



CORRUPTION AND CRIME COMMISSION

REPORT ON THE INVESTIGATION OF ALLEGED MISCONDUCT CONCERNING REZONING OF LAND AT WHITBY

3 October 2008

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Dear Mr Peacock
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the Act"), the Commission hereby transmits to you a copy of the *Corruption and Crime Commission Report on the Investigation of Alleged Misconduct Concerning Rezoning of Land at Whitby*.

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

Yours faithfully

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

The Hon L W Roberts-Smith RFD QC
COMMISSIONER

3 October 2008

ABBREVIATIONS AND ACRONYMS

“the Act”	<i>Corruption and Crime Commission Act 2003</i>
ALP	Australian Labor Party
ASIC	Australian Securities and Investments Commission
“Bemax”	Bemax Resources Limited
“Cable Sands”	Cable Sands Group
CEO	Chief Executive Officer
“the Commission”	Corruption and Crime Commission
“the Consultancy”	Julian Grill Consulting
“Council”	Shire of Serpentine-Jarrahdale Council
DoIR (or DOIR)	Department of Industry and Resources
DPC	Department of the Premier and Cabinet, Government of Western Australia
DPI	Department for Planning and Infrastructure
DPP	Director of Public Prosecutions
“the FOI Act”	<i>Freedom of Information Act 1992</i>
GST	Goods and Services Tax
GSWA	Geological Survey of Western Australia, a Division of the Department of Industry and Resources
“Iluka”	Iluka Resources Limited
KDC	Kimberley Diamond Company
MOU (or MoU)	Memorandum of Understanding
MRS	Metropolitan Region Scheme
PDC	Peel Development Commission
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the SD Act”	<i>Surveillance Devices Act 1998 (WA)</i>
TI	Telecommunications Intercept (or Interception)
“the TI Act”	<i>Commonwealth Telecommunications (Interception and Access) Act 1979</i>
“Urban Pacific”	Urban Pacific Limited
WAPC	Western Australian Planning Commission

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EXECUTIVE SUMMARY

- [1] During 2005 and 2006 the Corruption and Crime Commission (“the Commission”) investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach Development at Yallingup. The investigation examined the responses of public officers to the activities of Mr Brian Thomas Burke and Mr Julian Fletcher Grill in their role as lobbyists and consultants acting for the developer, Canal Rocks Pty Ltd. Public hearings were held at the Commission in respect of that matter in October, November and December 2006.
- [2] Arising from those inquiries the Commission identified a number of allegations of possible misconduct by public officers arising principally from the lobbying activities of Mr Burke and Mr Grill. Public hearings in respect of these matters were held at the Commission in February and March 2007. Additional investigations were conducted by the Commission into these matters before, at the time of, and following these hearings.
- [3] The Commission conducted these hearings publicly in order to expose and make the public aware of matters that could represent serious abuse of power by senior public officers in order to ensure that good governance within the Western Australian public sector was not compromised. The Commissioner was of the view that hearings conducted in this way would allow public sector agencies to take any expeditious action they thought appropriate.
- [4] One of the allegations investigated by the Commission was the response of public officers to the lobbying activities of Mr Burke and Mr Grill on behalf of Urban Pacific Limited (“Urban Pacific”), part of the Macquarie Group. Urban Pacific was the Development Manager for the development of 504 hectares of land at Whitby, near Mundijong, 38 kilometres south of Perth, purchased by a consortium in November 2005. The land contained minerals including titanium and, at the time of purchase by Urban Pacific, had been zoned “Urban Deferred” under the Metropolitan Region Scheme. This meant it could be mined first and then rehabilitated for other forms of development.
- [5] However, Urban Pacific wanted to develop the land immediately for residential development which meant they needed the land to be rezoned to “Urban”. To this end they submitted an application to the Western Australian Planning Commission.
- [6] The Department of Industry and Resources (DoIR) had a Memorandum of Understanding (MOU) with the Department for Planning and Infrastructure (DPI). One of the desired outcomes set out in the MOU was to promote “sequential development”, which meant that with advance warning of land use proposals DoIR could ensure that mineral resources were extracted, the land rehabilitated, and then made available for urban development.

- [7] In June 2005 DoIR advised DPI that it considered that the land covered part of an orebody containing more than \$1 billion of titanium minerals and opposed any subdivision prior to mining.
- [8] In 2005 and 2006 Mr Gary Wayne Stokes was a Deputy Director General of DoIR and was Acting Director General during the period 23 January to 20 February 2006. Mr Stokes said at a Commission public hearing that he met with Mr Burke and Mr Grill, who were working on behalf of Urban Pacific, in early 2006 when he was Acting Director General and talked to them about their proposition, and agreed to get advice from DoIR's Geological Survey area.
- [9] Mr Stokes stepped down as Acting Director General when the Director General, Dr James Macquarie Limerick, returned from leave on 21 February 2006. The next day Mr Stokes telephoned Mr Grill and told him that DoIR had decided to withdraw its objection to the rezoning.
- [10] However, following objections from other senior officers in DoIR, Dr Limerick reversed the decision Mr Stokes had apparently made whilst he was Acting Director General – a change Mr Stokes related to Mr Burke during an intercepted telephone conversation on 27 February 2006.
- [11] Mr Burke later asked Mr Stokes for a copy of a letter dated 28 February 2006 from Dr Limerick to the Director General of DPI, Mr Gregory Stuart Martin, assessing the mining potential of the land based on figures from Bemax Resources Limited, a mineral sands exploration and mining company.
- [12] Mr Stokes was in China at the time but asked an officer in DoIR to email the letter to him and he subsequently emailed it to Mr Burke on 23 March 2006. He asked Mr Burke to treat the letter as confidential.
- [13] Mr Burke forwarded the letter on to the Western Australian Project Director of Urban Pacific, Mr David Cecchelle, saying in an intercepted telephone call that “it’s worth my life it if gets out”.
- [14] Later, at a public hearing of the Commission, Dr Limerick said he considered the letter to be confidential as it contained commercially sensitive information and was part of the deliberative process of government.
- [15] In April 2006, the Minister for Resources, the Hon John James Mansell Bowler MLA, confirmed to Dr Limerick that he disagreed with the contention that the area could be mined. As a result Dr Limerick assumed there was no further role for DoIR in the process and wrote to the Director General of DPI, Mr Martin, on 30 June 2006 saying DoIR had no objection to the proposed lifting of the “Urban Deferred” zoning.
- [16] On 26 July 2006 Mr Stokes emailed Mr Burke a copy of that letter.
- [17] At a public hearing conducted by the Commission Dr Limerick said he did not consider this letter to be as confidential as the previous one because most of

the information was in the public area. However, he said he would not have released the letter to Urban Pacific though he would have been prepared to discuss, broadly speaking, the contents of the letter with that company.

- [18] In the opinion of the Commission Mr Stokes deliberately provided Mr Burke and Mr Grill with information without authorisation which he knew could be of commercial value to them and their clients.
- [19] The Commission is satisfied that Mr Stokes believed the lobbyists were able to influence Mr Bowler to advance Mr Stokes' career and that this was his motivation for helping them in the way he did.
- [20] In an intercepted telephone call Mr Grill said: "truth is that I think Gary's gonna be our man in DoIR". Also, Mr Burke said: "... one of the big things is to convince Bowler he'll be our bloke there and get Bowler to promote him".
- [21] As a result of evidence given at Commission public hearings on 26 and 27 February 2007, the Director General of the Department of the Premier and Cabinet initiated a disciplinary investigation into Mr Stokes under section 81 of the *Public Sector Management Act 1994* ("PSM Act") on 1 March 2007.
- [22] The report of that investigation found that Mr Stokes' release of the letter dated 28 February 2006 to Mr Burke was a minor breach of discipline.
- [23] However, the Director of Public Prosecutions has advised the Commission that there is a *prima facie* case with reasonable prospects of conviction against Mr Stokes for making an unauthorised disclosure to Mr Burke of the letter dated 28 February 2006.
- [24] Upon reviewing all the evidence of the Disciplinary Investigator, the Commission is concerned that the disciplinary processes under the PSM Act are unsatisfactory. Accordingly, the Commission makes the following recommendation.

Recommendation 1

The Commission recommends that the Director General of the Department of the Premier and Cabinet review the operation, processes and appropriateness of outcomes of the disciplinary provisions of the *Public Sector Management Act 1994*.

- [25] The Commission has formed the opinion that Mr Stokes has engaged in serious misconduct in releasing information to Mr Burke and Mr Grill in respect of the position of DoIR (and in one case DPI) on rezoning of the land at Whitby.

Recommendation 2

The Commission recommends that the Director of Public Prosecutions consider the prosecution of Mr Gary Wayne Stokes for the offence of acting corruptly in the performance of the functions of his office so as to gain a benefit for Mr Burke, Mr Grill, Urban Pacific Limited and himself, contrary to section 83 of *The Criminal Code*.

[26] As to Mr Bowler, in the Commission's opinion the available information does not establish misconduct in respect of:

- whether Mr Bowler's decision not to oppose rezoning of the land at Whitby was improperly influenced by the lobbying of Mr Grill and Mr Burke; and
- whether Mr Bowler provided Mr Grill and Mr Burke with confidential information.

[27] Also, in the opinion of the Commission, the material before it does not establish misconduct on the part of the following public officers who were also lobbied by Mr Burke and Mr Grill in relation to the rezoning of land at Whitby: Mr Simon John Corrigan, Chief of Staff to the Hon John James Mansell Bowler since August 2005, and during the relevant time in 2006; Mr Daron Frederick Smith, Policy Advisor to the Hon Ljiljanna Ravlich MLC, the Minister for Education and Training; Mr Thomas Harry John Hoyer, Councillor, Shire of Serpentine-Jarrahdale; Ms Lindsay Margaret Baxter, DPI Officer; and Mr John Alexander Cowdell, Chairman of the Peel Development Commission throughout 2006.

CHAPTER ONE

FOREWORD

1.1 Introduction

- [1] During 2005 and 2006 the Corruption and Crime Commission (“the Commission”) investigated allegations of misconduct by public officers in connection with the proposed Smiths¹ Beach Development at Yallingup. That investigation examined attempts by Mr Brian Thomas Burke and Mr Julian Fletcher Grill, in their role as lobbyists and consultants acting for Canal Rocks Pty Ltd, to influence public service officers involved in the development proposal. Public hearings were held at the Commission in respect of that matter in October, November and December 2006.
- [2] Arising from those inquiries the Commission identified a number of allegations of possible misconduct by public officers arising principally from the lobbying activities of Mr Burke and Mr Grill on behalf of their commercial clients. Public hearings were held at the Commission in respect of these matters in February and March 2007. Additional investigations were conducted by the Commission into these matters before, at the time of, and following these hearings.
- [3] In accordance with section 22 of the *Corruption and Crime Commission Act 2003* (“the Act”) the purpose of the investigations was to assess the allegations and form an opinion as to the possible occurrence of “misconduct”, as defined in section 4 of the Act.
- [4] This report examines the responses of public officers to certain lobbying activities of Mr Burke and Mr Grill on behalf of Urban Pacific Limited (“Urban Pacific”), part of the Macquarie Group. Urban Pacific was the Development Manager for the development of 504 hectares of land at Whitby, near Mundijong, south of Perth. The land contained minerals including titanium and was (arguably) suitable for sand mining. At the time Urban Pacific purchased the land it had been zoned “Urban Deferred”, under the Metropolitan Region Scheme (MRS), which meant that it could be mined first and then rehabilitated for other forms of development. Urban Pacific wanted to develop the land immediately for residential development. To do this they wanted the land to be rezoned to “Urban”, thus preventing mining, and accordingly they submitted an application to the Western Australian Planning Commission (WAPC) for the land to be rezoned.
- [5] Urban Pacific appointed several consultants to assist in the process of rezoning, including Mr Burke and Mr Grill as political lobbyists and consultants. Their brief covered two matters, the first of which was to “resolve the likely objection from the Department of Industry & Resources to the landholding being rezoned Urban under the Metropolitan Region Scheme because it has significant mineral sand reserves”.²

1.2 Jurisdiction of the Commission

- [6] The Commission is an executive instrument of the Parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the Act faithfully and impartially. The Commission cannot, and does not, have any agenda, political or otherwise, other than to comply with the requirements of the Act.
- [7] It is a function of the Commission, pursuant to section 18 of the Act, to ensure that an allegation about, or information or matter involving, misconduct by public officers is dealt with in an appropriate way. An allegation can be made to the Commission, or made on its own proposition. The Commission must deal with any allegation of, or information about, misconduct in accordance with the procedures set out in the Act.

1.3 Definitions

1.3.1 Public Officer

- [8] The term “public officer” is defined in section 3 of the Act by reference to the definition in section 1 of *The Criminal Code*. The term “public officer” includes any of the following: police officers; Ministers of the Crown; members of either House of Parliament; members, officers or employees of any authority, board, local government or council of a local government; and public service officers and employees within the meaning of the *Public Sector Management Act 1994* (“the PSM Act”).

1.3.2 Misconduct

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

Misconduct occurs if —

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or*

(d) a public officer engages in conduct that —

- (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
- (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
- (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
- (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

and constitutes or could constitute —

- (v) *an offence against the “Statutory Corporations (Liability of Directors) Act 1996” or any other written law; or*
- (vi) *a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the “Public Sector Management Act 1994” (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).*

1.4 Reporting by the Commission

[10] Under section 84(1) of the Act the Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct. By section 84(3) the Commission may include in a report:

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

- [11] The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4).
- [12] Section 86 of the Act requires that, before reporting any matters adverse to a person or body in a report under section 84 the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.
- [13] Accordingly, Mr Gary Wayne Stokes was notified by letter dated Wednesday 18 June 2008 of possible adverse matters which it was proposed to include in this report. Mr Stokes was invited to make representations about those matters by Friday 18 July 2008, and was advised that he and his legal adviser could inspect the transcript of hearings before the Commission and evidentiary material going to matters identified and any other matters about which he might wish to make representations. Mr Stokes' solicitors provided representations by this date and the Commission has taken those into account in finalising this report.
- [14] Despite the investigation being confined to the conduct of public officers, and the Commission making no assessment of, nor expressing any opinion about, Mr Burke or Mr Grill in its report, the Commission accepts that the words "any matters adverse to a person" in section 86 of the Act have a meaning wider than merely the Commission's assessments and opinions.
- [15] As it was possible that the matters considered in this report may be regarded as matters adverse to Mr Burke and Mr Grill, the Commission has notified them of those matters, pursuant to section 86 of the Act, and afforded them an opportunity to make representations if they wished.
- [16] Mr Burke was notified by letter dated Wednesday 18 June 2008, with a copy provided to his solicitors, and invited to make representations by Friday 18 July 2008. Mr Grill was also notified by letter dated Wednesday 18 June 2008 and also invited to make representations by Friday 18 July 2008. Both Mr Burke and Mr Grill were advised that they or their legal advisers could inspect the transcript of the hearings before the Commission and evidentiary material going to the matters identified and any other matters about which they might wish to make representations. Those representations were made by Fairweather and Lemonis, Mr Burke's lawyers, by the due date, and by Freehills, Mr Grill's lawyers, also by the due date. The Commission has had regard to these in finalising this report.

1.5 Disclosure

- [17] The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, compel the production of documents and other things, compel attendance at hearings and to compel responses to questions on oath in hearings conducted by the Commissioner.

- [18] Section 151 of the Act controls the disclosure of a “restricted matter” including evidence given before the Commission, information or documents produced to the Commission and the fact that any person has been or may be about to be examined by the Commission.
- [19] Section 151(4)(a) of the Act states that a restricted matter may be disclosed in accordance with a direction of the Commission. Pursuant to section 152(4) official information may be disclosed in various instances including: for the purposes of the Act; for the purposes of prosecution or disciplinary action; when the Commission has certified that disclosure is necessary in the public interest; or to either House of Parliament.
- [20] The Commission takes decisions about releasing information to the public very seriously. Consistently with the considerations to which it is required to have regard in deciding whether or not an examination (hearing) should be conducted in public, when considering the disclosure of information in a report the Commission takes into account the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.

1.6 Telecommunications Interception Material

- [21] The Commonwealth *Telecommunications (Interception and Access) Act 1979* (“the TI Act”) contains stringent controls and safeguards in relation to telecommunications interception and handling, and communicating information gathered from lawfully intercepted telecommunications. Section 63 of the TI Act prohibits the communication of lawfully intercepted information unless given particular restricted circumstances.
- [22] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,³ to make use of lawfully intercepted information and interception warrant information for a “permitted purpose”. “Permitted purpose”, as defined in section 5(1) of the TI Act, in the case of the Commission “means a purpose connected with ...: (i) an investigation under the Corruption and Crime Commission Act into whether misconduct (within the meaning of that Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or (ii) a report on such an investigation”.⁴

1.7 Privacy Considerations

- [23] In formulating this report the Commission has considered the benefit of public exposure and public awareness and weighed this against the potential for prejudice and privacy infringements. The Commission has also complied with the strict requirements of the TI Act and the *Surveillance Devices Act 1998* (WA) (“the SD Act”) in the utilisation of intercepted information in this report.
- [24] As a result of these considerations the Commission may decide not to include names of various individuals who assisted the Commission during its investigation. Similarly, some extracts from Telecommunications Intercept (TI)

material set out in this report may have been edited by omitting the names of individuals or other information collateral to this inquiry.

1.8 Opinions of Misconduct: Standard of Proof

- [25] The Commission fully appreciates that any expression of opinion by it in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion or any adverse matter against a public officer, or any other person, may have serious consequences for the public officer, or person, and their reputation.
- [26] The Commission is careful to bear these matters in mind, when forming opinions, when conducting inquiries and when publishing the results of its investigations.
- [27] The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.
- [28] The balance of probabilities is defined as:

The weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability⁵

- [29] The balance of probabilities is a standard used by courts when considering civil matters. It is a standard which is less than the criminal standard of beyond reasonable doubt. This was confirmed by the High Court in a unanimous judgement in Rejefek v McElroy (1965) 112 CLR 517:

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

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

... The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in

evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise ...

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

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

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

[32] Or, as Lord Denning said in Hornal v Neuberger Products Ltd (1956) 3 All ER 970: “The more serious the allegation the higher the degree of probability that is required ...”.

[33] Furthermore, the Commission could not reach an opinion of misconduct on the basis of a “mere mechanical comparison of probabilities”, without any actual belief in its reality. That is to say, for the Commission to be satisfied of a fact on the balance of probabilities, it would have to have an actual belief of the existence of that fact to at least that degree.⁶

[34] The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the inquiry. Any expression of opinion in this report is so founded.

CHAPTER TWO BACKGROUND

2.1 Commission Investigation

- [35] As previously stated,⁷ during 2005 and 2006 the Commission investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach Development at Yallingup. The investigation examined the efforts of Canal Rocks Pty Ltd and its consultants, including Mr Burke and Mr Grill, in seeking to influence the Busselton Shire Council, public service officers and politicians to take actions beneficial to the development.
- [36] Public hearings were held at the Commission in respect of that matter in October, November and December 2006. During that time Mr Burke and Mr Grill, and their relationships with public officers, received widespread media attention in Western Australia and nationally.
- [37] The Commission *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* was tabled in the Parliament of Western Australia on 5 October 2007.⁸
- [38] In the course of conducting an investigation into the Smiths Beach development the Commission lawfully intercepted telephones used by Mr Burke and Mr Grill. It also obtained a warrant for a surveillance device in Mr Grill's residence, which was also his office and the site of meetings held by Mr Grill and Mr Burke with clients and associates.
- [39] Between 12 February 2007 and 1 March 2007 the Commission held public hearings into a number of additional issues which had arisen from information obtained during the course of the Smiths Beach investigation, but which did not relate to the Smiths Beach development.
- [40] Before deciding to hold public hearings the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements.⁹ The Commission considered that it was in the public interest to hold public hearings.
- [41] One factor that was of particular importance in that consideration was the need to publicly expose and make the public aware of conduct involving lobbyists and public officers where misconduct had or may have occurred, was or may have been occurring and, if left unexposed, might lead to future misconduct.
- [42] In his remarks at the start of the February-March 2007 Commission public hearings, Commissioner Hammond said:

The Commission's focus in these particular hearings, as in the hearings conducted last December, is to investigate whether senior

public officers have engaged in what is termed serious abuses of power.

In using the term “serious abuses of power” the Commission means serious misconduct by persons in senior public positions, possibly exploiting their positions of public authority and trust to give special beneficial consideration to the interests of particular individuals or groups in a manner that, if known publicly, would bring the public officers and their offices into dispute [sic] and such actions may, in the context of the act, be characterised as misconduct or serious misconduct and may constitute criminal conduct under the code.¹⁰

[43] Commissioner Hammond reinforced this view in a speech to the Institute of Public Administration on 20 March 2007 when he said that the public hearings were held to address the overwhelming “public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State”.¹¹

[44] The Commission decided to expose the matters addressed in these hearings to enable, in the words of Counsel Assisting, Mr Stephen Hall SC:

... other bodies [to] take immediate action to ensure good governance is not compromised. Public hearings may enable those bodies to take such action as they think fit and in an expeditious way.¹²

[45] The hearings, conducted during February-March 2007, included a segment relating to the lobbying activities of Mr Burke and Mr Grill in relation to the rezoning of land at Whitby. In relation to this matter the following witnesses were called to give evidence on oath:

- The Hon John James Mansell Bowler MLA (26 and 27 February 2007);
- Mr David Cecchelle (26 February 2007);
- Mr Simon John Corrigan (27 February 2007);
- Dr James Macquarie Limerick (26 February 2007); and
- Mr Gary Wayne Stokes (26 February 2007).

[46] The Commission has also made additional inquiries into aspects of the lobbying undertaken by Mr Burke and Mr Grill in respect of the rezoning of the land at Whitby. These additional inquiries have included interviewing, and taking statements from, relevant people; and obtaining, and forensically examining, computer records and documents.

[47] The comments made in this report are derived from the above sources and are appropriately referenced.

[48] The following people mentioned in this report were public officers who held the described positions at relevant times during the first half of 2006.

Ms Lindsay Margaret Baxter, Team Leader, Metropolitan South East Region, Department for Planning and Infrastructure.

The Hon John James Mansell Bowler MLA Minister for:

- Resources and Minister Assisting the Minister for State Development;
- Employment Protection;
- Goldfields-Esperance; and
- Great Southern.

Mr Simon John Corrigan, Chief of Staff to the Hon John James Mansell Bowler since August 2005, and during the relevant time in 2006.

Mr John Alexander Cowdell, Chairman of the Peel Development Commission throughout 2006.

Dr Timothy John Griffin, Executive Director, Geological Survey of Western Australia, a Division of the Department of Industry and Resources.

Mr Thomas Harry John Hoyer, Councillor, Shire of Serpentine-Jarrahdale, elected member for the Byford Ward.

Dr James Macquarie Limerick, Director General, Department of Industry and Resources.

Mr Gregory Stuart Martin, Director General, Department for Planning and Infrastructure.

Mr Lew Pritchard, Executive Director, Corporate Support, Department of Industry and Resources.

Mr Daron Frederick Smith, Policy Advisor to the Hon Ljiljanna Ravlich MLC, Minister for Education and Training.

Mr Stuart John Smith, a Deputy Director General, Department of Industry and Resources.

Mr Gary Wayne Stokes, a Deputy Director General, Department of Industry and Resources.

Mr Timothy John Walster, Principal Policy Advisor (Resources and State Development), Office of the Hon John James Mansell Bowler (March to December 2006).¹³

[49] The following people mentioned in this report were not public officers at relevant times during the first half of 2006.

Mr Brian Thomas Burke, Lobbyist and Consultant, retained by Julian Grill Consulting.¹⁴

Mr David Cecchele, Western Australian Project Director, Urban Pacific Limited.

Mr Julian Fletcher Grill, Principal, Julian Grill Consulting.

- [50] The land at Whitby is 504 hectares adjoining the South Western Highway approximately 38 kilometres south of the Perth Central Business District, and 15 kilometres south of the metropolitan suburb of Armadale. It is in the Serpentine-Jarrahdale Shire near the town site of Mundijong.
- [51] Urban Pacific is part of the Macquarie Group.
- [52] Bemax Resources Limited¹⁵ is a mineral sands exploration and mining company. Its Western Australian operations are run through its wholly owned subsidiaries that make up the Cable Sands Group ("Cable Sands").

2.2 Process of Rezoning Land at Whitby

- [53] The land at Whitby was purchased in November 2005 by three companies, known collectively as the Whitby Joint Venture. Urban Pacific was the Development Manager. The land was purchased from a mineral sands mining company, Iluka Resources Limited ("Iluka"). When purchased, the land was zoned "Urban Deferred" which allowed mining activities to be undertaken prior to any residential development. Urban Pacific wanted the land to be rezoned "Urban" to prevent the possibility of mining and to permit residential development.
- [54] The decision on rezoning was to be taken by the WAPC, based on a recommendation by the Department for Planning and Infrastructure (DPI) following consultation with a range of other agencies with an interest. One of those agencies was the Department of Industry and Resources (DoIR).
- [55] Urban Pacific engaged the services of several consultants to assist in this process. These included Mr Grill, of Julian Grill Consulting ("the Consultancy"), and Mr Burke, as political lobbyists and consultants.
- [56] The appointment letter from Mr Cecchele to Mr Grill dated 7 December 2005 stated:

The general intent of the project is to undertake all necessary works to gain approval of a Local Structure Plan for a residential development over the landholding.

In relation to the role of the Consultancy the appointment letter said:

... we envisage your company's role and commission to initially provide strategic advice and assistance to:

a) resolve the likely objection from the Department of Industry & Resources to the landholding being rezoned Urban under the Metropolitan Region Scheme because it has significant mineral sand reserves ...¹⁶

- [57] There was a second role for the Consultancy relating to the Department of Main Roads, but it is not relevant to this report.
- [58] Mr Cecchele said during a Commission public hearing on 26 February 2007 that one of the factors which led to Urban Pacific choosing the Consultancy over other consultants was that in relation to potential objections for mining "... Mr Grill and Mr Burke suggested that it should be dealt with at the grass roots level from the department",¹⁷ rather than at a Cabinet and political level.
- [59] By the appointment letter the Consultancy was to be employed for 12 months from 1 December 2006 at a rate, exclusive of GST, of \$8,000 per month for the first four months, \$5,000 per month for the next four months, and finally \$3,000 per month for four months. In addition to the aforementioned fees, it was stated in the letter that "a success fee may be negotiated and payable for achievement of a particular milestone ... subject to further discussions ...".¹⁸
- [60] The information detailed in paragraphs [61]-[74] was provided to the Commission by Dr Limerick at a public hearing on 26 February 2007¹⁹ and by way of a statement to the Commission on 21 March 2007.²⁰
- [61] Dr Limerick said that the zoning "Urban Deferred" meant that, within the context of the MRS, it was an indication by the WAPC that the land was being contemplated for urban development in the future but would retain its current status until the urban front reached it.
- [62] The land at Whitby was part of an area of land known to DoIR as the Mundijong mineral sands deposit.
- [63] DoIR had a Memorandum of Understanding (MOU) with DPI to enable integrated resource planning and land use planning. One of the desired outcomes set out in the MOU was to promote "sequential development", which meant that with advance warning of land use proposals DoIR could ensure that mineral resources were extracted, the land rehabilitated, and then made available for urban development.
- [64] Although DoIR had no statutory role in relation to rezoning of land, on the basis of the MOU their advice was sought by DPI about whether any potential conflicts between urban development and resource development could be resolved in advance of planning decisions.
- [65] DoIR had become aware, in June 2005, that the previous owners of the land at Whitby, Iluka, were intending to sell it. Dr Limerick arranged to meet the

Managing Director of Iluka who told him that Iluka considered that mining on the land was not viable. Dr Limerick also thought that Iluka was “in the process of some asset disposal to fix up its balance sheet”.²¹

- [66] Dr Limerick wrote to the Director General of DPI on 9 June 2005 saying that the land at Whitby covered part of an ore body containing over \$1 billion of titanium minerals and DoIR opposed the reported subdivision at that time.²² In December 2005, after Urban Pacific had purchased the land and had made a formal request to the WAPC for the land to be rezoned, DPI formally asked DoIR to provide advice.²³
- [67] In preparing that advice DoIR officers spoke again to Iluka and to Urban Pacific, who provided DoIR with an independent assessment of Iluka’s report which reinforced the view that mining was not economic, but added a proviso which stated: “There might be, under special circumstances, an opportunity for some limited mining ...”.²⁴ DoIR also spoke to a sand mining company, Bemax Resources Limited (“Bemax”), which was interested in mining the land.
- [68] On the basis of these discussions Dr Limerick wrote to Mr Martin on 28 February 2006. The letter provided the DoIR assessment, including figures provided by Bemax relating to their estimate of the ore grade and tonnage and an estimate of project revenue for two mining periods. The letter noted that, although Bemax had expressed interest in mining the area, the Serpentine-Jarrahdale Shire had expressed opposition to mining and Urban Pacific had a veto over mining. In the letter it was stated that: “The principles of sustainable development would lead us to a conclusion that sequential mining and then urban development is the solution to this dilemma”. Dr Limerick asked for a briefing from WAPC/DPI on the planning context.²⁵
- [69] As this letter was released by Mr Stokes to Mr Burke, Dr Limerick was asked at a Commission public hearing on 26 February 2007 whether he considered his letter to be confidential, and he said that he did.

