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CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

COMMISSIONER JOHN McKECHNIE QC

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 27 APRIL 2018, AT 9.30 AM

COUNSEL ASSISTING:

MS K. NELSON

MS T. CHUNG

WITNESS: RODGER JOHN KERR-NEWELL

(Continued from 26/4/18)

KERR-NEWELL, RODGER JOHN recalled:

(Reporter's note: small portion at commencement hearing
not recorded)

NELSON, MS: - - - 0331^ thank you, Madam Associate.

I printed out a hard copy of that letter which I'll hand to you and one to your counsel. Before we get to that - just recapping, we also looked at your own words to the shareholders in New Zealand Windfarms as to what you had achieved since you became chairman and I just want to go back to that. That's 0020 thank you, Madam Associate, at page 3. Can you hear me well enough this morning, Mr Kerr-Newell? I don't want to shout at you?---(No verbal reply)

You say, "Let me start by thanking the shareholders for their patience as the company was transformed," and you say it has been your pleasure to lead the transformation, with your fellow directors and at the beginning of paragraph 2 you say, "2017 has been a very significant year in the development of New Zealand Windfarms," and yesterday we discussed specific areas that you had achieved in Windfarms over the course of that year as chairman. Do you recall that evidence?---Yes.

We were discussing how perhaps you could achieve that while you were located in Halls Creek as CEO. How do you say that you were able to achieve that at Windfarms while you were located at the Shire of Halls Creek?---Put most simply, there were very few changes that needed to be made in that company other than the thinking. The thinking was what I led. It was executed through the office of the chief executive.

You had to recruit and appoint a new chief executive?
---Yes.

So you had to get Mr Worth, the new CEO, up to speed while you were chairman? You had to induct him and get him up to speed, into the culture of the company. Is that correct?
---That's true, but it's a simple task: he was appointed for - with those skills.

I think you also agreed that you financed the acquisition of some significant power assets from Powerco, also during that year?---That was undertaken, yes; not by me, but it was undertaken by the chief executive and another director.

You were the chairman of the company while you went through that process?---Yes.

You also managed to rid the company of some litigation in relation to noise abatement. Is that correct?---That process was carried through, yes, by the company's lawyers.

But you oversaw that process?---Personally, no, but as

chairman, yes, I offered the direction as to how it should be resolved.

If we could go to the following page thank you, page 4 at the bottom, under the heading Capital Management and you say towards the last half of that paragraph that the board has aggressively pursued the purchase of the Powerco Transmission assets and you flag the possibility of the company having a loan of \$12.3 million to fund that purchase?---I'm sorry, the? I flagged the?

You tell the shareholders that there are plans to have a loan of over \$12 million to fund that purchase?---Yes.

You say in the last four lines, "It's a shame that past boards and CEOs have not shown the resolution necessary to execute the transaction, which has been in contemplation for some years"?---Yes.

"And your current board and CEO have executed the transaction in four months." So is that the four months prior to August 2017 when you sent this letter out?---Yes.

I suggest to you that would have been a considerable body of work to have achieved in that period of time?---It was for the chief executive, indeed.

You were required to oversee the chief executive?---The chief executive reported to the board.

THE COMMISSIONER: You're being paid \$70,000 a year. You must be being paid that considerable sum for something?---I talk to the chief executive at least weekly, yes. The transaction inevitably was undertaken by the chief executive, a team of lawyers and bankers.

NELSON, MS: Looking back at the hard copy letter that I've given you, 0331, you tell the shire president in the last paragraph, "There will be no impact on my activity as chief executive officer of the Shire of Halls Creek." Of course at this stage, as at 14 January 2016 when you wrote this letter you were merely a director or contemplating being a director weren't you, Mr Kerr-Newell?---Yes.

You weren't contemplating at that stage being the chairman of the board?---No. That - no.

And as chairman of the board did you see an increase in your activity in relation to oversight of the wind farm company?---The total volume of work didn't change from one to the other. It's a very small board. It was busy in both circumstances.

As a small board, you had an active role on committees? ---Yes. I think you asked me yesterday was I a member of various committees. The answer to that was yes. They - the only committee which has ever met in that time I think is the audit committee, of which all directors are members.

When you say met, do you mean physically come together?
---Met in any sense. I think the audit committee has to meet at least two or three times a year.

Now turning over to the second page of this document, you can see Mr Edwards' response of the same date?---Yes.

Would you agree that essentially he concedes to your request on the basis of the conditions that you said there would be no impact on your activity as chief executive officer?---Yes.

How did you keep in contact with your new CEO?---By telephone or Skype or Facetime.

How often did you phone him?---At least once a week and sometimes much more frequently.

Did you also have telephone calls with the other directors?---Yes, I did.

How often did you call them?---The regularity of it varied from frequently in some weeks to not at all in others.

Did you use your shire issued mobile phone to make those calls?---Yes, I did.

The commission has analysed your call usage over the 24-month period from January 2016 to December 2017 and I'll show you a schedule, 0932^. This schedule shows two things: the monthly duration of international calls made from the phone 0439 622281.

THE COMMISSIONER: Can we have it blown up just a little bit more? Yes.

NELSON, MS: Thank you.

The monthly duration of calls is the column in the middle of the schedule that says "Duration of Calls" and it also shows the cost, the monthly cost of the calls, and we're only talking about international calls. So over that 24-month period international calls totalled over 72 hours. Would you agree that that's a high frequency of international calls?---Yes.

And were the majority of those calls for the purposes of windfarm business?---Very likely.

Was this in accordance with the shire policy on mobile telephone usage?---I would need to look at the policy.

If we could have 0305^ at page 28, thank you.

So you can see there's been several iterations of this policy, the last one is 15 June 2017?---Yes.

Did you oversee the review of the policy on that date?
---(No reply).

Did you? Sorry, did you oversee the review of the policy on that date?---It would have been done at the management meeting, yes.

You can see at paragraph 2- if we could scroll slightly up, thank you - that the information technology resources are provided to support the council's administrative and operational activities and at paragraph 3, if you could read to yourself the first two dot points.

VANDONGEN, MR: I don't think the witness heard you.

NELSON, MS: Well, I'll read it to you. So paragraph 3, the first two dot points, Mr Kerr-Newell - - -?---Yes.

- - - that the policy has the intent of ensuring employees are not wasting work time in non-work activities?---Yes.

And I think we have agreed that calls to New Zealand Windfarms is a non-work activity?---Yes.

Also the policy is to ensure that costs are kept to a reasonable level for the shire?---Yes.

Do you consider that it is reasonable that the shire was paying for your international calls to New Zealand Windfarms?---I understood from my contract I had a cell phone. I made use of that.

THE COMMISSIONER: That's not an answer to the question that counsel asked?---I'm sorry, could you ask the question again?

NELSON, MS: Did you consider that it was reasonable for the shire to pay for your international business calls?
---No.

Did you offer to repay the shire at any point?---No.

Did you sign off on the mobile telephone bills that came in for your particular service?---No.

Who signed those off? Who signed those off for payment?
---They would have been signed - they would have been signed off by the CFO.

Under your direction?---She is under my direction.

If we go to page 30, thank you, the policy becomes quite specific about personal use, doesn't it, Mr Kerr-Newell, and what is acceptable?---Yes.

At paragraph 18, it has to be reasonable personal use - - -?---Yes.

- - - that doesn't negatively impact upon the user's work performance?---Yes.

And paragraph 19, it mustn't cause additional cost to council?---Yes.

Then paragraph 21 gives some guidance as to what would be reasonable personal use?---Yes.

Did you consider that the frequency of calls to the directors and CEO of New Zealand Windfarms was an occasional short telephone call?---No.

Then paragraph 22 is quite specific about what is unreasonable personal use, isn't it, Mr Kerr-Newell? If you could scroll, sorry, to the next page, thank you, Madam Associate?---Yes.

And that specifically states international calls involving significant additional charges?---Yes.

Were you aware of any other employees of the shire who used their shire-issued phones to make international calls on a regular basis?---No.

Would you have allowed that to have occurred?---It would have been situational but generally I would have discouraged it.

If we could look at a table, 0933^. This is a very lengthy document.

THE COMMISSIONER: Let's wait until it gets blown up.

NELSON, MS: Thank you.

THE COMMISSIONER: That will be better.

NELSON, MS: It's the calls made from your mobile phone over the course of one year from 14 February 2017 to 15 March 2018, so that's 13 months, and it's broken down into calls by recipient, so you can see that there are six lines of calls initially to a Mr Paul Carlo. Who is he?---He was someone present who was representing the interests of windflow technologies.

So that's windfarm business-related calls?---Yes.

Then there are five pages or four and a half pages of calls to Mr John Worth who was the CEO?---Yes.

You see at the bottom of the first page, at line 178, which is about the middle of the page on your screen - sorry, if we go back to page 1, so line 178 - sorry, it's line 34, my mistake, session 178. It's one call that I just - it caught my eye because it went for one hour and 21 minutes. Can you see that, Mr Kerr-Newell?---Yes.

And that was on 3 November 2017 which I can tell you was a Friday?---Yes.

Looking at the calls to Mr John Worth, I can tell you that they were all made during the working week except for 11 only on a weekend?---Yes.

