



CORRUPTION AND CRIME COMMISSION

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

FORTESCUE METALS GROUP LTD

14 September 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: Fortescue Metals Group Ltd.*

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

14 September 2009

ABBREVIATIONS AND ACRONYMS

“the Aboriginal Heritage Act”	<i>Aboriginal Heritage Act 1972</i>
ACMC	Aboriginal Cultural Material Committee
AMEC	Association of Mining and Exploration Companies
“the CCC Act”	<i>Corruption and Crime Commission Act 2003</i>
“the Code”	<i>The Criminal Code</i>
“the Commission”	Corruption and Crime Commission
DPC	Department of the Premier and Cabinet
FMG	Fortescue Metals Group Ltd
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the SD Act”	<i>Surveillance Devices Act 1998 (WA)</i>
“the TI Act”	<i>Commonwealth Telecommunications (Interception and Access) Act 1979</i>
TI	Telecommunications Intercept (or Interception)

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EXECUTIVE SUMMARY

Introduction

- [1] This is a report on one of a series of discrete investigations which arose out of a Corruption and Crime Commission (“the Commission”) Inquiry into a proposed Smiths Beach¹ Development at Yallingup. That Inquiry examined attempts by Mr Brian Thomas Burke and Mr Julian Fletcher Grill, in their role as lobbyists and consultants acting for Canal Rocks Pty Ltd, to influence public officers in relation to the development proposal. The results of that Inquiry were detailed in a Commission report tabled in the Parliament of Western Australia on 5 October 2007.²
- [2] This report examines the responses of public officers to certain lobbying activities of Mr Burke and Mr Grill on behalf of Fortescue Metals Group Ltd (FMG).

Background and Commission Investigation

- [3] For several years, and throughout 2006, FMG was establishing port facilities at Port Hedland and a rail network in the Pilbara to enable it to export the iron ore it intended to mine. To do this involved it in continual negotiations with Government in order to obtain the approvals, cooperation and assistance it required. Mr Burke and Mr Grill appear to have been employed for their ability to assist the company in its dealings with the State Government of Western Australia.
- [4] In 2006 FMG were in the process of establishing an iron ore mine at Cloud Break in the Chichester Ranges, approximately 200 kilometres south of Port Hedland. FMG had applied for a heavy haulage railway corridor from the “Cloudbreak” mine site to Port Hedland under the provisions of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*.
- [5] The proposed railway corridor was routed through the Woodstock-Abydos Reserve, which was registered as a Protected Area in accordance with section 19 of the *Aboriginal Heritage Act 1972* (“the Aboriginal Heritage Act”). This protection was granted on the basis of significant Aboriginal heritage sites, including a large number of rock engravings.
- [6] To obtain approval for the railway corridor FMG made an application under section 21 of the Aboriginal Heritage Act to the Minister for Indigenous Affairs, the Hon. Sheila McHale MLA, seeking a variation to the Protected Area for a railway corridor. On 13 April 2006 the Minister advised the Registrar of Aboriginal Sites that she was satisfied that FMG had, under section 21 of the Aboriginal Heritage Act, shown reasonable cause why its interest should be taken into consideration. The Minister directed that it be considered at a meeting of the Aboriginal Cultural Material Committee (ACMC).³ The ACMC is an advisory body established under the Aboriginal Heritage Act and advises the Minister for Indigenous Affairs on matters

relating to Aboriginal heritage, “helping to ensure that development does not occur at the expense of sound heritage protection outcomes”.⁴

[7] At the times relevant to this report, Mr John James Mansell Bowler was the Minister for:

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

[8] Mr Simon John Corrigan was Chief of Staff to Minister Bowler.

[9] Mr Burke had a telephone conversation with Mr Bowler about the FMG Woodstock-Abydos issue on 27 April 2006. He complained that although Ms McHale, as the Minister for Indigenous Affairs, had the power under regulation 10 of the *Aboriginal Heritage Regulations* to allow the FMG railway line to be put through the Woodstock-Abydos Reserve, she just would not do anything. He asked Mr Bowler to speak to Ms McHale and tell her it was holding up the project. Mr Bowler agreed to do so.

[10] Mr Bowler telephoned Ms McHale the following day. He raised the FMG regulation 10 issue. Ms McHale said about this conversation –

... the (then) Minister for Resources, John Bowler, telephoned me to discuss the regulation 10 issue. He errantly referred to the process as a “section 10”, so I did not believe he was fully across the issue.

I did not think that the phone call was appropriate and I think I might have been a bit cautious because I was conscious of John’s relationship with Julian Grill. I did not want anything to go beyond John and I. From discussions with another person I was aware that FMG had retained Julian Grill as a Consultant.

In our discussion John was very keen to have the regulation 10 pushed through. I asked him who told him to ring me, and he replied, “I was ringing because I am the Minister”.

*I was very concerned about this phone call, however you have to work assuming that your colleagues will uphold confidentiality.*⁵

[11] In the evening of 28 April 2006 Mr Bowler telephoned Mr Grill. He said he had just spoken to Ms McHale and that she was “... still shying away from using the section [sic] 10 ...” saying that it would be setting a precedent. He referred to an alternative Ms McHale had told him she was considering, and to the meeting of the ACMC which was to be held the following week. Mr Bowler said Ms McHale was “humming and harring” but had agreed to look at a legal opinion which was different from that

which she had received from the State Solicitor's Office. That other legal opinion was one Mr Grill had earlier said could be made available.

- [12] Later in the same call Mr Bowler said that a member of his staff would forward Ms McHale and the Premier, the Hon. Alan John Carpenter MLA, a legal opinion from FMG (saying that Ms McHale could use regulation 10 of the *Aboriginal Heritage Regulations* to allow FMG to commence work in the Protected Area) and that he would also ring the Premier.⁶
- [13] On 1 May 2006 Mr Grill sent an email to Mr Julian Tapp, Head of Government Relations for FMG, with a copy to Mr Burke and Mr Andrew Forrest, Executive Director of FMG. In relation to his conversation with Mr Bowler, Mr Grill said:

As you know John Bowler did speak to Sheila. She concedes that she has the power to act under section [sic] 10 ..., however she is reluctant to do so as it will set "an unhealthy precedent". John was going to brief the Premier before he left. ...
- [14] The ACMC met on 7 June 2006 and decided to recommend to the Minister that FMG's application under section 21 of the Aboriginal Heritage Act not be approved.
- [15] On 8 June 2006 Mr Tapp phoned Mr Burke and advised him that the Department of Indigenous Affairs had said it would be seven to ten days before the outcome of the ACMC meeting would be known. Mr Burke advised Mr Tapp that he would make inquiries.⁷
- [16] Later on 8 June 2006 Mr Burke called Mr Corrigan to find out what the ACMC had recommended.⁸ Mr Corrigan said that he would try to find out.
- [17] The following day, 9 June 2006, Mr Corrigan rang Mr Burke and told him the ACMC had recommended against the lifting of heritage protection. He said he thought they were expecting to get the written advice of that early the following week.
- [18] Immediately following this call Mr Burke telephoned Mr Tapp and passed on the information regarding the ACMC decision.⁹
- [19] Ms McHale said in her statement to the Commission that in late May or early June 2006 she met with the Premier and Mr Bowler at Parliament House and discussed the situation in detail. She said that Mr Bowler was agitating to get a quick decision on the Woodstock-Abydos issue.¹⁰
- [20] Mr Carpenter said in his statement to the Commission that in relation to the Woodstock-Abydos issue: "I recall having several one-on-one meetings with Sheila and John, and possibly together on at least one occasion". He said that after he became aware that the ACMC had recommended against FMG being given access to a Protected Area he had further discussions with Ms McHale and he recalled her advising him "... that she had identified a solution, a compromise position, that would allow a transport corridor and preserve any aboriginal cultural interests".

[21] Mr Carpenter said he had discussed the issue with Mr Bowler in a telephone call around the middle of June 2006. He said: "I told John not to feel pressured and to relax as Sheila had indicated she'd found a compromise position in relation to FMG's application".¹¹

[22] On 16 June 2006 Mr Tapp sent Mr Bowler an email emphasising that FMG needed a decision made urgently and stressing the financial and project implications of delay. He particularly stressed the project was running the risk of financing not being achieved

... because nobody is going to risk equity when there is no solution to Woodstock Abydos in sight.

[23] Mr Bowler, together with Mr Corrigan and his Principal Policy Advisor (Resources and State Development), Mr Timothy John Walster, went to a lunch meeting at Mr Grill's home on 19 June 2006. Amongst other issues of concern to clients of Messrs Burke and Grill they discussed FMG.

[24] Mr Bowler told Mr Grill that Ms McHale understood the ACMC had to make the recommendation they did but that "... she will now overturn it". He said it was expected that she would "overturn the ACMC decision". She had said she would.

[25] When Mr Grill said he would "take that message back", Mr Bowler evinced some concern, saying:

So that's good news, you know look, you can't say the Premier's said to John Bowler. Just say look, you know. The word I'm getting is that Sheila will overturn this. ...¹²

(emphasis added)

[26] After Mr Bowler and his staff had left, Mr Grill emailed Mr Tapp (with copies to Mr Burke and Mr Forrest) advising that

John Bowler spoke to Alan Carpenter today and Alan has spoken to Sheila McHale. I am advised that she has agreed to reject the ACMC recommendation and grant the FMG application.

I shall do some follow up work on timing tomorrow.

[27] On 21 June 2006 Minister McHale sent a letter to FMG advising that she had received the recommendation from the ACMC but was not in a position to make a recommendation to the Governor. She invited FMG to address the issues raised by the ACMC.¹³

[28] Three days later, in a telephone conversation with Mr Bowler, Mr Grill complained that Ms McHale had gone back on her "commitment" to reject the recommendation of the ACMC. He said

... it makes us all look a bit lacking in credibility.

Mr Bowler asked if Mr Grill could get Mr Forrest to give him a copy of the letter and Mr Grill agreed to arrange that.

- [29] On 7 July 2006 Ms McHale met with representatives from FMG to discuss the Woodstock-Abydos issue. During that meeting the parties identified a rail route that would protect the significant Aboriginal rock art in the area. The Minister said that she indicated that she saw this as a way forward for all parties. On 10 July 2006 Ms McHale decided that a corridor be excised from the Woodstock-Abydos Protected Area, and made a recommendation to this effect to the Governor. This recommendation was accepted by the Governor, who approved a variation to the Protected Area.¹⁴
- [30] On 10 July 2006 Mr Grill rang Mr Forrest to find out whether FMG had agreed to anything with Minister McHale. Mr Forrest confirmed they had and they could just go quietly now and let the Government announce it when they were ready. He told Mr Grill to make sure no one “leaked” the information.
- [31] Mr Grill then telephoned Mr Burke to explain the development to him. Later that night he telephoned Mr Bowler to thank him for his assistance.
- [32] On 13 July 2006 Minister McHale issued a media release announcing that she had approved FMG’s application for a rail line through the Woodstock-Abydos Protected Area.

Commission Assessment

Mr John James Mansell Bowler

- [33] The issue considered by the Commission in this assessment is whether Mr Bowler engaged in misconduct by providing Mr Grill with confidential information about Cabinet deliberations and Ministerial decision making in relation to the Woodstock-Abydos Protected Area.
- [34] Mr Carpenter said in his statement to the Commission that he considered all discussions between Ministers to be confidential unless otherwise consensually decided or mutually understood. This is regardless of whether that conversation took place in or out of a Cabinet meeting.¹⁵ The Commission notes the ambiguity inherent in the words “mutually understood”.
- [35] In relation to these particular discussions, Mr Carpenter explained:¹⁶

The contents of these conversations between Sheila and myself and John and myself should obviously not have been revealed outside of Government. In particular these conversations should not have been revealed to any of the parties that had a commercial interest in the matter. Commercial sensitivities should always alert the Minister to issues of confidentiality.

I believed that all the discussions I had with my Ministers regarding this issue were confidential and should not have been revealed outside of Government.

Any discussions or deliberations should have remained confidential until Sheila McHale, as the Minister for Indigenous Affairs, had released her decision.

