



**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**Report in the matter of an
allegation of public sector misconduct
concerning Mr John D'Orazio MLA**

May 2006

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This report and further information about the Corruption and Crime Commission can be found on the Commission's website at www.ccc.wa.gov.au

Corruption and Crime Commission

Postal Address PO Box 7667
 Cloisters Square
 PERTH WA 6850

Telephone (08) 9215 4888
 1800 809 000 (toll free for callers outside
 metropolitan Perth)

Facsimile (08) 9215 4884

Email info@ccc.wa.gov.au

Office Hours 8.30 am to 5.00 pm, Monday to Friday



CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

11 May 2006

Hon Nicholas Griffiths MLC
President
Legislative Council
Parliament House
PERTH WA 6000

Hon Fredrick Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with section 84 of the *Corruption and Crime Commission Act 2003*, I am pleased to present the Corruption and Crime Commission's report in the matter of an allegation of public sector misconduct concerning the former Minister for Police and Emergency Services; Justice; Community Safety; Mr John D'Orazio MLA.

The opinions contained in this report are those of this Commission.

I recommend that the report be laid before each House of Parliament at your earliest convenience.

Yours sincerely



Kevin Hammond
COMMISSIONER

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EXECUTIVE SUMMARY

This report to Parliament supplements the opinion and decision on allegations against the former Minister for Police and Emergency Services; Justice; Community Safety; Mr John D’Orazio, published by the Commission at a public hearing on 3 March 2006.

On 22 February 2006, *The West Australian* printed a front-page story headed “Police Minister is the ‘Godfather’”. The story implied that Mr John D’Orazio MLA, brokered a deal between Mr Adam Spagnolo and Mr Tony Drago in which Mr Spagnolo would use his position at the City of Bayswater to direct council contracts to Mr Drago’s carpet business, Corporate Carpets.

Following publication of the story, the Commission started an assessment of the allegation that Mr D’Orazio, as a public officer, engaged in misconduct arising out of a meeting between Mr D’Orazio, Mr Drago and Mr Spagnolo in August 2003 that involved Mr Spagnolo using his position at the City of Bayswater to assist Mr Drago’s carpet business.

An assessment by the Commission involves examining an allegation to decide what action it should take. This could range from taking no further action to starting an investigation.

In making its assessment of the allegations against Mr D’Orazio, the Commission:

- Considered the assertions contained in *The West Australian* and other media outlets in February 2006.
- Reviewed its holdings, including material previously collected by the Official Corruption Commission (OCC) and the Anti-Corruption Commission (A-CC). This review of holdings included a search for, and review of, any holdings with regard to Mr D’Orazio and went back to 1996, which included the period that Mr D’Orazio was mayor of the City of Bayswater.
- Considered the testimony provided by Mr Drago and Mr Spagnolo at the Commission’s public hearing in June 2005 concerning the tendering processes at the City of Bayswater.
- Invited all three parties, namely Mr D’Orazio, Mr Spagnolo and Mr Drago, in to the Commission for the purposes of an interview. All consented to be interviewed by Commission investigators.
- Obtained and examined a recording of a conversation between Mr Spagnolo and Mr Robert Taylor provided by *The West Australian*.
- Conducted private hearings on Wednesday 1 March 2006 where Mr Drago and Mr D’Orazio were examined on oath by Counsel Assisting the Commission, Mr Brett Tooker. Mr Spagnolo was not examined under oath for legal reasons.

Key events

As a result of its assessment, the Commission has established that the key events associated with this matter are:

- In 2003, the predecessor of the Corruption and Crime Commission, the A-CC was investigating allegations of misconduct against Mr Spagnolo.
- As part of its investigation, the A-CC lawfully intercepted the telephone services of Mr Spagnolo.
- On 22 August 2003, the A-CC intercepted a telephone call made by Mr D’Orazio to Mr Spagnolo. It would appear that because there was no suggestion of official corruption in the telephone conversation itself and no other evidence of official corruption on the part of Mr D’Orazio, the A-CC took no further action against Mr D’Orazio.
- On 24 May 2004, the A-CC’s investigation into the activities of Mr Spagnolo, code-named Operation Athens, was handed over to the Corruption and Crime Commission.

Commission investigators reviewed the material on Mr Spagnolo, including the telephone call from Mr D’Orazio, but again no further action was taken as there was nothing to suggest any misconduct by Mr D’Orazio.

- On 7 – 8 December 2004, the Commission conducted a public hearing in relation to Mr Spagnolo’s actions in the 2003 City of Stirling local government election.
- Following the public hearing, the Commission undertook an assessment of the administration of contracts at the City of Bayswater. This included a range of matters dating back to 1996.
- In June 2005, the Commission conducted a public hearing into the awarding of contracts by the City of Bayswater. At no time prior to the hearing did the Commission have any evidence to suggest that Mr D’Orazio had engaged in, was engaged in, or intended to engage in misconduct.