Was that normal pattern of your activity - - -?---Yes.

- - - to call them during the working week?

VANDONGEN, MR: I just noticed, commissioner, that it says "incoming" and counsel is putting it on the basis that the calls were made by Mr Kerr-Newell. I just wonder if that's correct

THE COMMISSIONER: A fair comment.

NELSON, MS: Yes. Thank you for that correction.

So it's calls "in" and "outgoing". I apologise. So you received calls from Mr Worth on your shire-issued phone as well as making any calls to him?---Yes.

If we could scroll down to the next person who has called or you have called and that's Mr Stuart Bauld. What position does he hold at Windfarms?---A director.

If we could scroll down to the next person?---A director.

John Southworth is a director. A significant number of calls to Mr Southworth?---Sorry?

Do you recall a significant number of calls to Mr Southworth?---Yes.

VANDONGEN, MR: Again, your Honour, I make the same observation.

NELSON, MS: A significant number of calls either received or made to Mr Southworth. A significant number of calls either made or received from Mr Southworth?---Yes.

Not all the calls were made during the working week were they, Mr Kerr-Newell?---No.

There were some made on weekends?---Yes.

Would you accept that in that 13-month period that about 90 per cent of them were made or received in core business hours?---They may well have been, yes.

And the commission analysis is that 90 per cent of calls made or received amounts to 27 hours in total over the course of 13 months?---Yes.

Would that be reasonable?---Without going through and checking it looks reasonable, yes.

But it's not reasonable when you look at the shire policy, is it?---No.

Did you use the administration staff at the shire to do any Windfarm business for you?---No. They may - I kept a file so, yes, the answer to that is some time may have been applied, yes, was supplied to it.

I didn't hear the last bit of that sentence. "Yes," and then you said something else?---Sorry. Yes, I would have used some time of my PA, simply keeping a file for me, yes.

What sort of items would you have asked her to put in a file for you?---Notes and agendas.

If that document can be taken down thank you, Madam Associate.

I'm going to show you an orange file which was found in the executive services workstation at the Shire of Halls Creek and the file itself is 0373^?---Yes.

Is that the file you are referring to, or was there a separate file?---No, that's the one I'm referring to.

Are all the documents in that file related to Windfarm business?---I think so.

I'll give you a minute just to look through it, to make sure that you agree with that?---In the main I think also there's some reference to time I spent with my family in Sydney, but principally it's Windfarms.

There are some travel documents included in that folder aren't there, Mr Kerr-Newell?---Yes.

Do they relate to your trips back to New Zealand?---The travel documents specifically, yes, it is a trip to New Zealand and it is stopping in Sydney, I believe.

Was that stop in Sydney related to Windfarm business or was that - - -?---Meeting my family.

So that was purely personal?---Yes.

At the front of the folder there is an itinerary it seems to me. Would you agree that's an itinerary for your travel?---Yes, I see this.

What was the purpose of travel on that occasion?---As I said, to meet my family in Sydney and then subsequently go on to New Zealand for Windfarms business.

That document is on a shire logo letterhead. Why is it that it was typed up by someone at the shire?---It is the itinerary of where I was going to be, so that people knew at the shire.

Who typed that up for you?---My PA.

Was it your usual practice to get her to type up your business itineraries for travel to New Zealand?---No. It was in this case because I was going to meet my family in Sydney.

So after she typed up that document, did you distribute it to anyone in particular?---I can't remember. I don't think so.

Was the purpose of her typing it out purely for yourself and our family to have a copy of your travel movements?---Principally for me and the organisation to have a copy.

So if the organisation was to have a copy, who in the organisation would be the person who would retain the copy?---My PA.

Who was your PA at the time?---May 16. You need to go - it could have been Agnes Adan.

What was the date of that particular travel, Mr Kerr-Newell?---It was May of 16.

Thank you. If that folder could be shown to the commissioner and Mr Vandongen thank you, Madam Associate.

THE COMMISSIONER: Show it to Mr Vandongen first.

VANDONGEN, MR: Thank you very much. Thank you, commissioner.

THE COMMISSIONER: Carry on, Ms Nelson.

NELSON, MS: Thank you, commissioner.

I ask for document 0657^.

This shows a pattern of your international travel, and if we could have lines 1 to 34 magnified. You can see from the far right of the screen that it concerns your travel movements - and I'm more interested in the first three columns, thank you, Madam Associate, whether that assists in increasing it.

The fourth column along from the left shows the direction code, so "I" means into the country, "O" means out of the country. So taking the first four lines, it indicates that you flew out of Perth on 20 August 2017 and then you arrived back in on 25 August 2017. Does that accord with your memory?---Yes.

And you can see that it was a flight that ended up in New Zealand?---In?

New Zealand?---Yes.

At AKL which is short for Auckland ?---Auckland.

And then lines 5 and 6, in May you flew out of Perth - - -?
---Yes.

- - - on the 26th and back in on 2 June again to Auckland.
Lines 9 and 8 - - -?---Sorry?

8, lines and 8 and 9?---Yes.

In February 2017 you flew to Auckland?---Yes.

And over the Christmas period of 2016-2017 you went to
Asia?---Yes.

Then lines 14 and 15, November-December 2016, from
25 November to 3 December 2016 you went back to Auckland?
---Yes.

Lines 17 and 18, again in September 2016?---Yes.

Lines 19 and 20, you went back in July 2016?---Yes.

In May 2016, you can see line 20 and 22?---Yes.

In April you went to Singapore?---Yes.

Was that wind farm related business?---No.

That's shire related business?---Yes.

In February 2015 you went to Auckland. That's lines 25 and
26?---Yes.

And then in May 2014 you went - a code CGK, do you know
what that is?---Sorry?

Is that China? Did you go to China in May 2014?---What
line was that, I'm sorry?

27 and 28?---Yes. We went - yes.

Was that shire related business?---Yes.

And December-January 13-14 was when you went to Auckland
which we talked about just after - - -?---This is line?

Line 29 and 30, just after you took up - - -?---Yes.

- - - the CEO position. Now, from line 1 to 26, those
trips from Perth to Auckland, were all of those related to
New Zealand Windfarm business?---If it's after March of 16,
yes.

So that would mean from line 24 upwards, line 24 is
April 2016 and then moving back up the table we've got
May - - -?---Yes.

- - - 2016, July 2016, September 2016,
November-December 2016 - - -?---Yes.

- - - December-January 2017, February 2017, May 2017 and
August 2017. If we take lines 14 and 15 when you went back
over the November - end of November, beginning of December,
was that for a significant board meeting?---Sorry?

Was that for a significant board meeting at the end of
2016?---Line?

14 and 15. You left on 25 November - - -?---14 and 15?

- - - 25 November 2016 and came back in on 3 December
2016?---The AGM would have been in late 16, about - I think
it was November.

Would you agree that the pattern of your international
travel increased over the time after you became chairman of
New Zealand Windfarms?---Yes.

Is that because - why was that?---Because I was attending
an average of four meetings a year in New Zealand.

What leave did you use from your position as CEO of the
shire to attend those board meetings in New Zealand?---I
would imagine it was time off in lieu as I had asked that
the organisation generally use time off in lieu in advance
of annual leave.

On what basis do you say you were entitled as CEO to time
in lieu?---It was the usual practice of the organisation to
work a nine-day fortnight in most jobs.

THE COMMISSIONER: That wasn't the question. It is an
answer to your question - but isn't your position governed
by your employment contract?---Yes.

NELSON, MS: Does your employment contract entitle you as
CEO to time in lieu?---Not specifically, no.

When you say "not specifically", on what basis then can you
as CEO have time in lieu?---I don't know. It was the usual
practice of the organisation to work a nine-day fortnight.
It was something that was established before I arrived. It
carried on. I didn't think about it at the time.

But you used it to enable you to be absent from the shire
to attend to your secondary employment, Mr Kerr-Newell?
---Yes, I did.

And you used it regularly, didn't you?---Yes.

You used it in preference to using your annual leave,
didn't you?---Yes, I did.

The records the commission has establishes that you

expended 78 days' time in lieu in the period up to September 2017. Would you agree with that?---Yes.

Who approved that time in lieu, for you to take it?---I gave all of my leave forms to be signed off by the shire president.

If we could have 0336^, thank you.

THE COMMISSIONER: Does that leave form include time in lieu?---Yes. I treated any absence from the office as requiring a leave form.

NELSON, MS: This appears to be a leave form signed by you. Is that correct?---Yes.

You appear to have signed it on 9 December 2013?---Yes.

At that stage you hadn't yet taken up your sole role as CEO. The other CEO was still in the chair?---Yes.

You were CEO designate. And you asked for two days' time in lieu. Is that correct?---Yes.

On that basis, how did you account for those two days' time in lieu?---I honestly can't remember. It should have accrued at the rate of one day in lieu for each fortnight.

Are you saying this was an automatic accrual process?---Yes.

And what mechanism was there to automatically accrue your time in lieu?---That - the policy was established before I arrived. It meant that you had the effect of working at least four extra hours in the course of each week or it may not have been four, it might have been three and a fraction so over nine days you worked 10 days' hours.

