CORRUPTION AND CRIME COMMISSION

Report on an Administrative Matter relating to the Functions of the Commission

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Corruption and Crime Commission

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CORRUPTION AND CRIME COMMISSION

Hon Nicholas Griffiths MLC

President
Legislative Council
Parliament House
PERTH WA 6000

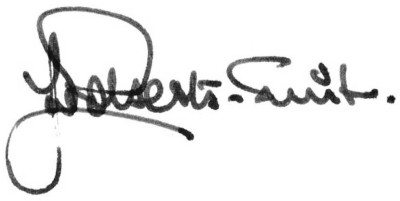
Hon Fred Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with sections 88 and 93 of the *Corruption and Crime Commission Act 2003*, the Commission presents the Corruption and Crime Commission's Report on an Administrative Matter relating to the Functions of the 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



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

14 March 2008

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EXECUTIVE SUMMARY

This Special Report, made pursuant to sections 88 and 93 of the *Corruption and Crime Commission Act 2003* (the CCC Act), addresses an important administrative matter related to the functions of the Corruption and Crime Commission (the Commission) and the Parliamentary Inspector of the Corruption and Crime Commission (the Parliamentary Inspector).

This report's focus is on identifying the nature of, and proposing a solution to, the current impasse between the Commission and the Parliamentary Inspector arising from his two recent reports concerning the Commission's dealings with allegations of misconduct by Mr Paul Frewer and Mr Mike Allen (the Frewer and Allen Reports).

In order to identify the nature of the problem the Commission does not intend dealing with every issue raised by the Parliamentary Inspector in this report. Rather, this report contains, at Appendices 1 and 2, the relevant correspondence between the Commissioner and the Parliamentary Inspector. It is this correspondence that describes the Commission's detailed position.

This report only deals with the Frewer and Allen Reports to illustrate the nature of the problem so that the Commission can propose a solution.

Finally, in making this report the Commission recognises that an ongoing public debate between it and the Parliamentary Inspector could not lead to resolution of the issues raised, would be counterproductive to both and could potentially go on interminably. For this reason the Commission has refrained from making public comment on these issues, instead reporting to the Parliament and the Joint Standing Committee on the Corruption and Crime Commission.

The Commission recognises the situation which has unfortunately developed between the Parliamentary Inspector and the Commission is one for resolution by the Government and the Parliament.

The report has four main elements:

- It responds to the two recent Parliamentary Inspector's reports broadly explaining why it cannot accept his position in respect of Mr Frewer and Mr Allen.

- It provides copies of all the relevant correspondence between the Commission and the Parliamentary Inspector on these matters so that its dealings are transparent.

- It canvasses the highly important role of the Parliamentary Inspector, explaining that it readily accepts the essentiality of his function in auditing and holding the Commission accountable for its compliance with the CCC Act and other state legislation. However, it does not accept that the Parliamentary Inspector has nor should have a role in terms of conducting evidentiary reviews of the Commission's reports, particularly

their assessment of evidence and the resultant opinions and recommendations, for four reasons:

  - Such reviews may result in an impasse, particularly if the Commission still considers its opinion is soundly based after the Parliamentary Inspector has published a report critical of its position, as has occurred in this case.
  - No other external oversight body in Australia operates under such conditions, as they are unworkable in a very real and practical sense.
  - Such an approach would overturn years of practice and precedent based on legal practice that has governed Royal Commissions, Commissions of Inquiry and other standing Commissions, similar to the Corruption and Crime Commission.
  - Last, the above observations simply beg the question: why should the opinion of the Parliamentary Inspector be accepted as having greater validity than the opinion of the Commission - and who reviews the opinion of the Parliamentary Inspector.

- The Commission proposes a solution to the current impasse based on making provision in the CCC Act whereby either the Parliamentary Inspector, the Commission or both refer a question of law, concerning or arising under the CCC Act, to the Supreme Court for determination.

The CCC Act

The CCC Act established the Commission and provides the framework for the performance of its functions. After four years of operation, and in light of some of the high profile matters with which the Commission has dealt, a range of issues and concerns associated with its application has arisen.

This is not unusual in terms of major legislation. Gaps and unintended consequences become apparent in their early lives and are subject to either interpretation in the courts or legislative amendment. The Parliament anticipated this when requiring, under section 226 of the CCC Act, a review of the "operation and effectiveness" of the CCC Act three years after its commencement. The Commission understands that this review, conducted by Ms Gail Archer SC, is now complete and under consideration by the Attorney General.

Present circumstances have highlighted very particular issues connected with the statutory functions of the Parliamentary Inspector that are affecting the capacity of the Commission to effectively perform its functions. These are likely to seriously inhibit the capacity of the Commission to conclude a number of reports resulting from investigations of lobbying and public sector misconduct and may result in a loss of public confidence in the work of the Commission.

The Commission believes the Parliamentary Inspector has a very important role that is absolutely necessary and critical to the effective operation of the CCC Act. The external and independent monitoring performed by the Parliamentary Inspector to ensure that the Commission's operations are conducted in accordance with the CCC Act and other laws, and that its procedures are effective and appropriate, gives the Parliament, the community and the Commission itself, the confidence that the exercise of the Commission's

extensive powers is appropriately subject to Parliamentary scrutiny and legislative control.

The Parliamentary Inspector's Reports

On Friday 8 February 2008, the Parliamentary Inspector tabled in the Parliament of Western Australia a report entitled "Report on the Corruption and Crime Commission's Findings (sic) of 'Misconduct' by Mr Paul Frewer" (the Frewer Report).

In the Frewer Report the Parliamentary Inspector expressed his opinion that there was no justification for the Commission's "findings" (sic: the word used in the CCC Act is "opinion" not "findings") in its "Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup" (the Smiths Beach Report), tabled in the Parliament of Western Australia on 5 October 2007, that Mr Frewer engaged in misconduct, nor for recommending that a "relevant authority" consider taking disciplinary action against him. The Parliamentary Inspector noted that in a draft report he had recommended that the Commission publicly acknowledge that its opinion, that Mr Frewer failed to act "impartially" and "with integrity", was in error, but that the Commission had rejected that recommendation. The Parliamentary Inspector did not explain why the Commission had rejected it.

On Friday 7 March 2008, the Parliamentary Inspector tabled in the Parliament a report entitled "Report on the Corruption and Crime Commission's Investigation and Finding of 'Misconduct' by Mr Michael Allen" (the Allen Report). In that report the Parliamentary Inspector contended that the Commission's investigation in respect of Mr Allen was inadequate, its opinion of misconduct was "unsupported by the evidence", and was contrary to evidence which it had and which "a full investigation would have obtained". He also asserted that the Commission failed to comply with section 86 of the CCC Act[1] and he made a range of other criticisms.

If, subsequent to the publication of a report, the Commission were to come to believe that anything that it had said in the report which was substantially adverse to a person was in fact wrong, then the proper course would be for the Commission to publicly acknowledge that error and correct it. That acknowledgement would desirably occur in the same manner in which the original adverse assessment, opinion or recommendation had been made. The Commission considers this to be a matter of necessary principle and one to which it would unreservedly adhere.

However, the Commission believes that the opinions it expressed in respect of Mr Frewer and Mr Allen in the Smiths Beach Report were well-founded and correct. That being so, the Commission could not, and cannot, say otherwise.

[1] 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.

The Frewer Report

The Commission's view of the evidence and its responses to the points raised with it by the Parliamentary Inspector are set out in detail in the correspondence (particularly the Commission's "Response" dated 31 January and pages 3-4 of its letter of 13 February 2008), copies of which are at Appendix 1. The Commission will not set them out in detail again here. In summary:

- There were emails between Mr Burke and Mr Frewer from January 2004 to September 2005 from which it is apparent Mr Frewer well knew that Canal Rocks Pty Ltd did not want Amendment 92 to proceed.

- When Mr Burke telephoned Mr Frewer on 18 May 2006 (the day before the South West Region Planning Committee (SWRPC) meeting), after ascertaining that Mr Frewer was going to the meeting the following day, he told him that Nigel Bancroft was "playing funny buggers" and "bringing amendment ninety-two on". In the context of their previous communications, the only reasonable inference is that Mr Burke wanted Mr Frewer to delay the amendment and Mr Frewer understood that.[2]

- At the SWRPC meeting, another member declared that she had been lobbied, stating by whom, about what and for what purpose. That was a proper disclosure that was recorded in the minutes.

- In a jocular vein, Mr Frewer said "Someone rang me about the Smiths Beach thing and they said they'd send me all this stuff but they didn't … (indecipherable) and anyhow, nothing arrived and I didn't receive anything so if that's called lobbying that's fine." This remark was not recorded in the minutes as a disclosure.

- Notwithstanding the telephone call from Mr Burke had been the night before, Mr Frewer did not say by whom he had been approached, on whose behalf, nor for what purpose.

- What he said was not recorded in the minutes as a disclosure of lobbying by the minute taker.

- In his evidence before the Commission, Mr Frewer agreed that he should have disclosed the approach by Mr Burke, on his own understanding of the disclosure requirement.

- At the meeting, Mr Frewer spoke in favour of the deferral of Amendment 92 (without having disclosed he had been lobbied by Mr Burke to do so).

- No fair reading of the whole of the transcript of the SWRPC meeting could result in any conclusion other than that Mr Frewer played a significant and persuasive role in the decision to defer the amendment. The fact that

[2] The Parliamentary Inspector acknowledges (Frewer Report, Executive Summary, [3.5]) "It is implicit in what Mr Burke said to Mr Frewer that he did not want Amendment 92 considered at that meeting."

other members also agreed with and advocated this position and that the resolution was unanimous is not to the point.

- On 23 May 2006, Mr Frewer telephoned Mr Burke. They spoke for over 24 minutes. The first topic of conversation (introduced by Mr Burke) was the SWRPC meeting. Mr Burke said "thanks very much for that". Mr Frewer responded by saying "no worries" and explained what happened at the meeting. It is clear he knew what he was being thanked for. He effectively claimed that it was done gently and he had not had to do much.

- At the hearing before the Commission, Mr Frewer denied on oath having any contact with Mr Burke in connection with Smiths Beach generally or in regard to the 19 May meeting of the SWRPC particularly. However the call on 18 May had lasted for over 4½ minutes and that on 23 May 2006 had lasted over 24 minutes. Mr Frewer denied any such calls. Those two calls were made only six months before he first gave evidence. Nor had he disclosed them in response to a notice served on him by the Commission on 3 July 2006 requiring him to give written responses to questions. The false denials support an inference that Mr Frewer was conscious he had been lobbied and had failed to disclose it.

- It was entirely open to the Commission to conclude that a failure to disclose that he had been lobbied and then to argue in favour of the deferral was a failure by Mr Frewer to act with impartiality and integrity.

The Commission agrees with and accepts the recommendations at [50] and [51] of the Parliamentary Inspector's Frewer Report, that:

- *The Commission should ensure that any proposed adverse opinion is not expressed in a report without prior compliance with section 86, and acknowledge that it is not sufficient compliance to give notice of a proposed misconduct finding, on a particular basis, and then report such a finding, but on a different factual basis, without giving the person affected reasonable opportunity to make further representations with respect to that different basis.*

- *When relying on minutes of a meeting, as a basis for examination of a witness, or comment in a report, care must be taken to check their accuracy against any recording of the meeting, if one exists (as is now very often the case).*[3] *The Commission accepts this, and has directed that this procedure is to be followed in the future, so that, where relevant, the full record of a meeting will be put to a witness.*

[3] Note: The Commission's investigators did review the recording of the meeting on 24 October 2006 and compared it to the minutes prior to the Smiths Beach public hearings.

The Allen Report

The Commission's view of the evidence and its responses to the points raised with it by the Parliamentary Inspector are set out in detail in the correspondence, copies of which are at Appendix 2. They should be referred to, but the Commission will not set them out again here. In summary:

- Mr Allen has had a continuing relationship with Messrs Burke and Grill. They had sought his assistance in delaying the progress of Amendment 92. Mr Allen denied any communication with them until confronted with the relevant telephone calls at the public hearings. That was described at pages 78 and 79 of the Smiths Beach Report.

- Mr Burke had a meeting with Mr Allen on 2 August 2006. It seems not to be in dispute that the matter of "an assessment" of the position of the DPI in regards to the methodology to be applied to the developable area and visual analysis at Smiths Beach and whether DPI officer Ms Barbara Pedersen could be involved in that, was discussed. Mr Allen said it was possible that was discussed, but it was not the purpose of the meeting.

- At 1054 hours on 4 August 2006, Mr Burke telephoned Mr Allen's office. He was not there. Mr Burke spoke to his executive assistant. He told her that when he saw Mr Allen the previous Wednesday he had mentioned "a matter of the DPI position on the developable area at Smiths Beach" and said he understood that Mr Allen "had instructed Barbara Peterson (sic) to complete the opinion of the DPI on that question". He said he just wanted to confirm his understanding was correct. She told him she would pass the message onto Mr Allen.

- Mr Allen returned Mr Burke's call less than 4 hours later.

- Mr Burke then said the Smiths Beach people had mentioned "that a man called Singleton in there was an excellent person" and was apparently in the same area Ms Pedersen was working. He said the Smiths Beach people were "… keen to get some assessment of the developable area" and that they were very worried about Ms Clegg (doing it). Mr Burke went on to say that he had spoken that day with David McKenzie and told Mr McKenzie that "… I'd raised it with you and suggested Barbara Peterson (sic) **might be able to be involved**" (emphasis added).

- Mr Allen responded that he had "just been speaking with Barbara" and she was "happy to be the entry point". Mr Allen must therefore have spoken to Ms Pedersen as a result of either what Mr Burke asked of him at their meeting on 2 August or the message from Mr Burke passed to him by his executive assistant from Mr Burke's call earlier on 4 August.

- It is apparent from this conversation that Ms Pedersen's involvement was likely to be limited, because her schedule over the next few weeks was "a bit disastrous", according to Mr Allen. So it was Mr Allen who suggested that, depending on the time commitment, there may need to be some options. He said Mr Burke had mentioned Mr Singleton who was now Ms Pedersen's boss and who may well be another option. That was

acceptable to Mr Burke, who observed that Mr Singleton was "… very well regarded amongst the circles of these people we represent". Mr Burke then said he would tell them to make the initial approach to Ms Pedersen.

- Less than two hours after the above telephone call Mr Burke advised Mr McKenzie (at 4.36 p.m.) that Ms Pedersen would be involved and that he thought "she'll do the report for us" (T 676). The fact that there was an arguable case that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes is fortified by the fact that Mr Burke told Mr McKenzie that Mr Allen's actions in going to speak to Ms Pedersen had been "true to form".

- Mr Burke also repeated to Mr McKenzie in T 676 what Mr Allen had told him about Ms Pedersen's workload.

- Ms Pedersen's account to the subsequent DPI disciplinary investigation regarding Mr Allen's statement in T 98 that he had spoken to her was:

  > *I have no specific memory. It's a vague memory of Mike saying 'Are you aware that there is a request for advice? Will that be provided?'*[4]

- Information obtained by the subsequent DPI disciplinary investigation demonstrates that Mr McKenzie in fact met with Ms Pedersen just 4 days later, on 8 August 2006, for "an information exchange". This was consistent with the evidence Mr McKenzie gave at the CCC public hearings (referred to below). Significantly, Ms Pedersen made a note:

  > *Sticking points: The response/support from DPI on developable area and visual analysis.*[5]

- This was the very issue which had been the subject of Mr Burke's request to Mr Allen. It is clear that what the developer was seeking was a "response" (however particularly described) expressing DPI "support" on the methodology used to determine the developable area and visual analysis. But that had been a "sticking point". It did not remain so much longer. The conditional approval was issued on 15 September 2006.

The evidence taken as a whole, which must entail placing the telephone conversation on 4 August 2006 between Mr Burke and Mr Allen in its proper context, justified the conclusion that Ms Pedersen was not only approached by Mr Allen at the behest of Mr Burke to prepare or progress a document giving DPI's "support" to the developer's consultant's methodology used to determine the developable land and visual analysis at Smith's Beach, but that the approach was one that was not carried out in an impartial manner and was one that lacked integrity in all the circumstances.

[4] Page 22 of the disciplinary investigation report.
[5] Page 22 of the disciplinary investigation report

The Commission Opinions and Recommendations

The Commission does not exercise judicial power. It does not make determinations that persons have committed criminal offences or disciplinary offences. Like any Royal Commission, or equivalent body exercising the sort of powers the Commission has, its opinions are only opinions, albeit expressed under its authority in accordance with the CCC Act. The evidence which it may receive and act upon to inform its opinions or make its assessments may be inadmissible in a court of law, or not available to a disciplinary investigator. It may form its opinions or make its assessments on the basis not only of statements of witnesses or evidence from witnesses in hearings, but on the basis of consultations, and investigations and other actions. The standard of proof which applies to the Commission (like any Royal Commission) is on the balance of probabilities, not beyond reasonable doubt as in criminal proceedings before a court.

The CCC Act expressly stipulates that an opinion of the Commission, expressed in a report by it, 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 (section 23 (2)).

Under section 43 (1) the Commission may make recommendations as to whether consideration should be given (or should not be given) to the prosecution of a person for a criminal offence or for the taking of disciplinary action against a person.

It is implicit in section 43 that a recommendation that consideration be given to charging a person with a criminal offence or taking disciplinary proceedings against them:

- may not be accepted by the person or body to whom it is made;
- may be accepted, and consideration be given to prosecution for a criminal offence or disciplinary proceeding, but they decide not to prosecute or institute such proceedings; or
- is accepted, and a criminal prosecution is, or disciplinary proceedings are, taken – in which case they may either fail or succeed.

Given their different nature and purpose it is to be expected that where criminal or disciplinary proceedings are initiated as a consequence of a Commission recommendation, more or different evidence may be adduced and different or more extensive submissions or representations may be made. The court or investigator will commonly have different material and in that circumstance a different outcome would not be surprising.

But whatever the outcome of action taken subsequent to a Commission opinion of misconduct and a consequent recommendation, that outcome does not affect the validity of the Commission's reported assessment, opinion or recommendation – nor would it mean that the Commission's investigation was inadequate or deficient.

DPI's Disciplinary Investigations of Mr Frewer and Mr Allen

The Commission has reviewed the DPI disciplinary investigations of Mr Paul Frewer and Mr Michael Allen under the provisions of s.41 of the CCC Act in order to establish why the Commission and DPI investigations reached different conclusions.

The review noted that there were significant differences between the approach adopted by the Commission in its report to Parliament on the Smiths Beach matters and the approach taken by the DPI investigations. The Commission's view is that while the overall approach adopted by DPI in investigating the matters was reasonable, the information available to the DPI investigator was more limited than that evidence and other information available to the Commission.

In relation to the Frewer matter, the DPI investigation considered all relevant issues arising out of the Commission's recommendation, however, did not consider:

- the nature and extent of the relationship between Mr Burke and Mr Frewer;
- Mr Frewer's apparent influence at the 19 May SWRPC meeting;
- the credibility of Mr Frewer's initial denial at the Commission hearing that he had received communication from Burke; and
- the substance of Mr Frewer's telephone call to Mr Burke on 23 May 2006.

In relation to the Allen matter, the Commission's view is that the DPI investigation, while considering all the relevant issues arising out of the Commission's recommendations, was focussed on evidence of other departmental witnesses who expressed an opinion that Mr Allen's conduct was 'appropriate and consistent with departmental practice'. The Commission's investigation focussed on Mr Allen's preparedness to agree to Mr Burke's request to arrange for Ms Pedersen's involvement in the provision of the document that he and Mr McKenzie were waiting for from DPI. In doing this the Commission placed greater reliance on its assessment of Mr Allen's relationship with Mr Grill and Mr Burke, and his agreement to arrange for Ms Pedersen's involvement, which was subsequently reinforced by the DPI investigator's report that Ms Pedersen met with Mr McKenzie.

The review also identified two issues with the provision of information to agencies arising from Commission investigations. First, the Commission was unable to make available to the DPI investigator a range of material due to legal constraints. Second, the Commission should have provided more detailed analysis and briefings to assist the DPI investigator.

The Commission's review identified the potential for perceived conflicts of interest to arise where senior officers within the public sector are tasked with investigating fellow officers. While there was no evidence to suggest this as being an issue in the current cases, it suggests that in future when departmental disciplinary investigations into allegations against senior officers are contemplated,

departments should give consideration to engaging persons independent of the sector as investigators.

Whether the Commission should withdraw its Opinions and Recommendations

With one qualification in relation to Mr Allen (see page 15 of this Report) and having reviewed the evidentiary material and the matters put by the Parliamentary Inspector, the Commission considers the assessments, opinions and recommendations made by it in the Smiths Beach Report, in respect of Mr Frewer and Mr Allen, were properly grounded and correct.

That being so, the Commission could not publicly (nor otherwise) acknowledge that there was no justification for them – even in order to avoid being in dispute with the Parliamentary Inspector. For the Commission to do so, not believing it to be true, would be itself a failure to act with honesty and integrity.

The Parliamentary Inspector has recommended (Allen Report [146]) that the Commission consider taking a different course in relation to "misconduct" findings in the future.

He first suggests that an allegation of "misconduct" should be fully investigated "as if it were an allegation of a criminal offence" and says that "Mr Ingham's[6] proposition that an investigation of misconduct need not be as thorough as an investigation of a criminal offence" must be rejected (Allen Report [146.1]). The Commission does not understand that to be a correct statement of Senior Investigator (SI) Ingham's "proposition". Rather, the Commission understands him to have been referring to the lower standard of proof (that is, proof on the balance of probabilities) which applies to investigations by Royal and standing Commissions, than that which applies to criminal prosecutions (which require proof beyond reasonable doubt).

That said, the Commission is particularly conscious that an opinion of "misconduct" is extremely serious and will ordinarily have very significant consequences for the public officer concerned. "Misconduct" investigations must accordingly be conducted with the thoroughness those considerations demand.

The Commission has noted the procedure recommended by the Parliamentary Inspector (Allen Report [146.2-146.4]) that recommendations for disciplinary actions should be made before finalisation and tabling of a Commission report in the particular manner. The Commission has previously indicated to the Parliamentary Inspector that it is prepared to consider that course in an appropriate case. In the meantime, how such an approach might be implemented will require further examination.

The Parliamentary Inspector

The approach taken by the Parliamentary Inspector in relation to what the Commission said about Mr Frewer and Mr Allen in the Smiths Beach Report has created a substantial difficulty which the CCC Act has no mechanism to resolve.

[6] Mr Ingham was the Case Officer for the Smiths Beach investigation.

In the Commission's view, that is because (consistent with fundamental legal principle) the Legislature never intended nor contemplated that the functions of the Parliamentary Inspector would extend to substituting his or her own assessment of the evidence, opinions and recommendations for those of the Commission.

A Possible Mechanism

The "Report of the Standing Committee on Legislation in Relation to the *Corruption and Crime Commission Act 2003* and the *Corruption and Crime Commission Amendment Bill 2003*" (Parliament of Western Australia, December 2003) ("Committee Report") canvassed the issue of possible mechanisms for resolving disputes between the Commission and the Parliamentary Inspector. The then Chief Justice had made a submission that such a mechanism was necessary (Committee Report, [7.29]).

The Standing Committee referred to one possible option being for the Commission and the Parliamentary Inspector to seek advice from the Solicitor General as to the statutory functions and powers of the Parliamentary Inspector.

In the current situation, the Commission did ask the Solicitor General to brief independent counsel for an opinion.

At the public hearing before the Parliamentary Joint Standing Committee on the Corruption and Crime Commission (the Committee) on 27 February 2008 the Commission told the Committee it would abide by the resulting independent opinion. The Parliamentary Inspector reportedly told the Committee that although he would be interested in the opinion, it would not necessarily sway him. Consequently that mechanism would ultimately not be an effective way to resolve such differences. In the end, it would produce only another, non-binding "opinion".

It is the Commission's view that the only effective mechanism to resolve disputes between the Commission and the Parliamentary Inspector about matters of law must be one which enables their determination in the Supreme Court.

Although that avenue would probably already be available in most situations at present, it would only be so in an ordinary adversarial context. In the Commission's view, proceedings of that kind between the Commission and the Parliamentary Inspector would be inappropriate, unsatisfactory and likely to undermine public confidence in both offices.

Those disadvantages would not arise if the CCC Act itself were to provide a simple procedure whereby either the Parliamentary Inspector, the Commission or both may apply to the Supreme Court for a declaration on a question of law in dispute between them, concerning or arising under the CCC Act. Any determination made by the Court would be binding in law, subject only to the normal judicial appellate processes

The Corruption and Crime Commission was created by an Act of the Western Australian Parliament. The role of Parliamentary Inspector was created by the same Act.

The CCC Act's stated purpose is to improve continuously the integrity of and reduce the incidence of misconduct in the public sector. The Commission is tasked with helping public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power itself to investigate cases of misconduct, while the Parliamentary Inspector contributes to this task by undertaking specific functions defined by the CCC Act.

Over the past three and a half years the Commission has dealt with over seven thousand allegations of misconduct pursuant to the provisions of the CCC Act. Its activities and the results achieved have had a direct impact on improving the integrity of the public sector. That success has been in part due to a very effective working relationship between the Commission and the Parliamentary Inspector.

Recent events and the circumstances of this matter contained in this report have put the Parliamentary Inspector and the Commission into conflict. This regrettable development has caused significant concern for the Commission distracting it from its main purpose.

While the issues addressed in this report are important of themselves, arising as they do in terms of the need to fully and properly interpret the CCC Act, it is important that they be resolved as quickly as practicable so that both the Commission and the Parliamentary Inspector can resume dealing with public sector misconduct appropriately and effectively.

REPORT ON AN ADMINISTRATIVE MATTER RELATING TO THE FUNCTIONS OF THE COMMISSION

This Special Report, made pursuant to sections 88 and 93 of the *Corruption and Crime Commission Act 2003* (the CCC Act), addresses an important administrative matter related to the functions of the Corruption and Crime Commission (the Commission) and the Parliamentary Inspector of the Corruption and Crime Commission (the Parliamentary Inspector).

The CCC Act established the Commission and provides the framework for the performance of its functions. After four years of operation, and in light of some of the high profile matters with which the Commission has dealt, a range of issues and concerns associated with its application has arisen. This is not unusual in terms of major legislation. Gaps and unintended consequences become apparent in their early lives and are subject to either interpretation in the courts or legislative amendment. The Parliament anticipated this when requiring, under section 226 of the CCC Act, a review of the "operation and effectiveness" of the CCC Act three years after its commencement. The Commission understands that this review, conducted by Ms Gail Archer SC, is now complete and under consideration by the Attorney General.

That review notwithstanding, present circumstances have highlighted very particular issues connected with the statutory functions of the Parliamentary Inspector that are affecting the capacity of the Commission to effectively perform its functions. These are likely to seriously inhibit the capacity of the Commission to conclude a number of reports resulting from investigations of lobbying and public sector misconduct and may result in a loss of public confidence in the work of the Commission.

The Commission believes the Parliamentary Inspector has a very important role that is absolutely necessary and critical to the effective operation of the CCC Act. The external and independent monitoring performed by the Parliamentary Inspector to ensure that the Commission's operations are conducted in accordance with the CCC Act and other laws, and that its procedures are effective and appropriate, gives the Parliament, the community and the Commission itself, the confidence that the exercise of the Commission's extensive powers is appropriately subject to Parliamentary scrutiny and legislative control

Recent Parliamentary Inspector Reports to the Parliament

On Friday 8 February 2008 the Parliamentary Inspector tabled in the Parliament of Western Australia a report entitled "Report on the Corruption and Crime Commission's Findings (sic) of 'Misconduct' by Mr Paul Frewer" (the Frewer Report).

In the Frewer Report the Parliamentary Inspector expressed his opinion that there was no justification for the Commission's "findings" (sic the word used in the CCC Act is "opinion" not "findings") in its "Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup" (the Smiths Beach Report), tabled in the Parliament of Western Australia on 5 October 2007, that Mr Frewer engaged in misconduct, nor for recommending that a

"relevant authority" consider taking disciplinary action against him. The Parliamentary Inspector noted that in a draft report he had recommended that the Commission publicly acknowledge that its opinion, that Mr Frewer failed to act "impartially" and "with integrity", was in error, but that the Commission had rejected that recommendation. The Parliamentary Inspector did not explain why the Commission had rejected it.

On Friday 7 March 2008, the Parliamentary Inspector tabled in the Parliament a report entitled "Report on the Corruption and Crime Commission's Investigation and Finding of 'Misconduct' by Mr Michael Allen" (the Allen Report). In that report the Parliamentary Inspector contended that the Commission's investigation in respect of Mr Allen was inadequate, its opinion of misconduct was "unsupported by the evidence", and was contrary to evidence which it had and which "a full investigation would have obtained". He also asserted that the Commission failed to comply with section 86 of the CCC Act and he made a range of other criticisms.

The Commission believes that the opinions it expressed in respect of Mr Frewer and Mr Allen in the Smiths Beach Report were well-founded and correct.

That being so the Commission could not publicly (nor otherwise) acknowledge that there was no justification for them – even in order to avoid being in dispute with the Parliamentary Inspector.

In relation to Mr Allen, the Commission has conceded that, in retrospect, the use of the word "appoint" in its opinion (at, for example, Smiths Beach Report [7.21]) that

> *Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke …*

was likely to convey a different meaning from that which was intended – and if that more formal meaning had been interpreted, then there would not have been proper compliance with section 86 of the CCC Act. For that reason, the Commission informed the Parliamentary Inspector by letter of 13 February, and confirmed in public hearing before the Parliamentary Joint Standing Committee on the Corruption and Crime Commission (the Committee) on 27 February 2008, that it withdrew that opinion and the recommendation based on it, and substituted an opinion and recommendation referring to Mr Allen's conduct

> *… in agreeing to arrange for Ms Pedersen's involvement in the DPI assessment … .*[7]

[7] An order suppressing Ms Pedersen's name from publication was made by Commissioner Hammond during the course of the hearing. Consequently, in the public hearing before the Committee, the Commissioner referred to her as "an officer of DPI". The Commission wrote to Ms Pedersen on 20 February 2008 indicating that because of a pending prosecution it was considering revoking that order, and inviting any submissions she wished to make. Ms Pedersen's lawyers made submissions arguing that the order should not be revoked. However, the order became pointless once the Parliamentary Inspector tabled the Allen Report, in which Ms Pedersen was named. The Commissioner accordingly revoked the suppression order after the tabling of the Parliamentary Inspector's report.

