

# **SUBMISSIONS TO THE FLOOD INQUIRY ON BEHALF OF JOHN TIBALDI**

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## 1. INTRODUCTION

- 1.1. The submissions of Counsel Assisting the Commission make serious allegations against Mr Tibaldi, and the other flood engineers. They make submissions that there is sufficient evidence to warrant another agency to carry out an investigation about possible offences. Notably, Counsel Assisting does not submit that any matter should be referred to the DPP for prosecution.
- 1.2. The recommendation for further review appears to be based on the premise that there is material which suggests:
- Mr Tibaldi knew whilst drafting the flood report that there had not been a transition from W1 to W3 at 8.00am 8 January 2011;
  - Mr Tibaldi knew:
    - that no flood engineer knew of the transition out of W1; and
    - that Mr Ruffini, Mr Ayre, Mr Tibaldi himself and Mr Malone all mistakenly believed that they remained in W1, from 8.00am 8 January 2011 through to at least 3.30pm 9 January 2011;
  - in consequence of the above matters, that Mr Tibaldi deliberately sought to mislead in his drafting of the flood report by identifying that there had been a transition from W1 to W3 at 8.00am 8 January 2011 and that W2 had been bypassed. This last proposition being that he deliberately drafted the report to give an impression that there had been a conscious decision as at 8.00am on 8 January 2011 to enter W3.
- 1.3. It is submitted on behalf of Mr Tibaldi that the objective evidence does not support the serious allegations made against him, and does not support that he acted dishonestly and with an intent to mislead in his preparation of the flood report.
- 1.4. It is submitted that based upon the evidence before the Commission, it ought to be found:
- (a) that in fact there was a transition from W1 to W3 at 8.00am 8 January 2011 and that W2 was bypassed;

- (b) further and in any event, that whilst Mr Tibaldi was writing the Flood Report he honestly held the opinion that there had been such a transition and honestly held the opinion that W2 had been bypassed;
- (c) Mr Tibaldi did not believe whilst writing the Flood Report that the flood engineers mistakenly thought they remained in W1 from 8.00am 8 January 2011 to 3.30pm 9 January 2011 (or indeed into the morning of 10 January 2011);
- (d) that Mr Tibaldi did not intend to mislead anyone by his drafting of the Flood Report on these issues;
- (e) the Flood Report was not in fact misleading on the issue of the transfer from W1 to W3 at 8:00am on 8 January 2011 and the bypass of W2.

## 2. PROCEDURAL FAIRNESS

- 2.1. Given the serious nature of the allegations made in submissions by Counsel Assisting, it is appropriate to make some observations about how the making of findings ought to be approached.
- 2.2. The starting point is to recognise that section 17 of the *Commissions of Inquiry Act 1950* provides as follows:

***“17 Commission not to be bound by rules as to procedure or evidence***

*A commission, in the exercise of any of its functions or powers, shall not be bound by the rules or practice of any Court or Tribunal as to procedure or evidence, but may conduct its proceedings and inform itself on any matter in such manner as it thinks proper; and, without limiting in any way the operation of this section, the commission may refer any technical matter to an expert and may accept the expert’s report as evidence.”*

- 2.3. It is accepted that this section provides a wide discretion to the Commission as to how it conducts itself, both procedurally and in relation to evidence. However, where there are serious allegations, effectively asserting dishonesty, it is submitted that it is appropriate for the Commission to approach its findings having regard to the “Briginshaw Test”, as applied in civil cases where there are

allegations of dishonesty. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 Justice Dixon discussed the civil standard of proof in cases involving allegations of dishonesty, inter alia, as follows:

*“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus Mellish LJ says: ‘No doubt the Court is bound to see that a case of fraud is clearly proved, but on the question of what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct’...In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, Best J said: ‘I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall.’ ... It is often said that such an issue as fraud must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’ ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues .... But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.”*

- 2.4. The principles espoused in *Briginshaw* are applicable by analogy to the process of making findings in this Commission.
- 2.5. That is not because section 17 of the Act requires this approach, but rather it reflects the caution which should occasion the making of such serious findings, particularly when the rules of evidence do not apply.

- 2.6. The appropriateness of the application of the “Briginshaw Test” to a Commission considering serious allegations such as dishonesty has been recognised both in other Commissions. In this respect reference is made to examples such as:
- (a) the 1956 *Royal Commission into Certain Crown Leaseholds* which adopted a criminal standard of proof when examining allegations of corruption against a minister in the Queensland Government;<sup>1</sup>
  - (b) the Final Report of the 2003 *HIH Royal Commission (Owen Report)* which adopted the *Briginshaw* formula.<sup>2</sup>
- 2.7. The ramification of adverse findings in this Commission is that the professional and personal reputation of Mr Tibaldi will be irreparably harmed. That is equally applicable to the other flood engineers. Such findings, it is submitted, ought not be made unless those findings have been proved “*clearly, unequivocally, strictly or with certainty*”.<sup>3</sup>
- 2.8. It is submitted that the findings sought by Counsel Assisting do not meet the requirements of the Briginshaw Test and that no reference to the Crime and Misconduct Commission is appropriate in the circumstances.
- 2.9. Serious allegations were put to Mr Tibaldi and the other flood engineers in open session. There were allegations consistent with dishonesty and a deliberate intent to mislead. Those allegations have received significant exposure in the media. Their reputations, both professionally and personally, have been significantly damaged by the airing of those allegations. If ultimately the Commission finds that those serious allegations are not established on the evidence, then those findings ought to be published. That will provide at least some rehabilitation of Mr Tibaldi’s and the other flood engineers’ reputations within the community.
- 2.10. To the extent that the Commission makes adverse findings in relation to the serious allegations which were advanced against the flood engineers, then it is

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<sup>1</sup> JRS Forbes (2010) *Justice in Tribunals*, Federation Press, pp 351.

<sup>2</sup> Final Report, para 1.2.6.

<sup>3</sup> *Briginshaw* (supra).

submitted that those particular findings should appear in a confidential section of the report. That confidential section ought not be published generally. That course recognises that this Commission has not held a trial, has not applied the rules of evidence and has not created binding findings of fact. The publication of those adverse findings would have a tendency to prejudice any fair trial if subsequent criminal proceedings were brought and would further damage the reputation of the relevant flood engineers. In the *HIH Royal Commission* the terms of reference had referred to conduct that “*might*” constitute a breach of the law. Justice Owen in the Owen Report identified that he was not going to make any findings that a breach of the criminal law had occurred.<sup>4</sup> He explained his reasons, inter alia, as follows:

*“There are several reasons for following that course. First, a finding in those terms would not be binding on or enforceable against anybody. It could become binding and enforceable only as a consequence of subsequent proceedings before or actions by other bodies. For example a finding that the law has been breached is of no effect until it has been made by a court of competent jurisdiction.*

*Second, specific findings of that type could give rise to the serious risk of inconsistency with subsequent findings by courts or other bodies whose task it is to make binding and enforceable determinations in these areas. The rules of evidence would apply in any subsequent proceedings; they do not apply in this inquiry. The practices and procedures in the court before which proceedings might subsequently come will be quite different from those adopted in the inquiry and include additional evidentiary and other safeguards. For these reasons alone, the inquiry’s findings of fact may not necessarily be the same as those that a court would make. This explains why, when expressing conclusions that there might have been a breach of the law, I use the phrases such as “If as I have found...” or after referring to intermediate findings, “on this basis...”.*

*Third, an expression by me of a concluded view could prejudice any subsequent proceedings. This is especially so because the evidence adduced in the later proceedings may differ from that presented in the enquiry...*

*There is a further reason for declining to make finding of criminal (or, for that matter, civil) liability. A court makes legally binding determinations and because of that it will not make a finding unless it is satisfied to a specific standard. My determinations are not legally binding and there is*

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<sup>4</sup> Final Report, para 1.2.6.

*no specific standard to which I must be persuaded before making a finding that there might have been a breach of the law.”<sup>5</sup>*

- 2.11. The publication of a separate private report was an approach taken in the Cole Report of the *Royal Commission into the Building and Construction Industry 2003*. At paragraph 59 on page 59, the Commissioner stated:

*“I have not made findings to the effect that named individuals, organisations or companies have committed criminal offences. Instead, my views in relation to matters that might have constituted breaches of the criminal law have been set out in a separate volume, which I have recommended should not be made public. In that volume, I have set out the matters that I recommend be referred to appropriate law enforcement agencies for consideration and, if appropriate, further investigation with a view to determining whether criminal charges should be laid.”*

### **3. THE OPERATIONAL MANUAL AND CHOICE OF STRATEGY**

- 3.1. The submission of Counsel Assisting is that the only reasonable interpretation of the Operations Manual is that it requires a conscious act, that is, to “choose” or “adopt” a strategy, W1, W2, W3 or W4, during a flood event.<sup>6</sup> This proposition is expanded on at paragraph 14 and following of the submissions of Counsel Assisting. For the reasons set out below, that interpretation is rejected.
- 3.2. In addressing the allegations made against Mr Tibaldi it is important to understand what his belief is in relation to the operation of the Manual and when particular operating strategies occur.
- 3.3. Mr Tibaldi was asked on a number of occasions by Counsel Assisting about what paragraph 8.4 of the Operations Manual requires.<sup>7</sup>
- 3.4. Mr Tibaldi’s understanding in relation to a transition from W1 is that it was not a transition made by the subjective intent of a flood engineer, but is one which is

<sup>5</sup> Volume 1 at paragraph 1.2.6.

