



Report into the Road Safety Commission and an allocation of funds to Western Force

13 December 2018



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CHAPTER ONE

Introduction and overview

- [1] In 2014, the Government received a report from Mr P Browne 'A Review of Road Safety Governance in Western Australia'. The Browne Review made a series of recommendations, and in its response the Government adopted a Commissioner model as recommended by Mr Browne. The Road Safety Council was to be abolished by legislation and replaced by a Road Safety Commission.
- [2] The Road Safety Commission was a short lived Government department existing for two years from 1 July 2015.¹ Although the Government established a department under the *Public Sector Management Act 1994*, no legislation was advanced to transfer the powers of the Road Safety Council to the department which was called the Road Safety Commission.
- [3] Mr Kim Papalia, who had a 32 year career in the Police Force, including experience in road traffic matters, was the head of the department. He was referred to as the Road Safety Commissioner and was the first person to occupy this position.
- [4] As head of the Road Safety Commission, Mr Papalia was required to assist the Minister in the administration of the *Road Safety Council Act 2002* (RSC Act). He was also appointed Chair of the Road Safety Council.
- [5] The Road Safety Commission did not take over the Road Safety Council's statutory functions, including a function to make recommendations to the Minister as to how Road Trauma Trust Account (RTTA) funds should be allocated.²
- [6] While Mr Papalia was Chair of the Road Safety Council, he did not wield power in his own right. The Council was a separate body to the Road Safety Commission and comprised of 12 appointed members, mainly but not exclusively, from senior ranks within Government departments.
- [7] Hundreds of millions of dollars go into the RTTA each year. The money in the account is mainly from photographic traffic fines. Funds are required to be allocated in accordance with the RSC Act to advance road safety initiatives.

¹ On 1 July 2017 the Road Safety Commission was transitioned into a portfolio of the WA Police Force that reports to the Minister for Road Safety.

² *Road Safety Council Act 2002* ss 5, 6A, 12.

- [8] Mr Papalia orchestrated the redirection of some of the 2016/17 RTTA funds to Western Force without Council members' knowledge. Initially Mr Papalia was considering sums of up to \$6m for Western Force over a four year period.
- [9] As part of the 2016/17 RTTA budget, \$14.5m of \$177m funds were allocated to a Main Roads project - the Electronic School Zone Sign project.
- [10] By January 2017, Main Roads did not expect to use all the allocated money for this project before 30 June 2017. Some other RTTA funded projects and programs were in the same position. This was commonly termed "underspend".
- [11] Mr Papalia, in his capacity as Road Safety Commissioner, recommended the redirection of \$1.5m of "underspend" to the Western Force Rugby Union owned club at a time when the team was in dire straits. The recommendation was made shortly before the State election and without consultation with the Council.
- [12] The Minister accepted Mr Papalia's recommendation just before the Government went into caretaker mode before the State election.
- [13] These matters were scrutinised by the Special Inquiry into Government programs and projects within its broad terms of reference, which included scrutiny of the merits of the Road Safety Western Force partnership.
- [14] The evidence of Mr Papalia and the Road Safety Commission Director of Operations and Programs, Mr Chris Adams, at the Special Inquiry amplified the Special Inquirer's concerns about the allocation of RTTA funds to Western Force, which he considered was possibly unlawful.
- [15] The Special Inquiry into Government Programs and Projects expressed concerns about the Road Safety Commission's role in facilitating \$1.5m of RTTA funds to Western Force.
- [16] At the conclusion of the Special Inquiry, allegations that serious misconduct had or may have occurred were referred to the Commission.
- [17] The allegations and supporting material were assessed. There were sufficient confirmatory materials to generate a reasonable suspicion that serious misconduct had or may have occurred. These included:
- the timing of the decision to redirect RTTA funds to Western Force;

- indicators of possible political pressure or interference in the process;
- the quantum of funds in question;
- the possible unlawful allocation of funds;
- the exclusion of Council from mandatory statutory processes;
- the unsatisfactory evidence of Mr Papalia and Mr Adams at the Special Inquiry; and
- concerns about inaccurate information being given to the Minister.

[18] The Commission conducted an investigation using the Commission's investigatory and coercive powers under the *Corruption, Crime and Misconduct Act 2003* (CCM Act) together with conventional investigative techniques. In the absence of a corrupt intent or serious criminal conduct, the Commission does not digress into assessing the merits or value of projects or programs.

[19] Prior to appointment as Road Safety Commissioner, Mr Papalia had been Director of Operations at the Corruption and Crime Commission. He was seconded to the Public Sector Commission to assist in the establishment of the Road Safety Commission before the present Corruption and Crime Commissioner assumed office.

[20] The investigators and Counsel assisting the Commission in examinations were engaged after Mr Papalia had left the Commission.

[21] The Commission's investigation uncovered no evidence that:

- any public officer had a corrupt intent or engaged in serious misconduct in connection with the redirection of \$1.5m of RTTA funds to Western Force; or
- there was express, implied or subtle political pressure or interference to provide RTTA funding to Western Force.

[22] Rather, the investigation identified a tension between the legislative scheme in place under the RSC Act and the Government's road safety agenda articulated in the Browne Review.³

[23] This created a difficult environment for the Road Safety Commission and Mr Papalia to operate effectively. A more diligent head of department would ensure proper processes were followed in the allocation of RTTA

³ Government of Western Australia, P Browne, A Review of Road Safety Governance in Western Australia (2014); Office of the Auditor General, Managing the Road Trauma Trust Account, Report 15 (2012).

funding under the RSC Act rather than pre-empting anticipated legislative changes recommended by the Browne Review.

