



CORRUPTION AND CRIME COMMISSION

REPORT ON THE INVESTIGATION OF ALLEGED PUBLIC SECTOR MISCONDUCT IN CONNECTION WITH THE ACTIVITIES OF LOBBYISTS AND OTHER PERSONS

A MINISTERIAL DECISION IN RELATION TO APPLICATIONS FOR A MINING TENEMENT AT YEELIRRIE

16 November 2009

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Dear Mr Peacock
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), the Commission hereby transmits to you a copy of the *Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons: A Ministerial Decision in Relation to Applications for a Mining Tenement at Yeelirrie*.

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

Yours faithfully

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

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

16 November 2009

ABBREVIATIONS AND ACRONYMS

ALP	Australian Labor Party
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
BHPB (or BHP)	BHP Billiton
“the CCC Act”	<i>Corruption and Crime Commission Act 2003</i>
“the Commission”	Corruption and Crime Commission
DolR	Department of Industry and Resources
EISC	Economics and Industry Standing Committee, Legislative Assembly, Parliament of Western Australia
ELA	Exploration Licence Application (or Application for Exploration Licence)
“Metraloop”	Metraloop Nominees Pty Ltd
“Mindax”	Mindax Limited
PMA	Precious Metals Australia Ltd
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the State Agreement”	<i>Uranium (Yeelirrie) Agreement Act 1978</i>
“the TI Act”	Commonwealth <i>Telecommunications (Interception and Access) Act 1979</i>
“Use It or Lose It”	“Use It or Lose It” Pty Ltd
“Victory Street”	Victory Street Pty Ltd
WMC	Western Mining Corporation Ltd

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EXECUTIVE SUMMARY

- [1] This is a report on a Corruption and Crime Commission (“the Commission”) investigation into the circumstances surrounding the exercise of a Ministerial discretion under section 111A of the *Mining Act 1978* in relation to uranium mining tenements at Yeelirrie.
- [2] Yeelirrie is a uranium deposit in Western Australia, located about 500 kilometres north of Kalgoorlie, held by BHP Billiton (BHPB) under the *Uranium (Yeelirrie) Agreement Act 1978* (“the State Agreement”). In 2005 Precious Metals Australia Ltd (PMA) made a decision to try and acquire the tenements held by BHPB. To assist in these endeavours, in October 2005, the Managing Director of PMA, Mr Roderick James Hollas Smith, retained the services of Mr Brian Thomas Burke and Mr Julian Fletcher Grill as lobbyists and consultants.
- [3] The strategy to acquire the uranium tenements involved a number of steps. On 11 August 2005 and 24 October 2005 BHPB had lodged applications with the Warden’s Court seeking exemption from the requirement to work the ground placed upon it by the *Mining Act 1978* in respect to the Yeelirrie tenements. On 8 November 2005 PMA signed plaints alleging that BHPB were not complying with regulation 50 of the *Mining Regulations 1925* and seeking forfeiture of the tenements. These plaints were lodged with the Meekatharra Warden on 9 November 2005 and the Leonora Warden on 10 November 2005.
- [4] On 17 November 2005 PMA sought to lodge objections to the BHPB exemption applications. However, as the date for lodging those objections had expired, PMA submitted an application for an extension of time in which to lodge its objections. That application was dismissed by the Meekatharra Warden on 12 April 2006.
- [5] PMA also applied for exploration licences over the area held by BHPB under the State Agreement.
- [6] The theory behind the strategy was that if the plaints were successful in the Warden’s Court then the Exploration Licence Applications (ELAs) would give PMA rights over the ground.
- [7] About the same time, apparently because there was an expectation in the mining community that the State Agreement was to be revoked, a number of other companies also applied for exploration licences over the area. On 14 December 2005 after two ELAs had been referred to his office, the then Minister for Resources, the Hon. Alan John Carpenter MLA, advised the applicant companies that their applications would not be approved and encouraged them to withdraw their ELAs before he considered invoking his discretionary power to terminate their tenement applications under section 111A of the *Mining Act 1978*. PMA, whose applications had been made in the name of Victory Street Pty Ltd (“Victory Street”), a wholly-

owned subsidiary, was advised of Minister Carpenter's request by letter dated 12 January 2006.

- [8] Mr John James Mansell Bowler was appointed Minister for Resources on 3 February 2006. Mr Bowler indicated to Mr Grill and Mr Burke that he intended to terminate the ELAs lodged by PMA. He was of the view that the plaintiffs would have to fail because BHPB could hardly be penalised for not mining uranium when the then (Labor) Government's policy was not to allow uranium mining.
- [9] As at 17 March 2006 there were nine applications still outstanding for Minister Bowler to consider exercising his discretion to terminate them under section 111A. Five of these which were by a company called Metraloop Nominees Pty Ltd ("Metraloop"). The remaining four were the PMA applications.
- [10] By 28 April 2006 Mr Burke and Mr Grill were well aware the Minister was contemplating exercising his powers under section 111A in respect of the applications. They had already had discussions with lawyers and others about it. On that day Mr Grill had a telephone conversation with Minister Bowler, in which the latter said several times that PMA was not going to get it, and referred to the State Agreement. He asked for an informal meeting of the three of them to discuss it.¹
- [11] On 4 May 2006 Mr Burke called Mr Smith and they discussed Yeelirrie. Mr Burke told Mr Smith that Mr Bowler had approached them about Yeelirrie and wanted PMA to withdraw, and there was no prospect of penalising BHPB for doing what was Government policy, which was not to mine. Mr Burke said that by withdrawing it provided Mr Smith an opportunity to consolidate him "in" with Mr Bowler and Government. Mr Burke told Mr Smith there was no chance of Mr Bowler approving his application. Mr Smith proposed a meeting with Mr Bowler where he could "graciously" accept Mr Bowler's point of view.²
- [12] In a conversation on 23 May 2006³ Mr Grill told Mr Bowler that "... in relation to PMA and their application ... in respect to Yeelirrie ... we have got them to the point where ... I think they'll withdraw their application ...". Mr Bowler said that was good and that "he's [Roderick Smith] got no chance of success". Mr Grill then said he was going away for three weeks but they were meeting with the Earl of Warwick (who he described as "sort of ... the second guy within PMA") and would get agreement in principle with him the next day to withdraw. He then said

... but what we'd like to try and do is to well try and get something out of uh BHP ...⁴

and asked whether Mr Bowler was in a hurry to make a decision or could it be left until he got back. When Mr Bowler said it could wait, there was the following exchange:

GRILL: *Okay, if you leave it till after I get back, Brian will have done a bit more work on it uh, if we can screw a little bit out of uh*

BOWLER: *Yep, good on you, that's up to you guys.*

GRILL: *BHP. Yeah.*

BOWLER: *Yep.*

GRILL: *Okay then we'll do that.⁵*

- [13] On 6 July 2006 Mr Smith told Mr Grill he was contemplating meeting the Minister to discuss the matter. Mr Grill discouraged Mr Smith from contacting the Minister directly without seeing "Brian and I".
- [14] In a telephone conversation with Mr Bowler on 10 July 2006 Mr Grill told him that Mr Burke had confirmed his view that PMA should simply withdraw, and he had told them that. Mr Grill said PMA were quite happy to do that, but there were two things he wanted. The first was for Mr Bowler to meet with the PMA representatives to explain that not withdrawing would put the Government in an embarrassing position which might force it to enact legislation which would be negative for the uranium industry. The second was that Mr Bowler "just slow down the process" and not encourage BHPB too much, so as to give him and Mr Burke time to reach an "ancillary settlement" with BHPB, "just covering some costs". Mr Bowler said he would not be party to people making a windfall profit or "gouging". Mr Grill assured him it would not be that, and that it would not meet even half the costs PMA had expended. Mr Bowler then agreed, saying "no worries". Mr Grill assured Mr Bowler the "costs" they were seeking to get out of BHPB "wouldn't be big money".⁶
- [15] In an email to Mr Burke on 11 July 2006 Mr Grill mentioned the prospect that the two of them could keep whatever costs they were able to recover from BHPB on behalf of PMA and referred to a possible payment of \$60,000 to \$70,000.⁷
- [16] On 12 July 2006 a letter of advice from the Department of Industry and Resources about the remaining outstanding applications was received by the Minister's office. The advice was that he should exercise his discretion to terminate them all.
- [17] On 25 July 2006 Mr Bowler signed letters of termination, including in relation to the Victory Street applications. He did so inadvertently, not realising that they were the PMA applications. He was of the belief those were still on-foot. That is apparent from subsequent events.
- [18] The following evening, 26 July 2006, Mr Bowler and his wife went to Mr Grill's house for dinner with Mr Grill and Mr Burke, and their wives.
- [19] Towards the end of the dinner Mr Grill initiated a discussion about Yeelirrie. Mr Bowler told them he had just signed the section 111A letters terminating five applications. He was vague about the name of the

company. Mr Burke reminded him that he had asked Mr Grill to get PMA to withdraw, and said PMA had agreed. Mr Grill said that if Mr Bowler wanted PMA to withdraw, they would, but they would like to get something back out of it from BHPB, "even their costs". But he then advanced another proposal. It was that on the basis PMA withdrew its applications, the State Agreement be effectively terminated, BHPB keep that part of its tenements on which there was prospective uranium and PMA take some of the parts with prospective other minerals. Mr Grill said he had put that to BHPB the previous week and again that evening and "no-one said no". He then told Mr Bowler:

... but ... if you act precipitously and uh, cut short uh ... PMA's position ... then you just take away from me all my fucking uhm, "leverage". I've got no, got no bargaining chip.⁸

- [20] Mr Bowler repeated he had just dealt with another company's applications, not PMA's and asked how he could deal with them one way and PMA's applications another. There was further discussion about that, and whether or not legislation would be required. Mr Grill reiterated BHPB was going to consider the proposal seriously, but it would come undone if Mr Bowler precipitously or in some other way were to tell BHPB he would support its position.
- [21] Mr Bowler was persuaded to do what Mr Grill and Mr Burke were urging, but expressed the hope it was not too late because he had signed off on the other applications, not those of PMA, the previous day. He said he would have to get back the document he signed the day before. Mr Burke said he would send a note the next day to Mr Bowler's Chief of Staff setting out a justification for treating the PMA applications differently to the others.
- [22] The next morning Mr Grill informed Mr Smith by email of what had happened. He told Mr Smith that Mr Bowler had undertaken to try and stop the process relating to the other company, because of his concern about that setting a precedent for the way the PMA applications should be dealt with.⁹
- [23] Within an hour Mr Smith had responded, saying that Mr Bowler's actions in rejecting the other applications might actually help PMA because it would leave the PMA applications first in line and that was the only company to have filed plaints in the Warden's Court.¹⁰ In light of that Mr Grill said he would telephone Mr Bowler and advise him to let the other company's refusal proceed.¹¹ He did so immediately, leaving that message on Mr Bowler's mobile phone answering service.¹²
- [24] In a conversation with Mr Burke in the afternoon of 27 July 2006 Mr Bowler said it was the other company he had signed off on, so they were "out of the equation". He added that he did worry that it could be seen as "almost ... industrial blackmail", but that he would proceed and "see how we go on that". Mr Burke again advanced arguments why the PMA applications could be dealt with differently.¹³

[25] Mr Grill and Mr Burke continued to negotiate with the BHPB and PMA representatives, on the understanding the PMA applications were still on-foot. On 2 August 2006, in an email to Mr Smith, Mr Grill commented that he thought Mr Peter Michael Clough (one of the BHPB representatives) was swinging back towards some sort of monetary settlement, as it would be cleaner.¹⁴

[26] On 10 August 2006, Mr Timothy John Walster, Principal Policy Advisor (Resources and State Development) to Minister Bowler,¹⁵ had a meeting with Mr Grill at his home.¹⁶ Amongst other things, they discussed Yeelirrie. Mr Grill was clearly still of the belief the PMA applications were on-foot. He explained to Mr Walster what he and Mr Burke were trying to achieve. He explained that the Minister had called him some time ago and told him PMA was not going to get the tenements because the Government would exercise its rights under the *Mining Act 1978* and ensure the tenements stayed with BHPB. Mr Grill said the Minister asked him to get his client to withdraw, so he went to PMA and PMA was prepared to do that, but would like to do some sort of a deal with BHPB to get their costs (or part of their costs) back, and PMA would then withdraw. Mr Grill said he told Mr Bowler that and he was happy.

[27] According to Mr Grill's description of these events, the first proposition advanced was that PMA would try to get some financial payment ("costs") from BHPB, and it was only when it appeared senior BHPB officers in Adelaide would not agree to that, that the proposal to try to obtain part of the BHPB mining tenements was raised by Mr Smith.

[28] It was not until the afternoon of 17 August 2006 that Mr Smith learned that the Minister had terminated the Victory Street (PMA) applications. He received that information in an email from the PMA lawyer, who said he had heard it from the BHPB lawyers.¹⁷ When Mr Smith queried with Mr Burke whether he knew about it, the latter said he would be "very surprised" if the Minister had done so.¹⁸ When the information was passed on to Mr Grill his response was to ask what the Victory Street applications were.¹⁹ In an email the following morning, Mr Smith explained that Victory Street was the subsidiary of PMA that had made the Yeelirrie applications.²⁰

[29] On 25 August 2006 Mr Clough advised Mr Grill that BHPB would not consider any settlement as its position was both legally and morally strong.²¹

[30] It was not until Mr Burke and Mr Bowler had a meeting at Mr Grill's house on 6 September 2006 (in Mr Grill's absence) that Mr Bowler learned he had inadvertently terminated the PMA applications on 25 July 2006.²² He said there were two lots of applications, he had terminated one lot and the other he was holding up until he spoke to Mr Grill. Mr Burke explained the Victory Street applications he had terminated had in fact been the PMA ones.

[31] Mr Bowler maintained to the Commission that he was allowing the PMA applications to continue because he believed negotiations between PMA

and BHPB might lead to BHPB ceding part of their (non-uranium) tenements to PMA, so there was a prospect for mining which might lead to a discovery and the development of wealth. The Commission accepts that became the proposition put to him – but it was not the initial proposition.

[32] In any event, the point does not lie in the precise nature of the benefit PMA might get. It lies in the fact that Mr Bowler agreed to delay a Ministerial decision to terminate the PMA applications for the purpose of allowing their continued existence to be used as “leverage” by PMA to obtain a financial benefit from BHPB. There was no legal nor moral reason why BHPB should simply pay money, or cede part of its mineral tenements, to PMA. Once Mr Bowler had accepted that the PMA applications had to be terminated if not withdrawn, his decision to delay doing that was calculated to unfairly benefit PMA over BHPB.

[33] In the Commission’s opinion Mr Bowler’s actions between 23 May 2006 and 26 July 2006, in

- acceding to Mr Grill’s request by agreeing to defer his decision on PMA’s applications, so as to give Mr Grill and Mr Burke “leverage” in their negotiations with BHPB on behalf of PMA to obtain a financial benefit (“screw a little bit out of … BHP”), first by way of money and later by way of mineral tenements, in circumstances in which he recognised the applications had to be refused in the public interest anyway,
- in fact slowing the process down, to that end, (albeit, as it turned out, only for a short time, because he inadvertently signed termination letters without realising they related to the PMA applications), and
- agreeing to try to recover letters he had already signed, terminating the applications of other applicant companies on the ground of public interest, for the purpose of assisting Mr Grill and Mr Burke to extract money (or later mining tenements) from BHPB by negotiating the withdrawal of applications he knew were unmeritorious, and would be terminated in any event,

constituted serious misconduct within the meaning of section 4(a) and (b) of the *Corruption and Crime Commission Act 2003* (“the CCC Act”). In the Commission’s opinion it also constituted misconduct within the meaning of section 4(d), (ii), (iii) and (vi) of the CCC Act.

[34] Mr Bowler’s conduct here was deliberate. It was advertent. He agreed to Mr Grill’s request to defer his decision on PMA’s applications, to slow the process down and, later, to try to recover letters he had already signed terminating the applications of other applicants. He did so knowing (or believing) that his duty as Minister required him to terminate PMA’s applications in the public interest. But he nonetheless agreed to delay doing so, to allow Mr Grill and Mr Burke to exert “leverage” in their negotiations with BHPB on PMA’s behalf, and knowing they were seeking to obtain a payment (or later, tenements) from BHPB in that way. In other words, he agreed to delay making and implementing a Ministerial decision

in the public interest, so as to advance the personal financial interests of Mr Grill and Mr Burke and their client, PMA. Likewise, he agreed to try to recover the letter to the other applicants, similarly to allow the advancement of those private interests instead of the public interest - indeed, contrary to it. In each of these respects his conduct was deliberate, it was contrary to the duties incumbent upon him by virtue of his public office and it was attended by moral turpitude. It accordingly fell within the meaning of "corruptly" in section 4(a) and 4(b).

- [35] By section 43(1)(a)(i) of the CCC Act the Commission may make recommendations as to whether consideration should or should not be given to the prosecution of particular persons.
- [36] The Commission has considered whether or not a recommendation should be made in relation to a prosecution for a possible offence under section 83(c) of *The Criminal Code*. That relevantly provides that –

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

- (a) *acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) *acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (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, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

- [37] The elements of an offence under section 83(c) of *The Criminal Code* are that:
 - the person is a public officer
 - the person acts corruptly
 - without lawful authority or a reasonable excuse
 - in the performance or discharge of the functions of his office
 - so as to gain a benefit, whether pecuniary or otherwise.
- [38] The Commission is mindful that in any criminal prosecution the rules of evidence are strictly applied and the prosecution must prove each element of the offence charged beyond reasonable doubt. The Commission considers that the evidence which would be legally admissible in a criminal trial is not likely to be sufficient to properly found a charge of corruption

under section 83 of *The Criminal Code* against Mr Bowler, and accordingly does not recommend further consideration of that.

[39] As Mr Bowler is now an Independent Member of Parliament and not a Minister, there is no practical recommendation the Commission could make for consideration of disciplinary action.

EXECUTIVE SUMMARY: ENDNOTES

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

¹ Telecommunications Intercept, T 0963, 28 April 2006.

² Telecommunications Intercept, T 1044, 4 May 2006.

³ Telecommunications Intercept, T 0964, 23 May 2006.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Telecommunications Intercept, T 0962, 10 July 2006.

⁷ Email of 11 July 2006, 10:02 p.m., from Mr Julian Grill to Mr Brian Burke [E 17537].

⁸ Transcript of meeting held on 26 July 2009 between Mr John Bowler, Mr Brian Burke and Mr Julian Grill at Mount Street, Perth WA [T 0559].

⁹ Email of 27 July 2006, 9:38 a.m., from Mr Julian Grill to Mr Brian Burke and Mr Roderick Smith [E 17542].

¹⁰ Email of 27 July 2006, 10:34 a.m., from Mr Roderick Smith to Mr Julian Grill [E 17542].

¹¹ Email of 27 July 2006, 10:51 a.m., from Mr Julian Grill to Mr Roderick Smith [E17542].

¹² Email of 27 July 2006, 11:01 a.m., from Mr Julian Grill to Mr Roderick Smith [E17542].

¹³ Telecommunications Intercept, T 1041, 27 July 2006.

¹⁴ Email of 2 August 2006, 2:43 p.m., from Mr Julian Grill to Mr Roderick Smith [E 17546].

¹⁵ Transcript of Proceedings, Private Examination of Mr Timothy John Walster on 30 July 2008, pp.4 and 39.

¹⁶ Transcript of meeting held on 10 August 2006 between Mr Julian Grill and Mr Timothy Walster at Mount Street, Perth WA [T 0980].

¹⁷ Email of 17 August 2006, 12:45 p.m., from Mr Robert Edel to Mr Roderick Smith [E 17549].

¹⁸ Email of 17 August 2006, 2:33 p.m., from Mr Brian Burke to Mr Julian Grill and Mr Roderick Smith [E 17549].

¹⁹ Email of 17 August 2006, 10:30 p.m., from Mr Julian Grill to Mr Brian Burke and Mr Roderick Smith [E 17549].

²⁰ Email of 18 August 2006, 8:47 a.m., from Mr Roderick Smith to Mr Julian Grill [E 17549].

²¹ Email of 25 August 2006, 4:41 p.m., from Mr Peter Clough to Mr Brian Burke and Mr Julian Grill [E 17551].

²² Transcript of meeting held on 6 September 2006 between Mr Brian Burke and Mr John Bowler at Mount Street, Perth WA [T 0568].

CHAPTER ONE

FOREWORD

1.1 Introduction

[1] In late 2005 the Corruption and Crime Commission (“the Commission”) received an allegation concerning funding irregularities in a Busselton Shire election. As a result of its assessment of the allegation the Commission commenced an investigation pursuant to section 33(1)(b) of the *Corruption and Crime Commission Act* (“the CCC Act”).

[2] During the course of this investigation lawfully intercepted telecommunications led to the identification of allegations of serious misconduct and misconduct by numerous public officers.

[3] On 21 February 2006 a parallel investigation was commenced into this particular matter pursuant to sections 26 and 33 of the CCC Act.

[4] The Hon. John James Mansell Bowler MLA, during the period 3 February 2006 to 13 December 2006, in the Parliament of Western Australia, was Minister for:

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

[5] One matter that came to the attention of the Commission was the manner in which Minister Bowler dealt with a number of Exploration Licence Applications (ELAs) submitted in accordance with the *Mining Act 1978* over land in Western Australia, located about 500 kilometres north of Kalgoorlie, known as “Yeelirrie”. Yeelirrie is a tract of land to which BHP Billiton (BHPB) holds the rights under the *Uranium (Yeelirrie) Agreement Act 1978* (“the State Agreement”).

1.2 Allegation

[6] The Commission investigated the circumstances surrounding the exercise of the discretion afforded Minister Bowler under section 111A of the *Mining Act 1978*, and whether his actions when using that discretion constituted misconduct in respect of his treatment of certain applicants for exploration licences made in accordance with the provisions of the *Mining Act 1978*.

1.3 Scope and Purpose

[7] The 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.

- [8] The Commission's investigation included the utilisation of lawful telecommunications interception and surveillance device material, search warrants, interviews and other enquiries.
- [9] This matter was one of the subjects covered in public hearings of the Commission held in February and March 2007. In addition, Mr Timothy John Walster gave evidence in July 2008, Mr Brian Thomas Burke and Mr Julian Fletcher Grill gave evidence at private hearings in October 2008, Mr Peter Michael Clough gave evidence at a private hearing on 8 July 2009, and Mr Ian Ross Fletcher, Vice-President, External Affairs (Western Australia), BHPB,¹ and Mr Peter Herbert Lloyd Monkhouse, Vice-President, Business Projects, BHPB,² gave evidence at a private hearing on 9 July 2009.

1.4 Jurisdiction of the Commission

- [10] 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 CCC 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 CCC Act.
- [11] It is a function of the Commission, pursuant to section 18 of the CCC 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 CCC Act.

1.5 Definitions

1.5.1 Public Officer

- [12] The term "public officer" is defined in section 3 of the CCC 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").

1.5.2 Misconduct

[13] The term “misconduct” has a particular and specific meaning in the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC 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).

1.6 Reporting by the Commission

- [14] Under section 84(1) of the CCC 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.*
- [15] The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4).
- [16] Section 86 of the CCC 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.
- [17] Accordingly, Mr Bowler was notified by letter dated Thursday 9 April 2009 of possible adverse matters which it was proposed to include in this report. He was invited to make representations about those matters by Friday 8 May 2009, 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 Bowler's solicitors provided representations by this date and the Commission has taken those into account in finalising this report.
- [18] Despite the investigation being confined to the conduct of public officers, and the Commission therefore making no assessment of, nor expressing any opinion about, Mr Burke or Mr Grill in its report, the Commission takes the view that the words "any matters adverse to a person" in section 86 of the CCC Act have a meaning wider than merely the Commission's assessments and opinions.
- [19] 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 notified them of those matters, pursuant to section 86 of the CCC Act, and afforded them a similar opportunity to make representations if they wished. Mr Grill's lawyers, Freehills, responded by letter dated 8 May 2009 advising that Mr Grill did not intend to make any representations. Mr Burke's lawyers, Fairweather and Lemonis, also replied by letter dated 8 May 2009 advising that Mr Burke did not intend to provide a substantive response.

1.7 Telecommunications Interception Material

- [20] 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.
- [21] 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

1.8 Privacy Considerations

- [22] 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) in the utilisation of intercepted information in this report.
- [23] 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 material set out in this report may have been edited by omitting the names of individuals or other information collateral to this investigation.

