



# **CORRUPTION AND CRIME COMMISSION**

## **REPORT ON THE INVESTIGATION INTO ALLEGATIONS OF MISCONDUCT BY COUNCILLORS OR EMPLOYEES OF THE CITY OF BAYSWATER**

**13 November 2009**

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Dear Mr Peacock  
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the Act"), the Commission hereby transmits to you a copy of the Corruption and Crime Commission *Report on the Investigation Into Allegations of Misconduct by Councillors or Employees of the City of Bayswater*.

The Commission notes that under section 93(3) of the Act a copy of a report transmitted to a Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in black ink that reads "Len Roberts-Smith".

The Hon. LW Roberts-Smith, RFD, QC  
**COMMISSIONER**

13 November 2009



## ABBREVIATIONS AND ACRONYMS

A-CC	Anti-Corruption Commission
“the ACC Act”	<i>Anti-Corruption Commission Act 1988</i>
“the Act”	<i>Corruption and Crime Commission Act 2003</i>
ASIC	Australian Securities and Investments Commission
CEO	Chief Executive Officer
“the City”	City of Bayswater
“the Commission”	Corruption and Crime Commission
DPP	Director of Public Prosecutions
GIS	Geographical Information System
GST	Goods and Services Tax
“G.T. Evans”	G.T. Evans Weed Spraying Services Pty Ltd
ICG	Integrity Coordinating Group
“the Local Government Act”	<i>Local Government Act 1995</i>
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the Regulations”	<i>Local Government (Functions and General) Regulations 1996</i>
“the TI Act”	<i>Commonwealth Telecommunications (Interception and Access) Act 1979</i>
“Turfmaster”	Turfmaster Facility Management



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# EXECUTIVE SUMMARY

## Background

- [1] This report is the culmination of a protracted investigation which was commenced by the Anti-Corruption Commission (A-CC) in July 2002 and which, on the closure of the A-CC, was referred to its replacement body, the Corruption and Crime Commission (“the Commission”) in May 2004.
- [2] The investigation focused on the activities of councillors and officers of the City of Bayswater (“the City” or “City of Bayswater”).
- [3] As the investigation progressed, it identified anomalies in the recordkeeping and tendering processes at the City of Bayswater, and encompassed a range of allegations, including that:
  - public resources had been misused and the tendering and contracting processes at the City had been mismanaged;
  - staff and councillors at the City had failed to accurately complete their annual returns disclosing financial and other interests as required by the *Local Government Act 1995* (“the Local Government Act”); and
  - staff and councillors at the City had not appropriately declared the receipt of gifts and benefits.
- [4] The Commission also investigated processes, policies and procedures of the City of Bayswater relating to the management of tenders and contracts between 2003 and the end of 2005 with a specific focus on:
  - (a) contracts between the City of Bayswater and businesses in which councillors of the City held an interest;
  - (b) tender contracts between the City of Bayswater and a company called Turfmaster Facility Management (“Turfmaster”) and its associated entities; and
  - (c) work undertaken by Turfmaster for the City without quotations being obtained.
- [5] From an early stage, the Commission’s investigation covered a range of issues, which expanded as the investigation evolved. During the course of the investigation the Commission engaged with the Council and administration of the City concerning what was being revealed by it. The City was responsive to the Commission’s concerns and over the period has devised and implemented a range of measures to deal with them.
- [6] The Commission’s original intention was to table in the Parliament of Western Australia a report dealing in detail with the apparent misconduct of a number of public officers, together with the systemic issues which

had been identified as creating misconduct risks and facilitating misconduct within the City of Bayswater.

- [7] However, although considerable work was done towards that, following the substantive investigation, a number of factors intervened.
- [8] The first was that in the course of the misconduct investigation, evidence of various possible criminal offences was revealed. As a consequence, while the Commission's misconduct investigation continued, various charges of criminal offences were laid. Several such charges were laid in April 2005, resulting in convictions in 2006.
- [9] On 18 October 2005 the Commission charged a public officer by summons with four counts of corruption pursuant to section 83 of *The Criminal Code* relating to his involvement in administering contracts and tenders for work undertaken by private contractors for the City of Bayswater. He was committed to the District Court for trial. On 16 February 2006 the Commission provided a brief of evidence to the Office of the Director of Public Prosecutions (DPP), who was to conduct the trial on indictment in the District Court.
- [10] In light of the pending charges the Commission decided at that time not to publish a report on its investigation until those criminal matters had been resolved.
- [11] The Commission was advised by the DPP on 18 October 2007 that he did not intend to proceed with those criminal charges in the District Court. There was therefore no further obstacle to publication of a report on that account and the Commission's investigation was accordingly recommenced.
- [12] By late 2007 circumstances had changed. A new Commissioner had been appointed in June of that year. The Commission was bringing to conclusion a series of substantial investigations (some of which were still ongoing), a number of which had involved high profile public hearings. There were potentially some 12 or more Parliamentary reports which had to be written and tabled in respect of them, in addition to reports on investigations and hearings conducted by the new Commissioner. Also, significant Commission resources were dedicated to the conduct of the Commission inquiry into alleged misconduct by police officers in connection with the investigation of the murder of Mrs Pamela Lawrence (the report on which was tabled in Parliament on 7 October 2008).<sup>1</sup>
- [13] Notwithstanding the importance with which the Commission regarded its investigation into public officers at the City of Bayswater, by late 2007 the Commission was compelled to accord other investigations a higher priority. Apart from the serious – and ongoing – issues going to the need to deal first with Parliamentary reports on those other Commission investigations, significant considerations relating to the City of Bayswater investigation included that:

- the City had been closely involved in the progress of the investigation;
- the City was responsive to the systemic issues as they were identified and had taken positive action to remedy deficiencies;
- much of the most serious misconduct of individual Council officers had been dealt with by way of criminal charges; and
- any of the public officers who would potentially be the subject of misconduct opinions by the Commission were no longer employed by the City.

## **Publication of Report**

- [14] The Commission appreciates that any expression of opinion by it, in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion (or even information about the investigation of an allegation where the Commission did not form an opinion of misconduct) may have consequences for the person, their family, friends and associates and their reputation and livelihood.
- [15] However, the Commission has decided that in this matter the benefits of public awareness outweigh the potential for adverse impact on individuals. In the Commission's view this report contains information which provides valuable examples for local governments about the sort of misconduct which can occur where there is insufficient awareness of the risks of misconduct and controls to prevent it.
- [16] The Commission considers that notwithstanding the delay, it is necessary to place on the public record the mismanagement of some tender, contractual, purchasing and administrative processes which created conditions for actual misconduct or a perception of it, at the City of Bayswater between 2000 and 2007, and to identify some instances of individual misconduct.
- [17] By early 2009 the Commission had prepared an extensive draft report covering the conduct of a number of public officers as well as a range of systemic issues affecting the risk of misconduct at the City of Bayswater between 2000 and 2007. In accordance with the Corruption and Crime Commission Act 2003 ("the Act"), in February 2009 the Commission notified all the affected persons of matters in the draft report which may be adverse to them. Most of those persons subsequently made representations about the matters affecting them. The last such representation was received by the Commission in May 2009. In part as a result of some of the representations made, the Commission does not deal in this report with the conduct of a number of public officers where it considers that conduct has already been the subject of other appropriate action or to do so would be unfair to them because of the lapse of time and other circumstances.

- [18] The ratepayers of the City of Bayswater (and the community generally) are entitled to know about the circumstances existing at the City between 2003 and 2005, which gave rise to a risk of potential (and, in some instances, actual) misconduct. Public exposure of those matters, even now, affords lessons from which better practices can be identified so as to reduce the risk of misconduct in the future – not only in the City of Bayswater, but in local government generally.
- [19] In deciding to publish this report notwithstanding the lapse of time since the relevant events occurred, the Commission is also mindful that by section 17(2)(ca) of the Act, it is directed to ensure that in performing all of its functions, the Commission has regard to its misconduct prevention and education function.

## **Commission Investigation**

### **Awarding Contracts**

- [20] The Commission’s investigation revealed that during 2003-2004 there was a lack of financial control, supervision and accountability at a practical level within the City of Bayswater. This enabled a City officer to preferentially award City contracts to businesses owned by his personal associates and family members.
- [21] Two methods by which this favoured treatment was given, were:
- telling the contractor what other businesses had quoted, so that the favoured contractor could submit a quote which would be the lowest; and
  - arranging for the favoured contractor to submit their own quote plus other (false) higher quotes ostensibly from other businesses.
- [22] There were instances where, having secured the work on the basis of the lowest quote, the favoured contractor ultimately charged (and was paid) significantly more.
- [23] Even where what was done resulted in a lower price in fact being quoted – and eventually charged – to the City, the contractor benefitted unfairly by getting work they otherwise would not have.
- [24] A further longer-term benefit was that being contracted to do the work on these occasions enabled the favoured contractors to develop an ongoing relationship with the City, becoming “preferred” contractors and so securing more work in future.
- [25] The public officer was able to give his friends and associates a competitive advantage so they would secure work from the City.
- [26] This conduct constituted a failure to act impartially and with integrity. It was unfairly preferential to relatives, friends and associates of the public

officer and on occasion resulted in the City paying more for contracted services than it otherwise would have paid.

- [27] These matters were brought to the attention of the City whilst the Commission's investigation was continuing.

### **Private Activities During Work Hours**

- [28] Evidence obtained from covert surveillance conducted between February and September 2003 showed that a public officer regularly undertook private activities during work hours.<sup>2</sup>

- [29] The Commission examined City of Bayswater time sheets submitted by a public officer for that period and compared them with other evidence relating to his conduct during that period. The analysis showed numerous occasions when he was engaged in private activities when his time sheets indicated he was working for the City of Bayswater. His private activities included attending lunches with building industry colleagues outside the City of Bayswater, attending to private building developments by visiting various councils to submit development documents, visiting building sites and suppliers, assisting concrete workers at a private development of his own, campaigning for a local government election during two days when he produced a medical certificate stating he was unfit for work, and undertaking other clearly private activities for lengthy periods.

- [30] In an interview with the Commission the public officer accepted that the time sheets he had submitted during this period were false, but said that he had made up the time by attending meetings in the evenings and on the weekend, and had worked from home. He also said that the forms had been signed by his supervising officer and if his supervisor hadn't agreed with what he was doing he should not have signed them.<sup>3</sup>

- [31] The Commission's examination of the City of Bayswater's electronic time keeping systems, policies, procedures and guidelines showed them to be adequate, provided managers applied sufficient checks to ensure the information entered into the systems was accurate. The problem was no checking procedure existed in this officer's area of work. There was a disconnect between the policy and the practice. That constituted a serious misconduct risk, which here encouraged, facilitated and ultimately resulted in misconduct.

- [32] The officer's manager was interviewed by Commission officers and in respect of the time sheets he said: "They come to me and I sign them and then they go to the director. Okay. I don't check them because I - - these people, I trust them that they do the right thing".<sup>4</sup>

- [33] The Commission makes the following recommendation:

### **Recommendation 1**

The City of Bayswater devise and implement a selective audit or checking process to validate its systems, policies, procedures and guidelines relating to employee time sheets and other records and to ensure the relevant information is recorded and is accurate.

### **Primary and Annual Returns**

- [34] The Local Government Act provides a legal framework within which local governments must operate, and provides for the disclosure of financial and other interests by councillors and delegated employees.
- [35] The Commission examined the primary and annual returns submitted by City of Bayswater councillors and employees for a sample period, between 2000 and 2004. The Commission found that several councillors appeared not to have declared their interests in various companies during this period, although the Commission accepts that in some instances it was possible that they had been declared in returns submitted before 2000.<sup>5</sup>
- [36] At a public hearing conducted by the Commission a councillor of the City of Bayswater was asked why he had not declared his interest in several companies. He said he thought that he was not required to declare an interest in companies if they had not conducted business with the City. He also said that he did not realise that he was required to declare an interest in a company which was a trust company forming part of another company which he had previously declared.<sup>6</sup>
- [37] The information before the Commission suggests that in some instances the returns required by the Local Government Act had not been completed accurately by councillors of the City of Bayswater. This mainly appears to have involved a lack of information in the returns, rather than incorrect information having been provided. It appears to the Commission that some councillors were confused about the requirements of the Local Government Act in respect of both the primary and annual returns.
- [38] In the opinion of the Commission the information before it does not establish misconduct by any councillor or employee of the City of Bayswater in relation to this matter.
- [39] The Commission makes the following recommendation:

### **Recommendation 2**

In order to clarify the obligation of elected members with respect to primary and annual returns, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.



## **Declaration of Gifts and Benefits**

- [40] Section 5.82 of the Local Government Act places an obligation on a “relevant person” (a council member or a designated employee) to disclose gifts which exceeded a prescribed amount (\$200 at the relevant time) in an annual return.
- [41] Section 5.88 of the Local Government Act requires a Chief Executive Officer (CEO) of a local government to keep a register of financial interests including the interests declared by councillors and designated employees in their annual returns.
- [42] The Commission examined the City of Bayswater gifts registers for 2003 and 2004 and annual returns submitted by councillors and employees from 2000 to 2004. This examination showed that very few gifts (required to be declared under section 5.82 of the Local Government Act at item 4 of the annual return) had been declared, and then only by a small number of people. A spot review conducted by the CEO of the City of Bayswater immediately following the Commission’s review of the 2003-2004 period showed that the incidence of gifts being declared increased significantly once the City of Bayswater became aware of the Commission’s investigation. The Commission considers that this may be because “relevant persons” had been made more aware of their obligations to make declarations.
- [43] In the opinion of the Commission a lack of knowledge by councillors and employees of the City of Bayswater about the legal requirement for them to declare gifts meant that the gift register was not accurately maintained. However, in the Commission’s opinion the material before it does not establish misconduct by any person.
- [44] The Commission makes the following recommendation:

### **Recommendation 3**

In order to clarify the obligations of elected members with respect to the declaration of gifts and benefits, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.

## **Management of Tenders and Contracts**

- [45] At the time of this investigation Regulation 11 of the *Local Government (Functions and General) Regulations 1996* (“the Regulations”), required that, except in specified circumstances, tenders must be publicly invited before a local government entered into a contract for another person to supply goods and services worth more than \$50,000.<sup>7</sup>
- [46] The Regulations controlled the processes leading to the award of tenders, but were silent on the management of tenders once they were

awarded. The Local Government Sector had no centralised standards for the procurement of goods and services and there was no independent risk management control.

[47] At the time all supply and works services provided externally to the City of Bayswater were bound by its Purchasing Policy (FS-P19), which stated:

1. *quotations are not required for purchases less than \$100;*
2. *documented verbal quotations are required for purchases of value of \$100 to \$1,000;*
3. *written quotations are required for purchases above \$1,000 but below \$50,000; and*
4. *when seeking quotations a minimum of three (3) quotations are required ...*<sup>8</sup>

[48] The Commission notes that the City of Bayswater has since developed a new procurement manual to assist employees involved with procurement processes at the City.<sup>9</sup>

#### **Contracts with Businesses Associated with Councillors**

[49] The Commission examined records relating to contracts entered into between the City of Bayswater and three companies which were owned and directed by three City of Bayswater councillors. The records established that these businesses had undertaken work for the City of Bayswater on a regular basis.<sup>10</sup>

[50] The Commission established that there was no impropriety associated with the award of work to these businesses. The City of Bayswater, at its own initiative and in consultation with the Commission, introduced new guidelines for the awarding of contracts to business entities closely associated with councillors and employees.<sup>11</sup>

[51] In the opinion of the Commission, the material before it does not establish misconduct by any councillors in relation to this matter.

#### **Tender Contracts with Turfmaster Facility Management (“Turfmaster”)**

[52] Turfmaster, and its associated entities, have provided turf management, weed control and fertiliser supply and application services to the City of Bayswater for many years. The Commission conducted an investigation into the administration and management by the City of Bayswater of some of the services supplied to it by Turfmaster.

[53] The Commission examined material relating to contracts awarded to Turfmaster by the City of Bayswater for the period 1997-2004. It was established that during that period Turfmaster, or its associated entities, tendered for and were awarded the following contracts:

- Tender 34-96/97: Weed Control;
- Tender 6-2003: Weed Control; and
- Tender 17-97/98: Supply, Application and Delivery of Turf Fertiliser.

- [54] The Commission found serious anomalies in the payments made under weed control contracts with Turfmaster and its associated companies. The question was whether those anomalies evidenced or were the result of misconduct on the part of public officers, or something else.
- [55] Tender 34-96/97: Weed Control was awarded to G.T. Evans Weed Spraying Services Pty Ltd (“G.T. Evans”) on 18 June 1997, for a three-year term. Based on the tendered schedule of rates, the City calculated the tender to be for \$104,400 per annum. That was the cheapest of four tenders. The next cheapest was calculated to be \$107,895. However the method used by the City to evaluate the tenders was calculated on the prices for one application of herbicide per annum, when in fact two applications were required for some items. Had the correct figures been used then the G.T. Evans (Turfmaster) tender would have been \$126,400 per annum compared to \$114,747 from another tenderer.
- [56] This mistake by the City of Bayswater was significant, because the contract was extended for a further three years, resulting in payments to G.T. Evans amounting to \$70,000 more than the City would have paid to the lower tenderer.
- [57] The mistake was made by Mr George Rimpas, the then Deputy City Engineer. At the time he had only recently been appointed and had not previously been involved with weed control management. For the reasons expressed in the report, the Commission accepts this was a genuine mistake and does not constitute misconduct.
- [58] Furthermore, the approximate quantities specified in the City’s tender documentation were so inaccurate that the amounts paid to G.T. Evans overall appear to have been approximately double those which would have been paid had the quantities estimated in the price schedule been accurate.
- [59] The Commission found a similar situation with Tender 6-2003: Weed Control. That was a continuation of Tender 34-96/97 and was for the period 1 July 2003 to 30 June 2006 with an optional extension of three years – which was exercised. Once again, it appears the amount paid by the City of Bayswater was approximately double what it would have been if the quantities estimated in the price schedule had been accurate.
- [60] Based on the tender documents and figures provided by the City of Bayswater, the Commission’s financial analysis indicated the City had paid Turfmaster for spraying almost twice the potential spraying area of selected sample locations.
- [61] After the Commission brought this to the attention of the City of Bayswater, the City recalculated the distances and areas it had been

using for the purposes of weed spraying. In September 2005 the City provided the Commission with "... approximate figures that reflect more accurately the weed spraying contracts". When the estimated annual costs were recalculated using the "more accurate" figures, they were much more closely aligned to the amounts actually paid to Turfmaster, although there were still discrepancies. Some of those discrepancies were explained by the impact of the Goods and Services Tax introduced on 1 July 2000, which had not been allowed for in the rates quoted. The Commission notes that the City of Bayswater had advised its revised specifications provided in September 2005 were approximations and still being "fine tuned". That may account for some continued variations between the revised specifications and the distances and areas actually sprayed.

- [62] It is apparent that the estimated quantities specified by the City of Bayswater for these contracts by tender were seriously inadequate. The issue is how that came to be and why the City failed to detect this from either a contract management or budgeting and finance perspective. So far as the Commission's investigation is concerned, the question is whether any public officer engaged in misconduct in that regard.

**Mr George Rimpas**

- [63] It seems the tender documentation was prepared by Mr Rimpas. He had only just commenced his employment with the City. In preparing the tender specifications Mr Rimpas relied on specifications which had been used previously for earlier tenders, albeit with some accommodation of additional areas. It is apparent the earlier specifications for weed spraying contracts were seriously inaccurate.
- [64] The discrepancy between the contract value, as implied by the approximate specifications in the tender documents, and the actual amounts paid to Turfmaster under the contracts, was primarily due to the inaccuracy of those specifications. The inaccuracy of the specifications arose over time as a result of the repeated reference to prior contract specifications when compiling specifications for new contracts. This was not detected by the City of Bayswater as budgeted expenditure was also a function of the previous year's expenditure, and bore no relationship to the contract value implied by the specifications estimated in the tender document.
- [65] In the opinion of the Commission, the evidence does not establish misconduct on the part of Mr Rimpas. The Commission accepts that Mr Rimpas's failure to account for bi-annual sprays for some items on the price schedule when analysing Tender 34-96/97 was a genuine error, brought about by the fact that Mr Rimpas had had no prior involvement with weed spraying contracts.

## **Mr Terry Blanchard**

- [66] Mr Terry Blanchard, then Director of Technical Services for the City, had a personal friendship with Mr Evans (of G.T. Evans) and Mr Evan's late father.
- [67] In his role as Director of Technical Services, Mr Blanchard was present at the meeting of the Technical Services Committee on 18 June 1997 which recommended Tender 34-96/97 be awarded to G.T. Evans Weed Spraying Services Pty Ltd (Turfmaster). This was a committee of councillors. Mr Blanchard and Mr Rimpas attended as advisors. The Commission accepts that Mr Blanchard did tell his superior, Mr Mario J Carosella, Chief Executive Officer of the City of Bayswater during the period of the Commission investigation, that he and Mr Evans were friends. Mr Carosella told him he was not to be involved in the analysis of the tenders or reporting to Council on them. The Commission accepts that Mr Blanchard subsequently left those tasks to Mr Rimpas. However, Mr Blanchard was present at the opening of the tenders; he signed the tender opening document; he signed the letter to Turfmaster advising they were the successful tenderer; and he subsequently signed purchase orders and approved payments.
- [68] Mr Carmelo Casilli, the Manager Parks and Gardens, managed the spraying of parks and gardens under the contract; Mr Blanchard maintained control over the spraying of kerbs, roads and footpaths.
- [69] Mr Blanchard signed three purchase orders between April 2004 and April 2005, for a total of \$133,205. Although the accounting processes at the City of Bayswater required a purchase order to be raised before work could be done and an invoice submitted, in all three of these instances Mr Blanchard signed the purchase orders after Turfmaster had done the work and submitted an invoice for payment.
- [70] In August 2005 Mr Blanchard approved a proposal by Mr Evans to increase the frequency of spraying kerbing, footpaths and verges from two to three applications per year. The proposal involved a discounted rate per application, but an overall increase of \$30,000 per annum in payments to Turfmaster. Mr Blanchard agreed he knew this would result in increased cost to the City. The Commission is satisfied on the evidence any significant increase in cost was a variation of the contract which required Council approval. That did not occur. Mr Blanchard did not have the authority to agree to increase the frequency of applications from two to three per annum, at an increased cost to the City of more than \$30,000 per year.
- [71] Mr Blanchard's personal friendship with Mr Evans was an interest capable of affecting his impartiality in respect of the weed spraying contracts with Turfmaster. Mr Blanchard had a conflict of interest between his public office with the City and his personal relationship with Mr Evans.

