

CMC INVESTIGATIONS INTO ALLEGATIONS AFFECTING THE DOUGLAS SHIRE COUNCIL

A SYNOPSIS

October 2006

CRIME AND
MISCONDUCT
COMMISSION



QUEENSLAND

Synopsis: CMC investigations into allegations affecting the Douglas Shire Council.

October 2006

Introduction

This synopsis details the results of a number of investigations conducted by the Crime and Misconduct Commission (CMC) into allegations against the mayor, councillors, and council officers of the Douglas Shire Council.

It will be noted there is a degree of overlap in the complaints – in the sense that allegations concerning the same subject matter were directed against different persons. For ease of reference, the synopsis canvasses the outcome of investigations according to the identity of the person/s against whom the allegation relates.

Accordingly, the synopsis addresses the various complaints under the following headings:

1. Complaints against the Mayor – involving over 20 allegations
2. Complaints against the Chief Executive Officer – involving 6 allegations
3. Complaints by the Mayor and Chief Executive Officer – involving allegations in respect of the process by which Douglas Shire Council awarded a contract for the operation of a ferry service upon the Daintree River

The CMC's investigations in respect of the various complaints were comprehensive: interviews were conducted with over 60 witnesses (and some witnesses were interviewed on more than one occasion), and a careful inspection and analysis was carried out of all relevant Council documentation and records held by various Queensland Government departments. Moreover, the issues raised by some of the allegations proved complex, both factually and legally.

In respect of the allegations concerning the granting of the contract to operate the Daintree River ferry service, the CMC embarked upon a co-operative investigation with the Queensland Ombudsman. (A separate report in respect of that matter is to be published by the Ombudsman.)

In all instances, the CMC investigations established that:

- the allegation is without substance, or
- the allegation is not capable of establishing an act of official misconduct, or raising a reasonable suspicion of official misconduct, or
- the allegation remains unable to be substantiated on the available evidence.

Jurisdiction of the CMC

The CMC's ability to conduct an investigation on any matter is governed by the provisions of the *Crime and Misconduct Act 2001*. Put simply, the CMC is able to undertake an investigation where the allegations reasonably suggest 'official misconduct' has been committed.

What then constitutes official misconduct?

In the case of a person elected to a public office – such as Councillor Mike Berwick (Mayor of Douglas Shire), or the holder of an appointment in a unit of public administration – such as Mr Terry Melchert (Chief Executive Officer of Douglas Shire Council), in order to amount to official misconduct, the conduct in question must involve the exercise of the person's official powers in a way that:

- is not honest or impartial; or
- is a breach of the trust placed in the person by virtue of the person's office; or
- involves misuse of official information or material.

In addition, the conduct in question must also amount to either a criminal offence or, at least a disciplinary breach providing reasonable grounds for the person's dismissal.¹

Different considerations apply to holders of an *elected* office – such as a mayor or councillor.

Because there is no regime for the removal of a mayor or councillor for a disciplinary breach, it follows that for conduct to amount to official misconduct, the conduct in question must amount to a criminal offence.

Finally, for a criminal offence or a charge of official misconduct to be proven, a tribunal of fact must be satisfied to the requisite standard of proof. For criminal offences that standard is, of course, proof beyond reasonable doubt. The standard of proof applicable to proceedings for official misconduct is the lesser civil standard of proof on the balance of probabilities – although the degree of satisfaction required will vary according to the gravity of the case, and it must be borne in mind that for acts of official misconduct, dismissal is within the range of penalties that could be imposed.

Conflicts of interest

A recurrent theme in the allegations – particularly as against Cr Berwick – was that Cr Berwick was acting under a conflict of interest.

There are several types of conflict of interest and not every type will culminate in official misconduct.

¹ If the conduct was not such as to warrant the person's dismissal it will not constitute official misconduct, but may still attract a disciplinary sanction as part of any routine disciplinary regime that may apply to the person.

In terms of the obligations imposed on elected members of local authorities, conflicts of interest can be classified as perceived or apparent conflicts of interest, potential conflicts of interest, actual conflicts of interest, and material personal interests.²

Section 229(2) of the *Local Government Act 1993* ('LGA') provides that councillors must:

- serve the overall public interest.
- resolve conflicts of interest by giving preference to the public interest.

Section 229(3) LGA provides:

A councillor must ensure there is no conflict, or possible conflict, between the councillor's private interest and the honest performance of the councillor's role of serving the public interest.

Importantly, while a breach of section 229(3) LGA may invalidate a Council decision, it is not an offence.

On the other hand, section 244 LGA requires councillors to disclose *material personal interests* (where they exist) and prohibits councillors from participating in any Council discussion or decision concerning any issue to which a material personal interest relates.³

A councillor who fails to comply with section 244 commits an offence (for which a punishment may be imposed) and is liable to automatic disqualification as a councillor for four years.⁴

Consequently, in the case of a mayor or councillor, a *material personal interest* must be shown to exist before the conduct in question is otherwise capable of amounting to official misconduct.

The expression 'material personal interest' is defined in section 6 LGA, the effect of which is that for the mayor or a councillor of the Douglas Shire Council to have a material personal interest in a particular issue, he/she should reasonably have had a realistic expectation (either directly or indirectly) that he/she or an associate stood to gain a benefit or suffer a loss depending on the outcome of the issue.⁵ An 'associate' would include the person's spouse, other members of the household, or a partner.⁶

Finally, section 6(3) LGA provides that 'a person does not have a material personal interest in an issue' if the issue is about 'a planning scheme of general application in the local government's area', or the interest is merely 'as a member of a non-profit ... organisation involving no personal gain or loss to the person.'

² *Managing conflicts of interest in the public sector*, CMC and ICAC – accessible online at <http://www.cmc.qld.gov.au>

³ Note 6, 16

⁴ *Local Government Act 1993*, sections 246 & 222

⁵ Section 6(1)

⁶ Section 6(2)

Complaints against the Mayor

In the period August – December 2005, the CMC received various complaints against the Mayor of Douglas Shire Council, Cr Berwick.

In the main, those complaints emanated from Mr Jeff McCloy, a developer with property and business interests in the Douglas Shire. In what has been something of an on-going conflict with the Douglas Shire Council, Mr McCloy sought assistance from Mr Bob Baldwin MP, the Federal member for Paterson (a regional electorate to the immediate north of Newcastle, New South Wales). Mr Baldwin aided in the preparation of Mr McCloy's written complaint to the CMC.⁷

As the CMC progressed with its assessment and investigation of the various issues, further allegations were received from Ms Dixie Phillpot, a member of a local residents' action group in the Douglas Shire, and later still, from the law firm Sciaccas Lawyers & Consultants (who advanced further material concerning Cr Berwick).

In addition to his complaints against Cr Berwick, Mr McCloy made allegations concerning the conduct of Mr Melchert, the Chief Executive Officer of Douglas Shire Council.

Mr McCloy's complaints relate to his operation of a business situated in Vixies Road, Wonga, near Port Douglas. The business is conducted by Wonga Beach Aquaculture Resort Pty Ltd ('Wonga Beach Aquaculture').

Wonga Beach Aquaculture had purchased a tourist-resort site and aquaculture farm at separate but nearby locations in Vixies Road, between January 2001 and March 2003.

The resort site was purchased in two stages, in January 2001 and December 2002. (The first stage was purchased by Whitburn Pty Ltd, one of a number of entities owned by Mr McCloy. Whitburn Pty Ltd changed its name to Wonga Beach Aquaculture Resort Pty Ltd in May 2001. The resort site was reconfigured into one allotment when the second stage was purchased in December 2002.) The property is now described as Lot 51 on Special Plan 155078 in the Parish of Whyanbeel, County of Solander, and is referred to in this synopsis as 'the resort site'.

The aquaculture farm was purchased in March 2003 and is described as Lot 3 on Special Plan 150448 in the Parish of Whyanbeel, County of Solander. This property on which the aquaculture business is conducted is referred to in this report as 'the aquaculture farm'.

Cr Berwick and his partner, Ms Jane King, operate an aquaculture business known as *Daintree River Barramundi* under a formal partnership agreement on a property owned by Ms King on the north bank of the Daintree River – across the river from Daintree Village.

Ms King's property is described as Lot 147 on Plan C157223 in the Parish of Whyanbeel, County of Solander and is referred to in this report as 'Ms King's property'.

⁷ The CMC acknowledges Mr Baldwin's contribution and assistance in refining Mr McCloy's concerns.

A total of 24 separate allegations were advanced against Cr Berwick. In essence, the allegations fall within four categories, summarised as follows –

- Cr Berwick allowed his personal interests in a barramundi farm, a private forestry operation and a corporation known as FNQ NRM Ltd to conflict with his public duty as an elected member of the Council.
- Cr Berwick corruptly used his authority as Mayor of the Council to benefit his personal interests.
- Cr Berwick misappropriated substantial funds the Commonwealth and Queensland Governments had granted to FNQ NRM Ltd and an organisation called the Daintree Coordination Group.
- Cr Berwick improperly made unauthorised disclosures of confidential Council information to certain individuals with tourism or development interests north of the Daintree River.

The precise allegations raised by Mr McCloy against Cr Berwick are set out as follows, namely:

- 1 Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (between July 2003 and June 2004) which had imposed unlawful or unnecessarily onerous conditions on a development application made by Wonga Beach Aquaculture concerning its aquaculture farm.
- 2 Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (in June 2005) to recommend to the Minister for Local Government and Planning that a Local Environmental Plan for the Douglas Shire include a condition prohibiting tourism activity being conducted within 300 metres of aquaculture activity, which Cr Berwick knew or ought to have known would adversely affect a tourism activity Wonga Beach Aquaculture was then proposing for its aquaculture farm.
- 3 Cr Berwick inappropriately made use of his authority as Mayor of the Douglas Shire Council to personally benefit himself or Ms King, by supporting a Council decision (on 21 June 2005) to acquire property near the aquaculture farm ('the Rossi property') to construct a sewage treatment plant, which Cr Berwick knew or ought to have known could adversely affect the aquaculture operations on the aquaculture farm (ie. McCloy's property).
- 4 Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (on 12 November 2004) to re-zone:
 - 4.1 The resort site from special facilities (resort) to rural.
 - 4.2 Another property in Vixies Road, Wonga (situated near the resort site) from rural to rural residential.
- 5 Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (in about February 2004) to permit or allow Ms King or *Daintree River Barramundi* to use the Daintree Village Jetty.
- 6 Cr Berwick failed to disclose a personal interest in a private forestry operation on Ms King's property, and participated in Council discussions and decisions to amend the definition of 'private forestry' in the Council's Draft Planning Scheme.

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- 7 Cr Berwick failed to disclose a personal interest in FNQ NRM Ltd, and participated in Council discussions and decisions (on 27 July 2004) for the Council to become a member of and contribute \$5,906 to FNQ NRM Ltd.
- 8 Cr Berwick failed to disclose a personal interest in FNQ NRM Ltd, and participated in Council discussions and decisions (on 8 June 2005) for the Council to assign to FNQ NRM Ltd the Council's interest in a substantial grant from the Australian Greenhouse Office to develop a farm forestry project in Far North Queensland.
- 9 Cr Berwick, as the chairperson of the Daintree Planning Coordination Group, had misappropriated funds the Australian and Queensland Governments had granted to the Daintree Planning Coordination Group.
- 10 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by issuing a Council General Business Memo to the Manager of the Council's Planning Services (on 11 April 2005) requesting a report as to how the Council could enforce the Council's development approval conditions over the aquaculture farm.
- 11 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing officers of the Department of Primary Industries and Fisheries ('DPIF'), the Environmental Protection Agency ('the EPA') and the Minister for Environment to subject the aquaculture farm to excessive scrutiny (since July 2003).
- 12 Cr Berwick made inappropriate use of his authority as Chairperson of FNQ NRM Ltd for the personal benefit of himself or Ms King by:
 - 12.1 Awarding or causing FNQ NRM Ltd to award contracts to a Mr Peter Stanton (another FNQ NRM Ltd director) and others to undertake vegetation mapping for the Wet Tropics Management Authority (between 2003 and 2004) without first calling tenders for those contracts.
 - 12.2 Influencing Mr Peter Stanton to include an area of land in the Douglas Shire in a vegetation map for the Wet Tropics Management Authority (between 2003 and 2004), which Cr Berwick knew or ought to have known would adversely affect the aquaculture farm.
- 13 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by approving Council payments of over \$4,000 to Ms King (in the 2004-05 financial year) from National Heritage Trust funds administered by the Council for riparian wetland revegetation on Ms King's property, on conditions more favourable than similar Council payments to other land holders in the Shire.
- 14 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by lobbying and influencing the Queensland Government on unspecified dates to prevent the further supply of electricity north of the Daintree River (though a three phase electricity supply had already been connected to Ms King's property).
- 15 Cr Berwick improperly made unauthorised disclosures of confidential Council information (about an impending Council decision known as the Temporary Local Planning Instrument) to Mr Bill Calderwood, Mr Cam Charlton and Mr John McIntyre (in or about November 2003), and other individuals who had supported Cr Berwick or contributed to his election campaigns (between November 2003 and June 2004).
- 16 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King (on an undisclosed date in November 2005) by wilfully damaging protected vegetation on Ms King's property contrary to section 28 of the Council's *Local Law No 56 (Vegetation Management)*.

- 17 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King (on an undisclosed date) by fabricating a Council letter which purported to give authorisation to Ms King to construct four ponds and a dam on her property.
- 18 Cr Berwick remained in Council meetings, participated in Council discussions, and voted on Council motions, which ultimately awarded contracts to Norris Earthmoving and Raw Materials ('Norris Earthmoving') to dredge the Daintree River and operate a ferry service over the Daintree River, even though (in the case of the ferry service contract) Cr Berwick had disclosed to Council that he may have a perceived conflict of interest in the matter because Norris Earthmoving had previously undertaken some earthworks on Ms King's property.
- 19 Cr Berwick supported the Norris Earthmoving tender for the Daintree River Ferry Service in exchange for Norris Earthmoving having undertaken earthworks on Ms King's property at either reduced rates or for no charge whatsoever.
- 20 Cr Berwick misused a Council low-loader to transport a Norris Earthmoving excavator to Ms King's property when Norris Earthmoving had undertaken earthworks on Ms King's property in about October 2005.
- 21 Cr Berwick misused Council resources to respond to Mr McCloy's allegations.
- 22 Cr Berwick made inappropriate use of Council information on *Easy Listening Radio 846AM* on 17 November 2005 to gain, directly or indirectly, a financial advantage for himself or Ms King.
- 23 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing Council, DPIF and EPA officers to treat a development application Ms King had made to the Council more favourably than a development application made by Wonga Beach Aquaculture.
- 24 Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing a Council Environmental Officer to subject the aquaculture farm to excessive scrutiny.

An additional matter was raised against Mr Melchert. In that regard, it was alleged that as Chief Executive Officer of the Council, he ought to have known about Cr Berwick's conflicts of interest and had obviously failed to fulfil his statutory obligation to report those matters to the CMC (pursuant to sections 38 and 39 of the *Crime and Misconduct Act 2001*).

(Mr Melchert denied this allegation, but in turn alleged that he possessed information tending to show Cr Berwick had acted corruptly towards Mr McCloy's business interests. To this extent, Mr Melchert too, was a complainant against Cr Berwick.⁸)

⁸ The matters raised by Mr Melchert are canvassed elsewhere in this synopsis.

1 – Aquaculture Farm and development application

Allegation:

Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (between July 2003 and June 2004) which had imposed unlawful or unnecessarily-onerous conditions on a development application made by Wonga Beach Aquaculture concerning its aquaculture farm.

Material obtained by the CMC from Douglas Shire Council confirmed the Council received a development application from Chris Van Dyke Designs ('Van Dykes') on behalf of Wonga Beach Aquaculture on 18 August 2003. The application sought permission for 'a material change of use' to allow for the operation of the aquaculture farm, construction of some buildings (a processing shed, a caretaker's cabin and an office) and to enable the use of existing unused ponds.

The application was processed by Ms Vanessa Maruna, who at that time was a Council planning officer. (Ms Maruna possesses formal qualifications in town planning and law, and now works as a solicitor with a Cairns law firm.)

Ms Maruna initially considered the application did not comply with the *Integrated Planning Act 1997*, nor the Council's Planning Scheme. Council wrote to Van Dykes on 26 August 2003 and 16 September 2003 requesting further information. These requests lead to a protracted exchange of correspondence between Wonga Beach Aquaculture and the Council.

On 27 August 2003, Council issued notices inviting Wonga Beach Aquaculture to show cause why unauthorised preparation work for the construction of a shed on the aquaculture farm should not be stopped and the site restored to its pre-development condition.

Wonga Beach Aquaculture wrote to the Council on 12 September 2003, claiming that aquaculture was an 'as of right use' on the property (under a previous Council Planning Scheme) and that Council approval was not required for the preparation work.