*It contains commercially sensitive information because it’s putting forward the project revenues that a company is anticipating out of this and to the extent that it indicates the extent to which the department is going to be opposed to the redevelopment. It would potentially influence the willingness of the parties to negotiate over whether mining is going to occur, so, yes, it is confidential.*²⁶

- [70] Dr Limerick was then asked, at the same public hearing, if it was more confidential at a particular period of time and he said:

*Well, this is what I would call the deliberative process of government where we’re really trying to come to a landing on this, and in the context that we were encouraging Urban Pacific to enter into discussions with Bemax it was – I would have said at this time it was quite a sensitive document, yes.*²⁷

(emphasis added)

[71] Dr Limerick said that he provided briefing notes to the Minister for Resources, the Hon John Bowler, on 24 March and around 18 April 2006. The first of these set out all the factors affecting the decision about the land. The second was in response to an article which had appeared in a local newspaper which quoted the Minister for Planning and Infrastructure, the Hon Allanah MacTiernan MLA, as saying that she supported the rezoning, and that she had spoken to the Minister for Resources who also supported the rezoning. Dr Limerick said that the note went to Minister Bowler referencing the article and saying: "We're not sure whether this means that your support is with or without prior mining...".²⁸

[72] Minister Bowler wrote on that note:

In noting this, I disagree with the contention herein that the area can be mined. I have already advised the Minister for Planning and Infrastructure accordingly.

Minister Bowler dated this note 22 April 2006.²⁹

[73] Dr Limerick said that he took that note as being the formal advice of Minister Bowler's decision. Given that the Ministers had agreed, DoIR understood there was no further role for them. However, WAPC wrote to DoIR in June 2006 asking whether DoIR was now willing to formally withdraw its objection.³⁰ Dr Limerick wrote to the Director General of DPI on 30 June 2006. In that letter he confirmed that the Minister for Resources had said that mining would not be pursued on the Urban Pacific land and DoIR, therefore, did not object to the proposed lifting of "Urban Deferred" zoning. Dr Limerick then confirmed DoIR policy of sequential development (of mining and then urban development) and that potential interest in mining the titanium resource had been expressed by Bemax.³¹

[74] As the 30 June 2006 letter was also released by Mr Stokes to Mr Burke, Dr Limerick was asked whether he considered it to be confidential. Dr Limerick said at a Commission public hearing on 26 February 2007 that he did not consider it to be as confidential as the earlier letter, because most of the information was then in the public arena. However, Dr Limerick said that he would not have released the letter to Urban Pacific, although he would have been prepared, broadly speaking, to have discussed with them the content of the letter.³²

[75] In any event, the rezoning process continued. In December 2006 WAPC resolved to transfer the Whitby land owned by Urban Pacific from "Urban Deferred" to "Urban" under the MRS.³³

2.3 Process Followed by Mr Burke and Mr Grill in Lobbying for Land at Whitby to be Rezoned

[76] While this report is concerned with considering allegations of misconduct by public officers, it is necessary to describe briefly the contacts made by Mr

Burke and Mr Grill with public officers on behalf of Urban Pacific, and the processes they followed. This can provide an insight into the lobbying methods used by Mr Burke and Mr Grill and how, in some circumstances, the methods used could lead to misconduct by public officers.

- [77] The Commission does not suggest that there is anything intrinsically improper about lobbying or the activities of professional lobbyists. Nor does the Commission suggest that there is anything wrong with public officers meeting or communicating with lobbyists. Like many other activities, it all depends on how it is done and how the public officers respond to it.
- [78] Mr Burke and Mr Grill were extremely well connected in government in Western Australia, in both political and administrative spheres. On being appointed as consultants to Urban Pacific they were able to cultivate and use contacts in a number of agencies which might have an influence on the rezoning decision, and the speed of the process.
- [79] Although the decision on rezoning the land at Whitby was ultimately made by the WAPC, the consultation process involved a number of agencies and public officers, including: the Serpentine-Jarrahdale Shire, DoIR and DPI; and the Minister for Resources, and the Minister for Planning and Infrastructure. By the appointment letter from Urban Pacific the focus for Mr Burke and Mr Grill was to "... resolve the likely objection from the Department of Industry & Resources ..."³⁴. However, from the information available to the Commission it appears that they did not confine their lobbying activities to DoIR. Information obtained by the Commission establishes that the public officers Mr Burke and Mr Grill spoke to in 2006 about matters relating to the rezoning of the land at Whitby, included the following.³⁵
 - **Mr Gary Wayne Stokes.** There was frequent contact between Mr Grill, Mr Burke and Mr Stokes. They appeared to require two things from Mr Stokes: that he influence DoIR not to oppose the rezoning of the land at Whitby; and that he provide them with information and documents about the DoIR position and actions.
 - **The Hon John James Mansell Bowler MLA.** Minister Bowler was contacted by telephone by Mr Burke who pressed him to ensure that DoIR notified DPI that it had no objection to the land being rezoned. Mr Bowler also visited Mr Grill at his residence and provided information about the actions (or inaction) of DoIR, and his own intentions as Minister.
 - **Mr Simon John Corrigan.** Mr Corrigan visited Mr Grill at his residence with Minister Bowler and was present when Minister Bowler provided Mr Grill with a situation report. Mr Burke called Mr Corrigan several times and asked him to do things, such as providing Mr Burke with a copy of a confidential letter.
 - **Mr Daron Frederick Smith.** In the 2005 elections Mr Smith had been an Australian Labor Party (ALP) candidate for the Seat of Serpentine-

Jarrahdale. Mr Smith also had a good relationship with the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA, and members of her staff. Mr Burke and Mr Grill contacted Mr Smith to obtain information about Minister MacTiernan's thoughts and intentions in relation to this matter.

- **Ms Lindsay Margaret Baxter.** Mr Burke contacted Ms Baxter frequently to inquire about the progress of DPI's consideration of this matter, and to attempt to persuade Ms Baxter to take actions helpful to Urban Pacific.
- **Mr Thomas Harry John Hoyer.** A Councillor with the Shire of Serpentine-Jarrahdale. Mr Hoyer was Chairman of a local "Mining Objectors Group".³⁶ Mr Burke contacted Mr Hoyer to assist with obtaining official Council support for the rezoning of the land. They discussed tactics and arranged for Mr Hoyer to meet with Urban Pacific. Mr Hoyer put forward a motion supporting the rezoning which was passed by the Council.
- **Mr John Alexander Cowdell.** Mr Grill contacted Mr Cowdell and offered to brief him on the Whitby development.

[80] It is important to stress that, for these (or any other) public officers, simply being in contact with Mr Burke and Mr Grill does not imply misconduct. Mr Burke and Mr Grill have the same rights as any other citizens to contact public officers, and in this situation, where they were employed to represent a company, public officers were entitled to treat them as legitimate company representatives. This appears to have been the case in relation to most of these contacts. However, the Commission has decided to include details of these contacts in order to describe the full extent of the lobbying activities undertaken, and indicate the type of pressures that were placed on the public officers who were being lobbied.

[81] It is also worth making the point that there were some areas of government to which Mr Burke and Mr Grill did not have access. Notably, in this case, to the office of the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA.

2.4 Allegations

[82] Section 26 of the Act empowers the Commission to make a proposition about the occurrence of misconduct "based on the Commission's own experience and knowledge, or assessment of a received matter". The Commission may then use its powers to assess and investigate the proposition.

[83] On 21 February 2006, arising from the inquiry into the development at Smiths Beach, Commissioner Hammond authorised an investigation into the activities of certain people.³⁷

[84] In the course of that investigation the Commission obtained information relating to the processes leading to the rezoning of land at Whitby. This report examines some of that information in relation to the following allegations.

- That public officers improperly provided confidential information and documents to Mr Burke and Mr Grill in relation to government processes and decision making.
- That public officers were influenced to act improperly in their decision making.

2.5 Scope and Purpose of the Investigation

[85] The general scope and purpose of the Commission investigation was to enable the Commission to make an assessment and form an opinion as to whether misconduct by public officers arising in connection with the activities of other persons, including but not limited to lobbyists, had or may have occurred or was occurring.

CHAPTER THREE

EXAMINATION OF THE INVESTIGATIVE MATERIAL

3.1 Introduction

[86] Further to the overview, presented in Chapter 2, part 2.3, of this report, of the lobbying activities undertaken by Mr Burke and Mr Grill on behalf of Urban Pacific, the following section describes the material obtained by the Commission in respect of the contact that Mr Burke and Mr Grill had with individual public officers.

3.2 Mr Gary Wayne Stokes

3.2.1 Background and Contact with Mr Burke and Mr Grill

[87] Commencing on 10 December 2002 Mr Stokes was employed in accordance with section 45(1) of the PSM Act as a Chief Executive Officer in the Western Australian Public Service. On 10 May 2004 he was seconded to a position of a Deputy Director General, DoIR. Mr Stokes remained in this position during 2005 and 2006.

[88] Mr Stokes acted in the position of Director General of DoIR from 23 January to 20 February 2006.³⁸

[89] In a Commission public hearing on 26 February 2007 Mr Stokes was asked about his relationship with Mr Grill and Mr Burke, and responded as detailed below.

*You have been a public servant though for a substantial period of time?---
Absolutely.*

In the 1980s, were you a ministerial adviser--I was.

When precisely was that?---1986 to 1989.

Who was the minister?---I worked for three, Mal Bryce, Julian Grill and David Parker.

How long did you work for Mr Grill for?---Around nine months.

What position did he hold in Cabinet at that time?---He was Minister for Industry basically and I was seconded there to look after non-resources matters.

Had you met Mr Grill before that time?---No.

... Mr Burke, did you meet him through your capacity as a ministerial adviser to those three ministers?---No, I did not.

Have you met him before?---No.

Have you ever spoken to him?---Yes. In January 2006.³⁹

[90] Mr Stokes also said at a Commission public hearing on 26 February 2007 that Mr Grill contacted him in late 2005, and Mr Grill and Mr Burke both came to meet with him in early 2006. Mr Stokes, in relation to this matter, stated:

I was acting Director-General and they came to talk to me about a matter relating to sand mining and a development that they were working on behalf of Urban Pacific. ... I talked to them about what their proposition was and I undertook to get advice from our Geological Survey area.⁴⁰

[91] On 13 February 2006 Mr Stokes called Mr Grill who asked him: "Uhm, did you get that stuff from uhm, Urban Pacific". Mr Stokes said: "Yep ... and ... soon as we've had a look at it, and I'll find out today where that's at ... we'll get back to you".⁴¹

[92] In an intercepted call on 15 February 2006 Mr Burke called Mr Grill and they discussed their consultancy for Urban Pacific. They expressed concern about the demands being made of them, and of Mr Stokes, by Mr Cecchele.

BURKE: *I mean the easier thing for Gary Stokes to do is just fucken not worry about it you know? Ah, he's been very accommodating and very forthcoming but I just don't want Gary Stokes to, this bloke to think Gary Stokes works for him.*

GRILL: *Well, I do too, ah, I mean it's crossed my mind more than once, a couple of times this morning, I mean. We've got other, we've got other clients.*

BURKE: *That's exactly right.*

GRILL: *I mean if we start putting too much pressure on Gary*

BURKE: *That's right.*

GRILL: *he says go and get fucked.*

BURKE: *Especially on something like this which is not, you know which is a bit sort of not what he, this isn't asking him to hurry up a mining thing, it's asking him to stop one.*

Later in the conversation:

BURKE: *... I'm gonna send him [Mr Cecchele] a little note telling him he has to be very sensitive, you know?*

GRILL: *Yeah okay that's alright.*

BURKE: *I mean I'll, I'll phrase it properly.*

GRILL: Yeah.

BURKE: *I'll just, I'll just say look we need to be very careful because we're asking Gary Stokes to do something which goes against the normal policy of the department, that is we're asking him not to mine something.⁴²*

[93] It appears from this conversation that Mr Burke and Mr Grill considered that what they were asking Mr Stokes to do for their client was contrary to the normal policy of DoIR. That of course was so – it was a matter of public record that the policy was to require sequential development, which meant mining first. Urban Pacific was seeking a decision not to require mining.

[94] The conversation (together with the conversation referred to at paragraph [104]) also shows that Mr Burke and Mr Grill viewed Mr Stokes' capacity to assist as an asset to their lobbying business in relation to a number of their clients, and they did not wish to spoil their relationship with him in regard to this matter (which was to stop mining) when they had arguably greater benefit from his capacity to support mining interests.

[95] On 21 February 2006 Dr Limerick, the substantive Director General of DoIR, returned from leave, ending the tenure of Mr Stokes as Acting Director General.

[96] In an intercepted call on 22 February 2006 at 8:27 a.m. Mr Stokes telephoned Mr Grill, advising him of DoIR's intended actions in relation to the Whitby matter.

GRILL: *Hello Gary.*

STOKES: *How are you Julian?*

GRILL: *Good mate good.*

STOKES: *Uhm well you can close one chapter on your Urban Pacific dealings.*

GRILL: *Yep.*

STOKES: *Ah, we're gonna be writing to DPI removing our objection.*

GRILL: *Oh brilliant, brilliant. Brilliant Gary, brilliant.*

STOKES: *So uhm, that letter hopefully will be done today or tomorrow.*

GRILL: *Mm hm, brilliant. Thank you very very much. I think your decision's absolutely right but, ah, I know there was some opposition within the Department.*

STOKES: *(laughs) There was a lot of opposition there'll be some pissed off people but you know, sometimes you gotta lose to win.*

GRILL: *Yeah, brilliant, brilliant. So, thank you very much for*

STOKES: *No, no problem at all.*⁴³

[97] In his evidence at a Commission public hearing on 26 February 2007 Mr Stokes said that, while Dr Limerick was away, from his perspective the matter had got to a point that DoIR had decided to remove any objection to the rezoning, and he assumed that Dr Limerick would sign off on that decision.⁴⁴ What the evidence shows is that what he was actually talking about here was that he, as Acting Director General, had made that decision, which was contrary to the known view of the Director General and all DoIR advice to that point.

[98] Later in the day on 22 February 2006, at 10:44 a.m., Mr Stokes sent an email to Mr Stuart Smith, a Deputy Director General, DoIR, with a copy to Dr Limerick. The email was headed "Mundijong Mineral Sands Mining – Urban Pacific". It stated:

Hi Stuart

After discussing this with Jim, it has been decided that we remove our objection to the rezoning of this land from urban deferred to urban on the basis that the land is owned freehold by Urban Pacific, that the mining of the site is marginally viable at best and that there is strong demand for urban development in that particular area. Accordingly, could you arrange for a minute to be drafted (Mike Freeman) from Jim to Greg Martin advising of this position. Letters to both Urban Pacific and Bemax should also be prepared for his signature advising of the decision.

*Gary Stokes
Deputy Director General
Department of Industry and Resources*⁴⁵

[99] Mr Smith forwarded the email to Dr Timothy Griffin, Executive Director, Geological Survey of Western Australia (GSWA), a Division of DoIR.⁴⁶

[100] At 11:32 a.m. Dr Griffin sent an email in reply to Mr Smith, Mr Stokes and Dr Limerick, with a copy to Mr Mike Freeman and Mr Rick Rogerson, stating:

I totally disagree with this recommendation and request an urgent meeting with the DG and others.

I find this approach surprising considering the discussion with Bemax/Cable Sands last Friday.

Despite the freehold title, the urban deferred status was clear to Urban Pacific and our position was made clear before they purchased the land.

They knew that mining would have to take place prior to urban development when they purchased the land.

Please find attached draft letters prepared yesterday.

Tim⁴⁷

[101] On 24 February 2006 Mr Stokes returned a telephone call to Mr Grill, referring to the issue during part of that call.

STOKES: *Uhm, Urban Pacific there's been a bit of a ah, what would I say, ah, a bit of a rearguard action. It won't, it won't ah, won't change the decision.*

GRILL: *Mmm hmm.*

STOKES: *It may just delay it by a week.*

GRILL: *Okay.*

STOKES: *But, I'll, I'll ...*

GRILL: *Alright well I'll...*

STOKES: *... I'll talk to you about that tonight, yep⁴⁸*

[102] The reference to Mr Stokes and Mr Grill talking “about that tonight” related to a conversation earlier in the call in which they had discussed the fact that they were both staying at Bunker Bay that night as guests of the Griffin Group.

[103] In his evidence at a Commission public hearing on 26 February 2007 Mr Stokes said he had heard that the DoIR position in relation to rezoning the land had changed upon Dr Limerick’s return. Mr Stokes said that the “rearguard action” referred to was “Geological Survey making a strong position” that the land should be mined.⁴⁹

[104] On 25 February 2006 Mr Grill called Mr Burke and they discussed their strategy in relation to Whitby. Mr Grill said he had discussed the matter with Mr Stokes who had told them there was a problem within DoIR where some officers had gone to Dr Limerick on his return from leave and complained about Mr Stokes’ proposed policy on Whitby, and also about his attempts to restructure DoIR. Mr Burke and Mr Grill had the conversation detailed below.

GRILL: ... see the truth is that I think Gary's gonna be our man in DoIR.

BURKE: Absolutely, absolutely.

GRILL: but

BURKE: ...

GRILL: we've gotta give him some support.

BURKE: Well we have to and that one of the big things is to convince Bowler that he'll be our bloke there and get Bowler to promote him.⁵⁰

[105] On 27 February 2006 Mr Stokes returned a telephone call to Mr Burke and explained how DoIR was dealing with the Whitby matter.

BURKE: What happened Gary? Just came off the rails did it?

STOKES: Er ...

BURKE: With these ah, Mister Freeman.

STOKES Ah, Mister Freeman got to Mister Griffin who got to Mister Limerick.

BURKE: Yeah. Yeah.

STOKES: And Jim hates confrontation so, for him it was you know. He got bamboozled with all the bullshit they carried on about MOUs and ...

BURKE: So what will they do, will they send anything over to DPI, or?

STOKES: Yes they will. They'll write to DPI. They'll also write to Urban Pacific.

BURKE: Yeah.

STOKES: Saying ah, the department cannot support it because it still thinks it's a mining, mineable resource.

BURKE: Yep.

STOKES: So that's the front, the front door. The back door will be providing advice which effectively ah, I think they've even provided a draft for Alannah to sign off

coming back saying, heard all your noise, happening anyway.⁵¹

- [106] In his evidence at a Commission public hearing on 26 February 2007 Mr Stokes said: "My issue with this right from day one was that we were taking a position which was not strategically sound and I figured that as a department if we wanted to retain our credibility in the system that this was one that we shouldn't pursue to its end".⁵²
- [107] When Counsel Assisting the Commissioner put it to Mr Stokes that it was not entirely proper to disclose that sort of information to a lobbyist or an interested party, Mr Stokes replied: "I'm not absolutely convinced about that. I mean, he's working for Urban Pacific and I think they have a right to know where we stood as a department".⁵³
- [108] When it was put to him that he had revealed the information before the Director General of DoIR had sent a letter to the Director General of DPI, Mr Stokes said: "That may be the case, but as I said earlier on my view when I was acting Director General was that the matter had been resolved".⁵⁴
- [109] On 28 February 2006 Dr Limerick wrote to Mr Martin, responding to Mr Martin's formal request for comments on the proposal to lift the "Urban Deferred" status on the land at Whitby. Dr Limerick said: "I write to you now to seek resolution of an impending land use conflict ...".⁵⁵
- [110] In his letter Dr Limerick set out DoIR's assessment of the situation which was that Bemax had expressed interest in mining the deposit and had sought agreement with Urban Pacific to undertake a three-year mining operation. The letter then provided details of Bemax's estimate of the total ore resource, the grade, the tonnage and the project revenue for two possible mining periods, three years and six years.
- [111] It was stated in the letter that GSWA had assessed the deposit and advised Dr Limerick that it could support a viable mining operation as proposed by Bemax.
- [112] Also, in the letter, Dr Limerick commented that the Serpentine-Jarrahdale Council had historically been opposed to mining. Dr Limerick said:

As the private land owner, Urban Pacific effectively has a veto over mining under Part 3, Division 3 of the Mining Act. Urban Pacific has clearly indicated it has no willingness to allow mining and wishes to proceed with urban development, which it can only do if the zoning is changed from "Urban Deferred".

- [113] Dr Limerick also said:

The principles of sustainable development would lead us to a conclusion that sequential mining and then urban development is the

solution to this dilemma. That outcome is foreshadowed in the 1998 MOU ...

[114] Dr Limerick stated in the letter that he had requested a briefing from WAPC/DPI on the planning context, and offered a fuller DoIR briefing to Mr Martin on the mineral resource. Dr Limerick concluded:

Following that, I expect you and I will be in a better position to resolve the matter.

[115] On 21 March 2006 at 1:41 p.m. Mr Cecchele sent an email to Mr Grill and Mr Burke saying that he had been advised by DPI officers that DoIR had written to DPI. Mr Cecchele said that he had not seen the letter, but had been advised by DPI officers about the positions of the respective departments and told that DPI would be replying shortly. Mr Cecchele said:

I would appreciate your assistance to determine the contents of both letters ...⁵⁶

[116] At 2:36 p.m. on the following day, 22 March 2006, Mr Cecchele emailed Mr Burke and Mr Grill about strategy. Mr Cecchele referred again to the correspondence between DoIR and DPI and said:

I would really appreciate assistance in obtaining a copy of these letters.⁵⁷

[117] At 3:24 p.m. on 22 March 2006 Mr Burke called Mr Stokes and was advised by his secretary at DoIR that Mr Stokes was in China but contactable by email. The secretary then provided Mr Burke with an email address for Mr Stokes.⁵⁸

[118] At 3:30 p.m. on 22 March 2006 Mr Burke sent an email to Mr Stokes which said:

Dear Gary

Is there any possibility of obtaining a copy of the DoIR response to DPI on Whitby?

Regards⁵⁹

[119] At 4:07 p.m. on 22 March 2006 Mr Burke sent an email to Mr Cecchele and Mr Grill saying, among other things:

DOIR CORRESPONDENCE

Unfortunately, key DoIR people are presently in China (returning April 3) and getting hold of a copy of the letter DoIR sent to DPI will be difficult from the DoIR end. Nevertheless, I have put the request in train and hope to have a reply in the next day or two. I have also left messages for DPI Officers who may be able to assist. It should

be remembered that this sort of correspondence is really very confidential and normally the best one can hope for is to have a detailed briefing of what they contain.⁶⁰

[120] At 4:55 p.m. on 22 March 2006 Mr Stokes emailed Dr Griffin and asked:

Can I get a copy of the letter we sent to DPI re Whitby.⁶¹

[121] At 5:20 p.m. on 22 March 2006 Mr Burke received an email in response to his earlier email, sent at 3:30 p.m., from Mr Stokes saying:

I will are [sic] what I can do.⁶²

[122] Dr Griffin replied by email to Mr Stokes the following day, 23 March 2006, at 9:33 a.m. and attached an unsigned copy of Dr Limerick's letter to DPI of 28 February 2006.⁶³

[123] At 11:10 a.m. on 23 March 2006 Mr Stokes forwarded Dr Griffin's email and the attachment to Mr Burke, stating:

*Please treat as confidential but here is copy of our response to DPI
Gary Stokes⁶⁴*

[124] Shortly after receiving this email from Mr Stokes, Mr Burke telephoned Mr Cecchele at 11:38 a.m. on 23 March 2006.

BURKE: *David, it's Brian Burke.*

CECCHELE: *Oh hi Brian how are you?*

BURKE: *Yeah good. Now David I've got a copy of this letter,
DoIR's response to DPI.*

CECCHELE: *Yep.*

BURKE: *But mate it, it, it's worth my life if it gets out.*

CECCHELE: *Okay.*

BURKE: *So I'm happy to send it to you*

CECCHELE: *Yep*

BURKE: *but*

CECCHELE: *as long as I just read it.*

BURKE: *Yeah.*

CECCHELE: *And that's it.*

BURKE: And, and don't, you don't need to tell your board do you or anything?

CECCHELE: No, don't need to tell my board.

BURKE: Okay.

CECCHELE: It can still stay as bullet points uhm.

BURKE: Yeah.

CECCHELE: That we, we roughly know what it says but that's it.

BURKE: Yeah.

CECCHELE: ...

BURKE: I mean you can say look on very reliable advice and you're absolutely sure of your thing but I mean it's, it's a letter from Limerick you see.

CECCHELE: Yeah I'm aware.

BURKE: And it's to Greg Martin uhm.

CECCHELE: Director General of DPI.

BURKE: Yeah, so it, it's from two director generals so, are you in front of your computer?

CECCHELE: I'm in front of my computer right now.

BURKE: Just click your send receive.

CECCHELE: Yep.

(pause)

BURKE: ... that you must, must protect me on it because otherwise my source will get sacked.

CECCHELE: I, I'm aware of that.

BURKE: Okay.

CECCHELE: Thanks a lot Brian, I really appreciate your work.⁶⁵

(emphasis added)

[125] At 11:43 a.m. on 23 March 2006 Mr Burke sent an email replying to Mr Stokes saying:

Dear Gary

Thanks...treated with strictest confidence.⁶⁶

Regards

(emphasis added)

[126] At 3:36 p.m. on 23 March 2006 Mr Burke called Mr Grill and they had the following conversation.

BURKE: *I got a copy of that letter by the way that the DoIR sent to DPI.*

GRILL: *Good. How'd you get it?*

BURKE: *Oh from Gary.*

GRILL: *Good.*

BURKE: *Mmm, I'll give you a copy tomorrow.*

GRILL: *Good, okay.*

BURKE: *Uhm.*

GRILL: *How did Gary react? I haven't gone back to him since last Friday.*

BURKE: *What do you mean? He's in China.*

GRILL: *Oh I see. Right okay. Well how did, how did you get on to him in China?*

BURKE: *Emailed him.*

GRILL: *Did ya, ah, okay and you got his secretary to send it through?*

BURKE: *No no. He sent it to me himself.*

GRILL: *Oh did he? Good on him.*

BURKE: *It's very confidential I'd say.*

GRILL: *Yeah. Okay well maybe you can send that in, at least.*

BURKE: *What I'll do is I'll ring David and I'll tell David to get by his computer, take it off. It's for his eyes only, he can change it, bovrilise it but he's not to tell anyone he's got it.⁶⁷*

[127] On 28 March 2006 Mr Cecchele telephoned Mr Burke and said that he was meeting with Minister Bowler that afternoon, and he wanted a briefing on the Minister's current position in relation to the mining. Mr Burke said that he wasn't aware of Minister Bowler's current position but said: "... I am absolutely confident that John [Minister Bowler] will see this matter in the correct way". Mr Burke said that Mr Bowler was a protégé of Mr Grill's, who was hand picked by Mr Grill to take his place in Parliament. Mr Cecchele then said that he was thinking of calling Gary Stokes.

BURKE: *Yeah. Uhm, Gary's in China.*

CECCHELE: *Oh okay, well there, there goes that idea. (laughs)*

BURKE: *But but you do have that letter.*

CECCHELE: *Yes.*

BURKE: *And that will, if you read the letter, it's a very prevaricating letter David.*

CECCHELE: *It's not an objection at all.*

BURKE: *No. Exactly right.*

CECCHELE: *It's more of a, I, I personally believe that Limerick wrote that letter on the assumption that, he, he's basically sitting the fence waiting for someone else to make a decision.*

BURKE: *Of course he is.*

CECCHELE: *That's what I'm, and that ...*

BURKE: *That's exactly right.*

CECCHELE: *He doesn't want to put egg on his face so he's sitting there going let's have a chat about it and then waiting for someone else to make a call.*

BURKE: *Okay. So what you can do is to read the letter.*

CECCHELE: *Mmm hmm.*

BURKE: *Take out say five points.*

CECCHELE: *Mmm hmm.*

BURKE: *And repeat those five points to the Minister today.*

CECCHELE: *Mmm hmm.*

BURKE *And answer those points*

CECCHELE: *Mmm hmm.*

BURKE: *so that when the Minister sees that advice himself*

CECCHELE: *Mmm hmm.*

BURKE: *he'll immediately think oh well shit they've answered that, they must er you know be on the ball.*

CECCHELE *Yep, not a problem.⁶⁸*

[128] This intercepted telephone call was played to Mr Stokes at a Commission public hearing on 26 February 2007 and the following exchange between Mr Stokes and Counsel Assisting ensued.

Mr Stokes, the view of the department is reflected in Mr Limerick's letter - - -?---Yes, it was - - -

- - - on 28 February?--- - - on the 28th of February, that's right.

And you can see now why it was so beneficial of Urban Pacific to have that letter, can't you?---No, because they would have pursued this matter no matter what the letter said.

But they were aware of the position taken by the department and they could address those matters raised by Mr Limerick in a meeting with Mr Bowler?---Sure and they could have raised exactly those same issues in meetings with people in the department and they probably did.⁶⁹

[129] On 17 March 2006 Mr Martin wrote to Dr Limerick replying to his letter of 28 February 2006. Among other things Mr Martin said:

My advice is that land supply in the south-east section of Perth is not at a premium. ...

I am of the view that it is not an urgent matter to determine the request made by Urban Pacific. That said it would be unreasonable to delay consideration of this matter indefinitely.

In the spirit of the MoU that exists between our agencies, I am comfortable with the proposition of allowing time for negotiations to continue with Urban Pacific and Bemax.⁷⁰

[130] On 6 April Dr Griffin emailed other DoIR officers, not including Mr Stokes, saying:

DoIR has a letter today from Greg Martin, DPI, saying there is no urgent need to change the status of land at Mundijong as it is still some 10 years before there will be a need for significant additional urban land
*...*⁷¹

[131] On 10 April 2006 Mr Stokes emailed Mr Burke, with a copy to Mr Grill, saying:

Confidential

DPI advice to is is [sic] that there is no need for land for at least 10 years ... not sure whether Urban Pacific project is on its radar given this latest written advice.