- [72] Mr Blanchard disclosed this relationship or friendship, to Mr Carosella. He thereafter took no part in the analysis of and reporting on the tenders. That was done by Mr Rimpas. But Mr Blanchard ought not to have been present at the opening of the tenders and his participation could have given rise to a reasonable perception of conflict. That would have been reinforced by the fact he signed the letter to Turfmaster (even though that was written by Mr Rimpas and enquiries were directed to Mr Rimpas).
- [73] Mr Blanchard's management of the paths, kerbs and verges part of the Turfmaster contract was problematic. Mr Blanchard justified it on the basis the contract was already in place and he was merely authorising work or payments in accordance with it, in each instance. That may be so, but his involvement in that way could have been reasonably seen as affording an opportunity to benefit his friend, Mr Evans. The fact that he issued purchase orders after Turfmaster had done work and submitted invoices for it, contrary to City policy, was capable of lending weight to any such perception of partiality or favouritism.
- [74] Mr Blanchard's conduct as outlined above may therefore have given rise to a reasonable apprehension that it affected the honest or impartial performance of his functions.
- [75] In approving the change in the frequency of herbicide applications, thereby incurring a significant increase in cost to the City, Mr Blanchard acted contrary to its Code of Conduct, in that he exceeded his authority.
- [76] In the opinion of the Commission, by taking part in the formal tender process as he did (even though not in fact being involved in the analysis or decision on the tender) and continuing to manage part of the City of Bayswater's weed spraying contract with Turfmaster, and by approving an increase from two to three applications per annum for some items without having the authority to do so, whilst having a conflict of interest by virtue of his friendship with a proprietor of Turfmaster, Mr Blanchard engaged in misconduct.
- [77] In terms of paragraph 4(d)(i) of the Act he engaged in conduct that "adversely affects or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer ...".
- [78] The Commission also considers that in terms of paragraph 4(d)(vi) of the Act Mr Blanchard's conduct could constitute "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*".
- [79] The Commission makes the following recommendation:

#### **Recommendation 4**

The City of Bayswater review its policy on conflicts of interest to ensure:

- councillors are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately;
- the Chief Executive Officer and senior managers are aware of their responsibility to appropriately manage conflicts of interest within the City administration;
- individual officers of the City administration are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately; and
- declarations of conflict of interest and action (to be) taken in respect of them, are appropriately recorded.

#### **Mr Carmelo Casilli**

- [80] City of Bayswater records show that Turfmaster invoiced the City of Bayswater for the supply for fertiliser on 16 occasions between 18 September 2003 and 1 September 2004, for a total of \$47,612.64, with three invoices for an amount less than \$100, eight invoices for an amount between \$100 and \$1,000, and five invoices for an amount in excess of \$1,000.
- [81] For 12 of the 13 supplies of fertiliser by Turfmaster valued over \$100, City of Bayswater employees failed to obtain verbal or written quotes, contrary to the City of Bayswater purchasing policy. Instead, it appears that Turfmaster was asked to supply the product without having to quote.
- [82] In addition, Turfmaster invoiced the City for works undertaken on 48 occasions between 4 September 2003 and 14 July 2005, for a total of \$105,546.98. All payments were for amounts over \$100 and 32 of them exceeded \$1,000. The City was not able to provide the Commission with evidence of any quotations having been obtained.
- [83] The City officer responsible for obtaining quotes and completing purchase requisitions in these instances was Mr Casilli, Manager Parks and Gardens.
- [84] On the information available, in the Commission's assessment Mr Casilli breached the City of Bayswater purchasing policy on a regular basis by providing Turfmaster with work, without first obtaining quotes.
- [85] The Commission accepts this was the result of poor work practices and record keeping, combined with Mr Casilli's careless disregard of his managerial responsibilities. As Manager of Parks and Gardens he was negligent in incurring financial liabilities for the City, without ensuring they were properly incurred and appropriate procedures were followed.

However, there is no evidence of any corrupt motivation on Mr Casilli's part, nor that he was deliberately subverting the City's processes so as to obtain a benefit for himself or Turfmaster.

[86] Nonetheless, there can be no question but that Mr Casilli's conduct was not impartial in its result, or effect. It advantaged Turfmaster over other potential suppliers; it disadvantaged other potential suppliers by denying them the opportunity to tender and get the work. It resulted in Turfmaster repeatedly being treated more favourably as a matter of course. There is no evidence that what Mr Casilli did was done for that purpose, but it was undeniably the outcome. Having regard to the fact there is a positive obligation upon public officers to act impartially, without bias and without favour, and to the harm to public confidence in the public sector and in government which flows when they do not do so (for whatever reason and whether intentional or not), the Commission is of the opinion that his conduct in this respect fell within paragraphs 4(d)(i) and (ii). It was conduct which:

- did directly adversely affect the impartial performance of the functions of the City and his own position; and
- constituted the performance of his functions in a manner that was not impartial.

[87] In the opinion of the Commission Mr Casilli's conduct, albeit negligent and not deliberately intended to benefit Turfmaster or cause a detriment to other service providers, could constitute a disciplinary offence (repeatedly failing to comply with the City's purchasing procedures and acting contrary to them) providing reasonable grounds for the termination of a public service officer's office or employment, within the meaning of paragraph 4(d)(vi) of the Act.

[88] In his section 86 representations, Mr Casilli's lawyer concedes<sup>12</sup> that his conduct was capable of coming within paragraph 4(d)(vi) of the Act, but submits that in his circumstances termination would have been unlikely; that a likely consequence of disciplinary proceedings would have been his demotion and/or a requirement to undergo formal training on the City's purchasing policy. That might or might not have been so, but it is irrelevant to the application of the hypothetical test in paragraph 4(d)(vi).<sup>13</sup> The concession that Mr Casilli's conduct was capable of coming within paragraph 4(d)(vi) is an acknowledgement that it was sufficient to meet the statutory test.

[89] In the opinion of the Commission it follows that Mr Casilli engaged in misconduct under section 4(d)(i), (ii) and (vi) of the Act.

[90] However, Mr Casilli is no longer employed by the City and so he is no longer open to disciplinary proceedings. The Commission accordingly makes no recommendation that disciplinary proceedings against him be considered.



## City of Bayswater: Progress and Current Situation

### Introduction

- [91] It is important to appreciate that the events which were the subject of the investigation which focused on the activities of councillors and officers of the City of Bayswater occurred in the main between February 2003 and late 2005.
- [92] From the outset of the investigation, during the course of it and subsequent to it officers of the Commission have worked with the City of Bayswater and its officers to identify misconduct risks and to develop and implement misconduct resistance strategies to address identified risks. This involved the review of existing policies, processes and procedures.
- [93] The Commission acknowledges the commitment to dealing with the misconduct risks identified through this collaborative process and the cooperation extended to it by Mr Mario J Carosella, Chief Executive Officer of the City of Bayswater during the period of the investigation, Ms Francesca Lefante, the current Chief Executive Officer, and City of Bayswater officers.
- [94] The City of Bayswater in its representations dated 17 March 2009,<sup>14</sup> made in response to the 24 February 2009 notice given to it under section 86 of the Act, whereby a person or body must be given a reasonable opportunity to make representations to the Commission before any matters adverse to a person or body are reported to the Parliament of Western Australia, submitted that a number of developments have occurred at the City of Bayswater since the conclusion of the investigation in 2005, including:
- a comprehensive overhaul of practices and procedures;
  - major changes to the City's management team; and
  - the departure of individuals who are the subject of serious adverse comments in the Commission's report on the investigation, and who are, therefore, no longer employed by the City.
- [95] The City of Bayswater also submitted in its representations in response to the section 86 notice that further measures, relevant to matters in the Commission's report, have been and continue to be implemented by the City in various areas, including:
- disclosure of interests and gifts;
  - rules of conduct;
  - asset management;
  - tendering (procurement);

- contract management;
- financial management;
- performance management;
- professional development; and
- recruitment.<sup>15</sup>

[96] In addition, Mr George Rimpas, Manager of Engineering Services, City of Bayswater, in his representations dated 12 March 2009, made in response to the 23 February 2009 notice given to him under section 86 of the Act, submitted that the City has vastly improved the processes for procurement of services by external contractors and for recording the procurement of such services as a consequence of the Commission investigation, from both a logistical and organisation structural perspective.

[97] Mr Rimpas also submitted in his representations that during the Commission's investigation he canvassed several Councils on how contracts were supervised, and the information so obtained was included in a report to the Council in 2005.

[98] Mr Rimpas further submitted that, whilst ideally the auditing of quantities actually received would be done at-arms-length, he was currently doing this in-house within his own Engineering Section. Although that is not quite at-arms-length, the process is documented and can itself be audited.

### **Policy and Practices (Procedures) Manual**

[99] Based on information provided by the City of Bayswater, the Commission is aware that the City of Bayswater now has a policy and practices (procedures) manual available to all staff and that ongoing work is being done to continually improve the knowledge of staff and to ensure understanding and application of the various policies and procedures relating to their positions.

### **Tendering Processes and Contracts**

[100] The Commission investigation highlighted a lack of an interrelationship between the finance system then operating and the management of tender contracts (refer paragraph [149], p.27, of this report). The Commission notes the City of Bayswater has since addressed this issue in detail in order to improve the management and transparency associated with ongoing tender contracts.

[101] The control and management of tender contracts is now more centralised with a greater involvement by the Finance Division, and appropriately trained officers, providing an at-arms-length involvement.

- [102] Quantities for tenders are reviewed, with each recalling of annual supply tenders required to be more closely aligned with expected purchases. Operations where it is very difficult to supervise contractor's performances (such as weed spraying and graffiti control) have been brought in-house and are carried out by the City's own day labour workforce, and supplement broad acre spraying by contract.
- [103] Day-to-day quoting of low cost services has changed with order books now in triplicate format, enabling one copy of the order to be held by records and another, together with the invoice, to be held by the Finance Division. The Finance Division is also auditing expenditure thresholds so as to ensure they do not breach tendering regulations.
- [104] The City's Technical Services Division has also been restructured with the Deputy City Engineer's position being abolished and a flatter management based structure adopted with each manager responsible for a smaller section, thus allowing greater control of day-to-day operations.
- [105] The Parks and Gardens Section has also had its supervisory staffing level doubled to allow for more supervision of contractors. The City now also has a dedicated assistant supervisor of street tree pruning who supervises the street tree contract, which is a large (\$750,000) annual contract.

### **Conclusion**

- [106] The City submitted in its section 86 representations that insofar as it relates to the City of Bayswater, the Commission's report deals with problems that occurred many years ago, largely involving people who are no longer employed by the City, under practices and procedures that have been replaced and in a situation where, given the changes that have been made, similar problems are unlikely to recur.
- [107] The Commission notes that the vast majority of current employees of the City had little or nothing to do with the events in question.
- [108] The Commission acknowledges that the City has demonstrated, in its dealings and work with the Commission over the past four and a half years, that it welcomes and responds positively to identified shortcomings. Organisationally, the City has publicly acknowledged and addressed, and continues to address, the shortcomings identified in the public hearings and in this report.
- [109] However, in conclusion, it needs to be stated that whilst it is recognised that significant progress has been made by the City of Bayswater and its officers in relation to the identification of misconduct risks and implementation of strategies to address such risks, maintenance of the current improved position and continued progress are dependent on a number of factors, including:

- continuous review and improvement of processes and policies across the areas specifically outlined in the City's section 86 representations;
- transparent operations which are open to public scrutiny and comment;
- ongoing training for City officers to ensure understanding of and compliance with relevant legislation, regulations and policies, especially those which assist councillors and officers to identify and avoid, or declare and defuse or manage, conflicts of interest;
- that job descriptions, which detail job specific duties and required skills, abilities, experience and knowledge to undertake the stated duties, appropriately reflect the current and future employment needs of the City; and
- recruitment of suitably qualified officers, particularly in senior positions.

## EXECUTIVE SUMMARY: ENDNOTES

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<sup>1</sup> Corruption and Crime Commission *Report on the Inquiry Into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mark Mallard, and Other Related Matters*, tabled 7 October 2008.

<sup>2</sup> Anti-Corruption Commission surveillance running sheets and photographs.

<sup>3</sup> Commission Interviews of 13 January 2005, 14 January 2005 and 3 February 2005.

<sup>4</sup> Commission Interview of 14 February 2005.

<sup>5</sup> Commission Information Report, 25 May 2004.

<sup>6</sup> Transcript of Proceedings, Public Examination on 23 June 2005, pp.242-259.

<sup>7</sup> This amount has now been changed to \$100,000.

<sup>8</sup> City of Bayswater Purchasing Policy FS-P19 [E 05859].

<sup>9</sup> Draft Procurement Manual dated September 2005 provided to the Commission on 19 September 2005, [E 05366].

<sup>10</sup> The Commission selected a sample of City of Bayswater records relating to work performed by each of these businesses for the City of Bayswater. An examination was also conducted of the general ledger entries relevant to these businesses.

<sup>11</sup> City of Bayswater Policy AD-P14, adopted 1 March 2005: *Awarding of Contracts to Business Entities Closely Associated with Councillors and Employees (Tenders, Expressions of Interest or Quotation Guidelines and Procedures)*.

<sup>12</sup> Representations on behalf of Mr Carmelo Casilli dated 20 March 2009, p.6.

<sup>13</sup> Cox v Corruption and Crime Commission [2008] WASCA 199, per Martin CJ at [64]; Steytler P at [118].

<sup>14</sup> City of Bayswater representations dated 17 March 2009, p.2.

<sup>15</sup> *Ibid*, p.1.



# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the Investigation

- [1] In July 2002 the Anti-Corruption Commission (A-CC) commenced a preliminary investigation into allegations of misconduct against a public officer working in the Building Services Directorate of the City of Bayswater (“the City” or “the City of Bayswater”) who was also a councillor at the City of Stirling.
- [2] On 24 May 2004 the investigation was referred to the Corruption and Crime Commission (“the Commission”)<sup>1</sup> due to the closure of the A-CC.
- [3] During the course of the Commission’s investigation certain anomalies were discovered in the record keeping and tendering processes at the City of Bayswater. Accordingly, the Commission went on to investigate the following allegations of misconduct, that:<sup>2</sup>
- public resources had been misused and the tendering and contracting processes at the City of Bayswater had been mismanaged;
  - staff and councillors at the City of Bayswater had failed to accurately complete their annual returns; and
  - staff and councillors at the City of Bayswater had not appropriately declared the receipt of gifts and benefits.
- [4] Following the referral by the A-CC the Commission commenced an investigation pursuant to section 33 of the *Corruption and Crime Commission Act 2003* (“the Act”). In accordance with section 22 of the Act the purpose of the investigation was to assess the allegations and form an opinion as to the occurrence of misconduct, as defined in section 4 of the Act.
- [5] The Commission’s investigation fell broadly into two areas: an investigation of allegations of misconduct by the public officer in his capacity as a public officer with both the City of Bayswater and the City of Stirling; and an investigation of other aspects of the administration of the City of Bayswater.
- [6] In the course of its investigation the Commission examined information provided by the A-CC to the Commission, including recordings of intercepted telephone calls and material obtained by surveillance devices. The Commission also obtained documents and information by way of notices issued in accordance with section 95 of the Act, and by way of search warrants issued by the Supreme Court of Western Australia. The Commission also conducted interviews and held private and public hearings.

## 1.2 Time Between Investigation and Report

- [7] Given that there has been a considerable delay between the events on which the Commission is reporting, and the publication of the report, the Commission has given the publication of this report very careful consideration.
- [8] Several charges of criminal offences were laid in April 2005. Those charges resulted in convictions in 2006.
- [9] On 18 October 2005 the Commission charged one public officer by summons with four counts of corruption pursuant to section 83 of *The Criminal Code* relating to his involvement in administering contracts and tenders for work undertaken by private contractors for the City of Bayswater. He was committed to the District Court for trial. On 16 February 2006 the Commission provided a brief of evidence to the Office of the Director of Public Prosecutions (DPP), who was to conduct the trial on indictment in the District Court.
- [10] In light of the pending charges the Commission decided at that time not to publish a report on its investigation until those criminal matters had been resolved.
- [11] The Commission was advised by the DPP on 18 October 2007 that he did not intend to proceed with those criminal charges in the District Court. There was therefore no further obstacle to publication of a report and the Commission's investigation was accordingly recommenced.
- [12] The Commission appreciates that any expression of opinion by it, in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion (or even information about the investigation of an allegation where the Commission did not form an opinion of misconduct) may have consequences for the person, their family, friends and associates and their reputation and livelihood.
- [13] However, the Commission has decided that in this matter the benefits of public awareness outweigh the potential for adverse impact on individuals. In the Commission's view this report contains information which provides valuable examples for local governments about the sort of misconduct which can occur where there is insufficient awareness and controls to prevent it.
- [14] The ratepayers of the City of Bayswater are entitled to know about the circumstances existing at the City between 2003 and 2005, which gave rise to a risk of potential (and, in some instances, actual) misconduct. Public exposure of those matters, even now, affords lessons from which better practices can be identified so as to reduce the risk of misconduct in the future – not only in the City of Bayswater, but in local government generally.
- [15] In deciding to publish this report notwithstanding the lapse of time since the relevant events occurred, the Commission is also mindful that by



section 17(2)(ca) of the Act, it is directed to ensure that in performing all of its functions, the Commission has regard to its misconduct prevention and education function.

### 1.3 Jurisdiction of the Commission

- [16] The Commission deals with allegations of misconduct made to it in accordance with the procedures set out in the Act.
- [17] One of the Commission’s functions, pursuant to section 18(1) of the Act, is to ensure that “... an allegation about, or information or matter involving, misconduct is dealt with in an appropriate way”. Section 18 then describes how this function may be performed by the Commission, including “investigating ...” (section 18(2)(c)), “making recommendations and furnishing reports on the outcome of investigations” (section 18(2)(f)) and furnishing to another agency “... evidence which may be admissible in the prosecution of a person for a criminal offence against a written law ...” (section 18(2)(h)).
- [18] Pursuant to section 17 of the Act, the Commission also “has a function (the **prevention and education function**) of helping to prevent misconduct”.

### 1.4 Definitions

#### 1.4.1 Misconduct

- [19] The term “misconduct” has a particular and specific meaning in the Act and it is that meaning which the Commission must apply. Section 4 of the Act states that:

*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,*

*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).*

[20] Misconduct, as defined in section 4 of the Act applies only to the conduct of public officers.

[21] In section 3 of the Act “**serious misconduct**” is defined as “misconduct of a kind described in sections 4(a), (b) or (c)”.

[22] Misconduct of a kind described in sections 4(d)(i) – (iv) must not only involve the type of conduct described in those sections, but must also be serious enough to meet the criteria set out in either section 4(d)(v) or section 4(d)(vi).

[23] The criteria in section 4(d)(v) says that the conduct must be serious enough so that it constitutes, or could constitute, an offence against a written law.

[24] The criteria in section 4(d)(vi) is more complex. It says that the conduct must be serious enough so that it constitutes or could constitute “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)”.

[25] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, the test is notional – that is, although it cannot then apply directly, the Commission must assess the public officer’s conduct against the objective criteria set out in the *Public Sector Management Act 1994* (“the PSM Act”), as if that person were a member of the public service.

[26] General principles of official conduct are set out in section 9 of the PSM Act, which states that:

*The principles of conduct that are to be observed by all public sector bodies and employees are that they –*

(a) *are to comply with the provisions of –*

(i) *this Act and any other Act governing their conduct;*

(ii) *public sector standards and codes of ethics; and*

(iii) *any code of conduct applicable to the public sector body or employee concerned;*

(b) *are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and*

(c) *are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.*

[27] Breaches of discipline are set out in section 80 of the PSM Act, which states that:

*An employee who –*

(a) *disobeys or disregards a lawful order;*

(b) *contravenes –*

(i) *any provision of this Act applicable to that employee;*  
*or*

(ii) *any public sector standard or code of ethics;*

(c) *commits an act of misconduct;*

(d) *is negligent or careless in the performance of his or her functions; or*

(e) *commits an act of victimisation within the meaning of section 15 of the “Public Interest Disclosure Act 2003”,*

*commits a breach of discipline.*

[28] Section 80(e) was added on 1 July 2003 but otherwise the section has remained unchanged.

- [29] A breach of discipline may be a minor breach or a serious breach. In order to be dismissed under section 86(3)(b) of the PSM Act a person must have committed a serious breach. The PSM Act does not provide criteria for determining whether a breach is minor or serious. The *Disciplinary Procedures Guide* produced by the Department of the Premier and Cabinet, Government of Western Australia, states (at paragraph 2.3) that: “Agencies must use their own judgement when determining if a breach is serious or minor in nature. Consideration should be given to the impact the breach of discipline has on the relationship of trust between the respondent and the employing authority, other employees and the general public”.<sup>3</sup>
- [30] The *Disciplinary Procedures Guide* also states (at paragraph 4.9) that: “Serious breaches of discipline are difficult to define and in most cases a question of degree will be involved. An employing authority’s view is also likely to vary with the nature of the public sector body’s business and the position held by the respondent”.
- [31] A minor breach may be punished by a reprimand or a fine not exceeding 1 days pay or both, pursuant to section 83(1)(a)(i), (ii) or (iii) of the PSM Act.
- [32] If a departmental investigating authority is of the opinion that a serious breach of discipline appears to have been committed, that authority shall cause the public officer to be charged with that alleged breach pursuant to section 83(1)(b) of the PSM Act.
- [33] The procedure for dealing with a charge of a serious breach of discipline is set out in section 86 of the PSM Act.
- [34] The punishments which may be imposed where a charge of a serious breach of discipline is admitted and proved are set out in section 86(3)(b) of the PSM Act. Section 86(3)(b) states that:
- ... if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority –*
- (b) may –*
- ...
- (vi) dismiss the respondent, ...*
- [35] Where the public officer concerned is a Chief Executive Officer (CEO) and the recommendation is for dismissal, the Minister shall so recommend to the Governor (section 89 of the PSM Act).
- [36] It follows from the above, that not only must there be an identifiable (actual or possible) breach of discipline under the PSM Act for section 4(d)(vi) of the Act to be brought into play, but it must be characterisable as a serious breach for the punishment of dismissal to be an option under section 86(3)(b) of the PSM Act.

### **1.4.2 Public Officers**

- [37] The term “public officer” is defined in section 3 of the Act by reference to section 1 of *The Criminal Code* to include “(d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law”.
- [38] Employees and councillors of the City of Bayswater and the City of Stirling are public officers for the purposes of the Act.
- [39] Section 6(2) of the Act provides that the Commission may “... perform its functions in relation to acts, omissions or conduct alleged to have been done, omitted or engaged in by a person who was a public officer at the time of the alleged acts, omissions or conduct even if the person has ceased to be a public officer”.
- [40] The persons whose conduct is examined in this report, were public officers at the time of the conduct. Accordingly, in terms of section 6(2) of the Act, their conduct falls within the jurisdiction of the Commission, even though some are no longer public officers.

## **1.5 Reporting by the Commission**

- [41] Section 84(1) of the Act states: “The Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct ...”.
- [42] Section 84(3) of the Act states that the Commission may include in a report:
- (a) *statements as to any of the Commission’s assessments, opinions and recommendations; and*
  - (b) *statements as to any of the Commission’s reasons for the assessments, opinions and recommendations.*
- [43] Section 84(4) states: “The Commission may cause a report prepared under this section to be laid before each House of Parliament or dealt with under section 93”. Section 93 provides a procedure for the Commission to lay a report before a House of Parliament that is not sitting.

## **1.6 Disclosure**

- [44] The Commission has been given powers that enable it to apply for warrants to lawfully intercept telecommunications (telephone and email communications), utilise surveillance devices, conduct searches, compel the production of documents and other things, compel attendance of witnesses at hearings, and compel responses to questions on oath in hearings conducted by the Commission.

