

INQUIRY INTO THE CENTENARY HOUSE LEASE

Before the Hon David Hunt AO QC

Held at Level 5,
55 Market Street, Sydney

On Friday, 8 October 2004 at 10am
(Day 31)

1 THE COMMISSIONER: Before we start the evidence today, I
2 propose to give another one of these public interest
3 immunity claim decisions. I uphold the claim by the
4 Commonwealth for public interest immunity against
5 disclosure of document 49 referred to in the second
6 affidavit of Dr Shergold for use in the Inquiry. I
7 publish my reasons.

8
9 MR ROBERTSON: Commissioner, I think counsel have
10 considered that it may be appropriate, since Mr Sedgwick
11 won't be called to give evidence, to deal with any issues
12 arising out of his statement before Mr Joyce is called.

13
14 THE COMMISSIONER: If it will allow Mr Burmester to get
15 away, certainly.

16
17 MR BURMESTER: In relation to Mr Sedgwick's statement,
18 you will have seen --

19
20 MR ROBERTSON: I should tender it. Do you have a copy,
21 Commissioner?

22
23 THE COMMISSIONER: I have, yes.

24
25 MR BURMESTER: You will have seen in our letter of
26 5 October to the solicitor of the inquiry that our concern
27 with Mr Sedgwick's statement no longer goes to particular
28 paragraphs or sentences, but simply to the inferences that
29 might be drawn from the statement and from what your --

30
31 THE COMMISSIONER: May I cut you short? There are two
32 paragraphs there which I think we should deal with.
33 Paragraph 15 - I accept that those were the views of
34 Mr Sedgwick and perhaps of those in the executive
35 government, but I do not propose to draw any inference
36 that they were the views of Mr Morling. Of course,
37 exhibit 92, which is the confidential exhibit, does
38 contain some of that material, in any event, which does
39 identify where it originated - in fact, from two different
40 sources - but so far as paragraph 15 is concerned, there
41 will be no inference drawn that those were the views of
42 Mr Morling.

43
44 MR BURMESTER: Then I have no --

45
46 THE COMMISSIONER: I think, actually, some of it may be
47 incorporated in that exhibit, which is the document

1 produced by the Department of Finance and Administration
2 of the notes taken by somebody of the informal meeting
3 that Mr Morling had with the parties shortly before the
4 letters patent were issued. So there is all sorts of
5 material already in, but we don't need to know whether
6 they were Mr Morling's views, except in this way, and I
7 think that this is something which we would have to face
8 up to.

9
10 The terms of reference C and D rather tend to be
11 directed to those who were providing the resources, rather
12 than to Mr Morling, and I think it is only fair to those
13 who were responsible for providing the resources to make
14 it clear, as it appears to be the case on the evidence so
15 far, that Mr Morling said he did not want counsel
16 assisting him.

17
18 MR BURMESTER: Yes. I have no trouble with that.

19
20 THE COMMISSIONER: You see, that's why it has to go in,
21 in my view.

22
23 MR BURMESTER: Yes. I am not objecting to the admission
24 of any of the statement today, simply to reinforce the
25 point made in the letter that it should not be used to
26 draw inferences concerning the correctness or irregularity
27 of Mr Morling. I took from what you said yesterday that
28 you didn't intend to do that.

29
30 THE COMMISSIONER: That's not part of the terms of
31 reference. It would be a little late in the day to be
32 saying that it was an irregular Royal Commission.

33
34 MR BURMESTER: No. I took from what you said yesterday
35 that that was not a concern.

36
37 THE COMMISSIONER: Of course. The other paragraph which
38 I have draw to your attention is paragraph 23. Now,
39 bearing in mind the last sentence of that paragraph, "I
40 have no recollection of that meeting", Mr Sedgwick was
41 quite unable to in fact establish that document. If it
42 had been tendered through him, it could have been
43 suggested that it was not something he could say was
44 correct, but it was produced by the Department of Finance
45 without objection, and I don't think any objection would
46 have been appropriate anyway, so that it is in evidence by
47 virtue of its source, rather than anything Mr Sedgwick has

1 said.

2

3 MR BURMESTER: Yes.

4

5 THE COMMISSIONER: Those are the two paragraphs that I
6 thought I should raise with you. Are there any others?

7

8 MR BURMESTER: No, Commissioner, there are no particular
9 paragraphs I want to raise.

10

11 THE COMMISSIONER: Mr Burmester, I want you to feel
12 assured, if I can put it that way, that we are not here to
13 draw inferences or to seek to elicit anything in relation
14 to Mr Morling's state of mind which led him to various
15 decisions he made during the course of the inquiry, and
16 indeed before it. That would infringe, in my view, the
17 judicial immunity against disclosure. I don't think that
18 any of the terms of reference are directed to that, and,
19 as I think I said to you yesterday, in my view, that
20 immunity is absolute; it can't be balanced out against
21 anything like the terms of reference anyway.

22

23 MR BURMESTER: Yes. On the basis of what you had said
24 yesterday, and what you have just said, as I indicate, I
25 have no objection to particular provisions and I accept
26 what you have said, as Commissioner, and, on that basis,
27 have no concerns with its admission.

28

29 There is one other matter I just wanted to mention,
30 and that was how it ought to be treated, in terms of
31 whether it should be a public document or any of it should
32 be kept confidential.

33

34 THE COMMISSIONER: Why not? You see, it should not be
35 confidential unless it is essential to do so. Now, I know
36 that in your letter you suggested that, if that had been a
37 civil proceeding in a court, you would have had a good
38 claim for judicial immunity against disclosure. You and
39 I, I'm afraid, disagree about that. So, in my view, it
40 doesn't infringe the immunity in any way. I cannot
41 understand why it should be confidential.

42

43 MR BURMESTER: The only basis on which consideration
44 might be given to keeping the paragraphs dealing with the
45 discussions with Mr Morling leading up to the
46 establishment of the Commission, is that --

47

1 THE COMMISSIONER: But those were --

2

3 MR BURMESTER: -- there is public interest immunity in
4 terms of frankness and candour.

5

6 THE COMMISSIONER: Wait a moment --

7

8 MR BURMESTER: But you might consider that there is no
9 pressing public interest in keeping those portions
10 confidential and, if that is your judgment, Commissioner,
11 we don't take exception to it.

12

13 THE COMMISSIONER: I'm afraid, Mr Burmester, I have to
14 say a Royal Commission which hides behind confidentiality
15 is not a good Royal Commission. There are necessities,
16 sometimes, where a company's private financial records are
17 produced or a person's financial records are produced,
18 where you could see no real interest in having them
19 disclosed if you are able to refer to them in some way.
20 But in the report I suspect I'm going to have to refer to
21 some of these things.

22

23 Now, if something is made confidential, what do we do
24 then about the use to be made of that in the report? We
25 have already got that problem arising out of confidential
26 exhibit number 92. That, of course, is a very different
27 case. That's one in which we have overruled a claim for
28 public interest immunity on the basis of a balancing out
29 of the different public interests, and that is one where
30 the exhibit, so far as I'm concerned, will remain
31 confidential. But we did say that we would give the
32 Commonwealth the opportunity of addressing me on what use
33 should be made of that in the report. I think that comes
34 a little further down the track, and you will certainly be
35 given the opportunity.

36

37 MR BURMESTER: Yes.

38

39 THE COMMISSIONER: It may be that we will be able to say
40 specifically at that stage what we want to extract from
41 it, not necessarily quoting it, but asserting the fact
42 that it discloses. The less of that that we have to do at
43 the last moment, the better.

44

45 MR BURMESTER: I accept that. In relation to
46 Mr Sedgwick's statement I have been instructed to raise
47 for your consideration whether you think there is any good

1 reason why any of it ought to be confidential. If your
2 ruling is that you don't think there is, then I am content
3 with that.

4
5 THE COMMISSIONER: If you look at the public interest
6 immunity, which you raised briefly in the course of that
7 last submission, about making judges free to be frank and
8 forthright and unpopular, and all the usual sorts of
9 expressions used, there is nothing said by Mr Morling that
10 gets in evidence in any way that would demonstrate that he
11 was in any way upset at the thought that it might have
12 been revealed. A lot of it - for example, that exhibit
13 that went in yesterday - was said to the parties. So it
14 was, in effect, public statements made by him without any
15 suggestion that it was confidential and could not be
16 disclosed by them to others. So that's the sort of thing
17 that we have to avoid if we can possibly do so.

18
19 MR BURMESTER: I accept that.

20
21 THE COMMISSIONER: But, basically, I see no public
22 interest in keeping it confidential.

23
24 MR BURMESTER: On that basis, we don't press any
25 objection to it being released as a public document.

