

Abuse of power at the Department of Primary Industries and Regional Development

5 July 2019



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Corruption and Crime Commission

Postal Address	PO Box 330 Northbridge Post Shop WA 6865	Email	info@ccc.wa.gov.au
		Website	www.ccc.wa.gov.au
Telephone	(08) 9215 4888 1800 809 000 (toll free for callers outside the Perth metropolitan area)	Twitter	@CCCWestAus
		Office Hours	8.30 am to 5.00 pm, Monday to Friday
Facsimile	(08) 9215 4884		

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CHAPTER ONE

Overview

- [1] Good government depends on the integrity of public officers.
- [2] Ms Felicity Heffernan is a lawyer. Between 2016 and 2018, she was Director, Legal and Commercial Division in the department now known as Department of Primary Industries and Regional Development (DPIRD).¹
- [3] She was afforded great discretion in view of her legal experience but she corrupted that trust on two matters investigated by the Commission.

A sham arrangement to pay Dr Howard Carr

- [4] Dr Howard Carr, an expert in plant breeding rights, had been engaged by DPIRD from time to time to provide advice and perform other duties.
- [5] Ms Heffernan entered into an arrangement with a partner at Herbert Smith Freehills (HSF) to circumvent the requirements of a government ordered public sector recruitment freeze to allow Dr Carr, whose employment contract had expired, to continue to work for DPIRD. Only one payment was made to Dr Carr through HSF. Later, to enable Dr Carr to continue to be paid, Ms Heffernan falsified a letter of engagement purportedly from HSF and backdated it. Dr Carr signed the letter.
- [6] The Commission has formed an opinion of serious misconduct in respect of Ms Heffernan's actions in preparing the purported engagement letter, backdating it and authorising payments of outstanding invoices from Dr Carr using the letter as authority.
- [7] Dr Carr was a public officer who participated in a scheme to continue his employment with DPIRD in contravention of the recruitment freeze. The Commission is unable to determine the extent to which he turned his mind to the letter and its backdating. It recognises that Dr Carr worked assiduously on DPIRD's behalf largely continuing the work from his earlier engagement.

Arrangements with Mr Peter Evans, former CEO of the Potato Marketing Corporation

- [8] Mr Peter Evans is the former Chief Executive Officer (CEO) of the Potato Marketing Corporation (PMC). The PMC, one of the last remaining market

¹ Previously the Department of Agriculture and Food (DAFWA) and since the machinery of Government changes on 1 July 2017, DPIRD. For convenience the Department will be referred to as DPIRD throughout the report.

regulatory bodies, had outlived its usefulness and in 2016 the Government decided to abolish it.

- [9] In due course, the *Marketing of Potatoes Amendment and Repeal Act 2016* was passed and set the date of abolition as 31 December 2016. The government provided, through DPIRD, about \$1.2m for the abolition process.
- [10] In transitional provisions employees whose contract of employment continued beyond that date, by operation of law, transferred to another government department. DPIRD was the obvious destination.
- [11] Mr Evans was one such employee. He was also a public officer employed by the PMC under a *Public Sector Management Act 1994* award until at least the PMC was abolished on 31 December 2016.²
- [12] Between them, Ms Heffernan and Mr Evans brought about a situation where Mr Evans was, in effect, paid a full redundancy (close to \$400,000) then immediately hired as a consultant to assist DPIRD in ongoing litigation between the State and entities associated with Mr Tony Galati.³ Ms Heffernan prepared a purported letter of engagement by a firm of solicitors, Kott Gunning. The solicitors knew nothing of the letter and did not authorise it.
- [13] The extent to which Mr Evans fulfilled his consultancy role having regard to the hours claimed is open to doubt.
- [14] Mr Evans used his position as CEO to enrich himself at the State's expense.
- [15] Before this report was finalised, the Commission gave each person and organisation adversely referred to in the draft a reasonable opportunity to make representations. Many responded and each representation has been considered. Where appropriate, the Commission has amended the report.
- [16] Ms Heffernan made extensive submissions regarding all matters, with detailed reference to many documents. She did not however address the behaviour which forms the basis of the Commission's opinion of serious misconduct. That is the creation of purported letters of engagement for Dr Carr and Mr Evans when each was false. The letters were used as authority to expend State funds.
- [17] Although it has no legal effect, and is not to be taken as a finding or opinion that a person is guilty of, or has committed a criminal offence, or a

² *Corruption, Crime and Misconduct Act 2003*, s 3.

³ At a cost of almost \$100,000.

disciplinary offence, the Commission is none the less empowered to express an opinion of serious misconduct.

- [18] The Commission has formed an opinion of serious misconduct in relation to Ms Heffernan's actions in preparing the false purported letter of engagement used to authorise the expenditure of State funds.

Summary of investigation

- [19] The Commission received notifications of suspected serious misconduct under the *Corruption, Crime and Misconduct Act 2003* (CCM Act) concerning Ms Heffernan in mid and late 2017.
- [20] In March 2018 the Commission received DPIRD's audit and integrity reports which gave rise to serious concerns about misuse of public monies through procuring legal services from private law firms.
- [21] The Commission investigated the matter from mid-2018 and used its investigative powers to acquire relevant evidence. The Commission conducted several private examinations.

Ms Felicity Heffernan

- [22] Between 2016 and 2018, Ms Heffernan was the Director, Legal and Commercial Division, Department of Agriculture and Food, now DPIRD. She is a qualified Australian lawyer and while employed at DPIRD a WA government lawyer.⁴
- [23] She ought to have epitomised honesty and integrity and acted in DPIRD's best interests, not least because she was in a position of trust and given great autonomy. Instead, she dishonestly brought about situations where significant unauthorised payments were made to two individuals, by preparing false letters of engagement.
- [24] One matter involved Dr Carr, an expert in plant intellectual property. Another involved Mr Evans, the CEO of PMC.

Dr Howard Carr

- [25] Dr Carr was employed by DPIRD on term contracts from 1999. Dr Carr's employment with DPIRD ended in December 2015. DPIRD could not subsequently employ or engage him because a public sector recruitment freeze was in force until 30 June 2016.

⁴ *Legal Profession Act 2008* ss 3 and 36.

- [26] The recruitment freeze provided a mechanism to apply for an exemption. Ms Heffernan did not use it.
- [27] Ms Heffernan had developed a professional relationship with Mr Tony Joyner, Managing Partner of HSF.
- [28] In March 2016, Ms Heffernan informed Mr Joyner that she had access to hundreds of thousands of dollars which she wanted to spend on legal services. By April 2016, Ms Heffernan also called on Mr Joyner because she wanted a favour - she wanted HSF to engage Dr Carr to carry out work for DPIRD.
- [29] Mr Joyner eventually acquiesced to engage Dr Carr but refused to vouch for his work. This did not worry Ms Heffernan who wrote, binding DPIRD, never to bring a claim against HSF connected with Dr Carr's work.
- [30] HSF directly engaged Dr Carr on 3 May 2016 under an expert retainer agreement for a specific matter. This contract was between HSF and Dr Carr, albeit payment was to be to Dr Carr's consulting entity. The retainer, on the face of it, was designed to assist HSF provide legal services to DPIRD concerning the granting of access rights for DPIRD plant intellectual property to the private industry.
- [31] In practice the use of the HSF expert retainer was a mechanism Ms Heffernan used to avoid the recruitment freeze. In reality, Dr Carr continued working at DPIRD as he had been doing under his earlier employment contract. He also worked on several matters totally unrelated to HSF legal services. He addressed invoices to DPIRD via HSF.
- [32] The State Solicitor's Office (SSO), who oversee legal services to government, did not know about the arrangement with Dr Carr.
- [33] HSF issued one invoice only to DPIRD in the 2015/2016 financial year for legal services it provided to DPIRD and in which Dr Carr's fees appeared as a disbursement payable to his consulting entity.
- [34] The HSF invoice was issued on 22 June 2016 and Ms Heffernan authorised payment of the invoice.
- [35] Dr Carr continued to invoice DPIRD purportedly via HSF for the next 13 months. He issued nine additional invoices that equated to approximately \$106,000.
- [36] HSF was unaware of these invoices. Usually when an expert invoices a law firm directly, the law firm then on-charges those fees as a disbursement to a client. Dr Carr gave his invoices to Ms Heffernan who told him she was giving them to HSF. She did not do so.

- [37] Between June and December 2016, Dr Carr's invoices were not paid. It is unclear why. Some information indicates HSF's legal fees, on top of Dr Carr's fees, created a significant expense for DPIRD. Other information points towards DPIRD management saying that Dr Carr should be directly employed 'now that the freeze is over'.⁵
- [38] What is clear is Ms Heffernan implemented a dishonest solution to resolve the issue of Dr Carr's non-payment.
- [39] Ms Heffernan drafted a new engagement letter for Dr Carr purporting to retain his services by HSF. It closely followed HSF's expert retainer agreement of 3 May 2016. It created a false impression that HSF was involved in the arrangement. Several, but not all, matters identified in the letter were matters where HSF was providing legal services to DPIRD. HSF knew nothing of this purported engagement letter. Mr Joyner had not seen this letter before the Commission showed it to him. He said some of the matters identified were related to matters which HSF was advising DPIRD.
- [40] Ms Heffernan signed the purported engagement letter on or around 7 December 2016. On the same day, Ms Heffernan explained to Dr Carr the document was required in order for him to get paid. She directed Dr Carr to sign the document and to falsely backdate his signature to 9 June 2016. He acquiesced.
- [41] Ms Heffernan used the purported engagement letter as the basis to authorise payments to Dr Carr totalling approximately \$106,000.
- [42] In June 2017 Ms Heffernan wanted to deposit large sums of DPIRD's money to HSF to be held on account. Mr Joyner issued three statements to Ms Heffernan equating to \$286,000.
- [43] Ms Heffernan's attempts to deposit large sums of public money into HSF accounts in response to the HSF statements never eventuated.
- [44] One statement concerned Dr Carr's proposed ongoing work for HSF in the 2017/2018 which was estimated to be \$110,000. Mr Joyner sent the statements with a covering email. In the Commission's opinion Mr Joyner's email gave the impression that there was already an existing legitimate arrangement concerning HSF's engagement of Dr Carr in 2016/2017. This was despite HSF not paying Dr Carr's invoices for work he did in that financial year.
- [45] Just what arrangement Mr Joyner was referring to, remains a mystery given HSF issued only one invoice for Dr Carr's fees in 2015/2016.

⁵ Email from P Metcalfe to F E Heffernan, 23 June 2016, p 2.

- [46] In June 2017, external auditors detected issues with the engagement letter dated 9 June 2016. It did not align with mandatory procurement practices, nor appear on DPIRD's register of contracts.
- [47] This was brought to the attention of Ms Heffernan's line manager, Mr James Eftos, who terminated the arrangement with Dr Carr in about August 2017.
- [48] Mr Eftos did not know the purported engagement letter was falsely backdated to 9 June 2016.

Mr Peter Evans

- [49] Mr Evans was the CEO of PMC until it was abolished on 31 December 2016 and therefore a public officer.
- [50] Once Cabinet made the decision to abolish the PMC in April 2016, the PMC Board gave Mr Evans great authority.
- [51] Mr Evans had an important role in assisting Kott Gunning with the PMC legal cases against Mr Galati and his entities.
- [52] Mr Evans sought funds to assist with closure of the PMC.
- [53] Cabinet allocated approximately \$1.2m to PMC for closure processes but refused a request for an additional \$450,000 to assist with PMC's litigation against Mr Galati and his entities. The closure money was transferred from DPIRD to the PMC.
- [54] When PMC was abolished, all existing legal proceedings were, by operation of law, continued by the State. Mr Evans' continuing role was important in the minds of some as he was intimately familiar with the litigation and evidence.
- [55] Repeal legislation⁶ enabled PMC employees, including the CEO, to be employed by a government department from 1 January 2017 in cases where their employment contracts were beyond the date of abolition. Mr Evans' employment contract was not due to expire until 25 August 2018.
- [56] Mr Evans sought advice from an industrial agent about his own employment contract but did not advise the agent about the repeal legislation or transitional employee provision. This omission led to him getting favourable advice about the termination of his contract which he gave to the PMC Board.