In his evidence, Mr Drago said that somebody suggested a meeting with Mr Spagnolo in order to sort out a dispute they were having over the encroachment of the carpet business of Mr Spagnolo’s son, Emilio, on his own business. Council Assisting the Commission, Ms Patti Chong, referring to this person as the ‘godfather’, asked Mr Drago the name of the person. Mr Drago replied the person was “just a friend”.

- On 22 February 2006, *The West Australian* published its story identifying Mr D’Orazio as the person Ms Chong referred to as the ‘godfather’.

The Commission's assessment

On the evidence before it, the Commission is satisfied that there was a meeting between Mr D'Orazio, Mr Drago and Mr Spagnolo at Mr D'Orazio's office on 25 August 2003.

On the crucial issue of what was discussed during that meeting, there is a divergence between the evidence of Mr Spagnolo on the one hand and Mr D'Orazio and Mr Drago on the other.

It is the sworn testimony of both Mr D'Orazio and Mr Drago that once there had been a degree of personal mediation facilitated by Mr D'Orazio in his office, that Mr Drago and Mr Spagnolo went outside. It is the sworn testimony of Mr Drago that the two men discussed the business arrangements outside.

However, Mr Spagnolo told the Commission that the meeting was about his son, Emilio, starting his own carpet business and that the three men discussed the business arrangements in the presence of Mr D'Orazio.

Crucially, however, Mr Spagnolo denies that he promised to assist Mr Drago through his position at the City of Bayswater during the meeting at which Mr D'Orazio was present, or in fact at all.

Commission's opinion and decision

The Commission's opinion as to whether or not misconduct may have occurred in the dealings between Mr D'Orazio, Mr Drago and Mr Spagnolo does not depend on whether or not discussions about business dealings or the split up of Mr Drago's carpet business occurred in Mr D'Orazio's presence as this is a commercial concern and not related to whether public sector misconduct occurred.

The crucial issue, with regard to public sector misconduct, is whether there was any discussion, involving Mr D'Orazio, of Mr Spagnolo misusing his position at the City of Bayswater to assist Mr Drago's carpet business.

On the material before the Commission, and following the Commission's assessment of that material, the Commission's opinion is that there is no evidence that Mr D'Orazio engaged in misconduct during the meeting at his office on 25 August 2003 or at any other time in relation to the business arrangements between Mr Spagnolo and Mr Drago.

Having formed its opinion, the Commission made a decision to take no action pursuant to section 33 of the Act with regard to the allegation of misconduct concerning Mr D'Orazio.

The use of the term 'godfather'

The term 'godfather' was used by Counsel Assisting the Commission at the City of Bayswater public hearing in June 2005 to ask Mr Drago who had suggested the meeting between Mr Drago and Mr Spagnolo.

Subsequently, Ms Chong has acknowledged that her use of the term 'godfather' was a throwaway line.

In the Commission's opinion, the use of the term 'godfather' was, in the context of the Bayswater hearing, inappropriate. It had no basis in fact and enabled an incorrect inference to be drawn that suggested the existence of some form of conspiracy involving either Mr D'Orazio or some other 'godfather' figure.

Disclosure of material

In making this report, it is the Commission's opinion that it is not in the public interest to disclose transcripts of private hearings and transcripts of lawfully obtained telephone interceptions associated with this assessment of the allegation concerning Mr D'Orazio.

1. FOREWORD

At a public hearing on 3 March 2006, the Corruption and Crime Commission ('the Commission') announced its opinion and decision with regard to an allegation of misconduct concerning the former Minister for Police and Emergency Services; Justice; Community Safety; Mr John D'Orazio MLA. The Commission took this step because of the very considerable public interest associated with this matter. Before doing so, the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice and privacy infringements and decided that it was in the public interest to pronounce its opinion and decision publicly.¹

This more complete report to Parliament supplements the Commission's opinion and decision on this matter, published by it at the 3 March 2006 public hearing.

1.1 Misconduct allegations

One of the two purposes of the *Corruption and Crime Commission Act 2003* ('the Act') is to "improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector".²

The Act specifically defines misconduct as follows:

4. "Misconduct", meaning of

Misconduct occurs if –

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;
- (b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or
- (d) a public officer engages in conduct that –
 - (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;
 - (ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;
 - (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or
 - (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,

¹ This decision was made pursuant to section 140 of the *Corruption and Crime Commission Act 2003* ('the Act').

² Section 7A of the Act.

and constitutes or could constitute –

- (v) an offence against the *Statutory Corporations (Liability of Directors) Act 1996* or any other written law; or
- (vi) a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

[Section 4 inserted by No.78 of 2003 s.6]

1.2 Dealing with allegations

The Act specifies the mechanism by which the Commission deals with allegations of misconduct in the public sector.