- [36] Mr Carpenter said that it is quite conceivable there might be financial gain to persons acting as lobbyists who have advance knowledge of Government decisions, even if that gain is not immediate or direct. Lobbyists representing commercial interests often try to create the perception that they are able to get things done or influence Government decisions as a result of their actions, whether or not that is true. Receiving inside information about Government processes and Government deliberations assists in creating that perception.
- [37] The Commission accepts the correctness of that observation
- [38] Ms McHale said in her statement to the Commission that the ACMC matter was raised during Cabinet, and that all discussions that take place inside Cabinet are confidential. She said that there is no distinction between confidentiality of discussions between Ministers inside or outside of Cabinet, and that there is an expectation that Cabinet Members can rely on Ministerial colleagues for absolute confidentiality. She said that the discussions she had with any person within Government prior to her media release on 13 July 2006 should not have been discussed with any person outside Government.
- [39] The Commission accepts that Mr Bowler had a legitimate interest in the advancement of FMG's project as he was the Minister for Resources. The implications for State revenue and employment were considerable once FMG commenced production.
- [40] The immediate Woodstock-Abydos issue was not within Mr Bowler's area of Ministerial responsibility. The decision in this instance was within the portfolio area of the Minister for Indigenous Affairs. The Commission has had regard here to the submissions made by Mr Corrigan¹⁷ concerning Mr Bowler's responsibility as the Minister Assisting the Minister for State Development, to assist projects through the approvals process, even though the projects fell primarily within another Minister's portfolio responsibility. The same point is made in the section 86 representations made on behalf of Mr Bowler¹⁸ in which it was said that as the Minister for Resources Mr Bowler had a responsibility to be across all issues that might affect the development of a major resource such as that being contemplated by FMG. However, the Commission does not take that role to extend to disclosing to particular proponents information about the deliberations or thinking of such other Ministers given to him in confidence. But in this instance, the position with respect to the Ministerial concerns and views about the ACMC recommendation and the use of regulation 10 of the *Aboriginal Heritage Regulations* is by no means clear.
- [41] In his telephone call to Mr Grill on 28 April 2006 Mr Bowler disclosed to Mr Grill information which Minister McHale had given him in confidence as a Ministerial colleague with a relevant interest in being kept informed of her thoughts on, and the progress of, the FMG application.

[42] On 19 June 2006 Mr Bowler attended a lunch meeting with Mr Grill directly after a Cabinet meeting. The information that he provided to Mr Grill clearly arose from conversations with the Premier and Minister McHale, from formal or informal Cabinet discussions.

[43] It appears the Woodstock-Abydos issue was not discussed in the formal Cabinet meeting on 19 June 2006. However, in the Commission's view this does not materially affect the matter.

[44] The statements to the Commission of Mr Carpenter and Ms McHale are clear as to their expectations about the confidentiality of information handled at Ministerial and Cabinet levels, and in the Commission's opinion, accurately reflect Ministerial obligations in that respect as set out in the *Ministerial Code of Conduct* (introduced by the then Premier, the Hon. Dr Geoff Gallop MLA, in March 2005).¹⁹

[45] The Commission is satisfied that:

- (1) On 28 April 2006 Minister McHale had a confidential discussion with Minister Bowler about the possible use of regulation 10 of the *Aboriginal Heritage Regulations* in relation to the Woodstock-Abydos issue.
- (2) That evening Mr Bowler disclosed Minister McHale's then views about the use of regulation 10 in relation to that application to Mr Grill.
- (3) Minister McHale told the Premier in June 2006 that she had identified a transport corridor through the Woodstock-Abydos area.
- (4) The Premier passed this information on to Mr Bowler (quite properly as the Minister for Resources) on the evening of 16 June 2006.
- (5) Minister Bowler passed this information on to Mr Grill at their meeting on Monday 19 June 2006.

[46] As a Member of Cabinet, Mr Bowler was bound by the *Ministerial Code of Conduct* of March 2005. Clause 9 of that Code of Conduct deals with the use of confidential information:

9. Use of Confidential Information

Ministers will maintain the confidentiality of information committed to their secrecy in the Executive Council, in Cabinet or otherwise in accordance with their duties.

Ministers shall undertake not to use information obtained in the course of official duties to gain for themselves or any other person a direct or indirect financial advantage. They will not solicit or accept any benefit in respect of the exercise of their discretion, whether for themselves or any other person.

[47] The Commission is satisfied on the evidence that the information concerning the recommendation of the ACMC and the discussions, deliberations and views of the Premier and Minister McHale about the use of regulation 10 was confidential information in the wide sense. But the critical issue here is whether it was confidential as against FMG and its representatives (including Mr Grill) – and in particular, whether Mr Bowler was under a duty not to disclose that information to them. There is evidence both ways on this issue and the Commission is mindful that it would not be sufficient to form a view merely that there was a (statistically) greater likelihood that it was confidential to that extent; the Commission could not form any opinion adverse to Mr Bowler unless positively satisfied on the balance of probabilities that that was the fact.

[48] As the Minister for Resources and the Minister Assisting the Minister for State Development, Mr Bowler had a legitimate interest in being kept informed of these matters. That is apparent from the fact that the Premier and Minister McHale included him in their discussions. The FMG project was regarded by the Government as important. For reasons discussed below in connection with Mr Corrigan's position,²⁰ Mr Bowler apparently was seen as having something of an active role in dealing with FMG, in the sense of assisting the company to progress the project. It is also apparent that Minister McHale, in her discussions with Mr Forrest, openly discussed the ACMC recommendation and her thinking on it. She confirmed that in a letter to him on 21 June 2006, and in a subsequent discussion, indicated what she intended to do.

[49] Whilst there is force in the expectations of confidentiality expressed by Premier Carpenter and Minister McHale, the Commission considers that in light of the ambiguity of Mr Bowler's role insofar as it related to FMG and the nature of the discussions generally that were occurring between FMG and Minister McHale over the relevant period, it is not possible to be satisfied to the necessary extent that Minister Bowler was in breach of an obligation of confidentiality in disclosing this information to Mr Grill. The Commission accepts the submissions made in Mr Bowler's section 86 representations in this regard.

[50] In light of the foregoing, it is the Commission's opinion that the evidence does not establish that Mr Bowler's actions in disclosing the subject information constituted misconduct within section 4 of the *Corruption and Crime Commission Act 2003*.

Mr Simon John Corrigan

[51] The Commission first considers here the disclosure by Mr Corrigan to Mr Burke on 9 June 2006, of information concerning the recommendation made by the ACMC.

[52] As a Ministerial staff member, Mr Corrigan was under an obligation of confidentiality. Ministerial staff are engaged on contract under Part 4 of the *Public Sector Management Act 1994* ("PSM Act"). Mr Corrigan's contract required him to comply with the Code of Conduct promulgated by the Department of the Premier and Cabinet (DPC). The relevant Code of

Conduct was that promulgated in February 2005 (“the 2005 Code of Conduct”).

[53] In his introduction to the 2005 Code of Conduct the then Director General of DPC, Mr Mal Wauchope, wrote that:

All employees have a responsibility to familiarise themselves with, and understand their responsibility to comply with the Code of Conduct.

[54] At paragraph [2.1] under the heading “Performance of Duties” the 2005 Code of Conduct required DPC employees to:

act with integrity in the performance of official duties and be scrupulous in the use of official information ...

[55] Confidentiality was specifically dealt with at paragraph [3.8] –

3.8 Confidentiality

In the course of official duties, Department employees will have access to information classified as restricted or confidential information ...

Classified information may only be used in the course of official duties or for other lawful purposes e.g. under the requirements of “Freedom of Information Act 1992”. In general, employees are not to disclose classified information nor use information for any purpose other than the purpose for which it was retained. Improper disclosure includes any of the following:

- *Giving unauthorised persons information relating to the business of the Department or any other government agency.*
- ...
- ...
- *Disclosing the contents of any official papers including internal reports or documents to unauthorised persons.*
- ...
- *Using information in pursuit of a private interest for employees, family members, friends or associates.*

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

- [56] The DPC Ministerial Office Manual detailed a range of matters relating to Ministerial staff. In it paragraph [3.8] of the 2005 Code of Conduct was reproduced in full.
- [57] The DPC Ministerial Office Manual also stated that all Ministerial officers were obliged to comply with the DPC Code of Conduct.
- [58] General principles of official conduct are set out in section 9 of the PSM Act, which states that:

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

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

(emphasis added)

- [59] The first and fundamental question here, is whether the recommendation made to Minister McHale by the ACMC was confidential information which Mr Corrigan was under a duty not to disclose without authority.
- [60] As already observed, the ACMC is an advisory body to the Minister.²¹ The functions of the Minister under that Act may only be exercised after consultation with, and after consideration of any advice given, by the ACMC.²² The provision of advice or making of recommendations by the ACMC to the Minister is part of the deliberative processes of Government. The decision of the Minister may or may not be in accordance with the advice or recommendation of the ACMC. It may be more influenced by other advice or recommendations or by other public interest considerations. In these circumstances, the Commission considers that, according to the conventions of Responsible Government under the Westminster System, the advice given or recommendation made by the ACMC to the Minister, would, on the face of it, be confidential. The evidence of Mr Carpenter and Ms McHale set out above, to the effect that the Minister's decision itself was confidential until announced by her, supports this conclusion.²³
- [61] The Commission also notes section 56 of the Aboriginal Heritage Act, which is headed "Secrecy".

A person who discloses any information that results, or may result, in the disclosure of a trade secret, or with regard to any mining or prospecting operations, that has been furnished to him or obtained by him under this Act, or in connection with the execution of this Act, commits an offence unless such information is necessary for, and is disclosed in the course of, the conduct of any legal proceedings arising out of this Act.

Penalty: \$1,000

- [62] Again, on the face of it, the disclosure to Mr Burke of the recommendation of the ACMC could constitute the disclosure of:

... information ... with regard to [a] mining or prospecting [operation], that was furnished to [Mr Corrigan] ... in connection with the execution of [the] Act ...
- [63] However, section 56 is expressed in extraordinarily broad terms. It would appear to be wide enough to cover disclosure of any information, confidential or not, and with authority or not. That cannot have been the legislative intention. The notion of disclosure of a trade secret seems clear enough – confidentiality is inherent in the term “trade secret”. The verb “disclose” does not assist in characterising the type of information – it simply denotes what is not to be done with it. To “disclose” is “to cause to appear; allow to be seen; make known; reveal” or “to uncover; lay open to view”.²⁴ Given the penal nature of the provision, it should be construed strictly and in favour of the subject. The heading to section 56 is “Secrecy”. The heading to a statutory provision is to be read as part of it.²⁵ These considerations together with the reference to “trade secrets”, suggest that the information “... with regard to any mining or prospecting operations ...” of which section 56 speaks must be information which is related to the operations of mining or prospecting and is commercially or otherwise confidential. It is difficult to see how disclosure by Mr Corrigan of the ACMC recommendation to Mr Burke as FMG’s representative, could be so characterised.
- [64] In his section 86 representations²⁶ Mr Corrigan submitted that there is no evidence upon which it could be found that the information he disclosed to Mr Burke was in fact confidential, nor that (if it was) he knew or ought to have known it was confidential.
- [65] The Commission considered whether the demarcation between Ministerial portfolio responsibilities bears on the question.
- [66] Mr Corrigan submitted that treatment of Ministerial portfolios as strict separate “silos” does not match up with the reality of working within portfolios such as Resources and State Development. He argued that at the time (and believes to this day), a major complaint of resource companies in Western Australia was the myriad of approvals that are required across many Government agencies. In dealing with large projects such as FMG’s, the office regularly dealt with other Ministerial offices. This predominantly would be the Minister for Environment (at the

time the Hon. Mark McGowan MLA) and the Minister for Planning and Infrastructure (at the time the Hon. Alannah MacTiernan MLA), but also other portfolios such as Indigenous Affairs.

- [67] He asserted that despite the involvement of other Government agencies and Ministers it was the responsibility of the Minister for State Development to assist projects through the approvals process in the State's interest. While Premier Carpenter held the State Development portfolio it was clearly understood that Minister Bowler (as Minister Assisting the Minister for State Development) carried out the day-to-day work of the portfolio. He said his understanding was that the Premier's description of the division of workload between himself and Minister Bowler was, "you do all the work and I'll take all the credit".
- [68] Mr Corrigan submitted his recollection that the Strategic and Operational Plans for Minister Bowler's office included the progression of FMG's projects through environmental and heritage approvals. The Strategic and Operational Plans were plans developed in conjunction with (and approved by) the Premier's office. The progression of FMG's project was seen as a strategic priority for the Government because it would help to break down the virtual duopoly over the iron ore industry in the State held by Rio Tinto and BHP Billiton.
- [69] He contended that the complexity of approvals processes was an area of great sensitivity for the Government, and Minister Bowler received some criticism from companies and from industry groups such as the Association of Mining and Exploration Companies (AMEC) about companies "getting the run around" in the approvals process.
- [70] Mr Corrigan submitted that the Government as a whole had responded in part to this criticism by creating the Office of Development Approvals Coordination, which, while part of the Department of the Premier and Cabinet, was physically located in Minister Bowler's office. On a smaller scale Minister Bowler had indicated that any companies having difficulty navigating the approvals process should contact his office to see if his staff could assist. He said he was present when Minister Bowler made this offer to individual company representatives and to the then Chief Executive of AMEC.
- [71] Mr Corrigan submitted that in this context it was not unusual for companies to contact him or other policy advisors to seek assistance with ascertaining the status of an approval either within Minister Bowler's portfolio or another portfolio. It was usual practice to ascertain the information and report back to the company. It would not have been in line with the Minister's expectations to "pass the buck" by referring enquiries to another office.
- [72] He thus submitted that in the context described it is not appropriate to describe the decision of the ACMC as "confidential", simply because it was from another portfolio.

