CORRUPTION AND CRIME COMMISSION

Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup

5 October 2007

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

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CORRUPTION AND CRIME COMMISSION

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President
Legislative Council
Parliament House
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Hon Fred Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with sections 84 and 93 of the *Corruption and Crime Commission Act 2003*, the Commission is pleased to present the Corruption and Crime Commission's Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup.

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

The Commission recommends that the report be laid before each House of Parliament forthwith pursuant to the *Corruption and Crime Commission Act 2003*.

Yours faithfully

Neil McKerracher QC
ACTING COMMISSIONER

5 October 2007

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GLOSSARY

Amendment 56	Proposed Amendment to Town Planning Scheme 20
Amendment 92	Superseded Amendment 56
CALM	Department of Conservation and Land Management
CCC Act	*Corruption and Crime Commission Act 2003*
CEO	Chief Executive Officer
DEC	Department of Environment and Conservation
DGP	Development Guide Plan
DLGRD	Department of Local Government and Regional Development
DPI	Department for Planning and Infrastructure
EIAD	Environmental Impact Assessment Division of the Environmental Protection Authority
EPA	Environmental Protection Authority
Form 9A	A 'disclosure of gifts' form required under Regulation 30D of the Local Government (Election) Regulations 1997
IAG	Independent Action Group
LNRSPP	Leeuwin-Naturaliste Ridge Statement of Planning Policy
MLA	Member of the Legislative Assembly
MLC	Member of the Legislative Council
PSMA	Public Sector Management Act 1994
SEA	Strategic Environmental Assessment
SWRPC	South West Region Planning Committee
TPS	Town Planning Scheme
WAPC	Western Australian Planning Commission

EXECUTIVE SUMMARY

In late 2005, the Corruption and Crime Commission (the Commission) received an allegation concerning funding irregularities in a Busselton Shire Council (the Council) election. As a result of its assessment of the allegation, the Commission decided to undertake an investigation pursuant to s.33(1)(a) of the *Corruption and Crime Commission Act 2003* (the CCC Act).

Subsequently, the Commission investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach development.[1] The investigation included the analysis of documents, execution of search warrants, physical and technical surveillance, liaison and cooperation with a range of government and local government public officers and others, both public and private hearings, and a review of information provided to the Commission or obtained by the Commission after those hearings.

This report relates only to allegations of public sector misconduct linked to the Smiths Beach development. It examines the efforts of Canal Rocks Pty Ltd and its consultants in seeking to influence the Council, public service officers and politicians to support the development. The report incorporates the Commission's assessment and opinions of their actions. It also reports the facts concerning the conduct of individuals who aren't public officers but whose actions affected the conduct of the public officers who were the focus of this investigation.

Neither the investigation, nor this report, has assessed the suitability of the proposed development at Smiths Beach. Conducting such an assessment is not the role of this Commission.

Public Hearings

The Commission conducted private hearings and two sets of public hearings. In conducting public hearings the Commission was acutely aware of the potential to unfairly damage the reputation of individuals. Before deciding to hold public hearings the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements.[2] The Commission considered that it was in the public interest to hold public hearings.

The first set of public hearings, conducted in the periods 23 October to 8 November 2006 and 4 to 6 December 2006, was solely focused on the Smiths Beach development and the conduct of a number of public officers in regard to that development.

[1] The spelling of 'Smiths' has no possessive apostrophe
[2] As required by sub section 140(2) of the *Corruption and Crime Commission Act (2003)*

The second set of public hearings, conducted in the period 12 February to 1 March 2007, focused on the possibility that lobbying had led to misconduct by public officers in regard to a number of other matters. Those matters exposed at the second set of hearings, along with others not mentioned at those hearings, remain under investigation.

The Smiths Beach Development Proposal

In 1999, Canal Rocks Pty Ltd proposed an extensive tourist and residential development on 45.3 hectares adjacent to Smiths Beach, 10 kilometres south-west of Dunsborough. However, there was widespread public opposition to the proposal. In 2003, due to the lack of progress that had occurred, the company engaged Mr Brian Burke and Mr Julian Grill to assist in advancing the proposal.

Canal Rocks Pty Ltd retained Julian Grill Consulting to act for them.[3] Julian Grill then retained Brian Burke through Abbey Lea Pty Ltd. Julian Grill Consulting would invoice Canal Rocks Pty Ltd and Abbey Lea Pty Ltd would invoice Julian Grill Consulting for half the amount paid by Canal Rocks Pty Ltd. In other words the financial proceeds for the work performed by Mr Burke and Mr Grill were, in effect, equally shared.

Two main strategies to assist Canal Rocks Pty Ltd were used.

The first strategy related to events surrounding the Council election in May 2005 and the by-election in September 2005. Canal Rocks Pty Ltd, with the assistance primarily of Mr Burke, embarked on a process of identifying, engaging with and financially supporting candidates considered sympathetic to Canal Rocks Pty Ltd's development application. There was nothing unusual or inappropriate about that strategy in itself.

However, elaborate steps were taken to conceal the true source of the financial support for these candidates from the Busselton community through the use of an unconnected organisation, the Independent Action Group (IAG), as the 'public' source of the campaign funding. As a result, the funding for these candidates, in fact coming initially and in reality from Canal Rocks Pty Ltd, was not disclosed to the Busselton community. Disclosure of funding support is required by legislation and regulation in a manner discussed in more detail in this report.

The other major element of their strategy was the attempt to delay the introduction of new Town Planning Scheme (TPS) provisions in order to enable the passage of the development proposal under less rigorous arrangements. This was pursued by Mr Burke (in the main) and Mr Grill, on behalf of and in conjunction with Canal Rocks Pty Ltd, influencing or attempting to influence compliant public officers to assist with achieving this delay.

[3] With effect from 22/02/2006, Julian Grill Consulting became Julian Grill Consulting Pty Ltd

Commission's Opinions as to Misconduct

Misconduct has a particular meaning under the CCC Act and not all disreputable or inappropriate conduct will necessarily fall within the definition. Some public officers may not be the subject of a misconduct opinion, but there may be grounds upon which disciplinary proceedings should be considered. The Commission can make recommendations to responsible authorities that disciplinary proceedings should be considered, and recommendations in this report will cover all relevant conduct, not merely that which can be classified as misconduct under the CCC Act. In this report, the Commission has made one such recommendation in the case of Mr Mark Brabazon, a public service officer, formerly from the Department of Conservation and Land Management (CALM) and now with the Department of Environment and Conservation (DEC).

Having assessed the material gathered during its investigation, the Commission has formed opinions regarding misconduct by seven public officers. Three of these officers are public service officers who, as public sector employees, are subject to the *Public Sector Management Act 1994* (PSMA) and are therefore bound by the Public Sector Code of Ethics. The other four, as either a Member of Parliament or members of local government councils are not bound by the Public Sector Code of Ethics. These public officers are not public sector employees under the PSMA. However, as public officers they are still subject to the provisions of the CCC Act, and their actions may constitute misconduct as defined in section 4 of the CCC Act. In particular, sub-paragraph 4(d)(vi) provides that misconduct occurs when, amongst other things, conduct of a public officer constitutes or could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the PSMA (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

The Commission is also considering the preparation of criminal charges that may result from this investigation. That issue is not addressed in this report.

Mr Mike Allen: Department for Planning and Infrastructure Senior Officer

Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the Department for Planning and Infrastructure (DPI) report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

Dr Walter Cox: Chairman of the Environmental Protection Authority

On 17 May 2006, Dr Cox accepted an invitation from Mr Grill to attend a lunch hosted by Messrs Burke and Grill, specifically knowing from Mr Grill that Smiths Beach was to be discussed at the lunch. This lunch and the discussion occurred at a time when Dr Cox had before him and his agency a Strategic Environmental Assessment (SEA) lodged by Canal Rocks Pty Ltd and affecting Smiths Beach. In accepting the invitation and attending the lunch Dr Cox deliberately sought to avoid a perception of a conflict of interest by asking Mr Grill to shift the proposed location for the lunch to a more discrete place. The acceptance of the invitation and attendance by Dr Cox to this private lunch, when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd's SEA was before him and his agency, constituted the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

Dr Cox and Mr Grill both deny that Smiths Beach was discussed at the lunch. Mr Burke (in light of surrounding email evidence) confirmed that it is likely that Smiths Beach was discussed as planned. That is not an issue the Commission needs to decide, as the impropriety, with regard to Dr Cox, is in the acceptance of the invitation and attendance at this private lunch when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd SEA was before him and his agency.

Mr Paul Frewer: Deputy Director of DPI and Acting Director General of the Department of Water

On 19 May 2006, at a meeting of the South West Regional Planning Committee, Mr Frewer recommended deferring consideration of a Shire of Busselton proposal to amend Town Planning Scheme (TPS) 20. This deferral was in the interest of Canal Rocks Pty Ltd. Mr Frewer's conduct in failing to declare that he had been approached by Mr Burke to speak in favour of the deferral of Amendment 92 constitutes the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

Mr Norman Marlborough: Former Minister for Small Business, Peel and the South West and Member of Parliament

Mr Marlborough, by agreeing with Mr Burke that he would appoint Ms Morgan to the South West Development Commission in circumstances where the relative merit of Ms Morgan holding such a position was unknown, failed to act with integrity in the performance of his duties. Such conduct could constitute a serious breach of the Public Sector Code of Ethics. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

Ms Philippa Reid: Busselton Shire Councillor

Ms Reid failed to make a declaration of an interest affecting impartiality relating to her personal relationship with Mr Crichton-Browne, a lobbyist for Canal Rocks Pty Ltd, prior to the final consideration of Amendment 92 affecting Smiths Beach, at the 14 December 2005 Council meeting. At that meeting she seconded a motion on Amendment 92 in a manner favourable to Canal Rocks Pty Ltd, and participated in debate about Amendment 92. This was conduct that could adversely affect the honest or impartial performance of her functions as it concealed the existence of a potential conflict of interest. This conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constituted misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

Ms Anne Ryan: Busselton Shire Councillor

The Commission formed four misconduct opinions regarding Ms Ryan:

- Ms Ryan admitted that when she completed the requisite Form 9A, in order to disclose gifts she had received, she failed to disclose those costs previously incurred by her but which had been reimbursed by IAG. This failure was conduct that could adversely affect the honest or impartial performance of Ms Ryan's functions as a councillor because it assisted in concealing the degree of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan's failure to directly inquire of the President of IAG, Mr Greg Dean, as to the true state of affairs regarding the funding of her campaign, involved the performance of her functions in a manner that was not honest or impartial because it concealed the existence of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan failed to declare a financial interest in the Canal Rocks Pty Ltd matter at the August 10 Council meeting. A councillor who has received a notifiable gift at an election is obliged under the *Local Government Act 1995* to treat the giver of that gift as a close associate.[4] The effect of this is to oblige a councillor to make a financial interest declaration if a matter arises for consideration at a meeting and the matter is one in which the provider of the election funding has an interest. There is also obvious potential for such a failure to adversely affect the honest and impartial performance of the functions of a councillor because it conceals the existence of a potential conflict of interest, and Ms Ryan could be in breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan failed to make a financial interest disclosure at the Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of her duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Ms Ryan as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

Mr John Triplett: Busselton Shire Councillor

Mr Triplett, having received election funding from Canal Rocks Pty Ltd, failed to make a financial interest disclosure at the Busselton Shire Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of his duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Mr Triplett as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

[4] Section 5.62

Messrs Burke and Grill's Influence on Public Sector Agencies

In assessing the material available to it in regard to its investigation of whether misconduct has occurred, the Commission has necessarily examined the actions of certain people who are not public officers. The CCC Act focuses on allegations of misconduct by public officers. During the compilation of this report there has been considerable debate about the power of the Commission to make comments on allegations of misconduct by non-public officers. Therefore, in order to avoid further delaying the tabling of this report, comment on non-public officers, particularly Messrs Burke and Grill, has been limited to reporting the facts concerning their actions as revealed by the Commission's investigations.

However, the Commission is of the view that it would be wholly artificial if, in reporting on the outcome of its investigation, it reported only on the actions of public officers. Where the actions of others have led to, invited or given rise to misconduct, those actions must necessarily be the subject of examination and, where appropriate, report, in discharge of the obligations of the Commission under paragraph 7A(b) of the CCC Act, to reduce the incidence of misconduct in the public sector.

In terms of their involvement in the matters considered in this report, Messrs Burke and Grill were equal partners as discussed above. The misconduct of Messrs Allen, Frewer and Marlborough resulted from the requests or influence of Mr Burke.

Mr McKenzie for Canal Rocks Pty Ltd was also in close telephone contact with each of Messrs Burke and Grill. In all, while more of the contact was carried out by Mr Burke (whom Mr McKenzie had initially approached for assistance), Mr Grill participated in, or was referred to in, over 130 telephone calls, emails and faxes in relation to the actions to be taken in connection with the Smiths Beach matter from May to November in 2006.

Specifically, in relation to the instances of public officer misconduct on which the Commission has expressed an opinion in this report, in addition to the invitation specified in relation to Dr Cox, Mr Grill was also involved in other discussions. He had discussions in which he supported the conduct of Messrs Frewer and Allen in relation to the deferral of Amendment 92[5] and with Mr Burke concerning Mr Allen appointing the DPI officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers.[6] Some, but not all of those discussions, are published in this report. The primary focus of attention is the allegations of misconduct of public officers.

It is an unfortunate outcome of this investigation that the improper conduct of a few has obscured the principled conduct and hard work of many others in the public sector who performed their duties while subject to very considerable pressure from Canal Rocks Pty Ltd and its consultants. The actions of a few have damaged the reputations of public sector agencies built

[5] see para 5.3 below
[6] see para 5.4 below

over many years by thousands of dedicated public officers who have acted with integrity.

It is likely that there will always be some who seek to advance their partisan interests through a mixture of both legitimate and inappropriate means. What is important is that public officers respond to such approaches in a principled way, focused on the public interest.

Mr Burke's Influence on the Department of Conservation and Land Management

The Commission has expressed concern with regard to Mr Burke's apparent influence on Mr Brabazon, a senior CALM officer, in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee. The Commission notes that any influence of Mr Burke, relevant to the former matter, does not appear to have extended to affect the policy officers tasked with the day-to-day dealings with the Smiths Beach development proposal.

Concern has also been expressed about Mr Brabazon gratuitously providing Mr Burke with advice on how ministerial approval could best be achieved by the withholding of concessions to CALM, his own department. There is no suggestion that Mr Burke caused Mr Brabazon to give this advice.

Indeed, while CALM's Executive Director, Mr McNamara met Mr Burke to discuss CALM's dealings with the development proposal, the steps Mr McNamara took to establish greater management oversight and coordination appear appropriate in terms of the public interest and environmental consequences attendant to the Smiths Beach proposal.

There is no suggestion in the material before the Commission that Mr Burke's representations resulted in any pressure from CALM's senior management to require their officers to change their approach in dealing with the Smiths Beach development proposal.

The Commission acknowledges that CALM's response to the pressure Mr Burke placed on it appears to have been appropriate and measured.

Messrs Burke and Grill's Influence on the Department for Planning and Infrastructure

On the information available to the Commission, Mr Frewer and Mr Allen were the only DPI officers apparently susceptible to the influence of, mainly Mr Burke. Nevertheless, it is of concern to the Commission that two such senior DPI officers should compromise the department's integrity. Their conduct demonstrates a failure by them to meet their obligation of impartiality in promoting and sustaining the public interest.

Given the authority and influence of DPI, in terms of major infrastructure and other decisions, it is important that a high level of public confidence in the

integrity of the department is maintained, especially in terms of compliance with the Public Sector Code of Ethics by its senior officers.

Mr Grill's Influence on the Environmental Protection Authority

While the Commission has formed an opinion that Dr Cox, as the Chairman of the EPA, has engaged in misconduct as a result of the influence of Mr Grill it is not apparent to the Commission, on the basis of the material before it, that any other person in the Authority engaged in misconduct.

Conclusions Regarding the Involvement of Canal Rocks Pty Ltd

Canal Rocks Pty Ltd, through Mr David McKenzie, was kept informed of Messrs Burke and Grill's intentions and actions. In relation to their actions giving rise to misconduct of Messrs Allen, Cox and Frewer, it is clear that Canal Rocks Pty Ltd, through Mr McKenzie, gave at least tacit approval to these actions and, at times, was an active participant in the process of seeking approval of its development.

Corruption Prevention Issues

While the issues raised in this report relate specifically to the Smiths Beach proposal, they have much wider implications. Public officers, including local government councillors, regularly have to make judgements about how they will conduct themselves and about the proper course of action to take.

In particular, the Smiths Beach investigation has highlighted three key areas relating to the conduct of public officers. These are:

- The disclosure of the 'true source' of donations in local government elections;
- The declaration of interests and conflicts of interest in council decision-making processes; and
- Lobbying and external influences on decisions made by public officials.

Failure to act ethically and impartially can have a substantial impact, both on people involved in the specific activity and on the community as a whole. Loss of public confidence can occur whether the actions of the public officer were intended or accidental, and whether they are actually, or merely perceived, as improper. This loss of confidence can result in the erosion of the public's faith in the public sector as a whole.

The Commission holds the view that inappropriate conduct and misconduct by public officers, irrespective of whether it reaches the threshold for criminal sanctions, should not remain unexposed. The community is entitled to know when the trust they have placed in public officers has been breached, and by

whom. Equally important, the community requires assurance that action will be taken to strengthen public sector systems against similar abuses occurring in the future.

Recommendations

The Commission has made six specific recommendations, three dealing with public officers and three relating to a suggested review and to reforms to the *Local Government Act 1995.*

Recommendation 1

That consideration should be given to the taking of disciplinary action against Mark Brabazon by the Director General of the Department of Environment and Conservation. This is in regard to his integrity in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee and in providing Mr Burke with advice on how ministerial approval could best be achieved. This included the withholding of concessions to the department he worked for.

Recommendation 2

That the appropriate relevant authority should consider taking disciplinary action against Paul Frewer for his lack of integrity in seeking the deferral of Amendment 92 at the request of Mr Burke at the 19 May 2006 meeting of the South West Regional Planning Committee.

Recommendation 3

That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report.

Recommendation 4

That the Department of Local Government and Regional Development, in consultation with sector stakeholders, review the adequacy of the current election donation disclosure regime for local government, using the principles articulated by the WA Inc Royal Commission as a benchmark for regulatory reform.

Recommendation 5

That the Department of Local Government and Regional Development, in drafting regulations for a uniform standard of conduct for council members, consider the introduction of a model code of conduct with which all councils must comply. The code should address the identification and management of conflicts of interests, particularly as these relate to relationships with proponents and representatives who have proposals before council.

Recommendation 6

The Commission recommends that the Department of Local Government and Regional Development undertake appropriate consultation and advise the Minister for Local Government on an appropriate mechanism to enable the suspension of a councillor who is subject to an investigation and is reasonably suspected of having engaged in misconduct sufficiently serious that their continued presence on the council could undermine the credibility, functioning and authority of the council.

CHAPTER ONE
THE COMMISSION'S JURISDICTION

1.1 The Smiths Beach Investigation

The Corruption and Crime Commission (the Commission) has conducted an investigation under the *Corruption and Crime Commission Act 2003* (the CCC Act) in regard to possible misconduct by public officers in relation to the proposed development of land at Smiths Beach[7] by Canal Rocks Pty Ltd. The investigation was commenced following a notification about alleged funding irregularities in a Busselton Shire election.

The purpose of the investigation was to assess, in accordance with section 22 of the CCC Act, the allegations and form an opinion as to the occurrence or possible occurrence of 'misconduct', as defined by section 4 of the CCC Act.

The investigation included the gathering and analysis of a large amount of material in the form of documents and witness statements, the execution of search warrants, physical and technical surveillance, and liaison and cooperation with a range of government and local government public officers and others, the conduct of private and public hearings, and the receipt of numerous representations by those who may possibly be adversely affected by the proposed contents of the report.

The Commission conducted both private and public hearings. In conducting public hearings, the Commission is acutely aware of the potential to unfairly damage the reputation of individuals. Before deciding to hold public hearings the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements.[8] The Commission decided that it was in the public interest to hold public hearings.

On 29 and 30 March 2006, the Commission held private hearings. It conducted public hearings between 23 October 2006 and 8 November 2006 and between 4 December 2006 and 6 December 2006.

1.2 Jurisdiction

The Commission's function is to deal with allegations of misconduct concerning public officers. The term 'public officer' is defined in section 3 of the CCC Act by reference to section 1 of *The Criminal Code* which defines 'public officer'; it specifically includes government ministers, elected members of State Parliament and local councils, public service officers and local council employees. 'Public service officers' are those persons who work in the State

[7] Smiths Beach has no possessive apostrophe
[8] As required by section 140(2) of the *Corruption and Crime Commission Act (2003)*

Public Service and who are subject to the *Public Sector Management Act 1994* (PSMA).

The Commission investigated the alleged misconduct by persons, elected members of State Parliament and the Busselton Shire Council and public service officers. In the course of the investigations, the Commission necessarily and relevantly touched on the actions of certain people who are not public officers.

Definition of Public Service Officers

Section 3 of the PSMA defines public service officer to mean an executive officer, permanent officer or term officer employed in the Public Service under Part 3 PSMA. Under section 34 PSMA, the public service is constituted by Departments, SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service, and persons employed under Part 3 PSMA, whether in departments or in the Senior Executive Service in SES organisations, or otherwise. 'Public service officers' are 'public officers' for the purposes of the CCC Act.

Definition of Public Officers

Section 1 of *The Criminal Code*[9] defines the term **'public officer'** to mean any of the following:

(a) a police officer;
(aa) a Minister of the Crown;
(ab) a Parliamentary Secretary appointed under section 44A of the Constitution Acts Amendment Act 1899;
(ac) a member of either House of Parliament;
(ad) a person exercising authority under a written law;
(b) a person authorised under a written law to execute or serve any process of a court or tribunal;
(c) a public service officer or employee within the meaning of the Public Sector Management Act 1994;
(ca) a person who holds a permit to do high-level security work as defined in the Court Security and Custodial Services Act 1999;
(cb) a person who holds a permit to do high-level security work as defined in the Prisons Act 1981;
(d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law;
(e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not.

[9] *Criminal Code Act Compilation Act 1913*

Definition of Misconduct

Section 4 of the CCC Act provides that misconduct occurs if:

(a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;

(b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;

(c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or

(d) a public officer engages in conduct that –

(i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;

(ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;

(iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or

(iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,

and constitutes or could constitute —

(v) an offence against the Statutory Corporations (Liability of Directors) Act 1996 or any other written law; or

(vi) a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

1.3 Purpose and Function of this Report

The purpose of this report is for the Commission to publish both its assessment of the material before it and its opinion as to whether any public officers have or may have engaged in misconduct. Additionally, it recommends improvements to legislation, systems, procedures and processes within government.

The Commission is also able to make recommendations as to whether consideration should or should not be given to the prosecution of particular persons and the taking of disciplinary action against particular persons. This report recommends consideration of disciplinary action against some public officers. The Commission is still considering whether, and if so the extent to which, criminal charges may be warranted.

Neither the investigation, nor this report, has assessed the suitability of the development of Smiths Beach. Conducting such an assessment is not the role of this Commission.

Further, the role played by the Commission is not a judicial role as some of the submissions to the Commission would appear to suggest. The Commission performs investigations, reports on them and makes recommendations. On some occasions, those roles are performed publicly. On many more occasions, those roles are performed privately. Whether the roles are performed publicly or privately is determined by a rigorous analysis as to what is in the public's interest in terms of the rights of the public to know about the matters concerned. These rights are not to be assessed on the basis of some prurient or curious interest but are to be measured against values underpinning legislation and regulation. The greater the number of people likely to be affected by those values, the more likely the public exposure of a matter would lie in the public interest.

Unlike a judicial function, the content of a report by the Commission does not affect legal rights in any way at all. It clearly has the capacity to affect reputations, which is why certain safeguards are imposed on the reporting function.

Although the role of the Commission is an investigative role, its powers and obligations are defined by statute in relation to what and how it should report if it chooses to do so.

The completion of this report has, amongst other things, given rise to many submissions and representations as to the nature, extent and limitations upon the powers of the Commission. It is appropriate therefore that the Commission record its views on those matters.

In relation to its powers and obligations, the following other statutory provisions in the CCC Act are of particular relevance:

*s **18. Misconduct function***

*(1) It is a function of the Commission (the **'misconduct function'**) to ensure that an allegation about, or information or matter involving, misconduct is dealt with in an appropriate way.*

(2) Without limiting how the Commission may perform the misconduct function, the Commission performs the function by —
…….
(f) making recommendations and furnishing reports on the outcome of investigations;

22. Assessments and opinions as to occurrence of misconduct

(1) Regardless of whether or not there has been an allegation of misconduct, the Commission may make assessments and form opinions as to whether misconduct —

(a) has or may have occurred;
(b) is or may be occurring;
(c) is or may be about to occur; or
(d) is likely to occur.

(2) The Commission may make the assessments and form the opinions on the basis of —

(a) consultations, and investigations and other actions (either by itself or in cooperation with an independent agency or appropriate authority);
(b) investigations or other action of the Police Royal Commission;
(c) preliminary inquiry and further action by the A-CC;
(d) investigations or other action of an independent agency or appropriate authority; or
(e) information included in any received matter or otherwise given to the Commission.

(3) The Commission may advise an independent agency or appropriate authority of an assessment or opinion.

23. Commission must not publish opinion as to commission of offence

(1) The Commission must not publish or report a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence.

(2) An opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

32. Dealing with allegations

(1) The Commission is to deal with an allegation by assessing the allegation and forming an opinion under section 22, and making a decision under section 33 that the Commission considers appropriate in the circumstances.

(2) For the purposes of subsection (1) the Commission may conduct a preliminary investigation into the allegation.

(3) The Commission may consult any person or body about an allegation or other matter.

33. Decision on further action

(1) Subject to subsection (2), having made an assessment of an allegation the Commission may decide to —

(a) investigate or take action without the involvement of any other independent agency or appropriate authority;
(b) investigate or take action in cooperation with an independent agency or appropriate authority;
(c) refer the allegation to an independent agency or appropriate authority for action; or
(d) take no action.

(2) The Commission may deal with a matter reported to it under section 30 as if it were a matter notified under section 28(2).

84. Report to Parliament on investigation or received matter

(1) The Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct, irrespective of whether the investigation or action was carried out by —

(a) the Commission alone;
(b) the Commission in cooperation with an independent agency or appropriate authority; or
(c) an appropriate authority alone.

(2) The Commission may at any time prepare a report on any received matter, irrespective of whether the matter has been the subject of an investigation or other action under this Act or any other law.

(3) The Commission may include in a report under this section —

(a) statements as to any of the Commission's assessments, opinions and recommendations; and
(b) statements as to any of the Commission's reasons for the assessments, opinions and recommendations.

(4) The Commission may cause a report prepared under this section to be laid before each House of Parliament or dealt with under section 93.

86. Person subject to adverse report, entitlement of

Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

Section 86 of the CCC Act

Regardless of section 86 of the CCC Act, in *Annetts v McCann* (1990) 170 CLR 596 the majority of the High Court of Australia said at 598:

> *It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.*

It is well established that personal reputation is an interest which may be protected by the principle requiring procedural fairness: see *Mahon v Air New Zealand* [1984] AC 808 at 820.

But the process must be viewed in its entirety. In *Ainsworth v Criminal Justice Commission* (1991-92) 175 CLR 564 the High Court dealt with a situation where an inquiry was conducted by a statutory body and the report furnished to a Parliamentary Committee which then tabled it in Parliament. Mason CJ, Dawson, Toohey and Gaudron JJ said at 578:

> *It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness': South Australia v O'Shea (1987) 163 CLR 378 at 389. (emphasis added)*

In *Kiao v West* (1985) 159 CLR 550 Mason J in the High Court described procedural fairness as 'the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case' (at 585).