- [24] Mr Papalia was not up to the task at hand. He excluded the Council from mandatory statutory processes which led, in the Commission's opinion, to the Minister acting beyond her statutory power when allocating the entire 2016/17 RTTA budget. This was despite Council members raising concerns with Mr Papalia about their position to discharge their obligations under the RSC Act.
- [25] The exclusion of Council, in the Commission's opinion, invalidated the redirection of RTTA funds allocated to Main Roads for the Electronic School Zone Signs project to the Road Safety Western Force partnership.
- [26] The Commission does not form an opinion of serious misconduct lightly. It must be satisfied that there is an element of corruption in misconduct as defined in the CCM Act s 4(a) and (b).
- [27] The evidence suggests Mr Papalia appeared intent on implementing the Browne Review recommendations endorsed by Cabinet, and which sought to address concerns with the management of road safety in WA. This led Mr Papalia to exclude Council from performing its mandatory role under the RSC Act and failing to discharge his role as Council Chair. His conduct does not amount to corrupt conduct or serious misconduct. Whether it amounts to something less than serious misconduct, such as a disciplinary matter, is not for this Commission to explore. It has no jurisdiction to do so.
- [28] The Commission forms no opinion of serious misconduct of Mr Papalia and Mr Adams.

CHAPTER TWO

Why the Commission investigated

- [29] The Special Inquiry reported on the Road Safety Commission's \$1.5m RTTA funded partnership with Western Force.⁴ The report was critical of Mr Papalia and Mr Adams. It also expressed concerns that RTTA funds allocated to Western Force were possibly unlawful.⁵
- [30] These matters were brought to the attention of the Commission. The Public Sector Commission also raised concerns with this Commission about whether Mr Papalia or Mr Adams had made false or misleading statements in their evidence to the Inquiry.
- [31] The *Public Sector Management Act 1994* creates offences for refusing to answer questions, hindering a special inquirer or providing false or misleading statements.⁶
- [32] The Commission does not have jurisdiction to investigate any alleged offences under the *Public Sector Management Act 1994* as they are not within the definition of serious misconduct.⁷
- [33] The Commission has a serious misconduct function.⁸ Serious misconduct encompasses a public officer:
- corruptly acting or failing to act in the performance of the functions of their office or employment;
 - corruptly taking advantage of their office or employment to obtain a benefit for himself or for another person or to cause a detriment to any person; or
 - while acting or purporting to act in his official capacity, commits an offence punishable by two or more years' imprisonment.

⁴ Government of Western Australia, Special Inquiry into Government Programs and Projects: Final Report (2018) Volume 2 pp 569-589.

⁵ Ibid pp 571, 588.

⁶ See *Public Sector Management Act 1994* s 24(2), Schedule 3, cl 3(4)(b) and 5.

⁷ The maximum penalties for these *Public Sector Management Act 1994* offences are below the threshold to invoke the Commission's jurisdiction to investigate suspected serious misconduct in and of itself: CCM Act s 4(c).

⁸ CCM Act s 18.

[34] The Commission considered the Special Inquirer's Final Report as it related to the Super Rugby partnership. Furthermore:

- the position taken by Mr Papalia and Mr Adams at the Special Inquiry, including Mr Papalia refusing to answer questions about critical issues concerning the allocation of RTTA funds;
- limited information that left open the inference of improper political interference;
- the quantum of the funds in question;
- the Special Inquirer's opinion that the allocation of funding was 'possibly unlawful' and his finding that the funding 'was likely beyond the provisions of the [RSC Act]';
- the exclusion of Council from the Minister's decision making processes; and
- concerns that inaccurate information provided to the Minister or Minister's office were to advance an improper purpose,

provided sufficient confirmatory material to generate a reasonable suspicion that serious misconduct had or may have occurred. The Commission commenced an investigation under the CCM Act Pt 3.

[35] The Commission conducted a comprehensive investigation including private examinations of Mr Papalia and Mr Adams.

[36] The Special Inquiry had concerns about the possible unlawfulness of allocating \$1.5m of RTTA funding to the Road Safety Western Force partnership. In the Commission's opinion, these concerns are justified.

[37] Council had no role in recommending \$1.5m of 2016/17 RTTA allocated funds be taken from one business case/project and given to Western Force. Consequently, the Commission investigated the purported approved RTTA 2016/17 budget in excess of \$177m.

[38] The purpose of examining the 2016/17 RTTA budget was to ascertain whether the original allocation was in accordance with statutory requirements. As elaborated upon later in this report, in the Commission's opinion, the purported allocation of the RTTA 2016/17 budget was vitiated by legal error meaning the Minister's determination to allocate in excess of \$177m was beyond power. This error was due to Mr Papalia's conduct in excluding the Council from making recommendations to the Minister.

- [39] The evidence obtained during the investigation does not directly or inferentially point towards Mr Papalia (or Mr Adams) having acted corruptly. Moreover, both Mr Papalia and Mr Adams were more forthcoming in examinations before the Commission compared to their appearances before the Special Inquirer.
- [40] A draft of this report was made available to Mr Papalia and Mr Adams.⁹ Neither made any response. A draft was also made available to the Hon Lisa Harvey who was Minister for Road Safety at the time, her responses have been considered and, where appropriate, incorporated into this report.

⁹ CCM Act s 86.

CHAPTER THREE

Road Safety Commission and Road Safety Council

Background

- [41] On 1 July 2015, the Road Safety Commission was established as a stand-alone Government department.
- [42] It replaced the Office of Road Safety which had been part of Main Roads WA and earlier, other Government departments.
- [43] The establishment of a Commissioner of Road Safety was a key recommendation of the Browne Review. Other recommendations, in so far as they concerned legislative change to the RSC Act, did not eventuate.
- [44] Mr Papalia described the structure of the Road Safety Commission:

So we had the Commissioner, the second tier was two Directors and, assisting the two Directors was the Executive Officer and the CFO; so that third tier formed the Corporate Executive.

