



**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

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**REPORT ON THE CORRUPTION AND CRIME  
COMMISSION'S  
INVESTIGATION AND FINDING OF  
"MISCONDUCT" BY MR MICHAEL ALLEN**



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**ERRATUM**

In paragraph 4 of the "Executive Summary" of the above report, there is a typographical error.

The year "2006" should read "2007", as is stated in the main body of the report, at para 71 et seq.

**Malcolm McCusker AO QC  
PARLIAMENTARY INSPECTOR**

7 March 2008



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**ERRATUM**

In addition to the typographical errors referred to in my note of 7 March 2008 would you please note the following additional errors:

- Para 2 of the Report line 2  
for "Graham McKenzie" read "David McKenzie"
- Para 27 of the Report, fifth last line  
for "pages go 13" read "pages 6 to 13"
- Page 28, half way down page, after  
"May two thousand and six", insert "(sic, seven)"

**Malcolm McCusker AO QC  
PARLIAMENTARY INSPECTOR**

10 March 2008



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**REPORT ON THE CORRUPTION AND CRIME COMMISSION'S  
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**EXECUTIVE SUMMARY & RECOMMENDATIONS**

1. The CCC made a finding of "*misconduct*" against Mr Allen because (as it concluded in its Report of 5 October 2007) he had "complied" with the wishes of Mr Burke in August 2006, by agreeing to appoint "a DPI officer" (Ms Pedersen) to write a "DPI report" on Smiths Beach, in preference to "other DPI officers" (Ms Clegg).
2. Before making and publishing such a grave finding a careful and thorough investigation should have been carried out. At the very least, it would be expected that the CCC would have:
  - 2.1 interviewed Ms Pedersen, to ascertain whether she had been "*appointed*" by Mr Allen to "*write a DPI report on Smiths Beach*"; and
  - 2.2 interviewed Mr Singleton, Director of the Environment and Sustainability Directorate, who was the supervisor of both Ms Pedersen and Ms Clegg, to ascertain whether there was a "DPI report on Smiths Beach" written, or to be written, in August 2006, and if so, whether Mr Allen had any power to appoint Ms Pedersen to write such a report; and whether he had appointed, or sought the appointment of Ms Pedersen, "*in preference to Ms Clegg*"; and
  - 2.3 interviewed Ms Clegg, to ascertain whether Ms Pedersen had been "*appointed*" to write "a DPI report on Smiths Beach" "*in preference*" to her.
3. However, of those persons, all of whom were obviously relevant witnesses, only Ms Pedersen was interviewed.
4. Ms Pedersen was interviewed by the CCC's senior investigator Mr Mark Ingham in May ~~2006~~ 2007. Her evidence did not support the finding of

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"*misconduct*" against Mr Allen, but negated it. She said that she did not believe she had ever been given any instruction by anyone to write a "*DPI report on Smiths Beach*"; that she had no memory of any such report; that she would have remembered if she had "*had a conversation that (she) had been allocated to do a job*"; and that she had "*absolutely no memory*" of Mr Allen ever telling her that she had been "*allocated*" the job of writing a report.

5. The evidence given by Ms Pedersen is not mentioned in the CCC's Report. I have not yet ascertained whether that evidence was ever brought to the notice of the Report's author. Mr Ingham was unable to tell me whether it was or not, when I interviewed him on 29 February 2008. It seems unlikely that it was, as that evidence contradicts the Report's finding.
6. The misconduct finding in the Report was not made on the recommendation of Mr Ingham, who was the senior investigator heading the investigation, in his Final Report of April 2007. Although he read the CCC's Report before it was tabled, it did not occur to him that Ms Pedersen's evidence was inconsistent with that finding.
7. Had the CCC interviewed the other obvious witnesses, Ms Clegg, Ms Cherrie and Mr Singleton (as did Ms Petrice Judge, the independent investigator later appointed by the Director General of DPI) further evidence, also inconsistent with the CCC's finding of misconduct, would have been revealed.
8. In August 2006 the DPI was not writing, or about to write, a "*report on Smiths Beach*". The only work on Smiths Beach then in progress was an assessment of whether the methodology used in a Landscape Study prepared by the developer's Consultants was consistent with the methodology required by the Busselton Shire TPS (the "*methodology assessment*"). Advice had been given to the consultant from time to time on that matter by the DPI's officers, Ms Clegg and Ms Cherrie. It did not involve, or result in, any "*opinion*" or "*report*" by the DPI on the merits of the proposed Smiths Beach development. Ms Pedersen played no part in the methodology assessment. It was not within her area of expertise. Ms Cherrie took the "*lead role*", with the assistance of Ms Clegg, who was never excluded from it. No suggestion was

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made by Mr Allen that she should be excluded. When Ms Clegg and Ms Cherrie were satisfied that the consultant's methodology conformed with the TPS methodology, Mr Singleton signed a letter to confirm that.

9. No satisfactory explanation has been given by the CCC for the omission from the Report of the evidence of Ms Pedersen, nor for the failure to interview Ms Clegg, Mr Singleton and Ms Cherrie, all of whom would have given additional evidence inconsistent with the CCC's finding of misconduct.
10. The "finding" or "opinion" of misconduct expressed in the Report was made
  - (a) without referring to the evidence of Ms Pedersen, which contradicted the finding;
  - (b) without interviewing important and obviously relevant witnesses, whose evidence also would have contradicted the CCC's finding;
  - (c) by "inferring" from a TI conversation on 4 August 2006 between Mr Burke and Mr Allen, that Mr Allen "agreed to appoint Ms Pedersen to write a DPI report on Smiths Beach in preference to Ms Clegg", although Mr Allen did not, in fact, say that; and
  - (d) relying on claims made by Mr Burke to Mr McKenzie and to Mr Grill in monitored conversations, to support that inference.
11. Pursuant to the CCC's recommendation in its Report, that the Director General of the DPI "*give consideration to the taking of disciplinary action against Michael Allen*", the Director General appointed Ms Petrice Judge, a senior and experienced public officer from another department (Premier & Cabinet) to conduct an investigation, pursuant to Section 81(2) of the *Public Sector Management Act*. Ms Judge conducted an admirably thorough, objective and professional investigation into the allegation of misconduct, in contrast with the CCC, which had not taken into account the evidence of an important witness (Ms Pedersen), failed to interview witnesses whose evidence was obviously (and admittedly) relevant, and relied heavily on hearsay.
12. By letter of 13 February 2008, the CCC "withdrew" its opinion as stated in its Report, and "substituted" another "opinion", that Mr Allen had "agreed to arrange for Ms Pedersen's involvement in the DPI's assessment of the

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proposed development at Smiths Beach, in preference to other officers". This was only after I had pressed the CCC, several times, to identify evidence establishing that there was a "DPI report" which, as "*found*" by the CCC in its Report, Mr Allen had agreed to appoint Ms Pedersen to write, and following the CCC's receipt of Ms Judge's report, which established that there was no such "*DPI report*", and that Ms Pedersen had never been asked by Mr Allen to write "a report".

13. An obvious problem with the vaguely expressed "*substituted opinion*" (eg what does "*Ms Pedersen's involvement*" mean?) is that, as with the original opinion in the Report, the CCC has not identified any evidence to support it, and the evidence of Ms Pedersen, both in the CCC interview of May 2006 and when interviewed by Ms Judge, as well as the other witnesses interviewed by her, refutes it.
14. The CCC failed in its obligation to state, in the Report, its reasons for the "*misconduct opinion*". In particular, it did not identify
  - (a) the evidence said to support each element of its assertion that Mr Allen agreed to arrange for Ms Pedersen to write a DPI report in preference to Ms Clegg; or
  - (b) the evidence said to establish that Mr Allen did not perform his functions in an "*impartial manner*" (an element of the statutory definition of misconduct); or
  - (c) the objective criteria for "*dismissal*" (a further element of the statutory definition) or the evidence establishing that the case fell within those objective criteria.
15. The CCC commented on my previous report, concerning its finding of misconduct by Mr Frewer, to the effect that there was merely a "*difference of opinion*" between the Parliamentary Inspector and the Commissioner, as to the interpretation of the evidence. That is not so. In Mr Frewer's case, and now in Mr Allen's, the CCC's investigation was demonstrated to be inadequate. Its "*opinion*" of misconduct was unsupported by the evidence, and was contrary to the evidence which the CCC had, as well as other

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- evidence that a full investigation would have obtained. It is not merely a "difference of opinion" as to the interpretation of the same evidence.
16. The CCC failed to comply with its statutory obligation under section 86 of the *Corruption and Crime Commission Act*. The notice which it gave to Mr Allen, of proposed "*adverse comment*", in reply to which he made representations to the CCC, was substantially different from the basis for the opinion stated in the Report, of which no notice was given to him.
  17. The CCC contention, that the Parliamentary Inspector (who is an "officer of the Parliament") cannot review and report on an adverse finding made in a CCC Report which it has tabled in the Parliament "*including any factual errors, or inadequacy of the evidence relied on by the CCC to support the finding*", is incorrect. That would mean that the power of the CCC to make and table findings of "*misconduct*" by any public officer, (with the serious consequences that follow) would be absolute and unchecked, and not subject to review and criticism by the Parliamentary Inspector. That is contrary to the intention of the Parliament, manifest both in sections 195 and 196 of the Act, and the Parliamentary debates on the CCC Bill.
  18. The CCC has failed satisfactorily to explain in the Report why it decided to publicly examine Mr Allen, with (foreseeable) consequential damage to his reputation and career.
  19. The delay between Mr Allen's examination, in November and December 2006, (when he was, to use his term, "*pilloried in public*") and the publication of the CCC's Report in October 2007, was unacceptable and unfair to him. It was not until then that the Director General, acting on the CCC's Recommendation in the Report, commissioned an objective and more thorough investigation, which found that he had "*no case to answer*".

### **Recommendations**

20. The CCC should now conduct (as I have requested the Commissioner on 4 March 2008) an internal investigation to determine why no mention of the crucial evidence of Ms Pedersen was made in its Report tabled in the Parliament on 5 October 2007 (and whether that evidence was considered) and then report to the Parliamentary Inspector, for his consideration of

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whether to hold an inquiry, pursuant to Section 197, into whether any CCC officer has been guilty of "misconduct".

21. Investigative officers of the CCC should be instructed that there must be the same thorough and objective investigation as for the investigation of an allegation of a criminal offence, into an allegation of "*misconduct*", because of the serious consequences of a finding of misconduct. They should also be instructed on the danger of placing reliance on "hearsay".
22. A decision to publicly examine a person, and then to put to that person damaging allegations in public, ought not to be made before that person has been privately examined, the allegations put to him or her, and a full and thorough investigation carried out (including any matters raised by that person in response) to ensure that there is a sound evidentiary basis for the allegations.
23. When the CCC has found (or made an "assessment") that a public officer is guilty of misconduct, and has decided to recommend to the head of the relevant department that "consideration be given to disciplinary proceedings", as a general rule the CCC should not table a report with its finding of misconduct before the relevant department has, in accordance with the CCC's recommendation, commissioned an independent investigation, and its report on that investigation has been received and considered by the CCC.
24. The CCC should publicly acknowledge that it was in error in finding that Mr Allen was guilty of misconduct, and withdraw not only the "opinion" of misconduct by Mr Allen as expressed in its Report of 5 October 2007 (which it withdrew on 13 February 2008) but also its "substituted" opinion of 13 February 2008, as neither opinion is supported by evidence, and both are inconsistent with evidence which the CCC had, but did not refer to in its Report, as well as the evidence of other relevant witnesses not interviewed by the CCC.



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**Introduction**

1. In late 2005, the Corruption and Crime Commission ("CCC") began investigating alleged "*funding irregularities*" in the Busselton Shire Council elections. Essentially, the allegation was that Canal Rocks Pty Ltd was the indirect and undisclosed source of funding for some candidates believed to be in favour of its controversial proposal for the development of coastal land owned by it at Smiths Beach, in the South West of Western Australia.
2. That development had been proposed for several years. Many residents in the area, permanent and part-time, opposed it. Mr ~~Graham~~ David McKenzie, a real estate agent, was a director of Canal Rocks Pty Ltd. It had engaged the consultancy services, through their respective companies, of two former WA Labor politicians, Mr Brian Burke (an ex-premier) and Mr Julian Grill (an ex-minister).
3. For the purposes of its investigation of the alleged "*funding irregularities*" the CCC obtained a warrant, under the *Telecommunications (Interception & Access) Act 1979 (Commonwealth)*, to covertly intercept (inter alia) telephone calls to and from Messrs Burke, McKenzie and Grill. It also obtained a warrant, under the *Western Australian Surveillance Devices Act 1998*, authorising it to install in the private residence occupied by Mr and Mrs Grill, a surveillance device (or "*bug*", as it is often called).
4. The CCC then proceeded to covertly monitor and record telephone conversations between (among others) Messrs Burke, McKenzie and Grill, and private conversations in the Grill residence. In the course of those recorded conversations the CCC overheard, as might be expected, many conversations which were totally irrelevant to the subject and purpose for

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which the warrants had been originally issued (the source of funding of some candidates for Shire Council elections).

5. These unrelated conversations included discussions, in August 2006, about a proposed amendment to the Busselton Shire Town Planning Scheme ("Amendment 92") which Canal Rocks Pty Ltd believed to be contrary to its interests (although whether it was, in fact, was questionable) and also a report which it apparently believed was being prepared by the Department of Planning and Infrastructure ("DPI") on the "*developable area*" of the Canal Rocks Pt Ltd land. Those conversations did not refer to the alleged "*election funding irregularities*".
6. The conversations about "*Amendment 92*" caused the CCC to suspect a senior civil servant, Mr Paul Frewer, of "*misconduct*", by "*seeking the deferral of Amendment 92 at the request of Mr Burke*". This later became a "*finding*" in a Report by the CCC in October 2007. In my report to the Parliament of 8 February 2008, I stated that the CCC had no evidence reasonably capable of supporting that finding, and recommended that the CCC publicly acknowledge its error, which (regrettably) the CCC has refused to do, asserting (incorrectly) that there is merely a "*difference of opinion*" between the Parliamentary Inspector and the Commission, as to the conclusions to be drawn from the same evidence.
7. Presumably, it is to be inferred from that statement, that the CCC maintains that :
  - (a) it considered all of the relevant evidence which I considered; and
  - (b) its "*opinion*" was one which was reasonably open to it.As my report makes clear, neither is correct. The CCC did not consider all of the relevant evidence (which I did) before it made its finding of "*misconduct*" in the Report.
8. The "*Amendment 92*" conversations also caused the CCC to suspect Mr Michael Allen of misconduct by (as it was put in a letter of 19 January 2007 from the CCC to him - the "S.86 notice") forwarding to Mr Michael Schramm, the DPI's representative on the SWRPC (which had Amendment 92 on its agenda) an email from Mr Burke, outlining "*the opposition to the progression of*

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*Amendment 92*" because (as the S.86 notice put it) Mr Allen "*made no enquiries to confirm the merits of this opposition*". Mr Allen pointed out to the CCC, however, that his email to Mr Schramm, forwarding Mr Burke's email, said "*I don't know anything about the amendment or why it is going to the Committee. I'll leave that issue to your judgment*".

9. In the light of that, the suggestion in the CCC's letter that Mr Allen's conduct was "*not impartial*" and therefore "*misconduct*" was obviously untenable. Mr Allen's email is reproduced in full at page 79 of the CCC's Report. I would add that even if he had not sent that email to Mr Schramm, I am unable to see how it could be considered "*misconduct*" for a public officer to pass on to the appropriate officer a submission from a member of the public, without any comment. I would have thought it more likely to be "*misconduct*" if the submission were not passed on to the appropriate officer, and simply ignored or destroyed. To do that would be a breach of the Public Sector Code of Ethics, and the stated duties of a public officer in dealing with "*members of the community*".
10. In any event, that proposed "*misconduct*" finding suggested by the CCC in the S.86 notice was abandoned, because (as the CCC's Report conceded (p. 79)) Mr Allen's email did not "*suggest any attempt by Mr Allen to influence Mr Schramm in taking a stance that would favour Canal Rocks Pty Ltd*".
11. However, other intercepted conversations between Messrs Burke, Grill and McKenzie, about a "*DPI report*", caused (or so it would seem) the CCC to suspect Mr Allen of "*misconduct*" by arranging for Ms Pedersen's "*participation in preference to other DPI employees*" in "*the DPI's assessment of the proposed development at Smiths Beach*". I say, "*so it would seem*", because that was another proposed finding in the 19 January 2007 "S.86 notice", to which Mr Allen responded; but as I shall explain, that was not the "*misconduct*" finding which ultimately appeared in the CCC's October 2007 Report.
12. Neither the examination of Mr Frewer's conduct, nor that of Mr Allen, had anything to do with the original purpose of the CCC's investigation, for which it had obtained TI and SD warrants. They were entirely collateral matters.

13. As I will explain in this report, the CCC's finding of "*misconduct*" against Mr Allen and the serious "*collateral damage*" this caused to Mr Allen, resulted from an inadequate and unsatisfactory investigation, and a failure by the CCC to obtain and then to objectively review and consider all relevant evidence, before reaching its conclusion of "misconduct". Instead, the CCC reached that conclusion, and has adhered to it, by what can only be described as "teleological reasoning".
14. Mr Michael Allen was executive director of statutory planning with the Department for Planning and Infrastructure ("DPI"). He was a senior public servant with an unblemished record, who had been with that Department since September 1977. In 2006 he was summonsed to give evidence at a public examination conducted by the CCC, in relation to an investigation of "*alleged public sector misconduct linked to the Smiths Beach Development at Yallingup*" ("the Smiths Beach Investigation"). He gave evidence in November and December 2006.

