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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION SIREN

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON MONDAY 27 SEPTEMBER 2010

AT 9.45AM

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

THE COMMISSIONER: Mr Payne.

MR PAYNE: Commissioner, we're resuming this morning with Mr Stafford and there are one or two documents that I need to just show to him rising from my examination before Mr Stevenson completes - - -

THE COMMISSIONER: Mr Stafford, you're still under your oath?---Yes, Commissioner.

10

<MICHAEL LEO STAFFORD, on former oath [9.45am]

MR PAYNE: Mr Stafford, you told me when I was asking you some questions on Thursday about two versions of the confidentiality agreement where you'd made changes to clause 8.12 concerning Sydney Water and its authority?---Yes.

20

And you remember those questions and answers?---Yes.

Can I show you first of all draft 16, still being described as the confidentiality agreement which became of course the business implementation and confidentiality agreement. And if you could look at clause 8.12 in that agreement which is on page 11 at the top. Do you have it?---Yes.

Is that the clause and the drafting that you were telling me about in answers on Thursday?---That's correct.

30

And that the crossing out on this agreement to the best of your knowledge, who was that done by?---Mr Makucha.

And he gave you back a copy of the agreement in this form with those matters crossed out?---Yes.

Commissioner, I tender that document.

40

THE COMMISSIONER: Yes. The draft of the confidentiality agreement which has the number 202 on the top right hand side of the coloured page is Exhibit P169.

#EXHIBIT P169 - DRAFT 16 OF CONFIDENTIALITY AGREEMENT

MR PAYNE: And then can I show you Exhibit, can I show you I'm sorry, draft 17 of the confidentiality agreement. And again if you could go to

clause 8.12 on page 11. There is a bracket around the words you had drafted about sighting a copy of Mr Harvey's authority from its board of directors at the time the agreement was to be signed, you put a bracket around that and you've written on the right haven't you, PM wants out despite my advice?---Yes.

You advised Mr Makucha on or about 29 October, 2009, which is the date that this agreement, that words to that effect should be included?---Yes.

10 And that was a continuation of the advice you'd given on the first occasion, I think that you saw Mr Makucha, that he needed - - -?---Yes.

- - - to sight a copy of the delegated authority of Mr Harvey before any agreement was signed?---Yes.

And do you tell the Commissioner that this is where your advice was met by, I think what you described on Thursday as a tirade by Mr Makucha? ---Yes.

20 And he rejected that advice in emphatic terms?---Well he put a line through the change and said, Take it out. So I took that as being emphatic.

And if I just ask you about the front of that agreement, is the handwriting there yours?---Most of it.

I see. Can you just identify what's not yours?---The, the insertion of the words business implementation agreement and - - -

I see?--- - - -and the words under Sydney Water Corporation, Mr Ed Harvey
30 property asset, I'm not sure what that is.

MNG as in manager?---MNG.

Is it manager or you're not sure?---Well, I, I presume it's what it stands for.

And that writing is in Mr Makucha's hand, is it?---Yes.

Everything else is yours?---Yes. Oh, no, the words "Done" at the right-hand
40 corner with the smiley face was presumably by my secretary.

I see. And just the words under the smiley face in the box, can you help me with those, "This draft," what's that word?---"This draft document" - - -

"and its contents are accepted - - -?---Yes.

- - - on behalf of Sydney Water Corporation SWC under the delegated authority of Mr EH from Sydney Water Corporation?"---Yes.

Is that your drafting or something that Mr Makucha had suggested to you?
---He suggested I put something in the right, top right-hand corner, this was something that he required on, on a number of drafts that went out to Mr Harvey. The intention was to have Mr Harvey acknowledge receipt of this particular version of the draft.

I see. Commissioner, I tender that document.

10 THE COMMISSIONER: Yes. The draft of the, the draft number 17 of the Confidentiality Agreement is Exhibit P170.

#EXHIBIT P170 - DRAFT 17 OF CONFIDENTIALITY AGREEMENT

20 THE COMMISSIONER: Mr Stafford, I just want to ask you a couple of questions about this. P169 is draft 16 I think and one sees that on the bottom left-hand side of the first page, is that correct?---(NO AUDIBLE REPLY)

Yeah. So you took the draft - - -?---Sorry.

You took draft 15 and then changed it - - -?---Yes.

- - - and the 15 became 16?---Yes, Commissioner.

And that's dated 28 October, 2009?---Yes.

30 And can you just go to clause 8.12 please. Did you, who, who deleted the words at 8.12?---Mr Makucha.

And that had been put in for the first time in draft number 16?---Not my recollection, Commissioner.

I beg your pardon?---Not my recollection, I think it was an earlier draft.

(not transcribable) always been there?---Since around early October.

40 And this is the first time that Mr Makucha picked that up, was it?---Well, it could have been. It was marked up in version, I think early October.

And who put the line through this, do you remember?---Mr Makucha.

Right. Then if you go to P170 - - -?---Yes.

- - - it's hard to, that line is, still appears there?---Yes.

Was that a mistake or did you deliberately leave it in?---If I left it in it might have been just an oversight. There was a number of changes at any one time.

And that's your handwriting which says PM wants out despite my advice?
---Yes.

10 So did he repeat his instruction to you having first, having given it earlier with regard to draft number 16 and you not having complied with this instruction, did he then repeat it again in relation to draft number 17?---I can't recall precise but it would have been, because it was a day, a one or two day period he may well have, yes.

Are you saying that he may have told you to take it up or you may have unilaterally of your own account realised that you hadn't complied with his instruction?---That, that could have been the case.

So one or the other?---Yes.

20 Yes, thank you.

MR PAYNE: And just finally from me, Mr Stafford, can I show you section 120 of the Trademarks Act relevant to some answers you gave me on the transcript at transcript 1474, a question that I asked you that commenced at line 40 and there you agreed with me that the use of or the registration of the Sydney Water logo and mark for class 32 purposes couldn't take place so far as you understood it without the permission of Sydney Water, you remember those questions and answers?---Yes.

30 I just want to ask you about section 120(3) of the Trademarks Act. You're aware broadly speaking of the provisions of the Act at the time you gave advice to Mr Makucha?---Yes, but I didn't give specific advice on the viability of the trademark to Makucha.

I see, that was my question. So you never actually, you were never, was advice sought on that topic?---No, I was instructed to register it.

40 And just in terms of subsection (3) it provides that a registered trademark is infringed if the trademark is well-known in Australia, I take it you knew that the Sydney Water mark was well-known in Australia at the time of registration?---Well, yes.

And you knew that to be used on bottled water by a company Sydney Water P Pty Limited would be a use of the mark which would be substantially identical with or deceptively similar to Sydney Water's mark in relation to goods not of the same description, namely the mark in relation to other classes, its use in relation to class 32 would meet that description as you understood it?---Yes.

And sub (c) because the trademark is well-known, the sign would be likely to be taken as indicating a connection between the unrelated goods and services and the registered owner of the trademark so you understood that to be the position should the mark be used by Sydney Water P on bottled water, absent registration that is?---Yes.

10 And it was for that reason amongst others that you agreed with me that Sydney Water logo and mark in order to be registered in respect of class 32 needed the permission because under sub 120 they could stop this proposal dead (not transcribable)?---Yes.

Commissioner, I don't think there's a need to tender that but - - -

THE COMMISSIONER: No.

MR PAYNE: I have nothing further for Mr Stafford.

20 THE COMMISSIONER: Yes, thank you. Mr Gordon?

MR GORDON: Mr Stafford, Mr Makucha (not transcribable) looking for expert legal advice, didn't he?---No, he came to me to draft a Confidentiality Agreement.

Well, that involved expertise, didn't it?

THE COMMISSIONER: Mr Gordon - - -

30 MR STEVENSON: Sorry to interrupt but I was halfway through my cross-examination earlier.

THE COMMISSIONER: I beg your pardon, Mr Stevenson.

MR STEVENSON: I'm not complaining but Mr Gordon I think would wish to go after me.

MR GORDON: (not transcribable) Yes, I am grateful. I'd prefer that.

40 THE COMMISSIONER: You're quite right, Mr Stevenson. Mr Gordon, apparently your microphone has been turned off so if you could correct that, please.

MR MAKUCHA: I'm sorry, I turned it off.

MR GORDON: Is it working now?

THE COMMISSIONER: I don't know.

MR STEVENSON: Yes, yes it is.

MR GORDON: Thank you.

THE COMMISSIONER: Yes, thank you. Mr Stevenson.

MR STEVENSON: Mr Stafford, you recall the barrister for Sydney Water?
---Yes.

10 And we were halfway through on Thursday you recall?---Yes.

Do you recall that at close of play on Thursday I was asking you questions about the circumstances in which you changed the attestation clause of the agreement to include a reference to a book number?---Yes.

You recall that, now I'm trying to get that into time sequence with the two exhibits that we've been shown this morning. In Exhibit P170, which is draft, do you have there, P170?---I do.

20 Draft 17?---Yes.

You have made a note at clause 8.12 "PM wants out despite my advice?"
---Yes.

And that advice was of course to, advice you gave Mr Makucha that he should procure from Mr Harvey written evidence of Mr Harvey's authority to enter into the agreement?---Yes.

30 You told us Mr Makucha refused to take that advice, correct?---Yes.

Indeed he became impatient with you when you kept insisting that that's the course he should follow?---Yes.

And was it after you received and understood your instructions to delete the last sentence from paragraph 8.12 that you decided to include in the attestation clause a reference to the book number?---Yes.

40 And I think you told us on Thursday that so far as you are concerned Mr Makucha didn't seem to have noticed that reference, at least he didn't raise it with you?---That's right.

Although he did make a, he did suggest a change to the attestation clause I think to add the words "to bind Sydney Water?"---Yes.

All right. We'll come back to that in a moment. Could Mr Stafford be shown Exhibit 155, please. And you can give that back. I don't think you've been shown this document before. Can you look at it and my question of you is did you draft it?---I drafted it.

Mr Makucha asked you to draft several documents didn't he, which you were told were intended to be typed up on Sydney Water letterhead to be signed by Mr Harvey?---There were - - -

(not transcribable)?---Sorry?

This being one of them?---Yes.

10 I got the view (not transcribable) occasions?---Oh, yeah, there were occasions, there would've been two or three times.

And do you see in this letter you've defined something called the project in the heading?---Yes.

And about two thirds of the way down the page you have defined something as being the business proposal?---Yes.

20 And in the paragraph below that you have drafted for Mr Harvey the words, I confirm my previous statements to you that you, that's Mr Makucha, own all intellectual property in respect of the business proposal. Do you see that?---Yes.

Mr Makucha didn't instruct you did he that he thought he owned the Sydney Water trademark did he?---No. He instructed me that he owned the IP in the proposal which included the registration trademarks in class 32.

30 So what he said to you was his idea was to use Sydney Water's trademark in class 32. Correct?---Yes.

He having apparently noticed that the Sydney Water trademark was not registered in that class?---Yes.

But he was always clear to you he didn't ever claim to be the owner of the trademark Sydney Water?---No, that's right.

40 And you were careful weren't you draft this letter so that it stopped short of having Mr Harvey acknowledge that Mr Makucha owned the Sydney Water trademark?---Yes. I guess they were my instructions.

And did you not know that in order to make an application for a trademark under Section 27 of the Trademarks Act, it was necessary for the applicant to claim to be the owner of the trademark?---I wasn't aware of that.

THE COMMISSIONER: So you were not aware of it?---No.

MR STEVENSON: Had you been aware of it, you would not have caused the 26 August, 2009 application to be made because your instructions were,

from Mr Makucha that he was not the owner of the Sydney Water trademark?---Well, we filed on the basis that we considered we had sufficient consent from Sydney Water to lodge it.

You're not a trademark expert are you?---No.

I think you told us on Thursday that there was someone else at Eakin McCaffery Cox who is?---Yes.

- 10 Did that person ever mention to you that under Section 27 of the Trademarks Act, an applicant for a trademark, sorry an application for a trademark cannot be made except by a person who claims to be the owner of the trademark?---No.

Had you known that you wouldn't of caused the 26 August, 2009 application be made because your instructions were Mr Makucha was not the owner of the trademark?---I don't think so. I think we still would've proceeded on the basis that we had consent from Sydney Water.

- 20 Even though your instructions were from your client that he was not the owner of the trademark, you would've made an application to IP Australia asserting he was. Is that what you say?---Well, he was the applicant, yes.

THE COMMISSIONER: No, no, that's not the question Mr Stafford?
---Well, the answer then is yes.

- 30 What, you would've made an application saying that he was the owner when you had instructions that he wasn't the owner?---No. That's, sorry, if he had consent from Sydney Water then we would've made the application.

But that wasn't the question. I think you better put the question again, Mr Stevenson.

MR STEVENSON: Let's go back to, the consent you had from, sorry, what you thought was the consent you had from Sydney Water was a handwritten document from Mr Harvey?---Yes.

- 40 And Mr Harvey didn't say in that document did he that he consented to Mr Makucha asserting that he, Mr Makucha was the owner of the Sydney Water trademark?---I think he said he was the owner of the IP in the trademarks.

Perhaps I should show you, if Mr Stafford could be shown Exhibit P127?
---Thank you.

Mr Stafford, to save you leafing through that document, can you close that folder?---Sure.

I'll show you a document a little easier to access which is Exhibit P158, which you were looking at on Thursday. Now, the, we'll go to the fifth last page of that document. I think you'll see a handwritten document you called a consent. Have you got that?

THE COMMISSIONER: What page are you, did you, do you remind repeating that Mr Stevenson?

10 MR STEVENSON: The fifth last page. Do you have the handwritten consent there?

THE COMMISSIONER: This is Exhibit P155, 158?

MR STEVENSON: Still 158, yes. You now have the handwritten consent document?---Yes.

20 And looking at the second page, which is the one dated 20 May, 2005, what is written there is that Sydney Water confirms that the intellectual property in relation to these trademarks for the use of Sydney Water for packaged water is the IP of Paul Makucha. Do you see that?---Yes.

All right. So this consent that you're relying upon didn't contain an assertion, can I suggest, by Mr Harvey that Mr Makucha owned the trademark, rather the words used were that the intellectual property in relation to the mark was in property of Mr Makucha?---Mmm.

Right. Do you agree with that?---Yes.

30 There's nothing in the consent to say that Mr Makucha owned the trademark. Correct?---Well, I also relied on the, Paul said that - - -

Let's take it step by step. Nothing in the consent to say that Mr Makucha owned the trademark?---No.

That's right isn't it?

40 THE COMMISSIONER: Mr Stevenson, I'm sorry, I'm having difficulty in finding this. Is the consent contained in the handwritten material here which is, you say is the last five pages, the fifth last page?