"Involvement" rather than "appoint" was the word which had been used in the section 86 notification to Mr Allen (quoted at Allen Report [123]).

The CCC Act: New and Untested

The present situation has arisen because it is only now that the CCC Act has been in operation for four years, that various uncertainties in its practical operation are arising. The CCC Act is still untested in the courts (although the presently pending application by Dr Cox to the Supreme Court is anticipated to give legal clarity to some aspects of it). As more challenging circumstances arise as a result of major Commission investigations and reports, more uncertainties or ambiguities in the legislation have appeared and no doubt will continue to appear, resulting in differing interpretations between the Parliamentary Inspector and the Commission.

Differences of interpretation are not unusual with such important and complex legislation. They can be seen, for example, even between eminent jurists in the highest courts.

The Commission is a permanent body in the form of a corporate entity with perpetual succession. Its functions are performed by the Commissioner in the name of the Commission. The Commission does not exercise judicial power. Its reports are not judicial judgments; they are executive reports on the outcome of Commission investigations into alleged misconduct by public officers.

The process involved in the production of the Smiths Beach Report was explained in that Report at [1.6].

> *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.*

Although there is no legal difficulty with the process described above, in light of that course of events, the need for Commissioner the Hon Len Roberts-Smith RFD QC to respond to the Parliamentary Inspector's requests and requirements following him taking up his appointment on 5 June 2007, obviously involved substantial practical challenges. Not only did he have to examine much of the material held by the Commission, but he also had to attempt to discern what may or may not have been in Commissioner Hammond's and Acting Commissioner McKerracher QC's minds in terms of the range of detail and material they considered at different times about a range of issues.

Both the Frewer Report and the Allen Report raise a multiplicity of evidentiary and other issues. The Commission understands that the Parliament and the public of Western Australia require and are entitled to some explanation of the Commission's response to the Parliamentary Inspector's opinions and recommendations. The Commission will therefore give the substance of that in this report.

However the Commission also recognises that an ongoing public debate between it and the Parliamentary Inspector could not lead to resolution of the issues raised and would be counterproductive to both and could go on interminably

For that reason, and because the primary purpose of this report is to identify the nature of the problem which concerns the proper construction of the CCC Act and the role of the Parliamentary Inspector, the Commission's response here will be confined to an explanation of its position with respect to Messrs Frewer and Allen, only to an extent sufficient to illustrate the nature of the problem. This Report contains copies of the relevant correspondence about these matters between the Commission and the Parliamentary Inspector to enable the Commission's position on all of the issues to be understood.

The Commission recognizes the situation which has unfortunately developed between the Parliamentary Inspector and the Commission is one for resolution by the Government and the Parliament.

The Frewer Report

The Commission's explanation for remaining satisfied of the correctness of the assessments, opinions and recommendations in respect of Mr Frewer in the Smiths Beach Report is detailed in its letters to the Parliamentary Inspector annexed to this report (the relevant correspondence from the Parliamentary Inspector is also annexed for completeness).

The Commission emphasises that this Report should be read with the Smiths Beach Report.

The Commission's present view of the evidence and its responses to the points raised with it by the Parliamentary Inspector are set out in detail in the correspondence (particularly the Commission's "Response" dated 31 January and pages 3-4 of its letter of 13 February 2008), copies of which are at Appendix 1. The Commission will not set them out in detail again here. In summary:

- There were emails between Mr Burke and Mr Frewer from January 2004 to September 2005 from which it is apparent Mr Frewer well knew that Canal Rocks Pty Ltd did not want Amendment 92 to proceed.

- When Mr Burke telephoned Mr Frewer on 18 May 2006 (the day before the SWRPC meeting), after ascertaining that Mr Frewer was going to the meeting the following day, he told him that Nigel Bancroft was "playing funny buggers" and "bringing amendment ninety-two on". In the context of their previous communications, the only reasonable inference is that Mr Burke wanted Mr Frewer to delay the amendment and Mr Frewer understood that.[8]

- At the SWRPC meeting, another member declared that she had been lobbied, stating by whom, about what and for what purpose. That was a proper disclosure that was recorded in the minutes.

- In a jocular vein, Mr Frewer said "Someone rang me about the Smiths Beach thing and they said they'd send me all this stuff but they didn't … (indecipherable) and anyhow, nothing arrived and I didn't receive anything so if that's called lobbying that's fine." This remark was not recorded in the minutes as a disclosure.

- Notwithstanding the telephone call from Mr Burke had been the night before, Mr Frewer did not say by whom he had been approached, on whose behalf, nor for what purpose.

- What he said was not recorded in the minutes as a disclosure of lobbying by the minute taker.

- In his evidence before the Commission, Mr Frewer agreed that he should have disclosed the approach by Mr Burke, on his own understanding of the disclosure requirement.

- At the meeting, Mr Frewer spoke in favour of the deferral of Amendment 92 (without having disclosed he had been lobbied by Mr Burke to do so).

- No fair reading of the whole of the transcript of the SWRPC meeting could result in any conclusion other than that Mr Frewer played a significant and persuasive role in the decision to defer the amendment. The fact that other members also agreed with and advocated this position and that the resolution was unanimous is not to the point.

- On 23 May 2006 Mr Frewer telephoned Mr Burke. They spoke for over 24 minutes. The first topic of conversation (introduced by Mr Burke) was the SWRPC meeting. Mr Burke said "thanks very much for that". Mr Frewer responded by saying "no worries" and explained what happened at the meeting. It is clear he knew what he was being thanked for. He effectively claimed that it was done gently and he had not had to do much.

[8] The Parliamentary Inspector acknowledges (Frewer Report, Executive Summary, [3.5]) "It is implicit in what Mr Burke said to Mr Frewer that he did not want Amendment 92 considered at that meeting."

- At the hearing before the Commission, Mr Frewer denied on oath having any contact with Mr Burke in connection with Smiths Beach generally or in regard to the 19 May meeting of the SWRPC particularly. However the call on 18 May had lasted for over 4½ minutes and that on 23 May 2006 had lasted over 24 minutes. Mr Frewer denied any such calls. Those two calls were made only six months before he first gave evidence. Nor had he disclosed them in response to a notice served on him on 3 July 2006 requiring him to give written responses to questions. The false denials support an inference that Mr Frewer was conscious he had been lobbied and had failed to disclose it.

- It was entirely open to the Commission to conclude that a failure to disclose that he had been lobbied and then to argue in favour of the deferral was a failure by Mr Frewer to act with impartiality and integrity.

As can be seen from the correspondence (particularly the Commission's letter and attached "Response" dated 31 January 2008 and its letter of 13 February 2008), the Commission made an assessment of the evidence before it which led it to certain opinions and recommendations. The Parliamentary Inspector has taken a different view of the evidence, leading him to a different view of what the "facts" are, and therefore to different conclusions.

By way of further illustration only, at [3.6] and [3.7] of the Frewer Report, the Parliamentary Inspector says:

> *[3.6] Mr Burke did not request Mr Frewer to seek a deferral of consideration of Amendment 92; nor did Mr Frewer agree to do so. There was no apparent reason why he should.*
> *[3.7] The e-mail from Mr Burke, which stated a reason for deferring Amendment 92, was not received by Mr Frewer, as it was wrongly addressed.*

Mr Frewer had given evidence on 5 December 2006. The following day, his lawyers wrote to Counsel Assisting, pointing out Mr Burke had sent the email to an incorrect addresses. The Commission made further enquiries, and on 30 January 2007 advised Mr Frewer's lawyers in writing that:

> *… the Commission cannot conclusively form a view as to whether Mr Frewer did or did not receive the email from Mr Burke, and therefore this email will not be relied upon, in respect of Mr Frewer, in the final report.*

In the Smiths Beach Report the Commission expressly accepted that Mr Frewer did not receive the email:

> *Following the hearings, Mr Frewer advised that the addresses on the emails 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.* [Smiths Beach Report p75]

To say Mr Burke did not request Mr Frewer to seek a deferral of consideration of Amendment 92, nor did Mr Frewer agree to do so, is only a "fact" to the extent such words were not expressly said. The Parliamentary Inspector then argues the telephone call was not "lobbying", and so, in turn, that it therefore did not need to be disclosed by Mr Frewer.

But Mr Burke did not have to expressly ask Mr Frewer to seek a deferral. The clear inference from the evidence (as explained in the Smiths Beach Report and elaborated in the Commission's "Response" of 31 January 2008 and its letter of 13 February 2008) is that from their previous contacts Mr Frewer knew perfectly well what Mr Burke wanted. As noted above, the Parliamentary Inspector himself acknowledged that fact when he wrote at [3.5] that:

> *It is implicit in what Mr Burke said to Mr Frewer that he did not want Amendment 92 considered at that meeting …*

In the Commission's opinion the evidence also gives rise to the clear inference that Mr Frewer went to the meeting of the SWRPC intending to deliver the outcome Mr Burke sought, and that in his telephone call to Mr Burke on 23 May 2006, he claimed credit for having done so – although in effect saying that he did not have to do much to achieve that.

The Commission notes that, in his report, the Parliamentary Inspector accepts (at [14]) that if Mr Frewer had received Mr Burke's email, then he would have been "lobbied". The Commission's position is that he did not need to receive the email because he already knew what Mr Burke wanted.

On the above understanding of the facts, Mr Frewer certainly had been "lobbied" by Mr Burke and that "lobbying" was exactly the sort of circumstance which the committee resolution required him to disclose. Indeed, on his own evidence, Mr Frewer accepted that in those circumstances he would have been obliged to disclose those details (which he did not do).

The Commission's assessment of these facts was that in supporting the deferment of Amendment 92 without disclosing that he had been lobbied by Mr Burke to achieve that very result, Mr Frewer failed to act impartially or with integrity. The Commission remains of that opinion.

The Parliamentary Inspector asserts that the "unsoundness" of the Commission's opinion of "misconduct" in its report resulted from, amongst other things, a failure to check for accuracy the minutes of the SWRPC meeting against the tape recording of the meeting, and its failure to consider whether what Mr Frewer did say at the outset of the meeting was a sufficient report of lobbying.

Commission investigators did check the tape. As noted above, another member of the SWRPC had made a declaration of lobbying at the meeting. She disclosed that she had been approached by someone (whom she named) about the Smiths Beach Development and what that person wanted. That was a proper disclosure. It was recorded in the minutes.

Mr Frewer then said, in a flippant and jocular manner:

> *Someone rang me about the Smiths Beach thing and they said they would send me all this stuff but they didn't … (indecipherable) and anyhow nothing arrived and I didn't receive anything so if that's called lobbying that's fine.*

The minute taker did not record this as a disclosure of lobbying. It is wrong to say that the minutes were therefore inaccurate. Mr Frewer had not disclosed that he had been lobbied by Mr Burke, as recently as the evening before, to take a position in respect of an item in which Mr Burke's client had a known interest. It was not a disclosure of lobbying at all.

The Parliamentary Inspector assumes the allegation was that Mr Frewer said nothing, and the Smiths Beach Report is flawed because the tape shows that he did say something. But that was not the substance of the point. The fact that he had said what he did say (and the way he said it), only makes his position worse, because it revealed that while Mr Frewer was conscious of the contact, he deliberately portrayed it as insignificant and entirely inconsequential.

The Commission will not set out again here its other reasons for believing the assessments, opinion and recommendation in respect of Mr Frewer in the Smiths Beach Report were well-founded. They are dealt with in detail in its correspondence with the Parliamentary Inspector contained at Appendices 1 and 2 to this Report.

Being of that belief, the Commission could not accept the Parliamentary Inspector's recommendation (Frewer Report, [49]) that it publicly acknowledge that its opinion that Mr Frewer failed to act impartially and with integrity, was in error. Were it to do so, the Commission would itself be failing to act with honesty and integrity.

The Commission agrees with and accepts the recommendations at [50] and [51] of the Parliamentary Inspector's Frewer Report, that:

- *The Commission should ensure that any proposed adverse opinion is not expressed in a report without prior compliance with section 86, and acknowledge that it is not sufficient compliance to give notice of a proposed misconduct finding, on a particular basis, and then report such a finding, but on a different factual basis, without giving the person affected reasonable opportunity to make further representations with respect to that different basis.*

- *When relying on minutes of a meeting, as a basis for examination of a witness, or comment in a report, care must be taken to check their accuracy against any recording of the meeting, if one exists (as is now very often the case).*[9] *The Commission accepts this, and has directed that this procedure is to be followed in the future, so that, where relevant, the full record of a meeting will be put to a witness.*

[9] The Commission's investigators did review the recording of the meeting and compared it to the minutes prior to the Smiths Beach public hearings

The Allen Report

The Commission's view of the evidence and its responses to the points raised with it by the Parliamentary Inspector are set out in detail in the correspondence, copies of which are at Appendix 2. They should be referred to, but the Commission will not set them out again here. In summary:

- Mr Allen has had a continuing relationship with Messrs Burke and Grill. They had sought his assistance in delaying the progress of Amendment 92. That was described at pages 78 and 79 of the Smiths Beach Report.

- Mr Burke had a meeting with Mr Allen on 2 August 2006. It seems not to be in dispute that the matter of "an assessment" of the position of the DPI in regards to the methodology to be applied to the developable area and visual analysis at Smiths Beach and whether DPI officer Ms Barbara Pedersen could be involved in that, was discussed. Mr Allen said it was possible that was discussed, but it was not the purpose of the meeting.

- At 1054 hours on 4 August 2006, Mr Burke telephoned Mr Allen's office. He was not there. Mr Burke spoke to his executive assistant. He told her that when he saw Mr Allen the previous Wednesday he had mentioned "a matter of the DPI position on the developable area at Smiths Beach" and said he understood that Mr Allen "had instructed Barbara Peterson (sic) to complete the opinion of the DPI on that question". He said he just wanted to confirm his understanding was correct. She told him she would pass the message onto Mr Allen.

- Mr Allen returned Mr Burke's call less than 4 hours later.

- Mr Burke there said the Smiths Beach people had mentioned "that a man called Singleton in there was an excellent person" and was apparently in the same area Ms Pedersen was working. He said the Smiths Beach people were "… keen to get some assessment of the developable area" and that they were very worried about Ms Clegg (doing it). Mr Burke went on to say that he had spoken that day with David McKenzie and told Mr McKenzie that "… I'd raised it with you and suggested Barbara Peterson (sic) **might be able to be involved**" (emphasis added).

- Mr Allen responded that he had "just been speaking with Barbara" and she was "happy to be the entry point". Mr Allen must therefore have spoken to Ms Pedersen as a result of either what Mr Burke asked of him at their meeting on 2 August or the message from Mr Burke passed to him by his executive assistant from Mr Burke's call earlier on 4 August.

- It is apparent from this conversation that Ms Pedersen's involvement was likely to be limited, because her schedule over the next few weeks was "a bit disastrous" according to Mr Allen. So it was Mr Allen who suggested that depending on the time commitment there may need to be some options. He said Mr Burke had mentioned Mr Singleton and he was now Ms Pedersen's boss and may well be another option. That was acceptable to Mr Burke, who observed that Mr Singleton was "… very well

regarded amongst the circles of these people we represent". Mr Burke then said he would tell them to make the initial approach to Ms Pedersen.

- Less than two hours after the above telephone call Mr Burke advised Mr McKenzie (at 4.36 p.m.) that Ms Pedersen would be involved and that he thought "she'll do the report for us" (T 676). The fact that there was an arguable case that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes is fortified by the fact that Mr Burke told Mr McKenzie that Mr Allen's actions in going to speak to Ms Pedersen had been "true to form".

- Mr Burke also repeated to Mr McKenzie in T 676 what Mr Allen had told him about Ms Pedersen's workload.

- Ms Pedersen's account to the subsequent DPI disciplinary investigation regarding Mr Allen's statement in T 98 that he had spoken to her was:

  > *I have no specific memory. It's a vague memory of Mike saying 'Are you aware that there is a request for advice? Will that be provided?'*[10]

- Later in the same conversation on 4 August 2006 Mr Burke and Mr McKenzie returned to the subject of Ms Pedersen and the "report":

  > ***McKenzie**: also. Alrighty. Well, uh, that's great about Barbara so, uh,*
  >
  > ***Burke**: Monday*
  >
  > ***McKenzie**: Yeah?*
  >
  > ***Burke**: someone's ring her. Who'd. who'd ring her?*
  >
  > ***McKenzie**: Well, I can. I mean I know her.*
  >
  > ***Burke**: Well, I mean*
  >
  > ***McKenzie**: Uh, but, and I might just advise her that, and this is to do with the developable area?*
  >
  > ***Burke**: Yes, that's right. You can*
  >
  > ***McKenzie**: Yeah.*
  >
  > ***Burke**: I mean I'm sure, well, in fact **he told me he went to speak to her today***
  >
  > ***McKenzie**: Yeah.*
  >
  > ***Burke**: **or yesterday after my request***

[10] Page 22 of the disciplinary investigation report.

***McKenzie**: Yeah.*

Burke**: and, uh, **she said yes, I'll do it if I can fit it in and I'll certainly be the first point of entry**. So I, and I told her we didn't want Ms Clegg so I think you can speak quite frankly to her. **And I'd be ringing her on Monday and saying look have you got five minutes? It won't be more than five. I'd just like to come and see you.

McKenzie**: **Yeah. Okay.

Burke**: **And then I'd tell her the absolute truth and see if Mr Singleton could be involved.

***McKenzie**: I might even ring her now, see if she's around and set up an*

***Burke**: Uh*

***McKenzie**: appointment for Monday*

***Burke**: I, I'm not sure that I*

***McKenzie**: or leave it?*

***Burke**: No, I'm not sure that I would now.*

***McKenzie**: Yeah.*

***Burke**: I'll tell you why, cause I think he spoke to her this morning.*

***McKenzie**: Right.*

***Burke**: And I'd, I'd just need a bit of time, I mean*

***McKenzie**: Yeah, yeah, yeah. Just let the*

***Burke**: You, you know*

***McKenzie**: dust settle a bit.*

***Burke**: The last thing you, you want to do is have people think I'm pulling strings*

***McKenzie**: Yeah. Yeah.*

***Burke**: because, you know, it become, in the end it becomes, oh, I don't fucking have Brian Burke telling me what to do, you know.*

***McKenzie**: Yep. Sure.*

***Burke**: It's not even like*

***McKenzie**: No. Mon, Monday, uh, I'll ring her first thing.*

(emphasis added)

- Information obtained by the subsequent DPI disciplinary investigation demonstrates that Mr McKenzie in fact met with Ms Pedersen just 4 days later, on 8 August 2006, for "an information exchange". This was consistent with the evidence Mr McKenzie gave at the CCC public hearings (referred to below). Significantly, Ms Pedersen made a note:

  Sticking points: The response/support from DPI on developable area and visual analysis.[11]

  This was the very issue which had been the subject of Mr Burke's request to Mr Allen. It is clear that what the developer was seeking was a "response" (however particularly described) expressing DPI "support" on the methodology used to determine the developable area and visual analysis. But that had been a "sticking point". It did not remain so much longer. The conditional approval was issued on 15 September 2006.

- As to whom Mr McKenzie thought was going to prepare this response, the answer can be found in a conversation he had with Mr Burke approximately 1½ hours after his meeting with Ms Pedersen had concluded:

  ***Burke**: Is she gunna [sic] do it?*

  ***McKenzie**: Ah, well, I, I believe so, er.*

  ***Burke**: She told you she's very snowed under?*

  ***McKenzie**: Yeah, yeah*

  ***Burke**: Yeah*

  ***McKenzie**: Ah uhm, **but er, she's sorta [sic] going to oversee, ah, everything**, but er, she's also going to come, er to Busselton on the thirtieth...*

  ***Burke**: Good*

  ***McKenzie**: of August er, when, when we do our presentation*

  ***Burke**: Alright mate **I'll keep riding it from**…*

  ***McKenzie**: Yeah, yep*

[11] Page 22 of the disciplinary investigation report

Burke**:* ***that end don't worry.

(emphasis added)

The fact that Ms Pedersen had advised Mr McKenzie that she was "snowed under" supports the contention that Mr Allen had specifically asked her to prepare or progress the "report" and that Mr McKenzie had also expressed a similar request to her at their meeting on 8 August 2006.

That Ms Pedersen was going to "oversee" the DPI response was consistent with her role as she described when interviewed by the Commission. The fact that Ms Pedersen was not under Mr Allen's "line" of authority does not matter. If it did, why would he have agreed? And he did in fact approach her about it; Mr McKenzie (as Mr Allen suggested) did talk to her and within days she met with him and spoke specifically about the DPI response on the methodology.

The evidence taken as a whole, which must entail placing the telephone conversation on 4 August 2006 between Mr Burke and Mr Allen in its proper context, justified the conclusion that Ms Pedersen was not only approached by Mr Allen at the behest of Mr Burke to prepare or progress a document giving DPI's "support" to the developer's consultant's methodology used to determine the developable land and visual analysis at Smith's Beach, but that the approach was one that was not carried out in an impartial manner and was one that lacked integrity in all the circumstances.

The conclusion made by the subsequent DPI disciplinary investigation at page 16 of the report was that:

> *In summary, an analysis of the conversations in the phone calls of 4 August 2006 indicated that Mr Burke did not* ***explicitly*** *request of Mr Allen, Ms Pedersen's involvement as a report writer. Mr Burke sought and received confirmation from Mr Allen that Ms Pedersen would be the entry point for the proponent in relation to the proposed Smith's Beach development. (*emphasis added)

This failed to consider the critical 4 August 2006 telephone call in the proper context and failed to appreciate the subtle manner in which Mr Burke made approaches to public servants.

It follows from the brief outline above that the Commission cannot agree with the proposition that its examination of Mr Allen and its opinion of misconduct on his part were "fundamentally flawed", nor that he was treated unfairly by the Commission.

The basis for the Commission's opinion in respect of Mr Allen set out in the Smiths Beach Report, that it was that Mr Allen agreed to cause or arrange for Ms Pedersen to write a supportive DPI response on the methodology used by the developer's consultants in their assessment of the developable area and visual analysis, or if she were unable to do that because of her work commitments, for her to nonetheless be involved in that sufficiently to progress it through DPI, was and remains that second possible adverse opinion set out in the Commission's

letter of 19 January 2007. That was what was intended to be conveyed (in a short-hand form) by the word “appoint”.

In retrospect, the Commission accepts the word “appoint” was likely to convey a different meaning from that which was intended. And if that more formal meaning was what had been intended, then there would not have been proper compliance with section 86.

However, as what was meant to be conveyed was the substance of the second possible adverse opinion of which Mr Allen had been given notice under section 86 (in respect of which he was able to make representations), section 86 was complied with on that basis.

Commission Opinion and Recommendation

For the above reasons the Commission accepts that the word “appoint” should not have been used in the report and would accordingly reframe its opinion and recommendation to reflect its consistent intention.

The Commission withdraws its opinion (at [7.21] of the Smiths Beach Report), that:

> *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.*

And substitutes instead the opinion that:

> *Mr Allen’s conduct in August 2006, in agreeing to arrange for Ms Pedersen’s involvement in the DPI’s assessment of the proposed development at 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 withdraws recommendation 3 (at [7.6] of the Smiths Beach Report):

> *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.*

and substitutes instead, the recommendation:

> *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 him agreeing to arrange the involvement of a certain departmental officer in the DPI's assessment of the proposed development at Smiths Beach.*

In substituting this recommendation to stand in place of recommendation 3 in the Smiths Beach Report, the Commission acknowledges that the subsequent DPI disciplinary investigation against Mr Allen conducted by the Director General (DPI) and the charge based on the former recommendation was found not to be made out. On the Commission's reading of the DPI Investigator's reasons, the same outcome would have resulted had the charge of the disciplinary offence been cast in the terms of the Commission's substituted recommendation.

The Pedersen Interview

It is necessary to say something about the interview with Ms Pedersen on 7 May 2007, which the Parliamentary Inspector describes as "crucial evidence" (a view which the Commission does not share).

First, the Parliamentary Inspector appears to assume that any decision whether to interview Ms Pedersen for the purpose of its investigation with respect to Mr Allen, lay entirely with the Case Officer, Senior Investigator (SI) Ingham. That was not so.

The Commission's Smiths Beach investigation into allegations of serious misconduct commenced in September 2005. It was initially concerned with the dealings of Canal Rocks Pty Ltd and the lobbyists Messrs Burke and Grill with local councillors and council officers. However, it soon became apparent that the lobbyists' activities and strategy were multi-stranded and extended to other public officers, including Messrs Frewer and Allen. It is therefore simply incorrect for the Parliamentary Inspector to assert (as he does at [12] of the Allen Report) that neither of their examinations "had anything to do with the original purpose of the CCC's investigations, for which it had obtained TI and SD warrants", nor that they were "entirely collateral matters".

The Deputy Director of Operations was the Principal Officer for the investigation. SI Ingham, as Case Officer, reported to him.

Private hearings were held as part of the ongoing Smiths Beach investigation in March 2006 and public hearings in October, November and December 2006. Ms Pedersen's name had, of course, been known since the telephone conversation in August 2006.

By February 2007 the process of writing the Commission report had commenced.

Counsel Assisting had been involved from May 2006 and from that time the investigators had been working increasingly in cooperation with them (in consultation with Commissioner Hammond).

SI Ingham was not asked to interview Ms Pedersen, nor Mr Singleton, Ms Clegg or Ms Cherrie. That was apparently because the view was taken that the misconduct identified in relation to Mr Allen was his agreeing, in the telephone conversation of 4 August 2006, to accede to Mr Burke's request about Ms Pedersen – and the evidence did show that agreement.

Commissioner Hammond's term concluded on 23 March 2007. Acting Commissioner McKerracher QC took over the writing of the report.

At no stage was SI Ingham asked to interview Ms Pedersen for the purposes of the Smiths Beach investigation or report.

In May 2007, Commission investigators (who had in the meantime been working on other matters) had begun to prepare briefs for criminal prosecutions. It was then – and for that purpose – that SI Ingham interviewed Ms Pedersen on 7 May 2007.

Given the Parliamentary Inspector's request (Allen Report [80]) that the Commissioner make further enquiries about this matter and report to him so that he may consider whether to conduct an inquiry into possible misconduct by any DPI (sic: CCC) officer, it would be inappropriate to deal further with that matter here.

The Parliamentary Inspector has recommended (Allen Report [146]) that the Commission consider taking a different course in relation to "misconduct" findings in the future.

He first suggests that an allegation of "misconduct" should be fully investigated "as if it were an allegation of a criminal offence" and says that "Mr Ingham's proposition that an investigation of misconduct need not be as thorough as an investigation of a criminal offence" must be rejected (Allen Report [146.1]). The Commission does not understand that to be a correct statement of SI Ingham's "proposition". Rather, the Commission understands him to have been referring to the lower standard of proof (that is, proof on the balance of probabilities) which applies to investigations by Royal and standing Commissions, than applies to criminal prosecutions (which require proof beyond reasonable doubt).

That said, the Commission is particularly conscious that an opinion of "misconduct" is extremely serious and will ordinarily have very significant consequences for the public officer concerned. "Misconduct" investigations must accordingly be conducted with the thoroughness those considerations demand.

The Commission has noted the procedure recommended by the Parliamentary Inspector (Allen Report [146.2-146.4]) that recommendations for disciplinary actions should be made before finalisation and tabling of a Commission report. The Commission has previously indicated to the Parliamentary Inspector that it is prepared to consider that course in an appropriate case. In the meantime, how such an approach might be implemented will require further examination.

The Role of the Parliamentary Inspector

The observations made above are sufficient to illustrate how the effectiveness of the statutory scheme embodied in the CCC Act is likely to be undermined if it extends the functions of the Parliamentary Inspector to reviewing the assessments, opinions and recommendations of the Commission on the evidence, by undertaking a re-evaluation of the evidence which was before it (or which he or she considers could or should have been before it).

In summary, the Commission does not believe that the Parliamentary Inspector has nor should have a role in terms of conducting evidentiary reviews of the Commission's reports, particularly their assessment of evidence and the resultant opinions and recommendations, for four reasons:

- Such reviews may result in an impasse, particularly if the Commission still considers its opinion is soundly based after the Parliamentary Inspector has published a report critical of its position, as has occurred in this case.
- No other external oversight body in Australia operates under such conditions, as they are unworkable in a very real and practical sense.
- Such an approach would overturn years of practice and precedent based on legal practice that has governed Royal Commissions, Commissions of Inquiry and other standing Commissions, similar to the Corruption and Crime Commission.
- Last, the above observations simply beg the question: why should the opinion of the Parliamentary Inspector be accepted as having greater validity than the opinion of the Commission - and who reviews the opinion of the Parliamentary Inspector.

The public expression of such differences of opinion is inevitably damaging to the legislative scheme created by the Parliament. There is no statutory mechanism for resolving such differences of opinion.

The Commission reiterates and emphasises that it considers the role of the Parliamentary Inspector to be absolutely necessary and critical to the operation of the legislative scheme. The external and independent monitoring so afforded to ensure the Commission’s operations are conducted in accordance with its own Act and other laws, and that its procedures are effective and appropriate gives the Parliament, the community and the Commission itself the confidence that the exercise of the Commission’s extensive powers, is appropriately subject to Parliamentary scrutiny and ultimate legislative control.

However, the approach taken by the Parliamentary Inspector in relation to the Commission’s opinions about Messrs Frewer and Allen in the Smiths Beach Report has created a substantial difficulty which the CCC Act has no mechanism to resolve. In the Commission’s view, that is because the Legislature never intended nor contemplated that the functions of the Parliamentary Inspector would extend to substituting his own assessment of the evidence, opinions and recommendations for those of the Commission.