**Mr Allen's complaint, before the CCC Report's publication**

15. By letter dated 31 July 2007, before the Commission ultimately published its Report, Mr Allen wrote to me, complaining about the way in which the Commission had conducted its investigation, and its treatment of him as a witness in the public examination. His letter said, in part:

*"my experience leaves me with the impression that the Commission is more interested in creating a circus for the entertainment of the public, the media and whoever, than in showing any concern for the protection of basic human rights"*.
16. Following this were detailed criticisms of a number of aspects of the Commission's investigation and the conduct of the public examination. Included in those criticisms was the assertion that, after the hearing, he had received a letter outlining the CCC's preliminary conclusions, adverse to Mr Allen, (i.e. the S.86 notice) to which Mr Allen had responded, but which he contended "*contained nothing but errors of fact*" as well as being threatening in its terms. One of those "*preliminary conclusions*", later dropped, was that referred to at paragraphs 8 - 10 above.
17. Another criticism was "*unacceptable delay*" by the CCC in releasing a final report. Mr Allen's concern was that he had been, as he put it, "*pilloried in*

*public*". He said that this had seriously impacted on his role as an executive director in the DPI. He therefore wanted the final report - which he expected would fully exonerate him from any wrongdoing - to be published as soon as possible.

18. I discussed Mr Allen's complaint with him on 2 August 2007, and replied in detail, by letter dated 9 August 2007. A copy of my letter is **annexed**. I also forwarded to the present Commissioner, Mr Len Roberts-Smith QC, a copy of Mr Allen's letter of complaint of 31 July 2007, and my letter of 2 August 2007 in reply. I requested that the Commissioner discuss with "*the relevant officers and counsel*" the matters raised by Mr Allen, and provide me with the Commission's response to them. I received a short reply from the Commissioner, by letter dated 14 August 2007, stating that the Commission was then concluding its inquiry and "*intends tabling a report in Parliament shortly*". The letter said that "*the report is likely to touch on issues connected with Mr Allen's relationship with Messrs Burke and Grill*"; and concluded by stating "*in the meantime, the Commission will start to prepare a response to your letter*".

#### **The CCC Report and "findings"**

19. The CCC's report ("the Report") was not tabled until 5 October 2007. I had not, at that time, received any further response from the CCC. The Report contained a finding of "*misconduct*" against Mr Allen. It stated at page 3, repeated at para 5.4.1, page 80; and para 7.2.1 page 106 (emphasis added):

*"Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to subparagraphs 4(d)(ii) and (vi) of the CCC Act. "*

"*Recommendation 3*" of the Report, at page 12, repeated in para 5.4.1, page 80 and para 7.6 page 112 said that the DPI's Director General should consider taking disciplinary action against Mr Allen

*"for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report".*

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The "*certain departmental officer*" was Ms Barbara Pedersen, who was the Manager, Coastal Planning, of the DPI. Her name was mentioned when an intercepted telephone conversation between Mr Burke and Mr Grill was publicly played in the course of Mr Allen's examination. Although her name was suppressed in the course of his second examination, that was not at her request. She had not, at that stage, been interviewed, (although she was interviewed later, in May 2007).

20. In addition, at page 10 of the Report it was asserted that Mr Allen (and Mr Frewer) were "*apparently susceptible to the influence of, mainly Mr Burke*" and that "*it is of concern to the Commission that two such senior DPI officers should compromise the Department's integrity. Their conduct demonstrates a failure by them to meet their obligation of impartiality in promoting and sustaining the public interest*". The Report gave no reason, or explanation, by reference to any specific evidence, for this damaging assertion.

#### **Mr Allen's further complaint after the CCC Report**

21. By letter dated 10 October 2007 Mr Allen made a further complaint to me regarding the CCC's finding in the Report, which he claimed was made without any evidentiary basis, and in disregard of information which he had offered. He also alleged that it had failed to comply with section 86 of the *Corruption and Crime Commission Act*, in that the notification of a possible "*adverse finding*", given to him by letter dated 19 January 2007, ("the S.86 notice") and to which he had responded, differed significantly from the adverse finding in the Report, to which he had been given no opportunity to respond before it was published. These were serious allegations, which were not merely general, but accompanied by specific detail.
22. I replied to Mr Allen's letter by letter dated 15 October 2007, in which I sought clarification from Mr Allen on one matter, and at the same time informed him that I was raising his concerns with the Commissioner. I did so by letter dated 15 October 2007, in which I repeated my as yet unanswered request of 9 August 2007 for the CCC's comments on the matters raised in that earlier letter.

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23. I received a response, by letter dated 30 October 2007, and forwarded a copy of that response to Mr Allen. Mr Allen then provided me, by letter dated 17 November 2007, with his criticisms of the CCC's letter, and I wrote to him on 30 November 2007, asking him to provide me with a copy of an internal memorandum, referred to in his previous correspondence. This he did under cover of letter dated 4 December 2007, at the same time informing me that he was now facing "*departmental disciplinary proceedings*", as a result of the "*misconduct*" finding by the CCC, and the recommendation in the Report, that the Director General of DPI give "consideration to taking disciplinary action".

**The DPI's independent investigation: "no case to answer"**

24. On 6 November 2007 the Director General of the DPI, acting on the Report's "*Recommendation 3*", appointed Ms Petrice Judge, a senior public officer from the Department of Premier and Cabinet, to conduct an independent investigation, in order to determine whether there was any basis for "*disciplinary proceedings*" to be taken against Mr Allen. This action was taken by the Director General pursuant to section 81(2) of the *Public Sector Management Act*. It was the proper response to the CCC's recommendation. After a much more thorough investigation than the CCC's, in the course of which she interviewed a number of relevant DPI officers who had not been interviewed by the CCC before it delivered its Report, the investigator concluded that Mr Allen had "*no case to answer*". Mr Allen was so informed on 21 January 2008. I received a copy of the DPI's investigator's report ("the DPI report") on 29 January 2008. A summary of the "*DPI report*" has since been publicly released by the Director General.

**Request for reasons for the CCC's misconduct finding and its response**

25. On 5 February 2008 I again wrote to the CCC, which on 31 January 2008 had responded to a number of matters which I had raised with it, questioning the reasons for its finding of "*misconduct*" against Mr Allen. In that letter, I gave the CCC notice, pursuant to section 200 of the *Corruption and Crime Commission Act*, that I proposed to deliver a report to the effect that its finding of misconduct by Mr Allen was "*fundamentally flawed*", for reasons stated in the

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letter (essentially, the lack of any evidence capable of supporting it, and an inadequate investigation). I invited the CCC's comment, and concluded by recommending that it publicly withdraw its "*finding*" of misconduct against Mr Allen.

26. The CCC replied, at some length, by letter dated 13 February 2008. It began by contending that it was not part of the statutory functions of the Parliamentary Inspector, in reviewing a CCC investigation and its consequent report, to consider and report on any "*factual errors, or inadequacy of evidence relied on (by the CCC) to support damaging findings in the CCC's report of (its) investigation*". I do not agree, for reasons stated later.
27. I replied to the CCC's letter on the same day (13 February 2008) seeking further information about some matters which it claimed supported its finding of misconduct against Mr Allen, and requesting copies of all transcripts of evidence (whether from interviews or examinations) of any witnesses whose evidence was considered to be relevant to the conduct of Mr Allen. I also requested that the CCC identify the "*precise evidence*" said to support the Commission's "*opinion*" of "*misconduct*" including evidence of what was the "DPI report", whether there was one, and if so who wrote it; and what evidence there was that Mr Allen had either "appointed" or "agreed to appoint" Ms Pedersen to write it. The CCC replied on 18 February 2008. As to my request for the "*precise evidence*", the CCC simply referred me to its earlier letter of 13 February 2008, at pages 6 ~~go~~ to 13. That was distinctly unhelpful, and missed the point. What is set out in those pages is simply a series of assertions and conclusions, unsupported by any identifiable evidence, references to the opinions of Messrs Burke, Grill and McKenzie, and conversations between those men, to which Mr Allen was not privy. What I requested was the evidence.

**The CCC's withdrawal of its "opinion" and "Recommendation", and substitution**

28. In its letter of 13 February 2008, however, in response to my request to identify the evidence relied on by the CCC for its opinion of misconduct (as stated in its Report at para 7.2.1) that Mr Allen had "*agreed to appoint (Ms Pedersen)*" to write "*the DPI report on Smiths Beach*", the CCC "*withdrew*" that

opinion and substituted a new "opinion". (Although not expressly stated in the CCC's letter, I infer that this is also intended to be substituted for the two identical opinions expressed at page 3 and para 5.4.1 of the Report). It also "withdrew" Recommendation 3, at para 7.6 of the Report, and substituted a new "Recommendation 3". It is implicit that this "withdrawal" and "substitution" applies also to the identical "Recommendation 3" at page 12 and at para 5.4.1 of the Report.

29. The relevant parts of the CCC's letter of 13 February 2008 are:

*In retrospect, the Commission accepts the word "appoint" was likely to convey a different meaning from that which was intended....*

*... the Commission accepts that the word "appoint" should not have been used and would accordingly reframe its opinion and recommendation to reflect its consistent intention.*

*The Commission withdraws its opinion (at [7.21] of the Smiths Beach Report), that -*

*"Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the Department for Planning and Infrastructure (DPI) report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act."*

*And substitutes instead the opinion that -*

*"Mr Allen's conduct in August 2006, in agreeing to arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach, in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act."*

*The Commission withdraws recommendation 3 (at [7.6] of the Smiths Beach Report) -*

*"That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report."*

*and substitutes instead, the recommendation -*

*That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to him agreeing to arrange the involvement of a certain departmental officer in the DPI's assessment of the proposed development at Smiths Beach.*

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*In substituting this recommendation to stand in place of recommendation 3 in the Smiths Beach Report, the Commission acknowledges that disciplinary proceedings against Mr Allen were taken by the Director General (DPI) and the charge based on the former recommendation was found not to be made out. On the Commission's reading of the DPI Investigator's reasons, the same outcome would have resulted had the charge of the disciplinary offence been cast in the terms of the Commission's substituted recommendation.*

30. This "substitution" puts the basis for the "misconduct" opinion or finding on a very different one from that originally stated in the Report. The original "finding", that Mr Allen agreed to "appoint" Ms Pedersen to "write a report", has now been withdrawn. That begs the question, why was it in the Report in the first place? Although the CCC maintains that its "substituted" finding still constitutes "misconduct", the proposition that Mr Allen "arranged" for "Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach in preference to other officers (i.e. Ms Clegg), has to be considered against the factual context, and in particular with an understanding of the positions and responsibilities of officers of the DPI, Ms Pedersen, Ms Clegg, Ms Cherrie, Mr Singleton and Mr Allen, in August 2006. As will be explained below, Mr Allen could not, and did not, "arrange for Ms Pedersen's involvement ... in the DPI's assessment of the proposed development at Smiths Beach, in preference to other officers", (the "substituted" opinion) nor is there any evidence that he agreed to do so.
31. Mr Allen attempted to provide that understanding, in his public examination (T1303.12) when he asked counsel assisting "Can I explain the relationship of these people". To that, counsel assisting said "In a moment"; but did not return to the subject.

### **Need to state reasons for a finding of misconduct**

32. One would expect to find, in the Report itself, clearly and succinctly stated, the evidence on which the finding of "misconduct" against Mr Allen was based. Any such finding, and any adverse comment, should be supported by explicit reference to the supporting evidence, not necessarily verbatim, but at least sufficiently clear so that the reasons for the conclusions reached

may be understood. It is not enough merely to state a conclusion, without explaining the reason for it.

33. Section 84(3) of the *Corruption and Crime Commission Act 2003* provides:

*The Commission may include in a report under this section –*

- (a) *statements as to any of the Commission's assessments, opinions and recommendations; and (emphasis added)*
- (b) *statements as to any of the Commission's **reasons** for the assessments, opinions and recommendations*

34. "Reasons", in this context, means more than simply expressing an "opinion" or conclusion that a person has engaged in certain conduct which (if engaged in) could be "misconduct" and then stating that in the opinion of the CCC it is misconduct. That is circular. The CCC must explain, in a Report, the reasons why it has concluded that the person has engaged in the specified conduct. That is, what was the evidence which led to that conclusion?

35. This requirement, to give reasons by reference to the evidence, is always necessary in the interests of fairness and justice. It is particularly important when the CCC is determining whether to make a finding of misconduct, because of the grave consequences for a person who is the subject of such a finding. As Gleeson CJ (later Chief Justice of the High Court) said in the Court of Appeal of New South Wales, dealing with similar legislation, in Greiner v Independent Commission Against Corruption (1992) 28 NSW 125:

*"The publication of findings of Royal Commissions or a Commission such as the present defendant, or the Criminal Justice Commission of Queensland, although they do not affect or create legal rights or obligations, can have the most far-reaching consequences for the reputation of citizens."*

36. In the same case, Gleeson CJ (p. 129) observed that although a "finding" under the ICAC Act - like a "finding" of misconduct under Section 4(d) of the CCC Act - is "provisional *only*", in the public perception the conditional premise ("could constitute a disciplinary offence") upon which it is based could easily be "obscured" by "the unconditional form of such a conclusion" (i.e. a "finding" or "opinion").
37. The CCC acknowledged the seriousness of a finding of "misconduct", at paragraph 1.5 of the Report

*"An opinion formed by the Commission under the CCC Act that misconduct has occurred is a serious matter. It may affect individuals personally and professionally. It has the capacity to affect relations between those of whom the Commission has adversely mentioned, and their family, friends and acquaintances. Accordingly, there is a need to exercise care in forming opinions as to the occurrence of misconduct.*

*The Commission does not act as some roving moral guardian, with its own idiosyncratic views of what is in the public interest.*

*The Commission is a creature of statute and its rights and obligations are governed by statute. 'Misconduct' is expressly defined, but even within the definition (e.g. s.4(d)) what may be 'impartial' or what may constitute 'misuse' can give rise to debate. But the Commission's function is to measure conduct against the statutory definition before expressing an opinion that it constitutes 'misconduct', (see Greiner v ICAC (1991) 28 NSWLR 125)"*

38. But for the CCC to say that in its opinion Mr Allen agreed "to appoint the DPI officer (Ms Pedersen) preferred by Mr Burke in preference to other officers (i.e. Ms Clegg) is stating no more than a conclusion, and begs the question, what is the evidence, or reasons, for that conclusion?

### **Hearsay evidence**

39. It is a well established principle of law, that (with a few irrelevant exceptions) evidence of what A has said to B, about the conduct of C, is not evidence against C. That rule is of such long standing, so well understood and basic to our system of justice that I would not have thought it necessary to mention it in this report, but for the fact that the CCC has relied on hearsay to a considerable degree, for its conclusions.
40. The reason for the rule is well understood, and not only by lawyers. It is really a matter of commonsense. In "Cross on Evidence", a textbook edited by J D Heydon, a Justice of the High Court of Australia, the "hearsay" rule is stated thus:

*"an assertion other than one made by a witness while testifying ... is inadmissible as evidence of any fact asserted".*

And at paragraph 31020:

*"The rule against the admission of hearsay evidence is fundamental".*

41. Although s.135 of the CCC Act states that

*"Except as otherwise stated in this Act, the Commission is not bound the rules or practice of evidence (sic) and can inform itself on any matter in such manner as it thinks fit"*

it would obviously be quite unsafe to find, for example, that Mr Allen had appointed or agreed to appoint Ms Pedersen to "write a DPI report", based solely or mainly on a statement by Mr Burke to Mr McKenzie to that effect. If Mr Burke said that, he may, or may not, have believed it to be true; but is there any "hard evidence", in the form of statements by either Mr Allen, Ms Pedersen, or any other DPI officer, to establish that it was true?

42. In response to me, when I questioned the CCC's reliance on "hearsay" - particularly of what Mr Burke said to Mr Grill or Mr McKenzie - as evidence of "misconduct" by Mr McKenzie, the CCC said in a letter dated 4 March 2008 (underlining added):

*The Commission takes the position that before making any determination of fact involving the assessment of hearsay evidence, it should weigh that against all the other evidence before it on the issue in question and then give the hearsay evidence such weight as that consideration suggests it deserves.*

*In this instance, whilst it is correct to say that the word "report" came out of the telephone conversation between Mr Burke and Mr McKenzie, the conclusion that (however described) the document they were talking about – and which Mr Allen and Mr Burke were talking about – was the same thing, was inescapable. It was the DPI response on the methodology of the report on developable area and visual landscape assessment. And self-evidently the one Burke/McKenzie conversation to which you refer was not the only evidence of the document which Mr McKenzie (and hence Mr Burke) wanted from DPI. That also included a telephone conversation between Messrs Burke and McKenzie at 1059 hours on 4 August 2006 (copy attached); Mr Burke's telephone call to Mr Allen's office at 1054 hours on 4 August 2006 (made while Mr Burke was still on the line to Mr McKenzie in the previous call); and the Burke/Allen telephone conversation at 1452 hours on 4 August 2006, as well as what Ms Pedersen said about it, which I have already mentioned. It was not an "unsafe" basis upon which to proceed and indeed subsequent events, including the DPI disciplinary investigation, showed it to be correct.*

43. Apart from the fact that, in the TI conversation between Mr Burke and Mr Allen, there was no mention of any "document", the CCC's response misses the point:

- 43.1 The "substituted" opinion of the CCC is that Mr Allen agreed to "arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach, in preference to other officers". Read in isolation, that does not appear to be "misconduct" at all. As I

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understand it, however, the gravamen of the CCC's "finding" is that Mr Allen "complied" with the wishes of Mr Burke, by "arranging" for Ms Pedersen's "involvement" (etc) in preference to Ms Clegg, another DPI officer, and that this was a failure to act "impartially".

