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TRANSCRIPT OF PROCEEDINGS

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**THE HON MICHAEL F ADAMS KC, COMMISSIONER**

**THE ACT INTEGRITY COMMISSION – OPERATION KINGFISHER**

**PUBLIC HEARING**

**DAY 2**

**FRIDAY, 11 AUGUST 2023 AT 10.07 AM**

**MR CALLEN O'NEILL, Counsel Assisting**  
**MR M HASSALL, Counsel for the witness John Green**

COMMISSIONER: Yes, Mr O'Neill.

5 MR O'NEILL: Thank you, Commissioner. Yesterday, Mr Green, we ended on the period  
of time between the first Tender Evaluation Team arriving at its directed conclusion that it  
needed to recommend a process and then after that - can I just take you back slightly in  
chronology to the document which is found at 2.1529 but specifically I want to take you to  
page 3 of that document, which is at 2.1531. This is an excerpt or part of the Government  
10 Solicitor's advice. Now, I think your evidence yesterday was that you hadn't seen this  
advice in that period that I had just provided to you, that is, after the recommendation or  
prior to the recommendation from the first TET team for a BAFO. Is that fair?

MR GREEN: I think that's fair, counsel.

15 MR O'NEILL: Had you seen that subsequent to that recommendation?

MR GREEN: I don't recall ever reading this full advice. I relied on precis that I was given  
from other people.

20 MR O'NEILL: A precis from other people in.

MR GREEN: Ms Power who was the one I think who told me in broad terms what the  
advice was and the Government Solicitor's advice supported that we could go to a BAFO  
process.

25 MR O'NEILL: And what about turning your mind to the matter that's addressed there in  
paragraph 8, if I could draw that out, the whole of the that paragraph, and that is the way in  
which the standard conditions for tender, specifically 29.4.1 address the issue of BAFO.  
Had - did you have some awareness of how this operated?

30 MR GREEN: No, counsel.

MR O'NEILL: So, for example, did you have any awareness that the BAFO process was  
reserved for use where costs submitted by all tenderers were unacceptably high. Do you  
35 see that?

MR GREEN: Yes, that's sub (a), whatever, sorry (1).

40 MR O'NEILL: Or:

*A preferred tenderer cannot be clearly determined based upon the evaluation of responses.*

MR GREEN: Number 2, yes.

45 MR O'NEILL: Or:

*They are unacceptably deficient in one or more areas.*

MR GREEN: Yes.

MR O'NEILL: Or:

5

*It becomes evident that the RFT contained a mistake or area of uncertainty.*

Do you see that?

10 MR GREEN: Yes.

MR O'NEILL: Now, working through those, there was no area of mistake or area of uncertainty with respect to these tenders, was there?

15 MR GREEN: (d), no.

MR O'NEILL: There was no unacceptably deficient - deficiency in any of the tenders.

MR GREEN: No, I don't agree with - no.

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MR O'NEILL: Fair enough. What was the unacceptable deficiency?

MR GREEN: Almost number one. Cost submitted by all tenderers are unacceptably high. It doubles up.

25

COMMISSIONER: There was almost more than that, wasn't there? Accepting for the moment the - for the sake of discussion, the correctness of the first evaluation team's views, I think one would say of Lendlease that it was unacceptably deficient, for example, in design. The report in effect - not in effect, the report said so and also the scoring led to a medium risk which unless the circumstances were very unusual, the government could not undertake a medium risk tender. So this is always - I mean, there is no bright line here; it's a matter of fact and degree, but one could say on the - if one accepted as the starting point that the first team's assessment was a correct assessment, then you were, if not definitely, very much in the country of paragraph (c). Do you not think? Although, not all tenders, one tender.

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MR O'NEILL: The scenario you put forward, Commissioner, was very much a Lendlease kind of assessment, if that makes sense. So I would - on this, one looking at these four items, you know, number one, costs submitted by all tenderers unacceptably high, both tenders were over budget. (c) could also be read the same way, all tenders unacceptably deficient in one or more areas. Again, over budget is a deficiency.

40

COMMISSIONER: Right.

45 MR GREEN: It could also, looking further down, there is also a case in (d), I know we discussed that, it becomes evident that the RFT contained a mistake or error, uncertainty which has resulted in one or more tenders not meeting the Territory's requirements. That

scenario occurs when our description of, say, the works results in an outcome where the tenders are much more expensive than the budget we had allowed. So that's another way you could also describe two tenders coming in over budget, because we - RFT - poorly described RFT but that's by the bye. In this case I think 1 and (c) -

5

COMMISSIONER: If I can just put it then in much more simpler language, if you have a budget that enables you to buy a Mazda, you don't have a specification that would only be satisfied by a Rolls Royce. That's the-

10 MR GREEN: Yes.

COMMISSIONER: That's essentially the point you are making.

MR GREEN: Yes.

15

COMMISSIONER: The scope has to be reasonably located in the area of the budget. Is that -

20 MR GREEN: That's correct, and that would then be a mistake in the RFT, because we have asked for a Rolls Royce when we really had the budget for a Mazda.

COMMISSIONER: Right.

25

MR GREEN: That's - that's a mistake in the RFT.

COMMISSIONER: And here, it's all - it's a grey area, obviously, as I say there is no bright line, but here that may have been a problem with the RFT scoping.

30 MR GREEN: Yes, we might have asked for additional items to be included in the works that put it beyond the budget that was calculated for it, and that might have been an RFT issue.

COMMISSIONER: Right. Those problems actually are endemic in all construction, aren't they?

35

MR GREEN: Yes, Commissioner.

COMMISSIONER: Because once the work starts on the ground and it becomes - hypotheses become real, and they have a way of kicking you back-

40

MR GREEN: Optimism bias as well is we go to the market, and we think we are going to get a better price than our pre-tender estimate. So that optimism bias is a problem in all construction too.

45 COMMISSIONER: Right. Okay. Well, it's a difficult undertaking because you are attempting to be predictive and that's always - in a complex situation, that's always difficult.

MR GREEN: Yes, Commissioner.

5 MR O'NEILL: And so when you come to read the word "unacceptably high", and in particular the qualifier, does that mean they are just over budget at all, or what does that mean to you?

10 MR GREEN: In any budget there's a bit of tolerance, if that makes sense, a bit of contingency that sits there. So, you know, that's "unacceptably high" is more than the budget anticipated. So in this case, I think it was 11 per cent and 17 per cent, so that's in the "unacceptably high". Whereas 1 or 2 per cent might be where we will just deal with it.

15 MR O'NEILL: All right. Thank you. So to your mind then, the process allowed you to recommend or adopt a recommendation of BAFO.

MR GREEN: Yes.

20 MR O'NEILL: The question then is why didn't you, once you had that recommendation from the first Tender Evaluation Team, adopt that recommendation?

MR GREEN: So I think we got to this point yesterday a little bit as well. So I have a recommendation from the first Tender Evaluation Team, and as that signoff process is taking place, it is identified to me that the chair of the Tender Evaluation Team doesn't want to continue. And then there's a conversation around, well, how will we go about the - how will we go about that, the BAFO evaluation, when the chair is not going to be there, and then that conversation then ends up with a - with a change of the Tender Evaluation Team because the previous team, at least one but I think two members were indicating - or one didn't want to continue and one indicated they didn't want to continue, and so then there was the need to do a second Tender Evaluation Team at that point there. So I could have taken the recommendation of the first team and appointed a new team, but at that time there was a conversation going around, well, we are going to have a new team so is it - how will that new team understand what's changed between the previous - the previous assessment of the tender versus what comes back in the BAFO and the - I can't remember how the discussion went, but the decision that was made was we will have a new team and that new team will re-evaluate the tender because the tender evaluation process hasn't finalised on the previous tender so the new Tender Evaluation Team can finalise - sorry, can complete a tender evaluation on the original tender and then they are placed - well placed to look at the BAFO when the BAFO comes in.

40 MR O'NEILL: Who is that conversation between at that point in time?

MR GREEN: So that conversation at the time I think was between Rebecca Power and myself - Ms Power and myself. And there may have been others; I can't recall precisely.

45 MR O'NEILL: See, in fairness to you, it seems like it's a double up of whatever has already been done, and it's just going to be another expensive process that's going to waste time, if

it is that what it is that you're attempting to do is get to the recommendation you've already got.

5 MR GREEN: Yes, it was certainly going to take more time. I think it goes a little bit towards, as I said yesterday, it wasn't - in my mind at this time was not making a decision quickly on this process, you know, kicking the can down the road, juggling my balls in the air, which I think we have said - you know, described it before. The - in my view it was better to take time necessary to work through the processes as opposed to make a quick decision.

10

MR O'NEILL: Were you aware at or about this time that the CFMEU had written to Manteena to address the issue of bargaining and becoming its bargaining representative?

MR GREEN: No, I was not aware of that.

15

COMMISSIONER: I think you also mentioned that you were hoping that you may get an outcome which favoured Lendlease rather than Manteena, which would solve your problem.

20 MR GREEN: I - I think I was hoping that the gap between the two scores would close, Commissioner.

COMMISSIONER: Would narrow.

25 MR GREEN: Would narrow. I - I think it would be wildly optimistic to assume that the scores would change and Lendlease would come out ahead -

COMMISSIONER: Right, right.

30 MR GREEN: - on that re-evaluation.

COMMISSIONER: But narrowing would give more room for movement, as it were.

MR GREEN: Yes, Commissioner.

35

MR O'NEILL: Now, I want to show you a document at 2.1577. Again, it has you depicted as the person "Dad" and this time the message is to Dylan Blom. You send a message to him on 25 March 2020 at 4 o'clock, or 4.20, rather.

40 MR GREEN: Yes.

MR O'NEILL:

*Campbell, Throsby.*

45

What's this conversation about?

MR GREEN: I think I was in another meeting at the time, and it had been raised that there were three education projects that were awaiting outcome, and I'm texting Mr Blom, probably while I'm still in the meeting, and trying to find out what the third one is.

5 MR O'NEILL: Does it sound like it was a meeting - or can you recall what that meeting was?

MR GREEN: It might have been an industry meeting talking about the state of the industry. I mean, at this stage, COVID had just hit, construction jobs were being stopped  
10 all over the place. Most of the industry was saying, "What's going on? You know, we need to lock in work." We have - all the private construction jobs in the Territory had stopped and so there was a degree of concern in the industry about the wheels falling off the entire industry.

15 MR O'NEILL: Does it assist you to know that there was a meeting that you attended with Mr Edghill on that day. Does that assist?

MR GREEN: Yes, that would be the industry stakeholder with Mr Edghill in his role as the head of Major Projects Canberra.

20 MR O'NEILL: Right. Do you recall who was there?

MR GREEN: If it was an industry meeting, there would have been representatives from the MBA, the architects, the building association, various Directorates across the ACT  
25 Government. Probably some more industry reps who I can't picture but I'm sure there would be more than just three or four of them.

MR O'NEILL: Do you recall the - that you addressed the meeting in respect of Campbell?

30 MR GREEN: I don't recall it, but I think it would be normal that I think Mr Edghill, if he was chairing the meeting, would ask the directors where they were all up to on their projects.

MR O'NEILL: And do you recall that the sentiment was expressed these projects, that is,  
35 Campbell and Throsby, needed to get done?

MR GREEN: Yes, I think that's similar to what I said, counsel, the view from the industry, the industry was tanking, essentially the wheels were falling off it and they wanted, you know, government jobs to be awarded so that they could lock in their workbooks and their  
40 labourers and that while the rest - the private construction industry was basically shutting down.

MR O'NEILL: Now, having a second Tender Evaluation Team do the job of the first Tender Evaluation Team is not consistent with getting it done, is it?

45 MR GREEN: No, it was going to add more time.

MR O'NEILL: Now, if you go to - if I can just take to you the next page. This is a text message, when it comes up. It's got some pieces that need to be taken out of it. Can you focus in on the first text message. This is a text message that follows about 30 minutes after the last one and you are speaking to Ms Haire, and you say:

5

*Can we have a chat about our favourite tender – Campbell?*

MR GREEN: My favourite tender?

10 MR O'NEILL: Your favourite tender, yes. Firstly, why was it your favourite tender?

MR GREEN: Because this was the one taking up the majority of my time, to deal with this particular tender.

15 MR O'NEILL: There's a quick way home here, though, isn't there Mr Green, and that is for you to simply take the first recommendation of the TET and –

COMMISSIONER: Move on.

20 MR O'NEILL: - move on.

MR GREEN: Yes, counsel.

25 MR O'NEILL: And instead you've now asked them to give you a recommendation of a BAFO and they're telling you they're going to start resigning from the team and you're going to stand up another team to do exactly the same job.

MR GREEN: Yes, counsel.

30 MR O'NEILL: In any event you ask her to have a chat about the favourite tender.

COMMISSIONER: It's obviously ironic, but what you mean is the most troublesome.

MR GREEN: Yes. Correct, Commissioner.

35

MR O'NEILL: And then in the following text message, if we zoom into the next one. You ask her about an hour and a bit later - so this is at 6.18:

*Can you chat now?*

40

Now, in contradistinction to the off-the-cuff comment I made yesterday about the public service, at this point in time everyone was all hands on deck, weren't they, at all hours. Fair?

45 MR GREEN: Yes.



MR O'NEILL: What was happening in the Territory was unprecedented. There had never been a crisis that you had faced like this one, and there was pressure coming on to the Directorate to get it done coming from Major Projects; agree?

5 MR GREEN: No. There was pressure coming on to the director from the industry saying can we get it done. I don't think we had a Major Projects view on that yet.

COMMISSIONER: That would have - but also government.

10 MR GREEN: I don't recall any particular conversation with government about "get this one out." It was kind of the -

COMMISSIONER: No, no, no, I'm not talking about any particular project, but -

15 MR GREEN: Government to government industry -

COMMISSIONER: Government was taking the problem very seriously and naturally wanted to assist industry if it was practically possible to do so. In that sense, I meant there would have been political pressure also to see whether something - some things could  
20 move forward more quickly than otherwise they might have done.

MR GREEN: Yes, Commissioner. The Government was doing a lot of COVID stimulus kind of activities across the board, not just in the construction industry but in other places as well.

25 COMMISSIONER: Right. So that's the sort of operating in the background of all this.

MR GREEN: Yes. Yes.

30 COMMISSIONER: Yes.

MR O'NEILL: Now, if I take you to the next text message in the line, at the top blue bubble. Ms Haire responds to you:

35 *On the phone with Josh. He's heard about it.*

Now, who did you understand she was talking about in the first sentence of the text message?

40 MR GREEN: Josh will be Josh Ceramidas, the minister's chief of staff.

MR O'NEILL: What's the significance to you of that fact that Josh has heard about it?

MR GREEN: That the minister's office is aware of the Campbell tender. I think by this  
45 stage as well, Ms Haire and I had had conversations around the minister's office view. So this is, to me, re-affirming that, you know, she's talking to the minister's office about the Campbell tender.

MR O'NEILL: Right. Now, let's talk about those conversations. Firstly, where were they and how did they go?

5 MR GREEN: So the first conversation I can recall is after Ms Haire had come back from leave and, sorry, I don't know the date of that but it's clearly before the 25th, and not long after she came back from leave, we had a conversation in her office in 220 Northbourne Avenue on the executive floor, which I think was level 5, where I had an office and Ms Haire had an office and a few other execs had offices in one end of the building.

10 MR O'NEILL: Were you not working from home at this point in time?

MR GREEN: No, at this stage I think we were still in the office. I distinctly remember having that conversation in her office.

15 MR O'NEILL: How did it start?

MR GREEN: I can't remember if it was a grab me in the corridor and walk in. It was kind of an informal one. It wasn't part of a planned catch-up. Possibly some pleasantries. It wasn't the first one of the day or anything; it was sort of there. And then Ms Haire let me know that she had been -

MR O'NEILL: In her words, if you can.

25 MR GREEN: In her words:

*I was summoned to the minister's office to talk about the Campbell tender. They've got a view that Manteena is not to get the job.*

30 MR O'NEILL: Did you respond to that?

MR GREEN: I certainly responded to that.

35 MR O'NEILL: What did you say?

MR GREEN: I think I mentioned that I had spoken to Ms Cross about it previously. I don't think too much of that - sorry, I don't go too much into that one. I explained the process.

40 MR O'NEILL: Just try to be as precise as you can about what you actually said rather than summarise it, if you can.

MR GREEN: Okay.

45 MR O'NEILL: I know it's a difficult task, but it's an important one as well.

MR GREEN: It was three years ago as well, counsel.

MR O'NEILL: I appreciate that.

MR GREEN: I think I said:

5 *I've got a process underway. At the moment we are looking at a BAFO offer to keep the two tenders open at this point to give us a chance to, you know, reassess the tenders and not make a decision immediately.*

10 That - I think there was more conversation about what a BAFO I think I explained more process issues at that point. Then she said - her words were:

*I will be final decision maker on this process.*

15 Could have been - and I'm thinking, sorry, back:

*I've been told I will be the final decision maker on this process.*

20 But certainly I got the message from her that she was going to be the final decision maker in the process.

MR O'NEILL: And this was prior to March - prior to these text messages?

25 MR GREEN: Yes. So this is not long after Katy has got back. I can't recall the exact dates, but I think it was one of the first days she made it - sorry, came back to the office after her leave. I think it was - it reflects that it was possibly an important thing from the minister's office that they had this conversation with her earlier on in the process. And then so -

MR O'NEILL: She tells you that -

30 MR GREEN: She will be the decision maker, but then that I am to keep going with the process because there's process steps along the way there. And that - again she repeated that the desired outcome from the minister's office was that Manteena not get the job.

35 MR O'NEILL: And the words "minister's office", were they the words that were used?

MR GREEN: I think so, but I cannot be 100 per cent certain.

MR O'NEILL: All right. Was it the word "the minister"?

40 MR GREEN: That's not my recollection from the conversation.

MR O'NEILL: Okay. Now returning to these text messages.

45 COMMISSIONER: Did she -

MR O'NEILL: Sorry.

COMMISSIONER: Did she say why this view was expressed?

MR GREEN: Commissioner, she may have, but again that wouldn't have been news to me, so I don't have a strong recollection of that. I had already heard the reasoning from the  
5 minister's office via Ms Cross about what the - what the reasoning behind the "don't give it to Manteena" instruction was. So I - if Ms Haire mentioned it, I didn't particularly take note of it because it wasn't news.

COMMISSIONER: Right.

10

MR O'NEILL: What was your reaction to that conversation with Ms Haire?

MR GREEN: It confirmed to me the - sorry, it - yes, well, confirmed to me that what she wanted was the desire - for me to achieve the desire's outcome of the minister's office,  
15 which was to head down a process where Manteena - sorry, that's unfair. That she wanted me to head down a process where the minister's objective could be achieved, and that's why I went through what the BAFO could do, keeping both bids alive, we might get a better bid from Lendlease. It keeps both of them alive. We will get a chance to potentially get a better offer and the evaluation process would continue. And I suppose I took that as  
20 my direction, my running orders to go. At this point, I'm, you know, an acting executive and being told by my Director-General what the desired outcome that she wanted achieved was.

MR O'NEILL: Yes. But there's no - prior to 25 March 2020, the rubber hasn't hit the road  
25 in respect of actually making any decisions; correct?

MR GREEN: No, I don't think the - the BAFO had a - if you like, a pencilled in decision, you know, as you said I talked to the Tender Evaluation Team around it, I've kept the tender open, I've worked the process to make sure the outcome - sorry, the decision point  
30 hasn't been made. Katy, in that conversation - sorry, Ms Haire in that conversation has confirmed to me she will be the final decision maker, and I am to keep running the process.

MR O'NEILL: Now, I think earlier in your answer, in that first part of that sequence of answers, you said that there was more than one conversation with Ms Haire.

35

MR GREEN: Yes.

MR O'NEILL: When was the next one that you can recall?

MR GREEN: Well, there's these text conversations like this. There was probably some updates. As the EGM, I would have a regular meeting with the Director-General to give her updates. I am sure that Campbell was discussed at various times in that one. When there's another email when Duncan - sorry, Mr Edghill -

45 MR O'NEILL: We will come to that. We will come to that one.

MR GREEN: Yes.

MR O'NEILL: Okay. I will return then to the text messages. So the next one -

5 COMMISSIONER: Just before you do, Mr O'Neill, you may intend to do this at a later point, but I just wonder whether it would be useful now to explore the significance of the change of decision maker. I understood Mr Green's evidence to be that, as delegate, that was not a particular position; that arose because of his position as acting EGM. That's correct, isn't it?

10 MR GREEN: That's right, Commissioner.

COMMISSIONER: And that was the conventional approach that was taken to these procurement and obviously long standing and, as it were, built into the structure.

15 MR GREEN: Correct, Commissioner.

MR O'NEILL: So had you previously been aware of any situation where the decision was taken out of the hands of the delegate and - by the Director-General?

20 MS MORGAN SC: Can I just ask for some clarity in relation to that question with Mr Green. Commissioner, are you asking that question in relation to Mr Green's three-month position at the Education Directorate or otherwise?

25 COMMISSIONER: No, I was asking a general question and then we might drill down into where his information came from and assess, therefore, the significance of the answer is the way I intended to approach it.

MS MORGAN SC: Thank you, Commissioner.

30 COMMISSIONER: Well, you heard that exchange.

MR GREEN: Thank you. Because that was the same question I was going to have as well.

35 COMMISSIONER: Right. Well, had you heard of it generally, and then had you actually experienced it as I suppose is the -

40 MR GREEN: So, Commissioner, generally across ACT government, delegations would cascade down from Director-Generals to various executives and officers in Directorates. Sometimes the delegation holder would be involved in tender evaluations, like, actually on the team. And so being involved in a tender evaluation, they wouldn't exercise the delegation but the next person in the chain would be. So it was - it was unusual for someone above the normal level of delegation holder to make a decision, but it wasn't unknown. I can recall another earlier procurement, different directorate, different - years before where the Director-General actually sat on the Tender Evaluation Team and one of her staff had the delegation to make the decision after the Director-General had been part  
45 of the Tender Evaluation Team and made her recommendation. So it wasn't unusual.

COMMISSIONER: I'm not suggesting that she didn't have authority to do - make that decision at all; I'm really asking a more general question of practice.

5 MR GREEN: Yes. In - in certainly in another Directorate, the delegations were structured so that the Director-General delegated responsibility to his EGM equivalents to make the decision, but asked them to let him know before they made a decision, just so that he could have a slight review process, but basically would allow them to make a decision. So there's a few different ways of doing it. It wasn't - yes, it wasn't unique that someone would manage a process, and someone would be a decision - I guess a final decision maker.

10 COMMISSIONER: Quite. Well then, I would gather from - but I would need to assess whether my assumptions is a reasonable one. In those cases that you were aware of where the Director-General, for example, sat on the team, those would be cases presumably where the Director-General had some specific expertise or knowledge in the area being covered by the particular procurement.