*Gary*⁷²

[132] On 30 June 2006 Dr Limerick wrote to Mr Martin again about the issue of rezoning the land at Whitby. In that letter Dr Limerick confirmed that it was the understanding of DoIR that the Minister for Resources, and Assisting the Minister for State Development, had indicated that mining would not be pursued on the Urban Pacific land at Whitby and that DoIR, therefore, did not intend to object to the proposed lifting of "Urban Deferred" zoning at Whitby. Dr Limerick noted the policy of DoIR that sequential development (of mining and then urban development) should be supported ... and the potential interest expressed by Bemax in mining the local titanium resource.⁷³

[133] On 17 July 2006 Mr Stokes returned a telephone call to Mr Burke, during which Mr Burke asked for a copy of the latest letter sent to DPI from DoIR.

BURKE: *A lady just gave me a parking ticket, I was gunna pull in and she had a spent, a spare ticket. Uhm, I was just gunna ask you something Gary, uhm everything's sorted out with that uhm, business with er, Whitby and the mineral sands,*

STOKES: *Mm.*

BURKE: *but I'd really, if I could get a copy of that letter that Stewart sent across to uhm, to DPI it'd be very helpful to me.*

STOKES: *Okay.*

BURKE: *D'you reckon you could do that?*

STOKES: *I think so.*

BURKE: *Good on you. If, maybe just email it to me mate.*

STOKES: Yep. Alright.

BURKE: Ah, I'm seeing you on Wednesday, uhm,

STOKES: Yes.

BURKE: *I dunno how much time we'll have but I think you and me and Julian maybe in the next two weeks might get together and just talk about a few things, there're a few things moving around I think, there's a lot of dissatisfaction with the way the department's organised, I dunno, you you're probably more aware of it than me.*⁷⁴

(emphasis added)

- [134] On 25 July 2006 at 7:40 a.m. Mr Burke sent the following text message to Mr Stokes' mobile phone: "Any chance of that letter? BB".⁷⁵
- [135] Seven minutes later Mr Burke received a text message in reply from Mr Stokes': "I will fix today".⁷⁶
- [136] On 25 July 2006 Mr Stokes sent an email to Dr Griffin which was headed "Whitby" and said:

*Can you send me a copy of the letter Stuart sent to DPI re this issue please.*⁷⁷

- [137] On 26 July 2006 at 11:43 a.m. Mr Stokes sent an email to Mr Burke with the letter attached. Mr Stokes said in his email "Is this the letter you were after".⁷⁸ Mr Burke replied by email at 11:51 a.m. saying "Thanks".⁷⁹
- [138] On 26 July 2006 also at 11:51 a.m. Mr Burke sent an email, with the letter attached, to Mr Cecchelle, with copies to Mr Grill and Mr Des Riley, a public relations consultant to Urban Pacific. Mr Burke said: "Here's the letter to DPI. It is dated 30 June but was probably delivered in the time frame we thought occurred".⁸⁰

3.2.2 Commission Assessment

- [139] The Commission has considered Mr Stokes conduct in relation to the following three issues:
 - Did Mr Stokes engage in misconduct by providing confidential documents to Mr Burke?
 - Did Mr Stokes engage in misconduct by providing confidential information to Mr Burke and Mr Grill?

- Did Mr Stokes engage in misconduct by improperly attempting to influence the decision making process of DoIR to assist Urban Pacific because they were a commercial client of Mr Burke and Mr Grill?

3.2.2.1 Did Mr Stokes Improperly Provide Confidential Documents to Mr Burke?

[140] On the material available the Commission is satisfied that, at Mr Burke's request, Mr Stokes provided two documents to Mr Burke by email.

- On 23 March 2006 Mr Stokes emailed Mr Burke a copy of a letter, dated 28 February 2006, written by the Director General of DoIR, Dr Limerick, addressed to the Director General of DPI, Mr Martin.
- On 26 July 2006 Mr Stokes emailed Mr Burke a copy of another letter, dated 30 June 2006, also from Dr Limerick to Mr Martin.

[141] Both these letters were concerned with the DoIR position in relation to rezoning the land at Whitby. The first letter discussed relevant factors and the second conveyed DoIR's final position.

[142] The fact that Mr Stokes provided the letters, by email, to Mr Burke does not appear to be in dispute. The Commission holds a copy of the email traffic and the attached letters. These were shown to Mr Stokes at a Commission public hearing on 26 February 2007 and he agreed that he had sent them.

[143] In relation to the letter dated 28 February 2006, when Mr Stokes was shown it he was asked what he expected Mr Burke to do with the letter. Mr Stokes said: "I didn't expect him to do anything with it. He had asked for the letter and I provided a copy".⁸¹

[144] Mr Stokes was also asked what other documentation he had provided to Mr Burke or Mr Grill. Mr Stokes said: "I gave a letter, I think, of the final position that government reached on this particular matter".⁸² Mr Stokes was then shown his email of 26 July 2006 to Mr Burke, and the attached letter from Dr Limerick to Mr Martin dated 30 June 2006⁸³ and Mr Stokes agreed that that was the letter.⁸⁴

[145] DoIR has a policy entitled *Confidentiality and Release of Official Information*, which has four principles, the first of which is detailed below.

*You need to treat all Departmental information as confidential and should not release that information to third parties, without appropriate approval.*⁸⁵

[146] DoIR also has a policy entitled *Code of Conduct*⁸⁶ which states the following in relation to expected conduct in DoIR.

As an employee of DoIR, you are required to:

Act with integrity in the performance of official duties and to be scrupulous in the use of official information and facilities.

In relation to confidentiality and release of official information the following is stated in the *Code of Conduct*.

Section 81 of The Criminal Code makes it illegal for a public official to disclose confidential information, and prohibits employees of the public service from publishing or communicating any fact or document that came to their knowledge or possession by virtue of their office and which it is their duty to keep confidential.

- [147] At a Commission public hearing on 26 February 2007 Mr Stokes was reminded of the various legal obligations of a public servant relating to confidentiality and release of official information. Mr Stokes said that he had abided by those provisions in his dealings with Mr Burke and Mr Grill.⁸⁷
- [148] Mr Stokes was then shown a copy of the emails between Dr Griffin, Mr Burke and himself on 23 March 2006, and Dr Limerick's letter of 28 February 2006.⁸⁸ The following exchange ensued between Mr Stokes and Counsel Assisting.

Do you accept that's the letter that Mr Griffin sent to you?---It must be, it was attached to the email.

Containing, I would suggest to you, confidential information?---The confidential information, you could argue, Bemax, the Bemax (indistinct)

That's one. Shouldn't have been disclosed to anyone, should it?---They knew Bemax was there already.

*It shouldn't have been disclosed to anyone, should it?
---Possibly not.*

Definitely not, Mr Stokes. Definitely not, I would suggest, not possibly, definitely?---Mm'hm.

Do you agree with that?---No. That's your position. It's not mine.

No. I'm asking you whether you agree with that?---And I have already - I have already answered that question.

You said "possibly"?---Yes.

I'm suggesting to you it's actually definitely?---Well, that's fine. I'm saying possibly.

You're still maintaining possible?---Yeah. I don't see anything in here that's of a confidential nature with respect to Bemax's commercial position and that's the driver for me.

That's the position being taken by your department?---No, again, as I said earlier on, Burke and Grill at that point in time were operating or working for

Urban Pacific and I didn't see any problem with providing information to them that related to their interests in the project.

So you had no concern then as to who received this letter?

--Of course I did. These guys are working for the proponents.

So who did you not want to see this letter?---I wouldn't have given it to people other than the proponents and they were working for Urban Pacific.

At this point in time the proponents, apart from what you were telling them, didn't know the position taken by your department, did they?---No. They had a position that I thought had been locked away when I was acting Director-General absolutely and after that time the position obviously shifted and you've already proven that through the phone conversation.⁸⁹

[149] Mr Stokes was then asked at a Commission public hearing on 26 February 2007 about the comment in his email to Mr Burke "Please treat as confidential...".⁹⁰

"Please treat as confidential but here is copy of our response to DPI"?---Mm'hm.

"Gary Stokes"?---Mm'hm.

You regarded it as confidential, didn't you?---I - no, I'm asking them not to bandy it around to everyone around town.

Because it's confidential?---No. It's confidential to them as the managers of that particular proponent. This is an issue between Urban Pacific and Burke and Grill representing Urban Pacific dealing with us so it shouldn't go outside that network.⁹¹

[150] In his evidence at the public hearing when asked if he could see how this information would be helpful to Urban Pacific, Mr Stokes said:

Yes, I guess it could be helpful to Urban Pacific, yeah, but given that my original position always supported Urban Pacific it was nothing that I had moved from.⁹²

[151] Mr Stokes was also asked about his release to Mr Burke of Dr Limerick's letter of 30 June 2006.⁹³ Mr Stokes said that he did not regard that as inappropriate.

For the same reason I said before. This is a particular matter that relates to their particular client who was seeking a deferral. The decision has been taken. There's no - no mention on that of any confidentiality and it related to their client.⁹⁴

[152] Essentially, Mr Stokes' position appears to be summarised in his comment that release of the information was justified because:

... Burke and Grill at that point in time were operating or working for Urban Pacific and I didn't see any problem with providing information to them that related to their interests in the project.⁹⁵

- [153] Dr Limerick gave evidence at a Commission public hearing on 26 February 2007. Dr Limerick's opinion about the confidentiality of his letters which were released by Mr Stokes is quoted at paragraphs [69]-[74].
- [154] On 21 March 2007 Dr Limerick made a statement to the Commission.⁹⁶ In this statement Dr Limerick made the following comments in relation to the disclosure of his letter of 28 February 2006.

The letter provided a brief summary of my Department's assessment of the Whitby situation, including a summary of Bemax's estimated project revenue. The letter sought information from DPI as to the planning context so that a more fully-informed position could be reached.⁹⁷

I believe that, largely, the contents of this letter are confidential.⁹⁸

I did not authorise the disclosure of this letter to any other party.⁹⁹

The letter contains commercially sensitive information as it is putting forward Bemax's anticipated project revenues.¹⁰⁰

The letter also indicates the extent to which the department is opposed to the potential redevelopment of the Whitby land.¹⁰¹

Knowledge of the content of the letter could potentially influence the willingness of the parties (Urban Pacific and Bemax) to negotiate over whether mining was to occur prior to development.¹⁰²

I would say that, as at the date of the letter, this correspondence to the Department of Planning and Infrastructure was a sensitive document.¹⁰³

If a request had been made of me by representatives of Urban Pacific around the time that the letter was sent, I would not have provided a copy of the letter to them. I would have entered into general discussions with the parties to encourage discussions between them, but I would not have provided the projected revenue figures.¹⁰⁴

- [155] In relation to the letter of 30 June 2006, Dr Limerick made the following comments in his statement to the Commission.

The contents of the letter at the time of writing were largely in the public arena and I would not regard this second letter as being a confidential document in anywhere near the context of the letter

dated 28th February 2006. I would not consider the suggestion of the "memorial" to be sensitive.¹⁰⁵

If a representative from Urban Pacific had asked me at [sic] for a copy of the letter, I would not have provided a copy. However I would have broadly discussed the contents of the letter with them, confirming information such as the lifting of the Department's objection to rezoning, without providing a copy of the letter.¹⁰⁶

The Department has a "Code of Conduct" and a "Confidentiality and Release of Official Information Policy" that applies to all employees.¹⁰⁷

[156] On 20 April 2007 Mr Martin, the recipient of the letters from Dr Limerick, made a statement to the Commission.¹⁰⁸ In relation to the letter of 28 February 2006 Mr Martin made the following comments.

I would not have provided a copy of this letter to an outside organisation if I received such a request.¹⁰⁹

The process that I would take if a request was received would be to advise the party to make application under the FOI regime, so that due consideration could be given to the possible release of the letter.¹¹⁰

From a review of the DPI file concerning the proposed Urban Pacific Whitby development, I am aware that staff from this department did in fact receive two requests from outside parties to obtain a copy of the letter.¹¹¹

The notes made by my staff indicate that these requests were refused.¹¹²

I did not authorise the release of this letter dated 28 February 2006 to any party outside of my department.¹¹³

[157] In relation to Dr Limerick's letter of 30 June 2006, in his statement to the Commission, Mr Martin confirmed receiving it and made the following comment.

I did not authorise the release of this letter dated 30 June 2006 to any party outside of my department.¹¹⁴

[158] On 12 July 2007 Dr Griffin made a statement to the Commission.¹¹⁵ Dr Griffin said that, at Mr Stokes' request, he had sent Mr Stokes an electronic copy of Dr Limerick's letter of 28 February 2006. In relation to the release of that letter Dr Griffin made the following comments.

I have reviewed the letter and my general view is that the letter is not for release to the general public, but rather it is structured and

contains information designed for department-to-department communication, not for communication to outside organisations or persons.¹¹⁶

I would not have released this letter to a party outside of government for the following reasons.

- *The tonnage and revenue information relating to Bemax is commercially private and confidential, and should not be released to Urban Pacific or any other party.*
- *The time frame of the mining operation proposed by Bemax is a matter between government and Bemax, and I would not pass this information onto any other interested party.*
- *The letter contains comments on the potential to brief Ministers and the use of a MOU between the departments which is detail that would not normally go outside government as it is not relevant to outside parties to become involved in this process, but rather it is the working process of the two government departments involved. A statement saying the issue is still under consideration would be appropriate to go outside.¹¹⁷*

[159] In relation to the release of the letter of 30 June 2006 Dr Griffin made the following comment in his statement to the Commission.

Once again I do not believe that it would be appropriate to release this letter to any person outside of government.¹¹⁸

[160] Mr Garry Douglas Fee, Western Australian Operations Manager, Cable Sands (the Cable Sands Group being wholly owned subsidiaries of Bemax), made a statement to the Commission on 8 May 2007.¹¹⁹ In the statement Mr Fee commented on the information provided by Bemax to DoIR, which was included in Dr Limerick's letter of 28 February 2006.

[161] Mr Fee said that it was his understanding that the information had been provided to DoIR as a legislative requirement under the *Mining Act 1978*, and was provided when Bemax expressed an interest in the Mundijong deposit. In his statement to the Commission Mr Fee made the following comments in relation to this matter.

The letter correctly indicated that Bemax had shown an interest in the deposit at Mundijong.¹²⁰

The letter also contained a table of information pertaining to Bemax's indication of the resource located at Mundijong, and the projected revenue for a potential mining operation.¹²¹

I would consider that the information contained in that table was sensitive and confidential, and is not normally something that we would make public.¹²²

The technical data provided in the table, that is the figures relating to “Total Ore”, “Grade HM (%)” and “Tonnes HMC (t)” has likely been obtained from the technical data that Iluka supplied to us.¹²³

The information relating to the projected revenue is what I consider to be confidential.¹²⁴

The projected revenue figures are extremely sensitive to Bemax. These figures were based on our mining and processing costs, which are unique to each individual mining company.¹²⁵

The structure of how we (Bemax) valued the deposit at Mundijong was between the company and government.¹²⁶

These projected revenue figures are not something that Bemax would release to another party.¹²⁷

- [162] In this context, it is worth noting that Bemax wrote to Mr Cecchele of Urban Pacific on 23 February 2006. In that letter Bemax confirmed their interest in a mining program either over five to six years, or three years. Bemax stated in the letter that: “The value of in-ground mineral, assuming a fully optimised mining operation, has been estimated at around AUD\$134 million. Royalties of up to \$10 million could be expected to be paid to Urban Pacific as owners of the project”.¹²⁸
- [163] On the same date Bemax wrote to Dr Limerick.¹²⁹ In that letter Bemax provided a summary of reserve details, based on estimates, of the Total Ore (t), the Grade HM (%), the Tonnes HMC (t) and Project Revenue (\$) for both six-year and three-year mining operations. This summary was included in Dr Limerick’s letter to Mr Martin of 28 February 2006.¹³⁰
- [164] DoIR were aware that Bemax had written to Urban Pacific and Dr Limerick referred to it in his letter to Mr Martin on 28 February 2006.
- [165] The fact that Bemax had already provided Urban Pacific with one of the revenue figures later contained in Dr Limerick’s letter to Mr Martin could be argued to diminish the confidentiality of Dr Limerick’s letter. However, as the Commission understands it, this is not so. Mr Fee explained in his statement that the projected revenue figures “were based on our mining and processing costs, which are unique to each individual mining company”. These could only be determined if all the figures were known, and could not be derived from one revenue figure. The Commission is satisfied that Dr Limerick’s letter contains considerable additional information, both figures detailing the potential ore resource over two different mining periods, and to the deliberations of DoIR. In the Commission’s view the release of limited information by Bemax does not reduce Mr Stokes’ obligation to keep that

information confidential in conformity with the DoIR *Confidentiality and Release of Official Information* policy.

- [166] DoIR, in common with all other government departments in Western Australia, is subject to the *Freedom of Information Act 1992* (“the FOI Act”). The FOI Act provides criteria, a process and legal protection for government agencies to provide access to official documents. DoIR has an FOI Officer, and an application form and relevant information is provided on the DoIR Website. Requests for access to documents which do not contain personal details require an initial \$30 fee and other fees may also be charged.
- [167] Decisions on providing access to documents under the FOI Act are made by authorised officers based on specified criteria. Schedule 1 of the FOI Act contains a number of exemptions from the right to access which may be relevant to Dr Limerick’s letters. These exemptions include commercial or business information (section 4), deliberative processes of government (section 6) and confidential communications (section 8).
- [168] On 22 March 2006 Mr Burke sent an email to a DPI Officer requesting “a copy of the DoIR response to DPI on Whitby”. Mr Burke was told that he would need to make an FOI application, as the correspondence was on an “active” file (see paragraphs [333]-[334]).¹³¹ The Commission considers that there was no reason why Mr Stokes could not have done the same in response to Mr Burke’s request for the letter (although it accepts that he was under no legal obligation to do so). A decision could then have been made about whether lawful access should be provided.
- [169] The Commission notes that another consultant working for Urban Pacific, Ms Maureen Hegarty of Roberts Day, wrote to DPI on 27 March 2006 asking for a copy of correspondence between DoIR and DPI. Ms Hegarty’s request was refused. In the DPI reply of 7 April 2006, from the Executive Director of the Statutory Planning Division, it was stated: “... it would not be appropriate to make that correspondence available to a third party at this time”.¹³² Information about the process DPI was undertaking in relation to lifting of the “Urban Deferred” zone and “planning considerations for the land” was then detailed in the reply.
- [170] On the basis of the material available to the Commission it appears highly likely that any FOI request to DoIR for a copy of Mr Limerick’s letter would have received a similar response.

3.2.2.2 Whether Release of the Documents Could Constitute Misconduct

- [171] In determining whether Mr Stokes’ release of the two letters to Mr Burke could be considered misconduct, the Commission has had regard to all the evidence. Of particular significance are the following facts.
 - Mr Stokes provided copies of two letters to Mr Burke. These letters were dated 28 February and 30 June 2006. Both were unsigned but

addressed from the Director General of DoIR to the Director General of DPI. They both contained information about the position of DoIR in relation to whether it would support the rezoning of the land at Whitby.

- The first principle of the DoIR policy on *Confidentiality and Release of Official Information* states: “You need to treat all Departmental information as confidential and should not release that information to third parties, without appropriate approval”.
- Dr Limerick, the author of the letters, and the only officer senior to Mr Stokes at the time the letters were released, said that he did not authorise disclosure of the letters and that he would not have provided a copy to a representative of Urban Pacific, if they had made a request to him.
- The Directors General of both departments (DoIR and DPI) have given, in their statements, a number of reasons why they believe the documents should not have been released to external parties.
- The letter of 28 February 2006 contained commercial information provided by Bemax to DoIR and which senior officers from Bemax, DoIR and DPI considered to be commercially sensitive.¹³³
- The letters were from one Director General to another, and represented the official deliberations and position of DoIR. They were part of the government’s deliberative policy and decision making process. They were communications at the highest departmental level on an issue with significant commercial and social implications.
- Dr Limerick considered that release of the document “would potentially influence the willingness of the parties to negotiate over whether mining is going to occur ... ”.¹³⁴
- Mr Burke did not make an application for access to the documents in accordance with the FOI Act. Mr Stokes did not refer Mr Burke to the FOI Act. If Mr Burke had made such an application, it is unlikely that full access would have been given to the documents.
- DPI refused requests for a copy of the letter of 28 February 2006 which were made by other parties, including another consultant working for Urban Pacific.
- When Mr Stokes sent the letter dated 28 February 2006 to Mr Burke Mr Stokes was aware that it was confidential. In his email to Mr Burke, Mr Stokes said: “Please treat as confidential but here is a copy of our response to DPI”.¹³⁵
- Mr Burke was also aware that it was confidential. In his return email to Mr Stokes he said: “Thanks...treated with strictest confidence”.¹³⁶ In his

conversation with Mr Cecchele when telling him about the letter he said “But mate it, it, its worth my life if it gets out” and “... that you must, must protect me on it because otherwise my source will get sacked”.¹³⁷ Mr Grills’ lawyers submitted¹³⁸ that these comments by Mr Burke were “gratuitous and an exaggeration”. In part, they may or may not have been an exaggeration; but they were not gratuitous. In the Commission’s assessment, Mr Burke was patently trying to impress upon Mr Cecchele the need not to let it become known they had obtained detailed information of the DoIR position, much less a copy of the actual letter.

- After providing the letter to Mr Cecchele, Mr Burke coached Mr Cecchele about how he could use the contents of that letter to the advantage of Urban Pacific in his discussions with Minister Bowler.¹³⁹

[172] It is against the background of these facts and circumstances that it is then necessary to consider the application of section 4 of the Act, which the Commission does below.

3.2.2.3 Did Mr Stokes Improperly Provide Other Information to Mr Burke and Mr Grill to the Benefit of their Commercial Client?

[173] It is clear from the intercepted calls and emails quoted in this report that Mr Stokes was happy to provide information to Mr Burke and Mr Grill about the status of DoIR’s consideration of the Whitby issue.

- Mr Stokes provided detailed information about DoIR deliberations in several telephone calls. See paragraphs [96]-[105].
- Mr Stokes provided information about DPI’s advice to DoIR by email to Mr Burke on 10 April 2006.¹⁴⁰

[174] In providing this information Mr Stokes appeared to be disclosing the deliberative process of the Government. Mr Stokes said at a Commission public hearing on 26 February 2007 that he provided information to Mr Burke and Mr Grill because they were representing Urban Pacific which was an interested party. Mr Stokes said when his call to Mr Burke on 27 February 2006¹⁴¹ was played at the Commission public hearing: “I mean, he’s working for Urban Pacific and I think they have a right to know where we stood as a department”.¹⁴²

[175] However, Mr Stokes did not suggest that he had provided the same level of service to Bemax or any other interested party. And the Commission also notes, that at that stage, the most Mr Stokes could have been conveying, and what he purported to be conveying, was the position taken or advice given by DoIR – which was not the outcome of a final decision by the Government, but a departmental view as part of the deliberative process of governmental decision making.

[176] In the opinion of the Commission Mr Stokes was deliberately providing, without authorisation, Mr Burke and Mr Grill with information which he knew could be of commercial value to them and their clients and, in any event, was confidential because it was part of the deliberative process of governmental decision making. The question then becomes whether, in the circumstances, that constituted misconduct within the meaning of section 4 of the Act.

3.2.2.4 Did Mr Stokes Improperly Attempt to Influence the Decision Making Process of DoIR?

[177] The contacts Mr Stokes had with Mr Burke and Mr Grill suggest that he was willing to be very helpful to them, and supportive of their client's objectives. There is nothing necessarily wrong with that, in principle; public servants are supposed to be helpful. It is necessary to consider what was done, in what circumstances and for what purpose. The information obtained by the Commission shows that Mr Stokes took the following actions.

- Mr Stokes met with Mr Burke, Mr Grill and Mr Cecchelle, without any other DoIR officer present to discuss Urban Pacific's proposition.¹⁴³
- After Dr Limerick's return from leave, as a Deputy Director General, Mr Stokes, who no longer had any responsibility for the Whitby rezoning application, notified Mr Grill on 22 February 2006 that DoIR had decided to act in their client's favour, despite opposition from the relevant areas of DoIR.¹⁴⁴
- On the same date, Mr Stokes instructed, by email, other DoIR officers to prepare a letter to DPI saying that DoIR had no objection to the rezoning of the land.¹⁴⁵
- When this was unsuccessful Mr Stokes provided information to Mr Burke and Mr Grill about what was happening within DoIR and suggested a strategy for them to bypass DoIR and approach politicians.¹⁴⁶
- Mr Stokes then provided them with copies of Mr Limerick's letters to DPI.

[178] Clearly, Mr Stokes was supportive of Urban Pacific's objectives. However, it is not clear whether he took this position simply because he was being asked to by Mr Burke and Mr Grill, or because he genuinely believed that it was the correct policy position for DoIR, and the policy position of other DoIR officers was wrong.

[179] As in so many of the lobbying activities of Mr Burke and Mr Grill, although people in significant positions seemed willing to cooperate with them, there is little direct information which clearly establishes their motives in doing so. The Commission is, therefore, left to infer motives from the information available to it.

- [180] It is important to keep in mind that, because of its interception of telephones, it has been possible for the Commission to observe the manner in which Mr Burke and Mr Grill performed the task of lobbying – contacting whichever people, and in whichever way, would best achieve the ends their clients were seeking. However, the Commission realises that for the individual who has been approached it would not necessarily be obvious that they were being lobbied, or manipulated, in this way.
- [181] There is material available to the Commission which suggests that Mr Stokes saw his contact with Mr Burke and Mr Grill as helpful to his career. This is discussed in detail below, beginning at paragraph [183].
- [182] On balance, the Commission is not able to reach a conclusion about why Mr Stokes so actively supported the aims of Urban Pacific in the face of what appeared to be general opposition from other relevant officers in DoIR. The information available does not support a conclusion, to the required standard, that Mr Stokes improperly attempted to influence the decision making process of DoIR to the benefit of Urban Pacific because it was a commercial client of Mr Burke and Mr Grill.

3.2.2.5 Motivation for Mr Stokes to Assist Mr Burke and Mr Grill

- [183] Before reaching any conclusion on whether Mr Stokes' actions might constitute misconduct, it is helpful to consider his possible motivation for helping Mr Burke and Mr Grill.
- [184] Mr Stokes was a former Ministerial Officer to Mr Grill and it appears that he was aware (or at least believed) that Mr Grill had influence with his current Minister, the Hon John Bowler MLA. In the course of an intercepted phone call made by Mr Stokes to Mr Grill on 22 February 2006 after providing information about the view of DoIR relating to the land at Whitby (refer paragraph [96]), then briefly discussing action relating to another client, Mr Stokes asked Mr Grill about Minister Bowler.¹⁴⁷

STOKES: *Now on ano-on another matter.*

GRILL: *Yeah.*

STOKES: *Ah Bowler took over your seat didn't he?*

GRILL: *Exactly yes.*

STOKES: *So presumably ah, you've had a fair bit to do with him?*

GRILL: *A lot, he's very close to me.*

STOKES: *Yeah.*

GRILL: *I've run his campaign.*

STOKES: Yeah well I'd guessed that would be

GRILL: financed that in fact.

STOKES: I'd guessed that would be the case.

GRILL: Yeah.

STOKES: Uhm, ah

GRILL: When I say financed them I raised the money for them okay?

STOKES: Yeah, yeah.

GRILL: Yeah.

STOKES: Uhm what advice can you give as to how to deal with him?

Later in the conversation:

STOKES: Yeah okay. What's his view of bureaucrats?

GRILL: Uhm not, he will speak to bureaucrats uhm but he's not necessarily going to take advice that doesn't accord with ah

STOKES: That's alright.

GRILL: his view of the world.

STOKES: Yep. That's what Ministers are elected for at the end of the day.

GRILL: Yeah. He still takes

STOKES: Bit like you Julian.

GRILL: (laughs) Could be.

STOKES: (laughs)

GRILL: Ah and just between you and me because we're old friends he still takes a fair bit of political advice from me.

STOKES: Yeah I would have thought that would be ah, I'd be surprised if he didn't.¹⁴⁸

It is apparent from the above that Mr Stokes did not know the new Minister and was seeking Mr Grill's advice on how to deal with him. It appeared that in his response Mr Grill was keen to demonstrate to Mr Stokes that he had personal and political influence over Minister Bowler. It is clear from the final comment that Mr Stokes accepted that Mr Grill did have that influence.

[185] Mr Stokes also appeared to be willing to accept that Mr Burke and Mr Grill could have some influence on the organisation of DoIR, for example, on 17 July 2006, Mr Burke and Mr Stokes had the following conversation, continuing from the conversation quoted at paragraph [133] above.

BURKE: *Ah, I'm seeing you on Wednesday, uhm,*

STOKES: Yes.

BURKE: *I dunno how much time we'll have but I think you and me and Julian maybe in the next two weeks might get together and just talk about a few things, there're a few things moving around I think, there's a lot of dissatisfaction with the way the department's organised, I dunno, you you're probably more aware of it than me.*

STOKES: *No, (clears throat), no sometimes when you're in the middle of it as you know, uhm, you're usually the I- you can sometimes be the last person to know.*

BURKE: Well, maybe

STOKES: And I've been away for a little while too, so.

BURKE: *Have you, yeah I went over to the World Cup, it was really good. But maybe Julian and I are creating a bit of it I have to say,*

STOKES: Yeah.

BURKE: *but there seems to me to be a realisation that uhm, this four way split is really, really bad.*

STOKES: Problematic, yeah.

BURKE: Yeah but I mean a, not a realisation outside a realisation in government.

STOKES: Yeah.

BURKE: Anyway, if we get a chance we, er er probably ...

