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INDEPENDENT COMMISSION AGAINST CORRUPTION

PATRICIA McDONALD SC
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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON TUESDAY 24 APRIL, 2018

AT 10.00AM

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MR BUCHANAN: Commissioner, the witnesses proposed to be called today are Simon Manoski resuming his testimony - - -

THE COMMISSIONER: Yes.

MR BUCHANAN: - - - and Gillian Dawson. In respect of Ms Dawson we've notified the parties who have leave that Ms Dawson will be giving evidence on the subject matter of the whole of her statement, notwithstanding the fact that some of it concerns properties which I indicated in my opening we propose to lead evidence on in the second tranche of this hearing rather than the first. The reason for that is that Ms Dawson is not available to give evidence in the second tranche.

THE COMMISSIONER: Yes.

MR BUCHANAN: I apologise to parties if that is short notice of what we intended to lead, but hopefully we'll be able to accommodate that.

THE COMMISSIONER: Right.

20

MR BUCHANAN: If Mr Manoski can be recalled.

THE COMMISSIONER: Yes. We'll have you re-sworn.

MR MANOSKI: Sure.

MR BUCHANAN: Could the witness be supplied with his statements, please. It's part of Exhibit 52.---Thank you.

Correction, 53. Please consult your statements at any time if it will assist you in answering questions, Mr Manoski.---Thank you.

- 10 I'd like to take you if I could to your second statement and to material commencing around, excuse me a moment, your second statement commencing around paragraph 9. You indicate there that in November 2014 you applied for a position of director of city planning at Canterbury City Council. Is that right?---That's correct.

And you tell us that you liaised with Judith Carpenter, a recruitment consultant, who you understood had been asked by Canterbury City Council to run the recruitment process for the council.---That's correct.

- 20 Is that right?---Correct.

You attended a formal interview in relation to that position?---Yes.

Can you remember that interview as you sit there now?---I do.

Have you given your CV, you've obviously taken part in recruitment processes before as a candidate for a position?---Yes.

- 30 How would you characterise the interview of you for the position of director of city planning at Canterbury Council in November 2014, compared to other interview panels that you've attended?---So on the face of it, it seemed attending the interview quite an ordinary interview in terms of there were questions that were to be asked, there was a panel in place. What, there were a couple of elements that didn't seem completely usual from my perspective, one of those being the composition of the panel. So we had been in interviews for, in, in senior planning roles in local councils before and also in state government and hadn't had till that time any representations from, from local representatives. Look, it was a - - -

- 40 When you say local representatives, you mean councillors?---Councillors. That's not to say that's, it's inappropriate, for a director role there is quite a lot of interaction between director of planning and councillors, so it wasn't a complete surprise. What was a surprise to me was the composition and that three-quarters of the panel were councillors. I was fully expecting the general manager there, potentially a councillor, but again, coming from my experience, my expectation would have been potentially an HR director or another director of the council or a planning director from another council. The other potential panel member that we thought could be on there was,

given the fact that the director or the Planning Department of the council has a lot of interaction with the Department of Planning, potentially an independent person from the Department of Planning coming in and sitting on the panel. So, it was the composition that I found a little unusual.

And when you say, "We thought", do you mean you thought?---I thought, sorry.

Yes, that's okay.

10

THE COMMISSIONER: Can I just ask, when you refer to the possibility of a planning director from another council or somebody from the department, is that, sorry, a member of the panel to have expertise in planning?

---Correct.

And is that a usual, you usually have somebody with that expertise in an interview committee?---I have attended a number of interviews where there has been technical expertise on the panel or on the committee, yes.

20

MR BUCHANAN: And when you say technical expertise, what would you say to the proposition that that need, in the composition of an interview panel, could've, in this instance, been catered for by the inclusion of a councillor who had a serious interest in planning issues in the local government area, without planning qualifications?---I don't think you could cover that, from an expertise perspective. They have an interest, yes, but the role of the director of planning has a leadership component but it also has a technical component as well. In the questions that I would've expected to come through there was, there would've been potentially some technical elements to the questions where you could have an exchange during the interview with another expert, so to speak, but I couldn't, I wouldn't expect that to happen with a councillor.

30

So talking of the questions, do you recall the questioning?---I don't recall all the questions, no. I do recall there were a number of questions that were displayed at the interview. Again, I don't recall all of them in my statement what was, again, unusual to me but you'd expect for a role like this to be asked questions along the lines of what's your leadership style, what do you see as the strategic planning challenges of the area, what is, what are your capabilities in terms from a governance perspective and what have you.

40

There was a question that again jumped out of me in terms of would you follow, along the lines of would you follow the direction of the general manager? There was a - - -

Do you remember who that came from?---I, I don't recall. There was also - - -

Sorry, do you remember whether it came from a councillor or the general manager?---I don't recall.

Thank you.

10 THE COMMISSIONER: And why did that jump out?---I guess you'd expect to be taking directions from whoever you report to regardless, you wouldn't need to be asked a question. And I do also recall, again I don't recall who from, a question along the lines of what my views were on laneways. Again, that's a very narrow question and again, for a senior role in, in council, I would've expected the questions to be a lot more broader ranging.

MR BUCHANAN: Do you remember anything more about that question, about laneways as to whether it was laneways in respect of a particular type of development?---I, I don't know.

20 Could the witness be shown, please, from Exhibit 52 the volume 3 page 181? We might be able to get it up on the screen for you. Do you see that document headed Suggested Interview Questions? Just casting your eye down it, I have two questions. First of all, have you seen it before? I should, I'll reframe that question. Have you seen it before in the context of the interview panel at Canterbury City Council in November 2014?---I, I don't recall the exact nature of the document presented at, that would represent along the lines of what we would be shown.

You were actually shown a document? Do you recall that?---At the interview.

30 At the interview. And can you now have a look through the questions, just taking your time to read it, and my question is going to be, do you recall whether you were asked any one or more of those questions?---I'm sorry. I don't recall.

THE COMMISSIONER: And so, can I go back, you were shown a document, you recall that, during the interview?---A list of questions.

During the interview?---At the interview.

At the interview.

40 MR BUCHANAN: And do you remember the circumstances of which you were shown them?---I think at the, the start of the interview when we're introduced to the, the panel, that there was, there, there'll be a series of questions asked and it's not, it's, it's ordinary to, to be given a set of the questions to refer to as, as part of the interview process and I do recall, to the best of my recollection, a, a list of questions being handed to me at the interview.

Do you recall, I know this is testing your memory, but do you recall whether it was in a spiral, ring-bound set of sheets of paper or whether it was on a single sheet of paper on its own?---To the best of my recollection, I don't recall a, a spiral-bound folder. I think, testing my memory but, I do recall just a, a plain sheet of paper coming through.

Do you recall by whom you were shown that document?---No.

10 Was Ms Carpenter present in the interview panel room?---She was.

Did she participate?---I understand Mr Carpenter was there as, as an observer. I can't tell you with any degree of certainty whether she asked any questions, though, no.

So, just to clarify, did you see a sheet of paper like this, that's on the screen, with a list of questions before you entered the room in which the interview took place?---No.

20 Were you provided with any documents or information in advance of the interview otherwise?---Apart from the package that was sent out giving me a description of the, the position and position description, no.

And do you recall learning of the outcome of your application?---Initially, there was a phone, well, we left the interview and I recall telling Ms Carpenter that we had a holiday scheduled, that we would be out of the country, you know, a week or two after the, the interview process. She'd called me prior to, to leaving overseas to advise that we weren't successful for the role, which is fine. But then while overseas, I do also recall a telephone message from Ms Carpenter advising that, to give her a call and that we're now being considered as a preferred candidate.

30 I'm sorry, say that again?---That we were not being considered as the preferred candidate. It was a phone, a phone - - -

Meaning you were?---I was, that's right.

40 THE COMMISSIONER: And sorry, both telephone calls were from Ms Carpenter?---That's correct. And we also, while, while overseas, we also had a, a telephone message from Mr Montague, stating to, to give him a call in relation to the director (planning) role.

MR BUCHANAN: Did you?---I didn't.

Give him a call?---I didn't give him a call. I did give him a call when we returned. We tried to call a number of time but it was unsuccessful getting through.

Did you subsequently have any discussion or interaction with Mr Montague on the subject of whether your application was successful or not?---No. There was a, a phone call from Mr Montague some, sometime after just advising that I was not successful, and this would have been after we were away and the role had been given to someone else.

And were you told who that successful candidate had been?---We were aware that it was Spiro.

10 And how - - -?---I was aware, sorry.

How were you aware?---If I can backtrack, sorry, it was during that phone call from Mr Montague that it was that we had appointed Spiro, you know, you were unsuccessful, apologies, and it wasn't a long phone call.