15 MR GREEN: Yes, Commissioner, in that case she was definitely the subject matter expert.

20 COMMISSIONER: Right. Now, in this case, though, so far as you're aware, did Ms Haire have that expertise in the procurement space?

25 MR GREEN: Not to my knowledge, and she - Ms Haire had recently come from Victoria and I don't think she had a - any particular experience in construction procurement. I'm not sure about other forms of procurement but certainly not construction procurement.

COMMISSIONER: Yes.

30 MR O'NEILL: Thank you, Commissioner. I may come back to that topic. Dealing now with the text messages, in response to the text message you received from Ms Haire, you then say:

*I had a chat with Lynette.*

35 Do you see that?

MR GREEN: Yes.

MR O'NEILL: Who is Lynette?

40 MR GREEN: Lynette Daly was the CFO or chief financial officer of Education at the time.

MR O'NEILL: Right. And you say:

*I think it is doable if the MO -*

45 Who is that?

MR GREEN: Minister's office.

MR O'NEILL:

5 - *is on side.*

MR GREEN: Yes.

MR O'NEILL: What's "doable"?

10

MR GREEN: So I think we are having a conversation about the budget. So I must have had a conversation with Katy at some stage, saying one of the concerns about the tenders is they are both over budget. Which will make sense because that's part of the conversation around the - the BAFO, about the budget issue. So that repeats back there that I've spoken to Lynette, Lynette had the financial records - that makes sense of where the capital works budgets were up to. So typically within a capital works program, we've got projects that we have completed, and sometimes they actually come in under budget and we have surplus cash sitting in capital works budgets. Colloquially they get called "hollow logs" and there's a bunch of hollow logs sitting around in the capital works budget that can be used to deal with projects that are going to exceed their budget.

15

20

MR O'NEILL: Right. So is it your recollection this text message is dealing with the topic of Campbell?

25

MR GREEN: Yes.

MR O'NEILL: And is the effect of what you are saying that extra money can be located to deal with the fact that the tenderers were over budget?

30

MR GREEN: Yes.

MR O'NEILL: Now, to my mind, that naturally suggests that one of the options open is selecting a tenderer now, if - if there is budget for it. Agree?

35

MR GREEN: Yes.

MR O'NEILL: And the logical person to select at that point is Manteena, given it is the highest scoring tenderer. Agree?

40

MR GREEN: They were the highest scoring tenderer at that point, yes. And so that would be the quickest way to come to a solution to the awarding of a contract.

MR O'NEILL: Why is there then the qualifier, if the MO is on side?

45

MR GREEN: To transfer money from one capital works project to another is something you need to advise the minister's office about. It's got to be supported by the minister's office and that's the - essentially the way it works with Treasury. The first option to get for

money from capital works is to go and ask Treasury for more money, and you can imagine their first answer is no. The next conversation back is what spare money do you have and does your minister agree to transfer money from one funded project to another. So in order to transfer money from, say, Project 1 into Campbell Modernisation, we would need  
5 minister's MO agreement, that we can make that transfer.

MR O'NEILL: If I can then take to you the next text message. It says:

*Josh is good.*

10

MR GREEN: Yes.

MR O'NEILL: That's sent 16 minutes after the other that you sent previously.

15

MR GREEN: Yes.

MR O'NEIL: What does that mean?

MR GREEN: I think I'm alluding to the fact that I've had a conversation with Josh.

20

MR O'NEILL: Ceramidas?

MR GREEN: Joshua Ceramidas, yes, at some point before the text exchange. I had it between 7.30 and 6.46, but my recollection with Josh it was during daylight hours, not at that time of night. And we had had a conversation and Josh in that conversation had given his support to transferring money within capital works budgets to add more dollars into the Campbell upgrade project.

25

MR O'NEILL: Now, can we deal with that conversation in detail, please.

30

MR GREEN: Yes.

MR O'NEILL: Where do you recall that it happened?

35

MR GREEN: Via mobile phone. I recall I was in 220 Northbourne Avenue. I wasn't on level 5. I think I was down on level 1, which is where Infrastructure Capital Works and Finance sat at the time. And I received a phone call from Josh Ceramidas.

MR O'NEILL: He called you?

40

MR GREEN: He called me.

MR O'NEILL: And how did the conversation proceed?

45

MR GREEN: Normal pleasantries along the way. Then - trying to go to his voice:

*I want to talk about Campbell. Has Katy spoken to you yet?*



And I said:

*Yes, Katy has spoken to me.*

5 *What did she say?*

I repeated back that Min's office doesn't want Manteena or:

10 *You don't want Manteena to get the job because of industrial relations issues and Secure Local Jobs pieces. And that's the outcome we are going to - we need to achieve.*

Then I think he asked:

15 *Is there any other issues I need to be aware of or any other pieces that I need to be aware of in the process?*

I said:

20 *Yes, we have a budget issue. Everything is over budget. We - you know, either way we need more cash. We don't want to have another Margaret Hendry.*

And Josh gave his support to, you know, finding more money if needed and if need be going asking Treasury for more money to complete the project. And, sorry, his comment was:

25 *Let's not make it another project where the government just chases the cheapest bidder.*

MR O'NEILL: "Let's not make it another project where the government chases the cheapest bidder."

30

MR GREEN: Yes. Words to that effect, counsel.

MR O'NEILL: Yes. You heard those sentiments expressed to you by someone else previously, hadn't you ?

35

MR GREEN: Yes, counsel.

MR O'NEILL: That was Mr -

40 MR GREEN: O'Mara, that's a standard CFMEU line.

MR O'NEILL: Did you make that link at the time?

45 MR GREEN: I made that link earlier, counsel, from you know, the conversation with Ms Haire, that it was clearly - there was a similarity between the CFMEU line and what I heard directly from Josh.

MR O'NEILL: Then if I can take you to the next text message, 2.580, please. 2.1580. Now, this text message follows slightly out of order, it follows the:

*I had a chat with Lynette.*

5

text message. So it's in between the two text messages that you sent to Ms Haire.

MR GREEN: Yes.

10 MR O'NEILL: And it says here, to Mr Blom:

*How much extra budget will we need to cover the more expensive tender for Campbell?*

MR GREEN: Yes.

15

MR O'NEILL: The more expensive tender?

MR GREEN: Lendlease's tender.

20 MR O'NEILL: Why are you asking Mr Blom this question?

MR GREEN: Because Mr Blom had the figures more to hand than I did and was possibly more likely to give me a quick answer back about what that number was rather than me having to dig my way through the submissions.

25

MR O'NEILL: And why is your question focused to the more expensive tender?

MR GREEN: Following on from my conversation with Mr Ceramidas, trying to understand what sort of number we would need to find if we were to fund the Lendlease tender as it was at that time.

30

MR O'NEILL: So even at this point, it's your understanding that what was to be achieved was the Lendlease bid.

35 MR GREEN: Yes, counsel. I think I've said that before.

MR O'NEILL: Now, if I could just take you to the next - sorry - 2.1582. Now, at the top of this email, for a start, please, just the - now, to give you orientation, Ms Haire is sending you an email on the same date as the text messages, but it's at 6.10. So it falls in the chronology after your text message - sorry, in between your text messages:

40

*Can we chat about my favourite tender Campbell.*

And:

45

*Can we chat now?*

Do you see that?

MR GREEN: Yes.

5 MR O'NEILL: And Ms Haire says to you:

*Thanks for the heads up.*

What heads up was that?

10

MR GREEN: So I must have mentioned to her that Duncan would be in contact with her about Campbell.

MR O'NEILL: It says:

15

*See below, can we discuss?*

And then:

20

*Is it even possible to do that under procurement rules?*

Do you see that?

MR GREEN: Yes.

25

MR O'NEILL: And then, if you take your eye to the page below - sorry, the email below, this is an email from Mr Edghill to Ms Haire, the relevant part of which says:

30

*We've had a daily hook-up. The sector is under significant pressure. We understand there are two bids that came in over budget. I also understand there are other sensitivities there.*

Do you have any idea what that could be a reference to?

MR GREEN: The view from the minister's office that Manteena wasn't to get it.

35

MR O'NEILL: Right. And so by that answer, is the Commission to understand that it's your understanding that Mr Edghill was aware of that position?

MR GREEN: I - from this email, I read that to know that he's aware of the issue.

40

MR O'NEILL: He then suggests that rather than reopening the bid process, they just identify a preferred bidder, let them know they are over budget, and work to bring the price down as much as possible before seeking additional funds.

45

MR GREEN: Yes.

MR O'NEILL: So effectively he's suggesting, is he not, to the best of your understanding, that the original position of the TET be accepted.

5 MR GREEN: No, I don't accept that, counsel. What he's suggesting is we identified the preferred bidder, and I will use that in the very technical way that preferred bidder is described in the ACT, that's someone we go to negotiate with. He's not saying we go to the highest scored tender; what he is saying is we go to the preferred bidder. That can equally be read, we choose Lendlease and just negotiate with them to get the price down.

10 MR O'NEILL: Is that process permitted by the procurement rules, as you understood it?

MR GREEN: Yes.

15 MR O'NEILL: And it's clear that what he is saying is that will allow to give some certainty to both the preferred and non-preferred bidder and also get things done.

MR GREEN: Quicker, yes.

20 MR O'NEILL: Do you recall having a conversation with Ms Haire about this email?

MR GREEN: No, I don't recall. Given the heads up, though, that she would get this email, I don't recall having a specific conversation about this email, sorry.

25 MR O'NEILL: If you then move to 2.1584, please, and just the top - pull out the top part of the email. Now, just accept from me that the bit that follows is actually the same email from Mr Edghill.

MR GREEN: Yes.

30 MR O'NEILL: He forwarded it to you and Mr Piani?

MR GREEN: Yes.

35 MR O'NEILL: Who is Mr Piani?

MR GREEN: Mr Piani was the EGM in Major Projects Canberra, Ms Power's boss.

40 MR O'NEILL: So what was happening here was that he was sending it to the two people of the same -

MR GREEN: Level.

MR O'NEILL: - seniority or level -

45 MR GREEN: Yes.

MR O'NEILL: - in the two different departments.

MR GREEN: Yes.

5 MR O'NEILL: And then at 2.1585 at the top of the page, and just call out the top of that email, you respond to Mr Edghill, copying Mr Piani, saying:

*Katy and I have had a positive conversation about this.*

10 Do you see that?

MR GREEN: Yes.

MR O'NEILL: What do you mean by "positive conversation"?

15 MR GREEN: Positive conversation in that sense meant we had a way forward and, yes, it's a public service euphemism. We have had a discussion, we have an idea on that one, as opposed to it's not saying "yes, we agree."

20 MR O'NEILL: And the conversation that you had with Ms Haire, can you recall that conversation?

MR GREEN: I think it was the same BAFO conversation before. This is only at 7.35, so it's not long after those series of emails. So I'm referring back to the fact that Katy and I must have spoken at some point that day, sorry, some point earlier, around the path  
25 forward. And that path forward was the BAFO.

MR O'NEILL: Right. So, you recall that the import of that conversation was still press on with the BAFO process?

30 MR GREEN: Yes.

MR O'NEILL: Now, that didn't achieve what Mr Edghill was asking could be possibly achieved in his email, did it?

35 MR GREEN: No. Mr - yes, as I said, Mr Edghill's was, you know, negotiate with someone. Identify a preferred, put them in preferred status and negotiate with them. Either set them a revised target or chase the budget.

40 MR O'NEILL: Now, soon after sending that email, you sent a text message at 2.1587. I will just call out the green bubble. This is an email - sorry, I withdraw that. This is a text message from you to Mr Michael Hopkins who is he?

MR GREEN: Michael Hopkins is the CEO of the Master Builders Association in the ACT.

45 MR O'NEILL: Right. This is industry side.

MR GREEN: Yes.

MR O'NEILL: You ask him:

*Would you care to share what the three education projects are.*

5

MR GREEN: I'm reading that email from Mr Edghill, where it says Campbell, Throsby, and I can't remember what the third one is.

10 MR O'NEILL: Right. So you knew two of them were, but you needed to know what the third one was.

MR GREEN: He then says to you in a text message that follows, and we will call that one out now -

15 *I don't know it was Manteena that I was talking with. I think it was actually three tenders which included a school.*

I see he mentions Manteena.

20 MR O'NEILL: Yes.

MR GREEN: What was the discussion that was going on at that time of these text messages?

25 MR GREEN: Sorry, I don't follow, counsel.

MR O'NEILL: What's prompted this text message exchange?

MR GREEN: So I'm trying to puzzle out what the three tenders are.

30

MR O'NEILL: Yes.

MR GREEN: On the basis - sorry, following up from the earlier meeting in the day which was the industry engagement meeting where it was mentioned.

35

MR O'NEILL: Yes.

40 MR GREEN: And - and I've asked Michael Hopkins as to, you know, what are the three tenders, the three schools because he mentioned that in the meeting, and he volunteered that it was Manteena that he was talking to about where the - where the tender is up to. So he was letting me know where he was getting pressure from, which of his member - which of his member companies is asking the question.

45 MR O'NEILL: All right. Then if I can take you across to the next document, 2.1588. Again, it's a continuation of the chain of SMSs. And if I can call out the green bubble:

*There are two schools. One closed Thursday week ago.*

What was that?

MR GREEN: Throsby?

5

MR O'NEILL: And then:

*The other is a problem. But the conversation had the desired effect.*

10 MR GREEN: So it has focused some executive attention on to the matter and getting the highest decision makers in the organisation to - to talk about it.

MR O'NEILL: Right.

15 MR GREEN: He was - you know, clearly trying to prompt some action by mentioning, you know, the tenders in the industry meeting and it's - as you have seen, Mr Edghill sent an email to Katy, and we've all had conversations around it.

MR O'NEILL: Right. So then to use your analogy of balls in the air, you now have a few  
20 more. You've got industry saying, "Let's get things done".

MR GREEN: Yes.

MR O'NEILL: Then you have got Major Projects now putting pressure on to get things  
25 done.

MR GREEN: Yes.

MR O'NEILL: If I can take you to the next document, 2.1589. In the middle email, if I can  
30 just call that one out first. Now, this is an email from Ms Haire at 6.49 am the following day. And in fairness to her, this is not uncommon. She is a very diligent worker and works big hours.

MR GREEN: I would say this is a late email from Ms Haire. She's often sending them a  
35 long time before this.

MR O'NEILL: Yes. And so she says.

*Thanks again for your email. I've discussed your ideas with you. And we are keen to work  
40 with you on them.*

Do you see that?

MR GREEN: Ministers.

45

MR O'NEILL: And she also mentions she has spoken to the minister's office.

MR GREEN: Yes, I can see that.

MR O'NEILL: Did Ms Haire tell you that she had spoken to the minister's office?

5 MR GREEN: In the text of the night before, she told me she had spoken to the minister's office. She was speaking to Josh.

MR O'NEILL: Was that the extent of her -

10 MR GREEN: I don't think we had a conversation between Wednesday at 6 pm and Thursday at 6.49 am.

MR O'NEILL: Yes. And then at the top of the top of the email chain, at a much more civilised hour, 8.44 am, still pretty early, you forward that on to Ms Power?

15 MR GREEN: Yes.

MR O'NEILL: Why?

20 MR GREEN: To let her know what's in it. She hadn't been part of those conversations the night before. Her boss Adrian may or may not have forwarded it on to her, so I was letting her know where the conversation was up to.

MR O'NEILL: But why is that your job?

25 MR GREEN: We tended to work really closely together. The way Major Projects works, Ms Power was my infrastructure delivery partner, I think was the word they like to use, and she was the one who had the most day-to-day involvement with Education's projects.

30 MR O'NEILL: Now, do you recall that there was a meeting that day in respect of the Campbell tender with the tenderer - the first Tender Evaluation Team, including Ms Young?

MR GREEN: I don't recall if there was. I -

35 MR O'NEILL: As a matter of fact, as at the date - as at 26 March 2020, the first Tender Evaluation Team had not yet provided - sorry, you had not made a decision in respect of the decision that the Tender Evaluation Team had provided. True?

40 MR GREEN: Thank you for aligning me, counsel.

MR O'NEILL: Yes. Then on next - so, if I could show you document 2.1594, on the Friday 27 March at 10.23, Mr Piani, so your equivalent over in Major Projects, emails you copying his next in line, Ms Power:

45 *Have you been able to reach a decision on Campbell?*



Do you see that?

MR GREEN: Yes.

5 MR O'NEILL: And his aim was to - their aim, presumably Major Projects, was to advise the successful tenderer today.

MR GREEN: Yes.

10 MR O'NEILL: That timeline, it seems that it was at least, on that part of the government, they thought something was going to happen on the 27th.

MR GREEN: I don't agree with that characterisation.

15 MR O'NEILL: Right.

MR GREEN: Maybe Mr Piani did, but Mr Piani sent that out of the blue and maybe it reflects his lack of involvement in this particular project. He might have been asked by his boss, Mr Edghill, to follow up on it, but it reflects that he doesn't - he's not actually  
20 involved in what's going on inside the project at this point.

MR O'NEILL: If I can take you then to the next document, 2.1595. Just call out the top of the email. You will see here that Ms Young sends an email to you, copying again Ms Power. She says:

25 *As the Education delegate has requested re-evaluation -*

Do you see that?

30 MR GREEN: Yes.

MR O'NEILL: Who was the Education delegate?

MR GREEN: Me.

35 MR O'NEILL: Wasn't that you?

MR GREEN: Yes.

40 MR O'NEILL: So she's talking about in an email to you talking about you in the third person, that you have requested a re-evaluation. The original Tender Evaluation Team will be replaced. Do you see that?

MR GREEN: Yes.

45 MR O'NEILL: Was it your decision to replace the original Tender Evaluation Team?

MR GREEN: No. Ms Young decided she didn't want to participate in it, and she had said that to her hierarchy, and that had been passed on to me by probably Ms Power and then we discussed that. I think, as I said yesterday, maybe Mr Moreton was reluctant to continue as well. And then given that we had one and a half of the original three not really  
5 wanting to do the tender evaluation, that was the conversation around, well we need a new Tender Evaluation Team. So I disagree with her characterisation that the Tender Evaluation Team will be replaced because the Education delegate has requested a re-evaluation of that. Maybe in her decision making about why she didn't want to be part of the Tender Evaluation Team was because I had requested or was going to request or a  
10 version of that, a re-evaluation, but I didn't request that the Tender Evaluation Team be replaced in order to do a re-evaluation of the -

COMMISSIONER: No, but the cause of the - of the new team was the requirement for a re-evaluation. In that sense, the requirement of re-evaluation led to - ineluctably led to a  
15 new team.

MR GREEN: But even the re-evaluation piece, Commissioner, it is actually - sorry it's an evaluation of a BAFO. So it's not actually a re-evaluation of the original tender. So I don't agree with her characterisation.  
20

MR HASSALL: Commissioner, I'm reluctant to rise again, but the witness has on a couple of times just been clipped off at the end of his answers and I'm a little unsure whether, Commissioner, you are expressing a conclusion that might be drawn from the evidence in your role as Commissioner or alternatively suggesting to the witness that this is the  
25 evidence. So -

COMMISSIONER: Well, it's really the latter. I've not drawn a conclusion about it.

MR HASSALL: Thank you.  
30

COMMISSIONER: The - it's really my understanding of where we are at and where the process has led. Leaving aside the precise meaning of re-evaluation, as I understand the causality of events, there was to be a new evaluation or, to be less prescriptive, another evaluation -  
35

MR O'NEILL: Of the BAFO, Commissioner?

COMMISSIONER: Yes, of the BAFO, maybe so. That doesn't - but that process led to the need for a new team.  
40

MR GREEN: No, Commissioner. The -

COMMISSIONER: I'm not suggesting, just to be clear -

MR GREEN: No, Commissioner, can I just explain.  
45

COMMISSIONER: Yes.

MR GREEN: So the - in how I expected the process would go, is that the original Tender Evaluation Team would run the BAFO offer, and they would evaluate the BAFO when it came in. And that was where that process would have followed. Because members of the team didn't want to do that, there was a requirement to have a team to do that. And if the team was saying, "It's not us", this needs to be a new team to do it. So, you know - normal - in a smooth running course of events, the - sorry, in another BAFO, it would be the team who evaluated the original offer would evaluate the BAFO when it came in.

COMMISSIONER: Okay, sorry.

MR GREEN: There was no need to change from one to another just because of the before what of -

COMMISSIONER: I'm not talking about expectations. I understand perfectly the point you are making. You were expecting the team to continue, you found for one reason or other they didn't want to, and it was in - not useful to press people to do a job that they were reluctant about. All I'm pointing out to, as a matter of fact, the new or the fact that another evaluation was necessary led to the need for a new evaluation team. There was an intervening fact because the old team didn't want to do it, I understand that. But the fact is, when you looked at the circumstances objectively, there was to be another process. The people who might have been expected to undertake that process for one reason or another didn't want to do it, and therefore a new team was necessary.

MR GREEN: Yes, Commissioner. You need to have a team to evaluate the BAFO.

COMMISSIONER: No, no, of course you do. So all I'm pointing out is the causation, the fundamental cause of the new team was the decision to have another evaluation. Because that's what led the old team to say, "We are not interested", and the need therefore for a new team to be set up. It's - I'm not - I'm simply pointing out the way events occurred. Now, do you take issue with -

MR GREEN: No, Commissioner. As you explained it like that, I'm comfortable that you understood the way it worked at and that was my understanding as well.

COMMISSIONER: No, quite.

MR GREEN: So there needed to be a new team because the president team didn't want to do it and they didn't want to do it because they were going to - sorry, didn't want to do a second evaluation.

COMMISSIONER: And the need for the new team was because there was a new process or a further process, however one described it -

MR GREEN: That required an evaluation.

COMMISSIONER: - that was being required. All right.

MR O'NEILL: Then in a fairly succinct email, on - at 4.16 on the same day, you wrote:

5 *Agreed.*

It will come up, but that's what it says. So you agreed with the - effectively the replacement of the Tender Evaluation Team.

10 MR GREEN: Yes.

COMMISSIONER: Well it was a fait accompli, really, wasn't it? There was no choice.

MR GREEN: I couldn't force the others to do something they didn't want to do.

15

HIS HONOUR: No, quite.

MR O'NEILL: Now, the next document I want to take you to is at 2.1598. And if I could pull out the blue bubble. This is the 30th. So we've had the weekend, the 27th is a Friday, 20 28th, 29th, Saturday, Sunday. 30th is the Monday. The text message from Mr Hopkins to you:

*Did the Campbell school get awarded last week as discussed?*

25 "Like discussed", rather. Do you see that?

MR GREEN: Yes.