STOKES: *That'd be good.*¹⁴⁹

(emphasis added)

- [186] This appears to resemble other situations noted by the Commission in which Mr Burke or Mr Grill encouraged public officers to believe that they had some influence over other more highly ranked people; Ministers, Chief Executive Officers (CEOs) or others, who potentially could have a beneficial influence on the person's career. The relevant issue is not whether Mr Burke and Mr Grill actually had the influence they purported to have, but whether the public officer in question believed they had such influence. In this case the Commission is satisfied, on the basis of the information available to it, that Mr Stokes had no difficulty in accepting that Mr Burke and Mr Grill could influence the organisation of DoIR. The fact that such a long term senior public servant accepted this is, in itself, a testament to the influence of Mr Burke or Mr Grill. Given that Mr Stokes had formerly worked for Mr Grill (refer paragraph [89]), it is also likely that he felt some personal loyalty, or thought that Mr Grill had had some positive influence on his career in the past. That was certainly the view that Mr Grill and Mr Burke had of him.
- [187] In this context it is worth noting the attitude of Mr Burke and Mr Grill to Mr Stokes' position in DoIR. For example, on 25 February 2006, in a conversation quoted at paragraph [104], Mr Grill said: "truth is that I think Gary's gonna be our man in DoIR". Mr Burke said: "... one of the big things is to convince Bowler he'll be our bloke there and get Bowler to promote him".¹⁵⁰
- [188] In their section 86 representations, Mr Grill's lawyers contend that all this conversation reflected was the need for lobbyists to foster relationships with persons within industry and government, and support and encourage their promotion. They say that the comment did no more than indicate the need to have a "contact" within DoIR, which, of itself, is not improper. For the reason previously explained, the Commission expresses no opinion and makes no comment on the propriety or otherwise of Mr Burke and Mr Grill's purpose. It is the fact of it, the dealings they had with public officers to give effect to it and the responses of those officers, which are of relevance here. In the Commission's assessment on the evidence as a whole, Mr Burke and Mr Grill's purpose was much more than Mr Grill's lawyers assert.
- [189] On 12 March 2006 Mr Burke and Mr Grill discussed Mr Stokes and his role in DoIR. Mr Burke referred to the current Director General, Dr Limerick, and said: "... we can shift him somewhere and put Gary in charge of that department, we'd be home and hosed". Mr Grill said: "... I'll mention it to John, you mention it to John, we'll see what we can do".¹⁵¹
- [190] On 9 April 2006 Mr Grill telephoned Mr Bowler and, after discussing other matters they had the following conversation.

GRILL: *Now, I want to move onto another issue.*

BOWLER: *Mm.*

GRILL: *I'm getting feedback that the setup of the department, uhm, that, that is that the Department of Resources is really not delivering. The setup is wrong; three Ministers is wrong, uh, personnel within the department are wrong, the, uhm, intervention of Alannah, eh, in respect to the state agreements in relation to ports and rail and infrastructure is not working out well. They don't seem to be equipped to handle that. Uhm, I mean a, to be blunt with you, uhm, people like Gary Gray who I discussed it with last night and a range of others have they [sic] view that uh, Alan should get out of that arena and that Fran should get out of uh, the science side of it. It should all go to you, then you don't have confusion with the department. Once you've got one Minister handling the matter you can then get some decent people in there. Jim Limerick is, is not a salesman for the department. He's allowed or, or, uhm, Clive and Limerick allowed, uh, Alannah's people to run all over them in respect to, uh, the infrastructure agreement in respect to FMG that, not the mine agreement but the port and rail.*

BOWLER: Yeah.

GRILL: *And they just don't have the, just don't have the people*

BOWLER: *But I, uhm*

GRILL: *to handle it.*

BOWLER: *Yeah. How 'bout I drop around your place, uh, and look I'm about to lift some, uh, furniture in the middle Hammond Street there donated to St Vincent de Paul*

GRILL: Yep.

BOWLER: *And they're all waiting for me to help 'em.*

GRILL: Yep.

BOWLER: *Uhm, how 'bout I uhm drop around. Eh, you doing anything tomorrow night?*¹⁵²

[191] It is reasonable to infer that this conversation represents Mr Grill's intention to lobby Minister Bowler about replacing Dr Limerick as Director General with Mr Stokes. While there is no mention of Mr Stokes in the conversation, it is clear that Minister Bowler and Mr Grill intended to continue the conversation face to face the following day. It is, also, worth noting that this conversation suggests

that Minister Bowler seemed to see nothing incongruous in Mr Grill advising him how DoIR should be restructured and that the Director General should be removed – again, a testament to the influence of Mr Grill and Mr Burke.

- [192] In their representations of 18 July 2008, Mr Grill's lawyers submitted that these and similar comments made by Mr Burke and Mr Grill concerning the reorganisation of DoIR were an expression of their oft-expressed views regarding the complexities faced by organisations seeking to obtain government approvals in circumstances in which several ministers and departments are involved in the overall approval process. They submitted that such concerns reflected the broader concerns of the business community, particularly the mining industry. All of this may well be so, but it does not go to the point here, which is the way in which Mr Burke and Mr Grill sought to influence the internal workings of the government and the public service – or at least to create the impression they could.
- [193] The Commission is satisfied that Mr Stokes believed that Mr Burke and Mr Grill had some influence on his Minister, the Hon John Bowler MLA, and also that Mr Grill did make an approach to Minister Bowler at least about restructuring DoIR and replacing Dr Limerick as Director General. However, the Commission has no additional information to suggest that Minister Bowler took any action on this or that Mr Grill or Mr Burke did any additional lobbying specifically to benefit Mr Stokes.
- [194] In any event, at the time of Commission public hearings in February 2007, Mr Stokes and Dr Limerick were both in the same positions they had been in early 2006, so it appears that Mr Grill's lobbying did not result in the changes for which he and Mr Burke had apparently hoped.
- [195] On the basis of the information before it the Commission is satisfied that Mr Burke and Mr Grill intended to influence Minister Bowler in favour of Mr Stokes, and that they attempted to influence Minister Bowler to this end. That Mr Stokes could have been left with that impression was not the result of any misapprehension on his part of what they were seeking to convey. The Commission is satisfied that Mr Stokes believed Mr Burke and Mr Grill were able to influence Minister Bowler to advance his career and that this was his motivation for helping them in the way he did.

3.2.3 Commission Opinion as to Misconduct

3.2.3.1 Background

- [196] Having assessed the material before it the Commission has formed the opinion that Mr Stokes has engaged in misconduct in releasing information to Mr Burke and Mr Grill, in respect of the position of DoIR (and in one case DPI) on rezoning of the land at Whitby.
- [197] The Commission is of the opinion that in providing information to Mr Burke and Mr Grill about the deliberative processes of DoIR, including providing, without authorisation, Mr Burke with copies of letters sent by the Director

General of DoIR to the Director General of DPI, Mr Stokes has engaged in serious misconduct in terms of the section 4(a) and 4(b) of the Act. In respect of the former, as a public officer he corruptly acted in the performance of his functions by providing the letter to Mr Burke, contrary to his duty. In respect of the latter, by corruptly taking advantage of his employment as a public officer to obtain a benefit for Mr Burke, Mr Grill and Urban Pacific – and, indirectly, for himself.

[198] The essential elements of misconduct under section 4(b) of the Act are:

- (1) the person is a public officer;
- (2) the person takes advantage of their office or employment as a public officer;
- (3) corruptly; and
- (4) to obtain a benefit for themselves or some other person, or to cause a detriment to any person.

[199] Mr Stokes was a public officer at all relevant times.

[200] Mr Stokes could not have provided the information or copies of the letters to Mr Burke had he not held the public service position he did. In that way, Mr Stokes took advantage of his employment as a public officer.

[201] The question which arises in respect of both section 4(a) and 4(b) of the Act is whether Mr Stokes' actions could be said to have been done "corruptly".

[202] Corruption is a notoriously difficult concept to define. The word is not defined in the Act. Although there are many cases which discuss the meaning of corruption, each is a product of the statutory provision (or common law concept) being considered and the circumstances then at hand.

[203] The leading authority in Western Australia on the meaning of corruption is *Willers v R* (1995) 81 A Crim R 219. In that case Malcolm CJ said that section 83 of *The Criminal Code* ("the Code"), Western Australia, "is concerned with the use of power or authority for improper purposes". Malcolm CJ noted that in the context of the corporations law the term improper "has been held not to be a term of art, but simply to refer to conduct by an officer of a company which was inconsistent with the proper discharge of the duties, obligations and responsibilities of the officer concerned ...". Malcolm CJ went on to cite various definitions from the dictionary. Malcolm CJ said, for example, that the Oxford English Dictionary definition of "corrupt" included "perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like". In the same dictionary the verb "corrupt" meant "to destroy or pervert the integrity or fidelity of (a person) in his discharge of duty". Ultimately Malcolm CJ concluded that an exercise of lawful authority for an improper purpose can amount to corruption under section 83 of the Code. Malcolm CJ's *ratio decidendi* should not be taken as an exhaustive definition of the meaning of corruption. The facts in that case involved the abuse of an otherwise lawful power for an improper purpose and so Malcolm CJ's reasons must be

understood in that context. The case does, however, provide a useful guide to what is corruption in those circumstances.

[204] *Re Lane* (unreported, Supreme Court, Qld, Ryan J, 9 October 1992) concerned legislation pursuant to which a public officer could lose their superannuation entitlements if they committed an act of corruption. As to the meaning of corruption Ryan J said:

In my opinion, in this context it means conduct which is done deliberately and contrary to the duties incumbent upon the person by virtue of his public office, as a result of which the person has sought to gain an advantage for himself or another.

I consider that the word “corruptly” is not to be equated with “dishonestly”, and that dishonesty does not necessarily connote corruption, but if a person who holds a public office dishonestly applies public moneys to his own use, then his conduct is properly describable as corruptly using a public office held by him.

I accept as correct the submission made on behalf of the respondent that it is necessary to find a conflict between duty and interest before one can find a corrupt performance or non-performance of public duties. But if a person uses a public office which he holds so as to dishonestly apply for his own benefit public funds, he has allowed his own private interest to override his public duty to apply the funds only for public purposes, and his conduct is corrupt.

(emphasis added)

[205] Thus for Ryan J the essence of corruption was the dereliction of public duty. The judgment of Ryan J in *Re Lane* was cited with approval by Higgins J in *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452.

[206] Another decision that provides a useful insight into the meaning of the phrase “acts corruptly” is that of the Federal Court of Australia in *Williams v R* (1979) 23 ALR 369. That case involved an appeal from the ACT Supreme Court. At trial the appellant was convicted of conspiring to cause a police officer to act corruptly. His defence was that he had paid the police officer the money so as to encourage him to investigate the complaint (against the appellant) properly because he had been “framed”. In deciding the case it was important to assess the meaning of the phrase “acts corruptly”. Blackburn J (with whom St John J agreed) expressed this opinion about the meaning of the phrase, at 373:

The word has, in my opinion, a strong connotation of misconduct, ie dereliction of duty, whether by act or omission. To that extent, the scope of the section resembles that of the common law offence of bribery, which implied the intention to procure a breach of duty on the part of the official bribed.

(emphasis added)

[207] The trial judge's direction to the jury in that case left open the possibility that the jury might think that they could convict the appellant even if they concluded that he had bribed the police officer to conduct a thorough investigation. Blackburn J took the view that the appellant could not be convicted of conspiring to cause a police officer to act corruptly in circumstances where he was paid to do his duty. For that reason the conviction was quashed with an order for a retrial. The decision in this case is authority for the proposition that the phrase "acts corruptly" means to act contrary to one's public duty.

[208] In the criminal law, the notion that a person may act corruptly does not of itself involve the gaining of a benefit or the causing of a detriment. For example, section 83 of *The Criminal Code* (WA) makes it an offence for a public officer, without lawful authority or a reasonable excuse, to act "corruptly" in the performance or discharge of the functions of his office or employment, so as to gain a benefit for, or cause a detriment to, any person. The meaning of "corruptly" therefore cannot necessarily involve an intent (or purpose) to obtain a benefit or cause a detriment.

[209] More importantly, the same distinction is made clear in section 4 of the Act itself. The word "corruptly" appears in both section 4(a) and 4(b). The former contains no reference to the gaining of a benefit or the causing of a detriment. That section makes it misconduct for a public officer to "corruptly" act or fail to act in the performance of his or her office or employment. The latter does expressly refer to gaining an advantage or causing a detriment, by the public officer "corruptly" taking advantage of his or her office or employment. If the notion of "corruptly" already included an intent to gain an advantage or cause a detriment, those words would be otiose.

[210] Ordinary dictionary definitions support the conclusion that in section 4 of the Act, "corruptly" connotes dereliction or breach of duty, or acting contrary to one's duty; being perverted from fidelity or integrity. "Corruption" is the perversion of a person's integrity in the performance of official or public duty or work.¹⁵³

[211] Thus, "corruptly" is not to be equated with "dishonesty", although a person who acts dishonestly may act corruptly.¹⁵⁴ For the purposes of this report, the Commission takes the law to be that the word "corruptly" in section 4(a) and 4(b) of the Act, is to be interpreted to mean conduct that is done deliberately and contrary to the fidelity and duties incumbent upon the person by virtue of his or her office (to adopt the language of Ryan J in *Re Lane*).

[212] In the Commission's opinion what Mr Stokes did was done deliberately and was contrary to the duties incumbent upon him by virtue of his position. The DoIR *Code of Conduct* required him to: "Act with integrity in the performance of official duties and to be scrupulous in the use of official information ...".¹⁵⁵ The DoIR policy on *Confidentiality and Release of Official Information* required him "to treat all Departmental information as confidential and ... not release that information to third parties, without appropriate approval".¹⁵⁶ In the Commission's opinion Mr Stokes failed to comply with these requirements. In

these circumstances, his actions constitute misconduct under section 4(a). Further, combined with the fourth element, which this report addresses next, in the opinion of the Commission he “corruptly” took advantage of his employment as a public officer, within the meaning of section 4(b) of the Act.

- [213] The fourth element under section 4(b), “to obtain a benefit …”, is purposive. It does not connote that a benefit must in fact be obtained (although of course it would include that situation). Rather it speaks of the purpose with which the public officer engages in the relevant conduct. Here the evidence establishes in the Commission’s assessment that Mr Stokes’ purpose was to benefit Mr Grill and Mr Burke by enabling them to achieve a benefit or advantage for their client. His motivation for doing that was to secure or maintain their goodwill towards him, in the expectation that they could, and would, exercise their influence to advance his career. Mr Stokes was, accordingly, taking advantage of his employment to obtain a benefit both for himself and for them. In the Commission’s opinion, this element is established.
- [214] The necessary four elements having been established on the balance of probabilities, it is the opinion of the Commission that Mr Stokes’ conduct constitutes serious misconduct under section 3, and section 4(a) and 4(b) of the Act.
- [215] The Commission points out that an opinion by it that misconduct has occurred is not, and is not to be taken as, a finding or opinion that Mr Stokes has committed a criminal or disciplinary offence.¹⁵⁷
- [216] Section 81 of *The Criminal Code* provides that –

Disclosing official secrets

- (1) *In this section -*

“disclosure” includes –

- (a) *any publication or communication; and*
- (b) *in relation to information in a record, parting with possession of the record;*

“government contractor” means a person who is not employed in the Public Service but who provides, or is employed in the provision of, goods or services for the purposes of –

- (a) *the State of Western Australia;*
- (b) *the Public Service; or*
- (c) *the Police Force of Western Australia;*

“information” includes false information, opinions and reports of conversations;

“official information” means information, whether in a record or not, that comes to the knowledge of, or into the possession of, a person because the person is a public servant or government contractor;

“public servant” means a person employed in the Public Service;

“unauthorised disclosure” means –

- (a) the disclosure by a person who is a public servant or government contractor of official information in circumstances where the person is under a duty not to make the disclosure; or
- (b) the disclosure by a person who has been a public servant or government contractor of official information in circumstances where, were the person still a public servant or government contractor, the person would be under a duty not to make the disclosure.

(2) A person who, without lawful authority, makes an unauthorised disclosure is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

[217] Section 83(c) of *The Criminal Code* relevantly provides that –

Corruption

Any public officer who, without lawful authority or a reasonable excuse –

- (a) ...
- (b) ...
- (c) acts corruptly in the performance or discharge of the functions of his office or employment,

so as to gain a benefit, whether pecuniary or otherwise, for any person ... is guilty of a crime and is liable to imprisonment for 7 years.

[218] In the opinion of the Commission, based on the facts set out at paragraphs [197] and [212]-[213], a properly instructed jury could find that the conduct of Mr Stokes, in releasing information to Mr Burke, constituted a breach of section 81 of *The Criminal Code* (disclosing official secrets) and section 83 of *The Criminal Code* (corruption). Therefore, in terms of section 4(d)(v) of the Act his conduct could constitute an offence against a written law.

[219] The Commission is further of the opinion that this conduct of Mr Stokes falls within the terms of section 4(d)(ii), 4(d)(iii) and 4(d)(iv) of the Act in that it:

- constituted or involved the performance of his functions as a public officer in a manner that was not honest or impartial (section 4(d)(ii));
- constituted or involved a breach of the trust placed in him by reason of his office or employment as a public officer (section 4(d)(iii)); and
- involved the misuse of information or material that he had acquired in connection with his functions as a public officer (section 4(d)(iv)).

[220] In the course of its investigation and having formed a preliminary opinion that Mr Stokes' conduct might constitute a breach of section 81 of *The Criminal Code*, the Commission wrote to the State Director of Public Prosecutions (DPP) recommending consideration be given to possible charges under section 81. By letter dated 4 March 2008 the DPP advised there was a *prima facie* case with reasonable prospects of conviction against Mr Stokes arising from the disclosure by him to Mr Burke of the letter dated 28 February 2006, but not that of the letter dated 30 June 2006.

3.2.3.2 Disciplinary Investigation

[221] That advice was given notwithstanding that the material provided to the DPP included a report of a disciplinary investigation conducted under the PSM Act into a number of allegations against Mr Stokes, one of which concerned his release to Mr Burke of the DoIR letter dated 28 February 2006. The Disciplinary Investigator had found that although that conduct was a breach of discipline, it was only a minor breach (and thus not one which could provide reasonable grounds for termination of office or employment). It is necessary at this point to explain how that came about.

[222] As a result of evidence given at the Commission's public hearing on 26 and 27 February 2007, the Director General of the Department of the Premier and Cabinet (DPC), Government of Western Australia, initiated disciplinary proceedings under section 81 of the PSM Act on 1 March 2007.

[223] Mr Stokes was given notice of suspected breaches of discipline. It was alleged he had released confidential DoIR information to third parties on seven separate occasions. Two of those related to his release of the DOIR letters dated 28 February and 30 June 2006. Mr Stokes was invited to provide an explanation having regard to the transcript of the Commission's hearing on

26 and 27 February 2007. Mr Stokes responded on 21 March 2007. According to the report of the Disciplinary Investigator:

In his written response of 21 March 2007, Mr Stokes provided an extensive background to the Whitby and [other] matters in order to frame his response to each suspected breach of discipline. He agreed that he had released the information as itemised to Mr ... Grill and/or Mr ... Burke, but he did not accept that the information was confidential and that it should have been kept from the clients Messrs Grill or Burke were representing. Mr Stokes argued that Messrs Grill and Burke had been engaged to represent Urban Pacific Limited (Urban Pacific) and Kimberley Diamond Company (KDC) in their respective dealings with the State government and thus had a legitimate right to receive the information he released. Mr Stokes emphasised that:

... in the normal course of events DoIR would always keep its clients informed of progress with respect to their projects and of DoIR's deliberations on those projects.

Mr Stokes acknowledged that, through an oversight, he had forwarded a letter to Mr Burke containing a paragraph referring to a private company, Bemax, and "... provided some rudimentary details relating to its proposed development". He accepted that he "... should not have forwarded them to a third party without their consent".¹⁵⁸

- [224] The Director General reached the view that several matters in Mr Stokes' written response were not adequately explained and required further information.
- [225] On 10 April 2007 Mr Stokes was notified of an investigation into a suspected breach of discipline in accordance with section 81(2) of the PSM Act. On 25 May 2007 he was advised that an investigator had been appointed.
- [226] The discipline investigation included the conduct of interviews (not on oath or affirmation) with Mr Stokes and a number of other DoIR officers, as well as an examination of Commission transcripts and other documentary material.
- [227] The results of the discipline investigation were contained in a report dated 12 September 2007. The Disciplinary Investigator found that Mr Stokes' actions were part of his official duties, that the passing on of information to representatives of proponents "was consistent with accepted departmental practice" and that in respect of six of the allegations Mr Stokes' actions did not constitute a breach of discipline. In respect of the seventh allegation, the Disciplinary Investigator found that when Mr Stokes emailed Mr Burke a copy of the letter from the Director General of DoIR to the Director General of DPI dated 28 February 2006 about the rezoning of the land at Whitby, which included information about another party, that was a minor breach of discipline.

[228] In his response to the section 86 notification by the Commission, Mr Stokes' lawyer submitted that "at all stages" Mr Stokes "acted with [sic] the best interests of his position and that of the community".¹⁵⁹ In the final paragraph of that letter Mr Stokes' lawyer appeared to be requesting "a final consideration" of the evidence. The Commission has taken that approach, and in so doing, has had regard not only to the material obtained in the Commission's investigation, but also to the disciplinary report and to the evidentiary statements obtained in that investigation. The Commission notes those statements are marked "Strictly Confidential: Not to be Released to Third Parties".

[229] Those sections of the Disciplinary Investigator's Report¹⁶⁰ which deal with the release by Mr Stokes of the DoIR letters dated 28 February and 30 June 2006 (Suspected Breaches C and D respectively) are Attachments 1 and 2 to this report.

[230] The Commission has a role, in accordance with section 41 of the Act,¹⁶¹ to review the way in which an Appropriate Authority has dealt with misconduct. "Appropriate Authority" is defined in section 3 of the Act as "a person, body or organisation who or which is empowered by a law of the State to take investigatory or other action, or both, in relation to misconduct". A disciplinary investigator under the PSM Act is an Appropriate Authority. The Commission conducts more than 1,000 reviews each year in accordance with section 41 of the Act. The Commission has reviewed the DPC investigation and, as it does with all reviews of this type, will correspond separately with the Director General of DPC about the results of its review. The Commission does not intend to analyse the DPC investigation in this report. Suffice to say that the Commission has ultimately formed its views on misconduct having considered the documents of that investigation, in concert with its own hearings and investigations.

[231] The Commission has had regard to all the material mentioned above and will not rehearse it all here. However, some particular aspects are noteworthy.

[232] Mr Stokes argued before the Disciplinary Investigator that the Commission had not recognised the fundamental issue, which he said was that in relation to the Whitby rezoning the Minister for Resources did not have a statutory role nor any formal decision to make. On that point the Commission notes that the whole idea of the MOU between DoIR and DPI was that if the two departments could not agree, they would advise their respective Ministers who would then meet and make a decision.¹⁶² In his letter to Mr Martin dated 30 June 2006, Dr Limerick confirmed the DoIR understanding that the Minister for Resources had indicated that mining would not be pursued on the Urban Pacific land at Whitby "and that DoIR, therefore, did not intend to object to the proposed lifting of 'Urban Deferred' zoning at Whitby ...".

[233] Mr Stokes told the disciplinary investigation that he was in China when he received the letter dated 28 February 2006 as an attachment to an email from Dr Griffin. He said he forwarded the attachment to Mr Burke on 22 February 2006 without opening it, and did not realise it contained information on Bemax.

However, Mr Stokes knew there had been “a rearguard action” against his decision, within DoIR. He told Mr Grill that in their telephone conversation two days later, on 24 February 2006. By 22 February 2006 of course, Dr Limerick had returned and Mr Stokes was no longer Acting Director General. As previously observed,¹⁶³ Mr Stokes said in evidence before the Commission that he had heard that the DoIR position in relation to rezoning the land had changed upon Dr Limerick’s return. His appreciation of that position was confirmed in his telephone conversation with Mr Burke on 27 February 2006.¹⁶⁴ Given that the DoIR position on the land at Whitby had been the subject of disagreement between Mr Stokes and other senior officers, it makes no sense for Mr Stokes to say that he assumed that the Director General’s final letter about that position would be the same as an earlier draft, or that he took no interest in what it said. Under the circumstances, it is inconceivable that he would not have wanted to know what was in it. In the Commission’s assessment, he knew perfectly well what the content of that was a month later, and in any event that it was part of the deliberative process of government, and he must necessarily have appreciated at the time that that was precisely why Mr Burke wanted it.

- [234] The above conclusion is reinforced by the fact that when Mr Stokes was asked in his evidence on oath before the Commission on 26 February 2007, about sending to Mr Burke an email copy of the DoIR letter dated 28 February 2006, he made no claim to not having opened the attachment or not being aware of the content of the DoIR letter.
- [235] The fact that the DoIR letter contained confidential commercial information on Bemax was important, but it was only one aspect of the confidentiality of the letter. Mr Stokes provided to Mr Burke, without the authority of his Director General, a letter between his Director General and his counterpart in DPI which was part of the government’s deliberative process on a contentious matter with serious social and commercial implications.

3.2.3.3 Interviews by the Disciplinary Investigator

- [236] On the issue of confidentiality, Dr Griffin told the Disciplinary Investigator that at the time he would “most definitely” have viewed the letter dated 28 February 2006 as being confidential.¹⁶⁵ He said that if Mr Stokes had asked him to send it to Mr Burke or Mr Grill, he would not have done so; he would not have sent it to anyone outside the agency.¹⁶⁶
- [237] Asked whether he considered Urban Pacific could have derived a benefit from knowing what DoIR was proposing to do, Dr Griffin said:

TG: There's confidential information in there ... about Bemax's mining proposal and ore and all sorts of stuff, I don't know, about what ... Urban Pacific could do. Urban Pacific are a branch of Macquarie Bank, who've got big mining interests, I can't speculate on what they could or couldn't do with it!

Q: But it may be of interest to them?

*TG: Well, I would have thought, if I was trying to find a way through something like that, yeah, any information like that, you don't know how it might be valuable. It's intelligence and you're never quite sure how you might make use of it, you can't speculate on how they do it.*¹⁶⁷

- [238] He said that it would not be appropriate for an officer to release either the letter dated 28 February or that dated 30 June 2006.
- [239] Asked whether disclosure here would be "in the course of the officer's official duty" within the meaning of *Administrative Instruction 711*,¹⁶⁸ Dr Griffin said:

TG: Yeah, well I guess that why I wanted ... that, I suppose, you could argue in his official duty of talking to these people, if it was the proponents in a room, then you may give them a bit more information.

Q: But not in the circumstances that have been outlined there?

*TG: No.*¹⁶⁹

- [240] Asked then whether he regarded any of the seven incidents of the release of information as constituting misconduct, Dr Griffin responded:

*I would have thought so. Well, I think giving copies of official correspondence, agency to agency, is definitely misconduct. I think giving any verbal advice on any contentious issue, particularly if the issue is under discussion, is wrong because what it does is that it flags to the people, hey, you still have a problem with this, and then they know go in and work harder at it, whatever they might feel they need to do. All it does is encourages people outside to actually put extra pressure on government ... So that's why you don't do it ...*¹⁷⁰

(emphasis added)

- [241] The distinction between advice given to a proponent before a decision is made and advice given afterwards, was also made by Mr Lew Pritchard, during his interview with the Disciplinary Investigator:

LP: Well, I think its very clear as to where a point is where information is, you know, the end result of the decision and therefore can be released to a proponent, or information is still in a process that hasn't lead [sic] to that decision and therefore, in my view, is confidential to the Department. I don't think there's any doubt in my mind ...

Q: So you're drawing a clear distinction between process and when the decision is made, then you tell the proponent about the decision.

*LP: Indeed. I think, as a government agency, we cannot, in most cases, make a decision ourselves, particularly in the area we're talking about. I mean, we have a whole lot of legislation that we do make decisions on and that's clearly within our mandate ... but in this area, they're political decisions, they're made by ministers. Until the minister has made his decision, I don't think we can make any assumption about what that decision is going to be. Now, I appreciate that's very ... difficult when you're dealing with a client who is trying to get something done and we're trying to help get something done, and they're trying to get a feel for where it's all going. It's a complex area, but if it comes to the crunch, I think the issue is pretty clear. Until that decision is taken, there's no decision there, so what can you tell them?*¹⁷¹

[242] Dr Limerick was asked by the Disciplinary Investigator about how the requirement to maintain official confidentiality could be accommodated in negotiations conducted by a public officer, leading to an agreement that is endorsed by Cabinet. The Disciplinary Investigator relied upon his answer that "you can't have a negotiation without telling people what you want from them". However, the present situation did not involve commercial negotiation of a State Agreement. That answer must be looked at in the context in which it was given:

Q: ... and what I'm trying to tease out is what an officer is able to talk through and with a proponent that leads ultimately to an agreement that's then endorsed by Cabinet or modified or whatever happens at Cabinet.

JL: Yeah, I'm still struggling with the information side of it. Normally, what we're talking about in a negotiation like that is what the proponent is seeking from government, and what the government is seeking from the proponent. There's rarely information, or what I would consider to be confidential information put on the table.

Q: Maybe we could say, what government is seeking from them, it's legitimate to put that on the table, you don't regard that as confidential information?

JL: No, you can't have a negotiation without telling people what you want from them.

Q: OK, fine.

JL: But, what you want, for example, we'd be saying, "we want local content, we want rates to be payable to local councils, we want royalties, we want infrastructure, we want this, we want that".

Q: OK, that's fine.

JL: Yeah? OK?

Q: I just wanted to be clear what an officer can do in the development of those sorts of agreements.