MR STEVENSON: The handwritten consent, Commissioner is, the handwritten document which I think is on the - - -

THE COMMISSIONER: My fifth last page is a typed document of Exhibit 158. It has, I has a top, these numbers, 1317577 and there are a number of documents like that. The handwritten documents that I have commenced with the words Sydney Water requires a specific (not transcribable) proposal.

MR STEVENSON: Yes. That's it. The consent, the so called consent is on the next page, which reads, Sydney Water confirms that at the top.

THE COMMISSIONER: Sydney Water confirms that, it's quite difficult to read.

10 MR STEVENSON: The intellectual property in relation to these trademarks for the use of Sydney Water for bottled, packaged water sales is the IP of Paul Makucha.

THE COMMISSIONER: I can't read this. Do you mind reading that again? SWC- - -

MR STEVENSON: Confirms that the intellectual property in relation to these trademarks for the use of Sydney Water for bottled/package water sales is the IP of Paul Makucha.

20 THE COMMISSIONER: Thank you.

MR STEVENSON: And he has (not transcribable) So, Mr Stafford, do you agree that nothing in that handwritten consent document contained an assertion by anyone that Mr Makucha owned the trademark?---Well, one could infer that by virtue of that that if they agreed that he owned the IP then the implication was that it was his to be able to lodge.

30 You've just told us that Mr Makucha's instructions to you were that he did not own the trademark?---Well, sorry if I said that, it's incorrect. He did assert that he owned the trademark. It's in the document.

THE COMMISSIONER: Which document?---In the business implementation and confidentiality agreement.

MR STEVENSON: Isn't it the case that all Mr Makucha ever asserted to you, as you've stated in the letter of 4 September, 2009, I'll withdraw that and start again. Isn't it the case that all Mr Makucha asserted to you was that he owned the intellectual property in respect of the business proposals? --- (NO AUDIBLE REPLY)

40 THE COMMISSIONER: This, yes, that's Makucha.

MR STEVENSON: 4 September letter.

THE COMMISSIONER: Where is the document, Mr Stevenson? Where is the document?

MR STEVENSON: Which document?

THE COMMISSIONER: The confidentiality, is it in the draft confidentiality agreement that one finds it?

MR STEVENSON: It may be. At the moment I might, can I do it this way. I started this line of questions by asking about Exhibit 155, Mr Stafford, which is the letter you drafted dated 4 September, 2009. Do you have that there?---No, I don't.

10 And do you see that, the third-bottom paragraph you've drafted, "I confirm my previous statements to you that you own all intellectual property in respect of the business proposal?"---Ah hmm.

And Mr Makucha instructed you to use that wording, didn't he?---Well, I prepared it and I presume he okayed it.

Well, you prepared it on the basis of your instructions?---Yes.

20 And you've stopped short, in this draft, of putting words in to the effect that Mr Makucha owned the trademark, Sydney Water?---Well, the business proposal included the registration of new trademarks.

THE COMMISSIONER: I don't actually understand the phrase intellectual property in respect to the business proposal. I just don't understand what it means.

MR STEVENSON: Commissioner, I guess it's the idea of introducing this business methodology based upon registering trademarks, packaging bottled water.

30 THE COMMISSIONER: Well, it doesn't say you own all the intellectual property the subject of the business proposal, does it?

MR STEVENSON: Well, I'd take "in respect of" to be the same thing as in the business proposal.

THE COMMISSIONER: The business proposal is an idea, isn't it?

MR STEVENSON: Yes.

40 THE COMMISSIONER: So there's intellectual property in that idea presumably?

MR STEVENSON: Yes.

THE COMMISSIONER: That doesn't, that's not the same thing as saying as the intellectual property in the subject of the business proposal, because that's something else. The subject of the business proposal would include the trademarks which are the subject of the business proposal, but the idea

which is the business proposal may be capable of having intellectual property attaching to it. So the statement that you own all intellectual property in respect of the business proposal is to be at the very least a statement of considerable ambiguity. So I would like to know, what did you tell Mr Makucha about this at the time of this letter, which is 4 September, 2009, what advice did you give him?---Well, I wasn't asked to provide advice, Commissioner.

10 Well, what, it says, "I confirm my previous statements to you." What kind of statements were they if they were not advice?---The statements were from Paul to Ed Harvey and I assume those statements were based on previous correspondence.

That's, excuse me for interrupting, but that's not what this letter says. It says, "I confirm my previous statements to you."---Oh, sorry, yes.

That's a statement by you to Mr Makucha?---Yes, sorry, the other way around, yes.

20 So you must have been giving advice to him about it, weren't you?---No.

So what statements were you making that were not advice?---The- - -

MR STEVENSON: If I may interrupt, I think it's a little unfair in that this is a draft that Mr Stafford's prepared for Mr Harvey to sign.

THE COMMISSIONER: Oh, I see. I beg your pardon.

30 MR STEVENSON: (not transcribable) letter.

THE COMMISSIONER: Forgive me, Mr Stafford, I didn't appreciate that. I thought this was a letter you'd written. This is a letter you had drafted for Mr Harvey to sign?---Yes.

I didn't turn over the page.

MR STEVENSON: (not transcribable)

40 THE COMMISSIONER: Yes, it's, yes.

MR MAKUCHA: (not transcribable) copy.

THE COMMISSIONER: Mr Makucha, will you be quiet. I'm really, that's enough of you interrupting this.

MR MAKUCHA: (not transcribable)

THE COMMISSIONER: If you, you are in danger of me asking you to leave the hearing room. You must please not interrupt.

MR MAKUCHA: Forgive me, Commissioner.

THE COMMISSIONER: Yes. You sit down. You're forgiven.

MR STEVENSON: So Mr Makucha instructed you about previous statements he said Mr Harvey had made to him?---Yes.

10

So what Mr Makucha told you was that Harvey had told him earlier that he, Makucha, Mr Makucha owned all intellectual property in respect of the business proposal?---Yes.

And he wanted you to draft a letter for- -?---Yes.

- - -Mr Harvey to sign to confirm it?---Yes.

20

Right. Well, once again. Mr Makucha did not instruct you at any time, did he, that he owned the Sydney Water trademark?---Ah, he did, because I wouldn't have drafted the agreement to say that he did own it.

On the contrary, didn't he tell you he didn't claim to own the Sydney Water trademark, rather he claimed to own the idea of registering that trademark in Class 32?---Well, my recollection was that he said he owned it, it was his idea to lodge it in that particular class.

30

THE COMMISSIONER: And how did he, did he tell you how he had become the owner of it?---No, Commissioner.

How could he have been the owner of it?---Well, I see what you're, I see what's, it's being said, it's just that the way I was instructed to draft it had him as the owner of the business proposal, which included the registration of the trademarks with the consent of Sydney Water.

I understand that?---So- - -

40

But that means that he would become the owner, I presume, upon registration, doesn't it?---Yes.

But before it was registered, how could he have been the owner of it? ---I see. Well, that's, that's quite true. He couldn't be. He couldn't be.

What's quite true is that there is no conceivable way in which he could have been the owner of that.

MR STEVENSON: Let's go to the confidentiality and business implementation agreement. Could you return that document and could the witness be shown Exhibit P132. This is, you're the person who drafted this agreement, are you not?---Yes.

And Makucha Intellectual Property is defined on page 9, is it not?---Yes.

Now it's all intellectual property of PMH and Intellectual Property is itself defined on page 8, is it not?---Yes.

10

To include trademarks?---Yes.

And the definition of Makucha Intellectual Property includes amongst other things something called Sydney Water Trademarks?---Yes.

And Sydney Water Trademarks is defined on page 13 to mean the Additional Trademarks and the Water Trademarks?---Yeah.

20

And the Water Trademarks is defined on page 14 - - -?---Yes.

- - - to mean new or additional trademarks to include something called SW Water?---Yes.

And any other trademarks that might be agreed between PHM, that's Paul Makucha Holdings, and Sydney Water?---Yes.

So it doesn't include does it the existing Sydney Water trademarks?---Yes.

30

You agree with me?---(NO AUDIBLE REPLY)

You agree with me?---Yes.

And that's because, isn't it, Mr Makucha never told you that he thought he owned the Sydney Water trademarks?

THE COMMISSIONER: The existing Sydney - - -

MR STEVENSON: The existing Sydney Water trademarks?---Yes.

40

That being so, how could you have made an application on 26 August, 2009 on behalf of Mr Makucha or his company when such an application could only be made by a person who asserted that he, she or it was the owner of the trademark the subject of the application?---I relied on the note from Harvey, the letter from Hall Chadwick and the letter from Griffith Hack dated 5 June.

None of which said that Mr Makucha owned the trademarks?---Not owned, no, but had consent to apply for.

Your (not transcribable) was very fuzzy, wasn't it, Mr Stafford?---Well, I wasn't an expert in trademarks.

(not transcribable)?---I relied on my trademark attorney to prepare the application.

Can you close that if you would please. Could Mr Stafford be shown Exhibit P131. Did you draft that document?

10

THE COMMISSIONER: When you say that document are you talking about the first, the letter of 4 September?

MR STEVENSON: Yes. I'm asking about Exhibit P131, the letter from Sydney Water to Mr Makucha of 4 September, 2009 and my question is did you draft that?---Yes, I think so.

It's on the same typeface isn't it as the previous letter that you looked at, Exhibit 155?---Yes.

20

What was the physical process you went through in this regard? Did you give Mr Makucha a disc or some other electronic medium with the draft letter on it?---I can't recall whether I gave him a disc, it could have been a, on a printed-off blank piece of paper.

Well, Mr Makucha didn't I hope give you blank Sydney Water letterhead? ---No, no, no, no.

30

All right. And the letter of Exhibit P131 was composed by you on Mr Makucha's instructions?---Yes.

You see in paragraph 3 you've written to Mr Harvey to agree that it was the intention of Sydney Water to enter into a legally binding agreement in respect of the project once necessary senior management and board approvals are obtained?---Yes.

40

And that reflects your instructions, does it, from Mr Makucha that he understood that senior management and board approvals would have to be obtained before a legally binding agreement was entered into?---Yes.

And that's also consistent, isn't it, with the advice you gave Mr Makucha about the need for authority senior to Mr Harvey to be obtained in order that an agreement of the kind you were drafting be binding on a state-owned corporation?---Yes.

Can you return that please and could Mr Stafford be shown Exhibit P127 and can you go to page 566 which is a letter to Mr Makucha dated

10 September, 2009 from Mr Harvey on Sydney Water letterhead. Do you have that?---Yes.

Now, you drafted that too, didn't you?---Yes.

I think that you mentioned drafting that in your private examination before the Commissioner a few weeks ago, correct?---Yes.

10 And you knew didn't you when you drafted this letter that were Mr Harvey to sign it it would be probative of nothing concerning his authority?---Yes, but I guess at the time, at this juncture it was still a fairly, the document we were talking about was a Confidentiality Agreement.

The reason you knew that Mr Harvey's signature on this document was probative of nothing was that you knew that an agent can't himself prove his own authority by asserting the authority?---That's right.

20 You knew that his principal, Sydney Water, would have to confirm his authority?---Well, I knew this wasn't evidence of his authority.

And in your private examination, if Mr Stafford could be shown Exhibit P156, if you can turn to page 219PT, bottom right corner of that transcript, you see at line 35 there's a question, "How did that come about?" from Ms Colquhoun I think?---Ah hmm.

And you're talking there about this document and you say at line 40, "I said it's a bit self-serving for me to draft something like that to convince myself that he's got authority but at least it was a start?"---Yes.

30 Well, were you trying to convince yourself my drafting this document for Mr Harvey's signature that Mr Harvey had Sydney Water's authority?---No, I was trying to put Harvey on notice that he was, had to represent to my client that he did have such authority.

But you knew that any assertion Harvey made about his own authority was, as you've just agreed, probative of nothing about that subject?---Yes, sure, yeah.

40 And over the page at - - -

THE COMMISSIONER: Sorry, Mr Stevenson. Mr Stafford, this phrase on page 566, "in dealing with you on this project," was that your idea to use that phrase?---It could have been, Commissioner.

It's quite an unusual phrase isn't it? I mean, either you say you have this authority to enter into this contract on behalf of the principal or you say nothing but I'm not sure what "in dealing with you" means. Did you know

what it meant?---I presumed that, from, from this letter, the words “in dealing with me” able to negotiate - - -

Well, there has been other evidence before the Commission that there was talk of Mr Harvey having authority to negotiate and evidence to the effect that that was something different from authority to enter into and a better distinction by certain parties who were involved in the negotiation of this contract understood there to be such a distinction?---Yes.

- 10 Do you, is that your evidence as well?---Yes. Initially, it was one thing to sign a confidentiality agreement to exchange ideas about a project, it was a different thing when we’re dealing with the actual subject matter.

To actually sign the, oh, it’s a different thing to negotiate the terms of the eventual proposed agreement and sign the eventual proposed agreement?
---Yes.

Those are two different things?---Yes.

- 20 Were you conscious then of the difference?---I was, at the early stages I was conscious of whether Harvey had (a) the authority to sign the confidentiality agreement, but also did he have the authority to deal with the project itself.

Well, there’s a third thing, did he have the authority to sign the agreement which bound the parties to the project?---Yes.

This simply says to have the authority to act on behalf of Sydney Water in dealing with you in the project?---Yes.

- 30 What I’m really trying to find out Mr Stafford is whether that, whether there was a conscious decision on your part to use this phrase because you have in mind the discussions, had in mind discussions, if they existed, as to whether Mr Harvey had authority to deal with the project, that is to negotiate as opposed to signing the eventual agreement on behalf of Sydney Water. Did you have that in mind or not? Was that a conscious, so, that is did you have that in mind in drafting this letter and in using the phrase in dealing with you or was it just by chance that you used this phrase?---I can’t recall at the time whether a conscious effort, I was conscious - - -

- 40 I understand that. But was there at the time were there, were there discussions at this time about Mr Harvey’s authority to negotiate - - -?
---Yes.

- - - rather than Mr Harvey’s authority to actually bind Sydney Water to the eventual terms of the agreement?---Well, I understood there’d be two scenarios. One authority to sign an agreement but (b) being able to, is he the right person to discuss the nature of the agreement, the size of the proposal. And at that stage still, so there was separate dealings.

So was this letter, I know, was this letter designed to establish whether Mr Harvey was the right person to discuss the proposed terms of the agreement?---Yes, I'd say so.

That was, and that was in accordance with your instructions from Mr Makucha?---He suggested draft something to confirm that Harvey had authority to - - -

10 Do what?---Well, do - - -

All these questions that I'm asking you - - -?---Yeah.

