



THIRTY-EIGHTH PARLIAMENT

REPORT 40

**STANDING COMMITTEE ON ESTIMATES AND
FINANCIAL OPERATIONS
INQUIRY INTO PEEL HEALTH CAMPUS
PAYMENTS REPORT**

Presented by Hon Giz Watson MLC (Chair)

November 2012

STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

Date first appointed:

30 June 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“2. Standing Committee on Estimates and Financial Operations

- 2.1 *An Estimates and Financial Operations Committee* is established.
- 2.2 The Committee consists of 5 Members, 3 of whom shall be non-government Members.
- 2.3 The functions of the Committee are to consider and report on –
- (a) the estimates of expenditure laid before the Council each year;
 - (b) any matter relating to the financial administration of the State;
 - (c) any bill or other matter relating to the foregoing functions referred by the House;
 - (d) to consult regularly with the Auditor General and any person holding an office of a like character.”

Members as at the time of this inquiry:

Hon Giz Watson MLC (Chair)

Hon Philip Gardiner MLC (Deputy Chair)

Hon Liz Behjat MLC

Hon Ljiljana Ravlich MLC

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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

Glossary

DRG	Diagnosis Related Group	Casemix provides hospitals with a consistent method of classifying types of patients, their treatment and associated costs. To implement it fully requires developing and implementing classifications of each type of service provided tools and services. The classification tool for inpatient hospital services is a Diagnosis Related Group (DRG). Charges for each type of DRG service are set by the Department of Health for public hospitals.
FACEM	Fellow of the Australasian College of Emergency Medicine	The Australasian College for Emergency Medicine (ACEM) is an incorporated educational institution whose prime objective is the training and examination of specialist emergency physicians for Australia and New Zealand and the Continuing Professional Development of the Fellows.
CDU	Clinical Decisions Unit	A short stay ward in a hospital.
PWC	Price Waterhouse Coopers	A major chartered accounting firm.
HDWA	Health Department of Western Australia	
ED	Emergency Department	
MPA	Maximum Payment Amount	
HSWA	Health Solutions (WA) Pty Ltd	Operator of the Peel Health Campus.
HR	Human Resources	
PHC	Peel Health Campus	

CONTENTS

GOVERNMENT RESPONSE

EXECUTIVE SUMMARY AND RECOMMENDATIONS.....	i
EXECUTIVE SUMMARY.....	i
Procedural issues.....	ii
Payment to doctors for admissions scheme	ii
Other observations	iii
Recommendations.....	iii
Recommendation One	iii
Recommendation Two.....	iii
Recommendation Three.....	iv
Recommendation Four	v
CHAPTER 1 INTRODUCTION.....	1
Introduction.....	1
Procedural Issues Arising from this Inquiry	2
Mr Jonathan Fogarty.....	2
Background.....	3
CHAPTER 2 DIAGNOSIS RELATED GROUP OVERPAYMENTS AND RECOVERY OF THE OVERPAYMENTS.....	5
Sources of Information for the Inquiry	5
Schedule of Events.....	5
Establishment and role of Clinical Decisions Unit	6
Formation of the Clinical Decision Unit at Peel Health Campus	6
The Maximum Payment Amount	7
Incentive Payment, Bonus or Fee For Service?.....	8
Resourcing the Emergency Department.....	14
Impact of the Clinical Decisions Unit.....	16
Adverse clinical impacts from the scheme (May 2010 – June 2011).....	16
Unnecessary Admissions – Impact on Health System	16
Repayment of overpayments	21
CHAPTER 3 OTHER RELEVANT MATTERS	23
Relationship between Peel Health Campus, Health Solutions and the Department of Health	23
Limitations of the contract.....	27
State of the Sinking Fund under the Contract	28
Is the State getting value for money under the Peel Health Campus contract?.....	32
Profits and Dividends	33

Consultancy Agreements	33
Profit Sharing Arrangement	36
Committee Comment	37
Governance and Management Issues.....	37
Bullying and Senior Management Turnover	38
Locumforce Pty Ltd.....	43
Timesheet Adjustments and Records Management.....	46
Whistleblower Protections.....	46
Conduct of Clayton Utz	46
Additional Issues	47
Closing Remarks.....	47
APPENDIX 1 LIST OF PUBLIC WITNESSES	49
APPENDIX 2 SCHEDULE OF KEY EVENTS	53
APPENDIX 3 CLAYTON UTZ LETTERS.....	57

EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 The origins of this inquiry came from evidence received by the Committee from the Department of Health at its Annual Report hearings on 4 October 2012. In the course of that hearing a number of matters were raised with the Department regarding the Peel Health Campus.
- 2 The Director General, Department of Health requested that the Committee advise him of any evidence it held in relation to the Peel Health Campus so that it could make a full investigation of the matter.
- 3 Accordingly, the Committee commenced this inquiry.
- 4 The Committee issued summons to a number of parties requesting information and requiring witnesses to appear to give evidence.
- 5 The Committee was surprised at the seriousness and extent of issues revealed in the evidence it received and the documents it considered.
- 6 The key witness, Mrs Ashton Foley, the former Chief Operating Officer of Peel Health Campus, gave a highly critical account of how Health Solutions (WA) Pty Ltd (**Health Solutions**), the operator of the Peel Health Campus, provided health services to the public and managed its contract with the State.
- 7 The Committee thanks all witnesses who appeared before the Committee or provided it with written submissions and documents to assist in this inquiry. In particular, the Committee wishes to place on record its appreciation to Mrs Ashton Foley, who put the interests of the people of Western Australia above those of her own by bringing to the public's attention, through the parliamentary committee process, serious matters relevant to the application of public expenditure with regard to the conduct of the operators of the Peel Health Campus. It is not easy for anyone to be the whistleblower and Mrs Foley is to be commended for her courage in this regard. The Committee wishes her well in future endeavours.
- 8 In the time available to the Committee it was not possible to investigate all of the allegations made and the issues identified in this inquiry. However, the evidence obtained by the Committee raises significant questions about the provision of health care on behalf of the State by Health Solutions as operators of the Peel Health Campus, including but not limited to implications for the financial administration of the State's health system.

Procedural issues

9 Parliament is expected to rise on Friday, 30 November 2012. This means that the Committee has not had sufficient time to make any findings or conclusions. In particular, it has not had an opportunity to discuss certain matters with Mr Jonathan Fogarty, the major shareholder of Health Solutions. Also, a number of issues have not been discussed with officers of Health Solutions.

10 **The Committee has not made public the names of witnesses who provided private evidence. Anyone seeking to identify, threaten or harm any witness may be in serious contempt of the Parliament of Western Australia.**

11 The Committee reminds people of the provisions of section 58 of the *Criminal Code* of Western Australia which is reproduced below:

58. Threatening witness before Parliament

Any person who :

- (1) Threatens to do any injury, or cause any detriment of any kind to another with intent to prevent or hinder that other person from giving evidence before either House of Parliament, or before a committee of either House, or before a joint committee of both Houses; or
- (2) Threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any other person for having given such evidence, or on account of the evidence which he has given, unless such evidence was given in bad faith;

is guilty of a crime, and is liable, on conviction, to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

Payment to doctors for admissions scheme

12 Between May 2010 and June 2011 a scheme operated at the hospital whereby Health Solutions would pay \$200 to each doctor in the Peel Health Campus's Emergency Department for an admission into the hospital. This admission generated an inpatient Diagnosis Related Group (**DRG**) payment from the State. This \$200 payment was in addition to any normal remuneration received by the doctor from Peel Health Campus (**PHC**).

13 Evidence suggests this scheme was driven by Health Solutions' desire to maximise revenue generation under the contract with the State and thereby maximise profits.

- 14 The scheme together with other factors led to a spike in admissions at Peel Health Campus during the period July 2010 to January 2011.
- 15 The scheme came under scrutiny when it became apparent that doctors had admitted patients into the hospital in a manner which did not qualify them for payment from the Department of Health.
- 16 In February 2011, due to the spike in admissions, Health Solutions requested substantial additional funding from the Department of Health of between \$1.5 million to \$6.3 million.
- 17 Subsequent to this request, an internal audit identified that the incorrect admissions had given Health Solutions approximately \$1.4m. Further audits, initiated by the Department of Health, identified additional non-complying admissions totalling approximately \$380,000.
- 18 A total of \$1.78 million has since been recovered by the Department of Health from Health Solutions.

Other observations

- 19 There have been a number of other matters raised with the Committee in the course of its inquiry. These other matters affect the State in a variety of ways that may not initially be apparent.
- 20 In the view of the Committee, these issues raise substantial doubts as to whether the current contractual arrangements are in the best interests of the State. Further, the seriousness and extent of these matters require a full investigation.
- 21 It is for this reason that the Committee recommends there be a full independent inquiry.

Recommendations

Recommendation One

The Committee recommends that the Government establish an independent inquiry, with investigative powers, into the operation of Peel Health Campus by Health Solutions (WA) Pty Ltd.

Recommendation Two

If the Government does not establish an independent inquiry a future Parliamentary Committee should examine the issues raised in this report.

Recommendation Three

Any future inquiry should consider:

- Whether the contract between the State and Health Solutions contains sufficient oversight and remedies to protect the State;
- Whether there are grounds for detailed investigation of the financial controls, including cost of services, to the State's health system;
- Whether the fit and proper test for private sector operators of public hospitals is adequate;
- Whether the State is getting value for money from the current contractual arrangements with the Peel Health Campus;
- Whether Health Solutions has breached its fiduciary duties to the State in its management of the Sinking Fund under the contract;
- Whether the reporting relationships between Peel Health Campus, Health Solutions (WA) Pty Ltd and Department of Health are adequate to provide public confidence;
- Whether Health Solutions governance arrangements are appropriate to operate a public hospital;
- Whether Health Solutions will be in a position to meet the contingent liability to the State under the contract arising from Group Three assets when that contract expires;
- The financial arrangements, including the consultancy agreement, between Health Solutions and Mr Jonathan Fogarty;
- Whether the Clinical Decisions Unit (CDU) admission scheme as implemented by the Peel Health Campus constitutes a fraud against the State;
- Whether any patient has been given clinically inappropriate or unnecessary treatment arising out of the CDU admissions scheme;
- Whether the hospital has been appropriately maintained to avoid adverse clinical outcomes;
- Whether there is a culture of workplace bullying in the Peel Health Campus; and

- Whether Peel Health Campus has suitable information systems to manage its operations and meet its reporting obligations to the State under the contract.

Recommendation Four

The Committee recommends that all documents and records relating to this inquiry be held by the Clerk and access granted, if requested, to:

- Director General Department of Health or their authorised delegate;
- Commissioner of Police or their authorised delegate;
- Commissioner, Crime and Corruption Commission or their authorised delegate; and

- 22 Any other Inquiry established by an Officer of the Parliament or the Government to examine any matters raised in this report where the Clerk of the Legislative Council believes it is appropriate.

CHAPTER 1

INTRODUCTION

Introduction

- 1.1 This Inquiry was commenced as a result of questions raised at the Committee's 2011/12 Annual Report hearing with the Department of Health on 4 October 2012. In the course of the hearing, the Committee raised a number of issues with Mr Kim Snowball, Director General, Department of Health who advised that:

It would be helpful to us in any further work we might do to actually have the evidence of those arrangements before us; you have given me a scenario and I have responded as best I can to that scenario by saying that, first of all, I am unaware that that was in place in Peel—I would be surprised if it was—but I would like the evidence, if it is, to establish whether or not it impacts on our contractual arrangements with Peel.¹

- 1.2 Following the Director General's comments above and his invitation to the Committee to provide further evidence, the Committee conducted some initial enquiries which led to the Committee resolving on 29 October 2012 to initiate a formal inquiry with the following terms of reference:

- 1. the circumstances surrounding the overpayment by the Department of Health of approximately \$1.8 million and subsequent recovery from the Peel Health Campus or Health Solutions (WA) Pty Ltd;*
- 2. whether arrangements for fees, bonuses, remuneration or other payments for services made to doctors of the Peel Health Campus or Health Solutions (WA) Pty Ltd included a payment for each admission of a patient from the Emergency Department to the hospital; and*
- 3. any other relevant matter.*

These hearings follow on from the 2011/12 Agency Annual Report with the Department of Health held on Thursday, 4 October 2012.

- 1.3 The Committee sought a number of documents from Health Solutions, the operator of the Peel Health Campus. After receipt of some of the documents it became apparent that there were many other relevant matters.

¹ Mr Kim Snowball, Director General, Department of Health, *Transcript of Evidence*, 4 October 2012, p9.

- 1.4 The Committee took evidence from a number of witnesses, including some in private session. Details of public hearing witnesses are contained in Appendix 1.

Procedural Issues Arising from this Inquiry

- 1.5 Parliament is expected to rise in the week ending Friday, 30 November 2012 and it is not expected to sit again before the election which is due to be held on 9 March 2013. This means that the Committee has not had sufficient time to thoroughly examine all the evidence it has received to date.
- 1.6 The Committee is aware of its obligations under the Standing Orders to provide a witness with a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry.²
- 1.7 The Committee advised that it heard evidence from Dr Aled Williams (Director Clinical Services, Health Solutions) following a public hearing with Mrs Ashton Foley (Former Chief Operating officer, Peel Health Campus) in which some serious allegations were made. The Committee invited Dr Neale Fong, Managing Director of Health Solutions and Chief Executive Officer of Peel Health Campus, to provide a written submission to the Committee. This submission was received on 12 November 2012.

