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INDEPENDENT COMMISSION AGAINST CORRUPTION

PATRICIA McDONALD SC  
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PUBLIC HEARING

OPERATION DASHA

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON FRIDAY 10 AUGUST 2018

AT 2.05PM

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The transcript has been prepared in accordance with conventions used in the Supreme Court.

MR BUCHANAN: Mr Stavis, looking at page 298 of volume 21 and keeping a finger on page 296, page 298 being the email you sent to Mr Montague on 6 November 2015 and page 296 being the email you sent to your address, but, it would appear, with intention to send it on to Mr Hawatt, you omitted, as I think I drew to your attention, from  
10 Mr Montague's version of the email the words, "Ordinarily I would have refused this DA long ago". Do you see that?---Yes, sir.

Refusing the DA, which you say in the email on page 296 you ordinarily would have done in such a situation, was the alternative, wasn't it, to trying to massage the DA to an acceptable level?---Yeah, trying to find a solution. Yes.

And trying to massage it to an acceptable level was what  
20 you did in the case of 548 Canterbury Road, wasn't it?---I don't believe so. What I was trying to do was convey to him what my concerns were, particularly - I'm not sure exactly on the timing, but in terms of the spirit of the advice that we got from the solicitors as well about the application of clause 4.6 and what that ultimately meant in terms of the design and the changes that needed to be made.

So do you mean to say that despite identifying Mr Demian's  
30 applications as failing in the respects that you identified, "inconsistent plans, blatant disregard for council's controls", you were telling Mr Montague that you didn't have to do anything about it? Is that what you tell us?---No, I don't - no, that's not what I'm saying, sorry.

Well, what were you telling Mr Montague if that wasn't what  
you were saying?---Look, I think, just reading the email again, I'm just merely pointing out to him that, you know, his blatant disregard for issues and his inconsistent plans  
40 and so forth, so I was conveying to the general manager, particularly in light of the meetings that I had with the general manager and Mr Demian, with or without the councillors present, you know, that I'm still having problems with this guy.

But you're not doing anything about those problems? You're not providing solutions?---I didn't say that, no.

This is what I'm trying to understand. You're not providing us with any assistance as to what that part of the email that said, "I'm left with trying to massage to an acceptable level. Quite frankly, that's not our role" - you're not providing us with any assistance as to what you meant by those words. Why did you use those words in the email to Mr Montague?---I don't know, sir.

10 Well, it's obvious, isn't it - - -?---I'm just trying - - -  
- - - that if you didn't do that, you'd have to refuse the DA, because of the same story, "inconsistent plans, blatant disregard for council controls"?---Yes, but - no, I don't accept that. I had no control over the fact of what Mr Demian was submitting to council. The fact that he was submitting inconsistent plans and what have you - I didn't have any control over that.

20 Mr Stavis - - -?---I'm trying to answer the question. Really, I don't know what I meant by that last statement.

THE COMMISSIONER: Your control would have been to refuse the application. If somebody is giving you, or submitting, inconsistent plans with a blatant disregard for council's controls, your recommendation would be to refuse?---I didn't see that as an option, given the context of how I was operating, under what regime I was operating, namely, the general manager and the two councillors, and  
30 given --

MR BUCHANAN: So what did you do instead?---I had meetings with him. We had meetings. We - - -

With a view to doing what?---For him to submit and address the issues.

40 So you say you had no control over what Mr Demian submitted, but then you tell us, and indeed we've seen an abundance of evidence of it, that you procured from Mr Demian additional or substitute material, didn't you?---Of course.

In respect of each of his DAs?---I don't deny that.

So you did have control over what Mr Demian submitted? You told him, "You need to put this in and that in", didn't

you?---Well, that's no - sorry. Yes, yes, that's true.

So you were changing his applications, weren't you?---No, I saw it as getting to a situation where I could support the application.

And how were you doing that if not changing the application?---Well, they're your words, but - okay, I accept that.

10

The material on which the applications were ultimately assessed was different from the material which had been submitted in the first place; correct?---That's true.

And it was different because you and/or your staff required Mr Demian to put in that different or substitute material?---That's fair.

20

Now, can I go back to some evidence that you gave before lunch to the effect that, "I did it for mums and dads too." Do you remember saying words to that effect?---Yes, I do, yes.

What you meant there was, what, providing solutions?---Yeah. I mean, there were instances where there were issues that arose from time to time regarding applications that were, you know, houses or carports or the like, and there were issues with certain non-compliances or design-wise or - and I offered input, yes.

30

Would it be right to say that as the Director Of City Planning, you didn't make every decision that was made in your division as to what should be done with a DA?---No. That's right.

You, as far as individual projects were concerned, would have had a focus on the larger projects, to start with; would that be fair?---Mainly, yes.

40

And as well, you included in your work projects which Mr Hawatt and Mr Azzi drew to your attention?---That's correct.

And they drew to your attention a number of mums and dads projects, if we can use that expression?---I'm not sure if that was the case. Sometimes I received - I remember getting calls, through Eva or whoever, if they were having

problems or with delays or what have you, so it wasn't always the case that it was through Mr Hawatt or Mr Azzi or any other - - -

But you intervened in 51 Penshurst Road because Mr Hawatt asked you to; correct?---That's fair. Yes, that's fair.

You intervened in 23 Willeroo Street because Mr Hawatt asked you to?---That's fair.

10

And they were certainly much smaller projects than the kind that Mr Demian and Mr Maroun and Mr Faker were concerned with?---Yes.

Compliance was one of your responsibilities; is that right?---That's correct, sir.

And you intervened in some compliance matters at the request of Mr Hawatt in particular, didn't you?---Yes.

20

Can I take you to a fresh volume of exhibit 69, please - volume 22. Can I take you to page 68, please. This is part of the business papers for the IHAP meeting on 23 November 2015, and it commences at item 4 on their agenda, namely, 548-568 Canterbury Road, Campsie. Can you see that?---Yes.

It goes through, on my count, to page 110. Does that seem to be the last page of the report to you?---Yes.

30

You signed off on this report?---That I can't recall, but it was common practice for either myself - generally myself, yes, to actually sign off on these sorts of reports.

It was a report, it says, in your name, "Director of City Planning" - this is on page 68?---Yes.

40

But as well, it was in respect of an application or applications which, as you have told us, were the subject of interest expressed to you by Mr Hawatt and Mr Azzi and Mr Montague?---Yes.

Which would all lead to the conclusion, wouldn't it, that it's highly likely that you signed off on what was in this report before you allowed it to go into the business papers for the IHAP?---Yes.

Now, if I can just take you to parts of it, please. The summary is on pages 68 to 69. Can you see that?---Yes.

10 And the last dot point on page 68 indicated that "The DA had been assessed against the provisions in a number of environmental planning instruments", including, if I can take you to the second-last line, State Environmental Planning Policy (Infrastructure) 2007. Do you see that?---I do, yes.