<sup>6</sup> Submissions of Counsel Assisting, para 1.

<sup>7</sup> The first occasion started at T5069, lines 34 and following to T5073. The second at T5071, line 8 and following to T5073.

dictated by the Manual. That is, where the Wivenhoe Dam level exceeds 68.5m, there is a transition out of W1. At that point it is black and white, and does not involve or require a conscious choice.<sup>8</sup>

- 3.5. Equally, when transitioning out of W1 then by default strategies W2 or W3 must be used. Which of those two strategies is used is dependent on the predicted natural peak flows at Lowood and Moggill and the releases which are currently being made at the time of transition. In circumstances where the release rate from the dam significantly exceed the predicted natural peak flows at those two locations, the Manual effectively dictates that only W3 is open. The conditions for W2 simply cannot be satisfied.<sup>9</sup>
- 3.6. It is submitted that Mr Tibaldi's understanding of the Manual, dictating that the transition has to have taken place once the level reaches 68.5m, is plainly correct. The Operations Manual at page 26 records in bold at the bottom of the page:

***“If the level reaches EL68.5m AHD in Wivenhoe Dam, switch to Strategy W2 or W3 as appropriate.”***

- 3.7. Equally, it is submitted that Mr Tibaldi's understanding of the Manual that when the level of the releases from Wivenhoe Dam are significantly exceeding the then predicted peak flow at Lowood and Moggill, W2 is not an available strategy, is also plainly correct.
- 3.8. Mr Tibaldi was cross examined about the use of particular terminology in the Flood Report such as “*adopt*” and “*for use*”. As Mr Tibaldi made clear, the use of the words “*adopt*” or “*use*” or “*transition*” or “*applied*” to him were just interchangeable words.
- 3.9. He did not consciously use those words to communicate that there had been some active decision by either Mr Ruffini or Mr Ayre to move out of W1 at 8 January

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<sup>8</sup> T5070, lines 7-11, lines 17-24, lines 35-50, T5097, lines 24-38.

<sup>9</sup> T5154, lines 21-38.



2011.<sup>10</sup> What he readily accepted was that when the Manual dictated the transition out of W1, the primary consideration applicable to strategy W3 applied, but consideration still needed to be given to the lower level objectives. He believed the flood engineers had done this during the flood event.<sup>11</sup>

#### **4. TRANSITION FROM W1 TO W3 AT 8.00AM 8.01.2011**

- 4.1. The allegations which are raised against Mr Tibaldi, and each of the other flood engineers, are premised on the assumption that there was not in fact a transition from W1 to W3 on 8 January 2011 and that the transition was not consciously recognised by Mr Ruffini and Mr Ayre at that time. It is important then to examine what the contemporaneous documents from that period identify. It is submitted that those documents in fact identify that there was an appreciation by Mr Ruffini that there was an imminent transition out of W1 and that in the case of Mr Ayre, that there was an appreciation that there had been a transition out of W1 at 8:00am 8 January 2011.
- 4.2. Once it is accepted that they appreciated that a transition had occurred, then the necessary conclusion is that they were considering the primary objective to avoid urban inundation whilst taking into account the lower level objectives. That set of objectives is effectively identical in W2 and W3.
- 4.3. It is accepted that no-one made a recording during the relevant flood event such as "*I am in W3*". The Manual did not require such a recording to be made. This Commission has already recognised that there is a benefit in such a requirement being imposed for future events.
- 4.4. Whilst neither man in giving their evidence in the Commission could now specifically recall saying to themselves "*I am going to W3*" or "*I am in W3*", the contemporaneous documents and their actions on 8 January 2011 provide compelling evidence that they appreciated the transition out of W1 and acted only

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<sup>10</sup> T5078, line 8 to T5079, line 4.

<sup>11</sup> T5080, lines 7-15.

in accordance with W3. There were simply no conditions which could have engaged W2 at 8.00am 8 January 2011. We know that both Mr Ruffini and Mr Ayre actively increased the releases beyond the estimated natural peak flows at Lowood and Moggill and where W2 and W3 were the only two options open, that action was only consistent with W3.

- 4.5. To draw these conclusions, it is necessary to examine in some detail the documents that each had and used during their shifts.
- 4.6. Mr Ruffini's evidence was that by reference to contemporaneous documents he made or used on 8 January 2011, he believed that he was conscious of the fact that they were moving out of W1 and that he was aware that the 68.5m level was approaching.<sup>12</sup>
- 4.7. Mr Ruffini identified that when he came on shift there were spreadsheets that he took from Mr Malone.<sup>13</sup> During that shift Mr Ruffini continued to review those spreadsheets and as part of that process, he continued to ramp up releases.<sup>14</sup>
- 4.8. Counsel Assisting did not take Mr Ruffini to those spreadsheets.<sup>15</sup> Nor did Counsel Assisting put to Mr Ruffini or any other witness the statements he makes in paragraphs 53 or 54 of his submissions.
- 4.9. Having chosen not to take Mr Ruffini to the spreadsheets it is apparent that Counsel Assisting has misunderstood the contemporaneous documents. He refers to a model run 8 which was performed at 3.00pm on 7 January 2011. That is not what Mr Malone gave Mr Ruffini. Mr Ruffini was given spreadsheets which were created at 6.00pm on 7 January 2011 by Mr Malone. It is these spreadsheets which Mr Ruffini used. Counsel Assisting appears to have wrongly concluded that "SDWD-201101071800" was saved at 6.00pm. That is incorrect. The meta data for "SDWD-201101071800" shows that it was saved at 8.15am on 8 January

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<sup>12</sup> T6081, to T6086.

<sup>13</sup> T5385, lines 25-36.

<sup>14</sup> T5387, lines 1-13.

<sup>15</sup> T5386, lines 27-31.

2011. The inference is open that it was Mr Ayre who saved it at that time. It coincided with Mr Ayre issuing the 8.15am, 8 January 2011 gate directive.

- 4.10. "SDWD-21101071800" contains a snapshot of the live version of the Operations Spreadsheet as at 8:15am on 8 January 2011.<sup>16</sup>
- 4.11. Importantly, in that part of the spreadsheet where the Wivenhoe "**Rec Gauge Boards**" column can be seen it is apparent that it has been updated by Mr Ruffini during his shift. The last update into "**Rec Gauge Boards**" column was at 7.00am 8 January 2011 at the end of Mr Ruffini's shift. What it shows is twofold:
- Firstly, the spreadsheet is predicting that Wivenhoe will exceed 68.5m at midday 8 January 2011.
  - Secondly, that the releases adopted by Mr Ruffini drains from a peak level at 2.00pm, 8 January 2011 to a full supply level of 67m by 2.00pm, 11 January 2011. That is an aggressive drain down regime.
- 4.12. This spreadsheet which Mr Ruffini was actually using up until the end of his shift illustrates that he appreciated that the dam level was going to exceed 68.5m and that he adopted an aggressive drain down strategy.
- 4.13. This spreadsheet, which is the one he was actually using on 7 and 8 January 2011, is entirely consistent with his evidence at Transcript page 5400.
- 4.14. Further, in Exhibit 524, in the "Appendix A1" folder, the results of certain model runs are summarised. It can be seen that Mr Ruffini ran a model run 9 at the end of his shift, at 7.00am on 8 January 2011. It showed, inter alia, the predicted dam level at 68.8m, the predicted natural peak flows at Lowood as 530 cumecs and at Moggill as 660 cumecs.
- 4.15. Inevitably, Mr Ruffini and Mr Ayre would have looked at the model run 9 which was done at the 7.00am change of shift.

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<sup>16</sup> Operational Versions folder, Ex 524.