- - - are designed to establish is what did you, what were your instructions as to what you had to draft? Was it an authority that Mr Harvey had authority to bind Sydney Water to the actual agreement once negotiated or was it your instructions to, to ascertain or to establish that Mr Harvey had instructions to negotiate the terms of the agreement which was to be approved by the board of Sydney Water if it was to bind Sydney Water? And those are two
20 different things?---Yes.

I'm trying to find out what your instructions were?---Yes. Well, it was my advice to my client that he needed to sign authority for Harvey to sign the confidentiality agreement, because they were my initial instructions to prepare a confidentiality agreement. During the course of discussions with my client, he suggested, we'll get something from Harvey to confirm he has authority.

30 Authority to what?---Well, my intention was to elicit from Harvey that (not transcribable) sign any confidentiality agreement and is therefore be able to at the same time one would assume that if he's got authority to sign the agreement, he'd also have authority to deal with the subject matter.

What does that mean?---Well, to be able to negotiate any terms of the confidentiality agreement. I can't say with any great certainty what I meant by dealing in matters.

40 I'm not actually asking you what you meant, I'm asking you what instructions you received?---Oh. He, Makucha asked me to get something from Harvey to establish his authority and - - -

Authority to do what?---Well, I presume sign the documentation.

What documentation?---Well, the confidentiality agreement.

That's if this goes further?---Well, the - - -

It says to act on behalf of Sydney Water in dealing with you on this project?---Yes.

So what were your instructions? Look (not transcribable) impression, Mr Stafford, is that you just can't remember?---Not specifically, no.

And you don't know how it came about that you, you can't remember how it came about that you used these particular words?---Not these particular words, no.

10

Yes, thank you.

MR STEVENSON: Do you have Exhibit P131 still there with you?---No.

You don't? I'll show it to you now, you looking at it again, you had it before?---Ah hmm.

20

It's clear from the third paragraph of that letter which you drafted you told us on instructions that you knew because Mr Makucha told you that Harvey would have to get senior management and board approval before executing a legally binding agreement?---To give effect to the proposal, yes.

To bind Sydney Water to the agreement. It's what it says doesn't it? ---Mmm.

Do you agree?---Yes.

30

So we have these two letters written six days apart, drafted by you six days apart. One makes clear, that is Exhibit P131, doesn't it, that Harvey couldn't bind Sydney Water, he said, without senior management and board approval. Correct?---Yes.

And that's what Mr Makucha instructed you to write in this one you told us?---Yes.

40

On the other hand we have your letter of, the letter you drafted of 10 September, 2009 which is the Commissioner has been discussing with you, simply pointed out, so it simply asserted the delegated authority to deal with you on this project?---Yes.

So the distinction between those two ideas was clear in your mind wasn't it? Between dealing with Sydney Water on the one hand and binding Sydney Water on the other?---Yes.

And it was clear in your mind because they're the instructions you had from Mr Makucha?---Yes, at that point.

Which is why you drafted these letters in the form we see. Correct?---Yes.

Now looking at the, page 566 in the bundle, that is the letter of 10 September, 2009, I just want to draw your attention to something else you said about that in your private examination. Perhaps you could return Exhibit P131, you won't need that any more. And look at your private examination which is Exhibit P156?---Ah hmm.

10 Page 220PT, I think you've told us that Mr Makucha arranged to take your 10 September draft away and have it signed by Mr Harvey. And then you say he brought it back to you and Ms Colquhoun asked you, And you then kept it? And you say, Yes. Do you see that at the top of the page?---Ah hmm.

And you were asked, Well what did Mr Makucha say?---And you said he said, Well, here's your letter. Happy now?---Ah hmm.

20 So Mr Makucha was asking you, was he, were you were happy with the fact that Mr Harvey had signed the 10 September, 2009 letter, Exhibit P126, page 566?---Yes.

And you see you said to him, "No, but at least it's something on my file." Is that what you said to Mr Makucha or was that a - - -?---No, where did I say that?

MR GORDON: Sorry, where are you on the page please?

MR STEVENSON: 20 of the private transcript, the third question from the top.

30 MR GORDON: Thank you.

MR STEVENSON: Do you see your, your - - -?---Yes.

- - - (not transcribable) "Well, here's your letter," and that's Mr Makucha speaking to you, is it?---Yes.

"Happy now?" That's a question from Mr Makucha to you?---Yes.

40 "I said, 'No.'" That's you replying to Mr Makucha?---Yes.

Then you go on to say but at least it's something on my file?---Yes.

Is that what you said to Mr Makucha?---Yes.

Did you mean by that that whether or not Mr Harvey did have authority to do anything at least you had something on your file to protect your backside if something went wrong?---It wasn't for the purpose of protecting my backside, at least I was then at least aware that Harvey was aware that we

wanted something in writing from him and that this was something that we were seeking.

The last sentence of that paragraph I think has a word missing, it reads, "It was obviously evidence of authority but it was a start in the right direction," I think what you said was it was obviously not evidence of authority, but it was a start in the right direction?---Yes, it wasn't, it wasn't - - -

MR GLEESON: (not transcribable)

10

MR STEVENSON: For the transcript, Mr Gleeson's pointed out to me that in the revised version of the transcript that sentence now reads, "It wasn't obviously evidence of authority but it was a start in the right direction?" ---Yes.

And you knew it was meant to be stronger than that, you knew that it was no evidence, so you knew that Mr Harvey writing a letter asserting he had authority was no evidence of his authority?---Yes.

20

Okay, could those exhibits please be returned. Mr Stafford, I'm just going to read you something from an affidavit Mr Makucha has sworn and read in Supreme Court proceedings and see whether it triggers your recollection and seeing whether, what, anything you can tell us about it. An affidavit dated 5 August, 2010 which Mr Makucha has read in the Supreme Court, he says this at paragraph 82, "10.00am Wednesday, 21 October, 2009," so that's the date, "Makucha meeting with ML Stafford re 'PM don't own IP.'" Have you got that?---(NO AUDIBLE REPLY)

30

So Mr Makucha is, has made a note that he had a meeting with you the subject of which was PM don't own IP and my question of you is do you recall having a meeting with Mr Makucha in which the question of whether he did or didn't own intellectual property was discussed?---No, I don't.

Can Mr Stafford be shown Exhibit P134?---Thank you.

This is the attestation clause in respect of the agreement, do you see that? ---Yes.

40

And are you looking at the copy which has your signature and that of Mr Harvey as well?---Yes.

All right. So you, you told us on Thursday I think you, when you signed this document as witness to Mr Makucha there was no other signatures on the document, is that correct?---That's correct.

And you made provision in the attestation clause for Mr Makucha there to be a witness, the bottom of the page?---Sorry, what was that question?

You made provision in the attestation clause by which Mr Makucha was to sign for there to be a witness?---Yes.

And you ended up being the witness?---Yes.

And you see at the top of the page where there's the attestation clause for Sydney Water you've made no provision for anyone to witness?---Yes.

10 You've made provision for Mr Harvey to sign but no provision for anyone to witness his signature?---Yes.

Was that on instructions from Mr Makucha?---No.

Was that so that the document could be signed by Mr Harvey on behalf of Sydney Water in the absence of any other person?---Yes.

20 And was that because you were confident Mr Harvey did not have authority to sign on behalf of Sydney Water and therefore you wished to avoid the need for Mr Harvey to purport to sign in someone's presence?---No.

What was the reason?---I guess my recollection when I see people sign an authority that if they quote the book number or they say they so and so and normally I don't see it witnessed.

Right. Now, your reference to a book number was inserted by you in this attestation clause based on your experience at the solicitors?---Yes.

30 That experience being that when public authorities execute documents the person signing normally has authority under a book with a number?
---Something like that.

And you understood that the reference in an attestation clause such as this to a book number was a reference to a book maintained at the Registrar General's?---No, it'd be a book maintained at Sydney Water.

Really?---Yes.

40 As an experienced conveyancing solicitor you're aware aren't you that the Registrar General maintains a register of general deeds under the Conveyancing Act?---Well, I don't do a lot of conveyancing.

Sorry?---I don't do any conveyancing.

So you thought did you that these references you'd seen in attestation clauses in your days at the Crown Solicitor's, in your days as a Crown Solicitor to a book number was a reference to the, some book maintained by the government agency itself?---Yes.

I take it then you didn't think to do a search at the Registrar General's to see whether there was any book maintained, sorry, any entry in any book maintained by the Registrar General of any authority - - -?---No.

- - - of Mr Harvey. Did it occur to you that there may be a power of attorney that Mr Harvey was the (not transcribable) of which would set out the terms of his authority?---No, I assumed there'd be an instrument of delegation, not a power of attorney.

10 Not a power of attorney?---No.

Can I show you this document?---Thank you.

Now, I'm going to suggest you've seen this before and you'll see it is a power of attorney, do you see that?---Yes.

And you'll see that there's an endorsement from the Registrar General at the bottom of the third page which shows it has been registered on 11 April, 2008 as book 4541 number 606?---Yes.

20

And didn't you understand that the reference you'd placed in the attestation clause to a book was to a book of the kind maintained by the Registrar General that is revealed by that endorsement?---No.

You see in the opening words of the power of attorney it says that Sydney Water appoints any two of the persons named in the first schedule to be attorneys?---Yes.

30 And you see Mr Harvey's one of the five people named in the schedule?
---Yes.

And you can see the top of the third page that there's provision that nothing in the power of attorney authorises any of the attorneys to exceed their particular delegations?---Yes.

So if you'd seen this document, if you'd called for this document and seen it it would have been obvious to you at a glance that Mr Harvey didn't have power to execute the 3 December, 2009 agreement?---Yes.

40 And you should have called for this power of attorney, shouldn't you?---No.

You say that the reason you didn't was because Mr Makucha would become irate with you, sorry, became irate with you and he pressed you to ask Harvey to produce evidence of his authority?---Yes.

But you could have done a search at the Registrar General's, you can now see, can't you, that would have revealed at a glance the true position?---Yes.

I tender that document.

THE COMMISSIONER: Yes. The Power of Attorney by Sydney Water in favour of Mr Harvey and other is Exhibit P171.

#EXHIBIT P171 - POWER OF ATTORNEY BY SYDNEY WATER IN FAVOUR OF MR HARVEY & OTHERS

10

MR STEVENSON: Now, after you witnessed Mr Makucha's signature, I think you've told us you gave the document to Mr Makucha so he could get Mr Harvey to sign?---Yes.

And did you draw Mr Makucha's attention to the fact that he, that the reference in the attestation clause to a book number was blank and contained no book number?---Ah, no, not at the time of signing it. It would probably have been brought o Mr Makucha's attention at the time it was first inserted.

20

So your advice to him at that time was, was it, I'll withdraw that and start again. Do you say you drew Mr Makucha's attention to the reference in the attestation clause to a book number?---Well, yes. I inserted the change in the attestation clause to provide for such and at the time ah, I would have advised Makucha that that had to be completed at the time of signing.

That's the opposite of what you told the Commissioner at your private examination, isn't it?---Well, it's not the opposite.

30

I'll just show you. Let the witness be shown Exhibit P156. Go to page 217PT, line 23. You start talking about putting a line through, clause 8.12 I think you're talking about?---Ah hmm.

And then you say at about line 30, "So I put that execution clause and there it remained. I didn't tell Makucha about it- - -?---Ah hmm.

- - - but he, I gave him a draft and he didn't pick that up?"---Yes.

Well, which is it, that you- - -?---Oh, well- - -

40

Did you tell Mr Makucha about the book number as you've just sworn then or did you not tell him about it as you swore on 3 September, 2010?---Well, at the time of putting it in, I made, as I said, the intention was I didn't bring it to his attention but as in a mark-up. I guess that subsequent to that time then when in the course of discussing the clause, which we did eventually, I would have advised at that point that the number should have gone it.

Well, the problem with that is this, isn't it. Looking at your private transcript at line 32 you say, "That was, that was probably one of the last times I raised the question of authority because I'd raised it at least half a dozen times before in our meetings and in the document itself, but he would have none of it?"---Mmm.

10 You were telling the Commissioner there, weren't you surely that you didn't at all, you didn't discuss the attestation clauses in reference to a book number with Mr Makucha because you were sick of arguing with him about the proof of authority?---Well, the, certainly the, the intention of that was putting in that clause about having the authority produced at the time of signing. At the time of putting in the book number ah, in subsequent drafts ah, you know, as I said, as I said, I may have, I can't recall precisely, advised Makucha that had to be completed. Obviously it was put there for a reason.

20 Sitting there now you don't have, do you, any recollection of saying to Mr Makucha anything about the book number?---Well, it was in the, I put in the, in the clause so I can only assume that we discussed it at some point closer to execution date.

So when you told the Commissioner on 3 September, 2010 that you didn't tell Makucha about it, that was wrong?---Well, it wasn't, the distinction between bringing it to his immediate attention as opposed to then perhaps discussing the, the purpose of that clause down the track.

THE COMMISSIONER: Well, look at the last sentence on page 217, the last question?---Mmm.

30 Just read it, Mr Stafford?---"That was, 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"- - -

No, the last questions on the page?

MR STEVENSON: The bottom of the page?---Oh. "Well, I'd already done it for the past two months and it was not- - -

40 THE COMMISSIONER: No, just read it to yourself?---Oh, sorry. Yes. Well- - -

I mean, weren't you saying that you put it in and you didn't tell Makucha about it ever?---Well, I put it in but it, it may have been raised towards the end ah, when we were going to- - -

I asked you expressly, "Did you not discuss the question of authority with Makucha again?" And you explained that you'd already done it for two months and Makucha would have none of it?---Mmm. Well, perhaps I

wasn't as well, I should have expressed it clearer. The, the question of authority I was talking about was putting in a clause where he had to provide a copy of the delegated authority. At the time I didn't necessarily assimilate the putting in the book number, whilst it was relevant to authority, it wasn't specifically saying, well, you've got to get that copy of the authority produced at the time of signing.

MR STEVENSON: Were you careless with the truth?---Oh, not at all.

10 Now, you saw the agreement, sorry, Mr Makucha went away to get Mr Harvey to sign and he then returned the agreement to you?---Yes.

And you saw Mr Harvey had signed it?---Ah, he told me he'd signed it. I grabbed the bundle and pushed it to one side.

THE COMMISSIONER: So, Mr Stafford, the practice had arisen, had it not, before the signing of this agreement whereby you would hand documents to Mr Makucha that you'd prepared for signature by Mr Harvey and Mr Makucha would go away and get Mr Harvey to sign it and then
20 bring it back to you signed by Mr Harvey?---They were those letters, yes.

Yes. Was this letter prepared in the same way? Sorry, was the agreement prepared in the same way? That is, did you put in a space for Mr Harvey to sign but not the space for any witness to sign because you took it for granted that Mr Makucha would take it away and have it signed by Mr Harvey while he and Mr Harvey were alone together?---Well, he said he was going out to Sydney Water to meet Harvey to sign up. I assume that, I didn't assume who would be present there in addition to those two gentlemen.

