn't.

You can now see, can't you, that the names that you caused to be attributed to those four companies were ones which under the Corporations Act were unavailable?---Possibly, yes, yes.

And don't you agree that before causing those four companies to be incorporated in those names you should have applied your mind or at least obtained advice about whether there was anything in the law, particularly the Corporations Act, which touched on the question of whether or not you could use the words Sydney Water in those names?---Well, I probably

should have had direct authority from Sydney Water to, to do that but I mean I, I hadn't applied my mind to these regulations in registering those companies.

10 My question was and I just want to put it to you squarely so you can answer it, don't you think that you should have either had a look at the Corporations Act yourself or attained some advice about the Corporations Act to see whether or not there was any problem with using the words Sydney Water in the names of those four companies?---I mean, companies get registered all the time so its, if it's inappropriate then it's also a matter for ASIC to come back and deny registration.

So your attitude was throw it up to ASIC and see whether they knock it back, is that the idea?---Well, as I said, I hadn't applied my mind to it but if there had of been an area where ASIC had of thought it was inappropriate to register those names then I would have expected that to be relayed back to us from ASIC and the names not registered.

20 So you don't want to answer my question as to whether you think you should have made some inquiries yourself?---I didn't make any inquiries and - - -

You should, you should have, shouldn't you, sure?---Well, if, I possibly should have, yes.

THE COMMISSIONER: Mr Thangaraj, do you want to go first or do you want to go last?

30 MR THANGARAJ: Last, thank you.

THE COMMISSIONER: Yes, Mr Gordon.

MR GORDON: Thank you, Commissioner.

THE COMMISSIONER: Mr Gordon, can you tell me how long you'll be please?

MR GORDON: I don't think I'll be more than 15 minutes.

40 THE COMMISSIONER: Yes, very well.

MR GORDON: Mr Malacco, when you first met Mr Makucha that was, was it not, in, near the end of March 2009?---Correct.

And he approached you with views of getting advice in relation to a joint venture?---Correct.

In your initial discussions did he explain to you the nature of that joint venture?---Yes, he did.

And did he draw your attention to the position under the trademarks as he perceived it to be?---Yes, he did.

Can I pass you a document please. Do you see there a document that sets out what appears to be a search under the Trademark Act?---Yes.

10 And is that in the name of Sydney Water?---Yes, it is.

And does that set out a number of areas covered by their trademark?---Yes, it does.

And that does include anything under class 32, does it?---No, it doesn't.

Do you see a date at the bottom of that page?---12 May, 2009.

20 Thank you. Were you shown that document by Mr Makucha?---I believe so, yes, I recall something of this nature.

And that was early on in your relationship with him?---Yes.

And did you also become aware then or shortly thereafter - - -

THE COMMISSIONER: Are you tendering that document, Mr Gordon?

30 MR GORDON: I will in just a moment, there's a bundle of three if I may, Commissioner. Then or shortly thereafter did you become aware, let me pass two further documents to you, one being, I think at the bottom right-hand corner of the page its got the number 3, do you have that?---Yes.

In the circle. And the other document has number 4 in circle at the bottom? ---Yes.

And are they applications to register a trademark?---They appear to be, yes.

40 And there's the first of those in the name of the applicant being Sydney Water P Pty Limited?---Yes.

And does that relate to an application under class 32?---Yes, it does.

And does that set out an application in relation to water, drinking water, natural water, bottled water and so on?---Yes.

And there is no equivalent in relation to the first document that I showed you, that is the goods covered by the application or trademark followed by Sydney Water. Is that right?---Correct.

So that there was on the face of it an area under class 32 of goods not held under the trademark by Sydney Water is that right?---It would appear that way, yes.

May I tender all those please?

THE COMMISSIONER: Yes.

10 MR GORDON: And it was - - -

THE COMMISSIONER: Just a moment, please Mr Gordon.

MR GORDON: I'm sorry.

THE COMMISSIONER: Exhibit P153 is a bundle of three documents comprised of an application to register a trademark with the page number 85. A similar document with the page number 84 and a document headed Trademark Details.

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#EXHIBIT P153 - BUNDLE OF THREE DOCUMENTS COMPRISED OF TWO APPLICATIONS TO REGISTER A TRADEMARK (PAGES 84 & 85) AND A DOCUMENT TITLED TRADEMARK DETAILS

THE COMMISSIONER: Yes, thank you.

30 MR GORDON: Thank you, Commissioner. And it was in relation to the apparent absence under the trademark details held by Sydney Water of goods under 532 that enlightened the activities of Mr Makucha in the terms of seeing the possibility of a venture dealing specifically with water?---Yes.

So as strange as it may seem Sydney Water did not itself have water as a commodity under its trademark on the face of those documents?---Correct.

40 And it was for that reason I suggest that you had some belief that Mr Makucha's proposed joint venture had, to put it in the vernacular, legs?
---Yes.

And you saw there was quite a possible business venture?---Yes.

And it was that venture which was the same sort of thrust and nub of his activities through you thereafter?---Yes.

THE COMMISSIONER: And did you think that, that the joint venture could exploit a trademark relating to this water under the name of Sydney

Water without Sydney Water's consent?---I, it was something that I had no experience in and so - - -

Well did you think it or didn't you? Or didn't you apply, didn't you think about it?---Well, I didn't really think about it.

All right?---But I mean it was brought to my attention that it could've, so, I took it on face value.

- 10 It was brought to your attention and what?---It was brought to my attention that it was possible, so - - -

It was, that what was possible?---The trademark registration and the, the business proposal to bottle water.

Without Sydney Water's consent?---Yes.

Who drew that to your attention?---Well, Mr Makucha.

- 20 What he said that you could register a trademark in the name of Sydney Water in relation to water generally without the consent of Sydney Water Corporation?---He said that Sydney Water had omitted to register it in that class.

Yes?---I wasn't too sure what the application process was.

You haven't answered my question?---Sorry, can you rephrase the question, please?

- 30 The question is did you think that a trademark could be registered in respect of water generally in the name of Sydney Water without the consent of Sydney Water Corporation?---I hadn't really applied my mind to it.

MR GORDON: The application that was made in fact was made by the entity in Sydney Water Inc Pty Limited. Is that right?---Yes.

Subsequent to your knowledge of that matter is it the case that advice was sought from a trademark expert?---Yes.

- 40 And who was that expert?---I believe it was - - -

THE COMMISSIONER: You can leave that, Mr Gordon, let's not waste time. You can leave that.

MR GORDON: Commissioner, if I had it in front of me I'd gladly do so. I apologise.

THE WITNESS: I know he was speaking to Griffith Hack, he also spoke to Spruson and Ferguson in relation to registration of the trademark.

MR GORDON: Yes. All right. Thank you. When the application was made in that name was there a tax consideration in relation to the nature of the applicant? In other words was there a tax reason for making the application in the name of a company as against the name of Mr Makucha?
---Yes, there was.

10 What was that?---If the registration was in the name of Mr Makucha then if the, when the registration got transferred to the joint venture then Mr Makucha would've been subject to tax on that and we were looking at putting the registration in an entity whereby the, the losses that Mr Makucha had could've been utilised.

So there were two aspects to that, one was the potential advantage that you perceived it to be of this intellectual property was quite high. Correct?
---Yes.

20 And therefore there could've been a (not transcribable) tax liability?---Yes.

To (not transcribable) off against that Mr Makucha had some tax losses?
---Correct.

I'll come to those again in just a minute if I may. At the outset it was clear to you that he was dealing with intellectual property and ideas that could be stolen by a third party perhaps?---Yes.

30 And for that reason you advised him did you not that he should embark upon (not transcribable) agreements as soon as possible?---Yes.

And that was perhaps (not transcribable) initial advice?---Yes.

And you stressed that to him for his own protection?---Yes.

And you advised him that he should have such an agreement in place between himself and Sydney Water among others?---Yes.

40 You say that you met with Mr Harvey, do you recall the date of that?---I don't recall the exact date but I think it was about 10 September.

Or was it in November?---No, I never met Mr Harvey in November.

Going on to the question of the confidentiality agreement that started off predominantly aimed to protect his interest in relation to the trademark as we just discussed?---Yes, the business idea, yes.

But he kept on having ideas?---Yes.

Some of which have been described as fanciful and some perhaps less so?
---Yes.

