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INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

MELBOURNE

MONDAY, 14 DECEMBER 2020

(44th day of examinations)

BEFORE THE HONOURABLE ROBERT REDLICH AM, QC,

AND DEPUTY COMMISSIONER DAVID WOLF

Counsel Assisting: Mr Michael Tovey QC  
Ms Amber Harris  
Mr Tam McLaughlin

OPERATION SANDON INVESTIGATION

PUBLIC EXAMINATIONS PURSUANT TO PART 6 OF THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011

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*Every effort is made to ensure the accuracy of transcripts. Any inaccuracies will be corrected as soon as possible.*

1 UPON RESUMING AT 2.31 PM: 02:31:58PM

2 COMMISSIONER: Good afternoon, everyone. Professor Ryan, thank 02:32:04PM

3 you so much for joining us. Mr McLaughlin, Counsel 02:32:07PM

4 Assisting, and Deputy Commissioner Wolf will have the 02:32:11PM

5 primary task of asking you questions, and we look forward 02:32:16PM

6 to your evidence. Thank you very much. 02:32:18PM

7 PROFESSOR RYAN: Pleasure. 02:32:24PM

8 COMMISSIONER: Yes, Mr McLaughlin. 02:32:24PM

9 <PROFESSOR ROBERTA RYAN: 02:32:26PM

10 MR McLAUGHLIN: Thank you, Commissioner. Professor Ryan, thank 02:32:26PM

11 you for agreeing to attend here today to speak with us 02:32:28PM

12 about the matters that we have explored as part of 02:32:31PM

13 Operation Sandon. Just to start with, I guess we'd like 02:32:34PM

14 to do a bit of a background in terms of your 02:32:40PM

15 qualifications and experience. I understand that you're 02:32:43PM

16 presently the Professor of Local Government within the 02:32:48PM

17 Faculty of Business and Law at the University of 02:32:51PM

18 Newcastle; is that correct?---That's correct, yes. 02:32:54PM

19 And how long have you held that position?---I was appointed - 02:32:55PM

20 commenced work late May this year. 02:33:00PM

21 And you were previously an Associate Professor at the Centre of 02:33:03PM

22 Local Government at the University of Technology, 02:33:09PM

23 Sydney?---Correct. I was the Director of the Centre for 02:33:11PM

24 Local Government, the Australian Centre of Excellence for 02:33:13PM

25 Local Government, and the Institute for Public Policy and 02:33:17PM

26 Governance. So did a lot of work with local government 02:33:19PM

27 and state government in that role. 02:33:22PM

28 So it's fair to say that your expertise as evidenced by those 02:33:23PM

29 appointments to those positions is primarily in local 02:33:28PM

1 government processes and also the public policy that 02:33:31PM  
2 surrounds local government and the powers that they 02:33:37PM  
3 exercise?---Yes, that's correct. 02:33:39PM  
4 And do you have - I note you're a professor. Do you have 02:33:40PM  
5 specific qualifications, academic qualifications, in that 02:33:45PM  
6 regard?---Not specific academic qualifications with 02:33:48PM  
7 respect to that, except in public administration, public 02:33:52PM  
8 policy, you know, I teach graduate studies in public 02:33:56PM  
9 administration, master of local government and so on. So 02:34:00PM  
10 there's no specific qualifications for local government 02:34:03PM  
11 per se, but a lot of experience and exposure in this area. 02:34:07PM  
12 And I guess an aspect of that experience and exposure has been 02:34:10PM  
13 the work you have done for the New South Wales government 02:34:14PM  
14 in terms of advising on the introduction of planning 02:34:17PM  
15 panels; is that correct?---Yes, that's correct. So part 02:34:21PM  
16 of my role is public policy adviser in various 02:34:24PM  
17 jurisdictions. In 2018 I led the conduct of the 02:34:28PM  
18 evaluation of the first 12 months of the introduction of 02:34:33PM  
19 the local planning panels into New South Wales and 02:34:35PM  
20 provided significant advisory around how those panels 02:34:38PM  
21 might work and then we had a close look at how they were 02:34:41PM  
22 working in that first 12 months. 02:34:44PM  
23 Okay. And I understand you've also done some work with the 02:34:47PM  
24 Tasmanian Planning Commission?---Yes, that's correct, was 02:34:51PM  
25 engaged by the Tasmanian government to have a look at the 02:34:54PM  
26 planning system in Tasmania, particularly with respect to 02:34:57PM  
27 their independent planning authority, what they call the 02:35:00PM  
28 Tasmanian Planning Commission in Tasmania. So I worked in 02:35:05PM  
29 various jurisdictions looking at different approaches to 02:35:08PM

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planning, planning assessment in local and state governments.  
Thank you. So today we're really going to focus on a couple of specific areas of your expertise, and they are primarily the role of councillors within local government and the relationship between councillors and the CEO, and also the independent planning panels and how they can be used to minimise corruption risks within local government. So if we could go to the first of those. The recent changes to the local government law here in Victoria, the Local Government Act 2020, set out clearer or clear definitions of what the roles were for councillors and council staff. Part of that was to try and enable the councillors to have a strategic role and to really be - to be involved in setting the strategic direction for their local government area. In your view what are the benefits of having councillors really focus on that strategic direction setting as opposed to, say, day-to-day administrative decision making?---Thank you. I think at the broadest level it's helpful to think about councils as the elected level and the administrative or organisational level of council, and the interaction between those two levels is very important in terms of the success of how a council functions. For the elected level, for the councillors, it's very useful. They are often people with very diverse backgrounds. They are indeed representative of those local communities. So that local representation piece is very important. But they very likely come with no planning qualifications or very limited experience with

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1 the planning system, which of course is a complex and 02:37:11PM  
2 technical system. So one of the things that I think is 02:37:14PM  
3 very important in terms of the role of councillors, 02:37:18PM  
4 particularly with regard to the role in that 02:37:20PM  
5 representative role, you know, every council in Australia 02:37:23PM  
6 has a different focus, different priorities, reflecting 02:37:26PM  
7 the specific needs and aspirations of each of those 02:37:29PM  
8 communities; it is indeed what local government is meant 02:37:32PM  
9 to be about. So those councillors of course, they vary 02:37:34PM  
10 from place to place but they also vary in terms of where 02:37:38PM  
11 they come from. So one of the key things about that is 02:37:41PM  
12 that I think it's helpful if they are most - they are most 02:37:44PM  
13 well used when they, if you like, steer the ship rather 02:37:47PM  
14 than row the ship; so, in other words, if they set the 02:37:50PM  
15 direction of the organisation. Sometimes people think 02:37:52PM  
16 about that as analogous to boards. There are some 02:37:58PM  
17 problems with that strict analogy, but it might be helpful 02:38:01PM  
18 for the general public to think about boards setting 02:38:04PM  
19 strategic directions, setting some key policies, but not 02:38:06PM  
20 being involved in the day-to-day operation. Councils are 02:38:09PM  
21 very complex organisations. They cover a lot of 02:38:11PM  
22 functions, and CEOs of councils are highly paid 02:38:15PM  
23 professionals, as are other senior staff. Councillors, 02:38:18PM  
24 don't get paid very much, if at all. They just get 02:38:22PM  
25 limited remuneration. So their role is really to what 02:38:25PM  
26 I think of as set the direction, set the strategic 02:38:29PM  
27 direction, bring those views of what they know as members 02:38:32PM  
28 of those communities, knowing the aspirations of those 02:38:35PM  
29 communities forward into all of the policy setting that 02:38:39PM

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drive councils, and then it's important that there's a separation between the role of the council, just as there is importance in the separation between a board and an organisation, but the day-to-day operational tasks of the council are governed and led by the CEO and the senior staff members. Of course there's interaction with respect to understanding those needs. But in terms of those boundaries councils, as I said, are most successful when those boundaries are fairly tightly held. In terms of the strategic direction setting in respect to land use planning, it's very helpful and the role of local planning panels or other mechanisms such as these enable councillors to focus their energy and attention on, if you like, the rule setting. In other words, if you think about land use planning very crudely as putting a map before you and on that map you determine what the particular land uses are in a particular location, what's permitted in a particular area, what's not permitted in a particular area, that's quite a complex process and it's an extremely important process because whatever the permitted uses on that map are determine - fundamentally determine the value of the land, but also making sure that that land - that land is, if you like, an instrument to enable communities to have enough open space or enough cemetery space or enough land for residential development or enough land for commercial and industrial use. So those areas or those zonings, it is usually referred to, determine the kinds of look and feel of the place but also, you know, affects things like housing prices and so

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on. And of course land use planning is at that very important intersection between what I often describe as public and private interests. So in the public interest an authority such as a council or a government, State Government, can determine a zone which in fact determines the value of a piece of land. And that has direct - so you can down zone something or up zone something, but it has direct implications in terms of private interests. So it's clearly an area people feel very strongly about. Communities come out feeling - everyone wanting to express their views about, you know, having enough services, having enough land zoned for housing et cetera et cetera, and of course what their neighbourhoods look like and indeed what's permitted in places where they might perhaps live or own property. So it's a highly contested area for many people, and people are deeply interested in what happens in their communities. So in my view it's important to have councillors, if you like, set the rules, in other words with expert input from people in the councils, make decisions about what that zoning might look like, that zoning should be aligned to regional priorities so that we do have enough industrial land or cemetery space or whatever, things that happen at a regional as well as a local scale. But importantly in my view particularly with respect to transparency and corruption I think it's important that councillors don't have a role in determining specific applications, if you like, against those rules. So, in other words, the very important job of setting the rules should be the work of councillors.

