



Transcript of Proceedings

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IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT 1950

BUNDABERG HOSPITAL COMMISSION OF INQUIRY

COMMISSIONS OF INQUIRY (No. 1) 2005

BUNDABERG

..DATE 12/07/2005

..DAY 23

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THE COMMISSION RESUMED AT 9.30 A.M.

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COMMISSIONER: Mr Diehm, Mr Ashton, nice to have you back with us again.

MR DIEHM: It's nice to be back, Commissioner.

MR ASHTON: Thank you, Commissioner.

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COMMISSIONER: Both of you gentlemen might like to give some thought to one matter: as you know, it had been our intention that Dr Keating and Mr Leck would give their evidence when the hearing resumes in Brisbane the week after next. If either of you wishes to contend that that ought not to happen while proceedings are pending in the Supreme Court, obviously I will entertain what you have to say on that subject but not now, but it's something that you might like to think about.

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MR DIEHM: Thank you Commissioner.

MR ASHTON: Thank you, Commissioner.

COMMISSIONER: Mr Atkinson?

MR ATKINSON: Good morning Commissioners. Perhaps I should start the day with what we hope will unfold in the way of witnesses: it's envisaged in the course of the morning five patients will be called. The names of the patients are these: Trevor Halter; Ian Vowles; Nancy Swanson; Geoff Smith and Vicki Lester. It's hoped after those witnesses and still before lunch to call Mr Terry Fleming and at 2 o'clock it's envisaged that Ms Mulligan will give evidence, so in a perfect world that would be seven witnesses are heard today.

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COMMISSIONER: Yes.

MR ATKINSON: Could I commence then by calling Trevor John Halter?

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COMMISSIONER: Just - I'm sorry, Ms McMillan?

MS McMILLAN: Yes, Mr Commissioner. In relation to the witness that Mr Atkinson's just about to call, I seek your leave to appear on behalf of the Health Rights Commission purely for that witness as a cost saving exercise. Mr Perrett has given me instructions to appear for that witness and to ask some questions. I've discussed this with Mr Atkinson and Mr Perrett has had numerous e-mail correspondence with Mr Atkinson about that and as I've pointed out, that it is clearly a cost saving exercise and that's entirely consistent with the Medical Board's instructions to do that.

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COMMISSIONER: That's entirely appropriate then to do that. But may I also mention to everyone and all of the counsel and solicitors that I'm anxious that patients be put to no more inconvenience than is necessary. If any of you are not

expecting a need to cross-examine witnesses, it may assist to inform Mr Atkinson of that and then it may not be necessary for the witness to go through the whole of their statement orally. So I'll leave that to your judgment and discretion.

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TREVOR JOHN HALTER, SWORN AND EXAMINED:

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COMMISSIONER: Mr Halter, please make yourself comfortable. Can I ask whether you, have you any objection to your evidence being photographed or filmed?-- No, not really, no, Commissioner.

All right. It's entirely up to you, if you have a problem, please say so?-- Okay, no worries.

Thanks.

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MR ATKINSON: Commissioners, and can I say these things by way of overview: Mr Halter's code name is P20. Second of all, Commissioners, you will find in the medical review team's report at page 121 an analysis by Dr Woodruff of what Mr Halter went through in medical terms. It, in short compass, you will find that analysis is that he had a laparoscopic cholecystectomy, it was intended that that happen by way of day surgery and it was intended that it be a routine lap choly. Instead, there were a number of complications, he had a subhepatic haematoma, he developed an infection, I've counted through the medical records, four different bugs, if you like. He became dependent on the ventilator so that he couldn't be weaned. He was transferred to the RBH and they've noted that amongst other things he was suffering from ARDS, which I understand stands for acute respiratory disorder. Mr Halter, have you provided - or can you tell the Commission your full name?-- Yes, Trevor John Halter.

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Could I show you this document? Mr Halter, is that your signature at the bottom of the document?-- Yeah, that's correct.

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And is that a statement that you have provided to the Commission?-- Yeah, you've got the wrong date though.

We'll get to that in a second, but that is a statement that you have provided to the Commission?-- That's the one, yes.

Now, in terms of dates, there's a typographical error in that paragraph 1 you weren't born in 1957, you were born in 1947?-- That's right.

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Now, apart from that, the contents of the document are true and correct to best of your knowledge?-- That's correct.

Mr Halter, if you don't mind, what I'd like to do is walk you through the statement. You say in paragraph 2 that back in

2004, you had been experiencing pain in your guts for some time?-- That's right, yes.

1

You went to see your general practitioner and he referred you to the Bundaberg Base Hospital; is that right?-- Yep, that's right, yep.

And when you went to the Bundaberg Base Hospital in 2004 in November, you met with Dr Patel?-- Yes, I met him in the Outpatients Department.

10

Can you tell us your impression of the doctor and how the meeting proceeded?-- Well, I went in there and told him - he had a letter from my doctor, Ken Hornsby, to say that I was going to go in there and have an op and that and he suggested to me, he said that, "You're probably better having your gall bladder out because" he said "you don't really need it and so you may as well have it out.", and being a doctor, I thought well, he should know best, so I let it go at that.

20

You say in your statement, Mr Halter, is that your recollection is that Dr Patel said he was doing four or five of these operations each week?-- That's what he said, yeah, he said, "Yeah, I do four to five a week and there's nothing to it, it's only keyhole surgery."

And did he tell you how long you would be in hospital for?-- Maybe a night at the most.

Now, in paragraph 4 you say that you came in on 17 November or about then for a preadmission clinic?-- That's right, yes.

30

And then you came in for the operation on 19 November?-- Yeah, that's right.

And you say in the next sentence that at that time you were as fit as a mallee bull?-- Well, I don't know about that but there was nothing wrong with me, put it that way, I was rolling kegs around at the club I worked at, so, you know, I wasn't too bad.

40

That was part of your job?-- That's right, yeah.

Now, you were wheeled in for anaesthetic?-- Yes.

Can I just ask you this in terms of chronology: is this right, that your recollection is that you were admitted to the hospital on the Thursday?-- On the Thursday - Friday morning for the op, yeah, I went straight in and early in the morning I think they done me about 10 or 11 o'clock, something like, that I'm not sure about that time but around that time.

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Right. In paragraph 5 just over the page, you say that when you woke up you were as sick as a dog?-- Exactly, yeah.

Can you - I know they're the words you used when you spoke to me?-- Yeah.

But can you paint the picture a bit more fully?-- Well, I woke up and I felt like I wanted to vomit and everything, you know, throw up and I just felt oh, rotten, put it that way, I thought I was going to die to tell you the truth, I was that sick.

1

Your recollection is that on the Saturday morning, is this right?-- Yes.

You have a recollection of listening to the races on the radio?-- That's right, yeah, yeah.

10

And that's the last thing you remember at Bundaberg Base?-- That was it, yeah.

In fact, you were there from the 19th of November to the 4th of December?-- Yeah, I didn't know, yeah.

Do you have much recollection of what you were experiencing or feeling over that period?-- Not really because I was in intensive care and I was there most of the time until they flew me to Brisbane on the helicopter, which I didn't even know about, so.

20

You do have a recollection, I understand, of some hallucinations or dreams while you were at the Bundaberg Base?-- Exactly, yeah, I dreamt I shot a policeman and right up to Christmas Eve I believed I'd done it, and everyone that walked in there I thought they're coming to get me, so I was going with me head in other words.

30

You stated that you thought detectives were coming in to interview you?-- Yeah.

And your recollection was that you shot the policeman in Melbourne?-- In Melbourne, yeah.

And when they came to transfer you, you were concerned that you were going to be transferred to Melbourne?-- Going back to Melbourne to face a Court, yeah.

40

And as you say, you didn't find out until Christmas Eve that in fact you hadn't shot anyone?-- Exactly, yeah, Mmm.

Now, you mentioned that you were transferred by helicopter. You set out in paragraph 5 what you think happened to you but that's all hearsay; you don't know that?-- Well, apparently the staff at the Bundaberg Base told my kids that's what happened, the lungs collapsed, the liver burst, I got pneumonia, then I got - it's not in there but they reckon I got septicaemia as well, then my heart went and I nearly went to too, so.

50

Now, in paragraph 6 you say that on the 4th of December or thereabouts you were transferred to Brisbane?-- That's right, yeah.

Can I take you to one of the annexures to your statement?

It's TJH1?-- Sorry, what was that?

1

If you flip through your statement?-- Yeah.

Towards the back you will find some documents from the RBH. Do you see a document's headed "Royal Brisbane Hospital" at the top?-- Oh yeah.

Now, you'll see one document, the one that's on the screen now with - have you got that one?-- Yeah, I've got it, yeah.

10

You'll see that document, it talks in the third paragraph about a routine laparoscopic cholecystectomy; did you know what - that's what you were having?-- I knew I was having a gall bladder op but I didn't know about all this other stuff, no, I didn't have a clue, no.

And you'll then see further down, "CT evidence of collection in GB bed and BC positive", and it talks about four different bugs you had, "Klebsiella, E.colli, proteus and streptococci." You mentioned that you had some bugs; are they the ones?-- Apparently I had four or five, yeah, I got them from the hospital, yeah, I don't know their names.

20

And then it mentions later that you were having difficulty being weaned from the ventilator?-- That's right.

Could you tell the Commissioners about that?-- Well, I remember some of it, they took me off the ventilator and they put me on the breathing thing for a bit and I couldn't breathe properly, I thought well, this is it, I'm definitely gone now because I couldn't breathe. Then they put it back on again and they put something through me nose, and that hurt like hell, I'll tell you that, whatever it was, and as far as I can remember, they put me back in the ICU, but I'm wondering if I'd get my sister-in-law to help me out because she probably knows more about it than I do.

30

Well, I might just ask you to explain, I know your sister-in-law's in Court?-- Yeah.

40

But just tell us what you felt, what you saw, so you remember the ventilator and how difficult it was to be weaned?-- Yeah, it was very - and I remember sometimes they'd stick a plastic bag down your neck and make you cough up and they had me strapped to a - some chair, like a straight jacket like this and they held all these tubes in me neck and that was probably the worst of it, I thought.

You've had other injuries before?-- Yes, yeah.

50

I think you've had to have your foot reconnected to your leg?-- Well, it was cuff off and they sowed it back on, yeah - well, it wasn't actually cut it off, it was hanging by a matchstick, it was done - that was about 12 years ago.

How did the pain after the routine day surgery compare?-- After this, you mean on me leg?

1

I wonder if you can compare the pain in your leg and the pain-----?-- I'd sooner me leg any day.

Now, you stayed in the RBH from the 4th of December until Christmas Eve?-- Yeah, that's correct, yes.

And then you were transferred back to Bundaberg?-- Yeah, they flew me back in the ambulance, in the same - because I had some disease or some infection or something and they had me all wrapped up in this white stuff and - well, white coat thing, you know, and you know, it was not as bad as the chair, but it wasn't very good, it wasn't very comfortable, I can assure you of that.

10

Tell us a bit more about the chair?-- Well, I don't know how I got through there but I was strapped up in this chair, like, a straight jacket and they had these tubes down me neck and I was as sick as a dog to tell you the truth, and-----

20

This was - the chair was in the RBH?-- Yeah, in the ICU I think it must have been, because I was in there mostly when I was there, and she - some young or when I say young, about 40 year old nurse come along, a sister and pulled this thing out and made me feel a lot better, I don't know what it was, but I know she pulled something out and I felt better.

And that was in the ICU at the RBH?-- Yeah, that's right, yeah.

30

Then on Christmas Eve you were transferred back here?-- Yeah.

Did you go back to the Bundaberg Base after-----?-- Yeah, well, when I come back here, I was here for about a week and a half, I think, I'm not quite sure, but something like that, about a week and a half, and then I was pretty weak, I lost about 10 kilos in weight and I couldn't walk properly and they wouldn't let me out to go home until I could learn to walk properly, so when I learned to walk properly, I was allowed out, discharged and I was away probably three or four days and I collapsed again, so I had to go back again.

40

Now, when you went back, were you admitted to hospital?-- Yes, yeah, for about another three or four days, something like that, yeah.

So in all, Mr Halter, whereas initially the operation was to take at most one night, in fact, you were in hospital for about seven weeks?-- Easy, yes.

50

When you went into hospital initially, it was because you had a pain in your guts?-- Yeah, that's right, they said I had gall stones and an ultrasound proved that I had two or three gall stones, yeah.

And has the pain gone away as a result of the surgery?-- No way, no.

And what are you doing about that pain now?-- I just take Somac tablets and they help a lot.

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Mr Halter, can I ask you to turn to the last three pages in your statement? And you'll see there there's a document called "Complaints Registration Form"?-- Oh yeah, I've got it.

You'll see on the second page that there's a note at the top of the page at paragraph 10?-- Yes.

10

It says that you called the hospital; is that right?-- That's right, yes.

And when you called them, one of the things on your mind was that you wanted compensation?-- Well, I hadn't worked for, well, at that stage I suppose for about seven months and I don't look like getting back till this November, I went off last November, so it's nearly 12 months, and I'm a race caller by trade and I had to give that away for a while because, you know, I'm a bit weak and I'm back to it now, but that's the only thing I do at the moment, yes.

20

And the money that you lost in income, you haven't recovered?-- No, definitely not, no.

In paragraph 13 it sets out what your complaint was; you've read that, that's accurate?-- That's correct.

All right. And then over the page you will see there's a letter from Dr Keating at the hospital dated 17 March 2005?-- Yes.

30

Now, you received that letter?-- I did, yes.

It makes reference in the second paragraph to this: "These concerns will be investigated and you will be advised further on the completion of that investigation." Have you received any further correspondence from the hospital?-- Well, I had to go to the Queensland Health, they had a - some, something going up at the hospital and you had to go up there and they asked you what went wrong and all this and that. Apart from that, I had to go to the Health Commission.

40

Well, let me stop you there. You went up to the hospital, you spoke to the lawyers for Queensland Health; is that right?-- No, they were investigating some of the cases or something, there was quite a few, it was a young girl, I can't think of her name.

50

Was she tall and blond?-- No, she was plump and black hair.

I'll stop guessing. Right. Did you ever hear further from Dr Keating?-- I don't think so, I can't remember, but I don't think so, no, that was the only letter I thought I'd got.

Now, you mentioned Health Rights Commission as well?-- Yes.

You spoke to them?-- Yes, spoke to them quite a few times on the phone and that and I met Mr John Cake at the School of Arts in Bundy and he took me complaint and that and wrote it all out and then sent me a letter with the complaint in it.

1

At this stage though, you don't know what's happening with the HRC inquiries?-- No, no, I've got no idea, they just said that they're looking into it and going to investigate it and whatnot, you know, and get their doctors to check, check it out whether I'm telling the truth or, you know, or Patel is to blame and all this and that and so, yeah.

10

You understand the matter's still under investigation?-- Yes, yeah, that's right, yeah.

That's all I wanted to get from you, Mr Halter. Is there anything you'd like to tell the Commissioners or the people here?-- Yeah, well I've got to go back another three or four weeks' time to get another operation on me, I got a hernia on top of what was here, there's about a nine inch scar there and my doctor, Dr De Lacey told me that Patel absolutely stuffed me inside and he's going to fix it and he said, "It will probably take you another three months to get over it, probably in four to seven days in the Mater and probably about three months to get over it.", so I ain't looking forward to going back, but he said, "If you don't go back", he said, "You'll probably be sick for the rest of the your life.", so I least I'm going to do that.

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COMMISSIONER: Mr Halter, is that treatment at your expense or is somebody else paying for that?-- Queensland Health's paying for that, yes, I had a stent in my liver and they took it out about three or four weeks back, Dr De Lacey done that one too but that was okay that one, they put this thing down your neck.

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Mr Atkinson, you did tell us, give us the page references to the Woodruff report, I'm wondering if I can ask you for those?

MR ATKINSON: Commissioners, yes, it's page 125.

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COMMISSIONER: 125?

MR ATKINSON: Sorry, 121.

COMMISSIONER: Right, yes, thank you.

MR ATKINSON: Commissioners, that's the evidence-in-chief.

COMMISSIONER: Ms McMillan, I know you have some questions. Does anyone else have any questions before her?

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MR DIEHM: Not me, Commissioner.

MR FITZPATRICK: No, thank you, Commissioner.

MR ASHTON: No, thank you.

COMMISSIONER: Ms McMillan?

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CROSS-EXAMINATION:

MS McMILLAN: Mr Halter, I'm just appearing for the Health Rights Commission, my name is McMillan. I just want to ask you a few questions. You've in fact answered some of the things I was going to ask you when you spoke to Mr Atkinson a moment ago. In fact, Mr Cake did meet you in Bundaberg, didn't he, and in fact he wrote out your complaint for you, didn't he?-- That's right, yes.

10

And in fact, he had typed up a letter of complaint for you, didn't he?-- He did, yeah.

And they sent that out to you, didn't they?-- That's right.

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Okay, and it's also been explained to you by Ms Bettridge; you've been talking to a Rachel Betteridge?-- Rachel and Georgie.

Georgie, who is a conciliator?-- Yeah, I wouldn't know.

Okay, and they've also indicated that they're happy to liaise with your solicitors?-- That's right.

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Who are looking at compensation for you; is that correct?-- That's correct.

All right. And it's been explained to you, hasn't it, as late as last month, early in June, that your complaint's being looked at and they've put it into the conciliation phase?-- Yeah, what does it - actual conciliation mean?

All right, well, they're looking at conciliating your complaint with the hospital, that's the provider, of the services; you understand that, that's in the conciliation phase?-- Yes, yes.

40

Right, and you also understand that the Commission has been gathering your files from the Bundaberg Hospital?-- That's right.

Also Royal Brisbane Hospital?-- Royal Brisbane and Bundaberg, yes.

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Yes, and your GP as well, your general practitioner?-- Apparently they're going to contact him, yes.

And they also explained to you that they may get some independent advice, that might be a doctor, to look over your files to look at the treatment that you've received?-- That's right, yes, independent surgeon, yes.

And they explained to you one that doesn't really have anything to do with Queensland Health?-- No, that's right, yes.

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Right, so you understand all of those things are in train?-- I do.

Okay, thank you, I've got nothing further, thank you Mr Commissioner.

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COMMISSIONER: Thank you. Any re-examination, Mr Atkinson?

MR ATKINSON: Only this: can I tender the statement?

COMMISSIONER: Yes, the statement of Mr Halter will be Exhibit 171, subject to the correction in paragraph 1 where "1957" should read "1947" and for the purpose of making this statement public, I notice that Mr Halter's address appears in some of the attachments and those should be covered up before the statement becomes public.

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ADMITTED AND MARKED "EXHIBIT 171"

MR ATKINSON: Thank you. May Mr Halter be excused?

COMMISSIONER: Yes, Mr Halter, thank you very much for your time, we appreciate that and you are excused from further attendance-----

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MS McMILLAN: Mr Commissioner, I have numerous pieces of correspondence, I didn't want to tender them to the Commission because they don't seem to be contentious in the slightest and I know you're not keen to have the record cluttered with more exhibits that are not required.

COMMISSIONER: Thank you.

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MS McMILLAN: I won't add to it on this occasion, thank you.

WITNESS EXCUSED

MR ATKINSON: Commissioners, may I call then the next witness? His name is Ian Rodney Vowles?

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IAN RODNEY VOWLES, SWORN AND EXAMINED:

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MR ATKINSON: Commissioners, can I say these things by way of overview. First of all, that Mr Vowles' code name is P26. Second of all, that-----

COMMISSIONER: Sorry, P26?

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MR ATKINSON: Yes, Commissioner.

COMMISSIONER: That's not right according to my copy of the key. That's the young man who lost his leg.

MR ATKINSON: Let me check that, Commissioner. I'll come back to you with his code name. He is not mentioned at all, Commissioners, in the Woodruff report and that's perhaps for a very simple reason, which is that Dr Woodruff reviewed 221 clinical records. The report sets out that the team found that there were at least 1,457 patients. So, of course, the report doesn't purport to be exhaustive and it's to be expected that many patients haven't been analysed.

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What Commission staff have done is this: Mr Vowles will give evidence that he was treated subsequently by a Dr O'Loughlin; a statement has been obtained from Dr O'Loughlin and that will be tendered in due course. What Dr O'Loughlin says is this, that this man had a polyp in his bowel. The proper conventional way to treat a polyp is to do a biopsy. When one does a biopsy - well, the biopsy that Dr Patel did didn't show that it was malignant but notwithstanding that, Dr Patel removed the entire bowel. He will say that what should have happened is that a specialist in removing polyps should have removed the entire polyp and then it should have been tested and the situation should have been monitored.

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Dr O'Loughlin will say that he finds this case very serious and distressing for a number of reasons: first of all, the operation didn't proceed as it should have; second of all, the bowel, of course, has been removed and that can't be reversed; and third of all, as a result that will have a very serious effect on Mr Vowles' quality of life.

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Witness, would you tell the Commissioners your full name?-- Ian Rodney Vowles.

COMMISSIONER: Mr Vowles, I should have asked you, do you have any objection to your evidence being filmed or photographed?-- Only one little section I have pointed out to - it's a little bit personal but the rest can go, yes.

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Mr Atkinson, you will alert us when we come to that.

MR HARPER: Commissioner, I might be able to assist in that. Do you have a copy of Mr Vowles' statement in front of you?

COMMISSIONER: Yes.

MR HARPER: At paragraph 15 subparagraph (e) is a matter relating to his current condition which he does not wish to be made public. If perhaps there could be a non-publication order over that, that would be of assistance.

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COMMISSIONER: Yes, I will direct that there be no reference in any press or media report to the matters mentioned in paragraph 15(e) of the statement of Mr Vowles. Subject to that, the name of Mr Vowles that was previously the subject of a suppression order is no longer subject to that order and, similarly, the name of Mr Halter, previously referred to as P20, is no longer subject to any suppression order.

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MR HARPER: Thank you, Commissioner.

MR ATKINSON: Witness, your full name is Ian Rodney Vowles?-- That is correct.

Will you have a look at this document, please. Is that your signature at the base of the document?-- That's mine, yes.

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This is a statement that you provided to the Commission?-- It is.

Are the contents of that statement true and correct to the best of your knowledge?-- As far - as far as I know, yes.

Commissioners, I tender that document.

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COMMISSIONER: Yes, the statement of Mr Vowles will be marked as Exhibit 172.

ADMITTED AND MARKED "EXHIBIT 172"

MR ATKINSON: Mr Vowles, if you don't mind, I'd like to do what I did with Mr Halter?-- Yes. Yeah, that's okay.

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That is, to walk you through your statement?-- Yeah.

You were born on 14 February 1947?-- I was.

You mention in paragraph 3 that in September 2003 you went for a routine check-up?-- Yes.

You met Dr Patel at about that time?-- Yes, that would have been about the time I met him, yes.

50

Can you tell the Commissioners something about that meeting?-- Well, I - I saw his - I don't know what you call him, his understudy or one of the many he had working with him, and he got my diagnosis and he said, "I'll have to see Dr Patel about this", and he brought Dr Patel in and he introduced me to him.

All right. Now, you mentioned that on 8 December 2003 Dr Patel operated on you?-- Yes.

1

And then in paragraph 6 you say that almost a year later in September 2004 Dr Patel performed a routine colonoscopy?-- Yes.

Would you tell the Commission about what happened then?-- Well, he'd done this colonoscopy on me and he said he found a benign cyst. He - well, he said he found a cyst in me bowel at the time and he sent biopsies away to get it tested and they came back benign and he said to me that he would have to take the rest of me bowel out and I said, "Why?" "Because it's" - I said to him, "Now, why are you taking my bowel out with a benign cyst?" and he said, "Well, the cyst is attached to the wall of your bowel and I cannot see what's in behind it." He said, "There may be cancer in behind it", and that's why he done the operation.

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So, your recollection is even then Dr Patel acknowledged that he didn't know whether there was a cancer there?-- He did not know, no.

20

And then you mentioned that he said to you, "Your bowel does not like your body. We will whip it out"?-- "We will whip it out", that's the exact word, yes.

So you went in for an operation, you say in paragraph 7, on 4 October 2004?-- That is correct, yes.

30

And he did remove your bowel?-- He did, yes.

And he put a bag on instead?-- Yes, I've got an ileostomy bag, yes.

Now, tell us about what happened after you had the bag. You mentioned what happened in paragraph 8 but perhaps you could just explain it to the Commission?-- Yeah, I - I had the bag on and I was having a lot of trouble stopping leaks. It used to leak all the time. I'd change the bag sometimes five or six times a day, and I visited the stoma sister at the hospital to try and sort it out, to find out what was going on, and she had a look at the stoma on my stomach and she said it was - her word, "It was a mess." And she could see that the stoma was dying, it went black and virtually dropped off me stomach.

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Is this right: you know now-----?-- Yes.

-----that the problem with the stoma was that when they did the ileostomy, the part that pokes out from the stomach-----?-- Mmm.

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-----instead of being beyond the stomach, it was recessed?-- It was recessed back into the stomach, yes.

That meant that all the stuff that was coming out was touching the skin?-- Touching the raw skin.

It was full of enzymes, so it was making the skin red raw?--
Yes, yes.

1

All right. Now, you mentioned that you visited Sister Logan
on 4 October 2004?-- Yes.

And tell us about that. She said to you, did she, that the
stoma was going black and dying?-- It - yeah, the stoma did
go black and she said, "It's dying", and she said, "I'll have
to get in contact with Dr Patel again and sort of see what we
can do." He had to do a reconstruction. In other words,
reconstruct the stoma again to try and get it sort of
protruding.

10

Right. So what happened? You went back in?-- I went back in
and had it and it - he - it - he told me at the time that he
couldn't do it properly because there was too much scar tissue
in there and I still had the recess stoma in my stomach, it
was not protruding from my stomach.

20

You know now - is this right - from Dr O'Loughlin, Mr Vowles,
that the problem was that he did the second operation too soon
after the first operation?-- That's what Dr O'Loughlin said to
me, yes. He said there was too much scar tissue in there at
the time and he said that he should have left it there for a
while and maybe he might have been able to fix it up.

In paragraphs 11 and 12 you speak about your meetings with
Dr O'Loughlin?-- Yes.

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Of course, we have a statement now from Dr O'Loughlin, so it
will tell its own story?-- Mmm-hmm.

But in short, you were told by Dr O'Loughlin that you will
need a new stoma bag?-- I'll need a new stoma reconstructed -
another stoma reconstructed, yes.

Did that happen?-- It has.

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Tell us about when that happened?-- He made an appointment
for me I think it's about six weeks ago today I was in the
Royal Brisbane Hospital.

You mention in paragraph 14 it was about 8 June 2005?-- That
would be about the date, yes.

So, in all, you have had three different operations for the
stoma bag?-- That's right, yes.

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In paragraph 15 you talk about some of the ways it's affected
you. Just talk to the ones you want to talk to, Mr Vowles,
but can you tell us how this long saga has affected your
lifestyle?-- Well, I-----

COMMISSIONER: Mr Vowles, this is covered in your statement,
isn't it?-- Yes.

I don't see any need to go through it again unless you wish to discuss it?-- I'm easy, it doesn't worry me. 1

MR ATKINSON: As you please, Commissioner. You set that out in paragraph 15 and 16. You also explain that you are now restricted in the foods that you can eat?-- Sorry?

You explain in your statement that you are now restricted in the foods that you can eat?-- Yes, yes. 10

In paragraph 17 you explain that you have recovered to some extent and you are gradually returning to some of your old energy levels?-- Yeah, I'm getting my strength back gradually, yes, yeah.

Mr Vowles, that's essentially the evidence I wanted to get from you?-- Mmm-hmm.

