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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE RUTH McCOLL AO
COMMISSIONER

PUBLIC HEARING

OPERATION KEPPEL

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON MONDAY 18 OCTOBER, 2021

AT 2.00PM

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

**<MICHAEL ALAN GERARD TOOHEY, on former affirmation
[2.02pm]**

THE COMMISSIONER: Yes, Mr Robertson. Please be seated.

MR ROBERTSON: Can we go, please, to page 270 of volume 26.1. Mr Toohey, before the adjournment, we got up to 16 November, 2016. I'll show you another email from that date, from you to Mr Doorn, 16
10 November, 2016, 3.41pm. The one I showed you just before the luncheon adjournment was 11.12am on the same day. That was the one about the Treasurer needing to get it put on the agenda. And do you see here an email from you to Mr Doorn 3.41pm?---Yes, I can.

If you just look at the note next to the word "attachments". "ERC submission ACT Wagga Wagga discussion draft PD_NT."---Yes, I can.

And if you just have a look at the text of this email, you say "I've spoken to" the two individuals there, "Very early days in the three grants and at this
20 stage, they are forecast to be full expended." Do you see that there?---Yes, I do.

What were you referring to there by referring to "early days" in three grants?---From, from memory – sorry. Can you hear me 'cause I, I don't think my microphone wasn't working.

I can hear you well and if others can't, I'll get a note.---Yeah, I, I - - -

THE COMMISSIONER: I think the most important thing, Mr Toohey, is
30 the transcription people can hear you and - - -?---Yeah. Okay. All right.

Well, it's not the most important thing but it is very important that we record what you say, obviously.---I just, make sure the technology wasn't letting us down. So Phil and Mia would have been two other officers at the Office of Sport, Phil Hamdorf, Dr Philip Hamdorf and Mia Jenkins. From memory, this would have arisen as a question of what was the, the source of funds and whether or not it could be reallocated from existing grants programs. So this would have indicated that why those grants programs were not fully committed, you know, where were we from a cash position
40 and where were we from a, a forecast position. So from a, a cash position, there would have been cash but the projections were based on demand and whatever correspondence that Phil and Mia had entered into that we weren't expecting to have any unspent funds from those grants allocations.

MR ROBERTSON: So I take it that's the first place you would look, as it were, do we have any existing allocations of funds which we made be able to use to find this particular project?---Yeah. That, that, that's, yeah.

I mean, we saw in one of the previous drafts the ERC submission that you and I discussed before lunch that the recommendation was to approve the allocation of a particular sum of money to the Office of Sport, allocation from where?---Well, when I wrote it I assumed it was Treasury's consolidated revenue fund, which is also sometimes referred to as ConFund, as just a, an abbreviation from that. That's the usual source for topping up an agency's budget for things like this. You would look for, you know, do you have funds within, you know, that year's allocation, if so can they be repurposed and the process around that. If not, then then the agency would need, would need funds. The second point which the – this project would have been too, too small. It was whether or not the, the NSW Government Restart NSW Fund, so there are other, there are other sources, sources of funds that were available. This really didn't qualify for Restart because Restart from memory was 100 mil plus projects, in that, in that vicinity. So we were looking for a source of funds.

In your experience, would an ERC submission ordinarily identify the proposed source of funds or is it more common in your experience to simply say we want an allocation or perhaps a reservation and it's left to others to figure out where the money comes from?---It's, it's better if you can identify, if an agency, sorry, if an agency can identify it but it may, in the end, be up to ERC to decide whether or not it qualifies for one of the special-purpose capital funds like Restart or whether or not the decision would, would go back, the fund, the project is approved but the agency has to find funds from within existing budget. Usually you just, it's a, it's a, a top-up, an allocation from ConFund.

So at least that was what was in your mind, was it, that this money was going to come from the consolidated revenue fund?---Yeah. Because I, I, what I knew at the time, and with other demands which, like, for example, in that, that October email from, from Mr Doorn, there were other, other demands on Office of Sport's available funds.

And the consolidated revenue fund, sometimes referred to as the ConFund, that's the fund kept by the government that receives ordinary revenues, things like taxation and things of that kind, and ordinary expenditure. Is that right?---Yeah. That's, yeah, that's - - -

And when one talks about the budget, for example, or the appropriation bills and appropriation acts, that's what we're talking about in terms of appropriating money from the consolidated revenue fund, is that right? ---Yeah, that's correct. I mean, I'm sure Treasury has a more nuanced understanding and I'm talking in very broad-brush terms but, yeah, that, that's my understanding.

But in relation to the three grants have been referred to in this email from you to Mr Doorn, just explain what you're referring to there. Is this in effect looking at other grant programs with a view to seeing whether the 6.7

million or some other figure can come from an existing grant program?
---Yeah. I, I, there would, there would have been grant programs that we had at, at the time, available at the time, no three separate grant allocations, but I, I don't recall the name of the three grants, the three, the grand funds.

I might see if I can help you this way. See in the parentheses it says "See 3.21 and 3.22 of the sub"?---Yes.

If we go, please, to page 276.---Oh, right. Okay, yep.

10

This might help you with your recollection, 276. We'll go to those paragraphs. We'll zoom into about the middle of the page. Would you just have a look in particular at paragraph 3.22?---Oh, right. Yep.

"Total value of those grants is" and then there's a figure "and is forecast to be fully expended." See that there?---Yeah. I do, I remember now. Yep.

20

And so do we take from all of that, what you were seeking to do is see if there was a, what I might call a hollow log, some money that was available to be used for this particular funding but to find that the existing grants had been fully expended and that there was no money in the hollow log, as it were?---Yeah. That's, that's right, and it would have been, yeah, okay. So now, and it would have been also in the cash flow of these three projects. Were we, were we fully expending, these, these, the three grants, grant there, for this year or did we expect it to go over two financial years, something like that. It becomes, so could the Wagga proposal, Wagga Wagga proposal, be funded in a cash flow sense from, or in the – excuse me – the cash flow for these programs.

30

And so if there was spare money, as it were, your ERC submission may have identified in the recommendations "Let's allocate this amount of money but from this existing grant program."---That's right, and then, and bring the funds. That, and because a commitment would have already been made to those clubs. If they weren't going to spend it that financial year, it would be topped up, you know, recouped as it were, in a following financial year.

40

So if we can go back now, please, to page 271, which is the first page of the draft of the Cabinet submission or the ERC submission as at 16 November, 2016. I'm just showing you the front page again. If we then just turn to the following page, please. Now, do you see there in Roman (i), if we zoom in to the top half of the page.---Yes. Yes.

Do you see there now our figure has changed from \$6.7 million to \$5.5 million. Do you see that there?---Yes. Yes.

How did that change come about as you recall it?---The, by that stage I've confirmed, and there's a typo in Roman numeral (ii). "ACTS" should be

“ACTA”. The S and the A are next to each other on the keyboard. So by this stage I’ve confirmed that ACTA is going to contribute \$1.2 million towards the costs, capital costs of the facility, so therefore accepting the 6.7 as the total estimated costs, government’s support now could be reduced from 6.7 to 5.5.

So 6.7 minus 1.2 equals 5.5, is that right?---That’s, yep, yep.

10 How did you know that it was expected, or the building project was expected to cost about \$6.7 million?---Based entirely, from memory, on the GHD business case. There had been no independent verification of the cost. We had no idea of whether it was a P50 or a P90 cost. No idea of the robustness. It was just a figure and there was, I had no time to verify it or have any independent verification.

20 Well, let’s go back to that business case. Can we go, please, to page 236 of volume 26.1, which forms part of Exhibit 379. This is page 19 of the document, which is page 236 of volume 26.1. Exhibit 379. This is a document that I’ve already showed you part of. But can I draw your attention, if we zoom into the bottom half of the page, please. See under the dot points the total upgrade has been budgeted at \$6.1 million?---Yes.

See that there? And then just for context, if we move to page 237, which is page 20 of the document, we see in a separate table the capital cost in nominal terms about \$6.678 million. Do you see that there?---Ah - - -

See that - - -?---Yes, I can, yes, sorry, yep.

30 Or the discounted cost using a 7 per cent discount rate of about \$6.53 million. See that there?---Yes. Yes, yes, I can.

40 So we seem to have at least two different figures or, on one view, three different figures. Why was it 6.7 that was in your document and then changed to 5.5 once you subtract the 1.2, rather than the \$6.1 million figure that we saw on the previous page, page 236.---To be really direct about it, I, I thought this was one of the problems with the quality of the document. And for the sake of the Cabinet submission and the financial risk to government, I was better off using the most expensive cost that was cited. So I, I proposed that the funding was on the worst-case scenario in the absence of any independent advice to the contrary.

And is that because it’s better to get approval for a higher figure and then only needing a lower figure rather than the other way around?---Well, that, that’s right, and in the absence of any breakout of the costs, one of the other problems that I had with is it is we didn’t know what the project – excuse me – contingency should be. So, you know, like, what is, what’s the, the bit you leave in the bank, as it were, to, in, in case there’s a cost blowout, which is just a very typical practice, very common practice for capital projects.

So are you drawing to attention the fact that at least on the face of the purported business case that we can see on the screen, you didn't know how the \$6.678 million figure that we can see on the screen was made up?---No, I, I didn't.

Including, in particular, whether there was any contingency in that figure or whether that figure was what I might call a figure without a contingency?
---That's, yes, that's correct. That was my, my thought. So I didn't try and, in the available time, I didn't try and contact GHD to reconcile any of those figures. I just, the six point, okay, the 6.7 becomes the figure I work with.

And you see in this table, table 4-3, there's also a maintenance cost figure changing from a base of about \$1.25 million in nominal terms to \$1.88 million with a net cost of \$630,000 or thereabouts. Do you see that there?
---Yeah. Yeah.

Was that something that you brought to account or otherwise dealt with in the ERC submission or were you focused only on the capital cost rather than the maintenance cost?---I was focused on the capital cost. My problem with the, the, the net cost was I, I was really only concerned with if it was likely to become an expense to be borne by the NSW Government, point 1, and point 2 was was it a credible figure? And I, I didn't know the answer to that. So it was, like, for the purpose of the, fairly early on, I, I couldn't tell exactly when but it was clear that the, you know, opex and maintenance we referred to earlier this morning was going to be borne by the, the club. So it was like I had enough to work out with this rather than to chase every rabbit down every rabbit hole.