Then you had operational levels under each of the directorates. So there was business teams sitting under each of the directorates ...¹⁰

Appointment of the Road Safety Commissioner and Chair of Road Safety Council

- [45] Mr Papalia was appointed as the first Road Safety Commissioner on 28 October 2015 for a term of five years. At around the same time, he was appointed Chair of the Road Safety Council. This was to be an interim appointment pending the abolition of the Council. As it happened, the Council was not abolished.
- [46] Mr Papalia previously acted in the role of Commissioner from the time the Road Safety Commission was established on 1 July 2015.
- [47] Mr Papalia had a 32 year WA Police Force career where he had gained some experience in road traffic matters.
- [48] The Road Safety Commissioner title was attributed to Mr Papalia's position but the duties and functions of the position were not enshrined in statute. Rather, he was a special division CEO under the *Public Sector Management Act 1994* and, in effect, the department head/CEO of the newly formed department.

¹⁰ K Papalia transcript, private examination, 8 October 2018, p 88.

[49] As head of a department, Mr Papalia had an important responsibility to provide accurate advice to the Minister and ensure she discharged her functions under legislation.¹¹

[50] Mr Papalia explained the context of the conflicts of interest that arose on the Council leading to the proposed change:

So preceding the establishment of the Road Safety Commission, the [Office of the Auditor General] officer or the general made a report in November 2012 highlighting significant concerns around the conflict of interest of the beneficiaries from the RTTA, creating business cases for the RTTA, the allocation. Government at the time I think implemented or established a review that was undertaken by Peter Browne. Peter Browne's final report in late 2014, I can't remember the date but it was late 2014, highlighted continuing concerns about that conflict of interest. So we certainly - cabinet ultimately made a recommendation decision in - and I do remember that date, that was 18 March 2015 where a cabinet decision said that we will implement the 56 recommendations. That's the context in terms of where did this concern about conflict of interest arise.¹²

[51] Mr Papalia was concerned about conflicts of interest that Council members had due to their roles with agencies that applied for RTTA funding. These were issues that the Minister's office recognised and were for the Road Safety Commission to try to resolve:

Were those matters about conflicts of interest raised in any communications you had with the Minister?---The minister was certainly aware of the continuing conflict, in conversation with the Minister when I first came into the space, and probably more pertinently the Minister's policy officer.

... In relation to those challenges and the direction, so we've got to do something.

So is she indicating how she would like things done in the department?---No. She indicated that this is an issue, and then over to the department to try and resolve that issue.

And she highlighted that specific issue of conflicts of interest in Council?---It was certainly relevant during both establishment and then once we were established. I was part of the shaping of what we needed to respond to.¹³

Role of the Road Safety Council Chair

[52] Council had clearly defined functions under the RSC Act. They were required to make recommendations to the Minister for Road Safety as to how to spend money held in the RTTA.¹⁴

[53] Mr Papalia's role as Chair of the Road Safety Council was a statutory position. His role and responsibilities were documented.

¹¹ K Papalia transcript, private examination, 8 October 2018, p 4.

¹² K Papalia transcript, private examination, 8 October 2018, pp 9-10.

¹³ K Papalia transcript, private examination, 8 October 2018, p 16.

¹⁴ RSC Act ss 4-6, 12.

- [54] One responsibility was the "[c]ommunication of Council recommendations".¹⁵
- [55] The Council's Governance Charter sets out procedures for its meetings.¹⁶ These included a process relating to decision making where consensus could not be reached; and voting.¹⁷
- [56] Council recommendations could be made under the RSC Act in one of two ways:
- a recommendation from the Council to the Minister; or
 - a recommendation from the Council in response to a Ministerial direction.¹⁸
- [57] A critical and mandatory role of the Council concerned making recommendations to the Minister as to the expenditure of money in the RTTA.¹⁹
- [58] RTTA funds are substantial, deriving from, amongst other monies, all penalties from photographic based infringement notices issued in WA.
- [59] The 2016/17 RTTA account budget was over \$177m.
- [60] The Minister for Road Safety was required by law to have regard to the recommendations of the Council. If a Minister does not have regard to Council's recommendation, a decision to apply monies may be beyond power, and if so the decision may be invalid.
- [61] When Mr Papalia communicated purported recommendations to the Minister about allocating RTTA funds, a reasonable inference to draw was that he had the authority to speak on behalf of the Council. However, in respect of the RTTA 2016/17 allocated budget and the Western Force partnership agreement, this was not the case.
- [62] The RSC Act, as legislation, had not been amended to align with recommendations made in the Browne Review and the Government's agenda on road safety governance. The consequence was Council retained a mandatory role in the determination of how monies standing to the credit of the RTTA could be applied, notwithstanding the creation of the new department and the appointment of the Road Safety Commissioner.

¹⁵ Government of Western Australia, Road Safety Council, Report on Activities 2016/17, p 11.

¹⁶ RSC Act s 11.

¹⁷ Government of Western Australia, Road Safety Council, Governance Charter, p 6.

¹⁸ RSC Act ss 5(f), 5(g), 6A, 12(6).

¹⁹ RSC Act s 12.

CHAPTER FOUR

2016/17 Road Trauma Trust Account budget: Was it authorised?

- [63] Having regard to the requirements of the RSC Act and the new structure of the Road Safety Commission unsupported by legislation, issues arise:
- whether the RTTA budget allocation was in accordance with the RSC Act; and
 - whether the Road Safety Commissioner placed the Minister in a position to have regard to Council recommendations prior to applying RTTA funds.