Was it your belief that as the matter progressed on there would be considerations within Sydney Water as to which of those would be acceptable and applied and which not?---That would be my understanding, yes.

10 (not transcribable) throughout the principle thrust is the bottled water and bottling plant (not transcribable)?---Yes.

I want to deal briefly if I may with the question of the \$10 million tax benefit?---Yes.

I think and tell me do you agree that in the mind of Mr Makucha he always described it as a tax benefit?---Yes.

20 And you gave him considerable advice in discussion about that?---Yes.

What was that advice as to how that could be utilised please?---Well, I indicated that if Mr Makucha's entity Paul Makucha Holdings formed a tax consolidated group then all of the losses would be part of the head entity which is Paul Makucha Holdings and that the, because the returns had not been prepared from 2002 onwards we had the ability to form a consolidated group at that date and then any wholly owned subsidiaries of that group, any income that was derived by those the income would be offset against those losses.

30 So in one way or another those losses could be utilised within the joint venture?

THE COMMISSIONER: Well, that doesn't follow Mr Gordon. It could only be utilised for the benefit of Mr Makucha.

40 MR GORDON: Well, can I address it another way please, Commissioner. Was it, were the, were the losses proposed in your scheme of things to be to the benefit only of Mr Makucha or within the corporate structure of the joint venture?---I was looking at proper fees that could be charged to the joint venture company by Mr Makucha's company so that the, the joint venture company could have expenses, which could obviously be offset against future income and revenue derived in the Makucha Group to offset those losses.

THE COMMISSIONER: The losses - - -

MR GORDON: So almost in fact, I'm sorry.

THE COMMISSIONER: The tax losses would only be to the benefit of Mr Makucha?---Yes.

MR GORDON: Excuse me one moment, Commissioner. When you gave evidence in the inquiry on 24 August of this year, at page 171, you said, I effectively put down a draft of how Sydney Water could eventually get a \$10 million benefit?---Yes.

10 There you were addressing a \$10 million benefit potentially for Sydney Water?---Yes.

So how does that work?---The benefit that was being derived by Sydney Water was through the, the first \$20 million worth of profits being channelled up to Sydney Water Corporation. So there was \$10 million worth of additional profit that would've otherwise not gone on a 50/50 basis, it would've been 100 - - -

20 THE COMMISSIONER: I'm afraid I have no idea what you're talking about?---Commissioner, the, if the company, the joint venture company was forming a 50/50 joint venture, then 50 per cent of all profits via the way of dividends would've been paid to Mr Makucha's company and 50 per cent of the profits would've been paid to Sydney Water Corporation. Through the use of the preferential dividends that would've been held, dividend share which would've been held by Sydney Water Corporation - - -

30 THE COMMISSIONER: Preferential or dividend share in what?---In the joint venture company. So the joint venture company would've issued a preferential share to Sydney Water Corporation whereby it would've received the first \$20 million worth of profits from the JV company.

This has nothing to do with tax losses?---No.

40 MR GORDON: You say at page 133 of the transcript that in Mr Makucha's mind it was always a tax benefit. Can you explain that?---Mr Makucha had effectively promised or put forward as part of the deal with Sydney Water Corporation through Mr Harvey that the losses were going to be available and it will provide a benefit to the joint venture. When I advised Mr Makucha that that was difficult to construct in that manner, he indicated that he'd promised Sydney Water a \$10 million benefit and so that in his mind the benefit I think arose out of the fact that the company had the losses.

THE COMMISSIONER: Which company?---His companies, sorry. So when I was trying to structure a way that Sydney Water could get the, an additional \$10 million, I structured in terms of dividend flows being the right to the first portion of the profits out of the joint venture company. But I think in Mr Makucha's mind he, he always thought that because he'd promised them a benefit based on a tax benefit, but that's essentially how he continued to refer to it.

MR GORDON: (not transcribable)

THE COMMISSIONER: Excuse me, Mr Gordon.

MR GORDON: I'm sorry.

THE COMMISSIONER: As I understood your evidence earlier this morning you made it clear to Mr Makucha that the only person who could benefit from the tax losses was himself?---Yes, that's true.

And that whatever benefit there may or may not accrue to Sydney Water as a result of the scheme you proposed had absolutely nothing to do with his tax losses?---That's right.

MR GORDON: However, there was, was it his instruction to you to make good \$10 million to Sydney Water an instruction?---Yes.

And when you were dealing with it, was it clear to you that whether he understood perfectly or imperfectly in his mind at least, he was describing that as related to the tax loss of the companies?---I believe so, yes.

THE COMMISSIONER: Even after you explained to him that it had nothing to do with the tax losses?---Yes.

And then you've stopped explaining to him then that the tax losses had nothing to do with it?---I, I refer to it as a \$10 million benefit. I didn't refer to it - - -

My question was did you then stop explaining to him - - -?---Yes.

- - - that the \$10 million was as a result of your ingenious scheme that had nothing to do with his tax losses?---Yes.

How could he have thought that it had anything to do with his tax losses once you explained to him that it didn't?---I think it's just how he referred to it, but it wasn't, it wasn't said to him that they were tax losses.

From the earliest acquaintance that you had with Mr Makucha, you knew that he personally was not a man of money. Is that right?---Correct.

Were you aware right at the beginning that he was in fact being pursued by creditors?---I wasn't aware at the beginning, no.

You became aware - - -?---I became aware afterwards, yes.

Fairly soon afterwards?---I can't recall when, when I became aware of it, but I became aware of it, yes.

Because he made no secret to you of the fact that he had no money?---No, he made no secret of that.

And you sent an email (not transcribable) as it were, you ended up sending invoices to Sydney Water?---Correct.

And those invoices were paid without process?---Three or four of them were paid, correct.

- 10 Were they paid by means of a cheque or by a direct transfer or how - - -?
---Direct transfer into our bank account.

Direct transfer. Okay. And it was your understanding that they were paid as a result of Sydney Water's backing or at least interest in backing the joint venture?---Correct.

Mr Harvey never made any reference to you about (not transcribable) was he or (not transcribable) progressively?---No.

- 20 In the course of your discussions with Mr Makucha, have you ever had (not transcribable) suggestion that he was in any way intending to bribe Mr Harvey?---No.

I think a bottle of champagne and a box of chocolates was as far as it got?
---That's what I understand, yes.

But certainly nothing more?---No.

- 30 Yes, that's all I have to ask. Thank you.

THE COMMISSIONER: Yes, thank you. Mr Thangaraj.

MR THANGARAJ: Mr Malacco, just to summarise very quickly, Mr Makucha was referred to your firm, not to you?---Correct.

And one of your partners referred him to you?---Correct.

- 40 And why was, why was that do you know?---Well, Mr Kenney was, had a first meeting with Mr Makucha and then he had to go overseas for a period of a couple of weeks so he couldn't see Mr Makucha, so he asked me to look after him.

All right. You met with Mr Makucha on many occasions?---Yes.

On the other hand you met Mr Harvey how many times?---Once.

And you understood that the fees, the fees were not payable by Mr Makucha due to his own percuniosity?---Yes.

And as a result you were told, it became a fact that Sydney Water would cover your fees?---Correct.

I think you've given this evidence that you understood the input from Mr Makucha was ideas et cetera and Sydney Water would fund?---Yes.

Did you feel any obligation to inform Sydney Water in those circumstances of the rates that Hall Chadwick had charged?---Yes.

10 Did you do that?---Yes.

Right. And we've seen an exhibit, we don't need to bring it up, I think it's P127 the engagement letter where the rates are set out?---Yes.

Did Mr Harvey ever ask Hall Chadwick to act for Sydney Water?---No.

Could one exhibit be shown, Exhibit P126, it's at page 388. I think this is one, sorry, this is one of the documents that Mr Stevenson took the witness to.

20

THE COMMISSIONER: What page did you say, Mr Thangaraj?

MR THANGARAJ: My number, Commissioner, is 388, it's the letter of 8 April, 2009. You were taken by Mr Stevenson to the third paragraph of this letter - - -?---Yes.

- - - which says, "We also note that you'll require additional services et cetera, the cost of those agreements which will be prepared by external solicitors are in addition outside this quote."?---Yes.

30

See that paragraph?---Yes.

Who, who was to do the work on this shareholder agreement?---External solicitors.

Was Hall Chadwick to do any work on the shareholder's agreement?---No.