But is there anything you'd like to say to the Commissioners or to the people here in Court while you have the stand?-- Well, the only thing at the moment that, sort of, actually is keeping me going is I - I drink a lot of Gatorade sort of thing to put me - to put the - what do they call them? I can't think of the word. To put the - oh, it will come. 20

D COMMISSIONER VIDER: Electrolytes?-- Electrolytes, that's what it was, back in my body because everything is going through me. So I have got to drink the Gatorade to put the electrolytes back in my body. Without that I would be that weak and hopeless, I just wouldn't be able to do anything. 30

COMMISSIONER: From what we have been told from Mr Atkinson from Dr O'Loughlin's statement, it seems that, firstly, you should never have had your bowel removed at all?-- Mmm, that is correct, yes.

Secondly, that Dr Patel made a mess of putting in the-----?-- Stoma.

The bag?-- The stoma, yes, that's right, Commissioner. 40

The colostomy bag in effect?-- Yes.

So you really missed out two ways?-- I have, yes.

And obviously, as a result of that, spent a lot more time in hospital than you needed to?-- Yes.

And it's interrupted your life in all sorts of different ways?-- It has, yes. 50

As set out in your statement?-- Yes, yes.

I understand that Dr O'Loughlin has been paid for by Queensland Health; is that right?-- Yes, so far as I know, yes.

That's not coming out of your pocket anyway?-- No, no.

Thank you.

D COMMISSIONER VIDER: Just one thing I wanted to check with you. From this statement I understand that it was not Dr Patel that came back to you with the pathology report. Dr Patel didn't come back and say to you, "I've taken out your whole large bowel and I didn't need to"?-- No, no, he - he did not mention that whatsoever.

Your statement would indicate it was Dr O'Loughlin who has told you that your bowel has been removed unnecessarily?-- Unnecessarily, yes, that is correct. Yes.

Thank you.

D COMMISSIONER EDWARDS: Did Dr Patel tell you anything after the major operation what he had done?-- No, not so much after it. Before it I - I questioned him about it and he says - oh, he says, "Look, you'd be running round like a young horse." He said, "I've done a lot of these operations before", and he said, "People are" - he said, "People, after they get well again, they go skiing", and sort of full of sport, and he said, "You'll have no worries whatsoever." But after the operation, he never said that the operation was needless or anything at all.

Did he tell you that you had no cancer, as an example?-- No. I - I have had two bowel cancer operations beforehand and I have been notified that everything came back clear from then. But after this last one, he - he said just - well, they sent biopsies away with the - with the growth he took out and everything, they sent a lot of lymph glands or lymph nodes, or whatever you call, away and everything came back clear, everything-----

But Dr Patel didn't tell you that; other doctors told you that?-- Well, I can't be sure on that. I have seen - I did see Dr Patel a few times after the operation sort of thing and I think he might have mentioned that everything did come back clear, yes.

COMMISSIONER: But he certainly didn't make it clear to you that you'd unnecessarily had your bowel taken out?-- No.

He didn't admit to making any mistakes?-- No, no, no. No, there is no mention of that at all, Commissioner, no.

Just one other thing. In the earlier part of your statement you refer to the fact that the first time you went to Bundaberg Base with this problem you saw Dr Nankivell?-- Dr Nankivell, that is correct.

Yes. We have already heard some very favourable reports about that doctor. What was your experience with him?-- Very good. No, he was top. He was A1.

Excellent?-- I couldn't - couldn't fault him.

Look, thank you so much. Does anyone else have any questions? 1

MR FITZPATRICK: Just a couple, Commissioner Morris.

MR ATKINSON: Perhaps I should ask one last question.
Mr Vowles, did you make any complaints about the service you'd received?-- Any complaints?

Yes, did you raise it with the hospital?-- Only when I was re-admitted to sort of diagnose - everybody who was sort of operated on by Dr Patel had to go back and get re-assessed. 10

That was in about May of this year?-- That's when I made the complaint, yeah. I - after - after - after I sort of realised what happened, I did tell the sister up there then at the time who interviewed me that I wasn't sort of really happy with what went on.

But is it the case that you didn't really understand what went wrong until you spoke to Dr O'Loughlin?-- Dr O'Loughlin, that is correct, yeah. 20

That's the evidence-in-chief.

COMMISSIONER: Thank you. Mr Fitzpatrick has some questions. Does anyone else at the Bar table?

MR ASHTON: No, thank you.

MR ALLEN: No, thank you. 30

COMMISSIONER: Thank you. You have the floor.

MR FITZPATRICK: Thank you, Mr Commissioner.

CROSS-EXAMINATION: 40

MR FITZPATRICK: Mr Vowles, I'm Mr Fitzpatrick. I act for the health department. Just a couple of things that I wanted to ask you?-- Mmm-hmm

You say in paragraph 11 of your statement that you attended at the Patient Liaison Office. That was at the Bundaberg Hospital; is that so?-- That is correct, yes. 50

And as a result of that visit you subsequently saw Dr O'Loughlin?-- Yes.

I think that was here in Bundaberg when you first saw him?-- That was here in Bundaberg, yes.

You have subsequently seen him I think at the Mater Hospital in Brisbane?-- At, no, the Royal Brisbane.

At the Royal Brisbane?-- Royal Brisbane Hospital, yes.

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All right. You have told Commissioner Morris, in answer to one of his questions, that the costs of your consultations of Dr O'Loughlin were met by the health department?-- Well, I went through the general hospital sort of thing so I'd say they would have been, yes.

Certainly, you've not been asked to pay-----?-- No.

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-----any part of those?-- No.

And in so far as you visited with Dr O'Loughlin in Brisbane, the costs of your travel and so on have been paid for-----?-- It has all been taken care of, yes.

It is the case, isn't it, that you have also been offered counselling by Queensland Health?-- Yes.

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I think you were also offered the option of a second opinion in relation to your surgery from Dr De Lacey; is that so?-- I have never seen Dr De Lacey, no.

All right. You may not have seen him but do you remember being offered the option of obtaining an opinion from him?-- No, that I can't remember.

All right. Yes, that's all ether I have, Commissioners.

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COMMISSIONER: Thank you. Mr Atkinson.

MR ATKINSON: May the witness be excused, Commissioner?

COMMISSIONER: Thank you so much for coming in this morning and telling us your story. We really do appreciate how difficult it can be talking about these personal things in public and it is very important that people like you do have the opportunity to tell us what you've been through. We appreciate it very much?-- Thank you. Thank you.

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WITNESS EXCUSED

MR ATKINSON: Commissioners, I have arranged for the secretary to hand to each of you a copy of Dr O'Loughlin's sworn statement. That statement has been provided to the parties. Effectively, as I indicated at the outset, all it does is corroborate to some extent what Mr Vowles says. As you might expect, Dr O'Loughlin uses much more precise terms and corrects Mr Vowles' from time to time, but he does make the points that the Commissioner made: there didn't need to be a total bowel removal; the first operation was done poorly; and the second operation was done too soon.

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I was hoping that it wasn't necessary to call Dr O'Loughlin and that I could tender his statement without calling him. I should say there's some chance that he will be called at a later stage in any case to address the general patient auditing if you like because he has seen many of these patients. But so far as he relates to Mr Vowles, I would hope that this statement can go in without any cross-examination.

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COMMISSIONER: Does anyone at the Bar table have a different view?

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MR DIEHM: Commissioner, I've not actually seen the statement. I am unlikely to have a different view but I would like to see the statement.

MR BODDICE: Likewise, we haven't seen it but, again, we wouldn't have a different view.

COMMISSIONER: I think we might stand down for 10 minutes and get this resolved because I have only read it very briefly and, frankly, the only person whose interests it seems to affect is that of Dr Patel, who has chosen not to participate in these proceedings, so we needn't worry about him. I don't see it as being critical of Queensland Health for example, save in its capacity as the employer of Dr Patel. So, we will take 10 minutes.

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THE COMMISSION ADJOURNED AT 10.21 A.M.

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THE COMMISSION RESUMED AT 10.38 A.M.

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MR ATKINSON: Commissioners, I have spoken with my learned friends about Dr O'Loughlin's report. Mr Diehm and Mr Boddice are both agreeable for the statement to go into evidence without any cross-examination. Ms McMillan has explained to me that it may be at some later stage she would like to cross-examine Dr O'Loughlin, not about Mr Vowles, but about general patient issues. That is something the Commission will look at at a later time and it doesn't detract from the statement being tendered.

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COMMISSIONER: Exhibit 173 will be the statement of Dr Barry Stephen O'Loughlin.

ADMITTED AND MARKED "EXHIBIT 173"

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COMMISSIONER: That will be received into evidence subject to counsel for the Medical Board of Queensland indicating to counsel assisting whether they require Dr O'Loughlin to be made available for cross-examination at a later stage in the proceedings.

MR ATKINSON: Thank you. He's in Brisbane, of course, too, Commissioner.

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COMMISSIONER: Yes.

MR ATKINSON: So-----

MS McMILLAN: We would do that obviously in a timely fashion.

COMMISSIONER: Yes, thank you. That is Exhibit 173.

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MR ATKINSON: Commissioners, I now seek to call Geoffrey Smith.

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GEOFFREY LEONARD SMITH, SWORN AND EXAMINED:

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MR ATKINSON: Witness, would you tell the Commissioner-----

COMMISSIONER: Sorry, Mr Atkinson, Mr Smith make yourself comfortable there. Can I ask whether you have any objection to your evidence being filmed or photographed?-- No, Mr Commissioner, no.

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Thank you, Mr Smith.

MR ATKINSON: Witness, can you tell the Commissioners your full name?-- My name is Geoffrey Leonard Smith.

Mr Smith, would you have a look at this document? Is that your signature at the base of the document?-- That is my signature, yes.

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The document is a statement that you have provided to the Commission?-- That's true.

Are the contents of the statement true and correct to the best of your knowledge?-- To the best of my knowledge, yes, it is.

Commissioners, I tender that statement.

COMMISSIONER: Yes, the statement of Mr Smith will be Exhibit 174.

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ADMITTED AND MARKED "EXHIBIT 174"

MR ATKINSON: Mr Smith, if you don't mind I'd like to walk you through the statement as I have the other witnesses?-- Yeah, not a problem.

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In-----

COMMISSIONER: Sorry, you mentioned your middle name is Dennis, is it?-- Leonard.

Leonard, I beg your pardon.

MR ATKINSON: In paragraph 2, Mr Smith, you say that there's been a number of incidents in your life where anaesthetic has been used for procedures and the anaesthetic hasn't had any effect upon you?-- Yeah, that is correct, yes.

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And then in paragraph 4 you talk about going to see Dr Patel at the Bundaberg Base Hospital in relation to lumps on your shoulder and your nose?-- Yes, that's correct.

Can you tell us, Mr Smith, about that meeting with Dr Patel

the first time?-- Yes. I was referred to the Bundaberg Base Hospital by my GP and he had a look at the - the melanoma on my shoulder, the BCC, and he said the procedure that he would do in the surgery, he said, would - "may put you at risk.", he said. "I'd like you to go to the hospital.", he said, "and get them seen to and done at the hospital because", he said, "there'd be more facilities there available for you than I can provide in my surgery.", and that's when I went to - had a letter of referral from my GP to the hospital and I, on the 13th of January, had appointment to - to see a surgeon about the - about my shoulder and I - I went to the hospital, filled in the necessary documents. I think I put my Medicare card over it and got it all filled out and what have you and waited for the doctor to be called in. He introduced himself as Dr Patel. He asked me to have a look at what I was there for. I showed him. He said, "Mmm." He said, "Very simple, very easy." He said, "We'll fix it that up, no worries.", and I told him - I said, "Well, I'd like to tell you a bit about myself." I said, "I have a problem with local anaesthetic." I said, "I feel everything that you do - that is done, the procedures, you know, when I'm cut or where I'm stitched up or anything like that." I said, "I feel that all the time." I said, "Is there any other way", I said, "that this procedure could be done?", and he said, "No." He said, "There isn't any procedure any other way." He said, "This is the way it is done." I said, "Is there any other hospital that I can go to and maybe get a second opinion on this?" He said, "No, you'll have to be a big boy now. You're not a baby." He said, "I'll look after you." He said, "And we'll pencil you in for surgery and we'll get this thing removed.", and I said, "Well, I'm not happy with that because could I tell you", I said, "I feel everything that goes on with this local anaesthetic." I said, "Is there any other procedure that can be done? Can we maybe get radium or burn it off with a light or something like this? Have I got to go through this operation?" He said, "Yes." He said, "Trust me." He said, "We'll have you back.", and I said, "Well, will I need any time off work so I can let my employer know that I would need time off work?" He said, "No, you'll be back to work the next day."

In any event, you had the operation on Thursday, 13 January 2004?-- No, that's incorrect. That was the day that I went in to - my pre-op procedure and that's the day I signed the form here. That's a pre-admission form - sorry, pre-admission form that I signed and may I also say with this pre-admission form that I did sign I only signed the - I only seen the back of it, right, and I only signed the back. I never seen the front at all and it wasn't until I received these things here I found that this form is incomplete also because at the front of it there should be some ticked boxes up here. It says, "Yes or no". That hasn't been filled out and neither was I giving - given an information sheet on anaesthetic also. I wasn't given that also, so-----

You had the pre-operative procedure where you go in for the pre-admission clinic, if you like, on the 13th of January?-- That's right. That's correct. Yes, and it wasn't until some time-----

The operation happened a couple of days later?-- No, no, no. The operation happened on the 26th of February 2004.

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Right?-- There was a statement put out but there is some incorrect things in there and that's why I asked that to be fixed up, Mr Commissioner.

I noticed that. So you had the operation on the 26th of February?-- Yes, that's correct. I was called in to day surgery for that.

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Now, you talk about the operation on paragraph 8 of your statement, Mr Smith, and you mention that prior to the operation you witnessed Dr Patel explaining to his juniors exactly how the operation will proceed?-- Now, I didn't know whether they were juniors or who they are or what they are, right. I thought that they might be there just to have a look. I didn't even know if they were doctors, nursing staff or nothing. I was called in out of the waiting room and I went in to do the - for the operation and he said to me, "Hop up here on the table. Take your shirt off. Hop up here on the table.", and that I did, so I thought that was very, very, very strange because at that time when I went to the doctor on the 13th of the 1st there was no blood pressure taken, there was no temperature taken, there was nothing like that done. When I come to have this operation on the 26th of February there was still no temperature taken, no blood pressure taken, you know, the pre-op stuff that normally happens, you know. Generally you go to your GP or something in emergency and the first thing they do they'll check your blood pressure and all that sort of thing, so I found this very strange.

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It seemed a bit rushed to you, did it, Mr Smith?-- Well, it seemed - seemed out of the ordinary for me, you know.

Sure?-- Not rushed, seemed out of the ordinary. This doesn't seem-----

Can I take you to paragraph 9 of your statement?-- Right.

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And you explain that Dr Patel started cutting?-- No, he hit me with the needle first which I take to be the local anaesthetic and-----

He injected you with a local anaesthetic?-- Yeah, yeah, he did. He injected me with local anaesthetic and I give a bit of a twitch and I felt the thing go in. I felt a burning, what have you, and the next thing I felt this cut and I lifted again and then I said, "Here we go again. Hang in, Geoffrey."

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And it hurt?-- Of course it hurt.

Right. And when it started hurting you gave Dr Patel some feedback?-- Yeah, I did give him some feedback. I swore at him and-----

You can tell us the words you used. How clear were you? How

unequivocal were you?-- I said, "Fuck you. I can feel this." Sorry, but, mate, I was hurting.

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COMMISSIONER: I'm sure I would have said the same.

MR ATKINSON: And how did Dr Patel respond to that indication?-- Well, he pumped another one into me. I felt another one go into me. I could feel this cut still. I said, "Hey, I can feel this. Would you shut up what you're talking about. I can feel this." I said, "This local is not affecting me.", and he threw a towel or something over me head. He said, "This will help you anyhow.", and at that time there I was biting into me thumb, sweat was coming out from underneath me feet and, man, I was hanging in.

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And you go through some of the things that you heard and saw in paragraph 12 and 13?-- Yep.

All right. Then there comes a stage when Dr Patel says, "Get up."?-- Yeah. Well, you know, as I was going along he said - I said, "I can still feel what you're doing. I can still feel it.", and then after a while I said, give up, you know, he's not going to stop, this bloke, so I just hung in and - then I was lying there and to add insult to injury he just come straight around and he said, "Get up.", and I just looked at him. I said, "I wish I could get up.", and he sang out again to me, "Get up.", and I said, "I can't get up." I said, "I'm feeling a bit woozy." I said, "I'm not feeling the best", I said, "just like to lay here for a minute if I could.", and he said, "Look, get up.", and I said, "All right. You want me to get up, I'll get up.", and I got up and I fell down and at that time there - I think it was a nurse, I'm pretty sure, that come over to me, or a sister or something, she helped me get up and sit on a chair. He said, "Get rid of that stuff." That set him off. That was when I went down - and may I say at this time in my evidence that what has been stated in here that was cut out of my arm was the size of a match box. A match box is about 40 centimetres long and about 38 centimetres wide and about 15 centimetres thick.

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You mean millimetres?-- Millimetres, yes. It was the size of a match box that he chopped out of my arm. That's what I know of. That's what is wrote in my biopsy, but I sat down there. He said, "Look, put your head" - the nurse said, "Put your head between your legs.", and all this type of thing and that and he hand me a - he said, "Here's a script for you also.", and he said, "This is for some pain-killers."

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Can I take you to the next day and this is addressed in paragraph 18 of your statement?-- Could I just finish what I was saying also, too, that I went down to the - to the - to get these tablets and while I was doing that I could feel this burning sensation in my arm. I could feel something, like it was - it was something like dripping in there or something and I said, "Look, I've got to go back up here." I said, "There's something wrong with this thing. There's something.", so I went back and they got me to sit in the - the room where the rest of the patients were sitting ready to go in for this day

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surgery and at no time was I offered a bed to lie down to rest or anything like that. I thought it was very unprofessional what was happening to me and I was sitting in front of all these people and one woman happened to say to me, "What's" - "What's happened with you?", and I told her and she said, "I'm out of here.", so she took off.

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In paragraph 18 you talk about that burning sensation and you mention that on the following day you went to out-patients?-- Yes. There was no - I wasn't given any follow up to come back or anything like that. Remember, I was supposed to go back to work the next day, I was gonna be all right, and that evening at home I was trying to sleep. I was jumping in my sleep. I was restless. I never had much sleep at all. My arm was totally burning all the time and the next day I went back to the out-patients and seen them at out-patients and that's what I'm saying, you know, the difference. I went to out-patients. The out-patients couldn't do enough for me. They took me pressure - blood pressure, everything like that. There was a wonderful doctor there, Dr Barnes. He looked at it and he said, "Phew, there is something wrong here. I can smell it now. It doesn't smell the best.", and this is the day after and he said, "There. There's a few things there.", and that's when there was a couple of stitches removed and I didn't even know whether Dr Patel showed me arm for the procedure or not. I don't even know that.

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Let me ask you this - don't tell me what the doctor said to you, but is it the case that when you went to out-patients they had to reduce the tightness in the site?-- Yes, that's true, yes.

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Now, how have you been left? How is your arm now?-- Well, my arm now is not the best. You know, I've got movement in it, but there's burning feeling, burning pains I get there. I ride the bike, same thing about after 15 minutes or so, I get this burning sensation. If I do things at work and I forget about what I'm doing I hurt my arm again. It's sore. It's just like a corked feeling in my arm. I get that feeling in my arm now. I have flashbacks about the - about what - what went on and - I'm just slowly trying to get over things.

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Now, you made a complaint subsequently, you say, in paragraph 20 and your recollection is that the complaint was made to the Medical Board?-- Yeah. I - I made a complaint the very next day that I went back and seen the out-patients. I went straight up and I said I'm going to complain about this bloke because I don't feel he should be - should be a doctor. He shouldn't be doing what he's doing because he's - he's - doctor what's a name was rude. He - what he does in his operations aren't right and I'm sure that in my own mind that I - that I wasn't the first person he's done this to so I went up and made a complaint up at the head office and I made a complaint that I was making to the manager of the hospital and she said, "You want to fill this form out?", and I said, "No, I'm not very, very good at writing. Can you help me fill it out?" She said, "I'll help you do that." She helped me fill this complaint form in and she said, "You'll hear from us in

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five working days.", and I said, "Fine, that will be great. I would like to see somebody about this because, you know, I'm not very happy at all.", and I went back in five days - six days time, actually, because nothing arrived in the post within five days and I went back on the - on the sixth day and I seen the lady in the office and I said, "I'm here to see the manager. I put a complaint in about a procedure I had done on my arm.", and I said, "I've had no feedback from the hospital. I want to know what's going on.", and she said, "Just one minute.", and she come back and she said, "There's no-one here can see you today." I said, "That's fine. I'll sit here as long as it takes. I'll sit here all day if I got to. I want to see somebody about my problem I got.", and I was sitting there about 15 minutes, 20 minutes or so and then I seen Dr Patel breeze past and he went into the office part and he's probably in there 10, 15 minutes or so and then he come back again, put his head down as usual and off he went past. I sat there for a little bit longer and I went in. I got called into his office and may I say now that the person who I thought I was talking to was the manager, Mr Leck, but it wasn't until this Commission that the - I found out the person I was talking to was Mr Keating over here. He was the person I was talking to.

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Can you recollect whether or not, Mr Smith, when you entered the office the person inside introduced himself?-- No, the person inside never introduced himself at all. He said, "What are you here for?" I said, "I've got a complaint"-----

Sorry, you must have been ushered in, were you, by the-----?-- Yes, there was a lady out of the office took me into the office.

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All right, so-----?-- Sat down, and on the other side of the desk, and away the interview went, talking, and I talked to him about my situation, and what have you, and he said, "Well, what do you want from us? Tell me what do you want from us? Do you want money? What's the story? What do you want from us?" I said, "Well, there is a problem here with this Dr Patel." I said, you know, "I think that this bloke shouldn't be here doing what he is doing.", and went through the whole procedure again, what my statement says, and what I have said here before to Dr Keating about him, and I said, "Something needs to be done about this bloke." I said, "If you don't do something about him, you will end up with a lawsuit on your hands."

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You set out this conversation at paragraph 22 of your statement, and you say there that the conversation became somewhat heated and aggressive?-- Yes.

Are you reconstructing what words happened, or are you sure these things happened? I ask that because it is not in your statement?-- What's that?

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The extra bits you have said now, about how "if you don't do something about this there might be a law suit"?-- Well, when I gave my statement out, that's what I gave in my statement, and this is what's been put in here.

All right. You say in paragraph 23 that Dr Keating replied to you by saying, "You didn't have to have Patel."?-- Yes, this was - come as strange news to me because he said, "You didn't have to have Dr Patel." He said, "You could have had another surgeon.", and I said, "Well, where was this ever explained to me that I could have had another surgeon?" I said, "It is no use telling me now after I have had the operation that I could have another surgeon." I said, "Now, where is this said? Where is it in the hospital and where is it that anybody should know, not only myself but anybody having an operation in the Bundaberg Base Hospital, can have a pick whether they can have this doctor or that doctor?" I said - I thought once you come to a hospital, you know, you were given that doctor and that was it.

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How did the meeting conclude?-- Well, the meeting concluded that he said, "Well, will an apology be good?" I said, "I need something." I said, "Plus", I said, "I need you to talk to this doctor because this doctor is very rude. His mannerism is not the best." I said, "Even the procedures he goes through is not the best." I said, "You need to have a talk to him."

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Now, you did get a letter, Mr Smith?-- Yeah, I did get a letter, an apology, actually, from the hospital.

If you go to the first exhibit to your statement, that's a copy of the apology?-- Exhibit on my statement.

If you go to the very last page of your statement?-- Yes, yeah, that's correct. This is what I received, yes.

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And it is quite a fulsome apology, to be fair?-- It is. I said, "Thank goodness." I said, "Somebody is going to have to do something about this doctor. They are going to talk to him, they are going to do something about the procedures that goes on in day casualty, day surgery. They are going to do something about that." I said, "That's good, they are going to do this."

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And if you look at the last paragraph, Dr Keating says, "It is very evident that you were fearful of local anaesthetic", and attempted, on several occasions, to discuss this matter with Dr Patel?-- Absolutely.

And again, to be fair to Dr Keating, he says that your medical record will from now on carry an alert, and it does, from the 11th of March it now carries that alert?-- That, there, is something I would like to talk about.

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Well, let's get to the point I make before we get to the point you would like to talk about, if you don't mind?-- Okay.

On the next page of the exhibits, you will see there that's the front cover of your medical records?-- Yes.

It says there "alert"?-- That's correct.

And then it says "refer to inside cover"?-- That's correct.

30
And at least now, certainly, you will see on the next page toward the bottom there it says the alert is this: "Local anaesthetic ineffective. Use alternative pain relief"?-- Correct.

That should have happened earlier. Dr Patel should have done something about that earlier?-- Correct.

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At least now it is there? Yes?-- I have a problem with that. I believe that that wasn't put there at the time that I got this because I asked for a full what's-the-name on myself, my full file on myself from the hospital.

You made a-----?-- Application for the full file of my - like, what I have had done at the hospital, you know, and it went right back to when I started going to the Base Hospital.

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And you made that clear, of course, Mr Smith, in paragraph 26 of your statement. You requested your records and eventually you attended the Patient Liaison office and copied them?-- Yes. I - I was going to the Patient Support Group meeting, and that's when the Patient Support Group meeting, the people - we kicked off a meeting and they said we could get our files and things like that. And I said, "Great, I would like to check" - to myself and my wife, "I would like to check my file out and see if this is on my file and in my file.", and there is a - 21 days we had to wait before we got our files. But in the meantime, I was called up to see the Patient Liaison officer, whose name was - I can remember as Carol - and I went

up and seen this lady. In the meantime, my wife had been to the hospital and see if they could hurry up my file, so I could have that present when I seen the Patient Liaison. And the day that I went up to see the Patient Liaison, my file wasn't there, and we went through the same situation that I have just gone through here today with the Patient Liaison, and she said, "Maybe you should be able to see a counsellor who may be able to help you in a lot of these things", and she said, "And while I'm doing that I will slip down and grab your file." And I thought to myself, "Well, what the hell have I got to be waiting 21 days for when she could slip down and get it in X amount of time."

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When you get to the file, just to cut to the chase, if you don't mind, some things were missing in the file. In particular what was missing was, you say, the letter from Dr Keating?-- Yes.

And the alert material?-- Yes.

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And----?-- As I said, this is what I received on the cover of my file. This is what I wanted. I wanted everything in my file. I didn't want anything left off. As I said, I wanted my whole file because no-one could come back and say, "Well, you only wanted half your file and we forgot to put this in." I said, "I want my whole file." So there could be no confusion later on down the track whether this alert was in my file, whether this letter of apology was in my file, whether other stuff was in my file.

30

Right. And the documents you have got don't include the alerts and allergies registration?-- Definitely not.

Now, in paragraph 29 of your statement, that's the last paragraph, you say that having been through your records there are a couple of inaccuracies in the records?-- There is quite a few inaccuracies in my records.

COMMISSIONER: Just before we come to that, Mr Atkinson, I see that the next attachment is a letter from Corrs Chambers Westgarth Lawyers which states quite emphatically, "We attach a copy of the Bundaberg Health Service District patient file for Geoffrey Smith." Did that letter include the cover and the other things that you say were missing from the file?-- They weren't there. Definitely weren't there.

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So there is no confusion about this, the letter itself says that what you were supposed to get was the entire file?-- Yeah.

50

And these things just weren't bundled in the file that was provided?-- Commissioner, they were not there.

Right.

MR ATKINSON: To return to my question, Mr Smith, you were saying that there are some inaccuracies in your records?-- There is a lot of inaccuracies in my records.

Well, can you tell us what they are, in point form, if you like?-- In point form, on this here form it says that I was supposed to have a biopsy on my nose as well the same day I had my shoulder done, right. On this form here that I signed on the 13th of the 1st, it hasn't got anything on there about the nose. It has got only about my shoulder. Going back on the 26th of the 2nd, there is a person named Kath, and she said in that - I take it she because I have now looked through and find out who Kath is - that the patient had six - a total of six amps of local. Now, I am only a road builder, I am not a surgeon, but I think that after the second one, he should have pulled up, the doctor, and said, "Hey, this isn't going to work, but they have put six amps bottles of local into my shoulder to kill the pain.