MR O'NEILL: What did you understand he was referring to.

30

MR GREEN: So I think he was referring to probably the industry meeting where possibly Major Projects had said we will get Campbell awarded.

MR O'NEILL: In the next text message below it, in the green bubble, you say:

35

*I'm expecting the tender report for both Campbell and Throsby today.*

MR GREEN: Yes.

40 MR O'NEILL: It's not a direct answer to his question, is it?

MR GREEN: No.

MR O'NEILL: And then on the following page, 2.1599, some 30 seconds after the green 45 bubble that you can see now, it says - you say:

*Is that the project?*

Why have you asked that question?

5 MR GREEN: I'm not entirely sure. I think I may have been in a Teams meeting at the same time. We may have been having another industry catch-up and, yes, maybe I'm responding to that. It does seem a bit out of sequence with the two beforehand.

COMMISSIONER: So you are maybe talking about another project of some kind?

10 MR GREEN: Yes, and maybe - often in these things we are in a Teams meeting, having a group session and having texts conversation outside of those meetings. So he might have said something, and I might be responding to what he said.

MR O'NEILL: And then in the next bubble, blue:

15 *I just can't remember which one you said would be first, but I know a couple who are on both and they said they hadn't heard yet.*

Is this helping?

20 MR GREEN: It sound likes he is talking about Campbell and Throsby but "on both" would be the Campbell and Throsby link again.

MR O'NEILL: Okay.

25 COMMISSIONER: So "a couple who are on both" -

MR GREEN: A couple of contractors.

30 COMMISSIONER: - would be the contractors or tenderer?

MR GREEN: Yes. A couple on both, "on" being a tenderer.

COMMISSIONER: Right.

35 MR O'NEILL: So at 2.1601 -

MR GREEN: Sorry, counsel on the bottom of that screen there, that green box, is another example he has mentioned something in the meeting.

40 MR O'NEILL: We will pull it out for you just so people in the back can see what you are talking about. This is the green bubble at the bottom of 2.1599. Yes, your answer was directed to this bubble.

45 MR GREEN: Yes. So, you know, here I'm giving advice to the MBA, you know, the MBA should ask the SLJC Minister to extend all certificates in three months. I think the meeting we were in by the sound of things he just said how do we support the industry and, you

know, we have got people up for Secure Local Jobs recertification and that sort of stuff there. So I think I made a comment in the meeting there saying they asked the Min to extent the certificates for three months.

5 COMMISSIONER: Because there were practical difficulties with COVID, with keeping them up to date and doing the audits and so on.

MR GREEN: Yes, the cost of doing audits and things like that, so they were looking at ways to reduce regulation and that was a suggestion I made into that conversation.

10

MR O'NEILL: And the point that you're directing the Commission to is this is indicative of you sending text messages during comms.

MR GREEN: Yes.

15

MR O'NEILL: Sorry. So I was going to take you to 2.1601. He then texts you again on 1 April.

MR GREEN: Yes.

20

MR O'NEILL:

*Do you know if the Throsby or Campbell school tenders have been announced yet?*

25

Do you see that is.

MR GREEN: Yes.

MR O'NEILL: You would have known that. It was either yes or no.

30

MR GREEN: Yes.

MR O'NEILL: But you didn't respond to that text message?

35

MR GREEN: It doesn't look like I responded to it. I'm not sure if I did. No green bubble behind this. One. It's unlikely I was in a meeting at 6.07.

MR O'NEILL: Now, in an email Mr Piani sent on the 26th, so back in the previous week, which was the Thursday -

40

MR GREEN: Yes.

MR O'NEILL: He mentions that he had had a call with you and Rebecca - it must be Power.

45

MR GREEN: Yes.

MR O'NEILL: Do you recall that conversation?

MR GREEN: Not in any detail, I don't, I'm sorry.

5 MR O'NEILL: Mr Piani's email records that you advised that you were aiming to have a decision made today, being the Thursday.

MR GREEN: Yes.

10 MR O'NEILL: Does that help your recollection?

MR GREEN: I can now remember this email, because we discussed it at length previously.

MR O'NEILL: Okay. Give us your best recollection of that conversation.

15

MR GREEN: So we were talking around where the tenders were up to, talking about timelines on it. I can't remember the details of the conversation, but there's an email that came out at the end of it where the email suggests that we are going to make a decision on Campbell the following day, and that email doesn't make a lot of sense until you read it through, and then if you substitute the word "Throsby" for Campbell, where it is first mentioned it actually makes sense. It looks like a - a typo in the email and then -

20

MR O'NEILL: Mr Piani records that you had indicated that once - sorry, that there was going to be a - that there was going to be an award of the tender on the Thursday or the Friday. Do you recollect that conversation and saying that to him?

25

MR GREEN: No, I don't.

MR O'NEILL: On the Monday, Mr Piani sends Mr Edghill an email that says that:

30

*Campbell High Project TER will be with the delegate for approval today.*

That's the Monday. Had you spoken to Mr Piani about that on the Monday? That is the 30th?

35

MR GREEN: No. And additionally, Campbell High wasn't a project.

MR O'NEILL: That is so.

40

COMMISSIONER: Do you think it was a mistake for Campbell Primary School?

MR GREEN: I think - I think that - I recall an email that, you know, that we have discussed previously where it looks like he got tangled between Throsby and Campbell and he continues being -

45

COMMISSIONER: Confused.

MR GREEN: - confused between which school was which. And conflates high school into it as well.

5 MR O'NEILL: It probably doesn't matter too much for Major projects, doesn't it? I mean, they just want to build things. They just want to get the projects going.

MR GREEN: And I think that was - that was Adrian's point of view at the time there, just get things out to the industry.

10 MS MORGAN SC: Commissioner, can I just ask for the tender bundle references for those emails that are being discussed? They are not coming up on the screen.

MR O'NEILL: No, they're not; that's deliberate. It - I will bring them - because they are not his document, Commissioner.

15

MS MORGAN SC: That hasn't stopped you before with documents.

MR O'NEILL: I can give you the tender bundle references. They are 2.1602 and continues to 2.1603.

20

MS MORGAN SC: Thank you.

MR O'NEILL: They will be shown to Mr Edghill. At 2.1604 on the Tuesday, 31 March 2020, you sent to Ms Power a link to the union MOU "read it for yourself" document.

25

MR GREEN: Yes.

MR O'NEILL: And attached the MOU.

30 MR GREEN: Yes.

MR O'NEILL: Why?

35 MR GREEN: We must have had a conversation, something around the MOU around that time and where do you find it kind of thing, and I sent her this link.

MR O'NEILL: Do you recall her asking - or her providing a reason for why she wanted to look at the MOU?

40 MR GREEN: No.

MR O'NEILL: What was your understanding of the status of the MOU at this point in time?

45 MR GREEN: Irrelevant. It had been largely taken over by the Secure Local Jobs provisions.



5 COMMISSIONER: Not only the Secure Local Jobs provisions, but I think the processes within the - within Tender ACT, because Tender ACT placed on its websites the fact that particular tenderers had made tenders. So the MOU also made provision for the carriage of that information, but I think the approach was essentially "put this on the public record for transparency" and in that sense the need for direct communication between Tenders ACT or whoever it was, and, say, Unions ACT was no longer necessary because it all went on to the public record. Do I understand that correctly?

10 MR GREEN: Largely, Commissioner, but I think the automated emailing of tender notifications still occurred and certainly occurred throughout 2019 when I had visibility. Because I received as Secure Jobs Code Registrar. In the central mailbox for Secure Local Jobs we received the same notification, and we could see that it went to certain entities at which Unions ACT was one of them. So we knew they were getting emails.

15 COMMISSIONER: Right. So there was dual notification, there was a public notification and as it happened the old process of specific notification kept going. But am I right in understanding it didn't really add anything because it was on the public domain anyway?

20 MR GREEN: Correct, counsel.

COMMISSIONER: I suppose one thing would have been easier for Unions ACT in the sense they didn't have to bother looking at the website because they would have got an email, but -

25 MR GREEN: Yes, Commissioner, and from something in Secure Local Jobs I was also aware that the union email was actually automatically forwarded on to other unions. It went to the centralised union address and then it was automatically forwarded on. So it made their administration easier.

30 COMMISSIONER: Easier. But with the same effect in - because all that information was on the public website.

MR GREEN: Yes, Commissioner.

35 MR O'NEILL: At 2.1635 of the bundle, there is an email from Mr Hopkins to Carolina Ross. Do you know who she is?

MR GREEN: I think she was Mr Edghill's EA. She's -

40 MR O'NEILL: And then it's copied to you and Mr Edghill. And Mr Hopkins is seeking an update on current tenders and the timing of when they were awarded. And this is the next Friday, so 3 April.

MR GREEN: Yes.

45 MR O'NEILL: Do you see that? Campbell School is the main one.

MR GREEN: Yes.

MR O'NEILL: And then at -

5 MR GREEN: Sorry, I think that's Mr Hopkins advocating on behalf of his members, finding out where the work is up to.

MR O'NEILL: Then at 2.1638, at the top - I will just call that out - you say to Mr Hopkins:

10 *I've just heard that the tender evaluation report for those has been received for my decision.*

So Throsby is going to be out of the way:

15 *And I need to have a conversation with the Campbell tenderers about a next step as it's a challenge.*

Do you see that?

20 MR GREEN: Yes.

MR O'NEILL: Now, at this point in time the second Tender Evaluation Team is still undertaking its evaluation.

25 MR GREEN: Yes.

MR O'NEILL: And yet here you are expressing a view that you need to have a conversation with the tenderers about the next step.

30 MR GREEN: Yes.

MR O'NEILL: Are those two positions inconsistent?

MR GREEN: No.

35

MR O'NEILL: Why?

40 MR GREEN: So there was a concern - a conversation raised some time before that around, if we went down the BAFO path, given all the other challenges happening currently in the industry, if we went down a BAFO path, would the two tenderers want to participate, and that was a conversation that I had with Ms Power and possibly others and -

MR O'NEILL: Is it a fait accompli that BAFO is going to be the decision that the second Tender Evaluation Team arrives at?

45

MR GREEN: I expected that was the recommendation that they would make.

MR O'NEILL: Well, it's more than expectations, isn't it?

MR GREEN: Strong expectation, yes.

5 MR O'NEILL: You know that's what they are going to do.

COMMISSIONER: No, I think this is quite important. I understand you've described it as a strong expectation. Is not the reality that one way or the other we might need to come to that, but one way or the other the team were given to understand that the recommendation  
10 which you wanted was for a BAFO?

MR GREEN: Yes. I think that's a fair characterisation and, you know, they could have come back to me and said, "we don't think a BAFO is justified for these reasons" and that would have been another conversation. But I fully expect that they would come back to me  
15 with a tender evaluation report that said, "let's go to a BAFO."

MR O'NEILL: A bit stronger than that.

COMMISSIONER: In response to your direction.  
20

MR GREEN: Yes, in response to my stated position. That's what the outcome would be. So they didn't come back to me with something else, they could have and there was senior enough people on that team to come back to me and say, hey, you know, we have done the evaluation then, say, Lendlease popped out on top. We have done the evaluation and, you  
25 know, it's as bad as we thought. But I expected that the answer would be they would do an evaluation, they would look at the pieces - sorry look at the bids, come up with a set of scores, and that they would recommend that we go down a BAFO process.

COMMISSIONER: Let me put this to you, and it concerns conflict of interest. Here you  
30 have - leaving aside the major - the chairperson, is it, from -

MR GREEN: The chair from - yes.

COMMISSIONER: Major Works.  
35

MR GREEN: Major Projects.

COMMISSIONER: Major Projects. The other two persons on this committee, who although you expect them to operate in a consensus way, were the majority and the client,  
40 were your subordinates.

MR GREEN: Yes.

COMMISSIONER: You had directed them as your superior, or given them to  
45 understand - let's not tie it up with the formalities - given them to clearly understand the outcome which you wanted was that there should be a recommendation for a BAFO.

MR GREEN: Yes.

COMMISSIONER: They, at the same time, were obliged to consider the issues independently.

5

MR GREEN: They were obliged to consider the issues. You know, I'm not sure about the independent piece.

COMMISSIONER: All right. Let me put it in another way: It was not for them, as I understand the general responsibilities of a team, and correct me if I'm mistaken, it's not for them to draft or attempt to draft a report the object of which was to comply with your direction.

10

MR HASSALL: I apologise for -

15

COMMISSIONER: You don't have to apologise; you are entitled to make what objections you wish.

MR HASSALL: Commissioner, you quite carefully put to Mr Green that "you gave them to understand that you wanted a recommendation for a BAFO". And then that's - in the next question it's become you gave them a direction.

20

COMMISSIONER: Well, no, I think what I did was explain what I meant by "direction" was that you gave them to understand a particular - and I'm just using it as a shorthand term.

25

MR HASSALL: There is a subtle difference.

COMMISSIONER: Do you accept that it amounted to a direction, Mr Green?

30

MR GREEN: I - I don't think of it as a direction. I think I told them this is the outcome I wanted, and with my senior staff on that, they are staff who I would trust to come back to me and say I don't think it's a BAFO.

COMMISSIONER: No, quite. I understand. That - on my analysis, that would be a way of managing the conflict of interest. But what I'm exploring first of all is was there a conflict of interest. That is, then exercising their own judgment about the issues raised by the evaluation process on the one hand and being obliged, or feeling obliged, to obey what they understand you wanted to be the outcome on the other. Objectively speaking, would you agree that that is a conflict of interest? Now, you might manage it, I understand, by saying, "Look, although this is the outcome frankly I would like, if you think it is not viable or if you think that a better outcome is appropriate, by all means make that recommendation." That might be an acceptable way of managing it. But that's the distinction I'm drawing and I'm asking for your response.

40

45

MR GREEN: Okay, so, Commissioner, the - the staff that I had on that were - one in particular was well-known and senior enough to me that I would expect that he would

come and have that conversation with me. I don't think I ever directed him that it had to be a BAFO. I definitely communicated that was where the previous - sorry, he was aware that was where the previous process was going to and that that was an outcome that I was happy with. But if he - he could have come to me and said, "I don't think that's the answer", and then we would have always been able to have that conversation. I trusted his professional judgment and he had history with me over years, not just at Education, where he would have been - would have felt frank enough to come and have that conversation with me if he thought that that BAFO outcome wasn't possible on that evaluation.

5

10 COMMISSIONER: I know. But - I understand what you are saying.

MR GREEN: I don't think - I don't think I instructed him it had to be a BAFO.

15

COMMISSIONER: No, no. I don't - I'm not - I don't think I've suggested that. But you were not neutral.

MR GREEN: I had a position, definitely. I had a - what I expected the outcome to be. And I had communicated that.

20

COMMISSIONER: And one way or another, you had conveyed that to the members of the team.

MR GREEN: Yes.

25

COMMISSIONER: Are you saying then you do not perceive that as a conflict of interest, raising a conflict of interest from their point of view?

30

MR GREEN: No, I don't. I think that was a normal kind of process within tender evaluations in ACT Government where delegate viewpoints were in the mix. It was rare that they were totally independent in any way. Sorry -

35

COMMISSIONER: Yes, but there's a difference - there's a difference between predicting an outcome, that is, you're feeling that when everything is looked at at the end of the day you are going to have a BAFO.

MR GREEN: Yes.

40

COMMISSIONER: That's a prediction, that's one possible result, and wanting that outcome. You see, there is a distinction, is there not?

MR GREEN: Yes, Commissioner.

45

COMMISSIONER: And you were not predicting it. Well, at one level you were predicting it, because I think at one level you yourself thought that a BAFO was an appropriate outcome.

MR GREEN: Yes, Commissioner.

COMMISSIONER: But without - is it fair to say without an actual direction, you went as far as you could, or felt you could go to ensure that was going to be the result?

5 MR GREEN: I don't - I don't think I ever actively directed them it had to be a BAFO. I think -

COMMISSIONER: Sorry, I don't think I - I missed what you said.

10 MR GREEN: I don't think I actively directed it had to be a BAFO.

COMMISSIONER: No, no, I understand that.

15 MR GREEN: I - I definitely - everyone in that team knew that the previous team had made it to a BAFO and that was an acceptable outcome as far as I was concerned. I had trust in that team, and I had trust in the ability of that team to discuss with me if they thought that that wasn't a suitable outcome. I - I remember asking at one point, you know, essentially you are a set of fresh eyes to look at this, and, yes, so I - I thought I gave them the space to let them make their viewpoints on it, but I definitely guided that BAFO was a suitable  
20 outcome that I would support.

COMMISSIONER: You see the distinction, though, on the one hand to start out without preconceptions about where the end might be, and knowing your preference to follow along to that conclusion unless you found a good reason for not doing so.  
25

MR GREEN: Yes, I do see that distinction, Commissioner. And, Commissioner, in - you are more experienced than me, if you think that raise a conflict of interest, I -

30 COMMISSIONER: Well, I'm trying to explore the significance of those rules in context of this kind, because tender evaluations happen all the time and the lines of probity are sometimes blurred and it's necessary that they be as clear as circumstances permit. That's really why I'm raising these matters with you.

35 MR GREEN: Yes. And, Commissioner, in my experience in ACT Government in capital works, the boundaries between Tender Evaluation Teams and others who are involved in the process is pretty blurry or -

40 COMMISSIONER: The issue here, though, comes from the fact that you were in a position of authority and dealing with subordinates.

45 MR GREEN: Equally so, Commissioner, there's times when the Tender Evaluation Teams report up and have conversations with delegates around where the decisions will go. So this one is more unusual because you've got a replacement Tender Evaluation Team coming in when those conversations have already been had. So I - I can't recall a similar situation where that's there, so there's definitely -

COMMISSIONER: Well, there may be other matters in play here, but I will leave those to Mr O'Neill to develop.

MR O'NEILL: Commissioner, I note the time.

5

COMMISSIONER: Yes, very well. Yes, I will take a morning adjournment.

**<THE HEARING ADJOURNED AT 11.37 AM**

10 **<THE HEARING RESUMED AT 12.09 PM**

COMMISSIONER: Yes, Mr O'Neill.

15 MR O'NEILL: Thank you, Commissioner. Now, Mr Green, we were talking about the second Tender Evaluation Team that's now been stood up. You're communicating to the industry people, that's Mr Hopkins, that there's an issue, and I will be talking to the relevant persons, that is Lendlease and Manteena, about it.

20 MR GREEN: I think "challenge" was the word, wasn't it, counsel?

MR O'NEILL: Challenge. And what was the challenge?

25 MR GREEN: The challenge was that we had two tenders, neither of which we could accept in their current forms, for - and were going to be going down a different process.

MR O'NEILL: Now, then the Commissioner asked you some questions about - I think the word you used was "expectation"; is that fair?

30 MR GREEN: Yes. I think I used that word.

MR O'NEILL: And that that expectation had been communicated by you to members of the Tender Evaluation Team.

35 MR GREEN: The second Tender Evaluation Team, yes.

MR O'NEILL: Yes. Can we just drill down into that. Who had you spoken to about your expectation?

40 MR GREEN: Mr Blom and Mr Patel of the Tender Evaluation Team. I don't recall having a conversation with Ms Wright.

MR O'NEILL: So that is the persons who were part of your Directorate?

45 MR GREEN: Correct.

MR O'NEILL: Now, we have seen that you text Mr Blom. We have taken you to a few of them before.

MR GREEN: Yes.

MR O'NEILL: What was your relationship like with him?

5

MR GREEN: I had known Mr Blom for some years. We had been colleagues in the predecessor organisations to Major Projects Canberra.

MR O'NEILL: And he was obviously - he reported to you?

10

MR GREEN: Via someone else. I think I - he was the senior of the capital works part of the Infrastructure Capital Works, so he reported to the EBM, the executive branch manager of Infrastructure Capital Works.

15 COMMISSIONER: Which was your substantive role.

MR GREEN: My substantive, role, yes.

COMMISSIONER: Who was filling that role at the time?

20

MR GREEN: Mr Nakam.

COMMISSIONER: Mr Nakam, right.

25 MR O'NEILL: Now, how did you make it known to Mr Blom what your expectation was?

MR GREEN: I can't recall the actual mechanism. I would suspect a phone call, Teams meeting. I don't think we were in the office by that point, so it's unlikely we were to be sitting in the office together. And yes, a conversation, I think, saying pretty much that, you know, he was now the Tender Evaluation Team and, you know, he knew where the previous Tender Evaluation Team had got to and that was a recommendation that I was happy with. I can't remember the exact form, sorry, counsel.

30

MR O'NEILL: Did you speak to him about the tenderers?

35

MR GREEN: It's likely, but I have no specific recollection of them. He had been involved in the earlier processes, so he knew the view on the tenderers and, yes, the conversation that had been going on for some time.

40 MR O'NEILL: When you say, "the view on the tenderers", can you be more specific?

MR GREEN: Sorry, the view from the minister's office that Manteena shouldn't get the job.

45 MR O'NEILL: So it's your evidence that whether it was at this point or prior, you understood that Mr Blom was aware of the minister's office position that Manteena was not to be awarded the bid?



MR GREEN: Yes.

5 MR O'NEILL: Did you speak to Mr Blom about the way in which the tenders had been scored?

MR GREEN: I don't have a specific recollection. I expect that I would have spoken to Mr Blom around the fact that there was such a disparity between Manteena and Lendlease. He also was experienced in the local construction industry and, like me, would have  
10 looked at, you know, a tier 1 contractor versus Manteena and thinking that scoring was different.

MR O'NEILL: Well, this notion -

15 COMMISSIONER: But of course, that must necessarily depend what actually came forward in the particular case. A tier 1 might for a number of reasons -

MR GREEN: Do a poor design, Commissioner.

20 COMMISSIONER: Exactly.

MR GREEN: Which is what I think the scoring reflects. I think the tier 1s, the criteria of Lendlease were lacking in were the more design and project related ones as to more their performance ones.

25 COMMISSIONER: Yes.

MR O'NEILL: And what about Mr Patel?

30 MR GREEN: I was less - Mr Patel was a newer acquaintance to me - a newer person to me. I think he was probably in some of those conversations with Mr Blom. I'm not sure exactly what conversations I had with Mr Patel, but I think he was also aware of the minister's office view that Manteena shouldn't get the job.

35 MR O'NEILL: What leads to you think that?

MR GREEN: I think he was involved - given some of the earlier conversations on level 1 of 220, where you, you know, probably the sit-down conversations that just happened with the team, he was - he was part of that team. Mr Moreton and Mr Jacobi, I think reported to  
40 him. So I think he would have been part of those conversations.

COMMISSIONER: Sorry, these were conversations of which you were -

MR GREEN: Yes, just office chat kind of conversations, sitting around the desks in the office, having conversations around the project and the - the views of the minister's office, the - our assessment of how the process had gone and those sort of general conversations about the project.