Did you retain the solicitors or were they retained by some other means?---It was meant for them to be, the solicitor to be retained directly, not by us.

40

Right. That's all I need from that exhibit. We know that Mr Makucha and Mr Harvey were involved in ongoing negotiations in relation to this potential project. Were you ever involved in any of these negotiations?
---No.

You were given instructions by Mr Makucha to do various things?
---Correct.

He was your client?---Yes.

And you performed those tasks that he asked of you?---Yes.

As far as you understood it Sydney Water at least in those negotiations was being represented by Mr Harvey?---Yes.

And at various points, we've seen the exhibits, you were informed that he had a delegated authority?---Yes.

10

Did that inform you that other people from Sydney Water were assisting Mr Harvey?---That was my impression, yes.

THE COMMISSIONER: Why was that?---Well, the size of this transaction would've been one where I would've thought he would've referred it internally, to get advice internally from Sydney Water.

That was just an assumption?---It was an assumption, yes.

20

And his authority was to do what? The delegated authority was to do what?---Well, it was always understood by me that his authority was to negotiate a deal with Mr Makucha.

But not complete a deal?---Not complete a deal, no. That would've been subject to the board.

That's really an authority about contents isn't it?---Well, not really, you need someone to negotiate a transaction.

30

But nothing he could do could bind Sydney Water on your understanding? ---No, but I mean someone still needed to prepare the, the, the concept.

Once nothing that he could, once he could do nothing to bind Sydney Water what was the extent of his authority?---Well, to negotiate the deal on behalf of Sydney Water.

MR THANGARAJ: There's been some implicit suggestion that perhaps you were favouring Mr Makucha in relation to these matters. Was there any - - -

40

THE COMMISSIONER: There's been an explicit suggestion.

MR THANGARAJ: Sorry, I should say explicit suggestion, to that effect. Was there any point in the circumstances of preparing documentation or a structure that would not be approved by the board of Sydney Water?---I would've thought that I had put something together which was going to be totally rejected by Sydney Water then we were just wasting everyone's time and money.

Were you concerned that Sydney Water wouldn't have the resources, that the board wouldn't make its own inquiries with whatever expert assistance it required to make a proper informed decision?---I would've thought that Sydney Water had ample resources.

And you told us earlier that you believe that Sydney Water would come back to you if anything needed further work?---Yes.

10 You were asked before about fiduciary obligations and you said yes. What did you understand from that question to be your obligation?---Well, because Sydney Water was funding the, the project I didn't want to waste their money.

And that's what you understood when you were answering the question about fiduciary obligations?---Yes.

Nothing further, Commissioner.

20 MR PAYNE: Before Mr Malacco goes so that there's no suggestion that there's any unfairness he referred to something he thought of in July, we've scoured his files and the Supreme Court files, can I just show him two documents, this is the first. This is a document, accept from me, Mr Malacco, was found on the Supreme Court papers but not on your file. Do you recognise it?---Yes, it's a letter I prepared.

30 Is this the document you were talking about in answer to Mr Stevenson about some discussion in July you understood had taken place between Mr Makucha and Mr Harvey on the subject of authority and intellectual property?---This, this letter, sorry, can you rephrase that question, I - - -

Do you remember Mr Stevenson asking you some questions and you said you thought there was a document somewhere - - -?---In July, yes.

In July. That had something to do with this question of intellectual property and authority?---Yes.

40 Accept from me that we've scoured the papers we were able to, this is all we can find in July. Is this the document to which you're referring?---Yes. There's a letter that I drafted on 15 July which preceded this one. Sorry, there's a letter that I drafted on the 13th and there's also a letter that Mr Harvey wrote to me dated 15 July.

Do you have either of those documents with you?---No, but I possibly have them in my office. I would've thought, I mean if they're not, I would've thought they would've been in the documents I provided.

We can't find them, is there some reason they weren't produced?---There's no reason why they wouldn't have been produced.

Perhaps after your evidence if you can have your solicitors forward them to the Commission later today. Can you do that?---I will.

Commissioner, I tender that letter.

THE COMMISSIONER: Yes. Exhibit P154 is a letter from Hall Chadwick to the Managing Director, the Sydney Water Corporation on 17 July, 2009.

10 **#EXHIBIT P154 - LETTER FROM HALL CHADWICK TO
MANAGING DIRECTOR DATED 17 JULY 2009**

MR PAYNE: And finally, Mr Malacco, you were asked some questions about some letters in September and this is a document that is on your file apparently signed by Mr Harvey which is nowhere else. I'll show you this document. In answering Mr Stevenson questions where you thought Mr Harvey had said something about authority and the joint venture was this the document you had in mind?---Yes.

20

It was?---It was, yes.

Commissioner, I tender this letter.

THE COMMISSIONER: Yes. Letter from Mr Harvey to Mr Makucha of 4 September, 2009 is Exhibit P155.

30 **#EXHIBIT P155 - LETTER FROM MR HARVEY TO MR
MAKUCHA DATED 4 SEPTEMBER 2009**

MR PAYNE: Yes, if Mr Malacco could be excused, Commissioner.

THE COMMISSIONER: Yes, Mr Malacco, you're excused from your summons?---Thank you.

40 **THE WITNESS EXCUSED** **[2.59pm]**

MR PAYNE: Commissioner, I call Mr Stafford.

MR THANGARAJ: Might I be excused, Commissioner?

THE COMMISSIONER: Yes, certainly.

MR THANGARAJ: Thank you.

THE COMMISSIONER: Mr Gleeson are you seeking - - -

MR GLEESON: Yes, Commissioner, under the section 38.

THE COMMISSIONER: Pursuant to section 38 of the Independent Commission Against Corruption Act I declare that all answers given by Mr Stafford 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
10 him to make objection in respect of any particular answer given or document or thing produced.

**PURSUANT TO SECTION 38 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT I DECLARE THAT ALL ANSWERS GIVEN BY MR STAFFORD AND ALL DOCUMENTS AND THINGS PRODUCED BY HIM DURING THE COURSE OF HIS EVIDENCE AT THIS PUBLIC INQUIRY ARE TO
20 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.**

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

MR STAFFORD: Oath, Commissioner.

30 THE COMMISSIONER: Yes.

THE COMMISSIONER: Mr Payne.

MR PAYNE: Mr Stafford, what's your full name?---Michael Leo Stafford.

And you're a partner of the Sydney commercial law firm Eakin McCaffery Cox?---Yes.

10

You have participated in an examination before this Commission on 3 September, 2010?---Yes.

And you've had an opportunity to look at the transcript of that examination in recent times?---I have.

I'll show you the transcript. That's the transcript you perused?---It looks like it.

20

Commissioner, I tender that transcript.

THE COMMISSIONER: Yes. The transcript of Mr Stafford's compulsory examination of 3 September, 2010 is Exhibit P156.

**#EXHIBIT P156 - MR STAFFORD'S EVIDENCE GIVEN IN
COMPULSORY EXAMINATION**

30

MR PAYNE: Now, Mr Stafford, if I can ask you some questions at a high level to start with. When did you first become involved with Mr Paul Makucha and his group of companies?---I met with Mr Makucha on 17 August, 2009.

And what were the circumstances in which you came to meet him?---He was referred to me by Gino Malacco, a partner at Hall Chadwick Accountants.

40

And what did you understand was your retainer at that stage?---To draft a Confidentiality Agreement.

And at all times throughout the project, if I might describe it that way, involving Mr Makucha and his companies, was your retainer with Mr Makucha and those companies or did it also extend to Sydney Water and the related body corporate to Sydney Water?---No, just simply Paul Makucha and later on his related companies, Paul Makucha Holdings.

Did you ever address any bill or other account to Sydney Water?---No.

And I think you did address a number of accounts to Mr Makucha and his related bodies corporate and as I understand it they were and remain unpaid?---That's quite correct.

In what amount?---I think in the matter of the project matter - - -

Yes?--- - - - something in the vicinity of \$160,000 including disbursements.

10 Can I ask you about the Confidentiality Agreement you were asked to draft. That very quickly grew?---It grew between the period of August '09 to late November 2009 so it grew over that period.

You're making hand motions. Does that mean it grew exponentially towards the end?---Certainly more detail got into it towards the end, more and more amendments were taken on board.