- [45] The Commission takes any decision to release information to the public very seriously. In that regard too it weighs the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.
- [46] In the Commission's view there is a real and substantial public interest in the public dissemination of this report.
- [47] Section 86 of the Act requires that: "Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters".
- [48] Accordingly, a number of persons were notified in February 2009 of possible adverse matters which it was proposed to include in this report. They were invited to make representations about those matters and were advised that they and their legal adviser could inspect the transcript of hearings before the Commission and evidentiary material going to matters identified and any other matters about which they might wish to make representations. Most of those identified did make representations in response, the last of those being received by the Commission on 8 May 2009. Some of these representations were quite detailed and extensive.
- [49] The Commission has given careful consideration to all the section 86 representations received and has taken them into account in finalising this report. A list of persons who received notifications under section 86 is provided in Appendix 1 to this report.
- [50] In the early stages it was the Commission's intention to deal specifically with all of the public officers involved, including those who had been convicted of criminal offences or who had criminal charges pending, arising out of the matters investigated by the Commission. However, given the time which has passed since most of the relevant events happened, and what has occurred in the meantime, the Commission considers that in relation to some of those concerned the adverse impact on them would outweigh any public benefit from identifying them in this report. The Commission's primary focus will, therefore, be on systemic issues affecting misconduct risks at the City of Bayswater, although where it is necessary and appropriate to refer to specific persons the Commission will do so.

## **1.7 Telecommunications Interception Material**

- [51] The Commonwealth's *Telecommunications (Interception and Access) Act 1979* ("the TI Act") contains stringent controls and safeguards in relation to telecommunications interception and handling, and communicating information gathered from lawfully intercepted telecommunications. Section 63 of the TI Act prohibits the communication of lawfully intercepted information unless given particular restricted circumstances.

[52] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,<sup>4</sup> to make use of lawfully intercepted information and interception warrant information for a permitted purpose. “**Permitted purpose**”, is defined in section 5(1) of the TI Act, and in the case of the Commission it includes:

(i) *an investigation under the Corruption and Crime Commission Act into whether misconduct (within the meaning of that Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or*

(ii) *a report on such an investigation.*

## 1.8 Privacy Considerations

[53] In formulating this report the Commission has complied with the strict requirements of the TI Act and the *Surveillance Devices Act 1998* (WA) in the utilisation of intercepted information.

[54] As a result of these considerations the Commission has decided not to include the names of some individuals who assisted the Commission during its investigation.

## 1.9 Opinions of Misconduct: Standard of Proof

[55] The standard of proof used by the Commission in order to form its opinions on misconduct is “on the balance of probabilities”.

[56] The balance of probabilities is defined as:

*The weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability ...<sup>5</sup>*

[57] The balance of probabilities is a standard used by courts when considering civil matters. It is a standard which is less than the criminal standard of “beyond reasonable doubt”. This was confirmed by the High Court in a unanimous judgment in Rejfeek v McElroy (1965) 112 CLR 517, at 521:

*... The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ...*

[58] The balance of probabilities can be applied to circumstantial evidence, as explained by the High Court in Luxton v Vines (1952) 85 CLR 352, at 358:

*... The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise ...*

- [59] The degree of evidence necessary to reach a conclusion on the balance of probabilities varies according to the seriousness of the issues involved. This was explained by Sir Owen Dixon in Briginshaw v Briginshaw (1938) 60 CLR 336:

*... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.*

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...*

- [60] Or, as Lord Denning said in Hornal v Neuberger Products Ltd (1957) 1 QB 247, at 258: "The more serious the allegation the higher the degree of probability that is required ...".
- [61] The Commission could not reach an opinion of misconduct on the basis of a "mere mechanical comparison of probabilities", without any actual belief in its reality. That is to say, for the Commission to be satisfied of a fact on the balance of probabilities, it would have to have an actual belief of the existence of that fact to at least that degree.<sup>6</sup>
- [62] The Commission has borne the foregoing considerations in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.



## **CHAPTER TWO BACKGROUND**

### **2.1 Allegations about the Conduct of a Public Officer**

[63] In 2002 the A-CC received allegations about a public officer from the Chief Executive Officer of the Town of Vincent and the former National Crime Authority (now the Australian Crime Commission).<sup>7</sup> The A-CC undertook a preliminary investigation into the activities of the public officer.

[64] On 24 May 2004 the A-CC referred the matter to the Commission.

### **2.2 Allegations Involving the Administration of the City of Bayswater**

[65] As part of its investigation the Commission also examined other aspects of the City of Bayswater's administration in order to form an opinion about the possible occurrence of misconduct by its employees or councillors.

[66] The areas investigated were:

1. the disclosure of financial and non-financial interests by employees and councillors;
2. the declaration of gifts and benefits by employees and councillors; and
3. existing accountability frameworks, including, but not limited to, the management of tenders and contracts in respect of work performed for the City of Bayswater by a company called Turfmaster Facility Management ("Turfmaster") and its associated entities.

### **2.3 Commission Investigation**

[67] The Commission investigation was conducted between August 2004 and December 2008. In the course of its investigation the Commission examined documents provided by the A-CC to the Commission, including telecommunications interception and surveillance device material. The Commission also obtained documents and information by way of notices issued in accordance with section 95 of the Act, and by way of search warrants issued by the Supreme Court of Western Australia pursuant to section 101(2) of the Act. The Commission also conducted interviews and held private and public hearings.

### **2.4 Private and Public Hearings**

[68] Section 140(2) of the Act states:

(2) *The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.*

[69] In the course of this investigation the Commission conducted the following private and public hearings:

- 29 October 2004 (a private hearing);
- 7 and 8 December 2004 (public hearings relating to the 2003 City of Stirling local government election);
- 10 June 2005 (a private hearing relating to management of tenders and contracts involving employees at the City of Bayswater);
- 13 to 15 June 2005 (public hearings relating to the management of tenders and contracts at the City of Bayswater);
- 23 and 24 June 2005 (public hearings relating to the management of tenders and contracts involving employees at the City of Bayswater); and
- 16 and 17 November 2005 (private hearings relating to the management of tenders and contracts involving employees at the City of Bayswater).

## **2.5 Scope and Purpose of the Investigation**

[70] The general scope and purpose of the Commission's investigation in relation to officers of the City of Bayswater was:

*To make an assessment and form an opinion as to whether certain public officers, namely members, officers or employees of the City of Bayswater, have or may have engaged in misconduct, with particular reference but not necessarily 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.<sup>8</sup>*

## **CHAPTER THREE**

### **COMMISSION INVESTIGATION**

#### **3.1 Allegations that a Public Officer used his Official Position to Ensure the Award of City of Bayswater Contracts to Friends and Family Members**

- [71] The Commission's investigation revealed that during 2003-2004 there was a lack of financial control, supervision and accountability at a practical level within the City of Bayswater. This enabled a City officer to preferentially award City contracts to businesses owned by his personal associates and family members.
- [72] Two methods by which this favoured treatment was given, were:
- telling the contractor what other businesses had quoted, so that the favoured contractor could submit a quote which would be the lowest; and
  - arranging for the favoured contractor to submit their own quote plus other (false) higher quotes ostensibly from other businesses.
- [73] There were instances where, having secured the work on the basis of the lowest quote, the favoured contractor ultimately charged (and was paid) significantly more.
- [74] Even when what was done resulted in a lower price in fact being quoted – and eventually charged – to the City, the contractor benefitted unfairly by getting work they otherwise would not have.
- [75] A further longer-term benefit was that being contracted to do the work on these occasions enabled the favoured contractors to develop an ongoing relationship with the City, becoming “preferred” contractors and so securing more work in future.
- [76] The public officer was able to give his friends and associates a competitive advantage so they would secure work from the City.
- [77] This conduct constituted a failure to act impartially and with integrity. It was unfairly preferential to relatives, friends and associates of the public officer and on occasion resulted in the City paying more for contracted services than it otherwise would have paid.
- [78] These matters were brought to the attention of the City whilst the Commission's investigation was continuing.

#### **3.2 Abuse of Conditions of Employment and Falsification of Records: City of Bayswater**

- [79] Evidence obtained from covert surveillance conducted between February and September 2003 showed that a public officer regularly undertook private activities during work hours.<sup>9</sup>

- [80] The Commission examined City of Bayswater time sheets submitted by the public officer for that period and compared them with other evidence relating to his conduct during that period. The analysis showed numerous occasions when he was engaged in private activities when his time sheets indicated he was working for the City of Bayswater. His private activities included attending lunches with building industry colleagues outside the City of Bayswater, attending to private building developments by visiting various councils to submit development documents, visiting building sites and suppliers, assisting concrete workers at a private development of his own, campaigning for a local government election during two days when he produced a medical certificate stating he was unfit for work, and undertaking other clearly private activities for lengthy periods.
- [81] In an interview with the Commission the public officer accepted that the time sheets he had submitted during this period were false, but said that he had made up the time by attending meetings in the evenings and on the weekend, and had worked from home. He also said that the forms had been signed by his supervising officer and if his supervisor hadn't agreed with what he was doing he should not have signed them.<sup>10</sup>
- [82] The Commission's examination of the City of Bayswater's electronic time keeping systems, policies, procedures and guidelines showed them to be adequate, provided managers applied sufficient checks to ensure the information entered into the systems was accurate. The problem was no checking procedure existed in this officer's area of work. There was a disconnect between the policy and the practice. That constituted a serious misconduct risk, which here encouraged, facilitated and ultimately resulted in misconduct.
- [83] The officer's manager was interviewed by Commission officers and in respect of the time sheets he said: "They come to me and I sign them and then they go to the director. Okay. I don't check them because I - - these people, I trust them that they do the right thing".<sup>11</sup>
- [84] The investigation found that insufficient monitoring and oversight of employee's time sheets in the area where this employee worked allowed poor practices to develop and continue.
- [85] The Commission makes the following recommendation:

**Recommendation 1**

The City of Bayswater devise and implement a selective audit or checking process to validate its systems, policies, procedures and guidelines relating to employee time sheets and other records and to ensure the relevant information is recorded and is accurate.

## **CHAPTER FOUR CITY OF BAYSWATER**

### **4.1 Scope and Purpose of the Investigation**

[86] The general scope and purpose of the investigation was “to make an assessment and form an opinion as to whether certain public officers, namely members, officers or employees of the City of Bayswater, have or may have engaged in misconduct, with particular reference but not necessarily 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”.<sup>12</sup>

[87] The areas examined by the Commission related to the:

- disclosure of financial and non-financial interests by councillors and employees;
- declaration of gifts and benefits by councillors and employees; and
- process of administering tenders and contracts.

### **4.2 Disclosure of Financial and Non-Financial Interests**

[88] The *Local Government Act 1995* (“the Local Government Act”) provides a legal framework within which local governments must operate, and provides for the disclosure of financial and other interests by councillors and delegated employees.

[89] Section 5.75 of the Local Government Act requires a “relevant person” (other than the Chief Executive Officer (CEO), who is subject to other provisions) to lodge a primary return with the CEO within three months of commencing their employment or position. Section 5.76 requires annual returns to be lodged thereafter. The maximum penalty for breaching these provisions is \$10,000 or imprisonment for two years.

[90] A “relevant person” is defined in section 5.74 of the Local Government Act as “a person who is a council member or a designated employee”.

[91] A “designated employee” is defined as meaning the CEO, an employee other than the CEO to whom a power has been delegated, an employee who is a member of a committee comprising councillors and employees, and an employee nominated by the local government to be a designated employee.

[92] The Commission examined the primary and annual returns submitted by City of Bayswater councillors and employees for a sample period, between 2000 and 2004. The declarations recorded on those returns were then checked against records of the Department of Land Administration (now Landgate) and the Australian Securities and Investments Commission (ASIC). The Commission found that several councillors appeared not to

have declared their interests in various companies during this period, although the Commission accepts that in some instances it was possible that they had been declared in returns submitted before 2000.<sup>13</sup>

- [93] At a public hearing conducted by the Commission a councillor of the City of Bayswater was asked why he had not declared his interest in several companies. He said he thought that he was not required to declare an interest in companies if they had not conducted business with the City. He also said that he did not realise that he was required to declare an interest in a company which was a trust company forming part of another company which he had previously declared.<sup>14</sup>

#### **4.2.1 Commission Opinion**

- [94] The information before the Commission suggests that in some instances the returns required by the Local Government Act had not been completed accurately by councillors of the City of Bayswater. This mainly appears to have involved a lack of information in the returns, rather than incorrect information having been provided. It appears to the Commission that some councillors were confused about the requirements of the Local Government Act in respect of both the primary and annual returns.

- [95] In the opinion of the Commission the information before it does not establish misconduct by any councillor or employee of the City of Bayswater in relation to this matter.

- [96] The Commission makes the following recommendation:

#### **Recommendation 2**

In order to clarify the obligation of elected members with respect to primary and annual returns, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.

### **4.3 Declaration of Gifts and Benefits**

- [97] Section 5.82 of the Local Government Act places an obligation on a "relevant person" (a council member or a designated employee) to disclose gifts which exceeded a prescribed amount (\$200 at the relevant time) in an annual return.

- [98] Section 5.88 of the Local Government Act requires a CEO of a local government to keep a register of financial interests including the interests declared by councillors and designated employees in their annual returns.

- [99] The Commission examined the City of Bayswater Gifts Registers for 2003 and 2004 and annual returns submitted by councillors and employees from 2000 to 2004. This examination showed that very few gifts (required to be declared under section 5.82 of the Local Government Act at item 4 of

the annual return) had been declared, and then only by a small number of people. A spot review conducted by the CEO of the City of Bayswater immediately following the Commission's review of the 2003-2004 period showed that the incidence of gifts being declared increased significantly once the City of Bayswater became aware of the Commission's investigation. The Commission considers that this may be because "relevant persons" had been made more aware of their obligations to make declarations.

#### **4.3.1 Commission Opinion**

[100] In the opinion of the Commission a lack of knowledge by councillors and employees of the City of Bayswater about the legal requirement for them to declare gifts meant that the gift register was not accurately maintained. However, in the Commission's opinion the material before it does not establish misconduct by any person.

[101] The Commission makes the following recommendation:

#### **Recommendation 3**

In order to clarify the obligations of elected members with respect to the declaration of gifts and benefits, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.

#### **4.4 Management of Tenders and Contracts**

[102] The Commission investigated processes, policies and procedures of the City of Bayswater relating to the management of tenders and contracts, with a specific focus on:

- (a) contracts between the City of Bayswater and businesses in which councillors of the City held an interest;
- (b) tender contracts between the City of Bayswater Turfmaster Facility Management ("Turfmaster"); and
- (c) work undertaken by Turfmaster for the City without quotations being obtained.

[103] At the time of this investigation Regulation 11 of the *Local Government (Functions and General) Regulations 1996* ("the Regulations"), required that, except in specified circumstances, tenders must be publicly invited before a local government entered into a contract for another person to supply goods and services worth more than \$50,000.<sup>15</sup>

[104] The Regulations controlled the processes leading to the award of tenders, but were silent on the management of tenders once they were awarded.

The Local Government Sector had no centralised standards for the procurement of goods and services and there was no independent risk management control.

[105] At the time all supply and works services provided externally to the City of Bayswater were bound by its Purchasing Policy (FS-P19), which stated:

1. *quotations are not required for purchases less than \$100;*
2. *documented verbal quotations are required for purchases of value of \$100 to \$1,000;*
3. *written quotations are required for purchases above \$1,000 but below \$50,000; and*
4. *when seeking quotations a minimum of three (3) quotations are required ...*<sup>16</sup>

[106] The Commission notes that the City of Bayswater has since developed a new procurement manual to assist employees involved with procurement processes at the City.<sup>17</sup>

#### **4.4.1 Contracts with Businesses Associated with Councillors**

[107] The Commission examined records relating to contracts entered into between the City of Bayswater and three companies which were owned and directed by three City of Bayswater councillors. The records established that these businesses had undertaken work for the City of Bayswater on a regular basis.<sup>18</sup>

[108] The Commission established that there was no impropriety associated with the award of work to these businesses. The City of Bayswater, at its own initiative and in consultation with the Commission, introduced new guidelines for the awarding of contracts to business entities closely associated with councillors and employees.<sup>19</sup>

##### **4.4.1.1 Commission Opinion**

[109] In the opinion of the Commission, the material before it does not establish misconduct by any councillors in relation to this matter.

#### **4.4.2 Tender Contracts with Turfmaster Facility Management (“Turfmaster”): Anomalies with Amounts and Quantities**

[110] Turfmaster, and its associated entities, have provided turf management, weed control, and fertiliser supply and application services to the City of Bayswater for many years. The Commission conducted an investigation into the administration and management by the City of Bayswater of some of the services supplied to it by Turfmaster.

[111] The Commission examined material relating to contracts awarded to Turfmaster by the City of Bayswater for the period 1997-2004. It was established that during that period Turfmaster, or its associated entities, tendered for and were awarded the following contracts:



- Tender 34-96/97: Weed Control;
- Tender 6-2003: Weed Control; and
- Tender 17-97/98: Supply, Application and Delivery of Turf Fertiliser.

[112] This report will examine the three tenders listed above.

[113] Tender 34-96/97 and Tender 6-2003 were essentially for the same service; the provision of weed control for the City of Bayswater. Tender 34-96/97 was awarded to Turfmaster for three years, from 1 July 1997 to 30 June 2000, with an optional extension for a further three years. The City of Bayswater exercised its option to extend the contract. Tender 6-2003 was awarded to Turfmaster for three years from 1 July 2003 to 30 June 2006, with an optional extension of a further three years. This means that Turfmaster has held the weed control contracts at the City of Bayswater since 1 July 1997.

[114] Tender 17-97/98 for the supply, application and delivery of fertiliser was awarded to Turfmaster for 1 July 1998 to 30 June 1999, with two optional extensions of a further 12 months each. The City of Bayswater exercised the first option to extend the contract, and the tender file contains a letter from Mr Kim Gorey Turf Maintenance Contractors (a Turfmaster entity) requesting the second 12-month extension. Assuming the City of Bayswater exercised its second option to extend the contract, Turfmaster held the contract from 1 July 1998 to 30 June 2001.<sup>20</sup>

#### **4.4.2.1 Tender 34-96/97: Weed Control**

[115] Tender 34-96/97: Weed Control was awarded to G.T. Evans Weed Spraying Services Pty Ltd (“G.T. Evans”),<sup>21</sup> an entity associated with Turfmaster, based on a recommendation from the City of Bayswater Technical Services Committee on 18 June 1997.<sup>22</sup> Four tenders were received. One tender was excluded on the basis of price, and another because of the method it used to kill the weeds. The tender from G.T. Evans was calculated to be for \$104,400 and was evaluated as the cheapest tender, whilst another company tendered \$107,895. The Technical Services Committee recommended that Council award the tender to G.T. Evans, and following approval by Council the tender was awarded for the period 1 July 1997 to 30 June 2000 with an additional three-year option.

[116] It is necessary at this point to say something briefly about the tender process involved here. It began with the issue of a “Request for Tender” document. That set out details which included:

- nature of the service (e.g., weed control);
- deadline for submission of tenders;
- General Conditions of Contract;

- specific contractual requirements (under the heading “Principal’s Request”); and
- specifications and special conditions of contract.

[117] The weed control tenders related to contracts for the supply of services by reference to a list of services and prices set out in a schedule to the specifications. The City was not obliged to take or accept all or any of the services listed except those actually ordered by it during the period of the contract. Contract prices were firm unless stated otherwise in the contract (here they were not stated otherwise). Applications by the supplier for variation of contract prices or rates had to be made in writing. Any actual variation of the terms of contract prices or rates had to be made in writing. Any variation of the terms of the contract had to be agreed to by the City in writing. The weed control tenders stipulated that all prices for services offered were to be fixed for the term of the contract.

[118] The tender specifications stated that distance and area requirements on the schedule were an approximation only and could be varied by the appropriate Council officer. There was a specific requirement that the tender price include an allowance to maintain all paths, medians and verges in a weed-free condition during the period of the contract and the supplier should assume they would be required to carry out monthly maintenance spraying free of charge to the City.

[119] The tenders submitted gave costs per application of specified herbicides. Some of the items showed two applications were required each year, whereas others were shown as requiring only one. In this sense, these were “schedule of rates” contracts. However, it was possible – and indeed necessary – for Council officers to undertake an analysis of the tenders to come to a comparative annual cost. That was readily done by multiplying the distance or area of the item to be sprayed (e.g., kerbing) by the quoted cost per kilometre (or hectare) by the number of applications stated in the tender (and making any appropriate allowance for quoted price differentials dependant for example on distance or area).

[120] The Commission found that the analysis of the tenders was flawed, and that the figures used by the Technical Services Committee were incorrect. Turfmaster’s tender was not contained on the City of Bayswater file provided to the Commission, although tenders from three other companies were. However, there was a price schedule completed by Turfmaster on the file and an examination of that document suggests that the costs used by the Technical Services Committee to evaluate the tender offers was based on the prices given to do one application of herbicide per annum – when in fact two applications were required for some items. Had the correct figures been used then the tender from Turfmaster would have been \$126,400 per annum compared to \$114,747 from another tenderer. It appears from the minutes of the Technical Services Committee meeting that the intention of the Committee was to recommend the tenderer which submitted the cheapest quote.<sup>23</sup>

- [121] This mistake by the City of Bayswater is significant because the contract was for a three-year period with an option of a further three-year extension. The City of Bayswater exercised its option and the contract with Turfmaster was extended until 30 June 2003, which, had the specifications for approximate quantities been accurate, would have resulted in payments to Turfmaster totalling approximately \$70,000 more than what would have been paid to the other tenderer.
- [122] Mr George Rimpas, the Deputy City Engineer, informed the Commission that he analysed the tenders. He told the Commission that he had been appointed in April 1997 and was new in the job at the time he analysed Tender 34-96/97: Weed Control. Mr Rimpas explained that he is an engineer and that he focused on the engineering side of things, and that he had never before been involved in weed control. Mr Rimpas said that he simply entered the quantities as one application per year not realising that some items should have been multiplied by two.<sup>24</sup> On the material available the Commission accepts that this was a genuine mistake.
- [123] The Commission examined the City of Bayswater Creditors Ledger and, although figures were not available from the beginning of the tender operation in 1997, between July 1999 and June 2003 it appears that the City of Bayswater paid Turfmaster the following annual sums for weed control.

Year	Amount
01/07/99 to 30/06/00	\$220,186.00
01/07/00 to 30/06/01	\$250,861.63
01/07/01 to 30/06/02	\$265,676.40
01/07/02 to 30/06/03	\$276,404.10

- [124] These amounts substantially exceed the initial Turfmaster tender (amounting to \$126,400 per year, based on the quantities estimated in the price schedule). In fact the amount paid by the City of Bayswater to Turfmaster for the above four years was around double what it would have been had the quantities estimated in the price schedule been accurate.
- [125] The City of Bayswater estimated the particular areas and distances to be sprayed in the price schedule. For example, the approximate quantity of kerbing was shown as 400 kilometres, and the approximate quantity for public open space was shown as 120 hectares. Tenderers were required to specify a fixed price per unit of measurement. This is known as a "schedule of rates" contract, in which the price (or rate) is fixed, and the quantity is variable. From a comparison of the contract value based on the estimated specifications provided in the price schedule, and the amounts actually paid to Turfmaster, it is apparent that the quantities for which City of Bayswater officers raised purchase orders, and for which Turfmaster was paid, must have been around double those estimated in the price schedule.