Mr Lloyd Nolan (then Manager of the Council's Planning Services) submitted a memorandum to Council on 19 September 2003. Mr Nolan agreed that the *Integrated Planning Act 1997* preserved the pre-existing aquaculture user rights on the farm, but said approval was still required for the preparation work. However, Mr Nolan considered the requirements of the *Integrated Planning Act 1997* were poorly understood not just by members of the public but also by some planning practitioners, and therefore recommended Council not prosecute Wonga Beach Aquaculture.

The Council appears to have accepted Mr Nolan's recommendation. Minutes of a Council meeting held on 25 September 2003 indicate Council resolved to write to Wonga Beach Aquaculture advising (amongst other things) that Wonga Beach Aquaculture should refrain from any works on the aquaculture farm until the appropriate permits had been issued.

Van Dykes wrote to the Council on 15 October 2003 advising that the initial development application had 'incorrectly included an application for a material change of use for the purpose of aquaculture', and that Wonga Beach Aquaculture did not intend to increase the size or quantity of the aquaculture ponds. Van Dykes withdrew the application for a material change of

use, but indicated that Wonga Beach Aquaculture still wished to construct a storage shed on the aquaculture farm, make use of an office and two cabins as a caretaker's residence, and undertake earthworks and landscaping.

Ms Maruna was telephoned by Mr McCloy on 28 November 2003, at which time Mr McCloy is said to have conceded the original application had been made in error. However, McCloy is said to have claimed relevant approvals had been obtained from the Department of Primary Industries and Fisheries ('DPIF') and the Environmental Protection Agency ('EPA'), and he believed Council was delaying the development application unnecessarily.

Council wrote to Wonga Beach Aquaculture on 23 December 2003 advising it regarded the development application as having lapsed – allegedly because Wonga Beach Aquaculture failed to provide copies of its application to the relevant agencies within the prescribed time.

Mr McCloy and Mr Brian Swaine (Project Manager, Wonga Beach Aquaculture) participated in a telephone conference with Cr Berwick and Ms Maruna on or about 3 February 2004, to discuss the development application. This teleconference is referred to again, below.

A DPIF letter dated 20 January 2004 (concerning the transfer of the aquaculture licence from the former property owner to Wonga Beach Aquaculture) was referred to the elected body of the Council on 12 February 2004. The Council was informed that discussions were then underway between 'the applicant's consultant and Council officers'. Cr Berwick and other councillors resolved to note the information.

Mr Troy Richardson (a building surveyor) wrote to the Council on 2 March 2004 advising he had been engaged (presumably by Wonga Beach Aquaculture) to assess the building of a farm shed and residence (on the aquaculture farm) under the *Building Act 1975*.

The Council exchanged further correspondence with Wonga Beach Aquaculture (and its advisers), until Mr Richardson decided, on 8 June 2004, to conditionally approve the construction of the farm shed and residence.

Wonga Beach Aquaculture does not appear to have lodged any further development application with the Council. Indeed, Wonga Beach Aquaculture decided to use the proposed shed for storage rather than processing of fish, and the Council conceded on 25 March 2004 that a material change of use application was no longer required for the shed (so long as it was used for storage and not processing).

Consequently, Mr Richardson's building approval on 8 June 2004 appears to have cleared the way for Wonga Beach Aquaculture to construct a storage shed and a residence on the aquaculture farm.

When interviewed by the CMC about his complaint, Mr McCloy claimed:

- The delay of some 11 months in receiving approval to construct the shed and the residence was unnecessary, deliberate and had been instigated by Cr Berwick.
- Cr Berwick's actions amounted to a conflict of interest because Cr Berwick had an interest in the only other barramundi farm in the Shire.

Mr McCloy contended that during a teleconference on or about 3 February 2004, Cr Berwick had accused Wonga Beach Aquaculture of clearing vegetation and not having enough native plants on the aquaculture farm site.

Further, Mr McCloy said he had telephoned Ms Maruna sometime after the Council had advised in December 2003 that the development application had lapsed. He claimed Ms Maruna told him that she would recommend the approval of the development application, but that she considered the application would not be 'politically successful'.

Finally, Mr McCloy said he had telephoned Mr Peter Brody (the Council's Plumbing Inspector) on 17 May 2004, as a result of information Mr McCloy had received from Mr Richardson. According to Mr McCloy, Mr Brody was satisfied with the plumbing proposals for the shed and residence, but stated the Council's town planning manager had instructed him not to issue a plumbing certificate because of some outstanding geotechnical issue.

According to Cr Berwick, he first met Mr McCloy about three years previously, when Mr McCloy approached him (at the Council Chambers) to discuss problems Wonga Beach Aquaculture was then experiencing with Council officers in obtaining approval for construction of a shed (on the aquaculture farm).

Cr Berwick said he listened to Mr McCloy's complaints and spoke to the relevant Council officers. According to Cr Berwick, it appeared the issues were more complex than Mr McCloy had suggested, prompting him to go back to Mr McCloy and explain that he was satisfied the actions of the Council officers were reasonable and he would not intervene in the matter.

Cr Berwick told the CMC that the first he had heard of plans for a shed and residence was when Mr McCloy had approached him. He could not recall the issue of these structures being raised at any Council meeting. He was unaware Wonga Beach Aquaculture had originally lodged a material change of use application until CMC officers produced to him a copy of the initial development application.

Cr Berwick told the CMC he could not remember the teleconference of 3 February 2004, however Ms Maruna acknowledged participating in a teleconference between Cr Berwick and Mr McCloy to discuss what she described as Council procedures for dealing with operational works. Ms Maruna said the conference was probably not recorded, but she could not recall mention of vegetation or native plants. Ms Maruna recalled that landscaping had been an issue at some stage, but she did not view this as unusual, because Cr Berwick took an interest in environment issues.

Ms Maruna conceded she was party to a number of telephone conversations with Mr McCloy, but said she could not recall saying anything about the development application being politically successful or unsuccessful. She explained how she routinely warned applicants seeking material change of use approval that applications would be referred to the Council, and cautioned that she could not predict what councillors would eventually decide. Ms Maruna said that within that context she might have told Mr McCloy the development application was politically sensitive – because the DPIF and the EPA had by then raised concerns (about the destruction of marine plants and the presence of acid sulfate soils).

Mr Paul Gleeson (now the Manager of the Council's Planning Services) confirmed that he had instructed Mr Brody not to issue a plumbing certificate for construction of the shed. Mr Gleeson said he gave that instruction because he believed construction of the shed required planning approval and that planning approval was outstanding.

It is not precisely clear when Mr Gleeson gave the instruction to Mr Brody. (The instruction would have been inconsistent with the Council's position if it had been given on or after 25 March 2004, because by then Mr McCloy had modified the intended use of the shed and the Council had determined a material change of use application was no longer required.)

In any event, on the available evidence the CMC does not consider there to have been anything

sinister in Mr Gleeson's instruction, because Mr Gleeson claims he gave the instruction without any influence or intervention from any councillor.

Moreover, any administrative error or misunderstanding by Mr Gleeson was corrected on 26 May 2004, when Williams Graham & Carman (a Cairns law firm acting for the Council) wrote to MacDonnells (another Cairns law firm, acting for Wonga Beach Aquaculture) advising that the Council was then processing the plumbing approval, as required by the *Plumbing and Drainage Act 2002*.

Ms Maruna agreed the building approval for the shed had been delayed, but did not consider the delay to have been instigated by Cr Berwick (or any other councillor). Instead, according to Ms Maruna, the delay had been occasioned by:

- Van Dykes originally lodging an application seeking material change of use;
- Wonga Beach Aquaculture's failure to comply with the requirements of the *Integrated Planning Act 1997*, and the Council's Planning Scheme;
- The Council having insufficient human resources.

Ms Maruna, Mr Nolan and Mr Gleeson all told the CMC that their relationship with Cr Berwick was professional, and that Cr Berwick at no time influenced or attempted to influence them in respect of the Van Dykes application, or indeed on any other issue concerning Wonga Beach Aquaculture.

For his part, Mr Nolan said he had managed planning services at Douglas Shire Council from August 1997 until March 2004 (with the exception of a period of leave in 2000 and 2001). He was adamant Cr Berwick had never sought to give him directions concerning the processing or management of any development application.

Similarly, Mr Melchert said no council officer had complained to him about Cr Berwick attempting to influence the processing or management of any development application.

Apart from the suggestion that Cr Berwick sought to influence Council officers, Mr McCloy argued that Cr Berwick's interest in 'the only other barramundi farm in the Shire' amounts to a conflict of interest whenever the Douglas Shire Council has to consider any issue affecting Wonga Beach Aquaculture.

Cr Berwick and his partner, Ms King, informed the CMC they conducted a business known as *Daintree River Barramundi*⁹ under a formal business partnership agreement. Ms King had initially gone into the aquaculture venture on her own, and a formal partnership evolved after Mr Berwick began contributing financially.

Cr Berwick and Ms King explained that they do not consider their venture to be competing with Wonga Beach Aquaculture (or any other barramundi farm in the Shire) for a number of reasons.

Firstly, they argue their operation is too small. Ms King said it is the smallest barramundi farm in Queensland. Cr Berwick explained that while biggest annual yield from the farm had been 20 tonnes, it usually produced about five tonnes of fish a year. (Mr McCloy informed the CMC that having flown over Ms King's property in a helicopter, he considered the place a 'disorganised jungle' and wondered how fish were kept alive.)

⁹ A business name search revealed this entity commenced trading on 22 June 2001. The business is carried on by both Cr Berwick and Ms King.

Secondly, Cr Berwick explained that the business sold fish only to markets within Australia, and not to the same buyers as Wonga Beach Aquaculture.

Thirdly, Cr Berwick said the prices the business (and Wonga Beach Aquaculture) receives for product is predominantly influenced by the market price for farmed fish imported into Australia from considerably larger aquaculture operations. Neither operation is large enough to influence the price of farmed fish sold on Australian markets.

The CMC obtained and examined the financial records of Cr Berwick and Ms King. Those records are reflective of the small scale production referred to by Cr Berwick.

For all these reasons, Cr Berwick contended his private interests in *Daintree River Barramundi* had not conflicted with his public obligations as Mayor of the Council.

(Cr Berwick also argued that even if a conflict of interest had arisen, because he was well known for taking a stand on environmental issues, his public obligation to stand up for the environment outweighed any private interests he might have. The CMC offers no opinion as to the correctness of such a proposition.)

Conclusion:

The threshold issue is whether at any relevant time Cr Berwick had a material personal interest in any issue concerning the Wonga Beach Aquaculture development application.

Cr Berwick would have had a material personal interest in an issue if he could reasonably be said to have had a realistic expectation that (either directly or indirectly) he or Ms King (because of their interests in *Daintree River Barramundi*) stood to gain a benefit or suffer a loss dependant on what decision or other action was taken by Douglas Shire Council in respect of the development application brought by Wonga Beach Aquaculture.¹⁰

The CMC has physically inspected the operations at both Wonga Beach Aquaculture and on Ms King's property. While the CMC does not profess that its investigators are experts in aquaculture, it would nevertheless appear to the lay person that there is an obvious contrast in the two facilities. Whereas Wonga Beach Aquaculture presents as a commercially-orientated enterprise, the facilities operated at *Daintree River Barramundi* appear to be part of a long term project focussed upon conservation and rehabilitation.

The farms give every appearance of being operated in different ways and for different purposes. The only point of commonality is that both enterprises sell farmed barramundi – albeit in different markets.

It is the CMC's view that the aquaculture operation undertaken on Ms King's property is fundamentally different to the aquaculture farm operated by Wonga Beach Aquaculture.

The *Daintree River Barramundi* financial records show a small scale primary production, which is consistent with the CMC's view of the nature of the operation.

Accordingly, the CMC does not consider that it can reasonably be said Cr Berwick had a realistic expectation that (either directly or indirectly) he or Ms King (because of their interests in *Daintree River Barramundi*) stood to gain a benefit or suffer a loss depending on whatever action the Council took or whatever decisions the Council made about the Wonga Beach Aquaculture development application.

The CMC therefore considers that Cr Berwick's interest in *Daintree River Barramundi* did not amount to a material personal interest within the meaning of section 6 LGA.

¹⁰ Section 6 LGA

It is also worth considering whether – had there existed a material personal interest – Cr Berwick might have contravened section 244 LGA by failing to disclose the issue when Council was dealing with the Wonga Beach Aquaculture development application, or by participating in Council discussions and decisions about such an issue.

The available evidence suggests:

- Wonga Beach Aquaculture initially applied for a material change of use of the aquaculture farm. The application (like all other applications for material change of use) would have ultimately been referred to the elected body of the Council had Wonga Beach Aquaculture not withdrawn the application on 15 October 2003.
- The Council eventually conceded, on 25 March 2004, that application for material change of use was no longer required (having previously decided the initial application had lapsed).
- Mr McCloy met with Cr Berwick on an undisclosed date (probably in early 2004) and had a tele-conference with Cr Berwick and Ms Maruna (probably on 3 February 2004). Notwithstanding, there is no direct evidence to contradict Cr Berwick's statement he knew nothing about a material change of use application until CMC officers showed him a copy of the application on 20 March 2006.
- Wonga Beach Aquaculture engaged a private building surveyor (Mr Richardson) on 26 February 2004 to assess the building of a farm shed and residence. (The development application was effectively resolved on 8 June 2004 when Mr Richardson approved the construction of a shed and a residence on the aquaculture farm.)
- While Mr Nolan referred the issue of a show cause notice to the elected body of the Council on 25 September 2003, Cr Berwick and the other Councillors resolved to accept Mr Nolan's recommendation not to prosecute Wonga Beach Aquaculture. (Similarly, when a DPIF letter and other issues concerning the transfer of an aquaculture licence were referred to the elected body of Council on 12 February 2004, councillors resolved simply to note the information.)
- Council officers dealt with the Wonga Beach Aquaculture development application and no other issue about the development application was referred to the elected body of the Council before Mr Richardson effectively resolved the development application on 8 June 2004.

While Cr Berwick did, in all likelihood, participate in Council discussions and decisions about issues concerning the Wonga Beach Aquaculture Farm on 25 September 2003 and 12 February 2004, the CMC does not consider his actions amount to a breach of section 244 LGA, because:

- There was no apparent connection between those issues and the development application brought by Wonga Beach Aquaculture.
- On one occasion the Council simply resolved to accept a Council officer's recommendation not to prosecute Wonga Beach Aquaculture, and on the other, to merely note the information submitted.
- Neither issue can be reasonably said to have caused Cr Berwick to have a realistic expectation that (either directly or indirectly) he or Ms King (because of their interests in *Daintree River Barramundi*) stood to gain a benefit or suffer a loss.

The Council might have assessed the development application with some greater rigor, and the assessment may not have proceeded as quickly as Mr McCloy would have liked. However, Cr Berwick did not influence or attempt to influence any action any Council or other government officer had taken.

For these reasons, the CMC considers the evidence is not capable of establishing official misconduct on the part of Cr Berwick in respect of any failure to disclose a material personal interest when dealing with issues pertaining to development applications brought by Wonga Beach Aquaculture.

2 – Local Environmental Plan

Allegation:

Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (in June 2005) to recommend to the Minister for Local Government and Planning that a Local Environmental Plan for the Douglas Shire include a condition prohibiting tourism activity being conducted within 300 metres of aquaculture activity, which Cr Berwick knew or ought to have known would adversely affect a tourism activity Wonga Beach Aquaculture was then proposing for its aquaculture farm.

Mr McCloy's concerns in this regard stem from the Douglas Shire Council's adoption of a new provision within a local environmental plan. More particularly, it was asserted by Mr McCloy that:

- Douglas Shire Council inserted a new provision (section 4.5.2) into what he described as a local environmental plan.
- He had not been consulted about the new provision and did not know how the section came to be adopted.
- Wonga Beach Aquaculture had intended to develop a tourism activity on the aquaculture farm, but section 4.5.2 effectively prevents the proposed development because it prohibits any tourism activity being conducted within 300 metres of an aquaculture activity.

Mr McCloy was unable to assert whether Cr Berwick had any involvement in the adoption of section 4.5.2, but speculated that the new provision would directly benefit *Daintree River Barramundi*. He therefore suspected Cr Berwick might have had something to do with the Council's actions.

When interviewed by the CMC, Cr Berwick said he had no specific recall of the relevant provision, but was aware it was part of a draft planning scheme of general application within the Shire, had been drafted by Ms Liz Taylor¹¹, and was intended to reflect the dominant aquaculture policies of the Queensland Government.

Mr Paul Gleeson¹² told the CMC that a 'local environmental plan' was a New South Wales term and there was no such thing in the Council's Planning Scheme or any other Queensland local government planning scheme. He explained that section 4.5.2 was part of a draft planning scheme of general application in the Shire.