Can I take you to page 70. You provided the reader with a bit of a history about the RDS, or the involvement of this site in the RDS, with a recitation of what happened to it at the 31 October 2013 meeting of council and then the 2 October 2014 meeting. I'm sorry, I'm looking at the last two paragraphs on the page. Do you see that?---Yes.

20 And then over the page, after talking about the planning proposal having been sent to the department, you said:

*During this process, the RMS raised concerns at the unknown traffic and road safety implications across the Regional Road Network as a result of increased numbers and density on a number of identified sites. In relation to the subject site, the RMS made the following comments:*

30 "Roads and Maritime notes that the planning proposal to increase permissible building height of the subject site has the potential to generate a significant volume of additional traffic. Roads and Maritime will support the proposed rezoning subject to the potential traffic impacts of the maximum developable yield of the site being considered and assessed. Traffic impacts on Canterbury Road and the junction of Elizabeth Street and Canterbury Road should be assessed. Roads and Maritime is likely to require access to be provided from the adjoining local road network for any future development or subdivision of the subject site."

40

You went on, in concluding that dot point that had been commenced at the bottom of page 70 in relation to background of the matter:

10                    *Subsequently, Council determined to omit a number of specific properties (including the subject site) from the Planning Proposal to allow resolution of the issues separately, while proceeding with a range of other important amendments to the CLEP 2012. The CLEP 2012 was formally amended in March 2015 and there is no outstanding or active Planning Proposals by Council that relate to this particular site. However, there is a Council resolution to increase the height limit on this site to 25m.*

20                    Can I take you now to page 80, please. You dealt with the requirements and the question of compliance with the requirements of a number of planning instruments in descending order from those with the greatest degree of requirement for compliance to that with the lesser degree, as is usual in these reports; is that fair to say?---In descending order by way of planning instruments, yes. Yes.

                      So you started that process on page 74 under the heading "Assessment" and you referred to SEPP 65?---Yes.

30                    Then you came eventually at page 80, in the middle of the page, to the infrastructure SEPP, SEPP 2007. Do you see that?---I do, yes.

                      You refer there at the bottom of the page to clause 104 of the SEPP. Do you see that?

40                    *In terms of Clause 104 of the SEPP, the site is located on Canterbury Road which is a Classified Road.*

                      Before I go on, you referred to clause 104 because it had requirements in it as to what the trigger or triggers were for, in essence, the RMS becoming a concurrence authority, having to have the matter referred to it and concurring or providing consent?---Yeah, look, I can't recall, to be honest with you.

We can assist. If I could provide you with a copy of clause 104 of the SEPP 2007, and we can bring it up on the screen as well?---Thanks.

Clause 104 was headed "Traffic-generating development". Do you see that?---Yes.

It identified, in the first two clauses, the triggers for what appears in clause 3:

10

*Before determining a development application for development to which this clause applies, the consent authority must ...*

And then it said: "give written notice of the application to the RTA" - that was the RMS, effectively; correct?---Yes.

20

"Within 7 days after the application is made and take into consideration any submission that the RTA provides". Do you see that?---I do, yes.

And there's, as well, a schedule 3 with a table in it, which had in it the material to which subclause (2) of clause 104 referred in calculating whether the trigger applied?---Sure, yes.

30

Do you recall broadly that that's how it worked?---Yes.

And, in particular, in terms of trigger, if we could just blow up the top of it, in respect of apartment or residential flat building with 300 or more dwellings if it was a site with access to any road, or 75 or more dwellings if it was a site with access to a classified road in particular, they were triggers for the application of subclause (3) of clause 104. Does this come back to mind now?---Yes.

40

Can I now take you to page 80 again in volume 22. Feel free to refer to the copy of clause 104 if it will assist.---Okay.

In terms of clause 104 of the SEPP, the site is located on Canterbury Road, which is a classified road, you say:

*Having regard to the Table to Schedule 3 of*

*the SEPP, the application proposes 70 dwellings and no additional parking spaces (which are provided via the concurrent Section 96(1)(a) application). Accordingly, the proposal does not require a referral under this clause to the RMS, based on the size or capacity triggers contained in Columns 2 or 3 of the Table to Schedule 3.*

10

*The proposed development therefore meets the requirements of SEPP 2007. Where required, relevant conditions will need to be imposed on any development consent issued.*

Do you see that material there?---Yes. That's on 80 and 81?

20

That's correct. Sorry, that is.---Yes.

This question of whether the matter should have been referred to the RMS was something on which you received advice from Mr McEwen SC. Do you recall that - his advice of July 2015? I can take you to it.---Yeah, I don't recall the details in that advice.

30

Volume 20, page 3. We looked at this earlier. That's the front page of the advice in respect of 548 Canterbury Road?---Yes.

If you go to page 11, you can see material in about the middle of the page which is in the context of the clause 4.6 objection, as he characterises it, which you've highlighted. The material you've highlighted says:

40

*The Council would be wise to consider the traffic impact of the additional 70 residential units which would result from approval being granted to the additional two residential floors, but I note that the applicant has provided a traffic report in support of the application and that the Council will have the benefit of advice from its own traffic engineers.*

Do you see that?---I do, yes.

Was that advice which you conveyed to council in your report?---I'm not sure, because the actual report itself was written by, as you pointed out earlier, the external consultant, Willana & Associates.

10 But that doesn't mean, does it, that you wouldn't have ensured it didn't contain all relevant material?---To the best of my ability, yes.

We've seen in the case of other reports how you have attended to the contents of a report that has been drafted by an external consultant?---Sure, yes.

20 So is that advice which should have been provided to council if it was in the legal opinion that you were provided with in July 2015?---Not really. It doesn't say that it needed to be referred. It said it would be wise, from recollection of that advice.

And you didn't think that if you were given that advice by senior counsel that it would be the wiser course, if I can use that term, to provide that advice to council so that it could take that into account in considering the question of the relevance of traffic impact of the DA?---I don't consciously remember thinking that at all, no.

30 If you would assume for a moment that that advice from Mr McEwen doesn't appear in this report, would you be able to give us an explanation as to why it doesn't?---Well, because the advice was in relation to - primarily in relation to clause 4.6, and I was also in discussions with our solicitor, Peter Jackson, in regards to that. I don't know whether it had something to do with legal privilege. I don't know. But like I said, in terms of that paragraph, he's just saying it would be wise, and if you look - you took me to schedule 3 - it doesn't appear to be - there to be a trigger for it.

40 I'm just wondering why, in that case, when it came to reviewing the advice itself, you highlighted it in three ways. You used a highlighter to highlight that passage, you underlined it, and then you placed a large asterisk next to it. It tends to suggest, doesn't it, that you thought that was important?---Yeah, well, it's definitely because it's highlighted - yes.

Well, you wouldn't have highlighted it, underlined it and put a big asterisk next to it unless you thought it was important?---I wouldn't say "important", but I thought it was relevant, I guess. I don't know why I did it like that. Ordinarily I don't, but - - -

Well, there's other passages which you have treated in the same fashion, if you flick through the pages.---Sure.

10

That's not the only passage. So you thought it was at least relevant?---Yes.