- 4.16. Mr Ruffini gave evidence that W2 simply was not “in play” on the morning of 8 January 2011.<sup>17</sup> The objective data is unambiguous on this matter. The predicted natural peaks at Lowood and Moggill were significantly below what Wivenhoe was already releasing. That was obvious from the spreadsheets and the 7.00am model run. The release at the end of Mr Ruffini’s shift was approximately 840 cumecs and was recommended by Mr Ruffini to go to 1200 cumecs. Mr Ruffini’s Situation Report<sup>18</sup> of 6:32am 8 January 2011 stated the following:

*“At 06:00 Saturday, Wivenhoe Dam was 68.45m AHD and rising steadily with all five gates open and releasing about 890 m<sup>3</sup>/s. River levels upstream of Wivenhoe Dam were rising again, generating further inflow to the dam It is intended to ramp up the releases from the Wivenhoe to 1,200 m<sup>3</sup>/s by midday Saturday 08/01/2011. Further assessments will be undertaken to determine increases above this level. However, given the high likelihood of significant inflows in the next week, this may be increased”.*

- 4.17. This extract by itself (but even more so when read with Mr Ruffini’s spreadsheets and model run) illustrates that there was a conscious knowledge of the dam height of Wivenhoe, a conscious knowledge that the dam height was rising steadily and a conscious recording of the fact that the release strategy then being adopted was to increase flows.
- 4.18. The objective evidence supports that Mr Ruffini:-
- was aware of the lake height of Wivenhoe Dam throughout his shift;
  - was aware from, at the very least, the spreadsheets he was actually using in his shift, that the dam level was increasing, was to a level just under 68.5m at 6.00am and 7.00am, and the dam level was continuing to rise steadily;
  - was also aware from the spreadsheets which he was actually using that the dam level was predicted to exceed 68.5m sometime about midday on 8 January 2011, and was also aware from the model run 9 at 7.00am that the dam level was predicted to exceed 68.5m that day;

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<sup>17</sup> T5401, lines 8-51.

<sup>18</sup> See Ex 24, Appendix E, page 13-14.

- consciously decided to recommend the increase of releases as evidenced by his Situation Report;
- was aware that the conditions that existed during his shift simply did not bring a W2 scenario into play.

- 4.19. Mr Ruffini identified that he wasn't able to now remember whether, for example he had a conversation at the shift changeover such as "*this is 1 and this is 3*".<sup>19</sup> In the absence of an express recollection, the best he can do is look back at the contemporaneous documents which he had used or created at the time of his shift and refresh his memory. Indeed, that is what he did when he was asked by Mr Tibaldi to check the accuracy of the draft Flood Report.<sup>20</sup>
- 4.20. His honest view, having refreshed his memory from the documents, is that he was aware of a transition being made to W3.<sup>21</sup>
- 4.21. It is clear that Mr Ruffini also held this honest belief when he was asked to review the draft Report by Mr Tibaldi.<sup>22</sup>
- 4.22. It is then relevant to turn to Mr Ayre's state of mind.
- 4.23. Mr Ayre gave evidence that a flood engineer does not choose to go out of W1 after the dam level rises above 68.5m, he or she is forced out of W1 because of the dam level.<sup>23</sup> That accords with Mr Tibaldi's understanding.
- 4.24. Mr Ayre gave evidence that at the 7.00am handover on 8 January 2011, he would likely have discussed the 6.23am 8 January 2011 Situation Report drafted by Mr Ruffini.<sup>24</sup> It is likely that they would have discussed and looked at model run 9, which was run at the actual changeover time of 7.00am, 8 January 2011. That model predicted that the dam level would exceed 68.5m.

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<sup>19</sup> T5387, lines 17-20. See similar evidence at T6085, line 8-10 about W2.

<sup>20</sup> T5414, line 55 to T5415, line 4.

<sup>21</sup> T5387, lines 15-26.

<sup>22</sup> T5414, line 5 to T5415, line 4.

<sup>23</sup> T5209, lines 53– 56 and T5212, lines 49–50 as examples.

<sup>24</sup> T5263, lines 10-15.

- 4.25. The Situation Report of 6.23am identifies that the Wivenhoe dam level was 68.45m at 6.00am and was rising steadily.
- 4.26. Mr Ayre was a very experienced flood engineer. At that time he had a good working understanding of the Manual.<sup>25</sup> Mr Ayre (as all the flood engineers did) used the operational spreadsheet which contained the live data including dam levels. He would have been inputting the manual readings for the Wivenhoe dam levels in the “**Rec Gauge Board**” column of the operational spreadsheet. The operational spreadsheet shows that such manual entries for Wivenhoe dam levels were entered into the “Rec Gauge Board” column hourly during Mr Ayre’s shift from approximately 8.00am 8 January 2011 to 6.00pm 8 January 2011. Every single entry recorded a dam level above 68.5m. The first entry was at 8.00am on 8 January 2011 and recorded a dam level of 68.52m.
- 4.27. As set out above, the “SDWD-201101071800” spreadsheet that Mr Ruffini had used throughout the evening of 7 January 2011 and into the morning of 8 January 2011 was saved at 8.15am, 8 January 2011. This raises a reasonable inference that Mr Ruffini and Mr Ayre would have discussed it. The time of its saving coincided with the gate directive which indicates Mr Ayre is likely to have looked at it.
- 4.28. The 8.15am gate directives increased the releases from Wivenhoe Dam which ultimately led to the discharge rate rising to about 1250 cumecs.
- 4.29. Further, in the “operational versions” folder of Exhibit 524 it can be seen that Mr Ayre created a new live spreadsheet at 9.00am, 8 January 2011. This is “SDWD-201101080900”. The meta data shows that it was saved at 4.08pm on 8 January 2011, presumably by Mr Ayre. As with Mr Ruffini’s version of the spreadsheet, it is evident that Mr Ayre was inputting dam levels of Wivenhoe into this spreadsheet up until 3.00pm, 8 January 2011. Importantly it predicted that by 11.00am, 9 January 2011 the Wivenhoe dam level would drop below 68.5m.

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<sup>25</sup> T5256, line 40-41.

- 4.30. Again, Appendix 1A to Exhibit 524 on its second page identifies that Mr Ayre undertook model run 10 at 2.00pm, 8 January 2011 and model run 11 at 6.00pm, 8 January 2011. Each of those model runs shows the actual Wivenhoe level was above 68.5m and shows the predicted naturally occurring peaks at Lowood at 530 cumecs and at Moggill at 770 cumecs.
- 4.31. At 2.22pm on 8 January 2011 (after running model 10) Mr Ayre produced a Situation Report. Under the heading “**Wivenhoe (Full Supply Level 67.00m AHD)**” he identified that at midday the Wivenhoe Dam was at 68.6m AHD and rising steadily with releases of 1150 cumecs with an intention to increase that to 1250 cumecs.
- 4.32. Mr Ayre also drafted the 5.53pm 8 January 2011 Situation Report. That can be seen at exhibit 1047 and relevantly under the heading “**Wivenhoe (Full Supply Level 67.00m AHD)**” he recorded that at 6.00pm the Wivenhoe Dam level was then 68.65m AHD and rising slowly with the releases being 1250 cumecs.
- 4.33. This objective evidence supports that Mr Ayre:
- was aware of the height of Wivenhoe Dam throughout his shift;
  - was likely aware of the results of model run 9;
  - was aware at 8.00am from the receipt of the manual level recording and his entry of that data in the operational spreadsheet he was actually using, that the dam level had exceeded 68.5m;
  - was aware from the further manual recordings and the content of his operational spreadsheet that the Wivenhoe dam level was rising gradually throughout the day and always remained above 68.5m;
  - was aware that Mr Ruffini had recommended further increased releases;
  - consciously decided to continue increases in releases as evidenced by his direction of 8.15am on 8 January 2011 and his two Situation Reports written in his shift, at a time when he knew that the Dam level was above 68.5m.

- 4.34. As with Mr Ruffini, Mr Ayre did not purport to say that at the time of giving evidence in this latest sitting that he now had a positive recollection of thinking “*I am in W3*”. What he can say is that he was aware at handover they were still in W1 and the dam level was approaching the transition to W2 or W3.<sup>26</sup> Mr Ayre gave evidence that he knew at the start of the shift they were in W1 and as soon as the lake level exceeded 68.5, he knew that they had transitioned out of W1.<sup>27</sup>
- 4.35. As observed by Mr Ruffini, there was no suggestion of a W2 scenario being in play. Mr Ayre clearly was using operational spreadsheets and models which showed that the releases from Wivenhoe greatly exceeded the predicted natural peaks at Lowood and Moggill.
- 4.36. The compelling evidence is that Mr Ruffini and Mr Ayre fully appreciated the Wivenhoe dam level at the times they were on shift. They were both experienced flood engineers managing a flood event. It is untenable to suggest that Mr Ruffini or Mr Ayre did not appreciate the significance of the 68.5m level as the level where there is a mandatory transition out of W1.
- 4.37. Merely because Mr Ruffini and Mr Ayre cannot now say whether they actually said to themselves “*this is W3*”, does not support a finding that the two men failed to appreciate that they had left Strategy W1. If they appreciated that, then they knew the primary objective had changed. In respect of W2, the Commission should find that it simply was not a scenario in play. On the data they were using that was incontrovertible. It is not a breach of the manual to fail to expressly state to one’s self “*I am in W3*”, if that is where you are consciously operating.
- 4.38. Mr Shannon put it this way: -

*“Ms Wilson: can I ask you this: when a flood engineer is operating the dam, does the flood engineer have to appreciate what strategy he is in? At any given time? –*

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<sup>26</sup> T5183, lines 18-21.