Let's just stick with the issue I raised, which is parts of the records that aren't accurate?-- Okay. Then it goes in here further that is inaccurate, there is a form here on my file - it says from the North Burnett Health District. The North Burnett. Not the Bundaberg Health District, the North Burnett. And I looked at this and it said "did not tolerate LA, did not experience pain relief after six amps, complete exertion of BCC, healed well, dated 18/03/04, and on the top here in black writing it says, "Medical practitioners are requested to complete the following at discharge to facilitate accurate timing and DRG assignment." Now, I don't know what that is, but this - I have never gone to this hospital, I have never seen this person, but this is in my file.

Now, I understand that. You also mention in your statement that there is a comment that your wounds have "healed reasonably well". That's a letter from the hospital dated 10 March 2004 signed by Dr Boyd?-- That's correct. On here Dr Boyd has said "there is a little bit of stuff oozing out and the sutures around the site into the flap, and there is a small amount of discharge." That discharge went on for about another three weeks after that. I was dressing it myself then. And this kept - as I said, the discharge was coming out, but somehow this doctor over here eight days after says "complete healed well".

Well-----?-- So it was still - it is contradicting what's happening. As I said, there is - I don't know where this has come from, who this Dr Heidi Kath is. It appears on my - the form here - this is where I have got the name from, from the pathology and that's where I've picked up the name Dr Heidi Kath.

That's effectively all the inaccuracies in your records then, Mr Smith?-- That's what I could find, yeah. As I said, I am not a nurse, or a doctor, or anything like that, I am just a simple roadworker, and this is what I could find in my files myself.

COMMISSIONER: Mr Atkinson, just going through the version of the file that we've got with the statement, it seems that what would've been given is not only the Bundaberg file but a

number of other hospital files going back over quite a number of years, and they involve matters about Mr Smith's previous medical treatment and personal history in years past, which would seem to be quite irrelevant for the matters here. It may be in cross-examination someone will want to raise those issues, but I don't think we should be including those in the exhibit at this stage unless someone wants to argue that they are relevant.

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MR ATKINSON: I accept that, Commissioner. That's an oversight and certainly that can be corrected before that document's formally posted on the website. Perhaps if I can have the document back in due course, then, and make changes after the cross-examination is completed.

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COMMISSIONER: Yes. I think you know the sort of things I am referring to, Mr Smith?-- True, and this is what I want to know; why are they in this transcript now? It has nothing to do with Patel.

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Yes.

MR ATKINSON: In the interests of fairness, they are there so the parties know about them, but certainly they can be removed.

COMMISSIONER: All right. Well, we will certainly deal with that before it goes on the inquiry website or performs part of otherwise.

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MR ATKINSON: Thank you, Commissioner. Mr Smith, is there anything else you would like to say to the Commission while you have the stand?-- Yes, I would like to say something about the doctor's certificates for work. It wasn't until Dr Barnes - I went back the next day and Dr Barnes said, "You can't go back to work with this, we will have to give you time off." And I said, "That will be great if you could." And then I let my employers know that I couldn't come back to work and things like that. But I would like to say that what has happened at the Bundaberg Base Hospital should never ever have happened, in my thinking. We go there, we're people of a community and we go to our hospital hoping there was good surgeons there. We put trust in surgeons, we put trust in the hospital. Most of the people in the support group are people on pensions, low-paid workers. We're not high paid workers, we're just ordinary people, and we would like a system that we could go to and we won't - we don't want to know about this culture stuff, we don't want to know that one person doesn't want to talk to this person. We want a health system that damn works - not only in Bundaberg, but in Queensland. We want this culture to get out of the system. We want managers to be able to go on to the floor and say to people, "Are you experiencing anything difficult going on here?", and bring these things out and air these things. It is no use shooting people, sacking people and doing this and doing that. We want things fixed, and I certainly do. And Deputy Commissioners and Mr Commissioner, I hope you do a job that people of Queensland could be proud of. Thank you very much.

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COMMISSIONER: Thank you, Mr Smith.

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MR ATKINSON: That's the evidence-in-chief, Commissioner.

COMMISSIONER: Thank you, Mr Atkinson. Who is next?

MR DIEHM: Commissioner, there is something I wish to raise. On my instructions-----

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COMMISSIONER: Mr Smith - sorry, you will have to wait for a little longer. Yes, Mr Diehm?

WITNESS: I am sorry, you can have a go at me.

MR DIEHM: Not at all, Mr Smith. Commissioner, on my instructions, the documents that have been produced are not all of the documents relevant to this witness's evidence, in the sense that there should be a complaints file, as it were.

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COMMISSIONER: Yes.

MR DIEHM: And that would include forms such as the complaint application form that the witness has referred to in his evidence. Now-----

COMMISSIONER: That's his complaint. He goes to the hospital, says he wants his entire file and isn't given it all.

MR DIEHM: Commissioner, I understand that, and that's not for me to be defending or dealing with.

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COMMISSIONER: No, but it might be for your client to defend.

MR DIEHM: That happened in May of 2005, Commissioner.

WITNESS: 2004, I am sorry.

MR DIEHM: Well, as I have understood the FOI reference and the letter from Corrs Chambers Westgarth, it is dated the 18th of May 2005.

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COMMISSIONER: That's so, yes.

MR DIEHM: Now, so that's - the purpose of my raising that is that I didn't have notice that this witness was to be called until this morning. I had his statement but I didn't know if he was going to be called today so I haven't made any further arrangement. I have, since discovering this problem, raised the matter through the lawyers acting for Queensland Health and I understand that they have gone to see if they can retrieve those documents from the hospital. It seems to me that, not only from my client's purposes, but for the Commission's purposes, the recourse to those documents would be something that would be appropriate to understand fully the circumstances of this particular witness, and certainly necessary, from my point of view, to obtain instructions to be able to cross-examine.

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COMMISSIONER: Yes, all right. Mr Smith, I am sorry for this inconvenience. We're going to have to ask you to step down for the time being?-- Fine.

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Whilst your complete file is brought from the hospital?--
Yep.

I am sure you will be as pleased as we are to see the full file?-- Definitely.

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In the meantime we will ask you - you can either sit in the audience here or leave and come back if you would prefer. Mr Atkinson, do we have another witness to go on with?

COMMISSIONER: We do.

WITNESS STOOD DOWN

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COMMISSIONER: In the meantime I will allocate - I have already allocated exhibit 174 to the statement subject to those changes made.

COMMISSIONER: Mr Atkinson, I am inclined for the moment, subject to anything that anyone else wants to say whilst these things are a bit up in the air, to make an order - a non-disclosure order in relation to any matters appearing in Mr Smith's file prior to, for example, the 1st of January 2001. Would that be an appropriate way to cover the situation?

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MR ATKINSON: It would, in my submission.

COMMISSIONER: Does anyone have any different view about that?

MR DIEHM: No, Commissioner. I may have some questions to ask about this.

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COMMISSIONER: Indeed. If it becomes relevant, it becomes relevant.

MR DIEHM: Thank you.

COMMISSIONER: For the time being, it will be directed there be no publication of anything contained in Mr Smith's medical file prior to the date of 1st of January 2001. I take it, Mr Smith, that's acceptable to you?

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MR SMITH: Yes, I don't see where the other stuff in my file has got anything to do with what's going on today.

COMMISSIONER: I understand.

MR SMITH: Thank you, Mr Commissioner.

NANCY ESTELLE SWANSON, SWORN AND EXAMINED:

MR ATKINSON: Witness, would you tell the Commissioners your full name?-- Nancy Estelle Swanson.

COMMISSIONER: Swanson?-- Swanson.

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Do you have any objection to your evidence being filmed or photographed?-- No.

Thank you.

MR ATKINSON: Mrs Swanson, would you look at this document? Mrs Swanson, is that your signature at the base of the document?-- Yes.

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Is that a statement that you have provided to the Commission?-- Yes.

Are the contents of that statement still true and correct to the best of your knowledge?-- Yes.

If you don't mind, I will walk you through the statement?-- Sure.

We won't go into any more detail than you choose to go into. You saw Dr Patel in March 2004?-- Yes.

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And when you saw him, he told you that he found some polyps?-- That's correct.

Dr Patel said to you that you would require an operation to remove the polyps?-- Yeah, because the cancer - the polyps were all cancerous and they went right through the bowel.

He told you that?-- Yes.

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You would be in and out of hospital in four to five days?-- Yeah, that's right.

But that didn't happen?-- No.

You were there for about six weeks?-- Yes.

And you had many complications?-- I sure did.

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And you had, in all, five operations?-- Yes.

In the course of those operations, I note in paragraphs 9, for instance, of your statement, and 10, that your wound burst open?-- Pardon?

At one stage, and after the surgery, your wound burst open?-- Yes, that was after the second lot of surgery.

And then you had to be taken back to surgery after that?--
Yeah, for the third time.

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You talk about the various procedures in the operations in your statement. Can I just take you to paragraphs 10 and 11? You went into hospital on about the 22nd of April?-- Yeah.

And then in paragraph 10 at the end you say you were there six to seven weeks. In paragraph 11 it says, "I came home in early May 2004."?-- No, that's wrong. It was probably late May, early June. I really can't remember the exact date.

10

From your recollection is this right: that you came home just before your birthday?-- Yes.

And your birthday is on the 9th of July?-- Yes.

So you would have been there from the 22nd of April until late June?-- To late June, yes.

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Don't let me put words in your mouth; that's your recollection?-- No, that's right.

And at the end of it all, you had a bag for six months?-- Yes.

And when you were discharged home, you had to have daily dressings?-- Yeah, for months.

30

In paragraph 15 you talk about the wound re-opening again?-- Yes.

Sorry, Dr Patel re-opened the wound on that occasion, and he cleaned it and left it open?-- Yeah, that's right.

And then in paragraph 16 you speak about asking Dr Patel on your discharge if you could be provided with a pain-killer such as an oral morphine?-- Yeah, because I was having morphine right up till that morning because of the incredible pain.

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And what did Dr Patel say to you?-- He told me, "If I wanted the morphine, I could bloody well stay in hospital and have it." I had already been in there for two weeks just to have the wound cleaned out.

I am not asking you to go into detail, but can you tell us a bit about the pain that you went through in hospital?-- Pain is rather indescribable, actually. I have never experienced pain like it in my life. There was one stage in ICU where I rang my husband, and I just said I couldn't put up with the pain anymore, that if that's how I had to live, well, I didn't want to.

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And-----?-- I just wanted to die because nothing seemed to kill the pain. It was so bad.

And that was shortly after you had an epidural?-- Yes. 1

Right. You mention that in terms of how it has affected your lifestyle now, you have been left with scars?-- Bad scars, yes.

And they are not just from the first operation, are they?-- No, they are from the whole lot.

And there are - there are things that you used to do that you can't do anymore?-- Well, I can't do my housework, I can't do gardening. There is very little that you can do at all, actually. 10

You didn't make a complaint, did you, Mrs Swanson?-- No, because I thought I was the only one. You know, who is going to listen to a housewife whinging.

When did you find out for the first time that you weren't the only one?-- Well, Toni Hoffman came forward. 20

Well, your operation started on the 22nd of April?-- Yes.

Proceeded through to November of last year?-- Yes.

Was there any discussion with the hospital in the meantime about whether or not that was par for the course?-- No. I mean, in five months - in seven months I had five operations and a heart attack, all due to the botched up surgery the first time. 30

Can I tender Mrs Swanson's statement, Commissioners?

COMMISSIONER: Yes, thank you, Mr Atkinson. Exhibit 175 will be the statement of Mrs Nancy Estelle Swanson.

ADMITTED AND MARKED "EXHIBIT 175" 40

MR ATKINSON: Mrs Swanson, that's the evidence that I was hoping to get from you. Is there anything that you would like to tell the Commissioners or the people here, now that you have the witness stand, about yourself, about health in Bundaberg, any issues you would like to get off your chest?-- No, not really. Not really.

No. You feel like you have said everything you need to say, in your statement or in person?-- Yeah. I just wish - I just wish I could get a good night's sleep, I wish the nightmares would go away and I wish the pain would go away. You know, it is just never ending and you are reminded of this butcher every day of your jolly life. 50

When you went in, you went in because some of your siblings had had problems with polyps?-- Yes.

But apart from knowing about that and knowing you needed a check up, you weren't having symptoms at that time?-- I was having problems on and off for quite a while. I had drastic weight loss, other problems, not realising that it was cancer that I had, and if my brother hadn't have rung me, I would have never known. I just figured it was me.

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Have you had - have you got any plans for follow-up surgery now?-- Yes. I have been to see my GP this morning and he is putting it in place in Brisbane.

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Before I close I will just say this: Mrs Swanson is P41 and she has set out in the Mattiussi report at page 125.

COMMISSIONER: Yes.

MR ATKINSON: And Dr Woodruff sets out in clinical terms what happened to Mrs Swanson. Thank you, Mrs Swanson. If you will stay here in case anyone would like to ask any questions?-- Okay.

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But that's the evidence-in-chief.

COMMISSIONER: Again, the previous suppression order in relation to Mrs Swanson P41 is lifted. Mr Harper, I didn't ask you but I sort of assume that each of the patients giving evidence today is represented by you.

MR HARPER: Yes, yes, Commissioner.

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COMMISSIONER: Can I ask whether satisfactory arrangements are in place for Mrs Swanson to have any further surgery needed by her paid for by Queensland Health.

MR HARPER: I can take specific instructions in relation to Mrs Swanson. My understanding from Mrs Crosby, however, is that Queensland Health have got a protocol in place whereby the patients have been assessed and are being treated, but I can check on that further and come back to you.

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COMMISSIONER: I think we all appreciate issues like compensation claims for time off work and stress and loss of amenities of life and so on will have to go through the usual procedures but my understanding is that Queensland Health has a system in place to provide surgery for whoever needs it. And hearing from Mrs Swanson she has just seen her GP this morning and has been referred to a specialist in Brisbane, I would like to make sure that that is fully covered, not only for the actual out-of-pocket medical experiences, but also airfares and accommodation and anything else that's needed for Mrs Swanson to receive that treatment.

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MR HARPER: I will.

COMMISSIONER: Thank you, Mr Harper.

Does anyone have any questions? Mr Fitzpatrick?

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MR FITZPATRICK: I just have a couple, Commissioner, and I should have risen to say that I have some notes which appear to deal with some of the concerns that you've been talking with Mr Harper about, Commissioner Morris.

COMMISSIONER: Thank you for that.

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CROSS-EXAMINATION:

MR FITZPATRICK: Mrs Swanson, I'm Chris Fitzpatrick and I act for Queensland Health. Can I just ask you about some things in your statement from about paragraph 22 onwards and if you have those, it's from about page 4?-- Yeah.

20

Mrs Swanson, you seem to accept earlier up that page of your statement that you've had some contact with the patient liaison service at the Bundaberg Base Hospital-----?-- Yes.

-----in relation to your situation. You do say at the bottom of page 4 of your statement that you've never got an apology from the hospital?-- I haven't.

I've been given some instructions that your name and address appears on the list of Patel patients who were each sent a letter from Dr Michael Daly who was, from about April this year, made the Acting Manager of the Bundaberg Hospital, and the copy of the letter that I've been shown starts off in this way: it says, "Dear" and the patient name is then inserted.

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"I'm contacting you about the care provided to you by Dr Jayant Patel. I understand that you were treated by Dr Patel while you were a patient at the hospital." It says, "I'd like to offer you information and advice about this issue that may assist you.", and then in the next paragraph it says,

"Firstly, on behalf of the hospital staff and Queensland Health, I would like to offer my apologies for any distress you have experienced in relation to your care. I'd like to reassure you that our staff are dedicated to providing quality patient care and safety, and as such, we are very sorry for any upset caused to you."?-- Right.

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The letter then goes on, and in the last paragraph it says, "I hope this information will help you and your family address any concerns you may have. Again, our apologies. Yours sincerely, Dr Michael Daly."?-- I didn't receive that.

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You didn't receive a letter like that?-- No.

Can I ask you whether as at April of this year your current residential address was at (address supplied)?-- Yes.

All right. Well, can I say that my client's very sorry that you've not received such a letter, Mrs Swanson, but I hope

you'll appreciate that what I've said, that it was certainly my client's intention that you do receive such a letter?-- Thank you.

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All right. Can I just ask you about some concerns that Commissioner Morris expressed in relation to your ongoing care?-- Yes.

The information again that I have been provided suggests that as we've agreed, you had some contact with the patient liaison service at the Bundaberg Hospital?-- Yes.

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And I've got some information that says that as of May, I think, this year, you had seen Dr De Lacey?-- Yes.

Was that not arranged by my client?-- That was arranged by phone, they rang me and asked me was it convenient for me to see Dr De Lacey at 1 o'clock, I think it was a Tuesday or I can't remember the day-----

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Yes?-- -----but they just rang me, they said they'd made an appointment for me and I said yes, that I'd go which I did.

And you went to see Dr De Lacey?-- Yes.

All right. And then it looks like in June of this year, according to the notes that I've been given, there's a note that you were being referred to Brisbane?-- Yes.

And that you were faxed or your GP was faxed a list of cholectoral surgeons at the Royal Brisbane Hospital?-- Yes.

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Does any of this mean anything to you?-- What do you mean?

Well, has your GP, whom you've seen, said to you that he's received such a list from my client?-- Yes, yes.

All right. And my note says that you'll wait to hear when travelling to Brisbane, and it looks like in the first week of June you told my client that you did want to fly to Brisbane and that arrangements were made for you and your husband to fly to Brisbane on the 20th of June, it looks like at 2 p.m. for an appointment with Dr Clark?-- That's right.

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And that you expressed that you were very happy with that arrangement?-- Yes.

All right. So in answer to Commissioner Morris' concerns about your ongoing care, is it your evidence that you're satisfied with what's being done-----?-- Yes.

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-----for your care?-- Yes, most definitely.

And you feel happy that your case is being properly managed at my client's expense?-- Yes.

All right?-- I just wished Dr Clark would get it on with it and get it over and done with.

Yes, when are you to see him again?-- I don't know, Dr Nell is doing that today for me. 1

All right. Commissioner, does that assist the Commission?

COMMISSIONER: It does very much, thank you, Mr Fitzpatrick, for clarifying that. I'm sure that whilst there are adverse viewpoints that need to be put in these proceedings, all of us are united in the view that the patients recovery has to come first and I'm particularly gratified of the extent to which Queensland Health has gone to deal with that issue of primary concern. 10

MR FITZPATRICK: Thank you Commissioner.

MR HARPER: Commissioner, there's one matter. Mr Fitzpatrick quite reasonably put some information to the witness that disclosed Mrs Swanson's address. 20

COMMISSIONER: Yes.

MR HARPER: And it might be appropriate to issue a suppression order and perhaps a caution to the media about that.

COMMISSIONER: Indeed. I will make an order under the Commission of Inquiries Act that the address of Mrs Swanson not be published or disclosed outside these proceedings and that to the extent that the address features on any audio or visual recordings of these proceedings, that that part be edited before they're broadcast. I trust that's adequately understood by everyone concerned? 30

D COMMISSIONER VIDER: Mrs Swanson, I just have a question. You've given us details of the physical treatment that you've received. I notice that you also make reference to the fact that you have been taking some antidepressants?-- Yes.

Is someone managing your psychological care?-- Oh, not really, just my GP and pastor comes and visits me occasionally. 40

But your GP is aware of how you're feeling?-- Yes, yes.

You've got someone to talk you-----?-- Yes.

-----regarding the psychological trauma?-- Yeah, he's most concerned because he feels rather guilty that he's the one that sent me to Dr Patel in the first place. 50

Thank you.

COMMISSIONER: Thank you. Mr Atkinson?

MR ATKINSON: Nothing in reexamination. May the witness be excused?

COMMISSIONER: Yes, thank you, Mrs Swanson, for coming in and

giving your evidence. As I've said to some other witnesses, I can't imagine how difficult it is to speak publically about these issues, but the truth will never come out if it isn't for the bravery of people like yourself coming forwards to speak about it?-- Thank you.

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Thank you.

WITNESS EXCUSED

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MR ATKINSON: Thank you. Commissioners, I have one more patient, of course, from the list that I set out at the beginning, and that is Vicki Elaine Lester.

MS McMILLAN: Commissioner, Mr Atkinson was going to supply us with the attachments. I know he's been busy this morning-----

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COMMISSIONER: Why don't we take a 10 minute break to sort that out.

MS McMILLAN: Thank you.

COMMISSIONER: And in the meantime, you could find out about the other documents.

MR DIEHM: I can tell you that some documents have been produced, but I don't have instructions as to whether or not they are all of them.

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COMMISSIONER: Thank you.

THE COMMISSION ADJOURNED 11.39 A.M.

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THE COMMISSION RESUMED AT 11.59 A.M.

COMMISSIONER: Are we right to proceed?

MR ATKINSON: I am. I'm not sure if issues about the file of Mr Smith has been resolved.

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MR DIEHM: Not entirely, Commissioner. After those documents were produced, some further requests for Queensland Health to check whether or not there are some further notes with respect to the file has been made and that's why we're waiting for an answer as to that.

COMMISSIONER: Well, we'll do our best to keep going.

MR DIEHM: Thank you.

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VICKI ELAINE LESTER, SWORN AND EXAMINED:

COMMISSIONER: Do we have a statement for this witness?

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MR ATKINSON: There's two there and there should be one there already.

COMMISSIONER: Should be but there doesn't seem to be.

MR ATKINSON: I'm instructed that it's in a folder. Witness, would you tell the Commissioners your full name?-- Vicki Elaine Lester.

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Vicki Elaine Lester?-- Yes.

Could you speak up or perhaps pull the microphone closer?-- Vicky Elaine Lester.

Thank you.

COMMISSIONER: Miss Lester, do you have any objection to your evidence being filmed or photographed?-- No.

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Thank you.

MR ATKINSON: Miss Lester, you've provided a statement to the Commission?-- Yes.

And the original of that statement is in front of you?-- Yes.

Can you say that that's your name and your handwriting on the document?-- Yes, it is.

40

The contents of the statement are still true and correct to the best of your knowledge?-- Yes.

What I'll do then is walk you through the statement but we'll do it as briefly as possible because I understand most of what you need to say is contained within the statement?-- Yep.

All right?-- Sure.

50

You explain that in August 2003, you went to see a doctor called Dr Wijeratne?-- Yes.

And he told you that you'd need - at the time you were suffering from some symptoms such as losing weight, dehydration, nausea?-- Yes.

He told you that you'd need an operation?-- Yes.

1
And that you needed someone who was - had some specialty with a specialist in bowel surgery?-- Yes, he felt it was the endometriosis causing the problem and I felt it was the adhesions and so he decided to do a laparoscopy to dissect the adhesions and to burn any cysts or the cysts with the endometriosis.

You had a procedure through Dr Wijeratne at the Bundaberg Base Hospital?-- Yes.

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And after that, you developed some infections?-- The drainage site became really inflamed and red and where the - had the drainage bag catching the blood and fluid that was leaking out, it got all inflamed around the site and then started weeping puss and going abscess-like.

And subsequently you developed abscesses?-- Then I developed abscesses below that.

20
If I can take you to paragraph 10 of your statement, you explain there that you had an operation carried out by Dr Patel on 20 September 2003?-- Yes.

And then at paragraph 11 you explain that after the operation, you woke up and asked Dr Patel what had happened?-- Yes, he was visiting a patient opposite me and when he was walking out with the team of doctors behind him, I was saying, "Excuse me doctor.", and he ignored me, and then when he got to the door I said, "Excuse me doctor" again, and he turned around and said, "What do you want?", and I said, "I just want you to explain what you - what the operation that you did was and what the outcome of the operation was.", and he said, "I already told you this.", and I said, "When did you tell me this?", and he said, "I told you this last night and after the operation.", and I said, "Well, I was unconscious in the recovery room so I don't recall you telling me.", and then he said he drained a lot of infection - puss out of the site and he put three packs in the incision holes of the abscesses.

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Now, there's matters you set out in paragraphs 11 and 12, effectively in paragraph 12 you explain that you continued to get sicker and more abscesses appeared, and then you say that; do you agree with that, that's still your case?-- Yes.

And then in paragraph 13, Miss Lister, you explain that you went back to see Dr Patel in November and December 2003?-- Yeah, back in 11, back in paragraph 11, before I left the hospital when they discharged me, I went looking for the nurse that was looking after me that day and asked him could he take the last packing out because I'd taken the other two out myself and he was on a coffee break and he said to me, "Just get them outside yourself in a salt bath yourself.", and I said to him, "But Andrew, I can't even see it, it's that far back.", and he said, "Just take a hand mirror into the bath with you so that you can see to get it out yourself.", so after that because the pack was left in, I continued getting more abscesses.

And then, as I say, in paragraph 13, you speak about returning to see Dr Patel in November and December 2003?-- Yes.

Can you tell us about that meeting?-- He just told me that it was my negative attitude, I needed to tell myself that the pack wasn't there, it would break down eventually. He said it was sorbisol, it would break down eventually but he didn't know how long it would take to break down.

In paragraph 14, Miss Lester, you said that you had an operation when local anaesthetic was used?-- Yes.

And you explain there that the local anaesthetic had no effect?-- No, I felt the lot.

Right, and you were screaming in agony?-- Yes.

But the doctor didn't stop what he was doing?-- No, he proceeded to operate, I was screaming at him telling him I could feel him cutting, I could feel everything. I pulled myself off the bed as far as it would allow me but he had my legs in stirrups so I couldn't get any further away from him.

And you said here that he said to you, "You can scream as hard as you like because no-one can hear you."?-- No-one can hear me because I was in the operating theatre.

Now, after that, I understand you were a little bit gun-shy of seeing Dr Patel again?-- Yes, very.

And instead, you arranged to see a doctor McGregor at Rockhampton Base Hospital?-- Yes, because the packing was still showing up and causing more abscesses all the time and showing up on the X-rays that had formed two tracks like fistulas.

And you explain in paragraph 16 that Dr McGregor arranged for you to see him again?-- Yes.

And he arranged for - he completed the forms so that there would be a travel subsidy?-- Yep.

So that you could go from Bundaberg to Rockhampton?-- Yes.

And avoid Dr Patel?-- Yes, he said the operation was a necessity, that he had to take the packing out, so he filled the travel forms out and I put them into Bundaberg.

Can I take you to paragraph 17, but can you tell the Commission what became of that plan to send you to Rockhampton?-- What do you mean?

Well, you didn't have the operation that Dr McGregor suggested in Rockhampton?-- Yes I did.

You did?-- I paid for it myself, I went ahead with it because it was booked in two days and I told Bundaberg that on the

phone, that they wanted me to wait and they offered me other surgeons other than Patel, I said - told them I already had it booked in two days' time and I was too sick to wait to go on a waiting list in Bundaberg, so I paid for the costs myself.

1

Can you tell the Commission of the plan, what became of the trip to Rockhampton?-- They said they wouldn't pay for it, they rang me back and said they wouldn't pay for it and I said to the lady, "Well, that's not right because it's not my fault, I shouldn't have to pay for this."

10

Well, who was the lady?-- Someone from the travel thing rung me to tell me that they wouldn't be paying for it.

Within the hospital?-- Yes, from the travel section and that if I didn't agree, I could ring the Director of Medical Services and complain, so I rang his office and was put on to a secretary at his office. I explained the whole operation and everything to her and she said to leave it with her and they'd get back to me with a decision whether they'd pay or not, and a Michael rang me back and he said, "No, the decision still stands, Bundaberg won't pay for Rockhampton costs and I could have a surgery there and I wouldn't have to have Dr Patel, I could have the other surgeons", but like I said, I had the operation booked for two days' time and I was too sick to change my plans.