In dealing with an allegation about misconduct, the Commission takes a number of steps:

- The Commission assesses the allegation and forms an opinion as to whether misconduct has or may have occurred.
- To assist the Commission assess allegations and form opinions as to whether misconduct has or may have occurred, it can conduct a preliminary investigation into the allegation which enables it to use its coercive powers including the power to require the production to it of information, documents and things and the power to summons witnesses to attend and give evidence on oath before it.
- Having assessed an allegation of misconduct, the Commission makes a decision as to further action. This may include investigation of the allegation by the Commission itself, particularly if serious misconduct is involved, referral to another agency or the taking of no action by the Commission.

The Commission receives thousands of allegations of misconduct each year, some of which concern persons in the public eye, all of which are taken seriously. However, the Commission cannot decide to investigate on the basis of innuendo, rumour, vexatious or false reports or assertions that have no basis; to do otherwise would be inappropriate and could be an abuse of power.

This report describes the Commission's approach to dealing with an allegation of misconduct concerning Mr John D'Orazio MLA. In assessing the allegation, the Commission considered all the available material in order to establish whether the allegation had any basis, this included identifying whether any evidence was available that contradicted the allegation.

1.3 Disclosure

The Parliament has charged this Commission with the responsibility for assessing, forming opinions and making decisions on further action with regard to misconduct by public officers. In doing so, the Parliament has granted the Commission very considerable powers, the equivalent of a Royal Commission, that include the capacity to apply for warrants to lawfully intercept telecommunications and place surveillance devices to monitor private conversations; compel attendance at hearings, the production of documents and other things; and to compel responses to questions on oath in hearings conducted by the Commissioner.

While the Commission can make aspects of its assessments and investigations public, this will only be done when it is in the public interest to do so. In circumstances where no evidence exists to support an opinion that misconduct has or may have occurred, ordinarily the Commission will not make these aspects public. Other Australian law enforcement agencies take a similar approach.

Accordingly, in deciding whether it is in the public interest to release any material associated with an assessment, the Commission is required to weigh the benefits of public exposure and public awareness against the potential for prejudice and privacy infringements.

A decision that disclosure is not in the public interest involves a number of important considerations. These can include:

- the protection of the reputation and good standing of citizens;
- the importance of ensuring the appropriate protection of the privacy of citizens, including those who are required to testify before the Commission;
- the need to avoid the potential for prejudicing just outcomes in any criminal proceedings;
- the need to recognise the coercive nature of the hearings;
- the need to protect the integrity of the Commission's investigative methods and intelligence holdings; and
- the general prohibition against the disclosure of telephone interceptions by the *Telecommunications (Interception) Act 1979* ('TI Act').

The Commonwealth's TI Act contains a number of safeguards and controls in relation to interception and dealing with intercepted information. It generally prohibits any dealing with or disclosure of lawfully obtained information and designated warrant information other than in certain circumstances. For example, the Commission can only deal with lawfully obtained information for a 'permitted purpose'. In the Commission's case, a permitted purpose includes an investigation under the Act into misconduct as well as a report on such an investigation. The Commission is similarly empowered to give lawfully obtained information in evidence in its hearings. The Commission is empowered to communicate to, and receive lawfully obtained information from, other law enforcement agencies where the information relates to the jurisdiction and functions of those agencies, and where these agencies are prescribed pursuant to the TI Act.

In formulating this report, the Commission has considered the benefit of public exposure and public awareness weighed against the potential for prejudice and privacy infringements, including the constraints of the TI Act.

1.4 Parliamentary Inspector of the Corruption and Crime Commission

Should any person or body have concerns about whether the conduct of the Commission in this, or any other matter, is appropriate, it is open to them to bring such concerns to the attention of the Parliamentary Inspector.

The Parliamentary Inspector has wide-ranging and extensive powers of audit and access, including Royal Commission-type inquiry powers, when considering matters associated with the conduct of Commission officers and the Commission itself.

The Parliamentary Inspector's contact details are:

Mr Malcolm McCusker QC
Parliamentary Inspector
Box Z5110
PERTH WA 6831

Telephone: 08 9323 2222
Facsimile: 08 9325 3280

2. BACKGROUND

2.1 The origins of this report

On 22 February 2006, *The West Australian* ran a front-page story under the heading “Police Minister is the ‘Godfather’”. The story implied that the then Police Minister, Mr John D’Orazio MLA³, brokered a deal between Mr Adam Spagnolo⁴ and Mr Tony Drago⁵.

The alleged deal involved Mr Drago giving Mr Spagnolo’s son, Emilio, 50 percent of his carpet business in consideration of Mr Spagnolo’s pledge to provide the business with a lot of work from the building industry and the City of Bayswater, where he was employed.

Following the publication of this story, the Commission commenced an assessment of an allegation that Mr D’Orazio, as a public officer, engaged in misconduct because of his involvement in discussions concerning Mr Spagnolo using his position at the City of Bayswater to assist Mr Drago’s carpet business.

On 3 March 2006, after completing its assessment, the Commission published its opinion and decision at a public hearing.

This report to Parliament provides supplementary detail of the Commission’s assessment of an allegation concerning Mr D’Orazio.