- [73] In summary, Mr Corrigan argued that his disclosure of the ACMC decision to FMG's representative (Mr Burke) was "no more than a response to a routine request for information on the status of an approval relating to a resource project".
- [74] It is pertinent at this point to refer also to submissions made on behalf of Mr Bowler in his section 86 representations.²⁷ It is submitted that the Woodstock-Abydos issue was not confidential as between the parties involved and was being discussed openly by them.
- [75] The Commission accepts there is evidence that Minister McHale was communicating directly with Mr Forrest on the issue, including to the extent of indicating her thinking and concerns. She spoke to him at least twice on the telephone and she wrote to FMG on 21 June 2006 with the information that the ACMC had recommended against the application and seeking further discussions. Those discussions were held on 7 July 2006 and Minister McHale professed herself satisfied with what was then proposed.
- [76] In all of these circumstances, in the opinion of the Commission, the evidence does not establish to the necessary degree of satisfaction that the information disclosed by Mr Corrigan to Mr Burke was confidential information which he was under a duty not to disclose to FMG or its representative (Mr Burke) without authority. That being so, such disclosure could not constitute a breach of discipline by him, and in turn nor could it constitute misconduct under section 4 of the *Corruption and Crime Commission Act 2003*.

EXECUTIVE SUMMARY: ENDNOTES

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

¹ The term “Smiths Beach” does not have a possessive apostrophe.

² *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007.

³ Response to Parliamentary Question No. 280 (Without Notice) by the Hon. Adele Farina MLC on 10 May 2006 in the Legislative Council of the Parliament of Western Australia.

⁴ Department of Indigenous Affairs, *Annual Report 2005-2006*, Director General’s Overview, p.7.

⁵ Statement of the Hon. Sheila Margaret McHale MLA, Minister for Disability Services, Culture and the Arts, Tourism and Consumer Protection, Western Australian Government, to the Corruption and Crime Commission on 29 August 2007 [E 15260], paragraphs [20]-[23].

⁶ Telecommunications Intercept, T 0913, 28 April 2006.

⁷ Telecommunications Intercept, T 1817, 8 June 2006.

⁸ Telecommunications Intercept, T 0972 and T 0974, 8 June 2006.

⁹ Telecommunications Intercept, T 0977, 9 June 2006.

¹⁰ Statement of the Hon. Sheila Margaret McHale MLA [E 15260], *op cit*, paragraphs [32]-[33].

¹¹ Statement of the Hon. Alan John Carpenter MLA, Premier of Western Australia, to the Corruption and Crime Commission on 17 August 2007 [E 14875], paragraphs [23]-[29].

¹² Transcript of meeting held on 19 June 2006 between Mr Julian Grill, Mr John Bowler, Mr Simon Corrigan and Mr Timothy Walster at Mount Street, Perth WA, p.7 [T 0001].

¹³ Letter to Mr Andrew Forrest, Chief Executive Officer, Fortescue Metals Group Ltd, of 21 June 2006 from the Hon. Sheila McHale MLA, Minister for Indigenous Affairs.

¹⁴ Statement of the Hon. Sheila Margaret McHale MLA [E 15260], *op cit*, paragraphs [37]-[38].

¹⁵ Statement of the Hon. Alan John Carpenter MLA [E 14875], *op cit*, paragraph [13].

¹⁶ *Ibid*, paragraphs [30]-[32].

¹⁷ Refer paragraphs [64]-[73] of the Executive Summary in this report.

¹⁸ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 15 May 2009, p.4.

¹⁹ Government of Western Australia, *Ministerial Code of Conduct*, March 2005 [E 9972].

²⁰ Refer paragraphs [67]-[76] of the Executive Summary in this report.

²¹ *Aboriginal Heritage Act 1972*, sections 28 and 39.

²² *Ibid*, section 39D.

²³ Refer paragraphs [10], [34]-[35] and [37]-[38] of the Executive Summary in this report.

²⁴ *Macquarie Concise Dictionary*, Australia’s National Dictionary, Fourth Edition, p.339.

²⁵ Western Australia, *Interpretation Act 1984*, section 32(1).

²⁶ Section 86 representations: letter from Mr Simon Corrigan of 14 May 2009, Annex 1.

²⁷ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 15 May 2009, *op cit*, p.5.

CHAPTER ONE

FOREWORD

1.1 Introduction

- [1] During 2005 and 2006 the Corruption and Crime Commission (“the Commission”) investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach¹ Development at Yallingup. That investigation examined attempts by Mr Brian Thomas Burke and Mr Julian Fletcher Grill, in their role as lobbyists and consultants acting for Canal Rocks Pty Ltd, to influence public officers in relation to the development proposal. Public hearings were held at the Commission in respect of that matter in October, November and December 2006.
- [2] Arising from those inquiries the Commission identified a number of allegations of possible misconduct by public officers arising principally from the lobbying activities of Mr Burke and Mr Grill on behalf of their commercial clients. Public hearings were held at the Commission in respect of these matters in February and March 2007. Additional investigations were conducted by the Commission into these matters before, at the time of, and following these hearings.
- [3] In accordance with section 22 of the *Corruption and Crime Commission Act 2003* (“the CCC Act”) the purpose of the investigations was to assess the allegations and form an opinion as to the possible occurrence of “misconduct” (as defined in section 4 of the CCC Act) by public officers.
- [4] This report examines the responses of public officers to certain lobbying activities of Mr Burke and Mr Grill on behalf of Fortescue Metals Group Ltd (FMG).
- [5] Although Mr Burke and Mr Grill were already undertaking work for FMG in 2004 they were appointed as on 23 February 2005 as consultants “... to promote, develop and extend the Business, the Project and the interests of FMG and do all things within the Consultants’ power to enhance and extend the prosperity, business and reputation of FMG”.²

1.2 Jurisdiction of the Commission

- [6] The Commission is an executive instrument of the Parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the 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.
- [7] 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.

1.3 Definitions

1.3.1 Public Officer

[8] 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 Code”). The term “public officer” includes any of the following: police officers; Ministers of the State; Members of, either House of, Parliament; members, officers or employees of any authority, board, local government or council of a local government; and public service officers and employees within the meaning of the *Public Sector Management Act 1994* (“the PSM Act”).

1.3.2 Misconduct

[9] The term “misconduct” has a particular and specific meaning in the 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).*

1.4 Reporting by the Commission

[10] 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.*

[11] The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4).

[12] Section 86 of the 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.

[13] Accordingly, a number of persons were notified by letter of possible adverse matters which it was proposed to include in this report. They were invited to make representations about those matters by a particular date, and were advised that they and their legal advisor could inspect the transcript of hearings before the Commission and evidentiary material going to matters identified and any other matters about which they might wish to make representations. Mr John James Mansell Bowler and Mr Simon John Corrigan provided representations and the Commission has taken those into account in finalising this report. Mr Timothy John Walster did not provide a representation.

- [14] Despite the investigation being confined to the conduct of public officers, and the Commission making no assessment of, nor expressing any opinion about Mr Burke or Mr Grill in this report, the Commission accepts 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.
- [15] As it was possible that the matters considered in this report may be regarded as matters adverse to Mr Burke and Mr Grill, the Commission notified them of those matters, pursuant to section 86 of the CCC Act, and afforded them an opportunity to make representations if they wished. The lawyers for Mr Burke, Fairweather and Lemonis, and Mr Grill, Freehills, advised that their clients did not intend to make any substantive representations.
- [16] A list of persons who received notifications under section 86 in respect of this report is detailed in the Appendix to this report.

1.5 Disclosure

- [17] The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, compel the production of documents and other things, compel attendance at hearings and to compel responses to questions on oath in hearings conducted by the Commissioner.
- [18] Section 151 of the CCC Act controls the disclosure of a “restricted matter”, including evidence given before the Commission, any statement of information or document produced to the Commission and the fact that any person has been or may be about to be examined before the Commission.
- [19] Section 151(4)(a) of the CCC Act states that a restricted matter may be disclosed in accordance with a direction of the Commission. Pursuant to section 152(4) official information may be disclosed in various instances including: for the purposes of the CCC Act; for the purposes of prosecution or disciplinary action; when the Commission has certified that disclosure is necessary in the public interest; or to either House of Parliament.
- [20] The Commission takes decisions about releasing information to the public very seriously. Consistently with the considerations to which it is required to have regard in deciding whether or not an examination (hearing) should be conducted in public, when considering the disclosure of information in a report the Commission takes into account the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.

1.6 Telecommunications Interception Material

- [21] The Commonwealth *Telecommunications (Interception and Access) Act 1979* (“the TI Act”) contains stringent controls and safeguards in relation to

telecommunications interception and handling, and communicating information gathered from lawfully intercepted telecommunications. Section 63 of the TI Act prohibits the communication of lawfully intercepted information unless given particular restricted circumstances.

[22] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,³ to make use of lawfully intercepted information and interception warrant information for a “permitted purpose”. “Permitted purpose”, as defined in section 5(1) of the TI Act, in the case of the Commission “means a purpose connected with ...: (i) an investigation under the Corruption and Crime Commission Act into whether misconduct (within the meaning of that Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or (ii) a report on such an investigation”.⁴

1.7 Privacy Considerations

[23] In formulating this report the Commission has considered the benefit of public exposure and public awareness and weighed this against the potential for prejudice and privacy infringements. The Commission has also complied with the requirements of the TI Act and the *Surveillance Devices Act 1998* (WA) (“the SD Act”) in the utilisation of intercepted information in this report.

[24] As a result of these considerations the Commission may decide not to include names of various individuals who assisted the Commission during its investigation. Similarly, some extracts from Telecommunications Intercept (TI) material set out in this report may have been edited by omitting the names of individuals or other information collateral to this investigation of alleged public sector misconduct.

1.8 Opinions of Misconduct: Standard of Proof

[25] The Commission fully appreciates that any expression of opinion by it in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion or any adverse matter against a public officer, or any other person, may have serious consequences for the public officer, or person, and their reputation.

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

[27] The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.

[28] The balance of probabilities is defined as:

The weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability ...⁵

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

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

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

... The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise ...

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

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

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

- [32] Or, as Lord Denning said in Hornal v Neuberger Products Ltd (1956) 3 All ER 970: “The more serious the allegation the higher the degree of probability that is required ...”.
- [33] Furthermore, the Commission could not reach an opinion of misconduct on the basis of a “mere mechanical comparison of probabilities”, without any actual belief in its reality. That is to say, for the Commission to be satisfied of a fact on the balance of probabilities, it would have to have an actual belief of the existence of that fact to at least that degree.⁶
- [34] The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.

CHAPTER TWO BACKGROUND

2.1 Commission Investigation

- [35] As previously stated, during 2005 and 2006 the Commission investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach Development at Yallingup. The investigation examined the efforts of Canal Rocks Pty Ltd and its consultants, including Mr Burke and Mr Grill, in seeking to influence the Busselton Shire Council, public service officers and politicians to take actions beneficial to the development proposal.
- [36] Public hearings were held at the Commission in respect of that matter in October, November and December 2006. During that time Mr Burke and Mr Grill, and their relationships with public officers, received widespread media attention in Western Australia and nationally.
- [37] The Commission *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* was tabled in the Parliament of Western Australia on 5 October 2007.⁷
- [38] In the course of conducting an investigation into the proposed Smiths Beach Development the Commission lawfully intercepted telecommunications services used by Mr Burke and Mr Grill. It also obtained a warrant for a surveillance device in Mr Grill's residence, which was also his office and the site of meetings held by Mr Burke and Mr Grill with clients and associates.
- [39] Between 12 February 2007 and 1 March 2007 the Commission held public hearings into a number of additional issues which had arisen from information obtained during the course of the Smiths Beach investigation, but which did not relate to the Smiths Beach Development.
- [40] Before deciding to hold public hearings the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements.⁸ The Commission considered that it was in the public interest to hold public hearings.
- [41] One factor that was of particular importance in that consideration was the need to publicly expose and make the public aware of conduct involving lobbyists and public officers where misconduct had or may have occurred, was or may have been occurring and, if left unexposed, might lead to future misconduct.
- [42] In his remarks at the start of the February-March 2007 Commission public hearings, Commissioner Hammond said:

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

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

In using the term “serious abuses of power” the Commission means serious misconduct by persons in senior public positions, possibly exploiting their positions of public authority and trust to give special beneficial consideration to the interests of particular individuals or groups in a manner that, if known publicly, would bring the public officers and their offices into dispute [sic] and such actions may, in the context of the act, be characterised as misconduct or serious misconduct and may constitute criminal conduct under the code.⁹

- [43] Commissioner Hammond reinforced this view in a speech to the Institute of Public Administration on 20 March 2007 when he said that the public hearings were held to address the overwhelming “public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State”.¹⁰
- [44] The Commission decided to expose the matters addressed in these hearings to enable, in the words of Counsel Assisting, Mr Stephen Hall SC:

... other bodies [to] take immediate action to ensure good governance is not compromised. Public hearings may enable those bodies to take such action as they think fit and in an expeditious way.¹¹
- [45] The hearings, conducted during February-March 2007, included a segment relating to the lobbying activities of Mr Burke and Mr Grill on behalf of FMG. In relation to this matter the Hon. John James Mansell Bowler MLA was examined on 26 and 27 February 2007, Mr Simon John Corrigan was examined on 27 February 2007, and Mr Julian Fletcher Grill was examined on 28 February 2007. The Commission later conducted private examinations with Mr Timothy John Walster on 30 July 2008, Mr Brian Thomas Burke on 14 October 2008 and Mr Grill on 13 and 15 October 2008.
- [46] The Commission has also made additional inquiries into aspects of the lobbying undertaken by Mr Burke and Mr Grill on behalf of FMG, insofar as they bore upon the conduct of public officers. These additional inquiries have included interviewing, and taking statements from relevant people, and obtaining and forensically examining computer records and documents.
- [47] The Commission has been provided with statements in relation to aspects of this matter by the Hon. Alan John Carpenter MLA, the Hon. Sheila McHale MLA and Mr Corrigan.
- [48] The comments made in this report are derived from the above sources and are appropriately referenced.