The Functions of the Parliamentary Inspector

It is the Commission's view that the Legislature never intended this situation to arise. And it could not arise, unless the functions and powers of the Parliamentary Inspector extended to undertaking an evidentiary review of Commission reports and making recommendations to the Commission based on his own evaluation of the evidence and other materials.

The functions of the Parliamentary Inspector are set out in section 195 (1) of the CCC Act. That section provides:

(1) The Parliamentary Inspector has the following functions –

(aa) to audit the operation of the Act;

(a) to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;

(b) to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;

(cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act;

(c) to assess the effectiveness and appropriateness of the Commission's procedures;

(d) to make recommendations to the Commission, independent agencies and appropriate authorities;

(e) to report and make recommendations to either House of Parliament and the Standing Committee;

(f) to perform any other function given to the Parliamentary Inspector under this or another Act.

(2) The functions of the Parliamentary Inspector may be performed –

(a) on the Parliamentary Inspector's own initiative;

(b) at the request of the Minister;

(c) in response to a matter reported to the Parliamentary Inspector; or

(d) in response to a reference by either House of Parliament, the Standing Committee or the Commission.

(3) The Parliamentary Inspector may declare himself or herself unable to act in respect of a particular matter by reason of an actual or potential conflict of interest.

(4) The Commission is not to exercise any of its powers in relation to the Parliamentary Inspector.

(emphasis added).

The Commission accepts without reservation that the Parliamentary Inspector can subject any of its operations or investigations (including its reports) to "methodical review", to determine whether they were conducted in accordance with the CCC Act and any other laws of the State and that its procedures were effective and appropriate.

The CCC Act's Legislative Scheme

The CCC Act empowers the Commission to make assessments and form opinions as to misconduct (section 22) (the Commission may also do other things, but none of those bear on the issue here).

Section 22 of the Act says that:

(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.

The Commission does not exercise judicial power. It does not make determinations that persons have committed criminal offences or disciplinary offences. Like any Royal Commission, or equivalent body exercising the sort of powers the Commission has, its opinions are only opinions, albeit expressed under its authority in accordance with the CCC Act. The evidence which it may receive and act upon to inform its opinions or make its assessments may be inadmissible in a court of law, or not available to a disciplinary investigator. It may form its opinions or make its assessments on the basis not only of statements of witnesses or evidence from witnesses in hearings, but on the basis of consultations, and investigations and other actions. The standard of proof which applies to the Commission (like any Royal Commission) is on the balance of probabilities, not beyond reasonable doubt, as in criminal proceedings before a court.

The CCC Act expressly stipulates that an opinion of the Commission, expressed in a report by it, 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.

Section 23 of the Act says that:

(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.

Under section 43 (1) the Commission may make recommendations as to whether consideration should be given (or should not be given) to the prosecution of a person for a criminal offence or for the taking of disciplinary action against a person.

It is implicit in section 43 that a recommendation that consideration be given to charging a person with a criminal offence or taking disciplinary proceedings against them:

- may not be accepted by the person or body to whom it is made;
- may be accepted, and consideration be given to prosecution for a criminal offence or disciplinary proceeding, but they decide not to prosecute or institute such proceedings; or
- is accepted, and a criminal prosecution is, or disciplinary proceedings are, taken – in which case they may either fail or succeed.

Given their different nature and purpose, it is to be expected that where criminal or disciplinary proceedings are initiated as a consequence of a Commission

recommendation, more or different evidence may be adduced and different or more extensive submissions or representations may be made. The court or investigator will commonly have different material, and in that circumstance, a different outcome would not be surprising.

But whatever the outcome of action taken subsequent to a Commission opinion of misconduct and a consequent recommendation, that outcome does not affect the validity of the Commission's reported assessment, opinion or recommendation – nor would it necessarily mean that the Commission's investigation was inadequate or deficient.

It is that statutory framework and context which answers any questions about the standing of the Commission's assessments, opinions and recommendations in respect of Mr Frewer, Mr Allen and Dr Cox, notwithstanding the outcome of the departmental disciplinary or other proceedings against them, noting that Dr Cox was apparently subject to some form of extra-regulatory process and not a disciplinary process by the Department of Agriculture and Food under *the Public Sector Management Act 1994*.

DPI's Disciplinary Investigations of Mr Frewer and Mr Allen

The Commission has reviewed the DPI disciplinary investigations of Mr Paul Frewer and Mr Michael Allen under the provisions of s.41 of the CCC Act in order to establish why the Commission and DPI investigations reached different conclusions.

The review noted that there were significant differences between the approach adopted by the Commission in its report to Parliament on the Smiths Beach matters and the approach taken by the DPI investigations. The Commission's view is that while the overall approach adopted by DPI in investigating the matters was reasonable, the information available to the DPI investigator was more limited than that evidence and other information available to the Commission.

In relation to the Frewer matter, the DPI investigation considered all relevant issues arising out of the Commission's recommendation, however, did not consider:

- the nature and extent of the relationship between Mr Burke and Mr Frewer;
- Mr Frewer's apparent influence at the 19 May SWRPC meeting;
- the credibility of Mr Frewer's initial denial at the Commission hearing that he had received communication from Burke; and
- the content of Mr Frewer's telephone call to Mr Burke on 23 May 2006.

In relation to the Allen matter, the Commission's view is that the DPI investigation, while considering all the relevant issues arising out of the Commission's recommendations, was focussed on evidence of other departmental witnesses who expressed an opinion that Mr Allen's conduct was 'appropriate and consistent with departmental practice'. The Commission's investigation focussed on Mr Allen's preparedness to agree to Mr Burke's request to arrange for Ms Pedersen's involvement in the provision of the document that he and Mr

McKenzie were waiting for from DPI. In doing this the Commission placed greater reliance on its assessment of Mr Allen's relationship with Mr Grill and Mr Burke, and his agreement to arrange for Ms Pedersen's involvement, which was subsequently reinforced by the DPI investigator's report that Ms Pedersen met with Mr McKenzie.

The review also identified two issues with the provision of information to agencies arising from Commission investigations. First, the Commission was unable to make available to the DPI investigator a range of material due to legal constraints. Second, the Commission should have provided more detailed analysis and briefings to assist the DPI investigator.

The Commission's review identified the potential for perceived conflicts of interest to arise where senior officers within the public sector are tasked with investigating fellow officers. While there was no evidence to suggest this as being an issue in the current cases, it suggests that in future when departmental disciplinary investigations into allegations against senior officers are contemplated, departments should give consideration to engaging persons independent of the sector as investigators.

Other Legislative Schemes

A comparative table setting out relevant legislative provisions dealing with the inspection functions of Australian anti-corruption commissions is set out at Appendix 3.

The following conclusions can be drawn from the legislative provisions of the Australian anti-corruption commissions in relation to the respective inspection function.

First, none of the inspectors have a “review” function in relation to decisions made by agencies, namely, the ability to review the evidence, assessments, opinions or recommendations made.

Secondly, the functions of the inspector in most (if not all) jurisdictions appear to be that of audit and monitoring to ensure compliance with the respective legislation and other State laws, and also to deal with matters concerning improper conduct by the agency and/or its officers.

Consequences of Contrary Assessments, Opinions and Recommendations

A real difficulty arises when the Parliamentary Inspector undertakes an evidentiary review of the evidence before the Commission (or selected parts of it), perhaps together with other evidence, material or submissions which were not before the Commission, and based on his assessment of that material, comes to a different view of the facts than that taken by the Commission, leading then to a different opinion as to misconduct.

If, taking a different view of the evidence in that way, the Parliamentary Inspector forms an opinion that the Commission was “wrong” and recommends that the Commission publicly corrects its “error”, the problem becomes acute. This creates an impasse and there is no way forward under the CCC Act.

Of course, irrespective of whether the Parliamentary Inspector is seen to be acting within or outside the scope of his or her statutory functions, or whether the matter comes to the attention of the Commission in some other way, if, subsequent to the publication of a report, the Commission were to come to believe that anything that it had said in the report which was substantially adverse to a person was in fact wrong, then the proper course would be for the Commission to publicly acknowledge that error and correct it. That would no doubt desirably be done in the same manner in which the original adverse assessment, opinion or recommendation had been made. The Commission considers this to be a matter of necessary principle and one to which it would unreservedly adhere.

But that principle has no application in the case of Mr Frewer, nor (subject to the qualification already mentioned) to Mr Allen. That is because, having reviewed the evidentiary material, and the matters put by the Parliamentary Inspector, the Commission considers the assessments, opinions and recommendations were properly grounded on the evidence and were correct.

That highlights the problem. In that circumstance, the Commission could not act on the recommendation of the Parliamentary Inspector and agree to say otherwise. To do so would be itself to fail to act honestly and with integrity.

However, for the Commission to have to conduct its operations (including its reports) on the basis that the Parliamentary Inspector would have authority to make his own assessment of the evidence, and on the basis of his taking a different view of it, recommend to the Commission that it should change its assessments, opinions or recommendations, would result in an unworkable situation.

In addition, the need to check the Commission's evidentiary holdings, review the evidence and other material and prepare materials for the Commissioner's consideration and review, has drawn substantial staff resources from other activities, investigations and operations of the Commission, which have been degraded as a result.

The effect of such an approach is demonstrated by the following statistic. Between 1 January and 11 March 2008 the Commission has spent in excess of 992 hours in responding to issues directly arising out of the Parliamentary Inspector's inquiries, much of which include the hours spent in responding to, or related to, inquiries in respect of Smiths Beach. This amounts to a very considerable diversion of the Commission's resources and has seriously affected the Commission's operational capacity, both in terms of the production of other reports and in the conduct of continuing investigations.

Further, as views may often differ about the effect of evidence, or inferences to be drawn from it, and consequently about what opinion should be formed about a particular issue, it would be inevitable that a Parliamentary Inspector may assess evidence differently (or additional or different material and submissions may be put to him or her) and come to a different opinion than the Commission has in a published report, from time to time. If the Commission were not then able to agree that its own earlier assessments, opinions or recommendations were

"wrong" or lacked any evidentiary foundation, it could not accept a recommendation from the Parliamentary Inspector to withdraw them and the same situation as the present would arise. The resultant impasse could erode public confidence in the legislative scheme.

In any case, two points need to be reiterated in connection with these concerns. First, the publication of a Commission opinion, as with other similar bodies such as Royal Commission and corruption agencies in other jurisdiction, is not a finding that any person has engaged in criminal or disciplinary offences. The conduct of criminal prosecutions and disciplinary actions appropriately occur separate to and independently of the Commission. Second, an avenue already exists that permits individuals to seek recourse, particularly where they perceive themselves as having been denied procedural fairness, and that is through the Courts. Any ruling by a court would be enforceable, a power not available to the Parliamentary Inspector.

These concerns are made more challenging in the context of the Commission's current program of work. It is drafting a significant number of Commission reports addressing matters arising from its investigations of the influence of lobbying and public sector misconduct. The purpose of those is to make assessments and form opinions as to whether any public officer engaged in misconduct.

The finalisation of these reports prior to tabling is complex and time consuming. To then have them subject to the potential for some form of non-binding evidentiary review will protract the process, promoting uncertainty and creating the risk of a loss of confidence in the Commission's work.

The Commission notes that the Attorney General is likely to table his report of the review of the CCC Act shortly. This report will provide the opportunity for the Parliament to assess the issue of the Commission's reporting process amongst other things.

A Possible Mechanism

The "Report of the Standing Committee on Legislation in Relation to the *Corruption and Crime Commission Act 2003* and the *Corruption and Crime Commission Amendment Bill 2003*" (Parliament of Western Australia, December 2003) (Committee Report) canvassed the issue of possible mechanisms for resolving disputes between the Commission and the Parliamentary Inspector. The then Chief Justice had made a submission that such a mechanism was necessary (Committee Report, [7.29]).

The Standing Committee referred to one possible option being for the Commission and the Parliamentary Inspector to seek advice from the Solicitor General as to the statutory functions and powers of the Parliamentary Inspector.

In the current situation, the Commission did ask the Solicitor General to brief independent counsel for an opinion.

At the public hearing before the Parliamentary Joint Standing Committee on the Corruption and Crime Commission (the Committee) on 27 February 2008 the Commission told the Committee it would abide by the resulting independent

opinion. The Parliamentary Inspector reportedly told the Committee that although he would be interested in the opinion, it would not necessarily sway him. Consequently that mechanism would ultimately not be an effective way to resolve such differences. In the end, it would produce only another, non-binding "opinion".

It is the Commission's view that the only effective mechanism to resolve disputes between the Commission and the Parliamentary Inspector about matters of law must be one which enables their determination in the Supreme Court.

Although that avenue would probably already be available in most situations at present, it would only be so in an ordinary adversarial context. In the Commission's view, proceedings of that kind between the Commission and the Parliamentary Inspector would be inappropriate, unsatisfactory and likely to undermine public confidence in both offices.

Those disadvantages would not arise if the CCC Act itself were to provide a simple procedure whereby either the Parliamentary Inspector, the Commission or both may apply to the Supreme Court for a declaration on a question of law in dispute between them, concerning or arising under the CCC Act. Any determination made by the Court would be binding in law, subject only to the normal judicial appellate processes

Other Changes

Since taking up his appointment on 5 June 2007, the present Commissioner has reviewed a range of matters in terms of the Commission's activities and processes. He has done this in order to satisfy himself that the Commission meets his personal expectations in complying with requirements of the CCC Act and best practice. This is not to suggest any criticism of either his predecessor or the Acting Commissioners' oversight of Commission activities. Rather, it reflects his personal style and view of the Commission's obligations and his own professional experience.

Three particular changes made at the Commissioner's direction may be mentioned, some of which also address concerns raised by the Parliamentary Inspector. These are the need for enhanced documentation of the Commission's decision-making processes (including whether to conduct public hearings); a more comprehensive approach to ensuring procedural fairness is afforded as required under section 86 of the CCC Act; and the need to ensure that the contents of reports that express misconduct opinions more comprehensively address the basis for those opinions.

Conduct of Public Hearings

The Act is very clear with regard to the conduct of hearings. The default position is that hearings are to be conducted in private unless otherwise ordered (section 139). But, the Commission may open hearings to the public if it decides that it is in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. The CCC Act requires that the Commissioner satisfy him or herself in terms of the public interest, and of course this has always occurred. As he explained at the

Committee public hearing on 27 February 2008, the Commissioner has initiated changes to processes to more precisely document the decision whether to conduct a hearing in private or in public. Although he has conducted a number of hearings since June 2007, none have been in public.[12] Further, in the four years since its inception the Commission has investigated 37 matters through private hearings and only eight matters by way of public hearings.

Section 86 Processes

Commissioner Roberts-Smith QC has directed that more comprehensive information be provided to persons or bodies before reporting any matters adverse to them in a report tabled in Parliament. He has made this change in light of what he viewed as a previously overly narrow, legalistic view of the Commission's obligations under section 86 of the CCC Act.

He has also introduced a new (draft) protocol for regulating and monitoring the s. 86 process so as to ensure consistency, accuracy, thorough review and timeliness. Although in draft, the protocol is being implemented and will be further developed as necessary.

Contents of Reports

A range of views are held concerning how much information (and evidence) should be included in reports to Parliament. One view is that it is sufficient to provide a broad overview; another is that it should be completely comprehensive. There is no one correct view and the CCC Act is silent in this regard, specifically leaving it to the Commission to determine both whether reports may or may not be prepared and their contents (section 84 of the CCC Act). The amount of detail to be provided will depend on the nature and content of the report. Nevertheless, the present Commissioner's approach is that it is better, and fairer, to provide more detail rather than less, particularly so as to clearly address the basis for any adverse matters affecting individuals.

The Corruption and Crime Commission was created by an Act of the Western Australian Parliament. The role of Parliamentary Inspector was created by the same Act.

The CCC Act's stated purpose is to improve continuously the integrity of and reduce the incidence of misconduct in the public sector. The Commission is tasked with helping public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power itself to investigate cases of misconduct, while the Parliamentary Inspector contributes to this task by undertaking specific functions defined by the CCC Act.

Over the past three and a half years the Commission has dealt with over seven thousand allegations of misconduct pursuant to the provisions of the CCC Act. Its activities and the results achieved have had a direct impact on improving the integrity of the public sector. That success has been in part due to a very

[12] With the exception of the investigation of allegations against Dr Neale Fong, all other hearings were conducted in private because the investigations were still covert and public hearings would have compromised them.

effective working relationship between the Commission and the Parliamentary Inspector.

Recent events and the circumstances of this matter contained in this report have put the Parliamentary Inspector and the Commission into conflict. This regrettable development has caused significant concern for the Commission distracting it from its main purpose.

While the issues addressed in this report are important of themselves, arising as they do in terms of the need to fully and properly interpret the CCC Act, it is important that they be resolved as quickly as practicable so that both the Commission and the Parliamentary Inspector can resume dealing with public sector misconduct appropriately and effectively.

APPENDIX 1: In respect of Mr Paul Frewer the following correspondence has been collated:

Date	Format	Direction	Title
04/01/08	Letter	PI → CCC	Re: Paul Frewer
07/01/08	Letter	CCC → PI	Paul Frewer
22/01/08	Letter via email	PI → CCC	Mr Paul Frewer
22/01/08	Letter	CCC → PI	Paul Frewer
25/01/08	Letter via email	PI → CCC	Re: Mr Paul Frewer & Mr Mike Allen
29/01/08	Letter	CCC → PI	Mr Paul Frewer
30/01/08	Letter via email	PI → CCC	Paul Frewer
31/01/08	Letter	CCC → PI	Paul Frewer
05/02/08	Letter via email	PI → CCC	Paul Frewer, Mike Allen & the "Smiths Beach Report"
08/02/08	Email	PI → CCC	Report – Mr Paul Frewer
13/02/08	Letter via email	CCC → PI	Paul Frewer, Mike Allen and Smiths Beach Report

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

4 January 2008

STRICTLY CONFIDENTIAL
The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Re: Paul Frewer

Herewith my (draft) report re Mr Frewer, for your consideration and comment.

As discussed to-day, I have concluded that the adverse opinion and recommendation in the Report have done an injustice to Mr Frewer, and if, you agree, steps must be taken, as soon as possible, to remedy it.

As my draft Report contains matters adverse to the Commission, I must of course give the Commission a reasonable opportunity to make representations to me concerning those matters (S.200 of the Act).

I appreciate that you were not the author of the Report, which (then) Acting Commissioner Mr McKerracher QC (now a Federal Court Judge) wrote, so you may well have some difficulty in "getting to grips" with the issues that I have raised. I would be happy to discuss them with you, once you have digested the draft report, as well as deciding a "way forward". The recommendations in the draft report are not necessarily my final view on that.

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

Locked Bag 123, Perth Business Centre, 6839
Telephone: (08) 9323 2222 Facsimile: (08) 9325 3280
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ABN: 39 838 081 950

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your ref:
Our ref: 01853/2005

7 January 2008

Mr M J McCusker QC
Parliamentary Inspector of the
Corruption & Crime Commission of WA
Locked Bag 123
PERTH BUSINESS CENTRE 6839

Dear Parliamentary Inspector

PAUL FREWER

I acknowledge receipt of your letter dated 4 January 2008, and your draft report forwarded with that.

As you observe the Commissions Smiths Beach report was written by Mr McKerracher QC (now the Hon Justice McKerracher) and it will take some time for me to "come to grips" with the issues you raise in your draft report. I am presently working on that, and will get back to you as soon as possible.

Certainly I would wish to discuss the issues, your draft report and a "way forward" once I am in a position to do so.

Yours faithfully

Len Roberts-Smith.

The Hon LW Roberts-Smith RFD QC
COMMISSIONER

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PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

22 January 2008

By email:
The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Mr Paul Frewer

I refer to my letter dated 4 January 2008 enclosing, for the Commission's comments, a copy of my draft report which concluded that there was no basis for the expression of opinion by the Commission, in its report of 5 October 2007, that Mr Frewer had been guilty of misconduct.

When I spoke to you about this matter, yesterday, you explained that due to staff illness and the heavy workload, it had not been possible to provide a response, but said that one would be sent to me later that day. That was later changed to Tuesday, by 9.30am.

I am sorry to put added pressure on you, as I fully appreciate the difficulties involved, especially since you were not the author of the report. However, unless I have the Commission's comments, for me to take into consideration, by 4pm today I would propose to finalise my report and forward it to the Standing Committee.

The reason for the urgency of the matter, as explained to you, is twofold:

(a) first , the Commission's opinion that Mr Frewer had been guilty of "*misconduct*" has caused him considerable damage, and affected him adversely in his career; and

(b) I was informed, yesterday, by his solicitors that the departmental independent investigation, conducted as a result of the Commission's recommendation in its report, has concluded that Mr Frewer has "no case to answer". I have no doubt that I will be called upon to provide a report and to comment on that conclusion.

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

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CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your ref:
Our ref: 01853/2005

22 January 2008

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption & Crime Commission
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Parliamentary Inspector

PAUL FREWER

Your letter dated today arrived at 3.00pm.

When I spoke to you yesterday (and earlier), I said that whilst I had of course been working on your letter of Friday 4 January and the draft report forwarded with that, it was necessary that I go through the relevant evidentiary and other material. Following receipt of your draft report I had discussions with Commission officers about it and at a meeting on Tuesday 8 January I had a meeting to canvass the issues raised, and at which I identified the materials which I wished to have collated and provided to me. That process has been under way since then. It was disrupted by the need for the Commission to respond to a series of other significant requests from you, and by the illness of the Senior Investigator now handling the matter.

In passing, I should point out that I did not say to you that you would have a response by yesterday or today – I said that for the reasons explained I was still awaiting the materials and I expected them to be provided to me by then. Obviously it would still be necessary for me to consider them for the purpose of the Commission's response to you.

I did in fact receive a lever arch file of material this morning, and have been considering that. I am also awaiting a report from Mr Hall SC, who was Counsel Assisting the Commission in respect of the Smiths Beach investigation. He has told me that should be available within the next couple of days.

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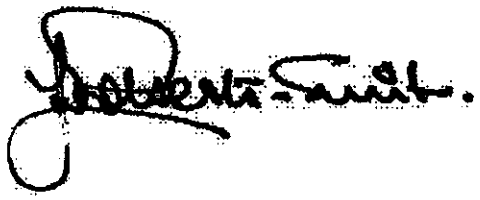
There is clearly no prospect that you could have the Commission's response within the next half hour.

I am compelled to advise that, with respect, I do not agree with your opinions nor with your recommendations at [29.1] and [29.2]. I am also presently of the view that your proposed report falls outside the scope of your statutory functions. You will appreciate that in these circumstances I would wish to deal with the issues in a comprehensive and properly considered way.

I accept that you propose to finalise your report and forward it to the Standing Committee.

Yours faithfully



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

25 January 2008

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

By Email:

Dear Commissioner

Re: Mr Paul Frewer & Mr Mike Allen

Thank you for your letter of 22 January 2008.

In view of its contents, I have not finalised the report, or forwarded it to the Standing Committee, as I would prefer not to do so until the Commission's response is received and considered by me.

I note that you do not agree with my "opinions" nor the recommendations at paras 29.1 and 29.2 of the draft report and I therefore assume that the draft report has been fully considered, and that the Commission's reasoned response to it may be expected soon. Obviously, it is of no help for me simply to be told that the Commission does not agree.

I also note that you are presently of the view that the proposed report falls outside the scope of my statutory functions. That raises a very important issue of principle and statutory interpretation. I would therefore greatly appreciate your sending me, as a matter of urgency, detailed reasons in support of that view, if it is maintained.

As we have discussed and agreed, it would be highly undesirable for the Commission and the Parliamentary Inspector to become embroiled in issues of jurisdiction and power.

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

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CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your Ref: -
Our Ref: 01853/2005

29 January 2008

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption and Crime Commission
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Parliamentary Inspector

MR PAUL FREWER

I acknowledge receipt and note the contents of your letter dated 25 January 2008.

I am currently working on the Commission's response to your draft report and will provide that to you as soon as possible. I understand it does not assist you to be told that the Commission does not agree with the opinions in the draft report, but you will appreciate you had required an immediate response and in indicating that was not possible, it was considered only proper to state what the Commission's view would be.

I am very anxious that we identify, discuss and (hopefully) resolve between us any different views about the provisions of the Corruption and Crime Commission Act.

Yours faithfully

The Hon L W Roberts-Smith RFD QC
COMMISSIONER

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PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

30 January 2008

By email:

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Paul Frewer

Thank you for your letter of 29 January 2008. I fully agree with the last paragraph.

I am, however, concerned at the time taken to respond to my draft report, sent to you on 4 January 2008. Before then, on 3 November 2007 I raised the important question that (contrary to the Commission's Report) Mr Frewer had in fact made a disclosure that he had been approached regarding the "Smiths Beach matter", although that disclosure had not been minuted. In the same letter, I mentioned that Mr Frewer was concerned, as a result of the Commission's finding of "misconduct", that he might not be appointed as Director General of Water. Clearly, it was in both his interests and the broader public interest, that the matters that he had raised with me be resolved promptly.

I did receive, by letter dated 18 December 2007, a response to my letter of 13 November 2007, but (for the reasons set out in my draft report) the response, in my opinion, did not adequately deal with the issue.

I have now received, and read, the report of the investigation of the alleged "breach of discipline" by Mr Frewer, which was conducted by reason of the Commission's Recommendation 2. Please advise:

(a) Whether the Commission, before making that Recommendation, interviewed any of the members of the SWRP Committee concerning the practice of declaring approaches by "interested parties" and whether, in their view, Mr Frewer had acted consistently with that practice.

(b) If so, who were they, and please provide copies of any statement obtained from them, transcript or otherwise.

(c) The evidentiary basis for the assertion, at p.75 of the Report, that there was "no inconsistency" between the Council resolution and the form of the proposed "Amendment 92".

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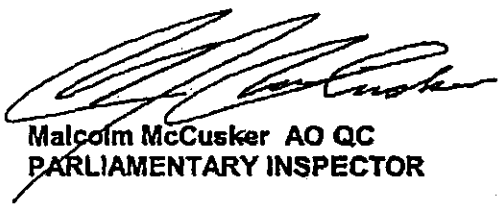
(d) Any comments which the Commission has on the contents of the investigator's report and its conclusions.

I am under some pressure to deal with the complaints of both Mr Frewer and Mr Allen, and I would therefore appreciate your letting me know a date by which I may expect to receive the Commission's response to the proposed "adverse comment" contained in the draft report.

Yours faithfully



Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your Ref: -
Our Ref: 01853/2005

31 January 2008

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 3, 45 St Georges Tce
PERTH WA 6000

Dear Parliamentary Inspector

PAUL FREWER

I refer to your letter dated 4 January 2008, the draft report forwarded with that, and our subsequent correspondence that includes your letter dated 30 January 2008 forwarded to me by email that day.

In your letter of 30 January you say that on 3 November 2007 you had raised the important question that (contrary to the Commission's Report) Mr Frewer "had in fact made a disclosure that he had been approached regarding the Smiths Beach matter", although that disclosure had not been minuted. That implies he had made a genuine or sufficient disclosure. As you acknowledged in your initial correspondence, given that I was not appointed Commissioner until June 2007 and had not been involved in the Smiths Beach hearings or investigations at all, it would take me some time to "get to grips" with the issues and all the evidentiary material. You were quite right about that. However, as I did so, it became apparent there was a real question whether or not what Mr Frewer had said at the beginning of the meeting was any disclosure at all. That issue (together with the many others you raised) is now addressed in the Commission's response which is forwarded herewith.

You advise that you have received and read the report of the (DPC) investigation of the alleged "breach of discipline" by Mr Frewer.

In your letter of 30 January you also ask a number of other specific questions and seek any comments which the Commission has on the contents of the investigator's report and its conclusions. The Commission has not yet received a copy of that report and so cannot comment on it (although it is presently not at all clear how the comment of the Commission on a Public Service investigation could possibly be

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required in the exercise of any of the Parliamentary Inspector's functions under s. 195 of the *Corruption and Crime Commission Act 2003* (the Act).

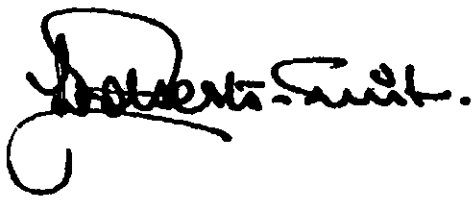
In any event, given that you have been seeking a response to your draft report as soon as possible, I am forwarding that now without delaying it further by responding to the queries in your letter of 30 January. I shall do that shortly, once I have had an opportunity to consider them.

I note your comment that you are "under some pressure to deal with the complaints of both Mr Frewer and Mr Allen". I am not aware that you have written to the Commission about Mr Allen. Be that as it may, there seems to me to be nothing in the statutory functions of the Parliamentary Inspector which either enables the Parliamentary Inspector to deal with the "complaints" of persons adversely mentioned (or, indeed, potentially to be adversely affected) as such, much less to disclose to such persons any information acquired by the Parliamentary Inspector in the performance of his functions under the Act – which on the face of it would include informing them of any communications between the Parliamentary Inspector and the Commission (see s. 208 of the Act). I do appreciate, of course, that the functions of the Parliamentary Inspector may be performed, inter alia, in response to a matter reported to him, (s. 195 (2) (c)), but that seems to me to be a different thing to dealing with and responding to complainants in the way apparently being done here.

There are obviously many complex and difficult issues arising now which have not had to have been addressed before. We both agree that we must work together to resolve them between ourselves or, failing that, to put forward a proposal for satisfactorily resolving them. I would be happy to discuss these issues with you to that end at your convenience.

The Commission's response to the draft report is enclosed herewith.

Yours faithfully



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

Encs.

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Our Ref: 01853/2005

31 January 2008

COMMISSION RESPONSE TO DRAFT REPORT BY PARLIAMENTARY INSPECTOR REGARDING PAUL FREWER

In a draft report dated 4 January 2008 ("draft report") the Parliamentary Inspector, of the Corruption & Crime Commission, Mr Malcolm McCusker, AO, QC, concludes that there was no justification for the Commission's opinion that Mr Frewer was guilty of "misconduct", nor for its "Recommendation 2", that a "relevant authority" consider taking disciplinary action against him and that the Commission should publicly acknowledge its error, and withdraw its recommendation.