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So you went to Rockhampton as planned?-- Yes.

All right. Now, in paragraph 21 you explain that in February of this year, you still had problem?-- Yep.

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And in paragraph 22 you explain that you collapsed on 12 February 2005 and you were taken back to the Bundaberg Base Hospital?-- Yeah.

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And at that time you saw a doctor from Dr Patel's team?-- Yes.

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Now, can I take you to paragraph 23. You decided to make a complaint?-- Yes.

Why did you choose the Health Rights Commission?-- I actually rang lawyers the year before because - after the local operation because I was that upset and just to find out if I had any rights at all to stop myself being taken there and I rang the lawyers back in '05 when this happened to see again if I had anyone - any protection and they explained I could complain to the Health Rights Commission then if I-----

10

When you say you were looking for protection-----?-- Against the hospital, so I didn't have to have Dr Patel.

So, really, your view was you could go back to the Bundaberg Base but as long as you weren't going to be seen by Dr Patel again?-- Well, I just wanted to have any level of medical care I could possibly get without - with protection against him, yeah.

20

Is this right, that was something you discussed with the secretary to the Director of Medical Services before the Rockhampton operation?-- Yes, I explained that to the secretary about the whole operation, what I went through.

Well, paragraph 23 you explain your approach to the Health Rights Commission?-- Yes.

30

And you explain there that you spoke to a lady and explained your fear about seeing Dr Patel?-- Yes.

She told you that she had spoken with Dr Keating?-- Not at that stage. I rang her and then she tried to get on to Dr Keating after she spoke to me.

All right. And she told you to write a formal letter of complaint?-- Yes, to Dr Keating.

40

Right. And you did that?-- Yes.

And that appears as an exhibit to your statement?-- Yep. I was really sick at the time, 35 kilos, really weak, I could barely get out of bed and I said to Sue, "I don't know if I've got the strength to write a letter", and I pushed myself to - to sit there and write it.

In paragraph 24 you explain that you spoke to the lady from the Health Rights Commission subsequently?-- Yeah.

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And she hadn't received a substantive response from Dr Keating?-- No.

And she told you that if you were to go back to the hospital at some stage, you should tell them verbally that Dr Patel was not to operate on you?-- She - when she first contacted Dr Keating she asked - she told me that Dr Patel was on

holidays for two weeks and Dr Keating couldn't give me an answer until he came back from holidays. After the 10 days that I waited to hear from him I rang her back again and she said that she wanted - he needed a further three weeks to respond. I don't know if he was busy or what but she said he needed a further three weeks to respond and - yeah.

1

Is this right, Ms Lester: your concern was that in those three weeks you might collapse again and get called to hospital?-- Yes, and I said to her, "What protection have I got to save myself being taken to Dr Patel in the three weeks?" and she said, "Well, you're a public patient. You still have to have Dr Patel because you're a public patient. It is up to you to verbally tell him you don't want him when he comes to your bed."

10

I will take you later on to what the Health Rights Commission says about that conversation?-- Yeah.

But suffice to say at this point the Health Rights Commission view or recollection of that particular officer is that you were told that you would have to tell them verbally when you went in?-- Yes, she told me I was a public patient so I would still have to have Dr Patel and it is up to me to verbally tell him when he comes to the bed and I said to her, "But then I'll be thought of as the hard to get along with patient", and she sort of laughed and said, "Yeah, I know, but that's all I can do."

20

What do you say to the position of the Health Rights Commission that they never said you would have to have Dr Patel?-- That they - they what?

30

The Health Rights Commission suggests that they never said those words, that you would have to have Dr Patel?-- No, that was her words. The words I just said is her exact words.

Right. And in the event, I understand, you didn't get sick over those three weeks?-- No. I was probably sick but my doctor told me to go to Rockhampton if I needed to, definitely not go to Bundaberg.

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I might just take you through more specifically what the Health Rights Commission says. Would you have a look at this document. Ms Lester, I'll just put this on the record. The arrangement I've reached with the Health Rights Commission is I will put to you their version of events and you can comment on whether it is true or false or you can't remember?-- Mmm-hmm.

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Now, you will see it's very detailed. You have had a chance to read the document before?-- Oh, only really quickly. I haven't read it properly.

Well, they say that on the 11th - sorry, on the 21st of February at 11 a.m. there was a conversation between you and Susan McAnany?-- Yeah.

I understand in that first paragraph there's nothing that you disagree with?-- No.

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The second paragraph is mostly about Ms McAnany's discussions with Dr Keating and you don't know what happened there?-- No, I know she was waiting all day to hear from him. She kept ringing me back saying she was waiting to hear back from him.

If you can go to paragraph 3?-- Yep.

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There is discussion there about your frustration and that accords with your own views?-- Yeah, that's what they said. He was on holidays and they couldn't discuss the complaint till he came back.

It is an awfully long chronology but the main point - the point you do disagree with is the one we discussed earlier?-- Yes.

All right. Can you just take a couple of minutes to read through it and see if there is anything else you disagree with?-- Question 3, is that what you mean?

20

Well, the whole chronology, actually. Obviously there are some things that you can't know the truth of. I'm talking more about the bits where you're quoted as saying things or having been told things?-- No, she didn't say that, that the hospital only received the complaint 10 days ago and they need, like, a standard month or something. She asked if he could have three more weeks when she rang up the second time.

30

You're referring to the last sentence in paragraph 4?-- Yeah, in that, "It is possible that" - yeah, she never said that to me.

COMMISSIONER: Can we have the next page on the screen.

MR ATKINSON: Now, in paragraph 4, of course, Ms Lester?-- Yep.

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Ms McAnany's recollection is that she said you should tell the hospital that you didn't want Dr Patel. Does that accord with your recollection?-- Yeah, she told me verbally to tell him, when he comes to the bed, that I don't want him.

And in paragraph 5, that's obviously the source of difference between the two of you?-- No, she did say I was a public patient.

All right?-- So I couldn't have a choice in what doctor I wanted, and if Patel came to the bed, it is up to me to tell him I don't want him.

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Paragraphs 6, 7 and 8, you don't need to worry about them. Can I take you to paragraph 9?-- Yep.

There's talk there about receiving a written response and that he would need another month?-- Yeah. She said three more

weeks, to me.

1

And then paragraph 10, there's mention of a discussion on 14 April and then-----?-- Yeah.

-----you will see in paragraph 11 there is some difference. Does that make you change your mind?-- No, she definitely did say that.

Right?-- That was when she asked for a three-week extension.

10

Right?-- She said to me, "You can use that three weeks to get your records together, Vicki. I'll just tell you quietly that Dr Keating is denying it."

You've never spoken to Dr Keating yourself?-- No.

And, really, there is no more references to conversations between you and Ms McAnany. So they're the real points of difference, those two points we covered?-- Yes.

20

That's effectively the evidence, Ms Lester, that I wanted to elicit from you?-- Mmm-hmm.

While you have got the stand and the attention of the Commissioners and the public, is there anything you'd like to say for yourself or for the position generally or in relation to health?-- Oh, it's just a shame if it all - after all this, if it doesn't change, and the health system has to improve. We have to have a decent level of health care here, which we haven't got, and I'm sure hoping, after all this, that it all gets rectified and fixed and we do have a decent level of medical care for us, for the normal people, average people.

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COMMISSIONER: Thank you.

MR ATKINSON: That's the evidence-in-chief.

COMMISSIONER: Does anyone have any cross-examination? Miss McMillan?

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MS McMILLAN: Yes. Again, I seek leave on behalf of the Health Rights Commission to ask some questions of this witness, Mr Commissioner.

COMMISSIONER: Of course.

MS McMILLAN: On the basis I did with Mr Halter if it please.

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CROSS-EXAMINATION:

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MS McMILLAN: Ms Lester, my name is McMillan and I appear just on this occasion for the Health Rights Commission. I want to ask you some questions in relation to your statement and attachments. I have just been given a copy of your attachments and your first attachment is, as I understand, handwritten diary notes; is that correct?-- Yep.

10

Now, just so I understand the preparation of your statement, and I should say I'm particularly interested in paragraphs 23 through to paragraphs 25 of your statement, these are the ones dealing with your interaction with the Health Rights Commission, you understand that?-- Yes.

Right. In terms of preparation of your statement, do you say that your diary notes assisted you in the preparation of your statement?-- Little things I had to look back in to see what I'd written, yeah, just names and things like that.

20

And dates?-- Possibly some dates.

So that, would you agree that there are at times inconsistencies between your statement and your notes in relation to just those paragraphs?-- There could be, yeah, in my diary notes.

Yes?-- I have several diaries.

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About that time, that period of time?-- Yes. Well, it's been a period of 18 months or something, so.

Now, for instance, would you accept that paragraph 23, you talk about lodging a complaint on the 15th of February 2005?-- Yep.

You see, you've accepted the Health Rights chronology that it was in fact the 21st of February 2005?-- Oh, yeah, I agree. I mean, I was that sick, I could have got that date a few days out, yeah.

40

Indeed, your own diary notes acknowledge it was the 23rd of February, and I don't necessarily want to trouble you with individual dates, but you accept there are some inconsistencies between those documents of yours?-- I could have been a few days out, yeah.

As I understand, I just want to make it so I clearly understand, the last part of paragraph 1 of the chronology - do you still have that in front of you, the Health Rights Commission chronology?-- Yes.

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Now, you accept that the call lasted approximately - that's the first page, please-----?-- Yes.

Lasts about 60 minutes?-- Yes, I was really distressed,

sobbing in the whole phone call.

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And you accept that Mrs McAnany did offer to contact the hospital on your behalf?-- Yes.

To relay your concern that you be placed under the care of another team of surgeons?-- Yes, I think Sue did comprehend what I said and she was genuinely upset with me.

But you understand my question. She offered to do that, firstly. She offered to relay your concern that you be placed under the care of another team of surgeons; correct?-- She offered to contact Dr Keating, yes, and lodge a complaint on my behalf.

10

And also to relay your concern that you be placed under the care of another team of surgeons?-- I don't know if she said that.

Well, you see, her chronology is, and I'd understood you accepted paragraph 1, so I'm just clarifying, do you accept what she set out in the chronology that she offered to contact him to relay your concern?-- Yeah, she was lodging a complaint on my behalf for me.

20

Yes, but also that you be placed under the care of another team of surgeons?-- I didn't know it was in her power to do that.

Well, do you recollect that she offered to do that?-- No. No.

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You don't recollect that?-- No.

So she may have said it-----?-- She just lodged the complaint to Dr Keating.

Yes, I understand you've accepted that part. Do you acknowledge that she may well have said that and you just don't recollect it now?-- No, she just said to me, "You will have to put your complaint in writing and everything to protect yourself."

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All right. But we've-----?-- But she didn't say anything about protecting me from the surgeons.

We have clarified that you went through the complaint process of putting it in writing but do you accept that she did offer to relay your concern about being placed-----

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COMMISSIONER: The witness has already said no.

WITNESS: No.

MS McMILLAN: I'm just clarifying.

COMMISSIONER: There is no clarification required. The answer is unequivocal. That didn't happen. I'm not going to allow

this witness to be badgered like that.

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MS McMILLAN: With respect, Mr Commissioner, I wouldn't consider that I was badgering her. I suggested to her she did indicate-----

COMMISSIONER: You have got the answer to that question. Will you move on, please.

MS McMILLAN: Yes, I will be moving on, thank you, Mr Commissioner. Now, in relation to the next issue, I just want to move on, in the paragraph 4 of the chronology, and that's on the second page, did Mrs McAnany also advise you to have your general practitioner, that is Dr Gills, contact the hospital and advise them of your wishes?-- No, I don't remember her saying that at all.

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Again-----?-- She may have when I was really sick but I don't remember her saying that because I would have contacted my doctor.

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And, in fact, you see that she says in the next paragraph that she would not have said to you that because you're a public patient, you could not avoid being treated by Patel. You said she's quite clear about that in the next paragraph?-- Yes, I'm quite clear she did say it.

You see, what she says is inconsistent with the various steps taken by her in fact. Firstly, you don't accept that she says, of course, she did offer to relay your concern about a different team of surgeons and also her conduct in relation to following up with Dr Keating, so she says the steps she'd taken really were contrary to what you're asserting. Do you understand that?-- No.

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That what she's saying is that stuff that you say she said flies in the face of what she said and done; do you accept that?-- What do you mean?

Well, she says she wouldn't have said that and you see she says it's inconsistent with the various steps taken and recommended by her to inform the hospital of your concerns?-- She did say that. She said it when she asked for the three-week extension for Darren to reply to my letter and I said to her then, "Well, what can I do in the three weeks if I have to go to hospital", and that's when she said, "Well, you're a public patient. I can't" - "you'll have to tell him verbally you don't want him when he comes to your bed."

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And you say Mrs McAnany also says in paragraph 5 that she is aware that public patients are entitled to request that they not be treated by a specific doctor or doctors?-- She said I could verbally tell him when he came to the bed.

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And in relation to - as you understood, with Dr Keating, the situation was the conversation that you relayed at paragraph 25 was that, as you understood it, Ms McAnany was still in fact really waiting for some word back from

Dr Keating, wasn't she?-- Yes.

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In fact, really what he said was, "I need extra time", effectively. "It's complex. I need more time to consider the complaint and I'll get back to you." I'm paraphrasing it. That's not the exact words but that was what you understood was the response for Dr Keating?-- That she wanted three more weeks, yeah.

Yes, that he wanted more time to respond?-- Yes.

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Correct, right. And that, in fact, she again indicates that she did not say to you that he was denying it?-- She did say that.

And, in fact, that was the point; she hadn't had a response from him?-- She did say that at the end of the phone call. She said, "I'll tell you quietly, he's denying it. Spend the next three weeks getting your records together because Dr Keating's denying it."

20

Well, she in fact did ask you to get your records together, didn't she?-- Yes, in that conversation.

And, in fact, you understood that was because your complaint was going into the assessment phase with the Commission?-- I don't know. No, that was before it went to assessment. That was the phone call before that.

But you understood it was - the collection of records was coming into the Commission. It was no longer a matter between you and the hospital. It was coming through to the Commission?-- Oh, yeah, yeah.

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Dr Keating's response had to come into the Commission?-- No, he had to respond to me.

No, you recollect that she'd ask Dr Keating's response to come to the Commission by that stage?-- She didn't do that till after that, after she asked for the three-week extension. Then there was a phone call about four days later, I think it was the day of the first meeting, about the 14th of April. That's when she said, "It's now going to assessment and you will now see, Vicki, he's flown out of the country. You don't have to have him anymore", and I said, "Yeah, well, no thanks to you, Sue. It's only because he's left the country."

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I see. You in fact, at paragraph 25, talk about the - the matter had been referred to assessment?-- That's the phone call when she said it was going to assessment, the day of the first meeting, the 14th of April or something.

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Well, in fact, wasn't this in March, because this was after two weeks-----?-- In March she asked for the three-week extension.

I see. "Two days after that conversation Miss McAnany called me again"?-- It was only days later.

"And she said not to expect a response from Dr Keating because she told him to direct the response to the Health Rights Commission"?-- Yes. 1

And she told you to gather up your records immediately?-- No, she told me to gather the records in the phone call before that when she asked for the three-week extension.

Would you have a look in paragraph 25. I'm just reading from your paragraph?-- Yes. What's the----- 10

It starts on my copy, "About two days after that conversation Mrs McAnany called me again"?-- Yeah, when she said it was going to assessment.

"She advised me not to expect from Dr Keating a response to my initial letter"-----?-- That's worded - they've actually fixed mine up because I told them it was wrong, in the wrong place. I don't know if yours has the same thing. 20

No?-- But when they showed-----

MR ATKINSON: My learned friend has seen that version, altered, and I have shown it to you just before. You can have it again if you like?-- Because it was actually in the other conversation.

MS McMILLAN: I don't have a copy. I apologise if I'm not reading the correct version. Can you read it out to me. It says, "She", something, "told me to gather up all my records immediately"?-- Yeah, but that was in the previous conversation. It was in this conversation in paragraph 24 that she told me to get the records, when she asked for the three-week extension. 30

Right?-- And then said quietly, "I'll tell you quietly that Dr Keating is denying it, so gather your records up in the next three weeks." 40

So you say that that - right sorry, Mr Commissioner, it is just a bit difficult. Right. So in terms of - that was in March, you say, and that was at the time when Dr Keating had in fact requested a three-week extension?-- Yes, yes.

You say to put in the response?-- Yes.

And she - you say at that time she informed you that he was denying it?-- Yes. 50

You say that despite the fact that, as you understood, he hadn't yet responded to the complaint?-- I didn't know what she'd received from Dr Keating.

Very well. Thank you, Mr Commissioner. I have nothing further for the witness.

COMMISSIONER: Anyone else?. Yes, Mr Fitzpatrick.

MR FITZPATRICK: Thank you, Commissioner.

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CROSS-EXAMINATION:

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MR FITZPATRICK: Ms Lester, I'm Mr Fitzpatrick and I'm for the Health Department. The Commission is concerned that - as is my client, to feel that your ongoing symptoms and medical condition has been addressed?-- Yes.

I was of the feeling that that was something that hadn't been addressed in your statement and could we look, perhaps, at paragraph 27 on page 11? Do you have that?-- Yes.

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You say there that you've got a feeling that the packing is still in there?-- Yes.

You believe that there's infection still there. You suffer pain when you sit down and you received some counselling in relation to it. Was that counselling arranged through the Health Department?-- Yes.

20

And are you still receiving counselling?-- Yes.

I've had some notes provided to me which suggest that you've seen Dr O'Loughlin?-- Yes.

Was that in Bundaberg?-- Yes.

And have you seen him subsequently to the Bundaberg visit?-- No.

30

The notes that I was given also suggest that he recommended that you have a laparoscopy?-- Yes.

Something like that?-- Yeah, my doctor's referring me to a specialist at the Wesley for it.

All right?-- Yeah.

And is the cost - are you going ahead with that?-- Yes.

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When are you to consult with the specialist?-- As soon as possible, yeah.

And who is the specialist?-- He's got a list of doctors from the solicitors that he's going through.

Is the cost of the referral being paid for by the Health Department?-- Apparently, yes.

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And are you satisfied with what's being done in that regard?-- Yes.

All right. Thank you, Commissioners.

COMMISSIONER: Mr Fitzpatrick. Does anyone else have any questions?

MR DIEHM: Commissioner, I don't specifically, on the basis that whilst Dr Keating will explain his role in this particular matter there were no interactions directly between him and this witness so there is really nothing for me to cross-examine about and it's-----

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COMMISSIONER: That makes sense.

MR DIEHM: Commissioner, the other thing that I ought to draw to your attention is that my understanding is, or my instructions are that there would be a file for the - what's described as the patient transfer file. The witness has referred in her evidence to her application for a funding travel subsidy patient transfer. Now, I don't have anything specific to raise out of that file. At the moment I don't know what its contents are, but I do simply draw it to the Commission's attention that there may be other documents that touch upon the issue rather than the witness's evidence.

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COMMISSIONER: Thank you for that, Mr Diehm. No other questions? Mr Atkinson?

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MR ATKINSON: Nothing else. Maybe there's one I should add for the sake of completeness, Commissioners, that Ms Lester's case is referred to in the Mattiussi report. It appears at page 136 and it's the fifth entry down and it's perhaps remarkable for this reason that the conclusion is that the care that Ms Lester received was reasonable, but there's nothing else and may Ms Lester be excused?

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COMMISSIONER: Well, to be fair all that means is that Dr Woodruff was unable to identify the problems from the files.

MR ATKINSON: Yes, and I certainly can't put it higher than that.

COMMISSIONER: Yes. We should mark as an exhibit the statement of Ms Lester Exhibit 176.

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ADMITTED AND MARKED "EXHIBIT 176"

COMMISSIONER: And, Mr Atkinson, I'll put the onus on you to ensure that the copy that becomes a formal exhibit has those necessary corrections to it. They're the ones that you raised when Ms McMillan was asking questions.

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MR ATKINSON: Yes, I will make sure that is done.

COMMISSIONER: I think we should also mark as an exhibit the chronology that was put to Ms Lester.

MR ATKINSON: Commissioner, I ask that you do that.

MS McMILLAN: Yes, that is my omission that I ask you to do. 1

COMMISSIONER: Exhibit 177 is the HRC chronology pertaining to Ms Lester.

MR ATKINSON: Thank you.

COMMISSIONER: Thank you for your time this afternoon coming along giving evidence. We appreciate your assistance very much and we wish you a complete recovery. Hope that that can be achieved very quickly?-- Thank you. 10

Thank you.

WITNESS EXCUSED

MR ATKINSON: Ms Lester's evidence is the last of the group of patients I proposed to call this morning subject to Mr Diehm's concern about Mr Smith's records. 20

COMMISSIONER: And where do we stand with that?

MR DIEHM: I haven't yet received an answer, Commissioner. I'm not certain that one is available.

COMMISSIONER: Well, it's 25 to 1. If we take lunch now till, say, 2 o'clock that should give everyone sufficient time to get up to speed do you have another witness? 30

MR ATKINSON: Mr Andrews, if it comes to that, will call Mr Fleming. That might be relatively-----

MR ANDREWS: I doubt Mr Fleming will be that quick. I expect him to take an hour, in any event.

COMMISSIONER: All right. We'll take lunch now and resume at 2 o'clock. 40

THE COMMISSION ADJOURNED AT 12.38 P.M. TILL 2.00 P.M.

THE COURT RESUMED AT 2.08 p.m.

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COMMISSIONER: Have you resolved the matter, Mr Diehm?

MR DIEHM: Commissioner, as I am informed by Mr Boddice the car was dispatched a few minutes ago to the hospital to collect the original file-----

COMMISSIONER: Right.

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MR DIEHM: -----to put beyond doubt one way or the other whether there is or isn't anything further. As I understand, the document produced in response to my earlier application is taken from a printer G drive from the hospital rather than take it from the file itself, so that's what is being sought.

COMMISSIONER: That's fine. Mr Andrews, is it convenient to get on with Mr Fleming in the meantime?

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MR ANDREWS: Yes, Commissioner.

COMMISSIONER: I'm not sure that we have statements yet.

MR ANDREWS: I can provide you with copies of Mr Fleming's statement.

COMMISSIONER: Mr Ashton?

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MR ASHTON: Commissioner, may I be heard? Commissioner, I've been given a copy of the statement by counsel assisting and I think it can be said that the statement or the evidence to be given reflects in some respects or might act adversely upon Mr Leck and I think in those circumstances I'm obliged as a matter of prudence to make a limited application. I say limited application, Commissioner, in that it is as to apprehend bias, but it is no more than - it doesn't seek, for example, to close down the Commission, as that expression has been used, but rather seeks in respect of the relevant paragraphs - and they are 2, 4 and 5 of the matters appointed for inquiry in the Terms of Reference of the Commission - a declaration that the Commissioners are disqualified from proceeding - sorry, I'm inviting the Commissioners to disqualify themselves from calling the applicant Mr Leck as a witness or from making findings or recommendations in respect of him.

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The reason, Commissioner, I say that I feel obliged as a matter of prudence to raise this application is that, as I mentioned, the evidence seemed, at least in some respects, adverse and although, of course, we have raised this matter, Commissioner, unlike Mr Diehm and his client we're not in Court. They've made their complaint and they're in Court. We have foreshadowed our position. You've indicated a view that that foreshadowing doesn't require any action whilst we are merely foreshadowing and we're not in Court. The reason we're not in Court, Commissioner, is simple but serious.

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COMMISSIONER: Mr Ashton, what is your application?

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MR ASHTON: My application is the one I just read out, Commissioner, that the Commissioners disqualify themselves in respect of paragraphs 2, 4 and 5 from proceeding to further call Mr Leck as a witness or make findings or recommendations in respect of him, and I feel obliged to make it at this time, Commissioner, because-----

COMMISSIONER: If you are going to make the application make it. What are the grounds of it? 1

MR ASHTON: Thanks, Commissioner. I just wanted to explain why we are not in Court having foreshadowed.

COMMISSIONER: No, if you have an application make it.

MR ASHTON: Very well. Commissioner, the principle of apprehended bias is, of course, well accepted and well known and I don't propose taxing the Commissioners with the law at length. The principle is simply that it's conveniently and recently articulated in Ebner's case in the High Court and it's simply that a decision maker is disqualified if a fair minded observer may reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question the decision maker is required to decide. There's ample authority, Commissioner, in my submission. 10

COMMISSIONER: What's the relevant decision here? 20

MR ASHTON: That's Ebner's case.

COMMISSIONER: What is the relevant decision here?

MR ASHTON: I'm sorry, I don't understand the question.

COMMISSIONER: You say a "decision maker" creates an apprehension of bias. What decision are we making? 30

MR ASHTON: The decision is to be in respect of paragraphs 2, 4 and 5 of the Terms of Reference of the Commission. Decisions in respect of referral or recommendations with respect to my client, Commissioner.

COMMISSIONER: But, as I understand it, this document isn't yet in evidence, but I understand Mr Andrews was proposing to tender a document, but your client has already been referred to the Crime and Misconduct Commission for consideration of allegations of official misconduct, so that's happened. 40

MR ASHTON: Yes, that's so, Commissioner.

COMMISSIONER: So what decision is left for us to make?

MR ASHTON: In respect of that particular matter that might be in question, but I'm talking about all of the matters that are before the Commission or may be before the Commission before it concludes. This application is not limited to this evidence. It is simply that the fact of this evidence I think obliges me, as I said, as a matter of prudence to be heard. After all, as you know, Commissioner, the Courts don't care very much for the idea of parties having a punt by staying silent and allowing the Commission or the decision maker to move to a decision and then complain afterwards. 50

COMMISSIONER: Well, that's the course you chose last week, of course.

MR ASHTON: I'm sorry?

COMMISSIONER: That is the course which you chose last week when I invited you on two occasions, Tuesday and Thursday, from memory, to indicate whether you have an application to make. Your leader, Mr Jensen, was here on Thursday morning and indicated quite specifically that he didn't have an application.

MR ASHTON: That is so, Commissioner.

COMMISSIONER: You changed your mind, did you?

MR ASHTON: I wanted to explain before, but you cut me short.

COMMISSIONER: Have you changed your mind?

MR ASHTON: Yes, we have changed our mind because we are not in Court. I had sought to explain why we are not and, therefore, I find myself in this position, but I hadn't included that and so we find ourselves in the position we're not being able at this time, at least, to make this application in Court. We are awkwardly placed if we don't make it somewhere - if we don't raise the matter.

COMMISSIONER: Mr Ashton-----

MR ASHTON: That's why I am doing it, Commissioner.

COMMISSIONER: Can you direct me to any authority that suggests that the party has waived his or her opportunity to take such an objection and then change their mind a week later because they've decided not to go to Court?

MR ASHTON: Well, I'm not accepting, with respect, Commissioner, that not taking the invitation last, whenever it was, at a time when we were in correspondence with the Attorney-General constitutes a waive.

COMMISSIONER: Okay. What about when you said on the 26th of May, which is a month and a half ago now, "We do not for a moment complain about - certainly don't dissent for a moment about your authority and power to require him to give evidence today and we don't complain about your decision to do so." That was a waive of right, do you say?

MR ASHTON: Certainly not, Commissioner. Do you want me to address you on that point of waive?

COMMISSIONER: Whatever submission you think appropriate.

MR ASHTON: Commissioner, I will respond to your question. Commissioner, you will note that what I said was we didn't object to - did not complain or dissent from the existence of the power. Plainly the power is there. We didn't dissent from the decision to call Mr Leck. In fact, we have been told it was necessary in the interests of the further

investigations of the Commission. That's what the explanation was for calling Mr Leck. I did not at any time acquiesce in the content or implementation and, in fact, expressly complained about that and at the time-----

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COMMISSIONER: A week later.

MR ASHTON: Sorry, Commissioner?

COMMISSIONER: Was there one objection to any question asked?

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MR ASHTON: Yes, there was.