COMMISSIONER: Right. Well, you would have - I gather, but tell me in if that is mistaken, I gather you would have been the source of the information about what came from the minister's office?

5

MR GREEN: Yes, Commissioner.

COMMISSIONER: Right. Did you discuss with Mr Blom how the minister's office desire might be satisfied, how it might influence the process?

10

MR GREEN: Yes, but there's lots to that.

COMMISSIONER: Indeed.

15

MR GREEN: So, the - certainly I - having conversations around all the various possible outcomes and permutations of tender processes. So Mr Blom, like me, had been through many tender valuations processes with the ACT Government and understood how process works and can work in lots of ways. So we certainly would have discussed ways that could all come around. We certainly discussed scenarios, you know, BAFO offer getting to the end and, you know, scoring showing a clear win one way or another. We would have discussed those sort of issues along the way there. We would have discussed ways, you know, the ability to recommend someone who is not the top scorer. We would have discussed all of those issues. I can't put a date or time on a specific conversation, but - but a trusted officer who had been through many procurement projects, he and I would have discussed such matters, as would - with Ms Power, another colleague in a similar space.

20

25

COMMISSIONER: Well, Mr Patel was relatively new.

MR GREEN: Yes.

30

COMMISSIONER: But I - am I right in thinking that you would - you and Mr Blom had a fairly close professional relationship? You trusted each other?

MR GREEN: We trusted each other, yes.

35

COMMISSIONER: And does it follow that you will probably be more forthcoming and candid with him than, for example, with Mr Patel, because you and he would understand the sensitivity of information and you would have the same view about the need for care in moving forward. Would that be a fair characterisation?

40

MR GREEN: That would be fair. I would say, though, Mr Patel was in many of those conversations.

COMMISSIONER: He was present in many of them. Yes.

45

MR GREEN: He had some fairly relevant shared experience with working with major contractors and performances, performance major contractors and such like. So he wasn't,

if you like, excluded from a circle of trust. He was kind of just newer to it, necessarily have understood all the nuances of the ACT Government's procurement processes that the time.

5 COMMISSIONER: Sure, but the intrusion of the minister's office into the process was a new element.

MR GREEN: Yes. But Mr Patel would have been into that part of the conversation.

10 COMMISSIONER: No, quite. And then that would have led to the problem, well, how are we going to deal with it? How do we manage it? How do we respond to it?

MR GREEN: Yes.

15 COMMISSIONER: And what was the solution that was proposed, or was one proposed?

MR GREEN: There wasn't; it was more about the process. And ultimately at the end of the processes, there would be a decision and we wondered where the decision would get to. We wondered where the scoring would get to but ultimately at the end of it there needed to be a decision made, and I think I was clear to the team that I wasn't going to be the ultimate decision maker, after that point. I was progressing the process, and the Director-General would be the ultimate decision maker.

25 MR O'NEILL: Was - to the best of your knowledge, was Mr Blom aware of who the decision maker was at the time of the establishment of the TET that he was the member of?

MR GREEN: To the best of my knowledge, he was. I - to some extent, there was a degree of relief that I wouldn't be the final decision maker, so I expect that I passed that on fairly promptly into the - into the conversation.

30 MR O'NEILL: Why was there a sense of relief that you weren't the decision maker?

MR GREEN: Because we were being directed for a political outcome and, you know, in my view that's above my acting pay grade.

35 COMMISSIONER: I want to renew then my discussion with you about conflict of interest. Because what's happened now is the next step. In short, your - the members of your team become aware, (a) of the minister's desire - or minister's office, we have to be careful whether it involved the minister is a matter yet to be explored. But the minister's office. And that the Director-General, as I understand you, but correct me if I am wrong, wished  
40 to accommodate the minister's approach.

MS MORGAN SC: I object to that question, Commissioner. I don't think that evidence has been given yet in that form in relation to the - at this point the evidence is -

45 COMMISSIONER: No, I will rephrase the question. Is it the position that in conveying the information about the minister's office, first of all you conveyed that it came from the Director-General to you. Is that correct?

MS MORGAN SC: Excuse me, Commissioner, but yesterday the evidence of this witness was that it was Ms Cross - when this witness shared that information with the TET members or his staff -

5

COMMISSIONER: No, no, we are talking about the new TET. Ms Cross -

MS MORGAN SC: But he hasn't - yes, yes, Commissioner, I understand that, but this witness hasn't given that evidence yet.

10

COMMISSIONER: No, I'm asking him, was it the position?

MS MORGAN SC: Indeed, but he hasn't given the evidence himself yet, Commissioner, as opposed to agreeing to a proposition.

15

COMMISSIONER: Yes, very well. I will rephrase the question. When you informed the team - excluding the chairperson, I think, Blom and Patel, of the desired approach or desired outcome from the minister's office, did you indicate who it came from to you?

20

MR GREEN: I think both of those two were aware of the minister's office position early during the say the first Tender Evaluation Team's tenure, so they were aware of that piece of information. So I don't know - sorry, I cannot recall whether I said where that would come from and which path and which individual was the conduit between the minister's office and myself, but I think they would deduce, whatever -

25

COMMISSIONER: Deduce, yes.

MR GREEN: - that it came via the -

30

MS MORGAN SC: I object to - I object to this evidence, Commissioner.

COMMISSIONER: Why?

35

MS MORGAN SC: Mr Green's deductions or otherwise will not assist you in a fact-finding exercise in relation to what you are examining.

COMMISSIONER: I think you are mistaken, because his deductions were material to the way in which he interacted with the relevant persons, or might have been relevant. So I think I'm entitled to know what his frame of mind was.

40

MS MORGAN SC: Certainly, Commissioner.

45

MR GREEN: So at the time when I passed on to the team that - the minister's office viewpoint on Manteena would have been early in the process, so it would be - they would have assumed, deduced, whatever, that it came via the Director-General's office, because that's generally how the communications happen.

COMMISSIONER: Came from the minister's office.

5 MR GREEN: By the Director-General's officer, or by the Director-General or her office. Then the later conversation, though, that would have happened when the second Tender Evaluation Team was appointed, with - and I've said - I'm sure, relatively sure - sorry, I think that I told them that I wasn't going to be the final decision maker, I would have at that point identified that that is the instruction I received from the Director-General. She was the one who gave me that instruction - sorry, that decision.

10 COMMISSIONER: All right. But I think we just need to be careful we are not aligning two matters here. There are two - as I see it, two possibilities. There are possibly more, but there's the first that you simply told them that she was now the - in effect, that she was now the decision maker, and the second is, that you explained or said that that was in the context of her telling you - of her telling you about the communication from the minister's  
15 office.

MS MORGAN SC: Commissioner, I object to this line of questioning. Commissioner, you are suggesting evidence to this witness. He's been quite clear that this group already knew from an earlier conversation about the minister's office, and what he was now telling them was that he was no longer the decision maker, and he has - he said, "I think I told them that and they would understand that came from the Director-General."

COMMISSIONER: Yes, I'm simply exploring those circumstances and I'm asking him what he means. When he says he told them, what was it that he told them?  
25

MS MORGAN SC: He told them that he wasn't going to be the decision maker. He's given that evidence, Commissioner.

COMMISSIONER: No, your objection is not - I don't accept your objection.  
30

MS MORGAN SC: It's on the record, Commissioner.

COMMISSIONER: I'm looking at - I'm looking at the sense of his evidence. Thank you. Well, you've heard the objection.  
35

MR GREEN: I'm trying to frame it. So with - so I told the group earlier and that that telling earlier was around, you know, the min's office doesn't want Manteena to get it.

COMMISSIONER: That was apropos months Ms Cross' -  
40

MS CAINS: Objection. That was not the evidence that he gave yesterday. The evidence that he gave yesterday was about views that were expressed by the minister's office and not in relation to the direction.

45 COMMISSIONER: I'm sorry, many his evidence yesterday, as I recall it, was that he had a conversation with the then acting Director-General Ms Cross, and she had told him about a communication from the minister's office as to Manteena, and that he is saying, and I think

he said yesterday also that, he passed that message on to the team. Sorry, what is wrong with that sequence?

5 MS CAINS: He passed on that the minister's office had a view.

COMMISSIONER: Yes. I'm sorry, what -

10 MS CAINS: Well, there's a slight difference between the minister's offices directing this outcome and that the minister's office has reported a view.

COMMISSIONER: That's the distinction.

MS CAINS: In our submission, yes.

15 COMMISSIONER: Well, you have heard the distinction. What do you say about it?

MR GREEN: So picking up the words, I passed on that the view of the minister's office was that the - Manteena shouldn't get the job.

20 COMMISSIONER: Right. And did you pass on, at that point, specifically, first of all, that that's what you have been told by the then acting Director-General, or did you not mention that?

25 MR GREEN: I don't recall whether I mentioned that or not. I think it would be - if I - if I did, it wasn't the - a key point of the message. The - the point was the minister's office had a view.

30 COMMISSIONER: All right. Now, let's come, then, back to the new team. Did you have a conversation with them about - leaving aside where it came from, about the view from the minister's office?

MR GREEN: Yes. I - I had a conversation with the new team and the broader project team as well.

35 COMMISSIONER: All right.

40 MR GREEN: That - about my conversation with the Director-General and that would have included both that the minister's - the MO's view, the minister's office's view was still that Manteena shouldn't get the job. That was the outcome we were working toward, and that the Director-General would be the final decision maker on the process, but I was running the process until the final decision.

COMMISSIONER: Thank you. Yes.

45 MR O'NEILL: Commissioner, the transcript reference for the evidence yesterday in respect of this matter is at page 60 at line 20.

COMMISSIONER: Was my recollection correct or mistaken?

MR O'NEILL:

5 *I will put it from her side of things:  
I have been summonsed down to the minister's office to talk about Campbell. Josh says  
Manteena is not to get it, there is problems with the Secure Local Jobs and industrial  
relations performance.*

10 COMMISSIONER: Right.

MR HASSALL: It was - to be fair, it was also described on page 62 as the minister's office had a view that Manteena wasn't to get it.

15 COMMISSIONER: Yes, that was my recollection, yes. Go on.

MR O'NEILL: So - yes. So just to recap, doing the very best you can, what do you think you had - you told Mr Blom about the position in respect of tenderers?

20 MR GREEN: Okay. I thought I put it really well in the last one so let's try to do that again, that the minister's office still held the view that Manteena weren't to get it, that we were to seek to achieve the - the minister's office objective, that the Director-General would be the final decision maker, but I was still the delegate for process matters until then. And, counsel, that - not just to Mr Blom, that would also be to the other broader members of the  
25 project team.

MR O'NEILL: Who are you referring to when you say that?

30 MR GREEN: So Mr Patel and Ms Power. I'm not sure that Ms Wright was in the conversation. In fact, I don't think she was in the conversation. But she would have been talking to Mr Patel and Mr Blom.

MR O'NEILL: Did you place pressure on that team -

35 COMMISSIONER: I think you need to ask a more direct question about what he said about it rather than the effect of it.

MR O'NEILL: Certainly, Commissioner. What did you specifically say?

40 COMMISSIONER: Can you recall?

MR GREEN: I can't recall, other than they were the four key messages that I would have passed on. I cannot recall what form I said that in.

45 MR O'NEILL: Did you place pressure on the team to change the scoring so that the evaluation would become closer?

MR GREEN: No.

MR HASSALL: I -

5 MR GREEN: I asked the team to have a look at the tenders, that was that re-evaluation. I had expressed that I thought the scores were remarkably divergent - different based on that number. But I don't think I expressed or placed pressure on the team to bring those scores, you know, together there.

10 COMMISSIONER: Do you think you used any words which might have conveyed, firstly, that you thought a re-evaluation might lead to a closer scoring?

MR GREEN: I - look, I quite probably used some words like that. That would be my style of conversation. I would have said those scores look crap, and have a look at them and, you know, come back with what you think. But I did not have any realistic expectation that, for instance, they come back with a tender evaluation report putting Lendlease ahead of Manteena. But I did think the score gap was bigger than I would have expected, knowing those two tenderers.

20 COMMISSIONER: And you conveyed that message.

MR GREEN: And I conveyed that, yes.

MR O'NEILL: At page 2.1640 of the bundle, is - there is a number of text messages which will come up shortly. The first one I will have drawn up. This is a message from you to Mr Blom on 3 April at 10.41. It starts with "& Rebecca":

*& Rebecca and I have talked about Campbell. I've suggested an IP payment to both if they agree to BAFO with another 75K to the unsuccessful.*

30 What's this topic?

MR GREEN: So the IP payment is the intellectual property payment. Sorry, I have forgotten the term of it. So essentially we purchase IP off contractors as they go about their tender processes. So what it is used for in practice is that we get good ideas that people come through in people's tenders, and most of the contractors use it to pay architects and services engineers in their time for bidding for the job. So in this context here, obviously 75,000 was the previously agreed IP payment for the unsuccessful tenderer on Campbell, and to overcome - sorry, noting the industry conditions at the moment where many architects were saying they have got no money because every project has died up and everything has gone on hold, people are being laid off left, right and centre, there was a concern that maybe both parties wouldn't participate in the BAFO offer and maybe both parties would just do the minimalist job and wouldn't actually get it. So in order to get buy-in for the BAFO and get the companies to take it seriously, I suggested in the conversation with Rebecca that we make another IP payment to them and basically pick up the IP on their tender bids and essentially allow them to pay the architects and get on to the BAFO.



MR O'NEILL: Now, in your mind at the time of this text message, you knew that the way in which it had been previously been scored was that the design element by Lendlease was lesser -

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MR GREEN: Yes.

MR O'NEILL: - than that of Manteena.

10 MR GREEN: Yes.

MR O'NEILL: And that Manteena was not to get the bid.

MR GREEN: Yes, I knew the minister's - MO's view on the work.

15

MR O'NEILL: So is it the case, and feel free to reject this proposition, that in reality what you are talking about here is giving \$75,000 to Manteena because you are going to take some of their design elements and give them to Lendlease?

20 MR GREEN: No. That's incorrect. The BAFO, as I understand it, we couldn't take the design work that had been done by one tenderer and give it to another tender for the BAFO section. So this is - I mean, both tenderers would be eligible for that \$75,000 payment if they agreed with the BAFO, and the unsuccessful one in the BAFO, whoever that was, would get another \$75,000. It goes some way towards making sure that they participate.  
25 For instance, the architect used by Manteena I remember - I cannot remember their name, sorry, but I remember they had made contact to say basically all their work had dried up, and so they were making direct contact back into the capital works team to say do you have any work coming up. You know, they were looking at laying off people. So this was a way to support the architects involved with the bid, because that's generally where these  
30 payments go to, to make sure they are in - they participate and they have staff there to participate and pay their bills to be part of the BAFO offer.

MR O'NEILL: All right. Let me put a different proposition to you. You were concerned at this time to ensure that both parties participated in the BAFO because one of the  
35 possibilities may be that Lendlease would not, leaving only Manteena as the tenderer that could be accepted?

MR GREEN: And that was certainly a conversation. It was also seen as possibly a get out of jail card because if Lendlease declined we only had one tender, so there was no other  
40 option than recommend Manteena up the chain. So there was two sides to that - that discussion.

MR O'NEILL: So there is some force to that proposition as at the 3rd of -

45 MR GREEN: Yes, absolutely. So there was thoughts, you know, if we only have one that makes the decision easy. If we have two participating, it keeps the competition open.

MR O'NEILL: In the following bubble you say, at a minute later:

*Can you talk?*

5 To Mr Blom.

MR GREEN: Yes.

10 MR O'NEILL: And then if we go across the page to 21641. And you don't need to draw out any of these two. There's just two further text messages. He says:

*Yes, can chat.*

15 And then an hour later, he sends the details over for Mr Owen at Lendlease ACT. Do you see that?

MR GREEN: Yes. Yes.

20 MR O'NEILL: Do you recall what that conversation was about?

MR GREEN: The conversation was probably around the IP payment with Mr Blom. It looks like it's - it happened some time between 10.46 and 11.27. Talks about the fact that I had contact details for Manteena already, but I didn't have the contact details for Lendlease. And there's - I remember an earlier email from this morning where I think I've said in the email that I have spoken to - to Manteena already and need to talk to Lendlease later today. I'm guessing that's on the same day as this. So this is me getting the contact details for who to talk to at Lendlease about their participation of the BAFO.

30 MR O'NEILL: Did you speak to Lendlease? Do you recall speaking to Lendlease about it?

MR GREEN: Yes, yes.

MR O'NEILL: Now, no decision has yet been made?

35 MR GREEN: Yes.

MR O'NEILL: What was the term - what were the terms of that conversation with Lendlease?

40 MR GREEN: Something along the lines of we are considering a BAFO. Will you participate? We are willing to pay another IP payment of 75,000, and I think - I got a - obviously got a positive response from Lendlease to say they would participate in that process.

45 MR O'NEILL: Right.

MR GREEN: And that was a very similar conversation I had with Manteena, I think, before this.

5 MR O'NEILL: Right. That was my next question. Did you have a similar conversation with Manteena in.

MR GREEN: Yes, Mark Bower from Manteena.

10 MR O'NEILL: Yes. And what did you tell him?

MR GREEN: Same thing. We are considering BAFO, willing to participate, another \$75,000 in IP payment along the way.

15 MR O'NEILL: Now, the date of the Tender Evaluation Report, hearing bundle 1 - I don't have the numbering for it. You might just have to help, because it's been updated. I think it should be 1.280. Well done. Got it right. Okay. Pat on the back for counsel assisting. 1.280, this was the Tender Evaluation Report. If we just scroll through it to the page at 1.282. There is two tenders received. The scoring is at 1.283. Sorry, this is not the right document. That's my fault. I will withdraw my pat on the back. 1.330, let's try this one. No.

20 MR GREEN: This one has got a logo on top.

COMMISSIONER: Yes. Take away the document you first thought of.

25 MR O'NEILL: I will get it right eventually. This is 1.364. Now the numbering will probably go out, but we will see. 1.366, purpose of this report was described as being to advise on assessment of the tender responses and to seek approval to enter into a best and final request. Do you see that?

30 MR GREEN: Yes.

MR O'NEILL: And this was provided to you on or about 6 April 2020. Now, we know that no tender had changed at this point in time. These were still the original tenders that had been submitted. So the pricing remained the same; correct?

35 MR GREEN: Yes.

40 MR O'NEILL: But then when one turns across to 1.367, under a subheading Evaluation, and if you can pull out the box, the scoring had come in significantly closer than the previous recommendations, 69.1 and 68.4. Do you see that?

MR GREEN: Yes.

45 MR O'NEILL: You had expected that, had you not?

MR GREEN: I suspected it to close up. I must admit when looking at this I was surprised about how close they did become.

MR O'NEILL: Right. Why were you surprised?

MR GREEN: That's pretty close.

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MR O'NEILL: Now that they are almost - well, they are now within .6 of a point of each other. Fair?

MR GREEN: Yes, .7.

10

MR O'NEILL: Yes, .7 of a point.

COMMISSIONER: Well, it also shows, doesn't it, a marked difference in analysis between the first team and the second.

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MR GREEN: Yes, Commissioner.

MR O'NEILL: Can you explain - sorry, I withdraw that. Go did you when coming to consider making this decision that was being recommended to you look at the working out of how this decision was - how this recommendation was arrived at?

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MR GREEN: The working out of how the scores were arrived at?

MR O'NEILL: Yes.

25

MR GREEN: Or the working out of the -

COMMISSIONER: Yes, because there was working papers. I think Mr O'Neill is asking you did you look at the working papers.

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MR GREEN: Yes, we've talked about this before. No, Mr O'Neill, I didn't look at the working papers for this score.

COMMISSIONER: I'm just a little baffled. This, the recommendation of this was made to you but you were no longer the delegate. Why was it made to you and not then to Ms Haire on the basis that you said the decision's for me. Or had that decision not yet been effected, as it were?

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MR GREEN: No, Commissioner, I think you're - there's a couple of different terminologies in that. So I think my evidence has been that the Director-General advised that she would be the final decision maker.

40

COMMISSIONER: This is not the final decision; this is an interim step.

MR GREEN: Yes, this is an interim step. So for instance, if this had recommended that it be awarded to one company or another, that would have been a final decision that would have gone to the Director-General.

45

COMMISSIONER: But this wasn't that; this was a recommendation that there be a BAFO. So there had to be an intermediary process.

5 MR GREEN: A process step.

COMMISSIONER: Right.

10 MR O'NEILL: And at page 1.369, you will see a number of black boxes which doesn't help in the question I'm about to ask, but if you see a date, the 8th -

MR GREEN: Of the 4th, yes.

15 MR O'NEILL: April 2020. Does that accord with your recollection of when you approved -

MR GREEN: Yes.

20 MR O'NEILL: - the recommendation? Now, at the time of approving that recommendation, were you aware of your probity and ethical obligations under the Public Sector Management Act?

MR GREEN: In a generic sense of the Public Sector Management Act. I'm sure that's mentioned in a document.

25 MR O'NEILL: Were you aware of your obligations under the Government Procurement Act?

MR GREEN: I was aware of the Government Procurement Act.

30 COMMISSIONER: I'm sorry, is that a yes, no or an avoidance of the question?

MR GREEN: No, but I don't have any specific obligations in the Government Procurement Act.

35 COMMISSIONER: Right. I think the question really was are you aware of the obligations surrounding procurement in the Act?

MR GREEN: Yes.

40 COMMISSIONER: All right.

MR O'NEILL: Were you aware of a document known as the Procurement Policy Circular PC21, Probity and Ethical Behaviour?

45 MR GREEN: Not in any detail.

MR O'NEILL: All right. Now, the document will be made available on the Commission's website for those here as it was at the time. But given you're not aware of it, I'm going to put some propositions to you and see what you say. Were you aware that you were required to perform your task in procurement honestly and without favour or prejudice?

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MR GREEN: Yes, I think that's a standard obligation.

MR O'NEILL: Were you aware of your obligation to spend public money efficiently and effectively in accordance with law and government policy?

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MR GREEN: I think that's a standard obligation.

MR O'NEILL: That's a yes?

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MR GREEN: Yes.

MR O'NEILL: You were aware that you were required to deal fairly, impartially and consistently with suppliers?

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MR GREEN: Yes.

MR O'NEILL: Now, to your mind, this process that had been conducted as at this date, did it accord with performing an honest task without favour or prejudice?

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MR GREEN: Looking at it, this task - this - this BAFO could be seen to be favouring Lendlease who were less scored, but it also didn't preclude either company winning the next process.

MR O'NEILL: Right. Was it honest?

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MR GREEN: It was honest in terms of the scores were there. There's a valid recommendation out of that process.

MR O'NEILL: Although had those scores been honestly derived? That is, had you honestly - had the process been honestly conducted to arrive at those scores, To your mind?