1.9 Opinions of Misconduct: Standard of Proof

- [24] 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.
- [25] The Commission is careful to bear these matters in mind, when forming opinions, when conducting inquiries and when publishing the results of its investigations.
- [26] 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.

[27] 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

[28] The balance of probabilities is a standard used by courts when considering civil matters. It is a standard which is less than the criminal standard of beyond reasonable doubt. This was confirmed by the High Court in a unanimous judgment in Reifek 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 ...

[29] 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 ...

[30] 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 ...

- [31] 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 ...”.
- [32] 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
- [33] The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.

CHAPTER TWO BACKGROUND

2.1 Introduction

- [34] In 1978 the Western Australian “Court” Government entered into a State Agreement with Western Mining Corporation Ltd (WMC) in respect of the mining and treatment of certain uranium ore reserves in Western Australia.
- [35] The agreement between the State of Western Australia and WMC was ratified by the *Uranium (Yeelirrie) Agreement Act 1978* (“the State Agreement”) that was assented to by the Governor on 12 December 1978. The State Agreement created Temporary Reserve 6899H (First Schedule – Clause 5) and allowed for the granting of mineral claims. Clause 21(4) of the First Schedule of the State Agreement provides that:

The State shall not during the currency of this Agreement register any claim or grant any lease or other mining tenement under the Mining Act or otherwise by which any person other than the Corporation or an associated company will obtain under the laws relating to mining or otherwise any rights to mine or take the natural substances ... within the mineral lease and so long as the Temporary Reserve created pursuant to Clause 5 remains in force, within that Temporary Reserve and within the areas of any blue mineral claims or surrendered blue mineral claims (as defined in sub-clause (7) of this Clause) which are not included in the mineral lease.

- [36] The “Mining Act” referred to in Clause 21(4) of the State Agreement is The *Mining Act 1904* which was repealed and replaced by the *Mining Act 1978* in 1982. Transitional provisions exist within the *Mining Act 1978* that recognise mineral claims granted under the *Mining Act 1904*. These transitional provisions apply to the State Agreement.
- [37] Clause 21(2) of the State Agreement provides that: “Subject to the performance by the Corporation of its obligations under this Agreement and the Mining Act [1904] ... the term of the mineral lease shall be for a period of 21 years ... with the right during the currency of this Agreement to take successive renewals of the said term each for a period of 21 years ...”.
- [38] Under the State Agreement and also the *Mining Act 1978* certain obligations were placed upon WMC in respect of the resource in the Temporary Reserve and mineral claims created by that Agreement. One such obligation was under regulation 50 of the *Mining Regulations 1925*:

Every claim shall be worked continuously and efficiently on every working day unless exemption or partial exemption from working the same has been granted by the Warden. Every claim not so worked shall be liable to forfeiture at the discretion of the Warden on the application of any miner in the manner prescribed by these Regulations ...

- [39] It appears that some trial and exploration activities occurred at Yeelirrie until about 1983 or 1984. It seems, however, that the mine was never fully operational and has been under care and maintenance for some years.
- [40] The reason for the mine being under care and maintenance for such a long period appears to be caused by a combination of factors. These factors include the low economic viability of uranium mining (particularly between 1996-2001 when Liberal Governments held office at both State and Federal levels), a failure of the joint ventures commercial arrangements, and changes of government that led to the invocation of the Australian Labor Party's (ALP) policy of no new uranium mines, more commonly known as the "Three Mines Policy" (Australian Labor Party National Platform and Constitution 2004 – Clause 66-70). At the time of the major part of this investigation the ALP held office in Western Australia.
- [41] On 3 August 2005 BHPB announced that it had completed the process of compulsorily acquiring all the shares of WMC Resources Ltd in which it did not have a relevant interest. BHPB now owns 100% of WMC Resources Ltd shares. Australian Stock Exchange (ASX) data indicates that WMC now operate under the BHPB name. As the new owners of WMC, all the rights and obligations formerly held by WMC under the State Agreement became those of BHPB upon its acquisition of WMC.
- [42] On 11 August 2005 BHPB lodged an application (LE195/056) in the Leonora Warden's Court, seeking an exemption from work, occupation or use of the Yeelirrie mineral claims for six calendar months from 29 October 2005 to 28 April 2006. On 24 October 2005 the Meekatharra Mining Registrar received a similar application (ME78/056). The ground of each application was:

It is neither practicable or justifiable to comply with the labour covenants attaching to the Mineral claims as development of the Yeelirrie project will not proceed until the Yeelirrie project is deemed to be economically viable.
- [43] Clause 68 of the prevailing National Australian Labor Party policy (in 2006) with respect to uranium states that: "In relation to mining and milling, Labor will: - prevent, on return to government, the development of any new uranium mines". This policy is essentially reflected in the State ALP Platform and, as a consequence, it appeared that BHPB, despite its obligations under the State Agreement and the *Mining Act 1978*, was not in a position to receive Government approval to mine uranium in the Yeelirrie State Agreement area whilst the Labor Party was in Government.
- [44] Dates were set by the mining registrars for objections against the applications to be lodged. Precious Metals Australia Ltd (PMA) lodged objections against the applications but not until after the objection lodgement dates set by the registrars had expired. PMA then sought an extension of time in which to lodge its objections against BHPB's applications.

- [45] Both parties, BHPB and PMA, agreed for the matter to be dealt with by the Meekatharra Warden and on 12 April 2006 the Warden dismissed PMA's applications for an extension of time.
- [46] Although the BHPB exemption applications were on the grounds of economic viability, in the then economic environment and prevailing environmental concerns over Global Warming, the attractiveness of uranium as a power source was perceived as likely to have vastly improved the viability of uranium mining operations.
- [47] Arguably a more pragmatic reason for seeking the exemption may in fact be unrelated to the economic factors used as grounds for the exemption applications, but more related to Labor Party policy dictating that no new uranium mines could be opened.
- [48] A circumstance which existed during 2005-2006 for the parties to the *Uranium (Yeelirrie) Agreement Mining Act 1978* was that obligations placed upon BHPB by the State Agreement and the *Mining Act 1978* were entirely inconsistent with ALP policy. That is to say that BHPB, in contravention of the *Mining Act 1978* and the State Agreement, could not develop the uranium resource at Yeelirrie because the policy of the State Government of the day, the ALP, did not allow it to do so.
- [49] On 9 and 10 November 2005 (prior to the lodgement of PMA's objections to BHPB's exemption applications) PMA had lodged plaints with the Warden's Court complaining that the Yeelirrie mineral claims had not been worked in accordance with regulation 50 of the *Mining Regulations 1925* and sought forfeiture of the tenements from BHPB. A plaint is simply a process used to initiate proceedings in the Warden's Court
- [50] The determination of these plaints rested with the relevant Mining Warden. On 21 February 2007 all plaints were adjourned "indefinitely with liberty to apply to re-list for mention".
- [51] Also in 2005, due to an apparent misunderstanding in the mining community that the State Agreement was to be revoked, a number of companies applied for exploration licences over the area covered by the State Agreement. On 24 November 2005 BHPB wrote to the then Minister for State Development, the Hon. Alan John Carpenter MLA, expressing their concern about the applications, and sought that he use his discretionary powers under section 111A of the *Mining Act 1978* to terminate them.
- [52] In the November correspondence BHPB referred to WMC's applications to the Minister for exemption from any labour conditions affecting its Yeelirrie uranium tenements, and to the applications by several other parties for exploration licences wholly or partly overlapping those tenements. BHPB made its position on the latter quite clear, even then. The company asserted that they could not be validly granted or alternatively the State was bound by the State Agreement and, in any event, it was in the public interest to refuse the applications. BHPB specifically referred to section 111A of the *Mining Act 1978*, arguing that the Minister should refuse the

other applications in the public interest to fulfil its obligations under the State Agreement and to uphold the proper scheme of the mining regime by summarily terminating invalid or hopeless applications, as those were.

- [53] On 1 December 2005 (and subsequent to the 24 November 2005 BHPB letter to Mr Carpenter), Victory Street Pty Ltd (“Victory Street”), a wholly owned subsidiary of PMA, applied for exploration licences over the State Agreement area. These applications were numbered as E53/1207 and E53/1206. Due to what appeared to be a technical issue with application E53/1206, on 13 March 2006 Victory Street submitted two further applications being E36/579 and E53/1222.
- [54] On 14 December 2005 Mr Carpenter wrote to two of the companies which had applied for exploration licences over the State Agreement area. The applicants were Metraloop Nominees Pty Ltd (“Metraloop”) with five separate applications and Mindax Limited (“Mindax”) with two separate applications. The Minister advised the two applicants that their ELAs would not be approved, and that he encouraged them to withdraw their applications before he considered invoking his discretionary power under section 111A of the *Mining Act 1978*. Victory Street was not included as a recipient of the letters because its applications were received at the Department of Industry and Resources (DoIR) after the Metraloop and Mindax applications had been forwarded to the Minister for his consideration. Victory Street was advised of the Minister’s request for applications to be withdrawn by a DoIR representative by way of a letter dated 12 January 2006.
- [55] A number of the applications mentioned in the BHPB letter of 24 November 2005 were approved but only after the State Agreement area was excised from the areas over which applications had been made. A number of applications that had little or no land outside the State Agreement area were not withdrawn and did, however, remain on-foot. The Metraloop applications were among those remaining on-foot.
- [56] The Hon. John Bowler MLA was appointed Minister for Resources on 3 February 2006.
- [57] As at 17 March 2006 the applications remaining on-foot for which the Minister was to consider invoking section 111A of the *Mining Act 1978* were the five Metraloop applications, and the four Victory Street applications.
- [58] On 25 July 2006 Mr Bowler in his capacity as Minister for Resources signed letters addressed to Metraloop and Victory Street advising those companies that he had used his discretion under section 111A of the *Mining Act 1978* to terminate their ELAs over areas protected by the State Agreement.
- [59] The propriety of the decision by the Minister to terminate these ELAs is not an aspect which is under question. What have been investigated are the circumstances surrounding the Minister’s treatment of the companies that

applied for those licences and whether that treatment involved misconduct.

- [60] The Yeelirrie aspect was one of those which were the subject of public hearings by the Commission between 12 February 2007 and 1 March 2007, arising out of information obtained during the course of the Commission's Smiths⁷ Beach investigation, but which did not relate to the Smiths Beach Development.⁸
- [61] The Commission investigation in respect of Yeelirrie also included lawfully obtained telecommunications interception, the lawful use of surveillance devices, interviewing and obtaining statements from relevant people, and forensically examining documents and computer records. In addition, further private hearings were held in October 2008 and July 2009.
- [62] The Commission notes that the public hearings in February and March 2007 were held at an early stage of what became a long and complex set of disparate investigations. The decision to hold those hearings at that stage was made by the then Commissioner, Mr Kevin Hammond, because of concern about some of the activities that had been and were still occurring and might lead to future misconduct. Having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements⁹ Commissioner Hammond concluded it was in the public interest to hold those hearings in public. One important factor was that exposure of the matters to be addressed would enable departments, agencies and other bodies to take immediate action to ensure good governance was not compromised pending completion of the investigation and the tabling of future reports, neither of which was at that stage, thought to be likely for some time. This was one of a number of factors identified by then Commissioner Hammond in a speech shortly after the public hearings. He said:

Generally speaking, there are three main benefits that result from the conduct of public hearings. First, public hearings enhance the public's confidence in the Commission's work, as it enables the work to be observed and through this the public can judge for itself the Commission's worth.

Second, it allows the public to become more aware of the range of matters that concerns the Commission and promotes awareness of public sector misconduct more broadly. Experience has shown the numbers of matters of suspected misconduct brought to the Commission's attention increases during high profile public hearings.

And thirdly, the educative benefit of these public examinations of alleged serious misconduct for other public officers cannot be underestimated [sic: overestimated].

Additionally, with regard to the recent hearings, a specific benefit of their conduct in public is that the exposure of some of the matters raised may hopefully enable public sector agencies within the State

to take immediate remedial action to ensure good governance is not compromised.

In terms of the importance of openness it is worth remembering our predecessor – the Anti-Corruption Commission – and how its Act forced the agency to operate in great secrecy. That quickly eroded the public’s confidence in the Commission and the efforts to combat corruption in the State.

With regard to the potential prejudice to, or privacy infringements of, individuals, the Commission acknowledges that public hearings come at considerable cost to some witnesses and their families. While it is not the Commission’s intention to cause undue stress and discomfort to individuals, the overwhelming need has been to address the public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State.¹⁰

[63] In the same speech Commissioner Hammond also stated:

In regard to the effect on the reputation of individuals it has been said that often any damage to a person’s reputation resulted from the public revelation of his or her conduct. In that circumstance it was really the person’s conduct rather than the Commission’s revelation of it that damaged their reputation. That being said, the degree to which the reputations of individuals might be inadvertently adversely effected [sic] is a matter of careful consideration by the Commission.¹¹

[64] There had been earlier judicial recognition of the benefit of public scrutiny of alleged misconduct. In Independent Commission Against Corruption v Chaffey & Ors (1992) 30 NSWLR 21, Mahoney JA said:

The scrutiny of impugned conduct in public has a disinfectant effect: reference has often been made to the “the disinfectant effect of sunlight”. And scrutiny in public rather than behind closed doors is a traditional check upon abuse of both administrative and judicial power ...¹²

2.2 Entities Involved

[65] This section of the report provides information about each of the parties involved in this investigation.

2.2.1 Hon. John James Mansell Bowler MLA

[66] Mr Bowler was elected to the Legislative Assembly of the Parliament of Western Australia on 10 February 2001 as the Member for Eyre, and was elected as the Member for Murchison-Eyre on 26 February 2005 and as the Member for Kalgoorlie on 6 September 2008. In the Western Australian Government Gazette No. 42, 10 March 2005, it was published that the Hon. John Bowler MLA had been appointed as Minister for Local Government and Regional Development; Land Information; Goldfields-Esperance; and Great Southern.

- [67] As a consequence of a Cabinet re-shuffle, the Western Australian Government Gazette No. 221, 1 December 2005, published that Mr Bowler had resigned as Minister for the aforementioned portfolios (refer paragraph above) and that he had been appointed as Minister for Local Government and Regional Development; Sport and Recreation; Land Information; Goldfields-Esperance; and Great Southern. The same Gazette announced the Hon. Alan Carpenter MLA as the Minister for State Development.
- [68] After the resignation of the Premier, the Hon. Dr Geoff Gallop MLA, in January 2006 Mr Carpenter was appointed Premier of Western Australia and another Cabinet re-shuffle occurred. The Western Australian Government Gazette No. 28, 3 February 2006, announced the resignation of the entire Cabinet followed by the announcement of the new Carpenter Cabinet. Mr Bowler was appointed as Minister for Resources and Minister Assisting the Minister for State Development; Employment Protection; Goldfields-Esperance; and Great Southern. Mr Carpenter, amongst other Ministerial duties, retained his role as Minister for State Development.
- [69] The Western Australian Government Gazette No. 37, 21 February 2006, contained a schedule detailing the administration of “Departments, Authorities, Statutes and Votes” placed under the control of particular Ministers as approved by the Governor in Executive Council.
- [70] Placed under Mr Bowler’s administration as the Minister for Resources and Minister Assisting the Minister for State Development were the *Mining Act 1978* and the *Uranium (Yeelirrie) Agreement Act 1978*.

2.2.2 Hon. Alan John Carpenter MLA

- [71] Mr Carpenter was elected to the Legislative Assembly of the Parliament of Western Australia on 14 December 1996 as the Member for Willagee. He was re-elected as the Member for Willagee in 2001, 2005 and 2008.
- [72] Mr Carpenter was first appointed to the Gallop Government Ministry in February 2001 as Minister for Education; Sport and Recreation; and Indigenous Affairs. In June 2003 he became Minister for Education and Training. Following his re-election in the February 2005 State Election he became the Minister for Energy; and State Development.
- [73] In January 2006, following the resignation of the then Premier, the Hon. Dr Geoff Gallop MLA, Mr Carpenter was appointed Premier of Western Australia. In the Western Australia Government Gazette No. 28, 3 February 2006, it was published that Mr Carpenter was appointed as the Minister for Public Sector Management; State Development; and Federal Affairs.
- [74] Premier Carpenter, as the Minister for State Development, remained responsible for the administration of DoIR.

2.2.3 Department of Industry and Resources (DoIR)

- [75] DoIR was established on 3 February 2003 under the PSM Act by the redesignation of the Department of Mineral and Petroleum Resources and the transfer of functions from the abolished Department of Industry and Technology. After the 2008 State Election DoIR was restructured to establish new departments more closely aligned with the priorities of the State Government. The new departments began operation on 1 January 2009 and are the Department of Mines and Petroleum, the Department of State Development and the Department of Commerce.¹³
- [76] The Director General of DoIR during the period relevant to this investigation was Dr James Macquarie Limerick. Different areas of DoIR reported to different Ministers dependant upon the portfolios assigned to particular Ministers.
- [77] The Hon. Alan Carpenter MLA at all relevant times during the period under investigation was the Minister for State Development, and was, therefore, responsible for matters concerning major resource projects.
- [78] From 3 February 2006 until 13 December 2006 the Hon. John Bowler MLA was the Minister for Resources and the Minister Assisting the Minister for State Development. As the Minister for Resources he was responsible for matters concerning the State's resource sector, including royalties and mining.
- [79] Within DoIR the Minerals and Petroleum Services area included the Tenure and Native Title Branch, and the Mineral and Title Services Division.
- [80] DoIR received and assessed tenement applications and allocated titles giving legal rights to explore for and mine minerals within Western Australia. Such applications were dealt with in accordance with the *Mining Act 1978* by the Mineral and Title Services Division.
- [81] A type of tenement application received by DoIR was an ELA submitted under Part IV Division 2 of the *Mining Act 1978*, lodged with the Mining Registrar for the district in which the land was situated. After due process within DoIR, the ELA, with a recommendation from DoIR, was either placed before the Minister for Resources for determination, or dealt with by DoIR under delegated authority.

2.2.4 Warden's Court

- [82] The Warden's Court is constituted under Part VIII of the *Mining Act 1978* and its jurisdiction extends throughout Western Australia. Any Stipendiary Magistrate may be appointed as a Warden and consequently preside over Warden's Court matters.
- [83] All proceedings relating to a mining tenement must be filed in the Warden's Court for the designated district in which the mining tenement lies. A Warden's Court has jurisdiction to hear and determine all actions, suits and other proceedings recognised by any court of civil jurisdiction as

set out in section 132 of the *Mining Act 1978* and the power to make orders as per section 134 of the *Mining Act 1978*.

2.2.5 Mr Simon John Corrigan

- [84] Mr Simon John Corrigan was a Term of Government employee, Department of the Premier and Cabinet. Mr Corrigan became the Chief of Staff to Minister Bowler in August 2005 when Mr Bowler was the Minister for Local Government and Regional Development; Land Information; Goldfields-Esperance; and Great Southern. Mr Corrigan continued as Chief of Staff to Minister Bowler until February 2007, the time of Mr Bowler's dismissal as a Minister by the Premier.
- [85] Mr Corrigan was a member of the ALP and had previously worked for Federal Senator Mr Peter Cook.
- [86] Mr Corrigan's role as Chief of Staff to the Minister included management of staff (both administrative and policy) and matters relating to public service procedures and requirements, coordinating policy advice for the Minister and providing a first point-of-contact to the Minister.

2.2.6 Mr Timothy John Walster

- [87] Mr Timothy John Walster was also a Term of Government employee, Department of the Premier and Cabinet, and was Chief of Staff to Minister Bowler before the appointment of Mr Corrigan. During the period March to December 2006, prior to taking up a position in the private sector, Mr Walster was Principal Policy Advisor (Resources and State Development) to Minister Bowler.

2.2.7 Yeelirrie

- [88] Yeelirrie is a uranium oxide deposit located about 500 kilometres north of Kalgoorlie in Western Australia. The deposit is estimated to contain approximately 52,000 tonnes of uranium oxide, and also quantities of vanadium oxide. The deposit extends over 9 kilometres in length and is 1.5 kilometres wide. The value of uranium has fluctuated significantly over recent years. It rose from about \$US10 per pound in 2000 to approximately \$US135 per pound in the middle of 2007. The value of the Yeelirrie deposit would have increased accordingly over that period.¹⁴

2.2.8 Precious Metals Australia Ltd (PMA)

- [89] PMA was at all relevant times a publicly listed company on the ASX with a registered office at Level 4/76 Kings Park Road, West Perth, Western Australia. The core asset of PMA was the Windimurra Vanadium mine near Mount Magnet in Western Australia. Vanadium is used as a strengthening agent for use in carbon steel and high strength steel used in structural applications. PMA subsequently became Windimurra Vanadium Ltd.

2.2.9 Mr Roderick James Hollas Smith

[90] Mr Roderick James Hollas Smith was the Managing Director of PMA at the time relevant to this investigation. He appears to have been a founding Director of PMA in 1988 and announced on 20 April 2007 that he was stepping down following a three-month handing-over period to the new Managing Director. Mr Smith remained with PMA as a non-Executive Director. It is believed he now lives in London.

2.2.10 Earl of Warwick

[91] The Earl of Warwick, who is also known as Mr Guy Greville, has been a Director of PMA since 1991.

2.2.11 Victory Street Pty Ltd (“Victory Street”)

[92] Victory Street was first registered with the Australian Securities and Investments Commission (ASIC) on 5 March 1993. Mr Smith became a Director of Victory Street on 10 March 1993 ceasing on 14 June 2002. He again became a Director of Victory Street on 26 October 2005.

[93] According to the 2005 and 2006 Annual Reports of PMA, Victory Street was a 100% fully owned subsidiary of PMA.

[94] On 4 September 2006 Victory Street registered a change of company name with ASIC from Victory Street to “Use It or Loose It” Pty Ltd. On 18 September 2006 “Use It or Loose It” Pty Ltd registered a change of name to “Use It or Lose It” Pty Ltd, most probably due to the obvious error. Mr Smith was a Director of “Use It or Loose It” Pty Ltd and remained so with “Use It or Lose It” Pty Ltd after both name changes.

2.2.12 “Use It or Lose It” Pty Ltd

[95] “Use It or Lose It” Pty Ltd (“Use It or Lose It”) according to the PMA 2006 Annual Report is the successor of Victory Street and a 100% fully owned subsidiary of PMA.

2.2.13 Western Mining Corporation Ltd (WMC)

[96] WMC was a company listed on the ASX that was one of the world’s largest producers of gold, copper, nickel, alumina, talc and uranium.

[97] In 1978 WMC signed an Agreement with the State of Western Australia that was ratified by the *Uranium (Yeelirrie) Agreement Act 1978*. The Agreement between the two parties is detailed in the First Schedule of that Act.

[98] In March 2005 BHPB announced a takeover bid for WMC which it successfully completed on 17 June 2005. WMC’s operations became part of BHPB’s operations.

2.2.14 BHP Billiton (BHPB)

[99] BHPB executed a successful takeover of WMC in 2005. As a consequence of that takeover BHPB assumed the rights and obligations under the Yeelirrie State Agreement. At various times throughout this report BHPB is also referred to as BHP as this is how the company has been referred to by the parties concerned.

2.2.15 Metraloop Nominees Pty Ltd (“Metraloop”)

[100] Metraloop, an Australian Proprietary Company, registered with ASIC on 8 June 2005 and voluntarily deregistered on 3 September 2007.

2.2.16 Mr Peter Michael Clough

[101] Mr Clough is a former Director of Enhance Corporate which is part of the Enhance Group who are consultants. Mr Clough, during a private hearing on 9 July 2009, described himself as a self-employed “registered lobbyist”. He has extensive experience in the mining industry and the public sector, including Chief of Staff appointments to Western Australian Members of Parliament. He was, during the relevant period, a friend of Mr Burke and Mr Grill and was a member of the committee that raised and managed funds for Mr Bowler’s 2005 election campaign.

2.2.17 Mr Brian Thomas Burke

[102] Mr Burke is a former Premier of Western Australia and now a lobbyist and consultant. Mr Burke is a business partner of Mr Grill and both were retained by PMA to assist them with several matters including attempting to gain access for PMA to the area protected by the State Agreement. As well as a retainer, Mr Burke and Mr Grill were also to receive a “success fee” if their lobbying activities proved successful.

2.2.18 Mr Julian Fletcher Grill

[103] Mr Grill is a former Member of the Legislative Assembly of the Parliament of Western Australia and a former Cabinet Minister in the Burke Government. Mr Grill worked for PMA under the same arrangements as Mr Burke. Mr Grill, in particular, had many contacts within DoLR and the mining industry generally.