- 43.2 Putting aside the question of whether that would necessarily be "misconduct", the question is, where is the evidence to support this "substituted" opinion?
- 43.3 Nowhere in the TI conversation of 4 August 2006 did Mr Allen say that he would arrange to involve Ms Pedersen "in the DPI's assessment" (or anything else) in preference to Ms Clegg. If, by the "DPI's assessment", the CCC means the DPI's ongoing advice on, and appraisal of, the methodology used by the developer's consultant in its Landscape Study (as now appears to be the proposition, although it did not know what it was, when the Report was tabled) and assuming (as the CCC now says) that that was what Messrs Burke and McKenzie were really talking about, when referring to a "DPI report", Ms Pedersen's evidence, both in her interview by Mr Ingham, and her later interview by Ms Judge, clearly shows that (a) she was not "involved", nor was she requested by Mr Allen or anyone else to be "involved" in that "methodology appraisal", and (b) those "involved" in it were DPI officers Ms Cherrie and Ms Clegg, who reported to Mr Singleton. Furthermore, that is borne out by the statements made to Ms Judge by Ms Cherrie, Ms Clegg and Mr Singleton.
- 43.4 So the only "evidence" relied on by the CCC for its "substituted" opinion is the TI conversation of 4 August 2006 between Mr Burke and Mr McKenzie and a telephone call made to Mr Allen's office on the same day (when Mr Burke left a message, but did not speak to Mr Allen).
- 43.5 How does that hearsay evidence "weigh against all the other evidence", as the CCC puts it? None of the "other evidence", of Ms Pedersen, Ms Cherrie, or Mr Singleton, lends any support to the

CCC's substituted opinion. To the contrary, Mr Allen did not "arrange for Ms Pedersen's involvement" in the "methodology appraisal". She did not become "involved", as it was not her area of expertise. Ms Clegg was not excluded (or by-passed) from that appraisal. Although Ms Cherrie took the lead role, subject to Mr Singleton, the Director, who ultimately signed a letter, confirming that the methodology used in the consultant's study conformed with the TPS methodology, Ms Clegg was also involved in the methodology appraisal.

**What is the evidence of "misconduct" on which the CCC relied?**

44. At page 79 of the Report it is stated: *"the telephone conversations suggest that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes"*. Surely Mr Burke's views about Mr Allen, as expressed to Mr McKenzie in an intercepted telephone call are not in themselves relied on by the CCC for an adverse finding against Mr Allen? Yet, immediately following this statement, and presumably for the purpose of supporting it, the Report goes on to say: *"This would certainly appear to have been Mr Burke's view (at least on the face of it) since he subsequently told Mr McKenzie that Mr Allen's actions had been 'true to form'"*.
45. Following that, the Report refers to a conversation of 4 August 2006, between Mr Burke and Mr Grill, recorded by a *"surveillance device"* placed in Mr Grill's residence, and says:

*"Mr Grill was also aware of, and involved in the successful attempt to obtain a particular report writer. At 12.30 pm on 4 August 2006, in discussions at 1/53 Mount Street, Mr Burke informed Mr Grill that he had asked Mike Allen to ensure that the particular officer did the DPI report on Smiths Beach because she was familiar with the project and they needed it quickly etc. Mr Burke told Mr Grill that Mr Allen had rung back and said 'yes' and that her boss was very strongly in support"*.

I presume that this reference to a *"successful attempt to obtain a particular report writer"* must also now be "withdrawn" in the light of the withdrawal of the Report's *"opinion"* and *"Recommendation"*, as it is now no longer the CCC's *"opinion"* that Mr Allen either agreed to *"appoint"* or did appoint Ms Pedersen to *"write the DPI report"*.

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46. Clearly, the Report treats both of these conversations, one between Mr Burke and Mr McKenzie, the other between Mr Burke and Mr Grill, as "*conversations*" which, according to the CCC Report, "*suggest that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes*", and that in turn, those two conversations (albeit only one was on the telephone) are evidence relied on by the CCC for its finding of "*misconduct*". If there were any doubt about that, first there was only one relevant telephone conversation between Mr Burke and Mr Allen (on 4 August 2006); secondly, in correspondence with me, in answer to my request for the specific evidence relied on for the "*misconduct*" finding, the CCC has expressly referred to these two pieces of hearsay; and, thirdly, the CCC's senior investigator, Mr Ingham, referred to it as supporting the "*misconduct*" finding when I interviewed him on 29 February 2008.
47. During his public examination, Mr Allen (T1305) had played to him a telephone conversation of 4 August 2006 between Mr Burke and Mr McKenzie. He was asked if he accepted the description "*true to form*" given of him in that conversation by Mr Burke, in the sense (as it was put to him in the examination) of "*someone who would do the bidding of others*". Mr Allen replied indignantly, "*I deny that absolutely*". No reason was given for that disparaging proposition. At no time in his two public examinations, apart from that, was Mr Allen asked to comment on what Mr Burke had said in either of his recorded conversations with Mr McKenzie or Mr Grill. Nor did Mr Burke, in his public examination, say that was what he meant by the phrase. To the contrary (see T1146) when the same suggestion was made to him by counsel assisting, he replied "*Certainly not, and he (ie Mr Allen) wasn't*".
48. The danger inherent in the CCC relying on anything said in conversations between Mr Burke and Mr McKenzie or Mr Grill, as evidence against Mr Allen, is so obvious that it goes without saying. Not only is it hearsay, which is always dangerous to rely on (even though S.135 of the Act does not prohibit it); but the possible tendency of Mr Burke, like many lobbyists, to overstate his value and influence (or, to use a common term, "pump up his

own tyres") and to claim "influence" that does not exist, plus the CCC's own views of Mr Burke's credibility, increase that danger.

49. At page 76 of the Report (in a different context) the CCC conceded that *"it would view such claims by Mr Burke with caution"*. This referred to an intercepted call from Mr Burke to a solicitor for Canal Rocks Pty Ltd, when he said that he and Mr Grill had been able to get Mr Allen and Mr Frewer to effectively adjourn a decision on Amendment 92. In fact, as the Report accepts (p 78-9), Mr Allen did nothing to obtain or seek to obtain an adjournment, even if Mr Burke thought he had. Why, then, did the CCC not treat things said by Mr Burke to Messrs Grill and McKenzie, about Mr Allen, with similar *"caution"*? Particularly where the direct evidence of other witnesses, Ms Pedersen, Ms Clegg et al contradicts Mr Burke's claims.

#### **The reasons stated in the Report**

50. Far from specifying the evidence which was relied on by the CCC for its finding of *"misconduct"* the Report is both brief and vague. It said:

*"Mr Allen, however, had subsequent discussions with Mr Burke regarding whom Canal Rocks Pty Ltd would prefer to have as the DPI officer appointed to write a report on the development. These discussions occurred both at personal meetings and on the telephone."*

And

*"As has been noted, the object of the discussions was to obtain a particular report writer. Mr McKenzie confirmed that he wanted this because the desired person was considered more favourably inclined to the development. Mr Burke made this view known to Mr Allen and the desired person was in fact appointed. Mr Allen said that this person was appropriate in any event because she had had previous involvement in the project. That may be so, but the telephone conversations suggest that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes."*

51. That is virtually all that the Report says about the *"evidence"* said to support its *"misconduct"* opinion (apart, of course, from the hearsay discussions between Mr Burke and others). It does not say when the *"subsequent discussions"* took place; or the substance of what was said; or the source of the evidence of them. It does not say how or when Mr Burke *"made this view known to Mr Allen"*; nor what he actually said; nor what Mr Allen replied; nor what telephone conversations *"suggest that Mr Allen was improperly influenced*

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by a desire to comply with Mr Burke's wishes" (although I suspect that they are the "hearsay" conversations referred to above).

52. After those passages in the Report, (which are not statements of reasons, but merely conclusions or assertions, with no explanation, by reference to any evidence, of how they were reached) the Report continues, p.80:

*"Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act."*

53. Again, no explanation (by reference to any evidence) is given for this conclusion. When, and how, did Mr Allen "agree" to appoint the DPI officer prepared by Mr Burke to write the DPI report in preference to other DPI officers? Was the "agreement" in some (unspecified) telephone discussion? And what was actually said, that supports any conclusion that Mr Allen so "agreed"? The Report does not tell us. It does not even say whether (and if so, when) Mr Allen did "appoint" Ms Pedersen to write "the DPI report", although "Recommendation 3" implies, again unsupported by reference to any specific evidence, that he did.

54. The "misconduct" of Mr Allen was said, in the CCC's Report, to be that defined by s.4(d)(ii) and (vi) of the CCC Act, that is to say "*conduct involving the performance of his functions in a manner that was not impartial*" and which "*constitutes or could constitute a disciplinary offence providing reasonable grounds for the termination of (his) employment as a public service officer under the Public Sector Management Act*".

55. The CCC, in discharge of its obligations to state its reasons for the finding, should have identified the following in its Report:

55.1 The evidence said to establish that Mr Allen "performed his functions in a manner that was not impartial". That would not be established merely by evidence, (of which in any event there is none) that he "agreed to arrange for the involvement of Ms Pedersen in the DPI's assessment (etc)". The Report should state the reasons why, had he done so, that would have been the performance of his

functions "in a manner that was not impartial". The CCC Report has not identified any facts establishing that. It is not sufficient merely to assert it, as a conclusion.

55.2 The "objective criteria" for the conclusion, based on identifiable evidence, that Mr Allen's conduct not only constituted "performance of his functions in a manner that was not impartial", but also "*would or could constitute a disciplinary offence providing reasonable grounds for the termination of his employment*". (an essential element of "misconduct").

56. The Report fails to identify either the evidence, referred to in 55.1 or the "objective criteria" referred to in 55.2.

57. The CCC must identify (by reference to objective criteria) what "could constitute reasonable grounds for dismissal". As Gleeson CJ said of a similar provision in the NSW legislation, in *Greiner v ICAC* (supra) at 141 (F):

*"We know that the Commissioner regarded the conduct he found to have occurred as constituting such grounds (for dismissal). But why? Nowhere in his report does the Commissioner identify the standards by reference to which such a power of dismissal might reasonably be exercised"*.

and at p145:

*"... The test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner"*.

and at p147(F):

*"(The Commissioner) never applied any objective criteria for dismissal by reference to which his conclusion could be tested. He approached the question as though the matter was to be determined by his personal and subjective opinion. In this respect he exceeded his jurisdiction and failed to apply the correct test ..."*.

The CCC Report does not identify such "objective criteria".

58. I have endeavoured to ascertain what other evidentiary material (apart from the hearsay TT's between Burke, Grill and McKenzie) the CCC has relied on for its opinion. On the not unreasonable assumption that any such evidence

would surely be put to Mr Allen in his public examinations, I examined the transcript of those examinations. The only possible relevant evidence appeared to be a TI of 4 August 2006 between Mr Burke and Mr Allen plus, of course, whatever he said in the public examination. There was nothing else: no evidence from Ms Pedersen, the DPI officer when Mr Allen allegedly agreed to appoint in preference to another DPI officer to write "*the DPI report*", to say that was true; no evidence from Ms Clegg, to say that Mr Allen had appointed Ms Pedersen to write "*the DPI report*" in preference to her; no evidence that a "*DPI report*" was actually written, and if so, by whom.

59. I have closely reviewed what appeared to be the only evidence, to see whether it was evidence reasonably capable of supporting the CCC's findings. It is not a question of my deciding whether the CCC has given more, or less, weight to some of the evidence than I would; nor of my evaluating which of two opinions, reasonably open on the evidence, is preferable, but whether there is any evidence which could support a finding of "misconduct".

#### **The intercepted telephone conversation**

60. The precursor to Mr Allen's telephone conversation with Mr Burke on 4 August 2006 was that (according to p.80 of the Report) Mr Burke had called Mr Allen's office and "*left a message for Mr Allen to call him back regarding a discussion he and Mr Allen had had 2 days earlier regarding the developable area at Smiths Beach. Mr Burke wanted to confirm that Mr Allen left the completion of DPI's opinion with (Ms Pedersen) and asking would it be okay for Mr Burke and Mr Grill to call that officer*". That statement in the Report is not accurate if it purports to be the message itself. The actual message Mr Burke had left with Ms Farmer was: "*When I saw him on Wednesday I mentioned the matter of the DPI position on the developable area at Smiths Beach, and I understood that Mike had instructed Barbara Pedersen to complete the opinion of the DPI on that question ... I just wanted to confirm that my understanding was correct and would it be all right if Julian (Grill) or I called Barbara*". If that was Mr Burke's "understanding", however, it was wrong. There was no opinion being prepared by the DPI on "*the developable area of Smiths Beach*"; and Mr Allen

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- had never "*instructed*" Ms Pedersen to complete an opinion on that. All that was being done, at that stage, on the Smiths Beach proposal was an appraisal of the methodology used by consultant, and Ms Pedersen was not involved.
61. In its letter to me of 4 March 2008, the CCC refers to this message as part of the "evidence" supporting its misconduct finding. Patently, it does not. Furthermore, there is no evidence that this message was relayed to Mr Allen. The CCC did not take evidence from Mr Allen's assistant, Ms Farmer, (with whom Mr Burke had left the message) in the course of its investigation. When the audio tape of it was played to Mr Allen at his public examination (T 1301) he was not asked whether she had passed on that message to him; and there was no reference to it in the telephone conversation, when Mr Allen returned Mr Burke's call, later that day. Had that message been passed on, verbatim or in substance, to Mr Allen, it would be expected that he would have asked Mr Burke what on earth he was talking about, for there was no "*opinion on the developable area*" being prepared, and Mr Allen had not "*instructed*" Ms Pedersen to either prepare or complete one, nor was he in a position to do so.
62. Apart from playing to Mr Allen the audio tape of the message left by Mr Burke, counsel assisting the CCC, Mr Urquhart, asked Mr Allen almost nothing about it (other than commenting that when Ms Farmer took the call she apparently knew who Mr Burke was, which she did, as she had some contact with him when she was in another department). As noted, Mr Allen was not asked if Ms Farmer had told him what Mr Burke had said, and if so, did he understand what Mr Burke had meant by "*the opinion on the developable area of Smiths Beach*", or whether he had "*instructed*" Ms Pedersen to "*complete the DPI's opinion*", or "*left it to Ms Pedersen*". And there was no evidence whatever that he had done so.
63. The message left by Mr Burke therefore provides no evidentiary basis whatever, for a conclusion that Mr Allen had "*instructed*" Ms Pedersen to write a report (or opinion), and certainly not that he had been asked by Mr Burke to do so, either "*in preference*" to Ms Clegg, or at all.

64. That afternoon, Mr Allen returned Mr Burke's call. At no time during that intercepted telephone conversation did Mr Burke ask Mr Allen to appoint Ms Pedersen to "*write the DPI report on Smiths Beach*" (as it was put in the original CCC opinion in the Report). Nor did he ask whether Mr Allen had "*appointed*" her or would appoint her to do so (as it was also put in the CCC's original "*opinion*"). During the conversation, Mr Burke said that the Smiths Beach developers were "*very worried*" about another DPI officer, Ms Clegg, because (as he said) she was a "*very firm thinking person*". He said that he had told the developer (Mr Burke's client) that he had "*raised it with (Mr Allen) and suggested Barbara Pedersen might be involved so I just thought I'd check that*". Mr Allen said that he had already spoken to Ms Pedersen and "*she's happy to be the entry point ... so by all means ... I know you've spoken to her before*". Mr Burke said "*that's good. You've answered my question and I'll say to them to make the initial (contact) with (Ms Pedersen)*". Mr Allen then commented that as Ms Pedersen was extremely busy, contacting Mr Singleton (her senior) was "*another option*".
65. In that extremely short telephone conversation, it is self-evident Mr Allen did not "*agree to arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach in preference to other officers*" (the substituted opinion) either. Nor did Mr Burke ask him to do so, or suggest to Mr Allen that he had agreed to do so. Mr Allen said no more than that Mr Pedersen (whose involvement with the Smiths Beach proposal had begun years earlier) would be happy to be "*the entry point*", if available.

#### **The public examination of Mr Allen**

66. As I noted earlier, the audio tape of the intercepted telephone conversation of 4 August 2006 was played to Mr Allen at his public examination (at T 1302) but he was asked remarkably few questions about it. It is remarkable, given the adverse finding that appeared in the Report when produced 10 months later, that Mr Allen was never asked by counsel assisting what he meant by "*the entry point*", or whether Mr Burke had asked him to appoint Ms Pedersen to write a "DPI report" on the developable area of Smiths Beach; or whether he had ever agreed to do so, "*in preference*" to Ms Clegg, because

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- Mr Burke had asked him to ; or whether he had any authority to appoint Ms Pedersen to do so; or whether he in fact did appoint her or arrange for her to do so; or whether any such "*report*" was ever produced (and if so by whom).
67. Without getting affirmative answers to those questions, either from Mr Allen or from some other evidence, there was simply no evidence which could conceivably have enabled the CCC to reach the adverse conclusion of "*misconduct*" which it originally expressed in the Report of October 2007 (before that opinion was "*withdrawn*" on 13 February 2008, and another "*substituted*").
  68. Not only was Mr Allen not asked those questions; neither Ms Pedersen, Ms Clegg, Mr Singleton, nor anyone else had been asked. Ms Pedersen was interviewed by Mr Ingham, Senior Investigator CCC later, on 7 May 2007 (6 months after Mr Allen was publicly examined). Her answers certainly did not support the opinion stated in the Report; but neither the fact that she had been interviewed, nor the answers she gave to the investigators, were mentioned in the Report. I will refer in greater detail to her interview, later.
  69. The intercepted phone conversation between Mr Burke and Mr Allen of the afternoon of 4 August 2006 does not provide the answers to any of these questions. As noted, so far as relevant, it amounted to no more than Mr Burke saying that the developer was "*keen to get some assessment of the developable area*", was "*worried*" about Ms Clegg, that he had "*raised*" it with (Mr Allen) and suggested that Ms Pedersen "*might be involved*" and "*just thought he would check that*". Mr Allen said he had spoken to Ms Pedersen, who replied that she was "*happy to be the entry point*", but added that she was extremely busy and another option was to contact her supervisor, Mr Singleton.
  70. What conclusion, adverse to Mr Allen, can possibly be drawn from the fact that Mr Allen said he had spoken to Ms Pedersen, who was "*happy to be the entry point*"? Certainly not that Mr Allen had "*agreed to appoint her to write the DPI report on Smiths Beach in preference to others*" (as the opinion in the October 2007 Report stated). Nor that he had agreed to arrange for her

*"involvement in preference to other officers"* (as put in the *"substituted"* opinion of 13 February 2008).