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1 But, if you like, the more transactional task or at least 02:42:09PM  
2 the task with respect to does a particular application 02:42:13PM  
3 align or not with the rules I think is best done by people 02:42:17PM  
4 who are not councillors. 02:42:21PM  
5 COMMISSIONER: Can I just ask you, Professor Ryan, which 02:42:24PM  
6 jurisdictions around Australia now have that arrangement 02:42:29PM  
7 where council effectively are the policy makers, the 02:42:33PM  
8 strategists, but the decision making on particular 02:42:38PM  
9 planning issues are delegated or left to council 02:42:43PM  
10 officers?---It does vary in the detail because in most 02:42:50PM  
11 jurisdictions development applications over a certain 02:42:54PM  
12 value, say 30 million by way of example, would be 02:42:58PM  
13 delegated to a state or a regional scale planning panel. 02:43:02PM  
14 What happens at the smaller scale varies from jurisdiction 02:43:07PM  
15 to jurisdiction. But certainly New South Wales has it. 02:43:11PM  
16 Tasmania, whilst it deals with development applications at 02:43:13PM  
17 the local government level, any development of 02:43:17PM  
18 significance goes to an independent body, the Tasmanian 02:43:19PM  
19 Planning Commission. West Australia has a very - West 02:43:22PM  
20 Australia and South Australia have very similar systems, 02:43:25PM  
21 although a bit less evolved because they were earlier, 02:43:29PM  
22 such as the New South Wales system has now. So in most 02:43:33PM  
23 jurisdictions at some level of scale there is a separation 02:43:36PM  
24 between councillors and the development assessment 02:43:42PM  
25 process. 02:43:47PM  
26 And I take it from the opinion you've expressed that that 02:43:48PM  
27 system is working in those jurisdictions you think 02:43:52PM  
28 effectively or better than if it were otherwise?---Yes, 02:43:56PM  
29 I certainly think the system that's been introduced in New 02:44:01PM

1 South Wales in 2018 is a step ahead with respect to other 02:44:04PM  
2 jurisdictions because we had the benefit of learning what 02:44:09PM  
3 other jurisdictions were doing, it's the most recent of 02:44:12PM  
4 those. But it is a step ahead with respect to things such 02:44:14PM  
5 as bringing expertise to those development decisions, but 02:44:17PM  
6 importantly of course for your purposes transparency with 02:44:21PM  
7 respect to who makes the decisions and how those are made. 02:44:25PM  
8 Yes. Yes, Mr McLaughlin. 02:44:30PM  
9 MR McLAUGHLIN: Thank you, Commissioner. Firstly, I note 02:44:32PM  
10 I neglected to seek to tender Professor Ryan's written 02:44:37PM  
11 statement. 02:44:42PM  
12 COMMISSIONER: Yes. That will be public forum exhibit 3. 02:44:43PM  
13 #PUBLIC FORUM EXHIBIT 3 - Written submission of Professor 02:44:39PM  
14 Roberta Ryan. 02:44:40PM  
15 MR McLAUGHLIN: Thank you, Commissioner. So by way of 02:44:49PM  
16 reference to those submissions, Professor Ryan, you noted 02:44:51PM  
17 that not only is there, I guess, an efficiency benefit in 02:44:58PM  
18 splitting those rule setting roles versus essentially 02:45:02PM  
19 administrative rule implementation roles, but there's an 02:45:06PM  
20 inherent conflict between councillors occupying those same 02:45:11PM  
21 roles at the same time, so being asked to set the rules 02:45:17PM  
22 but enforce them at the same time, so that that creates an 02:45:20PM  
23 integrity risk; is that correct?---That's correct. 02:45:24PM  
24 And that that integrity risk - well, as you've mentioned here, 02:45:30PM  
25 the creation of planning panels or other independent 02:45:36PM  
26 bodies which set aside from council, where you set that 02:45:40PM  
27 threshold and how you set it is I guess a matter for each 02:45:46PM  
28 jurisdiction, but that helps ameliorate that integrity 02:45:50PM  
29 risk by taking the enforcement of the rules away from 02:45:53PM

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the councillors?---It does in my view, in part because  
rightly in many ways councillors see themselves as  
advocating for their communities. So if a development  
application is perhaps contentious in any way, it might be  
because it's a sensitive use or it might be around height  
or bulk or scale or those kinds of things, councillors  
find themselves caught with - because they are elected by  
those same constituents, they find themselves caught with  
wanting to respond to those expressed views of their  
communities, whereas it might not be in the best interests  
of the whole community not just because certain land needs  
to be zoned to do certain things, for houses and so on,  
service people, but it can be without full regard to the  
planning rules. So there's an expertise question there.  
But there is certainly in the role of councillors being  
close to the people, it's an important democratic - local  
democratic function, they are also much more available for  
influence. They are much more available for meeting up  
with people in their roles as they rightly see it often in  
understanding the aspirations of those communities.  
Typically how a planning panel - as you say, they have got  
different names in different jurisdiction, but typically  
how a planning panel which is separate from the elected  
role, there are very strict rules with respect to any  
connection with anybody with respect to a particular  
development application. These are all done on the public  
record. It's not a popularity contest. It's assessing an  
application against rules that have already been set.  
It's also not a problem for the members of a planning

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panel if they make a decision which is clearly unpopular because it's approvable within the rules. So the conversation then has to be, 'Let's have a conversation subsequently with council about how those rules need to be set in the future.' But a particular application is viewed with the lens of does it comply with the rules, if you like, regardless of some of those concerns that community often rightly have. They are not - for example, declarations are made. It's forbidden in the New South Wales system for members of panels to have any contact with anyone in relation to a matter, or historically. So you might have - you know, planning experts are often appointed to these panels. They may have worked for a particular proponent or they may have conducted their business in the local government area. All of those things are dealt with through complex conflict of interest declarations. They are all done on the public record. Anyone involved with a matter (indistinct) approach and then a panel, and in fact mostly they wouldn't know who was going to be on the panel until shortly before a hearing. So there's a lot of things in place to allow for that kind of transparency and probity to be pretty rigorous around how the operations of the panels work. So if I could just take you to perhaps the specifics of the New South Wales standard because they provide a useful illustration of what you were just discussing in terms of the membership of the panel. As I understand it there's three expert members, one chair and two other members and a community member as well. But none of those members are

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1 allowed to be either planning officers or people engaged 02:49:34PM  
2 within an organisation that currently has a development 02:49:41PM  
3 application, there are strict rules around membership; is 02:49:44PM  
4 that correct?---That's correct. So the chairs are 02:49:46PM  
5 appointed by the minister in New South Wales, by the 02:49:50PM  
6 Minister for Planning. The experts are also appointed to 02:49:53PM  
7 what's called an eligibility list. So people apply. The 02:49:58PM  
8 minister through his delegates in the state department 02:50:02PM  
9 review that eligibility list for the experts. Then people 02:50:06PM  
10 get put on eligibility lists. So for each of the chair 02:50:09PM  
11 appointments the minister or his delegate makes those 02:50:12PM  
12 appointments for particular local government areas or the 02:50:17PM  
13 local government - for the experts the local government 02:50:21PM  
14 themselves can choose from that approved list. And all of 02:50:24PM  
15 those people, experts or chairs, go through rigorous 02:50:28PM  
16 background checks et cetera et cetera in terms of board 02:50:32PM  
17 probity appearances. The community members are able to be 02:50:35PM  
18 appointed. They are called community representatives, 02:50:39PM  
19 which in my view is a bit problematic, but community 02:50:42PM  
20 members appointed by the councils themselves. Sometimes 02:50:47PM  
21 those community members are appointed because they have 02:50:49PM  
22 planning expertise, which again sometimes leads to some 02:50:51PM  
23 sort of difficulties in that space. But people are 02:50:54PM  
24 prohibited - either experts, chairs or community members - 02:50:57PM  
25 from being developers, real estate agents, or anyone who 02:51:01PM  
26 within that system could have a particular influence over 02:51:08PM  
27 something. So there's this whole process. The community 02:51:12PM  
28 members themselves are not subject to those background 02:51:15PM  
29 probity checks. So that's the sort of set-up of the 02:51:17PM