2.2 Jurisdiction

The Commission has jurisdiction to deal with allegations of misconduct concerning public officers.

The Act defines “public officer” by reference to section 1 of the *Criminal Code*. Section 1 of the *Criminal Code* defines “public officer” to include “a member of either House of Parliament”.

On the date of the alleged misconduct, 25 August 2003, Mr D’Orazio was a member of the Legislative Assembly. For that reason the Commission had jurisdiction to deal with the allegation.

2.3 Allegation of misconduct

In dealing with alleged misconduct by public officers, section 26 of the Act enables the Commission to make a proposition about misconduct. The Act deems a proposition to be an allegation of misconduct.⁶ The Act requires the Commission to

³ Hereafter referred to as Mr D’Orazio

⁴ Hereafter referred to as Mr Spagnolo

⁵ Hereafter referred to as Mr Drago

⁶ Section 24

deal with an allegation of misconduct by assessing the allegation and forming an opinion under section 22 and making a decision on further action under section 33.⁷ Following the publication of the story in *The West Australian* on 22 February 2006, the Commission made a proposition about misconduct pursuant to section 26 of the Act. That proposition was in the following terms.

...that misconduct by certain public officers, arising out of a meeting between Pasquale Antonio Drago ('Mr Drago'), Adam Amadeo Spagnolo ('Mr Spagnolo') and John D'Orazio ('Mr D'Orazio') in about August 2003 and referred to in the evidence given by Mr Drago before the Commission on 14 June 2005, has or may have occurred.

The Commission formed a view that this allegation of misconduct against Mr D'Orazio, if sustained, concerned serious misconduct and accordingly dealt with the matter itself rather than referring it to the Speaker of the Legislative Assembly.⁸

In forming its opinion and making its decision when assessing allegations of misconduct, the Commission can use its coercive powers to assist in the assessment process. The Commission applied these processes in its assessment of the allegation concerning Mr D'Orazio. The range of decisions available to the Commission under section 33 of the Act include investigation of the allegation by the Commission itself, referral to another agency for investigation, or no further action.

It is important to note that one of the purposes of the Commission is to assess material that could suggest misconduct by a public officer. The fact that the Commission makes a proposition and commences an assessment does not mean that the Commission has formed any view as to whether misconduct has occurred, is occurring or will occur.

2.4 Assessment process

The assessment process took the following steps:

- (1) The Commission considered the testimony provided by Mr Drago and Mr Spagnolo at the Commission's public hearing in June 2005 concerning the tendering processes at the City of Bayswater.
- (2) It considered the information contained in *The West Australian* and other media outlets in February 2006.
- (3) The Commission reviewed its holdings, including material previously collected by the Official Corruption Commission ('OCC') and the Anti-Corruption Commission ('A-CC'). This review of holdings included a database search for, and review of any holdings with regard to Mr D'Orazio.
- (4) The Commission invited all three parties, namely Mr D'Orazio, Mr Spagnolo and Mr Drago, to be interviewed and each of those persons consented to be interviewed by Commission investigators.

⁷ Section 32

⁸ Section 27A of the Act requires an allegation of misconduct made against a member of the Legislative Council or Legislative Assembly, not being serious misconduct, to be referred to the presiding officer. In this case the allegation of misconduct concerns a member of the Legislative Assembly and the presiding officer is the Speaker. The clear intention of the Act is that the Commission deal with allegations of serious misconduct.

- (5) The Commission obtained and examined a recording of a conversation between Mr Spagnolo and Mr Robert Taylor provided by *The West Australian*.
- (6) The Commission conducted private hearings on Wednesday 1 March 2006 where Mr Drago and Mr D'Orazio were examined on oath by Counsel Assisting the Commission, Mr Brett Tooker.⁹

The Commission then considered all of this material, formed its opinion and made its decision.

⁹ For an explanation as to why Mr Spagnolo was not examined see section 3.5 below.

3. ASSESSMENT

3.1 City of Bayswater investigation

Upon the formal closure of the A-CC in May 2004, the Commission inherited all its investigations. One of these matters, known as Operation Athens, was transferred on 24 May 2004. This matter involved the investigation of allegations of misconduct against Mr Spagnolo, a councillor at the City of Stirling and an employee of the City of Bayswater.

As a part of its investigation, the A-CC had lawfully intercepted the telephone services of Mr Spagnolo, pursuant to telephone interception warrants.

As a result of its interception of Mr Spagnolo's telephone services, the A-CC intercepted a call made by Mr D'Orazio to Mr Spagnolo on 22 August 2003. The Commission understands that this call was reviewed and considered by the A-CC investigators.

No further action was taken by the A-CC at that time because there was nothing in the call that suggested any official corruption by either party. The A-CC continued to monitor Mr Spagnolo's telephone services but this did not reveal any evidence of misconduct involving Mr D'Orazio.