So if we go back to page 272, volume 26.1, zoom in to the top half of the page, please. 272, volume 26.1. Is that what you were seeking to confirm or at least make clear with paragraph (c) one of the conditions of the suggested approval, ACTA undertaking to meet all ongoing maintenance and operational costs and any capital costs with the facility that are greater than \$6.7 million?---That's correct. At, at this stage, at this stage, all we had was the, the GHD business case and there was no commitment on any of, any of this and it wasn't within the funds, that I'd been asked to write the ERC submission for. So I thought it should be, my professional view was if this was to proceed, rather than government have an ongoing liability, ACTA should, any funds allocation should be subject to ACTA agreeing to what I, I put down in 1(c).

And you've said, in effect, you were asked to prepare a draft ERC submission for the capital cost rather than things like ongoing maintenance and operational costs. Is that right?---That's correct.

And that was an instruction or direction given to you by who?---That's how I interpreted Mr Doorn's instruction to me.

10 So was there any discussions that you can recall either within the agency or within the minister's office as to effectively the scope of the funding to be proposed, whether it was just capital costs or broader or narrower or is that just an inference that you're saying you drew from Mr Doorn's email which was asking you whether you're willing to accept the challenge of drafting a draft ERC submission within a day?---It was the inference I took when I first got the, the request and in subsequent discussions because I think 1(c) was, you know, when I had the, the two, the feasibility study or the 6.7 set of recommendations, from memory, 1(c) was included in the, the 6.7 recommendations and if it hadn't been deleted, I, I took it that people thought it was a good idea.

And so (a), (b) and (c) is really you trying to limit the risk to government - - -?---Yeah.

- - - of an option that you didn't think was a good idea?---Yeah. Absolutely. And appreciating it's the government of the day that makes the call, but I thought it was a very risky idea.

20

Commissioner, I tender the email from Mr Toohey to Mr Doorn, 16 November, 2016, 3.41pm.

THE COMMISSIONER: Exhibit 384.

#EXH-384 – EMAIL FROM MICHAEL TOOHEY TO PAUL DOORN REGARDING ERC SUBMISSION ACTA WAGGA WAGGA DISCUSSION DRAFT DATED 16 NOVEMBER 2016 AT 3.41PM

30

MR ROBERTSON: So that gets us to 16 November, 2016. Do you recall what happened next, at least in terms of your involvement, with what I've been describing as the ACTA proposal?---No. Sorry, the date, November 20th, did you say?

16 November, 2016 was the last one that I referred you to.---Oh, 16, sorry. Oh, some, so by, by the end of the working day we'd, it was clear on the recommendations that had been supported which direction I was to write this. I wasn't aware, from memory, of any communication back to the minister's office yet, so I - - -

40

Minister Ayres' office you're referring to?---Yeah, I'm sorry, yep. So my memory is that I started writing up the rest of the body of the submission for a \$5.5 million capital grant to be given to the club in 2017-2018, with a range of conditions associated with it.

But you recall just before the luncheon adjournment I showed you the email from Mr Meulengracht, to you and to Mr Toohey, saying, “We need to get the Treasurer’s sign-off,” as it were, or the Treasurer’s decision to get it on the agenda. Do you remember seeing that email?---Yes, I do.

10 Is that what ultimately occurred? Or how was it that the matter was progressed in terms of getting on an ERC agenda or perhaps not getting on an ERC agenda?---From memory, the, the, any meaningful action about getting it on the ERC agenda didn’t occur till early December, around, around December 2, December 4. And this is the email that originated from Zach Bentley in the Treasurer’s Office. So - - -

And let me show you what I think might be that email. Volume 26.2, page 9. And can we start at the top of the page, please, and this is an email I’m going to show you from you of Saturday, 3 December, 2016. Zoom into the top half of the email first. So this is from you to Mr Meulengracht, copied to Mr Doorn.---Yes, yep.

20 3 December, 2016, 5.07pm. Can you see that on the screen?---Yes, I can, thank you.

And then you say, “The attached version has been approved by the minister’s office for lodging.” See that there?---Yes.

And just have a look at the attachments. ERC Submission ACT Wagga Wagga Discussion 3 December 2016.docx. See that?---Yep. Yep.

30 And your second sentence says, “As you can see, the Treasurer has approved this to go to the ERC on 14 December.” See that there?---Yes.

Ms Berejiklian was the Treasurer at that point in time, correct?---Yeah, that’s correct.

And if we just turn to the bottom of this email chain, so go to the next page. And zoom into the top half of the page.---Yep. Here we go. Yep.

Now, you referred to Zach, Z-a-c-h, Bentley, is that right?---Yep.

40 And then see the text, “The Treasurer has requested this issue be put on the agenda for the ERC meeting on 14 December.” See that there?---Yes.

Now, you weren’t a party to this particular email, but is that the email that you’re referring to in your email to Mr Meulengracht when you say, “As you can see, the Treasurer has approved this to go to ERC on 14 December”?---That’s, that’s correct. This is the email. And, from memory, this is the first communication I was aware of from the Treasurer’s Office. So we didn’t have an ERC date when I was first given the request, and now we have an ERC date.

So you find out, in effect, on about 2 December, 2016 - - -?---Yep.

- - - that the ERC submission that you had prepared would be before the ERC on 14 December, 2016?---Yes, that's correct.

10 Could we then go back to the preceding page, and we'll start at the bottom of the page. Just because it's an email chain we have to go from the bottom up. At the bottom-half of the page Mr Bentley sends an email to Mr Landrigan and Mr Hall, "Gents, please upload submission. ERC will deliberate on 14 December." See that there?---Yep.

And then going further up, Mr Doorn to, amongst others, you, "Nick and Michael, for your action please." Do you see that?---Yes.

And so that's the context, I take it, of you sending the email that I started with of 3 December, 2016?---Yep.

20 So we can focus on that email then, if we zoom into the top-half of the page, please. If you have a look at the fourth substantive line of your email, it starts with "Given the time frame." See that?---Yes.

"Given the time frame requested by the minister." Now, pausing there, that's Minister Ayres you're referring to there?---That's right.

Your portfolio minister, correct?---That's correct.

30 "This has not been reviewed by Treasury, DPC or other agencies." Do you see that?---That's correct.

Now, is that a reference to the usual procedure that you and I discussed this morning where a draft ERC submission will be the subject of interagency, or at least inter-cluster consultation?---That's correct.

And so you then go on to say, "As noted in the submission, the draft lodgement stage will be the forum for agency consultation." Do you see that?---Yes.

40 What did you mean by that?---It, I mean, okay. If we can just go back. So given the time frame, what I, my preference at that point be, even be to have informal discussions with, particular with the central agencies, Treasury and DPC, about it and they just hadn't had the time. So, what I had put in the – the second sentence, as noted in the submission, reminds me is that I was hoping we could be able to do that agency consultation if this was lodged through eCabinet as a draft proposal. That was the hope.

So can we just put back up on the screen the NSW Cabinet system document that you and discussed this morning? It's Exhibit 378. I just

want to make sure I understand what you're saying by reference to, in effect, the flow chart that you and I discussed this morning.---Yep.

10 So when Mr Bentley is saying "Please upload the submission. ERC will deliberate on the 14th of December." What stage is this in terms of uploading? Is this the lodgement stage, the final submission stage or the draft submission stage, or is it none of the above?---I, I put that in, I put it that he meant at the lodgement stage and I was suggesting that it be at the draft submission stage so that we had a chance for consultation with the cluster, the other agency clusters.

So as at 2 December, 2016, had your draft ERC submission, as you understood it, been uploaded to the eCabinet system at all?---No. Not at, not at, not at 2 December.

Had it been subject to any interagency consultations or opportunities to comment?---No, not, no, not, not by then, no.

20 And so is the substance of what you're saying in your email of 3 December, 2016, that we're not, in this case we haven't been adopting the usual procedure like we can see on the screen by reference to Exhibit 378, we've effectively jumped straight to the lodgement stage?---Yeah, that's correct. Yep.

And if we go back then, please, to page 9 of volume 36.2, and zoom into the top-half of the page, please. If you just have a look at about the sixth line, see there's a sentence, "Paul and I appreciate that this is not standard procedure"?---Yes.

30 And so the aspect that's not standard procedure that you're referring to is in effect fast forwarding directly to the lodgement stage rather than doing the draft submission stage and final submission stage in the way that you and I discussed this morning, is that right?---That's correct.

Then goes on to say, "This has not been submitted to Blair for release." See that there?---That, that's, yeah.

Is that a reference to Blair Comley?---Comley, yeah.

40 C-o-m-l-e-y- - -?---Yeah, that's right. He was the secretary for DPC at the time.

And so I take it that his relevance is the fact that the Department of Premier and Cabinet was the relevant department to which the Office of Sport was an associated agency. Is that right?---Well, he had two roles. One is, as you outline. The other is that he had to, from, from memory, the, the secretary of DPC also approved all Cabinet and committee papers being, you know, lodged into the, the Cabinet Secretariat process.

Commissioner, I tender the email from Mr Toohey to Mr Meulengracht, 3 December, 2016, 5.07pm, page 9, volume 26.2, including the attachment.

THE COMMISSIONER: That will be Exhibit 385.

10 **#EXH-385 – EMAIL FROM MICHAEL TOOHEY TO NICOLAI MEULENGRACHT REGARDING WAGGA WAGGA CLAY TARGET SHOOTING DATED 3 DECEMBER 2016 AT 5.07PM**

MR ROBERTSON: Can we then please go to page 111 of volume 26.2. That last email was Saturday, 3 December, 2016. I'm now going to show you an email of 6 December, 2016. Page 111, volume 26.2. Now, if we actually go to page 112, the next page.---Right.

20 Just so we can get some context. If you have a look at the second of that emails. Is that close enough or do you need us to zoom in a little bit more?
---No, that's, it's, that's good. Thank you.

So here's an email from Mr Broadhead - - -?---Kent Broadhead, yeah.

- - - to you and Mr Doorn. And Mr Broadhead was Principal Policy Officer Skills within the Department of Premier and Cabinet.---Yes.

Is that right?---Yeah.

30 And you see, he says, "As discussed, the Premier's Office has questioned why the Wagga Wagga clay target facility submission could not be delayed until the new year." See that there?---Yes.

And it says, "To allow time for market testing of costings and project planning to be completed." See that there?---Yes.

And that was in terms of the Premier's Office, that was Premier Baird at that point in time. Is that right?---Yes.

40 It then goes to say, "The submission does not make a clear case as to why it requires approval before Christmas although discusses the broad 2018 construction deadline."---Yeah.

See that there?---Yes, I can.

Do you recall receiving that email?---I, yes, I do.