In *National Companies and Securities Commission v News Corporation Ltd (1984)156 CLR 296* (again in the High Court) Gibbs CJ remarked (at 316) that 'the rules of natural justice may vary from case to case even though the same power is being exercised'.

As observed by Owen J in *Edwardes V Kyle And Anor* (1995) 15 WAR 302

> *The notion of procedural fairness demands that a person be given notice of what is put against him and be given a real opportunity to be heard. He must be given sufficient particulars of contentious matters to allow him to respond by way of correcting or contradicting the adverse material in a meaningful way: Kanda v The Government of Malaya [1962] AC 322 at 337; Kioa (supra) at 587.*

> *The obligation to supply particulars of allegations is more pronounced where the subject includes specific allegations than it is in a general inquiry into a particular topic without precise allegations as to conduct: Bond v Australian Broadcasting Tribunal (1988) 19 FCR 494 at 510.*

In determining what is a 'reasonable opportunity' for the purposes of section 86, 'reasonableness' can vary markedly according to the circumstances. Factors which might affect 'reasonableness' include the level of seriousness of the adverse matter (bearing in mind that the Commission may not express a view as to the commission of a crime or disciplinary offence), and whether there have been previous opportunities to consider or comment on adverse matters either in the course of an examination or in the period of time following an examination during which submissions or communication with the Commission might occur. Some persons who were examined in public hearings in relation to Smiths Beach made supplementary submissions to the Commission shortly after giving evidence and long before the completion of this report.

What is a 'reasonable opportunity' may vary widely and factors can be listed on either side of an argument for or against the assertion that an opportunity has been reasonable.

What is clear, however, is that the test of a 'reasonable opportunity' is an objective test. The Commission must satisfy itself that a reasonable opportunity has been afforded in the circumstances. It is not for the Commission to satisfy the person affected or purportedly affected that the opportunity to comment on a potentially adverse matter has been reasonable. It is most certainly not the role of the Commission to answer lengthy correspondence requesting particulars and claiming, indeed demanding, compliance with section 86 by provision of detailed evidence, reasoning and provision of the full text of a draft report.

It will never be in the public interest that the tabling of a report be delayed for protracted periods by extensive correspondence or by complying with demands made in extensive and protracted correspondence. Unlike some administrative decisions (for example, a decision to deport), there are no immediate consequences of the publication of an adverse matter or an expression of an opinion as to misconduct or a recommendation as to disciplinary action. However, reputations can be affected by such publication and, for that reason, the Commission takes its obligation under section 86 very seriously. But the Commission alone must form its own view as to whether or not there has been compliance.

A Commission opinion that misconduct has occurred is not, and is not to be taken as, a finding or opinion that a particular person has committed a criminal offence or a disciplinary offence.[10]

[10] Section 23(2) of the CCC Act.

The difference between the expression of such opinions and the publication of judicial findings has a bearing on the manner in which procedural fairness is afforded. The Commission concurs with the observations of Roger Gyles QC (as he then was) in the *Royal Commission into Productivity in the Building Industry in New South Wales* (1991-1992) when he said:

> *I can say that I do not accept that in this type of inquiry an adverse finding is the equivalent of a finding of disputed fact, or any criticism of a party, or of the exposure of evidence or material which might reflect badly on a person. Nor do I accept that a warning must be given of all possible ramifications of each piece of evidence before it can be referred to in the Report. I do agree that a party should not be confronted for the first time in a Report with a true adverse finding upon a totally new point or issue which it could not have reasonably anticipated. I do not accept that this anticipation can only come from an express statement or warning by the Commissioner or Counsel Assisting.*

It is noted that not only does the Commission concur with those observations but so also did Hon. Justice Owen, sitting as a Royal Commissioner in the *HIH Royal Commission,* and Commissioner Cole QC, in the *Royal Commission into the Building & Construction Industry.*

Circumstances would be very rare indeed in which the Commission would provide the draft report to a person in respect of whom an adverse matter may be expressed. Neither is provision of the draft of a report the practice of Royal Commissions or of Independent Commission Against Corruption. One reason this is so is that to do so would often involve revealing the Commission's views about persons other than the person to whom the opportunity is afforded.

Lord Denning MR said in *Re Pergamon Press*, [1971] Ch 388 at 399:

> *It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see In te Grosvenor & West-End Railway Terminus Hotel Co Ltd (1897) 76 LT 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see Hearts of Oak Assurance Co Ltd v Attorney-General [1932] AC 392. They do not even decide whether there is a prima facie case, as was done in Wiseman v Borneman [1971] AC 297.*
>
> *But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: see Re SBA Properties Ltd [1967] 1 WLR 799. Even*

> *before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see s 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.*
>
> *Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see R v Gaming Board for Great Britain: Ex parte Benaim and Khaida [1970] 2 QB 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.* ***They need not quote chapter and verse. An outline of the charge will usually suffice.*** *(emphasis added)*

In *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 84 ALR 646 at 664, Wilcox J said:

> *An obvious way of ensuring that the company would not be 'left in the dark' would be for the Commission to give notice of any tentative adverse conclusion. But this can hardly be necessary in a case where the subject matter of a potential criticism has been flagged as an issue, in the presence of the affected person, during the course of the inquiry; and particularly if questions have been directed to that matter by counsel assisting or by members of the tribunal themselves.*
>
> *I do not wish to suggest that occasions will never arise in which it will be appropriate for an investigator, like the tribunal, to direct the attention of a party to a particular matter. In rare cases the investigator might do this by indicating a tentative view upon a point: see, for example, the procedure suggested by Woodward J in Freeman v McKenzie (1988) 82 ALR 461. The investigator might simply express concern about the adequacy of the material relating to an aspect of the case. Judges frequently take this course, in an endeavour to gain the maximum assistance from the parties in resolving an issue. In an unusual case—like Mahon, in which the adopted procedure obscured from Air New Zealand the significance of evidence which the Royal Commissioner regarded as condemnatory of that party's conduct—there may be a positive obligation upon the investigator to call attention to a point. But this course will hardly be necessary in a case where the relevant matter has been clearly identified as an issue and has been the subject of contested evidence.*

Until a report is tabled or otherwise published or the Commission indicates that it is about to table or publish it and no further changes to the report will be made, neither the report itself nor the investigation to which it relates is finalised. That is so because section 86 implicitly requires the Commission to take into account representations (if) made by a person in respect of whom an adverse matter may be published and therefore. if persuaded by those representations, to change its draft report.

For the reason that an investigation is never finalised prior to this point, its content may well vary substantially through the course of revision of various drafts of a report. The Commission may receive information from many sources. For example, it is at least conceivable that representations on behalf or by one person could have a bearing upon the section 86 protection to be conferred to another. What the Commission may propose publishing at one time may be added to or subtracted from or varied in a subsequent draft and the protection that is afforded any person in those circumstances continues to be the protection afforded under section 86.

It is for the Commission to form a view at the appropriate time whether there has been a reasonable opportunity to make representations in all the circumstances.

It is not the Commission's duty, nor arguably in the public interest, to be required to satisfy persons in respect of whom an adverse matter may be expressed, or any other person, that a reasonable opportunity to make representations has been afforded the person, nor is it in the public interest for completion of reports such as the present to be unreasonably delayed.

The Commission's view as to whether a person or body has had a reasonable opportunity to make representations can only be formed after reaching a considered position as to the proposed content of its draft report.

The nature of the 'reasonable opportunity' under section 86 of the CCC Act, is to be identified in each instance in part by the other statutory provisions in the CCC Act which articulate the purpose, functions and powers of the Commission.

Although statutory provisions vary considerably from act to act the Commission has applied the principles which flow from cases such as those discussed above in order to establish an appropriate policy in relation to section 86.

It is important to acknowledge that the procedural fairness to be afforded must be balanced against the public interest in being informed of the outcome of the Commission's investigation in a coherent and timely manner.

As a general rule, the Commission in relation to section 86 will:

- First, pay regard to the extent to which the 'adverse' matter is indeed adverse, bearing in mind limitations arising under section 23 of the CCC Act.
- Second, in deciding on the amount of time and the amount of matter to provide to a person or body, take into account the extent to which the matter is in fact adverse.
- Third, rarely if ever, supply the whole draft report to a person or body affected.
- Fourth, take into account what, if any, other opportunities there have been to make representations in relation to the adverse matter.

- Fifth, give written advice to the person or body affected of the possible adverse matter which may be published, and
  a. will require that communication to be kept confidential
  b. allow sufficient time (having regard to the first two points above) for the person or body who may be affected to digest and respond to the material by making representations; and
  c. will acknowledge and consider those representations.
- Sixth, where the representations persuade the Commission to remove the adverse material, it will do so, but will be unlikely to convey that to the person or body affected prior to publication.
- Seventh, where the representations persuade the Commission to soften or reduce the criticism which might be made, it will do so but will not necessarily convey that to the person or body affected prior to publication.
- Eighth, repeat this procedure if and when, for whatever reason the Commission proposes to publish new or different material which may constitute adverse matter.

1.4 Expression of opinion on Conduct Falling Short of Misconduct

By section 84(1) the Commission may prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct. By section 84(3) the Commission may include in such a report statements as to any of its assessments, opinions and recommendation and the reasons for them.

The words ‘assessments’ and ‘opinions’ are a reference back to section 22 of the CCC Act, which states that the Commission may make assessments and form opinions as to misconduct.

The ‘recommendations’ which may be made by the Commission are recommendations as to whether consideration should or should not be given to the prosecution or taking of disciplinary action against persons, or for the taking of other action the Commission considers should be taken in relation to the subject matter of its assessments or opinions the result of its investigations (section 43(1)).

Significantly, the notice to be given to a person or body under section 86, is not confined to ‘assessments, opinions and recommendations’ (that is, of or as to misconduct). The term used in that section is ‘matters adverse to a person or body’. That term must contemplate that the Commission may properly include in a report matters which are adverse to a person or a body yet do not amount to assessments or opinions of actual misconduct.

One of the functions of the Commission is to help prevent misconduct (section 17(1)). Without limiting the ways the Commission performs that function, it may do so by providing information relevant to its prevention and education function to the general community (section 17(2)(c)), generally increasing the

capacity of public authorities to prevent misconduct by providing advice and training to those authorities (section 17(2)(cb)), and ensuring that in performing all its functions it has regard to its prevention and education function (section 17(2)(ca)).

The giving of reasons for an opinion that certain conduct does not amount to 'misconduct' may well involve explaining that, although the conduct is undesirable, inappropriate, unwise, imprudent, dangerous or any other number of other things, it does not fall within the definition of 'misconduct' in section 4 of the CCC Act. The giving of reasons may well involve explaining why that is so. It may also be self-evident from the narrative. Furthermore, the Commission's obligation to prevent future misconduct may necessitate expressing a critical view about that conduct because, if unchecked, or if repeated in other circumstances, it may be likely to constitute, or lead to, misconduct. Such criticism would be within the Commission's reporting function, whether or not it was the basis of a recommendation.

The Commission considers that adverse comment falling short of 'misconduct' may properly be made, where justified, whether in respect of a public officer or some other person, if relevant or related to an allegation of misconduct by a public officer.

Where conduct has caused, led to or induced misconduct, it matters not whether the former was initiated by a public officer or a private citizen. If recording the conduct is central to, and necessary to enable, a comprehensive and comprehensible report, the Commission will publish it.

Where those circumstances exist, the Commission gives reasons for the adverse opinion, supported by a summary of the relevant evidence as well as reason(s) for expressing the opinion.

1.5 Reaching an opinion

An opinion formed by the Commission under the CCC Act that misconduct has occurred is a serious matter. It may affect individuals personally and professionally. It has the capacity to affect relations between those of whom the Commission has adversely mentioned, and their family, friends and acquaintances. Accordingly, there is a need to exercise care in forming opinions as to the occurrence of misconduct.

The Commission does not act as some roving moral guardian, with its own idiosyncratic views of what is in the public interest.

The Commission is a creature of statute and its rights and obligations are governed by statute. 'Misconduct' is expressly defined, but even within the definition (e.g. s.4(d)) what may be 'impartial' or what may constitute 'misuse' can give rise to debate. But the Commission's function is to measure conduct against the statutory definition before expressing an opinion that it constitutes 'misconduct', (see *Greiner v ICAC* (1991) 28 NSWLR 125)

1.6 Perpetual Nature of the Commission and Commissioner

The CCC Act provides that the Commissioner is to perform the functions of the Commission. It also provides that an Acting Commissioner performs the functions of Commissioner, among other situations, during a vacancy of that office.

As the reports of the Commission are not judicial, unlike the completion of a judgment, there is no statutory basis (and no need in the circumstances) for a Commissioner whose term has expired to complete a report after that retirement.

The Commission's report contains its assessments, opinions and recommendations in respect of misconduct. In formulating the report the Commission has undertaken a number of steps to arrive at its views and to afford procedural fairness to those who may be adversely affected by views expressed in the report:

- The Commission conducted extensive investigations and, as a result, gathered a wide range of material.

- It then conducted examinations by way of private and public hearings, during which that material relevant to the matters examined in the hearings was produced.

- Transcripts of the public hearings were generally published twice daily during the hearings on the Commission's web site where they now remain. One purpose of doing so was to permit any person who may be directly or indirectly affected by any of the material presented, to examine and make representations about it.

- Counsel Assisting made written submissions to the Commission concerning any material which it was suggested should result in adverse misconduct opinions affecting public officers.

- Counsel Assisting played no role after making those written submissions (save for effectively withdrawing one submission on receipt of further information).

- Those public officers whom it was then thought may possibly be subject to misconduct opinions were provided the opportunity to make written submissions in response to the substance of the relevant portion of Counsel Assisting's submissions.

- A draft report, taking into account the available material and all submissions to that point, was prepared within the Commission.

- Commissioner Hammond assessed the material available to the Commission, Counsel Assisting's submissions and those submissions made by or for public officers in response.

- Commissioner Hammond then formed opinions as to whether any public officer had engaged in misconduct. In doing so, he placed a caveat on one opinion in regard to one public officer requiring that this be given further consideration.

- Following the Commissioner's retirement, Acting Commissioner McKerracher QC reviewed the draft report as it then was; reviewed all the evidence and the submissions made by, or for, public officers in response; reviewed Commissioner Hammond's opinions; and also sought further information with regard to one of those public officers.

- In conducting this review, the Acting Commissioner had access to all of the Commission's holdings in regard to this matter, including documents, transcripts, and audio and video recordings, both public and private in nature.

- The Commission then provided the opportunity for other persons, who may possibly be subject to adverse mention within the report, to make representations. In addition, one of the public officers was given a further opportunity to make representations on another possible adverse matter.

- The latter process, of engaging in extensive correspondence with persons who may be affected by adverse matters, consumed several months and occasioned many revisions and re-drafts of the report. It also involved correspondence with the Parliamentary Inspector in relation to issues raised by certain persons affected.

- Acting Commissioner McKerracher QC then considered those representations and determined in settling the entirety of the report, the Commission's assessments, opinions and recommendations in relation to all matters, before authorising the tabling of the Commission's report in Parliament.

1.7 Matters Adverse

Section 86 of the CCC Act has been referred to above.

'Matters adverse' is not defined in the CCC Act but is generally taken by the Commission to include an adverse comment, an opinion that misconduct has occurred, expressing an adverse opinion in relation to a disputed fact, a criticism of a person or body or the exposure of information or material which might reflect badly on a person.

The Commission has erred on the conservative side in affording the opportunity under section 86. In some instances, persons given such an opportunity did not consider the material foreshadowed as being 'adverse'.

CHAPTER TWO
THE LEGISLATIVE AND REGULATORY FRAMEWORK

Prior to describing the Commission's assessment of the key information and material available to it, it is useful to place the obligations of local government councillors and State public sector officers into their proper legal context.

This is important in understanding the Commission's findings with respect to both the funding of local government candidates and the responses to conflicts of interest identified by this investigation.

2.1 Local Government Act 1995

In regard to councillors, the *Local Government Act 1995* (the Local Government Act) provides a legal framework within which local government operates. *The Local Government (Election) Regulations 1997* are made under section 4.59 of the Local Government Act. These regulations require that all candidates complete and submit a return disclosing all electoral gifts or promises with a value of $200 or more. The period covered by the declaration begins six months before the election and ends three days after it for unsuccessful candidates or on the start date of financial interest returns for successful candidates (usually when they commence their position by taking the relevant declaration). The regulations provide that the candidate must identify the 'true source' of the gift and that the candidate must ensure that information is not 'false or misleading'.

Section 5.62 of the Local Government Act also provides that councillors who have received notifiable electoral gifts must declare that interest in the same way as personal financial interests. The interest can be declared either in writing or orally prior to a matter being raised at a meeting.

2.2 Financial Interests Handbook

The Department of Local Government and Regional Development (DLGRD) in turn provides a Financial Interests Handbook to councillors that is available from the department's website. Relevantly, the handbook refers to the obligation to disclose where there is a financial interest held by a person who is a 'close associate'. This includes those who have provided election-related gifts and where a spouse or de-facto spouse has a close association with a person with an interest in a matter before the council. The handbook stresses that the obligation to disclose is on the individual councillor and that care should be taken to ensure that the disclosure is complete and accurate. After such a disclosure, a councillor is required to leave the room and may only be present or participate if allowed by the other members (or given permission by the Minister on written application made beforehand).

2.3 Financial Interest Returns

Elected councillors are also obliged to complete financial interest returns. Gifts must be disclosed in these returns. The first return (a 'primary return') must be lodged within three months of the start date of the councillor – that is the day on which the councillor takes the required declaration after being elected. Thereafter councillors are required to complete returns annually. This declaration is required by the Local Government Act. Councillors are required to declare that they will act faithfully, honestly and with integrity and that they will abide by their respective Code of Conduct. The Busselton Shire's Code of Conduct includes sections dealing with conflicts of interests, disclosure of interests affecting impartiality, gifts and bribery. Clause 2.4 provides that gifts should not be received from a person who is likely to undertake business that requires authorisation from the Shire. The Code of Conduct deals with a broader range of disclosure issues than the financial interests dealt with by the Local Government Act, but does not supplant those obligations. The declaration of non-financial interests is required to be included in Local Government Codes of Conduct by regulation 34C of the Local Government (Administration) Regulations. The disclosure of a non-financial interest does not require the member to leave the room.

2.4 Department of Local Government and Regional Development Guidelines

The DLGRD issues guidelines (available from its website) to assist councillors. Guideline No.1 (Disclosure of Interests Affecting Impartiality) and Guideline No. 12 (Elected Members Relationships with Developers) are relevant. Guideline No. 12 was introduced in April 2006, and therefore after most of the events discussed in this report, but its contents provide a useful guide as to how councillors should conduct themselves. In particular, councillors should avoid meeting with developers or their representatives individually in any place in which it could be perceived that hospitality is being provided. It also points out the compromising effect of gifts and suggests that councillors should consider refusing them (paragraphs 24 - 26).

2.5 State Legislative and Regulatory Framework

In regard to public officers other than local government councillors and members of Parliament, the Public Sector Code of Ethics (the Code) must be complied with pursuant to section 9 of the PSMA. Both the Code and the PSMA emphasise the need to act with integrity and to be scrupulous in the use of information. One of the express guiding principles of the Code is justice, which is explained as 'being impartial and using power fairly for the common good'. There is also a requirement to declare any interest that may conflict with the performance of a public duty.

The Code of Ethics is a short document. The Code was first established in 1996 and a revised version came into effect on 8 May 2007.

The web page for the Office of the Public Sector Standards Commissioner asserts that public sector bodies must 'comply with the provisions of…codes of ethics….and any code of conduct applicable to the public sector body or employee concerned.'[11]

The Public Sector Standards Commissioner's web site[12] describes the three key principles of the Code of Ethics as:

- ***Justice*** *– being impartial and using power fairly for the common good. It means not abusing, discriminating against or exploiting people.*
- ***Respect for Persons*** *– being honest and treating people courteously, so that they maintain their dignity and their rights are upheld. It means not harassing, intimidating or abusing people.*
- ***Responsible Care*** *– protecting and managing with care the human, natural and financial resources of the State. It means decisions and actions do not harm the short and long term well being of people and resources.*

Scope and Coverage

The Western Australian Public Sector Code of Ethics applies equally to:

- *Public sector employees, including chief executive officers, chief employees and ministerial staff*
- *Public sector bodies established or continued for a public purpose under written law including boards and committees*

Working relationships within the Western Australian Public Sector

The Code of Ethics has been developed to help agencies consider the risks to ethical behaviour and embed ethical behaviour in the activities and culture of the agency.

It is useful to consider the risks to ethical behaviour, the agency values and the Code of Ethics in terms of the activities and the working relationships. This helps identify clear expectations for acceptable behaviour in the workplace.[13]

The 2007 amendments deal in particular with ministerial staff, but to the extent the Code deals with the first principle of justice, its content is not changed in any material way from the code that was in place during the events examined in this report.

[11] Available at: www.opssc.wa.gov.au/ethics/principles.htm
[12] Available at: www.opssc.wa.gov.au/ethics/code of ethics/index.htm
[13] Ibid

Of relevance to this report, the justice principle requires individuals to act with integrity to the highest ethical standard and to comply with any applicable code of conduct.

Administrative Instructions were issued under *Public Service Act 1978* for the purpose of producing best practice guidelines for public servants. Administrative Instruction 711 provides that public officers shall not disclose any information that comes to them in the course of their official duties. Provision of confidential information to another in order to give that other an advantage (and in the absence of a duty to provide that information) would clearly be improper. Using a power or making a decision for the purpose of benefiting another (rather than with regard to the merits) would be an abuse of power and clearly improper.

Section 80 of the PSMA defines action that constitutes a breach of discipline. This includes contravening the PSMA or any public sector standard or Code of Ethics, committing an act of misconduct or being negligent or careless in the performance of duties.

A distinction is made between minor and serious breaches of discipline. Only serious breaches can result in termination of employment and, therefore, only such breaches can constitute misconduct for the purposes of section 4 of the CCC Act.

There is no definition of 'serious breach' and the 'Disciplinary Procedures Guide' provides that 'agencies must use their own judgement when determining if a breach is serious or minor'.

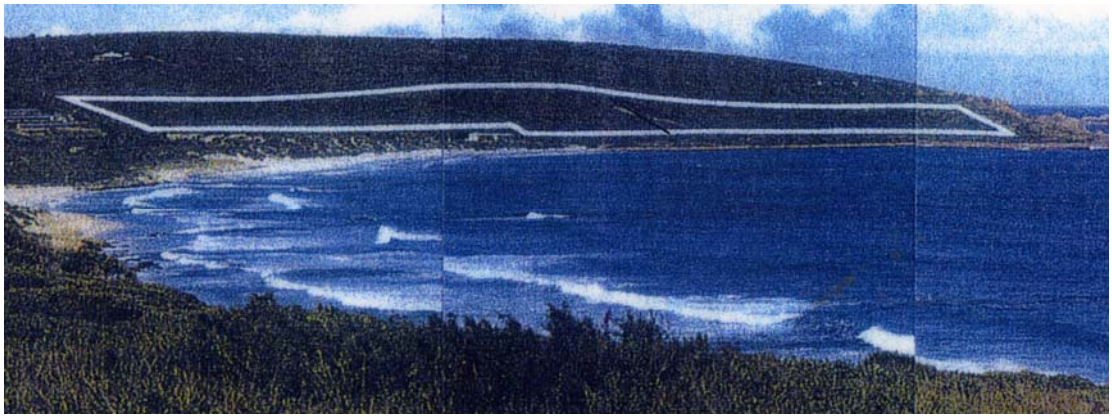
Some of the submissions received from persons likely to be adversely affected by the Commission's report, referred to the fact that Shire Councillors and Members of Parliament are not bound by the public sector Code. While this is correct it does not mean that such persons are immune from the forming of an opinion as to misconduct under section 4 of the CCC Act. Sub-section (d)(vi) contains a deeming provision which has the effect of applying standards that apply to public sector officers to other persons for the purpose of the definition of 'misconduct'. That such persons should be expected to act with integrity, as an example, should not come as a major surprise.

CHAPTER THREE
CANAL ROCKS PTY LTD
AND THE SMITHS BEACH DEVELOPMENT

3.1 The Proposed Development

The land at the centre of the Commission's investigation comprises 45.3 hectares adjacent to Smiths Beach in the south-west of the State, located at Sussex Location Lot 413 Smiths Beach Road, Yallingup. The land is approximately 10 kilometres south-west of the Dunsborough town centre and south of Yallingup. It is in a prominent location on a north-facing slope above the beach.

Canal Rocks Pty Ltd owns the land at Smiths Beach as trustee for the Canal Rocks Unit Trust. There are 21 investors who are unit holders in that unit trust, with a varying percentage holdings between 13.29 per cent and 0.83 per cent. Canal Rocks Pty Ltd proposes to develop the land on behalf of the unit trust.



The Smiths Beach Site

One of the directors and investors in Canal Rocks Pty Ltd is a Perth-based real estate agent, Mr David McKenzie, and the business is run from his offices in Claremont. Mr McKenzie has the principal responsibility for managing the development project in respect of the land at Smiths Beach. He has authority to act autonomously in this regard. In particular, he has engaged consultants in relation to the development proposal and represents Canal Rocks Pty Ltd's interests at meetings with State and local government officers.

The local government authority with responsibility for the area is the Shire of Busselton. The land is zoned 'Tourist' under the shire's Town Planning Scheme number 20 (TPS 20), with additional use zoning also permitted. This allows for residential, as well as tourist, development of the land. The land is also designated as a 'development investigation area' under the TPS 20, which means that a Development Guide Plan (DGP) must be prepared and approved by the Shire and the Western Australian Planning Commission prior to any subdivision or development of the land.

Canal Rocks Pty Ltd submitted a Development Guide Plan to the Shire of Busselton in September of 1999. That plan showed that the owner was proposing extensive tourist and residential development on the land. As required by the Town Planning Scheme, the plan was advertised for three months in late 2000 and early 2001. In response, the Shire received a total of 3330 submissions, of which 3058 were objections. The owner then withdrew the plan. The number of objections to the plan reflects the level of public interest and controversy that has surrounded this proposed development.

Following the advertising of the Development Guide Plan, in late 2000 a public meeting was held at the Yallingup Hall. The meeting was attended by hundreds of local residents. The Smiths Beach Action Group was formed following this meeting. The group was addressed by a number of politicians regarding the steps that would be taken to ensure the area would be appropriately protected. These statements were made in the context of the pending State election.

The State election was held in February 2001. Following the election, the new Minister for Planning and Infrastructure put in place a process for increasing the level of control in respect of possible future development of the land. This involved amending a document entitled the Leeuwin-Naturaliste Ridge Statement of Planning Policy (LNRSPP).

Statements of planning policy are prepared by the Western Australian Planning Commission and are intended to guide local governments in the preparation or amendment of town planning schemes and when making planning decisions. The express purpose of the LNRSPP is to provide a strategic planning framework for the area between Cape Naturaliste and Cape Leeuwin for the next 30 years. The planning policy is intended to provide clear advice to developers and ensure that planning decisions for the area are consistent. It is intended to promote sustainable development, conservation, and land and resource management.

Following the 2001 State election, amendments to the LNRSPP were drafted, approved by Cabinet and gazetted on 31 January 2003. Those amendments proposed that there be additional controls on future development of the land at Smiths Beach; in particular, restrictions on subdivision: a ratio of not less than 70 per cent tourist development and not more than 30 per cent residential; a maximum density of R25, which basically equates with 25 blocks per hectare; and requirements that the size, nature and location of any development have regard to the overriding need to protect the visual amenity and environmental values of the area.