Background

- [64] Shortly after being appointed Commissioner, Mr Papalia decided he would bring about a change in practice in the RTTA budget process from previous years.²⁰
- [65] This significantly impacted on Council's role in the budget process.
- [66] No changes to the RSC Act occurred to justify a change to Council's mandatory statutory role in making recommendations to the Minister about how to apply for RTTA funds.
- [67] In bringing about change, Mr Papalia:
- limited Council's role to identifying priority areas at an annual planning day in July 2015 in order to inform priority areas for the 2016/17 RTTA budget allocation; and
 - excluded members of Council seeing papers concerning the RTTA budget before the papers went to relevant Ministers.

Mr Papalia's explanations

- [68] Mr Papalia was questioned about limiting Council's role to identifying priority areas for road safety:

... there's some information and questions that I've been putting to you that suggests that the Minister may have approved the 2016-17 budget without regard to Council's recommendations? ...

Or whether there was a recommendation at all?---Well, perhaps if I can answer it in this manner. If you refer to that document you showed me before on page 13-14, this document. The budget highlighted around the RTTA, in the dark blue rows,

²⁰ K Papalia transcript, private examination, 8 October 2018, pp 6-8.

are those strategic priorities that Council made recommendation to, and that the Minister authorised them to have agreed, and that was through that workshopping process. They were the strategic priorities.

And your suggestion is that the fact that you had a planning day where those were spoken about, and that got its way into the budget papers which Council didn't see, that they were ultimately recommendations from Council?---They were recommendations from Council.²¹

[69] Mr Papalia's suggestion that the identification of priority areas at a planning day in July 2015 were amplified into Council recommendations under the RSC Act submitted in December 2015, lacks plausibility.

[70] The identification of road safety priority areas at a planning day are not recommendations to the Minister. There is no record of a Council recommendation going to the Minister.

[71] Council was excluded from seeing papers concerning the RTTA 2016/17 budget before they were presented to the Minister.

[72] Mr Papalia explained why he excluded Council from seeing RTTA 2016/17 budget papers:

I'm trying to work out what the motive is on your part from excluding Council from seeing the budget papers before they went to the Minister?---It might be helpful if I could explain some of the context. So preceding the establishment of the Road Safety Commission, the OAG officer or the general made a report in November 2012 highlighting significant concerns around the conflict of interest of the beneficiaries from the RTTA, creating business cases for the RTTA, the allocation. Government at the time I think implemented or established a review that was undertaken by Peter Browne. Peter Browne's final report in late 2014, I can't remember the date but it was late 2014, highlighted continuing concerns about that conflict of interest. So we certainly - cabinet ultimately made a recommendation decision in - and I do remember that date, that was 18 March 2015 where a cabinet decision said that we will implement the 56 recommendations. That's the context in terms of where did this concern about conflict of interest arise.

So cabinet has endorsed the recommendations. What did they do from a legislative point of view?---Part of the recommendation was that we were to make legislative change.

And did that ever occur?---No.

And you accept that until that occurs, you've got to comply with the legislation?---And we did, yes.²²

²¹ K Papalia transcript, private examination, 8 October 2018, pp 9-10.

²² K Papalia transcript, private examination, 8 October 2018, p 10.

- [73] Mr Papalia's decision in changing the RTTA budget approval process led to the Minister determining that \$177m may be applied to six identified business cases.
- [74] Because of Mr Papalia's actions, the Minister did not have before her a valid Council recommendation.
- [75] Several Council members expressed concern to Mr Papalia that his changes in practice did not comply with the RSC Act.
- [76] Council members made statements along these lines:
- Council had not been consulted or advised of the recommended budget prior to it going to the Ministerial Council for approval as it had been in previous years.
 - Council's role in accordance with the RSC Act had been ignored.
 - Local Government no longer had an opportunity to provide input.
 - Concern on adequate governance with the Council not having access to budget papers or assessments.
 - Business cases and project submissions have not been made visible to all Council members at Council meetings.²³
- [77] Mr Papalia justified changing the practice (**emphasis added**):
- And why did you bring about the change in practice?---Because of the identified conflict of interest between beneficiaries of the RTTA creating the business case that the minister relied on to make a decision. So to remove those, mitigate that conflict of interest, we created a practice where - **and it was an accepted practice where Council would make consideration of strategic priorities. Business cases would align to those strategic priorities, and the Minister could consider those independent of that conflicted interest.***²⁴
- [78] Mr Papalia stated the Road Safety Commission had legal capability in a practising lawyer on staff.
- [79] It would have been prudent to seek advice from the State Solicitor's Office.
- [80] The Road Safety Commission did not seek advice from the lawyer as to how the RSC Act ss 6A and 12(6) operated. These sections made it plain that the Minister was to have regard to Council's recommendations.

²³ Road Safety Council, Meeting Minutes, Thursday 26 November 2015, pp 2-3.

²⁴ K Papalia transcript, private examination, 8 October 2018, p 8.

[81] Consequently, Mr Papalia's conduct in bypassing Council meant the Minister may have been led into a legal error when she determined to allocate over \$177m from the RTTA to fund business cases and projects in the proposed budget 2016/17.²⁵

[82] In the Commission's opinion, the determination to apply RTTA funding for 2016/17 was not in accordance with statutory requirements and therefore beyond the power of the Minister.

[83] This has a corresponding impact on the authority to shift allocated underspend on the basis of the 2016/17 budget between approved business cases or projects in 2016/17. The allocation was not capable of being authorised in the absence of a Council recommendation.

[84] While the investigation revealed issues with Mr Papalia excluding Council, the explanations he gave and other evidence available, fall short of demonstrating he did this with a corrupt intent or engaged in serious misconduct.