You mentioned the policy. We'll just have a look at that, it's 0305^?---I'm sorry, I can't hear you.

We're going to look at the policy that you mentioned?---Yeah.

Page 205, thank you. You can see this was adopted on 19 November 2015?---Yes. Yes.

Was there a leave entitlement policy in place when you started as CEO?---I think so, yes. It may not have been.

If we could scroll down to the bottom of the page, paragraph 16, "Employees' individual contracts will specify their entitlement to TIL," which is a reference to time in lieu isn't it?---Yes.

And your contract does not specify that does it, Mr Kerr-Newell?---No, it doesn't.

Paragraph 12, "A leave form must be completed before the leave is to commence," and paragraph 9, "Employees are permitted to accumulate a maximum of 300 hours of annual leave entitlements." Are you aware of how much annual leave you have accrued, Mr Kerr-Newell?---It must currently be about 700 hours, 600 hours; it's significant.

More than double what the policy says?---Indeed.

And this appears to have been a policy that was put in place while you were CEO?---Yes.

So you must have had some input into what was in this policy, Mr Kerr-Newell?---I was seeking to drive down the leave balances.

But not your own?---I took little leave, as you will have seen from the spreadsheet. My accumulated leave is excessive, as it is for many people in the organisation.

THE COMMISSIONER: It is if you've taken time in lieu to which you were not entitled, then your leave would be excessive wouldn't it?---Yes.

NELSON, MS: Thank you. If we could go back to the leave forms you were looking at, 0336^ at page 1, if we go to the second half of this page which we didn't look at before, who has approved that?---I couldn't tell you. I don't recognise the signature. Obviously it's not mine and it's not the shire president's, so it - I don't know.

You wouldn't approve your own leave form would you, Mr Kerr-Newell?---I try not to.

What do you mean you try not to?---I don't approve my own leave. It needs to have a - - -

If we could go to page 2, this is a memo obviously from the shire president. What's the meaning of this memo?---I'm sorry?

What is the meaning of this memo?---It means that I worked over a weekend.

It's very specifically asked for 15.2 hours to be credited as time in lieu?---Yes.

How did you come to that particular figure?---It must be - it must be two times 7.6. Two - a day is 7.6 hours' long. That is two days, so I must have worked over two days of the weekend.

Doesn't your contract specify that you're required to work the number of hours necessary to do the job, Mr Kerr-Newell?---Yes.

What did you show to the shire president to justify that you had worked the 15.2 hours over a weekend?---I would

have worked - we must have been at a work-related event.

When you say we must have been, do you not have any documentation to support that assertion?---I cannot recall what it was.

In your summons to attend at this examination, you were asked to bring along some documents, any records relating to your accruing and expending of time in lieu including but not limited to calendars, electronic or otherwise, diaries, spreadsheets et cetera?---Yes.

Did you bring any documents with you?---I did.

Could you please produce those, thank you. This appears to be a printout. Where has it been taken from, Mr Kerr-Newell?---I asked that one of my staff print all the records of my absences from the office by leave time.

So who created this document for you, which member of staff?---Daniel.

And where has Daniel taken the data from?---From the records we keep in the shire.

Those are electronic records?---Yes.

So who inputs the data into whatever software is used to create those electronic records?---A hard copy form is created, signed. That should be imaged and it should go into the system.

When you say a hard copy form, you mean a leave form like what we've just looked at?---Yes.

So, for example, when it has a description of "public holiday" and then it says "hours taken minus 7.6", has Daniel obtained that amount of time, 7.6, from a hard copy form?---Yes.

On the second page, there's a number of descriptors that say "TIL taken" and then the hours taken vary from 7.6 to .84 to 53.20. Well, how would Daniel arrive with an hour of .84 for TIL? So presumably that's not a full hour. It's only .84 of it. Can you account for that?---No.

Perhaps I'll get this scanned, so everyone can see what we're talking about. Hand that to the commissioner to have a look, thank you, Madam Associate.

THE COMMISSIONER: I take it you've got a copy of this, Mr Vandongen.

VANDONGEN, MR: Yes - - -

NELSON, MS: Commissioner, I'd ask under section 98(1)(b) that the commission retain that document for a period of time to take copies.

THE COMMISSIONER: Any objection, Mr Vandongen?

VANDONGEN, MR: None whatsoever, commissioner.

THE COMMISSIONER: Very well. The order leave is granted.

NELSON, MS: If we could go back to page 3 of the document on the screen, which is 0336^. Is this your application for one day time in lieu on 18 March 2014?---Yes.

It appears that you have signed it the day after you took the day in lieu. Is that correct? You signed it on 19 March?---Yes.

If we could scroll down to the bottom of the page, who had this leave been approved by, Mr Kerr-Newell?---By Teresa Foster, the CFO.

She's not your supervisor, is she?---No, she's not.

Why was it not approved by council?---It would normally have been approved by the shire president. For reasons I can't this moment recall, obviously I took a day off. I wanted to account for it.

If we turn to page 4, this appears to be an application form from you for the same day, time in lieu. Can you account for that?---I can't.

And if you scroll down to the bottom, thank you.

Who has approved this form?---The shire president.

On 20 March?---Yes.

If we go to page 5, thank you, Madam Associate.

In August 2014 you've requested five days' time in lieu?
---Yes.

Is that your signature?---Yes.

And why is it undated?---Sorry?

Why is this undated? You have not dated the form and the person who has approved it has not dated the form?---I didn't - I haven't either. It was an oversight.

Who has approved this leave?---The shire president.

Did the shire president ever sign these leave application forms in advance of you filling them out?---No.

If we go to page 6, thank you.

Now, this appears to be a leave application made by you on 5 December 2014 for six days' time in lieu for later that

month. Is that correct?---Yes.

And you have signed that?---Yes.

Is that your writing where it says "Rodger Kerr-Newell"?
---No.

Whose writing is that?---I can't recall.

And down the bottom of the page, thank you, who has approved this leave?---I have.

Why is that, Mr Kerr-Newell?---Obviously I could not at the time find the shire president. It was an oversight and my error.

Well, you've put this leave form in - well, you've signed it on 5 December which is probably more than two weeks before you were going on the leave. Are you suggesting you couldn't find the shire president in that entire period?
---I suspect practically someone was trying to create a payroll so it would be dealt with prior to Christmas. I have no clear memory (indistinct) go away and look myself. The form is accurate.

And then the next page, thank you, Madam Associate.

This is an application for one day time in lieu on 24 January 2015 and you appear to have requested it on 21 January 2015. Is that correct?---Yes.

And if we could scroll down. Who has approved this leave?
---The shire president.

If we could have the following page. You applied for one day's sick leave?---Yes.

If we could scroll down. Has anyone approved this?---No.

Shouldn't it have been approved by the shire president?
---Yes.

We'll have the next page, thank you.

You asked for 17 days' time in lieu for February to March 2015. What was the purpose of this leave?---It must have been a Christmas holiday.

Is it the case that you should have taken annual leave for this period of leave, Mr Kerr-Newell?---I believed that I was entitled to time in lieu. Yes, you could say I should have taken - - -

THE COMMISSIONER: How can you believe that? How can you believe that? You read your employment contract?---I understand that. The contract does not mention time in lieu. I was given to - - -

Other contracts do, don't they? Contracts for your executive directors and managers do mention time in lieu specifically, don't they?---I can't recall. I would need to go and look at the contract, but they may well do.

The shire council looked to you for advice and leadership?
---Yes.

And this error of yours seemed to entirely favour you, to the detriment of council and the shire. Isn't that correct?---I'm sorry, I couldn't hear.

This time in lieu entirely favours your interests, to the detriment of the shire's interest. Is that correct?---It favours my interest. Yes, indeed it does.

To the detriment of the shire because should you leave, they would have to pay you out your annual leave entitlement which has accumulated, wouldn't they?---Yes.

But by your booking as much leave as you can to time in lieu, to which you're not entitled, you would eventually end up with a sum of money to which you were not really entitled, wouldn't you?---Yes.

NELSON, MS: If we could just scroll down to the bottom, who has approved that?---The shire president.

If we could scroll back up to the top, at the time he approved it did the form that you put in front of him say, "Please pay airfare allowance of \$4000 times two, \$8000"?
---I would - I think so. It may not have done. I have no - I'm not clear in my memory as to whether it did.

Is that your writing?---And as it happens, it's also incorrect.

What do you mean by that?---It's not two lots of airfare allowance, it's only one.

Is that your writing?---Yes.

Were you paid either \$4000 or \$8000?---\$4000.

Were you entitled to be paid that under your 2013 contract?---I believe so.

If we just have a look at that, 0469^ page 9, so it's easier I'll give you a hard copy of your contract. That was 0469^ page 9 thank you, Madam Associate. Go down to 12.4 at page 9 of the document that you've been given, Mr Kerr-Newell. You can see from your 2013 contract that the benefit is the economy class return airfare to Perth?
---Yes.

And it is grossed up to be paid as a taxable payment, but under 12.4.3 you had to have taken one week's leave to qualify for the payment. Did you check your leave balance

to make sure that you had qualified for the payment?---No.

Because on this leave application form you were actually taking time in lieu, weren't you?---Yes.