And Mr Makucha was attending your offices I think sometimes up to three or four times a day with new things that needed to be included in the draft?
20 ---Yes. We, sometimes we had a meeting in the morning and then he'd call me about an hour later with more changes.

You understand that the agreement was signed on 3 December, 2009?
---Yes.

Did you witness anybody's signature on that day?---Yes, I witnessed Paul Makucha's signature.

In what circumstances?---He came to my office in the morning and he said
30 can you witness my signature, I witnessed his signature. He then took the documentation with him and went out to Sydney Water.

And you understand it for the purpose of having Mr Harvey sign the document?---Yes.

In relation to the document, by the time we get to 3 December, 2009 you would agree with me that it was a large and very complex commercial arrangement?---Yes.

40 It provided for the payment of potentially very large sums by Sydney Water to Mr Makucha or interests associated with Mr Makucha?---Yes.

It contained a number of clauses which were very surprising to a commercial lawyer of your standard, your experience?---Yes.

Things that you had never seen before in any commercial arrangement in your time in practice I suggest to you?---Yes.

In the course of preparing that agreement did you think that Sydney Water had any legal or accounting or other professional assistance in negotiating the contract?---I assumed that once I'd prepared a version of the document I gave it to Paul Makucha, he would then take it out to Sydney Water to discuss with Ed Harvey, I expected that Ed Harvey would then confer with relevant persons within Sydney Water.

Have you ever been engaged in drafting a commercial arrangement of the size of the one that this became in December 2009?---No.

10

So this is the biggest deal you've ever worked on in your professional career?---Well, of its type.

THE COMMISSIONER: Well, what type would you classify that, Mr Stafford?---I struggled to give it a name, Commissioner but obviously I've done business sales and 30, \$50 million type arrangements of course but I've never performed a document, agreement such as this before.

20 It contained a number of provisions which, let's not beat around the bush, you regarded as bizarre?---Yes.

Completely commercially irrational from Sydney Water's point of view you'd agree?---Some things, yes.

In a number of respects you would draft things that Mr Makucha would ask you to do but you regarded, if you were asked to advise Sydney Water its acceptance of those propositions as commercially irrational, you agree with me?---If I acted for Sydney Water.

30 I understand?---Yes.

And at no time I suggest to you were you contacted by you by any professional person to discuss potential changes to the arrangements?---No.

That was pretty surprising wasn't it, Mr Stafford, given the sort of things that were in this agreement, do you agree?---I think towards the end, yes, but at the beginning, when it was just a fairly benign Confidentiality Agreement I didn't expect any type of response.

40 I understand, if it's a two-page Confidentiality Agreement obliging each party to keep certain identified material confidential there's no debate between us, that you could enter such an agreement and not be expected to be called by somebody acting for a counterparty, we're agreed about that? ---Yes.

Of course there can be situations when these things, even, even Confidentiality Agreements can become hard-fought and you'd expect a call from another lawyer to negotiate terms, correct?---True.

Once it becomes a potential multi-million deal I suggest to you it was completely unprecedented in your commercial and professional experience that you would not be contacted once to discuss any of the terms of the agreement, do you agree?---Yes, yes.

I think you've agreed with me that a number of the terms had you been acting for Sydney Water you would have regarded as commercially irrational and given firm advice to that effect to Sydney Water?---Yes.

10

Did you ever raise with Mr Makucha the possibility that what he was asking you to draft was so strange that when ultimately the terms of the agreement were considered by a court questions might be asked about Mr Harvey's authority to suggest such terms?---Sorry, that question (not transcribable) would you repeat that please, sorry.

I'll start again. It wasn't my best question. Did you ever have a discussion with Mr Makucha about Mr Harvey's authority to negotiate any contract at all with him?---Yes, I did.

20

When was the first occasion you did that?---At our first meeting.

And was that, well, tell us why that was?---That was 17 August, Mr Makucha indicated he was doing a deal with Sydney Water and he was dealing with a person called Ed Harvey. I asked him, amongst other things, whether he had authority from Harvey to negotiate the transaction. He said he would check it out and then some weeks passed, there'd been another draft prepared. I questioned Mr Makucha again about the whereabouts of the authority. Makucha said well, look, why don't you just draft something for him to sign so I prepared a letter confirming, to be signed by Ed Harvey confirming that he did have such delegated authority. I guess the, whilst that was not evident to the, sorry Commissioner.

30

Mr Payne, do we know which letter that is, can we - - -

MR PAYNE: I'm about to show a document to, perhaps this might help you, Mr Stafford?---Ah hmm.

Have a look at this file note and attached document?---Ah hmm.

40

I've just shown you 2 pages. The first page, is that your handwriting, Mr Stafford?---Ah, yes, yes.

And it's a file note of 17 August, 2009?---That's right.

Just to help me, it says, "Asked to draft confidentiality agreement with SWC, Sydney Water Corporation"?---Ah hmm.

“Noted Paul Makucha dealing with Ed Harvey of Sydney Water Corporation.”?---Ah hmm.

“I asked Paul Makucha whether Ed Harvey had authority to sign.” Now, you’re asking about a confidentiality agreement at that stage?---Ah hmm.

Correct?---Yes.

10 “Sign such an agreement and suggested that we see his authority. Paul Makucha to raise with Ed Harvey- - ?---Ah hmm.

- - -but for”, what’s that word?---“But insisted that, but insist that EH procure a relevant instrument of delegation.” Oh, sorry, no, “But”- - -

I’m terribly sorry?---“But for now draft letter for signing by EH confirming authority.”

20 “I said okay but insisted that Ed Harvey produce relevant instrument of delegation.”?---Yes.

Now, just jumping forward to today. As you sit here, Mr Stafford, you never saw any relevant instrument of delegation from Mr Harvey, did you? ---No.

You’ve made a file note of you insisting to Mr Makucha that it be produced. That was because as I understand it you worked at the Crown solicitors prior to coming over to Eakin McCaffery Cox?---Yes.

30 You knew that in the state government it was almost inconceivable that someone like Mr Harvey would have authority to sign an agreement of the kind that you ultimately drafted on 3 December, 2009?---Yes.

You regarded it as so unlikely that as a matter of professional responsibility at this first meeting you were insisting- - ?---Mmm.

- - -that, that the instrument of delegation be produced to you?---Yes.

40 I suggest to you that was because in protection of everybody, including your own professional reputation, you regarded it as essential to see that instrument of delegation because this whole thing may be a complete nullity. Do you agree?---Yes.

Mr Stafford, just doing the best you can, why did you relax that insistence on seeing the instrument of delegation later?---Well, I guess in the fluxion of time when any draft was prepared, various meetings I had with Mr Makucha, one additional occasion in September when I again questioned him on the whereabouts of the delegated authority, Mr Makucha accused me

of trying to sabotage the deal, suggested I should join Champion Legal law firm.

Why was that an insult?---Well, it was because Champion Legal were the solicitors for the judgment creditor who was pursuing Mr Makucha at that time, so he suggested I should, I might as well be working for that firm, 'cause you're not on his side. And of course, after that little engenderment in my next draft of the agreement, which is dated on or about the 6 October, shortly after this latest altercation, we'll call it, I actually put in the
10 agreement that at signing, Mr, Sydney Water would produce a copy of the delegated authority at the time of signing. The following days there was a re-mark-up.

Yes?---I had a further meeting with Mr Makucha. He put a line through my mark-ups and said, "What did you do that for?" And I said, "Well, we need it." And he said, and then the same diatribe. So after a while when we continued to have these arguments with the fellow, you can only go so far in terms of advice to your client that authority was required otherwise it could
20 undermine the whole agreement, but I guess you take a line of least resistance. He could be quite troublesome to deal with if he didn't get his own way, and of course, you know, you just got sick and tired of arguing with the guy. So as a consequence I, in the execution clause, drawing upon previous experience that any delegation is then recorded in a book, a book of delegation. So rather than continue to have this fight about where's it got to go, I put it in the execution clause, a reference to a book number, which I presume would have been completed at the time of signing.

Can the witness be shown P134, and just while we're on this topic, deal with the attestation clause?
30

THE COMMISSIONER: Can we tender the, are you tendering the document?

MR PAYNE: I am, Commissioner, I'm going to come back to it as well, yes.

THE COMMISSIONER: All right. Do you want to tender it?