Mr Jonathan Fogarty

- 1.8 Mr Jonathan Fogarty, in his capacity as Chairman of the Board and majority shareholder of Health Solutions at the time these issues arose, was in the Committee's opinion a central figure and therefore vital to this inquiry. Mr Fogarty was summonsed on Thursday, 25 October 2012 to appear before the Committee on 30 October 2012. Mr Fogarty's counsel advised the Committee on 29 October 2012 that Mr Fogarty was not in the country at the time the summons was served. The Committee notes Mr Fogarty is a resident of Singapore.
- 1.9 On 1 November 2012, Mr Fogarty's counsel advised that:

Mr Fogarty had not intended to be returning to Perth until the middle of December. He is making every endeavour however to clear his calendar so that he can be back as close to possible to the middle of November.

*Is there a date in this period that would be convenient to the Committee?*³

² Standing Order 181(e)

³ Letter from Mr Martin Bennett, Counsel for Mr Jonathan Fogarty, 1 November 2012.

- 1.10 Subsequent to that offer, the Committee wrote to Mr Fogarty's counsel on 6 November 2012 advising of a proposed hearing date of 19 November 2012 and seeking confirmation of his appearance.
- 1.11 On 15 November 2012, Mr Fogarty's counsel responded to the Committee's letter. That response is detailed below:

As previously explained to you Mr Fogarty had no intention to return to Western Australia prior to December. He has been endeavouring to deal with matters that are critical to the commercial interests of, inter alia, the operators of Peel Health campus.

These are in no small way issues that have been caused or exacerbated by various matters that have occurred in Parliament.

Mr Fogarty regrets that he is unable to free himself from those commitments so as to be able to return (voluntarily) to appear before your committee on 19 November. He will endeavour to complete those matters as soon as possible and I will let you know when he will be available to attend.⁴

- 1.12 The Committee is of the view that it has given Mr Fogarty several opportunities to give evidence to this inquiry.

Background

- 1.13 Peel Health Campus is a privately operated hospital that delivers public health care in the Mandurah region.
- 1.14 On 18 June 1997, a contract was executed between the State and Health Solutions under which Health Solutions is the operator of the Peel Health Campus public hospital for a period of twenty years. The contract is due to expire on 13 August 2018.
- 1.15 The Peel Health Campus is owned by the State Government and leased to Health Solutions.
- 1.16 Health Solutions is presently seeking to negotiate a redevelopment proposal with the Minister for Health for a private hospital on the Campus.

⁴ Letter from Mr Martin Bennett, Counsel for Mr Jonathan Fogarty, 15 November 2012.

CHAPTER 2

DIAGNOSIS RELATED GROUP OVERPAYMENTS AND RECOVERY OF THE OVERPAYMENTS

- 2.1 The principal issues the Committee considered were:
- whether Health Solutions made any “incentive” payments, over and above normal remuneration, to doctors for admitting patients from the Emergency Department to the hospital; and
 - the circumstances surrounding the requirement for Health Solutions to repay approximately \$1.8 million to the Department of Health.
- 2.2 The Committee wishes to make clear that due to the limited time it has had to report to the House, it has not been able to conclude its investigations.

Sources of Information for the Inquiry

- 2.3 The primary source of information for this report is the documentary information the Committee has obtained from Health Solutions and other sources as well as the evidence heard by the Committee in public and private hearings with a number of witnesses.
- 2.4 A written submission was received from Dr Neale Fong, Managing Director, Health Solutions.
- 2.5 Although the Committee did not seek public submissions, it did receive evidence from a number of sources.
- 2.6 Witnesses who gave oral evidence to the Committee were subpoenaed, with the exception of public servants,
- 2.7 The Committee has not made public the names of witness who provided private evidence and it would be a serious contempt for anyone to seek to identify, or to threaten or harm these witnesses.
- 2.8 The Committee acknowledges the important role Mrs Ashton Foley has played in bringing the issues before this inquiry to the public’s attention.

Schedule of Events

- 2.9 Appendix 2 provides key dates that the Committee has been able to identify through the documents and evidence it has received.

Establishment and role of Clinical Decisions Unit*Formation of the Clinical Decision Unit (CDU) at Peel Health Campus*

- 2.10 The CDU was described as a “short stay trial unit”⁵ which will operate “as an extension of the Emergency Department.”⁶
- 2.11 The CDU trial was to commence in mid-May 2010 and conclude by June 2010. If the trial was successful the operation of the CDU was proposed to be extended from 1 July to September 2010.⁷
- 2.12 The documentation given to the Committee is unclear as to who initiated the creation of the CDU in the Peel Health Campus. E-mails between Dr Paul Bailey (Director of Emergency Department) and Dr Aled Williams indicate that Dr Bailey led the initiative yet other documents indicate that Mrs Catherine McKinley (Director of Nursing) was the leader.
- 2.13 Mr Jonathan Fogarty, in his capacity as Chairman of Health Solutions’ Board, approved the trial.⁸
- 2.14 One of the documents provided in response was a Briefing Note dated 23 April 2010 which states that:
- The trial of the Clinical Decisions Unit (CDU) will test the model to deliver clinically sound patient care which generates revenue to offset costs and contributes to MPA outcomes.*⁹
- 2.15 Some of the early discussions regarding the establishment of the CDU appear to have occurred during PHC management meetings regarding the Maximum Payment Amount (MPA) seeking to address a \$2 million underspend and it was expected that the CDU trial would generate \$1.35 million in extra revenue.¹⁰
- 2.16 Evidence suggests that the generation of additional revenue was a clear purpose in establishing the CDU. Dr Paul Bailey stated in internal correspondence that the “main game here is to capture missed revenue.”¹¹

⁵ Peel Health Campus, *Initial Project Proposal Trial of a Clinical Decisions Unit*, dated 12 April 2010.

⁶ *Ibid*, p1.

⁷ *Ibid*, p1.

⁸ E-mail Mr Jon Fogarty to Paul Bailey, *FW: to do list prior to 30 June*, 2:14 am 6 May 2010 where he states that “you have a green light as you recommend”.

⁹ Peel Health Campus Briefing Note, *Clinical Decisions Unit*, dated 23 April 2010.

¹⁰ E-mail from Pang Ong, *Re: MPA Meeting Minutes of MPA Meeting for 29 April 2012*, 15:20 3 May 2010.

¹¹ E-mail Paul Bailey to Jon Fogarty, *Re: To do list prior to 30 June*, 11:05 am 5 May 2010.

The Maximum Payment Amount (MPA)

2.17 Under the contract between the Department of Health and Health Solutions there is a ceiling on the amount that the State will pay Health Solutions by way of service charges for services provided during a financial year. This ceiling is called the MPA and is set on an annual basis.

2.18 The services to be provided under the contract include:

2.18.1 DRG Services

2.18.2 Non-DRG Services

- Emergency medicine services;
- Oncology/Haematology;
- Palliative/Terminal Care;
- Inpatient-Rehabilitation;
- Outpatients – Day Hospital;
- Outpatients – Renal Dialysis; and
- Care Awaiting Placement Patients.

2.19 The Committee notes that the structure of the contract (in particular the service charges) creates an incentive for Health Solutions to maximise service delivery so as to achieve the ceiling of funding available from the Department of Health.

2.20 The MPA for the 2010/11 financial year was \$78.1 million.¹² The table below is an extract that details the two key line items for payments relevant to this inquiry.¹³

Table 1

Peel Health Campus Notice 2010/11 Maximum Payable Amount revised May 2011

Service	Unit	Volume	Price (\$)	Total (\$)
Inpatient DRG Services	DRG V5.1 r12	11,817.43	\$3,659.80	\$43,249,430
Emergency Department Services	Occasion of service	40,200	\$559.26	\$22,482,252

¹² Letter from Ms Nicole Feely, Chief Executive Officer, South Metropolitan Area Health Service, Department of Health, 2 June 2011.

¹³ *Ibid.*

- 2.21 The proposal to establish a CDU was designed to lift Peel Health Campus's revenue under the contract from an Emergency Department Services payment of \$559.26 to a combined payment of an Emergency Department Services payment plus an Inpatient DRG Services Payment of up to \$3,659.80. This results in increasing revenue to the hospital to a possible maximum of \$4,219.06 (an increase of 654%).
- 2.22 Doctors admitting patients from the Emergency Department to the CDU received a \$200 payment if the hospital was able to claim a DRG payment.

Incentive Payment, Bonus or Fee For Service?

- 2.23 One of the key issues considered by the Committee was whether the \$200 payment was an incentive payment, bonus or a fee for service. All these terms were used in evidence provided to the Committee.
- 2.24 The theme running through the evidence received by the Committee was that the \$200 payment was an incentive payment designed to drive up the number of admissions. In addition, a Briefing Note on the CDU states that:

Medical staff will be paid an incentive of \$200 per patient in addition to their hourly rate for all patients who meet the discharge criteria and conert [sic] to DRGs.¹⁴

- 2.25 The linkage between the payment of the \$200 to doctors and inpatient admissions is openly acknowledged by one of the instigators of the scheme, Dr Paul Bailey, where he states that:

To save the potential "expense" of paying an extra \$200/patient, you are risking missing "revenue" in the order of \$3000/patient.¹⁵

- 2.26 The Committee has also received a number of other documents and oral evidence that refer to the \$200 payment as a bonus or incentive payment.
- 2.27 Under the scheme Doctors were required to obtain an ABN and separately bill for these payments.¹⁶ The Committee has not been able to establish why this arrangement was put in place rather than as an additional payment under their normal remuneration arrangements. This adds weight to the proposition that the \$200 payment was an incentive payment or bonus rather than a fee for service.
- 2.28 A witness with relevant knowledge of the matter gave the following evidence in private:

¹⁴ Peel Health Campus, *Briefing Note Clinical Decisions Unit*, dated 23 April 2010.

¹⁵ E-mail Paul Bailey to Jon Fogarty, *Re: To do list prior to 30 June*, 11:05 am 5 May 2010.

¹⁶ E-mail from Dr Aled Williams to Pang Ong, *Re: CDU*, 5:22am 22 April 2010.

The CHAIR: *Yes; okay. I wonder if you could tell the committee what you understand about the operation of the clinical decisions unit at the hospital when it was operating.*

Witness: *The way I understood it, it was set up to have a fast-paced admitting of patients into the hospital. Obviously, it was a bit controversial when it was raised. At the time when it was talked about, there was mention of an incentive payment, which I was very concerned about. It did not sit well with me because with the word “incentive”, why would a doctor get paid an incentive to admit a patient? They were paid to do a job. So I was very uncomfortable with it and I was very concerned for the company in terms of the areas of professional indemnity, for instance, from the ethical point of view and from a moral point of view. I did not think it was right, so I made my opinions known very clearly that I was very uncomfortable.¹⁷*

2.29 Further, the witness stated:

I was worried if they [the doctors] got carried away and admitted patients because there was this incentive payment. If someone got admitted incorrectly or something happened, they could sue the hospital. I was concerned with our professional indemnity insurance cover and that kind of thing, because it is not a fee that is paid as part of a doctor’s package, like a normal \$250 an hour or \$400 000 a year. It is an incentive payment. If a patient was wrongly admitted and something happened to that patient and the patient decided to sue the company, would our insurance cover that?¹⁸

2.30 Another witness with relevant knowledge of the matter made comments in a similar vein where they stated that:

The CHAIR: *Was it your understanding that it was an incentive payment? What was the nature of that payment? Certainly from the documentation I have read, it seemed to be referred to in different ways.*

Witness: *If people are honest, it was an incentive payment. That is the terminology in this documentation. I am only quoting what is in this documentation. It is mentioned as an incentive.*

¹⁷ Witness, *Transcript of Evidence*, 19 November 2012, p1.

¹⁸ Witness, *Transcript of Evidence*, 19 November 2012, p2.

The CHAIR: *You had concerns about this. Did you raise them with anyone?*

Witness: *As I said, when we did benchmarking with other hospitals, we thought an admission rate of presentations of somewhere from 18 to 22 per cent was within the norm. In around about, I think, January, February and March 2010 [The actual year was 2011], our rate jumped above that, so I tabled question marks with the medical director to question whether we were admitting patients within the guidelines. I think there is a document I tabled. There was a defined set of guidelines that the hospital had to follow if they were admitting patients. Provided the hospital met those guidelines, from my view—I am not a medical person—it was properly administered.*

The CHAIR: *Who was the medical director at that time?*

Witness: *Aled Williams.*

The CHAIR: *Do you know why this arrangement for the \$200 incentive payment was put in place? What was the objective?*

Witness: *I think, Madam Chairman, as I said just prior, the admission rate from the emergency department through to the hospital was substantially lower than comparative hospitals within the metropolitan area. So the \$200 was a fee to ensure that the appropriate paperwork was undertaken because, as I said, there is a fair amount of paperwork for the admission criteria and it was believed if the doctors were paid the \$200—and whether \$200 was representative of the time that it would take a FACEM to complete the paperwork to admit a patient, you can argue the case, but the basis was to cover their time in filling out the documentation, meeting the criteria in the admission because the admissions from the hospital were substantially lower than what would have been expected.¹⁹*

- 2.31 In a report prepared for the Department of Health dated 20 June 2012, Dr Aled Williams referred to the payment as a fee for service. Dr Suzanne Gray (current Director of Emergency Department, Peel Health Campus who at the time of the CDU was a part time Fellow of the Australasian College of Emergency Medicine (FACEM) supported this view in her evidence to the Committee and indicated that there was additional work involved in admitting a patient to the CDU.²⁰

¹⁹ Witness, *Transcript of Evidence*, 30 October 2012, p3.

²⁰ Dr Suzanne Gray, Director of Emergency Department, Peel Health Campus, *Transcript of Evidence*, 19 November 2012, p3.

2.32 Additionally, the Committee was advised by a witness with relevant knowledge that:

Prior to my time, the admission of patients through to the hospital from the emergency department was running at approximately 11 to 12 per cent. If you compare that to like hospitals, the normal percentage—I am not sure that you can call it “normal percentage”—or the range for like hospitals would have been around 18 to 22 per cent, so from a clinical side, when you benchmark against other hospitals, you would have to question: was the hospital giving the appropriate patient care? One of the factors was that paperwork was required to be undertaken by the doctors to admit patients, so the philosophy behind it was to pay a fee and the fee, depending on the documentation you read, was an incentive fee—an admission fee for the FACEMs that admitted patients through to the hospital.²¹

2.33 In considering whether the \$200 was a fee for service or an incentive payment, the Committee notes the spike in admissions which occurred at the Peel Health Campus after the creation of the CDU.