#### **Ms Pedersen's interview by the CCC**

71. The CCC investigators did interview Ms Barbara Pedersen (not in a public examination) on 7 May 2007. Ms Pedersen was Manager, Coastal Planning, then and in 2006, for the DPI, with a *"team of 11 passionate, dedicated coastal planners"*, as she put it in the interview. She said she had specialised as an environmental manager since 1995, and had been Manager for Coastal Planning since 2001.
72. Asked by the head of the CCC's investigation, Mr Mark Ingham, whether she had written a *"report"* on Smiths Beach in 2006, she said *"I'm not clear that I wrote any report, or that a report was prepared by my Statutory Planning Staff"*. When told that Mr Burke spoken about *"a report"*, she said that Mr Burke *"probably would have been waiting for a report on how the visual landscape assessment had been treated"* (T 15). She also said (T 20) *"I'm hesitating saying to you there was a report"*, and (T 21) *"I've got no clear recollection of anyone instructing me, and I guess that's because I've already as Manager Coastal taken the responsibility in the lead"*. She added *"I don't remember anyone in management instructing me ..."*.
73. **In answer to the investigators' repeated suggestion that Mr Allen had "appointed" her to write a "report" she said "I have no memory of Mike ever saying any such thing to me" (p.23).** This highly significant evidence of Ms Pedersen is not even mentioned in the CCC Report, which therefore, obviously, makes no attempt to reconcile its *"opinion"* with her evidence, which is contrary to the opinion.

#### **The Parliamentary Inspector's Interview of CCC chief investigator, Mr Ingham**

74. On Friday, 29 February 2008, I interviewed Mr Mark Ingham, senior investigator with the CCC. Mr Ingham had been the investigator in charge of the *"Smiths Beach investigation"*. With my permission, his barrister was present.
75. Mr Ingham produced a *"Final Report and Recommendations"* on 2 April 2007. It referred only briefly to Mr Allen, with a recommendation that *"consideration*

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*be given to a finding of misconduct*", based solely on the incorrect proposition, repeated by the CCC in its section 86 notice of 19 January 2007 to Mr Allen, and, as I have earlier noted, later abandoned, that Mr Allen had "*made representations*" for the deferment of Amendment 92, in response to a request by Mr Burke.

76. Mr Ingham's Final Report made no recommendation based on the proposition that Mr Allen had complied with the wishes of Mr Burke by appointing, or agreeing to appoint, Ms Pedersen to "*write the DPI report ... (etc)*". That proposition was not mentioned in his Final Report, although it was the stated basis of the original "*misconduct finding*" in the CCC Report of October 2007. I therefore asked Mr Ingham whether he had read the CCC Report before it was tabled. He said that he had. I asked if he had been involved in the formulation of the "*misconduct finding*" in the CCC's Report. He said that he had not, and was unable to tell me how that proposition had evolved, or by whom. He, the chief investigator, had not suggested it.
77. I put to Mr Ingham that the evidence of Ms Pedersen, given to him in the interview of May 2007, contradicted the "*finding*" in the CCC's Report that Mr Allen had appointed her to write "*the DPI report*", and asked him whether he had realised this, when he read the CCC Report. He said that he had not.
78. I further asked Mr Ingham whether he agreed that, given the terms of the misconduct finding, witnesses who were obviously relevant were not only Ms Pedersen, but also Ms Cherrie, Ms Clegg, and Mr Singleton (the Director to whom they, and Ms Pedersen, were responsible). He accepted that, and explained that if the investigation had been of a "*criminal offence*", which requires proof beyond reasonable doubt, he would have interviewed them, but to investigate possible "*misconduct*", he considered it was unnecessary.
79. When I pointed out to Mr Ingham that in the TI conversation between Mr Burke and Mr Allen of 4 August 2006 Mr Burke had not asked Mr Allen to appoint Ms Pedersen to write "*the DPI report*", nor had Mr Allen agreed to, he disagreed, but was unable to point to anywhere in the TI transcript where that was said. He then referred to the TI conversations between Mr Burke, Mr McKenzie and Mr Grill (ie the hearsay) as supporting the CCC's opinion.

80. Mr Ingham was unable to say to whom (if anyone) he had given the transcript of his interview of Ms Pedersen, and could not recall discussing it with anyone. I have asked the Commissioner to make further enquiries about this matter and report to me so that I may consider whether to conduct an inquiry into possible misconduct by any DPI officer.
81. Set out below are extracts of some of the evidence from my interview of Mr Ingham, of 29 February 2008, under subject headings:

- **Did he do a report, and if so to whom, of his interview of Ms Pedersen of 7 May 2007?**

INGHAM: I didn't do a written report to the best of my knowledge I most certainly, no. I can't remember who I reported to if anybody. I'm the case officer.

MCCUSKER: Would it be normal procedure to, after an interview , to report the results of that interview to someone?

INGHAM: In this?

MCCUSKER: In the Commission.

INGHAM: No in this case we have done, I don't know probably in excess of a hundred interviews and we don't report, ah I'm the case officer and so I'm the person in charge of the investigation.

MCCUSKER: ... Now, when you interviewed Miss Pedersen, having completed the interview, what did you do with the record of interview? Did you convey the contents of it to anyone else? As far as you can recall?

INGHAM: I don't know Sir.

MCCUSKER: In particular, ... you may not be able to be specific in terms of memory but as a matter of practice would you have conveyed the contents of that interview to a Commissioner or any senior officer or lawyer?

INGHAM: I'm sure I would have done, Sir, but I have no recollection of ...

- **The "DPI report"**

MCCUSKER: ... Can you tell me what inquiries or investigations were made before Mister Allen was publicly examined, about the existence of the so called report?

INGHAM: None.

MCCUSKER: Is it fair to say and I want you to think carefully about this, that the view that there had been an instruction to Miss Pedersen to write a report stemmed from Mister Burke's telephone discussion with Mister McKenzie, which was intercepted.

INGHAM: Yes Sir.

MCCUSKER: ... Can you tell me why no ... attempt was made ... to interview Miss Pedersen before Mister Allen was examined publicly to see whether any such report did exist and if so what it was?

INGHAM: I'll put that into two reasons. One, volume of work and Human Resources. Secondly, I think if we'd have interviewed Miss Pedersen or other people at DPI we would have alerted them to our inquiries and at that stage it was covert.

MCCUSKER: At that stage it was covert?

INGHAM: Yeah prior to the hearings.

MCCUSKER: But ... .. prior to the hearing, that is the examination of Mister Allen, would it not have been possible for you, for the investigation team, to interview Miss Pedersen, directing her of course, as she is directed under summons, that all of the questions and answers are to remain strictly confidential?

INGHAM: We ... we'd expose a risk of her telling people and we know full well that lots of people disobeyed ... their notices.

MCCUSKER: ... can you recall a conscious decision not to question her about the existence of a report and what it was before Mister Allen was publicly examined, because of a concern that she Miss Pedersen might tell others what she was being questioned about?

INGHAM: I don't think we considered Miss Pedersen in isolation ... I think it was decisions made in general terms about what we would disclose ... before the hearings. And as you're well aware we ran most of the Smiths Beach hearings without telephone intercept product. We didn't want to alert people to that fact.

MCCUSKER: Alright. But all you had, correct me if I'm wrong, in relation to the question of whether there was any report, was nothing that had been discussed between Mister Burke and Mister Allen, but a discussion between Mister Burke and Mister McKenzie?

INGHAM: Yeah if, if you use the term "report".

- **Why no reference to Ms Pedersen's evidence in the CCC Report?**

MCCUSKER: ... as the case officer did you have any input into the final report on the Smiths Beach development?

INGHAM: Very little.

MCCUSKER: Were you asked to consider it in any way before it was finally tabled?

INGHAM: Yes.

MCCUSKER: ...And did you read it?

INGHAM: Yes.

MCCUSKER: The report makes no mention, as you are no doubt aware, that's the CCC report makes no mention of the contents or even the fact of the interview that you conducted in May two thousand and six (*sic, seven*) with Miss Pederson. Does it?

INGHAM: Not with. She was or

MCCUSKER: No.

INGHAM: the number of people I interviewed.

MCCUSKER: True. But did you, did you notice at the time the report was produced before it was finally tabled that there wasn't any reference to what Miss Pedersen had told you?

INGHAM: No it didn't.

MCCUSKER: No. It didn't jump out at you?

INGHAM: No Sir it didn't.

MCCUSKER: that was only the negative finding. Now when that (CCC) report was finalised, by then of course you'd, you'd interviewed Miss Pedersen.

INGHAM: Yes.

MCCUSKER: And Miss Pedersen had told you that as far as she was aware there was no report.

INGHAM: Yes.

MCCUSKER: And she also told you that she had absolutely no recollection of Mister Allen instructing her or requesting her to write a report.

INGHAM: Yes and she says oh more than that.

MCCUSKER: Yes but she says that too. Doesn't she?

INGHAM: Yeah but she then she drew our attention to a letter and that there was some pressure to get a letter out.

MCCUSKER: Yes but that wasn't a report was it?

INGHAM: Well that's semantics whether a letter is a report or I think the letter is written in the form of a report.

MCCUSKER: Well did you obtain a copy of the letter before the publication of the CCC's report?

INGHAM: No we didn't.

MCCUSKER: Well ... .. , the CCC report ... effectively ... said that he, Mister Allen, agreed to appoint Miss Pedersen in preference to Miss Clegg to write a report. Do you not think having regard to the evidence that you got from the interview with Miss Pedersen, who denied that she'd been instructed to write any report, did you not think that it was desirable to at least mention that, to give balance to the report?

INGHAM: I didn't consider it at the time Sir.

INGHAM: My personal opinion? I don't think it, it's something that needed to be included in the report.

MCCUSKER: You'd certainly put it in the report if you were investigating a criminal offence wouldn't you?

INGHAM: Yes Sir.

MCCUSKER: But before making a finding of misconduct, against Mister Allen ...based upon his alleged agreement with Mister Burke to have her, Miss Pedersen, write the report in preference to Miss Clegg ... did you not consider that it was desirable and indeed essential to determine whether any such report existed?

INGHAM: I didn't and the Commissioner didn't.

MCCUSKER: ... when you read the report, CCC's report in draft before it was produced you say it didn't occur to you that Miss Pedersen's negative answers to the question, "did Mister Allen instruct her to write a report?" It didn't occur to you that they should be put in the report?

INGHAM: No.

MCCUSKER: No. But that was the position wasn't it, that when the report went to press (the CCC report) you had evidence before you, putting aside the question of whether you thought she was telling the truth. She had said I have absolutely no recollection of ever being instructed by Mike Allen.

INGHAM: When I read the draft of the Smiths Beach report I didn't consider Barbara Pedersen.

MCCUSKER: No. Alright. Now I just want to be quite sure of this. I think your answer is fairly clear. Did you consciously, keep back from the report or the report writer the evidence that you had obtained from the Smiths Beach, from the interview of Miss Pedersen?

INGHAM: No.

MCCUSKER: Do you now agree that that was relevant evidence?

INGHAM: I haven't got an opinion ... I

- **Why further inquiries and interviews of witnesses were not conducted by the investigation**

MCCUSKER: ... now to determine, since it was by inference that that arose, inference from Mister Burke's discussion with Mister McKenzie. To determine whether in fact that's what he did agree to do, since he didn't say it in his conversation with Burke, did you not consider it important to interview Miss Pedersen to find out whether Miss Clegg was excluded from whatever was going on?

INGHAM: No.

MCCUSKER: And you didn't interview her, did you?

INGHAM: No.

MCCUSKER: Do you accept that it would have been a desirable thing to do?

INGHAM: I accept that it would be desirable to have interviewed probably about another five hundred people in this investigation.

MCCUSKER: Understood. There's a workload problem. Is that what you're saying?

INGHAM: I tried to explain that before

MCCUSKER: and am I correct in my understanding, I'll just repeat it, that had this been an investigation of an alleged criminal offence, if getting Miss Pedersen to write a report in preference to Miss Clegg for example were a criminal offence ... you would have interviewed not only Miss Pedersen, as you did, but also Miss Clegg and the lady who wrote the letter as it turned out or prepared the letter with Miss Clegg, Miss Cherrie and probably Mister Singleton who wrote the letter, who signed the letter.

INGHAM: Yes.

MCCUSKER: So you're well and truly aware of the importance in the investigation of a criminal offence of interviewing all possibly relevant witnesses?

INGHAM: Yes.

MCCUSKER: And in this case if this had been a criminal offence investigation you would have interviewed the people that I've just mentioned.

INGHAM: Yes.

MCCUSKER: Well if that were the case and if ... Mister Allen had agreed to that, didn't you think it was desirable to check with Miss Clegg to see whether she'd been excluded from whatever it was? You didn't did you?

INGHAM: No.

MCCUSKER: You know that the investigator appointed by the Director General of DPI ... did interview Miss Clegg and she said that she wasn't excluded.

INGHAM: I do know that yes.

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**"Agreed to arrange" for Ms Pedersen's "involvement in the DPI's assessment"?**

82. The CCC's substituted opinion and Recommendation (in its letter to me of 13 February 2008, quoted earlier) has deleted the reference to Mr Allen "appointing Ms Pedersen to write a DPI report", and instead refers to his agreeing to arrange for (Ms Pedersen's) involvement in the DPI's assessment of the proposed development at Smiths Beach. But Ms Pedersen's evidence in her May interview (and later, when interviewed as part of the DPI investigation) does not support that opinion either.
83. This "substituted" opinion and "Recommendation 3", obviously requires proof that Mr Allen "agreed" to "arrange" for the "involvement" of Ms Pedersen in the DPI's assessment of the proposed development at Smiths Beach". To be "misconduct", it is also necessary to establish that, in doing so, he did not act "impartially", in that although there was another officer or officers equally or better qualified to write "the DPI report", he agreed to "arrange" for Ms Pedersen's "involvement" in preference to them, solely because that was what Mr Burke wished. There is no evidence to support that. The evidence was to the contrary.
84. Ms Pedersen's evidence, both in her interview by Mr Ingham in May 2007, and later to the DPI independent investigator, Ms Judge, was that she had been involved with the Smiths Beach Project, as a DPI environmental planner, and then as Manager of Coastal Planning, since 1995; that on her appointment as Manager, Coastal Planning in November 2001, her involvement had become "more focussed", and it was "one of the projects that I've been getting the team on". Mr Allen was the Executive Director of Strategic Planning. He was not in her "line of command". Her immediate supervisor was the Director of Environmental Sustainability, Mr Jim Singleton.
85. Ms Pedersen said that her involvement with the Smiths Beach project was not as a result of any "direction" to become involved, either from Mr Allen or anyone else, but as a normal part of the coastal planning process. She said, in her interview by Mr Ingham, of the CCC (p.16)

*"I was the person who had been involved and had been guiding one of the officers with the technical visual assessment and knew what she (Ms Clegg) had been providing into it and (Ms Clegg) was not the right person ... Because I was the*

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*right person and ... I always put my signature on my work.. and I wanted to as Manager take responsibility for the content of my advice".*

This is entirely consistent with what Mr Allen said, in his public examination (T1305):

*"(Ms Pedersen) is the Manager, Coastal Planning. Smiths Beach is a coastal development. Ms Pedersen would always have a role in assessing a development in such a location".*

86. She said in the interview that she remembered Jim Singleton (her superior) *"wanting us to get some advice back quickly and I think that was a letter about the visual landscape assessment"*; but Mr Allen was not involved in that, and nor was Ms Pedersen. That was a letter confirming that the consultants "methodology" conformed with the TPS methodology, signed by Mr Singleton.
87. From Ms Pedersen's interview (as well as from evidence obtained in the DPI investigation) certain salient facts emerge. In short:
- Mr Allen did not appoint or agree to appoint or *"arrange for"* Ms Pedersen to write a report (as the CCC Report originally stated).
  - Nor did he *"arrange"* for her *"involvement in the DPI's assessment of the proposed development"*, as the (substituted) opinion now puts it. No-one *"arranged"* for her involvement. She had been *"involved"*, on an ongoing basis, for years, in the Smiths Beach project.
  - Ms Pedersen was not involved in an appraisal of the landscape consultant's methodology, nor did Mr Allen ask that she should be; nor was Ms Clegg *"excluded"* from it.
88. As noted earlier, faced with the evidence of Ms Pedersen, Ms Clegg, Ms Cherrie and Mr Singleton, that Mr Allen did not *"appoint"* or arrange to *"appoint"* Ms Pedersen to write a *"DPI report"*, and that there was no *"DPI report"*, only an appraisal of methodology used by a consultant (in which Ms Pedersen took no part) the CCC withdrew the opinion expressed in its report, and *"substituted"* another opinion.
89. However, I then pointed out to the CCC that the evidence of those witnesses also establishes that Mr Allen did not arrange for Ms Pedersen's involvement in the DPI *"assessment of the Smiths Beach development proposal"* (which

the CCC says means the "methodology appraisal"). Ms Pedersen did not become "involved" in that; and Ms Clegg was not excluded from it, nor did anyone seek to exclude her.