MR PAYNE: I'll tender it now, yes.
40

THE COMMISSIONER: All right. Exhibit 158 is Mr Stafford's, sorry, 157 is Mr Stafford's file note of 17 August, 2009, together with the draft letter of authority to be signed by Mr Harvey but which is not signed.

#EXHIBIT P157 - FILE NOTE OF MR STAFFORD'S MEETING WITH MR MAKUCHA AND DRAFT OF LETTER FROM MR HARVEY TO MR MAKUCHA DATED 17 AUGUST 2009

MR PAYNE: Yes. 157. Can we just ask you a few questions about that attestation page. You were just telling me about that.

THE COMMISSIONER: Where are we now?

MR PAYNE: P134, Commissioner.

10 THE COMMISSIONER: Thank you.

MR PAYNE: So in one of the drafts you put in a clause requiring production of, of the instrument of delegation and that was- -?
---(not transcribable)

- - - deleted by Mr Makucha. You then put in, in the attestation clause above where we see Mr Harvey's signature in P134, those words- - -
---Ah hmm.

20 - - -for and on behalf of Sydney Water Corporation to bind Sydney Water Corporation and under instrument of delegation, and a reference to the book number?---Yes.

From what you told me before, when you witness Mr Makucha's signature - - -?
---Ah hmm.

- - -everything in this part of the attestation clause was blank, Mr Harvey hadn't signed?---That's correct.

30 Was it your intention in drafting the attestation clause in, in this way that in effect in signing it it would draw to the attention of whoever signed it, the absence of this instrument of delegation and/or if there was such a delegation, that the number would be written in the- - -?
---Yes.

- - -in the space? Can I ask you about the advice you gave to Mr Makucha - - -?
---Mmm.

40 - - -before the diatribe, if you like. I understand what you say about that. But when you raised this questions of authority with him, did you advise Mr Makucha that in your view it was almost inconceivable that Mr Harvey had the delegated authority of Sydney Water to enter the agreement of the kind you were now being asked to draft?---Ah, at, at the time of the, the last altercation, the agreement hadn't reached such epic proportions that it had at that stage as it turned out to be. So even in the middle of late September/October I still countenanced Harvey being able to sign it, assuming that he had the authority. I couldn't understand why he'd go

through this whole process without, you know, go to all this trouble if he didn't have some sort of delegated authority to get this far at least.

10 Didn't the alarm bells go with you, Mr Stafford, when you weren't contacted by anybody on behalf of Sydney Water to discuss the terms of this agreement you were drafting?---I'm not sure alarm bells is, is right. I, when I looked at the project itself as I said earlier today, I thought it had some leaks, I thought this could be a good thing for Sydney Water and, Sydney Water Corporation and the people of New South Wales. I thought that the benefits flowing to Sydney Water would be outweighed by the apparent
pitfalls of the, of the, you know, documentation in terms of its skew towards Paul Makucha.

Well, let's leave everything to do with nuclear-powered ships and everything else all to one side, just, just we'll talk about what you thought had commercial legs, namely the bottling plant?---Ah hmm.

20 But you agree with me that it would be, it almost beggars belief that Sydney Water would enter into an agreement to produce a bottling plant and exchange intellectual property with Mr Makucha and his companies without you being contacted by some solicitor on behalf of Sydney Water to discuss the drafting?---I did expect some sort of response but I wasn't conscious of it. Makucha often mentioned that this type of deal couldn't succeed if there were a lot of people reviewing it.

You were a very experienced commercial solicitor when you were drafting this weren't you, Mr Stafford?---Yes.

30 You weren't taking advice from Mr Makucha about how these deals get done were you?---He was quite adamant about how the document would look and what, I guess I was just following instructions.

40 I understand that, I understand that he was adamant, I understand that when you raised the question of authority on a number of occasions you were met with a diatribe. But my question is this. With your experience as a commercial solicitor and particularly given the fact that you worked at the Crown Solicitor it was inconceivable to you wasn't it that Sydney Water could allow this agreement to be signed by anyone without a single lawyer reviewing it, ringing you and discussing the terms?---It's unusual, I don't know whether it would be inconceivable.

Has it ever happened in any commercial deal you've ever done before that the counter party was perfectly happy just to let you draft it all and never had a single discussion with you about it?---I've done business sales where the party's been unrepresented and happy for changes to take place without being represented but nothing like this type of deal of course.

This is a much, much bigger deal than that isn't it?---Yes.

The first commercial deal you had ever done at least of its type I think?---Of its type, yes, that actually (not transcribable).

10 And by the time you came to, certainly by the time you came to Mr Makucha asking you to witness his signature you regarded it, I suggest to you, bizarre but you hadn't had a discussion with anybody on behalf of a counter party, Sydney Water Corporation about the terms of the agreement?---I didn't think it was bizarre I was just, I was sort of relieved that it was nearly over. It was more relief, that's the only expression, feeling I was having at the time.

20 Did Mr Harvey make any substantive suggestion to you about the drafting of any part of the agreement?---Only the first draft he came back with some comments and produced his own version of the standard Sydney Water Confidentiality Agreement. We then responded and suggested why wouldn't he accept that. But thereafter there was little contact from Mr Harvey, the modus operandi was that I would make changes as instructed by Makucha, he would take the draft out to see Ed Harvey at Sydney Water, they would then discuss the changes and Makucha would either ring or come back next day saying this has been agreed between me and Harvey.

30 Can you point to anything in the agreement that was suggested by Mr Makucha to you that you then took out as you understand it at Mr Harvey's insistence?---There was a reference to a proposal to amend the Sydney Water Act to permit the imposition of licence fees on alleged resellers of Sydney Water. Harvey suggested that should be the subject of a separate Heads of Agreement to be signed by the board. He also suggested that there was a proposal to get tax exempt status for Sydney Water bonds. Harvey suggested this was something he couldn't sign, it also had to go into a Heads of Agreement and those two items were the subject of Heads of Agreement which I referred to in this Confidentiality Business Implementation Agreement.

40 Was it your understanding throughout this project that this agreement once finalised would have to be submitted to the Sydney Water board?---That was my original understanding that we're preparing a confidentiality agreement to discuss terms and then at some point an executive summary would be prepared for submission to the board.

And that understanding namely that an agreement of this kind would have to go to the Sydney Water board never changed did it?---The, there's a clause within the agreement that actually provides that the agreement if determined by Sydney Water is to be signed by a minister or some other person then that was to happen. I think it's in clause 8.

But your understanding throughout was that an agreement of this kind had to go before the Sydney Water board for approval. Correct?---No.

You thought did you that Mr Harvey would be allowed to negotiate all aspects of this on his own and be the only person who knew about it within Sydney Water did you?---I don't know about the only person knowing within Sydney Water but certainly I expected Harvey to be able to sign the document.

10 Well, you knew nothing about what was happening within Sydney Water other than you had insisted on an instrument of delegation at the very first instance and then been shouted down and given up. Correct?---I gave up around early October.

And that your first instinct was this bloke can't even sign a confidentiality agreement without an instrument of delegation yet he insisted on it as you see in the minutes?---Yeah, yeah.

That was the correct legal advice to give, you agree?---Yes.

20 Do you now regret retreating from that position subsequently?---Giving up you mean?

Yes?---At the time I guess you had to appreciate the sort of pressure Mr Makucha was bringing to bear on the firm and I didn't want him upsetting staff by having stand-up arguments within the firm premises so in some respects, you know, maybe I should've stood firm though at the time I was instructed to continue on.

30 Are you telling the Commissioner that Mr Makucha's personality is such that even though you're successful commercial lawyer with a successful commercial firm in Sydney you felt under some sort of duress to basically path at least resistance with Mr Makucha?---Yes, yes.

Have you ever met Mr Harvey?---Twice.

What was your impression of the relationship between Mr Makucha and Mr Harvey?---They seemed to get on. Makucha did most of the talking so there was a lot of interchange between the two of them so you couldn't really assess the relationship but they, they appeared to be friendly.

40 To your observation Mr Harvey was clearly out of his depth wasn't he? ---Not really.

Well, you agreed with me earlier that there were a number of clauses in this agreement ultimately as you drafted that if you were advising Sydney Water you would've told them this is commercially irrational don't do it?---Mmm.

What explanation can you offer the Commission for why in your view Mr Harvey went along with those commercially irrational things?---I can only

assume that Mr Harvey saw merit in what was happening in terms of the total outcomes for Sydney Water.