2.34 The table below shows the spike more clearly as the number of Emergency Department admissions grew from 224 in July 2010 to 522 in January 2011 (an increase of 133%), while the number of Emergency Department presentations grew from 3,193 in July 2010 to 3,630 in January 2011 (an increase of 13.7%).

Table 2
Inpatient DRG Statistics July 2007 – January 2011²²

	Jul 2010	Aug 2010	Sept 2010	Oct 2010	Nov 2010	Dec 2010	Jan 2011
Emergency Department Presentations	3,193	3,239	3,538	3,571	3,302	3,667	3,630
Emergency Department CDU Admissions	224	280	438	523	532	607	522
Medical DRG	439	487	478	629	550	580	657
CDU Doctor Payments	21	41	51	88	90	103	110

²¹ Witness, *Transcript of Evidence*, 30 October 2012, p3.

²² E-mail Phil Hatt to Jon Fogarty, *Inpatient DRG July 07-Jan11*, 22:20, 3 March 2011.

- 2.35 Ms Nicole Feely, Chief Executive Officer, South Metropolitan Health Service, Department of Health gave evidence to the Committee regarding Peel Health Campus:

Hon LIZ BEHJAT: *Are you aware of any other health campus in this state that was running a CDU at that time or was planning to do CDU sort of things, or is this unique to Peel Health Campus?*

Ms Feely: *No. Hospitals across the board have varying areas attached to emergency departments where patients that actually meet particular criteria can be referred to for intensive assessment and treatment. So whether it is called a CDU—we might have a medical unit or we have surgery special units—there are various departments across the board, so in and of itself a CDU is not —*

Hon LIZ BEHJAT: *Is not a unique thing.*

Ms Feely: *— particularly unique, and it is one of the management tools that can be put in place by a hospital to manage their flow.*

Hon LIZ BEHJAT: *And separate payments to doctors to encourage admissions to a CDU—that is normal across other health campuses as well?*

Ms Feely: *I am sorry; no, no-one should be paying a special fee—I am sorry, can you repeat the question?*

Hon LIZ BEHJAT: *Well, evidence given to this committee is that—this is how it has been put to us: a patient arrives at ED. They are triaged. They then get put off—they are seen by an RMO. The RMO then makes a decision that perhaps this person needs further investigation or admission, but they do not have admitting rights. The FACEM is the one that has the admitting rights. The FACEM makes a decision that this patient is going to be there longer than four hours and one minute; needs to go to the CDU. If that patient then is admitted to the CDU, the FACEM is paid a \$200 incentive payment.*

Ms Feely: *No, that does not happen anywhere.*

Hon LIZ BEHJAT: *It does not happen anywhere?*

Hon LJILJANNA RAVLICH: *Well, it happened at Peel.*

Ms Feely: *Other than at Peel Health Campus.*

Hon LIZ BEHJAT: *Other than Peel. So that is the only health campus you have ever heard of that happening.*

Mr Strachan: *Can I just —*

Ms Feely: *But I understand that that is not the nature of the \$200 payment. The \$200 payment, according to Dr Neale Fong, was to ensure they had the appropriate level of overnight and medical support, and that \$200 was not an admission payment, but a payment made to doctors to stay on shift as such. So, no. But, in any event, that was not something we ever approved; did not know about —*

Hon LIZ BEHJAT: *You did not know about that at all.*

Ms Feely: *No.*

Hon LIZ BEHJAT: *That is what I really wanted to know. The health department was never aware of any of those sorts of arrangements or payments.*

Ms Feely: *No, and would not have authorised it.*

Hon LIZ BEHJAT: *You would never have authorised it.*

Ms Feely: *No.*

Hon KEN TRAVERS: *You are saying —*

Ms Feely: *That is how I understand the nature of the payment, and this is just in recent times, not at the time.*

Hon KEN TRAVERS: *Right. So you are saying that your knowledge about those payments is informed by Mr Fong; is that correct?*

Ms Feely: *Yes—mine is just recently, yes, when the issue was raised through here. That is how I became aware of it, and then reading some correspondence in relation to that. But as far as south metro is concerned, we do not authorise the payment for people to actually admit patients other than that which is paid through the normal DRG health process.²³*

²³ Ms Nicole Feely, Chief Executive Officer, South Metropolitan Health Service, Department of Health, Transcript of Evidence, 19 November 2012, p 4-5.

Resourcing the Emergency Department

- 2.36 The letter sent by Ashton Foley to the Department of Health in June 2012 attached a report prepared by Dr Williams outlining his version of how the CDU was established and operated. This report states that:

From the beginning staffing was always going to be an issue. There were no general physicians available and FACEM's though more available, were in high demand with various HDWA hospitals paying very large day rates at the time to attract staff (eg Armadale and Rockingham paying rates in excess of \$3000/day and even higher rates available in Kalgoorlie and Albany, in some cases more than \$4000 per day).²⁴

- 2.37 The same report later states that:

Ideally, the FACEM on for CDU was an additional staff resource to the FACEM on duty in ED. Again due to staff shortages this was not always the case, and sometimes the FACEM or senior doctor in ED, was also in charge of the care of patients admitted under CDU.²⁵

- 2.38 Other documents provided to the Committee indicates there were substantial issues associated with the CDU in its initial stages as the e-mail from Dr Gray outlined:

CDU has effectively become the dumping ground for difficult patients. There is no admission criteria that is being followed. The workup of these patients by the ED staff is extremely variable and sometimes very poor with inappropriate tests and management occurring.

...

The role of the CDU doctor over the weekend has become pretty unpleasant, quite stressful and clinically unsafe.

...

I also have a great concern that there is now no dedicated FACEM in ED. I think this is affecting the quality of care patients are receiving and the overall running of the department.

...

²⁴ Letter from Mrs Ashton Foley, Chief Operating Officer, Peel Health Campus covering a report by Dr Aled Williams, Director of Clinical Services, Peel Health Campus, 20 June 2012.

²⁵ *Ibid.*

We need to define the role of the CDU doctor, even if just to cover us medicolegally.²⁶

- 2.39 The Committee discussed Peel Health Campus Emergency Department resourcing with Dr Gray who did not resile from the comments made in her e-mail but did clarify a number of points.²⁷

- 2.40 Dr Gray provided evidence to the Committee regarding the current situation in the ED department:

We have done a 180 really. The staffing of the emergency department is just so much better now. We have increased our staffing across the hospital – medical staffing – by 50 per cent if not 60 per cent overall. We now have three ED consultant shifts every day that are filled every day. So we have consultants from 8:00 am to 11:00 pm on site in the emergency department solely and then on call overnight.²⁸

- 2.41 In another e-mail provided to the Committee, a number of issues were raised about the CDU including the following:

Appropriate investigations and keeping patients in ED longer

*Can you also remind CDU doctors that the whole idea of CDU was to get earlier plans and disposition and to get people out of the ED? **I have noticed I am seeing patients who have had unnecessary investigations to keep them here longer than four hours.** [emphasis added]*

...

***There are also doctors who are asking staff to keep patients here for four hours, so they will get money.** [emphasis added]*

Overall, I think CDU must be generating a lot of money for the hospital.²⁹

- 2.42 Time constraints have prevented the Committee from reaching a final conclusion on these issues and it makes no findings.

²⁶ E-mail from Dr Suzanne Gray, Consultant, Peel Health Campus, *FW: CDU*, 10:51 am 9 July 2010.

²⁷ Dr Suzanne Gray, Director of Emergency Department, Peel Health Campus, *Transcript of Evidence*, 19 November 2012, p10.

²⁸ *Ibid*, p12.

²⁹ E-mail from Simone Bartlett, *Re:FW: CDU Clarification*, 12:39 pm, 29 June 2010.

- 2.43 However, the Committee believes that it would be prudent for public hospital management, when developing and implementing new business units, to undertake some assessment of value for money. This does not appear to have been the case in the creation of the CDU in Peel Health Campus.
- 2.44 Peel Health Campus's CDU appears to the Committee to have been a money making proposition foremost and a clinical management issue second and this warrants further investigation.

Impact of the Clinical Decisions Unit

Adverse clinical impacts from the scheme (May 2010 – June 2011)

- 2.45 The Committee received evidence in the form of an e-mail from Dr Gray which indicated that there may have been over-servicing.³⁰ Another e-mail indicated that inappropriate tests may have been ordered to enable doctors to qualify for the \$200 payment from Health Solutions.³¹
- 2.46 The Committee also received other evidence in e-mails to senior managers in which Peel Health Campus nursing staff have raised similar concerns.
- 2.47 It would seem that these practices continued until the initiation of the internal audit in February 2011.
- 2.48 The public interest in ensuring that appropriate clinical treatment is provided by hospitals is readily apparent. While the Committee is not aware of any specific allegation of a patient receiving clinically inappropriate treatment, the seriousness and extent of the incorrect admissions means that further inquiry appears necessary.
- 2.49 The Committee is of the view that it may be necessary, in order to restore public confidence in Peel Health Campus, for the Department of Health to review each incorrectly admitted episode of care needs in order to determine whether the treatment provided to the patient was appropriate.
- 2.50 The Committee has not identified any particular case of clinically inappropriate treatment. However, given the weight of evidence received by the Committee which indicates that inappropriate admissions and tests were undertaken, a review appears to be required.

Unnecessary Admissions – Impact on Health System

- 2.51 On 14 February 2011, Peel Health Campus wrote to the Department of Health:

³⁰ E-mail from Dr Suzanne Gray, Consultant, Peel Health Campus, *FW: CDU*, 10:51 am 9 July 2010.

³¹ E-mail from Simone Bartlett, *Re:FW: CDU Clarification*, 12:39 pm, 29 June 2010.

As previously discussed by the Operator of Peel Health Campus (PHC) Executive and validated by outcomes in the first 6 months of this financial year, it has become evident that demand for health services within the Peel region is at a rate above that initially forecast when the 2010 MPA was formulated in February 2010.

..., the consequences now are a growing disquiet in the community, from doctors, patients and developing political unrest with both sitting members and the opposition MLA's, fielding a greater number of complaints on the lack of "service growth" and general disquiet regarding these service deficiencies.

...

PHC confidently forecast that with the increasing level of unplanned activity through our ED and to maintain a level of surgical demand similar to the first half of the year there would be a funding shortfall of \$1.5m to a maximum of \$6.3m to the allocated MPA for the current financial year.³²

2.52 The table below is extracted from and summarises the medical DRG forecast funding request in Peel Health Campus's letter:

Table 3

Peel Health Campus MPA Increase – Medical DRG Forecast FY 2011

Component	DRG	
	Budget	Actual/ Forecast
YTD Medical DRG (6 mths to Dec'10)	2,948	3,162
Forecast ED Admissions (Jan – June 2011)	2,900	3,505
Forecast Births (Jan –June 2011)		350
TOTAL	5,848	7,017
MPA Budget		5,848
Shortfall DRG		1,170
Shortfall Funding		\$4.28m

³² Letter from Mr Justin Walter, Chief Executive Officer, Peel Health Campus, 14 February 2011.

- 2.53 This indicates that Peel Health Campus had developed and implemented a scheme in July 2010 to maximise its MPA under the contract and that scheme had been so successful it was seeking additional funds from the Department of Health in February 2011.
- 2.54 The Committee understands that following this request, the Department of Health “*strongly suggested*”³³ that Health Solutions undertake an internal audit of its DRG admissions. Mrs McKinley, the then Director of Nursing, commenced the audit on 21 February 2011, seeking advice from the Department of Health as to appropriate audit criteria.
- 2.55 On 6 May 2011, Peel Health Campus wrote to the Department of Health advising the outcome of its internal audit was a “*conclusion that 393.4 cost weights have been disallowed*”³⁴ as outlined in the table below:

Table 4**Results of the Peel Health Campus – Incorrect Admissions**

	Jul 2010	Aug 2010	Sept 2010	Oct 2010	Nov 2010	Dec 2010	Jan 2011	Total
DRG Cost-Weight	22.54	31.38	28.65	72.8	60.98	80.59	96.46	393.4

- 2.56 Peel Health Campus detailed additional key findings arising from its internal audit as follows:

- *The error in compliance was limited to admission via the Emergency Department (ED) to the Clinical Decisions Unit (CDU).*
- *Two events occurred almost simultaneously, which impacted on the pattern of admissions via ED which had, until this point of time, been managed in accordance with the relevant policy.*

On 9 May 2010, the campus opened a Clinical Decisions Unit (CDU) with the objective of managing admissions via ED and reducing, where clinically possible, transfers out to the tertiary hospitals.

On 17 May 2010, the 4 Hour Rule project commenced at the campus.

³³ Mr Shaun Strachan, Group General Manager, Corporate Operations, South Metropolitan Health Service, Department of Health, *Transcript of Evidence*, 19 November 2012, p7

³⁴ Letter from Mr Justin Walter, Chief Executive Officer, Peel Health Campus, 6 May 2011.