But you didn't think it should therefore be provided to council?---I don't think so. I think relevant from the point of view of whether it triggered the need, as a traffic-generating development.

Triggered the need for what?---What it says here.

20

In subclause (3) of clause 104?---Yeah, yeah.

The notification of the RTA and taking into account its response?---Yeah.

Was the fact that you didn't pass on to council the advice that you highlighted as to council being wise to consider the traffic impact of the DA that you didn't want to include something that might cause the IHAP or council to fail to approve the DA?---No, sir.

30

Certainly its exclusion tended to favour Mr Demian, didn't it?---Well, no, because that advice clearly is in relation to as to whether or not it triggers the need for the referral to occur, so I - - -

And assuming that that reading is correct, what Mr McEwen is saying is it might not, but you should nevertheless consider the traffic impacts of the additional 70 residential units?---Yes.

40

And you didn't think that was an appropriate way to go about that aspect of your report on the matter to the IHAP and to council?---No.

What was wrong with Mr McEwen's opinion in that regard?---I didn't think there was anything wrong with

Mr McEwen's opinion.

Why didn't you take his advice?---Well, we did. There was a traffic analysis done by our own traffic people as well as - and I can't remember exactly - at some point in time, we had employed the services of a consultant to look at the traffic impacts along Canterbury Road, and the applicant provided the need for - provided a traffic report, as best as I can recall, anyway, yes.

10

Can I take you to page 206?---Which volume, sir?

I'm sorry, volume 22. I think it would be better if I took you to the version that was in the IHAP report, as I was before, so can I change that to 92. It's the same passage, it's just that it's in the same IHAP report rather than in the version that went to the city development committee at its meeting?---Sure.

20

So page 92. Can you help us understand this paragraph, please. Under the heading "Referrals" and the subheading "Roads and Maritime Services", you said:

*As stated previously in the report, as per the provisions of SEPP 2007, the application was referred to the Roads and Maritime Services (RMS). The RMS has advised that it raises no objection to the proposed development subject to conditions being imposed on any development consent issued.*

30

?---Sorry, what was the question?

Well, the material that I have taken you so far to would seem to have been a statement saying that it didn't have to be referred to the RMS?---From what I recall, it was - well, it seems like it was referred to the RMS, based on that statement. We had a standard procedure where almost all applications, larger applications, particularly along Canterbury Road, were referred as a matter of course, anyway. So I'm not sure whether - - -

40

So when you told the IHAP on page 80 that the proposal doesn't require a referral under this clause to the RMS, why didn't you tell them, "But it has been"?---I don't know, sir.

Are you sure it had been referred to the RMS?---Well, that's what it says. I can't - - -

10 I know that's what it says, but are you sure that that's what happened?---I really can't remember. I mean, I didn't have, I guess, day-to-day involvement with the actual writing of the report or referrals or actually handling the application. That was handled by staff internally to liaise with the external consultant. So these sorts of procedural matters I left up to staff.

But, Mr Stavis, you don't have a recollection, do you, that this became rather something of an issue when the IHAP came to deal with the matter?---Not as I sit here today, no.

20 For completeness, can I take you to page 98. This is objections. The heading is "Notification", commencing on page 93, but then you set out what the submissions were that were received in response to the notification. That starts at page 93?---Yes.

Then you have a series of dot points going through to page 98?---Yes.

And the last dot point is:

30 *The Roads and Maritime authority (RMS) has previously raised concern about the unacceptable traffic impacts resulting from the increased residential density on the site, resulting in Council omitting the 25m height control for the site from the Draft LEP, which was finalised in March 2015.*

40 So the objector has gone back to the RMS's response to that part of the residential development strategy planning proposal that included this property; do you recall that?---No, I don't.

Well, we went through the history of it. Do you remember that there was a planning proposal?---I do.

And it included 548 and that the RMS objected, and all of this was put on hold?---Yes.

Until the RMS's objections could be dealt with, and there

was a specific objection by the RMS in respect of this property. Do you recall all that?---I do, yes.

This, I suggest to you, is a reference to that?---It seems to be, yes.

Your response to it appears under the heading "Comment", and it includes, if I can just take you to the third paragraph under that subheading:

10

*It is also important to note that the RMS specifically requested that any subsequent development of the site assess the traffic impacts on Canterbury Road and the junction of Elizabeth Street and Canterbury Road. This has been undertaken, as demonstrated by the Revised Traffic and Parking Assessment Report prepared by Varga Traffic Planning Pty Ltd. This assessment includes a SIDRA analysis of the operational network performance of the surrounding roads, stating that the SIDRA analysis shows the proposal "will not have any unacceptable traffic implications in terms of road network capacity".*

20

You go on to say:

30

*Although the RMS has expressed concerns with Council's stated intentions to increase the height and density of development along the Canterbury Road Corridor, and are in the process of conducting a regional network review, this does not preclude a merit assessment of the proposal, as required under Clause 4.6 of the CLEP 2012. The assessment of the applicant's written submission demonstrates that the proposal has sufficient planning merit to warrant approval.*

40

So that's what was inserted into the report at that point. If I can just take you over to the recommendation. The recommendation was that the clause 4.6 submission to vary clause 4.3 - that's the height control - of the Canterbury Local Environmental Plan 2012 be supported and that the DA be approved subject to conditions. That was the

recommendation. Do you see that?---I do, yes.

You also in that report dealt with the question of the breach of the building height control, and if I could just take you through that briefly, under the heading "Summary" on page 68, going to page 69, the first dot point on the page:

10

*The proposal involves a breach of the building height development standard under Clause 4.3 of the CLEP 2012, which is supported by the provisions of a Clause 4.6 submission by the applicant.*

?---Sorry, where are you reading that?

The first dot point on page 69.---Oh, 69, sorry - yes.

20

Then the last dot point in that section, in "Summary":

*Notwithstanding the variation sought to building height standard, the development application is recommended for approval subject to conditions.*

?---Yes.

30

You set out at page 70 under the heading "Amendment to CLEP 2012" the building heights history that I took you to earlier?---Yes.

And at page 81 - - -?---71 or 81?

Page 81, in the compliance table in relation to the LEP, in the assessment section now, in the last row in relation to building height, you indicated that there was no compliance and referred to comments below; is that right?---Sure.

40

Can I just draw your attention, though, whilst you're on this table, to that row under the heading "Requirement". The requirement read:

*18m in Zone B5, however will be increased to 25m upon gazetta1 of the Draft CLEP 2012.*

Do you see that?---I do, yes.

What was that a reference to?---That's probably a bad choice of words, but - - -

It's wrong, isn't it?--Well, yeah, it probably should have said something along the lines of a council resolution, yeah, yeah.

10 Because 548 had been withdrawn from the planning proposal?---Yeah, yeah.

Then on page 85, there was material in a section that dealt with the clause 4.6 submission. That material commences, can I suggest, sir, on page 81, towards the bottom of the page. If you could just satisfy yourself of that?---Yes.