#### 4.4.2.2 Tender 6-2003: Weed Control

- [126] Tender 6-2003: Weed Control was essentially a continuation of Tender 34-96/97. It was one of nine tenders advertised by the City of Bayswater during April 2003. Tender 6-2003 was called for the period 1 July 2003 to 30 June 2006 with an optional extension of three years.<sup>25</sup>
- [127] On 18 June 2003 the City of Bayswater Technical Services Committee evaluated the tenders and prepared recommendations for Council. The tenders were presented to the Council at item 13.5.1 of the Ordinary Council Meeting on 24 June 2003. The minutes of that meeting confirm that two tenders were received in relation to Tender 6-2003. Turfmaster quoted \$132,500 and another tenderer quoted \$142,540. The minutes record that of the five “Qualitative Criteria” on which tenders were to be analysed, the “tendered price” received a 60% weighting – it was by far the most important consideration. The minutes also record that the other tenderer had not completed the Occupational Safety Questionnaire. The minutes say that Turfmaster had the highest score and “... have held this contract with the City for the last 30 years and are recommended accordingly”.<sup>26</sup>
- [128] The City of Bayswater paid Turfmaster the following annual sums for weed control.

Year	Amount
01/07/03 to 30/06/04	\$267,873.60
01/07/04 to 13/04/05	\$258,237.60

- [129] The amount paid by the City of Bayswater to Turfmaster for the above two years was around double what it would have been if the quantities estimated in the price schedule had been accurate. Or, to put it another way, the quantities estimated in the price schedule were only around half of the spraying distances and areas which Turfmaster had actually sprayed and for which it had been paid by the City of Bayswater. This appears to have continued the trend set by Tender 34-97/98.

#### 4.4.2.3 Approximate Quantities Shown in the Tender Price Schedules

- [130] It was necessary to determine the accuracy of the approximate quantities shown in the tender price schedules. If those approximate quantities were accurate, then, *prima facie*, the City of Bayswater had paid Turfmaster around double what it should have under the weed spraying contracts. Alternatively, if the approximate quantities were only around half what they should have been, such that the quantities specified in the purchase orders raised under the contract were accurate, then Turfmaster was paid for the areas actually sprayed, and there had been no overpayment by the City of Bayswater.
- [131] As part of its investigation the Commission selected four public areas within the City of Bayswater, and asked the City to provide accurate measurements from their Geographical Information System (GIS) for each

of them, and then separate measurements for the areas of each facility that did not require spraying.

- [132] The Commission then selected sample purchase orders for the herbicide treatment of two items from the price schedule (items 8 and 9, Public Open Space and Pre Emergent Crab Grass).<sup>27</sup> By multiplying the price per unit by the area to be treated, the area for which the City of Bayswater had been paying for herbicide treatment was determined. This was then compared with the measurements provided by the City of Bayswater from their GIS.
- [133] The Commission's analysis determined that for the four facilities sampled the total area (as determined by GIS) was 26.732 hectares, of which the potential spraying area was 17.642 hectares. The City of Bayswater purchase orders, based on the price schedule, show that the City paid for 34.259 hectares to be sprayed. In other words they had paid Turfmaster for spraying almost twice the potential spraying area of the four reserves sampled.<sup>28</sup>
- [134] As a result of the Commission's investigation the City of Bayswater recalculated the distances and areas it had been using for the purposes of weed spraying, and in September 2005 provided the Commission with a table which it said "shows approximate figures that reflect more accurately the weed spraying contracts".<sup>29</sup>

**Table 1: Comparison of Specifications for Weed Spraying Contracts**

Item	Approximate Quantity		
	Tender 34 – 96/97	Tender 6- 2003	August 2005
Kerbing	400 km	500 km	719 km
Footpaths (1.2 – 1.8m wide)	50 km	100 km	244 km
Paths verges (1m – 6m wide) <sup>30</sup>	25,000 m <sup>2</sup>	35,000 m <sup>2</sup>	110,000 m <sup>2</sup>
Public access ways (3m wide)	8 km	8 km	6.8 km
Firebreaks (3m wide)	20 km	20 km	20 km
Tanolith fencing	45 km	45 km	73.5 km
Open drains (10m wide)	5 km	5 km	8.4 km
Paved verges (1m – 6m wide)	10 km		
Public open space (Onehunga plus annual weeds)	120 ha	180 ha	260 ha
Pre Emergent crab grass	120 ha	80 ha	205 ha
Post Emergent crab grass	50 ha	50 ha	50 ha

- [135] The Commission calculated the estimated annual cost of the weed spraying contracts, using the more accurate specifications as calculated by the City of Bayswater and provided to the Commission in September 2005, and the quotes per unit of measurement as specified in the Turfmaster price schedules for the respective tenders, for the purpose of comparison with the actual amounts paid by the City of Bayswater to Turfmaster for weed spraying. The results are shown in the following table.

**Table 2: Comparison of Actual Contract Costs with Estimated Costs Using Accurate Specifications**

Year Ended 30 June	Amounts Paid by the City of Bayswater to Turfmaster in Respect of Weed Control Contracts	Contract Value Using Updated Specifications	Difference
2000	\$220,186.00	\$220,960.00	(\$774.00)
2001	\$250,861.63	\$220,960.00	\$29,901.63
2002	\$265,676.40	\$220,960.00	\$44,716.40
2003	\$276,404.10	\$220,960.00	\$55,444.10
2004	\$267,873.60	\$243,240.00	\$24,633.60
2005 <sup>31</sup>	\$258,237.60	\$243,240.00	\$14,997.60

[136] It is clear from the above table that the issue with the tender contracts was that the estimated quantities specified by the City of Bayswater in the price schedules were hopelessly inaccurate. While there are still some discrepancies between payments, based on the updated specifications and the actual amounts paid to Turfmaster, it is clear that the two are far more closely aligned when the updated specifications are used.

[137] The reasons for these apparent continued discrepancies are not clear, although the introduction of the Goods and Services Tax (GST) on 1 July 2000 undoubtedly had some impact. The rates quoted in Tender 34-96/97 would not have included GST, but the payments to Turfmaster under that contract for the 2001, 2002 and 2003 years would have included GST. This would account for most of the discrepancy in the 2001 year, and around half of the discrepancy in the 2002 and 2003 years. It ought to be noted that the rates quoted for Tender 6-2003 were inclusive of GST.

[138] The City of Bayswater noted that their updated specifications provided in September 2005 were still approximations and were still being “fine tuned”, which may account for some continued variations between the updated specifications and the distances and areas actually sprayed. It is also possible that the actual payments to Turfmaster for the 2006 and 2007 years are more closely aligned with what one would expect based on the updated specifications. The amounts paid to Turfmaster for those years have not been determined, and did not form part of the Commission’s investigation.

[139] It is also possible that these discrepancies are simply a reflection of a schedule of rates contract, in that the specifications are estimates, with the distances and areas sprayed subject to some variation.

[140] The proprietor of Turfmaster, Mr Kimberley Evans, explained during a Commission public hearing on 24 June 2005, the nature of a schedule of rates contract, from Turfmaster’s point of view:

*... I tender on the basis of a unit rate; that’s the schedule of rates contract*  
<sup>32</sup>  
*...*

And further:

*... The approximate quantities down there, the areas – when I submit a tender on a schedule of rates they don't mean anything to me; they don't mean anything to Turfmaster ...*<sup>33</sup>

[141] The issue is how it came to be that the estimated specifications provided by the City of Bayswater for both tender documents were so inaccurate, and the failure of the City of Bayswater, from either a contract management perspective or a budgeting and finance perspective, to detect this inaccuracy. So far as the Commission's investigation is concerned, the question is whether any public officer engaged in misconduct in that regard.

[142] Mr Terry Blanchard, during a public hearing on 23 June 2005, told the Commission that he joined the City of Bayswater as the Deputy City Engineer in 1985 and he held that position until 1995 when he became the Director of Technical Services. Mr Blanchard said he held the position of Director Technical Services from 1995 to May 2005, when he left the City of Bayswater.<sup>34</sup> Mr Blanchard said, during a private hearing on 16 November 2005, that Turfmaster held the weed spraying contract when he arrived at the City of Bayswater in 1985.<sup>35</sup> Details of those earlier contracts are not known, however Mr Blanchard told the Commission during the June 2005 public hearing, that in May 2005 the tender specifications were the responsibility of the Deputy City Engineer and the Purchasing Manager.<sup>36</sup>

[143] Mr Rimpas told the Commission, during a private hearing on 17 November 2005, that he joined the City of Bayswater as the Deputy City Engineer in April 1997, and he reported to the Director of Technical Services, Mr Blanchard.<sup>37</sup> Mr Rimpas noted that when he arrived at the City of Bayswater on 10 April 1997 "... it was very late in the piece in terms of calling for tenders ...".<sup>38</sup> He could not recall whether he prepared the specifications for Tender 34-96/97, but said that he "most probably did":

*Did you put together the tender specifications for the weed spraying contract 6 of 2003? - - - Yes, ma'am.*

*And prior to that? - - - I arrived in April 10, 1997.*

*Right? - - - Right, and that was – now, when I arrived I – it was very late in the piece in terms of calling of tenders. ... Whether I actually did those ones specifically – I would say I most probably did.*<sup>39</sup>

[144] Mr Rimpas was interviewed by Commission officers on 7 July 2005, before he appeared at the private hearing in November 2005. During the interview Mr Rimpas explained that he commenced employment with the City of Bayswater on 10 April 1997 and tenders must have been called around 10 May 1997 because they closed on 26 May 1997. Mr Rimpas said:

*When I got there there was obviously lots and lots of things to do and I can only, by going through the files now and the history of it all, can*

*see that annual supplies hadn't been called and it was mid-April and that's a bit late at the end of the day. So, when I got there - - what I can't remember is whether the specs were already made up or Camilla, our secretary, was putting them all together at that time and the annual supplies called and a series of - - of contracts for annual supply, and - - and through my investigation now I've seen that we must have called it around - - we must have called the tenders around May 10.<sup>40</sup>*

And further:

*... these measurements in kilometres, I suppose, as they are there - -*

*Yeah.*

*- - am I correct in saying that you assumed that these - - these were correct when you arrived at the City of Bayswater?*

*Absolutely.<sup>41</sup>*

[145] Regarding Tender 6-2003 Mr Rimpas was questioned about the approximate quantities during the November 2005 private hearing.

*Can you tell us who completed the approximate quantity on that column? - - I think I did, Ms Chong. I can't remember. I'm pretty - I think I may have somehow put it all together. I don't know if I got those from Turfmaster. I can't say that I did. I probably would rather say that I did that and somehow - - -*

*And if you did, where did you get the information from? - - - I think I would've pulled it from the old specification which was the 97 specification and I must've modified it, approximated it to somehow include the City of - the new area of Maylands.*

*To what extent did you check the accuracy of the quantities? - - - Not very well at all obviously. I just can't remember exactly but I think I may have just approximated it through the general growth that I understood when we took on Maylands ... So that to me was about, you know, a 14 per cent rise but I remember in parks, because they had a lot of open areas, they - it was a growth of about 26 per cent ...*

*When was Maylands taken over by the City of Bayswater or parts of Maylands? - - - It was taken over in July, officially in July 1, 1998.<sup>42</sup>*

[146] The problem in relation to determining the correct tender specifications was that reference was always made to what was used previously. Mr Rimpas made some attempt to accommodate the inclusion of areas of Maylands in the specifications for Tender 6-2003, by adding proportionately to the specifications used for Tender 34-96/97. When Mr Rimpas prepared the specifications for Tender 34-96/97 (if he in fact did so) it would have again been done with reference to prior specifications. It ought to be remembered here that the request for tender document must have been completed very soon after Mr Rimpas commenced employment with the City of Bayswater on 10 April 1997, given that he said that tenders



must have been called around 10 May 1997. It is clear that the specifications for the purpose of weed spraying were hopelessly inaccurate prior to Tender 34-96/97.

[147] Perhaps some comfort was taken in the fact that the weed spraying contracts were schedule of rates contracts, rather than lump sum contracts, so that the estimated specifications were relevant to assessing tender applications but did not constrain the total contract value. However, care should still be taken to ensure the specifications are accurate because it may be that different tenderers are able to perform different services at different rates, and in that case, accurate specifications are required to properly assess each tender. The error in relation to the assessment of Tender 34-96/97 highlights this. In that case, the failure to assess the tenderers on the basis of the required two applications per year resulted in the recommendation of the more expensive tenderer. That arose because one tenderer could perform the services that needed to be performed twice per year at a lower cost than the other tenderer.

[148] It may have been that some comfort was also taken in the fact that the weed spraying expenses were appropriately budgeted for, such that purchase orders could be raised for the actual costs, rather than restricted to the annual amounts implied by the tender document. This arose because, like the tender specifications, budgeted amounts were a function of what had occurred in the previous year. Thus the budget was a function of the previous year's expenditure on weed control, not the expenditure implied by the quantities specified in the tender document. Had that not been the case, then the inaccurate quantities would have been detected during the first year of Tender 34-96/97 because there would have been insufficient funds allocated in the budget to raise the necessary purchase orders.

[149] The Commission investigation highlighted a lack of an interrelationship between the finance system then operating and the management of tender contracts. The result was that, while actual expenditure was linked to budgeted expenditure, such that a purchase order could not be raised unless there were available funds from the budget, budgeted expenditure bore no relationship to the expenditure implied by the tender document. It was instead a function of the previous year's actual expenditure. The Commission notes the City of Bayswater has since addressed this issue in detail in order to improve the management and transparency associated with ongoing tender contracts. The control and management of tender contracts is now the responsibility of a central group of staff appropriately trained in this area.

#### **4.4.2.3.1 Commission Opinion**

[150] The discrepancy between the contract value, as implied by the approximate specifications in the tender documents, and the actual amounts paid to Turfmaster under the contracts, was primarily due to the inaccuracy of those specifications. The inaccuracy of the specifications

arose over time as a result of the repeated reference to prior contract specifications when compiling specifications for new contracts. This was not detected by the City of Bayswater as budgeted expenditure was also a function of the previous year's expenditure, and bore no relationship to the contract value implied by the specifications estimated in the tender document.

#### **4.4.2.4 Commission Opinion in Relation to the Conduct of Mr George Rimpas in Respect of Tender 34-96/97 and Tender 6-2003**

- [151] In the opinion of the Commission, the evidence does not establish misconduct on the part of Mr Rimpas. The Commission accepts that Mr Rimpas's failure to account for bi-annual sprays for some items on the price schedule when analysing Tender 34-96/97 was a genuine error, brought about by the fact that Mr Rimpas had had no prior involvement with weed spraying contracts. Mr Rimpas could have, when compiling the tender specifications for Tender 6 of 2003, caused a comprehensive review of the specifications as part of the process to include areas from the City of Maylands. However, the fact that he did not do so does not amount to misconduct.

#### **4.4.2.5 Role of Mr Terry Blanchard**

- [152] The Commission notes that Mr Blanchard was an officer of the City of Bayswater between 1985 and May 2005. He was elected a City Councillor in 2007 for a four-year term, which expires in 2011.

##### **4.4.2.5.1 Mr Blanchard's Relationship with Mr Evans**

- [153] Mr Blanchard attended a Commission public hearing on 23 June 2005 and a private hearing on 16 November 2005. Mr Blanchard agreed that he had a personal friendship with Mr Evans, and had a personal friendship with Mr Evans's late father. Mr Blanchard explained:

*How long have you had that friendship with Mr Evans? - - - I met Mr Evans – and I don't think he was even in the company at that stage, my sons played tennis and were in state in tournaments et cetera and I think the first tournament that I met him was the Leederville tournament about 1988, 89 when my son did very well against the number 1 in the tournament and he introduced himself as Tom Evan's son and my sons have had hit ups with him over the years because he was a state league – or an A-grade player and the friendship as you may want to call it has developed from there and in fact his family and my family over probably the last eight to 10 years have become pretty close.*

*Right? - - - It's a little difficult when you know somebody 20 years not to become friends, ma'am.*

*How close is close? - - - I would see Mr Evans three or four times a year maybe. I have had years when I've probably seen him at his Christmas show and that's been it for the year. I have had years where he has come into the office to have a talk but, as I said, like Mr Rimpas, I don't go down the local hotel and drink with him ...<sup>43</sup>*

[154] Mr Evans described his relationship with Mr Blanchard as follows:

*... How would you describe your relationship with Terry Blanchard? - - - We have a good professional relationship and we have an amicable personal relationship.*

*Right. Would you rate your relationship with Terry Blanchard as close and personal? - - - Close and personal? I wouldn't say it's close and personal. I mean, I've probably only got two or three friends that I have close and personal.<sup>44</sup>*

[155] However, information available to the Commission indicates that Mr Evans did ask Mr Blanchard to help in relation to Mr Evans's father. In a handwritten note to Mr Blanchard on Turfmaster letterhead Mr Evans asked: "Can you help with this please. Dad is home from hospital ... I have the flu so can't see him!"<sup>45</sup>

[156] Mr Blanchard was again asked about his relationship with Mr Evans during his November 2005 private examination:

*Coming to your relationship with Mr Kim Evans, could you please tell us your personal relationship with Mr Kim Evans? - - - Well, it's nowhere near what I thought it was. I thought we were personal friends. I know Mr Kim Evans through him being the weed spraying contractor at Bayswater. I know Kim through him being an A-grade tennis player because I had children play in state teams and those people were involved and when I sat back and thought about it I thought, yeah, Kim has hit up with my youngest son a few times at the Mount Lawley Tennis Club. Well, I tell you what, in 20 years he's hit up with him four times – not 24, four. So my relationship with him is one of, yeah, we're cordial, we're what I call friends, we've been to his Christmas show, I've been out to tea and I think I mentioned a couple of occasions his family came to my 50<sup>th</sup> birthday and my 25<sup>th</sup> wedding anniversary.*

*You had a close personal relationship with Mr Evans' father, didn't you? - - - I had nothing different than Kim's, in fact probably less. Kim's probably more of a friend to me than – than his father.<sup>46</sup>*

[157] Whatever the nature of the relationship between Mr Blanchard and Mr Evans, it is clear that whilst Mr Blanchard was employed by the City of Bayswater as the Director of Technical Services he considered that he had a personal friendship with Mr Evans.

#### **4.4.2.5.2 Mr Blanchard's Role in Relation to the Weed Control Tenders**

[158] In relation to Tender 34-96/97 Mr Blanchard was present at the meeting of the Technical Services Committee on 18 June 1997 which recommended the tender be awarded to G.T. Evans. Mr Rimpas was also present. The Technical Services Committee was comprised of certain councillors as members, with certain officers, such as Mr Blanchard and Mr Rimpas, attending as advisors.

[159] Mr Blanchard was asked during a public hearing on 23 June 2005 who was responsible for addressing Council on this particular tender.

*... If – that’s where I’ve got a problem with the document because if Mr Rimpas was there the reason he was there, as I explained earlier in the session – I’ve probably brought him in in case they had some questions because I didn’t want to answer anything to do with Mr Evans because I didn’t do the – I wouldn’t be doing the analysis of the actual – the actual tender. It would have been done by my deputy [Mr Rimpas].<sup>47</sup>*

[160] Mr Blanchard was also asked whether he performed the calculations regarding this tender.

*... Me? Not sure. I don’t think so. If George Rimpas was there I’m pretty sure my deputy has done it.<sup>48</sup>*

And later:

*... I’m not sure when Mr Rimpas started. It could have – if it wasn’t, if Mr Rimpas wasn’t there then it was probably prepared by me but I can’t give you a definitive answer ...<sup>49</sup>*

[161] In relation to Tender 6-2003 Mr Blanchard was also asked who compiled the request for tender document<sup>50</sup> (which included the price schedule detailing the approximate quantities), and he said:

*... Mr Rimpas would have done that, and one of the reasons why I say that he did that you have highlighted in the early part – my association with Mr Evans – and when the new regulations came in and our council adopted different policies I asked the CEO what I was going to do, that I was not going to resign my position, but I had a personal relationship with Mr Evans, and his advice to me, and I think it was in the transcripts last Monday – that I was not to analyse and be associated with the analysing and reporting of this tender to council ...<sup>51</sup>*

[162] Mr Rimpas agreed that he analysed the tenders in respect of both weed control contracts. When asked about Mr Blanchard’s involvement, at a private hearing on 23 June 2005, he said:

*... At any point when you were putting together the tender specifications did Mr Blanchard tell you that he could not be involved in this particular tender because of his association with Turfmaster? - - - From my memory, Ms Chong, every specification that we do, every tender and every letter, goes through Mr Blanchard. Nothing goes out of that office without his check in terms of checking; that is – so in terms of – I remember one thing is that he told me that he wanted to be kept at arm’s length during the assessment of the tender. That is clear in my mind.*

*That’s because of what reason? Why was that? - - - Because he felt that he was closely – well, very close friends to Mr Evans and that he wanted to be seen to be not influence the outcome of the tender.<sup>52</sup>*

[163] What Mr Blanchard meant when he referred to new regulations is not clear, but it is possible he was referring to the Local Government Act (i.e., *Local Government Act 1995*), which received Royal Assent on 9 January 1996, and specifically, section 5.70(2), which states:

*An employee who has an interest in any matter in respect of which the employee is providing advice or a report directly to the council or*

*a committee must disclose the nature of the interest when giving the advice or report.*

[164] That Mr Blanchard was referring to section 5.70 of the Local Government Act tends to be supported by a submission by the City of Bayswater to the Commission in September 2005. The City of Bayswater said that:

*Mr Blanchard did not disclose to the Chief Executive Officer the nature of his relationship with Mr Evans with the exception “they were friends”.<sup>53</sup>*

Nevertheless, and notwithstanding that there was no evidence of a financial interest by Mr Blanchard, the CEO approached Mr Blanchard’s “personal interest” as a “financial interest”.<sup>54</sup>

[165] If it was the financial interest disclosure provisions of the Local Government Act that Mr Blanchard was referring to, then that tends to support his claim that he would have refrained from the analysis of both the 1997 and 2003 tenders, based on his understanding of the advice which he said he received from the CEO.

[166] To summarise, Mr Blanchard’s evidence was that, rather than involving himself in the process and declaring an interest, he distanced himself from the analysis of the tender and from the reporting of the tender to Council, on the advice of the CEO.

[167] The Commission accepts that Mr Blanchard distanced himself from the analysis of Tender 6 of 2003, but he certainly had some involvement in the tender process, and the ongoing management of the weed control contract. An examination of the tender documentation has shown that Mr Blanchard’s signature appears on the tender opening document (a formal part of the tender process), indicating that he was present at the opening of the tender, with Mr Rimpas and Mr Brian O’Mara, the Manager Purchasing and Grants.<sup>55</sup> Mr Blanchard also signed a letter to Turfmaster advising that they were the successful tenderer,<sup>56</sup> and subsequently signed purchase orders and approved payments to Turfmaster against this tender, as listed below.<sup>57</sup> The purchase order dated 17 May 2004 was in respect of post and rail fencing; the others being for paths, kerbs and verges.

Date	Purchase Order No.	Amount
8 April 2004	101351	\$47,030.00
17 May 2004	101865	\$ 8,948.50
1 October 2004	104093	\$39,975.00
13 April 2005	106975	\$46,200.00

[168] Regarding Mr Blanchard’s involvement in the analysis of the 2003 Tender and any reporting to Council, it was noted that the “Officer” in respect of the “Annual Supply Tenders” to be considered at the Ordinary Council

Meeting on 24 June 2003 was the Director of Technical Services,<sup>58</sup> and he was then questioned at a public hearing on 23 June 2005 as follows:

*And you were the officer, director of technical services who was moving to have that annual supply tenders considered by full council? - - - All reports go to council in a director's name.*

*... It goes out in our name but it doesn't mean that the report was necessarily written by me. That is a policy our senior management group done ... the author of that particular report would be the deputy city engineer.*

*... Do you recall being present during this time when the tender was considered by the council? - - - I can't say I do but I would assume that in June 2003 I would have been at that council meeting ...<sup>59</sup>*

[169] Mr Blanchard signed the letter to Turfmaster dated 25 June 2003 which informed Turfmaster that they were the successful tenderer. At the top right hand side of the letter, next to "Enquiries" was G Rimpas. Mr Blanchard was questioned regarding his signature appearing on this letter.