26
27 THE COMMISSIONER: All right, then. Thank you very much
28 indeed for your attendance. You may leave. Did you get a
29 copy of the decision?

30
31 MR BURMESTER: I have, Commissioner.

32
33 THE COMMISSIONER: You will probably get one faxed to you
34 anyway.

35
36 MR ROBERTSON: I hand up the original of Mr Sedgwick's
37 statement for that to be tendered.

38
39 **EXHIBIT #95 STATEMENT OF STEPHEN THOMAS SEDGWICK, DATED**
40 **27/9/2004, BARCODED WITS.032.0001, AND DOCUMENTS REFERRED**
41 **TO IN STATEMENT**

42
43 (Mr Burmester withdrew from the hearing room)

44
45 MR ROBERTSON: I call Mr Joyce.

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<IAN JOYCE, sworn [10.13am]

<EXAMINATION BY MR ROBERTSON:

MR ROBERTSON: Q. Is your full name Ian Joyce?
A. It is.

Q. Do you live at 3 Raroa Road, Kelburn, Wellington, New Zealand?
A. Correct.

Q. You are a public servant?
A. That's correct.

Q. Have you signed a statement for the purposes of this Commission?
A. That's correct, yes, I have.

Q. Can I show you a copy. In fact, that is an original signed copy of your statement.
A. That's correct.

Q. Is that statement true and correct to the best of your knowledge and belief?
A. Yes.

EXHIBIT #96 STATEMENT OF IAN JOYCE DATED 23/9/2004, BARCODED WITS.033.0001, AND DOCUMENTS REFERRED TO IN STATEMENT

MR ROBERTSON: Q. Are you still employed by the Australian Commonwealth Public Service or the New Zealand Public Service?
A. I'm employed by the Australian Public Service. I work for the Department of Family and Community Services and I am currently on an exchange program with the New Zealand Ministry of Social Development.

Q. There is just one area of your statement that I wish to explore with you, and then I think Mr Sackar, who appears for John Curtin House, would like to ask you some questions. The document I want to raise with you - do you have a bundle of documents?
A. I do have the bundle you sent to me, yes.

1 Q. It would probably be easier if you have a hard copy,
2 and I will ask for DOFA.088.0036 to be brought up on
3 screen. Do you have the bundle of documents?
4 A. Yes.
5
6 Q. The document I am referring to is the document headed
7 "ANAO WTNP meeting 25 June 1991".
8 A. Yes.
9
10 Q. That is a note prepared by Mr Turner of a meeting
11 held at Medibank House, Woden. Did you see that minute in
12 or about June or July of 1991?
13 A. I have got no recollection of whether I saw it or
14 not.
15
16 Q. I think in paragraph 21 of your statement you say you
17 only have a limited recollection of attending that
18 meeting?
19 A. That's right. Upon seeing this file note, the
20 reference to the location did trigger my memory that I had
21 attended it but I have no recollection of content of that
22 meeting.
23
24 THE COMMISSIONER: Q. Do you know whether you played
25 any part in formulating its contents?
26 A. The contents of the minute?
27
28 Q. Yes.
29 A. I don't believe I would have been involved in writing
30 it up, no.
31
32 MR ROBERTSON: Q. It is fair to say, Mr Joyce, you were
33 in a different section to Mr Turner and Mr Wojcik, who
34 appear to have had some involvement?
35 A. That's right. We were in a different division, yes.
36
37 Q. If I could refer you to paragraphs 13 to 17 of your
38 statement, in those paragraphs you refer to your knowledge
39 of what was happening with the Taxation Office and
40 precommitment leases in 1990 and 1991. Could you perhaps
41 just explain to the Commission what you understood a
42 precommitment lease to be?
43 A. In simple terms one where the building didn't exist
44 until the lease was signed and the building was
45 purpose-built for the agency that was to occupy it and
46 sign the lease.
47

1 Q. Was it your understanding that there was a document
2 executed before construction started?

3 A. Yes.
4

5 Q. Is that the document you refer to as a precommitment
6 lease?

7 A. Well, in the context of this, what we - certainly my
8 understanding, at the time, we would have used it in the
9 broader concept of the whole arrangement, not actually
10 referring to the document that was being executed.
11

12 THE COMMISSIONER: Q. Do you mean, though, there had to
13 be something signed such as an agreement for a lease?

14 A. Yes, that's right.
15

16 MR ROBERTSON: Q. Did you gain your knowledge of
17 precommitment leases from your knowledge of what was
18 happening with the Taxation Office, or did you have a
19 general understanding beyond that?

20 A. No, I don't think I gained it from what was happening
21 with the Tax Office, no. It was more in dealing with
22 offices in the Department of Administrative Services,
23 particularly Australian Estate Management, which was
24 involved in the arrangements like that and working with
25 other departments that I would have gained that knowledge.
26

27 Q. In paragraph 15 you refer to a concern held by the
28 AEM that it should be given a greater opportunity to
29 compete, and another concern that you refer to, a
30 different concern, in paragraph 13, relating to the fact
31 that incentives would not be available. Is that the
32 context in which you became aware of the existence or
33 nature of precommitment leases, or was it, again, more
34 generally?

35 A. Look, I honestly can't remember, as to whether - I
36 mean, there would have been other precommitment leases
37 that the department had some interest or involvement in as
38 agencies were bidding for money and I can't - I wouldn't
39 be able to recall whether the Tax leases were some of the
40 first that I came across or others in that context.
41

42 Q. When you say the departments were bidding for money,
43 was it your experience that it was generally necessary for
44 a department to bid for special funding in order to enter
45 into a precommitment lease?

46 A. Well, certainly in my early years in the finance
47 section, in the property section in Finance it was,

1 because it was sort of pre the full completion of the
2 devolution of responsibility to agencies for property
3 funding.
4

5 THE COMMISSIONER: I wonder if you could speak up just a
6 little bit. We don't get any amplification.
7

8 THE WITNESS: Right. Sorry. Certainly in the early
9 years of my involvement in the property section of the
10 Department of Finance, I would have understood that - my
11 memory is that that was pre the sort of completion of the
12 process of devolution of the property funding and full
13 responsibility to agencies. So, as we were in the process
14 of devolving that money from the Department of
15 Administrative Services to individual agencies, they
16 generally had to bid for new property leases or fitout and
17 so on, through either new policy, if it was a significant
18 amount, or through a process that I recall was called
19 works technical new policy.
20

21 MR ROBERTSON: Q. Now, was your understanding in 1991
22 that a precommitment lease would involve the provision of
23 a guaranteed return to the developer or owner of the
24 lessor of the proposed development?

25 A. That was my understanding, yes.
26

27 Q. Was your understanding in 1991 that that guaranteed
28 return would need to be sufficient to give the developer
29 comfort that it could recoup its investment?

30 A. That's correct; although obviously, I mean,
31 developers would have different - you know, I think our
32 understanding in Finance, developers would have had
33 different expectations in terms of returns, but we would
34 have certainly understood that they would want to recoup
35 their investment in general terms.
36

37 Q. And they would ordinarily want to recoup their
38 investment over the term of the lease or a short period?

39 A. I don't know about a short period. It would depend
40 upon assumptions that the developer made about residual
41 values of the building at the end of the lease. So it
42 wouldn't necessarily be just over the term of the lease
43 but it would be over the term of the lease plus
44 assumptions they made about what the building might be
45 worth at the end of that period.
46

47 Q. I want to take you to the second page of the file

1 note, DOFA.088.0038.
2
3 MR SACKAR: Could I just interrupt my learned friend? We
4 have had a look at this last night, and it is only a minor
5 matter, but we think the annexure is actually out of order
6 and it may make some difference. The barcoding is
7 incorrect. Mr Commissioner. What we are looking at, if
8 you have it, is the document behind tab 4 of the bundle of
9 documents which follow Mr Joyce's statement.
10
11 THE COMMISSIONER: That is the meeting of 25 June.
12
13 MR SACKAR: It is. But the version in the bundle -
14 unlike perhaps the version that you are dealing with - is
15 out of order. I just wanted to raise that with
16 Mr Robertson.
17
18 THE COMMISSIONER: I'm afraid I only got one of the
19 bundles that have been prepared en masse.
20
21 MR ROBERTSON: I am rather bemused, because it seems to
22 be a different version of the --
23
24 MR SACKAR: It is the same version, out of order.
25
26 MR ROBERTSON: It actually has different barcoding from
27 the version that was tendered.
28
29 THE COMMISSIONER: It was produced from a number of
30 different files, I think. They were in the Finance
31 department, APG, everywhere.
32
33 MR SACKAR: Absolutely. No criticism, no problem; I just
34 wanted to point out, in case it hadn't been picked up,
35 that it is out of order and it might confuse the witness.
36
37 THE COMMISSIONER: Thank you, Mr Sackar.
38
39 MR ROBERTSON: Q. Mr Joyce, I wonder if I could trouble
40 you to actually let me have access to the copy that you
41 have of that document. Mr Joyce's is different again. It
42 is the same document but there seem to be two versions of
43 the numbering.
44
45 THE COMMISSIONER: The strange thing is that it doesn't
46 even have a barcode on it; it just has the number. That
47 reference to Canberra should be the third page in the