2.2 People and Entities Mentioned in this Report

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

The Hon. John James Mansell Bowler MLA Minister for:

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

The Hon. Alan John Carpenter MLA, Premier of the State of Western Australia (from 25 January 2006); Minister for Public Sector Management; State Development; and Federal Affairs (from 3 February 2006 to 13 December 2006).

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

The Hon. Sheila Margaret McHale MLA, Minister for Indigenous Affairs; Tourism; and Culture and the Arts (3 February 2006-13 December 2006).

Mr Timothy John Walster, Principal Policy Advisor (Resources and State Development), Office of the Hon. John James Mansell Bowler MLA (March to December 2006).¹²

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

[50] The following people mentioned in this report were not public officers at relevant times during 2006.

Mr Julian Fletcher Grill, Principal of Julian Grill Consulting (which from 22 February 2006 became Julian Grill Consulting Pty Ltd).

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

Mr Andrew Forrest, Executive Director of Fortescue Metals Group Ltd.

Mr Julian Tapp, Head of Government Relations for Fortescue Metals Group Ltd.

[51] Fortescue Metals Group Ltd (FMG) is an Australian mining company established to mine and export iron ore from the Pilbara. It has contracts for supply of iron ore to Chinese companies and its Executive Director, Mr

Andrew Forrest, became Australia's richest man on the basis of the increase in value of FMG shares.

2.3 Employment of Mr Burke and Mr Grill by Fortescue Metals Group Ltd (FMG)

- [52] For several years, and throughout 2006, FMG was establishing port facilities at Port Hedland and a rail network in the Pilbara to enable it to export the iron ore it intended to mine. To do this involved it in continual negotiations with Government in order to obtain the approvals, cooperation and assistance it required. Mr Burke and Mr Grill appear to have been employed for their ability to assist the company in its dealings with the State Government of Western Australia.
- [53] Mr Burke and Mr Grill signed a Consultancy Agreement with FMG on 23 February 2005, although they had been undertaking work for FMG for some time before. The Consultancy Agreement defined their role as follows:

FMG agrees to engage the Consultants and the Consultants agree to accept such engagement on a monthly basis to promote, develop and extend the Business, the Project and the interests of FMG and do all things within the Consultants' power to enhance and extend the prosperity, business and reputation of FMG.¹³

- [54] The Agreement specified a retainer of \$10,000 per month and a series of five additional payments, three at \$100,000 each and two at \$150,000 each. These were payable on the occurrence of certain events, including the passage of State Agreement Acts through Parliament and signing of certain agreements with other companies.¹⁴
- [55] Mr Burke and Mr Grill assisted FMG in many aspects of their negotiations with Government. However, this report does not propose to examine all of these and will be confined to the response of public officers to their lobbying activities in relation to the location of the FMG railway line through the Woodstock-Abydos Reserve.

2.4 Request by FMG for a Railway Through the Woodstock-Abydos Reserve

- [56] In 2006 FMG were in the process of establishing an iron ore mine at Cloud Break in the Chichester Ranges, approximately 200 kilometres south of Port Hedland. FMG had applied for a heavy haulage railway corridor from the "Cloudbreak" mine site to Port Hedland under the provisions of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*.
- [57] The proposed railway corridor was routed through the Woodstock-Abydos Reserve, which was registered as a Protected Area in accordance with section 19 of the *Aboriginal Heritage Act 1972* ("the Aboriginal Heritage

Act"). This protection was granted on the basis of significant Aboriginal heritage sites, including a large number of rock engravings.

[58] To obtain approval for the railway corridor FMG made an application under section 21 of the Aboriginal Heritage Act to the Minister for Indigenous Affairs, the Hon. Sheila McHale MLA, seeking a variation to the Protected Area for a railway corridor. On 13 April 2006 the Minister advised the Registrar of Aboriginal Sites that she was satisfied that FMG had, under section 21 of the Aboriginal Heritage Act, shown reasonable cause why its interest should be taken into consideration. The Minister directed that it be considered at a meeting of the Aboriginal Cultural Material Committee (ACMC).¹⁵

2.5 Aboriginal Cultural Material Committee (ACMC)

[59] The ACMC is an advisory body established under the Aboriginal Heritage Act. It advises the Minister for Indigenous Affairs on matters relating to Aboriginal heritage, "helping to ensure that development does not occur at the expense of sound heritage protection outcomes".¹⁶ In considering an application for land development one of the functions of the ACMC is: "Recommending to the Minister whether to grant or decline consent to the applicant to use the land, and whether conditions should apply to any consent granted".¹⁷ This included evaluating applications for variations over a Protected Area, and making recommendations to the Minister. When making a decision on such an application the responsible Minister takes into consideration the ACMC recommendation, the applicant's submissions and any other material he or she considers relevant, before making a recommendation to the Governor.

2.6 ACMC Consideration of FMG Submission

[60] The ACMC met on 3 May 2006 and requested further advice from FMG and the Department of Indigenous Affairs. It deferred consideration of the matter to its June 2006 meeting.¹⁸

[61] The recommendation of the ACMC on the railway corridor appears to have been considered by FMG to be of vital importance to their efforts to raise sufficient capital to complete the mining project. In an email sent by Mr Julian Tapp, Head of Government Relations for FMG, to Mr Bowler, Minister for Resources, on 16 June 2006, Mr Tapp said: "... the project really is running the risk of financing not being achieved when required because nobody is going to risk equity when there is no solution to Woodstock Abydos in sight ...".¹⁹

[62] The ACMC met on 8 June 2006 and considered this matter. They resolved to recommend to the Minister that the application not be approved.

[63] The primary function of the ACMC is to provide advice and make recommendations to the Minister. It is for the Minister to make any necessary decision. On the face of it, the process is confidential. It

concerns the deliberative processes of the Executive Government. The decision of the Minister may or may not be in accordance with the advice given or recommendation made by the ACMC. It may be more influenced by other advice or recommendations or by other public interest considerations.

- [64] On 10 July 2006 the Minister decided that a corridor be excised from the Woodstock-Abydos Protected Area, and made a recommendation to this effect to the Governor. This recommendation was accepted by the Governor, who approved a variation to the Protected Area. On 13 July 2006 the Minister issued a media release announcing that a decision had been made to "... excise a narrow corridor of land from the Woodstock-Abydos Protected Area ...".²⁰
- [65] This report examines disclosures by Mr Bowler, the Minister for Resources and Minister Assisting the Minister for State Development, and Mr Corrigan, Minister Bowler's Chief of Staff, to Mr Burke and Mr Grill in relation to the process of consideration by the ACMC, and by the Minister for Indigenous Affairs, of FMG's application in June 2006.

2.7 Public Officers Involved

2.7.1 Mr Bowler

- [66] From 3 February 2006 to 13 December 2006 Mr Bowler was the Minister for Resources and Minister Assisting the Minister for State Development; Employment Protection; Goldfields-Esperance; and Great Southern. Mr Bowler was a friend and close political associate of Mr Grill and succeeded him as the Member for Eyre (later Murchison-Eyre). Mr Grill managed Mr Bowler's election campaigns in 2001 and 2005.²¹
- [67] Mr Bowler said, at a Commission public hearing on 26 February 2007, that he knew Mr Burke through Mr Grill and that he was someone who Mr Bowler had looked to, in the past, for advice and guidance.²² Mr Burke contributed \$2,500 towards Mr Bowler's 2005 re-election campaign.²³

Mr Bowler said that he had met Mr Grill both socially and as a lobbyist. He said: "occasionally I'd go to his office to talk to him about lobby matters, you know, about his work. Occasionally I'd go to his house, sometimes thinking it was just an invitation for dinner and we'd - he'd want to talk about business, as he was wont to do".²⁴

Mr Grill, in his appearance before the Commission, confirmed Mr Bowler's comments, saying: "it was a bit unfair on him in some ways, we sort of invite him across and then we bombard him with problems".²⁵

2.7.2 Mr Corrigan

- [68] During 2006 Mr Corrigan was Chief of Staff to the Hon. John Bowler MLA. Mr Corrigan was a witness before the Commission in public hearings relating to several topics, including the lobbying undertaken by Mr Burke

and Mr Grill with respect to the land at Whitby.²⁶ Mr Corrigan also made a statement to the Commission on 26 February 2007.²⁷

- [69] Mr Corrigan said that he was aware that Mr Bowler and Mr Grill were good friends, that Mr Grill was Mr Bowler's predecessor in the Seat of Eyre,²⁸ and that Mr Grill had been Mr Bowler's campaign manager when he ran for election in 2000.²⁹
- [70] Mr Corrigan was also aware that Mr Grill was a lobbyist who worked with Mr Burke. Mr Corrigan said that he had been lobbied by both Mr Burke and Mr Grill in his capacity as Chief of Staff to Minister Bowler. Mr Corrigan said that he did not feel comfortable with the way Mr Burke spoke to him or with some of the things Mr Burke asked him to do, and considered that he was being put under pressure. Mr Corrigan said that on one occasion Mr Burke told him he was putting together a list of people for preselection and he was putting Mr Corrigan's name on the list. Mr Burke then asked Mr Corrigan to confidentially send him a copy of a letter from Minister Bowler to the Department for Planning and Infrastructure confirming the position of the Department of Industry and Resources on the rezoning of land at Whitby.³⁰ The relevant portion of that conversation is set out and discussed in the Commission's *Report on the Investigation of Alleged Misconduct Concerning Rezoning of Land at Whitby*.³¹

2.8 Allegations

- [71] Section 26 of the CCC Act empowers the Commission to make a proposition about the occurrence of misconduct "based on the Commission's own experience and knowledge, or assessment of a received matter". The Commission may then use its powers to assess and investigate the proposition.
- [72] On 21 February 2006, arising from the Inquiry into a proposed Smiths Beach Development at Yallingup, Commissioner Hammond authorised an investigation into the activities of certain people.³²
- [73] In the course of that investigation the Commission obtained information relating to the processes of Government in respect of some matters involving FMG. This report examines some of that information in relation to the allegations that public officers improperly provided confidential information to Mr Burke and Mr Grill in relation to Government processes and decision making.

2.9 Scope and Purpose of the Investigation

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

CHAPTER THREE

EXAMINATION OF THE INVESTIGATIVE MATERIAL

3.1 Introduction

[75] The following section describes the material obtained by the Commission relevant to possible misconduct in respect of information disclosed to Mr Burke and Mr Grill about the consideration by the ACMC of FMG's application for approval of a railway through the Woodstock-Abydos Reserve.

[76] On 27 April 2006, in a telephone conversation, Mr Grill and Mr Bowler discussed the issues FMG was facing. Mr Bowler was familiar with an issue FMG was having in relation to the route through Port Hedland but Mr Grill explained that it was also having difficulty in obtaining approval for a railway corridor through the Woodstock-Abydos Reserve:

GRILL: *It's uhm, it's really a matter of getting a pathway through the Aboriginal areas at Abydos and Woodstock.*

BOWLER: *But isn't that uh, uh, well hang on. This is yeah, oh, I heard about this the other day. This is uh, uh, uhm a known sort of a, err, high, high, high, an area of high significance isn't it?*

GRILL: *Yes it is, and everyone concedes that, uh, but uhm, uh, the uhm, Pilbara Native Title group, I just forget what they call themselves now, uhm, are quite happy for Sheila to use her discretion and for Alannah to use her discretion to resolve the matter. But uhm, I mean I, I'm not sure what Sheila does or what sort of protocol she puts in place but her people won't even talk to FMG and uhm, uh*

BOWLER: *But why won't they talk to her, talk to them? Oh Sheila's just saying no we're*

GRILL: *Well, when her people tried, uh sorry. When FMG tried to see her people they, her people said well, there's no protocol, uh, for us to see you in this office, uhm, and then the woman concerned made an appointment to see uhm, Julian Tapp outside the office. But uh, Sheila who's got the power to issue the order uhm, under the uh, under the Act, under the Heritage Act, just won't, just won't uh do anything ...³³*

[77] Mr Grill read Mr Bowler an extract from a letter from the Pilbara Native Title Service to the ACMC which said the relevant Aboriginal group

supported the Minister granting FMG access under regulation 10 of the *Aboriginal Heritage Regulations 1974*. Mr Grill asked Mr Bowler to speak to Ms McHale about the issue:

GRILL: ... can you contact uhm Sheila tomorrow and just say?

