

Submissions

Dr Morgan NAIDOO

Queensland Public Hospitals Commission of Inquiry

Submissions for Morgan Neelan Naidoo

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1. Terms of Reference

1.1 The Queensland Public Hospitals Commission of Inquiry sent a letter to Dr Morgan Naidoo on 14 October 2005 containing a notice of potential adverse findings and recommendations. The letter advised that the Inquiry would consider whether to make findings about Dr Naidoo's conduct and make recommendations that are adverse to Dr Naidoo. The letter mentioned two particular terms of reference of the Commission of Inquiry. The terms of reference are as follows:

- (1) Term of Reference 2(c);
- (2) Term of Reference 2(e)(iii).

The Terms of Reference are located within the *Commissions of Inquiry Order (No. 2) 2005*. Term of Reference 2(e)(iii) is contained within the *Commissions of Inquiry Order (No. 2) of 2005* as amended by *Commissions Amendment Order (No. 1) 2005*. These Terms of Reference are as follows:

- (1) Term of Reference 2(c): any substantive allegations, complaints or concerns relating to the clinical practice and procedures conducted by other medical practitioners, or persons claiming to be medical practitioners, at the Bundaberg Base Hospital or other Queensland Public Hospitals raised at the Commission of Inquiry established by *Commissions of Inquiry Order (no.1) of 2005*.
- (2) Term of Reference 2(e)(iii): In relation to (a) – (d) above, whether there is sufficient evidence to justify the bringing of disciplinary or other proceedings or the taking of other action against or in respect of any person.

1.2 Term of reference 2(e) is limited by way of express reference to terms of reference (a) to (d). The Notice of Potential Adverse Finding can only therefore refer to term of reference 2(c).

1.3 Accordingly, the inquiry is confined to making a finding under term of reference 2(e) to matters, which fall within the ambit of term of reference 2(c). Term of reference 2(e) does not provide for any wider jurisdictional basis than that provided by term of reference 2(c). It would not therefore be open to this Inquiry to make any finding under term of reference 2(e) with respect to any issue, subject matter, or evidence which does not itself fall within the ambit of term of reference 2(c).

- 1.4 Term of reference 2(c) is confined to the "clinical practice and procedure" of persons acting in their capacity as medical practitioners.
- 1.5 It is noted that there is no prospect that any finding be made concerning the clinical practice and procedures of Dr Naidoo himself. Indeed, the 'absence from duty' referred to in paragraph 1(a) of the Notice is not said to encompass any finding touching upon or concerning the clinical practice and procedure of any medical practitioner, including Dr Naidoo. The allegation is confined expressly to whether or not there has been an absence from duty.
- 1.6 Accordingly, for the Notice to provide a valid basis for findings, it must be confined to activities of Dr Naidoo relating to the clinical practice and procedures of Drs Sharma or Krishna. That much would appear to be recognised by the terms of paragraph 1(b) of the Notice.
- 1.7 Term of reference 2(c) was the subject of particular reference (by way of expansion of the terms of reference) in clause 2(f). That clause does not in any sense widen the terms of clause 2(c) insofar as all or any of the potentially adverse findings are concerned. Indeed, clause 2(f) makes it clear that clause 2(c) does not and cannot concern alleged management or supervisory deficiencies save to the extent that those deficiencies concern the clinical practices and procedures of Drs Sharma and Dr Krishna.
- 1.8 Further, term of reference 2(c) can only relate to alleged deficiencies in supervision to the extent that it can be found that those alleged deficiencies, actually or potentially, impacted upon the clinical practices and procedures undertaken by Krishna and Sharma. Yet the Notice does not assert such a conclusion at all.
- 1.9 Broadly, it is the submission of Dr Naidoo that paragraphs 1(a) and 2 of the Notice do not comprehend matters, which fall within the terms of reference. For example, alleged absence from duty cannot found a referral for disciplinary action under clause 2(e) except to the extent that there is a demonstrated factual basis for a finding under clause 2(c).
- 1.10 These submissions will deal with each of the paragraphs in the Notice. That is done only subject to the objection set out above and should not be construed as any concession that paragraphs 1(a) and 2 are findings which fall within the Terms of Reference.

2. Notice of Potential Adverse Findings and Recommendations

Potential Adverse Finding 1 (a):

Between August 2002 and February 2005 there were numerous occasions when you were in Brisbane or otherwise absent from duty when you should have been on duty in the Fraser Coast Health Service District for the Hervey Bay Hospital, and you were not on approved leave.

- 2.1 It is noted that the original Notice dated 14 October 2004 referred to 'several occasions' between January 2004 and February 2005. It is accepted that the amended Notice dated 21 October concerns an expanded timeframe.

- 2.2 Nonetheless, it is inappropriate for a Commission of this kind to rely upon or utilise subjective notions such as "numerous" when it is considering a finding, which has clear potential to seriously impact upon Dr Naidoo.
- 2.3 For the Notice to be one justifying a particular finding and capable of proper response, it should at least specify the number of occasions and indeed the dates themselves.
- 2.4 That the Notice does not do so is, perhaps, explicable on the basis that the records kept by the hospital concerning attendance on duty, hours worked, or leave taken are incomplete and inadequate. That inadequacy ought not however be a basis upon which a generalised, sweeping finding is made without descent into appropriate specifics.
- 2.5 Specificity is at the very least something, which a party subject to this Notice is entitled to expect and receive.
- 2.6 In the submission of Dr Naidoo, a finding ought not be made in the terms sought and to the extent that the commission identifies, as it should, specific instances, Dr Naidoo should be given a further opportunity to respond to those specifics and to provide an explanation where possible.
- 2.7 Were it otherwise, Dr Naidoo would be the subject of a finding, which is almost impossible to properly respond to, and which is one, which, in terms of potential publication in the media, would doubtless have a significant impact upon him. That much is clear from the media reporting, which has occurred already.
- 2.8 It is important that the Commission frame its findings in a way, which neither encourage nor permit expansive and grandiloquent treatment in the media.
- 2.9 The actuality or otherwise of Dr Naidoo's presence at Hervey Bay Hospital is unable to be determined on the evidence. Given the issues with accuracy of HR records that have been suggested by a number of parties, including Dr Hanelt and Dr Naidoo, these records constitute insufficient evidence justifying an adverse finding against Dr Naidoo.
- 2.10 There are three aspects it would appear, to the allegation. Firstly, that Dr Naidoo was not at the hospital at all when he ought to have been, i.e. unauthorised leave and secondly, that he was either late in arriving or early to leave during a working week and thirdly, that he was otherwise uncontactable.

Leave

- 2.11 It is submitted that the Commission of Inquiry ought not make an adverse finding against Dr Naidoo on the basis of the amount of leave he took whilst director of orthopaedic services. The leave that Dr Naidoo took over this time was approved leave that he was entitled to.
- 2.12 The Commission of Inquiry is unable to make adverse findings on the basis that Dr Naidoo took his entitlements. By taking that leave, the result, in practice, was that the hospital was indeed short staffed. That is a matter, which ought properly be laid at the feet of the appropriate party, not at the feet of a doctor who had for many many years selflessly, and at great personal expense, carried the burden of orthopaedic services at Hervey Bay.

- 2.13 Similarly, it is submitted that there is an insufficient evidentiary basis for the Commission to make any adverse finding to the effect that Naidoo took unauthorised leave.
- 2.14 It is submitted that Dr Morgan Naidoo always put in leave forms when he took planned leave and when he took unplanned leave, he always made a telephone call to the clinical support officer or to HR generally. Evidence to that effect was given by Dr Naidoo and has not been contradicted by any witness. Accordingly, the Commission should accept it without reservation.
- 2.15 The Commission should also refer to Dr Terry Hanelt's supplementary statement where he stated that: *"there are some times when leave was paid, but no application/approval form has been located and some times where leave has been approved but normal hours have been paid and leave has not been deducted."*
- 2.16 The Commission should refer to the final paragraph of page 3 of Dr Terry Hanelt's supplementary statement where Dr Hanelt referred to the: *"calculations of the HR department in relation to Dr Naidoo's long service leave entitlement and errors made within such calculations, combined with situations where there are approved leave forms in the HR file but no leave has been deducted and where leave has been paid despite no application being on the file and evidence that Dr Naidoo was at work on some occasions where he has been paid for being on leave."*
- 2.17 As Dr Hanelt stated in that supplementary statement, these points raise significant concerns in relation to the accuracy of data from the HR department and as such, there is insufficient evidence that Dr Naidoo was absent from the hospital without approved leave.
- 2.18 As Dr Naidoo stated at page 6594 of the transcript, when taking planned leave, he prepared a memorandum setting out what was to occur in his absence. Dr Naidoo stated there would be two memorandums for each occasion that he was on leave and one would go to the elective surgery coordinator for operating sessions and one would go to the clinic supervisor to indicate what was happening for the clinics.
- 2.19 Dr Naidoo stated that leave memoranda would not be created if he were on unplanned leave, for example, sick leave.
- 2.20 In Dr Hanelt's supplementary statement dated 7 October 2005, at page 2, Dr Hanelt stated that:

"Copies of any leave forms are held by the HRM department at the Maryborough Hospital. These have been requested and can be supplied. An analysis of these records has been performed as far as has been possible in the limited time available. These show some times when leave was paid but no application/approval form has been located and some times where leave has been approved but normal hours have been paid and leave has not been deducted. The rosters also show times where leave was marked but there is no other record of that leave being applied for or deducted."

- 2.21 On page 3 of the supplementary statement, Dr Hanelt discussed the inaccuracy of the calculations made by the HRM department in relation to Dr Naidoo's long service leave entitlements.
- 2.22 When you combine:
- (1) the significant error made by the HRM department regarding the calculated figure of long service leave entitlements;
 - (2) situations where there were approved leave forms in the HRM file but no leave has been deducted;
 - (3) situations where leave has been paid despite no application being on the file, and
 - (4) the evidence that Dr Naidoo was at work on some occasions where he has been paid for being on leave,
- significant concerns are raised in relation to the accuracy of data from the HRM department.
- 2.23 No witness was called from the HR department to explain the discrepancies or indeed to provide any sufficient evidentiary foundation for a finding that Dr Naidoo took unauthorised leave.
- 2.24 Given that the Director of Medical Services of the Fraser Coast Health Service District believed that there were significant concerns in relation to the accuracy of data from HR, it is submitted that it would be manifestly unfair for the Commission of Inquiry to make any adverse findings and recommendations on the basis that Dr Naidoo was absent from duty when he should have been on duty in the Fraser Coast Health Service District as it is entirely possible that the times that Dr Naidoo was absent from duty were actually occurrences where he called in sick, as was his practice, and for one reason or another, the HRM department has failed to take note of that approved absence. We would make that submission in relation to both planned and unplanned leave.
- 2.25 There is a related issue, which requires comment. That is whether Dr Naidoo discharged his on-call obligations whilst in Brisbane.
- 2.26 Ms Irwin-Jones stated at paragraph 31 of her statement and reiterated at page 5408 of the transcript that it is a well-known fact that over the years Dr Naidoo worked for the district he often did on-call from Brisbane. This was advice she received from staff prior to her working in Hervey Bay. Ms Irwin-Jones made this comment without any evidence of it being true.
- 2.27 Throughout the entirety of the evidence produced to the Commission of Inquiry, there has been no evidence that Dr Naidoo did indeed do on-call from Brisbane.
- 2.28 Dr Naidoo himself has said that he generally remained at Hervey Bay between Monday and Friday and, when on-call over a weekend, remained in Hervey Bay on that weekend.
- 2.29 There is no evidence before the Inquiry to gainsay that assertion by Dr Naidoo. Indeed it was not suggested to him in cross-examination by counsel assisting that he was in fact in Brisbane when he was in fact on call.