20 And there's material on the succeeding pages that deals with how clause 4.6 submissions are to be dealt with?---Sure.

And then on page 85 you said a bit above the middle of the page, first full paragraph:

*Having regard to the above matters and Clause 4.6(3), the applicant's written request has satisfactorily addressed the matters required to be demonstrated by sub-clause (3).*

30 Then you went into a little bit more detail. You went on to say, back to the original margin:

*In addition, strict compliance with the height standard as it currently stands, is not in the public interest, given Council's stated intentions for the Canterbury Road Corridor.*

40 Do you see that?---I do, yes.

And then in the last paragraph before you go on to clause 5.10 of the LEP, you said:

*Having regard to the above commentary, the preceding matters arising from [the Ashfield Council case] and Council's previous intentions to increase the height*

*limit for the site to 25m, it is considered appropriate in this instance to support the submission under Clause 4.6 of CLEP 2012 and vary the height standard to permit the proposed development.*

10 Now, how did it come to pass that the report to the IHAP came to that conclusion?---I don't know. I don't think I had much input in the drafting of this, this clause. It would have been done by the external consultant.

The drafting of this section?---Well, the whole report, actually. And I do remember getting the legal advice in terms of, from our solicitor, in terms of devising a checklist of how one was to deal with clause 4.6, and that was circulated, I believe, to the external consultant as well, as well as staff.

20 I drew your attention to the paragraph that commences "In addition", which reads:

*In addition, strict compliance with the height standard as it currently stands, is not in the public interest, given Council's stated intentions for the Canterbury Road Corridor.*

30 It wouldn't be right to say, would it, that council policy was the final arbiter of this aspect of the public interest, though, would it?---No. I mean, there are other factors that you need to look at as well.

Yes?---Yeah, absolutely.

40 But there are no other matters referred to. There's a statement above about compliance with the numerical standard being either unnecessary or unreasonable, but that's simply reciting the words of the clause, isn't it?---It is, yes.

The only actual consideration of whether it was appropriate to accept the submission that had been made is the words "strict compliance with the height standard as it currently stands, is not in the public interest, given Council's stated intentions for the Canterbury Road Corridor"?---To the best of my recollection, the clause 4.6 objection or submission has to come from the applicant, so there would

have been a report of some sort that was prepared by the applicant and included as part of a package that would have been given to the external consultant to review, and how he worded it and dealt with it - he was obviously satisfied that the clause 4.6 was supportable. But it was not uncommon to just, I guess, generalise in that way because the detail of the submission is contained in the applicant's objection.

10 I don't want to mislead you.---Sure.

If you go to page 84?---Yes.

Indeed, page 83, you can see in italics material that has been extracted from the applicant's submission?---Okay.

Going through to the top of page 85, so that material certainly was there and, indeed, has been extracted and put into the report?---Sure.

20

But the only statement about the public interest was one that referred to council's resolution?---Look, that would be a matter that I would need to discuss with the external consultant. But you're right, yes.

If council hadn't passed that resolution, then does that mean that it would not have been in the public interest for the submission to be accepted?---No, I don't think so, no.

30

There would have had to have been more, wouldn't there?---Of course. And I'm not sure if that's the full extent of what the applicant submitted.

Ordinarily the purpose of dealing with this aspect in a report to the IHAP or to council is to set out what the submission is and then to indicate what your opinion is about the submission and to make a recommendation as to whether the submission should be accepted- - -?---I accept that, yes.

40

- - - giving reasons. The only reason that's provided is the reason that refers to council's prior resolution?---But that's only in that aspect of it.

Yes?---Yes. Yes.

The public interest aspect?---Yes, yes.

You don't think it's somewhat deficient in that regard, the report?---Look, probably with the benefit of hindsight, I would have - the consultant should have expanded on it, yes.

This was a situation where, to go back to it, there was no planning proposal on foot; correct?---That's right.

10 And there had not been, therefore, even a Gateway Determination as to how a planning proposal affecting this property should proceed?---I believe so, yes.

All there was was an expression of opinion by council; correct?---Well, a resolution of council, yes.

A resolution of council, certainly?---Yes.

20 And a resolution of council, of course, is not law. It's not an environmental planning instrument?---No, it's not, you're right.

If I can just take you, then, to page 94, this again is dealing with the notifications/objections, and do you see the dot point at the top of page 94, commencing, "The Draft LEP Amendment"?---Yes.

It reads:

30 *The Draft LEP Amendment has not yet been gazetted and the development is contrary to the Canterbury Road Masterplan which envisaged higher buildings at major intersections and lower buildings between nodes with a maximum height set at 18m.*

*Comment*

40 *As discussed above, the Draft LEP, which (amongst other things) sought to increase the maximum height from 18m to 25m was gazetted in March 2015, excluding the proposed height limit for this site and others in order to progress the other housekeeping amendments.*

It then goes on to say what it allowed council to do in respect of other sites. The next paragraph reads:

*The proposal is consistent with both Council's stated policy intent and previous resolutions to pursue increased densities along the Canterbury Road Corridor, and SEPP 65 as assessed above, and the Clause 4.6 submission has demonstrated that the development satisfies the relevant statutory planning matters.*

10

Do you see that?---I do, yes.

Had you had any conversations with the external consultant who drafted this report as to the direction you wanted to see the report go in?---That I can't recall, if I did - I'm sure I did, but as far as detail goes, I don't recall that.

20

Did you indicate to the person drafting the report that you wanted to see the clause 4.6 submission accepted and a recommendation for approval?---I don't know whether I said that, no.

Well, do you have a recollection of providing other guidance for the person drafting the report?---Nothing that comes to mind, I'm sorry, no. All I know was that he did have issues with aspects of the proposal, I remember that - "he" being the external consultant - which led to a series of amendments that filtered through.

30

Amendments to the DA?---Yeah, the actual design - - -

Or the material supporting the DA?---No - both. So the actual design itself, because, from memory, in order to satisfy the clause 4.6, in light of the actual council cases, you needed to be able to demonstrate that it was a better planning outcome, what they were proposing, in order to allow for the breach. So there was a whole series of design changes that were lodged, which included supporting documentation by the applicant.

40

And was that as a result of you dealing with Mr Demian or Mr Demian's consultants with a view to achieving that outcome?---Yes, there were a number of meetings like that, yes.

And you don't think that would have been massaging the DA?---No. I think it was more a case of getting them to

identify the - sorry, getting them to understand the intricacies of clause 4.6 as it applied at that particular time in the context of those court cases.

But it resulted in a change in the design and a change in the materials - that's not massaging the DA?---Sir, that's not uncommon for - - -

10 I'm not saying it's common or uncommon. I'm simply asking you: isn't that massaging the DA?---They massaged the DA, yes.

At your request or guidance or direction?---I think that's fair, yes.

As a result of your intervention, we can put it neutrally - as a result of your intervention?---I think that's fair.

20 And you intervened because you knew that this was an important DA so far as Mr Montague was concerned and Mr Hawatt was concerned and Mr Azzi was concerned; is that fair?---I think that's fair comment.