And that's in fact what you've said in paragraph 17 - - -?---Yeah.

- - - of your second statement dated 23 February, 2017.---Yeah, that's right.

20 You also say in paragraph 17 that at the time you had a conversation with Judith Carpenter about this matter you recall her being very unhappy with the panel and frustrated. Can you tell us what your recollection is about that?---So at the time we had been in a position where we were told we weren't successful, then we were told we were preferred candidate. We just wanted to know what was happening to be honest with you, and whether I initiated the call to Ms Carpenter or, or vice versa, I can't recall, but this must have been at some point where we were no longer the preferred candidate and my, again the discussion would have been around, you know, what, what's going on with, with the role and, you know, I don't recall the
30 substance of the conversation but I do recall her being frustrated with the process and how it's all, what the outcome has been.

And did she - - -

THE COMMISSIONER: Can I - - -

MR BUCHANAN: I'm sorry.

THE COMMISSIONER: Sorry, can I just go back to the time sequence.
40 ---Ah hmm.

You went to the interview, you were going to go overseas about a week later.---It was thereabouts, yeah.

During that first week before you went overseas you got a phone call from Ms Carpenter saying you'd been unsuccessful.---Correct.

And then when you were overseas - - -?---Ah hmm.

- - - there was another message from Ms Carpenter along the lines of please ring me, or something like that?---That's correct.

How long were you overseas for?---It would have been, it was less than two weeks.

So it was during the two-week period.---That's right.

10 Right.

MR BUCHANAN: Thank you, Commissioner. If you'd just excuse me a moment. I'd like to pass to a subject which is addressed in your first statement, Mr Manoski, the one dated 3 November, 2016, and I appreciate that in that you tell the reader about your role when you were with the department as general manager responsible for Sydney Metropolitan east and west regions in relation to a planning proposal from Canterbury City Council in respect of a property at 15-23 Homer Street, Earlwood. Can I take a step aside from that at the moment, I'll come back to that particular
20 proposal, and ask you some general questions about both clause 4.6 of the LEP and planning proposals. Can I go first of all to clause 4.6 of the LEP. If you'd just excuse me a moment. Just while it's coming up on the screen can I ask you to have a look at this paper copy of clause 4.6 of the Canterbury Local Environmental Plan 2012, so that you have it in front of you. You would have been familiar with what was called in the context of Local Environmental Plans, "the standard instrument."---Yes.

What was the standard instrument?---The standard instrument was, I'll take a step back. Since the introduction of the Act, councils had Local
30 Environment Plans in place. Each council had different definitions, different clauses, different provisions, different standards. The standard instrument from around the 2005 mark, I don't recall exactly but around that time, the government released a template Local Environment Plan with standard definitions, standard clauses, standard numbering and every council across the state was required to prepare a new Local Environment Plan in accordance with the standard instrument. The whole intent around that is whether you're developing in Willoughby or Bankstown or the Upper Lachlan, you're dealing with a standard set of definitions, a standard set of
40 zones, a standard numbering system of clauses but there was opportunity for councils to, some flexibility in terms of what provisions to apply, not to apply, depending where they are in the state.

And was it your understanding that councils were required by the government, essentially, to prepare an LEP which used the standard instrument template and it was up to them as to its contents so far as it related to land in the particular local government area, but it would be expected that councils would largely tip into the standard instrument the content, the substantive content in the existing LEP as far as it applied to

particular land, for example, zonings?---From my experience it varied across the state. Some, some councils actually did quite a lot of strategic planning work to inform a new LEP, some councils just basically turned the existing, whether it was a planning scheme ordinance or a Local Environment Plan, that existing as best as possible into the standard instrument format.

10 And do you know what Canterbury City Council did?---From my understanding it was trying to basically do a, a direct swap from the existing into, as best as possible, the standard instrument format.

And the outcome was the Canterbury Local Environment Plan, Local Environmental Plan 2012?---Yes.

What happened to Canterbury's Development Control Plan in that process? Do you know?---I don't.

20 Canterbury has a, I'm sorry, Canterbury Bankstown has a Development Control Plan now. Is that right?---That's correct.

What is your understanding of its status in the period 2014/2016? Was it, has it changed since then or is it the same DCP that existed in 2014/2016? ---There hasn't been any fundamental changes to the development controls since the standard instrument for Bankstown or Canterbury has come into effect.

30 Thank you. Now, you've got a clause, the first part of clause 4.6 of the Canterbury LEP on the screen there and in front of you, and if we could just scroll through to the next page, please, that's subsequent provisions. The provisions one to three, sorry, subclauses one to three concern what a council may do and clauses four to five concern what the department, in essence, may do, the secretary on the advice of the department or in this case, the director general, the name of the CEO changes from time to time? ---Correct.

What was the function of clause 4.6 of Canterbury LEP?---The, the - - -

Sorry, I do apologise?---Yeah.

40 I'll take a step back. Was there a clause 4.6 in the standard instrument? ---Yes.

Thank you. What was the function of clause 4.6?---So the function of clause 4.6 is to provide an element of flexibility when applying development controls, development standards, particularly ones along the lines of height or floor space or lot size, and that's to, I think that's to give a flexibility where more so by exception and given the fact that not all sites are flat, not all sites are rectangular, the environment changes and again by

exception if a control is unreasonable or unnecessary or a site is particularly complex, it gives the consent authority some flexibility in how it appoints its controls, development controls.

In the application of development controls to particular land, to a particular property, rather than across the board. Is that the understanding you had, by using the word exception?---So it would apply to any development application - - -

10 Yes.--- - - - in relation to any land. It's not, it's not applicable to only certain properties.

Yes, but I'm just trying to attain an understanding of how clause 4.6 worked.---Mmm.

It didn't apply to the whole of the land in the local government area or to a particular type of land in the whole of the local government area, it only applied or is available to use in respect of land the subject of a development application and that would necessarily be particular land, a particular parcel of land?---That's correct.

Now, just to provide context, there was also a planning instrument called State Environmental Planning Policy 1 – Development Standards, known as SEPP 1, S-e-p-p 1. Is that right?---That's right.

And what was the function of that instrument?---Again along the lines to provide – so 4.6 as I understand effectively replaced SEPP 1 and it was again there to apply flexibility to development standards in relation to development applications as well.

30 But was it intended to apply where the LEP had been prepared other than through the standard instrument, that is to say where there wasn't a clause 4.6?---That's correct.

And so there were, so far as the whole of the state was concerned - - -?
---Ah hmm.

- - - these two tools that could be utilised by local government when considering a development application, depending upon the LEP that applied?---That's correct.

40 Is that right?---That's right.

Now, if we could look at, please, if the witness could be shown volume 1, page 128, and we might be able to get that up on the screen. In the Exhibit 52 is pages 128 to 149 of volume 1. Do you recognise the title page of that document, Varying Development Standards: A Guide, August 2011?
---Yes, I do.

And we can take you through it. If you could go to the next page there's an introduction there which refers to, as you can see in the right-hand column, clause 4.6 under the heading How Are Development Standards Varied.
---Ah hmm.

And if we go to the next page, please, there's a reference there in the top of the left-hand column to SEPP 1. Do you see that?---That's right.

10 And were you familiar with that guide?---Yes.

In the period say 2011/2012, can you just remind us what you were doing, if you remember?---Ah - - -

Were you in the department?---We were in the department. Again there was a number of roles we had in the Department of Planning, 2011/2012 we were – from a, from a - - -

20 I don't expect you to remember the particular position.---From about April 2011 we were operating as a, in a policy capacity we were seconded from the Department of Planning to the Minister for Planning's office.

Thank you. Now, if we could show you volume 1, page 64 of Exhibit 52, please. You're aware, aren't you, that a circular was published by the department in 2008, in which consent authorities were advised that the concurrence of the secretary of the department, under clause 4.6, subclause 4, could be assumed and was, should be taken to be assumed when councils were considering exercising their power under clause 4.6. Is that right?
---That's correct, that's correct.

30 And just to remind us, subclause 4 and 5 stipulated that the exercise of power under clause 4.6, subclauses 1 to 3, was to be regulated, as it were, by the requirement, excuse me, by the requirement in the LEP for the concurrence of the statutory, or the director general, as the case may be, in the variation or the exemption, in respect of the particular planning controls that were concerned in respect of the particular land?---That's my understanding, yes.

40 Is that right? I take it you weren't involved at all in the decision that was made in the department to issue that circular?---No.

Would you agree that you could, it would be reasonable to characterise the effect of the promulgation of that departmental decision that the department had outsourced to the councils its role in the regulation of the exercise of council's power under 4.6?---That's how I would say it, yes.