*After the tender was considered and approved by the council and Turfmaster was successful, you said that the successful tenderer was then advised; in this case by whom? - - - Mr Rimpas.*

*By Mr Rimpas? - - - Yeah, the actual – most letters go out of my division in my name, but I think if I'm correct and you look at the top, I don't remember writing to Turfmaster. I'm pretty sure Mr Rimpas writes it, and his name would appear at the term of imprisonment [sic: top] of the letter, and it would have my signature on the bottom.<sup>60</sup>*

[170] Mr Blanchard was also questioned about the ongoing management of the weed control contract.

*... Who in – did you say who was charged with the responsibility for managing this particular contract? - - - I think the management side of it, if you're talking on the ground, goes to my manager of parks and gardens and our parks people.*

*Who is that? - - - Mr Casilli and he's got two of his supervisors. Mr Cassidy and Mr Novak would be out there looking at that. Mr Rimpas is, and myself, are the only two that can really sign the order because that's the policy but in most cases for parks and gardens I'm pretty sure Mr Rimpas is the only one that has been signing it. I may have signed one when he's been away on leave. I can't say to you categorically I did or categorically I didn't.<sup>61</sup>*

And further:

*... you're telling us that you have very little – you had very little part to play with the management of that contract? - - - There's – the only part I have a dealing with is to do with the weed spraying of kerbs and footpaths, median islands and that has been something that has just been a force of habit having moved up from the deputy engineer and something that has stayed with me for no particular reason but to do with parks and gardens which is*

where you started I have very little to do with parks and gardens and the management of this contract in relation to parks and gardens.

...

You told us that Mr Rimpas was charged with the responsibility of this contract during the tender process because of your personal friendship with --- ? --- That's correct.

--- Mr Evans and his father? --- Yes. Yes.

And you say that you advised the chief executive officer of that relationship? --- Yes.

Mr Carosella? --- Yes.

Was that a verbal advice, was it in writing? - - - Verbal. I just went to his office and asked him what I was going to do with these new regulations that come in because I had known the Evans family for – I had been at the city for, I don't know, 11 years or something and I said, "I know these people outside the city. What am I going to do?" The advice I was given was I wasn't allowed to analyse the tender for the report that went to council and that's what I've done for the last – I can't tell you how many years. Eight years or whatever it is.

...

But you were allowed to raise purchase orders and other things? - - - Because it's under – once council has – in my opinion, once council has set the contract and the contract is in place then the document that we actually deal with if there is any problems with the contract et cetera is all set out in that document and it's a legal document which I'm in a situation to administer one way or the other if I'm involved.<sup>62</sup>

(emphasis added)

- [171] The evidence of Mr Rimpas was that Mr Carmelo Casilli, Manager of Parks and Gardens, City of Bayswater, managed the spraying of parks and gardens and that Mr Blanchard maintained control over the spraying of kerbs, roads and footpaths:

*Who handled this particular tender? - - - The day-to-day guy – well, Charlie handled the – obviously the spraying of parks, the broad leaf spraying and the spraying of crab grass, and the spraying of kerbs, roads and footpaths was coordinated and managed by the director of technical services.*

*Terry Blanchard? - - - Yes, ma'am.*

*How many contracts did Mr Blanchard manage as director? - - - He managed – he managed about three or four through the time that I've known and he's – and from what I remember, three or four.*

*And who managed the other contracts in the division? - - - Myself.*

*... Mr Blanchard said he had to be kept at arm's length. After the tender was let to – or made to Turfmaster, who made the decision to manage – that he should manage this particular tender? - - - How did it come about*

*that he ended up with the management of this particular tender? - - - Okay, Ms Chong, I arrived in April 97 and from me arriving, from that day, it has never even been any other way than him managing that part of it. He's – I don't know why. He managed the – he wrote out the orders and he managed that part of the tender, the contract, sorry ...<sup>63</sup>*

- [172] Each of the three purchase orders signed by Mr Blanchard for the spraying of paths, kerbs and verges were raised after the Turfmaster invoices were submitted.

Purchase Order No.	Amount (Excluding GST)	Purchase Order Date	Invoice Date
101351	\$47,030.00	08/04/04	31/03/04
104093	\$39,975.00	01/10/04	31/08/04
106975	\$46,200.00	13/04/05	21/12/04

- [173] Mr Blanchard was asked to explain the process when it is necessary for a task to be performed under the weed spraying contract.

*... If you're talking parks and gardens Mr Casilli will say it's a certain time and sometimes we have different weather conditions and we need to spray earlier or later. He would determine through is [sic] lawnmowing guys that (a) we are starting to get an infestation of weeds. He would contact Mr Rimpas. They would raise an order. That order would be given to Turfmaster and I believe they would ring Turfmaster first to find out when – as quick as – well, what dates they could do it on. They would issue him with an order and he would go out and do the works.<sup>64</sup>*

And further:

*... Once Turfmaster receives the purchase order, what then happens? - - - What would normally happen is that he would go and do the works et cetera. He would advise us when he was doing it, and the work would be completed and then he would send in his invoice.<sup>65</sup>*

- [174] Mr Blanchard agreed that a purchase order should be raised before the works were undertaken.

*With the purchase order, is it the case that it had to be raised before Turfmaster is required to undertake the task? - - - It should be. It should be. I can't guarantee in all cases that has happened, but there are times during the year when it should be done and the order should be issued prior to the works being done and an invoice being issued.<sup>66</sup>*

- [175] Mr Blanchard said that he did not raise purchase orders himself, but would ask a staff member to raise the order for him, and then he would sign it. Mr Blanchard explained:

*... I would have probably said, "Look, we have weed sprayed our public open space back in March of whatever it was, can you bring the order up, issue me one the same because it should be the same as the current contract and give it to me and I'll sign it."<sup>67</sup>*

- [176] Regarding Purchase Order Number 101351 dated 8 April 2004, Mr Blanchard agreed that the purchase order was generated at his request,



that he signed the purchase order, and that the Turfmaster invoice was dated 31 March 2004.<sup>68</sup>

- [177] Regarding Purchase Order Number 104093 dated 1 October 2004, Mr Blanchard agreed that he signed the purchase order, and that the Turfmaster invoice was dated 31 August 2004.<sup>69</sup> Mr Blanchard agreed that the work was done by Turfmaster without a purchase order having been raised and sent to them.

*... How is it that Turfmaster is able to submit an invoice without a purchase order? - - - What is probably happened, ma'am, is we have contacted him and said, "I'll get a purchase order to him" and I have forgotten about it and he's done the work and then advised me and brought it in. As I said yesterday, with weed spraying if the weeds aren't there we know that he's done the works and that's an oversight on my behalf in not issuing that purchase order prior to him actually doing the work.<sup>70</sup>*

- [178] Regarding Purchase Order Number 106975 dated 13 April 2005, Mr Blanchard agreed that the purchase order was generated at his request, and that he signed the purchase order.<sup>71</sup> When shown that the associated Turfmaster invoice was dated 21 December 2004, Mr Blanchard explained:

*... I think that that purchase – that invoice has been sitting around till that time and the lag that invoice has come in it has been – I don't know where it has been sitting around but I think I have found it, I have signed it off because I knew the works were done back in December and then there was no purchase order and I had no choice but to issue one.*

*So there was no purchase order and you issued a purchase order to match that invoice? - - - That's because I understood that the works had been done.*

*How did you understand? What was your understanding? - - - Well, from looking around my city Mr Evans had advised us that there would need to be an extra spray and I thought it was going to be in December and the works had been done and I believe that that work is done ...<sup>72</sup>*

- [179] Mr Blanchard was questioned about the fact that these three purchase orders were not raised until after Turfmaster had submitted their invoice.

*Mr Blanchard, of all the purchase orders that we have looked at, you have signed and approved three of those purchase orders: ATP32, ATP36 and ATP23? - - - Yes, ma'am.*

*Each time the invoice from Turfmaster came in for each of those purchase orders, the purchase order [number] is either handwritten in or not completed on the Turfmaster invoice? - - - Yes, ma'am.*

*Is it just coincidence that each time Turfmaster did not have a purchase order, you were the one who approved or instructed that purchase orders be generated? - - - I probably took it upon myself as director, madam, to – when they came and there wasn't. As I said, if purchase orders differed from invoices, it had to come to George Rimpas and myself, and as I'd been the director when they came and I probably had a part in issuing an instruction to Turfmaster to say, "Yes, go ahead with that spraying," and*

*then forgotten to issue on those three occasions an order, I took it upon myself to be the authorising person and that's why you're talking to me at the moment.*

*... Because an invoice would not have been paid without a purchase order, would it? - - - No, not unless somebody stepped in; either Mr Rimpas or myself stepped in and said, "Look, the works have been done; we know they've been done," and, "The contractor has done the works, we've got to pay him." So we would have had to issue an order post the actual works being done and the invoice coming in.<sup>73</sup>*

- [180] Mr Blanchard did not just step in and have a purchase order raised when he noticed that an invoice from Turfmaster had been received and that no purchase order had been generated. These purchase orders and invoices were all for the spraying of paths, kerbs and verges. That is the portion of the weed spraying contract over which Mr Blanchard maintained control. It was his responsibility to have the purchase orders raised prior to the works being undertaken, and on three consecutive occasions he failed to do so. It appears that his management of this part of the contract consisted of allowing Turfmaster to undertake the spraying and to then invoice the City of Bayswater, and then to raise a purchase order after the event to facilitate payment against the invoice.
- [181] To summarise, on Mr Blanchard's evidence, he had very little involvement with the weed control tender process and ongoing management of the contracts. He said that Mr Rimpas analysed the tenders and prepared the reports for Council, that Mr Rimpas prepared the letter to Turfmaster (in respect of the 2003 Tender) which he signed, and that he maintained involvement with the spraying of kerbs, footpaths and median islands by "force of habit". Indeed, three out of the four purchase orders signed by Mr Blanchard were for the spraying of paths, kerbs and verges. The Turfmaster invoices for those items were directed to Mr Blanchard, whereas the invoices for the items relating to parks and gardens were directed to Mr Casilli. For the three purchase orders relating to the spraying of paths, kerbs and verges, Mr Blanchard did not cause those purchase orders to be raised until after Turfmaster had invoiced the City of Bayswater. Mr Rimpas agreed that he analysed the tenders for the report to Council, and that Mr Blanchard had always maintained control over the spraying of kerbs, roads and footpaths.
- [182] Regarding the estimated quantities specified in the price schedules to the tender documents, the responsibility for ensuring their accuracy, in the opinion of the Commission, lay initially with Mr Blanchard, and subsequently with both Mr Blanchard and Mr Rimpas. Mr Blanchard was the Deputy City Engineer from 1985 to 1995 (when he was promoted to Director Technical Services), and Mr Rimpas took up his position as the Deputy City Engineer only four weeks before Tender 34-96/97 was called. The estimated quantities specified in the price schedule to that tender were only around half what they should have been, and Mr Blanchard had been the Deputy City Engineer for the past ten years. Regarding Tender 6 of 2003, Mr Rimpas said he referred to the previous tender and made some adjustments to accommodate parts of the City of Maylands. It was

the evidence of Mr Rimpas that every specification, tender, letter etc. went through Mr Blanchard. It was also the evidence of Mr Blanchard and Mr Rimpas that Mr Blanchard retained control over that portion of the weed spraying contract that related to the spraying of kerbs, footpaths and verges, being items one to three on the price schedule.

#### 4.4.2.5.3 Variations to Tender 6-2003: Weed Control

- [183] Records obtained from the City of Bayswater show that Mr Evans wrote to Mr Blanchard on 22 March 2004 seeking to increase the frequency of spraying relating to some items on the price schedule (kerbing, footpaths and verges) from two to three applications per year. Mr Evans wrote:

*It is our opinion that a 3<sup>rd</sup> application per annum is warranted to maintain the city's assets in a better condition consistently throughout the year. This is due to legislation outlawing the use of many residual herbicides once used to control germination for extended periods. Also the increase in ratepayer reticulation systems and councils continued development of verges, median and public open space has increased the presence of unwanted vegetation in kerb channels, paths etc.*

*Fiscally a 3<sup>rd</sup> application can be achieved at a heavily discounted price from the current \$48,000 per application.*

*We can now offer to perform 3 treatments per annum April/August/December at an annual price of \$126,000 (\$42,000 per treatment), which represents a saving of 12.5% based on the current tender values.<sup>74</sup>*

- [184] While it is correct that the proposal to increase to three applications per annum did represent a saving of 12.5% per application, there was still an overall increase in the cost per year to the City of Bayswater from \$96,000.00 (\$48,000.00 x 2) to \$126,000.00 (\$42,000.00 x 3). For the year ended 30 June 2004 the City of Bayswater paid Turfmaster the sum of \$267,873.60 under this contract, meaning that the increased cost from the change to three applications per annum of \$30,000 represented an increase in the value of the contract of around 11%.

- [185] This request by Mr Evans on behalf of Turfmaster related to items one to three on the price schedule, being the spraying of kerbing, footpaths and verges, which were the items over which Mr Blanchard maintained control. The request for tender document specified the following in this regard:

*For total weed control on verges, kerbs, footpaths, paved medians, public access ways, drains, fencing and fire breaks, contractors shall supply and apply a mixture of Glyphosate (360 g/l) 9L/ha, Simazine (900 g/kg) 10 Kg/ha, Sulfometuron (750 g/Kg) 400 gms/ha.<sup>75</sup>*

- [186] Mr Blanchard wrote to Mr Evans on 25 August 2004:

*Further to your request to amend our weedspraying regime, I wish to collate all the information in relation to the changes in herbicide*

*restrictions etc. and the corresponding effect on the City's weedspraying programmes.*

*I understand that in the existing contract Turfmaster had to keep the City weed free from one application to the next. I also understand that if the herbicides used have been taken off the approved list and other chemicals are now to be used then their effects may be different.*

*Could you please advise me of which herbicides you were using that have now been banned and what are the new herbicides to be used and their respective effects on the City's weedspraying programmes.*

*Once I have this data I will complete the investigations into your request and advise you accordingly.<sup>76</sup>*

[187] Mr Evans responded on 31 August 2004:

*Historically our company has used extensive residual herbicides namely Altrazine, Simazine and Sulfometuron in addition to knockdown herbicides such as Glyphosate (Roundup) throughout the City of Bayswater.*

*In recent years, Altrazine and Sulfometuron have been deregistered by the National Registration Authority (NRA) for such uses as industrial weed control within paths, roadways and drains.*

*... Hence my recommendation is to refrain from using residual based products (Sulfometuron, Altrazine etc) and increase the frequency of applications using only Glyphosate based products (eg Roundup).<sup>77</sup>*

[188] Mr Evans went on to propose applications in August, November and April. Under the contract, spraying of these items was to occur in May and November each year.

[189] Turfmaster submitted an invoice on 31 August 2004, for spraying under the new regime, at the reduced cost of \$43,972.50 including GST. A purchase order was raised on 1 October 2004, signed by Mr Blanchard.

[190] Mr Blanchard was asked about this contract variation during the November 2005 private hearing.

*In the instance of Turfmaster, Turfmaster wrote to you seeking a variation to the contract from two sprays to three sprays? - - - Yes.*

*Would that not have to go back to the council? - - - In my opinion, and I said this last time, if you check – my legal man has my sections of the contract but I'm going to guess it's 7.4 – it states that – there's two things in that one; one, there's the price variation which was a lowering and it's quite clear that if he gets a lowering he has to send that back to the principal and any monies we paid over the top of that into the time that we were saying, "Yes, it's okay," he has to refund us. So he took two chemicals, for want of*

*a better word, out; he lowered his price, which was in accordance with I think it's 10.8 or whatever it is of the contract; he then said, "Because it's now a weaker thing I need three sprays." If you read 7.4 it says the principal can order instalments and sizes and blah, blah, blah as he sees fit from time to time.*

*But the three sprays was going to end up costing the council more money, wasn't it, than the two sprays? - - - Yes, that's correct.<sup>78</sup>*

- [191] Clause 7.4 of the contract provides the City of Bayswater with flexibility in terms of ordering the services under the contract. Clause 10.5 imposes an obligation on the contractor to pass on any reductions affecting the contract rates. What is contemplated in those clauses of the contract is not what occurred here; which was a reduction in the cost per spray accompanied by an increase in the spraying frequency, resulting in an increase in costs to the City of Bayswater. Clause 36 of the contract makes it clear that prices are fixed for each three-year term, with the potential for negotiated price adjustments prior to the exercise of the option to extend the contract for the second three-year term.
- [192] Mr Blanchard was well aware that the proposal to move to three sprays per annum was not a "price variation which was a lowering" in the terms contemplated by the contract, but clearly represented an increase in costs to the City of Bayswater. He acknowledged in his evidence that the variation would end up costing the Council more money.
- [193] Mr Blanchard raised a purchase order in the new terms on 1 October 2004, and it is clear from the evidence of Mr Evans at the June 2005 public hearing that Mr Blanchard had verbally approved his proposal prior to the spray being undertaken, which was invoiced on 31 August 2004.

*... I can tell you what happened to that letter. I wrote that letter on 22 March 04, discussed it with Mr Blanchard. Mr Blanchard said, "I'll allow for it in the next financial year budget, commence – so – so do the April application 04 as normal, and then we'll revert – we'll go to that," and he gave me verbal approval to do that in the financial year 01 July 04 to 30 June 05."<sup>79</sup>*

*And further:*

*"When did Mr Blanchard give you the approval? - - - When?*

*Yes? - - - I wrote that letter – this letter on 2 March [sic], the one I've – and that's – because that's how I had the approval from there. So it was well and truly before the end of that financial year 30 June 04.*

*That he gave you the approval? - - - Yeah. He said to commence it in the next financial year because he had the – he said he had the funds available, in the next financial year. Hence we moved into the next financial year; we did a treatment in August; we did a treatment in December, and we did a treatment in April just gone.<sup>80</sup>*

- [194] Regarding Mr Blanchard's letter of 25 August 2004, Mr Evans said:

*... I can assure you that that's five months and I can assure you that I spoke to Mr Blanchard about that situation well and truly and we had a verbal agreement well and truly before the 30th – whenever that letter was written ...<sup>81</sup>*

[195] The CEO of the City of Bayswater, Mr Mario Carosella, said at a public hearing on 13 June 2005 that it was his understanding that any contract variations need to go back to Council:

*Are there any situations where a contract can be varied within what Mr Cowie called a minor variation after it has been entered? - - - Once the contract has been signed and the agreement is there, there can be no change unless it goes back to council ...<sup>82</sup>*

[196] Mr Carosella was questioned specifically about the change from two to three sprays per annum, and he made it clear that the matter should have gone back to Council.

*Is there any situation that you are able to tell us in which a contract has been varied by a particular manager or director without going to council? - - - Okay. There was one which I found out – I was away last week – the week before, Thursday before last week and it was the weed spraying contract. There was a letter – and I can give you this information. I didn't bring it along. There was a letter in March I think of this year. The person wanted to vary it.*

*Who was the person? - - - Who wanted to vary it?*

*Yes? - - - It came under Turfmaster. I presume it was Kim Evans but I'm not sure.*

*Did you say March this year? - - - I think it was March this year. I can show you the document tomorrow if you wish. As soon as I found out about it the invoice was in front of me. The director bought it to me. He had signed to pay it. I crossed the name out. I crossed it out. I said they weren't to be paid. It had to go back to council.*

*Who was the director who bought you the invoice? - - - It was – it wasn't the director. The director of technical services left. It was the director of – it was the acting director and he was concerned about it and he brought it to me.*

*And who was that? - - - It was George Rimpas.*

*... I went and saw the director of finance and asked, "We stop all payments on Turfmaster. This matter is going back to the council."*

*... the explanation that was given to me was that there's five combinations or six combinations of insecticide, right. Now, two of the combinations of the insecticide – this was told to me, Ms Chong, Okay, and I'm repeating what was told to me. Two or three of the combination Turfmaster would not allow to use any more on the open market and therefore he had to spray three times a year and not twice a year. I mean, that's completely changing the contract and therefore it's going back to council.<sup>83</sup>*

[197] In its submission to the Commission the City of Bayswater advised that:

*... the former Director Technical Services had no authority to change the frequency of the weed spraying contract from two applications to three applications per annum, adding around \$31,490 per annum over and above the contract price.<sup>84</sup>*

#### **4.4.2.5.4 Commission Opinion: Mr Blanchard**

[198] Mr Blanchard had a personal friendship with one of the proprietors of Turfmaster, Mr Kimberley Evans. Mr Blanchard said that he distanced himself from the analysis of the tenders and from the reporting of the tenders to Council, on the advice of the CEO. The evidence is that Mr Blanchard refrained from the analysis of both tenders and, whilst he attended the relevant Council meetings, it was Mr Rimpas who would have addressed Council in relation to the weed control tenders had that been necessary.

[199] In relation to Tender 6 of 2003, Mr Blanchard attended the formal opening of the tenders, and signed the letter to Turfmaster (prepared by Mr Rimpas) to inform Turfmaster that they were the successful tenderer. Mr Blanchard maintained control over the spraying of paths, kerbs and verges for the duration of both contracts. Mr Blanchard failed to raise three purchase orders until after the Turfmaster invoices had been received, when he then caused the purchase orders to be raised to facilitate payment of the invoices. Mr Blanchard said he believed he was able to raise purchase orders because the contract had been through Council and he thought he was in a position to administer the contract. Mr Blanchard also approved (without authority) an increase from two to three applications per annum in the knowledge that this would result in increased cost to the City of Bayswater.

[200] In its submission to the Commission, the City of Bayswater said that Mr Blanchard did not disclose the nature of his relationship with Mr Evans, except to say that they were friends. In relation to Mr Blanchard's involvement in the tender process and the management of the contract, the City of Bayswater said:

*It was not until the CCC hearings that the Chief Executive Officer became aware of the extent of Mr Blanchard's involvement with the tender and contract management process. In particular-*

- (i) the Chief Executive Officer was shocked to discover (after seeing Mr Blanchard's signature on the tender opening document) that Mr Blanchard was at the tender opening for the Weed Spraying Contract. Mr Blanchard should not have been present.*
- (ii) Mr Blanchard should not have signed the letter to the successful tenderer.*
- (iii) Mr Blanchard should not have raised purchase orders and approve weed spraying contract work directly with Turfmaster*

*and the Chief Executive Officer strongly disagrees with any suggestion that he was expressly or impliedly allowed to do so.<sup>85</sup>*

[201] To the extent (if any) that the submission by the City of Bayswater is predicated on the understanding that Mr Blanchard had a particularly close or strong friendship with Mr Evans, in the opinion of the Commission the evidence does no more than support the conclusion that the two men were long-standing friends.

[202] Having assessed all the material relating to this tender the Commission has formed an opinion on misconduct by Mr Terry Blanchard, then an employee of the City of Bayswater.