¹¹ Ms Taylor is a Director of the Town Planning Consultancy firm, Planning Far North.

¹² Manager of Planning Services, Douglas Shire Council

Ms Taylor confirmed to the CMC that she had drafted section 4.5.2, which she described as part of a draft planning scheme intended to be of general application to the Douglas Shire. Ms Taylor, who has worked as a consultant planner for the Council on various projects over about 10 years, explained that the new provision was consistent with provisions in other Queensland local government planning schemes and the dominant aquaculture policies of the Queensland Government.

The CMC has examined section 4.5.2. The provision has application to the assessment of material changes of use for aquaculture (and intensive animal husbandry) and seeks to ensure that:

- Aquaculture is established on 'suitable sites'.
- Aquaculture and associated activities do not adversely affect residential areas.
- Aquaculture does not have any adverse impacts on the environment.

The provision does not expressly prohibit tourism activities on aquaculture farms, but does provide that aquaculture farms must not be less than 300 metres from any residential, tourist, and rural settlement areas.

The CMC has confirmed that Wonga Beach Aquaculture had (prior to the drafting of section 4.5.2) commissioned town planning consultants to prepare an application seeking Council's approval to conduct a commercial activity (including a restaurant and fish and chip shop) on the aquaculture farm. That application is still being processed.

Conclusion:

The question of whether a material personal interest exists is again raised in the context of Cr Berwick's role in the (possible) adoption by Council of the new provision. In this instance, however, the issue involves a planning scheme of general application within the Shire. As such, Cr Berwick's interest in *Daintree River Barramundi* could not amount to a material personal interest within the meaning of section 6 LGA.

Moreover, section 4.5.2 of the Council's draft planning scheme has not yet been implemented, and it appears Wonga Beach Aquaculture is taking action to preserve its existing user rights under the Council's current Planning Scheme.

The CMC does not consider this allegation is capable of being substantiated.

3 – The Rossi property

Allegation:

Cr Berwick inappropriately made use of his authority as Mayor of the Douglas Shire Council to personally benefit himself or Ms King, by supporting a Council decision (on 21 June 2005) to acquire property near the aquaculture farm ('the Rossi property') to construct a sewage treatment plant, which Cr Berwick knew or ought to have known could adversely affect the aquaculture operations on the aquaculture farm (ie. McCloy's property).

Mr McCloy pointed the CMC to a copy of the minutes of Douglas Shire Council meetings held on 16 December 2004 and 21 June 2005. The minutes indicate Cr Berwick actively participated in deliberations concerning the establishment of a sewage treatment plant for the Wonga Beach area. Those deliberations culminated in a unanimous decision by councillors to spend \$450,000 to purchase a 61.79 hectare property from P & J Rossi ('the Rossi property') with a view to establishing the sewage treatment plant.

Straddling the Captain Cook Highway, the Rossi property is situated in very close proximity to the aquaculture farm. According to Mr McCloy, the only portion of the Rossi property suitable for a sewage treatment plant, is an area on the eastern side of the highway – which adjoins the aquaculture farm.

The possible detrimental effect of the establishment of a sewerage treatment plan was of such concern to Mr McCloy he decided to thwart Council's plans by purchasing the Rossi property himself – which he did, for a purchase price of \$600,000.

Mr McCloy surmised that Cr Berwick had somehow improperly influenced the Council's decision to purchase the Rossi property and construct a sewage treatment plant.

When interviewed by the CMC, Cr Berwick said the provision of sewage services to the Wonga Beach area had been an issue for some time, and that he had campaigned on the issue. He claimed he had relied on technical advice from engineers, as well as advice from Mr Melchert, in deciding what action Council should take.

Cr Berwick told the CMC he did not realise Mr McCloy held any concerns about the Council's proposal to establish a sewage treatment plant on the Rossi property. He said it had never occurred to him that the proposal might cause detriment to the adjoining aquaculture farm. Moreover, Cr Berwick explained that the Council had since decided it would be more cost effective to pipe sewage back to Mossman, for treatment at an existing plant.

Mr Melchert was interviewed about this issue. He told the CMC that disposal of sewage had been an issue at Wonga Beach ever since the area had been developed.

Mr Melchert said he gave advice to the Council about the issue from time to time, including on 16 December 2004 and 21 June 2005. His advice was always based on recommendations made by the Council's engineer, consultant engineers and consultant valuers, and he could not recall any of these advisers raising the issue of a threat to neighbouring properties.

Mr Melchert pointed out that Council's decision to purchase the Rossi property had been subject to a favourable environmental impact study (which presumably would have identified any detrimental impact on the aquaculture farm).

According to Mr Melchert, Cr Berwick had not sought to influence any advice or recommendation given to the Council on this issue. To the contrary, the issue of sewage disposal at Wonga Beach had been well-known, and anyone could have obtained information concerning the options open to Council at any time.

The material obtained by the CMC from the Council included a copy of engineering reports from Maunsell Australia Pty Ltd and a confidential memorandum Mr Melchert had provided to the Mayor and other councillors on 15 December 2004. This material confirms that the disposal of sewage had been an issue of concern to the Council over a lengthy period (going back as far, for instance, at a residents' meeting in May 2001), and that Council's decisions had been based on technical and other advice obtained from experts.

Conclusion:

The crucial issues in this allegation are:

- Whether Cr Berwick made inappropriate use of his authority as Mayor of the Council for the personal benefit of himself or Ms King as alleged or otherwise.
- If so, whether his conduct could amount to a criminal offence, and consequently, official misconduct.

The available evidence indicates that the disposal of sewage from the Wonga Beach area had been an issue considered by Council over a considerable period. There is no reasonable basis to suspect that Council's decision to purchase the Rossi property was contrary to the expert advice available at that time, or had otherwise been subject to improper considerations.

Having regard to the matters canvassed previously, it is doubtful Cr Berwick was affected by a material personal interest in any event.

4 – The resort site rezoning

Allegation:

Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (on 12 November 2004) to re-zone:

The resort site from 'special facilities/resort' to 'rural'.

Another property in Vixies Road, Wonga (situated near the resort site) from 'rural' to 'rural residential'.

The resort site was zoned 'special facilities/resort' under the Council's Planning Scheme when Wonga Beach Aquaculture purchased the property.

Mr McCloy said he became aware the Council intended to 'back-zone' the property to 'rural' under a draft local environmental plan.

According to Mr McCloy, Wonga Beach Aquaculture made a submission to the Council (in August 2004) requesting the property be back-zoned as 'urban' rather than 'rural'. He claimed

Cr Berwick participated in a series of Council decisions (on 16 December 2004, 20 April 2005 and 3 May 2005) which effectively rejected the Wonga Beach Aquaculture submission.

The material obtained by the CMC from Douglas Shire Council included a copy of the minutes of the relevant meetings.

The minutes of Council's meeting on 16 December 2004 reveal that Cr Berwick moved and voted for a motion (carried on Cr Berwick's casting vote) that Council not extend the boundaries of the Wonga Beach Urban Area.

The minutes of Council's meeting on 20 April 2005 reveal that Cr Berwick moved and voted for a motion (which was carried) that Council reconsider a number of submissions (including the Wonga Beach Aquaculture submission for the resort site) on 3 May 2005.

The minutes of Council's meeting on 3 May 2005 reveal:

- Cr Berwick used his casting vote against a motion (which was defeated) that part of the resort site be re-zoned to 'residential' and the other part be back-zoned to 'rural'.
- Cr Berwick moved and voted for a motion (which was carried) which essentially referred the Wonga Beach Aquaculture submission to a future Rural Land Use Study.

The minutes of a Council meeting conducted on 6 September 2005 reveal Cr Berwick had used his casting vote to defeat a motion to repeal Council's decisions of 16 December 2004 (not to extend the Wonga Beach Urban Area) and 3 May 2005 (to refer the Wonga Beach Aquaculture submission to a future Rural Land Use Study).

In his complaint to the CMC, Mr McCloy alleged that the Council's decisions (in which Cr Berwick had participated) concerning the resort site were inconsistent with another Council decision, on 20 April 2005, to allow rezoning of a property situated near the resort site from 'rural' to 'rural/residential'.

(The minutes of that Council meeting confirm that the Council resolved to rezone another Wonga Beach property – described as Lot 32 on Registered Plan 850495 – from 'rural' to 'rural settlement'. However, Council at the same time indicated any reconfiguration of lot 32 to rural settlement could only occur if and when reticulated sewerage and water services were provided in Wonga Beach.)

Mr McCloy informed the CMC he had, on 12 November 2004, complained to the Queensland Ombudsman, that Cr Berwick had a conflict of interest (because of Cr Berwick's interest in *Daintree River Barramundi*), and ought therefore to have refrained from involvement in any discussions or decisions concerning the resort site zoning. His contention was that the complaint would have been brought to Cr Berwick's attention, with the effect that Cr Berwick would have been aware of the conflict of interest beyond that time.

The CMC considers it is doubtful the Ombudsman ever relayed Mr McCloy's allegations to Cr Berwick. In fact, the Acting Assistant Ombudsman wrote to Mr McCloy on 2 June 2005 advising:

- Mr McCloy should consider obtaining legal advice about the resort site rezoning.
- Mr McCloy should refer Cr Berwick's alleged conflict of interest to the CMC, or obtain legal advice about it.

- The Ombudsman did not intend to take any further action with the matter.

When interviewed by the CMC about this issue, Cr Berwick observed:

- Council's decisions not to extend the Wonga Beach Urban Area, and to back-zone the resort site, were part of a draft planning scheme of general application in the Shire.
- The submission from Wonga Beach Aquaculture was one of about 1300 submissions received by the Council as part of the public consultation process.
- Ms Liz Taylor (consultant town planner) had initially recommended that the draft planning scheme was a good opportunity for Council to rationalise a number of inactive special facilities zones in the Shire, including the Wonga Beach Aquaculture resort site.
- Having considered the Wonga Beach Aquaculture submission, Ms Taylor had recommended Council reject it. (Cr Berwick voted according to Ms Taylor's recommendation.)

As to Council's approval of the re-zoning of Lot 32, Cr Berwick explained:

- Lot 32 was entirely different from the resort site. (The proposed residential capacity of lot 32 was much smaller than that proposed for the resort site, and did not pose the same infrastructure issues as the resort site. Further, lot 32 was being used, or was likely to be used, as an airstrip. A small residential development would therefore remove a threat to the amenity of neighbouring properties.
- Council had voted according to Ms Taylor's recommendations.

The CMC has considered the Wonga Beach Aquaculture submission to Council, which was prepared by Mr Hardy (of Victor G Feros, Town Planning Consultants) in August 2004. (The introduction to the submission specifies that it was 'in response to the Draft Douglas Shire Planning Scheme as part of the public consultation phase for the preparation of the Planning Scheme'.)

In essence, Mr Hardy's submission argued that the northern boundary of the Wonga Beach Urban Area should be extended to encompass adjoining land (but not the resort site), land adjacent or near to the resort site should be rezoned 'residential', but the resort site should remain zoned 'special facilities/resort'.

Mr Hardy told the CMC that his submission had encouraged Council to consider the resort site in the context of wider planning issues in the Wonga Beach area. He said the primary purpose of the submission was to persuade Council to retain the 'special facilities/resort' zoning for the resort site, or to include the resort site in a similar zoning in the Council's Draft Planning Scheme.

Ms Taylor was interviewed about this issue. She explained that the Council had engaged her early in 2001 to prepare a planning scheme (the 'Draft Planning Scheme') which would comply with the requirements of the *Integrated Planning Act 1997*.

Ms Taylor confirmed that the Council debate about extending the Wonga Beach Urban Area and rezoning of the resort site had occurred as part of a planning scheme of general application then being drafted in the Shire. She also acknowledged she had initially recommended Council back-zone a number of special facilities zones in the Shire (including the resort site).

Ms Taylor explained that she considered Mr Hardy's submission and other material submitted by or on behalf of Wonga Beach Aquaculture, and provided written advice and recommendations to the Council on 28 October 2004 and 15 December 2004.

A copy of Ms Taylor's memoranda to Council has been provided to the CMC. These documents confirm that Ms Taylor recommended against extending the boundaries of the Wonga Beach Urban Area, and in favour of Council back-zoning the resort site (contrary to the submission from Wonga Beach Aquaculture).

Finally, Ms Taylor asserted that her advice and recommendations to Council in respect of the re-zoning of lot 32 and the resort site, had been properly based on recognised town planning principles, and on the Council's policy of urban containment. She added that her advice was at no time influenced by Cr Berwick.

Both Mr Hardy and Ms Taylor acknowledged that Wonga Beach Aquaculture had a right to claim compensation from the Council if deprived of existing user rights (for the resort site) under the Council's current Planning Scheme.

Conclusions:

The issue of Cr Berwick having failed to declare a material personal interest does not arise, because Council was considering 'a planning scheme of general application' in the Shire.

The available evidence indicates that the entire Council debate concerning extending the Wonga Beach Urban Area and the rezoning of the resort site (and lot 32) occurred as part of a planning scheme of general application then being drafted.

The allegation is therefore unable to be substantiated.

5 - Daintree River Jetty

Allegation:

Cr Berwick failed to disclose a personal interest in *Daintree River Barramundi*, and participated in Council discussions and decisions (in about February 2004) to permit or allow Ms King or *Daintree River Barramundi* to use the Daintree Village Jetty.

In his complaint to the CMC, Mr McCloy claimed that at a Council meeting conducted in about February 2004, Cr Berwick had 'requested' Douglas Shire Council grant him 'sole commercial rights to the Daintree Village Pontoon'. It was contended that Cr Berwick ought to have declared a material personal interest and refrained from considering or voting on the motion (which was passed in his favour).

CMC investigators examined relevant Council material, but were unable to locate any record of any such request or matter during February 2004, or at any other relevant time.

However, investigators located material evidencing an application Ms King had made to the Council on 11 January 2004, for permission to use the Daintree River Jetty in connection with *Daintree River Barramundi*.

The Council material revealed:

- Ms King had applied to the Council for permission to use the Daintree River Jetty because Mr Melchert had earlier written to her (on 8 January 2004) suggesting she do so.
- Council had resolved, on 27 January 2004, to allow *Daintree River Barramundi* use the Daintree River Jetty, subject to Local Law 32.
- Cr Berwick had declared a material personal interest and excluded himself from the Council chamber while the Council had considered and voted on the matter.
- Council's resolution of 27 January 2004 was based on advice and recommendations from Ms Maruna.

Mr Melchert explained to the CMC that Ms King probably did not need the Council's permission under *Local Law 32*. However, he had taken the view that Council should consider the matter because he knew Cr Berwick had an interest in *Daintree River Barramundi*.

Mr Melchert confirmed that Cr Berwick had declared a material personal interest, and had not participated in the Council's discussion and decision concerning Ms King's application to use Daintree River Jetty.

Ms Maruna agreed the Council's resolution on 27 January 2004 had been based on her advice and recommendations.

Conclusion:

No basis exists to reasonably raise a suspicion of official misconduct on the part of Cr Berwick or any other person.

6 - The private forestry operation

Allegation:

Cr Berwick failed to disclose a personal interest in a private forestry operation on Ms King's property, and participated in Council discussions and decisions to amend the definition of 'private forestry' in the Council's Draft Planning Scheme.

In the information she provided to the CMC, Ms Phillpot claimed that Ms King's property was the only property north of the Daintree River on which private forestry activities could be conducted.

Mr McCloy asserts this situation came about because Cr Berwick used his position as Mayor to amend the definition of 'private forestry' in the Council's Draft Planning Scheme, and used his association with Mr Peter Stanton (a director of FNQ NRM Pty Ltd) to ensure Ms King's property was not included in vegetation mapping undertaken by Stanton (which would have influenced 'zoning overlays' in the Council's Draft Planning Scheme).

Mr McCloy alleged:

- Cr Berwick had an interest in a private forestry operation conducted on Ms King's property.
- Cr Berwick had failed to declare a conflict of interest on or about 6 April 2005 when he voted on a Council motion to amend the definition of private forestry in the Council's Draft Planning Scheme.
- The amended definition benefited the operation in which Cr Berwick had an interest.

When interviewed by the CMC, Cr Berwick acknowledged he and Ms King periodically harvested trees that had been planted for that purpose on Ms King's property. However, Cr Berwick asserted he had not influenced or attempted to exert any influence over the Council's Draft Planning Scheme, as alleged.

The information gathered by the CMC confirms that private forestry rights had traditionally been included in the existing user rights over Ms King's property under the Council's various planning schemes.

A search of minutes published on the Council's website for April 2005 contained no reference to any Council discussion or decision about the definition of private forestry. However, minutes of a Council meeting on 3 November 2004, record Cr Berwick as having participated in a Council resolution (of that date) to instruct Planning Far North (ie. Ms Taylor's firm) to amend the definition of 'private forestry'.