The opinion and recommendation referred to were contained in the Commission's Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup' tabled on 5 October 2007 ("the Commission Report").

Scope of Statutory Functions

The powers of the Parliamentary Inspector are extremely wide. They are set out in s.196 of the *Corruption and Crime Commission Act 2003* ("the Act"). However, wide as those powers are, they can only be exercised in or for the performance of the Parliamentary Inspector's functions.

The functions of the Parliamentary Inspector are specified in s.195 of the Act. They are to

(aa) audit the operation of the Act;
(b) audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;
(c) deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;
(bb) audit any operation carried out pursuant to the power conferred or made available by the Act;
(d) assess the effectiveness and appropriateness of the Commission's procedures.

Paragraphs (d) – (e) inclusive of s.195(1) authorize the Parliamentary Inspector to make recommendations and to report (on matters arising out of any of the actions taken under paras (aa) to (d) inclusive; para (1)(f) authorizes the Parliamentary Inspector to perform any other function given to the Parliamentary Inspector under the CCC Act or any other Act.

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The Commission agrees with and accepts the analysis of the audit and other functions of the Parliamentary Inspector as set out at [1.1] of his 2006/07 Annual Report. As there noted, the term "audit" is not defined in the Act. According to the Macquarie Dictionary, it means

> "1. an official examination and verification of accounts and records, esp. of financial accounts. ... 3. a calling to account. – *v.t.*"

The draft report sets out what are said to be "the relevant facts," and on the basis of what they are said to be, an argument that the Commission has taken a wrong view of the evidence, leading to an incorrect assessment of the facts, a misconceived opinion of "misconduct" and (therefore) an unfounded recommendation. The process engaged in is one of re-evaluating the evidence so as to lead to different conclusions. With respect, that is not an "audit" function – it is in the nature of an appellate review.

Furthermore, the draft report is clearly not an audit of the operation of the Act (s.195(1)9aa)), nor an exercise of the function of auditing the operations of the Commission "for the purpose of monitoring compliance with the laws of the State (s.195(1)(a)) – there is no suggestion of non-compliance with a law or laws of the State. Clearly it is not an exercise of the misconduct function (s.195(1)(b)). Nor could it be an exercise of the function of auditing an operation carried out pursuant to the powers conferred or made available by the Act (s.195(1)(cc)). An audit of that kind is necessarily directed to an examination to verify that the powers under the Act have been exercised in accordance with the Act. If they have been, it matters not that the Parliamentary Inspector may have exercised them differently (if that be so). It does not place the Parliamentary Inspector in the position of the Commission, entitling him to conduct his own examination or evaluation in place of the Commission, nor to recommend that the Commission take a different view of the evidence before it. Insofar as the draft report contends there was a failure to comply with s.86 of the Act, that contention is dependant upon the view of the facts which precedes it – which the Commission considers to be both misconceived and beyond power.

Finally, the draft report does not constitute an exercise of the function of assessing the effectiveness and appropriateness of the Commission's procedures (s.195(1)(c)) – it constitutes an (incomplete) evidentiary review as a result of which the draft report espouses a different view of the evidence to that taken by the Commission, leading to a different outcome.

The Commission notes that the "Executive Summary" in the draft report, under [2], which purports to recite "the relevant facts" contains factual assertions which the Commission does not accept as correct. What it amounts to, is that the Commission and the Parliamentary Inspector take a different view of the evidence. The assessment of evidence is a function of the Commission; it is not an audit function.

By way of brief illustration only, at this point, the Commission does not agree with the assertion in respect of Mr Burke and Mr Frewer, that "they were not friends". They may not have been close friends, but their conversations suggest a friendly relationship more than mere acquaintances.

Although the Commission agrees with the comment at [2.5] that

> "it is implicit in what Mr Burke said to Mr Frewer that he did not want Amendment 92 approved at that meeting"

it does not agree with the assertion (at [2.6]) that Mr Burke did not ask Mr Frewer to seek a deferral of consideration of Amendment 92 nor that Mr Frewer did not agree to do so nor that there was no reason why he should. That Mr Burke was seeking Mr Frewer's help to have consideration of Amendment 92 deferred was the whole purpose of his call. Mr Frewer understood that, and acted to give effect to it.

The Commission does not agree with the "fact" that there was no evidence that Mr Frewer went to the 19 May meeting with the intention of seeking a deferral of Amendment 92. In the Commission's opinion the evidence establishes that was exactly his intention (at [2.7]).

The Commission agrees with the assertion at [2.9] that what Mr Frewer said at the beginning of the meeting was not recorded in the minutes as a "declaration of interest" because the minute taker did not regard it as either a "declaration of interest" or of "lobbying".

The Commission does not accept that the reasons set out at [3] of the Executive Summary to the draft report are supported in any way by the evidence. The Commission's reasons are set out below.

The Draft Report

The draft report has concluded that the adverse opinion and recommendation in the Commission's report into the Smith's Beach matter have done an injustice to Mr Frewer. The Commission does not share that view.

The draft report places great weight on a recording of the SWRPC meeting. However, when that recording is considered together with all of the other evidence it compounds, rather than explains away, the conduct of Mr Frewer. In other important respects the draft report has failed to refer to significant aspects of the evidence. That failure has resulted in conclusions regarding the knowledge, understanding and intentions of Mr Frewer that are not soundly based because they do not have adequate regard for the whole context.

Mr S Hall SC was Counsel Assisting at the public hearings held in October to December 2006. He advises that at the time of Mr Frewer's appearance at public hearings he did not have either the audio tape or a transcript of the meeting. The investigators did have the tape and had listened to it. They were of the view that it was consistent with the minutes of the meeting and that although Mr Fewer had made a jocular comment at the beginning of the meeting what he said was not a declaration that he had been lobbied by Mr Burke. Mr Hall was subsequently informed to that effect by the investigators. Having seen the transcript, Mr Hall advises that it is apparent Mr Frewer did say something at the time disclosures were called for, although it was not anything that could meaningfully be described as a disclosure. (The minute-taker was of the same opinion, which is why he did not

record a "declaration" by Mr Frewer in the minutes.) Nonetheless, Mr Hall says that had he known what Mr Frewer had said at the meeting, he would certainly have put it to him when he was examined. Notwithstanding that, and for the reasons which follow, in the Commission's view, when considered properly and in context, what was said by Mr Frewer does not assist him.

The opinions in the draft report fall effectively into four categories;

1. Did the approach by Mr Burke to Mr Frewer on 18 May 2006 constitute lobbying?

2. Did Mr Frewer have an obligation to disclose the approach and, if so, what should have been included in the disclosure?

3. At the SWRPC meeting of 19 May 2006 did Mr Frewer act in a way that was consistent with the wishes expressed by Mr Burke?

4. On all of the available evidence is it possible to conclude that the failure of Mr Frewer to disclose the approach by Mr Burke was misconduct?

Background

In May 2006 an application for the approval of amendment to the Busselton Town Planning Scheme relating to Smith's Beach was on the agenda to be considered by the SWRPC. The developer, Canal Rocks, did not wish the amendment to proceed. Mr Frewer was a member of the committee.

On 18 May 2006 Mr McKenzie of Canal Rocks contacted Mr Burke and expressed his concerns that the amendment may be approved. Mr McKenzie then asked whether Mr Frewer was on the committee, he having chaired another committee involved in a mediation process. Mr Burke then called Mr Frewer, leaving Mr McKenzie on the line. Mr Frewer confirmed he would be attending the meeting the next day. Mr Burke then said that he wanted to send Mr Frewer an email and said it was in regard to Amendment 92 being brought on and that the Council officer was "playing silly buggers". The email was incorrectly addressed and is unlikely to have been received. The Commission clearly accepted that on the evidence it could not be concluded that Mr Frewer received the email (nor, therefore, the attachments) (Report p.75). It is incorrect to describe the Commission's acceptance of that as being done "somewhat grudgingly" (draft report, p.13 at [5])

On 19 May 2006 Mr Frewer attended the meeting but did not disclose that he had been contacted by Mr Burke or what Mr Burke had suggested. He then spoke in favour of deferring the amendment and a resolution in those terms was agreed.

On 23 May 2006 Mr Frewer telephoned Mr Burke and they discussed what had occurred at the meeting. Mr Burke commenced by thanking Mr Frewer. The call lasted some 24 minutes and also included discussions regarding Mr Frewer's career and offers from Mr Burke to assist him.

Mr Frewer appeared in public hearing on 1 November 2006 and denied that he had been contacted by Burke since October 2005. When later confronted with the calls in May he said that he had not recalled them when giving his evidence on 1 November 2006.

Lobbying

The draft report suggests that it is doubtful whether the phone call from Mr Burke to Mr Frewer on 18 May 2006 constituted "lobbying". It says this because the call is brief and Mr Burke does not state in terms what he wanted. Mr Burke says that he will send an email setting out a point of view but it is unlikely that this email was received. The draft report says that since the email was not received Mr Frewer could not have known what point of view Mr Burke was asking him to consider.

If this call was the only involvement Mr Frewer had had with Mr Burke in the latter's capacity as a consultant for Canal Rocks the conclusions of the draft report may have been soundly based. However, the reality is that Mr Frewer had numerous other contacts with Mr Burke. When those communications are taken into account it is clear that Mr Frewer knew that Mr Burke represented the interests of Canal Rocks, that it was not in Canal Rocks interests for Amendment 92 to become operative and that Mr Burke had consistently sought that the Amendment be deferred at various stages. As at 18 May 2006 it was unnecessary for Mr Burke to explain to Mr Frewer in any detail what his position was in respect of Amendment 92 or what he wanted to occur at the SWRPC meeting. Seen in this light it is apparent that what Mr Burke said could only have been understood as a request to assist with the deferral of the amendment.

There is in fact no doubt that Mr Frewer clearly understood that Mr Burke was asking him to have Amendment 92 deferred. This is apparent from a call made after the meeting on 23 May 2006 and initiated by Mr Frewer. In that call Mr Burke thanks Mr Frewer for his assistance and Mr Frewer then explains what occurred at the meeting in respect of the deferral. This call is not referred to in the draft report.

This response will now deal with matters referred to in the previous two paragraphs in more detail.

Mr Frewer was aware that Mr Burke was a consultant retained by Canal Rocks from at least 2003. At that time he was telephoned by Mr Burke in regard to the establishment of a mediation process (T 714). That process was effected by establishing another committee referred to as the coordinating committee. Thereafter, according to Mr Frewer, he had three meetings with Mr Burke; one in 2004 relating to Canal Rocks and two in 2005 relating to other matters (T 714). There were also "quite infrequent" telephone calls with Mr Burke about the project generally (T714).

Mr Frewer said that prior to the 19 May 2006 SWRPC meeting he had become aware that there was an allegation that the resolution of the Busselton Shire Council was different in terms to the report that was to be considered by the SWRPC (T707). One of the possible sources of this allegation was another consultant to Canal Rocks, Michael Swift, to whom Mr Frewer had a general recollection of talking. Mr Frewer

conceded that when he spoke to Mr Burke on 23 May 2006 "it would appear" that he knew Mr Burke was thanking him for the deferral of Amendment 92 (T1274).

There was no dispute from Mr Frewer in his evidence that he was aware that Mr Burke was seeking a deferral in the first call. Consequently, it was unnecessary to refer to any other evidence which would confirm his knowledge of Canal Rocks position in regard to the amendment. However, since it has now been suggested that, notwithstanding his evidence, Mr Frewer could not have known what he was being lobbied to do, it is relevant to refer to additional evidence in this regard.

There were a number of emails from Mr Burke to Mr Frewer in 2004 and 2005 that refer to the amendment. There is no reason to suspect that these emails were not received. On 7 January 2004 Mr Burke wrote to Mr Frewer and stated that a meeting had been arranged between Mr McKenzie and Ms Farina "to put a point of view about synchronising the amendment and the proposal". Mr Burke then goes on to state that "there is a fairly widespread view that the amendment should not proceed ahead of the proposal" and that "Adele said that her feedback was that the community was anxious to see an early amendment because it feared the proponents would lodge an application under the existing scheme". In a further email on 19 April 2005 Mr Burke wrote to Mr Frewer that "the decision to proceed with the amendment is very difficult to understand". That email attached an email from Michael Swift which stated that "it was most disturbing to learn via the Busselton Margaret Times of an Agenda item to initiate a fresh Scheme Amendment in relation to Location 413". On 20 September 2005 Mr Burke wrote to Mr Frewer that "Wally (Cox) expressed the firm view that Amendment (sic) 92 should not proceed to advertising in advance of the DGP". On 23 September 2005 Mr Burke again wrote to Mr Frewer in regard to the amendment and suggesting that the actions of the Shire in advertising the amendment were inappropriate. From these emails it is readily apparent that Canal Rocks did not want an amendment to proceed and that Mr Burke had advanced reasons for that to Mr Frewer at various stages prior to 18 May 2006.

In the 18 May 2006 phone call Mr Burke establishes that Mr Frewer is still on the SWRPC and that he will be attending the meeting the next day. He then says that he wants to send Mr Frewer an email. He then says "I'll tell you why, Nigel Bancroft's just playing funny buggers ... and what he's doing is bringing amendment ninety-two on. Now I went to see Mike Allen, now obviously not for repeating, Mike's not gonna fight fires or lions and he's on side but I don't know that he knows what to do". Whilst this might appear cryptic when viewed in isolation, when the context of the earlier communications referred to above is considered the meaning is clear. The reference to Mr Bancroft, as Mr Frewer must have known, was to the Director at the Shire who was responsible for planning. Mr Frewer also knew that the Shire had been pressing for the amendment to be made for some time. The reference to Mr Bancroft "playing funny buggers" and "bringing amendment ninety-two on" could only have been understood as meaning that the amendment was due to come before the SWRPC at the meeting the next day at the instigation of the Shire and that Mr Burke as a consultant to Canal Rocks not only did not support that move but was highly critical of it. In light of the consistent position advocated to Mr Frewer in the past he could only have understood this as meaning that Mr Burke was asking that the SWRPC not approve the amendment at the meeting. The reference to Mr Allen, another

employee of DPI, being "on side" makes it clear that Mr Burke was also seeking Mr Frewer's support for his client's position.

It was not necessary for Mr Frewer to receive the email from Mr Burke to understand what he was being asked to do. Indeed the email did not state in terms what Mr Burke wanted Mr Frewer to do. The email simply set out the concerns of Canal Rocks that the amendment was premature and reasons why it should not be approved. There is a distinction between asking a person to do something and providing reasons why they should do it. It cannot be the case that lobbying only occurs where the communication includes the latter. It would be extraordinarily naive to believe that Mr Frewer failed to understand that in the phone call on 18 May 2006 Mr Burke was asking him to use his position to ensure that the amendment was not approved by the SWRPC the next day. An approach to a public officer by a person with an interest in a matter to take a position in respect of that matter must on any view be lobbying.

There is no doubt that Mr Burke was intending to influence Mr Frewer to take a position favourable to his client. The call to Mr Frewer was made whilst Mr McKenzie listened in on another line. In subsequent calls to others Mr Burke said that "Frewer will definitely help us ... I had a long talk to him last evening" and that Mr Frewer was "gonna do his best I'm sure".

That Mr Frewer understood that he had been requested to take a position favourable to Canal Rocks is clear from the terms of the second call on 23 May 2006. Significantly, this call was initiated by Mr Frewer and the first topic of conversation is the SWRPC meeting. The topic is introduced by Mr Burke saying "thanks very much for that". Mr Frewer responds by saying "no worries" and then explaining what occurred at the meeting. It is apparent that Mr Frewer knew what he was being thanked for. Whatever view is taken with respect to the conduct of Mr Frewer at the meeting, the contents of this call show beyond doubt that he understood that the deferral of the amendment was consistent with what Mr Burke had asked him to do in the call on 18 May 2006. He understood this without any need to read the email. It is entirely unnecessary to consider whether there was a possibility that Mr Frewer had failed to understand Mr Burke on 18 May 2006 – the subsequent call makes it clear that he did.

Taking all of the above into account it was open to the Commission to conclude that in the 18 May 2006 call Mr Burke had approached Mr Frewer in regard to the amendment and, in effect, asked that he use his position to help ensure that the amendment not be approved at the meeting the next day. Mr Frewer understood that this was what Mr Burke was asking him and knew that Mr Burke was acting as a consultant to a party interested in deferring the amendment. A conclusion that this constituted lobbying was the only reasonable conclusion that could be drawn in the circumstances.

Disclosure Obligation

The draft report suggests that there was no clear obligation to disclose that a member of the SWRPC had been lobbied about a matter to be dealt with by the committee. It states that the only obligation to make a declaration was in the case of

a conflict of interest. In this regard it relies on a resolution made passed by the SWRPC in July 2001 and says that that resolution is unclear. The draft report says that in any event a breach of the resolution could not possibly constitute misconduct.

In passing, it is necessary to point out that the term "disclosure of interest" has been used by the Commission not because it asserts Mr Frewer had an interest in the matter, but because that was what actually appeared as the agenda item – although as explained below, in so far as that called for declarations of lobbying, it was distinguished from declarations of (actual) interest, or of conflict.

The obligation on public officers to act with integrity and honesty is not limited to compliance with rules and regulations. Whether a public officer has failed to act with integrity should be determined by examining all of the relevant circumstances, including the officer's reasons for acting as he did and his understanding of his obligations. If a public officer believed he was obliged to declare something and deliberately refrained from doing so his actions would be dishonest even if that obligation was later found to be insufficiently clear. What is important are the underlying reasons why it might be appropriate for such declarations to be made and the public officer's appreciation of those reasons.

A public officer may fail to act with integrity even though he breaches no law or regulation. Concepts such as honesty and integrity are clearly broad in scope. The fact that an obligation has been articulated and reduced to a written rule may be relevant in the sense that conduct in conscious contravention of that rule can be seen as being clearly deliberate.

Rules relating to the disclosure of conflicts of interests or approaches by lobbyists are not required in order to mandate integrity. Such rules are a manifestation of underlying concerns. For example, if a public officer were to approve a planning application in respect of a property owned by a member of his family without making the connection known there would be a failure to act with integrity whether or not disclosure of such an interest was regulated. If there was a requirement to disclose such an interest and the public officer deliberately refrained from doing so, that fact would make the lack of integrity more acute and make it clear that the conduct was deliberate.

In assessing whether Mr Frewer's conduct (judged objectively) lacked integrity it is crucial to take into account all the circumstances, which include his understanding of his obligations and the reasons for them. In this regard Mr Frewer said in evidence that the SWRPC "had decided some time ago that any lobbying that had occurred should be registered on – in the minutes so people were aware of the fact that they might have had contact with an individual or individuals relating to a particular matter" (T704). He said that the rationale for that was that "there seemed to be some developers and consultants who would contact members of the committee on a ring-around basis almost ...that happened to me very rarely because I guess I was in Perth, but some of the local representatives experienced that and it was decided just to – for the record, that it was best to show in fact that there had been some – you know, element of lobbying should be properly recorded in the minutes as a matter of course" (T704). He agreed with the proposition that this "was to provide some measure of assurance that if they were willing to disclose these matters that they

were unaffected by them and there was an appearance of independence and fairness about the process" (T704).

Mr Frewer had no doubt that the approach to him by Mr Burke on 18 May 2006 was of a type that should have been disclosed to the committee. When asked why he did not disclose the approach (putting aside the audio tape of the meeting for the moment) his response was not that this was not a matter that he was obliged to disclose, rather the answer he gave was that it was an oversight (T 1270). When asked the question "You should have disclosed it shouldn't you? There's no doubt about that?", Mr Frewer responded by saying "I should've disclosed it, yes" (T1272).

For the draft report to suggest that Mr Frewer's conduct should be judged on the basis that he had no clear obligation to disclose the approach from Mr Burke, fails to have proper regard to his obligation as a public officer to act with integrity nor to the fact that Mr Frewer considered that he did have such a clear obligation and gave unequivocal evidence in that regard. The failure to act with integrity and honesty is not analogous to a criminal offence in the sense that a person could ever be excused on a technicality. This is because integrity and honesty are concerned with the substance of a person's conduct. Mr Frewer's conduct falls to be assessed against his admitted understanding that he was obliged to disclose the lobbying by Mr Burke.

Furthermore, it is far from clear that Mr Frewer was wrong in his understanding of the July 2001 resolution. That resolution is reproduced in the draft report. Mr Frewer is recorded as saying that "evidence of discussion was the issue", that is, discussions with lobbyists. Another member then asked what the criteria for lobbying were and was told that "lobbying was confined to dialogue whereas any form of inducement would be covered by the Committee's Code of Conduct or declaration of pecuniary interests". The obvious interpretation is that ordinary lobbying was being distinguished from circumstances in which some inducement was offered. The latter already had to be disclosed under extant rules. The intention was to broaden the disclosure obligation to other approaches by interested parties lobbying in respect of a particular matter. There was a reference to retaining the current practise where members self-regulate any lobbying they receive. What this is apparently referring to is that the committee was imposing no restrictions on what lobbying a member could receive – that was a matter for each individual to determine. This is not relevant as it is not the receipt of lobbying that was here at issue. What is clear is that in future the committee would record all instances of lobbying in the minutes.

The draft report suggests that it was unclear what constituted lobbying. In the Commission's view the minutes do not reflect any confusion on the part of the members in this regard. The intention was to make the processes of the committee as transparent as possible and to capture by this resolution any "discussion" or "dialogue". A discussion with the representative of a developer urging a member to take a negative position in respect of a proposed amendment to a Town Planning Scheme on any reasonable view would have to fall within the ambit of the resolution. The relevant question is not what the precise limits of the definition of lobbying might be, but rather whether what occurred here was clearly within that territory. In any event, if there was any confusion as to whether such discussions would be covered (which the Commission doubts) it was not shared by Mr Frewer, as his evidence referred to above amply demonstrates.

As regards what should have been included in a proper disclosure, this is best understood by considering the reasons for the obligation as referred to in Mr Frewer's evidence. The intention was to expose and thereby neutralise any insidious effect that lobbying may have on individuals or on the appearance of independence and impartiality. That could only be achieved by identifying that an approach had been made in regard to a particular matter, the person and interest on whose behalf that approach was made and what position that person had promoted. To do less would be meaningless. That this was the proper practise is evidenced by the fact that at the meeting on 19 May 2006 another member of the committee, Ms Premji, made a disclosure in which she stated that she had been approached by Mr Bancroft of the Busselton Shire, in relation to two items on the agenda (including Smith's Beach) and that he supported the DPI recommendations.

It is now apparent that Mr Frewer spoke in relation to the disclosure item, though this is not recorded in the minutes. The transcript of the meeting shows that after Ms Premji made her disclosure Mr Frewer said "Someone rang me about the Smith's Beach thing and said we're going to send you all of this stuff but he didn't so... yeah nothing arrived, so if that's lobbying then that's fine (laughs)". This is an altogether dismissive comment. Rather than suggesting that Mr Frewer is any doubt as to what lobbying is, what this suggests is that he was minimising the significance of the contact. He did not disclose that Mr Burke was the person who approached him, that the approach was made on behalf of Canal Rocks and that the position advocated was that the amendment should not be approved. These facts were obviously known to him; there can be little doubt that the telephone call he is referring to is that from Mr Burke of the previous evening. Contrary to the evidence he gave during the hearings, he had not forgotten or "overlooked" the call at the time the disclosure item came up at the meeting. He failed to disclose the identity of the lobbyist and the content of the call despite Ms Premji making a proper disclosure in these very respects moments before and in respect of the very same item.

The minutes of the meeting record Ms Premji's disclosure but do not record that Mr Frewer said anything at this point of the meeting. The draft report appears to treat this as an error on the part of the minute taker. There is a better explanation and one that accords with the surrounding circumstances. That explanation is that Mr Frewer did not intend his comment to be treated as a disclosure and the others present did not consider it to be one.

The statement made by Mr Frewer compounds rather than explains away his conduct. He has conceded in evidence that the approach by Mr Burke was one that should properly have been disclosed. The second telephone call shows that Mr Frewer knew what Mr Burke wanted to achieve (a deferral). He knew the reasons for disclosure and, therefore, what a disclosure should consist of. What he said could not on any view be considered a proper disclosure. There can be no suggestion that the failure to disclose who had lobbied him and what had been said was in any way inadvertent. His dismissive statement when seen in this context takes on a deliberately misleading quality. The suggestion that it is significant that nobody at the meeting asked Mr Frewer any questions seems entirely unrealistic; his casual reference did not invite questions, indeed anyone who asked a question about such a statement would only appear foolish.

The Deferral

The draft report suggests that the Commission's characterisation of Mr Frewer's conduct at the meeting on 19 May 2006 is inaccurate in light of the transcript of the meeting. It says that it is incorrect to say that Mr Frewer sought or recommended a deferral, that he argued in favour of it or that his view prevailed. It is also said to be significant that it was the unanimous view of the committee that the matter be deferred.

In fact, the Commission report does not say "his view prevailed". What it says is "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". It was apparent from the minutes that nobody dissented from the decision to defer the matter and the report does not suggest otherwise.

What is significant is whether Mr Frewer took a position at the meeting in relation to deferral and whether he spoke in favour of that position. Whilst it is correct that the alleged inconsistency is referred to in the reporting officer's initial statement to the committee and another member expresses some concern about this, it is Mr Frewer who proposes that the matter be sent back to the Council. The excerpts of the meeting included in the draft report are not complete. In particular, they do not include everything said by Mr Frewer. It is also apparent from what is said that Mr Swift on behalf of Canal Rocks "has been making noises" that the amendment is inconsistent. It could not, therefore, have been lost on Mr Frewer that a position against approving this amendment was in favour of Canal Rocks and was consistent with what Mr Burke had been referring to the previous evening. The lobbying by Mr Burke was, accordingly, highly relevant to the matters that were under consideration. That Mr Frewer appreciated this is evident from the second call of 23 May 2006 (not referred to in the draft report).

When the whole of the transcript is considered what is clear is that Mr Frewer played a leading role in the discussions on this item. As the former Deputy Director of DPI his views were understandably accorded significant respect. At one stage another member refers to "the question that Paul asked" regarding whether the amendment changed the intent of the Council resolution and later to "Paul's excellent suggestion", which reflects the influence that Mr Frewer had on the discussions. When a member asks what the resolution is to be Mr Frewer formulates it as "well, basically deferring I think subject to clarification of the council's resolution" ... "I just think we need to take a step back". That it is reasonable to conclude that Mr Frewer played a leading role is supported by the fact that this how Mr Frewer himself represents what occurred at the meeting when he speaks to Mr Burke on 23 May 2006.

The draft report comments that it is significant that Mr Frewer suggests checking on the Council website to see the extent of the inconsistency. The implication is that this is inconsistent with any intention to unquestioningly do Mr Burke's bidding. However, the context in which this suggestion is made does not support this interpretation. When Mr Frewer refers to the website the resolution to defer has already been

agreed, he then says that for an amendment to be put up that is inconsistent with a resolution is "pretty serious" and that there might be "an issue there that council needs to deal with". Another member then says "they might have to spank someone". It is apparent from this that the concern here was to determine the extent of the inconsistency not the fact of it and that this was being suggested because it may be relevant to the conduct of council officers. That this was Mr Frewer's intention is clear from the call on 23 May 2006 (not referred to in the draft report) in which Mr Frewer refers to Mr Bancroft having "cashed in his chips with me". In light of the fact that Mr Burke had said on 18 May 2006 that Mr Bancroft was "playing silly buggers", the later call shows that Mr Frewer had accepted that view.

No fair reading of the whole of the transcript of the SWRPC meeting could result in any other conclusion than that Mr Frewer played a significant and persuasive role in the decision to defer the amendment. The fact that other members also agreed with and advocated this position and that the resolution was unanimous is not to the point. Mr Frewer presented a view that he knew was consistent with the interests of Canal Rocks and the view expressed to him by Mr Burke the previous night in circumstances where he had not disclosed that he had been so lobbied. It may be that his position at the meeting was capable of being sensibly argued, however the point of disclosure is to ensure that any such arguments are seen to be those of the member uninfluenced by interested parties. A failure to disclose lobbying when there was an accepted obligation to do so could leave the impression that Mr Frewer was merely presenting the lobbyist's views and not his own.

Misconduct

For the reasons stated above, there is evidence which could readily support a conclusion that Mr Frewer deliberately chose not to disclose the nature of the lobbying on 18 May 2006 or the identity of the person who lobbied him. He did this in circumstances where the issue that was the subject of the lobbying was one that he spoke in respect of and advocated a course that he knew was consistent with the wishes of Canal Rocks and Mr Burke. The second telephone call of 23 May 2006 is significant evidence in confirming that his interpretation of the evidence is correct.

There is a further piece of evidence which is significant but is given very little weight in the draft report; the denials on oath by Mr Frewer of any contact with Mr Burke. It is suggested that it is not inconceivable that a very busy public servant would forget a "short phone call". This appears to entirely overlook several important facts. There was not one phone call but two. The first call lasted 4 minutes and 47 seconds. The second call lasted over 24 minutes. Mr Frewer did not merely deny the first, he denied any such calls (T716). Although only excerpts of the second call were played in the hearing the fact that it went for 24 minutes was clearly stated (T1273). The second call was made by Mr Frewer and with the apparent intention of discussing what had occurred at the meeting and with the knowledge of the importance of this issue to Canal Rocks. His tone in that call is jovial and not at all consistent with a person who was so under pressure as to be likely to almost immediately forget this call.

The calls were made only 6 months before Mr Frewer was first examined and he was specifically asked about contact in relation to the SWRPC. This was not the first time

that the possibility of contact with Mr Burke had been raised. It was adverted to in opening the public hearings. More importantly, Mr Frewer was served with a notice on 3 July 2006 requiring him to provide written answers to questions. One of those questions was "Have you, or any other member of the South West Regional Planning Committee, of the Coordinating Committee, had any contact with Brian Burke in relation to the application by Canal Rocks? If so, provide time and date of those conversations or meetings, who was present and what was discussed." This notice was received by Mr Frewer only 6 weeks after the second lengthy conversation with Mr Burke. His response was "He rang me on a couple of occasions enquiring about progress of the project. I do not have records of times and dates of those discussions". The evidence strongly supports a conclusion that Mr Frewer falsely denied knowledge of the Burke calls.