These amendments were intended to significantly limit the ways in which the land could be developed; however, the policy does not necessarily prohibit a development that is contrary to it. It is a policy only and intended as a guide, not an instrument of regulation. For that reason, in April 2003 following the introduction of the amendments, the Minister for Planning and Infrastructure recommended that the Shire review TPS 20 in relation to Smiths Beach with a view to ensuring that the scheme conformed to the amended statement of planning policy. In simple terms, the intention was to encourage the Shire to

bring its planning requirements up to the new standards set by the planning policy and to thereby ensure that any development at Smiths Beach had to comply with those standards.

3.2 The Engagement of Consultants

By early 2003, Mr McKenzie had experienced difficulties in making contact with senior public servants and members of the State government for the purpose of advancing the Canal Rocks Pty Ltd development proposal. It was suggested to him that Mr Brian Burke and Mr Julian Grill could be effective in this regard.

Mr Burke is a former Premier of the State. Mr Grill is a former Minister. They were operating a consultancy business at this time, which intended to 'provide general strategic advice to a wide range of people about a wide range of matters'.[14] Mr Burke and Mr Grill have an informal business relationship by virtue of which income earned from joint clients is divided evenly between them.

Canal Rocks Pty Ltd retained Julian Grill Consulting to act for them[15]. Julian Grill then retained Brian Burke through Abbey Lea Pty Ltd. Julian Grill Consulting would invoice Canal Rocks Pty Ltd and Abbey Lea Pty Ltd would invoice Julian Grill Consulting for half the amount paid by Canal Rocks Pty Ltd.

Mr Burke, Mr Grill, Mr McKenzie and others met at offices in Subiaco. The purpose of this meeting was to give Mr Burke and Mr Grill a briefing as to the history and present position of the development proposal.

After being provided with further information, a retainer was agreed. The terms of the retainer appear not to have been written down, but it is apparent that initially the retainer was as high as $4,750 per month, and was later reduced to $1,100 per month because the work continued for longer than anyone expected. A success fee of between $150,000 and $175,000 was discussed, success being determined by planning approval for the development.

Mr Burke stated that he regarded the then existing development proposal as 'too aggressive', which he explained as meaning that Canal Rocks Pty Ltd wanted to sub-divide the land into too many blocks.[16] He also took the view that consideration had to be given to the height and size of the proposed buildings. He gave advice in this regard to Mr McKenzie. He also suggested that it was important to foster constructive relationships with officers in both the Shire and relevant State Government departments.

[14] Transcripts of Hearings, 6 November 2006, p 849
[15] With effect from 22/02/2006, Julian Grill Consulting became Julian Grill Consulting Pty Ltd
[16] Transcripts of Hearings, 6 November 2006, p 856

In late 2003, Mr Burke introduced Mr Norman Marlborough to Mr McKenzie. Mr Marlborough was a long-standing friend of Mr Burk,e and Mr Burke believed that he could be 'of some assistance in representing the position' of Canal Rocks Pty Ltd.[17] Mr Marlborough was then the member for Peel, an electorate distant from where the proposed development was to occur. Mr Burke, however, said that Mr Marlborough was a person whose ability he respected and who had had some experience in coastal developments in his own electorate. Mr Burke asked Mr Marlborough to interest himself in the development and raise the matter with the Minister.

Information obtained by the Commission indicated that Mr Grill and Mr Burke intended to meet with Mr Marlborough prior to attending a meeting in Subiaco in late 2003. This information refers to Mr Marlborough being asked to seek information as to the progress of the LNRSPP and as to the Minister's intended approach to that amendment. It is evident that Mr Marlborough was expected to obtain and provide this information for Mr Burke. Mr Burke's testimony before the Commission was that it was his belief that Mr Marlborough's interest was to be based on an objective assessment by the latter of the merits of the project. Neither Mr Burke nor Mr Grill could recall whether any such information was received.

It was in the interest of Canal Rocks Pty Ltd that the amendment to the LNRSPP not be approved as it would limit the size and, hence, potential value of the ultimate development. Clearly any information as to the content and progress of the amendment was valuable to Canal Rocks Pty Ltd because it would assist in formulating any course of action to seek variation or delay of the amendment.

The LNRSPP was approved and gazetted in January 2003. But there followed a significant delay in the policy being incorporated by the Shire into TPS 20. Notwithstanding the existence of the amended LNRSPP, it would have been advantageous to Canal Rocks Pty Ltd to submit a DGP to the Shire under the existing TPS, which is before the TPS was amended to conform to the LNRSPP, and be more restrictive of development. Before the TPS could be amended, the broad statements of policy contained in the LNRSPP had to be rendered into the more specific requirements suitable for a town planning scheme.

3.3 The Informal Co-ordinating Committee

In late 2003, an informal committee was established to resolve planning issues between the various relevant parties. The Department for Planning and Infrastructure (DPI), the Department of Conservation and Land Management (CALM), the Shire and Canal Rocks Pty Ltd were all represented on this committee. It was chaired by Mr Paul Frewer, then the deputy Director-General of the DPI and Acting Director General of the Department of Water. One of the initial objectives of the committee was to finalise methodologies that were to be applied to the assessment of the site.

[17] Ibid, p 862

The methodologies were settled in early 2004 and thereafter the committee fell into abeyance.

One of the CALM representatives on the committee was Mr Peter Hanly. Mr Hanly was the regional planning officer with CALM. In the case of developments of this nature it was usual for CALM to be informed and to provide advice to DPI and the Shire. CALM also had a direct interest as it manages an adjoining national park. Mr Hanly formed the view that the proposed development would have greater visual impact than was being suggested by the developer. The reason for this, he believed, was that the soil depth at the site was insufficient to allow for foundations and drainage work and that fill would be required. This would have the consequence that the height of the buildings from the existing ground level would be greater than anticipated. The significance of this was that the buildings may be visible from a greater distance than was readily apparent from Canal Rocks Pty Ltd's proposal, and may have been visible from a walking trail maintained by CALM. It is likely that this would have an adverse impact on the prospects for approval of the development.[18]

Mr McKenzie perceived Mr Hanly as being biased against the development. This is a contention strongly rejected by Mr Hanly and Mr Chandler, his manager at CALM. Mr McKenzie had the view that Mr Hanly was providing advice regarding the visual amenity of the development that was adverse to the developer and beyond the legitimate scope of CALM. These views were discussed with the consultants and Mr Burke proposed that an approach be made to senior officers within CALM.

An initial approach was made on 20 June 2005. On that date Mr McKenzie and Mr Marlborough met with the Executive Director of CALM, Mr Kieran McNamara, and an executive manager of that department, Mr Mark Brabazon. There were conflicting explanations as to how it was that Mr Marlborough came to be in attendance. Mr Marlborough said he was approached by Mr McKenzie to attend[19] but Mr Burke denied any involvement in arranging this meeting. However, in a subsequent telephone conversation with Mr McKenzie, it was stated by Mr Burke that he arranged for Mr Marlborough to attend. The clear impression that Mr Burke gives in this call is that he was able to call upon Mr Marlborough to lend assistance to his client when needed.

The 20 June 2005 meeting at CALM was not a constructive one. Complaints as to the actions of CALM officers were not well received. According to Mr Brabazon, Mr Marlborough endeavoured to salvage the situation by commenting as he was leaving that 'these guys aren't that bad, can you do something to help them on their way, to sort out the problems they are having'.[20] Mr Marlborough accepts that he said something to this effect.[21] The outcome was that Mr Chandler was asked to involve himself more in the

[18] Transcripts of Hearings, 7 November 2006, p 1019
[19] Transcripts of Hearings, 8 November 2006, p 1061
[20] Transcripts of Hearings, 31 October 2006, p 632
[21] Transcripts of Hearings, 8 November 2006, p 1059

process, but not it would seem because there was any acceptance of impropriety on Mr Hanly's part, rather to give Mr Hanly support and ensure that CALM was represented at a senior level.[22] Indeed, no suggestion was made to Mr Chandler that Mr Hanly's actions were in any way inappropriate.

Whether or not Mr Hanly's opinion as to the visual amenity was correct, it cannot be doubted that he acted in good faith and in the diligent performance of his duties. While his views no doubt had potentially adverse consequences for the developer, the material does not support a conclusion that he was biased against the development. His views had a sound basis in fact in that he had undertaken some soil depth measurements. The suggestion that Mr Hanly was acting beyond the proper limits of CALM responsibility was rejected by both he and Mr Chandler. In fact, Mr Chandler told the Commission he had 'the highest regard for Mr Hanly's ability and integrity', describing him as 'an exemplary, very high calibre planning officer' with the 'highest integrity'.

Mr Chandler confirmed that soil depth testing was a normal part of the planning process and that CALM had a legitimate reason to have an interest in this issue.[23] The importance of this is that at a later meeting in 2006 similar complaints by Mr Burke appear to have been treated differently.

3.4 The Approach by Mr Noel Crichton-Browne to Mr Troy Buswell

Early in the Burke/Grill consultancy, Mr Burke had suggested that one of the things Canal Rocks Pty Ltd should look to do was make approaches to Busselton Shire councillors to endeavour to persuade them that the proposed development should be supported. Mr Burke was of the view that, given the political demographic of the area, a person with Liberal Party connections could be more effective in making such approaches. Accordingly he recruited Mr Noel Crichton-Browne to assist.

Mr Crichton-Browne is a former Liberal Senator and former president of the Liberal Party. Though no longer a member of the Party, he retains a broad circle of contacts within it. One of the first matters Mr Crichton-Browne attended to was an approach to Mr Troy Buswell.

Mr Buswell was, at that time, the President of the Shire and, later, became a member of State Parliament. In early 2003, the council had passed a motion requiring formal consultations with the developer and other affected parties as part of the process in advancing an amendment to TPS 20. On 26 March 2003, Mr Buswell proposed that that motion be rescinded and replaced with a requirement that the Shire simply use its best endeavours to consult with the affected parties. This rescission motion was passed. Mr Buswell said that his

[22] Transcripts of Hearings, 7 November 2006, p 997
[23] Ibid, pp 1006-1008

concern in moving the motion was to ensure that the process of amendment was not unduly delayed.

Canal Rocks Pty Ltd was concerned about the rescission motion, as its interests were in having the amendment delayed for as long as possible so that it could have a better chance of having its development approved under the less restrictive existing TPS 20.

Mr Buswell was known to have political aspirations. He was an active member of the Liberal Party and had sought pre-selection for a seat in the previous State election. Mr Crichton-Browne contacted Mr Buswell and arranged a meeting at a cafe in Busselton. In the Commission's view, there is no doubt that this approach was made in the course of Mr Crichton-Browne's work as a consultant for Canal Rocks Pty Ltd.

Mr Buswell and Mr Crichton-Browne agreed that the rescission motion had been discussed and Mr Crichton-Browne indicated that the developer did not have a favourable view of the actions of Mr Buswell in supporting the scheme amendment.[24] Mr Buswell denied that the meeting was heated, but did describe it as 'rigorous'. Mr Buswell said that Mr Crichton-Browne did refer to Mr Buswell's political aspirations in passing, but that no threat was made. Mr Buswell said that Mr Crichton-Browne indicated that he felt it was disappointing that, as a person who espoused liberal values Mr Buswell had taken a stand that was effectively opposed to the Smiths Beach development.[25] Mr Crichton-Browne said that the meeting was 'perfectly civil' and that Mr Buswell did not appear to be at all concerned as to what was said.[26]

Information from others as to how Mr Buswell reacted at the time to the meeting is difficult to reconcile with his account. Two serving councillors were contacted by Mr Buswell immediately after his meeting with Mr Crichton-Browne and he told each of them that he had been approached by a person acting on behalf of a developer and that in future he would like an agreement that they would assist each other by ensuring that at least two councillors were present in such situations. He is reported as having told one of the councillors that Mr Crichton-Browne had threatened him with words to the effect that he (Mr Buswell) would be going nowhere in the Liberal party if he did not support the project. This councillor was also of the view that Mr Buswell seemed to be quite agitated in recounting what had occurred.

While Mr Buswell concedes that he spoke to the councillors, he denies that he said that any threat was made and has explained that his only concern was with the perceptions of others.

It should be noted that if a threat was made there is no reason to believe that Mr Buswell was influenced by it. There is no material that would suggest that he thereafter took a position that was favourable to the developer. If the

[24] Transcripts of Hearings, 30 October 2006, pp 504-5
[25] Ibid, p 507
[26] Transcripts of Hearings, 31 October 2006, p 544

accounts of the two councillors, one in particular, were accepted, and it is inferred that a threat was made, the actions of Mr Buswell at the time in reporting it are only to his credit.

It is important to acknowledge that the only two people present at the meeting both deny that any threat was made. If a threat was made, it is evident that Mr Crichton-Browne would have every reason for denying it. It is not so obvious why Mr Buswell would deny it. However, in this respect, regard might also be had to the fact that subsequent to that meeting, and by the time Mr Buswell appeared at the Commission, he and Mr Crichton-Browne seemed to have formed a closer acquaintance. This was evident from the fact that they had met to discuss political issues and the fact that Commission investigators were inquiring about their meeting at the cafe in early 2003. Indeed they had met in a car park at Parliament House the day before Mr Buswell was due to be interviewed by investigators.

Ultimately, it is impossible to conclusively determine the nature of the exchange between the two. Even accepting the accounts of either or both of the councillors, it would be difficult to determine whether an unambiguous threat was made or whether that was only Mr Buswell's perception at the time. It is clear, however, that Mr Crichton-Browne did use the opportunity to refer to Mr Buswell's political aspirations and, at the very least, this is indicative of the subtle means that can be used by a lobbyist with perceived political influence to endeavour to persuade an elected representative to a particular view.

3.5 The First Attempt to Amend the Town Planning Scheme

As has been noted, following the amendment of the LNRSPP in January 2003, the Minister wrote to the Shire urging that TPS 20 be amended. The process required staff at the Shire to prepare a draft amendment to the TPS, which would be sent to the council for approval before being released for public comment. The amendment to TPS 20 at this stage was known as Amendment 56. The amendment required more than a simple inclusion of the words from the LNRSPP into the TPS. Amendment 56 contained detailed requirements dealing with landscaping, rehabilitation, fire management and coastal and foreshore management.

The requirements proposed in the amendment had the potential to make development less profitable and, thus, were opposed by Canal Rocks Pty Ltd. Representatives of Canal Rocks Pty Ltd argued that the requirements were more onerous than was necessary to implement the LNRSPP. It was in the interests of Canal Rocks Pty Ltd if these requirements were not incorporated into TPS 20. Alternatively, if the amendment was delayed for long enough, the developer could seek to have a DGP approved under the existing scheme, thereby hoping to avoid the new requirements.

Where an amendment to a planning scheme has a significant environmental impact it is subject to an environmental impact assessment by the

Environmental Protection Authority (EPA). The procedure that is followed is for the Shire to refer a copy of the proposed amendment to the EPA so that a decision can be made as to whether an assessment is required. The intention is that amendments with the potential to adversely affect the environment will be assessed by the EPA to ensure that a consistent and coordinated approach to environmental protection is taken. The EPA has the power to issue an instruction that an environmental review be undertaken so that the impact of any proposed development can be assessed.

This case was unusual in that there was no DGP from the owner presently pending with the Shire. The amendment proposed by the Shire was not decreasing the level of control on possible development but increasing it, and this was being done in conformity with State planning policy. Furthermore, this amendment was initiated by the Shire itself and not at the instigation of a developer. The Shire was not seeking to develop the land, or to permit any specific development, but to place controls on what type of development could take place. For these reasons an amendment of this type would not be expected to attract a requirement that an environmental review be undertaken.

However, on 12 September 2003 the EPA wrote to the Shire and advised that it had decided to conduct an assessment. An instruction was issued to the Shire requiring it to prepare an Environmental Review. This would require the Shire to engage consultants and prepare detailed reports. The effect of this was to delay progress of the amendment and to impose a burden on the Shire to undertake a study of the environmental impact of any possible development of the land even though it was not the owner of the land, or the proponent of any such development. Furthermore, in the absence of a current DGP, the Shire could only speculate on exactly what type of development Canal Rocks Pty Ltd would ultimately propose.

The requirement by the EPA was not one that was expected by the Shire planners and not one that the responsible Shire planner had ever encountered before in such circumstances.[27] Because it believed that the requirement was inappropriate in the circumstances and practically impossible for the Shire to meet, the Shire sought to appeal the decision of the EPA to the Minister for the Environment.

That appeal was subsequently allowed, but with a suggestion that there could be negotiation between the EPA and the Shire regarding the instructions for an environmental review or that the amendment could be re-worded. The appeal was not determined for 12 months and, in the intervening period, the amendment to TPS 20 was in limbo.

An issue that arose for consideration at the Commission's public hearings was whether the decision of the EPA to require the Shire to conduct a review was a decision that involved any misconduct on the part of public officers. While the Commission, like the Shire, found the process to be rather curious in the circumstances, it has nevertheless become clear from written submissions for

[27] Transcripts of Hearings, 23 October 2006, p 45

the EPA and accompanying documentation that the internal processes within the EPA were comprehensive and it had received detailed legal advice on the appropriate procedure in the circumstances.

The letter from the EPA of 12 September 2003 was signed by Dr Walter Cox, the chairman of the EPA. He stated that the usual course when an amendment is referred to the EPA is that an officer would assess it to determine whether the amendment would have any environmental impacts. A recommendation would then be made to Dr Cox.[28] There is no reason to believe that such an assessment was not undertaken here or that Dr Cox did other than act in accordance with a recommendation made to him. He categorically denied that he had received any approaches in this regard from Canal Rocks Pty Ltd or anyone acting on its behalf.[29] There is no material to the contrary.

Through his counsel, Dr Cox provided extensive written submissions, dated 9 February 2007 and 10 May 2007, clarifying the processes undertaken by the EPA and the personnel involved in the decision to require the Shire to conduct an environmental review. These submissions included signed statements from Mr Kimberley Taylor, Director of the Environmental Impact Assessment Division (the EIAD) at the relevant time, Ms Marie Ward, a Senior Environmental Officer with the EIAD and Ms Alice O'Connor, also a Senior Environmental Officer with the EIAD. None of these public officers appeared at the public hearings.

The statement of Ms Ward, dated 9 February 2007, indicated that it was her decision, in consultation with Ms Natalie Thorning (an officer with the Department of Environmental Protection), to recommend that Amendment 56 should be the subject of an environmental review. Ms Ward stated that in making that decision:

> *I was not instructed, directed or influenced in any way by the Chairman of the Environmental Protection Authority, Dr Wally Cox, or any senior staff. My decision was based on the significance of environmental matters only and was not influenced in any way by any external persons, developers or consultants acting for developers.*[30]

3.5.1 Commission's Opinion regarding the EPA and the Environmental Assessment

Although the Shire's appeal was allowed, there is no basis for expressing a misconduct opinion in relation to the decision to require an environmental assessment.

[28] Transcripts of Hearings, 1 November 2006, p 676
[29] Ibid, p 681
[30] Written submission to the Commission of Ms Marie Ward, 9 February 2007.

CHAPTER FOUR
BUSSELTON SHIRE COUNCIL
AND THE SMITHS BEACH DEVELOPMENT

4.1 Introduction

The information that emerged at the public hearings was that the developers of Smiths Beach did not believe that their proposal had been given a 'fair go' by the Busselton Council. A decision was therefore made to find candidates to contest the 2005 Busselton Council elections who would be more favourably inclined towards the Smiths Beach development proposal than the sitting councillors. It was also decided that Canal Rocks Pty Ltd would offer financial support to these candidates' election campaigns. This financial support did not, however, directly come from Canal Rocks Pty Ltd. The entity that provided the cheques to pay for the campaign costs of six candidates was an incorporated association called the Independent Action Group (IAG).

The matters for consideration with respect to this part of the investigation concerned the legitimacy for such a funding arrangement between Canal Rocks Pty Ltd and IAG, the knowledge of the candidates as to the true source of their funding and whether the candidates complied with their disclosure obligations pursuant to the *Local Government (Elections) Regulations 1997* (the Regulations).

4.2 The Regulations Relating to Elections

Section 4.59 (a) of the *Local Government Act 1995* states that regulations may provide for the provision of information as to gifts made to or for the benefit of candidates. Part 5A of the Regulations sets out these regulations.

A 'gift' is defined as meaning 'a disposition of property, or the conferral of any financial benefit, made by one person in favour of another'.[31] A gift can include a gift of money or the provision of a service for no consideration[32] but is only relevant if the value of the gift is $200 or more.[33] The candidate must disclose to the Chief Executive Officer of the relevant local government a gift promised or received during the period commencing six months before the relevant election day and concluding three days after the election date for unsuccessful candidates and on the start day for financial interest returns for successful candidates under section 5.74 of the Local Government Act.[34] The maximum penalty for failing to comply with this requirement is $5,000.[35]

[31] Regulation 30A(1), Local Government (Elections) Regulations 1997
[32] Regulation 30A(2)
[33] 30A4(a)
[34] Regulations 30B(1) and 30C(1)
[35] Regulation 30B(1)

The manner of disclosure is set out in regulation 30D, which stipulates that a disclosure is to be made by completing a 'disclosure of gifts' form, known as a Form 9A, and lodging it with the CEO.[36] The disclosure must be made within three days of the receipt (or promise) of the gift once nominations are made or within three days of nomination, for gifts received (or promised) between the commencement of the period set out in regulation 30B and the day of nomination unless a disclosure outside this time period has occurred due to circumstances beyond the candidate's control.[37] The maximum penalty for a failure to comply with these requirements is $5,000.

The Regulations state that a candidate must identify the source of the gift in the manner set out in regulation 30E and also provide for a maximum penalty of $5,000 for failure to do so. It is relevant for the purposes of this investigation that regulation 30E which is titled 'Source of Gift' be quoted in full:

> *For the purposes of regulation 30B(3), a candidate must identify the true source of a gift, if known, or state on the 'disclosure of gifts' form that the true source of the gift is unknown to the candidate.*

The Regulations provide that the CEO is to establish and maintain an electoral gift register.[38] This register is to be kept at the appropriate local government offices and be available for public access.[39]

4.3 Identification of Candidates

Towards the end of 2004, Mr McKenzie had discussed with Mr Burke and Mr Grill the fact that the current Busselton Shire councillors were opposed to virtually anything that Canal Rocks Pty Ltd had proposed.[40] They therefore concluded that a change in councillors would be one way of getting a 'fair hearing'. It was proposed that Mr McKenzie would approach Ms Beryle Morgan, a former Busselton Shire President, and Mr Joseph White, a Dunsborough real estate agent, to find out if they knew anyone who would be prepared to run for Council at the May 2005 elections.[41] It was intended that those candidates would be offered some form of support by Canal Rocks Pty Ltd.[42]

Ms Morgan and Mr White were acquainted with Mr McKenzie and both were sympathetic to the difficulties Canal Rocks Pty Ltd was having in getting it's development approved.

Mr McKenzie met separately with Mr White and Ms Morgan in the months leading up to the May elections and it was decided that Ms Morgan and Mr

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[36] Regulation 30D(1)
[37] Regulation 30D(2)
[38] Regulation 30G(1)
[39] Regulation 30H)
[40] Transcripts of Hearings, 1 November 2006, p 737
[41] Ibid, p 738
[42] Id

White would find suitable candidates who would give the Canal Rocks Pty Ltd development proposal a 'fair hearing'. It was Mr White's recollection that Mr McKenzie was prepared to offer some support for the prospective candidates, in a financial and non-financial sense.[43]

Following his discussions with Mr McKenzie, Mr White approached a close friend of his, Mr Fraser Smith, whom he knew had previously been interested in running as a candidate. Mr White also recalled approaching another friend of his, Mr Adrian Gutteridge, who only agreed to run if he did not have to fund his campaign. Mr White confirmed he only approached Mr Smith and Mr Gutteridge because of the conversations he had had with Mr McKenzie.[44]

Towards the end of March 2005 Mr White arranged for Mr McKenzie to meet Mr Smith at a Dunsborough coffee shop. At about this time Mr Smith approached two close friends of his in order to encourage them to also run for council in the forthcoming elections. They were Mr Hamish Burton and Mr Wayne Lupton. Neither Mr Burton nor Mr Lupton was interested in nominating if they had to fund their campaign.

Though she accepted she had general conversations with Mr McKenzie about getting some good councillors on council, Ms Morgan at no stage intended to be a candidate.[45] Ms Anne Ryan (who was Mrs Morgan's campaign manager for the 26 February 2005 State elections) told the Commission that Ms Morgan said to her that Mr McKenzie would like to meet her to discuss the prospect of running in the forthcoming council election.[46] Ms Morgan subsequently took Ms Ryan to visit Mr McKenzie at his home in Perth in early March 2005 where he raised that question with her. Mr McKenzie denied asking Ms Morgan if he could see Ms Ryan at his house, though he admitted he asked her on this occasion, in 'a flippant manner', if she would consider running for council.[47]

Though Ms Morgan maintained that she had not approached Mr John Triplett or Mr Alan MacGregor about running for council she accepted that she did introduce Mr Triplett to Mr McKenzie prior to the election.

Ms Morgan could not recall whether she contacted Mr McKenzie to advise him that Mr MacGregor had nominated, although she conceded that she may have said it in a conversation with Mr McKenzie.[48]

Ms Morgan did, however, arrange for Mr MacGregor and Ms Ryan to attend her house in order to have a telephone conversation with Mr Burke regarding the manner in which they ought to campaign. She also conceded that she was interested in ensuring that Ms Ryan, Mr Triplett and Mr MacGregor

[43] Transcripts of Hearings, 24 October 2006, p 167
[44] Ibid, pp 166-167
[45] Transcripts of Hearings, 25 October 2006, p 285
[46] Transcripts of Hearings, 26 October 2006, p 340
[47] Transcripts of Hearings, 1 November 2006, p 744
[48] Transcripts of Hearings, 25 October 2006, p 291

campaigned as effectively as possible and that they were the three candidates she most wanted to get on council.[49]

Six of the candidates referred to above took up the offers that were made on behalf of Canal Rocks Pty Ltd to fund their campaigns. Only Mr Smith declined.

4.4 The Role of IAG

IAG was created in 2003 in response to the government's proposal to deregulate retail trading hours. It was strongly opposed to any such deregulation. Mr Greg Dean, the President of IAG, engaged the services of Mr Burke and Mr Grill as consultants to assist IAG in its campaign at the referendum to be held in conjunction with the State election in February 2005. The proposal to deregulate retail trading hours was defeated at this referendum. As far as Mr Dean was concerned, the role played by Mr Burke in defeating the deregulation proposal was a significant one.

Mr McKenzie testified that it was the suggestion of Mr Burke that the funding of the candidates by Canal Rocks Pty Ltd could be done through the use of IAG as a conduit. It was agreed that Canal Rocks Pty Ltd would donate to IAG and, in turn, IAG would use those funds to pay for the campaign costs of the candidates. Mr McKenzie said that he had received legal advice that IAG, in those circumstances, would be the legitimate source for the funding. The Commission doubts whether this reflects the meaning of 'true source' in regulation 30E.

Written submissions for Mr McKenzie stressed that there is no requirement at law for the donor of a gift to a candidate to disclose the true source of the gift. This may be so, but reliance on these technical arguments is artificial and does not address the reality which was that this mechanism was chosen for a specific reason.

It is obvious that the primary (and arguably only) consideration in setting up this arrangement was to ensure that any candidates who were supported and subsequently elected to council would be able to vote on matters concerning the Smiths Beach development.

Mr McKenzie agreed that those entities, including Canal Rocks Pty Ltd, which made donations to IAG for this proposal, had nothing to do with trading hours deregulation. He also agreed that IAG had no say in who was to be supported and who would be paid.[50] He admitted that it was very important for Canal Rocks Pty Ltd to remain anonymous with respect to its support of the candidates and he also agreed he never advised any of the candidates who received support from IAG that Canal Rocks Pty Ltd was contributing donations to IAG to pay the costs of their campaigns.