THE COMMISSIONER: Did it occur to you that Mr Harvey felt under similar duress as you did?---It's quite possible but I wasn't in a position to assess that.

10 MR PAYNE: In terms of the path of least resistance I think you said you were relieved when the document was signed and you didn't have to deal with Mr Makucha anymore. Correct?---Yes.

You can't offer any observation about Mr Harvey in relation to the same matter can you?---No.

Can I show you a bundle of documents concerning intellectual property. This I'd ask you to assume, well, you tell me. On 9 November, 2009 Eakin McCaffery Cox received the letter in the top of this bundle. Correct?---Yes, yes.

20 Are you experienced in trademark matters?---No.

How did it come about that you were the person who made the application for trademark on behalf of the company Sydney Water P Pty Limited? And you'll find your letter and application is the last document in the bundle I've just handed you. The very last page, Mr Stafford, can you see that?---Yeah.

You made this application on 26 August, 2009?---Yes.

30 About a week after you first met Mr Makucha?---Yes.

How did it come about that you made this application if you weren't experienced in trademark matters?---Well, sorry, when you said you I thought you meant the firm. The, I was instructed by Paul Makucha to attend to the registration. I sent the matter to our trademark person, their office to complete the application.

I see. And then it came back and you just signed the application and forwarded it on?---Yes.

40 You knew didn't you because he'd included this material in what you sent the registrar that in order for Sydney Water P Pty Limited to make an application for the mark Sydney Water in relation to class 32, which is water, drinking water, natural water, bottled water, aerated water, aerated mineral water, mineral water, carbonated water, spring water, still water and table water, it needed the permission of the owner of the existing mark Sydney Water. Correct?---Yes.

And what you did was to put the form in together with the items 3 and 4 on that letter from you of 26 August, 2009 being a letter from Hall Chadwick of 6 August and the handwritten note of 20 May being evidence that Sydney Water P Pty Limited had the permission of the owner of the mark Sydney Water to apply for this extension in relation to class 32?---Yes. That was also documented in the agreement.

What agreement are you talking about now?---The business, the business confidentiality business implementation agreement.

10

Well, this 26 August, that's, that's months away from being finished at this point?---Oh, yes. Sure. But there was a draft prepared by then.

Was it explained to you by Mr Makucha that he had found what he regarded as a loophole in Sydney Water's intellectual property protection?---Yes.

And that class 32 being water was not covered by the existing mark?---Yes.

20

The proposal as you understood it was that the existing Sydney Water mark would be extended to cover class 32?---Yes.

And that ownership of the mark in respect of class 32 would reside in Sydney Water P Pty Limited, a company owned and controlled by Mr Makucha?---Originally the, according to the Harvey note, he indicated that Makucha had owned or owned the IP in the marks. So it was ostensibly Makucha who owned the IP, who then licensed the right to register the trademark with Sydney Water P.

30

A serious answer?---Well, that was put before me.

Mr Stafford, let's not beat around the bush. The mark Sydney Water and the logo, you've seen it around?---Yes.

It's on all of your water bills?---Yes.

You see it on Sydney Water employees when they walk around?---Yes.

40

You seriously tell the Commission that you believed as an experienced commercial solicitor, that Mr Makucha owned that mark regarding water before you made this application?---Well, that was the note from Harvey.

I'll ask you again - - -?---Yes, my answer is yes.

- - - you believed that Mr Makucha owned it?---Yes.

How do you think that had happened?---Well, there's a note from Harvey to indicate that he did own it. And there was also a reference to the, we've had

correspondence saying that these would be registered by, I think at the time Makucha.

How do you think it was that Mr Makucha came into possession of the Sydney Water mark as it, as it relates to water?---Well, on the basis that there was a gap in the, in the trademark classes and I guess you took the view that there was an issue with that, it'd be raised by IP Australia.

10 THE COMMISSIONER: Mr Stafford, I don't understand this. You know, perhaps this is, it's because my knowledge of trademarks is defective. But I understand the proposition that there was a gap. I understand the proposition. I'm not commenting on whether it's right or wrong, but I understand the proposition that there was a gap in the trademarks that, that Sydney Water had obtained and that they hadn't registered a trademark in class 32, which relates to water itself. I understand that?---Mmm.

20 And I understand that it is, I understand that there could be an argument that someone could register a trademark in respect of that water. So that the trademark could be Smith's Water or Jones Water. I understand that that is something that could possibly happen. What I don't understand is how someone could register the trademark Sydney Water without the class 32, without Sydney Water's consent?---That's it, Commissioner. I believed that Sydney Water had consented.

And what lead you to believe that?---Well the, firstly the note from Harvey indicated that Makucha owned the IP in the marks. The letter from Griffith Hack, which seemed that they were going to proceed with registering such trademarks on an application by Makucha.

30 I see?---And secondly it was placed in the agreement. And I assumed from that there was (not transcribable) approval from Sydney Water.

Well, from Harvey?---Well, from Harvey, yes.

I mean, correct me if I'm wrong, but my impression from your evidence is that nothing was ever said to you to the effect that anybody other than Harvey had anything to do with this on behalf of Sydney Water. Is that right?---Yeah, as it turned out, yes.

40 No but, I know that's how it's turned out, but I mean during the course of your dealings with Messrs Makucha and Harvey, was anything said to you that could lead you to infer that someone other than Mr Harvey had had dealings with the subject matter of this agreement other than Mr Harvey himself?---I just, I just assumed Commissioner, that he was dealing with people within Sydney Water.

But that was an assumption that you made yourself. I'm not criticising you for that. I understand how that assumption can arise. But nothing was said to you?---No.

MR PAYNE: You thought that Mr Harvey had authority in relation to Sydney Water's trademarks because he said so?---Well at this point in time I accepted it.

10 Not one week before, Mr Stafford, in relation to a confidentiality agreement, you insisted on seeing his instrument of delegation. Correct?---Yes.

Yet you were prepared to accept just on his say so a week later that he was in a position to dispose of multi-million dollars in intellectual property on behalf of Sydney Water without any instrument of delegation. Correct?
---Well, I was still at that stage seeking copies of the instrument of delegation. The fact is that it hadn't been provided by then didn't mean that I wasn't conscious, I was still trying to get it. The idea was that the Sydney Water P was to the joint venture vehicle in which each party would have a 50 per cent stake in it eventually. So I assumed that Sydney Water was not
20 giving up its IP per se, it was going to take the benefit of it.

See, didn't Mr Makucha tell you that he had this commercial revelation and that he'd found this loophole in relation to class 32 and that he was going to register a mark, extend the mark over class 32 and put him in the driving seat in negotiating with Sydney Water in this proposed joint venture which had not yet been agreed. Correct?---Yes.

30 And so it was as you understood it, his plan as he explained it to you to obtain a potentially very valuable intellectual property by means of this application you were going to make?---It wasn't going to be valuable unless the project went ahead.

THE COMMISSIONER: Oh, no, it could be very valuable even without the project. To own the trademark over all the water that Sydney Water works with and the trademark is actually Sydney Water, that would cause absolute havoc with Sydney Water's operations, irrespective of the agreement?---Well, the idea was that Sydney Water would take half ownership of that in part of the ongoing - - -

40 That would be very kind of Sydney Water to give out half of its ownership of its right to Sydney Water trademark and the water that is actually used in one form or another I suppose since, since water services in Sydney began. You know, I just find it all very strange?---I guess, Commissioner, the idea was that the, Makucha identified that Sydney Water had fumbled the ball and - - -

I understand that?--- - - - he was bringing this to their attention.

Yes. But where did he get the right to use the name Sydney Water from, the mark? Where does the right to use the mark Sydney Water come from? From the kind, charitable benevolence on the part of Sydney Water that hands its rights to its own name for the product with which it works? I mean, I mean is this reality?---Well, we relied on the note from Harvey and from Griffith Hack and proceeded on instructions.

10 MR PAYNE: I just want to understand what Mr Makucha said to you. So you agree with me so far he'd come up with this devilishly clever loophole in relation to class 32?---Yes.

And he told you that in effect you were to go and register the mark because he could use the mark once he had it as a gun to hold to the head of Sydney Water in commercial negotiations about a joint venture, correct?---Well, no. Well, certainly not use it as a gun against the head. The idea was that it should be part of the joint venture proposal.