[85] Mr Papalia answered questions about the conflict between the Government's agenda and the legislative context:

Was the legislation adequate to cope with the transition?---Ultimately, the legislation needed to change. We were working in a legislative framework that really didn't suit the environment, so we were starting to just - - -

When you say "the environment," is that effectively - - - ?---Operational.

- - - that's what was happening, that the Commission, the extension of the Commission?---Yes. Well, the Commission wasn't even envisaged in the legislation, so - - -

So you had the legislative framework which you needed to abide by, but at the same time, you had a Commission that had been set up which effectively was taking the hands-on role in relation to road traffic issues?---Well, yeah, fundamentally, I, in taking over the - the role as the Commissioner, Road Safety, accepted that it was my responsibility to make a difference on the outcomes on our roads. Until then, you know, candidly, I think it was everyone cared but no-one's responsibility.²⁶

[86] This evidence of Mr Papalia does not evince an intention to be corrupt. He appears to have been trying his best to implement Government policy. But in doing so, he failed to take sufficient account of the existing legislation.

²⁵ *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)*(2008) 107 ALD 260, 289.

²⁶ K Papalia transcript, private examination, 8 October 2018, pp 82-83.

CHAPTER FIVE

The Road Safety Western Force partnership

Background

- [87] Western Force is a Rugby Union team based in Perth. References to Western Force are to the organisation that existed in 2016/17. That Western Force was a Rugby Union team owned by the Australian Rugby Union.
- [88] The Western Force Rugby Union team made contact with the Road Safety Commission in June 2016. This was clearly because of the financial strain on Western Force at that time.²⁷
- [89] Mr Adams is the Director of Operations at the Road Safety Commission and manages projects that are funded through the RTTA.²⁸
- [90] Mr Adams said he was invited to meet with a Western Force representative in June 2016. Nothing eventuated from the meeting. Mr Adams said Western Force were asking for too much RTTA money - around \$4 to \$5m. He told the Commission:
- And I, in my role as the Director, I sort of discarded that sort of quantity [of cash] because, candidly, that sort of money wouldn't pass the pub test in the sense of the value, what you get for that.²⁹*
- [91] By August 2016, Western Force's financial troubles led them to enter an arrangement with Australian Rugby Union. The arrangement resulted in Australian Rugby Union owning Western Force.³⁰
- [92] By late 2016, the Rugby Boards of South Africa, New Zealand, Australia and Argentina (SANZAAR) arrived at a decision to revoke some licences of teams that played in the international Super Rugby competition.³¹
- [93] The Australian Rugby Union had to revoke one Australian team's licence to give effect to the SANZAAR decision.
- [94] Western Force were an ideal candidate for revocation of its licence. The NSW Supreme Court later bluntly described Western Force's predicament

²⁷ *WARU v ARU Ltd* [2017] NSWSC 1174 [6].

²⁸ C Adams transcript, private examination, 7 October 2018, p 5.

²⁹ C Adams transcript, private examination, 7 October 2018, p 30.

³⁰ *WARU v ARU Ltd* [2017] NSWSC 1174 [2].

³¹ *WARU v ARU Ltd* [2017] NSWSC 1174 [8].

'[i]t is to be remembered that ARU owns the [Western] Force ... and can do with it what it likes, even destroy it'.³²

[95] By late 2016, Western Force was in survival mode.

The Government's interaction with Western Force

[96] Relevant influential Western Australians on the Australian Rugby Union Board and from the WA Rugby Union were considering various options to make Western Force a viable option for survival.

[97] The future viability of Western Force was a matter that even the Premier was turning his mind to.

[98] In November 2016, a proposal to acquire Western Force was put to the Premier by operators of the Highlanders Super Rugby Team in New Zealand.

[99] The Premier rejected the proposal by letter dated 22 December 2016. The letter relevantly stated (**emphasis added**):

*The Government is supportive of the Western Force as a member of the Super Rugby Competition and is willing to support this involvement where appropriate. However the proposal as submitted is not approved because of other arrangements already in place and the challenge of unpicking the implications of a number of other elements of your proposal.*³³

[100] The Deputy Director General of the Department of the Premier and Cabinet sent the Premier's letter by email to Mr Adams on or about the same date as the letter.

[101] The forwarding of such a letter leaves open an inference there was improper and subtle political influence being exerted on the Road Safety Commission to fund Western Force through the RTTA.

[102] Given the observations of the Special Inquirer about potential political interference and the unsatisfactory evidence of Mr Adams,³⁴ the Commission further enquired about why this letter was sent to him. Mr Adams said:

How that - what initiated, the email to come to me directly from [the Department of the Premier and Cabinet Deputy Director General], I have no idea. I must admit, I was surprised because when I received it, I went and spoke to I'm pretty sure I

³² Ibid [65].

³³ Letter from Premier to Messrs Burke and Goddard, 22 December 2016.

³⁴ Government of Western Australia, Special Inquiry into Government Programs and Projects: Final Report (2018) Volume 2 pp 569-589.

*spoke to Kim. I said, "You wouldn't believe this, I got an email from [the Department of the Premier and Cabinet Deputy Director General]."*³⁵

[103] In his evidence before the Commission, he speculated that he may have received the correspondence from the Department of the Premier and Cabinet's Director General because he was making due diligence enquiries to others about whether Western Force was getting funding from other Government sources.³⁶ He recalls being quite vocal to Mr Papalia that if Western Force were getting money from other Government sources, they were not going to get any more money through the Road Safety Commission.³⁷

Road Safety Commission's consideration of the Road Safety Western Force partnership

[104] The Road Safety Commission was considering a partnership with Western Force Super Rugby in the context of the above matters. However, the RTTA 2016/17 budget did not provide for a partnership agreement with Western Force.