When interviewed by the CMC, Ms Taylor confirmed:

- Ms King's private forestry user rights were no different from any other 'rural' property in the Shire.

- Council’s discussions and decisions (including the amendment to the definition of ‘private forestry’) had occurred in the context of a planning scheme of general application then being drafted.
- Council had not amended the ‘private forestry’ definition in any material way. (It had simply added a sentence to emphasise that the definition related to ‘purpose planted forests on private land’ and not to ‘native forests on freehold land’ – which were already regulated by the Council’s *Local Law No 56 – Vegetation Management*.)
- The definition of ‘private forestry’ in the Draft Planning Scheme (as proposed by Ms Taylor and later amended by the Council) did not just benefit the private forestry in which Cr Berwick has an interest, but applied to all purpose planted forests on private land throughout the Shire.

Conclusion:

The issue of Cr Berwick having failed to declare a material personal interest does not arise, because Council was considering ‘a planning scheme of general application’ in the Shire.

Accordingly the CMC does not consider that this allegation raises a reasonable suspicion of any criminal offence or official misconduct by Cr Berwick, or any other person.

7 – FNQ NRM Ltd

Allegation:

Cr Berwick failed to disclose a personal interest in FNQ NRM Ltd, and participated in Council discussions and decisions (on 27 July 2004) for the Council to become a member of and contribute \$5,906 to FNQ NRM Ltd.

Mr McCloy asserted that Cr Berwick was the chairperson of Far North Queensland Natural Resource Management Ltd (‘FNQ NRM Ltd’)¹³, and that Douglas Shire Council had resolved on 27 July 2004 to contribute \$5,906 to that entity.

Mr McCloy surmised that Cr Berwick may have participated in the Council decision of 27 July 2004 approving the contribution to FNQ NRM Ltd. McCloy contended that Cr Berwick should

¹³ According to its website, FNQ NRM Ltd is the designated body representing community-based Natural Resource Management in the Wet Tropics. Formed under Natural Heritage Trust arrangements, the organisation is responsible for:

- Developing and implementing a regional plan for managing natural resources in the Wet Tropics to encourage the conservation and sustainable use of the region's natural assets;
- Facilitating the integration of efforts and increased community participation in managing natural resources;
- Strategic investment of funds to manage natural resources at a regional scale (including leveraging funds from a range of public and private sources including the Natural Heritage Trust); and
- Communication and distribution of accurate and relevant information.

not have participated in that decision because he (Berwick) was remunerated for his role as chairperson of FNQ NRM Ltd, and therefore had a material personal interest in that entity.

When interviewed by the CMC, Cr Berwick acknowledged being chairperson of FNQ NRM Ltd, but explained that FNQ NRM Ltd was a not-for-profit organisation. He denied he had a material personal interest in FNQ NRM Ltd.

Cr Berwick referred to a handbook published by the Department of Local Government and Planning and said he understood he could not have a material personal interest in a not-for-profit organisation.

Cr Berwick also referred to independent legal advice he had sought in September 2005 concerning the same issue. Essentially, that advice was to the effect that Cr Berwick's interest in FNQ NRM Ltd could not amount to a material personal interest because his interest was merely as 'a member of a non profit organisation involving no personal gain or loss'.

Mr Melchert told the CMC he had been aware of Cr Berwick's position with FNQ NRM Ltd, and had asked Cr Berwick on two occasions if his role with that entity gave rise to a material personal interest. Mr Melchert said that Cr Berwick told him he (Berwick) had received legal advice to the effect there was no material personal interest.

A search with the Australian Securities and Investment Commission confirmed:

- FNQ NRM Ltd is an unlisted non-profit public company, registered since 19 September 2003.
- Cr Berwick had been appointed a director of FNQ NRM Ltd on 19 September 2003.

FNQ NRM Ltd has provided to the CMC a copy of its Constitution and its Annual Report for 2004-05. These documents reveal:

- Membership of FNQ NRM Ltd is comprised of over 100 'organisation[s] with a bona fide interest in natural resource management in the Wet Tropics region.'
- Directors (which included the chairperson) do not have to be members of FNQ NRM Ltd.
- Cr Berwick's term as chairperson terminates at the 2006 Annual General Meeting.

The Chief Executive Officer of FNQ NRM Ltd has informed the CMC that no dividends are paid to FNQ NRM Ltd members, but Cr Berwick is paid a stipend of \$15,000 annually, meeting fees of \$600 a day, and travel and accommodation expenses (when appropriate).

The Chief Executive Officer also informed the CMC that while Douglas Shire Council became a member of FNQ NRM Ltd in September 2004, the only payment ever received from the Council was \$583, paid on 5 August 2004, to reimburse FNQ NRM Ltd for Council-related travel expenses which FNQ NRM Ltd had inadvertently paid to Cr Berwick.

The CMC has examined the Directors' Remuneration Policy, and the relevant financial records of FNQ NRM Ltd. The documents confirm Cr Berwick has been remunerated according to guidelines recommended by the Department of Industrial Relations (for part-time chairs and members of government boards, committees and statutory authorities).

The financial records show FNQ NRM Ltd remunerated Cr Berwick to the extent of \$19,050 in the 2003-2004 financial year, and \$22,500 from 1 July 2004 to 22 November 2005. These amounts include Cr Berwick's pro rata annual stipend for the 2004 year and his full annual stipend for the 2005 financial year. They do not include any travel and accommodation expenses.

Material obtained from the Douglas Shire Council included a copy of minutes of a Council meeting of 27 July 2004. These minutes revealed:

- The meeting was held in the Council Chambers in Mossman.
- Cr Berwick and Mr Melchert did not attend the meeting but participated in the meeting to some extent by telephone at various times that day – particularly between 9.35 am and 9.55 am when the Council resolved to join FNQ NRM Ltd.
- The Council resolved to contribute \$5,906 to 'FNQROC' – *not* FNQ NRM Ltd.

According to Cr Berwick and Mr Melchert, 'FNQROC' is a regional organisation for Councils in Far North Queensland. It is not a subsidiary or other constituent part of FNQ NRM Ltd.

Cr Berwick said he could not recall whether he participated in the Council decision of 27 July 2004 to join FNQ NRM Ltd. He agreed he might have had a conflict of interest but asserted it was a perceived conflict of interest and not a material personal interest.

Cr Berwick said the issue of the Council's membership of FNQ NRM Ltd involved a public interest component. He pointed to his well-publicised policy position on environmental values, and said he had resolved any perceived conflict between his personal interest and public duty by remaining in the telephone link to the meeting and giving preference to what he considered was his publicly-stated duty to support environmental values. Cr Berwick said he believed he would have been failing in his public duty if he had not given preference to the public interest on such a well publicised policy position.

Mr Melchert said he could not recall if Cr Berwick participated in the Council discussion that led to the Council joining FNQ NRM Ltd. However, Mr Melchert made the point that Cr Berwick could not have voted on that issue because councillors have to be present at Council meetings to be able to vote on issues.

Conclusion:

The available evidence indicates that the Council resolution of 27 July 2004 to contribute funds to FNQROC had nothing to do with FNQ NRM Ltd. Consequently, the issue as to whether the Council should seek membership of FNQ NRM Ltd is the only issue which could give rise to a material personal interest on the part of Cr Berwick.

Cr Berwick could not have a material personal interest in any issue involving FNQ NRM Ltd if his interest in that entity was merely as a *member* of a non-profit organisation involving no personal gain or loss to Cr Berwick. (See section 6(3)(b)(iii) LGA.)

However, the available evidence suggests Cr Berwick is not a member of FNQ NRM Ltd (membership being restricted to 'organisations'). It is therefore difficult to argue that the exception provided by section 6(3)(b)(iii) LGA applies to Cr Berwick.

Furthermore, at the material time Cr Berwick was being remunerated for his services as the chairperson of FNQ NRM Ltd. Therefore, even if Cr Berwick could be regarded as a member of a non-profit organisation, his membership involved some limited personal gain.

For these reasons, the CMC is of the view that Cr Berwick's role as chairperson of FNQ NRM Ltd is capable of constituting a material personal interest within the meaning of section 6(1) LGA (assuming all other conditions are satisfied).

That is not the end of the matter, however. To constitute a material personal interest within the meaning of section 6(1) LGA, it would need to be established that the person had 'a realistic expectation that, whether directly or indirectly, the person or an associate stands to gain a benefit or suffer a loss'.

It is, with respect, difficult to see how Cr Berwick could have had such an expectation. This is because there was no benefit payable to Cr Berwick beyond his stipend and allowances. It mattered not whether Douglas Shire Council was or was not a member of FNQ NRM Ltd.

For this reason, the CMC does not consider Cr Berwick had a material personal interest in the issue considered by Council on 27 July 2004.

The CMC therefore regards this allegation as unsubstantiated.

8 - Australian Greenhouse contract

Allegation:

Cr Berwick failed to disclose a personal interest in FNQ NRM Ltd, and participated in Council discussions and decisions (on 8 June 2005) for the Council to assign to FNQ NRM Ltd the Council's interest in a substantial grant from the Australian Greenhouse Office to develop a farm forestry project in Far North Queensland.

Mr McCloy informed the CMC that Douglas Shire Council entered into a partnership with Mossman Central Mill in respect of a greenhouse gas abatement project. This qualified the Council to receive \$7.35 million from the Commonwealth Government.

According to Mr McCloy, when Mossman Central Mill was unable to proceed with its part in the project, Douglas Shire Council transferred its own interest (and its entitlement to funding) in the project to FNQ NRM Ltd. This occurred at a time when Cr Berwick was Chairperson of FNQ NRM Ltd – and therefore operating under a material personal interest. (It was alleged Cr Berwick would benefit from the transfer of the Commonwealth funding, at least to the extent of becoming entitled to a sizeable management fee for administering the project on behalf of FNQ NRM Ltd.)

The material obtained by the CMC from Douglas Shire Council included a copy of a correspondence between Mossman Central Mill, the Council, and the Australian Greenhouse Office. This material revealed:

- The Australian Greenhouse Office agreed (on 27 September 2001) to provide up to \$7.35 million to Douglas Shire Council and Mossman Central Mill to undertake a Greenhouse Gas Abatement Program.
- The program was to consist of ethanol, sweet sorghum and farm forestry projects.
- Mossman Central Mill subsequently withdrew from the program.

- Douglas Shire Council proposed to achieve the original environmental targets of the program by expanding the area of the farm forestry project (which was to be on the Atherton Tableland) from 3,000 to 6,500 hectares. The ethanol and sweet sorghum projects were deleted from the original agreement (in October 2005).
- The original funding limit for the program was reduced from \$7.35 million to \$2 million. Australian Greenhouse Office funds were to be paid to the Council in retrospective instalments, but were always subject to parliamentary appropriation and the satisfactory achievement of the milestones in the agreement.

When questioned by the CMC about this program, Cr Berwick acknowledged he was the Chairperson of FNQ NRM Ltd, and that he had participated in a Council discussion and decision, on 8 June 2005, to transfer the Council's interest in the farm forestry project (and the remaining Australian Greenhouse Office funding) to FNQ NRM Ltd. He denied he had received any entitlement to, or any financial benefit, as alleged.

Although conceding he might have had a conflict of interest in respect of this issue, Cr Berwick asserted it would have been a perceived conflict of interest, and not a material personal interest. He contended that any perceived conflict was resolved by his remaining in the discussion and giving primacy to what he considered was his publicly-known position in support of environmental values.

According to information provided by the Chief Executive Officer of FNQ NRM Ltd:

- Douglas Shire Council did not have the expertise or resources to manage the farm forestry project.
- The CEO was himself well-qualified (through his former position as the General Manager of Strategic Policy with the Department of Natural Resources and Mines) to manage the farm forestry project.
- FNQ NRM Ltd, Douglas Shire Council and the Australian Greenhouse Office, had been negotiating a transfer of the Council's interest in the farm forestry project to FNQ NRM Ltd, but negotiations had stalled because of Mr McCloy (and Mr Baldwin's) allegations against Cr Berwick.

Financial information provided to the CMC by Douglas Shire Council suggests:

- Since the 2000-2001 financial year, the Council has expended \$399,060 on the ethanol, sweet sorghum and farm forestry projects, but has recovered only \$275,303 from the Australian Greenhouse Office.
- The Council has not transferred any Australian Greenhouse Office funds to FNQ NRM Ltd.
- The Council has not transferred any Australian Greenhouse Office funds to Cr Berwick and has not made any other payments to Cr Berwick concerning the projects.

An examination of the financial affairs of Cr Berwick and Ms King has provided no evidence of unexplained income.

Conclusion:

The available evidence indicates Cr Berwick did not receive (nor was he likely to receive) any entitlement to, or any financial benefit, from the Australian Greenhouse Office funds.

For the reasons already canvassed (in respect of the previous allegation), the CMC does not consider it can reasonably be suggested that Cr Berwick had a realistic expectation that he stood to gain a benefit to suffer a loss depending upon whether or not Douglas Shire Council transferred its interests to FNQ NRM Ltd.

In other words, the CMC does not consider Cr Berwick's interest in the issue as considered by Council on 8 June 2005 (namely, the transfer of its interest in the farm forestry project) amounted to a material personal interest within the meaning of section 6(1) LGA.

The allegation is not substantiated.

9 - The Government Grant and the Daintree Coordination Group

Allegation:

Cr Berwick, as the chairperson of the Daintree Planning Coordination Group, misappropriated funds the Australian and Queensland Governments had granted to the Daintree Planning Coordination Group.

It was alleged that Cr Berwick, as Chairperson of the Daintree Coordination Group¹⁴, had somehow used for his own benefit unspecified Commonwealth funds granted to the Group.

The CMC was informed that the Daintree Coordination Group had been awarded Commonwealth grants totalling \$23.3 million, with a view to purchasing 60 freehold properties in the World Heritage Area of the Daintree, and funding co-operative management agreements, and research.

Cr Berwick told the CMC he was Chairperson of the Daintree Coordination Group. He denied misappropriating or misusing that organisation's funds – explaining that the Daintree Coordination Group was only an advisory body, and that the Wet Tropics Management Authority administered government grants.

Mr Max Chappell, Manager of Planning and Research with the Wet Tropics Management Authority, confirmed to the CMC:

- The Commonwealth and Queensland Governments had allocated \$23.162 million to the Wet Tropics Ministerial Council¹⁵ in the 1990s, for what was referred to as the Daintree Rescue Package.
- The Daintree Planning Group made recommendations, but the Wet Tropics Ministerial Council determined how funds were expended.

¹⁴ Formerly known as the Daintree Planning Coordination Group.

¹⁵ The Wet Tropics Ministerial Council consists of the Queensland Minister for Environment; the Queensland Minister for Tourism; the Australian Minister for the Environment and Heritage; and the Parliamentary Secretary to the Australian Minister for Tourism.

- The Wet Tropics Ministerial Council spent the funds purchasing private freehold properties and improving tourist facilities in the Daintree.
- The Wet Tropics Management Authority had administered the funds on behalf of the Wet Tropics Ministerial Council, and those expenditures had been subject to audit.
- Cr Berwick did not have access to any of the funds.

Conclusion:

The CMC considers the available evidence fails to support a reasonable suspicion of official misconduct.

10 – Memoranda to council officers

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by issuing a Council General Business Memo to the Manager of the Council's Planning Services (on 11 April 2005) requesting a report as to how the Council could enforce the Council's development approval conditions over the aquaculture farm.

Douglas Shire Council records disclose that Cr Berwick signed two relevant general business memoranda – on 11 April 2005 and 14 July 2005, respectively.

The first memorandum, addressed to the Manager of Council's Planning Services, requested the preparation of a compliance report on Wonga Beach Aquaculture. The second memorandum, while not addressed to any individual officer, dealt with the same issue.

Mr McCloy claimed Cr Berwick's conduct in requesting council officers to prepare the report on Wonga Beach Aquaculture was indicative of the extent to which he was prepared to abuse his position as Mayor to cause detriment to the aquaculture farm or an advantage for *Daintree River Barramundi*.

Cr Berwick acknowledged having signed the memoranda on 11 April 2005 and 14 July 2005, but otherwise rejected Mr McCloy's assertion. Instead, he claimed he was merely using an established Council protocol designed to permit councillors to obtain information from Council officers concerning items of Council business.

The Manager of Council's Planning Services, Mr Gleeson, responded to the two memoranda by preparing his own memorandum, dated 2 August 2005.

Mr Melchert and Mr Gleeson confirmed that Cr Berwick's actions conformed with Council protocol, which allows councillors to obtain information from Council officers about items of Council business. Mr Gleeson pointed out that Cr Berwick's memoranda constituted a request for information, not a direction as to how Council officers should perform their duties.