<sup>27</sup> T5213, lines 51-56.



Mr Shannon: *The general answer to your question is 'yes', but, as I have thought about the use of the terms 'strategies', it's a bit like my street address at home. I don't read my street address every time I drive home but I know I'm in the street that I live in when I get there. Now, these flood engineers are on call seven days a week, 365 days a year. They are very familiar with it. But I wouldn't regard that they need to address the exact strategy at every hour of the day during the flood emergency.*"<sup>28</sup>...

Commissioner: *So would you expect they'd be pretty clear about it at the time and shortly afterwards; -*

Mr Shannon: *They would need all the circumstances, a bit like understanding the geography of your home address. You know where you are, not just because there is a street name at the end of the street because you know all the circumstances that surround it. You don't absolutely need the tag to do the job you have been tasked with.*

Commissioner: *But what you're saying suggests to me you're advancing an argument that you would be so familiar with it, with where you were that there wouldn't really be room for doubt then or later.*

Mr Shannon: *I wouldn't think so, no, but, having said that, they have an obligation to make sure that they do follow the manual as it's set out.*"<sup>29</sup>

4.39. Professor Apelt put it slightly differently in the following exchange:

Ms Wilson: *That the report is not based on the flood engineers' recollection of their choices as to strategy, but is based on a reconstruction of the events having regard to when the lake reached certain levels?*

Professor Apelt: *When you say "the events", their actions?*

Ms Wilson: *Well, looking at the flood event, you know when it goes through?*

Professor Apelt: *Yes, that whole process.*

Ms Wilson: *8.00am on the 8<sup>th</sup>?*

Professor Apelt: *Yes*

Ms Wilson: *W3?*

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<sup>28</sup> T5820, lines 45-55.

<sup>29</sup> T5821, lines 1-17.

*Professor Apelt: Well, that's really the way I was reading it in the sense that what they were doing for the conditions that existed at the time, rather than what label they might be using for the strategy.*

*Commissioner: So you don't think it is necessary to consciously decide what strategy you were in, or what is it that you are saying?*

*Professor Apelt: I don't think it is necessary for you to advert explicitly to the fact that "This is W3". It is essential that you are conscious of the fact that the dam has passed a certain threshold. For that condition we must do certain things. So it is essential that they have a clear understanding of what is required for them to do. Whether they think, "This is W3", or whatever, is not for me the essence."<sup>30</sup>*

- 4.40. The evidence set out above supports a finding that Mr Ruffini was aware that there was an imminent transition from W1 at the end of his shift, and that his conduct was only consistent with consciously directing and recommending increased releases in anticipation of an imminent transition to a W3 strategy rather than a W2 strategy.
- 4.41. In the case of Mr Ayre, the evidence set out above supports a finding that he was aware by 8.00am 8 January 2011 that a transition from W1 had occurred and that his conduct throughout his shift was only consistent with consciously operating in a W3 strategy rather than a W2 strategy.
- 4.42. Turning then to Mr Tibaldi's shift which was from 7.00pm, 8 January 2011 to 7.00am, 9 January 2011. The starting point is that Mr Tibaldi simply has no recollection of this shift. Accordingly, he is not now able to say what was in his mind during that shift in relation to strategies.
- 4.43. However, it is incorrect to say that he did not give evidence of what his practice was. He gave evidence that when he would come on to a shift he would go to the data. For example, he would examine the rainfall data over various periods, eg., 1 hour, 3 hours, 6 hours, 12 hours, 24 hours, looking back to see what was going on. He would see what the river flows were doing, whether they were up or

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<sup>30</sup> T5732, line 31 to T5733, line 2. Note also the evidence at T5750, lines 1-58.

down. He would look at what the dam levels were doing. He would have read the Situation Report at sometime during his shift.<sup>31</sup>

- 4.44. Knowing Mr Tibaldi's practice, leads to the reasonable conclusion that he would have been aware of the contents of the Situation Report, the operational spreadsheets and model 11. He would have examined and accordingly would have been aware, that the dam level was in excess of 68.5m at the start of his shift and that the release rates from Wivenhoe well exceeded the predicted natural peak flows at Lowood and Moggill.
- 4.45. Again, Appendix A1 in Exhibit 524 shows that Mr Tibaldi ran two models during his shift. The first was at 1.00am, 9 January 2011, being run 12. The second was run 13 at 6.00am, 9 January 2011, just prior to his shift ending. Both of those model runs show the actual dam level was in excess of 68.5m for Wivenhoe and the predicted natural peak for Lowood was 530 cumecs and for Moggill was 770 cumecs.
- 4.46. Mr Tibaldi's Situation Report of 6.15am on 9 January 2011 recorded that the dam level was then 68.58m and falling slowly.<sup>32</sup>
- 4.47. Even though Mr Tibaldi has no recollection of the shift, the reasonable finding which is supported by that material is that Mr Tibaldi knew that at no stage during his shift was he in strategy W1, and the conditions for a W2 scenario, to use Mr Ruffini's language, were simply "*not in play*". The evidence set out above supports a finding that Mr Tibaldi's conduct at all times during his shift was only consistent with consciously operating in a W3 strategy rather than a W2 strategy.
- 4.48. Counsel Assisting seeks to challenge the ability to make such findings by reference to a number of documents and events. None of those documents or events indicate that the findings set out above should not be made. Nonetheless, each will be dealt with below.

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<sup>31</sup> T5051, lines 25-41; T5104, line 56 to T5105, line 34.

<sup>32</sup> Flood Report, Appendix E, pages 17 & 18.

## 5. SITUATION REPORT OF 5.53PM, 8 JANUARY 2011

- 5.1. One of the documents Counsel Assisting relies upon in support of a finding that Mr Ayre believed he was in W1 on 8 January 2011 is the Situation Report of 5.53pm, 8 January 2011.<sup>33</sup>
- 5.2. Counsel Assisting focused on the phrase “*will require the application of Strategy W2*” which appears in the 8 January 2011 5:53pm Situation Report.
- 5.3. The approach of simply extracting a single phrase and considering it in isolation is erroneous. The phrase has to be read both in light of what was apparent to its author at the time it was written, and in the full context in which it appears in the larger document.
- 5.4. Turning to the first of those matters, it is clear that Mr Ayre had run a model at 3.00pm on 8 January 2011. That model can be seen in Appendix K at page 224 of the Flood Report. It shows the estimated inflow into Wivenhoe, excluding Somerset Dam releases, projected several days into the future. At the time that the model was run the current inflows had peaked and were then approximately 1200m<sup>3</sup>/s at 3.00pm on 8 January 2011. The model predicted a steep reduction until a fresh steep rise in inflows was predicted to commence some time on 10 January 2011. That then led to a new predicted peak at some time around about midday on 11 January 2011. This model was clearly indicative of a scenario where the current release rate would gradually reduce the dam level below 68.5 metres some time over the next day or so with a subsequent rise back over that 68.5m level at some time after that.
- 5.5. Indeed, the historical operational spreadsheet<sup>34</sup> shows that from 7.00pm on 8 January 2011 the dam level did stabilise and then started to slowly decline back towards 68.5m from 6.00am on 9 January 2011.

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<sup>33</sup> Ex 1047.

<sup>34</sup> Historical Operational Spreadsheet, Ex 1054, page 3.

- 5.6. Importantly, the spreadsheets that Mr Ayre had created at 9.00am, 8 January 2011 and saved at 4.08pm, 8 January 2011, showed that the Wivenhoe dam level was predicted to fall below 68.5m at 11.00am, 9 January 2011. The spreadsheets created and used by Mr Ayre are found in exhibit 524 and are document “SDWD-201101080900”.
- 5.7. It is with the background of the model run and the live spreadsheet that Mr Ayre had created at 9.00am that morning and had evidently been using during the day, that Mr Ayre came to write the 5.53pm Situation Report.
- 5.8. The second matter is, the phrase has been divorced from the context in which it appears in the Situation Report.
- 5.9. The phrase which Counsel Assisting has emphasised is to be found under a heading “**Forecast Scenario – Based upon mid-range rainfall forecast**”. That heading itself indicates that it was dealing with a forecast scenario covering a period of several days. The prior Situation Report of 2.22pm on 8 January 2011 had not contained such a “forecast scenario”.<sup>35</sup>
- 5.10. Further, when the whole of the two paragraphs underneath that heading are read in context, it is clear that the phrase is not dealing with a present or imminent event. It is not a statement which communicated or inferred “*we are presently in W1 and we are going to proceed to W2*”. It was a statement made in the context about what may be appropriate at a future point, some days away.
- 5.11. It should also be noted that the 5.53pm Situation Report expressly identifies that the Wivenhoe Dam height was then at 68.65m and rising steadily. That information was written by Mr Ayre. It clearly indicated that he knew the dam height had exceeded 68.5m. It appears under the heading “***Wivenhoe (Full Supply Level 67.00m AHD)***”.

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<sup>35</sup> Flood Report, Appendix E, pages 15 and 16.