BOWLER: Yep.

GRILL: Look this is holding up this project and uhm.

BOWLER: Well can you fax?

GRILL: Yes.

BOWLER: And mark it attention Simon, just a bit of what the background you're got there and the name of the Aboriginal group.

GRILL: Yes.

BOWLER: Ah, so I've got some facts when I'm, when I talk to Sheila.³⁴

- [78] Regulation 10 of the *Aboriginal Heritage Regulations* permits the Minister to give written consent to a person to enter and undertake activities on land to which the regulations apply – an Aboriginal site or Protected Area.
- [79] In her statement to the Commission, Ms McHale said that on Friday 27 April 2006 (in the Commission's opinion it was probably actually Friday 28 April 2006) Mr Bowler telephoned her:

On Friday 27 April 2006 the (then) Minister for Resources, John Bowler, telephoned me to discuss the regulation 10 issue. He errantly referred to the process as a "section 10", so I did not believe he was fully across the issue.

I did not think that the phone call was appropriate and I think I might have been a bit cautious because I was conscious of John's relationship with Julian Grill. I did not want anything to go beyond John and I. From discussions with another person I was aware that FMG had retained Julian Grill as a Consultant.

In our discussion John was very keen to have the regulation 10 pushed through. I asked him who told him to ring me, and he replied, "I was ringing because I am the Minister".

I was very concerned about this phone call, however you have to work assuming that your colleagues will uphold confidentiality.³⁵

- [80] On 28 April 2006 at 6:13 p.m. Mr Bowler telephoned Mr Grill and they had the following conversation:

BOWLER: Julian, how are you going?

GRILL: Yeah, good.

BOWLER: A couple of things. I just spoke to Sheila. Uhm, she's still shying away from using the Section Ten, uhm, saying that, you know, it will set a precedent, uhm that they have been working going down Section Twenty One. She's confident that, you know, going down that way will, you know, pave the way. I said, well you know, you've still got to go to that bloody ah meeting next week of the, uhm, what is it? Ah, the ACMC?

GRILL: ACMC. Yeah.

BOWLER: Ah, on May the third and, uhm, who's to know what they they'll do? Uhm

GRILL: Hm.

BOWLER: and she said, she kept on going back and setting the precedent

GRILL: Hm.

BOWLER: and State Solicitor's advice. And I said, well, you know, mate, you know, State Solicitor's advice changes from day to day as I've just learned on

GRILL: Hm.

BOWLER: bloody err, on Shovelanna. Uhm, anyway, she said, oh, look, I'm, ah, and I said I've seen another legal opinion that says, you know, if we go down this other path, you know, while it may set a bit of a precedent, I said this, in itself, is a precedent because there is no other area in the State, you know, quite like Woodstock and the Abydos Reserves that are really ah, you know, and even she concedes that it could never have been done in the first place.

GRILL: Yeah.

BOWLER: Uhm, ah, but she, you know, she was humming and harring on that a bit. I think if I, two things. First of all, she said well look if you, if there is another legal opinion out there that I can then use and then maybe send back to State Solicitors and say well look, you know, someone else has said this

GRILL: Yeah.

BOWLER: I'm prepared to look at it.

GRILL: Yep.

BOWLER: So if you've got a legal opinion that

GRILL: Yeah, we have.

BOWLER: you know, that gives a concise way through that,

GRILL: Yeah

BOWLER: without setting a precedent, you know ...³⁶

- [81] Later in the same call Mr Bowler said that a member of his staff would forward Ms McHale and Premier Carpenter a legal opinion from FMG (saying that Ms McHale could use regulation 10 of the *Aboriginal Heritage Regulations* to allow FMG to commence work in the Protected Area) and that he would also ring the Premier.³⁷
- [82] On 1 May 2006 Mr Grill sent an email to Mr Tapp, Head of Government Relations for FMG, with a copy to Mr Burke and Mr Forrest, Executive Director of FMG. In relation to his conversation with Mr Bowler, Mr Grill said:

As you know John Bowler did speak to Sheila. She concedes that she has the power to act under section [sic] 10 ..., however she is reluctant to do so as it will set "an unhealthy precedent". John was going to brief the Premier before he left. ...
- [83] Later in the email Mr Grill said:

*... We shall be having lunch with Gary Stokes at Frasers today and you might like to come up at about 1:30 p.m. to discuss matters. ...*³⁸
- [84] Mr Tapp attended the lunch with Mr Burke, Mr Grill and Mr Stokes.
- [85] On 9 May 2008 Mr Grill sent an email to Mr Forrest saying: "The ACMC meeting deferred the Sec 21 application last week".³⁹ The Commission does not know the source of that information.
- [86] On 23 May 2006 Mr Grill sent Mr Tapp an email advising him that the information coming out of John Bowler's office was that the State Solicitor's Office did not think "section 10" was appropriate and that Sheila McHale was being stubborn.⁴⁰
- [87] As a part of the section 21 process Minister McHale directed the ACMC to provide her with a report on the FMG application. The ACMC met on 7 June 2006 and considered FMG's application for a variation to the Protected Area under section 21 of the Aboriginal Heritage Act. The meeting decided to recommend to the Minister that FMG's application not be approved.⁴¹
- [88] On 8 June 2006 Mr Tapp telephoned Mr Burke and advised him that the Department of Indigenous Affairs had said it would be seven to ten days

before the outcome of the ACMC meeting would be known. Mr Burke advised Mr Tapp that he would make inquiries.⁴²

- [89] Later on 8 June 2006 Mr Burke called Mr Corrigan to find out what the ACMC had recommended.⁴³ Mr Corrigan said that he would try to find out.
- [90] The following day, 9 June 2006, Mr Corrigan rang Mr Burke and told him the ACMC had recommended against the lifting of heritage protection:

BURKE: *Hello, Brian Burke speaking.*

CORRIGAN: *Oh Brian, Simon Corrigan, how are you going?*

BURKE: *Yes Simon, good thanks.*

CORRIGAN: *Sorry I've spoken, I've been late getting back.*

BURKE: *That's alright mate.*

CORRIGAN: *Uhm the, the Aboriginal Cultural Material Committee.*

BURKE: *Yep.*

CORRIGAN: *My, my understanding and I don't know, I don't know the full story quite.*

BURKE: *Yeah.*

CORRIGAN: *Is that they've recommended against the err.*

BURKE: *That's fine.*

CORRIGAN: *Yeah, the err the lifting of heritage protection.*

BURKE: *Yep.*

CORRIGAN: *What I'm not sure is whether it's, whether it's in relation to a specific site within the heritage area or about the whole heritage area.*

BURKE: *Yeah, yeah.*

CORRIGAN: *Uhm, they err I think they're expecting to get the written advice early next week.*

BURKE: *Right, no that's fine, oh a decision one way or another is all that can be expected you know, it's just.*

CORRIGAN: *Yeah.*

BURKE: *that how stupid they are when they just keep you hanging.*

CORRIGAN: *Yeah, yeah.*

BURKE: *Mate that's good Simon I'm really pleased you got back to me.*⁴⁴

- [91] Immediately following this call Mr Burke telephoned Mr Tapp and passed on the information regarding the ACMC decision.⁴⁵
- [92] Ms McHale said in her statement to the Commission that in late May or early June 2006 she met with the Premier and Mr Bowler at Parliament House and discussed the situation in detail. She said that Mr Bowler was agitating to get a quick decision on the Woodstock-Abydos issue.⁴⁶
- [93] Mr Carpenter said in his statement to the Commission that in relation to the Woodstock-Abydos issue: "I recall having several one-on-one meetings with Sheila and John, and possibly together on at least one occasion". He said that after he became aware that the ACMC had recommended against FMG being given access to a Protected Area he had further discussions with Ms McHale and he recalled her advising him "... that she had identified a solution, a compromise position, that would allow a transport corridor and preserve any aboriginal cultural interests".
- [94] Mr Carpenter said he had discussed the issue with Mr Bowler in a telephone call around the middle of June 2006. He said: "I told John not to feel pressured and to relax as Sheila had indicated she'd found a compromise position in relation to FMG's application".⁴⁷
- [95] On 14 June 2006 Mr Bowler telephoned Mr Grill, who was still on holidays in Europe, and arranged to meet for lunch on Monday 19 June 2006.⁴⁸
- [96] On 16 June 2006 Mr Tapp sent Mr Bowler the following email emphasising that FMG needed a decision made urgently and stressing the financial and project implications of delay.

From: "Julian Tapp"
Sent: Friday, 16 June 2006 9:48 AM
To: <jbowler@mp.wa.gov.au>
Attach: Woodstock Abydos bullets for JB.doc
Subject: Bullet points - Woodstock Abydos

Dear John

Please find attached a briefing note summarizing the Woodstock Abydos issues in bullet point form. To summarise those points:

- *The option of going around Woodstock Abydos is not practicable at this stage*
- *No significant heritage sites will be damaged by going through Woodstock Abydos*
- *The official view of the Indigenous people is one of support for the railway*
- *The Minister must make a decision based on the general interest of the community*
- *The project will be of huge benefit to the Indigenous people and to the State*

- *The project will be killed by indecision - we need a decision now*
- *In the general interest of the community the Minister must request the variation order now.*

I am not and would not cry wolf - the project really is running the risk of financing not being achieved when required because nobody is going to risk equity when there is no solution to Woodstock Abydos in sight. Coming up quickly behind is the risk that earthwork contracts let and requiring work to start in September will be unable to be implemented because of lack of necessary approvals.

Please don't hesitate to contact if you require further information.

Best regards

Julian⁴⁹

[97] On 18 June 2006 Mr Tapp called Mr Grill and told him that the ACMC had recommended that FMG not be granted access to the Woodstock-Abydos area.⁵⁰

[98] On 19 June 2006 Mr Tapp went to Mr Grill's residence. He gave him a map saying "I brought two maps. One for you to keep, one for you to leave with John".⁵¹

[99] Later that day, Mr Bowler, in company with his Chief of Staff, Mr Corrigan, and Principal Policy Advisor (Resources and State Development), Mr Walster, attended a lunch meeting at Mr Grill's residence. Mr Bowler attended immediately after attending a Cabinet meeting. The meeting at Mr Grill's residence was captured on a surveillance device.⁵²

[100] During the meeting they discussed a number of issues relating to clients of Mr Burke and Mr Grill. The first issue they discussed related to FMG. The following conversation ensued:

GRILL: *So how did Cabinet go?*

BOWLER: *Good. Good. Yes.*

SC/TW: *Just (indistinct) a couple of things for you.*

BOWLER: *Yeah. No.*

GRILL: *Oh it doesn't hurt.*

BOWLER: *Now Woodstock-Abydos. Apparently Carps says he's happy in the way it's going that, although they said you know the decision of the, of that committee.*

SC/TW: *ACMC.*

BOWLER: *Sheila. Sheila understands they have to say that, and that she will now overturn it.*

GRILL: *Uhm, alright so. If I can just take a note on this. Uhm.*

BOWLER: *So it's expected, that uhm Sheila will overturn the ACMC decision.*

...

GRILL: *So Carpenter has told you that Sheila should overturn the decision?*

SC/TW: *I think Sheila said that she will.*

BOWLER: *She yeah, yeah, yeah. She will. She will.⁵³*

[101] After further discussion, including about the map, Mr Grill said that he would “take that message back”. Mr Bowler then evinced some concern, saying:

BOWLER: *So that's good news, you know look, you can't say the Premier's said to John Bowler. Just say look, you know. The word I'm getting is that Sheila will overturn this. ...⁵⁴*

(emphasis added)

[102] On the same day, 19 June 2006, at 4:34 p.m., after Mr Bowler and his staff had left, Mr Grill sent an email to Mr Tapp, copied to Mr Burke and Mr Forrest:

Dear Julian,

John Bowler spoke to Alan Carpenter today and Alan has spoken to Sheila McHale. I am advised that she has agreed to reject the ACMC recommendation and grant the FMG application.

I shall do some follow up work on timing tomorrow.

Regards

Julian Grill⁵⁵

[103] On 21 June 2006 Minister McHale sent a letter to FMG advising that she had received the recommendation from the ACMC but was not in a position to make a recommendation to the Governor. She invited FMG to address the issues raised by the ACMC.⁵⁶

[104] On 24 June 2006 Mr Grill and Mr Bowler discussed how Minister McHale appeared to have gone back on her decision:

GRILL: *Now the other thing was uhm, uhm FMG. Uhm, has Sheila gone back on her commitment to uhm, reject that recommendation from the ACMC? She's certainly written a letter, first of all she rang uh up uh Andrew and said she was going to*

overrule them. Then she rang back and said uh, uhm, uh she didn't know whether she was or whether she wasn't and she's written a letter asking for more information. Were you aware of that?