[104] Mr Grill was Mr Bowler’s predecessor in the Seat of Eyre as well as being the manager of, and a contributor to, funds for Mr Bowler’s election campaigns in 2000 and 2005.¹⁵ Mr Bowler and Mr Grill describe themselves as friends and social acquaintances.

CHAPTER THREE

COMMISSION INVESTIGATION

3.1 Chronology of Events

1978	<i>Uranium (Yeelirrie) Agreement Act 1978</i> assented to by the Governor.
1982	<i>Mining Act 1904</i> repealed and <i>Mining Act 1978</i> assented to by the Governor.
2004	
31 March 2004	News article in which then Minister for State Development, the Hon. Clive Morris Brown, announces plans that the Yeelirrie State Agreement is to be terminated.
2005	
8 June 2005	Metraloop Nominees Pty Ltd registered as a company.
17 June 2005	BHPB completes their takeover of WMC.
8 August 2005	Mindax ELA's lodged at Meekatharra Warden's Court.
11 August 2005	BHPB lodge exemption application LE195/056 in the Leonora Warden's Court.
5 October 2005	Metraloop ELAs lodged at Leonora and Meekatharra Warden's Courts.
24 October 2005	BHPB lodge exemption application ME78/056 in the Meekatharra Warden's Court.
9 and 10 November 2005	PMA lodge plaints in Meekatharra and Leonora Warden's Courts seeking forfeiture of BHPB mineral claims granted under the State Agreement. Plaints are pursuant to regulations 50 and 178 of the <i>Mining Regulations 1925</i> .
17 November 2005	PMA lodge objections to BHPB exemption applications.
24 November 2005	BHPB write to the Hon. Alan Carpenter MLA, Minister for State Development, expressing concerns about ELAs over the Yeelirrie State Agreement area.
1 December 2005	Victory Street ELAs 53/1206 and 53/1207 lodged at Meekatharra Warden's Court.
14 December 2005	Minister Carpenter writes letter to applicants advising approval of ELAs over the Yeelirrie State Agreement area will not be granted and that they should withdraw to prevent him considering use of section 111A.
2006	
12 January 2006	DolR writes letter to Victory Street advising of Minister Carpenter's position on not granting ELAs.
3 February 2006	The Hon. John Bowler MLA appointed as Minister for Resources and Minister Assisting the Minister for State Development.
13 March 2006	Victory Street ELAs 53/1222 and 36/579 lodged in Leonora Warden's Court.
17 March 2006	Mindax withdraw their ELA.
17 March 2006	ELAs over the State Agreement area from two applicants, Metraloop and Victory Street, remain on-foot.
11 July 2006	DolR letter to Minister Bowler advising him of his two options on how to deal with the Metraloop and Victory Street ELAs.
12 July 2006	DolR letter received at Minister Bowler's office.
25 July 2006	Minister Bowler signs DolR letter taking option to terminate ELAs. He also signs letters to Metraloop, Victory Street and BHPB, and the Meekatharra and Leonora Wardens.
8 August 2006	Termination file appears to arrive back at DolR office.
10 August 2006	DolR sends termination notices for service on Wardens by email to Meekatharra and Leonora Mining Registrars.
15 August 2006	Notice served on Leonora Warden.
16 August 2006	Notice served on Meekatharra Warden.
2007	
21 February 2007	Plaints adjourned by Meekatharra Warden <i>sine die</i> .
3 September 2007	Metraloop deregistered as a company.

3.2 Course of Events

- [105] In October 2005 Mr Burke and Mr Grill agreed to assist PMA in the acquisition of a uranium deposit.¹⁶ This deposit was later identified as the Yeelirrie deposit which was held by BHPB.
- [106] The terms of their engagement consisted of a monthly retainer and a “success fee” that would vary according to the “path” (that is, “creative fast track solution merits special consideration” versus the “goat trail … that should not be treated comparably”) taken to achieve success. At one point in time Mr Burke contemplated a “success fee” of 10% of the purchase price of the Yeelirrie deposit paid by PMA or 10% of the Yeelirrie project itself, or payment by way of options or shares.¹⁷
- [107] Mr Burke, Mr Grill, Mr Smith and the Earl of Warwick met several times over the following months to develop a strategy to acquire the deposit.¹⁸
- [108] Although in December 2005 Mr Smith claimed to tell a journalist that his interest in the Yeelirrie area was the vanadium resource it contained, his real interest lay in the uranium deposit. In December 2005 Mr Smith had gone so far as to host visiting executives from a United States based company specialising in nuclear technologies called General Atomics.¹⁹
- [109] In December 2005 the Minister for State Development, the Hon. Alan Carpenter MLA, wrote a letter to a number of companies that had applied for exploration licences over the Yeelirrie deposit. In the letter Mr Carpenter advised those companies that their applications would be unsuccessful.
- [110] Minister Carpenter’s letter was the subject of some discussion in an email sent to Mr Burke, Mr Grill and Mr Smith by the Earl of Warwick on 23 December 2005 (PMA had yet to receive the letter but were anticipating its arrival).²⁰ The Earl of Warwick said:

At our meeting with Gadens on Jan 10th this letter needs to be the final agenda item – How we respond to the letter’s arrival, the nature of our submissions and most importantly the timing of our efforts – Optimally other parties (Mindax) abandoning their interest in Yeelirrie prior to the Minister reassessing his position.

Clearly the Earl of Warwick considered the abandonment by, or removal of their competition prior to the Minister reconsidering his decision, to be advantageous to PMA in its endeavours to acquire the Yeelirrie deposit.
- [111] Another strategy that was considered to obtain the deposit was to strike a deal between Consolidated Minerals Ltd, an Australian resource company, and BHPB, effectively swapping a Consolidated Minerals Ltd iron ore deposit known as “Mindi Mindi” for the Yeelirrie deposit. This arrangement would see PMA acquire up to 50% of the Yeelirrie deposit.²¹ The Chairman of Consolidated Minerals Ltd at the time was Mr Michael Kiernan.
- [112] It appeared that by the end of March 2006 PMA were not confident of their plan to acquire the Yeelirrie deposit by exchanging it for Mindi Mindi.²²

Mr Burke, however, retained some hope. In an email to Mr Grill on 9 April 2006,²³ that discussed their PMA retainer, Mr Burke stated Mr Kiernan told him that he, Mr Kiernan, had a feeling from BHPB that Yeelirrie was not a dead issue, so there was still a prospect (of success).

- [113] On 24 April 2006 Mr Bowler, as the Minister for Resources and Minister Assisting the Minister for State Development, signed a letter addressed to Mr Michael Hunt of Project Lawyers, Hunt and Humphrey, providing his reasoning for considering the use of section 111A.²⁴ Mr Bowler was responding to a 7 April 2006 letter from Mr Hunt on behalf of PMA and their wholly owned subsidiary Victory Street, in which Mr Hunt had sought the reasons from Mr Bowler why he was contemplating the use of section 111A of the *Mining Act 1978* to refuse the Victory Street ELAs.
- [114] On 28 April 2006 at 7:02 p.m. Julian Grill called Minister Bowler in response to a message that Bowler had left for him.²⁵ Yeelirrie was discussed. Although it is not clear in this conversation whether they were discussing the PMA plaints or ELAs, it is most likely it was the applications because that was an issue that was fresh in the Minister's mind. Mr Bowler told Mr Grill that "Roderick" was not going to get it, and later reiterated this statement twice saying that, it was part of a State Agreement (These comments are reflected in the 24 April 2006 Bowler letter to PMA.). Mr Bowler told Mr Grill "... there's no total rush on it. It's on my desk today ...", and asked Mr Grill to arrange an informal meeting between the three of them. Although the 24 April 2006 letter would have been fresh in Mr Bowler's mind, his comment on 28 April 2006 that the matter was on his desk that day is, however, inconsistent with that date.
- [115] On 28 April 2006 at 9:42 p.m. Mr Grill emailed Mr Smith copying in Mr Burke. Mr Grill said: "I have had some contact, initiated by Government, concerning your application in relation to Yeelirrie. Would it be possible for you and Guy to meet Brian and I to discuss the matter? We are available any day next week except Wednesday".²⁶ A meeting was scheduled for 24 May 2006 in which Mr Smith said he had made time with "Julian" to discuss Yeelirrie and Mr Bowler. This meeting was cancelled due to Mr Smith being overseas. In lieu of this 24 May 2006 meeting, Mr Grill tried to arrange a meeting with the Earl of Warwick and Mr Burke before he himself departed overseas so that before departing he could ring "John" and give him some indication of where PMA might go. This meeting probably occurred on 24 May 2006.²⁷
- [116] On 4 May 2006 Mr Burke called Mr Smith and they discussed Yeelirrie.²⁸ Mr Smith said he had just about given up on Yeelirrie and was focussing on Windimurra. Mr Burke told Mr Smith that Mr Bowler had approached them about Yeelirrie and wanted PMA to withdraw, and there was no prospect of penalising BHPB for doing what was Government policy, which was not to mine. Mr Burke said that by withdrawing, it provided Mr Smith an opportunity to consolidate him "in" with Mr Bowler and Government. Mr Burke told Mr Smith there was no chance of Mr Bowler approving his application. Mr Smith proposed a meeting with Minister Bowler where he could "graciously" accept Mr Bowler's point of view.

[117] Mr Burke and Mr Grill had also entered into negotiations with Mr Clough, who was a consultant and lobbyist engaged by BHPB, to represent that company's interest in Yeelirrie in negotiations with Government. That also included negotiations with PMA. In a discussion between Mr Burke and Mr Clough on 12 May 2006,²⁹ the former suggested that Mr Clough get his client to hire Mr Grill to get PMA to withdraw, and they could then split the "success fee" between the three of them. Mr Clough did not think the proposal to split the "success fee" was appropriate, but he did pass the proposal, that Mr Grill be hired, to BHPB. That did not seem to be accepted by Mr Clough's client, as indicated in an email on 22 May 2006.³⁰

[118] In a conversation on 23 May 2006³¹ Mr Grill told Mr Bowler that "... in relation to PMA and their application ... in respect to Yeelirrie ... we have got them to the point where ... I think they'll withdraw their application ...". Mr Bowler said that was good and that when you are dealing with Government on one hand you are making life difficult for the bureaucrats, and the next second you want them to go out of their way for you. Mr Bowler then said:

BOWLER: *If he uh, if he had any chance of success good on him, he's got no chance of success.*

GRILL: *Yeah, all right now listen what I what I was going to suggest to you I'm err Roderick's been away and I'm going away for three weeks but we're meeting with the Earl of Warwick who's the sort of uh the second guy within PMA and uh, he uh, we'll get agreement in principle with him tomorrow to withdraw it, but what we'd like to try and do is to well try and get something out of uh BHP and I was wondering uh, and we've already sort of tentatively started some negotiations there, Brian will carry them on while I'm away uh now are you in a hurry to make a decision on this or can we*

BOWLER: No.

GRILL: leave that till I get back?

BOWLER: No, it can wait.

GRILL: Okay, if you leave it till after I get back, Brian will have done a bit more work on it uh, if we can screw a little bit out of uh

BOWLER: Yep, good on you, that's up to you guys.

GRILL: BHP. Yeah.

BOWLER: Yep.

GRILL: Okay then we'll do that.

(emphasis added)

[119] In the Commission's assessment, at the conclusion of this conversation, it was clear to Minister Bowler that Mr Grill's intention at that time was to derive some benefit from BHPB. Mr Bowler provided tacit approval to Mr Grill's plan by agreeing to wait until Mr Grill got back from overseas before taking action on the matter.

[120] The conversations between Mr Grill and Mr Bowler on 28 April and 23 May 2006 were, of course, not known to Mr Clough at the time. Asked what his reaction would have been had he known, he told the Commission during a private hearing on 8 July 2009:

I think I would have been knocking on John's door saying "this is wrong. You need to do this thing right this minute".³²

[121] In his evidence to the Commission, during a private hearing on 9 July 2009, Mr Fletcher said that his recollection was that right from the start BHPB "were going to fight to the finish and certainly" were "not going to come to some settlement deal".³³

[122] On 6 July 2006 Mr Smith emailed Mr Grill asking if he was back in Perth,³⁴ and Mr Smith went on to say:

I am conscious that PMA have not responded to the Ministers [sic] invitation to gracefully withdraw. We talked about me meeting with the Minister to have this happen.

The matter is dragging on in the courts costing money, and various papers will be crossing the Ministers [sic] desk, so we had probably better get on and have the meeting. He might enjoy an update on the project anyway.

Should I contact the Minister's office direct to make an appointment

...

[123] Mr Grill discouraged Mr Smith from contacting the Minister directly without seeing "Brian and I".

[124] On 10 July 2006 Mr Grill called Minister Bowler and discussed several matters including Yeelirrie, about which they had the following conversation.³⁵

GRILL: *You mentioned Yeelirrie to me before you went away and PMA.*

BOWLER: *Yeah.*

GRILL: *Uhm, and I, I've told them and Brian's confirmed my, my thoughts to them that they should just simply pull out of that.*

BOWLER: *Yeah. Brian said that that was, he thought that was, you know, they were, they were talking about doing it*

before you went away but, you know, uhm, you know, yeah, well look, you know, uhm, (sighs) they're just going to put the Government in an embarrassing position. They may force the Government to put in legislation which will then be negative, uh, negative for the uranium industry. It'll be bad for our Government. Uhm, whilst we don't like to think we're vindictive, uhm, you know, people aren't fools. They're not

GRILL: No.

BOWLER: they're totally insensitive to bloody any, you know, if people embarrass them, you know, people remember, you know.

GRILL: No. We've, uh, uh, we've talked them into it. They're, they're quite happy to do that but there's two things that I'd like to do. Uh, firstly, uh, I was just wondering whether you could meet with them, uhm, where they could tell you that themselves.

BOWLER: Love to.

GRILL: And, uhm, secondly, uh, we'd like to do, uh, some ancillary settlement with BHP, uh, just on some costs and stuff and, uh, if you could just slow down the process so, give us time to do that and not encourage BHP too strongly just to close the door then we might just, it's not a big matter, it's only a little matter. At the end of the day if it doesn't come off it doesn't come off but if we could just sort of, if you could just slow the process down a bit and don't encourage them too much we'll just get that settled and tuck that away and, uh, get the whole thing off the agenda.

BOWLER: What sort of settlement, you know, is it sort of more (coughs) covering costs?

GRILL: Yeah, that's all, just covering some costs.

BOWLER: Won't be a party to

GRILL: Mm?

BOWLER: I, I, I just philosophically we, we wouldn't like, you know, people to be profiting out of a, a situation, that's all, you know, a windfall profit sort of gouging but you're, you're saying it's not, it won't be that

GRILL: No, no, no, no, no, no, no, no, no. It wouldn't even, it wouldn't even meet, uh, half their costs that they've already expended.

BOWLER: Okay.

GRILL: Uhm, no.

BOWLER: No worries.

GRILL: *It, it wouldn't, it, but I'll tell Cloughie this, who's been dealing on behalf of FMG [sic: BHP] that, yeah, I mean, our people will probably be prepared, uh, our people would be prepared to do a deal, uh, and we know the Government want to get it off their plate, uh, and out of the road but we don't want to embarrass Government any, any more than BHP does and if we could just sort of settle it, uh, on some sort of reasonable basis. This wouldn't be big money, I can tell you right now, uh, then we'd like to do that. I'm seeing them tomorrow, that, that's all.*

(emphasis added)

- [125] In this conversation Minister Bowler, for a second time, agreed to slow down a proper Ministerial decision making process, and to not encourage BHPB, thereby allowing Mr Grill time to negotiate a financial settlement with BHPB. Minister Bowler agreed to slow the process down in the full knowledge that Mr Grill was using that agreement to buy time for him to negotiate with BHPB for payment of some financial compensation.
- [126] Mr Fletcher was asked about this in his evidence before the Commission on 9 July 2009.³⁶ He said had he known about that arrangement at the time he would have reacted with considerable concern. The examination continued:³⁷

... What would your reaction have been if you had appreciated that, in effect, the Minister appeared to have agreed to slow the process down to enable Burke and Grill to exert "leverage" on BHP to get something for them or them and PMA?---We were very unhappy when we became aware of that through the public transcript that was available, very unhappy.

Yes, I see. All right. Again if I could just pursue that a little bit further. Given what you now know had transpired between them and the Minister before that, what do you think should have happened at this stage or by this stage?---Well, as far as I am concerned - and I'm speaking as an individual, not on behalf of BHP but I'm quite confident they would have a similar view, that why should the process be slowed down. It was costing us money in terms of legal representation. It was not going to go anywhere and that was the feedback we had, so why allow someone to get an unfair advantage and to "leverage" a settlement and my recollection is that, you know, they wanted to screw more out of us, you know, and my reading of that is that it was more than just, you know, recovering legal costs.

Yes?---So very unhappy with that. It serves no purpose.

He went on to explain that the continuing process was costing BHPB money for legal representation.

- [127] In his evidence Mr Clough could not recall the date, but said it was "somewhere around that period", in the course of what he intimated was something of an aggressive conversation at Mr Grill's house, Mr Burke and Mr Grill told him he would not be able to sort the problem out but if they were to be paid a sum of money they could get PMA to withdraw their complaints. He told the Commission that the view at BHPB was that BHPB was on strong ground and no deal was going to be done.
- [128] Mr Clough was asked his reaction to hearing the content of the telephone conversation between Mr Grill and Mr Bowler on 10 July 2006 –

... How do you see that – a request that the Minister slow the process down so that they could continue negotiating with you on behalf of BHP?---The fact is we held the view that we had a very strong case and that the Minister should have acted, so I think it's pretty clear that if we hold that view and there's some talk about delay that that would be something we wouldn't be very happy about.³⁸

- [129] On Tuesday 11 July 2006 Mr Grill met with Mr Clough. Yeelirrie was on the agenda for discussion.³⁹
- [130] Also on 11 July 2006, at 10:02 p.m., Mr Grill emailed Mr Burke.⁴⁰ Mr Grill said to Mr Burke that he had told Mr Clough that they were interested in settling the PMA Warden's Court action on the basis that BHPB paid at least part of their client's costs. Mr Grill then went on further saying:

... You shall remember that Guy was of the view that we could keep whatever costs that were recovered. There is still a prospect of achieving that aim.

Peter tells me that the WA lawyer and the South Australian ex WMC (now BHP executive) officer responsible for the running of the action are prepared to pay \$60,000 to \$70,000 to settle the issue. They are being vetoed from some senior executive, possibly Graeme Hunt.

On the other hand JB is saying that if the action is not withdrawn then the State may have to legislate. That would be to everyone's detriment. Peter is going to convey that back to his client.

We shall see what comes from it.

(emphasis added)

- [131] In his evidence, Mr Clough could not recall mention of \$60,000 to \$70,000 specifically, but said it was possible. However, he said that was not the conversation he had talked about earlier. That had occurred at Mr Grill's house and he thought that was for a much larger number.⁴¹

[132] On the morning of 12 July 2006 at 6:16 a.m. Brian Burke responded by email saying amongst other things:

... However, the problem will be getting Roderick to agree not to act quickly and withdraw his plaint(s). Clearly, we should try to maximize any return to us by coordinating the PMA decision and action ...⁴²

[133] On 14 July 2006 Mr Clough sent an email to an in-house BHPB lawyer, with a copy to Mr Fletcher:

... I passed on the message to PMA's representative. We are not interested in a deal. They advised they would report back to their client. They also indicated the Government had informed them that they, being Government, wanted this sorted out as failure to do so would have wider impacts in terms of legislation. I was not able to confirm if they were talking about specific legislation, if needed, to fix Yeelirrie or anti-uranium legislation, but I gathered the latter. In any event, this would cause problems for our strategy of maintaining the agreement and waiting for the policy or Government to change.⁴³

[134] On 25 July 2006 at 8:19 a.m. Mr Smith emailed Mr Grill and Mr Burke confirming their consultancy agreement with PMA with a \$2,500 per month retainer. An issue currently of interest to PMA that Mr Smith raised in the email was the resolution of the Yeelirrie plaints in a manner favourable to Government whilst preserving some benefit to PMA.⁴⁴

[135] At 8:54 a.m. Mr Smith sent another email to Mr Burke and Mr Grill with a comprehensive summary of what he thought the likely outcome of the Yeelirrie plaint action would be. Mr Burke responded at 2:48 p.m. by saying that "Julian and I are discussing this with John tomorrow evening and Julian will revert top [sic] you after that discussion". Mr Grill responded at 9:40 p.m. confirming the discussion with "J" the following evening. He also indicated that before meeting with Mr Bowler for dinner the following evening he would be meeting with Mr Fletcher and Mr Monkhouse of BHPB.⁴⁵

[136] In a series of emails commencing at 11:05 p.m. on 25 July 2006 Mr Smith in an email asked Mr Alex Jones, a solicitor with Gadens, to establish if the Yeelirrie Act could be terminated on agreement from the parties to the Agreement, or whether legislation was required. This request for legal advice was instigated by Mr Grill. In this same email Mr Smith advised Mr Jones that Mr Grill was seeing Mr Bowler that evening. That message was then forwarded to Mr Grill. Mr Grill responded by saying "... but if possible I would not like third parties to be aware that Brian and I are talking directly to the Minister (Ministers) on this or other matters".⁴⁶

[137] On 26 July 2006 Mr Bowler and his wife attended Mr Grill's residence in Mount Street, Perth, Western Australia, for dinner with Mr Grill, Mr Burke and their wives. The dinner party was monitored by lawfully installed surveillance devices.⁴⁷ Towards the end of the dinner Mr Grill initiated the following conversation:

GRILL: *I like it. Can we discuss a couple of issues before ...*

BOWLER: No, I'm, I'm issued out.

GRILL: Eh? (laughs)

BURKE: I did ask John about Henry.

BOWLER: ... Sue said she, Sue said she

GRILL: What?

BURKE: I asked John about Henry.

BOWLER: (aside) Sue and Maryanne. See ya then mate. What do you want?

BURKE: (aside) No don't see Sue

GRILL: Okay, Yeelirrie.

BOWLER: Yeelirrie, I, uhm, just signed the, ah, hundred and eleven A knocking 'em on the head. They still went ahead with it.

GRILL: Sorry? Hundred and eleven A, what does that, what does that mean?

BOWLER: That I've, uh, intervened and, uh, there were five tenements over the, uhm, is it, I think that's the same company, Moon, Moontrap or bloody

GRILL: ... Precious Metals Australia.

BOWLER: Was it?

GRILL: Precious Metals of Australia.

BOWLER: No, it wasn't ... Might, might be another mob doing this because uh, five tenements over the uh, state agreement area uhm, and I've used a hundred and eleven A which was Cazaly to say no, uhm, it's not ... the state ... uhm ...

BURKE: There was, there was

BOWLER: ... land's locked up ...

BURKE: someone who pegged before PMA.

BOWLER: Was there?

GRILL: There was, yeah.

BURKE: Maybe that's who... John thought it was. Do you remember you asked Julian

BOWLER: Yeah.

BURKE: to get PMA to withdraw?

BOWLER: Yeah.

BURKE: Now they've agreed to it.

BOWLER: And have they done it though?

GRILL: I thought they had

BOWLER: ...

GRILL: I told you on the phone the other day.

BOWLER: That they were going to?

GRILL: If you want them to withdraw they'll withdraw, okay? But they would like to get something back out of it, from BHP, even their costs. But a more tantalising and a fairer situation is, BHP acquired a hundred kilometres of scrub land. In the core of it there are uranium tenements. Our clients propose, that, on the basis they withdraw, the agreement be effectively terminated and in termination BHP walk away with their uranium tenements and our clients be allowed to pick up some of the other prospective territory north and south of it, and if they pick up those, that territory by way of mineral tenements, they will all be subject to a clause which says they can't withdraw uranium. Now, everyone looks good. I've got ... to take back to BHP last week. I put it to BHP through Ian Fletcher and Peter Monkhouse this evening. No one said no but as I said on the phone the other day if you act precipitously and uh, cut short uh

BOWLER: Well

GRILL: PMA's position

BOWLER: There are still tenements

GRILL: then you just take away from me all my fucking uhm, "leverage". I've got no, got no bargaining chip.

BURKE: ...

BOWLER: Well, how do I, how do I, well, there was these other companies.

GRILL: I thought we agreed on the phone the other day.

BOWLER: Yeah, but this wasn't PMA, this was Moontap or ...

GRILL: Mm. Yeah.