COMMISSIONER: Can you refer me back to maybe the transcript?

MR ASHTON: Yes, I can. My words were rhetorical questions, like - that are unfair to the witness and the rhetorical question was what were you doing when Dr Leck was - Mr - Dr Patel was killing patients.

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COMMISSIONER: What page is that on?

MR ASHTON: I don't have it in front of me, Commissioner, but I am turning it up.

COMMISSIONER: Thank you.

MR ASHTON: The evidence generally-----

COMMISSIONER: I am waiting for you to refer me to the passage you rely on.

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MR ASHTON: I am sorry, Commissioner?

COMMISSIONER: Where is the page you rely on?

MR ASHTON: I am just turning it up, Commissioner.

COMMISSIONER: Thank you.

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MR ASHTON: May I, while that is happening, continue what I was saying about my response-----

COMMISSIONER: No. I prefer to do these things one at a time. The passage I read out is at page 389 lines 21 to 28.

MR ASHTON: That's right, and if you read on, Commissioner, you will find that I pointed out the disadvantage at which my client had been placed.

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COMMISSIONER: Well, I have page 389 in front of me.

MR ASHTON: I don't yet, Commissioner, but my words were that my client had been placed at a serious disadvantage. I spoke of the opportunity to speak further on the matter and-----

COMMISSIONER: Just show me where it is in your application.

MR ASHTON: Yes, Commissioner.

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COMMISSIONER: You should be ready with your application if you are going to argue it.

MR ASHTON: I had the general references, but I had not anticipated the particular question. I beg your pardon, Commissioner, I just didn't have it at my fingertips. Commissioner, if you have before you, as I think you indicated a moment ago, the passage you read from you will see it goes on to express my concern at the disadvantage at which my client has been placed.

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COMMISSIONER: I thought my question was if and when you'd objected to any of the questions, and I can't find any objection. The questioning of Mr Leck commences at page 357 line 30. There's no objections on page 357, none on page 358, none on page 359, none on page 360, none on page 361 and-----

MR ASHTON: Commissioner, this occurs when I was re-examining.

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COMMISSIONER: What, you objected to your own question?

MR ASHTON: No, I objected to your interruption.

COMMISSIONER: Oh, I see.

MR ASHTON: Which was a question and it was a rhetorical question which is asked of my client what he was doing while Dr Patel was killing patients and I complained about it.

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COMMISSIONER: Well, the first objection I find is on page 377. The foot of page 376 I questioned - this relates to Dr Keating's letter offering Dr Patel an extension of his contract of employment. The question is this: "...is there some reason why this had to be rushed through on Christmas Eve?" "I don't know.", was the answer and then, Mr Ashton, you objected: "Commissioner, he said he wasn't there, it was put to him that he approved it, he says he didn't, he hasn't signed it, it would be interesting to know how he knows why there was some reason for rushing it through." I said, "He's in charge of the hospital. I would have expected to know" - I think it should read, "I would have expected him to know who would have been employed at this hospital, if he knows nothing about it, we'll hear from Dr Keating, but I want to know if the man charged with the responsibility of running the hospital is aware of any circumstances which would justify Dr Keating sending a letter on Christmas Eve offering another four years employment to a man who's already been identified by Charlotte Street as someone who needs to be investigated by a medical team?", and you say: "Put in that way, Commissioner, I've got no problem with the question.", so I don't think that stands as an objection.

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MR ASHTON: I took objection, but that's not the one I'm referring to, Commissioner.

COMMISSIONER: I see.

MR ASHTON: Yes, Commissioner, it's at page 380 at about line-----

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COMMISSIONER: 14.

MR ASHTON: -----14 or so.

COMMISSIONER: Yes, I asked a question. You objected to it and I didn't persist with that question.

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MR ASHTON: I complained it was a rhetorical question and I complained it was unfair.

COMMISSIONER: And I didn't persist with the question.

MR ASHTON: I'm answering your question, Commissioner. You asked me to take you to the objection and I took you to-----

COMMISSIONER: The only objection in the whole of it and I accept on fair grounds and, yes, I withdrew the question. Is that the only objection?

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MR ASHTON: Well, that - I have taken you to two, Commissioner. Do I-----

COMMISSIONER: You took me to one and I took you to one and together we arrived at two. You didn't persist with one. The other you succeeded on.

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MR ASHTON: Commissioner, I complained comprehensively about that objection - both objections that day. When you gave us the opportunity you might remember that I indicated I would make a statement and by agreement we made it at the - on the last day before we wrote it and my statement was-----

COMMISSIONER: Where did you complain comprehensively, you say?

MR ASHTON: Yes, I did, Commissioner.

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COMMISSIONER: Where do we find that?

MR ASHTON: It's on the 2nd of June, I think, Commissioner.

COMMISSIONER: No, you said on the same day you complained comprehensively.

MR ASHTON: Yes.

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COMMISSIONER: Where do I find that?

MR ASHTON: That's where I mentioned my client had been placed at a serious disadvantage, Commissioner. That taken with my objections, Commissioner, is all I need to do and I take the opportunity - the first available opportunity to complain further and when you offered an explanation I took the opportunity to expressly point out that I was not acquiescing

in the explanation either.

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COMMISSIONER: All right. Page 388 line 52 Mr Ashton:
"Thanks, Commissioner. That's greatly appreciated.
Commissioner, I raised these matters merely from this
perspective and I respectfully ask that I be permitted to
place it on record, that Mr Leck has indeed been asked to
prepare a statement about what the Commission itself describes
as a vast number of matters. I on his behalf assure the
Commission of our absolute resolve to assist the Commission.
Insofar as a bureaucratic response sounds hollow today, it's
the bureaucratic response, it's the correct response and
that's all we can do. But can I say, Commissioner, that the
witness has been at a very substantial disadvantage today in
that he's embarked upon the preparation of this statement of
vast matters, so far without access to records, and certainly,
of course, has in the one hour's notice of his giving evidence
this afternoon not had any opportunity really to seek that
access let alone get it-----" Commissioner: "Mr Ashton,
everything you say is understood and Mr Leck will have an
opportunity to give comprehensive evidence at a later stage."
Mr Ashton: "Thank you, Commissioner.", and then you said,
"May I hasten to say respectfully, we do not for a moment
complain about - certainly don't dissent for a moment about
your authority and power to require him to give evidence today
and we don't complain about your decision to do so but I
simply respectfully ask that it be understood by all the
disadvantage under which he labours in those circumstances."

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MR ASHTON: Yes.

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COMMISSIONER: Well, what's the problem with that?

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MR ASHTON: Well, that was my complaint about the way he had been treated. And, Commissioner, may I now take you-----

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COMMISSIONER: Your only complaint was you didn't want the disadvantage under which he labours.

MR ASHTON: Commissioner, with respect, I brought the matters to your attention.

COMMISSIONER: What, after I finished asking questions?

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MR ASHTON: During the course of it.

COMMISSIONER: Show me one instance where during the course of questioning you took an objection and persisted in it rather than withdrawing it.

MR ASHTON: I beg your pardon, Commissioner?

COMMISSIONER: Took an objection and persisted in it.

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MR ASHTON: I don't understand the point. I have taken you to that example. In any event, it cannot be suggested-----

COMMISSIONER: You are not going to take objection now. Very well.

MR ASHTON: Can I take you then to page 866, line 18.

COMMISSIONER: Yes.

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MR ASHTON: "You invited Mr Diehm and I at least to have our say, so to speak, in respect of the evidence last Thursday, and I foreshadowed that I would seek to do so today, and I think you agreed - is it convenient now, Commissioner? I'll be very brief." We had, in fact, agreed earlier in the week today would be the day.

COMMISSIONER: Yes.

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MR ASHTON: "Well, certainly if it is going to be brief, you're welcome to." "Thanks. In a sense, we decided against the course of a comprehensive statement, so to speak, but there is one matter that I wish to clarify, if I may, Commissioner. At the conclusion of my client's evidence on Thursday last - and the relevant passage appears at page 389, line 20 - I said that we don't dissent for a moment about your authority and power to require Mr Leck to give evidence, and I said further that I didn't complain about your decision to do so. My concern, Commissioner, is that that ought not to be thought to be an acquiescence in the implementation and the content of the questioning of Mr Leck. We say, respectfully, that process was unfair, unnecessary, unexplained and, in the context of the treatment of witnesses in the Commission so far, essentially unique to our client. We have come to the view-----" You interrupted, "I don't think Mr Diehm would agree with that." "I am sorry?" "I don't think Mr Diehm would agree with that." "I used the word 'essentially'

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advisedly because of the two - whether he agrees or not he can say, Commissioner. We've come to the view there's nothing to be gained by statements in response on the run, so to speak, and, rather, it's our view that we should, if the position is reparable, we should seek to repair it by an orderly and developed statement, which was what the Commission had originally contemplated and asked us to do." - I am complaining about what happened on that afternoon. "We are in the process of complying with it. Evidence about those matters can be before the Commission in due course." Later on, Commissioner-----

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COMMISSIONER: And don't leave out the last bit, "I don't wish to say anything further, thanks, Commissioner." So that's a month and three days ago, and there was no application to have us disqualify ourselves.

MR ASHTON: I haven't finished, in my submission.

COMMISSIONER: That's right?

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MR ASHTON: As a matter of fact, that's right, yes.

COMMISSIONER: There is no application as you now make to adjourn evidence relating to Mr Leck.

MR ASHTON: Commissioner, I make an application in respect of apprehended bias. It is not a question of adjourning evidence.

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COMMISSIONER: Is that the case?

MR ASHTON: That's a matter for you.

COMMISSIONER: Is that the case?

MR ASHTON: That is a fact, Commissioner, yes. Now, if I may continue?

COMMISSIONER: And during that month and three days, you accept you have played an active part in the proceedings.

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MR ASHTON: Commissioner, may I come to that?

COMMISSIONER: Is that right?

MR ASHTON: May I come to that?

COMMISSIONER: Well, if you are going to give me an answer, yes.

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MR ASHTON: I will be.

COMMISSIONER: Have you taken an active part in that month and three days?

MR ASHTON: Yes, Commissioner.

COMMISSIONER: Thank you.

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MR ASHTON: I thought for completeness, given that we're on this subject, Commissioner, I should address the explanation you then gave and my response to it. At page 869, line 52, Mr Diehm had just finished something. "I thank you for that, and I'd also remind everyone that at the point in time we were under the misapprehension that we would not be in a position of having any witness exposed to cross-examination on matters potentially relevant to the CMC inquiry until the Bundaberg sittings, and that was why it was felt desirable to get Mr Leck's and Dr Keating's response to the critical issues on the record at that stage. Obviously if events had taken a different course the approach of both witnesses' evidence might have been quite different, but that's a matter of history and none of us can do anything now." "Thank you", says Mr Diehm. I said, "I wouldn't want it thought that I acquiesce in that explanation of things either, with respect." "Sorry, what are you saying?" "I am saying, Commissioner, if that means that - well, for a start it would be our submission that our client was, in effect, cross-examined, if not in the sense of formal, legal nomenclature, but in so far as the - it's justified by reference to the anticipation that it might have been somehow defended in the following week in the CMC proceedings, we're left in confusion about that, Commissioner, because it implies that the interrogation, the questioning of my client, was somehow the charges, and the defence would come in the CMC the following week." "Not like that at all.", you said. "May I finish?", I asked. "Say whatever you like." "We're left in particular confusion because on 13 May the CMC wrote this to us: 'You are advised that for public hearings, as a general rule where a person is the subject of an allegation, that person will be given the opportunity to respond to the specific allegation in a formal interview or private hearing prior to the evidence being led in a public hearing. As I previously advised, it is likely that your client will be invited to participate in an interview prior to the public hearing.'" "Yes." "That doesn't seem to accord", said I, "with the anticipation we would have a public hearing here and a defence there", and so on.

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So I was further complaining there, Commissioner, and I respectfully reject any suggestion that I didn't take appropriate opportunity to complain.

COMMISSIONER: Mr Ashton, you didn't apply for any of us to disqualify ourselves.

MR ASHTON: That's right, Commissioner.

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COMMISSIONER: What's changed in the last month and three days?

MR ASHTON: Several matters, Commissioner, if I may continue.

COMMISSIONER: Yes.

MR ASHTON: The next matter is the interim report.

COMMISSIONER: Which says nothing about your client.

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MR ASHTON: I am sorry?

COMMISSIONER: Which says nothing about your client.

MR ASHTON: Not to - Commissioner, with respect, the interim report prematurely makes conclusions which have serious implications for my client and does so without putting my client on notice or hearing. It does so on the uncontested evidence of Ms Hoffman and Mr Leck.

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COMMISSIONER: Which conclusion?

MR ASHTON: The conclusion, it seems, with respect, that the-----

COMMISSIONER: Which conclusions?

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MR ASHTON: The conclusion - the analysis of Dr Patel's felony murder seems to have, as a centrepiece, his fraudulent - alleged fraudulent - well, fraudulent, as you found, registration.

COMMISSIONER: Yes.

MR ASHTON: Only days before, Commissioner - only days before you put to my client that he snuck Patel past the Medical Board.

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COMMISSIONER: Mr Ashton, that was the subject of evidence from officers of the Medical Board. You had the opportunity to cross-examine those officers, you did not challenge one word of their evidence about the fraud which led to Dr Patel's being registered.

MR ASHTON: Commissioner-----

COMMISSIONER: Is that the position? Is that the position?

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MR ASHTON: Well, I am not sure whether I didn't challenge one word, but my point is-----

COMMISSIONER: Not one word of their evidence in so far as it established Dr Patel's fraud in obtaining registration.

MR ASHTON: But their evidence, Commissioner, also established that my client had not one thing to do with that registration.

COMMISSIONER: Mr Ashton, do you agree with my proposition?

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MR ASHTON: Yes.

COMMISSIONER: Well, when it was unchallenged evidence by your client, how can your client then complain about a report which simply records the outcome of that evidence?

MR ASHTON: No, with respect, Commissioner, it doesn't record the outcome of the evidence. It embraces an analysis which necessarily has the implication, as you put to my client, that he snuck him past the Medical Board.

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COMMISSIONER: Where is that in the report?

MR ASHTON: I am sorry, it is in the evidence, Commissioner.

COMMISSIONER: No, no, in the report. I thought we quite specifically said we weren't making any findings about your client.

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MR ASHTON: Yes, you do, Commissioner.

COMMISSIONER: Thank you.

MR ASHTON: Unfortunately, you then went on to make findings which had powerful implications for my client.

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COMMISSIONER: Yes, findings on evidence which your client hadn't challenged.

MR ASHTON: With respect, we hadn't been put on notice.

COMMISSIONER: Mr Ashton, what did you think the Medical Board witnesses were giving evidence-----

MR ASHTON: I don't wish to say anything more about that.

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COMMISSIONER: I want to say what did you think they were giving evidence about if it wasn't Dr Patel's fraud?

MR ASHTON: Certainly they did. They did.

COMMISSIONER: If you thought that findings about that were adverse to your client, why didn't you challenge that evidence?

MR ASHTON: The evidence pertinent to my client made it clear that he had nothing to do with that registration.

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COMMISSIONER: Well-----

MR ASHTON: However, you had alleged he snuck it past, and then you found a fraud without our been being given the opportunity-----

COMMISSIONER: What is there in our interim report that constitutes a findings against your client which your client would complain about?

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MR ASHTON: Well, in my submission, the implications of the findings against Patel including the embrace of the untested evidence of Ms Hoffman and Dr Miach have serious implications for my client.

COMMISSIONER: Show me in the report where we say something

that has an implication for your client? 1

MR ASHTON: The adoption of their evidence in general sense.

COMMISSIONER: Where is it in the report?

MR ASHTON: I can't tell you with particular reference right now.

COMMISSIONER: Take your time. 10

MR ASHTON: But it is my submission-----

COMMISSIONER: Take your time. I want this done very specifically.

MR ASHTON: I can't do that.

COMMISSIONER: You have made serious allegations----- 20

MR ASHTON: I don't have it in front of me.

COMMISSIONER: I am happy for you to find it. You are making very serious allegations.

MR ASHTON: The paragraphs, Commissioner - the paragraphs of the report 67 to 89.

COMMISSIONER: 67 to 89. 30

MR ASHTON: Those conclusions - this is our submission - involve favourable conclusions as to the credit of the witnesses Ms Hoffman and Dr Miach. Neither have been tested in cross-examination.

COMMISSIONER: But you have now tested their evidence and not raised any challenge to their evidence on these subjects.

MR ASHTON: We're talking about apprehended bias here. It is a question of what the reasonable bystander infers from that report at that time. 40

COMMISSIONER: And-----

MR ASHTON: Has nothing to do with whether we cross-examine later on.

COMMISSIONER: How does 67 relate to your client?

MR ASHTON: They relate to findings against Patel. 50

COMMISSIONER: Yes.

MR ASHTON: And they embrace the untested evidence of Ms Hoffman and Dr Miach to do it.

COMMISSIONER: What is there in 67 that goes to your client?

MR ASHTON: I can't put it any more specifically than I just have, Commissioner.

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COMMISSIONER: What, that because your client was the manager of the hospital and that Patel was killing people, as we've now got a lot of evidence, including Queensland Health's own report from Dr Woodruff, that means that we can't find against Dr Patel without you giving your client an opportunity to say why we shouldn't make those findings.

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MR ASHTON: That's so, Commissioner. In so far as it implies - or it's open to implication that my client is responsible for something as to which you then made a conclusion without his having the chance to test it.

COMMISSIONER: We don't say anything about your client's responsibility.

MR ASHTON: I don't wish to say anymore, Commissioner, thanks, on that topic.

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COMMISSIONER: That's all you wish to say on that topic?

MR ASHTON: Yes, Commissioner. The third area of complaint is the Commission's differential treatment of witnesses. And I refer in particular as examples, contrast the treatment of, say, Ms Hoffman and Ms White with Mr Leck, Dr Keating, Ms Huxley. The fourth area, Commissioner, is the inadequately, in my submission, explained private meetings, and the last area that I refer to Commissioner is-----

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COMMISSIONER: Sorry, what's this about inadequately explained private meetings?

MR ASHTON: Well, Commissioner-----

COMMISSIONER: What's your complaint there?

MR ASHTON: Our complaint is that the private meetings, that it has been accepted that they occurred.

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COMMISSIONER: Yes.

MR ASHTON: They haven't, in our submission, been adequately explained. We have not, for example, been able to get an explanation as to whether Dr Fitzgerald was spoken to and, if so, in what way. And again I remind you, Commissioner-----

COMMISSIONER: I thought I put it clearly on the record that I had spoken to Dr Fitzgerald and neither your client's name or the name of Dr Keating was mentioned. I think Mr Andrews confirmed that from the Bar table. Is that right, Mr Andrews?

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MR ANDREWS: That's correct, Commissioner.

COMMISSIONER: Thank you.

MR ASHTON: My recollection is-----

COMMISSIONER: What further explanation do you say you want? 1

MR ASHTON: My recollection was that Dr Fitzgerald was not expressly mentioned in your - in what you had to say. And in any event, Commissioner, it is not sufficient to say that my client's name was not mentioned. In my submission, that doesn't abate the apprehension of bias in the reasonable bystander. So my-----

COMMISSIONER: What does that mean, Mr Ashton? 10

MR ASHTON: It means, Commissioner, it is not sufficient, in our submission - not a sufficient explanation of the private meetings.

COMMISSIONER: We can't speak to anyone, despite the fact that our Act says we can inform ourselves of facts however we think fit. Further, we're not allowed to speak to anyone without tape recording it and giving you a copy of the tape recordings. 20

MR ASHTON: Not necessarily so, Commissioner.

COMMISSIONER: What do you want us to do?

MR ASHTON: Commissioner, my submission is that in a fully resourced Commission like this one, which has counsel assisting, it is dangerous, unwise, and ultimately reasonably leads to an apprehension of bias in the ordinary bystander to have the Commissioners conducting private meetings with witnesses or potential witnesses and simply telling us, "Relax, your name wasn't mentioned." That's my submission. 30

COMMISSIONER: Are you challenging the truth of what Mr Andrews says?

MR ASHTON: I don't want to say anything more than that, Commissioner. 40

COMMISSIONER: Mr Andrews, do you mind going to the witness box and we will clarify this through evidence?

MR ASHTON: I am not challenging what Mr Andrews says.

COMMISSIONER: You are not?

MR ASHTON: No.

COMMISSIONER: All right. Either here or in any other place? 50

MR ASHTON: Well, I don't know what he might say in another place. I am not challenging what he says here, what he just said then.

COMMISSIONER: Can you inform us of your recollection of anything relating to Dr Keating or Mr Leck?

MR ANDREWS: Commissioner, I do recall that it was in fact included in a letter to the solicitors for Mr Leck that Mr Leck's name was not raised, nor was any matter in respect of Mr Leck. But, really, I am now trying to recall correspondence that was sent to Hunt & Hunt Solicitors at least six weeks ago and the correspondence probably will speak for itself.

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MR ASHTON: It will, Commissioner, and I can read it.

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COMMISSIONER: Yes.

MR ASHTON: This is our letter to Mr Andrews:

"We refer to the Chairman's statements during public hearings that he has, on occasion met with individuals in relation to their giving evidence at the Inquiry.

We refer in particular to Mr Diehm's request on 3 June 2004 in relation to whether any matters discussed at those meetings adversely or favourably affects any party.

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We accept, of course, the Chairman's assurance that our client's name was not mentioned during those meetings. However, it is of course possible that evidence could bear upon our client's interests, whether or not his name was mentioned. For example, we would expect Dr Fitzgerald's evidence to be relevant in this regard. There has been press speculation" -

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and I stress not acknowledgement by you or by Mr Andrews, but:

"press speculation that Dr Fitzgerald was one of the persons with whom the Chairman met privately.

We therefore ask for an assurance that the Chairman has not spoken privately with anyone whose evidence affects our client's interests. Alternatively, we ask that we be advised what that evidence is.

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We look forward to hearing from you."

The reply, and in my submission, respectfully, enigmatic, I refer to your letter dated 14 June 2005:

"The Commissioner can give his assurance that in no private discussions between the Commissioner and a past or potential witness" -

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still no mention of Fitzgerald -

"has there been mention of Mr Leck nor discussions that touched upon any aspect of the witness's evidence that may be relevant to Mr Leck's interest.

The Commissioner is unable to give an assurance that he has not 'spoken privately with anyone whose evidence

affects our client's interest'. This is because of the possibility that persons spoken to may be called to give evidence upon matters not privately discussed with the Commissioner. It is possible that such ultimate evidence may affect, positively or negatively, Mr Leck's interest.

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Would you please address future correspondence to Mr Groth."

We were left, lastly, none the wiser.

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COMMISSIONER: Wasn't that a direct answer to your question?

MR ASHTON: No, I don't think it was, Commissioner. For a start, it doesn't even tell us whether we're right in our concern that you have about speaking to Dr Fitzgerald.

COMMISSIONER: Why does that matter?

MR ASHTON: Because he was an important witness to our interests.

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COMMISSIONER: In what respect?

MR ASHTON: Well, Commissioner, he was, after all, engaged by - well, the Health Department, but Mr Leck forwarded the material to him to undertake the investigation. There are issues about how - in how timely a fashion that investigation was undertaken and whose responsibility that might be.

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COMMISSIONER: But what part of your letter was unanswered?

MR ASHTON: Well, for a start, we are - we still don't know whether you have had discussions with Dr Fitzgerald.

COMMISSIONER: You didn't ask that, did you?

MR ASHTON: Specifically raised him in our letter, Commissioner. "For example, we would expect Dr Fitzgerald's evidence to be relevant in this regard".

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COMMISSIONER: Yes.

MR ASHTON: There has been press speculation that Dr Fitzgerald was one of the persons with whom the Chairman met privately.

COMMISSIONER: Then your question?

MR ASHTON: "We therefore ask for an assurance that the Chairman has not spoken privately with anyone whose evidence affects our client's interests. Alternatively, we ask we be advised what the evidence is."

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COMMISSIONER: Did you get a response to that?

MR ASHTON: Well, Commissioner, we say, with respect, it was inadequate. I can't take it any further. I have read the

letters out.

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COMMISSIONER: You obviously can't. What is wrong with that response? You asked ask us a question, we answered it.

MR ASHTON: In my submission, it doesn't answer it.

COMMISSIONER: Why not?

MR ASHTON: I said it is enigmatic.

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COMMISSIONER: Why was it enigmatic?

MR ASHTON: It might at least have said, "Forget it, we didn't talk to Dr Fitzgerald", or, "Yes, we did, and this is what happened."

COMMISSIONER: We answered what you asked us.

MR ASHTON: Commissioner, I remind you again what we're concerned about here-----

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COMMISSIONER: Was there-----

MR ASHTON: -----is the apprehensions of the reasonable bystander; not a question of what you told-----

COMMISSIONER: The reasonable bystander doesn't know about that correspondence.

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MR ASHTON: I am sorry, Commissioner, but the authorities assume reasonable inquiry upon the reasonable bystander as to this kind of issue.

COMMISSIONER: How would the reasonable bystander find out about a letter that's in your solicitor's file?

MR ASHTON: Well, Commissioner, I have just - I put to you the authorities assume the relevant knowledge and then examine whether the reasonable bystander would have an apprehension with that knowledge. Otherwise, Commissioner, the test would be, well, if the reasonable bystanders in the Northern Territory who knows nothing about this inquiry - it makes a nonsense of the test.

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COMMISSIONER: Of course.

MR ASHTON: Of course. And the last matter, Commissioner, and it is, I have to submit, respectfully and regretfully, was a threat made to counsel, including me, of retaliation against our clients on the 29th of June 2005, that in the event that we make the forensic mistake of attacking the wrong witness, there would be consequences for our client.

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COMMISSIONER: Well, can we have the transcript? What page is that, Mr Ashton? I think you were speaking of Wednesday before last, was it?

MR ASHTON: Yes, Commissioner.

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COMMISSIONER: Have you got a page reference yet? I think - here it is, Mr Ashton, page 1653.

MR ASHTON: Thanks, Commissioner.

COMMISSIONER: Where you said, "I have no questions." This is line 10. I am ordering-----

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MR ASHTON: No, it is before that, Commissioner, I am sorry. It was in the course of Mr Diehm's cross-examination of Dr Miach.

COMMISSIONER: Yes. When we go back to that-----

MR ASHTON: Sorry, what was the page number again, Commissioner, thanks?

COMMISSIONER: 1638 line 5 where I said, "Mr Diehm, I think it only fair for me to say that at this stage the trend of your questions is obvious. I would expect from a counsel of your experience that you would not be attacking Dr Miach in this way, except on explicit instructions. It is, therefore, right, is it, for us to assume Dr Keating has instructed you to launch this attack on Dr Miach. Is that right?" "I have as counsel, as you know, Commissioner, a reasonably broad discretion as to the way in which I ask questions and what questions I ask. In fact, it is not for my client to tell me what questions to ask." I said, "Indeed. But by the same token, it is not for you to launch such an attack without your client's instructions." Mr Diehm: "Commissioner, I don't have instructions and I have not been - I have not been acting outside the scope of my instructions in asking the questions I am asking." And I said, "Well, I am going to adjourn for five minutes so you can take appropriate instructions, but I want everyone at the Bar table to understand that one of the issues that's clearly being raised is this shoot the messenger attitude, and if it comes to our attention that anyone from the Director-General of Queensland Health down has given instructions for a witness like Dr Miach to be attacked, then that will be an appropriate foundation for us to make findings at the end of the proceedings." Mr Diehm then said, "Commissioner, this is not - my question are not a shoot the messenger situation, and, with respect, that is not a fair observation about this situation. The second thing I wish to raise about the matter is that my client was subjected in Brisbane to a rather grueling and vigorous series of questioning no less than what I have just been asking of Dr Miach, in my respectful submission, and the situation must be that parties who are the subject of allegations at this Inquiry are entitled to defend themselves." Commissioner: "Of course, you will have every opportunity to put to Dr Miach your instructions. I will give you the opportunity to confirm those are your instructions, since you say that you don't have specific instructions to do that."