- 2.30 If it be found that he was absent when he should have been on duty, that finding in itself cannot sustain the broader conclusion that he discharged his on-call obligations by telephone from Brisbane.
- 2.31 At page 6758 of the transcript, Dr Terry Hanelt responded to the question of whether Dr Naidoo often did on-call from Brisbane by stating that: *"it is a comment he has heard raised but he is unaware of any time when Dr Naidoo was in Brisbane when he was on-call."*
- 2.32 It is important to note also that neither Drs Krishna or Sharma ever asserted that Dr Naidoo had been in Brisbane when he should have been on call.
- 2.33 There was one occasion touched on in evidence by Dr Krishna when he said that he could contact Dr Naidoo but that he declined to attend. It was suggested to Dr Krishna that that was because Dr Naidoo was in Brisbane.
- 2.34 That suggestion was flatly and cogently rejected:

At 6492-6493.

Did you consult - did Dr Naidoo supervise you when you performed the procedure on this patient?— No.

Did he consult with you?— I called him. He didn't come.

Why did you call him?— I called him on the day of surgery. I told him because she's got a lot of swelling, it might be a very difficult situation, and he talked to me by phone and he said, "Open, if there's any problem, let me know." When I opened up, the fibula fracture was more comminuted than we expected in the x-ray, because x-ray's are just a two-dimensional picture. When we open up we see three-dimensional bone. So it was more comminuted. I was seeking assistance and he did not come.

Did you make it clear to him that you would have preferred him to be present?— Twice.

Did he explain why he would not come?— No. He said, "You are SMO, you should be able to do this."

COMMISSIONER: Did he say where he was?— I think he was in his room. He was still in his residence— In Brisbane?— No, no, no. He stays in one of the motels close to the hospital.

But he stayed in Brisbane quite a lot. He lived actually in Brisbane, didn't he?— No, that day he was definitely in his motel. All right.

MR ANDREWS: How is it that you know he was definitely in his motel? Presumably you phoned him on his mobile?— No, we got him on his freeset. The freeset doesn't catch if he's in Brisbane, and - sorry, and he did come back - come to the hospital just after we finished the procedure. So he couldn't have been in Brisbane."

- 2.35 Further, Mr Andrews asked Dr Sharma at page 5681 of the transcript if he ever found that there were occasions Dr Sharma wanted the help of Dr Naidoo but

was unable to give it to him because he was in Brisbane. Dr Sharma states that he "did not have that kind of situation at any time".

- 2.36 The suggestion made to Dr Krishna and Dr Sharma set out above perhaps reflects an unfounded suspicion that the second hand evidence given by Ms Irwin-Jones had some foundation.
- 2.37 Just as Dr Krishna and Dr Sharma flatly rejected it, so should this Commission.
- 2.38 The reality is, that the notion that Dr Naidoo was in Brisbane whilst on call probably emanates from instances in which nursing staff were unable to contact him.
- 2.39 From that position, the unfounded conclusion is drawn that he was not in the district or area at the relevant time.
- 2.40 A simple but balanced review of the evidence will establish conclusively that there is no substance at all in either proposition.
- 2.41 The Commission should refer to page 4 of Terry Hanelt's supplementary statement of 7 October 2005 where he stated:

"There were incidents where staff reported to me that they were unable to contact Dr Naidoo. On each of these occasions, I then attempted to contact Dr Naidoo, unless I already knew his whereabouts and was able to make contact. Reasons for difficulty in contacting Dr Naidoo included being scrubbed in theatre; being on approved leave; delays in the paging message being received (this can be quite substantial for long range pagers); poor mobile phone reception locally and in transit between the two towns (Maryborough and Hervey Bay); and staff members using only one method of attempting to make contact when that method was unavailable at that time (eg. Trying to contact via mobile phone when Dr Naidoo was in an area where mobile phones must be switched off due to potential interference with medical equipment such as the operating theatres, intensive care and Emergency Department). I was satisfied on all but one or two occasions that Dr Naidoo was where he should have been under the terms of his employment. The couple of occasions when Dr Naidoo was not where he should have been (in theatre, in a clinic, in transit between the two hospitals, or on leave) were in the morning when he should have started work, and he told me he was en route but delayed by problems with traffic. As his explanations for being elsewhere were plausible and there were only a couple of occasions, I took no further action. Also, Dr Naidoo often worked longer than the required hours." (emphasis added).

- 2.42 Dr Hanelt's observation emphasised above ought be given its full effect by the Commission. The reality is that there is no suggestion that Dr Naidoo worked anything other than his required hours per week.
- 2.43 There is no suggestion that he failed to discharge his obligations to the hospital during his working week.
- 2.44 Indeed, it is not suggested in the Notice that he in any way was derelict in his duty due to, or as a consequence of, any alleged absence.

- 2.45 Apart from nurse Dale Irwin-Jones, the other possible source for the unsubstantiated allegation is the North Gibling Report.
- 2.46 The North Gibling Report into orthopaedic health care in the Fraser Coast Health Region stated at page 15, in relation to availability of Dr Naidoo, that several staff interviewed expressed concern about Dr Naidoo being in Brisbane for a large proportion of his time and frequently being absent on recreation leave, sick leave, conference leave or study leave.
- 2.47 The Report does not identify who those staff were. None of the supporting material upon which the report was based has been put into evidence.
- 2.48 The comment at page 15 of the North Gibling Report was the subject of some evidence by Dr North. The reality is that the complaint was no more specific than that Dr Naidoo was "very hard to find".

(at 5143)

COMMISSIONER: Could I just ask a question arising out of that? Given that Dr Naidoo lived in Brisbane and it's a three or perhaps more realistic, three and a half hours to Hervey Bay from where he lived, were you able to judge how much time he actually spent in Hervey Bay?-- We weren't.

Sorry?-- We were not.

Did you have any indication from staff there as to what that was?-- He was - we constantly got the sentence, "He is very hard to find".

- 2.49 The passage of evidence set out above explains the conclusion expressed in the North Gibling Report that Dr Naidoo was extraordinarily difficult to contact, being either out of range or out of town and that he simply did not respond to messages left by staff to contact them.
- 2.50 However, if the Commission refers to Terry Hanell's supplementary statement, at page 4, Dr Terry Hanell stated that there were incidents where staff reported to him that they were unable to contact Dr Naidoo, but on each of these occasions when he attempted to contact Dr Naidoo, he was able to make contact. The reasons for difficulty in contacting Dr Naidoo included being scrubbed in theatre, being on approved leave, delays in the paging message being received, poor mobile phone reception locally and in transit between Maryborough and Hervey Bay and that staff members using only one method of attempting to make contact when that method was unavailable at the time.
- 2.51 The North Gibling Report is not a source upon which the commission should rely in this, or indeed in many other, instances.
- 2.52 At page 6680 of the transcript, Dr Naidoo stated that the mobile phones did not work in certain areas and if he was in transit between Maryborough and Hervey Bay a certain segment of that area was not covered by mobile phones and within the hospital there were drop out areas with mobile phones but he would emphasise that whenever he was on duty during the day that he was at either one of the campuses.

- 2.53 At page 6760 Dr Hanelt agreed that over the years people made complaints about being unable to contact Dr Naidoo, and Dr Hanelt investigated those complaints. Dr Hanelt agreed that he personally attempted to contact Dr Naidoo on those occasions. It was then put to Dr Hanelt that he said that he was successful on all occasions in contacting Dr Naidoo the only qualified being on a couple of occasions over the years when Dr Hanelt found Dr Naidoo to be on the way to Hervey Bay from Brisbane. Dr Hanelt qualified this a little further by stating that occasionally it was impossible to personally contact Dr Naidoo because he was scrubbing in the operating theatre and you could not locate where he was.
- 2.54 Dr Hanelt stated that when people questioned where Dr Naidoo was, some of the time he was on leave and people simply were not aware that he was on leave. Other times he was contactable but had not been contacted by appropriate means: *"If you are in the operating theatre, your mobile phone must be turned off."*
- 2.55 Dr Hanelt stated at page 6801 of the transcript that the majority of the time when there were complaints about Dr Naidoo not being on duty when he supposed to be on duty, he was located and he was performing what he was supposed to be doing or he was already on legitimate leave, that the staff member who had claimed he was absent without leave simply did not know he was on leave.

Telephone Records

- 2.56 Counsel assisting cross-examined Dr Naidoo at some length on the basis of telephone records.
- 2.57 Only certain parts of those records were put to Dr Naidoo for comment and the Commission should therefore confine itself to those particular instances. To do otherwise would be to not accord him procedural fairness as counsel assisting was, obviously, deliberately selective in taking Dr Naidoo only to those areas which must have been of interest to the Commission.
- 2.58 Care should be taken in relying upon either the records themselves or some of Dr Naidoo's answers, which were elicited during this part of the cross-examination.
- 2.59 Counsel assisting quite properly withdrew any suggestion that calls logged as being from Kangaroo Point meant, for example, that Dr Naidoo could not have been in the New Farm Clinic. Counsel assisting also quite properly accepted that Dr Naidoo was indeed hospitalised in the New Farm Clinic in December 2004.
- 2.60 The records that were put to him initially seemed (erroneously) to establish that that was not the case. Between pages 6617 and 6619, Dr Naidoo accepted (no doubt by reason of the apparent logical force of the questioning and observations) that he was not in hospital when of course, he was. Care should be taken in relying upon any concession made by Dr Naidoo during this part of the cross-examination, as his evidence was no doubt affected by Dr Naidoo's acceptance of what was shown ultimately to be incorrect. He dealt with this in his supplementary statement.

- 2.61 One specific instance was put to Dr Naidoo by counsel assisting at page 6600, 6616 and 6617 of the transcript concerning late January 2004.
- 2.62 The phone records specifically show that Dr Naidoo was back in Hervey Bay on 4 February 2004. Some of the telephone records are entirely consistent with Dr Naidoo travelling up and back on one day. Unless he was on call, and there is no evidence that he was, there can be no criticism of him travelling up and back each day, particularly as is the case, he discharged all of his duties and worked more than his required hours per week.
- 2.63 It would be unfair of the Commission to make an adverse finding against Dr Naidoo on the basis that one interpretation of the evidence is that he was not at work when there is an equally likely interpretation of the evidence that he was. For example, in relation to the evidence relating to the phone records of 19 January 2004, the phone records show calls made outside of business hours, one at approximately 7.42am and the second one at 9.28pm. Both of these times are outside of normal working hours and as such, it is as likely as not that Dr Naidoo was at the Hervey Bay Hospital on duty on this day. Unless further evidence is provided, an adverse finding cannot be found on this basis alone.
- 2.64 At page 6609 of the transcript, Mr Andrews attempted to show that no leave was taken in the week of 22 January 2004 by stating there was no leave memo, that there was no record with HR of the leave and that Dr Naidoo had no memory of taking leave.
- 2.65 There is a memorandum that commences 27 January 2004 so the dates in question are only 2 working days; 22 January 2004, 23 January 2004 because 26 January 2004 was a public holiday.
- 2.66 The phone records show that Dr Morgan Naidoo was in Stones Corner or its surrounds on 27 February 2004, which was a Friday. In relation to 27 February 2004, Dr Naidoo is certain that he would not have just simply taken a day off work but that it would have been a sick day for which he made a call to the clinical support officer. There is no evidence to the contrary.
- 2.67 The next period of time relates to 21 – 23 April 2004. Once again, this was planned leave provided for in a leave memorandum of 12 December 2003 from Dr Morgan Naidoo to Terry Hanelt. In that form, Dr Naidoo states that he would be on leave from 21 April 2004 to 23 April 2004. That time was spent at the knee symposium held by Striker at Couran Cove, Gold Coast. No leave form has been discovered for this period of time. However the memorandum is consistent with what in fact occurred.
- 2.68 Monday, 26 April 2004 was a public holiday as stated in the table annexed to Dr Naidoo's supplement statement regarding the telephone records. On Monday 3 May 2004, Dr Naidoo would have been looking after his son who had been discharged from the Mater Private Hospital on 1 May 2004 after surgery.
- 2.69 Dr Naidoo was hospitalised for depression in August 2004 from 13 – 28 August. Forms were submitted for this period providing sick leave. The HR records are not complete in this regard. They leave out certain dates where Dr Naidoo was clearly in hospital. For example, the leave records of the HR department do not show that Dr Naidoo was on leave on 13 August 2004, when he was clearly in hospital and had provided information to Terry Hanelt to that effect.