90. To that, the CCC responded that the "misconduct" was in "agreeing" to arrange for Ms Pedersen's involvement (in the methodology appraisal) in preference to Ms Clegg. There are, however, problems with even that more limited proposition:-

90.1 First, apart from the "hearsay" referred to earlier, there is no evidence that Mr Allen said more than that Ms Pedersen had agreed to be the "entry point" for the developer - not that she had agreed to be involved, either in preference to Ms Clegg or at all, in the "methodology appraisal".

90.2 Secondly, the substituted "Recommendation 3", awkwardly worded though it is, alleges a "lack of integrity in relation to his complying with the wishes of Mr Burke ..." (etc), which strongly implies that the allegation is that Mr Allen did "arrange" for Ms Pedersen's involvement, not just that he "agreed" to. But that is in any event contrary to the evidence, as I have said.

90.3 Thirdly, even if the "misconduct" is said to be in "agreeing" to arrange for Ms Pedersen's "involvement" in preference to Ms Clegg, the evidence that in fact he did not do so must surely raise a strong doubt that he "agreed to", which is what the CCC says is to be "inferred".

90.4 Fourthly, the CCC has not explained how it could be "misconduct" for Mr Allen to "agree" to arrange for Ms Pedersen's involvement without actually arranging it. For a start, how could that conceivably be a "disciplinary offence providing reasonable grounds for termination" of Mr Allen's employment?

#### **The "DPI report on the Smiths Beach development"**

91. The CCC Report (as noted) referred, throughout, to a "*DPI report on Smiths Beach*", but it provided no elaboration or explanation of what that was

supposed to be, notwithstanding that Mr Allen's alleged "misconduct" was in agreeing to "appoint Ms Pedersen to write the DPI report".

92. Although the 13 February 2008 "withdrawal" has now removed any reference to the writing of a "DPI report", its inclusion in the original CCC Report raises the question: What, if any, evidence did the CCC have, which caused it to refer, in its original finding of "misconduct", to "the DPI report"?
93. Certainly, it was never put to Mr Allen, in the letter sent to him on 19 January 2007 (the "section 86 notice") that there was a proposed "DPI report" which (according to the "misconduct finding" in the Report of October 2007) he had agreed to appoint Ms Pedersen to write "in preference to" another officer, (Ms Clegg). The "section 86 notice" said that the proposed comment was that on 4 August 2006 Mr Allen had telephoned Mr Burke and "*confirmed that he had spoken to Ms Pedersen and that she would be able to become involved (in the DPI's assessment of the proposed development of Smiths Beach)*", and went on to say that Mr Allen's conduct "*in arranging Ms Pedersen's participation in preference to other DPI employees involved a performance of his functions in a manner that is not impartial*".
94. Mr Allen replied to that s.86 notice on February 2007 as follows:

*There was no preference given to Ms Pedersen over "other DPI employees". At no stage have I ever suggested, nor has evidence been presented, that anyone from the DPI ("the Department") was to be excluded from assessing the Smiths Beach proposal.*

*Ms Pedersen is the manager of the coastal planning branch and it was, in all circumstances, entirely appropriate that she be involved. This is because the proposal at Smiths Beach is a coastal development, and Ms Pedersen had been involved with previous iterations of proposals at the site and had a detailed knowledge of the area as a result. Her involvement was not exclusive and in the normal course of events she would involve other employees. Indeed, it would have been essential for her to involve others because, when the Development Guide Plan is eventually presented for assessment by the Department, certain matters to be covered are outside her area of expertise.*

*Directing applicants or their representatives to nominated employees of the Department is a normal procedure. The Department is large and very diverse, and often people outside do not know who is the most appropriate person to contact. I can and do provide that level of assistance.*

95. That response was not reproduced, or commented on, in the Report. At least it might have prompted further investigation. But it did not, (apart from the

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May 2007 interview of Ms Pedersen, which did not support the CCC's finding, and was not included in the Report). Everything in Mr Allen's response has been shown (as a result of Ms Judge's investigation) to be factually correct, and could have easily been verified.

96. Nothing in the section 86 notice referred to Mr Allen agreeing to appoint Ms Pedersen to "*write the DPI report*". And, as I have noted earlier (paragraphs 38 - 40) when Ms Pedersen was asked, in her interview of May 2007, about a "*report*" she said that she had no knowledge of any "*report*". It was quite apparent, from her statement to the CCC investigators, that she had not written a "*report*". Nor had she been asked by Mr Allen to do so. She was, in the course of that interview, questioned several times by the investigators about a "*report*", so the puzzle is, where did the CCC get the idea that there was one?
97. The answer appears to be that Mr Burke, for reasons best known to him, had held the belief in August 2006 that a "*report*" was to be written by the DPI. In the early afternoon of 4 August 2006 following his brief telephone conversation with Mr Allen, in a discussion recorded by the CCC, he told Mr Grill that he had asked Mr Allen to ensure that Ms Pedersen "*did the DPI report on Smiths Beach because she was familiar with the project and they needed it quickly and that Mr Allen had rung back and said Yes, and that her boss was very strongly in support*". However, Mr Allen had said no such thing in his telephone conversation that day with Mr Burke. There was no mention in that intercepted telephone conversation of any "*report*". Nor did Mr Allen say that Ms Pedersen's boss "*was very strongly in support*". All that Mr Allen had said in the course of that conversation with Mr Burke, relevantly, was that Ms Pedersen was happy to be the "*entry point*". This, again, highlights the danger of relying, as the CCC has done, on telephone conversations between Mr Burke and others, to support its conclusions.
98. Despite Ms Pedersen's statement to the investigators in May 2006 that she was unaware of any "*report*" to be written by the DPI, and had "*no memory*" of being asked (or appointed) by Mr Allen (or anyone) to write a report, the CCC failed to make any further inquiry of other departmental officers, such

as Ms Clegg or Mr Singleton, and proceeded to refer to "a DPI report" in its Report, without any explanation of what that supposedly was. The notion that there was, at the relevant time, a proposed "DPI report" became fixed in the mind of the CCC investigators by the non-specific references to a "DPI report" made by Mr Burke in his conversation with Mr McKenzie. The CCC did not enquire further, to see if there was a "report", and if so what it was.

99. After publication of the CCC Report I wrote to the CCC, on 15 October 2007, seeking its comments on the contention by Mr Allen that there was no evidence to support the assertion that Mr Allen had agreed to appoint Ms Pedersen to write "the DPI report on Smiths Beach". In its reply to me of 30 October 2007, on that point, the Commissioner said "I do not propose to comment on Mr Allen's contention that there is no evidence to support either of the assertions concerning Ms Pedersen" - that is to say, the CCC was not prepared to comment on Mr Allen's assertion that there was no evidence that there was a "DPI report", or that that he had ever "appointed" Ms Pedersen to write "a DPI report", or agreed to do so. The CCC was then still maintaining that there was evidence justifying its opinion that Mr Allen had asked Ms Pedersen to "write the DPI report". There was no suggestion then, that the CCC meant, by that phrase, that Mr Allen had only agreed to "arrange for her involvement" in the DPI's assessment of the proposed development at Smiths Beach; and that that was all that the term "DPI Report" was intended to convey.

#### **The DPI's investigation of the alleged "misconduct"**

100. On 4 February 2008 I again wrote to the CCC, referring to the recently released report of the investigation carried out by Ms Petrice Judge for the Director General of DPI. I said, at para 10 of that letter (in light of the evidence obtained by the investigation):

*In the case of Mr Allen, it seems to have simply been assumed by the CCC that:*

- (a) *Someone in DPI was to write a "report", on Smiths Beach, when in fact that was not so;*
- (b) *Mr Allen had the power to direct, and did direct, that Ms Pedersen write such "report" - when neither was correct; and*
- (c) *Ms Pedersen wrote a report, following Mr Burke's discussion with Mr Allen, when she did not.*

101. In the CCC's reply of 13 February 2008 the CCC said (underlining added):

*What is clear on the evidence, is that part of the process of progressing the developer's proposal required DPI to assess the methodology applied in the report of the developer's consultants, and to provide a document (which could be variously described as an "assessment", a "letter" or a "report") confirming that DPI had made that assessment, and that the methodology complied with the Department's requirements. Without that document from DPI, the consultants' report could not be further considered. To progress its proposal, the developer needed that "tick in the box" from DPI. It is common ground that document was required, that it was prepared by Ms Cherrie (who worked directly for Ms Pedersen), and signed by Mr Singleton (who had been discussed in the telephone conversation between Mr Burke and Mr Allen as the person who could do it if Ms Pedersen's existing commitments did not allow her the time). There were in fact two documents. The first was a letter of conditional approval dated 15 September and the second was a letter of final approval dated 21 September 2006. They are Attachment 4 to the DPI Investigator's Report.*

*The assertion that the Commission "was in error in assuming" (presumably as opposed to it being satisfied on the evidence before it) that someone in DPI was to write a "report" on Smiths Beach, when in fact that was not so, is untenable, unless one were to take a view that "report" could only mean an evaluation of the merits of the development proposal – something the Commission never suggested.*

*Nowhere in its report did the Commission say that Mr Allen had the power to direct, and did direct, that Ms Pedersen write the report (by whatever term it might be described). The conduct of Mr Allen which was the subject of the Commission's opinion, was in his "agreeing to appoint the departmental officer preferred by Mr Burke to write the DPI report ..." (page 80). The recommendation (also at page 80) expressed it in terms of his "lack of integrity in complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report".*

*In the Commission's assessment of the evidence, Mr Allen did agree to have Ms Pedersen write or be involved in the preparation of the report (the DPI document however described, dealing with the consultant's report) if her commitments allowed her to do so. He agreed that failing that, Mr Singleton would do so. Mr Allen was a Deputy Director General of the Department. He may not have had "line" responsibility for Ms Pedersen according to a departmental organisation chart, but he was certainly (in the Commission's view) able to cause that result. In fact, on the evidence before the Commission it was open to form the opinion (as the Commission did) that Ms Pedersen was involved in the preparation of the document (which was prepared by her subordinate, Ms Cherrie, subject to her oversight) and signed by Mr Singleton.*

102. Neither in the CCC's Report, nor in the section 86 notice, nor in previous correspondence with me, had the CCC said that by "the report" it did not really mean a "report" as such, but simply a letter to the developer's consultant, following an appraisal of the methodology used in the consultant's Landscape Study. The reason for that, of course, is that the CCC did not know, and did not try to find out, what "report" (if any) existed, when it referred in its Report, to a "DPI report".

103. By February 2007, of course, the Commission had received the DPI report prepared by Ms Judge. In that report Ms Judge observed as follows:

*"In summary, a review of interview material and documentation indicated that there was no requirement for any officer within DPI to produce the Department's report; either as described by Mr Burke, or as referred to in the CCC Report."*

104. Ms Judge's report then continued:

*Departmental Involvement with the Proposed Smiths Beach Development*

*As there was no evidence supporting the existence of a report, the investigator sought to establish the nature of the task that was of concern to the proponent and their representative, Mr Burke.*

- *All DPI interviewees indicated that, over many years, the environmental area of DPI had provided specialist advice on the proposed Smiths Beach development to statutory planners within the South West Planning Office of DPI, the Shire and a large number of consultants employed at various times by the proponent. During 2006, this consisted of advice on coastal planning and landscape assessment by various officers from two branches within the Environment and Sustainability Directorate.*
- *All interviewees who had worked in the Directorate, agreed and clarified that, at the time of the suspected breach, Ms Pedersen's branch had completed the advice on the coastal aspects and the outstanding issue related to advice on the visual landscape.*

*...given the stress that was coming down the telephones from the consultants associated with the Smiths Beach project...I think it was the visual impact study that was giving them heartburn of very high degree.*

*(Jim Singleton, Principal Sustainability Consultant, GHD Australia, and formerly Director, Environment and Sustainability Directorate, DPI)*

- *All DPI interviewees concurred that the issue-in-progress was an appraisal by DPI environmental planners of the Landscape Study, which had been completed by a consultant (EPCAD Consultants), in order to compare EPCAD's assessment to the methodology set out in the Shire of Busselton TPS.*

*It was just a review of EPCAD's report.*

*(Tara Cherrie, Senior Environmental Planner, Environment and Sustainability Directorate, DPI)*

*We were required...to sign off that the execution of the methodology in the study had been carried through to our satisfaction...We were giving an approval to the conduct of the methodology and that its outcomes were consistent with the methodology...That's not to say that we deemed or were in the position of deeming in any way, shape or form that the said Smiths Beach development at that point in time...was acceptable in landscape visual impact assessment terms.*

*(Jim Singleton, Principal Sustainability Consultant, GHD Australia, and formerly Director, Environment and Sustainability Directorate, DPI)*

- *Mr Singleton and Mdmes Clegg and Cherrie, the environmental planners who were directly involved, stressed that the appraisal was an iterative process of reviewing the versions produced by the consultant and then providing feedback direct to the consultant.*

*...that appraisal was not in a report form. It was just a summary of points ...It was never a report that we submitted. It was just a summary of our appraisal notes...It was just a review of EPCAD's report.*

*(Tara Cherrie, Senior Environmental Planner, DPI)*

*So that's what the report comprised; meeting notes and follow-up and making sure that report – that EPCAD's report – that we were happy with it.*

*(Stephanie Clegg, Senior Environmental Planner, DPI)*

- *A review of the file summaries and interview material confirmed that the outcome of the involvement by the environmental planners in 2006 was verbal advice to the consultants which was provided in meetings, minutes of a meeting with the consultants dated 28 July 2006, and two formal letters to the proponent in September 2006.*
- *The environmental planners agreed that the formal signoff of the appraisal was a two-stage process. In a letter to the proponent, dated 15 September 2006, Mr Singleton accepted the 12<sup>th</sup> edited version of the Landscape Study on a conditional basis. The 13<sup>th</sup> edited version of the Landscape Study was accepted in a follow up letter, dated 21 September 2006. These two letters are included as Attachment Four.*

*It appears that 'the Department's report' listed in the suspected breach is more correctly described as an appraisal of the extent to which the Landscape Study, produced by a consultant, adhered to the methodology set down in the Shire of Busselton TPS. The appraisal involved iterative feedback to the consultant by environmental planners within DPI. The process was formally concluded by correspondence in a two-stage process in September 2006.*

105. The "interviewees" mentioned in Ms Judge's report included Ms Pedersen, who again said (as she had informed the CCC investigators in May 2007) that her involvement with the Smiths Beach proposed development had been long standing, and did not result from any "direction" to her to become "involved", either from Mr Allen or any other senior officer, but began in 2000 as part of the usual coastal planning referral process in order to provide advice on the formal processes of statutory planning.
106. Other interviewees were Mr Singleton (Ms Pedersen's superior) Ms Clegg and Ms Cherrie. They said that what was being done at that stage (in August/September 2006) was not the preparation of a "report", but an appraisal, on a ongoing basis, of a Landscape Study prepared by a consultant to the developer, to compare its methodology with that required under the Shire of Busselton town planning scheme. Their task (from which Ms Clegg was not excluded) was not to report on whether the Smiths Beach development was "acceptable in landscape visual impact assessment terms".

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107. When Ms Judge wrote her report, there had been no "*withdrawal*" by the CCC of its original opinion, stated in the CCC report, that Mr Allen had agreed to appoint Ms Pedersen to "*write a report*". It was only after her very thorough investigation, and report to the Director General of DPI, that the CCC "*withdrew*" its opinion and "*recommendation*", and substituted those quoted above. When the CCC stated its original opinion and Recommendation in the Report, it had not carried out any investigation, to clarify what "*DPI report on Smiths Beach*" Mr Burke was referring to in his conversation with Mr Grill, of 4 August 2006 or what "report", if any, was written and by whom.
108. In summary, the CCC's investigation, if thoroughly conducted, should have produced the following evidence, which was obtained by Ms Judge. It refutes the assertion of "*misconduct*". None of this evidence is mentioned in the CCC Report, or taken into account when the CCC stated its "opinion" of misconduct:
- 108.1 Ms Pedersen was at all material times the Manager, Coastal Planning in the DPI. Her superior, to whom she reported, was Mr Singleton, Director of Environmental Sustainability.
- 108.2 The proposed development at Smiths Beach was one of the projects in which she and her "team" had been involved for some years, both prior to and during 2006. Ms Pedersen had considerable experience and knowledge of the Smiths Beach development proposal. The Coastal Planning Branch, which Ms Pedersen headed, had provided advice on coastal planning and landscape assessment.
- 108.3 As at August 2006, the Smiths Beach consultant (EPCAD Consultants) had prepared a "Landscape Study" report, which it had submitted to the DPI's Environment and Sustainability Directorate, seeking its confirmation that its "methodology" met the requirements of the "*Shire of Busselton's TPS Adopted Methodologies*".
- 108.4 The review of EPCAD's report, in terms of the methodology employed, was an "iterative process", involving DPI officers Clegg and Cherrie meeting from time to time with the consultant, to

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discuss the methodology required for the Consultant's report, and providing "feedback" to the consultant.