1 document. That's the point.
2
3 MR SACKAR: That's the point. I should have put it more
4 explicitly.
5
6 THE COMMISSIONER: So, if you reverse of order of those
7 two documents --
8
9 MR ROBERTSON: I would beg to differ. The correct order
10 - because I have a copy here of the file - DOFA.088, the
11 original file, was tendered, and it is available. The
12 first page, 0036, is the one which obviously is the front
13 page. The second page has at the top, "Sydney", and the
14 third page, which is 0038 --
15
16 THE COMMISSIONER: This should be a very good lesson to
17 the Commonwealth public service never to have unnumbered
18 pages. I, myself, having read that document a long time
19 ago, remember it was the third page. It must have been
20 out of order in the other file. It probably wasn't the
21 one produced by the Department of Finance, but probably
22 APG, or one of those. It doesn't matter, as long as you
23 and the witness and we all have the same order. You would
24 prefer to have the one headed "Sydney" as the second page.
25
26 MR ROBERTSON: That's my recollection.
27
28 MR SACKAR: That can't be right. May I just indicate why
29 we think you are correct, Mr Commissioner. The heading
30 "ANAO memo of 27 June 1991" appears to be, by the content
31 of it, and those dates which follow on the next page, what
32 ought to be page 3, because it deals with matters that
33 occur after 27 June 1991; for example, on the top of page
34 4, you will see it then moves to 2 July. Otherwise, the
35 document would appear not to be in correct chronological
36 sequence. That's the way we have looked at it. Now, we
37 might be wrong, but it would seem to fit into that
38 pattern.
39
40 MR ROBERTSON: I think it is best that we pull out the
41 original.
42
43 THE COMMISSIONER: No, don't worry about the original
44 file, if I may say so. It had to be pulled apart in order
45 to be barcoded and scanned. I wouldn't like to depend on
46 that as being accurate.
47

1 MR ROBERTSON: Except for this, Commissioner: I did have
2 the opportunity to look at it before that occurred. It
3 appears that the barcoding on the original is the original
4 barcoding on the earliest copy that is available to me,
5 which is the one which appears in exhibit 69.

6
7 THE COMMISSIONER: What was exhibit 69?

8
9 MR ROBERTSON: That was the Department of Finance
10 documents. Just to clarify why I say that Sydney and
11 Brisbane come first, the first paragraph says the meeting
12 was opened by suggesting they consider Sydney and Brisbane
13 proposals before looking at the Canberra matter. There
14 was then some discussion of some further comments provided
15 on the current markets. It then turns to Sydney,
16 Brisbane, and then turns back to Canberra, and then on
17 with the third page, which goes to matters subsequent to
18 the meeting, which is "ANAO memo".

19
20 THE COMMISSIONER: Having read it again, Mr Sackar, if
21 you see what is presently page 3, it is still dealing with
22 Canberra at the top of the page.

23
24 MR SACKAR: Yes, I see that.

25
26 THE COMMISSIONER: However, you and I probably have the
27 same document.

28
29 MR SACKAR: I don't think it will matter in terms of
30 substance.

31
32 THE COMMISSIONER: Let's agree now that this document
33 starts off with the heading "ANAO WTNP meeting 25 June
34 1991". The second page has the heading "Sydney". The
35 third page starts off, "ANAO verified the position"; and
36 the fourth page, "On 2 July Mr Joyce provided"; and the
37 last page is clearly the last page because of Mr Turner's
38 signature.

39
40 MR ROBERTSON: I believe that is consistent with all of
41 the copies contained in the original, in the Morling
42 Inquiry files.

43
44 Q. I do apologise for that, Mr Joyce. I will return to
45 you the copy that you had, and I only note that, for some
46 reason, the barcode on the top of the third page should be
47 0038, not 0037. Could we turn to the third page of that

1 document, which commences "Sydney". In the --
2 A. It is in fact the second page of the one that I have.

3
4 Q. Yes. My fault. Now that I am clear, the second
5 page, which is the one that commences "Sydney", and under
6 the heading "Canberra", the following appears:

7
8 *The ANAO officers were advised that the*
9 *issue of the proposed move from Medibank*
10 *House to another building would be one that*
11 *would need to proceed through the New*
12 *Policy process; this was based on the*
13 *presumption that the building would be*
14 *built with the intention of the owner*
15 *recovering the building costs, by way of*
16 *the rentals, in the first few years eg,*
17 *7-10 years. The ANAO would enter into a*
18 *precommitment lease.*

19
20 To your recollection, was that presumption something that
21 was identified by the Department of Finance officers or
22 the Audit Office?

23 A. As I say, I can't - I don't have any recollection of
24 the contents of that discussion, so I can't comment.

25
26 Q. Assuming the proposition had been raised in those
27 terms - that is, that the ANAO would enter into a
28 precommitment lease, and the building would be built with
29 the intention of the owner recovering the buildings costs
30 by way of the rentals in the first few years, eg, seven to
31 10 years - you would have understood that to mean that
32 both the construction cost and the interest on that
33 construction cost would be expected to be recovered by the
34 developer over the seven to 10-year period; is that
35 correct?

36 A. If you take that on face value, I read that to be
37 that's what that is saying, yes.

38
39 Q. If that had been said at that meeting, would that
40 have surprised you?

41 A. As I say, I don't recall the meeting, so I'm not
42 sure. I mean, I do think that the issue in terms of
43 whether it would have been a new policy proposal would
44 depend on what we would have thought of the value of the
45 stream of payments that the Audit Office was going to have
46 to make, and I know that \$6m used to be the figure, but I
47 can't recall whether we used to do that essentially just

1 for the fitout costs or whether we used to take a sort of
2 discounted cash flow estimate of the rental payments that
3 were estimated to be made over the period of the lease.
4

5 Q. So that's in order to identify whether it needed to
6 be new policy or works technical new policy?

7 A. That's right.
8

9 Q. So what you are saying, as I understand you, is that
10 when a proposal was brought to Finance in respect of a new
11 lease, a calculation would be done to determine a cost,
12 and if that was more than \$6m, then there would have to be
13 a new policy proposal?

14 A. That's right. Though, as I'm saying, I can't recall
15 exactly how we used to determine the \$6m, whether it
16 related purely to the capital side of the deal, the
17 fitout, or whether it was a combination of the fitout and
18 the rent. I think it was the latter. But we wouldn't
19 have, in that context, looked at the actual capital
20 outlays by the building owner as such or their interest
21 costs because the department wouldn't have been privy to
22 that. We would have been looking at the estimated rental
23 income stream payments being made by the department in
24 question.
25

26 Q. The conclusion you would draw from the proposition
27 first of all that Finance was stating that it would have
28 to proceed to a new policy process, and secondly that the
29 owner would recover the building costs by way of rentals
30 in the first few years, is that it was anticipated by the
31 Finance officers at the meeting that the rentals would be
32 very high, at least in the early years, under that lease?

33 A. I'm not - I mean, what I would read obviously is they
34 would anticipate that the total cost of the arrangement,
35 both the estimated fitout and the sort of discounted cash
36 flow of the estimated rental payments, would have been in
37 excess of \$6m. That would be my understanding.
38

39 Q. Were you at any stage, as far as you can recall,
40 shown spreadsheets prepared by the Department of Finance
41 in relation to this proposal?