- 2.70 From 4 – 6 August 2004, Dr Naidoo attended a conference in Queenstown; the Foot and Ankle Society Conference. This leave was approved via memorandum from Terry Hanelt.
- 2.71 No leave form has been discovered for this period of time, however a leave form would have been required for Dr Terry Hanelt to approve such leave. This deficiency tends to establish that there is almost a practice in the HR department of failing to maintain accurate and complete personnel files. The lack of an accurate and complete personnel file requires the Commission to consider whether it would be prudent to rely on such a file in order to make adverse findings against a medical practitioner, such as Dr Morgan Naidoo. In this regard, it is submitted that the evidence is insufficient to sustain an adverse finding against Dr Naidoo.
- 2.72 At TMH38 of the attachments to Dr Hanelt's original statement to the Inquiry, one finds an orthopaedic senior medical officer on-call roster for January 2005. During the Inquiry, the Counsel assisting the Inquiry put a number of telephone records to Dr Naidoo. Part of these telephone records identify 20 and 21 January 2005 as dates where Dr Naidoo was making telephone calls in Brisbane rather than being located in Hervey Bay where he was on duty. If one looks at the document TMH38, one finds that for the Thursday and Friday, 20 and 21 January 2005, Dr Kwon is listed as the consultant on duty and not Dr Naidoo. Dr Naidoo's name does not appear on this roster for those two particular days and as such, we would submit he was not on duty at Hervey Bay or at any hospital in the Fraser Coast Health District on these two particular days.
- 2.73 Similarly, Exhibit TMH38A to Dr Hanelt's original statement to the Commission of Inquiry, contains an orthopaedic senior medical officer on-call roster for February 2005. This roster demonstrates both the daily duty roster and the on-call times outside of normal working hours. The Commission of Inquiry's attention is directed towards Thursday and Friday, 3 and 4 February 2005. These two dates are dates for which the Counsel assisting the Commission of Inquiry put to Dr Naidoo in evidence that he was in Brisbane making telephone calls when he should have been at Hervey Bay. The roster for these two particular dates would show that the daily duty SMO and on-call SMO for these two dates was Dr Krishna and the Maryborough and Hervey Bay daily consultant on duty for these two dates was Dr Kwon. The district on-call medical officer for these two dates was, for Thursday, Dr Padayachay and Dr Kwon and for Friday, Dr Krishna and Dr Kwon. The admitting consultant on these two days was Dr Kwon. In other words, Dr Naidoo was not required to be on-call at Hervey Bay or Maryborough Hospital on Thursday or Friday, 3 or 4 February 2005. As such, the Commission of Inquiry cannot rely on these dates as evidence of occasions when Dr Naidoo was in Brisbane or otherwise absent from duty when he should have been on duty at the Fraser Coast Health Service District.
- 2.74 The supplementary statement of Dr Morgan Naidoo signed 10 October 2005 in particular contains a table addressing issues regarding absences from Hervey Bay arising out of the telephone records. This appears at page 15 of the supplementary statement of Dr Naidoo. The Commission ought to consider that table with reference to the table provided in the second supplementary statement of Dr Naidoo, dated 21 October 2005.

- 2.75 The reality is that the telephone records do not in any sense justify a conclusion of absence from duty on "numerous" occasions. Indeed, counsel assisting addressed only a few occasions throughout the entire period. At its highest, the evidence does not in any sense support the allegation in the Notice.
- 2.76 Moreover, there is a sufficient degree of uncertainty concerning any identified absence and the accuracy of the HR records, which, effectively precludes the commission from making any finding at all concerning unauthorised leave taking or failure to observe on-call obligations.

Fuel Records

- 2.77 The only document, which the Inquiry can rely on in relation to the fuel records, is exhibit 496 and the supplementary statement of Dr Naidoo dated 21 October 2005 regarding exhibit 496.
- 2.78 Exhibit 496 in its entirety was only provided to Dr Naidoo less than 24 hours before the deadline for submitting a supplementary statement on its contents. This did not afford Dr Naidoo the requisite opportunity to be able to consult all relevant records. His responsive statement is predicated upon an acceptance, but not a concession concerning the accuracy of the schedule prepared by Mr Stella on behalf of the Commission.
- 2.79 The Commission is referred to the table contained within the supplementary statement of Dr Naidoo dated 21 October 2005 regarding exhibit 496 and highlight the numerous occasions which are evidenced there where Dr Naidoo was absent from work on legitimate leave which is not represented in the records of the HR department.
- 2.80 In the absence of a detailed analysis of the original dockets it is not possible to test the validity of exhibit 496.
- 2.81 Exhibit 496 suggests some occasions on which Dr Naidoo may have left before the end of the working week or arrived during Monday morning. Even if that conclusion be accepted, there is ample explanation for it, consistent with the uncontradicted evidence.
- 2.82 Dr Hanelt mentioned at page 5 of his supplementary statement that Dr Naidoo often worked longer hours than the required hours.
- 2.83 Dr Hanelt also stated in his original statement at paragraph 61 (ii) that senior staff often work overtime for which they did not claim and in recognition of that fact, some flexibility was allowed in taking time off in lieu of payment of this overtime.
- 2.84 For the periods of time where Dr Naidoo may have left early or arrived late reference is made to his supplementary statement:

"I worked through my lunch break, almost without fail and was not paid for this time. As I stated in my original statement to the commission, I organised in-service meetings a 4-6 times in a year. Meetings often went from 5 to 9 pm. I never claimed payment for this overtime. From Tuesday to Thursday I often went in to work well before I was rostered to start. I would also like to mention that I very often took work home with me from the hospital, which I would

complete over the weekend in Brisbane. I believe that these practices mitigate the occasional late arrival or early departure."

- 2.85 We would submit that the schedule of fuel purchases provided by the Commission points to approximately 17 incidences of late arrivals and early departures over a period of 4 years. This is an average of 4 times per year. This is not substantial enough to be considered "numerous" when placed in its proper context. Dr Naidoo has provided almost 30 years of service to the health care system in Queensland, most of that within Queensland Health.

Inadequacy of HR Records

- 2.86 It is apparent from the foregoing that the records kept by the HR department at the hospital cannot be relied upon as a sufficient evidentiary basis to establish any dereliction of duty on behalf of Dr Naidoo.
- 2.87 In particular, annexure D to Dr Terry Hanelt's supplementary statement concerns Dr Naidoo's leave. If one looks at the entry start date 22 January 2004, one finds that Dr Naidoo was on sick leave on this date. Dr Hanelt has made a note in the comments section of the table stating that no application was found but that a phone call had been made that Dr Naidoo was off sick. 22 January 2004 was a day, which the Commission put to Dr Naidoo in his evidence that he had made a telephone call from Brisbane when he should have been at the Fraser Coast. We would submit that this particular day he was on sick leave, which was approved leave and thus he was not merely taking the day off. The Commission also put to Dr Naidoo various phone calls from 27 January 2004 to 30 January 2004. The summary of leave in Dr Hanelt's statement at annexure D also shows that this was a period of leave and the comment in the table of Dr Hanelt is that leave is shown on the roster but no application can be found.
- 2.88 Dr Terry Hanelt's annexure D, which is a summary of Dr Naidoo's leave in chronological order, is itself not even a complete record of the leave taken by Dr Naidoo. This table does not make any reference to the dates of 21 to 23 April 2004, which Dr Naidoo took as ARL. There is a memorandum from Dr Naidoo dated 12 December 2003 addressed to Terry Hanelt stating that this is a period of planned leave for the first half of 2004. Further, it is known that Dr Naidoo was attending a conference at this time. The conference he attended was the Knee Symposium presented by Striker at Couran Cove on the Gold Coast. That attendance is sworn to in annexure 4 to his supplementary statement of 10 October 2005. There is no record of this leave in the HRM file or in Dr Hanelt's tables. The Commission would not be able to say with sufficient certainty whether this oversight is the responsibility of the HRM department or Dr Naidoo. As such, the Commission of Inquiry cannot make an adverse finding about an absence of Dr Naidoo from the health district on these dates.
- 2.89 In August 2004, Dr Naidoo was hospitalised for depression at the New Farm Clinic. This hospitalisation occurred from 13 August 2004 to 28 August 2004. HR has recorded sick leave from 9 – 12 August 2004 and the next sick leave is from 16 August 2004 – 20 August 2004. HR has failed to record sick leave for 13 August 2004, which was a Friday. This cannot be held to be the responsibility of Dr Naidoo, but rather, goes towards establishing a pattern of inaccuracies recorded by the HRM department.

Evidence of Kristine Wyatt

- 2.90 Ms Wyatt was called apparently to buttress the case against Dr Naidoo with respect to his absence from duty. Notwithstanding her clear animus against Dr Naidoo, she herself has conceded, in exhibit 16 to the statement of Dr Hanelt that many of the complaints against Dr Naidoo arose from bias engendered by his personality.
- 2.91 To the extent that Ms Wyatt is in fact critical of Dr Naidoo, her evidence should be disregarded completely.
- 2.92 In Ms Wyatt's evidence, she stated (at page 7356 of transcript) that she recalled times when Dr Naidoo was difficult to contact and numerous occasions where Dr Naidoo cancelled surgery on the day of surgery. At page 7357, Ms Wyatt stated that she would have spoken to Mr Allsopp about Dr Naidoo several times. Ms Wyatt also stated that she recalled raising problems about Dr Naidoo at monthly surgical services committee meetings (which post 2001 was known as the Surgical Services Management Advisory Committee).
- 2.93 Ms Wyatt conceded in cross-examination by Mr Perry that Dr Naidoo's explanation for the cancellations she referred to were that they were for clinical reasons. There is simply no evidence to the contrary.
- 2.94 When questioned at page 7359 about the minutes of the surgical meetings, Ms Wyatt stated that she would expect the minutes to be an accurate reflection of what occurred in the meeting.
- 2.95 The minutes of various meetings of the Surgical Services Committee were entered as Exhibit 502. There are minutes from meetings of 30 January 2002, 25 March 2002, 7 May 2002, 3 June 2002, 9 July 2002, 7 August 2002, 4 September 2002, 9 October 2002, 6 November 2002, 5 February 2003, 12 March 2003, 7 May 2003, 4 July 2003, 1 August 2003, 5 September 2003, 17 October 2003, 7 November 2003, 5 December 2003, 6 February 2004, 12 March 2004, 2 April 2004, and 14 May 2004. This is a total of 22 meetings for which none of the minutes reflect an issue of cancellations or absences raised by any member of the committee regarding Dr Naidoo. The minutes do not reflect Ms Wyatt ever raising the issue either.
- 2.96 In the meeting of 9 October 2002, it stated: "*Discussion on booking for the orthopaedic lists. Bookings are done 6 weeks ahead for joints. Problems being experienced are patients are either unfit once they go to pre admission clinic or not enough Physiotherapy cover.*" This would suggest that cancellations were for genuine clinical reasons. There is no mention of Dr Naidoo here.
- 2.97 In the meeting of 12 March 2003, Dr Naidoo commented that: "*the Emergency Theatre sessions at HBH cannot always run due to Anaesthetic numbers. Dr Naidoo has requested that the Anaesthetic Department communicate with other Units what staff they have available for theatre sessions.*" In the meeting of 2 April 2004, Ms Dale Erwin-Jones raised the issue of the anaesthetic shortage and Ann Spring advises that in this context, "*theatre sessions cancelled or changed at the last minute*". This would also suggest that possible cancellations were due to staffing and resource issues in other departments and thus, for genuine clinical reasons, raised by Dr Naidoo and other staff members.