After the handover of Operation Athens, the Commission conducted a review of the investigation and held a public hearing in December 2004 focused on the allegations against Mr Spagnolo in the 2003 local government elections.

In following up a number of matters that arose from the public hearing, Commission investigators met Mr Drago, on 16 December 2004, who confirmed that Mr D'Orazio was a very close family friend who at Mr Drago's request had organised a meeting with Mr Spagnolo for the purposes of resolving a personal conflict between the two men.

As a result of the public hearings and its investigations, the Commission decided to *'make an assessment and form an opinion as to whether members, officers or employees of the City of Bayswater had or may have engaged in misconduct, with particular reference, but not limited to, the management and administration of contracts entered into by the City of Bayswater for the provision of goods and services to the City of Bayswater'*. This aspect of the investigation included a range of matters dating back to 1996.

In June 2005, the Commission conducted a public hearing into allegations of misconduct at the City of Bayswater. One of the persons called to give testimony was Mr Drago. He was called to give testimony in order to demonstrate that Mr Spagnolo had both a pecuniary and personal interest in Corporate Carpets¹⁰ and to demonstrate that Mr Spagnolo released details of competitors' quotes to Corporate Carpets while employed at the City of Bayswater in order to ensure that Corporate Carpets submitted the lowest quotes and could be awarded the contracts.

¹⁰ Corporate Carpets is Mr Drago's carpet business.

At no time prior to the public hearing in June 2005 did the Commission have cause to suspect that Mr D’Orazio had engaged in, was engaging in or intended to engage in misconduct.

3.2 City of Bayswater public hearing

3.2.1 Briefing Counsel Assisting for the hearing

In the period March to June 2005, the Commission prepared for the City of Bayswater public hearing and provided briefings to Counsel Assisting the Commission, Ms Patti Chong.

No mention was made of Mr D’Orazio as a person of interest, during the preparations for the hearing generally or to Counsel Assisting specifically, because he was not a person of interest.

There was no information available to the Commission, or provided to Counsel Assisting, to indicate that there was a ‘godfather’ figure linked to any of the matters relevant to the City of Bayswater hearing.

3.2.2 Mr Drago’s testimony at the public hearing

On 14 June 2005 Mr Drago gave testimony on oath about a business dispute between his business, Corporate Carpets, and a rival business being run by Emilio Spagnolo.¹¹ Mr Drago stated that Emilio was encroaching on his business. Thereafter there was this exchange between Mr Drago and Counsel Assisting the Commission, Ms Patti Chong¹².

Q: Then what did you do?

A: I met with somebody and we discussed it, and he said, “Call a meeting with Mr Spagnolo and we’ll sort - - -”

Q: Yes, who was the Godfather?

A: Just a friend.

Q: Right?

A: And we met together and we sorted out the dispute we had, and I accepted the 50 per cent. 50 per cent is better than nothing.

Q: Right, and on what terms did Mr Spagnolo offer to come on board?

A: Well, he said, that you know, “I’ll give you a lot of work. More than what you had before.”

¹¹ Emilio Spagnolo, the son of Adam Spagnolo, hereafter referred to as Emilio.

¹² City of Bayswater public hearing transcript 14/6/05 pp 114 -115.

Later in the examination the questioning returned to what Mr Spagnolo promised Mr Drago¹³.

Q: What did Mr Spagnolo, Adam Spagnolo, promise you?

A: That he would give us a lot of work.

Q: Where was that work going to come from?

A: People he knew in the industry, Bayswater council.

Q: Sorry?

A: Work from the council.

Q: Which council?

A: City of Bayswater.

The critical passage in all of this is Mr Drago's statement that "we met together and we sorted out the dispute we had, and I accepted the 50 per cent". That statement was not further explored by Counsel Assisting. The focus of the examination at that point was to determine Mr Spagnolo's personal interest in Corporate Carpets and to obtain information in relation to the number and value of contracts awarded to Corporate Carpets by the City of Bayswater.

3.2.3 The Commission's review of Mr Drago's testimony and its subsequent action

Following the public hearing, Commission investigators reviewed Mr Drago's testimony about the meeting and made further inquiries. The investigators identified the link between the meeting mentioned by Mr Drago in his meeting with them on 16 December 2004 and in his testimony at the June 2005 public hearing and in a lawfully intercepted telephone call made by Mr D'Orazio on 22 August 2003. The investigators reviewed the call again and after assessing all of the available material decided that there was no evidence to suggest any misconduct by Mr D'Orazio. Accordingly, no further action was taken.

3.2.4 Mr Spagnolo's testimony at the public hearing

At the public hearing on 15 June 2005, Mr Spagnolo testified that he negotiated with Mr Drago on behalf of his son Emilio.¹⁴ He did not say, and was not asked, whether these negotiations were conducted in the presence of Mr D'Orazio. Mr Spagnolo's testimony at the public hearing provided no evidence of misconduct by Mr D'Orazio.

¹³ City of Bayswater public hearing transcript 14/6/05 pp 116-117.