The draft report says that Mr Frewer's denial on oath of the conversations has nothing to do with the failure to disclose that Mr Burke had lobbied him. With great respect, that is a very surprising suggestion. A deliberately false denial of these conversations supports an inference that Mr Frewer was conscious that he had been lobbied and had failed to disclose it. The calls establish the fact of the lobbying and Mr Frewer's understanding of what he had been asked to do and the importance of it to Mr Burke's client. At the time Mr Frewer was first examined he was unaware that the Commission had any records of telephone calls. The strong likelihood is that he believed he could deny any recent contact with Mr Burke without fear of being contradicted. Certainly neither Mr Burke nor Mr McKenzie (who had heard the first call on another line) revealed these calls in their evidence. The proper question is why Mr Frewer would falsely deny that these calls occurred. The only reasonable conclusion is that he did so because he knew that they would show that he had failed to act with integrity in relation to the SWRPC meeting. The Commission report is perfectly clear in stating that this is the relevance of the denials (see page 76).

The failure to act with integrity is not confined to circumstances where a public officer fails to disclose a personal interest. Nobody has suggested that Mr Frewer had any pecuniary interest in the Canal Rocks project. Nor is partiality confined to circumstances where a person has a personal interest. It is clear that what is alleged in the Commission report is that at the meeting of 19 May 2006 Mr Frewer argued for deferral, having deliberately failed to make a declaration that he had been lobbied to do so. He did so in circumstances where he believed that he had such an obligation. An impartial approach would require disclosure. A deliberate failure leads to the conclusion that in not disclosing Mr Frewer was acting in Canal Rocks interests. Even if an unduly restrictive interpretation of the word "impartial" were adopted, the word "integrity" is not susceptible of the same reading down. It was entirely appropriate on the whole of the evidence for the Commission to come to the view that Mr Frewer failed to act with integrity in the performance of his official duties.

Section 86 Notice

The draft report is critical of the apparent fact that the adverse opinion referred to in the report is different from the submissions of counsel assisting as to possible findings. It says that Mr Frewer was given no opportunity to make submissions against the opinion expressed in the report. That is not correct. That possible opinion was clearly put.

By letter dated 19 January 2007 Commissioner Hammond wrote to Mr Frewer inviting submissions in reply to those made by Counsel Assisting. In part, that letter read –

> "As you are aware the Corruption and Crime Commission (the Commission) public hearings in respect of the above matter were concluded on Wednesday 6 December 2006. At that time I ordered that final submissions by Counsel Assisting in respect of this matter should be provided to persons who are adversely affected by **Friday 19 January 2007** and that those persons are required to provide any submissions in reply to the Commission by **Friday 9 February 2007**.
>
> Pursuant to sections 4 and 22 of the *Corruption and Crime Commission Act 2003* (the Act), the Commission can only form opinions and make assessments in respect of misconduct by persons who are public officers.
>
> The final submissions of Counsel Assisting include the following:
>
> 1. On 19 May 2006 at a meeting of the South West Regional Planning Committee Mr Frewer proposed and spoke in favour of a motion to defer consideration of a Shire of Busselton proposal to amend TPS20. The deferral was in the interests of Canal Rocks. Mr Frewer was acting as a public officer. He acted with the improper purpose of gaining a benefit for Canal Rocks rather than exercising his powers for the purposes for which they were given. Mr Frewer, therefore, acted corruptly in the performance of his functions as a public officer (section 83(c) Criminal Code). This conduct, therefore, constitutes misconduct pursuant to section 4(a) and 4(b) of the *Corruption and Crime Commission Act 2003.*
>
> 2. Alternatively, the conduct described in paragraph 1 constitutes the performance of functions in a manner that is not impartial. The conduct was a serious breach of the Public Sector Code of Ethics in that there was a failure to declare a conflict of interest and a failure to act with integrity in the performance of official duties. Such a breach could constitute a disciplinary offence contrary to section 80 of the Public Sector Management Act 1994 that would provide reasonable grounds for termination of office or employment. This conduct, therefore, constitutes misconduct pursuant to section 4(d)(ii) and (vi) of the *Corruption and Crime Commission Act 2003."* (underlining added).

This is not something to be approached as a matter of strict pleading in a civil or criminal court. What is important about that letter is whether or not it reasonably alerted Mr Frewer to the potential assessments and opinions which might have been made against him. The Commission considers there can be no question but that they did.

The letter (quite appropriately) set out the possible assessments and opinions against Mr Frewer at their highest. Those eventually made in the Commission report (after taking into account the representations made on behalf of Mr Frewer) were less serious, but certainly not "different in substance" (as the draft report asserts).

The portions emphasized in the above extracts set out precisely the opinion expressed in the Commission report (as set out at [1], [2] and [3] of the draft report). In this respect therefore, there was no failure to comply with s. 86 of the Act.

To the extent the draft report in this respect turns on the fact that what Mr Frewer said at the beginning of the meeting was not put to him in examination, the proposition that this was in some way a failure to comply with s.86 of the Act reflects an unduly restrictive view of the requirements of procedural fairness. Mr Frewer plainly had ample opportunity in the hearings to explain why he did not make a proper disclosure at the SWRPC meeting. Albeit that the audio recording of the meeting was not put in the hearings it is difficult to imagine that anything could have been said in that regard other than has been put in the draft report. However, for the reasons already stated, when seen in the whole context of the evidence the audio recording of the meeting does not assist Mr Frewer, it rather makes his position worse. In those circumstances there has been no unfairness or material lost opportunity.

The Commission agrees with the recommendation at [29.3] of the draft report, but says that there was a checking procedure in place, which was followed, so that any proposed adverse opinion was not expressed without prior compliance with s. 86. In this instance, that included a review by the Director of Legal Services of the matters which had been put to the individuals considered to be the subject of adverse mention in the draft Commission report, in reference to the Commissioner's letter of 19 January 2007, that advice was:

> "By letter from the Commission dated 19 January 2007, this public officer was advised that the final submissions of counsel assisting included two (2) opinions that he had engaged in misconduct. Mr Frewer made representations by letter from Williams Ellison Barristers and Solicitors dated 9 February 2007. The Commission's draft proposed report V21 expresses one (1) opinion that the public officer engaged in misconduct. This opinion is substantially the first and second opinions expressed in counsel assisting's submission, that is, '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 section 4(d)(ii) and (vi) of the Act.'."

Thus, whilst the Commission agrees with and accepts the substance of the recommendation at [29.3] it does so on the basis that it reflects the existing practice of the Commission and one which was in fact followed in this instance.

The Commission accepts the recommendation at [29.4] and furthermore would in future require that any apparently relevant differences or discrepancies in the minutes and a recording of such a meeting be brought to the attention of Counsel Assisting and the Commissioner so that they may exercise their own judgement about the relevance or significance of such differences or discrepancies. However, for the reasons explained above, the Commission does not accept that in this instance not doing so "resulted in unfairness, an erroneous opinion and a Recommendation without any valid foundation".

Comments on the Commission's Letter of 18 December 2007

The draft report sets out certain comments upon observations made in the Commission's letter to the Parliamentary Inspector of 18 December 2007. They are addressed below.

(a) The statement that the taped recording of the meeting of 19 May 2006 "does not reveal a disclosure of any conflict" is not a full quotation of the relevant paragraph of the Commission's letter. That reads:

> "The recording does not reveal a disclosure of any conflict, nor that Mr Frewer had been approached by any named person for any identified purpose in connection with Smiths Beach. He did not disclose that he had been approached by Mr Burke, nor for what purpose." (emphasis added).

It is the underlined position which expresses the gravamen of the Commission's position. The Commission acknowledges that the references to "conflict of interest" at the 12th paragraph on page 2 and the 7th paragraph on page 3 were inapt because there was no suggestion Mr Frewer had a conflict of interest: the issue was whether or not he was required to (and did) make a declaration of interest. As to the use of that term, however, the Commission has not "elided" "declarations of interest" with "the quite different declaration" that a person has been lobbied. As explained above, the Commission uses the term "declaration of interest" because that was the agenda item under which the Committee expected members to make a declaration that they had been lobbied (exactly as Councillor Premji did and as Mr Frewer understood was required).

(b) The Commission did not assert in its report that Mr Frewer had a "conflict". He certainly did know the purpose for which he had been approached – but that was for the reasons explained above, not (as the draft report suggests) " ... based on the incorrect supposition that Mr Frewer had received Mr Burke's e-mail". The Commission report clearly shows the Commission did not act on that supposition. Finally, it was not just that Mr Frewer failed to say it was Mr Burke who approached him which constituted his failure to act impartially: it was that he recommended deferring consideration of the

amendment having failed to declare that he had been approached by Mr Burke to seek its deferral, which constituted acting in a manner that was not impartial and a failure to act with integrity in the performance of his official duty. He was not "impartial" because (on the Commission's view of the evidence) he was doing Mr Burke's bidding, not acting independently in the public interest.

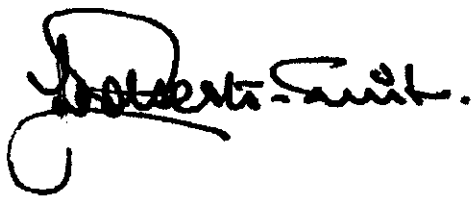
(c), (d) and (e). These have been addressed above.

Conclusion

The draft report fails to have proper regard to all of the evidence. In particular it does not take into account the second call between Mr Frewer and Mr Burke nor give appropriate weight to the false denials on oath of Mr Frewer regarding contact with Mr Burke.

The audio recording of the SWRPC meeting and the resolution of 2001 regarding disclosure of lobbying, do not, when properly understood and considered in context, support the conclusions reached in the draft report. Nor do they weigh against the opinion expressed in the Commission report in respect of Mr Frewer.

The opinion that Mr Frewer failed to act with integrity was well founded, is not erroneous and there is therefore no basis upon which it (or the recommendation based on it) should be withdrawn.



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

5 February 2008

By email:

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Paul Frewer, Mike Allen, and the "Smiths Beach Report"

Thank you for your letter of 31 January 2008 and the attached "Response", the contents of which I have carefully considered.

Functions of the Parliamentary Inspector

1. The Response begins by contending that the Parliamentary Inspector's defined "functions" under s.195(1)(d) (to make recommendations to the Commission ...) and (e) (to report and make recommendations to either House of Parliament and the Standing Committee) are limited to matters arising out of "*any actions taken under paras (aa) to (d) inclusive*". There is nothing in s.195, or elsewhere in the Act, which expressly or impliedly supports that construction. With respect, I think this is a misreading of the section.

2. During the Parliamentary debate on the Bill, concern was expressed about the "extraordinary powers" proposed for the CCC, and the potential threat that those powers posed to the privacy and reputations of individuals. Mr McGinty, in his second reading speech, said (inter alia) that the office of the Parliamentary Inspector "*provides an important balance in relation to the CCC's extensive powers*". The CCC's proposition is that the Parliamentary Inspector has no function, or power, to investigate and report on the manner in which a CCC investigation (here, the Smiths Beach investigation) has been conducted, including any factual errors, or inadequacy of evidence relied on to support damaging "*findings*" in the CCC's report of that investigation. If that proposition were correct, the manifest intention of Parliament would be defeated, and the Parliamentary Inspector's function would be unduly limited.

3. The selective definition of "audit" in the Macquarie Dictionary, quoted in your letter, is not apposite. The Parliamentary Inspector's "audit" functions are <u>not</u> "an official examination and verification of accounts and records", and it is surprising that it should be suggested that they are so confined, (if that is the suggestion). The relevant (and applicable) definition (see the New Shorter Oxford English Dictionary)

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is *"a hearing, an enquiry, a methodical and detailed review ... a searching examination"*.

4. Does the CCC <u>really</u> consider that it can carry out an investigation, and produce a report, without that operation (including its report) being subject to *"methodical review"* by the Parliamentary Inspector, followed by his recommendations?

5. If the CCC takes what is likely to be perceived as a defensive stance, seeking to rely upon a "jurisdictional" argument to shield itself from scrutiny and criticism, it will not foster public confidence in the CCC, and the manner in which it exercises its very wide powers.

6. My intention, in the "draft Report" was not to *"re-evaluate the evidence"* as suggested, but (inter alia) to objectively review and examine the CCC's "Smiths Beach" operation and the adequacy of the investigation.

Mr Frewer

7. In the course of that operation, Mr Frewer was publicly examined on the basis of two factually incorrect hypotheses. First, that he had received Mr Burke's email (which was wrongly addressed) and which he had not received. Secondly, that he had not told the SWRPC meeting of any approach (which he had although this was not recorded in the Minutes).

8. The investigation on which the Commission's findings were based was inadequate in several ways. No check was made to compare the Minutes with the tape-recording of the meeting; no members of the SWRPC were questioned for their views on the appropriateness of the declaration which Mr Frewer had (in fact) made; and no investigation was made to determine the basis of the agreement to disclose "lobbying", or the understanding of the Committee members of what that meant, or what its purpose was.

Mr Allen

9. You say in your letter of 31 January 2008 that you were unaware that I had written to the Commission about Mr Allen. In fact, I did write to you regarding Mr Allen's complaints, on 9 August 2007, and again on 15 October 20007. You responded to both letters by letter dated 30 October 2007 (after the Smiths Beach Report had been tabled). I did not, and do not, consider the response to have adequately or satisfactorily dealt with the matters of concern that I raised.

10. In the case of Mr Allen, it seems to have simply been <u>assumed</u> by the CCC that:

    (a) Someone in DPI was to write a *"report"*, on Smiths Beach, when <u>in fact</u> that was not so;

    (b) Mr Allen had the power to direct, and <u>did</u> direct, that Ms Pedersen write such "report" - when neither was correct; and

    (c) Ms Pedersen <u>wrote</u> a report, following Mr Burke's discussion with Mr Allen, when she did not.

11. I propose to report to the Standing Committee to that effect; that the Commission's examination of Mr Allen, and its findings of "misconduct", were for that reason fundamentally flawed; that the DPI's investigation was both objective and thorough; and that I consider that Mr Allen has been unfairly treated by the CCC. I invite the Commission's comments.

The DPI report

12. As mentioned in my letter of 30 January 2008, I have read the report of the independent investigator on the investigations of Mr Allen and Mr Frewer. Both investigations were very thorough. Neither was a "re-evaluation" of the evidence. The CCC had not considered all of the relevant evidence before reaching the conclusions expressed in its Report. I propose to include a statement to that effect, in reporting to the Standing Committee. Since that is, clearly, an "adverse report", I must give the Commission a reasonable opportunity to make representations in that regard, and I must therefore invite the Commission's comment.

Recommendation

13. I repeat the recommendation in my draft report, that the Commission make a public statement, acknowledging that it erred in its opinion that Mr Frewer was guilty of any "misconduct"; I also recommend that it do likewise in the case of Mr Allen. I believe that this would be less likely to shake public confidence in the Commission, than for it to persist in "defending the indefensible". I would like to discuss this further with you, at our meeting tomorrow morning. I do not wish to damage the Commission's standing and reputation. Far from it - I believe that it is important that public confidence be maintained. But I must perform my statutory functions, even if that entails criticism of an investigation by the Commission.

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

Attachments: img-2081349-0001.pdf; img-2081349-0001.pdf; img-2081349-0001.pdf; img-2081350-0002.pdf; img-2081351-0003.pdf

From: [mailto:l @piccc.wa.gov.au]
Sent: Friday, 8 February 2008 2:00 PM
To: Commissioner LWRS
Subject: Report - Mr Paul Frewer

Dear Commissioner,

RE: Paul Frewer

Enclosed is a copy of my Report, which will be tabled in both houses today.

Yours faithfully,

Malcolm McCusker QC
Parliamentary Inspector of the
Corruption and Crime Commission

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

8 February 2008

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

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

Dear Mr President
Dear Mr Speaker

In accordance with sections 199 and 206 of the *Corruption and Crime Commission Act* 2003, I am transmitting to the Clerk of the House a copy of my report on the finding of "misconduct" by Mr Paul Frewer, made in the Corruption and Crime Commissions Report of 5 October 2007, of its Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup.

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

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

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CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your Ref: LWRS/MP
Our Ref: -

13 February 2008

By Email: piccc@piccc.wa.gov.au

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 3, 45 St Georges Tce
PERTH WA 6000

Dear Parliamentary Inspector

PAUL FREWER, MIKE ALLEN AND SMITHS BEACH REPORT

I refer to your letter to me dated 5 February 2008 and our meeting on 6 February.

As we discussed, both the Commission and the Parliamentary Inspector are having to confront for the first time some very difficult and complex legal issues. I have acknowledged my commitment to the need to resolve them so far as possible between ourselves and with the object of making the legislative scheme work effectively, fairly and as the Parliament intended. Regrettably that now appears unlikely, at least in relation to the major area of contention between us, which is the scope of the functions of the Parliamentary Inspector. I say that because of the tabling in Parliament last Friday of your report in respect of Mr Frewer.

Functions of the Parliamentary Inspector

While it is apparent that we still have different views on the proper scope of the Parliamentary Inspector's functions under s. 195 of the *Corruption and Crime Commission Act 2003* (the CCC Act), the Commission's view is not as presented in your letter.

As I have said on a number of occasions, I consider the role of the Parliamentary Inspector to be absolutely necessary and critical to the operation of the legislative scheme. The external and independent monitoring so afforded to ensure the Commission's operations are conducted in accordance with its own Act and other

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laws, and that its procedures are effective and appropriate gives the Parliament, the community and the Commission itself the confidence that the exercise of the Commission's extensive powers is appropriately subject to Parliamentary scrutiny and ultimate legislative control. That reflects the "important balance in relation to the CCC's extensive powers" in the statement by Mr McGinty quoted at paragraph 2 of your letter.

It is therefore self evidently not the CCC's proposition (asserted at paragraph 3 of your letter) that "the Parliamentary Inspector has no function, or power, to investigate and report on the manner in which a CCC investigation (here, the Smiths Beach investigation) has been conducted". The Commission accepts without reservation that the Parliamentary Inspector's functions and powers include investigating and reporting on the manner in which a Commission investigation has been conducted, in so far as that goes to determine whether that was done in accordance with the CCC Act and other State laws and that the Commission's procedures were effective and appropriate.

Where the Commission does part company with paragraph 2 of your letter, is the reference to "including any factual errors, or inadequacy of evidence relied upon to support damaging 'findings' in the CCC's report of the investigation". Whether something is "a factual error" will almost almost invariably turn on an assessment of evidence and inferences or conclusions to be drawn from the evidence, leading to certain opinions as to whether or not misconduct is established. That will certainly be the situation where it is suggested there has been an "inadequacy of evidence". I remain of the firm view that it is not part of any of the statutory functions of the Parliamentary Inspector to express his own opinion (and make any recommendation) on whether or not the Commission ought to have assessed the evidence in a particular way. That would effectively be the exercise of an "appellate" jurisdiction. Indeed, that would not even be open to the Supreme Court on an application for judicial review. In so far as an application for judicial review might be advanced on a ground of insufficiency of evidence, it could succeed only if there was no evidence upon which the Commission could reasonably have made the assessment or come to the opinion it did. But in any event, that is a matter for the exercise of judicial review by the Supreme Court; in my view, it is not any part of the statutory functions of the Parliamentary Inspector.

It also follows from the above, that the answer to the question posed at paragraph 4 of your letter, is patently that the Commission does not consider at all that it can carry out an investigation, and produce a report, without that opinion (including its report), being subject to "methodical review" by the Parliamentary Inspector, followed by his recommendation. And the Commission has never taken that position. The Commission has no doubt that the Parliamentary Inspector can subject any of its investigations (including its reports) to "methodical review", to determine whether the investigation was done in accordance with the CCC Act and any other laws of the State and that its procedures were effective and appropriate.

But none of that would allow of a report and recommendations such as you have made in respect of Mr Frewer (and as you apparently intend to make in respect of Mr Allen). I must emphasise what should already be clear. Contrary to the

assertion at paragraph 5 of your letter the Commission is not seeking to "shield itself from scrutiny and criticism" by seeking to rely upon a jurisdictional argument nor at all. The Commission welcomes the scrutiny (and, where justified, the criticism) of the Parliamentary Inspector in the exercise of his functions under the Act. Public confidence in the Commission and of the legislative scheme Parliament has created in the CCC Act, will readily be eroded by the Parliamentary Inspector reporting publicly that on his own view of the evidence which was (or, perhaps, was not) before the Commission, the Commission "got it wrong" and should publicly retract its assessments, opinions or recommendations.

Mr Frewer

Having considered your draft and final reports and the points that you raised there and in our discussion, and having reviewed the Commission report and relevant evidentiary material, I am of the clear view that the Commission's assessment, opinion and recommendation in respect of Mr Frewer were not only reasonably open to it, but were correct. That being so, I could not say otherwise. The reasons for this conclusion were set out in the Commission's response attached to my letter to you of 31 January 2008.

As to paragraph 7 of your letter, to say that Mr Frewer was examined on two factually incorrect hypotheses contains an assumption that these matters were material to the opinion formed in the CCC reports. That is quite wrong. The fact that the email from Mr Burke was unlikely to have been received by Mr Frewer, was first brought to the CCC's attention after Mr Frewer was examined the second time. He had said that he could not recall the email in any event, so he suffered no disadvantage at the hearing. The CCC report acknowledged that the email address was different to that given by Mr Frewer and thus it was likely that it had not been received. The Commission report expressly placed no reliance on Mr Frewer receiving the email in the report, nor did that in any way inform its opinion as to misconduct by him.

The second hypothesis is said to be that "he had not told the SWRPC meeting of any approach". That is <u>not</u> the hypothesis that formed the basis of the opinion by the Commission. The observation appears to expand the concept of disclosure to encompass what Mr Frewer said. Clearly the question for the Commission was not merely whether Mr Frewer had revealed "any approach" but whether he had made a proper disclosure of the fact that he had been lobbied to take a position in respect of an item in which the lobbyist's client had a known interest. An approach here was not just "any approach". By this over-simplification, the significance of the failure to disclose is completely obscured. Whatever view is taken of what Mr Frewer said at the meeting, it was not a disclosure of the lobbying of him by Mr Burke. The assertion made assumes that the allegation is that Mr Frewer said nothing and then says that the CCC report is flawed because the audio shows he did say something. But the point that has to be addressed is one of substance, not mere form. Even by Mr Frewer's own admitted standards he should have disclosed that he was lobbied by Mr Burke on behalf of Canal Rocks to defer this item. He did not do that and he then argued in favour of deferral (whether or not there were grounds to do so). The audio changes nothing in that regard, other than to make his position worse.

As to paragraph 8 of your letter, a check was made by the investigators who formed the view that Mr Frewer had made a flippant remark but did not disclose that he had been lobbied by Mr Burke. That view is correct, although as I have indicated earlier, the remark and the taped recording ought to have been brought to the attention of Counsel Assisting who then would undoubtedly have put it to Mr Frewer in the course of his examination. However, if Mr Frewer did not have an opportunity to put a contrary view in the hearing, he has had such an opportunity since. It must be open to the Commission to take the view (as it did, and maintains) that no proper disclosure was ever made, and that the audio recording does not affect that view. That you have a different view as expressed in your report is, with respect, surely, irrelevant to whether or not it was reasonably open to the Commission to form the opinion it did.

As to whether members of the SWRPC were questioned as to their view of the appropriateness of the "declaration" that Mr Frewer made, I note this criticism has not previously been raised. It seems to have come from the departmental investigator's report. In any event it could reasonably be thought unnecessary to do so, given Mr Frewer's unequivocal evidence as to the purpose of disclosure and acknowledgement that the approach by Mr Burke should have been disclosed by him. If other members of the SWRPC thought that what Mr Frewer said was an adequate disclosure of the fact that he had been approached by Mr Burke on behalf of Canal Rocks to defer this item, one would have to question their competence or integrity. That what he said did not disclose anything of the material content of the approach (who approached him, on behalf of whom and what they wanted him to do) is beyond sensible argument. If what Mr Frewer said could be compliance with the obligation to disclose the lobbying, then that obligation would be utterly pointless. Clearly it was not intended to be pointless – and Mr Frewer did not believe that it was. By his own standards (as expressed in his evidence) what he said could not have been an appropriate disclosure.

As to there being no investigation to determine the basis of the agreement to disclose lobbying or what members understood it to mean or its purpose, this overlooks the perfectly sensible answers Mr Frewer himself gave in regard to his obligation and the purpose of it. His understanding was clear (and the Commission was entitled to accept it as being correct). The views of other individuals, therefore, would have little or no possible relevance. If another person was confused as to what his or her obligations were, that could not assist Mr Frewer when he was not himself confused.

Mr Allen

In paragraph 9 of your letter, you refer to my comment that I was unaware that you had written to the Commission about Mr Allen. As you observe, you had written two letters in August and October 2007, and I had responded to them on 30 October 2007. I was, however, referring to your telephone advice to me in January this year that you were in the process of preparing a draft report in respect of Mr Allen which I would receive shortly thereafter. I was referring to the fact that the Commission had not received that.

The substance of the issues you raise with the Commission report in respect of Mr Allen, is contained in paragraph 10 of your letter.

As to that you assert "it seems to have simply been assumed by the CCC that – someone in DPI was to write a 'report', on Smiths Beach, when in fact that was not so".

What the Commission report said (at page 5) was that –

> *"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 ...".*

Your point seems to be that was no "report" on Smiths Beach to be written by DPI.

What is clear on the evidence, is that part of the process of progressing the developer's proposal required DPI to assess the methodology applied in the report of the developer's consultants, and to provide a document (which could be variously described as an "assessment", a "letter" or a "report") confirming that DPI had made that assessment, and that the methodology complied with the Department's requirements. Without that document from DPI, the consultants' report could not be further considered. To progress its proposal, the developer needed that "tick in the box" from DPI. It is common ground that document was required, that it was prepared by Ms Cherrie (who worked directly for Ms Pedersen), and signed by Mr Singleton (who had been discussed in the telephone conversation between Mr Burke and Mr Allen as the person who could do it if Ms Pedersen's existing commitments did not allow her the time). There were in fact two documents. The first was a letter of conditional approval dated 15 September and the second was a letter of final approval dated 21 September 2006. They are Attachment 4 to the DPI Investigator's Report.

The assertion that the Commission "was in error in assuming" (presumably as opposed to it being satisfied on the evidence before it) that someone in DPI was to write a "report' on Smiths Beach, when in fact that was not so, is untenable, unless one were to take a view that "report" could only mean an evaluation of the merits of the development proposal – something the Commission never suggested.

Nowhere in its report did the Commission say that Mr Allen had the power to direct, and did direct, that Ms Pedersen write the report (by whatever term it might be described). The conduct of Mr Allen which was the subject of the Commission's opinion, was in his "agreeing to appoint the departmental officer preferred by Mr Burke to write the DPI report ..." (page 80). The recommendation (also at page 80) expressed it in terms of his "lack of integrity in complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report".

In the Commission's assessment of the evidence, Mr Allen did agree to have Ms Pedersen write or be involved in the preparation of the report (the DPI document however described, dealing with the consultant's report) if her commitments allowed her to do so. He agreed that failing that, Mr Singleton would do so. Mr Allen was a Deputy Director General of the Department. He may not have had "line" responsibility for Ms Pedersen according to a departmental organisation chart, but he was certainly (in the Commission's view) able to cause that result. In fact, on the evidence before the Commission it was open to form the opinion (as the Commission did) that Ms Pedersen was involved in the preparation of the document (which was prepared by her subordinate, Ms Cherrie, subject to her oversight) and signed by Mr Singleton.

I shall now deal with the Commission's position with respect to Mr Allen in more detail.

The Commission suggests you have placed a too narrow interpretation on the words used in the CCC report such as "direct" and "report". The word "report" is interchangeable with any number of words such as "opinion" or "advice".

Nor was it ever assumed that Ms Pedersen actually prepared a document herself. The gravamen of the alleged misconduct was not determined by whether a report/opinion/or letter of approval was actually written by her. The fact that there was a sound evidentiary basis for finding that Mr Allen complied with the wishes of Mr Burke was sufficient for alleging the misconduct in all the circumstances.

Mr Burke's modus operandi

There was considerable material at the disposal of the Commission which portrayed Mr Burke's modus operandi. It was evident that he was careful in selecting the public servants he chose to contact. The communications that he and Mr Grill had with Mr Allen in May 2006 over the deferring of consideration of the amendment at the SWRPC meeting that month indicated an arguably over-enthusiastic attempt by Mr Allen to assist. The importance of that deferral to Canal Rocks was clear given the reaction by Mr Grill when advised that the amendment had been deferred. He repeated several times over, the word "brilliant".

The desire by Mr Allen to render as much assistance as he could (and arguably assistance beyond what was necessary) was illustrated by the message he left on Mr Grill's mobile telephone expressing his apologies that he couldn't do more. Mr Allen also falsely denied having communication with Mr Burke and Mr Grill in regard to the Smith's Beach matter in general and the SWRPC meeting in particular. It is worthy of note that this failing was one that was shared also with Mr Burke, Mr Grill and Mr McKenzie. All of the persons who had engaged in discussions about the 19 May 2006 SWRPC meeting claimed to have forgotten them until confronted with recorded telephone calls. Whilst 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 and Mr

Grill expressed gratitude for that willingness. There was no reason for them to be misleading each other about that.