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Then there was an adjournment and we resumed on 1640 line 5.

Commissioner: "Yes, Mr Diehm." Mr Diehm: "My instructions would be to ask the questions I'm asking." Commissioner: "That's fine, then. There's no need to explain. You have got your instructions, so you can continue." "Commissioner, though, it is a matter of concern to my client that it appears, from what you have said, that there will be some adverse consequences for him if he persists through me in asking those questions." I said, "Well, he gives you instructions, what consequences flow from that is a matter for us." Mr Diehm: "It is a matter for him, Commissioner, in the sense, with respect, that what you have said gives rise to an inference, in my respectful submission, that if he seeks to challenge the evidence of those who have made accusations against him, that he will have some sanction visited upon him." I said: "Not at all. That's, with respect, a completely inaccurate statement of the situation. You have been going on now for - what is it, about three hours? There has been no attempt to prevent you from challenging adverse evidence, and you have unrestricted right to do that. The question is whether there's any merit in the line of cross-examination which has been taking place now which seems to involve the implication that Dr Miach is somehow personally responsible for referring patients to Dr Patel for surgery in light of the previous adverse outcomes. If your instructions are to do more than merely protect your client's interests and to suggest that Dr Miach is somehow culpable, then that's a matter for you. You pursue those instructions if they are the instructions you have." "Commissioner, that's not the purpose of my questions. I said, "If that's not the purpose, then I'm gratified to hear that."

End of discussion until, Mr Ashton, you stand up and the exchange can be seen at page 1653 line 10: "I have no questions, but I feel obliged, with respect, to say that that's not to be taken as an acquiescence in the intimation that you earlier gave to Mr Diehm, and me and my colleagues at the Bar table. That's something as to which I'll need to take instructions." I said, "Well, I think I know what you're referring to. I thought - and no doubt you would be in a position to take me to the relevant case law, and so on, at an appropriate time - I thought it was well settled that in proceedings where the standard of proof is balance of probabilities rather than criminal proceedings where it is beyond reasonable doubt, that if counsel are instructed to, or the tribunal of fact can infer that counsel are instructed to attack a witness without a foundation subsequently being established for that attack, that is something which a Court can take into account in making findings of credit." Mr Ashton, "Well, respectfully, Commissioner, I don't wish to engage on that matter. I would prefer to have the opportunity to consider the implications overnight." And I said, "Of course, of course. Consider the implications, and if you wish to persuade me otherwise as a matter of law, then of course I'll listen to what you have to say, but I would have thought it is quite elementary that if that sort of attack is made, then the client on whose behalf it is made bears the consequences." Mr Ashton, "Thank you, Commissioner."

Is that the passage you are referring to?

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MR ASHTON: Principally, the first passage you read, but, of course, that lends context to it, the first passage.

COMMISSIONER: Come back with any case law?

MR ASHTON: No, in fact we came back about notice we were going to apply to the Court.

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COMMISSIONER: You didn't come back with any case law.

MR ASHTON: No, Commissioner, because it is not to the point.

COMMISSIONER: You didn't attempt to persuade me my view of the law is wrong.

MR ASHTON: That's not the expression that gave us the concern, Commissioner. It was a third version of what you first said, which was a plain threat to retaliate against witnesses, against clients if we as counsel attacked a witness being the wrong witness. That's my submission.

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COMMISSIONER: Being - without a foundation?

MR ASHTON: Well, Commissioner, may I say this was all in the context of a careful, studious, polite but powerful cross-examine by Mr Diehm in which he had laid a complete factual foundation for what he was doing.

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COMMISSIONER: Yes, an excellent cross-examination. As I said, it went on for three hours and I didn't interrupt once, until there was appearance that he might be going further than protecting his client's interests and attacking someone else without the need to do so. He assured me that that wasn't his intention, so I allowed him to continue. Was there a problem with that?

MR ASHTON: What you said, if that was your concern, Commissioner, was that where counsel did that you regard yourselves as free to draw inferences against the clients.

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COMMISSIONER: Yes, and I explained that and gave you an opportunity to comment on it and you didn't take advantage of that opportunity.

MR ASHTON: I expressly reserved my position because of my concern about that.

COMMISSIONER: I gave you an opportunity to comment on it and you chose not to.

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MR ASHTON: You gave me an opportunity to comment on another version of it, Mr Commissioner.

COMMISSIONER: Mr Ashton, I explained exactly what I had in mind, I asked for your assistance. If you thought my proposition was wrong and you chose-----

MR ASHTON: We thought your proposition was so wrong, Commissioner, the trigger was really there, and, as you know, Commissioner, we shortly after communicated what our instructions were.

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COMMISSIONER: Shortly after. Well, that's three weeks ago. What have you been doing in the meantime?

MR ASHTON: Well, Commissioner, I was about to explain that but you cut me short.

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COMMISSIONER: Oh, yes. What is it?

MR ASHTON: Our position is simple but serious, and that is that we have a problem - my client, as a Crown employee, has a problem about his indemnity.

COMMISSIONER: Yes.

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MR ASHTON: He doesn't seek government money to bring his application, he doesn't seek anybody's money to bring his application but he needs some sort of assurance that the Crown, should he be unsuccessful, or the State, should he be unsuccessful, will not pursue him for adverse costs.

COMMISSIONER: That's not a matter for me.

MR ASHTON: Well, you asked me why we haven't replied yet and I am telling you. We're in correspondence with the Attorney General about that. And that's as much as I can tell you, and that's why I found myself in this awkward position of - and, Commissioner, you have not hesitated to suggest a moment's silence is a waiver I have found myself in this awkward position.

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COMMISSIONER: I have never suggested a moment's silence is a waiver; I suggested a month and three days is a little more than-----

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MR ASHTON: I have explained that on the subject of waiver. Can I conclude my submissions with this passage from Callinan J. He referred to the Vakauta decision, which is an important one on this waiver issue, incidentally, that a high question about whether this waiver proposition applies at all in Commissions of Inquiry, as distinct from party-party litigation because of the public dimension to it. That's adverted to by Thomas J in Connolly/Ryan, but returning, if I may, to this passage:

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"It is unnecessary to explore the sorts of problems to which some of the statements in Vakauta may give rise; such as: that, on one view, the literal application of them may have" -

because they talk about waiver -

"the consequence that a higher and greater responsibility

to ensure the conduct of impartial proceedings is imposed upon counsel than the Judge trying the case; that an apprehension of bias may be created cumulatively so that its full impact and relevance may really only become apparent when judgment is pronounced; that exceptionable, apparently biased statements by judges in the course of proceedings may confront counsel with dilemmas which it is almost impossible for them to resolve, or to resolve without causing offence to the Court and the creation of a not unreasonable perception on the part of the parties, of prejudice to the one who takes the point; the risk of other dilemmas of the kind to which the Court referred in Livesey", and so on.

Those are my submissions, Commissioner.

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COMMISSIONER: Mr Ashton, can you answer me a couple of other things: is it true as I've read from the press, that in the proceedings in Brisbane on Monday of this week - yesterday, you informed the Court that your client was still considering its position and may wish to participate in the proceedings?

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MR ASHTON: Yes, Commissioner.

COMMISSIONER: Secondly-----

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MR ASHTON: Well, the Court was informed about the indemnity problem, Commissioner.

COMMISSIONER: Mmm. Secondly, as you understand, if your client were to apply to the Supreme Court for an interlocutory injunction to restrain the further prosecution of these proceedings pending a hearing in the Supreme Court, your client would be required to give an undertaking as to damages; you understand that, of course?

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MR ASHTON: Yes, Commissioner.

COMMISSIONER: Is your client prepared to offer such an undertaking to those who will suffer loss or damage as a result of these proceedings being-----

MR ASHTON: Mr Commissioner - sorry-----

COMMISSIONER: As a result of these proceedings being delayed pending a final resolution of the proceedings in the Supreme Court?

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MR ASHTON: Commissioner, my instructions are that the application will be of a limited nature that I mentioned.

COMMISSIONER: Well, is the answer that your client is not prepared to give such undertaking?

MR ASHTON: I don't have - in fact, are you asking me to give you the undertaking, Commissioner?

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COMMISSIONER: No, I'm asking if your client is prepared to give one?

MR ASHTON: To whom?

COMMISSIONER: To the Court.

MR ASHTON: Well, the Court is better placed to answer that question, with respect.

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COMMISSIONER: No, Mr Ashton, don't nitpick, you're asking me to consider an application on the footing that depending on my decision, the Supreme Court may be the appropriate matter to resolve it, if you're now saying that your client is in a position to give an undertaking as to damages so as to cover the costs that will be thrown away by organisations like the nurses union and the victims or the patients, the Medical

Board Of Queensland, the AMA and so on, then that would be a very relevant factor in my consideration of your application.

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MR ASHTON: Commissioner-----

COMMISSIONER: So can you simply answer my question?

MR ASHTON: I don't have instructions to give that undertaking.

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COMMISSIONER: No, that's not the question. Is your client prepared to give one to the Court?

MR ASHTON: I don't have instructions about that yet either and I'm sure we'll tell the Court when the subject arises.

COMMISSIONER: All right.

MR ASHTON: As to that matter of costs thrown away, as you appear to be adverting to-----

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COMMISSIONER: Yes.

MR ASHTON: -----with respect, in terrorem, it's said in-----

COMMISSIONER: No, Mr Ashton, I'm simply asking you a question and you've answered it.

MR ASHTON: Very well, Commissioner. Can I just refer you to in Connolly Ryan, his Honour Thomas J refers at the conclusion of his judgment when he refers to relief, to a decision of the Federal Court in Gaisford. He quotes, the Court:

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"We are, of course, aware that the orders which we shall make will have the result that an inquiry which has already proceeded some distance will be brought to a premature end so that considerable time and resources will have been wasted. It is perhaps to state the obvious, however, to say that a finding of a reasonable apprehension of bias can lead to no other result. There can be no loss if findings of apprehended bias and if there were", the report follows-----

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COMMISSIONER: Now, your application is limited to which of the topics in the Terms of Reference?

MR ASHTON: 2, 4 and 5, Commissioner.

COMMISSIONER: So you don't want any investigation of the circumstance of employment of Dr Patel either by other than your client, is that right?

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MR ASHTON: No, what I've asked for, Commissioner, is that you disqualify yourselves in respect of those paragraphs from proceeding to further call Mr Leck as a witness or make findings or recommendations in respect of him. I seek nothing more than that, Commissioner.

COMMISSIONER: Right, so that's 2, 4-----

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MR ASHTON: And 5.

COMMISSIONER: -----and 5? Yes, all right. I'd like some time to consider the matter. Does anyone else wish to make any submissions?

MR HARPER: Commissioner, I can foreshadow we would like to make some submissions, but again, a short adjournment might assist so that I can take instructions.

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COMMISSIONER: Certainly. Mr Diehm, you're in a delicate position because you are already a litigant in another place.

MR DIEHM: Yes, Commissioner. My client has chosen the Supreme Court as his forum to make its application, so I'm not making the application to you as I have previously indicated, that isn't an acquiescence or a waiver, it's simply unnecessary given the course my client has chosen and similarly, I might also take the opportunity to put this on the record: to-date I have intimated on a number of occasions to the Commission that my client is not seeking any order for the Commission to cease sitting until that Supreme Court application is resolved, that is for the simple reason as you averted to last week, Commissioner, that the legitimate interest of a person in my client's position is if the concerns, I should say, the publication of a report with recommendations, not the hearing of evidence in the interim.

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COMMISSIONER: Yes. Mr Diehm, I'm sure that you and I understand one another very well, but I should say, so that someone else reading the transcript won't misunderstand the exchange that took place. You have said that you're not acquiescing in the course that has been taken. For my part, I can't give that any imprimatur and say that your client's further participation in the proceedings doesn't amount to an acquiescence, that's a matter for the Supreme Court to determine, and what do you say or what I say is largely irrelevant to that, the fact is that the proceedings are ongoing and your client is continuing to participate. If a Supreme Court judge considers that's acquiescence, then that's a matter for the Supreme Court judge. All I'm simply saying is that the fact that you say you're not acquiescing is not something that I'm acknowledging or accepting, that's a matter for the Supreme Court.

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MR DIEHM: Yes, perhaps if I can clarify what I meant by that, Commissioner?

COMMISSIONER: Yes.

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MR DIEHM: When I say acquiescing, by not applying as Mr Ashton is, I wouldn't wish to be taken to be - or my client to be taken as acquiescing in the conduct of the inquiry to the contrary interest of his application.

COMMISSIONER: Yes.

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MR DIEHM: That is all, yes.

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COMMISSIONER: I know that you don't wish to be taken as acquiescing, but the fact that you say that you don't wish to be taken as acquiescing may not necessarily prevent a Supreme Court judge saying that that is acquiescing.

MR DIEHM: No.

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COMMISSIONER: But that's a matter for you and your client in the Supreme Court.

MR DIEHM: Quite so, thank you.

COMMISSIONER: Yes. Mr Andrews, do you wish to make any submissions?

MR ANDREWS: Only this, Commissioner: that there is - there's an amount of orchestration in the timing of Mr Ashton's application. I say that because there is no need for him prior to the calling of Mr Fleming to bring the application. He is not seeking to have Mr Fleming's evidence excluded. Mr Ashton's application seeks to have the commissioners effectively refrain from proceeding further to call Mr Leck as a witness. That, after all, is something that, at Mr Ashton's request, was not likely to happen until you had returned to Brisbane.

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COMMISSIONER: Yes.

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MR ANDREWS: The other aspect of his application is to restrain the commissioners from making findings with respect to Mr Leck in respect of paragraphs 2, 4 and 5 of the Terms of Reference. There has been no notice yet save for to hypothesize that you're using, from the evidence back in Brisbane, to Mr Ashton that there has been no notice to Mr Leck of the potential to make adverse findings against him.

In that respect, the application, there's no urgency for you to decide it today, nor was there any reason that I can suggest to you that would explain why it was brought without notice when Mr Fleming has been summoned to Court now for the convenience of Mr Ashton so that he might return this afternoon to Brisbane after Mr Fleming's evidence has been dealt with.

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There is no urgency or need for you to rush your response to Mr Ashton's application.

COMMISSIONER: Mr Harper, I understand you'd like a little while to think about the matter?

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MR HARPER: Yes, Commissioner.

COMMISSIONER: Shall we take a 10 minute break? Would that suffice?

MR HARPER: That would be convenient.

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COMMISSIONER: Thank you.

THE COMMISSION ADJOURNED AT 3.07 P.M.

THE COMMISSION RESUMED AT 3.20 P.M.

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COMMISSIONER: Mr Harper?

MR HARPER: Yes, Commissioner. I've obtained instructions to oppose the application. I might at the outset express what is our preliminary view of the application by indicating that we would not be arguing that the application itself be adjourned for some other argument. In essence, our opposition to Mr Ashton's application is that firstly, that there is no evidence of any reasonable apprehension of bias. Our submission will be that any observations made by the Commission related specifically to evidence before you and not any specific present view. As I say, that is our preliminary argument.

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Secondly, for the Commission to determine of its own volition that certain Terms of Reference should not be open to it in relation to certain witnesses, in our submission, would unnecessarily and inappropriately hamstring you from the responsibilities and obligations which you have been charged with by the Governor-in-Council.

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Commissioner, however, our main argument today is that an application of this significance should not be heard this afternoon and determined this afternoon. It has some significant ramifications for all parties involved. We support the view expressed by Mr Andrews that there is no urgency for this application to be brought and determined this afternoon and we would submit, Commissioner, that it may be appropriate where we adjourn this application to be heard perhaps in Brisbane on Friday morning.

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Those, in essence, Commissioner, are my instructions and submissions for this afternoon.

COMMISSIONER: Mr Harper, I realise that you're at a very great disadvantage as are all of us because the application was made without warning this afternoon. Despite that, now that the application has been made, I see real difficulties in postponing the determination of it when we have witnesses lined up to give evidence this afternoon and over the next two days, so I am minded to rule on the application this afternoon.

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MR HARPER: Very well, Commissioner. I can perhaps do little

more than I have done then in expressing our view as to the matters firstly relating to bias which we acknowledge is largely a matter between Mr Ashton and counsel assisting to argue, but our view is that as I mentioned, any of the observations which have been made by you related to evidence before you and the totality of that evidence over the close to six weeks of hearings which have now occurred and the other evidence gathering which has been done by Commission staff and should be seen in that context.

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As I again mention, for you to make a ruling today, that as requested by Mr Ashton, that certain parts of the Terms of Reference be excluded, in our view would make the commission unworkable. It would be very difficult, in our submission, to be able for you to report appropriately on those Terms of Reference without having regard to the individuals who were responsible, in our client's view, for those - for the omissions occurring.

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Commissioner, I don't think I can assist you any further other than outlining those general views.

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COMMISSIONER: Thank you Mr Harper. Mr Allen?

MR ALLEN: Commissioner, my instructions are to urge the Commission on behalf of the Nurses Union to dismiss my learned friend's application and I respectfully support my learned friend Mr Harper's submissions that it would not be a practical option for the Commission to somehow limit its inquiry so as to exclude Mr Leck from its inquiry or any way limit the task it has been entrusted with pursuant to the Terms of Reference.

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COMMISSIONER: Thank you, Mr Allen.

MR ALLEN: Thank you, Commissioner.

COMMISSIONER: Anyone else at the Bar table? Thank you.

I propose to give an immediate ruling. As I will be speaking without notes, I reserve the right to check the transcript and make any typographical or clerical corrections that may be necessary but not to change the substance of what I'm about to say.

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It has often been commented that the most difficult task ever faced by a judge is to deal with an application to disqualify himself or herself on the ground of apprehended bias. The judge may know in his or her own heart that the judge is completely unbiased, but that isn't the real test. The real test is whether a reasonable person with knowledge of the relevant facts would consider that the decision-maker brings to the proceedings a mind which is affected by some prejudgment or pre-formed views with regard to the outcome.

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It is therefore irrelevant for me to say, although I propose to say it anyway, that I do believe in my heart of hearts that I am unbiased as regards Mr Leck. I do believe that whilst

evidence has been heard which may call into question some of his conduct, we have not yet heard a full answer from him in relation to those matters, and until we do hear his full answer, we're not able to form a view one way or the other either in his favour or against him. The question though, as I've said in legal terms, is whether a reasonable person might form an apprehension that I'm biased.

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I've indicated that that is a difficult thing for a judge. In many ways, it's an even more difficult thing for a Commissioner in my position, because a judge who disqualifies himself or herself simply gets transferred to another case and there's always another judge available to take over the hearing.

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Obviously, if I were to disqualify myself in whole or in part, that would have far-reaching consequences. It would have consequences for the costs of those parties who are represented at their own expense such as the Queensland Nurses Union and the Australian Medical Association; it would have ramifications for the costs of those parties whose expenses are borne directly or indirectly by the taxpayer such as the Patients Group, Queensland Health, the Medical Board, Dr Keating, Mr Leck and others.

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It would also have very grave personal consequences for the individuals who wish to see an outcome to this, and the thing that presses most upon my mind is the gruesome stories that we've heard over the past three or four weeks: cases like that of Mrs Kemps' late husband who, on the evidence as it presently stands, was undoubtedly deprived of his last months of life by the incompetence of Dr Patel; cases like the 15 year old boy who lost his leg; cases like the gentleman we heard this morning who had his bowel removed for no good reason at all. They're the people that the inquiry is about.

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If, as a consequence, individuals have to face proceedings in another place, be that the Crime and Misconduct Commission or even the criminal courts, that is one of the potential fallouts, but my primary concern, as I've articulated I believe from day one, isn't to conduct a witch-hunt into the individuals who may or may not be blamed for what went wrong, but to do what we can to fix up the system so that the sorts of horror stories that we've heard over the past three weeks aren't repeated either here in Bundaberg or anywhere else. That is what makes my decision a particularly difficult one.

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Mr Ashton has raised a number of bases for suggesting that a reasonable apprehension of bias arises. In my view, a reasonable bystander aware of the facts would not conclude from those matters that I, let alone the Deputy Commissioners, have prejudged anything. To make good that view, I propose to go through briefly the matters raised by Mr Ashton.

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Firstly, there is the fact that Mr Leck was called on very short notice, about an hour, to give his version of events. At that stage, we understood that the CMC was going to hold a public hearing in a short period of time, and that that public

hearing would give Mr Leck, along with Dr Keating, a full and untrammelled opportunity to defend themselves against any allegations which might result in findings of improper conduct on their part.

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I accept, I have always accepted and I continue to accept that Mr Leck, Dr Keating and others have a clear right to natural justice before any conclusion adverse to themselves is made, but it must be clearly remembered that at the stage at which those events took place, we were of the understanding that decisions about their conduct would be made, not by the Commission of Inquiry, but by the Crime and Misconduct Commission based on evidence that would be heard within a very short space of time.

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For various reasons, that didn't happen, and when it didn't happen, I did what I considered to be the best possible to rectify any damage to Dr Keating or to Mr Leck by giving each of them through their counsel the opportunity either to give evidence immediately to redress any imbalance or to make statements on their behalf to redress any adverse views, and indeed, Mr Ashton, on behalf of Mr Leck, availed himself of that opportunity.

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I don't think that any reasonable bystander aware of all of those facts, which are true facts, would feel that there was anything in my conduct or our conduct which involved a prejudgment concerning Mr Leck, or for that matter, Dr Keating.

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The next matter of complaint raised by Mr Ashton concerns what he refers to as the differential treatment of witnesses. It is undoubtedly the case that I and other members of the Bench have shown courtesy and sympathy to witnesses whose circumstances are deserving of the greatest possible sympathy.

I cannot imagine that if Mr Leck was here, he would have objected to our expressing our appreciation to people like Mrs Kemps and many of the other patients who have come along to give their evidence or that he would have any objection to the fact that we did our best to prevent them from the harrowing need to go through matters of evidence relating to their or their loved ones' medical treatment.

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On the other hand, when it has come to people involved in the administration of the medical system, I believe that we have consistently been rigorous in our exploration for the truth where necessary and I think it's worth saying in that context that Commissioners like myself don't come to these proceedings without a knowledge of what goes on in the real world. Things will happen in evidence which excite one's concern, one's suspicion that what is being said isn't the whole truth. I'll take an example with Mr Leck because I think it is a very good example.

The evidence given by Mr Leck was that approximately six weeks before he gave his evidence he had signed an authority to allow Dr Patel to fly back to the United States business class at the expense of the taxpayers of Queensland and he claimed not to remember doing that. Now, maybe that was true; maybe it had gone completely out of his mind. But in my view, those circumstances were enough to excite interest in whether or not Mr Leck was being entirely frank and candid in the evidence which he was giving and, therefore, I felt justified in exploring that issue and doing so in a very robust way, and that's not exclusive to Mr Leck. I think it's fair to say that I was equally robust in my questioning of Dr Keating on certain issues. I was equally robust in my questioning of Dr Huxley on certain issues. On each occasion it wasn't a matter that I'd come here with some predisposition, some ingrained belief that these witnesses were dishonest or dishonourable, or that they had done wrong. It was simply that the way the evidence came out excited a concern and I pursued that concern, and I know of no principle of law that prevents me or anyone else in a decision making position from exploring matters which at first blush don't seem to be entirely consistent with what one would expect from ordinary human experience.

The next matter raised by Mr Ashton concerns the publication of an interim report. The interim report did three things. Firstly, it recommended a legislative change to increase the penalty for doctors who obtain registration by fraud. Mr Ashton doesn't suggest that there was anything improper in making that recommendation. The second thing that we recommended was that the system for registering doctors in areas of need be tightened up and, again, I don't understand Mr Ashton to suggest that there was anything wrong with that suggestion. The third thing that we did was to recommend certain criminal charges against Dr Patel. What we made very clear in that interim report, and I refer specifically to what is said in paragraph 4, is that there were other individuals who may potentially have a case to answer but that natural justice requires that those individuals be given notice of the relevant allegations, an opportunity to adduce evidence in respect of those allegations and an opportunity to address submissions to the Commission in relation to those allegations.

Mr Leck was not mentioned in the interim report and, in my view, nothing in the interim report could conceivably be regarded as reflecting adversely on Mr Leck. The fact that we

recommended charges against Dr Patel in respect of his fraud was based on evidence given by officers of the Medical Board of Queensland which had been fully tested by cross-examination on behalf of all interested parties, including counsel representing Mr Leck, and not one of them challenged the substance of the evidence that Dr Patel had got into this country as a medical practitioner by providing false information. I am mystified as to how Mr Ashton seriously suggests that by expressing conclusions based on evidence which he had the opportunity to challenge and which he chose not to challenge, we have somehow revealed ourselves as having some form of apprehended bias.

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The same relates to the other charges recommended in respect of Dr Patel. The unequivocal evidence, which since then has received further support from Dr Woodruff and other sources, indicated very strongly the grounds for a prima facie case that Dr Patel was guilty of serious criminal charges, including homicide, either murder or manslaughter. We were not saying that Dr Patel is guilty. That's not for us to decide. That's for a jury to decide. We simply decided that there was evidence which made out a prima facie case sufficient to justify charging Dr Patel. We said nothing about Mr Leck or his responsibility for or involvement in that situation and we still say nothing about Mr Leck and his responsibility for or involvement in that situation. Again, I am candidly mystified as to how it can be suggested that by indicating that there is a prima facie case that one man has committed homicide, we are therefore exposing ourselves to the allegation that we have an apprehended bias against another individual.

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The next and I think final matter raised by Mr Ashton concerns an exchange which took place approximately a fortnight ago during the cross-examination of Dr Miach by Mr Diehm of counsel. As I indicated in the course of argument, Mr Diehm conducted an extremely thorough and, if he will forgive me for saying so, an extremely competent cross-examination of Dr Miach. It was a fine example of a good cross-examination by a very capable barrister.

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There was one stage during that cross-examination when I misunderstood the direction of Mr Diehm's questions and I thought, for a moment, that Mr Diehm was attempting to advance an accusation against Dr Miach. After an adjournment and further instructions were obtained, Mr Diehm assured me that was not his intention and I accepted Mr Diehm's assurance, as that I invariably would. I made it clear at all times that I was not going to restrict his right or any other counsel's right to fully test and challenge any evidence adverse to their clients but that I was concerned that everyone be aware of the risks to which their clients might be exposed if they made allegations or advanced allegations in cross-examination which were unsubstantiated or subsequently found not to be substantiated.

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Mr Ashton suggested that I didn't express that proposition or that I expressed it in different ways on different occasions.

He might be right about that. The way I look at it is that, having expressed my concern in the heat of argument, we came back to the matter later and I clarified what my concern was and Mr Ashton himself stood up and expressed some disquiet. I clarified it further and made it clear that the only situation which concerned me was a situation where an attack was made on a witness without a substantial basis for that attack subsequently being established.

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I put it to Mr Ashton very, very clearly that I thought that it was a well settled principle of legal practice that if a barrister attacks a witness in that way and it's subsequently found that there was no basis for the attack, that it can reflect adversely on his client. Mr Ashton said he would like the opportunity to think about that and respond to it. I made it very clear again that if my view of the law was wrong, I would welcome any further submissions from Mr Ashton on that subject, any case law that he'd like to draw my attention to or any other matters to correct my error. Of course, Mr Ashton did not avail himself of that opportunity and the next thing we heard of the matter was the letter that his instructing solicitors Hunt & Hunt sent to the Secretary to the Commission of Inquiry on the 4th of July 2005 threatening proceedings for apprehended bias.