Conclusion:

Section 1131 LGA provides that it is the Chief Executive Officer of a council who is responsible for the day-to-day operation council business and the coordination of council officers. Councillors are expressly prohibited from directing a council officer about the way the officer's duties are to be performed. (See section 230 LGA)

Section 1135 LGA recognises that a councillor may ask the Chief Executive Officer for help or advice, and may ask council officers for help or advice if the request is made under guidelines established by the Chief Executive Officer. Further, section 1135(3) permits the mayor of a council to ask for reasonable help or advice from any council officer.

The available evidence suggests Cr Berwick was using an established Council protocol, by which councillors obtained information from council officers. In any event, section 1135(3) permitted him, as mayor, to ask for reasonable help and advice from any officer.

In the circumstances, the evidence fails to raise a reasonable suspicion of official misconduct on the part of Cr Berwick.

11 – DPIF & EPA officers, and the Minister for Environment

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing officers of the Department of Primary Industries and Fisheries ('DPIF'), the Environmental Protection Agency ('the EPA') and the Minister for Environment to subject the aquaculture farm to excessive scrutiny (since July 2003).

Mr McCloy claimed that shortly after the Douglas Shire Council received the original development application from Wonga Beach Aquaculture, the aquaculture farm came under excessive scrutiny from the DPIF and the EPA. He asserted that the former owner and operator of the aquaculture farm had operated the business for 14 years without anything like the level of scrutiny applied to Wonga Beach Aquaculture.

Mr McCloy surmised that Cr Berwick knew various DPIF and EPA officers 'through his role on various boards and Natural Resource Management Groups', and had improperly influenced those officers and their agencies to take action against the aquaculture farm.

More particularly, the CMC was informed that the aquaculture farm had been 'raided' by officers from the EPA on 8 December 2005. The raid was said to have been authorised by warrants issued the previous day by a magistrate at Cairns under provisions in the *Environmental Protection Act 1994* and the *Fisheries Act 1994*. It was said that while the magistrate had 'steadfastly refused' to give reasons for issuing the warrants, it was suspected Cr Berwick was 'all over it', because the raid had taken place soon after Cr Berwick had criticised the aquaculture farm during a radio interview broadcast on 17 November 2005.

CMC investigators have examined a copy of the warrants, but do not have access to the material placed before the magistrate to support their issue.

In any event, section 456 of the *Environmental Protection Act 1994* and section 148 of the *Fisheries Act 1994* permit a magistrate to issue warrants (to an authorised EPA officer and to a DPIF inspector) to enter land for certain purposes, if the magistrate is satisfied there are reasonable grounds for suspecting there is a particular thing or activity that will provide evidence of the commission of an offence against those Acts.

When interviewed as part of the investigation, Cr Berwick acknowledged telephoning officers of the DPIF and EPA, and writing to the Minister for Environment, to convey his concerns as to the operation of Wonga Beach Aquaculture. He denied taking such action because Wonga Beach Aquaculture competed with *Daintree River Barramundi*, but rather, because he was genuinely interested about environmental issues, and had legitimate concerns about the aquaculture farm's operations.

Cr Berwick said he had been elected Mayor for five consecutive terms on a platform of pro-environmental policies, and he was well-known for taking a stand on environmental issues. He maintained he would have taken action with the DPIF and the EPA against anyone creating an environmental hazard.

Mr McCloy provided the CMC with a copy of correspondence exchanged by Wonga Beach Aquaculture and DPIF and EPA over various issues. The CMC has examined this material, together with documentation obtained from DPIF, the EPA, and Douglas Shire Council.

These documents – particularly the files held by relevant Government departments – point to a lengthy history of dealings in respect of concerns held by public officers and members of the public over the operations of the aquaculture farm. Such dealings extended back prior to the transfer of ownership to Wonga Beach Aquaculture.

Crucially, none of the public officers has any complaint about the actions of Cr Berwick. None complained that Cr Berwick attempted to influence them in the conduct of their duties.

Conclusion:

It is clear the operation of the aquaculture farm has attracted attention from the DPIF and the EPA over a period of some years – including a period prior to the transfer of the property.

The records of the Government departments reflect the fact that such attention stemmed from the need to investigate environmental concerns which existed before Wonga Beach Aquaculture took over the aquaculture farm – as opposed to any action Cr Berwick took to report his own concerns, in February 2004 and November 2005.

While it is possible Cr Berwick's communications with the DPIF and the Minister for Environment elevated the level of concern and prompted a more-immediate response by the Government agencies, Cr Berwick was neither the first nor the only individual to express concern about the operations of the aquaculture farm.

It is not the CMC's function to adjudicate on environmental issues. Whether or not the various concerns identified by Cr Berwick proved to be meritorious, he was entitled to express those concerns in the manner he did.

The issue of the CMC is whether an act of official misconduct was committed.

There is no evidence Cr Berwick had any unlawful or improper association with the Minister for Environment, or any public officer charged with investigating the environmental issues affecting Wonga Beach Aquaculture.

The CMC therefore considers that this allegation is unsubstantiated.

12 – Vegetation mapping

Allegation:

Cr Berwick made inappropriate use of his authority as Chairperson of FNQ NRM Ltd for the personal benefit of himself or Ms King by:

Awarding or causing FNQ NRM Ltd to award contracts to a Mr Peter Stanton (another FNQ NRM Ltd director) and others to undertake vegetation mapping for the Wet Tropics Management Authority (between 2003 and 2004) without first calling tenders for those contracts.

Influencing Mr Peter Stanton to include an area of land in the Douglas Shire in a vegetation map for the Wet Tropics Management Authority (between 2003 and 2004), which Cr Berwick knew or ought to have known would adversely affect the aquaculture farm.

Mr McCloy claimed that as a result of vegetation mapping undertaken by Mr Peter Stanton for the Wet Tropics Management Authority, the aquaculture farm was included in ‘an area of state significance’ in the *Wet Tropical Coast Regional Coastal Management Plan*. As a consequence, the property was now ‘useless for the commercial purpose’ for which it had been acquired – namely, as an aquaculture farm.

Mr McCloy said it was his understanding that the vegetation mapping was supposed to have been conducted north of the Daintree River, yet the aquaculture farm is situated to the south of the river. He speculated that Cr Berwick had used his position as chairperson of FNQ NRM Ltd to influence Mr Stanton’s work, with a view to putting Wonga Beach Aquaculture out of business.

This allegation was put to Cr Berwick by the CMC. While he acknowledged an association with Mr Stanton, Cr Berwick otherwise disputed the claim that he had improperly influenced Mr Stanton’s work.

Cr Berwick pointed out that Mr Stanton had been mapping vegetation in the Wet Tropics Region for many years, and understood that the vegetation on the aquaculture farm had been mapped prior to the property being taken over by Wonga Beach Aquaculture. He also claimed that while FNQ NRM Ltd had contributed to the cost of vegetation mapping in the Wet Tropics Region, such funding had gone to the Wet Tropics Management Authority (not to Mr Stanton), and related to the cost of mapping of an area near Townsville (not Douglas Shire).

For his part, Mr Stanton told the CMC:

- He had known Cr Berwick for about 15 years.
- Since 1997, he and his son (Mr David Stanton) had mapped vegetation of all the land in the Wet Tropics bio-region from Cooktown to Townsville (including his own land).
- The mapping exercise had been conducted by studying aerial photographs. It had not included any physical inspection of any property, and the nature of the tenure of property was irrelevant.

- The methodology applied to the mapping of the aquaculture farm was the same as applied to all other land in the Wet Tropics bio-region.
- Mapping of the Mossman area (which had included the aquaculture farm) had been completed by 9 November 2001 – that is, before Mr Stanton was appointed a director of FNQ NRM Ltd.
- His appointment as a director of FNQ NRM Ltd had occurred on the basis of a recommendation of an independent selection committee.
- Cr Berwick had not influenced or attempted to influence any action he or his son had taken concerning the mapping of vegetation in the Wet Tropics bio-region, nor any decision or recommendation they had made to the Wet Tropics Management Authority about the mapping.

Mr Stanton agreed with Cr Berwick's account of the circumstances in which FNQ NRM Ltd contributed to the Wet Tropics Management Authority for vegetation mapping near Townsville. (In addition, for his part, Mr Stanton said he declared a conflict of interest at the time, and took no part in the approval of that payment.)

Material obtained by the CMC from FNQ NRM Ltd includes the minutes of a board meeting conducted on 29 October 2003, an agreement between FNQ NRM Ltd and the Wet Tropics Management Authority dated 15 November 2004, and details of FNQ NRM Ltd's expenditure from 1 December 2003 to 22 November 2005. These documents support the accounts given to the CMC by Cr Berwick and Mr Stanton.

The CMC also made inquiries of the EPA regarding the issue of the *Wet Tropical Coast Regional Coastal Management Plan*. Information provided by the EPA confirmed:

- The EPA had commenced a project in 2001 to formulate and implement a Coastal Management Plan for the Wet Tropics Coastal Region.
- The terms 'coastal wetlands' and 'significant coastal wetland' were defined in the *State Coastal Management Plan – Queensland's Coastal Policy*.
- The *State Coastal Management Plan – Queensland's Coastal Policy* does not identify areas of state significance, but section 2.8.1 of the plan describes the characteristics of 'areas of state significance (natural resources)'. Section 2.8.1 contains policies for assessing development applications in respect of areas of state significance.
- The *Wet Tropical Coast Regional Coastal Management Plan* is a sub-plan of the *State Coastal Management Plan – Queensland's Coastal Policy*. The 'plan' identified the aquaculture farm as an area of state significance (according to the criteria in section 2.8.1 of the 'policy'). Mr Stanton's mapping was not the sole determinate.
- In November 1996, the then Minister for Environment publicised the EPA's intention to prepare a Coastal Management Plan for the Wet Tropics Coastal Region, and invited public submissions on the proposal. The EPA did not receive any submission from the then owner of the aquaculture farm.
- Advertisements were published in the *Cairns Post*, the *Courier Mail* and the *Port Douglas and Mossman Gazette* on 14, 15 and 20 March 2003 respectively, advising that the *Draft Wet Tropical Coast Regional Coastal Management Plan* was available

on the EPA's website for comment. (A copy of the plan – including large scale maps – was made available for public inspection at the Douglas Shire Council Chambers.)

- An advertisement was published in the *Port Douglas and Mossman Gazette* on 27 March 2003, advising that EPA officers would be available at the Douglas Shire Council Chambers on 7 and 8 April 2003 to meet with members of the public who had an interest in the *Draft Wet Tropical Coast Regional Coastal Management Plan*. The EPA did not receive any requests from Mr McCloy or Wonga Beach Aquaculture to change the boundaries of the areas of state significance proposed in the *Draft Wet Tropical Coast Regional Coastal Management Plan*.

Conclusion:

The available evidence suggests:

- The area occupied by the aquaculture farm had in all probability already been identified as an area of state significance prior to Wonga Beach Aquaculture's acquisition of the aquaculture farm in March 2003.
- Mr Stanton's vegetation mapping was just one factor EPA officers considered when the aquaculture farm was included in an area of state significance in the *Wet Tropical Coast Regional Coastal Management Plan*.
- Mr Stanton had mapped the vegetation on the aquaculture farm in 2001.
- FNQ NRM Ltd had contributed National Heritage Trust funds to the Wet Tropics Management Authority from 1 December 2003 to 22 November 2005 for vegetation mapping, but this mapping had nothing to do with the mapping of vegetation in the Mossman area.

The available evidence does not support the proposition that Cr Berwick improperly influenced Mr Stanton's work, or otherwise acted improperly in respect of the allocation of funding by FNQ NRM Ltd.

The allegation is not substantiated.

13 - National Heritage Trust Funds and Revegetation

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by approving Council payments of over \$4,000 to Ms King (in the 2004-05 financial year) from National Heritage Trust funds administered by the Council for riparian wetland revegetation on Ms King's property, on conditions more favourable than similar Council payments to other land holders in the Shire.

The material submitted to the CMC by Mr McCloy included a copy of a Council Account Management Report dated 30 April 2005, and a title search conducted on 30 May 2005 in respect of Ms King's property.

The Account Management Report indicated Douglas Shire Council had paid \$4,016 (out of a \$4,184 allocation) to Ms King for riparian wetlands. The title search indicated there were no registered encumbrances or unregistered dealings over Ms King's property, other than a registered mortgage in favour of a bank.

Mr McCloy asserted:

- Douglas Shire Council had allocated money to Ms King for revegetation of wetlands on her property out of National Heritage Funds administered by the Council. The revegetation had been undertaken under a Council project known as the Remediation Plan for Protection and Restoration of Riparian Wetland Areas.
- The Remediation Plan for Protection and Restoration of Riparian Wetland Areas requires beneficiaries to register covenants over the title to their land (presumably in favour of the Council) restricting development on the land.
- No such covenant was registered over the title to Ms King's property.

Mr McCloy told the CMC he suspected Cr Berwick had improperly used his authority as Mayor to ensure revegetation of wetlands on Ms King's property occurred in circumstances that were more favourable than those applying to others.

Cr Berwick and Ms King were interviewed separately about this allegation. Both proffered a consistent response to the allegation, namely:

- The Council had not paid any money directly to Ms King. The entry in the Account Management Report represented the cost of trees supplied by the Council to Ms King for revegetating wetlands on her property.
- The revegetation project had been a shared arrangement between the Council and the beneficiaries of the project. The amounts recorded in the Account Management Report represented about 20% of the total cost of the revegetation carried out to wetlands on Ms King's property, with the balance having been contributed in-kind by Cr Berwick and Ms King.
- The funds paid by the Council had come from monies allocated by the Commonwealth to the National Heritage Trust. The Commonwealth Government had initially required registered covenants from beneficiaries, but later agreed that the Council could enter into voluntary management agreements with beneficiaries.
- Ms King had entered into a voluntary management agreement with the Council and had complied with all other requirements of the revegetation project.
- Neither Cr Berwick nor Ms King had influenced nor attempted to influence any action taken by the Council in respect of the matter.

The CMC interviewed a number of Council officers regarding this matter, including Mr Peter Bradley (Project Manager for the Council's Water Quality Improvement Project at the relevant time) and Mr Greg Keith (an Environmental Officer, who was responsible for managing the project at an operational level).

Mr Keith explained:

- He inspected Ms King's property on 8 April 2004 and considered it was eligible for wetland revegetation under the Council's water quality improvement project – funded by the National Heritage Trust.
- Having ascertained that landholders were reluctant to participate in the project because they were not prepared to grant covenants over their properties, he had recommended the use of voluntary management agreements.
- The project had been a shared arrangement, and Ms King and Cr Berwick had made in-kind contributions.

The minutes of Council meetings provided to the CMC confirm that Council resolved to include Ms King's property in the water quality improvement project at a meeting conducted on 23 April 2004. Cr Berwick is recorded as having declared a material personal interest in the matter, and thereafter took no part in the discussion or decision.

The Council's General Manager of Finance (Mr Ian Barton) confirmed to the CMC that (between 2003 and 2006) the Council expended \$8,591.91 in National Heritage Trust funds in revegetating wetlands on Ms King's property. None of that money was paid directly to Ms King.

In examining this particular allegation, the CMC considered a copy of a letter sent by Ms King to the Council, dated 12 November 2002, seeking financial assistance from the National Heritage Trust and the Douglas Shire River Improvement Trust for the purpose of revegetating wetlands on her property. Council records confirm:

- Ms King's letter was tabled at a River Improvement Trust meeting on 20 November 2002. Cr Berwick was not present, and a report was requested for consideration at the next meeting.
- The matter was next considered at a River Improvement Trust meeting on 5 March 2003, when the Trust unanimously decided to support an application (presumably by Ms King) for Queensland Government funding.
- Cr Berwick was present at the River Improvement Trust meeting of 5 March 2003, but declared an interest in the matter and did not participate in the discussion or decision.

(The evidence suggests that no River Improvement Trust funds were ever allocated towards work on Ms King's property.)

The CMC is also aware (from Council minutes) that during Council meetings conducted in August 2005, Cr Berwick stated that a 'covenant' had been placed over the title to Ms King's property. (At the time, the Council was considering a matter unrelated to Ms King or Cr Berwick.) When interviewed by the CMC about his statement, Cr Berwick confirmed he was referring to the voluntary management agreement in place in respect of Ms King's property.

Conclusion:

The available evidence indicates Ms King was entitled to seek financial assistance to regenerate wetlands on her property under a Council water quality improvement project funded by the National Heritage Trust. She ultimately entered into a voluntary management agreement (not a covenant), and has complied with the requirements of the project.

The available evidence does not support the contention that Ms King or Cr Berwick acted improperly in this respect.

The allegation is not substantiated.