- 2.98 Ms Wyatt stated that several times since 1997 she had spoken to Mr Allsopp about cancellation issues with Dr Naidoo (page 7360). However, it was pointed out to her by Mr Farr that Mr Allsopp began working as district manager in 2001. Ms Wyatt could not remember if she raised the issues with the previous district manager. There is no documentation from Ms Wyatt to Mr Allsopp regarding the issues. Further, Ms Wyatt stopped working at Hervey Bay Hospital in October 2003.
- 2.99 Ms Wyatt agreed (at page 7356 of transcript) that there were times when Dr Naidoo could have been on leave and she was not aware of it.
- 2.100 Ms Wyatt recalled that she raised the issues with many people but was unable to recall any specifics of times, dates, years, whether or not she documented her concerns, any of the advice given to her by those she spoke with, or whether she was told to raise it at the surgical services management advisory committee (see page 7367 of transcript). Ms Wyatt did not recall whether she put anything in writing after the meeting with Mr Allsopp or whether she put in an incident report (see page 7368 of transcript).
- 2.101 It is submitted that there is no evidence that Ms Wyatt raised any of these issues with anyone else. Further, we would submit that if someone in the position of Ms Wyatt thought these issues to be serious, they would put them in writing and follow protocols by documenting the issues in incident reports and taking issues to the relevant committees and having the issues recorded in those forums. It could not possibly have been a matter of serious concern to Ms Wyatt as there is no documentation of her raising the issues at any point of time with anyone.

Insufficient Evidence to make a finding under paragraph 1(a) of the Notice

- 2.102 The Commission ought not accept the speculative evidence concerning Dr Naidoo's alleged absence from duty.
- 2.103 The reality is decidedly to the contrary. Uniformly, the assertion is based upon rumour and scuttlebutt not evidence.
- 2.104 The telephone and fuel records do not sustain the findings sought to be made. At their highest, they may indicate episodic instances over a period of many years, which, even if proven, are more than counterbalanced by the uncontradicted evidence of Dr Naidoo's working hours, and commitment to the hospital.

Potential Adverse Finding 1 (b):

- 2.105 The purpose of the Notice is clearly to meet the requirements of procedural fairness with respect to potentially adverse findings. To do so, the Notice must provide sufficient details to Dr Naidoo to enable him to properly respond to it.
- 2.106 That requirement presupposes that the individual matters specified in (i), (ii) and (iii) occurred in a particular context sufficient in itself to establish that the conduct specified in those subparagraphs was conduct, which ought not to have occurred for some particular reason.
- 2.107 That is, the Notice ought to specify the particular context in which the alleged conduct occurred. The fact, if established, that each of (i), (ii) and (iii) occurred

is not of itself a sufficient basis for an adverse finding to be made unless and until it can also be established that that conduct should not have occurred and or if it occurred, constitutes a dereliction of duty or failure to maintain appropriate standards of clinical practice and procedure.

- 2.108 The Notice ought therefore to specify why it is that Dr Naidoo should not have done the things alleged against him. The Notice does not do that.
- 2.109 The Notice should specify consequences, actual or potential, which might have flowed from each of (b)(i), (ii) and (iii). The Notice does not do that.
- 2.110 The Notice should identify what the 'certain orthopaedic procedures' were which ought not to have been authorised in the light of the matters referred to in (i), (ii), and (iii). The Notice does not do that.
- 2.111 It is not possible to properly respond to such an allegation where there was quite clearly a range of orthopaedic procedures, which Dr Krishna and Dr Sharma should quite properly have been authorised to perform and no distinction is made between those procedures and those, which the Commission might find, ought not to have been authorised.
- 2.112 The Notice should specify or at least refer to a body of evidence, or conclusions to be drawn from such evidence, which would necessarily or potentially place the conduct alleged against Dr Naidoo in the category of conduct warranting an adverse finding.
- 2.113 It might be speculated that the clinical competence, as exhibited in the clinical practice and procedure of Drs Krishna and Sharma was such that Dr Naidoo ought not to have done that which is alleged against him.
- 2.114 It cannot however be asserted that that conclusion could be warranted across the broad range of activities undertaken by each of those two doctors. Indeed, the Notice does not even pretend to make such a broad assertion.
- 2.115 It can only therefore be that there were particular aspects of their competence, as revealed in their clinical practice and procedure, which were such that required Dr Naidoo to do the converse of that which is alleged against him. If that be the case, or if there be a different context in which the allegations against Dr Naidoo ought properly be considered, then that context should be specified in the Notice. The Notice does not do that.
- 2.116 The deficiency in the Notice constitutes a fundamental deficiency in terms of procedural fairness.
- 2.117 Dr Naidoo is therefore compelled to attempt to answer paragraph 1(b) by hypothesising as to what it is that the Notice seeks a response to.

Ground 1(b)(i) is in the following terms:

Between July 2003 and August 2004 you as Director of Orthopaedics at the Hervey Bay Hospital authorised Dr Krishna and Dr Sharma ("the Senior Medical Officers") to perform certain orthopaedic procedures in circumstances where:

(i) Apart from 4 occasions in which you observed Dr Krishna perform procedures, you had not observed either of the Senior Medical Officers performing those procedures;

2.118 The Notice of potential adverse findings or recommendations in relation to supervision of the SMOs, Dr Krishna and Dr Sharma, states that between July 2003 and August 2004, Dr Naidoo only observed Dr Krishna performing procedures on 4 occasions. We would submit that the Commission has failed to recognise the fact that Dr Krishna arrived at Hervey Bay Hospital on 20 July 2002. When Dr Krishna first arrived at Hervey Bay Hospital, Dr Naidoo took Dr Krishna along with him to various operating sessions and had an opportunity to observe him in this initial period of employment.

2.119 At page 6595 of the transcript, Dr Naidoo gave evidence concerning his memorandum dated 2 October 2002, which indicated that Dr Krishna could do certain elective cases without supervision. At that stage, Dr Krishna had been at the hospital for about 9 weeks and Dr Naidoo had observed him performing surgery. Dr Krishna was in the operating theatre with Dr Naidoo for about 4 operating lists per week and did parts of procedures with Dr Naidoo. In other words, Dr Naidoo observed Dr Krishna's surgical abilities at periods of time before July 2003 (the date specified in the Notice of potential adverse findings and recommendations).

2.120 In simple terms, the Notice is deficient in form and content.

Role of Senior Medical Officers

2.121 It would appear that there is no ready description of the level of competence or experience required for appointment. That is perhaps a deficiency, which the Commission may wish to address.

2.122 What is apparent is that Drs Krishna and Sharma were appointed, not by Dr Naidoo, but by the department upon a particular basis.

2.123 That basis is set out in their appointment documentation.

2.124 The Senior Medical Officers, Dr Krishna and Dr Sharma were hired under an Area of Need provision. The documentation for an area of need position provides a section for supervision. Dr Hanelt stated at page 6715 of the transcript that the supervision indicated in such a document would primarily be supervision by Dr Naidoo.

2.125 In relation to the Form 1 Area of Need documentation that was used in order to be able to recruit senior medical officers for the orthopaedic department (TMH-31 to Dr Hanelt's original statement), Dr Hanelt referred to a person who could undertake the management of a wide range of conditions with: "*minimal supervision*".

- 2.126 The hospital management itself envisaged minimal supervision in the recruitment of senior medical officers for the orthopaedic department. The hospital had the intention that these officers provide orthopaedic services with minimal supervision. As such it would be inappropriate to make an adverse finding against Dr Naidoo on the basis that the Senior Medical Officers in fact required more than the level of supervision, which the hospital itself used as a benchmark for their appointment.
- 2.127 At page 6760 of transcript, Dr Hanelt was asked whether Dr Naidoo was aware that the hospital's intention was in seeking someone who would be, upon appointment, capable of providing management of a wide range of conditions with minimal supervision, to which Dr Hanelt replied: "yes".
- 2.128 Mr James Patrick O'Dempsey swore an affidavit for the Commission of Inquiry dated 14 October 2005. An annexure to that statement is JPO16K, which is a letter to Dr Krishna dated 28 June 2002 which informed him that he had been granted special purpose registration as a medical practitioner in Queensland, effective from 18 July 2002 until 18 June 2003. That letter advised that he was not registered as a specialist.
- 2.129 JPO16O is a letter to Dr Krishna dated 6 June 2003 where Dr Krishna was informed that he had been granted special purpose registration as a medical practitioner in Queensland effective from 18 July 2003 to 17 July 2004. In that letter, it was stated that there were nil conditions imposed on his registration. In that letter, there was no mention of the supervision, which would be required for Dr Krishna. It merely stated that special purpose registration enabled him to practice as an SMO in orthopaedics at Fraser Coast Health Service District, or any other public hospital authorised by the medical superintendent of Maryborough Hospital on a temporary basis.
- 2.130 JPO16S is a letter to Dr Krishna dated 8 July 2004. In that letter, a person signing for the registrar advised Dr Krishna, that he had been granted special purpose registration as a medical practitioner in Queensland effective from 18 July 2004 until 17 July 2005. He was informed that there were nil conditions imposed on his registration. The letter merely stated that his special purpose registration enabled him to fill an area of need at Hervey Bay Hospital and Maryborough Hospital or any other public hospital authorised by the medical superintendent on a temporary basis. Supervision requirements were not mentioned in the letter.
- 2.131 These letters annexed to James O'Dempsey's affidavit cover the period discussed by the Notice of Potential Adverse Findings and Recommendations set out in 1(b) of the letter to Dr Naidoo dated 14 October 2005. Dr Naidoo allowed Dr Krishna to perform orthopaedic procedures in circumstances which directly correlated with the conditions set out in the letters regarding the SMOs' registration.
- 2.132 Dr Naidoo cannot be held responsible for a subsequent change in standards. This subsequent change in standards is evidenced in JPO16U which provides some details as to a board meeting held on 21 December 2004 regarding Dr Krishna. In that meeting, it was recommended that Dr Krishna's general registration with supervised practice conditions be effective from 14 June 2005. That was the first time Dr Krishna was provided with supervised practice conditions imposed on his registration. As that occurred on 14 June 2005, it is

outside the scope of the dates (July 2003 to August 2004), which the Commission has dictated in its Notice against Dr Naidoo.

- 2.133 The documents relating to Dr Sharma which are attached to the affidavit of James O'Dempsey follow a similar pattern to the documents for Dr Krishna. JPO17C is a letter to Dr Sharma dated 13 March 2003 where he is informed that he has been granted special purpose registration as a medical practitioner in Queensland effective from 27 February 2003 and valid until 25 January 2004. The conditions imposed on his registration were nil. Dr Sharma was merely told that special purpose registration enabled him to practice at Fraser Coast Health Service District or any public hospital authorised by the medical superintendent of Maryborough Base Hospital on a temporary basis. No mention of supervision was made in that letter.
- 2.134 JPO17G is a letter from the registrar dated 11 February 2004 to Dr Sharma. This letter informed Dr Sharma that he had been granted special purpose registration as a medical practitioner in Queensland effective from 26 January 2004 and valid until 25 January 2005. Conditions imposed on Dr Sharma's registration are listed as nil. Once again, Dr Sharma was told the special purpose registration enabled him to practice at Fraser Coast Health Service District or any public hospital authorised by the medical superintendent on a temporary basis. There was no mention in the letter of supervision.
- 2.135 JPO17J is another letter, which follows the same pattern as the previous letters. It is a letter from the registrar dated 30 November 2004 to Dr Sharma where he was informed that he had been granted special purpose registration as a medical practitioner effective from 17 January 2005 and valid until 16 January 2006. The conditions imposed on his registration were nil. Dr Sharma was told again that special purpose registration enabled him to fill an area of need as a SMO in orthopaedics at Fraser Coast Health Service District or any public hospital authorised by the medical superintendent on a temporary basis. Once again, no mention of supervision was made in this letter.

- 2.136 At paragraph 31 of his statement, Dr Sharma stated that:

"as for supervision, I said to the investigators that I had no problems when the consultant was around and that during on-call hours there was none available. I always discuss cases before surgery when needed and would get the consultant into theatre when needed. I did not have any problems with communication between the leadership of the Hospital. I would also like to comment that people at SMO level are not expected to supervised all the time". (emphasis added)

- 2.137 Dr Sharma went on at paragraph 32 to state the following:

"I agree that in my role I may need supervision, but I do not agree with the level of it. There are procedures that I can perform with no consultant present in theatre and there will be occasions where I will need one. For example, in straightforward trauma and some minor elective procedures I have not needed any supervision and there were no hospital rules to the contrary."