Do you know whether the department provided training to councils in respect of clause 4.6 beyond the publication of the guide that we saw

earlier?---I, I don't recall. The, the department does from time to time do training with local councils. Whether it's briefings or seminars or, or what have you. I don't recall in this instance though.

Now, it would be reasonable again, wouldn't it, to, to say that when a council utilised the provision of clause 4.6 to exempt a, a development application from a particular development control or controls, the council was required by 4.6 to be satisfied of the matters referred to in 4.6, but otherwise it was a matter of judgement?---A matter of judgement, taking in
10 to consideration the clauses as stipulated against the, the criteria, so to speak, in 4.6.

But those criteria themselves, and I invite you to peruse them, are themselves, at the end of the day, going to be matters for judgement. That's to say they could be matters of argument, one way or the other. There was little that was black and white about the content of the criteria?---Yes.

And it conferred, in effect, clause 4.6 conferred, in effect, a qualified discretion upon councils to exempt development applications from the
20 controls that applied to the land for subject of a development application?
---I agree.

Is that right?---Ah hmm.

And it was qualified by the criteria to which you've referred, but also by, in theory, the requirement for the department's consent or the secretary's consent?---Yes.

But that had been made, effectively, a dead letter by the 2008 planning
30 circular, that qualification?---Dead letter, I'm not following, sorry.

Well, it meant that although it was there in writing, in clause 4.6, the requirement for concurrence, there was no effective requirement for concurrence?---No.

You agree with my proposition?---I agree. I do.

In those circumstances and leaving aside Canterbury City Council or what
40 you might know of Canterbury City Council, that left open a potential for abuse if the council did not exercise its power under 4.6 in good faith.
Would you agree?---That's a possibility.

And thinking now of what you know about clause 4.6, as you sit there in the witness box, have there been allegations or suggestions of which you're aware that clause 4.6 or SEPP 1 has been abused by consent authorities?
---Yes.

Particularly councils?---Yes.

If the witness be shown pages 135 to 137 of volume 1, excuse me a moment, at 136, turn to 136, thank you. The guide that we looked at earlier gave advice to councils that they were required to report in respect of variations greater than 10 per cent in respect of the use of SEPP 1. Do you see that?---Yes.

And that occurred, did it, those reporting's occurred and were received by the department?---By the former Canterbury Council?

10

No, general?---General.

Thank you for asking?---I don't know.

Was there a requirement to report the use of clause 4.6 to the department?
---There is.

Was there in 2014/16?---I understand there was a requirement to report on the use of 4.6, yes.

20

And if I could just take you to page 137 of volume 1, the same guide under the heading Monitoring the Use of SEPP 1 in clause 4.6 ask that councils monitor the use of the director general's assumed concurrence under SEPP 1 on a quarterly basis. If you would just excuse me a moment?---Yes.

You see the, in the left hand column going over to the right hand column?
---I do.

30

And again, it refers to the use of SEPP 1, but your understanding and perhaps informed by the heading is that it applied as much to clause 4.6 of Instruments Made Under the Standard Instrument?---That's correct.

Was there anything apart from this particular guide? I just, have you got the hard copy in front of you?---The - - -

No, sorry. The hard copy of the 2011 guide, this is volume 1. Sorry, I apologise, I should've given it to you in the first place. Would you mind in this volume turning to page 128. And do you see that's the first page, Varying Development Standards: A Guide?---Yes.

40

And if you just flip through and satisfy yourself going to pages 137/138, that's the substantive content of the guide?---Yes.

And although it certainly does refer to clause 4.6 on page 129, and I appreciate you've told us that you understood that it applied, the question of monitoring in particular applied to clause 4.6 as well, the references to clause 4.6 are few and far between in this document, aren't they? It seems to focus on SEPP 1.---SEPP 1.

Is that a fair observation to make? In particular on page 137?---Correct, yes.

Now, do you know, it refers to monitoring there, and please read it if it will assist you in answering the question.---Ah hmm.

But how was the use of clause 4.6 by councils monitored by the department?---(No Audible Reply)

10 If you can say to us is it only what you see there on the page in front of you or do you have some knowledge of your own?---The knowledge that I have is effectively what's written there in terms of there were, there was a requirement for reporting or monitoring and then reporting of, of the use of SEPP 1 and 4.6 by councils. I understood, I'd need to confirm here, but that would have been sent to the Department of Planning as well.

20 Do you have any understanding of what the reason or reasons were behind the planning circular in 2008 advising council that they could assume the concurrence of the secretary or director general as it might have been in that era?---I guess it would have been along the lines of if there's, if there's no assumed concurrence of, of a degree or the use of SEPP 1 or 4.6 that any variation as I understand it would then need to go back to, to the secretary if there's no concurrence.

Sorry, I don't quite understand your answer there. Do you know why that decision was made that councils should assume the concurrence of the department?---No.

30 As you sit there now with the experience that you have of both the department and at the council end - - -?---Ah hmm.

- - - can you assist as to what you think is likely to have been the rationale?
---Well, my understanding would be given, giving the councils the opportunity to employ or to implement 4.6 or SEPP 1 and being given the concurrence to actually use those provisions.

40 But they had the power to use those provisions whether concurrence was required or not. Clauses 1 to 3, subclauses 1 to 3 of clause 4.6 said so. The question I'm asking is, do you have a feel for what is likely to have been the thinking in the department behind the decision to inform councils that they don't really have to worry about subclauses 4 to 5?---Reading the clauses again it removes the need from the council seeking the secretary's concurrence every single time and they can assume that concurrence under delegation effectively and they, they, they are given that power to do so. I'm not understanding.

THE COMMISSIONER: If you look at the requirements of 4 and 5?---Yes.

That appears as if it's saying that the director general, in a sense, has a vetting function?---Correct.

That is so council is satisfied that the requirements of 4.6 clauses 1-3 are satisfied?---Mmm hmm.

But you've got, like, a supervisor or a vetting mechanism?---Mmm hmm.

10 Would the director general then vetting in making sure that, for example, in subclause 5 that all those requirements are satisfied? Now, the circular by just saying, "assume concurrence of the director general" takes away that vetting or supervisory role in substance?---Yes.

And I think Counsel Assisting is saying why did that occur? Was it a matter of, you know, for example, getting the concurrence of the director general for every application clause 4.6 was going to be too time consuming or more red tape? Is that the justification?---Yes. That's exactly what I'm trying to make, so, it's, from an administrative perspective I wouldn't think the department would want to see every submission to 4.6 or SEPP 1
20 submission being submitted to the department to assess. So, this is giving, handing powers, so to speak, back to the councils to implement those provisions.

MR BUCHANAN: And it means less work for the department?---Yes.

That's one effect?---That's one effect, yes it is.

And it means less oversight on the part of the department of what councils are doing with the exemption of development applications from planning
30 controls?---Yes.

Excuse me. And this is, of course, subject to the monitoring that was spoken about at the end of that guide in 2011?---That's correct.

Do you have any knowledge as to the extent of that monitoring so far as the department was concerned?---No, I don't. I knew, I knew they were random audits that were undertaken.

40 Random audits?---Random audits.

Yes?---I, I was never subject to, or, my area was never subject to an audit so I wouldn't know how, how deep that audit is or that process.

You are aware, are you, that an audit took place of the use of clause 4.6 in the Canterbury and the Bankstown Councils but after the amalgamation of the two councils?---Yes, I am.

Did you contribute to that by providing documents or anything like that, or was that before your time?---No, I didn't contribute. No.

Have you, if you'll just excuse me a moment, can I show you a folder, I'll show you a folder entitled Department of Planning Documents, and it's under a cardboard tab number 3. Have you seen this document before, headed, Department of Planning and Environment, City of Canterbury-Bankstown Council, SEPP 1 and Clause 4.6 Audit? And it's got the word "draft" stamped on every page.---No, I haven't. No.

10

You were aware that an audit was conducted?---Yes.

Could you just tell us what your knowledge is of that audit?---So, I don't, have not seen this document as it stands. What I had, what I was aware of, what I had viewed was effectively a, a, a table setting out the development applications and a brief description of what they were and also the extent of variation provided under 4.6, clause 4.6.

20

And if you look at appendix 1, which commences on page 21 of this draft report, it's headed, Assessment Sheets for the 12 Variations.---Yes.

Is that the table that you had in mind or does it look like the sort of table that you had in mind?---It's same information, different format, though. Yes.

THE COMMISSIONER: There's also a table on page 6.---Just excuse me a moment.