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MR GREEN: Yes, in my mind, honestly conducted. They were the scores that the Tender Evaluation Team had come up with, or that process there.

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MR O'NEILL: Was it an efficient and effective spend of public money?

MR GREEN: There's no spend attached with this technically. But it - "efficient" doesn't mean lowest value. So efficient always means best value for money and that has regard to the various weighted factors within it. So in my mind, it was efficient because we were looking a range of outcomes, not just the lowest cost.

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MR O'NEILL: Was it fair?

MR GREEN: I may have answered that one before.

5 MR O'NEILL: Different. You said - I said favour or prejudice or honest. This is fair. Was it fair?

MR GREEN: So it's fair as in neither tenderer has yet been excluded from the process.

10 MR O'NEILL: Well, put that to one side. Assuming they knew about it, was it fair?

MR GREEN: Well, it's fair in terms of both companies were over budget. Yes, Manteena had a lower score before, but we couldn't accept Manteena. So this is moving the process down the train to have a process to allow both companies to put a best and final offer in.

15 MR O'NEILL: Was it impartial?

MR GREEN: I believe in this case it was. Both companies had been given the opportunity.

20 MR O'NEILL: Had a conflict of interest arisen in respect of the procurement activity being undertaken?

MR GREEN: I don't think so. In the - conflict of interest would normally in my mind be whether there is a relationship with one of the contractors. So I don't think I had a conflict of interest, bearing in mind the Commissioner's points from before. But I don't think I had a conflict of interest with either of the tenderers.

25 MR GREEN: I don't think so. In the - conflict of interest would normally in my mind be whether there is a relationship with one of the contractors. So I don't think I had a conflict of interest, bearing in mind the Commissioner's points from before. But I don't think I had a conflict of interest with either of the tenderers.

COMMISSIONER: Mr Green, why did you tell the team - let's leave the earlier conversation for a moment. No, I won't. Take the conversation that occurred after Ms Cross's intimation to you that the minister's office knew. Why did you tell the team that - why did you give them that information? Really, I'm exploring, was it relevant to their task in any way? Why did they need to know it?

30 MR GREEN: Mr Green, why did you tell the team - let's leave the earlier conversation for a moment. No, I won't. Take the conversation that occurred after Ms Cross's intimation to you that the minister's office knew. Why did you tell the team that - why did you give them that information? Really, I'm exploring, was it relevant to their task in any way? Why did they need to know it?

MR GREEN: Commissioner, I've asked myself this question a number of times since - many times since. I was sharing with my team the political environment in which we were operating. In hindsight I regret - deeply regret doing that. I should not have said anything at all in that - in that process. But I think at the time I was letting my team know about the environment we were in and with - with one of - sorry, with a couple of views on it. One is that there would have been scrutiny on whatever we did. So for instance, if we went ahead and awarded it to Manteena, as the process could have been at that point, we would have made - had to make sure we dotted our is and cross our ts and have ministerial scrutiny, if that makes sense, on that sort of sense there. And also if, well, we head down another path we needed to make sure - we need to plan another ways to get down another path if we were ultimately going to be pushed that way. So I think I overshared with my team and, as I said, I have asked myself times in the year since and, you know, was that a wise decision and my conclusion is that it wasn't. I should not have talked to my team at all about that.

COMMISSIONER: It wasn't quite my question, though. It probably would have been the second question. Can you think of the reason - can you now go back or are you saying it was just generally contextual and you just opened up because you were being candid?

5 What - what was your frame of mind?

MR HASSALL: I object to the question on the basis in my submission, Commissioner, the witness answered. He said that after saying he had asked himself that question, he said "I was sharing the political environment." He also explained that there would - it seemed he wanted to communicate that there would be scrutiny on whatever we did if we awarded to Manteena or - so that was my submission, and he provided a responsive answer.

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COMMISSIONER: I understood that was describing what he did. I'm really trying to find out why he did it. Why share? That's really what my question is about.

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MR HASSALL: Yes. I don't seek to say anything else.

COMMISSIONER: All right.

20 MR GREEN: So -

HIS HONOUR: Do you know now, looking back?

MR GREEN: So to not just try to paraphrase my previous answer, I was sharing with my team. I was being overly candid. I shouldn't have shared that information, but I was sharing with my team, you know, where - where this was going and, sorry, where I thought this was going to be going and warning everyone up that this is where the process was going to go to. Sitting on the fence saying, okay this one is going to be a challenging one, you know, we are going to need to work through it and this is - this is what I've heard.

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COMMISSIONER: Right, then. Now, let's get then to the second team.

MR GREEN: Yes.

35 COMMISSIONER: And you had more or less a similar conversation. Would you mind saying yes rather than nodding.

MR GREEN: Yes.

40 COMMISSIONER: Because it's not recorded. Again, I ask you, why did you do that on that occasion or those occasions in relation to the second team?

MR GREEN: So I see that as a continuation of that first conversation, because most of those members of the second team were aware of the first conversation. So it was a - a continuation of that piece. The second team, though, with the more relevant information was the confirmation of our - sorry, the four items I raised. So the Min's office still held the

45



view about Manteena, that we were to achieve the objective, that the Director-General be the decision maker and I was still the delegate. That was more specifics on that one.

5 COMMISSIONER: Well, that had changed because Ms Haire had said, "I will now make the decision."

MR GREEN: Yes.

10 COMMISSIONER: Right.

MR GREEN: So again, sharing with my team in a candid way, so they could understand where -

15 COMMISSIONER: And on reflection, what's your view about wisdom of that course?

MR GREEN: For - again, I deeply regret. I, you know, go back to the previous statement, I should have not shared anything in my team to start with, and then I do think I did on the second one I would have needed to share that I was no longer the final decision maker as a process matter, and that I had - you know, my delegation still worked through the process. But by that stage the - the views on the minister's office were, you know, well-known within the project team, so -

20 COMMISSIONER: Right.

25 MR O'NEILL: Do you accept, though, that the sharing of that information to the second team had the risk of driving it towards an outcome?

MR GREEN: Yes, I do. But also I had the other side of that piece which is that the team could work and that I wasn't going to be the final decision maker but someone else will be the final decision maker. So there's a double side to that.

30 COMMISSIONER: Well, if we might return then to the conflict-of-interest point that I raised with you. I raised it with you in the context of your relationship to the members of the team that they were your subordinates.

35 MR GREEN: Yes.

MR O'NEILL: Now we have it coming from one or perhaps two levels above you. The first level is the Director-General, and the higher level, I think higher is fair enough in the context, the minister's office. So in effect, am I right - to act rightly, the team had to put out of their mind what opinion the Director-General might have, what opinion the minister's office might have, and conscientiously weigh up the competing bids in line with their merits. Does that fairly set the position?

40 MR GREEN: I think yes, that's a summation of the position.

COMMISSIONER: And the challenge is of course to put their other matters out of their minds. That's always the challenge.

MR GREEN: Yes.

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COMMISSIONER: And that - therein lies, I think, and I'm asking you for your view on this, therein lies at least but probably more an objective conflict of interest. On the one hand, you have an interest to comply with what you understand your superiors want, and on the other hand you have a responsibility to consider the matters given to your judgment conscientiously and independently. So those two things objectively conflict.

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Now, you deal with them - there are several ways. One way is to step out all together and not make - not be responsible for the decision. That's one way. And there are things in the procurement guidelines which suggest, when there's a conflict, that's what you should do. And other is to make it explicit that you understand that it's there, and you will make a deliberate and intentional choice not to acknowledge the influence of the outside authorities and attempt to do the work independently in accordance with your judgment. So those are probably the two ways in which you can manage. Or the third way is to put your thumb on the scales in order to do the job that you think people want you to do. That's always the risk. Have I fairly described the problem?

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MR HASSALL: I object. Sorry, have you finished, Commissioner?

COMMISSIONER: No, my question was, no you can object in a moment. Just let me ask my question. Have I fairly described the problem that one has in the situation like this? Now.

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MR HASSALL: Thank you, Commissioner. Can I be heard on the use of the term "conflict of interest".

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COMMISSIONER: By all means.

MR HASSALL: In this context.

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COMMISSIONER: If you - I say it once; it's fraught. There's - I think almost no legal authority that usefully describes a specific principle. The principle is always stated in generalities which you then have to try to apply to particular circumstances. Personal interest is easy. Are they a friend? Are they married? Are they your son? Do I have shares in the bank, and so on. Those are very easy ones. The conflicts that arise in this context are much more difficult and will, I think, call for some discussion in a final report because they are difficult to apply. There are guidelines in the procurement guidance documents in its various iterations, but again, they seem to proceed on the basis everybody knows what a conflict is. And they do give examples, but only of the most obvious ones. So the - what I'm suggesting might be a conflict, well, I think I have probably gone further. I think there was a conflict here. Subject to what people ultimately submit, but I think there was. That's what I'm trying to explore with this witness.

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MR HASSALL: I suspect I'm, to a significant extent, agreeing with the comments you've just made, Commissioner. The difficulty I have is with the rubric "conflict of interest" because it does have a commonly understood meaning and, in my submission, it - it's not a situation. It doesn't embrace a situation where there's a conflict, for example, between a  
5 desire to comply with what one understands one's superiors wishes to be and a duty to decide a matter impartially. I have no problem with the description of there being a conflict between what one understood to be one's superior's wishes and the duty to decide a matter impartially, but to describe that situation as a conflict of interest, I respectfully submit may ultimately be unhelpful, and particularly for those outside of this room who might  
10 associate another meaning all together with conflict of interest.

COMMISSIONER: That's - I have endeavoured to, in another way, make the point that you've just made, but it must be - the issue, I think, is squarely raised in these circumstances. How one ultimately resolves it is a matter upon which it may be reasonable  
15 minds could reasonably differ.

MR HASSALL: I don't dispute at all that the issue arises. It's just the moniker or the terminology that goes with it.

20 COMMISSIONER: Yes. I can't think of another way of describing the problem, though. I think it is a - I think it is a live issue in its terms. So -

MR HASSALL: Perhaps I will finish by saying I don't object to the topic or the question generally. I do object to the extent that it incorporates the term "conflict of interest"  
25 because of the inherent ambiguity.

COMMISSIONER: Yes well it's that ambiguity that I'm attempting to resolve.

MR HASSALL: May it please.  
30

COMMISSIONER: Well, you have - you have heard that discussion. Mr Green, I think I do no more than say, do you want to make any additional comment to the evidence you have already given about that problem?

35 MR GREEN: Coming back to the comment made by my counsel, the - there is laughter happening over here.

COMMISSIONER: Well, to be fair to you, I think - let me tell you what I understand you to be saying and you tell me whether I'm wrong or right about this. You have already said  
40 you think it was unwise. Part of the reason that it was unwise, because it set up a problem which didn't need to be set up - created an issue that didn't need to be created. Am I right? You could have got on with your job of proceeding with this process without complicating the process by bringing in the political environment to which you have referred. Is that  
45 why you think it was unwise or -

MR GREEN: Yes, Commissioner.

COMMISSIONER: Right. And does it follow from that that however you would describe the problem, certainly at the time you did not perceive anything that you might have seen as a conflict of interest?

5 MR GREEN: Sorry, I've lost -

COMMISSIONER: Okay. At the time -

MR GREEN: Yes.

10

COMMISSIONER: - did you see the issue of proceeding with this process and taking into account the minister's office view as representing a conflict of interest?

MR GREEN: I did not see it as representing a conflict of interest. I saw it as the normal, like, tension between what - what we do in our day-to-day works and our directions we get from our superiors, and organisationally down there. So it's - like the normal tension you get a - you want to do this, but then you get this instruction and then there's always intention of working your way through those different perspectives.

20 COMMISSIONER: Very well.

MR O'NEILL: But here, that different instruction had a political element to it. Agree?

MR LEE: I object. Earlier the witness gave evidence that he shared information with the team in part, so the team understood the environment in which they were working in. Mr Hassall in his -

COMMISSIONER: I think he described it as the political environment.

30 MR LEE: Well, I just want to -

COMMISSIONER: Am I mistaken or is that -

MR O'NEILL: No, that's correct.

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MR LEE: I just wanted to check that. That wasn't my note. My understanding was Mr Hassall referred to as a political environment, but I don't think the witness had said that.

COMMISSIONER: No, I think he did.

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MR O'NEILL: No, he did.

MR LEE: Okay. Thank you.

45 COMMISSIONER: It's clear, isn't it, accepting the reliability of discussion on Mr Green's evidence on that point that's what was happening. That's how one would characterise it if it occurred.

MR LEE: Well, the evidence is that there was a view from the minister's office.

COMMISSIONER: Quite.

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MR LEE: The motivation for that is yet to be explored. There may be an inference that -

COMMISSIONER: Certainly. There are probably implications about how it arose, but the source is a political rather than bureaucratic.

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MR LEE: It came from the minister's office. That's the evidence. That's the evidence, yes. But to describe it as a political motivation, we haven't got there yet.

COMMISSIONER: I'm sorry, I don't quite understand the point you are making. Sorry, let me be - and I don't - contrary to the way in which the media reports these matters, I don't actually regard the word "politician" as being an insult or a denigration. It is simply a description of a certain task that people undertake in a democracy. So by using the term politics or politician, I'm not intending the slightest adverse suggestion. But it can be not doubted that the minister is operating in a political environment. Yes?

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20

MR LEE: Yes, yes. No.

COMMISSIONER: And of course we have not descended yet into where this information came from except from that context, if we can try and use a neutral term here. But that is a political context, is it not? Or do you feel that is an inappropriate description, and if you do, what description do you think is appropriate?

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MR LEE: The only point that I would make, Commissioner, is that at the moment we have evidence that there was a view coming from the minister's office through the chief of staff. Why that view existed, there may be -

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COMMISSIONER: That's another question.

MR LEE: And what my concern is whether we say a political environment, it is inferring that conclusion that there that was a political motivation behind this minister's view - sorry, the minister's office's view.

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COMMISSIONER: Well, I don't think -

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MR LEE: That was my understanding.

COMMISSIONER: I understand your point, but we are really not talking about motives here. We are talking objectively about where things came from, so in that sense.

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MR LEE: I've got no difficulty with that. It was just the -

COMMISSIONER: All right.

MR LEE: There was a conclusion about motivation of something.

COMMISSIONER: I think we are now all clear.

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MR LEE: Thank you, Commissioner.

COMMISSIONER: Thank you, Mr O'Neill.

10 MR O'NEILL: Thank you. So that instruction at a political -

MS MORGAN: Commissioner, I'm so sorry to make life a misery, but the -

COMMISSIONER: Not at all. I thought you would have gathered I'm enjoying it.

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MS MORGAN: I think one of the issues is the use of the word "instruction". The evidence at the moment is that the minister's office had expressed a particular view and so right now -

20 MR O'NEILL: No, I accept that. That's fair.

MS MORGAN: Thank you.

25 MR O'NEILL: So there was a political element to the information that was being fed down to you; agree?

MR GREEN: Yes.

30 MR O'NEILL: And it's that political element of that information which gives rise to the potential for conflict; do you accept that?

MR GREEN: Yes.

35 MR O'NEILL: Because this process from a procurement probity position is designed to do something to evaluate the tenders objectively and fairly.

MR GREEN: Yes.

40 COMMISSIONER: Well, and in addition, transparently, so everybody knows what the ingredients of the sausage are. Isn't that right?

MR GREEN: Yes, Commissioner.

45 MR O'NEILL: And so that gives rise to the potential for conflict at least; agree?

MR GREEN: Yes.

MR O'NEILL: And the problem with feeding that information to people who are making the decision is there is a potential for conflict. Sorry, people who are making an assessment there is a potential for conflict.

5 MR GREEN: Yes.

MR O'NEILL: Do you agree with that? Commissioner, after that session, I think it's time for lunch.

10 MR GREEN: Can I add one more thing?

MR O'NEILL: Surely. It's been certain you want to go.

MR GREEN: Because there's two bits to this one and there's -

15 COMMISSIONER: Possibly more.

MR GREEN: Yes, sorry, at least two bits to this one. More than one bit to this one. There's the political piece, which was the early section, and then there's the later one where the Director-General passed on to me the - the -

20 COMMISSIONER: View.

MR GREEN: The view, and the view that we should be seeking to do that. So there's two stages in this, in my view, counsel.

MR O'NEILL: We are not at the second stage yet, though, are we?

MR GREEN: No, I think we are talking about the first bit.

30 MR O'NEILL: Believe me, we will get there.

COMMISSIONER: Yes, you are right. So -

35 MR O'NEILL: It's 1.16, Commissioner.

COMMISSIONER: Sorry?

MR O'NEILL: It's 1.16.

40 COMMISSIONER: 2.16. I think we need an hour after that.

**<THE HEARING ADJOURNED AT 1.16 PM**

**<THE HEARING RESUMED AT 2.24 PM**

45 COMMISSIONER: Thank you, Mr O'Neill.

5 MR O'NEILL: Mr Green, if I can take you to document 2.1742. I first want to draw your attention to the bottom of that document. 2.1742. Now, at the bottom of that document is an email from Mr Nakkan to you, Ms Power, CCing Mr Blom, and an email within the ICW director's office. And you see there it's addressed to you:

10 *Please see recommendation from the Tender Evaluation Team and the attached brief version 2 for your consideration and approval. Can you also sign Attachment G following the endorsement.*

And then moving up to the email that you reply on the following morning at 8.17:

15 *Attached are the signed TER and PPM. I have authorised the BAFO but expect a further TER.*

Can you assist us with what that expectation is about?

MR GREEN: No, counsel, it doesn't actually ring a bell.

20 COMMISSIONER: What does TER stand for, so people understand?

MR GREEN: Tender Evaluation Report, Commissioner. I'm not sure exactly what the document is. I have authorised the BAFO, so maybe there's a - there's a tick box at the end of the TER that's come through with the PPM, but I don't actually understand the second part of the -

25 MR O'NEILL: Would you like me to show you the tender evaluation report that was attached? It starts at 2.1744. And if we scroll through - and you think it might be something at the back end of it?

30 MR GREEN: Yes.

MR O'NEILL: Do you want to go to the last page - the second to last page, 2.1748? Do you see there the signatures of the team? This one has a tick on it, approved. And then if I take you to the next page.

35 MR GREEN: So scroll back a page, please. So in the first box that I've ticked, it's requested best and final offer from the - under the parameters, whatever. Then the next two boxes after that would be - number 2 will be report - the outcomes of the - back to me for approval prior to arranging for a contract to be prepared, or 3, arrange for a contract to be prepared. I've ticked neither of those. So I think my comment relates to the words of number 2, which is:

45 *Report the outcomes of the contract negotiation back to me for approval prior to arranging for a new contract to be prepared.*



So what I've said is, I would actually like a new report in lieu of the options set out in number 2.

5 MR O'NEILL: I see. Does that answer encompass what you expected would be returned after the BAFO process?

MR GREEN: Yes, that I would expect to see another tender evaluation report at the end of the BAFO process. That's pretty much standard wording in most of those sort of pieces there. So I don't think the standard word, which is kind of what number 2 was almost  
10 saying -

COMMISSIONER: They are not very apt. It's been a cut and paste from another form, is what's happened.

15 MR GREEN: Yes. So essentially I'm saying, go and do the BAFO but I want a Tender Evaluation Report at the end of it, not give me the contract report negotiations outcomes.

COMMISSIONER: Yes, because you wouldn't undertake contract negotiations until the BAFO report recommendation, which assumed - presumably would recommend one or  
20 more tenderer, had been made and accepted.

MR GREEN: Yes. Correct, Commissioner. And number 2, the standard words would relate back to a kind of VM negotiation where I would say, appoint so and so was preferred, negotiate on these matter with the desired outcome of this. And then number 2  
25 will be valid to tick back, report the outcomes back to me and then arrange a tender.

MR O'NEILL: Now, that was done. The BAFO - that can be taken down now. The BAFO process was initiated in both Manteena and Lendlease were notified and that process was to take some time. On 16 April while that process was being undertaken, you sent this text  
30 message at 2.1775. Do you see there, "Interesting", this was to Mr Piani on the 16th.

MR GREEN: Yes.

MR O'NEILL:

35 *Interesting info on Lendlease given Campbell BAFO!*

MR GREEN: Yes.

40 MR O'NEILL: What was the interesting info?

MR GREEN: I - I kind of didn't recall until we saw this email. So I think Adrian - sorry, Mr Piani and myself were in a meeting at the time, an industry meeting, and I think someone mentioned that Lendlease were no longer tendering on fixed price jobs. They  
45 were only going to do negotiated work and I think that's my comment back there.

MR O'NEILL: If I take you to 2.1776.

COMMISSIONER: Did that have any implications for the BAFO?

5 MR GREEN: It seemed to conflict with Lendlease's agreement to participate in the BAFO.  
Because -

COMMISSIONER: Because you'd end up with a fixed price. That's the very point of a contract.

10 MR GREEN: Yes. Yes.

COMMISSIONER: So the alternatives are fixed price or progress payments depending on the amount of work agreed to be done. Is that the -

15 MR GREEN: No, Commissioner. Fixed price would be that we agree an amount with normal clauses in our construction contract, how you vary it. The options will be, say, a managing contract or a cost-plus contract, which is they would agree an amount to manage the project, and then all trade costs would be passed on with an appropriate margin.

20 COMMISSIONER: To the client.

MR GREEN: To the client, yes.

25 COMMISSIONER: Right.

MR GREEN: So progress payments will be made in either scenario.

COMMISSIONER: Right. And I suppose at this stage, it was already becoming somewhat difficult to manage the cost of inputs.

30 MR GREEN: Yes.

COMMISSIONER: Because of COVID.

35 MR GREEN: Yes, and, you know, very short-term price validity periods. Some subcontractors were saying this is the price valid for the next seven days and things like that. So it was very difficult to pin down trade pricing.

40 COMMISSIONER: Right.

MR O'NEILL: So the text messages that are before you, you see Mr Piani says:

*Better ask the question.*

45 And then you respond.

MR GREEN: Yes, I see that.

MR O'NEILL:

5 *I figure they will put a line in the BAFO response that they want to renegotiate the contract terms to make it an MC contract.*

That of course -

10 MR GREEN: Yes. Which is that - the contract scenario that I explained to the Commissioner a moment ago, MC being managing contract.

MR O'NEILL: Okay. Now, in the period that the Directorate was waiting for the responses to the BAFO, did you have a conversation with either of the tenderers?

15 MR GREEN: I don't recall, and it would be really unusual for me to have a conversation with either tenderer in a valid tender process.

MR O'NEILL: Right.

20 MR GREEN: Sorry, about the contract. Sorry, let me phrase that. There may be opportunities where - sorry, there may be times when I'm in a meeting with one of the tenderers in their role as, say, an industry representative. So for instance, if there was industry stakeholders meetings are there, but that would be a conversation about the industry; it would not be a conversation around the tender.