- 108.5 The appraisal by the DPI of the methodology used was never intended to result in a "report" by the DPI, or an evaluation of the merits of the Smiths Beach development (in respect of visual impact or otherwise).
- 108.6 Mr Singleton, as Director, and Ms Clegg and Ms Cherrie, environmental planners, were directly involved in this appraisal of the methodology. In the ordinary course, when and if they were satisfied that the EPCAD report conformed to the required methodology, Mr Singleton would so inform EPCAD, by letter.
- 108.7 He did so, subject to some "minor alterations" on 15 September 2006; and on 21 September 2006 wrote to EPCAD, noting that after a further meeting with the consultant satisfactory alternations had been made, and that EPCAD's Landscape Study Report "*meets the technological standards in the field of landscape assessment in relation to technique and the accuracy of the visual modelling used*". That letter was copied to a number of interested parties, but not to Mr Allen.
- 108.8 Mr Allen had no involvement in that process whatever. He was, at the relevant time, Executive Director, of the Statutory Planning Branch of in the DPI. Neither Ms Pedersen, Ms Clegg nor Ms Cherrie were officers in that branch. They did not report to him.
- 108.9 Ms Pedersen did not become "*involved*" in that process either. It was, as she has stated to Ms Judge, outside her role and her area of expertise, which was "coastal planning advice", which had been provided to the proponent on 16 March 2006. In April 2006 the Shire was informed by DPI that "*no further comment would be provided unless further coastal matters arose*".
- 108.10 For any development proposal being considered by DPI including the Smiths Beach proposal, the DPI would often nominate one of its officers as the "*main contact*" (or "entry point") for the proponent, if it had queries. In 2003 Ms Clegg was the "*main contact*" for such

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queries. From June 2006 onwards, Ms Cherrie had been the main contact, and in early 2006 the then Director had agreed that Ms Cherrie would review the consultant's report for its adherence to the required methodology. Ms Clegg was also "*closely engaged*" in this appraisal, providing Ms Cherrie with advice and support. She was continuing to do so in August/September 2006. As she told Ms Judge, no one had sought to exclude her from participation, or to influence her. Although Ms Cherrie took the "*lead role*" in the appraisal of the EPCD report's methodology, reporting directly to Mr Singleton (not Ms Pedersen) Ms Cherrie incorporated the views of Ms Clegg in her advice to the Director, Mr Singleton.

109. The CCC has failed to identify, in its correspondence with me, any evidence which could arguably be relied upon to support even its "*substituted*" opinion. As I have observed earlier, Mr Allen said no more, in his telephone conversation with Mr Burke on 4 August 2006, than that he had spoken to Ms Pedersen and that she was happy to be the "*entry point*" although as she was very busy another option was to speak to Mr Singleton, her superior. He did not say that he had "*arranged*" for either of them to be "*involved*" in the DPI assessment of the proposed development at Smiths Beach: That is because, of course, both were already "*involved*", Ms Pedersen's involvement, as Manager, Coastal Planning, having commenced years before. That evidence was available to the CCC from Ms Pedersen's interview of May 2007, although not mentioned in the CCC report.
110. Those DPI officers interviewed by Ms Judge, including Ms Pedersen, considered that for Mr Allen to tell Mr Burke that Ms Pedersen would be the "*entry point*" (meaning the initial contact who could refer any issues if necessary to the appropriate officer) was quite appropriate, as Ms Pedersen was a senior officer, with longstanding involvement in the proposed Smiths Beach development.
111. The evidence of those interviewees further established that Mr Allen did not approach Ms Pedersen or her director, Mr Singleton, to suggest that Ms Pedersen, "*in preference to any other officer*", complete the appraisal of the

methodology used in the consultant's Landscape Study. Nor did the CCC have any evidence that he had done so.

112. As to the "*substituted*" opinion of the CCC, that Mr Allen agreed to arrange Ms Pedersen's "*involvement*", in preference to the involvement of Ms Clegg, by the term "*involvement*" the CCC is presumably referring to Mr Allen's statement to Mr Burke on 4 August 2004, that Ms Pedersen, or failing her Mr Singleton, could be the "*entry point*" (meaning point of first contact). But it could never have been the case that this was "in preference" to Ms Clegg nor did he say that. From June 2006 through to at least September 2006, Ms Tara Cherrie was the main contact in relation to the proposed Smiths Beach development. Ms Cherrie was in Ms Pedersen's "*team*" and although she worked in conjunction with Ms Clegg, in 2006 Ms Cherrie, rather than Ms Clegg, was the principal officer of the DPI dealing with its part in the Landscape Study process with Mr Singleton as her superior. In her evidence to Ms Judge, Ms Clegg said "*There was nobody influencing or attempting to influence anything .... Its our area of expertise and nobody would tell us what to say or do*". According to Mr Singleton, Ms Cherrie reported directly to him, and neither Mr Allen nor anyone else had attempted to influence him, his decisions, or the deployment of resources within the Directorate.

113. Hence, it is clear that Mr Allen's statement to Mr Burke, in their discussion of 4 August 2006, that Ms Pedersen was happy to be the "*entry point*", did not result in any change whatever in the pre-existing assignment of responsibilities within the DPI. Ms Clegg continued to be involved with the appraisal of the Landscape Study. The CCC should have obtained evidence from her, before completing its Report.

#### **"Susceptible to the influence of Mr Burke"**

114. As noted earlier, at page 10 of the CCC Report it is asserted that Mr Allen was "*apparently susceptible to the influence of Mr Burke*" and that this compromised "*the Department's integrity*".

115. This very damaging assertion is not supported by any evidence. It was and is, according to senior DPI officers interviewed by Ms Judge, common for

proponents to seek advice from senior officers in DPI. As one senior officer remarked

*"I find it disturbing that what appears to me to be fairly normal client service relationship is misconstrued for something sinister. I think planners have a relationship for being negative regulators and have tried to foster client relationship to be a lot more facilitative and helpful and courteous and I think its inappropriate for helpfulness to be construed as acting inappropriately."*

116. This mirrors what Mr Allen explained (to no avail) in his public examination, and again in his response to the section 86 notice on of 13 February 2007 (see above).

### **Submissions of Counsel Assisting, and Non-compliance with Section 86 of the Corruption and Crime Commission Act**

117. Section 86 of the Corruption and Crime Commission Act provides

*"86 Person subject to adverse report, entitlement of  
Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters."*

118. For the purpose of complying with that requirement, by letter dated 19 January 2007 the Commission wrote to Mr Allen, setting out the Final Submissions of counsel assisting the Commission, which had been stated publicly, at the end of the public examination.

119. The first submission was to the effect that Mr Allen had *"acted in a manner that was not impartial"* by forwarding to Mr Schramm an email which Mr Allen had received from Mr Burke, which outlined reasons for opposition to the progression of Amendment 92 without making any *"enquiries as to the merits of this opposition"*.

120. How that could possibly be imagined to be *"acting in a manner that was not impartial"* is mystifying. Mr Allen, in forwarding the email to Mr Schramm, a member of the SWRPC, made no comment on the *"merits of the opposition"*. In his covering email to Mr Schramm he said

*"Just have a look at the email from Brian Burke. When I met him and Julian Grill last week, we didn't go into any detail about Smiths Beach, other than for them to voice the opinion that there shouldn't be any lessening of the area for development if allowed."*

*I don't know anything about the amendment or why it is going to the Committee. I'll leave that issue to your judgment*

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121. That was I would think, about as "*impartially*" as Mr Allen could possibly have dealt with Mr Burke's email. What was he supposed to do with it, one may ask? Shred it? Mr Burke, in common with all members of the public, was entitled to submit a point of view to public officers. And they were obliged, by the Code of Conduct, to give any such submissions fair and objective consideration.
122. This submission as to misconduct was (ultimately) abandoned in the Report (although it was mentioned). But it was a submission made in public, and damaging to Mr Allen.
123. The second submission was:
- On 2 August 2006 Mr Allen met with Mr Brian Burke where it was discussed that it would be in the interest of Canal Rocks Pty Ltd if Ms Pedersen, an employee with the Department of Planning and Infrastructure ("the DPI"), were involved in the DPI's assessment of the proposed development at Smiths Beach. On 4 August 2006 Mr Allen telephoned Mr Burke and confirmed that he had spoken to Ms Pedersen and that she would be able to become involved. The conduct by Mr Allen in arranging for Ms Pedersen's participation in preference to other DPI employees involved a performance of his functions in a manner that was not impartial. Such conduct could constitute a disciplinary offence contrary to section 80 of the Public Sector Standards Management Act 1994 that would provide reasonable grounds for termination of office or employment. This conduct, therefore constitutes misconduct pursuant to section 4(d)(ii) and (vi) of the Corruption and Crime Commission Act 2003."*
124. There was, however, no evidence that Mr Allen "*arranged Ms Pedersen's participation in preference to other DPI employees*". Nor was that ever suggested to Mr Allen during his public examination, and no evidence was ever sought from any DPI officer, to determine whether this allegation was correct - apart from the May 2007 interview of Ms Pedersen, which refuted it.
125. In the Report, however, the expressed basis for the finding of "*misconduct*" was not as put in the "*Submissions*". The Submissions did not assert, as in the later Report, that Mr Allen had "*complied with the wishes of Mr Burke*" by agreeing to appoint Ms Pedersen "*to write a report*". Mr Allen was never given the opportunity to comment on that proposition, and refute it by showing that there was in fact no "*report*", and that Ms Pedersen was never "*appointed*" by him either directly or indirectly to write one.
126. In a letter to the CCC dated 5 February 2008, the Parliamentary Inspector stated:

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*I propose to report to the Standing Committee to the effect that the Commission's examination of Mr Allen, and its findings of "misconduct", were for that reason fundamentally flawed; that the DPI's investigation was both objective and thorough; and that I consider that Mr Allen has been unfairly treated by the CCC. I invite the Commission's comments.*

127. The CCC's response, by letter of 13 February 2008, was written after it had received a copy of Ms Judge's report, which concluded that Mr Allen had "*no case to answer*". Ms Judge had obtained, from interviews of Ms Pedersen, Ms Clegg, Ms Cherrie, and Mr Singleton, evidence that Mr Allen had not requested Ms Pedersen to "*write the DPI report on Smith's Beach*"; that Ms Pedersen had not done so, and that Ms Cherrie and Mr Singleton had made an assessment of the "*methodology*" used by the developer's consultant, to determine whether that "*methodology*" complied with the requirements of the Shire TPS - not a "*report*" which (as the CCC's Report had implied) endorsed or approved the Smiths Beach development. Faced with that evidence, which the CCC's investigation, if thorough, should have obtained before it produced its Report - indeed, before it publicly examined Mr Allen - the CCC sought to explain its references to Mr Allen "*appointing*" Ms Pedersen to "*write the DPI Report on Smiths Beach*" by saying it had "*never suggested*", in its reference to a "*report*", that this meant an "*evaluation of the merits of the proposal*".
128. The problem is that the CCC had never said that. It did not explain in its Report what it meant by "*the DPI report on Smiths Beach*". And it was never put to Mr Allen, either in the section 86 notice or the public examination the proposition that:
- (a) he had agreed to "*appoint Ms Pedersen to write the DPI report on Smiths Beach*", and
  - (b) by that, it meant (if, in then fact, it knew what it did mean by the vague reference to "*a report*") no more than an assessment of a consultant's methodology.
129. Had this ever been put to Mr Allen, he could have refuted the proposition, by referring the CCC to Ms Pedersen, and the other relevant DPI officers who could have told the CCC, as they told Ms Judge, that Ms Pedersen did

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not become "*involved*" in that assessment, and that Ms Clegg was never excluded from it.

130. In response to my invitation, referred to above, the CCC (in its letter dated 13 February 2008) stated the "*evidence*" which, it claimed, justified its finding of "*misconduct*".
131. That "*justification*" reveals a disturbing lack of objectivity, and a failure to distinguish "*evidence*" from suppositions and conclusions based largely on hearsay. Paradoxically, given the views expressed in the Report about the credibility of Mr Burke and Mr Grill, a great deal of reliance is placed (for the purpose of justifying its opinion that Mr Allen was guilty of "*misconduct*") on the views and beliefs of Messrs Burke, Grill and McKenzie; on the fact that Mr Allen was "*willing to assist*" (with the unexplained rider, "*arguably more than necessary*"); and on what Mr Burke said to Mr Grill or Mr McKenzie, in conversations to which Mr Allen was not privy.
132. I will endeavour to summarise the "*evidence*" which the CCC claimed justifies its (amended) opinion:
- 132.1 It refers in various places to Mr Allen's "*willingness to assist*", and "*desire to render as much assistance as possible*", as if that were, in some unexplained way, improper. It is entirely consistent with the duties of a public officer that he or she should be "*willing to assist*" any member of the public, including Mr Burke or his client. As other officers interviewed by Ms Judge have said, there is nothing at all inappropriate in that, nor in Mr Allen telling Mr Burke that Ms Pedersen, the Manager of Coastal Planning, was "*happy to be the entry point*" - meaning the point of first contact for the developer.
- 132.2 "Mr Allen falsely denied having communication with Mr Burke and Mr Grill in regard to the Smiths Beach in general and the SWRPC meeting in particular."
- Mr Allen explained, in his second public examination, that he had forgotten the contact. He was not involved in the Smiths Beach assessment, and was a very busy public officer. In any event, whether his initial denial was deliberately false, or

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simply (as he said) forgetfulness, at the most it might reflect on his credit, but it is not evidence that he "*agreed to arrange for the involvement of Ms Pedersen in the Smiths Beach assessment in preference to Ms Clegg*" (the substituted "*misconduct*" opinion of the CCC).

132.3 The message left with Mr Allen's executive assistant on 4 August 2006

- As to that, see my comments at paragraphs 27 to 31 above: This is not evidence from which any adverse conclusion could be drawn.

132.4 Mr McKenzie's evidence at the CCC hearing, that he was "aware that Ms Pedersen thought the proposed development had good merit".

- This invites the comment, So what?

132.5 That the "document" (as the CCC now describes what it previously called a "report") which assessed the methodology of the consultant was "prepared by Ms Cherrie (who worked directly for Ms Pedersen) and signed by Mr Singleton (who had been discussed in the telephone conversation between Mr Burke and Mr Allen as the person who could do it if Ms Pedersen's commitments did not allow her the time)".

- First, this mis-states what Mr Allen actually said to Mr Burke in the intercepted telephone discussion. He said that Ms Pedersen was "*happy to be the entry point*", but "*another option*" was Mr Singleton, if she was too busy. He did not tell Mr Burke that Ms Pedersen would "*write a report*" (or a "*document*" or anything at all); nor that Mr Singleton "*would do it*" if she was too busy. And it ignores the evidence that Ms Judge obtained in her investigation, that Ms Cherrie was the appropriate officer to make the "*methodology assessment*", that Mr Allen had nothing to do with that, and had never suggested to Ms Pedersen, or anyone else, that Ms Clegg be excluded from the process (which she was not).

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- 132.6 That both Ms Pedersen and Mr Singleton were "*well regarded*" by the developer.
- Again, so what? They were both competent, senior public officers. Why should they not be "*well regarded*"?
- 132.7 Ms Pedersen's statement to Ms Judge, that she had "no specific memory of Mr Allen speaking to her about the Smiths Beach matter, but a "*vague memory*" of his saying "Are you aware that there is a request for advice? Will that be provided?" The CCC then speculates (without having put it to Mr Allen or Ms Pedersen) that it is "*more likely given the content of phone conversations between Mr Burke and Mr Allen, that he said 'Can that request for advice be provided by you'*".
- The CCC's preparedness to rely on speculation, to support its conclusion is disturbing. It shows a lack of objectivity coupled with a "fudging" of the evidence. The "*content*" of Mr Allen's conversation with Mr Burke (that he had spoken to Ms Pedersen, who was "*happy to be the entry point*") cannot possibly support an inference that he asked her if the "*request for advice*" (of which Ms Pedersen had only "*a vague memory*") could be provided by her. She did not, in fact, give any "*advice*" on the appraisal of the methodology of the Landscape Study, and was not involved in that appraisal.
- 132.8 That it is "implicit" in (Mr Allen's) response to the (section 86 notice) that he had 'arranged' for Ms Pedersen's participation in the DPI's assessment of the proposed development".
- This is an extraordinary suggestion. The proposition put to Mr Allen in the Section 86 notice was that he had "*arranged for Ms Pedersen's participation in the DPI's assessment of the proposed development in preference to other DPI employees*". When the Report was written, the CCC had interviewed Ms Pedersen, who had made it clear that she was not instructed, or requested, by Mr Allen to participate in the DPI's

assessment of the Smiths Beach development (or to write a report). And if by that the CCC now means the "methodology appraisal", she was neither asked to participate in it, nor did she. Furthermore, it is not "implicit" in Mr Allen's response to the section 86 notice that he "accepted" that he had arranged for her "participation". All that Mr Allen had said to Mr Burke about Ms Pedersen's "participation" was that she was "happy to be the entry point". That was the only "involvement" of Ms Pedersen which he had mentioned to Mr Burke, and in relation to that Mr Allen said in his response: "Directing applicants or their representatives to nominated employees of the Department is a normal procedure. The Department is large and very diverse, and often people outside do not know who is the most appropriate person to contact. I can and do provide that level of assistance."

133. I considered the CCC's lengthy "justification" did not identify any evidence to justify its finding, so on 13 February 2008, I wrote again:

*I would also be grateful if the Commission could identify for me the precise evidence which supports the Commission's opinion to which you refer at the foot of page 5 and top of page 6 of your letter.*

*Without limiting that request, I would in particular appreciate your identifying the evidence which the Commission obtained in the course of its investigation (including, of course, any private or public examination) that*

- (a) Mr Burke requested Mr Allen to appoint (or cause the appointment of) Ms Pedersen to write "the DPI report" in preference to other DPI officers;*
- (b) Mr Allen agreed to do so;*
- (c) Mr Allen did arrange for Ms Pedersen to write "the DPI report";  
and*
- (d) Mr Allen "agreed" that failing that (ie failing Ms Pedersen writing it) Mr Singleton would do so.*

134. By letter dated 18 February 2008 the CCC referred me, by way of answer, to what it had said in its letter of 13 February 2008. I replied by letter of 21 February 2008, stating:

*Thank you for your letter of 18 February 2008, with enclosures. I appreciate the prompt response, although I am afraid that it did not identify, as I requested in paragraphs 4 and 5 of my letter the "precise" evidence (by which I meant relevant passages from examinations, public or private, from TIs, or interviews) which the Commission considers supports the opinions referred to at the foot of page 5 and 6 of your letter. The stated "reasons" for those opinions fail to identify, as I requested, the evidence which supports those "reasons".*

135. The CCC responded, by letter dated 25 February 2008, enclosing copies of transcripts of evidence of Messrs Allen, Burke and McKenzie, and of telephone intercepts (all of which I had, of course already seen). In that letter

135.1 The CCC repeated its previous reference to Mr Burke's discussions with Mr McKenzie as reflecting "*Mr Burke's understanding of his conversation with Mr Allen on 4 August 2006*". But Mr Burke's "*understanding*" of the intercepted conversation, was irrelevant. The question is, what was actually *said*? Not what the CCC believed was Mr Burke's "*understanding*".