30

MR BUCHANAN: What I was going to do, Commissioner, sorry to interrupt, is take the witness through the executive summary which is on page 3. And just, if I can, take you to a couple of the paragraphs here, Mr Manoski, that, "The Department of Planning and Environment undertook an audit of the City of Canterbury-Bankstown Council's use of state environmental planning policy number 1, development standards and clause 4.6 exceptions to development standards, between 2012 and 2016. This report details the finding of the audit, covering a review of council files for selected applications and a further analysis of reporting data provided by council. As Canterbury-Bankstown is a merged council, an audit of development assessment files from both the former and Canterbury," sorry, "the former Canterbury and the former Bankstown Councils was undertaken. The audit reveals a noticeably different approach to the assessment and development standards variations between the two councils, finding significant concerns at the lack of rigor and consistency in the assessment of variations at the former Canterbury Council. The audit also identifies several concerning assessment practices at the former Canterbury Council." Three dot points, the first reading, "Splitting development proposals into multiple development applications to reduce the scope of the development below the capital investment threshold required for a referral to the Joint Regional Planning Panel or Sydney Planning Panel." Second

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dot point, "Using section 96 modifications to vary the height of a building beyond the original application, taking the proposal over the development standard and avoiding the unnecessary and unreasonable tests for a variation." Which, I think is meant to be read as, avoiding the test of whether it would be unnecessary and unreasonable, in clause 4.6. And thirdly, "Take development applications to modify an existing development consent (often used by the Regional Panel) and not referring the application to the Regional Panel because it was below the capital investment value for referral." I'll read on. "Changes to the assessment process, introduced by the new council, such as the integration of the assessment teams," and I pause there, I read that as an integration of the assessment teams from the two councils in to the assessment team of the amalgamated council.---That's correct.

20 "The use of best practice assessment templates and peer review of assessment reports will address many of the concerns raised here in the audit. Work also being undertaken jointly between the department of the council on the planning controls for Canterbury Road will also address the concern about the appropriateness of existing planning controls. Finally, the new council has taken steps to modify its Independent Hearing and Assessment Panel to provide it with a determination role. The department recommends that the changes made by the council under the administration be retained by the incoming councillors." Does any of that come to you as a surprise?---No.

30 Is there any comment that you would like to make? I appreciate you haven't seen the document before, but just on what I've taken you to. If you assume that the data, particularly in appendix 1, supports the conclusions summarised in the executive summary?---I, I agree with the references to the changes made. In terms of the processing and development applications, they're still in place today and I also agree with the retention, although it's not mandatory, but the retention of the IHAP as a determinative function.

And just to get that onto the record, to what extent has the determinative function been taken out of the hands of the councillors?---To the point where they make no decisions on development applications.

40 And what bodies make those decisions now?---So it's depending on the scale or the dollar value of the development application but it may be done under delegation by council staff. It would be referred to the IHAP for determination if there's a conflict of interest, if it's, the property is owned or the proponent is a councillor or a member of, or a minister or a member of government, or a relative of theirs. If there are more than 10 submissions that are unique submissions that have come through, or if the variation is more than 10 per cent of the development standard, or if it's an application for a, or it's deemed a sensitive development sex services premises or a hotel or club, so to speak, then it would be referred to the Independent

Hearing Assessment Panel, or the other panel that can be and is more to do with the dollar value, would be the Sydney Planning Panel.

Commissioner, I tender the audit report emphasising, as I've been asked to do by the department, that is a draft only. If it is convenient, could you receive it in digital form as a file on the USB drive that I pass up so that it can be, because it's quite a lengthy document, so that it can be more easily and more faithfully seen on the public website as an exhibit, Commissioner, if you're prepared to admit it into evidence.

10

THE COMMISSIONER: Do we have a date for the draft report?

MR BUCHANAN: I can only indicate, Your Honour, that the audit is recorded as having been undertaken at dates in September and October 2016 but otherwise I don't think there is a date.

THE COMMISSIONER: All right. The draft Department of Planning Environment order - - -

20 MR BUCHANAN: Before you, Commissioner, admit it, can I just indicate that the thumb drive contains in it a Notice to Produce addressed to the Department of Planning and Environment, and under section 21 and the response by the department in various tabs and the last of those is the cardboard tab 3. Commissioner, if you would excuse me a moment. I'm told the notice itself isn't in the digital copy but the document we seek to tender, sorry, the documents we seek to tender are, and there are some 10 of them together with the draft audit report. And I've been told, Commissioner, that the answer to your question as to the date of the document, even though it might not be indicated on a page I can take you to,
30 is November 2017.

THE COMMISSIONER: Thank you.

MR BUCHANAN: The date of the draft audit report.

THE COMMISSIONER: And, sorry, just to confirm, the tender of the USB drive includes all the documents produced by the department pursuant to the section 21 notice?

40 MR BUCHANAN: That's correct, Commissioner, and as I indicate there are some 11 including the audit report.

THE COMMISSIONER: All right.

MR BUCHANAN: Draft audit report.

THE COMMISSIONER: The USB drive which consists of a schedule of a notice, section 21 notice to the Department of Planning and Environment

and documents produced by the department including the draft City of Canterbury-Bankstown Council SEPP 1 and clause 4.6 audit dated November 2017 will be Exhibit 61.

MR BUCHANAN: May it please the Commissioner. I've been also advised that the draft audit report was not provided pursuant to notice but voluntarily by the department.

10 THE COMMISSIONER: All right.

MR BUCHANAN: I do apologise.

THE COMMISSIONER: That's okay. So the tender is the notice to produce on the department - - -

MR BUCHANAN: No, no, the notice isn't there, it's just 10.

20 THE COMMISSIONER: Sorry, the schedule to the notice to produce and 10 documents.

MR BUCHANAN: 10 document which have in fact I inform you been produced consequent to notice.

THE COMMISSIONER: And in addition the audit which has been produced voluntarily to the Commission by the department.

30 **#EXH-061 – DEPARTMENT OF PLANNING & ENVIRONMENT
DOCUMENTS PRODUCED UNDER SECTION 21 & 22 AND DRAFT
REPORT ON SEPP 1 & CLAUSE 4.6 AUDIT DATED NOVEMBER
2017**

MR BUCHANAN: I apologise for the confusion.

THE COMMISSIONER: That's all right.

MR BUCHANAN: It's my fault.

40 THE COMMISSIONER: Thanks.

MR BUCHANAN: Mr Manoski, you I suspect have at least in part answered this question a little while ago, but can I just ask it directly. ---Mmm.

To your knowledge has the situation of the department's oversight of the determination of clause 4.6 submissions by development proponents changed at all since the period 2014-16?---Not in, not in any great detail.

We, council is required on a, on a quarterly basis to tabulate those, the use of 4.6 and we are submitting them to the Department of Planning on a quarterly basis, which I think is consistent with what's previously in the 2011 document.

Thank you. Would you excuse me a moment.

10 THE COMMISSIONER: What about if an audit is conducted which reveals a problem which the draft audit does suggest, does the department take any action then to your knowledge?---I haven't been part of that process, I can't really comment, but I would expect so.

All right.

20 MR BUCHANAN: Commissioner and parties, I should advise that appendix 1 to the draft audit report sets out, as the witness has described, in tabular form the, as it were, development application files audited. None of those are in respect of development applications or properties the subject of this hearing.

THE COMMISSIONER: Mmm.

MR BUCHANAN: They're all in respect of other development applications and properties.

THE COMMISSIONER: All right.

30 MR BUCHANAN: Can I turn, Mr Manoski, to planning proposals? I think I've already asked you questions about the way that, as it were, rezoning and the modification of an LEP to make an amending LEP could occur at the request of a council via the department, but I'd like to go into that in a little bit of detail - - - ?---Sure.

- - - with you, if I can. Excuse me a moment. You're aware that under the Act before it was recently renumbered, sections 55 and 56 of the Environmental Planning and Assessment Act 1979 provided a mechanism for consent authorities to embark on a process of spot rezoning or changing development standards in respect of particular parcels of land?---Yes.

40 And just for the record, the provisions that apply today that are the counterparts of section 55 and 56, and we'll come later to the questions of changes that might have been made, are sections 3.33 and 3.34 of the current Act. Mr Manoski, can you explain to us, just taking a step through, how that process worked both generally speaking, not in respect of Canterbury Council, at council level, then department level and then what response, if any, that might be required of a council, and so forth?---Okay. A request may come in from a proponent to amend a development standard, increase height or increase floor space ratio. That request will come in to

council to consider, council officers would undertake an assessment of that request. If there was a view that there is merit in progressing, a planning proposal, a report would be prepared for council to determine, one, whether to support their request progressing and being turned into a planning proposal, or not. Or, an amendment, or something to make an amendment to it and then progress it to the department.