[49] Transcripts of Hearings, 25 October 2006, pp 299-300
[50] Transcripts of Hearings, 1 November 2006, p 749

He admitted that he knew candidates would not be able to vote on any council matters involving the Smiths Beach development if they disclosed Canal Rocks Pty Ltd as a true source of any donations, but he denied that this was a consideration in setting up the arrangement with IAG. When pressed with respect to that answer, he shifted to a position that he could not recall if it was a consideration.[51]

Mr Dean told the Commission that in early April 2005 Mr Burke contacted him and said that he had been approached to support and help campaign for a group of 'small business minded candidates' in the forthcoming Busselton council elections. Mr Burke then asked Mr Dean if IAG would be prepared to assist him with this exercise. Mr Dean said that he would have to discuss the proposal with other members of IAG.

Following those discussions he contacted Mr Burke again and stated that IAG would be prepared to assist provided IAG made no financial contributions. Mr Dean testified that Mr Burke agreed to this, stating that IAG would simply be used as a conduit for his own fundraising efforts and that that would be the extent of IAG's involvement.[52]

Mr Dean, on behalf of IAG, accepted this arrangement, provided he could speak to at least one of the candidates and that the arrangements were legal. Mr Burke gave an assurance that it was in every respect, legal and he gave Mr Dean the name and telephone number of Anne Ryan as being typical of the candidates. Mr Dean subsequently contacted Ms Ryan and he was satisfied that she held views consistent with IAG.

Ms Ryan, however, was the only candidate of the six who was subsequently funded who had any views on the deregulation of retail trading hours. The other five candidates were never asked what their views were on this question of deregulation.

Between 9 May 2005 and 4 August 2005 a total of $48,786.81 was deposited into the IAG bank account for the purposes of paying the campaign expenses of the six candidates. Canal Rocks Pty Ltd contributed $12,786.81, $10,000 came from the unit holders of the Canal Rocks Unit Trust, $10,000 was from Mr Grill, on behalf of Griffin Coal Mining Company Pty Ltd, with Mr Grill expecting reimbursement from Griffin Coal Mining Company Pty Ltd., and $16,000 was from another developer, Kintyre Holdings Pty Ltd. Kintyre Holdings Pty Ltd was subsequently reimbursed $10,000 from Canal Rocks Pty Ltd. [53]

A total amount of $47,632.42 was subsequently paid by IAG to the six candidates.

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[51] Ibid, p 760

[52] Transcripts of Hearings, 6 November 2006, p 966

[53] Written submissions for Canal Rocks Pty Ltd dispute that $10,000 came from Unit Holders of the Canal Rocks Unit Trust, saying that $10,000 came from Canal Rocks Pty Ltd itself, so that the company gave $22,786.81. The Commission observes that the summary it has given already reflects that the company contributed $22,786.81. Mr. McKenzie was not aware of the precise source of the cheque and nothing turns on that fact for the purposes of this report.

In contrast to Mr Dean's account, Mr Burke said that it was Mr Dean who initially contacted him, asking him whether Mr Burke could help raise money for Ms Ryan's candidacy. Mr Burke agreed to do that and subsequently spoke to a number of people including Mr McKenzie, Mr Grill, Mr Glyn Crimp (the director of Kintyre Holdings) and Mr Trevor Delroy (a client of Mr Burke).

Mr Burke agreed it was quite clear in his mind that it was Mr Dean who had asked him to raise funds for the purpose of IAG funding candidates in the Busselton election.[54] Mr Dean was adamant that Mr Burke approached him. The accounts of Mr Burke and Mr Dean differ in this critical aspect. But again, the real question is why this arrangement was negotiated at all, and the answer to that is obviously to use IAG as a shield for the Canal Rocks Pty Ltd funds. It defies logic that IAG would support from its own funds (which were not substantial) five candidates in a local government election without ascertaining either their identity or views on the single issue that IAG was concerned with i.e. the deregulation of retail trading hours. Written submissions for Mr Burke dealing with this proposed conclusion by the Commission omitted reference to the key words 'from its own funds'. Those words are clearly central to the analysis.

4.5 What did the Candidates Know of the Source of Their Funding

The state of knowledge as to the source of the funding varies from candidate to candidate. Though Mr Smith eventually declined an offer of funding from Mr Burke, he did bring it to the attention of Mr Lupton, Mr Burton and Mr Gutteridge, which they all subsequently accepted.

As to when he was made aware of this offer of funding, Mr Smith recalled that it occurred at a meeting at the end of March or early April 2005 at the offices of Olifents Real Estate in Claremont. Present at that meeting were Mr Burke, Mr Crichton-Browne, Mr Grill (for a short time), Ms Morgan and Mr Paul Downey from the advertising company Porter Novelli. Mr Burke, who had contacted him over the telephone, had invited Mr Smith to this meeting.

It was Mr Smith's recollection that Mr Burke stated to him that the preparedness of the group at the meeting to offer their assistance to him had nothing to do with Smiths Beach. The reason why Mr Smith could so clearly recall this is the expression that Mr Burke used when he stated this. He recalled that Mr Burke said that he could 'safely say hand on heart' that the meeting had nothing to do with Smiths Beach. He recalled Mr Burke actually placing his hand over his heart.[55]

Mr Burke denied ever making that comment to Mr Smith. He gave as one reason for being certain of that because the expression 'hand on heart' is not an expression that he had ever used in his life. When pressed about that, he

[54] Ibid, p 888
[55] Transcripts of Hearings, 24 October 2006, p 122

stated that he could never recall using such an expression.[56] However, it is clear that Mr Burke used precisely that expression in relation to another matter.[57] Be that as it may, there was no other probative material particularly corroborative of either account on this point.

It was also Mr Smith's position that it was at this meeting that he was told that IAG would be the source of the funds for the various election campaigns of the candidates. He believed that it was Mr Burke who conveyed that information to him.[58] Mr Smith was prepared to accept that the funding for the election campaign was coming from a number of people and not just one person. He had assumed that Mr McKenzie was involved to some extent but he was not sure whether it was in his capacity as the developer of Smiths Beach or in his capacity as simply a landowner.

In contrast to Mr Smith's account, Mr Burke also denied making reference to IAG as the source of funding at this particular meeting. Similarly, Ms Morgan also stated that IAG was not raised in this meeting. Mr Grill stated that he had no recollection of IAG being mentioned at this meeting either.

Following that meeting, Mr Smith contacted Mr Lupton, Mr Burton and Mr Gutteridge and advised that funding would be available for their campaigns and that they need not be out of pocket themselves. He also told them that they had the advice of Brian Burke and Noel Crichton-Browne to back them up.

After the meeting, Mr Smith was advised that someone would contact him from IAG in relation to the proposed funding. He subsequently received a telephone message from Mr Dean providing him with a post office box address and a telephone number for IAG. Mr Smith had previously left his telephone number with Mr Burke.

Mr Dean was unable to recall leaving a telephone message for Mr Smith. His account was that he only had a vague memory of a short phone call to a male candidate around about the week after speaking with Ms Ryan but he had no details in his mind as to who or what the conversation was. Nor did he have a recollection of ever being asked to provide IAG's postal details.[59]

4.5.1 Mr Lupton, Mr Burton and Mr Gutteridge

With respect to Mr Lupton, Mr Burton and Mr Gutteridge the question arises as to whether they ought to have known that the funding for their campaigns was coming in reality from an entity other than IAG. Mr Lupton stated on his Form 9A [60] that he had received $7,435 from IAG. This form was completed on 10 May 2005 and the date that the gift was received was listed as 9 May 2005. Given that the funding was received for the cost of campaigning in the

[56] Transcripts of Hearings, 6 November 2006, p 890
[57] Telephone Intercept 0305
[58] Transcripts of Hearings, 24 October 2006, p 124
[59] Transcripts of Hearings, 6 November 2006, p 978
[60] E6034 - Electoral Commission Form LG09A - LUPTON

weeks prior to 7 May 2005, it was incorrect to assert that the gift was received on 9 May 2005. Mr Lupton denied that this date was chosen to make it appear he had complied with Regulation 30D(2). His account was that

> *…from what I can recall I just put the date on it - as far as I can remember the date I filled the form out. I filled the form out honestly without trying to match dates or cover anything up that's for sure.* [61]

Mr Burton completed his Form 9A on 11 May 2005, declaring that he had received a gift from IAG on 9 May 2005 in the amount of $3,933. When questioned why he entered that date when he was aware the gift was provided before then, Mr Burton said that he presumed he was advised by Mr Smith to write that date.[62] It was evident from his testimony that Mr Burton was largely ignorant of his disclosure obligations under the Regulations.

Mr Gutteridge failed to make a disclosure at all of the $5,663.82 he had received by way of an electoral gift. His explanation for that oversight was that he only became aware of his disclosure obligations after he had been disqualified and that 'therefore [I] didn't deem it necessary'.[63] He, like Mr Lupton and Mr Burton, had always assumed that IAG was the legitimate source of the funds.

While the Commission considers that the three candidates were somewhat naïve, it could not be concluded that they ought to have known that the source of the funding was from Canal Rocks Pty Ltd. Mr Smith told them that the funding was coming from IAG, and it was Mr Smith who co-ordinated their campaigns, subsequently paid for the costs of the campaigning and was later reimbursed by IAG.

It was also evident that their naivety could be explained by the fact that all three of them nominated as candidates in a somewhat half-hearted manner. Mr Burton and Mr Lupton at one point both wanted to withdraw their nominations but were persuaded to continue. The fact that not one of the three was elected is consistent with the reality that they took little interest in their election campaigns.

4.5.2 Mr Smith and Mr Triplett

It was Mr Smith's account that at all times during the election campaign he believed that IAG was responsible for the funding. He maintained in all his dealings with Mr Burke that Mr Burke never expressly said he was working on behalf of either Mr McKenzie or Canal Rocks Pty Ltd. At best, Mr Smith was very naïve. At worst he was wilfully blind to the question of who was responsible for the substantial campaign costs of the three candidates he was assisting. In the Commission's opinion, Mr Smith's conduct could not be said

[61] Transcripts of Hearings, 25 October 2006, p 231
[62] Ibid, p 261
[63] Transcripts of Hearings, 24 October 2006, p 206

to reflect adversely upon his integrity and did not have a capacity to undermine public confidence in local government, and therefore his actions would be insufficient to constitute misconduct within the meaning of section 4 of the CCC Act.

The same observation could be made about Mr Triplett. Surprisingly, Mr Triplett stated that he had never heard of the proposal to develop Smiths Beach before he became a councillor. He further maintained that there were no conversations about any beach developments when he met Mr McKenzie with Ms Morgan prior to his nomination to stand as a candidate at the 2005 election.

Mr Triplett said that just prior to the end of the election a gentleman rang up and said he was David McKenzie and that he acted for IAG and that IAG was interested in funding a letter drop for Mr Triplett. Mr Triplett denied that he had any idea at that time that Mr McKenzie was behind the development of Smiths Beach. Mr Triplett admitted that Mr McKenzie did not ask him to campaign on the deregulation of retail trading hours or that Mr McKenzie asked him for his views on it.

In contrast to Mr Triplett's account of this telephone conversation, Mr McKenzie testified that he simply offered support to Mr Triplett on the basis that the same group that was backing Ms Ryan would be prepared to support Mr Triplett. He was categorical in his denial that he stated that he represented IAG.[64] Mr McKenzie said that he had had legal advice and advice from Mr Burke that he was not to 'disclose that sort of thing'.[65]

Mr Triplett did not immediately accept the offer but, after further consideration later did. Upon obtaining the details of the donor's address and the value of the gift from Mr McKenzie, he completed a Form 9A for the sum of $3,004.50.[66]

Mr Triplett maintained that it was still his belief these funds came from IAG. That was so notwithstanding correspondence he received from Mr Bayfield Collison alleging that Mr McKenzie had paid for that donation in his capacity as the developer of Smiths Beach. He also denied that that same allegation was made to him shortly after the election when he met with Mr Bob McKay and Mr Bill Mitchell from the Smiths Beach Action Group.

Mr Triplett stated that after receiving the correspondence from Mr Collison he did contact Mr McKenzie who assured him that the funding was provided by IAG.[67]

Mr Triplett accepted that if he was aware that Mr McKenzie was representing Canal Rocks Pty Ltd when he offered to pay for a letter drop he would have

[64] Transcripts of Hearings, I November 2006, p 742
[65] Ibid
[66] E6036 Disclosure of Gifts form for John Franklin Triplett
[67] Transcripts of Hearings, 25 October 2006, p 325

had to declare a financial interest in any voting regarding Canal Rocks Pty Ltd if elected to council.

The Commission has considered whether the actions taken by Mr Triplett to verify the true source of the donation were adequate in the circumstances that existed at the time when he received Mr Collison's letter. If it was not, then misconduct could be found to have occurred, as the failure to ensure his disclosure was not false or misleading could adversely affect the honest or impartial performance of his functions as a councillor due to the failure to disclose a potential conflict of interest.

Though the enquiries made by Mr Triplett were limited to merely contacting Mr McKenzie, in the Commission's opinion it could not be said that this action was so deficient as to warrant a misconduct opinion. In his written submissions to the Commission, dated 8 February 2007, Mr Triplett emphasised that it was Mr McKenzie who initiated the offer and that he also subsequently made enquiries with the Electoral Commission after speaking to Mr McKenzie. Mr Triplett stressed that he could not have done anything more than he did, i.e. confirm with Mr McKenzie that the source of the donation was IAG. While that could be said to have been sufficient shortly after the election, there may have been further obligations when matters involving the Smiths Beach development proposal later came before council.

4.5.3 Ms Ryan

In contrast with Mr Triplett's lack of knowledge as to who Mr McKenzie was, Ms Ryan had always been aware that he was the developer for the Smiths Beach project. It was Ms Ryan's position that Mr Burke was the person who stated he could obtain some financial assistance through IAG. Ms Ryan had no hesitation in accepting that offer as she had previously campaigned against deregulation.

Ms Ryan testified that after the conversation with Mr Burke she forwarded some receipts for expenses she had already incurred to the address for IAG that Mr Burke had provided to her. She then received a cheque from IAG, dated 14 April 2005, in the sum of $1,000.00. Ms Ryan admitted that she did not complete a Form 9A until 8 May 2005 in relation to this gift, which was outside the time frame stipulated by the Regulations. She stated in that form that the name of the donor was IAG. She made no attempt to ensure that IAG was in fact the original source of the gift.

Ms Ryan admitted that following the election she had received correspondence from Mr Collison who was alleging that she had received funding from Mr McKenzie. She also recalled a meeting with members of the Smiths Beach Action Group who made the same allegation. As a result of those allegations, Ms Ryan contacted Mr McKenzie, Mr Burke and Ms Morgan who all stated to her that the money had come from IAG. She confirmed, however, that she did not contact Mr Dean who she knew was the President of IAG and who she had spoken to on other occasions. That she did not contact the one person who could verify what was the true position is

significant. Given this obvious failing, it is likely, in the Commission's view, that she deliberately did not contact Mr Dean as she was concerned what his answer would be.

Ms Ryan also admitted that on 17 October 2005 she received a second cheque from IAG in the amount of approximately $766.00. She believed she had received that cheque after she had sent off more campaign receipts to IAG.

Though Ms Ryan disclosed that she had received campaign funds from IAG in her annual return for 2005/2006 she failed to quantify how much that funding was.

By the time Ms Ryan had received this cheque from IAG there was considerable publicity surrounding the question of the true source of the donations that various councillors had received from IAG. It was therefore incumbent upon her to make further inquiries as to the true donor, which she failed to do. Although it could be expected that IAG would be prepared to fund a candidate like Ms Ryan, given her stance on the deregulation of retail trading hours, her failure to directly inquire of Mr Dean as to the true state of affairs raises a real doubt as to the veracity of her denials that she had no idea of the role played by Canal Rocks Pty Ltd until after the commencement of the public hearings in October 2006.

Ms Ryan accepted that it is now obvious that the true donor of the funding that she had received was Canal Rocks Pty Ltd and that she will now need to make a financial interest declaration when council considers any Canal Rocks Pty Ltd matter. In a public hearing she was asked if, given the real and important difference between an interest affecting impartiality and the financial interest declaration, it was incumbent on her to do a little more than just accept Mr McKenzie's and Mr Burke's word for it. She replied:

> *I probably should've made more enquiries now with the benefit of hindsight.*[68]

4.5.4 Commission's Opinion on Ms Ryan's Conduct

The Commission formed four misconduct opinions regarding Ms Ryan:

- Ms Ryan admitted that when she completed the requisite Form 9A, in order to disclose gifts she had received, she failed to disclose those costs previously incurred by her but which had been reimbursed by IAG. This failure was conduct that could adversely affect the honest or impartial performance of Ms Ryan's functions as a councillor because it assisted in concealing the degree of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

[68] Transcripts of Hearings, 26 October 2006, p 384

- Ms Ryan's failure to directly inquire of the President of IAG, Mr Greg Dean, as to the true state of affairs regarding the funding of her campaign, involved the performance of her functions in a manner that was not honest or impartial because it concealed the existence of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

4.5.5 Mr MacGregor

As was the common theme with the accounts of most of these candidates, Mr MacGregor also asked very few questions as to the motivations behind the campaign support of Mr Burke and Mr McKenzie when it was offered. He testified that Mr McKenzie rang him and offered to provide a letter drop to about 160 absentee owners on Mr MacGregor's behalf. He subsequently accepted this offer of assistance and never completed a Form 9A as he believed the gift would have been worth less than $200. He admitted that he didn't seek any confirmation from Mr McKenzie as to exactly how much the letter drop had cost.

Notwithstanding a surprising lack of interest in a person who he did not know providing assistance for his campaign, the Commission is not critical of Mr MacGregor's assumption that this offer of funding would have been less than $200 and the Commission's opinion on the material before it is that Mr MacGregor's conduct could not constitute 'misconduct'.

4.6 Conclusions Regarding the Funding of Candidates

It is patently obvious that Canal Rocks Pty Ltd had this arrangement with IAG so that, unless they discovered the original source of the funding, those councillors who received funding and were considered more sympathetic to Canal Rocks Pty Ltd did not have to disclose a financial interest when voting on matters concerning Canal Rocks Pty Ltd.

Given the clear intent of Regulation 30E, which stipulates that candidates must disclose the true source of the donor of the gift, any assertion that it was perfectly proper for the candidates to identify IAG as that source depends heavily upon a very narrow meaning of the expression 'true source'. Material presented at the hearings and submissions received from all those associated with the use of IAG as the channel for funding, lent heavily on this very narrow and dubious construction.

There was a planned strategy of identifying, engaging with and financially supporting candidates considered sympathetic to the development application of Canal Rocks Pty Ltd. Further, elaborate steps were taken to hide this support from the Busselton community through the use of an unconnected company, IAG, as the 'public' source of the campaign funding.

4.7 The Council Meeting of 10 August 2005

Following the successful appeal to the Minister for the Environment in respect of amendment 56, the Shire had decided that rather than negotiate with the EPA and the developer as to the significance of certain words used in that amendment it was simpler to draft a new amendment that avoided these issues. The new amendment, Amendment 92, was prepared and submitted to the Council for approval at its 10 August 2005 meeting.

Prior to the 10 August 2005 meeting, solicitors acting for Canal Rocks Pty Ltd had written to the Shire asserting that there were deficiencies in the wording of Amendment 92 and that consideration of it should be deferred. There was also an expressed concern that a number of councillors would be absent from the meeting, amongst them councillors who had received funding from Canal Rocks Pty Ltd at the May 2005 election. One of those councillors was Mr Smith, who at the time was convalescing in Perth. Mr McKenzie asked if Mr Smith was prepared to send a letter to the Shire supporting deferral of Amendment 92. Mr Smith agreed and a letter was prepared for him and delivered by Mr McKenzie's personal assistant.[69] These events serve to illustrate the importance to Canal Rocks Pty Ltd of deferral of the amendment.

As to the alleged deficiencies in the wording of the amendment, there had previously been extensive and prolonged consultations with Canal Rocks Pty Ltd and its solicitors by Shire staff. Drafts of the amendment had been provided and some suggestions adopted. But by August 2005 all concessions that the Shire staff felt could reasonably be made consistent with the LNRSPP had been made. As to the absence of councillors, there were to be eight present (out of a total 13) and the quorum was seven, thus there was no reason why the meeting could not proceed.

The meeting of the Council took place on 10 August 2005 and Amendment 92 was on the agenda. Prior to any discussion an opportunity was given to councillors to declare any interests. No declarations were made. A motion in support of deferral (and thus in conformity with the wishes of Canal Rocks Pty Ltd) was put at the meeting and lost.

One of the councillors was Ms Philippa Reid, who testified to the Commission that she was in favour of the proposed development of Smiths Beach by Canal Rocks Pty Ltd. The motion to defer was moved by Ms Reid and seconded by Ms Ryan. Given that the motion was self-evidently one that Canal Rocks Pty Ltd had an interest in, there is a question as to whether these councillors had been improperly influenced and had failed to make any required declarations of interest.

Ms Ryan said that she had attended a meeting at Mr McKenzie's office prior to the 10 August 2005 council meeting at which Mr Burke was also present. She says that she was asked at that meeting whether she would put up a motion at the meeting, though she could not recall the terms of that suggested motion. She does recall, however, that she was shown a letter in similar

[69] Transcripts of Hearings, 24 October 2006, p 153

terms to that which the Canal Rocks Pty Ltd's lawyers sent to all councillors seeking deferral of the Amendment 92 decision. Ms Ryan said that Mr McKenzie represented to her that the Shire staff had not provided all relevant information.[70] Given Mr McKenzie's obvious interest in the matter it is surprising that Ms Ryan would accept such a claim at face value as a justification for deferral.

Ms Ryan had been the recipient of election funding and by this time must have well known that the true source of those funds was Canal Rocks Pty Ltd. That allegation had been put to her in clear terms shortly following the election. She conceded that she should have asked more questions and that she simply accepted assurances that the funding came from IAG.[71] However, she had very little contact with anyone from IAG but had been lobbied by Mr McKenzie. Indeed, the irresistible conclusion is that Ms Ryan was aware that there was every possibility that her funding had come from Canal Rocks Pty Ltd and her failure to determine the confirmation of this was simply wilful blindness on her part.

4.7.1 Commission's Opinion on Ms Ryan's Conduct Relating to the 10 August Meeting

Ms Ryan failed to declare a financial interest in the Canal Rocks Pty Ltd matter at the August 10 Council meeting. A councillor who has received a notifiable gift at an election is obliged under the *Local Government Act 1995* to treat the giver of that gift as a close associate.[72] The effect of this is to oblige a councillor to make a financial interest declaration if a matter arises for consideration at a meeting and the matter is one in which the provider of the election funding has an interest. There is also obvious potential for such a failure to adversely affect the honest and impartial performance of the functions of a councillor because it conceals the existence of a potential conflict of interest, and Ms Ryan could be in breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

4.8 A New Development Proposal

Shortly after the Council election, on 20 May 2005, Mr McKenzie and Mr Grill attended a meeting with Dr Cox at the EPA. Other Canal Rocks Pty Ltd consultants and EPA officers may also have been present. At this meeting the Canal Rocks Pty Ltd representatives sought clarification regarding what was then a relatively new process called a Strategic Environmental Assessment (SEA). An SEA is, as the name suggests, an assessment of the environmental impact of a development proposal. It is a voluntary process in the sense that a proponent of development can seek an SEA and can decide

[70] Transcripts of Hearings, 26 October 2006, p 371
[71] Ibid, p 366
[72] Section 5.62

at any time to discontinue that process.[73] If the SEA does not proceed, the EPA can nonetheless subsequently assess the development if the local authority refers it because it is thought to be environmentally significant or if the EPA 'calls in' the development using its powers under section 38 of the EP Act.

On 18 August 2005, Canal Rocks Pty Ltd wrote to the EPA formally applying for an SEA. This was agreed to by the EPA. It is important to note the timing and circumstances of this proposal to the EPA. Canal Rocks Pty Ltd did not at this time have a Development Guide Plan that was suitable for presentation to the council. Without doubt, whenever such a plan was in an adequate form it would be referred to the EPA. Thus since the EPA would be consulted in any event what purpose was served by seeking an SEA in August of 2005? One possible explanation is that Canal Rocks Pty Ltd wanted to get the environmental assessment process moving as quickly as possible rather than waiting for a DGP to be put to Council and referred to the EPA.

However, in the Commission's view there is an alternative explanation. The possibility must be considered that the SEA process was commenced as a reason for asking the Council to further delay approving Amendment 92 and thus giving Canal Rocks Pty Ltd an extended opportunity to get a DGP approved under the less rigorous existing TPS. Despite the requests from Canal Rocks Pty Ltd to defer this process, Council did approve advertising the new amendment at its 10 August meeting. On 12 August 2005, Canal Rocks Pty Ltd submitted a new DGP to the Shire. However, that DGP was identified as containing a number of what are described as 'fatal flaws' and on being advised of this, Canal Rocks Pty Ltd requested that further consideration of the DGP be deferred until those matters were addressed.[74] Mr McKenzie acknowledged that it was advantageous to Canal Rocks Pty Ltd to have a DGP approved before Amendment 92 was finalised.[75]

Having approved the commencement of the SEA process the EPA advertised it on 26 September with an eight-week review period. On the face of it there would appear to be no obvious inconsistency between the SEA process and the process dealing with Amendment 92. Whatever the outcome of the SEA, any DGP submitted to the Shire would have to comply with the town planning scheme. It is also pertinent that the SEA, being a voluntary process, could be discontinued by Canal Rocks Pty Ltd at any time, and thus it would be inappropriate for the amendment to be deferred pending such a process. To do so could deliver control of the progress of the amendment into the hands of the developer. In fact, given the necessity to comply with the town planning scheme, it would seem more sensible for the SEA to be deferred if an amendment was pending, rather than the other way around. Yet on 11 October 2005, the EPA wrote to the Western Australian Planning Commission (WAPC) suggesting that consideration of Amendment 92 should be deferred in light of the SEA. For a considerable time that deferral was achieved, as will be seen below.

[73] Transcripts of Hearings, 1 November 2006,p 684
[74] Transcripts of Hearings, 23 October 2006, p 85
[75] Transcripts of Hearings, 2 November 2006, p 787

On 30 September 2005 there had been a meeting at the EPA attended by Mr McKenzie, Mr Grill, Dr Cox and others. The purpose of the meeting was to discuss the SEA, but Mr McKenzie recalls that Amendment 92 was also discussed. In particular, Mr McKenzie asked why a decision had been made by the EPA not to assess Amendment 92, as had been the case with amendment 56. He says that this issue was passed over quickly, but clearly he was concerned that Amendment 92 may overtake the SEA process before Canal Rocks Pty Ltd could have a DGP before the council for approval. Mr McKenzie could not recall whether there was any discussion regarding a request that Amendment 92 be deferred.[76] However, Dr Cox has accepted that this concern was raised. [77]

The 11 October 2005 letter from the EPA was, as has been noted, addressed to the WAPC. The WAPC has a role in an amendment to a town planning scheme because such an amendment must be referred to it for approval by the Shire. That point would be reached after the Shire had advertised the proposed amendment, considered any public submissions, made any changes resulting from those submissions and the final version had been voted on by the council. That point was not in fact reached until after a subsequent meeting of the council on 14 December 2005. Thus, as at 11 October 2005, Amendment 92 had not reached the WAPC. In fact, the public consultation process was still being dealt with at Shire level. In these circumstances, if there was an argument for deferring Amendment 92, one would expect that it would be directed to the Shire in the first instance.