42 A. I can't - I don't recall being shown such
43 spreadsheets, but that doesn't mean I wasn't.
44

45 Q. You did receive, I think you have said in paragraph
46 19, Mr Turner's handwritten note, which refers to a
47 telephone conversation between you and Mr Turner of 21

1 June, which indicates to you that did you see the letter
2 from the Audit Office to the Department of Finance dated
3 11 June 1991, which is CH94.002.0002. Do you have that in
4 front of you?
5 A. That's the letter dated 11 June; is that correct?
6
7 Q. Yes.
8 A. Yes, as I said in my statement, I don't have any
9 recollection of the letter but I have no reason to doubt
10 Mr Turner's note which indicates that I did see it at the
11 time.
12
13 Q. If I could ask you to turn to page 0006, do you see
14 on that that there is a cost comparison over 10 years,
15 "Stay in Medibank and other Canberra locations versus move
16 to Section 22"?
17 A. Yes.
18
19 Q. That identifies as rent and outgoings new building
20 \$22.4m, I think, plus fitout of \$2.8m. Do you see that?
21 A. On the "Move to Section 22" column?
22
23 Q. Yes.
24 A. Sorry, 22.41?
25
26 Q. Yes.
27 A. Yes.
28
29 Q. Is that the figure that you would have anticipated
30 was used to determine whether it was a new policy or a
31 WTNP proposal?
32 A. Well, as I say, I don't recall the particular
33 meeting, so I'm not sure what would have been said, but in
34 general terms we would have looked at an analysis like
35 that and thought that it was indicating that the total
36 proposal was in excess of \$6m, so it was certainly
37 potentially going to be a new policy proposal. Even
38 though we would normally - it appears, from looking at it
39 just now, that that is a sort of simple comparison or
40 analysis of the two alternatives being outlined by the
41 Audit Office. The general approach in the Department of
42 Finance at the time was that we would certainly, usually
43 for those sort of analyses, want to see a discounted -
44 what we term a discounted cash-flow comparison between the
45 two alternatives, not a simple sort of addition of dollars
46 over the 10 years, because potentially it distorts one
47 option versus another. If one had a lot of outlays in an

1 early year and not as many later, if you just do a simple
2 addition as opposed to a discounted cash flow, it doesn't
3 compare the two alternatives appropriately.
4

5 THE COMMISSIONER: Mr Joyce, I am often accused of
6 speaking very quickly. You speed far more than I do. It
7 is a very long answer. It is very hard for the court
8 reporters to take it down. Just break it up into
9 sentences.

10
11 THE WITNESS: Sure.
12

13 MR ROBERTSON: Q. If you wouldn't mind going back to
14 the page of the 25 June note that I took you to earlier -
15 that's the one commencing with "Sydney" at the top of the
16 page - you would have understood in 1991 that if an owner
17 was going to recover building costs by way of rentals in
18 the first few years, that would have required rents in
19 excess of the interest rates payable on the building cost
20 in order to recoup both the building cost and the interest
21 rate?

22 A. Could I ask you to repeat that question?
23

24 Q. I am sorry. I perhaps didn't put it very clearly.
25 The building cost would be expended by the owner, and the
26 owner would presumably seek to recover a return on those
27 building costs over the period, and, in the ordinary
28 course, you would anticipate would have borrowed to fund
29 those building costs; is that correct?

30 A. I presume that's potentially correct, but, as I said,
31 that wasn't really our concern in the Department of
32 Finance at the time; it was about the merits of the
33 outflows that the agency was going to have to pay versus
34 the alternatives that they had, not what the building
35 owner's interest costs might be. But in general terms I
36 agree with the proposition.
37

38 Q. If the owner expected to recoup its costs over a
39 limited period, it would expect to recover not only the
40 costs but also the cost of funds over that period?

41 A. That's correct, but, as I say, it would depend on
42 what assumptions the owner made about the value of the
43 asset that they had left at the end of that lease.
44

45 Q. Well, I am asking you about what your understanding
46 would have been in 1991 about the assumptions identified
47 in this note, that is that the owner would recover the

1 building costs by way of rentals in the first few years?
2 A. Well, as I say, I can't recall that particular
3 incident, but if we take that proposition as correct, yes,
4 presumably the owner would want to recover the cost of
5 funds as well as the capital costs.

6
7 Q. Do you have any recollection now of what interest
8 rates were in the market at that time?

9 A. No.

10
11 Q. Do you have a recollection that the resource
12 agreement between the Department of Finance and the Audit
13 Office provided for a 10.7 per cent interest rate in March
14 1992?

15 A. No.

16
17 Q. On the assumption that it does, would you accept that
18 that would have reflected the market interest rates at
19 that time?

20 A. I wasn't quite closely involved in the Audit Office
21 resource agreement at all, so I don't think I am equipped
22 to comment.

23
24 Q. Perhaps I will put it another way. If the owner had
25 expected to recover both cost of funds and building costs,
26 the annual rent would need to exceed, and by a not-small
27 margin, the cost of funds in each year, wouldn't it?

28 A. Well, I suppose - I mean, it would depend on how they
29 packaged their arrangement, presumably. Potentially they
30 could have a higher rent at the start and be getting in
31 front. It really depends on how the whole package works,
32 not in a particular year, would be my memory.

33
34 Q. Perhaps I can put it more globally. The fact that
35 the owner expected to recover the building costs by way of
36 rental in the first few years, eg, seven to 10 years,
37 would imply that rents in the course of the lease could
38 not be fixed solely by reference to rents being paid in
39 the market?

40 A. Well, I mean, if you accept that first proposition,
41 potentially that's right. I mean, I haven't been involved
42 in these issues for a long time.

43
44 Q. I am sorry, but you would agree that if it was
45 understood that that was the intention of the owner, it
46 would be understood at the same time that the rents would
47 not be fixed by reference solely to rents being paid in

1 the market?
2 A. Well, I suppose, again, it depends on what the
3 starting rent is and what the various people's perceptions
4 of what the market might do --

5
6 Q. Well, I put this to you: even if the rent commenced
7 at a market rate, it would need, over the course of the
8 lease, to escalate by a minimum amount in order to ensure
9 that there was a recovery of costs - the building costs
10 plus cost of funds in that seven to 10-year period?

11 A. Well, I think my general experience in the property
12 section over time was that for precommitment leases it was
13 certainly often the case that there might be provision
14 other than just market, if it starts at market, as you
15 put.

16
17 Q. In June 1991, when this matter was canvassed at this
18 meeting - and I understand you really can't recall - do
19 you believe that you would have given any consideration to
20 the significance of the presumption identified in that
21 part of the note - that is, that the owner would recover
22 the building's costs by way of rentals over the first
23 seven to 10 years?

24 A. As I say, I mean, my expectation in general terms, in
25 the way we would have approached those things is that
26 would have been a relevant consideration in considering
27 the potential cost to the Audit Office compared to
28 alternatives that might have been in the market of
29 existing buildings, and so on.

30
31 Q. The note indicates that there were comments provided
32 on the current markets and tactics of real estate agents
33 at the commencement of the meeting. That appears on the
34 first page. In a context where those issues, in
35 particular that fixed rates of increases may be dangerous
36 and the wording of rent reviews needs to be watched, are
37 you able to say to the best of your recollection or belief
38 whether anything was said at the meeting in the context of
39 discussion of this precommitment lease issue in relation
40 to Canberra about the nature of the rent review clause or
41 fixed rates of increase?

42 A. No. I've got no recollection of that.

43
44 MR ROBERTSON: I have no further questions.

45
46 <EXAMINATION BY MR SACKAR:
47

1 MR SACKAR: Q. Mr Joyce, a couple of preliminary
2 questions. You say in paragraph 1 of your statement that
3 you had worked in the property section since 1987. Had
4 you been in the Department of Finance prior to that, or
5 had you been in another department?

6 A. I had been in the department for just one year, in
7 1986, as a graduate.

8
9 Q. I see. So may I just interpolate, therefore, you
10 finished your accounting course or degree, I should say, I
11 am sorry, at the University of Canberra, in 1986 or 1985?

12 A. 1985.

13
14 Q. And you joined the public service in 1986?

15 A. Early 1986.

16
17 Q. The property section of the Department of Finance
18 appears in documents we have seen to be referred to by an
19 acronym D&G?

20 A. D&G was actually the full division, which would have
21 had three branches of which the property section would be
22 one element of one branch. So there were probably 10 or
23 12 sections in the D&G division.

24
25 Q. You say in paragraph 2:

26
27 *The Property Section had broad policy*
28 *responsibility within Finance for the*
29 *reforms to Commonwealth property*
30 *administration...*

31
32 Et cetera. It is in the context, do I assume, or does the
33 Commissioner assume, that you gained such information as
34 you did about the property market either in Canberra or
35 otherwise from your activities in the policy or in the
36 context of policy considerations?

37 A. Yes. I mean, the property expertise that I developed
38 and the knowledge that I gained was entirely in the work
39 in that section in relation to those reforms and more
40 broadly.

41
42 Q. But do I take it that your work in relation to policy
43 issues required you, from time to time, to consider
44 property markets around Australia as opposed to simply
45 confined to Canberra; is that fair?

46 A. Oh, yes, certainly.

47

1 Q. By the time you got to certainly 1991, from time to
2 time do we take it you had had a need to look at various
3 property matters around Australia?

4 A. Correct.

5
6 Q. On the question, if I can invite you to go to
7 paragraph 4, you say:

8
9 *In the course of my involvement, in*
10 *particular with AEM, I accumulated some*
11 *knowledge of the arrangements and proposals*
12 *which were being put forward in the period*
13 *1989 to 1992 relating to buildings to be*
14 *constructed or occupied by and for the*
15 *Commonwealth.*

16
17 I take it that, in that respect at least, you draw a
18 connection between that activity, in a broad sense, and,
19 perhaps more directly, the particular knowledge you gained
20 as a result of the expansion of the AT0?