135.2 The CCC repeated earlier references to conversations between Mr Burke, Mr McKenzie and Mr Grill. All were not only hearsay, but for reasons explained earlier, not evidence capable of supporting a finding of "*misconduct*" by Mr Allen.

135.3 The CCC referred to the evidence that on 8 August 2006 Ms Pedersen met Mr McKenzie, and made a note of "*sticking points*" the *response/support from DPI on developable area and visual analysis*".

This was not evidence on which the CCC relied when it wrote its Report. The CCC has selected that, and other evidence in Ms Judge's report, in an attempt to "shore up" the opinion in the Report (or the substituted opinion). But it is a selective reference. It fails to

mention Ms Pedersen's following evidence to Ms Judge, that although she made a note of what Mr McKenzie said, she took no action on it - no doubt because she was not involved in that task.

### **The Public Examination**

136. Mr Allen complained to me, as mentioned earlier, about the fact that he was "pilloried in public" by his public examination, and questioned why it was necessary for him to be publicly examined.

137. Section 140(2) of the CCC Act provides

*The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.*

The clear implication is that, in general, examinations will be conducted in private.

138. In the course of Parliamentary debate on the CCC Bill several members (somewhat presciently) expressed concerns about the potential for public examinations to damage innocent individuals:

Mr Trenorden:

*"The public and the media judge these organisations on how many baddies they prosecute. The organisations themselves try to say that that is not the way in which they should be judged; they should be judged on the type of society that is generated out of the process. However, we will never stop the media being the media and the public being the public. That will never be able to be controlled".*

*"The National Party is concerned about the rights of individuals to not be prosecuted by the public before they are found guilty or not guilty".*

*"I just hope that we do not destroy someone's life in the process".*

*"No matter how hard this new organisation works, the public will judge it on how many criminals get pinged. That will be the public measure of it. It should not be the measure, but it will be".*

Mr Birney:

*"Something I do not give my approval to is public hearings. I am aware that my view on public hearings differs somewhat from the view of my colleagues".*

*"...I said that one of the greatest issues of human rights that faces Western Australia today is the ability of a media outlet to print somebody's name in a newspaper or air somebody's name on an electronic media outlet when that person has not been found guilty. It is an absolute tragedy for somebody to wake up one morning and find his name in print associated with all manner of accusations, such as ... corruption as in this case. It would be an absolute tragedy for somebody to have his name sullied publicly without being found guilty. We proceed in this country on the basis that one*

*is innocent until found guilty. Unfortunately, public hearings do not recognise the court of public opinion. Like it or not, if somebody's name appears in the media in association with a particular crime, human nature dictates that people automatically assume, rightly or wrongly, that he is guilty".*

*"... hearings will be misused to sully the name of a person who might subsequently be found to be innocent. I have a very strong reservation about the need for public hearings".*

*"I have a severe reservation about people's names being made public in connection with allegations prior to any possible determination of guilt. I do not have any problem with the new Commissioner being able to speak publicly about particular ongoing cases, but I have a problem with people being able to print somebody's name in connect with a case prior to its being determined .... I fear that public hearings will become a charade and a media circus, and will result in victimisation by association and guilt by media".*

*"We need to strike a balance. There is a need to ensure that CCC investigators are not overzealous... that does not take into account the court of public opinion...but to leave people's names out of it unless they have been found guilty. Is the presumption of innocence not the basic foundation stone upon which western democracy is built? This Bill removes that presumption of innocence. I believe that we will see a media circus at some stage in the future"*

139. In the Report p.3, the CCC states:

*"The Commission conducted private hearings and two sets of public hearings. In conducting public hearings the Commission was acutely aware of the potential to unfairly damage the reputation of individuals. Before deciding to hold public hearings the Commission weighted the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. The Commission considered that it was in the public interest to hold public hearings."*

140. That said, the Report fails to explain why it considered it to be "*in the public interest*" for there to be a public examination of Mr Allen. Without a full explanation, there is a danger that the public generally, and those whose reputations have been damaged in particular, will suspect that the underlying reason is that the CCC wishes to demonstrate that it is "*doing its job*" of "*prosecuting baddies*", as Mr Trenorden put it; or conducting "*show trials*", to use Mr Allen's phrase.

141. "*Public interest*" does not (of course) simply mean matters which the public would be interested to read about. The public airing of secretly recorded private discussions is, self-evidently, a serious infringement of a citizen's right to privacy. It should not be done, save in exceptional cases, when a clear explanation should be provided. To the question, "*Why is it in the public interest?*", it is not sufficient for the Commission to say "*because we consider it*

to be". As to the CCC's assertion that, in deciding whether to have a public examination of a citizen, a major consideration is "evidence of ongoing misconduct", there was no such evidence concerning Mr Allen.

142. The CCC is charged with investigating complaints of "*misconduct*". The Police Force is also an investigative body; but it conducts its investigations, including interviews of suspects and witnesses, in private, and then, if it considers that there is a prima facie case, it may lay charges. The laying of charges does not imply that the person charged is guilty. The police make no "*finding*". The evidence on which the charge is based must be provided, before any trial, to the accused, will be tested for its admissibility, and may be the subject of cross-examination and counter-evidence, to explore any flaws. The accused is entitled to be presumed innocent, as judges constantly remind juries and themselves, and has rights of appeal. None of those safeguards applies to a "*finding*" by the CCC, of "*misconduct*". Scrupulous care should therefore be taken by the CCC before making such a "*finding*".
143. These basic tenets of our justice system are put in jeopardy by a system whereby the investigation of "*misconduct*" is partly conducted by public examination of "*suspects*" who are not told, in advance, what evidence they are to be faced with (not even that they are "*suspects*"); are not entitled to object to its admissibility; are unable to prepare, in advance, an explanation or response or to answer and refute evidence which other witnesses may give. One egregious illustration of the problem is playing in public, to a witness, of a telephone conversation between two other persons, saying things about that witness which are damaging to him or her, and false. Such hearsay evidence would never be admitted in a trial, much less relied on as evidence of guilt. Yet this kind of "*evidence*" was ventilated in the public examinations of both Messrs Allen and Frewer in the Smiths Beach Investigation, and then referred to, and relied upon, in the Report:

At p.79

*" ... in discussions at 1/53 Mount St... Mr Burke informed Mr Grill that he had asked Mike Allen to ensure that the particular officer did the report on Smiths Beach because she was familiar with the project and needed it quickly etc".*

At p.78:

*"... in discussions between themselves it is apparent that Mr Burke and Mr Grill believed that Mr Allen was willing to assist..."*

At p.76:

*"Mr Grill phoned Mr Burke confirming that Mr Allen had received Mr Burkes' e-mail and sent off a note to Mr Schramm suggesting that it (Amendment 92) be removed from the agenda (and) ... it appears that a few people have been working on their behalf".*

144. The media can be forgiven for reporting this, as well as the CCC's "opinions" or "findings", when, under the heading of "5.4.1. Commission's opinions on Mr Allen's Conduct", it states "Mr Allen's conduct ... involved a performance of his duties that was not impartial".
145. In the cases of Mr Allen (and Mr Frewer) serious damage was done to their reputations, and their careers, by the public examination and the accusatorial way which counsel assisting put questions. They were sometimes based on incorrect information, as for instance, when Mr Urquhart, counsel assisting, put to Mr Allen (T1294):

*"Were you aware that your colleague, Mr Frewer, was also assisting Mr Burke in getting amendment 92 deferred?"*

There was in fact no evidence to support that proposition; nor had the CCC any basis for suggesting that Mr Allen was "assisting Mr Burke in getting amendment 92 deferred". Such "loaded questions" are damaging. The later Report, with its "findings" of misconduct and recommendations of "disciplinary action" was even more damaging. Whilst both men have been vindicated by the fuller (and objective) investigation conducted by Ms Judge as a result of the CCC's "recommendations", showing the CCC's investigation to be inadequate and its "findings" to be seriously flawed, that does not compensate them for damage to their careers, the anguish and stress which, for over 12 months, they endured as a result of the CCC's public examination and accusations, followed (many months later) by the findings of "misconduct". And, although vindicated after a full investigation by Ms Judge, the refusal of the CCC to acknowledge that it was in error still leaves a "shadow".

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146. I have recommended to the Commissioner that he consider, in the future, taking a different course in relation to "misconduct" findings.

146.1 First, an allegation of "misconduct" should be fully investigated, as if it were an investigation of a criminal offence. A finding of misconduct is so serious that Mr Ingham's proposition, that an investigation of misconduct need not be as thorough as an investigation of an alleged criminal offence, must be rejected.

146.2 If, after a thorough investigation of an allegation of "misconduct", as defined by section 4(d) of the Act, ie that the conduct is one of the species in 4(d)(i), (ii), (iii) or (iv) and "*constitutes or could constitute a disciplinary offence providing reasonable grounds for termination of a person's office as a public officer under the Public Sector Management Act*", the CCC decides to refer the allegation to the "appropriate authority for action" (see section 33(1)(c)) it should do so, with its recommendation (under section 43(1)(a)(ii) that "consideration be given to the taking of disciplinary action against the particular officer". The referral of that allegation, accompanied by a report which includes a recommendation under section 43, is authorised by section 37.

146.3 By section 40 the appropriate authority is required to prepare a detailed report of the action taken by it in relation to the allegation, and that may be reviewed by the Commission pursuant to section 41.

146.4 The Commission could then decide whether to report to the Parliament on the misconduct allegation, instead of doing so at the time of referral to "the appropriate authority".

147. This procedure would not have involved the tabling of a report with a "finding" of misconduct against Mr Allen, and a recommendation to the "appropriate authority" (in this case was the Director General of the DPI). Although the Commission is given the power to prepare and table a report on any matter that has been the subject of an investigation in respect of misconduct (section 84(1)) it is not obliged to do so, either at the point where it has referred the allegation to the "appropriate authority", with its

"recommendation" that consideration be given to disciplinary proceedings, or indeed at all. It would have been open to the Commission, if it chose, to wait until the Director General had given consideration to disciplinary action under the Public Sector Management Act, then considered the report from the Director General, which the Director General would be obliged to provide to the CCC in detail (section 40(2)) and then decide whether or not it should table a report on that matter.

148. The Act clearly contemplates this course, which is in my opinion the preferable one.

149. Other relevant provisions of the Act, are:

149.1 Section 33(1)(c) which provides that when the Commission receives an allegation of misconduct it may decide to refer the allegation to an independent agency or appropriate authority for action, rather than investigating the allegation itself, or itself in co-operation with an independent agency or appropriate authority; and

149.2 Section 34(1) which contemplates that the Commission will not normally investigate the allegation either itself, or in cooperation with an independent agency or appropriate authority, unless in the opinion of the Commission "serious misconduct" has occurred or may be occurring.; and

149.3 Section 34(2)(c) which provides that when the Commission is deciding whether or not to refer an allegation to an independent agency or appropriate authority, it is to have regard to a number of matters including "*the need for there to be an independent investigation rather than an investigation by a public authority with which any public officer to whom the allegation relates is connected*".

150. In the case of Mr Allen, there was no need for the Commission to have tabled a report with its "finding" of misconduct. Having made its "assessment" of the allegation of misconduct, it could have referred it to the Director General of the DPI, with its recommendation that consideration be given to disciplinary action under the Public Sector Management Act and that that investigation be carried out by "an independent investigator" (as it was in

this case). Without being satisfied that there had been a full investigation the CCC should never have tabled a report with its finding of "misconduct". By doing so the CCC has "nailed its colours to the mast", making it difficult to "back down", lest this be seen as diminishing its standing or credit..

151. A further problem which could have been avoided, had it taken the course I have suggested, is that the CCC has made a public and highly publicised finding of "misconduct" about which Mr Allen has justifiably complained to me, leaving me with no course other than to first (as I did) suggest to the CCC that it publicly withdraw that "finding" and acknowledge that it was erroneous; and, that suggestion having been rejected, to table a report which, in detail, explains the glaring inadequacies of the CCC's investigation and its report, and its untenable finding of "misconduct".
152. Taking the course that I have suggested, and which was clearly open to it, would also have avoided the inexcusable delay between the time that Mr Allen was "publicly pilloried" and his ultimate vindication.

### **Functions of the Parliamentary Inspector**

153. The Parliamentary Inspector is "*an officer of Parliament and is responsible for assisting the Standing Committee in its functions.*" (Section 188(4) CCC Act).
154. The CCC has asserted, as noted earlier, that the Parliamentary Inspector has no power to review a CCC Report, and its findings of "*misconduct*", and to report to the Parliament any "*factual errors or inadequacy of evidence to support the findings of misconduct*" contained in a report tabled by the CCC. That assertion is both unfortunate and wrong. It is unfortunate, because it may be perceived to be "*defensive*" for the CCC to raise a "*jurisdictional argument*", to avoid scrutiny and review by an officer of the Parliament, of a report tabled by the CCC in the Parliament.
155. Furthermore, the assertion is simply wrong, as a matter of statutory interpretation. And since the CCC must, at least, accept that the Parliamentary Inspector's functions and powers are expressed so widely that it is clearly arguable that the Parliamentary Inspector has the power to carry out such a review and report to the Parliament, it would reflect more credit on the CCC's office if, instead of responding to legitimate criticism with

unproductive jurisdictional debate, it were to deal fully, and objectively, with the issues raised, and acknowledge its fallibility and, in this case, its erroneous finding.

156. The CCC's assertion is also at odds with the manifest intention of the Parliament. There was considerable debate in the "Consideration in Detail" stage of the Corruption and Crime Commission Bill, in 5 June 2003, about the extent of the powers given to the CCC, and the importance of the supervisory role of the Parliamentary Inspector, an officer of the Parliament. The Attorney General, Mr McGinty observed "*I am of the opinion that the Parliamentary Inspector is a more powerful person than the Commission*".
157. If, as the CCC concedes, it is within the statutory functions of the Parliamentary Inspector to "*review*" a CCC investigation and its report of that investigation, and to report on such review, then it must follow that it is also part of that function to report that adverse findings in a CCC report are "*fundamentally flawed*" because they are either without foundation in the evidence or based on an inadequate investigation (if that is the conclusion that the Parliamentary Inspector has reached after such review). Otherwise, what is the point or value of a review? **Annexed** are extracts from the exchange of correspondence between the CCC and the Parliamentary Inspector on this question, commencing with the CCC's contentions in its letter of 31 January 2008.

### **Conclusion**

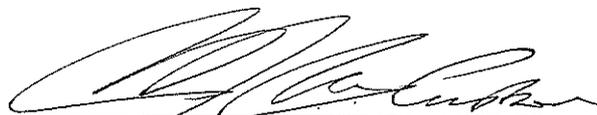
158. My review of the CCC's investigation and its Report has revealed serious inadequacies in both in the investigation, the Report and the finding of misconduct. These are matters which in my opinion, should be reported by the Parliamentary Inspector. In summary, major inadequacies and flaws are:
- 158.1 Failure to interview Ms Clegg, Ms Cherrie, and Mr Singleton, as well as other DPI officers, whose evidence was readily available, and was obviously relevant.
- 158.2 Failure to include in the Report, any reference to the evidence of Ms Pedersen, obtained in an interview before the Report was tabled

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which contradicted the finding in the Report (as the evidence of Ms Clegg, Ms Cherrie and Mr Singleton would also have done).

- 158.3 Reliance on intercepted telephone conversations between Messrs Burke, McKenzie and Grill, to support a finding of "misconduct" against Mr Allen.
- 158.4 Failure to specify, in the Report, the evidence upon which the CCC based its misconduct finding, as distinct from its conclusions.
- 158.5 Failure to comply with section 86 of the Act.
159. The Parliamentary Inspector's statutory functions include the investigation of a variety of complaints against the CCC by citizens adversely affected by the CCC's conduct. At the conclusion of such investigation, the Parliamentary Inspector "may" (but need not) report on the result of the investigation. (See S.199 of the Act). A complaint by a citizen about a "finding" of misconduct, in a report which the CCC has tabled in the Parliament, is in a special category. As an "officer of the Parliament" (S.188(4)) it is particularly important for the Parliamentary Inspector to determine whether such a report has factual errors (or omissions), or is otherwise flawed, and if that view is reached to report to the Parliament.
160. I am, of course very conscious of the importance of not undermining public confidence in the CCC. It is an important statutory body, established to investigate corruption, and to combat "organised crime". For that purpose, it has been given extraordinarily wide powers. Those powers include the power to compel citizens to be "examined" in public, and to make "findings" of misconduct which, though in law only provisional, are understandably treated by the public as final. It is for that reason that the Parliament has appointed a Parliamentary Inspector, as an officer of the Parliament, to supervise the CCC's exercise of its wide powers. That is clearly intended to reassure the Parliament, and the public, that the CCC's power is not unchecked.
161. If the Parliamentary Inspector were not to report that after a careful review, his or her conclusion is that the CCC has wrongly "found" that a named

citizen has been guilty of misconduct, that in a report tabled in the Parliament, then (damaging though that may be to the CCC's credit and standing) the reassurance which the Parliament and the public expected from the appointment of a Parliamentary Inspector would be an empty one.