If I could go back to 0336^ page 10, thank you, this is a reference to time you spent at a forum which was related to your business as CEO wasn't it, Mr Kerr-Newell?---Yes.

On what basis can you get time in lieu for doing your actual work as CEO?---I would have added to that because I had worked seven days that week.

Do you maintain that a reasonable working week for a CEO was only from Monday to Friday?---No.

A reasonable working period would have included on occasion weekend work wouldn't it, Mr Kerr-Newell?---Yes, it would.

Do you accept that you weren't entitled to time in lieu under your contract?---Yes.

And you weren't entitled to time in lieu for doing weekend work because as part of your contract, you had to do whatever was required to fulfil the duties?---Yes.

If we go to the next page, two days' time in lieu in May 2015 and is that your signature - - -?---Yes.

- - - applying for that leave? And then who has approved this leave?---Councillor O'Neil.

What supporting documentation would you have given her to enable her to approve this?---I'm sorry, I don't understand you. I gave her the form.

Would she have asked you for any supporting documentation to establish your entitlement to time in lieu?---She did not ask me that.

If we go over to the next page, this is a leave form for 2015. Why has it not been dated, either by you or the person who has approved this leave?---I can't recall. Oversight.

Then the next page, would you agree from this form it's not clear who has actually put in the leave application?---I agree.

If we scroll down, it has been approved by Councillor O'Neil?---Yes.

If we could go to page 15 please. This application is again undated - - -?---Yes.

- - - for December to January 2015-2016, and if we could scroll down. Who has approved this one?---I'm sorry?

Who has approved this?---The shire president.

If we could go to page 17, thank you.

THE COMMISSIONER: Would the shire president or deputy president, the person approving, be entitled to rely on your assurances that the leave is due and owing?---He's entitled to do it.

NELSON, MS: Who has signed this application? It appears to have been double-signed?---I've signed it but I don't know - recognise the other signature.

The document you produced has been scanned, and it's document 1008^, thank you.

Just slowly scan through the two pages, thank you, Madam Associate.

Looking at the TIL taken that's on this page - if we could just slightly scroll up, thank you - there appears to be a recurring number of hours of 7.60?---Yes.

How do you account for that?---The number? It's a day, a working number of hours in a day.

If we could go up to the top of the document to the annual leave, do you say this is the entirety of the annual leave that you have taken as CEO?---I believe so.

So for the year 2014, is it correct to say you've only taken approximately three days' annual leave?---Yes.

And for 2015 approximately six to seven days?---Yes.

And for 2016 how many days have you taken? My maths is starting to - - -?---Yes.

Probably 10 days, maybe 14 days. Okay, thank you. If we could have 0332^.

Is this a leave form for six days' annual leave over November-December 2016?---Yes.

And is it correct - if you could scroll down - that it's been approved by the shire president?---Yes.

On the occasions that you were absent from the shire, you said yesterday that Mr Musa Mono would normally be appointed acting CEO?---That was my normal practice, yes.

Is that something you would discuss with the council?---No.

Why not?---It was delegated to me.

Would you tell the council that you were going to be absent from the shire before you left?---I would certainly tell the shire president, yes.

Not necessarily the rest of the council?---No, but there was a minute of the meeting between the shire president and I which was sent to all councillors.

And did you always discuss it in advance with the shire president at your meetings with him?---Unless some circumstance intervened, yes.

Did Mr Mono have any of the delegations that you exercised as CEO - - -?---Yes.

- - - when he was acting?---Yes.

Did you document that?---I delegated the responsibilities of the chief executive in the main to Mr Mono.

But did you document that in written form anywhere?---Yes.

And where did you put that?---It will be in the filing system.

Is that not something that needed to be informed to council, that you were sub-delegating their delegation to you?---I believe not.

If we could go to the next page, thank you, Madam Associate.

You've asked for 14 days' time in lieu over December-January 16-2017. Is that correct?---Yes.

Was that for the purposes of a holiday or for wind farm business?---A holiday.

And the next page, thank you.

You've required one day annual leave, 27 January 2017. Is that your signature?---Yes.

Is that your writing of your name?---No.

Whose writing is that?---I expect it's my PA's.

And down the bottom of the sheet has it been authorised by the shire president?---Yes.

Did he do that in your presence normally?---Yes.

How is it that he was able to sign the form without either making a recommendation for or against this application?---He has failed to put a cross in the box.

And it's also undated?---Yes.

The date near your signature, at the top, appears to have been entered by your PA. Is that correct?---I'm sorry?

The date of 25 January 2017, near your signature - - -?
---Yes; yes.

- - - that was not entered by you, was it?---No.

Was that something that was done retrospectively after the event?---I don't believe it was. If I was taking any absence from the office, because it would go the meeting with the shire president, I would have said to my PA, "Make certain there's a leave form there", for a particular period of time.

Did your PA have some leave forms that were pre-signed by the shire president?---No, she didn't.

If we could turn to the next page, thank you.

Similarly in this one, another annual leave application for three hours. It's undated when it's authorised by whoever's signature that is. Whose signature is that?
---It's my signature at the bottom. It is not countersigned.

And you've recommended your own annual leave?---I did.

If we could have 0951^, thank you.

On 15 September 2017 you've asked for half a day time in lieu and this document appears to have been also authorised by yourself - - -?---Yes.

- - - and undated. Would you agree that as you've become more settled in the chair as CEO that you've become increasingly relaxed about the forms that you put in to take leave, Mr Kerr-Newell?---The forms should have been properly authorised. I don't think I was more or less relaxed about it. The important objective I had was to ensure that I did record my absence.

If we could go to the next page, thank you.

Who has authorised this half day time in lieu? If we scroll down, thank you, Madam Associate?---The shire president.

How did the staff become aware that you were going to be off on time in lieu?---Because I told them.

How would you tell them?---It would have been at a Monday morning management meeting. It was done via the minutes of the shire president's meeting and in a very small office, it's impossible to notice I'm not there but the process was mainly through the Monday morning meetings.

Was there ever an occasion where you would have forgotten to tell your staff that you were going to be absent from the shire?---I can't think of one. My absence would have been glaringly obvious.

Because if you told them at the Monday morning management meeting, that would assume that you had already put in for the leave - - -?---Yes.

- - - prior to that day - well, in advance of taking it. On some of these leave applications we can see - well, one we've looked at you've asked for it after the event? ---Mainly - unless it was long - like a holiday, it would at the very least have been signed off at the Thursday meeting which may have followed the Monday meeting.

If we could have document 0852^.

This is a commission document which shows the yearly calculation of TIL that you accrued and you took. Madam Associate, if you could click on 2013 down the bottom.

You can see that the hours accrued at the far right in 2013 are 24.6?---Yes.

And you took 15.2 hours in 2013?---Yes.

Now, the hours accrued in whole and part hours, so 8.44, 9.44, 6.72, do you say that was an automatic accrual process - - -?---Yes.

- - - attached to the payroll? Is that correct?---Yes.

And then 2014, if we could click on that tab, thank you, if we could go to the totals at the bottom.

You can see that there are number of 8.44 hours accrued in any time period. Do you agree with that?---Yes.

So would this accrue automatically without you necessarily doing any extra work in that particular period?---Yes.

You approved 216.89 hours and you took 99.64?---Yes.

In 2015, similarly there's the automatic accrual amount we can see of 8.44. Given that you said earlier that a day is 7.6 hours, how was 8.44 calculated?---I don't know.

You've accrued 192.41 hours and taken 190 hours in that year and in 2016 you can see you took 205.2 hours?---Yes.

And then in 2017, 2018, the first month of 2018 only, you took 270.64 hours?---Yes.

Do you agree, Mr Kerr-Newell, that the pattern is of increasing usage of time in lieu over the course of the period from 2013 to 2017?---Yes, I do.

And would you agree that there's a marked increase after you became chairman of New Zealand Windfarms?---Yes.

If that is a convenient time.

THE COMMISSIONER: Yes. We will break for 15 minutes.

NELSON, MS: Thank you. That can be taken down, Madam Associate.

So in summary, all those applications that we looked at and the analysis that we looked at before the break indicated that as at 30 January this year you had expended 674.64 hours of TIL which is just over a hundred days? ---Yes.

Which, when you put that against your pay rate, your hourly pay rate, would equate to just over \$78,000?---Yes.

That your contract says you were not entitled to?---As I said, I believed I was, erroneously. The point - the reason that I used time in lieu is relatively simple. Given that I believed I was capable of accumulating both time in lieu and annual leave, my preference for the organisation, and therefore myself as well, was that we first used time in lieu, simply because annual leave is accounted for in a special fund, we accumulate that. Time in lieu is something which would appear to continue to be a liability but it has to be found out of the annual operating statement and therefore should someone leave, we didn't wish to have that charged to the operating statement. It was preferable that any charge was to the special fund for annual leave.

Mr Kerr-Newell, there is no basis for your belief that you, as CEO, had any entitlement to time in lieu, was there? ---The basis for my belief was my induction, and the creation of that system prior to my arrival.

What were you told at your induction, your induction package about time in lieu?---I was told by the previous chief executive that I would accumulate time in lieu.