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For the reasons I have canvassed, doing the best I can and bearing in mind that I'm in this awkward position of having to make an objective judgment regarding my own conduct, I do not feel that the grounds are made out for a case of apprehended bias and I'm fortified in that view by reading what Justice Thomas said in the case of Carruthers and Connolly (1998) 1 Queensland Reports page 339, which quite fairly may be described as the leading Queensland case governing situations of this nature, where his Honour said under subheading 5:

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"It is not to be expected that Commissioners who are appointed to examine and make recommendations on matters such as those entrusted to these Commissioners should be devoid of a sense of social, political, moral or economic direction. The main question in the end will be whether a Commissioner is reasonably open to persuasion and seen to be so. In the circumstances which have been shown to exist in relation to the appointment of this particular Commission and the performance of its work, political prejudice or favouritism, if shown to be harboured by a Commissioner, would be a matter for considerable concern."

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And nothing, I note, of that kind is suggested in the present case. In the same case under the subheading 6 Justice Thomas added:

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"It must be remembered that the cut and thrust of forensic work may produce tensions and that denigratory comments to counsel, sarcasm and hard words from time to time may not be amiss. It is also to be remembered that although there are the trappings of Court procedure, the

investigation is essentially inquisitorial and that Commissioners are to be expected to play a far more active role in ascertaining the facts than permitted for a Judge and one should not interpret robust conduct as a badge of bias."

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For those reasons, were the application made at the appropriate time, I would have had serious doubts as to whether or not I should disqualify myself. However, I would like to add this: the first duty that fell to me in conducting this Commission of Inquiry was to consider a suggestion that my Deputy Commissioner Sir Llew Edwards was himself the subject of an apprehension of bias due to connections between his wife and the Medical Board. At that time I concluded that there were no grounds for a reasonable apprehension of bias but nonetheless, in order to preserve the transparency and the integrity of the proceedings, I invited Sir Llew to stand aside from issues relating to the Medical Board and he very properly agreed to do so.

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If the issues now raised by Mr Ashton had been raised in a timely fashion, I have to say that despite my strong belief that no case is made out for a reasonable apprehension of bias, I would have done everything in my power to ensure that those concerns were properly addressed so as not to in any way infect the integrity of this Commission.

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The real difficulty that we have is that this application has been made so late and in such awkward circumstances. Mr Ashton was here right back on the 25th of May when he made it clear in the transcript, page 389 lines 21 to 24, as regards the calling of his client, Mr Leck, "We do not for a moment complain about - certainly don't dissent for a moment about your authority and power to require him to give evidence today and we don't complain about your decision to do so." That was his position on the 26th of May.

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His position on the 3rd of June had progressed to the point where at transcript page 866 line 39 he was complaining that the treatment of Mr Leck was unfair, unnecessary and unexplained and, yet, even then he made no application. He didn't ask us to disqualify ourselves. He didn't ask us to review our approach in relation to Mr Leck or any other witness or any other party. That was his position, as I've said, on the 3rd of June.

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Following receipt of the letter from his solicitors Hunt & Hunt dated the 4th of July 2005, I raised the matter again when we came to Bundaberg on Tuesday of last week and invited him to make submissions. He didn't apply for us to disqualify ourselves - I beg your pardon, Mr Ashton wasn't here. His instructing solicitor, Ms Feeney, didn't apply for us to disqualify ourselves. I asked her whether she wished us to adjourn the proceedings pending the application; she made a submission indicating that she wished us to adjourn but did not support that application by any submissions and subsequently withdrew it.

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I indicated that I would hear further argument on the Thursday of that week. On that day Mr Ashton was led by Mr D J S Jackson of Queen's Counsel. I again asked whether Mr Jackson had any application and he told me that he didn't.

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What we then learnt was that despite the letter of 4th of July 2005 saying that Hunt and Hunt had instructions to bring an application and that they anticipated being in a position to file and serve the material by Wednesday the 6th of July, no such application was filed or served. Mr Ashton has sought to explain that by saying that whilst Mr Leck doesn't want anyone to pay for him to bring the application, he nonetheless wants an indemnity against any costs orders that may be made against him as a result of it. Now, it is not our business to offer indemnities of that nature. I have some difficulty in seeing how any responsible government could say to Mr Leck, "Bring your application and if you lose, then we'll pay the costs of everyone involved, including, for example, the nursing union, the patients group, anyone else who wishes to participate in the proceedings." I don't know how a responsible government could give anyone a blank cheque like that. But, anyway, that's now the explanation for why Mr Leck isn't doing what was foreshadowed in his solicitor's letter of the 4th of July 2005.

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One might wonder why those issues weren't considered before the letter of the 4th of July 2005 was written, rather than leaving it until Wednesday or Thursday of last week for Mr Leck's legal representatives to turn their mind to those matters, but that seems to be what has occurred.

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As matters now stand, there are proceedings on foot in the Supreme Court of Queensland brought by Dr Keating. I and the two Deputy Commissioners have indicated through lawyers to the Supreme Court that we will abide the Supreme Court's decision. It's not our function to defend ourselves. We will accept whatever the Supreme Court rules about our conduct. For my part I am gratified to have the opportunity that if my conduct has been erroneous, to have it corrected by the Supreme Court and if my conduct has been appropriate, to have it vindicated by the Supreme Court, and I look forward to having an outcome one way or the other. But in circumstances where Mr Ashton's application is made so late, after his client has been involved in these proceedings for six weeks, where Mr Ashton not only didn't complain but specifically said that he did not object to the course which was taken on the 26th of May, when Mr Ashton expressed some complaints on the 3rd of June but didn't bring any application then, when Mr Ashton and his client continued to participate in these proceedings for another four weeks or so without raising any objection, and where an application is now made for the very first time without notice, without forewarning and without explanation for why it's done now, I don't consider it would be appropriate for us to engage in a prejudgment of a matter which is to be determined by the Supreme Court in other proceedings, particularly where, as Mr Ashton has confirmed, his client has already indicated to the Supreme Court that he wishes still to consider participating in those proceedings in

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the Supreme Court.

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The form of order sought by Mr Ashton is, and I say this with the utmost respect, quite bizarre. He seeks to have his client quarantined so that we can make full inquiry as required to under the order in council regarding the circumstances of the employment of Dr Patel, his appointment to the Bundaberg Base Hospital, all issues relating to the appropriateness, adequacy and timeliness of action taken to deal with allegations and whether matters should be referred to the Commissioner of Police Service or to the CMC or for disciplinary action in respect of everyone else, but he wants to be quarantined from that sort of scrutiny. I am not aware of any case in history where a Royal Commission or Commission of Inquiry has said to a witness, "We are prepared to quarantine you. We'll make whatever findings we think appropriate about everyone else but we'll stand you aside."

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What Mr Ashton proposes is, with respect, totally unworkable. Let's take the simple situation where someone says, "I did my duty. I knew of concerns involving Dr Patel. I did my duty by referring them to Mr Leck." How do we find out who's telling the truth if Mr Leck isn't here to give evidence, if we can't get both sides of the story? For all we know, Mr Leck might say, "Well, yes, I got that report and I passed it on to someone else up the line and it was that person's responsibility." How do we know that unless Mr Leck gives evidence? How is it fair, even to people like Dr Keating and Mrs Mulligan, to have Mr Leck isolated from adverse findings whilst the proceedings continue against them so that Mr Leck can criticise their conduct but is himself immune from criticism? It just can't work.

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So the application made by Mr Ashton has to be refused but let me say again that if the application had been made in a timely fashion rather than at a time of Mr Ashton's convenience, then our attitude could have been different and we would have explored a way to ensure that any legitimate concerns were appropriately addressed.

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I want to conclude by saying that obviously this application involves to some extent an adversarial position as between counsel asking me to disqualify myself and myself as the person who is the subject of that application. Despite that, I have intended at all times and I intend to give Mr Leck every opportunity to give his answer to the allegations that are made against him, to justify his conduct and to give him the opportunity if possible to exonerate him. As matters stand, I understand that his employer, Queensland Health, has already referred him to the Crime and Misconduct Commission for his conduct in relation to authorising the payment of Dr Patel's airfares. So that issue really doesn't seem to loom large in these proceedings.

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The only question which remains concerning Dr Patel so far as I can see is whether he acted appropriately and with appropriate expedition in relation to the allegations raised by Toni Hoffman and others concerning Dr Patel, and in

relation to those matters, Mr Leck will have the opportunity which he was promised six weeks ago in Brisbane and which Mr Ashton then told us that he was anxious to avail himself of, and that is to furnish a statement to the inquiry, which we're still waiting for, and to come forward and give evidence so that he can explain, justify himself and take advantage of the opportunity, if he is entirely innocent of any wrongdoing, of being exonerated and having findings made to that effect, even though that carries with it also the risk that if the evidence tends in the other direction, we will make whatever findings are necessary as regards Mr Leck's conduct.

That is the position and we will therefore continue with the evidence. However, we might take another brief break before we deal with that.

THE COMMISSION ADJOURNED AT 4.02 P.M.

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MR ANDREWS: Commissioner, I call Terrence Allen Fleming.

TERRENCE ALLEN FLEMING, SWORN AND EXAMINED:

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COMMISSIONER: Mr Fleming, please make yourself comfortable. Do you have any objection to your evidence being filmed or photographed?-- No.

All right.

MR ANDREWS: Mr Fleming, I have here a copy of a statement which bears, I think, your signature and is dated the 14th of June 2005. Would you have a look at it, please? Is that a statement taken from you by Mr King?-- That's true.

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And are the facts contained in that statement true to the best of your knowledge?-- I expect so, yes.

And are the opinions in that statement opinions you honestly hold?-- Yeah. Yes.

Before I tender it I'd like you just to check what seems to be a possible typographical error in paragraph 6 where you say, "I recall the 1st of April 2004." Do you mean 2005?-- Yeah.

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I tender that statement.

COMMISSIONER: Exhibit 178 will be the statement of Terrence Allen Fleming.

ADMITTED AND MARKED "EXHIBIT 178"

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MR ANDREWS: Mr Fleming, at paragraph 3 you advise us that you have authority to approve up to \$10,000 being spent on purchases for hospital related use?-- Yep.

That's because you have an Expenditure Delegation?-- That's true, yes.

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Expenditure Delegation, I see it starts in capital letters. Is that a document?-- Yeah, well, it's a list of - there's a list of employees that have delegations within the hospital, yeah.

Does the document tell us anything about - anything other than the identity of the employees and the amounts that they are

authorised to approve?-- No, just lists positions, actually, and amounts, so-----

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Now, I see Mr Leck is also an Authorised Expenditure Approval Officer?-- Yep.

With authority to approve much higher amounts, up to a million dollars?-- That's correct.

Now, am I correct in assuming you too are an Authorised Expenditure Approval Officer but to the limit of \$10,000?-- That is true, yes.

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Mr Fleming, as an Authorised Expenditure Approval Officer are there certain things that you're to do before you authorise approval of expenditure?-- Yeah. You just, oh, well, have to check that it's - that it's necessary.

Now, you're also the finance manager of the hospital?-- Yes.

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Do you have some accounting qualifications?-- No, I don't.

What qualifications do you have aside from your long experience?-- Oh, a degree in HRM, that's all.

HRM, is that Human Resources Management?-- Yes.

Thank you. When Dr Patel saw you on the 1st of April 2004 - 2005-----

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COMMISSIONER: Did you see Dr Patel or did you only see Mr Leck on that day?-- No, I saw Dr Patel.

Right.

MR ANDREWS: Well, by the 1st of April 2005 Dr Patel had been in the - his name had been in the news for at least 10 days. Isn't that the position?-- It could be.

Well, when you saw Dr Patel on the 1st of April 2004 you knew then that Dr Patel had been the subject - or the hospital had been the subject of adverse publicity, didn't you?-- Yes, yeah.

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And you knew that it was linked to Dr Patel, didn't you?-- Not really. I don't know.

Do you mean you had not heard-----?-- I can't recall. I can't - no, I can't recall.

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Well, had you been on vacation between the 22nd of January and the 1st - I beg your pardon?-- No.

The 22nd of March and the 1st of April?-- No.

Had you been attending at work on each working day?-- Yes.

How many days a week were you working?-- Would be five days.

Eight hour days?-- Yeah.

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Now, surely the hospital was a buzz with the news that had arisen after Mr Messenger's speech?-- Not that I'm aware of. No.

COMMISSIONER: Sorry, is it your evidence that you weren't aware of any of the news reports concerning Dr Patel?-- I was aware that there was something going on, but that's as - as far as-----

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Would it be fair to say you knew there was a controversy about Dr Patel at the time?-- Yes, that's fair, yes.

Had you heard the expression in the news or elsewhere "Dr Death"?-- No, not at all, not at that point.

MR ANDREWS: You were aware that there was a controversy with respect to Dr Patel. What was the source of your awareness? Did somebody tell you or did you read it?-- It would have to be the media.

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So you read it. Now, when you work at the hospital do you work in what section? Who are the people who work near to you?-- The finance area and we're located in - in the payroll area, virtually just beside the-----

And who would - I haven't been to the hospital. Where's the payroll area in relation to the executive offices?-- Underneath it.

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And how many people work in the payroll area with you?-- Oh, in that section there'd be 10 roughly.

Well, it would be accurate, wouldn't it, that there would have been considerable conversation among all the people in the payroll section about the news?-- No.

As the finance manager how often do you speak with, for instance, the district manager?-- It would vary. Once a week maybe.

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And why do you speak with the district manager weekly?-- It's not a regular thing. I'm just trying to average out how often I'd speak to him.

I understand?-- I don't know. I guess the finance meet once a month so I see him in there. Just if I'm ever up in the area sometimes I go up and access files I might pass him.

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And does the district manager ever come down to your section?-- On occasions if they want - you know, if something needs to be paid, stuff like that, because - that's in brief.

Now, a claim appears annexed to your statement. Commissioners, do you each have a copy of the claim annexed to the statement?

COMMISSIONER: Yes, I do, thank you.

MR ANDREWS: Do you see the claim for staff expenses for Dr Patel dated the 1st of April 2005 annexed to your statement?-- Yep.

May I put this up on the monitor, please? If you have a look at that screen you'll see I've done some highlighting of a few items on the page?-- Yep.

You'll see there are some green and yellow items in a box that's headed, "To Be Completed By Accounting Officer". Do you see that box and it contains your - what appears to be your signature?-- Yeah, that's my signature.

Now, you completed everything within that box, didn't you?-- I believe so.

With whom did you have discussions before completing the items in that box?-- I only spoke to Dr Patel. He come down with his claim that was signed by Peter Leck.

Now, towards the right-hand side under a heading "Text" there are some words that I've used a green highlighter on. What do they read?-- Sorry, where are we?

Right-hand side?-- Yeah.

Yes, where the finger appeared?-- Oh, yeah. That says, "Recruitment fare, Portland, USA." That's what it says.

Now, where did you get the information that this was to be classified as a recruitment fare?-- He just said that it was the end of his term and he was going back - going back home so what else would it be. I just assumed that's what it would be, recruitment.

So Dr Patel didn't tell you it was a recruitment fare?-- No, I just made that call myself. I put those descriptions in there so that - like they show up in the ledger, so if I ever have to dig it up again I can tell what it is. I didn't know I'd have to dig this one up.

Now, within the same large section headed, "To Be Completed By Accounting Officer" I see there's a section "Certificate of Authorised Accounting Officer". Do you see that section?-- Yeah.

And the words underneath it I used a yellow highlighter on some of them. Do you see that section?-- Yes.

"I certify that this claim complies with the provisions of Financial Management Practice Manual". You signed down below that section, didn't you?-- I did.

You understood, didn't you, that you were certifying certain things about Dr Patel's claim, didn't you?-- Yes.

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One of the things you certified was that it complied with the provisions of financial practice manual. Do you agree?-- Where's it say that?

The first line?-- It says, "I certify that this claim complies with the provisions of Financial Management Practice Manual which states", and then it lists the items.

Yes?-- Yeah. 10

COMMISSIONER: The first item is, "The transaction has been approved by an officer having competent authority"?-- That's right.

Who was that officer?-- It would have been Peter Leck in this instance.

Right. 20

MR ANDREWS: The third item is that supporting evidence exists. Now, it has a couple of alternatives for the kind of supporting evidence. What supporting evidence did you regard as existing in this case?-- The actual - the invoice for the airfare.

COMMISSIONER: But, Mr Fleming, if I came in with an invoice you wouldn't sign a form like this to reimburse the invoice. You'd need to satisfy yourself, wouldn't you, that the person presenting the invoice was entitled to have it paid by Queensland Health?-- That - you know, that satisfaction is the fact that it's been authorised - you know, the expenditure was authorised by Peter Leck. 30

But, you see, the forms supposes that there will be two things: one is that it will be approved by an officer. You accept that's Mr Leck?-- Mmm.

But, secondly, that there would be supporting evidence which would show that there was an obligation to pay. What was the supporting evidence that there was an obligation to pay?-- Yeah, I guess there's nothing. There's no receipt from Jetset. 40

All right. And you didn't see a contract or anything that said that Dr Patel was entitled to have his travel back to the States reimbursed?-- I didn't sight that, no.

No. 50

MR ANDREWS: Why didn't you sight Dr Patel's contract?-- I don't know. I just, I guess, assumed that it would be no dramas because it was approved by district manager, so - I got nothing.

Well, as an officer with the authority - I beg your pardon, as an Authorised Expenditure Approval Officer aren't you supposed to think before signing? Aren't there jobs that you ought to

do before you authorise payment?-- I didn't authorise the expenditure is what I'm saying.

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Aren't you supposed to look for supporting evidence that Dr Patel had either performed an approved transaction or looked for evidence that under an approved arrangement the hospital had an obligation to pay Dr Patel?-- I should have, yes.

Well, when other doctors seek a claim for payment of expenses don't you sight their contracts?-- Oh, I don't know. In some instances I may.

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So you agree that you do ask for contracts and review their terms to determine whether claims are justified or not?-- I don't remember reviewing a doctor's contract to see if they were entitled to a flight back, no, I don't. I can't remember any instances that I have.

COMMISSIONER: Well, Mr Fleming, in the section that's on the screen at the moment under, "To Be Completed By Accounting Officer" you'll see on the left-hand side there's the words "Vendor number" and then you've written in the number "2033", is it "LS"?-- It would be a number. It would be 15, I suggest.

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But who would be the vendor that that number relates to?-- That would be - I expect that to be Dr Patel's vendor number.

I see. So it wouldn't be made out to Jetset because he'd already paid Jetset and so you put in his - his own number as if he were-----?-- That's right.

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-----selling the air ticket to the hospital?-- I don't know about the hospital, but we were - reimbursed him of moneys that he had claimed.

And beside that there's another number that looks like TA010405, something like that. Do you know what that is?-- TA is probably travel - you know, travel allowance it probably stands for, but I never wrote those numbers. That's probably our accounts girls. After it left me it went to one of them to be processed and like that vendor number, that - that looks like one of the girl's writing, so-----

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At the foot of the page you'll see it says, "Please attach: 1) Original receipts", and you did have the receipt from Jetset, didn't you?-- Well, this suggests that I don't have it, like I've only got the tax invoice. I should have had a receipt that he would have got.

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Item 2 is "the approved travel authorisation". Did you have an approved travel authorisation?-- Sorry, where's-----

You will see right at the foot of the page, "Please attach: 1) Original receipts"-----?-- Sorry.

"2) the approved travel authorisation". Did you have such a

document?-- No.

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And "3) FBT form (if applicable)". Should there have been a FBT form?-- I shouldn't think so associated with recruitment. I wouldn't think so, no.

Right, okay. In retrospect was it appropriate to sign the document without having an original receipt or an approved travel authorisation?-- I should have had a receipt, but when you say approved travelling authorisation I guess something that suggested - suggests in his contract that he needed to be flying back, yes, I should have.

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Mr Fleming, would it be right to think that given your position in the hospital when you have a document like this filled in by the district manager you would assume that it's all in order? You don't really have to check for yourself?-- Well, that's - I guess that's what I've done, haven't I?

You realise now, of course, that the reason you have this system with two signatures is that one person checks up on the other. You realise that's why you need two signatures on the form?-- Yes.

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Okay. And you accept that by taking a short cut you really prevented that system from working properly?-- Appears so.

Yes.

MR ANDREWS: When these forms are filled out I see that the authorised accounting officer has to certify to more than the Authorised Expenditure Approval Officer. Do you see that?-- I'm not sure what you mean by "more".

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Items 1U were, as I read the document, certifying to six things, and Mr Leck, as I read the document, was certifying to three. Do you see that difference? Do you see that Mr Leck was certifying to three and you were certifying to six?-- I guess so. It is in front of me, yes.

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Is it the case that when these forms are filled out, they're usually filled out first by the authorised accounting officer, who signs certifying to those six items, and then the form is produced to the authorised expenditure approval officer. That's the usual method, isn't it?-- I'd - yeah, more times it is that way, yes.

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Why was it not done that way on this occasion?-- I have no idea. Like I said, Dr Patel just turned up at my desk with the claim signed. So I processed the payment.

Are you telling me that in the week before Dr Patel handed you this form, you did not speak with Peter Leck?-- In the week?

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Yes, in the week. While Dr Patel's name was linked with controversy?-- I can't say one way or the other. It is more likely I would have spoken to him.

And it is likely you would have spoken to him about Dr Patel?-- No. Why?

Wasn't it front-page news in Bundaberg? Why wouldn't you have spoken with him about front-page news?-- I don't know. I don't make a habit of going and speaking to Peter Leck about what's on the front of the paper. I am sorry.

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COMMISSIONER: I think you have already told us, Mr Fleming, at this time, on the 1st of April, you knew that Dr Patel was the subject of some controversy?-- I knew there was something out there, yeah.

Surely then when this came in - sorry, when this came in, did you understand it was for Dr Patel to fly out that day or the next day?-- Yeah, I would have done. It was - I think it was - yeah, I would have.

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Didn't it twig to you there was something a bit unusual about this; that, you know, the man's under some controversy in the press, here he is asking for approval for money so he can leave the country the next day?-- I didn't think that at all.

And was that-----?-- I am sorry.

-----because your superior had already signed the form, you didn't think it was necessary for you to turn your mind to it?-- Yeah.

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MR ANDREWS: At paragraph 8 of your statement - do you have it?-- Yep.

You speak of a conversation between you and Dr Patel about Dr Keating. What is it about that that made you recall it?--

Just the fact that he was - he come down from, you know, with his form, he said he was looking for Dr Keating, couldn't find him, so he got Peter to sign it, the approval, and that was it.

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What was it about that that made you recall it months later when you gave this statement?-- I don't know. I just - that's what I said at the time and the man typed it in. I saw-----

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May I have that document returned, please? There is a travel service at the hospital, isn't there?-- Yes.

And it's Queensland Health policy that hospital staff members should use travel agents selected by Queensland Health, isn't it?-- Yes.

How regularly did doctors departing the hospital use travel agents not selected by Queensland Health?-- I'd say probably more often not - they more often booked their own than used the travel hub. How is that?

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Please have a look at paragraph 14 of your statement, the first sentence. Tell me what it means?-- I guess the question there was they wanted to know whether there was any other doctors that I approved a form for, you know, on a recruitment basis that went back after their contract and I couldn't remember. I couldn't remember when I said I'd see if I could find one for them, which I did.

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Thank you. So this is the first time - I beg your pardon, the only time you recall approving an airfare on a recruitment basis for a doctor?-- That's right, at that time that's all I could remember, and then I tried to dig up some other examples of whether we'd sent another doctor back, I guess at the time whether I was treating Dr Patel different to anybody else, so I tried to find another example.

Did you find one?-- Yeah - well, I found another - it should be - I think it is attached to this, isn't it? Or not?

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I am thinking about paragraph 14 where you observed that you would make inquiries to determine how these return airfares might have been paid for. Did you make any further inquiries, Mr Fleming?-- Yeah, I did. I found another - another one which is, you know, attached which is - it was Dr Younis, earlier returned him.

I see.

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COMMISSIONER: Now, Dr Younis, did that relate to recruitment or did it relate to travel overseas for study?-- My understanding of it was recruitment, the end of his contract.

MR ANDREWS: In his case - well, was it you who authorised it or was it somebody else? Somebody else, wasn't it?-- Yeah, that would have been just our accounts-----

So when you authorised Dr Patel's, his was the only one that you'd ever authorised for a return fare for recruitment. Is that the position?-- Well, that could be the case. Like, it was the only one I could find.

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In those circumstances, you would certainly have gone to the contract, wouldn't you, to determine whether or not Dr Patel's contract showed that he was owed this return airfare?-- We have already been there. I didn't - I didn't - I didn't do that. You know that.

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I tender a letter from Ms R McMahon of the Investigations Audit and Operational Review Unit of Queensland Health to Mr Mark Dockwra, Executive Legal Officer, Complaints Services, Misconduct Division, Crime and Misconduct Commission, dated the 16th of June 2005 with annexures. And I have copies I can provide to the Commissioners.

COMMISSIONER: The letter just described by Mr Andrews-----

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MR ASHTON: May I be heard on that, Commissioner? I have no objection in the general sense to it being received into evidence, but - I received a copy from my friend - but we might want the opportunity to cross-examine its auditors. That's something that I could take up with counsel assisting, if that were appropriate. But no objection to its being received at this time.

COMMISSIONER: Well, exhibit 179 will be the letter described by Mr Andrews from Ms R McMahon - I think it is Acting Manager Investigations Audit and Operation Review Unit, Queensland Health to Mr Mark Dockwra, Executive Legal Officer Complaints Services Misconduct Division, Crime and Misconduct Commission and the various attachments to that letter.

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ADMITTED AND MARKED "EXHIBIT 179"

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MR ANDREWS: I'd like you to look at the monitor for me, Mr Fleming, as I put up some pages of that letter on the screen. Would you put up the pages that I've - firstly, the page flagged with a blue tag. If I'm correct, the bottom of the page ends in the code 9. Mr Fleming, it's suggested that there was an approval of Dr Patel's application for study leave to attend a conference in Chicago in October 2003 and that you, as finance manager, signed approval documentation for that reimbursement; that you were required, when doing so, to be satisfied that the claim met the requirements of the Financial Management Practice Manual. Now, the authors suggest that you didn't look at evidence to confirm that Dr Patel actually attended the conference. Is it correct that you didn't look at or sight such evidence?-- It must be. They would have had the voucher there.

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Thank you. Now, I see from paragraph 6 that the author's then speaking of another topic and that's study leave for Dr Patel taken in May 2004 and at paragraph 8 the author suggests that you signed the approval documentation and didn't check whether the entitlement to reimbursement existed. Is the author correct that you did not check to see whether the entitlement to reimbursement existed?-- I'm not sure which instance you're talking about there.

20

Perhaps you could look at annexure 2 or 3 or 4?-- Is it in here, is it?

Regrettably, they're not numbered. Would you turn up the first of the flagged pages at the end of the statement. It seems to be a claim for expenses. That's the one, yes?-- Is that the one?

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Yes, Mr Fleming?-- Yep.

If that can be raised so that you could see whether your signature appears. That's your signature, is it not?-- It definitely is, yes.

Now, you will see that it's - could you lower the page on the monitor, please. You will see that it's a claim for airfare, looks like, "Bundi to Bundi. Round the world". The rest of it looks difficult to decipher?-- Yep.

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But it seems to be attached to an invoice on the page before. Could you turn that up, please?-- Yep.

Now, what the author of this audit was suggesting was that you didn't check whether Dr Patel had an entitlement to these reimbursements. Now, the issue is whether the author's correct, that you failed to check whether Dr Patel was entitled to a round the world ticket?-- My - my understanding of that was that - that was associated with his change of contract. That he had finished one stint and was beginning another and if it had been somebody else, we would have had to send them home and bring somebody else back. That's my understanding of it. So he was paid to return-----

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And on the next page - could you turn it over, please - is that "change of contract" which is written on the left-hand side in the yellow highlighter?-- Yeah, I wrote that.

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Where did you get the understanding that he was owed this because of a change of contract?-- I spoke to Dr Keating or he spoke to me. That was - and that seemed reasonable to me. If it had been somebody else, we would have had to fly him home and fly a new guy back.