Malcolm McCusker AO QC  
PARLIAMENTARY INSPECTOR

7 March 2008



**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

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**ANNEXURES**



**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

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MJMcC:us:096/07

9 August 2007

Mr Mike Allen  
17 Rae Place  
HILLARYS WA 6025

Dear Mr Allen

I acknowledge receipt of your letter dated 31 July 2007, raising matters of concern to you in relation to the treatment received by you when called as a witness at a public hearing into the Smiths Beach Inquiry.

As discussed with you by telephone on 2 August 2007, you have agreed that I may make a copy of your letter available to the Commissioner of the Corruption and Crime Commission, Mr Roberts-Smith QC, with whom I will raise the matters, both general and particular, set out in your letter. In particular, following the points made in your letter, and during our discussion, you have identified the following concerns:

1. The need for CCC investigators to conduct a full and thorough investigation, rather than make assumptions based upon the content of telephone intercepts, which may in some cases be misleading.
2. The need to ensure that before appointing counsel assisting, for a public hearing, counsel is fully conversant with the subject on which he or she proposes to conduct an examination. That applies not only to planning matters, of course, but to any other matters which call for a specialised knowledge.
3. The desirability of the CCC taking some step (such as a media statement, perhaps) where there has been misleading reporting of evidence given at a public hearing. I note from your letter, and from what you told me in our telephone discussion, that you did consult a lawyer regarding defamation proceedings against The West Australian, but on his advice decided not to commence legal action and instead to accept a retraction and apology, duly published by The West, reasonably prominently, on page 6 of its Saturday edition.

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4. That when public hearings are conducted, a witness should be given the opportunity to provide further comment and further information, at that hearing. That may, in some cases, be difficult because the witness may not have readily available letters, emails or documents which could refute allegations or insinuations raised during the examination of the witness by counsel assisting.
  5. You referred to the Standing Parliamentary Committee which has announced that it will be conducting an inquiry into public examinations held by the CCC. I believe that this is principally for the purpose of determining what criteria are applied, or should be applied, when deciding whether or not a public hearing should be held. The *Corruption and Crime Commission Act* does lay down a broad principle in s.139 which states that except as provided in s.140 an examination is not open to the public (ie it is to be private). However, s.140(2) states that it may conduct a public examination if, "*having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so*".
  6. The problem lies in the application of this provision. What may be viewed by some as an overarching benefit resulting from public exposure and public awareness, may well be viewed by others, more conscious perhaps of the prejudice to an individual, as being insufficient to justify a public hearing.
  7. Before the Joint Committee had announced its proposal to conduct an inquiry into this issue, I had previously discussed the problem with the Joint Committee, as well as with the previous Commissioner, Mr Hammond. Both the past Commissioner, and the present Commissioner (who had not been appointed when you gave evidence) have assured me that a decision to hold a public hearing is not taken lightly, and that no such decision is made without the Commissioner first being provided with a full explanation of why a public hearing is proposed to be held, so that he may weigh up the public benefits to be derived, as against the potential for prejudice to the individual. I understand that you have made a submission in that regard to the Joint Committee, as well as to Ms Gail Archer, who is presently conducting an examination of the operations of the *Corruption and Crime Commission Act*.
  8. I shall raise this important question, again, with the Joint Committee and also with the current Commissioner. Although I have no power to direct the CCC as to when it shall or shall not conduct a public hearing (as against a private hearing) I am empowered to review and report on any of the operations of the Commission and its procedures, and to make recommendations to it. If my recommendations are not adopted, I may report to either the Standing Committee or the Parliament.

9. You have referred to the CCC having sent you a letter with false accusations and threats of dismissal. My understanding from our discussion is that that is a reference to a notification which you received in February 2007, of possible adverse comment, so as to give you a reasonable opportunity to make representations to the Commission concerning those matters, as required by s.86 of the Act. I confirm that you will forward me a copy of the letter which you received from the Commission, and your response. I would assume that your response enclosed any relevant documentation, such as the email referred to at page 2 of your letter, which you say the CCC investigators did not obtain, relying instead upon what they heard on the telephone intercept, from which they made assumptions which you assert were without any foundation.
10. You suggest that the recruitment and training processes of the CCC should be reviewed, to ensure that, as an investigative body, those employed by it not only carry out a full and thorough investigation before making any allegations, but do so with the presumption of innocence firmly in mind.
11. You refer to an unacceptable delay in issuing a final report. I have previously discussed this question with the Commissioner, who is equally concerned at the delay. However, it has been caused, as I am informed, by the need to ensure that a number of persons in respect of whom it is proposed to make adverse comment or findings are given full opportunity to make representations, which then must be considered by the Commission.
12. You have raised the fact that Commissioner Hammond had retired before the final report into the Smiths Beach Inquiry is to be handed down. Your comment regarding the way in which court cases are conducted, where a judge or magistrate may die or retire before delivering judgment is correct. It is understandable that you should seek to draw an analogy with an investigation conducted by the CCC. However, as I discussed with you by telephone, although Commissioner Hammond presided over the public examinations and was the Commissioner until the conclusion of all hearings, it is not essential that he be the Commissioner who signs the final report, following the inquiry. The Act does not provide that the report itself must be that of the Commissioner who presided over the examination or inquiry, even though he was the person who (by s.141 (2)) administered the oath to witnesses.
13. I appreciate, however, that where a report contains views or opinions which are based wholly or in part on considerations of a witness' demeanour or credibility, a difficulty may arise. I believe the Commissioner is aware of that.
14. Referring to the "general comments" at the end of your letter, I have explained to you that it is not within my power or function to raise the question of whether the Government can redress damage done to your

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reputation or compensate for the treatment "meted out" to you by the CCC, as you put it.

15. I believe that the present Commissioner is aware of the need to ensure that a decision on whether a public hearing is appropriate should be made with the utmost care, and with proper regard to the possible prejudice to individuals.
16. Finally, as I explained to you, the damaging reports published by The West Australian newspaper do not constitute a breach of s.173 or s.175 of the CCC Act. Those provisions are designed to prevent any person who acts as a witness, or otherwise assists the Commission, from being victimised, threatened or attacked, by reason of that person having given such assistance or evidence to the Commission. I do not consider that a report by a newspaper of proceedings in a public hearing before the Commission fall within that category. They may, of course, constitute defamation if not a fair report, but that is a matter which you have already considered and decided, on advice from your lawyer, to be content with an apology rather than take legal action.

Yours faithfully



**Malcolm McCusker QC**  
**PARLIAMENTARY INSPECTOR**



## CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

Our Ref: 01853/2005

31 January 2008

### COMMISSION RESPONSE TO DRAFT REPORT BY PARLIAMENTARY INSPECTOR REGARDING PAUL FREWER

In a draft report dated 4 January 2008 ("draft report") the Parliamentary Inspector, of the Corruption & Crime Commission, Mr Malcolm McCusker, AO, QC, concludes that there was no justification for the Commission's opinion that Mr Frewer was guilty of "misconduct", nor for its "Recommendation 2", that a "relevant authority" consider taking disciplinary action against him and that the Commission should publicly acknowledge its error, and withdraw its recommendation.

The opinion and recommendation referred to were contained in the Commission's Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup' tabled on 5 October 2007 ("the Commission Report").

#### Scope of Statutory Functions

The powers of the Parliamentary Inspector are extremely wide. They are set out in s.196 of the *Corruption and Crime Commission Act 2003* ("the Act"). However, wide as those powers are, they can only be exercised in or for the performance of the Parliamentary Inspector's functions.

The functions of the Parliamentary Inspector are specified in s.195 of the Act. They are to

- (aa) audit the operation of the Act;
- (b) audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;
- (c) deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;
- (bb) audit any operation carried out pursuant to the power conferred or made available by the Act;
- (d) assess the effectiveness and appropriateness of the Commission's procedures.

Paragraphs (d) – (e) inclusive of s.195(1) authorize the Parliamentary Inspector to make recommendations and to report (on matters arising out of any of the actions taken under paras (aa) to (d) inclusive; para (1)(f) authorizes the Parliamentary Inspector to perform any other function given to the Parliamentary Inspector under the CCC Act or any other Act.

The Commission agrees with and accepts the analysis of the audit and other functions of the Parliamentary Inspector as set out at [1.1] of his 2006/07 Annual Report. As there noted, the term "audit" is not defined in the Act. According to the Macquarie Dictionary, it means

"1. an official examination and verification of accounts and records, esp. of financial accounts. ... 3. a calling to account. – *v.t.*"

The draft report sets out what are said to be "the relevant facts," and on the basis of what they are said to be, an argument that the Commission has taken a wrong view of the evidence, leading to an incorrect assessment of the facts, a misconceived opinion of "misconduct" and (therefore) an unfounded recommendation. The process engaged in is one of re-evaluating the evidence so as to lead to different conclusions. With respect, that is not an "audit" function – it is in the nature of an appellate review.

Furthermore, the draft report is clearly not an audit of the operation of the Act (s.195(1)9aa)), nor an exercise of the function of auditing the operations of the Commission "for the purpose of monitoring compliance with the laws of the State (s.195(1)(a)) – there is no suggestion of non-compliance with a law or laws of the State. Clearly it is not an exercise of the misconduct function (s.195(1)(b)). Nor could it be an exercise of the function of auditing an operation carried out pursuant to the powers conferred or made available by the Act (s.195(1)(cc)). An audit of that kind is necessarily directed to an examination to verify that the powers under the Act have been exercised in accordance with the Act. If they have been, it matters not that the Parliamentary Inspector may have exercised them differently (if that be so). It does not place the Parliamentary Inspector in the position of the Commission, entitling him to conduct his own examination or evaluation in place of the Commission, nor to recommend that the Commission take a different view of the evidence before it. Insofar as the draft report contends there was a failure to comply with s.86 of the Act, that contention is dependant upon the view of the facts which precedes it – which the Commission considers to be both misconceived and beyond power.

Finally, the draft report does not constitute an exercise of the function of assessing the effectiveness and appropriateness of the Commission's procedures (s.195(1)(c)) – it constitutes an (incomplete) evidentiary review as a result of which the draft report espouses a different view of the evidence to that taken by the Commission, leading to a different outcome.

The Commission notes that the "Executive Summary" in the draft report, under [2], which purports to recite "the relevant facts" contains factual assertions which the Commission does not accept as correct. What it amounts to, is that the Commission and the Parliamentary Inspector take a different view of the evidence. The assessment of evidence is a function of the Commission; it is not an audit function.



PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA

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5 February 2008

By email: [Comm.LWRS@ccc.wa.gov.au](mailto:Comm.LWRS@ccc.wa.gov.au)

The Hon Len Roberts-Smith RFD QC  
Commissioner  
Corruption and Crime Commission of  
Western Australia  
PO Box 7667  
CLOISTERS SQUARE WA 6850

Dear Commissioner

**Paul Frewer, Mike Allen, and the "Smiths Beach Report"**

Thank you for your letter of 31 January 2008 and the attached "Response", the contents of which I have carefully considered.

***Functions of the Parliamentary Inspector***

1. The Response begins by contending that the Parliamentary Inspector's defined "functions" under s.195(1)(d) (to make recommendations to the Commission ...) and (e) (to report and make recommendations to either House of Parliament and the Standing Committee) are limited to matters arising out of "*any actions taken under paras (aa) to (d) inclusive*". There is nothing in s.195, or elsewhere in the Act, which expressly or impliedly supports that construction. With respect, I think this is a misreading of the section.
2. During the Parliamentary debate on the Bill, concern was expressed about the "extraordinary powers" proposed for the CCC, and the potential threat that those powers posed to the privacy and reputations of individuals. Mr McGinty, in his second reading speech, said (inter alia) that the office of the Parliamentary Inspector "*provides an important balance in relation to the CCC's extensive powers*". The CCC's proposition is that the Parliamentary Inspector has no function, or power, to investigate and report on the manner in which a CCC investigation (here, the Smiths Beach investigation) has been conducted, including any factual errors, or inadequacy of evidence relied on to support damaging "*findings*" in the CCC's report of that investigation. If that proposition were correct, the manifest intention of Parliament would be defeated, and the Parliamentary Inspector's function would be unduly limited.
3. The selective definition of "audit" in the Macquarie Dictionary, quoted in your letter, is not apposite. The Parliamentary Inspector's "audit" functions are not "an official examination and verification of accounts and records", and it is surprising that it should be suggested that they are so confined, (if that is the suggestion). The relevant (and applicable) definition (see the New Shorter Oxford English Dictionary)

is "a hearing, an enquiry, a methodical and detailed review ... a searching examination".

4. Does the CCC really consider that it can carry out an investigation, and produce a report, without that operation (including its report) being subject to "*methodical review*" by the Parliamentary Inspector, followed by his recommendations?
5. If the CCC takes what is likely to be perceived as a defensive stance, seeking to rely upon a "jurisdictional" argument to shield itself from scrutiny and criticism, it will not foster public confidence in the CCC, and the manner in which it exercises its very wide powers.
6. My intention, in the "draft Report" was not to "*re-evaluate the evidence*" as suggested, but (inter alia) to objectively review and examine the CCC's "Smiths Beach" operation and the adequacy of the investigation.



**CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

Your Ref: LWRS/MP  
Our Ref: -

13 February 2008

By Email: [piccc@piccc.wa.gov.au](mailto:piccc@piccc.wa.gov.au)

Mr Malcolm McCusker AO QC  
Parliamentary Inspector of the  
Corruption and Crime Commission  
Level 3, 45 St Georges Tce  
PERTH WA 6000

Dear Parliamentary Inspector

**PAUL FREWER, MIKE ALLEN AND SMITHS BEACH REPORT**

I refer to your letter to me dated 5 February 2008 and our meeting on 6 February.

As we discussed, both the Commission and the Parliamentary Inspector are having to confront for the first time some very difficult and complex legal issues. I have acknowledged my commitment to the need to resolve them so far as possible between ourselves and with the object of making the legislative scheme work effectively, fairly and as the Parliament intended. Regrettably that now appears unlikely, at least in relation to the major area of contention between us, which is the scope of the functions of the Parliamentary Inspector. I say that because of the tabling in Parliament last Friday of your report in respect of Mr Frewer.

**Functions of the Parliamentary Inspector**

While it is apparent that we still have different views on the proper scope of the Parliamentary Inspector's functions under s. 195 of the *Corruption and Crime Commission Act 2003* (the CCC Act), the Commission's view is not as presented in your letter.

As I have said on a number of occasions, I consider the role of the Parliamentary Inspector to be absolutely necessary and critical to the operation of the legislative scheme. The external and independent monitoring so afforded to ensure the Commission's operations are conducted in accordance with its own Act and other

laws, and that its procedures are effective and appropriate gives the Parliament, the community and the Commission itself the confidence that the exercise of the Commission's extensive powers is appropriately subject to Parliamentary scrutiny and ultimate legislative control. That reflects the "important balance in relation to the CCC's extensive powers" in the statement by Mr McGinty quoted at paragraph 2 of your letter.

It is therefore self evidently not the CCC's proposition (asserted at paragraph 3 of your letter) that "the Parliamentary Inspector has no function, or power, to investigate and report on the manner in which a CCC investigation (here, the Smiths Beach investigation) has been conducted". The Commission accepts without reservation that the Parliamentary Inspector's functions and powers include investigating and reporting on the manner in which a Commission investigation has been conducted, in so far as that goes to determine whether that was done in accordance with the CCC Act and other State laws and that the Commission's procedures were effective and appropriate.

Where the Commission does part company with paragraph 2 of your letter, is the reference to "including any factual errors, or inadequacy of evidence relied upon to support damaging 'findings' in the CCC's report of the investigation". Whether something is "a factual error" will almost almost invariably turn on an assessment of evidence and inferences or conclusions to be drawn from the evidence, leading to certain opinions as to whether or not misconduct is established. That will certainly be the situation where it is suggested there has been an "inadequacy of evidence". I remain of the firm view that it is not part of any of the statutory functions of the Parliamentary Inspector to express his own opinion (and make any recommendation) on whether or not the Commission ought to have assessed the evidence in a particular way. That would effectively be the exercise of an "appellate" jurisdiction. Indeed, that would not even be open to the Supreme Court on an application for judicial review. In so far as an application for judicial review might be advanced on a ground of insufficiency of evidence, it could succeed only if there was no evidence upon which the Commission could reasonably have made the assessment or come to the opinion it did. But in any event, that is a matter for the exercise of judicial review by the Supreme Court; in my view, it is not any part of the statutory functions of the Parliamentary Inspector.

It also follows from the above, that the answer to the question posed at paragraph 4 of your letter, is patently that the Commission does not consider at all that it can carry out an investigation, and produce a report, without that opinion (including its report), being subject to "methodical review" by the Parliamentary Inspector, followed by his recommendation. And the Commission has never taken that position. The Commission has no doubt that the Parliamentary Inspector can subject any of its investigations (including its reports) to "methodical review", to determine whether the investigation was done in accordance with the CCC Act and any other laws of the State and that its procedures were effective and appropriate.

But none of that would allow of a report and recommendations such as you have made in respect of Mr Frewer (and as you apparently intend to make in respect of Mr Allen). I must emphasise what should already be clear. Contrary to the



assertion at paragraph 5 of your letter the Commission is not seeking to "shield itself from scrutiny and criticism" by seeking to rely upon a jurisdictional argument nor at all. The Commission welcomes the scrutiny (and, where justified, the criticism) of the Parliamentary Inspector in the exercise of his functions under the Act. Public confidence in the Commission and of the legislative scheme Parliament has created in the CCC Act, will readily be eroded by the Parliamentary Inspector reporting publicly that on his own view of the evidence which was (or, perhaps, was not) before the Commission, the Commission "got it wrong" and should publicly retract its assessments, opinions or recommendations.