- 5.12. The matters set out above do not depend on Mr Ayre's recollections. They are matters which are objectively apparent. He undertook the modelling prior to writing this Situation Report, he included in this Situation Report a heading which was, on its face, dealing with future matters which were days away, the modelling shows that there was to be a peak in the dam levels and then the dam level would be reducing, and that in fact is what occurred. The spreadsheet saved at 4.08pm on 8 January 2011 showed that the dam level was predicted to fall below 68.5m at 11.00am on 9 January 2011. That was the very next day. In that context the phrase makes perfect sense that it was referring to the possibility that in a few days time there might be need to go to a W2 strategy because the Lockyer and Bremer streams may dominate.
- 5.13. Far from that suggesting that Mr Ayre mistakenly thought he was in W1, it does suggest that Mr Ayre was consciously considering strategies at various times.
- 5.14. Another example that Mr Ayre was consciously aware of manual strategies was his obvious awareness of S2 and the gate directives made by him consistent with that strategy.<sup>36</sup>

## 6. THE 3.30PM FLOOD LOG ENTRY

- 6.1. Counsel Assisting relies on an entry in the Flood Log of 3.30pm, 9 January 2011 to support the allegation that the flood engineers may have mistakenly believed that they were operating in W1 prior to 3.30pm, 9 January 2011.
- 6.2. The entry in the Flood Log for 3.30pm on 9 January 2011 provides as follows:

*“Duty Engineer Conference held at the FOC: Attended by RA, JR, TM with JT on conf phone. At this stage operating at the top end of W1 and the bottom end of W2 Storing approx. 300,000 ML at present (above Wivenhoe) with an additional 500,000 ML expected to flow into the dams from rainfall on the ground. The rainfall system is currently in the N-E part of the catchment and expected to travel south over the next 24 – 36 hours according to the BoM forecasts. This has the potential to significantly increase flows in Lockyer Ck*

<sup>36</sup> T5844, line 37 to T5846 and directive of 11:30am of 8 January 2011 at page 66, Appendix L in the Flood Report.

*and the Bremer River which potentially could close Fernvale Bridge and Mt Crosby Bridge and increase the risk of flooding in the Lower Brisbane Releases from Wivenhoe Dam will be maintained on the current level of ~1,400 cumecs. It required, releases from Wivenhoe Dam will be reduced to contain the flow in the Mid-Brisbane to 1,600 cumecs and 3,000 cumecs in the Lower Brisbane. At this stage it is anticipated that the levels below 102.5 in Somerset and 72.5 in Wivenhoe can be attained.”*

- 6.3. The category reference for this entry was “*Situation Report*”.
- 6.4. It is not apparent who the author of the entry was. It bears Mr Ablitt’s initials, however he only accepts that he would have authored the first two sentences under the “action” heading. The usual practice would have been for Mr Ablitt to make the full note where a telephone call was involved. Mr Tibaldi was not physically at the meeting. He was on a mobile phone whilst unpacking his car at his house.
- 6.5. Turning to the entry itself, what the words do not and could not mean is that a flood engineer was operating both in W1 and W2 at the same time. Mr Tibaldi indicated, correctly, that it is only possible to be in one W strategy at a particular time. Every witness who was asked about this proposition agreed that this was the case. The entry then was not a reference to what any engineer believed was the current operational strategy.
- 6.6. A possible meaning for the words used is that they are a clumsy form of expressing what the engineers had been practically achieving prior to that time. The conditions which had existed throughout Saturday and into Sunday morning had allowed them to adopt releases which resulted in the Fernvale and Mt Crosby Weir bridges remaining open. That position was one contemplated by the top end of W1 (namely W1E), and the bottom end of W2 (or equally W3), namely having regard to the primary consideration of protecting urban areas from inundation, but also having regard to and (where conditions allowed) achieving the lower level objectives.

- 6.7. What it did not record or indicate was that any of the flood engineers thought that they were still in W1. The incontrovertible evidence shows that since 8.00 am 8 January 2011 the dam had been consistently above 68.5m and that fact was known to each of the flood engineers who had been on shift. The contention that all four of these flood engineers (or indeed, any of them) failed to recognise that 68.5m was the transition out of W1, is an untenable proposition.
- 6.8. The 3:30pm meeting was called after Mr Malone had undertaken and distributed an assessment of the potential for run off volumes into the dams during the next three days.<sup>37</sup>
- 6.9. The 3.30pm Flood Log entry recorded the prospect that the Wivenhoe Dam level might rise significantly. The last sentence of the entry stated, inter alia, "*at this stage it is anticipated that the levels below ... 72.5 in Wivenhoe can be attained.*" After this meeting, two flood engineers were present on subsequent shifts.
- 6.10. The Flood Log then identifies that from 4.15pm Mr Malone was progressively contacting and updating local authorities and other persons in relation to the developing situation. All of this is consistent with Mr Malone being conscious of an escalating situation and that he would have to decide when circumstances dictated that the lower level objectives in W3 could no longer be achieved.
- 6.11. Mr Ruffini and Mr Ayre commenced their shift at 7 o'clock on Sunday and it can be seen from the Flood Log that steps were then taken to allow the two relevant bridges to be safely closed prior to ramping up releases.
- 6.12. The calling of the 3.30pm meeting, the subsequent conduct of Mr Malone immediately after the meeting and throughout the afternoon together with the conduct of the two flood engineers who came on shift from 7.00pm 9 January 2011, are consistent with there being an appreciation that a more serious flood was developing where at some point it would cease to be appropriate to continue to consider the lower level objectives in W3. The

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<sup>37</sup> Malone Statement dated 25 March 2011, para 21.



suggestion that the flood engineers mistakenly believed they were operating in W1 until some time on the morning of Monday 10 January 2011 is also untenable.

**7. MR DRURY'S EMAIL OF 10 JANUARY 2011 AT 8.23AM AND MR ALLEN'S EMAIL TO MR COOPER AT 10.57AM ON 12 JANUARY 2011**

- 7.1. Commencing with the email of Mr Drury sent at 8.23am on 10 January 2011,<sup>38</sup> this was the email where Mr Drury had replied to Mr Spiller that they were operating in W2. In Counsel Assisting's submissions at paragraph 167, it is stated that "*although the evidence weighs towards the view that somebody in the flood operation centre must have told Mr Drury that the strategy in operation was W2, it is not possible to reach a concluded view about the matter*".
- 7.2. The reference to the evidence weighing towards that view has no foundation in the evidence before this Commission and is not a supportable submission. It relies solely on the fact that in past days Mr Drury had spoken to flood engineers. There simply is no evidence that Mr Drury had been informed of that fact. There is no entry in the Flood Log that indicates that anybody from the flood centre had informed Mr Drury of that fact. There is no entry in the Flood Log that any telephone call was received from Mr Drury after he received the enquiry at 8.13am on the morning of 10 January 2011 from Mr Spiller.<sup>39</sup> No telephone record has been produced indicating that a telephone call was made to the flood centre at that time, regardless of whether it was entered in the Flood Log. Mr Drury recalls no such conversation. To suggest that there is evidence weighing towards the view that somebody from the flood centre had told Mr Drury that the strategy in operation was W2 is unsupportable.
- 7.3. The position is the same for Mr Allen's email to Mr Cooper at 10.57am on 12 January 2011. This is dealt with in Counsel Assisting's submissions at paragraphs 185 to 195. The email from Mr Allen contained a statement "*Strategy 1 applies*

<sup>38</sup> Ex 1080, Annexure B document 46, pages 169 - 170.

<sup>39</sup> Ex 1080, Annexure B document 45, pages 167-168.

*until the reservoir exceeds 68.5 and then it moves into W2 or W3. For the last day or so before yesterday's big rise, it would have been in W2. ..."* Again there is no evidence that Mr Allen had been told this information by a flood engineer.

- 7.4. What was clear was that Mr Allen had been receiving technical situation reports.<sup>40</sup> His initial recollection was that he had not made his own assessment of what strategy was being operated, but it was from information received from reports.<sup>41</sup>
- 7.5. When Mr Allen was asked on a number of occasions whether he recalled the information in the email having been told to him by flood engineers, he indicated that he did not have a recollection of being told this.<sup>42</sup>
- 7.6. As with Mr Drury, the only basis for this proposition was that in the days before this email Mr Allen had spoken to persons in the flood centre.
- 7.7. There is simply no evidence that either Mr Allen or Mr Drury had been told by a flood engineer at the flood centre that strategy W2 had been in operation.
- 7.8. The conclusion put forward by Counsel Assisting in respect of Mr Allen's email should be rejected.

## **8. MALONE SUMMARY, STRATEGY SPREADSHEET AND DRAFT MINISTERIAL BRIEFING STATEMENT**

- 8.1. Counsel Assisting has sought to rely upon three further documents to support the contention that the flood engineers knew that there had not been a transition from W1 to W3 at 8.00am, 8 January 2011.
- 8.2. The first is the Malone summary document.