And do you recall what, if any, steps you took in light of receiving that email?---I, I raised it with, with Paul. I, I had, was certainly on the phone

with, with Mr Broadhead quite a bit over it. And we were, we were trying to understand the, the rush, well, you know, the imperative – sorry. That’s, that’s a better word. And around this date, I would have commenced discussions with Treasury, as well, with various officers. So it had been discussed, I, I wasn’t able to, to answer the, the, the questions about why it couldn’t be pushed into the year and I, the, I’d also, around this time, time, I would have been in consultation with, in particular, Marc Landrigan, who was then a policy adviser in Mr Ayres’ office, around these issues, as well.

10 But are you saying as at receipt of this email, 6 December, 2016, 12.47pm, you still weren’t aware of the reason for the - - -?---No.

- - - rush or I think you called it the imperative - - -?---No, I, no. No.

- - - bringing this submission into the ERC in December of 2016?---No. No. No, I wasn’t. I thought, I, I, I agreed with Mr Broadhead’s advice.

20 In other words, you agreed with Mr Broadhead that this was a matter that should be delayed until the new year to allow the kinds of analyses and further work - - -?---Yes.

- - - that you and I have been discussing this morning to take place?---Yeah, that was, that was my professional opinion. If the, if there was, the government wanted to proceed, I would do everything to, to support that and, and do my job professionally, but I didn’t understand the reason for the rush and I thought there were risks involved in the timetable.

30 And did you have any discussions concerning this issue directly with the Premier’s Office, as in Premier Baird’s office?---No, no.

Or was it just through Mr Broadhead, who was in the Premier’s department, the Department of Premier and Cabinet?---It was just, yeah, just discussions with Mr Broadhead.

And I think you might have said that there may have been some discussions with the Treasurer’s Office, is that what you said?---No, I, no, with, with Treasury, I’m, I’m sorry.

40 With Treasury.---I’d had discussions. Yeah, so public servants working in New South Wales Treasury.

And what was the nature of the discussions with Treasury?---Oh, around this time it was, there was debate around the source of funds, how that should be shown in the Expenditure Review Committee, in the submission. So in the submission, I think we saw an example of it before. So there’s a financial impact table. It’s usually page 9 or page 10 of the submission. Page 9, I think. And it shows where the impact of the funds on the budget. So there were, there were discussions around there and, you know, just

about getting this to ERC given the, what I understood to be Minister Ayres and, by now, sorry, by the time of Zach Bentley's email, the political desire to get this finalised in December of 2016.

When you say the political desire to get this done according to Mr Bentley's email, what are you referring to there?---That the, the Treasurer wanted it on the agenda for the 14 December ERC.

10 Now, in that document I just showed you – and we'll put it back on the screen – it refers, it says, "Minister Ayres' office may wish to discuss the priority of the item direct with the Premier's Office." Can you see that now?---Yep, yep.

Are you aware of whether that in fact occurred? As in Minister Ayres' office discussing the priority of the item direct with Premier Baird's office. ---Yeah, I, I'm just trying to recall. I, I don't recall. I don't, I wasn't aware, at the time of this email, whether any discussion had occurred. I know that there's a subsequent email where it's like, oh, the Premier's Office is okay. I, I wasn't involved in any of those discussions.

20

So we'll come to that in a moment. But before I do that, I tender the email from Mr Toohey to Ms Paudel, P-a-u-d-e-l, 6 December, 2016, 2.28pm, page 112 of volume 26.2.

THE COMMISSIONER: That will be Exhibit 386.

30 **#EXH-386 – EMAIL FROM MICHAEL TOOHEY TO SHARON PAUDEL REGARDING WAGGA WAGGA CLAY TARGET FACILITY SUBMISSION DATED 6 DECEMBER 2016 AT 2.28PM**

MR ROBERTSON: If we go back to page 111, we'll start in about the middle of the page if we can. I'd like to show you first Mr Broadhead's email to Mr Meulengracht, Ms Graham, copied to you.---Ah hmm.

It's 11.57am, so just before the email that I showed you a moment ago. "We've had some significant feedback on the submission from the Premier's Office." See that there?---Yes, okay.

40

"Could one or other of you please give me a call urgently?" See that? ---Yep.

Do you recall whether it was you that made that call? Appreciating that this email wasn't directed immediately to you, it was to – you were copied to it but it was sent to Mr Meulengracht and Ms Graham.---I, I can't recall whether it, I had a lot of conversations with Mr Broadhead about this time, an awful lot. I can't recall whether it was Nick or I that responded to this

specific email, but we've, Mr Broadhead and I were in, you know, we were consulting quite a bit over it.

Anyway, if you just go up the page a little bit, you'll see it looks like at least Ms Paudel may have had a discussion because you can see she says, "I spoke to Kent at DPC since Nick is not here today. It may be best to talk directly to him to understand DPC's concerns." See that there?---Yep.

10 "Also Matt has since approved the submission document so it's ready for secretary approval now." See that?---Yes.

The reference to Matt, who was that a reference to?---Matt Miller, the Chief Executive of Office of Sport.

20 And she goes on to say, "I'll send it through shortly." Does that assist at all in recalling whether you had a further discussion with Mr Broadhead, perhaps leading to the email that you and I referred to or that I asked you about a few minutes ago?---Well, yeah, he, yeah, I, I, I – well, the email above it at 2.27, by then I'd spoken to Kent Broadhead, yeah.

And so you're saying "The MO," meaning minister's office, "needs to speak to the Premier's Office." See that?---Yep, yep.

30 Does that refresh your memory of the substance of a communication with Mr Broadhead concerning this issue?---Yeah, it does. Thank you. It's, it's the same issue, from memory, it's the same issue that he pointed out in his email what, given the gaps in, in the submission in terms of the, you know, the robustness of the information, what was the rush. Why, why did this need to go to ERC as early as it, as it was being pushed, why couldn't it wait until the new year to do a little bit more standard diligence on it.

Did you ever get an answer to that question, be it on 6 December or at any other time?---No.

I tender the email on the screen, the email from Mr Toohey to the Office of Sport EMS ministerials, plural, mailbox, 6 December, 2016, 2.27pm, page 111, volume 26.2.

40 THE COMMISSIONER: That will be Exhibit 387.

#EXH-387 – EMAIL FROM MICHAEL TOOHEY TO SHARON PAUDEL REGARDING WAGGA WAGGA CLAY TARGET FACILITY SUBMISSION DATED 6 DECEMBER 2016 AT 2.27PM

MR ROBERTSON: Can we go then please to page 191, still in volume 26.2? Now, this might be an example of the kind of communications that

you were having with Treasury that you referred to before in terms of the formulation of the recommendation, is that right?---Yep, yep.

So here's an email from you to Mr Milner, M-i-l-n-e-r.---Josh Milner, yep.

Treasury, 9 December, 2016.---Yep.

It then identifies a particular a form of potential resolution. Do you see that there?---Yes, yes.

10

And is this right, this is effectively debate or discussion between your agency and Treasury as to how the recommended resolution should be formulated for consideration by the Expenditure Review Committee of Cabinet?---Yep. So where we were up to in the process with all of this, we'd had some editing highlights. I remember, you know, some of the discussions. I had to, or editing suggestions from Mr Broadhead just around, around the wording, the number of recommendations within the submission. So the key recommendation at this point remained this, the conditions around, around the approval. So it, you know, where the money was to go through at this, this point in the proceedings, it was that the money would go from ConFund to Office of Sport, that's just really standard, and then before it was released, there would be a funding agreement and these would be key conditions in that agreement and without that, the deal was off as it were. So, so there's no allocation, so, and this goes back to what I thought would, from, in November was required to safeguard the government's interest but we needed to, well, well, it's there, to, to go through a competitive tender, which would have required a, a suitable designer, you know, architectural work and design work, put a cost in, a project delivery plan and the, the financial risk beyond the, by this stage, the 5.5 was all, going to be fully borne by ACTA.

20

30

But I think you used the phrase in that answer, in effect, if you don't comply with these conditions the deal's off, did I get that right?---Yeah. Yeah, yeah, yeah. Sorry, that, I was just being colloquial. The - - -

And so by that, using the colloquialism, but by that do you mean that at least so far as you were concerned, the approval of this recommendation or approval of this Cabinet submission by the ERC would not mean that money's in the bag, as it were, but rather that a further process would need to be undertaken to confirm or not whether the funding ultimately flows? ---Yeah. That's, that, that's correct. Yeah, sorry about the colloquialism but the, I envisaged at that point that there would be a formally, a formal, excuse me, binding legal agreement before the release of any funds, there would be conditions in that, in that, in that agreement before the release of any funds and if those conditions were not met, then the funding agreement would be terminated, and that you wouldn't allocate the - my recommendation was that the money would not be allocated, you know, on a best endeavours point of view, that there were, there were specific points

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to mitigate financial and delivery risk that ACTA had to meet, and that's what, so that's what those points were included from November 16 in the, the submission. Those points were, in my view, critical to protecting the government's financial interest, given the state, the condition of the original funding submission.

10 But is it right to say that, at least as a matter of ordinary practice in your experience, these kinds of conditions or these kinds of issues aren't dealt with by way of conditions – you've got the funding allocated and here's
10 some conditions subsequent – but rather these are things that are usually done to start with, confirm cost estimates, develop project delivery plan and the like, before it even sees the light of day in an ERC submission?
---Absolutely. And, and that's, if we go to the capital business policy, you know, the business case policy at the time that this occurred, the, the Treasury policy envisages two stages. There's a preliminary where the costs don't have to be robust, the so-called P50 cost estimate, but it's based on a design. You've got to know, well, if I think it's going to cost \$5.5 million, what is that based on? And then by the time you get to the final
20 business case, the probability of the cost estimates is at the so-called P90, so I'm 90 per cent confident that these costs are robust, and it can be based on,
20 there's multiple factors but the most robust is that you've got an expression of interest or some sort of quotation from industry that says it's going to cost, you know, cost you \$6.7 million to build this, this. And none of that was present. And then the second part of it was, okay, so if you were to give the money, tell me how it's going to be delivered? Like, what will be built by when? How do we manage that process? It's just fundamental.

30 But I'm right, aren't I, that those fundamental matters are usually dealt with at the front end of the process - - -?---Yeah.

30 - - - before it even sees the light of day in, for example, an ERC submission?---Yeah, yeah.

I tender the email on the screen, email from Mr Toohey to Mr Milner, 9 December, 2016, 12.30pm.

THE COMMISSIONER: Exhibit 388.

40 **#EXH-388 – EMAIL FROM MICHAEL TOOHEY TO JOSH MILNER REGARDING GRANT TO THE AUSTRALIAN CLAY TARGET ASSOCIATION DATED 9 DECEMBER 2016 AT 12.30PM**

MR ROBERTSON: I'd like to just jump back, for context, to page 167. That was 9 December, Mr Toohey. I'm going back to the preceding day, 8 December.---Okay.