JL: Just, having done a lot of them, the concept that any of that information that you would put on the table would be in the nature of confidential, doesn't, it's a non sequitur.

Q: OK. Right. I just wanted to clarify that that was so, that that was your view of it ...¹⁷²

(emphasis added)

- [243] Dr Limerick was there talking about negotiations between public officers acting on behalf of the government, and corporate representatives, in respect of a formal State Agreement. That was not the situation here; the disclosures by Mr Stokes to Mr Burke were not part of the negotiations of any contractual agreement between the latter's client and the government. Even if they had been, Dr Limerick's responses clearly indicate that the matters that are negotiated based on an exchange of information do not include confidential matters. It is reasonable to infer from his response that DoIR officers were not authorised to release confidential information (including information about both commercially sensitive matters and the deliberative processes of government).
- [244] The importance of maintaining confidentiality whilst the process of government decision making was still in progress was emphasised by Mr Pritchard. There was no doubt in his mind that information which is the end result of a decision can be released to a proponent; but not that which is still in a process that hasn't led to a decision.¹⁷³ Mr Pritchard said he could not think of any circumstance in which it would be appropriate for a DoIR officer to email to Mr Burke a copy of the DoIR letter dated 28 February 2006 – and it was “clearly not appropriate” to send that dated 30 June 2006 to him.¹⁷⁴ He said he would regard both of those as constituting misconduct “simply because it's the release of departmental correspondence on a matter that's still in process ...”¹⁷⁵
- [245] What Mr Stuart Smith said to the Disciplinary Investigator about these two letters was subject to a very important qualification. Speaking of the letter dated 28 February 2006, he said:

SS: ... So, the letter's been sent to DPI, it had plenty of time to receive it and all of that. If Brian Burke is representing the party and the party is aware of the decision, I think it would be quite possible that the letter was sent to Brian Burke at that stage ... Maybe I should have a look. Hang on, I'll just see if there's some confidential information in there.

Q: There's some information about Bemax on the front.

SS: *Alright... Typically, if it's a letter of advice saying, "here's the Department's view", then yeah, that going to someone representing the proponent after the Department would've received it, it wouldn't be a big issue. If the letter contains confidential information about another party, then that's a different issue. I was thinking the letter didn't contain confidential information. Yes, that would be more of an issue.*

Q: *So when you say "more of an issue" ...I've asked the question would it be departmental practice at the time to release information about a third party?*

SS: *No, its not department practice, it wasn't department practice then to release confidential information to third parties.*¹⁷⁶

(emphasis added)

[246] Referring to the letter dated 30 June 2006 the Disciplinary Investigator said:

Q: *So this is after the Minister has done a handwritten note to say, "I don't support your position, so the Department is formalising, now removing the objection, but they're still saying, 'we think it's still minable".*

SS: *[reads the letter dated 30 June 2006] ... I'm familiar with that one, I was involved with the drafting of that letter.*

Q: *So would that have been departmental practice at the time to release that correspondence to Brian Burke?*

SS: *The letter of the 30th?*

Q: Yes.

SS: *A letter like that, after the companies have received it and he's representing them ... It would be unusual for it to be sent, but not particularly disturbing. There's no confidential information in that letter about third parties. It's a bit different to this one of the 28th of February.*¹⁷⁷

(emphasis added)

[247] Mr Smith was interviewed by Commission investigators on 24 April 2008, during which he explained that he doubted he would have released the 28 February 2006 letter to someone outside government.

*... the information in there, unless it's in the public domain, has the potential to provide an, an, an advantage to the recipient, a, a commercial advantage, so I, I would have reservations about releasing it.*¹⁷⁸

[248] Mr Smith said that if the person persisted in requesting it he would be looking at what sort of process the department could put in place to make a decision about whether the document could be released or not. He mentioned asking the proponent to lodge an FOI claim or seek legal advice.¹⁷⁹

3.2.3.4 Commission Opinion

[249] Upon reviewing all the material, and notwithstanding the findings of the Disciplinary Investigator, the Commission's assessment is that the evidence before the Disciplinary Investigator in fact adds further support to an opinion¹⁸⁰ that Mr Stokes' conduct constituted serious misconduct under section 4(a) and 4(b) of the Act, and could constitute an offence against a written law within the meaning of section 4(d)(v) of the Act.¹⁸¹

[250] In dealing with an allegation of misconduct which raised as a live issue the question whether the conduct could constitute a breach of discipline which could provide reasonable grounds for termination of an officer's office or employment under the PSM Act, the Commission ordinarily would proceed to form and express an opinion about that.¹⁸² In this instance however, the Commission refrains from expressing an opinion about whether Mr Stokes' conduct falls within section 4(d)(vi) of the Act because of uncertainty about the interrelationship between the Act and the PSM Act in circumstances in which, on all the material available, the Commission is unable to come to the same conclusion as the Disciplinary Investigator. In this regard, the Commission also notes the opinion of the DPP that Mr Stokes' conduct in passing the DoIR letter dated 28 February 2006 to Mr Burke does ground a *prima facie* case of an offence against section 81 of *The Criminal Code*, on which there would be a reasonable prospect of conviction. That is the same conduct which the Disciplinary Investigator found to be only a minor breach of discipline. The Commission recognises, of course, that does not necessarily mean that Mr Stokes would be convicted of that offence. The outcome of any prosecution must always be a matter for a court.

[251] In order to be dismissed from office or employment under section 86(3)(b) of the PSM Act a person must have been charged with a serious breach of discipline under the PSM Act. Although the PSM Act defines a "breach of discipline" in section 80, it does not define "serious breach". The *Disciplinary Procedures Guide* produced by DPC states that: "Agencies must use their own judgement when determining if a breach is serious or minor in nature".¹⁸³

[252] The release of information by Mr Stokes arguably could constitute a serious breach. The reasons suggesting that include the following factors.

- Mr Stokes was a very senior public officer.
- In the Commission's assessment of the material available, Mr Stokes' release of information to Mr Burke was deliberate, not accidental.
- The information Mr Stokes released was, at least in the case of the letter of 28 February 2006, clearly about high level government

deliberations, with potentially serious commercial and social consequences.

[253] Section 9 of the PSM Act, in relation to general principles of official conduct, states:

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

- (a) *are to comply with the provisions of –*
 - (i) *this Act and any other Act governing their conduct;*
 - (ii) *public sector standards and codes of ethics; and*
 - (iii) *any code of conduct applicable to the public sector body or employee concerned;*
- (b) *are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and*
- (c) *are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.*

[254] It could be argued that Mr Stokes breached the applicable principle of the DoIR *Code of Conduct*, namely:

As an employee of DoIR, you are required to:

Act with integrity in the performance of official duties and to be scrupulous in the use of official information and facilities.

[255] It is arguable that Mr Stokes breached the DoIR policy on *Confidentiality and Release of Official Information* which states:

You need to treat all Departmental information as confidential and should not release that information to third parties, without appropriate approval.

[256] Acceptance of those arguments could sustain an opinion that Mr Stokes' conduct could constitute "a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public officer under the Public Sector Management Act 1994 ..." ¹⁸⁴ However, that was neither the approach nor the view taken by the Disciplinary Investigator. In light of the finding made by the Disciplinary Investigator and the present uncertainty of the position under the relevant legislation, the Commission expresses no opinion about whether Mr Stokes' conduct falls within section 4(d)(vi) of the Act.

[257] Given the apparently conflicting official conclusions described above, the Commission is concerned that the disciplinary processes under the PSM Act are unsatisfactory. They are complex and difficult to apply. They are not necessarily structured to lead to appropriate outcomes. The Commission accordingly makes the following recommendation.

3.2.4 Recommendation 1

[258]

The Commission recommends that the Director General of the Department of the Premier and Cabinet review the operation, processes and appropriateness of outcomes of the disciplinary provisions of the PSM Act.

3.2.5 Commission Opinion: Mr Stokes

[259]

It is the opinion of the Commission that in providing information to Mr Burke and Mr Grill about the deliberative processes of DoIR, including providing, without authorisation, Mr Burke with copies of letters sent by the Director General of DoIR to the Director General of DPI, Mr Gary Wayne Stokes has engaged in serious misconduct in terms of section 4(a) and 4(b) of the *Corruption and Crime Commission Act 2003*, in that Mr Stokes: (a) corruptly acted in the performance of his functions as a public officer; and (b) he corruptly took advantage of his employment as a public officer to obtain a benefit for Mr Burke, Mr Grill and Urban Pacific – and, by so doing, to obtain a benefit for himself.

[260] By section 43(1)(a)(i) of the Act the Commission may make recommendations as to whether consideration should or should not be given to the prosecution of particular persons. As noted above, the Commission made such a recommendation in respect of a possible charge against Mr Stokes of unauthorised disclosure of official information contrary to section 81 of *The Criminal Code* and the DPP subsequently advised there was a *prima facie* case with reasonable prospects of a conviction. The Commission now makes a further recommendation.

3.2.6 Recommendation 2

[261]

The Commission recommends that the Director of Public Prosecutions consider the prosecution of Mr Gary Wayne Stokes for the offence of acting corruptly in the performance of the functions of his office so as to gain a benefit for Mr Burke, Mr Grill, Urban Pacific Limited and himself, contrary to section 83 of *The Criminal Code*.

3.3 Mr John James Mansell Bowler

3.3.1 Background and Contact with Mr Burke and Mr Grill

[262] From 3 February 2006 to 13 December 2006 the Hon John Bowler MLA was Minister for:

- Resources and Minister Assisting the Minister for State Development;
- Employment Protection;
- Goldfields-Esperance; and
- Great Southern.

Mr Bowler was a friend and close political associate of Mr Grill and succeeded him as the Member for Eyre (later Murchison-Eyre¹⁸⁵). Mr Grill managed Mr Bowler's election campaigns in 2001 and 2005.¹⁸⁶

[263] Mr Bowler said, at a Commission public hearing on 26 February 2007, that he knew Mr Burke through Mr Grill and that he was someone who Mr Bowler had looked to, in the past, for advice and guidance.¹⁸⁷ Mr Burke also contributed \$2,500 towards Mr Bowler's 2005 re-election campaign.¹⁸⁸

[264] In the course of a Commission public hearing on 26 February 2007 Mr Bowler said that he had first become aware of the issue of rezoning land in the Mundijong and Whitby area in about 2002, and was initially of the view that the area should be first mined, and later developed for residential purposes. Mr Bowler changed his view after listening to a parliamentary debate on the matter and speaking to a fellow Member of Parliament, Mr Martin Paul Whiteley MLA, about the arguments against mining in that area.¹⁸⁹

[265] The Commission notes in this regard that it is recorded in the Legislative Assembly of the Parliament of Western Australia Hansard for 27 June and 24 October 2002, and 13 March 2003 that Mr Whiteley raised in Parliament issues relating to mineral sands mining leases at Mundijong.

[266] On 9 April 2006 Mr Grill called Mr Bowler and they discussed a meeting relating to another company. Mr Grill then told Mr Bowler that he was concerned about the structure of DoIR (see paragraph [190]). Mr Grill said he believed that Mr Bowler should be responsible for all aspects of the department (DoIR) and also said: "Once you've got one Minister handling the matter you can then get some decent people in there. Jim Limerick is, is not a salesman for the department". Mr Bowler then suggested that he should "drop around" to Mr Grill's "place" the following evening.¹⁹⁰ A short time later, Mr Grill telephoned Mr Burke and invited him to attend the meeting he had just arranged with Mr Bowler.¹⁹¹

[267] In his evidence at a Commission public hearing on 26 February 2007, when asked about that meeting, Mr Bowler said that he was aware that Mr Burke and Mr Grill were employed by Urban Pacific. Mr Bowler said he could recall that they had urged him, as Minister, to overturn DoIR's "view that there should be any objection raised to the development of the land at Whitby".

However, he was not sure whether this conversation happened on that night or another night.¹⁹²

[268] On 11 April 2006, in an intercepted telephone call, Mr Burke told Mr Cecchele that he had met with Mr Bowler the previous night and discussed the land at Whitby.

BURKE: *We met with Bowler last night he was as happy as Larry you know he*

CECCHELE: *Oh excellent.*

BURKE: *he err told us what Alannah was saying and said err, err the whole Cabinet's fine not a problem.*

CECCHELE: *Okay and so is he writing a letter is he to, or is Alannah writing the letter to DPI.*

BURKE: *Uhm no well*

CECCHELE: *sort of, sort of a bit confused about who's writing*

BURKE: *Alannah will make the decisions, he's already written to Alannah.*

CECCHELE: *Yep.*

BURKE: *And told Alannah. He got a recommendation that mining should be allowed to proceed so he reversed that*

CECCHELE: *Yep.*

BURKE: *And told Alannah that he'd decided not to allow mining of those mineral sands*

CECCHELE: *Yep*

BURKE: *She's now going to tell DPI that*

CECCHELE: *Yep*

BURKE: *that err she wants the thing up coded as quickly as possible.*

CECCHELE: *Thank you very much Brian I really appreciate it.*¹⁹³

[269] In his evidence at a Commission public hearing on 26 February 2007 Mr Bowler was asked if he had told Mr Burke "these things" during their meeting on 10 April 2006. Mr Bowler said: "When they spoke to me about the issue I

indicated my position on it". When Mr Bowler was asked if he had written to Ms MacTiernan setting out his views he said: "I may well have. Those exact words that I'd written a letter? I had told him that I had no opposition so whether the letter had gone out or was going to go out I'm not too sure on that day". However, Mr Bowler did not think he would have told Mr Burke that the "whole Cabinet's fine" because he said it was not a Cabinet matter. Mr Bowler was also not sure that he would have told Mr Burke "what Alannah was saying" because "Alannah MacTiernan couldn't make a decision until I had made mine and once my decision was made then she could proceed however she wanted to".¹⁹⁴

- [270] On balance, it appears to the Commission that Mr Bowler accepts that he had a discussion with Mr Burke, and probably Mr Grill, at Mr Grill's residence, about his position on the rezoning of the land. However, the Commission accepts that it is possible that Mr Burke embellished or exaggerated the information when he was reporting to Mr Cecchelle the following day.
- [271] On 18 April 2006 Dr Limerick provided a briefing note to Mr Bowler on the issues relevant to a decision on rezoning the land at Whitby. On 22 April 2006 the briefing note was returned to Dr Limerick with a handwritten marginal note by Mr Bowler, which said:

*In noting this I disagree with the contention herein that the area can be mined. I have already advised the Minister for Planning and Infrastructure accordingly.*¹⁹⁵

- [272] Dr Limerick said at a Commission public hearing on 26 February 2007: "Well, we took that as being the formal advice of the Minister's decision ...".¹⁹⁶
- [273] On 30 May 2006 Mr Burke called Mr Bowler and they discussed the Whitby issue.

BOWLER: John Bowler.

BURKE: Yeah John it's Brian. Can you talk?

BOWLER: Yeah mate.

BURKE: Yeah. John I'm sorry to bother you, I don't normally ring you, you know but Julian's away.

BOWLER: Mmm.

BURKE: Uhm, and there's a particular matter he rang me about last evening from France where he was sort of meandering down a canal in a bloody boat. Uhm it's just this question of the Whitby up coding to residential where

BOWLER: Yeah, no I'll be speaking to Alannah yep.

BURKE: Oh will you, good. It's just that, that the public record, the story in the paper and, and your instruction to DoIR is sort of, they're fighting against it and I don't know why they are except that they're

BOWLER: DoIR yeah I know.

BURKE: Yeah.

BOWLER: They won't win.

BURKE: No I know that mate but Julian is, is stronger at mining than you are and even he came to the view that DoIR's stronger if it makes the right decision when it's unrealistic to mine. Later on when you have a fight you've got to win you've got the strength of saying look we were reasonable at that case. Do you know what I mean?

BOWLER: Uhm uhm uhm ...

BURKE: Well see DPI, the trouble is this, DPI sent out a note to all the agencies and Julian tells me DoIR sent back a note opposing and then they've refused to act on your instruction rejecting their advice so DPI now need some indication that the advice has changed.

BOWLER: Right, I'll call

BURKE: They've got the story out of the paper

BOWLER: I'll ring er Stuart Smith then.

BURKE: Will ya? Who's Stuart Smith?

BOWLER: He's two IC. He's the one I, he's one below Limerick that I deal with mostly.

BURKE: Oh good. If they could just indicate to DPI that that's gonna be done, anyway Simon will let me know will he?

BOWLER: He will.

BURKE: Yeah okay mate as I say

BOWLER: Okay.

BURKE: I'm sorry to ring you but Julian's away and he asked me.

BOWLER: Okay mate.

BURKE: Right-o.

BOWLER: See ya mate.

BURKE: Ta ta mate.¹⁹⁷

- [274] It appears that in this call Mr Burke was attempting to press Mr Bowler to ensure that DoIR acted in accordance with his decision not to object to rezoning the land at Whitby. Mr Bowler appears to have acceded to Mr Burke's request. Mr Bowler said that he would contact Mr Smith, a Deputy Director General, DoIR, and ask him to advise DPI of the decision.
- [275] Mr Grill's lawyers point out¹⁹⁸ that the Hon Alannah McTiernan MLA strongly opposed mining at Whitby and lobbied Mr Bowler to that end, both before and after she became a Minister. They further point out that Labor Party policy was changed prior to the 2001 State Election to allow the Labor Party candidate to claim that "mining at Whitby would not proceed". They contend that the greatest influence on Mr Bowler's position was Minister McTiernan's "longstanding and well-documented opposition to mining in the area". None of this detracts from the observations at paragraph [270].
- [276] On 19 June 2006 Mr Bowler, in company with his Chief of Staff, Mr Corrigan, and Principal Policy Advisor (Resources), Mr Walster, attended a lunch meeting with Mr Grill (at Mr Grill's residence). The meeting was arranged by Mr Bowler, who called Mr Grill while he was in France to arrange it.¹⁹⁹
- [277] During the meeting they discussed a number of issues relating to clients of Mr Grill and Mr Burke. In relation to Whitby, they had the following conversation.

GRILL: Um, now. Simon uhm, in respect to ah, Whitby.

CORRIGAN: Whitby.

GRILL: Yeah. What's the score there I mean, have we got the uhm, department there sort of.

BOWLER: The department was uhm, being uhm.

SC/TW: Bloody-minded.

BOWLER: Yeah. You know.

GRILL: Is that coming from, Jim or?

BOWLER: Well the, the note came from Jim to me I don't know. It came from someone with (indistinct).

SC/TW: It's uhm, Tim Griffin from Geological Surveys that.

BOWLER: You know. Where he said you know I, you know recommend, the way of the recommendation was you know, the recommendation was that we uhm, uhm, recognise the uhm, you know the mineral importance of that area and that uhm, prospectivity and that we oppose uhm, any rezoning.

GRILL: Mm hm.

BOWLER: I wrote back saying I don't support the recommendation. See I assumed that was, that was it, and then sort of like six weeks later find out that you know nothing else has happened.

SC/TW: DPI have written to DOIR, you know Brian let me know that, that DPI had written to DOIR, (indistinct) of their position. But they'd gone to Jim Limerick. I rang Stuart immediately after I heard from Brian I can't remember when it was last week, and just asked him to confirm that, that you know to ensure that he, that he, that the letter didn't get drafted out to outside of his loop which is always possible in DOIR and that, and that the response reflected the Minister's views.

BOWLER: And I've spoken to Alannah.

SC/TW: Which you publicly expressed, yeah.

BOWLER: Yeah and I've spoken to Alannah and uhm, you know reaffirmed my uhm, support.²⁰⁰

- [278] In the Commission's assessment this conversation confirms Mr Bowler's willingness to keep Mr Grill informed of matters relating to his client, and his comment "I rang Stuart immediately after I heard from Brian ..." suggests he was prepared to act at Mr Burke's request in a way which was to the benefit of Mr Grill and Mr Burke's client. However, this conversation does not, in the opinion of the Commission, establish to the required standard that Mr Bowler's decision on the rezoning issue was improperly affected by the lobbying, only that he was prepared to expedite the process at their request.
- [279] On 30 June 2006 Dr Limerick wrote to Mr Martin confirming that "the Minister for Resources and Assisting the Minister for State Development had indicated that mining would not be pursued on the land held by Urban Pacific and consequently that DoIR was removing its objection to the land being rezoned".²⁰¹

3.3.2 Commission Assessment

- [280] The Commission has considered two aspects of Mr Bowler's conduct in relation to this matter.

- Whether Mr Bowler's decision not to oppose rezoning of the land at Whitby was improperly influenced by the lobbying of Mr Grill and Mr Burke.
- Whether Mr Bowler provided Mr Grill and Mr Burke with confidential information.

[281] In the opinion of the Commission, for the following reasons, the answer to both these questions is "no". Accordingly, the Commission considers that the available information does not establish misconduct by Mr Bowler in respect of these two aspects.

[282] In relation to the decision made by Mr Bowler not to oppose rezoning of the land, Mr Bowler said at a Commission public hearing on 26 February 2007²⁰² that he had reached a view some years before that mining should not be pursued in that area. The Commission is not aware of any information which might cast doubt on his account.

[283] In relation to the information Mr Bowler provided to Mr Burke and Mr Grill, it is clear from the transcripts of intercepted conversations quoted above, and Mr Bowler's evidence at a Commission public hearing on 26 February 2007, that Mr Bowler had informed Mr Burke and Mr Grill of his own position on the matter, and DoIR's position and actions, or lack of action.

[284] In addition, at Mr Burke's urging, Mr Bowler had contacted Mr Stuart Smith, a Deputy Director General, DoIR, in an attempt to speed up, or implement, the process.

[285] In the opinion of the Commission, the information supplied by Mr Bowler did not appear to be of a type which would have been likely to affect the eventual decision on the rezoning of the land. Given that Mr Bowler, and the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA, had already made a public statement in support of rezoning,²⁰³ the fact that Mr Bowler had told Mr Burke and Mr Grill about the process that he and DoIR were undergoing to implement that decision does not appear to be particularly significant. The information does not appear to have been inherently confidential and may well have been provided (although probably in a different way) on request to any other representative of Urban Pacific, even without the influence wielded by Mr Burke and Mr Grill.

3.3.3 Commission Opinion as to Misconduct

[286] In the opinion of the Commission, the material before it does not establish misconduct by Mr Bowler in respect of the propriety of his decision not to oppose rezoning of the land at Whitby nor in respect of an allegation that he provided Mr Grill and Mr Burke with confidential information about that process or the outcome of it.

3.4 Mr Simon John Corrigan

3.4.1 Background and Contact with Mr Burke and Mr Grill

[287] During 2006 Mr Corrigan was Chief of Staff to the Hon John Bowler MLA. Mr Corrigan was a witness before the Commission in public hearings relating to several topics, including the lobbying undertaken by Mr Burke and Mr Grill with respect to the land at Whitby.²⁰⁴ Mr Corrigan also made a statement to the Commission on 26 February 2007.²⁰⁵

[288] Mr Corrigan said that he was aware that Mr Bowler and Mr Grill were good friends, that Mr Grill was Mr Bowler's predecessor in the Seat of Eyre²⁰⁶, and that Mr Grill had been Mr Bowler's campaign manager when he ran for election in 2000.²⁰⁷

[289] Mr Corrigan was also aware that Mr Grill was a lobbyist who worked with Mr Burke. Mr Corrigan said that he had been lobbied by both Mr Grill and Mr Burke in his capacity as Chief of Staff to Minister Bowler. Mr Corrigan said that he did not feel comfortable with the way Mr Burke spoke to him or with some of the things Mr Burke asked him to do, and considered that he was being put under pressure. Mr Corrigan said that on one occasion Mr Burke told him he was putting together a list of people for preselection and he was putting Mr Corrigan's name on the list. Mr Burke then asked Mr Corrigan to confidentially send him a copy of a letter from Minister Bowler to DPI confirming the position of DoLR on the rezoning of the Whitby land.²⁰⁸

[290] On 23 May 2006 Mr Grill called Mr Bowler's office and left a message asking Mr Corrigan and others to call him back about matters relating to several of Mr Grill's clients.²⁰⁹ Mr Corrigan called Mr Grill back later, on the same day, and in relation to Whitby the following conversation ensued.

GRILL: *Ah, the other thing I wanted to ask you about was Whitby, and I didn't mention this to John either but*

CORRIGAN: *That was the uhm the that's the Urban Pacific?*

GRILL: *Yeah.*

CORRIGAN: *Yep.*

GRILL: *That's right yeah. Uh what's needed I mean John's been good he's he's made the joint press statement with Alannah but, what the Department of Planning doesn't have is any letter*

CORRIGAN: *Yeah.*

GRILL: *from from ...*

CORRIGAN *My my my understanding from talking to the department afterwards is that they were going to, uhm, prepare one for John's signature to get over.*

GRILL: *Oh so*

CORRIGAN: *So I'll*

GRILL: *oh the department were were they?*

CORRIGAN: *Yeah I'll I'll I'll I'll I'll I'll just chase that up as to uh yeah I I don't know whether it's been signed and gone but I'll*

GRILL: *Okay.*

CORRIGAN: *I'll I'll check.*

GRILL: *Could you chase that up?*

CORRIGAN *Uhm, yeah, yep.²¹⁰*

[291] On 26 May 2006 Mr Burke called Mr Corrigan and discussed the formation of “an elite group of potential leaders” as candidates at the next State Election, which included Mr Corrigan.²¹¹ Mr Burke then asked Mr Corrigan whether a letter was being prepared by DoIR to advise DPI about the DoIR position on the rezoning of the land at Whitby. When Mr Corrigan said it was ready to go Mr Burke asked for a copy to be faxed to him “confidentially”, and Mr Corrigan agreed to do so.

BURKE: *The second Julian asked me to do which is why I'm ringing, he said that you were looking at getting a letter er from John about this Whitby land, just confirming DoIR's position.*

CORRIGAN: *Yeah.*

BURKE: *Er is that somewhere on the horizon?*

CORRIGAN: *Yeah. Yeah. I just need to, ah, I, I think it, ah, I think it's ah, I think it's ready to go. I need to er*

BURKE: *Is it?*

CORRIGAN: *just get it out.*

BURKE: *Okay. Now, can I ask you if you'd er send me a, fax me a copy?*

CORRIGAN: *Sure.*

BURKE: You're, you're intending to send it to the UDR people are you, or where are you going to send it?

CORRIGAN: Ah, no, it would be a letter from er, to DPI.

BURKE: Oh, to DPI.

CORRIGAN: Withdrawing, yeah.

BURKE: Okay. Well, does it present you with a difficulty in sending me a copy, confidentially?

CORRIGAN: Oh, confidentially, no.

BURKE: No. Alright. If you sent it to me confidentially. It won't go any further. I just, Julian will ring me and I'll tell him, tell him he's got it. Alright, my number is [number suppressed].

CORRIGAN: Okay, that's your

BURKE: The last thing

CORRIGAN: that's your fax, sorry, is it?

BURKE: Yeah, that's my fax, or do you want to email it to me?

CORRIGAN No, no, that's good.

BURKE: Fax is better.²¹²

(emphasis added)

- [292] On the same day, 26 May 2006, shortly after the call to Mr Corrigan, Mr Burke sent an email, entitled "Whitby – DOIR", to Mr Cecchele and Mr Grill stating: "I expect to have a CONFIDENTIAL faxed copy of this letter today or Monday at the latest".²¹³
- [293] On 29 May 2006 Mr Burke called Mr Corrigan and asked about the letter. Mr Corrigan said he had followed up on the matter, but there was no letter. Mr Corrigan also said that DoIR "are, vehemently opposed to rezoning it because there's, because there's mineralisation there" and that DPI "weren't pursuing rezoning either, because they felt there wasn't the demand in the area" (for housing land). Further to this Mr Corrigan said that he had tried to arrange for Mr Bowler and the Minister for Planning and Infrastructure to meet, but the meeting did not occur.

Sorry, I'd what I what I'd, what I'd organised last night was for uhm, for ah John and Allanah to, to catch up for dinner, they're both in Geraldton, I think they all, all the Ministers are in Geraldton, uhm,

Allanah was late in unfortunately so they didn't, they didn't catch up

...

Mr Burke appeared to become upset and said that:

... one problem is ... John [Mr Bowler] ... they [DoIR] will push him around ..

Mr Burke hectored Mr Corrigan about what Mr Bowler and DoIR needed to do. Mr Corrigan said he would "try and chase it down".²¹⁴

- [294] On 30 May 2006 at 10:23 a.m. Mr Burke called Mr Bowler and discussed Whitby (refer paragraph [273]). After Mr Bowler had explained what he would do, Mr Burke said: "Oh good. If they could just indicate to DPI that that's gonna be done, anyway Simon will let me know will he". Mr Bowler said: "He will".²¹⁵
- [295] On the same day at 11:16 a.m. Mr Burke called Mr Corrigan and told him about the conversation he had with Mr Bowler earlier that morning. Mr Burke said: "... he's [Mr Bowler] going to talk to her [Minister for Planning and Infrastructure] this morning and he's [Mr Bowler] going to ring Stuart Smith ... And tell Stuart Smith that they [DoIR] can't persist with the position with DPI which contradicts his [Mr Bowler's] public position ... uhm, but I just think it needs to be monitored and if you could do that and let me know ...". Mr Corrigan responded by saying: "I'll give Stuart a bell".²¹⁶
- [296] On 8 June 2006, at 5:47 p.m., Mr Corrigan called Mr Burke:

BURKE: *Did John do anything about that other thing ...*

CORRIGAN: *Yeah. Look I, I, I, I spoke to, he spoke to Stuart Smith, I spoke to Stuart Smith, I understand he's spoken to DPI*

BURKE: *Yeah.*

CORRIGAN: *and, you know, informed them of the, that there's no, that there are, there is no objection from uhm, the Department*

BURKE: *Right.*

CORRIGAN: *so its, its up to, up to, up to DPI now.*

BURKE: *Oh good.*²¹⁷

- [297] Later, on the same day, 8 June 2006, at 11:45 p.m., Mr Burke emailed Mr Cecchelle and said:

I was called this evening by Simon Corrigan who is the Chief of Staff of the Minister for Resources, John Bowler. He told me that both he and his Minister had spoken to Stuart Smith who had spoken to DPI and confirmed Minister Bowler's position in support of the "No mining" position.²¹⁸

[298] On 19 June 2006 Mr Corrigan attended a meeting at Mr Grill's residence in company with Mr Bowler and Mr Walster. During the meeting, among other things, Mr Bowler and Mr Corrigan provided information to Mr Grill about the progress of the Whitby issue (refer paragraphs [276]-[277]).²¹⁹

3.4.2 Commission Assessment

[299] Mr Burke's purpose in contacting Mr Corrigan seems to have been to pressure him to ensure that DoIR notified DPI that it did not oppose rezoning the land at Whitby, and to obtain related information. The information before the Commission does not suggest that Mr Corrigan had any influence on the decisions made by either the Minister for Resources or DoIR in relation to this issue.