10 Just stopping you there, so the inspiration for the process to commence would usually come from a proponent of development?---It could come from a proponent or it could come from council itself. I'm just spelling out a proponent lead process at this point, but it's very similar in terms of process from a council. The council would consider the report from staff and assume, let's assume the decision of council is to progress the planning proposal or the proposal, the council officers will then package all material up, prepare a report and then submit what is then called a planning proposal to the greater Sydney Commission as a delegate of the Minister, which is administered by, effectively, the regional team and Department of Planning.

20 You can see I'm about to ask you a question, of course, you know what it is. Can I ask you about 2014/16?---It would've been Department of Planning.

30 Thank you?---Okay. So the report would've been sent to the Department of Planning, the Department of Planning, the relevant regional team in Department of Planning would assess the planning proposal, would consider the report of the officers, consider the resolution, would consider any state level planning policies or strategies, would consider any request for additional information that council would want to see prior to exhibition and then would prepare its report to the delegate of the Minister. The delegate of the Minister would then consider that report and, let's assume, support and issue a Gateway Determination to - - -

I'm just stopping you there, if I may.---Yes.

The delegate would be a, I do apologise, a departmental officer?---That's correct.

40 And these two steps that we've talked about, the names for them are taken from sections 55 and 56 of the act, aren't they? At council level, the planning proposal. At departmental level, the Gateway Determination. ---That's correct.

Thank you. Once the determination has been made, I'll withdraw that, what types of content could the Gateway Determination have?---So the, the Gateway Determination may simply just permit the planning proposal to progress to Gateway. It may not permit it and effectively refuse or it may permit it, well, what's generally terms as a conditional Gateway, where we would apply additional reports that would need to be prepared or justification or assessment or analysis or whatever.

Or modification of the proposal?---Or, or modification. That may be in response to what council officers have requested in terms of when submitting the planning proposal to the department, or it may be in response to what the departmental assessment team has deemed important to, to prepare prior, generally prior to exhibition and that's to give the community an ability to look at a proposal in totality.

10 And exhibition is another requirement of the Act for any LEP being made?
---That's right.

With a whole LEP or an amending an LEP.---Absolutely. So the Gateway would also stipulate the exhibition time. It could be depending on the complexity of the planning proposal, it would be 14, it could be 21, it could be 28 days but it would also stipulate which agencies would need to be consulted during the exhibition period formally.

20 And it would transmit that determination to the submitting council?
---Correct.

30 And what should, or usually did happen next, assuming it wasn't refusal and assuming it wasn't unqualified approval.?---Okay. So the, the council would accept that. If there was any additional work that would need to happen, they would need to prepare that prior to exhibition. Once that information was prepared, then it would go out on public exhibition for the period stipulated under the Gateway Determination. Post the exhibition period, the council assess, or officers would consider any submissions, make any amendments, or sorry, propose any amendments and then it would go back to council to determine whether they still, at that point, want to progress the planning proposal to, to finalise, to make any amendments or to, to stop it at that point as well. Now, depending if the council was given the delegation, if they were given delegation - - -

40 By the department?---By the department, they will then progress to work with Parliamentary Counsel and do the legal drafting and work towards the, the finalisation, what they call, notification of the LEP or the gazettal. If they weren't, well, if they weren't given delegation, well then it would be submitted post the decision of council to the department for finalisation. Now, I recall during the 2014-15 period, there would have been around 85 per cent of, I think the number is 85 per cent of planning proposals were delegated back to councils.

You were, in '14-15 a manager of a regional teams, as you've told us?
---That's right. And I believe the figures are about 68 per cent of planning proposals were finalised by, by the local councils.

Now, there were guidelines in place for the preparation of LEPs. If we have a look at volume 2, page 1, please.---I'm getting folders here galore. Can you take some away or - - -

I'm not going to go through the whole of it.---Sure.

But if you could just have a look at what starts at page 1 of - - -?---Sure.

- - - volume 2 - - -?---Ah hmm.

10

- - - of Exhibit 52. Those are the guidelines that existed in 2014/15/16 for councils in the preparation of amending local plans as well as LEPs themselves, whole LEPs.---Correct.

And you've referred to that I think in your statement. I just want to remind myself that in your statement dated 3 November, 2016 you've referred to that as I think Exhibit 5 of your, to that statement on page 6 of your statement.---That's correct.

20

Can I just ask before going to a particular case, what was the extent which in the period 2014/16 the department retained oversight of the process by which a planning proposal went forward to the department and was dealt with after a determination had been issued?---So the only figure that I'm familiar with is for the year 2014/15 and that number is 85 per cent, sorry, 15 per cent were retained by the department and delegation was not given.

30

But what I'm trying to find out is, do you have any understanding of whether the department kept an eye on what happened after a determination had issued at all?---Generally if the, the delegation was given to councils to progress the planning proposal, the, I don't recall any, any oversight, unless there was a representation made by the council or council officers or through, through to the department from the community or indeed to the Minister from the community would the department investigate, but unless there was a representation made the delegation effectively gives the administration of the planning proposal across to the council itself.

40

And would it be reasonable to characterise the powers that the department had under section 56 in making a Gateway Determination to on the one hand at one end of the spectrum exercise close scrutiny of what was proposed to be done - - -?---Ah hmm.

- - - so far as it had come forward in the planning proposal from a council, extending to the power to reject it altogether - - -?---Ah hmm.

- - - but on the other hand to exercise only a sort of light touch scrutiny, depending on the view taken by the departmental officer who was exercising the power of forming a recommendation for the delegate?

---I guess where that delegation was given the level of scrutiny would be a more lighter touch, using your words, but the context of that is there was a very clear position of the government at the time to be handing powers back to local government. And that's in terms of, it is a matter of local significance, it wasn't of regional significance, it would be a matter that we would, the department would not want to play a heavy hand in.

And does that remain the case, as you understand it?---As I understand it, yes.

10

I note the time, Commissioner. I have probably another 20 minutes of questions for the witness.

THE COMMISSIONER: We might take a morning tea break.

MR BUCHANAN: May it please the Commissioner.

THE COMMISSIONER: We'll adjourn for about 15 minutes.

20

SHORT ADJOURNMENT

[11.30am]

MR BUCHANAN: Mr Manoski, can I just take up a topic that I was canvassing with you before the morning adjournment and ask another question on that subject? If a Gateway Determination was made and there was no condition requiring notification of the department that exhibition was occurring, then would the department be aware when exhibition was occurring?---No.

30

And unless there was a condition in the Gateway Determination which required council to bring the matter back for the department's scrutiny or input, once a determination had been made then if the power to make the amending LEP was delegated to the council, it would be expected to go on exhibition and after that, the powers of council could be exercised to make the amending LEP?---That's correct.

40

Without any oversight by, or input from, the department, absent a condition requiring that in the determination?---I do recall there is a requirement to at least make the department aware, as the council, it's right towards the end part of the process where they're liaising with Parliamentary Counsel. This is right at the end point, to discuss or at least to notify the department that it's, effectively, at the making stage.

Taking a step aside for a moment, are you familiar with the term 'regulatory capture' where a regulator comes under the control of the interests that it is supposed to regulate?---Yes.

In the context of land use regulation, regulatory capture could be when a consent authority comes under the control of the very interests that the consent authority is supposed to regulate. Do you accept that?---I understand. I understand, yes.

10 If the oversight of changes to development standards in the LEP, as they apply to particular parcels of lands, was at the light touch end of the spectrum so far as the department was concerned, then there was a risk, wasn't there, the potential for development standards in an LEP to be loosened in so far as they applied to particular properties, in a way which was not necessarily in the public interest, and loosened by a council which became the victim of regulatory capture. There was a potential for that, wasn't there?---Possible.

And if the policy of the government was to, as you said, hand powers back to local government, then the potential for that risk to be realised in a particular instance would increase?---Potentially.

20 And can I just take you, though, to – you're drawing our attention to government policy or the trend of it.---Ah hmm.

Would it be more accurate to describe it as being to devolve power to councils at least so far as they concerned land use control because councils had never had before the power to make LEPs, had they?---I'd have to – the intent was to give more power back to councils.

But it wasn't power that they'd had before is what I'm asking, it was more, they were getting more power - - -?---Ah hmm.

30 - - - if that policy was implemented.---Correct.

Now, clause 3.34 of the Environmental Planning and Assessment Act is the provision that replaced – I do apologise, start again. Section 3.34 of the Environmental Planning and Assessment Act replaced section 56, I'd ask you to accept if that's not something you're already aware of - - - ?---I accept that.

- - - so far as the Gateway Determination power's concerned?---Yeah.

40 And just on comparing the amount of space they take on the page, there appear to be more conditions that the department is empowered to impose or criteria it's required to consider when exercising its Gateway Determination powers than before the current Act was amended.---Ah hmm.

Is that your understanding?---Look, I'd need to look at a comparative.