Against that background, Mr Burke once again approached Mr Allen in early August 2006 regarding "an assessment" of the position of the DPI on the developable area at Smiths Beach and whether Ms Pedersen could be involved in that assessment. It was not in dispute that this matter was raised at a meeting Mr Burke had with Mr Allen on 2 August 2006. Mr Allen said it was possible, but that it was not the purpose of the meeting. It was not in dispute that Mr Burke left a message with Mr Allen's executive assistant on 4 August 2006 in respect to this same matter. In that call, Mr Burke mentioned that when he saw Mr Allen on the Wednesday he had mentioned a matter of "the DPI position on the developable area of Smiths Beach". He said he understood Mr Allen had "**instructed**" Ms Pedersen to "**complete the opinion** of the DPI on that question" (emphasis added). Nor was it in dispute that Mr Allen subsequently telephoned Mr Burke later that afternoon where this topic was again discussed and Ms Pedersen's name was again specifically mentioned by Mr Burke.

Evidence of Mr Allen on 1 November 2006

When Mr Allen gave evidence on 1 November 2006 he falsely denied having any such discussions with Mr Burke as outlined above, even though they occurred less than 3 months prior to his appearance at the Commission. This denial was maintained even when he was directly asked whether Ms Pedersen's involvement was ever discussed with Mr Burke (page 723 of t/s). His explanation for his denials when he was again called on 5 December 2006 was that he had forgotten the discussions. As noted at page 79 of the CCC Smiths Beach report:

> *"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 in his first appearance that he could not recall any discussion with Mr Burke would have been inherently implausible. It continues to be."*

It was therefore open to conclude that the false denials were deliberate and arose from a consciousness that the discussions were improper and needed to be concealed.

You have specifically asked the Commission to comment upon the report of the DPI Investigator.

Disciplinary investigation

This investigation apparently failed to place any importance on the false denials made by Mr Allen at his first appearance before the CCC. The disciplinary investigation could, and should, have placed more emphasis on the following facts.

- Mr David McKenzie's evidence at the CCC hearing that he was aware that Ms Pedersen thought the proposed development had "good merit" (page 1213 of t/s) and that his consultants had recommended that she write the "DPI report" about the visual amenity aspect of the proposed development (page 1212 of t/s).

- As to his understanding of the relationship between Mr Burke and Mr Allen, the evidence of Mr McKenzie was (at page 1214 of t/s):

  "I knew that there was some relationship but I didn't know, you know, how – in what detail.

  Why did you think Mr Burke – why was it not possible for you to simply say to Mr Allen, 'I would like [Ms Pedersen] to write this report.' Why was Mr Burke involved in that process? --- I would assume Mr Burke had a better relationship with Mike Allen than I did."

  And at page 1215 of t/s:

  "I take it you have had experience with DPI in the past before Mr Burke was involved as a consultant? --- Yes, we have.

  Have you ever in the past been able to pick who it is who would write reports for Canal Rocks? --- No. Not that I can recall.

  Was that something of value that Mr Burke brought to this consultancy? --- I suppose on the outcome of this you could say that's quite possible but, again, I do make the point this lady [Ms Pedersen] had been involved with this project for a long – a long time. She had an understanding of what it was all about."

- Mr Burke's belief as conveyed to Mr Allen's executive assistant in T 97 that he understood that Mr Allen had instructed Ms Pedersen to complete the opinion of the DPI with respect to its position on the developable area at Smiths Beach. Mr Allen's executive assistant advised Mr Burke that she would pass the message on to Mr Allen.

- Mr Allen returned Mr Burke's call less than 4 hours later (T 98).

- Mr Burke there said the Smiths Beach people had mentioned "that a man called Singleton in there was an excellent person "and was apparently in the same area Ms Pedersen was working. He said the Smiths Beach people were "... keen to get some assessment of the developable area" and that they were very worried about Ms Clegg (doing it). Mr Burke went on to say that he had spoken that day with David McKenzie and told Mr McKenzie that "... I'd raised it with you and suggested Barbara Peterson (sic) **might be able to be involved**" (emphasis added).

- Mr Allen responded that he had "just been speaking with Barbara" and she was "happy to be the entry point". Mr Allen must therefore have spoken to Ms Pedersen as a result of either what Mr Burke asked of him at their meeting on 2 August or the message from Mr Burke passed to him by his executive assistant from Mr Burke's call earlier on 4 August.

- It is apparent from this conversation that Ms Pedersen's involvement was likely to be limited, because her schedule over the next few weeks was "a bit disastrous". So it was Mr Allen suggested that depending on the time commitment there may need to be some options. He said Mr Burke had mentioned Mr Singleton and he was now Ms Pedersen's boss and may well be another option. That was acceptable to Mr Burke, who observed that Mr Singleton was "... very well regarded amongst the circles of these people we represent". He then said he would tell them to make the initial approach to Ms Pedersen.

- Less than 2 hours after the above telephone call Mr Burke advises Mr McKenzie (at 4.36 p.m.) that Ms Pedersen would be involved and that he thought "she'll do the report for us" (T 676). The fact that there was an arguable case that Mr Allen was improperly influenced by a desire to comply with Mr Burke's wishes is fortified by the fact that Mr Burke told Mr McKenzie that Mr Allen's actions in going to speak to Ms Pedersen had been "true to form".

- Mr Burke also repeated to Mr McKenzie in T 676 what Mr Allen had told him about Ms Pedersen's workload. He then stated to Mr McKenzie:

  *"... if she can fit it in or, or things can be arranged, **I didn't say this to him, or if we can do the work for her**, I think she'll do the report for us."*

  (emphasis added)

  That portion of Mr Burke's statement that has been emphasised is very telling. It suggests the possibility that the developer could undertake the work required for the preparation of the "report" which Ms Pedersen would then progress. The fact that Mr Burke raised this scenario as a possibility highlighted the importance for the developers that Ms Pedersen became involved.

- Ms Pedersen's account to the disciplinary investigation regarding Mr Allen's statement in T 98 that he had spoken to her was:

  "I have no specific memory. It's a vague memory of Mike saying 'Are you aware that there is a request for advice? Will that be provided?'"

  (page 22 of the disciplinary investigation report)

  It has to be noted that Ms Pedersen's recollection is not clear. Given the contents of the prior conversations between Mr Burke and Mr Allen it would be more likely for Mr Allen to have said to Ms Pedersen:

  *"Can that request for advice be provided **by you**?"*

- Later in the same conversation on 4 August 2006, Mr Burke and Mr McKenzie returned to the subject of Ms Pedersen and the "report" –

McKenzie: *"also. Alrighty. Well, uh, that's great about Barbara so, uh,"*

Burke: *"Monday"*

McKenzie: *"Yeah?"*

Burke: *"someone's ring her. Who'd. who'd ring her?"*

McKenzie: *"Well, I can. I mean I know her."*

Burke: *"Well, I mean"*

McKenzie: *"Uh, but, and I might just advise her that, and this is to do with the developable area?"*

Burke: *"Yes, that's right. You can"*

McKenzie: *"Yeah."*

Burke: *"I mean I'm sure, well, in fact* ***he told me he went to speak to her today***"

McKenzie: *"Yeah."*

Burke: *"**or yesterday after my request**"*

McKenzie: *"Yeah."*

Burke: *"and, uh, **she said yes, I'll do it if I can fit it in and I'll certainly be the first point of entry**. So I, and I told her we didn't want Ms Clegg so I think you can speak quite frankly to her. **And I'd be ringing her on Monday and saying look have you got five minutes? It won't be more than five. I'd just like to come and see you.**"*

McKenzie: *"**Yeah. Okay.**"*

Burke: *"**And then I'd tell her the absolute truth and see if Mr Singleton could be involved.**"*

McKenzie: *"I might even ring her now, see if she's around and set up an"*

Burke: *"Uh"*

***McKenzie**: "appointment for Monday"*

***Burke**: "I, I'm not sure that I'*

***McKenzie**: "or leave it?"*

***Burke**: "No, I'm not sure that I would now.*

***McKenzie**: "Yeah."*

***Burke**: "I'll tell you why, cause I think he spoke to her this morning."*

***McKenzie**: "Right."*

***Burke**: "And I'd, I'd just need a bit of time, I mean"*

***McKenzie**: "Yeah, yeah, yeah. Just let the"*

***Burke**: "You, you know"*

***McKenzie**: "dust settle a bit."*

***Burke**: "The last thing you, you want to do is have people think I'm pulling strings"*

***McKenzie**: "Yeah. Yeah."*

***Burke**: "because, you know, it become, in the end it becomes, oh, I don't fucking have Brian Burke telling me what to do, you know."*

***McKenzie**: "Yep. Sure."*

***Burke**: "It's not even like"*

***McKenzie**: "No. Mon, Monday, uh, I'll ring her first thing."*

(emphasis added)

- Information obtained by the disciplinary investigation demonstrates that Mr McKenzie in fact met with Ms Pedersen just 4 days later, on 8 August 2006, for "an information exchange". This was consistent with the evidence Mr McKenzie gave at the CCC public hearings (referred to below). Significantly, Ms Pedersen made a note:

  "Sticking points: The response/ support from DPI on developable area and visual analysis."

  (page 22 of the disciplinary investigation report)

This was the very issue which had been the subject of Mr Burke's request to Mr Allen. It is clear that what the developer was seeking was a "response" (however particularly described) expressing DPI "support" on developable area and visual analysis. But that had been a "sticking point". It did not remain so much longer. The conditional approval issued on 15 September 2006.

As to whom Mr McKenzie thought was going to prepare this response the answer can be found in T 99, which was a conversation he had with Mr Burke approximately 11/2 hours after his meeting with Ms Pedersen had concluded:

***Burke**: "Is she gunna [sic] do it?"*

***McKenzie**: "Ah, well, I, I believe so, er."*

***Burke**: "She told you she's very snowed under?"*

***McKenzie**: "Yeah, yeah"*

***Burke**: "Yeah"*

***McKenzie**: "Ah uhm, **but er, she's sorta [sic] going to oversee, ah, everything**, but er, she's also going to come, er to Busselton on the thirtieth..."*

***Burke**: "Good"*

***McKenzie**: "of August er, when, when we do our presentation"*

***Burke**: "Alright mate **I'll keep riding it from**..."*

***McKenzie**: "Yeah, yep"*

***Burke**: "**that end don't worry.**"*

(emphasis added)

The last comment from Mr Burke quoted above clearly indicated that he would take care of the matter in so far as the DPI was concerned. As the only officer he had contacted at DPI regarding this report was Mr Allen it was open to conclude that he would continue to use Mr Allen if and when he thought it was required. The expression "I'll keep riding it" was an interesting one to use as it suggested that Mr Burke believed he could exert a degree of control.

The fact that Ms Pedersen had advised Mr McKenzie that she was "snowed under" supports the contention that Mr Allen had specifically asked her to prepare or progress the 'report' and that Mr McKenzie had also expressed a similar request to her at their meeting on 8 August 2006.

That Ms Pedersen was going to "oversee" the DPI response was consistent with her role as she described it in her own statement to the Commission. The fact that Ms Pedersen was not under Mr Allen's "line" of authority does not matter. If it did, why would he have agreed? And he did in fact approach her about it; Mr Burke (as Mr Allen suggested) did talk to her and within days she did talk to the developer's representative specifically about it.

Response by Mr Allen dated 13 February 2007 to letter from CCC dated 19 January 2007

Mr Allen's written submission with respect to this disputed allegation of misconduct is conspicuous by its brevity. It barely covers one page and, importantly, there is no denial that he arranged for Ms Pedersen's participation in the DPI's assessment of the proposed development. To the contrary, it is implicit in his response that he actually *had* made this arrangement but that there was no preference given to Ms Pedersen and nor was there any departure from normal procedures. His explanation for his conduct is different to and far less detailed than the matters he apparently raised with the disciplinary investigation

From this initial response by Mr Allen the CCC was entitled to conclude that he accepted that he had arranged for Ms Pedersen to be involved in and progress the matter that Mr Burke had raised. The evidence otherwise supports the conclusion that this was because she was the officer Mr Burke and his client preferred as they understood she would be supportive of their interests.

Conclusion

All the evidence taken as a whole, which must entail placing the telephone conversation on 4 August 2006 between Mr Burke and Mr Allen in its proper context, justified the conclusion that Ms Pedersen was not only approached by Mr Allen at the behest of Mr Burke to prepare or progress a document giving DPI's "support" to the developer's consultant's assessment of the developable land at Smith's Beach, but that the approach was one that was not carried out in an impartial manner and was one that lacked integrity in all the circumstances.

The conclusion made by the disciplinary investigation at page 16 of the report was that:

> *"In summary, an analysis of the conversations in the phone calls of 4 August 2006 indicated that Mr Burke did not explicitly request of Mr Allen, Ms Pedersen's involvement as a report writer. Mr Burke sought and received confirmation from Mr Allen that Ms Pedersen would be the entry point for the proponent in relation to the proposed Smith's Beach development."*

This failed to consider the critical 4 August 2006 telephone call in the proper context and failed to appreciate the subtle manner in which Mr Burke made approaches to public servants.

It follows from the brief outline above, that the Commission cannot agree with the proposition at paragraph 11 of your letter that its examination of Mr Allen and its opinion of misconduct on his part, were "fundamentally flawed" nor that he was treated unfairly by the Commission.

DPI Reports

The implication in paragraph 12 of your letter is that the DPI investigations, being "very thorough", considered evidence that was not before the Commission and that, therefore, the Commission "had not considered all the relevant evidence before reaching the conclusions expressed in its report". You do not specify what relevant evidence the Commission failed to consider. I assume it refers to the matters you set out at paragraphs 8 and 10 of your letter. I have already dealt with those in terms of substance.

More particularly, however, that is not a complaint that the Commission failed to consider relevant evidence which was before it, but rather a complaint that the Commission failed to obtain further evidence and (assuming it was given and tested on oath before the Commission, it would have been the same as it (apparently) was before the DPI Investigator) failed to "consider" that evidence. That further assumes that "evidence", if given in the same terms before the Commission, would have been relevant and would have led the Commission to a different opinion. For the reasons adverted to above, that is simply not so. The proposition further illustrates why it is that the legislature never envisaged that the functions of the Parliamentary Inspector would extend to undertaking an evidentiary appeal or review of the outcome of a Commission investigation.

The Section 86 Process

In your letter to me dated 15 October 2007 you sought the Commission's comments on Mr Allen's contention (inter alia) that the Commission had failed to comply with s. 86 of the CCC Act in relation to him. The Commission acknowledges that whether or not it has complied with s. 86 of the CCC Act in particular is clearly a matter which falls within the audit function of the Parliamentary Inspector under s. 195(1) (a) and (cc) – unless, as in the case of Mr Frewer, that is dependent upon taking a particular, and different, view of the evidence.

Mr Allen's complaint about this is that it was never suggested to him, prior to publication of the Smiths Beach Report, that he had agreed to appoint Ms Pedersen to write the report; that in fact he never agreed to do so; and that there is no evidence that he either made such an agreement, or that he did appoint her. This turns entirely on the use of the word "appoint". In that regard, I wrote in my letter to you of 30 October 2007 (in part) –

"*By letter from the Commission dated 19 January 2007, Mr Allen was advised that the final submissions of counsel assisting included two opinions that he had engaged in misconduct. Mr Allen made representations by letter dated 13 February 2007. The Commission's report expresses one opinion that the public officer engaged in misconduct. This opinion is substantially the second opinion expressed in counsel assisting's submission, that is:*

> "*Mr Allen's conduct 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 section 4(d)(ii) and (vi) of the Act*"."

and that –

> "*Viewed objectively it cannot be said that Mr Allen has been 'left in the dark' as to the risk of the Commission forming an adverse opinion or that he has been confronted with an adverse opinion upon a totally new point or issue. The publication of the opinion in the Commission's report is not the publication of new of different material constituting a matter adverse.*"

The reference to "this opinion" in the extract first quoted above, is a reference to the opinion expressed in the Commission's report. The "second opinion expressed in counsel assisting's submission" (as contained in the letter to Mr Allen from the Commission of 19 January 2007) was in the following terms -

> "2. *On 2 August 2006 Mr Allen met with Mr Brian Burke where it was discussed that it would be in the interests of Canal Rocks Pty Ltd if Ms Barbara Peterson [sic], an employee with the Department of Planning and Infrastructure ("the DPI") were involved in the DPI's assessment of the proposed development at Smiths Beach. On 4 August 2006 Mr Allen telephoned Mr Burke and confirmed that he had spoken to Ms Peterson and that she would be able to become involved. The conduct by Mr Allen in arranging for Ms Peterson's participation in preference to other DPI employees involved a performance of his functions in a manner that was not impartial. Such conduct could constitute a disciplinary offence contrary to section 80 of the Public Sector Management Act 1994 that would provide reasonable grounds for termination of office or employment. This conduct, therefore, constitutes misconduct pursuant to section 4(d)(ii) and (vi) of the Corruption and Crime Commission Act 2003.*" (under-lining added)"

It should be apparent from what I have said above about the basis for the Commission's opinion in respect of Mr Allen set out in the Smiths Beach Report, that it was that Mr Allen agreed to cause or arrange for Ms Pedersen to write a supportive DPI response on the methodology used by the developer's consultants in their assessment of the developable area and visual analysis, or if she were unable to do that because of her work commitments, for her to nonetheless be involved in that sufficiently to progress it through DPI, was and remains that

second possible adverse opinion set out in the Commission's letter of 19 January 2007. That was what was intended to be conveyed (in a short-hand form) by the word "appoint".

In retrospect, the Commission accepts the word "appoint" was likely to convey a different meaning from that which was intended. And if that more formal meaning was what had been intended, then there would not have been proper compliance with s. 86.

However, as what was meant to be conveyed was the substance of the second possible adverse opinion of which he had been given notice under s. 86 (in respect of which he was able to make representations), s. 86 was complied with on that basis.

For the above reasons the Commission accepts that the word "appoint" should not have been used and would accordingly reframe its opinion and recommendation to reflect its consistent intention.

The Commission withdraws its opinion (at [7.21] of the Smiths Beach Report), that -

> *"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."*

And substitutes instead the opinion that –

> *"Mr Allen's conduct in August 2006, in agreeing to arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at 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 withdraws recommendation 3 (at [7.6] of the Smiths Beach Report) –

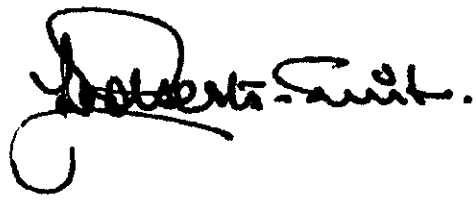
> *"That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain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

and substitutes instead, the recommendation -

> 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 him agreeing to arrange the involvement of a certain departmental officer in the DPI's assessment of the proposed development at Smiths Beach.

In substituting this recommendation to stand in place of recommendation 3 in the Smiths Beach Report, the Commission acknowledges that disciplinary proceedings against Mr Allen were taken by the Director General (DPI) and the charge based on the former recommendation was found not to be made out. On the Commission's reading of the DPI Investigator's reasons, the same outcome would have resulted had the charge of the disciplinary offence been cast in the terms of the Commission's substituted recommendation.

Yours faithfully



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

APPENDIX 2: In respect of Mr Mike Allen the following correspondence has been collated:

Date	Format	Direction	Title	Note
09/08/07	Letter	PI → CCC		*Encl: Allen's complaint PI's response to Allen*
14/08/07	Letter	CCC → PI		
15/10/07	Letter via email	PI → CCC	Mr Mike Allen	
30/10/07	Letter	CCC → PI	Commission Investigation and Report Mr M Allen	
25/01/08	Letter	PI → CCC	Re: Mr Paul Frewer & Mr Mike Allen	Refer Appendix 1
05/02/08	Letter via email	PI → CCC	Paul Frewer, Mike Allen & the "Smiths Beach Report"	Refer Appendix 1
13/02/08	Letter via email	CCC → PI	Paul Frewer, Mike Allen and Smiths Beach Report	Refer Appendix 1
13/02/08	Letter via email	PI → CCC	Michael Allen	
18/02/08	Letter	CCC → PI	Michael Allen	
20/02/08	Letter via email	PI → CCC	Michael Allen	
21/02/08	Letter via email	PI → CCC	Michael Allen	
29/02/08	Letter via email	PI → CCC	Michael Allen - Investigation	
04/03/08	Letter via email	CCC → PI	Michael Allen – Investigation	
05/03/08	Letter via email	PI → CCC	Michael Allen Investigation	

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

9 August 2007

The Hon L W Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

I have received a complaint from Mr Mike Allen, a public officer who was called to give evidence at a public hearing in relation to the "Smith Beach" inquiry.

Although I have, with regard to some matters concerning that inquiry, referred those matters to the Acting Parliamentary Inspector, Mr Allen's letter of complaint raises broad issues of the Commission's procedures with respect to the holding of public hearings, the questioning of witnesses, and the consequences that may flow from accusatory questions.

I enclose a copy of his letter, and of my letter in reply to him. On receipt of his letter, I discussed with him, by telephone, the issues that he had raised. You will see that they are reflected in my letter to him.

I appreciate that you were not the Commissioner when the public hearing in question was held. However, it would be appreciated if you could discuss with the relevant officers and counsel the matters which Mr Allen has raised, and provide me with the Commission's response to them.

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

enc

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CCC 47442

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HILLARYS WA 6025

31 July 2007

Mr M McCusker QC
Parliamentary Inspector
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WA 6849

Complaint about the operation of the Corruption and Crime Commission

I wish to register a complaint against the Corruption and Crime Commission (CCC) based on the way it conducted the hearing into the Smiths Beach Inquiry late last year, specifically the treatment I received.

On 1 November and particularly on 5 December last year, I underwent one of the most unpleasant experiences of my professional life as a witness at the CCC hearings into the development proposal at Smiths Beach. Despite having very little to do with that proposal, I was summoned to the Commission to have spurious, unsubstantiated allegations thrown at me by counsel assisting the Commission. In fact, far from being a mere witness called to assist the Inquiry, I was treated and questioned as though I was a defendant, accused of some unspecified crime.

Following this my photograph and my evidence was given prominent media coverage. This process, especially because of its public nature was grossly unfair to me, tarnishing my professional and personal reputation, and by its lack of any protections normally afforded to witnesses in other legal processes, denied me any form of natural justice or basic human rights.

My experience leaves me with the impression that the Commission is more interested in creating a circus for the entertainment of the public, the media and whoever, than in showing any concern for the protection of basic human rights.

The following points constitute the grounds for complaint that I wish to make.

1. **Over-reliance on telephone intercepts by CCC as "evidence" of allegations of corruption or misconduct, with no further investigation or checking of allegations.**

At the Smiths Beach hearing, among many such telephone intercepts, one was played in which Julian Grill was recorded leaving a message of thanks on my mobile phone because he believed that I had somehow furthered his and his client's cause by taking an action that led to a town planning scheme amendment being deferred by the South West

Region Planning Committee (a committee of the Western Australian Planning Commission with delegated powers to determine such matters).

As it was just a message from Mr. Grill and not a discussion with him personally at the time, I was not able to comment on his assertion that I had actually done anything to be thanked for. Indeed I had not done anything to be thanked for. I played no role whatsoever in the decision by the Committee to defer consideration of the amendment.

However the CCC assumed from that telephone message that I had provided inappropriate assistance to Messrs Burke and Grill.

I was accused of sending an email to a Committee member to further their cause. **Not only was the email not produced in evidence by the CCC during the hearing, no effort was made by the CCC to obtain a copy of that email. Given the significance of this piece of evidence, I consider the actions of the CCC to be incompetent.**

The fact of the matter is that I did not contact any member of the Committee, but rather sent the email to a member of my staff in the Bunbury office of DPI. In forwarding an email from Burke, my email reads as follows:

"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 and that it will be a great 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".

As the CCC investigators did not bother obtaining a copy of this email, they merely relied on what they heard on the telephone intercept and let their imaginations run riot: a classic case of putting two and two together and making five. I consider that obtaining the email was the most basic type of investigation that should have been conducted and CCC was derelict in its duty by not doing this.

I was also accused – in my opinion falsely - of supposedly allocating tasks to particular officers thereby acting not impartially, again based on merely listening to a telephone intercept, jumping to erroneous conclusions and failing to undertake any level of additional investigation or checking to see if the allegations had any substance. In this instance it would have been very easy for the investigators to speak about their suspicions to the other departmental staff members who were apparently affected by my actions. This they failed to do.

2. **Ignorance of planning processes and procedures including my role as an Executive Director of DPI, and no action to overcome this ignorance.**

During my interrogation at the public hearing (and also during that of Mr. Paul Frewer, who is also a qualified Town Planner), a lot of time was devoted to questions relating to the deferral of amendment 92 to the Shire of Busselton's town planning scheme that related to the proposed development at Smiths Beach. The CCC apparently had decided that the deferral was a significant matter and that any involvement of Mr. Frewer and myself in the matter must surely have constituted corruption and/or misconduct, and a willingness to do things for Messrs Burke and Grill that was either untoward or unusual.

In fact the amendment was deferred for what the South West Region Planning Committee considered to be an entirely justifiable reason, namely that questions had been raised as to its legality due to discrepancies between the wording of a Council resolution and the wording of the amendment itself. The fact that the concerns of the Committee were swiftly resolved allowing the amendment to be passed at its meeting the following month is, in my view, entirely irrelevant.

There was an overt assumption by the CCC that Messrs. Burke and Grill (and their clients) would gain a benefit from this amendment being deferred. The truth is they gained no benefit from its deferral and were never going to obtain a benefit. Just because they erroneously thought that they might merely serves to confirm the lack of planning knowledge or understanding of processes of Burke and Grill.

However there is no excuse for the CCC to assume that Messrs Burke and Grill were correct in their judgement, or in fact knew more than professional planners such as Mr. Frewer and myself. CCC investigators made no attempt to clarify with anyone at all – planning qualifications or not - as to the benefit or otherwise gained by Messrs Burke and Grill by any deferral of the amendment. Again the CCC jumped to wild unsubstantiated conclusions and then publicly implied corruption or misconduct on my part. The CCC called two members of the planning staff of the Shire of Busselton as witnesses but failed to ask them questions relating to this specific issue, i.e. if Messrs Burke and Grill could obtain any benefit from the deferral of the amendment.

The ignorance of the counsel assisting at the CCC hearing was highlighted by his remark, during questioning of me concerning the amendment, when he did not seem to either recognize or consider to be of any significance the difference between an amendment being withdrawn from a meeting agenda or deferred at the meeting – quote: "deferral, withdrawal, whatever....". Just to clarify: if the amendment had been withdrawn from the agenda, there would have been no opportunity for discussion; if the amendment was deferred it means that was a conscious decision taken by the Committee having discussed the merits of the amendment. I confirm: the amendment was deferred.

To me, this demonstrates that counsel assisting had no understanding whatsoever about the issue in question, and no interest in hearing any facts about the matter – as evidenced by the subsequent written accusations of misconduct leveled at me by the CCC.

Was it laziness, incompetence or just plain vindictiveness that the CCC undertook NO investigations into these and other matters before my public haranguing?

In relation to my role as Executive Director in DPI, once again it concerns me that evidence presented demonstrated I had forgotten about phone calls and meetings with particular individuals (and I was not alone in being forgetful). The suggestion by counsel assisting was that I had somehow deliberately forgotten these contacts – in fact I was accused of lying.

My response is that in my particular world, neither the proposal under investigation nor the personalities involved were significant or memorable. The proposal was not something I was personally handling.

In total, even allowing for all of the incidents revealed in the CCC hearings, I would have had barely a dozen meetings, phone calls and emails over a period of several months to do with Smiths Beach. Also at the time of the contact with Messrs. Burke and Grill I could not be expected to know that their role was extraordinary in any way, or different to the role of any other developer, lobbyist, consultant, landowner or anyone else trying to steer their way through complex planning processes.

From comments made at the hearings counsel assisting seemed to be of the view that public servants like myself should view Messrs Burke and Grill as extraordinary individuals, contact with whom would of course be indelibly etched on my memory. I never held that pair in the same regard as obviously do members of the CCC, and there is no reason why I should.

I receive emails at the rate of about 10000 per year, I often have recorded in my electronic diary 130 entries per month (and I do not record entries where internal people just wander in to my office without appointments), and I would not know how many phone calls I make or receive each day.

In the light of all this, and also without any opportunity to check any file notes because the CCC had secured all the files, somehow counsel assisting seemed to think that I should have a perfect memory of everything to do with the case. The press also seemed to conclude that the number of contacts I (and others) had with particular individuals over Smiths Beach constitutes "unprecedented access" to a senior public servant!

At the time, unfortunately I did not have the luxury of being able to refuse to see or speak to someone just because of his or her surname, but to describe this level of access as "unprecedented" is both laughable and ignorant of my role in the DPI. Anyone who has access to a telephone can ring me and seek an appointment (and does). I resent insinuations by the CCC and subsequent allegations in the press that I work in some ivory tower only granting audience to "special" people such as Messrs. Burke and Grill.

The operation of the CCC should be changed so that when planning matters are investigated, counsel assisting should be employed with expertise in planning matters

(not criminal law as in my case). The same principle should be applied to other special areas of interest.

3. **Public pillorying and vilification of me as a result of my appearance at the CCC.**

My appearance at the CCC hearing with all the factual errors, untested suspicions and misunderstanding of planning issues demonstrated by CCC was subsequently picked up on and embellished by the media. Since my appearance I have had my reputation destroyed by the constant and ongoing portrayal of myself as corrupt and under the control of Messrs Burke and Grill in local and national print media and in a national ABC "Four Corners" program.

My legal advice is that as the media was largely only reporting on what transpired at the hearings, that generally I am not able to complain about my appalling portrayal, notwithstanding the selective quoting and obvious "angle" that is being taken.

I was so appalled and angered by one report (in The West Australian of 30 March 2007) that I complained to the Press Council. With their assistance, I extracted a correction and apology from the paper. This demonstrates to me that the CCC is quite happy to see articles printed about witnesses to its hearings that set out to at best damage and at worst defame them to portray individuals in as bad a light as possible.

I therefore hold the CCC responsible, because of its decision to hold the hearings in public and the outrageous ignorance and bias of its questioning, for the unfounded and unsubstantiated attack on my personal and professional reputation which has endured in the media over the months following the hearings.

During these attacks there has not been one public comment or effort by the CCC to stop these unwarranted media attacks on me.