Just to give some context around one of the answers that you gave a little while ago. See the top of the page, 8 December, 2016, 4.03pm.---Yep.

To Mr Landrigan and to you, copied to Mr Doorn. “I advise that PO is happy for this to progress.” See that?---Yep.

“Can we try again with DPC?” See that?---Yep.

And DPC is Department of Premier and Cabinet, I take it?---Yep. Yep.

10

So how is it that it got from Mr Broadhead questioning why the submission was in effect so urgent as of 6 December, 2016, and some what I think he described as significant feedback from the Premier’s Office, that’s Premier Baird’s Office, to the Premier’s Office being happy for this matter to progress as at 8 December, 2016?---I, I can’t answer that. There’s, one of the, whatever day, 4th or 6th, one of Mr Bentley’s emails was copied to – look, I’d have to, you’d have to show me and I’d go that’s the name, but somebody in the Premier’s Office at that point. I don’t know how we went from, you know, “What’s the rush? Why can’t we wait? Why can’t we wait for, you know, more information?” the issues that Mr Broadhead had raised, to the Premier’s Office being satisfied. I, I, I don’t know.

20

Well, is this at least right, you’re aware that the Premier’s Office had some concerns or questions, but you yourself weren’t able to deal with them and assuage those concerns?---That’s correct, yep.

We can see from this email somehow the Premier’s Office was happy for it to progress, but you weren’t the source of it changing from “We’ve got some concerns, why can’t we kick it into next year” - - -?---No, no.

30

- - - to 8 December, 2016, the Premier’s Office is happy for this to progress, is that right?---That’s correct, yep.

Commissioner, I tender the email on the screen, email on behalf of Mr Landrigan, L-a-n-d-r-i-g-a-n, to Mr Toohey, 8 December, 2016, 4.03pm, page 167, volume 26.2.

THE COMMISSIONER: Exhibit 389.

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#EXH-389 – EMAIL FROM MARIA YU-SAPINOSO ON BEHALF OF MARC LANDRIGAN TO MICHAEL TOOHEY AND PAUL DOORN REGARDING ACTA WAGGA WAGGA BID DATED 8 DECEMBER 2016 AT 4.03PM

MR ROBERTSON: Can we then go to page 196, still of volume 26.2, and we'll zoom into about the middle of the page if we can.---Oh yeah, I remember this one.

Now I've just shown you an email from a Ms Hodson, H-o-d-s-o-n, to Mr Meulengracht, 9 December, 2016, 12.28pm, and I think when I showed that to you said something like, "Yeah, I remember this."---Yes, I'm sorry.

10 Don't need to apologise at all. Why did you remember, what memory did this jog?---The, okay, where we were by now, Josh Milner and there was another officer from Treasury, Yogi Savania, I can't remember the other officer's name, sorry, we'd been debating around the wording of this recommendation, this was the key recommendation, and Treasury is very rigorous in how things are to be worded, and we'd landed the wording of recommendation 1. Kent Broadhead had been from DPC had been comfortable with it. Rosie Hodson, Ms Hodson comes in after I believe discussions with the Chief Finance Officer Miles somebody, whose, anyway, whose name escapes me – from DPC – who wanted the wording changed from "allocation" to "appropriation", and at that point in the
20 proceedings it was like, I just want this finished, is it really going to be material to the difference? And there was conversations, they were very insistent, it was just a lot of work for, I wasn't sure was going to make a material difference. But it was just the reaction of having negotiated something successfully with Treasury, to get this was like, oh, do I need to go through all this again? There was enough pressure getting this finished as it was.

But at this point in time has the submission even been uploaded whether in a draft - - - ?---No.

30 - - - or any other form to the ERC system?---No, no, between Treasury, DPC and myself and Office of Sport, we're trying to get it, you know, ready for, you know, the intention was for consultation with the other agency clusters.

40 So is this right, as at 9 December, 2016 we have it on the agenda for 14 December, 2016 but we don't even have an ERC submission in draft or otherwise uploaded to the ERC system?---That's my understanding. The information from emails that I was copied in and/or forwarded to me from the Treasurer's Office, it was locked in for ERC on 14 December and the submission, the recommendations weren't changing much. But, no, it hadn't, it hadn't been lodged, there hadn't been a draft lodged. There'd been copies emailed around but there was no – if we go back to the formal process, no, there was nothing on eCabinet.

You remember in that process, even if one's to jump directly to the lodgement stage, that's supposed to be done a minimum of six days before the meeting?---Yes, that's correct.

And at least at this point of time, in fact, or even subsequently, you weren't aware of or you weren't informed of the reason for dealing with this matter so urgently?---No, no, you know, the questions around linking it to events, the DTL Championships, the Invictus Games argument or claim, none of that, I didn't know why it was urgent. It was just, the request was to get it done and I was focused on that.

10 Commissioner, I tender the email on the screen, which ends with the name of Mr Toohey to Mr Milner, 9 December, 2016, 12.39pm, page 196 of volume 26.2.

THE COMMISSIONER: Exhibit 390.

#EXH-390 – EMAIL FROM MICHAEL TOOHEY TO JOSH MILNER REGARDING CIRCULATION FOR SC0999-2016 WAGGA WAGGA CLAY TARGET FACILITY DATED 9 DECEMBER 2016 AT 12.39PM

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MR ROBERTSON: We'll do the next couple of documents fairly quickly page 257.

THE COMMISSIONER: Volume?

MR ROBERTSON: Of volume 26.2 still. If we just zoom in to the middle of the page, do you see 9 December, so still on 9 December, 1.55pm?
---Yeah. Yeah.

30

"Marc, can the MO please advise if they're okay with the sub, so that the Cabinet process can be formally initiated?" See that there?---Yes.

So by about 2.00pm on 9 December, we still haven't uploaded anything into the eCabinet. Is that right?---That's correct, yeah.

40 Do you recall when ultimately anything was uploaded to the eCabinet system in relation to what I've described as the ACTA project?---It would have been, from memory, around the, I think it was around 13 December, so the, the day before ERC. It, it was, I, I, I couldn't give you the exact date, but it, it, it might have been 24 hours beforehand.

A day or two before - - -?---Yeah, yeah, yeah, yeah.

- - - the ERC's meeting itself. Is that right?---Yeah, yeah.

Now, as a matter of practice, where your minister is a proponent minister in relation to a particular Cabinet submission or ERC submission, in your

experience, is your agency involved in assisting the proponent minister in any preparation or the like for the ERC meeting?---The meeting itself?

Yes?---Yeah. The agency usually prepares speaking notes, you know, there may be, depending on the complexity of the proposal, there may be, you know, more detailed briefings that are given, there may be meetings around it but at, at the very least, speaking notes are prepared.

10 Now, Minister Ayres was not a member of the ERC as at December of 2016. Is that right?---No, that, that's – sorry. That, that's correct. I, I, I'm, I'm sure he wasn't.

But he was the proponent minister in relation to the submission. Is that right?---Yes. Yeah.

Is this right? If one wishes to get something before Cabinet or a committee of Cabinet, one needs a minister to put it forward as the proponent minister of the submission?---Yes.

20 That's the procedure as you understand it?---That's, yes, exactly.

And so whilst you were drafting the ERC submission - - -?---Yeah.

- - - it wasn't you, Mr Toohey, turning up to the ERC and advocating for it? ---No.

It was you assisting your minister, Minister Ayres, in putting that together. ---That's correct.

30 Is that right?---That's correct.

I don't think I've tendered the email on the screen?

THE COMMISSIONER: No.

MR ROBERTSON: I tender the email on the screen, email chain ending with an email from Mr Toohey to Mr Landrigan 9 December, 2016, 2.57pm, page 257 volume 26.2.

40 THE COMMISSIONER: Exhibit 391.

#EXH-391 – EMAIL FROM MICHAEL TOOHEY TO MARC LANDRIGAN AND ROSIE HODSON REGARDING ACTA WAGGA WAGGA BID DATED 9 DECEMBER 2016 AT 2.57PM

MR ROBERTSON: And please go to volume 26.3, page 116. Can we zoom in to the bottom of the page? I'll show you an email chain 12 December, Monday, 12 December, 2016. Do you see there an email from Ms Little to the Office of Sport EMS ministerials mailbox?---Yes.

Who gets the emails from that mailbox, at least, as of December 2016?
---From the minister's office? Well, ordinarily, EMS, so that's the, the, the team headed by Nick Meulengracht, Sharon Paudel, whose name we saw earlier. There were other officers working there at the time. I can't recall
10 their names, sorry.

But if we then just zoom up the page a little bit, you see that that email box then sends an email to you with a copy to Mr Doorn.---Yeah.

"Please see below urgent request for speaking points for the Cabinet submission, development of sporting infrastructure", et cetera.---Yes.

See that there?---Yeah.

20 And then "due to EMS: urgent."---Yeah.

Obviously quite urgent 'cause it's 12 December and the meeting's on 14 December, 2016?---Yeah.

And then if we zoom up the page a little bit further, you it seems within quite short order, within a few hours, send back, if you have a look at the attachments, "speaking points – development of sporting infrastructure". See that?---Yeah. Yeah.

30 And I'll just show you the attachment. Go to page 118 first. Part of the attachment.---Yeah.

You'll see prepared by you, contents and accuracy endorsed by Mr Doorn, approved by Mr Miller?---Yeah.

If we then turn to next page, see there "Suggested speaking points/notes"?
---Yep.

40 So I take it this is a document that you prepared?---Yes.

Do you happen to know whether this was the last draft of the document that you prepared?---I understand that the version that the minister took in was different to this. I, I wasn't aware of that at the time.

So, is this right, doing the best you can, this is the last or close to last version of the document as you prepared it?---Yeah, can, can we just scroll up?

Of course.---Can I just read it, sorry? 5.5, yeah. Okay, yep. Oh yeah, yep. Yeah, yeah, yeah. They're my, like, building up my, my, the second-last bullet point, the one beginning with "ACTA's application" was, I thought was relevant to any consideration in the application.

10 Just to go back to one of the answers you gave before, I think you said you understand that some changes were made between the document that we can see on the screen and the one that the minister ultimately had for the purpose of the ERC meeting, is that right?---That's, that's what I said, yes.

Those changes weren't made by you, right?---No, no.

Who were those changes made by, do you know?---I think, I think the, I think it was the minister's office, well, nobody else in Office of Sport would have but my, yeah, my understanding is that the minister's office altered the advice, which, yeah.