1 system and people are appointed for periods of time for 02:51:22PM  
2 terms, and then - and they can continue to be turned over, 02:51:26PM  
3 if you like, or continue to be appointed. 02:51:31PM  
4 Sorry to jump in, but is there specific training offered to 02:51:34PM  
5 panel members regarding the declarations of conflict and 02:51:38PM  
6 how they are to treat conflicts within their careers, 02:51:42PM  
7 because I assume there's people who have jobs and other 02:51:45PM  
8 careers likely within this planning sphere at the same 02:51:48PM  
9 time as being a panel member?---Yes. Typically the chairs 02:51:53PM  
10 of the planning panels are not planning experts in New 02:51:57PM  
11 South Wales. There could be a discussion around that. 02:52:00PM  
12 But the experts are certainly, if you like, within the 02:52:01PM  
13 planning field. So they might be land use planners, 02:52:05PM  
14 architects and so on. And the idea is that particular 02:52:08PM  
15 people can be brought forward with certain expertise. So 02:52:11PM  
16 say it's a matter with significant traffic issues or 02:52:13PM  
17 heritage issues. You could bring forward an expert with 02:52:17PM  
18 that kind of expertise to look at that matter. Indeed the 02:52:20PM  
19 department provides ongoing training. There's workshops. 02:52:24PM  
20 There's sessions. There's releasing of materials. 02:52:27PM  
21 There's some interesting case studies. In other words, 02:52:30PM  
22 what happens if you find yourself in this situation do you 02:52:33PM  
23 have to declare it? The rule is if there is any question 02:52:36PM  
24 declare it and then the chair will make a kind of ruling 02:52:40PM  
25 on that. So a typical example might be that a person who 02:52:43PM  
26 is an expert is a planning professional. As you say, 02:52:47PM  
27 these are not full-time jobs. People get sitting fees for 02:52:51PM  
28 this work. Most people who are members of these panels, 02:52:54PM  
29 you know, have other jobs, or they may be retired, which 02:52:57PM

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is another issue in terms of people's currency. But if people have regular jobs they might be planning consultants typically; they might work for planning firms. So what the process is designed to do is that you get lists of who the proponents are, who the proponent's expert support team is. One goes through those lists to make sure that you are not related, you haven't worked with, you don't have - so there's, you know, quite a lot of process around what's an interest, pecuniary interest, non-pecuniary interest. Clearly if you are related to somebody who stands to have financial gain it's pecuniary interest et cetera et cetera. It's the non-pecuniary interests that get tricky for people. It's in the area of, look, say it's a large developer. Many planning consultants over their professional lives will have in the past potentially provided advice or conducted work for that for a payment. So then a discussion has to happen around, 'Is it recent? Is it relevant to this?' And so any time - this is all very clearly outlined in the guidelines. People are tested on these. People review how the declarations occur, needing to meeting et cetera. And again if there's any doubt the recommendation is always to step away and have somebody else appointed to assess this matter. But it's all about really clarity and putting anything on the record. So it might be the case that somebody has acted for that particular applicant five years ago, not related to that matter, that would be put on the record. It may not exclude that particular expert from being on the panel. But there's detailed processes

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around that and there's detailed review of those  
declarations by the department over time to see if  
particular individuals are coming up as often having  
conflicts or whatever. So, you know, it's quite a  
rigorous process, application and determination, each time  
this is done.

And all of those conflicts - - -

COMMISSIONER: Sorry, Mr McLaughlin, I just wanted to ask,  
Professor, did you hear Dr Rowley's evidence this  
morning?---No, I didn't. No.

Dr Rowley indicated on this issue of planning panels or an  
expert panel that might be separated from the council's  
policy decision making that he couldn't see a benefit  
because the integrity issues which would apply at council  
level would equally apply to the panel. Now, I don't  
think he had the benefit of hearing all that you've said  
just now. But I was wondering most of the conflict of  
interest concerns that you've raised would have to be  
raised by a councillor. If they were being asked to vote  
on a motion and there was any conflict, and plainly enough  
there are a lot of examples where councillors have  
demonstrated in a variety of inquiries during commission  
examination in different states that councillors don't  
always have the right perception about when they should be  
declaring conflicts. What is it that gives you confidence  
that an expert panel would discharge that obligation more  
effectively than councillors?---Principally because as  
expert members of panels they don't have the same  
obligations to the community with respect to the nature of

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the decisions that are made. Their obligations are professional obligations in terms of, 'Does this particular application fit within the planning rules, which have already been set?' But it doesn't have consequences, professional or otherwise, for the members of the panel if they approve something that is unpopular. And things can be unpopular in communities because of lack of understanding or concerns about particular populations and so on. And so that pressure that comes on councillors when a particular application might have many, many objections, sometimes as you know they might have hundreds of objections, that pressure that councillors feel to do the bidding of their constituents and they in fact would often feel considerable sympathy with the views of those constituents I think puts them in a pretty invidious position with respect to feeling pressure to approve matters which may not be in the public interest, for a variety of reasons. And that public interest might be because we need those particular facilities or it might be because they fit within the planning rules. So the lessons for the councillors is to change the planning rules in the way they set, you know, the local environmental plans. But the panel doesn't have those same kinds of pressures with respect to concerns that communities raise. The other thing is that applicants get to know councillors. That's part of what applicants do. They get to know councillors. They have relationships with councillors. And that familiarity is not possible within the local planning panel set-up. If I have any

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knowledge of an applicant I have to - if I'm a member of a  
local planning panel I have to declare it and get off that  
decision. So there is no - I am subject to considerable  
scrutiny with respect to whether I have a relationship  
with or knowledge of or am capable of providing benefit to  
an applicant. That is, in my view, a completely  
different - the nature of that relationship is completely  
different. And of course as a planning professional - not  
everyone, as I say, is a land use planning professional,  
but in the broad category of planning professional one's  
reputation and professional livelihood depends on the  
transparency with which people deal with those decisions.  
It is a significantly - I mean, I've sat through, as most  
people who work in local government, many, many council  
meetings where it is clear that there are existing  
relationships because these are communities where people  
know one another, and often councillors are involved in  
encouraging particular proposals because they think it's  
good for their communities. Now, they can't possibly be  
involved in determining those matters because of the sort  
of - fairly because of the sort of relationships that  
exist, in my view. This is a significant step forward in  
terms of being able to allow people to be transparent,  
deal with any perceived conflicts, because people on those  
panels are simply not in the same position as councillors  
are.

Thank you. Yes, Mr McLaughlin.

DEPUTY COMMISSIONER: I might if I could just ask one thing,

Professor Ryan. Part of Dr Rowley's contention was the

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corruption risk of the decision maker. So at a local government level whether you might have a councillor that is approached or cultivated by a proponent over time, and perhaps predisposed to corrupt conduct, of course they're not going to declare that relationship in the course of decision making. So the more you're talking about - it seems to me there are a number of additional protections in there, but there's still that opportunity for, you know, someone who's putting forward a matter and who's perhaps a longer term game to cultivate perhaps the chair of a panel over a long period of time. So what are the safeguards that you've considered in the reviewing of that process and that may have been put in place?---The people who the minister appoints to chair the planning panels are generally not people who are planning professionals, and that's partly because they don't have that kind of day-to-day engagement in the planning system. I don't know whether your screen is doing a bit of a jig, but my screen is certainly bouncing around. But we'll carry on unless the technology stops us.

COMMISSIONER: Your voice is steady, Professor; that's the main thing?---Good. You're all sort of jiggling. But I'll carry on, thank you. So firstly the chairs of local planning panels are typically not, although they are sometimes, planning professionals. But they're often, if you might - if I could use this word, sort of esteemed individuals. In the New South Wales case they are often people who are, say, ex-commissioners of the Land and Environment Court, deeply familiar people. We have some

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judges, we have ex-ministers, people who would be seen as people of considerable standing in the community. In terms of the experts, who are crucial in this system - I mean, obviously the chair's crucial, but the experts themselves are crucial in this system - most people who work in the land use planning area much of what they do is on the public record. So that if you, for example, sometimes acting as an adviser and sometimes an applicant as a proponent, so you work for a planning firm, all of that documentation is on the public record because it's part of the documents that are lodged. So that you can, if you like - I'm not a land use planner, but if I was, every planning application I submitted you could track that on the public record. You could put my name into the system and you could pull up every one of those documents that I've had my name on and you could say to me, 'Look, Roberta, you know, five years ago you acted for ABC Developments, and now you've found yourself on a panel where you might be of a mind to approve an application for ABC Developments.' Now, one would hope that a planning professional would declare that they worked on a matter five years ago. But, just say they didn't, that information is all on the public record. You can go and find it. Whereas it's much more difficult to do that in the case of a councillor, who of course has all sorts of relationships. They are members of clubs, sporting groups, et cetera, et cetera, because that's how they build their relationships to get elected to council. So there's different dynamics at play. I mean, certainly

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1 there's a question around lobbyists, and of course people 03:04:02PM  
2 have to be on the register. But lobbyists are not 03:04:05PM  
3 permitted any more than developers are to be members of 03:04:08PM  
4 local planning panels. So I think there's a different set 03:04:11PM  
5 of capacity to oversight involvement. Of course I could 03:04:14PM  
6 be married to somebody who works for a proponent or, you 03:04:21PM  
7 know, et cetera, and those kinds of declarations, it's 03:04:26PM  
8 required - who may - if a matter is approved lead to, you 03:04:31PM  
9 know, that being a good outcome for somebody, those 03:04:35PM  
10 matters just have to be declared of course. But again 03:04:39PM  
11 planning professionals rely on their integrity to get 03:04:42PM  
12 work, really, as part of what they do. 03:04:47PM