BOWLER: *Uh about the sites?*

GRILL: *Yeah about going through Woodstock and uh Abydos.*

BOWLER: *Abydos. Well I think she wants she wants assurances, you know about that uh centre line that uhm you know that the the rail won't impact upon sacred sites.*

GRILL: *Yeah it goes beyond that.*

BOWLER: *... Andrew can do that, don't he, can't he?*

GRILL: *Yeah but it goes, ah yeah yeah of course he can. But it goes beyond that. I mean the main thrust of the letter that was sent, uhm really goes back to this question of consultation, and uh says you know uh, uh you say there's been thorough consultation and that uh, you know the great majority of the community agreed to uh, uh to the proposition you put forward but did they really understand it? Uhm, and what evidence have you got that they really understood it, uh et cetera. So uhm, you know she's going to all the fundamental objections, uh that the ACMC threw up uhm, to the proposition in the first place. I mean is she, I mean she makes, she makes herself look stupid because she rings up and tells Andrew it's gunna go ahead. I tell Andrew that it's likely to go ahead on the basis of what you tell me and your discussions with uh, with uh Alan Carpenter. And then he gets another phone call which count - sort of countmands it and then he gets this letter. I mean, uh, it makes us all look a bit lacking in credibility.*

BOWLER: *Can uhm, I, you know can you get uhm Andrew to give me a copy of that letter?*

GRILL: *So, uh I'll send you a c- ah no it shouldn't come from me should it? Okay I'll get a copy of that letter sent to you.⁵⁷*

[105] On 7 July 2006 Ms McHale met with representatives from FMG to discuss the Woodstock-Abydos issue. During that meeting the parties identified a rail route that would protect the significant Aboriginal rock art in the area.

The Minister said that she indicated that she saw this as a way forward for all parties. On 10 July 2006 Ms McHale decided that a corridor be excised from the Woodstock-Abydos Protected Area and made a recommendation to this effect to the Governor. This recommendation was accepted by the Governor, who approved a variation to the Protected Area.⁵⁸

[106] On 10 July 2006 Mr Grill rang Mr Forrest to find out whether FMG had agreed to anything with the Minister:

FORREST: *Hello.*

GRILL: *Oh, hello is that Andrew?*

FORREST: *Yes it is.*

GRILL: *Oh Andrew, Julian Grill. How are you?*

FORREST: *Gidday mate, how are you?*

GRILL: *Yeah good, I uhm, heard from inside uhm the Department of Indigenous Affairs that uhm, uh, Sheila's virtually reached agreement with you in respect to, uh, the basic elements of the uhm, the rail route on Friday. I just wanted uh, to find out whether that was correct uh, as to whether we needed to take any further action, just what the score was.*

FORREST: *No, look I hope not Julian, hope uhm, that we can just go very quietly now, let the Government announce it when they're ready. Uhm, we really got to make sure Julian it does not leak, uhm, 'cos Sheila's petrified about that but what, what she did is put us through a very, very fine mesh sieve which guarantees, we had this in train, in process anyway but she'll enshrine it into law and that suits me fine as a West Australian who loves rock art, uhm that it's, we've been able to guarantee and enshrine the safety and protection of every single carving.*

GRILL: *Okay, yeah.*

FORREST: *Uhm, and, and still uhm not hassle the railway line particularly.*

GRILL: *Yeah.*

FORREST: *So uhm*

GRILL: *Oh, that's good. It's just that uhm, uh, it seemed to me from the description I was getting that uh, you might have to deviate it somewhat but uh, uh*

FORREST: No. What was given away was large chunks of the two hundred metre corridor.

GRILL: Mm hm.

FORREST: And I'm comfortable with that.

GRILL: Okay.

FORREST: Okay?

GRILL: Alright then so we'll

FORREST: Thanks Julian.

GRILL: Uh, we'll leave it on that basis then?

FORREST: Yeah, I think so. Just make sure mate no one leaks the fucking thing please.

GRILL: Yeah, sure.

FORREST: And uhm

GRILL: And you know as far as I'm aware uhm, uh the only person that's been informed is myself. I am not aware of anybody else. Of course there'll

FORREST: No, I think

GRILL: be other people within Government. You know that don't you?

FORREST: Other people within Government but Sheila is uhm, Sheila, uh, I think it is a very brave decision by her. She's taken a very long time to reach it and strung this out to a point where, you know, I had decided the project will break. It can't stretch. It's not

GRILL: Yeah, sure.

FORREST: a uhm, it's not a ... you know projects, they usually

GRILL: Yeah.

FORREST: just stretch and stretch. We will actually go under.

GRILL: Yeah.

FORREST: Uhm, and you know she considered it all and

GRILL: Yeah.

FORREST: fortunately I think

GRILL: *Oh you're very persuasive too, uh*

FORREST: *Well, the facts really helped.⁵⁹*

- [107] Mr Grill then telephoned Mr Burke to explain the development to him.⁶⁰ Later that night he phoned Mr Bowler to thank him for his assistance.⁶¹
- [108] On 13 July 2006 Minister McHale issued a media release announcing that she had approved FMG's application for a rail line through the Woodstock-Abydos Protected Area.⁶²

3.2 Commission Assessment

3.2.1 Mr Bowler

- [109] The issue considered by the Commission in this assessment is whether Mr Bowler engaged in misconduct by providing Mr Grill with confidential information about Cabinet deliberations and decision making in relation to the Woodstock-Abydos Protected Area.
- [110] Mr Carpenter said in his statement to the Commission that he considered all discussions between Ministers to be confidential unless otherwise consensually decided or mutually understood. This is regardless of whether that conversation took place in or out of a Cabinet meeting.⁶³ The Commission notes the ambiguity inherent in the words "mutually understood".
- [111] In relation to these particular discussions, Mr Carpenter explained:⁶⁴

The contents of these conversations between Sheila and myself and John and myself should obviously not have been revealed outside of Government. In particular these conversations should not have been revealed to any of the parties that had a commercial interest in the matter. Commercial sensitivities should always alert the Minister to issues of confidentiality.

I believed that all the discussions I had with my Ministers regarding this issue were confidential and should not have been revealed outside of Government.

Any discussions or deliberations should have remained confidential until Sheila McHale, as the Minister for Indigenous Affairs, had released her decision.

- [112] Mr Carpenter said that it is quite conceivable there might be financial gain to persons acting as lobbyists who have advance knowledge of Government decisions, even if that gain is not immediate or direct. Lobbyists representing commercial interests often try to create the perception that they are able to get things done or influence Government decisions as a result of their actions, whether or not that is true. Receiving inside information about Government processes and Government deliberations assists in creating that perception.

[113] The Commission accepts the correctness of that observation. Indeed, Mr Grill acknowledged the importance of creating and sustaining that perception, in his telephone conversation with Mr Burke on 10 July 2006, about this very matter:

BURKE: *Hello Brian Burke speaking.*

GRILL: *Oh g'day I'm just ringing to let you know, uhm just so you're not caught out, uh, ah Andrew went in and had some negotiations with Sheila McHale on Friday. And essentially gave a commitment that the railway route would not touch one of the archaeological sites. That's meant a little bit of re-routing but hardly anything much at all. They just give away parts of the two thou- two hundred metre corridor. It looks as though it's done but there's only uhm I've got my sources inside her*

BURKE: Yeah.

GRILL: *organisation of course, you can guess who that is.*

BURKE: Yeah.

GRILL: *Uh but uhm, ah uh Julian Tapp wasn't there and Andrew was there and so uh Julian's only got second hand feedback on that. But I took uh the initiative to ring Andrew and just let him know that uh, our sources indicate that uhm, the thing's on track. I did that because you never quite know whether we're getting any credit for anything that we do. And I also told him that John Bowler had played a critical role in convincing, uh Carpenter that he needed to put some pressure on Sheila, now that's absolutely correct so, he's gunna give John a ring later on when the things,*

BURKE: Mm.

GRILL: *things settle a bit.⁶⁵*

(emphasis added)

[114] Ms McHale said in her statement to the Commission that the ACMC matter was raised during Cabinet, and that all discussions that take place inside Cabinet are confidential. She said that there is no distinction between confidentiality of discussions between Ministers inside or outside of Cabinet, and that there is an expectation that Cabinet Members can rely on Ministerial colleagues for absolute confidentiality. She said that the discussions she had with any person within Government prior to her media release on 13 July 2006 should not have been discussed with any person outside Government.

[115] The Commission accepts that Mr Bowler had a legitimate interest in the advancement of FMG's project as he was the Minister for Resources. The implications for State revenue and employment were considerable once FMG commenced production.

[116] The immediate Woodstock-Abydos issue was not within Mr Bowler's area of Ministerial responsibility. The decision in this instance was within the portfolio area of the Minister for Indigenous Affairs. The Commission has had regard here to the submissions made by Mr Corrigan⁶⁶ concerning Mr Bowler's responsibility as the Minister Assisting the Minister for State Development, to assist projects through the approvals process, even though the projects fell primarily within another Minister's portfolio responsibility. The same point is made in the section 86 representations made on behalf of Mr Bowler⁶⁷ in which it was said that as the Minister for Resources Mr Bowler had a responsibility to be across all issues that might affect the development of a major resource such as that being contemplated by FMG. However, the Commission does not take that role to extend to disclosing to particular proponents information about the deliberations or thinking of such other Ministers given to him in confidence. But in this instance, the position with respect to the Ministerial concerns and views about the ACMC recommendation and the use of regulation 10 of the *Aboriginal Heritage Regulations* is by no means clear.

[117] In his telephone call to Mr Grill on 28 April 2006 Mr Bowler disclosed to Mr Grill information which Minister McHale had given him in confidence as a Ministerial colleague with a relevant interest in being kept informed of her thoughts on, and the progress of, the FMG application.

[118] On 19 June 2006 Mr Bowler attended a lunch meeting with Mr Grill directly after a Cabinet meeting. The information that he provided to Mr Grill clearly arose from conversations with the Premier and Minister McHale, from formal or informal Cabinet discussions.

[119] It appears the Woodstock-Abydos issue was not discussed in the formal Cabinet meeting on 19 June 2006. However, in the Commission's view this does not materially affect the matter.

[120] The statements to the Commission of Mr Carpenter and Ms McHale are clear as to their expectations about the confidentiality of information handled at Ministerial and Cabinet levels, and in the Commission's opinion, accurately reflect Ministerial obligations in that respect as set out in the *Ministerial Code of Conduct* (introduced by the then Premier, the Hon. Dr Geoff Gallop MLA, in March 2005).⁶⁸

[121] The Commission is satisfied that:

- (1) On 28 April 2006 Minister McHale had a confidential discussion with Minister Bowler about the possible use of regulation 10 of the *Aboriginal Heritage Regulations* in relation to the Woodstock-Abydos issue.

- (2) That evening Mr Bowler disclosed Minister McHale's then views about the use of regulation 10 in relation to that application to Mr Grill.
- (3) Minister McHale told the Premier in June 2006 that she had identified a transport corridor through the Woodstock-Abydos area.
- (4) The Premier passed this information on to Mr Bowler (quite properly as the Minister for Resources) on the evening of 16 June 2006.
- (5) Minister Bowler passed this information on to Mr Grill at their meeting on Monday 19 June 2006.

[122] Section 4 of the CCC Act sets out a range of conduct which may constitute "misconduct". By section 4(b) that includes conduct whereby a public officer corruptly takes advantage of his or her office or employment as a public officer to obtain a benefit for themselves or another person.

[123] Conduct of that kind falls into the definition of "serious misconduct" in section 3 of the Act.

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

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

[125] As explained, Mr Bowler was a public officer at all relevant times.

[126] It is clear enough that had Mr Bowler not been a Minister, and indeed, a Minister whose portfolio gave him a legitimate interest in being kept informed, he would not have been able to obtain access to the information which he passed to Mr Grill. In that way, it could be said he took advantage of his public office.

[127] The next question is whether that could be said to have been done "corruptly", within the meaning of section 4 of the Act.

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

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

[130] *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)

[131] 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.

[132] 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)

[133] 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.

[134] 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 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” itself therefore cannot necessarily involve an intent (or purpose) to obtain a benefit or cause a detriment.

[135] 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.

[136] 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

CCC Act of which the provision is part, and having regard to the general purpose and policy of the legislation.⁶⁹

[137] 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.⁷⁰ It involves the concept of a prohibited act undertaken with a wrongful intention.⁷¹ 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;⁷² an improper purpose;⁷³ in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.⁷⁴

[138] Thus, “corruptly”, in section 4(a) and (b) 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.

[139] As a member of Cabinet, Mr Bowler was bound by the *Ministerial Code of Conduct* of March 2005. Clause 9 of that Code of Conduct deals with the use of confidential information.

9. Use of Confidential Information

Ministers will maintain the confidentiality of information committed to their secrecy in the Executive Council, in Cabinet or otherwise in accordance with their duties.

Ministers shall undertake not to use information obtained in the course of official duties to gain for themselves or any other person a direct or indirect financial advantage. They will not solicit or accept any benefit in respect of the exercise of their discretion, whether for themselves or any other person.