4. **No opportunity to clarify points raised by Counsel at the hearings or to correct errors of fact presented by CCC.**

As indicated above, all of the allegations and insinuations made about me were unsubstantiated, based on errors of fact and lack of understanding of planning processes and procedures. Yet their public airing and subsequent media handling were extremely damaging to my reputation.

At the hearing I felt like a criminal being interrogated by a prosecution lawyer (he was a criminal lawyer in fact). There was no feeling about the hearing being a means to obtain information to assist the inquiry. The feeling was more one of an inquisition, with an assumption of witnesses being guilty and the public hearing was to hang you out to dry to the world by way of punishment. The lack of opportunity for any form of cross-examination or even to merely provide further comment at the time I believe represented

a gross miscarriage of justice relating to me. In fact, because of the processes involved in hearings, it is fundamentally impossible for the CCC to obtain "the whole truth" about a matter because of the one-sided nature of its questioning.

I have heard former Commissioner Mr. Kevin Hammond make comments that "if one is innocent you have nothing to fear". The State Attorney General has made similar remarks. What rubbish!! I have done absolutely nothing wrong but yet I have been dragged before the inquisition known as CCC public hearings to have wild, untested allegations flung at me and then suffered months of public pillorying in the media, with not a whimper of protest from the CCC.

5. **Harassment of myself by the CCC in the form of a letter with false accusations and threats of dismissal.**

Subsequent to my appearance at the CCC I received a letter outlining the CCC's preliminary conclusions as to my involvement in this matter. It concluded with the threat that if these conclusions prevailed, I could be dismissed from my position in DPI.

The letter contained nothing but errors of fact, some of which have been alluded to above. The information in that letter made it obvious that not a modicum of investigation had taken place into the suspicions of the CCC concerning any of my actions. To follow this rubbish with the threat of dismissal was totally outrageous. Given the allegations contained in the letter I have never had any confidence in the CCC's ability, or willingness to seek the truth of the matter and to clear me of the allegations. This letter and its threat can only be described as harassment. I note you have recently stated that the CCC should not pass opinions as to the nature of any punishment that should be handed down. I agree – that is absolutely beyond the powers of the CCC.

6. **CCC operating from a culture of vindictiveness, bias and no respect for human rights.**

The lack of any investigations by the CCC into its suspicions about my actions, the airing of errors and misunderstandings at a public hearing and the subsequent allegations made to me by letter, demonstrate to me the incompetence, bias, lack of discrimination and sheer bloody mindedness of CCC investigators. There were several easy courses of investigation that could have been undertaken such as obtaining a copy of the email that I referred to under point 1 above, talking to other DPI staff, talking to other professional planners about the significance of the deferral of the amendment. There is no justification for CCC officers not to have taken these simple actions prior to their launch into the destruction of my reputation.

For the CCC to not check any suspicions about me is just plain incompetent and as such the performance of the officers concerned should be reviewed in terms of dereliction of duty. The CCC officers appear to believe that anyone who even bumped into Messrs. Burke and Grill must somehow be corrupted by them (Burke/Grill virus?). In my view this shows lack of judgement and discrimination that is totally unacceptable to people

holding the positions of investigators at the CCC. It's all very well to think that Burke and Grill corrupt everyone they meet – at the time why should everyone assume they had sought to corrupt anyone at all and therefore I should not meet with them? Hindsight is wonderful.

It is my view that the recruitment and training processes of the CCC should be substantially reviewed because it is obvious to me, based on my experience that they are simply not up to the job. This has resulted in my basic human right of the presumption of innocence until proven guilty being ignored. I have been harassed and received a threatening letter from CCC, and they have ignored the unrelenting attack on my reputation.

7. **Unacceptable delay in releasing the final report.**

It has now been nearly nine months since my first appearance at the CCC hearings and still no final report has been released. As a result I have had to endure nine months of pillorying in the media, and all of this time the outrageous attack on my reputation by the CCC and the media has not been corrected, nor have I had any opportunity to correct it.

I am aware that at least three witnesses have received either a copy of the report or some communication relating to how they may be treated in the final report, but this appears to again be a case of selective leaking of information. This is outrageous behaviour on the part of the officers in the CCC and goes against all concepts of procedural fairness and equality of treatment. The comparison with the "D'Orazio case" is compelling.

The delay in the release of the report is impacting directly on my role as an Executive Director in the DPI. As long as there is no final report that completely exonerates my role and actions in this matter, there remains a query hanging over me as to my integrity. This is grossly unfair and will not be rectified until the final report is released.

8. **Use of public hearings with little or no justification.**

I would like to know exactly what new information about me was gleaned or public interest served by the public hearings into Smiths Beach. I suspect absolutely none except to harass and embarrass innocent public servants such as myself. Evidence would have been better obtained in the Smiths Beach investigation if the hearings had not been public. Then there may have been more emphasis on Counsel obtaining information rather than just merely putting on a performance better suited to some second-rate TV drama, and the CCC being left with no further information to assist its enquiry.

There should be a requirement put on the CCC that prior to making a hearing public and prior to calling individual witnesses that an appropriate level of investigation has been carried out, and evidence, other than telephone intercepts, obtained to justify the public hearing.

9. Failure of presiding Commissioner to hand down the report

Commissioner Kevin Hammond presided over every moment of the Smiths Beach hearing, but retired before the final report into the inquiry was handed down. My understanding of how legal cases work, and I have spoken with lawyers about this, is that should a presiding officer – for whatever reason – be unable to complete the case (meaning to judgement, in matters such as criminal law), then the whole case is aborted and started again. With the CCC, a replacement acting Commissioner will table the final report in Parliament. This person has not, to my knowledge, heard or witnessed one second of the hearings and yet is charged with signing off on the recommendations as to the fate of all those who may be named.

Why is this so? Why is the CCC so different to other legal hearings in this matter? How can someone who has not been exposed to the behaviour both of counsel assisting as well as witnesses be expected to come to a fully considered and well-rounded opinion? If it's good enough for a replacement Commissioner to just read the transcripts, why do we bother having them sitting in hearings? Why do we ask judges to sit through cases for days or weeks on end if reading a transcript is a suitable substitute?

They are rhetorical questions because you and I both know the answer, and that answer does not support the case for allowing a replacement Commissioner to table a final report into a matter over which he has not presided.

General comments:

In summary, I have only ever carried out my duties with the utmost propriety, competence, professionalism and integrity. For my efforts, however, a Commission supposedly acting for the public interest has treated me appallingly.

Given the damage done to me by the incompetence of the CCC and its public hearings and its failure to protect me, I would like to know how the government is going to redress the damage done to my reputation, and compensate me for the treatment meted out to me.

In my job, one of the principal functions is to administer a system and processes that lead to land being made available for a variety of land uses, especially housing. These processes are complex, often time-consuming, often frustrating. The ethos that presently applies is to assist (not to be translated as "approve") wherever possible, so that proposals can be fairly assessed. If there is going to be an increasing level of scrutiny (which there is already in the planning system by virtue of the statutory processes embedded in legislation) through the CCC, there may well be an unintended consequence of slowing up the process even further. Everyone will become even more risk-averse.

I would urge you, as the Parliamentary Inspector, to recommend the CCC to consider carefully how it undertakes its investigations, to think long and hard about the need to conduct hearings in public, and to save the fishing expeditions for the sports pages.

Finally, I have previously made a complaint to you back in March about me being victimized simply by being a witness at a CCC hearing, but to date have received no reply. I am concerned at the length of time it has taken for a response to be provided on this issue as, to me, it would seem that the means whereby concern can be raised about the gross injustices done to me by the CCC processes seems to be flawed, if there is such a long time between the lodging of the original complaint and any subsequent finding.

Yours faithfully,

Mike Allen

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

MJMcC:us:096/07

9 August 2007

Mr Mike Allen
17 Rae Place
HILLARYS WA 6025

Dear Mr Allen

I acknowledge receipt of your letter dated 31 July 2007, raising matters of concern to you in relation to the treatment received by you when called as a witness at a public hearing into the Smiths Beach Inquiry.

As discussed with you by telephone on 2 August 2007, you have agreed that I may make a copy of your letter available to the Commissioner of the Corruption and Crime Commission, Mr Roberts-Smith QC, with whom I will raise the matters, both general and particular, set out in your letter. In particular, following the points made in your letter, and during our discussion, you have identified the following concerns:

1. The need for CCC investigators to conduct a full and thorough investigation, rather than make assumptions based upon the content of telephone intercepts, which may in some cases be misleading.

2. The need to ensure that before appointing counsel assisting, for a public hearing, counsel is fully conversant with the subject on which he or she proposes to conduct an examination. That applies not only to planning matters, of course, but to any other matters which call for a specialised knowledge.

3. The desirability of the CCC taking some step (such as a media statement, perhaps) where there has been misleading reporting of evidence given at a public hearing. I note from your letter, and from what you told me in our telephone discussion, that you did consult a lawyer regarding defamation proceedings against The West Australian, but on his advice decided not to commence legal action and instead to accept a retraction and apology, duly published by The West, reasonably prominently, on page 6 of its Saturday edition.

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4. That when public hearings are conducted, a witness should be given the opportunity to provide further comment and further information, at that hearing. That may, in some cases, be difficult because the witness may not have readily available letters, emails or documents which could refute allegations or insinuations raised during the examination of the witness by counsel assisting.

5. You referred to the Standing Parliamentary Committee which has announced that it will be conducting an inquiry into public examinations held by the CCC. I believe that this is principally for the purpose of determining what criteria are applied, or should be applied, when deciding whether or not a public hearing should be held. The *Corruption and Crime Commission Act* does lay down a broad principle in s.139 which states that except as provided in s.140 an examination is not open to the public (ie it is to be private). However, s.140(2) states that it may conduct a public examination if, "*having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so*".

6. The problem lies in the application of this provision. What may be viewed by some as an overarching benefit resulting from public exposure and public awareness, may well be viewed by others, more conscious perhaps of the prejudice to an individual, as being insufficient to justify a public hearing.

7. Before the Joint Committee had announced its proposal to conduct an inquiry into this issue, I had previously discussed the problem with the Joint Committee, as well as with the previous Commissioner, Mr Hammond. Both the past Commissioner, and the present Commissioner (who had not been appointed when you gave evidence) have assured me that a decision to hold a public hearing is not taken lightly, and that no such decision is made without the Commissioner first being provided with a full explanation of why a public hearing is proposed to be held, so that he may weigh up the public benefits to be derived, as against the potential for prejudice to the individual. I understand that you have made a submission in that regard to the Joint Committee, as well as to Ms Gail Archer, who is presently conducting an examination of the operations of the *Corruption and Crime Commission Act*.

8. I shall raise this important question, again, with the Joint Committee and also with the current Commissioner. Although I have no power to direct the CCC as to when it shall or shall not conduct a public hearing (as against a private hearing) I <u>am</u> empowered to review and report on any of the operations of the Commission and its procedures, and to make recommendations to it. If my recommendations are not adopted, I may report to either the Standing Committee or the Parliament.

9. You have referred to the CCC having sent you a letter with false accusations and threats of dismissal. My understanding from our discussion is that that is a reference to a notification which you received in February 2007, of possible adverse comment, so as to give you a reasonable opportunity to make representations to the Commission concerning those matters, as required by s.86 of the Act. I confirm that you will forward me a copy of the letter which you received from the Commission, and your response. I would assume that your response enclosed any relevant documentation, such as the email referred to at page 2 of your letter, which you say the CCC investigators did not obtain, relying instead upon what they heard on the telephone intercept, from which they made assumptions which you assert were without any foundation.

10. You suggest that the recruitment and training processes of the CCC should be reviewed, to ensure that, as an investigative body, those employed by it not only carry out a full and thorough investigation before making any allegations, but do so with the presumption of innocence firmly in mind.

11. You refer to an unacceptable delay in issuing a final report. I have previously discussed this question with the Commissioner, who is equally concerned at the delay. However, it has been caused, as I am informed, by the need to ensure that a number of persons in respect of whom it is proposed to make adverse comment or findings are given full opportunity to make representations, which then must be considered by the Commission.

12. You have raised the fact that Commissioner Hammond had retired before the final report into the Smiths Beach Inquiry is to be handed down. Your comment regarding the way in which court cases are conducted, where a judge or magistrate may die or retire before delivering judgment is correct. It is understandable that you should seek to draw an analogy with an investigation conducted by the CCC. However, as I discussed with you by telephone, although Commissioner Hammond presided over the public examinations and was the Commissioner until the conclusion of all hearings, it is not essential that he be the Commissioner who signs the final report, following the inquiry. The Act does not provide that the report itself must be that of the Commissioner who presided over the examination or inquiry, even though he was the person who (by s.141 (2)) administered the oath to witnesses.

13. I appreciate, however, that where a report contains views or opinions which are based wholly or in part on considerations of a witness' demeanour or credibility, a difficulty may arise. I believe the Commissioner is aware of that.

14. Referring to the "general comments" at the end of your letter, I have explained to you that it is not within my power or function to raise the question of whether the Government can redress damage done to your

reputation or compensate for the treatment "meted out" to you by the CCC, as you put it.

15. I believe that the present Commissioner is aware of the need to ensure that a decision on whether a public hearing is appropriate should be made with the utmost care, and with proper regard to the possible prejudice to individuals.

16. Finally, as I explained to you, the damaging reports published by The West Australian newspaper do not constitute a breach of s.173 or s.175 of the CCC Act. Those provisions are designed to prevent any person who acts as a witness, or otherwise assists the Commission, from being victimised, threatened or attacked, by reason of that person having given such assistance or evidence to the Commission. I do not consider that a report by a newspaper of proceedings in a public hearing before the Commission fall within that category. They may, of course, constitute defamation if not a fair report, but that is a matter which you have already considered and decided, on advice from your lawyer, to be content with an apology rather than take legal action.

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your ref:
Our ref: 01853/2005

14 August 2007

Mr Malcolm McCusker AO QC
Parliamentary Inspector
Corruption and Crime Commission
Level 3
45 St Georges Tce
PERTH WA 6000

Dear Mr McCusker

Thank you for your letter dated 9 August 2007 in which you raised issues in connection with Mr Mike Allen and the Smiths Beach inquiry.

As you are aware, the Commission is concluding its inquiry and intends tabling a report in Parliament shortly. The report is likely to touch on issues connected with Mr Allen's relationship with Messrs Burke and Grill. In light of your 17 July letter to Mr Lemonis, I enquire whether it is likely that you will refer this matter to Acting Parliamentary Inspector Scott.

In the meantime, the Commission will start to prepare a response to your letter.

Yours faithfully

The Hon L W Roberts-Smith RFD QC
COMMISSIONER

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PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

MJMcC:hmc: 96/07

15 October 2007

By email: [redacted]

The Hon L W Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission
of Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Mr Mike Allen

You may recall that I wrote you on 9 August 2007 regarding a number of matters raised with me by Mr Allen, detailed in a letter to Mr Allen which I copied to you. In your reply of 14 August 2007 you asked whether it was likely that I would be referring the matter to the Acting Parliamentary Inspector, Graeme Scott QC, although I did say in my letter of 9 August that although I had, with regard to <u>some</u> matters concerning the Smiths Beach inquiry, referred those matters to the Acting Parliamentary Inspector, Mr Allen's letter of complaint raised broad issues of the Commission's procedures etc. I therefore did not consider that those matters should be referred to the Acting Parliamentary Inspector, and did not do so.

Your letter of 14 August 2007 stated "*In the meantime the Commission will start to prepare a response to your letter*". As yet, I have not received that response, but have now received a letter of complaint from Mr Allen, in which he contends that the content of the report as tabled, so far as it relates to him, was not notified to him pursuant to section 86 of the Act.

He points out that in the CCC report it is stated that "*in agreeing to appoint the departmental officer preferred by Mr Burke <u>to write the DPI report</u> on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial*" (emphasis added); but the notification to him of 19 January 2007, to which he responded at some length in his letter of 13 February 2007, contained no allegation that Mr Allen had agreed to a point Ms Pedersen (the officer referred to) to "*write the DPI report on Smiths Beach*". Relevantly, it stated only that Mr Allen had telephoned Mr Burke and "*confirmed that he had spoken to Ms Pedersen and that <u>she would be able to become involved</u>*". (emphasis added)

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Mr Allen claims that it was never suggested to him, prior to the publication of the CCC report, that he had agreed to appoint Ms Pedersen to write the report; that in fact he never agreed to do so; and that there is no evidence that he either made such an agreement, or that he did appoint her.

He further contends that there is also no evidence that Ms Pedersen became involved "*in preference to other DPI employees*" in any capacity, and certainly not to write the report; and that the writing of a report would require input from a number of people, including, appropriately, Ms Pedersen (because of her position within the DPI) but not to the exclusion of others, or in preference to them.

It would be appreciated if, as soon as convenient, the Commission would:

(a) provide me with its comments on the matters I raised in my letter of 9 August 2007; and

(b) also provide me with its comments on the contentions by Mr Allen that

  (i) there has not been compliance with section 86, and

  (ii) that there is no evidence to support either the assertion that he agreed to appoint Ms Pedersen "*to write the DPI report on Smiths Beach;* nor even the proposed statement notified in January 2007, that Mr Allen had arranged for Ms Pedersen's participation "*in preference to other DPI employees*".

Yours faithfully

Malcolm McCusker QC
PARLIAMENTARY INSPECTOR

copy: Mr Michael Cashman Michael.Cashman@ccc.wa.gov.au

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your ref: MJMcC:hmc:96/07
Our ref: 01853/2005

30 October 2007

Mr M McCusker AO QC
Parliamentary Inspector of the Corruption and Crime Commission
Level 3
45 St Georges Terrace
PERTH WA 6000

Dear Inspector

COMMISSION INVESTIGATION AND REPORT
MR M ALLEN

Thank you for your letter dated 15 October 2007 which sought the Commission's comments on –

- Matters raised in your letter dated 9 August 2007, and
- Mr Allen's contention that the Commission had "... not complied with ..." section 86 of the *Corruption and Crime Commission Act 2003* ('CCC Act').

I address each of these matters *seriatim* –

Matters raised in your letter dated 9 August 2007 – Mr Allen's complaints

Over reliance on telephone intercept by CCC as "evidence" of allegations of corruption or misconduct, with no further investigation or checking of allegations.

The Commission's investigation was commenced in September 2005. Warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) were obtained and information lawfully intercepted.

The Commission also employed so-called 'traditional' investigative methodologies which included the gathering and analysis of a large amount of material in the form of documents and witness statements, the service of notices, physical surveillance, and

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liaison and cooperation with a range of government and local government public officers and others.

In March 2006, private examinations were held in which five witnesses were called. No lawfully intercepted information was given in evidence in those proceedings. In September/October 2006 public examinations were held in which 38 witnesses were called. Lawfully intercepted information was given in evidence in those proceedings in relation to one witness only. In October 2006, section 101 CCC Act search warrants were executed at the home addresses of Messrs Burke and Grill. A large volume of documentary exhibits was obtained, which included emails retrieved from computers. In December 2006 eight witnesses were recalled and asked about issues including TI product and the documents obtained from the computers of Messrs Burke and Grill.

Mr Allen also opines that "I was accused of sending an email to a Committee member to further their cause. Not only was the email not produced in evidence by the CCC during the hearing, no effort was made by the CCC to obtain a copy of that email. Given the significance of this piece of evidence, I consider the actions of the CCC to be incompetent".

The main body of the email referred to by Mr Allen was retrieved from the computer of Mr Grill and was put to Mr Allen in a public examination. Presumably Mr Allen refers to only one part of that email in his complaint, that being a forwarding note from him to Mike Schramm, which was not presented at the hearings. It is now apparent that the main body of the email and the forwarding note had been saved on Mr Allen's computer, and had been withheld from the Commission by Mr Allen despite the service of notices and/or summons on both the Department of Planning and Infrastructure and Mr Allen requiring production to the Commission of relevant material etc.

Mr Allen gave evidence before the Commission on 1 November 2006 and at line 26, and page 720 of the transcript he was asked in relation to his contact with Mr Burke "What about any other forms of communication, letters, emails, anything of that nature?" Mr Allen replied "No".

Mr Allen was recalled to the Commission on 5 December 2006 and, after admitting having read the previous days transcripts in which he admitted being aware of the email in question, he did not initially volunteer his knowledge of it.

At page 1282 of the transcript Mr Allen was asked (in relation to the hearing) "What did you do by way of preparation?". He replied "I did go through the emails that I still had on my computer....." He went on to admit that he had done that prior to giving evidence on 1 November and explained "I may have deleted it.....I don't retain every email that's sent to me". The body of the email referred to (Exhibit E9830) by Mr Allen was shown to him at page 1289 of the transcript.

Ignorance of planning processes and procedures including my role as an Executive Director of DPI, and no action to overcome the ignorance

Throughout the Commission's investigation, investigators interviewed numerous planners who assisted the Commission. Some of those planners were consulted, and they provided information regarding planning issues. However the matters the subject of the Commission's investigation were not complex.

Mr Allen also opines that '[t]here was an overt assumption by the CCC that Messrs. Burke and Grill (and their clients) would gain a benefit from this amendment being deferred".

The Commission's report tabled on 9 October 2007 indicates that Canal Rocks Pty Ltd's strategy was to delay and defer amendment 56 and amendment 92, in order that the development might be approved under the original Town Planning Scheme.

Mr Allen also opines that "this demonstrates that counsel assisting had no understanding whatsoever about the issue in question" and later in his letter "counsel assisting should be employed with expertise in planning matters".

Counsel Assisting Mr SD Hall SC and Mr P Urquhart are both vastly experienced counsel, each of whom had an in depth understanding of the matters involved in the investigation.

Public pillorying and vilification of me as a result of my appearance at the CCC

Mr Allen states "My appearance at the CCC hearings with all factual errors, untested suspicions and misunderstanding of planning issues" resulted in the media embellishing the facts. He goes on to suggest that the *Four Corners* television programme and *The West Australian* newspaper had portrayed him as corrupt. He states he complained to the Press Council about reporting by *The West Australian* which published an apology.

Mr Allen's assertions of "factual errors, untested suspicions and misunderstanding of planning issues", are incorrect. Throughout the hearings, the Commission considered the evidence of witnesses. It identified and produced documents, lawfully intercepted information and accurate transcripts of such information. In the Commission's view, the *Four Corners* programme accurately reported Mr Allen's role in the Smiths Beach development. It is unfortunate that *The West Australian* newspaper appears to have inaccurately represented the facts.

No opportunity to clarify points raised by counsel at the hearings or to correct errors of fact presented by CCC

By letter from the Commission dated 19 January 2007, Mr Allen was advised that the final submissions of counsel assisting included two (2) opinions that he had engaged in misconduct. Mr Allen made representations by letter dated 13 February 2007.

Harassment of the CCC in the form of a letter with false accusations and threats of dismissal

By letter from the Commission dated 19 January 2007, Mr Allen was advised that the final submissions of counsel assisting included two (2) opinions that he had engaged in misconduct. Mr Allen made representations by letter dated 13 February 2007. Mr Allen's assertion that the letter constitutes harassment by the Commission is wrong. The letter contains no false accusations and outlines the possible consequences of the Commissions findings.

CCC operating from culture of vindictiveness, bias and no respect for human rights; unacceptable delay in releasing the final report; use of public hearings with little or no justification and failure of presiding Commissioner to hand down report

The Commission's response to these complaints is found in Parts 1.3 to 1.7 inclusive of its report which canvasses the report's purpose and function, the expression of opinion on conduct falling short of misconduct, reaching an opinion, the perpetual nature of the Commission and Commissioner and matters adverse respectively.

I note that the final submissions of counsel assisting included two opinions that Mr Allen had engaged in misconduct. The Commission's report expressed only one opinion that he had engaged in misconduct. Thus it cannot be said that the Commission failed to consider his representations or that Acting Commissioner McKerracher QC failed to make an independent assessment of the matter.

Non-compliance with section 86 of the CCC Act etc

By letter from the Commission dated 19 January 2007, Mr Allen was advised that the final submissions of counsel assisting included two opinions that he had engaged in misconduct. Mr Allen made representations by letter dated 13 February 2007. The Commission's report expresses one opinion that the public officer engaged in misconduct. This opinion is substantially the second opinion expressed in counsel assisting's submission, that is:

> "Mr Allen's conduct 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 section 4(d)(ii) and (vi) of the Act".

I observe that in its report the Commission said, at page 21, 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 ...".

Viewed objectively it cannot be said that Mr Allen has been 'left in the dark' as to the risk of the Commission forming an adverse opinion or that he has been confronted with an adverse opinion upon a totally new point or issue. The publication of the opinion in the Commission's report is not the publication of new or different material constituting a matter adverse. Accordingly, I do not propose to comment on Mr Allen's contention that there is no evidence to support either of the assertions concerning Ms Petersen.

Yours sincerely

The Hon LW Roberts-Smith RFD QC
Commissioner

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Our ref: MJMcC:096/07

13 February 2008

By email: Comm.LWRS@ccc.wa.gov.au

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Michael Allen

1. Thank you for your letter of 13 February 2008, and the very detailed explanation of the Commission's position.

2. I would be grateful if you would advise me of the names of those personnel (apart from Messrs Allen, Frewer and Crimp) who were either examined or interviewed for the purpose of the Smiths Beach investigation, and who were (or had been) DPI officers.

3. To the extent that the evidence of such examinees or interviewees is relevant to the conduct of either Mr Frewer or Mr Allen, could you please forward to me a transcript of that evidence.

4. I would also be grateful if the Commission could identify for me the precise evidence which supports the Commission's opinion to which you refer at the foot of page 5 and top of page 6 of your letter.

5. Without limiting that request, I would in particular appreciate your identifying the evidence which the Commission obtained in the course of its investigation (including, of course, any private or public examination) that

   (a) Mr Burke requested Mr Allen to appoint (or cause the appointment of) Ms Pedersen to write "*the DPI report*" in preference to other DPI officers;

   (b) Mr Allen agreed to do so;

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(c) Mr Allen did arrange for Ms Pedersen to write "*the DPI report*"; and

(d) Mr Allen "agreed" that failing that (ie failing Ms Pedersen writing it) Mr Singleton would do so.

6. I note your explanation, at p5 of your letter about "the DPI report", that it could be "*variously*" described as "*assessment*" or a "*letter*" or a "*report*". Unfortunately, that explanation does not appear in the Commission's report. Could you please send me a copy of "*Attachment 4 to the DPI Investigator's Report*", and advise whether this was provided to counsel assisting the Commission before either of the public examinations of Mr Allen.

7. At the beginning of the last paragraph of your letter, you say that "*nowhere in its report did the Commission say that Mr Allen ... did direct that Ms Pedersen write the report*", and that the conduct of Mr Allen which was the subject of the Commission's opinion was in "*agreeing to appoint the departmental officer preferred by Mr Burke to write the report*". However, at page 80 of the Commission's Report (as you note at the foot of page 5 of your letter) it is stated that Mr Allen's "*lack of integrity*" was in "*complying with the wishes of Mr Burke ... in regard to the appointment of (Ms Pedersen) to write a report*". Is the Commission's opinion of Mr Allen's conduct confined to his having "agreed" to appoint Ms Pedersen (or failing her, Mr Singleton) to write "*the DPI Report*", and not that he did, in fact, appoint her (or cause her to be appointed)? If so, what is intended by the phrase "complying *with the wishes of Mr Burke*"? To me, at least, it means that he did what Mr Burke wished him to do, viz appoint Ms Pedersen.

8. In my letter of 5 February 2008, paragraph 9, I referred to an earlier letter of 15 October 2007, when I raised the question of whether there had been compliance with section 86, the point being that the Commission's 86 notice of 19 January 2007 stated that a possible adverse finding was that Mr Allen had arranged for Ms Pedersen to be "involved" in the DPI's assessment of the proposed development of Smiths Beach and that Mr Allen had arranged for her "participation in preference to other DPI employees".

9. The ultimate adverse finding, however at page 80 of the report, was that Mr Allen had "agreed" to appoint Ms Peterson to "*write the DPI report on Smith's beach in preference to other officers*", and he had "*complied with*" Mr Burke's wishes.

10. The Commission's response to this, at pages 4 and 5 of its letter of 30 October 2007, was that "viewed objectively it cannot be said that Mr Allen has been left in the dark as to the risk of the Commission forming an adverse opinion or that he has been confronted with an adverse opinion upon a totally new point or issue".

11. With respect, while it is true that Mr Allen was given notice of "the risk of the Commission forming an adverse opinion", what appeared in the Commission's report is significantly different from what appeared in that notice, as support for the potential adverse finding. The report asserts that Mr Allen had agreed to appoint Ms Pedersen to "write the DPI report" in preference to other officers, as distinct from arranging for her to "be involved" in the DPI's assessment, as was put in the section 86 notice. Mr

Allen's representation in his reply of 13 February 2007 acknowledged her "involvement" in the assessment, pointed out that, as Manager, Coastal Planning, this was entirely appropriate, and denied that her involvement was "*to the exclusion of other DPI employees*".

12. Had Mr Allen been notified, in the section 86 notice, that the Commission was proposing to report that he had "*agreed*" to appoint Ms Pederson to "*write the DPI report on Smiths Beach in preference to other officers*" and had "*complied with Mr Burke's wishes*", he could have established that he had not agreed to appoint her to write "*the DPI report*"; that he had not appointed her (and had no authority to appoint her) to do so, and that all he did was to confirm to Mr Burke that she would be the "*entry point*" for submissions to the DPI on the Smiths Beach project.

13. Does the Commission wish to make any further representations as to compliance with section 86, beyond those made in its letter to me of 30 October 2007?

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Your ref: MJMcC:096/07
Our ref: 01853/2005

18 February 2008

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption & Crime Commission
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Parliamentary Inspector

MICHAEL ALLEN

I refer to your letter dated 13 February 2008. I will respond to it using your paragraph numbering.