- 2.138 Dr Sharma continued at paragraph 33 to state:

"Even during my training at Royal Newcastle Hospital, I was able to do surgical procedures with no specialist in theatre. I also note that Dr Krishna worked in a teaching hospital as a PHO and even then 60% of the procedures he performed did not have any specialist in theatre."

Supervision-Ambit and Content

- 2.139 The Commission of Inquiry has heard that there are various levels of supervision. The categories of supervision would be from very close supervision to very distal supervision. The position of a RMO or a PHO is different to an SMO. You would expect a PHO or a RMO to have a very limited degree to which they could perform independently with procedural aspects of clinical patient care. This increases as you move up through the varying ranks. By the time one gets to an SMO level there is an expectation that SMO's would be able to perform a number of procedures without supervision or distal supervision.
- 2.140 Dr Hanelt at page 6716 of transcript explains distal supervision as situations such as a situation where all of the specialist orthopaedic surgeons in the district were unavailable (for example both Dr Mullen and Dr Naidoo), then supervision would be by contact with other orthopaedic specialists at other hospitals, in other words distal supervision.
- 2.141 Dr Hanelt stated at page 6716 of transcript that it is widespread throughout Queensland that there are senior medical officers who work independently after hours without direct supervision.
- 2.142 At the time that Dr Krishna and Dr Sharma were SMOs at Hervey Bay Hospital the Medical Board did not strictly define the levels of supervision required. The Medical Board has since defined the parameters within which an SMO can work. It would be unfair to hold Dr Naidoo to a standard that was not defined at the point in time the events occurred.
- 2.143 The level of supervision provided for Dr Krishna and Dr Sharma was consistent with the level of supervision provided in other health care services throughout Queensland and indeed throughout Australia. Dr Sharma stated at page 5682 of the transcript that the situation for SMOs existed not just at Hervey Bay Hospital but also at other hospitals including Rockhampton where the consulting doctor is at the Royal Brisbane Hospital.
- 2.144 Central to the question of supervision is the role of Dr Krishna and Dr Sharma in identifying those procedures or patients, which required the involvement of a supervising specialist. Each of them confidently asserted that they were able to safely and competently make that decision. For example, at page 6527 and 6528 Dr Krishna clearly and unequivocally agreed with the suggestion that in making the decision in question he always acted with prudence and caution and indeed would only proceed unsupervised where he was completely confident that there was no possible risk to the patient.
- 2.145 It is not enough to simply reject Krishna's evidence in that regard because of what Dr Mullen or Dr North may have said. Even if one were to do that, that step in itself does not provide a sufficient basis for a finding that Dr Naidoo was derelict in relying upon his two senior medical officers to call him as and when required.

- 2.146 At page 6608 of the transcript, Dr Krishna made it clear that in relation to scope of service, he was familiar with the procedures and was sure that he would not have called Dr Naidoo in any of those procedures except for the two arthroscopies.
- 2.147 It was both Dr Naidoo's and Dr Wilson's experience that Dr Krishna would call for help when he required it. It was also the experience of other staff members.
- 2.148 At page 5407 of transcript Ms Irwin-Jones stated that Dr Krishna always worked within his scope of practice. Implicit in that was that he knew what his scope of practice was and that he knew what his limitations were. Ms Irwin-Jones stated that they were advised that his capabilities and that of Dr Sharma's could meet that need and they did not see any evidence to show that he wasn't competent in performing.
- 2.149 Dr Wilson, who had Dr Krishna as his training registrar, provided evidence at page 7330 of transcript that Dr Krishna called him when he felt he was not happy about how it was going and at page 7338 of transcript, in answer to the question of whether Dr Krishna had the insight to call upon assistance if performing something unsupervised and it became more complex than anticipated, Dr Wilson stated that was his understanding of Dr Krishna's time at Toowoomba. Dr Wilson stated: *"I wasn't concerned about his-his-him trying to take on too much and making inappropriate decisions based on that."* Dr Wilson reiterates at pages 7345 and 7346 of transcript that Dr Krishna: *"knew when to call for help."* We would submit that it would be unfair to find adversely against Dr Naidoo for failing to come to the assistance of an SMO who failed to ask for help.
- 2.150 On 26 October 2005 Commission staff provided Deacons with a statement of Dr David Morgan. That statement is cogent and probative evidence, which should be accepted as establishing Dr Sharma's competence.
- 2.151 Dr Naidoo stated at page 6686 of the transcript that: *"The senior medical officer on duty is fully capable in determining whether a patient needed admission or needed to be discharged to the care of a general practitioner or would require and outpatient appointment."*
- 2.152 Dr Naidoo was not the only member of staff who relied on the senior medical officers to advise of what procedures they felt they were competent to perform. At page 6726 of the transcript, Dr Hanelt made it clear that when Dr Naidoo was absent on leave, it was left to the SMOs to assess what was in their range of competence to perform, which is what they were happy to perform and competent to perform, in the context of what had been assessed to be within their scope of service.
- 2.153 At page 6805 of the transcript, it was put to Dr Hanelt that the situation in the orthopaedic department worked in the following manner: *"Dr Krishna would never perform surgery he did not feel comfortable with performing, and we may also have heard from Dr Sharma. We have also heard from Dr Naidoo that he was confident that Dr Krishna and Dr Sharma would make careful decisions as to what surgery they would perform and what they would not perform. And we have heard that in circumstances where they were the only people available and they weren't comfortable with performing the surgery, they would refer it on – to transfer the patient."* Dr Hanelt stated that this was his understanding of the situation.

- 2.154 At page 7340 Dr Wilson gave evidence where he agreed with the proposition that using the term 'supervision' for Dr Krishna may mean that Dr Krishna might need to be supervised for the performance of a procedure a number of times before he could competently perform it on his own or it may mean only to perform it once and that depends upon the initial observation of his initial ability.
- 2.155 Dr Wilson stated that it was certainly true that the skills one acquires in the performance of one or two procedures would equip a doctor to perform other procedures of a similar nature. That: "*you have to extrapolate between cases*".
- 2.156 Dr Krishna was cross-examined by Mr Devlin at pages 6508-6514. That evidence demonstrates that Dr Krishna had a clear appreciation of the circumstances in which he should seek help and acted consistently with that appreciation.
- 2.157 Significantly, the criticism given in evidence before the Commission by Dr Mullen is not that Dr Naidoo did not adequately supervise while at the hospital but that supervision was lacking because Dr Naidoo was on leave.
- 2.158 That is the true position. That position is consistent in fact with all of the evidence and should be accepted unequivocally.
- 2.159 We would also refer the commission to the minutes of the Surgical Services Management Advisory Committee held on 12 March 2004, contained within Exhibit 502. Page 2 of the minutes indicates that Dr Hanelt: "*reminded medical staff that we are not funded as teaching hospital and therefore we should be mindful of the time when teaching does occur.*" In a regional hospital, with a very tight budget, the resources that one does have are required to be used as effectively as possible.
- 2.160 How can it be that Dr Naidoo can justly be criticised where the hospital placed constraints of this kind upon him?
- 2.161 There is an ample body of evidence concerning the competence of Dr Krishna and Dr Sharma. There is more than sufficient evidence as to their awareness of and appreciation of the circumstances in which they should seek assistance. They had had significant experience and were appointed to fulfil a role requiring minimal supervision.
- 2.162 It is apparent that Dr Naidoo was able to assess their competence, by particular reference to post-operative outcomes.
- 2.163 As Dr Wilson referred to, in cross-examination by Mr McDougall, differences of expert opinion by experienced surgeons do not equate with a sufficient basis to make an adverse finding against Dr Naidoo.

Potential Adverse Finding 1 (b)(ii):

You were aware that neither Senior Medical Officer had been appropriately privileged or credentialed in accordance with Queensland Health policy;

- 2.164 It is clear that a credentials and clinical committee had not been established contrary to Queensland Health Policy. Dr Hanelt stated at page 6723 of the transcript that Dr Sharma and Dr Krishna should have been privileged and this is an assessment, which Dr Naidoo would agree with.

- 2.165 At page 6623 of the transcript, Dr Naidoo stated that it is not the role of the Director of Orthopaedic Surgery to prepare the scope of service for senior medical officers. It is usually done by a credentialing or clinical privileges committee, which would consist of two or more people so there is no bias in the assessment.
- 2.166 Dr Hanelt stated at page 6723 of the transcript that it was Mr Allsopp, the District Manager's responsibility to set up a committee. According to Mr Allsopp at page 7077, he then assigned the management of the implementation of the clinical privileges policy to the Director of Medical Services (Dr Hanelt). Dr Hanelt and Mr Allsopp made attempts to organise a clinical privileges committee and when they saw the lack of success they attempted to amalgamate clinical privileges processing with Bundaberg Health Service District together with the Fraser Coast Health Service District in order to get college representatives acting on those committees.
- 2.167 Once again it is submitted that an awareness by Dr Naidoo that neither SMO had been appropriately privileged or credentialed in accordance with Queensland Health Policy is not something which should result in adverse findings against Dr Naidoo because it is clearly stated by both Dr Hanelt and Mr Allsopp that this is a responsibility belonging to Mr Allsopp as District Management of the Fraser Coast Health Service District. At page 7077 of the transcript, Mr Allsopp is asked: "Were you aware that you were responsible, as district manager, for ensuring that a process was in place to enable credentialing and privileging to occur?", to which Mr Allsopp replied: "That's correct."
- 2.168 The failure to properly privilege or credential Drs Krishna and Sharma was a matter beyond Dr Naidoo's control.
- 2.169 What then should he have done? It was obviously impractical to treat Drs Krishna and Sharma as registrars or PHOs requiring a greater level of supervision. Indeed, neither doctor was hired as such and neither doctor saw himself as such.
- 2.170 As the Notice fails to specify those procedures, which ought not to have been undertaken unless Drs Krishna and Sharma had been passed by a credentialing committee, it is simply impossible to properly or adequately meet such an uncertain and indeed vague allegation.
- 2.171 The Notice does not specify what operations ought only to have been performed had Drs Krishna and Sharma been subject of a proper committee deliberation.

Scope of Work Document prepared by Dr Naidoo

- 2.172 It is not alleged in the Notice that any potentially adverse finding is or might be made against Dr Naidoo arising out of or relating to this document.
- 2.173 That being the case, it is difficult to see how any adverse finding can be made against Dr Naidoo at all with respect to any formal or de facto credentialing process.
- 2.174 At page 6631 of the transcript, Mr Andrews asked Dr Naidoo why he did not get another orthopaedic specialist in Hervey Bay or even further a field to assist him

in prescribing the privileges and the answer is that Dr Naidoo responded to what the director of medical services wanted. In relation to the privileges committee, it was not up to Dr Naidoo to establish one. This was the role of the director of medical services and/or the district manager. Dr Naidoo did not attempt to set up a credentialing committee, as it was his understanding that the director of medical services, Terry Hanelt, had already commenced such a process.

- 2.175 It would be manifestly unfair for the Commission to make an adverse finding against Dr Naidoo for his awareness or otherwise of the fact that senior medical officers had not been appropriately privileged or credentialed in accordance with Queensland Health policy. This is a matter for people at a higher level within the organisation than Dr Morgan Naidoo as Director of Orthopaedic Services.
- 2.176 In submissions touching upon ground 1(c), there is a table concerning the elective surgery "privileges" which Dr Naidoo prepared in the scope of service documentation and a comparison with the evidence of Drs Mullen and Wilson.
- 2.177 Were such a task to be undertaken with respect to this ground relating to trauma surgery, it would be apparent that of the approximately 56 categories, Dr Naidoo and Dr Wilson disagreed on 10.
- 2.178 As the notice does not attempt to identify any particular procedure, which ought not to be authorised, it is not appropriate to address individual instances, save as to observe again that experts familiar with the individuals may have differing opinions as to their competence.
- 2.179 Most importantly, there is no identification of any clinical procedure actually undertaken by Drs Krishna or Sharma, which it is now said, they should not have been authorised to undertake.
- 2.180 In the absence of that fundamental level of specificity, ground 1(b) is an allegation, which is not capable of sustaining a rational or fair conclusion against Dr Naidoo.
- 2.181 It should also be recognised of course that trauma surgery requires, by definition, an instant response whether or not a supervising specialist is present or available.