[300] Mr Corrigan appears to have followed Mr Bowler's lead when dealing or communicating with Mr Burke and Mr Grill. Mr Corrigan seems to have expressed a willingness to help when Mr Burke asked him to do things, although he does not appear to have actually done anything other than to keep Mr Burke and Mr Grill informed about the lack of action by DoIR and to make a telephone call to Mr Stuart Smith, a Deputy Director General, DoIR.

[301] In a call from Mr Burke on 26 May 2006, Mr Corrigan agreed to confidentially fax a copy of a DoIR letter to Mr Burke.²²⁰ The letter in question was DoIR's notification to DPI of its position on the rezoning of land at Whitby. However, such a letter did not exist at that time and was not written until 30 June 2006. In July 2006 Mr Burke obtained a copy from Mr Stokes. The Commission is satisfied, on the material before it, that Mr Corrigan did not supply a copy of that letter, or any other confidential document, to Mr Burke.

[302] Mr Corrigan was also involved in a meeting at Mr Grill's residence with Mr Bowler on 19 June 2006, during which DoIR's position in relation to the land at Whitby was discussed. On the material available to the Commission it appears that the information supplied to Mr Grill relating to Whitby at that meeting was principally about a delay by DoIR in confirming a decision which had already been taken at a Ministerial level. It appeared to be only about the process and the Commission cannot conclude that it was information which, by itself, was confidential, or which would have provided a commercial advantage to Urban Pacific.

[303] It appears to the Commission that the only benefit which Urban Pacific might have obtained through the contacts Mr Burke and Mr Grill had with Mr Corrigan was an increased understanding of the processes DoIR was following and, possibly, a small speeding of the process through Mr Corrigan contacting Mr Stuart Smith, a Deputy Director General, DoIR. However, the

Commission is not able to conclude that these would have provided a commercial advantage to Urban Pacific beyond what an approach by any other company representative might have achieved.

3.4.3 Commission Opinion as to Misconduct

[304] In the opinion of the Commission, the material before it does not establish that Mr Corrigan released any information or took any action which might constitute misconduct.

3.5 Mr Daron Frederick Smith

3.5.1 Background and Contact with Mr Burke and Mr Grill

[305] In 2006 Mr Daron Frederick Smith was a Policy Advisor in the Office of the Minister for Education and Training, the Hon Ljiljanna Ravlich MLC. In the 2005 State Election Mr Smith stood as an ALP Candidate for the Seat of Serpentine-Jarrahdale, but was not elected.

[306] On 16 January 2006 Mr Burke telephoned Mr Smith and they had the following conversation.

SMITH: *Hello Daron Smith.*

BURKE: *Yeah Daron it's Brian.*

SMITH: *Afternoon Brian. How are ya?*

BURKE: *Yeah good mate, good as gold. Listen Daron, ah would you be available at, at two o'clock for ah, a few minutes?*

SMITH: *This afternoon?*

BURKE: *Yeah.*

SMITH: *Yep I can do that. No problem at all mate.*

BURKE: *I'll tell you why. If you could meet us at the Subiaco Hotel.*

SMITH: *Yep.*

BURKE: *Julian and I are having lunch with Noel Crichton-Browne but, I just want to have a talk to you about a particular issue*

SMITH: *Okay.*

BURKE: which has arisen in your, the electorate you contested.

SMITH: Right.

BURKE: The mining of those mineral sands.

SMITH: Yep.

BURKE: Now I just, I'm thinking two things first of all we can use your help but secondly, this could position you well if Alannah decides to pull the pin, or if they redistribute the boundaries to make a seat down there that's gonna be safer.

SMITH: Yes. Yeah no worries.

BURKE: Okay?

SMITH: No problem.

BURKE: I've just got to keep an eye on your interests and my interests

SMITH: Yep. No worries.

BURKE: so if you could, we're gonna have lunch at the Subiaco Hotel

SMITH: Yep.

BURKE: and we'll see you there at two o'clock.

SMITH: Okay then no problem at all.

BURKE: Good onya mate, eh listen

SMITH: Okay.

BURKE: keep it to yourself.

SMITH: Yes no problems. Clear as.

BURKE: Right. Ta ta.

SMITH: Thanks.²²¹

[307] On 6 April 2006 at 1:53 p.m. Mr Burke again telephoned Mr Smith and said "Daron, I need to find some information pretty urgently". Mr Burke said he had heard that the Minister for Planning and Infrastructure would be making an

announcement about Whitby, and Mr Burke wanted to find out what the Minister would be saying. Mr Smith said “Righto, no worries, I’ll give em [a member of the Minister’s staff] a call now”.²²²

[308] Just over an hour later, at 3:10 p.m., on 6 April 2006, Mr Grill phoned Mr Smith and asked him about the same matter. Mr Smith said: “... Uhm yeah I had a call from Brian this afternoon about this. ... Yeah. Uhm what I did was I, I tried to contact the woman in Alannah’s Office that handles these things and she’s not in today unfortunately. ... Uhm and there’s a guy that helps her out with that as well ... Uhm, and he wasn’t in his office and then I tried to contact Alannah’s Media Advisor to find out if he knew anything about it and he hasn’t returned my call yet. I’m actually going down to Parliament very shortly so, I’ll bump into one of them or both of them down there I’m sure”.²²³

[309] On 7 April 2006 Mr Smith called Mr Grill and had the following conversation.

SMITH: *... look I've made a couple of phone calls as regards to that issue you raised with me yesterday.*

GRILL: Yep.

SMITH: *Uhm, speaking to uhm one of the media people there, what they told me is that, apparently John Bowler and Alannah will be making an announcement next week with regards to housing, a housing development out there.*

GRILL: Yep.

SMITH: *Uhm, ah now what this person has told me is that they're not sure but they, they said it's got something to do with a mining issue uhm*

GRILL: Yeah.

SMITH: *but they're gunna announce that some ah, that it'll be turned into a housing development.*

GRILL: Yep.

SMITH: *Uhm and John, John Bowler's involved in it somewhere so I think he's going to be a part of the uhm, a part of the announcement. I'm just actually waiting for one of her other officers to call me back just so I can confirm that, make sure that is the case.*

GRILL: Yes that sits in with the information we have

SMITH: Good.

GRILL: *that John Bowler's also involved.*

SMITH: *Yeah. So. Well if, if that's the case I suggest that's probably what's going to happen so.*

GRILL: *Yeah good.*

SMITH: *Alright well*

GRILL: *Brilliant.²²⁴*

- [310] Mr Smith was not a witness at a Commission public hearing but did participate in a recorded interview with Commission investigators. The following information is taken from the information provided by Mr Smith during that interview.
- [311] In relation to the meeting at the Subiaco Hotel, Mr Smith told investigators that Mr Burke had asked him what he knew about the mineral sands development at Mundijong. Mr Smith said that what he knew was from his experience as a candidate in the area and was not confidential information. Mr Smith said that Mr Burke also asked him to speak with the Minister for Planning and Infrastructure about changing the zoning of the area. Mr Smith said: "He asked me if I could speak to Alannah with regards to changing the mineral sands, not quite sure what the correct term is, but changing it from a mineral sands mine to an 'Urban Deferred' development, so that a company called Urban Pacific could develop it as housing lots".²²⁵
- [312] Mr Smith said that he met with the Minister for Planning and Infrastructure some months later and asked the Minister if she was aware that Mr Burke and Mr Grill were lobbying on behalf of Urban Pacific. Mr Smith said that was the extent of the conversation.
- [313] In relation to the telephone calls in which Mr Burke and Mr Grill asked Mr Smith to obtain information from the Office of the Minister for Planning and Infrastructure, Mr Smith said that he did not recall the conversations but would probably have contacted a policy officer with whom he sometimes dealt on planning matters. In relation to the issue of whether the information was confidential he said: "... but I know working our office it's not unusual to let an interested party to know that there's a media release coming out before hand". Mr Smith said that normally policy officers, when talking to each other, would say whether information was sensitive, or if it was embargoed.²²⁶
- [314] On 23 April 2007 Commission investigators met with the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA, and asked if the Minister considered the release of this information to be improper. The Minister advised the investigators that her position in relation to Whitby was well established, and that in this instance she did not see anything wrong with the information being provided to the lobbyists by Mr Smith.²²⁷

3.5.2 Commission Assessment

[315] The Commission has no evidence to suggest that any of the information provided by Mr Smith to Mr Burke or Mr Grill was confidential.

3.5.3 Commission Opinion as to Misconduct

[316] In the opinion of the Commission, the material before it does not establish any misconduct by Mr Smith.

3.6 Mr Thomas Harry John Hoyer

3.6.1 Background and Contact with Mr Burke and Mr Grill

[317] Mr Hoyer was a Councillor with the Shire of Serpentine-Jarrahdale representing the Byford Ward from 5 May 2001 until his resignation on 26 May 2006. Mr Hoyer was the Chairman of a local “Mining Objectors Group”.²²⁸

[318] Mr Hoyer’s resignation was recorded in the minutes of the Ordinary Council Meeting of 26 June 2006.

*On the 26th May 2006 the Chief Executive Officer received, effective from that date, the resignation of Cr Thomas HJ Hoyer. As an elected member for the Byford Ward, Cr Hoyer was ... well known for his service to the community in defending the Shire (through the Serpentine Jarrahdale Ratepayers Association) against the threat of mineral sand mining. His passion and commitment were evident to all who worked with him.*²²⁹

[319] Mr Hoyer was not a witness at a Commission public hearing.

[320] On 1 March 2006 Mr Grill telephoned Mr Hoyer and told him that previous information Mr Grill had given him about the attitude of DoIR (that DoIR would not oppose the rezoning) was not correct. Mr Grill asked Mr Hoyer if he was prepared to meet with Urban Pacific, and he agreed. Mr Hoyer said:

HOYER: *Well my, entire focus is not to have a mineral sand mine in the area.*

GRILL: *Yeah.*

HOYER: *Uhm, nothing else consumes me, and it is about that as well, that sort of passion. I've spent, invested a long amount of time in this.*²³⁰

[321] On 22 March 2006 Mr Burke called Mr Hoyer and a motion Mr Hoyer intended to put before Council at a meeting on 27 March 2006 was discussed.²³¹ The motion related to Council supporting the lifting of the “Urban Deferred” zone of

land at Whitby. The motion was successful and Council voted in favour of rezoning the land to "Urban".²³²

- [322] On 5 June 2006 Mr Burke called Mr Hoyer and they discussed the reasons Mr Hoyer resigned from the Council. At the end of the conversation Mr Burke offered Mr Hoyer political assistance.²³³

3.6.2 Commission Assessment

- [323] In the opinion of the Commission there is no evidence of misconduct by Mr Hoyer in relation to his role as a Councillor nor his association with Mr Burke. The evidence suggests that Mr Hoyer had a long term political goal to prevent sand mining in the Shire of Serpentine-Jarrahdale and appears to have seen rezoning the land at Whitby as a means of furthering this goal. The evidence suggests that he used his association with Mr Burke to obtain advice on how best to achieve his goal. Mr Hoyer does not appear to have benefited personally in any direct way from the association and did not appear to have had any declarable interest in terms of the *Local Government Act 1995*.

3.6.3 Commission Opinion as to Misconduct

- [324] In the opinion of the Commission, the material before it does not establish any misconduct by Mr Hoyer.

3.7 Ms Lindsay Margaret Baxter

3.7.1 Background and Contact with Mr Burke and Mr Grill

- [325] Ms Baxter, a DPI Officer, worked throughout 2006 as the Team Leader Metropolitan South East.
- [326] Mr Burke and other representatives of Urban Pacific were in regular contact with Ms Baxter because she and her staff were responsible for coordinating responses from interested parties to the WAPC.
- [327] Ms Baxter was not a witness at a Commission public hearing, but provided written answers to questions on specific topics.
- [328] On 15 February 2006 Mr Burke called Ms Baxter and asked about the status of DPI's consideration of the Whitby matter. Ms Baxter explained that they had referred the documents to servicing agencies such as the Water Corporation and Western Power. Ms Baxter said that the proposal had been considered by the relevant District Planning Committee and was generally supported.²³⁴
- [329] This call was interrupted and Mr Burke called Ms Baxter again a few minutes later. Mr Burke attempted to get the work on the project taken away from another DPI staff member who reported to Ms Baxter, on the basis that he was overworked. Ms Baxter refused. They then discussed the DoIR

consideration of the issue. Mr Burke told Ms Baxter that Mr Stokes was acting Director General of DoIR and Mr Burke thought that he had formed the view that mining was not viable. Mr Burke said: "The latest advice I had this morning was that no one thinks this is viable".²³⁵

[330] Later in that conversation Ms Baxter asked Mr Burke if Urban Pacific were preparing an economic statement. Mr Burke said that they had, it was with Mr Stokes. Ms Baxter asked for a copy and Mr Burke said: "Absolutely, I'll tell him today to give it to you".²³⁶

[331] On 22 February 2006 Mr Burke telephoned Ms Baxter and discussed Whitby.

BURKE: *Uhm things may have moved past it because I'm told this morning that DoIR will be writing to you today*

BAXTER: Yes.

BURKE: *er withdrawing any objection to the up codings.*

BAXTER: *Withdrawing any objection?*

BURKE: Yes they're quite

BAXTER: Right.

BURKE: *supportive of the move to residential.*

BAXTER: Right. Okay. So who have you been dealing with at DoIR?

BURKE: *Uhm I'm speaking to you on a confidential basis?*

BAXTER: Yeah.

BURKE: Yeah Gary Stokes.

BAXTER: Yeah okay. Alright.

BURKE: *He's the action - Acting Director General.*

BAXTER: Mm hm.

BURKE: *Uhm and he, Jim Limerick returns on the twenty-seventh.*

BAXTER: Mm hm.

BURKE: *Uhm and I've been aware of the ah, people a bit down the line who have taken the philosophy, er which*

Julian and I inevitably support actually but they've taken it too literally.

BAXTER: *Mm hm.*

BURKE: *and we made representations and I, I'm informed that our representations, well not that they've been accepted but the arguments by the company have.*

BAXTER: *Mm hm. Okay.*

BURKE: *It came down to this Lindsay.*

BAXTER: *Yep.*

BURKE: *Even those people who wanted to preserve it for mining, couldn't say when it might be mined.*

BAXTER: *Mm hm. Yep.*

BURKE: *So that's where it stands but I wouldn't want you to pass that onto anyone because I don't ...*

BAXTER: *Yeah.*

BURKE: *say, I mean I don't tell people I talk to you*

BAXTER: *Yeah.*

BURKE: *er or to anyone really.*

BAXTER: *Okay. Well look uhm, if DoIR are responding next week sometime then we'll see what they actually do come up with.²³⁷*

- [332] On 22 March 2006 Mr Burke sent Ms Baxter an email stating: "Would it be possible to obtain a copy of the DoIR response to DPI on Whitby, please".²³⁸
- [333] On 27 March 2006 Ms Baxter replied to Mr Burke stating: "As this correspondence is on an 'active' file it will need to be released by FOI application".²³⁹
- [334] On 7 April 2006 Mr Burke called Ms Baxter and advised that Minister Bowler and Minister MacTiernan had met, and that Minister MacTiernan would be making a public statement about the residential development at Whitby.

BURKE: *But her office confirmed today*

BAXTER: *Mm hm.*

BURKE: *that she and Bowler had met*

BAXTER: *Yep*

BURKE: *and had agreed to support that.*

BAXTER: *Okay.*

BURKE: *With no mining.*

BAXTER: *Right okay. That's the, that's the crunch of it really.*

BURKE: *Yeah, it is.*

BAXTER: *Yeah. Okay.*

BURKE: *Uhm, we went to see Bowler. We knew he was going to concede on that point.²⁴⁰*

[335] On 9 June 2006 at 7:59 a.m. Mr Burke spoke to Mr Cecchele, from Urban Pacific. After Mr Burke had briefed Mr Cecchele on other aspects of his lobbying activities the following exchange ensued.

BURKE: *but today I'll ring Lindsay Baxter if you want and*

CECCHELE: *No that's fine I've gone I'm going to the football with Lindsay on Sunday.²⁴¹*

[336] Also on 9 June 2006, at 9:57 a.m., Mr Erwin Roberts, Director, Roberts Day Town Planning, another consultant group employed by Urban Pacific, sent the following email to Mr Cecchele.

David

I spoke with Lindsay Baxter this morning. She confirmed that a letter has been sent from DPI around 2 days ago (signed by Mike Allen) and addressed to the Director General of DOIR and seeking confirmation of DOIR's position. In our discussion she made no reference to being contacted by DOIR personnel; however I would expect that this would have occurred at a higher level (eg Mike Allen) given the level of personnel involved at DOIR and may have been in response to Mike's letter. If necessary I am happy to follow this up further with Lindsay at Sunday's game.

*Cheers
Erwin²⁴²*

[337] Mr Cecchele forwarded that email to Mr Burke later on the same day.²⁴³

[338] Also on 9 June 2006 at 1:21 p.m. Mr Burke sent an email to Ms Baxter.

*My message was to ask you to update me re Whitby. I am informed that DoIR's Stuart Smith has spoken to DPI and confirmed Minister Bowler's position in support of the "No mining" position. And I understand Ian Paterson in Minister MacTiernan's office has similarly confirmed the position. Are you able to update me, please?*²⁴⁴

[339] Ms Baxter replied by email at 1:48 p.m. on the same date.

As we had heard nothing since the Ministerial meeting and press articles, Mike Allen (Executive Director Statutory Planning Division) has written to the Director General of DoIR to ask it confirm that it no longer opposes urban development of the land.

*Letter went out earlier this week.*²⁴⁵

[340] On 29 June 2006 Ms Baxter sent an email to Dr Limerick asking him to "... confirm the position of DoIR".²⁴⁶

[341] On 4 July 2006 Mr Burke called Ms Baxter and after discussing another matter relating to Whitby Mr Burke asked: "The other thing is did you get that letter from Stuart Smith at all". Ms Baxter said: "Not yet but, uhm, I ended up sending an email to the Director General last week and, uh, I got a cc back saying that they were getting onto it so I'm expecting from, something from them this week. ... Well it was Stuart Smith I think I got cc-ed in or, I got an email from him uh, basically outlining what their position is and he said he would confirm that to me in writing".²⁴⁷

[342] On 12 October 2006 Mr Burke called Ms Baxter and left a message stating: "It's really, really important that we get this Whitby thing to the November meeting if we can...".²⁴⁸

[343] On the same day, Ms Baxter returned Mr Burke's call and said: "... I'm in fact just sitting going through the report that's been partly drafted now. ... And what I agreed to do was that if I don't have the time to fully write up and flesh out this report ... uhm, I will give it to Roberts Day to do and then I'll sort of vet it. Now, it will also go through other people in this Department, obviously". Mr Burke tried to suggest that Ms Baxter give the report to Roberts Day "sooner rather than later 'cos they'll get it done and back for your vetting", but Ms Baxter declined. Mr Burke said: "Alright. Lindsay, the problem they've got is that, uh, and they mightn't want to mention this to you, Macquarie, which owns Urban Pacific ... have a major internal uh structural financing, financial requirement that means that it, it really has to get up before December".²⁴⁹

[344] On 28 November 2007 Ms Baxter spoke to Commission investigators and confirmed that she had attended an AFL game at Subiaco Oval as a guest of Urban Pacific. Ms Baxter said that she had attended in company with other DPI staff and did not make an entry into any DPI register about being a guest of Urban Pacific.²⁵⁰

3.7.2 Commission Assessment

- [345] In the opinion of the Commission Ms Baxter acted professionally in her contacts with Mr Burke. It appears to the Commission that Ms Baxter treated Mr Burke only as a representative of Urban Pacific and provided Mr Burke with information, which she was legitimately able to, about the process which DPI was following. When Mr Burke asked for a copy of DoIR's letter to DPI Ms Baxter advised him to make an FOI application.²⁵¹ When he asked her to do other things he considered beneficial (such as replacing a DPI officer who was dealing with aspects of the application, or providing an early copy of a report to Roberts Day) Ms Baxter refused. In the opinion of the Commission, on the material available, Ms Baxter acted impartially and objectively.
- [346] In relation to the issue of Ms Baxter, and other DPI officers, attending a football match as a guest of Urban Pacific, the Commission considers that this is something which has the potential to create a perception that Urban Pacific was attempting to influence them to be helpful to their application in a way they would not otherwise be. However, the Commission has no information which suggests that Urban Pacific received any benefit or additional service which might be attributable to its hospitality, and the Commission does not consider that Ms Baxter's actions in this regard constitutes misconduct.
- [347] During a phone call from Mr Burke to Ms Baxter on 22 February 2006 Mr Burke said that he had received information from Mr Stokes that DoIR was withdrawing any objection to rezoning of the land. Mr Burke confirmed with Ms Baxter that he was speaking to her on a confidential basis. In the Commission's view, although it has concluded that Mr Stokes has committed serious misconduct in corruptly releasing information to Mr Burke, it does not consider that there are grounds to conclude that Ms Baxter was obliged to report this particular incident. There are a number of reasons for this, not least that, given that Mr Stokes had been acting Director General to that date, Ms Baxter would have been entitled to assume that the information had been legitimately released. In this context it is worth noting that six days later Dr Limerick wrote to DPI in terms that made it clear that the information Mr Burke had given Ms Baxter was wrong.

3.7.3 Commission Opinion as to Misconduct

- [348] In the opinion of the Commission the material before it does not establish any misconduct by Ms Baxter.

3.8 Mr John Alexander Cowdell

3.8.1 Background and Contact with Mr Burke and Mr Grill

- [349] Mr Cowdell was the Chairman of the Peel Development Commission (PDC) throughout 2006. Mr Cowdell was elected as a Member of the Legislative Council of the Parliament of Western Australia in 1993 for the South West Region, and was re-elected in 1996 and 2001. In 2001 the Hon John

Alexander Cowdell MLC was President of the Legislative Council. Mr Cowdell was not a witness at a Commission public hearing.

- [350] The land at Whitby was within the geographical area for which the PDC had responsibility. In 2006 the PDC provided \$27,500 to the Shire of Serpentine-Jarrahdale to create the Mundijong Whitby District Structure Plan.
- [351] On 13 February 2006, at 2:40 p.m., Mr Cecchele of Urban Pacific received an email from Mr Ken Fisher, Executive Officer, Strategic Development, Serpentine-Jarrahdale Shire. In the email Mr Fisher said: "The SJ Shire CEO and Shire President had met with John Cowdell ... Chairman of the Peel Development Commission Board. Among other things your proposed development and the mining situation in respect to your Whitby Land was explained to John. We understand this matter is going to Cabinet very shortly. John ... is prepared to lobby Ministers on our behalf". Mr Fisher indicated that a one-page précis of the situation would be helpful, and asked if Mr Cecchele could provide the précis for Mr Cowdell.²⁵²
- [352] At 2:41 p.m. on 13 February 2006, Mr Cecchele forwarded the email received from Mr Fisher to Mr Grill and Mr Burke.²⁵³ Later on that day, at 4:46 pm, Mr Grill emailed Mr Cecchele and said: "I can talk to John Cowdell. He shall have to report through his Minister Norm Marlborough".²⁵⁴
- [353] On 15 February 2006 at 9:10 a.m. Mr Grill called Mr Cowdell and during the conversation that ensued ascertained that Mr Cowdell had been given a briefing on the Urban Pacific proposed development at Whitby. Mr Cowdell said that, although it had not been a detailed briefing, it sounded like a good idea and that he "should ... push appropriately for it".²⁵⁵ Mr Grill said he would talk to Mr Cowdell more about it at a social event later that week.
- [354] Shortly after this conversation, at 9:52 a.m. on 15 February 2006, Mr Grill sent an email to Mr Cecchele.

Dear David

I have spoken to John Cowdell, the Chairman of the Peel Development Authority. He has received a briefing from the Serpentine/Jarrahdale Council on the project. It [sic] think that it was fairly superficial. It was clear that his interest was not provoked by any directive from above. He is going to come around to my place for a social chat shortly and he expects to be more fully briefed by me.

I do not believe that we have any problems from that quarter.

Regards

*Julian Grill*²⁵⁶

3.8.2 Commission Assessment

- [355] On the basis of the information obtained by the Commission it appears that Mr Grill was advised by Mr Cecchele that Mr Cowdell had been briefed by the Serpentine-Jarrahdale Shire on Whitby. As a long term associate, Mr Grill called Mr Cowdell on 15 February 2006 and they arranged to meet. Mr Grill intended to brief Mr Cowdell and, presumably, to determine whether he could be of assistance to Urban Pacific.
- [356] While it appears, from the intercepted conversation between them, that Mr Cowdell may have been sympathetic to Urban Pacific's aims, the Commission is not aware of any further involvement by Mr Cowdell in this matter.
- [357] As Chairman of the PDC Mr Cowdell reported at that time to the Hon Norm Marlborough MLA, Minister for Peel and the South West. However, the Commission is not aware of any involvement by Mr Marlborough in the Whitby matter.

3.8.3 Commission Opinion as to Misconduct

- [358] In the opinion of the Commission the material before it does not establish misconduct by Mr Cowdell, nor does the Commission consider that further investigation would be likely to alter this conclusion.

CHAPTER FOUR

OPINION AND RECOMMENDATIONS

4.1 Commission Opinion as to Misconduct

[359] Having assessed the material before it the Commission has formed the opinion that in relation to dealings with Mr Burke and Mr Grill, in respect of the rezoning of the land at Whitby, Mr Gary Wayne Stokes has engaged in misconduct.

[360] It is the opinion of the Commission that in providing information to Mr Burke and Mr Grill about the deliberative processes of DoIR, including providing, without authorisation, Mr Burke with copies of letters sent by the Director General of DoIR to the Director General of DPI, Mr Stokes has engaged in serious misconduct in terms of section 4(a) and 4(b) of the *Corruption and Crime Commission Act 2003*, in that Mr Stokes: (a) corruptly acted in the performance of his functions as a public officer; and (b) he corruptly took advantage of his employment as a public officer to obtain a benefit for Mr Burke, Mr Grill and Urban Pacific, and, by so doing, to obtain a benefit for himself.

[361] The Commission is further of the opinion that this conduct of Mr Stokes also constituted misconduct because it:

- constituted or involved the performance of his functions as a public officer in a manner that was not honest or impartial (section 4(d)(ii));
- constituted or involved a breach of the trust placed in him by reason of his office or employment as a public officer (section 4(d)(iii));
- involved the misuse of information or material that he had acquired in connection with his functions as a public officer (section 4(d)(iv)); and

in the opinion of the Commission, based on the facts set out at paragraphs [197] and [212]-[213], a properly instructed jury could find that the conduct of Mr Stokes, in releasing information to Mr Burke, constituted a breach of section 81 of *The Criminal Code* (disclosing official secrets) and section 83 of *The Criminal Code* (corruption). Therefore, in terms of section 4(d)(v) of the Act his conduct could constitute an offence against a written law.

[362] Having formed a preliminary opinion with regard to the breach of section 81 of *The Criminal Code* the Commission had earlier referred it to the DPP for consideration. The DPP has since advised that there was a *prima facie* case with a reasonable prospect of conviction against Mr Stokes. Having now formed a separate, additional opinion with respect to section 83 of *The Criminal Code* the Commission will refer that to the DPP for consideration.

4.2 Recommendations

[363]

Recommendation 1

The Commission recommends that the Director General of the Department of the Premier and Cabinet review the operation, processes and appropriateness of outcomes of the disciplinary provisions of the *Public Sector Management Act 1994*.

[364]

Recommendation 2

The Commission recommends that the Director of Public Prosecutions consider the prosecution of Mr Gary Wayne Stokes for the offence of acting corruptly in the performance of the functions of his office so as to gain a benefit for Mr Burke, Mr Grill, Urban Pacific Limited and himself, contrary to section 83 of *The Criminal Code*.

ATTACHMENTS

ATTACHMENT 1

Sections of the *Report of an Investigation Into a Suspected Breach of Discipline* by Mr Gary Stokes, Disciplinary Investigator, Department of the Premier and Cabinet, 12 September 2007, relating to Suspected Breach C

IN CONFIDENCE

SUSPECTED BREACH C

On 23 March 2006, Mr Gary Stokes emailed Mr Brian Burke a copy of correspondence from the Director General of DoIR to the Director General of DPI (dated 28 February 2006), concerning the rezoning of land located at Whitby.

KEY QUESTIONS

- Did the letter contain confidential information?
- Was the action part of the officer's duties?