Paras 2 & 3: These requests do not accommodate the nature of the investigative process, which is not confined to the taking of formal statements or the examination of witnesses in hearings. In the course of the Smiths Beach investigation, for example, investigators made enquiries of agencies, departments, the electoral office, town planners and numerous other persons or bodies to ascertain the character, processes and considerations bearing upon the issues raised in the investigation. Those contacts ranged from telephone calls taking a few minutes, to discussions or meetings taking some hours. They were not necessarily conducted in any sense as "interviews," but as simple enquiries or consultations. Their purpose was to develop an understanding of these matters, which would inform the conduct of the investigation into the facts and into the roles of the individuals involved.

There were, for instance, consultations with a number of people in Busselton (including Mr Bancroft) directed to obtaining a practical understanding of Council processes, and of the Busselton Council processes specifically.

Mr Bancroft had formerly been an officer of DPI for many years, and gave the Commission investigators extensive information about that department's organization, methods, personnel and processes. I

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understand he was spoken to about these matters on approximately 20 occasions. Investigators spoke to Mr Matthew Smith (the Shire solicitor) a similar number of times, and Mr Aaron Bell, Senior Planner for the Busselton Shire, on some 10 occasions.

It would be fair to say Commission officers spoke to numerous people (estimated to be in excess of 100) in this way. Many of those persons were consulted on multiple occasions. Some of them agreed to speak only in strict confidence, as they did not wish the fact they were cooperating with or assisting the Commission to be known. I should point out that I am referring here to people whose information did not go to the actions of the particular persons the subject of the investigation, but was of general background only.

In the course of the investigation the Commission also obtained and examined an enormous quantity of documents. Most of those were obtained by way of notices issued under s.95 of the CCC Act. These were supplemented by notices issued under s.94 requiring the persons to whom they were addressed to provide a "Statement of Information".

By way of illustration, I enclose herewith:

- S.94 notice to Mr Greg Martin, Director General of DPI, 16 June 2006;
- S.95 notice to Mr Martin, 28 September 2006 (I understand he produced 6 boxes of documents from DPI, since returned);
- S.95 notice to Mr Michael Schramm, South West Region Planning Committee, 20 October 2006;
- S.95 notice to Mr Robert Vogel, Coordinator of Administrative Services, DPI, 25 July 2006.

(I have omitted the proforma parts of the notices)

I also enclose herewith the following statements or recorded interviews:

1. Telephone interview with Mike Schramm, 18 October 2006
2. Recorded interview with Barbara Pederson, 7 May 2007
3. Recorded interview with Karl White, 23 November 2006
4. Statement of Robert Vogel (telephone), 12 December 2007
5. Statement of John Mercadante, 19 December 2007

The understanding gained from this aspect of the investigation was reflected in the further conduct of the investigation itself, oral and written briefings to Counsel Assisting, the opening address by Counsel Assisting and no doubt the conduct of the examination.

Whilst it would no doubt be possible to compile a complete list of all persons spoken to who were (or had been DPI) officers, from running-sheets and investigators' notes, you will appreciate that would probably take some time and require the attention of possibly all of the investigating officers. Your requests are already having a significantly

detrimental effect on the Commission's limited staff resources, and I would therefore ask whether or not the above information is sufficient for your purposes.

If these particular requests are directed to the complaint made by Messrs Allen and Frewer that the Commission and Counsel Assisting had an inadequate, or no, understanding of relevant DPI processes (which I assume it to be), I should make the point that in an investigation (as in a trial before a court) the fact that Counsel asks a question does not necessarily mean (and often will not mean) that Counsel does not know the answer or does not understand what he or she is asking about.

Paras 4 & 5: With respect, I would have thought the precise evidence which supports the Commission's opinion at the foot of page 5 and the top of page 6 of my letter to you of 13 February 2008 has already been identified to you from pages 6 to the top of page 13 of that letter.

Para 6: The Smiths Beach Report used the term "report" as a descriptor of the document Mr Burke and Mr Allen were talking about, because that was the term used by Mr Burke in his telephone conversation with Mr McKenzie on 4 August 2006. In his conversation with Mr Allen's executive assistant at 10.54 on 4 August, he referred to it as

> "... a matter of the DPI position on the developable area at Smiths Beach", and
> "... the opinion of the DPI on that question".

In his conversation with Mr Allen at 2.52pm on 4 August 2006, Mr Burke referred to and explained the Smiths Beach people were

> "... keen to get some assessment of the developable area".

Speaking to Mr McKenzie at 4.36pm that day, Mr Burke described the document as a "report". Mr McKenzie later in the same conversation reiterated that it was to do with "the developable area". (I set out that portion of the transcript of that call at p.9-11 of my letter to you of 13 February 2008).

At the time of its Smiths Beach Report, the Commission did not know precisely what "report" or document was the subject of these discussions. It was, however, clear that whatever it was precisely,

- it had to do with the assessment of the developable area;
- it was in some way to give the DPI "opinion" in relation to that;
- it was being (or had to be) prepared within DPI; and
- Mr Burke's clients wanted it completed and wanted the "opinion" to be favourable to them (which was hardly surprising).

Given the already wide scope of the Smiths Beach investigation, the Commission considered it unnecessary to pursue the issue of what the particular document was further, because Mr Allen's failure was in agreeing to comply with Mr Burke's wishes to serve the interests of his client.

The DPI investigation report dated 16 January 2008 concluded (at p.29) that –

"• There was no requirement for an officer within DPI to produce 'the Department's report'; either as described by Mr Burke, or as referred to in the CCC Report.

• 'The Department's report' is more correctly described as an appraisal of the extent to which the Landscape Study, produced by a consultant, adhered to the methodology set down in the Shire of Busselton TPS. The appraisal involved iterative feedback to the consultant by environmental planners within DPI. The process was formally concluded by correspondence in a two-stage process in September 2006".

The Commission suggests those findings are inherently inconsistent. The "appraisal" described in the second dot point above is clearly the document which was the subject of the agreement between Mr Burke and Mr Allen – which confirms the correctness of the Commission's assessment of the evidence before it, in that regard.

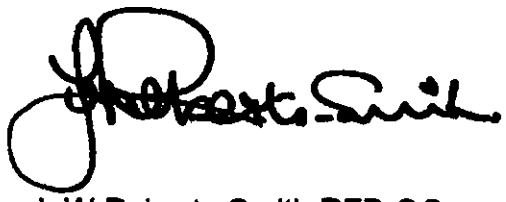
I understood you had a copy of the DPI Investigator's report in respect of Mr Allen. The relevant documents are attachment 4 to that. In any event, I enclose a copy herewith, as you request.

Para 7: I take you to be referring here to the last paragraph at p.5 of my letter of 13 February. The Commission's opinion is most particularly set out at the top of p.6, the penultimate paragraph at p.13 and at pages 15 and 16 of that letter. Mr Allen "complied" with Mr Burke's wishes by agreeing to arrange for Ms Pedersen's involvement in the DPI assessment of the proposed development at Smiths Beach, in the circumstances and for the purpose already described. The fact of Mr Allen's agreement was further evidenced by Mr Allen speaking to Ms Pedersen about that and arranging her involvement to the extent she was able to be involved given her "disastrous schedule".

Paras 8 – 12: The Commission's response to the matters raised here has already been given at pages 14 – 17 of my letter of 13 February 2008.

Para 13: The Commission's further representations as to compliance with s.86, beyond those made in its letter to you of 30 October 2007, are those in my letter of 13 February 2008.

Yours faithfully



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

Encs.

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

20 February 2008

By email:

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Michael Allen

1. Thank you for your letter of 18 February 2008, with enclosures. I appreciate the prompt response, although I am afraid that it did not identify, as I requested in paragraphs 4 and 5 of my letter the "precise" evidence (by which I meant relevant passages from examinations, public or private, from TIs, or interviews) which the Commission considers supports the opinions referred to at the foot of page 5 and 6 of your letter. The stated "reasons" for those opinions fail to identify, as I requested, the evidence which supports those "reasons".

2. I have read the record of interview of Barbara Pedersen conducted by Mark Ingham and Dave Allen. Some aspects of their conduct of that interview concern me - in particular, propositions which were put to Ms Pedersen which do not appear to have any factual basis.

3. As the questions were put by Mr Ingham, I would like to interview him, to explain the reason for my concern, and to give him the opportunity to respond. Would you please ask Mr Ingham if he would be available to meet with me, for an interview at the offices of the Commission on 26 February 2008 at 10am. If possible, I would like to have audio equipment made available, so that the interview may be recorded. Mr Ingham should have with him a copy of the transcript of the interview, together with any of the TIs referred to in the interview, and the Investigation Report.

4. I do not, of course, wish to unduly inconvenience or disrupt any operation in which Mr Ingham may be involved, so if that time is not suitable, I would ask that he telephone me, before the end of this week, to fix an alternative time.

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

Locked Bag 123, Perth Business Centre, 6839
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Email: picce@picce.wa.gov.au

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Our ref: MJMcC:096/07
Your ref: 01853/2005

21 February 2008

By email: [redacted]
The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Michael Allen

Thank you for your letter of 20 February 2008. As the questions which I raised at paragraph 1 of my letter of 20 February 2008 were a reiteration of the request at paragraphs 4 and 5 of my letter of 13 February 2008, I would be most grateful if you could let me have a substantive response very soon.

The purpose of my proposed interview with Senior Investigator Ingham is both to assess the appropriateness of the procedure adopted by him, in his questioning of Ms Pedersen (section 195(1)(c) of the Act) and also to determine whether there is any basis for conducting a "misconduct" inquiry (section 195(1)(b) of the Act).

As you know, the powers conferred on the Parliamentary Inspector under section 196 of the Act are extremely wide, including (without limiting the generality of the power conferred by section 196(2)) the power to investigate any conduct of Commission officers (section 196(3)) and to require officers to attend before me and answer questions or produce documents (section 196(3)(d)).

I would be grateful if you could confirm that Senior Investigator Ingham will attend the interview, as requested, and that the Commission will make audio equipment available, so that the interview can be recorded.

I would, of course, be more than happy to discuss this matter with you, if you would like to raise any further questions.

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

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PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

29 February 2008

By email:
The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Michael Allen - Investigation

1. As foreshadowed and arranged, I met with Mr Mark Ingham, senior investigator of the CCC, at 10am today. I gave permission to a barrister engaged on Mr Ingham's behalf by the CCC to be present, although I pressed on him the confidentiality of the proceedings.

2.

3.

4. Pursuant to section 200 of the CC Act, I am writing to formally notify the Commission that it is my present proposal subject to any representations in that regard, to include the following "adverse" matters, in a report to the Parliamentary Inspector :

   (a)

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(b) In the course of the interview, Ms Pedersen said, more than once, that she had not been instructed or asked by Mr Allen to write a "report". That was relevant evidence which ought to have been referred to in the CCC report of October 2007, but no reference was made either to that evidence, or to any other part of the interview of Ms Pedersen, in particular her evidence that she was unaware of any "report". Mr Ingham states that he had read the proposed CCC report before it was tabled, but that he did not, at the time, appreciate that there was no reference to his interview with Ms Pedersen, or of her evidence, that she had not been asked to write a report by Mr Allen, and had not done so. He added that he did not believe Ms Pedersen, but did not explain why.

(c) The CCC's investigation failed, before making a finding of misconduct, to interview witnesses who were clearly relevant to the finding of misconduct ultimately appearing in the Report. Those witnesses were Ms Klegg, Mr Singleton and Ms Cherrie. The CCC investigation also failed to determine what, if any, "report" was being prepared, and who prepared it. It was an inadequate investigation for the purpose of whether or not to make a serious finding of "misconduct". Mr Ingham's explanation is that although evidence from those witnesses, and the question of the existence of a report, was "relevant' and would have been evidence to be obtained if the investigation were of a criminal offence, it was not necessary for the CCC to establish misconduct "beyond reasonable doubt", and it was therefore not necessary to obtain this further evidence. He added that at the time, the CCC's resources were stretched. The failure to obtain this further evidence, and to refer to it in the report, resulted in a flawed conclusion, based on inference rather than evidence, in the report concerning Mr Allen.

(d) The view taken by the CCC, and referred to in the interview of Ms Pedersen, that there was a "report", was based on an IT conversation between Mr Burke and Mr McKenzie. That was "hearsay", and an unsafe and inappropriate basis upon which to proceed with the questioning, in public examination of Mr Allen, and to conclude "misconduct".

2. When I spoke with Mr Michael Cashman earlier today, following the interview of Mr Ingham, I reserved the question of whether the transcript of that interview should be made available to the Commission. I have now confirmed to Mr Cashman that it may be made available, as you will undoubtedly wish to refer to it for the purpose of responding to this notice.

3. I should add that the above proposed adverse findings have been foreshadowed in the course of the interview of Mr Ingham, and he has given his responses. I therefore request that you provide me with any further response that the Commission wishes to make, by close of business Tuesday, 4 March 2008.

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

Your Ref:
Our Ref: LWRS/MP

4 March 2008

By Email: mccuskerqc@iinet.net.au

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the
Corruption and Crime Commission
Floor 3, 45 St Georges Terrace
PERTH WA 6000

Dear Parliamentary Inspector

MICHAEL ALLEN - INVESTIGATION

I refer to your letter dated 29 February 2008 and will respond using your paragraph numbering.

Paragraph 3:

Paragraph 4 (a)

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Telephone: 08 92154888 Facsimile: 08 92154884
Email: info@ccc.wa.gov.au
Website: www.ccc.wa.gov.au

Paragraph 4 (b) In her interview on 7 May 2007, when Ms Pedersen was asked whether she had been involved in writing a "report", she said first that –

> "... I'm not clear that I wrote any report or that a report was prepared by my Statutory Planning Staff (sic)" (p12),

and later in the interview, when it was put to her that

> "... on a later date, he actually asked for you to write the report, he didn't want somebody call Klegg".

She responded (at p15) –

> "Ah okay now I can explain to you what's happening there, he probably would have been wanting (sic) for a report on how the visual landscape assessment had been treated ... and that's quite a technical matter".

Later she said she was "hesitating to say there was a report because [she couldn't] remember exactly where we put it to" (p20) and that they worked together on shaping the response to what was on the table at that point and it went over her signature. (That, however, was clearly not the document Mr Burke was talking about.)

Asked again about the Burke/Allen conversation, she said (p21) –

> "I've got no clear recollection of anyone instructing me ..." (emphasis added)

and

> "I don't remember anyone in management instructing me" (emphasis added)

and (at p22) –

> "... I don't remember that ever being communicated to me because it was work that was already on my work program" (emphasis added)

and (at p23) –

> "I have absolutely no memory of Mike ever saying any such thing to me" (emphasis added).

She then went on to suggest there may have been another "less formal process from Mike's point of view" and he may have had a conversation with the then Director of Coastal Planning, Mr Singleton, to be confident it was indeed coming from Coastal Planning, and maybe it was he who checked she was doing it. She said she did not remember Mr Singleton asking whether she was doing that report, and then added (p25)

> "... when you say report I mean report to me suggests a formal document that might go to the South West Region Planning Committee which is a formal agenda paper and a report and I kinda I don't have a memory of doing any formal report coming out of my team like. I think there was (sic) some responses so letters in response and in that sense yes I do remember and there was, there was also a letter in response on how they did there (sic) visual landscape assessment. Tara Cherry (sic) did that ...".

For the reasons previously explained, that last document which she mentioned was in the Commission's view the one which had been the subject of Mr Burke's conversations.

Later, she again said (at p26) that –

> "...I don't think I was ever given a direct instruction to produce a report ...".

At p27 she again expressed puzzlement about what "report" could have been referred to –

> "... now your (sic) saying report and I'm really disturbed because my memories (sic) more like letters or advice back to Shire or what if was ..."

and then added –

> "I do remember Jim Singleton wanting us to get some advice back quickly and I think that was a letter about the landscape the visual landscape assessment".

Asked if she remembered when that meeting took place, she responded that –

> "It wasn't a meeting it was uhm bit of corridor conversation".

Later again, she firms up (at p31) her view that what was being talked about was the visual landscape assessment. SI Ingham accepted that was likely to be correct (p32) and referred her to the fact Mr Allen had said he had already spoken to Ms Pedersen about it, to which she replied -

"He may have done again ... but it's not, it's normal for us to very lightly touch base. It's not something that stands out in my memory at all" (emphasis added).

Finally, (at p34) she said –

"... my memory does not give me any detail of whether (sic) ever spoke to me about the letter or anything".

What appears from the evidence therefore is that although Mr Burke referred to the relevant document Canal Rocks was awaiting from the Department of Planning and Infrastructure (DPI) as a "report", it was actually a letter from DPI approving the methodology used in the consultant's report on the developable area and visual landscape assessment. In the circumstances, nothing turns on the use of the word "report". Nor did Ms Pedersen say in her interview, that she had not been asked by Mr Allen to write it (whether described as a report or a letter) – she said she had no recollection of that but eventually conceded he may have spoken to her about it (which Mr Allen himself said he had).

Making a determination of the extent to which it is necessary to discuss individual items or aspects of evidence in a Commission report will always be a matter of judgment which will vary depending upon the writer. It may be expected that particular evidence would be discussed if it adds to the narrative or underpins the process of reasoning leading to any opinion or recommendation. There may be other reasons why particular evidence should be discussed in individual instances, depending on the circumstances.

Of course there could have been some discussion of Ms Pedersen's interview in the Smiths Beach Report, but not to do so did not make the Report deficient, especially when the opinion on this aspect was that the relevant misconduct was in the agreement made in the telephone conversation between Mr Burke and Mr Allen on 4 August 2006.

Paragraph 4 (c): You assert that the Commission's "failure" to interview Ms Klegg, Mr Singleton and Ms Cherrie, and to determine what, if any, "report" was being prepared and who prepared it, resulted in a flawed conclusion based on inference rather than evidence, in the Report concerning Mr Allen.

Again, as I have pointed out, the gravamen of the Commission's concern about Mr Allen's conduct was his agreement to do what Mr Burke wanted, in the interests of Mr Burke's clients. The evidence before the Commission showed that beyond that, Mr Allen had in fact approached Ms Pedersen about it (despite her maintaining she had no recollection of that); Mr Burke had told Mr McKenzie to telephone and meet with her; and Mr McKenzie did telephone and meet with her and they discussed the fact that the issue of the developable area and visual landscape assessment was a "sticking point".

Your assertion that the Commission's conclusion was "flawed" is predicated on an assumption that the matters to which you refer would have led to a conclusion that there was not an agreement of the kind described. With respect, that assumption is not justified. It is common experience that despite agreement to do something subsequent events or circumstances prevent the agreement being put into effect in the way agreed, or perhaps even at all. In this instance, as Mr Allen himself pointed out, Ms Pedersen's then existing work commitments were such that her schedule was "disastrous" – although (in fact) she was able to at least be the point of entry for Mr McKenzie. What actually happened subsequently tends to support, rather than detract from, the opinion expressed by the Commission in the Smiths Beach Report, that Messrs Burke and Allen did reach the agreement described.

Paragraph 4 (d): You maintain that the view taken by the Commission, and referred to in the interview of Ms Pedersen, that there was a "report" was based on a TI conversation between Mr Burke and Mr McKenzie. You say that was "hearsay", and an unsafe and inappropriate basis upon which to proceed with the questioning, in public examination of Mr Allen, and to conclude "misconduct".

Section 135 of the *Corruption and Crime Commission Act 2003* expressly provides that the Commission is not bound by the rules of evidence and can inform itself on any matter in such manner as it thinks fit.

That section reflects the position which applies generally to Royal Commissions and commissions of inquiry.

Hearsay evidence may be, and routinely is, received in evidence before such bodies. In some circumstances, with appropriate precautions, it may be used as probative material for making findings of significance.

The Commission takes the position that before making any determination of fact involving the assessment of hearsay evidence, it should weigh that against all the other evidence before it on the issue in question and then give the hearsay evidence such weight as that consideration suggests it deserves.

In this instance, whilst it is correct to say that the word "report" came out of the telephone conversation between Mr Burke and Mr McKenzie, the conclusion that (however described) the document they were talking about – and which Mr Allen and Mr Burke were talking about – was the same thing, was inescapable. It was the DPI response on the methodology of the report on developable area and visual landscape assessment. And self-evidently the one Burke/McKenzie conversation to which you refer was not the only evidence of the document which Mr McKenzie (and hence Mr Burke) wanted from DPI. That also included a telephone conversation between Messrs Burke and Mckenzie at 1059 hours on 4 August 2006 (copy attached); Mr Burke's telephone call to Mr Allen's office at 1054 hours on 4 August 2006 (made while Mr Burke was still on the line to Mr McKenzie in the previous call);

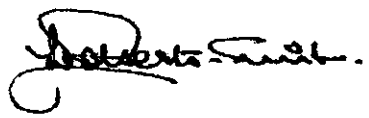
and the Burke/Allen telephone conversation at 1452 hours on 4 August 2006, as well as what Ms Pedersen said about it, which I have already mentioned. It was not an "unsafe" basis upon which to proceed and indeed subsequent events, including the DPI disciplinary investigation, showed it to be correct.

In the final paragraph (incorrectly numbered 3) of your letter dated 29 February you say that the proposed adverse findings you mentioned above were foreshadowed in the course of your interview with Mr Ingham, and he has given his responses. You request that I provide you with any "further" response that the Commission wishes to make, by close of business Tuesday 4 March 2008.

Notwithstanding that I consider a requirement to respond to these matters within one working day (1-3 March being a long weekend) is hardly a "reasonable opportunity" to make representations, especially when it necessitated preparing and considering the transcript of your 11/4 hour interview with SI Ingham which concluded at 11.17 a.m. on Friday 29 February – I have endeavoured to meet that request.

[redacted]

Yours faithfully



The Hon L W Roberts-Smith RFD QC
COMMISSIONER

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

5 March 2008

By email:

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Michael Allen Investigation

1. I refer to my letter of 29 February 2008, which I discussed with you yesterday morning. Incidentally, that letter contained a typographical error in the third line of paragraph 4 when referring the "*Parliamentary Inspector*" which should obviously be a reference to the Parliamentary Committee, and (as you correctly note in your letter of 4 March 2008) wrongly numbered the last 2 paragraphs, which should be 5 and 6, not 2 and 3. Please amend my letter accordingly.

2.

3.

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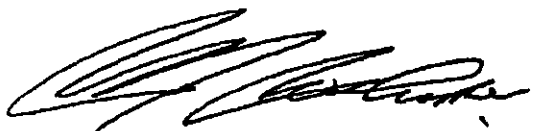
4. Thank you for your prompt response of 4 March 2008 to my letter of 29 February. As I understand the Commission's present position, it is not claimed that Mr Allen instructed, or arranged for, Ms Pedersen to write a "*report*" (or a document, however described), nor that he agreed with Mr Burke that he would do so. The "*substituted*" opinion is that he "agreed" with Mr Burke to arrange for her "*involvement*", in preference to Ms Clegg, "*in the DPI's assessment of the proposed development at Smiths Beach*". And, as I understand your letter (see top of page 5) it is not contended that he did arrange for her "involvement" either "in preference to Mr Clegg" or at all, just that he "*agreed*" to.

5. As to hearsay, I appreciate, of course, that the Commission (by virtue of section 135) is not bound by the rules of evidence. However, the evidence to which you refer at the foot of page 5 and top of page 6 is all "*hearsay*", save for the Burke/Allen call of 4 August 2006, in which no reference was made, either to a report, or any other document, nor to arranging Ms Pedersen's involvement in preference to Ms Clegg.

Yours faithfully



Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

APPENDIX 3

FUNCTIONS OF INSPECTORS IN AUSTRALIAN ANTI-CORRUPTION AGENCIES

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
Relevant legislation	• *Corruption and Crime Commission Act 2003 (WA)*	• *Independent Commission Against Corruption 1988 (NSW)*	• *Crime and Misconduct Act 2001 (Qld)*	• *Police Integrity Commission Act 1996 (NSW)*	• *Major Crime (Special Investigations Monitor) Act 2004 (Vic)* • *Police Regulation Act 1958 (Vic)* • *Major Crime (Investigative Powers) Act 2004 (Vic)* • *Surveillance Devices Act 1999 (Vic)* • *Telecommunications (Interception) (State Provisions) Act 1988 (Vic)*
Title of Inspector	Parliamentary Inspector of the Corruption and Crime Commission	Inspector of the Independent Commission Against Corruption	Parliamentary Crime and Misconduct Committee Parliamentary Crime and Misconduct Commissioner	Inspector of the Police Integrity Commission	Special Investigations Monitor

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
Establishing provision	Section 188 *Corruption and Crime Commission Act 2003 (WA)*	Section 57A *Independent Commission Against Corruption 1988 (NSW)*	Committee - Section 291 *Crime and Misconduct Act 2001 (Qld)* Parliamentary Commissioner - Section 303 *Crime and Misconduct Act 2001 (Qld)*	Section 88 *Police Integrity Commission Act 1996 (NSW)*	Section 4 *Major Crime (Special Investigations Monitor) Act 2004 (Vic)*
Functions of Inspector	Section 195 *Corruption and Crime Commission Act 2003* • audit operation of the Act; • audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State; • to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector; • to audit any operation carried out pursuant to	Section 57B *Independent Commission Against Corruption 1988* • to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State; • to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission; • to deal with (by reports and recommendations)	Committee - Section 292 *Crime and Misconduct Act 2001* • to monitor and review the performance of the commission's functions; • to report to the Legislative Assembly, commenting as it considers appropriate, on either of the following matters the committee considers should be brought to the Assembly's attention— (i) matters relevant to the commission; (ii) matters relevant to the performance of the commission's	Section 89 *Police Integrity Commission Act 1996* • to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State; • to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission; • to assess the effectiveness and appropriateness of the procedures of the	Section 11 *Major Crime (Special Investigations Monitor) Act 2004* • Has the functions conferred by or under *Major Crime (Special Investigations Monitor) Act 2004* or any other Act. Section 86ZA *Police Regulation Act 1958* • monitor compliance with this Act by the Director, members of staff of the Office of Police Integrity and persons engaged by the Director under section 102E(1)(b); • assess the questioning of persons attending

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
	the powers conferred or made available by this Act; • to assess the effectiveness and appropriateness of the Commission's procedures; • to make recommendations to the Commission, independent agencies and appropriate authorities; • to report and make recommendations to either House of Parliament and the Standing Committee; • to perform any other function given to the Parliamentary Inspector under this or another Act.	conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission; • to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.	functions or the exercise of the commission's powers; • to examine the commission's annual report and its other reports and report to the Legislative Assembly on any matter appearing in or arising out of the reports; • to report on any matter relevant to the commission's functions that is referred to it by the Legislative Assembly; • to participate in the selection of commissioners and the removal from office of a commissioner as provided under this Act; • to review the activities of the commission at a time near to the end of 3 years from the appointment of the committee's members	Commission relating to the legality or propriety of its activities.	the Director in the course of an investigation under this Part concerning the relevance of the questioning and its appropriateness in relation to the purpose of the investigation; • assess requirements made by the Director for persons to produce documents or other things in the course of an investigation under this Part concerning the relevance of the requirements and their appropriateness in relation to the purpose of the investigation; • investigate any complaints made to the Special Investigations Monitor under this Division; • formulate recommendations and make reports as a result of performing above functions.

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
			and to table in the Legislative Assembly a report about any further action that should be taken in relation to this Act or the functions, powers and operations of the commission; • to issue guidelines and give directions to the commission as provided under this Act. Parliamentary Commissioner - Section 314 *Crime and Misconduct Act 2001* • audit records kept by the commission and operational files and accompanying documentary material held by the commission, including current sensitive operations, including for the purpose of deciding the following— (a) whether the commission has		Section 51 *Major Crime (Investigative Powers) Act 2004* • monitor compliance with this Act by the Chief Examiner, Examiners, the Chief Commissioner and other members of the police force; • assess the relevance of any questions asked by the Chief Examiner or an Examiner during an examination to the investigation of the organised crime offence in relation to which the coercive powers order was made; • assess the relevance of any requirement made by the Chief Examiner or an Examiner for a person to produce a document or other thing to the investigation of the organised crime offence in relation to which the coercive powers order was

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
			exercised power in an appropriate way; (b) whether matters under investigation are appropriate for investigation by the entity investigating or are more appropriately the responsibility of another entity; (c) whether registers are up to date and complete and all required documentation is on the file and correctly noted on the registers; (d) whether required authorisations for the exercise of power have been obtained; (e) whether any policy or procedural guidelines set by the commission have been strictly		made; • investigate any complaints made to the Special Investigations Monitor under this Part; • formulate recommendations and make reports as a result of performing above functions. Sections 30P & 30Q *Surveillance Devices Act 1999 (Vic)* • inspection of records to monitor compliance with this Act; • Make reports as a result of performing above functions. Section 10 *Telecommunications (Interception) (State Provisions) Act 1988* • inspect records of the Police Force in order to ascertain the extent of compliance by officers

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
			complied with; • investigate, including by accessing operational files of the commission to which the parliamentary committee is denied access, complaints made against, or concerns expressed about, the conduct or activities of— (i) the commission; or (ii) a commission officer; • independently investigate allegations of possible unauthorised disclosure of information or other material that, under this Act, is confidential; • inspect the register of confidential information kept under section 67 to verify the commission's reasons for withholding information from the parliamentary		of the Police Force with Part 2; • inspect records of the Office of Police Integrity in order to ascertain the extent of compliance by members of staff of the Office of Police Integrity with Part 2A; • report to the Minister about the results of those inspections; • do anything incidental or conducive to the performance of any of the above functions.

	Corruption and Crime Commission (CCC) (WA)	Independent Commission Against Corruption (ICAC) (NSW)	Crime and Misconduct Commission (CMC) (Qld)	Police Integrity Commission (PIC) (NSW)	Office of Police Integrity (OPI) (VIC)
			committee; • review reports given by the commission to the parliamentary committee to verify their accuracy and completeness, particularly in relation to an operational matter; • report, and make recommendations, to the parliamentary committee on the results of performing the above functions; • perform other functions the parliamentary committee considers necessary or desirable.		

Comment/ observation	The general theme is that the inspection function of the inspector in all jurisdictions is that of "audit", "compliance" and "monitoring" rather than substitution of an inspector's opinion as to the particular commission's finding, opinion, comment on evidence etc.