30 But you left out a place for a witness to sign?---Yes.

And put it in for Mr Makucha?---Yes.

Because you knew he was signing before you?---Yes.

So didn't you leave it out as regards Mr Harvey because you knew he would be signing it in from of Mr Makucha alone?---Ah, that wasn't a deliberate ah, ah, that was not my intention, it's just that my experience based on other delegations, I've normally just seen a director general just sign without it
40 being witnessed.

Yes, Mr Stevenson.

MR STEVENSON: Mr Makucha told you that he'd let Mr Harvey to sign the document at- -?---Yes.

- - -Mr Makucha's residence at the Fraser Suites. Did he tell you that?
---No. I thought he was going to Sydney Water at Parramatta.

Well, Mr Makucha told you Mr Harvey had signed?---Yes.

You were anxious to know, weren't you, that Mr Harvey had signed?
---I wasn't anxious, I was just happy to get the documents off my desk and into the hands of Mr Makucha.

Now, did you then in December 2009 have a PA called Janette Wood?
---Yes.

10

And did you instruct her to telephone Mr Makucha around early December 2009 to ask whether Mr Makucha had arranged to have the confidentiality agreement signed?---That I'd caused my secretary to call Makucha?

Did you cause you secretary to call Mr Makucha to ring Makucha to ask him whether or not the document had been signed and whether or not it was now binding?---No, I can't recall that.

Do you deny it?---Pardon?

20

Do you deny that?---I can't recall it.

So you're not sure it's wrong?---Yes.

You agree with me?---Yes.

Surely you checked the agreement to see whether Mr Harvey had signed it?
---Not immediately, no.

30 But you did at some point?---Yes.

When?---A few days later.

Right. So, and you saw that no book number had been inserted?---It was just something I, I looked at but didn't register.

Was not the question of Mr Harvey's authority to sign this document at the forefront of your mind?---Yes.

40 And you tell the Commissioner that you didn't check to see whether the book number had been inserted?---Yes.

You didn't notice it had not been inserted do you say?---I would've just looked at the signature, I just went to the page, look at the signature and closed the file.

And your state of mind when you look at that signature was that you did not know whether or not Mr Harvey's signature on a document had the effect of

binding Sydney Water did you?---I, I had some, I can't recall precisely the way I was feeling. I thought it was signed and then the executive summary would then be prepared. And there'd be some other link in the chain.

Surely your state of mind was that you didn't know one way or the other whether the appending by Mr Harvey of his signature on the document had the effect of binding Sydney Water?---If he signed it, I, my, my initial reaction that he must then have the authority.

10 But you knew that all you had was his own assertion of his authority to negotiate in relation to the matter?---That's right.

You drafted a document for Mr Harvey to sign in which you had him say that it was the intention of Sydney Water to enter into a legally binding agreement once the necessary senior management and board approvals were obtained?---Yes.

20 And you had no idea, did you when you saw Mr Harvey's signature on the document whether or not any senior management or board approvals had been obtained?---No.

You thought that they probably hadn't did you?---Again, during the course of this process I assumed Harvey was talking to someone at Sydney Water.

Well, I suggest to you that despite not knowing whether or not the agreement was binding on Sydney Water you immediately asserted in correspondence its enforceability against Sydney Water didn't you?---I can't recall.

30 Can I show you this document. The document is essentially highlighted, I don't suggest that it has anything to do with you?---Ah hmm.

But you see this is your letter to Mr Harvey, 11 December, 2009?---Ah hmm.

40 Whereby now you've noticed haven't you that no book number was on the attestation clause about his signature?---Again, if I, at the time of writing this letter, I couldn't say that at the time of writing this letter that I was aware of the book number being completed.

You certainly were aware of that matter by the end of January weren't you, 2010?---Again, I can't, unless if you're talking about the institutional proceedings by Sydney Water, it might've raised with me then.

Well, looking at page, this letter, under the documents with the tab on them in the middle of the page, you say, in addition, Sydney Water has agreed to reimburse Paul Makucha Holdings and, for all costs incurred by them in the course of developing the agreement?--- Yes.

And of course you were referring there to the \$160,000 in costs owing to you weren't you?---Yes.

And you knew that the agreement provided for Sydney Water, purported to provide for Sydney Water to pay the costs you describe in this paragraph?
---Yes.

10 And you knew that because you drafted the clause in the agreement we've seen just there?---Yes.

So isn't this the case of, isn't what you're doing in this letter is asserting the enforceability against Sydney Water of an agreement that you didn't know was enforceable, by which I mean, you didn't know one way or the other?
---Well, I certainly didn't have concrete evidence that supported authority of Harvey to sign. But the, I guess I was instructed to draft this letter to Harvey.

20 Paragraph I've drawn you attention to was not something that you were instructed to put in, surely, it was something you were putting in in your own interests in the hope that you could get paid the \$160,000 owing to you?---No. This is, I prepared this letter based on instructions.

So isn't this an example of you rolling the dice and asserting the enforceability of the agreement when you had grave doubts about its enforceability in the circumstances that I've asked you about?---I didn't have grave doubts that it was not enforceable at all.

30 I tender that letter.

THE COMMISSIONER: Yes. The letter of 11 December, 2009 from Eakin McCaffery Cox to Mr Harvey is Exhibit P172.

#EXHIBIT P172 - LETTER FROM EAKIN MCCAFFERY COX TO SYDNEY WATER DATED 11 DECEMBER 2009

40 THE COMMISSIONER: Mr Stevenson, how long will you be?

MR STEVENSON: I have one more question. Finally, Mr Stafford, if you could look at Exhibit P127 and go to page 646. When I say one more question, I mean one more subject matter.

THE COMMISSIONER: Sorry, what Exhibit, please.

MR STEVENSON: P127. This is another letter you sent in terms of, I think very similar to the 11 December, 2009 letter, Exhibit P172, which also contains on page 4 your - - -

THE COMMISSIONER: Are we looking at page 646 did you say?

MR STEVENSON: 646?---Yes.

10 And it's the same paragraph on page, the fourth page of that letter?---Yes.

And by now, that is 25 January, 2010, you had noticed hadn't you that Mr, sorry, that the book number had not been inserted in the attestation clause? ---No. Not at that stage, no.

Yes, thank you, Mr Stafford.

THE COMMISSIONER: Yes, Mr Gordon.

20 MR GORDON: Thank you. M Stafford, your dealings with Mr Makucha involved among other things a basic project, the idea of which was there would be a joint venture with Sydney Water and in relation to bottled water. Is that right?---Yes.

And that was a project that you believed at that time had legs?---Yes.

And that was your belief all the way through wasn't it?---Yes.

30 And it's fair to say that Mr Makucha made it clear to you that he passionately believed in that joint venture?---Yes, he did Yes, he was.

And from beginning to end that remains true?---That's correct.

At no time did you form the view that he was embarking upon any sort of fraudulent exercise in relation to Sydney Water did you?---No.

I think you told (not transcribable) before me that you were not a trademarks expert?---Correct.

40 Did you have consultations with a trademarks expert in the course of your dealings with Mr Makucha?---Yes.

How often were they?---Well, the first occasion was to ask them to prepare the trademark application. The second time was when the notice of, the requisitions came back from the Trademarks Office in November, 2009, which sought certain requisitions and asked them to prepare a response.

So basically there were two occasions when you consulted with them. Is that right?---Yes.

Do you have any serious familiarity with the relevant legislation of trademarks?---No.

Or indeed with the practice concerning trademarks?---No.

Are you familiar with Section 20 of the Trademarks Act?---No. The subject has been brought to my attention during the course of this.

10 Indeed. But you wouldn't hold yourself out to be expert in nor to give professional advice in respect of that section?---No.

Or any other part of the Trademarks Act?---No.

Indeed, forgive me for asking, but (not transcribable) have you actually read section 20 of the Trademarks Act?---No.

THE COMMISSIONER: Are you talking about 20 or 120?

20 MR GORDON: At the moment I'm talking about 20, Commissioner. Do you, are aware that section 20 gives the owner of a registered trademark the exclusive right to use the mark or authorise others so to do?---No.

And that exclusive right is limited to use - - -

THE COMMISSIONER: Well, if he doesn't know, he doesn't know, Mr Gordon.

30 MR GORDON: Yes, I won't press it, well, the Act speaks for itself in any event. And at no stage did you receive advice, did you, from your trademark expert within the firm that the application was in any sense false - - -?---No.

- - - or deemed to failure?---No, though there was, our head of litigation did express reservations as to whether it might get through - - -

Yeah?--- - - - but that was - - -

40 But there was nothing wrong or dishonest in the process of making the application as far as you were advised?---No.

And presumably the fact that the application went forward suggested that the expert in your firm at least thought there was a sensible prospect that it may be registered?---Well, there was a chance, of course.

Yes. The position therefore was that if that application had succeeded, Mr Makucha or the company making the application would then have become the owner of a trademark that related to the class 32 water and bottled water referred to in that class?---That's correct.

In relation to Mr Harvey, I'd like you please, do you have the transcript of your evidence before you?

THE COMMISSIONER: Evidence where, Mr Gordon?

MR GORDON: The evidence on 3 September, 2010.

THE COMMISSIONER: The compulsory examination, 156 isn't it?

10

MR GORDON: It's in particular page 220.

THE COMMISSIONER: Yes.

MR GORDON: You've been asked some questions in relation to your view of Mr Harvey and what if any authority he had. Do you recall that?---(NO AUDIBLE REPLY)

20

If you could go to page 220 at lines 10 to 20 on that page, what you said was, "At that time, because it was still a fairly benign document," that refers to the confidentiality agreement wasn't it?---Yes.

"And (not transcribable) harping on that but at that stage it was a document I thought that a person of his authority, well, his seniority, would have the capacity to sign." That was your view then, wasn't it?---Yes.

And that remained your view throughout?---Yes.

30

In relation to the confidentiality agreement which was dated when signed, 3 December, 2009 by you, that's the date that appears under your signature as witness, do you see that? Have you got that document?

THE COMMISSIONER: What exhibit is it?

MR GORDON: Forgive me one minute, I'm not sure what that is. P134 I'm advised, Commissioner.

THE COMMISSIONER: Yes, thank you.

40

MR GORDON: Might the witness perhaps have a copy of that. I wonder if I might just for a moment please see that exhibit to make sure it's the same as mine, thank you very much. Mr Stafford, help me with this, the signature appears at the bottom by you dated 3/12/2009, yes?---Yes.

Above that in two separate pens there appears the signature of Paul Makucha?---Yes.

The same date, is that right?---Yes.

Note the signature appears twice?---Yes.

Above that at the very top of the page there's the signature of Mr Harvey in a different pen again on 3 December?---Yes.

Now you didn't see Mr Harvey sign that document did you?---No.

10 And do you recall of your own memory now when and where it was that you put your signature to that document?---In my office.

Yes. And were you alone or in company at that time?---I was with Mr Makucha.

Is it the case that the signatures above your witness signature did not in fact appear at that stage?---No.

You see, what I suggest to you is that you signed - - -

20 THE COMMISSIONER: So you agree?---(NO AUDIBLE REPLY)

You're agreeing that - - -?---That they didn't appear.

They did not appear, yes?---No, I just witnessed - - -

So you just signed the witness section?---Yes.

And the signature lines above it were all blank at that time?---Yes.

30 And then Mr Makucha took the document away and had Mr Harvey sign it - - -?---Yes.

- - - as far as you're aware and Mr Makucha signed it?---Yes.

Thank you. In relation to the book number that appears at the top left-hand side, do you see there?---Yes.

40 Under the first attestation clause, you've got (book number), does that appear as matter of course or as a matter of document precedent on this type of document that you draft?---It was to my mind a matter of precedent.

So it wasn't - - -

THE COMMISSIONER: As a matter of precedent, what does that mean? ---Its how I've seen it expressed before.

I beg your pardon?---Its how I've seen these sorts of clauses expressed before.

If you give me one moment, Commissioner.

THE COMMISSIONER: Mr Stafford, I think that you have said both at this public inquiry and in your compulsory examination that you thought that Mr Harvey had the authority to sign the confidentiality agreement in its initial form?---Yes.

10 The questions that Mr Gordon asked you about your belief as to the authority of Mr Makucha, sorry, Mr Harvey to sign the confidentiality agreement, were your answers intended to apply to the form, to the confidentiality in its initial form or to the eventual Confidentiality and Business Implementation Agreement as signed by Mr Makucha and Mr Harvey?---Really to do with the original documentation. When some of the amendments were made I had my own, mine, some, some concerns as to whether or not this could be signed but at this stage - - -

20 At what stage?---Well, towards then when some of this, this consideration component clauses came in I did sort of, did question my mind whether or not this guy had that type of authority but I assumed that at some point there'd be someone higher up in the chain would give proper effect to the operational side of this documentation.

That's not an answer to my question?---Well, at the time that I witnessed Makucha's signature I had reasonable cause to suspect that Harvey could sign the agreement.

30 That Mr Harvey could sign the Confidentiality and Business Implementation Agreement?---Yes.

Now what gave, what are you saying you relied on to come to that view?--- Well, I, I kept thinking why would this fellow continue this process if he didn't have such authority. It just seemed to be wasting everyone's time if he didn't have such authority and given the, I guess the – what I considered to be the beneficial outcomes to Sydney Water, I didn't expect there to be any foul play.

40 So are you saying, well let me put it differently. Did you, have you accepted previously in your evidence that the terms of the, that some of the terms of the confidentiality agreement as signed were bazaar?---Yes.

Do you accept that some of the terms were actually were kind of the provisions that you would never expect a person in Mr Harvey's position to have authority to sign?---No, I think I said that, would it be something that if I was advising Sydney Water, would I recommend that they accept such terms and I, to that I said, probably not.

And is that not something that caused you to wonder if Mr Harvey had authority to agree to?---Oh, I did wonder, yes of course I wondered about it but that's why I asked but - - -

Were you not sceptical?---Oh, I guess I put it down to those earlier issues that I thought that this proposal seemed to have legs although some of them were more - - -

10 I'm not talking about that Mr Harvey, I'm, Mr Stafford, I'm talking about your position immediately before this document was signed?---Yes.

I'm asking you were you sceptical about Mr Harvey's authority at that point?---Oh, not sceptical I - - -

Did you apply your mind to it?---I well, I, I had throughout the process and I gave the advice that it should have been, I guess, further explored but it wasn't something as I said well received, so I – at the time of signing I presumed he, he had authority to sign.

20 I'm not asking you what you presumed I'm asking you if you were sceptical?---I don't think sceptical is the right word.