21 A. Yes - could I get you to repeat that, sorry?

22
23 Q. I am sorry, perhaps it was a little confusing. Do I
24 take it that much of your experience of arrangements and
25 proposals which were being put forward in the period 1989
26 to 1992 in relation to buildings to be constructed was at
27 least in part from AT0's expansion, or AT0's modernisation
28 policy?

29 A. In very small part, I think, as I said in the
30 statement. My memory is that the modernisation program
31 was handled very much by the supply division that was
32 responsible for the agencies. What I am alluding to in
33 that paragraph is more there were two main elements that I
34 would say that my work in the property section that was
35 generating - where I was developing that knowledge. One
36 was dealing with AEM's own proposals, which were to have
37 buildings built for agencies and so on, and that was where
38 I had my greatest involvement in relation to Australian
39 Estate Management's own proposals to develop buildings,
40 and so on, and also proposals from agencies to take out
41 leases and so on, as property was being - as that process
42 of devolution was unfolding from DAS controlling it to
43 agencies. I wasn't closely involved in the AT0
44 modernisation projects.

45
46 Q. But certainly aware, at least from the AT0
47 modernisation process, that those arrangements or many of

1 them involved precommitments?

2 A. Yes. Yes.

3

4 Q. And did you become familiar, both in relation to the
5 ATO and perhaps other agencies - whether it might be DSS
6 or DEET, for example - with other terms and conditions
7 that were being put forward by developers in the context
8 of precommitment; for example, fixed escalators?

9 A. I was aware of other agencies having precommitment
10 leases. I don't recall any particular details of which
11 agencies or the arrangements, but I do recall that there
12 was a variety of arrangements involved potentially.

13

14 Q. But the variety of arrangements included not only
15 precommitments, but also, on occasions, fixed escalators?

16 A. My memory is not good enough to be certain in terms
17 of what did come across my desk over that period.

18

19 Q. Well, let me ask you this: were you in Canberra in
20 1992 and in 1994, for example?

21 A. Yes.

22

23 Q. Did you become aware of controversy surrounding the
24 Centenary House lease in 1992, or 1993?

25 A. Yes, I was aware in general terms of the controversy,
26 yes.

27

28 Q. And it wouldn't have passed your attention that
29 Mr Morling conducted a Royal Commission into the lease in
30 1994, for example?

31 A. Correct.

32

33 Q. Were you involved in any way with any part of the
34 Royal Commission? I don't mean by giving evidence,
35 because we know you didn't, but were you involved in any
36 respect at all in any aspect of the Royal Commission?

37 A. I don't believe I was, no. I don't have any memory
38 of having any involvement at all. I had left the property
39 section around the end of 1993 and moved into an entirely
40 different functional area.

41

42 Q. Let me, if I may, bring you back to your paragraphs
43 12 to 17. You say in paragraph 12:

44

45 *I recall being aware that in the late 1980s*
46 *and early 1990s the Australian Taxation*
47 *Office ("ATO") was engaged in a very*

1 *significant program of modernisation and*
2 *was entering into arrangements for*
3 *pre-commitment leases...*

4
5 A. Correct.

6
7 Q. Just to elaborate a little, in various parts of
8 Australia?

9 A. Yes.

10
11 Q. And how was it, for example, if you can recall, that
12 the Tax Department initiatives or program came to your
13 attention in the first place? Was it in the context of
14 AEM as a competitor, if you like, to the private sector,
15 looking at deals that might have been offered by the
16 private sector for the purposes of seeing whether they
17 could be bettered, or something of that sort, by AEM?

18 A. I think it would have been in two contexts. One
19 would have been about the AEM's interest in being involved
20 in developing proposals for the Tax Office potentially,
21 and also just in the fact that we were having day-to-day
22 dealings, or maybe not day-to-day, but regular dealings,
23 with Eddy Wojcik and Wayne Turner who were in the area
24 responsible. Probably we would have been talking about
25 other proposals, about Audit, no doubt the Tax
26 arrangements were discussed at times and so on.

27
28 Q. Let me take you back. The concept of precommitment
29 leases - that was something that you also became aware of
30 in the context of other agencies, not just Tax?

31 A. Yes.

32
33 Q. But in the context where some agency or another
34 asserted a need, or a desire, perhaps, for the
35 construction of a building for their use?

36 A. Correct.

37
38 Q. In those cases where the precommitment context was
39 looked at by you, are you able to agree that in most of
40 those cases the leases were going to be long-term leases?

41 A. Yes.

42
43 Q. By that I mean, would you agree, that in most cases
44 you would have believed that they were going to be leases
45 of 10 years or more?

46 A. Yes.

47

1 Q. For example, do you recall in 1990 or 1991 becoming
2 aware of what has been called here the AUSLIG lease?
3 A. No.
4
5 Q. Do you recall DSS at Corrimal, for example? Do you
6 recall anything about that?
7 A. I don't recall Corrimal, no.
8
9 Q. Do you recall anything about the concept of fixed
10 escalators at all in this period? Even though you can't
11 recall any specific leases or arrangements, do you recall
12 that fixed escalators were not uncommon in the context of
13 developers negotiating terms and conditions?
14 A. I don't think I could say that I can recall one way
15 or another.
16
17 Q. All right. Have you heard of a concept of a ratchet
18 clause?
19 A. Yes.
20
21 Q. What did you, if you can put us back into your head
22 and history, understand by a ratchet clause, let's say, in
23 1990 or 1991, if you believe you had an understanding
24 then?
25 A. I think my understanding would be that a ratchet
26 clause was where, at rent review time, whenever that would
27 be, the rent would either be adjusted to market rates or
28 by a fixed escalator, whichever was the - well, it could
29 be potentially higher or lower, I think, but I think the
30 norm would be whichever was the higher.
31
32 Q. All right. Do you remember any contexts in which the
33 question or the concept of a ratchet clause arose in terms
34 of your becoming familiar with ATO or any other agency in
35 1990 or 1991?
36 A. I know I was familiar with the concept, so I'm sure
37 we were exposed to arrangements where that was suggested
38 and so on, but I couldn't say which deal or which
39 arrangement.
40
41 THE COMMISSIONER: Mr Sackar, I don't want to have to
42 debate what a ratchet clause is, but my understanding is
43 that it also includes one where, at the rent review, it is
44 not necessarily a ratchet clause but it can't be reduced
45 from the previous year.
46
47 MR SACKAR: Ratchet in the sense, I suppose --

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THE COMMISSIONER: That it is never reduced?

MR SACKAR: Yes. Or, it may be a figure which might be maintained above market at the particular point in time; in other words, some of the arrangements we have seen have a fixed escalator, fixed percentage, and where there is the so-called market review, if the market were, for example, shown to be 8 per cent, the clause or the agreement or the escalator were 9 per cent, there were arrangements that we have seen where, notwithstanding the market review might throw up an 8 per cent figure, the arrangements are 9 per cent if that is the agreed escalator in the lease. So ratchet in the sense that it can never be reduced and might, on rent review, actually produce a figure which is above market, so, I suppose in that sense, ratched up. But that's one species; I don't suggest it's the only form.

THE COMMISSIONER: I think we have to look at it in a general way because there must be many different types of ratchet clauses.

MR SACKAR: Commercial agreements are as varied as the imagination of the negotiating parties, I assume, and we accept that.

THE COMMISSIONER: That's the way I'm going to approach it - that it can't be reduced.

MR SACKAR: We would accept that.

Q. May I ask you to look at a screen, if the operator would be kind enough to bring up CH94.012.0330. When that document comes up on the screen, can you read that, or is the typeface a bit small for you? Don't worry about the handwriting for the minute, if you can just concentrate on the typescript.

A. Yes, yes. I can read it.

Q. Would you be kind enough to run your eye down that list that appears on that page, and when you have done that, I am going to ask you a question, but I won't intrude into your reading of it just for the moment. Would you have a look and run your eye down the page and when you have done that would you be kind enough to tell me that you have done it.