13 Perhaps just a quick follow-up. I think what I was alluding to 03:04:50PM  
14 was how you quarantine the decision maker from corrupt 03:04:55PM  
15 approaches. Obviously fixed tenures is one way of 03:04:58PM  
16 achieving that. So there is a turnover, but that is 03:05:03PM  
17 difficult to manage from an administrative perspective 03:05:07PM  
18 because the pool of people to do it is not as deep as we 03:05:09PM  
19 probably want. The other options of course are a random 03:05:12PM  
20 pool, like a random panel, so selected from the pool so 03:05:18PM  
21 you don't know who are going to be the people that are 03:05:21PM  
22 making the decision. And of course to the other extreme 03:05:24PM  
23 there's the invisible decision making panel. So they are 03:05:28PM  
24 drawn from that but the actual proponents don't know who 03:05:31PM  
25 the people are that are actually deciding upon it. Have 03:05:34PM  
26 you had any thoughts about those?--Yes. Look, I think as 03:05:37PM  
27 I said the chair is critical. The chair is appointed for 03:05:40PM  
28 a period of time. So in this system the chair would be 03:05:43PM  
29 the most vulnerable member of that panel. Who comes up to 03:05:47PM

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assess a particular matter is to some extent - it's not fully randomised, as you say. For industry reasons there is a pool of people who are available for that. So, you know, you could potentially work the odds if that was your interest. But it is - from matter to matter it's fairly random, if you know what I mean. Somebody is available or they are not, it will be a timetabling issue, or the process of declarations will have occurred anyway. In terms of it being, if you like, a blind panel, I suspect that would pose another kind of difficulty where we want the community and applicants to feel these processes are fair. They might not like decisions, but I think it's important that they are confident that the process - they feel the process is fair. If they can see it and hear it and be subjected to the kinds of questions that panels ask in terms of, 'Well, have you thought about why you couldn't set that back or why can't you preserve that tree' or the kinds of questions, I think that helps with building a level of education with applicants as well as communities, and I think that level of transparency in understanding how the system works is important. So along that continuum there's a spot, because some of the things that happen around local planning panels are, you know, a bit about administrative, you know - what's the right word; you know, they are administratively easy. You can't randomise it to the point of everybody being new every time because, you know, the panels need to build capacity as well as, you know, there being enough randomness or enough unknownness, if you like, as to who might sit on a

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particular - you know, assess a particular matter. So  
there's a bit of a balance at that end too just in terms  
of administrative smoothness, if you like.  
COMMISSIONER: I'm sorry, Mr McLaughlin, we are cutting you out  
of your task, but I'm just curious. So at a council level  
when councillors are making these decisions about  
individual applications or motions, before they do so  
there's been quite a - usually quite an intense  
consideration of that issue by council officers. How is  
that replaced at panel level? And a second question,  
Professor, did I get the impression that the panel  
actually conducts a hearing in which they hear from  
the person who's wishing to proceed with the  
application?---Correct.  
So that's also a difference then from a council operation,  
isn't it?---It depends. A council might have a briefing  
from an applicant. Some of this is done according to sort  
of historical ways of operating within councils. Some  
councils might have a work - particularly if it's a large  
significant matter or a controversial matter, a council  
might seek a briefing from the applicant where the  
applicant will do a presentation, councillors will ask  
questions, which in operation wouldn't differ too much  
from mostly how the planning panels would work themselves.  
So again in a complex matter, look, many of the local  
planning panels seek briefings from the applicant and the  
hearings are public. In other words, anyone from the  
community can come but, you know, particularly people who  
have made objections. People get a - you know, are on a

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list to speak. They are usually - they are not always objectors. They are often objectors. They have the opportunity to express their views directly to the panel. And then the panel may deliberate in front of that group and say, 'Look, we've reviewed this. We've reviewed all the documentation. We've heard from the applicant. We might have separately heard from the council staff. We've heard from objectors and now this is our decision.'

Sometimes they go away, if you like, and close the door. When we used to - all this year everyone's been doing this stuff remotely, but previously when it was done face-to-face they might go into a separate room, have that conversation and say, 'What do you think about that' or 'We heard something out there we hadn't heard before. Do we need more information' or whatever. But typically they'll come back and say, 'This is the outcome.' It depends on the time of day and all sorts of other variables, but generally they'll come back within an hour or so potentially, yes, and announce their determination. So some panels, however, have that deliberation in front of people. So there's a range of views about the value of that kind of process. In terms of being - the council officers provide the same kind of documentation to panels that they would provide to councillors. They're often wads of documents with detailed, you know, studies, storm water and acoustic and, you know, masses of studies, great wads of documents which the panel members will have read before that. They'll generally have had the opportunity to ask the councillors to clarify things or, you know,

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'We're not happy with', you know, 'We wonder if there's a risk of flooding here. Can we get another expert to review,' you know, if it's a significant issue. So these are often run quite (indistinct) around the expertise and then that's all gone through. It may happen in a day or it may happen where there's an early briefing on a complex matter and then there's a hearing, you know, a month or two months later when some more documentation is put before them. So, look, it varies. The procedures are a little bit flexible with respect to that kind of process. But it's encouraged that there is some interaction because it helps applicants understand the sorts of issues that are going to be a concern in the determination.

COMMISSIONER: So the panel then draws on the council's infrastructure for the gathering of information, initial reports and the like?---Indeed, and the councils in New South Wales make recommendations to the panel to approve or not to approve. So when we did the evaluation of the first 12 months, and I can't tell you if the first 12 months has been indicative of the second 12 months because I haven't done the research subsequently, but assuming it's indicative, upwards of 85 per cent of planning panel decisions aligned with council staff recommendations. So, in other words, if there's a recommendation to approve or not approve, around about 85 per cent plus of those decisions were decisions made by the planning panels themselves.

Thank you.

MR McLAUGHLIN: Thank you, Commissioner. Just a couple more

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items to round out the discussion in relation to the  
planning panels. If we just go back to the membership of  
those panels and we were talking about obviously the  
practical reality of people being available and the  
experts being able to appear. An earlier witness we had,  
Dr Murray, had put forward an idea of essentially a jury  
system for the membership of those panels. Your thoughts  
on that? Do you feel that that is part of that practical  
implementation of this process, that we just don't have  
the pool of people available to be able to randomise it in  
the way that we do, say, a jury pool?---Yes, so a jury  
system in as much for every matter a new panel, a new  
group were put on the panel?

Yes, to ameliorate that risk of, you know, to use I guess a  
fairly blunt parlance, a person who would have been gotten  
to in advance?---Yes. Look, I think it's about the  
administrative convenience of these issues. We all,  
members of planning - I'm a member of State panel and I'm  
available when I'm available and I'm not available when  
I'm not available, and there's a group of us who often,  
you know, sometimes I'm with this colleague, sometimes I'm  
with that colleague. It would be fair to say that it  
would be fairly evident if a particular member of either  
the State or the local planning panel had a disposition to  
approve or not approve matters that didn't line up with  
the rest of the panel, and those issues would be flushed  
out fairly quickly. So if there was a member, say, who  
suddenly went along and thought, 'Let's approve that one,'  
and the rest of us go, 'Oh, we don't think we're approving

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that one for the following reasons,' so who actually makes the decision in which way is also public. So, if I'm the dissenter the whole time, you might ask what that's about. So there are mechanisms within the way the panels themselves work which would flush out anyone who suddenly looked pretty keen on proposals from, you know, Fred Nurk & Associates. So there's those kinds of things. But I think firstly the pool is not deep enough yet. Even in a large jurisdiction like New South Wales, the planning profession who are available for this kind of work is not vast. I had the pleasure of assisting the minister in selecting the first round of local planning people and, without being certain about it, there were maybe a couple of hundred applications, of which we needed about 100 people to cover the territory. So, you know, the pool is not that deep; you try to weigh out all the time. Very experienced, very esteemed people, particularly ex-members of courts and commissions and so on, are very sought after for these roles. But the further they are from face-to-face practice, the less they are up to date with current planning rules, current planning matters and so on. So you try to balance people who are in the system because they're across the detail of how all this works. You know, lots of changes come through all the time, we're always being trained on changes in planning system, with the sort of practicality of having a pool of people that you can draw from.