¹⁴ City of Bayswater public hearing transcript 15/6/05 pp 236-237.

3.3 Interviews

Following the story on the front-page of *The West Australian* on 22 February 2006, the Commission conducted further interviews with Mr Drago, Mr Spagnolo and interviewed Mr D'Orazio.

The following is a summary of what each told the Commission.

3.3.1 Tony Drago

Mr Drago told Commission investigators that the business dispute with Emilio put a strain on his relationship with Mr Spagnolo. As a result Mr Drago went to see Mr D'Orazio. He explained the problem to Mr D'Orazio and Mr D'Orazio suggested a meeting with Mr Spagnolo to sort it out. Mr D'Orazio telephoned Mr Spagnolo and the meeting took place soon after. At the meeting, Mr D'Orazio encouraged them to sort out their differences. Mr Drago and Mr Spagnolo then went outside where they discussed the business arrangements. Mr Spagnolo said he knew a lot of builders and worked at the City of Bayswater and would help them out. Mr Drago offered Emilio 50 percent of the business and they shook hands. It wasn't until four or five weeks later that Mr Drago told Mr D'Orazio about the 50/50 split.

Mr Drago denied that there was any discussion about work from the City of Bayswater in the presence of Mr D'Orazio.

3.3.2 Adam Spagnolo

Mr Spagnolo told Commission investigators that in early 2003 Emilio worked for Mr Drago in his carpet business but that he was not being paid properly. As a result Emilio went out on his own on about 1 July 2003. This caused Mr Drago some concern. Mr Drago offered Emilio 20 percent and then 30 percent of the business. Both offers were not accepted. Mr D'Orazio convened a meeting at the request of Mr Drago. Present at the meeting were Mr D'Orazio, Mr Drago and Mr Spagnolo. The meeting was about Emilio going off and working on his own. Mr Drago was concerned that his business was suffering. Mr Drago reiterated his previous offers of 20 percent and 30 percent. Mr D'Orazio indicated to Mr Drago that he needed to ensure that the proposition was fair and that if he wanted Emilio to return to work for him that he needed to make it attractive enough for Emilio to return. Mr Drago then mentioned the figure of 50 percent. Mr Spagnolo said that through his contacts in the community they could have a good business together. At the end of the meeting it was left for Mr Drago to consider his position and get back to Mr Spagnolo with an offer. Four or five weeks later Mr Drago called Mr Spagnolo and offered his son Emilio a 50 percent stake in the business. This offer was accepted and in September/October 2003 the two businesses amalgamated.

Mr Spagnolo told the investigators that all the discussions took place in Mr D'Orazio's presence inside his office. However, he denied promising to assist Mr Drago through his position at the City of Bayswater during that meeting.

3.3.3 John D’Orazio

Mr D’Orazio told Commission investigators that Mr Drago came to his office upset. Mr Drago wanted Mr D’Orazio to talk to Mr Spagnolo. Mr D’Orazio rang Mr Spagnolo and asked him to come down to his office, which he did. All three men were present in Mr D’Orazio’s office. Mr Spagnolo was clearly angry at Mr Drago. Accusations flew for about 15-20 minutes. The two men then went outside and spoke for a long time.

Mr D’Orazio stated that no deals were brokered in his office; that there was no discussion of amalgamation; and that there was no discussion of what Mr Spagnolo could offer Mr Drago.

Mr D’Orazio denied that there was any discussion about City of Bayswater contracts in his presence.

3.4 Private hearings

On 1 March 2006, Mr Drago and Mr D’Orazio were each summonsed to appear before the Commission for a private hearing. Both men attended and were examined on oath by Counsel Assisting the Commission, Mr Brett Tooker.

The following is a summary of the testimony that each gave.¹⁵

3.4.1 Tony Drago

At the private hearing, Counsel Assisting showed Mr Drago the relevant portion of his testimony from the public hearing on 14 June 2005. In particular he was asked to explain the statement that, “we met together and we sorted out the dispute we had, and I accepted the 50 per cent”. He told the Commission that the three of them had a meeting where personal issues were discussed. His testimony was that Mr D’Orazio encouraged them to sort out their differences. Mr Spagnolo and Mr Drago then went outside and this is where Mr Drago says that the business arrangements were discussed and the dispute sorted out. His testimony was that he agreed to the 50 percent and the two men shook hands.

Mr Drago’s testimony on oath was consistent with what he told the investigators during his interview.

Mr Drago’s testimony does not contradict what he said at the public hearing.

¹⁵ The Commission has decided that it is not in the public interest to disclose the transcripts of these private hearings. The decision to disclose the transcript of a private hearing is akin to the decision to open an examination to the public under section 140(2) of the Act. Accordingly, in deciding whether to release the transcripts the Commission is required to weigh the benefits of public exposure and public awareness against the potential for prejudice and privacy infringements. The Commission is also cognisant of the present criminal proceedings against Mr Spagnolo and the potential for disclosure to prejudice a just outcome in that case.