Even though it was not in your contract?---Yes.

And even though you presided over the creation of a policy which said that it was only an entitlement if it was in the employee's contract?---Yes.

If you could look back at the induction package that you created after you became CEO, 0906^, if we go to page 3, at the bottom of the page you can see that you have signed this?---Yes.

And behind it is the induction package and if we go to page 12, down the bottom of that page:

All full-time staff work 76 ordinary hours per fortnight on average. How these are made up are

sometimes varied by mutual agreement to suit operational requirements.

Over to the next page under the heading Office Staff Hours:

Office employees work 76 hours per fortnight, Monday to Friday. Employees are offered a system of time in lieu to have an occasional day off, maximum one per fortnight.

On what basis do you say you were entitled to time in lieu?---I said that in my induction that the previous - my predecessor told me that the expectation was I would only have to work a nine-day fortnight, and when I arrived that system was installed and accumulated hours to achieve that.

We'll have a look at your contract, the 2013 contract initially. I believe you've got a copy of that in front of you?---I do.

0469^; if we go to page 5, 6.4?---Yes.

"The CEO shall work such reasonable hours as are necessary to carry out the duties and functions of the position"?
---Yes.

It doesn't say anything about time in lieu, does it?---No.

Then if we look at Ms Little's contract, 0901^, page 5, 6.4 again:

The officer shall work such reasonable hours as are necessary to carry out the duties and functions of the position, provided that the officer shall be entitled to one flexiday each two-weekly work cycle?

---Yes.

There was a distinction between the CEO and the employees of the shire, wasn't there?---Yes.

THE COMMISSIONER: And you got more leave, annual leave entitlement than they did, too, didn't you?---Yes.

NELSON, MS: How many extra weeks?---In that contract, one.

The commission analysis is that by 30 January 2018 you had accrued 674.35 hours of annual leave, or 88 days?---I agree.

Which is a considerable expense for the shire when it comes to the end of your contract isn't it, Mr Kerr-Newell?
---Yes.

Because it will be paid out under the terms of your contract, won't it?---Yes.

The commission has been told that there were at least two councillors who were not aware that you had leave applications and were not told on a continuing basis when you were going on leave, of any type of leave?---I can't say with absolute certainty that every piece of leave was recorded in the minutes of my meetings with the shire president, but if it - if it is not a hundred per cent it's pretty close to it and all councillors were circulated with all of that information.

You utilised the time in lieu to either travel to New Zealand for wind farm business or to go overseas on holiday. Is that correct?---I did utilise that, yes, for the reasons I said.

And looking at the pattern of your time in lieu, you took on average 24 days per year over the period of the last four years?---Yes.

Whereas you took only on average 9.5 days per year annual leave?---Yes.

And you say that there was a policy and a practice of the shire to accrue annual leave rather than expend it?---Yes, that the preference for leave would come from, effectively, own-funded time in lieu.

If we can have document 0030^, thank you.

This is the travel itinerary that was in the front of the orange lever arch folder that you were looking at this morning. Is that correct?---Yes.

Madam Associate, could you just slowly scroll through.

Mr Kerr-Newell, could you satisfy yourself that all the items on that itinerary were solely for either personal or wind farm business?---I believe so.

Who paid for the flights and accommodation for this trip? Who paid for the flights and accommodation for this trip? ---I would have. My - - -

Did anyone pay you back for those? Did you claim any expenses from anyone?---I'm sure, yes, the wind farm material would have been repaid to me, yes.

Did you claim any expenses from the shire for that trip? ---Not that I have a memory of.

Thank you. If we could have 0922^. This is a list of all payments made to yourself into your Commonwealth Bank account - - -?---Yes.

- - - from New Zealand. What was the purpose of these payments? Take a minute to look through them?---The repayment of various expenses which I incurred with New Zealand Windfarms.

What type of expenses are we talking about?---Principally flights.

So was it your practice for you to pay on your personal credit card upfront for the flights and then - - -?
---Yes.

- - - put in an expense claim?---Yes.

When you travelled to New Zealand for the High Court case, that we were looking at yesterday, in September 2016, who paid for that travel?---The serious fraud office.

In New Zealand?---Yes.

If we could have 0213^, thank you, and page 2 - sorry, keep scrolling through. There should be an expense claim form. Thank you.

Is that your writing?---It doesn't look like it but it - yes, this is a form.

If we could scroll down a bit further, thank you. Keep going. Thank you.

Is that your signature there?---I'm sorry?

Is your signature anywhere on that expense form?---I don't see it.

Keep going further, thank you, Madam Associate.

Do you recall giving them taxi receipts?---That's my writing.

Is that still your writing?---Yes.

Keep going. Thank you.

Is this your writing?---Yes.

Thank you. Just scroll slightly.

You've got written there - I think it says "travel to Halls Creek, driving, 360 kilometres"?---Yes.

What was the purpose of telling the serious fraud office that?---I was recording the costs of the activity.

Did you get paid mileage for travelling those kilometres?
---I can't recall. I - I would've thought so.

Did you use your shire vehicle to travel to Kununurra from Halls Creek?---I would have, yes.

If we could scan back further up.

And another 360 kilometres the other way?---Yes.

Go further up, thank you, Madam Associate, back to the expense claim form. Thank you.

Can you see there that they have accounted for 720 kilometres at 38 cents?---Yes.

Did you repay that amount of money of \$273.60 to the shire?---No.

Do you believe you should have done so?---I don't know.

THE COMMISSIONER: Well, it wasn't an expense you incurred?---Sorry?

It wasn't an expense that you incurred, was it?---It wasn't an expense that I incurred, no.

And you have claimed it?---I see. I see your point.

NELSON, MS: You have pocketed that money, haven't you, Mr Kerr-Newell?---Yes.

If we could have document 0891^. Keep scrolling through, thank you. That's actually the wrong document. You can take that down, thank you, Madam Associate.

What was the procedure for doing your performance reviews? ---It's an annual event. The shire - I on behalf of the shire, in discussion with the shire president, identified someone who was independent to undertake it. It was something we both had to agree on, who was to report to a - the council, the shire council, which identified that individual and they undertook the review of my performance and reported to the council.

Did you always get the same person to do that review for you?---In my time, yes.

And who was that?---Mr Fitzgerald.

Did he prepare a report?---Yes, he did.

And after he prepared that report and it was given to council, was there a meeting between yourself and council in which you discussed what was in that report?---Yes.

When it came to you entering into your second contract in 2016, who did you undertake the negotiations for that with?---Essentially Mr Fitzgerald.

When you say "essentially Mr Fitzgerald", did you discuss with him changing the terms - some of the terms of your 2013 contract?---Yes.

Mr Fitzgerald was retained by the shire?---Yes.

Was there any of the council members involved in those discussions?---About my contract?

About changing the terms of your 2013 contract?---They must have been. I'm sure Mr Fitzgerald talked to the council about it. I don't know.

Was it the situation that you presented to Mr Fitzgerald the changes that you wanted to be made?---I certainly said to him the changes I was looking for.

Was there much to-and-fro discussion between you, him, him and the council and then back again as to - - -?---There was discussion.

Over what particular aspects of the changes was there discussion?---The term was important.

In what way was the term important?---The - the shire had normally contracted on a three-yearly basis. I suggested it be longer. I had - at that stage I either had or was in the process of extending contracts to five years across the board. They were not enduring. I suggested that mine be increased to slightly over four years which came to the end of the term of council in 2019 and then left a transition period prior to my exit.

Apart from the term of the contract, were there any of the aspects of your suggested changes that were not acceptable to council?---I can't recall.

If we could turn to 0469^ - which is the hard copy of the 2013 contract that you have in front of you - and go to page 8, and at the bottom of that page.

The terms of your package are set out in dollar terms? ---Yes.

What's your understanding of the SAT determination? What's that a reference to?---What is my understanding of?

It says at the top there "SAT determination - - -?
---That - - -

- - - ?--- - - - determines the pay for shire chief executives, amongst others.

If we go over to the next page to the top, 12.2.1.

What was your understanding of the meaning of that clause? ---As it says.

Given that the contract also says at paragraph 16 that it may only be varied or replaced by agreement in writing signed by the parties - - -?---Yes.

- - - was it your understanding that any increase in your salary or in your package needed to be agreed in writing to

be a variation of this contract?---Yes.

Going to your 2016 contract which I'll give you copy of - that's 0334^, thank you - go to page 5. This was made on 30 April 2016. Would you agree looking at paragraph 6, and specifically combined 6.4, 6.5, 6.6 and 6.7, that this is a contract on which your performance is assessed on what you produce, not on the time that you expend being CEO?---Yes.

Looking at 6.4 we see the same contractual terms that was in 2013's contract, that you are to work reasonable hours as are necessary to carry out the duties and functions of the position?---Yes.

And 6.7, "Devote the whole of your professional effort to your employment and will not hold any position or take on any activities which may in any way be seen to conflict with your obligations under this contract - - -"?---Yes.

"- - - unless approved by council or if the council so chooses by the president". It would seem to me, Mr Kerr-Newell, that the intent of that subparagraph is that you cannot be authorised to do any secondary employment as CEO of the shire?---I'm sorry, the intent of it is to?