25 MR O'NEILL: Okay.

COMMISSIONER: No, well that's just a no-go area, isn't it, you can't have independent discussions with tenderers.

30 MR GREEN: Yes. Yes, Commissioner.

MR O'NEILL: Now, in relation to those discussions outside of the tender process, that is - that message can be taken down. Outside the process, do you recall having a conversation with anyone from Manteena?

35

MR GREEN: I don't recall having a conversation around the tender.

40 MR O'NEILL: Not around the tender, but on a separate topic?

MR GREEN: I - look, I don't recall having a conversation with Manteena about separate topics.

45 MR O'NEILL: What about someone - what about Mr Bower in about May 2020?

MR GREEN: I don't recall that. Mr Bower is of course Manteena, and he would have been involved with some of those industry conversations.

MR O'NEILL: There was a - there's information before the Commission that a conversation occurred on or about 6 May 2020 between you and Mr Bower where the topic of union involvement in construction was raised. Does that assist your memory?

5

MR GREEN: No. Sorry, counsel.

COMMISSIONER: Would that be an unusual conversation or -

10 MR GREEN: That would - I would put that in the category of industry matters.

COMMISSIONER: Sure. Well, in light of the fact that you had been Registrar and so involved in this kind of potentially controversial area, is it fair to say that you may well have had such a conversation?

15

MR GREEN: I may well have had such a conversation. There was certainly plenty of industry engagement.

COMMISSIONER: But you don't recall it now.

20

MR GREEN: I don't recall it.

MR O'NEILL: In this period before you had to hand the BAFO team recommendations - so that is the second TET team's recommendation in respect of BAFO, did you have any discussions with anyone on the Tender Evaluation Team about the BAFO process?

25

MR GREEN: I will say yes, I don't recall any specific ones, but I cannot imagine that I didn't have a conversation with them.

30 MR O'NEILL: Now, on the - I will bring up this document. What about - sorry, I should, for completeness - what about any discussions with the Director-General?

MR GREEN: I expect that I would have been having regular meetings with the Director-General as part of my normal business and, I mean, Campbell would have been raised in those conversations and that would be a normal part of the business.

35

MR GREEN: Was the Tender Evaluation Team feeding information to you about what its likely decision was going to be in respect of the evaluation of the BAFO process?

40

MR GREEN: Yes.

MR O'NEILL: Can you help us with the tenor of those discussions? Firstly, when do you think about these conversations occurred?

45 MR GREEN: So the BAFO would have closed and then they would have had an initial meeting, and I think I heard fairly quickly from the team that they thought that Manteena would be the highest scored respondent to the BAFO.

MR O'NEILL: Right.

5 COMMISSIONER: Just before we get there, can I just ask you, Mr O'Neill, was there not some limitation on the criteria to be considered by -

MR O'NEILL: Certainly. Certainly.

10 COMMISSIONER: Have you - are you going to come to that?

MR O'NEILL: We can do that topic now, Commissioner. The Commission understands that the way the BAFO process was to be conducted was of a more limited review of various criteria than the tender process had been conducted. Is that fair?

15 MR GREEN: Yes, I think three of the six criteria were being reassessed.

MR O'NEILL: And were you involved in selecting which of those criteria were going to be reassessed?

20 MR GREEN: No. My understanding is they were out of the GSO advice as to which - which items could be reassessed and which items couldn't.

25 COMMISSIONER: So then the items which were not to be reassessed were simply to - their earlier scores would simply have been adopted for the purpose of the ultimate recommendation. Was that the -

MR GREEN: That's my understanding, Commissioner, how it was going to operate.

30 COMMISSIONER: Now, I think I'm correct in saying, in relation to each of the relevant criteria, we now - we had at least - I think there were two scores. There was the very first pass and then there was the second one that recommended the BAFO.

MR GREEN: Yes, Commissioner.

35 MR O'NEILL: Which score - which was the score that was to be adopted, or was it to be an average? I mean, how did you manage that?

40 MR GREEN: Commissioner, it would have been the scores contained in the signed Tender Evaluation Report. So the second report was the way the mechanics work with that one.

COMMISSIONER: Right. Okay.

45 MR O'NEILL: Now, I want to show you a document at 2.1787. There's two text messages. They are dated on 28 May 2020. .

MR HASSALL: May I just - sorry to interrupt my learned friend.

MR O'NEILL: Again.

MR HASSALL: Pardon?

5 MR O'NEILL: Again.

MR HASSALL: Again. There was a question a moment ago, "was TET feeding info to you about the likely decision", and the witness started to answer that question and said that it was fed back to him that Manteena will be the highest scorer. And then, Commissioner, you raised a slightly different - raised with Mr O'Neill whether he was going to explore a different area first. So I just wanted to inquire whether we are going to come back to that previous question and if not whether the witness had finished his answer.

10 COMMISSIONER: Well, I understood the witness had finished his answer, but I will leave that to Mr O'Neill.

MR O'NEILL: I will double-check.

MR HASSALL: May it please.

20 COMMISSIONER: We might need to come back to it.

MR O'NEILL: I will double-check with the witness, Commissioner. I'm happy to do so. So you've heard the objection. Information was being fed back to you that Manteena was likely to be preferred in the BAFO process. Agree?

25 MR GREEN: Yes.

MR O'NEILL: Who was providing you that information?

30 MR GREEN: I received that information from I think two individuals. Mr Blom in particular, and also the pedagogy advisor.

MR O'NEILL: Who is that?

35 MR GREEN: Mr McCarthy.

MR O'NEILL: And.

40 COMMISSIONER: How was Mr McCarthy - perhaps we just - because his name has now popped up, can you just tell us how he was involved?

MR GREEN: I think he was a - sorry, I - he was an expert helping - a subject matter expert helping the Tender Evaluation Team and looking at how the designs were to work from a teaching point of view.

45

COMMISSIONER: Had he been involved in the previous work - that is, the previous evaluation?

5 MR GREEN: He was not involved in the first evaluation. He may have been involved in the second evaluation. He had recently come into Infrastructure and Capital Works from schools. He was a long-serving principal who had been seconded into Capital Works to work with the builders, if you like, on how school design should work from a teacher's point of view - educator's point of view. So he was a very knowledgeable individual who had been through a very large building project in his own school and was brought in as a subject matter expert to help out with our understanding. You know, most of my team were 10 builders and architects, we build stuff. Teachers tell us how the spaces should work.

COMMISSIONER: Was this a new position or was he taking over from someone who -

15 MR GREEN: No, it was a new position.

COMMISSIONER: So there was not such an expert available for the first evaluation; is that right?

20 MR GREEN: That's correct.

COMMISSIONER: Okay.

25 MR GREEN: So previously, Commissioner, in projects we had often used external subject matter experts.

COMMISSIONER: So you'd use them as a consultant.

30 MR GREEN: Yes.

COMMISSIONER: Right.

MR GREEN: Where Mr McCarthy was in-house.

35 COMMISSIONER: Yes, he was employed.

MR GREEN: Yes, he was an employee of the Directorate - a longstanding employee of the Directorate.

40 COMMISSIONER: Thank you.

MR O'NEILL: Thank you, Commissioner. And in relation to that information that came to you from the Tender Evaluation Team in relation to its preliminary view -

45 MR GREEN: Yes.

MR O'NEILL: What did you do with that information?

MR GREEN: So I had a conversation with Mr Blom when he passed on their preliminary views on where it was going. And we had a chat about the, you know, steps going forward, and I made it clear to Mr Blom that he should continue to write the report independently as to what he and the team thought the outcome was from the BAFO and that he should do that independently. He of course knew of what the minister's office view was, but I passed on to him that I wanted him to write that report independently and that - to bring that forward.

10 MR O'NEILL: Did you speak to anyone else about it?

MR GREEN: I spoke to Mr Blom. I may have mentioned it to Ms Power at the time. But I wanted to make it clear to Mr Blom that they could write what they wanted in that report.

15 MR O'NEILL: Did you pass the information on to the decision maker?

MR GREEN: No. Sorry, not that information that I spoke to Mr Blom about at that time there. I don't know if I spoke to the decision maker about where the evaluation was heading. I think I probably just kept it fairly general that we were doing the evaluation at that time.

MR O'NEILL: Now, I will bring you up to the document now, 2.1787. Do you see there's two emails here - sorry, text messages, rather. The first from Mr Blom:

25 *I have all the Campbell BAFO assessment documents in a presentable draft format. Happy to meet with you or Katy.*

MR GREEN: Yes.

30 MR O'NEILL: And that's on 28 May 2020.

MR GREEN: Yes.

MR O'NEILL: Is it standard procedure to meet with someone?

35

MR GREEN: It's not unusual when you get to the end of a Tender Evaluation Report; they have a meeting with the decision maker or the delegate to work out what's there. It's part of the review process that often occurs.

40 MR O'NEILL: And then you say.

*What's your day like tomorrow? I'm free between 10 and 2.*

That's 28 May. And then on the following page, there is two more text messages:

45

*I can do 10.30.*



From Mr Blom. And then from you, you will send an invite. Do you recall meeting with Mr Blom?

5 MR GREEN: Yes. I think it was a Teams meeting. I'm sure my diary would confirm the date or time.

MR O'NEILL: Do you remember what was said?

10 MR GREEN: We talked about the evaluation. He discussed where the scoring was at and that Manteena were coming through as the highest scored on that tender evaluation report for the BAFO.

15 MR O'NEILL: During that meeting, was the result of - was there any descent into detail about what the Tender Evaluation Team had decided or was going to recommend?

MR GREEN: I don't recall. I do recall the position - sorry, the starting position of it was that Manteena was scoring higher. I don't recall going into details about scoring marks or anything like that.

20 MR O'NEILL: What about the views of the subject matter expert? Were they addressed?

MR GREEN: I - I think it was probably a topic of conversation.

25 MR O'NEILL: Do you remember what those views were?

MR GREEN: I think the views were that the design from Lendlease had improved, that it was better, but still not best. I can't recall many more details than that. There was discussion around where the - like, the special programs unit was and that sort of stuff. I remember some micro details along those lines but that's -

30 COMMISSIONER: But overall, that was Mr McCarthy, was it or Dr McCarthy?

MR GREEN: Yes, Mr McCarthy.

35 COMMISSIONER: Mr McCarthy. Mr McCarthy - I just would like to understand a bit. I mean, I know it's thirdhand because you are not actually present at the meetings with the team. But he would be consulted by the team in relation to the design aspects, for example?

40 MR GREEN: Yes.

45 COMMISSIONER: And would he participate in the scoring or simply give advice, perhaps a critique of where the good points of the design and perhaps the lesser points of the design, that kind of - that kind of input or would he expect there to be - would you expect there to be a report, a written consultant's report?

5 MR GREEN: Typically he would be part of the conversation and the team would be having his input in either a meeting or a conversation. And then he doesn't score; the team scores. But typically there - with an internal expert or like that, they are part of the conversation. And whether he nominated a score and the others agreed with him or something, I don't know the detail. But sometimes that happens.

COMMISSIONER: But it may have been a consensus process.

10 MR GREEN: Yes, it would have been a consensus process of some form.

COMMISSIONER: Right. So do we gather then that at the end of the day, while perhaps not every point that Mr McCarthy made was reflected in the points, that, broadly speaking, you would expect the points to incorporate and reflect his assessment of the design. I mean, it wouldn't obviously echo it, because they - Mr Blom - the other members of the  
15 team have to bring their own judgment to bear on those questions. But it would incorporate his advice about particular aspects. Would that be the expectation?

MR GREEN: It would, Commissioner. I would say it also would be the other members of the team would possibly moderate some of his comments as well. I mean, I - I know  
20 Mr McCarthy's point of view on a few things in the EDIS that he had been brought into fix. So I expected him to be fully frank around the -

COMMISSIONER: Well, of course there's no point in getting him if he's not going to give his opinion.  
25

MR GREEN: And I expect him to have passed his opinion, that there were - there were things that had been adjusted and there were still things that could be fixed and still things that could be improved. And that was both in the design as submitted by the tenders as well as EDIS as a whole, that there need - that there was work to done on all those things.  
30

COMMISSIONER: Right. And you would expect the team to take into account what he said, of course exercise their own judgments, but give appropriate acknowledgment to his expertise. Does that fairly express it?

35 MR GREEN: Yes. Yes, I think so. And they would also talk about it from a contractual point of view more so than, say, Mr McCarthy would because he's not necessarily been involved with the contractual mechanisms of changing designs in contracts, so they would be talking around, you know, what can and can't be done within the - within the contract forms going forwards.

40 COMMISSIONER: And did Mr McCarthy ever make any complaints to you about the process or about the way his opinions were considered?

MR GREEN: No, no. Mr McCarthy and I had a conversation around what he thought of the designs. It was part of the point with him coming in new to get that thing. I remember Mr McCarthy says there is good bits, there is stuff we can fix up, there is work to be done.  
45

His view was that, you know, both designs needed to be worked on and evolved as the project went forwards.

5 MR O'NEILL: Now, were you having any discussions - this was the end of May, so the 29 May in particular. Had you spoken to Mr Nakkan about what was happening?

10 MR GREEN: Yes. As part of our general updates. I remember a conversation with Mr Nakkan. I let him know that I knew where the Tender Evaluation Team was up to. I said to him, you know, it will come through the process as it is. I think he - well, it was - at least during or after that conversation he was aware of, you know, I thought it would be a recommendation saying Manteena. And we had a bit of a chat around the process going forwards. So I said to him basically send me the brief, the covering brief that comes through with the tender valuation report when it comes through and send it to me.

15 MR O'NEILL: Right. Now, can I show you a document that which will appear at 2.1789. It's a series of text messages between you and Mr Nakkan. Do you see here that you tell him that you can't talk right now. That's 29 May at 3 in the afternoon - sorry, 3.14 in the afternoon, and then you said you will call him at 3.30.

20 MR GREEN: Yes.

MR O'NEILL: He responds at 3.35 - 3.34, rather, sorry. I withdraw that. He responds at 3.17, but you read it at 3.34:

25 *I have a branch meeting at 3.30. The TER for Campbell is making the same recommendation as previous.*

MR GREEN: Yes.

30 MR O'NEILL: Now, you knew that at the time.

MR GREEN: Yes, I knew that.

MR O'NEILL: And you knew that because you had spoken to Mr Blom.

35

MR GREEN: Yes.

MR O'NEILL:

40 *The delegate will have to override.*

MR GREEN: Yes.

COMMISSIONER: So who is the delegate, first of all?

45 MR GREEN: So I'm the delegate. But in the context he's saying it there, he's saying the delegate as the decision maker. So shorthand we always refer to the person as making the decision as the delegate. And it's -

MR O'NEILL: So - sorry. I interrupted you.

5 MR GREEN: So this is unusual in the situation because I was still the delegate, but the Director-General was going to be the decision maker.

MR O'NEILL: Were you aware of whether Mr Nakkan knew that or not?

10 MR GREEN: So in I think he did. In this case he is referring to the delegate. He is referring to the person who makes the decision. He is not saying, "You will have to override." So I think he's aware of the decision-making chain that was going to occur on this final recommendation.

15 MR O'NEILL: Now, were you also aware - I withdraw that. Mr Nakkan's text message to you appears to be suggesting that this concept of overriding the recommendation had already been one that had been floated or discussed.

MR GREEN: Yes.

20 MR O'NEILL: Can you assist us with that?

MR GREEN: So I think, as I said earlier, we - we, the project team, had had a bit of a conversation around, you know parts forward and how things could work. So there was an awareness in the project team that there's that provision in the tender evaluation  
25 plan - sorry, it might be the tender - I think in the tender evaluation plan that says that the delegate can make another decision other than the lowest score - sorry, the highest score. And that's the override that's been talked about there. So we had discussed that as an - as an option in the process.

30 MR O'NEILL: Yes, I can understand you've discussed it conceptually, but here it was a separate meaning, doesn't it? I mean, it means that you're going to get a decision that you don't want, so you are going to have to override it. Fair? Not you, but whoever is making the decision is going to have to override it to get to the opposite result.

35 MR GREEN: Yes. That's -

COMMISSIONER: He's not saying we will have to consider whether or not; he's putting in terms finality.

40 MR GREEN: But this goes to the point I made before, counsel, which I told the team to make their recommendation.

MR O'NEILL: Yes, but you know they are going to recommend Manteena.

45 MR GREEN: Yes.

MR O'NEILL: Mr Nakkan appears to know that -

MR GREEN: Yes.

MR O'NEILL: They are going to recommend Manteena.

5

COMMISSIONER: I think what Mr O'Neill is asking you and perhaps I took you off the path, is he's trying to explore the conversations that you had with Mr Nakkan if you had any that would have led him to that definite conclusion.

10 MR GREEN: So I think -

COMMISSIONER: Do you see what I mean?

MR GREEN: Yes.

15

COMMISSIONER: You said, "I think he knew". So I think what Mr O'Neill wants to you to do is unpack that, so we can understand if possible the line of information that led him to that conclusion.

20 MS MORGAN: Commissioner, can I just - things have got a bit messy. Could I just check that what's being asked is based on the assumption that the word Delegate appears in the text message -

COMMISSIONER: Well it's not an assumption, the word does appear in the text message.

25

MS MORGAN: Yes, I hadn't finished my sentence, Commissioner.

COMMISSIONER: I beg your pardon.

30 MS MORGAN: The word "delegate" appears in the text message and delegate is Mr Green, but Mr Green is answering the question as if "delegate" doesn't appear in the text message and the word that appears in the text message is "decision maker".

35 COMMISSIONER: No, you're wrong. It will be clarified. But your assumption is mistaken. I think you have misunderstood the evidence. But it will be clarified by Mr O'Neill.

MS MORGAN: Thank you, Commissioner.

40 MR O'NEILL: Do you see the word "delegate" in that text message?

MR GREEN: Yes, counsel.

45 MR O'NEILL: When you received it, what did you understand that word meant, or rather who was that person referred to when you received it?

MR GREEN: I understood that Mr Nakkan was referring to the decision maker which would be the Director-General.

MR O'NEILL: Right. Now -

5

COMMISSIONER: So now - sorry, if we could go back to my explanation of Mr O'Neill's questions, we need to understand how you got to that point in terms of your communications with Mr Nakkan.

10 MR GREEN: Okay. Reading this, I am sure that I had had a conversation with Mr Nakkan at some preceding point before this, saying that - explaining the minister's office's view around who should get the tender and explaining that the decision maker would be the Director-General.

15 MR O'NEILL: When do you think you had that conversation with Mr Nakkan?

MR GREEN: I don't have a firm idea, sorry. I would say that it is some time after my conversation with Ms Haire when she returned from holidays, but before this email. I don't have a frame of reference in there.

20

MR O'NEILL: And so -

COMMISSIONER: Am I correct in understanding that, to a degree, you're reconstructing based upon an understanding of what must have gone on for this communication from Mr Nakkan to have made sense?

25

MR GREEN: And also, Commissioner, my - my style - sorry, it's a really bad way to describe it. I spoke to all of my direct reports; John - Mr Nakkan was my direct report at that time. He was acting as the EBM of ICW, so my substantive position. I would have met him regularly because he was a key player in all of the capital works and infrastructure matters that were going on at the time, knowing this is COVID and we were doing stimulus projects and all sorts of other things at the same time there. I would be talking to Mr Nakkan very regularly and I would have kept him up to date in that same candid way we just spoke about earlier as I did with the rest of my staff about matters that I, yes, knew about.

30

35

COMMISSIONER: Right.

MR O'NEILL: In the next message in the green bubble, yes, it says:

40

*Dylan and I had a chat earlier.*

Is that the discussion that you gave previous answers in relation to, do you think?

45 MR GREEN: I think so. It was the meeting on the same day or was the meeting on the day before, the 29th?

MR O'NEILL: The same day.

MR GREEN: Right.

5 MR O'NEILL: So those text messages were taking place on 29 May. But it wasn't until 9 June 2020 that you actually received a document from Mr Nakkan in relation to the evaluation report. It's a period of some 10 days.

MR GREEN: So we are two weekends in there, so it's a week later.

10 MR O'NEILL: Yes. Can you recall what happened in that week and -

MR GREEN: No. I think there's probably some conversations in the project team or someone saying, you know, the Tender Evaluation Report is nearly ready, it's coming  
15 across. I hope it was being proofread at various things. That previous text exchange with Mr Blom suggests it's a final draft presentational form or words to that effect, and that was on, I think, the Thursday. So maybe I did some proofreading, it came through -

COMMISSIONER: Were people working from home at this time? Is this COVID - the  
20 middle of COVID lockdown?

MR GREEN: This is the middle of COVID, yes.

COMMISSIONER: Right. So that probably slows things down as well. It's one thing to be  
25 able to pop into someone's office with a piece of paper and have a talk with them, quite another if you have got to get them on the phone or get them on Teams or -

MR GREEN: And also, Commissioner, the other volume of work that was going on. It's  
30 not -

COMMISSIONER: Sure. So they were very busy anyway.

MR GREEN: So plenty of other things apart from Campbell were happening.

35 COMMISSIONER: Right.

MR O'NEILL: Now, at 2.1834 is the email from Mr Nakkan to you with the report. In the first paragraph, Mr Nakkan says that he is satisfied with the Tender Evaluation Team has effectively rated both tenderers' best and final offers against the criteria:

40 *And I support their recommendation.*

MR GREEN: Yes.

45 MR O'NEILL: And this is what he's attached.

5 COMMISSIONER: I'm sorry, I really just want to take this in a granular way. Didn't Mr Nakkan, by virtue of his position, have a - was he part of the formal process for recommendation, that is, was he - I understand he was doing this as part of his job, but was it the part of the process that the person in that position would sign off on a recommendation, or was this unusual?

10 MR GREEN: No, this - so, Commissioner, I'll unpack the two bits. So this wasn't unusual to start with, okay. So typically in the way documents were dealt with in the Directorate, they would come up the Directorate's chains of hierarchy and come through multiple steps like this. In a - in a technical procurement sense, the Tender Evaluation Team makes a recommendation to the delegate as it's always described in the documents, "The delegate". So there is, if you follow those procurement guide pieces, there's no one between the Tender Evaluation Team and the delegate who makes a decision on the documents. Practice in this Directorate and most other Directorates at the time was that it came up via 15 the normal executive briefing chains up to the delegate via whatever normal internal processes they did, like this one here. So this is essentially Education executive covering, or Education briefing process overlaid on top of the procurement documentation.

20 COMMISSIONER: Just to look at the language Mr Nakkan uses, he's actually examined the merits. I mean, he probably hasn't - he obviously wouldn't have gone back to the original documents, or at least I assume he wouldn't have; he would have looked at the report and that kind of document.