3.4.2 John D’Orazio

Mr D’Orazio denied that any business arrangements were discussed at the meeting. He also categorically denied that Mr Spagnolo talked about using his position at the City of Bayswater to assist Mr Drago.

Mr D’Orazio’s testimony on oath was consistent with what he told the investigators during his interview.

3.5 The decision not to conduct an examination of Mr Spagnolo

Although Mr Spagnolo was initially summonsed and in fact appeared at the Commission on 1 March 2006, the Commission decided that it would not proceed with a sworn examination of Mr Spagnolo due to the High Court’s ruling in the case of *Hammond v Commonwealth of Australia* (1982) 42 ALR 327. In that case Brennan J, at 337, said that “it is a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged”.

The proposed examination of Mr Spagnolo would almost certainly have touched on issues relevant to the criminal proceedings that he presently faces. Because of that, and because Mr Spagnolo appeared without legal representation, the Commission took the view that it was not appropriate in this instance to compel him to answer questions on oath.

3.6 Lawfully obtained telecommunication interception

After the story appeared on the front page of *The West Australian* on 22 February 2006, and as a part of its assessment, the Commission again reviewed its holdings in relation to Operation Athens and Mr D’Orazio. Two telephone calls of interest were identified and considered.¹⁶

3.6.1 Call from Mr D’Orazio to Mr Spagnolo on 22 August 2003

On Friday 22 August 2003, Mr D’Orazio called Mr Spagnolo from his electoral office in Morley. The Commission is satisfied that this call was made after Mr D’Orazio received a plea for assistance from Mr Drago. It appears from Mr Spagnolo’s own words in that recorded conversation that the association broke down because of what Mr Spagnolo saw as the unfair treatment of his son Emilio by Mr Drago. Emilio had gone to work for Mr Drago as a driver when Mr Drago’s licence was suspended and

¹⁶ Because of the general prohibition against the disclosure of lawfully obtained information in the TI Act, the Commission will only disclose such material where it is permitted to do so *and* where it is necessary to do so in the public interest. The TI Act permits the Commission to make use of lawfully obtained information for the purposes of a report on an investigation into misconduct. Accordingly the Commission is able to use lawfully obtained information for the purposes of this report. In this instance the Commission considers it necessary to provide a summary of the two telephone calls so that its opinion and decision can be properly understood. However, the Commission has decided that it is not necessary in the public interest to disclose the recordings of these conversations. This decision recognises the private nature of the conversations and the general prohibition against disclosure in the TI Act.

was assisting him generally in his business. It was Mr Spagnolo's claim that Emilio had not been properly paid and was being taken advantage of. Throughout this telephone call it is clear that Mr D'Orazio is attempting to mediate between Mr Spagnolo and Mr Drago, whose longstanding personal and family relationship going back many years had seriously broken down, and suggested the parties meet for a coffee.

The Commission is of the opinion that this telephone call does not provide any evidence of misconduct. This call supports Mr D'Orazio's version of events in that there was absolutely no discussion about City of Bayswater contracts or any other matter indicative of misconduct.

3.6.2 Call from Mr D'Orazio's secretary to Mr Spagnolo on 25 August 2003

On Monday 25 August 2003, Mr D'Orazio's secretary called Mr Spagnolo to arrange a time for a meeting. A time of 3pm was suggested. Mr Spagnolo said that he would 'reluctantly' attend. Again, the Commission is of the opinion that this telephone call does not provide any evidence of misconduct.

The Commission is satisfied that the meeting in question took place on Monday 25 August 2003 at Mr D'Orazio's electoral office in Morley.

3.7 Information supplied by *The West Australian*

During the assessment, the Commission wrote to the editor of *The West Australian* requesting information that might assist in forming its opinion. The Commission was subsequently provided with a tape-recorded conversation between Robert Taylor, a journalist at *The West Australian*, and Mr Spagnolo.

During that conversation Mr Taylor questions Mr Spagnolo about the meeting. Mr Spagnolo tells him that when Mr D'Orazio realised that Emilio was not getting a good deal, Mr D'Orazio hinted to Mr Drago that he had to consider making it worth Emilio's while. Crucially, Mr Spagnolo denied (in the face of a direct question) that they discussed City of Bayswater contracts at the meeting.

3.8 Information contained in the media

Following the story on the front-page of *The West Australian* on 22 February 2006, a number of media outlets published stories relevant to this matter. The Commission monitored those stories and considered them as a part of its assessment. Of particular interest were stories that quoted statements made by the three men who attended the meeting. After consideration, the Commission concluded that the statements of each of the three men to the media were consistent with what they had told the Commission. Importantly, none of the media stories quoted any of the three men saying that City of Bayswater contracts were discussed during the meeting on 25 August in Mr D'Orazio's office.