However, not only was the letter of 11 October 2005 not sent (or copied) to the Shire, the Shire was completely unaware of it until late April 2006.[78] The existence of the letter was discovered as a result of a conversation between a Shire officer and an officer of the EPA, in which it was mentioned that the matter had been deferred due to the continuing SEA. This was also the first time that Shire officers had been aware that the amendment was being deferred at all. The Shire then wrote to the EPA on 26 April 2006 seeking a copy of the letter, and made subsequent requests both by telephone and email, to no avail.[79] Dr Cox said that he was unaware of these requests and could think of no reason why a copy of the letter could not have been provided. He said that it was 'just an oversight' that the letter was not referred to the Shire in the first place.[80]

The content of the letter, its effect in delaying Amendment 92 and the failure to provide it to the Shire caused the Commission to question whether it was written for an improper purpose, namely to assist the developer by delaying the amendment. In this context it is relevant to consider the nature of the existing relationship between Dr Cox and Messrs Burke and Grill.

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[76] Ibid, p 794
[77] Transcripts of Hearings, 1 November 2006, p 688
[78] Transcripts of Hearings, 23 October 2006, p 76
[79] Ibid, 82
[80] Transcripts of Hearings, 1 November 2006, p 695

Dr Cox described his relationship with Mr Grill as being that of a professional colleague rather than a friend. He conceded that he had been to lunch with Mr Burke and Mr Grill in May of 2006, but said that there had been no discussion of Smiths Beach at that time. He also said that Mr Grill, when inviting him to the lunch had said 'this is not to talk about any proposal I'm associated with'.[81] Clearly Dr Cox advanced this as being a justification for attending the lunch.

However, there is other material available to the Commission that is inconsistent with that given by Dr Cox. In his telephone call both to Dr Cox's secretary and then to Dr Cox, Mr Grill in fact mentioned that the purpose of the lunch was to discuss the environment portfolio generally, but to also perhaps bring Dr Cox up to date with Smiths Beach. In the call Dr Cox then indicated that it was not his practice to socialise with anyone who has a matter pending before him, but he concluded that there was no impediment in that regard. However, at the hearing Dr Cox conceded that the SEA process was still pending at that time. It would be surprising if he had overlooked the fact that the SEA process was still pending. In the call, there was discussion as to the venue for the lunch and Dr Cox said that he had a preference to 'disappear' further away from his office.[82] Dr Cox agreed to Mr Grill's proposal that they go to the back room of Perugino's Restaurant. In the Commission's view, this is consistent with Dr Cox being quite conscious of the possibility of a perception of bias arising from the lunch.[83] Given the expressed intention of Mr Grill in the invitation was to perhaps raise the topic of Smiths Beach, it is difficult to understand how Dr Cox could possibly accept such an invitation in these circumstances. This could only be compounded by the fact that Messrs Burke and Grill paid for the lunch.

Despite the reference in the telephone arrangements for the lunch, Dr Cox and Mr Grill deny that Smiths Beach was discussed. However, Mr Burke had received an email earlier on the same day from a Canal Rocks Pty Ltd consultant providing information on the SEA process. Mr Burke accepted that he had sought this information with a view to raising the matter with Dr Cox and that he may have told Mr McKenzie that this was his intention. He stated that he presumed he did raise the topic as promised but is now unable to recall. Later that day, after the lunch, Mr Burke responded to the Canal Rocks Pty Ltd email stating that he and Mr Grill had had a good meeting with Dr Cox and that Mr Grill would brief Mr McKenzie in that regard.[84] In the context of the communications discussed above, the most likely inference is that Mr Burke was conveying to Mr McKenzie that Smiths Beach was discussed at the lunch in terms favourable to Canal Rocks Pty Ltd.

However the Commission possesses no direct information that Smiths Beach was discussed at the lunch.

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[81] Transcript of Hearings, 1 November 2006, p 696
[82] Telephone Intercept 0026
[83] The Commission's opinion in this regard is reinforced by Dr Cox's failure, in response to the Commission's section 94 Notice of 16 June 2006, to provide details of the lunch.
[84] Transcripts of Hearings, 4 December 2006, p 1148

4.8.1 Commission's Opinion Related to the Lunch Between Dr Cox, Mr Burke and Mr Grill

On 17 May 2006, Dr Cox accepted an invitation from Mr Grill to attend a lunch hosted by Messrs Burke and Grill, specifically knowing from Mr Grill that Smiths Beach was to be discussed at the lunch. This lunch and the discussion occurred at a time when Dr Cox had before him and his agency a Strategic Environmental Assessment (SEA) lodged by Canal Rocks Pty Ltd and affecting Smiths Beach. In accepting the invitation and attending the lunch Dr Cox deliberately sought to avoid a perception of a conflict of interest by asking Mr Grill to shift the proposed location for the lunch to a more discrete place. The acceptance of the invitation and attendance by Dr Cox to this private lunch, when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd's SEA was before him and his agency, constituted the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

Dr Cox and Mr Grill both deny that Smiths Beach was discussed at the lunch. Mr Burke (in light of surrounding email evidence) confirmed that it is likely that Smiths Beach was discussed as planned. That is not an issue the Commission needs to decide, as the impropriety, with regard to Dr Cox, is in the acceptance of the invitation and attendance at this private lunch when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd SEA was before him and his agency.

4.9 Other Telephone Calls Regarding Dr Cox

There are other telephone calls in which Mr Burke and Mr Grill make claims regarding Dr Cox. In a call on 3 March 2006 Mr Burke tells Dr Cox that he and Mr Burke are supportive of his reappointment as chair of the EPA and have been 'pulling strings' on his behalf.[85] Dr Cox said that he did not take this claim seriously. Mr Grill said that Mr Burke's claim was an exaggeration, though he (Mr Grill) did speak to 'lots of people in government'[86] and had told them that in his view Dr Cox was a good officer. In a call on 12 April 2006 Mr Burke told a client that Dr Cox was a 'great mate' of Mr Grill's, that either he or Mr Grill had been instrumental in his promotion through the Public Service and that there had been a proposal for Dr Cox to join them in their consultancy business.[87] Dr Cox rejected that any of these claims was true. Both Mr Burke and Mr Grill describe the claims as 'exaggeration'.[88]

There is no doubt that Mr Burke sought at times to give a false impression of the power and influence each of them had over senior public officers,

[85] Telephone Intercept 0470
[86] Transcripts of Hearings, 5 December 2006, p1226
[87] Telephone Intercept 0474
[88] Ibid, p 1226

particularly when talking to clients. Indeed in the case of Mr Burke, this practice was readily accepted in both the Commission's assessment of material before it and in submissions for Mr Burke. There is no independent basis to support the conclusion that Dr Cox has received any assistance or benefit from Messrs Burke and Grill. In these circumstances no great weight can be attributed to the claims in the telephone calls of 3 March and 12 April 2006.

4.10 The 11 October 2005 Letter to the Western Australian Planning Commission

Taking into account all of the circumstances, the Commission has investigated whether the actions of Dr Cox in sending the letter to the WAPC on 11 October 2005 were open to question as to their propriety. In that regard, included in the written submissions of counsel for Dr Cox was a signed statement dated 9 February 2007 from Mr Mark Jefferies. Mr Jefferies was the Manager of the Planning and Infrastructure Branch of the Environmental Impact Assessment Division in 2005. Mr Jefferies did not testify at the public hearings.

Mr Jefferies stated that he was also in attendance at the meeting on 30 September 2005 and was responsible for drafting the letter dated 11 October 2005 addressed to the WAPC. He also said:

> *… at no time has the Chairman of the EPA sought to influence the advice I provided to him, [or] directed or instructed me in relation to my involvement with Amendment 92 or to SEA.*
>
> *The advice I provided at the meeting of 30 September 2005 contributed to the letter being written. The need for the letter was founded on preserving the integrity of the assessment being undertaken in accordance with the requirements of the EP Act.* [89]

Mr Jefferies also provided an explanation as to why a copy of this letter was not forwarded to the Shire of Busselton. He stated there was no 'overt' decision to not include a copy of the letter to the Shire and added there was only a possibility that there would be any implications arising in any event. As to the failure to forward a copy of the letter when the Shire requested it in June 2006, he explained that this request coincided with a very busy time involving a relocation of his offices. A response to the request was therefore simply overlooked. He also stated that he did not tell Dr Cox that the Shire had requested a copy of the letter.

It was 18 August 2006 before the SEA was close to finalisation. On that day, Dr Cox phoned Mr Grill and referred to the SEA being completed and advised there needed to be a partial review concerning the visual amenity aspect. Dr

[89] Statement from Mr Mark Jefferies, 9 February 2007

Cox assured Mr Grill that 'there are no hidden agendas for David McKenzie'. Mr Grill then phoned Mr McKenzie to say that he had spoken to Dr Cox and they had the right to pick the reviewer and it was not a conspiracy against him.

4.11 Conclusions Regarding Messrs Burke and Grill's influence on the Environmental Protection Agency

While the Commission has formed an opinion that Dr Cox, as the Chairman of the EPA, has engaged in misconduct as a result of the influence of Messrs Burke and Grill, it is not apparent to the Commission, on the basis of the material before it, that any other person in the Authority engaged in misconduct.

4.12 The September 2005 Busselton Shire Election

At the May election, Ms Helen Shervington was the successful candidate in the ward for which Mr Gutteridge nominated. Ms Shervington was a well-known critic of the Smiths Beach development proposal, to the extent that Mr Crichton-Browne was of the view that she was unable to cast an 'objective eye' over the merits of the application.[90] It was therefore the view of Canal Rocks Pty Ltd that any councillor would be a better alternative to Ms Shervington.

With the approval of Mr McKenzie and Mr Burke, Mr Crichton-Browne examined the merits of lodging an appeal with the Court of Disputed Returns on the grounds that the disqualification of Mr Gutteridge rendered the results of the election for that ward invalid. He then proceeded to draft the papers for the appeal that were subsequently used by the unsuccessful candidate in that ward, Mr Kerry Clarke.

Mr Crichton-Browne asked Mr White, a friend of Mr Clarke, to forward the material that Mr Crichton-Browne had prepared on to Mr Clarke. It was Mr White's position that he did not pass on to Mr Clarke where this information had come from. His reason for that being because Mr Crichton-Browne insisted that his name be kept out of it. Mr White believed that Mr Crichton-Browne took this position because he was acting in his capacity as a lobbyist for Canal Rocks Pty Ltd and it was in Canal Rocks Pty Ltd's interest that Mr Clarke be elected instead of Ms Shervington. Mr Crichton-Browne, however, denied that he asked Mr White not to tell Mr Clarke of his involvement.[91]

Mr Clarke's appeal was successful and the by-election was to be held on 1 September 2005. Regrettably for Mr Clarke's campaign, he had already made plans for a holiday overseas in the weeks leading up to that date. He did not change the plans for his trip and left his campaigning in the hands of his

[90] Transcripts of Hearings, 31 October 2006, p 583
[91] Ibid, p 588

daughter and son-in-law. He had always intended that it would be a very low-key campaign in any event.

The assistance provided by Canal Rocks Pty Ltd to Mr Clarke was not confined to the appeal to the Court of Disputed Returns. Financial assistance was also provided to Mr Clarke's campaigning and, once again, that was carried out with a degree of subterfuge using Mr White as an intermediary. It was Mr White's position that Mr Clarke would have been completely unaware of the financial assistance that was provided to him by Canal Rocks Pty Ltd while he was overseas.[92]

That assistance was organised by Mr Crichton-Browne and involved the distribution of letters to the ratepayers endorsing Mr Clarke as a candidate. Tax invoices from Lasermail, a bulk mail distributor, indicated that over $1,600.00 was spent mailing over 2,000 letters during the month of August. One of those letters endorsing Mr Clarke was from a R. W. Mercer. Mr Clarke had no idea who this person was. This person was actually Robert Mercer, a Canal Rocks Pty Ltd shareholder, whose company Daleside Pty Ltd was a unit holder in the Canal Rocks Unit Trust. In written submissions, Mr Mercer has explained that the letter had been sought from him and he assumed that Mr Clarke had understood and approved of the letter being given. In the scheme of matters addressed by the Commission, the actions of Mr Mercer in providing the letter of support are of interest only in illustrating the ongoing artificiality and secrecy of the whole arrangement being set up for Canal Rocks Pty Ltd.

The tax invoices from Lasermail were addressed to Mr White. He forwarded them onto Mr McKenzie to pay. It is evident that these invoices totalling $1,608.88 was paid by eight unit holders from the Canal Rocks Unit Trust each contributing $199.00. Mr McKenzie admitted that this amount was deliberately chosen so that Mr Clarke did not have to disclose the identity of the donors.

As it transpired, Mr Clarke had no idea that Canal Rocks Pty Ltd was financing his campaign, let alone the amounts that were contributed. That was the deliberate intent of Canal Rocks Pty Ltd. The representation made to Mr Clarke was that it was his friend Mr White who was merely assisting him. The length to which Mr Crichton-Browne went to conceal from Mr Clarke the role played by Canal Rocks Pty Ltd is illustrated by the fact that he gave Mr Clarke a false name when he contacted him by telephone while Mr Clarke was overseas. Mr Crichton-Browne's explanation for that was he did not want Mr Clarke to tell others that Mr Crichton-Browne was assisting him. That explanation was incomplete. Even if it is accepted that Mr Crichton-Browne (as he asserts) may have felt that disclosure of his identity may have been disadvantageous, it is obvious also that disclosure carried the risk of indicating to the candidate that he was being assisted by Canal Rocks Pty Ltd.

[92] Transcripts of Hearings, 24 October 2006, p 175

Mr McKenzie was questioned as to why IAG wasn't used for the funding of Mr Clarke's campaign. Mr McKenzie stated that he couldn't specifically recall any reason.[93] While Mr McKenzie admitted there was a good deal of controversy surrounding the funding of candidates at the May election by September 2005, he stated that he could not recall that that was the reason why Canal Rocks Pty Ltd did not persist with the method of funding that had been used at the May elections.[94]

The tactics employed by representatives from Canal Rocks Pty Ltd in the funding of Mr Clarke's by-election campaign are particularly disturbing. Not only was Canal Rocks Pty Ltd concealed as the contributor to the costs of this candidate's campaigning, the candidate himself was unaware of the extent of this assistance. Given the lack of information provided to Mr Clarke while he was overseas, his assumption that members of his family and his friend, Mr White, did no more than a few dozen letter drops to ratepayers known to him is not criticised by the Commission. Mr Clarke was unsuccessful at the by-election.

The Commission notes that it is asserted for Canal Rocks Pty Ltd that there was no concealment or anonymity of the contributions as the funds advanced by various unit holders were by cheques for $199 which disclosed their identity but kept the contributions below the compulsory declaration amount. Again, this observation is hardly to the point. Those individual cheques were sent to 'Lasermail' not to Mr Clarke. Mr Clarke had no reason or opportunity to know that the funding of his campaign was being supported by the Canal Rocks Pty Ltd unit holders.

4.13 The Council Meeting of 12 October 2005

Mr Brian Box was elected unopposed as a Busselton Shire councillor in a by-election in August 2005. In late September 2005 he was approached by Mr Crichton-Browne with a proposal that he should put a motion up at the next Council meeting (to be held on 12 October 2005). The motion was to the effect that the Canal Rocks Pty Ltd amended DGP be brought forward for consideration at the next meeting. The normal process would be that the shire officer would prepare a report and that this would then be distributed with an agenda. A report on the amended DGP lodged with the Shire on 12 August 2005 was not yet available (because it had been identified as having fatal flaws).

Mr Box conceded that Mr Crichton-Browne drafted the motion and that he was aware that he was being lobbied on behalf of Canal Rocks Pty Ltd. He describes Mr Crichton-Browne as being 'very pushy'.[95] He agreed to move the motion, though he made no attempt to elicit what opposing views there may be. Nor did he attempt to determine what the views of the Shire planners

[93] Transcripts of Hearings, 2 November 2006, p 785
[94] Ibid
[95] Transcripts of Hearings, 26 October 2006, p 423

would be to a requirement to present a report in a short time frame.[96] He knew that the proposed development was a matter of some controversy. It is now apparent to Mr Box that he was naïve and allowed himself to be persuaded by Mr Crichton-Browne regardless of its merits.

Clearly the intent of this motion was to have the development proposal considered before Amendment 92 was approved and came into effect. Other councillors were lobbied on behalf of Canal Rocks Pty Ltd to support the motion. Mr Box put the motion and Mr Triplett seconded it. Mr Triplett states that he did so only to permit debate, not because he was necessarily supportive of the motion. The motion was strongly opposed by other councillors, including the Shire President, Mr Kevin Douglas, who spoke against it. Mr Douglas was aware that at least one other councillor had been approached by Mr McKenzie to move the motion. It was clearly evident to him, as it became to others after he spoke, that Mr Box was advancing the motion at the behest of Canal Rocks Pty Ltd.[97] When this was apparent the absence of merit of the motion was such that even the mover and seconder did not support it and it was unanimously lost.

The events relating to this motion are relevant in revealing the objective of Canal Rocks Pty Ltd and the methods used in endeavouring to achieve that objective, but it could not be said that the actions of Mr Box constitute misconduct. As Mr Box himself conceded, he 'learnt a very big lesson that night'.[98]

4.14 The Council Meeting of 14 December 2005

On 14 December 2005, Amendment 92 came before the Council for final approval. On this occasion Ms Ryan and Mr Triplett, being two of the councillors who had received financial assistance, declared interests. Mr Triplett stated that he 'was now aware that a director of the company associated with Smiths Beach development had an association'[99] with IAG. There was no indication of what that association was or when he had become aware of it. Ms Ryan stated that 'there may be a perception that the developer is in some way involved with IAG'[100] but that she was not aware of this. She did not explain what such a perception could be based upon, or what she had done to determine the truth of the matter.

The declarations of interest made by each of the councillors were declarations affecting impartiality rather than financial interest declarations. The significant difference is that impartiality declarations do not require the person not to participate in the issue. In this case, both councillors stated that they intended to consider the amendment on its merits and both participated in the debate and the votes that ensued. In fact, as noted above, since both Ms Ryan and

[96] Transcripts of Hearings, 26 October 2006, p 428
[97] Transcripts of Hearings, 23 October 2006, p 95
[98] Transcripts of Hearings, 26 October 2006, p 430
[99] Ibid, p 383
[100] Ibid, p 383

Mr Triplett had received election funding from Canal Rocks Pty Ltd, that entity was considered a 'close associate' and they were obliged to make financial interest declarations.

Ms Ryan said that, though she was aware of allegations that Canal Rocks Pty Ltd was the source of the election funding, she accepted the assurances of Mr Burke and Mr McKenzie that the funding was from IAG. She accepts that she was too trusting in that regard and should have asked more questions.[101] Yet she felt compelled to make a declaration affecting impartiality at this meeting because of a letter from a lawyer representing the Smiths Beach Action Group suggesting that declarations were required. Given that Ms Ryan had only very brief contact with Mr Dean, that IAG showed no apparent interest in the Council and that there were no trading hours issues arising for consideration, Ms Ryan's claim that she persisted in the belief that IAG was the true source of the funds is difficult to accept. She had, in contrast to IAG, had a number of contacts with Mr McKenzie and Mr Burke (particularly prior to the election).

Mr Triplett also said that he received assurances from Mr McKenzie that the funds came from IAG and that 'he'd had nothing to do with paying for it himself'. He accepted those assurances, though by the time of the 14 December 2005 meeting he was clearly aware that Mr McKenzie was also a director of Canal Rocks Pty Ltd. Mr Triplett maintained that he continued to believe that Mr McKenzie wore two hats, as a director of Canal Rocks Pty Ltd and as a representative of IAG. He continued to believe that when he dealt with Mr McKenzie regarding election funds it was solely in his capacity as an IAG representative. Somewhat surprisingly Mr Triplett continued to maintain that view to the date of the hearings, because, he said, 'no-one has told me any different'.[102] This position would require a profound level of naivety. Mr Triplett had been made aware of allegations that Canal Rocks Pty Ltd was the source of his election funding and was stubborn in his refusal to consider or make reasonable inquiries to determine whether those allegations were true.

It is impossible to avoid the conclusion that nothing short of a blunt statement from Mr McKenzie that Canal Rocks Pty Ltd was the source of the funds that paid their election expenses would have convinced Ms Ryan and Mr Triplett of this fact. Mr Triplett, in his written submissions, stressed the lengths that those involved in Smiths Beach went to in order to conceal the true source of the funding and that he had a lack of actual knowledge of the actual connection between Mr McKenzie and Canal Rocks Pty Ltd. However, in the view of the Commission, a wilful refusal to inquire, to show any reasonable level of interest, indicates that both councillors were avoiding an inconvenient truth. Wilful blindness, which is the refusal to obtain confirmation because the truth is strongly suspected, may well be the equivalent of knowledge. A person cannot avoid lawful obligations arising from his or her knowledge of a fact by maintaining a deliberate and stubborn ignorance.

[101] Ibid, p 367
[102] Transcripts of Hearings, 25 October 2006, p 324

In these circumstances the proper course was for Mr Triplett and Ms Ryan to declare that they had financial interests and to absent themselves from the debate and vote relating to the motion in regard to Smiths Beach.

4.14.1 Commission's Opinion Regarding Mr Triplett's Declarations

Mr Triplett, having received election funding from Canal Rocks Pty Ltd, failed to make a financial interest disclosure at the Busselton Shire Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of his duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Mr Triplett as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

4.14.2 Commission's Opinion Regarding Ms Ryan's Declarations

Ms Ryan failed to make a financial interest disclosure at the Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of her duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Ms Ryan as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

4.15 Debate on Amendment 92

In the debate on Amendment 92 that occurred at the meeting, an attempt was made to add a clause to the shire officer's recommendations. This clause was one that requested the DPI to consider the reasonableness of the Amendment. Such a clause would have reflected the views that Canal Rocks Pty Ltd had consistently expressed – that the Amendment was too onerous. The motion was moved by Ms Ryan and seconded by Ms Reid.

Ms Reid made no declaration of interest at the meeting, though by this time she was engaged in a personal relationship with Mr Crichton-Browne, who continued to be a paid consultant for Canal Rocks Pty Ltd. Though it may be

doubted whether this relationship was, on the face of it, such as to require a financial interest declaration, it was clearly one that required the declaration of an interest affecting impartiality.

Ms Reid, in written representations to the Commission, stressed that prior to any such relationship, she was supportive of the Canal Rocks Pty Ltd DGP and seconded the motion to permit debate. She says that she did so without having previously discussed the Ryan motion with anyone representing Canal Rocks Pty Ltd. These submissions may support a conclusion that Ms Reid had her own independent belief in and reasons for supporting the Canal Rocks Pty Ltd DGP but do not affect the disclosure obligations. The Code of Conduct of the Shire of Busselton makes provision for conduct in relation to conflicts of interest. Ms Reid had signed a declaration on becoming a councillor that she would comply with that Code and said that she had read it.[103] The Code provides that councillors should disclose a non-financial interest when they believe that the public may have a perception that their impartiality may come in to question.

Ms Reid said that she was unaware of the specific provision of the Code, though she had previously made declarations affecting impartiality. She also said that she did not believe that her relationship with Mr Crichton-Browne affected her impartiality. That, however, is not the point. The obligation to disclose does not arise only where a councillor believes he or she is in fact compromised but where this may be the reasonable perception of others if the information were known. Ms Reid's response to this was to say that her personal relationship with Mr Crichton-Browne was not public knowledge.[104] This response reveals the very reason for the obligation to disclose and displays an inadequate understanding of the concepts. A councillor is not relieved from the obligation to disclose an interest that could be perceived as affecting his or her impartiality because the interest is unknown. The obligation, in fact, assumes for the purpose of testing its existence or otherwise, that a reasonable observer would know of the interest. If it were otherwise the very purpose of making a declaration would be undermined. That purpose is to allow others to know that such an interest exists so that they may make their own judgement as to whether the councillor is in any way compromised.

Accepting that Ms Reid failed to make the appropriate declaration, the question that then arises is whether this failure could constitute misconduct. A failure to make a declaration of interest affecting impartiality is a less serious matter than a failure to make a financial interest declaration. Such a failure, for example, does not constitute an offence under the Local Government Act. It could not, therefore, be misconduct under section 4(d)(ii) and (v) of the PSMA. The possible alternative is misconduct under section 4(d)(ii) and (vi) which would require that the conduct be of sufficient seriousness that it would provide grounds for termination from office if the person were a public service officer. There is no doubt that failures of this

[103] Transcripts of Hearings, 26 October 2006, p 444
[104] Ibid, p 445

type can reflect adversely upon the integrity of the individual and have the capacity to undermine public confidence in local government.

The proposal to develop Smiths Beach was arguably the most important (and controversial) matter before council. It had divided the local community and generated an enormous amount of publicity. It was therefore incumbent upon all councillors to be particularly candid and conduct themselves with the utmost propriety when motions involving Canal Rocks Pty Ltd were before council.

4.15.1 Commission's Opinion on Ms Reid's Failure to Declare an Interest

Ms Reid failed to make a declaration of an interest affecting impartiality relating to her personal relationship with Mr Crichton-Browne, a lobbyist for Canal Rocks Pty Ltd, prior to the final consideration of Amendment 92 affecting Smiths Beach, at the 14 December 2005 Council meeting. At that meeting she seconded a motion on Amendment 92 in a manner favourable to Canal Rocks Pty Ltd, and participated in debate about Amendment 92. This was conduct that could adversely affect the honest or impartial performance of her functions as it concealed the existence of a potential conflict of interest. This conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constituted misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

CHAPTER FIVE
CANAL ROCKS PTY LTD
AND PUBLIC SERVICE OFFICERS

5.1 Introduction

In addition to the funding of local government candidates and their subsequent failure to properly declare interests in the decision-making process regarding Smiths Beach, the investigation also identified a number of approaches to State government officers that are a cause for concern. These approaches and the subsequent actions by certain public officers involved the Environmental Protection Authority (EPA), the Department of Conservation and Land Management (CALM), the South West Regional Planning Committee (the SWRPC) and the Department for Planning and Infrastructure (DPI).

The attempt by Ms Reid and Ms Ryan to raise doubts with the WAPC as to the reasonableness of Amendment 92 failed. The Amendment was passed in accordance with the Shire officer's recommendations. Those recommendations were to approve the amendment with a number of small changes arising from the public consultations. The changes were precisely listed and the original amendment was annexed (as contained in the minutes of the 10 August meeting). There was, however, a final hurdle before the amendment was incorporated into TPS 20; approval by the WAPC.

As has been previously noted, the EPA had written to the WAPC on 11 October 2005, suggesting that consideration be given to deferring approval of Amendment 92 until the SEA process was complete. This suggestion appears to have been accepted and by April of 2006 the matter had not been referred to the relevant committee for approval. The Shire was unaware of the reason for the delay until April 2006 but, on becoming aware, pressed for the matter to be resolved. The WAPC had delegated the relevant approval authority to the South West Regional Planning Committee (the SWRPC) and that committee was due to meet on 19 May 2006.

5.2 Approaches to CALM

In early 2006, Mr McKenzie told Mr Burke that CALM was requiring that Canal Rocks Pty Ltd engage in an extensive drilling program to establish the depth of soil at the site. This was something that Mr McKenzie viewed as being unnecessary and of no proper concern to CALM. Mr McKenzie told Mr Burke that Mr Hanly was the responsible CALM officer and that he was biased against the development.[105] Mr Burke said that he would make an appointment to see Mr McNamara with a view to ensuring that CALM's approach was, as he put it, reasonable.

[105] Transcripts of Hearings, 6 November 2006, p 924

The meeting was to be held on 2 May 2006 at the offices of CALM. Prior to that meeting Mr Burke sent 'a detailed briefing note' to Mr Brabazon in response to a request for some indication of what the meeting was to be about. The email contained attachments referring to Mr Hanly's requirements and notes critical of Mr Hanly's actions. The 'detailed briefing note' was marked by Mr Burke as being 'confidential, not for file'. He said that this was because the notes were personal rather than 'something official'. He could not explain on whose file it was that he intended the notes not be placed. He did, however, say that he was prepared to have the claims in the notes investigated.