AGREED HISTORY

The background to, and analysis of, suspected breaches A and B are of relevance to an understanding of the current suspected breach. The chronology developed from information sourced by the investigator of the events associated with the Whitby issue is presented in the section entitled 'Background to the Whitby Matter'.

THE SUSPECTED BREACH

- Copies of a number of emails were examined at the CCC hearing of 26 February 2007. The emails included as Attachment C1 have been released to the investigator for disciplinary purposes and cannot be disseminated. The emails included one sent by Mr Burke to Mr Stokes while Mr Stokes was in China on business. On Wednesday 22 March 2006, Mr Burke requested a copy of the DoIR letter to DPI dated 28 February 2006 in relation to the rezoning of Whitby. Mr Stokes emailed Dr Griffin, who was fulfilling Mr Stokes's duties while Mr Stokes was in China, and asked him to get a copy of the letter.
- When he received a copy of the letter attached to an email from Dr Griffin, Mr Stokes forwarded the attachment on 23 March 2006 to Mr Burke requesting that it be treated as confidential. **This was suspected breach C.**
- Mr Burke acknowledged by return email that it was confidential. Mr Burke reiterated the confidential nature of the letter in the subsequent exchange of emails and phone calls to Mr Cecchele, from Urban Pacific, and Mr Grill, Mr Burke's partner.
- The DoIR letter confirmed that there was a mineable resource although profitability was the issue, indicated that Bemax was interested in gaining access to the deposit, and asked for information on the planning context and a meeting to resolve an impending land use conflict. The letter is included as Attachment C2.

SUSPECTED BREACH C

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IN CONFIDENCE

- At the CCC hearing of 26 February 2007, from the questions directed to Dr Limerick and Mr Stokes, the inference was that Mr Stokes's actions were improper because information in the letter would be helpful to the proponent. Counsel suggested that the letter should not have been released because it was confidential, as the Minister for Resources had not made a decision on the contents at that time.

MR STOKES'S EXPLANATION

In his written response to the DG of DPC dated 21 March 2007, an interview with the investigator conducted on 27 June 2007 and a subsequent written submission, Mr Stokes provided the following information:

- Mr Stokes argued that he had provided the copy of the letter as part of his official duties because he was the departmental officer who had had all the interaction with Urban Pacific as a client of DoIR.
- Mr Stokes refuted the CCC contention that the contents of the letter were confidential. He asserted that the letter was not labelled confidential and Urban Pacific had provided to the department the information summarised in the letter to help DoIR assess the viability of a mining operation on the land.
- Mr Stokes contested that a policy issue was involved. He emphasised that the Minister for Resources had no statutory role in the decision-making process and that the department's preferred position of sequential mining and most of the information included in the letter was well known in the land development and mining industries.
- Mr Stokes emphasised that he had received Mr Burke's request by email on his BlackBerry while he was on DoIR business in China. He had been sent the letter attached to an email from Dr Griffin. Mr Stokes stated that he had then forwarded the attachment unopened. He emphasised that his 'hectic schedule' of appointments in China had contributed to his lack of attention to the content.
- He had anticipated that the letter would be 'the standard sort of letter' maintaining the department's preference for sequential mining. The draft letter, which Dr Griffin had directed through him to Dr Limerick on 24 February 2006, had indicated 'DoIR cannot support this change in land status at this time' and did not mention Bemax. He had not been informed that the signed letter contained significant changes made by Dr Limerick. He regretted not having opened and read the letter and conceded that, although the information on Bemax was 'pretty superficial', it should not have been released.
- Mr Stokes denied 'the CCC notion' that he had given ammunition to Urban Pacific in dealing with the Minister for Resources, because Mr Cecchelle already knew the information in the letter. He also emphasised that:

SUSPECTED BREACH C

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...there's no point having a meeting with the Minister if you don't know what the positions are going to be, you need to know so that you don't waste time.

- Mr Stokes indicated that the fundamental issue had not been recognised by the CCC, which was that the Minister for Resources did not have a statutory role or any formal decision to make.
- Although Mr Stokes's involvement lessened after Dr Limerick wrote to DPI on 28 February 2006, he had maintained his role as interface between DoIR and the representatives of Urban Pacific.

EVIDENCE

Assumptions

The analyses of suspected breaches A and B are relevant to an understanding of this suspected breach. The investigator has also accepted the following issues as the basis for considering suspected breach C.

- Mr Burke had been jointly engaged with Mr Grill to represent Urban Pacific in having land at Whitby owned by that company rezoned to enable urban development. Therefore, it was accepted by DoIR officers that Mr Burke could make enquiries and receive information on behalf of Urban Pacific.
- Mr Stokes had been involved with the Whitby issue as part of his official duties.

Scope

The following questions are relevant to the consideration of the suspected breach.

- Was it within Mr Stokes's official duties to provide a copy of DoIR correspondence to a proponent?
- Did the letter contain information that needed to be kept confidential from the proponents?
- What were the views of the Director General?
- What was the nature of the decision?
- Did the letter provide undue advantage to the proponent?
- Did Mr Stokes knowingly include information on another party when he forwarded the letter to Mr Burke?

Was it within Mr Stokes's official duties to provide a copy of DoIR correspondence to a proponent?

It has been established that it was within Mr Stokes's official duties to deal with the Whitby issue. The investigator considered whether the release of the DoIR correspondence could be seen to be part of his official duties.

- Documents clearly demonstrate that Mr Stokes had been the point of contact for Urban Pacific with the department.

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- All interviewees acknowledged the strong customer service ethos of DoIR and the obligation to 'inform others about decisions and actions that affect them'.
- Mr Pritchard, the recognised expert on the DoIR policy on *Confidentiality and Release of Official Information*, stated that although it would have been accepted departmental practice in 2006 to convey to a proponent the general contents of a letter, he had never given advice on the issue of the release of an actual letter:

I don't recall ever being consulted on that issue...So certainly they consult me all the time on aspects of policies. I don't recall anyone saying 'can I release this document?' or 'can I not release this document?'

- In relation to making judgements about the circumstances in which it was appropriate for DoIR officers to release information to proponents he emphasised that:

...these questions are very hard to answer and I think it varies enormously with the circumstance.

For example, Mr Pritchard indicated that there was more leeway for a senior officer such as a DDG to make a decision to release information.

- When asked to consider the application of the confidentiality policy to the release of information, Mr Pritchard indicated:

We're really talking about custom and practice as opposed to what may have been the written thing.

He acknowledged the limitations of the policy and stressed that:

...we're about to revise it and roll it out again, but this time, we'll getting input from the CCC to make sure that we're capturing the sort of things they think we should capture...

- Mr Pritchard indicated that while he personally questioned whether it was appropriate to release the letter itself, it would be accepted that Mr Stokes as DDG would be able to argue that he was doing it in the course of his official duties in trying to facilitate an outcome that the State wanted.
- Mr Pritchard and Dr Limerick both acknowledged that at the time of the suspected breach the department did not have clear guidelines for identifying and dealing with confidential documents. As a result of the issues raised at the CCC hearing, a system of classifying documents for release has recently been introduced.
- Mr Smith, who has been undertaking the duties previously undertaken by Mr Stokes since March 2007 and was a DDG at the time of the suspected breach, indicated that with regard to the position of DDG:

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There's a pretty high degree of autonomy if the individual chooses to use it.

In relation to the release of the letter, Mr Smith stated:

Probably doesn't matter that much. So the letter's been sent to DPI, it had plenty of time to receive it and all of that. If Brian Burke is representing the party and the party is aware of the decision, I think it would be quite possible that the letter was sent to Brian Burke at that stage.

He added:

Alright, typically, if it's a letter of advice saying, 'here's the department's view, then yeah, that going to someone representing the proponent after the department would've received it, it wouldn't be a big issue.'

Mr Smith considered that to release such a letter would be appropriate and in the course of an officer's duty.

Overall, there was evidence of a general understanding that it was appropriate for senior officers to release to a proponent a departmental letter to another agency.

Did the letter contain information that needed to be kept confidential from the proponents?

At the CCC hearing of 26 February 2007, the line of questioning suggested that because Mr Burke said that the letter was 'very confidential', it should not have been divulged to the proponent, Urban Pacific. It is useful to examine this in further detail.

- When Mr Stokes released the document to Mr Burke, who was representing the proponent, he emphasised that the document was confidential. Mr Burke's comments to Messrs Grill and Cecchelie can be interpreted as meaning that, as the letter was accepted on that basis, it was appropriate to reinforce that it was confidential to Urban Pacific. It appears that the letter was not shared more widely than with the proponent.
- The letter confirmed that DoIR preferred sequential mining and was not removing its objection. All interviewees accepted that this was the standard policy position of the department. It was always communicated in its dealings with proponents and the position was well known in the land development industry.
- The letter indicated that the shire was opposed to mining within its boundaries. Interviewees acknowledged that this had been the subject of a newspaper article.
- The letter summarised information from a report that the proponent had commissioned and provided to the department.

IN CONFIDENCE

- Mr Cecchele advised at the CCC hearing on 26 February 2007 that an officer in DPI had already conveyed the contents of the letter to Urban Pacific.
- The letter contained a table of information on Bemax's plans for mining. As Mr Burke did not represent Bemax, all interviewees agreed that the letter contained information on another party. All interviewees, including Mr Stokes, acknowledged that confidential information on another party should not have been included in the letter without their approval.

In summary, the letter contained information that was known to the proponent. It also contained brief details on another party (Bemax).

What were the views of the Director General?

At the CCC hearing of 26 February 2006, Dr Limerick provided the following information in response to questions from Counsel.

- Dr Limerick indicated that as long as the information was not in the public arena the letter was confidential. He considered that the letter contained commercially sensitive information and the release of that information could potentially influence the willingness of the parties to negotiate over whether mining was going to occur.
- Dr Limerick stated that it was 'quite a sensitive document' because it represented part of the deliberative process of government.
- Dr Limerick would not have provided a copy of the letter if a representative of Urban Pacific had requested it because he wished to perpetuate the negotiations between Urban Pacific and Bemax.

During the first interview with the investigator on 12 June 2007, Dr Limerick provided the following additional information.

- Dr Limerick indicated that as he runs a department that spans many areas, the DDG position was given a lot of autonomy:

I only got involved on rare occasions, when it was needed. Gary [Mr Stokes] was largely given the responsibility for the day-to-day, month-to-month driving of the major resources projects bit...My deputies can sign off on Ministerials, except on matters of significant government policy, matters which are politically sensitive or have a significant budgetary implication.

- Dr Limerick considered that the release of the letter by Mr Stokes was not within the officer's normal course of duties. However, Dr Limerick conceded that he had been unaware of the extent of Mr Stokes's involvement.
- He confirmed that he did not have to go to the Minister for Resources for a decision as the final decision rested with WAPC.

IN CONFIDENCE

- In 2006, confidential documents produced internally were not labelled as such. Dr Limerick stated 'to have something confidential on it would be extraordinary'.

What was the nature of the decision?

The questions at the CCC hearing and Dr Limerick's responses suggested that the letter should not have been released because the Minister for Resources had not yet made a decision. This assertion was considered in greater detail.

- Mr Stokes strongly contested that a decision on the rezoning needed to be made by the Minister for Resources, as the Minister has no statutory role in approving requests for rezoning of land. He asserted that in the case of Whitby:

...the issue concerned the interpretation of the policy position. It did not have to go to Ministers for resolution.

- Although DoIR is consulted over land use issues, Dr Limerick confirmed that the decisions were made in the planning portfolio and that the Minister for Resources had no statutory decision-making role.
- The letter of 28 February 2006 outlined the department's assessment that the deposit was mineable and its preference for its standard policy position of sequential mining before urban development. The letter also requested more information from DPI on the planning context in order to determine the urgency of developing urban land in the area.
- An analysis of documents and interview material indicated that there was confusion in the use of the word 'decision', particularly by Dr Limerick and Counsel. It is useful to distinguish between:
 1. The DoIR policy of sequential mining;
 2. The WAPC decision on rezoning of land; and
 3. Assessment of the viability of mining the deposit on the Whitby land.

Dr Limerick and Counsel used all three dimensions interchangeably.

- Interviewees have indicated that there was no question that the department would depart from its policy position of sequential mining. There were however differences of opinion about the results of the assessment of the viability of accessing the deposit on the land. Dr Griffin and Dr Limerick placed emphasis on Bemax's desire to mine while Mr Stokes considered factors such as low profitability and the right of veto being exercised by Urban Pacific.
- Mr Smith indicated that the Minister for Resources disagreed with the department's assessment that the land was mineable. The Minister later clarified in a marginal note on 22 April 2006 that in his opinion the deposit

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could not be mined and notified the department and the Minister for Planning and Infrastructure accordingly. He did not, and could not, make a decision on the rezoning of the land and he did not overturn the policy position of sequential mining. What the Minister actually did was to not accept the department's assessment of the viability of the deposit.

The investigator is satisfied that the decision to rezone the land did not rest with the Minister for Resources, the department did not have a statutory role and DoIR was one of many agencies being consulted for its views. What was at issue was the assessment of the viability of mining the land. Therefore, the letter did not appear to form part of the deliberative process of government, despite this being asserted by Dr Limerick.

Did the letter provide undue advantage to the proponent?

At the CCC hearing of 26 February 2007, it was suggested that the release of the letter was inappropriate because the proponent could use the letter to prepare for a meeting with the Minister for Resources. The use of the letter has therefore been examined.

- During the phone call taped by the CCC on 28 March 2006 between Messrs Burke and Cecchele, Mr Burke told Mr Cecchele to use the letter to prepare for the meeting with the Minister for Resources by extracting five points and preparing answers to those points. Mr Cecchele denied that he had taken that advice, although he agreed that the letter had been useful. Mr Cecchele emphasised that:

The information that was in the letter was consistent with the information that I'd provided to Department of Industry and Resources in terms of the viability of mining and also the information that [Bemax] provided me in a correspondence from them to me...

- The investigator has confirmed that Urban Pacific had been closely working with DoIR and that the letter summarised information on the viability of mining that was well known to Urban Pacific, much of which they had passed on directly to DoIR. The investigator also confirmed that Mr Stokes knew Urban Pacific had provided the information being considered by DoIR.
- The information Urban Pacific passed onto DoIR also included information on Bemax's plans. Urban Pacific had been working closely with Bemax to establish whether Bemax's concept plan to access the deposit was viable. However, on 14 February 2006, Urban Pacific informed Bemax that Urban Pacific rejected Bemax's financial offer and would not let Bemax mine on their land. Therefore, in the context of the negotiations, it appears unlikely that the inclusion of information on the Bemax proposal was significant.
- The investigator accepts Mr Cecchele's claim that the information in the letter on Bemax's plans was consistent with information that he had already obtained direct from Bemax during the negotiations over whether Urban Pacific was willing to give Bemax access to the mineral sands on the land.

IN CONFIDENCE

- The letter maintained the departmental policy position of sequential mining, which was espoused to all proponents who approached DoIR on land use issues. Therefore, this section of the letter did not appear to provide confidential information to Urban Pacific.

In summary, it appears that the provision of the letter did not appear to provide undue advantage to Urban Pacific.

Did Mr Stokes knowingly include information on another party when he forwarded the letter to Mr Burke?

- The investigator was unable to locate evidence that indicated that Mr Stokes had read the letter before forwarding it to Mr Burke and therefore knew that it contained information on another party, Bemax.
- Mr Stokes has acknowledged that he should not have forwarded the letter with the Bemax paragraph included. He volunteered that his usual practice would have been to delete the paragraphs outlining details on Bemax, or to obtain Bemax's permission, before forwarding the letter.

SUMMARY OF EVIDENCE

A review of documentation and interview material provided the following information.

- Mr Burke represented Urban Pacific to assist with an application to have land they owned in Whitby rezoned from 'urban deferred' to 'urban'.
- Mr Burke emailed Mr Stokes seeking a copy of a letter from DG DoIR to DG DPI dated 28 February 2006, which outlined the DoIR stance on the request.
- Mr Stokes received the email while he was in China on business and, having obtained a copy from Dr Griffin, forwarded it by email to Mr Burke the next day.
- Mr Stokes claimed that he did not open the attached letter. As he had not been consulted by the DG, he assumed that the letter was unchanged from the draft standard version that had been provided through him to the DG on 24 February 2006.
- Mr Stokes asked Mr Burke to treat the letter as confidential.
- The letter contained information that was already known to Urban Pacific.
- The letter contained information on another party (Bemax).

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- Mr Stokes acknowledged that he should have obtained approval from Bemax, or deleted the information on Bemax, before providing that information to Urban Pacific.
- Mr Stokes had a great deal of autonomy as DDG.
- Mr Smith considered, in the context of departmental practice at the time, that it was acceptable to provide a copy of the letter generated by DoIR on a proponent's request after it had gone to the recipient.
- Mr Smith, Dr Limerick and Mr Pritchard indicated that the information on Bemax should not have been provided.

CONSIDERATION OF EVIDENCE AND CONCLUSIONS

- It is clear that Mr Stokes provided to Mr Burke, who was representing Urban Pacific, a copy of the letter dated 28 February 2006 from the DG of DoIR to the DG of DPI. The letter communicated the department's position on a request by Urban Pacific that the department not oppose their application for rezoning land at Whitby.
- The investigator is satisfied that the letter contained information that had been provided by Urban Pacific to assist the department to assess the feasibility of accessing the mineral sands on their land.
- There was evidence of a general understanding that a senior DoIR officer could release a departmental letter to a proponent.
- Dr Limerick did not consider that the release of the document fell within Mr Stokes's official duties. However, the investigator has not given a great deal of weight to this view because it became apparent during the investigation of the previous suspected breaches that Dr Limerick had been unaware at the time of the full extent of Mr Stokes's involvement in the discussions regarding the land at Whitby.
- Dr Limerick stated that it was inappropriate to release correspondence, as the matter was part of the deliberative process of government. Although Dr Limerick emphasised the deliberative role of the Minister for Resources, he also confirmed that the Minister had no statutory role in the rezoning decision. DoIR was one of a number of agencies consulted by DPI. Therefore, the investigator has not given a great deal of weight to the view that the Minister had a decision-making role, because Dr Limerick did not distinguish between the department's assessment of the deposit's viability, WAPC's decision-making powers and the department's preferred policy position.
- Mr Smith considered that it was acceptable that the department's letter had been shared with the proponent so long as there had been plenty of time for DPI to receive it. The letter was sent to DPI prior to it being released to

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Mr Burke and a DPI officer had already revealed the contents of the letter to Mr Ceccheli. As a fellow DDG, Mr Smith has a strong appreciation of the departmental expectations of officers working at that level. The investigator has accorded greater weight to his views that Mr Stokes's action in releasing such a letter was acceptable and within the officer's duties.

- All those interviewed, including Mr Stokes, agreed that it was not consistent with departmental practice to release confidential information about another party to a proponent.

Therefore the investigator has reached the following conclusions:

- The provision of correspondence to a proponent could be seen to be part of Mr Stokes's official duties.
- The majority of the letter contained material that had been provided by the proponent, including information on Bemax. All interviewees agreed that the information on Bemax should not have been included without the express permission of Bemax.
- The decision to rezone the land did not rest with the Minister for Resources and therefore the letter did not form part of the deliberative process of government.
- The release of the letter did not provide an undue advantage to the proponent.
- Mr Stokes did not knowingly include the information on Bemax when he released the letter to Mr Burke.

FINDINGS

After considering all of the evidence, and having regard for:

- The autonomous nature of the DDG's role;
- Evidence that it was acceptable under departmental practice for a senior officer to release the letter;
- The lack of guidelines covering the release of departmental correspondence to proponents; and
- The general consensus that it was inappropriate to include the information on another party, Bemax.

The investigator formed the view that:

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Mr Stokes provided information about another party when he emailed Mr Burke on 23 March 2006 a copy of correspondence from the DG of DoIR to the DG of DPI (dated 28 February 2006), concerning the rezoning of land located at Whitby.

The investigator accepts it was an oversight in that he failed to check the contents before forwarding the letter to Mr Burke. There appear to be the following mitigating circumstances:

- He was unaware that the draft letter forwarded for the DG's signature had been significantly changed and that details on Bemax had been added.
- He was working overseas with a heavy schedule of appointments and travel when he dealt with the correspondence using a BlackBerry.

In deciding whether the action was a serious breach of discipline, the investigator considers that the evidence would have needed to show that Mr Stokes:

- Knew that the letter contained information about another party and provided it anyway; or
- Disobeyed a specific instruction from the DG; or
- Obtained personal gain from passing on the letter; or
- Deliberately provided another party with an advantage.

There was no evidence to show that these circumstances applied when Mr Stokes released the letter to Mr Burke. Therefore, Mr Stokes's action was not considered by the investigator to be a serious breach of discipline.

Therefore, the investigator finds that Mr Stokes's action, when he emailed Mr Burke on 23 March 2006 a copy of correspondence from the DG of DoIR to the DG of DPI (dated 28 February 2006), concerning the rezoning of land located at Whitby, was a minor breach of discipline pursuant to section 80 of the Act.

Mr Stokes contravened:

- Section 9 (b) of the Act, which requires employees to act with integrity in the performance of official duties and to be scrupulous in the use of official information, equipment and facilities, when he forwarded a letter that included details of another party; and
- The *Western Australian Public Sector Code of Ethics*, namely, the requirement that employees be 'conscientious and scrupulous in the performance of public duty', when he forwarded an unsigned copy of a letter without confirming that the final version of a letter signed by the DG on 28 February 2006 was the same as the draft letter of 24 February 2006.

ATTACHMENT 2

Sections of the *Report of an Investigation Into a Suspected Breach of Discipline by Mr Gary Stokes, Disciplinary Investigator, Department of the Premier and Cabinet, 12 September 2007*, relating to Suspected Breach D

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SUSPECTED BREACH D

On 26 July 2006, Mr Gary Stokes emailed to Mr Brian Burke a copy of correspondence from the DG of DoIR to the DG of DPI (dated 30 June 2006), concerning the rezoning of land located at Whitby.

KEY QUESTIONS

- Did the letter contain confidential information?
- Was the action part of the officer's duties?

AGREED HISTORY

The background to, and analysis of, suspected breaches A, B and C are of relevance to an understanding of the current suspected breach. The chronology developed from information sourced by the investigator of the events associated with the Whitby issues was presented in the section entitled 'Background to the Whitby Matter'.

THE SUSPECTED BREACH

- On 17 July 2006, Mr Stokes returned a phone call from Mr Burke. This phone call was intercepted and played at the CCC hearing on 26 February 2006. The transcript is included as Attachment D1.
- During the phone call, Mr Burke advised that everything was sorted out with the business with Whitby and the mineral sands and asked for a copy of the letter that had been sent across by DoIR to DPI. Mr Stokes agreed to do so.
- Mr Stokes sent the copy of the letter (dated 30 June 2006) attached to an email on 26 July 2006, asking if it was the letter Mr Burke was after. The email and letter are included as Attachment D2 (a copy of the letter has been provided by the CCC for disciplinary purposes only and cannot be disseminated). **This action was suspected breach D.**
- The letter confirmed that the Minister for Resources had indicated that mining would not be pursued on the land held by Urban Pacific and that this position had been agreed by the Minister for Planning and Infrastructure. Consequently, DoIR was removing its objection to the land being rezoned. The letter also provided proposed wording for a memorial that DoIR suggested be placed on all residential blocks that might be affected by possible future mining of the Mundijong mineral sands deposit outside the land owned by Urban Pacific.

The line of questioning at the CCC hearing was confusing. Counsel indicated that Mr Stokes's action in providing a copy of the letter dated 30 June 2006 was inappropriate. The questions however focused on the benefit given to the proponents of the previous letter dated 28 February 2006. Counsel then

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acknowledged that the letter dated 30 June 2006 was of less benefit because 'a decision has been already made'.

MR STOKES'S EXPLANATION

From his written response to the DG of DPC dated 21 March 2007, two interviews with the investigator and a subsequent written submission, Mr Stokes provided the following information.

- Mr Stokes acknowledged that he emailed Mr Burke and attached a copy of the letter on the Whitby rezoning dated 30 June 2006 from DoIR to DPI.
- He had sent the copy to Mr Burke in his capacity as the representative of the proponent Urban Pacific 'on the basis that it completed the documentary record of the process'.
- Mr Stokes indicated that the letter was internally generated within DoIR and was not a copy of correspondence from another party.
- Mr Stokes denied that the letter contained confidential information and referred to Dr Limerick's evidence at the CCC hearing that the information was 'in the public arena'.
- Mr Stokes emphasised that he had provided the information in the course of his duties. He had maintained his role as the interface with the proponents and their representatives, because the approach had initially been made to him.
- He strongly rejected the accusation at the CCC hearing that he had given Mr Burke special treatment. He did not have a close relationship with Mr Burke and he had not treated him any differently from other lobbyists working for proponents:

I did not see the need for lobbyists, but the companies concerned chose to use them and as a public servant I had to deal with them as their representatives.

- Mr Stokes confirmed that he read the letter and passed it on, because he did not consider it to be confidential. He emphasised that the department should have kept the proponent informed of all developments. He was very surprised that the department had not copied them into the letter. In his capacity as 'DDG on the second-line of management', he'd decided that Urban Pacific was entitled to receive the copy of the letter that finalised the whole issue.

EVIDENCE

Assumptions

The discussions of suspected breaches A, B and C form a useful background to consideration of the current suspected breach. The investigator has accepted the following as the basis for considering the suspected breach.

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- Mr Burke had been engaged to represent Urban Pacific in having land rezoned at Whitby and it was consistent with departmental practice to treat him as though he was the proponent.
- Mr Stokes had been involved with the Whitby issue as part of his official duties.

Scope

The following questions are relevant to the consideration of the suspected breach.

- What were the views of the Director General on the appropriateness of releasing the letter?
- What was departmental practice in relation to release of such a letter?
- Was it within Mr Stokes's official duties to release the letter to Mr Burke?

What were the views of the Director General on the appropriateness of releasing the letter?

- At the CCC hearing on 26 February 2007, Dr Limerick indicated that the contents of the letter at the time of writing were largely in the public arena and he:

...wouldn't regard that [letter dated 30 June 2006] as being a confidential document in anywhere near the context of the earlier one [the letter dated 28 February 2006].

- Dr Limerick stated that he would have informed the proponent in broad terms about the content of the letter.
- Dr Limerick believed that the sensitivity of the letter was not great. However, he stated:

Just as matter of principle, that it was a letter between two agencies and I wouldn't feel comfortable passing a copy of that letter on.

- During the interview with the investigator on 12 June 2007, he indicated that, although he had not given explicit approval, the reference to the 'memorial' in the letter was not sensitive and the release of the letter was of:

...no particular consequence in my view, because the decision had been made already that the land would be rezoned. Once you get to the 26 July [2006], it's a simple matter of advising the parties of where the decision-making was at.

- Dr Limerick considered that the release of the letter could be seen to be within the officer's duties.

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What was departmental practice in relation to release of the letter?

- Mr Smith, a DDG who was involved in drafting the 30 June 2006 letter, accepted that, as Mr Burke was representing the proponents Urban Pacific and the Minister had indicated that he did not support the department's position, the release of the letter was 'unusual, but not particularly disturbing'. He also considered that the release was within the officer's official duties.
- Mr Pritchard, the policy owner of the DoIR policy on *Confidentiality and Release of Official Information*, indicated that the policy did not provide guidance to officers on the release of documents to proponents. He indicated that correspondence had not been labelled confidential and that a system of classifying documents in DoIR had been introduced recently as a result of the issues raised by the CCC hearing.
- In relation to Mr Stokes's actions in the context of the current investigation, Mr Pritchard now believes the release of the letter was not appropriate. However, he emphasised that at the time of the suspected breach:

In a pragmatic sense, people at that level [DDG] make these sorts of decisions everyday. And so custom and practice would be, I don't think the organisation would question a DDG about their authority to make that sort of a decision on an ad hoc basis.

Was it within Mr Stokes's official duties to release the letter to Mr Burke?

- As Mr Burke was engaged to represent the proponent Urban Pacific, all interviewees acknowledged that it was appropriate for him to make enquiries of Mr Stokes to obtain information on the department's response to Urban Pacific's request of 9 February 2006.
- At the time he released the letter to Mr Burke, Mr Stokes was fulfilling the role of DDG Office of State Development. He was no longer responsible for Geological Survey, which had provided advice back in February 2006 on the viability of the mining deposit on the land. However, a review of documentation has confirmed that all correspondence from Urban Pacific had been directed to Mr Stokes. This provided support for Mr Stokes's contention that he had been the interface with Urban Pacific throughout their dealings with the department.
- Documents suggested that Mr Stokes's action in providing feedback to proponents was consistent with the strong client focus of the department, as exemplified in the obligations contained in the DoIR Code of Conduct e.g. to 'Inform others about decisions that affect them' and 'Share information wherever possible'. Moreover, as a Board member, he had signed the Board Charter under which he committed to 'Consulting stakeholders and affected parties about issues under consideration' and 'Ensuring that decision making is transparent'.

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- Interview material confirmed that senior officers in DoIR were expected to provide feedback to proponents. This was established previously in the section entitled 'Departmental Practice in Relation to Providing Advice to Proponents'.
- There was no evidence of special favours being sought or offered by Mr Burke.
- Both the DG and Mr Smith, also a Board member, agreed that the release of the letter was within Mr Stokes's official duties and was not inappropriate.

SUMMARY OF EVIDENCE

The review of evidence provided the following information.