And I guess one last question in relation to those panels. A very important point is the selection criteria, at which

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point a particular decision is referred to the  
panel?---Yes.  
Because I think most people would accept that when you're  
talking hundreds of millions of dollars, those sorts of  
projects, often even within jurisdictions without the  
similar system as New South Wales, they already have some  
sort of process where that goes through that review. But  
where do you see the best place to put that threshold for  
something going to a panel?---Yes. Clear criteria for  
referral I think is crucial to the effective operation of  
the system. Matters in most jurisdictions that are of a  
certain dollar value, it varies roughly between 20, 25 and  
30 million, automatically go to a State panel, so there's  
no discretion there. If the development value of that  
application is of whatever that amount is, if you like, it  
just automatically goes to a determination of the State  
panel. There are opportunities for developers to game  
that. If they think, 'Oh, I don't think this proposal is  
going to be particularly well thought of at the local  
level,' they can parcel things up so that they can get  
that dollar value and push it up to the State planning  
panel. So every criteria is going to have its challenges,  
but a fixed dollar amount is quite helpful, and my view is  
that for the local planning panels which are matters  
underneath those dollar amounts, the criteria in New South  
Wales is based on the number of objections and it's been  
set again at a kind of - in other words, contentious is  
defined as 10 separate objections, they're called  
individual objections, in other words you could have

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petitions and so on, but they have to be considered 10  
objections around particular issues, or 10 per cent  
departure from development, greater than 10 per cent  
departure from development standards, which again has in  
fact in practice been the most problematic one because  
departures from development standards can be technical  
matters that don't necessarily require a planning panel as  
councils get their planning controls sorted out. Other  
ones are what we call sensitive developments, so they'll  
be brothels, licensed premises, cemeteries, funeral  
parlours and so on.

So my view would be, and this is also the view of  
others who have looked at this more closely, there should  
be no discretion, if you like, not to refer. So if it  
fits within that, there shouldn't be a discretion from the  
council not to refer a matter. I left out the key one.  
If the council is an applicant, if you like, if it's their  
land or it impacts on their land, that automatically comes  
up, if you like, to a planning panel.

So my view would be there should be no discretion  
not to refer. There are occasions when councils seek to  
refer to a planning panel for reasons such that this is a  
contentious issue among the councillor group, and they  
know that, so they'll seek to defer it to the planning  
panel. It shouldn't be possible to say, 'Oh, no, no,  
we'll keep this one,' and not defer it, for whatever  
'we'll keep this one' might mean. That we think shouldn't  
be possible. But those things being clear, in the  
evaluation we did we looked at all of the deferral

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reasons, we read all the documentation. You know, as I said, the clearer the boundaries, the easier it is. And indeed when you talk to planning directors, who of course can't go on the public record and say, you know, 'Gee, it's better if councillors don't determine these matters,' we'll in fact tell people like me as researchers that it is better for them if these matters go to independent panels because they don't have to get caught in, if you like, that local kind of politics piece. They don't have to feel that pressure where they know, look, this councillor group doesn't like this kind of development, whatever it is; it's just much easier for them if they're dealing with an independent group of experts with whom they don't typically have much of a relationship, they might see on the odd occasion. They are not employed by them, if you like.

So, I think that those referral criteria are really critical. Where you draw the line in terms of the dollar value would be a jurisdictional matter, I think, in terms of where you are. It's different in regions from metropolitan areas and so on as well.

DEPUTY COMMISSIONER: Perhaps if I could just ask a couple of questions. In your review of the system, and clearly taking those decisions out of the councillor space is a reasonably significant move, in terms of the performance of the scheme did it add any additional time or cost and did the community still feel they had a voice or representation in the decision-making process?---It does add cost to the system because the panels - you know, it

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adds cost at the State government level because the panels are formed through the work of the State government level, the panels are paid through the State Government level. There are sitting fees, they're not fortunes, but it is an additional cost. The work of the council in terms of the council staff doesn't really change materially because they're still doing detailed assessment reports with recommendations. Whether they go to a council or whether they go to an independent panel I think largely doesn't affect the scale of the work that happens at the council level. There are savings, if you like, in terms of the effort of councillors who are deeply overworked and, you know, find themselves going to meetings every day of the week, often for almost no remuneration. You know, it's definitely largely volunteer work in many ways, the work of councillors.

Much of the work of councillors was taken up with development applications, particularly in high growth councils where there's a lot of activity. I mean, not for some regional councils where a DA is an occasional thing, but certainly in high growth metropolitan councils those councils would be very busy. So there are savings in terms of their time and effort, and particularly in New South Wales and this also happened in Tasmania, calls to strengthen what you call the strategic planning settings at the State level, so regional plans that say, 'Well, what do we need in terms of resources,' or 'What do we need in terms of cemetery space,' or whatever. When that's done really effectively, that also helps councils

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because it helps them align their strategic planning with State and regional priority, so that saves money. But really the effort for councillors in my view, as I said before, is really better at the strategic level and if they can get out of the kind of transactional stuff around approvals, they can really focus their minds on what is a quite extensive process of reviewing the planning controls for their locations and making sure that they are meeting the future needs of their community.

So it's quite a piece of work and councillors often didn't have the time or didn't understand the value of their input at that strategic level in terms of representing the interests. So a lot of the early conversations around the introduction of the local planning panels, as you could imagine, there was expressed disquiet by councillors in New South Wales when this was being mooted. But a lot of conversations and a lot of education went on with councillors who - and I've had the opportunity to do a lot of training with councillors around strategic planning, how to involve themselves in strategic planning. They sort of go, 'Wow, it's much better to be involved in this bit when you're setting the rules,' rather than the tedium of reading all of those detailed assessment reports, for which I'm sure mostly people don't read them because of the time pressures. So, it's much better to bring their expertise with that local knowledge. Certainly early signs in the surveys and so on that we did in the evaluation of the introduction of the local planning panels, those trends were beginning to

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1 show. It would be interesting to do it another year on, 03:25:05PM  
2 but we haven't done that. 03:25:08PM  
3 And the last point from me, and I'm assuming the quality and 03:25:09PM  
4 consistency of the decisions has meant there's a lot less 03:25:14PM  
5 challenges to the actual decision making?---Correct. And 03:25:18PM  
6 so one of the indicators that is mapped is how often 03:25:21PM  
7 decisions are appealed and so, yes, that is an indicator 03:25:27PM  
8 that is tracked and it's improving. Timeliness, it's a 03:25:31PM  
9 bit hard to judge the timeliness point. The early review 03:25:36PM  
10 showed that it was faster because panels can be called and 03:25:41PM  
11 can happen relatively quickly, depending on the demands of 03:25:46PM  
12 the panel, whereas councillors do DAs amongst everything 03:25:50PM  
13 else they do, strategic planning and policies and all 03:25:55PM  
14 sorts of other things, and matters can be significantly 03:25:58PM  
15 delayed before they get to councils, whereas that's the 03:26:01PM  
16 planning panel's job, so they get things quickly. There 03:26:04PM  
17 are timelines set on those and during COVID in most 03:26:07PM  
18 jurisdictions there was considerable effort put into 03:26:10PM  
19 speeding them up and certainly on the State planning panel 03:26:13PM  
20 the timing has been really impressive through COVID 03:26:16PM  
21 because government wants to get people, you know, building 03:26:19PM  
22 and helping the economy along at this point. So, planning 03:26:22PM  
23 panels I think provide an opportunity for speed and 03:26:26PM  
24 improved consistency. But, look, there's certainly more 03:26:29PM  
25 research to do in looking closely at the effectiveness and 03:26:32PM  
26 the areas where there might be, you know, holes that can 03:26:37PM  
27 be further plugged, if you like. 03:26:42PM  
28 MR McLAUGHLIN: If we might move on to the relationship then 03:26:46PM  
29 between the CEO and the councillors, which is a very 03:26:56PM

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different aspect of the roles that councillors play.  
I think certainly as you'd be aware, in Victoria council is both responsible for employing the CEO, for managing their performance and for, you know, basically firing them if they don't believe that they're up to measuring against that performance. Your submission notes that you think that that again, much like the planning decision making role, in that that places councillors in a very difficult position and a very conflicted position if they're responsible for performance managing someone who is also responsible for managing them. So if I could just have you speak a bit to the difficulties that you see councillors being in that position of performance managing a CEO's conduct?---Look, I think this is one of the really big issues for local government generally with respect to not just land use planning but undue pressure and corruption generally. One of the key talents of a good CEO is their capacity to manage that relationship, particularly the relationship between the mayor and particularly their relationship, the CEO's relationship with the mayor and vice-versa. If that doesn't work well and if there's acrimony or disagreement about policy direction or operational matters, it really impedes the effectiveness of council just to get the general business done. Councils that are - elected councils that are highly fragmented because of political differences or who have members who, you know, there's behavioural kind of issues around the way they conduct themselves, it is really the business of council that makes the job of a CEO

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extremely difficult. But it makes the CEO vulnerable because of, just as you've described, how directly reliant they are on the mayor particularly. The mayor will be the mayor because they have the majority of the council, even if that can be an unstable majority at times. So that criticality of the relationship between the mayor and the CEO is just - you can't stress it enough. So if there is some issues of pressure, issues of interference or questions of bad behaviour by councillors, which is not endemic but it's pretty common from time to time, it's quite difficult for CEOs to manage this because if they have an unfavourable relationship with the mayor or the councillors, they're putting their own employment at risk.