1 A. Yes.
2
3 Q. Does that document refresh your recollection in any
4 respect, and, if so, please say in a moment, in respect of
5 any arrangements in connection with the ATO or any other
6 agency that you believe you were familiar with, either in
7 1989, 1990 or 1991, or thereabouts?
8 A. I mean, there are some addresses there that ring a
9 bell, like the one at the very bottom of the page, the ATO
10 in Collins street, Hobart, but - and it looks like the
11 sort of information I would have expected that we might
12 have considered at the time, but, no, the particular
13 arrangements for any of those leases doesn't refresh my
14 memory, as such.
15
16 Q. All right. May I take you, then, to another
17 document, and if the operator would be kind enough to
18 bring up on the screen CH94.012.0127. First of all, may I
19 ask you just a couple of questions before you get too
20 deeply embroiled in the reading of it, which I will of
21 course invite you to do in a moment. The name at the top,
22 the contact officer, Michael Vnuk, is he someone who you
23 were familiar with back in 1990 or 1991 or thereabouts?
24 A. Yes.
25
26 Q. Who was he?
27 A. Certainly for some of that period Michael was in
28 property section as well, and worked directly to me.
29
30 Q. Does that mean reported to you from time to time?
31 A. Yes.
32
33 Q. Mr Richard Williams, to whom the letter is addressed,
34 was the general manager, was he, or was some other person
35 working to the general manager of AEM?
36 A. No, no, my understanding was he was the general
37 manager of AEM at that time.
38
39 Q. May we assume that in all probability - and I don't
40 expect you have got the slightest recollection, perhaps,
41 of the actual letter - it is probable that Mr Vnuk would
42 have discussed the contents of this letter with you or may
43 even have shown it to you prior to it going?
44 A. Yes, that's very probable.
45
46 Q. And before you --
47 A. Can I just confirm one thing? What's the date on it?

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Q. Yes, I can tell you. The date of the letter is 11 October 1991.

A. Yes --

Q. And it went out under the signature of a Mr Cooney, whom you are well familiar with?

A. Yes.

Q. But the person whose name was typed in was first assistant secretary, Ms Sainsbury or Mr Sainsbury?

A. Mr Sainsbury, yes.

Q. Would you just kindly read that page and when you are finished, there are three pages, plus a two-page or so annexure. I can't show you a hard copy, but if you can do your best to read it on the screen and when you have got to the end of the pages, would you just indicate to the operator so that you can move on?

A. Thank you.

Q. May I take you to one part of the attachment, if the operator would be kind enough to bring up CH94.012.0131?

A. I should just make the point that whilst some of the issues in that thing are familiar to me, I said I was on - because I know I was overseas for the AFL grand final in 1991, which is in the end of September. I think I had six weeks leave, almost through September and into mid October, is my memory, so it may be why that letter is not particularly as familiar to me.

Q. I won't hold it against you. Would you be kind enough to look at the page which is on the screen, and may I draw to your attention particularly, in the middle of the page, by all means read it all, "The concept of precommitment of leases for office space", down to the bottom of the page.

THE COMMISSIONER: What was the annexure? What was the heading to it?

MR SACKAR: It simply says, I will read it on to the transcript:

Australian Estate Management's role in the ACT - policy issues.

1 And then the subheading "The ACT office environment" is
2 the previous page.

3
4 THE WITNESS: Yes.

5
6 MR SACKAR: Q. One of the policy issues, it appears,
7 that was on the table, so to speak, in 1991, and perhaps
8 earlier, was AEM's role in development of property for
9 Commonwealth use as opposed to private sector; correct?

10 A. Yes, it would be appear so from the --

11
12 Q. All right. Do you recall any buildings that the AEM
13 developed in the period 1989, 1990 or 1991, say, for
14 Commonwealth use?

15 A. I can recall a number which the ATO developed for
16 Commonwealth use, I am just struggling as to whether they
17 were exactly in that three-year window, because I --

18
19 Q. Pardon me interrupting you. What I was directing my
20 attention to is not so much the use by an agency such as
21 the ATO, but the point of the question was do you recall
22 any buildings being developed by the AEM by use for
23 Commonwealth agencies?

24 A. Yes. What I am saying, sorry, is, yes, I do. I just
25 can't quite get that window, because I know there were
26 buildings in Alice Springs and Townsville.

27
28 Q. Townsville is probably one that you saw on a previous
29 page. In the Townsville context or in any context that
30 you can recall in which the AEM developed property for the
31 use by Commonwealth agencies, was it usually in the
32 context of a precommitment as well?

33 A. Well, I think some of those buildings were
34 commissioned before the new arrangements came into place,
35 so that the agency would have just been - DAS, the
36 Department of Administrative Services, effectively could
37 have assigned an agency to a building, I think. But
38 certainly once the new model was in place, I think
39 Australian Estate Management would only develop a building
40 if it had a Commonwealth agency that had agreed to it.

41
42 Q. Precommitted?

43 A. Yes.

44
45 Q. Exactly. Could I take you back to CH94.012.0131. I
46 think that is the page as you see it on the screen. Do
47 you see at the top it says:

1
2 *It is also important to recognise that AEM*
3 *has additional roles in the ACT that it*
4 *would not attempt to take on outside the*
5 *ACT. It is a land developer and marketer*
6 *of that asset. However, AEM is, after all,*
7 *only a precommitment developer, not a*
8 *speculative developer.*
9

10 Do you see that?

11 A. Yes. Yes.

12
13 Q. That helps you recall, does it not, that the
14 Australian Estate Management, itself, it seems, in the
15 particular point of time, if it was going to develop a
16 building for Commonwealth use, would only do so in the
17 context of the agency having entered into a precommitment,
18 at least, whatever other terms and conditions might flow?

19 A. Yes. I mean, it depends - obviously because there
20 was no separate legal entity, a precommitment might have
21 a - you know, mightn't involve the same legal process.

22
23 Q. It might not have the same legal or commercial
24 perhaps significance as it might between a third party and
25 the Commonwealth --

26 A. Yes, but the concept of a precommitment or agreement
27 to occupy, or whatever you term it, yes, that was my
28 understanding of what AEM, post the new arrangements,
29 would do before they developed a building.

30
31 Q. Do you recall any arrangements at the time - I don't
32 mean specifically, perhaps even generally - between the
33 AEM and any agency in respect of which a property was
34 developed where there was a fixed escalator?

35 A. No, I can't say I recall one one way or the other.

36
37 Q. I take it it wouldn't surprise you? I am not
38 suggesting one does exist, but it wouldn't surprise you;
39 in other words, it wouldn't be contrary to the kind of
40 commercial condition you might expect to find?

41 A. Well, I think, like you said earlier, that, you know,
42 any commercial deal can be the scope of the two
43 negotiating parties. AEM was trying to operate as a
44 commercial player in the market.

45
46 Q. But certainly, insofar as the Commonwealth was using
47 taxpayers' funds, as it were, to develop a property, one

1 would expect not only a pre-commitment, but that, in
2 general terms, AEM would have agreed to long-term, or
3 would have required, rather, long-term leases from the
4 agency that was going to be using the property?

5 A. Yes.

6

7 THE COMMISSIONER: Q. Would they be leases, though?

8 A. Long-term agreements, I think, probably.

9

10 MR SACKAR: Q. Yes, not leases per se, in that sense,
11 but certainly agreements which both sides, if I can use
12 it, at the table, although it is the one entity, in a
13 sense, would have regarded as enforceable?

14 A. Yes, well, I don't - it depends how you interpret the
15 word "enforceable", but both agencies would accept they
16 should, you know, abide by it.

17

18 THE COMMISSIONER: Can I get the time frame clear here?

19

20 MR SACKAR: 1991 I am putting. I have put earlier.

21

22 THE COMMISSIONER: That was when they were starting to
23 bring in the idea that agencies had to, in effect, pay
24 rent. So it was at that time --

25

26 THE WITNESS: I think they started paying rent on owned
27 buildings from 1 July 1989, didn't they?

28

29 MR SACKAR: Q. So your recollection, at the moment -
30 and I am not suggesting anything; it may be right or
31 wrong, I'm not questioning you, but certainly from 1 July
32 1989, or certainly somewhere around that period, but at
33 least by 1991, agencies in the devolution process were, as
34 it were, going to pay rent?

35 A. Were paying rent to AEM for Commonwealth-owned office
36 space; is that right?

37

38 Q. Now, it was certainly AEM's view, was it not, as best
39 you could recall it, that as many of these arrangements as
40 possible, so far as the Tax Office was concerned, for
41 example, or other agencies, ought to involve the
42 Commonwealth in participating in the commercial aspects
43 and, therefore, reaping the commercial benefits as far as
44 could be done?

45 A. I don't know if my recollection is as many as
46 possible. Certainly I recall that the AEM was concerned
47 that the nature of the Commonwealth budget process, for

1 instance, which is where they had to get their capital
2 funding to build a building, was somewhat restrictive
3 compared to the way their competitors went about getting
4 funding, obviously, and there was definitely - I recall
5 them being concerned and discussing with Finance, on more
6 than one occasion, concerns about that process.