BOWLER: *How do I deal with them one way and deal with PMA another way? Unless I suppose PMA requires me to do it then I don't have to do that do I? That's okay.*

GRILL: *We'll deliver you what you want.*

BOWLER: *Mm.*

GRILL: *I mean, at the end of the day I told you we'll deliver.*

BOWLER: *As long as BHP agree.*

GRILL: *Yeah, but Jesus there should be a bit of pressure on BHP. You're talking about a huge amount of strike there.*

BOWLER: *On the back of the err behest of the Government, and the Government's policy.*

GRILL: *You don't need ...*

BURKE: *John. BHP, in the state agreement, had an area a hundred kilometres long. Of that hundred kilometres, about ten kilometres covers Yeelirrie. The balance doesn't cover any ura, uranium, or known uranium deposit. These people have agreed to withdraw. And they say we'll withdraw but we would like an agreement with BHP that we're allowed to pick up this bottom part for example of the state agreement area,*

GRILL: *Mmm.*

BURKE: *agreeing not to explore for uranium, and then we'll step aside completely.*

GRILL: *Now when I put it to Peter Clough last week, that's a very clear way of putting it. He said to me...*

BOWLER: *If Clough can pull that off with BHP then that's okay.*

GRILL: *He said, well*

BURKE: *It'll need both ...*

GRILL: *my only concern is, my only concern is, that, that might involve legislation to negate the agreement.*

BOWLER: *Mm.*

GRILL: *Now, I got our people to get us a legal opinion, which came through today, not in detail just in some form, it said the Minister's got the ability to do all of the things that you want done, without legislation. And I told BHP when I saw Ian Fletcher and Peter*

Monkhouse this evening. So they're going to consider that seriously. But it will come undone if you precipitously, or some other way, just tell BHP no matter what, you're gonna support their position, and they can sit on that hundred kilometres of strike forever and a day.

BOWLER: *It does open a bit of a Pandora's box if uh, if word got out about this, that every state agreement which contains large tracts of land, that uh, you know, you basically go, go and over-camp areas uh and build some negotiating power then give up some of that area.*

GRILL: *This area is just so uhm, uhm atypical. You've never had that, you've never had that kind of a situation ... you need to have a better ... it's been absolutely no way ... before. There are these ... straight ...*

BOWLER: ... you're talking about uranium ...

GRILL: Yeah. Yeah. That's what makes them unique.

BOWLER: It's not ah ...

GRILL: Absolutely unique. You couldn't find, you couldn't find ...

BOWLER: Very, very small ...

BURKE: You know the other thing Julian is that uhm ... is important ... diamond royalty.

GRILL: ... but I just

BOWLER: *I just hope it's not too late because I signed off yesterday.*

GRILL: But Jesus mate

BOWLER: Uhm. Last night ...

GRILL: ...

BOWLER: *No no, on this other mob, on this other mob, is that, is that, not on PMA but ...*

BURKE: What about if we send Simon a note?

BOWLER: I'll speak with Simon first thing tomorrow morning.

BURKE: There is a difference about this one John. You see, I agree that BHP has done what the Government wanted in respect to uranium ...

GRILL: Not BHP, it was Western Mines.

BURKE: Well Western Mines, and now BHP. But what's happened is you've extended, that accommodation, well past the uranium part of the agreement. You see the agreement is a hundred kilometres long, only ten percent of it's uranium. But they've been given the same holiday in respect of ninety kilometres. If it was just the uranium leases you'd say well that's fine, that's the Government's policy, ... do what the Government wants.

BOWLER: But it has been ... in the one area.

BURKE: Alright well...

BOWLER: ... proposal is now by PMA.

BURKE: No, they're different leases John. In the, in the State Agreement Act ... the Act, that's true, yes. But they're not just one hundred ... It's not one ...

GRILL: John ... BHP to agree.

BOWLER: Okay. I'll have to get back that uhm, document I signed yesterday.

BURKE: Shall I do a ...

BOWLER: ...

BURKE: What about if I do a five or six paragraph note and send it to Simon in the morning?

BOWLER: Yeah, I, I'll be there first thing tomorrow morning. It's the first thing I'll do.

BURKE: Alright

[138] At 9:21 a.m. on 27 July 2006 a facsimile was sent from Mr Burke's facsimile number to the office of Mr Bowler.⁴⁸ The facsimile was a typed note that had four separate titles corresponding to some of the topics discussed the previous evening at Mr Grill's residence. One title on the note was "PMA and Yeelirrie". Under this title was written:

PMA will withdraw. However, it seeks that the area of ground protected in the State Agreement be reduced from the present 100km in length to more accurately and fairly represent and protect the area of uranium deposit and that it (PMA) be given access to part of the balance of the area released from sterilisation as a result. BHP is keen for PMA to withdraw and this basis for agreement to withdraw has been presented to BHP which appears quite well disposed.

[139] Mr Clough told the Commission he recalled the proposition being put to him as another option after the first proposition – that BHPB would pay money – did not work. He said the next proposition was that the ground would be split, with some remaining with BHPB and some going to PMA. However, he reiterated that BHPB's view was that it held the ground legitimately and should be able to keep it.

[140] In the discussion with Mr Bowler on 26 July 2006 Mr Grill had mentioned that he had put the tenement proposition to Mr Fletcher and Mr Monkhouse that evening. In evidence, both of them said the subject came up unexpectedly and that, although they agreed to pass it on to relevant BHPB personnel, they certainly did not indicate any support for it.

[141] In his evidence Mr Fletcher said they had been to a Labor business round-table lunch at which third-party access to the BHPB rail line was discussed. Whilst there they agreed to meet Mr Grill at a city hotel to discuss that issue further. In his evidence Mr Fletcher said the meeting took place the same day as the lunch. However, after giving his evidence Mr Fletcher had his electronic calendar restored from the BHPB backup system. That showed the lunch was held on 24 July 2006. The Commission notes that is consistent with Mr Grill's email of 25 July 2006, indicating that at that date the meeting had been arranged, but was for 26 July 2006. Nothing turns on that fact. They did so, and at that meeting, without any notice to them, Mr Grill raised the issue of BHPB and PMA coming to some agreement about mining the Yeelirrie tenements. That was the first time they had heard any proposition in relation to PMA withdrawing which involved BHPB giving up part of the tenements. Prior to that their understanding had been that it was going to be a cash settlement "for costs and whatever else".⁴⁹

[142] Mr Fletcher's evidence was that he did not say he was supportive of a settlement – and in fact he was not. He also knew the BHPB view was "No settlement. It was as simple as that".⁵⁰

[143] The meeting on 26 July 2006 was the only occasion on which Mr Monkhouse met Mr Grill. He gave a similar account of it, as had Mr Fletcher. He said his recollection was that he asked Mr Grill why would BHPB grant the non-uranium mineral rights to PMA. According to him:

... The answer was along the lines, "The Minister has a problem. The Minister would like you to - the Minister would like this to happen." Something - words to that effect but it was put in terms, "The Minister has a problem."

What was your reaction to that proposition?---Verbally I don't know that I said that much to Julian Grill. My recollection is after the meeting I explained to Julian that I was not in the business unit that looked after Yeelirrie, that it was not within my authority or domain or influence to have - you know, to be able to address his request and I do vaguely recall saying, "I will raise it with," you know, if you like, someone within that business unit that did have responsibility for Yeelirrie, but I tried to leave him with the impression that I didn't think he would get a positive answer.

What would have been in that for BHP?---Exactly, nothing.

*It doesn't sound like much of a proposition, give us part of your tenements because the Minister has a problem?---I agree and that was the tone of my response over drinks.*⁵¹

He said that Mr Grill did not elaborate in any way on what problem the Minister had nor why BHPB should accommodate it.

[144] In a series of emails commencing at 9:38 a.m. on 27 July 2006 Mr Grill emailed Mr Smith copying in Mr Burke. The subject of the emails was "Urgent Yeelirrie". Mr Grill discussed his approach to Mr Fletcher and Mr Monkhouse and his view that they considered that his proposition had merit, but that BHPB were unlikely to give away value. Mr Grill then detailed his conversation with Mr Bowler over Yeelirrie the previous evening.⁵² Mr Grill wrote:

Later yesterday evening, Brian and I briefed J. He understood the concept, but it was very disappointing to hear from him that he had used his discretionary powers under the Mining Act to reject tenement applications over part of the Yeelirrie structure from another competitor company. He feared that that might have set a precedent for the PMA applications. This news was especially disappointing to me as I have spoken to J only a couple of weeks ago and explained our general policy in relation to PMA and he had agreed to slow down the process, so that PMA could negotiate with BHP prior to withdrawing the current applications. He seemed to have forgotten our conversation at the time he took his most recent action.

J undertook to try and stop the process in respect to his actions relating to the other company. He shall try to do that this morning and Brian has faxed him a reminder note.

I am not sure of how J's actions in relation to the other over pegging tenements has effected the legal position of PMA. Perhaps you could give that some consideration this morning and advise us. Naturally we will inform you once we have heard back from J's office on the issue.

[145] Mr Smith responded to Mr Grill at 10:34 a.m. writing:

Will chat when I return from Hong Kong but just quickly, Js [sic] action may help.

PMAs [sic] tenement applications were made after applications by Metraloop (a \$2 company) and so rejecting those applications leaves PMA's applications first in line. The difference is that Metraloop had not lodged plaints or objections to the expenditure exemption applications so had no prospect of prevailing. It might be best to let the refusal of Metraloops [sic] applications flow through which leaves PMA as the only party to negotiate with. Only we can offer to

withdraw the plaints, and it is now out of time for anybody else to lodge plaints in respect of the past two years.

- [146] Mr Grill responded at 10:51 a.m. saying: "As long as you are happy with this situation I shall ring John and advise him to let the Metraloops [sic] refusal proceed".
- [147] Mr Smith emailed at 10:54 a.m. saying: "OK thanks, I think that works".
- [148] At 10:51 a.m. Mr Grill left a message on Mr Bowler's mobile phone answering service.⁵³ Although the time on this message appears out of sequence, logically it would have been made after Mr Smith's 10:54 a.m. response. The message said:

GRILL: *Oh John it's Julian. Thanks for coming around last night it was great. Uh in respect to uh Yeelirrie your action uh, may in fact be uh, uh entirely legal and quite beneficial to PMA. If the company is Metraloop it's a two dollar company, which uh pegged over Yeelirrie. If you've rejected their applications then that simply leaves PMA first in line. They have their own uhm applications in respect to uhm, uh matters which are now before the Warden's Court uhm and they, only they can withdraw them. So uhm the action that you've taken in respect to Metraloop, if that's the company, may well be beneficial and you may uh, you may reconsider that on the basis that you might just let the refusal go through. Anyhow if you'd like to ring me back that'd be great. Uh thanks a lot mate and thanks for coming round last night, bye.*

- [149] At 11:01 a.m. Mr Grill responded to Mr Smith by saying: "I have left a message on J's message bank indicating that it might be better to allow the Metraloop refusal to proceed".
- [150] Mr Grill, under the mistaken belief that the Metraloop applications had been terminated and the PMA applications remained on-foot, continued negotiating with Mr Clough for his proposition of a settlement between PMA and BHPB. He advised Mr Clough that the Metraloop applications had been terminated by the Minister and that had cleared the way somewhat for the PMA proposal to go forward.⁵⁴
- [151] In a separate series of nine emails between Mr Burke, Mr Grill and Mr Smith, commencing on 27 July 2006 at 1:10 p.m. and finishing at 6:43 p.m. on 30 July 2006, the Yeelirrie matter is discussed.⁵⁵ In one email Mr Smith hoped that BHPB didn't want to risk being seen as paying off a "dirty plaintiff" and there was no downside to BHPB agreeing to "J's plan". He went further to say: "Hopefully BHP will credit us with not having run a media war against them on Yeelirrie as we did Xstrata".

- [152] Although Mr Smith in this email makes a reference to "J's plan", it is obvious by the discussions that occurred on 26 July 2006 at Mr Grill's home that the plan to terminate the State Agreement allowing access to PMA was in fact Mr Grill's plan. It is also likely that if Mr Grill's plan were successful, then a fairly significant "success fee" would follow.
- [153] In this series of emails, at 5:26 p.m. on 27 July 2006, Mr Burke says: "I spoke to John about this matter this afternoon. RODERICK: Can you provide me ASAP with a "one pager" distinguishing PMA from the Metraloop position".
- [154] Mr Smith responded to Mr Burke at 4:50 p.m. on 30 July 2006 agreeing to do so. However, Mr Smith's response to Mr Burke's request did not occur until Mr Smith emailed Mr Grill the view of his solicitor Mr Hunt at 10:14 a.m. on 2 August 2006.⁵⁶ Mr Burke was not copied into that series of emails until 2:39 p.m. that day until Mr Grill responded to another Mr Smith email.
- [155] In fact at 4:04 p.m. on 27 July 2006, 82 minutes before Mr Burke's request to Mr Smith for the "one pager", Mr Burke had had the following conversation with Mr Bowler.⁵⁷

BOWLER: *On that matter with uh uh BHP uhm*

BURKE: *Yeah.*

BOWLER: *uh it was that company that I said that I'd*

BURKE: *Oh yeah.*

BOWLER: *uhm signed off on you know so they're out of the equation, uhm*

BURKE: *Yeah.*

BOWLER: *I do worry a bit ah that you know uhm that could be seen as almost uhm you know industrial blackmail or*

BURKE: *Well*

BOWLER: *what but you know uhm I'll I'll proceed and see how we go on that.*

BURKE: *Well let me let me give you a, a bit of a political steer. You should present it as being, in the Government's interests not to once again be taking the side of a big company against a small company, and so what*

BOWLER: *Yeah but what you know you know okay, yeah but what I'm saying is two lots of people have over pegged that area, right?*

BURKE: *Yeah but different, they were different peggings.*

BOWLER: Yeah but you know, there two lots of people who want that land.

BURKE: No no no.

BOWLER: One lot I've just well one lot I've just

BURKE: No no no no that's wrong. Two lots of people did certain things in respect of the land but they did different things. They didn't plaint, they didn't plaint BHP. They didn't lodge an objection to the fact that they haven't spent. I'll I'll get a note to you on this. I thought that straight away, but that's not right, I said to Julian well how can you dismiss one and not the other, and he got a paper from Roderick Smith which showed they're completely different issues.

BOWLER: Okay.

BURKE: Maybe I'm not being persuasive but I'll make sure

BOWLER: Well y-y-y you know look I'm I'm I'm just, okay, I haven't looked at the Roderick one, all I knew was I didn't know that it was any different to the other one I've just knocked on the on the head.

BURKE: Yeah well just keep an open mind.

BOWLER: Oh I am, I am just

BURKE: Presuming I'm right, yeah

BOWLER: Giving you a note of caution that ah uhm I have some worries about it.

BURKE: Well let me say this to you. If this

BOWLER: And I think what's going to have to happen is BHP, of course someone can go to see them and ask them to do it, BHP may, I think, have to make an approach.

BURKE: Well let me say this to you, presume you're right and they're both the same until I can get these couple of paragraphs of explanation and then my predicted course would be for someone to raise with BHP informally this solution.

(emphasis added)

[156] At 10:00 a.m. on 28 July 2006, the morning after the Messrs Burke and Bowler conversation, Mr Burke faxed a second note⁵⁸ to Minister Bowler's office. This note was headed "PMA – METRALOOP and YEELIRRIE" and said:

The difference is that Metraloop had not lodged plaints or objections to the expenditure exemption applications, so had no prospect of prevailing. Only PMA can offer to withdraw the plaints, and it is now out of time for anybody else to lodge plaints in respect of the past two years.

Therefore the decision in respect to Metraloop is different to the decision in the case of PMA.

- [157] After receiving an email from Mr Fletcher of BHPB dated 1 August 2006 Mr Grill formed the opinion that BHPB were seriously considering the proposal.⁵⁹ He emailed Mr Smith advising him of that.
- [158] Four minutes after the 2:39 p.m. email on 2 August 2006⁶⁰ Mr Grill again emailed Mr Smith copying in Mr Burke. Mr Grill said: "Dear Roderick, By the way, I saw Peter Clough again today. He is swinging back towards some sort of monetary settlement as it would be cleaner. I am pleased that we have two 2 irons (Ian Fletcher) in the fire here".⁶¹
(emphasis added)
- [159] On 10 August 2006 Mr Grill met Minister Bowler's Principal Policy Advisor, Mr Walster, at Mount St, Perth, Western Australia, where between 2:56 p.m. and 3:15 p.m. they discussed Yeelirrie.⁶²

GRILL: Now next one's PMA and Yeelirrie,

WALSTER: Yep.

GRILL: *uhm, John rang me, some time ago now, and said uh look, this is all a bit embarrassing, I've been a strong supporter of PMA in the past, and it was largely because of my support that PMA were able to prevail over Xstrata and get their leases back.*

WALSTER: Yep.

GRILL: Now all of that's correct. And he said, in the end PMA are not going to get these tenements,

WALSTER: Mm hm.

GRILL: uh, because, the Government'll exercise their rights under the Mining Act and,

WALSTER: Mm.

GRILL: and uhm, ensure that uhm they stay with BHP. So, he said, will you get your clients to pullout and I said yeah I will. And I went to my clients and they're prepared to pull out.

WALSTER: Mm.

GRILL: *But, they say well we'd like to do some sort of a deal with, with uhm, uh BHP,*

WALSTER: Yep.

GRILL: *and, just two secs I'll get a map I'll,*

WALSTER: Sure.

GRILL: *yeah find this map.*

(pause)

GRILL: *Uhm, so Cloughie's working on this one,*

WALSTER: Yep.

GRILL: *and uh, I, well our client said yeah, well we'd you know we'd like to get some sort of a deal, uhm, you know get our costs back or, get part of our costs back or something, uh and then we'll withdraw and, we'd like to go up and meet John and get thanked for withdrawing. (laughs)*

WALSTER: (laughs)

GRILL: *So, and I told John this and he was happy.*

WALSTER: (laughs).

GRILL: *Uhm,*

WALSTER: (Aside) Just going to have that ... thanks.

GRILL: *So, you work for many masters in this business but, one of the directors of PMA was down here and I said oh, why don't we just go for some costs. And he said yeah sure, go for some costs, so you know we'd,*

WALSTER: Mm.

GRILL: *try and get that fixed on that basis. Ah, we'd just sign a confidentiality agreement no one'll know that any costs are being paid and we'll ... sort of even everywhere round. The advice that PMA get from their lawyers is long-winded court cases, but there's no guarantee they'll win the battle.*

WALSTER: Yeah.

GRILL: *And John tells me well, they're not going to win the battle, so*

WALSTER: Yep, yeah.

GRILL: *it's pretty clear that it's a pretty empty exercise isn't it.*

WALSTER: *That's right.*

GRILL: *So why go through all that pain? (laughs)*

WALSTER: *(laughs) That's right.*

GRILL: *Okay. So I then put that to Cloughie and Cloughie said yeah that doesn't sound too bad, I'll go back and see my clients and uhm we'll see what we can work out. Anyhow his clients came back and, uh I think he got people here in Perth to agree, and the guy in South Australia but people in head office wouldn't cop it ...oh well.*

WALSTER: *See they I think feel like they're in a strong legal*

GRILL: *Yeah.*

WALSTER: *position as well.*

(emphasis added)

[160] The Commission notes that in the first part of this conversation on 10 August 2006 Mr Grill was still talking about “their” preference to get their “costs back”, that is, some financial benefit from BHPB. Mr Grill then told Mr Walster that PMA had accepted they were not going to get compensation from BHPB and to pursue it further on that basis seemed to be futile. Mr Grill then proposed another deal involving BHPB retaining their existing mineral claims but relinquishing the Temporary Reserve which PMA could then pick up as prospective territory. Mr Grill maintained that PMA were interested in vanadium and not uranium, but if they happened to pick up some uranium then that was a bonus.

[161] During this part of the conversation Mr Grill stated:

GRILL: *So when I went back and said oh, there is some support within BHP for this deal but, uh it looks as though head office's not going to cop it. Then Roderick Smith who's managing director, said oh what about if we do another deal, whereby uh, BHP, oh I should put this around the other way ...*

WALSTER: *...*

GRILL: *BHP's got a hundred kilometres in tenements here, or more, and what they really, only what they really want to do is just*

WALSTER: *The mineral claims.*

GRILL: *Is is the ones with uranium on them, here.*

WALSTER: Yeah.

GRILL: *Why should they be tying up that, that huge area and even further down I think, why should they be tying up all of those. Why don't we do a deal whereby uh, uh, they take those, uhm, and*

WALSTER: *Because this is the, deposit here isn't it?*

GRILL: *Yeah that's yeah that's the deposit there. They take those, uhm and they're released from the state agreement, or their extraction of the state agreement. They have to have the tenement subject to the normal condition that they won't mine uranium, and that would allow our clients to pick tenements at either end, which would be prospective and which would help our share price. Because you get vanadium in association with uranium you see, so you so there's vanadium there*

WALSTER: *Mm*

GRILL: *and our clients are vanadium miners. Now (coughs) I think a lot of people think that in due course you're never going to mine uranium in Western Australia anyway, uhm so well they might pick up some vanadium leases and there's the bonus that in due course*

WALSTER: *There's a bit of uranium there too (laughs)*

GRILL: *Yeah, so ah like everyone's a winner.*

(emphasis added)

[162] Mr Grill briefly suggested that he wanted something from Minister Bowler and then elaborated on what PMA wanted:

GRILL: *Oh, his view was yes, a nice idea but uhm I don't think it'll get up I said oh why, he said 'cause BHP doesn't like giving away value.*

WALSTER: *But Ian said ...*

GRILL: *he said I don't necessarily agree,*

WALSTER: *No.*

GRILL: *I'm gonna put it up to the people above, above me just to see how it goes. Now all all I want from John is, look at the end of the day our people will withdraw alright?*

WALSTER: *Mm.*

GRILL: *but you know they gotta get something out of it, in fact nick some tenements,*

WALSTER: *Mm.*

GRILL: *that'd be good ...*

[163] Mr Grill and Mr Walster then had a conversation concerning the State Agreement and the ALP uranium mining policy before Mr Walster reintroduced the topic of Minister Bowler.

WALSTER: *So, I think you were about to say ah,*

GRILL: *Yeah.*

WALSTER: *what it is you need, from John.*

GRILL: *Well all I really need from John and I explained it to him, is that, but I don't know really whether he really if he understood it because there was another group that had an application in this area*

WALSTER: *Yep.*

GRILL: *and when he was around for tea about two weeks ago, I brought this subject up.*

[164] Mr Grill then detailed his discussions with Mr Bowler at the dinner meeting on 26 July 2006 regarding the Yeelirrie matter and the options available to Mr Bowler in respect of the PMA plaints that were before the Warden's Court, before Mr Walster said:

WALSTER: *Uhm, I I agree because if he feels he needs to there's an opportunity to wait*

GRILL: *... our client's not going to give any trouble anyhow, apart from they'd like to come to some arrangement with BHP if they can.*

WALSTER: *Mm, mm.*

GRILL: *And all I'd like John to do is to give give BHP some encouragement.*

WALSTER: *(laughs) Okay.*

GRILL: *Well I mean*

WALSTER: *(laughs)*

GRILL: *he's prepared to talk informally to me about withdrawing,*

WALSTER: *Okay.*

GRILL: *he should be prepared to talk to BHP informally but for Christ sake, do a deal with them. So, ah Cloughie's other concern initially was that it might need legislation and if it needs legislation then that will throw into stark relief question of legislating against uranium mining altogether.*

WALSTER: *Mm.*

GRILL: *Now I mean this is all subject to verification of course but uh our clients have got an opinion from Gadens that says if you can do all of this*

WALSTER: *Without ...*

GRILL: *without legislation and it would just leave the mining agreement sitting there as a, as an empty shell, now as I say also with verification you'd need to look at it, run it past the state solicitors office if you want to*

WALSTER: *Yeah.*

GRILL: *but it's just something that could be done. Yeah I mean if they can be encouraged to do that, then there's no more court actions uh, everyone I would have thought could, could uh walk away happy.*

WALSTER: *Uh, you know I'm not in a position to negotiate for BHP, if if they said look we're not interested in in uh land tenure, changing the land tenure arrangements and they move, they'll adopt a adopt a position that ah, provides for some costs that you know PMA have incurred due to this process. Is that still something that your clients are considering or are they moved away from that now?*

GRILL: *Oh I think they've got that.*

WALSTER: *Okay.*

GRILL: *They'd prefer to get some tenement.*

WALSTER: *Sure.*

GRILL: *Uhm*

WALSTER: *Sure.*

GRILL: *And I would have thought it was good state policy that freed up some tenements but*

WALSTER: *It's always good ... policy.*

GRILL: *uh but yeah they'd I mean they'd ...*

WALSTER: Yeah okay.