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<sup>40</sup> T5910, lines 26-29.

<sup>41</sup> T5910, lines 31-36.

<sup>42</sup> T5910, line 38 to T5911, line 6.

- 8.3. Mr Malone had been working for many consecutive days in the course of the flood, no doubt was exhausted and was in fact the flood engineer who was currently on shift from 7.00am to 7.00pm on 15 January 2011. Mid shift he was imposed upon to draft a summary document. He produced a short document.
- 8.4. The document identified in that summary<sup>43</sup> that at 8.00am on the Saturday there had been a transition out of W1. It incorrectly identified that there was a transition to W2. It incorrectly identified that W3 was engaged at 6.00pm on 8 January 2011.
- 8.5. Mr Malone of course did not work the Saturday shifts. His first shift after 8.00am, 8 January 2011 commenced at 7am on 9 January 2011.
- 8.6. Mr Malone quickly produced the document. He sent it out to the other flood engineers at 1.02pm for comment. There is no evidence to suggest that any comment was ever made or that anything further came of this document.
- 8.7. The strategy spreadsheet was created by somebody on 15 January 2011.<sup>44</sup> It is evidently a cut down version of the flood event log, with different strategies ascribed to different times. Again, the times ascribed to those strategies are inaccurate, and suggest that whoever created the document did so quickly and without care.
- 8.8. In terms of who drafted that document, the following can be said; it will not have been Mr Malone, who produced a different document, nor will it have been Mr Tibaldi who had that strategy spreadsheet emailed to him at 6.57pm later that evening. Mr Rob Ayre, whilst originally having given evidence that he had sent the email to Mr Tibaldi with that strategy spread sheet, having considered the matter further later said that he believed he probably did not. The likelihood is that that is correct. The email to Mr Tibaldi was simply signed "Rob" and when

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<sup>43</sup> Ex 1050.

<sup>44</sup> Ex 1051.

Mr Ayre sends emails, other than from his Blackberry, it seems that he has a practice of signing "Rob Ayre".

- 8.9. The only other person who was in the flood centre at that time, with the name 'Rob', was Mr Rob Drury. It is possible that Mr Drury created or assisted in the creation of that strategy spreadsheet. It is possible that he received assistance from Mr Ablitt, although Mr Ablitt has no such recollection.
- 8.10. The document was sent to Mr Tibaldi and he later forwarded it to others. As with Mr Malone's summary, there is no evidence that anything came of it. Counsel Assisting acknowledged that to the extent the draft ministerial statement document refers to strategies, those references are not consistent with the strategy spreadsheet.<sup>45</sup>
- 8.11. The final document is the draft ministerial briefing statement. It is likely that Mr Tibaldi assisted in the drafting of this document.
- 8.12. Mr Tibaldi has effectively no recollection of the period around 15 January 2011. He had no recollection of drafting this document.
- 8.13. It is important to have an accurate appreciation of where Mr Tibaldi was physically and mentally at this stage. He had been working shifts in the flood event since 7pm 8 January 2011. From 7am 10 January 2011 they had become 12 hour on/12 hour off shifts. His sleep was only intermittent. Mr Tibaldi has evidently been affected emotionally by the events. He has two clear recollections. They are viewing the Toowoomba and Grantham flooding on 10 January 2011 and the circumstances about making the decision to go to W4 and understanding the consequences as dam releases were increased from that point.<sup>46</sup>
- 8.14. He had come off a 12 hour shift at 7.00am on the morning of 15 January 2011. The Flood Log indicated that by 2.00pm Mr Tibaldi, with other flood engineers,

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<sup>45</sup> Paragraphs 238, 285 & 293 of Counsel Assisting's Submissions.

<sup>46</sup> Eleventh Tibaldi Statement, para 6.

was involved in a telephone hook-up in relation to discussing a report for the Minister.

- 8.15. To use the words of Mr Tibaldi when he was asked about the state he was in on 15 January 2011:

*“I hadn’t really slept for a week, even up to that point. Like a lot of people affected by the – a lot of people would have been in that situation. In terms of – you know, operating at a level that I can write, you know, something of that nature realistically I wasn’t at that level at that time. You know I just can’t remember those two days apart from the incident I recalled yesterday. That’s all I can say...<sup>47</sup> ... I will just make the point I hadn’t slept for an extended period, probably since around the 11<sup>th</sup>. Obviously I had had some sleep but I was engaged in flood duties, this further report, I was answering all sorts of queries trying to get information together, press statements, etc, when I wasn’t on shift, and, you know there were things on my mind which I referred to in paragraph 6 of my most recent statement. I won’t go through those. But, yeah as I said, I just – you know, we did what we had to do. I was asked to, you know, come in after a shift and assist with a briefing and I felt that was the right thing to do and I came in.”<sup>48</sup>*

- 8.16. He did have some recollection that he was asked to go into a press conference and he just could not do it.<sup>49</sup>
- 8.17. When he has been shown emails which have on their face been sent by him he has agreed that they do indicate that he was assisting in the preparation of this document, likely drafting parts of the document and then sending them on.
- 8.18. Mr Tibaldi when referred to that ministerial briefing document in cross examination identified that, having looked at it, it contained things which were wrong.<sup>50</sup> There is reference to the operating strategy having “*progressed to W2*” by 3.30pm on 9 January 2011 and to it being apparent that the operational strategy “*had progressed to*” W3 by 6.30am on 10 January 2011. It is relevant to

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<sup>47</sup> T5160, lines 18-28.

<sup>48</sup> T5161, lines 13-28.

<sup>49</sup> T5064, lines 38-41.

<sup>50</sup> T5067, lines 19-39.

note this indefinite language. It does not purport to give exact times when W2 or W3 are said to have been first transitioned to.

- 8.19. The reference to W2 having been progressed to by a particular time, was clearly wrong.
- 8.20. The existence of errors in that document is hardly surprising as it was drafted at a time when Mr Tibaldi was exhausted and being asked to do something, which frankly, he should not have been asked to do in the circumstances. The Minister, Mr Robertson, recognised the reality of the situation, namely that the flood engineers had been working for an extensive period of time under stressful conditions with little sleep, and that anything they produced was likely to have errors in it.
- 8.21. There is no evidence that Mr Tibaldi even turned his mind again to that part of the Ministerial briefing statement which referred to strategies. He circulated the draft document on 16 January 2011, but it is apparent that no material changes were made to that part of the document. This is consistent with it not having been substantively revisited by him.
- 8.22. Again, there is no evidence that anything further came of the Ministerial briefing statement as far as Mr Tibaldi was concerned. Mr Tibaldi was not brought back to it at some later time. It was not a part of his draft of Chapter 2 nor any other section of the Flood Report. Mr Tibaldi's drafts are attached to his Eleventh Statement.
- 8.23. None of these documents support a finding that Mr Tibaldi or any of the other flood engineers mistakenly believed that strategy W1 was in operation from 8.00am, 8 January 2011.
- 8.24. There is no evidence that he had regard to or used this document in the drafting process.

## **9. DRAFTING OF THE FLOOD REPORT**

- 9.1. Quite separately to a finding that there had been as a matter of fact a transition from W1 to W3, bypassing W2, there needs to be an understanding of Mr Tibaldi's mind during the drafting process. This requires a careful consideration of what Mr Tibaldi actually did when he drafted his parts of the Report. It is submitted that this review supports that Mr Tibaldi honestly held the view which he expressed in Chapters 2 and 10 of the Flood Report, which related to the transition from W1 to W3 at 8.00am on 8 January 2011 and the bypassing of W2 at that time.

## **10. PROCESS ENGAGED IN BY MR TIBALDI IN THE DRAFTING OF THE FLOOD REPORT**

- 10.1. Mr Tibaldi was given the task of drafting a large portion of the Flood Report. This included the Executive Summary, Part 2 – Flood Event Summary, Part 10 – Flood Management Strategies and Manual Compliance and Part 19 – Report Conclusions.<sup>51</sup>
- 10.2. It is important to recognise that of the four flood engineers, Mr Tibaldi had had the least involvement in the flood event. He had been on annual leave for the first 60 hours of the flood event. His first shift started at 7.00pm on 8 January 2011. He was only on official duty for 24 hours of the 120 hour period from event commencement to the time when strategy W4 was applied, and was only on official duty for 96 hours of the total 324 hours of the flood event.
- 10.3. Mr Tibaldi has little recollection of what actually occurred during the flood event. As stated previously, the two experiences which stand out to him are the shock at seeing the Toowoomba and Grantham flooding on the television late on 10 January 2011, and the decision to transition to strategy W4 on

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<sup>51</sup> Eleventh Tibaldi Statement, para 4.