Well, I'll take another approach if I may.---Yeah, yeah.

Is it your impression that changes that are in place now to planning controls for particular parcels of land via the assessment of planning proposals is easier or harder for a proponent to achieve than it was in 2014/16?
---I couldn't really comment.

Can I ask the question a different way. Is there today any greater or lesser potential for the process of changing an LEP via the planning proposal process to be corrupted as a result of regulatory capture on the part of a council?---I don't believe so.

10

You don't believe there's any greater potential and you don't believe there's any lesser potential than there was in the period 2014/16?---No, I don't.

Would you excuse me a moment.

THE WITNESS: Can I, can I withdraw that?

MR BUCHANAN: Yes, of course.---I, sorry, my view is that there's less potential at this point than there was back in 2014/15.

20

And what are you thinking of when you say that?---So, the, the introduction of the mandatory referral to the Local Planning Panels or Independent Hearing Assessment Panels for rezoning applications. So, now every council in the Sydney basin is required to have the Independent Local Planning Panels and it is a mandatory referral of rezoning applications to at least go through the, the Local Planning Panel for advice to the council. So, there is additional checkpoints so to speak, and oversight.

That are outside the political centre of decision making at council?

30

---Correct.

Now, Mr Manoski, can I take you to the property 15-23 Homer Street and the planning proposal in that case?---Yes.

You've provided the Commission with some evidence of your involvement in this in your first statement, dated 3 November. Please consult that, if it will assist you in answering questions, and I'm looking at particularly, starting at the bottom of page 3, going over to page 4 of your statement. You refer there to a letter, this is volume 9 at page 89 of the document in Exhibit 52, but it's also in volume 9 at page 57. You refer to a letter from the general manager of Canterbury City Council, dated 13 January, 2015, putting forward to the department a planning proposal for land located at 15-23 Homer Street, Earlwood. And that's the letter that's on the screen in front of you. Is that right?---Yes, yes.

40

And have you got, I wonder if we could pass the witness volume 9 of the documents, please? And I'll take you, if I may, volume 9, page 58.---Thank you.

And is that the first page of the planning proposal, the subject of the letter from Mr Montague of 13 January?---Yes.

How did it come to your notice? How did they, this matter come to your notice?---At the time, when the assessment report, if I can take a step back, we would have regular meetings with the staff that would identify what planning proposals are coming to the department that we would need to process. It came to my attention at that point, that it's with the department,
10 in terms of just generally being aware, being, but in detail, at the time when it came, post the assessment by the staff with a recommendation that the Gateway decision be supported. At that point we intimated from a review and, and assessment, we became aware of it in detail.

And was assessment conducted by you or was it conducted by another officer in the department?---By another officer.

And you received a report from that officer?---Correct.

20 And, if I can ask you to have a look at volume 9, page 107 to 108?---Yes.

This is your determination of, this is your Gateway Determination in respect of that planning proposal. Is that right?---Correct.

Now can I just, to assist those in the hearing, summarise the gist of the planning proposal? It was to vary the height limit component of the development controls that applied to the land 15 to 23 Homer Street. Is that right?---That's correct.

30 And just for clarification it wasn't a proposal for a particular building to be erected, it was simply a proposal to change the development standard so far as the concerned height of building that could be erected on the site?---As I recall, there was, there was two changes being sought.

Yes?---One was to the height.

Yes?---And one was to reduce the amount of commercial space at the ground floor.

40 Thank you. And if I can take you back then in this volume to pages 105 to 106, is that a letter written by you to Mr Montague in response to his letter? And this letter is dated the, if you go to the second page of it, page 106, 19 March 2015?---Yes.

Referring now if you could please to both the determination so far as it appears on page 107, I'm sorry, I withdraw that question. The determination included conditions. They were set out in the determination, I'm looking at pages 107, 108?---Yes.

And I'll come back to the first condition for amendment of the proposal. The second condition was for consultation with identified concurrence authorities?---Correct.

The third condition was for community consultation by way of public exhibition. Is that right?---Yes.

10 Then leaving four aside, five was a timeframe for completing the plan, the Local Environment Plan, 12 months from the date following the date of the determination which was 19 March 2015. Is that right?---Correct.

20 What was the purpose as you understood it of the fifth condition, the timeframe?---So the timeframes would be generally imposed on all Gateway Determinations and I guess the intent of putting a timeframe is to avoid the planning proposal process extending out an extensive period of time. It could be three, four, five years. The intention is that looking at the complexity of the proposal, factoring in the 28-day exhibition and the fact that delegation was provided, the 12 months was applied.

Including the requirements for - - - ?---Consultation - - -

- - - additional work and amendment?---Correct. A reasonable amount of time to finalise the planning proposal.

Having regard to the content of the determination?---All the conditions of the Gateway Determination.

30 Thanks. Now can I take you back to those conditions, and page, if you could just keep your finger on page 105 which is your letter and then page 107, the first page of the determination?---Yes.

40 Leaving aside the first two dot points in condition one in page 107, and that's the sulphate soils assessment and amended key sites map, the third condition was further justification to support a maximum building height of 17 metres on the site. An additional study that accurately represents and addresses the impact of future development on the character of the local area is to be made available within the planning proposal during the exhibition period. I'll just read it onto the record. Those two sentences in that third dot point, are they separate matters or are they connected?---They're connected.

In what way?---So the intent is the additional study would provide the further justification.

And in your letter reproduced on page 105, you provided some explanation for that particular condition comprised in those two sentences in your third paragraph. You noted the council officers had recommended a building

height increase from 10 to 14 metres along Homer Street from retention of the current 10 metres building height for the rest of the site in recognition of the site's context. That should be site apostrophe s, I take it?---Yes.

10 In this regard the planning proposal is to be updated to provide further justification to support a maximum building height of up to 17 metres on the site, including an additional study that accurately represents and addresses the impact of future development on the character of the local area. Would you just excuse me. Just excuse me a moment while I find my notes. The letter from Mr Montague didn't indicate that there had been a discrepancy between the building height recommended by council officers and the building height the subject of the application itself. The planning proposal commences at page 58. Do you recall how it was that the department knew that there was a discrepancy between what council had determined should be the subject of the planning proposal and what the council officers had recommended to council?---Well, ordinarily when we, we do assess the planning proposals that are submitted from the councils we, we would also look at the recommendations from council officers as part of the ordinary process.

20

And that's provided as part of the documents provided to the department. Is that your understanding?---It generally would be, yes.

And if I can just draw your attention to page 97, a document commencing at page 97 of volume 9, it's headed Planning Team Report. That's the departmental planning team report. Is that right?---That's correct.

30 And then at page 103, second-last line, there's an indication that the council report, that's to say the report to council, has been provided - - -?---Yes.

30

- - - as well as the council resolution?---That's correct.

And so the department picked up on the fact that council officers recommended a significantly lower building height limit to that determined by council as being part of the planning proposal. And your assessment officer, if I can take you to the bottom of page 102, going over to page 103, discussed that matter. Looking at the last paragraph on page 102 going over to page 103 on volume 9.---Yes.

40 Thank you for that. Then if I can take you to page 104 of your assessment officer's report there's discussion of why it was considered that the determination should be in the terms in which you signed it essentially referring to the items under additional information.---That's correct.

And supporting reasons.---Yes.

Thank you. Now, as you can see from the determination itself it delegated to council the power to exercise the functions of the Minister in respect of making the plan.---That's correct.

That can be seen at page 109 of the determination. And can I ask you this. Now, if I could just ask you to look back at the determination on the first page of it on page 107 of volume 9, and looking at the third dot point under Condition 1. What did you understand would happen or was expected to happen if an additional study in the terms you set out there was not
10 obtained?---(No Audible Reply)

That is to say - - -?---If there was no, if there was no effort made to prepare an additional report to provide additional or any justification in the height being from what the officers recommended to the 17 metres, that would be in contravention of the Gateway Determination.

And if the determination is contravened, what's the consequence of that, what's the outcome then? What's the situation that the council is in?---So, the, if the council was to continue to exhibit the planning proposal without
20 the additional study, the department has the opportunity to put a submission and object to the planning proposal.

Was the delegation still valid as far as the department was concerned, if the condition of the determination was not complied with?---If there is an unresolved objection, the, the - - -

No. That's not what I'm asking.---Sorry.

What I'm asking is, was it your understanding that the delegation still had
30 effect and was valid to confer power to make the LEP if a condition of the determination was not complied with?---No.

That is to say, it was your understanding that it was not effective or valid?
---No.

If a condition of the determination was not complied with?---That's correct.