7
8 Q. Having read the letter that I have taken you to - and
9 I appreciate that you probably haven't been shown it for a
10 very long time, even if you saw it back in 1991 - does it
11 help you to accept that one of the competitors in the
12 marketplace at the time, in relation to AEM, was probably
13 regarded as Barclays, for example? Does your recollection
14 help you to recall that Barclays was one of the
15 competitors of AEM?

16 A. I don't recall that, other than reading the letter
17 where Barclays is mentioned in relation to the Tasmanian
18 proposal, I think.

19
20 Q. That doesn't help you recall?

21 A. No. I remember there was just a number of players
22 that would have been --

23
24 Q. Could you recall Lend Lease being regarded as a
25 competitor of AEM?

26 A. They were obviously a name that I was familiar with
27 because they were a very large player in the market. I
28 recall Lend Lease was involved in the ANAO proposal at the
29 time and I'm sure I would have recalled that they were
30 potentially involved in other proposals as well, yes.

31
32 Q. Let me move on, then, please, to the bundle of
33 documents that are attached to your statement. Is that in
34 your bag or in front of you?

35 A. No, I have got the documents that I was sent.

36
37 Q. Let me ask you, please, if I may, about a document
38 which is behind tab 1. It is the discussion paper which
39 emanated, it seems, from the Department of Finance in
40 October 1990.

41 A. Yes, I have it, thank you.

42
43 Q. Short question: Attachment C, which you deal with in
44 your statement, if you want to look at it on the screen,
45 CH94.012.0073.

46 A. Yes, I have the hard copy here, thank you.

47

1 Q. I just wanted to refer you to the last column dealing
2 with Canberra. You have, as I said, made some reference
3 to it in your statement. I think it is paragraph 11. The
4 only point I want you to agree to is this: did the
5 Department of Finance, whenever it wanted to have
6 information concerning rentals, or matters of that sort,
7 perhaps details of specific arrangements, rely entirely on
8 its own research in that regard, or did it rely on the AVO
9 or some other agencies by way of combining the knowledge -
10 in other words, what was the process? If you wanted to go
11 through a process of compiling what the rentals had been,
12 let's say, in Civic over a period of 10 or so years, would
13 you have had records internally in the Department of
14 Finance which would have permitted you to form a view
15 about that or would you have had some exchange with the
16 AVO?

17 A. Certainly at this time, in about 1989, we wouldn't
18 have had any substantial records like a database of leases
19 going back, I don't believe. We would have had - and as
20 the table refers to Australian Valuation Office being the
21 source of that information. I don't believe we had - we
22 would have had newsletters and things like that that we
23 got from various property real estate firms and so on that
24 the section subscribed to, but I don't believe we would
25 have - and we might have had ad hoc sorts of examples of
26 leases that came in. Because essentially, for the period
27 prior to that, the Department of Administrative Services
28 was responsible for rentals and so on, we would have - if
29 we needed information like that, and particularly in
30 preparing a table like this, we obviously went to other
31 sources, such as the AVO and other DAS bodies.

32
33 Q. May I put it this way, or ask this question: your
34 experience, at least in the years 1987 through, let's say,
35 to 1991, was that, from time to time, if you sought
36 information from the AVO, they gave you a good deal of
37 assistance insofar as you wanted historical rentals,
38 either in Canberra or elsewhere; is that fair?

39 A. Yes, I don't think it was information that we were
40 often - I mean, it was - we particularly needed it for
41 this purpose, because an arrangement was being developed
42 about what's the correct way to index leases into the
43 future. My recollection is that we could have, and we had
44 contacts in the AVO, but I don't think we were generally
45 seeking historical information very often. This would
46 have been the main context where we were --
47

1 Q. But when you did seek it was your first port of call,
2 generally speaking, the AVO?
3 A. I don't remember. I mean, I think the only instance
4 that I would know of that we did that would be in the
5 context of this, and clearly AVO - I don't remember how we
6 put this table together, but clearly AVO is referenced as
7 the source.
8
9 Q. Let me take you then, finally, to a couple of
10 questions about the document behind tab 4, which is
11 the 25 June 1991, if I can use that description for the
12 moment.
13 A. Is that the file note by Mr Turner?
14
15 Q. Yes, it is.
16 A. Yes, I have that, thank you.
17
18 Q. Your name is mentioned in the file note, at least on
19 two occasions, the first on page 3, just above the heading
20 "ANAO memo of 27 June", which indicates that you undertook
21 to provide certain details. Do you see that?
22 A. Yes.
23
24 Q. Again, at least, on the top of the next page, on
25 2 July, you did provide some details in relation to
26 Brisbane and other places, or at least other rentals?
27 A. Brisbane Avenue, yes.
28
29 Q. I am sorry. I am quite wrong. Brisbane Avenue in
30 Canberra; is that fair?
31 A. As I said in my statement, I don't recall doing that,
32 but I have got no reason to doubt.
33
34 Q. No reason to doubt that you would, because that would
35 be the kind of activity, would it, that would be more in
36 your domain than in either Mr Wojcik or Mr Turner, or
37 Ms Kalis?
38 A. Yes, certainly at the time we were privy to more
39 information than those individual supply areas were about
40 other --
41
42 Q. And of the four persons who were at the meeting from
43 the Department of Finance, although you don't recall the
44 meeting and don't recall the detail of it, it is likely
45 you that were there because you were the person who was
46 more likely to be able to access information that might be
47 germane to the debate or the discussion you were having?

1 A. Well, I think the reason somebody from property
2 section used to attend those meetings, because it was
3 fairly early in the process of devolving funding,
4 therefore we were just generally, you know, familiar with
5 the issues about devolving funding and property issues
6 more generally than the supply division officers.
7

8 Q. You will see that comments were provided on the
9 current markets and the tactics of real estate agents.
10 You will see the various matters that are set out there.
11 Again, whilst it may not have been you who made the
12 comments at the meeting about those items, is it more
13 likely than not that you would have been the source of
14 those terms and conditions in relation to real estate
15 dealings?

16 A. I don't think it would have necessarily been me. I
17 think it would have resulted from - but it was likely that
18 some of that information was gained from discussion with
19 officers of the property section.
20

21 Q. Who was your superior in the property section, if I
22 may ask you that?

23 A. Brian Cooney.
24

25 Q. Mr Cooney. The second item on the list, "Fixed rates
26 of increases may be dangerous", do you see that?

27 A. Yes.
28

29 Q. That would indicate that either you or Mr Cooney or
30 someone from the property section had, at least, from a
31 commercial point of view, become exposed to a context in
32 which there were fixed rates of increases?

33 A. Certainly somebody in the Department of Finance had
34 obviously been familiar with it.
35

36 Q. Yes, but somebody must have chosen, whether it was
37 you or Mr Wojcik or both of you in consultation one with
38 the other, that these were put forward as examples, would
39 you agree - it seems from the note, if it is an accurate
40 record - of current market trends? Do you see that on the
41 page?

42 A. Yes, I mean, it starts "Current markets".
43

44 Q. Yes. So whether it was you or Mr Wojcik or whether
45 it was Mr Cooney, via you or somebody, somebody, you will
46 agree, most likely from the property section, perhaps in
47 consultation with Mr Wojcik, decided to give these as

1 examples of current market conditions or proposals that
2 might be put forward in the current market environment;
3 would you agree?

4 A. Well, as I say, I couldn't agree as to who was the
5 source of it, because Mr Wojcik was also dealing with the
6 modernisation program, for instance, so he might have
7 devolved that information. But certainly somebody from
8 the Department of Finance would appear to have put that
9 proposition forward, yes.

10
11 Q. And does that help you recall that, for example,
12 fixed rates of increases were not an uncommon phenomenon
13 back in 1991, at least not so uncommon that it required,
14 in your mind or Mr Wojcik's mind, or was worthy of being
15 singled out?

16 A. Well, I can see the point you are making, but, as I
17 say, not recalling the conversation at all, I don't think
18 I can make that conclusion, particularly whether they were
19 common or not, but clearly the implication from that note
20 is that they existed.

21
22 Q. Existed and were important enough to be raised, along
23 with others, as conditions or terms which might be sought
24 to be imposed on agencies?

25 A. Well, clearly something that Finance thought was a
26 risk that agencies should consider.

27
28 Q. The purpose of this conversation, or the meeting, in
29 large measure, would you agree - and by all means take a
30 minute or two to look through the note before you answer
31 the question I'm posing - the main thrust of the meeting,
32 or one of the principal thrusts of the meeting, was to try
33 and persuade Audit, or at least make them fully aware,
34 that a move to Barton, in the opinion of the Department of
35 Finance, was likely to be a much more expensive
36 alternative than remaining at Medibank House or something
37 else. If you would like to just take a minute to look
38 through it, by all means please do that. May I draw to
39 your attention particularly the part of the paragraph
40 which appears on page 3 commencing "The assumed rentals",
41 et cetera?