14 - Electricity supply North of the Daintree River

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by lobbying and influencing the Queensland Government on unspecified dates to prevent the further supply of electricity north of the Daintree River (though a three phase electricity supply had already been connected to Ms King's property).

Mr McCloy claimed that at some undisclosed time, the Queensland Government (or one of its agencies) engaged Mr Guy Chester to undertake an environmental impact study into a proposal to extend a reticulated electricity supply north of the Daintree River.

It was suggested that of the 500-odd dwellings between the Daintree River and Cape Tribulation, only thirteen (including Ms King's property) have been connected to a reticulated electricity supply.

Mr McCloy surmised that Cr Berwick had used his position as Mayor to influence Mr Chester's recommendation that a reticulated electricity supply not be extended any further north of the Daintree River.

In response to this accusation, Cr Berwick informed the CMC:

- Consulting engineers, Gutteridge Haskins and Davey ('GHD'), had been engaged during the 1990's to undertake an environmental impact assessment study in respect of a Queensland Government proposal to extend a reticulated electricity supply into the coastal area between the Daintree River and Cape Tribulation. (Mr Chester worked for GHD.)
- Ms King's property was not in the study area.
- He was not opposed to any further extension of a reticulated electricity supply north of the Daintree River, but did object to any extension between the Alexandra Range and Cape Tribulation.
- As Mayor, he had been consulted about the terms of reference for the study, but this occurred before GHD was engaged to undertake the study.
- He had known Mr Chester professionally, but did not share any personal association. He had not attempted to influence Mr Chester in his work.
- Mr Chester advised a reticulated electricity supply could be extended into the study area, but had recommended certain measures be taken to address some development issues.

For his part, Mr Chester confirmed to the CMC that Cr Berwick had not influenced or attempted to influence the outcome of the study he had undertaken.

Conclusion:

The CMC considers the available evidence fails to give rise to any reasonable suspicion of official misconduct on the part of Cr Berwick or any other person.

The allegation is unsubstantiated.

15 - Disclosures concerning the Temporary Local Planning Instrument

Allegation:

Cr Berwick improperly made unauthorised disclosures of confidential Council information (about an impending Council decision known as the Temporary Local Planning Instrument) to Mr Bill Calderwood, Mr Cam Charlton and Mr John McIntyre (in or about November 2003), and other individuals who had supported Cr Berwick or contributed to his election campaigns (between November 2003 and June 2004).

According to the information provided to the CMC by Ms Phillpot, in June 2004 the Douglas Shire Council implemented a Temporary Local Planning Instrument ('TLPI'), which effectively banned any further development north of the Daintree River.

It was alleged that Cr Berwick had thereafter, on 21 November 2003, leaked information concerning the TLPI to Mr Bill Calderwood, Mr Cam Charlton and Mr John McIntyre. This resulted in a 'flood of planning applications' (by supporters of Cr Berwick) to the Council before the TLPI was formally implemented (in June 2004).

Ms Phillpot nominated a number of individuals as having brought planning applications as a result of Cr Berwick's disclosure of the TLPI. In support of her allegation, Ms Phillpot produced a copy of a newspaper article said to have been published in the *Cairns Post* (on a date unknown).

The newspaper article, entitled 'Daintree ban leaked claim', is under the by-line of Fiona Gowers – described as the newspaper's Port Douglas reporter. The article reads, in part:

Cr Berwick said he told three Tourism Tropical North Queensland representatives about the impending ban.

He said it was necessary to tell Bill Calderwood, Cam Charlton and John McIntyre at a council-endorsed meeting to snare State Government funds and ensure the draft planning scheme's success.

"I thought it was necessary to bring them into the confidence," Cr Berwick said, "The tourism industry has a pretty big stake in the debate. They assured us they wouldn't tell anyone and I believe they kept that promise. Whether or not we should have done that is a fair question but we wanted to get the tourism industry back on board."

Cr Berwick said he would ignore innuendo that he selectively spread news of the ban until evidence was presented to the contrary.

By way of background, the information available to the CMC suggests:

- Douglas Shire Council had been considering introducing an IPA-compliant planning scheme (that is, the Draft Planning Scheme) from early 2001. The TLPI was a mechanism under the *Integrated Planning Act 1997* for suspending or otherwise regulating the Council's current planning scheme, where there was likely to be a delay in implementing an IPA compliant planning scheme.
- Since the March 2004 local government election, councillors on the Douglas Shire Council have expressed divergent views about Council policy and planning.
- There have been two relevant TLPIs. The Minister for Local Government and Planning eventually forced the Council to implement the first, and the Minister implemented the second.
- The TLPIs effectively prohibit residential development on land with conservation values situated north of the Alexandra Range – pending implementation of an IPA-compliant planning scheme.
- The TLPIs have no affect on the aquaculture farm, the resort site, or any other properties south of the Alexandra Range.

Cr Berwick has acknowledged that he and Mr Melchert met with Mr Calderwood, Mr Charlton and Mr McIntyre in November 2003 to discuss tourism issues in the Daintree. He conceded to the CMC that although the Council had not wanted information about the pending TLPI to find its way into the public domain, he had nonetheless informed Mr Calderwood, Mr Charlton and Mr McIntyre of the matter.

Cr Berwick claimed the tourism industry had a substantial interest in the region, and it had become evident during the meeting that Mr Calderwood, Mr Charlton and Mr McIntyre needed to be aware of the implications of the Council's Draft Planning Scheme. He said the Council needed the support of the tourism industry to implement the *Daintree Futures Study* (which recommended planning controls to reduce residential densities in the Daintree).

Cr Berwick said Mr Calderwood, Mr Charlton and Mr McIntyre had undertaken to keep the information about the TLPI confidential, and when he subsequently informed the Council of his disclosure, no councillor took issue with his actions.

Furthermore, Cr Berwick said the TLPI had evolved out of the *Daintree Futures Study*, and in that sense, it was already publicly known Council might consider limiting development in the Daintree. Indeed, according to Cr Berwick, one of the reasons the TLPI was implemented was because the level of residential planning applications was approaching the threshold recommended in the *Daintree Futures Study*.

Mr Melchert informed the CMC that Council had authorised Cr Berwick and him to meet with Mr Calderwood, Mr Charlton and Mr McIntyre, and that Cr Berwick had spoken of the pending TLPI during this meeting. According to Mr Melchert, Cr Berwick reported back to the Council about the meeting, and informed Council of the disclosure. There was no criticism of Cr Berwick.

Mr Melchert also made the point he was aware of his statutory obligations under the *Crime and Misconduct Act 2001*, and he would have reported Cr Berwick's conduct to the CMC if he had considered there had been an unauthorised disclosure of confidential Council information.

Information provided to the CMC by Douglas Shire Council suggests that Council usually received about 15 to 20 planning applications a year for the area north of the Alexandra Range. Approximately 60 applications were received in the three months before the TLPI was announced publicly (in June 2004). It is suggested that many of those applications appeared to have been prepared hurriedly, and many of the applications have since lapsed.

The CMC has compared a list of applicants (for the period 1 November 2003 to 30 June 2004) with the electoral gift returns disclosed by Cr Berwick in his previous electoral returns. There is no direct correlation, nor is there any apparent connection between any applicant and any individual named in the electoral returns.

A copy of the *Daintree Futures Study* has also been examined.

The study was compiled for the Wet Tropics Ministerial Council between January and July 2000 by the Rainforest Cooperative Research Centre in conjunction with GHD and Far North Strategies. It presents as a comprehensive report about the future use of freehold land north of the Daintree River. The authors claim to have consulted almost 200 organisations and individuals (including Ms Phillipot) before publishing the study, in November 2000.

Some of the study's major findings included the following:

[The Council should] *introduce planning controls for biodiversity conservation and ... [to] reduce ultimate settlement densities [north of the Daintree] to ecologically sustainable levels.*

A Daintree Land Trust, incorporating government and community representatives, should be established to support compensation and land acquisition programs. This Trust will require seed funding from State or Federal Government.

The CMC also considered the minutes of Douglas Shire Council meetings held on 13 October 2003, 30 October 2003, 17 November 2003, 24 November 2003, and 2 June 2004.

The minutes of the 13 October 2003 meeting, reveal that proceedings were closed to the public while Council discussed a confidential memorandum concerning a temporary local planning instrument. (The minutes do not disclose what transpired while the proceedings were closed.)

The minutes of the 30 October 2003 meeting reveal that Council discussed a proposed IPA-compliant planning scheme and the retention of conservation values on the Daintree Coast. Council is reported to have resolved to write to the Minister for Local Government and Planning and others about a proposed temporary local planning instrument. All of this business was conducted in open session.

The minutes of the 17 November 2003 meeting record that Council reviewed a planning scheme and discussed a temporary local planning instrument – again, in open session.

The minutes of the meeting conducted on 24 November 2003 reveal that Council discussed planning issues north of the Daintree River, and that Council had the support of the tourism industry to request funding from State and Federal Governments under the *Daintree Futures Study* to protect and preserve rainforest areas north of the Daintree River. This apparently occurred in public session.

Finally, the minutes of Council meeting of 2 June 2004 record that Council discussed the 'planning scheme' in closed session, before reconvening in public and passing a motion (moved by Cr Berwick) for the adoption of the TLPI and authorising notification of the Draft Planning Scheme.

Conclusion:

In order for Cr Berwick's conduct to amount to official misconduct, it would be necessary to prove he contravened section 250 LGA (or section 85 *Criminal Code*), as alleged by Ms Phillpot.

Section 250 LGA applies to two kinds of conduct. Firstly, it prohibits a councillor from making improper use of Council information to gain a direct or indirect financial advantage for the councillor or someone else, or to cause harm to the Council.

Secondly, it prohibits a Councillor from releasing information the Councillor knew (or should have reasonably known) was confidential **and** which the Council wished to keep confidential.

Section 85 of the *Criminal Code* is similar to section 250(2) LGA, in that it makes it a criminal offence for a public officer to unlawfully communicate any information that came to his or her knowledge because of his or her office and which he or she had a duty to keep secret.

There is no reasonable basis to suspect that by disclosing the TLPI during the meeting with Messrs Calderwood, Charlton, and McIntyre, Cr Berwick intended to gain a direct or indirect financial advantage for himself or someone else, or to cause harm to the Council.

Similarly there is no evidence that the Council had formally resolved to keep information about the TLPI confidential. To the contrary, it may be inferred from subsequent events that the Council had not wished to keep the information confidential.

The evidence does not demonstrate any correlation between those who brought applications, and persons named in Cr Berwick's electoral returns.

Accordingly, it is the CMC's view that the evidence fails to give rise to any reasonable suspicion of official misconduct on the part of Cr Berwick or any other person.

16 - Removal of vegetation from Ms King's property

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King (on an undisclosed date in November 2005) by wilfully damaging protected vegetation on Ms King's property contrary to section 28 of the Council's *Local Law No 56 (Vegetation Management)*.

The CMC was informed that on an occasion in November 2005, Cr Berwick felled certain trees on Ms King's property, and that such trees were protected under the Council's by-laws. This allegation was ventilated in articles published by *The Australian* on 11 November 2005, and *The Cairns Weekend Post* on 12 November 2005.

Cr Berwick has admitted felling the trees. He claimed the trees in question had been planted in 1995 for the purposes of plantation timber, and that no permit had been required in order for them to be felled.

Ms King confirmed Cr Berwick's explanation. She said that the trees were felled to re-align a track traversed by one of her neighbours.

The CMC has ascertained that a Council environmental officer, Mr Robert Jago, visited Ms King's property on 10 November 2005 to investigate the allegation, and that a report dated 11 November 2005 was compiled as a consequence.

According to Mr Jago's report, two trees had been felled: one being a black wattle and other a silver quandong. The report concluded that there had been no breach of Council's *Local Law No 56 (Vegetation Management)* for a number of reasons, including the fact:

The trees were felled to construct, operate or maintain a track.

Both trees were less than 15 years old and had been planted on land which had previously been cleared for cultivation, pasture or plantation purposes.

Mr Jago was interviewed by the CMC, and confirmed the observations and findings as recorded in his report. He asserted that neither Cr Berwick nor Ms King had influenced or attempted to influence his report.

Conclusion:

Section 28 of *Local Law No. 56 (Vegetation Management)* makes it an offence for a person to wilfully damage protected vegetation. It is not an offence to damage vegetation where the damage is otherwise permitted as a specified activity recognised by section 29(g) of *Local Law No. 56*.

The available evidence indicates Cr Berwick damaged protected vegetation in a vegetation protection area when he felled two trees on Ms King's property in November 2005. However, such damage was permitted by section 29(g)(i) & (vi) of *Local Law No. 56* because – as Mr Jago found – the trees were felled to construct, operate or maintain a track, and because the trees were less than 15 years old and had been planted on land which had previously been cleared for cultivation, pasture or plantation purposes.

In other words, Cr Berwick was entitled to fell the trees without obtaining the Council's approval.

Accordingly, the allegation is not substantiated.

17 – Earthworks on Ms King’s property

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King (on an undisclosed date) by fabricating a Council letter which purported to give authorisation to Ms King to construct four ponds and a dam on her property.

On 8 June 2005, Ms King lodged a development application with Douglas Shire Council seeking permission to expand the production area of her aquaculture operation from 1 hectare to 2.3 hectares.

Information provided to the CMC on 11 November 2005 (including aerial photographs) suggested that the expansion work had already been carried out, and that no relevant approvals had been granted.

The CMC understands there was some public debate on this issue and, on 16 November 2005, Ms King had sent an email to a particular councillor, pointing out the work depicted in the aerial photographs was simply maintenance of pre-existing ponds that had been constructed with the Council’s permission. In support of her claim, Ms King also produced a letter purportedly sent to her by the Douglas Shire Council on 2 December 2002 (granting authority).

It was suggested to the CMC that the letter produced by Ms King is a fabrication, because:

- It was not signed.
- It bears an Internet website address (at a time when Council did not have a website).
- It bears an incorrect telephone number.

When interviewed about this issue, Cr Berwick denied that he had created the letter of 2 December 2002.

Ms King told the CMC she had received the letter from the Council in 2002, and that the fresh earthworks shown in the recent photographs were merely repairs to ponds the Council had previously authorised her to construct.

Mr Melchert informed the CMC he had no memory of the letter of 2 December 2002, but it otherwise appeared to be the style of letter Mr Nolan would have routinely signed on his behalf. Mr Melchert suggested that the Council’s minutes would confirm whether the letter purportedly granting authority to Ms King to construct the fish ponds was authentic.

Within the material provided to the CMC by Douglas Shire Council was a copy of a memorandum from Mr Nolan to the Chief Executive Officer, dated 27 November 2002, and the minutes of a Council meeting held on 28 November 2002. These documents confirm:

- Ms King made application to the Council in June 1999 for planning approval to change the natural surface levels on her property. (This approval was necessary in order for Ms King to construct ponds and dams on her property for aquaculture purposes.)

- Council considered Ms King's planning application on 28 November 2002, and unanimously resolved to approve the construction of ponds and dams subject to certain conditions (concerning silt control, dust suppression and the use of the ponds and dams for aquaculture purposes).
- Cr Berwick had declared a material personal interest and had not participated in the discussion and decision concerning Ms King's planning application.
- The Council's decision was consistent with recommendations contained in Mr Nolan's memorandum of 27 November 2002.

Mr Nolan asserted that Cr Berwick had not influenced or attempted to influence any action he had taken or any advice or recommendations he had given about Ms King's planning application.

Conclusion:

While the available evidence does not provide any sensible explanation for the anomalies in the letter produced by Ms King, it does confirm that in November 2002, the Douglas Shire Council gave its authority for the construction of pools and dams on Ms King's property.

It is also clear from the evidence that Cr Berwick was not involved in the Council's discussion or decision at that time, nor did he attempt to influence the work of Mr Nolan, whose recommendations were adopted by Council.

There is no reasonable suspicion of official misconduct on the part of Cr Berwick.

18 & 19 - Norris Earthmoving and the Ferry Service contract

Allegations:

Cr Berwick remained in Council meetings, participated in Council discussions, and voted on Council motions, which ultimately awarded contracts to Norris Earthmoving and Raw Materials ('Norris Earthmoving') to dredge the Daintree River and operate a ferry service over the Daintree River, even though (in the case of the ferry service contract) Cr Berwick had disclosed to Council that he may have a perceived conflict of interest in the matter because Norris Earthmoving had previously undertaken some earthworks on Ms King's property.

Cr Berwick supported the Norris Earthmoving tender for the Daintree River Ferry Service in exchange for Norris Earthmoving having undertaken earthworks on Ms King's property at either reduced rates or for no charge whatsoever.

These two allegations are addressed together at this point because both link the awarding of Council contracts to earthworks performed on Ms King's property. (Issues relating to the calling of tenders for the operation of the Daintree River Ferry are canvassed again, below.)