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Well, you spoke to Dr Keating. That seemed reasonable to you. Do you remember what Dr Keating told you?-- Not word for word, just that that - that was the reason for it.

Are you suggesting that Dr Keating told you Dr Patel was entitled to this because he was changing his contract?-- That's what I'm suggesting, yes.

Could you turn to the next page, please. Would you put the yellow highlighted section on to the screen. Is that your handwriting?-- It is, yes.

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"Lindy, please pay Jetset." Is that what it reads?-- That's what it says, yes.

Now, pursuant to what instruction were you giving that instruction to Lindy? Were you acting there as an authorised accounting officer or as an authorised expenditure approval officer?-- Authorised accounting officer I'd say.

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Would you, in the audit document, continue, please, to the next - no, it will be the prior flagged page. It's a page within the document that ends in the code at the bottom right-hand corner 13. Mr Fleming, the author is here discussing a claim for payment form which was for study leave for Dr Patel for a conference in Chicago and suggests that you did not seek any evidence to show that Dr Patel attended the conference in Chicago. Are you able to say whether it was your practice to demand evidence that a doctor attended an overseas travel conference before authorising payment?-- It's usually there. Like, you know, we usually pay a registration or something like that.

40

In this case it seems there was no claim by Dr Patel for registration?-- No.

Is the author correct that-----?-- Yes.

-----"under normal expenditure acquittal practices, evidence should have been required that the expenditure being reimbursed related to the agreed itinerary"? That is an itinerary that would have involved travel to Chicago for a conference?-- On study leave, you would normally - yeah, they're supposed to provide a diary if that's what you're getting at, yeah.

50

And is it the case that you didn't ask Dr Patel for a diary in respect of his travel to Chicago?-- No, I did not.

Why not?-- I don't know. I - I'm pretty sure that, you know, there would be other study leave guys that have gone that haven't produced a diary either at the end of it. Some do, some don't. I just - I have not enforced that.

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Do you mean if you fell down on the job, it wasn't just with Dr Patel's study leave application; it would have been with other-----?-- I'd expect so. Some of them would have, would not have provided a - an itinerary or they're supposed to keep a diary on their trips.

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The next item on the page, "Expenditure on Accommodation", it seems it was reimbursed on a daily basis and the author suggests that there is no authority for doing so but that the proper basis is for actual expenses. Do you have any knowledge of whether the author's correct or is incorrect?-- He - he must be. He would have sighted, you know, the voucher. I've done that on occasions where the doctors haven't produced receipts so I've used the conference leave allowance because I deem that reasonable expenses. Like, if someone's away for, you know, a week, two weeks on study leave, they don't always keep a receipt for every meal or everything they have.

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Thank you, Mr Fleming. I have no further questions.

COMMISSIONER: Does anyone else have questions for Mr Fleming? Mr Diehm?

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MR DIEHM: Commissioner, I may do but I would need to get some instructions. I wasn't on any notice that there was to be evidence led from Mr Fleming that touched my client but there has been.

COMMISSIONER: I understand your difficulty and we will accommodate that. Is anyone ready to go tonight?

MR ASHTON: I am, Commissioner.

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COMMISSIONER: How long do you expect to be, Mr Ashton?

MR ASHTON: I think no more than half an hour, probably less.

COMMISSIONER: Let's resume in the morning then. Does that suit everyone?

MR ANDREWS: That's suitable to me.

MR MacSPORRAN: Mr Commissioner, I have a difficulty in respect of my client, Ms Mulligan, who was to be called at 2 o'clock today or thereabouts.

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COMMISSIONER: Yes.

MR MacSPORRAN: That was to, helpfully, accommodate my difficulty in not being here after tomorrow night.

COMMISSIONER: I see. Yes. Of course, we weren't expecting Mr Ashton's bombshell.

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MR MacSPORRAN: No.

COMMISSIONER: What can we do to avoid any inconvenience to yourself?

MR MacSPORRAN: Mr Commissioner, the way it appears, I understand counsel assisting is not intending to do more with my client than tender her statement.

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COMMISSIONER: I think that's right.

MR MacSPORRAN: That will leave me in a position of having to, and I'm more than happy to do this, take her to some parts of the statement which are necessarily detailed.

COMMISSIONER: Can I make it clear that I have discussed this matter with Mr Andrews and make no secret about this. Your client has very helpfully answered every allegation put against her. As I've previously indicated, we really don't want to descend into the trivia, and if it's questions of, you know, whether someone used a raised voice or spoke in an angry fashion or something like that. So what I've said to Mr Andrews is, yes, Mrs Mulligan's given a comprehensive response to all allegations. There is no need to take her through it line by line and I'd encourage you to take the same view. If you focus on what really matters rather than minutia, I think that will be in everyone's interest.

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MR MacSPORRAN: Yes, I certainly do intend to do that because necessarily - because of the volume of evidence that's been given thus far it will be necessary to place some of that in context and address parts of her statement, although not at length I can assure you-----

COMMISSIONER: But bear in mind that the three of us are all literate as well. We can all read it. And we don't have to be taken through it-----

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MR MacSPORRAN: I'm not concerned about the Commissioners taking full note of what's in the statement. I'm more concerned about how it might be reported or not reported.

COMMISSIONER: Of course, of course.

MR MacSPORRAN: Necessarily, that involves therefore some articulation of contents, although not at length I can assure you, but there'll need to be some-----

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COMMISSIONER: Of course.

MR MacSPORRAN: -----reference to what are important parts of her statement to place in context what has gone before.

COMMISSIONER: Now, when you say you're leaving tomorrow night, does that mean the last night?

MR MacSPORRAN: Yes, yes, 5.15.

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COMMISSIONER: So you'd really want to be finished by 4.30 at the very latest.

MR MacSPORRAN: Yes. I can indicate that I would be, I think, about an hour to possibly slightly more, not much more. And I'm told from people at the Bar table who I have had discussions with, they shouldn't be very long and that the cross-examination should finish by 4.30 tomorrow if we start on Ms Mulligan around about 9.30, 10 o'clock.

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COMMISSIONER: I see.

MR MacSPORRAN: So the only complication is how long Mr Fleming might be with us yet.

COMMISSIONER: Mr Ashton thinks he'll be half an hour. Mr Diehm.

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MR DIEHM: I'd be quite briefer, Commissioner.

COMMISSIONER: Does anyone else anticipate they'll have lengthy cross-examination for Mr Fleming?

MR BODDICE: Not at the present time.

MR ALLEN: Not.

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COMMISSIONER: I see Mr Allen shaking his head. Mr Andrews?

MR ANDREWS: There is one other logistical problem. There is a witness, a Mr Connelly, scheduled for 9.30 tomorrow and he must be away at 10.

COMMISSIONER: Oh, and Mr Connelly is a very ill man, isn't he?

MR ANDREWS: That's so. And it's for health reasons that he must be away at 10.

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COMMISSIONER: One possibility that comes to mind, someone, I think it was Mr Farr, reminded me how difficult it is for counsel when you're expected to work extended hours. I've always found it bizarre that as soon as people give up being barristers and going on to the Bench, they seem to forget overnight how difficult it is being a barrister and I've suddenly realised that I'm making that mistake myself. I realise that there is an enormous amount of work that goes into taking instructions and so on outside sitting hours and I don't want to put unreasonable expectations on anyone, but if everyone were comfortable about starting early, I mean really early, maybe 8 o'clock tomorrow morning, to finish Mr Fleming and deal with Mr Connelly, that might cover everything.

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MR BODDICE: The other option, Commissioner, would be that if Mr Fleming was stood down until after - if Connelly is not

going to be long, Ms Mulligan could then start at a time and Mr Fleming could come afterwards. That might ensure Mr MacSporran's difficulty is met. I'm not sure about Mr Ashton, whether he has a difficulty, but that seems to be one way it could be achieved.

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COMMISSIONER: Mr Ashton, would that suit your convenience?

MR ASHTON: It would be quite awkward, Commissioner.

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COMMISSIONER: I was afraid of that.

MR ASHTON: I had really needed to be back tonight but I understand the difficulties and I can be here in the morning.

COMMISSIONER: No, no, well, what about we continue with Mr Fleming this evening. Mr Diehm, how long do you think you will need to take instructions?

MR DIEHM: Five minutes.

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COMMISSIONER: Why don't we take a short comfort stop break now; then perhaps, Mr Diehm, you'll let me know when you're ready.

MR DIEHM: Yes.

COMMISSIONER: We will try and finish Mr Fleming tonight and then start with Mr Connelly first thing in the morning. Now, I have been warned, Mr Boddice, and I don't mean this in any sense critically but I've been warned that Mr Connelly is a gentleman who has some things he wants to get off his chest. Within reasonable limits, I feel that this inquiry is here as much for the patients as anyone else and I don't want to restrict him so long as it's relevant to the Terms of Reference. So I can't guarantee that his evidence will finish within a fixed period of time, but we'll just have to take that as it comes. If it means having a shorter lunch hour or something like that, it will depend.

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MR BODDICE: We'll be happy to accommodate that.

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COMMISSIONER: Mr Ashton, are you happy with that?

MR ASHTON: Yes, thank you very much, Mr Commissioner.

COMMISSIONER: Mr Diehm, are you happy with that?

MR DIEHM: Yes.

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COMMISSIONER: Everyone else? Mr Allen?

MR ALLEN: Commissioner, the only problem that is presented in relation to Mrs Mulligan, there's - it's quite a large statement which has only been fairly recently received.

COMMISSIONER: Yes.

MR ALLEN: And I had anticipated that I would be spending quite some hours tonight taking instructions in relation to it.

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COMMISSIONER: Oh, I see.

MR ALLEN: And the less time that's available, the more difficult it becomes, and I understand that it's important that any patients in Bundaberg have an opportunity to be called during this week.

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COMMISSIONER: Yes.

MR ALLEN: I understand that it wouldn't be completely suitable for my learned friend Mr MacSporran but one possibility that does arise is whether Ms Mulligan could give evidence in Brisbane.

COMMISSIONER: How do you feel about that, Mr MacSporran? Let me say again, I understand the situation is that your client has been given the choice, as it were, whether to give evidence here or in Brisbane.

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MR MacSPORRAN: Yes.

COMMISSIONER: As, indeed, was both Dr Keating and Mr Leck. So it really is a matter for your client. If she's anxious, I think she should be given the opportunity to speak in front of the local community and answer the allegations against her. I think she's entitled to that chance.

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MR MacSPORRAN: Certainly, her preference is to do that as soon as possible here this week.

COMMISSIONER: Yes.

MR MacSPORRAN: That was why we arranged to have it done today, it was going to be, and then into tomorrow if necessary. It can still be done, it would seem - I just don't know whether it might be possible for Mr Allen, who may not be concerned with Mr Fleming, to start taking instructions sooner rather than later.

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COMMISSIONER: I was going to say that, Mr Allen. You're not really particularly worried about Mr Fleming's evidence, are you?

MR ALLEN: No, no.

COMMISSIONER: I certainly would give you leave to vacate the Bar table and go and start work on the evidence of Mr MacSporran's client, if that would assist.

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MR ALLEN: And he is the only witness who will be remaining today?

COMMISSIONER: Oh, yes. I'm not going to call anyone else.

MR ALLEN: No.

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COMMISSIONER: Or allow anyone else to be called tonight. So we will finish off this evening with Mr Fleming. The first thing tomorrow morning at 9.30 we will have Mr Connelly.

MR ATKINSON: If we could, and all I propose to do is to put his statement to him and ask him if he has anything to get off his chest, although that could blow out.

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COMMISSIONER: Yes, I understand that. But let me emphasise again, I have no criticism of that. It is his right to say what he thinks is relevant.

MR ATKINSON: Thank you, Commissioner.

COMMISSIONER: But we could fairly assume that we will be finished that process by 10.30.

MR ATKINSON: Certainly, Commissioner.

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COMMISSIONER: And that should give us sufficient time to deal with Mrs Mulligan.

MR MacSPORRAN: I certainly hope so. The only other option would be to start earlier before Mr Connelly comes in and takes the evidence-in-chief of Ms Mulligan, although that may depend on Mr Allen's ability to get instructions overnight.

COMMISSIONER: Mr MacSporran, I think probably - and despite the debate we had a little earlier this afternoon, I do want to be seen to be fair to everyone. I think probably the best thing is if we take the course I have suggested and if Mrs Mulligan's evidence isn't finished by the time we have to leave, then it may be that the balance of her evidence can be dealt with in Brisbane at a time that suits you. I know that that may be somewhat inconvenient for her but I think it's the least unsatisfactory option if I can put it that way.

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MR MacSPORRAN: Could I just raise a complication with that. It is a very helpful suggestion but what you don't know is that I am not available after this week.

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COMMISSIONER: Yes. Are you going on the Bench?

MR MacSPORRAN: No, not that I know of. Now, that's not an impediment to your inquiry continuing. It would necessarily involve other counsel being briefed to be present for the balance of Mrs Mulligan's evidence. Now, that would be clearly undesirable for everyone including, most importantly, her.

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COMMISSIONER: It would. It would clearly be undesirable. I shouldn't have made the joke about going on the Bench but can I ask in a more serious way: would your commitments be such that it would be possible for you to come along in the evening, for example, and deal with Mrs Mulligan outside sitting-----

MR MacSPORRAN: Well, for six or so weeks, yes.

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COMMISSIONER: Or even at weekends?

MR MacSPORRAN: I'm overseas so I won't be here at all.

COMMISSIONER: Sorry, I didn't mean to pry.

MR MacSPORRAN: No, I understand your inquiry, but that's the reason we were very keen to have the evidence dealt with here, and that seemed to be possible and practical, and her preference, or have it done in Brisbane totally, and that was the least attractive option frankly.

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COMMISSIONER: Yes.

MR MacSPORRAN: And especially now that she has prepared to give evidence here, she is ready, she is present, her family are here and she is very keen to have it dealt with as quickly as possible.

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COMMISSIONER: Why don't we proceed on this basis, that we resume at 8.30 tomorrow, start with the evidence-in-chief of Mrs Mulligan, stand her down at 9.30, deal with Mr Atkinson's witness and then continue from there?

MR MacSPORRAN: I'd appreciate that very much, thank you, Commissioner. I'm sure she does as well.

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COMMISSIONER: We get one sorted out and then someone else jumps up.

MS McMILLAN: I just didn't want Mr MacSporran to have the last say. I understand with Mr Connelly - I didn't know he was being called at that time tomorrow and I haven't - his statement has been fairly late but I am told very briefly that the chart doesn't necessarily correspond with his evidence.

COMMISSIONER: Yes.

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MS McMILLAN: So, firstly, I need some time to go through with that and I see that one of the matters he wants is that the document discipline which, naturally, would concern my client. Now, I don't know how long I would be with him and I would wonder whether it is necessary that he does have to come tomorrow. I would hope that I wouldn't be very long with him.

COMMISSIONER: He is a very ill man.

MS McMILLAN: I understand that.

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COMMISSIONER: I mean, I don't think it's any exaggeration to say he doesn't have long to live. He is very keen to have his say and we must accommodate him.

MS McMILLAN: I only meant the next day or something like that.

COMMISSIONER: Mr Atkinson?

MR ATKINSON: Commissioner, counsel assisting is anxious that we get the patients out of way because we don't want to be transporting them, least of all Mr Connelly, to Brisbane. There always could be problems of a similar nature on Thursday. Mr Connelly has been waiting for his day in Court very patiently for some time and I promised him tomorrow. I understand my learned friend's concerns. To the extent they involve the Health Rights Commission, Mr Perrett and I have had lengthy negotiations and he is comfortable with Mr Connelly giving his evidence and not cross-examining him-----

COMMISSIONER: I think Ms McMillan was talking about the Medical Board.

MS McMILLAN: Yes. I wasn't talking about-----

COMMISSIONER: I think that's not a problem because I understand the matter has already been considered by the board and dealt with by the board, so I don't think we'll find that that's a problem.

MS McMILLAN: I will need to just take some further instructions on that because I hadn't to be honest and have been pre-occupied with other matters, and I didn't understand he was to be called at that time and I think there has been some confusion about witnesses-----

MR ATKINSON: The Medical Board have made a finding. They have provided us with their records - they're very short records - and I'm more than happy to tender the records in toto so that where there are discrepancies, it is clear what the records show.

COMMISSIONER: In the meanwhile, we might let Ms McMillan have them overnight so she can familiarise herself with the situation.

MS McMILLAN: That might obviate any need-----

COMMISSIONER: Should we take, as I say, a short break now, finish off the evidence of Mr Fleming as soon as Mr Diehm tells me he is ready to resume and then start at 8.30 with the evidence of Mrs Mulligan, stand Mrs Mulligan down at 9.30 to deal with Mr Connelly and then resume Mrs Mulligan for the rest of the day.

MR ALLEN: Can I-----

COMMISSIONER: Yes, Mr Allen.

MR ALLEN: Did I understand my learned friend Mr Atkinson to say we it would simply not be possible, given Mr Connelly's circumstances, for him to give evidence Thursday?

COMMISSIONER: No, that wasn't said but what was said was he is a very ill man, he is waiting to give evidence, he has been promised a fixture tomorrow morning and, Mr Allen, whilst I will bend over backwards to accommodate the convenience of counsel, Mr MacSporran, Mr Ashton, yourself, Mr Diehm, anyone else, the convenience of Mr Connelly has to take precedence over everyone, and that will happen.

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MR ALLEN: It is just that I'm given this statement this afternoon unsigned for the first time and on my brief perusal of it I see allegations about complaints about nurses which haven't been properly investigated. There is reference to attachments I don't have. It seems this will just be another matter I'll be trying to take instructions on tonight on the fly and then dealing with two witnesses tomorrow from 8.30.

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COMMISSIONER: Yes.

MR ATKINSON: It is a matter that has been fully investigated by the Health Rights Commission and the Medical Board and that appears on the records and I will make sure that those records are made available. But, really, the matter has been investigated and it is really about Mr Connelly feeling like he's being heard.

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COMMISSIONER: I'm sorry, Mr Allen, but I think it will be apparent that I've tried to deal the cards in a way that creates the least inconvenience for everyone concerned.

MR ALLEN: Yes.

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COMMISSIONER: It looks like you're going to be the loser this time. It just means burning a bit more midnight oil I'm afraid.

MR ALLEN: Thank you, Commissioner.

COMMISSIONER: Thank you, Mr Allen.

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THE COMMISSION ADJOURNED AT 5.15 P.M.

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TERRENCE ALLEN FLEMING, CONTINUING:

MR DIEHM: Commissioner, I have no questions for Mr Fleming.

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COMMISSIONER: Thank you Mr Diehm. Mr Ashton?

MR ASHTON: Thank you, Commissioner.

CROSS-EXAMINATION:

MR ASHTON: Mr Fleming, I take it you didn't have much contact with Dr Patel over the period of his time in the hospital?-- Only in instances like this, refunding money and stuff like that.

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But you didn't know that he was - his contract was at an end and he was going home until he came down with this form; is that right?-- That's right.

Can I just go to that form, it just puzzles me in a number of ways. It's described as a claim for "Payment, Staff Expenses". Does it apply to expenses other than travel?-- Yeah, it would, you could claim your telephone expenses and doctors are entitled to their rental refunds on phone rental sorry.

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You see, for example, it refers in the section the "Certificate of Authorised Expenditure Approval Officer", there's a reference to approving the itinerary, it seems to actually have the flavour of travelling allowance, meal allowance, all that sort of thing but it's not limited to that?-- I didn't think so, no.

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All right, thanks. Now, can I just point out to you towards the top of the document, the heading "Claim Summary"; do you see that, about the third box down?-- Yes.

"Details must be completed on the back of this form." Is there a section on the back ordinarily for that purpose or does that refer to attaching things?-- There is a section on the back for if you're claiming travel to list your days that you were away, you know, when you left and when you came home.

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So we don't have the backs of any of those forms?-- Well, it's like you-----

SHORTHAND REPORTER: I'm sorry sir, I can't hear you.

MR ASHTON: I was just asking you about the claim summary and the reference to details must be completed on the back of the form and I asked you do we just not have the backs of these forms, you didn't copy them or?-- No, no, like, this comes in a, like, an Excel sheet format and you can print the two pages out, you don't necessarily need the second page if you haven't filled out the travel component.

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I see. So does that mean the back sheet had not been completed in these cases?-- That's right.

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Is that usual or unusual in your experience?-- Not when it doesn't apply like this here, it's usually, you know, they say when they left and when they come home, it's usually probably for conference leave because there's an allowance that applies for incidentals and meals and all that and they fill that form out and then work out what they're entitled to from that.

All right. Now, the section to be completed by the claimant, that ordinarily, of course, in this case Patel, and we have one from Dr Younis or someone from your department is the correct expression; do you have is there an accounting department of which you're an accountant?-- There's an accounts payable area, which consists of two people.

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Two people?-- Yep.

So is that you and Le Patourel, how do I pronounce that?-- Le Patourel.

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Le Patourel?-- Yeah, she's the accounts payable officer.

So there's just the two of you?-- No, there's her and another girl in that area and then in finance there's myself and another lady.

All right. You seem to be dependent, are you, for your information about the transaction upon what the claimant inserts in the claimant's section as to the detail of it; would that be a fair statement?-- Oh yes, and it just - well, it matches up the invoice that's attached.

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But its actual purpose so, for example, we see Patel says "Airfare Bundaberg to Portland including accommodation"?-- Yep.

Younis says "Reimbursement of Airfares", and would that be in brackets "End of Contract"?-- That's what - yes.

Brisbane to Pakistan, that's why you chose that one as an example of someone having their fare paid to go home at the end of the contract; is that right?-- Well, that's the only one that I could find.

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Yes, and there's a different version again from Dominik O'Neill?-- Yeah, well I thought I'd found two where we sent the bloke back but this guy was applying after the event after his 12 month contract.

How many kinds of travel are there? There's end of contract return, there's study leave?-- That's right.

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What else?-- It's about it, and conference leave.

What about compassionate leave; is there such a thing?-- Not with respect with travel.

Yes?-- Not that I'm aware of, there may be.

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All right. Now, if you have a look at the Patel form there, in the section "Certificate of Authorised Accounting Officer" - sorry, just above that, do you see the expense code there, the section to be completed by the accounting officer and there's an expense box about halfway down; do you see that on the left-hand side?-- Expense?

Just above the certificate, the "Certificate of Authorised Accounting Officer"; do you see that?-- Yeah.

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Just above that at the left-hand side of the document; do you see "Box" which has "Expense"?-- No, I don't know what you're looking at?

Well, let's go up to the top of the section "To be completed by Accounting Officer" in the left-hand corner; do you see "Vendor Number"?-- Yep.

And down immediately "GL account"?-- Yep.

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Numbers under "Travel Advance Credit"?-- Yes.

The next one's "Expense"?-- Yes.

Do you see a number entered there?-- Yep.

What's that number?-- That's our just a ledger code that represents the - be an overseas travel, overseas air travel.

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Right, is that the overseas travel code that you refer to in your statement?-- That would be, yes.

Yes. All right. Now, that code is the same, is it not, for each of the forms you've chosen?-- Well, it should be.

Yes, so it doesn't distinguish between the different kinds of overseas travel?-- No, that's just a code for overseas travel.

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When you went looking for examples, how did you look for them?-- I would have ran it on that account code.

Yes?-- Just to see some.

So you would have looked for that overseas travel code number?-- That's right, that's because that's what we try and do.

But it's the same for everything, isn't it?-- Not necessarily, if you take a flight within-----

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Every overseas travel I meant?-- Yes.

Yes?-- That's true, yep.

And so you're then dependent really, aren't you, on what the claimant has put in his box "to be completed by claimant" to know what it is?-- Oh, pretty much, plus the, you know, the supporting evidence.

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Yes?-- Which I didn't have a lot, did I?

No, all right. And so on this basis, you said that Younis was the further one that you found and Patel was the only one that you could remember. But it sounds like you haven't been in the practice of going to contract files, for example-----?-- That's true.

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-----to check these things?-- That's true.

And so is it likely, do you think, that they're others that you just don't remember?-- Well, there could be, yeah.

Mmm?-- But like I said before, I couldn't find any, I was happy to find one that was different to Patel because that was the line of the questioning that I give the statement to. I don't think this is working, is it?

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COMMISSIONER: Can you speak up a bit?-- I'll try.

MR ASHTON: Tell me this, Mr Fleming: when a document is authorised by the person who completes the bottom panel, that is, the "Certificate of Authorised Expenditure Approval Officer", is his certificate ordinarily accompanied by any kind of reasons or other explanation of what he's done or why he's doing it or do you normally just get that form with the signature on it and the attachment?-- Sometimes, sometimes there's things attached.

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Yes, but the things attached, are they in the nature of the things you've shown us here, the Jetset invoice?-- Oh, sometimes there's a contract, like, if you look to that O'Neil guy, there was a, you know, a copy of his employment contract attached in that instance.

Yes, that's right, but you wouldn't expect to get, say, if Dr Keating or Mr Leck or whatever signed that bottom panel, you wouldn't expect a set of reasons from them to accompany the document, you simply expect to have their signature on a document with the invoices or whatever it might be attached?-- I don't really expect anything, like, sometimes they're there, sometimes they're not.

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I see?-- And I've just, you know, ran with the signature and I should have got some.

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And I think you said that in your statement that you saw nothing particularly unusual in this particular transaction, Patel came down with the document, told you he was off?-- Yeah, didn't ring any bells with me, no.

All right. Nothing further, thanks Commissioner.

COMMISSIONER: Thank you Mr Ashton. Does anyone else have any questions for this witness? Mr Andrews, any re-examination? 10

MR ANDREWS: No Commissioner.

COMMISSIONER: Thank you. Mr Fleming, I do appreciate you coming to give evidence this afternoon. The matters that have been raised do call into question your conduct, and I note that you've been very frank and forthcoming in admitting that in retrospect there are things that should have been done differently. We do appreciate your frankness on that score and, as I say, thank you for coming to give evidence. You're excused from further attendance. Thank you. 20

WITNESS EXCUSED

COMMISSIONER: Mr Andrews, I did raise with Mr Allen before he left the building whether he had any difficulty if we finished off with Mr Smith tonight. If Mr Smith's still around, I think there are only some limited questions that people want to ask of him. That is, if he's still here. 30

MR ANDREWS: I'm getting a lot of either heads shaking that he's not or the look that he might not be. I'll have inquiries made immediately, Commissioner.

COMMISSIONER: Thank you. All right. Well, we get an early night then - a relatively early night. As I indicated, we'll resume at 8.30 tomorrow and Mr Smith can be informed that we'll finish his evidence on Thursday if that suits everyone's convenience? 40

MR DIEHM: Thank you Commissioner.

COMMISSIONER: Mr MacSporran, you don't have any questions for Mr Smith?

MR MACSPORRAN: No, not at all. 50

COMMISSIONER: So that doesn't cause you any problem?

MR MACSPORRAN: Do I understand he's coming on Thursday?

COMMISSIONER: Yes.

MR MACSPORRAN: Certainly that doesn't cause any problem at

all.

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COMMISSIONER: Thank you. Mr Ashton, I think you said you won't be here on Thursday?

MR ASHTON: No, if that please the Commission.

COMMISSIONER: And is that a problem with regards to Mr Smith?

MR ASHTON: No, it isn't, Mr Commissioner.

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COMMISSIONER: Do I take it then that everybody is happy to resume at 8.30 tomorrow with Mr - I'm sorry, with Mrs Mulligan first and then Mr Connelly being interposed at 9.30?

MR ANDREWS: Yes, that's so.

MS McMILLAN: We cavil with the word "happy".

COMMISSIONER: Yes, I should know better. Content?

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MR MACSPORRAN: It will do for this time.

MR ANDREWS: I think satisfactory is as good as it gets, Commissioner.

COMMISSIONER: 8.30 tomorrow. Thank you, ladies and gentlemen.

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THE COURT ADJOURNED AT 5.45 P.M. TILL 8.30 A.M. THE FOLLOWING DAY

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