GRILL: *And uh I think Cloughie who was initially not so strong ...came back and said oh they've got the other proposition and it might be better.*

- [165] By 17 August 2006 Mr Grill and Mr Burke had heard nothing firm back from BHPB and so at about 10:22 a.m. Mr Burke rang Mr Fletcher who was in a meeting, before advising Mr Grill by email.⁶³ In this email Mr Burke also expressed a desire to settle an options arrangement (shares) with Mr Smith which they were told would be made available to them. Mr Grill, however, preferred to wait until they were in a slightly stronger position with Mr Smith before making the arrangement.
- [166] At 11:45 a.m. Mr Burke again emailed Mr Grill telling him that Mr Fletcher rang him back and told him the Yeelirrie matter was under active consideration and would be decided in Adelaide.⁶⁴
- [167] Also on 17 August 2006 in a series of emails commencing at about 12:45 p.m. Mr Smith received an email from Mr Robert Edel of Gadens, the legal firm representing PMA in their action against BHPB over the exemption applications in the Warden's Court. At the end of Mr Edel's email to Mr Smith he says: "Lastly, I was told by WMC's lawyer yesterday that the Minister terminated the Victory Street applications on Tuesday pursuant to s111A. Have you been informed of that?".⁶⁵
- [168] At 1:11 p.m. Mr Smith forwarded that email to Mr Grill and Mr Burke asking: "At the end of the email there is a reference to the BHPB lawyer claiming that the Minister has terminated PMA's (Victory Streets [sic]) applications. We haven't been told of this. Is this perhaps why BHPB have delayed responding to you?".
- [169] At 2:33 p.m. Mr Burke responded to Mr Smith saying: "I would be very surprised if the Minister has dealt with this matter as suggested by Rob Edel but no doubt Julian will raise this with the Minister and get back to you ASAP".
- [170] Mr Grill responded at 10:30 p.m. by saying: "Pleas [sic] excuse my ignorance, but what are the Victory Street applications?". Mr Smith responded the following morning by advising Mr Grill that: "Victory Street Pty Ltd is the subsidiary of PMA that has made the EL applications at Yeelirrie".
- [171] Three days earlier on 14 August 2006 Mr Michael Hunt of "Hunt and Humphry" the legal firm representing PMA's interests in the ELAs over Yeelirrie, had received correspondence from Minister Bowler's office terminating the Victory Street ELAs. He appeared to have forwarded that letter to Mr Smith by way of email on the same date. Mr Smith, however, seemed to remain ignorant of the termination, suggesting that he had not received the Hunt email.⁶⁶

- [172] Mr Smith appears to have received confirmation of the ELAs termination on 18 August 2006 and seems to have become somewhat distressed by what had occurred as evidenced by his comments in an email.⁶⁷
- [173] On 25 August 2006 Mr Clough advised Mr Grill that BHPB would not consider any settlement in relation to this matter as their position (BHPB) was both legally and morally strong.⁶⁸
- [174] On 4 September 2006 Mr Smith advised both Mr Grill and Mr Burke that PMA had lodged new ELAs over other parts of the Yeelirrie State Agreement area using a new PMA subsidiary company called "Use It or Lose It" Pty Ltd.⁶⁹
- [175] In a series of emails commencing on 3 September 2006 Mr Grill emailed Mr Smith at 10:07 p.m. on that day saying:

Can you do a check to ensure that the Victoria [sic] Street tenements have in fact been the subject of a Section 111A decision by the Minister as it is being maintained that the decision has not yet been made and conveyed to you.

*This enquiry by me to you is for clarification only. Please don't get your hopes up over this as I still believe that the Minister intends to exercise his discretion against PMA. He feels bound to, for reasons that I shall discuss with you privately.*⁷⁰

- [176] At 10:51 a.m. on 5 September 2006 Mr Smith forwarded the copy of the termination letter Mr Hunt had received from Minister Bowler to Mr Grill. Mr Grill then forwarded the email to Mr Burke at 8:14 p.m. saying:⁷¹

Brian,

When you see John tomorrow you might give him a copy of this letter which shows that John did use his powers under sec 111A of the Mining Act to terminate the PMA Victoria [sic] Street tenements.

John has maintained in my last 2 conversations with him that although he intends to use his powers under sec 111A he had not yet done so.

It was a pointless act in any event as it does not dispose of the Wardens [sic] Court applications for forfeiture of the BHP tenements and PMA can and will simply apply for other tenements in place of the ones terminated.

All John is doing, if he persists, is building a dubious record for application of the rarely used Sec 111A. It wouldn't be judicious to put it to him in these terms though. Maybe just give him the copy of [the] letter and leave it at that.

(emphasis added)

[177] On 6 September 2006 Mr Grill emailed Mr Burke an agenda of items for Mr Burke to discuss with Minister Bowler that day.⁷² Item three on the agenda was to discuss PMA. Mr Grill wrote:

PMA—Exercise of Section 111A of the Mining Act powers to terminate PMA's EL applications. I sent you an e-mail on this last night. It is simply a matter of showing John a copy of the letter that he sent to PMA terminating the EL's under Section 111A. There were two sets of EL applications over the BHP Yeelirrie tenements. One by PMA and one by Metraloops [sic]. He may have confused the 2.

[178] On 6 September 2006 between 6:03 p.m. and 6:47 p.m. Mr Burke and Minister Bowler met at Mr Grill's residence. Mr Grill was not present. The meeting was lawfully recorded using surveillance devices. At 6:37 p.m. during the meeting Mr Burke raised the subject of Yeelirrie and the following conversation occurred:

BURKE: ... Yeelirrie, Julian asked me to give you this, the copy of your letter behind it is behind it. You know the one you thought you didn't sign? (long pause)

BOWLER: Yeah no, this, (long pause) that was uhm, there's two lots of applications.

BURKE: Yep, there are.

BOWLER: This is the first one, and the second one I was holding up until I spoke to Julian.

BURKE: Well,

BOWLER: That's the, PMA ones.

BURKE: No. They're the PMA ones. The ones you're holding up are the other ones. I think it's just a mix-up.

BOWLER: Oh that's what, right.

BURKE: Yeah.

BOWLER: Tim told me, these were the

BURKE: See Michael Hunt is the PMA lawyer.

BOWLER: Yeah, I thought he was acting for both.

BURKE: Oh he may I didn't know. Anyway Julian gave it to me, and he says the Victorian lease, whatever it is, are the, are the PMA ones.

BOWLER: Why can't they put em in their own fucken name? 'Cause they're running dodgy deals but anyway ...

BURKE: Anyway mate (laughs), I'm just giving it you,

BOWLER: *The other thing is, just quickly, on*

BURKE: *Yeah.*

BOWLER: *a lot of these people, my attitude is mate, a hundred years ago they were classed as claim-jumpers and were run out of town*

BURKE: *Yeah.*

BOWLER: *now it's the way to make money in mining.*

BURKE: *Yeah. Uhm,*

BOWLER: *That's what it ...*

BURKE: *I work with Julian, I'm a very loyal person, and I don't want to comment on that, I'm, I've given you that,*

BOWLER: *You know as a, eh not as the Minister, the Minister would never say that publicly, 'cause he actually*

BURKE: *Well mate let me just tell you*

BOWLER: *but I'm saying to you as John Bowler,*

BURKE: *Alright, well let me*

BOWLER: *that you know !!!,*

BURKE: *just tell you*

BOWLER: *I I have a bad taste in my mouth ...*

BURKE: *Let me just tell you what I said to*

BOWLER: *fly-by-nighters who never ever want to,*

BURKE: *That's right.*

BOWLER: *all they ever want to do is use the Act,*

BURKE: *Yeah. Well,*

BOWLER: *right,*

BURKE: *You're dead right.*

BOWLER: *and a hundred years ago they were called claim jumpers and were,*

BURKE: *Yeah.*

BOWLER: *and the prospectors rattled tins and they were ran out of the community.*

BURKE: *Mate, let me just tell you what I told Julian as Brian Burke, I said Julian, Roderick Smith's a greedy c..t.*

BOWLER: *(laughs) Yeah.*

BURKE: *But, I mean you take South Boulder, they've got a claim now which the fucken Warden has given to the, this claim jumper who works out the back of his car. You, it'll come before you in due course, doesn't matter, it's unimportant. I, I don't disagree with you, but Julian has this thing, bee in his bonnet and he's right too, that BHP and Rio use their size, their might and their power to tie up areas and areas of land for twenty, thirty, forty years.*

BOWLER: *You can't say that, when one company's going to mine a hundred and ten million tonne this year and the other one's gonna mine a hundred million tonne.*

BURKE: *Yes, you can.*

BOWLER: *They're not sitting on, well you know when you do it, mining that, you need, if you've got a billion tonne or two billion tonnes,*

BURKE: *Mm.*

BOWLER: *that's only twenty years.*

BURKE: *Yeah.*

BOWLER: *So what do you say, oh well you know you've got all this huge, ah port, you've built all this massive railway, you've built the towns,*

BURKE: *Eh,*

BOWLER: *and, you should only have ten years ahead of you,*

BURKE: *Hey mate, mate, eh*

BOWLER: *None of these other people have ever*

BURKE: *All*

BOWLER: *mined at, ever mined that.*

BURKE: *Mate, let me just tell you,*

BOWLER: *Or never will.*

BURKE: *all of those, railways, ports and other infrastructure were project financed. They did not put in one dollar of their own money.*

BOWLER: Well you know, what whatever,

BURKE: Secondly, they've been paid back for that investment, twelve times over. Thirdly, I don't want to argue about the future mining of different areas, I'll just direct your attention to one thing, and that's the way they've high-graded the iron ore deposits, leaving behind areas which they still stand over like the dog on the river Styx and won't let other people access.

BOWLER: But they're not doing that now, they're they're really, they're low-grade, they're they're spreading the grade out, and I know the previous owners did.

BURKE: Yeah.

BOWLER: They think the ownership has changed well not so much in BHP but the other one. They are spreading it out, particularly Rio ... But uhm

BURKE: Well you're the Minister, you know better than me
...⁷³

(emphasis added)

[179] After the meeting Mr Burke emailed Mr Grill advising that Minister Bowler was reluctant to accept the proposition (that he had terminated the wrong applications in error) but now thought that he accepted it.⁷⁴

[180] On 28 August 2006 Mr Grill and Mr Smith met at Mr Grill's home where they discussed Yeelirrie.⁷⁵ Mr Smith commenced the conversation by seeing if Mr Grill could cast any light on Mr Bowler's thinking on Yeelirrie. Mr Smith explained that the reason PMA lodged the ELAs was to be first in line should the land become vacant as a result of the plaints because there was no point in plainting if there was somebody in front of them.

SMITH: I I thought it's uh, be a good idea to, to catch up where, where we are. And uhm, so if you can, I dunno if you can cast any light on, on John's, thinking or whatever but, the curious thing is, uhm, is that uhm, now where we're at with with Yeelirrie in terms of sort of, the Mining Act and litigation or whatever, uhm, as you know we objected to expenditure exemption applications

GRILL: Mm hmm.

SMITH: by BHP. And plainted the tenements and then lodged an E L over the ground.

GRILL: Mm.

SMITH: *And the reason for lodging the E L is that, if the ground should become vacant by the plaints, then uhm, we'd be first in line. Because there's no point in plainting it if if somebody else is*

GRILL: *Exactly.*

SMITH: *in front of us. And*

GRILL: *Yeah.*

[181] Mr Smith again, later in the conversation, reiterated that PMA wanted to be first in line.

SMITH: *Well I think at the end of the, the day they would but it hasn't, it has it's not nearly got to that point. 'Cause all he's done is terminate an E L application and it's open to anybody, to put in a fresh one as we in fact have. And we'll just keep putting them in and he can keep knocking them out every few months if he wants. But that doesn't get him anywhere, it doesn't get*

GRILL: *No.*

SMITH: *BHP anywhere because people can just, anyone could.*

GRILL: *No.*

SMITH: *We just want to be the first in, in line.*

[182] Mr Grill then explained to Mr Smith what had occurred during the dinner with Mr Bowler on 25 July 2006 and the outcome.

GRILL: *And uhm, he uh, he'd gone away. So, John came around for dinner and Brian and I both briefed him on the issue and he'd had a background on it before that because*

SMITH: *Mm.*

GRILL: *he indicated to me that he wanted you to,*

SMITH: *Mm.*

GRILL: *withdraw remember?*

SMITH: *Yeah.*

GRILL: *And then, he said oh well uhm, now what's the other company, that he*

SMITH: *Metraloop.*

GRILL: Metraloop yeah. He said well, we're gonna use section hundred and eleven A in Metraloop and I said oh well, fair enough but, uh there's a distinction

SMITH: Mm.

GRILL: with PMA and I think we, advised you of that.

SMITH: Mm.

GRILL: Brian sent a note to him just to, confirm the advice we'd given you. So the next thing was I uh, I spoke to Tim Walster just to confirm all of that and give him a proper briefing. Then we find out there's this letter floating around which hadn't sort of hit the light of day

SMITH: Yeah.

GRILL: for some reason or other.

SMITH: Which really confused things yeah.

GRILL: Yeah, so but we actually, it was clear that, John was either confused or wasn't telling us the truth because, he was around here on the twenty sixth of July. He sent the letter out to Metraloop on the twenty fifth. He'd sent the same letter to you on the same day but he didn't tell us that when he was here.

SMITH: Oh. It did, is he ...

GRILL: (aside) Do you mind if I put something underneath ...

SMITH: (aside) Oh I'm sorry ... oops.

GRILL: (aside) ...giving you all these bloody things aren't they.

SMITH: (aside) Oh god.

GRILL: Yeah. Go on.

SMITH: Is he feeling sort of uh conflicted by uhm, maybe he feels that's sort of inside information he shouldn't be sharing.

GRILL: Don't think so but I mean he contacted me on the issue. And then I contacted you, it wasn't the other way around.

(emphasis added)

[183] A new strategy for PMA was discussed and Mr Grill agreed to argue that new case to Mr Bowler on PMA's behalf. Mr Smith raised the issue of giving Mr Grill and Mr Burke a "good swag" of options as payment and that Mr Grill would be speaking to Minister Bowler in the next day or two.

GRILL: *Okay, we'll work on that basis.*

SMITH: *... bigger and yeah. And as I said to you before you know we'll give you some, a good swag of options or something if we, you know, if we know this is going our way we can ... get some good "leverage" in there.*

GRILL: *Okay, so we'd be keen to take up some options.*

SMITH: *Mm.*

GRILL: *You want to give that a bit of thought as to how many et cetera?*

SMITH: *Yeah.*

GRILL: *Okay. Alright. You give it some thought and I'll talk to you next, next week.*

SMITH: *Sure.*

GRILL: *And I'll talk to John in the next day or two and I'll let you know what*

SMITH: *Yeah.*

GRILL: *Okay.*

SMITH: *... you can reassure him we're not, not the enemy but*

GRILL: *No.*

SMITH: *we can see a sort of uhm, a solution.⁷⁶*

3.2.1 Information Provided by Mr Corrigan

[184] During the course of the investigation the Chief of Staff to Mr Bowler, Mr Corrigan, agreed to provide information to the Commission on the basis that the information he provided was not used as evidence against him. A deposition was obtained.⁷⁷

[185] Mr Corrigan stated, in his deposition, 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 Eyre, and that Mr Grill had been Mr Bowler's campaign manager when he ran for election in 2000.⁷⁸ Mr Corrigan was also aware that Mr Grill was a lobbyist who worked with Mr Burke, and stated 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.

- [186] Mr Corrigan provided evidence that, shortly after commencing as Chief of Staff, Minister Bowler had given him an instruction, that was to apply to the whole Ministerial office, that no correspondence from Mr Grill or Mr Burke was to be recorded in the correspondence system. Mr Corrigan was also aware of an instruction Minister Bowler had given directly to the administrative staff in the office that phone messages from Mr Grill or Mr Burke were not to be conveyed via email to the Minister (contrary to normal practice), but they were to be written on a piece of paper and handed to Mr Bowler personally. Both of these practices were adopted to circumvent Freedom of Information processes.
- [187] These practices were the subject of a Commission report to the Procedure and Privileges Committee of the Legislative Assembly, tabled in the Parliament of Western Australia on 6 November 2008.⁷⁹
- [188] Regarding the Yeelirrie matter, Mr Corrigan stated in his deposition (paragraphs [104]-[120]):

Another issue that came before the Minister and myself was a matter concerning Precious Metals Australia (PMA) and a mineral deposit at Yeelirrie.

I had previously come across PMA before whilst I was working in Peter Cook's office. On that occasion there was a dispute between PMA and Xstrata over vanadium deposits at Windimurra.

The Yeelirrie matter involved PMA applying for an exploration License [sic] over an area of land that was already covered by the BHP Yeelirrie State Agreement. Such applications can be taken by a third party to gain ownership over a mineral tenement owned by someone else who had not fulfilled their obligations under the Mining Act.

There was a minute from the agency (DoIR) recommending that John indicate to PMA that he would terminate any successful application. I recall a discussion with John in which he indicated that he would like to try and persuade PMA to withdraw their application. This would have been a better position for the Government for various reasons.

I was aware that Julian and Brian represented PMA.

I believe that John met with Julian Grill in an attempt to have PMA withdraw their application. This request may have been made at the lunch meeting, or at some other time. I don't recall ever being present when John spoke to Julian or Brian about it.

PMA in fact did not withdraw their exploration application, but it was later determined that the application would be terminated by the Minister under section 111A of the Mining Act (public interest).

I believe that Julian Grill at one stage told me that there was a commercial matter between PMA and BHP, and that, if the State prematurely intervened, would prejudice PMA.

I am aware that they, Julian and Brian, wanted the decision to be held off, or another decision to be made.

A letter advising the company that the exploration licence was terminated was prepared for signing by the Minister. I am aware that Tim Walster had given the letter to the Minister, however John returned the letter with a please discuss note on it. I think that it took some time for Tim to go back to John with the letter.

In the end Tim and I took the letter before the Minister saying that the letter had to be signed. I did this as there was some delay in the letter being signed.

We were aware that from time to time plaints were withdrawn after the plaintiff had reached a settlement with the titleholder. It was questionable whether there was anything wrong with that particular behaviour but John had expressed a view that that was behaviour that he did not endorse and that he would not assist.

Once the letter was signed I am certain there was no delay in sending it out. I am not aware of any efforts to delay sending the letter or to prevent it being sent after it was signed.

I don't recall getting lobbied, or getting contact from Julian or Brian in regards to PMA, but I may have done.

On 13 February 2007 I was shown what appeared to be a faxed document sent to John Bowler's Ministerial office. The date on the fax header is 09/08/2006, and the name J Grill was also included on the fax header.

The fax contained information on several topics including "Henry", "Murchison Metals", "PMA and Yeelirrie", "Kimberley Diamonds" and "PMA Metraloop and Yeelirrie".

I can't recall receiving or seeing that document before, but I may have done.

CHAPTER FOUR

COMMISSION HEARINGS

4.1 Introduction

- [189] In February and March 2007 public hearings were held into a number of matters under investigation. One of those matters was Yeelirrie. Three witnesses were then examined in relation to the Yeelirrie matter, being Mr Bowler, Mr Corrigan and Mr Grill.
- [190] Further (private) hearings were held in October 2008 and July 2009. Mr Burke was examined about Yeelirrie on 14 October and Mr Grill gave further evidence about it on 15 October 2008. Further evidence was given on the matter by Mr Clough on 8 July, and Mr Fletcher and Mr Monkhouse on 9 July 2009.

4.2 Mr Bowler

- [191] Mr Bowler's examination commenced during the afternoon session on 26 February 2007. He was examined about Yeelirrie during the morning session on 27 February 2007, by Counsel Assisting.
- [192] Mr Bowler said he was aware that Mr Burke and Mr Grill represented PMA and that PMA and some other companies had pegged tenements over the Yeelirrie State Agreement area that was held by BHPB.⁸⁰ Mr Bowler acknowledged that as the Minister for Resources he had a power under section 111A of the *Mining Act 1978* to intervene and terminate tenement applications which were not in the public interest.⁸¹
- [193] Mr Bowler had knowledge of the PMA tenement applications that came before him and he agreed with the proposition that the applications had no chance of success.⁸² He claimed that at one stage there was the possibility of negotiations occurring between PMA and BHPB, and also that he had a consciousness of companies that tried to extract compensation from other companies using a process known as "plainting". Mr Bowler stated he had been talking to Mr Grill about the PMA applications and was told that there was a chance that BHPB might let PMA mine the area, although he told the Commission he was being sceptical about it. He said that ultimately, on 25 July 2006, he dismissed the PMA applications using section 111A of the *Mining Act 1978*.⁸³
- [194] Mr Bowler claimed to believe that there were two separate applications over the State Agreement area, those of PMA, and those of another company called "Use It or Lose It". He stated that in respect to the PMA applications his exercise of section 111A was delayed because of advice he received that BHPB and PMA were negotiating, and, if there was a prospect of mining, then that was good for Western Australia.⁸⁴
- [195] The recording of an intercepted telephone conversation between Mr Grill and Mr Bowler that occurred on 23 May 2006⁸⁵ was played during a public

hearing on 27 February 2007. Mr Bowler was asked several questions and responded, as detailed below.

COUNSEL ASSISTING: *Wasn't it clear to you that Mr Grill's client wanted to use this application as part of the negotiating processes with BHP?---To try and get some land to mine that mine.*

Yes, but this application was in fact one that, on your view, had no chance of success?---Not unless BHP were prepared to talk to them and he was indicating that BHP were prepared to talk to them. If they can come to a settlement, well and good. If not, I'll invoke 111A, which I did.

Wasn't it apparent to you that what they were doing was using that as part of their negotiating ploy with BHP? We have this application that is still before the Minister. Wasn't that clear to you?---No, no, I - - -

*Well, what did you think Mr Grill meant when he said, "If we can screw a little bit out of BHP"?---When - it looks like that in that sort of cold - hard cold light of day, it sounds like money but I said to Julian - I don't know if you've got that tape there but I thought PMA were opportunistic on this and I didn't want to be a part of that and then - but he - I remember him saying, "Look, no, there's a prospect of a mine developing there and if they can come to an agreement to develop the mine, we should," and I agreed and if we - that could happen, that would happen.*⁸⁶

[196] The recording of an intercepted telephone conversation between Mr Grill and Mr Bowler which occurred on 10 July 2006⁸⁷ was also played during the public hearing. Mr Bowler was asked several questions and responded, as detailed below.

COUNSEL ASSISTING: *There's no suggestion of a mine at that stage, is there?---Not in that conversation - - -*

No. Indeed, you seem to be very conscious of the risk that - I think the phrase you use is gouging, that this could be PMA using a position to extract in an unfair money from BHP?---Yep. Look, this happens constantly.

Well, I'm sure people try to do it constantly but you will be very careful, wouldn't you, not to lend your hand to it as Minister?---That's what I was saying there and - - -

Yes?--- - - - in the end I used 111A to reject PMA's application.

Eventually and we will come to that but you can see what Mr - clearly what he's looking for here is some sort of monetary settlement. It may not be big money but it's money, isn't it?---If the companies could come to an agreement, great, but I was under the impression that initially they were talking about PMA coming in there to explore on that area which hadn't been widely explored because it was tied up in the state agreement that they could get access to a mine. I didn't know whether those negotiations were then falling down and then PMA was sort of saying, "Well, if we can't have a mine, you know, now that we've gone this far can we have some our costs back?" that's up to them.

But they shouldn't be able to use a completely unmeritorious application to try and extract some costs, should they?---Well, that's - you know, that's up to them. I was still - - -

Well, it's not entirely up to them?--- - - - hopeful that there could be negotiations for a mine and that was ongoing up till then.

But it's not up to them is it, Mr Bowler, because you have the power as the Minister to stop and unmeritorious claim?---Which I did.

But shouldn't you do that as soon as you come to that conclusion and not defer it for the commercial advantage of one of Mr Grill's clients?---Look, I believe the speed with which I acted is probably quicker than the average.

But you see in this call what you are saying, if we go to the top of page 2, Mr Grill makes it perfectly clear what he is trying to achieve for his client.