#### **4.4.2.5.5 Commission Opinion in Relation to the Conduct of Mr Terry Blanchard in Respect of Tender 34-96/97 and Tender 6-2003**

[203] In the opinion of the Commission, Mr Blanchard had a conflict of interest in relation to the weed spraying contracts held by Turfmaster, contrary to clause 1.1(a) of the City of Bayswater Code of Conduct,<sup>86</sup> which states:

*Members and staff will ensure that there is no actual (or perceived) conflict of interest between their personal interests and the impartial fulfilment of their professional duties.*

[204] In their section 86 representations on his behalf,<sup>87</sup> Mr Blanchard's lawyers conceded that his personal friendship with Mr Evans of Turfmaster was an interest capable of affecting his impartiality in respect of the tender process. However, they contended that he openly and unhesitatingly acknowledged that interest in his evidence to the Commission and had notified his superior, Mr Carosella, of it at the time. The Commission notes that in his evidence Mr Carosella claimed he was "shocked" to later learn of Mr Blanchard's attendance at the tender opening and that Mr Blanchard subsequently signed the letter advising Turfmaster it was the successful tenderer. The Commission accepts that Mr Blanchard did tell Mr Carosella of his friendship with Mr Evans in general terms, that Mr Carosella told him he was not to do the tender analysis or report to Council and that Mr Blanchard acted in accordance with that advice. But at no point did Mr Blanchard make a formal or written declaration of his conflict of interest.

[205] In relation to the tender analysis and representations to Council, in the opinion of the Commission, the evidence does not establish misconduct on the part of Mr Blanchard. The evidence suggests that, whilst Mr Blanchard was involved at meetings of the Technical Services Committee which discussed the weed spraying tenders and provided recommendations to Council, and he was also present at the relevant Council meetings, he did not take part in the analysis of the tenders, and did not make representations to Council beyond submitting the reports (prepared by Mr Rimpas) in his name. Turfmaster was recommended on the analysis of Mr Rimpas as they were determined to be the cheapest.

[206] The Commission agrees with the City of Bayswater that Mr Blanchard should not have been present at the tender opening, and should not have



signed the letter to Turfmaster. The Commission notes Mr Carosella's statement in the City of Bayswater submission that he was "shocked" when he learned (during the Commission's investigation) that Mr Blanchard had been present at the tender opening, that he had written to Turfmaster advising it was the successful tenderer and that he raised purchase orders and approved weed spraying contract work directly with Turfmaster. He said he strongly disagreed with any suggestion that Mr Blanchard was expressly or "impliedly" allowed to do those things. The tenor of Mr Blanchard's evidence effectively was that once the tender was accepted, he simply continued to manage the kerbing etc. aspect of it because he had done so in the past.

- [207] The Commission agrees with the City of Bayswater that Mr Blanchard should not have raised purchase orders in respect of the weed spraying contract. Mr Blanchard continued to manage the contract in relation to the spraying of paths, kerbs and verges, which he said was due to "force of habit". In the opinion of the Commission, he should not have done so. In the opinion of the Commission, Mr Blanchard ought to have refrained from having any involvement whatsoever in the ongoing management of the weed spraying contract, due to the fact that he had a conflict of interest arising from his friendship with Mr Evans.
- [208] Mr Blanchard's management of the paths, kerbs and verges part of the Turfmaster contract was problematic. Mr Blanchard justified it on the basis the contract was already in place and he was merely authorising work or payments in accordance with it, in each instance. That may be so, but his involvement in that way could have been reasonably seen as affording an opportunity to benefit his friend, Mr Evans. The fact that he issued purchase orders after Turfmaster had done work and submitted invoices for it, was capable of lending weight to any such perception of partiality or favouritism.
- [209] Mr Blanchard's conduct as outlined above may therefore have given rise to a reasonable apprehension that it affected the honest or impartial performance of his functions.
- [210] Regarding the variation to the weed control contract, Mr Blanchard had, prior to 30 June 2004, approved Turfmaster's request to change to three applications per annum, despite not having the authority to do so. Mr Blanchard knew that this would result in an increase in costs to the City of Bayswater. He said so in his evidence to the Commission.<sup>88</sup> That the change would result in an increase in costs to the City of Bayswater is also obvious from Mr Evans's letter of 22 March 2004, and is also apparent from the evidence of Mr Evans that Mr Blanchard said he could make the change from the new financial year when he would allow for it in the budget. Mr Blanchard took this action himself, without consulting with the CEO and without seeking the approval of Council, despite the fact that he considered he had a personal friendship with Mr Evans.
- [211] In Mr Blanchard's section 86 representations,<sup>89</sup> his lawyers argue that because the contract provided that the City reserved its right to order its

requirements “in such quantities as may be required from time to time”, and that the measurements were approximate and the circumstances flexible, it was within Mr Blanchard’s authority to agree to changes without having to go back to Council for a contractual variation involving a costs increase. The Commission is unable to accept this submission. In the opinion of the Commission, the proposal advanced by Mr Evans in his letter dated 22 March 2004 seeking approval to increase the frequency of spraying, at a higher annual cost to the City, was a contractual variation which required the approval of the Council.

[212] In the opinion of the Commission, in approving the change to three applications per annum, Mr Blanchard acted contrary to clause 3.1(iii) of the City of Bayswater Code of Conduct, which states:

*Members and staff will:*

*(iii) act in good faith (i.e., honestly, for the proper purpose, and without exceeding their powers) in the interests of the Council and the community.*

[213] In the opinion of the Commission, by taking part in the formal tender process as he did (even though not in fact being involved in the analysis of, or decision on the tender) and continuing to manage part of the City of Bayswater’s weed spraying contract with Turfmaster, and by approving an increase from two to three applications of herbicide per annum for some items without having the authority to do so, whilst having a conflict of interest by virtue of his friendship with a proprietor of Turfmaster, Mr Blanchard’s conduct fell within the terms of section 4(d)(i) of the Act in that he engaged in conduct that “adversely affects or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer ...”.

[214] The Commission also considers that in terms of section 4(d)(vi) of the Act Mr Blanchard’s conduct could constitute “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*”.

[215] The application of the PSM Act by the Commission to issues of misconduct is discussed at paragraphs [24] to [36] above.

[216] The factors taken into account by the Commission when determining whether Mr Blanchard’s conduct was serious enough to meet the qualifications in section 4(d)(vi) of the Act include that Mr Blanchard:

- was a senior public officer of the City of Bayswater;
- continued to manage part of the weed spraying contract, despite being aware he had a conflict of interest arising from his friendship with one of the proprietors of the contractor;
- acted without authority in approving a variation to the weed spraying contract, despite knowing that it would result in an increase in costs to the City of Bayswater; and

- engaged in conduct which was contrary to clauses 1.1(a) and 3.1(a)(iii) of the City of Bayswater Code of Conduct.

[217] As Mr Blanchard's conduct fell within sections 4(d)(i) and (vi) of the Act, as described above, in the Commission's opinion it constituted misconduct.

[218] One of the early difficulties with this investigation was establishing whether or not Mr Blanchard had made a declaration of interest in relation to Mr Evans and Turfmaster's commercial dealings with the City, and if so, what that was and what action was taken about it. Both Mr Blanchard and the City would have been better served if his declaration of interest to Mr Carosella and the action decided upon to deal with it, had been documented in some formal way. That would have aided transparency and avoided the uncertainty which subsequently arose.

[219] The Commission emphasises that it is not unusual for public officers to have a conflict of interest, especially in local government where they live and work with their constituents or the people they serve as well as those with whom they have dealings in their capacity as public officers. It is not wrong to have an actual or perceived conflict of interest. The issue is how it is managed. Advice on how to recognise and manage conflicts of interest is available in The Integrity Coordinating Group (ICG)<sup>90</sup> publication *Conflict of Interest Guidelines*, a copy of which is in Appendix 2 to this report.

[220] The Commission makes the following recommendation:

**Recommendation 4**

The City of Bayswater review its policy on conflicts of interest to ensure:

- councillors are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately;
- the Chief Executive Officer and senior managers are aware of their responsibility to appropriately manage conflicts of interest within the City administration;
- individual officers of the City administration are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately; and
- declarations of conflict of interest and action (to be) taken in respect of them, are appropriately recorded.

[221] Although it is not necessary for the Commission to specifically canvass all arguments, submissions or representations made to it, there is one further submission made on behalf of Mr Blanchard which the Commission will address briefly. It is that the (draft) report of the investigation purports to be the opinion of the current Commissioner (the Hon. L.W. Roberts-Smith,

RFD, QC) but as it was former Commissioner, Kevin Hammond, who heard the evidence of Mr Blanchard and others, the proceedings would either have to be reheard by the present Commissioner or the investigation abandoned.<sup>91</sup>

[222] That submission is fundamentally misconceived. It is not apt to compare Commission investigations (which might include the examination of witnesses) to a civil or criminal trial in a court. The Commission does not exercise judicial power. It is an administrative investigation, which may include inquisitorial examinations. The investigation is not conducted by a judicial officer, but by the Commission, which is a body corporate with perpetual succession.<sup>92</sup> The Commissioner performs the functions of the Commission, in the name of the Commission.<sup>93</sup> The Commission does not make binding determinations of law or fact. It conducts investigations, exposes and assesses the evidence, expresses opinions and makes recommendations. Even in a strictly judicial hierarchy, the law allows for the resolution of factual and other matters by appellate courts which have not seen or heard the witnesses. It is common for a legal appeal to be conducted by way of a rehearing limited to the record of evidence already given.<sup>94</sup> The Commissioner is supported – and his or her opinions and assessments assisted by the product of investigative work done by all those Commission officers involved in the investigation (including investigators, lawyers and forensic technical experts, amongst others) as well as by any representations or submissions made by or on behalf of the affected parties.

#### **4.4.2.6 Tender 17-97/98: Supply, Application and Delivery of Turf Fertiliser**

[223] Tender 17-97/98 for the supply, application and delivery of fertiliser was awarded to Turfmaster for 1 July 1998 to 30 June 1999, with two optional extensions of a further 12 months each. The City of Bayswater exercised the first option to extend the contract, and the tender file contains a letter from Mr Gorey Turf Maintenance Contractors (a Turfmaster entity) requesting the second 12-month extension. Assuming the City of Bayswater exercised its second option to extend the contract, Turfmaster held the contract from 1 July 1998 to 30 June 2001.<sup>95</sup>

[224] There was no evidence among the documentation provided by the City of Bayswater of a subsequent contract with Turfmaster for the supply, application and delivery of turf fertiliser. However, City of Bayswater records show that Turfmaster invoiced the City of Bayswater for the supply of fertiliser on 16 occasions between 18 September 2003 and 1 September 2004, for a total of \$47,612.64, with three invoices for an amount less than \$100, eight invoices for an amount between \$100 and \$1,000, and five invoices for an amount in excess of \$1,000.<sup>96</sup>

[225] The City of Bayswater purchasing policy, as it was on 23 July 2003, detailed requirements for simple purchasing and advanced purchasing/tenders. For simple purchasing, the requirements included the following:

1. *quotations are not required for purchases less than \$100;*
2. *documented verbal quotations are required for purchases of value of \$100 to \$1,000;*
3. *written quotations are required for purchases above \$1,000 but below \$50,000; and*
4. *When seeking quotations a minimum of three (3) quotations are required.*<sup>97</sup>

[226] In relation to the invoices from Turfmaster the City of Bayswater was not able to provide material to the Commission to confirm that verbal quotations were obtained for the invoices valued between \$100 and \$1,000. Only one written quote was obtained in relation to invoices exceeding \$1,000 (and in that case a competitor provided an identical quote). This resulted in Turfmaster being afforded an advantage over other service providers by being able to provide the service without having to quote for it.

[227] The City of Bayswater employee responsible for overseeing the procurement of this service was Mr Casilli. His direct supervisor was Mr Rimpas.

[228] For 12 of the 13 supplies of fertiliser by Turfmaster valued over \$100 City of Bayswater employees failed to obtain verbal or written quotes, contrary to the City of Bayswater purchasing policy. Instead, it appears that Turfmaster was asked to supply the product without having to quote.

[229] This conduct will be examined in concert with other instances in which Turfmaster was requested to provide services to the City of Bayswater without any quotes being obtained.

#### **4.4.3 Other Works**

##### **4.4.3.1 Works Conducted Without Quotes**

[230] City of Bayswater records show that Turfmaster invoiced the City of Bayswater for works undertaken on 48 occasions between 4 September 2003 and 14 July 2005 for a total of \$105,546.98. This is in addition to the fertiliser supplies discussed above. In 32 cases the value of the works exceeded \$1,000 and the City of Bayswater was not able to provide the Commission with evidence of any quotations having been obtained. For the other 16 cases the value of the works was between \$100 and \$1,000 and the City of Bayswater was not able to provide evidence of verbal quotations having been obtained. In many cases, the job description describes the nature of the works followed by the words "as quoted". Turfmaster may have indeed quoted in respect of such works; however there is no evidence that any quotes, verbal or written as the case may be, were sought from any other potential provider.<sup>98</sup>

[231] Mr Casilli was the employee responsible for obtaining quotes and completing purchase requisitions in these instances.

#### **4.4.3.2 Examination of Mr Carmelo Casilli: Manager Parks and Gardens, City of Bayswater**

- [232] The purpose of the Commission's examination at a private hearing on 17 November 2005 was to determine Mr Casilli's knowledge of the policies, procedures and legislation governing procurement at the City of Bayswater and to ask about a number of anomalies detected during the Commission's examination of tenders and contracts relating to work done for the City of Bayswater by Turfmaster.
- [233] Mr Casilli told the Commission that he reported to Mr Rimpas and Mr Blanchard.
- [234] On Mr Casilli's behalf it was submitted<sup>99</sup> that his involvement in the tender process was limited to having some responsibility in determining the scope of works, and his understanding of the tendering process was equally limited. The Commission accepts the submission that at that time poor work practices were endemic at the City. It was put that Mr Casilli received little if any formal training in how he was to carry out his functions, particularly his administrative duties, and underwent little if any scrutiny by his superiors. His understanding, albeit misguided, was that those officers responsible for purchasing were responsible for ensuring that the necessary paperwork was in order.
- [235] The poor record keeping, and the lack of accountability and absence of scrutiny of employees resulted in Mr Casilli adopting poor work practices that continued in breach of the City's policy for many years. Indeed, Mr Casilli told the Commission that he had not seen the City's purchasing policy.
- [236] Nonetheless, as the holder of an important and senior managerial position, Mr Casilli had an obligation to make himself familiar with the responsibilities which it bore and to discharge them properly and effectively.
- [237] It also appears to the Commission that the poor work practices revealed by the matter were the immediate responsibility of Mr Casilli's supervisor, Mr Rimpas. However, in the opinion of the Commission the material before it does not establish misconduct by Mr Rimpas in that regard. At that stage, the practices were well-established and endemic. A failure to correct them does not of itself constitute misconduct within the meaning of section 4 of the Act.
- [238] Mr Casilli said that he was not familiar with the tender process and had never put services out to tender. He had obtained quotes for work contracts.<sup>100</sup> When shown the City of Bayswater Purchasing Policy (FS-P19), Mr Casilli said he had not seen that document before, although he knew that written quotes had to be obtained for works over \$1,000.<sup>101</sup> He said that he could not authorise expenditure or purchase orders. These were authorised by the Deputy Director or another senior officer.

- [239] Mr Casilli said that in his position he was responsible for the preparation of requisition orders. These included details of the quotes obtained. When the works exceeded \$1,000 the three written quotes were attached to the purchase order.<sup>102</sup>
- [240] A sample of a City of Bayswater requisition order form was shown to Mr Casilli. The form allowed for details of all quotes to be entered on the order. Mr Casilli told the Commission that he only entered the details of the successful contractor. He said that he did not complete the section asking for the reason a supplier had been selected. He said that no-one did that. He said that they were completed in a simple way, and admitted it was a lazy way. He agreed that many of the requisitions he completed were still in the book but said that it was up to the person doing the purchase order to take it out.<sup>103</sup>
- [241] He said he gave the requisitions to the person who was going to raise the purchase order – Mr Blanchard, or another senior officer.
- [242] From an examination of documents obtained from the City of Bayswater, it appeared that Mr Casilli had contracted Turfmaster for a number of works at the City of Bayswater without first obtaining three written quotes.
- [243] When asked about this in relation to a requisition for spraying, Mr Casilli said: “Because I thought that Kim – Kim was Turfmaster. He had the contract to spray for everything”. He said he did not know who gave him that understanding.<sup>104</sup>
- [244] In relation to other work given to Turfmaster, it was put to Mr Casilli that he did not go to other contractors. He said: “No, I call in other contractor [sic] as well, but it all depends how urgent the job is. It’s a matter of favouring a contractor near ourselves”. Mr Casilli said that in many cases he had not contacted other contractors for quotes.<sup>105</sup>
- [245] Various reasons were given by Mr Casilli as to why quotes may not have been obtained in particular circumstances, including Turfmaster being local and close by; Turfmaster had other contracts with the City of Bayswater; urgency; ability to complete the job promptly; and using the same contractor to complete or do further works.
- [246] Mr Casilli was questioned about the process involved in engaging a contractor for works at the City of Bayswater, and his evidence was as follows:

*Who writes the requisition? - - - I write or somebody else, one of the supervisors can write the requisition, and then the requisition – we notify the deputy director or the director the spray has to be done. So we ask to raise a purchase order and then they have to sign. No work can be done until the contractor receive [sic] the purchase order.<sup>106</sup>*

...

*Do the details of the three quotes that you obtained have to be completed on the requisition? - - - It has to be on the requisition.*

*It has to be filled in? - - - The requisition has to be filled in; not the full sheet, just enough information to do the job.*

*As we understand it, that is compulsory, the details of the quotes to be filled in the requisition? - - - I don't know. I believe the requisitions are to describe what has to be done before an order number is raised, a purchase order is raised.*

...

*When we receive our quotes – after we, you know, receive our quotes, we attach our three quotes to the purchase order.*

*You attach the three quotes to the purchase order? - - - The purchase order, otherwise the director or the deputy director won't be able to sign before they checking it.*

*Does that always happen - - -? - - - Yes; all the time.<sup>107</sup>*

...

*Have you always filled in the quotes – the other two quotes? - - - We don't have – we don't have the quotes in there, in the requisition. We only – when we ask the requisition we only put one quote in there, the winning quote.<sup>108</sup>*

...

*The purchase order is completed after the purchase order is approved by - - -? - - - The requisition – the requisition is done after we receive the written quotes.*

*Yes? - - - We check the written quotes and we'll see the winning quote.*

*Yes? - - - Okay, and then we fill out a requisition book just with the name or the company that's been the winning quote, and that's it.*

*Right, and where are the three quotes that you have obtained? Where are they attached? - - - Attached to the order number, to the purchase order.*

...

*So where does this purchase requisition go? - - - I don't know. Maybe the depot manager or somebody keep the requisition, otherwise it will be left in the book.*

...

*On the occasions when you have completed a requisition where would you put the requisition you have completed? - - - I'm going to give it to – going to give my requisition with the book to the person who's going to raise the order number – the purchase order, sorry.<sup>109</sup>*

...

*So does the requisition book come back to you? - - - The requisition – a copy of the requisition will come back to me with the purchase order – with a purchase order number on the requisition.<sup>110</sup>*



...

*What happens to the quotes that are attached to the purchase order? - - - I mean, they should go to finance. Once the job has been done, it's been completed and we receive – they receive the invoice. Together with the invoice we send purchase order, the three quotes which are attached to the purchase order and then it goes to finance.<sup>111</sup>*

[247] It seems from Mr Casilli's evidence that his understanding of the process to engage a contractor for works at the City of Bayswater was as follows:

1. quotes are obtained;
2. a purchase requisition is completed with the details of the successful contractor only;
3. a purchase order is raised based on the details in the purchase requisition;
4. the purchase order together with the quotes is sent for authorisation;
5. a copy of the purchase order (bearing a purchase order number) is returned to Mr Casilli;
6. the works are performed;
7. the contractor's invoice is received; and
8. the invoice and purchase order (with quotes attached) are sent to finance for payment.

[248] Mr Rimpas was examined during a Commission private hearing on 17 November 2005.<sup>112</sup>

[249] Mr Rimpas was asked to provide the Commission with an overview of the City of Bayswater requisition and purchase order documentation, and the process to be followed in obtaining service providers.

[250] Mr Rimpas said that supervisors attached to the City of Bayswater Works Depot were issued with requisition books. When they identified works to be done they compiled requisition orders which made provision for the inclusion of three quotes, the scope of works and the supervisor's recommendation about the successful contractor.

[251] Once completed, the requisition order was forwarded to the Depot Coordinator, who was responsible for raising a purchase order. The purchase order would then be forwarded to either the CEO, one of the four Directors, the Manager of Purchasing and Grants, or Mr Rimpas, for authorisation.

[252] He said that any quotations obtained relevant to the purchase order were usually not attached to the purchase requisitions when they came to him for signature.

[253] It was the evidence of Mr Rimpas that he had no involvement whatsoever with purchase requisitions.

*... Down at the depot they have requisition books, okay, and what they do is they raise a requisition book – they raise a requisition to go to the coordinator there to then type out the [purchase] order, and then that [purchase] order would then go off and be signed by various people.<sup>113</sup>*

[254] Mr Rimpas was then shown a sample purchase requisition.

*You would never see them? - - - No, never. They were raised with the depot only, not in – up in administration. We don't use purchase requisitions. We don't use requisitions in the administration building.*

*...*

*So where does this purchase requisition – once completed, where does it go to? - - - I'm not sure, Ms Chong. It's – it's my understanding it stays at the depot ...<sup>114</sup>*

[255] Mr Rimpas was then questioned about his knowledge of the movement and storage of quotes.

*And then do you know if the quotes are attached to the requisition? - - - No, I don't.*

*You don't? - - - I don't. I don't – my recollection is that that – I don't know whether they're attached to the requisition or not. That's – I have, like, a depot coordinator that handles that part of it in terms of requisitions.*

*...*

*Take, for instance, if this document was to be completed by Charlie Casilli - -? - - - Yes, ma'am.*

*- - - manager of parks and gardens - -? - - - Yes.*

*- - - who is within your division and under your direct supervision, you have no way, do you, of ensuring that Mr Casilli complies with the policy in the City of Bayswater of obtaining three quotes and ensuring that this purchase requisition is completed accurately? - - - No. I don't get involved with the requisitions, but what I've asked the guys to do is to ensure that when they can't get three quotes is to tell me, phone me, give me a reason why, and that's – and that's fine. If – and what I've expected them to always do, and which is what's being done right across the board, is that when they get quotes is to keep them and they were meant to be keeping them in a file down at the depot.*

*Together with the requisition? - - - That I don't know in terms of whether it was together with the requisition or not. My understanding was it was to do with – as long as I had the files there with the quotes there, the requisitions, it's really more of a finance type of operation in terms of having requisitions.*

*...*

*The guys have assured me that they – when they call quotes that they have kept – there is a file at the depot that they have kept the quotes together.*

*Have you ever seen the quotes file? - - - I have – yes, I have seen the file.*

*Under what circumstances have you called for that quotes file? - - - I've seen them when I've been down there and on the odd occasion periodically I've asked for copies of quotes for – to come up, and sure enough they produce the quotes.<sup>115</sup>*

- [256] Mr Rimpas then made it clear that it was not his practice to sight the purchase requisitions prior to authorising the resulting purchase orders.

*Was it a practice that you are required to sight the requisition with the attached quotes before you - - -? - - - No.*

*- - - authorise the purchase order? - - - No, there was no requirement for that and there hasn't been a requirement throughout the whole of the organisation.<sup>116</sup>*

- [257] Mr Rimpas was asked to what extent the City of Bayswater had checks or balances to ensure that its employees were carrying out work in compliance with policies. He said: "Overall, I'd say very, very little ...".