That the intent is to prevent you from doing any secondary employment as the CEO of the shire?---Yes, with the caveat at the end.

"Unless approved by council or council so chooses by the president." Is that what you're referring to?---Yes.

I think the commissioner asked you yesterday whether, when you gave that letter to the shire president some three months earlier than this, if you satisfied yourself that he had the approval of council to authorise secondary employment. You remember being asked that question yesterday?---Yes.

And given that your contract specifies that he needs their approval, did you satisfy yourself that he had it?---I've always seen the shire president act only with the consent of his council.

THE COMMISSIONER: So that would be minuted? So there would be a minute to that effect?---If it was a meeting, yes, there would be. Councils also discuss amongst themselves what they do.

Everybody does that but council speaks through its minutes and resolutions, does it not?---There is no minute, that I'm aware of, of this.

NELSON, MS: If we could go to page 7, there is a specific clause about divulging confidential information which is not available to the public. It's clause 9.1. Do you agree with that, Mr Kerr-Newell?---Yes.

It says, "Confidential information includes all information relating to the functions and operations of the local government which is not made available to the public"?
---Yes.

I'm referring to the tender, that the information that was given to Ms Baz in March 2017 was not material that was available generally to the public was it, Mr Kerr-Newell?
---Some of the information. You're right, yes.

So that was a breach of that clause of your contract?
---Yes. It was about the colour of vehicles.

And also about the specifications that needed to be included in each vehicle?---Included that, yes.

Looking at paragraph 12.1, you're entitled to the total remuneration package of \$309,000 per annum, which takes into account the requirement to attend meetings outside working hours?---Yes.

That's incompatible with accruing time in lieu isn't it, Mr Kerr-Newell?---Those words are. I've told you what I thought before.

And an acknowledgment that the position is measured on performance and not on the number of hours worked?---Yes.

If we could go over to page 8 and you can see your new total remuneration package, schedule 1 total rewards \$244,145 which is a figure that does not include the regional isolation allowance which is the top figure of 65,000. Are you aware that the SAT allowances say that for someone in the shire who's the CEO of the Shire of Halls Creek may only earn up to 256,711? Were you aware of that, that your total package at the time you signed this contract was near the top that was allowed by the SAT?---It was near the top, yes.

You were aware of that when you signed this contract?
---Yes.

Looking at the next page, 12.2.1, about review of your base salary, this is an edition from your 2013 contract. Why was this particular portion of 12.2.1 included?---I'm sorry?

This is different to what is in your 2013 contract. If you look at 12.2.1, why was there a change made to the way your base salary could be reviewed?---It's trying to reflect reality. It was something that we discussed at the time. I don't recall a particular reason for it, other than to better reflect what happens.

But in any event, any increase in leave was subject to the SAT salary capping - - -?---Yes.

- - - that we just discussed? Looking at 12.4, in your 2016 contract it's been changed, the calculation of your airfare allowance so that you get a cash benefit of \$4000? ---Yes.

And the requirement that you take one week annual leave has been removed hasn't it, Mr Kerr-Newell?---Yes, it has.

Was that at your suggestion?---May have been.

Was that because you were using time in lieu to be away from the shire, rather than annual leave?---No.

Why was that requirement removed?---I can't remember.

And then over to page 11, to 12.12.1.1, it specifies the type of vehicle that you're to be given has to seat five persons, be fitted with a bull bar, driving lights, cruise control, GPS, and satellite telephone. These are additional specifications than what appeared in your 2013 contract?---I'm sorry, these are?

These are additional specifications from what appeared in your 2013 contract which referenced - - -?---Yes.

- - - a motor vehicle, Prado. Why were those changes made?---To reflect reality. I spend a great deal of time on a gravel or dirt road, it's an appropriate vehicle. We now fit all vehicles without exception with bull bars, driving lights; GPS, yes. Satellite telephone in fact has been removed as it happens and replaced with a satellite location beacon.

Down the bottom of that page, 12.12.1.6, your 2016 contract references unlimited private use of your motor vehicle in Western Australia, and in the Northern Territory for business and private purposes. In 2013 you were actually required to pay the cost of fuel purchased outside the shire during periods of private use. Do you recall that? ---Yes.

Why did you make that change?---Increasingly we were doing business with the Territory administration in relation to common roads and I sought that benefit.

And at page 13 at the bottom, 13.1.1, annual leave, you're entitled to six weeks' paid annual leave?---Yes.

Over to page 14, under the termination conditions a change was made at 14.2.2, a council may terminate you for any reason by giving 12 months' written notice. In 2013 it was 13 months?

VANDONGEN, MR: Three months?---Yes.

NELSON, MS: Sorry, three months. Thank you, Mr Vandongen.

What was the reason for making that change, for increasing it by nine months, Mr Kerr-Newell?---We - I asked that clause to be in, simply for the reason that I believe the council should be able to exit their chief executive for no reason at all. There were in the course of that contract a number - I think two elections. Ultimately if the newly elected council doesn't like the chief executive, full stop, they should be able to exit him. It was simply documenting that route.

But that's not my point, Mr Kerr-Newell. That was not changed. In 2013 they could also terminate for any reason but only with three months' - - -?---Yes. I sought a longer period.

And it was agreed to, obviously?---Yes.

THE COMMISSIONER: And that's the real reason for the change, is that you sought a longer termination period?---Yes.

That was the real reason for the change, not to give the council the ability to dispense with the CEO?---It was to document a longer period, yes.

NELSON, MS: Thank you, that can be taken down.

Yesterday you gave evidence that when it was suggested to you that council had only agreed to a two per cent budget increase for salaries for shire employees, you suggested that was not the case. Do you recall that evidence?---Sorry, what was that?

Yesterday we were talking about increases of salaries for shire employees?---Yes.

We were talking about that in relation to Ms Little and Ms Glass - - -?---Yes.

- - - receiving - - -?---More than two per cent.

- - - substantial increases and there was some discussion about whether council had agreed to that and whether they agreed to general salary increases in a percentage form?---Yes.

If I could show you a council agenda from 18 June 2015 which is 1009^ at page 122 specifically, thank you. You can see this is part of a longer document but if we go to the bottom of page 122, over to the top of page 123 and council have been told that staff salary and wages costs have been budgeted with an average three per cent increase?---This is a - - -

An agenda item?---Yes, it is.

Represents approximately one-third of the shire's operating costs?---Yes.

Does that accord with your memory for the 2015-2016 financial year, that council agreed to a three per cent? ---Each year we prepare that set of assumptions, yes, and variously that one, you're right it's three per cent. The succeeding ones are two per cent, I believe.

If we could have - - -

VANDONGEN, MR: Commissioner, might it be possible just for my benefit for that document to be scrolled up so I can just see under the heading Risk.

THE COMMISSIONER: Surely.

VANDONGEN, MR: That page, commissioner, that was previously being shown had a heading at the bottom which said Risk. I just wanted to read underneath it. Further up, I think. A bit further, the next page.

THE COMMISSIONER: Would you like a hard copy?

VANDONGEN, MR: I believe it's 157 pages long. If there is one available, I certainly would appreciate a hard copy.

NELSON, MS: I could give Mr Vandongen my page 122, 123. I don't have the entire document.

VANDONGEN, MR: Thank you, commissioner.

THE COMMISSIONER: Continue on.

NELSON, MS: Thank you. If I could have document 1010^ at page 53 and if we could scroll down to page 55 thank you, keep scrolling thank you.

That last paragraph that's on the screen, do you see that this council agenda for 16 June 2016 is suggesting that salary staff and wages costs have been budgeted with an average of 1.5 per cent increase?---At an average one and a half per cent, yes.

THE COMMISSIONER: Mr Vandongen, if these documents are important to you, I'm quite willing to adjourn and have a full copy made available.

VANDONGEN, MR: At the moment they're not necessary, thank you.

THE COMMISSIONER: If that changes, let me know.

VANDONGEN, MR: I will. Thank you.

NELSON, MS: Thank you.

If we could have 1011^ at page 112, scrolling down, thank you.

Council has been told for the 20 July 17 agenda, item 2, build in two per cent - - -?---Yes.

- - - for salary and wage costs. Thank you. If we could have document 0864^ and up to the top of the page, thank you.

If we look at Margaret Glass initially. The third line down in her review on 1 February 2015 she is given a three per cent pay rise - - -?---Yes.

- - - which is in line with what the budget - council had been told was budgeted?---Right.

I showed you the agenda item for 2015. 2016 said there was to be a three per cent - - -?---The presentation to the council is about the total budget, not about individuals. The assumptions document says it's our intention - I think it says precisely it's our intention not to inflate any other costs other than the salaries and wages budget which goes up, you're right, by a number of percentages, three, one and a half and two. That is not a description of what the pay rates would be.

But is it not an indication of how much you're going to raise the salary of each of employee, percentage-wise?---I don't believe so. It's an indication of what the budget line is going to be because inevitably, as you pointed out, the staff are a very large part of the cost of the shire.

If we could go down to the very last row which I think is 25.

For Ms Little, on 24 February 2017, she's given a 5.98 per cent pay rise whereas in the council agenda item of 16 June 2016, they were told the salary increases were budgeted for 1.5 per cent.