Mr Burke said that he was given a good hearing at the meeting and was given assurances that decisions by CALM in respect of Smiths Beach would be reviewed at a senior level. He also requested that Mr McNamara seek to have the coordinating committee meet again with a view to resolving any differences of views regarding the development. Mr Burke also made a number of proposals to CALM which related to making offers regarding ceding some of the land to be incorporated into the National Park and discontinuing an application to build a single house on another part of the land. Mr McNamara viewed these offers favourably.

Subsequently, Mr Hanly prepared a document entitled 'Comments on the Smiths Beach Applied Methodologies' and provided it to the members of the co-ordinating committee. A copy of this document was provided to Mr Burke. Mr Burke then sent a strongly worded email to senior officers at CALM expressing concern that Mr Hanly was continuing to attend the coordinating committee meetings and that his actions in providing the comments was contrary to the assurance that he said had been given, namely that 'responses' by CALM would be coordinated or overseen by senior departmental people. He also repeated allegations that Mr Hanly's work was 'unbalanced, unfair and based on such poor science as to reflect poorly on CALM'. Mr Burke told the Commission that Mr McKenzie had expressed the view to Mr Burke that Mr Hanly had 'exceeded his brief'. However quite what the 'poor science' that Mr Burke was referring to was unexplained. Even if that view was genuinely held, there was no material available to the Commission that could support that claim, though it is readily apparent why Canal Rocks Pty Ltd might express such a view.

Mr Chandler, Mr Hanly's manager, said that he was never made aware of any assurance given to Mr Burke.[106] Nor were any allegations made to senior officers regarding Mr Hanly's competence or integrity ever brought to his attention. Mr Chandler was aware that Canal Rocks Pty Ltd wanted Mr Hanly checked but he considered that there was no basis for doing so and that to do so would be perverse and unjust.[107] Mr Chandler said that there was a requirement that concluding documents should be signed off by a senior officer but this did not apply to procedural or technical process documents. Mr Hanly's comments clearly fell, in Mr Chandler's view, into the latter

[106] Transcripts of Hearings, 7 November 2006, p 1003
[107] Ibid, p 1005

category and were part of Mr Hanly's expected normal participation in the coordinating committee.

Mr McNamara had a different view. He believed that the document produced by Mr Hanly came within the ambit of senior oversight and that it was arguably overly subjective and beyond what CALM was entitled to say. Mr McNamara accepted that Mr Burke implied in email communications that he wanted Mr Hanly to be brought under control, but said that the steps he (Mr McNamara) took were no different from those that would be taken in any similar case.[108] While Mr Burke expressed his views in strong terms, Mr McNamara said he did not feel intimidated.

Mr Brabazon came to a view that he described as being 'stronger' than Mr McNamara's regarding Mr Hanly.[109] He said that he was concerned by aspects of Mr Hanly's submissions and about what he perceived as bias in those submissions.[110] This is in accord with what Mr Burke was suggesting. Mr Brabazon maintained that this was his honestly held view and he had not been influenced by any desire to be of assistance to Mr Burke. If this is so then it would be expected that Mr Brabazon would take some step to have Mr Hanly formally disciplined and perhaps removed from involvement with this proposed development. However, he said that all he did was to raise the issue with another senior officer, Mr Sharp. However, Mr Sharp, who was the senior officer appointed to attend the coordinating committee, said that he had no concerns as to bias or impropriety on the part of any of the CALM officers involved and that no-one suggested such concerns to him other than Mr Burke in the email.[111] Mr Sharp saw the document prepared by Mr Hanly and saw nothing in it that was unbalanced, unfair or based on poor science. Somewhat ironically, Mr Brabazon was willing to come to a seriously adverse view as to the integrity of another CALM officer without giving that officer any opportunity to address those concerns.

In telephone calls at this time Mr Burke refers to Mr Brabazon as being an appointee of his and Mr McNamara as being a 'very good friend'[112], clearly suggesting that he was in a position to influence those officers. He also referred to Mr Brabazon as 'working hard for us'.[113] Both Mr Brabazon and Mr McNamara strongly rejected that they had been in any way assisted in their careers by Mr Burke or that he could be described as a friend. Mr Burke said that he had been mistaken in thinking that he had ever had a role in appointing Mr Brabazon.

Mr Burke also said that it was not true that he was a very good friend of Mr McNamara and that he had only said this to Mr McKenzie to reassure him. In respect of claims made by Mr Burke to others it is important to take into account that he could well be making claims that were untrue or exaggerated. A lobbyist might have a personal interest in making inflated claims as to his or

[108] Transcripts of Hearings, 31 October 2006, p 624
[109] Transcripts of Hearings, 1 November 2006, p 658
[110] Ibid, p 659
[111] Ibid, p 669
[112] Transcripts of Hearings, 4 December 2006, p 1162
[113] Ibid, p 1167

her power and influence in order to convince a client that he or she is in a position to achieve a desired objective.

Without more material it would be difficult to rely on the calls to reach a conclusion that Mr Burke was in a position to exercise influence over Mr McNamara and Mr Brabazon. In phone conversations with Mr Burke, Mr Brabazon gives assurances as to other senior officers being 'rock solid' and that Canal Rocks Pty Ltd need have no concerns. He also gave what he described as 'gratuitous' advice as to how a developer could best achieve an outcome by withholding concessions until late in the process so that they could be offered to a Minister.

He said he considered it to be appropriate to advise a person to withhold concessions as a tactical ploy in dealing with his own department. The ethics of this are at least open to question and his rationalisation of this advice tends to suggest a loss of objectivity. To his credit, Mr McNamara said that he had some concerns with the view expressed by Mr Brabazon.

5.2.1 Commission's Opinion of Mr McNamara's Conduct

As has been noted, misconduct under section 4(d)(ii) and (vi) of the CCC Act would require that there be a conduct which constituted a breach of duty of such seriousness as to justify termination from office. There is no material before the Commission that could support such a conclusion in respect of Mr McNamara.

5.2.2 Commission's Opinion of Mr Brabazon's Conduct

The conduct of Mr Brabazon is of concern. However, even if that conduct was accepted as involving a loss of impartiality, it was probably not such as to justify termination from office and, accordingly, would be insufficient to constitute misconduct within the meaning of section 4 of the CCC Act. In reaching this conclusion consideration has been given to Mr Brabazon's written submissions dated 7 February 2007. Those submissions also detailed the work history of Mr Brabazon, which confirmed his position at the hearing that Mr Burke was not instrumental in securing any of his positions within the Public Service.

However, in the Commission's view, while Mr Brabazon's conduct did not constitute misconduct, he nevertheless acted with a lack of integrity and his actions warrant disciplinary action by the Department of Environment and Conservation.

Therefore, the Commission recommends:

Recommendation 1

That consideration should be given to the taking of disciplinary action against Mark Brabazon by the Director General of the Department of Environment and Conservation. This is in regard to his integrity in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee and in providing Mr Burke with advice on how ministerial approval could best be achieved. This included the withholding of concessions to the department he worked for.

5.2.3 Mr Burke's Influence on CALM

The Commission has expressed concern with regard to Mr Burke's apparent influence on Mr Brabazon, a senior CALM officer, in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee and in providing to Mr Burke with advice on how ministerial approval could best be achieved. This included the withholding of concessions to CALM, his own department. The Commission notes that this influence does not appear to have extended to affect the policy officers tasked with the day-to-day dealings with the Smiths Beach development proposal.

Indeed, while CALM's Executive Director, Mr McNamara met Mr Burke to discuss CALM's dealings with the development proposal, the steps Mr McNamara took to establish greater management oversight and coordination appear appropriate in terms of the public interest and environmental consequences attendant to the Smiths Beach proposal.

There is no suggestion in the material before the Commission that Mr Burke's representations resulted in any pressure from CALM's senior management to require their officers to change their approach in dealing with the Smiths Beach development proposal.

The Commission acknowledges that CALM's response to the pressure Mr Burke placed on it appears to have been appropriate and measured.

5.3 Approaches to the South West Regional Planning Committee

On 18 May 2006 Mr McKenzie telephoned Mr Burke and asked whether Mr Paul Frewer was a member of the South West Regional Planning Committee (SWRPC). The question obviously arose because by this time Mr Frewer had left DPI and joined another government department. Leaving Mr McKenzie on the telephone, Mr Burke then called Mr Frewer and established that he was still a member of the committee and would be attending the meeting the next day. Mr Burke said that the responsible Shire officer was 'playing funny buggers' and seeking to 'bring Amendment 92 on'. He said that he had gone

to see Mr Michael Allen of DPI and that Mr Allen was 'on side' but it wasn't clear that he knew 'what to do'. He offered to send Mr Frewer an email on the issue. He then went on to talk about changes in the Department of Environment and how he might be able to offer some assistance.

Following the hearings, Mr Frewer advised that the addresses on the email sent by Mr Burke were incorrect. In these circumstances it cannot be concluded that Mr Frewer received them. Certainly Mr Frewer said he had no recollection of doing so. In these circumstances he would not have received the attachment to that email, a letter setting out that Canal Rocks Pty Ltd considered that there was an inconsistency between the wording of the amendment and the resolution passed by the Council on 14 December 2005.

In fact there was no inconsistency. On 14 December 2005 the Council had made a few minor amendments as a consequence of the public consultation process and had otherwise adopted the amendment as originally passed. There was nothing unusual about this process. It had been adopted on previous occasions and had been accepted by the WAPC. The Shire was not told that there was anything inadequate about the resolution or the process that was followed. Indeed, it should be noted that the amendment was subsequently passed by the SWRPC without any change to the Council resolution at a later meeting. This is relevant because it sharply contrasts with what occurred at the 19 May 2006 meeting.

At that meeting Mr Frewer asked whether there was any difference between the Council Resolution and the amendment, and argued that the matter should be deferred until the matter was resolved. This view prevailed and the matter was put over to another meeting. This was, of course, precisely the outcome that Canal Rocks Pty Ltd desired. Mr Frewer sought to justify his decision by saying that he was informed that there was a discrepancy and that his position was well-founded. The difficulty with that is that he appears to have made no real inquiry as to whether there was a material difference that required deferral. His position is also made more difficult by the fact of the approach by Mr Burke and subsequent communications.

The SWRPC followed a procedure of disclosing approaches made to members by people lobbying them in respect of matters coming up for decision. As Mr Frewer acknowledged, any such lobbying should be disclosed by a member and recorded in the minutes and that this was necessary to ensure that there was an appearance of independence and fairness about the process. The disclosure item arose early in each agenda and at this meeting, as it happened, another member disclosed that she had been approached in respect of Amendment 92. Given that Mr Frewer had spoken to Mr Burke only the night before and that Mr Burke was self-evidently a lobbyist acting for Canal Rocks Pty Ltd, there was no reasonable excuse for Mr Frewer not making a disclosure. He did not do so and has offered no credible explanation for his failure. His only explanation was that it was an 'oversight'. This failure is capable of supporting a conclusion that Mr Frewer was motivated by the improper purpose of providing assistance to Mr Burke.

It is evident from calls made by Mr Burke that he was clearly of the understanding that Mr Frewer had obtained a deferral because of the request he made. On 19 May 2006 Mr Burke told another Canal Rocks Pty Ltd consultant that 'Frewer will definitely help us…I had a long talk to him last evening'. On the same day Mr Burke told Mr Grill that Mr Frewer was 'gonna do his best I'm sure'. Also on the same day Mr Burke told Mr McKenzie that he was 'absolutely confident' about Mr Frewer who, he said, 'will fight this to the death for us'.[114] Later that day Mr McKenzie obtained information that the deferral had been achieved and thanked Mr Burke. Mr Burke subsequently told a solicitor acting for Canal Rocks Pty Ltd that 'we were able to get Mike Allen and Paul Frewer to effectively adjourn it '.

The Commission has previously noted that it would view such claims by Mr Burke with caution and the written submissions for Mr Frewer correctly make the same point. That said, however, the content of the actual telephone conversations between Mr Frewer and Mr Burke taken with Mr Frewer's denial of such conversations referred to below, eloquently tell the story in themselves.

In relation to both Mr Frewer and Mr Allen, Mr Grill was also aware of and involved in, the efforts to achieve the deferral. On 19 May, Mr Grill telephoned Mr Burke to say that he was playing golf with Mr McKenzie. Mr McKenzie was worried about the application coming forward that morning in Bunbury. Mr Grill tried to call Mr Allen on behalf of Mr McKenzie but was unable to get through. They also discussed Paul Frewer being in Bunbury and the fact that Mr Burke had sent him something through regarding the amendment. Later that day Mr Allen called Mr Grill on his mobile leaving a message that he had sent a note to Mr Mike Schramm after a call from Mr Burke concerning Smiths Beach. An hour after that message Mr Grill rang Mr Burke to tell him that it had been successful in Bunbury and that it was 'pulled off the agenda by Paul Frewer and Co'.[115] At 2.41pm that day Mr Grill left a message with Mr Allen saying that his actions worked with the withdrawal from the agenda which was excellent and thanked him profusely. Shortly after this phone call Mr Grill phoned Mr Burke confirming that Mr Allen had received Mr Burke's email and sent off a note to Mr Schramm suggesting that it be removed from the agenda. Mr Grill said that he felt it appeared that a few people have been working on their behalf - Mr Burke said that was good.

On 23 May 2006, Mr Frewer called Mr Burke and Mr Burke thanked him. Mr Frewer then gave an account of what occurred at the SWRPC meeting. The call continued for some 24 minutes and canvassed other issues such as department amalgamations and Mr Frewer's position. In these circumstances it would be surprising if Mr Frewer could not recall the conversation. Yet when first called to appear at the Commission Mr Frewer denied that this or any conversations on the subject with Canal Rocks Pty Ltd consultants had occurred.[116] In particular he denied having any discussions with Mr Burke regarding the 19 May meeting of the SWRPC.

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[114] Transcripts of Hearings, 4 December 2006, p 1134
[115] Surveillance Intercept T39, Hearing 4 December 2006
[116] Transcripts of Hearings, 1 November 2006, pp 712-716

There can be no suggestion that Mr Frewer was caught by surprise by the questions regarding the 19 May 2006 meeting or that he did not have adequate opportunity to prepare for them. The issue regarding the propriety of the deferral was raised in the opening address of counsel assisting over a week before Mr Frewer appeared. The questions were clear and the answers unequivocal. It must also be remembered that the conversations in question took place only five months prior to the hearings.

When Mr Frewer was recalled as a witness he sought to explain his previous incorrect statement by saying that he did not recall the conversations and that at the time they occurred he was going through a period of great personal stress. But the denials of any such calls were not couched in terms of being unable to recall. That these denials were deliberate is consistent with the failure to make a declaration at the 19 May 2006 meeting. If it is accepted that the denials of the calls was deliberate, it is strong substantiation that Mr Frewer was conscious that he acted improperly and was seeking to conceal that fact.

5.3.1 Commission's Opinion on Mr Frewer's Conduct

On 19 May 2006, at a meeting of the South West Regional Planning Committee, Mr Frewer recommended deferring consideration of a Shire of Busselton proposal to amend Town Planning Scheme (TPS) 20. This deferral was in the interest of Canal Rocks Pty Ltd. Mr Frewer's conduct in failing to declare that he had been approached by Mr Burke to speak in favour of the deferral of Amendment 92 constitutes the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

The Commission therefore recommends:

Recommendation 2

That the appropriate relevant authority should consider taking disciplinary action against Paul Frewer for his lack of integrity in seeking the deferral of Amendment 92 at the request of Mr Burke at the 19 May 2006 meeting of the South West Regional Planning Committee.

5.4 Approaches to DPI

The SWRPC was due to meet on 19 May 2006 and Amendment 92 was on the agenda. Mr McKenzie was concerned that Amendment 92 would be approved and this was an outcome he was anxious to avoid. He wanted consideration of the amendment to be deferred. This was a matter that he raised with Mr Burke.

On 12 May 2006, Mr Burke and Mr Grill met with Mr Allen at his DPI office to discuss a number of matters including Smiths Beach. On 18 May 2006, Mr Burke sent an email to Mr Allen, copied to Mr Grill, suggesting that Amendment 92 had been brought prematurely before the SWRPC at the instigation of Shire officers and that it might not be desirable to proceed with it at this point in time. There was a reference in the email to discussions with Mr Allen on the subject on 12 May 2006.[117] Mr Allen referred the concerns to Mr Michael Schramm, a DPI officer in Bunbury, and then left for a conference in Queensland.

Mr Grill telephoned Mr Allen on 19 May 2006, and left a message saying that there was an urgent matter coming before the SWRPC and Mr Grill thought that Mr Allen would be able to do something about it. There was then further telephone contact from Mr Allen in Queensland in which he discussed the SWRPC but apologised to Mr Grill for not being able to do more to assist. On 19 May 2006, Mr Grill contacted Mr Allen and left a message thanking Mr Allen for his actions in regard to the SWRPC advising that the matter was withdrawn from the agenda which Mr Grill thought was 'excellent'.[118] On 23 May 2006, Mr Mike Allen called Mr Grill and Mr Grill again thanked him for his actions with the SWRPC.

Mr Allen also denied having communication with Mr Burke and Mr Grill in regard to the Smiths Beach matter in general and the SWRPC meeting in particular. Indeed, none of the persons who had engaged in discussions about the 19 May 2006 SWRPC meeting seemed to remember them until confronted with recorded telephone calls.

While the calls to Mr Allen do not indicate that he was able to do anything to assist, this seems to be at least in part due to his absence from the State. However, in discussions between themselves it is apparent that Mr Burke and Mr Grill believed that Mr Allen was willing to assist, and Mr Grill expressed gratitude for that willingness.

The written submissions dated 19 January 2007 by Mr Allen were considered in reaching that conclusion. Importantly those submissions included a copy of his email dated 18 May 2006 to Mr Michael Schramm that contained the email from Mr Burke. [119] Mr Schramm was the manager of DPI's south-west region planning office in Bunbury and was attending the SWRPC meeting on 19 May

[117] Transcripts of Hearings, 5 December 2006, p 1289
[118] Transcript of Hearings, 5 December 2006, p 1233 and 1295
[119] Email from Mr Mike Allen to to Mr Michael Schramm dated 18 May 2006.

2006 to explain the details of the proposed Smiths Beach development, Mr Allen's covering note in his email stated:

> *Just have a look at the email from Brian Burke. When I met him and Julian Grill last week, we didn't go into any detail about Smiths Beach, other than for them to voice the opinion that there shouldn't be any lessening of the area for development if allowed.*
>
> *I don't know anything about the amendment or why it is going to the Committee. I'll leave that issue to your judgment.*

The above comments do not suggest any attempt by Mr Allen to influence Mr Schramm in taking a stance that would favour Canal Rocks Pty Ltd. As has already been noted, Mr Allen was very apologetic in a message he left on Mr Grill's mobile telephone on 19 May 2006, saying 'sorry I couldn't do anything more for you on this occasion.'[120] This was before he became aware that the SWRPC had actually deferred consideration of the matter.

Mr Allen, however, had subsequent discussions with Mr Burke regarding whom Canal Rocks Pty Ltd would prefer to have as the DPI officer appointed to write a report on the development. These discussions occurred both at personal meetings and on the telephone.

Mr Allen specifically denied that any such discussions with Mr Burke had occurred, even though they occurred only three months prior to his first appearance at the Commission. His explanation was that he forgot the discussions. This would seem surprising, given the topic, the timing of the first appearance, the significance of the controversial development, the profile of Mr Burke and the issues known to be under consideration in this inquiry. To have suggested at his first appearance that he could not recall any discussion with Mr Burke would have been inherently implausible. It continues to be.

As has been noted, the object of the discussions was to obtain a particular report writer. Mr McKenzie confirmed that he wanted this because the desired person was considered more favourably inclined to the development. Mr Burke made this view known to Mr Allen and the desired person was in fact appointed. Mr Allen said that this person was appropriate in any event because she had had previous involvement in the project. That may be so, but the telephone conversations suggest that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes. This would certainly appear to have been Mr Burke's view (at least on the face of it) since he subsequently told Mr McKenzie that Mr Allen's actions had been 'true to form'.

Mr Grill was also aware of, and involved in the successful attempt to obtain a particular report writer. At 12.30 pm on 4 August 2006, in discussions at 1/53 Mount Street, Mr Burke informed Mr Grill that he had asked Mike Allen to ensure that the particular officer did the DPI report on Smiths Beach because

[120] Telephone Intercept 0042

she was familiar with the project and they needed it quickly etc. Mr Burke told Mr Grill that Mr Allen had rung back and said 'yes' and that her boss was very strongly in support.

On the same day, Mr Burke telephoned the DPI and left a message for Mr Allen to call him back regarding a discussion that he and Mr Allen had had on Wednesday regarding the developable area at Smiths Beach. Mr Burke wanted to confirm that Mr Allen left the completion of DPI's opinion with the officer concerned and asking would it be okay for Mr Burke and Mr Grill to call that officer.

5.4.1 Commission's Opinion on Mr Allen's Conduct

The Commission has considered Mr Allen's actions in receiving and forwarding-on the email from Mr Burke on 18 May 2006 regarding the SWRPC meeting. Mr Allen was prepared to provide this assistance without making any assessment of the validity of the claims being made. However, the Commission has considered the submissions of Mr Allen on this topic and accepts that there is nothing that would indicate misconduct in these actions.

Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

The Commission therefore recommends:

Recommendation 3

That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report.

5.4.2 Messrs Burke and Grill's Influence on DPI

On the information available to the Commission, Mr Frewer and Mr Allen were the only DPI officers apparently susceptible to the influence of, mainly Mr Burke. Nevertheless, it is of concern to the Commission that two such senior DPI officers should compromise the department's integrity. Their conduct demonstrates a failure by them to meet their obligation of impartiality in promoting and sustaining the public interest.

Given the authority and influence of DPI, in terms of major infrastructure and other decisions, it is important that a high level of public confidence in the integrity of the department is maintained, especially in terms of compliance with the Public Sector Code of Ethics by its senior officers.

5.5 Discussions with Hon Adele Farina MLC

The Honourable Adele Farina MLC has at all material times been a member of the Legislative Council representing the South West region. She had some involvement in the drafting of the amendment to the LNRSPP. In mid-2002 she was contacted by Mr Burke who advised her that he had taken on a role as consultant to Canal Rocks Pty Ltd and that his client did not think it had been fairly treated by the Government. Ms Farina advised that there was very little room for movement because the Government had a committed position in respect of the matter.

There were subsequent meetings at which Mr McKenzie, Mr Burke and Mr Grill were present. Ms Farina is a public officer and was called to appear in relation to her ongoing dealings with Mr Burke and others representing Canal Rocks Pty Ltd.

Ms Farina described meetings at which she considered Mr Burke had threatened to harm her political prospects. In written submissions for Mr Burke, it has been asserted that it is not open to the Commission to reach a conclusion as to the nature of these discussions as (amongst other reasons) the substance of Ms Farina's position was not put to Mr Burke for his response. The Commission accepts this submission.

There being absolutely no indication whatsoever of any misconduct on the part of Ms Farina, her dealings with Mr Burke, however important or interesting they may be to others, are peripheral to the focus of the Commission's inquiry into alleged or possible misconduct of public officers.

5.6 The Role of Mr Norm Marlborough

As has been noted, Mr Marlborough was identified by Mr Burke at an early stage as a person who may be of assistance to his client. Prior to February 2006, Mr Marlborough was not a Minister and accordingly his ability to assist might be thought to be limited. It would appear that he was asked by Mr Burke to obtain information in late 2002 regarding the LNRSPP and the Minister's attitude to it. It may well be that this is the type of inquiry that Mr Marlborough would answer for constituents. What seems unusual is that he would do this for Mr Burke and Canal Rocks Pty Ltd when the proposed development was not in his electorate. Mr Marlborough said that he was willing to help because he has some skills in resolving disputes. However, the material available to the Commission at least raises the question of whether his willingness was much more driven by his close friendship with Mr Burke.

Mr Marlborough's attendance at the first CALM meeting on 20 June 2005 appears to have achieved very little. Although Mr Burke claimed that he had not been responsible for arranging Mr Marlborough's attendance, this is at odds with what he said to Mr McKenzie in a telephone call. Notwithstanding the outcome, it is reasonable to conclude that Mr Burke's object in sending Mr Marlborough was to demonstrate both to the client and to the CALM officers that he was able to call upon a Member of Parliament to assist him.

It is relevant in considering Mr Marlborough's motivations to ask whether he had any personal reason for wanting to assist Mr McKenzie. In February 2005, a fundraising lunch for the Peel election campaign was organised by Mr Burke. Mr Marlborough was in attendance. Mr Burke suggested to Mr McKenzie that he might like to purchase a ticket. Mr McKenzie did so, in the name of Canal Rocks Pty Ltd, at a cost of $5000.00. Clearly, this money was a political donation. Mr Marlborough's wife deposited the cheque in an account styled the 'The Peel Campaign' account. The donation was not reported. However, the obligation for reporting the donation appears to be that of the political party as it takes responsibility for the account and providing returns to the Electoral Commission.

The fact of the donation provides an explanation for why Mr Marlborough was willing to attend the 20 June 2005 meeting at CALM. Mr Marlborough denied that receipt of the donation caused him to be favourably disposed to Mr McKenzie. He said that any such expectation would be naïve. However, the Commission is of the view that it would be 'naïve' to believe that such a donation would not have some influence on Mr Marlborough and material before the Commission indicates that it did, as his attendance at the CALM meeting is otherwise inexplicable.

In late 2005, Mr Burke arranged a lunch in Fremantle to which he invited Mr Grill, Mr McKenzie, Ms Morgan and Mr Marlborough. At this time Ms Morgan was seeking appointment to government boards and, meeting with little success, had raised the matter with Mr Burke. Mr Burke told Mr Marlborough the nature of Ms Morgan's problem and asked that he give her a 'fair hearing'.[121] Mr Burke did not say that Ms Morgan had in fact been of assistance to his client, Canal Rocks Pty Ltd, at the previous council election. At the lunch Mr Marlborough said he gave Ms Morgan some general advice but was unable to offer her anything by way of practical assistance.

On 3 February 2006, Mr Marlborough became the Minister for Small Business and the South-West. The South West Development Commission fell within his portfolio and some of the positions on that Commission are reserved for ministerial appointees. In mid-2006 two of those positions became available and Ms Morgan applied to be appointed. Ms Morgan called Mr Burke and asked whether the Minister made such appointments personally. Mr Burke suggested that she send him a copy of her application and indicated that he would speak to Mr Marlborough.

[121] Transcripts of Hearings, 8 November 2006, p 1062

On 9 August 2006 Mr Burke spoke to Mr Marlborough about the appointments and said 'you're not going to let me down on Beryle, are ya?' Mr Marlborough responded by saying 'No, course I'm not' and 'That'll be fine, Brian'. Mr Burke stressed that the appointment was important to him and Mr Marlborough said 'Oh, mate, it's a done deal …Don't even worry about it…if you hadn't brought it to my attention…she would have slipped by'.[122]

Mr Marlborough accepted that at this time he was in no position to assess whether Ms Morgan had a better claim to the position than any of the other candidates. The personal interest of Mr Burke is evident from statements in the call, such as 'Mate, mate, it is just, believe me, it is just so important on about fifteen different fronts'.[123]

Before the call was played, Mr Marlborough denied that he would have given any assurance that Ms Morgan would be appointed.[124] Mr Burke also denied it, saying that he would not have asked Mr Marlborough to appoint Ms Morgan because 'I wouldn't have thought that that was the right thing to do'.[125] After the call was played Mr Marlborough said that regardless of what he said it was never a 'done deal' and that the appointments would have gone through the usual process. Mr Burke said that his only intention was to put forward a person who he believed would be a very good appointment.