20 So at least as a matter of practice it would ordinarily be the agency who would prepare at least a first draft of speaking notes for a meeting of Cabinet or a committee of Cabinet, is that right?---Yeah, that's correct.

In your experience is it common or uncommon for those speaking notes to be changed or amended at the ministerial office level?---In my experience it's uncommon.

If we can go to page 193. I'll come back and tender that document in a moment, if that's convenient, Commissioner. Page 193, volume 26.3.---Oh yeah, yeah. I didn't write this.

30 Now, when I put that - - -?---Oh, yeah, I didn't write this.

- - - document on the screen you said, "Oh, yeah." Does that refresh your memory, or does that jog a memory of a, of an amended document or speaking notes?---If, if, if this is, if this is the version that went in, I didn't write, this is amended from, from what I wrote. This, this - okay. So if we go through it, you know, the, the approval point, the sub-points under that, yeah, that's non-controversial, and then the highlighted part, "Note, if asked," I didn't write that.

40 So just pause for a moment. So you're drawing attention to about the middle - - -?---Yeah, I didn't write this document.

- - - of page 193, there's a highlighted passage that says "Note, if asked, the Australian Clay Target Association has advised that the World Down the Line Clay Target Championships in March 2018 will continue in Wagga Wagga even if the upgrade is not completed."---Yeah, yeah.

That's not something that you wrote?---No. I, I mean, it's a poor, the other document. By this stage I knew that it was the case but, no, I didn't, I didn't, didn't write that and I think it shows that this wasn't the upgrade wasn't material. You know, this, this is to say that they needed the upgrade for the DTL Championships and it was just irrelevant. If anything it was going to put that, put them at risk because you've got construction going at the time.

10 If we just turn to the next page, to page 194, just have a look at the third dot point. We'll just zoom into that. See the third dot point in bold? It starts with "Due to the urgency with the championships in March 2018" and then it goes on to say "and the of the submission case not being subject to any agency consultation to or independent review" et cetera. Do you see that there?---Yeah, yeah.

But on the previous page, as I showed you, it said, "If asked, the Australian Clay Target Association has advised" et cetera.---Yeah.

20 Why did you have a little chuckle when you saw - - -?---Well, it, it contradicts itself. It, it, it's like, if, if we just take a couple of steps back. ACTA already had the 2018 DTL Championships. There's this question which isn't highlighted in the notes about if, if construction's going ahead, does it, what does it mean for the facility and the ability to host it? And then the second page, then this page, it's "Due to the urgency of the championships in March 2018." It's like what's the point they're trying to make? It doesn't reconcile with the claim made on the previous page. Sorry, is that - - -

30 If we go back to the preceding page, have a look at the highlighted section. ---Yep.

Do you see how it says, "Note, if asked, Australian Clay Target Association," et cetera. See that there?---Yes, I, yes, I can.

40 Is it common in your experience for speaking notes or briefing notes for the purposes of committees of Cabinet, or perhaps the Cabinet itself, to have "if asked, say these things" and then another series of things that say "here are some dot points or things you might want to say"?---Not, not in my experience. It can be, it can be a way of presenting information in house holder notes or budget estimate notes that, where there's normally a "if asked" and then there'll be, you know, specific points, whatever the, the question is. But, no, in my experience, this "if asked", it's just meant to be a simple sort of concise summary of what the proposal was about and the benefits of the proposal. That's the purpose.

So you're saying an "if asked" perhaps dot points or "if asked" points are not at least unusual in the case of, for example, parliamentary committees or perhaps briefing notes for the purposes of Question Time?---Yep, yep.

But that's less likely or at least less common, in your experience, in relation to speaking notes for the purposes of Cabinet or a committee of Cabinet?
---In my, in my experience it's less common.

10 But this "if asked" point, at least from your perspective, was quite important to the ERC's consideration of the Cabinet submission that you prepared, is that right? At least as you saw it.---Well, yeah, and as I saw it, it, it, the, the championships were not, I don't think, material to whether or not the grant should, should go ahead per se. It, it wasn't, because ACTA didn't need the grant to host the championships. They already had the event, the (not transcribable), so in some ways it's irrelevant. I thought that there was a potential relevance – and not, not that others picked up the point – of if, let's say just for the, theoretically, if construction had started late or wasn't completed in time, would it be a disruptive effect on the event? Would it, could it mean that they would, you know, lose the ability to host the event? That part was relevant. But as far as securing the event, they already had it. It's like, yeah. The relevant part was the project plan, which we didn't have, not whether or not the money was going to be granted.

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Commissioner, I tender first the email from Mr Toohey to Office of Sport, EMS ministerials mailbox, 12 December, 2016, page 116 of volume 26.3, including the attached speaking notes.

THE COMMISSIONER: Exhibit 392.

30 **#EXH-392 – EMAIL FROM MICHAEL TOOHEY TO SHARON PAUDEL REGARDING ERC CLAY TARGET SHOOTING SPEAKING POINTS DATED 12 DECEMBER 2016 AT 2.17PM**

MR ROBERTSON: And then I tender the last document that I went to, which was, it starts with an email from Mr Landrigan to Mr Hall and another, 14 December, 2016, 2.28pm, page 192, volume 26.3, including the attached speaking notes.

THE COMMISSIONER: That will be Exhibit 393.

40

#EXH-393 – EMAIL FROM MARC LANDRIGAN TO JO RYAN AND CHRIS HALL REGARDING AUSTRALIAN CLAY TARGET SHOOTING – ERC TALKING POINTS WITH ATTACHMENT A – ERC SUBMISSION

MR ROBERTSON: Now, did the ERC submission that you ultimately prepared ultimately get considered by the ERC, as you understand it?---As I understand it, yes, it did, yep. On 14 December.

10 And what was the result of that consideration?---There were the, the recommendations were, were approved. In the, the ERC decision, there was, there was another, there was another decision which, which, which wasn't recommended, but it was, from memory, it was about the potential source of funds and it triggered off a whole range of process and consultation from late December, well, into 2017.

So how did you find out what the ERC had decided in relation to the submission that you prepared?---Oh, roughly, it was just before Christmas, to roughly eight days, nine days after I, I saw a, a copy of the, of the decision.

20 And so you got a copy of the decision itself as distinct from some sort of second-hand report as to the substance of the submission, is that right? ---That's correct.

Substance of the decision I should say.---That's correct, yes.

Can we have on the screen, please, page 255 of volume 26.3. I might observe, Commissioner, I'm about to show an Expenditure Review Committee Decision but I note the ruling you announced and published earlier today regarding Cabinet documents.

THE COMMISSIONER: Yes.

30 MR ROBERTSON: Page 255, volume 26.3.---This is it.

I think you've just said, "This is it," so this is the decision of the Expenditure Review Committee to which you referred before?---Yes.

If we can just zoom in on the text, please, about halfway down the page, you can see Roman (i) is the approval of expenditure of \$5.5 million, do you see that there?---Yes.

40 But there's then a Roman – I withdraw that. That Roman I was in effect picking up your recommendation or your proposal in the draft ERC submission that you prepared, is that right?---That's correct.

But Roman (ii) is not something that was in the ERC submission that you prepared, is that right?---No, that's correct.

And so that says, "Approve that the grant in recommendation (i) should be sourced from the Regional Growth – Environment and Tourism Fund" - - -? ---Yes.

- - - “and comply with the criteria to access the fund.”---Yes.

Do you see that there?---Yes, I can.

Is this right though, that wasn't any part of your involvement in the ERC submission, is that right?---No.

10 At the time that the ERC submission was uploaded to eCabinet, and indeed up to and including the time that this decision came to your notice, your understanding was that the expenditure would be allocated or provided or appropriated or spent from the consolidated fund?---That's correct and by the time, by the time it was lodged, that it was going to be a grant so there was, there was this internal sort of bureaucratic discussion about how it would be shown in the submission, but whether or not it would be a grant directly to rather than a capital approval. So, but this, any reference to the Regional Growth – Environment and Tourism Fund, this was news.

20 But at least in the ERC Submission as you prepared it, it was going to be a grant to the Office of Sport, is that right?---Yes, yes.

So in effect, money from the consolidated revenue fund comes to the Office of Sport, Office of Sport administers that by paying that money through to ACTA?---That would have been a funding agreement as a whole process with safeguards.

30 You don't just cut a \$5.5 million cheque, you have a funding agreement which might say once you reach a particular stage of the works we'll pay you so and so amount of money - - - ?---Exactly.

- - - and so on and so forth.---Yes.

But are you saying the Roman (ii) that we can see on the screen was in effect news to you until the ERC decision came to your notice towards the end of 2016?---That's correct, yeah.

40 Do you know what the Regional Growth – Environment and Tourism Fund is?---Oh, it was another fund available to government. I hadn't had any experience with it before, before then, sorry.

It wasn't, that wasn't a fund that was administered through the Office of Sport?---No, no.

In fact, that's one of the funds, The Regional Growth – Environment and Tourism Fund is a fund forming part of the Restart New South Wales Fund that I think you drew a brief attention to this morning, is that right?---Yes, that's correct, yes.

So you see the Roman (ii), the new one that was added, should be sourced from the Regional Growth – Environment and Tourism Fund and comply with the criteria to access the fund.---Yes.

Then B, subject to the finalisation of a satisfactory business case noting this can be approved by the Treasurer - - -?---Yes.

- - - that's Treasurer Berejiklian at that point in time, following Infrastructure NSW assurance processes linked to the fund.---Yes.

10

And C, should be capped at \$5.5 million with risk associated with project costs to be carried by ACTA.---Yes.

I think you were explaining before that the addition of that additional decision, the Roman (ii) aspect of the decision, then had a series of in effect, administrative flow-on consequences, is that right?---That's correct, yes.

20

Can you just explain, at least in general terms, what those consequences were?---The, okay, so the, what followed then through, towards the end of December but certainly through January, was a whole range of correspondence between myself, Infrastructure NSW and it was, it was part of Department of Industry. It might have been Office of Regional Development. I, I'd have to – the officer was Margaret O'Dwyer and there, and, and INSW, Infrastructure NSW and Margaret O'Dwyer's office were, were trying to be briefed and brought up to speed with where things were at with, with the project, what information there was relating to the, the business case, what information there was around assessment and, and so on,

30

But is the effect of what you're saying that one of the consequences of having the Roman II that we can just see was that, at least as a practice matter, it ceased to be an Office of Sport project as originally contemplated, get the \$5.5 million from consolidated revenue to Officer of Sport, Office of Sport pays to ACTA, subject to funding agreements and the like that you and I discussed - - -?---That's, that's, that's correct. Yeah.