- [258] Mr Rimpas was examined before Mr Casilli, who was examined later on the same day, and the examination of Mr Rimpas proceeded on the basis that the quotes accompanied the purchase requisition, as opposed to the purchase order as claimed by Mr Casilli. Nevertheless, it is clear from the evidence of Mr Rimpas that he did not examine any quotes prior to authorising purchase orders: Mr Rimpas said he had no involvement with purchase requisitions, and he understood that any quotes obtained were to be retained on files at the depot; being files which he had seen.

- [259] During his examination Mr Casilli was shown a purchase requisition he raised for the spray of beetle bug at Halliday Park. The selected contractor was Turfmaster. Mr Casilli was asked whether he obtained three quotes in this instance, and he said that he did not, as he understood that Turfmaster was contracted to spray for everything.

*Did you obtain three quotes? - - - No, no.*

*Why not? - - - Because I thought that Kim – Kim was Turfmaster. He had the contract to spray for everything.*

...

*What gave you that understanding? - - - I don't know. I knew that Turfmaster had the contract to spray for the City.*

*For what, for weeds? - - - For weeds and everything I thought, whatever - - -*

*Why did you get your understanding from? - - - I don't know. It's my understanding. I understood that once a company is a contractor to spray, so whatever spray has to be done in the city, it has to be done by the same company.<sup>117</sup>*

- [260] Mr Casilli was shown a purchase requisition he raised for "verti" draining Bayswater Oval. The selected contractor was Turfmaster. Mr Casilli was

asked whether he obtained three quotes in this instance, and he said that he did not.

*Did you obtain two other quotes? - - - No, we don't have to. It's \$990, less than \$1,000.*

*Less than \$1,000 so you didn't have to obtain any quotes? - - - That's right.<sup>118</sup>*

[261] Mr Casilli may have been confused when giving that evidence regarding the need for written quotes for amounts in excess of \$1,000, and for verbal quotes for amounts between \$100 and \$1,000. Nevertheless, it is clear from his earlier evidence that he understood the requirements for verbal quotes for amounts below \$1,000, and for written quotes for amounts in excess of \$1,000, and it is also clear that on this occasion he failed to obtain any quotes and simply engaged Turfmaster. Mr Casilli was asked why he engaged Turfmaster on this occasion.

*What made you choose Turfmaster as opposed to other contractors? - - - Turfmaster – no reason. We using the Yellow Pages to find some people working on turf – not many people working on turf and especially in Turfmaster – can I say one – were no people in the turf area and also he's a locally. He's working, you know, in Bayswater.<sup>119</sup>*

[262] Mr Casilli was shown a purchase requisition he raised for “verti” draining some fairways at Embleton Golf Course. The selected contractor was Turfmaster, and the value of the works was \$3,600. Mr Casilli was asked whether he obtained three quotes in this instance, and he said that he did not in this instance due to the urgency of the situation.

*Under the City's policy, three quotes would have to be obtained? - - - Not always. Sometimes, you know – at times, you know, there come jobs, we haven't got time to call quote because it has to be done straightaway on the spot, no matter what. So the only thing is to grab the first contractor that is available and get it done.*

*Did you try other contractors? - - - No. I didn't have the time to try other contractors because it was something to be done as soon as possible.*

*So you went to Turfmaster? - - - Correct.*

...

*I didn't call them [other potential contractors] for the simple reason that Turfmaster is at Bayswater, is close to the golf course. ... Turfmaster is across the road, so we call them on the phone, somebody answer the phone and we arrange to do the job as soon as possible.<sup>120</sup>*

[263] In both of the instances just discussed, Mr Casilli knew that he ought to have obtained three quotes (verbal for Bayswater Oval and written for Embleton Golf Course), and it is difficult to see how “verti” draining could be a matter of such urgency that there was insufficient time to obtain the required quotes. The theme emerging here is that Mr Casilli contracted Turfmaster for convenience. Turfmaster was located nearby. Mr Casilli was used to dealing with Turfmaster as a result of the weed spraying

contract and other works performed at the City of Bayswater. Mr Casilli seems to admit as much in his evidence.

*Time and time again we see that you go to Turfmaster, you don't bother to go to other contractors? - - - No, I call in other contractor as well, but it all depends how urgent the job is. It's a matter of favouring a contractor near ourselves.<sup>121</sup>*

[264] It ought to be noted that the City of Bayswater now has a policy and practices (procedures) manual available to all staff, and that the City of Bayswater advised the Commission that ongoing work is being done to continually improve the knowledge of staff and to ensure understanding and application of the various policies and procedures relating to their positions.

#### **4.4.3.3 Commission Opinion: Mr Casilli**

[265] On the available evidence the Commission is satisfied that Mr Casilli breached the City of Bayswater purchasing policy by failing to obtain, or cause to be obtained:

1. the necessary quotes in respect of the supply of fertiliser by Turfmaster on 13 occasions between 18 September 2003 and 1 September 2004, for a total of \$47,404.85; and
2. the necessary quotes in respect of other services provided by Turfmaster on 48 occasions between 4 September 2003 and 14 July 2005, for a total of \$105,546.98.

The question is whether that constituted misconduct under section 4 of the Act.

[266] Mr Casilli was not separately questioned regarding the fertiliser supplies. Notwithstanding that Turfmaster's fertiliser supply contract with the City of Bayswater expired on 30 June 2001, it is likely that Mr Casilli simply continued with the same process that applied during the term of the contract resulting in the requisition of fertiliser supplies from Turfmaster some two to three years later. It was obvious from Mr Casilli's evidence that he had little knowledge of the tender process.

*Are you familiar with the processes in the City of Bayswater with respect to tendering and the obtaining of quotes? - - - No, no.*

*You are not familiar? - - - Not familiar.*

*Have you ever been involved with having to tender or put - - -? - - - No.*

*- - - services out to tender? - - - No, no.<sup>122</sup>*

And further:

*You have told us that you have never been involved in the tender process - - -? - - - Never.*

*- - - at the City? - - - Never ever.*

*But are you familiar with the need and the policy of obtaining pre-quotes for services and goods? - - - I'm familiar – I've heard – as I said, I continue what the people before me was doing it. When I took over, when I was promoted supervisor there was a – you know, the same thing; I continue what doing before me.*

*Which is what? - - - For instance, like getting three quotes for some jobs and things like that.<sup>123</sup>*

[267] In any event, there is simply insufficient information to determine whether Mr Casilli was aware of the details of the fertiliser contract awarded to Turfmaster, including the contract expiry. Whilst Mr Casilli breached the City of Bayswater purchasing policy in this regard, there is insufficient evidence to support an opinion of misconduct as Mr Casilli's knowledge of the previous Turfmaster contract for the supply of fertiliser has not been determined. It is open to conclude, for example, that Mr Casilli was unaware of the expiry of that contract and continued to order fertiliser from Turfmaster as though it was under contract, obviating the need for him to obtain any quotes.

[268] Mr Casilli's evidence in relation to the other services provided by Turfmaster was that he did in fact comply with the purchasing policy by calling for three quotes where necessary, but only details for the successful contractor were entered on the purchase requisition. However, on Mr Casilli's evidence, there were two exceptions. The first exception related to spraying in that Mr Casilli said his understanding was that Turfmaster was contracted to spray for everything and so it was not necessary for him to obtain quotes. The second exception related to urgent works in that Mr Casilli said he did not call for quotes due to the urgency of the situation.

[269] Of the 48 occasions when Mr Casilli failed to obtain quotes for services that were rendered by Turfmaster totalling \$105,546.98, 20 seemingly involved spraying of some kind, for a total of \$48,784.50. Mr Casilli's explanation in relation to Turfmaster holding the contract to "spray for everything" seems plausible, particularly given Mr Casilli's lack of involvement in, and understanding of, the tender process. Mr Casilli said:

*... I understood that once a company is a contractor to spray, so whatever spray has to be done in the city, it has to be done by the same company.<sup>124</sup>*

[270] Whilst Mr Casilli breached the City of Bayswater purchasing policy in this regard, there is insufficient evidence to support an opinion of misconduct as there is insufficient information to determine whether Mr Casilli was aware of the details of the spraying contract awarded to Turfmaster, including the fact that the contract was in respect of weed control only, and did not extend to other types of spraying such as the eradication of black beetle.

[271] Of the 48 occasions when Mr Casilli failed to obtain quotes for services that were rendered by Turfmaster totalling \$105,546.98, 28 did not involve spraying of some kind, for a total of \$56,762.48. Those services included

“verti” draining, the supply and installation of lawn, and some renovations at the Noranda Athletics Track and the Peninsula Golf Course.

[272] The evidence of Mr Casilli was that he generally obtained the required three quotes, but only details for the successful contractor were entered onto the purchase requisition. However, when he was shown a purchase requisition for “verti” draining some fairways at Embleton Golf Course Mr Casilli agreed that he did not call for quotes, and explained that sometimes there is insufficient time because the works are required to be performed urgently. Mr Casilli also said that Turfmaster was chosen in that instance because it is located in Bayswater.<sup>125</sup>

[273] However, the evidence is that Mr Casilli simply engaged Turfmaster without seeking the required three quotes on 28 occasions between 4 September 2003 and 14 July 2005, with the value of the works totalling \$56,762.48. The City of Bayswater has been unable to provide evidence of any quotes having been obtained for these services provided by Turfmaster. It is difficult to accept the proposition that on each of these 28 occasions the works were sufficiently urgent so that the required three quotes could not be obtained. Rather, it seems far more likely (and in the Commission’s assessment, was the case) that Mr Casilli was simply lazy, and he cut corners by directly approaching Turfmaster for reasons of convenience. This was clearly in breach of the City of Bayswater purchasing policy.

[274] The Commission accepts the submission made on Mr Casilli’s behalf (“the Casilli representations”)<sup>126</sup> that his conduct should be considered in the context of his background and experience.

- Mr Casilli is 58 years old.
- He is of Italian extraction and migrated to Australia in 1968 with his parents.
- He completed high school in Italy, but did not speak any English when he arrived in Australia.
- He speaks English as a second language, having learnt the language without any formal training.
- He is qualified as a painter, but holds no other formal qualifications.
- He commenced employment with the City as a casual labourer in the Parks and Gardens Section on 15 November 1983 and was made permanent in that position on 23 December 1983.
- He was an employee of the City for more than 25 years.
- He was promoted through on the job experience to the position of leading hand in 1985. He ceased employment with the City in June 1986, and recommenced in the position of tree lopper in August 1987.

- He was promoted to the position of Supervisor (Parks and Gardens) and eventually Manager Parks and Gardens in July 1997, the position which he held at the relevant time.
- In the position of Manager he was responsible for in excess of 60 employees.
- He received no formal training in relation to the City's policy and procedures for tendering and purchasing.
- He left employment with the City in May 2007 and attempted to resume a career as a painter, however, that was unsuccessful.
- In October 2008 he was re-employed at the City as a Manager of Landscaping and Garden Maintenance.
- He resigned from that position on 13 March 2009.

[275] On his behalf it was submitted<sup>127</sup> that the any failings of Mr Casilli in performing his duties stemmed from what he admits was the "sloppy" and "lazy" way he performed his responsibilities in requisitioning work, and those work practices had been continued over a significant period of time without any apparent requirement of accountability to or scrutiny by the City. It was then put that Mr Casilli's familiarity with the purchasing policy was limited to that gained through on the job experience and doing what had been done before. He was not familiar with the written document and he received no formal training in relation to the policy and he had not been subject to any degree of scrutiny or requirement of accountability in the performance of his responsibilities.

[276] Mr Casilli acknowledged he must ultimately bear responsibility for the way he had performed his duties, but submitted that the severity with which his conduct is viewed must be in the context of the circumstances.

[277] In the Commission's assessment, whilst the City's regime of training, accountability and scrutiny over that period was clearly seriously deficient, that cannot wholly excuse the ongoing failure of a person holding a senior position to meet even the fundamental obligations which his position entailed. Certainly as his employer, the City had a duty to provide any necessary training and an effective regime of accountability; but at the same time, once appointed to the position, Mr Casilli was obliged to familiarise himself with the requirements of it and to comply with them and, as with any public officer, Mr Casilli's primary obligation was to act always in the public interest.

[278] On the information available, including an analysis of Mr Casilli's personal issue requisition book, in the Commission's assessment what is clearly established on the balance of probabilities is that Mr Casilli breached the City of Bayswater purchasing policy on a regular basis by providing Turfmaster with work, without first obtaining quotes.



- [279] However, there is no evidence of any corrupt motivation on Mr Casilli's part, nor that he was deliberately subverting the City's processes so as to obtain a benefit for himself or Turfmaster. The Commission accepts this situation was the result of poor work practices and record keeping, combined with Mr Casilli's careless disregard of his important responsibilities. As Manager of Parks and Gardens he was negligent in incurring financial liabilities for the City, without ensuring they were properly incurred and appropriate procedures were followed.
- [280] But the question is whether Mr Casilli's conduct in failing on numerous occasions to obtain quotes as required under the City's purchasing policy, amounted to misconduct within the meaning of section 4 of the Act.
- [281] In the circumstances described above, it could not fall within section 4(a), (b) or (c) of the Act.
- [282] So far as section 4(d)(i) of the Act is concerned, the notion that the "honest" performance of a public authority or public officer is, or could be, adversely affected by the conduct of a public officer, imports an element of conduct that is (or may be) "dishonest". Similarly, in section 4(d)(ii) conduct which constitutes or involves the performance of the public officer's functions in a manner that is not honest, connotes "dishonesty" in some form or another. Having regard to the gravity of an opinion of misconduct, the Commission construes these provisions as requiring proof of a state of mind, knowledge or intention which goes beyond mere negligence. Deliberate deceit or falsity or an intent to mislead, for example, would suffice. But there is no evidence Mr Casilli's conduct involved any of those.
- [283] Section 4(d)(i) also covers conduct which adversely affects (or could adversely affect), either directly or indirectly, the "impartial" performance of a public authority or public officer. Section 4(d)(ii) also covers conduct which constitutes or involves the performance of the public officer's functions in a manner that is not "impartial". There can be no question but that Mr Casilli's conduct was not impartial in its result, or effect. It advantaged Turfmaster over other potential suppliers; it disadvantaged them by denying them the opportunity to tender and get the work. It resulted in Turfmaster repeatedly being treated more favourably as a matter of course. There is no evidence that what Mr Casilli did was done for that purpose, but it was undeniably the outcome. Having regard to the fact there is a positive obligation upon public officers to act impartially, without bias and without favour, and to the harm to public confidence in the public sector and in government when they do not do so (for whatever reason and whether intentional or not), the Commission is of the opinion that his conduct in this respect fell within sections 4(d)(i) and (ii). It was conduct which:
- did directly adversely affect the impartial performance of the functions of the City and his own position; and
  - constituted the performance of his functions in a manner that was not impartial.

[284] In order to constitute misconduct under section 4(d) of the Act Mr Casilli's conduct must also meet the criteria set out in sections 4(d)(v) or (vi). In the Commission's opinion section 4(d)(v) does not apply.

[285] In the opinion of the Commission Mr Casilli's conduct, albeit negligent and not deliberately intended to benefit Turfmaster or cause a detriment to other service providers, could constitute a disciplinary offence (repeatedly failing to comply with the City's purchasing procedures and acting contrary to them) providing reasonable grounds for the termination of a public service officer's office or employment, within the meaning of section 4(d)(vi) of the Act, for the following reasons:

- Mr Casilli was a manager, with responsibility to ensure that contracts he was implementing for work at facilities administered by the City of Bayswater were properly administered;
- his conduct was contrary to the City of Bayswater's purchasing policy;
- the effect of this conduct was to provide a substantial financial benefit to Turfmaster, and a consequent detriment to other businesses which might compete for the same work; and
- his conduct was not a single lapse, but was on-going.

In his section 86 representations, Mr Casilli's lawyer concedes<sup>128</sup> that his conduct was capable of coming within section 4(d)(vi) of the Act, but submits that in his circumstances termination would have been unlikely; that a likely consequence of disciplinary proceedings would have been his demotion and/or a requirement to undergo formal training on the purchasing policy. That might or might not have been so, but it is irrelevant to the application of the hypothetical test in section 4(d)(vi).<sup>129</sup> The concession that Mr Casilli's conduct was capable of coming within section 4(d)(vi) is an acknowledgement that it was sufficient to meet the statutory test.

[286] In the opinion of the Commission it follows that Mr Casilli engaged in misconduct under section 4(d)(i), (ii) and (vi) of the Act.

[287] However, as noted, Mr Casilli is no longer employed by the City and so he is no longer open to disciplinary proceedings. The Commission accordingly makes no recommendation in that regard.

## **4.5 Financial Management Systems**

[288] The *Local Government (Financial Management) Regulations 1996* require the CEO to undertake a review of the Council's financial management systems at least every four years.

[289] The Commission examined a review of the City of Bayswater's financial management systems and procedures prepared in March 2001, and an external audit of its financial statements for 2005.

- [290] No major areas of concern or adverse findings were identified in either the review or the audit.
- [291] However, the Commission's investigation of the City of Bayswater's financial management systems showed that there was no link between a tender document and the relevant budget within which it fell. Budgeted expenditure was determined by reference to the cost of the product or service in the previous year, while the tender document remained static. This meant it was possible for purchase orders to be generated for amounts in excess of those specified in the tender document.
- [292] The Commission is aware that the City of Bayswater, as part of their organisational audit including a review of corporate governance and compliance, has introduced, and continues to introduce, more robust processes which amongst other areas, are also relevant to procurement standards and practices. The Commission is continuing to assist with further intensive and specific guidance and misconduct resistance training as requested by the City.

## **4.6 City of Bayswater: Progress and Current Situation**

### **4.6.1 Introduction**

- [293] It is important to appreciate that the events which were the subject of the investigation which focused on the activities of councillors and officers of the City of Bayswater occurred in the main between February 2003 and late 2005.
- [294] From the outset of the investigation, during the course of it and subsequent to it officers of the Commission have worked with the City of Bayswater and its officers to identify misconduct risks and to develop and implement misconduct resistance strategies to address identified risks. This involved the review of existing policies, processes and procedures.
- [295] The Commission acknowledges the commitment to dealing with the misconduct risks identified through this collaborative process and the cooperation extended to it by Mr Mario J Carosella, Chief Executive Officer of the City of Bayswater during the period of the investigation, Ms Francesca Lefante, the current Chief Executive Officer, and City of Bayswater officers.
- [296] The City of Bayswater in its representations dated 17 March 2009, made in response to the 24 February 2009 notice given to it under section 86 of the Act (refer paragraph [47] of this report), whereby a person or body must be given a reasonable opportunity to make representations to the Commission before any matters adverse to a person or body are reported to the Parliament of Western Australia, submitted that a number of developments have occurred at the City of Bayswater since the conclusion of the investigation in 2005, including:
- a comprehensive overhaul of practices and procedures;

- major changes to the City's management team; and
- the departure of individuals who are the subject of serious adverse comments in the Commission's report on the investigation, and who are, therefore, no longer employed by the City.

[297] The City of Bayswater also submitted in its representations in response to the section 86 notice that further measures, relevant to matters in the Commission's report, have been and continue to be implemented by the City in various areas, including:

- disclosure of interests and gifts;
- rules of conduct;
- asset management;
- tendering (procurement);
- contract management;
- financial management;
- performance management;
- professional development; and
- recruitment.

[298] In addition, Mr George Rimpas, Manager of Engineering Services, City of Bayswater, in his representations dated 12 March 2009, made in response to the 23 February 2009 notice given to him under section 86 of the Act, submitted that the City has vastly improved the processes for procurement of services by external contractors and for recording the procurement of such services as a consequence of the Commission investigation, from both a logistical and organisation structural perspective.

[299] Mr Rimpas also submitted in his representations that during the Commission's investigation he canvassed several Councils on how contracts were supervised, and the information so obtained was included in a report to the Council in 2005.

[300] Mr Rimpas further submitted that, whilst ideally the auditing of quantities actually received would be done at-arms-length, he was currently doing this in-house within his own Engineering Section. Although that is not quite at-arms-length, the process is documented and can itself be audited.

#### **4.6.2 Policy and Practices (Procedures) Manual**

[301] Based on information provided by the City of Bayswater, the Commission is aware that the City of Bayswater now has a policy and practices (procedures) manual available to all staff and that ongoing work is being done to continually improve the knowledge of staff and to ensure

understanding and application of the various policies and procedures relating to their positions.

#### **4.6.3 Tendering Processes and Contracts**

- [302] The Commission investigation highlighted a lack of an interrelationship between the finance system then operating and the management of tender contracts (refer paragraph [149] of this report). The Commission notes the City of Bayswater has since addressed this issue in detail in order to improve the management and transparency associated with ongoing tender contracts.
- [303] The control and management of tender contracts is now more centralised with a greater involvement by the Finance Division, and appropriately trained officers, providing an at-arms-length involvement.
- [304] Quantities for tenders are reviewed, with each recalling of annual supply tenders required to be more closely aligned with expected purchases. Operations where it is very difficult to supervise contractor's performances (such as weed spraying and graffiti control) have been brought in-house and are carried out by the City's own day labour workforce, and supplement broad acre spraying by contract.
- [305] Day-to-day quoting of low cost services has changed with order books now in triplicate format, enabling one copy of the order to be held by records and another, together with the invoice, to be held by the Finance Division. The Finance Division is also auditing expenditure thresholds so as to ensure they do not breach tendering regulations.
- [306] The City's Technical Services Division has also been restructured with the Deputy City Engineer's position being abolished and a flatter management based structure adopted with each manager responsible for a smaller section, thus allowing greater control of day-to-day operations.
- [307] The Parks and Gardens Section has also had its supervisory staffing level doubled to allow for more supervision of contractors. The City now also has a dedicated assistant supervisor of street tree pruning who supervises the street tree contract, which is a large (\$750,000) annual contract.

#### **4.6.4 Conclusion**

- [308] The City submitted in its section 86 representations that insofar as it relates to the City of Bayswater, the Commission's report deals with problems that occurred many years ago, largely involving people who are no longer employed by the City, under practices and procedures that have been replaced and in a situation where, given the changes that have been made, similar problems are unlikely to recur.
- [309] The Commission notes that the vast majority of current employees of the City had little or nothing to do with the events in question.
- [310] The Commission acknowledges that the City has demonstrated, in its dealings and work with the Commission over the past four and a half

years, that it welcomes and responds positively to identified shortcomings. Organisationally, the City has publicly acknowledged and addressed, and continues to address, the shortcomings identified in the public hearings and in this report.

[311] However, in conclusion, it needs to be stated that whilst it is recognised that significant progress has been made by the City of Bayswater and its officers in relation to the identification of misconduct risks and implementation of strategies to address such risks, maintenance of the current improved position and continued progress are dependent on a number of factors, including:

- continuous review and improvement of processes and policies across the areas specifically outlined in the City's section 86 representations;
- transparent operations which are open to public scrutiny and comment;
- ongoing training for City officers to ensure understanding of and compliance with relevant legislation, regulations and policies, especially those which assist councillors and officers to identify and avoid, or declare and defuse or manage, conflicts of interest;
- that job descriptions, which detail job specific duties and required skills, abilities, experience and knowledge to undertake the stated duties, appropriately reflect the current and future employment needs of the City; and
- recruitment of suitably qualified officers, particularly in senior positions.

## **CHAPTER FIVE OPINIONS AND RECOMMENDATIONS**

### **5.1 Commission Opinions as to Misconduct**

[312] Having assessed the material gathered during the investigation the Commission has formed the following opinions in regard to misconduct, and makes the following recommendations.