25 MR GREEN: Yes.

COMMISSIONER: But it's more than just doing a editing check to make sure every box is ticked. It does read as though it's a judgment about the adequacy of the work done and the correctness of the report. Is that fair or overstating it?

30 MR GREEN: No, I think that's fair. I think Mr Nakkan would have looked at at least the Tender Evaluation Report, satisfied himself that their recommendation could be supported, and I think he's making that point to me in that first sentence.

35 COMMISSIONER: Right. So it's a kind of quality assurance.

MR GREEN: Yes, Commissioner.

MR O'NEILL: Thank you, Commissioner. He then says in the bottom paragraph:

40 *The delegate is required to complete section 10 on page 7.*

This document is sent to you, and only to you; do you see that?

45 MR GREEN: Yes.

MR O'NEILL: It's copied to others, but it's only sent to you. Aren't you the delegate?



MR GREEN: In this case I am still the delegate. I still have delegation for this, and then this is the point where after this I will go to the higher authority and do as my - sorry, and I will pass it on to the final decision maker.

5 MR O'NEILL: Right.

COMMISSIONER: So we just - it really is just an echo of what you have already told us, namely you are delegate by virtue of the job you hold.

10 MR GREEN: Yes.

COMMISSIONER: As acting EGM.

MR GREEN: Yes.

15

COMMISSIONER: So that doesn't change. But in relation to this, you are no longer the decision maker.

MR GREEN: Yes, Commissioner. And in the briefing process in the Directorate, the executive branch manager reports -

20

COMMISSIONER: Reports to you.

MR GREEN: Reports to the EGM. And the executive branch manager would not send a brief directly to the Director-General.

25

COMMISSIONER: Right.

MR O'NEILL: But Mr Nakkan has used the same word he used in his text message to you. Surely they are the same thing. Surely he means you are the delegate in both.

30

MR GREEN: No.

MR O'NEILL: No?

35

MR GREEN: No. Mr Nakkan and I had spoken on this one and I had discussed with him that, you know, send me the brief and I will send it on to the Director-General.

MR O'NEILL: You had a conversation with Mr Nakkan to that effect?

40

MR GREEN: Yes.

MR O'NEILL: Do you remember when?

45 MR GREEN: No.

MR O'NEILL: The document attached substantively begins at 2.1838. And under subheading (1), Purpose, it says:

*To seek approval to enter into contract with phase one design with Manteena.*

5

At the top. Do you see that?

MR GREEN: Sorry, counsel, is this the Tender Evaluation Report?

10

MR O'NEILL: It is. Do you want to see the title page of it? You can accept it from me that it is.

MR GREEN: Sorry, I thought you were going to show me the brief.

15

COMMISSIONER: I'm sorry, I missed your -

MR GREEN: I thought he was going to show me the brief. I misheard, sorry.

COMMISSIONER: All right.

20

MR O'NEILL: So the purpose is to enter into the contract for phase 1 design with Manteena. An then if we scroll down to under - on the next page, 2.1839. Under 5, there's a box. Manteena's tender price, total 15.1 million, and Lendlease in excess of that by about \$897,000. Do you see that?

25

MR GREEN: Yes.

MR O'NEILL: Then underneath the box, all tenders were conforming.

30

COMMISSIONER: I wonder if we could just look at that price for a moment. Sorry, Mr O'Neill.

MR O'NEILL: That's all right, Commissioner.

35

COMMISSIONER: Otherwise I just lose track. Things are so detailed. But remember when you earlier talked about price and the - or proposed prices, and a proposed price, for example, that was more than 10 per cent than the budget just was unlikely to get the tender.

MR GREEN: Yes.

40

COMMISSIONER: It would be a reason for examining the possibility of other proposals such as a BAFO or retreat from the tenderer all together. As I look at that number, 15.1 is reasonably close to the budgeted amount, isn't it?

45

MR GREEN: I - sorry, Commissioner, I can't actually recall what the budget was at this stage, because it had moved.

MR O'NEILL: That comes next, Commissioner.

COMMISSIONER: All right. I will leave it until then.

5 MR O'NEILL: Under the subheading Conformity of Tenders and Compliance, there's a little - there's two paragraphs. The first says:

*all tenders were conforming.*

10 And it says:

*The Lendlease BAFO submission failed to comply with the target budget of 15.5 million.*

COMMISSIONER: Right. Well, that answers the question.

15

MR O'NEILL: So from this document, at least, in your role as the delegate - formal delegate, you were being told that the Lendlease bid actually exceeded the target budget.

MR GREEN: Yes.

20

MR O'NEILL: Now, not by a large number. Fair?

MR GREEN: Yes.

25 MR O'NEILL: So within the tolerance, probably.

MR GREEN: Some \$500,000 on 15.5 million.

MR O'NEILL: But nevertheless, one complied and one didn't.

30

MR GREEN: Yes.

MR O'NEILL: Then under Evaluation -

35 MR GREEN: I will note the comment above that says all tenders were conforming.

MR O'NEILL: Yes.

MR GREEN: Which was a statement that almost contradicts the following one.

40

COMMISSIONER: It rather depends what you mean - what is meant by "conforming".

MR GREEN: Yes.

45 COMMISSIONER: In ordinary speech, rather than specialised language, one might think of "conforming" in respect to everything else and that price would be - because they don't know the price that you're willing to pay, it's not something to which they can conform. So

in ordinary parlance, one can understand that language. But anyway, it is what it is, and the numbers speak for themselves.

MR GREEN: Yes.

5

MR O'NEILL: Now, you see under the subheading 6, Evaluation, including the box - I draw that out. It talks about the assessment undertaken by the Tender Evaluation Team. And it scores for criteria 1, 2 and 6, were not reassessed or - sorry - were not revised as part of the BAFO and not assessed further. Do you see that?

10

MR GREEN: Yes.

MR O'NEILL: And it's your evidence that that's because it was following the GSO advice that you don't need to reassess those. Fair?

15

MR GREEN: Yes.

MR O'NEILL: So the things that were reassessed were criteria 3, criteria 4 and criteria 5.

20

MR GREEN: Yes.

MR O'NEILL: Criteria 3 had a weighting of 20 per cent. Do you see that?

MR GREEN: Yes.

25

MR O'NEILL: And that means, doesn't it, that it's given double the importance of, say, criteria 2.

MR GREEN: Yes.

30

MR O'NEILL: In how it's weighted. And so criteria 4 is weighted the most heavy out of all of those criteria.

MR GREEN: Yes. 30 per cent.

35

MR O'NEILL: And that's indicative, isn't it, that it's the criteria to which most attention - sorry, I withdraw that - to which a score is given the most weight out of any of the criteria.

40

MR GREEN: And it relates to the design put forward by the tenderer.

MR O'NEILL: Yes, we will come to that in a moment.

45

COMMISSIONER: So when you say design, what you mean is the design reflecting that understanding?

MR GREEN: Yes.

COMMISSIONER: Right.

5 MR O'NEILL: So then looking at each of the criteria, past performance, Lendlease was ahead by one point but that hadn't been reassessed. Agree? That's criteria 1.

MR GREEN: Yes. Sorry, yes. Yes. So that's the coloured highlight looks to indicate the ones that wasn't reassessed.

10 MR O'NEILL: Yes. Then criteria 2, skills and resources. Again, Lendlease was ahead by a point but that hadn't been reassessed.

MR GREEN: Yes.

15 MR O'NEILL: Criteria 3, was - there was .5 of a score difference, but when that came to being weighted, that meant that Manteena was now one point ahead on that criteria. Do you accept that?

MR GREEN: Sorry I've lost -

20 MR O'NEILL: That's okay. Do you see in criteria 3, project completed in period?

MR GREEN: So we have been reassessed, Manteena's score was 7.5 and Lendlease's score was 7. So when you expand out the weighting, you get to that one point ahead. But in the scoring scale, it's the first row that's important, as everyone is scored out of 10.

25 MR O'NEILL: That's right. And so they would score. So Manteena who had been slightly ahead on that criteria, they were almost equal.

30 MR GREEN: Yes. 7.5 versus 7.

MR O'NEILL: Not much there. In relation to criteria 4, clear understanding of project. Out of 10, Manteena was now one point - had been scored one and a half marks better than Lendlease.

35 MR GREEN: Yes.

MR O'NEILL: But the weighting in respect of that meant that that was a significant difference between the two.

40 MR GREEN: Yes, and it was tripled.

MR O'NEILL: And in relation to financial offer, which is category 5, there was now a big difference. That is, there was three points difference between them.

45 MR GREEN: Which reflects the earlier comment that Manteena had met the target budget and Lendlease was over the target budget.

MR O'NEILL: All right. And then the Secure Local Jobs criteria, criteria 6 which hadn't been reassessed, it stayed the same and there was only .8 of a difference between them.

5 MR GREEN: Yes.

MR O'NEILL: Now, a worksheet was attached which was at attachment E. Did you review the worksheet?

10 MR GREEN: No.

MR O'NEILL: Did you read, then, the summary of the reassessed criteria that was contained within this document?

15 MR GREEN: This table as it is?

MR O'NEILL: Yes.

MR GREEN: Yes.

20

MR O'NEILL: And then below it, if I can just take your eye to the next part, a summary of the reassessed criteria in the BAFO.

MR GREEN: Yes.

25

MR O'NEILL: Did you read this?

MR GREEN: Yes, I read that.

30 MR O'NEILL: And this was the commentary that explained how it is that they arrived at the differences between them. Fair?

MR GREEN: Yes.

35 MR O'NEILL: If you go across the page, 2.1840. Do you see under the first part, Design Solution, understanding of project. The team had said that both tenderers made significant changes to their designs.

MR GREEN: Yes, I can see that.

40

MR O'NEILL: Did that accord with your understanding of what had happened, that he had actually both gone back and made changes in the BAFO process?

45 MR GREEN: And that was the expected outcome of the BAFO project; both tenders would go and change their designs.

MR O'NEILL: And you see bullet point 1?

COMMISSIONER: Why would they - why would it be expected? I can understand if the scoping had changed or the description of the job, but was it just implicit that they would - do you see what I mean? What would trigger the change of -

5

MR GREEN: Yes. So, Commissioner, if you - so buildings cost money and it's largely dependant upon the area of the building and other factors such as the specifications. So the specification in this case is one area for changing, or how they interpret the specification. But the other area which is typically where you find cost savings is you look at how the areas are being used and you rationalise that you -

10

COMMISSIONER: Try to be more economical.

MR GREEN: More economical. I'm reading it on screen there:

15

*Manteena improved their design and rationalised high cost as areas well.*

MR GREEN: If you've got a couple of square metres in a bathroom - they're very good things to take out; they're expensive. You can take out circulation spaces and make your building footprint smaller because building footprint is probably the biggest determinant on building cost.

20

COMMISSIONER: So the redesign comes about because, in a sense, they know they are in a competition and they are more likely to succeed if they can be more economical in their ultimate outcome.

25

MR GREEN: Yes.

COMMISSIONER: And therefore that encourages a reconsideration of their design.

30

MR GREEN: And the feedback points that will go back into the BAFO would give them guidance as to kind of areas to look at. And I think some of those comments would have been picked up by the design teams involved behind each team to do it. And other comment on the screen at the moment:

35

*Lendlease improved their design by removing central courtyards.*

So central courtyards are another expensive area because you are essentially building a space around a footprint, and then you have another area of building facade, windows and the like, which are expensive. So, you know, an efficient building has no spare space and is basically a square block with a minimum possible external area, because external building elements are expensive.

40

COMMISSIONER: You said "feedback", the BAFO feedback.

45

MR GREEN: So in the BAFO offer - sorry, in the BAFO documentation, there was a list of items that were going to be raised with each contractor. So those - I can't recall the list, but -

5 COMMISSIONER: Well, I don't think we need trouble with the detail, but that was a - that wasn't a consultation; that was in the BAFO proposal.

MR GREEN: Yes.

10 COMMISSIONER: And the tenderers were invited to take those things on board when they were considering their design presentation, and that opens up to them what might be useful in that area.

MR GREEN: Yes. Yes. Yes, Commissioner. So both BAFO respondents, I think, got the same list and had a grab list of items that -

COMMISSIONER: And both took advantage of it to different degrees.

MR GREEN: Yes.

20 COMMISSIONER: All right. Thank you.

MR O'NEILL: Can you see that after the bullet point says:

25 *Maintenance improved their design and rationalised high-cost areas well.*

Which is the point similar to what you are making:

30 *This design was preferred by both the Campbell principal -*

Pausing there. Had you known that the Tender Evaluation Team had consulted with the principal of the school?

MR GREEN: I don't think I was aware of it, no.

COMMISSIONER: It's not a bad idea.

MR GREEN: It's not a bad idea. It's a - it's a - you know, she's another subject matter expert and she's been involved with many of the discussions -

40 COMMISSIONER: And she's got to live with the outcome.

MR GREEN: Yes.

45 MR O'NEILL:

*and the advisor -*



who was Mr McCarthy.

MR GREEN: Mr McCarthy, yes.

5

MR O'NEILL: And they had both reviewed the scheme.

MR GREEN: Yes.

10 MR O'NEILL: And they both preferred it.

MR GREEN: Yes.

15 MR O'NEILL: There was concerns about what Lendlease had done, even though they had improved as well.

MR GREEN: Yes.

20 MR O'NEILL: And then there was a comment that an area comparison demonstrates that the Manteena designer provided approximately 20 per cent more learning area. Do you see that?

MR GREEN: Yes.

25 MR O'NEILL: Now, were you in a position to be able to assess that assertion that was made in the Tender Evaluation Report?

MR GREEN: No.

30 MR O'NEILL: And so you accept, don't you, that it was likely to be accurate?

MR GREEN: Yes.

35 MR O'NEILL: And then it says that their current metre - dollars per square metre, I assume that means, is that fair?

MR GREEN: Yes.

40 MR O'NEILL: Lendlease would need to approximately increase their fee by approximately 2 million to match the areas provided by Manteena. Do you see that?

MR GREEN: Yes.

45 MR O'NEILL: Now, that's telling you, isn't it, that the Manteena design is preferred and has significant advantage.

MR GREEN: It's rate - sorry, its preferred by both the Campbell School, as you said, in that sense there, and it's also cheaper per square metre.

5 COMMISSIONER: Well, the - and the difference is when you take into account the fact that there's already something like, what, a \$400,000 amount greater than the budget, something like that, I think.

MR O'NEILL: Yes, 497,000.

10 COMMISSIONER: Yes, well, I think that's closer to 500,000. And another 2 million, which makes that 2.5 million, to achieve, I think it's suggesting, more or less the same outcome as Manteena's providing.

MR GREEN: The same amount of learning area.

15 COMMISSIONER: The same amount of learning area. Well, I mean, obviously there's more than mere learning area involved.

MR GREEN: Yes.

20 COMMISSIONER: But learning area is a fairly key element of any school, obviously.

MR GREEN: Yes, Commissioner.

25 COMMISSIONER: So all I'm saying is that that becomes a two and a half million dollar difference. And to me, as a lay person that's eye watering.

MR GREEN: So, Commissioner, I would note that the areas are briefed in EDIS. Sorry, the - EDIS, the Education Directorate Infrastructure Specification, sets out the amount of  
30 learning areas that are required. So the Lendlease proposal doesn't - it's not mentioned here that they didn't comply with EDIS, so they have achieved briefed areas. So Manteena's areas are above (indistinct) specification, yes.

35 COMMISSIONER: Right. But I just wanted you to qualify, if it's justified qualifying, that as a lay person looking at that \$2.5 million extra spend to match the learning areas, that does seem to be very much more expensive than Manteena for the school refurbishment. Or am I misjudging some part of that?

40 MR HASSALL: I object to the question in the sense that this witness is actually not a lay person, so -

COMMISSIONER: No, no, I'm - that's why I'm asking him. I'm asking him as an expert what is his response to the layperson's view. Am I being ignorant or -

45 MR HASSALL: I thought he had responded.

COMMISSIONER: I beg your pardon?

MR HASSALL: I thought he had responded, but I'm happy for him to respond.

5 COMMISSIONER: No, well, if he had responded, and it may be because the combination of my age and the lateness in the day, I didn't understand it to be a response.

MR GREEN: I'm happy to -

10 COMMISSIONER: But, you see -

MR GREEN: Yes, I'm happy to -

15 COMMISSIONER: I agree it's a bit of an immediate response to it, but it does seem eye watering to me.

MR GREEN: So, Commissioner, let me attempt to explain it this way. So the areas provided by Lendlease, from reading this and not reading any other detail, but from reading this, Lendlease are providing the areas that were retired required in the brief. They were providing learning spaces of enough area and enough different types to meet the -

20 COMMISSIONER: EDIS requirements.

MR GREEN: The EDIS requirements, which is based on the population of students in that space.

25 COMMISSIONER: Right.

MR GREEN: What the other sentence says is that the Manteena design provides more learning space than what EDIS says. So it's above the brief. So it's a more generous space, a larger area.

30 COMMISSIONER: Would one say, broadly speaking, and it's not a technical term, that's a good thing?

35 MR GREEN: Sometimes, Commissioner, generally it's a good thing, but there is always an element of where are those space, how are they to be used and what other -

COMMISSIONER: And heating and cooling and insulation and so on.

40 MR GREEN: That's right. In any EDIS documentation, there is a trade-off between the amount of space you would want to give, you would always love to give student more space, but you can't afford more space, both to clean, maintain and heat, cool. All those other things.

45 COMMISSIONER: So there is always a balance.

MR GREEN: It's a balance. So I don't think it's a fair comparison that the \$2.5 million extra, I think it's an absolutely fair comparison that you are getting more space for less money. But I don't think it's a fair comparison to say that there's \$2.5 million -

5 COMMISSIONER: No, I think all they are saying is - no, the half million dollars, as it were, has already been spent. What they are saying is to give us what Manteena is giving us in relation to learning spaces - one has to remember there's more to the refurbishment than just that. But to give us what Manteena was giving us, you are going to have to spend on a rough assessment, because dollars per square metre is a fairly rough and ready  
10 measure, but it's pretty well - it's a reasonable one, am I right?

MR GREEN: Absolutely, Commissioner.

COMMISSIONER: Well, you would have to spend another \$2 million.  
15

MR GREEN: If we were to seek to upsize -

COMMISSIONER: To Manteena's level.

20 MR GREEN: To Manteena's size.

COMMISSIONER: Right. So - but does that not emphasise the - the value for money difference between the two bids?

25 MR GREEN: It emphasises a difference. To pull it apart further in a more technical way, you also have to look at what the equipment provision is. You would need to also look at the other elements of the bid. As you said, dollars per square metre is a pretty crude piece, you know. You can find - buildings are very - if - the appearance and the usefulness of buildings are pretty much driven by external elements as well. I mentioned building  
30 facades as well. So it's not just about adding extra space inside. You know, what would be the cost of the - the mechanical systems inside there, what are the differences between those. Yes, it's a - yes, it's a number, but I wouldn't say in and itself that's - that's a be all and end all. You really would need to pull that apart with a (indistinct) to work out what the difference is.

35 COMMISSIONER: I didn't intend to suggest that it was the be all and end all. I'm just trying to get an understanding of its, I suppose, scale of significance in terms of value for money. That's really what - because in the end, that's what the procurement is about. And I'm - is this - obviously the committee thought it was significant enough to make this  
40 additional calculation and this additional note, as a - perhaps as a supporter or a reinforcement of the ultimate recommendation. That's, I suppose, how one would read it. But I'm just trying to get a sense of how significant it is, or is it just a trivial observation?

MR GREEN: I think it would be very important to the principle and the pedagogy advisor.  
45 I have never met a teacher who wouldn't like to have more space.

COMMISSIONER: Quite.

MR GREEN: From a - from a building professional's point of view, we care more about - sorry, we have a different perspective in terms of maintaining the asset into the future. So I would absolutely be looking in a whole of life calculation - sorry, in a value of money calculation, I would also be looking at a whole of life element. It's not just, hey, can you get more stuff up front; it's about what that space is like in the long term, how maintainable is it, how flexible is it for future uses. It is not purely around floor space. And EDIS is trying to bring those whole of life considerations back into -

10 COMMISSIONER: The calculus.

MR GREEN: The capital works side of it. The actual building - the building up front.

15 COMMISSIONER: Now, I understand. I'm sorry, perhaps I'm just - this is - topic is not worth the time we are spending on it. But I understand that there are countervailing considerations, and one must ultimately look at the program as a whole, the project as a whole, and that there are costs on the other side of the bigger space, for example, which is the point you are making. But what I'm - I suppose I'm trying to - and you - one can't have an exact measure for the very reasons you have mentioned. To some degree, these things  
20 are matters of judgment. They are incommensurable.

So I accept that, but what I'm trying to understand is, is this difference to which the Tender Evaluation Team point, is it merely trivial commentary or is this a significant matter to which, although it wouldn't be by any means decisive, would be a significant thing to bear  
25 in mind when one came to decide what was the appropriated outcome of the process. In other words, is it worthy of taking into account?

MR GREEN: I think it's - I think this comment goes some way towards their justifying of the score difference, which I think was 8 to 6.5. And I think they are drawing - teasing out  
30 a couple of what they saw as matters in their decision of their scoring. They are talking about the difference in designs, and they are making a point that Lendlease is a bigger space. I think that's worthy of in justifying -

35 COMMISSIONER: Sorry, Manteena is a bigger space.

MR GREEN: Sorry, Manteena is a bigger space. I think they are pointing that out and I think that's appropriate in how they are describing how they reach the different scores.

40 COMMISSIONER: Very well.

MR O'NEILL: Did you drill down into the area comparison at attachment F. It's actually G, but attachment F?

45 MR GREEN: No.

MR O'NEILL: And then under the heading Financial Offer, both tenders have made significant cost reductions. Manteena have sharpened their pencils at 2.2 and Lendlease

even more at 2.8. Manteena's total fee is below the target cost, and a full cost comparison can be seen on the attachment. And then:

5 *As noted above, Manteena are providing significant additional area that must be considered in the cost comparison and value for money assessment.*

Do you see that?

10 MR GREEN: Yes.

MR O'NEILL: What do you understand that sentence is directed to?

15 MR GREEN: So the - I think - as I said, drawing attention to that additional area above, as the Commissioner and I have been discussing, a then they talk about the cost comparison, the cost comparison, I don't see how they have drawn that into the cost comparison but the statement suggests that they have, so that might be the difference between the 8 and the 5 score that they have given on the financial offer. And then the value for money is the overall tender assessment.

20 MR O'NEILL: Isn't it the very point that the Commissioner was taking up with you? That is, that this was a better value for money in - a better value for money bid?

25 MR GREEN: So they are drawing here is - they are saying that that's a - that that's being considered in their overall assessment.

COMMISSIONER: And they are teasing out something which is not otherwise transparent in the rest of the report.