VANDONGEN, MR: I think it said "on average", with respect.

THE COMMISSIONER: It did say "on average".

NELSON, MS: Given that it did say "on average", Mr Kerr-Newell, and Ms Glasson is getting just under six per cent, someone else is getting significantly lower.

THE COMMISSIONER: Ms Little.

NELSON, MS: Sorry, Ms Little. Someone else is getting considerably lower - - -?---Yes, they are. I sought to start people on the lowest rate and then increase it. As I said I think yesterday, yes, hers has gone up as you describe. It's - it's all there. That's accurate.

But my point is, Mr Kerr-Newell, that if everyone started low and went high and got just under six per cent pay rises, then you would not be able to meet the salary and

wages projected budget of 1.5 per cent increase, would you? It would go way over that?---Yes, and the budget was reduced in other areas by in some cases having less staff.

What it suggests, Mr Kerr-Newell, is that Ms Little was favoured, she was given favoured treatment when it came to her performance?---I don't believe so. When I made those decisions it was based on the information from various - well, as I said, the Macarthur salary survey.

THE COMMISSIONER: That's not noted anywhere, is it?---No.

All we have is their performance review and you've written a figure on it.

NELSON, MS: All right. Moving on, do you understand that you have obligations under the Local Government Act to put in annual returns to disclose various - - -?---Yes.

- - - interests, Mr Kerr-Newell? Have you, do you believe, fulfilled those obligations over the time you've been CEO? ---From time to time I believe not.

Why is that? Why have you not?---Because at the time I came to Australia I was led to believe I did not have to declare things outside of Australia. That was incorrect, and as a result of knowing that that was incorrect, we had a comprehensive legal opinion and I, and in fact everyone else, disclosed as widely as was possible.

Was that something that you did at the end of the last year, the end of 2017?---Yes.

THE COMMISSIONER: Who led you to believe to the contrary?---When I arrived my predecessor told me how to fill the form in. I thought no more about it and did it. It was wrong.

That's not leading you to believe anything, is it?---I'm sorry?

That's not leading you to believe anything?---He told me that I didn't have to declare things which were in New Zealand or indeed was in my superannuation, which I had invested in New Zealand which I considered to be my superannuation. I didn't disclose it. I can't avoid that fact.

NELSON, MS: When you say he led you to believe there were things you didn't need to disclose, what were the things that you specifically?---The things I disclosed - inevitably you have those disclosures - were I think i93 and Brink.

I won't make you exhaust your memory, 0899^ - - -?
--- - - - and Yachting New Zealand.

So you said you commenced office on 30 September 2013 and

this is your final return - - -?---Yes.

- - - which is your obligation when you commenced office. Scroll up a bit further.

Presumably - what did you understand - sorry, Madam Associate, I should have asked you to stop, "Income From and Occupation."

What did you understand the income sources to be that you had to disclose in a primary return?---Income which I was receiving within Australia.

And what do you understand it to mean now?---I'm sorry, what do I understand?

Do you understand it to mean something more than Australian income now?---I do now, yes.

If we go over to the next page, thank you, page 2. Thank you, you can stop there.

Under "Interest and positions in corporations" you have disclosed three entities?---Yes.

Are they all New Zealand entities?---Yes.

Why is it that you disclosed those when you say that you had the belief at that time that you didn't need to disclose New Zealand interests?---In the case of i93 because, like, that was my - I was always going to be director of that. B Brink had sought to - it had not in fact traded in Australia but had sought to trade to Australia and had registered for tax purposes. It seemed to me wiser to say that.

And what about Yachting New Zealand?---It was at the top of my mind.

That was never going to be operating in Australia, was it? ---No, it wasn't.

Why did you disclose that if you say you were told you didn't need to disclose New Zealand interests?---As I said for the other two, because I was trying to be complete.

So if you were trying to be complete in September 2013 what caused you to change your mind in later returns to not include New Zealand interests?---Because I ceased being a director of Yachting New Zealand. B Brink became a defunct organisation.

If you look at your next return which is an annual return for July 2014 - 0466^, thank you, Madam Associate. If we can scroll through to page 3.

Just before we do, is that your writing?---No.

Who filled this form out for you?---I can't recall. It may well have been Ms Perkins.

Thank you. If we could go back to page 3.

So you've seen fit in your next return to continue to disclose your New Zealand company interests?---Yes. They're very personal to me.

But you were a director of both of those?---Yes.

Which is only a position that you can hold personally, isn't it?---Yes.

And then if we could go to 0465^.

This is an annual return from 1 July 2014 to 30 June 15 period. Whose writing is on this page? Is it yours?---I don't think so, no.

Scroll through to page 2, thank you, and over on to page 3.

Again you've declared those - - -?---Yes.

- - - personal positions that you hold, New Zealand companies, and it's signed by you on the last page on 9 July 2015, and then if we could go to the next period, 0467^, which is for the period 1 July 2015 to 30 June 2016. Is this your writing?---No.

Given this period is to 30 June 2016, should we expect to have seen your directorship in New Zealand Windfarms declared in this return, Mr Kerr-Newell?---(No verbal reply)

Sorry, you'll have to actually say something for the transcript?---I failed to properly declare it.

What was the reason for that, Mr Kerr-Newell?---Oversight. The legal opinion made it very clear. I had to declare those things. It was my error.

You've signed this, on the last page, 9 August 2016?---Yes.

THE COMMISSIONER: The other two companies that you had declared directorships in were they trading, were they doing things?---In?

The two companies, B Brink - - -?---Yes.

- - - were they actually trading?---No.

But you declared them, but by this time you were actually involved in an ongoing company?---I recognise that.

Well, it just may seem odd - - -?---I should have - - -

- - - that you had an oversight of a company that you were

actually involved in but declared companies that weren't really doing anything. Some might consider that it was not an oversight at all.

NELSON, MS: By 9 August 2016 were you actually chairman of New Zealand Windfarms?---No, I don't think - - -

I think you were elected chairman - - -?---I might've been, yes.

- - - in late June?---Yes, that's possible.

And if we could go to the last page, thank you. Were the previous two annual returns given to the shire president, Mr Kerr-Newell?---I thought they were.

But there's no record of that receipt, is there?
---Inevitably I would have to check.

The commission has served notices on the shire for them to produce anything that's relevant to your returns, and they haven't produced any written documentation from the shire president that's similar to the one we see on the screen. Would that suggest to you that they perhaps were not - - -?---They may not exist. My memory was that I thought they did.

The relevance of that, Mr Kerr-Newell, is that as at 11 August 2016 there's no record that the shire president knew that you had any interests even in i93 or B Brink because that was not disclosed in this receipt that he was given. Moving on to the next one, 0468^, this is your handwriting, isn't it?---Yes.

For the period from 1 July 2016 to 30 June 2017 and look at page 2, you have not declared that you were getting an income from your chairmanship of New Zealand Windfarms, have you?---No.

And then over to page 3, you haven't declared that you held positions - - -?---No, I have not.

- - - and nor have you declared that you also held options to acquire shares in New Zealand Windfarms that you referred to yesterday, have you?---What is the date of it? Yes, you're right. I didn't, no.

You signed this on 10 October 2017?---Yes.

If we go to the next page, thank you, Madam Associate.

The shire president acknowledges receiving your disclosure on 10 July 2017. How is that possible, Mr Kerr-Newell?
---Because I put the wrong date on the - the form. I know this simply because my auditors identified that last week. When we went back and looked at this, the record, in fact I had submitted it on the right day.

What is the purpose, do you think, of these disclosures?
---Now that I have the legal opinion I have, no, I don't think it's an adequate disclosure.

But what do you think is the purpose of the obligation of a CEO to make these disclosures under the Local Government Act?---So that it is clear the relationships the CEO has with other entities.

Are you aware that the shire is obligated to actually make these public?---Yes.

Are you also aware that there's a penalty of \$10,000 - - -?---Yes.

- - - and imprisonment for breaches?

THE COMMISSIONER: Does this mean, Mr Kerr-Newell, that a ratepayer in Halls Creek may be unaware that their CEO is contributing significantly to a business elsewhere, earning \$70,000 and taking trips three or four times a year when he's absent from Halls Creek and they would be unaware of that?---They would have been then, yes.

Do you think that's a good position?---No. It should have been declared properly.

Do you think that the president might have liked to have known that you were chair of a company that was paying you \$70,000 a year before making his decision to approve?---I can't actually remember the precise conversation but, yes, he should know things like that.

NELSON, MS: I just have one more small topic, commissioner. I just can't find my - - -

THE COMMISSIONER: You're just trying to find it.

NELSON, MS: Yes.

THE COMMISSIONER: Do you want a short adjournment?

NELSON, MS: Yes, thank you. I might have left it in the office.

NELSON, MS: Thank you, commissioner.

Mr Kerr-Newell, the effect of you not making those disclosures that you were obligated to under the Local Government Act meant that not only did the ratepayers not know what interests you had outside the shire but the council didn't know either, did they?---No.

Is it correct that you tried to withhold some councillors getting a copy of your contract of employment?---No. There was only, in my memory, one councillor who asked for my

contract some years ago and I understand that or my memory was that she was invited to look at my contract, the shire presidents have a copy.