[105] On 16 December 2016, Mr Papalia met with representatives from Australian Rugby Union and WA Rugby Union. Mr Papalia suggested a \$6m partnership over four years. Mr Papalia denied making this suggestion,³⁸ however relevant records from Australian Rugby Union and the Road Safety Commission suggest otherwise and are more compelling.

[106] Several factors made progressing RTTA funding to a Western Force partnership time critical:

- the Super Rugby season commencing in February 2017;
- the Government moving into caretaker mode on 1 February 2017 before an election;³⁹ and
- the Christmas and New Year shutdown period.

[107] At a Council meeting on 20 December 2016 that Mr Papalia chaired and at which Mr Adams was present, no mention of a proposed RTTA funded partnership with Western Force occurred. No further Council meeting was scheduled until at least February 2017.⁴⁰

³⁵ C Adams transcript, private examination, 7 October 2018, p 52.

³⁶ C Adams transcript, private examination, 7 October 2018, pp 51-52.

³⁷ Ibid.

³⁸ K Papalia transcript, private examination, 8 October 2018, pp 32-35.

³⁹ The Proclamation proroguing the Legislative Council and Legislative Assembly and dissolving the Legislative Assembly 2017 occurred at 12 noon on 30 January 2017 and shortly thereafter, the Government went into caretaker mode.

⁴⁰ K Papalia transcript, private examination, 8 October 2018, p 43.

- [108] While Mr Papalia indicated the Road Safety Commission had no expectation at the time of the Council meeting that the partnership opportunity would eventuate,⁴¹ information obtained during the investigation suggests otherwise. For example, the tone at meetings was the Road Safety Commission was going to make the partnership happen. The Australian Rugby Union records also indicate that Mr Papalia conveyed he was confident that a partnership could be negotiated.
- [109] The business case for a Road Safety Western Force partnership was advanced throughout January 2017. The initial business case submitted to the Road Safety Commission on 9 January 2017 was not to a satisfactory standard. The Road Safety Commission allocated two employees to Western Force to assist develop a business case to an appropriate standard.
- [110] There was further communication between Mr Adams and the Department of the Premier and Cabinet. This at least included Mr Adams' further communication to Department of the Premier and Cabinet's Deputy Director General on 18 January 2017 about the progress of the Western Force business case that had not been received by the Road Safety Commission. Mr Adams stated in an email 'Early next week my intention was our Commissioner (Mr Kim Papalia) will forward [the Australian Rugby Union business case] to the Road Safety Minister Chief of Staff ... for actioning'.⁴²
- [111] This communication raised further concern that the Road Safety Commission may have been politically influenced to allocate RTTA funds to Western Force. This was compounded by the Road Safety Commission not providing updates to Council members who were none the wiser about the partnership proposal or the business case.
- [112] On Friday 20 January 2017, the Road Safety Commission received the Western Force business case. The officer primarily responsible for assessing the Western Force's business case assessed it shortly after receipt. The primary recommendation from his assessment was unfavourable. It stated:

... based on the identified risk of the club discontinuing operation, the low media exposure within Western Australia, the risk profile of the Road Safety Commission as a fledgling agency responsible for a significant commitment (100% of RTTA funds) to road safety and the potential for political implications of government partnership with elite sporting organisations, the level of funding requested within the proposal is inappropriate for RTTA funding and it is recommended that a lower

⁴¹ K Papalia transcript, private examination, 8 October 2018, p 42.

⁴² Email from C Adams to R May on 18 January 2017.

*amount should be negotiated with the club for the partnership to be considered feasible.*⁴³

- [113] Mr Papalia and Mr Adams had the recommendation brought to their attention. The recommendation was ignored and no one conferred with the officer who made it.
- [114] By Monday 23 January 2017, another officer reviewed the proposal in more favourable terms.
- [115] The Road Safety Commission was prepared to take short cuts and ignore relevant matters in pursuit of the partnership.
- [116] When examined during the Special Inquiry, Mr Adams was critical of previous processes for allocation and subsequent monitoring of spending RTTA funds. Mr Adams identified a process that he introduced to deal with these problems. It was called the Tasking and Coordination Group (TCG).⁴⁴ Mr Papalia gave evidence before the Special Inquiry⁴⁵ and the Commission⁴⁶ that he believed the Western Force proposal went through the TCG process before his referral to the Minister. It did not.
- [117] Standard operating procedures for the TCG were developed within the Road Safety Commission. The procedures were endorsed by Mr Adams and Mr Papalia in August 2016.⁴⁷
- [118] The purpose of the TCG process was to manage and facilitate the ongoing monitoring, assessment and administration of projects being funded by the RTTA through the Road Safety Commission. The purpose of it was to effectively and efficiently oversee the implementation, monitoring and management of projects that are funded by the RTTA. One of the main objectives in implementing the TCG process was to 'Govern the selection of projects to be funded through the RTTA and the subsequent allocation of resources in the pursuit of achieving agreed project goals'.
- [119] The TCG procedures outline processes for assessment of proposed projects. These procedures and processes were disregarded in relation to the Road Safety Commission initiated RTTA funding of the Western Force partnership. Mr Adams' reasoning for this was that they were on tight timeframes and the TCG process would have delayed the proposal.⁴⁸

⁴³ Western Force - Road Safety Commission, Partnership Proposal Assessment and Recommendation (January 2016), p 12.

⁴⁴ C Adams Special Inquiry interview transcript, p 37.

⁴⁵ K Papalia Special Inquiry interview transcript, pp 29-30.

⁴⁶ K Papalia transcript, private examination, 8 October 2018, pp 38-40.

⁴⁷ Government of Western Australia, Road Safety Commission, Standard Operating Procedures, Tasking and Coordination Group (2016).