⁶ *Marketing of Potatoes Amendment and Repeal Act 2016.*

- [57] He was given a termination payment of just under \$400,000 for the remaining 18 months on his contract. The termination payment was beneficial to Mr Evans' tax position. The termination payment equated to almost one-third of the Cabinet allocated funds for PMC's closure.
- [58] Ms Heffernan was familiar with the repeal legislation, including the transitional provisions. Despite her awareness of the advice and proposed termination payment to Mr Evans, she did nothing.
- [59] Instead of a termination payment, Mr Evans' employment should have transferred seamlessly to DPIRD as the transitional provisions allowed. His work on the Galati litigation would have continued as part of that employment.
- [60] Ms Heffernan and Mr Evans failed to consult with the reporting officer appointed under the *Financial Management Act 2006* who had reporting obligations concerning the abolition of PMC.
- [61] Instead, once Ms Heffernan was alerted that the entire \$1.2m of closure money may not be exhausted, both she and Mr Evans developed a plan to use the money to engage Mr Evans as a consultant so he could continue to assist Kott Gunning with the Galati litigation.
- [62] Ms Heffernan prepared a purported engagement letter. Kott Gunning was substituted for HSF. Otherwise the two purported engagement letters were similar. The letter dated 29 December 2016, which Mr Evans signed, specified that Mr Evans would work for Kott Gunning for 432 hours.
- [63] Kott Gunning was unaware of the engagement letter even though reference was made to the firm and a signature panel for a partner of Kott Gunning was inserted.⁷ A document prepared by Kott Gunning was attached as an annexure to Mr Evans' engagement letter without the firm's knowledge. Kott Gunning understood that there was some arrangement between Mr Evans and DPIRD that enabled him to continue to instruct the firm in relation to the Galati litigation.
- [64] The engagement letter provided for pre-payment to Mr Evans of just under \$100,000 for future services to be provided to DPIRD. DPIRD's processes stopped the pre-payment from occurring.
- [65] Nevertheless, the arrangement otherwise subsisted. Mr Evans was purportedly engaged as a consultant by DPIRD under the engagement letter from January until at least May 2017.

⁷ T Lethbridge transcript (Vol 2), interview, 11 March 2019, p 45 and T Darbyshire, CCM Act s 86 representations, 23 May 2019.

- [66] A carefully worded close out note was signed by Mr Evans on 15 May 2017 stating that he had carried out 400 hours work at \$200 per hour plus GST. Mr Evans was however paid for 432 hours, the original amount he was to be pre-paid. This discrepancy was picked up by internal auditors. Ms Heffernan was under pressure to explain matters.
- [67] Ms Heffernan misled internal auditors about the additional 32 hours and Mr Evans enabled this to occur.
- [68] The Commission examined the creation of the claim for the additional hours which Mr Evans acknowledged he placed into a spreadsheet once alerted to the issue identified in the audit.
- [69] The contemporaneous handwritten records Mr Evans claims to have relied on to enter the data into the spreadsheet have now, he asserts, been destroyed.
- [70] Sadly, Mr Evans' wife died on 8 February 2017. The majority of the additional 32 hours work Mr Evans claims he carried out were completed during the week of his late wife's funeral.
- [71] Mr Evans' original time records show no hours were recorded from 6 to 18 February 2017 until he updated his spreadsheet subsequent to the internal audit.
- [72] When the Commission asked what the court related matters he recorded during the week of his wife's funeral were, he said he did not know. He insisted that he did work the hours to distract himself from his loss.
- [73] The 432 hours claimed to have been worked by Mr Evans, as set out in the engagement letter of 29 December 2016, corresponds with an estimate of hours that an instructing officer in the Galati litigation may need to complete.⁸ The estimate was based on assumptions that did not eventuate.
- [74] The explanations provided by Ms Heffernan and Mr Evans in the context of the evidence about the additional hours are implausible. Ms Heffernan misled internal auditors and, in the Commission's opinion, submitted false records to justify payment made in respect of the claimed 32 extra hours. There is scant evidence that those hours were worked and a strong inference to the contrary.
- [75] Mr Evans represented to the Commission that he was not a public officer after the termination of his employment at the PMC, which took effect on 31 December 2016. He gives great credence to the termination and his

⁸ The estimate was prepared by a solicitor that Kott Gunning engaged to assist with the litigation.

subsequent purported engagement as a DPIRD consultant by Ms Heffernan. Mr Evans was improperly involved in his own termination at PMC as well as his entry into an unauthorised consulting arrangement with DPIRD.

- [76] Mr Evans was a public officer until at least 31 December 2016 while he was the PMC's CEO. Whether or not Mr Evans was a public officer subsequent to the PMC's abolition does not need to be resolved.
- [77] Ms Heffernan was a public officer. Mr Evans received financial gain by her serious misconduct in preparing a purported engagement letter which falsely created an impression of Kott Gunning's involvement in the engagement. Mr Evans signed the engagement letter before PMC was abolished with the intention of it operating from January 2017 onwards. When the letter was signed by Mr Evans he was a public officer. The conduct of Ms Heffernan and Mr Evans was intertwined.
- [78] Mr Evan's represented to the Commission he was outside the scope of its investigation. He refers to the summons which compelled his attendance providing a general scope and purpose which articulated that the purpose of his examination was to determine whether any DPIRD public officers engaged in serious misconduct by corruptly using their position to benefit others. He says he is not a DPIRD public officer.
- [79] The Commission's investigation is not confined by the general scope and purpose it decides to describe at a particular point in time of the investigation when it summonses a witness to attend. Mr Evans was legally represented at his examination. His lawyer did not raise issue in respect to the questioning of Mr Evans. Mr Evans was a person who benefitted from Ms Heffernan's serious misconduct and is within the scope of the investigation. In any event the Commission investigation extends to matters reasonably incidental and associated with Ms Heffernan's conduct.⁹

⁹ For example see: *LPCC v Lourey* [2019] WASC 62.

CHAPTER TWO

The lawyer, the expert and the public sector recruitment freeze

Ms Felicity Heffernan - DPIRD's Director of Legal and Commercial

- [80] Ms Heffernan was admitted as a lawyer in New Zealand in 1990. She came to Australia to practice law from about 2002, being admitted initially in New South Wales.
- [81] She practised as a senior lawyer in WA from about 2011 with the Department of Planning and Western Power before moving to DPIRD in January 2016.
- [82] Ms Heffernan was the most senior lawyer at DPIRD - the Director of Legal and Commercial Division. She reported to a non-lawyer, Mr Eftos. He was the Executive Director of Business Operations but did not direct her work.

The WA Government's public sector recruitment freeze

- [83] Cabinet directed an immediate freeze on external recruitment from 21 December 2015 until 30 June 2016. The objectives of the freeze were to curtail growth in salary expenditure and achieve savings measures.
- [84] The freeze applied to DPIRD. There were procedures to apply for exemptions and warnings issued not to circumvent the freeze.
- [85] Governments from time to time issue policies such as wage freezes, recruitment pauses and efficiency savings. These may be controversial but a public officer is expected to fully comply. Otherwise policy setting impermissibly passes from the elected to the non-elected.

Dr Howard Carr - the expert in plant breeder's rights

- [86] Dr Carr is a geologist by training. He completed an undergraduate degree in geology and a PhD in economic geology.
- [87] However, he developed expertise in plant breeder's rights and the commercialisation of those rights.¹⁰ This involves registering intellectual property over plants which generates legal rights and enlivens commercial opportunities.
- [88] From time to time DPIRD granted access to its intellectual property over plants to the private industry and Dr Carr was involved in this process, enabling both the private sector and the WA Government to profit from

¹⁰ See *Plant Breeder's Rights 1994* (Cth) and the *International Convention for the Protection of New Varieties of Plants*.

developments over which breeder's rights could be asserted. His work was valuable to DPIRD.

- [89] DPIRD had employed Dr Carr on and off for periods of time since at least 1999 via short term employment contracts. His last contract from 1 July to 17 December 2015 expired just before the freeze.
- [90] Because DPIRD had not entered into a further contract by 21 December 2015, nor made him a written offer of employment, the freeze prohibited Dr Carr from being employed, or otherwise engaged unless an exemption was granted by the Treasurer at the request of a Minister.
- [91] No process was invoked to seek an exemption.
- [92] If his work was necessary, an exemption to the freeze should have been sought. Instead, Ms Heffernan devised a scheme to get around the freeze. She persuaded a law firm to invoice Dr Carr's fees as a disbursement for expert advice.

Ms Felicity Heffernan's arrangements with Herbert Smith Freehills

- [93] Shortly after commencing with DPIRD, Ms Heffernan established a professional relationship with Mr Joyner, the Managing Partner of HSF in Perth. She informed HSF she was to be the primary contact for all DPIRD matters where HSF was engaged as solicitors. In her representation, Ms Heffernan stated she 'saw [Mr] Joyner monthly on our work tasks.'¹¹
- [94] She told Mr Joyner that she had large sums of money to give to the firm for the provision of legal services before the end of the 2015/2016 financial year. In March 2016 Ms Heffernan sent an email to Mr Joyner's secretary with the subject 'Appointment request - re half a million to spend'.¹²
- [95] She indicated to Mr Joyner that she wanted them to 'work through the options of how Government funds are best spent in [DPIRD] to achieve best practice outcomes' and alerted him to the public sector rules concerning the recruitment freeze.¹³
- [96] In this communication, Ms Heffernan cemented her position as the contact point for HSF and ensured the previous contact at DPIRD had little or no ongoing influence in matters with HSF.
- [97] Ms Heffernan and Mr Joyner were aware of the recruitment freeze and the impact on engaging personnel, including Dr Carr.

¹¹ F E Heffernan, CCM Act s 86 representations, received on 17 June 2019, [225].

¹² Email from F E Heffernan to AC Joyner's Assistant, 14 March 2016.

¹³ Email from F E Heffernan to A C Joyner, 18 March 2016.

[98] Mr Joyner's recollection, when examined by the Commission in December 2018, was poor. However, records show that he was aware of the recruitment freeze and its impact on DPIRD and Ms Heffernan, particularly as it concerned Dr Carr.

[99] Dr Carr stated the following when questioned by Counsel Assisting, Mr Sean Mullins:

And was the freeze ever spoken to at meetings where you were with Felicity Heffernan and Tony Joyner?---Yeah, I think – yeah, I'm, sure. Because that's the reason why they had to go to – had to do this. It's the reason – if there was no freeze they would have just employed me like previously, you know...¹⁴

¹⁴ H M Carr transcript, private examination, 12 December 2018, p 15.

CHAPTER THREE

The arrangement to circumvent the recruitment freeze

- [100] It appears that Dr Carr's absence was impacting DPIRD's ability to grant access to plant intellectual property to the private industry, a matter important to DPIRD's Executive Director of Grains and Livestock Industries, Mr Peter Metcalfe. Ms Heffernan was the architect in overcoming the recruitment freeze so that Dr Carr continued his work with DPIRD.
- [101] Ms Heffernan emailed Mr Joyner on 15 April 2016 at 12.50 pm and stated 'Due to the freeze I can't get [Dr Carr] in - Can I do this via yourself and you charge me his rates via your system ... Are you able to assist me so we can move forward'.¹⁵
- [102] Later that evening, Ms Heffernan sent a further email to Mr Joyner which relevantly stated 'Apparently this is the only guy [Dr Carr] who understands what is required in the Pastures IP project we are trying to get the brief of. I do hope you can help me'.¹⁶ Mr Joyner responded the same evening in relation to this and other matters and said 'I will fix those things next week. Cross my heart etc'.¹⁷
- [103] In responding to a draft of this report Ms Heffernan stated: 'While I did ask for the resource from [Mr] Joyner, this was because HSF already had a person [at DPIRD] during the [recruitment] freeze when I arrived'.¹⁸ However, in email exchanges with Mr Joyner on 18 March 2016 Ms Heffernan stated having a HSF employed lawyer backfilling a DPIRD employee position was 'a breach of the public sector rules during an employment freeze'.¹⁹
- [104] On 3 May 2016, Mr Joyner informed Ms Heffernan via email 'If it is easier for you we can engage the consultant. I will put a letter together. His fees will appear as a disbursement on our bill. We don't vouch for his work of course'.²⁰
- [105] Ms Heffernan responded:

... I agree with you re Howard Carr and undertake that no such claim will ever be made by [DPIRD] against HSF. Howard Carr was select [sic] by the Executive

¹⁵ Email from F E Heffernan to A C Joyner, 15 April 2016.

¹⁶ Ibid.

¹⁷ Email from A C Joyner to F E Heffernan, 15 April 2016.