If you could just slow down the process, so give us some time to do that -

that is a settlement -

and not encourage BHP too strongly, just to close the door then we might just - it's not a big matter, it's only a little matter. If you could just slow the process down a bit and don't encourage them too much we will just get that settled and tuck that away and get the whole thing off the agenda.

Now, what he's suggesting you do would be quite improper, wouldn't it?--- Not if there was a prospect of a mine being developed.

But there's no suggestion of the prospect - - -?---Not in that part there but I knew before that there was talk or he told me and I spoke to BHP or a representative of BHP also, that there was some talk but in the end that - those negotiations - talks broke down.⁸⁸

(emphasis added)

[197] Later during the hearing Mr Bowler provided a succinct explanation for his agreement to defer the termination of the PMA ELAs.

... I'm uncomfortable with people using the plaint system, which isn't here, but using this as a similar plaint system of pegging and then forcing a table - a party to the negotiating table just to get money. I was allowing it to continue because I believed there was a prospect for exploration which might lead to a discovery and then jobs and the development of wealth.⁸⁹

(emphasis added)

[198] Following this explanation, Mr Bowler went on to explain how he did not like confrontation, found it difficult to say no to people, and preferred not to say "no" to Mr Grill especially, as Mr Grill would then simply present another argument.⁹⁰ The following exchange then occurred between Counsel Assisting and Mr Bowler.

Well, did you intend to slow down the process - - - ?---No, I didn't.

- - - as Mr Grill asked you to?---If - whilst I thought there was a prospect of a mine, I wasn't going to jeopardise that. As I've indicated there, I find it abhorrent that companies use the mineral claim process to get money rather than use it for genuine mining. There's always a careful balance to make sure you don't cross from one to the other.⁹¹

(emphasis added)

[199] Mr Bowler acknowledged the existence of “other … applications … over the Yeelirrie land”⁹² that he had used section 111A of the *Mining Act 1978* to terminate. During the hearing he was questioned about the manner in which he dealt with these applications.

Were they all dealt with at the same time?---I can't recall.

Was there any difference in the way they were dealt with in terms of timing?---Well, the only difference with PMA, the first application by PMA, was the advice that they were talking to BHP about the prospect of getting onto the ground and doing exploring. The other companies weren't doing that.⁹³

[200] Mr Bowler was not able to recall the exact names of the other applicants whose applications he had terminated under section 111A. He could recall using that section to terminate the “Use It or Lose It” applications which he claimed to have later realised were associated with PMA (The “Use It or Lose It” applications were, however, not made until after the termination of the Metraloop and Victory Street applications.).

[201] Counsel Assisting then played an excerpt of the conversation recorded during the dinner meeting of 26 July 2006 at Mr Grill’s home.⁹⁴

[202] Counsel Assisting raised with Mr Bowler the proposition that it was during this dinner meeting that Mr Grill, for the very first time, had raised the alternative prospect of a mineable resource in that part of the land. Mr Bowler claimed that Mr Grill had mentioned several times the prospect of getting access to the land which might then lead to the development of another mine.⁹⁵

[203] Counsel Assisting suggested to Mr Bowler that the application was being used by Mr Grill as a ploy to negotiate with BHPB, and if Mr Bowler dismissed the applications, that would take away all of Mr Grill’s “leverage” to negotiate. Mr Bowler claimed that he interpreted the term “leverage” as used by Mr Grill, to mean “prospect” for “getting agreement with BHP...”⁹⁶

[204] Mr Bowler claimed that the PMA applications were unmeritorious if they were being used as “leverage” to extract compensation from BHPB. However, if there was the prospect of a mine being developed, then there was merit with the application, and, as such, he considered that, in his capacity as Minister for Resources, it was part of his function to make sure that mining happens.⁹⁷

[205] Mr Bowler maintained this stance throughout the examination.

[206] Counsel Assisting then examined Mr Bowler on the termination of the Metraloop applications under section 111A of the *Mining Act 1978* and the agreement he made with Mr Grill and Mr Burke to recover the documents on the morning of 27 July 2006.

[207] A further excerpt of the conversation recorded during the dinner meeting of 26 July 2006 at Mr Grill's home was played in which Mr Bowler told Mr Burke and Mr Grill that he would endeavour to get the letters he signed terminating the Metraloop application back first thing the following morning.⁹⁸ Mr Bowler claimed to be unable to recall what he meant when he said "It's the first thing I'll do" and that in the end he did not think that he recovered the document. He explained his agreement to try and recover the letters as a politician just saying "Yes" to people.⁹⁹

[208] Mr Bowler was asked if he had received the facsimile that Mr Burke had indicated he would send him the following morning. He claimed to not recall the document and qualified this by saying "No, I don't think so".¹⁰⁰

[209] Mr Bowler was then shown the document Mr Burke faxed to Mr Bowler's office at 9:21 a.m. on 27 July 2007.¹⁰¹ Mr Bowler again claimed that to not be able to recall the document saying: "Yes. I – look, I can't recall it now but I assume that was sent to my office. Whether I got it or Simon or ...".¹⁰²

[210] Mr Bowler was then shown an email message from Mr Grill to Mr Smith at 9:38 a.m. on 27 July 2006 in which Mr Grill referred to Mr Bowler terminating the applications of another competitor company.¹⁰³ When the proposition was put to Mr Bowler that what he had agreed to do was to pull back applications of a competitor to PMA he said that was Mr Grill's impression. Mr Bowler said he did not in fact recover the letters.

[211] Mr Bowler went on to speak about not doing all the things that he agrees to do in the conversations he has with people. He claimed if he were to do everything he agreed to do he would send the "State budget ... broke".¹⁰⁴ These comments by Mr Bowler appear to have been made in the context of a politician making promises to people but having no intention of ever keeping them.

[212] When confronted with the evidence in the same email of Metraloop being a competitor company and that Mr Smith's advice to Mr Grill was to let the Metraloop refusals flow through because that would leave PMA as the only party to negotiate with, Mr Bowler, with either genuine or feigned confusion queried:

... is Metraloop PMA as well, is it?

No. Metraloop is - that's the point I was making to you. At the dinner the previous evening, what I suggest was occurring was not that you recovered the PMA applications but that there were other applications. They thought they set a bad precedent so they wanted you to recover those terminations?---No, I didn't.

That's what they're saying here, and then they say, "Well, that's not such a bad thing because it will give us priority." Didn't you understand that?--- Yeah, well, I didn't, no. I was never going to, you know, pull that back.

*You were never going to do it?---No.*¹⁰⁵

[213] Mr Bowler was played a recording of the telephone message left for him by Mr Grill at 10:51 a.m. on 27 July 2006,¹⁰⁶ in which Mr Grill explained that if the company involved was Metraloop, the Minister's refusal of the application might well be beneficial to PMA and suggesting Mr Bowler might (therefore) reconsider it on the basis that he might let the refusal go through. Mr Bowler was asked if that explained why he did nothing to recover the letters. Mr Bowler claimed he could not recall the message and said "No, I don't think so" when it was put to him that this telephone message explained why he did not recover the termination letters.

[214] Next Mr Bowler was played the telephone conversation between him and Mr Burke commencing at 4:04 p.m. on 27 July 2006:¹⁰⁷

BOWLER: *On that matter with uh uh BHP uhm*

BURKE: *Yeah.*

BOWLER: *uh it was that company that I said that I'd*

BURKE: *Oh yeah.*

BOWLER: *uhm signed off on you know so they're out of the equation, uhm*

BURKE: *Yeah.*

BOWLER: *I do worry a bit ah that you know uhm that could be seen as almost uhm you know industrial blackmail or*

BURKE: *Well*

BOWLER: *what but you know uhm I'll I'll proceed and see how we go on that.*

BURKE: *Well let me let me give you a, a bit of a political steer. You should present it as being, in the Government's interests not to once again be taking the side of a big company against a small company, and so what*

BOWLER: *Yeah but what you know you know okay, yeah but what I'm saying is two lots of people have over pegged that area, right?*

BURKE: *Yeah but different, they were different peggings.*

BOWLER: *Yeah but you know, there two lots of people who want that land.*

BURKE: *No no no.*

BOWLER: One lot I've just well one lot I've just

BURKE: No no no no that's wrong. Two lots of people did certain things in respect of the land but they did different things. They didn't plaint, they didn't plaint BHP. They didn't lodge an objection to the fact that they haven't spent. I'll I'll get a note to you on this. I thought that straight away, but that's not right, I said to Julian well how can you dismiss one and not the other, and he got a paper from Roderick Smith which showed they're completely different issues.

BOWLER: Okay.

BURKE: Maybe I'm not being persuasive but I'll make sure

BOWLER: Well y-y-y you know look I'm I'm I'm just, okay, I haven't looked at the Roderick one, all I knew was I didn't know that it was any different to the other one I've just knocked on the on the head.

BURKE: Yeah well just keep an open mind.

BOWLER: Oh I am, I am just

BURKE: Presuming I'm right, yeah

BOWLER: Giving you a note of caution that ah uhm I have some worries about it.

BURKE: Well let me say this to you. If this

BOWLER: And I think what's going to have to happen is BHP, of course someone can go to see them and ask them to do it, BHP may, I think, have to make an approach.

BURKE: Well let me say this to you, presume you're right and they're both the same until I can get these couple of paragraphs of explanation and then my predicted course would be for someone to raise with BHP informally this solution.

BOWLER: Yeah.

BURKE: But lets keep an open mind until I get this explanation to you.

BOWLER: Oh I have, yeah no I'm I'm not closing it off I'm just ah passing on ...

BURKE: Just presume yeah presume you're right let's say you're right and I'm happy to accept that, I'll get this explanation to you.

(emphasis added)

[215] Importantly in this conversation between Mr Burke and Mr Bowler, Mr Bowler clearly confirms that he made some effort to examine the termination documents he signed two days earlier, or, at the very least, confirm the name of the competitor company, when he said:

BOWLER: *uh it was that company that I said that I'd*

BURKE: *Oh yeah.*

BOWLER: *uhm signed off on you know so they're out of the equation, uhm*

Also of importance in this conversation is where Mr Bowler said:

BOWLER: *... I haven't looked at the Roderick one, all I knew was I didn't know that it was any different to the other one I've just knocked on the on the head.*

That statement by Mr Bowler strongly indicates that in his mind, at that time, he had not yet seen the PMA applications but believed they were no different to applications he had already terminated.

[216] Mr Bowler was asked what he meant by the term "industrial blackmail".

COUNSEL ASSISTING: *Well, Mr Bowler, going back to page 1 of that. You had a worry that this could be seen as almost industrial blackmail?--- Mm.*

What did you mean - - -?---And that's why I've said, you know - - -

What did you mean?--- - - - a few times - well, that's what I've said before about - that companies would peg it, not in an intention to get land, access to the land, but sort of get the company to give them money to go away.

You weren't satisfied that it wasn't industrial blackmail, were you? You had some worries?---I had some worries that it may be and I didn't want to be a party to that.

Weren't you worried that you were potentially being used for that very purpose?---I was worried about that.¹⁰⁸

[217] Mr Bowler was shown the facsimile sent by Mr Burke to his office on 28 July 2007 explaining the differences between Metraloop and PMA.¹⁰⁹ Mr Bowler said he could not recall having seen the document before.

[218] An excerpt from the meeting between Mr Bowler and Mr Burke at Mr Grill's residence on 6 September 2006 was played.¹¹⁰ During this excerpt it was made apparent to Mr Bowler that he terminated the PMA applications. Although this meeting was at Mr Grill's home, Mr Grill was not present.

BURKE: *... Yeelirrie, Julian asked me to give you this, the copy of your letter behind it is behind it. You know the one you thought you didn't sign? (long pause)*

BOWLER: Yeah no, this, (long pause) that was uhm, there's two lots of applications.

BURKE: Yep, there are.

BOWLER: This is the first one, and the second one I was holding up until I spoke to Julian.

BURKE: Well,

BOWLER: That's the, PMA ones.

BURKE: No. They're the PMA ones. The ones you're holding up are the other ones. I think it's just a mix-up.

BOWLER: Oh that's what, right.

BURKE: Yeah.

BOWLER: Tim told me, these were the ...

BURKE: See Michael Hunt is the PMA lawyer.

BOWLER: Yeah, I thought he was acting for both.

BURKE: Oh he may I didn't know. Anyway Julian gave it to me, and he says the Victorian lease, whatever it is, are the, are the PMA ones.

BOWLER: Why can't they put em in their own fucken name? 'Cause they're running dodgy deals but anyway ...

BURKE: Anyway mate (laughs), I'm just giving it you,

BOWLER: The other thing is, just quickly, on

BURKE: Yeah.

BOWLER: a lot of these people, my attitude is mate, a hundred years ago they were classed as claim-jumpers and were run out of town

(emphasis added)

- [219] In the next part of his examination Mr Bowler claimed he did not terminate the wrong applications. Mr Bowler was of the opinion that PMA had lodged applications under their own name which he had terminated, and they had then lodged further applications under the name "Use It or Lose It" which he also later terminated. In his conversation with Mr Burke, Mr Bowler appeared to be confused about what applications he had actually terminated and which he hadn't.
- [220] Mr Bowler was then shown two documents that had been located during the search of Mr Grill's home on 8 November 2006.¹¹¹ This document said:

The attached letter shows that you exercised your powers under Section 111A of the Mining Act to terminate the PMA Victoria [sic] Street tenements.

Unfortunately, the decision does not dispose of the Wardens [sic] Court applications for forfeiture of the BHP tenements – PMA can and will simply apply for other tenements in place of the ones terminated.

...

[221] Mr Bowler was then shown the second page of the document which was the Victory Street termination letter. He was asked:

He gives you that. You have a chance to look at it and you're clearly under the mistaken impression that you have terminated somebody else's applications - - -?---No, no, but I might have been saying to Brian Burke - - -

- - - and he says, "This is the PMA ones"?---In the confines of my office when I made that decision, I made that decision on the right grounds and that's what I made.

When you made that decision, are you saying you knew that was the PMA application?---I can't recall. I know PMA had more than one application in different names. It was confusing and at the end of the day, as soon as I realised there was no prospects for serious mining, I invoked 111A.

Yes, I understand that?---Now, if Brian Burke says, "Oh, well, I've made the wrong decision," well, that's his decision.¹¹²

[222] Mr Bowler expressed an opinion that there were three applications, those clearly from PMA, those from Metraloop, and those from "Use It or Lose It".

[223] Of note, however, is that there were no ELAs over the Yeelirrie area in the name of PMA. An attempt is then made by Counsel Assisting to clarify the matter with Mr Bowler.

No, he's not just saying that though, Mr Bowler - 1050, if we can just go back to the transcript - because what you clearly say to him - he shows you that letter and his note. You say there were two lots of applications. You say, "This is the first one. The second one I was holding up until I spoke to Julian"?---And BHP.

You say, "That's the PMA ones and he says, "No." You see that towards the - he says, "No. They're the PMA ones." Now, he's clearly talking about the ones he's given you in the letter. "They're the PMA ones. The ones you're holding up are the other ones." Clearly, he was indicating to you that you should have dismissed somebody else's but in fact you have dismissed PMA's ones, isn't he?---Well, he seems to be indicating that but I think that's what I intended to do anyway. Are you saying I made the wrong decision?

I'm not saying you made the wrong decision except in this regard: I am saying to you that you agreed to hold up this termination process at Mr

Grill's request in order to provide his client with "leverage"?---The prospect to negotiate and [sic] agreement with BHP.

You think that makes it okay?---I certainly do ...¹¹³

(emphasis added)

4.3 Mr Corrigan

[224] Mr Corrigan was examined about Yeelirrie during the afternoon session on 27 February 2007 by Counsel Assisting. During his examination Mr Corrigan essentially repeated the information provided in his witness statement.¹¹⁴

4.4 Mr Grill

[225] Mr Grill was examined in relation to a number of matters concerning Mr Bowler on 28 February 2007, including Yeelirrie.

[226] Prior to giving evidence Mr Grill provided a three-page typed document to the Commission endeavouring to clarify some matters he had identified by reading the transcript of the evidence of Mr Bowler and Mr Corrigan the previous day.¹¹⁵ The main matters raised in the document by Mr Grill were:

- (1) Mr Bowler had approached Mr Grill asking that he arrange for PMA to withdraw their Warden's Court application for forfeiture of the BHPB (Western Mining) Yeelirrie (uranium) tenements.
- (2) References were made to the PMA application as being unmeritorious and having no chance of success when he believed otherwise, and the implication that they were only brought for the purposes of seeking compensation.
- (3) Mr Bowler, Mr Corrigan and Counsel Assisting misunderstood that there were two distinct types of applications from PMA which they were dealing with, that the examinations proceeded on the basis that there was only one type of application, and that there was no appreciation that each type of application could be dealt with differently. Mr Grill said he believed that these misapprehensions led to confusion during the examinations.
- (4) The Commission made an assumption that use of section 111A of the *Mining Act 1978* was an every day event when in fact it was seldomly used.

[227] During his examination Mr Grill acknowledged to having a long standing friendship with Mr Bowler and to assisting him in his electioneering and fund raising activities.¹¹⁶ Mr Grill was questioned regarding an email from Mr Bowler's Electoral Officer, Ms Rosemary Braybrook, detailing two donations, one for \$2,000 and another \$2,500 to Mr Bowler's 2005 election campaign, both of which were recorded as coming from Mr Grill. The email was dated 15 February 2005.¹¹⁷

[228] Mr Grill had responded to that email saying: “Dear Rosemary, the \$2000 in my name is OK. But just so that John knows, it actually came from PMA”.

Mr Grill was asked and responded as detailed below:

*Is that right? The money came from PMA?---I don't know. I can't remember back that far.*¹¹⁸

Mr Grill later claimed during questioning that he had no reason for concealing the donation to Mr Bowler from PMA.¹¹⁹

[229] In respect to raising funds for Mr Bowler’s election campaign Mr Grill said there “was a three-man committee … that was raising funds for John”, consisting of, Mr Clough, Mr Ian Taylor and himself.¹²⁰

[230] Mr Grill was questioned regarding his involvement in a 2004 inquiry held by the Economics and Industry Standing Committee (EISC) of the Parliament of Western Australia entitled *Inquiry Into Vanadium Resources at Windimurra*, Report No. 10, 11 November 2004. Windimurra is a vanadium mine project that had been a joint venture between multi-national mining company Xstrata and PMA. Xstrata had closed the mine thereby depriving PMA of its income stream. PMA had at that time retained Mr Burke and Mr Grill to represent their interests in their battle against Xstrata. Mr Bowler was a member of EISC and was instrumental in causing the inquiry to be established.

[231] The inquiry tabled its findings on 11 November 2004 and made adverse findings against PMA’s opponent Xstrata. That Mr Smith was able to have direct input into the tabled report after Mr Bowler had provided Mr Grill with a draft copy of the Committee’s final report prior to its official tabling in Parliament, was the subject of an inquiry by the Procedure and Privileges Committee of the Western Australia Parliament Legislative Assembly. That inquiry ultimately found Mr Bowler in contempt of Parliament.¹²¹

[232] Also during the Commission’s hearings Mr Grill was shown an email sent to him from Mr Smith on 26 April 2005 that was entitled “Settlement Bowler”. The email said: “Herewith some courtesy letters I have sent today …”.¹²²

[233] The email had three letters attached, one to Mr Bowler, one to Mr Anthony McRae MLA who was Chairman of EISC during its inquiry, and one to Mr Norman Marlborough MLA. The letter to Mr Bowler thanked him for his assistance during the EISC inquiry. Mr Grill could offer no explanation as to why Mr Smith would have sent such a letter to Mr Bowler although he did acknowledge that the Committee had held an inquiry, and the final report of the inquiry itself was of value to his client, PMA.¹²³

CHAPTER FIVE

COMMISSION ASSESSMENTS AND OPINIONS

- [234] During the course of this investigation it has not been possible to conclusively identify in all instances whether the parties to a conversation or email were discussing the PMA ELAs, or the PMA plaints in the Warden's Court. These are separate and distinct processes. Although not being able to distinguish between these separate processes it has not caused any significant difficulties, but it does lead to uncertainty in some respects.
- [235] It appears that in 2005, fresh after their success against Xstrata, PMA decided to attempt to acquire the tenements held by BHPB under the *Uranium (Yeelirrie) Agreement Act 1978* (or "the State Agreement"). Mr Burke and Mr Grill were retained by PMA to assist in this venture and were to receive payment by way of a monthly retainer and a "success fee". The terms of the "success fee" appear to never have been fully settled and reward by way of PMA options was discussed towards the latter stages of the Yeelirrie matter by Mr Burke, Mr Grill and Mr Smith.
- [236] PMA's strategy to acquire the Yeelirrie tenements involved first seeking forfeiture of the mineral claims granted under the State Agreement to BHPB. This was sought by initiating plaints in the relevant Warden's Court alleging that the mineral claims held by BHPB had not been worked in accordance with regulation 50 of the *Mining Regulations 1925*. These plaints were lodged with the Meekatharra Mining Registrar on 9 November 2005 and the Leonora Mining Registrar on 10 November 2005.
- [237] The second part of the strategy entailed applying for exploration licences over the area covered by the mineral claims and the majority of the Temporary Reserve granted under the State Agreement. Applications were lodged with the Meekatharra Mining Registrar on 1 December 2005. Further applications to address a technical issue with the first applications were lodged with the Meekatharra and Leonora Registrars on 13 March 2006.
- [238] If the plaints were successful, then PMA may have received some priority rights to the area that had been previously held under the forfeited tenements.
- [239] Other companies, including Metraloop, had also applied for exploration licences over the areas predominantly covered by the mineral claims and Temporary Reserve. These applications were prompted by a belief that the State Government was considering terminating the State Agreement. The companies whose applications included all or part of the mineral claims or Temporary Reserve area were advised that their applications would not succeed and they were asked to withdraw them to avoid the Minister contemplating the use of section 111A of the *Mining Act 1978*. As at 17 March 2006 only the Metraloop and Victory applications remained on-foot.

[240] On 28 April 2006 Mr Bowler contacted Mr Grill and asked what influence he had over Roderick (Smith) because “Roderick’s not going to get it”.¹²⁴ This is believed to be a reference to the ELAs as this was a matter that had been before Mr Bowler four days earlier on 24 April 2006, at which time Mr Bowler had signed a letter to Victory Street’s lawyers notifying them of his reasons for intending to use section 111A.¹²⁵ Minister Bowler expressed concern to Mr Grill that PMA’s actions would achieve nothing other than to drive the Government into a corner where it would be forced to legislate formalising the Government’s opposition to uranium mining.

[241] In Minister Bowler’s letter dated 24 April 2006, the reason he gave for considering using section 111A was that it was not in the public interest that time and money be consumed in Warden’s Court proceedings when ultimately there could be no grant of the applications. The reason why the applications could not succeed according to Minister Bowler was that the Temporary Reserve and mineral claims held by BHPB under the State Agreement remained current and in still in force, and under that Agreement the Government was prohibited from granting tenements to a third party over the area. That, of course, was precisely the view which BHPB had been maintaining since November 2005.

[242] During the 28 April 2006 conversation between Minister Bowler and Mr Grill a number of things are apparent.

- It was clear that Mr Bowler’s intention was to terminate the PMA ELAs as he believed the State Agreement prevented the Government from approving them.
- That Mr Bowler clearly advised Mr Grill that it was his intention to terminate the PMA ELAs.
- There is no reference at all by Mr Grill to PMA negotiating with BHPB to explore or possibly mine the area. The Commission’s assessment of the evidence about that proposition is that it was not raised until later. In the Commission’s opinion the evidence shows clearly that the original proposition being put was for BHPB to pay PMA money to withdraw.

[243] On 4 May 2006 Mr Burke and Mr Smith spoke by telephone.¹²⁶ Mr Burke told Mr Smith that: “Bowler has asked us to approach you about Yeelirrie” and that “he obviously wants you to withdraw”. Mr Burke elaborated by saying that Mr Bowler was “expressing a point of view … that there’s no prospect of … penalizing BHP for doing what their policy is which is not to mine” and that Mr Bowler was not going to grant PMA’s application.

[244] During this conversation a number of things are apparent.

- The use of the word “application” by Mr Burke indicates that this conversation and the one of 28 April 2006 are about the ELAs rather than about “plaints”.

- Mr Burke was aware that Minister Bowler was not going to grant the PMA ELAs and told Mr Smith so.
- Mr Smith proposed a meeting with Minister Bowler where he could “graciously accept” the Minister’s point of view.
- There is still no suggestion of PMA negotiating with BHPB to either explore or mine the area.