It rather becomes an Office for Regional Development issue.---Between the Office of Regional Department and Infrastructure NSW at this point, yeah.

40

Infrastructure NSW being relevant because, as we saw on the ERC decision a moment ago, it was subject to Infrastructure NSW processes?---The, the, yeah, assurance processes.

Assurance processes.---Yes.

And I'll just show you an email in that context, page 368 of volume 26.3. This is 19 December, 2016, from Mr Doorn to you. We'll zoom into the top of the page.---Oh, yeah. Yeah.

Mr Doorn to you, "FYI, looks like it's now up to INSW." See that there?
---Yes, I can.

So do we take it from that and from what you were explaining before that as least so far as the Office of Sport was concerned, once the ERC had decided to add the additional paragraph, the Roman (ii) paragraph, it really ceased, for all intents and purposes to be an Office of Sport project but rather became an Office of Regional Development/Infrastructure NSW project?
10 ---That, that was, yeah, that's how I interpreted what Paul wrote, yep.

I take it there had to be some in effect handover because you'd been doing the work so far?---Yep.

But is it right that, at least so far as you understood it, come the ERC's decision coming to your notice in December of 2016, it wasn't an Office of Sport's problem anymore, or its project anymore, it was those other agencies, Office of Regional Department and Infrastructure NSW?---Yes, yes. That's, yep, that's correct.
20

I tender the email on the screen, email from Mr Doorn to Mr Toohey, 19 December, 2016, 5.09pm.

THE COMMISSIONER: That will be Exhibit 394.

#EXH-394 – EMAIL FROM PAUL DOORN TO MICHAEL TOOHEY REGARDING AUSTRALIAN CLAY TARGET ASSOCIATION FACILITY IN WAGGA DATED 19 DECEMBER 2016 AT 5.09PM
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THE COMMISSIONER: Were you going to tender the ERC decision, Mr Robertson?

MR ROBERTSON: I was, thank you, Commissioner. I tender the ERC decision of 14 December, 2016, page 255 and 256 of volume 26.3.

THE COMMISSIONER: That will be Exhibit 395.

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#EXH-395 – DEPARTMENT OF PREMIER AND CABINET EXPENDITURE REVIEW COMMITTEE DECISION DATED WEDNESDAY 14 DECEMBER 2016

MR ROBERTSON: Just on that decision though, Mr Toohey, you would have seen that the only thing referred to in that document that I showed you, the only project that was referred to in that document was the ACTA

project, the \$5.5 million approval of expenditure. In your experience, is it unusual to have a single agenda item before the Expenditure Review Committee dealing with a proposal of expenditure of \$5.5 million as distinct, for example, dealing with matters of significantly further money, be they to do with stadiums or be them to do with other matters of much more significant dollars?---Oh, yes. That's the, that's the case. I've always assumed that 14 December had several items on the agenda because that's the way things, in my experience, typically ran.

10 Well, it may well have had, there may well have just been the decision with respect to one of many agenda items, but really what I'm asking is, is it unusual in your experience for the ERC to be concerned with \$5.5 million, a significant amount of money, but it's not a sport stadium, for example, it's not a hospital, it's nothing along those lines. Is it unusual in your experience for the ERC to be asked to approve expenditure in the single-digit millions as opposed to the tens of millions, hundreds of millions, billions?---Oh, yeah. It, it's, it's unusual.

20 Is this right, the more usual course for expenditure of that kind would either be to spend it through an existing grant program or, alternatively, fund it through the new policy proposals process that you and I discussed at the start of your examination?---Yeah. Yeah. Yeah. Yes.

Go then to volume 26.4, page 106. This is an email from Ms Davis to you. 9 January, 2017 is the end of the email chain.---Yep.

30 But it's an email chain, so we're going to have to jump down to the bottom of the chain and move up, so can we go to page 107, please, and zoom into the bottom half of the page? So there's an email from Mr Hall to Mr Miller. Mr Hall was the chief of staff to Minister Ayres as at December 2016, is that right?---Yes, yep.

Mr Miller, Chief of Staff, Office of Sport?---Yep.

And you'll see just for context, it was determined that the business case had to be reviewed or redone, unclear which.---Yep.

40 By Infrastructure NSW so it can qualify for funding from the Regional Growth – Environment and Tourism Fund. See that there?---Yep, yep.

Is that consistent with your understanding of what the ERC had decided in December of 2016?---Yes.

And so does that mean in substance, whilst there was a decision authorising or approving the expenditure of the \$5.5 million, it wasn't money in the bag, as it were.---No.

Because, in a sense, the ERC had picked up your concern and wanted a proper business case to be satisfied that the money should be expended. Is that the position as you understood it?---That's how I interpreted it, yep.

And if we move up the page a bit, Mr Miller delegates it to Mr Doorn.

---Yep.

10 And you can probably guess what happens next. Mr Doorn in effect delegates it to you, although you'll see, if we go back a previous page, back to page 106, you'll see Mr Doorn sends an email to Mr Betts, 19 December, 2016, see that there?---I, yeah, I wrote that email.

You wrote it for Mr Doorn but Mr Doorn sent it off, is that right?---Yeah, yeah, I mean, that's just, yep, yep.

But that was trying to provide a summary for Mr Betts' benefit as to the work that had been done within the Office of Sport in relation to the ACTA proposal, is that right?---Yeah, just to, the project's on a page, as it were, just - - -

20

Mr Betts, at that point in time, was the Chief Executive Officer of Infrastructure NSW, is that right?---That's correct.

And so is this in effect you and the Office of Sport handing over to Infrastructure NSW, perhaps also to the Office of Regional Development, the running, as it were of attempting to get the ACTA proposal from, in effect, conditional approval from the ERC to actual approval and money flowing?---That's, that's correct. Yep. It's just meant to be a factual summary and, you know, not editorialising.

30

I tender, Commissioner, the email from Ms Davis to Mr Toohey, 9 January, 2017, 1.13pm, page 106 to 108. Volume 26.4.

THE COMMISSIONER: That will be Exhibit 396.

#EXH-396 – EMAIL FROM JENNY DAVIS TO MICHAEL TOOHEY AND JILL BETTAY REGARDING AUSTRALIAN CLAY TARGET ASSOCIATION ATTACHING DOCUMENTS DATED 9 JANUARY 2017 AT 1.13PM

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MR ROBERTSON: But to be clear, just as you understood it, as at the end of December 2016, there's no guarantee that any money's going to flow at all.---No.

There's an approval but it's a conditional approval, including on the kind of work that you always thought should be done - - -?---That's correct.

- - - in fact being done.---That's correct.

So it wasn't ripe, as it were, for everyone to be satisfied that there's going to be a new facility in, at the ACTA premises?---I, I've got a sense what's going to appear. That's, that's absolutely correct. There were material processes to go through before any announcement could be made.

10 You said you got a feeling about what's going to happen next. What do you mean by that?---I, I know that early in January, I can't remember the, the date, the local member announced the, sorry, yeah, Mr Daryl Maguire announced, made a public announcement on funding.

So we go to page 67 of volume 26.4. I'll show you what I think is what you're referring to. Is this the press release or the announcement that you were referring to?---Yeah. Yeah.

20 You let out a bit of a sigh. Why are you letting out that sigh?---I, I was, I was just surprised that this announcement had been made. I, I may have been too conservative in my view, but I thought it was a long way of being guaranteed. And a personal opinion was that I thought this was trying to corner, trying to put, trying to wedge, you know, the, the funding being guaranteed ahead of a process that I thought was important to make sure that funds were protected and, and that, how, how do, how does one, it makes it very difficult for the, a business case process to go through, it makes it very difficult for people then to turn around and say, "The money's not going, going, going to be released," when you've got press releases like this. I, I thought it was a, a premature statement. Well, it's a personal opinion.

30 So, in effect, what you're drawing attention to the fact that an announcement was made by the local member that says things like, there's an announcement of \$5.5 million?---Yeah.

And see the second paragraph, "This funding will be used to build a new Administration, club and function centre," et cetera - - -?---Yeah.

40 - - - didn't, as you understood it, represent the truly correct position or at least the formerly correct position which was that the ERC decision was subject to a series of conditions, including importantly, a satisfactory business case and assurance processes through Infrastructure NSW?
---Exactly so. Yeah. Precisely.

THE COMMISSIONER: So your surprise was that this announced the funding - - -?---Extremely.

- - - as if it was a fait accompli?---Yeah. Extremely surprised.

MR ROBERTSON: Did you see this press release in draft before it went out?---No.

I take it from what you said if you had, you would have said “bad idea”?
---Exactly. I mean, yeah. I, I, I though this, this was premature and would interfere with the, with the proper consideration that, that needed to occur to make sure that the project would be delivered.

10 And so does that mean that you’re saying in a practical sense, an announcement of this kind might be able to put some pressure on the bureaucracy, as it were, to cause for the funding to actually flow in circumstances where all that had happened at that point in time was an agreement to expend money or a decision to expend money but subject to certain conditions?---Exactly.

As far as you’re aware, was anyone else within the Office of Sport asked to either prepare or comment upon this press release before it was issued?
---Not, not to my knowledge.

20 Is it a matter of practice, is that something that would ordinarily be done at the agency level or, in your experience, is that a matter ordinarily left within MPs’ offices, members of parliament offices and ministerial offices?---In, in my experience, agencies, agencies usually do most of the drafting. I mean, the, you know, the letterhead may change but agencies do most of the drafting to, to help out. So this was not typical.

So including in relation to media releases or press releases, the agencies typically do the drafting?---So that’s what I was referring to, yeah, yeah.

30 But not in this case, so far as you’re aware, at least?---Not, not that I was aware.

If we just scan down the page a little bit and have a look at the third paragraph, for example. “Mr Maguire said the improvements will deliver a multipurpose facility,” et cetera. And you’ll note that there’s no reference at all to any conditions in the kind that I showed you - - -?---No.

- - - a reference to the ERC decision?---Yeah.

40 And do I take it from what you said before, in the face of that, you would regard this media release as at least not telling the full story in that it says nothing about the conditions on the decision that the ERC had made?
---That’s correct, yeah. It is premature.

Commissioner, I tender the document on the screen - - -

THE WITNESS: Sorry. Can I just say one other thing about it?

MR ROBERTSON: Please.