⁴⁸ C Adams transcript, private examination, 7 October 2018, p 41.

The recommendation to the Minister

- [120] On 25 January 2017, Mr Adams emailed Mr Papalia a proposed ministerial memo dated 25 January 2017 with the favourable business case and a partnership value statement.
- [121] Mr Papalia only considered the documents for a short period of time, signed the ministerial memo and forwarded it to the Minister's Chief of Staff.
- [122] Mr Papalia signed the ministerial memo as Road Safety Commissioner and recommended the reallocation of 2016/17 RTTA budget approved expenditure from underspend on identified projects. Council members were not consulted about the recommendation, nor had any awareness of it.
- [123] Mr Papalia insinuated in his evidence that the ministerial memo may have also been signed by him in his capacity as Chair of the Road Safety Council.
- [124] This was not reflective of what is on the face of the ministerial memo. Furthermore, Council were unaware of the recommendations in the ministerial memo. To suggest he was also signing in his capacity as Council Chair is not supported by the evidence; nor was he authorised to do so given his roles and responsibilities as Chair. He was questioned about this during examination:

I'm asking you about the Western Force proposal; can you speak on behalf of the Council?---Well, the business case did align to those strategic priorities. That - that was - - -

I'm not asking that; listen to the question. Again, can you speak on their behalf about the Western Force proposal, when you haven't alerted them to it?---No, and perhaps I can explain that, or, provide a little bit more understanding of why?

Well, it is critical because you've just indicated that this memo might be in both capacities, and it's important that if it's in your capacity as a Council [Chair], that this Commission knows whether the Council members were aware of this specific proposal?---No, they weren't aware of this specific proposal.⁴⁹

- [125] The partnership value statement asserted the Road Safety Commission was getting a total value of \$2.676m in return for the provision of \$1.5m of RTTA funding. The Special Inquiry scrutinised this matter and reported '[t]he value for money to be achieved through the partnership was not substantiated by the documentation'.⁵⁰

⁴⁹ K Papalia transcript, private examination, 8 October 2018, p 63.

⁵⁰ Government of Western Australia, Special Inquiry into Government Programs and Projects: Final Report (2018) Volume 2, p 589.

- [126] The Commission's investigation did not reveal that the lack of records or proper substantiation were influenced by a corrupt intent or serious misconduct.
- [127] At noon on 30 January 2017, both houses of parliament were prorogued and the legislative assembly dissolved. Shortly thereafter, the Government went into caretaker mode due to the upcoming State Election on 11 March 2017. This impacts on ordinary Government business, including the allocation of RTTA funding.
- [128] At an unknown time on 30 January 2017, the Minister approved the application of \$1.5m of RTTA funds to the Western Force partnership by signing the ministerial memo.
- [129] The following day, Mr Adams notified members of the Council of the Minister's approval. They were unaware of the proposal. One Council member indicated that he, like most of the Council, found out about it in the newspaper.
- [130] The Department of the Premier and Cabinet's Deputy Director General sent a congratulatory email to Mr Adams in relation to the arrangement with Western Force.
- [131] Mr Adams was examined about email communications between himself and the Department of the Premier and Cabinet's Deputy Director General on 18 January 2017 and 31 January 2017. This was particularly relevant given a concern existed that RTTA funding to Western Force may have been a consequence of political interference:

There's communications with [Department of the Premier and Cabinet's Deputy Director General]; now, December, mid-January, and now it's gone through. What I'm suggesting, there's an inference you're keeping him up to date with how the funding proposal is going, keeping him posted on these matters throughout, more so than you are letting on during this examination?---Not really. I mean, at the end of the day, he didn't know the detail, I mean, other than that we were progressing towards, ah - - -

Why are you in communications with him at all, in relation to this?---Well, to be candid, it was seen as an opportunity to network, for myself, in the sense of dealing with a senior public servant, hadn't been in that space before. And I saw, an opportunity for myself to network across the Executive.⁵¹

⁵¹ C Adams transcript, private examination, 7 October 2018, p 88.

- [132] The Commission's investigation did not reveal any evidence of political interference with the Road Safety Commission's consideration of a partnership proposal with Western Force. Mr Adams:

Was there any pressure, implied or otherwise, that you were to get this Western Force proposal through?--No. I- you know, to candidly again, I never received any pressure. I was quite - in fact if anything, I was quite dogmatic about it. If there was a legitimate reason not to fund the proposal based on no safety outcome in the sense of what we were seeking to achieve, I was just going to make a recommendation that it's not funded, as I'd done with many projects.⁵²

Utilisation of allocated underspend

- [133] The utilisation of RTTA approved funding, that is underspend on one business case for the purpose of another approved business case, appears to be an accepted practice. Mr Adams indicated:

The Western Force proposal is an initiated action that we were approached by an entity to develop a proposal for the Minister to consider. So, it wouldn't go through the [Expenditure Review Committee] because the money has already been allocated, the Minister has already been given the money to spend on the 89 projects.

Now, the fact that there's an underspend existing across those projects, she's entitled to reallocate accordingly under the Act, where she feels fit, based on the recommendations put to her.⁵³

- [134] The Expenditure Review Committee did not consider the Road Safety Western Force partnership proposal. However, evidence before the Commission shows that allocated underspend from one business case/program to another has gone through that process, at least in so far as the recommendation was initiated by a Minister or Cabinet.
- [135] The RTTA funding for the Road Safety Western Force partnership was taken from underspend on the RTTA 2016/17 Budget for the Electronic School Zone Sign project. Drawing this conclusion required a close examination of annual reports for Council and the Road Safety Commission and the drawing of reasonable inferences.
- [136] The Electronic School Zone Sign project fell under the business case 'Reducing Injury Burden from Crashes Involving Inappropriate and Excessive Speed'. The funding was redirected to another business case area 'Informing and Mobilising Actions to Improve Road Safety Outcomes'.