Potential Adverse Finding 1 (b)(iii):

Instead you relied on each Senior Medical Officer to advise you of what procedures they felt they were competent to perform.

- 2.182 Dr Morgan Naidoo did not simply rely on what each Senior Medical Officer advised were the procedures they felt they were competent to perform. Dr Naidoo asked them what they performed in their previous employment and what they were comfortable doing and this formed part of his assessment, but did not complete the assessment. The evidence shows that there were a number of factors involved in Dr Naidoo's decisions of what procedures the SMOs could perform unsupervised. These were based on the references provided in their previous course of employment (which, were provided by doctors known to Dr Naidoo), a period of observation by Dr Naidoo of the SMOs performance at the beginning of their employment with the Hervey Bay Hospital, observing their

clinical practices in clinics and surgery and looking at post-operative care of patients.

- 2.183 To a certain extent, Dr Naidoo did rely on what each senior medical officer advised of what procedures they felt they were competent to perform. As stated at page 6593 of the transcript, what Dr Naidoo instructed was that they were to treat patients whom they thought were within their skill level and if they could not handle the situation; they were then to call Dr Naidoo. If Dr Naidoo were not available, the arrangement would be that patients would be transferred to another tertiary hospital.

Experience of SMOs

- 2.184 It is submitted that it is inappropriate for the Commission to make an adverse finding against Dr Naidoo on this basis as it appears that the Commission is failing to recognise that people at the level of SMO do have a certain amount of skill. We are not talking about a position, which involves people coming straight out of a tertiary institution. These are people with many years of training and experience in orthopaedics. Dr Krishna had over 10 years of experience in orthopaedics and Dr Sharma had 14 years of experience in orthopaedics.
- 2.185 Dr Krishna provided the Commission of Inquiry with a written statement dated 28 July 2005. In that statement, he outlined his orthopaedic training prior to coming to work in Australia. Dr Krishna was enrolled in the Fiji Orthopaedic Training Program in 1990. Dr Krishna also went through the process of graduating with a Diploma in Orthopaedics (Australian Orthopaedic Association) in 1995. Dr Krishna was registered as a specialist in orthopaedics in Fiji in 1998. At paragraph 10 of his statement, Dr Krishna stated that in 1997, he worked as a chief medical officer in orthopaedics in one of the three divisional hospitals in Fiji as its sole orthopaedic surgeon. In paragraph 11, he elaborated that during the Fiji Orthopaedic Training Program, he received supervised formal training by visiting orthopaedic specialists from Australia, New Zealand, America and Canada. Similarly to Dr Sharma, Dr Krishna had a 6-month period at the Royal Newcastle Hospital as a registrar in 1995 before the examination for the AOA Diploma in Orthopaedics. Once Dr Krishna started working in Queensland, he worked in the orthopaedic department of Toowoomba Base Hospital as a principal medical officer (PHO) from 5 December 2000 until 20 July 2002. From this point, Dr Krishna became an SMO in orthopaedics at Hervey Bay Hospital.
- 2.186 Dr Dinesh Sharma made a statement on 27 July 2005. In that statement, he outlined his training in orthopaedics. In paragraph 10 of that statement, Dr Sharma sets out that in Fiji he was registered as a specialist after completing two years of post-graduate practice under supervision. In paragraph 11, Dr Sharma elaborated by stating that the training program was structured similarly to the FRACS (Ortho). He did similar part 1 basic science exams followed by clinical training and clinical exams in Sydney. The Diploma of Orthopaedics from the Australian Orthopaedic Association was only presented to him after extensive and thorough examination and not on the basis of participation in professional development as claimed in the North Giblein Report. Dr Sharma provided documentation from his training. Although this qualification does not allow Dr Sharma to be recognised as a specialist in Australia, we would suggest that Dr Sharma does have qualifications in orthopaedics which knowledge assisted Dr Naidoo in making a decision as to what orthopaedic procedures he was able to perform without supervision. At paragraph 8 of his

statement, Dr Sharma stated that he had 14 years of orthopaedic experience and had reached the level of a consultant in the largest teaching hospital in Fiji. During his years of training and work experience, he had worked with prominent orthopaedic surgeons from Australia, New Zealand, Canada and the USA. Given this wealth of experience, Dr Naidoo's assessment that Dr Sharma was able to perform procedures without his observation, was based on an extensive history supported by documentation from former colleagues and supervisors.

- 2.187 From the extensive amount of orthopaedic training that the two SMOs had received before their time at Hervey Bay, we can deduce that these two doctors had a level of experience in orthopaedics not equalled by someone, for example, in a registrar position. The Commission of Inquiry should recognise that while these qualifications were not considered to be the equal of specialist qualifications in Australia, that these two surgeons were, nonetheless, very experienced orthopaedic surgeons. Dr Naidoo was aware of their qualifications and work experience and these factors weighed heavily in a decision by Dr Naidoo as to what kinds of procedures and the scope of procedures should fall within the scope of practice for these two particular surgeons. By allowing these surgeons to work in cases where they felt confident of their abilities, Dr Naidoo was affording the SMOs the respect that they deserved given their experience and qualifications before working for hospitals under the umbrella of Queensland Health. When you consider this in light of the fact that there were no true guidelines for someone in the position of Director of Orthopaedics as to what level of supervision truly was required for such doctors as Dr Krishna and Dr Sharma, it would be difficult to make an adverse finding against Dr Naidoo on this basis as you would be holding Dr Naidoo to a standard which did not exist at the time that these judgment calls were made.

Undefined Parameters of Supervision for SMOs

- 2.188 At page 5402 of the transcript, Ms Irwin-Jones is asked the following question: *"The position of senior medical officer in orthopaedics, is it the case that it is accepted in Queensland that when one is a senior medical officer in orthopaedics and one doesn't have Australian specialist qualifications, that it means one is supposed to be supervised by a consultant?"* Ms Irwin-Jones answers this question by stating that her understanding was: *"up until the Bundaberg Inquiry, that there was no definition as to what level of supervision an SMO would have. Certainly since that time, they had been directed that there will be specific levels of supervision."*
- 2.189 Ms Irwin-Jones continued at page 5403 of the transcript: *"in Queensland Health we have PHOs and we need to know whether they can operate independently, whether they need to be directly supervised. Certainly since the Inquiry, we have still requested to have a clear definition on that: Do they need direct supervision in the operating theatre, do they need supervision within the hospital, do they need supervision within 30 minutes? I have not seen a document out of Queensland Health states what level of supervision there is for any member of staff under consultant."*
- 2.190 Ms Irwin-Jones continued at page 5403 of the transcript by stating that it was her understanding that there is no degree to which senior medical officers must be supervised.
- 2.191 Mr Allsopp provided evidence at page 7075 of the transcript that the situation with the supervision of SMOs was not that Dr Naidoo was not around often

enough to supervise the two SMOs, but rather, that the issue was related to the terms of the supervision being unclear, and that that was an interpretation of supervision, which was the subject of disagreement between Dr Naidoo and Dr Mullen: *"It was on this basis that Dr Hanelt indicated that we would get an external review to actually clarify what the supervision requirements were."*

- 2.192 Exhibit 332 is a draft of a summary of a meeting between Dr Terry Hanelt, Dr Morgan Naidoo and Dr Sean Mullen held on Friday, 16 January 2004. At this meeting, a number of points were agreed upon. One of the points included *"that the AOA Review Report would provide guidance for supervision requirements and clinical privilege delineation for the SMOs. These matters to be further considered after that report in an attempt to find a system that is acceptable to the district, the orthopaedic surgeons and the AOA."* This evidences the fact that the various interested parties had different ideas as to what the supervision requirements were and as such, supervision as a concept was not well defined.
- 2.193 The evidence demonstrates that a number of parties at various levels within the organisation were confused about the role of Senior Medical Officers within the hospital.
- 2.194 In Mr Devlin's cross-examination of Dr Terry Hanelt on and around page 6775 of the transcript, Mr Devlin asked Dr Hanelt many questions regarding public service documentation concerning specialist senior medical officers. The Commissioner stopped Mr Devlin a number of times by essentially stating that the question whether senior medical officer orthopaedic is a specialist qualification is a matter of law. Given that even to this date no-one is able to say clearly whether "senior medical officer orthopaedic" is a specialist qualification or not, we would submit that a decision to allow senior medical officers to perform certain procedures in the orthopaedic department between July 2003 and August 2004, is not necessarily something which can be the subject of adverse findings, as the scope of allowable service for people in these positions, is not something that is understood by a room full of lawyers, let alone someone in the position of the Director of Orthopaedics. It would be unfair for the Commission to hold Dr Naidoo as Director of Orthopaedics at a higher standard of understanding in interpretation than the understanding of the Commission of Inquiry itself.
- 2.195 It is really impossible for the allegation in 1(b)(iii) to be made out. In the absence of a formal credentialing committee, is it really to be suggested that Dr Naidoo was remiss in relying upon the professional morality of Drs Krishna and Sharma with respect to whether or not they acted prudently and cautiously.
- 2.196 To make that finding one must in effect find that Drs Krishna and Sharma were sufficiently incompetent not to be able to recognise the circumstances in which supervision was appropriate or were sufficiently duplicitous to be so aware but to conceal that from Dr Naidoo and Dr Hanelt.
- 2.197 In the light of the evidence of Drs Morgan and Wilson it is simply inconceivable that either proposition can be properly made out here.

Potential Adverse Finding 1 (c):

Between July 2003 and August 2004 you allowed Dr Krishna and Dr Sharma to perform elective orthopaedic procedures without providing either with an appropriate level of supervision or consultant support.

- 2.198 This ground is, in the terms expressed, significantly deficient. It proceeds upon the assumption that the level of supervision or consultant support actually provided was insufficient to permit any elective orthopaedic procedures to be performed between the relevant dates.
- 2.199 If that is the true allegation, then it is patently absurd. As will be apparent from the table contained in these submissions, there was no disagreement between Drs Naidoo, Mullen and Wilson with respect to many aspects of elective surgery being performed without supervision.
- 2.200 Doing the best one can to hopefully divine the true intent behind the Notice, it may be the case that what is to be asserted is that when Dr Naidoo was on leave there was not a sufficient level of supervision or support.
- 2.201 If that is the case, then fault can hardly be attributed to Dr Naidoo. The level of supervision to be provided while Dr Naidoo was on leave and the orthopaedic services to be provided while Dr Naidoo was on leave were matters not for him but for Dr Hanelt and Dr Allsopp.
- 2.202 Where the Notice is deficient is that it does not pretend to specify what elective procedures should not be performed nor does it specify what constitutes an appropriate level of supervision or support.
- 2.203 That deficiency could have been rectified by enumerating the procedures in question and by providing a reference point in the evidence concerning supervision and support. The Notice however does not do that nor attempt to do that.
- 2.204 It is apparent from the submissions that Dr Naidoo considered that there was an appropriate level of supervision whilst he was on duty or on call.
- 2.205 Indeed, Drs Sharma, Krishna and Hanelt held a similar view.