However, it is a perfectly reasonable construction of the request and response that Mr Burke was not merely providing a personal recommendation, he was seeking an assurance that Ms Morgan would be appointed regardless of whoever else may apply. The fact that both Mr Marlborough and Mr Burke denied that any such assurance had been sought and given supports a conclusion that there was an attempt to conceal this arrangement.

Mr Burke seemed to consider that the matter was sufficiently settled to advise Ms Morgan that it was 'OK' and that he thought it was decided. He did go on to say that 'It's no guarantee and things can always come off the rails but they told me today that it'd been decided so it shouldn't be long'.[126] However, unforseen events aside, Mr Burke's confident expectation was that Mr Marlborough would make the appointment.

Ms Morgan thanked Mr Burke. In her written submissions Ms Morgan has made the points that she was never privy to any communication between Mr Marlborough and Mr Burke and never requested Mr Burke to put pressure on Mr Marlborough to have her appointed to the SWDC. There is no material before the Commission to the contrary.

The fact that the appointment was never made does not mean these actions are innocuous. In fact, no appointments had been made at the time the hearings commenced and, given the material that was disclosed in those

[122] Transcripts of Hearings, 8 November 2006, p 1084 ; 4 December 2006, p 1181 and Telephone Intercept 121
[123] Ibid (telephone intercept)
[124] Ibid, p 1066
[125] Transcripts of Hearings, 6 November 2006, p 953
[126] Transcripts of Hearings, 4 December 2006, p 182 and Telephone Intercept 167

hearings, it is not surprising that Mr Marlborough did not proceed to appoint Ms Morgan.

A call between Mr Burke and Mr Grill on 24 August 2006 appears to remove any doubt as to what had been agreed. Mr Burke says, 'I arranged for him to put up Beryle Morgan'. There is then discussion regarding ensuring that Mr Marlborough 'delivers' on the next available appointment that Mr Grill wanted for another client. [127]

In the light of all of this material, the only reasonable conclusion is that Mr Marlborough agreed to appoint Ms Morgan for the improper purpose of complying with Mr Burke's wishes and without having proper or any regard to the merits of all of the candidates.

In reaching this conclusion it is important to consider the nature of the relationship between Mr Marlborough and Mr Burke. At the time of his appointment the fact of Mr Marlborough's long-standing close friendship with Mr Burke received media attention. Mr Marlborough gave public assurances that he would not allow the friendship to compromise the performance of his duties as a Minister. He stated that he had always been open about the friendship and had never sought to hide the fact that he and Mr Burke contact each other. Mr Burke said that the number of calls with Mr Marlborough reduced after Mr Marlborough became a Minister from thee to five times a week to a couple of times a week. He gave the impression that he withdrew in order to allow Mr Marlborough to carry out his duties without any perception of influence. Telephone conversations revealed this was an entirely false picture.

On 2 February 2006, the day before Mr Marlborough was sworn in as a Minister, a pre-paid mobile telephone was connected in Mr Marlborough's wife's name. The telephone was used almost exclusively for contact between Mr Marlborough and Mr Burke. Mr Burke instructed Mr Marlborough that the phone was not to be revealed to anyone else and that Mr Marlborough was to carry it everywhere with him. Mr Marlborough denied it was to be kept secret, but accepted that this was so when the first call made on the telephone was played to him. In other calls they discuss the need to avoid scrutiny of their communications and what telephones may be susceptible to a Freedom of Information application.

The content of the calls reveals that Mr Burke acted as though he dominated Mr Marlborough, who for his part was apparently unable to resist the demands of his friend.

Mr Marlborough stated that he was simply trying to give Mr Burke the impression that he would do his bidding in relation to the appointment of Ms Morgan (and other matters). Submissions for Mr Burke rely heavily on this. However this is hardly a satisfactory answer as Mr Burke's request concerning Ms Morgan should simply have been rejected. The unwillingness

[127] Transcripts of Hearings, 5 December 2006, p 1237-8 and Telephone Intercept 112

of both men to admit the obvious at the hearing confirmed both the nature of this relationship and their consciousness that it was to be concealed.

Shortly after appearing at the Commission Mr Marlborough resigned as a Minister and as a Member of Parliament. He has, by those actions, made his own determination as to his fitness for office as a Cabinet Minister. No doubt he has paid a high personal cost, but that cost has been paid as a consequence of his own actions. The Commission has only exposed those actions for public scrutiny. His resignation does not, however, release him from other consequences of his actions. He was at all material times a public officer and consideration must be given to whether his conduct amounts to misconduct under the CCC Act.

5.6.1 Commission's Opinion on Mr Marlborough's Conduct

Mr Marlborough, by agreeing with Mr Burke that he would appoint Ms Morgan to the South West Development Commission in circumstances where the relative merit of Ms Morgan holding such a position was unknown, failed to act with integrity in the performance of his duties. Such conduct could constitute a serious breach of the Public Sector Code of Ethics. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

5.7 Messrs Burke and Grill's influence on Public Sector Agencies

In assessing the material available to it in regard to its investigation of whether misconduct has occurred, the Commission has necessarily examined the actions of certain people who are not public officers. The CCC Act focuses on allegations of misconduct by public officers. During the compilation of this report there has been considerable debate about the power of the Commission to make comments on allegations of misconduct by non-public officers. Therefore, in order to avoid further delaying the tabling of this report, comment on non-public officers, particularly Messrs Burke and Grill, has been limited to reporting the facts concerning their actions as revealed by the Commission's investigations.

However, the Commission is of the view that it would be wholly artificial if, in reporting on the outcome of its investigation, it reported only on the actions of public officers. Where the actions of others have led to, invited or given rise to misconduct, those actions must necessarily be the subject of examination and, where appropriate, report, in discharge of the obligations of the Commission under paragraph 7A(b) of the CCC Act, to reduce the incidence of misconduct in the public sector.

In terms of their involvement in the matters considered in this report, Messrs Burke and Grill were equal partners as discussed above. The misconduct of Messrs Allen, Frewer and Marlborough resulted from the requests or influence of Mr Burke.

Mr McKenzie for Canal Rocks Pty Ltd was also in close telephone contact with each of Messrs Burke and Grill. In all, while more of the contact was carried out by Mr Burke (whom Mr McKenzie had initially approached for assistance), Mr Grill participated in, or was referred to in, over 130 telephone calls, emails and faxes in relation to the actions to be taken in connection with the Smiths Beach matter from May to November in 2006.

Specifically, in relation to the instances of public officer misconduct on which the Commission has expressed an opinion in this report, in addition to the invitation specified in relation to Dr Cox, Mr Grill was also involved in other discussions. He had discussions in which he supported the conduct of Messrs Frewer and Allen in relation to the deferral of Amendment 92[128] and with Mr Burke concerning Mr Allen appointing the DPI officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers.[129] Some, but not all of those discussions, are published in this report. The primary focus of attention is the allegations of misconduct of public officers.

It is an unfortunate outcome of this investigation that the improper conduct of a few has obscured the principled conduct and hard work of many others in the public sector who performed their duties while subject to very considerable pressure from Canal Rocks Pty Ltd and its consultants. The actions of a few have damaged the reputations of public sector agencies built over many years by thousands of dedicated public officers who have acted with integrity.

It is likely that there will always be some who seek to advance their partisan interests through a mixture of both legitimate and inappropriate means. What is important is that public officers respond to such approaches in a principled way, focused on the public interest.

5.7.1 Mr Burke's Influence on the Department of Conservation and Land Management

The Commission has expressed concern with regard to Mr Burke's apparent influence on Mr Brabazon, a senior CALM officer, in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee. The Commission notes that any influence of Mr Burke, relevant to the former matter, does not appear to have extended to affect the policy officers tasked with the day-to-day dealings with the Smiths Beach development proposal.

Concern has also been expressed about Mr Brabazon gratuitously providing Mr Burke with advice on how ministerial approval could best be achieved by the withholding of concessions to CALM, his own department. There is no suggestion that Mr Burke caused Mr Brabazon to give this advice.

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[128] see para 5.3 below
[129] see para 5.4 below

Indeed, while CALM's Executive Director, Mr McNamara met Mr Burke to discuss CALM's dealings with the development proposal, the steps Mr McNamara took to establish greater management oversight and coordination appear appropriate in terms of the public interest and environmental consequences attendant to the Smiths Beach proposal.

There is no suggestion in the material before the Commission that Mr Burke's representations resulted in any pressure from CALM's senior management to require their officers to change their approach in dealing with the Smiths Beach development proposal.

The Commission acknowledges that CALM's response to the pressure Mr Burke placed on it appears to have been appropriate and measured.

5.7.2 Messrs Burke and Grill's Influence on the Department for Planning and Infrastructure

On the information available to the Commission, Mr Frewer and Mr Allen were the only DPI officers apparently susceptible to the influence of, mainly Mr Burke. Nevertheless, it is of concern to the Commission that two such senior DPI officers should compromise the department's integrity. Their conduct demonstrates a failure by them to meet their obligation of impartiality in promoting and sustaining the public interest.

Given the authority and influence of DPI, in terms of major infrastructure and other decisions, it is important that a high level of public confidence in the integrity of the department is maintained, especially in terms of compliance with the Public Sector Code of Ethics by its senior officers.

5.7.3 Mr Grill's Influence on the Environmental Protection Authority

While the Commission has formed an opinion that Dr Cox, as the Chairman of the EPA, has engaged in misconduct as a result of the influence of Mr Grill it is not apparent to the Commission, on the basis of the material before it, that any other person in the Authority engaged in misconduct.

5.8 Conclusions Regarding the Involvement of Canal Rocks Pty Ltd

Canal Rocks Pty Ltd, through Mr David McKenzie, was kept informed of Messrs Burke and Grill's intentions and actions. In relation to their actions giving rise to misconduct of Messrs Allen, Cox and Frewer, it is clear that Canal Rocks Pty Ltd, through Mr McKenzie, gave at least tacit approval to these actions and, at times, was an active participant in the process of seeking approval of its development.

CHAPTER SIX
CORRUPTION PREVENTION ISSUES

6.1 Introduction

This chapter explores the wider structural, systemic and cultural/environmental factors that either enabled, or failed to prevent, misconduct.

The cost of misconduct such as this, in potential damage to the reputation of the Busselton Shire and the named government departments, as well as the loss in terms of community confidence in the integrity of public officers and systems, is significant.

Loss of public confidence can occur whether the actions of the public officer were intended or accidental, and whether they are actually or merely perceived as improper. This loss of confidence is not confined to the individual officer or agency involved; but can be generalised to the whole council, across councils, or even the entire public sector. This can result in the erosion of the public's faith in the public sector as a whole.

6.2 The Public/Private Interface

The Smiths Beach investigation has demonstrated how relationships between the private and public sectors can be used and abused by vested interests. The conduct of State and local government officers, developers, and professional lobbyists involved in the multi-million dollar development has illustrated the corrosive effect of unrestrained and unregulated vested interests on public officers and public systems.

These behaviours are not unique, as has been demonstrated by a number of other inquiries into similar matters in WA and elsewhere:

- the Queensland Crime and Misconduct Commission (CMC) inquiry into the 2004 Gold Coast City Council election;

- an earlier Queensland Criminal Justice Commission inquiry into campaign funding by developers of candidates for the City of Gold Coast elections in 1991;

- an Independent Commission Against Corruption (NSW) public inquiry into the Tweed Shire Council in 2004; and

- various Royal Commissions in WA, including the WA Inc Royal Commission (1992), the Royal Commission into the City of Wanneroo (1997), the City of Cockburn Inquiry (1999), and the City of Belmont Inquiry (2003).

All had the common theme where the relationships between public officers and developers/business had resulted in widespread improper practices and conduct.

Activities surrounding the Busselton Shire Council elections in 2005, as revealed during the Commission's investigations, mirror the findings of these previous local and interstate inquiries. Canal Rocks Pty Ltd had a clear plan to support the nomination and election of candidates considered to be 'pro-development', and went to extreme lengths to hide this support from the Busselton community; including the use of the IAG to hide the true source of campaign funding.

Candidates who accepted financial support from IAG claimed to be unaware that the monies they received originated from Canal Rocks Pty Ltd; the excuse being they had not been told. The Commission considers that many of the candidates were conscious of the involvement of Canal Rocks Pty Ltd but that it was convenient for them to continue asserting that the source of the funds was IAG. As stated by Counsel Assisting during his concluding remarks:

> *Wilful blindness, that is, a deliberate failure to obtain positive confirmation of something because the truth is apparent, can be equated with actual knowledge in some circumstances.*[130]

6.3 Causes of Misconduct

A number of factors can lead to misconduct, including:

- Opportunity, when poor systems make misconduct easy;
- Little fear of exposure or likelihood of detection, due to a lack of reporting mechanisms, a poor history of dealing with reports, or an absence of detection mechanisms or strategies;
- Lack of ethical leadership and support; resulting in unclear messages about what is acceptable, and the setting of poor examples; and
- Cultural acceptance of aberrant behaviour, both within an organisation and the wider community. Risks are increased when improper behaviour is described as standard business practice, or justified by asserting that it's not illegal and that everyone does it.[131]

The legislative framework within which individuals and organisations operate, as well as their governance and accountability systems, can either strengthen or undermine integrity. The Smiths Beach investigation, while identifying

[130] Stephen Hall SC, Concluding remarks of the Corruption and Crime Commission Public Hearings, 6/12/2006, p 1377

[131] Boardman and Klum in *Corruption & Anti Corruption*, Edited by P. Larmour & N. Wolanin 2001, Chapter 5 Building organisational integrity 83-84

some current gaps and weaknesses in the relevant legislative and accountability/regulatory frameworks that require reform, did not reveal widespread structural weakness.

Rather, the hearings clearly demonstrated that otherwise robust public sector systems (i.e. designed to ensure transparent, accountable, ethical and fair practice and process) are vulnerable to being intentionally misused, abused and circumvented by both internal (e.g. elected officers, public service officers, local government personnel) and external forces (e.g. candidates, consultants, business entities).

The effectiveness of the strongest processes relies on individuals, (whether public officers or those seeking to influence public officers) acting with integrity in order to guide their behaviour and decisions.

> *…unless elected officials and public officers are willing to take a healthy attitude towards compliance obligations, rather than looking for loopholes to avoid them, legislation will do little to change the present public perception that private interests are being placed above public duty…*[132]

Senior public officers have even greater responsibility because of the power and authority they wield. Our system of government relies on the acceptance by every public officer of their personal responsibility for acting with integrity in carrying out their official duties.

> *If the trust owed to the public by our institutions and officials is to be a practised reality, and if the public is to be able to place its confidence in those institutions and officials, reassurance beyond mere words is an imperative. There must be, and be seen to be, integrity in the processes and practices of government. Equally, there must be, and be seen to be, integrity in the conduct of public officials.*[133]

6.4 Corruption Prevention Issues

A number of specific areas of concern have been identified through the investigation. These are discussed below.

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[132] Independence, Influence and Integrity in Local Government – A CMC Inquiry into the 2004 Gold Coast City Council Election 2004 page vii

[133] Report of the Royal Commission into Commercial Activities of Government and Other Matters, 1992 Part II Chapter 4, paragraph 4.1.2

6.4.1 Disclosing 'True Source' of Donations in Local Government Elections

It is a fundamental principle that the people of Western Australia have the right to determine by whom they are represented and governed. This same principle extends across all levels of government including local government. To satisfy this principle, our electoral processes must be fair. While public participation in, and support for, candidates and parties is to be encouraged, electoral laws should prevent sectional or vested interests from purchasing political favour, and prevent those seeking election by improper means from attracting support.

The events surrounding the Busselton Shire Council election in May 2005 and the by-election in September 2005 can be seen as a direct attempt to subvert this principle. This was done through a planned strategy of identifying, engaging with and financially supporting candidates considered sympathetic to the development application of Canal Rocks Pty Ltd, or at least 'pro-development'. Elaborate steps were then taken to hide this support from the Busselton community through the use of a conduit (IAG) as the 'public' source of the campaign funding.

While there is nothing wrong with anyone, including developers, encouraging people with similar or sympathetic views to seek election to council, when that support is hidden, and electors are deceived as to a candidate's associations, or when a councillor's own interests rather than the true merits of a matter influence their vote, then the democratic system is threatened and the public trust breached.

Material presented during the hearings indicates that sitting and past councillors had actively aided the developer and the developer's consultants by identifying and approaching 'sympathetic' candidates. For their part, these candidates appeared to have adopted a policy of 'functional ignorance or wilful blindness' in respect to the source of the campaign support and the involvement of Canal Rocks Pty Ltd. With one or two exceptions, the candidates seemingly had little understanding of, or interest in, their responsibilities in respect to declaring the true source of their campaign donations, and took little active involvement in the management of their own campaigns.

6.4.2 The Current Legislative Framework

The *Local Government Act 1995* (the Local Government Act) and *Local Government (Election) Regulations 1997* specify disclosure requirements in respect of campaign funding and gifts and the declaration of financial interests generally. Candidates must disclose to the CEO of the local government any electoral campaign-related gift with a value of $200 or more received within a period of six month's prior to a candidate's nomination, and ending three days after the election day for unsuccessful candidates, or on the start date for financial interest returns for successful candidates. An initial disclosure must be made within three days of a candidate's nomination, and thereafter within three days of a gift being promised or received.

Gifts include: money and non-monetary gifts of value, such as contributions to travel costs; and gifts in kind, such as the provision of a free service or a discount on goods or services. Details disclosed must include the name of the candidate, the name of the donor, the date the gift was given or promised, the value of the gift, and a description of the gift.

Further, regulation 30E provides that a candidate 'must identify the true source of a gift, or state… that the true source of the gift is unknown to the candidate'. Non-disclosure of electoral gifts carries a maximum penalty for each offence of $5000.

Persons who donate electoral gifts of $200 or more are considered to be 'closely associated' with the candidate under section 5.62 of the Local Government Act. Elected members have an obligation to disclose financial interests (direct and indirect) at council meetings when they, or someone defined as closely associated, stands to receive a financial gain, loss, benefit or detriment if a matter before council is dealt with in a particular way. Having disclosed a financial interest in a matter before council, the councillor must absent himself or herself from any discussion, decision-making procedure or vote on the matter.

The Local Government Act provides capacity in certain limited circumstances for exemption from all or some of these provisions (e.g. the interest is trivial or common to many ratepayers, or inability to form a quorum). Failure to disclose a financial interest, providing a false disclosure, and failure to absent oneself from involvement in a matter following disclosure are offences under the Local Government Act, which can result in a maximum penalty of $10000 or imprisonment up to two years.

Section 5.88 of the Act requires the CEO to maintain a consolidated register of all financial interests disclosures, including electoral gifts (regulation 30G), which is available for public inspection.

6.4.3 WA Inc Royal Commission

The WA Inc Royal Commission, in addressing the matter of electoral contributions by local businessmen during the period 1983 to 1989, found that the

> *…personal associations of those involved and the manner in which electoral contributions were obtained could only create the public perception that favour could be bought and that favour would be done.*[134]

In recommending changes to legislative and regulatory systems that existed at that time, the WA Inc Royal Commission articulated a number of general principles, detailed below, that should be reflected in 'an adequate' election

[134] Report of the Royal Commission into Commercial Activities of Government and other Matters 1992 Part II Chapter 1, paragraph 1.1.4

donations disclosure law. These general principles remain relevant today and provide a good test for evaluating the adequacy of current legislative provisions:

> *(a) Disclosure should generally be required of all donations;*
> *(b) Disclosure should be made in a timely fashion;*
> *(c) Disclosure obligations should apply to all relevant participants in the political process, including political parties, candidates, members of Parliament and other interested persons and organisations engaging in expenditure for political purposes;*
> *(d) Anonymous donations should not be accepted;*
> *(e) The law must be comprehensive and avoidance opportunities eliminated; and*
> *(f) Clear powers must be conferred upon the official responsible for the administration of the legislation to ensure its effectiveness*.[135]

6.4.4 Issues for Local Government Electoral Funding

In light of the Smiths Beach investigation, and acknowledging recent developments across Australia, a number of questions arise regarding the legislative requirements:

- Are the disclosure expectations for local government unrealistic in light of recent changes at the State and federal levels that have raised thresholds for political (including campaign) finance disclosure up to $10,000?

- Should the disclosure regime for local government remain different to their State and federal counter parts?

- What onus, if any, should be placed on candidates to make enquiries about the 'true source' of gifts and donations and should they be able to accept gifts and donations where they are unable to identify the 'true source'?

- Are additional provisions required to regulate gifts and donations made through trust accounts, artificial constructs which are not legal entities, or third parties (such as the IAG) to ensure transparency and prevent opportunity for purchasing favour?

- Should there be a requirement for the individual donor to disclose donations they make to local government candidates?

[135] Report of the Royal Commission into Commercial Activities of Government and other Matters 1992 Part II Chapter 5, paragraph 5.9.7

- Do enforcement arrangements need strengthening and are local government CEOs the best persons to enforce and audit election donation returns, or is an independent audit mechanism needed?

- Are penalties for breach of disclosure regulations of sufficient magnitude to operate as an effective deterrent?

- Should there be some form of compulsory briefing for new candidates on their obligations?

- Is a more comprehensive induction and continuing education program for elected public officers necessary?

These matters require urgent attention from State and local government. The investigation into Smiths Beach would indicate that the current thresholds, the level of understanding of the obligations, and the consequences for non-compliance are inadequate, and clearly insufficient in deterring misconduct.

Recommendation 4

That the Department of Local Government and Regional Development, in consultation with sector stakeholders, review the adequacy of the current election donation disclosure regime for local government, using the principles articulated by the WA Inc Royal Commission as a benchmark for a regulatory reform.

6.5 Declarations of interests and conflicts of interest in Council decision-making processes

The Royal Commission into Commercial Activities of Government and other Matters in 1992 stated that:

> *One of the axioms of our system of government is that public officials should subordinate to the interests of the public their own personal interests and those of their associates. Few things are more subversive of public confidence in government than the appearance that officials might not be doing so.* [136]

It is not always easy to identify when public duty and personal interests might clash. For a public officer, a 'conflict of interest' arises where there exists an actual, potential, or perceived conflict between the performance of a public duty and their personal interests. Personal interests in this context relate not only to the 'direct' interests, associations and relationships of public officers, but also to those of people close to them, such as partners, friends and children. Such personal interests are not always publicly or generally known,

[136] Report of the Royal Commission into Commercial Activities of Government and other Matters, 1992 Part II Chapter 4, paragraph 4.8.1

therefore an onus exists for public officers to be scrupulous in regulating their own conduct.

Avoiding conflicts of interest is not easy nor is it always possible. It should be emphasised that such conflicts are not in themselves wrong or unethical. What is essential to public confidence is how conflicts of interest are identified and managed. It is the failure to declare conflicts of interest, or to manage them in a way that protects impartiality, that damages the integrity of the organisation and/or individual public officer.

In any given situation there are a number of ways to effectively respond to an identified conflict of interest. The choice of strategy will depend on factors such as the nature of the conflict, legislative and regulatory requirements, or the practicality of solutions. Opting out of the process when a conflict of interest is disclosed is only one – albeit the most extreme – approach to managing conflicts. It may be the most appropriate response, as in the case of financial interests.

When deciding how to manage a conflict of interest, consideration should be given to the public perception. Queensland's Integrity Commissioner, Mr. Gary Crooke QC, described the importance of perception:

> *In the area of conflict of interest perception is all-important. The established test is an objective one, namely whether a reasonable member of the public, properly informed, would feel that the conflict is unacceptable. Essentially it means that such reasonable members of the public would conclude that inappropriate factors could influence an official action or decision. Because the test is an objective one, it matters not whether you as an individual are convinced that with your undoubted integrity you can manage what would otherwise be an unacceptable conflict of interest. The test does not permit you as an individual to be a sounding board.*
>
> *The appearance of a conflict of interest may be as serious as an actual conflict because it may reduce public confidence in the integrity of office that is held.*[137]

The WA Integrity Coordinating Group has stated that conflicts of interest need to be considered (and managed) within an ethical framework that requires public officers to act with integrity, impartiality, in good faith, and in the best interest of the organisation they serve.[138]

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[137] Independence, Influence and Integrity in Local Government – A CMC Inquiry into the 2004 Gold Coast City Council Election 2004 page 134

[138] Conflict of Interest Guidelines, 'Identifying and Managing Conflicts of Interest in the Western Australian Public Sector' 2006 produced by the Integrity Coordinating Group. See http://www.opssc.wa.gov.au/icg/publications.htm The Integrity Coordinating Group comprises the Auditor General, the Ombudsman, the Public Sector Standards Commissioner and the Corruption and Crime Commissioner.

6.5.1 The Current Legislative Framework

Regulation 34C of the *Local Government (Administration) Regulations 1996* requires local governments to include provisions in their codes of conduct that require a council member or employee (including persons under contract) to disclose any 'interest' they may have in a matter to be discussed at a council meeting or committee meeting that they will attend and/or will give advice to. Such disclosure is to occur at the beginning of the meeting in question, and before the matter is discussed, or at the time the advice is given, and is to be recorded in the minutes.

An 'interest' as defined in the Regulations, means:

> *an interest that would give rise to a reasonable belief that the impartiality of the person having the interest would be adversely affected but does not include an interest as referred to in section 5.60 [relating to financial and proximity interests].*

No examples are given in the Regulations as to what might constitute an 'interest affecting impartiality'. The Department of Local Government and Regional (DLGRD) guidelines warn against such interests as associations with individuals or organisations, but do not specifically discuss matters such as election pledges or individual beliefs and attitudes.

> *Matters where disclosure is warranted are those which require applications for approval, consent or a license where the financial interest provisions of the Act do not apply. This would include development applications, extensions or construction of facilities, requests for financial assistance, tenders, and staff recruitment and so on.*[139]

Similarly, DLGRD provides guidance on what types of associations might be considered relevant. They specify relationships with spouses, de-factos, siblings, parents, children, an employer or business partner, a friend or adversary, donors and associations with clubs or groups where the person holds a formal office/position.

Unlike declared financial interests, there is no requirement for the councillor declaring an interest affecting impartiality to leave the room or cease participation in the subsequent debate or voting. Following the disclosure, the councillor's participation continues as if no interest existed. Failure to disclose an interest affecting impartiality, while a breach of the Code of Conduct as required by the Regulation, does not constitute an offence.

This lack of consequence has been identified as a significant corruption risk across several Royal Commissions and local government inquiries. Additionally, under current legislation there is limited capacity for action against individual councillors who breach the provisions of Acts and Regulations (excluding those matters which constitute an offence) with the

[139] Disclosure of Interests Affecting Impartiality: Local Government Operational Guidelines Number 1, May 2000

minister responsible for local government only having authority to dismiss the whole council, not individual councillors.

To address these concerns, the *Local Government (Official Conduct) Amendment Bill 2005* was passed through State Parliament on 28 March 2007, to become operational prior to the October 2007 local government elections. The intent of the *Local Government Amendment Act 2007* is to provide a disciplinary framework to deal with individual misconduct by local government council members, when they do not comply with a code of conduct, or they contravene particular laws applying to them in acts and regulations.

The *Local Government Amendment Act 2007* establishes a State-wide standards panel to deal with complaints about minor breaches. The Bill also enables allegations of serious breaches - that is, a contravention of an act or regulations - to be referred to the Director General of DLGRD. The Director General will then determine whether to refer the matter to the State Administrative Tribunal, refer the matter to another enforcement agency or to take direct prosecution action.

The Bill also contains detailed provisions enabling regulations to be made prescribing uniform rules of conduct for council members which cover the key areas of: standards of general behaviour; the use of information; the securing of unauthorised advantages or disadvantages; the disclosing of certain interests (not financial) and restriction on receiving, and disclosure of, certain gifts. Provisions also include a requirement for the creation and maintenance of a complaints register where there is a finding against a person. The complaints register is to be open to public scrutiny.