⁵² C Adams transcript, private examination, 7 October 2018, p 63.

⁵³ C Adams transcript, private examination, 7 October 2018, p 80.

[137] Council did not make the recommendation nor were they aware of it until after the Minister approved it. Despite this, several Road Safety Commission records create an illusion that Council made recommendations, when this was not the case.

Treasury's involvement

[138] Treasury was not consulted by the Road Safety Commission when it made a recommendation to the Minister to reallocate RTTA funding from the Electronic School Zone Sign project to the Road Safety partnership program.

[139] There was conjecture whether Treasury was involved because Mr Papalia indicated to the Minister's Chief of Staff that 'Treasury are aware of the steps and agree the process'.⁵⁴

[140] The evidence of Mr Adams and Treasury indicate Treasury were not involved and is more compelling. The investigation did not reveal a corrupt intent behind Mr Papalia's misleading statement to the Minister's Chief of Staff.

[141] Treasury reviewed the Road Safety Western Force partnership after the new Government was elected. Part of the reason for doing so was to ascertain the rights and obligations of the partnership. The conclusion was that the State was obligated to meet the committed costs of the partnership. Mr Papalia took some comfort in this.

[142] Part of the analysis in arriving at the conclusion was as follows (**emphasis added**):

Legislative Authority

*Nevertheless, under the Road Safety Council Act 2002, RTTA monies are authorised to be applied to purposes determined by the Minister **having regard to the recommendations of the Road Safety Council. The Road Safety Commissioner is also the Chair of the Road Safety Council.***

*As such, **the then Minister had the authority to approve RTTA expenditure up to the approved [Road Safety Commission] expense limit of \$177 million for 2016-17.***⁵⁵

[143] The Commission's investigation revealed that:

- Mr Papalia did not wield power in his own right as Chair of the Road Safety Council under the RSC Act s 11.

⁵⁴ Email from K Papalia to Chief of Staff, 27 January 2017.

⁵⁵ Advice from the Department of Treasury attached to letter from Treasurer to Minister for Road Safety, 11 April 2017, p 1 of 3.

- Council did not make a recommendation to the Minister concerning the allocation of the 2016/17 budget which included the Electronic School Zone Sign project.
- Council members did not know about the proposed partnership with Western Force prior to the Minister determining the \$1.5m of allocated underspend to the Electronic School Zone Sign project.

[144] There is no evidence that the Minister appreciated these matters. In the Commission's opinion, what is contained in the Treasury's analysis of the Minister's authority to approve the expenditure, is erroneous. Treasury reasonably proceeded on the basis that Mr Papalia's recommendation was a Council recommendation by virtue of Mr Papalia's position as Council Chair. However, the Commission's investigation revealed that despite the recommendation coming from Mr Papalia, it did not constitute a Council recommendation.

[145] The Minister was not placed in a position to make a determination in accordance with the RSC Act. The fact that the RTTA budget may have been subsequently approved by the Expenditure Review Committee does not cure an invalid determination not made in accordance with the RSC Act.

[146] Mr Papalia's conduct vitiated the Minister's determinations in so far as they relate to valid determinations to allocate RTTA funds in 2016/17 and the application of allocated underspend to the Western Force partnership. However, the Commission's investigation did not reveal that Mr Papalia or any other officer at the Road Safety Commission had a corrupt intent or was involved in serious misconduct.

CHAPTER SIX

Conclusion

- [147] There is a public interest in reporting on the Commission's serious misconduct investigation concerning the allocation of over \$177m in 2016/17.
- [148] The quantum of RTTA funds in question is large. This in itself creates serious misconduct risks that ought to be considered by persons and agencies involved in the administration of and decisions concerning RTTA funds.
- [149] The Commission's investigation showed that Mr Papalia did not discharge his duties as head of a Government department and Chair of the Road Safety Council as well as he could have. He did not place the Minister in a position to have regard to recommendations of Council as required by the RSC Act.
- [150] The Minister's determination to allocate over \$177m of RTTA funds to various business cases, in the Commission's opinion, was likely vitiated by an error of law. This was contributed to by Mr Papalia's conduct in excluding Council from RTTA funding determinations. What consequences may flow from this is not a matter for the Commission to either determine or make recommendations about - it falls short of corruption or serious misconduct.
- [151] The Commission's investigation uncovered a tension between the Government's road safety agenda and legislative scheme. This created an awkward environment for the Road Safety Commission and Mr Papalia. This territory was complex to navigate and required a diligent operator to ensure proper processes were followed in the allocation of RTTA funding. A more considered approach supported by appropriate advice was necessary and required. Mr Papalia's exclusion of Council from necessary processes under the RSC Act was not justifiable or excusable. However, in the context of the Government's road safety agenda, his conduct does not amount to serious misconduct.
- [152] The Commission's investigation did not uncover evidence that:
- Mr Papalia, Mr Adams or any other public officer had a corrupt motive in respect to the RTTA allocation of funds for the 2016/17 year;

- demonstrates that Road Safety Commission officers received a financial benefit from the Road Safety Western Force partnership; and
- identified political interference in the reallocation of \$1.5m from the 2016/17 RTTA budget to Western Force.

[153] Accordingly, the Commission has formed no opinion of serious misconduct.

[154] The investigation has however highlighted the misconduct risks attended when administrative actions exceed current legislation, however laudable the motive.

[155] Only Parliament can enact laws. Of course, the executive can propose laws to Parliament and has the responsibility to administer laws in force.

[156] But until a law is in operation, no one has the right to ignore obligations existing under current law. Motive and good intentions do not supplant this basic proposition.