-
- *Some ED medical staff, attempting to comply with the four hour rule project objective chose to admit patients who were not ready for discharge from the ED to CDU.*
 - *Some patients who were admitted on this basis were not ready for discharge but did not meet business rule criteria therefore did not justify billing for inpatient admission.*³⁵
- 2.57 The Department of Health has stated that it “*introduced additional strategies for the management of the contract which included increased governance requirements of HSWA and a strengthened Executive contracts management oversight committee.*”³⁶
- 2.58 In June 2011, the Department of Health requested another audit, this time undertaken by PriceWaterhouseCoopers (PwC) to “*provide independent advice with respect to the accuracy and validity of invoiced claims for contracted public inpatient services admitted through Peel Health Campus (PHC), Emergency Department (ED) and billed to the South Metropolitan Area Health Service.*”³⁷
- 2.59 The June 2011 review identified a number of claims which were assessed as potentially not meeting the admission criteria specified in Technical Bulletin 17/3.³⁸
- 2.60 In March 2012, PWC were asked to undertake further work covering:
- Admissions not tested in the Peel Health Campus internal audit between July 2010 and April 2011;
 - Admission to all wards from the Emergency Department for the 2008/09 and 2009/10 financial years; and
 - An assessment of length of service.³⁹
- 2.61 In a letter explaining the formation of the CDU, Dr Williams advised the Department of Health that it “*had also become clear that some FACEM and senior*

³⁵ Letter from Mr Justin Walter, Chief Executive Officer, Peel Health Campus, 18 May 2011.

³⁶ Mr Shaun Strachan, *Briefing Note Memorandum Peel Health Campus Comprehensive Contract Update*, 4 July 2012, p3.

³⁷ Mr Shaun Strachan, *Briefing Note Memorandum Peel Health Campus Comprehensive Contract Update*, 4 July 2012, p3.

³⁸ *Ibid.*

³⁹ *Ibid.*

*ED staff had become **questionably efficient** [emphasis added] at admitting patients.⁴⁰*

- 2.62 The Committee discussed this “questionable efficiency” with a number of witnesses and was advised by one witness with relevant knowledge of the matter that:

... the issue of doctors changing the admission times was raised, and the question was asked: was the organisation going to recover those fees from doctors? ... if that was happening, that is fraud; any organisation I have worked for previously the organisation would bring in the fraud squad. The board elected not to do that. Then I also tabled that the business should recover the fees from the doctors that falsely changed the admission times. As I said, four of the executives voted that should be the case. Two of the executives said no. I said then the board needs to make a decision because we have four saying we should recover the money and two saying we should not.⁴¹

- 2.63 When questioned further, the witness advised:

... there was a dispute with the board and my argument was: you cannot condone the behaviour of the FACEMs. We had a staff of 800 to 900 people and you have to treat all staff properly. If you have that type of behaviour and you condone it, you have incongruence in an organisation that employs 800 or 900 people and you cannot effectively run a business doing that.⁴²

- 2.64 In his submission to the Committee, Dr Fong states on this matter:

I do not believe there is a risk to public money because HSWA was not entitled to earn more than the MPA. Any excess to the MPA is borne by HSWA unless agreed with DoH. If HSWA did not utilise the entire MPA, it could be inferred that it was not providing sufficient clinical or medical services to the Peel Region.[underlined in the original]⁴³

- 2.65 The Committee points out that the whole purpose behind the CDU admission scheme was to lift services to maximise the MPA and that Peel Health Campus was using the scheme’s “success” as a basis for requesting more funding from the Department of Health. While Peel Health Campus may suggest that there was no

⁴⁰ Letter from Mrs Ashton Foley, Chief Operating Officer, Peel Health Campus, 20 June 2012 covering a report from Dr Aled Williams, Director of Clinical Services.

⁴¹ Witness, *Transcript of Evidence*, 30 October 2012, p5.

⁴² Witness, *Transcript of Evidence*, 30 October 2012, p6.

⁴³ Submission from Dr Neale Fong, Managing Director, Peel Health Campus, 9 Nov 2012, p viii.

risk to public money, the reality is that requests for additional funding had already materialised by February 2011.

- 2.66 The Committee has not had the opportunity to fully understand all the issues surrounding Peel Health Campus's request for an upwards adjustment of the 2010/11 MPA in February 2011. The main issue is whether there was an attempt to create a scheme to advantage Health Solutions financial interests at the Department of Health's expense or if there is a more benign explanation.

Repayment of overpayments

- 2.67 Evidence presented to the Committee indicates that Peel Health Campus has repaid the overpayments of DRG Inpatient services as per the table below:

Table 5

Repayment of Incorrectly claimed DRG Inpatient services

Date of Invoice Adjustment	\$
20 May 2011	1,405,253 ⁴⁴
20 October 2012	380,303 ⁴⁵
Total	1,785,556

- 2.68 As the overpayment was clearly caused by Health Solutions and the funds were claimed from the Department of Health, the Committee believes there may be a case for the Department of Health to claim interest on the overpaid sums if this has not already occurred.
- 2.69 The Department of Health may choose to pursue this matter further.

⁴⁴ Peel Health Campus, Invoice Number 6895, *HDWA Inpatient Fees 1 April 2011 to 30 April 2011 Inclusive*, dated 20 May 2011.

⁴⁵ Peel Health Campus, Invoice Number 7645, *HDWA Inpatient Fees 1 Sept 12 to 30 Sept 2012 Inclusive*, dated 20 October 2012.

CHAPTER 3

OTHER RELEVANT MATTERS

- 3.1 In the course of this inquiry the Committee has become aware of a number of other relevant matters.

Relationship between Peel Health Campus, Health Solutions and the Department of Health

- 3.2 The Committee heard evidence from Mrs Ashton Foley regarding the working relationship between Health Solutions and the Department of Health. This included an allegation of bullying or harassment levelled against a senior Department of Health officer, relating to meetings between Health Solutions and the Department of Health involving Mrs Foley.
- 3.3 In an e-mail obtained by the Committee, Mr Fogarty stated:

In an attempt to stop private legal action, I have suggested to the Board they follow this up with Doh to arrest this totally unacceptable and unprofessional behaviour.

I have drafted a letter if acceptable may be used as a base for Mark. Open for your comments.

You should provide a written complaint.

Aled supports your complaint saying he has witnessed this bad behaviour from [public servant] too many times, that is good enough for me and should be for the Board as well.⁴⁶

- 3.4 The evidence of Mrs Foley is that:

But more disconcerting was what happened at the last board meeting that I attended, which was on 7 September. At that board meeting, a conversation that I had had with Shaun Strachan on the telephone regarding assumptions for the redevelopment proposal had been raised, and it was discussed that a letter would be drafted from Mark Stowell, the chairman of the board, to Nicole Feely, Shaun's superior, advising her that his behaviour was unprofessional. The main reason behind doing this was because they knew Shaun Strachan was not in favour of the redevelopment proposal, and also because my

⁴⁶ E-mail from Jon Fogarty to Ashton Foley, FW: *complaint*, 5.21 pm 7 September 2012.

understanding was that Kim Hames had left a fair bit of the decision making up to the Department of Health and to SMHS in particular as to whether or not the redevelopment plan would be progressed.

I left that meeting. I went back to the office that afternoon, and I received a plethora of phone calls from Jon Fogarty. During one of those phone calls, he acknowledged that he was aware of what had been discussed at the earlier meeting about the letter that Mark Stowell would be writing, and asked me what had happened. I explained it to him, and during another phone call that afternoon, he went on to say that it was sexual harassment and gender intimidation. I said, “No, Jon, that is not what happened”, and, again, this is where we discussed the combative and the adversarial. That night I returned home and I received an email. It was an email from Jon Fogarty to Mark Stowell as chairman, that I was copied in on. It included an attachment of a proposed draft letter written by Jon Fogarty that he wanted Mark Stowell to send to Nicole Feely. [emphasis added] In that letter, Jon Fogarty said that they were sending the letter from HSWA to prevent legal action being taken by me—which had never been discussed—and that Shaun Strachan had gender-intimidated me. I read the letter and I was appalled, and again I could not sleep that night. The other thing that was discussed was the fact that SMHS was bringing lawyers to the contract meetings. Jon Fogarty wanted that meeting—we had a contract meeting scheduled on the following Monday—to be cancelled. So the following morning I received an email from Mark Stowell confirming what had been discussed at the earlier board meeting—or the Friday board meeting—and advising me that I was to write to Shaun Strachan and cancel the upcoming contract meeting on Monday. Then there was a follow-up email from Jon Fogarty to Mark Stowell that I was copied in on, saying no, that I should not do that, because I was the alleged victim. Then there was another email from Mark Stowell to Jon Fogarty that I was copied in on, telling me that it was a board direction that I was to cancel the meeting. In the earlier email, Jon Fogarty had said that I should not do it but that Aled Williams should. So when Mark Stowell replied, he stated that it was a board direction that I should do it; that Aled had enough clinical concerns to worry about.

At that point, I did not know what to think. I did not exactly know what was going on. I sent an email to Mark Stowell telling him to let me know who was doing what, basically, and I asked him to call me and said that I wanted to discuss all that had transpired since the board meeting, meaning the conversations with Jon Fogarty. He

replied that evening around nine o'clock that he would call me the next day, which he did. The next morning is when I sent the letter to Jon Fogarty that I referenced earlier, saying that I was not comfortable making those claims. I referenced the fact that it would be career suicide for me, that I did not agree with it, and that he was adversarial and combative and so forth, and then spoke to Aled Williams, spoke to Neale Fong on the telephone, who both tried to calm me down. Then there was that chain of emails that I referenced earlier, where Jon Fogarty threatened me—threatened my role, let us put it that way.⁴⁷

3.5 Additionally, the Committee heard evidence from the Department of Health:

Hon LIZ BEHJAT: *Who was it who put pressure on you to have Mr Strachan removed from the position he is in at the moment?*

Ms Feely: *It was Dr Fong. You said “pressure”; it was a question of—it was raised in the context of an allegation of bullying against Mr Strachan in relation to Ms Foley, and it was in a telephone call. The preference of Dr Fong was that Shaun be removed and be replaced with somebody else to have control of the contract, and I said no.*

Hon KEN TRAVERS: *Were there more serious allegations than just bullying made?*

Ms Feely: *Not to me. So the telephone conversation I had with Dr Fong was —*

Hon KEN TRAVERS: *Was that on a Sunday, by any chance?*

Ms Feely: *It was on a Sunday, yes. So he had rung a couple of times prior to that, and on the Sunday I returned his call early evening, and that is when he raised with me the issue of—he said he was very unhappy that Mr Strachan had bullied Ms Foley in the last meeting they had, and what was I basically going to do about it. I indicated that it was a very serious allegation and I would anticipate that Ms Foley would be—what was the status of it, because Neale ringing me and saying this is happening is one thing, but I wanted to hear that from Ashton Foley. It was in that context of that discussion. I said I took that very seriously, and that this had better be backed up,*

⁴⁷ Mrs Ashton Foley, Former Chief Operating Officer, Peel Health Campus, *Transcript of Evidence*, 30 October 2012, p31

because I am not having those sorts of allegations thrown around about a senior member of the public sector. [emphasis added]

Hon KEN TRAVERS: *We have seen documentation that clearly suggests that there was a deliberate campaign driven by the chairman to try to expand those into including sexual harassment by Mr Strachan, and in fact it fell over because Ashton Foley refused to lodge the complaints.*

The CHAIR: *She said that in the public session with us.*

Hon KEN TRAVERS: *Yes.*

Ms Feely: *But it never went any—this is private.*

Hon KEN TRAVERS: *Yes.*

Ms Feely: *So Neale called on the Sunday night, and then on the Monday, or that night, I spoke to the individual executives who were at that meeting where Shaun was alleged to have bullied Ms Foley. They all confirmed that he was his usual direct, hard self, but there was no way that an allegation of bullying could be raised.* [emphasis added] *Then I started an internal investigation independently with my HR manager and then waited for the formal—something to come through, and it never did.*

Hon LIZ BEHJAT: *It never did.*⁴⁸

3.6 In other evidence obtained by the Committee, Mr Jonathan Fogarty states:

*... have allowed Doh [Department of Health] to build a substantial case against HSWA [Health Solutions], that I could have avoided. ... When Doh comes out with a scathing possibly legally defensible case recommending against HSWA expansion, based on contractual failings, ...*⁴⁹

3.7 And later that:

This is not a game. This is a serious commercial venture, where winning the extension is EVERYTHING, and losing is the end of the road for many.

⁴⁸ Ms Nicole Feely, Chief Executive Officer, South Metropolitan Health Service, Department of Health, *Transcript of Evidence*, 19 November 2012, p5.

⁴⁹ E-mail from Mr Jon Fogarty to Mrs Ashton Foley, *general discussion*, 11:19 am 9 September 2012.

You decide where you sit unconditionally. I have made my position on [the Department of Health officer] clear.⁵⁰

- 3.8 The Committee notes Mrs Foley “finished with” Health Solutions on 24 September 2012, approximately 2 weeks after this e-mail.
- 3.9 The Committee was concerned that an unsupported allegation of inappropriate behaviour against a public servant was made in the middle of contractual negotiations.
- 3.10 The Committee has not had the opportunity to consider the matter further and hear an explanation on this matter from Health Solutions and Mr Fogarty. Consequently, it will not be making a finding. However, it believes that the conduct involved requires further investigation.

Limitations of the contract

- 3.1 The Department of Health made the Committee aware of the inherent limitations of the contract that frustrated its attempts to examine Health Solutions’ business in greater detail. In this regard, the Committee notes that the contract was executed in 1997 and last reviewed in 2000.
- 3.2 The contract for services under which Health Solutions provides services to the State appears to be inadequate in that it does not give the State sufficient legal protection in ensuring the contracted outcomes are met. In this regard the Committee was advised that:

In terms of the provisions in the contract, the contract is very specific about what actually refers to as a potential default or a particular event that particularly the state would be concerned about in terms of the operation of the contract. It is not overly detailed associated with this particular issue that you are raising. It is around the issue that if particularly the company—in this particular case Health Solutions WA Pty Ltd as a subsidiary to the holding company of Health Solutions Australia Pty Ltd, obviously—were to move into an insolvency event, but in terms of the day-to-day management of Health Solutions WA Pty Ltd, it is not within the remit of the contract for us to make those inquiries.⁵¹

- 3.3 When this issue was followed up further, the Committee was advised that:

⁵⁰ *Ibid.*

⁵¹ Mr Shaun Strachan, Group General Manager, Corporate Operations, South Metropolitan Health Service, Department of Health, *Transcript of Evidence*, 19 November 2012, p20.