30 MR GREEN: So they are drawing attention to it in their body of their report, so you don't have to go and read the detailed scoring pages at the end.

COMMISSIONER: Right.

35 MR O'NEILL: Under the subheading Risk Comparison, they say in their conclusion that:  
*Manteena have presented a strong and cost-effective design proposal that provides best value for money and the lowest risk profile.*

40 Do you see that?

MR GREEN: Yes.

45 MR O'NEILL: Pretty clear words as to what they were - which bid they were recommending and preferred?

MR GREEN: Yes.

5 COMMISSIONER: Although, however, I suppose one wouldn't doubt it because of the grammatical use, or failure to use the comparative of "better value for money". It's late in the day, I know. Not everybody is listening. However, I - that's a silly point of course, but back to Mr O'Neill's question. That is - that is a strongly worded expression in relation to the risk.

10 MR GREEN: I don't totally agree. It's - it's the formulaic language that most well-written Tender Evaluation Reports would say. The risk profile is based upon the scores. If you - you know, score to enough points, I think we saw in one of the previous tender evaluation plans, there is thresholds to put in there. So, what, both the scores were in the 60s, so they were in the low-risk area. There's that note about additional funding will be required for the Lendlease proposal. That's additional above the target budget of 15.5 which increases their risk. That's a fair statement. And then the - Manteena presented a strong cost-effective design proposal, cost-efficient, sorry, cost-efficient, that provides best value and lowest risk profile. Again, that's the language. You talk about the -

20 COMMISSIONER: Sure, it is the language, and it is formulaic. But it is - it's long-established and designed to reflect the objects of an evaluation, so low risk is well understood. Medium risk is well understood, to the extent that you can calculate it by a numerical means that's attempted to be done, and it's true that the consequence is that you have - as a result of a certain set of numbers, you have a low risk and then the consequence of another set of numbers you have a medium risk. But they are not existing out there in the atmosphere; they are locked into or connected to the overall assessment of the criteria which have to be considered. So they are - correct me if I am wrong. They are anchored in the real world for all that they do have - they don't have bright line borders of where they start and where they end.

30 MR GREEN: Yes, Commissioner. And this, to me, is a well-written summation at the end of a Tender Assessment Report who they have gone and looked at the attributes of the tenders. They have provided scoring and they have made commentary that reflects the numbers they have scored.

MR O'NEILL: There was no ambiguity here, is there, about what they were saying?

35 MR GREEN: They have demonstrated a case for which Manteena is the lowest risk profile, to use their words.

COMMISSIONER: Well, and the best value for money.

40 MR GREEN: Yes.

MR O'NEILL: Did that accord with your view?

45 MR GREEN: Based on what I've seen on this document there, that sounded like a reasonable summation. I didn't go into looking at the design, so I was, you know, it was supported, they had assessed the evaluation. They had looked at the tender that was submitted and that was their conclusion. I had no reason to doubt their evaluation.

MR O'NEILL: I see.

COMMISSIONER: Did you find it persuasive?

5

MR GREEN: I don't know I turned my mind to it. I found it consistent and a document.

COMMISSIONER: Right. So you passed it on. It was an acceptable level of professional assessment. Is that -

10

MR GREEN: Yes.

COMMISSIONER: Right.

15 MR O'NEILL: What happened next?

MR GREEN: So this was submitted to me at that brief from Mr Nakkan. I then added it to my next meeting agenda with - sorry, meeting - I will call it agenda, with the Director-General to have a conversation around it. And then at our next regular catch-up - I don't know the date of that, sorry - we spoke about the - the tenders and the Tender Evaluation Report that I had received.

20

MR O'NEILL: Now, was that close to the date that you received it or - like, are we talking days, week, months, decades, what?

25

MR GREEN: I would say days we were meeting fairly regularly. I don't have a date in mind of when that meeting was.

MR O'NEILL: And the meeting that you are conceptualising, was that in person or over Teams, or some other form?

30

MR GREEN: I cannot recall, I'm sorry. I cannot recall whether it was an in-person meeting or a Teams meeting.

35 MR O'NEILL: Do you recall seeing - sorry, who was in it?

MR GREEN: The Director-General and myself.

MR O'NEILL: Two of you?

40

MR GREEN: The two of us. And it was our regular -

COMMISSIONER: Catch-up.

45 MR GREEN: - DG-EGM catch-up that occurred.

MR O'NEILL: Do you recall seeing during that meeting the Director-General's face or not?



MR GREEN: I don't recall, sorry.

5 COMMISSIONER: I suppose the only other possible communication was by phone, but you feel it was person to person in a - either Teams or in her office.

10 MR GREEN: Yes. And given we really weren't in offices, it would have been in her office at 220 Northbourne, if it was an office it would have been at Hedley Beare, at the education centre at Hedley Beare, whatever it is called, CTL.

MR O'NEILL: Now, doing the very best you can, can you talk us through what happened at that meeting?

15 MR GREEN: Okay. So I advised the Director-General that the tender evaluation had come back for the BAFO, that Manteena was again recommended as the preferred at the end of that evaluation process. I don't think I went into many details. The advice I got back is that that's not what the minister's office wants.

20 MR O'NEILL: Sorry. Pause there. Can you do it, if you can, specifically with what you recall Ms Haire told you.

MR GREEN: I'm struggling to do it in her voice with her words, and that's what I'm -

25 MR O'NEILL: Words to the effect of.

MR GREEN: Words to the effect of "that's not what the minister's office wants. That's not the outcome we need to achieve. Then what are the other options?" I then talked about the override as Mr Nakkam had described. I'm not sure words I used about that, but I pointed out there is the option for the decision maker to not take the recommendation of the Tender Evaluation Team. She indicated to me that that's -

30

MR O'NEILL: Use her words, please.

35 MR GREEN: "How do we do that?" I said, "I would need to write you a brief."

MR O'NEILL: So the idea of writing a brief, that was yours?

MR GREEN: I think so, yes. And then she said, "Write me the brief."

40 MR O'NEILL: Right. Was there anything else said at that meeting that you need to tell the Commission about?

MR GREEN: I don't recall any more substantive pieces than that. I think I mentioned that there was an unusual approach. I can't recall into it - the takeaway I took from that meeting was that - that she wasn't going to agree with the Manteena recommendation as presented by the Tender Evaluation Team and I needed to write her a brief to do something else.

45

COMMISSIONER: Well, two possibilities when one says one doesn't accept the recommendation. One could simply not accept the recommendation and send for a new tender or a new process.

5 MR GREEN: Yes.

COMMISSIONER: It's a second step to change the recommendation to an opposite decision. Do you see what I mean?

10 MR GREEN: Yes, Commissioner.

MS MORGAN: So was that logical point - it may not have been specifically discussed, but was anything said about that? Do you recall?

15 MS MORGAN: Commissioner, I object to -

COMMISSIONER: Yes, why?

20 MS MORGAN: Because the witness has said what he remembers of that conversation and, Commissioner, you are now suggesting more detail to that conversation.

25 COMMISSIONER: No, I'm asking about other things which logically arise from his evidence. And this is an investigation; it is not a trial. It's an investigation and I want to try and get to the truth to the extent that I can. I raise what are logical alternatives which follow from the fact that the recommendation was not accepted. And what I'm asking, in effect, was anything said about what that meant? Mr Green has said that it meant he had to in effect, as I understand his -

30 MS MORGAN: Commissioner, can I just interrupt you for one moment?

COMMISSIONER: Please let me finish.

35 MS MORGAN: The only reason why I would like to interrupt is whether Mr Green could step out while we have this discussion.

COMMISSIONER: I don't propose to say anything more. The question is appropriate, and I intend to ask it, thank you.

40 MS MORGAN: If I could just put on the record, Commissioner -

COMMISSIONER: You have done so already.

MS MORGAN: A further point.

45 COMMISSIONER: Yes.

MS MORGAN: Mr O'Neill specifically said to Mr Green 30 seconds ago, "Is there anything else that you can recall?" And Mr Green said there was not, or words to that effect.

5 COMMISSIONER: He did not ask that question. He said, "Is there anything else that you need to tell the Commission about" was his question.

MS MORGAN: Yes. And he said, that - he then started to go down this different route of information, Commissioner, you have now suggested a different route that he should  
10 provide -

COMMISSIONER: This was only a few minutes ago and I am able to recall the evidence given. But what is the point that you are making?

15 MS MORGAN: I wanted to reiterate my objection, Commissioner.

COMMISSIONER: Thank you.

MS MORGAN: And the suggestion in relation to this evidence from this witness.  
20

COMMISSIONER: Thank you. Now, could we come back to the matter that I was asking you about. Logically, when one - one can say of a recommendation, it - you don't accept it. But the - that leaves open that that's all you do. It doesn't necessarily mean that you reverse the recommendation.  
25

MR GREEN: Yes, I understand the difference.

COMMISSIONER: So what I'm asking is, was there anything said about that subject matter?  
30

MR GREEN: I don't recall it being discussed in that way, Commissioner. I will - I do recall - part of the conversation was we need to get on and get Campbell awarded. So possibly I didn't - I didn't suggest in the brief the reject - sorry, I didn't - I didn't focus on an option which was a -  
35

COMMISSIONER: A non-decision as it were.

MR GREEN: A non-decision, yes. Yes. Sorry.

40 COMMISSIONER: Right.

MR GREEN: I had been asked - sorry, Commissioner. I had - I had been asked by the Director-General at previous meetings where we were up to on Campbell, so I knew there was getting to be some urgency to get the matter resolved.  
45

MR O'NEILL: Now, I think your evidence was, you said you understood you had to draft a briefing note now or a report.

MS MORGAN: He offered.

MR GREEN: Yes.

5

MR O'NEILL: Or is it more correctly that you offered, and that offer was accepted?

MR HASSALL: Well, my learned friend -

10

MR O'NEILL: You offered to write - just someone has just - it's okay, if I could finish the question and then you can object afterwards.

MR HASSALL: Sure, I apologise.

15

MR O'NEILL: Your evidence was that it was you who offered to draft the briefing note; do you remember that?

COMMISSIONER: Well, I'm not quite sure.

20

MR O'NEILL: I think that's right, Commissioner.

COMMISSIONER: Mr O'Neill, I have to say -

25

MR O'NEILL: She said how can you achieve that, and he said, "I will write you a report. "

COMMISSIONER: Yes, but that's in relation to the questions rather than a mere offer, I think.

30

MR O'NEILL: That is so. That is so. That's so, isn't it Mr Green.

MR GREEN: Sorry, I'm unpacking.

35

COMMISSIONER: Look, Mr O'Neill is simply asking you to revisit how was - how did you finish up with the need to draft a briefing note? What was the conversation? And if you could revisit that for us, please.

40

MR GREEN: So the conversation - yes. So the conversation as I remember it, how do we achieve an outcome other than the tender - sorry, the recommended offer. I talked about the override mechanisms. How do we achieve that? I will write you a brief. I probably offered to write the brief, but in a - how do we achieve an outcome.

MR O'NEILL: Certainly.

45

MR HASSALL: May I be heard at this point?

COMMISSIONER: Sorry, do you maintain your objection?

MR HASSALL: Well, I do.

MR O'NEILL: To what question?

5 MR HASSALL: Well, the question that you previously asked and berated me from objecting.

MR O'NEILL: I'm asking a new one now.

10 COMMISSIONER: Sorry, just tell us what's the problem.

MR HASSALL: The problem is that there was a sotto voce comment from my friend at the back, as a result of which the formulation of the question was changed in a way which didn't accurately reflect -

15

MR O'NEILL: But now it's all been clarified.

COMMISSIONER: No, but I think it's fair to say, I decided to, as it were, cut to the chase and ask Mr [REDACTED] to go back to that area and tell us what the conversation was, which he has now done.

20

MR HASSALL: And in addition, he gave evidence to this effect, "At the end of it my understanding was she wasn't going to agree to Manteena and I had to write her a brief to do something else". That's all.

25

COMMISSIONER: No, that's right. But I understood him – tell me if that is unfair, but I understood Mr [REDACTED] to say that that was the end result -

MR O'NEILL: Commissioner, Mr Green. Mr Green.

30

COMMISSIONER: Sorry, Mr Green, yes. I order that the name that I used not be published. Sorry. It's the end of a day. But now, I understood the witness to mean that was the summation, that was the effect of where they were at when he, as it were, left the room and -

35

MR HASSALL: Yes, I agree.

COMMISSIONER: So that - so it's not problematic, I think.

40 MR HASSALL: The transcript will speak for itself.

COMMISSIONER: Indeed it will. Yes. Now -

MR O'NEILL: I have no idea where I was going but I will try and remember.

45

COMMISSIONER: Well, Mr Green has left the room.

MR GREEN: Which may or may not -

MR O'NEILL: You have now left the room, Mr Green.

5 MR GREEN: Physical or virtual room.

COMMISSIONER: Or switched Teams.

MR O'NEILL: What was your understanding of what you had to do next?

10

MR GREEN: My understanding was I needed to write a brief to enact the override - sorry, it is a really poor term, but the part of the tender evaluation plan documentation that enables the decision maker, or delegate as it's more probably described in the document, to make a decision to not agree - sorry, to come to another outcome other than recommended by the Tender Evaluation Team, and pick up the Commissioner's comment, to make a decision to go with someone else, not -

15

COMMISSIONER: In this case it was necessarily Lendlease.

20 MR GREEN: Yes, given those two.

MR O'NEILL: And - sorry, I withdraw that. Was part of that task to get to that outcome? So it had to be, in effect, reverse engineered to achieve the outcome?

25 MR GREEN: Yes.

MR O'NEILL: When did you start doing that?

COMMISSIONER: Considering the time, the fact that I think you will need to spend some time on this matter -

30

MR O'NEILL: I do.

COMMISSIONER: And it's clear in all events we would not finish with Mr Green, I think we should call it a day, Mr O'Neill.

35

MR O'NEILL: I'm in the Commissioner's hands.

COMMISSIONER: Mr Green has been in the witness box for two days now. So the next - just what is the next date upon which we will be sitting?

40

MR O'NEILL: The proposed next date is 6 September, 7 September and probably 8 September.

45 COMMISSIONER: Now, I think those dates have already been outlined in letters to the parties as possible days. Have they not?

MR O'NEILL: The 8th may be a fresh one.

COMMISSIONER: The 8th is a new day.

5 MR O'NEILL: If there's a significant kickback and no one can be here, then we will have to deal with that.

COMMISSIONER: I - I do understand that everyone has a diary, and everyone has work, but I just can't make allowances for everyone, or we will be going forever. So to that  
10 extent, I have to be arbitrary, I'm afraid. And we have to work with the days I've got. Now, my - can I tell you my presently minded order of witnesses. This might change, but I'm attempting to deal with it more or less in chronological order, so it makes sense.

So I'm thinking that the next witnesses will be, I think, Mr Smith and Mr O'Mara. I - I  
15 think then - as I've said, I - I'm not calling Mr Ceramidas at the present time. Although he would be a logical witness and we might have to deal with his evidence by submissions at a later point. But presently I don't think he can be called. Which would logically mean the minister, then I think Ms Cross, and then I think Ms Haire. So there is another witness who are in discussions with the - with counsel assisting. A tentative decision has been made to  
20 call that, whether or not he is to be called will be made - we will make a decision about that in the next day or two.

Now, Mr Green will resume on that first date in September, and between now and then, although it is true he has not yet completed his evidence, I think we have completed the  
25 bulk of the evidence, Mr O'Neill will need to question him further and then the question of cross-examination arises. Not every party will have an interest in cross-examining Mr Green, but I apprehend counsel for the - Mr O'Mara and Mr Smith may, although I'm uncertain presently about whether there will be any relevant dispute. Counsel for Ms Cross and Ms Haire I'm expecting will seek to cross-examine. It would be helpful to me if, shall  
30 we say, in the next week to 10 days, I could have an outline of the argument seeking - submission to seek cross-examination thus far. If you can move it forward to matters that have not been mentioned but you expect will be mentioned, that might be a useful foreshadowing just to save time when I need to consider it. That would be helpful.

35 MR PARARAJASINGHAM: Commissioner, Pararajasingham for Mr Ceramidas. Can I just flag I anticipate I will have some questions of Mr Green.

COMMISSIONER: I'm sorry, I overlooked you and you are quite right, I expect you would.

40 MR PARARAJASINGHAM: Yes. Thank you.

COMMISSIONER: Now, I think all of you have the private examination evidence of Mr Green? There is a very small extraction of it, and I can assure you at present I cannot  
45 see any relevance, but if that changes we will revisit that redaction. That examination involved extensive questioning by Mr O'Neill on potential contradictions and credibility issues, and it will be - I won't automatically close you out, but you will not find it easy to

persuade me that any of those lines of cross-examination should be revisited. However, if you seek to do so, I'm prepared to listen to submissions to that effect. Are there any other housekeeping matters to which I need to consider before the next occasion? No. Very well.

5 MR HASSALL: Sorry, Commissioner, are you setting the dates just the 6th, or the 6th, 7th and 8th at this stage?

COMMISSIONER: I think it must be the 6th, 7th and 8th. And I'm not certain that will be sufficient by the way.

10

MR HASSALL: It seems unlikely at this stage.

COMMISSIONER: Yes, I think so. I mean, it's - it strikes me that the major - what one might call the major interlocutors here, their evidence is likely to go in excess of a day.

15

MR PARARAJASINGHAM: Can I have one query arising from something that just fell from you, Commissioner. Commissioner, are you saying that the private examinations participated in by Mr Green, that they will be admitted into evidence in the public inquiry or not?

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COMMISSIONER: No, I'm not - I'm not presently - I mean, I will hear submissions about it, but I'm not presently minded to do so. That - that amount which needs to be admitted for the purposes of making sense of cross-examination, as one does in the ordinary course, may well need to be done. But that becomes part of the evidence of this inquiry. This is - because of the nature of the investigation and because of the nature of evidence, and I have to say, taking into account the experience of other Commissions where public examinations have been much - many more of them than - this is the first, so I - for me, I'm interested in seeing other practices and I'm willing to consider submissions on the point that bring me - bring my attention to the way other commissions do the work. But I'm not presently minded to tender, and it's not usually the practice.

30

As I understand it, what has to happen, and this was shown by recent litigation in Victoria, for example, that at the end of the - all hearings, both private and public, the Commission writes what is called a proposed report. That goes to the, one might say, the parties interested, or affected by the report, and they are entitled to make comments or submissions about it. And of course if the report refers to or relies on some part of evidence which is taken in private examination, that has to be given to the parties to enable them to know what is the underlying material that the Commission has relied on. And it's not impossible. One can foresee the possibility that most, if not all, of the private examinations is given to the parties. But that is a step considerably apart from tendering that material or placing that material on the public domain.

35

40

So those are matters which will need to be explored as we move forward, but I must say my approach is to be as open as I can and to give parties as fair a run as is consistent with the duty of the Commission to maintain control of its investigation. So does that answer your question?

45



MR PARARAJASINGHAM: In part, but I -

COMMISSIONER: Sorry, what's the other part not answered?

5 MR PARARAJASINGHAM: No, no, I understand what your position is, and we will make matters clear in our submission.

COMMISSIONER: Right.

10 MR PARARAJASINGHAM: So I'm assisted by it.

COMMISSIONER: It would be helpful, I think, if you - if any party makes submissions that are capable of affecting other parties, if you circulate them to the other parties so they have the benefit of perhaps responding or - if they wish to the matters and the Commission  
15 doesn't have to undertake that additional task.

MR PARARAJASINGHAM: Yes. I will note that.

MS MORGAN: Commissioner, if I could take up something you've just said. Thank you.  
20 Commissioner, just in terms of - not so much having it as evidence in these proceedings, what - a matter that we have been requesting, and I - and I've requested it twice already in writing and I will do it again, is certain private examinations if they occurred of those persons which will assist us in determining whether we cross-examine Mr Green and potentially what those subject matters might be. Because at the moment, Commissioner,  
25 you have access to evidence of other people that may be corroborating, may be contradictory. And in a prosecutorial sense, as, Commissioner, you are well aware, we would be entitled to see that, we may not be entitled to tender it, but we will be entitled at least as the legal representatives to see it and consider it in terms of potentially  
30 cross-examining Mr Green. And that's - so if I could -

COMMISSIONER: The difficulty - at a high level of generality, you're right. The difficulty is - the difficulty is that it first needs determination of the scope of cross-examination. Now, I understand it's a hen and the egg situation. You will say to me, well, how would I know what scope of cross-examination until I see this other material.  
35

MS MORGAN: Or even to cross-examine on that at all.

COMMISSIONER: Right. I think - I think the starting point is for you to make a submission as to the lines of cross-examination which you wish to take and the  
40 justification for them, and then I will consider (a) do I permit it and to what extent, and when I've considered that, that will open up a consideration of what additional material you should have. Now, it's true this may be a dynamic process, because that may open up other material. I understand that. But that is the way that I see it at present. So ultimately, I agree you should have what you need for a fair - for the fair representation of your client's  
45 interests.

5 MS MORGAN: I think, Commissioner, there's one issue that I'm not sure where - we might be at cross-purposes. For me to even know it might be a topic, I need to see what other people have said about the same thing. That's what I'm concerned about. We have been told certain things happened, I don't know what other people have said about that other than my own client.

10 COMMISSIONER: No, you do know some things, if I may say so. We have given you Mr Green's cross-examination, and you will have noted from that cross-examination - although we may be coming back to that matter in the course of his public examination - but there are a number of, how should I put it, interlocutors to whose evidence, in one way or another, or to whose positions he has been taken by counsel assisting and indeed by me in the course of his private examination. That should give you a good appreciation of at least some of the matters which are in the possession of the Commission. So I think what am saying to you, I think you have got enough, doing the best you can, to start this ball rolling. And then we will see as matters unfold how much more I am minded to give you. But I'm minded to be generous rather than close about that material.

20 MS MORGAN: Thank you, Commissioner.

COMMISSIONER: Well, do you wish to -

25 MS MORGAN: You have set out the process, Commissioner. I disagree with the process, but you have ruled, and we will make appropriate submissions about cross-examination and if you revisit what I need, I understand you will provide me with those examinations.

COMMISSIONER: Exactly.

30 MS MORGAN: Thank you, Commissioner.

COMMISSIONER: Yes. Are there any other matters that anyone wishes to raise at this point?

35 MR O'NEILL: Can I just mention that the Commission will put up on its website the documents that have been taken to - well, at least make available to the parties. It may well be that they are not put up publicly, but make available to the parties the documents that I've taken the witness to over the last couple of days.

40 COMMISSIONER: Thank you. Yes, very well then. 3 September - sorry, 6 September. Yes, I saw a twinge of concern.

**<THE HEARING ADJOURNED AT 4.11 PM TO 6 SEPTEMBER 2023 AT 10 AM**