Thank you. Now, you prefaced your answer to that question by saying, "If
40 no effort was made." What if effort was made and what was obtained still did not comply with the condition that there be further justification to support a maximum building height of 17 metres on the site? Is it the same outcome, that is to say, no further justification to support a maximum building height of 17 had been obtained? Accordingly, there's been no compliance with the condition? Accordingly, the delegation is ineffective?
---That's correct.

Now, you mentioned the department's power to intervene, and I, please tell me if I've used the wrong word, during the exhibition process if it was not

satisfied with the justification obtained for the additional building height, how was the council to know that?---There, there was a requirement, from memory, that - - -

10 Can I, in fairness to you, it might assist and it might not. The Commission has evidence that there was a telephone conversation between an officer of the department and a council planner in which the council planner was informed of exactly that. But was there, apart from that telephone conversation, an indication to council that the department could intervene or would intervene if it wasn't satisfied with the additional justification that was put on exhibition along with the rest of the other material supporting the proposal to change the LEP?---I'm not aware of any, no.

20 And it wasn't part of the Gateway Determination itself?---Not the determination. The letter back to Mr Montague did require the council, this is at page 105, council is also requested to notify the department's regional office when the planning proposal is placed on exhibition. So that would give you, the department relevant officer an opportunity to at least be aware of the exhibition and one to peruse the material that's on exhibition as well.

30 How common in the determination, in the drafting of Gateway Determinations was it for the department to use that device as a way of conducting oversight of how the Gateway Determination conditions were being implemented? Was that common practice or not?---I don't, I don't, from memory I don't believe it was common. The only reason why I could see it was applied in this instance is because the resolution of the council differed to that of council officers, hence the need for potentially some additional oversight.

Now can I go back to the determination at page 107? Am I right in saying that focusing upon the condition that is the third dot point of paragraph 1, that there was no requirement by the department as to who should conduct the additional study or what the source should be for the further justification to support a maximum building height of 17 metres?---That's correct.

40 And in requiring that further material be provided by a council to support its planning proposal, would it be right to say that it wasn't usual for the department to stipulate where the council had to go to obtain that additional material? It was its job to obtain it?---That's correct.

And can I ask whether in that case generally speaking or, if you like, in relation to this case, looking at page 107, the first page of the determination, the department was not concerned if the additional material came from the development proponent?---Based on the wording, the Gateway Determination, no.

And that notwithstanding the fact that a development proponent would have a conflict of interest in the putting together of the material to satisfy the condition requiring the provision of additional material?---I'm not sure how to answer your question, is that a question?

Well, I'll break that up?---Yeah, sorry. Yeah.

The development proponent had an interest - - - ?---Yes.

10 - - - in the proposal being implemented by the making of the amending LEP?---Correct.

If the proponent becomes aware as is likely to be the case that the department in its Gateway Determination has imposed a condition that particular additional material be supplied to support the planning proposal then it would be in the interests of the proponent to provide material itself which supports, which answers the request for additional material that the department has made?---It would be, yes.

20 And given that it is in the interest, the development proponent usually has a financial interest in the LEP being amended along the lines of council's planning proposal, then the development proponent would have an interest in skewing the additional information provided if it's to be the source, the proponent is to be the source, so that the condition is, in fact, satisfied, notwithstanding the fact that objectively it might not be possible to satisfy it?---I agree.

30 That hadn't been, I take it, at the time you signed this determination on 19 March 2015, a concern that you had because, I take it, no one had drawn your attention to the fact that that had occurred before?---There, there was no concerns from, in that perspective. The only concern we had was the fact that, and again looking at it objectively, that the report from the officers differed from that from the resolution of council, and that's all we had to go on.

40 Now, when I asked you about whether the wording of the third dot point in the first paragraph, the first clause of the Gateway Determination or the clause numbered 1 in the Gateway Determination could be satisfied by a report from the development proponent, you hesitated. Was that because you had an expectation that in fact the source would be either a council officer or a report commissioned by council from a consultant retained by council for that purpose?---The, well, my expectation would be that it would be done by the council. Some councils do have urban designers in-house or internal architects which would have the capability to do additional study, or the council would commission an independent person to undertake that analysis.

Is that what usually occurred when such a condition was imposed?---To my understanding, yes.

And it doesn't have to be a height limit condition, it could be indeed the balance of the third dot point, "That accurately represents," and I'm quoting, "That accurately represents and addresses the impact of future development on the character of the local area is to be made available with the planning proposal during the exhibition period."---It could be, yes.

10 It could be any aspect - - -?---That's right.

- - - of the impact of development pursuant to the relaxation of the development standards sought by the planning proposal?---Yes.

Now, in your statement, your first statement at paragraph 23 you say exhibiting the planning proposal without an additional study as required by the Gateway Determination would be in contravention of the determination, and you go on the say at paragraph 24, "If the independent study from
20 Olsson Architects was the additional study prepared in response to the Gateway Determination and was not publicly exhibited, then this would be in contravention of my determination." What you're referring to there is, at the top of page 7 of your statement, a report that you've been shown, volume 9, page 149 to page 173.---Yes.

149. Is that right?---Yes.

And on the information that's been given to you, you understand this report was commissioned by council to, in response to that condition in the
30 Gateway Determination.---Yes, and it specifically says that as well.

And you've been asked to assume that despite that, and despite the exhibition of the proposal for the making of the amending LEP, that study was not included in the materials exhibited. That's what you've been asked to assume.---Yes.

You've said however that that was, would be in contravention of your determination. That's what you've said in paragraph 24. Can I suggest to you that on one view that was not required by the determination inasmuch as, as we've canvassed, the third dot point of the paragraph numbered 1 in
40 the determination didn't identify the source which had to, to which council had to go for the additional study or the further information as to building height limit?---That's right.

And so on that basis a lawyer might say that it wasn't in contravention of the determination in fact. Would you accept that?

MR MOSES: Lawyers may say a lot of things, Commissioner. I'm not sure whether the witness is in a position to answer, but it's really a matter for the

Commissioner as to whether it would be assisted with that evidence from the witness.

MR BUCHANAN: Well, my question is how, I take my friend's point. My question is if the source of the additional information required by the determination isn't identified in the condition then how can it be a contravention of the determination to exhibit material which is not the material commissioned in response to the determination condition?---Just going back to the statement, the reason why we positioned it that way is that if, regardless of who the author is, if the study was prepared by Olsen, if that was deemed to be an additional study and not exhibited, it would be in contravention. Reading to understand what's happened since that time, if the JBA report is the additional study well then there's no contravention of the Gateway Determination because now the JBA report is the additional study.

THE COMMISSIONER: I'm sorry, I'm confused with that, sorry?---Yeah, that's all right. So the Gateway Determination asks for additional study.

20 Yes?---So, that's for council to, in a way, satisfy itself that the additional height is reasonable and appropriate for the site and from an environmental context, makes sense. And if the Olsson report was the report done for that purpose which it was, but that meets the requirement of the determination - - -

Even though it wasn't exhibited?---But council is not required to, not required to exhibit that report given they've exhibited an additional report which they termed the Additional Study, if that makes sense. So they, the council, has rested on the JBA report and cast to one side, effectively, the Olsson study and relied on the JBA report to be the additional study.

30 Even though it would appear they didn't like what the Olsson report found and then they reverted to the report prepared by the development proponent?---Mmm hmm.

That seems quite a skewed process that doesn't seem to be within the intent of your Gateway Determination?---I don't disagree. The Olsson report very clearly says, the expectation of the department would be that a report is prepared in response to the taking in consideration the office's report, the resolution of council, the assessment of the department, the Gateway Determination and the conditions of the Gateway Determination, and then go away and prepare a report in response to all of those matters. That's what the Olsson report has been prepared to do. Now, from reading through the material and understanding that that report wasn't exhibited, council has chosen to, like I mentioned, put that to one side and relied on the proponent led. Now, in my view, strictly speaking, is that contravention of the Gateway Determination? No, because the proponent letter report also says

it's being prepared in response to the Gateway Determination. Was it the intent of the department? My view is no. Is it good practice?

Is it what, sorry?---Is it good practice? My personal view is no.

MR BUCHANAN: So if I can just, two matters for the record?---Sure.

10 Firstly, the JBA report. If the witness could be shown volume 10 commencing at page 37? Is that the commencement of the JBA report that you're referring to?---Yes, it is.

And you understand that to be, indeed it says on page 42, first paragraph, it's being prepared on behalf of, and then it identifies a company Croycon, C-r-o-y-c-o-n, Investments Pty Ltd. Can you see that?---Yes.

20 I'll come back to what's on that page in a moment. Secondly, you refer to the Olsson report as indicating that it was prepared in response to the Gateway Determination. If you can go back to volume 9, and go to page 151. Is that the material in the two paragraphs at the top of the left hand column there?---Particularly, particularly the second paragraph on the left hand side.