Now can I take you to that part of this report which appears in a couple of places that I've just taken you to, which references council's resolution in the RDS process as being a relevant factor, a factor that is given weight on the part of the person conducting the assessment?---Sure.

30 Were you aware of a school of thought amongst any of your staff that it would be premature to carry out any form of merit assessment of a DA for a site which was the subject of a council resolution for a planning proposal before any proposed amendments were actually made to the applicable planning controls?---I can't recall, I'm sorry.

40 Do you recall a school of thought generally, whether it was on the part of your staff or not, that it was premature to assess a DA by reference to council policies or resolutions rather than to the actual controls?---I believe there were some staff, yes, who had those - shared those views, yes.

Mr Farleigh, was he one?---Yes, I believe he was, yes.

And was your attention drawn to this school of thought by either your planning staff or your assessment staff?---Not that I can recall, sorry.

You see, there was a process for a while in your division, was there not, whereby on some matters assessment staff would refer an application to the planning staff just to get their input, particularly if it had been a history, if the site had a history of being the subject of a planning proposal. Do you recall that practice?---I do, yeah.

10 You were aware that it occurred from time to time on relevant applications?---I was, but to the best of my knowledge, there was no formal process in place, yeah.

I certainly accept that, with respect. I am suggesting it was indeed an informal process?---Sure.

You became aware of it, didn't you?---At some point I would have, yes.

20 Did you then direct it was to cease?---As far as I understood at the time - I don't know the answer to that, I'm sorry. I can't recall that. But as far as my recollection of that process, if you want to call it that, was the feedback we were getting from development applications were design related, and we had no expertise from a design perspective in-house. So from what I recall, that was the main focus of the comments that we were getting back. But, look, I wasn't aware of - there's not many that I'm aware of that I had any involvement with, yeah.

30 But are you providing us with a reason why, in your opinion, that practice should not have been occurring?---I think so, yes.

That suggests that this has been a thought process in your mind in the past and that you had in fact intervened to cause the practice of internal consultation by assessing officers with planners to cease?---I may have, sir, yes.

40 Did you take that step because you saw it as providing an obstacle to the prompt determination of applications by way of approval?---No.

Because, of course, if that school of thought was accepted, then the DA would basically sit in a drawer until such time as the planning control had been ultimately determined, or else it would be determined against the existing control,

which would be much more restrictive?---It would have to be assessed under the existing control, anyway, from that perspective. No, because, as you rightly pointed out, it was a consultation, so comments received back from them did not necessarily stifle the processing of an application.

If I can just ask you to have a look at volume 21, if you still have it up there with you?---Yes.

10 Page 303. It commences, strictly speaking, on page 305, but 304 for all intents and purposes, in an email by Mine Kocak to Michael Brewer on 10 November 2015. The heading is "DA Reports", and Ms Kocak advises:

*Hi Michael,*

20 *Spiro has advised that he was able to get an extension from the Governance section for the final reports to be submitted for the agenda.*

Then she talks about sending through the reports. Mr Brewer, at the top of page 304, responds, "No problems" and provides a bit more detail there, but he asks:

30 *... I just needed to speak to you regarding the status of the Draft LEP about the 25m height limit. JBA claim in their objection that this was dropped from the DLEP before it was finalised in March but my viewing from the Department's LEP tracker website is that it was adapted in March this year and is close to being gazetted. Are you able to confirm?*

And on page 303, on 10 November, at 10.59am, Ms Kocak forwards that email to Warren Farleigh, who responded at 11.19am:

40 *This is a tad complex.*

*There was a resolution to increase the height on Harrison's from the current 18 metres to 25 metres. Note that this was despite officers recommendation that it should be only 21 metres.*

*This became part of the Residential Development Strategy Planning Proposal which dealt with a number of sites. This site, along with most on Canterbury Road, were the subject of an objection from RMS. This in effect became an unresolved agency objection.*

10 *All sites impacted by the RMS objection, including Harrison's, were then removed from the previously exhibited RDS planning proposal. What was left then proceeded to finalisation and gazettal.*

20 *We then had to engage consultants to deal with the terms of the RMS objection. This study is only at final draft stage and has yet to be seen, let alone considered, by Council. We are about to engage with RMS on this study to ascertain whether it meets their expectations.*

And then he says this:

30 *So, in the context of Harrison's, there's NO [and he emphasises "NO"] current planning proposal. Once the RMS issues have been resolved, a fresh report to Council will be required seeking initiation of a NEW [and he emphasises "NEW"] planning proposal.*

Then he says:

*Note that the whole exercise then starts anew and will be needing a fresh Gateway Determination.*

40 Then Ms Kocak provided that to Mr Brewer and cc'd you in on that, as well as Ms Nakhle and Mr Gouvatsos. Do you remember receiving this correspondence or viewing this correspondence?---No, sir, sorry, I can't.

Did you do anything as a result of this correspondence?---Not that I'm aware of, no.

Essentially, though, Mr Farleigh's advice was not accepted,

or it was not acted upon by you?---No, because - well, I'm not sure if I did. I mean, it certainly was forwarded to, as you pointed out, the consultant. And I remember reading the spirit of his advice in that report that I was shown before.

Well, that was an objection, wasn't it?---I'm not sure what section it was. What was your question, sorry? I just want to make sure I'm answering your question.

10

Was there a reason why you did not accept this advice? Maybe I should change the question. You didn't accept this advice, did you?---No, because this was in relation - what he's talking about is in relation to planning proposals. We had a development application that we were considering.

20

And so are you saying that this didn't tell you anything about how to deal with the development application? Is that the burden of your evidence? Is that what you're telling us?---I'm just trying to read it, sorry. Well, it doesn't say anything about the development application, anyway, and those comments are relevant to the planning proposal process, not the assessment of the DA.

But what it meant was that the DA had to be assessed against the existing controls?---Correct.

30

There was a major breach of the development controls so far as building height was concerned so far as the Harrison's additional two storeys DA was concerned?---Yes.

There needed to be a clause 4.6 submission. A submission having been made, it then needed to be reviewed to determine whether or not it should be accepted. You understand all of that?---I do.

40

What appeared in the report was a reference to council's resolution in respect of the public interest?---That's - yeah, that's a very small component of it, yes, but I'm assuming that the external consultant, as I said before, went through in detail, a detailed assessment of the applicant's clause 4.6 submission.

THE COMMISSIONER: Mr Buchanan, we just might take a quick five-minute break.

MR BUCHANAN: Certainly.

**SHORT ADJOURNMENT**

**[3.17pm]**

10 MR BUCHANAN: Can I take you to page 118, please, in volume 22. This is a copy of the IHAP report from its meeting on 23 November 2015 in respect of 548-568 Canterbury Road, Campsie. Do you see that? Three pages. Page 118, volume 22.---No, I don't think it's the IHAP report, is it?

Sorry. I could have the wrong document. I do apologise. You're quite right. It is a report of the IHAP report - is that a fair description of it - to the applicant by council?---I think that's a fair summation, yes.

If you go to page 120, it's dated 27 November 2015?---Yes.