What would you use?---Well, it's not agreement, I thought maybe I had some slight reservation but nothing more than that.

Why did you have a reservation?---Only because of the terms of the deal had, had, I guess exponentially expanded to include all sorts of things that I didn't think were within the scope of the original discussions.

30 Why didn't, why did your state of mind not affected by the information that you'd received from Mr Harvey that this document needed to be approved by Sydney Water's Board?---Well, that was some time ago.

40 It was in September.---Yes, and I guess in the discussions and drafting in the meetings and the interplay with Hall Chadwick and how it was all going to work, you know, I expected it at some point there would be a rubber stamp on the executive summary and the earlier principle was that the confidentiality agreement would be signed which would protect the executive summary, the executive summary would contain all the nuts and bolts but by stealth, some of that material ended up in the agreement itself.

By stealth?---Well, it would appear in by changes over a period of time.

By stealth?---Well, I guess that's one way to describe it but - - -

Why would you describe it by stealth?---Well, because it wasn't intended that they come into the agreement - - -

Wasn't intended?---No.

By whom?---Well, the, this was part was only talked about bottled water.

Who wasn't it intended by?---Well, I suspect it was the minds of the parties when it first started out.

That's not an explanation for your use of the word stealth.---Oh well, sorry, well (not transcribable) - - -

10

One explanation, one explanation for the use of your word stealth is that it was Mr Makucha's idea but not Mr Harvey's and you put it in?---It was always my understanding that Harvey agreed to changed suggested by Makucha.

Understanding, conveyed you to by Mr Makucha?---Yes.

I still don't really understand how you remove from your mind these
express statements as I understand it, given to you many times, perhaps
20 wrong, I withdraw that. The express statement is enough by Mr Harvey that
this had to be signed by, signed off by Sydney Water Board.---I think that's
how it was when the document was originally proposed.

In September?---Yes, it was a - - -

What happened, what happened that caused you to think that no longer
applied?---Well, the changes that were made when the agreement started to
build, I assumed the parties changed tact.

30 But that made, but those changes were surely so extreme that any indication
that the Board had to sign must have been reinforced, not so?---Well - - -

Are you saying that the affect of those statements was to reduce your
expectation, sorry, the affect of those changes was to reduce your
expectation that the Board had to sign?---Not so much reduce, the way the
document panned out, certain things were still reserved for Board approval
– it says that within the document. So therefore you'd think well, why
would Harvey suddenly say on one hand, I can sign this but I can't sign
that? So, I suspect that whether I remember, I may have forgotten about
40 what was said earlier, may be proceeded on when this was how it was going
to be.

But it wasn't just what Mr Harvey had told you, it was your own idea. You,
despite what Mr Makucha had said to you, your client had said to you about
not raising the issue of the authority, you put in the reference to the, in the
execution clause to the delegation book.---Yes, but I still wanted to see
something.

Why did you clear, if you had no reservations about authority, why did you – why did you put that in, indeed by stealth?---Well, I, I didn't believe, I wasn't of the view that he didn't have authority but I wanted to be assured that he did have authority and that was one way - - -

Well, you could have only wanted to be assured because you weren't assured yet.---That's right.

10 Despite anything however, you had been told, you weren't' assured?---
That's right. I had no concrete evidence to confirm that he had appropriate authority.

And the agreement was of such a nature that you would expect that he wouldn't have authority.---Well, as I say - - -

That's why you put that provision in the execution clause isn't it?---Well, I put it in there because I wanted to confirm that he did have.

20 I mean do you normally put things in an agreement which your client tells
you should not be there?---Well, he told me - - -

And not tell the client about it?---Well, he told me not to put in the clause about producing the delegated authority.

But you didn't tell Mr Makucha about the book number having to be put in did you?---Well, that I can't recall precisely, I recall putting it in - - -

30 Well, didn't you say in your compulsory examination, that you didn't,
words to that affect?---I put it as a highlight but I didn't bring it specifically
to his attention as far as I can recall.

You put it in as a highlight, what does that mean?---As a mark-up, when you amend a document from the previous version you highlight the change by virtue of underlining or appears on the side of the pages being marked-up.

Yes, Mr Gordon.

40 MR GORDON: Thank you Commissioner. You were asked questions by
my learned friend on your last appearance here in relation to what had you
been acting for Sydney Water, you might had done. Help me with this
would you. You became aware that the trademark Sydney Water did not, as
a matter of fact, include the items specific in the Class 3 of the regulations,
namely water itself.---That's right.

And, I'm sorry, 32, Class 32?---Mmm.

Did that come as a surprise to you?---Yes.

You would, would you not, have expected that in taking out a trademark for Sydney Water, the water itself and the bottling of water and other dealings with water so specified in that- - -

THE COMMISSIONER: That question, any answer to that question is no help, Mr Gordon. You've extracted from this witness the fact that he is no expert in trademark law. On that basis he's not qualified to express an opinion whether the submission was surprising or not.

10 MR GORDON: Yes.

THE COMMISSIONER: He's not an expert and he doesn't know about these matters.

MR GORDON: Well, I'll leave it at that point. Thank you, Commissioner. It was put to you from time to time that you did not get in touch with, or sorry, that you were not contacted by anybody from Sydney Water about the potential agreement. Is that right?---That's correct.

20 And in fact neither did you make any effort to contact them?---No.

So nobody made any effort to your knowledge to contact you or vice-versa? ---Correct.

It's also right to say that you from time to time gave Mr Makucha advice? ---Yes.

If you give me just one moment. And you were aware, weren't you, that Mr Makucha was also seeking advice from other experts in their field such as accountants and so on?---Yes.

30

Yes. That's all I ask. Thank you.

THE COMMISSIONER: Mr Gleeson?

MR GLEESON: Thank you, Commissioner. Could Mr Stafford be shown Exhibit P134, the attestation clause in the final version. Mr Stafford, last Thursday afternoon Mr Stevenson was asking you questions about the drafting of this attestation clause and you gave an answers that Mr Makucha did see it and he actually played with the actual wording of the execution clause to include the words, and the transcript (not transcribable) continues, and binded, B-I-N-D-E-D, in quote. Now, could you just look at the attestation clause and could you identify, what are the words you're referring to when you say Mr Makucha actually played with some wording in the clauses that finally appeared in the agreement?---I recall the words, "And to bind SWC" being inserted.

40

Thank you. Now, could you just look at these three documents, please. A copy for the Commissioner. Mr Stafford, this morning you were shown an Exhibit P170 which took us up to draft 17 of the confidentiality agreement. What I, could you just identify for the Commissioner what are the three extracts that appear in the bundle I'm showing you?---(NO AUDIBLE REPLY)

Just go through them one by one, please?---Yes. One is a draft of the execution clause draft- - -

10

THE COMMISSIONER: Don't they all speak for themselves, Mr Gleeson?

MR GLEESON: I just want to identify this with the witness, Your Honour. ---Draft 18, draft 19, and draft 21.

20

Thank you. And the Commissioner asked you some questions this morning about how the changes to the attestation clause were identified and you referred to marking up, so could you just identify what the process involved. Just take the first one will do?---Yes. In draft 18 the execution clause regarding parties were inserted in relation to Sydney Water Corporation. The original drafting had it, by its authorised representative who has delegate authority to sign for and on behalf of Sydney Water Corporation under instrument of delegation and had provision for signature of witness and signature of Ed Harvey.

Thank you. And the draft which appears as draft 19. If you look at that document please, that's the second document. Is that the draft that introduced the actual words book number with a blank?---That's correct.

30

Thank you.

THE COMMISSIONER: So that's on 11 September, is it, Mr Stafford? ---That's, no. It's- - -

MR GLEESON: I think, Commissioner, if you look at the bottom it seems to be the 6th of the 11th, '09, so I take that- - -

THE COMMISSIONER: I'm sorry.

40

MR GLEESON: So, Mr Stafford, is that date- - -

THE COMMISSIONER: 6th.

MR GLEESON: - - -the 6 November, 2009?---It's got (not transcribable) 10 November.

THE COMMISSIONER: Sorry?

MR GLEESON: No. Please, Mr Stafford. I've given you three documents?---Yes.

The first document had a date on it. Thank you, yeah. What I'd ask you to do is not look at the date that appears on the coversheet, but look at the date that appears on the bottom of the attestation clause?---Oh, sorry, yeah, 6 November.

10 All right. And then just for the Commissioner's reference, if you go to the last document, which is draft 21, and the date that appears on that document is?---11 November.

Thank you. I tender those documents, Commissioner.

THE COMMISSIONER: Yes. The execution clause, pages of- - -

MR GLEESON: Drafts 18, 19 and 21, Commissioner.

20 THE COMMISSIONER: Yes. The execution clause pages of drafts 18, 19 and 21 of the business implementation and confidentiality agreement together constitute Exhibit 173.

#EXHIBIT 173 - EXECUTION CLAUSE PAGES OF DRAFTS 18, 19 & 21 OF BUSINESS IMPLEMENTATION AGREEMENT

MR GLEESON: I have no further questions, Commissioner.

30 THE COMMISSIONER: Yes. Thank you. You are excused, Mr Stafford.

<THE WITNESS EXCUSED **[11.37am]**

MR PAYNE: Commissioner, can we take the unusual course today of a five-minute morning tea adjournment?

40 THE COMMISSIONER: Yes.

SHORT ADJOURNMENT **[11.37am]**

MR PAYNE: Thank you, Commissioner. I call Paul Makucha. I notice that he's bringing things with him to the witness box. I don't intend to show

him anything from those folders. We'll be showing him documents, the Exhibits - - -

THE COMMISSIONER: You don't those.

MR MAKUCHA: I may.

THE COMMISSIONER: You may, look please take it away, it's inappropriate for it to be there. If you need it - - -

MR MAKUCHA: (not transcribable) items out.

10 THE COMMISSIONER: If you need items, you'll be able to get them.

MR MAKUCHA: Are you sure?

THE COMMISSIONER: Officer, can you please remove that. Mr Makucha, can you go, can you go to the witness box without any documents. Thank you.

MR MAKUCHA: Can I take a book on intellectual property?

20 THE COMMISSIONER: No.

MR GORDON: Just do as you're told, please.

THE COMMISSIONER: Do you want to, Mr Gordon, do you want a Section 38 order?

MR GORDON: Yes, please, Commissioner, if I may.

30 THE COMMISSIONER: Please sit down, Mr Makucha. Pursuant to Section 38 of the Independent Commission Against Corruption Act, I declare that all answers given by Mr Makucha 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 answers given or document or thing produced.

40 **PURSUANT TO SECTION 38 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT, I DECLAR THAT ALL ANSWERS GIVEN BY MR MAKUCHA 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 ANSWERS GIVEN OR DOCUMENT OR THING PRODUCED.**

Mr Makucha, do you wish to give your evidence under oath or to affirm the truth of your evidence?

MR MAKUCHA: Under oath, sir.

THE COMMISSIONER: Yes. Please be seated Mr Makucha?---Can I have a piece of paper in the witness box and a pen?

10 No. If you need it you you can ask for it. Your duty is to answer the questions that you are asked. There should be no need for you to have a piece of paper. You don't need to write. You will not be asked to make any calculations.

MR PAYNE: Mr Makucha, what is your full name?---Paul Makucha, M-A-K-U-C-H-A.

You participated in a compulsory examination before this Commission on 15 July, 2010?---I have.

Commissioner, I tender that compulsory examination.

20 THE COMMISSIONER: Yes. Exhibit P174 is Mr Makucha's, is a transcript of Mr Makucha's compulsory examination.

#EXHIBIT P174 - COMPULSORY EXAMINATION OF MR MAKUCHA

30 MR PAYNE: We'll come back to that. Can Mr Makucha be shown Exhibit P126 and you can take P174 away if you wouldn't mind, officer.

THE COMMISSIONER: You want him to be shown Exhibit?

MR PAYNE: P126. Mr Makucha, there are - - -?---I'm sorry, P what is it?

The whole folder is called 126, the document I'm going to ask you to go to has got P157 in red in the top right hand corner, that's the numbering for pages?---Yes, P126 or 127?

40 P157?---I have it.

That's an order of the Supreme Court of New South Wales of 11 September, 2007?---Correct.

You consented to the making of that order?---I did.

In order 2 you agreed that you would give vacant possession of the land being land 111 Baxter Road, belonging to Sydney Water. Correct?
---Correct.

Were you at that time living in a container on that property?---I may or may not have been because I spent a substantial period of time in the United States and in Le Barone in that year.

THE COMMISSIONER: Was that your address in Australia?---It was PO Box 839, Mascot.

When you lived in Australia did you live in the container at that time?
---From time to time I did.

10

MR PAYNE: Can you turn over in that exhibit, in that folder, to the Deed of Release, its P168 at the top.

THE COMMISSIONER: Sorry, turn over the page?

MR PAYNE: Turn over the page, yes.

THE COMMISSIONER: And 158? The page number's P158.

20 MR PAYNE: And I'm asking him then to go to P168?---I have it.

That's a Deed of Release signed by you on the same day, namely 11 September, 2007 and you can see that at P173 which is the attestation page?---And witnessed by Rudolph Bergagnin, a solicitor acting for me, correct.

30 And at that time you had agreed to vacate the Baxter Road premises, I suggest to you that relations between you on the one hand and Sydney Water on the other at that time were fraught, do you agree?---We had some difficulties from time to time but most of the time I found them to be very nice people to deal with.

You remained in possession at Baxter Road despite the order of the Supreme Court on 11 September, 2007 until a date earlier this year, 2010, correct?---May I explain that I was in the United States - - -

THE COMMISSIONER: No, no, just answer yes or no please?---Well, I was in America, I wasn't there so - - -

40 You had control of the premises, no one else I assume?---I had instructed Rudolph Bergagnin solicitor to take care of any problems and I had prepaid him.

But you were in the control of the premises?---So be it, I'm not a lawyer.

MR PAYNE: Mr Makucha, I just want to understand, you were in control of those premises all the time from the end of, from 11 September, 2007 until a date in March this year, 2010, do you agree?---I do.

And you did not take any steps did you to comply with the Supreme Court order that you vacate until 2010?---That's not true or correct.

Can we go forward in the bundle to P231 in the top right-hand corner. Tell me when you're there?---I have it.

That's a letter from Sparke Helmore to you dated 20 October, 2008?
---Correct.

10

They were solicitors you understood to be acting for Sydney Water?
---Correct.

This is 20 October, 2008 so over one year after the orders of the Supreme Court that I showed you of 11 September, 2007, you agree?---I do.

20

Go to the second page of that letter, P232, the solicitors there told you, they strongly suggested to you in the last paragraph that you immediately take all steps appropriate to remove your goods from the property, you see that?---I can see a section there which says, indicating Sydney Water will agree to Makucha leaving the bitumen paving, underground services and the property if this is necessary.