30 And then now if we can go back to the JBA report, the proponent's report, volume 10 and looking a page 42. Above, sorry, in the first three paragraphs it provides some introductory material and says in the first paragraph that the report is submitted to Canterbury City Council to support a planning proposal and then under the heading, 1.2 Purpose of the Report it says, "The purpose of this planning justification report is to respond to a request made by the New South Wales Department of Planning and Environment in Gateway Determination." And then it provides the identifying numbers, dated 19 March, 2015, and sets out the content of the third dot point the first condition of the determination.---That's correct.

So that's the material that you've been talking about?---Yep. Yes.

40 Can I ask you this, do you regard the exhibition of the JBA report as, instead of the Olsson report, in the circumstances of where they respectively came from, as contrary to the spirit of the condition of your determination? ---Yes. I do.

Do you know if the department had any reaction or thoughts or response when it was learned that what had gone to exhibition was a report from the proponent and not the report which had been commissioned by council for the purposes of responding to the determination?---I, I don't know.

If a council in this situation had two studies, as there were in this case, with competing views as to the appropriate maximum building height, to take that component of that condition, what course should council take in a

situation with that sort of determination that it had received from the department?---In my, in my personal view, the Olsson report would be the report that's exhibited as commissioned by council. And - - -

10 It's the less favourable one. It's the one less favourable to the proponent. And less consistent with the, that aspect of the planning proposal.---No. Notwithstanding that, the, the proponent would have every opportunity to, during the exhibition period, prepare a, a contrary view and dispute the Olsson findings, so to speak, and that would be through a formal exhibition process, through a formal submission to council. That will then force, during the, the, the final assessment of the planning proposal - - -

By council?---By council prior to going to council for a final resolution, to consider, again, all the matter all over again effectively in terms of the resolution of council, Olsson study, the, any, any submission from the proponent including any reports but also submissions from the community as well.

20 Can I take you to another aspect of the Homer Street planning proposal and ask you to look at volume 10 – excuse me a moment. Can I ask you to go to page 28. Maybe if I could perhaps go to instead page 26 which is an email, a set of emails from the proponent's planner concerning the question of extension of the time limit for the planning process that you've identified earlier was part of the determination.---Ah hmm.

30 If you go to page 13, my attention is being directed to, and you can see there a letter from JBA, the proponent's planners, addressed to the department seeking an extension of time for the time frame for the amending LEP to be finalised.---Yes.

40 And that's dated 22 February, 2016. There is at page 33 a letter from the department to Mr Montague at council responding to the application for an extension of time, but it's referring to Mr Montague's letter of 9 February, 2016, which seems to predate the JBA letter. I can't find the council letter just as I stand here, but I don't think we need it. You can see that the application was essentially acceded to, and turning over to page 34, as indicated in the departmental letter, the Gateway Determination was formally altered by extending the time frame for completing the LEP to 26 March, 2017. Are you aware of whether there was any material beyond the JBA letter which was provided to council to justify the application for an extension of time?---No, I'm not.

But the fact that an application was made for more time than had been considered by the department to be required to complete the process didn't alarm the department I take it from the fact that it was, the application was granted?---No, it, it, it, it's, it's not irregular for a planning proposal to, particularly when there's, there's a requirement for additional time or it's

been controversial or there's a large number of submissions, for a council to require more time to finalise the plan.

Thank you. Can I ask you a different question? I'll change the subject now to the process of the selection of senior staff. Going back to your experience with Canterbury City Council and the, your application for appointment as director of city planning in 2014, do you have any awareness, and you'll have to tell us if you don't because I'm asking you about another agency, of whether the office of local government monitored processes for the selection of senior staff before their appointment by the general manager in consultation with council, as was required by the Local Government Act?---I'm not aware of any, no.

Different subject, Mr Manoski. You've spoken of the Joint Regional Planning Panel which existed at the time, or the Joint Regional Planning Panels which existed at the time in 2014/16. Thinking of that period of time in 2014/16 and also of your understanding of the thresholds for remitting an application to the IHAP for assessment by Canterbury City Council, there were ways, were there not, in which an applicant could so construct their application or applications as to avoid assessment of their application by a planning panel? And I'm asking in particular about the estimated cost of work?---It was possible, yes.

And if there was a threshold, which I think you've indicated you understood there was for the Joint Regional Planning Panel?---That's right, I think at the time it was 20 million.

And did you understand there was a threshold as well for consideration by the IHAP?---I, I don't know.

Thank you. If the applicant reduced the statement of the value of the works in its application, in its development application, that would be one way where the true value was in excess of \$20 million, for example, thinking of the JRPP, of avoiding the JRPP and ensuring that the consent authority was the council?---It's possible, yes.

Is assessment of the value of works in the application of proponent makes for development something that you had been involved in considering in any detail?---There has been occasions where, not with the former Canterbury Council but previous to that, where we would question the, the CIV or the construction investment value of a proposal.

And would that be to query whether council was the consent authority, the proper consent authority, having regard to the true value of the works or for some other reason?---It was for some other reason.

And if I can ask you to have a look at volume 1 if you still have it, page 317? No, you don't still have it, it's being given to you now. This is a

departmental planning circular dated 14 March 2013 entitled Calculating the Genuine Estimated Cost of Development. It is, and having regard to the first paragraph, “To specify the matters being taken into consideration when calculating development application fees.” And that was something that was set out in the Environmental Planning and Assessment Regulation 2000 if you look at the top of the right-hand column on page 1 of that planning circular?---Yes.

You see that?---Yes.

10

Is that the circumstance in which you’d been involved in querying an estimate of the cost of works?---Correct.

But nevertheless this circular set out, didn't it, tools that could be used by council to test the value of works stipulated in a development application for whatever purpose council saw it as necessary?---Yes, it did.

20

And those tools – I'll withdraw that. If I could just indicate, there were tools depending upon different circumstances, looking at page 318, bottom of the left-hand column. But can I take you to midway down the right-hand column under the heading Reviewing the Estimated Cost of Development, where it’s set out, if I can read onto the record, “The consent authority must accept the estimate of costs submitted with the DA, unless it is satisfied the estimate is neither genuine nor accurate.” And it identifies the fact that it was an offence to make a statement knowing it would be false and misleading in an important respect in connection with any document lodged with the consent authority for the purposes of the Environmental Planning and Assessment Act or regulations. But I take it that the circumstances in which you would be involved in or aware of a query by council as to an estimate of value would be where it was considered that on its face the value seemed inapt?---Correct.

30

The value stated seemed inapt.---The value stated, that’s correct, yes.

Is that right?---Yes.

It would only then be a situation where council would query it.---That’s correct.

40

Looking at page 318, if the value of works exceeded \$3 million, then a quantity surveyor’s report was required to justify the estimate of value of works. Are you familiar with that?---I, the, the threshold I'm not, but I know there is, there is a threshold that applies when a quantity surveyor is required.

Have you ever reviewed a quantity surveyor’s report in the context of initial assessment of a development application to determine what should be done with it?---Yes, yes, I have.

And has that been in a situation where, as you understand it, the value of the works exceeds \$3 million or a sum of money in that order?---In that particular instance it was above the \$3 million, yes.

The quantity surveyor would be retained in that circumstance where they're providing a report like that as required by the proponent, of course.---Yes.

10 And the surveyor would have an interest in providing a report that satisfied the interests of the proponent.---Correct.

There is a potential for a conflict of interest between an objective assessment and reliable assessment of value of works and the interests of the proponent, perhaps, in keeping the value down so as to avoid the Joint Regional Planning Panel.---Yes. Unless there was still dissatisfaction by a council officer, at what point we would commission our own quantity surveyor to, to assess the cost. That's only if we were still dissatisfied with what's come through from the proponent.

20 But your experience is that that is a concern essentially based on, am I right, maximising council's revenue?---It's about getting the appropriate fee payable depending on the complexity of the application.

Who got the fee?---Council.

30 You don't have a recollection in your experience – and I'm not suggesting you should have, I'm just asking – you don't have a recollection in your experience of having a concern that this applicant might be engaging in forum shopping as to who the consent authority would be?---Not personally, no.

But you've acknowledged that there's the potential for that to occur.---There is.

40 And of course in a situation where if a council has been the victim of regulatory capture by developer interests, there would be a risk that a proponent would prefer their application to be determined by that council, assuming it falls within that local government area, of course, than were it to go to an independent, expert body like a Joint Regional Planning Panel. ---There is that potential, yes.

Those are my questions. Thank you.

THE COMMISSIONER: Thank you, Mr Buchanan. All right. We'll take the luncheon adjournment and return at 2.00pm.

LUNCHEON ADJOURNMENT

[1.01pm]