20 And then if you go back to page 118, the report of the report says:

*Details of the Panel Assessment is provided as follows, for your information ...*

30 And then you would accept that the report has been set out?---I don't know whether this is the extent of the report, to be honest with you. That could just be a summary of some of the issues.

Very good. Would you like to have a look at page 224, then. Do you see that this is an extract from the business papers for the city development committee meeting of 3 December 2015?---Sorry, we're going back to page 118, being an extract?

Well, no. You said you wanted to see the whole report.---I've got that.

40 Page 224.---Yes.

Do you see there under the heading "IHAP Assessment and Recommendation", I just wanted to explain to you that what we're looking at is part of the business papers for the meeting of the city development committee of 3 December 2015; do you accept that?---Yes.

If you go back to page 181, you can see where that commences?---Yes.

So what was the practice, then, in relation to the officer's report to the city development committee? Was it to extract the whole of the report of the IHAP, where there was one?---I believe so, yes.

10 Looking, then, at page 224, can you see that under the heading "Panel Assessment", the IHAP said that it had considered both matters together, that is to say the DA and the section 96 application?---Yes.

And that it noted the LEP history?---Yes.

And after noting the LEP history, the panel went on to say:

20 *The Panel was advised that there is no current proposal to include this site in any planning proposal to increase the height controls.*

Do you see that?---I do, yes.

The panel went on to say:

30 *This history indicates that the Council resolution would only be relevant as a policy which without further consideration, by at least the RMS, must be given little weight in the determination of these development applications, one of which breaches the 18m height limit significantly. The previous comments from RMS included:*

40 *" ... has the potential to generate a significant volume of additional traffic. Roads and Maritime will support the proposed rezoning subject to the potential traffic impacts of the maximum developable yield of the site being considered and assessed."*

And that's the end of that quote. The panel goes on to say:

*The Panel is of the opinion that the traffic impacts raised by the RMS should be fully investigated and considered.*

The report went on to say, if I can skip over the next two paragraphs - this is on page 225 now:

10 *In addition the Panel is of the opinion that the Council cannot legally determine the development application until both the development application and the Section 96 modification application have been referred to RMS under clause 104 of the SEPP either because the DA/Section 96 (which relies on the existing consent) is for new premises under clause 104(1)(a) or they propose an enlargement/extension of existing premises under clause 104(1)(b). The Panel notes that the updated VARGA traffic report*  
20 *provided by the applicant has not been referred to the RMS and this can be part of the referral to the RMS. Finally the Panel notes there is a proposed condition (18) for intersection works at Elizabeth Street and Canterbury Road and the Panel questions if this should also be considered by and referred to the RMS.*

The panel went on to say:

30 *The Panel also notes that it was not satisfied with the justification for a variation of the height under clause 4.6, particularly having regard to the requirements of clause 4.6(3)(a) (development standard is unreasonable and unnecessary and the circumstances) (b) (sufficient environmental planning grounds to justify contravening the development)*  
40 *especially having regard to the recent cases referred to in the report. The context for the Panel's position reflects that the proposal exceeds the height limit (of 18m) by some 25-30% and involves the addition of two further basement car parks and two further residential levels to an existing non-complying building.*

The recommendation was that the DA be deferred until the application has been referred to the RMS. Do you remember this now? Has this brought back what happened to the officer's recommendation to the IHAP?---No, sir, I don't.

10 Well, that's a considerable obstacle, isn't it, to the council approving a development, if it gets a recommendation from the IHAP that the DA be deferred until something is done?---It was common practice where the business paper to the CDC in circumstances where applications required a referral to IHAP, that both recommendations be included in that business paper, and then it was a matter for council to decide whether or not they accepted - because there were circumstances with other applications where they accepted the IHAP recommendation instead of mine. So it gave them the choice.

20 The fact that the IHAP recommended deferral until the application had been referred to the RMS was a considerable obstacle, was it not, to the council approving the DA?---I don't believe so, because the advice we were getting was that there was no - well, it looks like we did refer it to them.

But somehow the IHAP seems to think that isn't correct?---I can't speak for them. I don't know where they would have got that information, but - - -

30 Did you, then, draw to anyone's attention that it had been referred to the RMS?---Not that I can recall, I'm sorry.

Is it possible that that passage in your report was a mistake, the passage that said it had been referred to the RMS?---Again, I wasn't the author of the report, so it may be, yes.

40 Because other passages in it reason as to why it doesn't need to be referred to the RMS, don't they?---They do, yes. Yes.

The whole purpose of the IHAP was to provide expert opinion to assist the council in deciding how to deal with or determine a development application, wasn't it?---Well, they didn't have determination powers, to the best of my recollection, but they were there as, yes, to provide advice, exactly.

Expert advice?---Yes.

You were aware, weren't you, of the provisions of clause 104(1) of the State Environmental Planning Policy (Infrastructure) 2007 at that time? You've got them there now, but you were aware of them at the time, weren't you?---I can't say that hand on heart that I was, but - - -

10 Well, there seems to have been an argument in your report to the IHAP and therefore to the CDC that because of the provisions of the SEPP and the structure of the proposed development, there was no need for a referral of the DA to the RMS?---Yeah, that's correct, yes.

So you had plainly addressed your mind to the provisions of clause 104, hadn't you?---It's likely that, I did, yes.

20 The effect of clause 104 was that if the trigger or triggers applied, then the consent authority could not determine the application without taking into consideration any submission of the RMS, could it?---That's assuming that that clause applied, yes.

The report that you got back from the IHAP, which included a qualified lawyer, did it not, a Mr Hudson - - -?---I think there was a lawyer there, yes. I forget his name, I'm sorry.

30 Page 225:

*The Panel is of the opinion that the Council cannot legally determine the development application until both the development application and the Section 96 modification application have been referred to RMS under clause 104 of SEPP ...*

40 Then they go on to provide alternative reasons as to why.---Yes.

So that was, was it not, a very serious matter when that position was reported to council by its IHAP, wasn't it?---Well, not necessarily, because we had a QC, or SC, senior counsel, who gave us the opposite advice, if I recall.

He gave you advice that it would be wise to refer it to the RMS?---He said "wise".

Which you did not accept?---We didn't, no.

Is it a bit like the curate's egg: you would take the parts of the advice that you liked and then ignore the parts of the advice that you didn't like?---No, that's not correct.

10

Well, it was a very serious position that this DA was in for the purpose of the CDC meeting on 3 December, was it not, to have its IHAP say to it that it could not legally determine the DA until conditions were satisfied?---And their point of view was included in the report, yes.

It was a very serious situation for that DA, wasn't it?---Well, no, because we had the advice from senior counsel that it didn't apply.

20

You don't think it was a serious situation? Are you saying it was a frivolous situation?---No, no, I don't say that at all.

What are you saying, then? To have an IHAP report that says that to you, when it includes among its expert members a lawyer expert in planning matters, it's not a serious matter for council to receive that report in respect of that particular DA when it's going to deal with that DA at its CDC meeting on 3 December 2015?---Sorry, I misheard you. Yes, it is, yes.