I just want to go back to the tender in 2017 of the six shire vehicles?---Of?

The six shire vehicles?---Right.

And I just want to put some matters to you in fairness, and first of all I will give you a copy of the agenda item again and one for Mr Vandongen. Tab 2 of the smaller folder thank you, commissioner, and if you could look at the agenda item of 18 May which is 0430^?---Yes.

This is the agenda item where council are being asked to look at the tender evaluation schedule that is on the last page - - -?---Yes.

- - - in order for them to make a decision as to who is to be awarded the tender?---Yes.

And to assist them in doing that, this analysis, appendix 1, is attached to the back of the report and can I just ask you again, who is it that prepared the figures in this document?---I think they were prepared initially by Mr Burgess. He was, as we discussed yesterday, absent in the time. The work would have fallen to Mr Kearney and also I believe, as I said at the time, Mr Kearney was not very good at writing reports and would have sought and received assistance from either Bronwyn Little or Kellie Gill in writing the report.

What's your basis for saying that Mr Burgess helped to prepare this particular schedule?---Well, he was managing it and I'm sure that he would have done all of the work up to the time he left. He left, I think, before the tenders were closed. The tenders would then have been opened by whoever opened them. There would have been an analysis thereafter.

But how do you say that Mr Burgess had access to the tender amounts for each particular tenderer if he left on leave prior to the tender closing?---I can't particularly recall the timing of it. If he wasn't there he wouldn't have had access. He was in New Zealand, I think.

Looking at the column that's headed Comments, in between Broome Toyota and Halls Creek Toyota, the evidence that has been given to the commission is that each of the items in that column under the heading Comments, referred to item cost that has been added to the Broome Toyota tender application?---I'm sorry, they?

I'll take it row by row. So the first row you can see is for a Prado Metal Storm. Do you agree with that?---Yes.

Then you can see under the column Broome Toyota, Broome

Toyota had put a tender price of 51,094.19 - - -?---Yes.

- - - for that particular Prado and scrolling across, Halls Creek Toyota had put a tender price of \$52,847.23 for the same vehicle?---Yes.

The evidence that has been given to the commission is that for that vehicle, the comment "added rear recovery point" - can you see that?---Yes.

Refers to additional cost that the person preparing this schedule put in to Broome Toyota's tender price for that vehicle, that was in addition to what Broome Toyota had on their actual tender document?---I thought we sought recovery points on the vehicles.

A recovery point costs in total about \$850, approximately. So the amount of 51,094.19 has had added to it, by someone at the shire, \$850 and you can see the next line down for the Glacier White - - -?---Yes.

- - - a roof rack was added and for the Wildfire, another recovery point was added?---Yes.

And these were added to the cost of the Broome Toyota tender price?

VANDONGEN, MR: In fact it says "no roof rack included".

NELSON, MS: Sorry, "no roof rack included". Correct. Thank you, Mr Vandongen.

In addition to that, the registration was included for Broome Toyota which was not included for Halls Creek Toyota. That was done by someone at the shire and yesterday we discussed how that was against the tender specifications. Correct?---Yes.

Which was that the shire was to pay the registration? ---Yes.

What I wanted to suggest to you, that adding those money amounts to the Broome Toyota tender price was in contravention of the Local Government Regulations, specifically regulation 14(5) which says that you cannot clarify the terms of a tender without going back to the tenderer to seek questions as to the price that was to be added?---Yes.

When I say the regulations, I'm referring to the Local Government Functions and General Regulations 1996. Were you aware that that had been done?---I was aware they were trying to analyse the pricing. I was not aware what they had done or not done.

When you say trying to analyse the pricing, can you expand on what you mean?---Well, to make certain that a fair decision was made.

How was it going to be fair if Broome Toyota had costs added to its tender price?---I would need to go through all of the documentation but if there were things omitted from one tenderer and included in another and vice versa, they would try to have, I understood, the price of the supplier of the vehicle as we wanted it.

Was that a direction that you gave to the person that made up this evaluation?---No.

How is it that you're aware that that was their intention? ---That would make sense to me. I don't particularly have a knowledge of it. I can look at one, the Glacier White Prado, and it appears to suggest - because that happens to be one that needed a roof rack and I'm sure that the tender specification required a roof rack. I tell you that from memory.

The regulations state that if you're going to change anything, if you're going to vary any part of the tender, you should go back to the tenderer to clarify that position with them?---Yes.

It may have been that Broome Toyota would say we would put that in for free, and then no cost would be added?---Yes.

Why is it that Kununurra Toyota's tender was not evaluated in this document for council?---I don't know.

Do you accept that if their tender was not rejected it should have been evaluated?---Yes.

And do you accept that given that Delia Baz had dealings with shire employees, including yourself, in relation to parts of this tender before the tender period closed, that that should have been disclosed as an interest in her tender?---Yes.

The reason for that would be that council, when they came to evaluate the tender, would be aware that Ms Baz had had some dealings in regard to the tender - - -?---It was not a secret in any way, shape or form from the council what we were attempting to do.

No. I'm talking about the fact that you had consulted with Ms Baz prior to the tender being actually formulated. You consulted with her as to costs and colours. Was that disclosed to council - - -?---We did discuss that, yes, as I say.

Sorry?---As I have previously said, yes.

Did you discuss with council prior to them evaluating the tender?---No. I did not discuss that with council.

Do you agree that that might have been information that would be relevant to them in their evaluation?---It may

have been.

Did you consult the West Australian Local Government Association handbook on procurement at any stage?---No.

That states that any party with a conflict of interest at any stage of the tender process should declare that conflict of interest and exclude themselves from the process. Do you think Mr Burgess should have excluded himself from being involved in the tender given that he he'd had extensive dealings with Ms Baz in March?---It was inevitable he would have extensive dealings with her. Do I think he should have excluded himself? On balance, no.

Well, it wasn't inevitable, was it? He could have actively consulted with Toyota WA?---He could have indeed or a web page or whatever.

Because at the time of his consultation with Ms Baz in March and indeed yours, it would have been known to you that Ms Baz wanted to put in a tender application?---It was highly likely she would.

The additional charges of \$11,776.50 that we looked at in that purchase order yesterday of 3 July 2017, do you accept that those further items should have been part of the tender amount?---Looking at that order yesterday, some of them could have been. Some of them were anticipated and some of them were after the event. It's a mixture.

Because if they were included in the tender, even part of them, as you say, then that would - - -?---I'm sorry?

- - - have increased the tender price, wouldn't it?---It would have of all of them.

And you agreed yesterday that the application of the local pricing preference to Ms Baz's application was incorrect? ---Having reviewed the policy the day before I came here, yes, although it was a commonly held view in the organisation that there was a 10 per cent local pricing preference.

But increasing it on this particular schedule that went to council was misleading for council, wasn't it?---Yes, but not impacting the overall outcome.

You say it doesn't impact on the overall outcome but it starts to look quite close between Broome Toyota and Halls Creek Toyota when you include in those - - -?---Yes, it is.

- - - the local pricing preference and all those items under the heading Comments and in fact the main advantage that Ms Baz got was what, Mr Kerr-Newell? What was the main advantage that Ms Baz got?---From?

In applying for this tender?---Presumably she makes a profit on it.

Well, she didn't make much of a profit. She said that she only made a few thousand dollars' profit?---I'm sorry?

She only made a few thousand dollars' profit?---Oh, right.

THE COMMISSIONER: Per vehicle.

NELSON, MS: Sorry, per vehicle, correct, but yesterday, you mentioned that she had a commercial advantage. She took a commercial advantage by putting in an early order?---I presume she did.

I can tell you that, as we just have, that she only made a few thousand dollars' profit on each vehicle, Mr Kerr-Newell. It was a significant risk, wasn't it?---I don't know. You mean for Ms Baz?

For Ms Baz.

THE COMMISSIONER: I think we've probably traversed this sufficiently.

NELSON, MS: Thank you, commissioner. I've no further questions.

THE COMMISSIONER: Mr Vandongen.

VANDONGEN, MR: With the commissioner's leave, I just do seek to ask one or two questions, if I may.

Mr Kerr-Newell, you've been asked questions about your annual returns?---Yes.

And about your failure to declare income in those annual returns?---Yes.

Do you remember being asked those questions?---Yes.

After you became a director in New Zealand Windfarms - - -? ---Yes.

- - - in particular you failed to declare income that you received from that company. Is that correct?---Yes.

What was the reason for not declaring the income?---The income from my directorships went to the company i93. It was - it's sufficiently financial to carry on. It did not pay me an income until quite recently. It now pays me an income of I think \$500 a week.

That's the only question I wanted to ask.

THE COMMISSIONER: Thank you, Mr Vandongen.

Thank you for your attendance, Mr Kerr-Newell, and at the conclusion of this, which will be in about 20 seconds' time, you'll be free to go.

(THE WITNESS WITHDREW)

THE COMMISSIONER: We will adjourn until 2 pm.

AT 12.53 PM THE MATTER WAS ADJOURNED UNTIL
FRIDAY, 27 APRIL 2018 AT 2 PM