According to allegations as conveyed to the CMC:

- Cr Berwick participated in Council discussions and decisions which resulted in two contracts – a dredging contract and a ferry service contract – being awarded to Norris Earthmoving.
- Cr Berwick had a conflict of interest in these issues because Norris Earthmoving had undertaken earthworks on Ms King's property (in connection with *Daintree River Barramundi*) in October 2005.
- Cr Berwick had voted to award the ferry service contract to Norris Earthmoving on 7 December 2005 in exchange for Norris Earthmoving having undertaken earthworks on Ms King's property in October 2005 at either reduced rates or for no charge whatsoever.

The CMC sought and obtained from Douglas Shire Council all documents relevant to the awarding of the dredging and ferry service contracts.

In the case of the dredging contract, the material provided to the CMC included a copy of tender specifications, a memorandum dated 8 June 2004 prepared by Mr Melchert and other council officers, and the minutes of a Council meeting conducted on 8 June 2004.

The tender specifications sought tenders for the dredging and removal of alluvial deposits from the operational path of the Daintree River Ferry for a period of five years.

The memorandum of 8 June 2004 recommended Council award the contract to Norris Earthmoving.

The minutes of the Council meeting on 8 June 2004 revealed that:

- The Council had accepted its officers' recommendation, and awarded the dredging contract to Norris Earthmoving.
- Cr Bellerio (whose business, Bellerio Excavation, had tendered for the contract) declared a material personal interest, and did not participate in the Council discussion and decision about the dredging contract.
- Cr Berwick participated in the Council discussion and decision.

So far as the ferry service contract is concerned, the material provided to the CMC included a copy of the tender specifications, a memorandum dated 6 December 2005 prepared by a Council officer, and minutes of Council meetings conducted on 7 December 2005 and 21 February 2006.

The tender specifications sought the provision of a ferry service to transport vehicles and people across the Daintree River.

The Council officer's memorandum, which was written on behalf of the team of officers assigned to evaluate the tenders, reveals:

- Only three tenders had been received – one submitted by Norris Earthmoving and two by Daintree Ferry Pty Ltd.

- Only Norris Earthmoving's tender conformed to tender specifications.
- The evaluation team had consulted McCullough Robertson Lawyers and MGI Cockrell Accountants.
- The evaluation team recommended the Council accept Norris Earthmoving's tender *at the submitted prices, for a term of 10 years and an option in the Council's favour to extend the contract for a further 5 years.*

The minutes of the Council meeting on 7 December 2005 reveal:

- Cr Berwick acknowledged there may have been 'a perception of a conflict of interest' on his part concerning the ferry service contract, on the basis that Norris Earthmoving had previously carried out work on Ms King's property. However, Cr Berwick announced he intended to participate in all discussions and decisions about the ferry service contract.
- Prior to making the statement concerning the possibility of a perceived conflict of interest, Cr Berwick had already moved and voted on two motions concerning the ferry service contract.
- Cr Berwick voted on the final motion concerning the ferry service contract.
- Cr Berwick's contribution to the debate, and his voting pattern were consistent with the evaluation team's recommendation that the contract be awarded Norris Earthmoving.
- Council eventually determined to accept the evaluation team's recommendation, and awarded the ferry service contract to Norris Earthmoving.

The minutes of the Council meeting of 21 February 2006 reveal that Council unanimously resolved in favour of a motion put by Cr Berwick to close the meeting while the Council discussed 'the contract for the Daintree River Ferry'. (Thereafter, there is nothing in the minutes to indicate the nature, extent or outcome of the proceedings conducted in closed session.) According to a letter Mr Melchert sent to the CMC on 22 February 2006, concerns about Cr Berwick's actions (and other allegations about the ferry service contract) were ventilated at the Council meeting of 21 February 2006.

When interviewed by the CMC, Cr Berwick explained:

- Norris Earthmoving had undertaken earthworks on Ms King's property (in October 2005). This work was charged out (and paid for) at commercial rates.
- Norris Earthmoving was the only contractor in the district with the equipment and skills to undertake the earthworks required on Ms King's property.
- Ms King had to wait until October 2005 for Norris Earthmoving to undertake the earthworks. (Norris Earthmoving had been engaged some months prior to October 2005, but certainly no earlier than the wet season at the beginning of 2005.)
- Mr Chris Norris, a proprietor of Norris Earthmoving, had informed Cr Berwick of his intention to tender for the ferry service contract. Cr Berwick had wished Mr Norris 'good luck', but at no time indicated to Mr Norris that such a tender would be treated more favourably than others.

Cr Berwick acknowledged he had voted to accept Norris Earthmoving's tender for the ferry service. He said he did so because:

- He considered the Norris Earthmoving tender was the only one of the two tenders that conformed to tender specifications.
- Norris Earthmoving was considerably cheaper.
- He considered there had been inappropriate canvassing of councillors to support the alternate tender.
- The evaluation team had recommended acceptance of the tender from Norris Earthmoving.

In addition, Cr Berwick asserted:

- The work performed by Norris Earthmoving on Ms King's property did not amount to a material personal interest within the meaning of the LGA.
- He had explained to Council on 7 December 2005 why he may have a perceived conflict of interest in an issue about the Norris Earthmoving tender for the ferry service contract.
- His understanding was that he was obliged to abstain from participating in Council discussions and decisions if he had a *material personal interest*, not simply because there might be a perceived conflict of interest.

Ms King was also interviewed, and asserted that she had paid commercial rates for the work performed by Norris Earthmoving in October 2005.

The proprietors of the business Norris Earthmoving, Mr Chris Norris and Ms Charmaine Norris, were interviewed by the CMC. Mr Norris confirmed that neither Cr Berwick nor Ms King hold any financial or other interest in Norris Earthmoving, nor in any other business conducted by Mr Norris or Ms Norris.

Ms Norris told the CMC that Norris Earthmoving had performed earthworks on Ms King's property from 29 to 31 October 2005. She produced a copy of a tax invoice dated 1 November 2005, which showed Cr Berwick and Ms King had been charged \$2,900.70 for the work.

Ms Norris also confirmed Cr Berwick and Ms King had been charged at a higher rate than that normally applied by Norris Earthmoving in respect of work performed for the Douglas Shire Council – the rate charged was that routinely applied to work performed for private customers.

Finally, Mr Norris asserted:

- Norris Earthmoving was one of three earthmoving contractors in the district, but was the only contractor with the appropriate equipment for the earthworks requested by Ms King.
- Cr Berwick had originally approached him to undertake earthworks on Ms King's property some six to eight months before the work was actually performed.
- He had not canvassed Cr Berwick's support for the ferry service contract.

Conclusion:

The available evidence indicates that the Council had most likely called for, considered and awarded the dredging contract to Norris Earthmoving well before Cr Berwick engaged Norris Earthmoving to undertake earthworks on Ms King's property.

Accordingly, there does not appear to be a basis to question Cr Berwick's conduct in that respect.

As to the awarding of the contract for provision of ferry services, the evidence suggests:

- Cr Berwick and Ms King had no direct or indirect interest in Norris Earthmoving (or any related business).
- The earthworks performed by Norris Earthmoving on Ms King's property from 29 to 31 October 2005 was charged (and paid for) at commercial rates.

In the circumstances, it cannot reasonably be contended that either Cr Berwick or Ms King stood to gain a benefit or suffer a loss depending on whether Council awarded the ferry service contract to Norris Earthmoving.

The available evidence is not capable of establishing a material personal interest on the part of Cr Berwick.

Equally, the available evidence fails to support the allegation that Cr Berwick gave favourable treatment to Norris Earthmoving, or otherwise acted improperly in voting to award the ferry service contract to that business entity.

(Other allegations concerning the awarding of the ferry contract are canvassed below.)

20 - The low-loader

Allegation:

Cr Berwick misused a Council low-loader to transport a Norris Earthmoving excavator to Ms King's property when Norris Earthmoving had undertaken earthworks on Ms King's property in about October 2005.

This matter relates to previous allegations concerning the earthworks performed for Ms King by Norris Earthmoving.

In this regard, it was alleged that a Council-owned low-loader had been improperly used to transport Norris Earthmoving's excavator to Ms King's property. The inference raised by the allegation is that Cr Berwick improperly benefited from the use of the low-loader.

The CMC's investigation has established that Norris Earthmoving's excavator was transported to Ms King's property with the aid of a low-loader hired from Santarossa Engineering Pty Ltd, of Mossman.

The tax invoice issued by Norris Engineering in respect of the work performed in October 2005, includes a charge of \$495 for 'float hire'.

In turn, Norris Engineering has produced to the CMC a tax invoice issued by Santarossa Engineering Pty Ltd, dated 31 October 2005. This invoice charges 'C & C Norris' the sum of \$495.00 for 'float hire'.

Conclusion:

The available evidence confirms that Norris Engineering conveyed its excavator to Ms King's property by means of a float hired from Santarossa Engineering Pty Ltd.

There is no substance to the allegation that a Council-owned low-loader was used.

21 – Use of Council resources to respond to allegations

Allegation:

Cr Berwick misused Council resources to respond to Mr McCloy's allegations.

Newspaper articles published by the *Courier Mail* in August 2005¹⁶ referred to Mr McCloy's allegations against Cr Berwick. Mention was made of 'a 150-page brief' provided to the CMC by Mr Baldwin.

Cr Berwick established an Internet website on or about 5 November 2005 and used the website to respond to Mr McCloy's allegations. In particular, Cr Berwick published on the website a copy of independent legal advice he had received about the allegations together with certain Council records, including extracts from Council minutes, correspondence to and from Council, and a memorandum prepared by a Council officer.

It was suggested to the CMC that the Council records published on Cr Berwick's website had been collated by his personal assistant – a Council officer – and that Cr Berwick's actions in tasking his personal assistant in this way contravened a draft *Code of Conduct*¹⁷ prohibiting councillors from using Council staff and resources for private purposes.

Cr Berwick admitted asking his personal assistant to access the Council's documents in order to defend himself from the various allegations that had found their way into the public domain.

Both Cr Berwick and his personal assistant have acknowledged that at the material time Mr Melchert directed Cr Berwick's personal assistant not to provide Cr Berwick with Council information in respect of Mr McCloy's allegations.

The CMC interviewed Cr Berwick's personal assistant regarding this issue. She asserted that she did not disregard Mr Melchert's direction, but rather, was obliged to take directions from Cr Berwick. She stated she was aware at the time that Mr Melchert had himself provided Council information relative to Mr McCloy's allegations to another councillor.

¹⁶ An article published on 17 August 2005 was entitled, '*Fish farmers fall out over zoning*', while two articles published on 18 August 2005 were entitled, '*Mayor accused of threat to MP*' and '*MP tells Parliament of "threats" from mayor*', respectively.

¹⁷ As published by the Department of Local Government

Cr Berwick's personal assistant explained to the CMC that she had used her own personal computer (at her own home) in her own time to undertake research in support of Cr Berwick. She had done this after consulting with the Acting Chief Executive Officer at the relevant time. (The Acting CEO confirmed to the CMC that he suggested the personal assistant conduct her research in her own time, in light of the 'particular sensitivities' attaching to the matter.)

For his part, Mr Melchert said he could not recall directing Cr Berwick's personal assistant not to gather information for Cr Berwick, but added such a direction 'would be consistent with his approach' to such matters. Mr Melchert regarded the allegations against Cr Berwick as pertaining to personal matters, as opposed to Cr Berwick's official duties.

Conclusion:

The CMC considers there is nothing on the available evidence to establish any act of official misconduct on the part of either Cr Berwick or his personal assistant.

It is not suggested that any of the information gathered on behalf of Cr Berwick was 'confidential to the local government' within the meaning of section 250 LGA. (Nothing in the draft *Code of Conduct* – which was not then in force in any event – would have constituted a breach on the part of Cr Berwick.)

Moreover, even if one were to assume the actions of Cr Berwick's personal assistant amounted to disobedience of Mr Melchert's direction, the circumstances of her conduct are such that any disciplinary action (even if successful) would be unlikely to result in her dismissal. It therefore follows that the personal assistant's actions are not capable of constituting official misconduct.

In the CMC's view, the allegations raised against Cr Berwick were inextricably interwoven with his conduct as Mayor. In those circumstances, it is difficult to accept that Cr Berwick should have been prevented from accessing Council information in order to reply to those allegations (particularly when such information had seemingly otherwise been made available to his accusers and other councillors).

22 - The radio interview

Allegation:

Cr Berwick made inappropriate use of Council information on *Easy Listening Radio 846AM* on 17 November 2005 to gain, directly or indirectly, a financial advantage for himself or Ms King.

The CMC was provided with a transcript of an interview conducted with Cr Berwick and broadcast on radio on 17 November 2005. The transcript of the radio broadcast records Cr Berwick as asserting:

- Mr McCloy had applied to the Council 'to expand his fish farm into a wetland of national significance'.
- The proposed expansion 'was completely against State policy'.
- Cr Berwick would be 'surprised if it's got any hope of getting up at all'.

- The wetland (on the aquaculture farm) had already been bunded and mangroves were dying.
- There was also an acid sulfate soil issue on the aquaculture farm and this issue was comparable to a similar issue elsewhere at East Trinity (near Cairns).
- The EPA and DNR had been aware of the issues for some time but Cr Berwick was concerned the wetland (on the aquaculture farm) would be lost, and he had sent an urgent memorandum to the Minister for the Environment.
- The wetland (on the aquaculture farm) was part of or adjacent to the South Arm of the Daintree River, and the Daintree River Wetlands contained the world's most diverse mangrove system.

It was submitted to the CMC that:

- Wonga Beach Aquaculture had only lodged its development application (to expand the aquaculture farm) on 3 November 2005.
- The fact such an application had been made was not publicly available information under the Integrated Development Assessment System (IDAS) of the *Integrated Planning Act 1997*.
- Cr Berwick had received notice of the application before other Councillors and before Council officers could process the application.
- Cr Berwick had misrepresented the facts about the expansion application and activities on the aquaculture farm.
- Cr Berwick's remarks were intended to turn public opinion against the aquaculture farm.
- Cr Berwick indirectly gained a financial advantage (in terms of his interest in *Daintree River Barramundi*) by damaging the reputation of the aquaculture farm in the minds of the community and by prejudicing the public against the expansion application.
- Cr Berwick's statements on the radio program had amounted to an improper use of confidential local government information within the meaning of section 250 LGA.

When interviewed about this issue, Cr Berwick acknowledged having made the statements attributed to him in the transcript, and asserted he been provided with a copy of the Wonga Beach Aquaculture development application by the Planning Services Manager of Douglas Shire Council, who had informed Cr Berwick the document was a public document. Cr Berwick considered the statements he had made to have been in the public interest.

The Council's Manager of Planning Services confirmed having provided a copy of the development application to Cr Berwick. He asserted that the application was a public document under the *Integrated Planning Act 1997*, and that Cr Berwick was entitled to see a copy of the application.

Conclusion:

It is common ground Cr Berwick publicly disclosed information about the Wonga Beach Aquaculture application on 17 November 2005.

In essence, the allegation advanced against Cr Berwick is that he misused confidential Council information while being interviewed on 17 November 2005, and revealed details of the application so as to indirectly gain a financial advantage for himself (or Ms King) in the operation of *Daintree River Barramundi*. (The suggestion is that by criticising Wonga Beach Aquaculture, some advantage flowed to *Daintree River Barramundi*.)

Pursuant to section 3.2.8 of the *Integrated Planning Act 1997*, a development application is a public document as soon as it is lodged with an assessment manager (such as Douglas Shire Council, or its Manager of Planning Services). There is an obligation to keep the application available for inspection (and purchase) from the time the assessment manager receives the application until it is withdrawn, lapses or the appeal period expires.

The CMC therefore does not consider that there was anything improper in Cr Berwick being provided with a copy of the application prior to 17 November 2005, nor can it reasonably be said that the information contained in the development application was confidential Council information within the meaning of section 250 LGA.

Cr Berwick said he made the statements attributed to him on the radio because he believed it was in the public interest for him to do so.

There is no doubt Cr Berwick's views were critical of Wonga Beach Aquaculture and the proposed development. However, it is difficult to conclude that, by making known his concerns about the proposed development, Cr Berwick was misusing Council information, or improperly influencing other councillors. He was surely entitled, as the Mayor of Douglas Shire, to express his opinion.

It follows that the CMC does not consider that Cr Berwick made improper use of Council information when he voiced his concerns during the radio interview broadcast 17 November 2005.

The allegations are not substantiated.

23 - Ms King's development application

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing Council, DPIF and EPA officers to treat a development application Ms King had made to the Council more favourably than a development application made by Wonga Beach Aquaculture.

In its investigation of this allegation, the CMC sought and was granted access to Douglas Shire Council's files in respect of two development applications brought by Ms King to expand the aquaculture operation on her property.