30

Now, in addition, the IHAP report had taken the position that Mr Farleigh had put in his email to Ms Kocak as to the significance of a council resolution in relation to the breach of the planning control consisting of the building height control? I'm looking back now at page 224 of the volume. Do you see the paragraph commencing, "This history indicates"?---Yes, sir.

40

And do you accept that what the IHAP appeared to think was, as Mr Farleigh had advised, that the weight to be given to the council resolution was only as a matter of policy and nothing more, council's policy?---Yeah, I think that's fair comment.

Can I ask you this: do you recall receiving the IHAP

report?---No.

You would have received it, though?---Yeah, I think it was common practice for all directors to get copies of the IHAP reports, yes.

10 And you would have been very interested in the IHAP report on 548 Canterbury Road, wouldn't you, given the interest that Mr Hawatt, Mr Azzi and Mr Montague had in it?---No, I don't think it was for that reason. I didn't really put - decipher it that way, dealing with IHAP. I mean, they - because, as I said before, we include their comments, anyway, as part of the final report that goes up to council.

20 But that's not the point, is it? The point is what the comment is, and the comment is, "You can't legally determine this"?---But, as I said to you, that's their view.

And that it also did not accept the submission under clause 4.6?---Yes.

So what did you think would be the likely reaction of Mr Demian when he learned of the outcome of the IHAP meeting?---The likely reaction?

Yes.---Oh, probably angry.

30 Explosive?---Yes.

Who do you think he would have been on the phone to? It's not a matter of speculation, is it? You know who he would have been on the phone to?---Probably those two councillors and also Mr Montague.

Yes, and who do you think they were on the phone to?---They being, sorry?

40 Those two councillors and Mr Montague.---I take it you're --

MR PARARAJASINGHAM: I object. Could that be made clear? It's a little ambiguous at the moment. Who they would be on the phone to - it's not clear, Commissioner.

MR BUCHANAN: It was clear enough when I asked about who

Mr Demian would be on the phone to. You understood the burden of that question?---I did, yes.

You don't understand the burden of the question of who do you think Mr Hawatt, Mr Azzi and Mr Montague would be on the phone to?---No. Sorry.

10 You don't think that they might have thought, oh, I might give Spiro a ring?---They may have thought that, but I don't recall receiving a call around the IHAP recommendation, but - yeah.

Did you have any contact, apart from a call, with Mr Hawatt or Mr Azzi about this report or the outcome of it?---Not that I'm aware of. I can't be a hundred per cent sure.

20 Did you have any contact with Mr Hawatt or Mr Azzi about the consequences of the recommendation of the IHAP for the city development committee's consideration of the DA at its meeting on 3 December 2015?---I really don't recall.

Did you have any contact with Mr Montague about the consequences of the IHAP recommendation for the city development committee's consideration of the matter at its meeting on 3 December 2015?---I don't recall, sir. Sorry.

30 Do you think that you probably did?---It would have been not necessarily just in relation to the IHAP. It would have probably been - if there was likely to be any contact, it would have been in relation to the report itself and timing and, you know, whether it was ready or something like that.

Can I take you, please, to page 125 of this volume. Do you see that that's an email by you to Andy, Andy Sammut, I suggest, of 30 November 2015 at 10.53am:

*Andy*

40 *The GM wants this DA to go to 3 December CDC meeting and asked for it to be circulated as a late item, notwithstanding IHAP's deferral request.*

?---Yes.

Well, does that spur a recollection in you as to whether

you had any contact with Mr Montague on the subject of the consequences for the CDC's consideration of this DA of the IHAP report?---Just trying to think. I do recall the general manager requesting it to go up as a late item.

And what's your recollection about that, if you could provide it, please?---He either would have been calling me into his office or on the phone and just instructing me to ensure that it goes to the CDC meeting as a late item.

10

And was there any discussion that you had with Mr Montague as to why it should go to the CDC as a late item?---I can't recall that, I'm sorry.

Can you tell us whether you have an understanding as to why Mr Montague directed that it go to the CDC as a late item?

20

MR ANDRONOS: Objection. Could my friend make clear whether he's talking about whether or not the witness, sitting in the witness box today, has that understanding or whether he had that understanding at the time?

MR BUCHANAN: As the witness sits there today. Do you have an understanding of why it was that Mr Montague directed that that matter should go to the CDC meeting of 3 December as a late item?---I would only be speculating, to be honest with you.

30

How many times did Mr Montague tell you that a development application should go to a council or CDC meeting as a late item after an IHAP refusal or deferral?---I can't think of in those circumstances, but he certainly from time to time requested matters go up as late items, yes.

But an IHAP matter on a development application came within your portfolio?---That's correct.

40

So how many times were you called up to Mr Montague's office or did he give you a ring saying, "I've seen that IHAP report. Notwithstanding it, I propose that it go to the CDC meeting or the council meeting and I want you to make sure that it's put on the agenda as a late item"?---Not many times.

Were there any others?---Not that I can remember, no.

So there was just this one, as you can - that's the only

one you can recall?---That's the only one I can recall, yes.

You can't recall anything about what it was that Mr Montague indicated as to why it should go to the CDC notwithstanding the IHAP recommendation?---I would only assume that there was an urgency around it. But I can't recall Mr Montague saying anything or any words to that effect.

10

That assumption is based on your experience, is it, of how both Mr Demian and Mr Montague handled the question of delays to or expediting Mr Demian's development applications?---Yes.

That is to say, Mr Demian, as a rule, wanted them to be expedited and so did Mr Montague?---Yes.

20

And they wouldn't brook a delay if they could possibly avoid it?---That's fair comment.

Did you have any other contact with Mr Montague about this matter, that is to say, the IHAP report, the direction that it be listed as a late item - was there any other contact you had with Mr Montague about how this should be handled at this point, that is to say, with a CDC meeting coming up?---Not that I can recall.

30

Can I take you to page 124, please. Can you see that this is a continuation of the conversation initiated by your email to Mr Sammut at 10.53am on 30 November? It is forwarded, it seems, to Brad McPherson at 10.56am by Andy Sammut, and then Brad McPherson, this is reading up the page, at 12.48pm emails Mr Sammut saying, "Hello, Andy". Can you see that email?---Yes, sir.

40

I have missed something out. I do apologise. Can I take you back, just in case it was thought to have been overlooked. The email from Mr Sammut said, "Hi Brad". Then if you go over the page and then to the middle of page 125, it reads:

*Please note instruction from GM re this item.*

Signed "Andy". Sorry, I overlooked that. Do you see that?---Yes.

Then that's sent on to Mr McPherson, and Mr McPherson emails Andy to say:

*The lawyer from our IHAP, Anthony Hudson, said it would be illegal for Council to determine this application. An extract from the IHAP minutes is shown below.*

10 And then three paragraphs that I took you to in the IHAP report as extracted from the business papers for the CDC meeting are set out. Do you see that?---Yes.