The last paragraph, "We strongly suggest," do you see that?---I do.

You understood it that the effect of the orders of the Supreme Court were that you had to vacate the property and make it good by taking away all of the demountable sheds and containers on the property, do you agree?---I do.

30

You had to do that at your own expense?---Correct.

Turn over if you would to P237 in the top right-hand corner. Tell me when you're there?---I have 237, sir.

237. That's a letter from Mr Harvey to you of 29 October, 2008?---Correct.

40

You understood Mr Harvey on behalf of Sydney Water to be making an offer to you, namely that if you were to remove all of the containers, portable, portable buildings and other goods and effects from the property by a date in November 2008, Sydney Water would agree to pay you \$27,500?---It may well mean that but the letter, letter and offer are on a without prejudice basis so they could withdraw it.

I see. And you signed your acceptance to that letter on 11/11/2008?---I did.

What, and you understand it to be conditional at all times in the sense that it could be withdrawn by Sydney Water, did you?---That is my belief about what with prejudice letters mean.

I see. So that even after acceptance you thought they could withdraw it?
---Yes, because with prejudice is used upon the basis of negotiations.

THE COMMISSIONER: Do you mean without prejudice?---Without prejudice, forgive me.

MR PAYNE: I see. And you tell the Commissioner you did not regard
yourself as then having an agreement with Sydney Water that funds would
10 flow to you conditional upon your leaving the property and taking certain
goods with you?---They may or may not.

You may or may not have had such an agreement is what you say?---Well,
I, I believed I did but I was never sure whether it would be withdrawn by
Sydney Water, the offer.

Please turn over to P238 which is the letter of 12 November, 2008. I take it
you remember receiving this letter on or about the date it bears?---I don't.
I've had a lot of letters to read and documentation over the last couple of
20 years, I can't remember them all.

Look please at the third page, P240?---I have it.

You understood didn't you, Mr Makucha, in November 2008 that Sydney
Water was agreeing to pay you \$27,500 within seven days of receipt of a tax
invoice and the completion of the removal of containers, portable buildings,
et cetera from the property being achieved by 21 November, 2008?---The
letter says what you have stated, sir.

30 And that was your understanding at that time?---Yes.

You agree?---Yes, yes, I do.

On that day, 12 November, 2008, you also made a telephone call didn't you
to a Mr Gary Inberg?---I can't remember that but if I did I did.

Please have a look at P252?---I have it.

You spoke to a Ms Kyera - - -
40

THE COMMISSIONER: Excuse me, Mr Payne. Mr Makucha, there's no
need for you to speak directly in the microphone, thank you?---Forgive me.

Just sit back and be comfortable?---Thank you, it's just a habit.

MR PAYNE: Mr Makucha, do you have this email?---P252 I have before
me.

That records a telephone conversation you had with Mr Inberg's executive assistant, Kyera Wilson, do you agree?---I have a copy of the email.

Do you remember ringing Mr Inberg's executive assistance, assistant and telling her that it had become impossible to negotiate with Ed Harvey because each time Ed consults with Gary Inberg there is a 180 degree turnaround?---I can't remember the explicit conversation but I don't deny that I, its possible that I may have had such a conversation, I can't remember everything.

10

You understood in November 2008 that Mr Inberg was Mr Harvey's boss, didn't you?---No.

Well, please tell the Commissioner who you thought Mr Inberg was in November 2008?---Can I explain the reason why I don't think that that is the correct case? Would you, would you permit me - - -

If you'd address my question and any question that Mr Gordon thinks that you need to be asked at the end, he gets the opportunity- -?---I know the subject better than anyone else. I don't believe that Mr Harvey only had one boss upon the basis that Mr Harvey's business card shows, and I will hand this up, it says, "Ed Harvey, BA", meaning- - -

20

THE COMMISSIONER: Did you believe that he was one of his bosses? ---Yes. And the reason being that there is a job description on Harvey's card.

Well, I don't think that we're interested in the reason at the moment. I think the only question was, I think you've answered the question that Mr Payne has asked you.

30

MR PAYNE: So just so we're clear, Mr Makucha, you knew that Mr Inberg was one of Mr Harvey's bosses, one of a number of bosses? ---I believe that's correct.

And that was your state of mind in November 2008?---I don't understand what state of mind context means in this situation. I'm not a lawyer. Please explain.

Did you understand, what were, your thought process, as best you recollect it, in November 2008 was that Mr Inberg was one of Mr Harvey's bosses. Do you agree?---No. If I can just explain it this way and say Mr Inberg and Mr Harvey inter-reacted at Sydney Water but I don't know the full extent of their inter-reactions.

40

THE COMMISSIONER: Mr Inberg, did you understand Mr Inberg to occupy a senior position to Mr Harvey?---It, it appears that way, however the description of Mr Inberg's position- - -

I'm not, I asked you whether you understand, whether you understood. That's the only question, whether you understood Mr Inberg to be in a superior position to Mr Harvey.---I can't be sure of that.

Are you telling the truth?---I am. I'll happily explain to you.

No, I'm not interested in your explanation at the moment.

10 MR PAYNE: Do you agree with me that you had written letters of complaint to Sydney Water prior to this time copied to Mr Inberg as a senior officer within Sydney Water?---Yes, but if you could highlight which letter, because there is one letter that went to the ah, managing director, Gabrielle Kibble, the daughter of the late Sir John Kerr who was the managing director and ah, also the same letter went to the Premier and others. So- - -

Mr Makucha, I suggest to you that it was clear to you in November 2008 that Mr Inberg was one of Mr Harvey's bosses. Do you agree?---I cannot agree to that and I think that ah, that's my position.

20

Having a look at P252, can you offer any explanation about why you told Mr Inberg's executive assistant that, if you pick it up in the second-last paragraph, you don't like it when Gary and Ed consult each other and you would like this to cease?---Well, can I refer to what I heard in evidence in this room?

THE COMMISSIONER: No. Your task is simply- - -?---Forgive me.

30 - - -to answer the questions that you are asked?---Forgive me. I will. Can you repeat your question.

MR PAYNE: In November 2008 you told Mr Inberg's executive assistant, didn't you, that you did not like it when Gary and Ed consult each other and you would like this to cease?---Correct.

And the reason was, wasn't it, that you thought that Mr Harvey was much more amenable to doing what you asked him to do. Correct?---No. Can I explain?

40 THE COMMISSIONER: No.

MR PAYNE: I suggest to you that this conversation recorded on 12 November, 2008, is an attempt by you to ensure that you dealt with Mr Harvey and Mr Harvey alone in relation to all matters concerning Sydney Water. Do you agree?---No.

Do you agree with me that from this time on you sought to deal with Mr Harvey and Mr Harvey alone in relation to all matters concerning Sydney

Water?---No. What I sought to do was deal with a person whose word I could always accept.

THE COMMISSIONER: And that was Mr Harvey?---Well, he'd not let me down. Mr Inberg- - -

Is your answer yes?---Yes.

10 And you didn't deal with anyone else?---Mr Inberg never contacted me.

You didn't deal with anyone else, did you?---Um, I dealt with Dr Peter Zeman there who was in charge of pipe services. He's an expert on ah, big pipes and stuff.

Anyone else?---I had discussions with other people but I can't, PA's and so forth who would answer the telephone.

Yeah.

20 MR PAYNE: What was it in this letter of 12 November 2008 that I have just shown you, if you go back to P238, which is the same day as your telephone call to Mr Inberg's executive assistant, what was it within that letter that you regarded as 180 degree turnaround by Mr Harvey?---I can't tell you three years down the track.

THE COMMISSIONER: All right. That's an answer.

30 MR PAYNE: That's an answer. Turn if you would to page P253 in the bundle?---I have it.

That's a Stay of Execution of the Writ of Possession agreed now up and to including the 23 December, 2008?---Correct.

And an order made by the court on 21 November 2008?---Correct.

As a result of an agreement that you made personally with Mr Ed Harvey. Do you agree?---No. The Supreme Court of New South Wales.

40 And this order was sought by consent as a result of an agreement between you and Mr Harvey personally. Do you agree?---It was a consent order, yes.

And you dealt with Mr Harvey personally. Do you agree?---I believe so.

At or about this time, if you turn over to P254, this is the first of the invoices that you submitted for payment by Sydney Water to Mr Harvey. Do you agree?---It's the one that has property asset manager position 28944.

Yes. Do you have the document at P254?---I do.

It's an invoice from you addressed to Mr Harvey. Correct?---Correct.

That was a result, wasn't it, of an agreement you reached personally with Mr Harvey?---Yes and no. It, it starts, that agreement has a genesis in the Sparke Helmore letter.

10 You understood in the Sparke Helmore letter that you were not going to be paid any money by Sydney Water until you had vacated the premises. Do you agree?---Unless there was another agreement to that agreement.

And you were then told by Mr Harvey in the letter of 12 November that I took you to that you weren't going to be paid anything unless you vacated the premises. Do you agree?---The letter states that.

20 And after you got that letter you got on the telephone and said you didn't want to talk, you didn't want Mr Inberg and Mr Harvey to talk together any more because of a 180 degree turnaround?---I cannot recall that as being the basis of the reason of my telephone call, sir.

When do you say you reached an agreement with Mr Harvey on behalf of Sydney Water that you would be paid despite the fact that you were not going to vacate the Baxter Road premises?---I can't tell you. I don't have all the documents here.

30 I want to suggest to you that you knew in submitting this invoice at P254 that Mr Harvey was agreeing with you to pay this money to you in order that you would move out of the premises. Do you agree?---No. Mr Harvey is an agent of the Sydney Water Corporation. It's not his money. He's only acting for and on behalf of Sydney Water in whatever capacity the law sees that, as an agent or vicariously binding Sydney Water.

Did you have a discussion with anyone other than Mr Harvey about amending what Sparke Helmore had told you, namely that there was no money to be paid unless and until you left the Baxter Road premises? ---I think I did with ah, Sparke Helmore Lawyers.

40 Do you tell the Commissioner that Sparke Helmore lawyers agreed with you that you could be paid money by Sydney Water even though you weren't going to move?---I had a discussion with - - -

THE COMMISSIONER: Do you mind answering the question?---Please repeat it?

MR PAYNE: Do you tell the Commissioner that you reached an agreement with somebody from Sparke Helmore that you would be paid money by Sydney Water before you left the premises at Baxter Road?---I don't believe

I had a documented agreement to that end, from, with Sparke Helmore on the letterhead.

THE COMMISSIONER: Did you talk to, did you have an oral agreement with anyone from Sparke Helmore to that effect?---I may have.

MR PAYNE: Who was that person?---I think one of the lawyers that was working for Sydney Water was Reanne Eagles and then there was a Vicky, a lady with a Greek sounding name, Vicky - - -

10

MR PAYNE: Antzoulatos?---I'm sorry I can't say yes or no.

You say you had an agreement with this person from Sparke Helmore that Sydney Water would pay you money even though you hadn't left the premises do you?---I didn't say that. I said I had discussions. Please keep it - - -

THE COMMISSIONER: I asked you about whether you, all right. (not transcribable) You had discussions with them about this. Correct?

20

MR PAYNE: Your discussions with them and I suggest to you at all times Sparke Helmore made it clear to you that no money would be forthcoming from Sydney Water until you had left the premises. Do you agree?---I can't and I don't know how you can assert that at this time. You weren't there.

Mr Makucha, I relation to this invoice at P254 that I am showing you at what time did you agree with any person that Sydney Water would make a part payment of \$5,000 to you although you weren't to leave the premises? ---At a time prior to 25 November, 2008.

30

Who was the person you made the agreement with?---The final agreement was with Mr Ed Harvey, Property Asset Manager, position number 289444.

And what was the terms of that agreement?---I read verbatim. It's on Paul Makucha letterhead. It's dated 25 November, 2008.

THE COMMISSIONER: That's not an agreement that's an invoice? ---Should I carry on, Commissioner?

40

No.

MR PAYNE: Mr Makucha, I want to suggest to you that in the middle of November, 2008 you approached Mr Harvey and said this, I am concerned that you are going to evict me. I need funds for the work I'm doing at Austral, the place I'm going to move to. Giving me this money now will ensure that I have that work completed and that I move out by 23 December, 2008. Did you say that to Mr Harvey?---I don't, I don't deny it, but I can't

recollect it. I had a lot of going on, my mother was dying from Alzheimer's Disease and I was - - -

THE COMMISSIONER: You've given an answer.

MR PAYNE: And that Mr Harvey said to you, Please provide me with an invoice and I will process, process it and I need to be assured that you are moving. Do you remember him saying that to you?---I think the intention was that I would move, yes.

10

By the intention you mean your intention at the time?---That's right. I had found some land there.

This is November, 2008. You didn't end up moving until March, 2010. That intention changed at some time did it?---I still haven't moved.

Sydney Water is now in possession of the premises at Baxter Road aren't they?---That's correct. But I have access on 48 hours notice at any time.

20

I see. So even though it was the intention that you would move in November, 2008 you tell the Commissioner that you still haven't moved. When did the intention to move out change?---Lands were found for the relocation and then inquiries were made about certain parties being down the road and that was a, there was a bikie club headquarters and it was, I received advice that I shouldn't go there, because it'd be too dangerous for me.

Mr Makucha, you told me a moment ago that your intention - - -?---That is in writing.

30

- - - at the time, that your intention at the time of writing this invoice at P254 was that you would move out of Baxter Road. Correct?---It is so stated in correspondence by me.

When did the intention to move out of Baxter Road change? You intention?---The intention was modified by agreement with Sydney Water in relation to the purchase by Sydney Water of all the records of the Makucha Group going back to 1983 or '84, whatever the, and that is a shipping container which contains about 700 archive boxes that are all dated plus
40 other shipping containers which contain other records including patent application by me and research and whatever. And offices of all manner of things.

You tell the Commissioner upon payment for those records your intention changed and you decided to stay at Baxter Road do you?---That was an agreement between myself - - -

Please Mr Makucha. Do you tell the Commissioner that your intention changed at that time. Yes or no?---My intention was modified to stay.

Modified to the exact opposite, to stay?---I didn't say that.

THE COMMISSIONER: You said it was modified to stay?---That's right. Because - - -

You did mean to go now it was to stay?---Yes, but, but - - -

10

All right. That's all we want to know.

MR PAYNE: Please turn over in that to P255, the next page?---I have it.

That's something you sent to Mr Harvey or gave to him by hand is it, on Wednesday, 26 November, 2008?---No, I don't believe so. I think it just, I can't remember, but it may be showing the banking details of Mascot Administration Services.

20

I understand that. That's what I'm going to ask you about. You gave Mr Harvey on 26 November, 2008, the banking details of a company, Mascot Administration Services Pty Limited. Do you agree?---I do.