¹⁸ F E Heffernan, CCM Act s 86 representations, received on 20 June 2019, [32].

¹⁹ Email from F E Heffernan to A C Joyner, 18 March 2016 and Email exchanges between F E Heffernan and H Gustin, 18 March 2016.

²⁰ Email from A C Joyner to F E Heffernan, 3 May 2016.

*Director who manages Pastures to give HSF and myself as Director of Legal the brief for this pastures work that includes how we transition the work to PGG/Wrightsons.*²¹

- [106] The issue of HSF's liability concerning Dr Carr's work was a live issue discussed by HSF lawyers. In examination, Mr Joyner downplayed the effect of Ms Heffernan's undertaking. However, an email from Ms Heffernan to HSF undertaking on behalf of DPIRD not to make a claim is a powerful statement that HSF could rely on if there was ever a need to negotiate, mediate, and/or litigate issues of liability. The purported undertaking by Ms Heffernan goes further than ordinary HSF business terms which HSF and Mr Joyner brought to the Commission's attention and provides that HSF is 'not responsible for' the accuracy of information or material from third parties.²²
- [107] Dr Carr told the Commission that Mr Metcalfe informed him Ms Heffernan was preparing and arranging for him to be engaged; that Dr Carr would be reporting to Ms Heffernan; and explained the rates agreed upon.²³ However, Mr Metcalfe says he never had discussions with Ms Heffernan about engaging Dr Carr through HSF.
- [108] Ms Heffernan spoke to Dr Carr about a possible arrangement with HSF and he recalls saying words to the effect "I thought there was a hiring freeze on too" and "so how are you guys doing it".²⁴
- [109] Mr Joyner sent Ms Heffernan a **draft** expert retainer letter on 3 May 2016 at 4.18 pm.
- [110] Within 30 minutes, the retainer letter was completed, signed by Dr Carr and returned to Mr Joyner. It included an annexure prepared by Dr Carr. Ms Heffernan emailed the document to Mr Joyner at 4.48 pm.
- [111] Mr Joyner explained:

... you're saying to her, If it's easier for you we can engage the consultant?---Yeah, I'd - - -

*Surely she must have raised some issues about what difficulties she was facing?--
-Yeah, look, I can't recall beyond her general troubles with getting things done.
Getting people to help her, getting the right advice internally; just general complaints of that nature.*

... she didn't explain why she couldn't employ Dr Carr?---I can't recall. I mean, there are emails there that we were discussing the freeze. She may well have given me the impression or said that engaging him directly was hard for her because of the

²¹ Email from F E Heffernan to A C Joyner, 3 May 2016.

²² HSF and AC Joyner, CCM Act s 86 representations, 31 May 2019.

²³ H W Carr, CCM Act s 86 representations, 20 May 2019.

²⁴ H M Carr transcript, private examination, 12 December 2018, p 14.

processes, possibly. I honestly cannot recall. I mean, the reality is it made – it still made legal sense for us to engage him anyway but I can't recall.

Why did it make legal sense?---Because if we engaged him, then we might – then there was the option of us possibly being able to argue privilege if the transaction went poorly and there was litigation. So on transactions of this nature for corporate clients, us engaging an expert like that on this basis was – is pretty standard. It's why we suggested it.

And were there any other reasons?---No, not from our perspective. It was quite simple, frankly.

What was the specific matter that he was engaged on?---The specific matter he was engaged on was the one where the – the State was selling its germ plasm.

And who was it selling it to?---I think it was a company called PGG Wrightson or something of that nature.²⁵

- [112] In relation to HSF's retainer with Dr Carr both HSF and Mr Joyner said it concerned one specific matter only, rather than operating as a general retainer.
- [113] When presented with a draft of this report, Ms Heffernan represented to the Commission that 'As I understood it from [Mr] Metcalfe, [Dr] Carr had tendered a project involving pastures, where there were [legal professional] privilege requirements concerned [sic] the documentation and discussions for the successful tenderer due to these factors.'²⁶
- [114] There were no records provided to the Commission to support that legal professional privilege was Ms Heffernan's driving force in requesting HSF's services to retain Dr Carr. Rather, evidence obtained by the Commission signify factors which militate against such an inference:
- Dr Carr's evidence that the stalling of the intellectual pastures project was due to the freeze and the mechanism to get it going was to "employ" him through HSF;
 - Dr Carr was physically located at DPIRD when working;
 - HSF lawyers were engaging with Dr Carr on matters unrelated to the matter for which he was engaged as an expert consultant;
 - Mr Metcalfe's lack of knowledge about this purpose;
 - Dr Carr approached his work at DPIRD no differently to when he was previously employed by DPIRD, including working on matters unrelated to legal files at HSF; and

²⁵ A C Joyner transcript, private examination, 4 December 2018, pp 24-25.

²⁶ F E Heffernan, CCM Act s 86 representations, received on 20 June 2019, [28].

- Dr Carr was reporting to Ms Heffernan on a daily basis and perceived her to be his boss.

Giving effect to the arrangement - Herbert Smith Freehills and Dr Howard Carr

- [115] HSF began to provide legal services to DPIRD and used Dr Carr's expertise under a file erroneously described as 'DAFWA - Transfer of IP to PGG Wrightson'²⁷ pursuant to Dr Carr's terms of engagement with HSF.
- [116] Dr Carr worked from an office at DPIRD on Mondays, Tuesdays and Wednesdays under the arrangement. He recalls staff querying him about being back during a hiring freeze. He provided the following explanation when queried:
- ... I'm working for [Herbert Smith] Freehills and I'm - the terminology that we used is "I'm disbursed to the Ag Department to work on this project"... So technically I'm working through [Herbert Smith] Freehills. I'm just providing services to the Ag Department.²⁸ (emphasis added)*
- [117] HSF invoiced DPIRD through Ms Heffernan for legal services on 22 June 2016 under a letter from Mr Joyner. This HSF invoice covered the provision of legal services to DPIRD from 6 May to 21 June 2016.
- [118] In addition to fees for legal services, there was a disbursement for Dr Carr's work in an amount of about \$10,500 (Invoice 1). Dr Carr's fees related to work he undertook between 1 May and 9 June 2016.
- [119] Dr Carr's invoice was not attached to the HSF invoice as is usual practice and required under government guidelines which HSF agreed to abide by.²⁹ Nor had the disbursement been paid by HSF when it issued the invoice to DPIRD.
- [120] In any event, DPIRD received an invoice from All Classic Enterprises Pty Ltd (ACE) for Dr Carr's consulting fees which was addressed to DPIRD via HSF. ACE was Dr Carr's consulting entity.
- [121] HSF was not formally engaged to provide legal services to DPIRD either in its own right or as was customary, through the SSO in relation to the transfer of IP to PGG Wrightson. This is despite HSF directing the invoice to Ms Heffernan by reference to this matter on 22 June 2016.
- [122] Mr Joyner was asked about HSF engagement processes with clients:

²⁷ H M Carr gave evidence that the DPIRD was not transferring its intellectual property, rather it was allowing access to its intellectual property: H M Carr transcript, private examination, 12 December 2018, p 24.

²⁸ H M Carr transcript, private examination, 12 December 2018, p 11.

²⁹ SSO guidelines for the undertaking of legal services, 1 November 2012, p 16.

Now, do you recall sending an engagement letter in relation to the specific matter ['DAFWA - Transfer of IP to PGG Wrightson']?---I can't remember. We have a process when a file is opened, the secretary will create a draft engagement letter, give it to the lawyer. The lawyer will package it up, come to the partner, settle it, go out, ideally. I sign a lot of these.

But it's quite a critical process in a law firm, isn't it, Mr Joyner?---It is.

The engagement?---Yes.

One that the partners give a lot of attention to?---One the partners give a lot of attention to, yes.

And in terms of ensuring that your bills get paid properly?---Yeah, absolutely.³⁰

- [123] A HSF unsigned, draft letter dated 24 June 2016 addressed to the SSO headed 'DAFWA - Transfer of IP to PGG Wrightson', enclosed the terms of engagement. This included the following section:

Engagement of Howard Carr

As requested, we will engage Howard Carr as a consultant to assist you with the process of transitioning WAAA's pasture breeding and agronomy function to industry.

Howard Carr will be engaged as an independent consultant and we accept no liability or responsibility whatever for his actions.

- [124] The language does not highlight that Dr Carr's services were being engaged to assist HSF provide legal advice or services to DPIRD.
- [125] In any event, the HSF unsigned, draft letter was not sent to the SSO or DPIRD. The absence of a solicitor-client engagement letter led to the SSO being in the dark about the retainer.
- [126] Dr Carr told the Commission he had been undertaking work on matters unrelated to the HSF 'PGG Wrightson' matter while at DPIRD:

... once I'm in the door then everybody knows that I write well, I can put together good ministerials quickly, efficiently ... So once I'm back, working at the Ag Department, then I was doing - you know, of course I was working on this but in between while I'm waiting on responses from PGG Wrightson or, you know, gaps in the action, I was doing all sorts of other stuff. Yeah.³¹

- [127] Dr Carr's work during the period of Ms Heffernan's employment with DPIRD, which she instructed him to do, included conducting an internal sexual harassment investigation and interviewing prospective job applicants, both of which had nothing to do with HSF or his expertise.

³⁰ A C Joyner transcript, private examination, 4 December 2018, p 34.

³¹ H M Carr transcript, private examination, 12 December 2018, p 20.

Ms Heffernan confirmed he functioned as 'a global resource'.³² She deployed him in this manner.

- [128] Ms Heffernan's line manager, Mr Eftos, did not know the specifics of Dr Carr's work. He explained to the Commission that until about June 2017, he was under the impression Dr Carr was a lawyer. Ms Heffernan, in her response to a draft of this report, disputes that.
- [129] Dr Carr continued to provide expert consulting services through ACE, issued invoices in the same manner as he did with Invoice 1 (addressed to DPIRD via HSF) and conferred with HSF lawyers.
- [130] He addressed his invoices to DPIRD via HSF for the entire 2016/17 period. Dr Carr gave all his invoices "to Felicity [Heffernan]" and "she told [him] that she would send them to Tony [Joyner]".³³ She did so for Invoice 1 and it was paid by HSF. However, after invoice 1, she stopped sending Dr Carr's invoices to HSF.
- [131] Between 23 June and 12 December 2016, Dr Carr addressed the following invoices to DPIRD via HSF:

Issue date	Invoice no	Period of work	Invoice amount	Payment date
23 June 2016	Invoice 3	9 June 2016 - 23 Jun 2016	\$4,167	16 March 2017
21 Sept 2016	Invoice 4	4 July - 2016 - 21 Sept 2016	\$17,938	16 March 2017
7 Dec 2016	Invoice 5	3 Oct 2016 - 7 Dec 2016	\$7,292	16 March 2017
12 Dec 2016	Invoice 6	1 Nov 2016 - 7 Dec 2016	\$21,521	13 Dec 2016

- [132] An Invoice 2 was never issued. Dr Carr said that this was "just an error" he made by issuing Invoice 1 and then going to Invoice 3.³⁴
- [133] But Dr Carr was not being paid for his services in relation to these four invoices. For almost six months, no payments were made to him in response to these four invoices.
- [134] Between 22 and 23 June 2016, there was an email exchange between Mr Metcalfe and Ms Heffernan about HSF's fees and Dr Carr's services. It provides some context as to why Dr Carr's invoices may not have been paid:

³² F E Heffernan, CCM Act s 86 representations, received on 20 June 2019, [110].

³³ H M Carr transcript, private examination, 12 December 2018, p 12.

³⁴ H M Carr transcript, examination, 12 December 2018, p 17.

Ms Heffernan: Peter [Metcalf], Good evening I have given [RD] these [HSF] invoices to pay as we are up on CF I wanted to get funds paid out.

Mr Metcalfe: Thanks for these details. Its [sic] expensive

When Howard returns from his holiday we should arrange for him to be employed on a short term specialist contract, now that the freeze is over.³⁵

[135] On 31 October 2016, Mr Joyner invoiced Ms Heffernan for further HSF legal services in relation to 'DAFWA - Transfer of IP to PGG Wrightson'. There was still no formal solicitor-client engagement letter.

[136] The primary HSF lawyer who had carriage of the matter under Mr Joyner's supervision continued to work with Dr Carr.

[137] The HSF details of fees shows legal services were provided in connection with Dr Carr, including in respect to preparing a further engagement letter regarding the provision of Dr Carr's services to HSF. However, there was no finalised nor executed agreement between the parties.