[245] As at 4 May 2006 Mr Burke, Mr Grill and Mr Smith were all aware that Minister Bowler had no intention of approving or granting the PMA ELAs over the State Agreement area. It was also clear in Minister Bowler’s mind that he was going to terminate the applications under the provisions of section 111A of the *Mining Act 1978*.

[246] Although appearing to have made up his mind to terminate the applications, Minister Bowler, in the interests of natural justice, was still providing an opportunity to the applicants to make submissions to him commenting on his intention to do so and on his reasons for proposing to terminate the applications. At that point Minister Bowler was not in possession of the necessary paperwork to officially terminate the applications.

[247] In the 12 May 2007 telephone conversation about Yeelirrie Mr Burke told Mr Clough that he would probably be able to convince Mr Grill to approach PMA and convince them to withdraw their action.¹²⁷ Mr Burke suggested that if Mr Clough’s client valued ending the matter, they could retain Mr Grill and pay him a “success fee” of \$150,000-\$200,000 to get PMA to withdraw, and the three of them could then split the “success fee”. Mr Burke said the arrangement would not involve any discussion or payment between PMA and Mr Clough’s client, and that when Mr Clough presented it to his client, he should point out the possibilities of what could occur, such as the loss of the Yeelirrie deposit.

[248] Mr Clough did not consider a three-way-split of any “success fee” as appropriate but did agree to take Mr Burke’s proposal to his client within the next week. Mr Burke stated he needed a response within three weeks.

[249] Mr Clough took Mr Burke’s proposal to BHPB but it was rejected.

[250] From this conversation between Mr Burke and Mr Clough it is apparent that:

- The terminology used such as “withdrawing their action” and “ending the matter” indicate that Mr Burke and Mr Clough were discussing withdrawal of the complaints.
- Although Mr Burke was aware that PMA had strongly indicated they were likely to withdraw their complaints, he declined to inform Mr Clough instead attempting to have BHPB agree to pay Mr Grill a “success fee” for getting PMA to withdraw.

- There was still no suggestion of negotiation between PMA and BHPB about exploring or mining the Yeelirrie area.

[251] In the 23 May 2006 conversation between Mr Grill and Minister Bowler, Mr Grill told Minister Bowler he believed that he and Mr Burke had got PMA to the point where they would withdraw their applications.¹²⁸ During this conversation a number of things occur or become apparent.

- Minister Bowler reiterates that PMA have no chance of success.
- Mr Grill was going away for three weeks.
- Mr Grill was meeting with the Earl of Warwick the following day to get agreement in principle for PMA to withdraw.
- Mr Grill told Minister Bowler that he would like to try and get something out of BHPB and they had already started some tentative negotiations.
- While Mr Grill was away Mr Burke would continue negotiating with BHPB.
- Mr Grill asked Minister Bowler if he was in a hurry to make a decision, and asked if he could leave it until Mr Grill got back.
- Minister Bowler told Mr Grill “No, it can wait”.
- Mr Grill told Minister Bowler the reason why he wanted him to defer his decision. That reason was to allow Mr Burke to do a bit more work on it so he and Mr Grill could “screw a little bit out of ... BHP”.
- Although Mr Grill does not specifically state what he is trying to “screw” out of BHPB, in light of his previous emails the Commission is satisfied he was talking about money.

[252] In the 6 July 2006 email from Mr Smith to Mr Grill, Mr Smith asked Mr Grill to arrange an appointment with the Minister to withdraw.¹²⁹ Mr Grill discouraged Mr Smith from contacting the Minister directly without seeing “Brian and I”. In this email it is apparent that:

- Mr Smith is referring to the plaints as he makes a reference to the matter dragging on in the courts and costing money. The ELAs were not before the courts at that time.
- As at 6 July 2006 it was clear to Mr Grill that PMA were intending to withdraw their plaints against BHPB.

[253] In the 10 July 2006 conversation Mr Grill had with Minister Bowler about Yeelirrie, a number of things occur or become apparent.¹³⁰

- Mr Grill tells Minister Bowler that PMA are prepared to withdraw and want to meet with him personally to do that.

- Mr Grill informs Minister Bowler that he would like to do some ancillary settlement with BHPB on “some costs and stuff”.
- Mr Grill asked Minister Bowler to slow down the process to give him time to settle with BHPB.
- Mr Grill asks Minister Bowler not to encourage BHPB too strongly.
- Minister Bowler asks Mr Grill what sort of settlement and expresses a concern that he won’t be a party to people getting a “windfall profit” or “gouging”.
- Mr Grill allays Minister Bowler’s concerns by telling him it is just covering some costs and wouldn’t even meet half of what had already been expended.
- Minister Bowler is satisfied with Mr Grill’s explanation and says “okay, no worries”.

[254] Again Minister Bowler is clearly aware that PMA’s intention is to withdraw, and despite this he again agreed to slow the process down in order to assist Mr Grill in his endeavours to obtain some form of monetary compensation from BHPB.

[255] Obtaining a result beneficial to PMA may not have been Mr Grill’s entire motivation as evidenced by comments in the email to Mr Burke dated 11 July 2006 in which he says: “You shall remember that Guy was of the view that we could keep whatever costs that were recovered. There is still prospect of achieving that aim”.¹³¹

Mr Burke’s response to Mr Grill was: “... However, the problem will be getting Roderick to agree not to act quickly and withdraw his plaint(s). Clearly, we should try to maximise any return to us by coordinating the PMA decision and action ...”.¹³² In the Commission’s assessment these comments show that:

- Mr Burke and Mr Grill believe that whatever costs are recovered may go to them in accordance with the view of “Guy” (the Earl of Warwick).
- The payment of “costs” is a motivating factor for Mr Burke and Mr Grill.
- Mr Burke and Mr Grill know that PMA intended to withdraw the plaints.
- Mr Burke and Mr Grill intend to coordinate matters to maximise their return.

[256] If payment of money (whether described as “costs” or “compensation”) was Mr Grill’s motivation, then clearly he was using Minister Bowler for his and Mr Burke’s own personal gain. Mr Bowler, by agreeing to defer his decision making process was allowing himself to be used for Mr Grill and Mr Burke’s potential financial benefit. The fact that Mr Bowler was

unaware that any compensation Mr Burke and Mr Grill intended to “screw” out of BHPB might go to them and not to PMA as a cost recovery exercise, does not mitigate his conduct.

[257] At the 26 July 2006 dinner meeting at Mr Grill’s residence where Yeelirrie was discussed, a number of things occurred or are apparent.¹³³

- Minister Bowler says that the previous day he terminated five tenement applications using section 111A “... knocking em on the head. They still went ahead with it”.
- Minister Bowler could not recall the applicant’s name but says it was a company sounding like “Moontrap”.
- Minister Bowler was asked if it was PMA and he said “No it wasn’t”.
- Minister Bowler was informed by Mr Burke that someone else pegged the land before PMA and maybe that’s whose applications he terminated.
- Minister Bowler was reminded that he asked Mr Grill to get PMA to withdraw and they were now agreeing to do so.
- Mr Grill told Mr Bowler that PMA would like their costs back and then detailed another option whereby if PMA withdrew, the State Agreement would be terminated, BHPB would retain their uranium tenements, and PMA would pick up some prospective territory north and south of the tenements.
- Mr Grill told Mr Bowler if he acted “precipitously” he would take away all of Mr Grill’s “leverage”.
- Minister Bowler acknowledged that it wasn’t PMA’s applications he terminated and then expressed concern about dealing with PMA one way, and the other company differently.
- Minister Bowler expressed a concern about companies over-camping State Agreement areas and building up negotiating power to get the companies holding the tenements to give up some of that land.
- Mr Burke provided Minister Bowler with a reason he could use to explain why he could treat the ELAs received from the two companies differently.
- Minister Bowler agreed to try and recover the termination documents he had signed the previous day.

[258] In the initial parts of this conversation Mr Bowler was clearly confused about whose applications he had in fact terminated. This point was clarified and he formed the belief that it was not the PMA applications he had terminated but those of another company that sounded like “Moontrap”. The reference to the name “Moontrap” was most likely to be a reference to the Metraloop applications.

[259] Mr Bowler agreed to try and recover the letters he signed terminating the applications. As he had already signed the Ministerial letters terminating those applications, the only possible reason he agreed to try and recover those letters was as a consequence of the conversation he had with Mr Burke and Mr Grill that evening regarding Yeelirrie.

[260] In his evidence at a public hearing Mr Bowler argued that he agreed to defer his decision to terminate the ELAs because there was the prospect of a mine or exploration of the ground held under the State Agreement.

[261] This explanation is incongruous with the objective facts. Firstly, the 26 July 2006 conversation was the first occasion where the proposition of exploration or mining occurring was raised by Mr Grill with Mr Bowler.

[262] Secondly, if Mr Bowler had been aware of any such negotiations, why, when he became aware that the ELAs he had terminated were those of a competitor company to PMA would he agree to try and recover those documents? The only logical explanation for agreeing to recover the terminated applications was to assist Mr Burke and Mr Grill in their endeavours to extract money (or financial benefit, by way of the tenements) from BHPB.

[263] If the competitor company and the PMA applications were not terminated, that might have signalled to BHPB that the Minister was giving consideration to approving the ELAs or contemplating that the plaints in the Warden's Court may be successful. If that were the case, then BHPB, fearing the loss of the Yeelirrie tenements altogether, may have been prepared to pay PMA compensation for their costs if PMA were prepared to withdraw their plaints. The ELAs before the Minister constituted the "leverage" referred to by Mr Grill on 26 July 2006 and on the Commission's assessment of evidence, Mr Bowler was well aware of that.

[264] The following morning the competitor company was identified by Mr Grill as Metraloop. Mr Grill, after corresponding by email with Mr Smith, left Minister Bowler a message requesting that he let the Metraloop refusals proceed as that would be beneficial to the PMA position because it eliminated the competition.¹³⁴

[265] Later that afternoon Mr Burke and Minister Bowler spoke on the telephone where the latter said: "Ah, it was that other company that I said I'd ... Uhm, signed off on you know so they're out of the equation ...".¹³⁵

[266] The relevance of this conversation is that Mr Bowler was able to confirm the identity of the competitor company whereas the previous evening he was unable to do so. There were only two ways Mr Bowler could confirm what company was now out of the equation. He either relied upon the telephone message from Mr Grill earlier that day, or he made some inquiry, either himself or with his staff in his Ministerial office. Relying on Mr Grill's message alone may have left some uncertainty in Mr Bowler's mind as to the correct identity of the competitor and the next logical step would have been to seek some confirmation of the company's identity in his office.

[267] Mr Bowler's proposal to recover the terminated Metraloop applications is significant, as he had already made his decision and signed the termination letters the previous day. The only new information before him when he suggested recovering the letters was that which was provided to him by Mr Burke and Mr Grill at dinner on 26 July 2006. Mr Bowler's proposition to recover the Metraloop termination letters can only have been made to assist Mr Burke and Mr Grill in their efforts to obtain money or some other benefit from BHPB.

[268] Correspondence obtained from DoIR¹³⁶ shows that the file to terminate the ELAs was received at Minister Bowler's office on 12 July 2006, the termination letters were signed on 25 July 2006 and the files were returned to DoIR on 8 August 2006, a period totalling 28 days.

[269] On the face of it, the period involved was not lengthy. But that is not the point. The question is whether Mr Bowler having clearly expressed his agreement (albeit indicating an awareness that it was problematical) to delay his termination of the PMA application actually did so.

[270] In Mr Bowler's section 86 representations¹³⁷ it was submitted that the delay was not great, was under the "normal turnaround time" from a Minister's office and could not be shown to be due to any deliberate slowing of it by Mr Bowler.

[271] The Commission accepts the delay was not long. What is important to note about that, however, is that Mr Bowler signed the Victory Street termination letter (which was the one relating to the PMA applications) on 25 July 2006 by mistake. In the Commission's assessment he did not realise that it was the PMA application he was terminating. His understanding at that stage was that he had not terminated the PMA applications and that they were still on-foot.

[272] In his evidence to the Commission Mr Bowler did not deny delaying his decision to exercise his power under section 111A and terminate the PMA applications. Indeed, the thrust of his evidence was that he did so, but only because BHPB and PMA were negotiating about excising part of the BHPB tenement and there was a prospect of mining.

[273] Mr Bowler's evidence was that he knew from the outset that Mr Grill was supporting PMA. He said he thought Mr Grill was "a bit embarrassed" because he realised the PMA application "wasn't going to get legs".¹³⁸

[274] When the subject was first raised with him by Counsel Assisting, Mr Bowler said that at one stage there was a suggestion from PMA that they were going to negotiate with BHPB on doing a deal about mining another mineral.¹³⁹ He said he knew Mr Grill was saying there was a chance BHPB would allow PMA to mine the area and to let PMA talk to BHPB about that.¹⁴⁰

[275] Mr Bowler said he thought there were two applications over the similar area, one by PMA and one by a company called "Use It or Lose It", but in the end he exercised section 111A. He added:¹⁴¹

... One of those was delayed because I was advised that BHP were talking to PMA about the prospect of allowing mining, so if they could come to an agreement between the two of them that's good for Western Australia ...

(emphasis added)

[276] When initially asked whether Mr Grill asked him to do anything specifically about the PMA application, Mr Bowler said he could not recall. The recording of his telephone conversation with Mr Grill on 23 May 2006 was then played to him. That was the conversation in which Mr Grill asked Mr Bowler to defer making his decision so he and Mr Burke could "screw a little bit out of ... BHP". In evidence, Mr Bowler acknowledged that sounded like money, but went on to say:¹⁴²

... I don't know if you've got that tape there but I thought PMA were opportunistic on this and I didn't want to be a part of that and then - but he - I remember him saying, "Look, no, there's a prospect of a mine developing there and if they can come to an agreement to develop the mine, we should," and I agreed and if we - that could happen, that would happen.

[277] The conversation to which Mr Bowler was referring there was in fact the one which occurred on 10 July 2006, almost two months later. However, there was in that no mention of negotiations to excise part of the tenement to allow mining by PMA; the subject was quite clearly some monetary benefit.

[278] Mr Grill described it as "just covering some costs". When Counsel Assisting pointed out that what Mr Grill was talking about was clearly money, Mr Bowler said:¹⁴³

... If the companies could come to an agreement, great, but I was under the impression that initially they were talking about PMA coming in there to explore on that area which hadn't been widely explored because it was tied up in the State Agreement that they could get access to a mine. I didn't know whether those negotiations were then falling down and then PMA was sort of saying, "Well, if we can't have a mine, you know, now that we've gone this far can we have some of our costs back?" that's up to them.

But they shouldn't be able to use a completely unmeritorious application to try and extract some costs, should they?---Well, that's - you know, that's up to them. I was still - - -

Well, it's not entirely up to them?--- - - - hopeful that there could be negotiations for a mine and that was ongoing up till then.

[279] Mr Bowler's attention was drawn to Mr Grill's request that he "just slow down the process ... and not encourage BHP too strongly ..." to give him and Mr Burke some time to achieve a settlement.¹⁴⁴

Now, what he's suggesting you do would be quite improper, wouldn't it?--- Not if there was a prospect of a mine being developed.

But there's no suggestion of the prospect - - -?---Not in that part there but I knew before that there was talk or he told me and I spoke to BHP or a

representative of BHP also, that there was some talk but in the end that - those negotiations - talks broke down.

Even if there was a prospect of a mine, even if you thought that was still on the cards at this stage why wouldn't you say, "Look, if you want to try and recover your costs you negotiate with BHP in respect of those matters involving the mine but why should I leave on-foot an application that has no prospect of success at all"?---Well, it did have prospect of success if there was a prospect of a mine.

[280] A little later, Mr Bowler explained to the Commission:¹⁴⁵

... I was allowing it to continue because I believed there was a prospect for exploration which might lead to a discovery and then jobs and the development of wealth.

(emphasis added)

[281] In the Commission's assessment Mr Bowler's evidence on this point was equivocal and evasive. Despite the answer just quoted, when Counsel Assisting asked whether he intended to slow the process down he said:¹⁴⁶

... No, I didn't.

[282] But added:

... whilst I thought there was a prospect of a mine, I wasn't going to jeopardise that.

[283] He repeated that he found it abhorrent that companies use the mineral claim process to get money rather than use it for genuine mining. The Commission notes that Mr Bowler was there referring to a practice he had previously described as "plaiting".

[284] Mr Bowler said he thought he had dealt with other applications apart from that by PMA, under section 111A as well, but he could not recall if they were all dealt with at the same time. Asked whether there was any difference in the way they were dealt with in terms of timing, he said:¹⁴⁷

... Well, the only difference with PMA, the first application by PMA, was the advice that they were talking to BHP about the prospect of getting onto the ground and doing exploring. The other companies weren't doing that.

[285] It is clear from his evidence that Mr Bowler understood he was being asked by Mr Grill to delay his Ministerial decision in respect of the PMA application to give Mr Grill and Mr Burke "leverage" to achieve a settlement with BHPB. But he maintained his evidence that he thought there was a prospect for a mine.¹⁴⁸

[286] Counsel Assisting had played the recording of the dinner conversation at Mr Grill's home on 26 July 2006. That of course was the day after Mr Bowler had inadvertently signed the letter terminating the PMA application – but none of those present then knew that.

[287] In the conversation on 26 July 2006 Mr Bowler told Mr Grill and Mr Burke that he had just used section 111A to terminate five tenements, but the PMA application was not one of them.¹⁴⁹ They went on to discuss the PMA application on the understanding it was still on-foot. Mr Grill emphasised that if Mr Bowler was to “act precipitously” and cut short PMA’s position, he would:

*... just take away from me all my fucking uhm, “leverage”.*¹⁵⁰

[288] Counsel Assisting pointed out to Mr Bowler that on the face of it this was the first time Mr Grill had raised with him the prospect of BHPB handing over part of its Yeelirrie tenements to PMA in exchange for PMA withdrawing its application. Mr Bowler’s response was that he thought there were a couple of times where Mr Grill talked about the prospect of getting access to that land, which might lead to another mine.¹⁵¹

[289] The examination then turned to the propriety of the Minister allowing what he regarded as an unmeritorious application which he intended to terminate, to nonetheless proceed so PMA could use it as “leverage” in negotiations to extract a benefit from BHPB:¹⁵²

... This application wouldn’t continue in any event, even if they negotiated a deal with BHP. Part of that deal Mr Grill says is they withdraw their applications. Why would you leave on-foot an application that had no prospect of success in any event, other than to give them “leverage”? --- Well, I thought the two companies were talking to each other, and I think they were, I was told they were, and I was hopeful that there could be a mutual outcome between the two of them. As I’ve indicated, I was never ever interested in “leverage” for - to get money. I was hopeful that if there was a prospect of the two coming to an agreement where the junior company would explore the land and they could do a deal, great.

But they shouldn’t be able to use an unmeritorious application for “leverage” whatever the outcome is, should they? --- Well, it wasn’t an unmeritorious application. It was an application.

You had already decided it had no chance of success and they said it would be withdrawn - - -? --- I indicated - - -

- - - if they were successful with BHP? --- I indicated that if they were just doing it to force money out of BHP then it would be unmeritorious.

But if they were using it to force an agreement out of BHP - - -? --- If there was a prospect - - -

- - - then you were happy with that, were you? --- If there was a prospect - as a Minister for resources my job is to make sure that mining happens, that we get more exploration. Here was a slice of Western Australia in a prospective area that was the least explored area in that region, and if suddenly you’ve got exploration, great.

Do you think it would be a fair exercise of your powers as the Minister to in fact defer a decision in order to give one party to negotiations some “leverage” in those negotiations, whatever the outcome? --- I understood the two - those two companies were talking to each other. If other companies

had come to me and said the same thing I suspect I would have done the same thing. I've indicated, Mr Hall, I think there and in the end my final actions on there and other occasions were that I wouldn't be a party to straight - a company pegging someone and just using that to get money out of them. If there was a prospect of real progress under the Mining Act for what the act was intended to then I would help them out.

Mr Bowler, pardon me but that really sounds like an ends justifies the means argument. Are you saying that if there was a prospect of a mine at the end of it then it was fair enough for you to use your Ministerial position to provide one party with "leverage"?---Well, that one party was - I spoke to people at BHP, they were the only company they indicated they were talking to, PMA. I forget the actual process but in the end I spoke to BHP and BHP said, "No, the negotiations are breaking down," whenever that was that's when I then used 111A to end their application but while there was a prospect - now, it may be Julian Grill and PMA were telling me one thing but I'm sure even in my discussions with BHP it was either Peter Clough or Ian Fletcher or both that they were talking to PMA. At the end of the day when you say the end justifies a means it's not a matter of that, at the end of the day when there was no prospect of a mutual agreement between the two that the junior could go on and explore the land and this happens all the time in the mining industry, you understand the mining industry in that regard, you know, there's a lot of joint ventures, once that prospect had ended that's when I invoked 111A.

[290] As whether he agreed to try and recover any decision he had already made under section 111A, Mr Bowler said:¹⁵³

--- If there was a prospect of the two companies agreeing – to reach an agreement I would do that.

[291] There was some further evidence that Mr Bowler in fact delayed the section 111A letter in respect of the PMA application. Mr Walster told the Commission during a private hearing¹⁵⁴ that Mr Bowler told him he was going to see if the application could be withdrawn:

... and that was the reason why the decision was being delayed ...

[292] In his statement to the Commission Mr Corrigan said that a letter advising the company (Victory Street/PMA) was prepared for signing by Minister Bowler and given to him by Mr Walster, however, Mr Bowler returned it with a "please discuss" note on it. Mr Corrigan said he thought it took some time for Mr Walster to get back to Mr Bowler with it. He said that in the end he and Mr Walster took it before Mr Bowler, saying that the letter had to be signed. Mr Corrigan said he did that because there was some delay in the letter being signed.

[293] Even as late as 6 September Mr Bowler still thought the PMA application was on-foot, and in his conversation with Mr Burke on that date he said that one he was "holding up".¹⁵⁵

BOWLER: *... there's two lots of applications.*

BURKE: *Yep, there are.*

BOWLER: *This is the first one, and the second one I was holding up until I spoke to Julian.*

BURKE: Well,

BOWLER: That's the, PMA ones.

(emphasis added)

- [294] In the Commission's assessment, although Mr Bowler did slow down the process of terminating the PMA applications, which throughout he regarded as completely unmeritorious, he did not do so for the reason he gave the Commission. He sought to justify having done so on the basis that there were at that stage negotiations on-foot or in prospect between BHPB and PMA which might result in further exploration, mining and jobs. Mr Bowler first agreed to defer the termination in his conversation with Mr Grill on 23 May 2006. His intention then was that, if PMA did not withdraw its applications, he would exercise his power as Minister to terminate them. He agreed to delay so as to give Mr Burke and Mr Grill the time and opportunity to "screw" money out of BHPB. The terms of his conversation with Mr Grill later, on 6 July 2006, when he reaffirmed his agreement to delay terminating the PMA applications, make it clear he understood what Mr Burke and Mr Grill were trying to get out of BHPB was money. There was no suggestion then of future exploration or mining. The first time there was any suggestion to Mr Bowler of a prospect of PMA picking up and exploiting part of the BHPB tenement was at the dinner at Mr Grill's house on 26 July 2006 – by which time he had already inadvertently and unknowingly terminated the PMA applications.
- [295] The suggestion in Mr Bowler's evidence to the effect that the reason he agreed to delay his decision had always been because he understood there were negotiations between BHPB and PMA which might lead to further exploration, then mining and more jobs and wealth for the State, cannot be accepted. He implied he had that understanding as a result of discussions with Mr Clough or with Mr Fletcher, but their evidence (which the Commission accepts) was that the tenement proposal did not come up until about 26 July 2006. Mr Bowler's agreement to delay his decision to that point had been for the sole purpose of enabling Mr Burke and Mr Grill to "screw" money out of BHPB in exchange for PMA withdrawing applications which Mr Bowler knew he had to terminate anyway.
- [296] In any event, the point does not lie in the precise nature of the benefit PMA might get. It lies in the fact that Mr Bowler agreed to delay a Ministerial decision to terminate the PMA applications for the purpose of allowing their continued existence to be used as "leverage" by PMA to obtain a financial benefit from BHPB. There was no legal nor moral reason why BHPB should simply pay money, or cede part of its mineral tenements, to PMA. Once Mr Bowler had accepted that the PMA applications had to be terminated if not withdrawn, his decision to delay doing that was calculated to unfairly benefit PMA over BHPB.