[140] The Commission is satisfied on the evidence that the information concerning the recommendation of the ACMC and the discussions, deliberations and views of the Premier and Minister McHale about the use of regulation 10, was confidential information in the wide sense. But the critical issue here is whether it was confidential as against FMG and its representatives (including Mr Grill) – and in particular, whether Mr Bowler was under a duty not to disclose that information to them. There is evidence both ways on this issue and the Commission is mindful that it would not be sufficient to form a view merely that there was a (statistically) greater likelihood that it was confidential to that extent; the Commission

could not form any opinion adverse to Mr Bowler unless positively satisfied on the balance of probabilities that that was the fact.

- [141] As the Minister for Resources and the Minister Assisting the Minister for State Development, Mr Bowler had a legitimate interest in being kept informed of these matters. That is apparent from the fact that the Premier and Minister McHale included him in their discussions. The FMG project was regarded by the Government as important. For reasons discussed below in connection with Mr Corrigan's position,⁷⁵ Mr Bowler apparently was seen as having something of an active role in dealing with FMG, in the sense of assisting the company to progress the project. It is also apparent that Minister McHale, in her discussions with Mr Forrest, openly discussed the ACMC recommendation and her thinking on it. She confirmed that in a letter to him on 21 June 2006, and in a subsequent discussion, indicated what she intended to do.
- [142] Whilst there is force in the expectations of confidentiality expressed by Premier Carpenter and Minister McHale, the Commission considers that in light of the ambiguity of Mr Bowler's role insofar as it related to FMG and the nature of the discussions generally that were occurring between FMG and Minister McHale over the relevant period, it is not possible to be satisfied to the necessary extent that Minister Bowler was in breach of an obligation of confidentiality in disclosing this information to Mr Grill. The Commission accepts the submissions made in Mr Bowler's section 86 representations in this regard.
- [143] In light of the foregoing, it is the Commission's opinion that the evidence does not establish that Mr Bowler's actions in disclosing the subject information constituted misconduct within section 4 of the CCC Act.

3.2.2 Mr Corrigan

- [144] The Commission first considers here the disclosure by Mr Corrigan to Mr Burke on 9 June 2006, of information concerning the recommendation made by the ACMC.
- [145] As a Ministerial staff member, Mr Corrigan was under an obligation of confidentiality. Ministerial staff are engaged on contract under Part 4 of the PSM Act. Mr Corrigan's contract required him to comply with the Code of Conduct promulgated by the Department of the Premier and Cabinet (DPC). The relevant Code of Conduct was that promulgated in February 2005 ("the 2005 Code of Conduct").
- [146] In his introduction to the 2005 Code of Conduct the then Director General of DPC, Mr Mal Wauchope, wrote that

All employees have a responsibility to familiarise themselves with, and understand their responsibility to comply with the Code of Conduct.

- [147] At paragraph [2.1] under the heading "Performance of Duties" the 2005 Code of Conduct required DPC employees to:

act with integrity in the performance of official duties and be scrupulous in the use of official information ...

[148] Confidentiality was specifically dealt with at paragraph [3.8] –

3.8 Confidentiality

In the course of official duties, Department employees will have access to information classified as restricted or confidential information ...

Classified information may only be used in the course of official duties or for other lawful purposes e.g. under the requirements of “Freedom of Information Act 1992”. In general, employees are not to disclose classified information nor use information for any purpose other than the purpose for which it was retained. Improper disclosure includes any of the following:

- *Giving unauthorised persons information relating to the business of the Department or any other government agency ...*
- *...*
- *...*
- *Disclosing the contents of any official papers including internal reports or documents to unauthorised persons.*
- *...*
- *Using information in pursuit of a private interest for employees, family members, friends or associates.*

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

[149] The DPC Ministerial Office Manual detailed a range of matters relating to Ministerial staff. In it paragraph [3.8] of the 2005 Code of Conduct was reproduced in full.

[150] The DPC Ministerial Office Manual also stated that all Ministerial officers were obliged to comply with the DPC Code of Conduct.

[151] The question then arises as to whether the relevant conduct 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. That is a “notional” or hypothetical test insofar as it applies to public officers who are not public service officers as defined in the PSM Act.⁷⁶

[152] General principles of official conduct are set out in section 9 of the PSM Act, which states that:

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

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

(emphasis added)

[153] Breaches of discipline are set out in section 80 of the PSM Act, which states that:

An employee who –

- (a) *disobeys or disregards a lawful order;*
- (b) *contravenes –*
 - (i) *any provision of this Act applicable to that employee; or*
 - (ii) *any public sector standard or code of ethics;*
- (c) *commits an act of misconduct;*
- (d) *is negligent or careless in the performance of his or her functions; or*
- (e) *commits an act of victimisation within the meaning of section 15 of the “Public Interest Disclosure Act 2003”,*

commits a breach of discipline.

[154] A breach of discipline may be a minor breach or a serious breach.

[155] A minor breach may be punished by a reprimand or a fine not exceeding 1 days pay or both, pursuant to section 83(1)(a)(i), (ii) or (iii) of the PSM Act.

[156] If a departmental investigating authority is of the opinion that a serious breach of discipline appears to have been committed, that authority shall cause the public officer to be charged with that alleged breach pursuant to section 83(1)(b) of the PSM Act.

[157] The procedure for dealing with a charge of a serious breach of discipline is set out in section 86 of the PSM Act.

[158] The punishments which may be imposed where a charge of a serious breach of discipline is admitted and proved are set out in section 86(3)(b) of the PSM Act. Section 86(3)(b) states that:

... if a respondent admits a charge ... and the employing authority finds the charge to be proved, the employing authority –

(b) may –

- (i) reprimand the respondent;*
- (ii) transfer the respondent ...;*
- (iii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work immediately before the day on which the finding of a breach of discipline was made;*
- (iv) reduce the monetary remuneration of the respondent;*
- (v) reduce the level of classification of the respondent; or*
- (vi) dismiss the respondent,*

or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

(emphasis added)

[159] It follows from the above, that not only must there be an identifiable (actual or possible) breach of discipline under the PSM Act for section 4(d)(vi) of the CCC Act to be brought into play, but it must be characterisable as a serious breach for the punishment of dismissal to be an option under section 86(3)(b) of the PSM Act.

[160] In this regard, the issue is whether the conduct described above could constitute a breach of a public sector standard or code of ethics contrary to section 80(b)(ii) of the PSM Act or an act of misconduct contrary to section 80(c) of the PSM Act.

[161] In ordinary use, “misconduct” means –

“unacceptable or improper behaviour, especially by a professional person”.

(Compact Oxford English Dictionary of Current English, Third Edition, p.649)

“1 improper or unprofessional behaviour. 2 bad management ...”

(The Australian Concise Oxford Dictionary, Fourth Edition, p.895)

“1 improper conduct; wrong behaviour. 2 unlawful conduct by an official in regard to his or her office, or by a person in the administration of justice, such as a lawyer, witness or juror”.

(Macquarie Dictionary, Fourth Edition, p.914)

“1 Improper or wrong behaviour; (in *pl.*) instances of improper or wrong behaviour. 2 Bad management, mismanagement; *esp.* culpable neglect of duties ...”

(Shorter Oxford English Dictionary, Sixth Edition, p.1796)

- [162] The use of the word in a section of an Act regulating matters to do with the public service of the State and public officers specifically, obviously means the misconduct referred to in section 80(c) must relate to, or bear upon, the conduct of the person as a public officer. It would clearly include unlawful conduct but relevantly here must necessarily also encompass unacceptable, improper or unprofessional or wrong conduct less than that which is unlawful.
- [163] The first and fundamental question here, is whether the recommendation made to Minister McHale by the ACMC was confidential information which Mr Corrigan was under a duty not to disclose without authority.
- [164] As already observed, the ACMC is an advisory body to the Minister.⁷⁷ The functions of the Minister under that Act may only be exercised after consultation with, and after consideration of any advice given, by the ACMC.⁷⁸ The provision of advice or making of recommendations by the ACMC to the Minister is part of the deliberative processes of Government. The decision of the Minister may or may not be in accordance with the advice or recommendation of the ACMC. It may be more influenced by other advice or recommendations or by other public interest considerations. In these circumstances, the Commission considers that, according to the conventions of Responsible Government under the Westminster System, the advice given or recommendation made by the ACMC to the Minister, would, on the face of it, be confidential. The evidence of Mr Carpenter and Ms McHale set out above, to the effect that the Minister’s decision itself was confidential until announced by her, supports this conclusion.⁷⁹
- [165] The Commission also notes section 56 of the Aboriginal Heritage Act, which is headed “Secrecy”.

A person who discloses any information that results, or may result, in the disclosure of a trade secret, or with regard to any mining or

prospecting operations, that has been furnished to him or obtained by him under this Act, or in connection with the execution of this Act, commits an offence unless such information is necessary for, and is disclosed in the course of, the conduct of any legal proceedings arising out of this Act.

Penalty: \$1,000

[166] Again, on the face of it, the disclosure to Mr Burke of the recommendation of the ACMC could constitute the disclosure of:

... information ... with regard to [a] mining or prospecting [operation], that was furnished to [Mr Corrigan] ... in connection with the execution of [the] Act ...

[167] However, section 56 is expressed in extraordinarily broad terms. It would appear to be wide enough to cover disclosure of any information, confidential or not, and with authority or not. That cannot have been the legislative intention. The notion of disclosure of a trade secret seems clear enough – confidentiality is inherent in the term “trade secret”. The verb “disclose” does not assist in characterising the type of information – it simply denotes what is not to be done with it. To “disclose” is “to cause to appear; allow to be seen; make known; reveal” or “to uncover; lay open to view”.⁸⁰ Given the penal nature of the provision, it should be construed strictly and in favour of the subject. The heading to section 56 is “Secrecy”. The heading to a statutory provision is to be read as part of it.⁸¹ These considerations together with the reference to “trade secrets”, suggest that the information “... with regard to any mining or prospecting operations ...” of which section 56 speaks must be information which is related to the operations of mining or prospecting and is commercially or otherwise confidential. It is difficult to see how disclosure by Mr Corrigan of the ACMC recommendation to Mr Burke as FMG’s representative, could be so characterised.

[168] In his section 86 representations⁸² Mr Corrigan submitted that there is no evidence upon which it could be found that the information he disclosed to Mr Burke was in fact confidential, nor that (if it was) he knew or ought to have known it was confidential.

[169] The Commission considered whether the demarcation between Ministerial portfolio responsibilities bears on the question.

[170] Mr Corrigan submitted that treatment of Ministerial portfolios as strict separate “silos” does not match up with the reality of working within portfolios such as Resources and State Development. He argued that at the time (and believes to this day), a major complaint of resource companies in Western Australia was the myriad of approvals that are required across many Government agencies. In dealing with large projects such as FMG’s, the office regularly dealt with other Ministerial offices. This predominantly would be the Minister for Environment (at the time the Hon. Mark McGowan MLA) and the Minister for Planning and

Infrastructure (at the time the Hon. Alannah MacTiernan MLA), but also other portfolios such as Indigenous Affairs.

- [171] He asserted that despite the involvement of other Government agencies and Ministers it was the responsibility of the Minister for State Development to assist projects through the approvals process in the State's interest. While Premier Carpenter held the State Development portfolio it was clearly understood that Minister Bowler (as Minister Assisting the Minister for State Development) carried out the day-to-day work of the portfolio. He said his understanding was that the Premier's description of the division of workload between himself and Minister Bowler was, "you do all the work and I'll take all the credit".
- [172] Mr Corrigan submitted his recollection that the Strategic and Operational Plans for Minister Bowler's office included the progression of FMG's projects through environmental and heritage approvals. The Strategic and Operational Plans were plans developed in conjunction with (and approved by) the Premier's office. The progression of FMG's project was seen as a strategic priority for the Government because it would help to break down the virtual duopoly over the iron ore industry in the State held by Rio Tinto and BHP Billiton.
- [173] He contended that the complexity of approvals processes was an area of great sensitivity for the Government, and Minister Bowler received some criticism from companies and from industry groups such as the Association of Mining and Exploration Companies (AMEC) about companies "getting the run around" in the approvals process.
- [174] Mr Corrigan submitted that the Government as a whole had responded in part to this criticism by creating the Office of Development Approvals Co-ordination, which, while part of the Department of the Premier and Cabinet, was physically located in Minister Bowler's office. On a smaller scale Minister Bowler had indicated that any companies having difficulty navigating the approvals process should contact his office to see if his staff could assist. He said he was present when Minister Bowler made this offer to individual company representatives and to the then Chief Executive of AMEC.
- [175] Mr Corrigan submitted that in this context it was not unusual for companies to contact him or other policy advisors to seek assistance with ascertaining the status of an approval either within Minister Bowler's portfolio or another portfolio. It was usual practice to ascertain the information and report back to the company. It would not have been in line with the Minister's expectations to "pass the buck" by referring enquiries to another office.
- [176] He thus submitted that in the context described it is not appropriate to describe the decision of the ACMC as "confidential", simply because it was from another portfolio.
- [177] In summary, Mr Corrigan argues that his disclosure of the ACMC decision to FMG's representative (Mr Burke) was "no more than a response to a

routine request for information on the status of an approval relating to a resource project".