[138] There were no disbursements for Dr Carr's fees on HSF's invoice dated 31 October 2016, despite his invoices of 23 June and 21 September 2016 and work logs indicating he had undertaken work on HSF files.

[139] Dr Carr told the Commission:

Okay. So there was something a bit weird. I remember I hadn't got paid for a period and I contacted HSF myself and they didn't know who I was, which is sort of - I never went into the Office. But anyhow, in the end I got paid and I'm certain the cheque came from - the payment came from [HSF].³⁶

[140] Dr Carr's first invoice was paid by HSF for work he completed in the year ending 30 June 2016 as reflected in the HSF invoice dated 22 June 2016. However, it was almost six months before he was paid again:

... when did you become, to the best of your recollection ... aware that you're required to direct your invoices to the department as opposed to Freehills?---I think it was around this time.

What time is that?---Late 2016. Around ---maybe it was early 2017 but I do recall being directed to just give the invoices direct -- that you -- from now on you're going to be paid directly from the [DPIRD]

Who gave you that direction?---Felicity.

And why did she say that that had to happen?---The reason they said was that it was to save money. That Herbert Smith Freehills were - were adding - you know,

³⁵ Email from P Metcalfe to F E Heffernan, 23 June 2016, p 2.

³⁶ H M Carr transcript, private examination, 12 December 2018, pp 12-13.

had a margin on top of my – my invoice and it was costing them too much and that it would be more efficient to just go direct.

*Okay. You've said "they" and "them". It's very critical that we know who's saying this to you?---Felicity **I reported to Felicity on a daily basis**. She's definitely told – 100 per cent she's told me that.³⁷ (**emphasis added**)*

[141] Ms Heffernan under examination:

Instead he has the arrangement which you signed?---There's a gap where he keeps coming in. There is no arrangement. He just keeps coming in to work. It's unwritten, he's still doing the work.

Okay, so it's unwritten until the date which that letter that you've signed and he's signed occurs?---What happens is, his invoices back up, so there's a point in time where he doesn't receive money.³⁸

[142] Payment did not occur until 13 December 2016 for work Dr Carr undertook from 1 November and 7 December 2016 (Invoice 6). However, several previous invoices (Invoices 3, 4 and 5) for work as far back as June 2016, remained unpaid until March 2017.

Ms Felicity Heffernan's purported engagement letter with Dr Howard Carr

[143] Ms Heffernan prepared a new purported engagement letter regarding the provision of Dr Carr's services. She used the previous HSF expert retainer letter of Dr Carr dated 3 May 2016 as a precedent and reworked it. HSF knew nothing about this letter.

[144] The purported engagement letter of Dr Carr omitted the HSF emblem. The engagement of Dr Carr via this new letter was tweaked and identified five projects that Dr Carr was 'engaged confidentially to the Director of Legal and Commercial Division and for work she does with [HSF]'.

[145] Some of the identified projects had nothing to do with HSF. Where the purported engagement letter suggested a project was connected with HSF, it was untrue.

[146] Mr Joyner was shown the letter when examined before the Commission. He said he was not aware of it, nor had he seen it before. He also said Ms Heffernan never brought it to his attention.³⁹

³⁷ H M Carr transcript, private examination, 12 December 2018, p 39.

³⁸ F E Heffernan transcript, private examination, 5 December 2012, p 54.

³⁹ A C Joyner transcript private examination, 4 December 2018, p 37 and HSF and AC Joyner, CCM Act s 86 representations, 31 May 2019.

[147] Relevantly, the terms of the purported engagement of Dr Carr included the following statements:

- 'The Director of L & C of the [DPIRD] **together work for HSF** [sic]' (Clause 1).
- 'The letter is to confirm your retainer is to **act as an independent consultant** in relation to the 5 projects above ...' (Clause 1).
- '[DPIRD] is responsible for the payment of your fees, although **your accounts are to be discussed by the Director of L & C and the Managing Partner of Perth HSF office**' (Clause 1).
- The scope of the assignment was 'to prepare a report in which you address (all the elements of the 5 projects before you commence those projects with the Director L & C)' (Clause 2).
- The details of Dr Carr's rates were '\$1000 a day plus expenses as listed: Expenses such as taxis, parking, couriers, printing etc are to be bill [sic] at cost'.
- The fee estimate stated 'As mentioned above, **it is Herbert Smith Freehills' client which is responsible for paying your fees**' (Clause 5).
- '**All communications, whether verbal or written, should be directed to our office**, except as otherwise directed, so that we can coordinate, manage and integrate work activities with legal requirements and ensure privilege is maintained as appropriate' (Clause 6).
- 'Your role is that of an independent consultant engaged to advise the Director of L & C and Herbert Smith Freehills on behalf of [DPIRD] on the matters the subject of this retainer' (Clause 7).
- 'Though you are retained by [sic] on behalf of [DPIRD], you are retained as an independent consultant to assist us in providing legal advice ...' (Clause 7).

(emphasis added)

[148] Some of these clauses do not make sense, omit words, are illusory and false.

[149] The purported engagement letter was signed by Ms Heffernan. Dr Carr dated the engagement letter 9 June 2016, signed and printed his name under his signature. The date was also false.

[150] Ms Heffernan explained to the Commission that this engagement letter was not signed by her, nor Dr Carr on 9 June 2016.

- [151] Ms Heffernan directed Dr Carr to falsely backdate the engagement letter and Dr Carr knew it had something to do with getting his invoices paid as he told the Commission:

So when did you sign this document?--- I don't know. What I'm saying is, my recollection is that I do recall signing something where the date was incorrect. It could have been this document, or it could have been another document, but you obviously have some belief this is the wrong date, and it could well be this document, and if it is, I'm pretty certain it was – if I signed after – if it was this document, whatever the document was, whether the date was incorrect, it was being backdated.

How long?---I don't rightly recall, but I do – yeah, months, yeah.

The same year, Dr Carr?---I think so, yeah. That sounds right.

Are you saying someone asked you?---Well, Felicity asked – Felicity directed me – yeah, the date needed to be changed – and I can't recall why. But, you know, I was busy – like, "Whatever, mate," you know, just whatever we had to do.

*Is that your practise, Dr Carr? Like someone's asked you to put an incorrect date on it, and you're just going to date it incorrectly?---Well, I didn't see the – yeah, well, I wasn't – **she's my boss. She's asked for this to be changed, this date.** I haven't really thought too much about it. I've just done it and gone back to work. I haven't really, you know, given it any thought. (emphasis added)*

This is a document that's going to give you a financial benefit, is it not, of \$1,000 a day?---Correct.

And you're happy to backdate a document on the instructions from someone?--- There was some explanation that she provided as to why it had to be done. I can't remember what the explanation was, and you know – no, I wasn't happy, but there was an explanation that seemed to make sense. I can't remember what it was, but there was an explanation provided.

And did you make a file note of your conversation at the time?---No, I did not.

This is a pretty significant issue, Dr Carr, because you're now talking about a document that you're backdating yourself?---Well – look, in hindsight, I can see what you're saying, but at the time I didn't see that there was an issue ...

You've got another one where you're backdating a document by several months – – –?---Yes. Yes.

– – – and not even recalling the reason why?---Correct. Correct – something to do with me getting paid. Yes.⁴⁰

- [152] In his representations to the Commission about the draft report, Dr Carr advanced an explanation, somewhat different to his evidence on oath:

Around this time Ms Heffernan came into my office with a letter of engagement that she had prepared. I read and said words to the effect of "this is the same as

⁴⁰ H M Carr transcript, private examination, 12 December 2018, pp 46-47, 53.

the one I already signed". She said "yes it's the same, but that the original one had got misplaced, and that she needed to "resubmit it into the system" to ensure that I got paid. Ms Heffernan had a reputation for a very untidy office, with many piles of papers on tables and chests relating to various projects she was working on. I presumed that she had misplaced it, which made sense. I re-read it, and signed it. She then told me to put a certain date on it; I can't remember what date she told me, but I recall it was not the current date. Given the explanation that it was the same engagement letter, and that it was a replacement of the original, that she was the Head of Legal and Commercial and that I had been repeatedly assured from Mr Metcalfe and Ms Heffernan that all was well, and that I was anxious to get back to my pressing tasks, I did not question her instruction to the backdate. I did so without thinking of the details or the implications of my actions. I did not see her countersign the letter, and was not aware that she was the countersignatory.

At the time, I did not consider that I was creating a false document, I was of the belief I was simply replacing the misplaced original.

...

- I signed and backdated the new engagement letter under direct instructions from Ms Heffernan who was my line manager at the Department.*
- I had no knowledge of what was going on behind the scenes on my engagement.*
- I had no part in the formulation of any of my Departmental engagement arrangements.*
- I was unaware of any issues relating to my Departmental engagement.*
- I had no knowledge of, or role in, the writing of the new engagement letter or in the plan to backdate the letter.*
- I accepted the explanation given to me by Ms Heffernan that the original engagement letter had been misplaced and that it needed to be resubmitted into the system for me to get paid.*
- At the time, I did not consider I was backdating a new engagement letter, I thought I was replacing the original that was misplaced.*

[153] This explanation is disingenuous. Dr Carr is a highly qualified intelligent person who ought to have recognised the issues involving the backdating of a letter in order for him to receive payment.

[154] Ms Heffernan told the Commission she was aware there was a period of time when Dr Carr was not being paid and claims that she was instructed by financial personnel to get his accounts paid. Moreover, she says that in December 2016 finance personnel told her to directly contract Dr Carr and to pay him from July 2016. Even if finance personnel did inform her to directly contract Dr Carr, which the Commission does not accept on the

evidence it has acquired, this was not authority for her to falsify and backdate an engagement letter - that decision was Ms Heffernan's.

- [155] The payment voucher she signed in December 2016 to authorise the payment of Invoice 6 stated 'contract attached'.
- [156] The contract attached to the payment voucher for Invoice 6 was the purported engagement letter backdated to 9 June 2016.
- [157] It was necessary for the purported engagement letter to be dated in June 2016, as Ms Heffernan directed Dr Carr, to cover the period of work performed from 9 June 2016. This covered several invoices Dr Carr had already issued which remained unpaid as at December 2016.
- [158] The date of 9 June 2016 aligns with the start date for the earliest unpaid invoice (Invoice 3).
- [159] Dr Carr knew he was not signing the engagement letter on the date that he stated on the document.
- [160] Had Dr Carr not backdated the engagement letter, his invoices would have been difficult to process given Ms Heffernan lacked authority to engage Dr Carr in this way. Ms Heffernan arranged for the falsification of a DPIRD record as means to pay Dr Carr's outstanding invoices.
- [161] Dr Carr's work logs even show he charged DPIRD for time he spent on the purported engagement letter.⁴¹ Ms Heffernan authorised the expenditure of public money on the basis of a letter which purported to come from HSF, but did not, and signed on a date which it was not.
- [162] The purported engagement letter and Ms Heffernan's authority was relied upon by DPIRD to pay Dr Carr from 13 December 2016.
- [163] HSF and Mr Joyner made the following representations to the Commission:

'it can be readily inferred from the circumstances... that the reason Ms Heffernan and Dr Carr engaged in these falsifications is that they knew:

(a) in the period 9 June 2016 to 7 December 2016, Dr Carr had undertaken work that was outside the scope of the Retainer;

(b) the work could not be invoiced to or via HSF;

(c) Mr Joyner had not entered into, and would not have agreed to entering into, any 'arrangement' (absent a formal retainer between HSF and Dr Carr) that would have enabled Dr Carr to have undertaken such work for DPIRD; and

⁴¹ Dr H Carr's work log entry for Invoice 5, 7 December 2016.

(d) accordingly, a falsified contract needed to be entered into between DPIRD and Dr Carr to enable Dr Carr's invoices to be paid'.⁴²

The Commission accepts these representations.

[164] While HSF did not invoice DPIRD for disbursements arising from HSF's retainer of Dr Carr for his work after 9 June 2016, Dr Carr continued to work with HSF lawyers on DPIRD granting access to plant intellectual property to PGG Wrightson. HSF also continued to charge their professional fees to DPIRD for work on the file, including in relation to communicating with Dr Carr.

The documentary façade

[165] From 13 December 2016, all Dr Carr's invoices were paid directly by DPIRD. They included invoices issued before 13 December 2016 that remained unpaid for almost six months (Invoices 3 to 6 inclusive).