Now, this is really I think an Achilles heel in the whole structure and system of local government and the whole system, and Victoria is no different in degree from anywhere else in Australia. This relationship and ways to manage this relationship more effectively I think is one of the things that would really strengthen local government's functions and operating. So some councillors you'll hear - I work a lot with councils. I do a lot of in-house work with councils, a lot of training with councils, a lot of training with the senior executive, but the thing they all bemoan, the senior staff hate it when the councillors interfere too much. There are legislative boundaries in each jurisdiction about what that interference means, that separation between policy and operational issues, but in regional councils you often find councillors just bowl in and start talking to a

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1 planning officer. In a metropolitan council that would 03:30:37PM  
2 not be permitted and they would be managed much more 03:30:40PM  
3 carefully. Mayors can be full-time, so they have much 03:30:44PM  
4 more time to kind of get involved in the operational side 03:30:48PM  
5 of council. So we talked a little bit at the beginning 03:30:51PM  
6 about the importance of separating that policy side from 03:30:54PM  
7 the operational side. The way that line is drawn is very 03:30:57PM  
8 important and the legislative strength of that and the 03:31:00PM  
9 subsequent capacity to enforce breaches is very important. 03:31:04PM

10 So when it comes to the employment of the CEO, as 03:31:07PM  
11 you mentioned it is governed by those two Acts in 03:31:13PM  
12 Victoria. It's very important that there is clear 03:31:16PM  
13 performance criteria. In other words, is the CEO doing a 03:31:21PM  
14 good job? What does a good job look like here? Is this 03:31:25PM  
15 something we're all agreed on? Are there things we can 03:31:28PM  
16 actually measure? You know, it's not, 'Do we like him? 03:31:31PM  
17 Is he cooperative?' Many are women; I shouldn't have used 03:31:34PM  
18 'him'. 'Do we like them, are they cooperative, are they 03:31:38PM  
19 friendly, do they give us what we want,' is not 03:31:41PM  
20 performance criteria. That might be the kind of 03:31:44PM  
21 performance criteria that councillors favour because they 03:31:47PM  
22 want, you know, warm working relationships, but are they 03:31:50PM  
23 effective, et cetera? 03:31:54PM

24 So, performance criteria is really important. It 03:31:56PM  
25 needs to clearly outline processes for termination within 03:31:58PM  
26 that contract. There have been numerous occasions, and 03:32:02PM  
27 there's been two in the last 12 months in another 03:32:05PM  
28 jurisdiction, not Victoria, where CEOs have just been 03:32:09PM  
29 dismissed and the State government agency have said, 'Yes, 03:32:12PM

1 those dismissals are illegal,' but they've still been 03:32:18PM  
2 dismissed. Now, you know, this is not a very good 03:32:22PM  
3 platform on which CEOs can manage behaviour that is either 03:32:24PM  
4 inappropriate or corrupt because they are put at risk so 03:32:27PM  
5 much through this relationship. So there needs to be 03:32:30PM  
6 processes, in my view, where there needs to be approval by 03:32:34PM  
7 a majority of council. This isn't a safeguard per se 03:32:37PM  
8 because councils function well when mayors have a majority 03:32:43PM  
9 on the council. Good mayors of course manage in 03:32:46PM  
10 everybody's interests and hear a range of views, but it 03:32:48PM  
11 often is a numbers game. So, again, a mayor can be very 03:32:51PM  
12 influential with respect to whether they like the 03:32:56PM  
13 performance - I put 'like' in inverted commas - of a CEO. 03:32:58PM  
14 So, I think there's room for a whole piece to be 03:33:03PM  
15 tried doing this differently and some of those things 03:33:08PM  
16 might be things like - you know, it's always a balance in 03:33:11PM  
17 these matters between local representation. Councils are 03:33:15PM  
18 for their communities. They're meant to be distinctive. 03:33:19PM  
19 They're meant to be people who represent the aspirations 03:33:22PM  
20 and interests of their local communities. So that 03:33:24PM  
21 localness, if that's a real word, is very important in 03:33:27PM  
22 this. So, you know, local councils around Australia, 03:33:31PM  
23 sometimes you have CEOs appointed who are fantastic in a 03:33:35PM  
24 community development area because for that council it 03:33:41PM  
25 might be a disadvantaged community, that's a really 03:33:44PM  
26 important strength for that council, that CEO to have. So 03:33:47PM  
27 of course the councillors ought to determine the sorts of 03:33:49PM  
28 things that they think are important for the leadership of 03:33:52PM  
29 that organisation. 03:33:55PM

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But there is a boundary here in terms of what is effective and what's not in terms of determining the performance of a CEO and in my view the appointment process could well do with, again, expert input in the way we're talking about for planning panels where you might say, okay, let's have three councillors - I'm making it up - a number of councillors who become part of a panel. The State Government, again like you might do in a planning process, might have a list of eligible experts. These might be HR experts, respected ex-CEOs, et cetera, who are available after a process of selection and scrutiny and probity checks and so on to be supporters for the councillors in setting up those contracts in determining selection processes and particularly when it comes to reviewing CEO performance so that it's done with increased expertise, but it's also done with increased transparency and there needs to be a level - of course what is reasonable in terms of privacy and so on - there needs to be a level of transparency and reporting about what is the performance criteria that is set, what does success look like, how did we measure it, how did we assess whether this particular individual has met that.

At the moment, oh, it's a dark art, to put it mildly, it's a dark art, and it can be extremely subject to political winds. You know, 'This person, this CEO, is making it difficult for us to get what we want done' is a comment you hear very often. As long as what you want done is okay, that might be okay, but if it's not what you want done it can be very problematic.

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1 So I guess the issue isn't so much with again council is 03:35:38PM  
2 setting the broad discretion in terms of what they see as 03:35:42PM  
3 the goals that they want that CEO to achieve in their 03:35:46PM  
4 contractual term, but the judgment that's being exercised 03:35:49PM  
5 about whether they have actually hit that mark may be 03:35:53PM  
6 better utilised with at least the input of an independent 03:35:57PM  
7 panel who isn't the person who is, I guess for want of a 03:36:01PM  
8 better term, judge, jury and executioner in terms of - - 03:36:05PM  
9 -?---Yes, I think so. And again I think it's that 03:36:09PM  
10 expertise question because councils are local experts but 03:36:11PM  
11 they're probably not - look, they may be, but it would be 03:36:14PM  
12 rare to see a councillor who had HR expertise or had the 03:36:17PM  
13 capacity to judge whether somebody was a cultural fit, 03:36:21PM  
14 whether somebody had the right kind of characteristics to 03:36:25PM  
15 deliver the aspirations for that particular locality. So 03:36:28PM  
16 again I think bringing in a level of expertise to support 03:36:32PM  
17 councillor decision making I think would really assist 03:36:35PM  
18 with that process. So when matters come up where 03:36:38PM  
19 councillors - it might be behavioural matters or code of 03:36:42PM  
20 conduct matters or it might be concerns that a CEO might 03:36:48PM  
21 have about some form of potential or corrupt behaviour, 03:36:50PM  
22 it's extremely difficult. That is the hardest thing, 03:36:55PM  
23 I think, for CEOs, because, you know, they've effectively 03:37:00PM  
24 got something to say about their employer. It puts them 03:37:05PM  
25 in this kind of slightly weird, almost whistle-blowing 03:37:08PM  
26 situation which you know is very tough, it's a very tough 03:37:11PM  
27 place for CEOs to be. 03:37:14PM  
28 DEPUTY COMMISSIONER: I might just follow on there. We've had 03:37:20PM  
29 a number of questions from the public around firstly the 03:37:28PM

1 capability of councillors, given the decision making 03:37:30PM  
2 responsibilities they have and the fact the democratic 03:37:33PM  
3 process doesn't guarantee you're going to get candidates 03:37:35PM  
4 with those skills and capabilities. So it's about whether 03:37:38PM  
5 you can train a councillor sufficiently to make good 03:37:40PM  
6 planning decisions or train a councillor to manage a big 03:37:43PM  
7 senior executive appropriately and we understand there's a 03:37:47PM  
8 lot of challenges around that, getting the required skill 03:37:51PM  
9 sets from a base level. My actual question is more around 03:37:53PM  
10 those big decisions that the councillors make around the 03:37:59PM  
11 hiring and the management of the CEO, setting the council 03:38:03PM  
12 plan in Victoria, the budgets to achieve that and making 03:38:06PM  
13 decisions for the benefit of the entire community and 03:38:10PM  
14 particularly around the CEO. I'm interested - and I take 03:38:13PM  
15 on board your comments around the political risk of the 03:38:16PM  
16 role, the fact that you might be doing it well in the 03:38:19PM  
17 community's eyes but your employer might not like the way 03:38:21PM  
18 you're doing it well. I've also heard, you know, the 03:38:24PM  
19 package of a CEO, so their remuneration has that risk 03:38:28PM  
20 factored into it and I think that's a bit of a strange 03:38:32PM  
21 concept because the price that's factored in comes out of 03:38:37PM  
22 the community funds, so I think it's an interesting 03:38:41PM  
23 concept. So a long-winded way of getting around to have 03:38:44PM  
24 you seen examples in other jurisdictions where either the 03:38:48PM  
25 State has interventions in place that give the community 03:38:52PM  
26 some safeguards that a high performing CEO is not going to 03:38:55PM  
27 be removed for the wrong reasons?---No, I don't think any 03:39:00PM  
28 jurisdiction is - I think everybody is having goes at this 03:39:03PM  
29 in different ways but I wouldn't - I think this is a 03:39:07PM

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significant issue for local government nationally and I don't know of any jurisdiction that's having a good crack at this. So, you know, it's sometimes dealt with by different codes of conduct, each jurisdiction deals with codes of conduct differently. So some jurisdictions have really detailed codes of conduct, like New South Wales where it's your mother-in-law's sister and if you've met them for lunch; you have no idea how detailed the New South Wales one is, whereas South Australia has a principles code of conduct and doesn't actually want to get involved in what they would refer to as behavioural matters.