20 What if Sydney Water didn't agree to the joint venture? What you did would put Mr Makucha as the owner of the Sydney Water mark in relation to water on his own, correct?---Well, I mean, that would be incongruous with the aims of the parties and I think Sydney Water had every right to challenge him on that.

THE COMMISSIONER: I mean I think I understand how it all happened, Mr Stafford. I mean, that it is, you were just doing what you thought was your job and didn't think about it much further?---Well - - -

I mean, I don't mean that as a criticism?---No, no.

30 I mean, that's just how it happened?---Yes.

MR PAYNE: And just to finish on this bundle before I tender it, you agreed with me that you understood that you needed to provide evidence of Sydney Water's consent before any mark could be issued to Mr Makucha's company, Sydney Water P, correct?---Of the use of the trademark?

Of the use of the trademark, yes?---Well, the, Makucha, Makucha as owner or alleged owner of the IP granted a licence to Sydney Water P to register.

40 I understand and you understood that Sydney Water Corporation, the real Sydney Water if I can call it that way?---Yes, yes.

Needed to provide evidence of consent which you needed to send to IP Australia in order that Mr Makucha's company could obtain the trademark registration?---Yes.

And what's what you set about to do and that was that handwritten letter which appears in the bundle confusingly enough, if you go forward about

two pages, there's a handwritten document signed by Mr Harvey that you sent to IP Australia. Do you see that, it has the numbers 1-3-1-7-5-7-7, in fact they all do, I'm sorry, the handwritten document, it's one, two, three pages on from what I've just taken you to? A two-page handwritten document - - -?---I've got it, yes.

That, that's the, that's the consent that you sent off to IP Australia, correct?
---Yes.

10 Together with the document immediately in front of it which is a Hall Chadwick document of 6 August, 2009 which you sent forward as evidencing Sydney Water's consent to Sydney Water P Pty Limited becoming the registered own of the mark?---Yes, yes.

As you understand it since November 2009 the fate of your application has not yet been determined?---No, it, it came back, IP Australia came back with requisitions.

20 Yes, there's requisitions, that's the covering letter in this bundle that I've shown you - - -?---Yes.

- - - of 9 November - - -?---Yeah.

- - - and it hasn't yet been decided as we sit here today?---That's quite correct.

30 So the possible applications are IP Australia reject it or, and the attempt to use the loophole fails, IP Australia accept it and Mr Makucha's company becomes the sole owner of the trademark Sydney Water in respect of class 32?---Well, Sydney Water P does.

Sydney Water P, I'm terribly sorry, becomes the owner of that trademark?
---Yes, yes.

Potentially worth millions of dollars?---Well, yes, but there was an Option Agreement in place or it would be in place for Sydney Water to take shares in that company.

40 I see. So it can pay millions of dollars for its own trademark?---Well, there, there was some value, consideration for the idea I guess.

Mr Stafford I just, to be fair to you, the transcript perhaps won't record the laughter, this whole proposal's a joke, isn't it?---Obviously I don't think so but - - -

Commissioner, I, I tender the bundle, it wasn't a fair question, I withdraw the question.

THE COMMISSIONER: The bundle of trademark documents commencing with the letter of 9 November, 2009 from IP Australia to Eakin McCaffery and Cox is Exhibit P158.

**#EXHIBIT P158 - BUNDLE OF TRADEMARK DOCUMENTS
COMMENCING WITH LETTER FROM IP AUSTRALIA TO EAKIN
MCCAFFERY COX DATED 9 NOVEMBER 2009**

10

MR PAYNE: You said on a number of occasions the letter from Harvey, can the witness be shown P126, I'm sorry, its 127, I'm terribly sorry, I'm sorry Mr Stafford, please close that. I want to take you to P, page 461 in volume 127. Do you have page P461 open, the numbers are in red in the top right-hand corner?---406?

461, it's in red in the top right-hand corner. Have you got that?---Yes.

20

Is that the document you're referring to you when you said the letter from Harvey about the trademarks?---The only letters I've referred to so far have been the note from, the handwritten note from Harvey and a reference to the Griffith Hack letter, I haven't referred to this letter.

I see. So when you told me before about the letter from Harvey that's the handwritten document that was sent to IP Australia in that bundle that I just showed you a moment ago?---Yes, yes, yes, yes.

30

This wasn't a document you saw prior to making the application?---I may have.

But it wasn't one that you're referring to, that's right?---Is it, I'm not sure if it's referred to in the application.

40

But we've, we've cleared that up, let's put it to one side. To your knowledge, Mr Stafford, was it ever explained clearly or at all to Mr Harvey by anyone what it was he was agreeing to in consenting on behalf of Sydney Water to the extension of the registration of the mark to class 32?---I had no dealings with Harvey on the point nor am I aware of any discussions. I was asked to do a job.

I see. Excuse me one second. I have nothing further for Mr Stafford, Commissioner.

THE COMMISSIONER: Yes. Mr Stevenson. I am just wondering whether we could finish with Mr Stafford this evening?

MR STEVENSON: If you're minded to rise at 4.00 the answer is no, I won't finish then.

THE COMMISSIONER: Can I just make some inquiries.

MR STEVENSON: Yes.

THE COMMISSIONER: Mr Gordon, are you going to examine Mr Stafford?

MR GORDON: I was rather hoping I would have the indulgence of overnight to take instructions.

10

THE COMMISSIONER: Proceed, Mr Stevenson.

MR STEVENSON: Mr Stafford, I'm the barrister for Sydney Water. Can I just ask you a few more questions on this question of the trademark application?---Mmm.

You were retained, you've told us, on 17 August?---17th, yes.

20

17 August and your note at Exhibit 157 contains no reference to any trademark application?---No.

So is this right, that the, the idea that you would be participating in an application to the IP, to IP Australia emerged some time between then and 26 August which was the date upon which the application went in?---Yes.

And I think you said referred the trademark matter to a colleague within the firm?---Yes.

30

Is that because you don't yourself have trademark expertise?---No.

And did you apply your mind to what the Trademarks Act said about who was entitled to make an application for a trademark?---No.

Did you know that section 27 of the Trademarks Act said that a trademark could only be applied for by a person who claimed to be the owner of the trademark?---No.

40

Did you understand that Mr Makucha in his instructions to you was claiming to be the owner of the trademark?---Yes.

That is, the owner of the trademark Sydney Water - - -?---Yes.

- - - that you get on your water bills as Mr Payne has put to you?---Yes.

You said that one thing that you relied upon was a letter from Griffith Hack?---Yes.

MR STEVENSON: Do you have Exhibit P127 in front of you. It's one of the, that's the folder on your right. If you turn to page 541 on the top right-hand corner, that is, is that a letter of 12 June, 2009 addressed to Mr Makucha?---Yes.

Is that- - -Yes.

Is that the Griffith Hack letter to which you were referring?---Yes.

10 I suggest this to you, that that letter does no more than record Griffith Hack's acknowledgement of instruction from Mr Makucha that he wished to file trademarks?---Yes. I assumed at that point that they would have raised an issue if he couldn't.

And in that first paragraph you'll see halfway down they refer to the handwritten note from Mr Harvey that you've referred to?---Sorry, where was this again?

In the first, the first full paragraph?---Oh.

20

The one starting, We understand?---Yes.

About two-thirds of the way down that paragraph there's a sentence commencing, We confirm receipt of a handwritten note?---Oh, yes, yes.

So Griffith Hack's evidently received the same handwritten note you got? ---Yes.

30

Well, can I suggest this to you, that this letter from Griffith Hack itself provided no evidence of any authority that Mr Makucha had to claim ownership of the trademark but did no more than reflect their acknowledgement of his instructions to that effect?---Well, ah, as I said, it appeared to me that if they had some issues with that they would have raised it rather than send such a response.

Well, it's simply acknowledging receipt of instructions, isn't it, only closing a retainer agreement?---Well, if I thought there was a problem in registering a trademark I wouldn't send a retainer agreement, I'd advise the client accordingly.

40

Well, don't you agree that the, from your own experience as a solicitor, the time you send out a retainer agreement is before you give advice?---Ah, not always.

So you inferred then, did you, from the fact that Griffith Hack were sending out a retainer agreement and (not transcribable) their instructions that they had given advice to Mr Makucha to the effect that he was the owner of the trademark?---No. I'm saying that ah, ah, um, that if I, if they thought that it

was not possible legally they would have raised it rather than send out such a letter.