[166] The purported engagement letter was attached to a DPIRD payment voucher to justify payment of Invoice 6. The purported engagement letter continued to leave an impression that HSF was involved in DPIRD's engagement of Dr Carr.

[167] Subsequent actions would create a stronger impression.

[168] After Invoice 6 was paid, Dr Carr continued to address his invoices to DPIRD via HSF for the remaining part of the 2016/2017 financial year. This comprised the following further invoices:

Issue date	Invoice no	Period of work	Invoice amount	Payment date
15 May 2017	Invoice 7	12 Dec 2016 - 31 Jan 2017	\$13,499	17 May 2017
15 May 2017	Invoice 8	1 Feb 2017 - 21 Mar 2017	\$13,677	17 May 2017
15 March 2017	Invoice 9	23 Mar 2017 - 9 May 2017	\$13,615	25 May 2017
21 June 2017	Invoice 10	10 May 2017 - 21 June 2017	\$13,313	21 June 2017
21 June 2017	Invoice 11	1 May 2016 - 21 June 2017	\$957.18	21 June 2017

[169] Dr Carr told the Commission that continuing to address his invoices to DPIRD via HSF was an oversight. The Commission does not accept it was an oversight.

⁴² HSF and AC Joyner, CCM Act s 86 representations, 31 May 2019.

- [170] Ms Heffernan continued to authorise payment of the invoices on the basis that each was issued to DPIRD via HSF.
- [171] Both contributed to a documentary façade to make it appear as though the invoicing was under an arrangement with HSF.
- [172] Dr Carr's actions and subsequent email communication with Mr Joyner and Ms Heffernan reinforced the façade that he had been engaged through HSF.
- [173] Seven days after Dr Carr issued Invoices 10 and 11, he sent an email to Mr Joyner:⁴³

From: Carr, Howard
Sent: Wednesday, 28 June 2017 3:41 PM
To: 'Joyner, Tony'; Heffernan, Felicity
Subject: estimated costs 17/18 FY

Dear Tony and Felicity,

Again thanks so much for organising my provision of services to DAFWA via HSF.

I look forward to working on the very interesting IP projects in the pipeline and planned for next year.

Estimated costs for next FY:

Pasture R&D transition to PGW

Cash payment (being salary transition payment): 75k

Legals to review agreement: 15K

Total 90k

HWC costs (thru All Classic Enterprises (ACE))

2016/17 FY (GST exempt) total invoice: 103k

2017/18 FY (GST inclusive) 114k

(last year I do [sic] not charge GST as I thought I would be under the GST threshold of 80k pa, however my accountant has reprimanded me and I have to register for gst and start charging it. Of course DAFWA gets all gst refunded from ato- so no net cost to dafwa)

Urs [sic]

Howard

(emphasis added)

⁴³ Email from H M Carr to A C Joyner and F E Heffernan, 28 June, 2017.

[174] The \$103,000 referred to in the email closely corresponds with the total amount of all invoices that Dr Carr addressed to DPIRD via HSF for Invoices 4 to 11. All invoices were issued in the 2016/17 financial year. None were paid by HSF.

[175] Ms Heffernan represented that Dr Carr wanted HSF to hold money on account to be drawn down and was 'demanding it happen' and that he was 'aggressive about this'.⁴⁴ The Commission does not have any evidence to suggest Dr Carr acted in this manner other than Ms Heffernan's representation.

[176] Dr Carr:

Does it make reference to the previous financial year as well, Dr Carr?---Yes.

And what's it saying there?---Right. Last year, last financial year, 2016-17 financial year, invoice 103 grand.

And that was all via Herbert Smith Freehills, as far as you're aware? Leaving out who actually paid you - - -

?---Yes.

In terms of the work that you are carrying out - - -?---This email confirms that at that date the relationship was still active, and that I was envisaging that that would be going on in the same way for the next financial year. And what I'm saying is that at some point I was told that this arrangement had to stop, and in my mind it was earlier than this, but I was obviously - - -

How many times were you told that the arrangement had to be stopped?---Twice.⁴⁵

[177] HSF did not pay any of Dr Carr's invoices in the 2016/17 financial year. The only invoice HSF paid was for services provided in the previous financial year (2015/2016), but the email from Dr Carr to Mr Joyner suggests some arrangement existed in 2016/17. HSF and Mr Joyner consider the email from Dr Carr on 28 June 2017 should be understood as referring to the provision of services in the forthcoming financial year of 2017/2018.

[178] Mr Joyner did not recall the email when examined and had no specific memories triggered when shown the record by the Commission. However, he observed the timing of the email was "at the same time Felicity [Heffernan] was having discussions with [him] about this idea of giving us money on account for our legal fees and for [Dr Carr's] stuff,

⁴⁴ F E Heffernan, CCM Act s 86 representations, received on 20 June 2019, [195]-[196].

⁴⁵ H M Carr transcript, private examination, 12 December 2018, p 50.

which [Mr Joyner] was uncomfortable with".⁴⁶ Dr Carr sent an email to Mr Joyner two days later on 30 June 2017 at 12.23 pm and indicated:

- Ms Heffernan had 'not received an invoice from you for 2017/2018 activities';
- Ms Heffernan wants 'an invoice based upon the estimates [Dr Carr] sent earlier in the week, urgently';
- 'we must have this invoice' today; and
- the HSF invoice 'is critical to achieve our objectives'.⁴⁷

[179] Mr Joyner agreed to Dr Carr's requests and said '[g]ive me 30 minutes'.⁴⁸ He also recalls Ms Heffernan said to him that she "needed it [the invoice] by 30 June [2017]".⁴⁹

[180] When taken to the email exchange Mr Joyner's memory was triggered that he had discussions with Ms Heffernan the day before Dr Carr's email of 30 June 2017 and Ms Heffernan said "I need it by 30 June".

[181] Other evidence suggests that Ms Heffernan wanted to exhaust funds before 30 June 2017.

[182] On 30 June 2017, Mr Joyner sent an email to Ms Heffernan which attached several documents including an attachment 'Statement - Funds for Carr'.⁵⁰

[183] This document was described as 'Funds to hold on trust to be disbursed to Howard Carr, as approved from time to time'. Mr Joyner relevantly described the purpose of the funds in his email as follows:

Felicity, you asked for several financial statements relating to work to be carried out in the short term for you.

...

Another relates to our arrangement regarding the engagement of Dr Carr, which as you know is run through us for several reasons. Based on your advice we would expect this amount to [sic] \$100,000 in the short/medium term, and so if you wish to put us in finds [sic] for that we would b [sic] be grateful.⁵¹ (***emphasis added***)

⁴⁶ A C Joyner transcript, private examination, 4 December 2018, p 53. Ms Heffernan asserted that she was not in Perth on 29 June 2017 and infers no discussion took place: F E Heffernan, CCM Act s 86 representations, received on 20 June 2019, [199].

⁴⁷ Email from Dr Carr to A C Joyner, 30 June 2017.

⁴⁸ Email from A C Joyner to Dr Carr, 30 June 2017.

⁴⁹ A C Joyner transcript, private examination, 4 December 2018, p 54.

⁵⁰ Email from A C Joyner to F E Heffernan enclosing statement of funds for Dr Carr, 30 June 2017.

⁵¹ Ibid.

- [184] This communication suggests either Mr Joyner was aware that HSF had an arrangement with Dr Carr in the 2016/17 financial year or he contributed, whether wittingly or unwittingly, to a continuing documentary façade that some form of arrangement existed. Both HSF and Mr Joyner submit that the email 'should properly be read as an arrangement to engage Dr Carr by HSF in relation to a specific matter or matters to be undertaken by him in the 2017/2018 financial year on similar terms to the [HSF retainer entered into in 2015/2016 financial year].'
- [185] The Commission does not suggest that Mr Joyner or HSF had any knowledge of the purported engagement letter that Ms Heffernan directed Dr Carr to sign.⁵² Rather, that Mr Joyner's communication created an impression of HSF involvement with Dr Carr in 2016/2017. The effect of Mr Joyner's evidence was that Dr Carr's services were provided on one matter and for the one invoice issued in the 2015/16 year (22 June 2016). Mr Joyner told the Commission the firm did not pay Dr Carr for services he rendered in 2016/2017, approximately \$103,000.
- [186] Mr Joyner's evidence before the Commission is perplexing in that:
- his email of 30 June 2017 confirms, in the Commission's opinion, the pre-existence of an arrangement in 2016/2017 regarding the engagement of Dr Carr when seeking large sums of money to be held on account in a HSF trust account for 2017/2018; and
 - his evidence given before the Commission was that HSF only paid one of Dr Carr's invoices on 22 June 2016 and on-charged these fees to DPIRD as a disbursement in 2015/2016.
- [187] To confuse matters further, the HSF lawyer who had day to day carriage of the relevant DPIRD file under Mr Joyner's supervision recalls dealing with Dr Carr for "somewhere between six months and a year" and said "It wasn't days or weeks or anything, it was definitely months. Yeah, it was definitely months - not intensively". She accepted that she was working with Dr Carr in 2016/17 in relation to a HSF legal file with DPIRD.
- [188] Whatever the true situation, the appearance created was that HSF had an arrangement with Dr Carr in 2016/17, most likely to placate Ms Heffernan who wished to circumvent the recruitment freeze. This contributed to an ongoing impression that Dr Carr's services were provided via HSF to assist DPIRD in respect of the management of its legal matters.
- [189] HSF and Mr Joyner take issue with the Commission describing Mr Joyner's evidence as 'perplexing'. In particular, each takes the view that Mr Joyner's

⁵² HSF and AC Joyner, CCM Act s 86 representations, 31 May 2019.

email to Ms Heffernan of 30 June 2017 does not confirm the pre-existence of an arrangement in 2016/2017 but rather, in their view, is speaking only of retaining Dr Carr in 2017/2018 financial year.

[190] Mr Joyner's email of 30 June 2017 attached two further statements to DPIRD via Ms Heffernan in addition to the statement concerning Dr Carr's anticipated fees for 2017/2018.

[191] In total, Mr Joyner issued HSF statements equating to \$286,000 to Ms Heffernan on 30 June 2017 seeking monies to be paid in advance. Lawyers are entitled to forward payment of fees, which are held on trust, and only drawn upon when work is actually carried out. This is a common arrangement except in relation to Government which pay bills on an invoice for services already rendered. Under examination, Mr Joyner referred to the statements as "drafts". There is nothing in his emails or on the statements themselves that indicate they were drafts.

[192] Mr Joyner informed the Commission:

- Ms Heffernan was very keen on getting the statements to enable HSF to hold monies on account;
- He did not think what Ms Heffernan was proposing would work and that the consent of the SSO was likely needed;
- Ms Heffernan indicated she would get the consent of the SSO to facilitate DPIRD funds being held by HSF on account;
- He was told by Ms Heffernan that she wanted the statements by 30 June 2017; and
- He thought Ms Heffernan's idea was misconceived to begin with and gave her the statements "because she was bugging [him] for it and I knew how it would end" and that he was "going through the motions to get her to stop calling [him] and move on".⁵³

[193] The Commission made enquiries with the General Manager at the SSO about the payment on account of legal fees.

[194] The SSO's General Manager informed the Commission he had never a practice of WA government departments depositing large sums of money into a private law firm's trust account (to be held on account) for the purpose of drawing down those funds as legal services. He described as unconventional and requiring extraordinary circumstances.

⁵³ A C Joyner transcript, private examination, 4 December 2018, pp 54-55.

- [195] In the Commission's opinion, Ms Heffernan and Dr Carr engaged in a façade to disguise payments for Dr Carr's continuing work at DPIRD. HSF was persuaded to invoice DPIRD for Dr Carr's services as an expert consultant when the real purpose was to allow him to continue his general work for DPIRD, cut short by the recruitment freeze.
- [196] HSF received payment from DPIRD for Dr Carr's Invoice 1. This was in response to DPIRD paying HSF professional legal fees together with Dr Carr's expert charges which were a disbursement. Other invoices were prepared by Dr Carr, purportedly via HSF. In fact, HSF was unaware of the other nine invoices which were all given directly to Ms Heffernan.
- [197] To arrange payment by DPIRD and mislead internal auditors Ms Heffernan prepared and backdated the purported engagement letter.