THE WITNESS: I'm conscious that some of the things I, I'm, I'm saying now may be seen as sticking to a bureaucrat upset that a process wasn't followed. I mean, and I believe that there is a value in the process. But if we turn it around in a different way, where, where we were at this point, so we were based on the \$6.7 million, which goes back to the GHD, the highest of the GHD estimates in that first business case. There's the process and all, all the stuff that we've given the evidence today. So what would have been, like, one of the things why, apart from not following due process, but one of the risks that I saw at this point was that while ACTA may have been committing to, to bear any additional financial risk, what would we do if the project turned out to be \$10 million? Like, where's the, so where does that money come from? It, it comes from somewhere else that, that needs it. And we had nothing. We've, we've got an announcement that's going to be – this in my view, and I'll leave it to the experts – makes it very difficult for the people to say no. But we didn't know, we don't even, at this point we didn't even know if it was enough money. We didn't know if the, if they were capable of delivering it. And suddenly there it is out in the media. While in the background, you know, the bureaucracy did have a process I think to go through and minimise the financial risks to government. The real issue was why was this the best use of delivering even the clubhouse? Irrespective of it, that it stepped outside of due process, even putting all of it aside. It's very, very hard then for the government, in my view, to do anything but to deliver the clubhouse and - - -

THE COMMISSIONER: Even if the capital cost was greater than the capped amount of - - -?---Well, how are they going to say no? Because we didn't know, I mean, ACTA, we didn't know ACTA's ability to – let's just say it, it cost \$10 million. Could ACTA have bridged the gap, the extra 4.5 million? We had, that would mean that because it was committed to World Championships and blah, blah, blah, that government would have had to bail it out, and that's at the expense of something else. That's why the process matters.

MR ROBERTSON: And is that one of the reasons why, at least in your experience, as a matter of ordinary course, you deal with matters such as policy planning, project management, research, data collection, analysis, impact assessment and targeted consultation at the front end of the process. ---Exactly.

As distinct from making a decision, perhaps subject to conditions, making an announcement perhaps without referring to conditions, and then doing that kind of what I'll call due diligence at the end of the process.---Exactly. Exactly. It's just like - - -

In effect is what you're saying, you're not raising process for process' sake. ---No, absolutely not.

You're raising process for a particular reason that, in your experience, as someone who's worked in government all his professional life, knows actually matters.---Look, there's other projects I've worked on with, with, at Office of Sport where it's, you know, what I saw my role in there is that how do you deliver. Government wants to do X. How do you ensure, how do you work with other government departments, how do you make sure that X is delivered in a financially responsible and prudent way, rather than just, oh, well, yeah, you know, you know, treat ourselves like an ATM and just give money to whomever. That's, that's, that's one of the things that I found difficult with the press release. Sorry, yeah.

I tender that press release. Press release from Mr Maguire embargoed to 2 January, 2017, page 66 of volume 26.4.

THE COMMISSIONER: Exhibit 397.

**#EXH-397 – EMAIL FROM WAGGA WAGGA ELECTORATE
OFFICE TO ADRIANA LEWIS FORWARDING ANNOUNCEMENT
OF ATTACHMENT OF PRESS RELEASE OF NSW FUNDING FOR
NSW CLAY TARGET ASSOCIATION HEADQUARTERS IN
WAGGA WAGGA DATED 1 JANUARY 2017 AT 1.10PM**

MR ROBERTSON: Go then, please, to volume 26.7, page 383. Just some further context around one of the matters you were raising before. This is an email from Ms O'Dwyer to you 19 January, 2017. You'll see Ms O'Dwyer is part of the Office of Regional Development in NSW Department of Industry, do you see that there?---Yes, yes I can.

And she's asking you to give her a call but I just want to draw your attention to the second substantive paragraph, "The Office of Regional Development has been requested to lead the project to update the business project," do you see that there?---Yes.

I take it you would read that as being reference to business plan as opposed to business project?---Business, yes, business plan or business case, yes.

But is this right, Ms O'Dwyer indicating that the Office of Regional Development is leading the project as at January 2017 - - -?---Yep.

- - - was consistent with your understanding from about the end of 2017 into December 2017, sorry, 2016, I'm so sorry, namely that one of the consequences of the ERC decision was to cause for the Office of Regional Development and Infrastructure NSW to, in effect, be taking the running of the ACTA proposal as distinct from the Office of Sport?---That's correct.

I tender the email from Ms O'Dwyer to Mr Toohey 19 January, 2017 at 11.20am.

THE COMMISSIONER: Exhibit 398.

10 **#EXH-398 – EMAIL FROM MARGARET O'DWYER TO MICHAEL TOOHEY REGARDING ACTA FUNDING REQUEST FOR WAGGA FACILITIES – UPDATING BUSINESS CARE DATED 19 JANUARY 2017 AT 11.20AM**

MR ROBERTSON: So is that then the end of your involvement in the ACTA project now that the Office of Regional Development has been requested to lead the project or - - - ?---Oh it hasn't ended yet. There's a series of communications with Jenny Davis and, from Infrastructure NSW and Ziggi Lejins, if I pronounce that correctly, in NSW Treasury. It's all part of a handover by then.

20 So it's not because the Office of Sport ultimately become back involved, as it were, as running the project or running at least the funding process in terms of the project, but rather is providing some assistance given that it started as an Office of Sport matter, is that right?---Yep, yep.

And so, if we go for example, to page 382 of volume 26.7, do you see that?
---Yes.

30 You're responding to Ms Davis of Infrastructure NSW, this is who's looking after this, it is not a OOS, Office of Sport, project.---Ah hmm. Yep.

So you've got the context, if you have a look towards the bottom of the screen I think you there quote the email from - - -?---Ms O'Dwyer.

- - - Ms O'Dwyer, the Office of Regional Development, has been requested to lead the project to update the business project, sic. No funds have been received by Office of Sport?---That's correct, yes.

40 I tender the email on the screen, email from Mr Toohey to Ms Davis 6 July, 2017 1.29pm.

THE COMMISSIONER: Exhibit 399.

#EXH-399 – EMAIL FROM MICHAEL TOOHEY TO JENNY DAVIS REGARDING ACTA FUNDING REQUEST FOR WAGGA FACILITIES – UPDATING BUSINESS CASE DATED 6 JULY 2017 AT 1:29PM

MR ROBERTSON: We then go to volume 26.8, page 3, it was 6 July, 2017, we are now going to 8 July, 2017. This is an email from Ms Davis of Infrastructure NSW to various individuals, including yourself, Saturday 8 July, 2017, 12.14pm, do you see that?---Yes.

10 And then if you look at what Ms Davis says, she says, “This project is unusual. The ERC minute approved it before we ever heard of it, subject to conditions, including an unconditional recommendation.” Do you see that there?---Yes I can.

Do you agree with Ms Davis’ assessment that this project, in other words the ACTA proposal, was unusual?---I would agree with that part of what she said, yes, it was unusual.

In fact very unusual in your experience?---Very unusual, yep.

20 If we then go a little bit further on, unfortunately these paragraphs have run together, but there’s a paragraph that starts, “the ERC approval” and “our recommendation is with”, and an individual is identified there.---Yep.

Our recommendation doesn’t need to go back to ERC but it does need the Treasurer to approve it, do you see that there?---Yes. Yep.

30 Was that your understanding of the position as well, namely that there was a further process that needed to take place outside of the ERC, including approval from the Treasurer, but it didn’t need to go back to ERC?---No. The, the, under the, my recollection is, under the INSW Act, the, the Treasurer could approve funds from Restart or any of the sub-funds around it, yep.

So, in relation to Restart NSW, the relevant minister is the treasurer, is that right?---Yeah. That’s my understanding, yep.

THE COMMISSIONER: I think it’s under the Restart NSW Act, not - - -?---Yeah, yeah. Thanks, yeah, that’s for correcting – my, yeah, my mistake, sorry. But it is the Treasurer that approves, is, is, is the approving authority.

40 MR ROBERTSON: But the Treasurer, before approving, requires a recommendation from Infrastructure NSW, is that right?---That’s my understanding, yep.

And when we’re referring to Restart NSW, that’s a special fund of money within government that’s sourced from, amongst other things, what’s sometimes referred to as asset recycling, things like colloquially referred to the poles and wires sales and things of that kind?---Yep. That’s my recollection.

And so is this right, as you understand it, one can't get money out of the Restart NSW Fund or any of the sub-funds fitting within it unless at least two things happen. First, there's a recommendation from Infrastructure NSW and secondly an approval from the Treasurer of the day. Is that right?---That's my understanding.

10 And is this also right, as you understood it, Infrastructure NSW, at least as a matter of practice, wouldn't give approval in relation to – I withdraw that – a recommendation in relation to a particular proposed money coming out of the Restart New South Wales Fund unless it was satisfied that there'd been an analysis suggesting that the business-to-cost ratio was more than 1? ---That, yeah, that's, that's my understanding, yep.

20 But in terms of the mechanics of that, in relation to the ACTA proposal, that wasn't something that you were taking the running of, that was something that was dealt with by the Office of Regional Development and by Infrastructure NSW itself?---Yeah, they were, they were taking the lead and then my understanding was there were, there were parts – so Office of Regional Development is part of the Department of Industry. They may have been referring some of the economic work to other parts of Department of Industry.

And then if you have a look a little bit further down, there's a paragraph that starts "After I sent the recommendation." See that there?---Oh, yeah, yeah. I can see it, yep.

30 In parentheses, "Which was worded in accordance with the ERC minutes for the grant to go to the Office of Sport. Michael Toohey has advised that the original ERC minute was not correct and the Office of Sport has no involvement at all and do not want any involvement in the funding." Do you see that there?---Yeah, yes, I can.

Now, was that the, just to the advice or any advice that you gave to Ms Davis that the original ERC minute was not correct and that the Office of Sport has no involvement at all and does not want to have any involvement?---I'm sorry, I don't understand the question.

40 If you just have a look at what Ms Davis is saying to various individuals, including you, she seems to be advising people of advice that you had given her.---Oh, I see.

Do you see "Michael Toohey has advised that"?---Yeah, that's correct. Yep.

Now is that advice that you gave to Ms Davis?---Yep. It would be, yep. I, I spoke to her quite often. I'm not sure what she's referring to in the original ERC minute off the top of my head. There was, I know there were drafts

about the funds coming to Office of Sport but I, I can't recall the detail of the final submission off the top of my head.

Do you remember when I showed you the ERC decision itself a little while ago, it did actually pick up the wording from your document by approving expenditure of \$5.5 million to the Office of Sport. Do you remember seeing that?---Yes, I do. Sorry. Yeah.

10 And so are you drawing attention here in your advice to Ms Davis that there was, in a sense, an inconsistency sitting within the ERC decision? On the one hand it says give the money to Office of Sport yet on the other hand it's saying that's all subject to processes such as Infrastructure NSW's?---Yeah, thanks. Yeah. That's, yeah, that right. Yep. The, yeah, there was a process to go through before the funds went anywhere.