[297] In Mr Bowler's section 86 representations it was submitted¹⁵⁶ there is no evidence Mr Bowler in fact did anything to reverse the process he set in train on 25 July 2006 and the only reasonable conclusion is that there was no action taken by him to recover or prevent the letters he had signed on that day from being sent out.

[298] The Commission is satisfied on the evidence that Mr Bowler agreed to retrieve the letters he had signed the previous day, on his then understanding that would be to the benefit of PMA. However, the obvious explanation for him not actually doing so is that Mr Grill left a telephone message for him the following morning saying that (for reasons Mr Grill there outlined) it would be more beneficial to PMA to let the Metraloop refusal go through.¹⁵⁷

[299] In the Commission's opinion Mr Bowler's actions between 23 May 2006 and 26 July 2006, in

- acceding to Mr Grill's request by agreeing to defer his decision on PMA's applications, so as to give Mr Grill and Mr Burke "leverage" in their negotiations with BHPB on behalf of PMA to obtain a financial benefit ("screw a little bit out of ... BHP"), first by way of money and later by way of mineral tenements in circumstances in which he recognised the application had to be refused in the public interest anyway,
- in fact slowing the process down, to that end (albeit, as it turned out, only for a short time, because he inadvertently signed termination letters without realising they related to the PMA applications), and
- agreeing to try to recover letters he had already signed, terminating the applications of other applicant companies on the ground of public interest, for the purpose of assisting Mr Grill and Mr Burke to extract money (or later, mining tenements) from BHPB by negotiating the withdrawal of applications he knew were unmeritorious, and would be terminated in any event,

constituted serious misconduct within the meaning of section 4(a) and (b) of the CCC Act. In the Commission's opinion it also constituted misconduct within the meaning of section 4(d), (ii), (iii) and (vi) of the CCC Act.

[300] "Serious misconduct" is defined in section 3 of the CCC Act as misconduct of a kind described in section 4(a), (b) or (c).

[301] The elements necessary for serious misconduct under section 4(a) of the CCC Act are:

- the person must be a public officer;
- who corruptly acts or corruptly fails to act; and
- in the performance of the functions of their public office or employment.

[302] The elements necessary for serious misconduct under section 4(b) of the CCC Act, are:

- the person must be a public officer;
- who takes advantage of their office or employment as a public officer;
- corruptly; and
- to obtain a benefit for themselves or some other person, or to cause a detriment to any person.

[303] As a Member of Parliament and a Minister of the State, Mr Bowler was a public officer at all relevant times.

[304] The element that the conduct be engaged in “corruptly” is common to both paragraphs (a) and (b) of section 4.

[305] Corruption is a notoriously difficult concept to define. The word is not defined in the CCC 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.

[306] 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*, 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 Criminal 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 guide to what may amount to corruption in the circumstances of that case.

[307] *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)

[308] 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. It is of course important to appreciate that the interpretation of particular words (such as “corruptly”) can be very case-specific, and turn on the particular legislative context and the facts of the case.

[309] Nonetheless, 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)

[310] 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.

[311] In the criminal law the notion that a person may act corruptly does not of itself necessarily involve the gaining of a benefit or the causing of a detriment. For example, section 83 of *The Criminal Code* 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.

[312] More importantly, the same distinction is made clear in section 4 of the CCC Act itself. The word “corruptly” appears in both subsection 4(a) and 4(b). The former contains no reference to the gaining of a benefit or the causing of a detriment. That subsection 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.

[313] It is axiomatic that the proper construction of a statutory provision turns upon the words used in the particular provision, read in the context of the Act of which the provision is part, and having regard to the general purpose and policy of the legislation.¹⁵⁸

[314] Ordinary dictionary definitions support the conclusion that in section 4 of the CCC 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.¹⁵⁹ It involves the concept of a prohibited act undertaken with a wrongful intention.¹⁶⁰ The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the CCC Act requires that the conduct contrary to the duties incumbent upon the public officer by virtue of their office (to adopt the language of Ryan J in *Re Lane*) also be attended by moral turpitude of a kind implied by the expression “perverted from fidelity or integrity”. Without attempting to be exhaustive, that may be found in dishonesty;¹⁶¹ an improper purpose;¹⁶² in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.¹⁶³

[315] Thus, “corruptly”, in section 4(a) and (b) of the CCC Act is not to be equated with “dishonestly” nor “for an improper purpose”, nor (merely), “contrary to [their] duty”. For present purposes it is sufficient to state that the Commission takes the law to be that “corruptly” in section 4(a) and (b) of the CCC Act connotes conduct done deliberately, which is contrary to the duties incumbent upon the public officer by virtue of their office and attended by moral turpitude in the sense explained above.

[316] Mr Bowler’s conduct here was deliberate. It was advertent. He agreed to Mr Grill’s request to defer his decision on PMA’s application, to slow the

process down and, later, to try to recover letters he had already signed terminating the applications of other applicants. He did so knowing (or believing) that his duty as Minister required him to terminate PMA's application in the public interest. But he nonetheless agreed to delay doing so, to allow Mr Grill and Mr Burke to exert "leverage" in their negotiations with BHPB on PMA's behalf, and knowing they were seeking to obtain a payment (or later, tenements) from BHPB in that way. In other words, he agreed to delay making and implementing a Ministerial decision in the public interest, so as to advance the personal financial interests of Mr Grill and Mr Burke and their client, PMA. Likewise, he agreed to try to recover the letter to the other applicants, similarly to allow the advancement of those private interests instead of the public interest - indeed, contrary to it. In each of these respects his conduct was deliberate, it was contrary to the duties incumbent upon him by virtue of his public office and it was attended by moral turpitude in the sense explained above. It accordingly fell within the meaning of "corruptly" in section 4(a) and 4(b) of the CCC Act.

- [317] In his dealings with Mr Grill and Mr Burke in this regard, with the PMA application and with the applications of the other companies under the *Mining Act 1978*, Mr Bowler was acting in the performance of the functions of his public office as the responsible Minister.
- [318] For the foregoing reasons, in the Commission's opinion, the elements of serious misconduct under section 4(a) of the CCC Act are established.
- [319] The fourth element, in section 4(b) of the CCC Act, "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. On the evidence set out above, the Commission is satisfied that Mr Bowler took advantage of his Ministerial position for the purpose of obtaining a benefit for Mr Grill and Mr Burke and their client PMA. He well knew they wanted him to delay terminating the PMA application (and to retrieve his letters to the other applicants) so as to obtain a financial benefit for PMA and themselves. He agreed, for the purpose of enabling them to do that.
- [320] On this basis the Commission is of the opinion the elements of serious misconduct under section 4(b) of the CCC Act are also established.
- [321] Mr Bowler's conduct in agreeing to defer his decision on PMA's application, in slowing the process down and in agreeing to try to retrieve the letter, in the circumstances described above constituted or involved,
 - the performance of his functions in a manner that was not honest nor impartial (section 4(d)(ii)) and
 - a breach of the trust placed in him by reason of his office as a Member of Parliament and Minister (section 4(d)(iii)),

and could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the PSM Act.

His conduct accordingly also constituted misconduct under section 4(d)(ii), (iii), and (vi) of the CCC Act.

[322] By section 43(1)(a)(i) of the CCC Act the Commission may make recommendations as to whether consideration should or should not be given to the prosecution of particular persons.

[323] The Commission has considered whether or not a recommendation should be made in relation to a prosecution for a possible offence under section 83(c) of *The Criminal Code*. That relevantly provides that –

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

- (a) *acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) *acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (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, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

[324] The elements of an offence under section 83(c) of *The Criminal Code* are that:

- the person is a public officer
- the person acts corruptly
- without lawful authority or a reasonable excuse
- in the performance or discharge of the functions of his office
- so as to gain a benefit, whether pecuniary or otherwise.

[325] The Commission is mindful that in any criminal prosecution the rules of evidence are strictly applied and the prosecution must prove each element of the offence charged beyond reasonable doubt. The Commission considers that the evidence which would be legally admissible in a criminal trial is not likely to be sufficient to properly found a charge of corruption under section 83 of *The Criminal Code* against Mr Bowler, and accordingly does not recommend further consideration of that.

[326] As Mr Bowler is now an Independent Member of Parliament and not a Minister, there is no practical recommendation the Commission could make for consideration of disciplinary action.

ENDNOTES

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

¹ Transcript of Proceedings, Private Examination of Mr Ian Ross Fletcher on 9 July 2009, p.4.

² Transcript of Proceedings, Private Examination of Mr Peter Herbert Lloyd Monkhouse on 9 July 2009, p.37.

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 and Access) 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; Rejzek v McElroy (1965) 112 CLR 517; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449.

⁷ The spelling of “Smiths” has no possessive apostrophe.

⁸ Corruption and Crime Commission *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007. A copy of the Smiths Beach Report is available from the Corruption and Crime Commission Website at www.ccc.wa.gov.au, Publications and Speeches, Publications, viewed 22 July 2009.

⁹ Section 140(2) of the *Corruption and Crime Commission Act (2003)*.

¹⁰ Speech by Commissioner Hammond to the Institute of Public Administration Australia, entitled *Corruption, Integrity and the Public Sector*, on 20 March 2007.

¹¹ *Ibid.*

¹² Independent Commission Against Corruption v Chaffey & Ors (1992) 30 NSWLR 2, p.543.

¹³ The Science and Innovation functions of the Department of Industry and Resources were transferred to the new Department of Commerce, which incorporates the Department of Consumer and Employment Protection, www.doir.wa.gov.au, viewed 31 July 2009.

¹⁴ At the time of writing this report the value of uranium was \$US50 per pound (as at 19 July 2009).

¹⁵ 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.

¹⁶ Email Chain of 24 October 2005 between Mr Roderick Smith, Mr Brian Burke and Mr Julian Grill [E 17516].

¹⁷ Email Chains of October and December 2005, and January 2006 between Mr Brian Burke, Mr Julian Grill, Mr Roderick Smith and the Earl of Warwick [E 17517, E 17518 and E 17519].

¹⁸ Email Chains of November and December 2005 between Mr Brian Burke, Mr Julian Grill, Mr Roderick Smith and the Earl of Warwick [E 17520, E 17521 and E 17522].

¹⁹ Emails of December 2005 from Mr Roderick Smith to Mr Brian Burke, Mr Julian Grill, the Earl of Warwick *et alii* [E 17523 and 17524].

²⁰ Email of 23 December 2005, 11:35 a.m., from the Earl of Warwick to Mr Brian Burke and Mr Julian Grill [E 17525].

²¹ Email Chains of January and February 2006 between Mr Brian Burke, Mr Julian Grill, Mr Michael Kiernan, Mr Roderick Smith and the Earl of Warwick [E 17519, *op cit*, E 17526 and E 17527].

²² Email Chain of 24 March 2006 between Mr Brian Burke, Mr Julian Grill and Mr Roderick Smith [E 17528].

²³ Email of 9 April 2006, 11:49 a.m., from Mr Brian Burke to Mr Julian Grill [E 17529].

²⁴ Letter of 24 April 2006 from the Hon. John Bowler MLA, Minister for Resources and Minister Assisting the Minister for State Development, to Mr Michael Hunt, Hunt and Humphry, Project Lawyers [E 13204].

²⁵ Telecommunications Intercept, T 0963, 28 April 2006.

²⁶ Email of 28 April 2006, 9: 42 p.m., from Mr Julian Grill to Mr Roderick Smith [E 17530].

²⁷ Email of 22 May 2006, 9:16 a.m., from Mr Julian Grill to Mr Brian Burke, Mr Roderick Smith and the Earl of Warwick [E 17531].

²⁸ Telecommunications Intercept, T 1044, 4 May 2006.

²⁹ Telecommunications Intercept, T 2000, 12 May 2006.

³⁰ Email of 22 May 2006, 9:17 a.m., from Mr Peter Clough to Mr Brian Burke [E 17532].

³¹ Telecommunications Intercept, T 0964, 23 May 2006.

³² Transcript of Proceedings, Private Examination of Mr Peter Michael Clough on 8 July 2009, p.14.

³³ Transcript of Proceedings, Private Examination of Mr Ian Ross Fletcher on 9 July 2009, *op cit*, p.14.

³⁴ Email of 6 July 2006, 11:49 a.m., from Mr Roderick Smith to Mr Julian Grill and Mr Brian Burke [E 17533].

³⁵ Telecommunications Intercept, T 0962, 10 July 2006.

³⁶ Transcript of Proceedings, Private Examination of Mr Ian Ross Fletcher on 9 July 2009, *op cit*, p.19.

³⁷ *Ibid*, p.20.

³⁸ Transcript of Proceedings, Private Examination of Mr Peter Michael Clough on 8 July 2009, *op cit*, p.19.

³⁹ Email Chains of July 2006 between Mr Peter Clough, Mr Brian Burke and Mr Julian Grill [E 17534, E 17535 and E 17536].

⁴⁰ Email of 11 July 2006, 10:02 p.m., from Mr Julian Grill to Mr Brian Burke [E 17537].

⁴¹ Transcript of Proceedings, Private Examination of Mr Peter Michael Clough on 8 July 2009, *op cit*, p.21.

⁴² Email of 12 July 2006, 6:16 a.m., from Mr Brian Burke to Mr Julian Grill [E 17537].

⁴³ Transcript of Proceedings, Private Examination of Mr Ian Ross Fletcher on 9 July 2009, *op cit*, p.16.

⁴⁴ Email of 25 July 2006, 8:19 a.m., from Mr Smith to Mr Brian Burke and Mr Julian Grill [E 17538].

⁴⁵ Email Chains of 25 July 2006 between Mr Brian Burke, Mr Julian Grill and Mr Roderick Smith [E 17539, E 17540 and E 17541].

⁴⁶ Email of 25 July 2006, 11:05 p.m., from Mr Roderick Smith to Mr Grill [E 17541], *op cit*, and Email Chain of 26 July 2006 between Mr Grill and Mr Roderick Smith [E 11649].

⁴⁷ Transcript of meeting held on 26 July 2009 between Mr John Bowler, Mr Brian Burke and Mr Julian Grill at Mount Street, Perth WA [T 0559].

⁴⁸ Facsimile Transmission of 27 July 2006, 9:21 a.m. [E 12178].

⁴⁹ Transcript of Proceedings, Private Examination of Mr Ian Ross Fletcher on 9 July 2009, *op cit*, p.24.

⁵⁰ *Ibid*, p.26.

⁵¹ Transcript of Proceedings, Private Examination of Mr Peter Herbert Lloyd Monkhouse on 9 July 2009, *op cit*, pp.42-43.

⁵² Email Chain of 27 July 2006 between Mr Brian Burke, Mr Grill, Mr Roderick Smith and the Earl of Warwick [E 17542].

⁵³ Telecommunications Intercept, T 1038, 27 July 2006.

⁵⁴ Email of 29 July 2006, 12:54 p.m., from Mr Julian Grill to Mr Peter Clough [E 17543].

⁵⁵ Email Chain, 27-30 July 2006, between Mr Brian Burke, Mr Julian Grill and Mr Roderick Smith [E 17545].

⁵⁶ Email of 2 August 2006, 10:14 a.m., from Mr Roderick Smith to Mr Julian Grill [E 17546].

⁵⁷ Telecommunications Intercept, T 1041, 27 July 2006.

⁵⁸ Facsimile Transmission of 28 July 2009, 10:00 a.m. [E 12179].

⁵⁹ Email of 1 August 2006, 9:09 a.m., from Mr Julian Grill to Mr Roderick Smith [E 17544].

⁶⁰ Email of 1 August 2006, 2:39 p.m., from Mr Julian Grill to Mr Roderick Smith [E 17546].

⁶¹ Email of 2 August 2006, 2:43 p.m., from Mr Julian Grill to Mr Roderick Smith [E 17546].

⁶² Transcript of meeting held on 10 August 2006 between Mr Julian Grill and Mr Timothy Walster at Mount Street, Perth WA [T 0980].

⁶³ Email Chain of 17 August 2006 between Mr Brian Burke and Mr Julian Grill [E 17547].

⁶⁴ Email of 17 August 2006, 11:54 a.m., from Mr Brian Burke to Mr Julian Grill [E 17548].

⁶⁵ Email of 17 August 2006, 12:45 p.m., from Mr Robert Edel to Mr Roderick Smith [E 17549].

⁶⁶ Email Chain of 18 August 2009 between Mr Brian Burke, Mr Julian Grill, Mr Roderick Smith, Earl of Warwick *et alii* [E 17550].

⁶⁷ *Ibid.*

⁶⁸ Email of 25 August 2006, 4:41 p.m., from Mr Peter Clough to Mr Brian Burke and Mr Julian Grill [E 17551].

⁶⁹ Email Chains of 4 September 2006 between Mr Brian Burke, Mr Julian Grill, Mr Roderick Smith and Mr Michael Hunt [E 17552 and E 17553].

⁷⁰ Email of 3 September 2006, 10:07 p.m., from Mr Julian Grill to Mr Roderick Smith [E 17554].

⁷¹ *Ibid.*

⁷² Email of 6 September 2006, 6:36 a.m., from Mr Julian Grill to Mr Brian Burke [E 17555].

⁷³ Transcript of meeting held on 6 September 2006 between Mr Brian Burke and Mr John Bowler at Mount Street, Perth WA [T 0568].

⁷⁴ Email of 7 September 2006, 9:31 a.m., from Mr Brian Burke to Mr Julian Grill [E 17556].

⁷⁵ Transcript of meeting held on 28 August 2006 between Mr Julian Grill and Mr Roderick Smith at Mount Street, Perth WA [T 2063].

⁷⁶ Transcript of meeting held on 28 August 2006 between Mr Julian Grill and Mr Roderick Smith at Mount Street, Perth WA [T 2064].

⁷⁷ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615].

⁷⁸ Refer endnote No. 13.

⁷⁹ *Corruption and Crime Commission Report on Behalf of the Procedure and Privileges Committee of the Legislative Assembly: Report on Issues Relating to Record Keeping in the Ministerial Office of the Hon. James Mansell Bowler MLA*, 6 November 2008.

⁸⁰ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, p.846.

⁸¹ *Ibid.*, p.847.

⁸² *Ibid.*

⁸³ *Ibid.*, p.848.

⁸⁴ *Ibid.*

⁸⁵ Telecommunications Intercept, T 0964, 23 May 2006, *op cit.*

⁸⁶ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.851.

⁸⁷ Telecommunications Intercept, T 0962, 10 July 2006, *op cit.*

⁸⁸ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, pp.854-855.

⁸⁹ *Ibid.* p.856.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* p.857.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Transcript of meeting held on 26 July 2006 between Mr Brian Burke, Mr Julian Grill and Mr John Bowler at Mount Street, Perth WA [T 1048].

⁹⁵ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.862.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* p.863.

⁹⁸ Transcript of meeting held on 26 July 2006 between Mr Brian Burke, Mr Julian Grill and Mr John Bowler at Mount Street, Perth WA [T 1049].

⁹⁹ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.867.

¹⁰⁰ *Ibid.*

¹⁰¹ Facsimile Transmission of 27 July 2006, 9:21 a.m. [E 12178], *op cit.*

¹⁰² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.868.

¹⁰³ Email of 27 July 2006, 9:38 a.m., from Mr Julian Grill to Mr Brian Burke and Mr Roderick Smith [E 11647] and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.869.

¹⁰⁴ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, pp.869-870.

¹⁰⁵ *Ibid.* pp.870-871.

¹⁰⁶ Telecommunications Intercept, T 1038, 27 July 2006, *op cit.*

¹⁰⁷ Telecommunications Intercept, T 1041, 27 July 2006, *op cit.*, and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, pp.872-873.

¹⁰⁸ *Ibid.* p.874.

¹⁰⁹ Facsimile Transmission of 28 July 2009, 10:00 a.m. [E 12179], *op cit.*, and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, p.874, *loc cit.*

¹¹⁰ Transcript of meeting held on 6 September 2006 between Mr Brian Burke and Mr John Bowler at Mount Street, Perth WA [T 1050] and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.875.

¹¹¹ Documents located in Mr Grill's home by the Corruption and Crime Commission on 8 November 2006 [E 11448] and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.878.

¹¹² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit.*, p.879.

¹¹³ *Ibid*, pp.879-880.

¹¹⁴ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.

¹¹⁵ Three-page typed document of 28 February 2007 prepared by Mr Julian Grill [E 12650].

¹¹⁶ Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 28 February 2007, p.1074.

¹¹⁷ Email Chain of 15 February 2005 between Ms Rosemary Braybrook and Mr Julian Grill [E 12091].

¹¹⁸ Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 28 February 2007, *op cit*, p.1091.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*, p.1092.

¹²¹ Procedure and Privileges Committee *Inquiry Into the Member for Murchison-Eyre's Unauthorised Release of Committee Documents and Related Matters*, Report No. 2, 20 June 2007.

¹²² Email of 26 April 2009, 4:37 p.m., from Mr Roderick Smith to Mr Brian Burke, Mr Julian Grill and the Early of Warwick [E 12611].

¹²³ Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 28 February 2007, *op cit*, p.1093.

¹²⁴ Telecommunications Intercept, T 0963, 28 April 2006, *op cit*.

¹²⁵ Letter of 24 April 2006 from the Hon. John Bowler MLA, Minister for Resources and Minister Assisting the Minister for State Development, to Mr Michael Hunt, Hunt and Humphry, Project Lawyers [E 13204], *op cit*.

¹²⁶ Telecommunications Intercept, T 1043 and T 1044, *op cit*, 4 May 2006.

¹²⁷ Telecommunications Intercept, T 2000, 12 May 2006, *op cit*.

¹²⁸ Telecommunications Intercept, T 0964, 23 May 2006, *op cit*.

¹²⁹ Email of 6 July 2006, 11:49 a.m., from Mr Roderick Smith to Mr Brian Burke and Mr Julian Grill [E 17533], *op cit*.

¹³⁰ Telecommunications Intercept, T 0962, 10 July 2006, *op cit*.

¹³¹ Email of 11 July 2006, 10:02 p.m., from Mr Julian Grill to Mr Brian Burke [E 17537], *op cit*.

¹³² Email of 12 July 2006, 6:16 p.m., from Mr Brian Burke to Mr Julian Grill [E 17537], *op cit*.

¹³³ Transcript of meeting held on 26 July 2009 between Mr John Bowler, Mr Brian Burke and Mr Julian Grill at Mount Street, Perth WA [T 0559], *op cit*.

¹³⁴ Telecommunications Intercept, T 1038, 27 July 2006, *op cit*.

¹³⁵ Telecommunications Intercept, T 1041, 27 July 2006, *op cit*.

¹³⁶ Documentation obtained from the Department of Industry and Resources by the Corruption and Crime Commission [E 13198].

¹³⁷ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 8 May 2009.

¹³⁸ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, p.847, *loc cit*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*, p.848.

¹⁴¹ *Ibid*, p.848, *loc cit*, and p.849.

¹⁴² *Ibid*, p.851. *Loc cit*.

¹⁴³ *Ibid*, p.854.

¹⁴⁴ *Ibid*, pp.854-855.

¹⁴⁵ *Ibid*, p.856.

¹⁴⁶ *Ibid*, p.857.

¹⁴⁷ *Ibid*.

¹⁴⁸ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit*, p.858.

¹⁴⁹ *Ibid*, p.859.

¹⁵⁰ *Ibid*, p.860.

¹⁵¹ *Ibid*, p.862.

¹⁵² *Ibid*, pp.863-4.

¹⁵³ *Ibid*, p.865.

¹⁵⁴ Transcript of Proceedings, Private Examination of Mr Timothy John Walster on 30 July 2008, p.23.

¹⁵⁵ Transcript of meeting held on 6 September 2006 between Mr Brian Burke and Mr John Bowler at Mount Street, Perth WA [T 0568], *op cit*.

¹⁵⁶ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 8 May 2009, *op cit*, pp.5-6.

¹⁵⁷ Refer paragraphs [144]–[149] in this report.

¹⁵⁸ See Martin CJ (with whom Newnes AJA agreed) in Ex parte West Australian Newspapers Ltd [2008] WASCA 209 at [51].

¹⁵⁹ *Shorter Oxford English Dictionary*, Sixth Edition, p.529; *Macquarie Dictionary*, 2nd Revised Edition, p.417.

¹⁶⁰ R v Gallagher (1987) 29 A Crim R 33.

¹⁶¹ Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.

¹⁶² Willers v R, *supra*, per Malcolm CJ at 225; Rowland J at 231; Application by DPP (Cth) for a Superannuation Order in Respect of Hogarth (1995) 93 A Crim R 452 per Higgins J at 454-5.

¹⁶³ Williams v R (1979) 23 ALR 369 per Franki J at 381.