Supervision an Issue of Resources

- 2.206 It is true that the situation with supervision provided in the orthopaedic department at Hervey Bay Hospital was not adequate. Dr Naidoo stated that himself, however it was considered more beneficial for the Fraser Coast community to have an orthopaedic department rather than not. The types of work undertaken by the SMOs were of a minor nature, which at their level of experience did not require such close supervision. It would have been beneficial for both the community and the doctors involved if more supervision had been provided, however the lack of a number of orthopaedic surgeons in the region made this difficult and in fact impossible. It would be grossly unfair to blame this situation on Dr Naidoo as the only orthopaedic surgeon prepared to be full time in the Fraser Coast Public Hospital Health District.
- 2.207 At page 6591 of the transcript, Mr Andrews put to Dr Morgan Naidoo that while he was on leave, the SMOs were mostly left unsupervised. Dr Naidoo agreed

with that. Mr Andrews asked Dr Naidoo if he would agree that that's far from ideal and Dr Naidoo agreed that it was not ideal. We would submit that the fact that the SMOs could not be supervised at the time that Dr Naidoo was on leave was not the responsibility of Dr Naidoo. The amount of supervision that Dr Naidoo was able to provide was limited by a number of factors, including the workload of the hospital providing that he be elsewhere from where the SMOs were and the ability for him to take his leave entitlements.

- 2.208 At page 5406 of transcript Ms Irwin-Jones stated that the situation where there would be no specialist in the district available to supervise Dr Krishna and Sharma was a situation which was far from ideal and that it would be the fault of Dr Naidoo or Dr Hanelt that there was no specialist in the district available to supervise them. Ms Irwin-Jones did however continue by stating that it is very difficult to attract any medical specialists out of the metropolitan. As such, it would be unfair to lay the blame for the lack of an appropriate number of specialists being available in the district to supervise the senior medical officers at Dr Naidoo's door.
- 2.209 At page 5418 to 5419 of transcript Ms Irwin-Jones stated that she believed that the Director of Medical Services and the District Manager were putting processes in place to manage Dr Naidoo. Apparently, they had attempted to address some of the issues in relation particularly to leave. They did not outline to her exactly how they were going to deal with Dr Naidoo but as she had never seen any major clinical poor outcomes for Dr Naidoo or the 2 SMOs she didn't feel she had significant evidence to give them to say: "you must act on this". Once again it is submitted that if there was insignificant evidence to state to the Director of Medical Services that there was a requirement to do something about Dr Naidoo's leave or supervision generally, then that situation still remains.
- 2.210 It would be manifestly unfair to blame Dr Morgan Naidoo for what is essentially an issue of resources.
- 2.211 The transcript, at page 6515, moves on to the 100% supervision provided to Dr Krishna by Toowoomba Base Hospital. It would be unfair to make a comparison between the supervision provided by doctors at Toowoomba and the supervision provided by Dr Naidoo as it does not take into account that Toowoomba had 7 VMOs, Dr Punn and Dr Ivers (page 6523 of transcript), whereas Hervey Bay had Dr Naidoo and the intermittent availability of Dr Mullen once per week. To make such a comparison and lay the blame for the difference with Dr Naidoo would be to blame Dr Naidoo for what is essentially an issue of supply of resources in regional hospital health care in Queensland.
- 2.212 At page 6593 Mr Andrews questioned Dr Naidoo regarding level of supervision as being 100% supervision. That kind of supervision is not sustainable and is not something that could or should be expected of a director of orthopaedics such as Dr Morgan Naidoo, because of its unsustainability. Dr Kwon was only present at Hervey Bay Hospital for a period of about 4 months and further:

"Mr ANDREWS: Now, I'll put up on the screen another orthopaedic specialist's level of supervision. This is again from the evidence of Dr Krishna yesterday in the transcript at page 6481, speaking of Dr Kwon's level of supervision. You will see it too was 100 per cent supervision but apparently even more so, more intense than had been provided in Toowoomba?—

I agree with that but Dr Kwon didn't do any of the trauma and didn't do any of the administrative work that I do and certainly had more time on his hands than I did."

- 2.213 The Commission of Inquiry heard evidence from Dr Hanelt that the district had difficulty in recruiting full-time orthopaedic surgeons, VMOs and locum orthopaedic surgeons. Dr Hanelt, as Director of Medical Services employed a number of methods in order to obtain such specialists. These included talking to the locum provision services of specialist colleges (this does not function in the orthopaedics area). The other methods were multiple locum agencies, multiple recruitment agencies who were notified when there is a position that the district needs to fill. The other method is through the staff themselves, through their contacts, their college meetings, etc (see page 6798 of the transcript).
- 2.214 At page 6749 of the transcript Dr Hanelt outlined his requests for an orthopaedic specialist surgeon for the district. This position was approved and advertised without success. The district had advertised and done two mail-outs to every registered orthopaedic surgeon in Australian and in New Zealand in conjunction with St Stephens Hospital to try and attract staff. This lack of resources led to Dr Morgan Naidoo being the only orthopaedic surgeon full time at Hervey Bay Hospital in the Fraser Coast district.
- 2.215 At paragraph 5.2 of Mr Mike Allsopp's statement to the Commission of Inquiry, he stated that currently the district had three accredited orthopaedic surgeons and has been recruiting for at least the last two years in conjunction with St Stephen's Private Hospital to increase that number to four. Unfortunately, the district had not been able to recruit due to the nationwide shortage of orthopaedic surgeons. Mr Allsopp then continued at paragraph 5.4 by stating:
- "The employment of SMOs was a support strategy to provide an infrastructure that would allow the orthopaedic surgeons to concentrate on joint replacements while the SMOs perform the minor orthopaedic work within their scope of practice."*
- 2.216 You cannot blame one party, one particular orthopaedic surgeon, for the lack of the *"necessary critical mass of orthopaedic surgeons"* which would, in Mr Allsopp's opinion, take the orthopaedic service to the *"next level"*. To make an adverse finding against Dr Naidoo on these facts would be to blame him for a systemic issue.

Trust in abilities of Senior Medical Officers

- 2.217 In the examination of Dr Naidoo it was put to him that leaving the SMOs to perform orthopaedic work, be it clinical or surgical work at the hospital when he was away or on leave and another specialist was not available, was unacceptable. At page 6705 of transcript, it was put to Dr Naidoo that while that may have been an unacceptable situation it was a situation where Dr Naidoo had a degree of trust in Dr Krishna and Dr Sharma in the performance of their work. Dr Naidoo agreed with this proposition.
- 2.218 The basis for that trust is in large part traversed in previous submissions concerning other grounds.

- 2.219 Dr Naidoo had a degree of trust in the judgement of Dr Krishna and Dr Sharma as to what they could comfortably handle with regard to orthopaedic problems. Dr Wilson in his evidence at page 7338 agreed with the proposition that as Dr Krishna's supervising consultant, a degree of trust developed between those two people.
- 2.220 At page 7338 of the transcript, Dr Wilson is asked, as Dr Krishna's: *"supervising consultant, if I can use that description, the relationship between you as supervising consultant and Dr Krishna as your registrar, does a degree of trust develop between the two of you? In other words, do you develop a trust in Dr Krishna's judgment to make decisions like that?"* to which Dr Wilson responded: *"Yeah, you get- you get to know the person reasonably well. Obviously when there's some doubt to start when you're asking about cases and what the x-ray shows and what the examination shows, but once you've confirmed that what he says is- is a good description of what's going on, then, you know, you're much more comfortable and that sort of trust develops over a period of a number of cases over a few months, really, I would say."*
- 2.221 Cases which the SMO's were not able to deal with were to be evacuated to another hospital or through the retrieval system or simply transferred. The nature of the injury would have an impact on where that trauma was transferred to. Dr Naidoo trusted Dr Krishna and Dr Sharma to make a competent judgement as to what they could handle and what they could not handle in the absence of supervision by a consultant.
- 2.222 Dr Hanelt's evidence at page 6732 provides an important light on the subject of the provision of an orthopaedic service. It is important to provide a medical orthopaedic service. Even when you do not have orthopaedic staff, you are still required to provide an orthopaedic service: *"People turn up with broken wrists, dislocated shoulders and those sorts of things"*.
- 2.223 Dr Hanelt stated that the elective procedures that Drs Krishna and Sharma were allowed to perform were of a very basic nature. As they were of a very basic nature, the appropriate level of supervision was provided.
- 2.224 In relation to clinics, Dr Naidoo was running a clinic at the same time as the SMOs were running clinics. Thus, he was within close proximity to offer supervision if required. Given the busy casework involved at Hervey Bay, it would have been ridiculous for the director to be present 100% of the time with his SMOs and indeed it was prudent to run a clinic within close proximity so that if supervision or assistance was required, it could be offered. The fact of the matter is that the SMOs did not ask. An adverse finding cannot be made against Dr Naidoo on the basis that he did not provide the appropriate level of supervision when the impression that the SMOs had provided him was that no greater supervision was required.
- 2.225 At page 6736 of the transcript, the Commissioner asked Dr Terry Hanelt if the level of the service in orthopaedics provided was inadequate leaving emergency work to one side. Dr Hanelt responded that there is inadequate coverage for any major elective orthopaedic work. The distinction to make is that it was not major elective orthopaedic work that Dr Krishna and Dr Sharma were assessed as being capable of doing in the scope of service documentation. They were only performing minor elective procedures that were within their scope of competence. At page 6804 of the transcript, Dr Hanelt stated that Dr Naidoo performed the majority of the elective surgery at Hervey Bay Hospital.

Dr Hanelt stated that the elective surgery performed by Dr Sharma and Dr Krishna was of a minor nature.

2.226 There was but one case raised with Dr Naidoo concerning elective orthopaedic procedures performed by Dr Krishna and Dr Sharma. Dr Krishna and Dr Hanelt have provided a more than adequate explanation of what was done in that case. The likelihood is that Dr Mullen missed a significant aspect of the injury and accordingly his criticism is misconceived.

2.227 This case was put to Dr Wilson at page 7343 of the transcript. Dr Wilson's evidence was that both an antegrade nail and a retrograde nail are reasonable procedures in the circumstances. In relation to the retrograde nail, Dr Wilson stated:

"I think that sounds reasonable treatment because the fracture extended towards the knee joint and it's hard to get fixation from an antegrade nail down at the knee joint, especially if the proximal femur's in good condition."

2.228 There is no reference in the Notice to any particular case or patient. Accordingly, no submissions are to be addressed to specific instances of clinical practice or procedures undertaken by Drs Krishna or Sharma.

Lack of Complaints

2.229 At page 5408 of transcript Ms Irwin-Jones stated that she never put any complaints that she had regarding supervision for Dr Sharma and Dr Krishna in writing. She stated that she spoke to Dr Hanelt on several occasions about the lack of support and supervision for Drs Sharma and Krishna but she never put anything in writing because to her knowledge there was never any negative outcome from those events. Given that there was no adverse outcome for the patients regarding supervision no written complaint was made.

2.230 At page 5399 of the transcript, Ms Irwin-Jones stated that she was never asked or given any concerns by the staff in relation to the Drs Sharma, Krishna and Naidoo.

2.231 At page 5429 of the transcript Ms Irwin-Jones stated that prior to Dr Mullen's complaint to the AOA, no-one, not Dr Mullen not Dr Naidoo not Dr Hanelt not any of the nursing staff had ever brought to her attention any concern about the capabilities of Dr Sharma or Dr Krishna.

2.232 At page 6761 of the transcript, Dr Hanelt stated that he did not recall the matter of inadequate supervision being raised by the nursing staff. The complaints made by nursing staff in email form only appeared once it had become known to staff that the North Giblin review was to take place. It is only after the North Giblin Report and the review undertaking by North and Giblin that staff members such as Ms Irwin-Jones thought to put such complaints in writing. The only concerns that nursing staff members had raised earlier, according to Dr Hanelt, were in relation to communication skills and leave matters.

2.233 It is submitted that the staff of the hospital obviously did not see the issue as a particularly significant one as there is a complete lack of documentation of these 'issues' throughout.