Hon LIZ BEHJAT: *Our concern is that we have to look after the public purse, and my concern, particularly as a member of this government, is that I do not want any dollars of the government's being misspent, and when I hear things like a consultant being paid 10 million bucks a year, that is outrageous. I cannot satisfy myself that somehow or another they are not trying to give you some sort of dodgy information about how they are running that public purse.*

Ms Feely: *From where I sit, we have instituted regular audits, regular monthly meetings, we have agendas, we have minutes, and we have across-the-board reviews of internal controls, so we are doing everything that we have, to date, been able to think of to try to make sure we are managing, as tightly as possible, that contract. In relation to a lot of the matters that have been raised today, the problem is that if they are not being raised with us, it is hard to know what you do not know.⁵²*

3.4 The Committee was also advised by Ms Feely that:

From where I am sitting, we have a responsibility for not only the contract but also the people of the Peel region.⁵³

3.5 The Committee notes this contract has been in place for approximately 15 years. Trying to achieve substantial change in its terms and conditions at this late stage would appear to be impracticable. However, the Committee is of the view that substantial lessons can be learnt regarding the establishment and framing of future contracts to ensure that the State has the degree of oversight and remedies necessary to protect the State's interests.

3.6 The Committee notes the comments by Ms Feely about a responsibility for the people of the Peel region. The evidence available to the Committee indicates that the Department is constrained in its ability to fully discharge that responsibility under the present arrangements.

State of the Sinking Fund under the Contract

3.7 Under the original agreement between the State and Health Solutions, the operator was required to establish a sinking fund and pay into the sinking fund by monthly payments in arrears, "*a minimum of 2% of the service charges payable in each financial year.*"⁵⁴ The purpose for establishing the sinking fund was the

⁵² Ms Nicole Feely, Chief Executive Officer, South Metropolitan Health Service, Department of Health, *Transcript of Evidence*, 19 November 2012, p5.

⁵³ *Ibid*, p7.

⁵⁴ Clause 27(2)(g)(ii), *Peel Health Campus Health Services Agreement*, 18 June 1997.

- replacement, maintenance and repair of “Group Three Equipment” as defined under the contract.
- 3.8 Group Three Equipment under the original contract meant “*a moveable item of equipment (including without limitation furniture and Facility Equipment)*” used at or in relation to the hospital. A schedule to the original agreement summarises the Facility Equipment and gives it a value of \$5.7 million as at 18 June 1997.
- 3.9 The sinking fund is to be held in trust for the State by Health Solutions throughout the life of the agreement.⁵⁵ Health Solutions’ 2011/12 Financial Statements include a note which states that during “*December 1999, the balance of the sinking fund was transferred to a separate bank account held on trust for the State.*”⁵⁶
- 3.10 On 16 June 2000, a Supplemental Deed was executed which required Health Solutions to establish the sinking fund and make all payments that were required at a rate of 2% of the service charges payable from 1 September 1997 to 16 June 2000 into the sinking fund. The Supplemental Deed also varied the original contract definition of what constituted Group One Equipment and Group Three Equipment.
- 3.11 The value of the sinking fund as at 30 June 2012 is \$5 million.⁵⁷ Note 19 to the 2011/12 Financial Statements includes a comment that an “*amount equal to 2% of the services charges (revenue) earned by the company is allocated to the Sinking Fund each period.*”⁵⁸
- 3.12 The Financial Statements include a note regarding a contingent liability arising from the sinking fund which states that:
- Under the Peel Health Campus Services Agreement with the State Government, the company is required to replace hospital equipment as and when needed, based on its performance and obsolescence. The directors believe that the sinking fund contributions referred to in Note 19 may not be sufficient to meet the Company’s future obligations for equipment replacement under the agreement.*⁵⁹
- 3.13 That is, Note 23 is indicating that Health Solutions may not be able to meet its contractual obligations when the contract terminates.

⁵⁵ Clause 27(2)(g)(iii), *Peel Health Campus Health Services Agreement*, 18 June 1997.

⁵⁶ Health Solutions (WA) Pty Ltd, *Health Solutions (WA) Pty Ltd Financial Report for the Year Ended 30 June 2012*, p21.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p23.

- 3.14 The Committee received a copy of an Audit Report prepared for the Department of Health by PwC which indicates that the sinking fund is being poorly administered.⁶⁰
- 3.15 A witness with relevant knowledge of the matters advised:

Witness: The sinking fund has been used quite liberally by the CEO and the COO of the day. I kept telling them that the sinking fund is to be used and if I remember correctly, the clauses in the contract, clause 27.2(g), I think point (iv) —

The CHAIR: Good memory! Please, continue.

Witness: It says that the sinking fund is to be used for the replacement of existing assets—group 3 assets. Then it goes on to explain in the explanation, definition, bit, facility equipment is defined as group 3 inherited from the old hospital and any new assets. Then in clause 9.1 or thereabouts it says any new equipment must be bought only for new services provided. So, any new services to be provided, would have to be discussed with the health department to have an agreement as to who is going to buy the assets for the new services. But what really happened is that assets were being bought left, right and centre using group 3. It could be for a new service, it could be for a private hospital—the line of demarcation is completely blurred. So, you have got this situation where the CEO or COO of the day would just sign off on group 3, because everybody wants equipment; everyone wants 10 computers, everyone wants 20 computers, everyone wants all this medical equipment—so, it just started off. That to me is: has anyone actually looked at the contract, 27, 9 and definition? Maybe I am on the wrong track, but —

The CHAIR: So that would indicate to you a lack of control in the system?

Witness: Yes, it would be, or lack of compliance with the wording of the contract.

The CHAIR: Who was responsible for administering the contract?

Witness: The CEO or the COO of the day.

I might be on the wrong track, but the way I read it is that if you want to buy equipment, you have got to buy it to replace existing equipment. If you want to buy equipment that is over or above what

⁶⁰ PriceWaterhouseCoopers, Department of Health Admission Compliance and Sinking Fund Review: Peel Health Campus, July 2012, p6-7.

you need, is it for a new service? If it is for a new service, you need to sit down with the health department and say, “We’re going to provide this new service. We need this equipment; let’s negotiate who is going to buy it.”

Hon PHILIP GARDINER: *Drawing on the sinking fund like that, was that largely because the chairman of the board was, in a sense, the key financial operator and disallowed capital investment, and that was the only way that money could be obtained to fund the necessity for the operation of the hospital?*

Witness: *To be totally fair, it is very blurred in terms of group 3 or non-group 3 or group 1 or group 3 or is it a fixed asset—it is fairly blurred. People just take the easier way out, say it is a group 3 request and sign it off. It does not hit the bottom line and if it does not hit the bottom line, it is not brought up.⁶¹*

3.16 The same witness later said:

Hon KEN TRAVERS: *On the same note there was not the same degree of rigorous internal controls about expenditure. You said you raised concerns about the sinking fund, who with?*

Witness: *With the executive, with Jon, with the CEO and the CEO of the day and in the end, I just said, “I am not going to get involved in this. You guys put in the form, I’m not signing it.”*

Hon KEN TRAVERS: *So you actually refused to sign forms going through?*

Witness: *Yes.*

Hon KEN TRAVERS: *What was their response to that?*

Witness: *The CEO or the CEO of the day signed it and it got processed.*

Hon KEN TRAVERS: *Who was that at the time?*

Witness: *There were four or five of them. There was Phil Hatt, Justin Walter, Angela for a short while and Bill Shields.*

Hon KEN TRAVERS: *And they all signed forms that you refused to sign?*

⁶¹ Witness, *Transcript of Evidence*, 19 November 2012, p22.

Witness: *I would kick up a stink about, “Why are we spending all this money? Why is it going to group 3?” And they would say, “Look —*

Hon KEN TRAVERS: *When you raised concerns with Mr Fogarty, what was his response?*

Witness: *I got none. Jon would pick and choose when he wanted to respond to your concerns or emails. So, you can only let him know, and say, “Look, you know.” One classic case was the filing system, the compactors, for the medical records of hospital—this compact system. It was 50 or 60 grand’s worth and to me I did not think it should have been group 3, it should have been a hospital expense, which counts as a bottom line, but it was put through as group 3.*

Hon KEN TRAVERS: *Is that an example in which you raised your concerns with Jon?*

Witness: *That one I raised with Jon and I said I would not sign it, and he said, “Okay, I’ll sign it.” So he signed the form and it was processed as group 3.*

Hon KEN TRAVERS: *Mr Fogarty signed the form himself on that occasion?*

Witness: *I remember it quite clearly.⁶²*

- 3.17 The Committee received a submission from Dr Fong in his capacity as Managing Director of Health Solutions indicating that the sinking fund appears to be a matter of dispute between the parties.⁶³
- 3.18 The Committee has not made any finding but believes these matters require further investigation to ensure the State’s interests are adequately protected at all times.

Is the State getting value for money under the Peel Health Campus contract?

- 3.19 The Committee identified three streams of payments to Mr Jonathan Fogarty. These streams are:
- Dividends arising from Health Solutions profits;
 - Fees from a consultancy agreement with Health Solutions; and
 - Participation in a profit sharing arrangement with Health Solutions.

⁶² Witness, *Transcript of Evidence*, 19 November 2012, p23.

⁶³ Submission from Dr Neale Fong, Managing Director, Health Solutions, 9 November 2012, pxxvii.

Profits and Dividends

- 3.20 Mr Fogarty is the dominant shareholder in Health Solutions, owning over 95% of its issued shares.⁶⁴ He is also a resident of Singapore.⁶⁵
- 3.21 The Committee obtained the financial statements of Health Solutions for the 2010/11 and 2011/12 financial years. The financial performance of Health Solutions is impressive. The table below shows that it has generated substantial returns on its equity and paid out substantial sums as dividends.
- 3.22 The Committee notes the 2011/12 dividend was subsequently lent back to Health Solutions.

Table 6**Health Solutions Shareholder Returns⁶⁶**

	2009/10	2010/11	2011/12
	\$	\$	\$
Profit after Tax (A)	5,872,866	7,929,916	8,424,382
Total Shareholder's Equity (B)	5,060,934	12,990,850	11,415,232
Return on Equity (A/B)	116%	61%	74%
Dividend Payments	2,500,000	Nil	10,000,000

Consultancy Agreements

- 3.1 In an e-mail provided to the Committee, Mr Fogarty states:

*I am contracted as the sole reporting point between the board and the executive. Until you receive a board resolution changing that, do nothing else.*⁶⁷

- 3.2 This relationship was examined by the Committee and explained by a witness as follows:

⁶⁴ E-mail from Jon Fogarty, *Re: SMAH Meetings*, 10:18 am 9 September 2012.

⁶⁵ Letter from Mr Martin Bennett, Mr Jon Fogarty's Counsel, 29 October 2012.

⁶⁶ Health Solutions (WA) Pty Ltd, *Financial Report for the year ended 30 June 2011* and Health Solutions (WA) Pty Ltd, *Financial Report for the year ended 30 June 2012*.

⁶⁷ E-mail from Jon Fogarty, *Re: SMAH Meetings*, 10:18 am 9 September 2012.

The CHAIR: *Okay, so on a slightly different matter, are you aware of any consultancy agreements between Mr Fogarty and Health Solutions?*

Witness: *Yes.*

The CHAIR: *And what is the nature of those agreements?*

Witness: *It is through his company, which—yes, through Jon’s company. There is a consultancy agreement and it is all minuted and approved by the board of the day.*

The CHAIR: *Do you know when that consultancy started?*

Witness: *I am just guessing now—about two or three years ago.*

The CHAIR: *And are you aware of any services of value that are provided under that agreement?*

Witness: *It is all relative, is it not? Jon’s the chairman.*

Hon PHILIP GARDINER: *That is the value part!*

The CHAIR: *He said with a wry smile, I might say to Hansard!*

Witness: *It is all relative because Jon is the chairman of the company and he has this consultancy agreement that has been approved by the board of the day, and off he went.*

Hon LIZ BEHJAT: *You said the board was Fogarty?*

Witness: *Or when it suits. When it suits, sometimes the board would be a board of two or three directors, but in other times it would be a board of—when you say “the board”, you know it is Jon.*

The CHAIR: *So were any services provided by Mr Fogarty that you can identify?*

Witness: *Well, Jon was not at the hospital a lot of the time. He was —*

Hon LIZ BEHJAT: *He was or was not?*

Witness: *He was not. He would be away for months on end or weeks on end. We would get the occasional email from him, maybe a phone call or two, then he would appear on the scene and he would strike terror in the executive and then off he goes. So, if that is service, then, yes. [emphasis added]*

Hon PHILIP GARDINER: *That is right; it is value!*

Hon LIZ BEHJAT: *And how much did he charge for these services?*

Witness: *Quite a bit.*

Hon LIZ BEHJAT: *What is “quite a bit”?*

Witness: *Am I allowed to say all this here now?*

The CHAIR: *Yes, please.*

Hon LIZ BEHJAT: *Yes, please be frank.*

Witness: *Well, I think from memory, the consultancy alone is about \$2 million a year.*

Hon LIZ BEHJAT: *Two million dollars a year —*

Witness: *Hang on, let me think. Yes, I think roughly \$2 million a year, just the consultancy alone, and then there is the profit share.*

The CHAIR: *On top of that.*

Witness: *On top of that, which is quite substantial.*

Hon KEN TRAVERS: *Sorry, is the profit share over and above the dividend?*

Witness: *Yes.*

Hon LJILJANNA RAVLICH: *So, does that mean you have got consultancy, profit share and dividend?*

Witness: *Correct. You have got a standing consultancy payment and then you have got a monthly share in the profit, which is quite substantial, and, of course, you have got a share in the dividend.⁶⁸*

3.3 Note 23 Contingent Liabilities in the 2011/12 financial statements states that:

Certain payments made by HSWA under a consultancy agreement are currently being queried from a tax perspective. At the date of signing the report, these queries have been answered by the Company and

⁶⁸ Witness, *Transcript of Evidence*, 19 November 2012, p19-20.

they are currently awaiting a response. No provision has been recognised in the financial statements in connection with this matter.⁶⁹

Profit Sharing Arrangement

- 3.4 The Committee received evidence of there being a profit sharing arrangement in Health Solutions in which Mr Fogarty receives substantial sums of money. This was on top of the consultancy agreement. That evidence is detailed below:

Hon KEN TRAVERS: *In the time that you were there, what was the monthly profit share? What would that be on a monthly basis?*

Witness: *When it started? When it started, anything that is above \$500 000 in EBIT, he keeps 50 per cent.*

Hon KEN TRAVERS: *In the period that you were there, what was that working out to on a monthly basis?*

Witness: *Sometimes it can be \$800 000 a month; sometimes, take or give, between \$500 000 to \$1 million a month.*

Hon LIZ BEHJAT: *So, \$800 000 a month —*

Witness: *Roughly. Sometimes, I said, “Wow!”*

Hon LIZ BEHJAT: *— on a profit share. So, that is 50 per cent of the above \$500 000 —*

Witness: *Correct; anything that is above \$500 000, he gets 50 per cent.*

Hon LIZ BEHJAT: *So, in some months, their profit is \$1.6 million and of that he gets \$800 000.*

Witness: *No, if the profit is, say, \$1.5 million, he keeps \$500 000, because anything above \$500 000, he gets 50 per cent. Sometimes the profit is about \$2.2 million, for instance; he gets \$750 000.*

Hon KEN TRAVERS: *On a monthly basis?*

Witness: *On top of the \$2 million.⁷⁰*

⁶⁹ Health Solutions (WA) Pty Ltd, *Financial Report for the year ended 30 June 2012*, p23.