11 January 2011, understanding the consequences as dam releases were increased at that point.<sup>52</sup>

- 10.4. The Commission has had the opportunity to see Mr Tibaldi give evidence. It is evident that Mr Tibaldi has been profoundly affected by his experiences during the flood event. The rawness of the event to Mr Tibaldi was evident on more than one occasion whilst he gave his evidence.
- 10.5. Beyond those two major events, he effectively has no recollection of large parts of what occurred during those parts of the Flood Event that he was personally involved in. For example, when examined about the shift which commenced at 7.00pm on 8 January 2011 and finished at 7.00am on 9 January 2011, Mr Tibaldi indicated that he simply had no recollection of the shift. Another example is in relation to the drafting of the Ministerial briefing statement on 15 January 2011, of which he has no recollection.
- 10.6. In a telling piece of evidence, he identified that there were things which his family told him had occurred at this time which he simply has no recollection of now.<sup>53</sup>
- 10.7. The approach which Mr Tibaldi took at the initial stage was to look objectively at the various sources of data that were available to him at the Flood Operation Centre. In light of the matters set out above, such an approach was unsurprising.
- 10.8. As he commenced his drafting, he would write down initial thoughts and considerations to then accept or reject them as he examined and tested those matters against the available information. His aim was to make the final summary as factual as possible.<sup>54</sup> As part of that initial process, Mr Tibaldi accepts that it is possible that he spoke to Mr Ruffini and Mr Ayre, albeit he does not now have an independent recollection of specific conversations.<sup>55</sup> He clearly

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<sup>52</sup> Eleventh Tibaldi Statement, para 6

<sup>53</sup> T5066, lines 54-57.

<sup>54</sup> Eleventh Tibaldi Statement, paras 5, 12 and 19.

<sup>55</sup> Eleventh Tibaldi Statement, para 17.



was receiving technical data from Mr Malone during this time. His drafts reflect that this information was being provided to him progressively.<sup>56</sup> Mr Malone was physically present in the flood room with him during this drafting process. Mr Tibaldi delegated the assembly of appendices to Chloe de Marchi.<sup>57</sup>

- 10.9. Eventually Mr Tibaldi developed his parts of the draft Report to a mature stage so that he was then able to give it to the other flood engineers for their review and their assessment as to whether the draft accurately reflected what they did or otherwise.<sup>58</sup>
- 10.10. The evidence of the other flood engineers corroborates that Mr Tibaldi had provided them with a mature draft Report and they appreciated that they were being asked to review the draft for accuracy.
- 10.11. Mr Ayre gave evidence in response to a question that he knew precisely the methodology which Mr Tibaldi had adopted in recording the manual strategies, as follows:

*“We – I certainly did my own forensics on the parts of the event that I was familiar with and they were consistent with John’s findings.”<sup>59</sup>*

Mr Ayre also gave evidence in response to a proposition that if Mr Ayre had wished to dissent from the Report there would have been no difficulty in his expressing such a position if he thought there was a problem, as follows:

*“No, I did my own independent assessments of those strategies when I was on shift; so I was happy that that reflected what was occurring”.<sup>60</sup>*

- 10.12. Mr Malone gave evidence of reading the Report before it was finally issued. He identified that he had spent some time reading it and that he would have read the

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<sup>56</sup> Eleventh Tibaldi Statement, para 15.

<sup>57</sup> Eleventh Tibaldi Statement, para 13.

<sup>58</sup> T5083, line 27 to T5084, line 58.

<sup>59</sup> T5209, lines 9-11.

<sup>60</sup> T6105, lines 15-19.

Executive Summary, Parts 2, 10 and 19, but would have concentrated on those particular parts that he contributed to.<sup>61</sup>

- 10.13. Mr Ruffini gave evidence to the effect that Mr Tibaldi asked them to go away and see if what Mr Tibaldi had drafted matched their recollection and whether they agreed with it or not.<sup>62</sup> Mr Ruffini stated that he reviewed the draft and thought what had been written was accurate.<sup>63</sup> Mr Ruffini gave evidence that he informed Mr Tibaldi in words to the effect that the draft Report matched his recollection.<sup>64</sup>
- 10.14. Mr Tibaldi's evidence was that he did not recall any of the other engineers disagreeing with the version of events he set out in the draft, to the extent it related to the transition from W1 to W3 and the bypassing of W2.<sup>65</sup>
- 10.15. The evidence from the other flood engineers is consistent that none of them told Mr Tibaldi that they disagreed with what was set out in there.
- 10.16. Criticism was made of Mr Tibaldi as to his approach to drafting the Flood Report in respect of these matters.<sup>66</sup> That criticism is both unwarranted and unsustainable.
- 10.17. Of course it is self-evident that there might have been a different approach to drafting the Report. A different drafter (such as a lawyer) might have approached the matter by taking statements of what flood engineers who had worked through a stressful situation with little sleep may have recollected, without the benefit of refreshing their minds from contemporaneous documents.

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<sup>61</sup> T5326, lines 45-57.

<sup>62</sup> T5414, lines 19-27.

<sup>63</sup> T5414, lines 29-31.

<sup>64</sup> T5414, lines 33-34.

<sup>65</sup> Eleventh Tibaldi Statement, para 39. It can be seen that the last example of the draft of Chapter 2 in the exhibits to Mr Tibaldi's Eleventh Statement recorded the transition from W1 to W3 on 8.1.2011 and W2 being bypassed at that time.

<sup>66</sup> A good example of this examination of Mr Tibaldi can be found in the cross examination by Mr Rangiah SC at T5083, line 27 to T5085, line 6.

- 10.18. The approach that Mr Tibaldi (an engineer) took is one which appeared to him to be the logical approach. He first put together a picture of what he believed had occurred based on all of the information and records that were available in the flood centre.<sup>67</sup> That necessarily involved a form of reconstruction, as he was not present for the majority of the flood event and had a poor recollection of that part he was present for. It was a reconstruction of what he believed had occurred, not what he believed should have occurred.<sup>68</sup>
- 10.19. Importantly, that is not where Mr Tibaldi left the matter. He then distributed the draft to those engineers who were present and sought their review of the draft for accuracy. Lastly, when he received comments from those flood engineers he made changes in respect of matters to clarify the times when he was not in the room.<sup>69</sup>
- 10.20. The use of the word “*reconstruction*” has been given an unwarranted sinister connotation by Counsel Assisting, and simply ignores the full process that Mr Tibaldi engaged in and why. This ignoring of the full process was evident in the way Counsel Assisting put suggestions to witnesses. By way of example, at paragraph 424 of the submissions of the Counsel Assisting, he states: “*Had Mr McDonald been aware of the process which Mr Tibaldi determined when W3 was engaged, it might have made a difference to his approach to his review.*” The Transcript reference is T5563 lines 1 to 13. The relevant passage starts at page 5562 line 55. The assumption which was put did not reflect the full process which Mr Tibaldi adopted. A similar failure to accurately state the full process which Mr Tibaldi adopted can be seen at T6058, line 57 to T6059, line 19, which includes Mr O’Donnell’s objection.
- 10.21. Counsel Assisting submitted at paragraph 324 that this reconstruction carried with it the risk of displacing each engineers’ actual recollection of what occurred. That criticism is unwarranted for a number of reasons. Firstly, Mr Tibaldi adopted a process where it was clear that the other engineers were being asked to

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<sup>67</sup> T5083, lines 39-42.

<sup>68</sup> T5159, lines 5-48.

<sup>69</sup> T5083, lines 45-46.

check the accuracy of the report. Secondly, Mr Ayre and Mr Ruffini, who were there at or about 8.00am on 8 January 2011, as a matter of fact went and reviewed those parts of Chapters 2 and 10 which concerned that part of the flood event at which they were present, including the transition from W1 to W3. They formed a view, as a matter of fact, and undoubtedly honestly, that those parts of the report accorded with their belief of what had actually occurred. To the extent that they had personal recollections of events, those recollections were able to be brought to bear as part of that process. Unsurprisingly, as part of their consideration, they would both have had regard to contemporaneous documents from that period to assist them in refreshing their memory and forming their belief. It cannot seriously be submitted that Mr Tibaldi schemed to try and repress those recollections of Mr Ruffini and Mr Ayre on this issue.

10.22. Regardless of whether the Commission ultimately thinks Mr Tibaldi's approach was logical or illogical, it was the course Mr Tibaldi adopted. It was not an approach which indicates that Mr Tibaldi was dishonestly concealing anything. If that were the case, he would never have asked the other flood engineers to check anything for accuracy.

10.23. Turning then to the contents of Chapter 2 and Chapter 10 of the Report to the extent it dealt with the transition from W1 to W3 and the bypassing of W2, this Commission has heard the evidence of those flood engineers who were there at or about 8am on 8 January 2011. In the case of Mr Ruffini, his evidence is that with the benefit of referring to contemporaneous documents, he believes that he appreciated that the dam level was approaching the transition from W1, and in the case of Mr Ayre, that he appreciated there was a transition from W1 at that time. Neither of those men purported to say at the time of the resumed hearing "*I now have a positive recollection that I thought W3 at 8 o'clock on 8 January 2011.*" How easy it would have been for either of those two men to tell this Commission they actually now retained a recollection of that positive state of mind at that time. The fact that those two men gave the evidence they did is consistent with the fact that they gave their evidence honestly.