Evidence of Dr Anthony Wilson

- 2.234 We note that Dr Wilson's evidence was not provided at the request of Dr Naidoo's solicitor's as stated by Mr David Andrews at page 7327 of the transcript.
- 2.235 Paragraph 4 of Dr Wilson's statement refers to the scope of service document for Dr Krishna, prepared by Dr Naidoo. In that paragraph, Dr Wilson stated that there are two additional procedures for which Dr Wilson would have wanted Dr Krishna to be supervised.
- 2.236 The following table summarises the evidence as provided by the scope of service document prepared by Dr Naidoo for Dr Krishna, and the evidence of Dr Mullen and Dr Wilson on the scope of service document for Dr Krishna.

Dr Krishna capable of performing independently			
Procedure	Dr Naidoo	Dr Mullen	Dr Wilson
Elective			
Rotator cuff tendonitis/rupture simple- Open acromioplasty and cuff repair	Yes	Concerns- number of orthopaedic surgeons referring to shoulder surgeons (page 5817 transcript)	'Prefer supervision' (page 7337)
Rotator cuff tendonitis/rupture complex- Open acromioplasty and cuff repair	No	No	No
Recurrent anterior dislocation shoulder- open anterior stabilisation bankart/putti platt	No	No	No
CTS- CTD/synovectomy	Yes	Yes in transcript, states 'possible after training' on the document	Yes
Dupuytren contracture- excision and z-plasty	Yes	No	Yes
Ganglion/bursa/bakers cyst- excision	Yes	Yes	Yes for ganglion and bursa - 'bakers cyst

			may need supervision' (page 7337 transcript)
Trigger finger- release tendon sheath	Yes	Yes	Yes
Extensor tendon rupture thumb-secondary repair/tendon transfer	Yes	No- would send it away to hand surgeon	Yes- rupture thumb-supervision for tendon transfer (page 7337)
Implants for fracture fixation	Yes	No mention in transcript but states 'only simple ones' on document	Yes
Foreign body	Yes	Yes	Yes
Wrist arthropathy	Yes	No	Probably still need supervision
Fracture non unions	Yes	No	Depends on size
Achilles tendon rupture	Yes	Does not mention in transcript but states possible after training on document	Yes
Hallux valgus	Yes	No- but in relation to bunions, states 'possible after training' on document	Need supervision for bunions
Hammer toes	Yes	Does not mention in transcript but states 'possible after training' on document	Yes
Moreton's neuroma	Yes	Does not	Yes

		mention in transcript but states 'possible after training' on document	
Subtalar osteoarthritis arthropathy	Yes	No	Need supervision
Cuboid/ talonavicular osteoarthritis/arthropathy	No	No	No- done by orthopaedic surgeon
Knee effusion	Yes	Does not mention	Yes
Knee infection osteoarthritis-arthroscopic debridement	Yes	Personally, Dr Mullen finds it difficult for himself to do	Yes
Knee internal derangement-arthroscopic memisectomy	Yes	Personally, Dr Mullen finds it difficult for himself to do	Yes
Knee internal derangement-meniscal repair/ replacement	No	No	No
Knee internal derangement-ACL/PCL reconstruction	No	No	No
Loose bodies	No	No	No
Non viable neuropathic fingers, toes, limbs- amputation	Yes	Yes	Yes

2.237 The table above demonstrates that there are three, occasionally differing, interpretations of the capabilities of Dr Krishna in evidence. Each of the three orthopaedic specialists agrees and disagrees with each other at one point or another. This demonstrates that the issues of supervision of Senior Medical Officers were more a difference of the approach of different orthopaedic surgeons and to elevate one interpretation above another is clearly outside of the expertise of the Inquiry.

2.238 At page 7341 of the transcript, Mr McDougall questioned Dr Wilson on his comments regarding the scope of what Dr Krishna could perform supervised and unsupervised and how those agreed and disagreed with Dr Mullen and Dr Naidoo. Mr McDougall stated: *"That tends to suggest, doesn't it, that different orthopaedic surgeons observing Dr Krishna's abilities form different opinions as to his ability?"* to which Dr Wilson replied: *"It does suggest that."*

2.239 This is further evidenced by Dr Hanelt at page 6744 of the transcript where he stated that under the ideas of the North Giblein Report any orthopaedic

procedure performed by anyone should be supervised by a specialist. Dr Hanelt disagreed with the North Giblein assessment of what was required by stating that *"if you are a medical superintendent at Emerald Hospital and somebody comes in with a dislocated finger, you have no specialist to fix it so you need to do it."*

- 2.240 It is submitted that it would be preferable for the Inquiry to agree with the proposition that it is impossible for the Inquiry to make a judgment as to which opinion to prefer as it does not possess sufficient uncontradicted evidence to make a decision.
- 2.241 If, however, the Inquiry were to elevate the opinion of one orthopaedic surgeon over another, we would highlight to the Inquiry that Dr Naidoo and Dr Wilson had more opportunities to observe Dr Krishna than Dr Mullen. Dr Naidoo was present on the same campus as Dr Krishna for four days per week (see roster at MNN-3 of exhibit 431), Dr Wilson had Dr Krishna as his registrar for 3 days per week (see page 7329 of transcript), whereas Dr Mullen was only present at the Hervey Bay Hospital one day per week (see transcript at page 5812).
- 2.242 Dr Wilson agreed at page 7342 of the transcript with the proposition that to pass comment on Dr Krishna's ability to perform the various items on the trauma list or the elective list required a reasonably close association as a supervising consultant in order to form that opinion. We would submit that one day a week is not sufficient.
- 2.243 In Dr Hanelt's statement at page 34, Dr Hanelt stated that Dr Mullen raised concerns that he did not share the same opinion as Dr Naidoo regarding the range of procedures that could be undertaken by the SMOs without supervision. This concern was tempered by the knowledge that at times, Dr Mullen was prepared to allow these same SMOs to perform at least some of these procedures on patients under his care without supervision as documented in the attachment to Dr Hanelt's statement, TMH20. If one goes to the document TMH20, Dr Krishna performed a number of procedures without supervision by Dr Mullen when Dr Mullen was the admitting surgeon, some of which Dr Mullen disagreed with in the scope of service documentation. These procedures included:
- (a) Open reduction fracture metacarpus with internal fixateur;
 - (b) Open reduction fracture femur with internal fixateur;
 - (c) Open reduction FX shaft radius and ulna internal fixation;
 - (d) Debridement of open fracture site;
 - (e) Open reduction fracture distal radius with internal fixation;
 - (f) Removal of loose body of ankle;
 - (g) Internal fixation of fracture of trochanteric or subcapital femur.
- 2.244 We would submit that if the Commission is to make an adverse finding against Dr Naidoo on the basis of allowing certain procedures to be undertaken by the SMOs without direct supervision, Dr Naidoo cannot be the only doctor for whom an adverse finding is applied.

Conclusions

- 2.245 At paragraph 25 of Dr Krishna's statement to the Commission of Inquiry, Dr Krishna states that all elective surgery was done with Dr Naidoo or was done unsupervised for **minor** elective cases, as per surgical privileges. Minor unsupervised cases would include carpal tunnel decompression, arthroscopy of knee and bunion corrections.
- 2.246 Given that Dr Krishna and/or Dr Sharma performed only minor orthopaedic procedures without direct supervision or support, we submit that it would be unfair to make an adverse finding against Dr Naidoo on the basis of allowing the doctors to perform elective orthopaedic procedures without appropriate supervision, as we would submit that appropriate supervision was provided.
- 2.247 Dr Naidoo judged what was appropriate in terms of supervision after assessing the clinical performance for each SMO. This process is a process that ought to be done by a credentialing committee, but due to the lack of resources for such a credentialing committee (i.e. the inability for the district to attract a member of the Colleges to sit on such a committee), the task fell to Dr Naidoo. To make an adverse finding against Dr Naidoo on this basis is to hold him responsible for a lack of support from the entire orthopaedic community for health care in regional Queensland. Dr Naidoo should not be weighted with such a burden.

Potential Adverse Finding 2:

With respect to Term of Reference 2(e)(iii) the Inquiry is considering whether your conduct should be referred to the Director-General of Queensland Health to further investigate whether you have been absent from work without approved leave and should be disciplined under section 87(1)(c) of the Public Service Act 1996.

- 2.248 As submitted at the outset, this term of reference can only relate to a finding under term of reference 2(c). The only finding proposed in that regard concerning absence is that set out in paragraph 1(a) of the Notice.
- 2.249 We would refer the Commission to each of our submissions relating to the potential adverse outcome of 1(a) above.
- 2.250 This ground focuses upon circumstances where Dr Naidoo was allegedly absent **without approved leave**.
- 2.251 That is, it quite properly does not refer to circumstances where Dr Naidoo was allegedly late for work or left early.
- 2.252 At page 25 of Dr Hanelt's original statement to the Commission of Inquiry, at paragraph 61(ii), Dr Hanelt attends to the allegation against Dr Naidoo of his frequently being absent from the hospital. In his statement, Dr Hanelt stated that senior staff often work overtime for which they do not claim. In recognition of this fact, some flexibility is allowed in taking time off in lieu of payment for this overtime. This is done on the basis that there is alternate coverage provided during these periods when they flex off. Given the attitude of administration regarding staff absences, and when considered with Dr Hanelt's observation in his supplementary statement of 7 October 2005 at page 5 when he stated that "Dr Naidoo often worked longer than the required hours", Dr Naidoo, or someone in the position of Dr Naidoo, would be forgiven for thinking that once

they had completed their duties or completed their hours per week and were not on-call, approved leave was not required.

- 2.253 Any consideration of a referral ought also take into account the service, which Dr Naidoo had provided over many years in a selfless way and which caused him significant personal detriment and harm.
- 2.254 There are significant practical difficulties inherent in any disciplinary proceeding.
- 2.255 Such a proceeding would necessarily involve a finding to the requisite level of satisfaction, that particular specified absences had occurred without approval, either express, tacit, or implied.
- 2.256 The deficiencies in the HR records and the attitude of Dr Hanelt concerning Dr Naidoo discharging his obligations effectively preclude any prospect of a successful case being made out against Dr Naidoo.
- 2.257 Further, a referral for disciplinary proceedings is not justified in this case for what might be described as, purely discretionary reasons. Namely, the absence of any evidence of detriment or harm being occasioned to patients, the absence of any evidence of Dr Naidoo financially benefiting from any absence, and the absence of any evidence of there being any impact at all upon clinical practice and procedure at the Hervey Bay Hospital by reason of any alleged absence.

3. General Observations

- 3.1 At paragraph 50 of his statement to the Commission of Inquiry, Dr Krishna makes the following observation:

"In my personal opinion, the shortfalls in orthopaedic care in the district cannot be blamed on any one person, but on a number of components including staff shortages, other departments involving emergency especially, the ability to provide supervision to non-specialist staff and the ever increasing workload."

- 3.2 We would agree with this statement that no one person could be blamed for the shortfalls in orthopaedic care in the Fraser Coast Health District. The lack of resources and the lack of support provided to the orthopaedic department in the Fraser Coast Health District have its genesis in Queensland Health itself. To make an adverse finding against Dr Naidoo when the blame lies squarely with a dysfunctional department would be to create a scapegoat.
- 3.3 At page 5193 of the transcript, Dr North himself states that in relation to the investigation at Hervey Bay: *"we recognise probably this investigation more than the other one how regional Queensland is somewhat dysfunctional from a health care services point of view and we did take that into account. I would be very happy to practice at Hervey Bay but only if there were 4 or 5 people available for on-call, for instance."*
- 3.4 To allow an adverse finding against Dr Naidoo for practising under such dysfunctional health care service conditions as exist in regional Queensland would be to put the blame somewhere where it does not belong. Orthopaedic specialists such as Dr North are attempting to hold Dr Naidoo to a standard that they would not even be prepared to place upon themselves.

- 3.5 Making adverse findings against Dr Naidoo for what is essentially an issue of resources in regional Queensland is to place the blame far from its rightful owner with those who ought to address issues of resources in regional Queensland. We would submit that this responsibility lies within the Department of Queensland Health. To lay the blame of an entirely dysfunctional health system with one doctor after 30 years experience in providing orthopaedic health care is grossly unjust.

MSSRS DEACONS ON BEHALF OF DR MORGAN NAIDOO