⁷⁰ Witness, *Transcript of Evidence*, 19 November 2012, p20-21.

Committee Comment

- 3.5 Based on evidence given to the Committee, it believes that Mr John Fogarty has a consultancy agreement with Health Solutions which provides to him:
- \$2 million annually in consultancy payments; and
 - 50% share on Earnings Before Interest and Tax (EBIT) over \$500,000 each month.
- 3.6 The Committee sought to confirm this arrangement by summoning a copy of the consultancy agreement from Health Solutions but they have failed to provide it. The Committee has reported separately to the House on this matter.⁷¹
- 3.7 In addition, in the 2011/12 financial year Health Solutions paid a dividend of \$10 million. The Committee believes Mr Fogarty would be the significant beneficiary of this dividend.
- 3.8 The Committee understands that Health Solutions is a private company and that it has a need to generate a reasonable return to shareholders. However, when a contract with the State results in a company earning a return on equity greater than 50% for three consecutive years and has such generous benefits for its majority shareholder, the Committee questions whether the State is receiving value for money.
- 3.9 The Committee believes that this issue requires further investigation.

Governance and Management Issues

- 3.10 On Wednesday, 24 October 2012, the Committee, issued a summons to produce documents, requesting Health Solutions to provide:
- Minutes of any Board meeting and any Board documents relating to any payment, bonus or remuneration in any manner to doctor(s) or any related entity between 1 March 2010 and 30 June 2011; and
 - Minutes of any Board meeting and any Board documents relating to the contract between the State of Western Australia and Health Solutions (WA) Pty Ltd and its related companies between 1 March 2010 and 30 June 2011.

⁷¹ Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 37, *Report in relation to a possible contempt regarding summonses to produce documents issued pursuant to section 5 of the Parliamentary Privileges Act 1891*, 27 November 2011.

- 3.11 As a result of Health Solutions failure to comply with the first summons, another summons was issued on 31 October 2012. Clayton Utz later wrote to the Committee advising that:

*We are instructed that there are no documents relating to any of these matters.*⁷²

- 3.12 The Committee earlier in this report noted that the Chairman approved the formation of the CDU. Clayton Utz's advice indicates that its formation was not discussed at a Board meeting and there were no relevant Board Minutes or documents for the period 1 March 2010 to 30 June 2011.
- 3.13 Other documents given to the Committee indicated to it that the Board may have had relevant deliberations or were presented with documents that the Committee believes fall within the scope of the summons.

Bullying and Senior Management Turnover

- 3.14 There was a significant amount of written and oral evidence received by the Committee of bullying and intimidation on the Peel Health Campus.
- 3.15 Mrs Foley said:

The CHAIR: You were talking about the culture. Do you have anything you want to say about your concerns about bullying or other aspects to do with this issue that have arisen?

Mrs Foley: Yes. When I commenced at Peel Health Campus, there was a culture of bullying and harassment. There were a significant number of workers' compensation claims that were stress-related claims for acts of bullying that had occurred on the campus. There was a mentality there that if you did not like one of their colleagues or they were questioning your actions or something along those lines, the way to deal with it was to bully them and make them quit. [emphasis added] That is exactly what happened to Cathy McKinley. However, she did not take the bait and ultimately they terminated her and made her redundant. For myself, once Aled Williams became aware of the fact that I had concerns about his performance as management and about the CDU issues, the relationship deteriorated and he made my life very difficult. To be honest, because he was a board member, he would go around me and try to create waves in that regard.

⁷² Letter from Mr Cameron Belyea, Partner, Clayton Utz, Counsel for Health Solutions, 2 November 2012.

...

The culture at that campus is bullying, it is intimidation, and it is prevalent from the cleaners and the orderlies all the way up to senior management. If you do not do what Jon Fogarty wants, you are in peril, whether it be professionally or it be in terms of your personal reputation, and that is what I have encountered here. There were also incidents of staff, again, where there were attempts to force them out—the stress situations that were created. It is not a happy environment. It is not a productive environment in that sense. It was very disconcerting to walk into an environment like that. [emphasis added]

*The one thing I can say is the people who work at that campus, at least the majority of them, are absolutely fabulous—people who hold that campus together, despite the inadequate resourcing, the lack of investment, the preference of revenue over patient care. To see some of the things that were going on there was disgraceful. I truly believed that I would be able to better things, and I had over a period of months. **But once Jon Fogarty came back into the picture in August, things started to sour, and it was very clear to me that all of the good deeds that I had been allowed to perform had been allowed simply to get the redevelopment plans over the line.*** [emphasis added]

Hon KEN TRAVERS: *Has that bullying and harassment continued since you have left the hospital?*

Mrs Foley: *Again, I am not there, but I was told there is a young lady —*

Hon KEN TRAVERS: *No; towards you, I guess I am after.*

Mrs Foley: *It has. When I resigned on the Monday, on the following Tuesday there was an article in the Coastal Times, one of the local newspapers, that stated that I had started off as an executive assistant and then was promoted to chief operating officer, which is false. I believe that that was intentionally meant to disparage me. There have been threatening phone calls. There have been times when I have been followed. There have been sticky notes that say “Burn, burn, burn” put on my door. I fully believe that the search that was initiated at my home last week was an attempt at intimidation. Granted, I did have documents on my computers. But the items that they rifled through were those items that would be most intrusive and most invasive. They never went outside. They never went into the backyard.*

If I had wanted to hide things, I certainly could have that out on the top veranda or the dog house or anywhere in the backyard. They went through things like the packed Christmas tree in my garage, and all my children's toy boxes. They opened birthday gifts that belonged to my children that had not been opened yet and that I just was giving to them gradually because there were so many. They went into the children's room, and I had a memory box for my daughter who passed away in 2010 and that had not been opened since her funeral. They opened that, and the attorney actually even wanted to open the Ziploc bag that was inside it, that included the clothes that she had passed away in. It was very clear that it was an intent to intimidate and to make me feel violated and I suppose to stop me from speaking to you today or from speaking to the media again; but, honestly, it did not work.⁷³

- 3.16 When this was raised with a witness with relevant knowledge of these matters, the Committee was advised as follows:

The CHAIR: *We certainly have heard suggestions of an unpleasant work environment, possibly harassment and bullying. Do you have any comment on that?*

Witness: *That is a fact. You would go to work and you would never know what was going to happen. As long as the board was not in town, things were fairly reasonable in terms of getting from day to day, but there was always a stranglehold in terms of bottlenecks and decision making, because no-one there makes any major decisions just in case the board does not like it. And then when you do make a decision, if it is the right decision, everything is fantastic and nothing happens; but if it is not, then you get pounded.*

The CHAIR: *By the board?*

Witness: *By the board.*

The CHAIR: *By the board in total or any particular —*

Witness: *In this case the board is one person.*

The CHAIR: *Mr Fogarty?*

⁷³ Mrs Ashton Foley, Former Chief Operating Officer, Peel Health Campus, *Transcript of Evidence*, 30 October 2012, p31.

*Witness: Yes.*⁷⁴

3.17 Later the same witness advised the Committee that:

*Everyone is a scapegoat if something goes wrong. If you are sitting in the position, you will be tarnished. If you are a CEO or COO of the day, if anything goes wrong you will be made a scapegoat.*⁷⁵

3.18 This requires further investigation.

3.19 The Committee received documentation which indicated that the turnover of senior management in the Peel Health Campus has been substantial. In a document titled *Review of Human Resource and Employee Relations Aspects at the Peel Health Campus WA* obtained by the Committee, the following comments were made regarding turnover and how it affects the business:

*impacts related to the ever changing direction of the Campus, to a lack of ongoing teamwork and team building and there being a perceived conflict between the Board and the senior management group.*⁷⁶

3.20 The Committee discussed senior management turnover with the witnesses who, in the view of the Committee, had knowledge of these matters. The Committee was advised by one witness:

*... if you have a look at the history of the hospital, every C-level [Chief Financial Officer, Chief Operating Officer, Chief Executive Officer etc] took the fall for Fogarty, and the reason no-one has actually put it on the table in the public arena is because there is a history of a given individual, because of his deep pockets, there has been, I suppose, rumours of intimidation and bullying, and I think what has just happened to the previous COO is consistent with that.*⁷⁷

3.21 Another witness when explaining why they left:

I got a bit tired of it actually. There were just constant changes, constant issues, the harassment, the pressure you are put under, you have five or six CEOs in the last four or five years. There were just

⁷⁴ Witness, *Transcript of Evidence*, 19 November 2012, p3.

⁷⁵ *Ibid*, p30.

⁷⁶ E.J. Baines, *Review of Human Resource and Employee Relations Aspects at the Peel Health Campus WA*, April 2012.

⁷⁷ Witness, *Transcript of Evidence*, 30 October 2012, p13.

*absolutely constant changes and you kept getting pounded and pounded and pounded. So I just got tired of it.*⁷⁸

3.22 The table below outlines recent senior management turnover.

Table 7

Senior Management Staff Turnover⁷⁹

Name	Title	Start Date	Finish Date
Previous Senior Managers			
Dr Neale Fong	Managing Director	1 Sept 2012	
Dr Aled Williams	Director Clinical Services	7 Mar 2007	
Mr Keith Muller	Chief Financial Officer	30 Apr 2012	
Mrs Sarah Ward	Deputy Chief Operating Officer	6 Aug 2007	
Mrs Dianne Barr	Director of Nursing and Midwifery	13 Aug 2012	
Mrs Michelle Adams	Director Organisational Development	18 June 2012	
Ms Carleen Sanders	Director Business Analytics	1 Sept 2010	
Mr Russell Cockburn	Nurse Director – Clinical Services	1 Aug 2011	
Mr Martin Feckie	Nurse Director – Perioperative Services	5 Dec 2011	
Dr Suzanne Gray	Director of Emergency Department	25 Mar 2007	
Previous Senior Managers			
Anne Fletcher	Chief Executive Officer	14 Oct 2002	28 Feb 2008
Steve Wisneswski-Smith	Chief Executive Officer	20 Aug 2007	16 Oct 2009
Bill Shields	Chief Executive Officer	11 Jan 2010	21 Mar 2011
Justin Walter	Chief Executive Officer	15 Mar 2011	27 Apr 12

⁷⁸ Witness, *Transcript of Evidence*, 19 November 2012, p3.

⁷⁹ List of all Senior Managers of the Peel Health Campus from 1 January 2009 to Present (provided 5 November 2012)

Phil Hatt	Chief Operating Officer	15 May 2010	21 Mar 2011
Angela Whittington	Chief Operating Officer	17 May 2011	25 Nov 2011
Ashton Foley	Chief Operating Officer	2 Apr 2012	24 Sept 2012
Catherine McKinley	Director of Nursing	12 Aug 2002	3 May 2012
Pang Ong	Chief Financial Officer	-	13 Mar 2012
Paul Bailey	Director of Emergency Department	3 Feb 2009	15 Sept 2010

3.23 The Committee notes over the period from 2009-2012 there has been a significant turnover at senior management levels in the Peel Health Campus. The Committee is concerned at the impact this turnover has on the functioning and morale of the hospital.

Locumforce Pty Ltd

3.24 The Committee was made aware of the involvement of Locumforce Pty Ltd (Locumforce) in the provision of services to the Emergency Department of the Peel Health Campus. Locumforce provided a number of the doctors to the Peel Health Campus who worked in the Emergency Department.

3.25 Dr Aled Williams was a director of Locumforce from 20 November 2000 to 25 February 2008 as well as holding shares in the company. Dr Williams appears to have sold his interest in the company on 11 August 2009.

3.26 Dr Paul Bailey was a director of Locumforce from 20 November 2000 to the present. He owns 225 A class shares (representing 29% of all A class shares) and 225 ordinary shares in Locumforce (representing 29% of all ordinary shares). Dr Bailey was the Director of the Emergency Department between 3 February 2009 and 15 October 2010 and was, as mentioned previously, an instigator for the creation of the CDU.