So if a councillor is rude consistently, for example, or is just generally hard to get on with, you know, the capacity for the State Government to dismiss councils varies in each jurisdiction. It's an extremely difficult space and needs I think considerable work.

COMMISSIONER: Professor, one of the things that feeds into the difficulties which a CEO of a council faces is the level at which particular councillors might interact with council officers in the discharge of the council officers' duties, so a number of questions in relation to that which will then bear upon the challenge for the CEO. If a councillor has a conflict of interest, what is your understanding of the right of the councillor, notwithstanding that conflict, to seek to influence council officers in the way in which they go about their duties?---In most jurisdictions the legislation prevents that interaction with respect to planning matters. It is

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1 prohibited for a councillor to have direct contact with, 03:41:04PM  
2 say, the director of planning or the planning staff 03:41:07PM  
3 individually. So, they can't roll into the office and 03:41:12PM  
4 say, you know, 'Fred, what's happening with Joe Blow's 03:41:16PM  
5 application? Can you tell me where it's up to? What are 03:41:20PM  
6 you thinking about it?' Those interactions are 03:41:22PM  
7 prohibited. They may well happen, but they're prohibited 03:41:25PM  
8 under the legislation. That interaction is reserved for 03:41:27PM  
9 those areas where I mentioned before where there might be 03:41:31PM  
10 a council briefing and a councillor in front of others and 03:41:34PM  
11 on the public record could say, you know, 'What are the 03:41:37PM  
12 key issues that you might be considering with respect to 03:41:41PM  
13 this particular application?' So those questions are at 03:41:44PM  
14 least capable of being recorded and done in some form of 03:41:47PM  
15 transparent way, but direct interactions with council 03:41:51PM  
16 staff, particularly in planning, are prohibited to assist 03:41:55PM  
17 with that, if you like, where the line is drawn. 03:42:00PM  
18 Yes. Can you see any reason why it should be confined to 03:42:03PM  
19 planning that that sort of interaction is 03:42:06PM  
20 prohibited?---No, I can't. But it is in the planning 03:42:10PM  
21 space that we've seen, you know, lots of challenges. You 03:42:13PM  
22 know better than I. But I think that these are things 03:42:17PM  
23 that differ a lot at councils of scale. Metropolitan 03:42:24PM  
24 councils are in a very different scale of operation from a 03:42:28PM  
25 regional council. You know, there's issues about 03:42:30PM  
26 ex-directors of areas in councils becoming councillors in 03:42:34PM  
27 regional areas, or ex-GMs getting elected as councillors, 03:42:39PM  
28 or CEOs getting - so some of the issues are different in 03:42:43PM  
29 regional areas where, if you like, there's a smaller pool 03:42:47PM

1 of people interested in local government and people might 03:42:50PM  
2 be an officer one day and a councillor the next - - - 03:42:53PM  
3 Yes?---And use this as a way to, if you like, get the council. 03:42:55PM  
4 I mean, this is part of their platform. 'We're going to 03:42:59PM  
5 hold these people accountable,' et cetera, et cetera. 03:43:03PM  
6 It's often interesting to know what that means, and just 03:43:05PM  
7 the closeness of people's kids going to the same school, 03:43:11PM  
8 all those kinds of things which will happen in 03:43:15PM  
9 non-metropolitan areas. It is somewhat easier, and many 03:43:17PM  
10 CEOs choose to live outside the geographical boundaries of 03:43:21PM  
11 the areas in which they work so they don't meet people in 03:43:25PM  
12 the supermarket. So this is a sort of - local government 03:43:28PM  
13 is a really challenging context in this kind of way; you 03:43:32PM  
14 know, what's a casual conversation in the supermarket 03:43:35PM  
15 versus, you know, your attempt to influence me or my 03:43:39PM  
16 attempt to influence you. 03:43:42PM  
17 I wonder, however, whether in embarking upon any recommendation 03:43:44PM  
18 about the relationship between council and CEO and the 03:43:52PM  
19 reality that elected representatives have the liberty to 03:44:01PM  
20 bring to an end a senior public servant's employment we 03:44:08PM  
21 would need to take account of the fact that this is not a 03:44:12PM  
22 political scene that's confined to local government. We 03:44:14PM  
23 see more and more now that the heads of department are at 03:44:21PM  
24 the mercy of elected ministers. Is the issue that's 03:44:25PM  
25 thrown up here one which would apply more generally or is 03:44:32PM  
26 it a problem that's peculiar to the local government 03:44:38PM  
27 area?---It's a good question. I think it's actually a bit 03:44:45PM  
28 of both. I think proximity and closeness are particular 03:44:47PM  
29 to local government. It's the confines of the community 03:44:53PM

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context, the fact that local government is local, that people get elected because they have extensive community relationships. Whether that's through, you know, being on the school committee or whether that's through memberships of sporting clubs, which is commonly the kind of route that councillors come to be elected by. They have extensive relationships in those communities. That's how they get elected. So it is a much more immediately transactional relationship.

Yes?---But many of the complaints when proposals are put up for reform in this area to local government, for example the notion of - I wouldn't have gone to a local government conference in the last 10 years where somebody hasn't put up a motion, a councillor hasn't put up a motion and said, 'We need to be paid more and the role needs to be professionalised.' This is a - oh, look, there's a real range of views on this one in terms of what is the correct answer to that. Are councillors essentially volunteers who are acting in the public interest of their communities because in a sense that's how it works because their remuneration is so limited for the hours that they work. Many of them stand in these conferences and say, you know, 'I get less than 12 cents an hour' or something because of the hours they work and the remuneration.

I have a personal view, or at least a view that is borne of some experience in this space, that the role of councillors in that kind of representing the community in that volunteer way I think is a really good role. I think once you professionalise these positions you are

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taking us closer to these sorts of issues that you see in state government where you get professional political advisers. The power of advisers vis-à-vis senior bureaucrats is probably one of the greatest trends that we've seen in the last 10 years, particularly since the Rudd government, I think, and public administration where the power of the adviser's office sometimes and often rivals the very senior, you know, secretary of department, and they can be professionalised, even though in effect they are political advisers.

So one might see that as an unwelcome public administration trend. I would. And if you take people as councillors down that kind of role, you end up with this notion that there's a kind of professional role of a councillor. So then what might you say the qualifications that people should have? What would those be? So, many jurisdictions do have basic training requirements for councillors, but then you think about jurisdictions where literacy is an issue or newly arrived communities, this whole idea that councils reflect these communities. You don't want to make these standards too high or you'll lose the capacity for communities to be reflected in that way. Yes?---It's an extremely difficult balance. So that's why I think the relationship, you know, it's an old-fashioned public administration to say good fences make good neighbours. The idea that those boundaries are well set allows people to understand this is my role, this is your role. It's when the boundaries are not well set that the difficulties arise and I think well functioning councils,

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and you know I watch many councils and how they operate,  
how those interactions occur between the senior staff and  
the elected. You know, sometimes you gasp about the lack  
of trust or the animosity that exists, not just between  
the councillor group which can be a feature, but between  
the councillor group and the senior staff, and that's  
not - it's just not good governance, of course. It  
doesn't lead to the best outcomes we can hope for for our  
communities.

So, ways to assist with the governing of those  
relationships, good rules, are really good ways in which  
CEOs or senior staff can raise issues in a way that  
doesn't jeopardise their jobs, really does require I think  
strong state agencies who have oversight of local  
government. Without those strong state agencies, the CEOs  
are left hanging. They've got nowhere to go when  
something's going wrong, and many just leave because they  
can't - but then, you know, the next CEO is going to find  
it tough, too; it's just not good governance. So it does  
need to be backed in by state agencies that can come in  
and support and do it in a way that doesn't put at risk -  
and I think there should be stronger capacity for State  
Governments to dismiss individual councillors as well as  
whole councils. It's quite hard in most jurisdictions to  
dismiss individual councillors, although South Australia  
has taken on that challenge recently, so those rules are  
changing around the country.