But did you say to Ms Davis the Office of Sport did not want any involvement in the funding?---That's correct.

20 Why did the Office of Sport not want any involvement in the funding?
---Because I thought it was a, a complicated project. There was, we had considerable capacity constraints at the time and I wasn't confident that, when all the due diligence, the business case process had gone through, that it was going to pass with flying colours.

30 So is this right, as you saw it at least, this was a bit of a risky project, and you'd prefer an agency other than yours to be holding the potential hot potato?---Well, yeah, and look, I, I mean, the, the other thing that was going on for me professionally at the time was that I was also involved with the, the stadium projects as well.

And the stadium projects weren't about \$5 million here or \$5 million there.
---No.

That's about a very significant additional order of magnitude.---Yeah, very significant additional order of magnitude. So I was more than happy for another agency to take the running with it.

40 Not just, though, because you had other things to do, but because you were concerned about the risks involved in this particular project, is that right?
---Mmm, that's correct.

I tender the email from Ms Davis to Mr Toohey and others, 8 July, 2017, 12.14pm, page 3 and 4 of volume 26.8.

THE COMMISSIONER: Exhibit 400.

#EXH-400 – EMAIL FROM JENNY DAVIS TO JULIE PATON, KELLEY ASHLEY-JONES, CHRIS HANGER AND MICHAEL TOOHEY REGARDING CLAY TARGETS DATED 8 JULY 2017 AT 12.14PM

MR ROBERTSON: And I'll just show you one further email to close off that particular exchange, page 5 of the same volume, 26.8. Another email from you to Ms Davis, referring her inquiries to Ms O'Dwyer. "As per
10 earlier advice, Margaret O'Dwyer, Department of Industry, was looking after this and helping ACTA with the business case. The business case attached to the ERC sub was not of sufficient quality for allocating funds." Do you see that there?---Yep.

And the reason that you're expressing that view were the reasons that you gave us during the course of this morning about the quality of what I think you described as "the purported business case".---Yep, that's correct.

And if we scroll a little bit further down, you're referring to the particular
20 ERC submission, and to the source of the funds, namely Regional Growth – Environment and Tourism, subject to a satisfactory business case.---Yep.

I tender the email from Mr Toohey to Ms Davis and others, 8 July, 2017, 12.36pm, page 5 and 6 of volume 26.8.

THE COMMISSIONER: Exhibit 401.

#EXH-401 – RESPONSE EMAIL FROM MICHAEL TOOHEY TO JENNY DAVIS, JULIE PATON, KELLEY ASHLEY-JONES, CHRIS HANGER REGARDING CLAY TARGETS DATED 8 JULY 2017 AT 12.36PM

MR ROBERTSON: Now, does that then complete your involvement in the ACTA project?---I was copied, yeah, pretty much, from memory. I was, there was correspondence with Treasury all around the same time about funds, the funding, but it was all just like administrative detail. I saw some
40 early aspects of Chris Hanger's advice and his work around the economic analysis, but it was all just copied in on, from memory, all just material I was copied in on. It, like, it tailed off into 2017, but I'm just CC'd on stuff, from memory. I can't remember anything more material to it.

And so is this right, in terms of your substantive involvement, it was really in preparing the ERC submission and in dealing with the immediate aftermath of the ERC decision at the end of 2016, is that right?---Yep.

There was some handover and assistance process to other agencies.---Yep.

But essentially by the time of the ERC decision and dealing with the immediate aftermath, at least so far as you were concerned, it was no longer a matter for you and your agency, it was left to others such as the Office of Regional Development.---Yeah.

And Infrastructure NSW.---Yep.

10 Pardon me for a moment. Now, Mr Toohey, I take it you're aware that Ms Berejiklian gave evidence to this Commission to the effect that she was in a close personal relationship with Mr Maguire from at least about the time of the 2015 election or slightly after or thereabouts.---I'm aware of that.

When did you first become aware of that matter? That is to say the personal relationship between Ms Berejiklian and Mr Maguire?---Oh, when it became news, roughly a – oh, I can't remember the date, but roughly a year ago, the hearings here.

20 Not something you knew about at the time that you had any involvement - - -?---No.

- - - in what I've described as the ACTA project. Is that right?---Absolutely not. No.

Had you been aware of the existence of that relationship at the time that you were involved in the steps that you and I have discussed today, would have you done anything differently? Would it have affected anything that you did?---Absolutely.

30 In what way would it have affected it?---I, I would have raised, I would have expressed my concerns initially through the executive structure and into the, the minister's office to say that I, I thought this was problematic. If that had been, if that hadn't produced any results, you know, any meaningful response, I would have escalated it then through the structures up to the, the secretary of Premier and Cabinet. And if that hadn't produced any result, which I'm very confident it would have, I would have raised it directly with this agency.

THE COMMISSIONER: Well, you said you would have expressed your concerns. What were the concerns you would have expressed?---Why, to like - - -

10 And this is in relation to the ACTA project, I take it?---Yeah, yeah, yeah. Why were we, why were we pushing a grant, anyway, a, an allocation of funds through to a local member based on such scant and inadequate information that didn't meet the NSW Government's own standards and policies to someone who was, it was not a matter of government policy and to someone that was in a personal relationship with the Treasurer. I, I can't see how that's anything but a conflict of interest and I think, and that the, the, the concerns that were raised by the Premier's Office, at least as reported to me, I, I didn't have any direct experience, were valid, like, what was the rush? Why were we doing this and why were we pursuing it on such a flimsy basis?

MR ROBERTSON: That's the examination.

20 THE COMMISSIONER: Thank you, Mr Robertson. Mr Agius, do you wish to seek leave to cross-examine Mr Toohey?

MR AGIUS: No, I do not, Commissioner.

THE COMMISSIONER: Thank you. Mr Harrowell, do you wish to seek such leave?

MR HARROWELL: No, Commissioner.

30 THE COMMISSIONER: Ms Callan, do you wish to seek such leave?

MS CALLAN: Yes.

THE COMMISSIONER: I take it Mr Walker has departed?

MS CALLAN: He has, Your Honour. Yes, I do. Just a few short questions.

40 THE COMMISSIONER: Yes. As long as they're relevant to the investigation, Ms Callan.

MS CALLAN: That's recognised.

THE COMMISSIONER: Very well. Thank you.

MS CALLAN: Mr Toohey, my name is Ms Callan, and I represent Ms Berejiklian in this investigation - - -

MR ROBERTSON: I'm sorry to interrupt my friend. You might just need to move her microphone a little bit - - -

THE WITNESS: Yeah, I'm - - -

MR ROBERTSON: - - - on the left-hand side and point in front of her face. I'm sorry to intervene.

10 THE COMMISSIONER: Thank you, Mr Robertson.

THE WITNESS: Thank you. Yeah.

MS CALLAN: Not at all.

THE COMMISSIONER: Can you hear Ms Callan, Mr Toohey?---Could just - - -

20 MS CALLAN: Yes.---I could barely hear you before. Sorry.

Mr Toohey, my name is Ms Callan. I appear for Ms Berejiklian in this investigation. You gave some evidence before lunch by reference to a series of emails on and around 15 November, 2016. And, amongst other things, you referred to having, my note of your evidence is to the effect that you said you would have had a conversation with Mr Doorn, and your sense was that from the minister's office, that there was a desire to allocate the funds and get going.---Yeah.

30 Can I ask you was that your sense, that that is the minister's office wanted to allocate funds and get going?---My, my sense, as conveyed to, to me by Mr Doorn, because if we go, and the basis for me saying, I mean, I can't remember exactly what I said to him at the time but the, the basis for me saying that was the very first draft of the submission when we were just doing the recommendations at this point, there was the, the two dichotomous paths. And the, the one that the feasibility study was just cut out, I took (not transcribable) that they wanted to allocate the money.

40 And so your sense came entirely from what Mr Doorn conveyed to you?
---That's correct.

You didn't have any direct communications with the minister's office at that time?---Not at that point, no.

And by "the minister", that was Minister Ayres, the Minister for Sport?
---That's correct.

And was it one or more conversations that you had with Mr Doorn at about that time?---Oh, it, it would have several but I couldn't count, I didn't count.

It, it was an unusual request in that, for the timeframe let alone anything else. We would have talked about it quite a bit.

During any of those conversations you had with Mr Doorn, and focusing on that point in time, was any reference made to the result of the Orange by-election, which had occurred the weekend before on 12 November?---Not that I recall.

10 At that stage, and in what followed, is it the case, Mr Toohey, that, to use your words, you were pushing a grant, that is for the allocation of funds, based on scant and inadequate information, is that your evidence?---Sorry, could you repeat the question?

Yes. And this is to pick up on some words that you used towards the end of your evidence in chief, that you considered you were pushing a grant, that is the allocation of funds, based on scant and inadequate information?---Yes.

20 And that was because the minister's office had indicated that it wanted to allocate the funds and get going?---That was, that's my understanding, yeah. That's, yeah.

That is Minister Ayres, Minister for Sport?---Yeah. I, I hadn't had – well, throughout I, I wasn't directly in communication with any of the other, any other advisers from any other minister's office.

Thank you, Mr Toohey. Thank you.

30 THE COMMISSIONER: Thank you, Ms Callan. Mr Lawrence, do you wish to seek leave to ask any questions?

MR LAWRENCE: I have no questions of Mr Toohey. Thank you, Commissioner.

THE COMMISSIONER: Thank you, Mr Lawrence. Mr Robertson?

MR ROBERTSON: Nothing arising, Commissioner.

40 THE COMMISSIONER: Thank you. I take it we can excuse Mr Toohey from his summons?

MR ROBERTSON: Yes, if it pleases the Commission.

THE COMMISSIONER: Thank you for attending today, Mr Toohey. You may step down.---Thank you.

THE WITNESS EXCUSED

[3.57pm]

THE COMMISSIONER: Does that conclude today's proceedings, Mr Robertson?

MR ROBERTSON: Yes, it does. I'll call Mr Doorn at 10.00am tomorrow. I would hope it to not be a completely full day with him but I suspect I'll trespass into the afternoon.

10 THE COMMISSIONER: Very well. We shall adjourn until 10.00am tomorrow.

MR LAWRENCE: Commissioner, can I ask whether Mr Toohey can be dismissed from his summons?

THE COMMISSIONER: Yes. I thought I just did that but for more abundant caution, Mr Toohey, you're excused from your summons to attend.---Thank you.

20 **AT 3.58PM THE MATTER WAS ADJOURNED ACCORDINGLY**
[3.57pm]