The independent audit and Dr Howard Carr's termination

- [198] An independent audit of DPIRD examined the purported engagement letter of 9 June 2016 used by Ms Heffernan to authorise payments to Dr Carr.
- [199] The audit identified flaws with Dr Carr's engagement letter.
- [200] This led to Mr Eftos taking swift action to terminate the arrangement with Dr Carr in about August 2017.
- [201] Neither the auditors, nor Mr Eftos, were ever aware that Ms Heffernan had Dr Carr falsely backdated the engagement letter to 9 June 2016 to facilitate payments in excess of \$100,000. This was despite Ms Heffernan having an opportunity to make them aware at a round table meeting that she said happened in about June 2017. Her meeting was with finance, procurement and audit personnel from DPIRD and the paperwork underpinning Dr Carr's engagement was discussed.
- [202] The backdating of Dr Carr's engagement letter was uncovered by the Commission in the course of its investigation.

CHAPTER FOUR

The Potato Marketing Corporation is abolished

- [203] The PMC, one of a number of marketing authorities, was established in 1946.
- [204] The PMC regulated the WA potato industry. In April 2016, Cabinet resolved to wind-up the PMC. The PMC continued as the potato regulator until abolished by statute on 31 December 2016.⁵⁴
- [205] In August 2016, the Government allocated about \$1.2m to fund the closure processes.
- [206] The funding was allocated after PMC's CEO, Mr Evans, expressed concern about non-availability of funds for the closure processes, including payouts to PMC staff.
- [207] The details of the persons who were to be paid out were not set out in documents that formed the foundation for Cabinet allocating the closure funding.
- [208] In the submission to Cabinet termination payments were proposed to be paid 'in accordance with public sector guidelines and legal requirements.'⁵⁵
- [209] The PMC invoiced DPIRD on 1 September 2016 and 10 October 2016 for the allocated closure funds under the cover of email communications involving Mr Evans, Ms Heffernan and the PMC's CFO, Ms Tracey Ford.
- [210] A mechanism existed for funds not required for the closure to be returned to the State.
- [211] The PMC's original request to the Minister for closure funds proposed an additional \$450,000 to assist with the well-publicised PMC litigation against Mr Galati and his entities.
- [212] The Minister rejected the request for litigation funding, partly due to the controversy of using the public purse to pursue the Galati litigation. Prior to the PMC's abolition, the litigation was not publically funded.

⁵⁴ Cabinet approved a decision, in April 2016, to direct the PMC to wind-up its operation by the end of 2016. Subsequently, Parliament passed the *Marketing of Potatoes Amendment and Repeal Act 2016*.

⁵⁵ F E Heffernan, CCM Act s 86 representations, received on 17 June 2019, [54].

Repeal legislation to abolish the Potato Marketing Corporation

- [213] Ms Heffernan was the primary contact at DPIRD who dealt with and instructed the drafters of the repeal legislation.
- [214] The Marketing of Potatoes Amendment and Repeal Bill 2016 was drafted. Mr Evans and Ms Heffernan were both involved in giving instructions to Parliamentary Counsel. The Bill progressed through Parliament between June and August 2016 and assent was given on 12 September 2016.
- [215] Ms Heffernan told the Commission that Mr Evans was required to be involved with the repeal legislation 'because of the specialist nature of the functions' in the statute. She confirmed he was 'a resource to assist' with the repeal legislation.⁵⁶

Transitional provisions

- [216] One simply worded transitional provision in the Bill set out what happened to existing PMC employees when abolition of the PMC took effect.⁵⁷
- [217] Relevantly, existing PMC employees whose employment contract expired after the PMC's abolition became employees of DPIRD.⁵⁸

Mr Peter Evans' knowledge of the amending legislation

- [218] The last CEO of the PMC was Mr Evans. While occupying this position Mr Evans was a public officer. Once the decision was made to wind-up the PMC, the PMC Board gave Mr Evans extraordinary authority. In the Board minutes of 20 May 2016, 'The Board resolved that they will back the CEO in all decisions he makes in regards to the PMC going forward'.⁵⁹
- [219] Mr Evans gave updates to the Board about the progress of the repeal legislation through Parliament and records show he attended parliamentary debates to assist answer questions.
- [220] Mr Evans was acutely aware of the proposed repeal legislation. This included setting out written considerations concerning the 'repeal/transitional legislation' as early as June 2016 to Ms Heffernan and others.⁶⁰

⁵⁶ F E Heffernan, CCM Act s 86 representations, received on 17 June 2019 [103]-[104].

⁵⁷ Marketing of Potatoes Amendment and Repeal Act 2016 s 12 (Pt 6 (s 47)).

⁵⁸ Specifically the legislation provided for employment by a department of the Public Service of the State designated by the Minister by notice published in the Gazette.

⁵⁹ PMC Board minutes, 20 May 2016.

⁶⁰ Letter P J Evans to F E Heffernan and another Re: Considerations on Repeal/Transitional Legislation Draft 5, 10 June 2016.

- [221] Ms Heffernan also kept Mr Evans up-to-date with developments on the status of the repeal legislation, including providing parliamentary speeches as it progressed through Parliament from June to September 2016.
- [222] The PMC Board minutes of 24 August 2016 record:
- The repeal legislation bill is going through Parliamentary review and all political parties are supporting it. Its final hurdle is the upper house and it is being submitted 24/08/2016 with the PMC CEO and Felicity Heffernan (DAFWA Legal) in attendance to take questions.*⁶¹ (emphasis added)
- [223] The minutes of 24 August 2016 were subsequently adopted at the board meeting on 30 September 2016.
- [224] Ms Heffernan asserts that what is set out above concerning the minutes is not accurate. She says that while Mr Evans was invited to attend Parliament, he did not do so. Rather, Ms Heffernan represented to the Commission that she attended with another person to observe the repeal legislation go through Parliament until late in the night, to assist the Treasurer and to receive instructions.
- [225] Mr Evans, through his solicitors, denied any attendance at the parliamentary review stage of the repeal legislation.
- [226] In any event, records acquired by the Commission show Mr Evans had an important role in respect to the repeal legislation and contributed to its development and progress.
- [227] Ms Heffernan knew that DPIRD wanted the contract of the PMC CEO, Mr Evans, dealt with under the repeal legislation and the repeal legislation catered for this.
- [228] DPIRD instructed Ms Heffernan, through its Human Resources Division, that the repeal legislation should include what was ultimately set out in the transitional employee provision.
- [229] It was always the intention of the Board to have the CEO and Chief Financial Officer (CFO) stay until the PMC was abolished.

⁶¹ PMC Board Minutes of 24 August 2016 cited in the PMC Board Minutes Papers for 30 September 2016.

CHAPTER FIVE

The CEO's financial gain from the Potato Marketing Corporation's abolition

[230] Mr Evans was a public officer of the PMC with an annual salary of \$232,000.

[231] In addition to his base salary, he received benefits - a car for business and personal use, a mobile telephone and superannuation.

[232] Mr Evans sought advice from an industrial agent about the effect of the abolition of the PMC on his own employment as CEO in August 2016.

[233] The industrial agent advised that Mr Evans could be paid out the entirety of his CEO contract once PMC was abolished. There was about 18 months remaining on his contract.

[234] The conclusion reached in the email from the industrial agent to Mr Evans was:

*It would appear that the employment contract Mr Evans has with the PMC, precludes the ability of placing him in another public sector position for the duration of his contract. **The option that is clearly available is paying out the contract.***⁶² (emphasis added)

[235] No mention of the transitional provisions were referenced in advice from the industrial agent. When the Commission asked him what information he gave to the industrial agent, Mr Evans said "the contract".⁶³

[236] The repeal legislation set out what was to happen to PMC employees who had contracts extending past the date of the abolition. However, Mr Evans did not bring the transitional provision to the attention of the industrial agent. The industrial agent's emailed advice does not mention it.

[237] Mr Evans forwarded the industrial agent's email to Ms Heffernan shortly after receiving it and stated that it was being 'given to her in confidence' and at her request.

[238] Ms Heffernan received Mr Evans' email after the repeal legislation passed both Houses of Parliament. She did nothing despite knowing the repeal legislation included the transitional employee provision. Ms Heffernan represented to the Commission that several others could have intervened if the proposed termination payment was inappropriate. This does not answer why she did not intervene given her awareness of the transitional

⁶² Email from Industrial Agent to P J Evans, 12 August 2016.

⁶³ P J Evans transcript, private examination, 12 December 2018, p 9.

employee provision, the ongoing Galati litigation and her duty to act in DPIRD's best interests.

- [239] When the Commission asked the PMC's contracted CFO, Ms Tracey Ford, if she was aware of the transitional provision concerning the impact of the repeal legislation on PMC employees, she responded "Absolutely not. Yeah - I was told the opposite".⁶⁴ In her role, she had to confer with the same industrial agent before sending termination letters.
- [240] The repeal legislation, by operation of law, made PMC employees with contracts expiring after the PMC's abolition employees of DPIRD.
- [241] Mr Evans presented the emailed views of the industrial agent to the Board. It was apparently accepted but records obtained by the Commission do not clearly evidence when the Board made the decision. No declaration of a conflict of interest was made by Mr Evans that he had procured the views of the industrial agent.
- [242] Leaving aside the transitional employee provision in the repeal legislation that clearly applied to Mr Evans, the industrial agent's analysis appears to have been erroneous. More considered advice given to DPIRD indicates the Public Sector Management (Redeployment and Redundancy) Regulations 2014 applied to Mr Evans' employment with PMC.
- [243] The payout to Mr Evans equated to nearly \$400,000, almost one-third of the total monies allocated by Cabinet for the PMC closure. This type of termination receives favourable tax treatment.

Letter of termination to the CEO

- [244] In early November 2016, Mr Evans proposed that the PMC's CFO, Ms Ford, be the reporting officer under the *Financial Management Act 2006* s 68.
- [245] The reporting officer has important financial reporting obligations under the *Financial Management Act 2006* for abolished authorities.
- [246] The Treasurer rejected Mr Evans' nomination of Ms Ford by way of a letter dated 24 November 2016.
- [247] Instead, the Treasurer appointed DPIRD's CFO, Ms Mandy Taylor, as the reporting officer.
- [248] The next day, 25 November 2016, and without Ms Taylor's knowledge, Ms Ford sent a formal letter to Mr Evans terminating his employment. She stated in the letter 'The PMC Board, in recognising that effectively your

⁶⁴ T Ford, interview, 20 February 2019, p 52.

position has been made redundant, has approved that you be paid a redundancy payment that will be equivalent to the remainder of your employment contract'.

- [249] The Commission questioned Ms Ford whether the fact she was not appointed as the reporting officer led her to quickly arrange this letter. She rejected the suggestion.
- [250] Ms Ford did not discuss Mr Evans' redundancy with the reporting officer, Ms Taylor, despite the allocation of funds equating to almost one-third of the total closure costs allocated to PMC.
- [251] Why Ms Ford, not Ms Taylor, was responsible for expending a third of the closure monies to pay out Mr Evans, remains unexplained.
- [252] On 28 November 2016, Mr Evans received his final PMC pay and termination payment. The termination letter makes it clear that he continued as CEO until the PMC was abolished on 31 December 2016.
- [253] Mr Evans submitted in representations that he ceased to be a public officer on 28 November 2016. The Commission rejects the submission. Mr Evans was contractually bound until 31 December 2016. The fact that he may have been paid in advance for this employment is irrelevant.

CHAPTER SIX

The Galati litigation during the Potato Marketing Corporation's closure process and beyond

- [254] Mr Evans had sound knowledge of the PMC Galati litigation⁶⁵ but he was not a lawyer.
- [255] Kott Gunning acted for PMC in the Galati proceedings.
- [256] The law firm saw Mr Evans' coordinating role as important and thought it was best that he assist with the litigation moving forward.⁶⁶
- [257] Once PMC was abolished, any legal proceedings commenced by, or brought against it, could be continued by the State.⁶⁷
- [258] In a letter dated 22 December 2016, the Attorney General confirmed what the legislation had already provided - the State would continue the litigation.
- [259] Significantly, the Attorney General indicated his view that SSO ought to assume conduct of the legal proceedings on behalf of the State. It was likely that a transition period would be required, during which Kott Gunning may need to continue its current work with respect to the legal proceedings, 'in order to meet certain court deadlines, and during which responsibility for the conduct of these proceedings is concurrently transferred from Kott Gunning to the SSO. As a result, **it may be necessary to retain Kott Gunning's services over the coming months during this transition period**'.⁶⁸ (emphasis added)
- [260] This view did not come as a surprise, as Ms Heffernan implied when examined by the Commission. It was always a real possibility.
- [261] It was well known that the Attorney General would make a decision on the legal cases.
- [262] In September 2016 Ms Heffernan briefed the PMC Board to obtain its views about whether it wanted the litigation to go to the SSO.