#### **5.1.1 Mr Terry Blanchard**

[313] In the opinion of the Commission, by taking part in the formal tender process as he did (even though not in fact being involved in the analysis of, or decision on the tender) and continuing to manage part of the City of Bayswater's weed spraying contract with Turfmaster, and by approving an increase from two to three applications of herbicide per annum for some items without having the authority to do so, whilst having a conflict of interest by virtue of his friendship with a proprietor of Turfmaster, Mr Blanchard engaged in misconduct under section 4(d)(i) and (vi) of the Act.

#### **5.1.2 Mr Carmelo Casilli**

[314] In the Commission's opinion, by simply engaging Turfmaster without complying with the City of Bayswater's requirement to obtain quotes for the work, on 28 occasions between 4 September 2003 and 14 July 2005, involving payments amounting to \$56,762.48, Mr Casilli engaged in misconduct under section 4(d)(i), (ii) and (vi) of the Act.

### **5.2 Commission Recommendations**

[315] As already noted, the Commission has engaged extensively with the City of Bayswater over the course of this investigation and the City has already implemented (or is implementing) a large number of new processes and changes to address issues relating to misconduct risks, as they become apparent. It is therefore unnecessary for the Commission to make recommendations now about all those matters.

[316] The Commission makes the following recommendations:

#### **Recommendation 1**

The City of Bayswater devise and implement a selective audit or checking process to validate its systems, policies, procedures and guidelines relating to employee time sheets and other records and to ensure the relevant information is recorded and is accurate.

**Recommendation 2**

In order to clarify the obligation of elected members with respect to primary and annual returns, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.

**Recommendation 3**

In order to clarify the obligations of elected members with respect to the declaration of gifts and benefits, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.

**Recommendation 4**

The City of Bayswater review its policy on conflicts of interest to ensure:

- councillors are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately;
- the Chief Executive Officer and senior managers are aware of their responsibility to appropriately manage conflicts of interest within the City administration;
- individual officers of the City administration are aware of how to identify conflicts of interest and their obligation to declare and manage them appropriately; and
- declarations of conflict of interest and action (to be) taken in respect of them, are appropriately recorded.



## **APPENDICES**



## **APPENDIX 1**

### **Notifications of Adverse Matters Under Section 86 of the *Corruption and Crime Commission Act 2003***



## Notification of Adverse Matters

No.	Recipient of Section 86 Notification	Date of Notification	Date of Representations	From
1.	Mr Terry D Blanchard	23 February 2009	8 May 2009	Kyle and Company Solicitors
2.	Mr Carmelo Casilli	23 February 2009	20 March 2009	Robert Grayden Legal
3.	Mr Pasquale A Drago	23 February 2009	30 March 2009	Pasquale Drago (David Moen)
4.	Mr K T Evans and Turfmaster	23 February 2009	15 April 2009	Hammond Worthington Lawyers
5.	Mr Kerry C Hegney	23 February 2009	No Response	-
6.	Ms Francesca Lefante (City of Bayswater)	23 February 2009	17 March 2009 (Received on 18 March 2009.)	City of Bayswater
7.	Mr Fank Pangallo	23 February 2009	No Response	-
8.	Mr George Rimpas	23 February 2009	12 March 2009 (Received on 17 March 2009.)	George Rimpas
9.	Mr Michael J Sabatino	23 February 2009	20 March 2009	Michael Sabatino (David Moen)
10.	Mr Adam Amedeo Spagnolo	23 February 2009	19 March 2009 (Received on 20 March 2009.)	S.C. Nigam and Co. Barristers and Solicitors



## **APPENDIX 2**

***Conflict of Interest Guidelines for the Western Australian  
Public Sector, The Integrity Coordinating Group<sup>130</sup>***

# Conflict of Interest Guidelines



The Integrity Coordinating Group

Promoting and Strengthening Integrity in WA Public Bodies

## Identifying and managing conflicts of interest in the Western Australian public sector

### What is a conflict of interest?

A conflict of interest is a situation arising from conflict between the performance of public duty and private, or personal interests.

Conflicts of interest may be actual, or be perceived to exist, or potentially exist at some time in the future.

Perception of a conflict of interest is important to consider because public confidence in the integrity of an organisation is vital.

### Is it wrong to have a conflict of interest?

Public officers have a responsibility to always serve the public interest in performing their duties. Personal interests, whether these are financial, or relate to family, friends or associates, should not influence public duty.

It is not always possible to avoid a conflict of interest, particularly in small communities, or some specialist industries. A conflict of interest in itself is not necessarily wrong, or unethical. However, identifying and managing the situation is important.

### Who is responsible for identifying and managing conflicts of interest?

Although CEOs and senior managers have a particularly important role in ensuring conflict of interest situations are managed appropriately within an organisation, identifying a conflict of interest is an individual responsibility.

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**How can officers identify if a conflict of interest exists?**

**The 6 Ps**

There is no one 'right' way to identify every situation, however a good starting point is for officers to consider the 6 Ps:

**P**ublic duty versus private interests

Do I have personal or private interests that may conflict, or be perceived to conflict with my public duty?

**P**otentialities

Could there be benefits for me now, or in the future, that could cast doubt on my objectivity?

**P**erception

Remember, perception is important. How will my involvement in the decision/action be viewed by others? Are there risks associated for me/my organisation?

**P**roportionality

Does my involvement in the decision appear fair and reasonable in all the circumstances?

**P**resence of mind

What are the consequences if I ignore a conflict of interest? What if my involvement was questioned publicly?

**P**romises

Have I made any promises or commitments in relation to the matter? Do I stand to gain or lose from the proposed action/decision?

**How can conflicts of interest be managed appropriately?**

**The 6 Rs**

There is likely to be more than one way to effectively manage conflicts of interest. The choice of strategies will be dependent on the operating environment, legislative requirements and practical solutions. Often a combination of strategies will be required.

The major options, or 6 Rs<sup>1</sup> for officers and supervisors to manage conflicts of interest are:

**R**ecord/Register

Recording the disclosure of a conflict of interest in a register is an important first step, however this does not necessarily resolve the conflict. It may be necessary to assess the situation and determine whether one or more of the following strategies is also required:

<sup>1</sup> The 6 Rs have been adapted from: Crime and Misconduct Commission/Independent Commission Against Corruption (2004) *Managing Conflicts of Interest in the Public Sector: Toolkit* (available at [www.cmc.qld.gov.au](http://www.cmc.qld.gov.au))

### Restrict

It may be appropriate to restrict your involvement in the matter, for example, refrain from taking part in debate about a specific issue, abstain from voting on decisions, and/or restrict access to information relating to the conflict of interest. If this situation occurs frequently, and an ongoing conflict of interest is likely, other options may need to be considered.

### Recruit

If it is not practical to restrict your involvement, an independent third party may need to be engaged to participate in, oversee, or review the integrity of the decision-making process.

### Remove

Removal from involvement in the matter altogether is the best option when ad hoc or recruitment strategies are not feasible, or appropriate.

### Relinquish

Relinquishing the personal or private interests may be a valid strategy for ensuring there is no conflict with your public duty. This may be the relinquishment of shares, or membership of a club or association.

### Resign

Resignation may be an option if the conflict of interest cannot be resolved in any other way, particularly where conflicting private interests cannot be relinquished.

### Are there laws relating to conflicts of interest?

Conflicts of interest need to be considered within an ethical framework that requires public officers to act with integrity, impartiality, in good faith, and in the best interests of the organisation they serve. In some cases, organisations are required by law to manage conflicts of interest in a particular way.

The key legislation<sup>2</sup> applicable to conflicts of interest includes:

- *Public Sector Management Act 1994*<sup>3</sup>
- *Western Australian Public Sector Code of Ethics*
- *Financial Administration and Audit Act 1985 (FAAA)*
- *State Supply Commission Act 1991*
- *Local Government Act 1995* and associated regulations
- *Members of Parliament (Financial Interests) Act 1992*

<sup>2</sup> Western Australian legislation, current as at April 2006

<sup>3</sup> Under s.9 of the Act, all public sector bodies and employees must comply with public sector standards and the *Western Australian Public Sector Code of Ethics* and any applicable code of conduct

## Conflict of Interest Guidelines

A collaborative initiative of The Integrity Coordinating Group

### What are some of the conflict of interest risk areas?

Almost all functions performed in the public sector can potentially lead to conflict of interest situations. Identifying areas of risk in the organisation is the first step to managing conflicts of interest.

Some common risk areas<sup>4</sup> include:

- Managing procurement processes, tenders and contracts
- Sponsorship from the private sector
- Allocation of grants for community-based services
- Dual roles as a public officer
- Boards and Committees with representative members
- Gifts, benefits and hospitality
- Recruitment, selection and appointment
- Secondary employment

### How should organisations deal with conflicts of interest?

The Organisation for Economic Co-operation and Development (OECD) promotes four core principles<sup>5</sup> for organisations to deal with conflict of interest situations, to promote integrity, and for maintaining public confidence:

- Serving the public interest
- Supporting transparency and scrutiny
- Promoting individual responsibility and personal example
- Engendering an organisational culture which is intolerant of conflicts of interest

Organisations should consider incorporating these principles in a policy<sup>6</sup> on conflicts of interest, or include a section on managing conflicts of interest in the organisation's Code of Conduct.

### Where can officers get additional information or advice?

The best starting point is to discuss the situation with a supervisor, or senior colleague. There may be specific legislative or policy requirements that need to be considered, as well as the agency Code of Conduct.

For additional information and enquiries visit:

[www.opssc.wa.gov.au/icg](http://www.opssc.wa.gov.au/icg)

<sup>4</sup> For further information refer to *Conflict of Interest Scenarios* (available at [www.opssc.wa.gov.au/icg](http://www.opssc.wa.gov.au/icg))

<sup>5</sup> OECD (2003) *Recommendation of the Council on guidelines for managing conflict of interest in the public service* (available at [www.oecd.org/dataoecd/13/22/2957360.pdf](http://www.oecd.org/dataoecd/13/22/2957360.pdf))

<sup>6</sup> Guidance on developing a policy is available in Crime and Misconduct Commission/Independent Commission Against Corruption (2004) *Managing Conflicts of Interest in the Public Sector: Toolkit* (available at [www.cmc.qld.gov.au](http://www.cmc.qld.gov.au))

#### Acknowledgements

The Integrity Coordinating Group (ICG) is grateful for the support of Queensland's Crime and Misconduct Commission (CMC) and the New South Wales Independent Commission Against Corruption (ICAC), and acknowledges that much of the content developed by CMC/ICAC in *Managing Conflicts of Interest in the Public Sector: Toolkit* has been adopted by ICG, with some modification and adaptation for the Western Australian environment.

#### Disclaimer

This information does not constitute legal advice and the ICG accepts no liability for the accuracy of the information; or for any act or omission done in reliance on the information provided, or for any consequences, whether direct or indirect, of any such act or omission.

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## ENDNOTES

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- <sup>1</sup> Pursuant to section 48A(2) of the *Anti-Corruption Commission Act 1988*.
- <sup>2</sup> Pursuant to section 33(1) of the *Corruption and Crime Commission Act 2003*.
- <sup>3</sup> *Disciplinary Procedures Guide*, Department of the Premier and Cabinet, Government of Western Australia, p.9.
- <sup>4</sup> As defined in section 5 of the *Telecommunications (Interception and Access) Act 1979*.
- <sup>5</sup> *Butterworths Concise Australian Legal Dictionary* (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.
- <sup>6</sup> Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J at 361-363; Rejfeek v McElroy (1965) 112 CLR 517; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449.
- <sup>7</sup> Anti-Corruption Commission File 03418/2002.
- <sup>8</sup> Transcript of Proceedings, Public Examination, Opening Statement by the Commissioner on 13 June 2005, p.2.
- <sup>9</sup> Anti-Corruption Commission surveillance running sheets and photographs.
- <sup>10</sup> Commission Interviews of 13 January 2005, 14 January 2005 and 3 February 2005.
- <sup>11</sup> Commission Interview of 14 February 2005.
- <sup>12</sup> Transcript of Proceedings, Public Examination, Opening Statement by the Commissioner on 13 June 2005, p.2, *loc cit*.
- <sup>13</sup> Commission Information Report, 25 May 2004.
- <sup>14</sup> Transcript of Proceedings, Public Examination on 23 June 2005, pp.242-259.
- <sup>15</sup> This amount has now been changed to \$100,000.
- <sup>16</sup> City of Bayswater Purchasing Policy FS-P19 [E 05859].
- <sup>17</sup> Draft Procurement Manual dated September 2005 provided to the Commission on 19 September 2005, [E 05366].
- <sup>18</sup> The Commission selected a sample of City of Bayswater records relating to work performed by each of these businesses for the City of Bayswater. An examination was also conducted of the general ledger entries relevant to these businesses.
- <sup>19</sup> City of Bayswater Policy AD-P14, adopted 1 March 2005: *Awarding of Contracts to Business Entities Closely Associated with Councillors and Employees (Tenders, Expressions of Interest or Quotation Guidelines and Procedures)*.
- <sup>20</sup> City of Bayswater Tender File 17-97/98, Council Minutes 22 May 1998, p.22.
- <sup>21</sup> By the date of the Technical Services Committee meeting the company name had changed from G.T. Evans Weed Spraying Service Pty Ltd to Transaus Pty Ltd.
- <sup>22</sup> City of Bayswater, Minutes for the Meeting of the Technical Services Committee, 18 June 1997, pp.48-57 [E 03738]. Note that the third page of the document shows the date of the meeting as 22 January 1997. This cannot be the case, as Mr Rimpas was present and he did not commence work at the City of Bayswater until 10 April 1997. It is considered that the date on the cover of the document of 18 June 1997 is the correct date for this meeting.
- <sup>23</sup> *Ibid*.

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- <sup>24</sup> Record of Interview of Mr George Rimpas at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 7 July 2005, pp.4-12.
- <sup>25</sup> City of Bayswater Ordinary Council Meeting Minutes, 24 June 2003, pp.188-191 [E 18988].
- <sup>26</sup> *Ibid*, p.191 [E 18988].
- <sup>27</sup> City of Bayswater Purchase Orders 103117 [E 03709] and 104688 [E 03712].
- <sup>28</sup> Comparison of Facility Area with Spraying Area. Chart compiled by Commission Investigators in consultation with City of Bayswater Geographical Information System Officer [E 03769].
- <sup>29</sup> City of Bayswater Council Meeting Confidential Report, 7 September 2005, p.10.
- <sup>30</sup> Tender 34-96/97 listed Paths Medians (1m – 6m wide) and Paved Verges (1m – 6m wide) separately.
- <sup>31</sup> Payments to 13 April 2005.
- <sup>32</sup> Transcript of Proceedings, Public Examination of Mr Kimberley Evans on 24 June 2005, p.440.
- <sup>33</sup> *Ibid*, p.444.
- <sup>34</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, p.264.
- <sup>35</sup> Transcript of Proceedings, Private Examination of Mr Terry Blanchard on 16 November 2005, p.26.
- <sup>36</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, p 281.
- <sup>37</sup> Transcript of Proceedings, Private Examination of Mr George Rimpas on 17 November 2005, pp.3-7.
- <sup>38</sup> *Ibid*, p.9.
- <sup>39</sup> *Ibid*.
- <sup>40</sup> Record of Interview of Mr George Rimpas at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 7 July 2005, *op cit*, p 3.
- <sup>41</sup> *Ibid*, p 9.
- <sup>42</sup> Transcript of Proceedings, Private Examination of Mr George Rimpas, 17 November 2005, p 13-14.
- <sup>43</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, p.272.
- <sup>44</sup> Transcript of Proceedings, Public Examination of Mr Kimberley Evans on 24 June 2005, *op cit*, p.426.
- <sup>45</sup> Handwritten note on Turfmaster Letterhead from Mr Evans to Mr Blanchard [E 03703].
- <sup>46</sup> Transcript of Proceedings, Private Examination of Mr Terry Blanchard on 16 November 2005, *op cit*, pp.25-26.
- <sup>47</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, p.330.
- <sup>48</sup> *Ibid*, p.332.
- <sup>49</sup> *Ibid*, p.337.
- <sup>50</sup> City of Bayswater Request for Tender 6-2003: Weed Control (E 03698).
- <sup>51</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, pp. 282-283.
- <sup>52</sup> Transcript of Proceedings, Private Examination of Mr George Rimpas on 23 June 2005, p.11.
- <sup>53</sup> Submission by the City of Bayswater to the Corruption and Crime Commission, September 2005, p.4.
- <sup>54</sup> *Ibid*.
- <sup>55</sup> City of Bayswater Tender File 6/2003: Weed Control.

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- <sup>56</sup> Letter from Mr Blanchard to Turfmaster, 25 June 2003 [E 03701].
- <sup>57</sup> City of Bayswater Purchase Orders 101351 [E 03707], 104093 [E 03711] and 106975 [E 03715].
- <sup>58</sup> City of Bayswater Ordinary Council Meeting Minutes, 24 June 2003, p.188 [E 18988], *loc cit*.
- <sup>59</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, p.288.
- <sup>60</sup> *Ibid*, p.291.
- <sup>61</sup> *Ibid*, p.288. *Loc cit*.
- <sup>62</sup> *Ibid*, pp.294-295.
- <sup>63</sup> Transcript of Proceedings, Private Examination of Mr George Rimpas on 17 November 2005. *op cit*, p.52.
- <sup>64</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, p.295, *loc cit*.
- <sup>65</sup> *Ibid*, p 318.
- <sup>66</sup> *Ibid*, p 313.
- <sup>67</sup> *Ibid*, p 303.
- <sup>68</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 24 June 2005, pp.394-399.
- <sup>69</sup> *Ibid*, p.407.
- <sup>70</sup> *Ibid*, p.408.
- <sup>71</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 23 June 2005, *op cit*, p.309.
- <sup>72</sup> *Ibid*, pp.316-317.
- <sup>73</sup> Transcript of Proceedings, Public Examination of Mr Terry Blanchard on 24 June 2005, *op cit*, p.417.
- <sup>74</sup> Faxed letter from Mr Evans of Turfmaster to Mr Blanchard, City of Bayswater, 22 March 2004 [E 03702].
- <sup>75</sup> City of Bayswater Request for Tender 6-2003, p.17.
- <sup>76</sup> Letter from Mr Blanchard to Mr Evans, 25 August 2004.
- <sup>77</sup> Facsimile from Mr Evans to Mr Blanchard, 31 August 2004.
- <sup>78</sup> Transcript of Proceedings, Private Examination of Mr Terry Blanchard on 16 November 2005, *op cit*, p.45.
- <sup>79</sup> Transcript of Proceedings, Public Examination of Mr Evans on 24 June 2005, *op cit*, p.447.
- <sup>80</sup> *Ibid*, p.453.
- <sup>81</sup> *Ibid*, p.449.
- <sup>82</sup> Transcript of Proceedings, Public Examination of Mr Mario Carosella on 13 June 2005, p.58.
- <sup>83</sup> *Ibid*, pp.80-81.
- <sup>84</sup> Submission by the City of Bayswater to the Corruption and Crime Commission, September 2005, *op cit*, p.5.
- <sup>85</sup> *Ibid*, p.4. *Loc cit*.
- <sup>86</sup> City of Bayswater Code of Conduct, December 2000 [E 36421].
- <sup>87</sup> Representations on behalf of Mr Blanchard, forwarded under letter from Kyle and Company Solicitors, dated 8 May 2009, paragraph [25].
- <sup>88</sup> Transcript of Proceedings, Private Examination of Mr Terry Blanchard on 16 November 2005, p.45, *loc cit*.

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<sup>89</sup> Representations on behalf of Mr Blanchard, forwarded under letter from Kyle and Company Solicitors, dated 8 May 2009, *op cit*, paragraphs [58] – [63].

<sup>90</sup> The Integrity Coordinating Group (ICG) was established in Western Australia in June 2005. It consists of the Commissioner of the Corruption and Crime Commission, the Auditor General, the Parliamentary Inspector for Administrative Investigations (Ombudsman) and the Commissioner for Public Sector Standards. The ICG meets informally several times a year and is supported by a working group of officers from the four member agencies. The ICG works for effective coordination and communication between their agencies.

<sup>91</sup> Representations on behalf of Mr Blanchard, forwarded under letter from Kyle and Company Solicitors, dated 8 May 2009, *op cit*, paragraphs [130]–[140].

<sup>92</sup> *Corruption and Crime Commission Act 2003*, Section 8.

<sup>93</sup> *Ibid*, section 9(1).

<sup>94</sup> See for example the explanation of this process given by Beech AJA (with whom Wheeler and Buss JJA agreed) in Ross v Insurance Commission of Western Australia [2009] WASCA 91, 22 May 2009.

<sup>95</sup> City of Bayswater Tender File 17-97/98, Council Minutes 22 May 1998, p.22.

<sup>96</sup> Corruption and Crime Commission Analysis *City of Bayswater: Contracts Awarded to Turfmaster* [E 19022].

<sup>97</sup> City of Bayswater Purchasing Policy FS-P19, 23 July 2003.

<sup>98</sup> *Turfmaster Works Without Quotes*, Corruption and Crime Commission [E 19024].

<sup>99</sup> Representations on behalf of Mr Carmelo Casilli dated 20 March 2009, p.3.

<sup>100</sup> Transcript of Proceedings, Private Examination of Mr Carmelo Casilli on 17 November 2005, pp.56-57.

<sup>101</sup> *Ibid*, p.58.

<sup>102</sup> *Ibid*, p.61.

<sup>103</sup> *Ibid*, pp.62-69.

<sup>104</sup> *Ibid*, pp.68-69.

<sup>105</sup> *Ibid*, pp.73-77.

<sup>106</sup> *Ibid*, p.60.

<sup>107</sup> *Ibid*, p.61. *Loc cit*.

<sup>108</sup> *Ibid*, p.62.

<sup>109</sup> *Ibid*, pp.63-64.

<sup>110</sup> *Ibid*, p 65.

<sup>111</sup> *Ibid*, p.67.

<sup>112</sup> Transcript of Proceedings, Private Examination of Mr George Rimpas on 17 November 2005, *op cit*, pp.2-53.

<sup>113</sup> *Ibid*, p.21.

<sup>114</sup> *Ibid*, p.23.

<sup>115</sup> *Ibid*, pp.23-24.

<sup>116</sup> *Ibid*, p.28.



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- <sup>117</sup> Transcript of Proceedings, Private Examination of Mr Carmelo Casilli on 17 November 2005, *op cit*, p.69.
- <sup>118</sup> *Ibid*, p.73.
- <sup>119</sup> *Ibid*, p.75.
- <sup>120</sup> *Ibid*.
- <sup>121</sup> *Ibid*, p.77.
- <sup>122</sup> *Ibid*, p.56.
- <sup>123</sup> *Ibid*, p.59.
- <sup>124</sup> *Ibid*, p.69. *Loc cit*.
- <sup>125</sup> *Ibid*, p.75. *Loc cit*.
- <sup>126</sup> Representations of Robert Grayden Legal dated 20 March 2009, p.2.
- <sup>127</sup> Representations on behalf of Mr Carmelo Casilli dated 20 March 2009, *op cit*.
- <sup>128</sup> *Ibid*, p.6.
- <sup>129</sup> Cox v Corruption and Crime Commission [2008] WASCA 199, per Martin CJ at [64]; Steytler P at [118].
- <sup>130</sup> The Integrity Coordinating Group Website at [www.opssc.wa.gov.au/icg](http://www.opssc.wa.gov.au/icg), viewed November 2009.