Mr Sammut, at 1.19pm, still on 30 November 2015, emails Mr Montague saying:

*Hi Jim*

20 *As per your instruction the report will be going to the 3 Dec CDC, but just so you are aware of Anthony Hudson's is of the opinion that it can't be determined without referral to RMS because as outlined more fully below:*

30 *... the DA/Section 96 (which relies on the existing consent) is for new premises under clause 104(1)(a) or they propose an enlargement/extension of existing premises under clause 104(1)(b).*

*Let me know if we can obtain any further information on this for you.*

Do you see that?---Yes, sir.

Then you emailed Mr Montague in which this conversation was part of your email to Mr Montague in which you said:

40 *Jim,*

*FYI, the DA was referred to RMS today. To overcome this issue I propose to provide you with a motion that can be moved off the floor or as a Memo from you to the Councillors recommending the following (or similar):*

*"Council is generally in support of the proposed development and delegates the determination of the DA to the GM once concurrence is obtained from the RMS".*

*I await your advice.*

10 First of all, just the first sentence there, "the DA was referred to the RMS today" - this is an email you sent at 1.25pm on 30 November 2015 - would tend to indicate that as far as you were concerned at that time it hadn't previously been referred to the RMS; is that fair to say?---That's probably fair, yes.

20 Can you help us as to why the IHAP, and council for that matter, were told otherwise in the officer's report?---Because we - we had that advice in the past that we were relying on - that's what I assumed to be the case - from senior counsel.

No, no, no. Sorry. I apologise. I'll reframe the question.---Sure.

30 Do you remember that part of the report to the IHAP, the officer's report, which also went to the CDC, that said that the matter has been referred to the RMS and the RMS has given us some comments? Do you want me to take you to it?---Yes, please.

Page 92, under the heading "Referrals":

*Roads and Maritime Services  
As stated previously in the report, as per the provisions of SEPP 2007, the application was referred to the Roads and Maritime Services (RMS). The RMS has advised that it raises no objection to the proposed development subject to conditions being imposed on any development consent issued.*

40

That's the passage I'm asking you about?---Sure.

If that was correct, why did you tell the general manager that you had referred the matter to the RMS on 30 November?---I don't - I don't know, sorry. I can't

remember.

Well, an explanation would be that at the time you told the GM that you had referred the matter to the RMS, that is to say, on 30 November, you didn't think it was correct that the application was referred to the RMS and that the RMS had advised it raised no objection?---I don't - I don't recall thinking that at all, to be honest with you.

10 But you must have thought that, mustn't you?---I must have thought something like that, yes. Otherwise we would not have referred it to the RMS.

So was there anything done to ensure that council was told that the advice in the officer's report in this regard, set out at pages 92 and 93 of volume 22, was incorrect?---Not that I can recall, I'm sorry.

20 Do you think that council should have been told?---I'd be very surprised if the general manager didn't convey the message, but - - -

You didn't draw it to his attention?---Well, only in that email.

You didn't draw to his attention that there was a passage in the officer's report in this regard which was wrong?---Probably not.

30 MR PARARAJASINGHAM: I object.

MR BUCHANAN: Well, it's too late.

MR PARARAJASINGHAM: I'm going to make my objection. This witness did not agree that he knew it to be wrong in the report. His position has been - - -

40 THE COMMISSIONER: No, I think the question is put on the premise that subsequently he must have known, when he sent the email to Mr Montague with the alternative proposal of the council resolution - he must have known at that point that it hadn't been referred to the RMS, and did he go back or did he then say to Mr Montague, "By the way, what was being put before the councillors in the council officer's report was incorrect"?

MR PARARAJASINGHAM: Yes, and that presupposes that he was

aware of that at the time that he sent the email to the general manager.

THE COMMISSIONER: He must have been, because - and I thought he conceded that. He must be, because he's saying to Mr Montague, "We've got a problem that we've got to get it to RMS, so my suggestion is you approve it in principle, and then delegate the authority once RMS come back to us to approve it."

10

MR PARARAJASINGHAM: I stand to be corrected, but that wasn't my understanding of what his evidence was. In any event, Commissioner, as counsel assisting has pointed out, the answer has been given.

THE COMMISSIONER: Yes, okay.

MR BUCHANAN: Now, could I take you back to page 124?---Yes.

20

You say in the second sentence of your email to Mr Montague at 1.25pm on 30 November:

*To overcome this issue I propose to provide you with a motion that can be moved off the floor or as a Memo from you to the Councillors recommending the following (or similar) ...*

30

Why did you make that proposal?---Because I knew that the - well, the general manager had expressed on numerous occasions to me that the matter had to go before that CDC meeting. And I distinctly remember talking to our solicitor and asking him whether that was in fact - and, to be honest with you, I don't know whether I suggested that or the solicitor suggested that might be a way of moving the application along.

40

Tell us more about the memory you have, a distinct one, of talking to "our solicitor"?---Quite often we would - - -

No, no.---I would, sorry.

No, the memory that you have, a distinct memory, of talking to "our solicitor" - your words? What's the memory that you have?---In relation to this matter?

You've told us that you have a distinct memory - - -?---Yes.

- - - of talking to "our solicitor" about it. And the solicitor proposed this motion or this device?---I don't recall. I don't recall whether he proposed it.

It was a "he", was it?---Yes.

10 It was a male?---Yes. Peter Jackson.

It was Peter Jackson?---Peter Jackson from - - -

Pikes?---Pikes, yes. Or whether I thought of it and asked for his opinion. But I do remember having a conversation with him about it.

When did you have that conversation?---It would have been around that time.

20

Did you call him?---That I can't remember. I probably did. I probably did.

Why did you call Mr Jackson?---Because I was trying to ensure the GM's wishes of trying to progress the application or making it - or having it go to that particular CDC meeting.

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What was it that you told Mr Jackson?---I can't remember the detail.

Did you provide Mr Jackson with a copy of any document?---I may have. I'm not sure. Sorry, I just can't recall.

Did you provide Mr Jackson with the contents of the IHAP report?---That I can't remember.

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Did you tell Mr Jackson about the legal opinion expressed in the IHAP report about council not being legally able to determine the matter until it had been referred to the RMS?---I may have prefaced the conversation telling him that.

Did you ask Mr Jackson what his opinion was on that subject, whether council had the legal authority to determine the application without a referral to the

RMS?---I can't remember the details.

Why wouldn't you have asked - if you were in communication with council's solicitor about the matter, why wouldn't you have told him what was in the IHAP report that caused this problem in the first place?---I have no reason why, no.

You must have told him, on your account?---It's likely, yes, sir.

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Did you receive a written advice?---I may have. There may have been an email exchange between myself and Peter Jackson, but I can't be a hundred per cent sure.

MR BUCHANAN: Commissioner, I note the time. I apologise I've gone a bit over time.

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THE COMMISSIONER: All right. We will adjourn until - I'm sorry, is there anything anybody needs to raise? All right, we're adjourned until 9.30 Monday morning.

**THE WITNESS STOOD DOWN**

**[4.04pm]**

**AT 4.04PM THE MATTER WAS ADJOURNED ACCORDINGLY**

**[4.04pm]**

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