⁶⁵ See Supreme Court proceedings (CIV 2545 of 2016 and 2701 of 2016) and Federal Court proceedings (WAD 442 of 2016).

⁶⁶ Email from SSO solicitor to F E Heffernan, 22 December 2016; T Darbyshire transcript, interview, 12 March 2019, p 9; and T Lethbridge transcript (Vol 2), interview, 11 March 2019, p 14.

⁶⁷ *Marketing of Potatoes Amendment and Repeal Act 2016* s 12 (Pt 6 (s 49(2))). See *State of Western Australia v Galati* [2017] FCA 236, [3].

⁶⁸ Letter from the Attorney-General to P J Evans, 22 December 2016.

[263] Her actions indicated that she preferred Kott Gunning over the SSO. She attempted to orchestrate matters so that Kott Gunning would retain carriage of at least some of the Galati litigation.

[264] Ms Heffernan emailed Kott Gunning with the subject heading 'SSO behaviours DAFWA knew nothing about - courtesy update in response to seeing a letter from SSO to Kott Gunning which confirmed it intended to take over the Galati litigation'. In a further email to Kott Gunning, she suggested a possible course of action to deal with the SSO taking over all of the Galati litigation:

From: Heffernan, Felicity

Sent: Thursday, 9 February 2017 11:33 PM

To: Tom Darbyshire; ... Tim Lethbridge

Cc: Peter Evans; ...

Subject: RE: sso behaviours - courtesy update - possible course of action

It's hard for me Tom to say what the appropriate response should be given. Here is some quick thoughts that may be useful.

What I can tell you that helps you is: As I said in the previous email Caretaker as you can see is a very strange time legally as no one is in charge - including the prior AG who wrote the letter, it's all to go to SSO.

Perhaps do the letter ASAP for the damages claim and I will try and get it in place as it appears ... [SSO] is only moving the contempt matter, in his letter.

The action is closely tied to growers funds your [sic] holding, so I will get a support letter from the [Potato Growers Association] for you as well - is the best I can do.

Warm regards

Felicity⁶⁹

[265] It is unclear in whose interests Ms Heffernan was acting in sending this email.

Exhausting use of closure funds before abolition of the Potato Marketing Corporation

[266] Ms Heffernan enquired with the SSO, on behalf of Kott Gunning, whether the Minister was going to make Mr Evans available for the litigation subsequent to the PMC abolition.

[267] The SSO advised Ms Heffernan on 22 December 2016 that it understood DPIRD would be instructing them in relation to the Galati litigation moving

⁶⁹ Email from F E Heffernan to Kott Gunning solicitors, 9 February 2017.

forward, to which Ms Heffernan said 'Ok it's me then that will be contacted'.⁷⁰

[268] Between 23 and 28 December 2016, both Ms Ford and Mr Evans told Ms Heffernan about an issue with the closure funds.

[269] Each explained the allocated close out monies allocated to PMC supposedly "erroneously contained money from the PMC superannuation costs based on figures provided by the previous CFO" in the amount of about \$300,000 (the superannuation error).⁷¹

[270] Ms Ford described the superannuation error:

*What had happened was [the former CFO of PMC] ... hadn't understood that when you're doing – and this is quite common – that when you do redundancies, you don't pay out super on redundancies, and he's calculated it into the figure for the closure costs.*⁷²

[271] Ms Heffernan swiftly acted to try to access this extra closure money for the purposes of engaging Mr Evans and another person to assist in the Galati litigation subsequent to the PMC abolition.

[272] Government had specified that unused funds would be returned to the State.

[273] Ms Heffernan gave evidence that she had the authority to engage Mr Evans through a combination of telephone discussions with the following persons who, at materially relevant times, held the positions set out below:

- Department of Treasury Director, Mr Cameron;
- DPIRD's Executive Director of Business Operations, Mr Eftos;
- DPIRD's Executive Director for Grains and Livestock Industries, Mr Metcalfe; and
- DPIRD's Director General, Mr Webb.

[274] Even if these persons were spoken to, they did not have permission or authority to exhaust PMC's allocated closure funds. Such permission could only have been given by the Premier, Minister, Attorney General or an appropriate official from Treasury. No permission or authority was granted. Moreover, the financial reporting officer was not consulted about the possible use of closure funds.

⁷⁰ Email from F E Heffernan to SSO solicitor, 22 December 2016.

⁷¹ T Ford transcript, interview, 20 February 2019, pp 17-19.

⁷² T Ford transcript, interview, 20 February 2019, p 52.

[275] Ms Heffernan purported to engage Mr Evans herself, on behalf of DPIRD, without following mandatory procurement processes. She falsely created an impression that Kott Gunning were involved in the engagement when the firm was not. Mr Evans and Ms Ford were enablers.

[276] On 28 December 2016, Ms Heffernan prepared a draft email to the PMC Chairman. She sent the draft to both Mr Evans and Ms Ford for comment. Mr Evans substantially altered Ms Heffernan's draft email and sent it back to her later in the day:

From: Peter EVANS

Sent: Thursday, 29 December 2016 4:54pm

To: Heffernan, Felicity, Tracey FORD

Subject: RE: DR email for your approval

Hi Felicity

My suggested amendments are below. I would not comment on the Minister's preferences. I would also make the message confidential or at least private.

Dear [PMC Chairman]

For your information, since the AG has decided it is in the public interest to continue proceedings re Galati, the SSO has appointed me as instructing officer for the litigation. In order to support me in this role, I have received approval to use an amount of the surplus allocated to the PMC for closure costs, and which would be returned to [DPIRD], to provide a retainer for the PMC CEO to assist me after 31 December 2016, and to fund a contract roll over [sic] [DPIRD] for [another PMC employee] ... Peter's continuing role is viewed as essential to the success of the litigation.

...

I trust the above arrangements are ones you would support but, given my current workload, are essential to enable me to manage the litigation going forward.

Any remaining funds from the close out of the PMC will be returned to [DPIRD].

Regards

Peter

Peter Evans

Chief Executive Officer⁷³

[277] Ms Heffernan sent the email to the PMC Chairman in the terms redrafted by Mr Evans, although that fact was not communicated.⁷⁴ The

⁷³ Email from P J Evans to F E Heffernan and T Ford, 29 December 2016.

⁷⁴ Email from F E Heffernan to Dr Edwards, PMC Chair, 30 December 2016.

PMC Chairman was pleased that the litigation was continuing and conveyed his happiness about that. He stated that the purpose of his email to Ms Heffernan was to reiterate his support for the continuing litigation.

[278] The PMC Chairman subsequently made it clear to DPIRD's Audit and Integrity Unit that there was no Board agreement concerning a new contract for Mr Evans to work on remaining PMC issues post abolition.

[279] The PMC Chairman explained that 'all understood that Peter [Evans] would use time from his existing contract to work on these matters as his existing contract ran beyond the closure of the PMC'.⁷⁵ This is consistent with the transitional employee provision in the repeal legislation.

[280] When these matters were examined by DPIRD's Audit and Integrity Unit, Ms Heffernan sought advice from HSF to ascertain whether under repeal legislation, she could ever be proxy for the Board. This was an attempt to justify the way in which Mr Evans came to be engaged by DPIRD after PMC was abolished, as opposed to accurately reflecting what she did do.

[281] In representations to the Commission, Ms Heffernan continued her attempts to justify her conduct and authority to engage Mr Evans. In particular, she asserts:

- DPIRD put her in charge of the PMC closure while the public service was closed down until the end of December 2016 by reference to a document that shows only she was on duty at that time.
- The relevant Minister at the time gave her permission to use PMC closure funds to pay for Mr Evans' future services to the DPIRD, by reference to an email she procured from him nine months later when he was no longer a Member of Parliament and which does not evidence such authority.⁷⁶

[282] There is no evidence she had authority to engage Mr Evans in the manner she did. Even if she was given such authority, which the Commission does not accept, such authority does not extend to incorporating false statements in the engagement letter she prepared and which Mr Evans signed.

Attempt to use closure money for an ulterior purpose

[283] Ms Heffernan prepared an engagement letter for Mr Evans in late December 2016. The letter was similar to the purported engagement letter

⁷⁵ Email from former PMC Chairman to DPIRD Audit and Integrity, 25 July 2017.

⁷⁶ F E Heffernan, CCM Act s 86 representations, received on 17 June 2019, [150] and [205].

for Dr Carr, and modelled on HSF's original expert retainer letter concerning Dr Carr.

[284] The purported engagement letter appeared to be issued by Kott Gunning to engage Mr Evans. The engagement letter was signed by both Ms Heffernan and Mr Evans two days prior to PMC's abolition, on 29 December 2016. Mr Evans was, at that time, a public officer as was Ms Heffernan. However, Kott Gunning had not seen, and were unaware of the engagement letter.

[285] Counsel assisting asked Ms Heffernan: "Did you raise this letter with Kott Gunning at all?" and Ms Heffernan said "No".⁷⁷

[286] The engagement letter provided, amongst other things:

- Mr Evans to be engaged confidentially to the Director of Legal and Commercial and for the work she would be doing with Kott Gunning during the transition period.
- Mr Evans' accounts were 'to be discussed by the Director of L & C and Tom Darbyshire of the Perth Kott Gunning office' (Clause 1).
- Mr Evans would address the elements set out in a report marked as Annexure A which purported to set out the role of DPIRD's Instructor (Clause 2).
- Payment of \$200 per hour plus expenses such as taxis, parking, couriers, telephone, printing etc that are to be paid at cost (Clause 5).
- Be 'pre-paid in keeping with PMC allocated funds, the urgency and transition of matters with hearings and requirements in Jan 2017, Feb 2017, March 2017, April 2017, May 2017 and June 2017' (Clause 5);
- Mr Evans is required to record hours for all pre-payment (Clause 5).
- A fee estimate of \$86,400 plus GST, that is to say \$95,040 (Clause 5 and Annexure B).
- A requirement to present memoranda of fees on a monthly basis, given the prepayment.
- Mr Evans is to be paid 'from funds allocated by Cabinet where a surplus is involved and given new instructions from the Attorney General in relation to the continuation of litigation' (Clause 5).

⁷⁷ F E Heffernan transcript, private examination, 6 December 2018, p 37.

- [287] Kott Gunning prepared what became described as Annexure A to the engagement letter and set out the role of an instructing officer.⁷⁸ But Kott Gunning did not appreciate the document it prepared was incorporated into an engagement letter concerning Mr Evans.
- [288] The heading to Annexure A was clearly not prepared by Kott Gunning - it spelt the name of the firm incorrectly, said it was written by Senior Counsel, and had a partner's signature panel without the partner's knowledge or authority. Ms Heffernan's inclusion of such information in the purported engagement letter left the false impression that Kott Gunning was involved in the engagement. In fact the firm did not know of the letter.
- [289] Ms Ford attempted to have Mr Evans' fees treated as a liability of PMC that had not been settled but would be taken care of prospectively, after PMC was abolished. This was not brought to the financial reporting officer's attention before PMC was abolished. Rather, Ms Ford informed the Commission that she emailed the reporting officer all invoices that were unable to be processed before PMC's systems shut down so the reporting officer could consider them in January 2017.
- [290] Ms Heffernan explained that her intention was to use a portion of the PMC closure funds for the purposes of engaging Mr Evans to do work for DPIRD after PMC was abolished. She did not believe that the Cabinet allocated funds for the PMC closure incorporated limitations on what use could be made of the funds. She did not consult with the financial reporting officer.
- [291] The final report for PMC for 1 July 2016 to 31 December 2016 records that one unnamed senior officer received \$539,400. This is the benefit Mr Evans obtained from his normal salary (including superannuation) for that period together with his contract termination payments.⁷⁹
- [292] On 13 January 2017, Mr Evans issued an invoice to DPIRD for pre-payment of \$95,040 for consulting services to assist the instructing officer on the Galati litigation between January and June 2017. This equated to 432 hours of service to be performed.
- [293] Ms Heffernan authorised the payment of Mr Evans' invoice for services not yet provided.
- [294] Despite the wording of the purported engagement letter and her approving payment, Ms Heffernan asserted that Mr Evans was "never going to be prepaid".⁸⁰

⁷⁸ T Lethbridge transcript, interview, 11 March 2019, p 17.