3.27 Locumforce was paid a total of \$9.5 million between the period 1 July 2001 to 30 June 2012.⁸⁰ It also appears to have provided a number of the Emergency Department doctors who received the \$200 payment for admissions at the Peel Health Campus.

⁸⁰ Locumforce Summary of Payments, 27 November 2012.

- 3.28 The conflict of interest was known to Mr Fogarty as he indicated a desire to buy Locumforce out from their contract with the Peel Health Campus in 2010.⁸¹ In the same e-mail chain Mr Fogarty stated that:

Legally Paul and Aled are pretty much compromised as you can't serve 2 masters and need to end this.

They work for us. So what time are they actually working for Locum-force. We could subpoena their phone bills and see just that. We can ask the doctors on shift when these shifts are arranged. Anyway they see that and want to sell.

So what price is it worth to us to end the locum-force contract.⁸²

- 3.29 The Committee was also advised by a witness with relevant knowledge:

Hon PHILIP GARDINER: *In relation to that executive committee to which you referred earlier, Aled Williams, I understand was party to some locum hiring—I forget how it was called now. But was that in place at the time that you had this issue concerning fraud or potential fraud?*

Witness: *Yes, LocumForce was still operating and Aled Williams and Paul Bailey, I think, were shareholders or owners of that company with some others. There were FACEMs that were—I think, hired, or labour-hired, you can probably call it—engaged by Peel Health Campus through LocumForce.*

Hon PHILIP GARDINER: *So, could that have been another factor? Could there have been a conflict of interest already, I am suggesting? If LocumForce was in place at that time and Aled Williams was a 50 per cent shareholder, the doctors who were under that possible cloud, was there a link, do you think, between the two or not?*

Witness: *I do not believe so.⁸³*

- 3.30 The Committee received evidence in the form of an e-mail dated 22 April 2010 from Mr Bill Shields in which he referred to a review of his work performance with Mr Jonathan Fogarty. That e-mail includes the following:

⁸¹ E-mail Jon Fogarty, Chairman, Health Solutions, FW: Locumforce 8:40pm 4 June 2010.

⁸² *Ibid.*

⁸³ Witness, *Transcript of Evidence*, 30 October 2012, p9.

My [Mr Shields] signing the Locumforce contract in the 1st week of my employment [January 2010]. This was indeed a major error on my part, and alone would have been grounds for my dismissal. You will recall Aled that when [redacted] advised me of the enormity of my error (within hours of me signing) I immediately met with you, advised you of the circumstances and asked if you, in your professional capacity with Locumforce, could “reclaim” the contact [sic] on my behalf. I also made contact with Locum Force [sic] and explained the predicament I was in.

*Since then I mistakenly was under the impression that Locum Force, through your intervention, had agreed to shred the document and forget the incident never happened. ... **I ask this question of you in your capacity as our Medical Director, and not in your position with Locum Force.** [emphasis added]⁸⁴*

3.31 On 31 May 2012, Peel Health Campus wrote to Locumforce, stating that:

...please note that the contract provided is dated the 1st of February 2008 and whilst you have informed Dr Williams that the contract was extended through to the 31st of January 2012, I am unable to locate a copy of this nor has a copy been provided. Additionally, you later advised Dr Williams that Justin Walter, former CEO of HSWA, stated in an email that the contract would be extended on a month to month basis, to which I have no knowledge, nor have I been able to locate such an e-mail in MR Walter’s mailbox.

Upon reviewing the terms of the Contract provided, it is evident that neither party has adhered to, nor enforced, many of the clauses and that agreement dates back to a time when the relationship between LF [Locumforce] and HSWA was of an entirely different nature. Moreover, the spirit of the Contract provided has not been the basis of the working arrangement between the two parties for several years now.⁸⁵

3.32 The Committee notes that it appears that Dr Williams was not a shareholder or a director of Locumforce at the time the Locumforce contract, referred to in the e-mail, with Peel Health Campus was executed. However, Mr Shield’s e-mail indicates he understood that Dr Williams held some position of influence with Locumforce.

3.33 Dr Paul Bailey was both a director and shareholder of Locumforce.

⁸⁴ E-mail from Bill Shields, Chief Executive Officer, 22 April 2010 17:00.

⁸⁵ Letter from Mrs Ashton Foley, Chief Operating Officer, Peel Health Campus, 31 May 2012.

- 3.34 The Committee believes that these matters require further investigation.

Timesheet Adjustments and Records Management

- 3.35 The Committee heard allegations that during the operation of the CDU that patient time sheets on which doctors entered details and times of admissions were altered to facilitate doctors receiving the \$200 incentive payment.
- 3.36 The Committee notes the findings in a report tabled in evidence which indicates that Peel Health Campus “*currently has no implemented document control, document management or non-medical records management. The medical teams provide the closest thing to records management in the hospital, but this service does not extend to non-medical records.*”⁸⁶
- 3.37 A private company’s information technology strategy is a matter for the company and irrelevant to the State under the operating agreement. However, when a company appears to underinvest in its information systems which results in a high risk to all and offers services to public patients, it becomes an issue for the State.
- 3.38 The Committee is concerned by the apparent underinvestment in Peel Health Campus’s information systems as outlined in the tabled report. It believes they potentially represent a risk to patient safety, requiring further investigation.

Whistleblower Protections

- 3.39 A consistent theme in the evidence received by the Committee was a reluctance of witnesses to appear before the Committee to provide public evidence because of the perceived threat of repercussions from Mr Jonathan Fogarty.
- 3.40 The Committee believes that the conduct involved requires further investigation.
- 3.41 The Committee believes that employees of Peel Health Campus should be protected by whistleblower legislation and that all employees are aware that they have access to these protections.

Conduct of Clayton Utz

- 3.42 Health Solutions appointed Clayton Utz as their legal advisers for this matter. The Committee received several pieces of correspondence from Clayton Utz that it wishes to bring to the attention of the House.
- 3.43 The first letter was received by the Committee on 17 October 2012. This letter “*put the Committee on notice*” and demanded “*seven days notice*” of any actions the

⁸⁶ Health Fusion, *Applications Assessment Peel Health Campus*, September 2012, p23.

Committee wished to take. Clayton Utz apologised for this letter on 25 October 2012 after it received the Committee's response.

- 3.44 The second letter was a request, bordering on a demand, that Health Solutions select which witness provide evidence to the Committee and that witness be granted a public hearing.
- 3.45 These letters are contained in Appendix 3.
- 3.46 The Committee is of the view that Clayton Utz has demonstrated a lack of knowledge and respect for the Parliament and its Committees.

Additional Issues

- 3.47 During the course of the inquiry the following additional issues were identified for further investigation:
- Whether clerical staff shredded records;
 - Whether there was a lack of adequate information technology in the campus;
 - Reconciling the contradictory evidence regarding the ability to monitor the increase in admissions as they occurred;
 - Whether Peel Health Campus provided misleading information to the Department of Health regarding whether their staff are receiving wages comparable to the public sector;
 - Whether facilities had been inadequately maintained leading to infection control risks; and
 - PHC's engagement in political campaigns favourable to their interests.

Closing Remarks

- 3.48 The Committee notes that this inquiry has involved a range of complex issues and was conducted within a limited time frame. The Committee wishes to thank the Committee staff for their hard work on this inquiry. They have shown a high degree of professionalism at all times and worked long hours. The Committee could not have held this inquiry without their extraordinary effort.



Hon Giz Watson MLC

Chair
30 November 2012

APPENDIX 1
LIST OF PUBLIC WITNESSES

APPENDIX 1

LIST OF PUBLIC WITNESSES

Date of Appearance	Name	Capacity
30 October 2010	Mrs Michelle Ashton Foley	Former Chief Operating Officer, Peel Health Campus
30 October 2012	Dr Aled Williams	Director, Clinical Services, Peel Health Campus Director, Health Solutions (WA) Pty Ltd
19 November 2012	Mr Shaun Strachan	Group Executive, Corporate Services, South Metropolitan Health Service Department of Health
19 November 2012	Ms Nicole Feely	Chief Executive Officer, South Metropolitan Health Service Department of Health
19 November 2012	Dr Suzanne Gray	Director of Emergency Department, Peel Health Campus

APPENDIX 2
SCHEDULE OF KEY EVENTS

APPENDIX 2

SCHEDULE OF KEY EVENTS

Date	Event
April 2010	Phase Three Hospitals – Four Hour Rule Program commenced
9 April 2010	e-mail from Bill Shields Clinical Decision Unit Formation
23 April 2010	Clinical Decisions Unit Board Proposal and Briefing Note
27 April 2010	e-mail between Mr Paul Bailey and Mr Jonathan Fogarty in which Clinical Decisions Unit is approved
28 April 2010	Formation of the Clinical Decision Unit – Management Arrangements
4 May 2010	\$200 payment per patient fee raised
14 May 2010	After Hours Clinical Decision Unit issues raised
17 May 2010	4 Hour Rule program launched at the Peel Health Campus
11 June 2010	Initial Project Proposal Clinical Decisions Unit
14 June 2010	Clinical Decisions Unit trial ends
26 June 2010	e-mail Roster issues
9 July 2010	e-mail Patient care issues
2 August 2010	e-mail Clinical Risk concerns
2 August 2010	Revised Clinical Decision Unit model
23 August 2010	Better Model Concept
1 December 2010	e-mail Difficulty in providing numbers
14 February 2011	Peel Health campus writes to Department of Health requesting an increase in 2010/11 MPA funding of between \$1.5m and \$6.3m as a result of an increase in activity.

21 February 2011	Internal Audit of Admissions commenced
10 March 2011	Phase out additional payments
6 May 2011	Medical Admissions - Audit Report provided to Dept of Health Letter
11 May 2011	Letter from Justin Walter to Paul Grove regarding CDU Audit
19 May 2011	Acknowledgement letter from Shaun Strachan Group General Manager SMHS
28 May 2011	Letter from Peel Health Campus
2 Jun 2011	Letter from Feely - SMHS Revised Maximum Payment Amount Notice, Advice of Audit and additional funds arising out of the EBA increases for Nurses and Doctors
15 June 2011	Authorisation of Recovery
29 June 2011	Post 30 June 2011 CDU Payments cease
16 September 2011	Feely to Peel Health Campus - PWC Audit
2 February 2012	E-mail Fogarty to Walter - Further Direction and Meetings
22 February 2012	Shaun Strachan - Peel Health Campus - Letter regarding Audit
23 February 2012	Shaun Strachan - Peel Health Campus - Letter regarding Audit Scope
23 February 2012	PWC - Admission Criteria Review Letter to SMAHS
11 May 2012	Strachan SMAHS - PWC Audit Report
28 May 2012	Letter from Peel Health Campus - Response to Findings
10 June 2012	Correspondence between Peel and Health regarding Board admissions
12 June 2012	E-mail regarding Disputed Claims
20 June 2012	Peel Health campus explanation surrounding the CDU
7 July 2012	Peel Health Campus - Response to Audit
7 September 2012	E-mail Fogarty -Complaints letter - RE Shaun Strachan
16 October 2012	Letter from Peel Health Campus advising it no longer operates a CDU or short stay unit.

APPENDIX 3
CLAYTON UTZ LETTERS

APPENDIX 3

CLAYTON UTZ LETTERS

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

PUBLIC

18/10/12



Confidential

BY EMAIL - Giz.Watson@mp.wa.gov.au

17 October 2012

Hon Giz Watson MLC
Parliament House
PERTH WA 6000

Our ref 60072/14467/80130183

Dear Madam

Peel Health Campus - Information Regarding Current And Former Employees

We act for Health Solutions (WA) Pty Ltd.

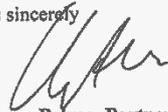
We refer to your letter dated 9 October 2012 requesting certain information and our client's response dated 12 October 2012 seeking a one week extension.

We put you on notice that there is a current injunction against Michelle Ashton Foley, who is a former employee of the Peel Health Campus. We attach the orders made on 3 and 8 October 2012. If it is intended that Ms Foley give evidence or make submissions to the standing committee, we request that you give us 7 clear days notice so that we can take appropriate action (we will also check your website). This may include seeking appropriate remedies from the Supreme Court of Western Australia or seeking that any evidence is taken in a closed hearing or in camera. If you are unwilling to provide us with this notice, please explain why.

We would also be grateful if you could confirm/provide us with the following information:

1. we understand that evidence will be taken in private and may be disclosed unless otherwise ordered by the Committee (Standing Order 178). We would be grateful if you would let us know when any ex-employee of Health Solutions (WA) Pty Ltd (if any) are to give evidence;
2. please explain how the information requested relates to the committee's terms of reference.

Yours sincerely


Cameron Belyea, Partner
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cbelyea@claytonutz.com

Kathleen McNally, Senior Associate
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IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV of 2012

BETWEEN

HEALTH SOLUTIONS (WA) PTY LTD 065 481 049

Plaintiff

and

MICHELLE ASHTON FOLEY

First Defendant

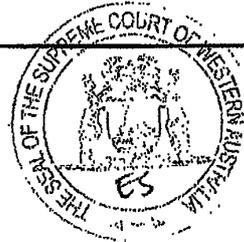
and

**FAIRFAX MEDIA LTD ACN 008 663 161 TRADING AS THE MANDURAH
MAIL NEWSPAPER**

Second Defendant

**ORDER FOR INTERIM INJUNCTION
BEFORE THE HONOURABLE JUSTICE SIMMONDS
3 OCTOBER 2012**

Date of Document: 3 October 2012
Date of Filing: 3 October 2012
Filed on behalf of: The Plaintiff



Prepared by:
Clayton Utz
Lawyers
Level 27, QV1 Building
250 St Georges Terrace
Perth WA 6000

Telephone: 9426 8000
Facsimile: 9481 3095
Reference: 60072/14467/80130183

Upon the application of the plaintiff and upon hearing Ms GA Archer for the plaintiff and upon the plaintiff undertaking to the Court that it will pay to any party restrained or affected by the restraints imposed by this interlocutory injunction, or of any interim continuation thereof, such compensation as the Court may in its discretion consider in the circumstances to be just, such compensation to be assessed by the Court, or in accordance with such directions as the Court may make and to be paid in such manner

as the Court may direct IT IS ORDERED THAT:

"Information" means information or documents (including electronic) the property of Health Solutions (WA) Pty Ltd, or obtained by the first defendant from Health Solutions (WA) Pty Ltd or acquired as a result of the first defendant's employment at Health Solutions (WA) Pty Ltd, whether during or after the first defendant's employment at Health Solutions (WA) Pty Ltd.