The Council's files reveal:

- Douglas Shire Council received Ms King's first development application (number TPC1138) on 7 November 2003.

- Ms King wrote to the Council on 20 November 2003, seeking to withdraw her application until a whole-of-government meeting had been organised.
- The whole-of-government meeting was scheduled for 18 December 2003, but Council wrote to Ms King on 12 December 2003, advising the assessment of her application could not be stopped and requesting she provide further information in order that her application could be assessed.
- The whole-of-government meeting was conducted on 18 December 2003. Council wrote to Ms King on 24 December 2003, advising her application was then considered to be 'officially withdrawn'.
- Council received Ms King's second development application (number TPC1211) on 8 June 2005.
- Council, DPIF, and the EPA imposed extensive requirements in respect of Ms King's development applications.

Cr Berwick told the CMC he had not influenced or attempted to influence the way in which the Council or any other agency dealt with Ms King's development applications. His claim in this regard was supported by the various council officers known to have had an involvement in processing the development applications. Indeed, there was no suggestion from any council officer that Ms King's applications were treated any differently because of her relationship with Cr Berwick.

There is, however, it is not just Mr McCloy who considers that the development application brought by Wonga Beach Aquaculture was subjected to an unusually high degree of scrutiny. For his part, Mr Melchert informed the CMC it is his opinion that the Council, DPIF and EPA officers scrutinised the Wonga Beach Aquaculture development application more rigorously than other development applications – including Ms King's applications. Mr Melchert also asserted that Cr Berwick constantly asked Council officers to scrutinise activities at the Wonga Beach Aquaculture Farm.

The CMC conducted a careful examination of the relevant Douglas Shire Council, DPIF and EPA files in respect of the Wonga Beach Aquaculture development application. The examination demonstrated no basis to suspect that any public officer had acted improperly when dealing with Wonga Beach Aquaculture generally, nor in respect of that entity's development application.

It is difficult to usefully compare the processes applied to the development applications submitted by Wonga Beach Aquaculture on the one hand, and by Ms King on the other. The CMC considers it more likely than not that any differences in the manner in which the respective applications were dealt with has much to do with the differing applications, as well as the fact that there has been a long history of scrutiny of environment issues in respect of the aquaculture farm.

Conclusion:

The CMC considers that the evidence does not support the proposition that Ms King's development applications received favourable treatment, nor the suggestion that Cr Berwick influenced or attempted to influence the way in which those development applications were processed.

Furthermore, despite the opinion expressed by Mr Melchert, the available evidence is simply not of a sufficient standard to establish that any public officer acted improperly in respect of Wonga Beach Aquaculture.

The issue of Cr Berwick's interventions in respect of Wonga Beach Aquaculture are addressed elsewhere.

24 - Environmental Officer

Allegation:

Cr Berwick made inappropriate use of his authority as Mayor of the Douglas Shire Council for the personal benefit of himself or Ms King by influencing a Council Environmental Officer to subject the aquaculture farm to excessive scrutiny.

Mr Melchert told the CMC he was aware the DPIF and EPA representatives had regularly asked Council officers to visit Wonga Beach Aquaculture, ostensibly to monitor environmental activities associated with the operation of the aquaculture farm. He added that he also understood Cr Berwick had on many occasions requested a Council Environmental Officer to attend the aquaculture farm, generally for reasons beyond the Council's jurisdiction.

The CMC interviewed Cr Berwick and the Council Environmental Officer in respect of Mr Melchert's observation.

Cr Berwick acknowledged having asked the Environmental Officer about operations at the aquaculture farm, but said he could not remember having ever asked that officer to visit the aquaculture farm, as suggested by Mr Melchert.

For his part, the Environmental Officer told the CMC he had visited the aquaculture farm on three occasions:

- In July 2002, when a councillor (not Cr Berwick) had asked that he inspect some vegetation.
- On 7 July 2003, when Mr Melchert tasked him with investigating a complaint about vegetation having been cleared (on 5 and 6 July 2003).
- During 2005, when he had been tasked with inspecting the aquaculture farm in respect of a development application lodged by Wonga Beach Aquaculture.

The Environmental Officer informed the CMC he considered it had been reasonable for him to visit the aquaculture farm on each of the three occasions he had done so. Further, he asserted that Cr Berwick had on occasions asked if the officer had been to the aquaculture farm, but had never requested him to attend.

The Environmental Officer also told the CMC that while he had informed Mr Melchert that Cr Berwick had questioned him about issues concerning the aquaculture farm, he had never informed Mr Melchert that Cr Berwick had requested him to attend the aquaculture farm.

Indeed, the Environmental Officer asserted that Cr Berwick had not influenced or attempted to influence him in respect of his work, including matters concerning the aquaculture farm.

Conclusion:

Mr Melchert has no direct knowledge of what transpired between Cr Berwick and the Environmental Officer. He has simply conveyed to the CMC what it was he claims the Environmental Officer had told him. The Environmental Officer did not support Mr Melchert's claims, and otherwise asserted that Cr Berwick at no time attempted to influence his work.

While Cr Berwick acknowledges having asked the Environmental Officer about issues concerning operations at the aquaculture farm, he effectively denied the suggestion he had requested the Environmental Officer to visit the aquaculture farm.

In the CMC's view, the matter must be resolved on the account provided by the Environmental Officer.

Accordingly, the CMC considers that the evidence is not capable of giving rise to a reasonable suspicion of official misconduct on the part of Cr Berwick or any other person.

Complaints against the Chief Executive Officer

Failing to report allegations to the CMC

Allegation:

Mr Melchert knew or ought to have known about Cr Berwick's conflicts of interest and had failed to report Cr Berwick to the CMC for suspected official misconduct as required by sections 38 and 39 of the *Crime and Misconduct Act 2001*.

This allegation is based upon the threshold assumption that Cr Berwick's interests in a barramundi farm on Ms King's property and FNQ NRM Ltd constituted a material personal interest within the meaning of the LGA (or that his conduct otherwise ought to have given rise to a reasonable suspicion he had committed official misconduct).

As already demonstrated, upon investigation, the available evidence does not support such an assumption.

Mr Melchert informed the CMC that while he knew Cr Berwick was the chairperson of FNQ NRM Ltd and had an interest in a barramundi farm on Ms King's property, he was unaware of the nature and extent of Cr Berwick's interest in the barramundi farm.

Mr Melchert asserted that he had asked Cr Berwick on many occasions whether Cr Berwick had any conflicts of interest because of Cr Berwick's involvement in the barramundi farm and FNQ NRM Ltd. Cr Berwick had always replied in the negative.

Conclusion:

The relevant statutory obligations on Mr Melchert are contained in sections 37 and 38 of the *Crime and Misconduct Act 2001*. Those provisions require a public official (such as Mr Melchert) to report suspected official misconduct.

The reporting requirement is mandatory and paramount to any other obligations Mr Melchert might have had as Chief Executive Officer of Douglas Shire Council.

However, in order for the statutory obligation to arise, there must first be something about Cr Berwick's conduct which would cause Mr Melchert to suspect Cr Berwick an act of official misconduct.

In other words, the crucial issue is not whether Cr Berwick's participation in certain Council discussions and decisions actually amounted to a material personal interest, but whether Mr Melchert should have suspected Cr Berwick had failed declare (and act upon) a material personal interest.

According to what Mr Melchert told the CMC (which is not contradicted by any other evidence), he knew very little about Cr Berwick's personal interests at the material times.

In the absence of any cogent information to the contrary, the CMC does not consider this available evidence raises a reasonable suspicion of official misconduct by Mr Melchert.

Complaint by the Mayor against Mr Melchert

On 6 March 2006, Mr Berwick transmitted to the CMC a lengthy email, the content of which gave rise to a suspicion of official misconduct on the part of Mr Melchert as Chief Executive Officer.

In essence, Mr Berwick suspected that Mr Melchert had:

- improperly monitored or accessed Mr Berwick's email account and laptop computer
- improperly accessed confidential council files – including legal opinions
- improperly used confidential files belonging to the Mayor and/or the Council for his own benefit – either to support a Workcover claim, or to prepare for possible litigation
- improperly passed confidential Council information to Mr McCloy
- improperly influenced or interfered with the tender process for the operation of the Daintree River Ferry.

Having interviewed all relevant witnesses, and leaving aside the issues pertaining to the Daintree River Ferry (which are separately addressed), the CMC considers the available evidence is incapable of giving rise to a reasonable suspicion of official misconduct on the part of Mr Melchert.

There is no direct evidence to support the suspicion (held by Mr Berwick's personal assistant) that a particular email transmitted to Mr Berwick's email account may have been improperly accessed by an unknown party. Furthermore, the officer to whom the personal assistant claims to have spoken about the incident has no recollection of it.

On the available evidence it is impossible to substantiate the suspicion that Mr Berwick's email account (or indeed, his laptop computer) may have been improperly accessed. Certainly, there is no evidence to implicate Mr Melchert in any such conduct, if it occurred.

Similarly, it is common ground that at relevant times Mr Melchert was pursuing a Workcover compensation claim and, more recently, was considering the possibility of commencing litigation against certain councillors. Mr Melchert readily acknowledged that he has in his possession a body of council documentation, including memoranda produced by Mr Berwick. However, he was able to outline how this material had lawfully come into his possession as part of the Workcover process.

As to the concern that Mr Melchert may have improperly communicated information to Mr McCloy, the CMC was informed by Mr Melchert that he had only spoken to Mr McCloy on a handful of occasions, and he denied improperly passing information to McCloy. Mr Melchert considers that the material relied upon by Mr McCloy in his contests with the Council would have been publicly-available. (The CMC concurs with this view.) On the available evidence, there is no reasonable basis to suspect that Mr Melchert has improperly communicated with or assisted Mr McCloy.

Conclusion:

It is apparent that suspicions held by Mr Berwick about Mr Melchert are based in large measure upon speculation. However, to a degree, those suspicions have been fuelled by Mr Melchert's behaviour, which included, for example, utilising a personal email account to conduct official business, his practice of taking work away from his council office and working irregular hours, and his reluctance to discuss issues with Mr Berwick.

On the basis of the available evidence, the suspicions raised by Cr Berwick cannot be substantiated. The CMC does not consider the expenditure of further resources in this regard to be warranted.

Complaints by the Mayor and CEO

The Daintree River Ferry and related matters

The Douglas Shire Council has the exclusive right¹⁸ to provide a ferry service across the Daintree River. From time to time the Council has entered into contracts with service providers to operate the ferry service.

From 1 July 2006, the operation of the ferry service was due to be taken over by Norris Earthmoving – a principal of which, one Charmaine Norris, is the step-daughter of Mr Robert Baade, who is employed by the Council as General Manager, Engineering Services.

In the lead up to 1 July 2006, the Council had itself operated the ferry service – from 22 March 2006 – having taken over the operation from the previous contractor, Daintree River Ferry Pty Ltd. (Commencement of the new service was delayed due to construction of a vessel.)

On 22 February 2006, Mr Melchert wrote to the CMC raising a number of allegations about the tender process undertaken by the Council prior to the awarding of the most recent contract to Norris Earthmoving. In essence, Mr Melchert alleged that the tender process had been corrupted because Council officers had engaged in inappropriate communications with the successful tenderer, and thus may have been improperly influenced in their decision-making.

More particularly, Mr Melchert alleged:

- As General Manager of the Council's Engineering Services division, Mr Baade had designed the tender specifications in a way that benefited his step-daughter's tender.
- Expressions of interest had been sought in respect of a contract period of five years, with the option of a further five years to be awarded at the absolute discretion of the Council. The contract was ultimately awarded for a ten year period, on the recommendation of the evaluation panel.
- Prior to the awarding of the ferry contract, Norris Earthmoving had performed excavation work for Mr Berwick – apparently at a discounted rate.¹⁹
- Council officers improperly affected the tender and contract processes by being slow to call tenders and finalise contract documentation.

Furthermore, as mentioned above, on 6 March 2006, Cr Berwick informed the CMC, in part, that he suspected Mr Melchert had improperly influenced or interfered with the tender process for the operation of the Daintree River Ferry.

Cr Berwick later complained to the Queensland Ombudsman about the conduct of other councillors, whom he claimed had collaborated with and lobbied in support of Daintree River Ferry Pty Ltd during the course of the tender process.

¹⁸ Pursuant to section 930 Local Government Act

¹⁹ This allegation was addressed above (as allegation 18 and 19). It does not reasonably give rise to a suspicion of official misconduct.

The allegations considered by the CMC and the Queensland Ombudsman overlapped – albeit that the jurisdiction of the agencies differ. Accordingly, the CMC and Queensland Ombudsman determined to conduct their investigations co-operatively, by sharing resources and pursuing a joint investigative strategy.

In the ensuing investigations, the CMC's focus was limited to matters capable, if proven, of constituting official misconduct.

On the other hand, the Queensland Ombudsman – whose jurisdiction extends to the investigation of possible improper administrative issues – has been concerned to investigate the matter in a way as to identify wider issues of potential maladministration. It is anticipated that, in due course, the Ombudsman will publish a more-expansive report on the issues of the Daintree River Ferry. (A draft of that report has been made available to the CMC, and is consistent with the CMC's conclusions.)

Conclusions:

In terms of the CMC's jurisdiction, the issues concerning the awarding of the ferry contract fall into two distinct areas – namely, those affecting council officers on the one hand, and elected councillors on the other.

The suggestion that Mr Baade designed the tender specifications in a way that benefited his step-daughter's tender was first raised (as a bare allegation) during the course of a meeting of the Douglas Shire Council. On investigation, it is apparent that the allegation is based upon speculation and has little substance in fact. Significantly, the unsuccessful tenderer makes no complaint about Mr Baade.

Inquiries established that although Mr Baade had an involvement in the early stages of the tender process, he withdrew from the process shortly before the tender period closed, upon discovering a tender had been submitted by his step-daughter. (There is no evidence Mr Baade was aware of his step-daughter's intention to submit a tender.)

Furthermore, the tender documents were not designed by Mr Baade, but by a legal practitioner. A review of the relevant documents (including the contract, contract conditions, and correspondence to and from McCullough Robertson, Lawyers) demonstrates that Mr Baade had little input into the process of their creation.

Speculation that Mr Baade may have assisted his step-daughter in the preparation of her tender documents is not supported by any evidence, and requires no further consideration.

The concern expressed as to changes to the terms of the final contract has been examined by the Queensland Ombudsman, and that matter will be addressed in the Ombudsman's report.

From the CMC's point of view, the evidence does not give rise to any suspicion of official misconduct.

The issue of the delay in attending to the signing of the ferry contract has also been examined in detail by the Queensland Ombudsman, and will be reported upon in his report.

It is common ground that the tender process for the awarding of the ferry contract was commenced later than was preferable. (The previous five-year contract expired on 21 March 2006, and the current contract was executed with Norris Earthmoving on or about 21 February 2006.) However, the CMC's investigation failed to identify any evidence of undue delay on the part of any individual, and some extraneous factors (including a 'scoping' report) prevented the Council from proceeding before July 2005 –

at which time Mr Baade was directed by Mr Melchert to take responsibility for the tender documents.

Finally, Mr Berwick expressed concern that the previous operator of the Daintree River Ferry had declined to extend the service (beyond 21 March 2006) as a consequence of contact with Mr Melchert and certain councillors. (The effect of the operator's decision not to extend the service was that the Douglas Shire Council was forced to purchase and operate the ferry until Norris Earthmoving was able to take up the service.)

The CMC has interviewed the relevant parties. While there is clear evidence that issues concerning the operation of ferry service were discussed with the previous operator, there is no evidence to support Mr Berwick's speculation that there was likely to have been conduct on the part of any councillor or council officer capable of constituting official misconduct.

The various allegations involving the tender process for operation of the Daintree River Ferry do not, on the available evidence, give rise to a reasonable suspicion of official misconduct on the part of any person.

Summary and acknowledgements

As stated at the outset, the CMC's ability to investigate matters is limited by its jurisdiction.

Put another way, the CMC's investigation was concerned with matters of official misconduct. It found insufficient evidence to establish any.

It is not for CMC to question the decision-making of local government simply on the basis of apparent inefficiency or poor judgment. Differences of opinion as to the rights and wrongs of decisions made by councils are matters for other agencies – such as, for example, the Queensland Ombudsman – and ultimately, of course, for the voting public.

It should be noted that aspects of the evidence in this matter are suggestive of underlying problems within the administration of the Douglas Shire Council. It is apparent, for instance, that the working relationship between Cr Berwick and Mr Melchert is strained. A CMC investigation will rarely afford a panacea to problems of this nature.

Finally, without exception, all persons approached by the CMC in this matter co-operated with investigators and demonstrated the utmost courtesy. As indicated, some witnesses had to be interviewed on more than one occasion, and often at short notice. The CMC is grateful for that assistance.