⁷⁹ PMC Final Report of PMC 1 July 2016 to 31 December 2016.

⁸⁰ F E Heffernan transcript, private examination, 5 December 2018, p 40.

- [295] Records however indicate attempts were made to accrue the payment in the December 2016 financials, clearly to draw down the PMC closure funds.
- [296] The Office of Auditor General prohibited this from occurring.

Mr Peter Evans' time recording practices

- [297] The purported letter of engagement required Mr Evans to record his hours to justify obtaining payment. This included 'presenting memoranda of fees on a monthly basis, given the prepayment'.⁸¹
- [298] Mr Evans indicated to the Commission that his time recording regime was poor and his recollection of how or when he recorded time was lacking.
- [299] Mr Evans explained that he "would jot post-it notes or whatever", that "it was a bit scrappy for a while", and "in conversation [Ms Heffernan] might have jotted something down".⁸²
- [300] Counsel Assisting questioned Mr Evans about his time recording:

I'm trying to get a position of where the records were created - - -?---Yep.

- - - that records your time?---Yep. So a lot of them were just handwritten. I then compiled them into spreadsheet form.

Have you got your handwritten records still?---No.

*And what did you do with them?---I just threw them out.*⁸³

- [301] Mr Evans could not clarify on what electronic devices he time recorded. When questioned further about his electronic recording practices, he said:

- - - how were the spreadsheets provided to Ms Heffernan or the department?--- Well, I'd generally print it out and take it and give it to her. If – yeah, that's what I did in the end, yes.

....

Can you give us an approximate month when you handed the spreadsheets to Ms Heffernan or the department?---I just can't remember...

- [302] Mr Evans met with Ms Heffernan on 15 May 2017 to debrief about his work in order to "finalise payment for five months work".⁸⁴

⁸¹ P J Evans transcript, private examination, 12 December 2018, pp 29-31.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid and F E Heffernan file note signed by P J Evans, 15 May 2017.

[303] Ms Heffernan prepared a file note of the debrief session. It was signed by Mr Evans. Two aspects of the file note are initialled by Mr Evans to make corrections. He also handwrote 'Felicity, please note my hours are recorded on the basis of the closest 15 minutes, in favour of [DPIRD]'. The file note that Mr Evans signed relevantly records:

- finalised payment ... is **based on the monthly timesheet records January to May 2017** with the Director of Legal and Commercial; (**emphasis added**) and
- 400 hours have now been completed at the agreed rate of \$200 plus GST per hour.

[304] Under Ms Heffernan's authority, DPIRD processed payment to Mr Evans for 432 hours of work up to 15 May 2017 in response to his issued invoice dated 13 January 2017. This led DPIRD to pay him \$95,040.

[305] This payment was made despite the 15 May 2017 file note that showed only 400 hours of work was carried out. This equated to a payment for an additional 32 hours to Mr Evans.

The internal audit

[306] An internal audit was conducted in June 2017.

[307] The audit identified issues with the engagement process in relation to Mr Evans that did not comply with mandatory procurement processes together with the discrepancy between the hours recorded and hours paid.

[308] The purported engagement of Mr Evans creates conjecture as to how he was employed or engaged by DPIRD from 1 January 2017.

[309] The Commission does not consider it necessary to determine whether Mr Evans was a public officer from 1 January 2017. Ms Heffernan was a public officer and her serious misconduct in preparing the engagement letter which Mr Evans signed is intertwined with the conduct of Mr Evans.

[310] When Mr Evans signed the false letter of engagement he was still a public officer - the CEO of the PMC and was involved in committing payment of PMC closure funds for his benefit.

[311] During the audit process, Ms Heffernan provided timesheets to auditors which reflected 401.5 hours of work undertaken by Mr Evans.

[312] This closely aligned with what was recorded in the 15 May 2017 file note which recorded the process to finalise Mr Evans' work with DPIRD.

[313] The audit revealed that Ms Heffernan authorised payment to Mr Evans for over 30 hours of work he never carried out according to DPIRD records.

Finding the additional hours to respond to internal auditors

[314] Ms Heffernan was under pressure to explain what happened.

[315] Behind the scenes, Ms Heffernan communicated with Mr Evans via email in an attempt to resolve what the audit identified. This led Mr Evans identifying an additional 42.5 hours of work he had performed which he was prepared to not charge for 10 hours.

[316] In an email communication on 4 July 2017, after the auditors picked up the issue, Ms Heffernan and Mr Evans reached an agreement that their previous file note should have recorded 432 hours and it was 'missing additional court related hours'.⁸⁵ Ms Heffernan described what was recorded in her file note as a mistake.⁸⁶

[317] Mr Evans gave a spreadsheet to Ms Heffernan after the issue was identified by the auditors. It purports to detail the work he carried out from 20 January to 17 February 2017 equating to 32.5 hours.

[318] Mr Evans conceded that he inserted these additional recorded hours into a spreadsheet after he was alerted to the issue by Ms Heffernan on 4 July 2017 but says the hours were previously recorded on a piece of paper which was relied on to insert the hours:

So when you got the email there was no time recorded in the spreadsheet. Is that your evidence?---For the court-related hours?

Yes?---I am unable to answer definitively, but I think I had them on a separate piece of paper.

Where is the separate piece of paper?---With the rest of them. I'm sorry, I don't have it.

And where is that?---In the bin. Because once I put them in the spreadsheet I didn't keep them.

Did you really have it on a piece of paper, Mr Evans?---Yes, I did have it on a piece of paper.⁸⁷

[319] Mr Evans' wife passed away on 8 February 2017. He said that this impacted on how he time recorded the matter.

⁸⁵ Email chain exchange between F E Heffernan and P J Evans, 4 July 2017.

⁸⁶ F E Heffernan transcript, private examination, 5 December 2018, p 53

⁸⁷ P J Evans transcript, private examination, 12 December 2018, p 38.

The claim for thirty-two extra hours

[320] Mr Evans told the Commission his wife's funeral was about a week later, that is the week commencing 13 February 2017, although he could not remember the precise day or date.

[321] His original record of hours prior to the internal audit showed no time recordings between 5 and 6 February 2017 until 18 February 2017.

[322] Mr Evans' newly created spreadsheet (created once the auditors identified the issue) recorded that he worked each day of the week of his wife's funeral. This equated to almost 60 per cent of the additional court hours.

[323] He narrated the work he did in the week commencing 13 February 2017 as:

- FH request to review docs for mediation/research/case coordination;
- FH request to review docs for mediation/court; and
- FH request to review docs for mediation/research/court.

[324] Counsel Assisting questioned Mr Evans about the work he carried out during the week commencing 13 February 2017:

Did Felicity [Heffernan] request you to do it [work hours] during that period?--- I couldn't tell you whether she requested specifically that I did the work during that period, but yes, it actually was a way for me to keep going.

And where did you do your work on those days?--- At home, mostly at home.

And were you on a computer?--- For parts of it, yes. I'd turn the computer on, and on and off the computer. Yeah.

And which computer was it at that time?--- I don't know, to be honest. I just don't know

... What were the court-related matters that were going on in the week of your wife's funeral?---I don't know.⁸⁸

[325] The Commission examined the professional fees charged by the Kott Gunning solicitors with carriage of the Galati litigation vis-a-vis the additional 32.5 hours of so called court related hours. These included narrations, in six minute increments, which described the work undertaken and persons involved. The invoices do not directly or inferentially show that Mr Evans undertook the additional hours he claims to have done.

[326] Ms Heffernan represented to the Commission that there exists an email of 22 January 2017 'from Galati discussing and arguing issues relevant to

⁸⁸ P J Evans transcript, private examination, 12 December 2018, p 39.

upcoming mediation' but did not provide this record. She further asserts that: '[t]here was an exchange of documents for the mediation. The mediation was scheduled for 9th and 10th March 2017. Evans was performing work relating to the exchange of documents that was scheduled 22, 23, 26 and 27 February 2017' supported by a schematic diagram she prepared.

[327] In the Commission's opinion, the explanations provided by Ms Heffernan and Mr Evans about the additional hours are implausible. The original estimate of hours was based on two assumptions which fell away:

- that the instructor to Kott Gunning would need to spend 20 hours to familiarise themselves with the legal and factual issues of the litigation, which was not necessary in Mr Evans' case; and
- the cases would result in civil trials, which did not eventuate.

[328] In the Commission's opinion, Ms Heffernan intentionally misled auditors and Mr Evans enabled her to do so. She did so to justify the earlier payment to Mr Evans of an amount in excess of 400 hours claimed. The extra 32 hours of work said to have been performed is not substantiated by any contemporaneous record or other evidence. The general description of the work said to be performed is so vague as to be meaningless.

CHAPTER SEVEN

Conclusion

- [329] There is a public interest in reporting on the Commission's serious misconduct investigation when it concerns a senior public officer discharging their duties.
- [330] DPIRD undertook an investigation of certain matters in 2017. Ms Heffernan was suspended on 29 November 2017. Ms Heffernan resigned during DPIRD's broader disciplinary investigation in mid-2018.
- [331] She resigned from her role without consequence.
- [332] All too often, the Commission sees public officers resign without consequence during a disciplinary process. Occasionally, this has led to these officers being employed in other parts of the public sector without earlier allegations of misfeasance being resolved.
- [333] There is a significant misconduct risk without a central database of allegations and whether they have or have not been resolved. It is a matter to which the Public Sector Commission might give consideration.
- [334] As a public officer and a lawyer, Ms Heffernan had a duty of honesty and integrity.
- [335] The Commission's investigation revealed that Ms Heffernan demonstrated reckless non-compliance with procedure resulting in significant unauthorised expenditure of public funds in defiance of Cabinet decisions.
- [336] In doing so, she showed a preparedness to act dishonestly by falsifying records and deceit. In the Commission's opinion, Ms Heffernan engaged in serious misconduct.
- [337] Dr Carr was employed by the State. He was a public officer at all material times. Dr Carr backdated the purported letter of engagement, knowing that backdating was necessary for him to receive payment for the work he had done.
- [338] Mr Evans was a public officer at least until his termination at the PMC took effect on 31 December 2016. He had a duty to PMC and DPIRD to continue his contract of employment so that he could advise lawyers about the litigation.
- [339] Days before the PMC was abolished Mr Evans, with the assistance of Ms Heffernan, exercised the great authority bestowed on him by the PMC Board one last time. He did so to facilitate the drawing down of PMC

closure funds beyond his earlier questionable termination payment of almost \$400,000.

- [340] By his conduct PMC closure funds were drawn down by a further \$95,040 for his benefit and without consulting with the Treasurer's appointed financial reporting officer before doing so.
- [341] Mr Evans and Ms Heffernan created a document trail which falsely made it appear as though the go ahead was given by DPIRD and the PMC Board Chairman to using the closure funds in this way.
- [342] Mr Evans, while still the PMC's CEO, signed a purported engagement letter on 29 December 2016 which committed \$95,040 of closure funds to himself for future services he was supposedly to provide to Ms Heffernan and Kott Gunning relating to the Galati litigation.
- [343] The engagement letter falsely left the impression that Kott Gunning was involved in the engagement of Mr Evans when it had no idea.
- [344] The extent of work actually performed by Mr Evans from January to May 2017 remains unclear. There are no original records.
- [345] The Commission has formed an opinion of serious misconduct in respect of Mr Evans during his time as a public officer.
- [346] An opinion that serious misconduct has occurred is not, and is not to be taken as a finding or opinion that a particular person is guilty of or has committed a criminal offence or a disciplinary offence.⁸⁹

Recommendations under CCM Act s 43

- [347] The Commission recommends that an appropriate authority or independent agency gives consideration to prosecuting Ms Heffernan for her conduct in preparing false letters of engagement of Dr Carr and Mr Evans and for her conduct misleading internal auditors.
- [348] A copy of this report will be made available to the State Solicitor for consideration whether there are avenues for recovery of public monies.
- [349] A recommendation is not a finding, and is not to be taken as a finding that a person has committed or is guilty of a criminal offence or has engaged in conduct that constitutes or provides grounds on which that person's tenure of office, contract of employment, or agreement for the provision of services, is, or may be, terminated.⁹⁰

⁸⁹ CCM Act s 217A.

⁹⁰ CCM Act s 43(6).