So, it's a big deal if a State Government is  
going to dismiss a whole council and put it into

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administration, whereas sometimes it's a couple of people,  
that the place might function a whole lot better if a  
couple of people were capable of being dismissed. Very  
tough stuff. I mean, this is the boundary between local  
autonomy. Local governments are separate legal entities,  
albeit functions of State Government. They are elected.  
They're separate tiers of government. That boundary not  
just between the CEO and the councillors, capital C  
councillors, but the State Government, and I use that term  
broadly, that State Government and local government, where  
those boundaries are set is also important in this picture  
because CEOs need to be able to take this stuff somewhere  
that allows them to be supported and have the power to act  
and get supported to act, particularly if they can see  
issues happening with particular councillors. I would  
like to say it's rare, but we wouldn't be here if it was  
that rare.

Professor, so where you're dealing with a non-planning issue,  
so you don't have your independent panel who's going to be  
making the hard decision, you simply have the councillors  
making policy decisions, but when you're in a different  
area where the council's actually got to make the  
substantive decision which of necessity then brings the  
councillors closer together with the council officers and  
the CEO, who no doubt have had to do all the research and  
gather the information and form either a tentative or a  
final view of what they think the decision should be, the  
potential for conflict is quite real?---It is, and so the  
way to assist that, in my view, is to have good

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legislation around what is the process that sets your strategic priorities as an organisation, which you have in Victoria, but also to make sure that those priorities are tested with really good engagement with the communities, because in the end council is there to serve the priorities and the interests of that community and the more involved councils are in bringing communities in to the nature of the decision making, the complexities of the choices that councils have to make, the better governance it is as a whole system. That does require investment, commitment, time, capability in terms of good ways to engage with communities, but it does a heck of a lot, in my view, to increase transparency and fairness, and in the end councils as leaders in those organisations have to make the decisions. If they make decisions that the community doesn't like, they're not going to be re-elected, so that's where the ultimate accountability sits through the ballot box. But of course in every jurisdiction, I mean in every level of government, that's a pretty blunt instrument. So there has to be opportunities for communities to be involved and the councillors to hear and to be held - you know, to be informed by both expertise and community views through those processes.

So, I think if I've followed you correctly, however, to your knowledge no State or territory in Australia has yet introduced legislation where the State has intruded to govern or oversee that relationship between councillors, CEO and council staff in relation to the substantive

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1 decisions that are left to council?---The Local Government 03:53:31PM  
2 Acts in each jurisdiction do set those boundaries in 03:53:37PM  
3 different places, but if you're referring to the kinds of 03:53:39PM  
4 things like a planning panel more broadly - - - 03:53:43PM  
5 Yes?---No, that hasn't occurred. The Victorian legislation 03:53:47PM  
6 does require councillors to test the strategic directions 03:53:50PM  
7 of the community plans through a deliberative engagement 03:53:56PM  
8 process and that is the first time and quite innovative 03:53:59PM  
9 legislation in Victoria. So that goes some way to the 03:54:03PM  
10 kind of position I was putting just now around the more 03:54:06PM  
11 you can engage with and test ideas with communities, the 03:54:09PM  
12 more robust - the more you support good decision making by 03:54:13PM  
13 councillors. So Victoria has done some, and I think it 03:54:17PM  
14 will be interesting to look at how well that's working. 03:54:21PM  
15 It's relatively new. 03:54:24PM  
16 DEPUTY COMMISSIONER: I think we touched on conflicts of 03:54:29PM  
17 interest and the process for an individual councillor with 03:54:31PM  
18 an interest in a matter to declare and perhaps to remove 03:54:34PM  
19 themselves from the decision-making process, and I know 03:54:38PM  
20 there's variations around the entire country . One of the 03:54:40PM  
21 things of interest to us is where that councillor abides 03:54:44PM  
22 by the process, but what measures and steps are in place 03:54:48PM  
23 that prevent them from influencing their fellow 03:54:53PM  
24 councillors who might be part of a particular bloc, a 03:54:55PM  
25 particular group, from still promoting that individual 03:54:58PM  
26 councillor's matter in the decision-making 03:55:01PM  
27 process?---Nothing, really, except to say that in most 03:55:08PM  
28 jurisdictions what's referred to colloquially as caucusing 03:55:13PM  
29 is prohibited. In other words, you know, I belong to the 03:55:16PM

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the banana group and you belong to the apple group and we  
tend to vote - we, the apples and bananas, tend to vote in  
blocs. Those voting patterns are on the public record.  
So if state agencies, you know, Departments of Local  
Government, et cetera, had a mind to, they could actually  
review those voting decisions and could see, 'Oh, look,  
over the last 20 times this council has voted, the bananas  
have all voted together and the apples have all voted  
together.' I might have changed my fruit then; I'm not  
sure. But you can look at this and one of the things that  
I say when I'm working with councillors is, 'Every vote  
you take is on the public record. If you vote together  
with Mary and Fred every time you vote, it is on the  
public record. It is capable - we can go and look at this  
and we can ask you questions.'

Now, as far as I know, nobody actively kind of  
engages in that. But that is one way, because the  
decisions are on the public record. Many jurisdictions,  
council meetings are - you can go online and watch them.  
They're recorded. You can go back and look at previous  
council meetings. So that helps, I think, with both, if  
you like, probity oversight as well as public oversight.  
Councillors forget that their meetings are being recorded  
and in fact fall into patterns that they might  
have - first few meetings when they're being recorded they  
behave and then they tend to fall into patterns. So this  
stuff is capable of being observed, but in my experience  
it's not and there wouldn't be a council that I've had  
anything to do with that hasn't historically voted in some

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kind of bloc and, you know, there's all these questions around do you have to declare that you're an apple when you stand for election or, you know, what is the detail to which information is available on a particular candidate? You know, whether you're part of the apples or oranges might be one thing, but are you very interested in community services or very opposed to over-development or what kind of information, how much do we as citizens - sometimes I do this just when I'm talking with the general public. 'Have you ever gone and looked at a councillor before you've voted for them, you know, to see whether you'd rather vote for Mary or Fred? What do you know about them before you vote for them? Is voting compulsory?' It's not in every jurisdiction. You know, under a third of people vote for local government in some jurisdictions.

So there's a whole series of things that can be I think introduced to stiffen this up: compulsory voting, greater transparency, ease of access to, you know, apples or oranges versus community versus over-development, whatever your thing is, pro-development, et cetera, et cetera, and of course, you know, democracies work effectively based on communities being well educated about their civic responsibility. So probably beyond the scope of your inquiry, but obviously we do sit in this broader context of people understanding the implications of the work that our elected representatives do on our behalf.

COMMISSIONER: It's clear enough, though, Professor, that if there's a bloc that votes together on issues and if one or

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1 two members of that bloc have been improperly influenced, 03:58:46PM  
2 that enables them to have their agenda carried into 03:58:52PM  
3 effect?---Indeed. 03:58:57PM  
4 To your knowledge have there ever been any probity issues 03:58:58PM  
5 formally identified as flowing from this notion of en bloc 03:59:04PM  
6 voting within councils?---I'm not - I don't know of that, 03:59:10PM  
7 but, as I said, it's actually easy enough to discover if 03:59:15PM  
8 one chose to monitor or make public those voting patterns. 03:59:18PM  
9 I'm not aware of any jurisdiction that has intervened to 03:59:26PM  
10 say, 'Hey, council over here, how come you always vote in 03:59:30PM  
11 this pattern? Are you caucusing? What happened when Fred 03:59:34PM  
12 stepped out and the rest of you still voted in a 03:59:37PM  
13 particular way?' I'm not aware of any jurisdiction doing 03:59:41PM  
14 that, but I do indicate to councillors that it's possible 03:59:44PM  
15 that you could. 03:59:48PM  
16 Yes. And if I may say so, you really make a good point that if 03:59:50PM  
17 someone's going to stand for the apples group, then it's 03:59:56PM  
18 imperative that voters know what the apple group 04:00:01PM  
19 represents in terms of local council issues. Otherwise 04:00:04PM  
20 there is no point in the en bloc apple group other than it 04:00:10PM  
21 makes it easy for someone to get their agenda 04:00:15PM  
22 fulfilled?---Correct. 04:00:18PM  
23 Yes, Mr McLaughlin. 04:00:23PM  
24 MR McLAUGHLIN: I have no further questions for Professor Ryan, 04:00:25PM  
25 unless yourself or Deputy Commissioner Wolf has anything 04:00:31PM  
26 further. 04:00:38PM  
27 COMMISSIONER: No, the en bloc issue was the last matter I had 04:00:38PM  
28 noted. Professor, thank you so much for giving of your 04:00:41PM  
29 time. We are very grateful for you coming along to assist 04:00:44PM

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us. It's been very helpful and I do thank you?---My  
pleasure. Good luck with your difficult task.  
Thank you very much. Mr McLaughlin, 10 am tomorrow?  
MR McLAUGHLIN: Yes, 10 am tomorrow with Dr Ng.  
COMMISSIONER: Thank you. Again, thank you very much,  
Professor.  
WITNESS: Pleasure.  
<(THE WITNESS WITHDREW)  
ADJOURNED UNTIL TUESDAY, 15 DECEMBER 2020

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