3.9 Review of the use of the term 'godfather'

In the period 22 to 24 February 2006, as a result of the story in *The West Australian*, Commissioner Hammond reviewed the transcript of the City of Bayswater public hearings and met CCC investigators. As a result, the Commissioner concluded positively that Counsel Assisting's 'godfather' remark was not based on any knowledge that Mr D'Orazio was involved in any misconduct or that there was any suggestion that a 'godfather' figure existed or was involved in matters associated with the City of Bayswater investigation.

Ms Chong readily acknowledges that her use of the term 'godfather' was a throwaway line.

4. OPINION AND DECISION

4.1 Review of the material

In making its assessment the Commission considered all of the relevant material in order to determine whether misconduct “has or may have occurred”, as required by section 22 of the Act.

It is the sworn testimony of both Mr D’Orazio and Mr Drago that once there had been a degree of personal mediation facilitated by Mr D’Orazio in his office, that the two parties, that is Mr Drago and Mr Spagnolo, went outside. It is the sworn testimony of Mr Drago that the two men discussed the business arrangements outside.

Mr Spagnolo’s statement is inconsistent with the testimony of Mr D’Orazio and Mr Drago. Mr Spagnolo told the Commission that the meeting was about Emilio going out on his own and that the three men did discuss the business arrangements in the presence of Mr D’Orazio.

Clearly then there is a divergence as to whether or not the business arrangements were discussed inside Mr D’Orazio’s office.

Crucially, however, Mr Spagnolo denies that he promised to assist Mr Drago through his position at the City of Bayswater during the meeting, or at all.

In all of the circumstances of this case it is not necessary, nor appropriate¹⁷, for the Commission to resolve this inconsistency.

The Commission’s opinion as to whether or not misconduct may have occurred in the dealings between Mr D’Orazio, Mr Drago and Mr Spagnolo does not depend on whether or not discussions about business dealings or the split up of Corporate Carpets occurred in Mr D’Orazio’s presence, as, in the final analysis, this is a commercial concern and not related to whether public sector misconduct occurred.

The crucial issue, with regard to public sector misconduct, is whether there was any discussion, involving Mr D’Orazio, of Mr Spagnolo using his position at the City of Bayswater to assist Mr Drago’s carpet business.

An assessment of all of the material available to the Commission reveals no evidence of any discussion between Mr Drago and Mr Spagnolo that involved Mr D’Orazio about Mr Spagnolo using his position at the City of Bayswater to assist Mr Drago’s carpet business. It follows that there is no evidence to support a proposition that any improper, illegal or corrupt deals were discussed during the meeting between the men or at any other time involving Mr D’Orazio.

On a proper consideration of the definition of misconduct in section 4 of the Act, it is the Commission’s opinion that the available evidence reveals no misconduct on the part of Mr D’Orazio during, or arising from, the meeting at his office on 25 August 2003.

¹⁷ The Commission is acutely aware of the present criminal proceedings against Mr Spagnolo and the potential for any premature assessment of the credibility of the witnesses to prejudice a just outcome in that case.

4.2 Formal statement of the Commission's opinion

On the material before the Commission, and following the Commission's assessment of that material, the Commission's opinion is that there is **no evidence that Mr D'Orazio engaged in misconduct** during the meeting at his office on the 25 August 2003 or at any other time in relation to the business arrangements between Mr Spagnolo and Mr Drago.

4.3 Decision

Having formed its opinion, the Commission made a decision to take no action pursuant to section 33 of the Act with regard to the allegation of misconduct concerning Mr D'Orazio.

5. ANCILLARY MATTERS

As a result of the Commission's assessment of the allegation concerning Mr D'Orazio, the Commission has had regard to a number of ancillary matters.

5.1 The use of the term 'godfather'

The term 'godfather' was used by Counsel Assisting the Commission at the City of Bayswater public hearing in June 2005 to ask Mr Drago who had arranged the meeting between Mr Drago and Mr Spagnolo.

It should be noted that:

- neither the Official Corruption Commission nor Anti-Corruption Commission held any evidence that Mr D'Orazio was involved in misconduct;
- in briefing Counsel Assisting, Ms Chong, for the June 2005 Bayswater public hearing, the investigators did not name Mr D'Orazio as a person of interest and no suggestion was made that there was a 'godfather' figure; and
- following the June 2005 City of Bayswater public hearing, and Mr Drago's statement of Mr D'Orazio's involvement in resolving the breakdown in Mr Drago and Mr Spagnolo's relationship, a further review of the Commission's holdings found no evidence of misconduct involving Mr D'Orazio.

In the Commission's opinion, the use of the term 'godfather' was, in the context of the Bayswater hearing, inappropriate. It had no basis in fact and enabled an incorrect inference to be drawn that suggested the existence of some form of conspiracy involving either Mr D'Orazio or some other 'godfather' figure.

5.2 Disclosure of material

In making this report it is the Commission's opinion that it is not in the public interest to disclose transcripts of private hearings and transcripts of lawfully obtained telephone interceptions associated with this assessment of the allegations concerning Mr D'Orazio.

Consequently, the Commission has decided not to publish them.