1. Until the return date herein, or further order, the first defendant be restrained and an injunction is hereby granted restraining her from using any Information directly or indirectly, including, without limiting that expression, disclosing, providing, publishing, or repeating any Information to another, or copying any Information, or from being knowingly concerned in any such conduct.
2. Until the return date herein, or further order, the second defendant whether by officers, servants, agents or otherwise, be restrained and an injunction is hereby granted restraining it from publishing or distributing any article or other material regarding the plaintiff based, directly or indirectly, on any Information directly or indirectly from, or statements made directly or indirectly by, the first defendant, or from being knowingly concerned in any such conduct.
3. Until the return date herein, or further order, the second defendant whether by officers, servants, agents or otherwise, be restrained and an injunction is hereby granted restraining it from publishing or distributing any article or other material regarding the plaintiff based on any information from or statements made by an anonymous source, without making enquiry as to whether or not the information or statements fall within order 2.
4. At the next return date, the plaintiff has liberty to make an application for the return and/or destruction of the Information.
5. Each party has liberty to apply on 24 hours notice.
6. The return date herein fixed as Monday, 8 October 2012 not before 10.30am.
7. The plaintiff is to file and serve an originating process in this matter by 12 noon on Friday, 5 October 2012.

8. The costs of this application be reserved.

BY THE COURT

R. Gimmordy.

JUDGE

If you the within named defendant disobey this order, you will be liable to process of execution for the purpose of compelling you to obey the same.

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2677 of 2012

BETWEEN

HEALTH SOLUTIONS (WA) PTY LTD 065 481 049

Plaintiff

and

MICHELLE ASHTON FOLEY

First Defendant

and

**FAIRFAX MEDIA LTD ACN 008 663 161 TRADING AS THE MANDURAH
MAIL NEWSPAPER**

Second Defendant

**ORDER
BEFORE THE HONOURABLE JUSTICE SIMMONDS
8 OCTOBER 2012**

Date of Document: 8 October 2012

Date of Filing: 8 October 2012

Filed on behalf of: The Plaintiff

Prepared by:
Clayton Utz
Lawyers
Level 27, QV1 Building
250 St Georges Terrace
Perth WA 6000Telephone: 9426 8000
Facsimile: 9481 3095
Reference: 60072/14467/80130183

Upon the application of the plaintiff and upon hearing Ms GA Archer for the plaintiff on 3 October 2012, and upon hearing Ms GA Archer for the plaintiff and Mr GA Croft for the second defendant on 8 October 2012, and upon the plaintiff undertaking to the Court that it will pay to any party restrained or affected by the restraints imposed by this interlocutory injunction, or of any interim continuation thereof, such compensation as the Court may in its discretion consider in the circumstances to be just, such

compensation to be assessed by the Court, or in accordance with such directions as the Court may make and to be paid in such manner as the Court may direct IT IS

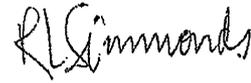
ORDERED THAT:

"Information" means information or documents (including electronic) the property of Health Solutions (WA) Pty Ltd, or obtained by the first defendant from Health Solutions (WA) Pty Ltd or acquired as a result of the first defendant's employment at Health Solutions (WA) Pty Ltd, whether during or after the first defendant's employment at Health Solutions (WA) Pty Ltd.

1. Until further order, the first defendant be restrained and an injunction is hereby granted restraining her from using any Information directly or indirectly, including, without limiting that expression, disclosing, providing, publishing, or repeating any Information to another, or copying any Information, or from being knowingly concerned in any such conduct.
2. Until the return date herein, or further order, the second defendant whether by officers, servants, agents or otherwise, be restrained and an injunction is hereby granted restraining it from publishing or distributing any article or other material regarding the plaintiff based, directly or indirectly, on any Information directly or indirectly from, or statements made directly or indirectly by, the first defendant, or from being knowingly concerned in any such conduct.
3. Until the return date herein, or further order, the second defendant whether by officers, servants, agents or otherwise, be restrained and an injunction is hereby granted restraining it from publishing or distributing any article or other material regarding the plaintiff based on any information from or statements made by an anonymous source, without making enquiry as to whether or not the information or statements fall within order 2.
4. At the next return date, the plaintiff has liberty to make an application for the return and/or destruction of the Information.
5. Each party has liberty to apply on 24 hours notice.
6. The return date herein fixed as Monday, 15 October 2012 not before 2.15pm.

7. The costs of this application be reserved.
8. This matter be admitted to the CMC List.

BY THE COURT

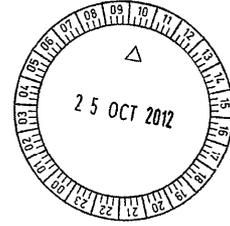


JUDGE

If you the within named defendant disobey this order, you will be liable to process of execution for the purpose of compelling you to obey the same.

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

PUBLIC
01/11/12**Confidential**

BY EMAIL - Giz.Watson@mp.wa.gov.au

25 October 2012

Hon Giz Watson MLC
 Chair
 Standing Committee on Estimates and
 Financial Operations
 Parliament House
 PERTH WA 6000

Our ref 60072/14467/80130183

Dear Madam

Peel Health Campus

We refer to our letter dated 17 October 2012 and to the media commentary that was published yesterday.

Firstly, on behalf of our client we recognise and acknowledge the important role of the Standing Committee on Estimates and Financial Operations and the broad powers and privileges of the Committee.

Secondly, our letter of 17 October 2012 was not intended to suggest that the Supreme Court might be asked to take any action that would interfere with the Committee's powers or privileges. Neither was there any intention to question the authority or standing of the Committee. We accept that the Court cannot make orders or grant remedies affecting the Committee's process or its rights in relation to evidence and witnesses. We sincerely apologise to the Committee and the Parliament if our letter conveyed any other impression.

Our letter was sent to inform the Committee about the orders that had been made by the Supreme Court. At the time we did not know whether the Committee was aware of the making of the relevant Court orders.

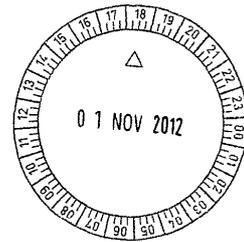
We asked for 7 days notice of any decision by the Committee to call ex-employees of the company to allow, if the Committee were minded to grant this request, sufficient time to make further submissions to the Committee about the receipt, privately or in camera, of any evidence of a sensitive business nature relating to our client's operations which has precedent and is within the powers and appropriateness for the committee to consider.

Yours sincerely

Cameron Belyea, Partner
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 cbelyea@claytonutz.com

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong



1 November 2012

BY EMAIL - mpeacock@parliament.wa.gov.au

Mr Malcolm Peacock
 Clerk of the Legislative Council
 Parliament House
 PERTH WA 6000

PUBLIC
 29 / 11 / 12

Our ref 60072/14467/80130183

Dear Mr Peacock

Standing Committee on Estimates and Financial Operations (Committee)

We would appreciate you providing this letter to the Committee.

We refer to our letter of 29 October 2012 requesting that Dr Neale Fong be permitted to provide evidence to the Committee and to the subsequent telephone call from the Honourable Giz Watson, as Chair of the Committee on the same date confirming that Dr Fong would be permitted to give verbal testimony to the Committee. At the conclusion of the Committee hearings on 30 October 2012, the Honourable Chair was informed that Dr Fong had relevant evidence to provide to the Committee. Dr Fong was not permitted to provide this evidence on 30 October 2012. Instead, Dr Fong was informed that he was entitled to seek the leave of the Committee to provide evidence.

The purpose of this letter is to confirm our client's application for Dr Fong, as a senior representative of Health Solutions WA Pty Ltd, be allowed to speak to the Committee and be questioned on the matters raised before the Committee. Furthermore, it is respectfully submitted there are several considerations which would support a decision of the Committee to grant this further request. We have set these reasons out below.

The Committee will appreciate that a number of very serious allegations have now been made to the Committee against Health Solutions, relating to the operation of the clinical decisions unit at Peel Health Campus, cultural issues and the quality of the health care facilities, some from ex-employees who were not employed at the Hospital at the time related to the allegations.

Dr Fong is the managing director of Health Solutions and is also the CEO of the Peel Health Campus. It is respectfully suggested to the Committee that Dr Fong is the best person to provide authoritative evidence on behalf of Health Solutions on these matters. He is able to speak first hand of his knowledge about some of these matters and can also speak about his review of the contemporary systems and procedures at the Hospital.

We would highlight this point by reference to the following matters set out below.

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Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Malcolm Peacock

1 November 2012

It is respectfully submitted that the allegations put before the Committee against our client are assertions which are unsupported by a proper factual foundation. Our client well understands that having heard these allegations the Committee will wish to discover whether there is any factual basis to the allegations. For example, in considering allegations of bullying and harassment and more broadly the culture of the Peel Health Campus, Dr Fong can speak to the procedures that have been taken to deal with complaints of bullying or harassment by or against existing or former employees at the Campus. Specifically, and by way of example, the Committee heard from Mrs Foley in relation to a situation concerning another person. Dr Fong can provide first hand evidence about what was said to him by Mrs Foley and the steps taken to deal with those matters and can speak to allegations of bullying made against Mrs Foley during her period as Chief Operating Officer (which she denied).

A number of assertions were made to the Committee about the state of facilities at the Peel Health Campus, both within the operating theatres and adjacent areas. The Committee has not yet heard evidence of the formal process of accreditation and the outstanding achievements through this independent and nationally recognised process. The fact is that for 15 years, the hospital has been accredited by the Australian Council on Health Care Standards and in 2011 received 15 extensive achievements, which is extremely difficult to achieve. Dr Fong would like to provide evidence about these matters and also address the capital investment program that has been underway for some time (commencing well before Mrs Foley's employment at the Hospital) and the executive team members responsible for developing and implementing that program.

Dr Fong would also provide evidence of existing governance practices within the Hospital concerning admission and billing practices. He also would like to point out inaccuracies that have been reported in the media and which were the subject of confusion in the evidence provided by Mrs Foley about the invoicing issues relevant to the clinical decisions unit (\$1.3m) and other invoicing disputes with the South Metropolitan Health Service (a claim for \$330,000 from and \$220,000 due to the Hospital).

If the Committee are contemplating expanding the terms of reference, which seems to be reasonably likely given the ambit of the Summons received by our client late yesterday (which will be the subject of a separate letter), Dr Fong is also in a position to explain the training and learning facilities that are provided to doctors, nurses and other staff regarding admission and billing practices, when these were instituted and how these are applied. It is respectfully suggested to the Committee that the fact doctors admit patients for sound clinical reasons, as they do at all tertiary and other hospitals in Western Australia is a completely separate matter from whether all of these admissions meet the Health Department business guidelines (and hence may be the subject of a DRG payment claim). The first is an issue for doctors making clinical decisions, the second is a matter of billing practices within the Hospital. Dr Fong would speak to these practices and detail the changes that have been made to the audit process to ensure that only admissions properly meeting Health Department guidelines are made the subject of a DRG payment claim.

Having regard to the fact that the allegations concern not simply our client Health Solutions, but also the personal reputations of doctors providing critical medical services within the Peel area, we respectfully ask that the Committee allow Dr Fong an opportunity to speak to the Committee, to be questioned and to provide the facts that are necessary to allow the Committee to understand the truth of the allegations that have been presented to it.

It is also submitted that the proposal that Dr Fong be permitted to give evidence is consistent with the principles that clearly underpin Standing Order 181 of the Legislative Council Standing Orders. Health

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Malcolm Peacock

1 November 2012

Solutions should, in these circumstances be afforded as a matter of fairness the opportunity to provide supplementary or new evidence to the Committee to address the adverse claims that have been made to the Committee.

Finally, we note that the Committee has now taken on an investigatory role and we presume is contemplating publishing a Report detailing its findings. In this regard we would note that the High Court in *Ainsworth v Criminal Justice Commission* (1991-1992) 175 CLR 564 found that under the general law of Australia administrative decision makers ought to comply with the rules of procedural fairness/natural justice. That case was concerned with an administrative report that had been tabled in the Queensland Parliament. Importantly the High Court found that reputation, whether personal, business or commercial was an interest that attracted the rules of procedural fairness/natural justice.

Now, we acknowledge that some commentators have suggested that Parliamentary Committees because they are protected by parliamentary privilege cannot be made the subject of a legal action in the Courts seeking redress for reputational damage. It has also been suggested that Parliamentary Committees are not making administrative decisions. Even if those propositions are correct our client Health Solutions strongly submits as a matter of fairness that:

- The Committee should have close regard to the rules of procedural fairness/natural justice when working out the procedures that it will apply in respect of this investigation. This is especially so given the potential reputational damage to Health Solutions and to current and former employees or contactors that have been engaged by the Company; and
- That Standing Order 181 shows that the Legislative Council intended that witnesses (and we note that Dr Williams is a current employee of Health Solutions) should have the right to answer allegations of criminal, improper or unethical conduct and to provide supplementary or new evidence. It is submitted that the Committee should as a matter of fairness also afford those right to Health Solutions as the key contactor and employer.

We await your reply.

Yours sincerely



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