- [178] It is pertinent at this point to refer also to submissions made on behalf of Mr Bowler in his section 86 representations.⁸³ It is submitted that the Woodstock-Abydos issue was not confidential as between the parties involved and was being discussed openly by them.
- [179] The Commission accepts there is evidence that Minister McHale was communicating directly with Mr Forrest on the issue, including to the extent of indicating her thinking and concerns. She spoke to him at least twice on the telephone and she wrote to FMG on 21 June 2006 with the information that the ACMC had recommended against the application and seeking further discussions. Those discussions were held on 7 July 2006 and Minister McHale professed herself satisfied with what was then proposed.
- [180] In all of these circumstances, in the opinion of the Commission, the evidence does not establish to the necessary degree of satisfaction that the information disclosed by Mr Corrigan to Mr Burke was confidential information which he was under a duty not to disclose to FMG or its representative (Mr Burke) without authority. That being so, such disclosure could not constitute a breach of discipline by him, and in turn nor could it constitute misconduct under section 4 of the CCC Act.
- [181] On 19 June 2006 Mr Corrigan attended a meeting at Mr Grill's residence with Mr Bowler and Mr Walster. Mr Bowler attended direct from a Ministerial Cabinet meeting.
- [182] During the meeting Mr Bowler provided information to Mr Grill about the progress of the FMG matter, as well as information relating to other clients of Mr Burke and Mr Grill.⁸⁴
- [183] In his statement to investigators, and during his evidence at a public hearing, Mr Corrigan said he recalled attending Mr Grill's residence for the meeting but could not recall the substance of the meeting.
- [184] Mr Corrigan appears to have followed Mr Bowler's lead when dealing or communicating with Mr Burke and Mr Grill.
- [185] Mr Corrigan was a party to the conversation between Mr Grill and Mr Bowler on 19 June 2006 during which Mr Bowler released information about Cabinet deliberations. Mr Corrigan did not report this. However, neither did Mr Walster. The two of them were present in their capacity as Ministerial officers, on Mr Bowler's personal staff. Again, having regard to the ambiguity of Mr Bowler's role in this particular matter, it is not possible to be satisfied to the requisite degree on the evidence, that his disclosures about Woodstock-Abydos, constituted a breach of his duty of confidence.

3.3 Commission Opinion as to Misconduct

3.3.1 Mr Bowler

[186] In the opinion of the Commission, the evidence does not substantiate an opinion that in making the disclosures he did to Mr Grill on 28 April and 19 June 2006 about the Woodstock-Abydos application by FMG, Mr Bowler's actions constituted misconduct under section 4 of the CCC Act.

3.3.2 Mr Corrigan

[187] In the opinion of the Commission, the evidence does not substantiate an opinion that Mr Corrigan's disclosure to Mr Burke on 9 June 2006 of the recommendation which the ACMC had resolved to make to Minister McHale about the Woodstock-Abydos application by FMG, constituted misconduct under section 4 of the CCC Act.

APPENDIX

Notifications of Adverse Matters Under Section 86 of the *Corruption and Crime Commission Act 2003*

Notifications of Adverse Matters

No.	Recipient of Section 86 Notification	Date of Notification	Date of Representations	From
1.	Mr John James Mansell Bowler	9 April 2009	15 May 2009	McKenzie and McKenzie Barristers, Solicitors and Notaries
2.	Mr Brian Thomas Burke	9 April 2009	Substantive representation not provided.	Commission advised by: Mr Stephen Lemonis Fairweather and Lemonis Lawyers
3.	Mr Simon John Corrigan	9 April 2009	14 May 2009	Mr Simon John Corrigan
4.	Mr Julian Fletcher Grill	9 April 2009	Substantive representation not provided.	Commission advised by: Mr Steven Penglis Freehills
5.	Mr Timothy John Walster	9 April 2009	No Response	-

ENDNOTES

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

¹ The term “Smiths Beach” does not have a possessive apostrophe.

² *Consultancy Agreement Between Fortescue Metals Group Limited, and Brian Burke and Julian Grill*, 23 February 2005, Part C, Clause 3.1 [E 11392].

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 A copy of the *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007, is available from the Corruption and Crime Commission Website at www.ccc.wa.gov.au, Publications and Speeches, Publications, viewed 23 July 2008.

⁸ Pursuant to section 140(2) of the *Corruption and Crime Commission Act (2003)*.

⁹ Transcript of Proceedings, Public Examination, Opening Address by Commissioner Hammond on 12 February 2007, p.2.

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

¹¹ Transcript of Proceedings, Public Examination, Address by Counsel Assisting on 12 February 2007, p.12.

¹² Transcript of Proceedings, Private Examination of Mr Timothy John Walster on 30 July 2008, pp.4 and 39.

¹³ *Consultancy Agreement Between Fortescue Metals Group Limited, and Brian Burke and Julian Grill*, 23 February 2005, Part C, Clause 3.1, *loc cit* [E 11392].

¹⁴ *Ibid*, Part C, Clause 4.2.

¹⁵ Response to Parliamentary Question No. 280 (Without Notice) by the Hon. Adele Farina MLC on 10 May 2006 in the Legislative Council of the Parliament of Western Australia.

¹⁶ Department of Indigenous Affairs, *Annual Report 2005-2006*, Director General’s Overview, p.7.

¹⁷ Department of Indigenous Affairs Website, <http://www.dia.wa.gov.au/Heritage--Culture/Aboriginal-Cultural-Material-Committee/>, ACMC Functions, viewed 15 July 2009.

¹⁸ Response to Parliamentary Question No. 280 (Without Notice) by the Hon. Adele Farina MLC on 10 May 2006 in the Legislative Council of the Parliament of Western Australia, *op cit*.

¹⁹ Email to Mr John Bowler of 16 June 2006, at 9:47 a.m., from Mr Julian Tapp [E 11068].

²⁰ Government of Western Australia Media Statement entitled Protection of Rock Art Paramount in Decision, 13 July 2006, Minister for Indigenous Affairs, the Hon. Sheila McHale MLA [E 11067].

²¹ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, p.756.

²² *Ibid*, pp.755-756.

²³ Letter to Mr Brian Burke of 8 February 2005 from Mr John Bowler, with receipt for \$2,500 attached [E 11262].

²⁴ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, p.757.

²⁵ Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 28 February 2007, p.1089.

²⁶ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, pp.932-933.

²⁷ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission on 26 February 2007 [E 12615].

²⁸ 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.

²⁹ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission on 26 February 2007 [E 12615], *op cit*, and Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, p.926.

³⁰ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, pp.927-928, and Telecommunications Intercept, T 0664, 26 May 2006.

³¹ Corruption and Crime Commission *Report on the Investigation of Alleged Misconduct Concerning Rezoning of Land at Whitby*, 3 October 2008, pp.74-76. A copy of the Whitby Report is available from the Corruption and Crime Commission Website at www.ccc.wa.gov.au, Publications and Speeches, Publications, viewed 16 July 2009.

³² Corruption and Crime Commission, *Section 26 Proposition & Assessment*, 21 February 2006 [CCC 55120].

³³ Telecommunications Intercept, T 1936, 27 April 2006.

³⁴ Telecommunications Intercept, T 0813, 27 April 2006.

³⁵ Statement of the Hon. Sheila Margaret McHale MLA, Minister for Disability Services, Culture and the Arts, Tourism and Consumer Protection, Western Australian Government, to the Corruption and Crime Commission on 29 August 2007 [E 15260], paragraphs [20]-[23].

³⁶ Telecommunications Intercept, T 0814, 28 April 2006.

³⁷ Telecommunications Intercept, T 0913, 28 April 2006.

³⁸ Email to Mr Julian Tapp of 1 May 2006, at 8:56 a.m., from Mr Julian Grill [E 17477].

³⁹ Email to Mr Andrew Forrest of 9 May 2006, at 10:51 p.m., from Mr Julian Grill [E 17477].

⁴⁰ Email to Mr Julian Tapp of 23 May 2006, at 10:59 p.m., from Mr Julian Grill [E 11458].

⁴¹ Statement of the Hon. Sheila Margaret McHale MLA [E 15260], *op cit*, paragraphs [24]-[26] and paragraph [34].

⁴² Telecommunications Intercept, T 1817, 8 June 2006.

⁴³ Telecommunications Intercept, T 0972 and T 0974, 8 June 2006.

⁴⁴ Telecommunications Intercept, T 0975, 9 June 2006.

⁴⁵ Telecommunications Intercept, T 0977, 9 June 2006.

⁴⁶ Statement of the Hon. Sheila Margaret McHale MLA [E 15260], *op cit*, paragraphs [32]-[33].

⁴⁷ Statement of the Hon. Alan John Carpenter MLA, Premier of Western Australia, to the Corruption and Crime Commission on 17 August 2007 [E 14875], paragraphs [23]-[29].

⁴⁸ Telecommunications Intercept, T 0819, 14 June 2006.

⁴⁹ Email to Mr John Bowler of 16 June 2006, at 9:48 a.m., from Mr Julian Tapp [E 11068], *op cit*.

⁵⁰ E 11413 and Telecommunications Intercept, T 1821, 18 June 2006.

⁵¹ Corruption and Crime Commission, Electronic Collection Unit, Surveillance Log and Audio of 19 June 2006 at 9:53 a.m. for Mount Street, Perth WA, Telecommunications Intercept, T 1823, 18 June 2006, and Map of Fortescue Metals Group Ltd Proposed Rail [E 11420].

⁵² Telecommunications Intercept, T 0819, 14 June 2006, *op cit*, and Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 27 February 2007, *op cit*, pp.908-909.

⁵³ Transcript of meeting held on 19 June 2006 between Mr Julian Grill, Mr John Bowler, Mr Simon Corrigan and Mr Timothy Walster at Mount Street, Perth WA, pp.3-4 [T 0001]. [Comments have been attributed jointly to Mr Simon Corrigan and Mr Timothy Walster in the transcript where voices were indistinct, denoted by "SC/TW".]

⁵⁴ *Ibid*, p.7.

⁵⁵ Email to Mr Julian Tapp of 19 June 2006, at 4:35 p.m., from Mr Julian Grill.

⁵⁶ Letter to Mr Andrew Forrest, Chief Executive Officer, Fortescue Metals Group Ltd, of 21 June 2006 from the Hon. Sheila McHale MLA, Minister for Indigenous Affairs..

⁵⁷ Telecommunications Intercept, T 0876, 24 June 2006.

⁵⁸ Statement of the Hon. Sheila Margaret McHale MLA [E 15260], *op cit*, paragraphs [37]-[38].

⁵⁹ Telecommunications Intercept, T 1935, 10 July 2006.

⁶⁰ Telecommunications Intercept, T 2009, 10 July 2006.

⁶¹ Telecommunications Intercept, T 0880, 10 July 2006.

⁶² Government of Western Australia Media Statement entitled Protection of Rock Art Paramount in Decision, 13 July 2006, Minister for Indigenous Affairs, the Hon. Sheila McHale MLA [E 11067], *op cit*.

⁶³ Statement of the Hon. Alan John Carpenter MLA [E 14875], *op cit*, paragraph [13].

⁶⁴ *Ibid*, paragraphs [30]-[32].

⁶⁵ Telecommunications Intercept, T 2009, 10 July 2006, *op cit*.

⁶⁶ Refer paragraphs [168]-[177] in this report.

⁶⁷ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 15 May 2009, p.4.

⁶⁸ Government of Western Australia, *Ministerial Code of Conduct*, March 2005 [E 9972].

⁶⁹ See Martin CJ (with whom Newnes AJA agreed) in Ex parte West Australian Newspapers Ltd [2008] WASCA 209 at [51].

⁷⁰ Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2nd Revised Edition, p.417.

⁷¹ R v Gallagher (1987) 29 A Crim R 33.

⁷² Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.

⁷³ 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.

⁷⁴ Williams v R (1979) 23 ALR 369 per Franki J at 381.

⁷⁵ Refer paragraphs [171]-[185] in this report.

⁷⁶ See Cox v Corruption and Crime Commission [2008] WASCA 199, per Martin CJ at paragraph [64]; Steytler P at paragraphs [117]-[118].

⁷⁷ *Aboriginal Heritage Act 1972*, sections 28 and 39.

⁷⁸ *Ibid*, section 39D.

⁷⁹ Refer paragraphs [79], [110]-[111] and [113]-[114] in this report.

⁸⁰ *Macquarie Concise Dictionary*, Australia's National Dictionary, Fourth Edition, p.339.

⁸¹ Western Australia, *Interpretation Act 1984*, section 32(1).

⁸² Section 86 representations: letter from Mr Simon Corrigan of 14 May 2009, Annex 1.

⁸³ Section 86 representations: letter from McKenzie and McKenzie, Barristers, Solicitors and Notaries, of 15 May 2009, *op cit*, p.5.

⁸⁴ Transcript of meeting held on 19 June 2006 between Mr Julian Grill, Mr John Bowler, Mr Simon Corrigan and Mr Timothy Walster at Mount Street, Perth WA [T 0001], *op cit*.