At the time of the Smiths Beach investigation, including the period during which the matters being investigated occurred, the Shire of Busselton had in place a code of conduct. The 'Code of Conduct of Principles' covers all elected members of the council (including those community persons appointed by council to serve on Council Committees) and senior staff. Members and staff are required to sign the document as an undertaking to commit to the standards, procedures, and principles outlined therein.

The Code covers areas of disclosure of interests; conflicts of interests; personal benefits e.g. undue influence, gifts and bribery; confidentiality of information; conduct generally; and use of council resources.

6.5.2 Issues for a Local Government Uniform Code of Conduct

The lack of perceived impartiality by some Busselton Shire councillors has attracted considerable community interest, as reflected in local media reports. The fall out, in terms of community confidence in council decision making processes, has been significant and has not been restricted to the Smiths Beach application or the Busselton Shire. The impartiality of decisions on other development applications dealt with by both the Busselton Shire and other councils have been questioned. The ripple effect for developers and local governments alike has been extensive and damaging.

While under existing provisions there is no requirement for councillors declaring an interest affecting impartiality on a matter before council to abstain from the discussion or vote, it is clear that community members in Busselton consider this to be wrong and believe that the councillors so affected should be required to remove themselves from the decision making process. In general terms, many in the community consider that a councillor whose partner is employed by a developer has as much of a conflict of interest, real or potential, as a councillor who accepted election campaign donations.

The new *Local Government (Official Conduct) Amendment Bill 2005* will go some way in addressing identified gaps through the introduction of a disciplinary framework to deal with individual misconduct by local government council members. There is also capacity – through the supporting regulations intended to set uniform rules of conduct for council members – to address the ambiguities and inconsistencies that exist currently in respect to the identification and management of interest affecting impartiality, particularly related to relationships between members and developers.

Recommendation 5

That the Department of Local Government and Regional Development, in drafting regulations for a uniform standard of conduct for council members, consider the introduction of a model code of conduct with which all councils must comply. The code should address the identification and management of conflicts of interests, particularly as these relate to relationships with developers, proponents and the representatives who have proposals before council.

6.6 Dealing with Local Government Councillors Suspected of Misconduct

At present, no power exists to suspend, pending an investigation of their alleged misconduct, a local government councillor who is reasonably suspected to have engaged in misconduct sufficiently serious that their continued presence on the council during the investigation could undermine the credibility and authority of the council.

A consequence of this is the potential for a loss of public confidence in not only the individual concerned, but in the whole of the respective council of which he or she is a member. This general loss of confidence may result in public protests and disruptions to meetings, such as have occurred recently. Such disruptions and loss of confidence can, at one extreme, subvert the principles of open and accountable democratic process that are central to social stability in this State. They may also act to discourage good people who would otherwise be prepared to serve the public interests of their communities. These events can affect community confidence in the whole local government sector.

The Commission believes that consideration should be given to the establishment of an appropriate process to enable the suspension of a councillor should the view be held that to do otherwise could result in the loss of confidence in the whole council of which he or she is a member.

Recommendation 6

That the Department of Local Government and Regional Development consult with relevant stakeholders and advise the Minister for Local Government on an appropriate mechanism to enable the suspension of a councillor who is subject to an investigation and is reasonably suspected of having engaged in misconduct sufficiently serious that their continued presence on the council could undermine the credibility, functioning and authority of the council.

6.7 Lobbying - external influences on public officers

A cornerstone of our liberal democratic structure is that governments are elected to make decisions on behalf of their constituents. Constituents expect that governments will make decisions that are in their best interests and that, where appropriate, there will be some form of consultation and opportunity for participation.

The process by which interest groups seek to influence decision-making is commonly referred to as lobbying. Interest groups, as they are discussed in this chapter, are broadly defined as those who:

> *…seek to influence the legislative [policy and/or planning] process [of government], either directly or indirectly, or by providing economic analysis and information to be used by clients in lobbying.*[140]

Interest groups are important to the democratic process. While they may be self-interested, they can represent marginal interests, and raise issues that have not previously appeared on the party political agenda. They also bring specialist knowledge and experience to bear upon the policy process and introduce an element of pluralism.[141]

The challenge for governments at all levels is to ensure that access to government is available to all groups, and that decision making processes are balanced, open and focused on benefiting the whole society to capture the knowledge, skills, experience and co-operation of the various interest groups

[140] J Fitzgerald, *Lobbying in Australia,* Rosenberg 2006, p13
[141] David Beetham & Stuart Weir , Political Power and Democratic Control in Britain: The Democratic Audit of the United Kingdom, Routledge, London 1999, p271

while addressing the public interest. The public sector must balance all of these competing interests and reach decisions based on the common good, with no one group receiving unfair or undue influence in the final outcome.

When managed according to 'the public interest', lobbying has a legitimate and important role to play in the democratic process. However, if vested interests are unfettered, where there is privileged and unfair access by some groups over others, and/or where the extent of external influence on government decisions is hidden, the public interest is compromised.

Improper influence/conduct will not always be blatant and often there will be elements of innuendo, subtlety, implication or half-truths. The dividing line between acceptable and unacceptable influence is therefore not always clear.

Being unable to clearly define and set benchmarks, with respect to acceptable and unacceptable behaviours, actions and practices on the continuum of conduct by government decision makers, means there will remain an area of uncertainty, a grey area, within which those intent on pursuing private interests to the detriment of public interest can operate.

By their nature, lobbyists are not usually neutral, nor are they responsible for promoting an unbiased or balanced view of the issue at hand. Lobbyists are not responsible for safeguarding the public interest. There are no laws or codes requiring lobbyists to act with equity and fairness, or to put aside personal or private gain to protect and promote state resources, or protect the common good. Lobbyists are responsible for communicating the views and interests of those they represent.

6.7.1 The Current Legislative and Regulatory Framework

Public officers, unlike their private sector counterparts, must operate within a complex arrangement of ministerial and parliamentary oversight, legislation, policy, independent agency reporting and administrative review systems. This is in addition to the community-wide obligations that regulate the activities of society at large as well as public officers, such as the criminal justice system.

There are a wide range of accountability obligations and mechanisms that exist and contribute to strengthening the framework for accountability in the Western Australian public sector. These include the following:

- *Public Sector Management Act 1994* (PSM Act) provides for the administration of the public sector of Western Australia and the management of the public service and of other public sector employment. The PSM Act sets general principles of official conduct and of human resource management, including breach of discipline provisions.
- Code of Ethics established by the Commissioner of Public Sector Standards. One of the three key principles contained in the Code of Ethics relates to justice – being impartial and using power fairly for the common good.

- Criminal Code has sections that apply specifically to the conduct of public officers, particularly with regard to bribery and the misuse of the officer's position to gain a benefit for any person or to cause a detriment to any person.

- The Department of the Premier and Cabinet issues instructions and policies aimed at directing the activities, priorities and conduct of public sector bodies and staff.

- Official agency policies and procedures constitute lawful orders, and public officers who fail to follow a lawful order, commit an act of misconduct, or are negligent in the performance of their functions can be considered to have committed a breach of discipline as detailed under section 80 of the *Public Sector Management Act 1994.*

- In November 2006, Cabinet agreed to the establishment of the 'Contact with Lobbyists Code', including a publicly available 'Register of Lobbyists' that commenced operation as at 16 April 2007. Under this code, government representatives are not to permit lobbying by a lobbyist who is not listed in the register or who does not provide details of the third party they are representing.[142]

While there is a plethora of different accountability mechanisms that operate in the WA State public sector, the principles and values that underpin and integrate these mechanisms are common. These principles not only reflect the community's expectations of public sector performance, but also provide benchmarks for the assessment of public sector performance. As such, they can and should be applied whenever individuals at all levels of State government carry out official functions. These principles are summarised as follows:

- **Public interest is paramount**. To protect the public interest, decision making must be impartial, aimed at the common good, uninfluenced by personal interest and avoid abuse of privilege.

- **Accountable, effective and efficient management**. Processes used and decisions taken must be open, honest, transparent, and lawful while balancing the cost of processes against the effectiveness and efficiency of decision making.

- **Equity and fairness.** The processes adopted should respect diversity, be non-discriminatory, merit-based, consistent, accessible and equitable.

[142] The code defines a government representative as 'a Minister, Parliamentary Secretary, Ministerial Staff Member or person employed, contracted or engaged by a public sector agency'

- **Inclusive, just and balanced decisions**. Processes used and decisions taken should be based on partnerships and an integrative approach.

- **Ethical and responsible care.** This requires protecting and managing with care the human, natural and financial resources of the State, carrying out promptly and correctly official duties and functions.

These principles individually and collectively also provide an ethical framework and guide for public officers in monitoring their own actions and conduct.

6.7.2 Issues for dealing with Public Sector Lobbying

One of the fundamental corruption prevention issues arising from the Smiths Beach investigation, and perhaps one of the most significant public interest issues, relates to the question:

> *What constitutes proper influence on government and what can or should the community be able to expect with regard to the conduct of public officers and those seeking to influence government?*

Lobbying represents a legitimate way for people and organisations to get their views heard by government and for trying to influence decisions. However, when lobbying activities are concealed, inducements are offered, threats are made or other actions are taken that go beyond presenting the proponents' arguments to the decision makers, then it can lead to misconduct.

Most democratic countries have legislative provisions, codes of conduct and policies to prevent and manage improper influence on government decision-making, be it focused on the lobbyist or the lobbied. Worldwide, there are two main approaches to managing the impact of lobbying, the regulatory and guidance approaches.

The regulatory approach usually requires lobbyists to comply with some form of central registration, where details regarding who they are, who they represent and who they are seeking to lobby are recorded and publicly available. Advocates argue that the regulatory approach improves transparency around who and how decisions are being influenced; is a necessary mechanism to ensure accountability; minimises conflicts of interest by making it harder for unfair privileged access to be granted; is a means of enforcing compliance with standards of good practice by forcing lobbyists to adhere to a standard; and results in lobbyists being held accountable for their actions.[143]

[143] G.Joran (Ed), The Commercial Lobbyist, Aberdeen University press, Britain 1991

The guidance approaches to managing the potentially corrupting impact of lobbying focus on strengthening accountability requirements for public officers and Ministers. Proponents of this method argue that the control of lobbyists becomes unnecessary and redundant if there are sufficient controls and systems in place to ensure the integrity of public officers and members of Parliament. Supporters of this method also argue that guidance frameworks are a more effective and realistic approach to managing the impact of external influences on government.

The experience of governments worldwide indicates that neither approach has to date been entirely successful in preventing or controlling the corrupt use of lobbying. It is likely that the more effective systems will be based on multi-faceted approaches that include a number of integrated strategies based on a mixture of policy guidance and regulatory regimes.

Further, as already discussed, regulations, codes and systems, no matter how extensive are only ever as effective as the individuals that operate and use them, as is evident from this investigation of the Smiths Beach development at Yallingup. Regulations unsupported by cultural and attitudinal change are unlikely to be effective. In the final analysis, it is how public officers respond to requests for support and assistance that matters. Any system that seeks to appropriately address lobbying mus,t in the first instance, have this as its focus.

6.7.3 Future Developments

The failure of some public officers to respond appropriately to requests for inappropriate assistance and support appears to be a continuing theme in the Commission's investigations of other matters connected with, but separate from, the Smiths Beach investigation.

It is the Commission's intention to consider further the corruption risks arising from the failure of public sector officers to deal properly with inappropriate approaches from lobbyists and others wishing to influence their decision making. It will most likely produce a number of reports addressing this issue.

CHAPTER SEVEN
CONCLUSIONS, OPINIONS, AND RECOMMENDATIONS

This investigation has considered allegations of misconduct concerning the actions of a number of public officers linked to proposals for a development at Smiths Beach.

7.1 The Smiths Beach Development Proposal

In 1999, Canal Rocks Pty Ltd proposed an extensive tourist and residential development on 45.3 hectares adjacent to Smiths Beach, 10 kilometres south-west of Dunsborough. However, there was widespread public opposition to the proposal. In 2003, due to the lack of progress that had occurred, the company engaged Mr Brian Burke and Mr Julian Grill to assist in advancing the proposal.

Canal Rocks Pty Ltd retained Julian Grill Consulting to act for them.[144] Julian Grill then retained Brian Burke through Abbey Lea Pty Ltd. Julian Grill Consulting would invoice Canal Rocks Pty Ltd and Abbey Lea Pty Ltd would invoice Julian Grill Consulting for half the amount paid by Canal Rocks Pty Ltd. In other words the financial proceeds for the work performed by Mr Burke and Mr Grill were, in effect, equally shared.

Two main strategies to assist Canal Rocks Pty Ltd were used.

The first strategy related to events surrounding the Council election in May 2005 and the by-election in September 2005. Canal Rocks Pty Ltd, with the assistance primarily of Mr Burke, embarked on a process of identifying, engaging with and financially supporting candidates considered sympathetic to Canal Rocks Pty Ltd's development application. There was nothing unusual or inappropriate about that strategy in itself.

However, elaborate steps were taken to conceal the true source of the financial support for these candidates from the Busselton community through the use of an unconnected organisation, the Independent Action Group (IAG), as the 'public' source of the campaign funding. As a result, the funding for these candidates, in fact coming initially and in reality from Canal Rocks Pty Ltd, was not disclosed to the Busselton community. Disclosure of funding support is required by legislation and regulation in a manner discussed in more detail in this report.

The other major element of their strategy was the attempt to delay the introduction of new Town Planning Scheme (TPS) provisions in order to enable the passage of the development proposal under less rigorous arrangements. This was pursued by Mr Burke (in the main) and Mr Grill, on behalf of and in conjunction with Canal Rocks Pty Ltd, influencing or attempting to influence compliant public officers to assist with achieving this delay.

[144] With effect from 22/02/2006, Julian Grill Consulting became Julian Grill Consulting Pty Ltd

7.2 Commission's Opinions as to Misconduct

Misconduct has a particular meaning under the CCC Act and not all disreputable or inappropriate conduct will necessarily fall within the definition. Some public officers may not be the subject of a misconduct opinion, but there may be grounds upon which disciplinary proceedings should be considered. The Commission can make recommendations to responsible authorities that disciplinary proceedings should be considered, and recommendations in this report will cover all relevant conduct, not merely that which can be classified as misconduct under the CCC Act. In this report, the Commission has made one such recommendation in the case of Mr Mark Brabazon, a public service officer, formerly from the Department of Conservation and Land Management (CALM) and now with the Department of Environment and Conservation (DEC).

Having assessed the material gathered during its investigation, the Commission has formed opinions regarding misconduct by seven public officers. Three of these officers are public service officers who, as public sector employees, are subject to the *Public Sector Management Act 1994* (PSMA) and are therefore bound by the Public Sector Code of Ethics. The other four, as either a Member of Parliament or members of local government councils are not bound by the Public Sector Code of Ethics. These public officers are not public sector employees under the PSMA. However, as public officers they are still subject to the provisions of the CCC Act, and their actions may constitute misconduct as defined in section 4 of the CCC Act. In particular, sub-paragraph 4(d)(vi) provides that misconduct occurs when, amongst other things, conduct of a public officer constitutes or could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the PSMA (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

The Commission is also considering the preparation of criminal charges that may result from this investigation. That issue is not addressed in this report.

7.2.1 Mr Mike Allen: Department for Planning and Infrastructure (DPI) Senior Officer

Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke to write the Department for Planning and Infrastructure (DPI) report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

7.2.2 Dr Walter Cox: Chairman of the Environmental Protection Authority

On 17 May 2006, Dr Cox accepted an invitation from Mr Grill to attend a lunch hosted by Messrs Burke and Grill, specifically knowing from Mr Grill that Smiths Beach was to be discussed at the lunch. This lunch and the discussion occurred at a time when Dr Cox had before him and his agency a Strategic Environmental Assessment (SEA) lodged by Canal Rocks Pty Ltd and affecting Smiths Beach. In accepting the invitation and attending the lunch Dr Cox deliberately sought to avoid a perception of a conflict of interest by asking Mr Grill to shift the proposed location for the lunch to a more discrete place. The acceptance of the invitation and attendance by Dr Cox to this private lunch, when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd's SEA was before him and his agency, constituted the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

Dr Cox and Mr Grill both deny that Smiths Beach was discussed at the lunch. Mr Burke (in light of surrounding email evidence) confirmed that it is likely that Smiths Beach was discussed as planned. That is not an issue the Commission needs to decide, as the impropriety, with regard to Dr Cox, is in the acceptance of the invitation and attendance at this private lunch when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd SEA was before him and his agency.

7.2.3 Mr Paul Frewer: Deputy Director DPI, and Acting Director General of the Department of Water

On 19 May 2006, at a meeting of the South West Regional Planning Committee, Mr Frewer recommended deferring consideration of a Shire of Busselton proposal to amend Town Planning Scheme (TPS) 20. This deferral was in the interest of Canal Rocks Pty Ltd. Mr Frewer's conduct in failing to declare that he had been approached by Mr Burke to speak in favour of the deferral of Amendment 92 constitutes the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act.

7.2.4 Mr Norman Marlborough: Former Minister for Small Business, Peel and the South West and Member of Parliament

Mr Marlborough, by agreeing with Mr Burke that he would appoint Ms Morgan to the South West Development Commission in circumstances where the relative merit of Ms Morgan holding such a position was unknown, failed to act with integrity in the performance of his duties. Such conduct could constitute a serious breach of the Public Sector Code of Ethics. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

7.2.5 Ms Philippa Reid: Busselton Shire Councillor

Ms Reid failed to make a declaration of an interest affecting impartiality relating to her personal relationship with Mr Crichton-Browne, a lobbyist for Canal Rocks Pty Ltd, prior to the final consideration of Amendment 92 affecting Smiths Beach, at the 14 December 2005 Council meeting. At that meeting she seconded a motion on Amendment 92 in a manner favourable to Canal Rocks Pty Ltd, and participated in debate about Amendment 92. This was conduct that could adversely affect the honest or impartial performance of her functions as it concealed the existence of a potential conflict of interest. This conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constituted misconduct pursuant to sub-paragraphs 4(d)(i) and (vi) of the CCC Act.

7.2.6 Ms Anne Ryan: Busselton Shire Councillor

The Commission formed four misconduct opinions regarding Ms Ryan:

- Ms Ryan admitted that when she completed the requisite Form 9A, in order to disclose gifts she had received, she failed to disclose those costs previously incurred by her but which had been reimbursed by IAG. This failure was conduct that could adversely affect the honest or impartial performance of Ms Ryan's functions as a councillor because it assisted in concealing the degree of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct therefore constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan's failure to directly inquire of the President of IAG, Mr Greg Dean, as to the true state of affairs regarding the funding of her campaign, involved the performance of her functions in a manner that was not honest or impartial because it concealed the existence of a potential conflict of interest. She could be in serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan failed to declare a financial interest in the Canal Rocks Pty Ltd matter at the August 10 Council meeting. A councillor who has received a notifiable gift at an election is obliged under the *Local Government Act 1995* to treat the giver of that gift as a close associate.[145] The effect of this is to oblige a councillor to make a financial interest declaration if a matter arises for consideration at a meeting and the matter is one in which the provider of the election funding has an interest. There is also obvious potential for such a failure to adversely affect the honest and impartial performance of the functions of a councillor because it conceals the existence of a potential conflict of interest, and Ms Ryan could be in breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

- Ms Ryan failed to make a financial interest disclosure at the Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of her duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Ms Ryan as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

7.2.7 Mr John Triplett: Busselton Shire Councillor

Mr Triplett, having received election funding from Canal Rocks Pty Ltd, failed to make a financial interest disclosure at the Busselton Shire Council meeting of the 14 December 2005, prior to the final consideration of Amendment 92 affecting Smiths Beach. This involved the performance of his duties in a manner that was not honest or impartial because it concealed the existence of a conflict of interest. To declare that there was a mere association or a perception of a connection was insufficient. This conduct was also capable of adversely affecting the honest or impartial performance of the functions of Mr Triplett as a councillor by concealing the existence of a conflict of interest. Such conduct would be a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. The conduct, therefore, constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (v) and/or (vi) of the CCC Act.

[145] Section 5.62

7.3 Messrs Burke and Grill's influence on Public Sector Agencies

In assessing the material available to it in regard to its investigation of whether misconduct has occurred, the Commission has necessarily examined the actions of certain people who are not public officers. The CCC Act focuses on allegations of misconduct by public officers. During the compilation of this report there has been considerable debate about the power of the Commission to make comments on allegations of misconduct by non-public officers. Therefore, in order to avoid further delaying the tabling of this report, comment on non-public officers, particularly Messrs Burke and Grill, has been limited to reporting the facts concerning their actions as revealed by the Commission's investigations.

However, the Commission is of the view that it would be wholly artificial if, in reporting on the outcome of its investigation, it reported only on the actions of public officers. Where the actions of others have led to, invited or given rise to misconduct, those actions must necessarily be the subject of examination and, where appropriate, report, in discharge of the obligations of the Commission under paragraph 7A(b) of the CCC Act, to reduce the incidence of misconduct in the public sector.

In terms of their involvement in the matters considered in this report, Messrs Burke and Grill were equal partners as discussed above. The misconduct of Messrs Allen, Frewer and Marlborough resulted from the requests or influence of Mr Burke.

Mr McKenzie for Canal Rocks Pty Ltd was also in close telephone contact with each of Messrs Burke and Grill. In all, while more of the contact was carried out by Mr Burke (whom Mr McKenzie had initially approached for assistance), Mr Grill participated in, or was referred to in, over 130 telephone calls, emails and faxes in relation to the actions to be taken in connection with the Smiths Beach matter from May to November in 2006.

Specifically, in relation to the instances of public officer misconduct on which the Commission has expressed an opinion in this report, in addition to the invitation specified in relation to Dr Cox, Mr Grill was also involved in other discussions. He had discussions in which he supported the conduct of Messrs Frewer and Allen in relation to the deferral of Amendment 92[146] and with Mr Burke concerning Mr Allen appointing the DPI officer preferred by Mr Burke to write the DPI report on Smiths Beach in preference to other officers.[147] Some, but not all of those discussions, are published in this report. The primary focus of attention is the allegations of misconduct of public officers.

It is an unfortunate outcome of this investigation that the improper conduct of a few has obscured the principled conduct and hard work of many others in the public sector who performed their duties while subject to very

[146] see para 5.3 below
[147] see para 5.4 below

considerable pressure from Canal Rocks Pty Ltd and its consultants. The actions of a few have damaged the reputations of public sector agencies built over many years by thousands of dedicated public officers who have acted with integrity.

It is likely that there will always be some who seek to advance their partisan interests through a mixture of both legitimate and inappropriate means. What is important is that public officers respond to such approaches in a principled way, focused on the public interest.

7.3.1 Mr Burke's Influence on the Department of Conservation and Land Management

The Commission has expressed concern with regard to Mr Burke's apparent influence on Mr Brabazon, a senior CALM officer, in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee. The Commission notes that any influence of Mr Burke, relevant to the former matter, does not appear to have extended to affect the policy officers tasked with the day-to-day dealings with the Smiths Beach development proposal.

Concern has also been expressed about Mr Brabazon gratuitously providing Mr Burke with advice on how ministerial approval could best be achieved by the withholding of concessions to CALM, his own department. There is no suggestion that Mr Burke caused Mr Brabazon to give this advice.

Indeed, while CALM's Executive Director, Mr McNamara met Mr Burke to discuss CALM's dealings with the development proposal, the steps Mr McNamara took to establish greater management oversight and coordination appear appropriate in terms of the public interest and environmental consequences attendant to the Smiths Beach proposal.

There is no suggestion in the material before the Commission that Mr Burke's representations resulted in any pressure from CALM's senior management to require their officers to change their approach in dealing with the Smiths Beach development proposal.

The Commission acknowledges that CALM's response to the pressure Mr Burke placed on it appears to have been appropriate and measured.

7.3.2 Messrs Burke and Grill's Influence on the Department for Planning and Infrastructure

On the information available to the Commission, Mr Frewer and Mr Allen were the only DPI officers apparently susceptible to influence mainly of Mr Burke. Nevertheless, it is of concern to the Commission that two such senior DPI officers should compromise the department's integrity. Their conduct demonstrates a failure by them to meet their obligation of impartiality in promoting and sustaining the public interest.

Given the authority and influence of DPI, in terms of major infrastructure and other decisions, it is important that a high level of public confidence in the integrity of the department is maintained, especially in terms of compliance with the Public Sector Code of Ethics by its senior officers.

7.3.3 Mr Grill's Influence on the Environmental Protection Authority

While the Commission has formed an opinion that Dr Cox, as the Chairman of the EPA, has engaged in misconduct as a result of the influence of Mr Grill it is not apparent to the Commission, on the basis of the material before it, that any other person in the Authority engaged in misconduct.

7.4 Conclusions Regarding the Involvement of Canal Rocks Pty Ltd

Canal Rocks Pty Ltd, through Mr David McKenzie, was kept informed of Messrs Burke and Grill's intentions and actions. In relation to their actions giving rise to misconduct of Messrs Allen, Cox and Frewer, it is clear that Canal Rocks Pty Ltd, through Mr McKenzie, gave at least tacit approval to these actions and, at times, was an active participant in the process of seeking approval of its development.

7.5 Corruption Prevention Issues

While the issues raised in this report relate specifically to the Smiths Beach proposal, they have much wider implications. Public officers, including local government councillors, regularly have to make judgements about how they will conduct themselves and about the proper course of action to take.

In particular, the Smiths Beach investigation has highlighted three key areas relating to the conduct of public officers. These are:

- The disclosure of the 'true source' of donations in local government elections;
- The declaration of interests and conflicts of interest in council decision-making processes; and
- Lobbying and external influences on decisions made by public officials

Failure to act ethically and impartially can have a substantial impact, both on people involved in the specific activity and on the community as a whole. Loss of public confidence can occur whether the actions of the public officer were intended or accidental, and whether they are actually, or merely perceived, as improper. This loss of confidence can result in the erosion of the public's faith in the public sector as a whole.

The Commission holds the view that inappropriate conduct and misconduct by public officers, irrespective of whether it reaches the threshold for criminal sanctions, should not remain unexposed. The community is entitled to know when the trust they have placed in public officers has been breached, and by whom. Equally important, the community requires assurance that action will be taken to strengthen public systems against similar abuses occurring in the future.

7.6 Recommendations

The Commission has made six specific recommendations, three dealing with public officers and three relating to a suggested review and to reforms to the Local Government Act.

Recommendation 1

That consideration should be given to the taking of disciplinary action against Mark Brabazon by the Director General of the Department of Environment and Conservation. This is in regard to his integrity in relation to his dealing with the allegations of bias made by Mr Burke against a CALM employee and in providing Mr Burke with advice on how ministerial approval could best be achieved. This included the withholding of concessions to the department he worked for.

Recommendation 2

That the appropriate relevant authority should consider taking disciplinary action against Paul Frewer for his lack of integrity in seeking the deferral of Amendment 92 at the request of Mr Burke at the 19 May 2006 meeting of the South West Regional Planning Committee.

Recommendation 3

That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report.

Recommendation 4

The Commission recommends that the Department of Local Government and Regional Development, in consultation with sector stakeholders, review the adequacy of the current election donation disclosure regime for local government, using the principles articulated by the WA Inc Royal Commission as a benchmark for regulatory reform.

Recommendation 5

The Commission recommends that the Department of Local Government and Regional Development, in drafting regulations for a uniform standard of conduct for council members, consider the introduction of a model code of conduct with which all councils must comply. The code should address the identification and management of conflicts of interests, particularly as these relate to relationships with proponents and representatives who have proposals before council.

Recommendation 6

The Commission recommends that the Department of Local Government and Regional Development undertake appropriate consultation and advise the Minister for Local Government on an appropriate mechanism to enable the suspension of a councillor who is subject to an investigation and is reasonably suspected of having engaged in misconduct sufficiently serious that their continued presence on the council could undermine the credibility, functioning and authority of the council.