- The suspected breach related to the release by Mr Stokes on 26 July 2006 of a copy of a letter from the DG of DoIR to the DG of DPI (dated 30 June 2006), concerning the rezoning of land located at Whitby.
- Mr Burke represented Urban Pacific to assist with an application to have land owned by Urban Pacific in Whitby rezoned from 'urban deferred' to 'urban'.
- The CCC taped Mr Stokes on 17 July 2006 in a phone call with Mr Burke agreeing to Mr Burke's request to provide a copy of the DoIR letter.
- The CCC had obtained a copy of the email dated 26 July 2006 from Mr Stokes to Mr Burke in which he attached a copy of the letter.
- The letter advised that DoIR was removing its objection to the land being rezoned.
- Mr Stokes confirmed that he had provided a copy of the letter to Mr Burke.
- The DG and Mr Smith considered that the release of the letter was not inappropriate and within Mr Stokes's duties.
- The release of the letter by a senior officer was acceptable under departmental practice.

CONSIDERATION OF EVIDENCE AND CONCLUSIONS

- In considering this breach the investigator noted the confusing line of questioning in the CCC hearing. Counsel accepted that the letter was not as significant as the previous one of 28 February 2006 (which has been considered under suspected breach B). Counsel also acknowledged that the decision had been already made. There was also less emphasis on the confidential nature of the letter.

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- Dr Limerick's comments at the hearing did not indicate a level of concern over Mr Stokes's action apart from a lack of comfort in the release of a letter between two agencies. The investigator has ascertained that DoIR did not have a policy relating to the release to proponents of letters generated within the department to another agency. Moreover, interview material did not indicate that there was a shared understanding of the DG's concerns within the department.
- After reviewing the circumstances of the suspected breach, the investigator has given weight to Dr Limerick's view that the release of the letter was of no particular consequence, as the contents of the letter were already in the public arena.

Therefore, the investigator has reached the following conclusions:

- It was within Mr Stokes's official duties to release a copy of the letter to a representative of the proponent.
- It was consistent with the departmental practice of keeping proponents informed of issues that affect them.

FINDINGS

After considering the evidence, and having regard for:

- The autonomous nature of the DDG's role;
- The lack of guidelines covering the release to proponents of departmental generated correspondence; and
- The views of the DG and a fellow Board member that the release of the letter was acceptable and within the course of the officer's duties.

The investigator finds that:

Mr Stokes's action, on 26 July 2006 when he emailed to Mr Burke a copy of correspondence from the DG of the DoIR to the DG of the DPI (dated 30 June 2006) concerning the rezoning of land located at Whitby, was not a breach of discipline.

ENDNOTES

All references to telephone intercepts are references to lawfully intercepted telephone intercepts.

¹ The spelling of “Smiths” has no possessive apostrophe.

² Letter to Mr Julian Grill, Julian Grill Consulting Pty Ltd, of 7 December 2005 from Mr David Cecchele, Project Director, Urban Pacific [E 10853].

³ State legislation (the *Telecommunications (Interception) Western Australia Act 1996* (“the Western Australia Act”) gives the Corruption and Crime Commission (“the Commission”) its status as an intercepting agency. The Western Australia Act is an Act to enable the Commission to be declared an agency for the purposes of the *Telecommunications (Interception) Act 1979* of the Commonwealth and for related purposes.

⁴ *Telecommunications (Interception and Access) Act 1979* (Commonwealth), p.17.

⁵ Butterworths Concise Australian Legal Dictionary (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 361-363; *Rejek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

⁷ At paragraph [1].

⁸ A copy of the *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007, is available from the Corruption and Crime Commission Website at www.ccc.wa.gov.au, Publications and Speeches, Publications, viewed 23 July 2008.

⁹ Pursuant to section 140(2) of the *Corruption and Crime Commission Act (2003)*.

¹⁰ Transcript of Proceedings, Public Examination, Opening Address by Commissioner Hammond on 12 February 2007, p.2.

¹¹ Speech by Commissioner Hammond to the Institute of Public Administration Australia, entitled *Corruption, Integrity and the Public Sector*, on 20 March 2007.

¹² Transcript of Proceedings, Public Examination, Address by Counsel Assisting on 12 February 2007, p.12.

¹³ Transcript of Proceedings, Private Examination of Mr Timothy John Walster on 30 July 2008, pp.4 and 39.

¹⁴ Julian Grill Consulting became Julian Grill Consulting Pty Ltd from 22 February 2006.

¹⁵ Bemax Resources NL up to 5 July 2006 (extracted from the Australian Securities and Investments Commission (ASIC) database on 23 July 2008 at 15:19, Historical Company Extract for Bemax Resources Limited).

¹⁶ Letter to Mr Julian Grill, Julian Grill Consulting Pty Ltd, of 7 December 2005 from Mr David Cecchele, Project Director, Urban Pacific Limited [E 10853], *op cit.*

¹⁷ Transcript of Proceedings, Public Examination of Mr David Cecchele on 26 February 2007, p.718.

¹⁸ Letter to Mr Julian Grill, Julian Grill Consulting Pty Ltd, of 7 December 2005 from Mr David Cecchele, Project Director, Urban Pacific Limited [E 10853], *op cit.*

¹⁹ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, pp.657-670.

²⁰ Statement of Dr James Macquarie Limerick to the Corruption and Crime Commission , 21 March 2007 [E 12881].

²¹ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.659, *loc cit.*

²² Letter to Mr Greg Martin, Director General, Department of Planning and Infrastructure, of 9 June 2005 from Dr James Limerick, Director General, Department of Industry and Resources [E 17151].

²³ Statement of Dr James Macquarie Limerick to the Corruption and Crime Commission, 21 March 2007 [E 12881], *op cit.*

²⁴ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.660, *loc cit.*

²⁵ Letter to Mr Greg Martin, Director General, Department of Planning and Infrastructure, of 28 February 2006 from Dr James Limerick, Director General, Department of Industry and Resources, attached to Statement of Dr Limerick to the Corruption and Crime Commission , 21 March 2007 [E 12881, *op cit.*].

²⁶ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.662, *loc cit.*

²⁷ *Ibid*, p.663.

²⁸ *Ibid*, p.667.

²⁹ *Ibid*, pp.667-668 and Briefing Note, entitled *Whitby Land-Mundijong*, to Minister Bowler of 18 April 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 15814].

³⁰ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.668, *loc cit.*

³¹ *Ibid* and letter to Mr Greg Martin, Director General, Department of Planning and Infrastructure, of 30 June 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 11109].

³² Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.670, *loc cit.*

³³ Serpentine-Jarrahdale Shire, Mundijong/Whitby District Structure Plan, March 2007, p.7 [E 15640].

³⁴ Letter to Mr Julian Grill, Julian Grill Consulting Pty Ltd, of 7 December 2005 from Mr David Cecchele, Project Director, Urban Pacific Limited [E 10853], *op cit.*

³⁵ Refer section 2.1 of this report for details about public officers and positions held at relevant times during the first half of 2006, and Chapter 3 of this report for further details relating to communication(s) by Mr Burke and/or Mr Grill with individual public officers.

³⁶ Shire of Serpentine-Jarrahdale Minutes, Ordinary Council Meeting, 27 March 2006, [E 11106], p.6.

³⁷ Corruption and Crime Commission, *Section 26 Proposition & Assessment*, 21 February 2006 [CCC 55120].

³⁸ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick and Mr Gary Wayne Stokes on 26 February 2007, p.657, *loc cit.*, and p.674 respectively.

³⁹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, p.673.

⁴⁰ *Ibid*, p.674. *Loc cit.*

⁴¹ Telecommunications Intercept, T 0207, 13 February 2006.

⁴² Telecommunications Intercept, T 0211, 15 February 2006.

⁴³ Telecommunications Intercept, T 0209, 22 February 2006.

⁴⁴ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit.*, p.679.

⁴⁵ Email to Mr Stuart Smith of 22 February 2006, at 10:44 a.m., from Mr Gary Stokes [E 15645].

⁴⁶ Email to Dr Timothy Griffin of 22 February 2006, at 10:55 a.m., from Mr Stuart Smith [E 15646].

⁴⁷ Email to Mr Stuart Smith, Mr Gary Stokes and Dr James Limerick of 22 February 2006, at 11:32 a.m., from Dr Timothy Griffin [E 15646].

⁴⁸ Telecommunications Intercept, T 0215, 24 February 2006.

⁴⁹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.682.

⁵⁰ Telecommunications Intercept, T 1722, 25 February 2006.

⁵¹ Telecommunications Intercept, T 0657, 27 February 2006.

⁵² Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.690.

⁵³ *Ibid.*

⁵⁴ *Ibid*, pp.690-691.

⁵⁵ Letter to Mr Greg Martin, Director General, Department of Planning and Infrastructure, of 28 February 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 15782].

⁵⁶ Email to Mr Brian Burke and Mr Julian Grill of 21 March 2006, 1:41 p.m., from Mr David Cecchele, Project Director, Urban Pacific Limited [E 11401].

⁵⁷ Email to Mr Brian Burke and Mr Julian Grill of 22 March 2006, 2:36 p.m., from Mr David Cecchele, Project Director, Urban Pacific Limited [E 11401].

⁵⁸ Telecommunications Intercept, T 1725, 22 March 2006.

⁵⁹ Email to Mr Gary Stokes of 22 March 2006, 3:30 p.m., from Mr Brian Burke [E 12602].

⁶⁰ Email to Mr David Cecchele and Mr Julian Grill of 22 March 2006, 4:07 p.m., from Mr Brian Burke [E 11401].

⁶¹ Email to Dr Timothy Griffin of 22 March 2006, 4:55 p.m., from Mr Gary Stokes [E 12605].

⁶² Email to Mr Brian Burke of 22 March 2006, 5:20 p.m., from Mr Gary Stokes [E 12602].

⁶³ Email to Mr Gary Stokes of 23 March 2006, 9:33 a.m., from Dr Timothy Griffin [E 11108].

⁶⁴ Email to Mr Brian Burke of 23 March 2006, 11:10 a.m., from Mr Gary Stokes [E 12605].

⁶⁵ Telecommunications Intercept, T 0217, 23 March 2006.

⁶⁶ Email to Mr Gary Stokes of 23 March 2006, 11:43 a.m., from Mr Brian Burke [E 12605].

⁶⁷ Telecommunications Intercept, T 0219, 23 March 2006.

⁶⁸ Telecommunications Intercept, T 0223, 28 March 2006.

⁶⁹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.714.

⁷⁰ Letter to Dr James Limerick, Director General, Department of Industry and Resources, of 17 March 2006 from Mr Gregory Martin, Director General, Department for Planning and Infrastructure [E 15813].

⁷¹ Email to Mr Stuart Smith of 6 April 2006, 4:39 p.m., from Dr Timothy Griffin [E 17153].

⁷² Email to Mr Brian Burke of 10 April 2006, 9:16 p.m., with a copy to Mr Julian Grill, from Mr Gary Stokes [E 15650].

⁷³ Letter to Mr Greg Martin, Director General, Department for Planning and Infrastructure, of 30 June 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 11109], *op cit*.

⁷⁴ Telecommunications Intercept, T 0672, 17 July 2006.

⁷⁵ Telecommunications Intercept, T 1810, 25 July 2006, 7:40 a.m.

⁷⁶ Telecommunications Intercept, T 1811, 25 July 2006, 7:47 a.m.

⁷⁷ Email to Dr Timothy Griffin of 25 July 2006, 8:09 a.m., from Mr Gary Stokes [E 15652].

⁷⁸ Email to Mr Brian Burke of 26 July 2006, 11:44 a.m., from Mr Gary Stokes [E 11109].

⁷⁹ Email to Mr Gary Stokes of 26 July 2006, 11:51 a.m., from Mr Brian Burke [E 15649].

⁸⁰ Email to Mr David Cecchelle of 26 July 2006, 11:51 a.m., with copies to Mr Julian Grill and Mr Des Riley, from Mr Brian Burke [E 10474].

⁸¹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.697.

⁸² *Ibid*, p.706.

⁸³ Email to Mr Brian Burke of 26 July 2006, 11:44 a.m., from Mr Gary Stokes [E 11109], *op cit*.

⁸⁴ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.710.

⁸⁵ Department of Industry and Resources Policy entitled *Confidentiality and Release of Official Information*, 9 January 2002 [E 12732].

⁸⁶ Department of Industry and Resources Policy entitled *Code of Conduct*, 9 March 2003 [E 11110].

⁸⁷ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, p.675.

⁸⁸ Email to Mr Gary Stokes of 23 March 2006, 9:33 a.m., from Dr Timothy Griffin [E 11108], *op cit*, and email to Mr Brian Burke of 26 July 2006, 11:44 a.m., from Mr Gary Stokes [E 11109], *op cit*.

⁸⁹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, *op cit*, pp. 694-695.

⁹⁰ Email to Dr Timothy Griffin of 22 March 2006, 4:55 p.m., from Mr Gary Stokes [E 12605], *op cit*.

⁹¹ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, p.695, *loc cit*.

⁹² *Ibid*, pp. 696-697.

⁹³ Email to Mr Brian Burke of 26 July 2006, 11:44 a.m., from Mr Gary Stokes [E 11109], *op cit*.

⁹⁴ Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, p.710, *loc cit*.

⁹⁵ *Ibid*, p.694. *Loc cit*.

⁹⁶ Statement of Dr James Macquarie Limerick to the Corruption and Crime Commission, 21 March 2007 [E 12881], *op cit*.

⁹⁷ *Ibid*, p.4, paragraph [23].

⁹⁸ *Ibid*, p.5, paragraph [24].

⁹⁹ *Ibid*, p.5, paragraph [25].

¹⁰⁰ *Ibid*, p.5, paragraph [26].

¹⁰¹ *Ibid*, p.5, paragraph [27].

¹⁰² *Ibid*, p.5, paragraph [28].

¹⁰³ *Ibid*, p.5, paragraph [29].

¹⁰⁴ *Ibid*, p.5, paragraph [30].

¹⁰⁵ *Ibid*, p.7, paragraph [41].

¹⁰⁶ *Ibid*, p.8, paragraph [42].

¹⁰⁷ *Ibid*, p.8, paragraph [43].

¹⁰⁸ Statement Mr Gregory Stuart Martin to the Corruption and Crime Commission, 20 April 2007 [E 12831].

¹⁰⁹ *Ibid*, p.2, paragraph [10].

¹¹⁰ *Ibid*, p.2, paragraph [11].

¹¹¹ *Ibid*, p.2, paragraph [12].

¹¹² *Ibid*, p.2, paragraph [13].

¹¹³ *Ibid*, p.2, paragraph [14].

¹¹⁴ *Ibid*, p.3, paragraph [18].

¹¹⁵ Statement of Mr Timothy John Griffin to the Corruption and Crime Commission, 12 July 2007 [E 14111].

¹¹⁶ *Ibid*, p.4, paragraph [21].

¹¹⁷ *Ibid*, pp.4-5, paragraph [22].

¹¹⁸ *Ibid*, p.5, paragraph [26].

¹¹⁹ Statement of Mr Garry Douglas Fee to the Corruption and Crime Commission, 8 May 2007 [E 12866].

¹²⁰ *Ibid*, p2, paragraph [11].

¹²¹ *Ibid*, p2, paragraph [12].

¹²² *Ibid*, p3, paragraph [13].

¹²³ *Ibid*, p3, paragraph [14].

¹²⁴ *Ibid*, p3, paragraph [15].

¹²⁵ *Ibid*, p3, paragraph [16].

¹²⁶ *Ibid*, p3, paragraph [17].

¹²⁷ *Ibid*, p3, paragraph [18].

¹²⁸ Letter to Mr David Cecchele, Project Director, Urban Pacific, of 23 February 2006 from Mr Ian McNeil, Operations Manager, Bemax Resources NL [E 11399].

¹²⁹ Letter to Dr James Limerick, Director General, Department of Industry and Resources, of 23 February 2006 from Mr Ian McNeil, Operations Manager, Bemax Resources NL [E 15804].

¹³⁰ Letter to Mr Greg Martin, Director General, Department of Planning and Infrastructure, of 28 February 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 15782], *op cit*.

¹³¹ Email to Mr Brian Burke of 27 March 2006, 1:48 p.m., from Ms Lindsay Baxter [CCC 43064].

¹³² Letter to Ms M Hegarty, Senior Planner, Roberts Day, of 7 April 2006 from Mr Michael Allen, Executive Director, Statutory Planning Division, Department for Planning and Infrastructure [E15784].

¹³³ Statement of Mr Garry Douglas Fee to the Corruption and Crime Commission, 8 May 2007 [E 12866], *op cit*, paragraph [16].

¹³⁴ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.662, *loc cit*.

¹³⁵ Email to Mr Brian Burke of 23 March 2006, 11:10 a.m., from Mr Gary Stokes [E 12605], *op cit*.

¹³⁶ Email to Mr Gary Stokes of 23 March 2006, 11:43 a.m., from Mr Brian Burke [E 12605], *op cit*.

¹³⁷ Telecommunications Intercept, T 0217, 23 March 2006, *op cit*.

¹³⁸ Freehill's representations dated 18 July 2008 at paragraph [9].

¹³⁹ Telecommunications Intercept, T 0223, 28 March 2006, *op cit*.

¹⁴⁰ Email to Mr Brian Burke of 10 April 2006, 9:16 p.m., from Mr Gary Stokes [E 15650], *op cit*.

¹⁴¹ Telecommunications Intercept, T 0657, 27 February 2006, *op cit*.

¹⁴² Transcript of Proceedings, Public Examination of Mr Gary Wayne Stokes on 26 February 2007, p.690, *loc cit*.

¹⁴³ Department of Industry and Resources, File Note, 1 February 2006, written by Mr Gary Stokes, Acting Director General [E 15806].

¹⁴⁴ Telecommunications Intercept, 22 February 2006, T 0209, *op cit*.

¹⁴⁵ Email to Mr Stuart Smith of 22 February 2006, 10:44 a.m., from Mr Gary Stokes [E 15645], *op cit*.

¹⁴⁶ Telecommunications Intercept, T 0657, 27 February 2006, *op cit*.

¹⁴⁷ Telecommunications Intercept, 22 February 2006, T 0209, *op cit*.

¹⁴⁸ Telecommunications Intercept, 22 February 2006, T 2062.

¹⁴⁹ Telecommunications Intercept, T 0672, 17 July 2006, *op cit*.

¹⁵⁰ Telecommunications Intercept, T 1722, 25 February 2006, *op cit*.

¹⁵¹ Telecommunications Intercept, T 1723, 12 March 2006.

¹⁵² Telecommunications Intercept, T 1712, 9 April 2006.

¹⁵³ Shorter Oxford English Dictionary (Sixth Edition), p.529, and Macquarie Dictionary (Second Revised Edition), p.417.

¹⁵⁴ See *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Peter M Hall QC, Thomson Lawbook Co, Sydney, 2004 at [2.195].

¹⁵⁵ Department of Industry and Resources Policy entitled *Code of Conduct*, 9 March 2003 [E 11110], *op cit*.

¹⁵⁶ Department of Industry and Resources Policy entitled *Confidentiality and Release of Official Information*, 9 January 2002 [E 12732], *op cit*.

¹⁵⁷ Section 23(2) of the *Corruption and Crime Commission Act 2003*.

¹⁵⁸ *Report of an Investigation Into a Suspected Breach of Discipline by Mr Gary Stokes*, Disciplinary Investigator (DPC), 12 September 2007 [E 15816], p.12.

¹⁵⁹ Letter from Gunning, Barristers and Solicitors, dated 18 July 2008, p.1.

¹⁶⁰ *Report of an Investigation Into a Suspected Breach of Discipline by Mr Gary Stokes*, Disciplinary Investigator (DPC), 12 September 2007 [E 15816], *op cit*.

¹⁶¹ Section 41 of the *Corruption and Crime Commission Act 2003* states: (1) The Commission may review the way an appropriate authority has dealt with misconduct, in relation to either a particular allegation, complaint, information or matter involving misconduct or in relation to a class of allegation, complaint, information or matter involving misconduct. (2) The appropriate authority must give the Commission all necessary help to undertake a review under subsection (1).

¹⁶² Interview with Dr Timothy Griffin, Disciplinary Investigator (DPC), 15 June 1007, p.15.

¹⁶³ At paragraph [103].

¹⁶⁴ See paragraph [105].

¹⁶⁵ Interview with Dr Timothy Griffin, Disciplinary Investigator (DPC), 15 June 2007, *op cit*, p.17.

¹⁶⁶ *Ibid*, p.18 and p.22.

¹⁶⁷ *Ibid*, p.18.

¹⁶⁸ *Public Sector Management Act 1994, Administrative Instruction 711: Official Information*.

¹⁶⁹ Interview with Dr Timothy Griffin, Disciplinary Investigator (DPC), 15 June 2007, *op cit*, p.23.

¹⁷⁰ *Ibid*.

¹⁷¹ Interview with Mr Lew Pritchard, Disciplinary Investigator (DPC), 14 June 2007, p.10.

¹⁷² Interview with Dr James Limerick, Disciplinary Investigator (DPC), Session 2, 6 July 2007, p.4.

¹⁷³ Interview with Mr Lew Pritchard, Disciplinary Investigator (DPC), 14 June 2007, *op cit*, pp.10-11.

¹⁷⁴ *Ibid*, pp.17-18.

¹⁷⁵ *Ibid*, p.19.

¹⁷⁶ Interview with Mr Stuart Smith, Disciplinary Investigator (DPC), 25 June 2007, pp.15-16.

¹⁷⁷ *Ibid*, p.16.

¹⁷⁸ Mr Stuart Smith, Record of Conversation with the Corruption and Crime Commission, 24 April 2008, p.9.

¹⁷⁹ *Ibid*, pp.9-10.

¹⁸⁰ Expressed at paragraphs [197] and [218] above.

¹⁸¹ Expressed at paragraph [215] above.

¹⁸² Section 32 and 84(3) of the *Corruption and Crime Commission Act 2003*.

¹⁸³ Department of the Premier and Cabinet, Government of Western Australia, *Disciplinary Procedures Guide*, November 2007, p.9.

¹⁸⁴ Section 4(d)(vi) of the *Corruption and Crime Commission Act 2003*.

¹⁸⁵ Mr John James Mansell Bowler was elected to the Thirty-Sixth Parliament, as Member for Eyre on 10 February 2001, succeeding Mr Julian Fletcher Grill (retired). The Eyre Electorate was abolished in redistribution 2003, and Mr Bowler was subsequently elected to the Thirty-Seventh Parliament as Member for Murchison-Eyre (new Seat) on 26 February 2005.

¹⁸⁶ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, p.756.

¹⁸⁷ *Ibid*, pp.755-756.

¹⁸⁸ Letter to Mr Brian Burke of 8 February 2005 from Mr John Bowler MP, Candidate for Murchison-Eyre, with annotation and receipt for \$2,500 [E 11262].

¹⁸⁹ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, pp. 786-788.

¹⁹⁰ Telecommunications Intercept, T 1712, 9 April 2006, *op cit*.

¹⁹¹ Telecommunications Intercept, T 1713, 9 April 2006.

¹⁹² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, p.785.

¹⁹³ Telecommunications Intercept, T 0907, 11 April 2006.

¹⁹⁴ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, pp.790-791.

¹⁹⁵ Briefing Note, entitled *Whitby Land-Mundijong*, to Minister Bowler of 18 April 2006 from Dr James Limerick, Director General, Department of Industry and Resources [E 15814], *op cit*.

¹⁹⁶ Transcript of Proceedings, Public Examination of Dr James Macquarie Limerick on 26 February 2007, p.668, *loc cit*.

¹⁹⁷ Telecommunications Intercept, T 0227, 30 May 2006.

¹⁹⁸ Freehill's representations dated 18 July 2008, *op cit*, at paragraphs [24] and [26].

¹⁹⁹ Telecommunications Intercept, T 0819, 14 June 2006, and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, pp.908-909.

²⁰⁰ Telecommunications Intercept, T 0001, 19 June 2006. [Comments have been attributed jointly to Mr Simon Corrigan and Mr Timothy Walster in the transcript of this intercept where voices were indistinct, denoted by "SC/TW".]

²⁰¹ Statement of Dr James Macquarie Limerick to the Corruption and Crime Commission , 21 March 2007 [E 12881], *op cit*, paragraph [38].

²⁰² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, pp.786-788, *loc it*.

²⁰³ Article entitled *Ministers back rezoning* [E 15639].

²⁰⁴ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, pp.932-933.

²⁰⁵ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission , 26 February 2007 [E 12615].

²⁰⁶ Refer Endnote 185.

²⁰⁷ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission , 26 February 2007 [E 12615].*op cit*, and Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, p.926.

²⁰⁸ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, pp.927-928, and Telecommunications Intercept, T 0664, 26 May 2006.

²⁰⁹ Telecommunications Intercept, T 0818, 23 May 2006.

²¹⁰ Telecommunications Intercept, T 0660, 23 May 2006.

²¹¹ Telecommunications Intercept, T 0664, 26 May 2006, *op cit*.

²¹² Telecommunications Intercept, T 0225, 26 May 2006.

²¹³ Email to Mr David Cecchelle and Mr Julian Grill of 26 May 2006, 10:15 a.m., from Mr Brian Burke [E 15644].

²¹⁴ Telecommunications Intercept, T 1714, 29 May 2006.

²¹⁵ Telecommunications Intercept, T 0227, 30 May 2006, *op cit*.

²¹⁶ Telecommunications Intercept, T 1727, 30 May 2006.

²¹⁷ Telecommunications Intercept, T 1728, 8 June 2006.

²¹⁸ Email to Mr David Cecchelle of 8 June 2006, 11:45 p.m., from Mr Brian Burke [E 15643].

²¹⁹ Telecommunications Intercept, T 0001, 19 June 2006, *op cit*. [Comments have been attributed jointly to Mr Simon Corrigan and Mr Timothy Walster in the transcript of this intercept where voices were indistinct, denoted by "SC/TW".]

²²⁰ Telecommunications Intercept, T 0225, 26 May 2006, *op cit*.

²²¹ Telecommunications Intercept, T 0625, 16 January 2006.

²²² Telecommunications Intercept, T 0656, 6 April 2006.

²²³ Telecommunications Intercept, T 0634, 6 April 2006.

²²⁴ Telecommunications Intercept, T 0635, 7 April 2006.

²²⁵ Corruption and Crime Commission, Record of Interview, Mr Daron Frederick Smith, 26 February 2007.

²²⁶ *Ibid*, 13 March 2007.

²²⁷ Commission case note of a meeting between the Minister for Planning and Infrastructure and Commission investigators, 23 April 2007 [E 17148].

²²⁸ Shire of Serpentine-Jarrahdale Minutes, Ordinary Council Meeting, 27 March 2006 [E 11106], *loc cit*.

²²⁹ Shire of Serpentine-Jarrahdale Minutes, Ordinary Council Meeting, 26 June 2006, pp.66-67.

²³⁰ Telecommunications Intercept, T 0631, 1 March 2006.

²³¹ Telecommunications Intercept, T 0637, 22 March 2006.

²³² Shire of Serpentine-Jarrahdale Minutes, Ordinary Council Meeting, 27 March 2006, *op cit*, pp.1 and 3, and *Comment News*, 4 April 2006, p.1.

²³³ Telecommunications Intercept, T 1720, 5 June 2006.

²³⁴ Telecommunications Intercept, T 1724, 15 February 2006.

²³⁵ Telecommunications Intercept, T 1715, 15 February 2006.

²³⁶ *Ibid.*

²³⁷ Telecommunications Intercept, T 0654, 22 February 2006.

²³⁸ Email to Ms Lindsay Baxter of 22 March 2006, 4:13 p.m., from Mr Brian Burke [CCC 43064], *op cit*.

²³⁹ Email to Mr Brian Burke of 27 March 2006, 1:48 p.m., from Ms Lindsay Baxter [CCC 43064], *op cit*.

²⁴⁰ Telecommunications Intercept, T 1716, 7 April 2006.

²⁴¹ Telecommunications Intercept, T 0666, 9 June 2006.

²⁴² Email to Mr David Cecchele of 9 June 2006, 9:57 a.m., from Mr Erwin Roberts [E 17398].

²⁴³ Email to Mr Brian Burke of 9 June 2006, 2:03 p.m., from Mr David Cecchele [E17398].

²⁴⁴ Email to Ms Lindsay Baxter of 9 June 2006, 1:21 p.m., from Mr Brian Burke [E 15660].

²⁴⁵ Email to Mr Brian Burke of 9 June 2006, 1:48 p.m., from Ms Lindsay Baxter [E 15660].

²⁴⁶ Email to Dr James Limerick of 29 June 2006, 11:25 a.m., from Ms Lindsay Baxter [E 15785].

²⁴⁷ Telecommunications Intercept, T 1717, 4 July 2006.

²⁴⁸ Telecommunications Intercept, T 2051, 12 October 2006.

²⁴⁹ Telecommunications Intercept, T 1718, 12 October 2006.

²⁵⁰ Commission case note of meeting between Ms Lindsay Baxter and Commission investigators, 28 November 2007 [E 15662].

²⁵¹ Email to Mr Brian Burke of 27 March 2006, 1:48 p.m., from Ms Lindsay Baxter [CCC 43064], *op cit*.

²⁵² Email to Mr David Cecchele of 13 February 2006, 2:40 p.m., from Mr Ken Fisher [E 15661].

²⁵³ Email to Mr Julian Grill and Mr Brian Burke of 13 February 2006, 2:41 p.m., from Mr David Cecchele [E 15661].

²⁵⁴ Email to Mr David Cecchele of 13 February 2006, 4:46 p.m., from Mr Julian Grill [E 10844].

²⁵⁵ Telecommunications Intercept, T 0213, 15 February 2006.

²⁵⁶ Email to Mr David Cecchele of 15 February 2006, 9:52 a.m., from Mr Julian Grill [E 17399].