That was for the purpose of having Mr Harvey arrange payments for which you would submit invoices to be made to that company. Do you agree? ---Well, the particular invoice that you're referring to I presume are dated the 25th. There's no payment details on it.

30

And you were telling Mr Harvey weren't you that you would like monies, funds, from Sydney Water to be paid to this company at this banking, in this bank account?---On my behalf.

On your behalf, I understand that. Mascot Administration Services Pty Limited was a company that you owned and controlled?---Correct.

40

And throughout this process when you would arrange for payments to be made by Sydney Water you would direct that they be paid to the bank account of Mascot Administration Services Pty Limited?---It was the administration company for the group. For me and all the group. It was set up by (not transcribable).

Can you please turn over to page 257 in that bundle. That's a letter you wrote on 22 December, 2008?---Correct.

That's the day before the present stay of the writ of execution in the Supreme Court was to expire?---I'll take your word for that. I don't have those documents at hand.

I showed it to you a moment ago, but accept from me that's the date. And what you were doing was writing to Mr Harvey to get an extension of time so that any moving if it was to take place would happen in the new year, no earlier than 31 January, 2009. Do you agree?---Correct.

THE COMMISSIONER: No later, I think.

10 MR PAYNE: No later, yes, thank you, Commissioner. And then if you go over to 259. They are proposed short minutes of order to give effect to that, that the execution of the writ of possession be stayed until Sunday, 31 January, 2009. Do you see that?---I do.

Those short minutes were proposed as a result of agreement that you, that you reached personally with Mr Ed Harvey. Do you agree?---Correct.

You had no conversation with anyone from any firm of solicitors about that matter?---I can't remember.

20 You had nothing to do with anyone on behalf of Sydney Water about this matter after this date other than Mr Harvey, did you?---I'm rather confused because you, counsellor your statement is slightly ambiguous to me - - -

THE COMMISSIONER: Rephrase the question.

MR PAYNE: I'll ask you another question, turnover if you would to P270 in the bundle. That's a further consent order by the Supreme Court of New South Wales. Do you see that?---Correct.

30 That order was made as a result of a prior agreement you had reached personally with Mr Ed Harvey correct?---Not correct, the consent order states on the face of it about two thirds or half way down, contact name and telephone Reanne Eagles phone number +61 - - -

THE COMMISSIONER: You can read that, read that, it doesn't mean that you agreed to anything with her.

40 MR PAYNE: Do you say that you did or did not make an agreement with Mr Harvey about this extension?---I'd say I made an agreement with both of them or all of them.

If by both of them or all of them you mean both Mr Harvey and solicitors acting for Sydney Water do you?---Yeah, including Susanna Isabelle Bennet, Spark Helmore Reanne Eagles.

Mr Makucha, is that a serious answer?---Very serious counsel.

You had a conversation with Susanne Bennett about it, did you prior to this happening?---I can't state that I did or I did not - - -

THE COMMISSIONER: But why did you say that you entered into an agreement with her if you can't remember?---Because here it says the legal representative.

But that says, that's a formal statement that she is the legal representative dealing with the matter, it's not a statement that she had anything to do with the agreement.---Well, I find counsel could help Paul Makucha by asking more clearly phrased questions because the way I interpreted counsel's question of me in request of answer was as an (not transcribable) by proposition did I have any dealings with any other parties or only Harvey?

That wasn't the question Mr Makucha but Mr Payne, would you try again please.

MR PAYNE: I want to suggest to you in relation to this consent order that you made an agreement, a verbal agreement with Mr Ed Harvey prior to making, prior to approaching the court for the order. Do you agree?---No, I think they all agreed to it otherwise I wouldn't of - - -

THE COMMISSIONER: You said you couldn't remember, I don't understand your answer.---No, no, what I'm saying is, it is highly possible that they all had to agree and Harvey probably contact their lawyers, his lawyers.

Is your answer you can't remember?---If that's appropriate Commissioner.

The truth is appropriate.---I'm trying to be as truthful as God will embrace me to be.

But can you remember with whom you made this agreement or can't you? ---I say that I - - -

Can you remember or can't you? It's an easy question, I'm not asking you anything (not transcribable) - - -?---I can't remember whether it was Harvey or Harvey and all the lawyers, that's the best I can do.

Thank you. That's all we wanted.

MR PAYNE: Mr Makucha, please turn over to P282 in the bundle. I want to suggest to you.---I have it.

You have it. I want to suggest to you that shortly prior to you issuing the invoice at P282 you had a face-to-face meeting with Mr Harvey where these words were said, you said to Mr Harvey, "Due to my recent illness and death of my mother, my plans have been delayed, I need an extension of time and an additional \$5,000 to process, progress my relocation." Do you agree that you said that to Mr Harvey?---Words - - -

THE COMMISSIONER: Words to that affect?---Correct.

MR PAYNE: And that Mr Harvey replied, "I need to be assured that your removal plans will be completed as soon as possible." Do you agree?---I don't disagree.

10 You said, "I need some funds to keep me afloat for a month or so, if you want me to relocate I need funds."---Is that a background statement or are you asking me to agree with it?

I'm asking whether you said that to Mr Harvey or words to that affect.---I don't dispute it, that I may have said that.

20 And that Mr Harvey said to you, "Please prepare an invoice, the invoice you gave me the last time it needs to have an ABN number. If you're looking for electronic funds transfer you need to provide account details." He said that to you?---I can't remember the ABN part of it because if that would have been said - - -

THE COMMISSIONER: All right, so you can't remember that, we understand that. What about the rest? Do you want Mr Payne to read it back to you again?---I'm happy to admit to the letter of 28 January, 2009 as at Exhibit P282.

That's an invoice.---It's an invoice, yeah.

30 It's not a letter. So what are you admitting to?---That there were various discussions with Harvey from Sydney Water and that as a result of those discussions I issued an invoice.

Thank you.

40 MR PAYNE: Do you agree you said words to the affect, "that you need money and if you want me out there would be another \$5,000 to progress your relocation." Correct?---I have cause to dispute the statement you have made because that could, that could create an erroneous belief of the people listening to this transcript that it was an extortion attempt or a standover and that's not the case.

THE COMMISSIONER: All right. Can you just answer the question whether you said those words or not?---I may have, yes. Otherwise, \$5,000 wouldn't have been stated as a payment there.

MR PAYNE: And in P282 unlike the first invoice, you actually identify Mascot Administration Services Pty Limited as the company you're directing be paid. Correct?---Correct. That's the administration company

for the group that did all manner of things. Did sex research, all sorts of things. My information was provided - - -

Please, Mr Makucha, if I want to ask you about sex research I promise you, I will, I'll give you a complete opportunity. That had nothing to do with my question, did it?---I don't, I don't (not transcribable) like that.

You knew it had nothing to do with my question didn't you Mr Makucha?
---Not true.

10

Mr Makucha, all I want you to agree, with this proposition that Mascot Administration Services Pty Limited was paid at your direction being a company you owned and controlled.---Correct.

Please look over at P283. This is the next invoice that you issue to Mr Harvey for payment of part of this \$27,500 amount. Do you agree?---I do.

Again, directed to payment to be made to Mascot Administration Services Pty Limited.---Correct.

20

I suggest to you that shortly prior to issuing this invoice Mr Harvey and you had a telephone conversation and you said words to him to the affect, "I need more funds to stay afloat, can you do something for me." Do you agree that you said that?---Not strictly, I made no dispute that I probably had a conversation which asked Harvey if I could have some more money.

And he said to you, "How are you removal plans going?" To which you replied, "Slowly due to my illness." Do you agree with that?---That's probably right, yes.

30

Do you agree with me, that by this time these payments that were being made to Mascot Administration Services by Sydney Water were a device that you had agreed with Mr Harvey should be used?---I do not.

Do you agree with me that there was never any conversation with Mr Harvey about any need Sydney Water had for the items described in this invoice?---I totally disagree with you because I believe that Mr Harvey be an agent duly authorised - - -

40 THE COMMISSIONER: No, no, what conversation did you say you had if you, you could answer Mr Payne, as you do, by saying you don't agree. If you want to say what the conversation was, you, you're at liberty to say that.---I can't remember the whole of the conversation. I made an offer to Sydney Water to buy the buildings because they contained - - -

No, I just want to know what you said, so - - -?---Do you want to buy the, the buildings, some of the buildings on 111 Baxter Road.

MR PAYNE: Mr Makucha, just in relation to this invoice, just so we're clear, I want to suggest to you - - -?---Yeah.

- - - that the only conversation you had with Mr Harvey about this payment, being the third part-payment, \$5,000, was you said to him, "I need more funds to stay afloat, can you do something for me?"---I disagree with you.

10 What do you say was said?---Words to the effect that I want to sell some buildings at 111 Baxter Road because it will be cheaper to sell them at a reduced market price rather than use cranes and big trucks and it'll cost more so as a cost benefit analysis it will be far more beneficial and practical to sell them - - -

Far more - - -?--- - - - and I had offered to sell them on the open market or sell them cheaply to Sydney Water.

20 You say that all of this took place in a conversation with Mr Harvey immediately prior to this invoice number 3 do you?---Conversations plural, sir.

Do you see that immediately - - -?---Or even meetings, probably meetings.

Do you say that immediately prior to this invoice that there was such a conversation with Mr Harvey?---There were such conversations, yes.

Do you say that immediately prior to - - -?---But such conversations as I've just referred to.

30 Do you, do you deny that immediately prior to issuing this invoice you said to Mr Harvey, "I need more funds to stay afloat, can you do something for me?"---I can't remember.

So it's possible that that's what you did say?---I have given you my answer.

And, and not what you've just told me about it would be cheaper for Sydney Water to buy this from me?---You're creating ambiguity with your line of cross-examination of me.

40 THE COMMISSIONER: Just answer the question, Mr Makucha.

MR PAYNE: Please look forward the bundle to P286. Tell me when you're there?---I'm there.

That's the letter you wrote on 11 March, 2009, correct?---Correct.

You've addressed it to the managing director of Sydney Water Corporation. Do you tell the Commissioner that you had any intention that the managing director would read this letter?---It was my complete belief that Mr Harvey

would supply or his superiors would supply a copy to the managing director's secretary of all letters at all times which were addressed to the managing director?

Just so we're clear, you thought at all relevant times you were communicating not only with Mr Harvey but with all relevant organs of Sydney Water including its managing director, do you?---The letter is addressed to the managing director - - -

10 THE COMMISSIONER: No, no, can you just answer the question, Mr Makucha?---Well, Mr Payne's a little tricky because he is - - -

No, I'm sorry, do you mind, I don't think, those comments are gratuitous and uncalled for. Please, and the question was clear, you can only say yes or no?---Mr Payne slipped in and all organs of Sydney Water Corporation. I don't know who the managing director would delegate to become involved in this matter.

20 MR PAYNE: Did you ever to Mr Harvey words to the effect that I want to deal only with you, Mr Harvey?---I'll take you back to the email where I agreed that there's a diary note of a conversation that amongst other things states that I had said that, yes.

So you agree with me that throughout this process you wanted to talk only to Mr Harvey?---I wanted to talk to someone who I could rely on as being a man of their word.

And that was only Mr Harvey, you agree?---Mr Inberg agreed.

30 Do you agree with me that was only Mr Harvey?---It appears that it happened to end up that way.

I see. And by that answer you - - -?---I don't have a problem with saying yes to that, that's fine, that's fine, that's okay, yeah.

Mr Makucha, so that we're clear, the only person you ever spoke to from Sydney Water about your joint venture proposal and any aspect of it was Mr Ed Harvey, do you agree?---Not correct, sir.

40 Who do you say you spoke to about the joint venture proposal other than Mr Ed Harvey from Sydney Water?

Dr Peter Zeman when it came to the narcotics system of inquiry in sewerage. That was discussed with Mr Harvey and Zeman both being present and the Supreme Court records show that the joint venture in relation to the bottled water business was brought to the attention of the Supreme Court and is so stated in documents - - -

THE COMMISSIONER: We're not asking about the records, we're asking about what was said to you and what you said to somebody so you've mentioned Dr Zeman, you've mentioned Mr Harvey, is there anyone else?
---The Supreme Court.

That's not on behalf of Sydney Water?---I don't know how to, to clarify my position but - - -

10 But did you speak, it's a very simple question, did you speak to anyone at - -
-?---The registrar of the Supreme Court.

Excuse me?---Sorry.

To anyone at Sydney Water in connection with the entering into of the joint venture agreement other than Dr Zeman and Mr Harvey?---Not that I can recall at this time, to the best of my knowledge.

20 MR PAYNE: Let's be clear. What was the occasion that you spoke to
Mr Zeman, when was it?---I can dig it out for you, I'm sure the Commission
has it because they have a photocopy of the diary notes and so forth, my
diary.

Do you know what year it was?---Excuse me, probably in 2008 or '07.

2008 or '07?---Yeah.

30 Did you explain, did you, what did you say to Dr Zeman as best you can
recollect it?---I said to him that I had come up with a methodology for doing
analysis of sewerage (not transcribable) to find out the narcotic content in
various groups, whether its heroin, cocaine, amphetamines.

Do you remember telling him anything else?---I, I, I can't say that I, I, I can recall the whole of the conversation, we did have a long conversation about the, the pressure of the site offices and their location in relation to the main southern outfall which goes through the subject property of 111 Baxter Road and the, I had asked Dr Zeman to provide copies of the drawings, the construction drawings, I can remember that.

40 Mr Makucha, I want to suggest to you that nothing in that conversation has
got anything at all to do with any joint venture between you on the one hand
and Sydney Water on the other, do you agree?---No.

You didn't tell him anything about a joint venture, did you, Mr Makucha?
---I can't remember exactly what I told him apart from what I have raised
with you and when it comes to the joint venture the analysis of sewerage is a
part of the joint venture.

Mr Makucha, so we're clear, what you told me a moment ago is all you remember you told Dr Zeman, correct?---I don't understand what you're referring you.

You said you told him you'd come up with the methodology for the analysis of sewerage, correct?---Correct.

You didn't tell him anything about a proposed joint venture with Sydney Water, did you?---Sewerage is a part of the JV.

10

You didn't tell him anything about a proposed joint venture with Sydney Water, did you?---I don't agree to that.

THE COMMISSIONER: Well, did you?---I can't say I did and I can't say I didn't.

You can't remember?---I can't remember.

All right.

20

MR PAYNE: Let's have a look at this document at P286 for a moment if we can, Mr Makucha?---I have it in front of me.

That's, that's a document where you're setting out certain aspects of what you describe as a total agreement in the first paragraph?---The document says so.