Did you know at the end of August 2009 whether Mr Makucha had retained Griffith Hack?---Ah, I had copies of this correspondence. I'm not sure what happened with the retainer with Griffith Hack. I know he came to see us about that.

About what, the- -?---No, lodging the trademark.

10

Well, just going back to the question, I put this. Is it the case that you didn't know as at the end of August whether or not Mr Makucha had retained Griffith Hack?---Um, wasn't this letter part of the application to IP Australia? So at the time I must have known that this letter was in existence.

Well, I'm asking you?---Yes.

Your letter to IP Australia is the last document in Exhibit P158. Do you still have that there, that bundle of documents?---Ah, no, I think they're gone.

20

(not transcribable) Look at the last page. Do you recognise that as your letter to IP Australia of 26 August, 2009?---Ah hmm.

No reference there to Griffith Hack letter?---No.

I think we can put that to one side, can we?---I assume given its date though that it would have been part of my documentation.

Well, what I'm suggesting to you is that this letter from Griffith Hack is no more than an invitation to Mr Makucha to sign a retainer agreement and it - - -?---Mmm.

30

- - -contains no advice and doesn't suggest whether or not any advice was ever given. Do you agree?---Ah, that it's your view? I don't agree with you.

Right.

THE COMMISSIONER: Do you regard this as an implicit expression of opinion by the patent attorneys?---No. What I'm saying, I inferred from this that if they thought there was an issue with proceeding with the matter that they would have identified that at the beginning rather than send out a retainer letter. It wouldn't make sense.

40

I understand (not transcribable) Mr Stafford, but what I would like to know is whether that is something that crossed your mind at the time or whether

it's something that you are reconstructing?---Ah, I, I imagine that at the time that was my mind set.

So that sounds like reconstructing to me, once you imagine at the time?
---Well- - -

That is a really frank admission of reconstructing?---Well, it was a while ago.

10 All right.

MR STEVENSON: It's not a, it's not a memory test, Mr Stafford. If you don't remember, just tell us. But what I'm suggesting to you- - -

THE COMMISSIONER: I don't think there's any reflection on you at all in that, but I mean I just need to know whether you thought of it at the time.

MR STEVENSON: Well, what I'm suggesting to you, just so we understand what I'm putting, is that this letter from Griffith Hack said
20 nothing to you at the end of August 2009 as to what their view was about whether or not Mr Makucha was the owner of the Sydney Water trademark?
---Well, if I read this letter, yes, you could take that view, but (not transcribable) I would do something different.

What did you say just then?---In other words, I would approach it this way. If a client came to me asking to register a trademark that I didn't think could be trademarked I would have- - -

Is your point you'd like to think, you'd like to think that as at the end of
30 August you had a sound basis for believing that Mr Makucha owned the Sydney Water trademark?---Well, I'm not a trademark attorney so I didn't know that. I referred it to my trademark person. I'm just saying, if I was a trademark attorney I wouldn't, if I was an expert in the field.

Just so you know where I'm coming from, Sydney Water may well make a submission to the Commissioner at the end of these proceedings that you had no sound basis on 26 August, 2009, to hold the view that Mr Makucha owned the Sydney Water trademark. That's- - -?---Yeah, true.

40 And what I'm suggesting is first that the letter from Griffith Hack provided you with no basis at all to come to the conclusion that Mr Makucha owned the trademark. What do you say about that?---I disagree.

And that the only other possible basis you could have had for thinking that Mr Makucha owned the trademark was the handwritten note from Mr Harvey?---Yes.

Not on Sydney Water letterhead?---No.

Not typed up?---No.

Not written in any formal fashion?---But he'd signed it.

Correct. Back of the envelope stuff, wasn't it?---Well, it was on, on a document I believe.

10 THE COMMISSIONER: Mr Stevenson, these matters are really for submission. I mean, it's- - -

MR STEVENSON: Yes, Commissioner, but- - -

MR MAKUCHA: I can't hear you, sir.

MR STEVENSON: - - -I'm going to make submissions in due course.

THE COMMISSIONER: It's nothing to do- - -

20 MR STEVENSON: Yeah. I'll move on. Anyway, it's all you had, Mr Stafford, isn't it?---Well, I had the letter from Hall Chadwick.

Yes, yes. Well, let's look at that. The letter from Hall Chadwick is in the bundle of material that I think you have, Exhibit P158. It's about eight pages from the end. See that?---Yes, I think I've got that letter.

30 Well, you see, what that letter says in the first paragraph is that Hall Chadwick had seen a letter written by Sydney Water to a Mr Von Muenster in which Sydney Water asserted that it owned the trademark?---Ah hmm.

Third paragraph, see that? So this is the letter you rely upon. First paragraph, Hall Chadwick reciting that a letter had been written by Sydney Water to a Mr Von Muenster who is a trademark attorney, you could assume, asserting that Sydney Water owned the trademark? First bit. Have you got that?---Yes. Yep.

40 And then in the second or third paragraphs Hall Chadwick say that in effect Mr Makucha has told them that that first letter was wrong and that really Mr Makucha owned the trademark?---Yes.

And the fourth paragraph, Hall Chadwick say that Mr Makucha has told them that Sydney Water is in the process of issuing a corrected letter? ---Yes.

Well, you didn't see any corrected letter did you?---I can't recall.

You didn't forward to IP Australia any corrected letter, you don't refer to it in the correspondence?---True.

And to be fair to you looking over the next page of that letter Mr Harvey has signed it?---Yes.

So is your case that you took from Mr Harvey's signature on that letter that he was going to issue a corrected letter saying that Mr Makucha not Sydney Water owned the trademark?---Yes, but I, if you take also the fourth paragraph to mean that Harvey agreed to Makucha owning the IP.

10 So that was third hand from your point of view wasn't it that a letter from Hall Chadwick saying what Mr Makucha had told them about what Mr Harvey had told him?---Absolutely, yes.

And that was good enough for you was it?---That plus the note.

That's the handwritten note?---Mmm.

20 All right. Now, in the months following August 2009 you were as you told us repeatedly advising Mr Makucha he should endeavour to get evidence from Mr Harvey of his authority?---Yes.

And you knew from your experience at the Crown that it was likely that Mr Harvey would have, you knew he would have to have some kind of indication which would be in a document?---Yes.

So what you were on about with Mr Makucha was get Harvey to show you the document?---Yes.

30 His response to that was to accuse you of trying to sabotage the deal and he accused you of being as bad as the solicitors acting against him in the bankruptcy proceedings. Is that correct?---Yes.

So you tell us you eventually gave up nagging him about that matter?---Yes.

You tried to put a clause 7112 in?---Yes.

He wouldn't have that?---Yes.

40 And so you ended up drafting the attestation clause which Mr Payne took you to to include a reference to the book number?---Yes.

And you said in your private examination that Mr Makucha didn't pick that up. Do you remember saying that?---Yes.

Well, did you point out to him that you changed the attestation clause on the draft agreement to include a book number for insertion by Mr Harvey when he signed?---He saw it. He actually played with the actual wording of the execution clause to include the words "and binded".

All right. So what did you mean in your private examination at page 220 I think when you said he didn't pick it up?---Well, I didn't, most changes I mark up and we would discuss each and every one but we didn't discuss that mark up.

10 What you said at page 217 of your private examination at line 29 was, "So I put that execution clause and there it remained. I didn't tell Makucha about it but I gave him the draft and he didn't pick that up."?---Yes, not immediately.

Then you go on to say, "That was probably one of the last times I raised the question of authority because I'd raised it at least a half a dozen times before in our meetings in the document itself but he would have none of it."?---Yes.

20 Well, was it true for you to say to the Commissioner in the private examination that so far as you were concerned Mr Makucha didn't pick up your reference to the book number and attestation clause?---Well, he didn't raise it with me as an issue.

And you didn't point it out to him or feel like having another argument with him?---Well, yeah, that's right.

THE COMMISSIONER: Mr Stevenson, is this a convenient time?

MR STEVENSON: Yes, it is, Commissioner.

30 THE COMMISSIONER: We'll adjourn until 9.30am tomorrow morning.

THE WITNESS STOOD DOWN [4.04pm]

AT 4.04 THE MATTER WAS ADJOURNED ACCORDINGLY [4.04pm]