- 10.24. In the report drafting process both men independently went back and looked at the data and reviewed their position in respect of their state of mind at or about that time of 8 January 2011. Assuming that there was an appreciation that the transition had occurred from W1, the actions of those men on 8 January 2011 were only consistent with by-passing W2 and going straight to W3.
- 10.25. As Mr Ruffini put it, the W2 scenario was simply “*not in play*” on Saturday 8 January 2011. The circumstances associated with a W2 (namely significant predicted peak flows in the Lowood and Moggill streams with the releases from Wivenhoe not already exceeding those peaks) simply did not exist at 8.00am on 8 January 2011. The releases from the Wivenhoe at that stage were well in excess of the predicted natural peak flows at those two locations. The reality was that W2 was simply not a strategy that any flood engineer would have considered engaging at that time.
- 10.26. At no time during the drafting process did anyone disabuse Mr Tibaldi of his honestly held belief that the way he had described the transition from W1 to W3 and the bypassing of W2 was accurate. It was the evidence of each of the other engineers that there was no inaccuracy. How can it be suggested that Mr Tibaldi held a view that his statements were false or misleading? The evidence compels the opposite conclusion.
- 10.27. Essentially, only two factual propositions are put forward to support a suggestion that Mr Tibaldi did not honestly believe the accuracy of how he described the transition from W1 to W3 and the bypassing of W2. Those two factual propositions appear in paragraphs 326 to 239 of Counsel Assisting’s submissions dealing with “*Mr Tibaldi’s state of mind*”.
- 10.28. The first of those is a conversation which Mr Ayre recalls as having taken place in the second or third week of February 2011<sup>70</sup> where Mr Tibaldi informed him in words to the effect that “*we didn’t implement strategy W2*”. Mr Ayre’s recollection is his response to that statement was that he looked at the screen

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<sup>70</sup> T6113, lines 55-58.

which Mr Tibaldi was looking at, and agreed with that proposition. Mr Tibaldi does not have a recollection of that conversation.<sup>71</sup>

- 10.29. Such a conversation does not give rise to any of the inferences or conclusions which Counsel Assisting seeks to attribute to it in paragraphs 326 to 329 of his submissions.
- 10.30. It is important to understand the context in which such a statement would have been made by Mr Tibaldi. He had gone through the process of looking at the objective data and by 31 January 2011, his drafts reveal that he had formed the belief that a transition from W1 to W3 had occurred at 8.00am on 8 January 2011 and that W2 had been bypassed.
- 10.31. It is also important to recognise that Mr Tibaldi was in no doubt that Strategy W2 had not been engaged. It is true that Mr Tibaldi had a dilemma whilst drafting the Flood Report. That dilemma however had nothing to do with any suggestion that he believed that W2 had actually been engaged. He did not hold that belief after he viewed the appropriate data. The dilemma simply related to the fact that he had drafted the flowchart in the Manual and that the flowchart could be read as indicating that there was a requirement to go into W2 when the conditions set out in the central box of the flowchart were met. That this was his dilemma is clear from his Eleventh Statement, particularly at paragraph 31 read with paragraphs 26 to 30. He was equally clear on this point throughout his cross examination. Some examples can be seen at Transcript pages 5035, lines 28-43; 5036, lines 27-31; 5093, lines 4-20. Mr Tibaldi's response to the dilemma was to tell Mr Allen, from the regulator, of the dilemma. That is not the conduct of someone seeking to dishonestly conceal.
- 10.32. To the extent that Mr Tibaldi made the statement recalled by Mr Ayre, it would simply have reflected what Mr Tibaldi actually believed had occurred. To the extent that Mr Ayre then agreed with that proposition (whether he looked at the

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<sup>71</sup> T5036, lines 2-13.

screen or not) this would have only served to reconfirm what Mr Tibaldi already honestly believed.

- 10.33. The various inferences or connotations attributed at paragraphs 326 to 329 of Counsel Assisting's submissions, in respect of Mr Ayre's recollection of such a conversation, are inferences and connotations which simply do not reasonably arise from the mere happening of that exchange. In particular, the submission in paragraph 327 that "*the need for any conversation on the topic must have made it clear to Mr Tibaldi that Mr Ayre did not know when he had transitioned out of W1, if at all, and if he did whether he had transitioned to W2 or W3*" is simply illogical. Making an observation that "*we didn't implement strategy W2*" says nothing about the fact that there had been a transition from W1 at 8:00am on 8 January 2011. On the other hand, such an observation was entirely consistent with the belief that the transition had been from W1 directly to W3.
- 10.34. Where Mr Tibaldi's honesty is being challenged, it is evident that Counsel Assisting has given no consideration to the most obvious and reasonable conclusion arising from such a conversation namely that Mr Tibaldi was not disabused of the honest view which he held, but rather had it confirmed, namely that W2 had been bypassed. Where the Briginshaw Test is to be applied it is important to ensure that reasonable conclusions consistent with honesty are considered. It is important to note that the various connotations and inferences contained in paragraphs 326 to 329 of Counsel Assisting's submissions said to arise from the happening of this conversation, were never put to Mr Tibaldi either on the first occasion when he gave evidence in this resumed sittings or on the second occasion when he was recalled to give further evidence.
- 10.35. The second basis to suggest dishonesty by Mr Tibaldi can be seen at paragraph 329 and it again harks back to the ministerial briefing draft. It is said that it was written before the March report and the inference that he knew that the two were contradictory is inevitable because he wrote both of them.

- 10.36. That again is an inference which on any view is not one able to be reasonably drawn, let alone one which would satisfy the Briginshaw Test.
- 10.37. That Ministerial briefing statement was produced at a time when Mr Tibaldi was in no condition to have been asked to write that document. Nonetheless, it appears he wrote it, but he has no recollection of it. Tellingly, that document does not resurface at any stage after his involvement on 15 and 16 January 2011. There is nothing to indicate that he used it as part of this drafting process or that he went back to it or made any reference to it whatsoever. What there is, is compelling evidence that in drafting this report he chose a process of going back to the actual official and un-contestable data maintained in the flood centre prior to seeking the review by the other flood engineers of the draft report for accuracy.
- 10.38. It is improbable that when he was drafting this report, Mr Tibaldi was turning his mind back to some document that he wrote without the benefit of any objective evidence at a time when he was exhausted and on any view, only made two broad references to strategies.

## **11. CONCLUSION.**

- 11.1. Mr Tibaldi, together with the other three flood engineers, performed their obligations in managing the Wivenhoe Dam releases during the flood event in a commendable fashion. Mr Babister, the Commission's expert, accepted that they had done a good job. Under any other circumstances Mr Tibaldi and the other flood engineers would have been congratulated.
- 11.2. What has occurred in the Commission's reconvened hearings is that Mr Tibaldi has had put to him in a direct way that he had shown a disregard for the operation manual during the operation of the flood event and that in the preparation of the flood report he had shown a disregard for the truth.<sup>72</sup> Mr Tibaldi has had both his professional and personal reputation significantly damaged.

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<sup>72</sup> T5080, line 58 to T5081, line 5.



- 11.3. It is submitted that the evidence as it has emerged supports that that case as put to him cannot be sustained. The compelling evidence is to the contrary.
- 11.4. It is submitted that the Commission ought to find:
- (a) that in fact there was a transition from W1 to W3 at 8.00am 8 January 2011 and that W2 was bypassed;
  - (b) further and in any event, that whilst Mr Tibaldi was writing the Flood Report he honestly held the opinion that there had been such a transition and honestly held the opinion that W2 had been bypassed;
  - (c) Mr Tibaldi did not believe whilst writing the Flood Report that the flood engineers mistakenly thought they remained in W1 from 8.00am 8 January 2011 to 3.30pm 9 January 2011 (or indeed into the morning of 10 January 2011);
  - (d) that Mr Tibaldi did not intend to mislead anyone by his drafting of the Flood Report on these issues;
  - (e) the Flood Report was not in fact misleading on the issue of the transfer from W1 to W3 at 8:00am on 8 January 2011 and the bypass of W2.
- 11.5. The making of these findings will go some way to redressing the damage that has been done to Mr Tibaldi's reputation. The evidence does not support the findings urged upon this Commission by Counsel Assisting.

11.6. Counsel Assisting has not submitted that the conclusions in Part 11 of his submissions, to the extent that they relate to Mr Tibaldi, are sufficiently established so as to justify a referral to the DPP. What is termed “degree of suspicion” is simply said to warrant continued investigation by an organisation which for all intents and purposes would be revisiting what this Commission has already undertaken. There is no justification for a referral to that organisation for a similar review of evidence which having already been ventilated in the course of the Commission’s hearings, led to conclusions which do not satisfy the Briginshaw test.

Tom Sullivan SC

Counsel for Mr Tibaldi

16 February 2012