30

You started off saying, "This letter confirms the following." Were you intending to convey by that that the matters set out in the letter were some part of an agreement you had reached with Mr Harvey?---The process of writing letters that way was a part of tuition which I received from a woman who had been the associate to Justice Rogers.

THE COMMISSIONER: Mr- - -?---And that's why- - -

You're not answering the question. Would you mind putting the question again.

40

MR PAYNE: I suggest to you, Mr Makucha, that by writing, "This letter confirms the following", you were intending to convey to Mr Harvey that Mr Harvey had agreed with what there followed in the letter. Is that correct?---I address ninety per cent of my letters in this manner, however, in this letter- - -

THE COMMISSIONER: Did you intend to convey that or not?---Convey what, sir?

What Mr Payne put to you?---Just repeat it, Mr Payne, just the last bit.

Did you intend to convey by writing, "This letter confirms the following", that everything that thereafter followed reflected an agreement you had reached with Mr Harvey?---No. This letter confirms that they are essential elements of a possible agreement. And I can read 1, the contents of this document are essential elements of the total agreement. And my ah, knowledge of entering legally-binding relations with parties requires that there be certain essential elements which will be referred to in an agreement at the end and the essential elements are the elements which cannot be
10 withdrawn. You can modify all other manner of clauses which may or may not end up in a final agreement.

Mr Makucha, in writing that did you intend to convey to Mr Harvey that the matters set out after those words in each of the points 1 to 13, had already been agreed between you and Mr Harvey or not?---This letter was intending to describe and put on the record as a warranty of my bona fide.

THE COMMISSIONER: Was it intended to set out something that had already been agreed between you and Mr Harvey?---No. It was a offer by
20 Makucha of the components of a proposed joint venture.

MR PAYNE: And so all you were intending to convey, you tell the Commissioner, was this letter confirms an offer in these terms. Is that what you say?---That's right. It sets out, it sets out- - -

Please, Mr Makucha?---Sorry.

Please turn over to page 289 in the bundle.---I am there.

30 This is another invoice from you to, to Mr Harvey?---I agree.

Do I take it from the answer you gave me before about letters addressed to the managing director of Sydney Water Corporation that you thought Mr Harvey was the only person who would see this invoice?---By converse no.

You expected this invoice to be seen by others within Sydney Water, did you?---Without a doubt, his supervisors and all management because it was my view that he had obtained an approval in principle, an understanding of what I had proposed to him because Sydney Water obtaining a benefit of
40 \$10,000,000 and so forth is a very substantial piece of business.

THE COMMISSIONER: You've answered the question.

MR PAYNE: I see. So in relation to this invoice, the fourth payment, you thought this had something to do with the proposed joint venture, did you? ---No. And I think it's wicked of you to try and- - -

THE COMMISSIONER: No gratuitous comments are necessary?---Forgive me.

MR PAYNE: Didn't you just tell me that you thought that Mr, that all of Mr Harvey's supervisors knew that he obtained agreement in principle to the joint venture?---That's not what, that wasn't the answer to my request, to my prior examination by you about one minute ago. That's not what I said. Please don't verbal me.

10 Mr Makucha, look at the document at P289?---I have it in front of me.

How did it come about that you issued this invoice to Mr Harvey?---It's an ongoing invoice in relation to the improvements of the land and so forth.

So you needed more money?---It's not a crime for a man to sell his assets.

You needed more money and you spoke to Mr Harvey, did you?---Excuse me. It's not a crime for me to sell- - -

20 THE COMMISSIONER: Just answer the question, Mr Makucha. Did you, it's not suggesting, it's not suggested that it's a crime at the moment. Will you just, you said you'd come to an agreement for the- - -?---I had, that's right.

One moment please. For the sale of these assets. There doesn't appear to be any agreement as to the dates on which payment was to be made, so you're perfectly legitimately being asked whether you agreed with Mr Harvey that the payment should be made on the date reflected in the invoice?---It is so, yes. And the invoice on the face of it states that because
30 it refers to prior invoices 1 2 and 3.

MR PAYNE: This invoice was given to Mr Harvey the day after the letter I showed you about the joint venture. Do you agree?---Sorry, I can't, let me just- - -

Go back to it if you would?---Yeah, its 12 March.

P286?---Yeah.

40 It's 11 March. This is dated 12 March?---No. I have an invoice dated 12 March in front of me which I just responded to your questions.

Yes?---And at 291, P291 I have another letter which- - -

I'll take you to that in a moment, Mr Makucha. At the moment, all I'm asking you is whether there was any agreement or conversation between you and Mr Harvey about any connection between this payment in relation to this invoice at P289 and your joint venture proposal?---I don't believe so.

Go over, if you would, to the document you've just drawn attention to at P291.---But I can't be sure.

Thank you. Go over to P291?---I'm there.

That was a letter sent by you to the managing director, attention Mr Harvey?---Correct.

10 I want to suggest to you there was a face to face meeting between you and Mr Harvey on or about 13 March 2009, after you had delivered him this letter?---I believe that's correct.

I want to suggest to you that Mr Harvey said to you words to this effect, Paul, this sounds like a complex arrangement. I don't have the delegated authority to deal with this. It would need management and board approval. It needs to be packaged up in a way that can get that approval. I'm happy to work with you to get to a point where it can be presented to management.
20 Do you agree that Mr Harvey said words to you, words to that effect to you at that meeting?---He may have said that, yes. And the contents of this letter also motivated my delivery to Sydney Water Corporation of a travelling bag on wheels full of documents.

THE COMMISSIONER: Mr Makucha, this letter was addressed to the managing director of Sydney Water, as you can see?---Correct.

Why didn't you post it?---My habit has always been to have face to face meetings, whether it's with Mr Temby or whether bringing documents and letters to this Commission. I always do it personally.
30

Well, why didn't you personally deliver it to the managing director then? ---You can't get into the managing director's secretary because I always dealt with the security guard at both Goulburn Street and at number 1 Smith Street.

Well, if you couldn't get in and your practice was always to direct with the individual you wished to deal with, why didn't you post it to him or her? ---I haven't bought any stamps for years. I always hand deliver.

40 But you hand delivered to Mr Harvey even though the letter wasn't addressed to him. Is that your ordinary custom?---Well, it's attention to Mr Harvey, it's appropriate.

Yes, but you wanted the managing director to see this you say, is that right? ---Without doubt.

So why didn't you post it to the managing director?---My expectation was that Mr Harvey was a very honest man, well-educated, having a very senior

position and that he would understand the normal protocols of communication (not transcribable).

Did you ask him to give this letter to the managing director?---Not, not as a singular demand.

10 All the letters that you gave to Mr Harvey and addressed to the managing director, did you ever ask him to hand it to the managing, each letter, any of the letters that you so addressed and so gave, did you ever ask Mr Harvey to hand any one of them to the managing director?---I asked - - -

Yes or no?---I expected that Mr Harvey - - -

Did you ask him?---I didn't say can you go and give that to the managing director, I did not but I did tell Michael Stafford the lawyer and Gino Malacco of Hall Chadwick to mail some letters to the managing director.

20 MR PAYNE: Mr Makucha, you understood at all relevant times didn't you that Mr Harvey would need management and board approval before there could be any joint venture between the Makucha group on the one hand and Sydney Water on the other?---That's not correct, if I could just - - -

THE COMMISSIONER: Isn't that why you addressed the letters to the managing director?---The question and answer there is not - - -

Isn't that why you addressed the letters to the managing director?
---Commissioner, I don't understand what you're (not transcribable) me.

30 Isn't the reason for your addressing the letters in question to the managing director the fact that you well knew that the kind of issues that were the subject of the agreement were issues that would have to be agreed to by at least the managing director and the board?---That's not correct.

Hence sent, hence that they were addressed to the managing director?---No, that's not correct because the Confidentiality Agreement, I take the view and continue to take the view is an agreement based upon the principal that if I am divulging intellectual property, trade secrets et cetera that on behalf of the corporation, that the agent with whom I'm dealing represents, those secrets will not be stolen, converted and I have, I have - - -

40 Mr - - -?---Excuse me, let me finish, I have - - -

Please?--- - - - used the, the directions of Justice Gummow from the High Court decision, and I have a copy there, of what should be embodied - - -

I am stopping you now, I'm not interested in that answer. I still am trying to find out whether - - -?---I'll answer you.

Just - - -?---I know what you - - -

I'm not interested in that answer, I said that to you?---I understand that but I
- - -

Be quiet please?--- - - - can I help you?

No, I don't want your help thank you?---Forgive me.

10 I would like to know whether you thought that because what you were disclosing to Mr Harvey was so confidential he was the only person who should know about what you were disclosing?---Mr Harvey gave me an undertaking - - -

No, just tell, answer the question please?---Maybe, maybe not.

Yes, Mr - - -

MR PAYNE: Have a look at P291, Mr Makucha?---I have it.

20

This letter confirms the following so the same introductory words that we saw before?---That's right.

Paragraph 1, "Sydney Water Corporation represented by its executive, Mr Ed Harvey, and Paul Makucha as the only shareholder have agreed to enter into legally binding relations." Do you see that?---That's correct.

Was that true?---Yes.

30 So you had made an agreement with Mr Harvey to enter legally binding relations in relation to a joint venture as at 12 March, 2009, had you?---No, we had made an agreement that a confidentiality agreement could be executed by Edward K Harvey of Sydney Water and that whatever Makucha disclosed to Harvey on behalf of Sydney Water he guaranteed that Sydney Water would not steal it, convert it or detain it and at all material times the view was that Harvey could sign a confidentiality agreement in those terms and that's why Harvey provided a generic form of confidentiality agreement and the Commission has a copy of that but - - -

40 Mr Makucha, I want to suggest to you that that answer is nonsense. Can you please look at paragraph 1 on page 291?---I know what's there, I wrote it.

You know what's there?---I can read it, Sydney Water - - -

"Enter into legally binding arrangements" which means that Sydney Water shall purchase 49 per cent of the shares in the Makucha group of companies, do you see that?---Its subject to board approval. You're putting all our

words which suits you, that was a description of what the potential agreement will embody.

THE COMMISSIONER: Where is, where does it say subject to board approval?---I can take you to documents - - -

Where does this letter say this agreement that's been entered into is subject to board approval?---I'd have to read it.

10 I thought that you were, knew very well what was in it because you wrote it as you explained to Mr Payne?---Well, it's about five pages and I can't recall.

Well, you review it over lunchtime and let me know later?---Legally binding in terms of the Confidentiality Agreement. At no time was it ever contemplated that Harvey had the authority to bind Sydney Water and I can give you dates and times and places when Harvey said he's got the authority to negotiate but the final approvals for the construction of the bottling plant and so forth for the joint venture facility have to be approved by the board.

20

MR PAYNE: Was it your state of mind, Mr Makucha, just so we're clear on the basis of that answer - - -?---I don't know what state of mind means.

Was it your understanding in December 2009 that Mr Harvey needed the approval of the board of Sydney Water before he signed the Business Implementation and Confidentiality Agreement?---I don't believe that Mr Harvey has ever needed or would ever need or any other person in a similar position at Sydney Water needs board approval to sign a Confidentiality Agreement in relation to intellectual property or secret
30 business methods or whatever.

30

All right. We'll come back to that in terms. Have a look at paragraph 3 of this letter on P291. You say, "This document," i.e. this letter, "is a legally binding document upon the parties." Do you see that?---That's right.

And a sum of money to be agreed shall be paid as a deposit within seven days?---That's right.

40 Do you tell the Commissioner that that was subject to board approval as well, that agreement?---No.

So you say you had reached a legally binding agreement with Mr Harvey had you, by 12 March, 2009 dealing with the matters in paragraph 3? ---What I say had been agreed is that the outlines of the proposed deal and the tax benefits and the joint venture of the bottling company, that being the features, intellectual property. He guaranteed that they wouldn't steal it off me.

I just asked you about paragraph 3. Do you say that there was a legally binding agreement between you on the one hand and Mr Harvey representing Sydney Water on the other prior to 4 March, 2009 that a sum of money shall be paid as a deposit within seven days?---I don't believe there was.

10 So when you wrote that here, this document is a legally binding document, that was a lie was it?---Certainly not. I don't lie. I love being honest. I love being intelligent and I love being a hard worker. And neither will I lie into the future.

I suggest to you Mr Makucha, that it is clear that you are saying in paragraph 3 that you had reached, sorry, that this document is a legally binding document upon the Makucha Group and Sydney Water Corporation. Do you agree that's what it says?---It says what it says, however, I am not a lawyer and Makucha, being a self-trained bush lawyer, sometimes is not as clear as he should be.

20 What do you say, what do you tell the Commissioner paragraph 3 should've said in order to reflect what you now say was your intention?---It should've just said that what's disclosed in this agreement, right, can't be (not transcribable), that my interests of intellectual property are protected.

30 And it shouldn't say that there's a legally binding obligation on Sydney Water to pay any amount of money to you or your companies. Do you agree?---No, I don't because under the Attorney General's guidelines for model litigant principals on behalf of state owned corporations there is a section there which states that state owned corporations have to act honestly. And also it was in the provisions in relation to Sydney Water. There is a strict protocol, binding the directors and executives about honesty.

THE COMMISSIONER: Mr Makucha, before 12 March, 2009, did you arrive at an agreement with Mr Harvey representing Sydney Water that a sum of money would be paid as a deposit within seven days of the date of this letter?---No, I did not. However - - -

40 I thought you said, I thought you said a couple of minutes ago that you had?---No. What I was understanding was that the rest of the letter to become binding there needed to be some consideration.

So you, you didn't arrive at a legally binding, you didn't arrive at an agreement with Mr Harvey on behalf of Sydney Water that an amount would be paid as a deposit within seven days of the letter?---I can't clearly recall that particular part. But however, he did agree with me that they, he would ensure that a documentary, documentation would be signed by him to reflect that they would not - - -

Did you arrive at a legally binding agreement that Sydney with you, to the effect that Sydney Water would pay a deposit within seven days, as the letter states?---Well, if they did I've never got it.

Did you arrive, I'll ask you the same question again until you answer it. Did you arrive at a legally binding, sorry, I'll start again. Did you arrive at an agreement with Mr Harvey, he acting on behalf of Sydney Water that a deposit would be paid to you within seven days of this letter?---I don't believe so.

10

So why did you say that in your letter?---Well, that's, that's a point of the letter that, or the rest of the letter they could agree or disagree. They could reflect their position if they didn't agree.

You knew that he couldn't do that without board authority?---That's not right.

So why, why is it not a binding agreement?---Can we go back to your first -
- -

20

No, I just would like an answer?---I'm very happy to give you an answer, Commissioner, if you tell me your question, clearly.

I've given you the question. We will adjourn and continue at 2 o'clock.

LUNCHEON ADJOURNMENT

[1.03pm]