42 A. Sorry, yes, now that I have read that, could I just
43 ask you to repeat the question?

44
45 Q. Yes, of course. Would you agree that the note would
46 appear to record that one of the principal thrusts of the
47 meeting was to try to persuade Audit that a move to Barton

1 was highly likely, or likely, to be a much more expensive
2 alternative than remaining at Medibank House or otherwise,
3 and that the information in particular which they had
4 either assumed themselves or had gleaned from APG was
5 probably properly to be seen as a bit on the low side, in
6 terms of Barton rentals - expected Barton rentals?

7 A. Well, that statement is made directly, so, as I say -
8 and it would seem certainly the tenor of the note is
9 trying to - would appear, if it is an accurate
10 representation of the meeting, that those concerns were -
11 that was the flavour of the discussion; that potentially
12 it was a more expensive location and Finance was wanting
13 them to think carefully about that.

14
15 Q. Let me ask you one last question, then, please. In
16 relation to the paragraph on page 3 commencing "The
17 assumed rentals", et cetera - do you see that paragraph?

18 A. Yes.

19
20 Q. Do you see in the fourth-last line:

21
22 *If the rent reviews were to be based on*
23 *existing market rates then the rental could*
24 *skyrocket.*

25
26 Do you see that?

27 A. Yes.

28
29 Q. Now, I know it is a term that you have been asked to
30 attend to and try to recall who, if anyone, might have
31 used it. If anyone at that meeting, on your side of the
32 table, was going to express a view as to the likely future
33 rentals in Barton, who was the most likely person on your
34 side of the table to have expressed that view, if it is an
35 accurate record of the meeting?

36 A. I don't think I could comment, because Mr Wojcik was
37 the more senior officer, but others - I really wouldn't be
38 sure; potentially it could have been anybody.

39
40 Q. If that is an accurate representation of the
41 expression of opinion which was put at the meeting, are
42 you able to say back in 1991 what would be the most likely
43 source of that opinion to enable one or other of you to
44 have expressed it? Where do you believe an information of
45 that sort was likely to have come from? I don't mean what
46 piece of paper, but would it have come from, for example,
47 internally within the Department of Finance? Would it

1 have been expectations of the market from the AVO or - not
2 the APG, perhaps, but the AVO, or historical? What was
3 the most likely source of that expression?

4 A. I would have thought it was a combination of all
5 those things: We would have had some feel for the
6 historical movement in that area, we would have been
7 talking to Australian Estate Management about their views
8 on the issues and so on. I'm not really sure.

9

10 THE COMMISSIONER: I don't want to hurry you.

11

12 MR SACKAR: One question.

13

14 THE COMMISSIONER: Is that all that you have left?

15

16 MR SACKAR: Yes, if that is convenient.

17

18 THE COMMISSIONER: Yes, certainly.

19

20 MR SACKAR: Q. Whoever expressed the view, each of you
21 at that meeting would have been intending honestly to
22 express views for the purposes of giving ANAO, or Audit,
23 the best information you believed you had available,
24 having conducted your own researches?

25 A. Well, as I say, I don't recall the discussion, but it
26 seems - I believe, in terms of how all of us would have
27 carried out or meetings, that that would have been the
28 approach that we would have taken.

29

30 MR ROBERTSON: I have just two questions.

31

32 **<RE-EXAMINATION BY MR ROBERTSON:**

33

34 MR ROBERTSON: Q. Mr Joyce, as far as you are aware,
35 did Finance have any role in relation to the ATO financing
36 of pre-commitment leases under this modernisation strategy
37 that you have referred to in relation to identifying them
38 as new policy or works technical new policy proposals?

39 A. I can't recall. I mean, clearly Finance would have
40 had a role because there was a funding implication. They
41 would have had to go to Cabinet to get money for that
42 program. So the supply division officers would have been
43 involved, but I can't recall whether there was an issue
44 about whether it was a new policy or works technical new
45 policy.

46

47 Q. Do you have any recollection of the circumstances in

1 which the ATO did obtain funding for that program?
2 A. I mean, I think it was likely that it was done as a
3 package, and given that the whole package was substantial,
4 it probably was new policy, but not necessarily, wouldn't
5 have been just new policy for property, it would have been
6 new policy for the whole strategy, I think, but that's
7 only my best recollection.

8
9 Q. Mr Sackar took you to document CH94.012.0130, which
10 is the attachment to the estimates memorandum that you
11 were shown.

12
13 THE COMMISSIONER: Was that attachment C?

14
15 MR ROBERTSON: Attachment A, I think. Yes.

16
17 Q. Could I ask for page 0131 to be brought up. I just
18 want to draw your attention, Mr Joyce, to a number of
19 statements on that document. Under the heading "The
20 concept of precommitment leases for office space", in the
21 second-last paragraph:

22
23 *Not only do the private sector need to*
24 *recover in rents higher relative costs, eg*
25 *costs of money, fees and charges, than AEM,*
26 *but incentives are available to occupy*
27 *existing properties.*

28
29 And another proposition:

30
31 *However, as the Commonwealth is the only*
32 *long-term potential owner the developer's*
33 *investment cannot easily be recouped*
34 *through capital gain, obtained by selling*
35 *to another landlord. The developer can*
36 *only recoup the investment from the rent*
37 *stream. This adds to rentals paid by the*
38 *tenant. The tenant has to meet this cost*
39 *penalty of the private sector precommitment*
40 *approach, as well as the cost of financing*
41 *the development fees etc that do not apply*
42 *when AEM builds offices funded directly by*
43 *the budget.*

44
45 I just wanted to ask you, Mr Joyce, would you disagree in
46 any way with any of those propositions that I have just
47 read out to you?

1 A. In relation to the first one, that's the one that
2 started:

3
4 *Not only do the private sector need to*
5 *recover in rents higher*
6

7 Q. Yes.

8 A. I think the point was clearly AEM didn't have to
9 recover those costs. The question was on what basis were
10 their returns assessed in comparison with the market. I
11 think this letter was written at a stage when it was
12 fairly early in the new regime for AEM, and those concepts
13 were obviously developed throughout that time, because, as
14 I say, they didn't have to recover those costs but they
15 were meant to be competing on an equal footing and being
16 assessed accordingly in terms of their performance. I
17 think the second one, again, reflects the market at the
18 time, that we still had this tied circumstance, where the
19 letter's coming from an approach that effectively the
20 Commonwealth is still one body in terms of its power and
21 the way it operates in the ACT market, because it
22 dominated that market. Again, that was a situation that,
23 you know, the government made decisions at the time about
24 tying to AEM, and so on. It may be that that is presented
25 - you know, was presented differently in a few years time
26 when some of those untying decisions had been changed, but
27 I think it was an accurate representation of the position
28 at the time.

29
30 Q. This is an attachment to a document, I think, dated
31 October 1991?

32 A. Yes, that's right. So I think at that stage, you
33 know, the estimates memorandums that had gone out about
34 being tied to AEM, and so on, were all still in force, and
35 the like, so it was - and those words are clearly in the
36 that context of the ACT market being unique in that sense,
37 in terms of the Commonwealth's power in it relative to the
38 other property markets around Australia.

39
40 Q. So what you are saying is that at that time you would
41 not have disagreed with those passages in any respect, but
42 that you suggest that circumstances slightly changed over
43 the ensuing years?

44 A. Yes, that's right. As decisions about the AEM's role
45 changed, the argument would have changed as well.

46
47 MR ROBERTSON: Thank you. I have no further questions

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for Mr Joyce.

THE COMMISSIONER: Thank you, very much, Mr Joyce, for coming back to Australia to give evidence. You are certainly free to go. In the unlikely event that we do need you, we will have to simply fly you back, I suppose, but you are free to return to your duties in New Zealand. Thank you for coming.

THE WITNESS: Thank you.

<THE WITNESS WITHDREW

MR ROBERTSON: Before you adjourn, Commissioner, I have just got Mr Turner's statement, the original was only received this morning and I seek to tender that. No-one seeks to ask Mr Turner any questions. This is a supplementary statement of Mr Turner.

THE COMMISSIONER: Have you seen this?

MR SACKAR: Yes, we have, and we have no questions, thank you.

EXHIBIT #97 SUPPLEMENTARY STATEMENT OF JOHN WAYNE TURNER, DATED 1/10/2004, BARCODED WITS.034.0001 AND DOCUMENTS REFERRED TO IN STATEMENT

THE COMMISSIONER: That now concludes everybody who was at the meeting?

MR ROBERTSON: Ms Kalis has not been called but she was a very junior officer at that time.

THE COMMISSIONER: Very well. We will adjourn.

AT 11.40AM THE COMMISSION WAS ADJOURNED ACCORDINGLY